



The Prohibition of Arbitrary Internal Displacement in National Laws and Policies

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CONTRIBUTORS

Faculty Supervisors:

Prof Martin Scheinin

British Academy Global Professor
Bonavero Institute of Human Rights, University of Oxford

Research Coordinators:

Gayathree Devi Kalliyat Thazhathuveetil

DPhil Candidate, University of Oxford

Research Officers:

Sameer Rashid Bhat

DPhil Candidate, University of Oxford

Vandita Khanna

MPhil Candidate, University of Oxford

Researchers:

Ayban Elliott-Renhard

MPhil Candidate, University of Oxford

Kwan Lui

MSc Candidate, University of Oxford

Sophie O'Neill-Hanson

MSc Candidate, University of Oxford

Titiksha Mohanty

DPhil Candidate, University of Oxford

Karen Azoulay

MJur Candidate, University of Oxford

Pamir Ehsas

MPP Candidate, University of Oxford

Stacy Topouzova

DPhil Candidate, University of Oxford

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP has been asked by the UN Special Rapporteur on the Human Rights of Internally Displaced Persons (IDPs), Cecilia Jimenez-Damary, to prepare a report on the scope of the prohibition of arbitrary internal displacement in national laws and policies. The Special Rapporteur on the Human Rights of IDPs is an independent human rights expert appointed by the UN Human Rights Council. Her mandate is to: (i) address the complex problem of internal displacement; (ii) work towards strengthening the international response to the problem of internal displacement due to reasons including armed conflict, generalised violence, human rights violations and disasters; and (iii) engage in coordinated international advocacy and action for improving protection and respect of the human rights of IDPs, while continuing and enhancing inclusive dialogue with governments, intergovernmental, regional and non-governmental organisations and other relevant actors.
2. The Special Rapporteur's next thematic report to the UN General Assembly is on the prevention and prohibition of arbitrary internal displacement. The United Nations' Guiding Principles on Internal Displacement (UN Guiding Principles) provide instructive guidance on the relevant international human rights law and international humanitarian law standards relevant to situations of internal displacement. For the purposes of these principles, internally displaced persons (IDPs) are '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.'¹
3. Relevant for the current report is Section II of the UN Guiding Principles, which is devoted to the prevention of arbitrary displacement.² This section is reproduced in full below:
 - **Principle 5:** All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in

¹ United Nations High Commissioner for Refugees (UNHCR), 'Guiding Principles on Internal Displacement' (22 July 1998) Introduction: Scope & Purpose [2] <<https://www.refworld.org/docid/3c3da07f7.html>> accessed 31 May 2021.

² *ibid*, Section II.

all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

- **Principle 6(1):** Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
- **Principle 6(2):** The prohibition of arbitrary displacement includes³ displacement:
 - a. When it is 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;
 - b. In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - c. In cases of large-scale development projects which are not justified by compelling and overriding public interests;
 - d. In cases of disasters, unless the safety and health of those affected requires their evacuation; and
 - e. When it is used as a collective punishment.
- **Principle 6(3):** Displacement shall not last longer than required by the circumstances.
- **Principle 7(1):** Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimise displacement and its adverse effects.⁴
- **Principle 7(2):**⁵ The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.
- **Principle 7(3):**⁶ If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:
 - a. A specific decision by a State authority empowered by law to order such measures;

³ Principle 6(2) gives an illustrative and non-exhaustive list of situations in which displacement would be arbitrary. See Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (The American Society of International Law 2008) 30 <https://www.brookings.edu/wp-content/uploads/2016/06/spring_guiding_principles.pdf> accessed 31 May 2021.

⁴ Principle 7 outlines standards applicable to all instances of displacement, and irrespective of the non-arbitrary character of the displacement. See Kälin (n 3) 37.

⁵ Principle 7(2) ought to be respected even in cases of arbitrary displacement. See Kälin (n 3) 38.

⁶ Absence of measures in line with Principle 7(3) may be an indication that displacement serves the purposes of, e.g., ethnic cleansing or collective punishment. See Kälin (n 3) 38.

- b. Adequate measures to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
 - c. The free and informed consent of those to be displaced shall be sought;
 - d. The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
 - e. Law enforcement measures, where required, shall be carried out by competent legal authorities; and
 - f. The right to an effective remedy, including the review of such decisions by appropriate judicial authorities.⁷
- **Principle 8:** Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.
 - **Principle 9:** 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.
4. A good number of States have enacted laws and policies to give domestic effect to Section II of the UN Guiding Principles, particularly to Principle 6(2). The Special Rapporteur hopes to dedicate a substantive portion of her report to existing good practices as well as gaps in national laws and policies that reflect Section II of the UN Guiding Principles. She seeks OPBP's research assistance in this regard to answer the question: ***What is the status of the prohibition of internal arbitrary displacement in national laws and policies as reflected by the UN Guiding Principles on Internal Displacement?***
5. To this end, the Special Rapporteur posed three narrow questions:
- What legal mechanisms, rules or principles could be said to give domestic effect to the 'prohibition of internal arbitrary displacement' in different jurisdictions?
 - Among these examples, to what extent are criminal prohibitions and sanctions used (e.g., gravity, nature of actors where State or non-State, aggravating or mitigating and other circumstances and if any, penalty)?

⁷ This principle envisages *inter alia* the return of IDPs to the land previously occupied by them, or in the absence of such return, the provision of lands of quality and legal status at least equal to that of the lands previously occupied by them, or the provision of compensation in money if they chose so. Additionally, relocated persons shall be compensated for any resulting loss or injury. See Kälin (n 3) 41.

- Can you provide examples of how the 'prohibition of internal arbitrary displacement' has been implemented in practice in these different jurisdictions?
6. In consultation with the Special Rapporteur, OPBP has decided to focus this report on the laws and policies of the following eight States: Colombia, El Salvador, Niger, Nepal, The Philippines, Turkey, Uganda, and Ukraine. The section below briefly sets out the findings of our research.

(b) Findings

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE 'PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT' IN DIFFERENT JURISDICTIONS?

1. In Colombia, Law 387 of 1997 (adopted before the UN Guiding Principles were published) affirms everyone's right not to be forcibly displaced by conflicts or violence. It further provides that displaced family members have right to reunification; that the displaced have the right to consent to definitive solutions to their situation; that the displaced have the right to return to their place of origin; and that those who got displaced from agricultural properties have the right to special protection. Further, the National Plan for Comprehensive Assistance further guarantees the right to effective remedies, and the right of indigenous populations to special protections. Importantly, the Colombian Constitutional Court, through its Decision T-025 of 2004, played a crucial role in adopting a human rights-based approach towards displacement, and gave domestic effect to the UN Guiding Principles. Further, in the context of reparations and land restitution for IDPs, Law 975 of 2005 and Law 1448 of 2011 play a significant role. It bears noting that the Colombian Peace Agreement is one of the few peace settlements to have incorporated protections for IDPs. However, although Colombia witnesses displacement due to natural disasters and large scale development projects, none of its legislations and policies specifically address such displacement. Decree 4147 of 2011, which calls for disaster risk reduction, does not address the possibility of 'build back better' policies causing arbitrary displacement. Finally, Articles 58 and 59 of the Colombian Constitution provide that the government may carry out expropriation in public interest, subject to prior compensation.

2. El Salvador adopted a new law on internal displacement in line with the UN Guiding Principles in 2020. It recognises the right of IDPs to dignity and security, the right to family reunification, the right to good living conditions, and the right to effective remedies. It calls for the prevention of displacement, and the mitigation of its adverse effects. However, the 2020 law addresses only displacement caused by gang violence, and specifically excludes victims of internal armed conflict and natural disasters from the scope of its application. In the context of the civil war in El Salvador, the Chapultepec Peace Agreement barely addresses the rights of IDPs – however, it specifically recognises that displaced peasant families are entitled to special protections. While national institutions were created with the mandate to secure the rights of IDPs (particularly their right to reparations), more comprehensive human rights-based protections for those displaced by the civil war came through decisions of the Inter-American Court of Human Rights in cases like the *El Mozote Massacre* case. While El Salvador’s law does not define when disaster-induced displacement becomes arbitrary, the Law of Civil Protection and Disaster Prevention and Mitigation 2005 provides that human dignity shall be the guiding principle for disaster prevention and mitigation in El Salvador. Finally, Article 106 of the Salvadoran Constitution allows for the expropriation of land by the government for reasons of public or social interest, subject to just compensation.

3. Nepal adopted the National Policies on Internally Displaced Persons in 2007, with the same definition of IDPs as the UN Guiding Principles. This policy states that, except for development projects which are to be operated for public and national interests, the state shall not cause displacement, and that reasonable compensation will be provided to the displaced. It further emphasises on rehabilitating IDPs on a voluntary basis, the right of IDPs to unification, the special priority to be given to women in determining relocation, and the special protection against displacement to be given to dwindling and marginal groups such as indigenous inhabitants and minorities. Article 37(2) of the Constitution of Nepal, and the Civil Rights Act 2012 additionally guarantee that no citizen shall be evicted from the housing owned by them, except by law. The Constitution further recognises the right of peasants to land for agricultural purposes. The Civil Rights Act guarantees the right to effective remedies. The 2006 Comprehensive Peace Accord between the Nepal government and Maoist groups also guaranteed to IDPs the right of return, the right to family reunification, and the right to security. Finally, Article 25(2) of Nepal’s Constitution provides that the State shall not, except in public interest, acquire, requisition, or create any encumbrance on the property of any person.

4. In Niger, Law No. 2018-74 gives domestic effect to the prohibition on arbitrary displacement, and implements the 2009 Kampala Convention on IDPs. The law states that every citizen has the right to be protected against arbitrary displacement from their home or place of habitual residence. It adopts the same definition of IDPs as the UN Guiding Principles, and calls on the state to prevent displacement by armed conflict or widespread violence, natural or man-made disasters, and development projects. Crucially, the law fails to mention ethnic cleansing, apartheid or collective punishment. It recognises the rights of IDPs to life, security, liberty and health, the right to be consulted in the designing and implementation of durable solutions, the right to family reunification, and the right to property or compensation. It urges the state to prevent displacement and mitigate its effects. Additionally, Article 28 of the Nigerien Constitution provides that no one may be deprived of their property except in the public interest, subject to fair and prior compensation. Further, Ordinance 2010-029 on Pastoralism specifically provides that any form of exclusive appropriation of pastoral space belonging to the public domain of the State or local authorities is prohibited, and that pastoralists have a priority right of pastoral use on their home territory, which they cannot be deprived of, except in the public interest after fair and prior compensation.

5. Although the Philippines tried to adopt a comprehensive law giving domestic effect to the prohibition on arbitrary displacement in 2013, this bill was vetoed by the then President. Therefore, currently, a bundle of legislations protect the rights of IDPs in the Philippines. The Disaster Risk Reduction and Management Act 2010 is the country's primary humanitarian legislation, which regulates State responses to displacements caused by both disasters and armed conflict. It calls for disaster risk reduction, and the provision of humanitarian assistance to IDPs. The Local Government Code 1991 requires local governing bodies to protect the inhabitants of the municipality from the harmful effects of human-made or natural disasters and calamities, and provide relief assistance to victims during and in the aftermath of the said disasters or calamities. The Special Protection of Children in Situations of Armed Conflict Act 2019 protects the rights of internally displaced children and their families to be resettled, to have their life, safety, liberty and health protected, and to move freely in and out of evacuation centres. The Special Protection of Children Against Abuse, Exploitation and Discrimination Act 1992 provides for the right to family unification of children displaced by armed conflict or disasters. The Magna Carta of Women 2009 recognises the right of women to protection and security during disasters, calamities and other crisis situations, and further requires the state to take the specific needs of women into account in all phases of relief, recovery,

rehabilitation and construction efforts. Finally, the Indigenous People's Rights Act 1997 recognises the right of indigenous cultural communities and indigenous peoples to stay in their territories and not be removed. Any relocation can only take place with free and prior informed consent, with guaranteed rights to return (alternatively, land restitution) and compensation.

6. Turkey's protections in respect of IDPs are also scattered in several legislations and policies. The 2005 Integrated Strategy on IDPs adopts the same definition of IDPs as the UN Guiding Principles. It guarantees to IDPs the right of return on a voluntary basis, and the right to an effective remedy. The Van Provincial Action Plan for Responding to IDP Needs similarly reflects the UN Guiding Principles by recognising IDPs' right to freedom of movement, right to safety and security, right to participate in decision-making process related to rehabilitation, and the right of women to participate in such decision-making. The Return to Village and Rehabilitation Project 1994 aims to secure the right of return to those displaced by armed conflict and violence. Law No. 5233 on Compensation of Damages That Occurred Due to Terror and the Fight against Terror gives domestic effect to the right to effective remedy, and guarantees compensation for material damages suffered due to terrorism and counter-terrorism activities in 1987-2004. In the context of disasters, Law No. 6306 of 2012 on Restructuring of Areas under Risk of Natural Disasters allows the state to evacuate and rebuild 'high risk' buildings in the interest of the safety of the occupants. However, contrary to the UN Guiding Principles, it does not insist on receiving the consent of all occupants before evacuation and demolition. Law No. 2090 of 1977 on the Aid to Farmers Affected By Natural Disasters guarantees assistance to farmers who have suffered from natural disasters. In the context of development projects, in line with Article 46 of the Turkish Constitution, Expropriation Law No. 2942 allows for expropriation in public interest, subject to payment of compensation. The law also guarantees the right to an effective remedy. Further, Resettlement Law No. 5543 regulates government assistance with resettlement for families whose properties have been expropriated whether fully or partially. The Resettlement Law further recognises that farmers require special assistance in the form of land, agricultural inputs, agricultural structures, etc. Finally, since Turkey is a member of the Council of Europe, the IDPs' right to effective remedy is additionally realised through decisions of the European Court of Human Rights.
7. While Uganda does not have a legislation specifically directed towards internal displacement, it established a National Policy for Internally Displaced Persons in 2004, which adopts the

same definition of IDPs as the UN Guiding Principles. Chapter 3 of the policy recognises that every person in Uganda is protected against being arbitrarily and/or compulsorily displaced from his/her home or place of habitual residence. Importantly, it prohibits arbitrary displacement resulting from all grounds listed in Principles 6(2) and 6(3) of the UN Guiding Principles. Further, the policy also provides for the full participation of IDPs (particularly women) in planning and managing durable solutions, and emphasises on not separating displaced families. Further, the Land Acquisition Act facilitates the compulsory acquisition of land for public purposes, in line with Article 26 of the Ugandan Constitution. The Act guarantees the award of compensation for acquisition. More generally, in relation to potential violations of the rights to life, dignity and liberty as guaranteed under the Ugandan Constitution, the Human Rights (Enforcement) Act 2019, together with Article 50(4) of the Ugandan Constitution, secure the right to effective remedy by providing access to courts. The 2013 National Land Policy requires the government, in its use and management of natural resources, to recognise and protect the right to ancestral lands of ethnic minority groups, and pay prompt, adequate and fair compensation to such groups if they are displaced from their ancestral land by government action. In the same vein, the Land Act 1998 provides for the recognition of customary ownership of lands by indigenous communities. Finally, the 2013 National Land Policy also requires the government to protect the land rights of IDPs through restitution of land, housing and property or adequate compensation or resettlement.

8. Article 30 of the Constitution of Ukraine affirms that everyone is guaranteed the inviolability of his or her dwelling place. The Law on Ensuring the Rights and Freedoms of Internally Displaced Persons 2014 requires the state to prevent internal displacement, and acknowledges that IDPs have a right to protection from forced internal displacement. It further guarantees to IDPs the right to safety of life and health; right to reliable information about potential threats to life or health; the right to proper living conditions at the temporary accommodation; the right to reunification of families; and consultations with public organisations that assist IDPs. However, the law makes legal residency a requirement for IDP status. The 2014 Law on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine (Crimea) and the 2018 Law on Particular Aspects of Public Policy Aimed at Safeguarding State Sovereignty of Ukraine Over the Temporarily Occupied Territory of Donetsk and Luhansk Regions, recognise the property rights of those who relocate from these occupied territories to the government-held territories of Ukraine, without IDP registration. Further, Articles 30 and 56 of the Constitution of Ukraine provide for the

restitution of damaged, destroyed, or lost properties during the conflict. Article 86 of the Code of Civil Protection further guarantees the provision of accommodation or paying monetary compensation for houses destroyed or damaged as a result of an emergency.

9. All eight countries surveyed in this report have ratified the International Covenant on Civil and Political Rights (ICCPR) and given it domestic effect (whether through their constitutions, legislations or court decisions). Thus, in all these countries, the prohibition on arbitrary displacement, as it stems from the freedom to choose one's residence (including the right to remain there) under Article 12(1) of the ICCPR,⁸ has been given domestic effect.
10. In sum, all surveyed jurisdictions have laws or policies on internal displacement. While Colombia, El Salvador and Niger have adopted special comprehensive legislations on internal displacement, Nepal and Uganda have adopted special comprehensive national policies on internal displacement. The Philippines, Turkey and Ukraine, on the other hand, have a basket of legislations and policies addressing various aspects of internal displacement. It is also seen that each State has given domestic effect to the prohibition on arbitrary displacement differently. The Colombian and Salvadoran legislations on internal displacement prohibit only displacement caused by conflicts or violence. While all eight countries address displacement caused by armed conflicts, disasters, development projects and generalised violence in some form or the other, none of the surveyed jurisdictions, apart from Uganda, has expressly prohibited arbitrary displacement caused by policies of apartheid/ ethnic cleansing, or collective punishment. Similarly, only Uganda's 2004 National Policy on IDPs and the Philippines' proposed 2013 IDP Bill define prolonged displacement as being arbitrary.

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

11. In answering this question, this report considers not only whether the domestic criminal law of each country considered herein defines 'arbitrary displacement' as a crime, but also whether domestic law implements provisions of the Rome Statute of the International Criminal Court (ICC) – specifically Articles 7(1)(d) and 7(2)(d) on the crime against humanity of 'deportation

⁸ Kälin (n 3) 28.

or forcible transfer of population’, as well as Articles 8(2)(a)(vii), 8(2)(b)(viii) and 8(2)(e)(viii) on the war crimes of forced displacement.

12. Article 180 of the Colombian Criminal Code 2000 criminalises arbitrary displacement, or displacement by means of violence or other coercive acts directed against a sector of the population. Perpetrators are liable to imprisonment for 6-12 years, a fine, and disqualification from public office for 6-12 years. Further, Article 159 of the Colombian Criminal Code also criminalises the deportation, expulsion, transfer or displacement by force of civilians in violation of international humanitarian law, punishable by a term of imprisonment of 10-20 years, a fine, and disqualification from public office for 10-20 years. Article 415 of the Colombian Penal Code states that the penalties will be increased by up to a third when the conduct amounting to forced displacement is carried out in a judicial or administrative capacity. However, the statute of limitations for punishing the crime of forced displacement is 30 years. Moreover, the Colombia does not exclude the defence of due obedience as grounds for exoneration of criminal responsibility or as justification for the crime of illegal forced internal displacement.
13. Article 152(B) of El Salvador’s Criminal Code 1998 was amended in 2016 to introduce the crime of ‘illegal restriction of freedom of movement’. Any person who, by violence, intimidation or threat to person or property, prevents another from freely moving, entering, remaining or leaving any place in El Salvador may be punished with imprisonment of 4-8 years. When carried out by two or more persons, such conduct is punishable with imprisonment of 6-10 years. When violence, intimidation or threat to persons or property is carried out to force another to leave their place of residence, the penalty is 8-12 years of imprisonment. Further, Article 362 of the Criminal Code of El Salvador provides that whoever, during an international or civil war, violates international laws or customs of war or in any way causes deportation for forced labour of the civilian population in occupied territory, will be punished with imprisonment from 5-20 years. Article 363 further states that whoever commits any crime against humanity, before, during or after actions of war, will be punished with imprisonment from 5-20 years.
14. Nepal has not enacted specific criminal sanctions against arbitrary displacement. Further, since Nepal is not a party to the Rome Statute of the ICC, it has not been given domestic effect. However, Section 40(e) of the Right to Food and Food Sovereignty Act of 2018 provides that any person who renders one homeless in such a manner as to deprive him or

her the basis of livelihood shall be punished with imprisonment for a term not exceeding 5 years and fine not exceeding 5,000 rupees.

15. In Niger, under Article 30 of Law No. 2018-74, restricting the right to free movement of IDPs within and outside their areas of residence is punishable with 15-30 years of imprisonment and a fine between CFAF 2 and 5 million. Further, under Article 31, displacing persons on the basis of policies of racial discrimination or other similar practices aimed at or resulting in the alteration of the ethnic, religious or racial composition of the population, displacing civilians individually or in masse in situations of armed conflict, unless required for the safety of civilians or for imperative military reasons in accordance with international humanitarian law, or causing forced evacuations in the event of disasters of natural or humanitarian origin, or for other causes, if the evacuations are not required for the safety and health of the affected persons, is punished by 15-30 years of imprisonment and a fine between CFAF 3 and 7 million. Additionally, according to Article 208.2 of the Nigerien Penal Code, deportation inspired by political, philosophical, racial or religious motives and organised in execution of a concerted plan against a group of civilians is a crime against humanity, punishable by the death penalty. Furthermore, as per Article 208.3 of the Nigerien Criminal Code, ‘the unlawful deportation, transfer or displacement, the unlawful detention of a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected in the same respect by Protocols 1 and 2 additional to the Geneva Conventions of 12 August 1949’ constitute war crimes, punishable by imprisonment of 15 to 20 years, or by life imprisonment if it results in the death of one or more persons.
16. In the Philippines, Section 6(d) of the Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity 2009 defines the ‘arbitrary deportation or forcible transfer of population’ as a crime against humanity. Sections 4(a)(6) of the Act reflects the inclusion of ‘arbitrary deportation or forcible transfer of population or unlawful confinement’ as a war crime. Section 4(c)(17) provides further that ‘transferring, 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 parts of the population of the occupied territory within or outside this territory’ is a war crime. Section 4(c)(16) enumerates ‘the ordering of displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’ amount to a war crime. Persons found guilty of committing any of the crimes above shall suffer the penalty of

‘reclusion temporal in its medium to maximum period and a fine ranging from one hundred thousand pesos (Php 100,000.0) to five hundred thousand pesos (Php 500,000.0). Other legislations like the Special Protection of Children in Situations of Armed Conflict Act 2019, Special Protection of Children Against Abuse, Exploitation and Discrimination Act 1992, Magna Carta of Women 2009 and Indigenous People’s Rights Act 1997 also include penalties in respect of public officers who violate the provisions of these laws.

17. While the Turkish Criminal Code does not criminalise arbitrary displacement, Article 109(1) provides that ‘any person who unlawfully restricts the freedom of a person by preventing him from traveling or living in a place is sentenced to imprisonment from one year to five years’. Where this offence is committed by misusing the influence derived from public office, or against a child or a person who cannot defend himself physically or mentally, the penalty to be imposed shall be doubled. Where this offence results in the significant economic loss to the victim, an additional penalty of a judicial fine up to one thousand days shall be imposed. Further, Article 77 of the Criminal Code provides that the systematic performance of any act, including the deprivation of liberty, against a part of society and in accordance with a plan with a political, philosophical, racial or religious motive, shall constitute a crime against humanity punishable with imprisonment for a term of not less than 8 years. There is no limitation period in respect of crimes against humanity.
18. While Uganda’s Penal Code Act does not criminalise arbitrary displacement specifically, it includes the incidental offences of forcible entry (entering land in a violent manner) and forcible detainer (holding possession of land in a manner likely to cause a breach of the peace), which are potentially relevant where displacement occurs in the context of a conflict. Further, Section 8 of Uganda’s International Criminal Court Act 2010, any crime against humanity specified in Article 7 of the Rome Statute is punishable with imprisonment for life or a lesser term. Similarly, Section 9 of the Act makes it an offence to commit a war crime, defined as acts specified under Article 8(2)(a), (b), (c) and (e) of the Rome Statute. The penalty for a war crime is imprisonment for life or a lesser term.
19. Arbitrary displacement is not penalised in the Criminal Code of Ukraine. However, Article 438 of the Criminal Code, which penalises non-compliance with international humanitarian law, does so to an extent, by stating that the ‘deportation of civilian population for forced labour...shall be punishable by imprisonment for a term of eight to twelve years’. Also

relevant in this context is Article 258(2) of the Criminal Code of Ukraine, which stipulates that if terrorist actions cause significant property damage or other grave consequences, the perpetrators of such acts may be punished by imprisonment for a term of 7-12 years.

20. In sum, some of the surveyed jurisdictions have criminal laws and sanctions against arbitrary displacement, but the conditions/ situations in which they apply differ. While Colombia and El Salvador criminalise only arbitrary displacement caused by violence, Niger's criminal prohibition addresses most causes of arbitrary displacement, including policies of apartheid/ ethnic cleansing. Further, some jurisdictions only criminalise incidental or related offences – for instance, Turkey criminalises all unlawful restrictions on the freedom of movement, Uganda criminalises the incidental acts of forcible entry and forcible detainer, and Ukraine criminalises the incidental property damage and other grave consequences of 'terrorist actions'. Significantly, while most of the surveyed jurisdictions have criminalized both the war crime and crime against humanity of arbitrary displacement, El Salvador and Ukraine define only the deportation of civilians 'for forced labour' as a crime against humanity, Turkey's Criminal Code potentially covers only the crime against humanity of arbitrary displacement, and Nepal has no such criminal prohibition.

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE 'PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT' HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

21. Several of the jurisdictions surveyed suffer from gaps in the law. For example, the definition of IDPs in Colombia only includes those displaced by conflict and violence, and not those displaced by development projects or natural disasters. Philippines does not have a legal framework eliciting the rights of IDPs. Turkey's Law No. 5233 of 2004 does not meet the standards of the UN Guiding Principles in providing adequate information to IDPs, imposes an unreasonable burden of proof on IDPs, lacks an effective appeals procedure and recognises only material damages. In Uganda, there appear to be no domestic legislative measures that give effect to its obligation under the Kampala Convention, although its 2004 National Policy for IDPs closely resembles the UN Guiding Principles. Similarly, domestic law in Ukraine does not explicitly address the displacement of indigenous populations, or peasants either.

22. Across all eight jurisdictions – including those with legislative frameworks that give domestic effect to the UN Guiding Principles – implementation of legislations and policies is seen to be inadequate. Some of the common reasons for these inadequacies include insufficient funding, lack of planning, lack of political will etc.
- a. In Colombia, the Constitutional Court in its T-025 judgment in 2004 noted the following reasons for inadequate implementation of Law 387 of 1997– (i) lack of planning; (ii) problems in proper recording and classification of displaced persons; (iii) insufficient budget; (iv) lack of specificity in the policies designed to assist the displaced population; (v) lack of protection of indigenous and Afro-Colombian groups; (vi) little security provided to displaced persons as they return to and settle on their original lands; and (vii) absence of a focus on prevention of forced displacement in the state’s security operations
 - b. In El Salvador, the CONADES and CONARA failed primarily because the registration information gathered through these programmes was used by the military to ‘identify guerrilla supporters’, and not to recognise them as war-affected civilians in need of humanitarian assistance. Other programmes suffered on account of underfunding, lack of comprehensive planning, over bureaucratisation, government inefficiency, rampant criminality and other logistical issues.
 - c. In Nepal, there exists a culture of impunity due to which prosecution decisions are subject to executive interference. It is commonly seen that government officials either ignore or are unaware of laws or government policies that prohibit arbitrary displacement. This is furthered by the reserved attitude NHRC as it doesn’t utilise its power to investigate violations of human rights and initiate prosecutions. Nepal also lacks any comprehensive registration of IDPs in Nepal as well as any systematic monitoring of population movements.
 - d. In Niger, authorities tend to focus more on measures to assist the currently displaced persons than on measures to prevent displacement. There are also instances of lack of implementation of rehousing policies, inadequate provision of food and other relief material and a lack of access to water and hygiene in IDP camps.
 - e. In Philippines, durable solutions to the issues posited by human-made disasters and natural calamities remain missing. Thousands of families continue to live in displacement sites beyond the time period required by the exigent circumstances. There are instances of limited access to adequate food, water, shelter, and healthcare, compounded further by communicable diseases, and limited assistance to relocate to

an area of the choice or origin of IDPs. These challenges are furthered by lack of funds, bureaucratic deadlocks, political differences and corruption allegations.

- f. In Turkey, compensation schemes for IDPs have been seen to be inadequately implemented by provincial commissions who calculate compensation on an arbitrary basis, and lack transparency, impartiality and independence. Similarly, its Van Action Plan was underfunded and under-resourced and failed to address the underlying physical security challenges preventing returns. Further, there exists a culture of impunity in Turkey. Even where Turkish security forces had deliberately destroyed the homes and property of villagers, depriving them of their livelihoods and causing forced displacement, there have been no prosecutions. Moreover, the development of military measures after 2015 further undermines Turkey's policies towards IDPs.
 - g. In Uganda, lack of security, political will and government participation, inadequate funding, social services, land and amnesty laws are some of the key challenges to the implementation of its 2004 National Policy for IDPs. Similarly, while UHRC has played a key role in the protection of IDPs, inadequate funding and an inadequate number of field offices located near vulnerable populations hinder its functioning.
 - h. In Ukraine, compensation for property damage is contingent on IDPs voluntarily transferring their title of the destroyed or damaged property to local councils or local administrations. It has been observed that majority of the plaintiffs are reluctant to waive their property titles, being skeptical of ever obtaining compensation. There are also instances where the courts have ruled against plaintiffs seeking compensation because they did not waive their property titles. At the same time, a general failure of the government to take adequate steps to prosecute or punish most officials who committed abuses has resulted in a climate of impunity. There have been no prosecutions for the illegal seizure of property and any corresponding property damage.
23. Despite these limitations, there are some best practices that can be gleaned from several or all the surveyed jurisdictions.
- a. In Colombia, the early warning system, the National Registry of Victims, coordination between the different national authorities responsible for victims of violence and victims of natural disasters, and the authorities' differentiated approach and targeted assistance to vulnerable groups are mechanisms and practices that are particularly

helpful in the prevention of arbitrary displacement and the protection of rights of IDPs.

- b. In El Salvador, the rehabilitation and reconstruction projects, set up in response to Tropical Storm Ida, are noteworthy for their targeted interventions for the poor and for their disaster preparedness components. Similarly, pre-legislative consultation with IDPs and other stakeholders has been key to creating an effective legal mechanism.
- c. In Niger, the government has organised workshops for national actors, national and international NGOs, government partners and researchers to equip them with training on the means of prevention, protection and assistance to IDPs. The government of Niger has also set up a specific budget for vulnerable people, including IDPs and has established the National Committee for Data Collection and Information Management on IDPs.
- d. In Philippines, community participation, collation of disaster data by the Disaster Response Operations Monitoring and Information Centre (DROMIC), use of predictive analysis to identify areas with high displacement risk and pre-emptive evacuations have been an integral part of the State's efforts to prevent arbitrary displacement.
- e. In Turkey, one of the best practices is its government's involvement of international experts and civil society actors in amending its law to protect IDP. Turkey has also engaged in data collection on IDPs and has organised capacity-building and training exercises, and awareness programmes to help formal agencies implement the UN Guiding Principles.
- f. Uganda has been credited to have made substantial contributions to international bodies processing statistics for internally displaced persons. Uganda also conducted a hazard risk profile of the whole country and collected data to create a voluntary relocation programme for people in high-risk areas. The Ugandan Human Rights Commission's (UHRC) makes regular visits to IDP camps, makes annual reports and recommendations, monitors government's programmes and organises outreach programmes, training workshops and roundtable discussions on IDPs – giving IDPs 'a sense of hope'.
- g. In Ukraine, localised programming has helped the authorities to grant non-recurrent monetary assistance to those whose housing had been destroyed as a result of anti-terrorism operations.

COLOMBIA

1. Colombia has faced one of the world's most acute internal displacement crises associated with conflict and violence over five decades. Additionally, sudden-onset disasters and large-scale development projects have also displaced people.⁹ In the backdrop of these causes, this section addresses how Colombia gives domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE 'PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT' IN DIFFERENT JURISDICTIONS?

a) Law 387 of 1997

2. Colombia adopted its first law on internal displacement in 1997, prior to the finalisation of the UN Guiding Principles. Arguably, this law influenced the UN Guiding Principles, and not the other way around.
3. Colombia's Law 387 of 1997 defines a displaced person as 'any person who has been forced to migrate within the national territory, abandoning his place of residence or customary economic activities, because his life, physical integrity, personal freedom or safety have been violated or are directly threatened as a result of any of the following situations: internal armed conflict, civil tension and disturbances, general violence, massive human rights violations, infringement of international humanitarian law, or other circumstances arising from the foregoing situations that drastically disturb or could drastically disturb the public order.'¹⁰ Clearly, the law addresses only displacement caused by conflict and violence, and not displacement triggered by natural disasters or large scale development projects. This is despite the fact that the country is prone to natural hazards, particularly annual floods.¹¹
4. Law 387 affirms that 'the Colombian people have a right not to be forcibly displaced' and that it is 'the responsibility of the Colombian State to formulate policies and adopt measures for

⁹ Internal Displacement Monitoring Centre (IDMC), 'Colombia' <<https://www.internal-displacement.org/countries/colombia>> accessed 31 May 2021.

