

# **Internal Displacement as a Global Human Rights Challenge: Looking for a Solution through the Practices of Ukraine, Colombia and the African Union**

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## **Executive Summary**

This thesis is dedicated to the phenomenon of internal displacement as a global human rights challenge. It addresses the issues arising in the legal protection of internally displaced persons (*hereinafter* – IDPs) from international, regional and national perspectives and questions what a solution can be. Firstly, it evaluates whether the existing international humanitarian and human rights law provide sufficient protection to IDPs during all stages of displacement. It concludes that even though the relationship of these two bodies of law is complementary, there are gaps in the legal protection of IDPs to be fulfilled. At the same time, the thesis highlights the absence of international binding instrument and demonstrates why the Guiding Principles on Internal Displacement currently represent the most comprehensive framework. Secondly, this thesis examines the practices of national legislators and their success in bringing legislation in line with international standards. By analyzing and comparing the national legal frameworks of Colombia and Ukraine, it recognizes that domestic legislators fail to address the specific protection needs of IDPs. Thus, even though the Guiding Principles is a very important standard-setting document, being a soft law, it does not impose any obligations on states, while national legislators are reluctant to incorporate them. Moreover, the thesis questions how the African Union Kampala Convention for the Protection and Assistance of IDPs in Africa, as the first regional binding treaty on internal displacement, has advanced the legal protection of IDPs. The research discovers that its framework more encompassing and sensitive to the specific human rights concerns in the context of displacement if compared to the national legislation of Ukraine and Colombia. Thus, the thesis draws three major lessons from the practices of Ukraine, Colombia and the African Union. By relying on these lessons and considering both arguments for and against, it claims that a treaty on internal displacement is a possible solution to the challenge of internal displacement.

## **List of Abbreviations**

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

IACHR – Intern-American Court of Human Rights

IASC – Inter-Agency Standing Committee

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICRC – International Committee of the Red Cross

ICTY – International Criminal Tribunal for Former Yugoslavia

IDMC – Internal Displacement Monitoring Center

IDPs – internally displaced persons

IOM – International Organization for Migration

N(GCA) – (non)government-controlled area

UDHR – Universal Declaration of Human Rights

UNHCR - The Office of the United Nations High Commissioner for Refugees

## Introduction

It is a well-known fact, that globally there are twice as many IDPs as refugees,<sup>1</sup> and what is very turbulent – their number is constantly increasing. According to Internal Displacement Monitoring Center (*hereinafter* – IDMC), in 2017 there were 30.6 million new displacements worldwide. This number includes 11.8 million conflict-induced displacements and 18.8 million displacements triggered by disasters.<sup>2</sup> Indeed, international and internal armed conflicts, situations of disturbances and generalized violence are often regarded as one of “the major causes of population movement within and outside borders.”<sup>3</sup> Accordingly, 7.9 million displacements were caused by armed conflicts, 3.4 million – by criminal and communal violence, 327,000 – by criminal violence and 175,000 by other types of conflicts. At the same time, 758,000 displacements were results of geophysical disasters (589,000 and 169,000 caused by earthquakes and volcano eruptions respectively) and approximately 18 million displacements were induced by weather-related disasters, including floods (8.6 million), storms (7.5 million), cyclones, hurricanes and typhoons (6.9 million). Geographically, internal displacement is observed in all regions. For example, as follows from the statistics of IDMC as of 2017, most of conflict-induced displacement occurred in the Middle East, South and East Asia, Pacific and Sub-Saharan regions, while the disaster-induced displacement was concentrated in the East, South Asia, Pacific region and Americas.<sup>4</sup> Consequently, as many as 40 million persons worldwide were forced to leave their homes and places of habitual residence and became IDPs.<sup>5</sup> These persons have not crossed the internationally recognized borders, so

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<sup>1</sup> United Nations High Commissioner for Refugees (UNHCR), “Figures at Glance. Statistical Yearbooks,” available at: <http://www.unhcr.org/figures-at-a-glance.html> [accessed 5 November 2018].

<sup>2</sup> Internal Displacement Monitoring Center (IDMC), “Global Internal Displacement Database,” available at: <http://www.internal-displacement.org/database/displacement-data> [accessed 5 November 2018].

<sup>3</sup> Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012), p. 1.

<sup>4</sup> IDMC, “Global Internal Displacement Database”.

<sup>5</sup> UNHCR, “Figures at Glance. Statistical Yearbooks”.

they stay within responsibility of their governments, which often perceive IDPs as a burden, and therefore, are reluctant to ensure their rights, to address their needs and to maintain their protection. IDPs are finding themselves in the situation of increased vulnerability, and vast majority of their rights' violations remain invisible for international community. Nevertheless, the outrageous numbers prove that internal displacement has become a global human rights challenge and sustainable solutions should be found. This includes combatting the root causes of displacement, where possible, in order to prevent displacement and to protect those at risk of being displaced, establishing an effective protection framework during displacement and creating long-term durable solutions for IDPs to eliminate the instances of protracted displacement.

This year, the Guiding Principles on Internal Displacement (*hereinafter* – the Guiding Principles) – the document defining the international standards on IDPs' protection, celebrates its 20<sup>th</sup> anniversary. This date, as highlighted by the Special Rapporteur on the human rights of IDPs, “is a unique opportunity to forge a stronger commitment for more strategic, concrete and joined-up action in order to more robustly and effectively prevent internal displacement, enhance protection for internally displaced persons and support durable solutions for them.”<sup>6</sup> To this end, commemorating the anniversary of the Guiding Principles, underlying the global importance and urgency of the issue of internal displacement, this thesis is looking for a pillar to address this challenge.

Chapter 1 discusses internal displacement within international law and standards. By focusing mostly on the conflict-induced displacement, it analyzes the existing definition of IDPs, compares and discusses the legal protection of IDPs during all stages of displacement under international human rights and humanitarian law. It concludes, that international binding law contains gaps when it comes to the protection of IDPs. At the same time, the Guiding

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<sup>6</sup> United Nations, Human Rights Council, *Report of the Special Rapporteur on the Human Rights of IDPs – Note by the Secretariat*, A/HRC/38/39 (11 April 2018), §14.



Principles represent the most comprehensive framework, yet deprived of binding force. While international stakeholders repeatedly insist on the importance and necessity of incorporation of the Guiding Principles into domestic frameworks,<sup>7</sup> Chapter 2 of this thesis investigates how IDPs are protected by Ukrainian and Colombian legislation, as well as under the regional framework of the African Union Kampala Convention for the Protection and Assistance of IDPs in Africa (*hereinafter* – the Kampala Convention). In addition, it explores the major challenges arising in the way of ensuring protection within these jurisdictions. Chapter 3 of this research compares the approaches of Ukraine, Colombia and Kampala Convention in terms of defining IDPs, protection against and during displacement, and finding long-term durable solutions. At first sight, the characteristics of conflict-induced displacement in Ukraine, Colombia and within the African Union seem to be too different to be compared. However, this choice allows to investigate the legal protection of IDPs in three different constituencies and to capture the widest scope of issues emerging in these thematic areas. Such approach serves to see if human rights issues of IDPs in Colombia, where conflict-induced displacement has been lasting decades,<sup>8</sup> are different from the issues in Ukraine, which nowadays represent the most serious displacement crisis in Europe,<sup>9</sup> and in the African Union, where the number of IDPs has reached 12 million, with 70% of new displacements also triggered by conflicts.<sup>10</sup> Thus, by comparing three legislative approaches, this thesis drives three major lessons from the experiences of Ukraine, Colombia and the African Union. Chapter 3 recalls that nowadays there is no binding framework on internal displacement on the international level, and by referring to the jurisdictions compared, it explains why it is an issue. Finally, this research discusses the

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<sup>7</sup> Ibid, §79.

<sup>8</sup> IDMC, “Country Profile: Colombia,” available at: <http://www.internal-displacement.org/countries/colombia> [accessed October 4, 2018].

<sup>9</sup> IDMC, “Country Profile: Ukraine,” available at: <http://www.internal-displacement.org/countries/ukraine> [accessed November 11, 2018].

<sup>10</sup> Norwegian Refugee Council/IDMC, *2017 Africa Report on Internal Displacement*, December 2017, available at: <http://www.refworld.org/docid/5ac787d54.html> [accessed October 4, 2018].

necessity of a legislative action and proposes an international treaty as a possible solution enhancing the protection of IDPs worldwide.

## Chapter 1: How does international law protect IDPs?

Internal displacement is traditionally regarded as a matter of domestic law and policy.<sup>11</sup> As David James Cantor writes, “protection of IDPs tends to be viewed principally as a policy and operational challenge rather than a legal one.”<sup>12</sup> To agree with the author, if compared to international refugee law granting special attention to the protection of this particular group, there is no separate set of binding norms protecting IDPs.<sup>13</sup> At the same time, the existing international human rights and humanitarian law instruments contain provisions relevant to the protection of these persons. Additionally, the Guiding Principles is an important and encompassing document, yet “fundamentally ‘soft’ law in character.”<sup>14</sup> To this end, before formulating a possible solution for internal displacement, it is necessary to define the gaps in the international protection of IDPs during all stages of displacement which have to be subsequently fulfilled.

### 1.1. Who are IDPs?

Even though there are millions of IDPs worldwide, there is no internationally binding definition answering the question who belong to this category. In 1992, the Report of the Secretary General of the United Nations introduced the definition of IDPs, which comprised the range of events potentially resulting in internal displacement and was limited to cover only individuals “forced to flee their homes suddenly or unexpectedly in large numbers”.<sup>15</sup> Such

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<sup>11</sup> United Nations, Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add.2, Principle 3, available at: <http://www.refworld.org/docid/3d4f95e11.html> [accessed 17 November 2018].

<sup>12</sup> David James Cantor, “The IDP in International Law? Developments, Debates, Prospects,” *International Journal of Refugee Law*, Vol. 30, Iss. 2, 13 October 2018, available at: <https://doi.org/10.1093/ijrl/eev031> [accessed November 18, 2018].

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> United Nations, Commission on Human Rights, *Analytical Report of the Secretary-General on Internally Displaced Persons*, E/CN.4/1992/23 (14 February 1992), §17, available at: [http://repository.un.org/bitstream/handle/11176/188685/E\\_CN.4\\_1992\\_23-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/188685/E_CN.4_1992_23-EN.pdf?sequence=3&isAllowed=y) [accessed June 5, 2018].

narrow approach to definition may lead, as Roberta Cohen and Francis M. Deng claim, to the exception of many important cases, because internal displacement refers not only to one-time abrupt mass movements of population.<sup>16</sup> For example, the authors speak about not numerous flees in Colombia,<sup>17</sup> which started in 1960-s and continue nowadays subsequently resulting in one of the most serious world crises.<sup>18</sup> In addition to the question of what can be considered ‘a large number’ and how it is calculated, the patterns of displacement vary not only globally, but also within one state. Displacement may not necessarily reach enormous numbers – e.g. in Russia (19,000), Honduras (16,000), Algeria (2,500), Mali (37,000) comparing to millions of displaced in Colombia (7,246,000), Sudan (3,300,000), South Sudan (1,854,000), Democratic Republic of Congo (2,230,000), Ukraine (1,520,531), Afghanistan (1,553,000), Turkey (1,108,000).<sup>19</sup> In addition, describing displaced persons as ‘forced to flee’ is also restrictive, as in certain circumstances not simply the causes, but the eviction itself, is orchestrated and conducted by political and armed forces.<sup>20</sup> The deportation of Crimean Tatars to the other parts of Soviet Union due to the state-organized ethnic cleansing operation in 1944<sup>21</sup> – is a tragic historical example. The very recent examples are the ongoing forced evictions in the North Caucasus, namely in Ingushetia and Chechnya, the republics of the Russian Federation,<sup>22</sup> in the

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<sup>16</sup> Roberta Cohen, Francis M. Deng. *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, D.C.: Brookings Institution Press, 1998), p. 17.

<sup>17</sup> Ibid.

<sup>18</sup> According to numbers as of December 2016 provided by IDMC the total number of IDPs (conflict and violence) in Colombia has reached 7,246,00. The numbers are based on the Government of Colombia’s national registry. IDMC, “Columbia Country Profile,” available at: <http://www.internal-displacement.org/countries/colombia/> [accessed June 5, 2018].

<sup>19</sup> IDMC, “Country Profiles”, available at: <http://www.internal-displacement.org/countries/> [accessed June 5, 2018].

<sup>20</sup> Cohen, Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, p. 17. The authors provide examples of Bosnian Muslims, Myanmar, Iraq, Ethiopia.

<sup>21</sup> Pavel Polian, “Forced Migration During and After the Second World War”, in *Against Their Will: The History and Geography of Forced Migration in the USSR*, (Budapest: CEU Press, 2004), p. 153.

<sup>22</sup> Vsevolod Kritskiy, “Forced Evictions of Displaced People Lies in the Dark Shadows of Sochi Olympics”, *IDMC: Expert Opinion*, January 2014, available at: <http://www.internal-displacement.org/library/expert-opinion/2014/forced-evictions-of-displaced-people-lies-in-the-dark-shadows-of-sochi-olympics> [accessed June 5, 2018].

Sinai region by the Egyptian authorities,<sup>23</sup> and the plights of Uighurs in China.<sup>24</sup> Internal displacement may be induced by different factors – not limited to international and internal armed conflicts (e.g. Mexico, Democratic Republic of Congo, Ukraine, Syria),<sup>25</sup> sudden natural disasters (e.g. 149,000 displacements caused by storm and 91,000 displacements caused by volcano eruption in the Philippines<sup>26</sup> or 1,738,000 displacements in Cuba caused by Hurricane Irma in 2017<sup>27</sup>), slow-onset crises (e.g. 82,000 new displacements in Malaysia caused by floods and tropical depression in 2017).<sup>28</sup> Moreover, internal displaced is often triggered by a combination of these factors – e.g. Iraq (internal conflict, intervention, persecution),<sup>29</sup> Ethiopia (urbanization, conflicts, drought and floods)<sup>30</sup> or Afghanistan (conflict and natural hazards).<sup>31</sup> As all these examples prove, internal displacement is not a homogenous phenomenon and, consequently, it is indeed a challenge to gather all IDPs under one umbrella term.

The most significant attempt to formulate a definition on the international level has been done by the drafters of the Guiding Principles. The document was introduced to the Commission of Human Rights in 1998 by the group of experts and scholars to address internal displacement as “one of the most tragic phenomena of the contemporary world”.<sup>32</sup> It became

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<sup>23</sup> IDMC, “Egypt Country Profile,” available at: <http://www.internal-displacement.org/countries/egypt/> [accessed June 5, 2018]. Accordingly, in 2015, the number of IDPs reached 78,000 in Egypt.

<sup>24</sup> United Nations Office of the High Commissioner, “Committee on the Elimination of Racial Discrimination Reviews the Report of China,” Geneva, 13 August 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23452&LangID=E> [accessed October 20, 2018].

<sup>25</sup> IDMC, “Country Profiles,” available at: <http://www.internal-displacement.org/countries/> [accessed June 5, 2018].

<sup>26</sup> IDMC, “Country Profiles: Philippines,” available at: <http://www.internal-displacement.org/countries/philippines> [accessed October 21, 2018].

<sup>27</sup> IDMC, “Country Profiles: Cuba,” available at: <http://www.internal-displacement.org/countries/cuba> [accessed October 21, 2018].

<sup>28</sup> IDMC, “Country Profiles: Malaysia,” available at: <http://www.internal-displacement.org/countries/malaysia> [accessed October 21, 2018].

<sup>29</sup> IDMC, “Country Profiles: Iraq,” available at: <http://www.internal-displacement.org/index.php/countries/iraq> [accessed October 21, 2018].

<sup>30</sup> IDMC, “Country Profiles: Ethiopia,” available at: <http://www.internal-displacement.org/countries/ethiopia> [accessed October 21, 2018].

<sup>31</sup> IDMC, “Country Profiles: Afghanistan,” available at: <http://www.internal-displacement.org/countries/afghanistan> [accessed October 21, 2018].

<sup>32</sup> United Nations, Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on*

the first and the only document summarizing international standards for the protection of IDPs, and was presented during the 2005 World Summit in New York as an “important international framework for the protection of internally displaced persons.”<sup>33</sup> Even though the Guiding Principles are not endowed with a binding force, they integrate and reaffirm the fundamentals of the international human rights and humanitarian law, and “legal standards relevant to internally displaced drawn from... refugee law by analogy”.<sup>34</sup> The Guiding Principles describe IDPs as: “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 generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border”.<sup>35</sup>

As Walter Kälin specifies in the Guiding Principles Annotations, this description is not a legal definition. It was not an accidental mistake made by the drafters of the Guiding Principles. On the contrary, Walter Kälin states, “becoming displaced within one’s own country of origin or country of habitual residence does not confer special legal status in the same sense as does, say, becoming a refugee”.<sup>36</sup> He further supports his statement by saying that IDPs are entitled to rights and guarantees as “human beings and citizens or habitual residents of a particular state... in a situation of vulnerability” and “need not and cannot be granted a special status under international law comparable to refugee status”.<sup>37</sup> This definition contains two main criteria. Firstly, such movement is circumscribed by the state’s international borders,<sup>38</sup> and this essentially differentiates IDPs from refugees and beneficiaries of subsidiary protection, who, as follows from the legal definitions, are outside their country of nationality or habitual

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*Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add.2, available at: <http://www.refworld.org/docid/3d4f95e11.html> [accessed 17 November 2018].

<sup>33</sup> United Nations, General Assembly, Resolution A/60/L.1, 16 September 2005, §132.

<sup>34</sup> Walter Kälin, *Guiding Principles on Internal Displacement Annotations* (Washington D.C.: The American Society of International Law, 2008), p. xi.

<sup>35</sup> *Guiding Principles on Internal Displacement*, p. 5.

<sup>36</sup> Kälin, *Guiding Principles on Internal Displacement Annotations*, p. 4.

<sup>37</sup> *Ibid*, p. 5.

<sup>38</sup> *Ibid*, pp. 3-4.

residence.<sup>39</sup> Secondly, similar to refugees and beneficiaries of subsidiary protection, internal displacement is a consequence of or a necessary step to eschew certain negative and undesirable effects, so it is ‘forced’ or a result of ‘coercion’.<sup>40</sup> In terms of ‘forcibility’, the International Organization for Migration (*hereinafter* – IOM) defines ‘forced displacement,’ which in a narrow sense refers to a war crime of forced displacement, and in a broader sense – is synonymous to ‘displacement’ and encompasses “involuntary movement, individually or collectively, of persons from their country or community, notably for reasons of armed conflict, civil unrest, or natural or man-made catastrophes.”<sup>41</sup> In other words, there is a certain factor triggering displacement. However, it is unclear whether or not the risk, and not yet the existence, of such factors would meet the threshold. For example, when a conflict has not exploded yet, but the tensions in society are steadily growing. As for the ‘coercion’, Walter Kälin writes that “it is clear that the Guiding Principles do not apply to persons who move voluntarily from one place to another solely in order to improve their economic circumstances.”<sup>42</sup> However, where is a borderline between ‘voluntariness’ and ‘coercion’ in each particular case? What is the standard applicable in its assessment? Yet, the Guiding Principles neither provide direct answers to these questions, nor do they define ‘coercion’. At the same time, the IOM defines ‘coercion’ as “compulsion, whether legitimate or not, by

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<sup>39</sup> United Nations, General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, UN Treaty Series, vol. 189, Art. 1: Refugee is any persons who... “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” See, European Union, European Parliament and of the Council, *Directive 2011/95/EU of the On Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*, 20 December 2011, Official Journal of the European Union, L337/9, Art. 2 (f): “A person eligible to subsidiary protection means a third country national or stateless person who does not qualify as a refugee, ...or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention, and who, owing to a well-founded fear of suffering serious and unjustified harm set out in article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

<sup>40</sup> Kälin, *Guiding Principles on Internal Displacement Annotations*, p. 5.

<sup>41</sup> *Ibid.*

<sup>42</sup> Kälin, *Guiding Principles on Internal Displacement Annotations*, p. 4.

physical force or threat thereof. Coercion may also be economic in nature, where one uses his or her control over a particular resource to influence the behavior of another.”<sup>43</sup> So, accordingly, there are three types of compulsion – physical force, threat of physical force and compulsion of economic nature. However, in this definition, economic compulsion also is not considered abstractly, rather the existence of another party controlling economic sources and using this power ‘to orchestrate’ displacement is required. Furthermore, the IOM defines ‘forced migration’ as “a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes”.<sup>44</sup> As an example of forced migration, it names “movements of... IDPs”.<sup>45</sup> Thus, under the definition of the IOM, the lack of household opportunities, such as accommodation and labor, are also very unlikely to qualify as ‘economic coercion.’ Nevertheless, this is relevant, for example, in the case of persons displaced in the Northern Myanmar, who used to work in the farms for all their lives, had to change their location several times while seeking labor across the Chinese border.<sup>46</sup> At the same time, these persons are indeed moving in order to improve their ‘economic circumstances.’ Eventually, they are moving not to enrich themselves, but to survive and to leave a more or less dignified life. Thus, it is suggested, that in the situations of internal displacement, ‘coercion’ should be interpreted broadly and flexibly depending on specific context. Otherwise, an absence of a clear threshold leads to terminological imprecision, which can be simply misused by national authorities to deny special protection to IDPs and the very fact of their existence.

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<sup>43</sup> International Organization for Migration, *Glossary on Migration (Second Edition)*, International Migration Law No.25, Geneva, 2011, p. 20, available at: [http://publications.iom.int/system/files/pdf/iml25\\_1.pdf](http://publications.iom.int/system/files/pdf/iml25_1.pdf) [accessed October 21, 2018].

<sup>44</sup> Ibid., p. 39.

<sup>45</sup> Ibid.

<sup>46</sup> Daniel Sullivan, “Access Denied: Images of Displacement in Northern Myanmar”, *Refugees International*, 21 December 2017, available at: <https://www.refugeesinternational.org/reports/displacementinnorthernmyanmar> [accessed June 5, 2018].



So, who are IDPs? From 68.5 million forcibly displaced people, IDPs constitute 58,4%, which means there are almost two times more IDPs than refugees.<sup>47</sup> They were forced or obliged to flee for different reasons – mostly because of natural disasters, violence and conflicts. However, they remain within national borders and, consequently, are not subjects of international protection. There is no universal legal definition of IDPs and the threshold to be reached to qualify as IDP is not clear from the existing international standards. The consequences of such approach and terminological imprecision are further discussed.

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<sup>47</sup> UNHCR, “Figures at a Glance. Statistical Yearbooks”.

## 1.2. *Protection against displacement.*

While international human rights law is applicable both during armed conflicts and peacetime, international humanitarian law should be applied as *lex specialis*.<sup>48</sup> At the same time, to agree with Melanie Jacques, “no international legal framework should be seen as isolated”.<sup>49</sup> In the context of protection against displacement, human rights and humanitarian law frameworks, undoubtedly, complement each other, but is it enough?

### 1.2.1. **Protection against displacement under international humanitarian law.**

International humanitarian law, which involves both treaty-based and customary international law rules,<sup>50</sup> does not directly address internal displacement or the status of those displaced, however, it contains provisions on the protection of civilians and, therefore, IDPs. All above, for the applicability of the international humanitarian law there is a threshold which should be reached for the situation to qualify as an armed conflict. Namely, as follows from the judgment of International Criminal Tribunal for the former Yugoslavia (*hereinafter* – ICTY) in the case of Duško Tadić “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>51</sup> Moreover, in the same judgement the ICTY confirmed that international humanitarian law is applicable not merely during an armed conflict, but also “extends from the initiation of such armed conflict... beyond cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a

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<sup>48</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, §25, available at: [http://www.refworld.org/cases/ICJ\\_4b2913d62.html](http://www.refworld.org/cases/ICJ_4b2913d62.html) [accessed 5 June 2018]. See also, United Nations, Human Rights Committee, *General Comment No. 30. The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, §11, available at: <http://www.refworld.org/docid/478b26ae2.html> [accessed 5 June 2018].

<sup>49</sup> Jacques, *Armed Conflict and Displacement, the Protection of Refugees and Displaced Persons under International Humanitarian Law*, p. 7.

<sup>50</sup> International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of 12 August 1949*, P. xxvii. See also, Francois Bugnion, “Refugees, Internally Displaced Persons, and International Humanitarian Law, Refugees and the Right of Return,” *Fordham International Law Journal*, Vol.28, Iss. 5, 2005, p. 1400.

<sup>51</sup> *Prosecutor v. Duško Tadić (Decision on The Defense Motion for Interlocutory Appeal on Jurisdiction)*, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, §70.

peaceful settlement is achieved”.<sup>52</sup> Regarding the territorial scope, “international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>53</sup> That is why it is important to highlight that international humanitarian law affords protection against displacement not only within hostilities, both temporarily and territorially, but also before and after them.

The scope of protection afforded to IDPs depends on the nature of the conflict. As for the difference between international and non-international armed conflicts, international armed conflicts involve two or more states,<sup>54</sup> while non-international ones encompass “conflicts between governmental forces and non-governmental armed groups, or between such groups only...with a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.”<sup>55</sup> Protection against forced displacement is one of the issues addressed by the IV Geneva Convention<sup>56</sup> and two Additional Protocols.<sup>57</sup> During international armed conflicts, Article 49 explicitly prohibits displacement in the forms of deportation and forced transfer with regard to persons residing on the territories which are under occupation non-depending on the motive of such displacement, but leaves space for the exception of evacuation, “as a separate rule”,<sup>58</sup> normally within the boundaries of

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> ICRC, “How is the Term “Armed Conflict” Defined in International Humanitarian Law?,” Opinion Paper, March 2008, p. 1.

<sup>55</sup> Ibid.

<sup>56</sup> ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (The IV Geneva Convention)*, 75 UNTS 287, 12 August 1949.

<sup>57</sup> ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977*, available at: [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf) [accessed 5 June 2018].

<sup>58</sup> Yutaka Arai-Takahashi, *The Law of Occupation, Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2009), p.343-4; See also, Jacques, *Armed Conflict and Displacement, the Protection of Refugees and Displaced Persons under International Humanitarian Law*, p.29.

the occupied state for security and military reasons, albeit limited to the period of their existence.<sup>59</sup> Regarding the communication between the Occupying and the Protecting Powers, the last one shall be notified about such displacement when it occurs.<sup>60</sup> Moreover, under Article 58 of the Protocol I, “the Parties to the conflict shall, to the maximum extent feasible without prejudice to Article 49 of the IV Geneva Convention, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”.<sup>61</sup> Those who are willing to leave the conflict zone shall not be unlawfully restricted to do so.<sup>62</sup> However, rarely displacement occurs in accordance with international rules of war and the relevant standards, more often being a tool of warfare, “a part of a strategy to weaken the adversary”<sup>63</sup> targeting civilians. Being a part of tactic, “forced displacement is often carried out as a part of a wider “ethnic cleansing”,<sup>64</sup> and to address this deportation and transfer are prohibited and recognized as a war crime by the Statute of International Criminal Court (*hereinafter* – the ICC).<sup>65</sup> In addition, an act of deportation or transferring of the Occupying State’s civilians into the occupied territories constitutes a violation of the IV Geneva Convention and the Protocol I.<sup>66</sup>

Non-international armed conflicts are the engines of displacement as well, and Article 17 of the Protocol II address this issue. As a general rule, it prohibits forced displacement outside the territory “for reasons connected with the conflict”<sup>67</sup> but allows displacement of civilians for the purpose of security or “imperative military reasons”<sup>68</sup> within the state’s territory. Under any

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<sup>59</sup> *The IV Geneva Convention*, Art. 49.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Protocol I*, Art. 58.

<sup>62</sup> *The IV Geneva Convention*, Art. 49.

<sup>63</sup> IDMC/NRC, *Internal Displacement Global Overview of Trends and Developments in 2006*, April 2007, pp. 16-17.

<sup>64</sup> *Ibid.*, p.20.

<sup>65</sup> United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Art.8 (2)(b)(viii).

<sup>66</sup> *The IV Geneva Convention*, Art. 49. *See also*, *Protocol I*, Art. 85(4)(a).

