Durable Solutions for IDPs: Normative Anchors in International Human Rights Law

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Abstract

The traditional durable solutions of return, resettlement or local integration – originating in refugee policy, and more recently transposed to internal displacement situations – have long been viewed as standard reference points for resolving displacement. However, the normative basis for durable solutions for internally displaced persons (IDPs) in international law remains under-examined and unclear in many respects, especially regarding the scope and status of relevant rights and obligations and identification of duty-bearers. This provides a relatively weak footing for the legality/normativity of a human rights-based approach to durable solutions, which has been asserted as offering the fairest and most sustainable results.

International legal norms underlying durable solutions for IDPs has mainly been articulated and developed through soft law and regional treaties. Legal research around these instruments has largely focused on their origins, domestication and implementation, while (sparse) research on the normative underpinnings of durable solutions for IDPs has mostly zoomed in on discrete issues around specific solutions, particularly in conflict situations. While research on durable solutions from the field of international refugee law may offer parallels, differences in underlying state responsibilities may complicate extension of its conclusions by analogy.

This paper therefore aims to explore the scope, content and nature of the normative basis for IDP solutions in the perspective of a human rights-based approach via mapping and analysis of primary and secondary doctrinal sources in international human rights law - also drawing on the author's research on reparation for displacement, and with an emphasis on the contributions of international and regional (quasi-)judicial human rights mechanisms. This analysis will allow for delineation of a number of future research questions on rights and responsibilities in resolving displacement. It may also contribute to discussions on the need for an IDP treaty (and its scope), as well as the development of a distinct body of IDP law.

Keywords

Internal displacement; IDPs; durable solutions; international law; human rights

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1. Introduction

The traditional durable solutions of return, resettlement or local integration – originating in the realm of refugee policy, and more recently transposed to situations of internal displacement as well – have long been viewed in policy and operational terms as the standard reference points for resolving displacement. However, their implementation has often been treated as a question of expediency, subject to shifting international and domestic political priorities.[1] In the process of seeking solutions, the macro-level "problems of displacement" frequently take precedence over the human-centred "problems of the displaced",[2] with displaced people's rights, participation and choices being sidelined in favour of competing political and economic considerations.[3]

A human rights-based approach has previously been asserted as delivering the "best, fairest and most sustainable results" in resolving situations of displacement.[4] Regardless of the causes of displacement, including potential responsibility and accountability for the situation of displaced people, framing solutions in terms of rights, obligations and remedies – and in particular, using human rights frameworks which go beyond property rights to focus on the position of the displaced rights-holder and their loss of home, livelihood, social capital, and well-being – may counter the compounded marginalization of (potentially) displaced people facing far more powerful political and/or economic interests. [5] In short, this approach brings the "problems of the displaced" back into focus.

The aspect of legality/normativity is necessary to underpin a human rights-based approach to resolving displacement, as this approach is distinguished by recognizing the rights of displaced people and the obligations of duty-bearers in line with international legal standards, and offering flexible and effective remedies.[6] This grounding in international human rights obligations is particularly important in advocating for the accountability of the territorial state, as well as other potential duty-bearers. Furthermore, it also contributes to positioning and conceptually clarifying a human rights-based approach in relation to other overlapping frameworks which are applied in displacement settings such as humanitarian action or disaster management/risk reduction, as well as the triple humanitarian-development-peace nexus.[7] Such clarity allows these frameworks to be

[1] Martin Gottwald, 'Back to the Future: The Concept of "Comprehensive Solutions"' (2012) 31 *Refugee Survey Quarterly (RSQ)* 101.

[2] Patrik Johansson, 'Displaced persons as symbols of grievance: collective identity, individual rights and durable solutions', in Megan Bradley, James Milner & Blair Peruniak (eds) *Refugees' Roles in Resolving Displacement and Building Peace: Beyond Beneficiaries* (Georgetown University Press 2019) 132, 139.

[3] Megan Bradley, 'Implications for Research, Policy and Practice', in Megan Bradley (ed) *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press 2015) 345, 351 – 352; see e.g., Enrique Prieto-Rios, Juan Francisco Soto Hoyos & Juan P. Pontón-Serra, 'Foreign concerns: the impact of international investment law on the ethnic-based land restitution programme in Colombia' (2022) 27 *International Journal of Human Rights* 1.

[4] Scott Leckie, 'Conclusions', in Scott Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers 2003) 395, 397.

[5] On these commonalities of displaced people's experiences, also with reference to marginalization and disempowerment vis-à-vis duty-bearers, see David Turton, *Refugees, forced resettlers and 'other forced migrants': towards a unitary study of forced migration* (UNHCR, 2003) 3 – 4; Helly Hirsh, Efrat Eizenberg & Yosef Jabareen, 'A New Conceptual Framework for Understanding Displacement: Bridging the Gaps in Displacement Literature between the Global South and the Global North' (2020) 35 *Journal of Planning Literature* 391.

[6] Scott Leckie, 'Conclusions', above note 4, 397.

[7] See e.g., Gloria Nguya & Nadia Siddiqui, 'Triple Nexus Implementation and Implications for Durable Solutions for Internal Displacement: On Paper and in Practice' (2020) 39 *RSQ* 466.

applied in a complementary manner, while explicitly anticipating and navigating tensions between them.[8]

However, research focusing on the normative underpinnings of durable solutions for internal displacement in international law has overall been sparse. Much theory-building on the concept of durable solutions (particularly in relation to questions of justice) has emanated from the fields of political science, international relations or transitional justice, and has mainly focused on refugees or situations of cross-border displacement.[9] In a more general context of a relative lack of attention to internal displacement in international legal scholarship,[10] where much existing work addresses the origins, domestication and implementation of specific instruments such as the Guiding Principles on Internal Displacement or the Kampala Convention,[11] the broader normative underpinnings of durable solutions for internal displacement have remained under-examined.[12] Legal studies more specifically addressing durable solutions for internal displacement have tended to focus on legal and implementation issues relating to specific solutions (mostly return), and/or on displacement situations stemming from conflict or violence.[13] As noted by Long with regard to a similar dynamic in refugee studies, it is also important to examine the structure of the durable solutions framework as a whole, especially given policy-makers' tendencies to focus on preferred solutions in isolation, as well as to view

[8] See Deborah Casalin, 'Humanitarian crisis', in Koen De Feyter, Gamze Erdem Türkelli & Stéphanie de Moerloose (eds) *The Encyclopedia of Law and Development* (Edward Elgar 2021) 118.

[9] See e.g. Bradley (ed), above note 3; James Souter, 'Durable Solutions as Reparation for the Unjust Harms of Displacement: Who Owes What to Refugees?' 27 *Journal of Refugee Studies* (2014) 171; Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge University Press 2013); Roger Duthie (ed.) *Transitional Justice and Displacement* (Social Science Research Council 2012); from a legal perspective (yet focusing on cross-border displacement), c.f. Mansha Mohee, State Responsibility for Protracted Displacement: An International Legal Approach to Durable Solutions, 33 *International Journal of Refugee Law (IJRL)* (2021) 111.

[10] David James Cantor, 'The IDP in International Law'? Developments, Debates, Prospects', (2018) 30 *IJRL* 191.

[11] See e.g. Carolin Funke, 'Durable Solutions: Challenges with Implementing Global Norms for Internally Displaced Persons in Georgia' (Berghahn 2022); Francis M. Deng & Romola Adeola 'The Normative Influence of the UN Guiding Principles on the Kampala Convention in the Protection of Internally Displaced Persons in Africa' (2021) 65 *Journal of African Law (JAL)* 59; Romola Adeola, *The Internally Displaced Person in International Law* (Edward Elgar 2020); Romola Adeola & Phil Orchard 'The Role of Law and Policy in Fostering Responsibility and Accountability of Governments Towards Internally Displaced Persons' (2020) 39 *RSQ* 412; Chaloka Beyani 'A view from inside the kitchen of the Kampala Convention: the modernisation of the international legal regime for the protection of internally displaced persons' (2020) 17 *LSE Law, Society and Economy Working Papers* (2020); Roberta Cohen & Francis M. Deng, 'Reflections from Former Mandate Holders: Developing the Normative Framework for IDPs' (2018) 30 *IJRL* 310; Dan Kuwali, 'From Durable Solutions to Holistic Solutions: Prevention of Displacement in Africa', (2014) 6 *African Journal of Legal Studies* 265.

