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Durable Solutions and the Right of Return for IDPs: Evolving Interpretations

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ABSTRACT

In this article I trace the evolution of norms on durable solutions for internally displaced persons (IDPs), focusing in particular on the right of return, since the introduction of the Guiding Principles on Internal Displacement in 1998. The Guiding Principles reflect and helped consolidate the view that the right of return pertains not only to those crossing international borders such as refugees but also to IDPs, and that respect for this right requires that forced migrants are able to reclaim and resuming living in their former homes or places of habitual residence ('domicile return'). While the clarification and subsequent broad recognition of IDPs' right to choose domicile return as a durable solution is an important normative development that often accords with IDPs' own wishes, I identify a range of other aspects of or approaches to realizing the right of return that may also be salient for IDPs. I suggest that narrow interpretations of the right of return as domicile return belie the complexity of the moral and political claims at stake when IDPs assert their right of return. Transposing insights from the literature on refugee repatriation, I argue that IDPs' right of return should not be narrowly conceived in geographic or legalistic terms. Instead, it should be understood as a political process of making complex, often intertwined claims, including for redress of past wrongs, opposition to ethnic cleansing, and recognition as equal and legitimate members of the political community.

1. INTRODUCTION AND BACKGROUND

In the twenty years since the introduction of the Guiding Principles on Internal Displacement, millions of internally displaced persons (IDPs) have been forced from their homes, weathered their uprooting, and sought out solutions to their predicament, whether through return and reintegration, local integration, or relocation elsewhere in the country.¹ The Guiding Principles clarify not only IDPs' right to protection from internal displacement, and protection and assistance during displacement, but also their right to a durable solution.² Over the past two decades, important progress has been made in further clarifying and advancing norms related to durable solutions to internal displacement, including through the creation of domestic laws and policies on IDPs, and the development of complementary tools and standards, such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and the Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons (IASC Framework). However, durable solutions remain elusive for the millions of IDPs now in protracted situations.³ Beyond the

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² UN doc E/CN.4/1998/53/Add.2, 11 Feb 1998.

³ W Kälin and H Entwisle Chapuisat, *Breaking the Impasse: Reducing Protracted Internal Displacement as a Collective Outcome* (OCHA, 2017).

security, political and socio-economic barriers that thwart the attainment of durable solutions for IDPs, efforts to resolve displacement situations are shaped by continued contestation over the rights and obligations of key actors in this process, including states, international organizations, IDPs themselves and their neighbours. Such contestation is perhaps most heated in relation to return.

The resolution of displacement is addressed in the Guiding Principles in ‘Section V—Principles Relating to Return, Resettlement and Reintegration.’ Principle 28 sets out the core norms on durable solutions for IDPs, stating that:

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

On the face of it, the idea that IDPs have the right to return, and that return is a matter of IDPs choosing to go back, ‘in safety and with dignity’ to ‘their homes or places of habitual residence’ may seem relatively straightforward. Yet when the Guiding Principles were introduced, the notion that the right of return pertains to IDPs was relatively nascent; instead, the right of return was more commonly understood in terms of the right to re-enter one’s country of origin, with debates focused on claims for the right of return in the complex case of the Palestinian refugees. Since 1998, the widespread dissemination and acceptance of the Guiding Principles has contributed to the increased traction of this interpretation of the right of return. However, this normative development raises a range of complex questions: What does respect for the right of return require when IDPs’ homes or former places of residence have been destroyed? What exactly constitutes a ‘home’?⁴ What does the right of return mean for the thousands of displaced persons who are landless? For renters? For those living under communal, customary or informal arrangements? For members of nomadic or otherwise mobile communities and households? What restrictions, if any, may legitimately be placed on the right of return? In the context of increasingly protracted displacement, how is the right of return affected by the passage of time and, in particular, the claims of longstanding secondary occupants (often themselves the victims of displacement) to remain? In the context of resource-strapped post-conflict and post-disaster environments, what degree of support are competent authorities obliged to provide in order to enable exercise of the right of return? Is it acceptable for state officials and other actors to provide different levels of support for different solutions? Developments in international human rights and humanitarian law, and related international standards, have provided some insight into these questions. However, the interpretation, scope and implications of the right of return for IDPs remain under-examined—particularly when the right of return is understood not only in narrow geographical or legalistic terms, but as a principle with complex moral and political dimensions.

⁴ This is an especially important issue in the context of the displacement of indigenous communities, for whom ‘home’ may involve attachment not only to particular abodes, but to traditional territories.

Voluntary return (or ‘repatriation’) is widely, if uncritically, hailed as the ‘preferred’ solution to refugee crises—despite declining numbers of repatriations in recent years—and is the only solution to which refugees have a clear legal right.⁵ A significant body of work has emerged that explores the normative underpinnings and implications of refugee returns, considering themes such as the restoration of refugees as equal citizens, the responsibilities states of origin and other actors bear towards returnees, and the complex relationship between return, the protection of minorities, and peacebuilding.⁶ Much of this work stresses that refugee return cannot be conceived simply as a legal or bureaucratic undertaking that aims to restore the *status quo ante* by putting refugees ‘back where they belong,’ whether this is understood as their countries of origin or, more specifically, their lost homes. Rather, return is better conceptualized and approached as an explicitly political process that is not reducible to geographic locations, but is shaped by complex power relations stretching from the inter-personal and local to international levels. Yet the extent to which this literature also illuminates the dynamics surrounding the right of return in cases of internal displacement has not been fully considered.

As a contribution to deepening understanding of the right of return as it pertains not only to refugees but in particular to IDPs, in this article I trace the evolution of norms on durable solutions for IDPs, focusing on the right of return, since the introduction of the Guiding Principles on Internal Displacement in 1998. The Guiding Principles reflect and helped consolidate the view that the right of return pertains not only to those crossing international borders such as refugees but also to IDPs, and that respect for this right requires that forced migrants are able to reclaim and resuming living in their former homes or places of habitual residence—an interpretation sometimes termed ‘domicile return.’⁷ While the clarification and subsequent broad recognition of IDPs’ right to choose domicile return as a durable solution is an important normative development that often accords with IDPs’ own wishes, I identify a range of other aspects of or approaches to realizing the right of return that may also be salient for IDPs. I suggest that narrow interpretations of the right of return as domicile return can belie the complexity of the moral and political claims at stake when IDPs assert their right of return. Transposing insights from the literature on refugee repatriation, I contend that IDPs’ right of return should not be narrowly conceived in exclusively geographic or legalistic terms. Instead, it should be understood as a political process of making complex, often intertwined claims, including for redress of past wrongs, opposition to ethnic cleansing, and recognition as equal, legitimate members of the political community.

2. EVOLUTION OF NORMS ON DURABLE SOLUTIONS FOR IDPS

⁵ On durable solutions frameworks related to refugees, see M Gottwald, ‘Back to the Future: The Concept of “Comprehensive Solutions”’ (2012) 31 *Refugee Survey Quarterly* 101-136.

⁶ See for example M Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge University Press, 2013); M Bradley, ‘Rethinking Refugeehood: Statelessness, Repatriation and Refugee Agency’ (2014) 40 *Review of International Studies* 101-123; K Long, *The Point of No Return: Refugees, Rights and Repatriation* (Oxford University Press, 2013); M Gerver, ‘Refugee Repatriation and Voluntariness’ (2014) *International Journal of Human Rights* 32-52; M Gerver, ‘Refugee Repatriation and the Problem of Consent’ (2016) *British Journal of Political Science* 1-21; G Toal and C Dahlman, *Bosnia Remade: Ethnic Cleansing and its Reversal* (Oxford University Press, 2011); L Hammond, *This Place Will Become Home: Refugee Repatriation to Ethiopia* (Cornell University Press, 2004).