<sup>67</sup> *Protocol II*, Art. 17(2).

<sup>68</sup> *Ibid.*; Otto Triffter, Ambos Kai, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999), p. 498: “imperative military reasons” should be interpreted in the same meaning as “military necessity”.

other circumstances, ordering<sup>69</sup> displacement is unlawful and qualifies as a war crime.<sup>70</sup> The common feature of international and non-international armed conflicts is that in both situations prohibition of forced displacement is not only regulated on the conventional level, rather it is a rule of international customary law, “supported by official statements...resolutions adopted by international organizations and conferences”.<sup>71</sup>

Nevertheless, the described framework under the international humanitarian law is not exempt from criticism. All above, the situation must reach the formal threshold to qualify as an armed conflict. Yet, this threshold may not be necessary reached in the cases of local disturbances or generalized violence.<sup>72</sup> Also, the very existence of the conflict may be denied by the parties to it, who may consequently claim non-applicability of international humanitarian law to them.<sup>73</sup> Secondly, while forced displacement is often ‘orchestrated’ non-state actors involved in the conflicts, there is no consensus on the bindless of the international humanitarian law to them.<sup>74</sup> This should be further explained. Namely, in the context of non-international armed conflicts, according to the Protocol II, these are “dissident armed forced or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to

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<sup>69</sup> Ibid., p. 497: “Ordering” refers solely to acts “directly aimed at removing” committed by “anyone in a position to effect such displacement by giving such order... The displacement should be a consequence of the reasons related to the conflict, what excludes other grounds as epidemics or natural disasters.”

<sup>70</sup> United Nations General Assembly, *Rome Statute of the International Criminal Court*, Art. 8(2)(e)(viii).

<sup>71</sup> Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1* (Cambridge: Cambridge University press, 2005), p. 457.

<sup>72</sup> ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” *International Review of the Red Cross*, Vol. 89, No. 867, September 2007, p. 720, available at:

<https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf> [accessed November 23, 2018]. See, Ganna Dudinska, “Freedom of Religion in the Context of Armed Conflicts,” Final Course Paper, *Freedom of Religion – Advanced*, Central European University, Budapest, 2018.

<sup>73</sup> Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (Geneva: ICRC, 2008), p.10, available at: [https://www.icrc.org/sites/default/files/topic/file\\_plus\\_list/0923-increasing\\_respect\\_for\\_international\\_humanitarian\\_law\\_in\\_non-international\\_armed\\_conflicts.pdf](https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf) [accessed 5 November 2018]. See, Dudinska, “Freedom of Religion in the Context of Armed Conflicts.”

<sup>74</sup> ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” pp. 724, 743. See, Dudinska, “Freedom of Religion in the Context of Armed Conflicts.”

implement this Protocol.”<sup>75</sup> The UN Office for the Coordination of Humanitarian Affairs further explained, that to qualify as a party to the conflict “non-state armed groups shall have i) the potential to employ arms in the use of force to achieve political, ideological or economic objectives, ii) are not within the formal military structures of States, State alliances or intergovernmental organizations, iii) are not under the control of the State(s) in which they operate, iv) have a group identity and v) are subjected to a chain of command.”<sup>76</sup> In the context of international conflicts, the status of national liberations movements is recognized.<sup>77</sup> With this regard, the Special Court for Sierra Leone referred to the Toronto Amicus Brief and concluded that “all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law”.<sup>78</sup> However, one issue is that states have not agreed to recognize the members of non-state armed groups as combatants. They are bound by Article 3 and, where meet the criteria mentioned above, by the rules under the Protocol II.<sup>79</sup> The question remains to be open when one speaks about non-state armed groups which do not fall within the ambit of the well-established definition of the party to armed conflict. Namely, according to international customary law, to qualify as a party to a conflict, an armed group, force or unit should be 1) organized and 2) “under a command responsible to that party for the conduct of its subordinates”.<sup>80</sup> Nowadays in the era of hybrid conflicts, the armed groups, including their territoriality and formal structures, are also becoming atypical. Another issue is that non-state actors may themselves deny the applicability of international humanitarian law to them, as they

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<sup>75</sup> *Protocol II*, Art. 1 (1).

<sup>76</sup> Gerard Mc Hugh, Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual For Practitioners* (New York: United Nations, OCHA, 2006), pp. 14-16, available at: <https://www.unocha.org/sites/unocha/files/HumanitarianNegotiationswArmedGroupsManual.pdf> [accessed 5 November 2018].

<sup>77</sup> Médecins Sans Frontières, “The Practical Guide to Humanitarian Law. Non-State Armed Groups”, available at: <https://guide-humanitarian-law.org/content/article/3/non-state-armed-groups/> [accessed 5 November 2018].

<sup>78</sup> *Prosecutor v. Sam Hinga Norman - Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-2004-14-AR72(E), Special Court for Sierra Leone, 31 May 2004, §22, available at: <http://www.refworld.org/cases,SCSL,49abc0a22.html> [accessed 5 November 2018].

<sup>79</sup> Médecins Sans Frontières, “The Practical Guide to Humanitarian Law. Non-State Armed Groups”.

<sup>80</sup> ICRC, “IHL Database. Customary IHL,” Rule 4, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule4](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4) [accessed 5 November 2018].

have not formally signed any treaty.<sup>81</sup> Traditionally, it is suggested that they are still bound by international humanitarian law: firstly, because of the territorial link between an armed group and territory where it fights, and secondly, because its members are nationals of a certain state. Practically, this is problematic, because on the one hand, these groups often do not represent the state and even straightforwardly claim their non-attribution to it. On the other hand, there may be no strictly identifiable national link – meaning, the members of armed groups may come from different national backgrounds. Moreover, another challenging context refers to armed groups acting on the territories of multiple states.<sup>82</sup> Therefore, this produces a gap in the protection of displaced persons, while to agree with Pauline Lacroix, Pascal Bongard and Chris Rush, “engagement with armed non-state actors... may point the way to innovative approaches to preventing forced displacement”.<sup>83</sup> The last problem is enforcement, because there is no special instrument, with exception of the ICC and special tribunals, however, their jurisdictions are limited.<sup>84</sup> Thus, there is no body with a competence to monitor and assess both actions and inactions of the states involved in armed conflicts regarding displacement and to offer protection to those individuals or groups of individuals affected by it, notably when they have been forcibly displaced by their own governments.

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<sup>81</sup> Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, p. 10.

<sup>82</sup> Ezequiel Heffes, Annyssa Bellal, “‘Yes, I Do’: Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent,” *Human Rights & International Legal Discourse*, Vol. 12 (1), pp. 122-125, available at: [https://www.geneva-academy.ch/joomlatools-files/docman-files/Bellal\\_Heffes\\_HRLD.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Bellal_Heffes_HRLD.pdf) [accessed 5 November 2018].

<sup>83</sup> Pauline Lacroix, Pascal Bongard et al, “Engaging Armed Non-State Actors in Mechanisms for Protection,” *Forced Migration Review*, No. 37, March 2011, p. 10, available at: <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/non-state/10-12.pdf> [accessed 5 November 2018].

<sup>84</sup> E.g. According to Art. 12 of the ICC Statute, the Court exercises jurisdiction only with respect to states which have ratified the ICC Statute or lodged a declaration accepting its jurisdiction on the ad hoc basis. Special tribunals also have limited temporal, territorial and personal jurisdictions. See, ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” p. 754. See also, Dudinska, “Freedom of Religion in the Context of Armed Conflicts.”

### **1.2.2. Forced displacement through the prism of fundamental human rights and freedoms.**

If compared to international humanitarian law, international human rights law does not explicitly prohibit forced displacement. Nevertheless, Universal Declaration of Human Rights (*hereinafter* – UDHR) talks about the “freedom of movement and residence within the borders of each state.”<sup>85</sup> Similarly under the freedom of movement clause, the International Covenant on Civil and Political Rights (*hereinafter* – ICCPR) includes the freedom to choose a place of residence, which can be restricted by the law and in the necessity “to protect national security, public order, public health or morals or the rights and freedoms of others,”<sup>86</sup> when it is “consistent with the other rights recognized in the present Covenant.”<sup>87</sup> The UN Human Rights Committee states in its General Comment No. 27, that the right to freedom of movement and residence includes, *inter alia*, “freedom to move from one place to another and to establish in a place of choice.”<sup>88</sup> Thus, “the enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place”.<sup>89</sup> To this end, it can be concluded, that even though the prohibition of forced displacement is not directly mentioned by these acts, it can be interpreted through other rights. Still, in addition to the shortcoming that it is not explicit, there are two major concerns about this framework: firstly, international human rights law is binding only on states which ratified the relevant international human rights treaties, and, secondly, it affords states a discretion under the legitimate aims.

It is also important to address the regional human rights instruments. Thus, IDPs in the Council of Europe (*hereinafter* – CoE) member-states are entitled to protection of their rights

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<sup>85</sup> United Nations, General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 [III] A, Art. 13.

<sup>86</sup> United Nations, General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, UN Treaty Series, Vol.999, Art.12.

<sup>87</sup> *Ibid.*

<sup>88</sup> United Nations, Human Rights Committee, *General Comment No. 27: Freedom of Movement (Art. 12)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, §1(5).

<sup>89</sup> *Ibid.*



under the European Convention on Human Rights (*hereinafter* – ECHR).<sup>90</sup> However, this document also does not explicitly refer to the prohibition of forced or arbitrary displacement. At the same time, the Preamble to Recommendation (2006) of the Committee of Ministers recalls that “arbitrary displacement of persons from their homes or place of habitual residence is prohibited, as can be inferred from the ECHR”.<sup>91</sup> Darren S. Dinsmore writes, that the series of Turkish cases in the 1990s, known as “the village destruction cases”<sup>92</sup> which emerged as a result of the conflict in the South-East of the state, were decided by the European Court of Human Rights (*hereinafter* – ECtHR) “as the first occasion in which forced movement had been litigated under international humanitarian law”.<sup>93</sup> The author explains that these cases were brought to the ECtHR “to establish a systematic, discriminatory practice of forced displacement, accompanied by a denial of redress”.<sup>94</sup> The ECtHR approached the cases from the perspective of Article 8 and Article 1 of the Protocol No. 1, however, as Darren S. Dinsmore concludes, it has not “conceptualized the violations as forced eviction, removal or displacement,” leaving this gap unfulfilled.<sup>95</sup> In the latter caselaw referring to the conflict between Turkey and Cyprus, the issue of forced displacement was raised again. For example, in the case of *Denizci and Others v. Cyprus*, the applicants argued that their arbitrary displacement “constituted an unjustified violation of their liberty of movement.”<sup>96</sup> The ECtHR found a violation of Article 2 of Protocol No. 4,<sup>97</sup> however, it addressed not exactly the fact of “forcible expulsion”,<sup>98</sup> rather the subsequent “monitoring of the applicants’ movements... and

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<sup>90</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, available at:

[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) [accessed November 18, 2018].

<sup>91</sup> Committee of Ministers, *Recommendation on Internally Displaced Persons*, 961<sup>st</sup> Meeting of the Ministers’ Deputies, 5 April 2006, available at: <https://rm.coe.int/16806b5aaf> [accessed November 11, 2018].

<sup>92</sup> Darren S. Dinsmore, “Pushing the Limits of the ECHR System: Village Destructions in Turkey”, *International Conference in Honor of Kevin Boyle and His Work*, NUI Galway / Queen’s University Belfast / University of Essex, 11 June 2011, p. 4.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, p. 6.

<sup>96</sup> *Denizci and Others v. Cyprus*, no. 25316-25321/94 and 27207/95, ECtHR, 23 May 2001, §401.

<sup>97</sup> *Ibid.*, §406.

<sup>98</sup> *Ibid.*

restrictions on liberty of movement resulting from special supervision”.<sup>99</sup> In addition, the applicants claimed that the way in which they had been displaced to Northern Cyprus, “amounted torture and/or inhumane and/or degrading treatment and punishment”.<sup>100</sup> The ECtHR found the violation of Article 3 of the ECHR, even though the level of severity to amount to torture had not been reached, classifying the treatment as inhumane.<sup>101</sup> However, the ECtHR referred to this alleged violation only in the context of detention,<sup>102</sup> and it has refrained from discussing it as a characteristic of displacement. The Committee of Ministers concluded in the explanatory memorandum to the above-mentioned Recommendation (2006) that “the protection against arbitrary displacement can be inferred from the compliance with a number of provisions of the ECHR, in particular from Article 2 of Protocol No. 4 (freedom of movement), Article 8 (right to respect for private and family life) and Articles 3 (prohibition of torture).”<sup>103</sup> Protection against displacement, even if derived from these provisions, convers additional issue for discussion. While Article 3, if raised in the context of the characteristics of displacement, is absolute, the rights under the first two articles – Article 2 and Article 8 – may be restricted, when there is a law in place and when it is “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.<sup>104</sup> What is more, as confirmed by the caselaw of the ECtHR, when it comes to the national security, which very likely to be claimed in the situations

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<sup>99</sup> Ibid, §§ 403-404.

<sup>100</sup> Ibid, §382.

<sup>101</sup> Ibid, §§ 384-388.

<sup>102</sup> Ibid, §384. *See also*, §§329, 334, 336, 338, 340, 342.

<sup>103</sup> Committee of Ministers, *Explanatory Memorandum to the Recommendation Rec(2006)6*, CM(2006)36 addendum, 8 March 2006, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d8728](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d8728) [accessed November 11, 2018]

<sup>104</sup> Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46, Art. 2 (3). *See also*, ECHR, Art. 8 (2).

of armed conflict, the states enjoy a wide margin of appreciation.<sup>105</sup> Overall, even if the absence of a direct prohibition of forced displacement can be subsequently indemnified by the jurisprudence, a broad list of legitimate aims, as referred under Article 2 of the Protocol No. 4 and Article 8, may be potentially relied on and misused by states to justify displacement as interference. Consequently, there is a high likelihood that if national security and prohibition of forced displacement as interpreted through other rights are weighted, the scales will not lean toward the latter.

In the American context, the American Declaration of the Rights and Duties of Men enshrines the right of individuals to stay in the chosen place of residence and to leave it only by his/her own will under the freedom of residence and movement clause.<sup>106</sup> Similarly, the American Convention on Human Rights provides for the right to move and reside within the territory of a state where an individual is present lawfully, which “may be restricted by law in designated zones for reasons of public interest”.<sup>107</sup> Separately, the problem of forced displacement has been addressed in the OAS Resolution 2229, by which “the importance of implementing effective policies for preventing and averting forced internal displacement”<sup>108</sup> has been accentuated. The Inter-American Court of Human Rights (*hereinafter* – IACHR) has also raised the issue of internal displacement in its caselaw. One of the most important cases is *Moiwana Community v. Suriname*,<sup>109</sup> in which the IACHR concluded that the members of Moiwana community have become the victims of forced eviction,<sup>110</sup> by finding a violation of freedom of movement and residence under Article 22 in conjunction with the general obligation to respect

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<sup>105</sup> European Court of Human Rights, Research Division. *National Security and European Caselaw*. Council of Europe, 2013, p. 3: “States are recognized to have a certain – even a large – measure of discretion when evaluating threats to national security and when deciding how to combat these.”

<sup>106</sup> Inter-American Commission of Human Rights, *American Declaration of the Rights and Duties of Men*, 2 May 1948, Art. 8.

<sup>107</sup> Inter-American Specialized Conference on Human Rights. *American Convention on Human Rights*. Costa Rica, San José, 22 November 1969, Art. 22.

<sup>108</sup> Organization of American States, *Internally Displaced Persons*, AG/RES. 2229 (XXXVI-O/06), 6 June 2006, p. 278, available at: <http://www.oas.org/en/sla/docs/AG03341E09.pdf> [accessed November 11, 2018].

<sup>109</sup> *Moiwana Community v. Suriname*, Petition no. 11,821, IACHR, 15 June 2005.

<sup>110</sup> *Ibid*, §109-121.

rights under Article 1 of the Convention.<sup>111</sup> Such decision has been reached by addressing forced displacement through the analysis and interpretation of Article 22 of the Convention in the light of the Guiding Principles,<sup>112</sup> what is a very progressive outcome.

The African Charter on Human and People's Rights does not have a provision devoted to the protection against displacement and identically to other regional human rights instruments, includes the right to freedom of movement and residence.<sup>113</sup> In addition, the Kampala Convention, includes a direct prohibition of forced displacement and an obligation to eliminate its causes,<sup>114</sup> and explicitly indicates a right to be protected against forced displacement.<sup>115</sup> In its latest Resolution on the Situation of Internally Displaced Persons in Africa, the African Commission on Human and Peoples' Rights urged the state parties to the Kampala Convention "to take all the necessary measures to protect populations from forced displacements irrespective of the causes."<sup>116</sup> The framework under Kampala Convention is analyzed by Chapter 2, however, this is not the only document relevant to the protection of IDPs. Thus, prior to the adoption of the Kampala Convention, in 2006, the Protocol to the Pact on Security, Stability and Development in the Great Lakes Region on the Protection and Assistance to IDPs was introduced on the sub-regional level calling the state-parties to implement the Guiding Principles.<sup>117</sup> Thus, in terms of protection against displacement it requires the state-parties "to prevent arbitrary displacement and to eliminate the root causes of displacement,"<sup>118</sup> but if

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<sup>111</sup> Ibid, §121.

<sup>112</sup> Ibid, §111.

<sup>113</sup> Organization of African Unity (OAU), *African (Banjul) Charter on Human and People's Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 12.

<sup>114</sup> African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009, Art. 2 (a).

<sup>115</sup> Ibid, Art. 4 (4).

<sup>116</sup> African Commission on Human and Peoples' Rights, *369 Resolution on the Situation of Internally Displaced Persons in Africa*, 60<sup>th</sup> Ordinary Session held from 8 to 22 May 2017 in Niger, ACHPR/Res. 369 (LX) 2017, available at: <http://www.achpr.org/sessions/60th/resolutions/369/> [accessed November 11, 2018].

<sup>117</sup> International Conference on the Great Lakes Region, *Protocol to the Pact on Security, Stability and Development in the Great Lakes Region on the Protection and Assistance to IDPs*, 30 November 2006, Art. 2, available at: <http://www.refworld.org/pdfid/52384fe44.pdf> [accessed November 18, 2018].

<sup>118</sup> Ibid, Art. 3 (1).

compared to the Kampala Convention, this document does not essentially broaden the scope of protection under the Guiding Principles.

So, among three regional frameworks, only the African Union has regionally binding treaty specifically constructed for IDPs which provides the most encompassing coverage for the protection against displacement. In general, protection against displacement can be interpreted from other fundamental rights, in particular the freedom of movement and residence. The IACHR in its caselaw has confirmed such approach by directly stating that forced displacement is prohibited as there is a freedom to fix one's place of residence to be interpreted through the Guiding Principles. However, it should be also recalled that the relevant human rights' provisions are only binding on states, which ratified the treaties containing them, and do not impose obligations on individuals. Moreover, there are no special norms concerning criminalization of the acts of arbitrary displacement. Generally, the international human rights law framework creates a wide forum for states' discretion justified by a list of legitimate aims. Eventually, there is always a risk of deliberate reliance on and misuse of such discretion. To conclude, the human rights framework is not full-encompassing to prevent displacement, namely to ensure that IDPs are protected against it.

### **1.2.3. Protection against displacement under the Guiding Principles on Internal Displacement.**

Apart from these two binding frameworks – international human rights and humanitarian law – the Guiding Principles reflect their essentials. This document requires not only states, but also “international actors... to respect and ensure respect for their obligations under international law, including international human rights and humanitarian law, in all circumstances, so as to prevent and to avoid conditions that might lead to displacement”.<sup>119</sup> The

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<sup>119</sup> *Guiding Principles on Internal Displacement*, Principle 5.

document also contains “the right to be protected against being arbitrarily displaced.”<sup>120</sup> Thus, the Guiding Principles absolutely prohibit displacement as a tool of apartheid, ethnic cleansing and as a collective punishment, and provides for displacement justified by “compelling and overriding public interest” in the context of development projects and evacuation when “safety and health of those affected” require it in the context of disasters.<sup>121</sup> Furthermore, the Guiding Principles set temporary limitation – even when displacement takes place, it should not last “longer than required by the circumstances”.<sup>122</sup> During armed conflicts forced displacement is also prohibited unless there is a justification of “security of the civilians involved or imperative military reason”.<sup>123</sup> The standards allow exceptions of displacement for the purpose of national security and evacuation, however, in the absence of alternatives, minimized and conducted in a way respectful of “the rights to life, dignity, liberty and security of those affected”.<sup>124</sup>

Overall, the Guiding Principles require that displacement, as a step undertaken in extreme situations as the measure of the last resort,<sup>125</sup> should be limited by time.<sup>126</sup> Thus, Romola Adeola proposes to divide all the above-mentioned requirements at those “to comply with international law” and “the minimum procedural requirements”.<sup>127</sup> These procedural requirements, or as Romola Adeola writes – “due process requirements,” are: consideration of alternatives, minimized negative effects of displacement, adequacy of resettlement, informing of persons affected, respect to human rights, existence of safeguards.<sup>128</sup> Separately, the Guiding

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<sup>120</sup> Ibid, Principle 6 (1).

<sup>121</sup> Ibid, (2).

<sup>122</sup> Ibid, (3).

<sup>123</sup> Ibid, (2 (b)).

<sup>124</sup> Ibid, Principles 7, 8.

<sup>125</sup> Ibid, Principle 7 (1).

<sup>126</sup> Ibid, Principle 6 (3).

<sup>127</sup> Romola Adeola, “The Rights Not to Be Arbitrary Displaced Under the United Nations Guiding Principles on Internal Displacement,” *African Human Rights Law Journal*, Vol. 16, No. 1, 2016, available at: <http://dx.doi.org/10.17159/1996-2096/2016/v16n1a4> [accessed 6 November 2018].

<sup>128</sup> Ibid.

Principles refer to the protection “against the displacement of indigenous peoples, minorities, peasants, pastoralists and groups with a special dependency on and attachment to their lands”.<sup>129</sup>

All the above-mentioned allows to place the Guiding Principles, without any doubt, as the most comprehensive, framework for the protection against displacement, despite the absence of explicit requirement of criminalization of arbitrary displacement on domestic level. What is only mentioned is that Guiding Principles “are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes”.<sup>130</sup> This again shows, that the role of the Guiding Principles is supplementary, what is clearly articulated in the Principle 5 cited above.<sup>131</sup> Thus, protection against displacement under the Guiding Principles is a good example of certain ‘symbiose’ between the norms of international human rights and humanitarian law, in spite of its major disadvantage – non-binding nature.

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<sup>129</sup> *Guiding Principles on Internal Displacement*, Principle 9.

<sup>130</sup> *Ibid*, Principle 1 (2).

<sup>131</sup> *Ibid*, Principle 5.

### ***1.3. Protection during displacement and durable solutions for displacement.***

Even though the most evident way to resolve the problem is to prevent its occurrence, there is still an overwhelming number of people both lawfully and unlawfully displaced. To this end, during displacement the most turbulent questions are whether IDPs require special or additional protection comparing to other people, and if yes, whether the existing humanitarian law and human rights law are able to ensure that such protection is provided.

#### **1.3.1. Protection under international humanitarian law.**

All above, it is important to document the relevant rules on international humanitarian law. The main principle is that displaced persons enjoy all the protection as afforded to civilians. This includes “respect for life, dignity and humane treatment”<sup>132</sup> and non-discrimination.<sup>133</sup> The legally binding standards specifically on the treatment of displaced persons are enshrined in Art. 49 of the IV Geneva Convention. It states that “the Occupying Power undertaking... transfers or evacuation shall ensure, to the greatest practicable extend, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated”.<sup>134</sup> Similarly, as applicable in the non-international armed conflicts, Art. 17 of the Protocol II requests that in the case of displacement, “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”.<sup>135</sup> The specific needs of children, women and elderly are also covered by general rules.<sup>136</sup> In the context of displacement during international armed conflicts, Art. 78 of the Protocol I, states that “no Party to the conflict shall arrange for

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<sup>132</sup> ICRC, “Internally Displaced Persons and International Humanitarian Law,” *Advisory Service on International Humanitarian Law*, December 2017, p. 3. See as cited in the source, *The IV Geneva Convention* (Art. 3, 27, 32), *Additional Protocol I* (Art. 75), *Additional Protocol II* (Art. 4).

<sup>133</sup> *Ibid.*, p. 2, see as cited in the source: *The IV Geneva Convention* (Art. 3, 13, 27), *Protocol I* (Art. 75), *Protocol II* (Art. 2 (1) and Art. 4 (1)).

<sup>134</sup> *The IV Geneva Convention*, Art. 49 (3).

<sup>135</sup> *Protocol II*, Art. 17 (§1).

<sup>136</sup> See, *The I Geneva Convention* (Art. 12), *The II Geneva Convention* (Art. 12), *The III Geneva Convention* (Art. 14), *The IV Geneva Convention* (Art. 27), *Protocol I* (Art. 76).



the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require.”<sup>137</sup> In addition, the written consent of “parents or legal guardians... or persons who by law or custom are primarily responsible for the care of the children is required”.<sup>138</sup> Such children shall be registered.<sup>139</sup> When occurred as an exceptional measure, the evacuation shall be under the supervision of the Protecting Power.<sup>140</sup> Education is also covered under this framework, namely, it “shall be provided while he is away with the greatest possible continuity”.<sup>141</sup> The Occupying Power is required to ensure proper accommodation for IDPs, while all the authorities involved are obliged to provide IDPs with basic satisfactory conditions of living.<sup>142</sup> Another crucially important rule of customary international law, relevant both during international and non-international conflicts, addresses providing and facilitation of humanitarian assistance.<sup>143</sup> The rules documented show that international humanitarian law contains provisions addressing protection of IDPs both during armed conflicts of internal and international nature as civilians or as a part of occupied population, including special guarantees for vulnerable groups.

In terms of durable solutions, Article 49 of the IV Geneva Convention states that “persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased”.<sup>144</sup> With this regard, the International Committee of the Red Cross (*hereinafter* – ICRC) concluded that there is a right of IDPs “to voluntary return in safety to their homes or places of habitual residence: as soon as the reasons for their displacement cease

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<sup>137</sup> *Protocol I*, Art. 78 (1).

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*, (3).

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, (2).

<sup>142</sup> Jacques, *Armed Conflict and Displacement, the Protection of Refugees and Displaced Persons under International Humanitarian Law*, p. 192.

<sup>143</sup> ICRC, “IHL Database. Customary IHL,” Rule 55, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule55](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule55) [accessed June 12, 2018].

<sup>144</sup> *Geneva Convention IV*, Art. 49.

to exist”.<sup>145</sup> However, international humanitarian law primarily aims to prevent displacement and to protect civilians “against the dangers of war”,<sup>146</sup> and therefore, the right to durable solution is not articulated as such. Moreover, it is evident that the humanitarian law framework is predominantly reactive – it focuses on emergency response to the needs of IDPs. On the one hand, it is absolutely true that IDPs shall enjoy protection as civilians. Indeed, they represent only one group of the conflict-affected population, which is also very diverse inside. So, the question is whether the scope of protection provided to IDPs should be equal if compared to other groups of conflict-affected population. Moreover, is it feasible both legally and institutionally to follow a ‘unified’ approach – namely, to ensure effective ‘umbrella’ protection of all conflict-affected population without actually distinguishing IDPs? The answer is rather no, the first and foremost, because eventually the needs and concerns of a civilian who was forced to flee to another part of a country or was evacuated are different from the needs and concerns of a civilian, who is, for example, residing in the territories controlled by guerilla groups. In the first case, one speaks not only about the general ‘dangers of war’, rather about the ‘dangers of forced displacement’. This is especially controversial in the context of protracted conflicts, when displacement may last for years, or even decades, and provision of basic satisfactory conditions of living and humanitarian assistance are insufficient. Again, as previously discussed in the context of protection against displacement, the responsibilities of the actors involved, namely when it comes to non-state actors, who can be both the ones who ‘orchestrate’ displacement or perpetrate violations of IDPs’ rights, is not clear. Summing up, in addition to the disadvantages of international humanitarian law framework already mentioned in this Chapter, while the international humanitarian law framework is obviously conflict-

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<sup>145</sup> ICRC, “Internally Displaced Persons and International Humanitarian Law,” p. 2.