¹⁰ Law 387 of 1997 (Colombia) art 1.

¹¹ IDMC, 'Protracted Displacement: Uncertain Paths to Self-Reliance in Exile – Annex 8' (September 2015) <<https://www.internal-displacement.org/sites/default/files/inline-files/201509-global-protracted-displacement-odi-case%20studies.pdf>> accessed 31 May 2021.

the prevention of forced displacement' as well as to protect, assist, and find durable solutions for displaced persons.¹² It recognises *inter alia* that:

- a. the forcibly displaced have the right not to be discriminated against due to their displaced status, or for reasons of race, religion, public opinion, place of origin, or physical disability;
- b. the families of the forcibly displaced shall benefit from the basic right to family reunification (in line with Principle 7(2) of the UN Guiding Principles);
- c. the forcibly displaced have the right to consent to definitive solutions to their situation (in line with Principle 7(3)(c) of the UN Guiding Principles);
- d. the forcibly displaced have the right to return to their place of origin (in line with Principles 6(3) and 7(3)(b) of the UN Guiding Principles); and,
- e. the forcibly displaced have the right for their freedom of movement not to be subject to more restrictions than those provided by law (in line with Principle 7(3)(a) of the UN Guiding Principles).¹³

5. The law further requires States to neutralise and mitigate the effects of the processes and dynamics of violence that lead to displacement (in line with Principle 7(1) of the UN Guiding Principles); promote and protect human rights, and comply with international humanitarian law; and integrate public and private efforts for the prevention of displacement by violence.¹⁴ The government is expected to adopt a National Plan for Comprehensive Assistance to Populations Displaced by Violence, which pursues the following objectives *inter alia*:

- a. Provide legal and lawful assistance to displaced populations to guarantee investigation of the acts, restitution for violation rights, and defence of affected assets (in line with Principle 7(3)(f) of the UN Guiding Principles);
- b. Adopt measures necessary to make possible the voluntary return of displaced populations to their areas of origin, or their relocation to new settlement areas (in line with Principle 7(3)(b) of the UN Guiding Principles);
- c. Provide special assistance to women and children, particularly widows, women heads of household, and orphans (in line with Principle 7(3)(d) of the UN Guiding Principles); and

¹² Law 387 (n 10) arts 2(7) and 3.

¹³ *ibid* art 2.

¹⁴ *ibid* arts 4 and 10.

- d. Guarantee special assistance to black and indigenous communities subjected to displacements, in accordance with their ways and customs, and supporting return to their territories (in line with Principle 9 of the UN Guiding Principles).¹⁵
6. In order to achieve these ends, the government created the SNAIPDV (National System of Integrated Support for Persons Displaced by Violence) and the National Council for Integral Support for Persons Displaced by Violence (CNAIPDV, its acronym in Spanish).¹⁶ The Council was responsible for policy formulation, whereas the System was responsible for the execution of those policies.
7. Decree 2569 of 2000 created a Unified Registration System for Displaced People (SUR, its acronym in Spanish). Article 3 of the Decree provides that the state will no longer recognise an individual as displaced once he or she complies with one of the following conditions: return, resettlement, or relocation, accompanied by socio-economic stabilisation; exclusion from the Unified Registration System for Displaced People (SUR), in conformity with the conditions listed in Article 14, or by request of the interested party.¹⁷ Importantly, Article 11 of this Decree provides a right to appeal initial refusals of IDP status, which has been recognised as a good practice.¹⁸
8. In line with Principle 9 of the UN Guiding Principles, Article 19 of Law 387 of 1997 specifically requires the Colombian Institute for Agrarian Reform (INCORA) to maintain a registry of the rural properties abandoned by those displaced by violence, in order to prevent any alienation or transfer of the property titles of such assets against the will of the title holders.¹⁹

b) Judicial Incorporation of UN Guiding Principles

9. By virtue of the ‘constitutionality block’ principle, all provisions in human rights treaties to which Colombia is a party, as well as customary human rights law, have become mandatory

¹⁵ *ibid* art 10.

¹⁶ *ibid* arts 5 and 6.

¹⁷ Manuela Trindad Viana, ‘International Cooperation and Internal Displacement in Colombia: Facing the challenges of the largest humanitarian crisis in South America’ (International Journal on Human Rights 2009) <<https://sur.conectas.org/en/international-cooperation-internal-displacement-colombia/>> accessed 31 May 2021.

¹⁸ Walter Kälin et al, ‘Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges’ (The American Society of International Law and The Brookings Institution 2010) 160 <<https://www.refworld.org/pdfid/4b6c164e2.pdf>> accessed 31 May 2021.

¹⁹ Law 387 (n 10) art 19.

standards adopted in constitutional interpretation by the Colombian Constitutional Court.²⁰ Through this legal device, the Court incorporated the UN Guiding Principles into the national system for the protection of the rights of internally displaced persons.

10. In Decision SU-1150 of 2000, it held: ‘...given that [the Guiding Principles] fundamentally reflect and fill in the gaps of the provisions of international human rights treaties, which have received widespread acceptance by different international human rights bodies, this Court considers that they must be held as parameters for legal creation and interpretation in the field of the regulation of forced displacement and State assistance to IDPs. Needless to say this does not preclude the fact that all of the provisions [of the Guiding Principles] that reiterate norms already included in international human rights treaties and international humanitarian law treaties approved by Colombia have constitutional rank, as provided by article 93 of the Constitution.’²¹

11. Another decision along these lines was Decision T-327 of 2001, in which the Court was examining the situation of an IDP who has been denied inclusion in the official registration system. The Court arrived at the conclusion that situations of forced displacement are configured objectively or *de facto*, and not by means of a formal declaration by a State authority, by reference to the UN Guiding Principles.²² The Court held: ‘The interpretation that is the most favourable to the protection of human rights renders necessary the application of the Guiding Principles on Internal Displacement (...), which are a part of the supranational body of norms that is integrated into the constitutional law of this case. Consequently, all of the parties involved in dealing with the displaced (...) should alter their conduct to conform to, in addition to the constitutional norms, that which is set forth in the forementioned Principles.’²³

c) Decision T-025 of 2004

12. In 2004, the Constitutional Court of Colombia reviewed over a 100 documents (*tutelas*) submitted by IDPs claiming they were not receiving protections guaranteed by Law 387. Subsequently, the Constitutional Court passed decision T-025 holding that the fundamental

²⁰ Rodolfo Arango Rivadeneira, ‘Judicial Protection of Internally Displaced Persons: The Colombian Experience’ (The Brookings Institution – University of Bern 2009) <https://www.brookings.edu/wp-content/uploads/2016/06/11_judicial_protection_arango.pdf> accessed 31 May 2021.

²¹ Colombian Constitutional Court, Decision SU-1150 of 2000 (30 August 2000) <<https://www.corteconstitucional.gov.co/relatoria/2000/SU1150-00.htm>> accessed 31 May 2021.

²² Rodolfo (n 20).

²³ Colombian Constitutional Court, Decision T-327 of 2001 (26 March 2001) <https://www.refworld.org/cases,COL_CC,3f38af514.html> accessed 31 May 2021.

human rights of IDPs were being disregarded in such a massive, protracted and reiterated manner that an ‘unconstitutional state of affairs’ had arisen.²⁴ In interpreting various constitutional rights, the Court made specific reference to the different UN Guiding Principles that are threatened or violated during forced internal displacement. In the specific context of the prohibition on arbitrary internal displacement, the Court noted:

- a. The right to life in dignified conditions must be interpreted in light of Principle 8.
- b. The interpretation of the rights of children, women providers, persons with disabilities and elderly persons, and other specially protected groups, must be carried out in line with Principles 4 and 9.
- c. The right to choose their place of residence, must be interpreted in light of Principles 5, 6 and 7.
- d. The rights to freely develop their personalities, to freedom of expression and association, and the consequences of such migrations for the affected persons’ life must be interpreted in light of Principle 8.
- e. The right to personal integrity and health of displaced persons, must be interpreted in light of Principles 5 and 6.
- f. The right to personal security, must be interpreted in light of Principle 8.
- g. Freedom of movement across the national territory and the right to remain in the place chosen to live, should be interpreted in light of Principles 6 and 7.
- h. The right to peace should be interpreted in light of Principles 6 and 7.
- i. The right to equality should be understood in line with Principles 4, 6 and 9.²⁵

13. The Constitutional Court also recognised that the Colombian State should protect *inter alia* the following minimum rights of IDPs: (i) the right to life, in the sense of article 11 of the Colombian Constitution, and (ii) the rights to dignity and to physical, psychological and moral integrity under article 1 and 12 of the Colombian Constitution.²⁶

14. Following this declaration, the court issued follow-up orders (*autos*) requiring institutions to provide evidence of the steps they were taking to ensure the adequate allocation of resources and timely institutional restructuring, to guarantee adequate services were provided to IDPs as outlined by law. Between February 2004 and December 2009, the Court issued 84 orders

²⁴ Colombian Constitutional Court, Decision T-025 of 2004 (22 January 2004) <https://www.brookings.edu/wp-content/uploads/2016/07/colombia_t-025_2004.pdf> accessed 31 May 2021.

²⁵ Rodolfo (n 20) 183-6.

²⁶ *ibid* 188.

soliciting reports and concrete actions, conducting punctual follow-up as well as establishing indicators of evaluation in realising the rights of displaced persons. Decision T-025 also established a permanent monitoring group titled the Comisión de Seguimiento, to oversee progress in the realisation of the rights of the displaced.

15. As a consequence of Decision T-025, the National Plan for Assistance to the Population Displaced by Violence was adopted through Decree 250 of 2005. The plan includes many specific measures, such as strengthening local authorities, designing prevention plans, and promoting a culture of human rights.²⁷
16. Further, in Decision T-025 of 2004, the court recognised the UN Guiding Principles' value in interpreting the existing international law in the field of internal displacement, and held that they can be taken into account under Article 93 of the Colombian Constitution,²⁸ even though they did not have the nature of an international treaty ratified by Colombia.²⁹ In any event, Article 93 would allow the court to take into account any prohibitions on arbitrary internal displacement flowing from provisions of the International Covenant on Civil and Political Rights (ICCPR).

d) Reparations and Restitution

17. Law 975 (the Law of Justice and Peace) of 2005 is meant to facilitate the individual and collective reincorporation of members of armed groups into civil society, and to guarantee the rights of victims to truth, justice and reparations. Article 5 of Law 975 of 2005 defines victims as 'persons that individually or collectively have suffered direct harm, either temporary or permanent, that have caused some kind of physical, psychological or sensorial disability; emotional suffering; financial loss; or reduction of fundamental rights. While this provision does not explicitly refer to IDPs, since most displaced persons have experienced such harms, they were eligible for reparations under this law.
18. In response to criticisms of Law 975, Decree 1290 of 2008 was issued, creating the Program of Individual Reparations by Administrative Means for Victims of Armed Groups Organised

²⁷ The Brookings Institution, 'From Responsibility to Response: Assessing National Approaches to Internal Displacement' (2011) <<https://www.refworld.org/docid/4f38cbe32.html>> accessed 31 May 2021 (Brookings Report 2011).

²⁸ Constitution of Colombia 1991, art 93. It states that treaties and international covenants ratified by the legislature, which recognise human rights, take legal priority internally.

²⁹ Decision T-025 of 2004 (n 24) annex 3.

at the Margin of the Law. A Constitutional Court ruling declared ‘perpetrators are to be the primary persons responsible for providing reparations to victims’.³⁰ When perpetrators are unable to do so, the state should exercise this responsibility. The purpose of Decree 1290 was to create an administrative system for ensuring that reparations were carried out in accordance with Law 975 of 2005, with the decree specifically establishing an amount for compensation (27 times the minimum monthly salary) and created a National Victims Reparation Fund.³¹

19. Subsequently, Law 1448 of 2011, the Victims and Land Restitution Law (Ley de Víctimas y Restitución de Tierras), recognised the presence of an internal armed conflict in Colombia and attempted to provide reparations for all victims, including internally displaced persons. Victims had to register with Central Registry of Victims (Registro Único de Víctimas). The Unit for the Atención y Reparación Integral de Víctimas (UARIV) was made responsible for coordinating, advising and developing the public policy to assist and provide reparations to the victims. In line with Principle 7(3), emphasis was placed on the differentiated approach in which targeted assistance is provided to particular groups of victims, such as women, children and youth, the elderly, people with disabilities, peasants, ethnic communities and indigenous groups.³²

e) Differential Treatment of Indigenous Populations

20. Colombia adopted a number of public policies in order to provide for differential treatment of ethnic and indigenous populations, including Afro-Colombian communities, including:

- a. *Long-term Plan for Afro-Colombian Communities*: It seeks to secure the participation of Afro-Colombians in formulating policies concerning the improvement of their living conditions. It also provides for a system to identify, characterise and quantify the population in this group.
- b. *Plan for Comprehensive Assistance to Vulnerable Populations and Populations at Risk of Forced Disappearance*: It lays down the principles and objectives, the phases of intervention and action strategies, the stages of assistance, etc. that ought to guide the institutions making up the SNAIPD in discharging their commitments towards vulnerable populations displaced by violence.

³⁰ Colombian Constitutional Court, Sentence C-370 of 2006 (18 May 2006) <<https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9221>> accessed 31 May 2021.

³¹ Elizabeth Ferris, ‘Changing Times: The International Response to Internal Displacement in Colombia’ (The Brookings Institution 2014) <<https://www.brookings.edu/wp-content/uploads/2016/06/Changing-Timesthe-Intl-Response-to-Internal-Displacement-in-Colombia-December-2014.pdf>> accessed 31 May 2021.

³² Law 1448 of 2011 (Colombia) art 13.

- c. *Directive of Comprehensive Assistance to Indigenous Communities Displaced or at Risk of Forced Disappearance*: It recognises that the assistance provided to indigenous communities must include: ‘adequate support of their traditional methods of providing nourishing diets, the way they organise themselves in housing, the role of the traditional doctor in psychosocial care, their educational processes and their processes of participation in making decisions.’³³

f) 2016 Colombian Peace Agreement

21. The peace agreement between the Colombian government and the FARC-EP specifically addresses forced internal displacement, and expresses a wish to achieve restitution for victims, restoration of land rights, and the voluntary return of displaced persons.³⁴ Chapter 5 of the agreement specifically addresses victims’ rights, and lays down *inter alia* that:

- a. Government authorities will take into account the different experiences and interests of vulnerable populations.
- b. Special will be afforded to victimisation suffered by women.
- c. Victims have the right to be compensated for the injury and loss suffered because of the conflict.
- d. Government authorities will develop return and relocation plans, land restitution processes and collective reparation plans, while ensuring that security measures necessary to guarantee life and personal integrity are in place.
- e. Crimes against humanity, including forced displacement, are ineligible for an amnesty or pardon.
- f. The Special Jurisdiction for Peace shall prosecute and punish serious human rights violations and serious infringements of international humanitarian law, including forced displacement.

22. In line with Principle 9 of the UN Guiding Principles, the peace agreement further recognises that indigenous populations, Afro-Colombian communities and other ethnically distinct groups require special protections. It provides that the agreement must be interpreted in line with an ethnic-based approach characterised by: ‘free determination, autonomy and self-government, participation, consultation and prior free and informed consent; social, economic

³³ Rodolfo (n 20) 136-7.

³⁴ Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Colombia – FARC-EP) (adopted 24 November 2016) [1.1.7.] <<https://www.peaceagreements.org/viewmasterdocument/1845>> accessed 31 May 2021.

and cultural identity and integrity, rights over land, territories and resources, which involve the recognition of their ancestral territorial practices, the right to restitution and strengthening of territoriality, the current mechanisms for legal protection and security of the land and territories occupied or owned ancestrally and/or traditionally.³⁵

g) Natural Disasters and Large Scale Development

23. Colombia is one of the most disaster-prone countries in Latin America, exposed to cyclones, coastal and river flooding, earthquakes, landslides and volcanic activity.³⁶ Disaster-induced displacement is, therefore, common. Yet, none of the aforementioned legislations and policies apply to those displaced by natural or man-made disasters. ‘Natural disasters’ are mentioned just once in the 2016 peace agreement, in the context of evacuation responsibilities in designated demobilisation zones.³⁷

24. Decree 4147 of 2011 set up the Unidad Nacional de Gestión de Riesgo de Desastres (UNGRD) as the national institution responsible for disaster risk reduction and prevention. Law 1523 of 2012 adopted a new national policy on disaster risk reduction and established a National Disaster Risk Management System (SNGRD). The 2012 Law sets out Colombia’s post-disaster rehabilitation, recovery and reconstruction strategy.³⁸ This strategy embraces the ‘build back better’ principle, and advocates for long-term resilience.³⁹ However, the word ‘displacement’ does not feature at all in the text of Law 1523. The legal framework concerning displacement, and the legal framework concerning natural disasters are entirely discrete and unrelated.⁴⁰ In many cases, vulnerable communities displaced by conflict and violence were forced to find shelter in disaster-prone zones, suffering the double effect of conflict-induced displacement and disaster-induced displacement.⁴¹

25. In 2015, Colombia also articulated a 10-year disaster risk reduction plan, the Plan Nacional de Gestión del Riesgo de Desastres 2015–2025. The plan, however, does not refer to internal

³⁵ *ibid* [6.2.2].

³⁶ Ayesha Siddiqi, Katie Peters and Julia Zulver, ‘Doble afectación: Living with disasters and conflict in Colombia’ (September 2019) <<https://cdn.odi.org/media/documents/12881.pdf>> accessed 31 May 2021.

³⁷ *ibid*.

³⁸ Law 1523 of 2012 (Colombia).

³⁹ Organisation for Economic Co-operation and Development, ‘Risk Governance Scan of Colombia’ (9 July 2019) 89-95 <<https://www.oecd-ilibrary.org/sites/ceb81954-en/index.html?itemId=/content/publication/ceb81954-en>> accessed 31 May 2021.

⁴⁰ Siddiqi, Peters and Zulver (n 36).

⁴¹ Roger Few et al, ‘Moving with risk: Forced displacement and vulnerability to hazards in Colombia’ (2021) 144 *World Development* 1-12; Siddiqi, Peters and Zulver (n 36) 18.

displacement or address the specific case of those suffering the double effects of the conflict and natural disasters.

26. Similarly, neither Law 387 of 1997 nor Law 1448 of 2011 extend the definition of internal displacement to cover those displaced by development projects. Writ 005 of 2009, perhaps, is the only decision which acknowledges that some vulnerable populations may be subjected to displacement derived from ‘the existence of mining and agricultural processes in certain regions that impose severe strains on their ancestral lands and facilitated their taking.’⁴² While this writ opened the door for recognising development-induced displacement, it has had no impact on Colombia’s IDP policy so far.⁴³

27. Articles 58 and 59 of the Colombian Constitution deal with protection from expropriation. Article 58, in particular, provides that ‘expropriation may be carried out for reasons of public utility or social interest defined by the legislature, subject to a judicial decision and prior compensation. The compensation will be determined by taking into account the interests of the community and of the individual concerned.’ Article 59 further confirms that even in the event of war, ‘the State will always be responsible for expropriations effected by the government on its own or through its agents.’

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

28. Forced displacement was criminalised in Colombia through Law 599 of 2000. The new Criminal Code of Colombia, adopted by Law 599 of 2000, defines forced displacement as a crime under Article 180. It states: ‘Anyone who arbitrarily, or by means of violence or other coercive acts directed against a sector of the population, causes one or more members of that population to change their place of residence, shall be liable to a term of imprisonment of 6 to 12 years, a fine of 600 to 1500 times the current minimum statutory monthly wage, and disqualification from the exercise of rights and the holding of public office for 6 to 12 years. Forced displacement shall not be deemed to include the movement of a population by State security forces to protect the security of the population or for imperative military reasons, in

⁴² Colombian Constitutional Court, Writ 005 of 26 January 2009 [67].

⁴³ Beatriz Eugenia Sánchez and René Uruña, ‘Colombian Development-Induced Displacement – Considering the Impact of International Law on Domestic Policy’ (2017) 5(1) Groningen Journal of International Law 73-95.

accordance with international law.⁴⁴ The Inter-Agency Standing Committee's Framework on Durable Solutions for Internally Displaced Persons cites this provision of the Colombian Penal Code as best practice on the criminalisation and prosecution of arbitrary displacement.⁴⁵

29. For the purposes of the definition under Article 180, the identity of the perpetrator is irrelevant. Further, forced displacement is a crime whether or not it is committed in relation to Colombia's armed conflict.⁴⁶ This was confirmed by the Colombian Constitutional Court in a decision in 2013, where it ordered the government to register as internally displaced people who flee their homes due to violence and abuses by paramilitary successor groups, irrespective of whether their displacement is caused by the armed conflict.⁴⁷ The Constitutional Court also specifically recognised that: '[T]hrough direct and indirect threats—pamphlets, emails, warnings written on public walls, among other [means]—[female leaders of IDPs] have been subjected to confinement in their own places of residence, villages or communities.... On occasion, given the high probability that the women or their family members will be attacked, they are compelled to abandon their place of residence either temporarily or permanently, which constitutes a new event of forced displacement.'⁴⁸ For the court, such displacement is also criminalised under Article 180.

30. Further, Article 159 of the Colombian Penal Code also criminalises the deportation, expulsion, transfer or displacement by force of civilians in violation of international humanitarian law. It states: 'Anyone who, on the occasion and during the development of an armed conflict and without any military justification, deports, expels, transfers or forcibly displaces the civilian population from their settlement site, will be liable to a term of imprisonment of ten (10) to twenty (20) years, a fine of one thousand (1,000) to two thousand (2,000) times the current minimum statutory monthly wage, and disqualification from the exercise of rights and the holding of public office for ten (10) to twenty (20) years.'⁴⁹

31. Article 415 of the Colombian Penal Code provides the aggravating circumstances for the crime of forced displacement, and states that the penalties will be increased by up to a third when

⁴⁴ Law 599 of 2000 (Colombia) art 180.

⁴⁵ Inter-Agency Standing Committee, 'IASC Framework on Durable Solutions for Internally Displaced Persons' (April 2010) <<https://www.unhcr.org/50f94cd49.pdf>> accessed 31 May 2021.

⁴⁶ Human Rights Watch, 'The Risk of Returning Home' (2013) <<https://www.hrw.org/report/2013/09/17/risk-returning-home/violence-and-threats-against-displaced-people-reclaiming-land>> accessed 31 May 2021.

⁴⁷ Constitutional Court of Colombia, Order 119 of 2013, 7 and 65.

⁴⁸ Constitutional Court of Colombia, Order 098 of 2013, 17, 79, and 105.

⁴⁹ Law 599 (n 44) art 159.

the conduct amounting to forced displacement is carried out in a judicial or administrative capacity. Additionally, Article 9 of the Colombian Penal Code states that the statute of limitations for punishing the crime of forced displacement is thirty (30) years. Article 340 of the Penal Code further provides that if several people conspire to commit the crime of forced displacement, the penalty will be imprisonment for six (6) to twelve (12) years and a fine of two thousand (2,000) up to twenty thousand (20,000) times the current minimum statutory monthly wage. Article 441 of the Penal Code provides that anyone who, with the knowledge of the commission of the crime of forced displacement, and without prior agreement, helps evade the action of authorities or hinders the corresponding investigation will be punished with imprisonment for four (4) to twelve (12) years.

32. The Colombian Supreme Court of Justice treats the crime of internal displacement as a continuing or permanent crime.⁵⁰ It has, in some judgments, considered displacement by paramilitary groups to be a crime against humanity.⁵¹ In a case against a demobilised paramilitary commander, the Chamber of Justice and Peace of the Superior Tribunal of the Judicial District of Bogotá, taking into account the links between several crimes committed by the paramilitary group and the internal armed conflict, considered the crime of internal displacement to qualify as a war crime.⁵² In a few cases, the Supreme Court of Justice considered the crime of forced displacement to be part of the offense of criminal conspiracy with paramilitary groups (*concierto para delinquir*).⁵³

33. However, the Colombian Criminal Code does not exclude the defence of due obedience as grounds for exoneration of criminal responsibility or as justification for the crime of illegal forced internal displacement.⁵⁴

34. Although the act of forced displacement was criminalised in Colombia only in 2000, the Colombian Supreme Court of Justice held this crime could be applied retroactively even in relation to the instances of forced displacement committed before 2000. It held so on the

⁵⁰ Supreme Court of Justice (SCJ), Case No 31582, Decision of 22 May 2009.

⁵¹ Supreme Court of Justice (SCJ), Case No 32022, Decision of 21 September 2009; Supreme Court of Justice, Case No. 29472, Decision of 10 April 2008.

⁵² Superior Tribunal of the Judicial District of Bogotá (Chamber of Justice and Peace), Case No. 2006 80201, Case of Jorge Iván Laverde Zapata alias “El Iguano”, Judgment of December 2, 2010 [197].

⁵³ Supreme Court of Justice (SCJ), Case No 26585, Case against the former Senator Humberto de Jesús Builles Correa, Decision adopted by Act No. 260 of 17 August 2010.

⁵⁴ Law 599 (n 44) art 32(4).

ground that, in Colombia's case, international law was already incorporated into national law through Article 93 of the Colombian Constitution, before 2000.⁵⁵

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE 'PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT' HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

a) Gaps in the Law

35. The definition of IDPs in Colombian law is narrow, for it only includes those displaced by conflict and violence, and not those displaced by development projects or natural disasters.

36. Law 387 of 1997 was poorly implemented, with several displaced persons not being recognised as IDPs. Both the Ombudsman's Office in Colombia and the UNHCR have pointed out flaws in institutional design and execution.⁵⁶ This is precisely why the Colombian Constitutional Court stepped in with its T-025 judgment in 2004. The Court identified the following gaps in implementation: (i) lack of planning; (ii) problems in proper recording and classification of displaced persons; (iii) insufficient budget; (iv) lack of specificity in the policies designed to assist the displaced population; (v) lack of protection of indigenous and Afro-Colombian groups; (vi) little security provided to displaced persons as they return to and settle on their original lands; and (vii) absence of a focus on prevention of forced displacement in the state's security operations.⁵⁷

37. Additionally, Law 975 of 2005 is seen largely as a law for perpetrators as victims' rights took second place to the demobilisation of armed groups.⁵⁸

b) Early Warning System

38. The early warning system (Sistema de Alertas Tempranas [SAT]) put in place in 2002 by the Office of the Ombudsman monitored conditions that could lead to displacement, violence, or violations of human rights. If an imminent risk was found, the Office of the Ombudsman sent a report to the national-level Inter-Ministerial Committee for Early Warning (CIAT), which

⁵⁵ SCJ Case No 32022 (n 51).

⁵⁶ Viana (n 17).

⁵⁷ *ibid.*

⁵⁸ Ferris (n 31).

determined whether an early warning will be issued to prevent forced displacement. The CIAT, however, failed to respond effectively and quickly to warnings of attacks and displacement.⁵⁹

c) Reparations Programme

39. The National Registry of Victims is a tool administered by the Victims' Unit (VU) to implement Colombia's Law 1448 of 2011. The registry includes a list of all victims of internal displacement due to conflict and violence, their needs, the circumstances of their displacement (including whether they were displaced as a group). It enables victims' access to reparation and land restitution measures. By mid-2020, nearly 6,000 land restitution judgments had been issued under Law 1448, and according to the VU, 1,156,401 monetary compensations had been paid to victims, half of whom are internally displaced persons.⁶⁰ The reparations programme has also allowed for the direct participation of victims.⁶¹

40. This system's challenge is that, in order to access the comprehensive reparation, relocation, rehabilitation, and restitution measures under this law, IDPs must be in the registry. However, victims who have suffered the 'double effect' of displacement (first due to the conflict, and then due to a disaster) could not avail themselves of this assistance the second time.⁶² The UARIV (under Law 1448 of 2011) and the UNGRD (under Decree 4147 of 2011) functioned independently, and therefore, those displaced by disasters had to seek assistance only through the UNGRD. However, these two bodies worked together in the aftermath of the 2017 Mocoa landslide – they coordinated efforts and expedited reparations to displaced persons who were 'doubly affected'.⁶³

41. The UARIV emphasises on the differentiated approach and provides targeted assistance to particularly vulnerable groups like women, children, the elderly, people with disabilities, ethnic communities and indigenous groups.⁶⁴

⁵⁹ Human Rights Watch, 'Colombia: Displaced and Discarded' (13 October 2005) <<https://www.hrw.org/report/2005/10/13/colombia-displaced-and-discarded/plight-internally-displaced-persons-bogota-and#:~:text=Internal%20Displacement%20in%20International%20and%20Colombian%20Law,-The%20Guiding%20Principles&text=The%20displacement%20of%20the%20civilian,imperative%20military%20reasons%20so%20demand>> accessed 31 May 2021.

⁶⁰ Forced Migration Review, 'GP20: Lessons and Good Practice on Internal Displacement' (November 2020) <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/recognising-refugees/case-studies.pdf>> accessed 31 May 2021.

⁶¹ Global Protection Cluster, 'Regional Exchange on Preventing and Addressing Internal Displacement in the Americas' (June 2020) <<https://www.globalprotectioncluster.org/wp-content/uploads/AMERICAS-regional-exchange-internal-displacement-English.pdf>> accessed 31 May 2021.

⁶² Siddiqi, Peters and Zulver (n 36).

⁶³ *ibid.*

⁶⁴ Ferris (n 31) 21.

d) Criminal Law

42. Unlike the rules under international law, Colombian legislation:

- a. allows defendants to plead the defence of due obedience as a ground for exoneration of criminal responsibility for the crime of forced internal displacement;
- b. stipulates a 30-year statute of limitations in respect of the crime of forced displacement
- c. does not include rules regarding the criminal liability of hierarchical superiors in the military.⁶⁵

e) Indigenous Populations

43. According to the Ombudsman's Office and the Controller's Office, the actions and plans adopted by Colombia to secure special protections for vulnerable populations 'do not contain precise information about how they will be implemented and evaluated'.⁶⁶ Further, although the 2016 Peace Agreement contemplates various measures to protect ethnic communities, at the beginning of 2020, only 10% of such measures had been fully implemented, with none of the approved regional plans containing differential components.⁶⁷

⁶⁵ Federico Andreu-Guzmán, 'Criminal Justice and Forced Displacement in Colombia' (July 2012) <<https://www.brookings.edu/wp-content/uploads/2016/07/AndreuGuzman-Criminal-Justice-Colombia.pdf>> accessed 31 May 2021.

⁶⁶ Rodolfo (n 20) 137-8.

⁶⁷ Open Democracy, 'Four years later, Colombia's Peace Agreement advances at a snail's pace' (6 January 2021) <<https://www.opendemocracy.net/en/democraciaabierta/colombia-peace-agreement-advances-snail-pace/>> accessed 31 May 2021.

EL SALVADOR

44. El Salvador has seen forced internal displacement due to gang-related violence, internal armed conflict and natural disasters, with the former being the dominant cause in recent decades.⁶⁸ In the backdrop of these causes, this section addresses how El Salvador gives domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ IN DIFFERENT JURISDICTIONS?

a) Criminal Gang Violence

45. El Salvador is home to several criminal gangs that resort to various kinds of violence including homicides, armed attacks, threats, disappearances and sexual violence.⁶⁹ El Salvador’s Ministry of Justice and Public Security, in 2018, recognised that such violence predominantly displaced young people and women.⁷⁰

46. In 2014, the Salvadoran government constituted the National Council for Citizen Security and Coexistence (Consejo Nacional de Seguridad Ciudadana y Convivencia), which published the Safe El Salvador Plan (Plan El Salvador Seguro) in 2015.⁷¹ The Plan contained 124 action points on ‘violence prevention, criminal prosecution, rehabilitation and social reinsertion, victims’ protection and assistance, and institutional strengthening’.⁷² In the context of internal displacement, action point 111 provided for assistance for victims of displacement and action point 106 focused on implementing a permanent register for IDPs.⁷³ The Plan also led to the

⁶⁸ IDMC, ‘El Salvador’ <<https://www.internal-displacement.org/countries/el-salvador>> accessed 31 May 2021.

⁶⁹ Civil Society Roundtable against Forced Displacement caused by Violence in El Salvador MCDF, ‘What El Salvador Does Not Recognize: Civil Organizations’ Report on Cases of Forced Displacement due to Violence 2017-2018’ <<https://www.afsc.org/sites/default/files/documents/What%20El%20Salvador%20Does%20Not%20Recognize.pdf>> accessed 31 May 2021.

⁷⁰ Ministerio de justicia y seguridad pública, ‘Caracterización de la movilidad interna a causa de la violencia en El Salvador’ (2018) <<https://www.refworld.org/es/pdfid/5ab96d624.pdf>> accessed 31 May 2021.

⁷¹ Ministerio de Seguridad, ‘El Salvador Seguro Plan (PESS)’ <<https://www.seguridad.gob.sv/dia/download/plan-el-salvador-seguro-pess/>> accessed 14 May 2021.

⁷² IDMC, ‘An Atomised Crisis: Reframing displacement caused by crime and violence in El Salvador’ (2018) 10 <<https://www.internal-displacement.org/sites/default/files/inline-files/201809-el-salvador-an-atomised-crisis-en.pdf>> accessed 14 May 2021.