⁷ The term ‘domicile return’ has been used most commonly in the case of Bosnia and Herzegovina, where it was employed primarily to distinguish between refugees who returned to the country but not to their lost homes (often because they did not wish to live as minorities in communities dominated by members of opposing ethnic groups), and those who returned to live in their pre-war places of residence.

Whereas the pursuit of durable solutions is now recognized as a central challenge facing government officials and humanitarian and development practitioners grappling with internal displacement, the Guiding Principles address this issue with relative brevity, primarily in the three principles that comprise Section V. Yet on this basis, over the past twenty years, a more detailed conceptualization of the rights and obligations surrounding efforts to resolve internal displacement has emerged, reflected in particular in the IASC Framework on Durable Solutions for Internally Displaced Persons.

The Guiding Principles' rather perfunctory treatment of durable solutions reflects the limited extent to which international human rights and humanitarian law at the time had grappled with this problem.⁸ The Guiding Principles do not in fact use the term 'durable solutions,' and do not explicitly address local integration as an avenue for resolving displacement, although this option is implicit in Section V. At the heart of Principle 28 is the notion that IDPs 'have the right to choose freely between return, local integration or resettlement... This principle is a consequence of the liberty of movement and the freedom to choose one's own residence (Article 12 CCPR) that internally displaced persons can enjoy because they have not left their own country.'⁹ Building on this recognition, Principle 29 underscores the importance of non-discrimination against IDPs seeking solutions to displacement, and IDPs' right to equal access to public services and participation in public affairs. Principle 29 also stresses the responsibility of competent authorities to assist IDPs in recovering their lost property and possessions, or obtaining other appropriate forms of redress where this is not possible. Principle 30 concludes Section V by clarifying the relevant authorities' obligation to enable access to IDPs for international actors involved in supporting solutions to displacement, in accordance with their mandates.

2.1 Advancing conceptualizations of durable solutions for IDPs: The IASC Framework

The avenues for resolving internal displacement parallel the main options available (in theory, if not in practice) for refugees: voluntary repatriation, local integration in the country of asylum, or resettlement to a third country. In cases of internal and cross-border forced migration alike, efforts to resolve displacement are intertwined with broader processes of recovery, stabilization and development. However, for refugees the crux of the durable solutions process is, 'arguably, the "regularization" of refugees' status, either through repatriation, or the acquisition of citizenship in the country of asylum or a resettlement state. In contrast, as IDPs are typically citizens (or "habitual residents") of the country in which they are displaced, the "regularization" of their citizenship status is not the predominant concern.'¹⁰

In light of the distinctions between durable solutions for refugees and IDPs, the first decade after the introduction of the Guiding Principles saw an important debate on 'when internal displacement ends'—that is, when durable solutions have been achieved. The Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons (RSG) initiated an in-depth study on this issue, which in turn informed the consultative development, under the RSG's leadership, of the 2010 IASC Framework on Durable Solutions

⁸ For a detailed compilation and analysis of the legal norms informing the Guiding Principles, including those related to durable solutions, see W Kälin, *Guiding Principles on Internal Displacement Annotations, Revised Edition* (ASIL and Brookings Institution, 2008).

⁹ Kälin, *Annotations*, above n 8, 126, 129-130.

¹⁰ M Bradley and A Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law "Success Story"' in S Lagoutte, T Gammeltoft-Hansen and J Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (2016) 155-183, 161.

for Internally Displaced Persons.¹¹ Building on the Guiding Principles, the IASC Framework identifies rights-based principles, criteria and processes to inform the pursuit of durable solutions to internal displacement, whether generated by conflict, disaster, or other factors. Like the Guiding Principles, the Framework emphasizes that states have the primary obligation to enable solutions to displacement, but whereas the Guiding Principles focus predominantly on states' responsibilities, the Framework's primary audience is the diverse collection of international actors involved in efforts to resolve displacement.

The IASC Framework emphasizes that the pursuit of durable solutions is a 'gradual and complex process' with human rights, humanitarian, development, and peacebuilding or reconstruction dimensions.¹² According to the Framework, durable solutions have been achieved when IDPs 'no longer have any specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement.'¹³ A rights-based approach to realizing durable solutions entails ensuring that IDPs can: make informed, voluntary choices on whether to return, locally integrate or relocate; participate in planning and managing the process; and access development and humanitarian actors and effective monitoring mechanisms. The Framework also emphasizes that 'in cases of displacement caused by conflict or violence,' a rights-based approach requires that 'peace processes and peacebuilding involve IDPs and reinforce durable solutions.'¹⁴ Critically, the Framework lays out four criteria that help determine the extent to which durable solutions have been achieved, indicating that IDPs who have accessed a durable solution will be able to equitably enjoy:

- Long-term safety, security and freedom of movement;
- An adequate standard of living, including at a minimum access to adequate food, water, housing, health care and basic education;
- Access to employment and livelihoods; and
- Access to effective mechanisms that restore their housing, land and property or provide them with compensation.¹⁵

In some circumstances, realizing durable solutions may additionally require IDPs' equitable enjoyment of:

- Access to and replacement of personal and other documentation;
- Voluntary reunification with family members separated during displacement;
- Participation in public affairs at all levels on an equal basis with the resident population; and
- Effective remedies for displacement-related violations, including access to justice, reparations and information about the causes of violations.¹⁶

¹¹ See Brookings-Bern Project on Internal Displacement, *When Displacement Ends: A Framework for Durable Solutions* (Brookings/Georgetown, 2007).

¹² IASC, IASC Framework on Durable Solutions for Internally Displaced Persons (Brookings-Bern Project on Internal Displacement, 2010) 7.

¹³ IASC, above n 12, 5.

¹⁴ IASC, above n 12, 15.

¹⁵ IASC, above n 12, A-4.

¹⁶ *ibid.*

The RSG on IDPs introduced the Framework to the UN community in his 2009 report to the Human Rights Council, and subsequently promoted the tool's publication, translation and dissemination.¹⁷ While the Framework has informed the development of durable solutions strategies in a wide range of internal displacement situations, awareness of the Framework remains relatively limited amongst international and NGO actors, and governments dealing with internal displacement situations. Some practitioners familiar with the tool view it as overly 'academic' and difficult to implement, particularly in disaster settings and in highly impoverished contexts, where the Framework's criteria are seen to set an extremely if not impossibly high bar.¹⁸

The Framework's complex, challenging nature is perhaps an inevitable consequence of the effort to flesh out a rights-based approach to durable solutions, and one might argue that its drafters should be commended for not bowing to demand for an overly simplistic tool that might inappropriately legitimize efforts to 'close the books' on particular IDP situations long before durable solutions worthy of the name have been achieved. In recent years, practitioners have launched important efforts to facilitate the implementation of the Framework, including through the development of indicators to help measure progress towards the realization of the Framework's eight criteria.¹⁹ At the same time, organizations involved in supporting the resolution of internal displacement have developed a range of alternative discourses that, depending on perspective, complement or shy away from the notion of durability, such as the pursuit of 'interim,' 'transitional' or 'comprehensive solutions,' and focus on the 'progressive resolution' of displacement, or 'reducing protracted internal displacement.'²⁰ Arguably, these discourses appropriately reflect key actors' efforts to prepare for and enable steps towards durable solutions in the absence of fundamental changes to political, security or socio-economic conditions needed to resolve displacement in a truly sustainable manner. Alternatively, they may reflect retrenchment from the commitment to support durable solutions for IDPs, or even a

¹⁷ Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Addendum: Framework on Durable Solutions for Internally Displaced Persons, A/HRC/13/21/Add.4, 29 December 2009.