<sup>146</sup> Jacques, *Armed Conflict and Displacement, the Protection of Refugees and Displaced Persons under International Humanitarian Law*, p. 188.

sensitive, it lacks sensitivity in terms of addressing the consequences of displacement, especially long-lasting.

### **1.3.2. Protection during displacement under international human rights norms and standards.**

Under international human rights law, on the one hand, there are human rights obligations imposed on the parties to a conflict which are, at the same time, parties to the relevant treaties, such as the right to health, education, property, social security, political participation, non-discrimination and other. On the other hand, none of the core nine human rights treaties<sup>147</sup> mention displacement (both within and outside borders), with exception of the Article 22 of the Convention on the Rights of the Child speaking about protection of a refugee child.<sup>148</sup> It can be argued, that these general human rights provisions do not cover the particular needs of IDPs which emerge as a result of displacement. These provisions, equally applicable to ‘everyone’, do not consider displacement-specific conditions in which IDPs often find themselves, such as, for example, residence in camp or loss of documentation. The right to a durable is not articulated as well, and even if interpreted in the context of displacement, these human rights norms do not address humanitarian assistance. Thus, the General Comment No. 14 states, that “state parties have a joint and individual responsibility... to cooperate in providing... humanitarian assistance... including assistance to refugees and internally displaced persons”.<sup>149</sup> With this regard, David Fisher writes, that the mere “existence of a general right to humanitarian assistance has been contested by some legal scholars”.<sup>150</sup> The author explains that indeed this

<sup>147</sup> United Nations, Office of the High Commissioner for Human Rights, “The Core International Human Rights Instruments and Their Monitoring Bodies” available at:

<https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> [accessed 5 November 2018].

<sup>148</sup> United Nations, General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UN Treaty Series, vol. 1577, Art. 22, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 12 July 2018].

<sup>149</sup> United Nations, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, §43.

<sup>150</sup> David Fisher, “The Right to Humanitarian Assistance” in *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ed. by W. Kälin et al. (Washington D.C.: American Society of International Law, Studies in Transnational Legal Policy No. 41, 2010), p. 48.

right is hardly articulated by human rights treaties, however, this gap is fulfilled by international human rights standards, mainly the emerging customary law and Guiding Principles.<sup>151</sup> To this end, the central part of the Guiding Principles is devoted to the protection during displacement. The principles are mostly based on the same structure: a fundamental right to which IDPs are entitled as all other people<sup>152</sup> and formulated expectations for the states to protect IDPs against particular threats potentially affecting them due to their vulnerability. Questioning responsibility leads to the Principle 25, which states that “the primary duty and responsibility for providing humanitarian assistance to IDPs lies with national authorities”.<sup>153</sup> Interestingly, Principle 7 repeats Art. 49 of the IV Geneva Convention, however, very generally it refers to “the authorities undertaking such displacement”.<sup>154</sup>

The first key feature of the Guiding Principles, if compared to humanitarian and human rights’ law norms, is that, as a document specifically designed to address the challenges emerging in the context of displacement, it is sensitive to the situation of displacement and circumstances in which IDPs find themselves. For example, many principles are framed from the perspective that IDPs often reside in special camps. Namely, the right to liberty and freedom of movement expand to include protection against detention in such camps.<sup>155</sup> Also, the fact of residing in a camp shall not be a ground for unequal enjoyment of the freedom of thought, conscience, religion or belief, opinion and expression, freedom of association, labor and voting rights.<sup>156</sup> Another important development refers to a widespread problem accompanying displacement – the loss of documents, birth certificates and failure to obtain new residence registration or registration as IDPs. It means that IDPs may stay undocumented and, therefore,

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<sup>151</sup> Ibid.

<sup>152</sup> E.g. the right to life (Principle 10), dignity and integrity (Principle 11), liberty and security (Principle 12), freedom of movement and residence (Principle 14), respect of family life, including family unity (Principle 17), adequate standard of living (Principle 18), property (Principle 19), recognition as a person before the law (Principle 20), education (Principle 23).

<sup>153</sup> *Guiding Principles on Internal Displacement*, Principle 25 (1).

<sup>154</sup> Ibid, Principle 7 (2).

<sup>155</sup> Ibid, Principle 14 (2).

<sup>156</sup> Ibid, Principle 22.

‘invisible’ for their governments. As a respond, the Guiding Principles formulate a duty of authorities to issue and to replace documents without an undue burden on IDPs.<sup>157</sup> A very important leitmotiv passing through the Guiding Principles is protection against discrimination. The first Section of the Guiding Principles opens with the equal treatment clause prohibiting discrimination against the IDPs based on their attribution to this group.<sup>158</sup> In other words, even though IDPs were forced to flee to another part of the state, they have all spectrum of rights and freedoms they used to have before, and their connection with the state does not interrupt. The Guiding Principles prohibit discrimination among IDPs on different grounds, such as “race, color, sex, language, religion of belief, etc.”<sup>159</sup> What in more, the document specifies protection against discriminatory treatment in the distribution of medical care,<sup>160</sup> “discriminatory practices of recruitment into any armed forces or groups”<sup>161</sup>, “direct or indiscriminate attacks or other acts of violence”<sup>162</sup>, safe access to food, water or accommodation.<sup>163</sup> In addition to the prohibition of discrimination, according to the Guiding Principles, some categories of IDPs shall be provided with additional protection and assistance corresponding their special needs, for example, children, persons with disabilities and elderly.<sup>164</sup> The further development of human rights in the context of displacement reflects in other rights, for instance, in the right to access to healthcare.<sup>165</sup> By doing so, the Guiding Principles accommodate human rights to the context of displacement and therefore they go beyond the international human rights framework.

The second feature of the protection during displacement under the Guiding Principles is its analogy with international refugee law. Thus, the core concept of the 1951 Refugee

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<sup>157</sup> Ibid, Principle 20 (2).

<sup>158</sup> Ibid, Principle 1 (1).

<sup>159</sup> Ibid, Principle 4 (1).

<sup>160</sup> Ibid, Principle 19 (1).

<sup>161</sup> Ibid, Principle 13 (2).

<sup>162</sup> Ibid, Principle 10 (2 (a)).

<sup>163</sup> Ibid, Principle 18 (2).

<sup>164</sup> Ibid, Principle 4 (2).

<sup>165</sup> Ibid, Principle 19.

Convention – protection of an asylum-seeker from refoulment<sup>166</sup> – is reflected in the Guiding Principles. As Miriam Bradley writes, the analogue to the principle of non-refoulment is a right of IDPs to return to their previous places of habitual residence, so they should not be forcibly relocated to the territories where they would be at risk.<sup>167</sup> Moreover, the right to seek asylum for IDPs transforms into “the right to seek safety in another part of the country”.<sup>168</sup>

Overall, the framework of the Guiding Principle is the most comprehensive and, hypothetically, international humanitarian and human rights law norms if interpreted through it, are able to provide protection for IDPs during displacement. However, there is a range of practical challenges, especially as a consequence of ignorance of these principles on the national levels, which is further demonstrated by Chapter 2.

### 1.3.3. International framework on the durable solutions for IDPs.

Internal displacement as a human right challenge does not cease to exist when a cause of displacement ends, or persons are simply relocated to the safe territories. The durable solution for IDPs shall be found – this is the moment when displacement ends.<sup>169</sup> To this end, the UN High Commissioner for Refugees (*hereinafter* – UNHCR) explains, that the durable solution is reached when “IDPs no longer have any specific assistance and protection needs that are linked to their displacement and can enjoy their human rights without discrimination on account of their displacement”.<sup>170</sup> The Guiding Principles do not contain a term ‘durable solution’, however, they speak about the right of IDPs “to choose freely between return, local integration

<sup>166</sup> United Nations, General Assembly, *Convention Relating to the Status of Refugees*, art. 33.

<sup>167</sup> Miriam Bradley, *Protecting civilians in war: the ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts* (Oxford: Oxford University Press, 2016), p. 5.

<sup>168</sup> *The Guiding Principles on Internal Displacement*, Principle 15.

<sup>169</sup> Megan Bradley, “Durable Solutions and the Rights of Return for IDPs: Evolving Interpretations”, *International Journal of Refugee Law*, Vol. 30, Iss. 2, 13 October 2018, available at: <https://doi.org/10.1093/ijrl/eev021> [accessed 6 November 2018].

<sup>170</sup> The Inter-Agency Standing Committee, *IASC Framework on Durable Solutions for IDPs* (The Brookings Institution – University of Bern, Project on Internal Displacement, April 2010), p. 5, available at: <http://www.unhcr.org/50f94cd49.pdf> [accessed November 11, 2018].

or resettlement”.<sup>171</sup> The document also addresses the recovery of property and redress.<sup>172</sup> This framework was further enlarged by the Inter-Agency Standing Committee’s Framework on Durable Solutions for IDPs (*hereinafter* – the IASC Framework ). This document establishes several main principles. Firstly, it is a national responsibility to provide IDPs with durable solutions, which includes “legal and policy framework... effective government structures... humanitarian and development assistance... adequate funding”.<sup>173</sup> Robert Kogod Goldman describes it as “the concept of sovereignty as a form of national responsibility.”<sup>174</sup> However, national authorities, who are dealing with consequences of internal displacement, do not always have practical ability or even, what is also not rare, willingness to undertake necessary steps. The second principle articulated by this document responds to such situations: states are required to allow the involvement and assistance of international actors in finding durable solutions.<sup>175</sup> At the same time, here the question of interfering with the national sovereignty arises. The concept of sovereignty can be interpreted to support the argument of internal displacement to be a matter of exclusively domestic policies. At the same time, following the Introduction of the Guiding Principles, they represent a manual for a number of actors. These actors include not only the states dealing with internal displacement, as the subjects responsible for IDPs’ protection in the first instance, but also “the Representative of the Secretary-General on internally displaced persons, intergovernmental and non-governmental organizations and all other authorities, groups and persons in their relations with internally displaced persons”<sup>176</sup>. However, political pressure as the only instrument to influence state which do not ensure sufficient protection of IDPs, is far not enough to change the attitudes of states, refraining from

<sup>171</sup> Bradley, “Durable Solutions and the Rights of Return for IDPs: Evolving Interpretations”. *See also, Guiding Principles on Internal Displacement*, Principle 15 and Principle 28 (2) addressing corresponding duties of states.

<sup>172</sup> *Guiding Principles on Internal Displacement*, Principle 29 (2).

<sup>173</sup> The Inter-Agency Standing Committee, *IASC Framework on Durable Solutions for IDPs*, p. 11.

<sup>174</sup> Robert Kogod Goldman, “Internal Displacement: The Guiding Principles on Internal Displacement-Normative Status, and the Need for Effective Domestic Implementation Null,” *Year Book of International Humanitarian and Refugee Law*, Vol. 7, pp. 265-278.

<sup>175</sup> The Inter-Agency Standing Committee, *IASC Framework on Durable Solutions for IDPs*, p. 11.

<sup>176</sup> *Guiding Principles on Internal Displacement*, Introduction.

requesting or accepting support and assistance from the third actors. The third principle of the IASC Framework gives priority to “the rights, needs and legitimate interests of IDPs” in determination of decisions upon durable solutions and displacement.<sup>177</sup> Therefore, to ensure this principle, IDPs should be involved in the decision-making process, as this is the only way to guarantee that their real concerns and problems are heard. Also, the document reinforces the ‘right’ to a durable solution, meaning that IDPs’ “informed and voluntary decision on what durable solution to pursue” shall be respected.<sup>178</sup> Namely, IDPs shall not be pressured to choose one or another durable solution, or to choose it in desperation, rather they shall be “provided with a meaningful and realistic choice”.<sup>179</sup> Moreover, the choice in favor of integration or resettlement does not exclude a right to return in future,<sup>180</sup> and oppositely, as according to the Guiding Principles, IDPs shall not be forcibly returned or resettled to the territories where “their life, safety, liberty and/or health would be at risk”.<sup>181</sup> Finally, the IASC Framework re-establishes the principle of non-discrimination and protection of IDPs under international law.<sup>182</sup> In addition to these principles, it also identifies eight criteria of a durable solution’s achievement: “1) a long term safety and security, 2) adequate standard of living, 3) access to livelihoods, 4) restoration of housing, land and property, 5) access to documentation, 6) family reunification, 7) participation in public affairs and 8) access to effective remedies and justice”.<sup>183</sup>

Nevertheless, as the IASC Framework itself mentions, these criteria shall be applicable with due regard to the uniqueness of each case of displacement, and they “should be rather seen as benchmarks for measuring progress made towards achieving durable solutions”.<sup>184</sup> For

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<sup>177</sup> The Inter-Agency Standing Committee, *IASC Framework on Durable Solutions for IDPs*, p. 11.

<sup>178</sup> *Ibid.* p. 12.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.* p. 27.

<sup>184</sup> *Ibid.*



example, what is crucial in the context of conflicts, “peacebuilding and durable solutions to internal displacement and long-term, inter-related processes, rooted in the common normative framework of human rights to redress and impacts of war”.<sup>185</sup> It means, that in the cases of conflict-induced displaced due regard should be given to the cause and it is necessary to consider the interests of IDPs within peacebuilding and reconciliation processes.<sup>186</sup> Namely, the question of redress shall be also raised through the prism of housing and property restitution for IDPs – “as a key element of restorative justice”.<sup>187</sup> Thus, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (*hereinafter* – the Pinheiro Principles) is the central document addressing it. The document is very straightforward in establishing that “whatever its cause, displacement must always be treated as a phenomenon in need of remedy and redress when those forced from their places of habitual residence determine the time is right.”<sup>188</sup> According to the Principle 2, “displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/ or property that is factually impossible to restore as determined by an independent, impartial tribunal.”<sup>189</sup> The Pinheiro Principles raise the necessity of special legislative measures on domestic level<sup>190</sup> and “independent, impartial tribunal”.<sup>191</sup>

Overall, undoubtedly, these international standards are very important, and they should serve as guidance for states in designing their laws and policies on the durable solutions. However, there is no right to durable solution for IDPs articulated by binding human rights’

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<sup>185</sup> Patricia García Amado, “Connecting Tenure Security with Durable Solutions to Internal Displacement: From Restitution of Property Rights to the Right to Adequate Housing,” *International Migration*, Vol. 54 (4), 2016, p. 75.

<sup>186</sup> Bradley, “Durable Solutions and the Rights of Return for IDPs: Evolving Interpretations.”

<sup>187</sup> Inter-Agency, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the 'Pinheiro Principles' (The Pinheiro Principles)*, March 2007, Principle 2, available at: <https://2001-2009.state.gov/documents/organization/99774.pdf> [accessed 8 November 2018].

<sup>188</sup> *The Pinheiro Principles*, p. 3.

<sup>189</sup> *Ibid*, Principle 2.

<sup>190</sup> *Ibid*, Principle 18.

<sup>191</sup> *Ibid*, Principles 2, 21.

instruments. It means that incorporation of the international standards on the durable solutions, namely under the Guiding Principles and the IASC Framework, only depends on the existence of political will within states, and there is no international instrument which can be relied on by IDPs in claiming their right to durable solution.

## **Chapter 2: Being internally displaced in Ukraine, Colombia and the African Union**

Ukraine and Colombia have faced the challenge of conflict-induced displacement. Despite difference in the history and nature of the conflicts, it appears that the main issues emerging in these national contexts of displacement are similar. Primarily, this refers to the challenge of developing a comprehensive legal framework. This includes, and is not limited to, formulating definitions, introducing legislative measures to protect persons against displacement, ensuring that IDPs are protected during displacement and guaranteeing durable solutions. This Chapter shows that the existing problems in Ukraine and Colombia are not merely the results of weak implementation, rather they originate from insufficiency of legislative frameworks. In both states, judiciary is ‘correcting mistakes’ of the legislators, that is very time-consuming and produces additional challenges in terms of enforcement. While in Colombia the Guiding Principles were step by step incorporated through adjudication, Ukrainian legislation absolutely does not reflect the international standards. Furthermore, this Chapter analyzes the legal framework of the Kampala Convention as a regional instrument, also focusing on its norms on conflict-induced displacement. It shows how the Kampala Convention, on the contrary to national legal frameworks, endowed the Guiding Principles with binding force and created an encompassing legal framework enhancing protection of IDPs.

### ***2.1. What do we know about IDPs in Ukraine, Colombia and the African Union?***

#### **2.1.1. Ukrainian IDPs: factual displacement vs legal recognition.**

As summarized within research on the freedom of religion in the context of armed conflict in Ukraine,<sup>192</sup> violating the Charter of the United Nations, territorial integrity and political

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<sup>192</sup> Ganna Dudinska, “Freedom of Religion in the Context of Armed Conflicts.”

independence Ukraine,<sup>193</sup> since 2014, the Autonomous Republic of Crimea (*hereinafter* – Crimea) has been under occupation by the Russian Federation (*hereinafter* – Russia).<sup>194</sup> March 2014, the referendum was held in a violation of the Constitution of Ukraine.<sup>195</sup> This referendum was condemned by the international community as one which had “no validity... and cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol”.<sup>196</sup> Thus, “Crimea became an epicenter of human rights violations,”<sup>197</sup> and occupation became a cause of thousands of displacements, in particular because of the “fear of persecution on ethnic or religious grounds, threats or reported attacks”.<sup>198</sup> Later on, a ‘referendum’ was organized in the Eastern Ukraine “proclaiming the independence of so-called ‘Donetsk and Luhansk People’s Republics’” (*hereinafter* – ‘DPR’ and ‘LPR’).<sup>199</sup> Controlled

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<sup>193</sup> United Nations, General Assembly, *Resolution 2625 (XXV) approving the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970: “the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations: The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”

<sup>194</sup> International Court of Justice, *Ukraine v. Russian Federation. Terrorism Financing and Racial Discrimination in Ukraine*, Application Instituting Proceedings filed in the Registry of the Court, 16 January 2017, §36.

<sup>195</sup> Verkhovna Rada of Ukraine, *Constitution of Ukraine*, 28 June 1996, with the latest amendments from 15 March 2016, available in Ukrainian language at: <http://zakon5.rada.gov.ua/laws/show/254к/96-бп> [accessed June 20, 2018]. The text is also available in English at the Council of Europe web-site: <https://rm.coe.int/constitution-of-ukraine/168071f58b> [accessed June 20, 2018]. See, Art. 72, 73.

<sup>196</sup> UN General Assembly, *Territorial Integrity of Ukraine*, Resolution 68/262, 27 March 2014, A/RES/68/262, §5, available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_res\\_68\\_262.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_68_262.pdf) [accessed June 20, 2018].

<sup>197</sup> Dudinska, “Freedom of Religion in the Context of Armed Conflicts”.

<sup>198</sup> Office of the United Nations High Commissioner for Human Rights, *Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, Report, §50, available at: [https://www.ohchr.org/Documents/Countries/UA/Crimea2014\\_2017\\_EN.pdf](https://www.ohchr.org/Documents/Countries/UA/Crimea2014_2017_EN.pdf)

<sup>199</sup> Dudinska, “Freedom of Religion in the Context of Armed Conflicts”.

by armed groups<sup>200</sup> and *de facto* by Russia, the ‘DPR’ and ‘LPR’ “are currently the areas characterized by extremely high rate of human rights violations and impunity”.<sup>201</sup>

According to the Norwegian Refugee Council, “4.4. million people have been affected by the conflict, over 10,000 have been killed and 25,000 wounded – including civilians...and as of February 2018, some 1.49 million people were registered as internally displaced”.<sup>202</sup> The IDMC documented over 2 million IDPs and “estimates that approximately 800,000 IDPs were living somehow permanently in government-controlled territory at the end of 2017.”<sup>203</sup> According to the Ministry of Social Policy of Ukraine, there are 1,520,531 IDPs registered in Ukraine as of November 5, 2018.<sup>204</sup> At the same time, it is difficult to guarantee absolutely accurate statistics for several reasons. Firstly, a number of people escaping the conflict do not undergo registration procedure as IDPs in their new places of residence and, therefore, stay ‘invisible’. Secondly, some people formally register as IDPs, but several times change their location between government and non-government-controlled area. Finally, there is no data on people who relocated within these territories.<sup>205</sup> Thus, internal displacement in Ukraine became a challenge from policy, legal and social perspectives. It has started abruptly, and Ukrainian legislative framework, obviously, had not been designed to deal with it. Moreover, in today’s realities the conflict with Russia has no real prospect of resolution, and internal displacement is becoming protracted. New laws have been adopted and the old ones have been amended to address it, however, the legislative response is absolutely inadequate.

<sup>200</sup> Parliamentary Assembly of the Council of Europe, *Humanitarian Consequences of War in Ukraine*, Resolution 2198 (2018), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24432&lang=en> [accessed June 27, 2018].

<sup>201</sup> Dudinska, “Freedom of Religion in the Context of Armed Conflicts”. *See also*, Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine from 16 May to 15 August 2018*, §§10, 23, 30, 34-36, 51-55, 78-80.

<sup>202</sup> “Norwegian Refugee Council in Ukraine. Humanitarian Overview,” available at: <https://www.nrc.no/countries/europe/ukraine/> [accessed July 17, 2018].

<sup>203</sup> IDMD, “Country Profile: Ukraine,” available at: <http://www.internal-displacement.org/countries/ukraine> [accessed November 11, 2018].

<sup>204</sup> “Ministry of Social Policy of Ukraine. 1,520,531 IDPs Registered,” available at: <https://www.msp.gov.ua/news/16197.html> [accessed November 11, 2018].

<sup>205</sup> IDMD, “Country Profile: Ukraine.”

October 2014, almost ten months after displacement had *de facto* started, the Law No.1706-VII addressing the rights and freedoms of IDPs was adopted.<sup>206</sup> Accordingly, Article 1 defines internally displaced person as: “a citizen of Ukraine, a foreigner or a stateless person who legally resides within the territory of Ukraine and may reside in Ukraine on the permanent basis, who has been forced to leave his/her place of residence as a result of negative consequences of the armed conflict, temporary occupation, widespread violence, infringement of human rights, and natural or man-made emergencies or in order to avoid the same.”<sup>207</sup>

Positively, this clause covers not only Ukrainian citizens as did the clause of original draft law.<sup>208</sup> Nevertheless, if compared to the descriptive definition under the Guiding Principles, the list of causes of displacement is exhaustive. With this regard, future applicability of the Law No.1706-VII, in particular the part about the ‘natural or man-made emergencies’, can be problematic, for example, in the context of slow-onset disasters, which by the moment of displacement may not reach the threshold of emergency. Also, this formulation does not include other possible triggers such as infrastructure development projects, urbanization, high rate of poverty, etc. Yet, this can be explained by the fact that the Law No.1706-VII was urgently and primarily adopted to address the displacement induced by conflict in the Eastern Ukraine and by the occupation of Crimea.

The definition embedded several main characteristics of IDPs. They are not necessarily citizens of Ukraine but should legally and permanently reside on the territories where the factors triggering displacement exist. Moreover, there should be a causal link between such

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<sup>206</sup> Verkhovna Rada of Ukraine, *The Law on Ensuring the Rights and Freedoms of IDPs (Law No. 1706-VII)*, Document No. 1706-VII, 20 October 2014, with the latest amendments No.2279-VII from 8 February 2018, available in Ukrainian at: <http://zakon2.rada.gov.ua/laws/show/1706-18> [accessed July 17, 2018].

<sup>207</sup> Ibid, Art. 1. See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons* (NRC, November 2016), p. 5, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/handbook\\_for\\_fundamental\\_rights\\_and\\_freedoms\\_of\\_idps\\_eng\\_web.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/handbook_for_fundamental_rights_and_freedoms_of_idps_eng_web.pdf) [accessed July 17, 2018].

<sup>208</sup> Stabilization Support Services, *Protection of the Rights of Internally Displaced Persons* (Kyiv: Stabilization Support Services, 2017), p. 10.

displacement and the above-mentioned factors.<sup>209</sup> The same provision also specifies, that a person is not burdened to prove the factors causing displacement if they are confirmed by “official reports (notices) on websites of one of the UN High Commissioner for Human Rights, Organization for Security and Cooperation in Europe; International Federation of Red Cross and Red Crescent Societies; Ukrainian Parliament commissioner for Human Rights, or the respective decisions on such circumstances have been taken by the respective governmental authorities”.<sup>210</sup> Thus, if interpreted linguistically, when the circumstances causing displacement are not established in such sources, their existence shall be proved by individual.

In Ukraine, displacement is linked to the outcome of administrative procedure and not the factual circumstances. Thus, many IDPs remain invisible and deprived of any special assistance, while the state enjoys a wide discretion in deciding who and how long is considered internally displaced. Namely, the fact of internal displacement is to be confirmed by the Certificate of registration as internally displaced person (*hereinafter* – IDP Certificate) issued by the competent body of the local administration for indefinite term according to the rules adopted by the Cabinet of Ministers of Ukraine.<sup>211</sup> Ukrainian IDPs have to register not only to access the benefits they are entitled to as IDPs, such as humanitarian assistance and other additional rights as listed by the Law No. 1706-VII.<sup>212</sup> The problem is that registration became a prerequisite to other rights and benefits, even though the Guiding Principles establish that “IDPs shall enjoy full equality, the same rights and freedoms under domestic law as do other persons in their country.”<sup>213</sup> This is further explained by the next subchapter.

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<sup>209</sup> Ibid, pp. 11-12.

<sup>210</sup> Ibid, See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p. 6.

<sup>211</sup> Ibid, See, Law No. 1706-VII, Art. 4 (1, 3-4). See also, Cabinet of Ministers of Ukraine, *Resolution No. 509*, 1 October 2014, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/509-2014-п> [accessed November 11, 2018].

<sup>212</sup> Law No. 1706-VII, Art. 9.

<sup>213</sup> *Guiding Principles on Internal Displacement*, Principle 1 (1).

In order to register, a person shall fill out an application form, provide identification document and other documents depending on his or her affiliation with Ukraine. These documents are primarily required to prove one's presence in the territories where the causes of displacement emerged. To this end, the identification document shall "contain a stamp of the registration of the place of residence (*hereinafter* - 'propiska') within the territory of the administrative territorial entity which the person is internally displaced from."<sup>214</sup> If a person has 'propiska' in another place or does not have it at all, still had been factually residing in the territories under question, he or she shall provide other evidence verifying it, such as "military registration card, certificate of secondary education, medical documents, video records, photographs, etc."<sup>215</sup> In the last case, authorities are given 15 days to evaluate the evidence provided and to decide upon issuing IDP Certificate.<sup>216</sup> In addition, upon receiving IDP Certificate, a person is obliged to inform the territorial department of the State Migration Service each time he or she changes a place of residence.<sup>217</sup> All these requirements are clearly problematic. Firstly, the loss of identification documents is a common difficulty faced by persons fleeing from the conflict zones. Eventually, a person has to wait until the identification document is reissued, otherwise its absence is an obstacle to obtain registration.<sup>218</sup> Consequently, without registration a person cannot fully enjoy the whole spectrum of entitlements linked to registration, including humanitarian assistance.<sup>219</sup> Secondly, authorities have a huge discretion in the assessment of evidence in the cases when 'propiska' requirement is not met, and the insufficiency of evidence is one of the grounds for refusal in registration.<sup>220</sup>

<sup>214</sup> Law No. 1706-VII, Art. 4 (7). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p. 10.

<sup>215</sup> Law No. 1706-VII, Art. 4 (7). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p. 10.

<sup>216</sup> Cabinet of Ministers of Ukraine, *Resolution No. 509*, §7.

<sup>217</sup> Ibid, §9.

<sup>218</sup> Law No. 1706-VII, Art. 4 (9(3)). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p.12.

<sup>219</sup> Law No. 1706-VII, Art. 9 (1).

<sup>220</sup> Ibid, Art. 4 (9(4,5)). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p.12.