⁷³ *ibid.*

establishment of twenty Offices for the Attention to Victims across El Salvador.⁷⁴ The Plan was commended for its potential to target the root causes of displacement and focus on the needs of victims.⁷⁵ However, the prevention measures under the Plan were underfunded, and therefore, ineffective.

47. In 2018, the Constitutional Chamber of the Supreme Court of Justice recognised that ‘in El Salvador there is a phenomenon of forced displacement of people that originates in the context of violence and insecurity that severely affects vulnerable groups in different geographical areas of the country controlled by gangs and in the systematic effects on fundamental rights such as life, physical integrity, freedom and property, among others, caused by organised crime, mainly by referred criminal groups, which constitutes a state of unconstitutional issues.’⁷⁶ It ordered the government to: (i) formally recognise forced displacement in the country, and (ii) adopt an appropriate legislation and policies to assist and protect displaced persons.⁷⁷

48. In 2020, El Salvador adopted a new law on internal displacement in line with the UN Guiding Principles. The Special Law for the Aid and Integral Protection of Persons in a Condition of Internal Forced Displacement (2020 Law) was adopted to recognise, guarantee and protect the rights of internally displaced persons and those at risk of being displaced internally because of violence.⁷⁸ The law also requires the government to create and implement a system for registering, systematizing and monitoring cases of forced displacement because of violence.⁷⁹

49. The 2020 Law adopts the same definition of ‘internal displacement’ as the UN Guiding Principles.⁸⁰ However, although El Salvador witnesses internal displacement caused by factors other than gang violence, the 2020 Law only addresses arbitrary displacement caused by violence alone, and specifically excludes the victims of internal armed conflict and natural disasters from the scope of its application.⁸¹

⁷⁴ UNHCR, ‘Expanding Operations in Central America 2019’ (2019) 24 <<https://reliefweb.int/sites/reliefweb.int/files/resources/2019%20Expanding%20Operations%20in%20Central%20America%20%28February%202019%29.pdf>> accessed 14 May 2021.

⁷⁵ UN General Assembly, Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador (23 April 2018) UN Doc A/HRC/38/39/Add.1 [38] <<https://undocs.org/A/HRC/38/39/Add.1>> accessed 14 May 2021.

⁷⁶ El Salvador: Sentencia sobre desplazamiento forzado (Amparo 411-2017), 13 July 2018 <<https://www.refworld.org/es/docid/5b4f72e54.html>> accessed 31 May 2021.

⁷⁷ IDMC (n 72).

⁷⁸ Special Law for the Aid and Integral Protection of Persons in a Condition of Internal Forced Displacement 2020 (El Salvador) art 1.

⁷⁹ *ibid* art 17.

⁸⁰ *ibid* art 3.

⁸¹ *ibid* art 2.

50. The 2020 Law recognises *inter alia* the following rights of displaced persons:
- a. the right to return to their place of origin or relocate to another place, with the guarantees of security and dignity, as well as the restitution of the rights that have been violated as a result of the displacement (in line with Principle 8);
 - b. the right not to be discriminated against in the exercise of their rights due to their status as displaced persons;
 - c. the right to be treated by the authorities in a dignified, respectful manner and with the urgency that the case demands (in line with Principle 8);
 - d. the right to family reunification when the family has separated due to displacement (in line with Principle 7(2));
 - e. the right to special protection from the authorities, when the persons displaced are girls, boys and adolescents, or other vulnerable persons (in line with Principles 7(3)(d) and 9); and
 - f. the right to request and receive legal assistance in pursuing administrative or judicial actions to obtain justice and restitution for their transgressed rights (in line with Principle 7(3)(f)).⁸²

51. According to Article 6 of the 2020 Law, durable solutions should, in the least, provide for: long-term protection and security; restitution of lost properties; an environment in which they can live in decent economic and social conditions; and access to effective remedies and effective justice. This is broadly in line with Principle 7 of the UN Guiding Principles. In particular, in accordance with Principle 7(3)(c) of the UN Guiding Principles, the 2020 law recognises that displaced persons have the right to make informed and voluntary decisions regarding their return, relocation or integration.⁸³

52. In line with Principle 7(1) of the UN Guiding Principles, Article 7 of the 2020 Law declares that prevention and protection measures must be in place before, during and after internal forced displacement has occurred, in order to mitigate its adverse effects and prevent the violation of the rights of displaced persons. The local authorities and the entities in charge of prevention are expected to adopt measures to identify the causes that generate internal forced displacement, and create or adjust the policies, plans or programs that are necessary to prevent their occurrence. Accordingly, the National Directorate of Attention to Victims and Forced

⁸² *ibid* art 5.

⁸³ *ibid* art 6.

Migration (‘the National Directorate’), local authorities and entities in charge of prevention, are expected to establish an ‘early warning system’ in order to identify in a timely manner the places, causes and situations that generate forced displacement.⁸⁴

53. In line with Principle 7(2) of the UN Guiding Principles, Article 10 of the 2020 Law provides that the National Directorate must ensure that:

- a. displaced persons are provided emergency health services in a timely, free, quality and efficient manner, regardless of their domicile or place of habitual residence;
- b. as soon as conditions permit, education and training services are provided to internally displaced persons, in particular children, adolescents and women; and
- c. temporary shelters are installed in dignified and safe conditions to accommodate displaced persons.⁸⁵

54. In line with Principle 7(3)(f) of the UN Guiding Principles, Article 14 of the law, *inter alia*, provides that displaced persons have the right to the protection of the State against arbitrary deprivation, misappropriation, occupation or destruction of their properties and/or possessions, whether individual or collective; and, where appropriate, to the restitution of their violated rights regarding land, housing and property.⁸⁶

55. Moreover, in line with Principle 8 of the UN Guiding Principles, the 2020 Law provides that no public servant or authority shall promote the return, relocation or integration of internally displaced persons, if the local or competent authorities cannot guarantee the rights to life, security, personal liberty or the right to health of the displaced persons or a minimum level of decent and adequate living conditions.⁸⁷ Additionally, Article 2 of El Salvador’s Constitution also recognises every person’s right to life, physical and moral integrity, liberty, and security.⁸⁸

56. Article 144 of the Constitution of El Salvador provides that international treaties formalised by El Salvador constitute laws of the republic once they enter into effect. Accordingly, in its 2018 judgment on the phenomenon of internal displacement, the Supreme Court of Justice observed that Article 144, read with the principle of dignity enshrined in the Preamble of

⁸⁴ *ibid* art 7.

⁸⁵ *ibid* art 10.

⁸⁶ *ibid* art 14.

⁸⁷ *ibid* art 6.

⁸⁸ Constitution of El Salvador 1983 (with amendments through 2014), art 2.

Constitution, makes international human rights treaties binding on the State.⁸⁹ This allows the Court to take into account any prohibitions on arbitrary internal displacement that flow from the ICCPR. As the Court acknowledged: ‘In relation to IDPs, there is no specialised treaty that focuses exclusively on their protection – which does not exclude the application, even in an analogical way, of IHRL and IHL treaties. However, there are declarative rules that are fully applicable, for example, statements of principles and commitments made at international conferences that are useful in interpreting and complementing treaties, like the UN Guiding Principles on Internal Displacement...’⁹⁰

b) Civil War/ Internal Armed Conflict

57. El Salvador saw a fierce 12-year civil war between the government and the Frente Farabundo Martí para la Liberación Nacional (FMLN), which displaced the country’s peasant population. The government was primarily responsible for the violence and displacement. According to the UNHCR, between 1979 and 1982, half a million Salvadorans were internally displaced.⁹¹ In 1982, the government created the National Commission for the Displaced (CONADES) and the National Commission for the Restoration of Areas (CONARA) to coordinate relief activities, rehabilitate conflict-affected zones, and support durable solutions. The CONARA was later replaced by the Unidos para Reconstruir (UPR).⁹² Subsequently, in 1985, the government adopted a contingency plan called ‘Project 1000’ to relocate the 500,000 people displaced by the civil war; it was implemented by CONADES and CONARA.⁹³ However, all these programmes attempted to use the resettlement of IDPs as a means to create ‘strongholds against guerrilla incursions’ and therefore, failed.⁹⁴

58. In 1992, the UN brokered the Chapultepec Peace Agreement between the Salvadoran government and the FMLN. Although hailed as one of the most comprehensive peace treaties ever negotiated, displacement was hardly mentioned in the agreement. At the same time, the agreement’s provisions on land redistribution and the resolution of competing land claims

⁸⁹ Sentencia sobre desplazamiento forzado (n 76) 23.

⁹⁰ *ibid* 24.

⁹¹ Megan Bradley, ‘Unlocking Protracted Displacement: Central America’s “Success Story” Reconsidered’, Working Paper Series No 77 (2011) <<https://www.rsc.ox.ac.uk/files/files-1/wp77-unlocking-protracted-displacement-central-america-2011.pdf>> accessed 31 May 2021.

⁹² Peter Sollis, ‘Displaced Persons and Human Rights: The Crisis in El Salvador’ (1992) 11(1) *Bulletin of Latin American Research* 49-67.

⁹³ Dan Williams, ‘Resettlement Planned for Thousands: Salvador Builds Fortified Towns to Block Guerrillas’ (29 January 1985, *Los Angeles Times*) <<https://www.latimes.com/archives/la-xpm-1985-01-29-mn-13926-story.html>> accessed 31 May 2021.

⁹⁴ Bradley (n 91).

addressed a critical issue for displaced peasant families.⁹⁵ These land transfer and resettlement programmes are in line with Principle 9 of the UN Guiding Principles.

59. In 2012, the Inter-American Court of Human Rights (IACtHR) considered the forcible displacement that took place as a result of the El Mozote Massacre.⁹⁶ In its judgment, the Court reaffirmed ‘that the obligation of States to guarantee the protection of the rights of displaced persons involves not only the duty to adopt measures of prevention, but also to provide the necessary conditions for them to return in safety and in dignity to their usual place of residence or for their voluntary resettlement in another part of the country. To this end, their full participation in the planning and implementation of their return or reintegration must be guaranteed.’⁹⁷

60. The Court *inter alia* ordered the government of El Salvador to:

- a. guarantee adequate conditions so that the displaced victims can return to their communities of origin permanently, if they so wish.
- b. if these conditions do not exist, provide necessary and sufficient resources to enable the victims of enforced displacement to resettle in similar conditions to those they had before the events, in the place that they freely and willingly indicate.
- c. implement a housing program in the areas affected by the massacres of this case, under which adequate housing is provided to the displaced victims who require this.⁹⁸

61. In 2013, the government approved a Reparations Program via Presidential Decree known as the National Programme for Reparations to Victims (CODREVIDH).⁹⁹ It provided for a comprehensive set of individual and collective reparations measures including indemnification, rehabilitation, dignity, and guarantees of non-repetition. El Salvador also adopted reparations measures in compliance with the 2012 judgment of the IACtHR in the El Mozote Massacre

⁹⁵ Peace Agreement between the Government of El Salvador and the FMLN (El Salvador – FMLN) (adopted 16 January 1992, entered into force 1 February 1992) <https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf> accessed 31 May 2021.

⁹⁶ IACtHR, Case of the Massacres of El Mozote and Nearby Places v El Salvador, Judgment of 25 October 2012 (Merits, Reparations and Costs) <https://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf> accessed 31 May 2021.

⁹⁷ *ibid* [188].

⁹⁸ *ibid* [345].

⁹⁹ Leonor Arteaga and Amanda Eisenhour, ‘The Uncertain Future of Reparations in Post-Conflict El Salvador’ (23 July 2019, Justicia En Las Américas) <<https://dplfblog.com/2019/07/23/the-uncertain-future-of-reparations-in-post-conflict-el-salvador/>> accessed 31 May 2021.

case, by creating a Reparations Commission to identify victims of the massacre that should benefit from the indemnifications required by the IACtHR.

c) Natural Disasters

62. El Salvador is a disaster-prone region. In 2005, the country adopted a comprehensive legislation for disaster prevention and mitigation, called the Law of Civil Protection and Disaster Prevention and Mitigation ('2005 Law'). Article 3 of the 2005 Law provides that 'human dignity' is a guiding principle of disaster management in El Salvador. The principle reads 'the human person is the main purpose of prevention and mitigation in the event of disasters, as well as in everything related to their necessary protection.'¹⁰⁰ The law also created the National System for Civil Protection (NSCP).

63. In the aftermath of Tropical Storm Ida, in 2009, the government of El Salvador created the National Rehabilitation and Reconstruction Committee to: (a) define and oversee the country's disaster rehabilitation and reconstruction strategy, which includes a medium-and long-term vision of disaster mitigation and prevention; and (b) establish the priorities to be addressed in the strategic context of rehabilitation and reconstruction.¹⁰¹ The NSCP has the responsibility to mainstream the implementation of risk management components in the reconstruction process, ensuring that projects overseen by the RRC incorporate risk reduction and risk mitigation activities in their design and construction.¹⁰²

d) Land Expropriation

64. Article 106 of the Salvadoran Constitution 1983 allows for the expropriation of land by the government for reasons of public or social interest. This is only permitted when authorised by law and those whose property is expropriated must receive just compensation. Public or social interest is not defined in the Constitution. There are no recent cases of expropriation.¹⁰³

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS

¹⁰⁰ Law of Civil Protection and Disaster Prevention and Mitigation 2005 (El Salvador) art 3.

¹⁰¹ Executive Decree No. 89 (26 November 2009).

¹⁰² IBRD, 'Program Document for a Proposed Disaster Risk Management Development Policy Loan with a Catastrophe Deferred Drawdown Option in the Amount of USD 50 Million to the Republic of El Salvador' (2010) <<http://documents1.worldbank.org/curated/en/108871468235478910/text/564250PGD0P1221e0only1910BOX353822B.txt>> accessed 31 May 2021.

¹⁰³ Land Links, 'El Salvador' <<https://www.land-links.org/country-profile/el-salvador/#1528912389774-87ceb1c4-d644>> accessed 31 May 2021.

WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

65. Article 152(B) of El Salvador's Criminal Code 1998 was amended in 2016 to introduce the crime of 'illegal restriction of freedom of movement'. Accordingly, 'any person who, by violence, intimidation or threat to persons or property, prevents another from freely moving, entering, remaining or leaving any place in the territory of the republic, will be sanctioned with imprisonment of four to eight years...If the conduct described above is carried out by two or more persons, it will be sanctioned with imprisonment of six to ten years. When violence, intimidation or threat to persons or property is carried out to force another to leave their place of residence, work, studies, or stop carrying out any lawful activity, the penalty of eight to twelve years in prison will be imposed.'¹⁰⁴ Accordingly, the 2020 Law does not separately criminalise forced internal displacement due to violence, or provide for the prosecution of criminal gangs for internal displacement.
66. In the context of El Salvador's civil war, particularly the El Mozote Massacre, the IACtHR in its 2012 judgment declared El Salvador's 1993 Amnesty Law incompatible with the American Convention on Human Rights, and the 1992 Chapultepec Peace Agreement.¹⁰⁵ In 2016, the Salvadoran Supreme Court's Constitutional Chamber also declared the Amnesty Law unconstitutional,¹⁰⁶ paving the way for criminal prosecutions.
67. In relation to the El Mozote Massacre, the country's former 1973 Criminal Code applies (due to the prohibition on retroactivity in criminal law). The retired military officers on trial have been charged with ordinary crimes, including murder, aggravated rape, unlawful imprisonment, search without warrant, robbery, creating mayhem, aggravated assault, preparatory acts of terrorism, and acts of terrorism (none of which explicitly cover forced internal displacement). Two *amici curiae* briefs, however, recommended the charges of war crimes and crimes against humanity as well. However, while the 1973 Criminal Code contains a prohibition on war crimes and crimes against humanity, this prohibition is drafted in such a way that it shields military

¹⁰⁴ Reforms to the Criminal Code, Decree No 347 (3 May 2016).

¹⁰⁵ El Mozote Case (n 96).

¹⁰⁶ El Salvador: Sala de lo Constitucional de la Corte Suprema de Justicia (Inconstitucionalidad 44-2013/145-2013), 13 July 2016 <<https://www.jurisprudencia.gob.sv/VisorMLX/PDF/44-2013AC.PDF>> accessed 31 May 2021.

personnel from criminal prosecution before ordinary courts. Only civilians can be charged and prosecuted under this law for committing war crimes¹⁰⁷ or crimes against humanity.¹⁰⁸

68. Importantly, the 1998 Criminal Code of El Salvador contains general prohibitions on war crimes and crimes against humanity.¹⁰⁹ Article 362 states: ‘Whoever, during an international or civil war, violates international laws or customs of war or in any way causes mental or bodily harm, deportation for forced labor of the civilian population in occupied territory, mistreatment of prisoners of war, death of hostages, looting of private or public property, unnecessary destruction of cities or towns or devastation not justified by military necessity, will be punished with imprisonment from five to twenty years.’ Article 363 states: ‘...whoever commits any crime against humanity, before, during or after actions of war, will be punished with imprisonment from five to twenty years.’ In 2018, El Salvador adopted a policy on investigations and criminal prosecutions of war crimes and crimes against humanity, which establishes guidelines for the criminal prosecution of crimes against humanity committed during the armed conflict in El Salvador, to ensure effective and responsible investigations based on the principle of due diligence, which upholds the rights of victims to access to justice, to the truth about the acts that had occurred, and to reparation arising from criminal proceedings in the competent courts.¹¹⁰

69. Further, El Salvador’s 1964 Code of Military Justice, under Article 68 states: ‘A member of the Armed Forces who, during international or civil war, burns or destroys ships, aircraft, buildings or other property, or loots the inhabitants of villages or the countryside, or commits acts of violence on people, without military necessity required for international war operations, will

¹⁰⁷ Criminal Code of El Salvador 1973, art 488. ‘A civilian who is not subject to military jurisdiction, and who during an international or civil war violates international laws or customs of war, with acts such as psychological or corporal damage, deportation for forced labor of civilian population in occupied territories, ill-treatment of prisoners of war, death of hostages, plundering of private or public property, unnecessary destruction of cities or towns not justified by military necessity, will be sanctioned with imprisonment from five to twenty years.’

¹⁰⁸ Criminal Code of El Salvador 1973, art 489. ‘A civilian who is not subject to military jurisdiction, that violates the duties of humanity against prisoners or hostages of war, wounded during war actions in hospitals or places intended for the wounded, and whoever commits any inhuman act against the civilian population before, during or after war, will be punished with imprisonment from five to twenty years.’

¹⁰⁹ Criminal Code of El Salvador 1998, arts 362 and 363.

¹¹⁰ UNGA Sixth Committee (74th Session) ‘Report of the Republic of El Salvador pursuant to General Assembly resolution 73/208’ <https://www.un.org/en/ga/sixth/74/universal_jurisdiction/elsalvador_e.pdf> accessed 31 May 2021.

incur the penalty of imprisonment from fifteen to twenty years.¹¹¹ However, it is doubtful if civilian courts would be able to apply this law to prosecute military officers.¹¹²

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

a) CONADES and CONARA

70. CONADES’s modest resources were inadequate to provide durable solutions. But more importantly, the failure of CONADES and CONARA can be traced to the fact that, the registration information gathered through these programmes was used by the military to ‘identify guerrilla supporters’, and not to recognise them as war-affected civilians in need of humanitarian assistance. Moreover, IDP-initiated local integration efforts and livelihood strategies were also undermined through governmental interference.¹¹³

b) Peace Accord

71. The failure to address the protracted internal displacement induced by the civil war in the Chapultepec Agreement, on the assumption that it was unnecessary since the majority of displaced Salvadorans had already repatriated, undercut the ability of returned and resettled Salvadorans to use the peace agreement to leverage much-needed support for the ongoing (re)integration process.¹¹⁴ This is why the vast majority of peace agreements now include detailed provisions on the rights of IDPs.

c) Rehabilitation and Reconstruction

72. The rehabilitation and reconstruction projects adopted by El Salvador in response to Tropical Storm Ida included low-income housing and rural infrastructure components, directly targeting the poor population in the country, and also aimed to strengthen disaster preparedness in these areas by ensuring adequate use of materials for housing construction and rehabilitating urban drainage, among others.¹¹⁵

¹¹¹ Code of Military Justice of El Salvador 1964, art 68.

¹¹² Vidan Hadzi-Vidanovic, ‘A War Crimes Trial That Needs More Attention’ (15 November 2018, EJIL:Talk!) <<https://www.ejiltalk.org/a-war-crimes-trial-that-needs-more-attention/>> accessed 31 May 2021.

¹¹³ Sollis (n 92).

¹¹⁴ Bradley (n 91).

¹¹⁵ IBRD Program Document 2010 (n 102).

d) Safe El Salvador Plan

73. The Safe El Salvador Plan was inadequately implemented because of underfunding, absence of a ‘comprehensive state programme to refer people to [the Offices for the Attention to Victims]’, and limited reach.¹¹⁶ Further, rampant criminality in pockets all over El Salvador posed as a significant hurdle in the successful protection of victims and guarantee of security.¹¹⁷

e) Criminal Law

74. Article 152-B of El Salvador’s Criminal Code does not specifically acknowledge ‘internal displacement’. Further, it requires individual IDPs to file a report to attest to the commission of the crime. In the light of a pervasive fear of gang-related violence, absence of adequate protection afforded by the state machinery, and mistrust in the institutional set up, many individuals are concerned for their safety and thus hesitant to report crimes.¹¹⁸

f) Reparations

75. The CODREVIDH, while comprehensive on paper, was almost entirely focused on paltry monetary reparations, which left much to be desired. Additionally, the programme was overly bureaucratic and severely underfunded. Moreover, the government office responsible for maintaining the registry of victims was slow to add the names of victims and indicate their eligibility for reparations. Finally, the programme failed to address the needs of female victims, of forced displacement.¹¹⁹

76. The IACtHR’s 2018 supervisory ruling in the El Mozote Massacre Case indicates that the state has yet to implement the recommended collective reparations programs, especially the development of housing and economic infrastructure that would allow internally displaced victims to return to the region. Further, with respect to the obligation to investigate and punish those responsible for the displacement, even the few trials that have been opened face procedural hurdles and military obstruction.¹²⁰

¹¹⁶ IDMC (n 72) 18.

¹¹⁷ Sam Tabory, ‘Massacres “High Cost” of El Salvador Security Strategy: Vice President’ (Insight Crime, 7 March 2016) <<https://insightcrime.org/news/brief/massacres-high-cost-of-el-salvador-security-strategy-vice-president/>> accessed 14 May 2021.

¹¹⁸ 2018 Report of the Special Rapporteur (n 75) [33].

¹¹⁹ Arteaga and Eisenhour (n 99).

¹²⁰ *ibid.*

g) Data Collection

77. Keeping a registry of IDPs and quantifying cases of internal displacement is essential to be able to grasp the extent of the issue and craft effective and targeted responses. The Office of the Ombudsman of El Salvador (PDDH) is the only state institution that has been publishing a registry of cases of families affected by internal displacement every year since 2016.¹²¹ The 2020 Law now formalised the keeping of such a registry.
78. However, the process of data collection on internal displacement is ridden with logistical issues. The official data collected is dependent on IDPs coming forward and seeking assistance. However, as reported by the Salvadoran Ministry for Justice and Security, 70% people internally displaced do not report crimes or seek state assistance.¹²² This may be because of fear of some retaliation, lack of faith in institutional structures, or lack of awareness on documentation and registration of IDPs.¹²³ This eventually leads to gross underreporting of internal displacement cases in official accounts.

h) Pre-Legislative Consultation

79. The 2018 ruling of El Salvador's Supreme Court of Justice recognising internal displacement due to violence as a problem was a watershed moment in legal responses to internal displacement in El Salvador. The follow-up mechanisms established by the court along with an 'exchange of good practices with Colombia and Honduras; mobilising of political will through a large forum; lobbying and media events by public institutions, civil society and others' all contributed to the adoption of the recent 2020 Law.¹²⁴ In May 2019, the Legislation and Constitutional Points Commission of the Legislative Assembly convened a forum of all stakeholders to promote dialogue on development of the law and its contents.¹²⁵ The Commission formed a technical team made up of advisers from parliamentary groups and the UNHCR. The technical team subsequently conducted a comparative study of four draft bills and consolidated a single bill with 69 articles that was presented to the Commission after

¹²¹ IDMC, 'Painting the Full Picture: Persistent data gaps on internal displacement associated with violence in El Salvador, Guatemala and Honduras' (November 2019) 10-12 <https://www.internal-displacement.org/sites/default/files/publications/documents/ntca_persisting_data_gaps.pdf> accessed 14 May 2021.

¹²² *ibid.*

¹²³ *ibid.* 4.

¹²⁴ Forced Migration Review, 'Case-studies from Uganda, Colombia, Yemen and El Salvador' (November 2020) 65 FMR 13 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/recognising-refugees/GP20.pdf>> accessed 14 May 2021.

¹²⁵ UNHCR, "El Salvador: ACNUR saluda esfuerzos de Asamblea Legislativa para construir una ley especial sobre desplazamiento forzado interno" (22 May 2019) <<https://www.acnur.org/noticias/press/2019/5/5ce5d61c4/el-salvador-acnur-saluda-esfuerzos-de-asamblea-legislativa-para-construir.html>> accessed 14 May 2021.

having consulted stakeholders, including IDPs.¹²⁶ This process of pre-legislative consultation with IDPs is integral to creating an effective legal mechanism.

i) 2020 Law

80. While the 2020 Law makes significant advances in the prevention and prohibition of arbitrary internal displacement, its implementation remains contingent on the ‘state’s ability to ensure the confidentiality of victims’ data, to reduce the gangs’ territorial control, and to build public institutions’ technical and material capacity’.¹²⁷
81. The National Civil Police and the Armed Forces pose an additional hurdle to effectively protecting IDPs. The security forces have an abysmal human rights record, weak accountability mechanisms, and are ridden with corruption.¹²⁸ It has also been officially acknowledged that security agents sometimes cause forced displacement.¹²⁹ Relatedly, changes to the penal code in 2014 have resulted in relatively relaxed standards to dismiss cases of state abuse if, for instance, the commanding officer submits a report attesting that the use of lethal force was necessary.¹³⁰ In effect, this gives the police ‘carte blanche to do whatever they want’.¹³¹

¹²⁶ Global Protection Cluster, Comparative Experiences on Internal Displacement: A Regional Exchange Series: Regional Exchange on Preventing and Addressing Internal Displacement in the Americas (25 June 2020) 5 <<https://www.globalprotectioncluster.org/wp-content/uploads/AMERICAS-regional-exchange-internal-displacement-ENG.pdf>> accessed 14 May 2021.

¹²⁷ Sonja Wolf, ‘Confronting Internal Forced Displacement in El Salvador’ (NACLA, 4 February 2020) <<https://nacla.org/news/2020/02/04/confronting-internal-forced-displacement-el-salvador>> accessed 14 May 2021; ICRC ‘ICRC vice-president Gilles Carbonnier travels to El Salvador and Honduras to address the impact of violence’ (20 April 2021) <<https://www.icrc.org/en/document/icrc-vice-president-el-salvador-honduras>> accessed 14 May 2021.

¹²⁸ Cristosal, ‘Visibilizar lo Invisible: Informe Sobre Desplazamiento Interno Forzado Por Violencia en El Salvador 2017’ (2017) <<https://static1.squarespace.com/static/5784803ebe6594ad5e34ea63/t/5b4e132d758d4693e7d658b4/1531843380138/Vizibilizar+lo+invisible.pdf>> accessed 14 May 2021.

¹²⁹ Nelson Rauda and Jimmy Alvarado, ‘Ministro de Seguridad: “Hay policías y soldados que provocan casos de desplazamiento interno”’ (ELFARO, 26 April 2018) <https://elfaro.net/es/201804/el_salvador/21803/Ministro-de-Seguridad-%E2%80%9CHay-polic%C3%ADas-y-soldados-que-provocan-casos-de-desplazamiento-interno%E2%80%9D.htm> accessed 14 May 2021.

¹³⁰ IDMC (n 72) 18.

¹³¹ *ibid.*

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82. Nepal was ranked as one of the worst displacement situations in the world in 2004 due to the Maoist insurgency during the late 1990s to mid-2000s.¹³² It was estimated that the violence and conflict caused internal displacement of up to 200,000 Nepalese.¹³³ Moreover, in recent years, disaster has become a prominent contributor to internal displacement in Nepal.¹³⁴ The Nepal Earthquake of 2015 displaced more than 2.6 million people, and the cases of IDPs remain concerning to date.¹³⁵ According to the latest figures provided by the IDMC in 2019, there are more than 100,000 new cases of disaster-related displacements and a total of 30,000 IDPs in the country.¹³⁶ With this in mind, this part will investigate how Nepal has given domestic effect to the UN Guiding Principles in relation to conflict-related and disaster-related displacements.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’?

a) Nepal Treaty Act, 2047 (1990)

83. As a matter of principle, Section 9(1) of the Nepal Treaty Act 1990 stipulates that international treaties accepted or approved by the Federal Parliament of Nepal shall be enforceable as good as Nepalese laws. A ‘treaty’ in this particular legislation is defined as ‘an agreement concluded in writing between two or more states, or between any state and any inter-government organisation and this term also includes any document of this nature, irrespective of how it is designated’,¹³⁷ which is identical to the definition under the Vienna Convention on the Law of Treaties 1969.¹³⁸ If there are inconsistencies between existing Nepalese laws and approved treaties, the Nepal Treaty Act further rules that the international treaty will prevail.¹³⁹

¹³² Padma Prasad Khatiwada, ‘Internally Displaced Persons in Nepal: More Issues, Less Heard: Study Report’ (SAHR 2012) i-24.

¹³³ World Health Organization, ‘Country Emergency Situation Profile: Nepal’ (WHO Regional Office for SE Asia Region, 2006).

¹³⁴ IDMC, ‘Nepal’ <<https://www.internal-displacement.org/countries/nepal>> accessed 8 May 2021.

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Nepal Treaty Act (2047) 1990 (Nepal) s 2(a).

¹³⁸ Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 2(1)(a).

¹³⁹ Nepal Treaty Act 1990 (n 137) s 9(1).

84. As such, being a member of the UN and a party to several UN human rights treaties,¹⁴⁰ Nepal is obliged to observe its obligations under these treaties whenever there are serious violations of human rights within its territory, which effectively cause arbitrary internal displacements. These general human rights principles are deemed enforceable under the domestic legal framework by courts of Nepal. For example, in 1992, the Supreme Court of Nepal gave domestic effect to the Indo-Nepal agreement on the development of water resources.¹⁴¹
85. However, as Walter Kälin pointed out,¹⁴² the UN Guiding Principles are not a UN declaration nor an international treaty. As such, it cannot be deemed to be enforceable domestic law in the state of Nepal under the Nepal Treaty Act 1990. Nonetheless, they may be regarded as principles of customary international law binding on Nepal.

b) Human Rights Protection in Nepal

i) The Constitution of Nepal

86. Constitutional protection for IDPs in Nepal differs greatly in each version of the Constitution of Nepal. Being a legal construct formed after the 2006 Comprehensive Peace Accord (“CPA”) that ended the armed conflict between Maoists and the Nepal Government, the previous Interim Constitution 2007 explicitly stated that the State had an obligation to rehabilitate and socialise conflict-related IDPs through a specific programme under Article 33(r). In addition, the Interim Constitution 2007 also included the CPA in Schedule-4, which stipulated that both the Government and the Maoists shall ‘express the commitment to respect the right of the persons displaced by the conflict and their families to return to their homes or to settle in any other place of their choice’ and prohibit both parties from harming or intimidating any IDPs or seizing their equipment and property.¹⁴³
87. After the government considered that the problem of conflict-related IDPs had been resolved, the 2015 Constitution of Nepal (currently in force) removed these articles that referred

¹⁴⁰ Nepal is party to over 18 international human rights instruments, including but not limited to ICCPR, ICESCR, CEDAW, CRC and CAT.

¹⁴¹ Surya P Subedi, ‘When is a Treaty a Treaty in Law: An Analysis of the Views of The Supreme Court on Nepal on a Bilateral Agreement Between Nepal and India’ (1995) 5 Asian Year Book of International Law 201.

¹⁴² Kälin (n 3).

¹⁴³ The Interim Constitution of Nepal (2063) 2007 (Nepal) Schedule-4.

specifically to the rights of IDPs and prohibition against arbitrary displacements.¹⁴⁴ Rather, the latest 2015 Constitution provides a list of civil and political rights of citizens.¹⁴⁵ The key Article that enshrines the prohibition against arbitrary displacement today is Article 37(2), which stipulates that ‘no citizen shall be evicted from the housing owned by him/her, or encroached on the housing, except in accordance with law’. Facing the specific problem of disaster-induced displacement, Article 51(g)(9) of the 2015 Constitution further places an obligation on the State to formulate a policy of designing a system that can improve its disaster preparedness and rehabilitate nationals that have been impacted.