¹⁸ On these challenges, see Bradley and Sherwood, above n 10, 164; M Bradley et al, 'Researching the Resolution of Post-Disaster Displacement: Reflections from Haiti and the Philippines' (2016) *Journal of Refugee Studies* 1-24; A Sherwood et al, *Resolving Post-Disaster Displacement: Insights from the Philippines after Typhoon Haiyan (Yolanda)* (Brookings/IOM, 2015); A Sherwood et al, *Supporting Durable Solutions to Urban, Post-Disaster Displacement: Challenges and Opportunities in Haiti* (Brookings/IOM, 2014). The Framework attends to many challenges associated with internal displacement in conflict contexts, particularly when displacement follows ethnic lines and is associated closely with discrimination. It is however less engaged with some of the key challenges faced in disasters, particularly in urban contexts, such as the relationship between durable solutions and disaster risk reduction and management, and urban planning processes.

¹⁹ See for example the Project on Informing Responses to Support Durable Solutions for Internally Displaced Persons coordinated by the Joint IDP Profiling Service (JIPS), <http://www.jips.org/en/profiling/durable-solutions>.

²⁰ On comprehensive solutions, see Gottwald, above n 5. On transitional solutions, see the Transitional Solutions Initiative bringing together UNHCR, UNDP and the World Bank: <http://www.unhcr.org/partners/partners/4e27e2f06/concept-note-transitional-solutions-initiative-tsi-undp-unhcr-collaboration.html>. On reducing protracted internal displacement, see the 2017 report published by OCHA, Kälin and Entwisle Chapuisat, above n 3. The International Organization for Migration has developed the notion of the 'progressive resolution of displacement' in its 2016 Framework on the Progressive Resolution of Displacement Situations.

rethinking of the value of durability in contexts in which ongoing mobility may be more advantageous for some populations than settling down.²¹

2.2 Durable solutions in related resolutions and instruments

Reflecting the increased influence of the concept of durable solutions since the introduction of the Guiding Principles in 1998, the 2009 Kampala Convention explicitly uses the term ‘durable solutions,’ indicating that the agreement’s first aim is to ‘Promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions’ (Article 2.a). The Convention forthrightly acknowledges local integration as an option for IDPs, and includes more robust provisions on IDP choice and participation in seeking durable solutions than those set out in the Guiding Principles. In contrast to the Guiding Principles’ indication that ‘Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration,’ the Convention provides that ‘States Parties *shall* enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions.’²²

The increased prominence of the challenge of resolving displacement is also evident in its integration into a wide range of UN resolutions, particularly from the General Assembly, Human Rights Commission, and Security Council. However, these resolutions also demonstrate a continued tendency to focus on certain options for resolving displacement, particularly return, rather than voluntary choice between solutions, as indicated in the Guiding Principles and IASC Framework. For instance, in the twelve year period from 1999-2010, the Security Council adopted 747 resolutions, 142 of which addressed internal displacement in some manner.²³ Of these 142 resolutions, over 100 refer to some aspect of durable solutions, but only three resolutions in this period actually employ the term ‘durable solutions.’ Two additional resolutions acknowledge the three options for resolving displacement, or otherwise include clear and relatively comprehensive language on the resolution of displacement.²⁴ In contrast, almost 100 resolutions refer to returns, with many resolutions reaffirming ‘respect for the ‘unconditional’ or ‘inalienable’ right of IDPs to return to their homes or places of origin in an unimpeded, voluntary and secure manner.’²⁵

Similarly, the collection of national laws and policies on internal displacement that have been developed since the introduction of the Guiding Principles reflects both the increased traction of norms on durable solutions, and continued disjunctures between the perspectives promoted in tools and standards such as the Guiding Principles and the IASC Framework, and

²¹ For a discussion of the questionable value of sedentary ‘solutions’ for forced migrants in urban southern African contexts, see L Landau, ‘Shunning Solidarity: Durable Solutions in a Fluid Era,’ Paper presented at Beyond Beneficiaries workshop, McGill University, Montreal, 14-15 December 2015. Under the IASC Framework, durable solutions do not necessarily entail an end to mobility, but to *forced* movements. However, the Framework, like the majority of tools and normative standards on forced migration, reflects sedentarist assumptions.

²² Guiding Principles on Internal Displacement, Principle 28.2; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Article 11.2, emphasis added. See Bradley and Sherwood, above n 10, 162.

²³ S Weerasinghe and E Ferris, Security Council, Internal Displacement and Protection: Recommendations for Strengthening Action through Resolutions (Brookings Institution, 2011), vii-viii.

²⁴ Weerasinghe and Ferris, above n 23, 24-25; SC res 1479, 13 May 2003; SC res 1923, 25 May 2010; SC res 1935, 30 July 2010.

²⁵ Weerasinghe and Ferris, above n 23, viii-ix, 24.

states' interpretations of IDPs' rights in the context of efforts to resolve displacement.²⁶ Between 1998 and 2014, nearly half of those states with major IDP situations created national laws or policies on internal displacement, with at least 26 states developing such documents.²⁷ Over time, a trend has become evident towards the integration of the concept of durable solutions into national laws and policies (particularly those focused on conflict-induced displacement) in ways that are consistent with the Guiding Principles and IASC Framework—in part a reflection of the involvement of international advisors well-versed in these norms in supporting the development of national instruments on internal displacement.²⁸ However, a considerable proportion of national laws and policies on internal displacement eschew important elements of the approach to durable solutions advanced in the Guiding Principles and IASC Framework. For example, 'hardly any national instruments recognize that IDPs actually have a *right* to a durable solution, but rather express a commitment to create the conditions for the resolution of displacement, establish funds for the settlement of IDPs, or specify certain settlement options that can be made available to IDPs. In most instances there are gaps in the representation of durable solutions, with only one or two settlement options mentioned—usually return and resettlement.'²⁹

Taken in total, analysis of the many instruments, tools and standards related to IDPs that have emerged following the drafting of the Guiding Principles demonstrates that normative frameworks on the resolution of displacement have been fleshed out considerably, building on the important foundation the Principles provide. However, domestic uptake and implementation of these norms remains highly uneven, with the lion's share of attention and effort still focused on return. This in turn points to the importance of considering how interpretations of the right of return have evolved in this period, and how continued contestation over the meaning and scope of this right affects efforts to resolve displacement.

3. INTERNAL DISPLACEMENT AND THE RIGHT OF RETURN: CONSOLIDATING THE 'DOMICILE RETURN' NORM

The right of return is a fundamental principle addressed in different ways in several branches of international law, including international human rights and humanitarian law, as well as in numerous peace agreements.³⁰ The right of return is discussed most often in relation to forced

²⁶ On the international push for the development of national laws and policies on IDPs, see N Schrepfer, 'Addressing Internal Displacement through National Laws and Policies: A Plea for a Promising Means of Protection' (2012) 24 IJRL 667-691. See also Brookings-Bern Project on Internal Displacement, Protecting Internally Displaced Persons: *A Manual for Law and Policymakers* (Brookings-Bern Project on Internal Displacement, 2008); IDMC and Brookings-LSE Project on Internal Displacement, *National Instruments on Internal Displacement: A Guide to their Development* (IDMC/Brookings-LSE Project on Internal Displacement, 2013).

²⁷ See Bradley and Sherwood, above n 10 for a more detailed analysis of how durable solutions are addressed in these documents.

²⁸ Bradley and Sherwood, above n 10, 166.

²⁹ Bradley and Sherwood, above n 10, 169.