Furthermore, a person can be de-registered as IDP. This can be voluntary, when a person requests it,<sup>221</sup> or the registration can be cancelled if a person had provided false information during registration.<sup>222</sup> In addition, the registration is cancelled if a person commits certain crime as specified by the Law No. 1706-VII<sup>223</sup> or returns to the abandoned place of permanent residence.<sup>224</sup> Of course, IDPs receiving any kind of social payments and humanitarian assistance from the state are particularly targeted, because revocation of the status leads to the termination of such payments. This raises the issue of social insecurity of IDPs which is further discusses in this Chapter. In addition, even though the list of grounds for status revocation is exhaustive, it can be misused by authorities. For example, this was documented by the Kharkiv Human Rights Protection Group and the Danish Refugee Council, when IDP status was revoked after an individual obtained ‘propiska’ in a new place of residence, explained and presented by the authorities as “attribution to a new territorial community”.<sup>225</sup>

Besides, the registration requirement can be justified by the necessity of reliable statistics and monitoring to ensure effective policymaking, and therefore, such administrative procedure is not excluded by the Guiding Principles. At the same time, as Erin Mooney writes, “from the standpoint of international law, such registration processes have no bearing on the descriptive reality of being internally displaced.”<sup>226</sup> She explains, that “being an IDP depends on the existence of objective facts, and not a process of legal recognition”, so a person remains to be IDP until the end of the factual internal displacement.<sup>227</sup> This is not reflected in Ukrainian

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<sup>221</sup> Law No. 1706-VII, Art.12 (1(1)). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p.13.

<sup>222</sup> Law No. 1706-VII, Art.12 (1(4,5)). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p.14.

<sup>223</sup> Law No. 1706-VII, Art. 12 (1(2)). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p.13.

<sup>224</sup> Law No. 1706-VII, Art.12 (1(3)). See, Norwegian Refugee Council, *Handbook for the Fundamental Rights and Freedoms of Internally Displaced Persons*, p.13.

<sup>225</sup> Kharkiv Human Rights Protection Group, “Not a Ground for Revocation of IDP Certificate,” 30 September 2016, available in Ukrainian language at: <http://khpg.org/index.php?id=1475228657> [accessed July 18, 2018].

<sup>226</sup> Erin Mooney, “When Does Internal Displacement End?” (Brookings, 8 February 2003), available at: <https://www.brookings.edu/on-the-record/when-does-internal-displacement-end/> [accessed July 19, 2018].

<sup>227</sup> Ibid.

legislation: there is a *de facto* legal IDP status, even though it has been formally rejected by the Supreme Court of Ukraine.<sup>228</sup>

Ukrainian legal framework for the protection against arbitrary displacement is also very weak. According to Article 33 of Ukrainian Constitution, the right to freedom of movement and choice of place of residence is guaranteed to everyone who is legally present on the territory of the country. This right can be restricted only by the law.<sup>229</sup> Article 3 of the Law No. 1706-VII entitles “citizens, foreign citizens and stateless persons legally residing in Ukraine to the right to protection against forced internal displacement and forcible return to the abandoned place of residence”.<sup>230</sup> However, Ukrainian legislation does not further specify any concrete measures for the realization of such protection. For instance, as opposed to the criminalization of arbitrary displacement in Colombia<sup>231</sup> and criminalization requirement under the Kampala Convention,<sup>232</sup> Ukrainian Criminal Code does not contain any provision specifically dedicated to this issue. Only academic commentaries mention forced displacement as a way of committing genocide, accordingly framed by Article 442 of the Criminal Code of Ukraine.<sup>233</sup> Displacement is also mentioned in the Article 149 of the Criminal Code of Ukraine addressing human trafficking which criminalizes “displacement’ for the purpose of exploitation”.<sup>234</sup> Notwithstanding, today there are several cases of forcible transfers and deportations documented by Office of the United Nations High Commissioner for Human Rights, all orchestrated by the Russian forces. In 2017, 155 persons were deported by the Russian

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<sup>228</sup> Supreme Court of Ukraine, *Case No. 805/402/18*, 3 May 2018, available in Ukrainian at: <http://reyestr.court.gov.ua/Review/73869341> [accessed November 11, 2018].

<sup>229</sup> *Constitution of Ukraine*, Art. 33.

<sup>230</sup> *Law No. 1706-VII*, Art. 3.

<sup>231</sup> Federico Adreu-Guzmán, *Criminal Justice and Forced Displacement in Colombia. Case Studies on Transitional Justice and Displacement*, Brookings-LSE, Project on Internal Displacement, 2010, p. 8, available at: <https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Criminal-Justice-Colombia-CaseStudy-2012-English.pdf> [accessed October 4, 2018].

<sup>232</sup> *Kampala Convention*, Art.4(6).

<sup>233</sup> Verkhovna Rada of Ukraine, *Criminal Code of Ukraine*, Document No. 2341-III 2001 with the latest amendments No.2505-VIII from 12 July 2018, Art. 442, available in Ukrainian at: <http://zakon2.rada.gov.ua/laws/show/1706-18> [accessed July 17, 2018].

<sup>234</sup> *Ibid*, Art. 149.

authorities from Crimea for alleged breach of immigration laws. In addition, as a result of ‘show trials’, Ukrainian citizens “were deported from Crimea on the basis of their ‘illegal employment’ and banned from entering Crimea for a period of 5 years”.<sup>235</sup> Before the transfer to Ukraine, these persons had been held in detention in the Russian territories, which is eventually a violation of international humanitarian law, namely the rule already recalled in the Chapter 1, prohibiting “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power... regardless of their motive.”<sup>236</sup> As long as according to the Law No. 1706-VII, “Ukraine undertakes all possible measures prescribed by Constitution, Ukrainian legislations and international treaties” to deal with displacement during all its stages, including its prevention,<sup>237</sup> there is an urgent need to amend the Criminal Code of Ukraine with provision criminalizing arbitrary displacement.

To sum up, internal displacement caused by conflict in Ukraine is a tragic and multi-faceted phenomenon, and its legislative framing has a very formalistic and security-centered approach – from the basic terminology to the administrative measures applicable. The existence of IDP legal status in Ukraine does not go in line with one of the basic concepts of the Guiding Principles, embedding that “becoming displaced within one’s own country... does not confer special legal status”.<sup>238</sup> International humanitarian law is not respected by the Occupying power, while Ukrainian legislation and consequently its implementation do not reflect the international standards, in particular in terms of defining IDPs and prohibiting arbitrary displacement.

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<sup>235</sup> Ibid.

<sup>236</sup> *The IV Geneva Convention*, Art. 49.

<sup>237</sup> *Law No. 1706-VII*, Art. 2.

<sup>238</sup> Kälén, *Guiding Principles on Internal Displacement Annotations*, p. 4.

### 2.1.2. IDPs in Colombia: trial and error.

For a period longer than fifty years, Colombia was engrossed in conflict and violence as a result of confrontation between the government forces, rights-wing paramilitaries, FARC and organized-crime groups. The roots of the conflict go long time back in history and one of its triggers was unequal land distribution: the concentration of landownership was very high, and the peasants were widely oppressed.<sup>239</sup> This resulted in a high rate of violence and an upraise of the insurgency movements. These disturbances triggered displacement. In Colombia, where the lands have been traditionally considered “the source of power”,<sup>240</sup> forced displacement became a military tool and “served... for armed actors to expand their power and territory,”<sup>241</sup> including the expansion of land holdings for the purpose of drug-trafficking.<sup>242</sup> Thus, the predominant trend shows that the displacement is “more intense in regions well-suited for agriculture or area rich in minerals”.<sup>243</sup> Persons were forced to flee because of the threats, including the threat of forced military recruitment, forced disappearance and human trafficking, torture, massacres and constant clashes of forces.<sup>244</sup> Therefore, as Ellen Fadnes and Cindy Horst write about the causes of the conflict, “the right to land is one of the major underlying factors”.<sup>245</sup> To this end, “the situation has been called a “veritable guerra de territorio or war for land.”<sup>246</sup>

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<sup>239</sup> Ellen Fadnes, Cindy Horst, “Responses to Internal Displacement in Colombia: Guided by What Principle?,” *Refuge*, Vol. 26, No.1, p. 112, available at: <https://refuge.journals.yorku.ca/index.php/refuge/article/viewFile/30613/28124> [accessed October 3, 2018].

<sup>240</sup> Ibid.

<sup>241</sup> James M. Shultz, Angela Milena Gómez, et al., “Internal Displacement in Colombia: Fifteen Distinguishing Features,” *Disaster Health*, vol. 2 (1), 2014, available at: <https://dx.doi.org/10.4161%2Fdish.27885> [accessed November 11, 2018].

<sup>242</sup> Ibid.

<sup>243</sup> Fadnes, Horst, “Responses to Internal Displacement in Colombia: Guided by What Principle?,” p. 113.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid, p. 112.

<sup>246</sup> Ibid., p. 113.

In 2016, a Peace Agreement has been concluded aiming to bring the hostilities to the end.<sup>247</sup> However, the decades of the conflict resulted in enormous numbers of IDPs, most of whom “are the *campesinos*, peasants from rural areas”.<sup>248</sup> Today IDMC estimates that the total number of IDPs has reached 6,509,000 as of December 2017, with 139,000 new displacements during 2017.<sup>249</sup> Both the dramatically high number of IDPs and the protracted nature made internal displacement a challenge for Colombia, in particular from legal perspective.

As a first response to it, in 1997, the Law No. 387 was adopted,<sup>250</sup> which has been widely welcomed by the international community as a landmark and innovative act,<sup>251</sup> which has not only admitted the existence of displacement, but also established institutional framework to address it – the National Plan for the Integral Attention to Population Displaced by Violence.<sup>252</sup> Interestingly, as concluded by Federico Guzmán, the Guiding Principles had a strong influence on the development of Colombian framework “as a result of their judicial incorporation through constitutional adjudication”.<sup>253</sup> For instance, in the Decision SU-1150 of 2000, the Constitutional Court ruled that the Guiding Principles “must be held as parameters for legal creation and interpretation”.<sup>254</sup> Consequently, the Guiding Principles have strengthened the IDPs protection in Colombia during all stages of displacement.

<sup>247</sup> *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, 24 November 2016, available at: <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> [accessed October 3, 2018].

<sup>248</sup> Joe Oloka-Onyango, “Movement-Related Rights in the Context of Internal Displacement,” in *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, ed. by W. Kälin et al. (Washington D.C.: American Society of International Law, Studies in Transnational Legal Policy No. 41, 2010), p. 37.

<sup>249</sup> IDMC, “Country Profile: Colombia,” available at: <http://www.internal-displacement.org/countries/colombia> [accessed October 4, 2018].

<sup>250</sup> *Law 387 on Internal Displacement of 1997 (Law No. 387)*. Colombia, 24 July 1997, available at: <http://www.refworld.org/docid/5a255b374.html> [accessed 20 November 2018].

<sup>251</sup> Marie-Hélène Verney, “Challenges Remain in Implementation of Landmark Colombian Law”, *UNHCR*, 18 July 2007, available at: <http://www.unhcr.org/news/latest/2007/7/469e2c3b4/challenges-remain-implementation-landmark-colombian-law.html> [accessed October 4, 2018].

<sup>252</sup> *Law No. 387*, Art. 9.

<sup>253</sup> Federico Guzmán Duque, “The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia,” in *Judicial Protection of Internally Displaced Persons*, ed. by Rodolfo Arango Rivadeneira (Brookings, November 2009), p. 177, available at: [https://www.brookings.edu/wp-content/uploads/2016/07/Chapter\\_6.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/Chapter_6.pdf) [accessed October 4, 2018].

<sup>254</sup> *Ibid*, p. 179.

According to the Article 1 of the Law No. 387, “a displaced person” is: “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.”<sup>255</sup> As a disadvantage, the clause does not mention natural disasters, and similarly to Ukrainian definition, it does not list development projects among the causes of displacement, so the causes of displacement are limited to conflicts and violence. It is very specific and narrower than the definition under the Guiding Principles in determining a threat or a violation of “life, physical integrity and personal freedom or safety”<sup>256</sup> as a reason for displacement, further providing an unexhaustive list of examples of such situations, all of which have one common characteristic – “a drastic disturbance of the public order”.<sup>257</sup> At the same time, according to Colombian definition, IDPs might have left not only the place of residence, but also a place where they conducted economic activities.<sup>258</sup>

The first Article of the Law No. 387 also mentions “displaced status” and empowers the National Government to legally frame it.<sup>259</sup> While Ukrainian Law No. 1706-VII after covering under the definition of IDP not only Ukrainian citizens, subsequently entitles all IDPs to the benefits provided by this law, the Colombia approach is different. After giving a general definition of IDP, Article 32 limits the availability of all the benefits under this Law to Colombians, who meet the characteristic of IDP and “who have reported those acts before the

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<sup>255</sup> *Law No. 387, Art. 1.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

Office of the Attorney General of the Nation, or before the Office of the Ombudsman, or before the District or Municipal Office of Human Rights, in the unique format designed by the Social Solidarity Network”.<sup>260</sup> The way how the application of Article 32 has been modified several times deserves attention. Originally, it placed registration as pre-condition to the availability of assistance and evaluation of the veracity of the declaration, however, later on, a Decree No. 2569 has been introduced, which switched the veracity of the declaration and registration in time, as well as it “set a deadline of one year after displacement for rendering the declaration.”<sup>261</sup> So, as Robert K. Goldman writes, Colombian who qualified as IDP under Article 1 of the Law No. 387, in accordance with Article 32, had to render a declaration to the above-mentioned authorities within one year of the events which caused displacement. This was necessary for one’s access to emergency humanitarian assistance. Unless registered, an IDP was only eligible for state funded programs on durable solutions.<sup>262</sup> However, Decree No. 2569 was later invalidated, and one-year limitation was cancelled by the High Administrative Court of Colombia.<sup>263</sup>

In 2009, the Constitutional Court of Colombia, in the decision Auto-011 addressed the registration procedure. As summarized in the study of the IDMC, the Constitutional Court of Colombia concluded the following: “a) important deficiencies with the registration system persist, resulting in significant rates of under-registration; b) that displaced persons have the right to be included in government information systems for displaced persons, through what it called positive or additive habeas data – habeas data is generally understood as a complaint that can be filed to find out what information is held about the plaintiff in government information

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<sup>260</sup> Ibid, Art. 32.

<sup>261</sup> Ibid.

<sup>262</sup> Robert K. Goldman, “Internal Displacement, the Guiding Principles on Internal Displacement, the Principles Normative Status, and the Need for their Effective Domestic Implementation in Colombia,” *ACDI*, Bogotá, Vol. 2, 2009, p. 77, available at: <https://revistas.urosario.edu.co/index.php/acdi/article/viewFile/1100/995> [accessed October 4, 2018].

<sup>263</sup> IDMC, NRC, “Colombia: Property Restitution in Sight but Integration Still Distant,” *Profile on the internal displacement situation*, 5 September 2011, p. 26, available at: <http://www.refworld.org/pdfid/4e6eec812.pdf> accessed October 4, 2018].

systems”.<sup>264</sup> Furthermore, the Conditional Court obliged “the Government to register people displaced before 2000, and between 2000 and 2008”.<sup>265</sup> Thus, it can be derived, that in Colombian legislation, the registration of IDPs and the fact of displacement are distinguishable. If compared to Ukraine, there is no ‘certification’ of IDPs in Colombia as such, rather such IDP certificate, as official confirmation of displacement, can be requested by individual.<sup>266</sup> Furthermore, while Ukrainian Law No.1706-VII lists concrete grounds for re-vocation of *de facto* legal IDP status, and therefore all the rights and duties linked to it, the Colombian Law No. 387 contains only one ground for one’s loss of the benefits under it – “the acts reported by someone alleging displaced status are untrue.”<sup>267</sup> Overall, there is no specific legal status of IDP produced by registration in Colombia, because as stated by the national Constitutional Court “forced displacement, being a factual situation, does not require for its configuration, nor as an indispensable condition to acquire the status of IDP, a formal declaration by any public or private entity”.<sup>268</sup>

In terms of prevention of forced displacement, the Law No. 387 includes mostly policy measures. For example, as expected from the National Government according to Article 14, such measures are “...formation of work groups... community and citizen actions to generate peaceful coexistence and law enforcement activity against agents of disturbance... actions to avoid arbitrariness and discrimination, and to mitigate the risks of life, personal integrity and the private property of displaced” and others.<sup>269</sup> Furthermore, Article 14 states that where “there are well-founded reasons to believe that a forced displacement” will occur, state, municipal and

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<sup>264</sup> IDMC, “Colombia: New Displacement Continues, Response Still Ineffective,” *Profile of the Internal Displacement Situation*, 3 July 2009, p. 22, available at: <http://hlm.org/img/violation/Colombia-July-2009.pdf> [accessed 18 September 2018].

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Law No. 387, Art. 32.

<sup>268</sup> Duque, “The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia,” p. 180.

<sup>269</sup> Law No. 387, Art.14.



departmental bodies are expected to react.<sup>270</sup> Protection against arbitrary displacement is also reflected in the Law No. 387: it is formulated as an entitlement under Article 2 of the Law No. 387, but its application is also limited to “Colombian people”.<sup>271</sup> Article 3 of the same law enshrines the corresponding responsibility of the state “to formulate policies and adopt measures for the prevention of forced displacement, and for assistance, protection, socioeconomic consolidation and stabilization of IDPs”.<sup>272</sup> In 2000, Colombia adopted the Law No. 589, which together with such crimes as genocide, torture and forced disappearance, framed the crime of forced displacement.<sup>273</sup> This provision was further transferred to the Criminal Code and “established a new crime of deportation, expulsion, transfer or displacement of civilians”.<sup>274</sup> Yet, it was criticized for its unenforceability because only a few people were brought to justice.<sup>275</sup> This again proves that the mere introduction of specifically designed provision introducing criminal responsibility for the act of arbitrary displacement is not sufficient, and a working enforcement mechanism is needed.

Overall, the legislative framework under the Law No. 387 was originally imperfect. By trial and error, its framework has been modified through gradual judicial incorporation of the Guiding Principles and adoption of supplementary legislation. However, the biggest shortcoming remains a low capacity (or willingness?) of the authorities to enforce it.

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<sup>270</sup> Ibid.

<sup>271</sup> Ibid., Art. 2 (7).

<sup>272</sup> Ibid., Art. 3.

<sup>273</sup> Federico Adreu-Guzmán, *Criminal Justice and Forced Displacement in Colombia. Case Studies on Transitional Justice and Displacement*, p. 8.

<sup>274</sup> Ibid., p.9.

<sup>275</sup> Ibid., pp. 14-15.

### 2.1.3. The Kampala Convention: focusing on prevention.

According to IDMC, there were around 12.6 million IDPs in Africa as of the end of 2016, with 70% of new displacements induced by conflicts and 55 countries affected all around the continent.<sup>276</sup> Showing the dramatic scale, only in 2017, the IDMC estimates 2,166,000 new displacements caused by conflicts and violence in the Democratic Republic of Congo, 857, 000 – in South Sudan, 725,000 – in Ethiopia, 539,000 – in Central African Republic, 388,000 – on Somalia, 279,000 – in Nigeria.<sup>277</sup> In 2009, African states have proved their commitment to the issue by adopting the first and unique in its nature regional framework – Kampala Convention – designed, as stated in its Preamble, to fulfil the gaps in “prevention of internal displacement and protection of and assistance to IDPs” in the absence of another regional or international legal framework endowed with a binding force.<sup>278</sup> Not only the alarming number of IDPs, but also the protracted nature of displacement accompanied by humanitarian and socioeconomic concerns, stimulated the adoption of the Kampala Convention.<sup>279</sup> It entered into force on December 6, 2012, and as of September 2018, there are 40 signatures and 27 ratifications.<sup>280</sup>

Indeed, the Guiding Principles served as its basis, for example, the Kampala Convention defines IDPs identically to the Guiding Principles.<sup>281</sup> At the same time, as Mike Asplet and Megan Bradley summarize, the Kampala Convention contains ‘exclusive’ and revolutionary provisions, “significantly advancing the normative framework on internal displacement in

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<sup>276</sup> Norwegian Refugee Council/IDMC, *2017 Africa Report on Internal Displacement*, p.8.

<sup>277</sup> IDMC, “2017 Internal Displacement Figures by County”, available at: <http://www.internal-displacement.org/database/displacement-data> [accessed October 4, 2018]

<sup>278</sup> *Kampala Convention*, Preamble. See, Art. 2 (b).

<sup>279</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocktaking Exercise,” *International Review of the Red Cross*, No. 99 (1), 2017, p. 374.

<sup>280</sup> African Union, “List of countries which have signed, ratified/accessed to the AU Convention for the protection and assistance of IDPs in Africa (Kampala Convention)”, available at: [https://au.int/sites/default/files/treaties/7796-sl-african\\_union\\_convention\\_for\\_the\\_protection\\_and\\_assistance\\_of\\_internally.pdf](https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf) [accessed October 4, 2018].

<sup>281</sup> *Guiding Principles on Internal Displacement*, Preamble. See, *Kampala Convention*, Art. 1.

several key areas,”<sup>282</sup> such as a broader list of duty bearers,<sup>283</sup> remedies<sup>284</sup> and protection from arbitrary displacement.<sup>285</sup> In addition, in terms of the causes of displacement, the Kampala Convention also goes beyond the Guiding Principles and two national legal frameworks previously analyzed – naming climate change<sup>286</sup> and development projects, conducted by both private and public actors.<sup>287</sup> Importantly, what also essentially differentiates the Kampala Convention from the Guiding Principles, most of its provisions are formulated not as entitlements, but as obligations – imposed on the State Parties, non-state armed groups, international organizations and the African Union. Thus, it opens with general obligations, in particular addressing protection against arbitrary displacement, prevention of IDPs’ exclusion and marginalization, respect to IDPs’ human rights and humanitarian law, accountability (including individual and responsibility of non-state actors) for the acts of arbitrary displacement, assistance to IDPs and cooperation with humanitarian organizations.<sup>288</sup>

Firstly, in order to implement the Kampala Convention, states should introduce legislative measures: incorporation of the conventional obligations into domestic legislation and its standardization in accordance with international law.<sup>289</sup> This was further stimulated by the adoption of the Model Law for the Implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa on the African Union level.<sup>290</sup> Still, there are challenges on the practical level. Among such challenges, as highlighted by the ICRC, are the relatively slow legislative processes, in particular because of insufficient

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<sup>282</sup> Mike Asplet, Megan Bradley, “What Does the Kampala Convention on Internal Displacement in Africa Mean for Housing, Land and Property Restitution?,” Brookings, 25 October 25, 2012, available at: <https://www.brookings.edu/opinions/what-does-the-kampala-convention-on-internal-displacement-in-africa-mean-for-housing-land-and-property-restitution/> [accessed October 4, 2018].

<sup>283</sup> *Kampala Convention*, Art. 2 (e).

<sup>284</sup> *Ibid.*, Art. 12.

<sup>285</sup> *Ibid.*, Art. 4 (4).

<sup>286</sup> *Ibid.*, Art. 5 (4), 10.

<sup>287</sup> *Ibid.*, Art. 10 (1).

<sup>288</sup> *Ibid.*, Art. 3.

<sup>289</sup> *Ibid.*, Art. 3 (2(a)).

<sup>290</sup> African Union, *Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa*, April 2018, available at: <http://www.refworld.org/docid/5aeb398e4.html> [accessed 18 November 2018].

funding, low awareness and factual incapacity. Of course, unless the necessary legislative steps on the national levels are undertaken, the conventional provisions risk staying on paper. For example, in monistic states, where the Kampala Convention has automatically become a part of the national legal systems, its “provisions... concerning criminal responsibility will likely be unenforceable or contrary to the principle of legality, unless there are designated penalties in law.”<sup>291</sup> To this end, Article 4 obliges the state parties to legally frame “the acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity”.<sup>292</sup> Overall, despite certain inconsistency in the practices and reluctance of some state-parties, many African states have adopted national laws and policies on internal displacement demonstrating the good practices.<sup>293</sup>

Secondly, on the institutional level, the existence of authority or body with a mandate in the sphere of protection and assistance of IDPs is required under the Kampala Convention.<sup>294</sup> Accordingly, the state parties shall design their policy to cover this issue, allocate funding and enhance “finding sustainable solutions to the problem of internal displacement”.<sup>295</sup> Again, there is a number of good examples among the states – the RRC in the South Sudan, Humanitarian Coordination Forum in Nigeria, Disaster Management and Mitigation Unit in Zambia, CONASUR in Burkina Faso, the Refugee Commission in Liberia and others,<sup>296</sup> – while insufficient budget allocations, lack of cooperation on the ground and inadequate data on IDPs still remain a problematic aspect.<sup>297</sup> Indeed, one of the measures expected from states in terms of ensuring protection and assistance to IDPs, is creation and maintenance of the registry of IDPs.<sup>298</sup> Furthermore, IDPs shall be provided with all necessary documentation, “for the full

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<sup>291</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocktaking Exercise,” *International Review of the Red Cross*, Switzerland, October 2016, p. 28.

<sup>292</sup> *Kampala Convention*, Art.4 (6).

<sup>293</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocktaking Exercise,” pp. 26-27.

<sup>294</sup> *Kampala Convention*, Art. 3 (2(b)).

<sup>295</sup> *Ibid*, Art. 3(2(e)).

<sup>296</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocktaking Exercise,” pp. 39-40.

<sup>297</sup> *Ibid*, pp. 40-41.

<sup>298</sup> *Kampala Convention*, Art. 13 (1).

enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates and marriage certificates”.<sup>299</sup> However, the article neither says a word that such documents are needed for the ‘legal’ recognition of IDPs, as opposed to Ukrainian case, nor it presupposes the very existence of IDP legal status as a result of registration. Even more, as Prisca Kamungi explains, *rationale* of the registration requirement is rather to deal with the instances where the governments are reluctant to effectively assist the IDPs by manipulating with high numbers of such persons.<sup>300</sup> This returns us to the possible justification of the registration and its necessity, once it does not result in a burden on IDPs, does not serve as a pre-condition of realization of human rights and is distinguishable from the factual situation of displacement.

While previously analyzed national frameworks are primarily dealing with conflict-induced displacement, for the purpose of comparison it is necessary to focus on two articles of the Kampala Convention – Article 4 (protection against internal displacement) and Article 7 (protection and assistance to IDPs in situations of armed conflicts). All above, as Maria Stavropoulou writes, even though the Kampala Convention was primarily designed to address the forced movement inside states, its scope is broader: the right to protection from arbitrary displacement enshrined in it refers to displacement both internally and outside borders. The author further concludes, that in this sense, the Kampala Convention “...complements the 1951 Convention on the Status of Refugees”.<sup>301</sup> Moreover, the Kampala Convention distinguishes ‘internal’ and ‘arbitrary’ displacement, by drawing a causal relationship between them. While ‘internal displacement’ leads to the ‘activation’ of certain human rights – entitlements which

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<sup>299</sup> Ibid., Art. 13 (2).

<sup>300</sup> Prisca Kamungi, “Beyond Good Intentions: Implementing the Kampala Convention,” *Forced Migration Review*, No. 34, February 2010, p. 54, available at: <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/kamungi.pdf> [accessed October 5, 2018].