[12] C.f. the recent examination in Walter Kälin, *Internal Displacement and the Law* (OUP 2023) 236 – 284, which takes a different but complementary angle to the current analysis by examining whether (or to what extent) IDPs have a right to a durable solution, and which legal norms underpin the necessary conditions for durability.

[13] David James Cantor & Agnes Woolley 'Internal Displacement and Responses at the Global Level: A Review of the Scholarship' (2020) 1 *Internal Displacement Research Programme Working Paper*; see e.g. David James Cantor, *Returns of Internally Displaced Persons during Armed Conflict: International Law and its Application in Colombia* (Brill 2018); Megan Bradley, 'Durable Solutions and the Right of Return for IDPs: Evolving Interpretations' (2018) 30 *RSQ* 218; Patricia Garcia Amado, 'Connecting Tenure Security with Durable Solutions to Internal Displacement: From Restitution of Property Rights to the Right to Adequate Housing' (2016) 54 *International Migration* 74; c.f., on disaster and climate-related displacement: Matthew Scott & Albert Salamanca, 'A Human Rights-based Approach to Internal Displacement in the Context of Disasters and Climate Change' (2020) 39 *RSQ* 564.

displacement simply as a physical problem which requires moving people to particular places and 'fixing' them there.[14]

As the durable solutions concept originated in refugee policy and has been transposed by analogy to IDPs, there may be some common reference points for analysing durable solutions for IDPs in literature focused on refugees or cross-border displacement. However, in refugee situations, the legal bases for durable solutions and the contextual factors relating to their implementation may diverge considerably from those in situations of internal displacement, owing to the element of cross-border movement which triggers the regime of international refugee law, and directly and inevitably implicates receiving states (and potentially third resettlement states) in any efforts towards solutions.[15] IDPs, by contrast, have not crossed an international border and remain under the primary responsibility of their state of nationality or habitual residence at all times - all three main durable solutions are envisaged as taking place within that state and do not directly engage other states.[16] Furthermore, a human rights-based approach clearly underlies the main soft law frameworks that have been specifically developed to address the issue of durable solutions for internally displaced people. Indeed, many key elements of a human rights-based approach are broadly reflected in the "development-oriented approach" to durable solutions recommended by the UN High-Level Panel on Internal Displacement in its final report in 2019.[17] This broad formal acceptance of the applicability of human rights-based norms demonstrates that beyond legal distinctions, the global political context for implementing a human rights-based approach to solutions for internal displacement may also differ from that relating to refugees. The differing basis for the involvement of international actors in IDP situations (which will primarily need to take place with the cooperation and consent of the state of origin / territorial state) also reflects how internal displacement "raises new questions about the role of the international community and in particular the interface between humanitarian and development actors in brokering sustainable solutions for displaced populations."[18] It is on the basis of these distinctions that the current paper aims to focus on durable solutions for internal displacement specifically.

[14] Katy Long, 'Rethinking Durable Solutions', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, & Nando Sigona (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 477 – 478; concurring with regard to IDPs, see Ben Hudson, 'Challenges in the Law of IDP Returns' (Doctoral thesis, University of Bristol Law School, 2019) 35, https://research-information.bris.ac.uk/en/studentTheses/challenges-in-the-law-of-idp-returns.

[15] On some of the politically charged dynamics around states officially accepting durable solutions for refugees other than repatriation, see Lucy Hovil, 'Local Integration', in Fiddian-Qasmiyeh et al (eds), above note 14, 488 – 497; Joanne Van Selm, 'Resettlement', in Fiddian-Qasmiyeh et al (eds), above note 14, 513 – 522. Confirming the voluntaristic and sovereign nature of states' decisions to accept resettlement and local integration of refugees on their territory, see e.g. UN General Assembly (UNGA), 'New York Declaration for Refugees and Migrants' (19 September 2016) UN Doc A/RES/71/1, par. 13 – 14; UNGA, 'Report of the United Nations High Commissioner for Refugees - Part II: Global compact on refugees' (2 August 2018) UN Doc A/73/12, par. 90 – 100.

[16] See also Bríd Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (Oxford University Press 2022) 31 – 32.

[17] See further Deborah Casalin, '"Development-oriented" durable solutions: (re-)entry point for a human rights-based approach?', *Researching Internal Displacement*, 25 April 2022, https://researchinginternaldisplacement.org/short_pieces/development-oriented-durable-solutions-re-entry-point-for-a-human-rights-based-approach/ (all websites last accessed 30 May 2022).

[18] Long, above note 14, 477.

Recognizing the need for durable solutions to be part of a multi-level and multi-disciplinary strategy,[19] this paper aims to contribute from an international legal perspective by identifying the normative bases in international human rights law which may underpin the concept of durable solutions in the framework of a human rights-based approach. Firstly, it will outline the concept of durable solutions as presented in soft law instruments that specifically address durable solutions for IDPs – in particular, the key sets of rights and obligations articulated in this regard, as well as any responsibilities of duty-bearers beyond the state. Secondly, it will give a broad overview of the norms of international human rights law that may underpin these concepts of durable solutions for IDPs, with particular reference to their interpretation by international and regional human rights treaty bodies. The paper will then conclude with a preliminary analysis of the extent to which soft law provisions on durable solutions norms are supported by international human rights law, as well as pinpointing where further normative development or clarification may be needed. It will also link the findings to current discussions around IDP law and policy.

2. Durable Solutions in Soft Law Frameworks

This section will outline the content and scope of rights and obligations connected to durable solutions for IDPs in key soft law instruments which deal specifically with this issue, as well as outlining the relevant duty-bearers which have been identified. This will provide a basis for examining to what extent these rights and obligations are anchored in international legal norms which have already been recognized as binding and enforceable (and applicable beyond specific regions), as well as determining who is responsible for carrying out these obligations and realizing the attendant rights.

Durable solutions for IDPs are most comprehensively and explicitly conceptualized in legal terms in a number of specific 'soft law' instruments (as well as regional treaties in Africa, which are not addressed here given their ample examination in the literature). Soft law instruments build upon binding legal instruments such as treaties, are often endorsed by states in international fora, and seek to provide interpretive and policy guidance. However, they are not in themselves generally considered to be a source of binding obligations, and may anticipate the progressive development of international law. The most relevant instruments for current purposes – which relate to a wide range of IDPs regardless of the cause or context of their displacement – are the Guiding Principles on Internal Displacement (1998);[20] the International Law Association's London Declaration on Internally Displaced Persons (London Declaration) (2000);[21] the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons

[19] Megan Bradley, 'Advancing the Agenda: Implications for Research, Policy and Practice', in Bradley (ed), above note 3, 349 – 352.
[20] UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39' (11 February 1998) UN Doc. E/CN.4/1998/53/Add.2, Addendum (Guiding Principles on Internal Displacement).
[21] International Law Association (ILA), 'Declaration of International Law Principles on Internally Displaced Persons' (London Declaration), adopted by the 69th Conference of the International Law Association, held in London, United Kingdom, 29 July 2000, https://www.refworld.org/docid/42808e5b4.html

(Pinheiro Principles) (2005);[22] and the Inter-Agency Standing Committee Framework on Durable Solutions Internally Displaced Persons (IASC Framework) (2010).[23] The scope of durable solutions in these instruments, as well as the associated rights and obligations they articulate, and an overview of the relevant duty-bearers, are examined in this section.