³⁰ For general discussions of the right to leave and return to one's country in international law, see for example H Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff Publishers, 1987); K Vasak and S Liskofsky (eds) *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden* (American Jewish Committee, 1976). On the right to leave, see J McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27-56. During the Cold War, many human rights advocates focused more on the right to leave than on the right to return, given the widespread restrictions Communist authorities placed on departures. Since the end of the Cold War, this balance has shifted such that returns are now the subject of more extensive attention.

migrants as they encounter perhaps the most pronounced barriers to its free exercise, but it is also relevant to those who voluntarily leave and seek to return to their countries and homes. Indeed, the absence of heated debate over or barriers to the exercise of the right of return in many cases reflects its considerable traction as a key norm in the human rights regime.

In major international human rights agreements, explicit provisions on the right of return pertain primarily to the right to return to or re-enter one's country of origin, and are often coupled with protections relating to the right to leave any country. The Universal Declaration of Human Rights, for example, states in Article 13.2 that 'Everyone has the right to leave any country, including his own, and to return to his country.' The International Covenant on Civil and Political Rights provides in Article 12.4 that 'No one shall be arbitrarily deprived of the right to enter his own country.'³¹ In recent decades, however, a growing number of advocates, policymakers and practitioners have argued that, properly interpreted, the right of return entails not only the right of those who have crossed an international border to return to their countries, but more specifically the right of all those who have been displaced to return to and resume living on original homes and lands (that is, 'domicile return').³² This reading of the right of return meshes with its predominant interpretation amongst Palestinian refugee rights advocates in light of UN General Assembly Resolution 194(III) of 1948, which recognizes that 'refugees wishing to return to their homelands and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.'³³ Hundreds of UN resolutions pertaining to particular conflicts and displacement

³¹ See also Article 3.2 of the European Convention on Human Rights, Protocol 4, and Article 12.2 of the African Charter on Human and Peoples' Rights. The ICCPR drafters used the language 'enter his own country,' rather than 'return to his country' (as indicated in the UDHR) to protect people such as refugee children who may have a right to enter a particular country (such as their parents' state of origin) although they have never been there and so cannot 'return' in the straight-forward sense of going back to a place where one has been before. See Hannum, above n 30, 56 and Human Rights Committee General Comment 27 on Freedom of Movement, CCPR/C/21/Rev.1/Add.9, 1999. In protracted internal displacement situations, some children born to internally displaced parents may also never have set foot in the places to which they may 'return.' However, in discussions of durable solutions for IDPs, the discourse has continued to be one of 'returning'; avoiding overly narrow interpretations of 'return' (and of 'homes or places of habitual residence') is thus necessary to ensure that children born in internal displacement contexts are not deprived of this choice.

³² On the consolidation of this normative interpretation, see for example S Leckie, 'An Introduction to the 'Pinheiro Principles, in *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (2005), 3. See also MJ Anderson, 'The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (The Pinheiro Principles): Suggestions for Improved Applicability' (2011) 24 *Journal of Refugee Studies* 304-322, 305. In acknowledging the consolidation of the 'domicile return' interpretation of the right of return in the post-Cold War era, I do not wish to suggest that there were no earlier incidents of refugees and IDPs seeking to reclaim and resume living in their lost homes or places of habitual residence. In Europe after World War II, for instance, some 17 million people were displaced within their own states; many of these so-called 'internal refugees' went back to and rebuilt their devastated homes and communities, although the discourse of the 'right of return' was rarely applied to frame and underpin such movements. On internal displacement in this period, see P Orchard, 'The Contested Origins of Internal Displacement' (2016) 28 *IJRL* 210-233.

³³ As the Palestinians' displacement has become profoundly protracted, many members of the refugee community, for whom the principle remains pivotal and even sacred, have come to embrace a more diverse range of personal understandings or interpretations of this right and what it might mean in their lives. See eg D Allan, *Refugees of the Revolution* (Stanford University Press, 2014) and M Molloy et al, 'The Palestinian Refugee Issue: Intangible Needs and Moral Acknowledgement' in M Bradley (ed) *Forced Migration, Reconciliation and Justice* (2015), 298-321.

situations, particularly those negotiated since the end of World War II, now address this dimension of the right of return, as do dozens of peace agreements.

Many of these resolutions and agreements link the right of return and the right of refugees and IDPs to the restitution of their lost property.³⁴ While this represents a significant development in understandings of displaced persons' human rights and their related property rights, it is also unsurprising insofar as efforts to resolve displacement through domicile return hinge on the ability of uprooted people to regain access to their homes and lands. The 1992 General Peace Agreement for Mozambique appears to be the first major post-World War II peace treaty to clearly recognize both of these rights, confirming that 'All citizens have the right to choose to reside anywhere in the national territory and to leave or return to the country,' and that 'Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it.'³⁵ Notwithstanding the agreement's acknowledgement of displaced persons' right to settle anywhere in the country, it indicates that assistance will be provided 'preferably in their original places of residence,' reflecting the widespread tendency for policymakers and political leaders to privilege return as the 'preferred' solution for IDPs as well as for refugees.³⁶ The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) was, however, the true watershed in efforts to establish and popularize a strong and explicit right for both refugees and IDPs to return to and reclaim their lost homes. The treaty far surpassed previous agreements in terms of the specificity of its provisions on the right of return, and the degree of support provided by the international community to ensure that the rights to return and restitution were realized in a tragically tardy effort to 'turn back the tide' on Bosnia's ethnic cleansing.³⁷ Annex VII of the Dayton Agreement is devoted to refugees and displaced persons, and famously states:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived... The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.

The Dayton Agreement's provisions on the right of return, and the related right to restitution, have been echoed in several subsequent agreements, with virtually every peace treaty signed since 1995 recognizing refugees' and IDPs' rights to return and redress in some manner.³⁸ Various handbooks prepared for peace negotiators stress that provisions protecting the right of

³⁴ For a compendium of these resolutions, particularly as they relate to restitution of returnees' property, see S Leckie (ed) *Housing, Land and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases, and Materials* (Cambridge University Press, 2007).

³⁵ General Peace Agreement for Mozambique, 1992, Protocol III, Article III and Article IV(e).

³⁶ General Peace Agreement for Mozambique, Article IV(b).

³⁷ On the highly fraught implementation effort, see Toal and Dahlman, above n 6. As Toal and Dahlman (above n 6, 7-8) assert, 'None of the major powers supporting the international effort in Bosnia ever seriously thought that the demographic legacy of ethnic cleansing could be reversed. The debate was whether to accept it as an unassailable reality.'

³⁸ See for example C Phuong, *Forcible Displacement in Peace Agreements* (International Council on Human Rights Policy, 2005), 12.

return and restitution for forced migrants are now staples in any agreement that aspires to end a conflict involving extensive displacement.³⁹

Interpreting the right of return as requiring not only respect for the right to enter one's country of origin, but also the right to return to and resume living in former homes or places of habitual residence gave the principle particular relevance for IDPs, and the Guiding Principles were drafted as this shift was unfolding. Indeed, the Guiding Principles both reflect and have contributed to the further consolidation of the interpretation of the right of return as domicile return. Comparison of the 1995 Compilation and Analysis of Legal Norms underpinning the Guiding Principles, and the first and revised editions of the Annotations to the Guiding Principles (from 2000 and 2008, respectively) underscores the rapid evolution and popularization of this interpretation of the right of return. While the Compilation and Analysis of Legal Norms opines that 'It can be concluded that internally displaced persons have a right to voluntary return to their places of origin as inherent in the freedom of movement,' it recognizes the limited underpinnings (at the time) in international humanitarian law (IHL) for this right, and identifies 'specific guarantees concerning the right [of IDPs] ... to return voluntarily and in safety to their place of residence' as an area 'of insufficient protection where a general norm exists but a corollary, more specific right relevant for the protection of particular needs of internally displaced persons has not been articulated.'⁴⁰ When the first edition of the Annotations to the Guiding Principles was released five years later, the range of standards relevant to the right of return for IDPs (and related restitution rights) had already expanded considerably.⁴¹ When the second edition of the Annotations was released in 2008, marking the tenth anniversary of the Guiding Principles, the analysis recognized that 'there is [still] no general rule in present human rights law that explicitly affirms the right of internally displaced persons to return to their original place of residence'; however, the steadily growing acceptance of the view that 'such a right can be deduced from the right to the liberty of movement and the right to choose one's residence as embodied in Article 12 CCPR,' was and is reflected in the steadily increasing plethora of related standards.⁴² Indeed, when the International Committee of the Red Cross (ICRC) released its seminal study of customary IHL in 2005, it recognized this interpretation of the right of return as a rule of customary IHL, stating that 'Displaced persons have a right to voluntary return in safety and dignity to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.'⁴³