<sup>301</sup> Maria Stavropoulou, “The Kampala Convention and Protection from Arbitrary Displacement,” *Forced Migration Review*, No. 36, November 2010, p. 62, available at: <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/DRCongo/62-63.pdf> [accessed October 5, 2018].

are triggered by the factual situation of displacement – protection from arbitrary displacement is formulated “in traditional human rights terms, putting the onus on states...”.<sup>302</sup> Thus, Article 4 imposes an obligation on state parties “to respect and to ensure respect for their obligations under international law... to prevent and avoid conditions that might lead to the arbitrary displacement”.<sup>303</sup> Moreover, the document enshrines individual “right to be protected against arbitrary displacement.”<sup>304</sup> Reflecting the norms of international humanitarian law, it prohibits displacement in the context of armed conflicts, “unless the security of the civilians involved, or imperative military reasons so demand in accordance with humanitarian law”.<sup>305</sup> Similarly, it forbids displacement as a method of a warfare or as a collective punishment.<sup>306</sup> What is unique, the Kampala Convention recognizes displacement in the context of harmful practices,<sup>307</sup> which shows that this document is also culturally sensitive. At the same time, the list of ‘contexts’ when displacement is prohibited is a non-exhaustive one, and to this end, the Article encompasses any “act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.”<sup>308</sup> Furthermore, Article 7 designed specifically to address conflict-induced displacement, is very important in terms of establishing individual criminal responsibility, including of the non-state actors,<sup>309</sup> which is not that clear under international humanitarian law as concluded by Chapter 1. Thus, according to this Article, the members of armed groups are forbidden, among others, “to carry arbitrary displacement...”.<sup>310</sup> Finally, as to prevention of displacement, the Kampala’s framework as a whole can be described as a long-term strategy. To reach the final goal – combating displacement in the continent and dealing with its

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<sup>302</sup> Ibid.

<sup>303</sup> *Kampala Convention*, Art. 4 (1).

<sup>304</sup> Ibid., Art. 4 (4).

<sup>305</sup> Ibid., Art. 4 (4(b)).

<sup>306</sup> Ibid., Art. 4 (4(c, g)).

<sup>307</sup> Ibid., Art. 4 (4(e)).

<sup>308</sup> Ibid., Art. 4 (4(h)).

<sup>309</sup> Ibid., Art. 7.

<sup>310</sup> *Kampala Convention*, Art. 7 (5(a)).

consequences,<sup>311</sup> – the conventional obligations should be transferred in domestic legal systems and the durable solutions should be found.<sup>312</sup>

Importantly, the Kampala Convention created a special monitoring mechanism – the Conference of States Parties, as a focused and “a structured platform for interactions between States Parties and stakeholders in the implementation of the Convention.”<sup>313</sup> Still, this does mean that the Conference can ‘interfere’ with domestic affairs of the states, but it can act on behalf of any state party and request assistance for it. As Adama Dieng further writes, “this can be distinguished from the Guiding Principles, which, while recognizing the primary role of States to provide protection and humanitarian assistance to IDPs, do not explicitly recognize an obligation of other States to provide humanitarian assistance to IDPs not in their own countries”.<sup>314</sup> To this end, the author concludes “that the Kampala Convention has enriched the provision to ensure that the IDP challenge is addressed on the basis of international solidarity and cooperation”.<sup>315</sup> April 2017, the first meeting of the Conference of States Parties took place and resulted in adoption of the Action for the implementation of the Kampala Convention.<sup>316</sup> The meeting was dedicated to the challenged emerging in the context of implementation of the Convention, necessity of cooperation and solidarity among the states parties, and ways to “strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions on the continent...”.<sup>317</sup>

To this end, the Conference has highlighted the necessity of ‘collective implementation’ and

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<sup>311</sup> Ibid., Art. 2.

<sup>312</sup> Ibid., Art. 3.

<sup>313</sup> First Session of Conference of States Parties for the African Union Convention for Protection and Assistance of IDPs in Africa (Kampala Convention), “Theme: From Norm. Setting to Implementation,” *Concept Note*, Zimbabwe, p. 3, 3-5 April 2017, available at: [https://au.int/sites/default/files/newsevents/conceptnotes/32304-cn-concept\\_note\\_-\\_cosp\\_meeting\\_2017.pdf](https://au.int/sites/default/files/newsevents/conceptnotes/32304-cn-concept_note_-_cosp_meeting_2017.pdf) [accessed October 4, 2018].

<sup>314</sup> Adama Dieng, “Protecting internally displaced persons: the value of the Kampala Convention as a regional example,” *International Review of the Red Cross*, Vol. 99, Iss. 904, April 2017, p. 277, available at: <https://doi.org/10.1017/S1816383117000613> [accessed October 5, 2018].

<sup>315</sup> Ibid.

<sup>316</sup> First Session of Conference of States Parties for the African Union Convention for Protection and Assistance of IDPs in Africa (Kampala Convention), “Theme: From Norm. Setting to Implementation,” *Concept Note*, p. 6.

<sup>317</sup> Ibid., p. 4.

performing the Agenda of 2063.<sup>318</sup> The Conference had three expected outcomes: declarations made by states about their commitments, a set of recommendations and decisions and a 5-years long Action Plan.<sup>319</sup> With this regard, the Kampala Convention has not only created a monitoring body, but also a platform for political dialogue.

Overall, even though the Kampala Convention to some extent duplicated the Guiding Principles, for instance, in terms of defining IDPs, it endowed them with a binding force. The emphasis on criminalization of prohibited activities in the context of displacements, in particular with a reference to non-state actors, the differentiation between arbitrary and internal displacement, the existence of a broad scope of the causes of displacement, the wider range of the actors involved – are all the progressive features of the Kampala Convention which make its framework unique and ground-breaking, especially in comparison to the national legal frameworks of Ukraine and Colombia. The Conference of the States Parties, created by the Kampala Convention, gives an opportunity for fostering the implementation of Convention, in particular, through political dialogue and pressure, including on those states who have not signed and/or ratified the Kampala Convention yet. Still, it is too early to evaluate the progress and the overall efficiency of this body. Nevertheless, undoubtedly, its existence and all the above-mentioned notions make the Kampala's framework a sophisticated instrument from the legislative and policy perspectives.

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<sup>318</sup> Ibid.

<sup>319</sup> Ibid., pp. 4-5.



## ***2.2. Protection during displacement in Ukraine, Colombia and the African Union.***

### **2.2.1. Gaps in Ukrainian legislation and ‘misuse’ of IDP status.**

Protection during displacement in Ukraine can be truly described as an area full of gaps and legislative collisions, which are relied on by the state authorities in order to escape their duty in assisting IDPs. The Law No. 1706-VII contains general article addressing protection of IDPs during displacement listing ‘other’ rights IDPs are entitled to as a result of their status: family unity, safety, information about the conditions in the abandoned and new places of residence. According to the same article, among others, IDPs have a right to the adequate living conditions, special tariffs and exemptions, facilitation in transferring their property, medical services, education for children, access to social and administrative procedures, and all other rights as prescribed by Constitution of Ukraine and other laws.<sup>320</sup> At the first sight, this provision reflects the Guiding Principles, however, if analyzed deeply – it is not like that. The main reason for that and the biggest shortcoming of Ukrainian legislation is that it recognizes only registered IDPs.<sup>321</sup>

Thus, the Law No. 1706-VII states that IDPs in Ukraine are entitled to humanitarian aid,<sup>322</sup> however, it does not specify and explain what is understood behind humanitarian aid in the context of displacement. Instead, the Law No. 1192-XIV, adopted in 1991, long time before Ukraine faced the challenge of internal displacement, explains that humanitarian aid includes, in particular, “a targeted free assistance... in the form of irrevocable financial assistance or voluntary donations... provided by foreign and domestic humanitarian donors to humanitarian recipients in Ukraine or abroad who need it because of social or material insecurity, difficult

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<sup>320</sup> *Law No. 1706-VII*, Art. 9 (1).

<sup>321</sup> *Law No. 1706-VII*, Art. 4 (1).

<sup>322</sup> *Law No. 1706-VII*, Art. 9 (1).

financial situation or state of emergency...”.<sup>323</sup> In 2014, the Cabinet of Ministers adopted an act regulating ‘a targeted monthly financial assistance to IDPs’, which aims to cover the living expenses of IDPs. So, the aid coming from the state has monetary form and has certain specific features. Firstly, it has a pre-condition: it is available only to IDPs who registered as such by receiving an IDP Certificate as a result of their displacement from the non-government-controlled territories (*hereinafter* – NGCA), included to the list defined by the Cabinet of Ministers.<sup>324</sup> Eventually, the assistance is terminated, if a person loses an IDP status. The second feature is time limitation. The original duration is only six months,<sup>325</sup> but with a possible renewal if a person preserves an IDP status, can prove that by providing an IDP Certificate and his or her financial situation has not essentially changed.<sup>326</sup> Thirdly, the sums of such financial assistance are extremely low, and they are granted to the households and paid to one authorized member.<sup>327</sup> These sums are miserable and do not cover even the basic expenses of IDPs, including rent and food, not speaking about their potential reintegration in new places of residence. Furthermore, humanitarian assistance is not granted if any member of a household owns property suitable for living in the NGCA or has a deposit in a bank exceeding the sum of 25 living minimums. Moreover, the assistance is not granted to a particular member of a

<sup>323</sup> Verkhovna Rada of Ukraine, *The Law on Humanitarian Aid (Law No. 1192-XIV)*, 1999, with the latest amendments No. 2462-VIII from 19 June 2018, Art. 1, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/1192-14> [accessed October 5, 2018].

<sup>324</sup> Cabinet of Ministers of Ukraine, *List of Settlements in the Territories Where the State Bodies Are Not Temporarily Exercising Their Authority*, Document No. 79-p, 7 February 2018, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/1085-2014-p> [accessed October 5, 2018].

<sup>325</sup> Cabinet of Ministers of Ukraine, *On the Provision of Monthly Targeted Assistance to IDPs to Cover the Cost of Living, Including for Payment of Housing and Communal Services*, Document No. 505 from 1 October 2018, §1, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/505-2014-p> [accessed October 5, 2018].

<sup>326</sup> *Ibid.*, §3.

<sup>327</sup> For example, as of September 2018, pensioners and children are entitled only to 1000 UAH (app. 30 EUR), while working persons can receive up to 442 UAH (app. 13,8 EUR). The sums for the persons with disabilities vary depending on the category of disability and are linked to the living minimum defined by the state. The numbers fluctuate from the mere sum of the living minimum (app. 44,8 EUR) up to 130 percent from this sum. Nevertheless, the overall sum received by the household shall not exceed 3000 UAH (app. 93,75 EUR), 3400 UAH (app. 106 EUR) and 5000 UAH (app. 156 EUR) for the households with persons with disabilities and large families with children respectively. This numbers are based on the Document No. 505 (*See*, footnote no. 320) and Official Currency Exchange Rate according to the National Bank of Ukraine.

household if a member is under full state maintenance or imprisoned.<sup>328</sup> In addition, the assistance can be terminated. Thus, there are verification procedures designed by the state to check the presence of IDPs in their new places of residence,<sup>329</sup> and their absence is one of the grounds for the termination of targeted assistance.<sup>330</sup> Among other grounds are revocation of IDP status and termination of IDP Certificate.<sup>331</sup> Furthermore, if IDP stays unemployed for more than two months or preserves any working relation with employees located in the NGCA area, assistance is also terminated.<sup>332</sup> It is difficult to give a definite answer if the attachment of state assistance to IDPs' registration and Certificate in Ukraine is an example of good practice. On the one hand, as it was stated several times before, in general, international standards do not criticize and even support the existence of registration for the purpose of monitoring and ensuring the rights of IDPs. In the given context, it may serve to ensure that all registered IDPs who need financial support receive it, and to control that such aid is not misused. On the other hand, in Ukraine the requirement of registration was 'radicalized'. After displacement, IDPs often find themselves in extremely difficult situation and need assistance at that very moment (even though its sum in Ukrainian realities is only enough for a mere survival). Registration as IDPs may not be possible for some of these people due to the loss of documents, and consequently – the state assistance is not available for them.

While the attachment of state assistance to IDPs' registration and IDP Certificate is to a certain extent 'a double-edged sword', what is very clear – the attachment of all types of social payments to it is the brightest example of Ukraine's failure to protect IDPs. As it was already mentioned, the verification procedure has been introduced to check the presence of IDPs

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<sup>328</sup> Cabinet of Ministers of Ukraine, *On the Provision of Monthly Targeted Assistance to IDPs to Cover the Cost of Living, Including for Payment of Housing and Communal Services*, §6.

<sup>329</sup> Cabinet of Ministers of Ukraine, *Some Issues of Social Payments for IDPs*, Document No. 365, 8 June 2016, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/365-2016-п> [accessed November 13, 2018].

<sup>330</sup> Cabinet of Ministers of Ukraine, *On the Provision of Monthly Targeted Assistance to IDPs to Cover the Cost of Living, Including for Payment of Housing and Communal Services*, §12.

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

receiving any kind of social payments was introduced.<sup>333</sup> Only in July 2018, the verification procedure was declared unlawful and cancelled by the Court of Appeal,<sup>334</sup> however, it is not a final judgement and the case will be further examined by the Supreme Court of Ukraine. The constitutional right to pension<sup>335</sup> is also attached to IDP Certificate.<sup>336</sup> As of January 2018, only 514,100 of pensioners in Ukraine were registered as IDPs from the total number of 8,915,600 of pensioners. Furthermore, this number is steadily decreasing and is alarmingly low in comparison with the total number of pensioners residing in the NGCA in 2014, which was 1.2 million.<sup>337</sup> With this regard, the Office of the United Nations High Commissioner for Human Rights concluded, that “a significant number of pensioners had their pensions suspended due to the verification and identification procedure linking pensions to IDP registration.”<sup>338</sup> This resulted in the increased social insecurity of IDPs. Recently, the Supreme Court of Ukraine had addressed the termination of pensions for IDPs. In the given case, an applicant, the Ukrainian pensioner, was internally displaced from the NGCA and registered as IDP. She had been receiving pension, until it was terminated by the territorial department of the Ukrainian Pension Fund, which based its decision on the outcome of verification procedure.<sup>339</sup> The issue in front of the Supreme Court was whether the decision of the territorial organs of the Pension Fund of Ukraine was legitimate. May 2018, the case has been decided by the Chamber of Supreme Court of Ukraine in favor of the applicant. Firstly, the Supreme Court stated that IDP status does not overlap or replace any other constitutional status, and is not a constitutional status per

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<sup>333</sup> Cabinet of Ministers of Ukraine, *Some Issues of Social Payments for IDPs*.

<sup>334</sup> Kyiv Administrative Court of Appeal, *Case No. 826/12123/15*, 4 July 2018, available in Ukrainian <http://reyestr.court.gov.ua/Review/75172804> [accessed November 18, 2018].

<sup>335</sup> *Constitution of Ukraine*, Art. 46.

<sup>336</sup> Cabinet of Ministers of Ukraine, *Some Issues of Social Payments for IDPs*.

<sup>337</sup> Pension Fund of Ukraine, *2017 Annual Report*, 3 March 2018, pp. 36-37, available in Ukrainian at: <https://www.pfu.gov.ua/32629-zvit-pro-robotu-pensijnogo-fondu-ukrayiny-u-2017-rotsi-byudzheth-priorytety-diyalnosti-ta-plan-roboty-fondu-na-2018-rik/> [accessed November 13, 2018]

<sup>338</sup> Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine from 16 February to 15 May 2018*, §41.

<sup>339</sup> *Case No. 805/402/18*, §§ 16-23.

se,<sup>340</sup> therefore, “IDP status entitles a person to special, additional rights (according to Article 9 of the Law 1706-VII), without narrowing down the scope of other constitutional rights and freedoms...”.<sup>341</sup> Secondly, the Supreme Court concluded that according to Ukrainian legislation, the right to pension can be regulated only by law, and not by administrative acts.<sup>342</sup> The existing list of grounds for termination of pensions is exhaustive, and does not include the ground applied by the territorial department of the Ukrainian Pension Fund.<sup>343</sup> Finally, the Supreme Court recalled the judgement of the Constitutional Court of Ukraine which ruled that pension cannot be pre-conditioned by the permanent residence in Ukraine, and that ‘the state, according to the constitutional principles, is obliged to guarantee this right notwithstanding the person’s place of residence... in Ukraine or outside it’.<sup>344</sup> However, even though the outcome of the case is positive, including the fact that the Supreme Court approached the case both from the property and social security perspectives, its enforcement remains a challenge, because there is no legislative framework underlying the procedure. Currently, the Draft Law No. 6692,<sup>345</sup> which was designed to fulfill the procedural gaps and to separate the right to pension and IDP status once and for all, is waiting for the voting in the parliament. Whether or not the parliament would support it – is a very political question. Still, in the overall context of this research, this judgement is important in terms of reaffirming by the Supreme Court of Ukraine that the registration of IDP is not a pre-condition for the enjoyment of constitutional rights and freedoms, rather it entitles a person to the additional ones. Hopefully, this position would find its reflection in the legislative framework and would be implemented in the nearest future.

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<sup>340</sup> Ibid, §50.

<sup>341</sup> Ibid., §51.

<sup>342</sup> Ibid., §65.

<sup>343</sup> Ibid., §67.

<sup>344</sup> Ibid., §68.

<sup>345</sup> Verkhovna Rada of Ukraine, *Draft Law No. 6692*, available in Ukrainian at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=62241](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62241) [accessed October 5, 2018].

Among other challenges IDPs face during their displacement in Ukraine are discrimination and inability to fully participate in the public affairs. Because of the existing link between registration of IDPs and other rights, ‘internal displacement’ became a ‘black mark’. This resulted in ‘profiling’ in a negative sense. It should be also recalled, that Crimean IDPs were considered non-residents, unless they receive IDP Certificate, so had “limited access to government or bank services.”<sup>346</sup> Moreover, according to UNHCR, persons who belong to the vulnerable groups appeared to be in the worst position in terms of discrimination after displacement.<sup>347</sup> Moreover, there is no procedure for IDPs to vote at the local elections, because the existing laws do not include procedure to guarantee the involvement of IDPs in the public affairs on the local level. This is not only crucial for their reintegration but is also important to ensure the effective protection during displacement. Undoubtedly, IDPs are themselves in the best position to determine their needs at this stage. The involvement of IDPs in the public life of the local communities is an important step towards advocating the rights of IDPs on this level and designing the protection framework, both legal and institutional, capable to meet their needs. Also, there is no legal framework able to ensure the right to housing of IDPs: they are only entitled to free housing for the period of six month after registration, while this term can be prolonged for certain groups – persons with disabilities, elderly and families with many children.<sup>348</sup>

Finally, IDPs face serious human rights violations during crossing the checkpoints to enter and to leave the NGCA. Risking their life, IDPs have to take “an arduous journey to reach GCA to access assistance, as well as their pensions.”<sup>349</sup> From January 2015 and up until now,

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<sup>346</sup> Inna Volosevych, Tetiana Kostiuchenko, “Desk Research on the Surveys of IDPs,” *UNHCR*, December 2017, p. 38, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/gfk\\_unhcr\\_desk\\_report\\_final.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/gfk_unhcr_desk_report_final.pdf) [accessed September 20, 2018].

<sup>347</sup> *Ibid.*

<sup>348</sup> *Law No. 1706-VII*, Art. 9 (1).

<sup>349</sup> Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine from 16 May to 15 August 2018*, §41.

the freedom of movement in the NGCA is regulated by the Temporary Order on Control of the Movement of People, Transport Vehicles and Cargo along the Contact Line in Donetsk and Luhansk regions (*hereinafter* – the Temporary Order).<sup>350</sup> It establishes that all persons who are entering or leaving the NGCA should obtain authorization – a special permit issued by the government (*hereinafter* – a Permit).<sup>351</sup> This regime and its serious weaknesses was addressed by the Thematic Report introduced by the OSCE Special Monitoring Mission to Ukraine in May 2015, which summarized that under “customary international law the sides to conflict are requested to take steps to ensure...the possibility for civilians to voluntary and rapidly leave areas affected by violence”.<sup>352</sup> The implementation of the order is very problematic. Firstly, in order to obtain a Permit, a person must apply for it either at the entry-exit check-points or through online system and specially created Registry. Online application form requires an applicant to register in a system, to select a sector where he or she plans to cross the checkpoints and to indicate personal details. In addition, a person is requested to explain a purpose and a plan of a trip. Originally, an application is reviewed within ten days and if successful, it is registered in the system within the next three days. Such Permit is valid for one year, it can be also prolonged two months prior its expiration date.<sup>353</sup> As long as not all people have access to the Internet, especially in the NGCA, there is an option of applying for a Permit at the checkpoint. However, each ‘trip’ to the check-point is a huge burden – financial, time and physical. As follows from the recent report of the UN Special Monitoring Mission on Human Rights to Ukraine, “according to the Main Department of the State Emergency Services of

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<sup>350</sup> Security Service of Ukraine, *Temporary Order on Control of the Movement of People, Transport Vehicles and Cargo along the Contact Line in Donetsk and Luhansk regions, approved by the First Deputy Head of the Antiterrorist Center under the Security Service of Ukraine*, with amendments from 15 December 2017, No. 1000, available in Ukrainian at: <https://ssu.gov.ua/ua/pages/32> [accessed September 20, 2018].

<sup>351</sup> Ibid.

<sup>352</sup> OSCE, “Protection of Civilians and their Freedom of Movement in the Donetsk and Luhansk Regions”, *Thematic Report*, 6 May 2015, p.5, available at: <https://www.osce.org/ukraine-smm/156791?download=true> [accessed September 20, 2018].

<sup>353</sup> Security Service of Ukraine, “Registry of the Permits,” available at: <https://urp.ssu.gov.ua> [accessed October 9, 2018].

Ukraine in Luhansk region, up to 100 people experienced health incidents each day during the reporting period at the Stanytsia Luhanska entry-exit check point on GCA. The conditions at Stanytsia Luhanska – the only official crossing route in Luhansk region – are particularly concerning. Open only to pedestrians, this route requires individuals who wish to cross the contact line in either direction to spend several hours standing in queues. At least six individuals (five men and one woman) died...”.<sup>354</sup> Ironically, the Temporary Order states that this restrictive regime exists, in particular, for the purpose of strengthening the control over people’s and vehicles movement to the NGCA and ensuring the right of Ukrainian citizens to leave these territories.<sup>355</sup> In fact, as a result of double check-point system introduced both by Ukrainian and by the authorities of ‘DPR’ and ‘LPR’, and due to the queues, it appears to be even more difficult to leave the NGCA than to enter it. Currently, a new Draft Resolution to address this issue is being developed,<sup>356</sup> and it should be done as soon as possible. Even though there might be an absolutely legitimate aim for Ukrainian government to introduce a check-point regime by restricting the freedom of movement in the territories under question, the way it functions resulted in serious barriers, both physical and administrative, faced by all persons who want to leave or to enter the NGCA.

As of October 2018, the situation became even more disturbing: Ukrainian Parliament introduced a criminal sanction for “illegal crossing of the state border”.<sup>357</sup> The amendment includes a general subject of crime – a person who has crossed “the state border of Ukraine in order to cause damage to the interests of the state... in any way outside the points of entry.... or without relevant documents or with documents containing unreliable information”.<sup>358</sup> This

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<sup>354</sup> Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine from 16 May to 15 August 2018*, §42.

<sup>355</sup> Security Service of Ukraine, *Temporary Order on Control of the Movement of People, Transport Vehicles and Cargo along the Contact Line in Donetsk and Luhansk regions*, §1.2.

<sup>356</sup> *Ibid*, §43.

<sup>357</sup> *Criminal Code of Ukraine*, Art. 332-2.

<sup>358</sup> *Ibid*, Art. 332-2(1).



innovation is problematic for several reasons. Firstly, the formulation “in order to cause damage” is very vague and it grants wide discretion to the security services in its interpretation. Secondly, this norm provides a ground for 72-hour detention of a suspect,<sup>359</sup> who can be any person “illegally crossing the state border”.<sup>360</sup> Thirdly, this amendment will affect all persons seeking asylum in Ukraine, as well as IDPs leaving NGCA outside the checkpoints, for example, when escaping the threats of war.

So, there are many disadvantages in Ukrainian legal framework in terms of protecting IDPs during displacement. This includes insufficiency of humanitarian assistance, social insecurity, discrimination, limitations on the voting rights and freedom of movement. Most of the arising problems are linked to the IDP registration procedure and are the results of the existence of *de facto* IDP ‘legal’ status. The legislation is very incoherent and obviously even discriminatory in relation to IDPs. While the legislator is reluctant to resolve the existing problems and is producing new ones, Ukrainian judiciary proves to be an effective mechanism to protect the rights of IDPs during displacement.

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<sup>359</sup> Verkhovna Rada of Ukraine, *Code of Criminal Procedure*, Document No. 4651-VI adopted 13 April 2012, with the latest amendments No. 2599-VIII from 18 October 2018, Art. 211(1), available in Ukrainian: <http://zakon.rada.gov.ua/laws/show/4651-17> [accessed November 12, 2018].

<sup>360</sup> *Criminal Code of Ukraine*, Art. 332-2.

### 2.2.2. Protection during displacement in Colombia: emergency response.

Colombian Law No. 387 reflects the Guiding Principles by entitling IDPs to civil rights,<sup>361</sup> freedom of movement,<sup>362</sup> protection against discrimination (including on the ground of IDP status)<sup>363</sup> and by enshrining the principle of family unity.<sup>364</sup> It also imposes an obligation on state to “facilitate coexistence among Colombians, equality and social justice”.<sup>365</sup> Despite these general norms, differently from Ukrainian framework, Guiding Principles or Kampala Convention, Colombian law does not have a separate provision of section devoted to the protection during displacement as such. However, it developed a comprehensive institutional framework, in particular to address the challenges emerging during displacement, yet it is not a subject of this research.

The Law No. 387 includes a detailed provision about humanitarian assistance. Pursuant to Article 15 of the Law No. 387, once displacement occurred, persons affected shall be provided with “emergency humanitarian assistance.”<sup>366</sup> Originally, the law restricted the availability of this right to three months with renewal “under exceptional circumstances for another three months.”<sup>367</sup> With this regard, Erin Mooney writes that such time limitation creates a situation, when “the duration of internal displacement appears to be determined by the capacity or readiness of the government to provide emergency humanitarian assistance”.<sup>368</sup> In 2004, the Constitutional Court of Colombia in its Decision T-025 addressed this issue. In this case, the plaintiffs argued that Colombian authorities failed to comply with their responsibility in protecting and assisting IDPs. In addition to the problems with insufficient funding and coordination between the state bodies, humanitarian aid, which according to the Law was only

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<sup>361</sup> *The Law No. 387*, Art. 2 (2).

<sup>362</sup> *Ibid*, Art. 2 (8).

<sup>363</sup> *Ibid*, Art. 2 (3).

<sup>364</sup> *Ibid*, Art. 2 (4).

<sup>365</sup> *Ibid*, Art. 2(9).

<sup>366</sup> *Ibid*, Art. 15.

<sup>367</sup> *Ibid*.

<sup>368</sup> Mooney, “When Does Internal Displacement End?.”

available for a certain term and only for persons registered in the Central Registry for the Displaced Population, could have been renewed only for another three months. According to the plaintiffs, “after such imperative term, it was impossible to renew the aid, regardless of the displaced person’s factual situation”.<sup>369</sup> Consequently, they claimed the requirement of recognition as IDPs and “the benefits arising from such condition”, including humanitarian aid, were contrary to the Constitution.<sup>370</sup> The Court stated that a three-months term with a potential renewal was not “manifestly unreasonable” as long as “it sets a clear rule on the grounds of which displaced persons can carry out short-term planning and adopt autonomous self-organization decisions which can allow them to have access to reasonable possibilities of autonomous subsistence, without being hastened by the burden of immediate subsistence needs” and “it grants the State an equally reasonable term to design the specific programs required to satisfy its obligations in the field of aid for the socio-economic stabilization of displaced persons”.<sup>371</sup> In other words, according to the Court, three months should be theoretically sufficient to address the urgent needs of IDPs right after displacement and to provide them with opportunity to plan their further life, as well as to allow the state to form its socio-economic policy. Nevertheless, the Court distinguished that some IDPs “have a minimum right to receive emergency humanitarian aid for a period of time which is longer than the legally established one: (a) persons in situations of extraordinary urgency, and (b) persons who are not in a condition to assume their own self-sufficiency through a stabilization or socio-economic re-establishment project.”<sup>372</sup> Therefore, the state shall provide humanitarian assistance to such IDPs “until the moment in which the circumstances at hand have been overcome.”<sup>373</sup> Still, the

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<sup>369</sup> Constitutional Court of Republic of Colombia, *Decision No. T-025 of 2004*, Third Review Chamber, Bogotá, D.C., 22 January 2004, p.3, available at: [https://www.brookings.edu/wp-content/uploads/2016/07/Colombia\\_T-025\\_2004.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/Colombia_T-025_2004.pdf) [accessed October 7, 2018].