2.1 Scope

The Guiding Principles on Internal Displacement broadly outline durable solutions for IDPs as entailing voluntary, safe and dignified return to the home or place of habitual residence, or voluntary resettlement in another part of the country.[24] The explicit reference to return under these conditions is echoed in the Pinheiro Principles (which add a reference to displaced people's right to return to their "lands"), as well as in the London Declaration; however, while both instruments make general references to durable solutions beyond return, neither contains further specifics in this regard.[25] The broad formulation in the Pinheiro Principles may relate to the fact that this instrument covers internal and cross-border displacement situations alike.[26] This would complicate the process of spelling out specific rights and obligations regarding solutions other than return, considering that in the case of refugees, local integration and resettlement are subject to sovereign decisions by states of which the refugee is not a national, while duties with regard to these solution options for IDPs can be derived from the territorial state's primary responsibility to respect and protect IDPs' right to freedom of movement and residence within the country, as well as their full range of social and economic rights.[27] Similarly, although the London Declaration specifically focuses on IDPs, its lack of precision on any durable solution besides return may also relate to the Declaration's focus on drawing analogies from refugee law, as well as the Guiding Principles on Internal Displacement.[28]

Since the option of voluntary resettlement in the Guiding Principles is deemed to entail IDPs' social, economic, cultural and political integration into the community,[29] it can be said that this largely also covers the option of local integration in the place of internal refuge as well as voluntary resettlement elsewhere in the country.[30] The former is nevertheless specifically

[22] UN Commission on Human Rights (Sub-commission), 'Final report of the Special Rapporteur Paulo Sérgio Pinheiro: Principles on housing and property restitution for refugees and displaced persons (Pinheiro Principles)' (28 June 2005) UN Doc. E/CN.4/Sub.2/2005/17 (Pinheiro Principles).
[23] Inter-Agency Standing Committee (IASC), *Framework on Durable Solutions for Internally Displaced Persons* (Brookings-Bern Project on Internal Displacement 2010) (IASC Framework).
[24] Guiding Principles on Internal Displacement, Principle 28(1).
[25] Pinheiro Principles, Principle 10.3; London Declaration, Arts 5.1 & 11.2
[26] Pinheiro Principles, Principle 1.2.
[27] See IASC Framework, 12.
[28] ILA, 'Report of the Committee on Internally Displaced Persons of the ILA' (London Conference, 2000). Report, Draft Declaration and Commentary (London Declaration Commentary), March 2000, https://www.refworld.org/docid/42808f3b4.html, 13, 27; Luke T. Lee, 'The London Declaration of International Law Principles on Internally Displaced Persons' (2001) 95 *American Journal of International Law* 454.
[29] Guiding Principles on Internal Displacement, Principle 28(1); Kuwali, above note 11, 277.
[30] Concurring with this view, see Ní Ghráinne, above note 16, 68 (citing Bríd Ní Ghráinne & Ben Hudson, 'The International Organisation for Migration's Engagement with the Guiding Principles on Internal Displacement', in Megan Bradley, Cathryn Costello & Angela Sherwood, *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (CUP 2023, forthcoming)).

mentioned as a third option in the IASC Framework,[31] mirroring the traditional three solution options for refugees. Arguably, the Guiding Principles do not explicitly mention local integration as there is less need to distinguish this from resettlement in internal displacement situations, in which all durable solutions will be implemented in the same country where IDPs in principle already have the right to freedom of movement and residence. This contrasts with the situation of refugees, where resettlement is an inter-state issue distinct from local integration in the host state, as it requires the consent and cooperation of a third country with which the refugee may as yet have no link.

Beyond outlining three possible options for durable solutions (return, resettlement, local integration), the IASC Framework elaborates significantly upon the Guiding Principles' stipulation that these options constitute durable solutions where they entail (re-)integration. The IASC Framework identifies five elements that characterize a sustainable process towards durable solutions for IDPs, i.e. voluntary choice, participation, access to humanitarian and development actors, access to effective monitoring mechanisms, and involvement in peace processes.[32] Furthermore, it specifies eight conditions to ensure the sustainability/durability of solutions, i.e. safety and security; an adequate standard of living; access to livelihoods; restoration of housing, land and property rights; access to documents; access to effective remedies and justice; family reunification; and participation in public affairs; all underpinned by the principle of non-discrimination.[33] The first four are considered to be core conditions that apply at all times.[34] To sum up, the IASC Framework considers that return, resettlement or local integration constitutes a durable solution when former IDPs "no longer have specific assistance and protection needs that are linked to their displacement and … can enjoy their human rights without discrimination resulting from their displacement."[35]

2.2 Rights and Obligations

While the IASC Framework takes a rights-based approach, the elements of a sustainable process and conditions for durable solutions that it identifies are not directly expressed as rights of IDPs – also taking into account the purpose of the document, which is more interpretative and operational than normative in itself. However, a number of the core elements are expressed more explicitly as rights and/or corresponding obligations in connection with durable solutions in both the Guiding Principles and Pinheiro Principles, and to a lesser extent, in the London Declaration (which has less of a focus on durable solutions). These elements are:

- Voluntary choice;
- Participation in durable solutions processes;
- Non-discrimination;
- Restoration of housing, land and property rights (reparation).

[31] IASC Framework, p. 5.
[32] IASC Framework,15; see also The Brookings Institution – University of Bern (Brookings-Bern) Project on Internal Displacement, 'When Displacement Ends: A Framework for Durable Solutions' (Brookings-Bern Project 2007) 12 – 14.
[33] IASC Framework, 27; Brookings-Bern Project, above note 32, 14 – 17.
[34] Bradley, 'Durable Solutions and the Right of Return for IDPs', above note 13.
[35] IASC Framework, 5.

2.2.1 Voluntary Choice

The right of IDPs to a voluntary choice of durable solution is implied in the Guiding Principles' formulation of a duty on competent authorities to create the conditions and provide the means for return or resettlement, including (re-)integration, read with the rights to seek safety elsewhere in the country and not to be forcibly returned. A similar prohibition on forcible internal return is expressed in the London Declaration (derived by analogy from the *non-refoulement* obligation in international refugee law), as well as in the Pinheiro Principles, which further specify an obligation to allow return and not subject it to arbitrary time limits.[36]

The issue of voluntary choice is only explicitly addressed in the Pinheiro Principles with regard to return, with the stipulation that this choice must be free, informed and individual, based on the provision of full, objective, current and accurate information, "including on physical, material and legal safety issues in countries or places of origin".[37] Regarding "durable solutions to displacement other than return", it is mentioned that any displaced person should be able to effectively pursue these.[38] Once again, the absence of mandatory language or precision on resettlement and local integration is likely due to the Principles' applicability to all displaced persons, regardless of whether they have crossed a border. Likewise, the London Declaration only specifies a right to return, once the reasons for displacement have ceased.[39]

The IASC Framework points to the erosion of voluntary choice where the provision of interim assistance is insufficient or conditional on the choice of a particular solution.[40] The issue of assistance in the durable solutions process is addressed by the Guiding Principles, as they specify a duty to allow "rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration",[41] distinctly from a more general duty to allow humanitarian access.[42] On the other side of the coin, Adeola points out that in order to foster IDPs' self-reliance, durable solutions to internal displacement must "of necessity" arise from a voluntary choice. She further highlights that denial of a particular solution needs to be substantiated based on impracticability or the need to protect IDP rights, e.g. where the area of origin has been devastated by a natural disaster or deliberately flooded to build a dam.[43]

2.2.2 Participation

As part of competent authorities' duties with regard to facilitating durable solutions, the Guiding Principles outline their responsibility to make special efforts to ensure IDPs' full participation in

[36] ILA, London Declaration Commentary, above note 28, 27, par. 2.
[37] Pinheiro Principles, Principle 10(1).
[38] Pinheiro Principles, Principle 10(3).
[39] London Declaration, Article 5(1).
[40] IASC Framework on Durable Solutions for Internally Displaced Persons, 18. See also García Amado, above note 13, 80 - 81. On the link between longer-term assistance and the durability of solutions, see Olivia Lwabukuna, 'The Responsibility to Protect Internally Displaced Persons in Africa' 65 *JAL* (2021) 73, 95; Kuwali, above note 11, 277.
[41] Guiding Principles on Internal Displacement, Principle 30.
[42] Guiding Principles on Internal Displacement, Principle 25. The London Declaration similarly addresses humanitarian assistance and protection, but formulates this as a right of IDPs (Article 3(2)).
[43] Adeola, above note 11, 51.

planning and managing the return/resettlement and (re-)integration process. In relation to the latter, former IDPs' right to participate in public affairs at the place of (re-)integration) is made explicit.[44] Furthermore, the Guiding Principles outline a duty to endeavour to ensure affected persons' participation (and especially that of women) in any kind of displacement outside of the emergency phase of armed conflict, which would include any planned relocation or resettlement.[45] The Pinheiro Principles stipulate a similar responsibility to ensure participation in restitution programmes.[46]