The development of the broader normative framework on durable solutions over the past twenty years has had important implications for clarifying the relationship between the right of return (particularly its interpretation as domicile return) and the resolution of displacement. For

³⁹ See eg G McHugh, *Integrating Internal Displacement in Peace Processes and Agreements – USIP Peacemakers Toolkit Series* (USIP, 2010), 56 and Public International Law and Policy Group, *Peace Agreement Drafters' Handbook* (Public International Law and Policy Group, 2005).

⁴⁰ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 – Compilation and analysis of legal norms, 5 December 1995, E/CN.4/1996/52/Add.2, para 257, para 415. See paras 242-257 for the analysis of provisions related to the right of return.

⁴¹ W Kälin, *Guiding Principles on Internal Displacement – Annotations* (ASIL and Brookings Project on Internal Displacement, 2000), 69-73.

⁴² Kälin, *Annotations*, above n 8, 126.

⁴³ JL Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (ICRC and Cambridge University Press, 2005), Rule 132. The ICRC study also addresses displaced persons' property rights as a matter of customary IHL, opining that customary law requires that 'The property rights of displaced persons must be respected.' (472)

example, the IASC Framework stresses, and UN mandate-holders on internal displacement have emphasized, that the physical return of IDPs does not necessarily represent a durable solution if the factors that led to displacement persist, or if IDPs continue to experience displacement-related discrimination or vulnerabilities. The IASC Framework also clarifies that IDPs opting to locally integrate or relocate does not entail renunciation of the right to return at a later point:

A person opting for local integration or settlement elsewhere in the country in the absence of a prospect of return does not lose the right to return once return becomes feasible. Exercising the right to choose a durable solution requires that different options (return, local integration, resettlement elsewhere) are available. IDPs, who have no prospect of return in the foreseeable future (eg due to unresolved territorial disputes or because a disaster has rendered land uninhabitable) will often choose to integrate locally for the time being while retaining the prospect of an eventual return. Supporting IDPs in normalizing their living situation at the site of displacement... does not exclude the right to return. Rather, such support contributes to avoiding protracted displacement, enhances self-sufficiency and places IDPs in a stronger position to return voluntarily to their homes at a later point. The decision to integrate locally or settle elsewhere in the country on a more permanent basis, even though return is feasible, does not preclude the person's freedom to later choose to move elsewhere, including to his/her original home.⁴⁴

In sum, the broad acceptance of the notion, reflected in the Guiding Principles and elaborated upon in numerous subsequent tools and standards, that the right of return applies not only to refugees but also to IDPs, and that this entails IDPs being able to 'return voluntarily, in safety and with dignity, to their homes or places of habitual residence,' represents a considerable advance in efforts to understand and protect IDPs' rights, particularly in the context of the search for durable solutions to displacement. However, as I address in the following section, reducing the right of return to this particular, relatively narrow interpretation belies the complexity of the moral and political claims at stake when IDPs assert their right of return.

4. THE RIGHT OF RETURN: COMPLEX REALITIES, COMPLEX INTERPRETATIONS

As discussed in the previous section, over the past decades it has become widely accepted—due in part to the popularization of the Guiding Principles—that as it pertains to forced migrants, the right of return requires not simply that refugees be able to return to their countries of origin, but that all those who have had to flee, including IDPs, must be able to return to live in their original homes, or on their former lands. The 'domicile return' interpretation resonates strongly with many IDPs and refugees themselves, and underscores that repatriating refugees who wish to regain their lost homes but cannot do so have not in fact benefitted from a durable solution; rather, they have joined the ranks of the internally displaced. Yet in this section, I wish to trouble the reduction of the right of return to domicile return. My view is not that the domicile return perspective is incorrect, but that conceptualizing the norm *only* in this way underestimates the theoretical and practical complexity of IDPs' claims for the right of return, including as a solution to internal displacement.

Analysis of some of the diverse contexts in which the right of return has been evoked demonstrates a much broader range of possible interpretations of the meaning, underpinnings

⁴⁴ IASC, above n 12, 12.

and implications of this principle. As discussed above, the right of return may be understood as a claim to repossess and return to live in former places of residence, stemming from inter-related rights to freedom of movement and to choose one's place of residence, and linked to property rights. But as I outline below, for many IDPs the right of return carries additional or alternative significance. It may, for example, (also) be a question of opposition to forced migration and ethnic cleansing, or a claim to be recognized as a legitimate member of a political community.⁴⁵ It may additionally be understood as, for example, an article of religious faith, or a claim for the redress of injustice (and not only in terms of property restitution). These aspects are not mutually exclusive. Indeed, they are often deeply intertwined. When IDPs demand or act on their right of return, they are often advancing complex claims for a variety of different political, socio-economic and remedial rights. This suggests that theoretically speaking, the right of return may best be understood as both a primary right with intrinsic value, and a secondary right that has instrumental value in enabling access to a wider range of other rights and social goods. This discussion is premised on the view that while it is important to understand how the right of return has been reflected and interpreted in hard and soft law, including the Guiding Principles, coming to terms with the complexity of the concept in theory and practice requires looking beyond legal provisions and operational frameworks to the political and moral claims and values that infuse this norm.⁴⁶

4.1 The right of return as opposition to forced displacement and ethnic cleansing

As recognized in the Annotations to the Guiding Principles, IDPs' right of return is rooted in part in the related principles of freedom of movement and the freedom to choose one's place of residence.⁴⁷ Even if IDPs pursue a durable solution elsewhere in the country, they may still assert a right to return on a temporary or seasonal basis to their homes or communities of origin, as a matter of freedom of movement. Relatedly, after conflicts involving internal displacement caused by attempts to carry out 'ethnic cleansing,' claiming the right to move freely around the country, particularly by returning to the communities from which IDPs were expelled, can be a powerful act of opposition to the warped logics of ethno-nationalism. In this sense, even when permanent return and reintegration is not the settlement option IDPs pursue to resolve their displacement, the ability to exercise particular, temporary forms of the right of return can still be integral to durable solutions and to broader peacebuilding and reconciliation processes.

In Bosnia, for example, the right of return—including but not limited to domicile return—was central both to principled efforts to oppose ethnic cleansing, and to the resolution of displacement.⁴⁸ Many repatriated refugees and IDPs who would be in the minority if they were to return to live in their original communities settled instead in villages, towns or cities

⁴⁵ The dimensions or interpretations of the right of return discussed in this article may also be pertinent in refugee situations.

⁴⁶ For a related discussion of how the practice of interpretation shapes international law, see I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012). On the broader question of how human rights and other international legal principles are transposed into local contexts and infused with varying and sometimes unanticipated meanings, see eg M Goodale and S Engle Merry (eds) *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007) and S Engle Merry, 'International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism' (2007) 41 *Studies in Law, Politics and Society* 149-149.