88. However, Article 37(2) is not as comprehensive as Principle 6 of the UN Guiding Principles in defining ‘arbitrary displacement’. While Principle 6(2) stipulates that displacing nationals in the case of disasters is considered as arbitrary unless the safety and health of those affected requires evacuation, the Nepal government’s responsibility under Article 51(g)(9) to combat disasters does not share or mention the same concern as in Principle 6(2), suggesting that the constitutional safeguards are not specific enough to prohibit the government of Nepal from engaging in arbitrary displacement. In addition, since Article 37(2) protects only the right of persons who owned the piece of housing, it does not extend to protecting people residing on public land, which further limits its scope of protection.
89. Article 25(2) of the 2015 Constitution provides that the State shall not, except in public interest, acquire, requisition, or create any encumbrance on the property of any person. Article 25(3) adds that the basis of compensation and the relevant procedure must be prescribed by law.
90. In line with Principle 7(3)(d) of the UN Guiding Principles, Article 51(j)(2) of the 2015 Constitution requires the State to adopt policies to make women who are vulnerable or victims of conflict self-reliant by making necessary arrangements of rehabilitation, protection and empowerment for them. Similarly, in line with the rights guaranteed under Principle 8 of the UN Guiding Principles, Article 16 of the 2015 Constitution provides that each person shall

¹⁴⁴ IDMC, ‘Nepal: Displacement associated with Conflict and Violence: Figure Analysis – GRID 2020’ 1 (IDMC 2020) <<https://www.internal-displacement.org/sites/default/files/2020-04/GRID%202020%E2%80%93%20Conflict%20Figure%20Analysis%E2%80%93%20NEPAL.pdf>> accessed 31 May 2021.

¹⁴⁵ Netra Bahadur Karki, ‘Impact of Displacement on Civil and Political Rights of the Internally Displaced Persons in Dolakha District of Nepal’ (2019) 2 Journal of APF Command and Staff College 32.

have the right to life with dignity, and Article 17 provides that no person shall be deprived of their personal liberty except as provided for by law.

91. Further, in line with Principle 9 of the UN Guiding Principles:

- a. Article 18(2) of the 2015 Constitution provides that nothing bars the making of special provisions by law for the protection, empowerment or advancement of women, minority groups, named indigenous populations, peasants, etc.
- b. Article 42(4) of the 2015 Constitution provides that peasants shall have the right to access to land as provided for in law for agricultural purposes.
- c. Article 42(5) of the 2015 Constitution provides that victims of conflict and the displaced, among others, have the right with priority, as provided for by law, to education, health, employment, housing and social security, with justice and appropriate respect.

92. In the context of the right to an effective remedy under Principle 7(3)(f) of the UN Guiding Principles, nationals of Nepal can enforce or safeguard their civil and constitutional rights by filing complaints to the Nepal National Human Rights Commission (NHRC). The NHRC, an independent and constitutional body recognised by Article 248 of the 2015 Constitution, is responsible for conducting investigations, monitoring agencies and hearing complaints relating to human rights violations.¹⁴⁶ Either the victim or support person of the victim may make a complaint to the NHRC. In a ruling dated 6 March 2013, the Supreme Court of Nepal decided that the NHRC has the authority to refer these cases to the attorney general and prosecutors for investigation and prosecution.¹⁴⁷ Therefore, apart from domestic courts, the NHRC is a mechanism to safeguard nationals' right to housing and to check whether state or non-state actors have breached these rights, including arbitrary displacements.

ii) Civil Rights Act

93. The major domestic legislation in Nepal for nationals to legally enforce their constitutional and civil rights is the Civil Rights Act 2012 ("CRA").¹⁴⁸ Section 6(5) of the CRA stipulates that all citizens shall have the right to reside and maintain household in any part of Nepal,¹⁴⁹ which

¹⁴⁶ Constitution of Nepal 2015, art 249.

¹⁴⁷ Human Rights Watch, 'Nepal: Carry Out Rights Panel's Recommendations (Human Rights Watch, 3 November 2020) <<https://www.hrw.org/news/2020/11/03/nepal-carry-out-rights-panels-recommendations>> accessed 8 May 2021.

¹⁴⁸ The Civil Rights Act (2012) 1955 (Nepal).

¹⁴⁹ *ibid* s 6(5).

corresponds with Article 37(2) of the 2015 Constitution.¹⁵⁰ In line with the right to an effective remedy under Principle 7(3)(f) of the UN Guiding Principles, Section 17 of the CRA provides a legal mechanism for nationals to file a petition before the Court of Appeal if there is reasonable doubt of infringement of any of the rights safeguarded in the statute. If the infringement is substantiated,¹⁵¹ the person or organisation (including the Government of Nepal) is obliged to pay compensation under Section 17(3).¹⁵² However, if the case is filed against the Government of Nepal or officials, the applicant is required to serve or make registered notice to the Secretary of the Government of Nepal or the official two months earlier under section 19.¹⁵³

c) National Policies on Internally Displaced Persons, 2063 (2007)

94. Nepal adopted the National Policies on Internally Displaced Persons (the “National Policies”) in 2007.¹⁵⁴ This policy document acknowledges the UN Guiding Principles as one of its guiding principles, and provides a range of national strategies to rehabilitate IDPs and prevent future cases of internal displacement.
95. It defines an IDP as “a person who is living somewhere else in the country after having forced to flee or leave one's home or place of habitual residence due to armed conflict or situation of violence or gross violation of human rights or natural disaster or humanmade disaster and situation or with an intention of avoiding the effects of such situations” under Article 3(a).¹⁵⁵ It is complemented by Article 8.1.6 of the National Policies, which states: ‘Except for the development projects and industry/ occupation which are to be operated for public and national interests, the state shall not cause displacement. Reasonable compensation will be provided if the displacement is required to be done for the aforesaid purposes.’ Article 12 further lays out in detail the criteria to be considered in identifying IDPs eligible for protection under the National Policies.¹⁵⁶ However, unlike the UN Guiding Principles, the National Policies do not recognise apartheid and collective punishment as potential causes of arbitrary internal displacement.

¹⁵⁰ Constitution of Nepal 2015, art 37(2).

¹⁵¹ The Civil Rights Act (2012) 1955 (n 148) s 17.

¹⁵² *ibid* s 17(3).

¹⁵³ *ibid* s 19.

¹⁵⁴ National Policies on Internally Displaced Persons (2063) 2007 (Nepal).

¹⁵⁵ *ibid* art 3(a).

¹⁵⁶ *ibid* art 12.

96. In line with Principle 7(3)(c) of the UN Guiding Principles, the policy emphasises on rehabilitating IDPs on a voluntary basis.¹⁵⁷ Further to Principle 7(3)(b) of the UN Guiding Principles, the policy recognises the right of IDPs to unify with their disintegrated family.¹⁵⁸ In accordance with Principle 7(3)(d), the policy provides that while formulating necessary programmes for relocation, special priority will be given to the participation of women.¹⁵⁹ Moreover, in accordance with Principle 9 of the UN Guiding Principles, Article 8.1.9 of the National Policies provides that the state shall give special protection against displacement to dwindling and marginal groups such as indigenous inhabitants and minorities. Emphasis is also placed on conducting specially target programmes to account for the needs of vulnerable groups or persons with special risks.¹⁶⁰ Article 8.1 of the National Policies lists the human rights protections and mechanisms that IDPs are entitled to.
97. However, the National Policies does not have the status of a legislation. Therefore, it is difficult to enforce Government's adherence to or implementation of the National Policies.¹⁶¹

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

a) Criminal Prohibitions and Sanctions

98. Nepal has not enacted specific criminal sanctions against arbitrary displacement. Although Nepal's new criminal code adopted in 2018 criminalises grave acts like torture and enforced disappearances, it does not criminalise forced displacement. Further, since Nepal is not a party to the Rome Statute, the prohibition on arbitrary displacement enshrined in the Rome Statute cannot be enforced domestically through the Nepal Treaty Act 1990.
99. It was not until 2018, following the newly enacted Right to Food and Food Sovereignty Act,¹⁶² that Nepal enacted a criminal prohibition that partly addresses arbitrary displacement. Under

¹⁵⁷ *ibid* arts 5 and 7.12.

¹⁵⁸ *ibid* art 8.3.1.

¹⁵⁹ *ibid* art 8.3.6.

¹⁶⁰ *ibid* art 7.10.

¹⁶¹ Elizabeth Ferris, Erin Mooney and Chareen Stark, 'From Responsibility to Response: Assessing National Approaches to Internal Displacement' (The Brookings Institution 2011) 33 <<https://www.refworld.org/docid/4f38cbe32.html>> accessed 31 May 2021.

¹⁶² The Right to Food and Sovereignty Act (2075) 2018 (Nepal).

Section 40(e) of the Act, any ‘person who renders one homeless in such a manner as to deprive him or her the basis of livelihood’ shall be deemed to have committed an offence. As outlined in Section 42(c) of the same Act, the punishment under this offence can lead to imprisonment for a term not exceeding five years and fine not exceeding five thousand rupees. Section 44 empowers the government to appoint or designate inspection officers, who are supposed to carry out investigations into the acts prohibited under this law.

100. While the offence under the Right to Food and Food Sovereignty Act does not cover all forms of arbitrary displacement under the UN Guiding Principles, most cases of forceful evictions in Nepal do effectively render a person homeless, especially in cases where the person does not own the land on which he or she is residing. A 2009 survey reveals that more than half of the IDPs in Nepal are struggling to meet their most basic needs,¹⁶³ suggesting that the offence faces the majority of eviction cases and can provide a form of deterrence for policymakers to at least ascertain the potential consequences of their plans to evict nationals from their residential home. Therefore, this legislation partly remedied the aforementioned gap in the Constitution of Nepal that only focuses on the right of the person who owns the land. Further, although this piece of legislation does not define a ‘person’ and whether it includes state actors, an analogy can be drawn from the Nepal National Penal Code 2017, where ‘public servant’ is considered to be ‘persons’ that are subjected to prosecution under section 3(h), which includes electorates and even persons holding any office with public accountability.

101. Similarly, while the Right to Food and Food Sovereignty Act does not include aggravating or mitigating factors in deciding the seriousness of the offence committed, the Nepal National Penal Code 2017 stipulates that offences taking advantage of the disturbance of public peace or disaster,¹⁶⁴ committed by subjecting anyone to inhumane treatment,¹⁶⁵ and committed as a crime against humanity¹⁶⁶ will add onto the seriousness of the crime committed.

b) Withdrawal of Cases

102. Section 29 of the Government Cases Act 1992 states that ‘[i]n cases where the Government of Nepal has to be a plaintiff or where the Government of Nepal has filed a case or where the Government of Nepal is a defendant pursuant to the prevailing laws, if there is an order

¹⁶³ Nepal IDP Working Group, ‘Distant from Durable Solutions: Conflict-Induced Internal Displacement in Nepal’ (2009).

¹⁶⁴ The National Penal Code 2017 (Nepal) s 38(h).

¹⁶⁵ *ibid* s 38(m).

¹⁶⁶ *ibid* s 38(u).

of the Government of Nepal, the Government Attorney, with the consent of other parties, may make a deed of reconciliation or with the consent of the court, may withdraw the criminal case in which the Government of Nepal is plaintiff.’ While this risks perpetuating a culture of *de facto* immunity for governmental officials, the Supreme Court of Nepal made it clear that the Government’s right to withdraw cases is not absolute.¹⁶⁷ Although Section 29 of the Government Cases Act 1992 does not provide a clear indication of what conditions suffice for a withdrawal, the court ruled that the Government’s decision should be at least ‘fair, reasonable and just’.¹⁶⁸ In *Suk Dev Ray Yadav v. Government of Nepal* (2012),¹⁶⁹ the court further observed that ‘[a] crime is a crime under the criminal law, no matter who committed it. A crime committed by politically affiliated persons is not a political crime, and no one can argue that crimes are committed for political reasons. If the elements of a crime are present, it does not matter what the objectives are, and the crime is a crime’. However, whether this stance is followed throughout all level of courts remains questionable. In fact, the NHRC report of 2020 said that out of 286 individuals that it deemed should be facing legal action in the past two decades, only 30 had been held liable.¹⁷⁰ Seemingly, the culture of impunity remains in post-conflict Nepal to date.

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN NEPAL?

a) Dysfunctional implementation of legal prohibition

103. According to the findings of the International Commission of Jurists (the “ICJ”), from 2008 to 2012, three successive governments withdrew around a thousand cases that were filed in several district courts across the country.¹⁷¹ While the Prime Minister replied in 2011 that withdrawals were only utilised in cases of ‘political nature’, it remains an open question how ‘political’ is determined.¹⁷² The NHRC commented that case withdrawals had already undermined the rights of alleged victims to an effective remedy and failed to act as a useful prohibition against acts that violate fundamental human rights.¹⁷³ Although the context of

¹⁶⁷ International Commission of Jurists, ‘Authority Without Accountability: The Struggle for Justice in Nepal’ (2013) 53 – 65 <<https://www.refworld.org/docid/530f04ce4.html>> accessed 31 May 2021.

¹⁶⁸ Supreme Court of Nepal, *Madhav Kumar Basnet et. al. v. Government of Nepal* (2011).

¹⁶⁹ *Suk Dev Ray Yadav v. Government of Nepal and Ors.*, Writ No. 2066-WO-1333 (2012).

¹⁷⁰ National Human Rights Commission of Nepal, ‘Annual Report 2020’ (2020).

¹⁷¹ International Commission of Jurists (n 167).

¹⁷² *ibid* 19.

¹⁷³ National Human Rights Commission of Nepal (n 170).

case withdrawals in this period focuses on the acts of violence during the Maoist insurgency, the focus is that there exists a culture of impunity in Nepal that prosecution decisions are subject to executive interference.¹⁷⁴

104. As recent as late 2020, Human Rights Watch (HRW) observed that there had been hardly any successful prosecutions for severe human rights violations in Nepal.¹⁷⁵ HRW reported a culture of impunity in Nepal that grants *de facto* immunity to government officials, as prosecution decisions as well as court processes are prone to interference by the executive. Against this backdrop, it has been common for government officials to ignore or even be unaware of laws or government policies that prohibit arbitrary displacement.

105. In 2019, advocate Raju Chapagai observed that local government was still adopting the old flawed policies to evict people from public land and pay little attention to the aforementioned newly enacted offence under the Right to Food and Food Sovereignty Act.¹⁷⁶ Officials are still forcefully evicting families from public land in Butwal and Nagarkot for developmental needs without considering their right to housing. Although the director of Amnesty International, Nepal, Nirajan Thapaliya, had written to Butwal sub-metropolis raising the issue of illegal forced eviction, there is no clear response or change in development policies that align with the Right to Food and Food Sovereignty Act.¹⁷⁷

106. Adding to the status quo is the reserved attitude of the NHRC. Although it was vested with the power to investigate violations of human rights and initiate prosecutions, the HRW discovered that the NHRC had not utilised this power since its establishment until its first prosecution recommendation in November 2020 by naming around 300 people as suspects of serious crimes.¹⁷⁸ The organisation still pays substantial deference to the Government of Nepal and refrains from directly bringing cases to court. Instead, its most utilised mechanism is to provide policy or legal recommendations to the Government of Nepal. In these two decades, it has registered around thirteen thousand complaints, reached conclusions in half of

¹⁷⁴ *ibid.*

¹⁷⁵ Human Rights Watch, 'No Law, No Justice, No State for Victims: The Culture of Impunity in Post-Conflict Nepal' (20 November 2020) <<https://www.hrw.org/report/2020/11/20/no-law-no-justice-no-state-victims/culture-impunity-post-conflict-nepal>> accessed 8 May 2021.

¹⁷⁶ Ram Kumar Kamat, 'Forced eviction from public land unlawful: Activists' (The Himalayan, 25 August 2015) <<https://thehimalayantimes.com/nepal/forced-eviction-from-public-land-unlawful-activists>> accessed 6 May 2021.

¹⁷⁷ *ibid.*

¹⁷⁸ National Human Rights Commission of Nepal (n 170).

these cases, and made 1195 recommendations to the government.¹⁷⁹ Only 13 percent of these recommendations have been carried out fully, 37 percent were partly carried out, and the remaining 50 percent have not been carried out at all.¹⁸⁰

b) Policy focused implementation

107. The National Policy is a key guide to the national strategy on arbitrary internal displacement in post-conflict Nepal and yet a substantial number of both officials and IDPs are not aware of its existence or contents. According to an assessment conducted by the Nepal IDP Working Group in 2009, none of the government's district-level agencies, Local Development Officers or the Police were aware of the National Policies.¹⁸¹ Similarly, although the National Policies call for consultation with IDPs, only 35 percent of IDPs are aware of the National Policies, and none of them are able to identify any of its elements, alongside their rights and prioritised status under this instrument.¹⁸²

108. In addition, the IDMC in 2010 observed that lacked any comprehensive registration of IDPs in Nepal as well as any systematic monitoring of population movements, which partly explains why the estimation of IDPs in Nepal varied drastically among different institutions and the Government of Nepal.¹⁸³ Although the Government established a Displacement Persons Identification Committee, the lack of clear directives and implementation mechanisms resulted in identification being taken over by ad-hoc district committees representing political parties and civil society organisations.¹⁸⁴ This resulted in the registration process being highly politicised and it became a barrier for many IDPs to register.

109. Another continuing issue with the National Policies is that while the document contains provisions for safe and voluntary return, reintegration, or resettlement, government assistance is only available to those seeking to return.¹⁸⁵

110. Although electoral legislation in Nepal was amended to address discrimination against IDPs in exercising their voting rights, these amendments do not account for the residency and

¹⁷⁹ Human Rights Watch (n 175).

¹⁸⁰ *ibid.*

¹⁸¹ Nepal IDP Working Group (n 163).

¹⁸² *ibid.*

¹⁸³ IDMC, 'Nepal: Failed Implementation of IDP Policies Leaves Many Unassisted' (IDMC 2010) 5.

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

documentation needs of IDPs. Although IDPs rarely return to their original residence, they are expected to vote in their original place of residence.¹⁸⁶

111. Further, according to Orchard's observation in 2017, there is no implementation of the National Policies at all, even though the Government of Nepal has repeatedly emphasised this instrument's importance.¹⁸⁷ Indeed, as per the Nepal 2020 Human Rights Report, around fifty thousand conflict-related IDPs are still unwilling or unable to return home, let alone the more recent disaster-related IDPs.¹⁸⁸ Although the Government of Nepal has been providing relief packages for the rehabilitation and voluntary return of IDPs, it seems that these measures are not entirely successful in ensuring that the displacement 'shall last no longer than required by the circumstances' under Principle 6 of the Guiding Principles.

¹⁸⁶ UNGA, 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons', UN Doc A/60/338 (7 September 2005) <https://ap.ohchr.org/documents/dpage_e.aspx?m=71> accessed 31 May 2021.

¹⁸⁷ Phil Orchard, 'Improving the Implementation of National Internally Displaced Persons Laws and Policies' (UNHCR 2017) <<https://www.unhcr.org/uk/events/conferences/5a86d0497/improving-implementation-national-internally-displaced-persons-laws-policies.html?query=IMPROVING%20THE%20IMPLEMENTATION%20OF%20NATIONAL%20INTERNALLY%20DISPLACED%20PERSONS%20LAWS%20AND%20POLICIES>> accessed 7 May 2020.

¹⁸⁸ National Human Rights Commission of Nepal (n 170).

NIGER

112. According to the UNHCR factsheet released in March 2021,¹⁸⁹ 580,610 persons have fled their home countries or are internally displaced in Niger. Most internal displacements in Niger result from the deteriorating security situation which began in 2012 with the outbreak of conflict in northern Mali, and continued with attacks from armed groups on Nigerien territory since 2015.¹⁹⁰ Moreover, 226,000 persons have been displaced from their homes by floods due to heavy rains in Niger during the summer of 2020.¹⁹¹ In the backdrop of these causes, this section addresses how Niger gave domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ IN NIGER?

a) Constitutional Guarantees

113. Title II of the Niger’s 2010 Constitution is entitled ‘Rights and Duties of the Human Person’ and provides for the protection of certain human rights for all Nigeriens. In line with the rights guaranteed under Principle 8 of the UN Guiding Principles, Article 12 of the Nigerien Constitution provides that ‘everyone has the right to life, health, physical and moral integrity, healthy and sufficient food, drinking water, education and instruction under the conditions defined by law. The State shall ensure the satisfaction of essential needs and services and the full development of everyone. Everyone has the right to freedom and security under the conditions defined by law.’ Further, Article 16 of the Constitution seems to be more specifically relevant to IDPs, as it provides that ‘no citizen may be forced into exile or deported. Forcing a citizen into exile or deportation shall be considered a crime against the nation and shall be punished in accordance with the law.’

114. Further, Article 171 of the Nigerien Constitution provides that ‘duly ratified treaties or agreements have, from the moment of their publication, an authority superior to that of laws, subject to the application by the other party of each agreement or treaty.’ Therefore, any

¹⁸⁹ UNCHR, ‘Niger – Operational Update’ (2021) <<https://data2.unhcr.org/en/documents/details/85625>> accessed 31 May 2021.

¹⁹⁰ *ibid.*

¹⁹¹ David Ochieng Mbewa, ‘At least 45 killed, more than 220,000 displaced by floods in Niger’ (CGTN Africa, 28 August 2020) <<https://africa.cgtn.com/2020/08/28/at-least-45-killed-more-than-220000-displaced-by-floods-in-niger/>> accessed 31 May 2021.

guarantees under treaties like the ICCPR relevant to the prohibition of arbitrary internal displacement are enforceable domestically.

b) Law No. 2018-74

115. The main legal instrument giving effect to the prohibition of internal arbitrary displacement in Niger is Law No. 2018-74 of 10 December 2018 on the protection and assistance of IDPs.¹⁹² This law implements the African Union Convention for the Protection and assistance of internally displaced persons in Africa (the Kampala Convention) which obliges States Parties to incorporate their obligations under the Convention into domestic law.¹⁹³ With this law, Niger became the first African country to implement the Kampala Convention.¹⁹⁴

116. Article 3 of the 2018 Law provides that the protection and assistance to IDPs in Niger is inspired from the UN Guiding Principles and Resolution 1998/50 (17 April 1998) of the UN Commission on Human Rights. Article 2(1) reproduces the UN Guiding Principles' definition of IDPs¹⁹⁵ as persons who have been forced or obliged to flee or abandon their homes or places of habitual residence, in particular after, or in order to avoid the effects of, armed conflicts, situations of widespread violence, human rights violations, and/or natural or man-made disasters, and who have not crossed the territorial borders of Niger. Article 2(12) defines arbitrary displacement broadly as any displacement in the Republic of Niger that is not in accordance with the laws and regulations in force, and not in reference to specific causes of internal displacement.

117. Under Article 6, the State must prevent or cease the violation of human rights in cases of armed conflict or widespread violence. Under Article 7, the State has to take measures to reduce the risk of internal displacement in cases of natural or man-made disasters. Under Article 8, this obligation is extended to any organ or individual participating in development projects. These articles therefore reflect most of the causes of displacement presented in Principle 6(2) of the UN Guiding Principles. However, the Law does not mention ethnic cleansing, apartheid or collective punishment.

¹⁹² Law No 2018-74 of 10 December 2018 on the Protection and Assistance to Internally Displaced Persons (Niger).

¹⁹³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) art 3(2).

¹⁹⁴ UNHCR, 'Niger becomes first African country to adopt national law for protection and assistance of Internally Displaced People' (2018) <<https://www.unhcr.org/afr/news/press/2018/12/5c0a29eb4/niger-becomes-first-african-country-to-adopt-national-law-for-protection.html>> accessed 31 May 2021.

¹⁹⁵ UN Guiding Principles (n 1) Introduction: Scope & Purpose [2].

118. In line with Principle 7(1) of the UN Guiding Principles, Article 9 of the 2018 Law provides that the State must ensure that all possibilities for avoiding internal displacement in situations mentioned in Articles 6-8 are explored, and if internal displacement is unavoidable, the State needs to take measures to mitigate the effects of internal displacement.

119. Under Article 10, every citizen has the right to be protected against arbitrary displacement from his or her home or place of habitual residence, which reflects Principle 6(1) of the UN Guiding Principles. Under Article 12, all IDPs have the right to be protected against forcible return or resettlement to a territory where their life, security, liberty or health are endangered. While this primarily implements Principle 15 of the UN Guiding Principles, it equally also aligns with Principle 8 by emphasizing on the rights to life, security and liberty of persons. Further, in line with Principle 7(3)(d) of the UN Guiding Principles, Article 20 of the law states that internally displaced persons must be consulted in the design, implementation and review of programs aimed at ensuring their protection, assistance and durable solutions. Moreover, in accordance with Principles 7(3)(c) and (d) of the UN Guiding Principles, Article 23 of the 2018 law calls for the voluntary resettlement of IDPs and their full participation in the planning and management of their return or resettlement and reintegration.

120. Additionally, the law provides that States must *inter alia*:

- a. Provide for the reunification of separated families,¹⁹⁶ in line with Principle 7(2) of the UN Guiding Principles;
- b. Provide for the protection of IDPs' property and retrocession or compensation where relevant,¹⁹⁷ in accordance with the right to effective remedy guaranteed under Principle 7(3)(f) of the UN Guiding Principles;
- c. Protect the right of IDPs not to be discriminated against on the basis of political opinion, religion, race, ethnicity nationality, race, ethnicity, membership of a particular social group or community;¹⁹⁸
- d. Provide specific assistance for vulnerable IDPs, such as unaccompanied minors, pregnant women, female heads of household, persons with disabilities and elderly people.¹⁹⁹

¹⁹⁶ Law No 2018-74 (n 192) art 13(4).

¹⁹⁷ *ibid* art 13(5).

¹⁹⁸ *ibid* art 14.

¹⁹⁹ *ibid* art 19.

121. Moreover, Article 24 provides that the return of IDPs to their place of origin or habitual residence will only be prohibited if these places are located in areas where there is a real risk of danger and/or disaster, and that these restrictions, which may not exceed the duration of the risks and dangers involved, are only implemented if other less protective means are not available or possible. This provision may be said to comply with Principle 6(3) and 7(1) of the UN Guiding Principles.

122. The law further provides for the creation of: (i) a national coordination committee for protection and assistance to IDPs to facilitate coordination and decision-making within the government, with national human rights institutions, members of civil society, organisations, national and international humanitarian agencies; (ii) a national observatory for the prevention and coordination of all activities for the prevention of factors likely to lead to internal displacement; and (iii) a protection and assistance fund for IDPs. The national coordination committee has been instituted by Decree of 17 April 2020.²⁰⁰

123. This Decree further provides that the State must put in place several mechanisms and programs to prevent or mitigate the effects of displacement, and to provide facilities for education, health, water, hygiene and sanitation.²⁰¹ This reflects Principles 7(1) and 7(2) of the UN Guiding Principles. It also requires the national coordination committee to establish vulnerability criteria through a participative approach including IDPs and host communities,²⁰² and provides that any measure shall be taken in consultation with IDPs.²⁰³ This reflects Principle 7(3)(d) of the UN Guiding Principles.

c) Expropriation

124. Some legal protection is also guaranteed to those displaced as a result of expropriation. Article 28 of the 2010 Constitution of Niger provides that ‘every person has the right to property. No one may be deprived of his property except in the public interest, subject to fair and prior

²⁰⁰ Decree No 2020-297/PRN/MAH/GC of 17 April 2020 on the National Coordination Committee for the Protection and Assistance of Internally Displaced Persons (Niger) <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=699751D679EB9030C1258673005481A8&action=openDocument&xp_countrySelected=NE&xp_topicSelected=GVAL-992BUE&from=state> accessed 31 May 2021.

²⁰¹ *ibid* arts 3(1) and 5.

²⁰² *ibid* art 3.

²⁰³ *ibid* art 4.

compensation.’ Law No. 2008-37 of 10 July 2008²⁰⁴ amended Law No. 61-37 of 24 November 1961 regulating expropriation for public utility by adding provisions protecting persons displaced for these reasons. According to Article 1, when expropriation results in the displacement of populations, the expropriator is required to put in place a resettlement plan for the populations affected by the operation.

125. Article 2 of the Law provides for the addition of articles 13/bis and 13/quarter. Article 13/bis provides for general principles on the compensation of persons displaced by expropriation, including consultation with persons affected by the expropriation. This reflects Principle 7 of the UN Guiding Principles. Article 13/quarter provides for three forms of compensation: (i) compensation in kind, which includes, *inter alia*, compensation in the form of replacement land, rehousing, building materials, seeds and provision of means of production; (ii) compensation in cash, paid and calculated in local currency; and/or (iii) compensation in the form of assistance, where those affected will be supported economically through the provision of, *inter alia*, technical assistance and transport allowances.

126. The protection of persons with a special attachment to their land under Principle 9 of the UN Guiding Principles is partially guaranteed. While there is no specific protection for indigenous peoples, Niger has some laws that seek to protect pastoralists from arbitrary displacement due to the impossibility of accessing their land or carrying out their activities. Ordinance 2010-029 of 20 May 2010 on Pastoralism²⁰⁵ completed Ordinance 93-015 of 2 March 1993 on the Orientation principles of the Rural Code.²⁰⁶ According to Article 3, paragraph 1, of the 2010 ordinance, ‘mobility is a fundamental right of herders, nomadic and transhumant pastoralists. This right is recognised and guaranteed by the State and local authorities.’ According to Article 5, paragraphs 1 and 2, ‘Subject to compliance with the provisions of this ordinance, any form of exclusive appropriation of pastoral space belonging to the public domain of the State or local authorities is prohibited. In particular, no rural concession may be granted if it has the effect of hindering the mobility of pastoralists and their herds and their free access to pastoral resources.’ Article 12 of the same ordinance provides for a ‘priority right of use’ which is ‘a

²⁰⁴ Loi N° 2008-37 du 10 juillet 2008 modifiant et complétant la loi n°61-37 du 24 novembre 1961 réglementant l'expropriation pour cause d'utilité publique et l'occupation temporaire (Niger) <<http://extwprlegs1.fao.org/docs/pdf/NER131364.pdf>> accessed 31 May 2021.

²⁰⁵ Ordonnance 2010-029 du 20 mai 2010 relative au pastoralisme (Niger) <http://www.elevage.gouv.ne/IMG/pdf/ordonnance_relative_au_pastoralisme_.pdf> accessed 31 May 2021.

²⁰⁶ Ordonnance N° 93-015 du 2 mars 1993 portant Principes d'orientation du Code Rural (Niger) <<http://extwprlegs1.fao.org/docs/pdf/ner4660.pdf>> accessed 31 May 2021.

right of occupation, enjoyment and management recognised to pastoralists on their home territory’, and that these pastoralists ‘either individually or collectively may not be deprived of their priority right of pastoral use except in the public interest after fair and prior compensation’.

127. The rights of pastoralists over their land may however be jeopardised by mining and oil concessions, since Article 52 provides that ‘when mining and oil titles cover all or part of the areas over which pastoralists have a priority right of use, the occupation of the land necessary for mining and oil activities can only be granted after fair and prior compensation of the latter. ... But when no agreement has been possible between the holder of the mining or petroleum right and the pastoralists, the Minister of Mines and Energy and the Minister in charge of domains shall initiate an expropriation in the public interest of the land concerned.’

128. It should be added that, in April 2015, the government of Niger had expressed the wish to establish a law against land grabbing. The ad hoc committee charged with making proposals to the government on the issue of land grabbing and the privatisation of grazing land in Niger was to submit a draft law to the Nigerien executive by June 2015.²⁰⁷ There have been no reports of progress on the issue since then.

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

a) Nigerien Penal Code

129. Before the Law of 10 December 2018, the only source of criminal prohibitions and sanctions against arbitrary internal displacement were contained in the Nigerien Penal Code 2003 – these provisions relate to crimes against humanity and war crimes.²⁰⁸

²⁰⁷ Le Hub Rural, ‘Le Niger veut se doter d’une loi contre l’accaparement des terres pastorales d’ici juin 2015’ <<http://www.hubrural.org/Le-Niger-veut-se-doter-d-une-loi.html?lang=fr>> accessed 31 May 2021.

²⁰⁸ Loi No 2003-025 du 13 juin 2003 modifiant la loi no 61-27 du 15 juillet 1961, portant institution du Code penal (Niger) <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=0E5120D06CBF4815C1257084002F35E6&action=openDocument&xp_countrySelected=NE&xp_topicSelected=GVAL-992BU6&from=state> accessed 31 May 2021.

130. In particular, according to Article 208.2 of the Nigerien Penal Code, deportation inspired by political, philosophical, racial or religious motives and organised in execution of a concerted plan against a group of civilians is a crime against humanity. Crimes against humanity are punishable by the death penalty. According to Article 245 of the Penal Code, crimes against humanity are never excusable. Article 208.6 of the Penal Code further provides that no interest and no need of a political, military or national nature, can justify, even by way of reprisals, crimes against humanity.

131. Further, as per Article 208.3 of the Nigerien Criminal Code, ‘the unlawful deportation, transfer or displacement, the unlawful detention of a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected in the same respect by Protocols 1 and 2 additional to the Geneva Conventions of 12 August 1949’ constitute war crimes. Article 208.4 provides that this offence shall be punished by imprisonment of 15 to 20 years, or by life imprisonment if it results in the death of one or more persons. According to Article 208.6 of the Penal Code, the perpetrator or co-perpetrator of such crimes cannot be exempted from liability solely because he has performed an act prescribed or authorised by legislative provisions or an act ordered by lawful authority, but this may be taken into account in determining the sentence. Furthermore, the same article provides that no political, military or national interest or necessity can justify such crimes, even by way of reprisal. Under Article 208.7, the immunity attached to the official capacity of a person does not prevent the application of these provisions.