<sup>370</sup> *Ibid.*, p.4.

<sup>371</sup> *Ibid.*, pp. 55-56.

<sup>372</sup> *Ibid.*, p. 56.

<sup>373</sup> *Ibid.*

Court rejected both the indefinite duration of humanitarian aid and the possibility of its abrupt suspension.<sup>374</sup> So, by this judgement the Constitutional Court of Colombia established that the term of humanitarian assistance should not be imperatively limited. If one of the following conditions – “extraordinary urgency” or “incapacity to access the economic stabilization programs” – exists, humanitarian assistance shall be provided for the entire duration of this condition.<sup>375</sup> Indeed, suspension of humanitarian aid to IDPs whose position is stable and self-sufficient might be a reasonable step toward efficient distribution of state funding and ensuring that humanitarian aid reaches those who are still in need. The question arises: if the term of humanitarian aid cannot be indefinite, what should be an objective criterion for its suspension? The Constitutional Court of Colombia did not provide a concrete answer, but it was very close to it. It can be derived from the judgement, that ‘the endpoint’ for humanitarian aid is a moment when a short-term solution to displacement is found and a person is socially and economically stabilized. To this end, obligation to provide humanitarian assistance is a central one imposed on Colombian authorities, however, as Ellen Fadnes and Cindy Horst write, this results in three problems. Firstly, the Government gives to humanitarian assistance more weight than to durable solutions. Secondly, the focus falls on short-term solutions for IDPs’ stabilization, rather than permanent ones. Thirdly, the humanitarian assistance addresses concrete technical issues, rather than the structural ones. All above, such approach neglects the importance of setting and fulfilling political goals to prevent displacement.<sup>376</sup> So, the framework on humanitarian assistance is strong in terms of reacting when the displacement occurs, and of course, its importance is not debated. Again, the judiciary played a great role in its formation and bringing it in line with international standards. However, to agree with Ellen Fadnes and Cindy Horst, the framework lacks sustainability: emergency assistance shall not and cannot replace long term solutions.<sup>377</sup>

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<sup>374</sup> Ibid.

<sup>375</sup> Ibid, pp. 56, 66.

<sup>376</sup> Fadnes, Horst. “Responses to Internal Displacement in Colombia: Guided by What Principle?,” p.116.

<sup>377</sup> Ibid.

Namely, the framework of the Law No. 387 does not go beyond humanitarian assistance and does not elaborate on other aspects of protection during displacement. In this context, the protection framework was significantly influenced by the Constitutional Court. For example, one of the most well-known Decisions T-025, recognizes the particular vulnerability of IDPs.<sup>378</sup> In this case, the Court also summarizes the most wide-spread human rights' violations the IDPs face: the right to life in dignified conditions, the right to choose the place of residence and the freedom of movement, the right to freedoms of expression and association, the economic, social and cultural rights, the right to health, the right to personal integrity and security, the right to legal personality and others.<sup>379</sup> Accordingly, most, if not all, rights are under higher risk of violation during displacement. Interestingly, for each right the Court makes a reference to the corresponding Guiding Principle. The Court further recognizes the lack of funding and limited institutional capacity as problems.<sup>380</sup> Moreover, the Court highlights that the high number of *tutela actions*, were the evidence of “the existence of an unconstitutional state of affairs”.<sup>381</sup> The Constitutional Court also concludes that Colombia, as a state, has not only negative obligations, but it must comply with its positive obligations – “to ensure the effective enjoyment of... rights.”<sup>382</sup> In the part of the decision dedicated to “the minimum levels of satisfaction of the constitutional rights of displaced persons” that Court states that the constitutional rights of IDPs should be interpreted in the light of the Guiding Principles, and making a reference to the international human rights and humanitarian law, the Court concludes that Colombia has “the minimum positive obligation that must always be satisfied”.<sup>383</sup> So, the framework on the protection during displacement has been largely formed by the jurisprudence. Basically, it is required that IDPs shall enjoy their fundamental rights, which shall be ensured by the state

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<sup>378</sup> Decision No. T-025 of 2004, p. 8.

<sup>379</sup> Ibid, pp. 16-20.

<sup>380</sup> Ibid, p. 9.

<sup>381</sup> Ibid, p. 43.

<sup>382</sup> Ibid, p. 46.

<sup>383</sup> Ibid, p. 53.

giving due regard to the fact of IDPs' particular vulnerability and by interpreting these rights through the prism of the Guiding Principles.

Overall, protection during displacement in Colombia focuses mostly on emergency humanitarian assistance. The level of state's compliance with its responsibilities in ensuring the rights of IDPs is still unsatisfactory, what has been confirmed both by international organizations and has been admitted by the Constitutional Court. The Constitutional Court has not only reaffirmed the binding nature of the IDPs rights granted by "constitutional and international provisions," but also of "the interpretation criteria compiled in the Guiding Principles".<sup>384</sup> Yet, similar to Ukraine, the major problem is IDPs' insecurity – both in social and physical sense, which remains to be disturbing even after the conflict was officially ended by signing of the Peace Agreement of 2016. According to IDMC "as many as 80 percent live below the poverty line, including between 33-35 percent who live in extreme poverty".<sup>385</sup> Furthermore, as reported by UNHCR, despite signing the Peace Agreement of 2016, new armed groups are perpetrating gender-based violence and other severe crimes against IDPs, such as killing and forced recruitment, as well as the arbitrary displacement itself.<sup>386</sup>

Therefore, for Colombia it took years to develop a national legal framework through judicial incorporation of the international standards. Currently, the legal framework is impaired by weak implementation.

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<sup>384</sup> Ibid.

<sup>385</sup> IDMC, "Colombia. Tackling Protracted Displacement Post-Conflict", *On the Grid: Global Internal Displacement in 2016*, p. 29, available at: <http://www.internal-displacement.org/global-report/grid2017/pdfs/2017-GRID-colombia-spotlight.pdf> [accessed October 7, 2018].

<sup>386</sup> UNHCR, "Forced Displacement Growing in Colombia Despite Peace Agreement", summary of what was said by UNHCR spokesperson William Spindler, Press Briefing at the Palais des Nations in Geneva, 10 March 2017, available at: <http://www.unhcr.org/news/briefing/2017/3/58c26e114/forced-displacement-growing-colombia-despite-peace-agreement.html> [accessed October 7, 2018].

### 2.2.3. Does the coherency of the Kampala Convention transcend on practical level?

Protection during displacement is also explicitly mentioned by the Kampala Convention, and even though the primary responsibility of the states is reaffirmed,<sup>387</sup> these are not the only actors expected to undertake steps to protect IDPs.<sup>388</sup> Obligations of state parties during displacement are addressed in Article 5 and 9 of the Convention. Accordingly, Article 9 covers a very broad range of human rights issues accompanying displacement. It creates both positive and negative obligations: preventing and refraining from certain acts, which include discrimination on the ground of internal displacement, violations of international humanitarian law, “arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman or degrading treatment or punishment... sexual and gender-based violence... and starvation”.<sup>389</sup> Undoubtedly, a progressive feature is existence of provisions oriented on protection of and assistance to different groups of IDPs, such as “separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and persons with disabilities or with communicable diseases.”<sup>390</sup> In comparison, the Guiding Principles also raise the necessity of special assistance to particularly vulnerable groups, but they do not specify who is responsible for that.<sup>391</sup> Furthermore, the Kampala Convention requires “to protect and provide for the reproductive and sexual health of internally displaced women as well as appropriate psycho-social support for victims of sexual and other related abuses,”<sup>392</sup> what corresponds with the Guiding Principles<sup>393</sup> and demonstrates certain level of gender-sensitivity.

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<sup>387</sup> Kampala Convention, Art. 9.

<sup>388</sup> Ibid, Art. 2 (e). *See also*, Art. 6 (international organizations and humanitarian agencies), 7 (members of armed groups), 8 (obligation of the AU).

<sup>389</sup> Ibid, Art. 9.

<sup>390</sup> Ibid, Art. 9 (2(c)).

<sup>391</sup> Dieng, “Protecting internally displaced persons: the value of the Kampala Convention as a regional example,” p. 277.

<sup>392</sup> Kampala Convention, Art. 9 (2(d)).

<sup>393</sup> *Guiding Principles on Internal Displacement*, Principle 19 (2).

Another notion of the Article 9 is an obligation to insure protection of IDPs in the places where they seek a shelter “against infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons.”<sup>394</sup> Identically to the Guiding Principles, the principle of family unity is also reflected in the Kampala Convention<sup>395</sup>, but another two new requirements were created in terms of protecting “individual, collective and cultural property” of IDPs and safeguarding “against environmental degradation” on the territories both under state’s jurisdiction and effective control.<sup>396</sup> Overall, in many aspects, protection during displacement under the Kampala framework is a mirror of the Guiding Principles, however, as a binding regional document it goes beyond the mere declaration of certain protection principles. Instead, it names the actors and imposes concrete obligations on them.

Eventually, similar to the national frameworks of Ukraine and Colombia, the Kampala Convention enshrines the right to humanitarian assistance on the regional level. Thus, Article 5 reestablishes the “primarily duty and responsibility of and humanitarian assistance to IDPs” as imposed on states within their respective jurisdictions.<sup>397</sup> In the context of armed conflicts, the Kampala Convention specifies that assistance “shall be governed by international law, in particular international humanitarian law”.<sup>398</sup> The Article 9 further reaffirms that states have a duty to “provide IDPs to the fullest extent practicable and with the latest possible delay with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services”.<sup>399</sup> Furthermore, what is very different from the Ukrainian and Colombia frameworks, the recipients of humanitarian assistance are not only IDPs: Article 9 of the Kampala Convention

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<sup>394</sup> Ibid, Art. 9 (2(g)).

<sup>395</sup> Ibid, Art. 9 (2(h)).

<sup>396</sup> Ibid, Art. 9 (2(j)).

<sup>397</sup> Ibid, Art. 5 (1).

<sup>398</sup> Ibid, Art. 7 (2).

<sup>399</sup> Ibid, Art.9 (2 (b)).



extends its availability to the local and host communities.<sup>400</sup> According to ICRC, this is explained by the fact, that not all IDPs settle in the camps, but seek shelter with host communities. Such extension of humanitarian assistance allows to consider “the possible negative impact... particularly as a result of sharing already strained resources” and to mitigate the risk of possible tensions between IDPs and other members of the hosting communities.<sup>401</sup> The ICRC also positively evaluates financial assistance to IDPs, as this provides them with possibility to choose how to allocate money depending on “their own priorities”, while at the same time it is automatically re-invested in the local economy, lowering the perception of IDPs as “a burden”.<sup>402</sup>

Still, on the practical level, the resources of the vast majority of the displacement-affected states of the continent are very limited. To this end, there is an obligation of state parties under Article 5 and Article 3 “to facilitate rapid and unimpeded access to IDPs by humanitarian organizations.”<sup>403</sup> Yet, the states preserve “the right to prescribe the technical arrangements.”<sup>404</sup> In general, while in terms of humanitarian assistance the Kampala Convention mostly reiterates the norms of international humanitarian law, primarily, because during armed conflicts IDPs enjoy the same protection as civilians, there are certain important developments. Firstly, as it was previously stated, the Kampala Convention is very concrete in imposing obligations on other stakeholders. For example, the members of armed groups, who are, among others, “prohibited from hampering the provision of protection and assistance to internally displaced persons under any circumstances... denying IDPs the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter, to separate members of the same family”.<sup>405</sup> This is a very important notion in terms of protecting IDPs during their

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<sup>400</sup> Ibid.

<sup>401</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocktaking Exercise,” pp. 403, 414.

<sup>402</sup> Ibid, pp. 404-406.

<sup>403</sup> *Kampala Convention*, Art. 5 (7), Art. 3 (1(j)).

<sup>404</sup> Ibid.

<sup>405</sup> Ibid, Art. 7 (5(b)).

displacement, which analogues are absent in the national frameworks of Ukraine and Colombia. Furthermore, it includes the relevant obligations of the African Union,<sup>406</sup> international organizations, humanitarian agencies.<sup>407</sup> Secondly, such developments refer to the involvement of IDPs in the public affairs. As Adama Dieng writes, IDPs who are often “placed in camps where their treatment is similar to that afforded to refugees” cannot fully enjoy the whole spectrum of civil and political rights.<sup>408</sup> That is why the Kampala Convention requires that civil and political rights, including the rights to vote and to be elected, shall be ensured.<sup>409</sup> Importantly, the Kampala Convention obliges the states to engage in a dialogue with IDPs in terms of consulting them and involving them in a decision-making process,<sup>410</sup> what is particularly important in the context of durable and sustainable solutions for IDPs. Thirdly, according to the Kampala Convention, IDPs shall also enjoy the right to the freedom of movement and the choice of residence,<sup>411</sup> which are also reflected in the Guiding Principles, and again, the members of armed groups are forbidden to restrict “the freedom of movement of IDPs within and outside their areas of residence.”<sup>412</sup> At the same time, freedom of movement, according to the Kampala Convention, belongs to the rights which can be limited if there is one of three legitimate aims – public security, public order and public health, and if such limitation is proportionate,<sup>413</sup> whereas a similar limitation clause does not exist in the Guiding Principles. Moreover, the Kampala Conventions specifies the obligation of States to “ensure that internally displaced persons shall be issued relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates,”<sup>414</sup> as

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<sup>406</sup> Ibid, Art. 8 (3)

<sup>407</sup> Ibid, Art. 6 (2,3).

<sup>408</sup> Dieng, “Protecting internally displaced persons: the value of the Kampala Convention as a regional example,” p. 278.

<sup>409</sup> *Kampala Convention*, Art. 9 (2(1)).

<sup>410</sup> Ibid, Art. 9 (2(k)).

<sup>411</sup> Ibid, Art. 9 (2(f)).

<sup>412</sup> Ibid, Art. 7 (5(d)).

<sup>413</sup> Ibid, Art. 9 (2(f)).

<sup>414</sup> Ibid, Art. 13 (2).

well as “to facilitate the issuance of new documents or the replacement of documents lost or destroyed in the course of the displacement”.<sup>415</sup> In this context, it is crucial, that IDPs shall not be overburdened in the process of renewal of their documentation, and the state’s “failure to issue... documents shall not... impair the exercise or enjoyment of... human rights”.<sup>416</sup> Thus, all the above-documented shows that the Kampala Convention has not only transferred the Guiding Principles into binding norms, but it has also advanced and clarified the protection during displacement framework under international humanitarian law.

However, in the context of enforcement and the overall practical efficiency of the Kampala’s framework during displacement – the challenges vary in the state parties and, therefore, there are both success stories and dramatic failures. The ICRC study tells that lack of funding and the state of conflict are the factors decreasing the states’ capacity to ensure protection of IDPs, including humanitarian assistance. In addition, the ICRC points out the lack of cooperation among the states and other actors.<sup>417</sup> Among the most problematic spheres is also economic empowerment of IDPs, who “are often not in a position to pursue any possible independent economic opportunities,” what also leads to social insecurity of these persons.<sup>418</sup> States tend to impose restrictions of IDPs’ freedom of movement, especially of those residing in the camps, which are often the consequence of security considerations.<sup>419</sup> In general, the challenges related to IDPs’ residence in camps are variable, and include not only the issues of the freedom of movement, but also a limited access to healthcare and a difficulty of maintaining “the strictly civilian and humanitarian character of IDP camps”.<sup>420</sup> According to the ICRC, another two problems refer to the family reunification<sup>421</sup> and documentation of IDPs, which

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<sup>415</sup> Ibid, Art. 13(3).

<sup>416</sup> Ibid.

<sup>417</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocktaking Exercise,” pp. 404-405.

<sup>418</sup> Ibid, p. 405.

<sup>419</sup> Ibid.

<sup>420</sup> Ibid, p. 410.

<sup>421</sup> Ibid, pp. 369, 411.

absence deprives IDPs of ability to realize their rights and access different services.<sup>422</sup> These are only some examples of the most wide-spread issues, and eventually states are undertaking different strategies towards their solution depending on their financial and factual capacity, and of course willingness.

Nevertheless, the Kampala's framework is the most comprehensive, and this is primarily because it reflects and enriches the Guiding Principles: it covers a broad list of rights by accommodating them to the context of displacement, including humanitarian assistance, creates obligations for different actors, contains culturally and gender-sensitive norms. However, the experience of the African Union also proves that the mere 'transfer' of the international standards into a binding document is only one step towards protection of IDPs during displacement.

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<sup>422</sup> Ibid, p. 374.

## ***2.3. Durable solutions for IDPs in Ukraine, Colombia and the African Union.***

### **2.3.1. Durable solutions in Ukraine: forgotten or ignored by the legislator?**

Ironically, the existing laws do not even contain any Ukrainian equivalent to the term ‘durable solution,’ however, Article 2 of the Law No. 1706-VII states that “Ukraine undertakes all possible measures prescribed by Constitution, Ukrainian legislations and international treaties...” to deal with displacement during all its stages, and as a reminder about the durable solutions, the article mentions voluntary return and reintegration,<sup>423</sup> avoiding the third well-established option – relocation. Article 9 of the same law, which lists the special entitlements of IDPs, includes facilitated voluntary return. Namely, it says that IDPs have a right to “free transportation in case of voluntary return to the abandoned place of residence by all means of public transport when the circumstances which induced displacement ceased to exist”.<sup>424</sup> Thus, unless special procedure is introduced and as currently seen by the legislator, the only tool to facilitate the return of IDPs is a transportation fee waiver. In term of reintegration, as follows from the research conducted by the UNHCR, Ukrainian IDPs find themselves in a very uncertain and vague position, “even though expressed a will to integrate locally, the lack of initiatives from the Government in support of integration creates tensions with local communities who consider the presence of IDPs as temporary... This particularly affects IDP’s access to housing, employment, and education.”<sup>425</sup> Among others, the possibility of IDPs’ reintegration is also diminished by the high level of social insecurity decreasing their ability to fully participate in all spheres of life, in particular economic and cultural, and barriers for their involvement in the public affairs as equal members of new communities.

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<sup>423</sup> *Law No. 1706-VII*, Art. 2.

<sup>424</sup> *Ibid*, Art. 9.

<sup>425</sup> UNHCR, *The 2017 Participatory Assessment Report for Refugees, Asylum Seekers, and IDPs in Ukraine*, July 2017, p. 23, available at: <http://www.unhcr.org/ua/wp-content/uploads/sites/38/2018/05/2017-06-UNHCR-UKRAINE-Participatory-Assessment-FINAL-EN.pdf> [accessed October 7, 2018].

A separate issue in the context of durable solution are compensations and property restitution. Pursuant to Article 15 of the Law No. 1706-VII, in the cases of internal displacement induced by conflict – aggression, invasion or occupation of the Ukrainian territories by the third state, this state should provide compensation directly to IDPs and to the local and state budgets.<sup>426</sup> Such approach can be criticized, the first and foremost, because to some extent such provision replaced the well-known and traditionally accepted primary national responsibility to protect IDPs during all states of displacement. Undoubtedly, when any conflict comes to the end, the transitional mechanisms shall be activated. However, this does not preclude that until then IDPs, as other conflict-affected persons, shall be deprived of protection. Furthermore, as Ukrainian Helsinki Human Rights Union urges, the recently adopted ‘reintegration law’<sup>427</sup> has even more ‘distanced’ Ukrainian government from compensating the losses of these persons by imposing “liability for the moral and material damage inflicted on Ukraine and its citizens... upon the Russian Federation”.<sup>428</sup> Prior to the adoption of this Law, these affected persons could have claimed compensation on the basis on the Law “On Fight against Terrorism” from the State Budget of Ukraine,<sup>429</sup> and even though as concluded by the Norwegian Refugee Council, there has been no detailed mechanism and the caselaw of Ukrainian Courts was very inconsistent, a person could have claimed compensation in civil proceeding after obtaining a status of ‘an injured party’ by initiating a criminal one.<sup>430</sup> However, after the ‘reintegration law’

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<sup>426</sup> Law No. 1706-VII, Art. 15 (3).

<sup>427</sup> Verkhovna Rada of Ukraine, *The Law on the State Policy on Ensuring the State Sovereignty of Ukraine in the Temporarily Occupied Territories in the Donetsk and Luhansk Oblasts*, Document No.2268-VII, 18 January 2018, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/2268-19> [accessed 7 October 2018].

<sup>428</sup> Ukrainian Helsinki Human Rights Union, “Evaluation of Initiatives of the Ministry of Interior of Ukraine in the Field of Donbass Reintegration”, 20 July 2018, available in Ukrainian at: <https://helsinki.org.ua/articles/otsinka-initsiatyv-mvs-ukrajiny-v-sferi-reintehratsiji-donbasu/> [accessed November 13, 2018].

<sup>429</sup> Verkhovna Rada of Ukraine, *The Law on Fight against Terrorism*, Document No.638-IV, with the latest amendments No. 2293-VII from 27 February 2018, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/2268-19> [accessed 7 October 2018].

<sup>430</sup> Ukrainian Helsinki Human Rights Union, “UHHRU: It Appears That the Government Is Backing Out from Providing Compensation for Property Destroyed in Donbass,” 6 February 2018, available at: <https://helsinki.org.ua/en/articles/uhrhu-it-appears-that-the-government-is-backing-out-from-providing-compensation-for-property-destroyed-in-donbas/> [accessed November 13, 2018].

has been introduced, the situation has changed dramatically. It has created a new obstacle for the affected persons, including IDPs: under its framework they are now excepted to claim compensation from Russia, and eventually, at this historical moment, such claims do not have any real prospect.

Nevertheless, it should be noted that in 2017 the Government of Ukraine adopted a strategy on integration of IDPs.<sup>431</sup> Civil society and international community had been urging Ukraine to adopt an action plan on the durable solutions to implement this strategy, however, for a long time there had been no shift. November 21, 2018, the Government has finally adopted an action plan.<sup>432</sup> Still, it is unlikely to bring any positive change, because the action plan in its most parts speaks only about IDPs' needs analysis, evaluation of the current state of affairs and necessity to develop relevant legislation.

If analyzed through the prism of the IASC Framework and its criteria defining the achievement of the durable solutions,<sup>433</sup> Ukrainian reality does not meet at least four of them which are covered by this research. These are social insecurity, non-involvement in public affairs, unrestored property and ineffective avenues for redress. In general, Ukrainian framework on the durable solutions is insufficient, and the legislative action is required. A new comprehensive legislation should be introduced relying on the international standards, following the good practices, mainstreaming the inclusive approach and involvement of IDPs in the decision-making process. It is suggested, that the solutions for displacement should be also sustainable, which means that the gaps in the protection prior and during displacement

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<sup>431</sup> Cabinet of Ministers of Ukraine, *Order No. 909-p*, 15 November 2017, available in Ukrainian at: <http://zakon.rada.gov.ua/laws/show/909-2017-p> [accessed November 23, 2018].

<sup>432</sup> Ministry of the Occupied Territories and IDPs of Ukraine, "Action Plan of Implementation of the Strategy of Integration and Durable Solution for IDPs for the period until 2020," available in Ukrainian at: <https://mtot.gov.ua/ministerstvo-z-pytan-tymchasovo-okupovanyh-terytorij-ta-vnutrishno-peremishhenyh-osib-ukrayiny-povidomlyaye-pro-provedennya-gromadskyyh-publichnyh-obgovoren-proektu-rozporyadzhennya-kabinet-2/> [accessed November 23, 2018].

<sup>433</sup> The Inter-Agency Standing Committee, *IASC Framework on Durable Solutions for IDPs*, p. 27.

should be also fulfilled. In addition, an adequate legislative framework is urgently required to ensure the IDPs' right to compensation and to create an adequate enforcement mechanism.

### **2.3.2. Durable solutions as a cog in a transitional justice mechanism in Colombia.**

Colombian IDPs have found themselves in the situation of protracted displacement, even though different policy strategies have been introduced within the past decades.<sup>434</sup> For example, in the early 2000s, Uribe government had been actively promoting “return of the IDPs as their primary durable solution”.<sup>435</sup> Eventually, this did not work: as Alex Mundt and Elizabeth Ferris write, the surveys have shown that over 80% of IDPs had been reluctant to accept such solution for a number of reasons, such as insecurity in previous communities, unwillingness to return to their original places in countryside after the years of urban life and soil depletion. At the same time, for many indigenous people, who are culturally and historically more attached to the places they have been forced to abandon, “return to their native lands was...the only possible end to displacement”.<sup>436</sup> This again proves the importance of the concept under the IASC Framework that there is no universal pillar, and IDPs shall not be ‘pushed’ towards one durable solution. Besides, the Law No. 387 and the Law No. 1448 on Attention, Assistance and Integral Reparation to the Victims of the Internal Armed Conflict and Other Provisions (hereinafter – Law No. 1448 or Victim’s Law)<sup>437</sup> represent a comprehensive legislative

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<sup>434</sup> Valcárcel Amaya, Vera Samudio, “Colombia: Durable Solutions for the Forcibly Displaced,” *Forced Migration Review No. 56*, October 2017, p. 28, available at: <https://www.fmreview.org/latinamerica-caribbean/valcarcel-samudio> [accessed October 7, 2018].

<sup>435</sup> Alex Mundt, Elizabeth Ferris, “Durable Solutions for IDPs in Protracted Situations,” *Three Case Studies. Brookings-Bern Project on Internal Displacement, ARC/Austcare Symposium “Enhancing Protection of Civilians in Protracted Conflicts”*, 28 October 2008, Canberra, Australia, p. 7 [https://www.brookings.edu/wp-content/uploads/2016/06/1028\\_internal\\_displacement\\_mundt.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/1028_internal_displacement_mundt.pdf) [accessed October 7, 2018].

<sup>436</sup> Ibid, p. 8.

<sup>437</sup> *Law No. 1448 on Attention, Assistance and Integral Reparation to the Victims of the Internal Armed Conflict and Other Provisions*, Diario Oficial, 10 June 2011, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/6589340762217632C1257B8600311912/TEXT/Colombia%20-%20Law%201448%20on%20Victims%20and%20Land%20Restitution%2C%202011%20%5Bsp%5D.pdf> [accessed October 7, 2018].



framework, which was influenced and supplemented by the rulings of the Constitutional Court of Colombia. This framework reflects the key international standards – the Guiding Principles, the IASC Framework and the Pinheiro Principles. Moreover, durable solutions to displacement shall not be considered in a vacuum, rather in the general context of Colombian transitional justice process. With this regard, the Special Rapporteur on the human rights of IDP has noted that durable solutions for IDPs can only be achieved when they “receive justice for the harm done to them...through processes that go beyond their physical return, local integration or resettlement.”<sup>438</sup> Therefore, as cited by the Special Rapporteur, the IASC Framework states that “this may entail the right to reparation, justice, truth and closure for past injustices through transitional justice or other appropriate measures”, and “internally displaced persons who have been victims of violations of international human rights or humanitarian law, including arbitrary displacement, must have full and non-discriminatory access to effective remedies and access to justice, including, where appropriate, access to existing transitional justice mechanisms, reparations and information on the causes of violations.”<sup>439</sup> Thus, the Peace Agreement of 2016 lists among the main principles “the reinstatement of the rights of victims of displacement”.<sup>440</sup> To this end, the solutions for IDPs, as concluded by Oscar Rico Valencia, preclude: “land restitution, collective repatriation, psychological rehabilitation, return and resettlement”.<sup>441</sup> Indeed, Colombian experience is one of the most interesting in terms of addressing the durable solutions in the context of transitional justice.

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<sup>438</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of internally displaced persons*, 18 April 2017, A/HRC/35/27, §53, available at: <http://www.refworld.org/docid/593a94cf4.html> [accessed October 1, 2018].

<sup>439</sup> Ibid.

<sup>440</sup> *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, p. 13.

<sup>441</sup> Joint IDP Profiling Service, “Interview with Oscar Rico Valencia (an Advisor to the Deputy Director of the Victims’ Unit),” *Case Study: Securing Durable Solutions for IDPs in Colombia*, available at: <https://reliefweb.int/report/colombia/case-study-securing-durable-solutions-idps-colombia> [accessed October 7, 2018].