⁴⁷ Kälén, *Annotations*, above n 8, 126.

⁴⁸ The Dayton Agreement entrenched the results of ethnic cleansing in that it divided the country into two territories, the Serb-dominated Republika Srpska and the Federation of Bosnia and Herzegovina, run primarily by Bosnian Muslims and Bosnian Croats.

predominantly populated by members of their own ethnic group. However, some retained the properties restored to them through the Dayton-mandated restitution process, using them for instance as summer homes. For some, exercising the right to return to their original homes periodically was a way to preserve their connection to remaining family members, and an act of defiance, allowing them to show off their prosperity to former neighbours from opposing ethnic groups who drove them out, but were now less economically secure.⁴⁹ Others exercised the right of return in the context of efforts to identify, bury and memorialize loved ones killed in the war. For instance, many survivors return annually for the commemorations of the Srebrenica massacre.⁵⁰ These are not mere visits. Referring to such movements as ‘return’ and understanding them as expressions of the ‘right of return’ is a significant political stance that reflects a refusal to forget histories of displacement or accept the consequences of ethnic cleansing. While some have suggested that in post-war Bosnia, “‘Local integration’ (i.e., not [domicile] returning) became the euphemism for acceding to the demographic consequences of ethnic cleaning,’ these alternative approaches to conceptualizing and exercising the right of return demonstrate that even if IDPs pursue durable solutions elsewhere, this does not necessarily mean that they forego all forms of return, or capitulate to their expulsion.⁵¹

Relatedly, in some cases assertion of the right of return is reflective of forced migrants’ opposition to repeated displacements. For instance, since the start of the Syrian civil war, hundreds of thousands of Palestinian refugees have been internally displaced from the camps in Syria where they are habitually resident. Many camp walls are now emblazoned with graffiti, left by the refugees, declaring their right to return not only to lost homes in historic Palestine but to their homes in the camps.⁵² Similarly, in 2007, Palestinian refugees in Lebanon who were displaced from Nahr El-Bared camp by fighting between Fatah El Islam militants and Lebanese government forces asserted their right to return to the camp. Amongst some leaders of those Palestinians displaced within Lebanon from Nahr El-Bared, there was a strong conviction that insisting on the right of return to the camp was essential to upholding their longer-standing claims for the right of return to lands that became part of Israel in 1948. For example, camp resident Abdel Hakim Sheref observed, ‘People only want to return to Nahr Al-Bared. It is a step on our way to Palestine.’⁵³ For its part, after the 105-day siege ended, the government of Lebanon publicly recognised that the refugees had a right to return to the reconstructed camp. For instance, the Republic of Lebanon, the Presidency of the Council of Ministers and the Lebanese-Palestinian Dialogue Committee produced and circulated posters in Arabic and English declaring,

Our Palestinian brothers and sisters. Your departure from Nahr El Bared is a safety precaution... The Lebanese Government is adamant on the return of all those who were forced to flee the fighting and will strive to ensure their homecoming as soon as the current conflict comes to an end. The Government is also determined and committed to assist in redressing all the damage suffered by Palestinian civilians and their possessions.

⁴⁹ A Stefansson, ‘Homes in the Making: Property Restitution, Refugee Returns, and Senses of Belonging in a Post-war Bosnian Town’ (2006) 44 *International Migration* 115-139.

⁵⁰ LJ Nettelfield and SE Wagner, *Srebrenica in the Aftermath of Genocide* (Cambridge University Press, 2013). See also C Pollack, ‘Returning to a Safe Area? The Importance of Burial for Return to Srebrenica’ (2003) 16 *Journal of Refugee Studies* 186-201.

⁵¹ Toal and Dahlman, above n 6, 13.

⁵² Personal communication, 15 March 2017.

⁵³ S Groult, ‘Lebanon Refugees Yearn to Return Home Once Fighting Ends’ *Agence France-Presse* (1 Sept 2007).

Although the implementation of these pledges was widely criticized, the government's recognition of the refugees' claims is revealing as the right to free movement and property rights (which typically ground claims to domicile return) have historically been severely limited for Palestinian refugees in Lebanon. This points to the traction of the idea that the right of return may also be understood—not only by the displaced but also by state actors—as an upshot of opposition to forced migration.⁵⁴

4.2 The right of return as a membership claim

Much of the theoretical literature on refugee repatriation considers the refugee as a figure who has been exiled, literally and figuratively, from the political community of the state. From this perspective, one of the central challenges at stake in repatriation is restoring the refugee to her rightful status as an equal citizen (or, enabling her to enjoy such rights for the first time).⁵⁵ Because IDPs remain in their country of origin, some may assume that they do not encounter such experiences of political disenfranchisement or exile. Indeed, the international normative framework on internal displacement, with the Guiding Principles as its cornerstone, is predicated on the view that the state bears primary responsibility for protecting and assisting those displaced within its borders precisely because they are *not* exiles but members of the national political community, either as citizens or habitual residents.⁵⁶ However, political community exists on multiple levels; even though IDPs remain within the borders of their state, their uprooting may reflect and exacerbate their alienation from local political communities, and be indicative of a fractured relationship with the state that is in some critical ways similar to that encountered by refugees who have fled their country of origin.⁵⁷ Like refugees, many IDPs struggle to make their claims for protection and assistance effective, and have little recourse in the face of denials of these claims.

Particularly when IDPs have been forced from their homes in the context of ethnic violence or other forms of identity-based conflict, when they assert the right of return, they challenge the prerogative of state officials and other actors complicit in their displacement to unilaterally determine the boundaries of membership in the political community, whether on the local, regional or national levels. When IDPs demand the right of return, this may thus be understood as a claim for recognition as equal and legitimate, rights-bearing members of the political community (or communities) from which they have been ostracized.⁵⁸ This dimension is not typically captured in legal provisions on the right of return. However, this is arguably one of the most important ways of understanding and asserting the right of return, because it is presumably only when IDPs are recognised as legitimate, rights-bearing citizens that return may represent a viable, durable solution to displacement. When enabling the right of return is understood to mean accepting returnees as legitimate, rights-bearing members of the political community, at both the local and national levels, the right of return then becomes a springboard from which returnees may make other important claims for recognition and respect as citizens

⁵⁴ Notably, from a political perspective at least, opposing forced migration does not necessarily equate with broader support for freedom of movement.

⁵⁵ See eg M Bradley, 'Back to Basics: The Conditions of Just Refugee Returns' (2008) 21 JRS 285-304.

⁵⁶ T Weiss and D Korn, *Internal Displacement: Conceptualization and its Consequences* (Routledge, 2006).

⁵⁷ A Shacknove, 'Who is a Refugee?' (1985) 95 Ethics 274-284, 277.

⁵⁸ Membership claims are associated with each of the three settlement options following displacement. The assertion of membership claims in the context of returns can be particularly fraught, however, because in the return process these claims are more likely to be made against those actors complicit in IDPs' displacement.