132. However, these provisions criminalise forced displacement and the treatment of IDPs provided these acts reach the threshold of gravity of a crime against humanity or a war crime, which may limit their application.

b) Law No. 2018-74

133. Law No. 2018-74 introduced new criminal offences specifically related to arbitrary internal displacement. Chapter VII relates to offences committed against IDPs. Under Article 30, restricting the right to free movement of IDPs within and outside their areas of residence, recruiting, coercing or permitting children in situations of internal displacement to take part in hostilities, abusing and exploiting internally displaced children or forcibly recruiting IDPs, kidnapping, abducting or taking hostages, engaging in sexual slavery or any other form of sexual exploitation, and trafficking in persons, especially women and internally displaced

children, is punished by 15 to 30 years of imprisonment and a fine of between CFAF 2 and 5 million.

134. Under Article 31 of the law, displacing persons on the basis of policies of racial discrimination or other similar practices aimed at or resulting in the alteration of the ethnic, religious or racial composition of the population, displacing civilians individually or in masse in situations of armed conflict, unless required for the safety of civilians or for imperative military reasons in accordance with international humanitarian law, or causing forced evacuations in the event of disasters of natural or humanitarian origin, or for other causes, if the evacuations are not required for the safety and health of the affected persons, is punished by 15 to 30 years of imprisonment and a fine of between CFAF 3 and 7 million. Under Article 32, where the acts of arbitrary displacement constitute genocide, war crimes, crimes against humanity and other violations of international humanitarian law, the penalties provided by the Penal Code are applicable.

135. Finally, Chapter IX contains common provisions for all offences created by the law. Article 37 provides that the same penalty applies for an accomplice or an attempt, and the provisions on mitigating circumstances and probation do not apply. Article 39 provides that the provisions of the Penal Code shall apply in all matters not provided for in this law. IDPs and any actor involved in their protection and assistance will therefore be able to also invoke any of the general criminal law offences provided for in the Nigerien Penal Code.

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN NIGER?

136. The information available on the implementation in practice of the prohibition of arbitrary internal displacement in Niger shows that authorities focus more on measures to assist the currently displaced persons than on measures to prevent displacement.

137. In terms of prevention, in 2019, the Ministry of Humanitarian Action and Disaster Management organised a workshop to equip national actors, national and international NGOs, government partners and researchers by providing them with training modules on the causes and consequences of internal displacement, as well as on the means of prevention,

protection and assistance to IDPs.²⁰⁹ Moreover, in 2020, the National Committee for Data Collection and Information Management on IDPs was established, with the goal to have an early warning mechanism to be informed about the displacements of civilian populations in Niger, identify protection and humanitarian needs among displaced populations, establish a list of beneficiaries of humanitarian assistance programmes and inquire about the intentions of displaced persons regarding their short, medium and long term future, with the aim of planning durable solutions programmes.²¹⁰

138. The Government of Niger has set up a specific budget to help vulnerable people, including IDPs. The 2021 Support Plan hopes to assist 338,858 internally displaced persons.²¹¹

139. The Nigerien authorities have undertaken some national and local assistance for IDPs affected by armed conflicts. On 30 April 2021, the Nigerien authorities successfully relocated 3,500 internally displaced persons, initially temporarily settled at the IBB Primary School in Minna, to the Gwada primary school, and made available food, non-food items, sanitary material and a clinic managed by officials of the state ministry of health.²¹² Following the directive of Niger Governor Abubakar S. Bello to the Niger State Emergency Management Agency (NSEMA),²¹³ several batches of food have been distributed in the IDP camp of Gwada in the beginning of May 2021.²¹⁴

140. Moreover, the Nigerien authorities have provided some assistance to IDPs affected by floods in the recent years. After the 2018 floods, the Secretary General of the Ministry of Humanitarian Action and Disaster Management officially launched, on 27 September 2018,

²⁰⁹ Ministry of Humanitarian Action and Disaster, 'Mise en oeuvre de la loi 2018-74 relative aux personnes déplacées internes au Niger' <<https://mahgc.ne/mise-en-oeuvre-de-la-loi-2018-74-relative-aux-personnes-deplacees-internes-au-niger/>> accessed 31 May 2021.

²¹⁰ Ministry of Humanitarian Action and Disaster, 'Mise en place du comité de collecte des données et la gestion des informations sur les PDI's' <<https://mahgc.ne/mise-en-place-du-comite-de-collecte-des-donnees-et-la-gestion-des-informations-sur-les-pdis/>> accessed 31 May 2021.

²¹¹ Réseau National Des Chambres D'Agriculture du Niger, 'Plan de soutien aux populations vulnérables du Niger 2021' <<https://reca-niger.org/spip.php?article1427>> accessed 31 May 2021.

²¹² 'Niger state government relocates internally displaced persons' (NewsLodge, 1 May 2021) <<https://www.newslodge.com.ng/niger-state-government-relocates-internally-displaced-persons/>> accessed 31 May 2021; Modupe Badejo, 'Niger govt supports IDPs with food, non-food items' (G9IJA, 3 May 2021) <<https://g9ija.com/2021/05/03/niger-govt-supports-idps-with-food-non-food-items/>> accessed 31 May 2021.

²¹³ 'Niger Governor directs NSEMA to provide more relief materials to IDPs, says government working for their safe return back home soon' (The Gazelle News, 24 April 2021) <<https://www.thegazellenews.com/news/niger-governor-directs-nsema-to-provide-more-relief-materials-to-idps-says-government-working-for-their-safe-return-back-home-soon/>> accessed 31 May 2021.

²¹⁴ 'Niger distributes second batch of food items to IDPs camps' (Vanguard, 3 May 2021) <https://www.vanguardngr.com/2021/05/niger-distributes-second-batch-of-food-items-to-idps-camps/?utm_source=dlvr.it&utm_medium=twitter> accessed 31 May 2021.

the free food distribution in two towns of the Gaya department as part of the assistance programme for flood victims implemented by the NGO Qatar Charity.²¹⁵ IDPs from Niamey affected by the floods of summer 2020 were temporarily housed on two sites, in Gamou and in the Niamey Hippodrome. In February 2021, 935 affected households were living in the Gamou site, with an estimated population of 7,389 IDPs.²¹⁶ According to the official in charge of rehousing the victims, 1,754 plots of 250 m² each have been developed and will be available to house the IDPs.²¹⁷ However, no rehousing has been announced recently and IDPs in Gamou have said that they are pessimistic about the outcome of this promise, as this would not be the first time that promises of plots of land have been made to them without implementation.²¹⁸

141. Despite these recent examples of assistance, the Nigerien authorities seem to be experiencing difficulties in implementing sufficient measures in practice to comply with the UN Guiding Principles. First, prevention measures are clearly insufficient as the numbers of IDPs in Niger continue to rise. Furthermore, the living conditions in IDP camps do not seem to be compatible with the Principles. For example, a recent testimony states that over 30 people sleep in the same room in the camps of Gwada and Kuta.²¹⁹ At the Gamou site, which has been hosting flood victims in tents since last summer, IDPs complain about the lack of sufficient food, that the tents do not protect them from the cold at night²²⁰ and that the heat inside the tents is too intense during the day.²²¹ Similarly, the 700 families affected by the floods and currently housed at the Niamey Hippodrome are still waiting to be rehoused, eight months after the floods occurred. IDPs say that the shelters are not sustainable, and that their

²¹⁵ Ministry of Humanitarian Action and Disaster Management, 'Distribution gratuite ciblée de vivres dans la commune de Tanda departement Gaya, région de Dosso' <<https://mahgc.ne/distribution-gratuite-ciblee-de-vivres-dans-la-commune-de-tanda-departement-gaya-region-de-dosso/>> accessed 31 May 2021.

²¹⁶ Le Sahel, 'Situation Des Sinistrés De Niamey : Les Sinistrés Du Site Gamou Dans L'attente De Parcelles Pour Leur Relogement' (9 February 2021) <<http://www.lesahel.org/situation-des-sinistres-de-niamey-les-sinistres-du-site-gamou-dans-lattente-de-parcelles-pour-leur-relogement/>> accessed 31 May 2021.

²¹⁷ Niamey et les 2 jours, 'Niger : 1754 parcelles en cours de viabilisation pour reloger des sinistrés' (9 February 2021) <<https://www.niameyetles2jours.com/l-uemoa/gestion-publique/0902-6488-niger-1754-parcelles-en-cours-de-viabilisation-pour-reloger-des-sinistres>> accessed 31 May 2021.

²¹⁸ Le Sahel, 'Situation Des Sinistrés De Niamey : Les Sinistrés Du Site Gamou Dans L'attente De Parcelles Pour Leur Relogement' (9 February 2021) <<http://www.lesahel.org/situation-des-sinistres-de-niamey-les-sinistres-du-site-gamou-dans-lattente-de-parcelles-pour-leur-relogement/>> accessed 31 May 2021.

²¹⁹ Justina Asishana, 'Niger IDPs Get Relief Materials' (Transcontinental Times, 4 May 2021) <<https://www.transcontinentaltimes.com/niger-idps-get-relief-materials.html>> accessed 31 May 2021.

²²⁰ Le Sahel, 'Situation Des Sinistrés De Niamey : Les Sinistrés Du Site Gamou Dans L'attente De Parcelles Pour Leur Relogement' (9 February 2021) <<http://www.lesahel.org/situation-des-sinistres-de-niamey-les-sinistres-du-site-gamou-dans-lattente-de-parcelles-pour-leur-relogement/>> accessed 31 May 2021.

²²¹ Labari, 'Les sinistrés du camp GAMOU témoignent des conditions de leur hébergement sur le site' (29 October 2020) <<https://www.labarinfo.com/article/Les-sinistres-du-camp-GAMOU--2481;text=Les>> accessed 31 May 2021.

last donation of provisions, two 25 kg bags of rice per household, was three months ago and they have not received anything since.²²²

142. Finally, a study conducted in camps in the Diffa region and published in March 2021 shows many problems in terms of access to water and hygiene, such as the fact that 8% and 84% of households respectively reported using unimproved water sources and sharing their main water source with their livestock, and only 66% of households reported having access to latrines, which are generally in very poor condition.²²³

²²² Gaëlle Laleix, 'Les déplacés du fleuve Niger à Niamey' (RFI, 24 April 2021) <<https://www.rfi.fr/fr/podcasts/reportage-afrique/20210423-les-d%C3%A9plac%C3%A9s-du-fleuve-niger-%C3%A0-niamey>> accessed 31 May 2021.

²²³ REACH, 'Niger - Evaluation des connaissances, attitudes et pratiques (CAP) en eau, hygiène et assainissement (EHA) des populations vivant dans les sites de déplacés de la région de Diffa' (March 2021) <<https://reliefweb.int/report/niger/valuation-des-connaissances-attitudes-et-pratiques-cap-en-eau-hygi-ne-et-assainissement>> accessed 31 May 2021.

THE PHILIPPINES

143. The Philippines witnesses frequent and prolonged displacement of marginalised minority communities, including indigenous groups, as a direct consequence of natural disasters, development projects,²²⁴ and conflict. An annual average of 3.6 million disaster displacements were recorded between 2008 and 2019.²²⁵ The country continues to witness protracted internal conflicts as a consequence of a communist insurgency²²⁶ and a separatist struggle in the southern Bangsamoro region.²²⁷ They also witness development-induced displacement, particularly of indigenous groups, to advance tourism and infrastructural development.²²⁸ In combination of these factors, the Philippines ranks among the highest in the global incidence of displacements each year.²²⁹ In this backdrop, this section assess how the Philippines gives domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ IN DIFFERENT JURISDICTIONS?

144. The Philippines has no central legal mechanism that specifically pertains to a human rights framework of rights for IDPs. A Bill titled, ‘Protecting the Rights of Internally Displaced Persons and Penalizing the Acts of Arbitrary Internal Displacement’ (IDP Bill) was nearly adopted into law in 2013.²³⁰ The Bill sought to adopt a comprehensive rights-based approach

²²⁴ Matthew Caruana Galizia et al, ‘Evicted and Abandoned: Explore 10 Years of World Bank Resettlement Data – Philippines’ (International Consortium of Investigative Journalists, 14 April 2015) <<https://www.icij.org/investigations/world-bank/explore-10-years-world-bank-resettlement-data/>> accessed on 2 May 2021.

²²⁵ *ibid*; IDMC, ‘Global Report on Internal Displacement 2020: East Asia and Pacific’ (2020) 41.

²²⁶ The Communist Part of the Philippines (CPP) and its New People’s Army (NPA) launched an armed struggle against the Philippine state in 1968. One of the key drivers of the conflict has been the Philippine state’s systemic neglect of indigenous communities in favour of larger corporations. International Crisis Group, ‘The Communist Insurgency in the Philippines: Tactics and Talks’ (Asia Report No 202, 2011).

²²⁷ The Bangsamoro rebellion, led by the Moro National Liberation Front, is against the Philippine state. While structural causes of the conflict include underdevelopment and systemic dispossession of land, the proximate cause of the conflict is an ethnic struggle between the Moros and Christian settlers, that resulted in violent attacks against Muslims. Armi Bayot, ‘Elite Bargains and Political Deals Project: Philippines Case Study’ (Stabilisation Unit 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766040/Philippines_case_study.pdf> accessed 9 May 2021.

²²⁸ Renée V Hagen and Tessa Minter, ‘Displacement in the Name of Development. How Indigenous Rights Legislation Fails to Protect Philippine Hunter-Gatherers’ (2020) 33(1) *Society and Natural Resources* 65.

²²⁹ IDMC, ‘Philippines’ (2020) <<https://www.internal-displacement.org/countries/philippines>> accessed 9 May 2021.

²³⁰ Senate Bill No. 3317 of 2013 (Philippines) (IDP Bill 2013).

for the promotion and protection of IDPs, in accordance with the UN Guiding Principles.²³¹ The Bill imposes heavy penalties against arbitrary internal displacement of any persons, including non-combatants in the crossfire of internal armed conflicts,²³² and also provides for monetary compensation for lost or damaged property or for the death of family members.²³³ However, the IDP Bill was vetoed by President Benigno Aquino III on objections to provisions that allowed for IDPs to claim financial assistance and compensation from the government.²³⁴ As of September 2020, pressure continues to be exerted on the government to prioritise the passage of the IDP Bill.²³⁵

145. It is pertinent to note that Section 4 of the Bill reiterates verbatim Principle 5 of the UN Guiding Principles. Section 5 of the Bill defines ‘arbitrary internal displacement’ in the same terms as Principle 6(2) of the UN Guiding Principles, while adding that any violation of the rights of IDPs as recognised under Section 8 of the Bill would also amount to ‘arbitrary internal displacement’. Section 6 of the Bill reproduces Principles 6(1), 6(3), 7, 8 and 9 of the UN Guiding Principles. Finally, Section 7 of the Bill adds that: ‘the prohibition of arbitrary internal displacement and the fundamental safeguards for its prevention shall not be suspended under any circumstances, including political instability, threat of war, state of war or other public emergencies.’

a) Human Rights Framework

146. Through a combination of state obligations and policy objectives, as well as Bill of Rights provisions, the 1987 Philippine Constitution ensures a broad human rights protection framework for all persons.²³⁶ Article II, Section 5 of the Constitution, that outlines the overarching declaration of principles and state policies provides that: ‘the maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.’²³⁷ On

²³¹ Vivian Tan, ‘Philippines Passes Historic Bill to Protect Internally Displaced’ (UNHCR, 08 February 2013) <<https://www.unhcr.org/uk/news/latest/2013/2/5114dd5c9/philippines-passes-historic-bill-protect-internally-displaced.html#:~:text=It%20also%20spells%20out%20key,the%20death%20of%20family%20members>> accessed 22 May 2021.

²³² IDP Bill 2013 (n 230) s 13 and s 17.

²³³ *ibid* s 19 and s 20.

²³⁴ Jefferson Antiporda and Catherine S Valente, ‘Aquino Vetoes Bill On Internally Displaced Persons’ (The Manila Times, 29 May 2013) <<https://www.manilatimes.net/2013/05/29/news/top-stories/aquino-vetoes-bill-on-internally-displaced-persons/5172/>> accessed 9 May 2021.

²³⁵ Rappler, ‘Groups Urge Senators to Prioritize Bill for Internally Displaced Persons’ (Rappler.com, 27 September 2020) <<https://www.rappler.com/moveph/groups-urge-senators-prioritize-bill-internally-displaced-persons>> accessed on 9 May 2021.

²³⁶ The Constitution of the Republic of the Philippines 1987 (Philippines).

²³⁷ *ibid* art II, s 5.

a similar note, Article II, Section 11 notes that ‘the State values the dignity of every human person and guarantees full respect for human rights’.²³⁸ Article III, Section 1, that enlists the Bill of Rights, notes that ‘no person shall be deprived of life, liberty, or property without due process of law’.²³⁹

147. Obligations arising out of international treaties like the ICCPR, in addition to customary human rights law, also bind the Philippine state. Article VII, Section 21 of the Philippine Constitution requires at least two-thirds of the Senate to concur in order for a treaty to be ‘valid and effective’ and take direct effect into domestic law.²⁴⁰ Article II, Section 2 reads: ‘the Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.’²⁴¹ Some understand the phrase ‘generally accepted principles of international law’ as giving domestic effect to at least provisions of the UN Charter,²⁴² while others think it makes customary law part of domestic law.²⁴³ However, no court has thus far categorically cleared the position of the Philippines.²⁴⁴ As Temprosa notes, cases decided the Court usually begin by quoting Article II, Section 2 of the Constitution, and then proceed to apply international law directly, ‘without finding any need to search for an enabling act of Congress’.²⁴⁵

b) Legislative Framework

148. The central legal framework that forms the basis of the Philippines’ response for displacement situations is the Philippine Disaster Risk Reduction and Management Act, 2010 (DRRMA).²⁴⁶ Along with the DRRMA, other laws that have elements of protection for IDPs are the Special Protection of Children Against Abuse, Exploitation and Discrimination Act, 1992,²⁴⁷ the

²³⁸ *ibid* art II, s 11.

²³⁹ *ibid* art III, s 1.

²⁴⁰ *ibid* art VII, s 21. See Cheryl Saunders, ‘Constitutions and International Law’ (International Institute for Democracy and Electoral Assistance, 2020) <<https://www.idea.int/sites/default/files/publications/constitutions-and-international-law.pdf>> accessed 22 May 2021.

²⁴¹ Constitution of the Republic of the Philippines 1987 (n 236) art II, s 2.

²⁴² This phrase finds its roots in Section 4 of the German Constitution and Section 7 of the Constitution of the Republic of Spain, where the framers intended to incorporate principles of international law expressly into municipal law, ‘the observance of which would be necessary to the preservation of the family of nations’. See Diane A Desierto, ‘A Universalist History of the 1987 Philippine Constitution (II)’ (2010) 11 *Historia Constitucional* 427.

²⁴³ Joaquin G Bernas, *An Introduction to Public International Law* (Rex Book Store 2002).

²⁴⁴ Francis Tom Temprosa, ‘Reflections of a Confluence: International Law in the Philippine Court 1940-2000’ (2013) 19 *Asian Yearbook of International Law* 88, 113.

²⁴⁵ *ibid*; Saunders (n 240).

²⁴⁶ The Philippine Disaster Risk Reduction and Management Act 2010, Rep Act No 10121 (Philippines) (DRRMA).

²⁴⁷ Special Protection of Children Against Abuse, Exploitation and Discrimination Act 1992, Rep Act No 7610 (Philippines) (SPCAAED).

Magna Carta of Women, 2009,²⁴⁸ the Indigenous People's Rights Act, 1997,²⁴⁹ and the Local Government Code, 1991.²⁵⁰

i) *Disaster Risk Reduction and Management Act, 2010*

149. The DRRMA institutionalises the State's approach to disaster situations, by putting into place policies and plans of action pertaining to disaster risk reduction and management, including the humanitarian assistance that internally displaced persons are entitled to.²⁵¹ As the country's primary humanitarian legislation, it regulates State responses to displacements caused by both disasters and armed conflict.²⁵²

150. The DRRM defines disaster as 'a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources.'²⁵³ This definition is wide, and the focus is on the nature of impact or consequences flowing from a disaster, instead of the factors of causation. Moreover, the definition recognises that disasters are often 'a result of the combination of: the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences.'²⁵⁴

151. The DRRMA establishes the NDRRMC, which is empowered with policy-making, coordination, integration, supervision, monitoring and evaluation functions,²⁵⁵ in relation to the management and mobilisation of resources for disaster risk reduction and management, including the National Disaster Risk Reduction and Management Fund.²⁵⁶ The NDRRMC is also expected to 'coordinate or oversee the implementation of the country's obligations with disaster management treaties and ensure that such obligations are incorporated into local disaster management frameworks, policies, plans and projects'.²⁵⁷

²⁴⁸ Magna Carta of Women 2009, Rep Act No 9710 (Philippines) (MCW).

²⁴⁹ Indigenous People's Rights Act 1997, Rep Act No 8371 (Philippines) (IPRA).

²⁵⁰ Local Government Code 1991, Rep Act No 7160 (Philippines) (LGC).

²⁵¹ Lara Victoria O Estevez, 'Philippine Compliance with International Standards for the Protection of Internally Displaced Persons' (2015) 89 Philippine Law Journal 374, 399-403.

²⁵² Reinna S Bermudez, Maria Camille Anne P Estonio, and Hector Dominic D Aleman, 'Displacements in the Philippines in a Post-Covid 19 Word: A Recovery Focus' (2020) 39(4) Refugee Survey Quarterly 602.

²⁵³ DRRMA (n 246) s 3(h).

²⁵⁴ *ibid*.

²⁵⁵ *ibid* s 6.

²⁵⁶ *ibid* s 6(a).

²⁵⁷ *ibid* s 6(q).

ii) *Special Protection of Children in Situations of Armed Conflict Act, 2019*

152. The Special Protection of Children in Situations of Armed Conflict Act, 2019 (SPCSAC) seeks to provide special protection to children in situations of armed conflict.²⁵⁸ Importantly, Section 8 of the law provides: ‘The State shall take all feasible measures to prevent the...displacement of...children involved in armed conflict.’ This is in line with the requirement under Principles 5 and 7(1) of the UN Guiding Principles, to avoid and prevent internal displacement.

153. The scope of application of this law extends to even children ‘displaced by armed conflict.’²⁵⁹ It defines ‘internally displaced children’ as children or a group of children, whether separated or together with their families, 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 effect of armed conflict and situations of generalised violence.²⁶⁰ It protects, *inter alia*, the rights of internally displaced children and their families ‘to move freely in and out of evacuation centers or other settlements’, and ‘to leave the country; seek safety in another part of the country; seek other service providers; seek asylum in another country; and be protected against forcible return to resettlement in any place where their life, safety, liberty or health would be at risk.’²⁶¹ This is in line with Principle 8 of the UN Guiding Principles.

iii) *Special Protection of Children Against Abuse, Exploitation and Discrimination Act, 1992*

154. The Special Protection of Children Against Abuse, Exploitation and Discrimination Act, 1992 (SPCAAED) was enacted to provide special protection to children against abuse, neglect, cruelty, exploitation, discrimination, and other conditions prejudicial to their development.²⁶² Among other things, the Act requires that children be given priority during evacuation as a result of circumstances which gravely threaten or endanger the survival and normal development of children,²⁶³ including situations of displacement as a result of armed conflict or natural disaster. It provides for existing community organisation to look after the well-being and safety of children during evacuation operations and provides for measures to be taken to ensure that the children evacuated are accompanied by persons who are responsible

²⁵⁸ Special Protection of Children in Situations of Armed Conflict Act 2019, Rep Act No 11188 (Philippines) s 2 (SPCSAC).

²⁵⁹ *ibid* s 3.

²⁶⁰ *ibid* s 5(v).

²⁶¹ *ibid* s 7.

²⁶² SPCAAED (n 247) s 2.

²⁶³ *ibid* s 3(c).

for their safety and well-being.²⁶⁴ The Act also provides that wherever possible, members of the same family are to be housed in the same premises and given separate accommodation from other evacuees and provided with facilities to lead a normal family life.²⁶⁵ In places of temporary shelter, the Act mandates that expectant and nursing mothers and children shall be given additional food in proportion to their physiological needs.²⁶⁶ These protections are in line with Principle 7(2) of the UN Guiding Principles.

iv) Magna Carta of Women, 2009

155. The Magna Carta of Women, 2009 (MCW) was signed to incorporate into national law the Convention on the Elimination of All Forms of Discrimination Against Women.²⁶⁷ It states that women have the right to protection and security in times of disasters, calamities, and other crisis situations, in all phases of relief, recovery, rehabilitation and construction efforts.²⁶⁸ The State has to ensure the provision of immediate humanitarian assistance, allocation of resources, and early resettlement, where possible. In doing so, it also has to address the specific needs of women to protect them from sexual exploitation and other sexual and gender based violence.²⁶⁹ The State also has to provide *inter alia* psychosocial support, livelihood support, education, and comprehensive health services as a part of its response to disaster situations.²⁷⁰ This follows Principle 7(3)(d) of the UN Guiding Principles.

v) Indigenous People's Rights Act, 1997

156. The Indigenous People's Rights Act was signed into law to recognise and promote the rights of Indigenous Cultural Communities (ICCs) and Indigenous Peoples (IPs).²⁷¹ The Act vests *inter alia* the right to stay in the territories and not be removed.²⁷² This reflects Principle 9 of the UN Guiding Principles.

157. In line with Principle 7(3)(c) of the UN Guiding Principles, the Act further mandates that if relocation is considered necessary as an exceptional measure, such relocation can only take place with the free and prior informed consent of the ICCs/IPs concerned and whenever

²⁶⁴ *ibid* s 23.

²⁶⁵ *ibid* s 24.

²⁶⁶ *ibid*.

²⁶⁷ MCW (n 248) s 2.

²⁶⁸ *ibid* s 10.

²⁶⁹ *ibid*.

²⁷⁰ *ibid*.

²⁷¹ IPRA (n 249) s 2.

²⁷² *ibid* s 7(c).

possible, they shall be guaranteed the right to return to their ancestral domain as soon as the grounds of relocation cease to exist.²⁷³ In the event that such a return is not possible, the ICCs/IPs shall be provided in all possible cases with lands of quality and legal status that is at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development.²⁷⁴ ICCs/IPs who have been relocated shall also be fully compensated for any resulting loss or injury.²⁷⁵ These provisions seek to secure the right to an effective remedy, guaranteed by Principle 7(3)(f) of the UN Guiding Principles.

158. In specifically recognizing the rights of ICCs/IPs to their ancestral domain, the Act provides that should their ancestral domain cease to exist and if normalcy and safety of the previous settlements are not possible, then the displaced ICCs/IPs shall enjoy security of tenure over lands to which they have been resettled.²⁷⁶ The State is mandated to ensure that basic services and livelihood is provided to the displaced ICCs/IPs and to ensure that their needs are adequately addressed.²⁷⁷

159. Furthermore, in accordance with Principle 9 of the UN Guiding Principles, the Act also enlists that the ICCs/IPs have the right to special protection and security in periods of armed conflict, stating categorically that the State shall observe international standards, and inter alia not force indigenous individuals to abandon their lands, territories and means of subsistence, or relocate them in special centres for military purposes under any discriminatory condition.²⁷⁸

vi) The Local Government Code, 1991

160. The Local Government Code, 1991 (LGC) implements the Philippine Constitution's policy of local autonomy for local government units (LGU) by providing for operative principles of decentralisation.²⁷⁹ Among other provisions, it also provides for the protection of IDPs.²⁸⁰ It mandates the sangguniang bayan, as the legislative body of the municipality, to adopt measures to protect the inhabitants of the municipality from the harmful effects of human-made or natural disasters and calamities.²⁸¹ Local government units are further expected to provide

²⁷³ *ibid.*

²⁷⁴ *ibid.*

²⁷⁵ *ibid.*

²⁷⁶ *ibid* s 7(d).

²⁷⁷ *ibid* s 7(d).

²⁷⁸ *ibid* s 22.

²⁷⁹ LGC (n 250) s 3.

²⁸⁰ Estevez (n 251) 402.

²⁸¹ *ibid* (n 250) s 447 (a)(iv), s 458(a)(1)(iv), s 468(a)(1)(iv).

relief services and assistance to victims during and in the aftermath of the said disasters or calamities, and ensure their return to productive livelihood following the said event.²⁸²

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

161. There are three key legislations that have been passed since 2010 that deal with the enforcement of international humanitarian law in the Philippines.²⁸³ These include the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, 2009 (CAIHL)²⁸⁴ and the SPCSAC. However, it is also pertinent to note that as of 17 March 2019, the Philippines has withdrawn from the Rome Statute.²⁸⁵

162. The CAIHL serves as the domestic enactment of the generally accepted principles of international law, including the Hague Conventions of 1907, the Geneva Convention's on the protection of victims of war, and international humanitarian law. In the specific context of displacement of persons, Section 6(d) reflects the inclusion of 'arbitrary deportation or forcible transfer of population' as a crime against humanity.²⁸⁶ Section 3(b) explains the scope of 'arbitrary deportation or forcible transfer of population' to include '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 domestic or international law.'²⁸⁷ Section 4(a)(6) reflects the inclusion of 'arbitrary deportation or forcible transfer of population or unlawful confinement' as a war crime.²⁸⁸ Section 4(c)(17) provides further that 'transferring, directly or indirectly, by the occupying power of parts of its own civilian population into the

²⁸² *ibid.*

²⁸³ International Committee of the Red Cross, 'Philippines: Strengthening Domestic Knowledge and Enforcement of IHL' (13 August 2020) <<https://www.icrc.org/en/document/strengthening-domestic-knowledge-and-enforcement-ihl>> accessed 22 May 2021.

²⁸⁴ Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity 2009, Rep Act No 9851 (Philippines) (CAIHL).

²⁸⁵ Coalition for the International Criminal Court, 'The Philippines' Membership in the ICC Comes to an End' (15 March 2019) <<https://www.coalitionfortheicc.org/news/20190315/philippines-leaves-icc>> accessed 22 May 2021; Al Jazeera, 'Philippines Officially Out of the International Criminal Court' (17 March 2019) <<https://www.aljazeera.com/news/2019/3/17/philippines-officially-out-of-the-international-criminal-court>> accessed 22 May 2021.

²⁸⁶ CAIHL (n 284) s 6(d) (in relation to art 7(1)(d) of the Rome Statute of the International Criminal Court (Rome Statute)).

²⁸⁷ *ibid* s 3(b) (in relation to art 7(2)(d) of the Rome Statute).

²⁸⁸ *ibid* s 4(a)(6) (in relation to art 8(2)(a)(vii) of the Rome Statute).

territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside this territory' is a war crime.²⁸⁹ Section 4(c)(16) enumerates 'the ordering of displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand' amount to a war crime.²⁹⁰

163. The CAIHL further enumerates that any person found guilty of committing any of the acts enlisted above, shall suffer the penalty of 'reclusion temporal in its medium to maximum period and a fine ranging from one hundred thousand pesos (Php 100,000.0) to five hundred thousand pesos (Php 500,000.0).²⁹¹ In situations justified by the extreme gravity of the crime, especially where the commission of any act of crime enlisted in CAIHL results in death, serious physical injury or constitutes rape, the penalty of 'reclusion perpetua and a fine ranging from five hundred thousand pesos (Php 500,000.0) to one million pesos (Php 1,000,000.0) shall be imposed'.²⁹²

164. Under the SPCSAC, any public officer who knowingly and maliciously prevents, prohibits, refuses or discontinues the implementation of any provision of the Act (including Section 8 mentioned above) shall be punished by imprisonment of not less than six (6) years but not more than twelve (12) years and perpetual absolute disqualification from public office. An officer who prevents, prohibits, refuses or discontinues the implementation of any provision of the Act by reason of inexcusable negligence or ignorance, shall suffer the penalty of imprisonment of not less than one (1) month but not more than six (6) months and temporary special disqualification from public office.²⁹³

165. While the IDP Bill mentioned above intended to criminalise the commission of acts of arbitrary internal displacement, incitement to such acts, cooperation in such acts, attempts to commit such acts, threats to commit such acts, etc.,²⁹⁴ it did not come into force.

166. The DRRMA criminalises several acts in relation to disaster risk reduction and management. Persons, groups or corporations are prohibited from: (i) dereliction of duties which would

²⁸⁹ *ibid* s 4(c)(17) (in relation to art 8(2)(b)(viii) of the Rome Statute).

²⁹⁰ *ibid* s 4(c)(16) (in relation to art 8(2)(e)(viii) of the Rome Statute).

²⁹¹ *ibid* sec 7.

²⁹² *ibid*.

²⁹³ SPCSAC (n 258) s 10.