Adeola further links the Guiding Principles' focus on participation to the durability/sustainability of solutions by noting that this "affords a premise to engage on which solution best achieves the end goal of ending displacement", as well as ensuring the inclusion of diverse groups of IDPs.[47] Such inclusivity in participation – particularly of various groups which may otherwise be marginalized, such as women, the elderly, children, indigenous peoples, etc. – is also addressed explicitly in the Pinheiro Principles in relation to restitution processes. Ensuring that potentially marginalized groups have proper representation, means and information is deemed key to ensuring that their participation can be effective.[48]

2.2.3 Non-discrimination

The London Declaration and the Pinheiro Principles reiterate the right to non-discrimination in general terms (with the former specifying state obligations to ensure gender equality in reparation processes, and the latter more generally highlighting displaced people's right to equality before the law).[49] The Guiding Principles, while also containing such a general provision, additionally articulate this right in the context of the durable solutions process, specifying that returning or resettling IDPs shall not be discriminated against on grounds of having been displaced.[50] This would appear key to ensuring the (re-)integration of IDPs at the place of return or resettlement. Adeola notes in this regard that any failure by the state to protect former IDPs from discrimination in the place of return or resettlement is not an adequate basis for claims that a particular solution is impracticable, and any resultant secondary displacement would be deemed arbitrary.[51]

[44] Guiding Principles on Internal Displacement, Principles 28(2) & 29(1), read with Principle 7(d), which outlines a duty to endeavour to ensure participation for any kind of displacement outside of the emergency phase of armed conflict, which would include any planned relocation or resettlement.
[45] Guiding Principles on Internal Displacement, Principle 7(d)
[46] Pinheiro Principles, Principle 14.1
[47] Adeola, above note 11, 48.
[48] Pinheiro Principles, Principles 13.2 – 13.3 & 14.2. Particularly on legal obstacles to restitution for women, as well as women's marginalization from reparation processes, see Leckie, 'Conclusions', above note 4, at 398; Simon Bagshaw, 'Property restitution for IDPs: developments in the normative framework', in Leckie (ed), above note 4, 375 – 387; Simon Bagshaw, 'Post-Displacement and Return', in Scott Leckie and Chris Huggins (eds), *Repairing Climate Displacement: The Peninsula Principles* (Routledge 2016) 138, 148 – 149.
[49] London Declaration, Article 2(2); Pinheiro Principles, Principles 3 & 19. See also Guiding Principles on Internal Displacement, Principle 4.
[50] Guiding Principles on Internal Displacement, Principles 4 & 29(1) (the latter specifying returnees/resettled persons' right to non-discrimination on grounds of having been displaced - this is stated more generally with regard to all phases of displacement in Principle 1).
[51] Adeola, above note 11, 51.

2.2.4 Reparation

The IASC Framework considers durable solutions and reparations to be mutually reinforcing,[52] and in terms of IDPs' access to justice in the process of seeking durable solutions, it is indeed the issue of reparations – and particularly restitution – which is the focus of the other three instruments examined.[53]

All three instruments formulate what can be considered as a right to restitution and/or other forms of reparation (usually compensation) for IDPs, with an emphasis on housing, land and property.[54] The Guiding Principles outline a duty on competent authorities to assist returning or resettling IDPs in recovering their property and possessions, as well as to provide or assist in obtaining other forms of reparation where restitution is not possible. This may be also be read in conjunction with their emphasis on IDPs' right to an effective remedy in relation to any kind of non-emergency displacement or relocation process, which would presumably also apply to any planned return or resettlement movement.[55] The Guiding Principles further set out a duty to protect the property of displaced persons against destruction and/or illegal appropriation or occupation.[56] The Pinheiro Principles set out the state's primary duties to protect and realize the right to restitution in further detail, in particular with regard to establishing reparation procedures, mechanisms and institutions, as well as property documentation and registration systems; ensuring displaced people's access to justice; property documentation and registration systems; refraining from recognizing property transactions conducted under duress; and enforcing restitution decisions and judgments.[57]

As for the relationship between restitution and other forms of reparation, both the Guiding Principles and Pinheiro Principles indicate that restitution should be prioritized wherever it is possible.[58] The latter further specify that housing, land and property restitution can only be ruled out in cases of factual impossibility, as determined by an independent and impartial tribunal, and that compensation can only be given in lieu of restitution in this case, or where the rights-holder has given informed consent to this (thus allowing space for displaced people to make a voluntary choice in this regard).[59] Adeola confirms, with reference to the Guiding Principles, that a state's

[52] IASC Framework, 43. See also UNGA, 'Report of the Special Rapporteur on the human rights of internally displaced persons' (17 July 2018) UN Doc. A/73/173, par. 33 – 37, 42; Lwabukuna, above note 40, at 95; Kuwali, above note 11, at 277.

[53] The London Declaration does, however, make more general reference to IDPs' right to equal access to courts, regardless of the phase of displacement (Article 8). The Guiding Principles on Internal Displacement also refer to IDPs' right to an effective remedy regarding the process of displacement itself (Principle 7(3)(f)).

[54] Guiding Principles on Internal Displacement, Principle 29(2), read with Principle 7(3)(f); Pinheiro Principles, Principles 2 & 21; London Declaration, Article 9 (also referring to compensation for "physical and mental suffering").

[55] Guiding Principles on Internal Displacement, Principle 29(2), read with Principle 7(3)(f)

[56] Guiding Principles on Internal Displacement, Principle 21.

[57] Pinheiro Principles, Principles 12 – 13, 15 – 16, 20.

[58] Guiding Principles on Internal Displacement, Principle 29(2); Pinheiro Principles, Principle 2(1)-(2)

[59] Pinheiro Principles, Principle 21. A partial exception to the right of restitution is also foreseen here in case of a negotiated peace agreement – however, given the stipulation that such an agreement should provide for a combination of restitution and compensation, it does not seem that a total exclusion of restitution would be deemed acceptable in this scenario.

claims regarding impracticability of return are not substantiated where it has failed to assist IDPs in reclaiming housing, land and property.[60]

The prioritization of restitution has previously been criticized as presupposing return, and thus undermining displaced people's voluntary choices.[61] However, the instruments examined formulate restitution and return as rights that are independent of each other,[62] albeit related in the sense that restitution is likely to be factually conducive, and even necessary, to facilitate return.[63] Williams also finds that restitution and other remedies can contribute to durable solutions beyond return, in the sense that "the attraction of restitution should not necessarily be that it facilitates return but that it facilitates choice".[64]

2.3 Duty-bearers

The territorial state (i.e. IDPs' state of nationality or habitual residence) is generally indicated as the primary duty-bearer with regard to the obligations and rights addressed in the section above. Notably, however, the instruments examined contain a number of references to the supplementary responsibilities of other duty-bearers. Given the high level of engagement of actors other than the territorial state in durable solutions for IDPs, as well as the fact that durable solutions may need to be sought in contexts where state authorities are not primarily in control of the territory in question, it is worth further outlining the scope of responsibilities foreseen for duty-bearers other than the state.

2.3.1 *De Facto* Authorities

The Guiding Principles on Internal Displacement generally refer to the responsibilities of "competent authorities", particularly with regard to the duties and responsibilities in terms of facilitating durable solutions, as set out in Principles 28 and 29. The legal annotations to the Guiding Principles indicate that only competent authorities "empowered by law" may implement the right to a remedy[65] – a situation which is unlikely in the case of a *de facto* authority.

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[60] Adeola, above note 11, 51

[61] See e.g. Megan J. Ballard, 'Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations' (2010) 28 *Berkeley Journal of International Law* 462, 479 – 483 (based on the premise that the right to restitution is derived from the right to return, rather than the right to a remedy); Anneke Smit, 'Property Rights and Public Interests: Restitution, Transitional Justice and Post-Conflict Reconciliation', in Leckie (ed), Returning Home, above note 4, 68, 76 (referring to the Pinheiro Principles' emphasis on restitution and return, but acknowledging that in principle, there is no contradiction between restitution and the choice of a durable solution other than return).

[62] Guiding Principles on Internal Displacement, Principles 28(1) & 29(2); Pinheiro Principles, Principle 2(1) & 10(3); ILA, London Declaration, Arts. 5(1) & 9.