(or habitual residents). Regardless of whether return is pursued as a durable solution to displacement, the assertion of the right of return may itself be central to a group's identity or sense of membership.⁵⁹

To be sure, the notion that the right of return may entail accepting returnees as legitimate members of the political community is one of the reasons why it is opposed in countries such as Israel, where accepting the right of the Palestinian refugees to return to the lands their families lost in 1948 would mean reimagining the nature of the political community, and the meaning of Jewish self-determination. This concern has in turn led the Israeli state to refuse claims for the right of return (even to empty land) asserted by so-called 'Present Absentees,' that is, by Palestinians whose families were displaced in 1948 but remained within the 1948 borders of Israel and who now hold Israeli citizenship. Respecting these IDPs' claims for the right of return would not alter the current demographic composition of the state, but they are refused out of concern that allowing any form of Palestinian return would set a precedent for the refugees' return. Many Present Absentees argue that such instrumental dismissals of their claims reflects and further entrenches their lack of acceptance as equal citizens in the state of Israel.⁶⁰

The assertion of the right of return as, inter alia, a membership claim is evident in cases such as the displacement of Tuareg IDPs from their homes in Ghadames, Libya in the summer of 2011. While Tuareg leaders have called for their right to return to Ghadames, some opponents attempted to undermine their return by claiming that the Tuareg are Malians, not Libyans.⁶¹ In insisting on their right to return to Ghadames, the Tuareg IDPs have both refuted this effort to exclude them from the (deeply fractured) Libyan citizenry, and have also, as discussed below, appealed to religious and spiritual ties binding them to their homes. The collective return movements of Guatemalan and Salvadoran IDPs during and after the civil wars in Central America provides another important example of the right of return being interpreted as a membership claim. In these cases, the exercise of the right of return was seen by collectively organized IDPs as an opportunity to challenge the behaviour and repressive nature of their states, and to assert themselves as equal members of the political community through their efforts to return and shape national peacebuilding processes.⁶²

The struggle of those displaced by Hurricane Katrina to return to New Orleans also reflects the notion that the right of return is not necessarily reducible to domicile return, but may also entail claims to equal membership in the political community—in this case, the political community of a culturally unique and deeply divided city, in a state and country troubled by long histories of racism and poverty that created the conditions for this 'unnatural disaster.'⁶³ When Katrina demolished New Orleans' levees in August 2005, 80 percent of the city was flooded, and

⁵⁹ Patrik Johansson, 'Displaced Persons as Symbols of Grievance: Collective Identity, Individual Rights and Durable Solutions,' Paper presented at Beyond Beneficiaries workshop, McGill University, Montreal, 14-15 December 2015.

⁶⁰ H Cohen, 'Land, Memory and Identity: The Palestinian Internal Refugees in Israel' (2003) 21 *Refuge* 6-13; J Schechla, 'The Invisible People Come to Light: Israel's "Internally Displaced" and "Unrecognized Villages"' (2001) 31 *Journal of Palestine Studies* 20-31; M Bradley, 'Redressing Internally Displaced Palestinians in Israel', in R Brynen and R El-Rifai (eds) *Compensation to Palestinian Refugees and the Search for Palestinian-Israeli Peace* (2013) 224-244.

⁶¹ M Bradley, I Fraihat and H Mzioudet, *Libya's Displacement Crisis: Uprooted by Revolution and Civil War* (Georgetown University Press, 2016).

⁶² M Bradley, 'Unlocking Protracted Displacement: Central America's "Success Story" Reconsidered' (2011) 30 *Refugee Survey Quarterly* 84-121, 96, 103-107.

⁶³ C Hartman and G Squires (eds) *There Is No Such Thing as a Natural Disaster: Race, Class, and Hurricane Katrina* (Routledge, 2006).

some 90 percent of residents were displaced, many out of state.⁶⁴ The sense that the uprooted residents, particularly poor African Americans, were not recognized as full, equal members of the polity was exacerbated by the early tendency to refer to them as refugees.⁶⁵ While visiting displaced persons temporarily accommodated in the Houston Astrodome, the Reverend Al Sharpton, a major civil rights leader, insisted, ‘These are not refugees. They are citizens of Louisiana and Mississippi, tax-paying citizens. They are not refugees wandering somewhere looking for charity. They are victims of neglect and a situation they should never have been put in in the first place.’⁶⁶ Concerned that a combination of inadequate and inequitable access to resources and purposefully erected barriers would undermine the ability of displaced persons, particularly from poor, black communities, to return to New Orleans, advocacy groups quickly introduced the concept of the right of return to debates on the future of post-Katrina New Orleans; the norm was ‘adopted far and wide by activists’ and became the early ‘motto of the reconstruction movement.’⁶⁷ In a city with particularly high rates of homeownership in the African American community, domicile return was an important aspect of how the right of return was understood. However, ‘return’ was also understood in terms of coming back to the city itself and to former neighbourhoods, even if former homes were not necessarily reconstructed and reoccupied—as was often the case for renters. Above all, the right of return was a matter of who could legitimately belong in the ‘new New Orleans.’ The suggestion floated by an early reconstruction planning commission that there could be a moratorium on rebuilding in some devastated, low-lying, predominantly African American communities (while equally low-lying, predominantly white communities were never considered for closures) propelled the right of return to the forefront of public debates. This ultimately led to a ‘free market’ approach to rebuilding under which all neighbourhoods were opened to returns, and homeowners could rebuild on their properties, regardless of where in the city they were located.⁶⁸ Although formal barriers to the right of return to particular neighbourhoods were thus averted, inadequate support was provided to enable many impoverished evacuees to return, resulting in a city that is now whiter and more affluent than in 2005, and in which poor, black residents who were able to return are still compelled to actively defend their claims to equal membership in the political community.

4.3 The right of return as a religious claim

Beyond being a claim to be recognised as a legitimate member of a political community, the right of return may also in some cases be seen as a religious calling or claim. Perhaps the most prominent example of this conceptualisation of the right of return pertains to the return of Jews from the diaspora to Israel. For some religious Zionists, the belief that members of the Jewish

⁶⁴ L Bliss, ‘10 Years Later, There’s So Much We Don’t Know About Where Katrina Survivors Ended Up’ *CityLab* (25 August 2015).

⁶⁵ Those displaced from New Orleans were rarely referred to as IDPs.

⁶⁶ C Kromm and S Sturgis, *The Guiding Principles on Internal Displacement: A Global Human Rights Perspective on a National Disaster* (Institute for Southern Studies, 2008) 6.

⁶⁷ L Graham, ‘Advancing the Human Right to Housing in Post-Katrina New Orleans: Discursive Opportunity Structures in Housing and Community Development’ (2012) 22 *Housing Policy Debate* 5–27, 15; R Luft, ‘Beyond Disaster Exceptionalism: Social Movement Development in New Orleans after Hurricane Katrina’ (2009) 61 *American Quarterly* 499–527, 516. In this case, the right of return was often understood in relation to civil rights principles, more so than as a matter of international human rights law.

⁶⁸ T Green and R Olshansky, ‘Rebuilding Housing in New Orleans: The Road Home Program after the Hurricane Katrina Disaster’ (2012) 22 *Housing Policy Debate* 75–99, 78.

diaspora have a right to return to Israel is an article of faith, a right given by God who is understood to have created the land of Israel for the Jewish people. Israel's Law of Return was passed by the Knesset in 1950 and enshrines the right of all Jews to make *aliyah* (literally, ascent to the Holy Land). Under this interpretation, however, the right of return is not rooted in humans' legal or moral agreements, but is justified by divine command.⁶⁹ The notion that the right of return may be a religious principle is also evident in internal displacement situations such as the uprooting of Tuareg IDPs from Ghadames, Libya noted above. As the Tuareg's displacement has become more protracted some IDPs have pursued integration in host communities in Awal. However, Tuareg IDP leaders emphasize that this does not foreclose their right to return to Ghadames, which they see in part in religious terms. As one IDP leader put it:

As for our return to Ghadames, we consider it as a holy city, it is a spiritual city for Tuaregs that we cannot give up to anyone even if we are building something in the region of Awal. When the law of transitional justice is activated, we will not accept that others live in the city of Ghadames...[It] is our city, in which we have been living for thousands of years. We are the guardians of this region.⁷⁰

This position underscores how different interpretations of the right of return can be inclusive or exclusive of other groups' claims to space and political community.