²⁹⁴ IDP Bill 2013 (n 230) s 10.

lead to destruction, loss of lives, critical damage of facilities and misuse of funds;²⁹⁵ (ii) preventing the entry and distribution of relief goods in disaster-stricken areas;²⁹⁶ (iii) buying for consumption or resale, from disaster relief agencies any relief material intended for distribution to disaster affected communities;²⁹⁷ (iv) buying for consumption or resale, any relief material originally received by a disaster affected person;²⁹⁸ (v) selling of relief material intended for distribution to disaster victims;²⁹⁹ (vi) forcibly seizing relief material intended for or consigned to a specific group of victims of relief agency;³⁰⁰ (vii) diverting or mis-delivery of relief material to persons other than the rightful recipient;³⁰¹ (viii) accepting, possessing, using or disposing relief material not intended for the entity in possession;³⁰² (ix) misrepresenting the source of relief material;³⁰³ (x) substituting or replacing relief material with the same items of inferior/cheaper quality;³⁰⁴ (xi) deliberate use of false or inflated data in support of the request for funding, relief material for emergency assistance or livelihood projects;³⁰⁵ and (xiii) tampering with or stealing hazard monitoring and disaster preparedness equipment and paraphernalia.³⁰⁶ Any individual, corporation, partnership, association, or other juridical entity that commits these acts shall be liable to a fine of not less than fifty thousand pesos (PHP 50,000) or any amount not more than five hundred thousand pesos (PHP 500,000), or imprisonment of not less than six years and one day or more than 12 years or both.³⁰⁷ The penalty is at the discretion of the court, including perpetual disqualification from public office if the offender is a public officer, and confiscation or forfeiture in favour of the government of the objects used in committing the prohibited act.³⁰⁸

167. The SPCAAED, in the context of children in armed conflicts, criminalises any violations of the provisions of the Act. The penalty imposed shall be in its maximum period in cases of repeated conviction, in cases where the offender is a corporation, partnership or association, and in cases where the offender is a public officer or employee.³⁰⁹ If the penalty imposed is

²⁹⁵ DRRMA (n 246) s 19(a).

²⁹⁶ *ibid* s 19(b).

²⁹⁷ *ibid* s 19(c).

²⁹⁸ *ibid* s 19(d).

²⁹⁹ *ibid* s 19(e).

³⁰⁰ *ibid* s 19(f).

³⁰¹ *ibid* s 19(g).

³⁰² *ibid* s 19(h).

³⁰³ *ibid* s 19(i);

³⁰⁴ *ibid* s 19(j);

³⁰⁵ *ibid* s 19(l);

³⁰⁶ *ibid* s 19(m);

³⁰⁷ *ibid* s 20.

³⁰⁸ *ibid*.

³⁰⁹ SPCAAED (n 247) s 31.

reclusion perpetual or reclusion temporal, then the penalty of perpetual or temporary absolute disqualification shall also be imposed.³¹⁰ If the penalty imposed is prision correccional or arresto mayor, the penalty of suspension shall also be imposed.³¹¹ In conjunction with these, a fine will also be imposed on the offender, disbursed as a cash fund for the rehabilitation of each child victim.³¹²

168. The MCW also mandates penalties for any violation of the provisions of the Act.³¹³ Upon a finding by the Commissioner of Human Rights that a government body has violated any provision of the Act, sanctions under administrative law, civil service, or other appropriate laws shall be recommended.³¹⁴ Both, the person directly responsible for the violation, as well as the head of the agency or local chief executive shall be held individually liable. Offending individuals are liable to pay damages.³¹⁵ In the case of violence proven to be perpetrated by State agents, extrajudicial killings, enforced disappearances, torture and internal displacements are considered to be aggravating offenses with corresponding penalties depending on the severity of the offenses.³¹⁶

169. The Indigenous People's Rights Act enlists penalties for the violation of the provisions of the Act, noting that any such violation, including but not limited to the unauthorised and/or unlawful intrusion upon any ancestral land or domain, shall be punished in accordance with the customary laws of the ICCs/IPs concerned.³¹⁷ In conjunction with the customary law, any conviction under the Act for a violation of its provisions, shall be punished by imprisonment of not less than nine months but not more than 12 years or a fine of not less than 100,000 thousand pesos (PHP 100,000) but not more than 500,000 pesos (PHP 500,000) or both, with the fine and imprisonment being contingent on the discretion of the court.³¹⁸ In addition, the offender shall also be obliged to pay damages to the ICCs/IPs concerned, in accordance to the harm suffered by the ICCs/IPs as a consequence of the violating act.³¹⁹ The Act further notes that if the offender is a juridical person, all such officers, such as (but not limited to) its

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² *ibid* s 31(f).

³¹³ MCW (n 248) s 41.

³¹⁴ *ibid.*

³¹⁵ *ibid.*

³¹⁶ *ibid.*

³¹⁷ Provided that no such penalty accorded by customary laws of the ICCs/IPs is cruel, degrading or inhuman punishment, nor does it call for death penalties or excessive fines. IPRA (n 249) s 72.

³¹⁸ *ibid.*

³¹⁹ *ibid.*

president, manager or head of office who are responsible for the unlawful act, shall be criminally liable.³²⁰ This would also result in the cancellation of certificates of their registration and/or license. If the offender is a public official, the penalty shall also include perpetual disqualification to hold public office.³²¹

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

a) Best Practices

170. Given the increased occurrence of severe natural disasters, the State’s response has been to ensure that disaster risk reduction is prioritised and supported by national policies and a legal framework, along with demarcated decentralised responsibilities and capacities at all levels.³²² In that context, the state has prioritised community preparedness, that is in turn driven by extensive data collection on the imminent disaster as well as the local communities.

i) Community Participation

171. A key factor in mitigating the displacement risk from natural disasters has been the level of local community preparedness. One such illustration of preparedness can be seen with the partnership between the International Organisation for Migration (IOM) and Manila’s most vulnerable cities to natural disasters, to strengthen community-based preparedness for disaster risk, especially in the event of earthquakes.³²³ Between 2017-2018, the project engaged with the local residents of Navotas, Pateros and Quezon. The project focussed on training the residents for situations of mass evacuation and camp management in vulnerable urban barangays facing imminent threats of earthquake and flood hazards. The most precarious barangays were selected for the project. IOM consulted local administration, along with community elders and members to gain support, advice and collaboration for the training. Following the training, local government officials and local civil-society organisations led barangay-level evacuation processes, mapping out detailed evacuation routes with the help of

³²⁰ *ibid* s 73.

³²¹ *ibid*.

³²² Glenn J Rabonza, ‘National Progress Report on The Implementation of the Hyogo Framework for Action’ (National Disaster Coordinating Council, 2009) <https://www.preventionweb.net/files/7495_Philippines%5B1%5D.pdf> accessed 13 May 2021.

³²³ Global Protection Cluster, ‘Working Together Better to Prevent, Address and Find Durable Solutions to Internal Displacement: GP20 Compilation of National Practices’ (2020) 144.

local knowledge of the areas.³²⁴ Such locally led training and community participation, and the lessons learnt through these simulations, have helped identify potential dangers and also the specific needs vulnerabilities of groups within the community, in situations of evacuation.³²⁵

ii) Collation of Disaster Data

172. The Philippines has also acknowledged the importance of data to disaster preparedness. The Disaster Response Operations Monitoring and Information Centre (DROMIC) creates a repository for disaster data.³²⁶ The Department of Social Welfare and Development (DSWD) leads the delivery of humanitarian assistance and early recovery plans for the displaced persons.³²⁷ The DROMIC gathers disaggregated data (pertaining to metrics like age, gender and disability) and information on the disaster (for example, meteorological and volcanic metrics) along with information on the displaced persons and other affected populations, evacuation sites, extent of damage, availability of humanitarian aid and local support networks amongst other metrics.³²⁸ It then utilises predictive analytics to predict future disaster situations, and then employs these baseline data and information to plan durable solutions, help communities become resilient to the incidence of the disaster and prepare for recovery.³²⁹ In 2018, the DSWD launched the pilot Disaster Vulnerability Assessment and Profiling Project (DVAPP) to initiate data collection and analysis on displacement risk. Relying on DROMIC's predictive analysis, the DSWD then identifies the hazard prone areas that face high displacement risk.³³⁰ Local and Municipal Disaster Risk Reduction and Management Councils also use DROMIC's scientific data, risk assessments and past disaster data to then forecast future risk and order pre-emptive evacuations.³³¹

b) Gaps in Implementation

173. While some displaced communities were able to return to the areas of their residence, others continued to live in temporary, camp-like arrangements for a prolonged period of time.

³²⁴ *ibid* 146.

³²⁵ *ibid*.

³²⁶ Barbara Essig, Sebastien Moretti, Platform on Disaster Displacement Secretariat, 'Preventing and Preparing for Disaster Displacement' (2020) *Forced Migration Review* 1, 20.

³²⁷ Global Protection Cluster (n 323) 149.

³²⁸ Essig (n 326).

³²⁹ *ibid*.

³³⁰ Global Protection Cluster (n 323) 149.

³³¹ For example, during Typhoon Ramon in 2019, the municipal DRRMCs in northern Cagayan pre-emptively evacuated residents based on areas most impacted during previous typhoons according to imminent disaster data collected. See Angely L Mercado, 'Cagayan Towns Effect Pre-Emptive Evacuation' (Philippine Information Agency, 19 November 2019) <<https://pia.gov.ph/news/articles/1030401>> accessed 13 May 2021; Global Protection Cluster (n 323) 150.

Durable solutions to the issues posited by human-made disasters and natural calamities remain missing, despite the intentions of the Philippine state, as is evident from the examples below.

i) State Response to Typhoon Haiyan

174. Typhoon Haiyan made landfall on 8 November 2013, causing the displacement of over 4 million people.³³² In context of the terms of displacement, the mass evacuation of residents in Visayas in anticipation of, and in the direct aftermath of, Haiyan was prompted by the State in light of the imminence of the disaster. While the length of the displacement was to last no longer than as required by the exigent circumstances, 20,000 displaced persons continued to live in the 56 displacement sites with host families, a year after the disaster.³³³

175. In terms of access to basic facilities, although government-run camps and transitory sites provided for basic assistance through food, water, sanitation and shelter, such assistance was inadequate to meet the needs of the IDPs.³³⁴ Despite the distribution of over five million food packs in the Haiyan evacuation centre, those in the resettlement areas had poor quality of housing, overflowing toilets, lack of regular garbage disposal and no access to potable water or electricity.³³⁵ Inevitably, the incidence and risk of communicable and water-borne disease was relatively high.³³⁶ Major challenges to the housing construction and redevelopment emerged from lack of funds, and bureaucratic deadlocks that delayed clearances for projects and permits.³³⁷ Political differences and corruption allegations plagued the process further.³³⁸

176. Most residents of the bunkhouses reported that they lacked regular income, access to jobs, livelihood opportunities and projects.³³⁹ Displaced children had to drop out of formal education due to lack of schools or school facilities and seek income generating activities to

³³² UNGA, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to the Philippines' (5 April 2016) UN Doc A/HRC/32/35/Add.3, 5 <<https://digitallibrary.un.org/record/842523?ln=en>> accessed 31 May 2021.

³³³ UNHCR, '1-Year on from Typhoon Haiyan, Thousands of People Still Rebuilding Lives' (2014) <<https://www.unhcr.org/uk/news/briefing/2014/11/545c9cda6/1-year-typhoon-haiyan-thousands-people-still-rebuilding-lives.html>> accessed 9 May 2021.

³³⁴ Angela Sherwood, Megan Bradley, Lorenza Rossi, Rufa Guiam, and Bradley Mellicker, 'Resolving Post-Disaster Displacement: Insights from the Philippines after Typhoon Haiyan (Yolanda)' (Brookings 2015) 40.

³³⁵ Jazmin Bonifacio, 'More Than a Year After Yolanda: Home Sweet Home?' (Rappler, 25 April 2015) <<https://www.rappler.com/nation/poor-quality-relocation-yolanda>> accessed 9 May 2021. See also UNGA (n 332) [24].

³³⁶ Miguel Antonio Salazar, Ronald Law, Arturo Pesigan and Volker Winkler, 'Health Consequences of Typhoon Haiyan in the Eastern Visayas Region Using a Syndromic Surveillance Database' (2017) PLOS Currents 9.

³³⁷ UNGA (n 332) [23].

³³⁸ *ibid.*

³³⁹ *ibid* [32].

support their families.³⁴⁰ Of those affected, the government assistance was limited and often reached certain sections of the rehabilitated society only.³⁴¹

ii) *State Response to Zamboanga armed conflict*

177. In September 2013, an offensive led by the Moro National Liberation Front (MNLFF) against the Armed Forces of the Philippines in Zamboanga resulted in the displacement of over 118,000 persons.³⁴²

178. The evacuation of the displaced was prompted by the state on account of the imminent threat of the residents of the barangays being taken hostage³⁴³ and being caught in the crossfire.³⁴⁴ While the state declared the military crisis in Zamboanga over on 28 September 2013,³⁴⁵ the incidence of violence and the protracted nature of the conflict continues to prompt further displacement.³⁴⁶

179. The vast majority of those displaced belonged to the Muslim minority.³⁴⁷ Out of over 17,000 internally displaced persons across 12 transitional sites, two thirds comprised the Tausug (who originated from the Sulu archipelago) and one third comprised the indigenous peoples of Zamboanga.³⁴⁸ As a result, the conflict has particularly affected the poorest and historically marginalised, rendering them more vulnerable to the ethno-political clashes that continue to prevail in the region.³⁴⁹

180. Most of the displaced residents in the Cawa-Cawa camp were the Badjaos people, who lived in coastal areas and derived their livelihood from fishery.³⁵⁰ They were prohibited from returning to their coastal villages, and were instead relocated to the mountains.³⁵¹ Reports suggest that they were not consulted about their relocation, rendering their displacement

³⁴⁰ *ibid.*

³⁴¹ *ibid* [31].

³⁴² *ibid* [45].

³⁴³ Estevez (n 251) 404.

³⁴⁴ *ibid.*

³⁴⁵ *ibid* 405.

³⁴⁶ Nick Aspinwall, 'Thousands of Families Are Being Displaced by Violent Clashes in Mindanao' (The Diplomat, 2 April 2021) <<https://thediplomat.com/2021/04/thousands-of-families-are-being-displaced-by-violent-clashes-in-mindanao/>> accessed on 5 May 2021.

³⁴⁷ UNGA (n 332) [47].

³⁴⁸ *ibid.*

³⁴⁹ Aspinwall (n 346).

³⁵⁰ Estevez (n 251) 408.

³⁵¹ *ibid.*

arbitrary.³⁵² Further, the aftermath of the Zamboanga conflict also witnessed greater incidence of sexual exploitation, human trafficking, drug use and gender based violence against women and children in camps and transitory sites.³⁵³ This risk of exploitation was further accentuated by the lack of electricity, chronic power outages and limited police presence in the camps.³⁵⁴ In terms of access to basic facilities, water shortages were frequent.³⁵⁵ Poor sanitation facilities rendered the camps critically unsanitary, increasing the incidence of communicable diseases.³⁵⁶ Almost 200 deaths in the displacement camps were due to pneumonia.³⁵⁷

181. The state's ambitious reconstruction and rehabilitation plan had glaring gaps. The plan focussed primarily on physical reconstruction and prohibited the displaced evacuees to return to their origins before the plan was finalised.³⁵⁸ While nearly 10,000 homes were destroyed by the conflict, the reconstruction sought to build only 5,581 new homes and support 1,661 families, leaving nearly 30% of the displaced out of the rehabilitation net.³⁵⁹ Further, it prioritised those displaced persons who had formal land ownership.³⁶⁰ As a consequence, those without proof of land ownership were relegated as 'informal settlers' or 'illegal squatters' and were denied State support or assistance.³⁶¹

182. While the state was successful in meeting the immediate needs of the displaced persons in both situations of armed conflict and the natural disaster, the local authorities faced challenges in the long-term recovery, reintegration, and rehabilitation of the displaced.³⁶² Limited access to adequate food, water, shelter, and healthcare, compounded further by communicable diseases, and limited assistance to relocate to an area of their choice or their origin, has resulted in a systemic protraction of violation of rights of the displaced.³⁶³

³⁵² *ibid.*

³⁵³ IDMC, 'Philippines: Long Term Recovery Challenges Remain in the Wake of Massive Displacement' (2015) <<https://www.internal-displacement.org/sites/default/files/publications/documents/201502-ap-philippines-overview-en.pdf>> accessed on 9 May 2021.

³⁵⁴ *ibid.*

³⁵⁵ *ibid.*

³⁵⁶ International Committee of the Red Cross, 'Philippines: Features of Displacement' (2014) <<https://www.icrc.org/en/doc/resources/documents/photo-gallery/2014/07-03-philippines-displacement-zamboanga.htm>> accessed on 9 May 2021.

³⁵⁷ Estevez (n 251) 409.

³⁵⁸ IDMC, 'Death in Displacement: Why the Philippine Government Must Allow Zamboanga's IDPs To Go Back Home' (2014) <<https://www.internal-displacement.org/expert-opinion/death-in-displacement-why-the-philippine-government-must-allow-zamboangas-idps-to-go>> accessed 9 May 2021.

³⁵⁹ *ibid.*

³⁶⁰ *ibid.*

³⁶¹ *ibid.*

³⁶² IDMC 2014 (n 358).

³⁶³ *ibid.*

c) Lack of Legal Framework

183. The lack of a legal framework, eliciting the rights of internally displaced persons, is a critical factor in understanding the status of the displaced in the Philippines. While the DRRMA provides a skeletal and procedural framework that facilitates, decentralises and coordinates the structure of the disaster response, it does not encompass provisions for long term recovery and rehabilitation of the displaced persons, nor does it include the substantive language of rights of the displaced that need to be accounted for in the process. As a result of this gap, displaced persons still stay in evacuation camps, long after the incidence of the disaster.³⁶⁴ As both national and local governments do not have a comprehensive framework to address displacements, the achievement of durable, long-term solutions remains bleak, thereby exposing displaced persons to longer durations of displacement.³⁶⁵

³⁶⁴ Bermudez (n 252); Jhesset O Enano, 'Six Years After 'Yolanda', Mental Scars Linger' (Philippine Daily Inquirer, 8 November 2019) <<https://newsinfo.inquirer.net/1187193/6-years-after-yolanda-mental-scars-linger>> accessed 9 May 2021.

³⁶⁵ Bermudez (n 252).

TURKEY

184. One of the major causes of internal displacement in Turkey is the armed conflict between the government of Turkey and the Kurdish political movement. The Turkish-Kurdish war led to the internal displacement of about 1.2 million people. Since then, further displacement was triggered by security operations in 2015 and the state of emergency in effect from 2016 to 2018.³⁶⁶ Disasters are another major cause of internal displacement in Turkey.³⁶⁷ Large scale development projects, like the Large Southeast Anatolia Project (Güneydoğu Anadolu Projesi, GAP) and the Ilisu Hydroelectric Dam Project, have also displaced several people.³⁶⁸ In this backdrop, this section addresses how Turkey gives domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ IN DIFFERENT JURISDICTIONS?

a) Armed Conflict/ Security Concerns

185. The 1983 State of Emergency Law allows the Government of Turkey to declare a state of emergency in case of ‘the appearance of serious indications resulting from widespread acts of violence designed to eliminate the free democratic order established by the Constitution or fundamental rights and freedoms or violent actions causing serious deterioration of public order’.³⁶⁹ It authorises the ‘prohibition of persons or groups of persons believed to be disrupting public order or public security from entering the concerned region, expulsion of such persons or groups from the region, or imposition of a requirement on them to reside in or enter specified places in the region’ in order to ‘protect general security, safety and public order and to prevent the spread of acts of violence’.³⁷⁰ While Principle 6(2)(b) of the UN Guiding Principles acknowledges that in situations of armed conflict, displacement may occur in the interest of ‘the security of the civilians involved’, the 1983 Law has been a major cause of protracted internal displacement in Turkey.

³⁶⁶ IDMC, ‘Turkey’ <<https://www.internal-displacement.org/countries/turkey>> accessed 31 May 2021.

³⁶⁷ *ibid.*

³⁶⁸ IDMC ‘Lessons Not Learned: Turkey’s Ilisu Dam’ (18 July 2017) <<https://www.internal-displacement.org/sites/default/files/inline-files/20170719-idmc-turkey-dam-case-study2.pdf>> accessed 31 May 2021.

³⁶⁹ Law 2935 of 1983 (Turkey) art 1.

³⁷⁰ *ibid* art 11(k).

186. Increased clashes between Turkish forces and the Kurdistan Workers' Party (PKK) led to the declaration of a state of emergency in a number of provinces in 1987. This led to gross violations of domestic and international law, and allowed Turkish security forces to cause mass displacement and destroy 3,500 towns and villages.³⁷¹ The peak occurred in the 1990s, when between 3 and 4 million villagers were forced out of their homes. Around 1 million IDPs are still unable to return to their homelands because of obstruction by village guards, landmines and poor socio-economic conditions.³⁷² Village Law No. 442 of 1924 and its subsequent amendments brought forth a 'village guard' paramilitary system in Turkey in 1985. Under this law, 'village guards' assumed control of the villages of Kurds and committed serious human rights violations, including displacement, and impeded the return of Kurds displaced from their villages during the 1990s.³⁷³ While the government has promised since 2002 to abolish the system, recruitment of village guards has continued. According to Human Rights Watch, rates of return in areas heavily dominated by village guards are markedly low and 'security forces often make village guard service an informal requirement for return.'³⁷⁴ Ironically, it was their refusal to join the village guard system that resulted in many IDPs' forced displacement, as such refusal provided the grounds for their forcible evacuation by Turkish authorities.³⁷⁵

187. The steps taken by the Government to address the problem are so far limited to the Return to Villages and Rehabilitation Project, which intends to secure the economic infrastructure for return, and the Law on Compensation for Damage Arising from Terror (Law 5233).³⁷⁶

i) Return to Village and Rehabilitation Project 1994

188. The Return to Village and Rehabilitation Project 1994 aims 'to ensure that those who left their villages for security reasons can return to their villages or settle in other suitable places to create sustainable life conditions by constructing necessary social and economic infrastructures'.³⁷⁷ The Project includes in its aims the initiation of resettlement studies, the

³⁷¹ Lucy Claridge and Catriona Vine, 'The Status of Internally Displaced Kurds in Turkey: Return and Compensation Rights: An Update' (Kurdish Human Rights Project and Bar Human Rights Committee of England and Wales 2006) <http://www.khrp.org/khrp-news/human-rights-documents/doc_download/97-the-status-of-internally-displaced-kurds-in-turkey--return-and-compensation-rights-an-update.html> accessed 31 May 2021.

³⁷² *ibid.*

³⁷³ Brookings Report 2011 (n 27) 71.

³⁷⁴ *ibid* 152.

³⁷⁵ *ibid* 152.

³⁷⁶ Claridge and Vine (n 371).

³⁷⁷ *ibid.*

identification of families who wish to return to their villages, provision of the necessary infrastructure and facilities within the abandoned and ruined villages, housing development, the completion of social facilities, and support for activities like agriculture, husbandry, beekeeping and handicrafts so that returning families can earn a living.³⁷⁸

189. However, since its inception, the Project has been heavily criticised by leading international organisations for its poor performance. The programme did not provide for prior consultations with IDPs on relocation and resettlement.³⁷⁹ In addition, return occurred on conditions to resettle not in their original villages, but in new ‘centralised’ villages. While the Turkish government claimed that the conditional return to ‘centralised’ villages was because of security and socio-economic factors, the Human Rights Association of Turkey has claimed that the underlying motive was to control and assimilate the villagers, thus preventing them from joining or assisting the armed opposition groups.³⁸⁰ However, IDPs suspected of sympathizing and supporting armed opposition groups were denied assistance and intimidated by state security forces if they tried to return under this policy.

ii) *Law on Compensation for Damage Arising From Terror (Law No 5233)*

190. Turkey’s Law No. 5233 on Compensation of Damages That Occurred Due to Terror and the Fight against Terror (27 July 2004) could be said to give domestic effect to the right to effective remedy, guaranteed under Principle 7(3)(f) of the UN Guiding Principles. The law aims to grant compensation for ‘material damages suffered by persons due to terrorist acts or activities undertaken during the fight against terror’³⁸¹ in 1987-2004. While this addresses a large group of current IDPs, the law does not address the rights of those persons who got displaced after 2004.³⁸²

191. Article 10 of the law provides that damages shall be compensated either in kind or in cash, with in kind payment being given priority depending on resources.³⁸³ Article 2 provides that the following damages shall not be compensated by the State:

³⁷⁸ *ibid.*

³⁷⁹ Human Rights Watch, ‘Overview: Turkey’ (2004) <<http://hrw.org/english/docs/2003/12/31/turkey7023.htm>> accessed 31 May 2021.

³⁸⁰ Claridge and Vine (n 371).

³⁸¹ Law 5233 of 2004 (Turkey) arts 1 and 2.

³⁸² Brookings Report 2011 (n 27) 66.

³⁸³ Law 5233 of 2004 (n 381) art 10.

- a. Damages previously compensated by the government with the allocation of land or house or by other means,
- b. Damages previously compensated in accordance with a court judgment,
- c. Compensation previously paid in accordance with a judgment or friendly settlement decision of the European Court of Human Rights,
- d. Damages which occurred as a result of economic and social migration, rather than terrorism, or as a result of voluntarily migration which was not motivated by security concerns,
- e. Losses that were incurred through the intentional acts of the individuals, and
- f. Losses suffered by those who were convicted under the scope of Articles 1, 3 and 4 of the Anti-terror Law and sentenced for aiding and abetting the PKK.

iii) *Measures on the Issue of Internally Displaced Persons and the Return to Village and Rehabilitation Project in Turkey [Integrated Strategy Document adopted on 17 August 2005]*

192. In response to international criticism of the inadequacies of Law No 5233 and the Return to Village and Rehabilitation Project to support IDPs, the Council of Ministers in 2005 issued a framework document entitled ‘Measures on the Issue of Internally Displaced Persons and the Return to Village and Rehabilitation Project in Turkey’.³⁸⁴ Importantly, the Council of Ministers provided that ‘this integrated strategy shall take into consideration the UN Guiding Principles’.³⁸⁵

193. This strategy document defines IDPs as ‘persons or groups of persons who have either been forced or have been obliged to leave their homes or places of habitual residence without having crossed internationally recognised state borders, 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 man-made disasters.’³⁸⁶ It comes close to recognising all forms of arbitrary displacement recognised under Principle 6(2) of the UN Guiding Principles. It is unclear if the Turkish State had ethnic cleansing, apartheid or collective punishment in mind when they referred to ‘violations of human rights’ as a potential cause of displacement.

³⁸⁴ IDMC and the Turkish Economic and Social Studies Foundation, ‘Overcoming a Legacy of Mistrust: Towards Reconciliation Between the State and the Displaced’ (IDMC 2006) <<https://www.internal-displacement.org/sites/default/files/publications/documents/200601-eu-turkey-overcoming-a-legacy-of-mistrust-country-en.pdf>> accessed 31 May 2021.

³⁸⁵ Measures on the Issue of Internally Displaced Persons and the Return to Village and Rehabilitation Project in Turkey 2005 (Turkey) 2 <<https://www.refworld.org/docid/5a7aacca4.html>> accessed 31 May 2021.

³⁸⁶ *ibid* 1.

194. The strategy document provides that ‘returns will be on a voluntary basis and will not be subject to any permission’,³⁸⁷ which is in line with the spirit of seeking the ‘free and informed consent of those to be displaced’ under Principle 7(3)(c) of the UN Guiding Principles. In line with the right to an effective remedy ‘including the review of such decisions by appropriate judicial authorities’ under Principle 7(3)(f) of the UN Guiding Principles, the integrated strategy commits to prioritizing any complaints about provisional village guards within the framework of returns.³⁸⁸

195. Although not immediately relevant in the context of the prohibition or prevention of arbitrary internal displacement, the strategy document also commits to:

- a. Sufficiently consultations and cooperation with NGOs,³⁸⁹
- b. Making the administrative, legal and economic framework and the process of implementation public in a transparent manner,³⁹⁰
- c. Informing the public in detail of the instruments and mechanisms for addressing the issue, with their economic, social, cultural and legal aspects;³⁹¹
- d. Exploring possibilities to provide support and assistance to facilitate new living conditions for those citizens who do not wish to return and their integration into their new places of settlement.³⁹²

iv) Van Provincial Action Plan for Responding to IDP Needs

196. The Van Provincial Action Plan for Responding to IDP Needs was drafted by the Governorate of Van, in line with the UN Guiding Principles.³⁹³ It recognises *inter alia* that:

- a. All citizens of Turkey, including IDPs, have the freedom of movement within the boundaries of the State³⁹⁴ (in line with the ‘right to liberty’ recognised by Principle 8 of the UN Guiding Principles);
- b. Efforts should be made to ensure the safety and security of all IDPs³⁹⁵ (in line with Principle 8 of the UN Guiding Principles);

³⁸⁷ *ibid* Section II [1].

³⁸⁸ *ibid* Section II [5].

³⁸⁹ *ibid* Section II [10].

³⁹⁰ *ibid* Section II [11].

³⁹¹ *ibid*.

³⁹² *ibid* Section I [6].

³⁹³ Van Provincial Action Plan for Responding to IDP Needs 2006 (Turkey) Section I <<https://www.refworld.org/pdfid/5a84354c4.pdf>> accessed 31 May 2021.

³⁹⁴ *ibid* Section II [(a)].

³⁹⁵ *ibid* Section II [(c)].

- c. Wherever possible, opportunities must be created for the recipients of services to express their opinions and participate in decision-making related to all aspects of planning, from design to monitoring³⁹⁶ (in line with Principle 7(3)(d) of the UN Guiding Principles); and
- d. Increased attention be given to strengthening the roles of women in decision-making processes and other matters that may influence existing conditions³⁹⁷ (in line with Principle 7(3)(d) of the UN Guiding Principles).

b) Disasters and Large Scale Development Projects

197. The 1983 State of Emergency Law empowers the Government of Turkey to declare a state of emergency ‘whenever there exist one or more natural disasters’.³⁹⁸ It authorises the ‘prohibition of people from residing in certain localities in the concerned region; restriction of entry into and departure from certain areas; evacuation of certain areas or transfer of people to other areas’ and the ‘destruction of unsafe buildings’.³⁹⁹ While Principle 6(2)(d) of the UN Guiding Principles acknowledges that in cases of disasters, evacuation in the interest of the safety and health of those affected is permissible, the 1983 Law does not include the protection guarantees specified in Section II of the UN Guiding Principles.

198. In the wake of the Van Earthquake of 2011, the Turkish State passed Law No. 6306 of 2012, also called the Law on Restructuring of Areas under Risk of Natural Disasters. This Law *inter alia* provided for the principles and procedures for determination of areas at risk of natural disasters, evacuation, demolition of high risk buildings, and expropriation (in line with the Expropriation Law discussed below).⁴⁰⁰ However, once a building is deemed ‘high risk’, the administration has the authority to require its evacuation and demolition, even without the consent of the occupants.⁴⁰¹ This is not in line with Principle 7(3)(c) of the UN Guiding Principles.

199. Law No. 2090 of 1977,⁴⁰² also called the Law on the Aid to Farmers Affected By Natural Disasters, requires the Ministry of Food, Agriculture and Livestock to provide aid to farmers

³⁹⁶ *ibid* Section II [(d)].

³⁹⁷ *ibid* Section II [(f)].

³⁹⁸ Law 2935 of 1983 (Turkey) art 1.

³⁹⁹ *ibid* arts 9(a) and 9(f).

⁴⁰⁰ Law No 6306 of 2012 (Turkey).

⁴⁰¹ Oguz Gunes, ‘Turkey’s Grand Challenge: Disaster-Proof Building Inventory Within 20 Years’ (2015) 2 Case Studies in Construction Materials 18-34.

⁴⁰² Law No. 2090 of 1977 (Turkey).

who have suffered from natural disasters, in the form of in kind or in cash assistance. This follows Principle 9 of the UN Guiding Principles, by providing special protections to farmers.

200. Article 46 of the Turkish Constitution allows for the confiscation of property by a public agency in public interest, which reflects Principle 6(2)(c) of the UN Guiding Principles. It reads: ‘The State and public personality shall be entitled, where the public interest requires it, to expropriate privately owned real estate wholly or in part and impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance. The compensation for expropriation... shall be paid in cash and in advance.’

201. The relevant Turkish law in this matter is Expropriation Law No. 2942 (amended by Law No. 4650 in 2001). Pursuant to Article 8 of the law, the Reconciliation Commission is expected to reach an agreement with the owner of the immovable property as to the cost of expropriation.⁴⁰³ This is in line with the principle of consent under Principle 7(3)(c) of the UN Guiding Principles. In the absence of such an agreement, the relevant court of first instance is approached for determination of the cost of expropriation.⁴⁰⁴ Importantly, the owner of the asset can apply to the administrative court for the cancellation of expropriation.⁴⁰⁵ Further, if the owner is not satisfied with the amount of expropriation compensation determined by the court under Article 10, they can appeal to the Supreme Court. These provisions are in line with the right to effective remedy, including through judicial authorities, as recognised by Principle 7(3)(f) of the UN Guiding Principles.

202. The Government of Turkey, however, regularly invokes Article 27 of the Expropriation Law which provides that, subject to a Council of Ministers decree for national defence or in case of an emergency, any immovable property may be expropriated earlier than the time needed in normal expropriation procedure. Under the rules for such urgent expropriation, all procedures, except the initial evaluation of the immovable property, take place later. The evaluation is completed within 7 days, and confiscation carried out as soon as the

⁴⁰³ Expropriation Law No. 2942 of 1983 (Turkey) art 8.

⁴⁰⁴ *ibid* art 10.