First of all, according to Article 2 of the Law No. 387, “forcibly displaced have the right to consent to definitive solutions to their situation.”<sup>442</sup> The same article further entitles IDPs to the right to return.<sup>443</sup> However, the Law No. 387 also sets obligations: pursuant to Article 16, the Colombian Government undertakes responsibility to support the return of IDPs and to uphold “the provisions contained in this law on the subjects of socioeconomic stabilization, consolidation, and protection”.<sup>444</sup> Also, the Law No. 387 requires the special guarantees “to black and indigenous communities” – underlining a certain level of cultural sensitivity.<sup>445</sup> Pursuant to Article 17, the Government is also undertaking responsibility for creating condition for the socioeconomic stabilization and consolidation of IDPs. Interestingly, this provision links social and economic sustainability of IDPs to the durable solutions for their displacement – voluntary return or resettlement.<sup>446</sup> This reminds the sustainable approach enshrined in the Kampala Convention.<sup>447</sup> Namely, it can be interpreted that if IDPs receive the necessary assistance during displacement, in particular “in the areas of health, education, urban and rural housing and education... employment,” and if the state makes steps towards implementing different social programs, such as “Profitable projects, National System of Agrarian Reform and Rural Development, Fostering small business,” they can be stabilized in society, which is a precondition of reaching the durable solutions.<sup>448</sup> To this end, the Law No. 387 provides an answer to the question: when does the forced displacement ‘discontinue’. According to Art. 18, the “forced displacement by violence status is discontinued when socioeconomic stabilization and consolidation are achieved, whether in the place of origin or the resettlement zones.”<sup>449</sup> Negatively, the socio-economic stabilization of IDPs is not an obligation of result, rather a

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<sup>442</sup> *Law No. 387*, Art. 2 (5).

<sup>443</sup> *Ibid.*, Art. 2 (6).

<sup>444</sup> *Ibid.*, Art. 16

<sup>445</sup> *Ibid.*, Art. 10 (8).

<sup>446</sup> *Ibid.*, Art. 17.

<sup>447</sup> *Kampala Convention*, Art. 11 (1).

<sup>448</sup> *Law No. 387*, Art. 17.

<sup>449</sup> *Law No. 387*, Art. 18.

progressive one, which means on the ground it can be always circumvented by the limited insufficient budgetary allocations and other, sometimes merely formal, obstacles. Moreover, by accentuating voluntary return and resettlements as a framework for IDPs' 'reincorporation' into Colombian society,<sup>450</sup> it does not cover reintegration of IDPs as a separately standing durable solution.

The second important document – is the Law No. 1448, which is also known as Victim's Law. It has been adopted "to facilitate truth, justice and integral repatriations for victims, with a guarantee of no repetition".<sup>451</sup> The Law No. 1448 has been further supplemented by the Decrees 4633/2011, 4634/2011 and 4635/2011 respectively addressing the reparations to indigenous persons, members of Roma community and Afro-Colombians. Accordingly, the Law No. 1448 recognized IDPs as victims of conflict,<sup>452</sup> by broadening the traditional definition of 'victimhood' originally linked to the responsibility of a perpetrator.<sup>453</sup> Covering different forms of displacement, the Law No. 1448 entitled IDPs, as other victims, to monetary and symbolic remedies. Thus, IDPs were "granted rights to damages, restitution of prior living conditions, a range of social services, and special protections in legal proceedings."<sup>454</sup> So, if compared to Ukrainian approach, Colombian IDPs do not have to establish their victimhood in a separate proceeding. Nevertheless, firstly, these rules are applicable only to those IDPs, who have received official recognition and who are registered with the National Victims' Registry.<sup>455</sup> Secondly, while the Law No. 1448 created a framework for the land restitution,<sup>456</sup> as one of the tools to strengthen the reconciliation process and entitled the victims to the "preferential access to state subsidy programs for land improvements and home

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<sup>450</sup> Ibid, Art. 4 (1).

<sup>451</sup> Law No. 1448, Art. 1.

<sup>452</sup> Ibid, Art. 3.

<sup>453</sup> Nicole Summers, "Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?," *Harvard Human Rights Journal*, Vol. 25, 2012, p. 226.

<sup>454</sup> Ibid, p. 225-226. See, as cited by Nicole Summers: Law No. 1448, Art. 28 (4, 9), 28, 31, 49, 51-54.

<sup>455</sup> Ibid, p. 231. See, Law No. 1448, Art. 76.

<sup>456</sup> Law No. 1448, Art. 72.

construction,”<sup>457</sup> its implementation, on the one hand, is very slow. For example, the Human Rights Watch reports that in terms of restitution, as of August 2017, only 5,400 claims have been satisfied from more than 106,000.<sup>458</sup> On the other hand, as summarized by the Amnesty International, a strict time limitation is applicable: the type of reparation depends on the date when the violation leading to the losses had occurred. Thus, persons, whose displacement occurred before 1985, are entitled only to symbolic reparation. The victims of violations which occurred during 1985-1991, are entitled to financial compensation, and those land were taken away after 1991 until the end of the applicability of the Law, which is in 10 years after its entrance into the statutes, are entitled to restitution.<sup>459</sup> To sum up, the Law No. 1448 has essentially amended the framework on the protection of IDPs in terms of durable solutions, even though there are certain limitations in its application.

Overall, the legislative framework on the durable solutions in Colombia can serve as a good example, however, not in terms of the enforcement. As reported by the IDMC, IDPs in Colombia can hardly find durable solutions,<sup>460</sup> while the problem of insecurity during displacement, as addressed in the previous subchapter, also leads to secondary displacement.<sup>461</sup> The difficulties in ensuring other rights, e.g. right to education and employment, also prevents the durable solutions.<sup>462</sup> Finally, the progress of granting the reparations to IDPs, as victims of conflict, is very slow, while more than 12 percent of the while Colombian population is eligible for it.<sup>463</sup> Land restitution is particularly important in Colombian context, the first and foremost,

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<sup>457</sup> Nicole Summers, “*Colombia’s Victims’ Law: Transitional Justice in a Time of Violent Conflict?*,” p. 229.

<sup>458</sup> Human Rights Watch, *Colombia. Events of 2017*, Country Summary, January 2018, p.6, available at: [https://www.hrw.org/sites/default/files/colombia\\_3.pdf](https://www.hrw.org/sites/default/files/colombia_3.pdf) [accessed October 7, 2018].

<sup>459</sup> Amnesty International, *Colombia: The Victims and Land Restitution Law*, Amnesty International Analysis, United Kingdom, 2012, p. 7, available at:

<https://www.amnesty.org/download/Documents/20000/amr230182012en.pdf> [accessed October 7, 2018].

<sup>460</sup> IDMC, “Colombia. Tackling Protracted Displacement Post-Conflict”, p. 29.

<sup>461</sup> Ibid, p. 30.

<sup>462</sup> Ibid.

<sup>463</sup> Ibid.

because the ‘war for lands’ is the root cause of displacement.<sup>464</sup> Moreover, as long as the majority of displaced population are the peasants originating from the rural areas, the importance land is deeply imbedded in their daily life. While some IDPs settled and got used to urban environment are unwilling to return to rural areas, other IDPs, especially indigenous people, are usually attached to their former livelihoods. These factors should be considered in the process of finding the durable solutions for displaced persons. The urgency of the durable solutions for IDPs shall not be underestimated: according to UNHCR “the persistence of the causes of displacement and the lack of durable solutions led to a yearly average of 253,000 newly displaced between 2010 and 2016”.<sup>465</sup>

In Colombian transitional justice process, repatriation of victims which is one of the pre-requisites to the peace and reconciliation, includes forcibly displaced persons. Therefore, in Colombian context these two different concepts – the durable solutions and repatriation of the victims of the conflict – overlap. With this regard and due to the tremendously high number of displaced persons, it is efficient to approach permanent durable, or definitive, solutions to the conflict-induced internal displacement and repatriation of the victims from the same angle – as cogs in a transitional justice mechanism.

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<sup>464</sup> Fadnes, Cindy Horst, “Responses to Internal Displacement in Colombia: Guided by What Principle?”, p.113.

<sup>465</sup> UNHCR, *UNHCR Submission on Colombia: 30<sup>th</sup> UPR Session*, May 2018, p. 1, available at: <http://www.refworld.org/country,,UNHCR,,COL,,5b082a484,0.html> [accessed October 7, 2018].

### 2.3.3. Sustainable solutions under the Kampala Convention.

One of the opening statements of the Kampala Convention declares that the state-parties are “committed to sharing ... common vision of providing durable solutions... by establishing an appropriate legal framework.”<sup>466</sup> In terms of the durable solutions, the Kampala Convention traditionally mentions return, local integration and relocation, which should be a result of an informed choice. Interestingly, in other articles, among the durable solutions the Kampala Convention also speaks about ‘reinsertion’<sup>467</sup> and ‘long-term reconstruction’.<sup>468</sup> This again proves the absence of uniformity of terminology. Generally speaking, the Kampala Convention is following the same route: it creates obligation for different actors and requires their cooperation. Thus, the second paragraph of Article 8 devoted to the obligations relating to the African Union, reaffirms its role in protecting and assisting IDPs by stating that State Parties have a right “to request intervention from the Union in order to restore peace and security... and thus contribute to the creation of favorable conditions for finding durable solutions.”<sup>469</sup> An important feature of the Kampala Convention is also provisions addressing one of the most problematic issues in the context of durable solutions – the land and property restitution or compensation. It requests the states to introduce relevant mechanisms to address the emerging disputes, and where there is “a special dependency and attachment to lands” and whenever possible, such lands shall be restored to such communities.<sup>470</sup> Furthermore, the Kampala Convention goes far beyond the Guiding Principles as it refers to ‘sustainable solutions’ for displacement, and by that it sets a goal to prevent and to eradicate displacement. In this sense, as Dan Kuwali writes, durable solutions constitute “only part of journal and not the

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<sup>466</sup> *Kampala Convention*, Preamble.

<sup>467</sup> *Ibid*, Art. 11(5).

<sup>468</sup> *Ibid*, Art. 11 (3).

<sup>469</sup> *Ibid*, Art. 8 (2).

<sup>470</sup> *Ibid*, Art. 11(5).

destination.”<sup>471</sup> This can be derived from Article 2, which says that the Kampala Convention represents “a legal framework for solidarity, cooperation, promotion of durable solutions... in order to combat displacement and address its consequences”.<sup>472</sup> Sustainability of the durable solutions means that they closely linked to effective protection during all stages of displacement, should be long-lasting and not reactive, while their achievement is a cornerstone of eliminating displacement on the continent as a negative phenomenon.

All above, the Kampala Convention enshrines the right to return, the right to reintegration and the right to relocation.<sup>473</sup> Additionally, Article 9 enshrines protection against forcible return,<sup>474</sup> which brings in mind the principle of non-refoulment. To this end, the State Parties, cooperating with the African Union and other actors, are responsible for creation of conditions for the realization of these rights. If compared, the Guiding Principles ambiguously impose this obligation on ‘competent authorities.’<sup>475</sup> Still, on the practical level, as criticized by Dan Kuwali, “the durable solutions approach, although comprehensive... is largely reactive”, so does not eliminate the causes of displacement.<sup>476</sup> Similar conclusion has been reached by the ICRC. Accordingly, one of the biggest challenges on the African continent is that armed conflicts triggering displacement are usually protracted,<sup>477</sup> and in such circumstances states are predominantly oriented on short- and mid-term solutions for IDPs and are unwilling or, due to the exhausting conflicts, unable to build a sustainable and comprehensive strategy.<sup>478</sup> Moreover, as previously highlighted, according to the Kampala Convention, IDPs should be involved in the process of finding long-term durable solutions and shall be adequately consulted

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<sup>471</sup> Dan Kuwali, “From Durable Solutions to Holistic Solutions: Prevention of Displacement in Africa,” *African Journal of Legal Studies*, No. 6, 2013, p. 275.

<sup>472</sup> *Kampala Convention*, Art. 2.

<sup>473</sup> *Ibid*, Art. 11.

<sup>474</sup> *Ibid*, Art. 9 (2(e)).

<sup>475</sup> *The Guiding Principles on Internal Displacement*, Principle 28.

<sup>476</sup> Kuwali, “From Durable Solutions to Holistic Solutions: Prevention of Displacement in Africa,” p. 284.

<sup>477</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocking Exercise,” pp. 386, 416.

<sup>478</sup> *Ibid*.

on the options available.<sup>479</sup> However, IRCR notes, that on the practical level, IDPs are rarely invited to the ‘roundtables’ on the durable solutions, they are informed neither about their rights, freedoms and obligation, nor about the options available.<sup>480</sup>

Similar to Colombian framework in terms of embedding durable solutions in the process of transitional justice, the Kampala Convention also obliges the state parties provide IDPs with a redress by introducing “an effective legal framework to provide just and fair compensation... reparations... for damage incurred as a result of displacement...”.<sup>481</sup> However, as Mike Asplet and Megan Bradley say, it is surprising that the Kampala Convention does not raise an issue of restitution, and to this end, its framework is clearly distinguishable from the Guiding Principles<sup>482</sup> and does not reflect the Pinheiro Principles.<sup>483</sup> Thus, the Kampala’s approach is less specific and refers to repatriation in general. At the same time, the land and property issues are not absolutely ‘ignored’ by the document, they are covered by Article 11. It requires the States Parties to create mechanism, ‘a simplified procedure’ for disputes’ resolution related to IDPs’ property and to undertake all the necessary steps “to restore the lands of communities with special dependency and attachment to such lands upon the communities’ return, reintegration, and reinsertion”.<sup>484</sup> Mike Asplet and Megan Bradley also explain that the application of this provision is very limited, because: firstly, the “duty to ‘restore lands’ comes into play where there is ‘special dependency and attachment,’” and it is an obligation of progressive realization, so it “is couched in limited terms as ‘appropriate measures’ required ‘whenever possible’”.<sup>485</sup> Still, according to the authors, in spite of this limitation, the general framework on reparations under Kampala is broad, which means it includes not only the mere

<sup>479</sup> *Kampala Convention*, Art. 11 (2).

<sup>480</sup> ICRC, “Translating the Kampala Convention into Practice: A Stocking Exercise,” p. 398.

<sup>481</sup> *Kampala Convention*, Art. 12(2).

<sup>482</sup> Asplet, Bradley, “What Does the Kampala Convention on Internal Displacement in Africa Mean for Housing, Land and Property Restitution?”.

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*

<sup>485</sup> *Ibid.*



right to restitution, but “demands the more expansive corollary: an obligation to remedy”.<sup>486</sup> Furthermore, they conclude that while the Pinheiro Principles “limit the scope of state liability to situations in which persons are “arbitrary” or “unlawfully” dispossessed”, under Kampala’s framework the states parties bear a duty to remedy all displaced persons. Such broad approach also means that IDPs are indeed provided with opportunity to choose voluntary the durable solution, whereas often return and restitution are considered ‘preferred remedies’.<sup>487</sup> This can be explained by the fact, that the trends of displacement vary among the affected states, and it is impossible to select one universal pillar. Therefore, to agree with Mike Asplet and Megan Bradley, a broad approach to redress is a good example of contextualizing the protection of IDPs.<sup>488</sup> This is undoubtedly a feature which also makes the Kampala’s framework sustainable.

Summing up, the Kampala Convention reaffirms that during return, reintegration and relocation the principles of voluntariness, respect to human dignity and safety shall be uphold.<sup>489</sup> It also enshrines the responsibility of the state parties to provide IDPs with avenues of redress and requires involvement and cooperation among different actors. Despite some terminological inconsistency with international standards, it represents a comprehensible framework – which can be also described as a strategy on eliminating the causes of displacement. The reasons for that is that Kampala Convention focuses not merely on durable, but long lasting and sustainable solutions. Nevertheless, even though the Kampala Convention does not specify the exact preventive tools and mechanisms, it enshrined this idea and opened a door to new developments in combatting the challenge of displacement. Of course, further dedication and commitment are required from the State Parties to transfer this idea into practice.

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<sup>486</sup> Ibid

<sup>487</sup> Ibid.

<sup>488</sup> Ibid.

<sup>489</sup> *Kampala Convention*, Art. 11(1).

### **Chapter 3: Looking for a solution to enhance protection of IDPs.**

This Chapter provides an answer to the central question of this thesis: what can be a solution to the challenge of internal displacement? Thus, firstly, this Chapter identifies three main lessons learnt from the comparative analysis of the practices of Ukraine, Colombia and the African Union. Secondly, it proposes a normative reform as a solution enhancing the protection of IDPs during all stages of displacement. It evaluates the necessity of a legislative action in the context of protection already afforded by existing legislative frameworks, weighing both arguments for and against.

#### ***3.1. Lessons from the practices of Colombia, Ukraine and the African Union.***

##### **3.1.1. Failures or successes in defining IDPs and protecting against displacement.**

The analyzed legislative frameworks of Ukraine and Colombia show, that national legislation does not always fully reflect the definition embedded in the Guiding Principles. Undoubtedly, Ukrainian definition is the most restrictive. Thus, it covers only persons who are “legally residing in the territory of Ukraine”,<sup>490</sup> while the Colombian Law No. 387 speaks about “any person”<sup>491</sup> and the Kampala Convention names “persons or groups of persons.”<sup>492</sup> Moreover, Ukrainian definition covers only persons residing in the territories from which they were displaced,<sup>493</sup> while Colombian Law includes the places where the persons used to engage with “customary economic activities”.<sup>494</sup> The Kampala Convention simply names “homes or places of habitual residence,”<sup>495</sup> so similarly to Colombian Law No. 387, and contrary to Ukrainian definition, it does not stick to the ‘legality’ of one’s residence. Another issue refers to the causes as listed in the respective provisions. The list under the Kampala Convention is

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<sup>490</sup> *Law No. 1706-VII*, Art. 1.

<sup>491</sup> *Law No. 387*, Art. 1.

<sup>492</sup> *Kampala Convention*, Art. 1 (k).

<sup>493</sup> *Law No. 1706-VII*, Art.1.

<sup>494</sup> *Law No. 387*, Art.1.

<sup>495</sup> *Kampala Convention*, Art. 1 (k)

not-exhaustive and absolutely reflects the approach of the Guiding Principles,<sup>496</sup> the Colombian provision names specific situations and circumstances setting a threshold of a “drastic disturbance of the public order”.<sup>497</sup> At the same time, the threshold under Ukrainian law is rather formal – the circumstances triggering displacement should be recognized by state officials or international organizations, otherwise they should be proved by IDP.<sup>498</sup> Moreover, neither Ukrainian, nor Colombian definitions mention development-projects, on-set natural disasters or other potential triggers of displacement. Finally, differently from Colombian and Kampala’s definitions which explicitly state that IDPs relocate within state borders,<sup>499</sup> the major shortcoming of Ukrainian definition is that it does not clarify that IDPs have not crossed the internationally recognized borders.<sup>500</sup> To this end, the Kampala Convention, as a regional treaty, has incorporated and elaborated the definition from the Guiding Principles, and therefore, made it binding for state parties. The scopes of Ukrainian and Colombian definitions are narrower, as they do not repeat the definition from the Guiding Principles. Thus, their application is limited. It can be explained by the fact that in both cases the legislators had been primarily aiming to address the situation of conflict, so they hadn’t proved to be foresighted to include other causes of displacement. Among these three definitions, Ukrainian is the most problematic and narrow. The regional framework of the Kampala Convention does not merely ‘guide’ the national legislators in creating domestic definitions, like the Guiding Principles as international standards do, but it has embedded a binding, and at the same time flexible, definition.

Furthermore, even though the Guiding Principles are very precise in terms of stating that internal displacement does not and shall not result in any special legal status, this thesis proves that this principle is not always transferred into national legislative frameworks. In particular,

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<sup>496</sup> Ibid.

<sup>497</sup> *Law No. 387, Art.1.*

<sup>498</sup> *Law No. 1706-VII, Art.1.*

<sup>499</sup> *Law No. 387, Art. 1; See, Kampala Convention, Art. 1.*

<sup>500</sup> *Law No. 387, Art.1.*

in Ukraine, the relevant legislation does not only state that IDP Certificate serves as a confirmation of internal displacement<sup>501</sup> and entitles IDPs to special rights,<sup>502</sup> but also makes it a pre-requisite to the rights and freedoms enjoyed by other persons as discussed by Chapter 2. Ukrainian legislator ignored the concept under the Guiding Principles and produced special legal status of IDP linked to administrative procedure of registration and not a factual situation of displacement. It, therefore, resulted in numerous gaps in legislative framework. The Colombian Law No. 387 distinguishes between IDPs and Colombians, who found themselves as IDPs, and if reported, are entitled to the benefits under the law.<sup>503</sup> In comparison, under the Kampala Convention the development of registration procedure is required,<sup>504</sup> however, it does not presume that persons are not considered internally displaced unless registered. Again, while the members of the African Union who signed and ratified the Kampala Convention are bound by its norms, neither in the Inter-American system, nor in the Council of Europe, there is a binding norm explicitly defining the necessity or the purpose of registration of IDPs and eliminating a possibility of creating a special legal status with all negative connotations.

Finally, in terms of prevention of displacement, and criminalization of arbitrary displacement as one of its pillars, Ukrainian legislative framework is the weakest: it simply entitles persons to the right to protection against arbitrary displacement,<sup>505</sup> without actual criminalization of such acts and relevant criminal procedural mechanism. Indeed, Ukraine is not obliged to do so under any of the international or regional treaties it is party to. It is impossible to estimate how many instances of arbitrary displacement stay unreported and unprosecuted. In general, the prevention of displacement is another disturbing aspect of Ukrainian framework certainly requiring legislative action. Oppositely, Colombian legislation

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<sup>501</sup> *Law No. 1706-VII*, Art. 4 (1).

<sup>502</sup> *Law No. 1706-VII*, Art. 9.

<sup>503</sup> *Law No. 387*, Art. 32.

<sup>504</sup> *Kampala Convention*, Art. 13(1).

<sup>505</sup> *Law No. 1706-VII*, Art.3.

has relevant norms designed to criminalize arbitrary displacement and relevant procedures,<sup>506</sup> however, its application and effectiveness are problematic. At the same time, Colombian preventive framework is broad, but mostly institutional. Again, this part shows that not all domestic systems are equally successful in incorporating the Guiding Principle's protection against and prevention of displacement framework. The Kampala Convention has also created obligation of criminalization,<sup>507</sup> and even though there are practical challenges in transcending this norm into domestic legislation, it created the most powerful and elaborate framework for the prevention of displacements.

This part of the thesis shows, states are free to define whom they recognize as IDPs and to condition the availability of not only certain benefits they are entitled to as a result of displacement, but also human and citizens' rights. Domestic legislators are not equally successful in prohibiting forced displacement and designing norms for its prevention. At the same time, regional binding framework is called, among others, to clarify the legal issues, while its implementation might be still circumvented by the lack of good political will, insufficient funding, limited practical capacity or other obstacles.

To this end, the first lesson learnt from these jurisdictions is the following: even though internal displacement as a phenomenon is not homogenous and, undoubtedly, vary from state to state, from region to region, there are aspects which should be established either on regional, or international levels – namely, definition of IDPs, including the causes, the role and necessity of registration and state's obligations in the context of preventing displacement, including but not limited to criminalization of arbitrary displacement.

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<sup>506</sup> Adreu-Guzmán, *Criminal Justice and Forced Displacement in Colombia. Case Studies on Transitional Justice and Displacement*, p. 8.

<sup>507</sup> *Kampala Convention*, Art.4(6).

### 3.1.2. Accommodating human rights to the context of displacement.

As concluded by the Chapter 1, the Guiding Principles represent the most comprehensive framework on protection during displacement. Again, it is necessary to recall that the underlying principle of the Guiding Principles is that during displacement, IDPs continue to enjoy the same spectrum of rights and freedoms as do other citizens,<sup>508</sup> however, as a consequence of displacement they are more vulnerable. It means that the risk of infringement with their rights is higher and it is more difficult for them to realize certain rights. Thus, they should be afforded increased protection and special guarantees.

In Ukraine, the legislation cannot be presented as adequate to address human rights challenges emerging during displacement. Yet, Ukrainian legislation itself creates unnecessary legal obstacles for IDPs to enjoy their right and freedoms in addition to factual obstacles faced by them. Thus, it is not merely a problem of insufficient funding allocations for targeted aid, but also conditioning availability of special benefits and other human and citizens' rights to the registration as IDP and IDP Certificate. This is the biggest shortcoming of the whole legislative framework on IDPs in Ukraine, which is also supplemented by the fact that Ukrainian legislator failed to consider effective protection during displacement as a pre-requisite to durable and sustainable solutions. The legislator intentionally or unintentionally avoids developing strong and comprehensive legislative framework to address if not all, but at least some of the most urgent needs of IDPs. Thus, a legislative action is required to elaborate the norms by making the existing constitutional entitlements not an abstract category. The courts in Ukraine prove to be more effective and 'prepared' to deal with the negative consequences of the conflict than the legislator, which is reluctant to develop procedures and often simply ignores the problems. However, the structural problems cannot be solved in a single blow: in this sense, the courts cannot replace the legislator. While Ukrainian legislation is absolutely deprived of any focus,

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<sup>508</sup> *Guiding Principles on Internal Displacement*, Principle 1 (1).

Colombian legislator has focused on humanitarian assistance, and what is an obvious feature of the Law No. 387 – it also focuses on dividing the tasks among different institutions. It does not have a section specifically framing the protection during displacement, and similarly to Ukrainian judiciary, Colombian judicial approach proved to be more oriented on the needs of IDPs. Thus, very progressively, the Constitutional Court of Colombia has set a minimum requirement – “the minimum levels of enjoyment of rights”<sup>509</sup> and the corresponding “minimum positive obligations”.<sup>510</sup> The adjudicator has reaffirmed that IDPs shall enjoy all the spectrum of constitutional rights, however, they should be interpreted through the Guiding Principles.<sup>511</sup> Even though practically there is still a range of challenges and the needs of IDPs are not always met on the ground, formally – the approach of the Constitutional Court can be hardly criticized. However, again, the experiences of Colombia and Ukraine show that legislators are not always following the Guiding Principles and, unfortunately, the legislative frameworks without the impact of judiciary are very weak. While Ukrainian legislator lacks focus, Colombian legislator emphasized humanitarian assistance leaving behind other concerns appearing in the context of displacement. In addition, both frameworks lack conflict-sensitivity and do not explain how IDPs shall be protected against negative consequences of the conflicts, in particular, from the interference into their rights by the members of armed groups. At the same time, the protection during displacement under the Kampala Convention is very comprehensive and evidently based on the Guiding Principles. Moreover, as to the displacement induced by conflicts, a separate article is devoted to it.<sup>512</sup> It contains rules cornering humanitarian assistance and simultaneously, like Colombian law, introduces novelty on the institutional level by imposing relevant obligations on different actors, including the

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<sup>509</sup> *Decision No. T-025 of 2004*, p. 46.

<sup>510</sup> *Ibid*, p. 53.

<sup>511</sup> *Ibid*.

<sup>512</sup> *Kampala Convention*, Art. 7.

members of non-state armed groups.<sup>513</sup> On the practical level, again, there are challenges in its implementation, but formally – the text of the Kampala Convention is ultimately more advanced than the laws of Ukraine and Colombia, where judiciary seems to be ‘responsible’ for correcting mistakes of the legislators and fulfilling the gaps. Eventually, this could have been avoided if the legislators had had not only an opportunity to consult with international standards while creating their frameworks but had been obliged to transfer norms on protection during displacement into domestic legislation from regional or international treaties, and consequently focus on implementation without being stuck on the stage of formulating the legislative provisions.

Therefore, the second lesson is that during displacement human rights must be accommodated to the context of displacement and, in the cases of conflicts, due regard should be given to last. Unfortunately, states are not always capable, ready or willing to do so. The mere legislative process and ‘correction’ of its outcomes take much time, and this time might have been used more rationally with a focus on enforcing the protection during displacement if there had been a legally binding international or regional framework setting the minimum requirements to the national protection frameworks for IDPs.