[63] Smit, 'Property Rights and Public Interests', above note 61, at 68; Rhodri C. Williams, 'Property', in Walter Kälin, Rhodri C. Williams, Khalid Koser & Andrew Solomon (eds) *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges* (American Society of International Law / Brookings Institution 2010) 369.

[64] Williams, 'Property', above note 63, 367. On the importance of housing, land and property redress (broadly conceived) to support solutions beyond return, see also Bradley, 'Advancing the Agenda', above note 19, 349; Anneke Smit, *The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution* (Routledge 2012).

[65] Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (American Society of International Law / Brookings Institution 2008) 21.

Otherwise, it is unclear to what extent the change in wording to "[a]ll authorities concerned" in Principle 30 (on allowing and facilitating assistance to returning or resettling IDPs) indicates the possibility of *de facto* authorities sharing this particular duty.

While the text of the Pinheiro Principles stress the overall primary responsibility on the territorial state to establish reparations processes and institutions, their commentary indicates that "[i]n cases of the non-existence of a State entity or in cases of a non-identifiable State-actor, this obligation passes to any State-surrogate."[66] This leaves open the possibility of a *de facto* authority taking up this role, and certainly also permits a similar reading of responsibilities where the duty-bearer is indicated with the more open wording of "other responsible authorities or institutions", e.g. the responsibilities to protect registries and records from destruction; provide documentary evidence to restitution claimants; and collect information which could facilitate restitution when registering displaced people.[67]

The London Declaration is even more explicit in placing states and *de facto* authorities on an equal footing when it comes to both promoting and respecting the rights of IDPs in the declaration (which may be read as including the right to restitution), as well as to cooperate with international actors towards ensuring durable solutions.[68] The commentary to the London Declaration refers to the overall duty to cooperate with international and regional organizations in addressing the root causes of internal displacement as "one of the most fundamental obligations incumbent on States and de facto authorities".[69] The Declaration defines *de facto* authorities as "any non-State entities in effective control of part(s) of a State's territory which are parties to an armed conflict and/or internal strife or have generated or hosted internally displaced persons." While the limitation to armed conflict situations and the reference to parties to the conflict may suggest that the responsibilities referred to are derived from international humanitarian law, the alternative reference to having caused internal displacement or hosted IDPs (as well as the reference in Article 11(2) to attaining durable solutions, which is likely to continue post-conflict) indicates that the duties and duty-bearers referred to may well be broader than those foreseen in international humanitarian law.

2.3.2 International Organizations

In the instruments examined, international organizations are mainly called upon to play a cooperative and supportive role in durable solutions and/or reparations processes, including through providing technical or financial support to states and assistance to IDPs in the process of resettlement or return; ensure the inclusion of restitution in peace agreements; sharing expertise on developing reparation programmes and monitoring their implementation; and establishing restitution mechanisms where the state is unable to do so.[70] In introducing the London Declaration in 2000, Luke T. Lee (chair of the ILA Committee on IDPs, which drafted the

[66] Khaled Hassine & Scott Leckie, *The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons ('The Pinheiro Principles'): A Commentary* (Brill Nijhoff, 2016) 60.
[67] Pinheiro Principles, Principle 15.4 – 15.6
[68] London Declaration, Article 11, read with Article 9.
[69] ILA, London Declaration Commentary, above note 28, p. 19, par. 2.
[70] Guiding Principles on Internal Displacement, Principle 30; London Declaration, Art. 11 (2) - (3); Pinheiro Principles, Principles 10(4), 12(4) & 22(3) – (4); see also Hassine & Leckie, above note 66, at 60.

declaration) further raised the question as to whether international organizations' cooperation could take the form of the General Assembly calling on UN agencies to establish a fund for the protection and assistance of IDPs (which, given the links between prevention, protection, assistance, and durable solutions, could then presumably also extend to the pursuit of the latter).[71]

The Pinheiro Principles also articulate more specific duties on international organizations which are already involved in internal displacement contexts via peacekeeping operations (i.e. to maintain stability for restitution processes and assist in enforcing restitution decisions where mandated);[72] registration of displaced persons (i.e. to collect information that can facilitate restitution);[73] involvement in restitution processes (i.e. to ensure participation of displaced people);[74] or simply their presence (i.e. to refrain from impeding restitution, e.g. by occupying displaced persons' property).[75]

3. Normative Bases for Durable Solutions for IDPs in International Human Rights Law

International human rights law will be the main starting point for this overview of international law norms underpinning the concept of durable solutions for IDPs, for three reasons: 1) international human rights standards have been visibly integrated into soft law frameworks that specifically address durable solutions for internal displacement; 2) international human rights law is the branch of international law which can be viewed as broadly applicable to all displaced people and situations of displacement, independently of any particular triggering events or conditions; 3) from the perspective of a human rights-based approach, international human rights law is a logical starting point from which to seek to define the legality/normativity of durable solutions for internal displacement.

Other complementary areas of international law – e.g. international humanitarian law, international criminal law, international disaster relief law, and/or international environmental law – may also be applicable to securing durable solutions in contexts where relevant factors are present (i.e. armed conflicts, international crimes, disasters, and/or environmental harm respectively). However, exploring the relevant norms in these areas of law lies beyond the scope of the current paper for reasons of space and manageability.

This section will examine the potential bases in international human rights law for the four key sets of rights and obligations relating to durable solutions for IDPs as outlined in the section above (i.e. voluntary choice, non-discrimination, participation, access to justice and reparation), as well as the potential bases for the duties of *de facto* authorities and international organizations with regard to durable solutions for IDPs.

[71] Lee, above note 28, at 458.
[72] Pinheiro Principles, Principle 22(5) – (6).
[73] Pinheiro Principles, Principle 15.6
[74] Pinheiro Principles, Principle 14.
[75] Pinheiro Principles, Principle 22(7).

3.1 Voluntary Choice

The right of IDPs to return voluntarily to their home or place of habitual residence can be inferred from international human rights law, based amongst others on their right to freedom of movement and residence within their country. In (post-)conflict situations, this is further supported by international humanitarian law.[76] However, the lack of an explicit IDP right to return in international law (outside of conflict situations) means that IDPs' choice to return may be subjected to the limitations which apply to the rights to freedom of movement and residence. Furthermore, IDPs cannot necessarily choose when to return (constrained by the conditions of safety and dignity), or to what (in this regard, see section 3.4. below on reparation).[77] Conversely, a prohibition on forcible internal return is deemed by Kälin to be "absolute and non-derogable" where this would amount to internal *refoulement* (i.e. returning IDPs to an area where their rights to life or freedom from inhumane treatment are at risk).[78] As for an IDP right to a voluntary choice of durable solution more generally, this also not explicitly articulated in international human rights law. Similarly to return, though, the right to freedom of movement and residence in principle permits IDPs to pursue other durable solutions anywhere within their country (not only at the place from which they were displaced), though this may be also restricted under the usual limitation conditions applicable to this right (e.g. legality, legitimate aim, necessity).[79] IDPs' integration (as well as assistance in this regard) is also assured – at least on a legal level – by their equal entitlement to the full range of human rights *vis-à-vis* the territorial state.

In applying international human rights treaties to the claims of (mostly internally) displaced people, regional human rights treaty bodies have kept open displaced persons' choice of a durable solution in a number of ways:[80] firstly, by explicitly endorsing the principle of a voluntary choice of durable solution;[81] secondly, by recognizing displaced people's housing, land and property rights regardless of the immediate feasibility of their choice of solution (in some cases requiring interim protection and/or longer-term recognition of these rights); thirdly,

[76] See International Covenant on Civil and Political Rights (ICCPR), Article 12; Williams, 'Property', above note 64, at 377; Hassine & Leckie, above note 66, 48 – 57; Cantor, *Returns of Internally Displaced Persons during Armed Conflict*, above note 13; Kälin, *Internal Displacement and the Law*, above note 12, 258 – 262.

[77] Hudson, above note 14, 219 – 221; Kälin, *Internal Displacement and the Law*, above note 12, 259 – 260; on return to one's property as an emerging right, see Smit, *The Property Rights of Refugees and Internally Displaced Persons*, above note 64, 29 – 33.

[78] Kälin, *Internal Displacement and the Law*, above note 12, 263

[79] *Id.*, 255 - 257.