⁴⁰⁵ *ibid* art 14.

compensation is deposited in the property owner's bank account. Such urgent expropriation is permitted without informing the right holders.⁴⁰⁶

203. While the Expropriation Law does not address resettlement of populations displaced by such expropriation, the Resettlement Law No. 5543 regulates government assistance with resettlement for families that request so. This emphasis on assisting the 'family' as a unit, and not individuals, may be read as giving domestic effect to the rule that families should not be separated, under Principle 7(2) of the UN Guiding Principles. Article 12 of the Law specifies that only the following families are eligible for such assistance:

- a. Families who have had to leave their locations as a result of partial or full expropriation of their immovable properties; and
- b. Families who did not own any immovable property, but who resided in the expropriation area at least for three years before the beginning of the calendar year in which the resettlement planning studies were commenced.⁴⁰⁷

204. However, affected families entitled to expropriation compensation have to commit to deposit a certain amount of this compensation with the government, in order to be eligible for such resettlement assistance. However, if they fail to do so, they will not be resettled.

205. Article 3 of the Resettlement Law states the types of resettlement that may be applied depending on the choices and requests of the affected families:

- a. Agricultural resettlement, where the family is provided agricultural land, house, animals, agricultural devices and tools, workbench and credit (which suggests that the special dependency of farmers and peasants on agricultural land is recognised, in line with Principle 9 of the UN Guiding Principles);
- b. Non-agricultural resettlement, where the family is provided a building plot, house, devices, tools, workbench and loans; and
- c. Physical Settlement, where the family is provided construction credit support to resettle within the boundaries of the same village.⁴⁰⁸

⁴⁰⁶ 'Resettlement Policy Framework for the Turkey Geothermal Development Project' (2016) 15 <<https://documents1.worldbank.org/curated/es/819191473357757015/pdf/SFG1378-V4-RP-P151739-Box396306B-PUBLIC-Disclosed-9-6-2016.pdf>> accessed 31 May 2021.

⁴⁰⁷ *ibid* 12.

⁴⁰⁸ *ibid* 12.

206. In line with Principle 9 of the UN Guiding Principles, Article 9 of the Resettlement Law recognises that farmer require special assistance in the former of land, necessary agricultural inputs, agricultural structures or plot of structure, and in kind and in cash operation and equipment credits as envisaged in agricultural resettlement project.⁴⁰⁹

c) Human Rights Law

207. Article 17 of the Turkish Constitution recognises that everyone has the right to life, and the right to human dignity. Article 19 of the Turkish Constitution further provides that everyone has the right to personal liberty and security. These two provisions are in line with Principle 8 of the UN Guiding Principles.

208. Turkey is party to the European Convention on Human Rights (ECHR), and is therefore expected to execute judgments of the European Court of Human Rights (ECtHR) in its respect. In this context, the ECtHR has, on several occasions, considered whether Turkey's policies have violated the right to home and family lives of internally displaced persons (particularly those displaced by security forces), as guaranteed under Article 8 of the ECHR, and the right to peaceful enjoyment of possessions under Article 1, Protocol No. 1 to the ECHR.⁴¹⁰ The ECtHR has awarded pecuniary and non-pecuniary damages⁴¹¹ (in line with the right to effective remedy under Principle 7(3)(f) of the UN Guiding Principles), including where necessary, by taking into account any loss of cultivated and arable land and loss of livestock⁴¹² (in line with the requirement under Principle 9 of the UN Guiding Principles to provide special protections to farmers, peasants, pastoralists, etc.). In the same vein, the ECtHR has also held that Turkey's obligation to provide resettlement assistance arises even if the displaced persons did not have registered property. For the court, it was enough that 'they had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling...in the Court's opinion, all these economic resources and the revenue that the

⁴⁰⁹ *ibid* 13.

⁴¹⁰ *Doğan v Turkey* App nos 8803/02-8811/02 & 8813/02 & 8815/02-8819/02 (ECtHR, 13 July 2006).

⁴¹¹ *Selçuk and Asker v Turkey* App nos 23184/94 & 23185/94 (ECtHR, 24 April 1998); *Menteş v Turkey* App no 23186/94 (ECtHR, 24 July 1998).

⁴¹² *Akdivar v Turkey* App no 21893/93 (ECtHR, 1 April 1998).

applicants derived from them may qualify as ‘possessions’ for the purposes of Article 1, Protocol No. 1.⁴¹³

209. Article 90 of the Turkish Constitution provides that: ‘The ratification of treaties...shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.’ Turkey ratified the ICCPR in 2003, and is therefore, bound by ICCPR guarantees which give effect to the prohibition on arbitrary internal displacement.

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

210. The Turkish Criminal Code does not criminalise forced or arbitrary internal displacement.⁴¹⁴

The only potential exception is Article 109(1) of the Criminal Code which guarantees to IDPs the right to the freedom of movement.⁴¹⁵ According to Article 109(1), ‘any person who unlawfully restricts the freedom of a person by preventing him from traveling or living in a place is sentenced to imprisonment from one year to five years’.⁴¹⁶ Where this offence is committed by misusing the influence derived from public office, or against a child or a person who cannot defend himself physically or mentally, the penalty to be imposed shall be doubled.⁴¹⁷ Where this offence results in the significant economic loss to the victim, an additional penalty of a judicial fine up to one thousand days shall be imposed.⁴¹⁸ In addition, according to Article 109 (6), if an aggravated injury on account its consequences is committed in order to commit this offence (or during the commission of this offence), then the provisions relating to intentional injury shall be additionally applied.

⁴¹³ *Doğan* (n 410) [139].

⁴¹⁴ Brookings Report 2011 (n 27) 70.

⁴¹⁵ *ibid.*

⁴¹⁶ *ibid.*

⁴¹⁷ Criminal Code 2004 (Turkey) art 109(3).

⁴¹⁸ *ibid* art 109(4).

211. Although Turkey is not a signatory or party to the Rome Statute of the International Criminal Court, it has criminalised genocide and crimes against humanity.⁴¹⁹ Importantly, Article 77 provides that ‘the systematic performance of any act, described below, against a part of society and in accordance with a plan with a political, philosophical, racial or religious motive, shall constitute a crime against humanity:...depriving one from his/her liberty...’⁴²⁰ Where such an act is committed, the offender shall be sentenced to a penalty of imprisonment for a term of not less than 8 years.⁴²¹ Further, there shall be no limitation period in respect of these offences.⁴²²

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

a) Best Practices

212. Turkey has, on some occasions, sought counsel from international experts and civil society actors on amending its law to protect internally displaced persons.⁴²³ The Van Action Plan and Integrated Strategy Document of 2005 reflect the government’s willingness to give domestic effect to the UN Guiding Principles. Capacity-building and training exercises, and awareness programmes to ensure that formal agencies implement the UN Guiding Principles are also helpful. Turkish State officials have, in the past, participated in such training programmes organised by the Internal Displacement Monitoring Centre of the Norwegian Refugee Council.⁴²⁴

213. Turkey also has, in the past, commissioned the Institute of Population Studies at Hacettepe University to develop well-documented information on the numbers and situation of the displaced.⁴²⁵ Such collection of data to assess the scope of the displacement is important to create effective policies.

⁴¹⁹ *ibid* arts 76 and 77.

⁴²⁰ *ibid* art 77(1)(d).

⁴²¹ *ibid* art 77(2).

⁴²² *ibid* art 77(4).

⁴²³ The Brookings Institution, ‘Statement by Roberta Cohen, Co-Director Brookings Institution-University of Bern Project on Internal Displacement at the Internally Displaced Persons Conference Organized by the United Nations Development Program in partnership with the Government of Turkey Ankara, Turkey’ (United Nations Development Program 23 February 2006) <http://www.undp.org/content/dam/turkey/docs/yeniufuklar/Roberta_Cohe1.doc> accessed 31 May 2021.

⁴²⁴ *ibid*.

⁴²⁵ *ibid*.

b) Gaps and Challenges

i) Law No. 5233 of 2004

214. The implementation of Law No. 5233 has been criticised by the civil society as being ineffective.⁴²⁶ The law does not meet the standards of the UN Guiding Principles in providing adequate information to IDPs. Further, it imposes an unreasonable burden of proof on IDPs, and also lacks an effective appeals procedure.⁴²⁷ Another problem is that the law recognises only material damages. However, the ECtHR has called upon Turkey to grant pecuniary compensation for the suffering and distress caused to IDPs.⁴²⁸ Further, the provincial commissions, entrusted with the task of calculating the compensation, have been criticised for being government-oriented, calculating compensation on an arbitrary basis, and lacking transparency, impartiality and independence.⁴²⁹

ii) Integrated Strategy 2005

215. The Integrated Strategy of 2005 undermined the return of IDPs by continuing to operate a system of central villages and not supporting return to the village of origin, and by continuing to enable the system of village guards. Further, while it recognised that landmines laid by terrorist organisations are a threat to the rights of IDPs, it failed to acknowledge the State's responsibility to remove these landmines.⁴³⁰ Further, it failed to provide commitments to prosecute perpetrators of displacement.⁴³¹

iii) Van Action Plan

216. The Van Action Plan, although comprehensive, was underfunded and under-resourced.⁴³² Further, it fails to adequately address the underlying physical security challenges preventing returns (including landmines and the village guards system).⁴³³ Further, it did not enable the development of one national strategy and further failed to develop a justice-based approach to forced displacement.⁴³⁴ In addition, the action plan has been criticised for its exclusion of

⁴²⁶ Brookings Report 2011 (n 27) 66.

⁴²⁷ *ibid.*

⁴²⁸ *ibid.*

⁴²⁹ Claridge and Vine (n 371).

⁴³⁰ IDMC and the Turkish Economic and Social Studies Foundation 2006 (n 384).

⁴³¹ *ibid.*

⁴³² Deniz Yüksek and Dilek Kurban, 'Permanent Solution to Internal Displacement? An Assessment of the Van Action Plan for IDPs' (TESEV 2009) <https://www.files.ethz.ch/isn/135037/TESEV_VanActionPlanReport.pdf> accessed 31 May 2021.

⁴³³ *ibid.*

⁴³⁴ *ibid.*

IDPs from the consultation process, and the involvement of government-oriented organisations in the consultation workshops under the guise of ‘civil society’.⁴³⁵ Lack of reporting and monitoring of implementation has meant that its overall success is unknown.⁴³⁶

iv) Expropriation Law No 2942

217. The Expropriation Law failed to provide for the payment of compensation to tenants and sharecroppers. This excludes the majority of the population, considering that homes and lands are often not registered, and land is often treated as collective property.⁴³⁷ Further, although courts have the power to determine the cost of expropriation, they tend to accept the level set by the commission. Further, there is no time limit for courts to rule on compensation complaints. As a result, many of the affected by for instance the GAP project have waited ten years for a decision.⁴³⁸

v) Resettlement Law No 5543

218. Article 12 of the Resettlement Law limits the scope of the law to nuclear families (a couple and their dependent children).⁴³⁹ This is problematic in a socio-cultural space where many several generations live in one house. The families are therefore left with a disheartening choice of splitting up their families or receiving inadequate support and living in overcrowded conditions, both of which are a violation of Principle 7(2) of the UN Guiding Principles. Further, living standards of those evicted for large scale development projects severely deteriorated after their displacement, with many living in slum-like conditions.⁴⁴⁰ Health workers have also reported that many of those displaced are suffering psychological impacts from the trauma of being displaced.⁴⁴¹

vi) Impunity

219. Although the ECtHR found that Turkish security forces had deliberately destroyed the homes and property of villagers, depriving them of their livelihoods and causing forced

⁴³⁵ Brookings Report 2011 (n 27) 151.

⁴³⁶ IDMC, ‘Submission from the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC) for consideration at the 87th Session of the Committee for the Elimination of Racial Discrimination’ (21 August 2015) <<https://www.refworld.org/docid/565308344.html>> accessed 31 May 2021.

⁴³⁷ IDMC 2017 Report (n 368).

⁴³⁸ *ibid* 7.

⁴³⁹ *ibid* 7.

⁴⁴⁰ *ibid* 10.

⁴⁴¹ *ibid*.

displacement,⁴⁴² Turkey has not prosecuted any of them. In *Dogan*, the ECtHR specifically noted: ‘Despite the extent of village destruction or evacuation in the state of emergency region, there appears to be no example of compensation having been awarded in respect of allegations that villagers have been forcibly evicted from their homes and that property has been deliberately destroyed by members of the security forces or of prosecutions having been brought against those forces as a result of such allegations’.⁴⁴³

vii) *Farmers’ Rights*

220. Further undermining Turkey’s policies towards IDPs is the development of military measures after 2015. For instance, rural parts in South-Eastern Kurdish-majority villages are being subjected to military designated areas preventing the movement of farmers, leading to marginalizing their livestock. This is the same tactic that caused mass displacement during the 1990s due to families not being able to sustain their agricultural lifestyle.⁴⁴⁴

⁴⁴² *Doğan* (n 410); *Akdiyar* (n 412); *Selçuk and Asker* (n 411); *Mentes* (n 411); *Bilgin v Turkey* App no 23819/94 (ECtHR, 16 November 2000); *Dulas v Turkey* App no 25801/94 (ECtHR, 30 January 2001).

⁴⁴³ *Doğan* (n 410) [105].

⁴⁴⁴ IDMC 2015 Submission (n 436) 3.

UGANDA

221. A significant number of people are internally displaced within Uganda each year. The conflict between the Lord's Resistance Army and the Ugandan government led to people fleeing from rural areas, apart from the forcible relocation of civilians by the government.⁴⁴⁵ Inter-communal violence has also caused displacement. However, many of the more recent internal displacements in Uganda are a consequence of disasters rather than conflict or violence.⁴⁴⁶ Evictions for development and conservation projects have also been on the rise.⁴⁴⁷ In this backdrop, this section considers how Uganda has given domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE 'PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT' IN Uganda?

a) Legal mechanisms giving effect to the prohibition of internal arbitrary displacement

222. Uganda does not have a legislation specifically directed towards internal displacement, despite its obligations under the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (the 'Kampala Convention'). At the same time, the following laws address some elements of the prohibition on internal arbitrary displacement.

i) Constitution of Uganda

223. The Ugandan Constitution includes a set of 'National Objectives and Directive Principles of State Policy.' These 'guide the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions.' Some of the objectives and directive principles relevant to IDPs are:

- a. The State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them (in line with Principle 7(3)(d) of the UN Guiding Principles).⁴⁴⁸

⁴⁴⁵ IDMC, 'Uganda: New displacement in Uganda continues alongside long-term recovery needs' (23 January 2014) <<https://www.refworld.org/pdfid/53c39a4d4.pdf>> accessed 31 May 2021.

⁴⁴⁶ IDMC, 'Uganda' <<https://www.internal-displacement.org/countries/uganda>> accessed 13 May 2021.

⁴⁴⁷ IDMC Uganda 2014 (n 445).

⁴⁴⁸ Constitution of Uganda 1995 (Uganda), National Objectives and Directive Principles of State Policy, Objective X.

- b. In furtherance of social justice, the State may regulate the acquisition, ownership, use and disposition of land and other property, in accordance with the Constitution.⁴⁴⁹
- c. The State shall endeavour to ensure that all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits (in line with Principle 7(2) of the UN Guiding Principles).⁴⁵⁰
- d. The State shall recognise the significant role that women play in society.⁴⁵¹
- e. The State shall institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or serious disruption of the normal life.⁴⁵²

224. Article 26 of the Constitution guarantees the fundamental right of every person to own property individually or in association with others. It also protects the right of every person not to be deprived of personal property except where it is acquired for public use under a law which provides for a fair and adequate compensation prior to such acquisition. This is in line with Principle 6(2)(c) of the UN Guiding Principles.

225. Further, in line with Principle 8 of the UN Guiding Principles, Article 22 of the Constitution guarantees the right to life, Article 23 provides that no person shall be deprived of personal liberty, and Article 24 indirectly recognises the principle of human dignity by prohibiting torture or cruel, inhuman or degrading treatment or punishment.

226. Objective XXVIII(i)(b) of the ‘National Objectives and Directive Principles of State Policy’ states that the ‘foreign policy of Uganda shall be based on the principles of ... respect for international law and treaty obligations’, and article 52(1)(h) of the Constitution empowers the Uganda Human Rights Commission to ‘monitor the government’s compliance with international treaty and convention obligations on human rights’. Uganda ratified the ICCPR in 1995, and is therefore bound to comply with the ICCPR guarantees that prohibit arbitrary internal displacement. However, Article 2 of the Ugandan Constitution states unambiguously that the Constitution shall prevail over ‘any other law or custom’ that is inconsistent with its provisions; consequently, ratified treaties that have not been incorporated into domestic law

⁴⁴⁹ *ibid* Objective XI(iii).

⁴⁵⁰ *ibid* Objective XIV.

⁴⁵¹ *ibid* Objective XV.

⁴⁵² *ibid* Objective XXIII.

have no domestic legal effect. This is evidenced by several notable cases decided by the Constitutional Court of Uganda, where it declined to apply principles of international agreements in its reasoning, even where parties submitted arguments premised on human rights principles.⁴⁵³ For example, in *Law & Advocacy for Women in Uganda v Attorney General*, although the applicant asserted that female genital mutilation was in violation of international law, and although the Court accepted that proposition, it made no specific determination about the applicability of international human rights law in deciding the case.⁴⁵⁴ Even in *Attorney General v Susan Kigula & Ors*, although the Supreme Court of Uganda referred extensively to provisions of international agreements, including the ICCPR, it did so only to the extent that the international law assisted its interpretation of the Ugandan Constitution.⁴⁵⁵

ii) *Human Rights (Enforcement) Act, 2019*

227. The Human Rights (Enforcement) Act, 2019 was enacted to ‘give effect to article 50(4) of the Constitution [which confers a right to apply to a court for enforcement of fundamental rights]’.⁴⁵⁶ It confers extensive powers upon ‘competent’ courts to grant remedies for violations of constitutional rights,⁴⁵⁷ and is relevant to the prohibition of arbitrary internal displacement insofar as displacement violates those rights. Where a magistrates’ court or the High Court determines that ‘a fundamental right or freedom has been violated, unlawfully denied or should be enforced’, that court must, pursuant to Section 9(1), ‘issue orders it considers appropriate, including an order for compensation’.⁴⁵⁸ No other provisions of the Act limit the scope of the power to make appropriate orders, and ‘in addition to’ the orders the court is obliged to make, it may make orders including, for example, (1) restitution; (2) the facilitation of rehabilitation for the victim of the violation; and (3) ‘satisfaction’, which *shall* include, *inter alia*, ‘criminal ... sanctions against persons liable for the violations’.⁴⁵⁹

⁴⁵³ Uganda Association of Women Lawyers and Ors v Attorney General [2004] UGSC 1 (10 March 2004); Soon Yeon Kong Kim & Anor v Attorney General [2008] UGSC 72 (06 March 2008); Muwang Kivumbi v Attorney General [2008] UGCC 34 (27 May 2008); Paul Kawanga Ssemwogerere & Others v Attorney-General of Uganda [2003] UGCC 4 (21 March 2003).

⁴⁵⁴ See also, for example, *Shabahuria Matia v Uganda* [1999] UGHC 1 (30 June 1999) [29], [38].

⁴⁵⁵ See *Attorney General v Susan Kigula & 417 Ors* [2009] UGSC 6 (21 January 2009). See also Jamil Ddamulira Mujuzi, ‘International Human Rights Law and Foreign Case Law in Interpreting Constitutional Rights: The Supreme Court of Uganda and the Death Penalty Question’ (2009) 9 *African Human Rights Law Journal* 576.

⁴⁵⁶ Human Rights (Enforcement) Act 2019 (Uganda).

⁴⁵⁷ See also Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules 2019, Statutory Instrument 31 of 2019 (Uganda).

⁴⁵⁸ Human Rights (Enforcement) Act 2019 (n 456) s 9.

⁴⁵⁹ *ibid* s 9(2).

228. A ‘public officer’ who the court determines is responsible, or participated in, the violation of a protected right is personally liable for the violation ‘notwithstanding the state being vicariously liable for his or her actions’, and must pay a portion of any compensation or restitution ordered to be paid, as determined by the court.⁴⁶⁰

229. Section 11(1) of the Human Rights (Enforcement) Act, 2019 makes it an offence for a person to derogate from a ‘non-derogable right and freedom guaranteed under the Constitution’, and the sentence on conviction for that offence, ‘if no sentence is prescribed by law’, must not exceed fifteen years.⁴⁶¹ Extraordinarily, Section 11(2) of that Act requires a court presiding over a criminal proceeding to acquit the accused where it (a) ‘appears’ or (b) ‘is brought to the attention of the judicial officer, or (c) ‘the competent court makes a finding’ that the accused’s non-derogable rights or freedoms have been infringed.

iii) Penal Code Act (Chapter 120)

230. The Penal Code Act (Chapter 120) is Uganda’s criminal code.⁴⁶² Although the Act criminalises conduct which may be incidental to instances of arbitrary internal displacement caused by violent conflict, there are no offences intended to prohibit acts that cause arbitrary internal displacement specifically. Incidental offences include, for example:

- a. section 58, which makes it an offence to be a member of an ‘unlawful society’ (defined exclusively by Section 56 as a combination of two or more people who are, essentially, engaged in levying war or committing other acts of violence); and
- b. sections 77 and 78, the offences of forcible entry and forcible detainer, respectively, which make it an offence to enter land in a violent manner or hold possession of land ‘in a manner likely to cause a breach of the peace’,⁴⁶³ and which is potentially relevant where displacement occurs in the context of conflict.

iv) Land Acquisition Act (Chapter 226)

231. The Land Acquisition Act (Chapter 226) facilitates the compulsory acquisition of land for public purposes, on the terms set out in Article 26 of the Constitution. The Act provides for the acquisition of land by declaration of the relevant minister subject to the requirement that the minister is ‘satisfied that any land is required by the Government for a public purpose’.⁴⁶⁴

⁴⁶⁰ *ibid* s 10.

⁴⁶¹ *ibid* s 11(6).

⁴⁶² Penal Code Act (Chapter 120) (Uganda).

⁴⁶³ *ibid*.

⁴⁶⁴ Land Acquisition Act (Chapter 226) (Uganda) s 3.

232. The process of acquisition is as follows: notice must be given to persons with an interest in the land pursuant to Section 5; an award of compensation for the acquisition must be given to interested persons pursuant to Section 6; and the public officer appointed by the minister for the purpose of the acquisition may take possession of the land either (a) as soon as the award of compensation is paid; or (b) immediately after publication of the declaration issued pursuant to Section 3, if the minister also certifies that immediate acquisition of the land is in the public interest. Land may also be acquired temporarily for a period of up to three years, and compensation is payable to interested persons.⁴⁶⁵

233. The only offences created by the Act are for (1) wilful obstruction of the powers conferred by the Act; and (2) interference with a ‘trench or mark’ made by a person authorised by the minister in the course of surveying the land prior to its acquisition.

b) Policies giving effect to the prohibition of internal arbitrary displacement

234. Uganda established a National Policy for Internally Displaced Persons in 2004,⁴⁶⁶ which recognises significant historical displacement as a consequence of ‘civil conflict and cattle rustling’.⁴⁶⁷ It adopts the same definition of IDPs as the UN Guiding Principles – ‘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 border.’⁴⁶⁸

235. The policy *inter alia* aims to: (1) minimise internal displacement, and (2) minimise the effects of internal displacement by providing an enabling environment for upholding the rights and entitlements of the IDPs.⁴⁶⁹ This reflects Principle 7(1) of the UN Guiding Principles. In implementing this policy, national and local authorities in Uganda are expected to take into account various international and regional instruments applicable to the protection and treatment of IDPs, including the ICCPR, UN Guiding Principles, the International Covenant

⁴⁶⁵ *ibid* s 10.

⁴⁶⁶ Office of the Prime Minister, Department of Disaster Preparedness and Refugees, ‘Ugandan National Policy for Internally Displaced Persons’ (Republic of Uganda 2004); Government of Uganda, ‘Ugandan National Policy for Internally Displaced Persons’ (Relief Web, 31 August 2004) <<https://reliefweb.int/report/uganda/national-policy-internally-displaced-persons-august-2004>> accessed 13 May 2021.

⁴⁶⁷ *ibid* vii.

⁴⁶⁸ *ibid* x.

⁴⁶⁹ *ibid* 1.

on Economic, Social and Cultural Rights, and the Geneva Conventions of 1949 and Additional Protocols (particularly Additional Protocol II).⁴⁷⁰ This is in line with Principle 5 of the UN Guiding Principles.

236. Chapter 3 of the National Policy addresses protection against arbitrary displacement in detail. In line with Principle 6(1) of the UN Guiding Principles, Chapter 3 provides that the ‘government shall ensure that every person in Uganda is protected against being arbitrarily and/or compulsorily displaced from his/her home or place of habitual residence.’⁴⁷¹ Further, the chapter prohibits arbitrary displacement resulting from all five grounds listed in Principle 6(2) of the UN Guiding Principles, and the ground listed in Principle 6(3) of the UN Guiding Principles.⁴⁷²

237. Further to Principle 7(3)(d) of the UN Guiding Principles, the District Disaster Management Committee is expected to ensure full participation of IDPs, in particular that of women, in the planning and management of responses to their protection and assistance needs, and to that end, consult with representatives of displaced women.⁴⁷³ Further to Principle 8 of the UN Guiding Principles, the policy recognises the right of IDPs against forcible return and resettlement in any place where their life, safety, liberty and health would be at risk.⁴⁷⁴ Further to Principle 7(2), the policy emphasises on not separating families.⁴⁷⁵ In line with Principle 7(3)(c) of the UN Guiding Principles, the policy requires the government to ensure that all IDPs are able to freely choose their places of residence.⁴⁷⁶

238. In 1997, the government of Uganda developed and launched the Poverty Eradication Action Plan (PEAP). Chapter 5 (under Security, Conflict Resolution and Disaster Management) deals with IDPs, and required the government to finalise the IDP Policy above.

239. In 2013, the Government of Uganda formulated the National Land Policy⁴⁷⁷ to provide a framework for articulating the role of land in national development, land ownership,

⁴⁷⁰ *ibid* 2.

⁴⁷¹ *ibid* 22.

⁴⁷² *ibid* 22-23.

⁴⁷³ *ibid* 13.

⁴⁷⁴ *ibid* 23.

⁴⁷⁵ *ibid* 23, 26.

⁴⁷⁶ *ibid* 21.

⁴⁷⁷ Ministry of Lands, Housing And Urban Development, ‘The Uganda National Land Policy’ (February 2013) <<https://extwprlegs1.fao.org/docs/pdf/uga163420.pdf>> accessed 18 May 2021.

distribution, utilisation, alienability, management and control of land. It discusses concerns related to tenure, compensation, displacement and resettlement. It acknowledges that ‘since minorities occupy land on the basis of precarious and unprotected land rights systems, they are exposed to constant evictions, removals and displacements.’⁴⁷⁸ Consequently, it requires the government, in its use and management of natural resources, to recognise and protect the right to ancestral lands of ethnic minority groups,⁴⁷⁹ which is in line with Principle 9 of the UN Guiding Principles. It also provides that the government shall pay prompt, adequate and fair compensation to ethnic minority groups that are displaced from their ancestral land by government action.⁴⁸⁰ Similarly, it provides for the possibility of land swapping, resettlement or compensation for pastoral communities displaced by government from their ancestral lands.

240. The National Land Policy acknowledges IDPs as a vulnerable group prone to loss of land rights and threats of landlessness due to poverty-induced asset transfers, distress land sales, evictions, land grabbing and abuse of land inheritance procedures. Accordingly, it states that (a) legislation and management practices shall accord all vulnerable groups equal land rights in acquisition, transmission and use of land; and (b) The State shall regulate land markets to curtail distress land sales and ensure that the land rights of the vulnerable groups are protected.⁴⁸¹

241. Further, the National Policy states that ‘to protect the land rights of internally-displaced persons, Government will take special measures to: (i) consider restitution of land, housing and property or adequate compensation or resettlement; and (ii) put in place mechanisms and structures for claiming restitution, compensation or resettlement.’⁴⁸² It also states that the government will ‘respect regional and international conventions governing the settlement and treatment of refugees and internally displaced persons.’⁴⁸³ Moreover, it provides for the ‘re-settlement of environmental refugees or internally displaced persons and initiate co-operation on responses with neighbouring countries on issues related to the Kyoto Protocol including adaptation to climate change.’⁴⁸⁴

⁴⁷⁸ *ibid* [56].

⁴⁷⁹ *ibid* [57(a)].

⁴⁸⁰ *ibid* [57(b)].

⁴⁸¹ *ibid* [73].

⁴⁸² *ibid* [75].

⁴⁸³ *ibid* [170(i)].

⁴⁸⁴ *ibid* [152(ix)].

242. Other (now-obsolete, but illustrative) elements of Uganda’s policy framework include the 2005 ‘National Internally Displaced Persons Return, Resettlement and Re-Integration Strategic Plan for Lango and Teso Sub Regions’;⁴⁸⁵ and the 2008 ‘Camp Phase Out Guidelines for All Districts that Have IDP Camps’.⁴⁸⁶ Uganda also published extensive ‘National Policy for Disaster Preparedness and Management’ in 2010 and 2011,⁴⁸⁷ the latter with the support of the UNDP.

c) Rights of indigenous populations

243. The Ugandan Constitution explicitly recognises a diverse range of indigenous communities for the purpose of conferring citizenship upon their members. The Constitution also mandates, in its Fifth Schedule, that the regional governments incorporated pursuant to Article 178 of the Constitution shall consist of, among other representatives, ‘representatives of indigenous cultural interests’.

244. The Uganda Wildlife Act, 1996, and its successor, the Uganda Wildlife Act, 2019,⁴⁸⁸ makes limited reference to collaborative land management to the potential benefit of indigenous communities. Similarly, the Land Act, 1998 provides for the issuance of a certificate of customary ownership in respect of land to any ‘person, family or [indigenous] community’ who possess ‘customary tenure’ over the land in question,⁴⁸⁹ and in this way, provide a framework for recognition and enjoyment of land rights by indigenous populations. Customary tenure is recognised by article 237(3) of the Constitution as one of four ‘systems’ of land ownership.

245. Despite these legislative frameworks, indigenous groups receive limited recognition, and some groups, including the Batwa and indigenous communities occupying the Karamoja region,

⁴⁸⁵ Republic of Uganda, ‘National Internally Displaced Persons: Return, Resettlement and Reintegration Strategic Plan for Lango and Teso Sub Regions’ (November 2005) <www.brookings.edu/wp-content/uploads/2016/07/Uganda_Lango-Teso_Plan_2005.pdf> accessed 13 May 2021.

⁴⁸⁶ Office of the Prime Minister of Uganda, ‘Camp Phase Our Guidelines for All Districts That Have IDP Camps’ <www.brookings.edu/wp-content/uploads/2016/07/Uganda_Camp_Closure_Guidelines_2008.pdf> accessed 13 May 2021.

⁴⁸⁷ Directorate of Relief, Disaster Preparedness and Refugees of the Office of the Prime Minister of the Republic of Uganda, ‘The National Policy for Disaster Preparedness and Management’ (October 2010) <www.ifrc.org/docs/IDRL/Disaster%20Policy%20for%20Uganda.pdf> accessed 13 May 2021; United Nations Development Programme, ‘The National Policy for Disaster Preparedness and Management’ (April 2011) <https://www.undp.org/content/uganda/en/home/library/crisis_prevention_and_recovery/TheNationalPolicyforDisasterPreparednessandManagement.html> accessed 13 May 2021.

⁴⁸⁸ Wildlife Act 2019 (Uganda).

⁴⁸⁹ Land Act 1998 (Uganda) s 4.

have been forcibly displaced in apparent contravention of these Acts and their constitutional rights.⁴⁹⁰ Although the elements required for recognition of rights that are consistent with the United Nations Declaration on the Rights of Indigenous Peoples are present, their realisation is limited in practice.

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

246. As discussed above, there is no domestic legislation that specifically implements the prohibition against arbitrary internal displacement. The Acts referred to above criminalise (a) conduct that may occur in the context of displacement caused by conflict; and (b) acts which derogate from non-derogable rights guaranteed by article 44 of the Constitution. As a consequence of the latter, it is conceivable that where conduct results in the internal displacement of persons and that conduct is also ‘cruel, inhuman or degrading treatment or punishment’, it may constitute an offence contrary to Section 11(1) of the Human Rights (Enforcement) Act, 2019, as mentioned above.

247. Article 23 of the Constitution provides that a person may be deprived of their liberty ‘in execution of the sentence or order ... of an international court or tribunal in respect of a criminal offence of which that person has been convicted’. Accordingly, in 2003, the Ugandan government referred the case of members of the Lord’s Resistance Army to the International Criminal Court,⁴⁹¹ and in 2021, Trial Chamber IX of the Court found Dominic Ongwen guilty of war crimes and crimes against humanity for conduct including attacks on IDP camps.⁴⁹²

248. In 2010, Uganda enacted the International Criminal Court Act, 2010, to ‘give effect to the Rome Statute of the International Criminal Court [and] to provide for offences under the law of Uganda corresponding to offences within the jurisdiction of that court’.⁴⁹³ Sections 7–9 of

⁴⁹⁰ International Work Group for Indigenous Affairs and African Commission’s Working Group on Indigenous Populations/ Communities, ‘Extractive Industries, Land Rights and Indigenous Populations’/ Communities’ Rights’ (2017) 71–87 <<https://www.iwgia.org/en/resources/publications/305-books/3294-extractive-industries-land-rights-and-indigenous-populations-communities-rights.html>> accessed 31 May 2021; International Work Group for Indigenous Affairs, ‘Uganda’ <<https://www.iwgia.org/en/uganda.html>> accessed 22 May 2021.