### **3.1.3. Sustainability of durable solutions**

The legislative approaches to the durable solutions in Ukraine, Colombia and the African Union are also very different. What is important, in Colombia and the African Union internal displacement has become protracted because of the protracted nature of the conflicts. Similarly, in Ukraine, displacement is also becoming protracted, because the confrontation with Russian Federation has now no real prospect of peace. This essentially tangles finding long-term durable solutions, primarily because the number of IDPs is still increasing and states are consequently disposing their policy, financial and practical efforts to ensure emergency relief for IDPs and

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<sup>513</sup> Ibid., *See*, Art. 6 (international organizations and humanitarian agencies), Art. 8 (obligation of the AU).



other conflict-affected people. At the same time, states are focused on military challenges rather than human rights' concerns of IDPs. Moreover, in the context of ongoing conflicts it is not feasible to ensure return of IDPs, still this does not mean that long-term durable solutions should be ignored by states, and especially by the legislators.

As examined by the Chapter 2, in Colombia the conflict has been formally ended by the Peace Agreement of 2016, so durable solutions for IDPs became a part of transitional justice process. In comparison, it is too early to speak about transitional justice process in Ukraine, however, Colombia can be a good example of reflecting the interests of IDPs in it. Colombian legislator speaks about 'reincorporation' of IDPs into society either by their voluntary return or resettlement,<sup>514</sup> and sets a threshold for such 'reincorporation' – "socioeconomic stabilization and consolidation".<sup>515</sup> For instance, the Kampala Convention recognizes return, resettlement and reintegration.<sup>516</sup> The Kampala Convention is very progressive in terms of conceptualizing durable solutions in the overall protection framework, thus requiring their sustainability. It allows to conclude that the Kampala Convention understands the interrelation between protection during displacement and durable solutions, and between long-term durable solutions and prevention of displacement. The Ukrainian Law No. 1706-VII names voluntary return and reintegration.<sup>517</sup> It is a central document on internal displacement, but it neither elaborates on the durable solutions (it does not even contain and explain such term), nor does it entitle IDPs to the right to durable solutions. However, in the cases of possible return, the state is 'generous' enough to provide IDPs with "free transportation".<sup>518</sup> Eventually, it makes Ukrainian legislative framework the 'poorest' one in this area if compared to Colombian and Kampala's. What is also very urgent in the cases of conflicts, and especially in the context of transitional justice, –

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<sup>514</sup> *Law No. 387*, Art. 4 (1), Art. 10 (5).

<sup>515</sup> *Ibid*, Section 6.

<sup>516</sup> *Kampala Convention*, Art.11.

<sup>517</sup> *Law No. 1706-VII*, Art. 2.

<sup>518</sup> *Ibid*, Art. 9 (1).

recognition of IDPs as victims as has been done by Colombian Victim's Law.<sup>519</sup> This created a mechanism for IDPs' reparations which are also translated as a component of transitional justice together with durable solutions. Colombian legislator introduced an avenue of redress for IDPs, in particular, by creating a mechanism for land restitution.<sup>520</sup> Even though practically there are challenges, the very existence of such tool and the recognition of IDPs' right to reparation is progressive. The Colombian state, at least formally, creates schemes for land restitution. The situation in Ukraine is totally different: the legislator has shifted the burden to repair violations on the aggressor – the Russian Federation.<sup>521</sup> However, it is very unlikely that Russia will comply with decisions of Ukrainian authorities. Thus, IDPs are left without redress. To this end, the Parliamentary Assembly of the Council of Europe in the Resolution 2198 invited "the Russian Federation and Ukraine to establish a commission for the compensation or return of IDPs' possessions and property, in accordance with the jurisprudence of the European Court of Human Rights under Article 1 of the Protocol to the European Convention on Human Rights."<sup>522</sup> Up until then, there is no working mechanism for land, property restitution and compensations for IDPs in Ukraine. On the contrary, Kampala Convention elaborates on the reparations – as previously states it undertakes a very broad approach by obliging state parties to provide IDPs with redress without giving preference a particular type of remedy.<sup>523</sup> It does not define special procedure and it is early to access the practical effectiveness of such regional obligation, however, it serves as a guidance for states and recognized such right of IDPs.

To this end, the third lesson learnt is that without binding guidance states are taking too much discretion in legal framing of durable solutions. This may, on the one hand, result in advanced framework as Colombian, which is still problematic in terms of implementation, or

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<sup>519</sup> *Law No. 1448*, Art. 3.

<sup>520</sup> *Ibid*, Art. 72.

<sup>521</sup> *Law No. 1706-VII*, Art. 15 (3).

<sup>522</sup> Parliamentary Assembly of the Council of Europe, *Humanitarian Consequences of War in Ukraine*, Resolution 2198 (2018).

<sup>523</sup> *Kampala Convention*, Art. 12 (1).

an absolute failure as in Ukraine, on the other hand, because Ukrainian legislator has not incorporated the very concept of the durable solutions, not speaking about their sustainability or IDPs' involvement.

### **3.2. *International treaty on internal displacement***

#### **3.2.1. Do we need an international treaty on internal displacement?**

The lessons learnt from Ukraine and Colombia show that domestic legislation does not always provide a sufficient level of protection to IDPs. Thus, IDPs' protection is either evidently not a priority of the legislator (Ukraine), or the legislative framework had been created during years still leaving normative gaps unfulfilled (Colombia). At the same time, the Kampala Convention, as a result of regional legislative and policy process, established the most comprehensive protection framework for IDPs. On the one hand, its implementation is a challenge, on the other hand – it is a huge step towards ensuring IDPs protection on regional and domestic levels. Thus, according to the project of IDMC, on the African Continent, 9 states are in the process of developing such laws – Liberia, Mali, Niger, Nigeria, Chad, Libya, Central African Republic, Democratic Republic of Congo, South Sudan and Kenya. All of them, except Libya and Kenya, have signed Kampala Convention. More states have already signed and ratified the Kampala Convention, but have not started its domestication yet.<sup>524</sup> While these states are in equally or even more difficult position in terms of ensuring protection to IDPs on the practical level, in terms of developing legislation – their legislators have a binding guidance to be followed, if compared to Ukraine, Colombia and other states outside Kampala.

Furthermore, only a few countries have developed their own laws on internal displacement. Outside African continent, only the following states have separate laws on internal displacement: Russia, Ukraine, Bosnia and Herzegovina, Georgia, Azerbaijan, Mexico,

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<sup>524</sup> IDMC, "IDP Laws and Policies: A Mapping Tool. Database," available at: <http://www.internal-displacement.org/law-and-policy/> [accessed October 16, 2018].

Colombia and Peru.<sup>525</sup> More states have other “national instruments relevant to internal displacement,” for example, United States, India, Syria, Serbia, Nepal and others.<sup>526</sup> However, even though it creates impression that the necessary normative frameworks are in place, as Ileana Nicolau and Anaïs Pagot conclude, “there still seems to be a lack of laws and policies where they are most needed”.<sup>527</sup> In particular, the authors say that there are gaps in these laws, for example, only “1/3 of all the laws and policies analyzed addressed the pre-displacement phase”.<sup>528</sup> Thus, what is also confirmed by the Chapter 2 through profound analysis of Ukrainian and Colombian legislation, the very existence of a single law on displacement may not fulfill of the gaps. Additionally, as a result of reluctance of the legislators, the adoption of such laws may itself produce new gaps and result in inconsistency of the overall domestic human rights framework. Of course, the enforcement of laws and the development of policies largely depend on political will. However, there is a question how to make the texts of domestic laws sufficient to contribute to the prevention of displacement from occurrence, for example, by protecting persons from arbitrary displacement? How to ensure these laws do not exclude factual IDPs from their scopes? How to guide the national lawmakers in accommodating the human rights to the context of displacement? What norms should be introduced to protect IDPs from further violations? How should legislation address the durable solutions?..

Sadly, the laws in some states might not be adopted at all or adopted when it is already too late. Deprived of protection from domestic legislator, IDPs do not have an international binding instrument specifically designed to address their needs. It may be claimed, that the Guiding Principles perform this role. Undoubtedly, as it was explained by the Chapter 1, the

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<sup>525</sup> Ibid.

<sup>526</sup> Ibid.

<sup>527</sup> Ileana Nicolau, Anaïs Pagot, “Laws and Policies on Internal Displacement: Global Adoption and Gaps”, *Forced Migration Review No. 59*, October 2018, p. 9.

<sup>528</sup> Ibid, p. 10.

role of this document cannot be underestimated. However, after 20 years from its adoption, internal displacement is steadily growing, raising new and worsening old human rights' challenges.

To this end, there is a need in a new creative legislative solution which would embrace all the most progressive features of the Guiding Principles and the best practices of domestic and regional legislators. Such document would be not only a 'model' for legislators, but would create a new platform for political dialogue, cooperation among states and would potentially become an avenue of redress for IDPs. Nevertheless, there are both serious arguments to consider for and against the internationally binding treaty on internal displacement.

### **3.2.2. Arguments against an international treaty on internal displacement**

To summarize and to respond to the arguments against the adoption of the international treaty on IDPs, it is necessary to recall the reasons why the format of the Guiding Principles as it is, has been chosen by the drafters. To this end, firstly, Walter Kälin argued that "treaty making in the area of human rights has, in general, become very difficult".<sup>529</sup> He claimed that international legislative process was lengthy, and the challenge of displacement should have been urgently addressed.<sup>530</sup> The Guiding Principles were primarily designed to address "the specific needs of IDPs"<sup>531</sup> and displacement as something temporary, and not for the purpose of combatting displacement as a negative phenomenon. This reminds a 'reactive approach' of Colombia, which focuses on humanitarian assistance to IDPs during displacement, and is different from the approach of the Kampala Convention, which aims to find sustainable solutions to displacement in order to eliminate it and its negative consequences. Twenty years have passed since the adoption of the Guiding Principles, and the challenge of displacement

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<sup>529</sup> Walter Kälin, "How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework," *Brookings/Cuny Project on Internal Displacement*, December 19, 2001, p.2, available at: <https://www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf> [accessed October 18, 2018].

<sup>530</sup> Ibid.

<sup>531</sup> Ibid, p.5.

has not been resolved. Moreover, it is becoming more urgent as the number of IDPs is constantly increasing. It means, that ‘urgent response’ to internal displacement is only one little step, and a fundamental solution is needed. Simply relying on the length of the treaty-making process is a weak argument, because otherwise international legal system would not have had almost any of its treaties. Indeed, the treaty making process is dependent on political consensus, but the adoption of the Kampala Convention proves that such consensus can be found.

The second argument of the drafters referred to the possible negative influence of the negotiations – as long as the text of the Guiding Principles goes beyond the existing law, “some states would have been given an opportunity to put into question some of the existing treaty provisions or to weaken customary law by expressing the opinion that some of its principles are no longer valid.”<sup>532</sup> As it was already stated, the Guiding Principles largely reflect the norms of international human rights and humanitarian law, and where it goes beyond – it rather accommodates the norms to the context of displacement and fulfills the existing gaps. Namely, instead, it has a potential of bringing clarity to certain issues, for example, the responsibility of non-state actors.

Thirdly, Walter Kälin states that the mere adoption of the treaty does not presume its success.<sup>533</sup> It can be argued that indeed the success is estimated by changes on the ground. However, it is difficult to rebut the statement that the existence of a treaty requiring the state-parties to transform their legislation fastens the process of getting practical improvements. Taking the example of Kampala Convention, its importance has been widely recognized as “a bold and landmark measure to create an instrument defining the rights and responsibilities of IDPs and States”.<sup>534</sup>

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<sup>532</sup> Ibid., p. 2.

<sup>533</sup> Ibid., p. 3.

<sup>534</sup> Dieng, “*Protecting IDPs: the Value of the Kampala Convention as a Regional Example*”, p. 264. See, as cited by the author: Won Kidane, “Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention,” *Vanderbilt Journal of Transnational Law*, Vol. 44, No. 1, 2011, p. 6. See also, Guy S.

The next claim of the drafters is about possible reservations or reluctance to enact implementing legislation.<sup>535</sup> However, it is equally applicable to any of existing treaties. Furthermore, Walter Kälin argued that drafting “a treaty that combines human rights and humanitarian law is probably premature.”<sup>536</sup> Thus, while the text of the Guiding Principles contains both norms of international “human rights and humanitarian law as a unified complex of Human Rights norm”, the “legal, institutional and political... distinction between human rights applicable mainly in peace time and humanitarian law” during armed conflicts might have made a text of a binding treaty controversial.<sup>537</sup> However, nowadays there are other human rights treaties which contain international humanitarian law norms.<sup>538</sup> Again, the Kampala Convention also proves that it is possible to embrace international human rights and humanitarian law rules in one document.

The final argument of the drafters in favor of non-binding document was that a new treaty on IDPs would have duplicated the norms under existing treaties.<sup>539</sup> This is also not true: on the one hand, as analyzed by Chapter 1 of this thesis, there still gaps in the international framework which should be fulfilled. On the other hand, this contradicts the previous statement of the drafters that the Guiding Principles went beyond existing human rights and humanitarian law. In addition, as already concluded, it is necessary to accommodate human rights to the context of displacement, as well as to the particular causes of displacement – for example, armed conflicts.

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Goodwin-Gill, “The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change,” *International Journal of Refugee Law*, Vol. 28, No. 4, 2016.

<sup>535</sup> Ibid, p.3-4.

<sup>536</sup> Ibid.

<sup>537</sup> Ibid.

<sup>538</sup> ICRC, “What is the Difference Between IHL and human rights law?” in *Extracts from “International Humanitarian Law: Answers to Your Questions”*, 22 January 2015, available at: <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law> [accessed October 21, 2018]. These are, as provided by the source: Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, and the Convention on Enforced Disappearance.

<sup>539</sup> Kälin, “How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework,” pp. 4-5.

In addition, it may be argued that instead of ‘inventing’ a treaty as a ‘creative’ solution, it is more productive and logical to focus on the existing instrument – the Guiding Principles. However, this has been done during the past twenty years, and the number of IDPs, together with the rate of their rights’ violations, is growing. It means, that such approach does not eliminate the roots of forced displacement and does not enhance finding sustainable solutions for IDPs. Now it is time for international community to recognize that a soft instrument, notwithstanding how revolutionary it was at the moment of its introduction and the positive changes it has helped to achieve, is not enough to address the challenge of internal displacement in the scale it has already reached. Besides, it is too early to say if the regional binding treaty brings the expected results, however, millions of IDPs and persons in the risk of displacement worldwide do not have decades to wait until it is tested.

Summing up, despite huge impact of the Guiding Principles and their importance, as a soft law instrument they cannot replace a binding treaty. The Kampala Convention, as first regional binding document on displacement, has proved that it is possible to find consensus and to advance the protection of IDPs. It may be that one day that the Guiding Principles would be recognized as customary law, but eventually this would take much longer than drafting any treaty.

### **3.2.3. Arguments in favor of an international treaty on internal displacement**

It is often concluded, that to address the challenge of internal displacement it is necessary to focus on domestic incorporation and implementation of the Guiding Principles, however, already in 2006, Walter Kälin has pointed out that “at the regional level, the time may have come to move from mere declarations to binding law”.<sup>540</sup> The author also raises the possibility of “elaboration of additional protocols to regional human rights conventions that would focus

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<sup>540</sup> Walter Kälin, “The Future of the Guiding Principles on Internal Displacement”, *Forced Migration Review*, December 2006, p. 6.



on incorporating”,<sup>541</sup> and importance of strengthening application of the documents at the international level.<sup>542</sup> He further states that “all these efforts may ultimately lead to the recognition that the Guiding Principles should be transformed into a universal convention on the protection of IDPs.”<sup>543</sup> Nowadays, when internal displacement law is developing,<sup>544</sup> it is necessary to re-think the possible value on a universal treaty on internal displacement.

All above, the absence of universal binding definition of IDPs has its negative consequences. It leads to narrowing down its scope within domestic systems, in particular by limiting the definition by time or causes of displacement. Thus, the descriptive definition from the Guiding Principles is currently widely used: it has been incorporated or taken as a cornerstone of African regional framework. For example, The Great Lakes’ Protocol defines IDPs literally to the Guiding Principles, however, in addition to the causes of displacement it lists “the effects of large-scale development projects”,<sup>545</sup> and such elaboration is actually pertinent in the context of growing development-induced displacement. The Kampala Convention, the first and only regional binding treaty focusing on internal displacement within the African Union, also repeats the descriptive definition from the Guiding Principles and supplements it by the definition of an act of internal displacement as “involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders”.<sup>546</sup> However, on the national level, only six countries adopted the definition of IDPs which is consistent with the Guiding Principles.<sup>547</sup> Interestingly, two of them – Kenia and Sudan have also ratified the Great Lakes Protocols, while Angola is a state-party to the Kampala Convention.<sup>548</sup> As concluded by the comparative constitutional research, the

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<sup>541</sup> Ibid.

<sup>542</sup> Ibid.

<sup>543</sup> Ibid.

<sup>544</sup> Cantor, “The IDP in International Law? Developments, Debates, Prospects.”

<sup>545</sup> *Protocol to the Pact on Security, Stability and Development in the Great Lakes Region on the Protection and Assistance to IDPs*, Art. 1.

<sup>546</sup> *Kampala Convention*, Art. 1.

<sup>547</sup> IDMC, “IDP Laws and Policies: A Mapping Tool.”

<sup>548</sup> Ibid.

trend of narrowing down the definition of IDPs is observed in several states. Thus, the Constitution of Nepal, addresses internal displacement under the general social justice clause together with other vulnerable categories directly or indirectly connected with “people’s movements, armed conflicts, revolutions” and establishing democracy in Nepal.<sup>549</sup> The application of this provision is limited only to those whose displacement had been caused by conflicts, while as of 2017, there were 384,000 newly displaced persons as a result of disasters (including earthquakes, floods, landslides and fires).<sup>550</sup> Accordingly, the Constitutions of Ghana and Gambia contain two identical provisions establishing obligations of States “to resettle displaced persons on suitable alternative land.”<sup>551</sup> The application of these norms “is limited only to situations when such displacement is caused by “a compulsory acquisition of land by or on behalf of the Government” and when it concerns “inhabitants who occupy the land under customary law”.<sup>552</sup> So, it has a format of administrative procedure addressing the deprivation of property, and it is not a provision framing internal displacement as such. Also, as David Fisher writes “the IDP laws of Peru, Croatia, Colombia, Georgia, and Russia only apply to persons fleeing individualized persecution, massive violations of human rights, or armed conflict... this approach makes for poor preparedness for future displacement situations and increases the potential that persons displaced by one cause will receive better care than those displaced by another”.<sup>553</sup> So, in the absence of a clear legal definition states enjoy full discretion in determination of IDPs and the attributed characteristics, consequently denying protection to those in need.

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<sup>549</sup> *Constitution of Nepal*, 20 September 2015 (2072.6.3), Art. 42 (5).

<sup>550</sup> IDMC, “Nepal Country Profile,” available at: <http://www.internal-displacement.org/countries/nepal/> [accessed June 5, 2018]

<sup>551</sup> *Constitution of the Republic of Gambia*, 8 August 1996 (entered into force 16 January 1997), Art. 22 (4); *Constitution of the Republic of Ghana*, 1992, Art. 20 (3).

<sup>552</sup> Ganna Dudinska, “Rights of Internally Displaced Persons,” Drafting exercise and essay, *Fundamental Rights in Comparative Perspectives*, Central European University, Budapest, 2018.

<sup>553</sup> Fisher, “The Right to Humanitarian Assistance,” p. 105.

Secondly, as Erin Mooney summarizes, “what distinguishes the internally displaced are the unique needs and heightened vulnerabilities that arise as a result of forced displacement, including their need for a durable solution...It is important to be clear that the purpose of identifying IDPs as a distinct category of concern is not to privilege them over others but rather to ensure that their needs are addressed and their human rights are respected along with those of other persons.”<sup>554</sup> To this end, an international treaty would ultimately establish whether internal displacement leads to special legal status, and if yes – how it should be applied purposefully not to repeat mistakes, as for example, made by Ukraine. Like Ukraine, states can now endow IDPs with special legal status by imposing registration requirement as a pre-requisite to the full enjoyment of their rights.<sup>555</sup> International treaty has a potential of either clearly forbidding any special legal statuses to IDPs, following the idea of the Guiding Principles, or it can create such legal status by making it beneficial for IDPs. To this end, international treaty would not only anchor the scope of definition of IDPs but would also align IDPs with other groups in society and create displacement-sensitive human rights framework. Thus, international treaty would cover the spectrum of human rights IDPs are entitled to as human beings but would also include those they are entitled to as a result of their displacement. For example, the right to humanitarian assistance, the right to family unity, the right to a durable solution and others.

Thirdly, the treaty is called to accommodate the human rights to the context of displacement. Such treaty is necessary to create a binding framework on the durable solutions for IDPs. Furthermore, if it follows the approach of the Kampala Convention and undertakes sustainable approach, the final aim of the treaty would be combatting displacement as a negative phenomenon and its consequences. This now sounds absolutely idealistic, however, the real

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<sup>554</sup> Erin Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern,” *Refugee Survey Quarterly*, 24(3), p. 18.

<sup>555</sup> Fisher, “The Right to Humanitarian Assistance,” pp. 104-106.

potential of such treaty to assist those in the situations of protracted displacement, where the durable solutions as IDP's right are ignored by the states, should not be underestimated.

Fourthly, a treaty would create obligations for different actors – not only the states, but also non-state actors and international community. This would allow to hold those non-complying with its norms accountable. A treaty has a potential of creating special monitoring mechanism and, what is more, complaint mechanism for IDPs. Furthermore, the very of existence of such treaty would help to fulfill the gaps in the domestic frameworks, meaning reference to a treaty and obligations the state has undertaken under it would create an avenue of advocacy of IDPs rights. It would create a platform for international cooperation in combatting forced displacement and its negative consequences.

Fifthly, sovereignty. When states are “unable or unwilling”<sup>556</sup> to fulfill their obligations towards IDPs, the role of international community becomes more significant. Should this serve as a ground for the realization of a so-called “right to humanitarian intervention”<sup>557</sup>? According to the International Commission on Intervention and State Sovereignty, the ‘Responsibility to Protect’ (R2P) transcends the principle of non-intervention “where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it”.<sup>558</sup> The Preliminary Study of Assistance to Internally Displaced in Afghanistan concluded, that “the gradual chipping away at the principle of territorial sovereignty ... opened the way for the international community to take a formal interest in the protection of those who were displaced within the borders of their own countries”.<sup>559</sup> However, if there is a possibility of legitimate interference into domestic affairs

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<sup>556</sup> Khalid Koser, *Internally Displaced Persons: Global Migration Governance* (Oxford: Oxford University Press, 2011), p. 219.

<sup>557</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, Ont: International Development Research Centre, 2001).

<sup>558</sup> Ibid.

<sup>559</sup> Peter Marsden, David Turton, *Preliminary Study of Assistance to Internally Displaced in Afghanistan* (Copenhagen: Danida, 2004), p.13.

for the purpose of IDPs' protection remains to be a controversial question to which we still do not have clear answer nowadays. Currently, an outside political pressure is the only instrument which is far not enough to influence certain states, refraining from requesting or accepting support and assistance from the third actors. The international treaty on internal displacement has a potential of clarifying it and setting strict grounds for legitimacy of interference.

Interestingly, in 2006, Walter Kälin wrote that advocacy for a universal treaty “would only be successful if there were a worldwide consensus that the Principles should be made legally binding at the universal level”.<sup>560</sup> Thus, in terms of political feasibility, right now it is a perfect moment to raise awareness about the challenge of internal displacement and to try finding such consensus. In 2018, United Nations have launched a Global Plan of Action for Advancing Prevention, Protection and Solutions for IDPs (2018-2020) (*hereinafter* – the Action Plan).<sup>561</sup> This documents states, that “as a complex human rights, humanitarian and development challenge, internal displacement requires a multi-disciplinary and multi-stakeholder approach.”<sup>562</sup> It was created as a response to the UN General Assembly Resolution on Protection of and assistance to IDPs,<sup>563</sup> and it is “bringing together stakeholders on internal displacement to work more effectively and collaboratively to promote and support the common goal of reducing and resolving displacement through prevention, protection and solutions for IDPs.”<sup>564</sup> Among its objectives the document sets as a priority to “expand the development and implementation of national laws.”<sup>565</sup> Thus, the Action Plan primarily approaches internal displacement through the prism of national responsibility. At the same time, very carefully, but

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<sup>560</sup> Kälin, “The Future of the Guiding Principles on Internal Displacement”, p. 6.

<sup>561</sup> United Nations, *A Plan of Action for Advancing Prevention, Protection and Solutions for IDPs (2018-2020)*, 23 May 2018, available at: <https://data2.unhcr.org/en/documents/download/64693> [accessed November 13, 2018].

<sup>562</sup> *Ibid*, p. 1.

<sup>563</sup> United Nations General Assembly, *Protection of and Assistance to Internally Displaced Persons*. A/C.3/72/L.46/Rev.1, 14 November 2017, available at: <http://undocs.org/A/C.3/72/L.46/Rev.1> [accessed November 13, 2018].

<sup>564</sup> United Nations, *A Plan of Action for Advancing Prevention, Protection and Solutions for IDPs (2018-2020)*, p. 1.

<sup>565</sup> *Ibid*, p. 4.

the Action Plan speaks about being a possible “foundation for... possible high-level initiative to address internal displacement”.<sup>566</sup> Therefore, this Action Plan may indeed become a new platform for different stakeholders to address “the regional and global significance of internal displacement and the measures that have been and can be taken to prevent, respond to and find solutions to this phenomenon.”<sup>567</sup> To this end, the anniversary of the Guiding Principles and the adoption of the Action Plan may become a basis for creation of a new instrument, which would be able to contribute to the protection of IDPs worldwide.

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<sup>566</sup> Ibid.

<sup>567</sup> Ibid, p. 8

## Conclusion

Undoubtedly, after 20 years from their adoption, the Guiding Principles have not lost their relevance. In the absence of a universal binding document on internal displacement, their increased value cannot be underestimated. Namely, the analysis of binding international human rights and humanitarian law has shown, that there are gaps in the protection of IDPs. In this regard, the Guiding Principles indeed go beyond these norms and provide the most comprehensive protection framework for IDPs, yet they are deprived of a binding force. Even though there is a trend of ‘hardening’ the Guiding Principles at national and regional levels,<sup>568</sup> the absence of a binding normative framework results in divergence and inconsistency in the state practices – in particular, ambiguity surrounding definition and creation of an ‘artificial’ IDP status. The research went beyond a theoretical overview of international law and standards, and has shown how IDPs are protected in Ukraine, Colombia and under the African Union Kampala Convention, discussing the major challenges and shortcomings. This allowed to draw three main lessons. Firstly, to avoid ambiguity there is a need to introduce a legal universal definition of IDPs in order to bring this category into line with others and to ensure that those in need are not denied protection because of the restrictive scopes of domestic definitions. Secondly, human rights should be accommodated to the context of internal displacement, and thirdly, the right to durable solutions for IDPs should be internationally enshrined therein. Thus, there should be clearly formulated obligations for different actors (in particular, states, non-state actors, international community) to address the pre-conditions and consequences of displacement. Having considered both pros and cons of such an approach, this thesis opens a door for the future debates and proposes a possible solution to the legal challenges that internal displacement poses today to state and non-state actors to address the protection needs of the population concerned – an international treaty on internal displacement. The proposed

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<sup>568</sup> Cantor, “The IDP in International Law? Developments, Debates, Prospects.”

legislative solution should not be perceived as the only and ‘universal pillar.’ Nevertheless, in the context of “emerging IDP law,”<sup>569</sup> gaps in the existing international binding frameworks, national failures, growing number of IDPs worldwide and adoption of the Action Plan, an international treaty on internal displacement should be considered as a step towards solving the complex and multi-faceted challenge of internal displacement.

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<sup>569</sup> Ibid.



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