[80] The following is drawn from the current author's doctoral research in Deborah Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement* (Doctoral thesis, University of Antwerp, 2022), 404 – 407, https://hdl.handle.net/10067/1875990151162165141. The current author has broadly characterized the four ways in which durable solutions have been addressed by regional human rights mechanisms as "safeguarding a choice of durable solution" (at 404). This would appear to cut across and incorporate aspects of both approaches of regional human rights mechanisms to durable solutions as identified in Kälin's typology, i.e. one approach inferring a duty on states to create conditions allowing IDPs to find durable solutions; another deriving duties to provide for durable solutions from the right to reparation and remedy (Kälin, *Internal Displacement and the Law*, above note 12, 245 – 254).

[81] The European Court of Human Rights (ECtHR) has referred with approval to a resolution upholding restitution as the only form of reparation which keeps all three durable solutions open; the Inter-American Court of Human Rights (IACtHR), on the other hand, has explicitly referred to state obligations to facilitate return or resettlement (as well as displaced persons' right to a voluntary choice) in a number of reparation judgments.

by ordering or recommending interim assistance to displaced people in their current locations where this is insufficient; and finally, by recognizing in principle that a right to restitution is not extinguished merely by the passage of time (while at the same time recognizing the need to strike a balance with the rights of secondary occupants, where relevant in the context).[82] Thus, human rights treaty mechanisms have effectively legally entrenched the principle of displaced people's voluntary choice, although not going as far as articulating this as a right. The consolidation of a right to restitution (discussed below in section 3.4) also directly touches upon the issue of a voluntary choice of durable solution, given the role of restitution in facilitating this. Indeed, Hassine and Leckie refer to pronouncements of the CERD Committee, as well as various UN General Assembly and Security Council Resolutions, in asserting the independence of the rights of return and restitution and return from one another in international human rights law.[83] This would entail that IDPs' choice to return, resettle, or integrate locally cannot be constrained by conditioning their right to restitution on this choice.

3.2 Non-discrimination

While the right to non-discrimination is well-established in international and regional human rights treaties, the right to non-discrimination on the basis of having been displaced (spelled out in the Guiding Principles) is not explicitly addressed. However, the Annotations to the Guiding Principles consider the prohibition on discrimination against internally displaced people on the basis of their displacement to be evident in light of existing international humanitarian and human rights law.[84] Under IHRL treaties, discrimination against IDPs on the basis of their displacement may be considered to fall into the category of prohibited discrimination based on "other status" (as mentioned in the ICCPR, ICESCR and ECHR), "any status" (African Charter), or "other social condition" (American Convention).[85] Indeed, the Annotations also support this view, and their reference to growing state recognition of this position (as at 2008) can only be reiterated and highlighted in light of the widespread domestication of the Guiding Principles since then.[86]

Since the right to non-discrimination applies in conjunction with other rights stipulated in the treaties, it is also applicable to the process of securing remedies (including reparation) for displacement, as well as securing other rights which are relevant in the process of ensuring durable solutions (e.g. freedom of movement and residence, adequate housing). Treaties relating to the equality of women, children and people with disabilities also stipulate that the equality of these groups must be ensured in applying the right to reparation (as well as the range of other

[82] On the common discourse of 'supersession' of displaced peoples' rights by the passage of time, see Mick Dumper, 'Refugee Entitlement and the Passing of Time: Waldron's Supersession Thesis and the Palestinian Refugee Case', in Bradley (ed), above note 3, 324.
[83] Hassine & Leckie, above note 66, at 48 – 57
[84] Kälin, *Guiding Principles on Internal Displacement: Annotations*, above note 65, 11 – 12.
[85] ICCPR, Article 2(1); International Covenant on Economic, Social and Cultural Rights, Article 2(2); American Convention on Human Rights (ACHR), Article 1(1); African Charter on Human and People's Rights (ACHPR), Article 2; European Convention on Human Rights (ECHR), Article 14.
[86] Kälin, *Guiding Principles on Internal Displacement: Annotations*, above note 65, 12; see also Adeola, above note 11, 29.

rights relevant to durable solutions).[87] However, the displacement reparations decisions of human rights treaty bodies have paid very limited attention to the equality of potentially marginalized categories of displaced persons in reparation processes.[88]

Only the UN Human Rights Committee has asserted a general principle that displaced people are equally entitled to reparation without arbitrary distinctions.[89] The outcome of *Simunek v. Czech Republic* and the raft of virtually identical subsequent cases which followed indicates that domestic laws which condition restitution on a displaced person's current nationality or place of residence (thus excluding those who have opted not to return) will likely be considered discriminatory, especially if the state itself was responsible for their initial displacement. This also touches upon the issue of respecting voluntary choice.[90]

The decisions of human rights bodies also do not appear to distinguish between people displaced within and across a state's borders in the same context for purposes of reparation[91] - a principle which has also been confirmed by the European Court of Human Rights (ECtHR) with explicit reference to the Pinheiro Principles.[92]

3.3 Participation

While the right to participate in durable solutions processes is difficult to derive directly from the text of human rights treaties,[93] human rights bodies have interpreted the right to property (in the American Convention on Human Rights) and the right to development (in the African Charter on Human and Peoples' Rights) as entailing obligations on states to ensure participation in decisions entailing movement of people and restitution of housing, land and property.

In *Xákmok Kásek v. Paraguay*, the Inter-American Court of Human Rights found that the right to property - in the context of the historic displacement and ongoing denial of return of an indigenous people – requires states to ensure indigenous peoples' effective participation in any plans or decisions which could affect their use or enjoyment of their lands, in line with their own customs and traditions.[94] In making an order of land restitution, the Court further specified that if expropriation or purchase of the traditional land for restitution proved impossible, the State was obliged to ensure that alternative land within the traditional territory would be selected with the participation of the community, in line with their own customs.[95]

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[87] See e.g. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 14(1), 14(2)(c) & (h); Convention on the Rights of the Child (CRC), Art. 27(1); Convention on the Rights of Persons with Disabilities (CRPD), Art. 28(1).
[88] Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement*, above note 80, at 105 – 110
[89] See *Simunek v. Czech Republic*, Human Rights Committee (HRC), Communication No 516/1992, UN Doc CCPR/C/54/D/516/1992 (19 July 1995), par. 11.6.
[90] Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement*, above note 80, at 219 – 220.
[91] *Id.*, 135 – 137
[92] *Đokić v. Bosnia*, ECtHR (Fourth Section), Application no. 6518/04, Judgment, 27 May 2010, par. 44.
[93] Concurring, see Kälin, *Internal Displacement and the Law*, above note 12, 266.
[94] *Xákmok Kásek v. Paraguay*, IACtHR, Judgment, 24 August 2010, par. 157.
[95] *Id.*, par. 281 – 286.

In *CEMIRIDE & MRG (on behalf of the Endorois Welfare Council) / Kenya*, the African Commission on Human and Peoples' Rights applied the right to development in a context of development-induced displacement of an indigenous people, and highlighted the centrality of choice, empowerment, participation and benefit-sharing in this regard.[96] With regard to the eviction of the Endorois, the Commission found a breach of the right to development as the principle of free, prior and informed consent should have been applied, but had not been respected; furthermore, the Endorois had been denied participation and consultation via their chosen representatives in any related process.[97] The implications of this decision for durable solutions are that any kind of planned relocation or return process may also be considered to be in breach of the right to development where people have been denied participation in the process, and this may entail a right to reparation.