⁴⁹¹ International Criminal Court, ‘ICC Holds Seminar with Ugandan Judicial Authorities’ (26 October 2005) <<https://www.icc-cpi.int>> accessed 22 May 2021.

⁴⁹² International Criminal Court, ‘Dominic Ongwen Declared Guilty of War Crimes and Crimes against Humanity Committed in Uganda’ (2021) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1564>> accessed 22 May 2021.

⁴⁹³ International Criminal Court Act 2010 (Uganda).

the Act specify the sentence to be imposed upon persons found guilty of genocide, crimes against humanity, and war crimes, respectively. Specifically, Section 8 of the Act makes it an offence to commit a crime against humanity, defined as ‘an act specified in Article 7 of the Rome Statute’. Therefore, ‘deportation or forcible transfer of population’, is ostensibly unlawful as a matter of domestic Ugandan law. The penalty for a crime against humanity is imprisonment for life or a lesser term. Similarly, Section 9 of the Act makes it an offence to commit a war crime, defined as acts specified under Article 8(2)(a), (b), (c) and (e) of the Rome Statute. Therefore, the grave breach of ‘unlawful deportation or transfer’ and other serious violations like ‘the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory’, are unlawful as a matter of domestic Ugandan law. The penalty for a war crime is imprisonment for life or a lesser term. The consent of the Director of Public Prosecutions must be obtained, in accordance with Section 17 of the Act, before a person may be prosecuted for those international crimes in a court in Uganda.

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

249. Uganda is a party to the Kampala Convention. However, there appear to be no domestic legislative measures that give effect to the obligation assumed by Uganda under that treaty. This accords with a 2019 report on the implementation status of the Kampala Convention published by the International Committee of the Red Cross (with which the Special Rapporteur is undoubtedly familiar), which (a) notes that Uganda has made substantial contributions to international bodies processing statistics for internally displaced persons; but (b) in its discussion of the implementation of domestic laws and policies in Africa, does not refer to any legislative enactments passed by the Ugandan Parliament.⁴⁹⁴

250. While the 2004 National Policy for IDPs is quite comprehensive, and closely resembles the UN Guiding Principles, its implementation has been insufficient. In 2006, the Government of Uganda ran a workshop to evaluate its implementation.⁴⁹⁵ Security, political will and government participation, inadequate funding, social services, land and amnesty laws were

⁴⁹⁴ See Eve Massingham et al, ‘The Kampala Convention: Key Recommendations Ten Years On’ (ICRC 2019) <<https://shop.icrc.org/the-kampala-convention-key-recommendations-ten-years-on.html>> accessed 11 May 2021.

⁴⁹⁵ The Brookings Institution, ‘The Implementation of Uganda’s National Policy for Internally Displaced Persons’ (4 July 2006) <<https://www.brookings.edu/events/the-implementation-of-ugandas-national-policy-for-internally-displaced-persons/>> accessed 13 May 2021.

identified as key challenges to implementation. The workshop recommended that IDPs be integrated more fully into the implementation of the policy. Another challenge is that the policy does not include provisions for its regular review or revision.⁴⁹⁶

251. While the 2004 National policy designates the Department of Disaster Preparedness and Refugees as the institution responsible to implement the policy, the Ugandan Human Rights Commission (UHRC) also plays a key role in the protection of the rights of IDPs. The UHRC's regular visits to IDP camps and reporting on the conditions of IDPs 'gave the IDPs a sense of hope that someone in the government was concerned with their plight', while the UHRC's annual reports and recommendations to Parliament improved interest in addressing internal displacement.⁴⁹⁷ The UHRC's activities emphasised that the state's duty to protect and assist IDPs was a matter of legal rights, and not just a matter of policy.⁴⁹⁸ The UHRC has in recent years been monitoring the implementation of the government's Return, Resettlement and Reintegration Program, by conducting visits to IDP camps and return sites to monitor the progress of IDPs and the extent to which their rights are being respected. In addition, it also organises outreach programmes, training workshops and roundtable discussions on IDPs, targeting primarily security forces, local and district government officials, and IDPs.⁴⁹⁹ However, inadequate funding and an inadequate number of field offices located near vulnerable populations hinder the UHRC from fulfilling its mandate.⁵⁰⁰

252. Uganda conducted a hazard risk profile of the whole country, and compiled a database which includes biometric registration details of persons in landslide-prone areas. This data is being used to implement a 10-year programme to relocate households on a voluntary basis from high-risk areas in the Mount Elgon area to safer areas. Under this programme, the government buys and develops land for settlement and encourages residents at high risk of displacement to relocate. The government provides housing, infrastructure, services and income-generating activities, and initially ploughs the land for the community. Around 240 households had been resettled by October 2019.⁵⁰¹

⁴⁹⁶ Brookings Report 2011 (n 27).

⁴⁹⁷ Brookings Institution–SAIS Project on Internal Displacement, the Intergovernmental Authority on Development, and OCHA, 'Conference on Internal Displacement in the IGAD Sub Region: Report of the Experts Meeting' (2003) 17 <https://www.brookings.edu/wp-content/uploads/2012/04/20030902_africa.pdf> accessed 31 May 2021.

⁴⁹⁸ Brookings Report 2011 (n 27).

⁴⁹⁹ *ibid* 102.

⁵⁰⁰ Uganda Human Rights Commission, 'Annual Report' (2008) 22 <www.uhrc.ug/index.php?option=com_docman&Itemid=138> accessed 31 May 2021.

⁵⁰¹ Forced Migration Review (n 60).

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253. The year 2014 saw Russia annex Crimea and a rise in armed aggression in the Donbas region. The Government of Ukraine has since reported that it has registered approximately 1.5 million internally displaced persons (IDPs) in government-held territory.⁵⁰² According to the United Nations Human Rights Monitoring Mission in Ukraine (HRMMU), since the start of Russia's aggression against Ukraine, more than three million residents have left the Donbas Region, namely the Donetsk and Luhansk areas, which continue to be controlled by Russia-led armed forces.⁵⁰³ Against this backdrop, this section considers how Ukraine has given domestic effect to the UN Guiding Principles.

QUESTION 1: WHAT LEGAL MECHANISMS, RULES OR PRINCIPLES COULD BE SAID TO GIVE DOMESTIC EFFECT TO THE 'PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT' IN DIFFERENT JURISDICTIONS?

a) Constitution and Legislations

254. In keeping with Principle 6 of the UN Guiding Principles, Article 30 of the Constitution of Ukraine affirms that 'everyone is guaranteed the inviolability of his or her dwelling place'.⁵⁰⁴ However, the first Ukrainian law to directly address the internal displacement caused by Russian aggression is the Law on Ensuring the Rights and Freedoms of Internally Displaced Persons, or Law No. 1706-VII of 2014.⁵⁰⁵ Article 1 of this law defines an internally displaced person as 'a citizen of Ukraine, permanently residing at the territory of Ukraine, that was forced or voluntarily left one's residence place as a result of or in order to avoid negative impact of armed conflict, temporary occupation, situations of generalised violence, mass violations of human rights and disasters of natural or human-made origin.'⁵⁰⁶ This definition contradicts that adopted in the UN Guiding Principles in two significant ways: (i) it narrows the definition in the UN Guiding Principles by establishing citizenship and legal residency requirements for IDPs; and (ii) the definition limits the causes of displacement to the ones

⁵⁰² UNHCR, 'Registration of Displacement in Ukraine' (5 May 2021) <<https://www.unhcr.org/ua/en/resources/idp-dashboard>> accessed 4 May 2021.

⁵⁰³ United States Department of State Bureau of Democracy, Human Rights and Labor, 'Ukraine 2020 Human Rights Report' (December 2020) <<https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/ukraine/>> accessed 4 May 2021.

⁵⁰⁴ Constitution of Ukraine 1996 (Ukraine) art 30.

⁵⁰⁵ Council of Europe (COE) 'Enhancing the National Legal Framework in Ukraine for the Protecting the Human Rights of Internally Displaced Persons' (June 2016) <<https://rm.coe.int/baseline-coe-report-on-idp-/16808c9da5>> accessed 4 May 2021.

⁵⁰⁶ Law on Ensuring the Rights and Freedoms of Internally Displaced Persons 2014 (Ukraine) art 1.

explicitly specified, and also, fails to specify that internal displacement concerns involuntary movement *within* national borders.⁵⁰⁷ However, by way of an amendment in 2016, foreigners who are habitual residents of Ukraine as well as stateless persons were added to the definition, in addition to citizens of Ukraine.⁵⁰⁸

255. Article 2 of this law, in line with Principle 5 of the UN Guiding Principles, states that Ukraine shall ‘take all possible measures under the Constitution and laws of Ukraine, international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine to prevent possible internal displacements, protect the rights and freedoms of internally displaced persons, support the return of such persons to their previous residence places and their reintegration.’ Similarly, in line with Principles 5 and 6(1) of the UN Guiding Principles, Article 3 of the law states that citizens of Ukraine, foreigners and stateless persons who legally stay in Ukraine ‘have a right to protection from forced internal displacement and forced return to previous places of residence’. Yet, the law does not explain what amounts to arbitrary displacement, and what measures the government shall undertake to protect persons against arbitrary displacement.⁵⁰⁹

256. The law further distinguishes between registered IDPs and non-registered IDPs in Article 7, and states that only ‘a registered IDP has the right to be provided with technical and other means of rehabilitation, to receive rehabilitation services in accordance with the legislation at the place of residence’.⁵¹⁰ It appears that the law does not provide the same provisions for non-registered IDPs thus discriminating in this regard against IDPs who are not registered. Further, in line with Principle 7(2) of the UN Guiding Principles, Article 9 of the law guarantees to IDPs *inter alia* the right to safety of life and health; right to reliable information about potential threats to life or health in the territory of an abandoned residence, as well as place of temporary accommodation, its infrastructure, environment, ensuring of rights and freedoms; and the right to proper conditions of person’s permanent or temporary accommodation. Moreover, the law requires government bodies to facilitate re-unification of families of IDPs,⁵¹¹ which is also in line with Principle 7(2) of the UN Guiding Principles. Moreover, Article 7 of the law was amended in 2020 to add clause 11, which stipulates that ‘IDPs from the temporarily occupied territories have the right to receive material support, insurance benefits, and social services under the obligatory state social insurance in connection

⁵⁰⁷ COE 2016 (n 505) 27.

⁵⁰⁸ *ibid* 27.

⁵⁰⁹ *ibid* 36.

⁵¹⁰ Law on Ensuring the Rights and Freedoms of Internally Displaced Persons 2014 (n 506) art 7.

⁵¹¹ *ibid* art 11(3).

with temporary disability and from an accident at work and an occupational disease that caused disability'.⁵¹² This recognises the specific vulnerabilities of these populations.

257. Another law that the Ukrainian Parliament adopted in 2014 is the Law on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine, or Law No. 1207-VII of 2014. Recognizing the vulnerability of populations residing in the occupied territory of Crimea, Article 18 of this law provides that such 'citizens of Ukraine are guaranteed the full observance of their rights and freedoms provided for by the Constitution of Ukraine, including their social, labour, electoral, and educational rights, upon their relocation from the temporarily occupied territory.' The law also expects the Cabinet of Ministers of Ukraine to secure: the employment, the continuation of education, and the electoral rights of citizens who relocated from the temporarily occupied territory to another territory in Ukraine.⁵¹³ These provisions also align with Principle 7(2) of the UN Guiding Principles. Finally, the law also provides that Russia, as the occupying power, will be responsible for any 'violations of human and citizen rights and freedoms provided for by the Constitution and the laws of Ukraine, which occur in the temporarily occupied territory'.⁵¹⁴ This can be read to mean that, in the context of internal displacement, Ukraine would consider Russia responsible for failing to prevent displacement of population from the temporarily occupied territory, to other territories in Ukraine.

258. Importantly, this law also states that the residents of the temporarily occupied territory of Crimea may receive a certificate confirming their place of factual residence on government-controlled territory from any State Migration Service Office, without IDP registration.⁵¹⁵ They can use these certificates for different purposes, including applying for social benefits and targeted IDP assistance, applying for pensions, etc.⁵¹⁶

259. To supplement the aforementioned laws, the Ukrainian Parliament passed the Law on Particular Aspects of Public Policy Aimed at Safeguarding State Sovereignty of Ukraine Over

⁵¹² *ibid.*

⁵¹³ *ibid* Section II(5).

⁵¹⁴ Law On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine 2014 (Ukraine) art 5.3.

⁵¹⁵ *ibid* art 6.4.

⁵¹⁶ UNHCR, 'Briefing Note: Analysis of the Law of Ukraine On Particular Aspects of Public Policy Aimed at Safeguarding State Sovereignty of Ukraine Over the Temporarily Occupied Territory of Donetsk and Luhansk Regions' (9 March 2018) <https://www.ecoi.net/en/file/local/1427118/1930_1521537891_unhcr-analysis-of-law-on-safeguarding-sovereignty.pdf> accessed 22 May 2021.

the Temporarily Occupied Territory of Donetsk and Luhansk Regions in 2018. This law not only affirms the status of the non-government controlled parts of Donetsk and Luhansk as ‘temporarily occupied territories’, but also the basic human rights protections available to the conflict-affected populations.⁵¹⁷ It seeks to safeguard the ‘human rights of civilian population in the temporarily occupied territories of the Donetsk and Luhansk regions in keeping with international treaties, rules and principles of international law, and according to national legislation’.⁵¹⁸ Article 5.1 specifically tasks ‘respective state authorities and their personnel to implement measures to protect rights and freedoms of civilians’.⁵¹⁹ In this way, this law establishes broad-spanning protections for the populations of the Donbas region, including for IDPs in Donetsk and Luhansk. This is in line with Principles 5 and 8 of the UN Guiding Principles.

260. Importantly, Article 2.6 makes it clear that property rights (i.e., rights to movable and immovable property located in the temporarily occupied territory) remain intact irrespective of changes in legal status of an individual or his/ her registration as an IDP.⁵²⁰ Additionally, like the 2014 law on Crimea, the 2018 law on the Donbas region also states that residents of these territories can apply for certificates confirming their place of factual residence on government-held territory, without IDP registration, and use these certificates to apply for targeted IDP assistance.⁵²¹

261. Further to Principle 7(3)(f) of the UN Guiding Principles, which guarantees the right to effective remedy, Articles 30 and 56 of the Constitution of Ukraine provide for the restitution of damaged, destroyed, or lost properties during the conflict. Article 56 of the Constitution, in particular, stipulates that: ‘everyone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power, bodies of local self-government, their officials and officers during the exercise of their authority’.⁵²² Furthermore, the Civil Code of Ukraine specifically outlines that people have a ‘right to have their property protected’.⁵²³ In

⁵¹⁷ *ibid.*

⁵¹⁸ Law on Particular Aspects of Public Policy Aimed at Safeguarding State Sovereignty of Ukraine Over the Temporarily Occupied Territory of Donetsk and Luhansk Regions 2018 (Ukraine) art 2.

⁵¹⁹ *ibid* art 5.1.

⁵²⁰ UNHCR Briefing Note (n 516) 6.

⁵²¹ *ibid* 7.

⁵²² Constitution of Ukraine 1996 (n 504) art 56.

⁵²³ Civil Code of Ukraine 2003 (Ukraine) art 22.

Article 117 it affirms that ‘property damage inflicted to the property of a physical person shall be indemnified by the state’.⁵²⁴

262. Further, the Code of Civil Protection stipulates that ‘quantifiable damages to those affected by emergencies shall be compensated’.⁵²⁵ More specifically, Article 86 establishes a ‘procedure for the provision of accommodation or paying monetary compensation for the housing destroyed or damaged as a result of an emergency’.⁵²⁶ Accordingly, the law provides a pathway to compensation for those who have suffered pecuniary damages to their accommodation as a result of destruction or damage to their housing. However, several organisations emphasise that Article 86 only covers the cases of ‘housing has become unfit for living’ and not damage caused by armed conflict.⁵²⁷ Furthermore, Article 86(9) requires that before any compensation can be issued for the destroyed or damaged housing as a result of an emergency, victims should voluntarily transfer their title of the destroyed or damaged property to local councils or local administrations.⁵²⁸ However, as the Norwegian Refugee Council in Ukraine has reported, a significant number of people who consider pursuing litigation for compensation are dissuaded by this provision out of a fear that they could altogether lose their housing after transferring their title.⁵²⁹

263. According to the Housing, Land, and Property Cluster, ‘several draft laws [namely No 6041 and 4301] on the compensation for damages inflicted upon housing of the population as a result of the ATO [anti-terrorist operations]’ are being considered in the Ukrainian Parliament.⁵³⁰ However, they are not likely to be adopted, at least, in the immediate future, as one of them was rejected in 2016, and the second was returned by the Parliament in 2018.⁵³¹

264. According to Article 38 of the Constitution of Ukraine, citizens have the right to participate in the administration of state affairs and in national and local referendums. The Law on Ensuring the Rights and Freedoms of Internally Displaced Persons requires executive bodies

⁵²⁴ Constitution of Ukraine 1996 (n 504) art 117.

⁵²⁵ Code of Civil Protection of Ukraine 2012 (Ukraine) art 85.

⁵²⁶ *ibid* 86.

⁵²⁷ Norwegian Refugee Council (NRC), ‘Emergency Compensatory Measures: Compensation for Housing Destroyed as a result of the Armed Conflict’ (15 January 2020) <<https://www.nrc.no/resources/reports/emergency-compensatory-measures-compensation-for-housing-destroyed-as-a-result-of-the-armed-conflict/>> accessed 13 May 2021 (NRC 2020 Report).

⁵²⁸ Code of Civil Protection of Ukraine 2012 (n 525) art 86.9.

⁵²⁹ NRC 2020 Report (n 527).

⁵³⁰ *ibid*.

⁵³¹ *ibid*.

and local governments to consult with public organisations that assist IDPs in developing and implementing state policy that addresses IDP rights.⁵³² This is supplemented by general regulations, namely Resolution No. 976 of 5 November 2008 and Resolution No. 996 of 3 November 2010, passed by the Cabinet of Ministers of Ukraine. These stipulate the procedure for governmental bodies to engage in consultations with community members on matters of State policy.⁵³³ Together, these provisions further the right of IDPs to be consulted in planning and relocation processes, guaranteed by Principle 7(3)(d) of the UN Guiding Principles.

265. Further, the Constitution of Ukraine also guarantees to everyone the right to freely collect, store, use and disseminate information by any means of his or her choice.⁵³⁴ The Law on Access to Public Information also helps secure this right to information, through information requests.⁵³⁵ In line with Principle 7(3)(b) of the UN Guiding Principles, the Law on Ensuring the Rights and Freedoms of Internally Displaced Persons requires local state administrations to ‘inform internally displaced persons about possible places and conditions of their accommodation with regard to offers of local governments, civil groups, volunteer, charitable organisations, other individuals and legal entities, as well as about state of infrastructure and environment at such places’.⁵³⁶

266. Further to Principle 8 of the UN Guiding Principles, Article 27 of the Constitution of Ukraine recognises that ‘every person has the inalienable right to life’, Article 28 recognises that ‘everyone has the right to respect of his or her dignity’, and Article 29 recognises that ‘every person the right to freedom and personal inviolability’.

267. The Constitution of Ukraine affirms Ukraine’s commitment to respect its obligations under international law.⁵³⁷ Article 9 reads: ‘International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.’ Accordingly, the provisions of the ICCPR, which embodies the prohibition of arbitrary internal displacement, form part of Ukraine’s domestic legal order, since Ukraine ratified the ICCPR in 1973.

⁵³² Law on Ensuring the Rights and Freedoms of Internally Displaced Persons 2014 (n 506) art 16(2).

⁵³³ COE 2016 (n 505) 183-4.

⁵³⁴ Constitution of Ukraine 1996 (n 504) art 34.

⁵³⁵ Law on Access to Public Information 2011 (Ukraine) art 19.

⁵³⁶ Law on Ensuring the Rights and Freedoms of Internally Displaced Persons 2014 (n 506) art 11(4)(8)(3).

⁵³⁷ Constitution of Ukraine 1996 (n 504) art 9.

b) Resolutions

268. The Ukrainian Cabinet of Ministers passed several resolutions that reinforce the rights and protections of IDPs including, Resolution 21 ‘On Procedure of Rendering of Humanitarian Assistance to the Population of Donetsk and Luhansk Regions’;⁵³⁸ Resolution 213 ‘On Temporary Accommodation of Families Displaced from Autonomous Republic of Crimea and the City of Sevastopol’;⁵³⁹ Resolution 505 ‘On Providing Monthly Targeted Financial Support to Internally Displaced Persons from the Temporarily Occupied Territory of Ukraine and Anti-Terrorist Operation Area to Cover Livelihood, Including Housing and Utilities’;⁵⁴⁰ Resolution 509 ‘On Registration of Internally Displaced Persons’;⁵⁴¹ and Resolution 637 ‘On Welfare Payments to Internally Displaced Persons.’⁵⁴² A number of these resolutions seek to address the gaps in legal provisions that adversely affect internally displaced persons. For example, Resolution 505 directly addresses the gap for providing compensation for property damage in armed conflict. However, these resolutions are not legally binding.

c) Policies and Programmes

269. The Ukrainian Ministry of Reintegration of Temporarily Occupied Territories in Ukraine, which is generally responsible for coordinating the overall response to internal displacement, developed a number of policies and programmes that seek to advance the prohibition of arbitrary internal displacement. In 2017, the Ministry developed and adopted a ‘Strategy for the Integration of Internally Displaced Persons and Implementation of Long-Term Solutions to Internal Displacement for the Period until 2020’ and an accompanying action plan.⁵⁴³ This policy was also adopted by the Ministry for the Development of Communities and Territories, which leads the Ukrainian government’s response for housing for IDPs. The Ministry has since adopted a number of existing housing schemes to meet IDPs’ specific needs, including

⁵³⁸ Cabinet of Ministers, ‘Resolution 21 On Procedure of Rendering of Humanitarian Assistance to the Population of Donetsk and Luhansk Regions’ (October 2014) (Ukraine).

⁵³⁹ Cabinet of Ministers, ‘Resolution 213 ‘On Temporary Accommodation of Families Displaced from Autonomous Republic of Crimea and the City of Sevastopol’ (June 2014) (Ukraine).

⁵⁴⁰ Cabinet of Ministers, ‘Resolution 505 On Providing Monthly Targeted Financial Support to Internally Displaced Persons from the Temporarily Occupied Territory of Ukraine and Anti-Terrorist Operation Area to Cover Livelihood, Including Housing and Utilities’ (October 2014) (Ukraine).

⁵⁴¹ Cabinet of Ministers, ‘Resolution 509 On Registration of Internally Displaced Persons from the Temporarily Occupied Territory of Ukraine and Anti-Terrorist Operation Area’ (October 2014) (Ukraine).

⁵⁴² Cabinet of Ministers, ‘Resolution 637 On Social Payments to Persons Displaced from Temporarily Occupied Territory of Ukraine and Areas of Anti-Terrorist Operation’ (November 2014) (Ukraine).

⁵⁴³ Global Protection Cluster, ‘Strategy for the Integration of Internally Displaced Persons and Implementation of Long-Term Solutions to Internal Displacement for the Period Until 2020’ (June 2020) <https://www.globalprotectioncluster.org/wp-content/uploads/ukraine_APE.pdf> accessed 5 May 2021.

temporary housing, social housing for vulnerable groups, and affordable long-term housing for people from the Donbas region.⁵⁴⁴

270. At the regional state level, state officials have adopted a specialised programme to address the housing needs of IDPs. In particular, ‘The Regional Program[me] of Support and Integration of Internally Displaced Persons in the Donetsk Region for 2019-2020’ included an array of programmes specifically aimed to create ‘appropriate living conditions’ for people residing in the region of Donbas.⁵⁴⁵

QUESTION 2: AMONG THESE EXAMPLES, TO WHAT EXTENT ARE CRIMINAL PROHIBITIONS AND SANCTIONS USED (E.G. GRAVITY, NATURE OF ACTORS WHERE STATE OR NON-STATE, AGGRAVATING OR MITIGATING AND OTHER CIRCUMSTANCES AND IF ANY, PENALTY)?

271. Arbitrary displacement is not penalised in the Criminal Code of Ukraine. While Chapter XX of the Criminal Code includes a number of war crimes and crimes against humanity – such as (Article 436-447) concerning ‘propaganda of war’ (Article 436), ‘planning, preparation and waging of an aggressive war’ (Article 437), the ‘violation of rules of the warfare’ (Article 438), and ‘criminal offenses against internationally protected persons and institutions’ (Article 444) – none of them criminalise arbitrary displacement. Article 438 of the Criminal Code, which penalises non-compliance with international humanitarian law, does so to an extent, by stating that the ‘deportation of civilian population for forced labour...shall be punishable by imprisonment for a term of eight to twelve years’.⁵⁴⁶ However, only deportation for the specific purpose of forced labour is criminalised here, while other types of displacement are not covered.

272. While Ukraine has signed the Rome Statute of the International Criminal Court (ICC), it has not yet ratified it. As such, domestic criminal laws are not fully aligned with the Rome Statute. Nevertheless, Ukraine was the first non-ICC member state to accede to the Agreement on

⁵⁴⁴ Natalia Pavlo Fedoriv, ‘Public Housing Policy in Ukraine: Current State and Prospects for Reform’ (CEDOS Think Tank, 27 November 2019) <<https://cedos.org.ua/en/researches/derzhavna-zhytlova-polityka-v-ukraini-suchasnyi-stan-ta-perspektyvy-reformuvannia/>> accessed 5 May 2021.

⁵⁴⁵ UNHCR, ‘Ukraine: Adapting Pre-Existing Housing Schemes to Meet IDPs’ Specific Needs’ (20 December 2020) <<https://reliefweb.int/report/ukraine/ukraine-adapting-pre-existing-housing-schemes-meet-idps-specific-needs>> accessed 4 May 2021.

⁵⁴⁶ Criminal Code of Ukraine 2001 (Ukraine) art 438.

Privileges and Immunities of the ICC in 2007.⁵⁴⁷ Ukraine also made two special *ad hoc* ‘article declarations’ under Article 12(3) of the Rome Statute and thus gave the ICC jurisdiction from November 2013 onward. Thereafter, the Office of the Prosecutor of the ICC conducted a preliminary investigation into Ukraine and on December 11, 2020, concluded that there was ‘a reasonable basis to believe that a broad range of grave conduct constituting war crimes and crimes against humanity were committed’.⁵⁴⁸ Furthermore, the Office also found that ‘the alleged crimes identified would currently be admissible, and thus there was a reasonable basis for investigation, subject to judicial authorisation’.⁵⁴⁹

273. In the context of securing the return of IDPs to their place of origin by preventing property damage, one of the most stringent provisions of the Criminal Code, Article 258(2), which is concerned with ‘countering terrorism’ stipulates that if ‘actions caused significant property damage or other grave consequences’, they ‘shall be punishable by imprisonment for a term of seven to twelve years.’⁵⁵⁰ Article 260(4) of the Criminal Code further stipulates that ‘participation in attacks on businesses, institutions, organisations, or private individuals by paramilitary or armed formations shall be punishable by imprisonment for a term of seven to twelve years’.

QUESTION 3: CAN YOU PROVIDE EXAMPLES OF HOW THE ‘PROHIBITION OF INTERNAL ARBITRARY DISPLACEMENT’ HAS BEEN IMPLEMENTED IN PRACTICE IN THESE DIFFERENT JURISDICTIONS?

a) Best Practices

274. A notable gap in domestic law is the fact that Article 19 of the Law on Combatting Terrorism, which recognises that the State shall pay compensation to victims of damage caused by a terrorist act, altogether omits armed conflict. Therefore, if Russia-led armed aggression in Donbas is not classified as ‘terrorism’, IDPs may not be able to seek any compensation.

⁵⁴⁷ *ibid.*

⁵⁴⁸ International Criminal Court (ICC) ‘Preliminary Investigation Ukraine’ (11 December 2020) <<https://www.icc-cpi.int/ukraine>> accessed 13 May 2021.

⁵⁴⁹ *ibid.*

⁵⁵⁰ Criminal Code of Ukraine 2001 (n 546) art 258.2.

275. Since residents of Donetsk and Luhansk have suffered significant property damage,⁵⁵¹ the Norwegian Refugee Council (NRC) has been supporting strategic litigation to secure compensation for people whose property was damaged in the armed conflict in the Donbas region. By October 2018, the NRC had identified 146 civil cases for compensation for damaged or destroyed property pending before domestic courts.⁵⁵² By NRC's account, in 26 additional cases, courts ordered state authorities to pay compensation, on the ground that the 'immovable properties were located within the territory of anti-terrorism operations, and that damages to housing had been caused by a terrorist act'.⁵⁵³ These cases were notable insofar as the judges interpreted Article 19 of the Law on Combatting Terrorism in favour of the plaintiffs, despite the fact that the provision does not explicitly include damages incurred in armed conflict.

276. In a perfect example of granting monetary assistance to IDPs, the City Council of Sloviansk granted non-recurrent monetary assistance to those whose housing had been destroyed as a result of anti-terrorism operations.⁵⁵⁴ According to the HLP Cluster, people whose homes were affected by armed conflict were included in the 'Programme for Social Protection of Specific Categories of Residents of Sloviansk for 2015—2019' and were approved by the City Council.⁵⁵⁵ As per the procedure adopted, a decision on granting the assistance was to be made by a special committee after considering applications from the people who own or rent apartments, or to the owners of such apartments or detached houses that were destroyed as a result of anti-terrorist operations.⁵⁵⁶ This localised programming allowed the city council to respond to the specific needs of people who were affected by armed conflict in Sloviansk.

b) Gaps and Challenges

277. The extent to which IDPs can seek compensation for property damage is inhibited by a legal provision which requires of them to first 'voluntarily transfer their title of the destroyed or damaged property to local councils or local administrations'.⁵⁵⁷ As some organisations have

⁵⁵¹ Norwegian Refugee Council (NRC), 'Pursuing Compensation for Properties Damaged or Destroyed as a Result of Hostilities in the Armed Conflict in Eastern Ukraine: Gaps and Opportunities' (15 January 2019) <<https://www.nrc.no/resources/reports/pursuing-compensation-for-properties-damaged-or-destroyed-as-a-result-of-hostilities-in-the-armed-conflict-in-eastern-ukraine-gaps-and-opportunities/>> accessed 13 May 2021.

⁵⁵² *ibid.*

⁵⁵³ *ibid.*

⁵⁵⁴ NRC 2020 Report (n 527).

⁵⁵⁵ Executive Committee of the Sloviansk City Council, 'Resolution 450 On Approving the Procedure for Granting the Non-Recurrent Monetary Assistance to the Citizens Whose Housing Has Been Destroyed as a Result of the Anti-terrorist Operation in 2019' (March 2019) (Ukraine).

⁵⁵⁶ *ibid.*

⁵⁵⁷ Code of Civil Protection of Ukraine 2012 (n 525) art 86.9.

noted, ‘the majority of the plaintiffs [that pursue litigation] are reluctant to waive their property titles, being skeptical of ever obtaining compensation’.⁵⁵⁸ It is notable courts have, on several occasions, ruled against plaintiffs seeking compensation because they did not waive their property titles.⁵⁵⁹

278. While Ukraine has adopted laws that impose criminal penalties for damaging property (which in practice can lead to internal displacement in a conflict zone), the OHCHR has reported gaps in their enforcement.⁵⁶⁰ The US State Department has also noted that the government ‘generally failed to take adequate steps to prosecute or punish most officials who committed abuses, resulting in a climate of impunity’.⁵⁶¹ No one, as of yet, has been charged or prosecuted for the illegal seizure of property and any corresponding property damage.

279. Domestic law in Ukraine currently does not explicitly address the displacement of indigenous populations, or peasants. As such, therefore, domestic law does not give effect to Principle 9 of the UN Guiding Principles.

280. Lastly, there are significant gaps in existing laws pertaining to emergency situations. In particular, the Law on Ensuring Sanitary and Epidemiological Welfare does not include any obligations for governmental bodies in the event of armed conflict, forced displacement, or human-made or natural disasters. For this reason, a number of organisations have called on the Ukrainian government to ‘assign a State body responsibility for ensuring provision and maintenance of adequate water, sanitation and hygiene services, including for IDPs, in cases of emergency and displacement, whether caused by conflict or disaster, and including preparedness measures’.⁵⁶²

⁵⁵⁸ NRC 2019 Report (n 551).

⁵⁵⁹ *ibid.*

⁵⁶⁰ United Nations Office for the High Commissioner for Human Rights (OHCHR), ‘Human Rights in the Administration of Justice in Conflict- Related Criminal Cases in Ukraine April 2014 – April 2020’ (27 August 2020) <<https://www.ohchr.org/Documents/Countries/UA/Ukraine-admin-justice-conflict-related-cases-en.pdf>> accessed 5 May 2021.

⁵⁶¹ United States Department of State Bureau of Democracy 2020 Ukraine Report (n 503).

⁵⁶² NRC 2020 Report (n 527).