Furthermore, the Inter-American Court and African Commission have also built requirements into their reparative orders/recommendations in displacement cases which are aimed at ensuring effective participation of the victims and/or their representatives in the implementation of these measures. For example, in *Moiwana v. Suriname* (a case of conflict-related displacement of a tribal people), the Inter-American Court retained the option to convene the parties if the development fund was not established on time, and required monthly official visits to monitor and respond to the security situation of returnees.[98] Participation and informed consent of the Moiwana community, as well as consultation with neighbouring communities, was also an integral part of this order to secure the community's collective rights to its traditional land – including through creation of a mechanism for demarcation, delimitation and titling.[99] In the *Endorois* case, the African Commission's recommendation to register the community's representative body effectively amounted to a guarantee of non-repetition, given that the state's prior refusal to do so has played a role in the failure to ensure effective consultation and participation.[100]

3.4 Reparation

[96] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council (Endorois) v. Kenya*, African Commission on Human and People's Rights (ACommHPR), Comm. No. 276/2003, 4 February 2010, par. 277 – 278, 283, 289, 294 – 296; see further Abraham Korir Sing'Oei & Jared Shephard, '"In Land We Trust": The Endorois' Communication and the Quest for Indigenous Peoples' Rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 57, 81 – 82; Derek Inman, Dorothée Cambou & Stefaan Smis, 'Evolving Legal Protection for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections' (2018) 26 *African Journal of International & Comparative Law* 339, 364; Jérémie Gilbert, 'Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations' (2017) 66 *International & Comparative Law Quarterly*, 657, 663 ; Gabrielle Lynch, 'Becoming Indigenous in Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois' (2011) 111 *African Affairs* 24, 40.

[97] *Endorois v. Kenya*, ACommHPR, above note 96, par. 279 – 282, 286 – 288, 291 – 292.

[98] *Case of the Moiwana Community (Moiwana) v. Suriname*, IACtHR, Judgment, 15 June 2005, par. 209 – 210; Thomas Antkowiak, 'Moiwana Village v. Suriname: A Portal into Recent Jurisprudential Developments of the Inter-American Court of Human Rights' (2007) 25 *Berkeley Journal of International Law* 268, 277 – 278

[99] *Moiwana v. Suriname*, IACtHR, above note 98, par. 209 – 210.

[100] See Sing'Oei & Shephard, above note 96, 104.

In international human rights law, the right to reparation (as part of the right to a remedy) has a well-established basis.[101] This right is also applicable in cases of violation of the various rights encompassed by the right not to be displaced (e.g. the rights to freedom of movement and residence, an adequate standard of living (including housing), non-interference with the home, and/or the right to development).[102]

In applying these rights and making reparative orders, regional human rights courts and commissions, as well as the UN treaty bodies – which are tasked with interpreting and applying the content of international and regional human rights treaties – have played a significant role in concretizing the right to reparation in displacement contexts in alignment with norms that are otherwise expressed in rights-based soft law such as the Guiding Principles on Internal Displacement and the Pinheiro Principles. The main areas of this normative development have been the confirmation of a broad material scope for displacement reparations (covering a range of displacement situations which had not previously been explicitly recognized as potentially giving rise to reparation); the recognition of a range of supplementary forms of reparation for displacement; and the consolidation of a right to restitution without prejudice to the choice of durable solution (also touching upon the issue of voluntary choice, as addressed in section 3.1. above).[103]

In particular, the right to restitution for displaced people as articulated in the Guiding Principles on Internal Displacement and the Pinheiro Principles was deemed by some writers to have anticipated the development of international law.[104] Since the adoption of these instruments, however, a growing acceptance of displaced persons' right to restitution has been consolidated in the decisions of the African, Inter-American and European regional human rights courts or (quasi-judicial) commissions. In response to claims brought by displaced persons, all of these mechanisms have recognized (at least in principle) a right to integral reparation for displacement, including restitution where factually possible. The overall practice of the African and Inter-American human rights mechanisms has been to order or recommend restitutive measures on a relatively systematic basis; while the ECtHR has not directly made such orders, it also

[101] ICCPR, Art. 2(3)(a); European Convention on Human Rights, Art. 13; American Convention on Human Rights (ACHR), Art. 25(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 14; HRC, 'General Comment 31' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, par. 16; Theo Van Boven, 'Victims' Rights to a Remedy and Reparation: The United Nations Principles and Guidelines', in Carla Ferstman, Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2ed) (Brill Nijhoff 2020), 20 - 22; Heidy Rombouts, Pietro Sardaro & Stef Vandeginste, 'The right to reparation for victims of gross and systematic violations of human rights', in Koen De Feyter, Stephan Parmentier, Marc Bossuyt & Paul Lemmens, (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia 2005), 268.

[102] Michèle Morel, 'The right not to be displaced in international law' (Intersentia 2014), 276.

[103] Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement*, above note 80, 400 – 409.

[104] UN ECOSOC, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57' (5 December 1995) UN Doc E/CN.4/1996/52/Add.2, 107; Catherine Phuong, *The International Protection of Internally Displaced Persons* (CUP 2004), 64. See also Rhodri C. Williams, 'Guiding Principle 29 and the right to restitution' (2008) *Forced Migration Review* 23 – 24; Bagshaw, above note 48, 378 – 380 (outlining previous doubts about the consolidation of this norm and asserting a growing acceptance thereof).

recognizes a right to restitution in principle, including its prioritization where possible.[105] In addition to the regional human rights bodies, the UN Human Rights Committee has also addressed the relationship between restitution and compensation. All have confirmed (explicitly or indirectly) that an obligation of compensation in lieu of restitution only arises once the impossibility of restitution is established.[106] Of course, such a right to restitution is not unqualified. The right to restitution may also be limited, for example, where expropriation has taken place in conformity with the usual limitation conditions applicable to the right to property; to avoid forced eviction of secondary occupants or third parties in good faith; or where the destruction of housing has been so widespread and devastating that neither the state nor the international community can fully cover the costs (thereby effectively making full restitution materially impossible).[107]

3.5 Duties of De Facto *Authorities and International Organizations*

The responsibility of non-state entities as duty-bearers of the obligation of reparation is recognized in international human rights law as part of the right to a remedy. This recognition is visible in various international human rights treaties and a range of specific soft law instruments on reparation, either explicitly or by implication (e.g. the author of the violations who is responsible for reparations is often not specified, or official capacity is excluded as an excuse, thus implying that those acting in a private capacity may be liable).[108]

However, there is a lack of international procedural options to engage the responsibility of non-state actors, including via the international human rights system. Owing to their mandates which exclusively establish their jurisdiction over states, international human rights courts and commissions are first and foremost tasked with determining state responsibility in terms of international human rights law. In the few displacement cases that such bodies have examined which relate to the actions of de facto authorities, the responsibilities of the de facto authorities were not directly established; rather, the respondent state's positive obligations to protect human

[105] Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement*, above note 80, 189 – 194 (on the mechanisms' approach to restitution), 216 – 220 (on the absence of conditionality between restitution and return); see also Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment 26' (22 December 2022) UN Doc E/C.12/GC/26, par. 50.

[106] *Id*., 202 – 207; on (post-)conflict situations specifically, see CESCR, 'General Comment 26', above note 105, par. 48.

[107] Kälin, *Internal Displacement and the Law*, above note 12, 277 – 280; c.f. also the exceptions foreseen in the Pinheiro Principles, Principle 21(1), i.e. material impossibility; the displaced person's knowing and voluntary acceptance of compensation in lieu of restitution; and where a negotiated peace agreement provides for a combination of restitution and compensation.

[108] ICCPR, Art. 2(3); ACHR, Art. 25(1); 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, UNGA Res 60/147 (16 December 2005) Annex, Principle 15 (explicit); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985), par. 4, 21 (the latter refers to remedies for abuses of economic as well as political power, implying applicability to economic actors as well); UN ECOSOC 'Updated set of principles for the protection and promotion of human rights through action to combat impunity' (2005) UN Doc E/CN.4/2005/102/Add.1, Principle 31; United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Res 61/295 (13 September 2007), Art. 40; CESCR, 'General Comment 24' (23 June 2017) UN Doc E/C.12/GC/24, par. 40 (specifically referring to businesses).

rights and/or remedy violations were interpreted and applied to establish state responsibility for making reparation to the displaced persons.[109]

As for the supportive role of international organizations and their members in facilitating reparation, this has been alluded to by both the African Commission and the Inter-American Court, although these bodies did not directly establish responsibility of international organizations or make recommendations/orders directed at them.[110]

In *SHRO & COHRE / Sudan*, in relation to a situation of conflict displacement, the African Commission stressed the obligation on all states parties to the African Charter to take measures to give effect to Charter rights, thus potentially alluding to the responsibility of third States to work towards such measures through their engagement in multilateral bodies.[111]

In *San Vicente / Guatemala*, the Inter-American Commission addressed the role of OAS and UN bodies in displacement reparations and durable solutions on the basis of a friendly settlement which was concluded by the parties and endorsed by the Commission. The state had agreed to request monitoring of humanitarian assistance to the community during their relocation and resettlement by national and international observers, including the UN Verification Mission in Guatemala (MINUGUA) and the OAS.[112] It was also recorded that the community had requested accompaniment during relocation by, amongst others, MINUGUA, the OAS, and the International Organization for Migration.[113] This was relevant in light of the community's earlier attempts to return to their original land, which had been impeded by threats and violence despite state assurances that security measures were being taken.[114] It was further recorded in the Commission's report that humanitarian assistance was being jointly coordinated by State agencies and the UN World Food Programme (WFP), along with some details of the implementation.[115] The explicit outlining of these roles and commitments was especially relevant in this case, as the displaced persons had earlier claimed that a food aid programme – through which the state had committed to assisting them while they waited for relocation – was not being implemented, with malnutrition as a result.[116]

In cases from context of the Cyprus conflict, the ECtHR has also confirmed that the involvement of international organizations in security arrangements and peace negotiations does

[109] Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement*, above note 80, at 151 – 158 ; see e.g. *Cyprus v. Turkey*, ECtHR, Application no. 25781/94, Judgment, 10 May 2001 (merits), at par. 77 – 81, 172 – 175, 184 – 189, 193 – 194; *Georgia v. Russia (II)*, ECtHR, Application no. 38263/08, Judgment, 21 January 2021 (merits), par. 205 – 222.
[110] Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement*, above note 80, 158 – 160.
[111] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACommHPR, Comm. No. *279/03-296/05*, May 2009, par. 227; see also ACHPR, Article 1; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, ICJ Reports 2004, p. 136, par. 159 – 160.
[112] *San Vicente de los Cimientos Community / Guatemala*, Inter-American Commission on Human Rights (IACommHR), Report No. 68/03 (Friendly Settlement), Case 11.197, 10 October 2003, par. 36.9.
[113] *Id.*, par. 44.
[114] *Id.*, par. 2, 10 – 15.
[115] *Id.*, par. 37.
[116] *Id.*, par. 16 – 19.

not relieve states of their responsibility to allow displaced persons access to their homes and property.[117]

4. Conclusion

In the first part of the analysis (section 2), the main global soft law instruments which specifically address durable solutions for IDPs were analysed, and four key sets of rights and obligations in this regard were identified, i.e. voluntary choice, participation, non-discrimination, and reparation. Furthermore, beyond the primary responsibility of the state for ensuring durable solutions, it was identified that these instruments articulate certain responsibilities in relation to durable solutions for other duty-bearers, namely *de facto* authorities and international organizations.

The second part of the analysis (section 3) sought to survey the international human rights treaty provisions, as well as interpretations of these provisions by international human rights courts and commissions, which could be said to underpin the four key sets of rights and obligations on durable solutions articulated in the soft law instruments, as well as the responsibilities of *de facto* authorities and international organizations. What emerges is that the rights to voluntary choice, non-discrimination and reparation in durable solutions processes are strongly rooted in international human rights law. Regarding voluntary choice and reparation particularly, international and regional human rights bodies have played a key role in interpreting and consolidating norms that were previously mainly articulated in soft law, in response to the claims of displaced people.

As for participation in durable solutions processes, this does not have such a clear or direct underpinning in 'hard' law – however, this does find some grounding in interpretations of the right to property and the right to development by the Inter-American and African human rights bodies respectively. These underpinnings of participation in durable solutions in international human rights law would warrant further investigation, especially beyond contexts involving indigenous peoples (which were the subject of the cases mentioned), and particularly in light of the importance of participation as a principle underlying a human rights-based approach.

As regards the potential responsibilities of actors beyond the state, these have been only very sparsely articulated and examined in international human rights legal instruments and decisions, albeit with reference to a slightly broader range of actors than those mentioned in the soft law instruments on durable solutions. There is certainly room for further analysis and development of the responsibilities of these duty-bearers – not only in the perspective of confirming the underpinnings of the duties identified in soft law instruments, but also potentially going beyond these in forums where international human rights law in this regard is being further elaborated. Furthermore, discussions on the human rights responsibilities of actors other than the territorial state have largely focused on accountability for violations, while the potential positive obligations of these actors - e.g. in working towards durable solutions - have been far less

[117] *Cyprus v. Turkey*, ECtHR, above note 109, par. 174 – 175; *Demades v. Turkey*, ECtHR (Third Section), Application no. 16219/90, Judgment (merits), 31 July 2003, par. 36; *Lordos v. Turkey*, ECtHR (Fourth Section), Application no. 15973/90, Judgment (merits), 2 November 2010, par. 80 – 82.

articulated. A further examination of the latter would be particularly relevant in view of the High-Level Panel's calls for international solidarity, UN accountability, and greater private sector involvement in durable solutions. In this sense, the duty to cooperate to realize human rights, as expressed in the UN Charter and core human rights treaties - may offer a pathway to better defining these responsibilities.[118]

Overall, this analysis has sought to clarify some of the underpinnings of rights and obligations in relation to durable solutions, in the interests of strengthening the normative element of a human rights-based approach (and particularly in contexts where regional treaties have not been ratified or soft law frameworks have not been incorporated into domestic law). This process has also identified some areas where potential legal underpinnings could benefit from further clarification and/or elaboration. Its findings may be relevant for a number of current discussions. They may connect to discussions on need for an IDP treaty and its potential scope – while this paper does not take a position on the need for such a treaty, its assessment has highlighted some potential areas which could benefit from further clarification or regulation, including through such a process (e.g. responsibilities of duty-bearers beyond the state). Furthermore, it appears that the issue of rights and responsibilities in relation to securing durable solutions is a relevant one for discussions on the development of a distinct body of IDP law, since this is an area where the legal basis for responsibilities towards IDPs differs from that applicable to refugees and would need to develop in parallel (although perhaps not in isolation). The rationale for this distinction is supported by differences in context and duty-bearers, as well as rights-holders' relationship to the state which is primarily responsible for implementing durable solutions within its own territory.

[118] See e.g. Sigrun Skogly, 'Global Human Rights Obligations', in Mark Gibney, Gamze Erdem Türkelli, Markus Krajewski & Wouter Vandenhole (eds) *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022), 25 – 39; Margaretha Wewerinke- Singh, 'Pandemics, Planetary Health and Human Rights: Rethinking the Duty to Cooperate in the Face of Compound Global Crises', in Erika de Wet, Kathrin Maria Scherr, and Rüdiger Wolfrum (eds) (2021) 24 *Max Planck Yearbook of United Nations Law Online,* 399 – 425.

Selected Bibliography

Romola Adeola, *The Internally Displaced Person in International Law* (Edward Elgar 2020)

Megan Bradley (ed) *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press 2015)

Megan Bradley, 'Durable Solutions and the Right of Return for IDPs: Evolving Interpretations', (2018) 30 *Refugee Survey Quarterly* 218

David James Cantor, *Returns of Internally Displaced Persons during Armed Conflict: International Law and its Application in Colombia* (Brill 2018)

Deborah Casalin, *The role of international (quasi-)judicial mechanisms in ensuring reparation for arbitrary displacement* (Doctoral thesis, University of Antwerp, 2022), 404 – 407, https://hdl.handle.net/10067/1875990151162165141

Khaled Hassine & Scott Leckie, *The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons ('The Pinheiro Principles'): A Commentary* (Brill Nijhoff, 2016)

Ben Hudson, 'Challenges in the Law of IDP Returns' (Doctoral thesis, University of Bristol Law School, 2019), https://research-information.bris.ac.uk/en/studentTheses/challenges-in-the-law-of-idp-returns

Inter-Agency Standing Committee (IASC), *Framework on Durable Solutions for Internally Displaced Persons* (Brookings-Bern Project on Internal Displacement 2010)

International Law Association, 'Report of the Committee on Internally Displaced Persons of the ILA' (London Conference, 2000). Report, Draft Declaration and Commentary, March 2000, https://www.refworld.org/docid/42808f3b4.html;

Walter Kälin, *Internal Displacement and the Law* (Oxford University Press 2023)

Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (American Society of International Law / Brookings Institution 2008)

Scott Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers 2003)

Luke T. Lee, 'The London Declaration of International Law Principles on Internally Displaced Persons' (2001) 95 *American Journal of International Law* 454