4.4 The right of return as a claim for redress

Claims for the redress of profound injustices are often implicit in IDPs' demands for the right of return. The injustices at stake in return processes often include varying combinations of, for example, exposure to violence and ethnic cleansing, the loss of home, non-recognition as legitimate members of the political community, and the denial of the right to free movement. Standards such as the 2005 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles) explicitly recognize that the implementation of the right of return through 'return to one's place of residence' may in and of itself represent a form of redress for past injustice.⁷¹ The physical return of forced migrants their homes and lands is typically understood as a form of restitution, which aims to restore (to the extent possible) the conditions that existed before a violation occurred, and has conventionally been seen as the preferred remedy for breaches of international law. However, several recent standards, including the UN Reparations Principles, challenge restitution's conventional place at the top of the remedial hierarchy, and suggest instead that the most appropriate forms of redress will depend on the specifics of the case at hand.⁷² Indeed, as I

⁶⁹ For a critique of this interpretation of the right of return to Israel, see M Prior, 'The Right to Expel: The Bible and Ethnic Cleansing' in N. Aruri (ed) *Palestinian Refugees: The Right of Return* (2001) 9-34. For a broader defence of the Law of Return, see N Perez, 'Israel's Law of Return: A Qualified Justification' (2011) 31 *Modern Judaism* 59-84.

⁷⁰ Bradley, Fraihat and Mzioudet, above n 61, 21.

⁷¹ UN doc A/RES/60/147, 21 March 2006, Section IX, para 19.

⁷² A variety of forms of redress may be applied to address the wrongs associated with displacement, including not only restitution, but also compensation, apologies, trials and truth-telling processes. See R Duthie (ed), *Displacement and Transitional Justice* (SSRC, 2012) and M Bradley (ed), *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press, 2015). The notion that restitution is the preferred form of remedy, and that the right of return and the right to restitution are two sides of the same coin, is reflected in the 2005 UN

have discussed above, the right of return need not necessarily entail IDPs' physical or permanent return to their original homes (in other words, restitution) in order for them to perceive it to be an effective form of redress; this will depend on how the displaced conceive of the wrongs they have experienced and the meaning of return for them, and their preferences regarding durable solutions. For instance, for some indigenous IDPs in Colombia, the exercise of the right of return is a critical element of the long process of redressing historical and contemporary violations of their rights as individuals and as groups. Yet in this case the right of return is not understood narrowly in terms of returning to former residences, in the sense of specific buildings or privately held lands. Rather, it is a matter of restoring ancestral lands to indigenous communities, upon which they may collectively enjoy increased autonomy.⁷³

Many Guatemalan and Salvadoran refugees and IDPs who collectively negotiated their return movements as part of the country's transition from civil war to a fragile peace also embraced interpretations of the right of return as a form of redress and, as noted above, a claim to equal membership in a reformed Guatemalan state. Many displaced indigenous Guatemalans understood the enactment of their right of return to and within Guatemala as part of the rectification of the injustices inflicted upon them during the war, and tracing back to the colonial era. However, their aim in asserting their interlinked rights to return and redress was not to re-establish the conditions that existed prior to their displacement, but to challenge the exclusionary and discriminatory nature of the state itself. Although some sought the restitution of their original lands, others preferred to return to other locations in their regions of origin where they could live together, and ideally make a better living than would be possible on the land they occupied previously.⁷⁴ These cases demonstrate that while the voluntary exercise of the right of return may be broadly seen as a form of redress and a claim for recognition and rectification of the wrongs associated with displacement, the goal of this process is not necessarily the restitution of the *status quo ante*.

4.5 Claiming the right of return: Variations and strategies

The examples discussed above are far from exhaustive. They do, however, demonstrate that while the Guiding Principles reflect and further advanced a particular conception of the right of return as a potential durable solution to displacement involving IDPs' return to their former

Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles). In introducing the Principles, the former UN Special Rapporteur on the Right to Restitution and Compensation for Refugees and Displaced Persons, Sergio Pinheiro, opined that, 'The best solution to the plight of millions of refugees and displaced persons around the world is to ensure that they attain the right to return freely to their countries and to have restored to them housing and property of which they were deprived during the course of their displacement, or to be compensated for any property that cannot be restored to them. It is the most desired, sustainable and dignified solution to displacement.' (See COHRE, 'UN to Adopt Pathbreaking New Global Standard which Demands Return of Confiscated Refugee Land and Housing,' Media Release, 11 August 2005.) In this sense the Pinheiro Principles are significantly out of step with the Guiding Principles on Internal Displacement and the IASC Framework, which stress instead the importance of choice regarding durable solutions for IDPs, and the equal legitimacy of the three settlement options for IDPs. The Pinheiro Principles have been widely critiqued for, inter alia, misrepresenting international legal standards on these issues, and insufficiently considering the complex question of the rights of secondary occupants. See eg A Smit, *The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution* (Routledge, 2012); M Ballard, 'Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations' (2010) 28 *Berkeley Journal of International Law* 1-36.

⁷³ J LeMaitre and K Sandvik, 'From IDPs to Victims in Colombia: Reflections on Durable Solutions in the Post-Conflict Setting,' Paper presented at Beyond Beneficiaries workshop, McGill University, Montreal, 14-15 December 2015.

⁷⁴ Bradley, above n 62, 103-107.

homes or places of residence—that is, domicile return—there is a wider range of ways in which the right of return has been and may be interpreted by IDPs themselves, as well as by related actors including refugees, states, and international organizations. Clearly the conceptualisations of the right of return discussed above are not mutually exclusive: a particular group of IDPs may see themselves as having a right of return that involves reclaiming their lost lands, *and* achieving recognition as legitimate members of the polity. Alternatively, landless IDPs may see themselves as having a right to return to the cities, towns or villages that they fled, and be recognised as legitimate members of these communities, but they may admittedly have no original lands to claim in the context of asserting their right of return. One might suggest that technically, the definitions of the three durable solutions options set out in tools such as the IASC Framework imply that such IDPs would not be returning but rather relocating or settling elsewhere. However, such a technical reading would overlook the fact that many IDPs in such situations do understand themselves to be returning on important levels, and may perceive barriers to such movements as infringements on their right to return. This reflects the particular discursive and political power bound up, for better or for worse, in the notion of return.

The interpretations of the right of return sketched above may be advanced in various ways, with important implications for whether these claims are accepted by other actors. For example, claims for the right of return may be framed as questions of *principle*, or as *pragmatic* claims that need to be addressed in order for IDPs' displacement to be resolved. In some cases, political recognition of the principle of the right of return, even if it is not implemented in practice as a permanent, durable solution to displacement, may make it more socially acceptable for IDPs to choose alternative settlement options. Furthermore, claims for the right of return may be advanced in an *exclusionary* or in an *inclusionary* manner. When claims for the right of return are exclusionary, IDPs as well as repatriating refugees may for example seek to repossess their lost properties and oust secondary occupants who have been living on and using the land in their absence. In contrast, when claims for the right of return are framed and advanced in a more inclusionary manner, returnees' concerns are balanced alongside the concerns of secondary occupants and others affected by the return process, such that each citizen's claims and concerns are considered and assessed equitably. In cases such as Mozambique after the civil war, avenues were sometimes successfully negotiated to enable returning IDPs and refugees to share their reclaimed lands with those who had been living on them in their absence, sometimes for more than a decade.⁷⁵ Such arrangements may not always be viable or appropriate. Yet this experience suggests that acknowledging and supporting the diverse range of ways in which displaced persons may envision their own exercise of the right of return beyond domicile return, may open up greater possibilities for securing durable solutions and promoting peace and reconciliation.

CONCLUSION

Since the introduction of the Guiding Principles in 1998, it has become widely recognized that IDPs do indeed have the right to return, and the view that this requires enabling those who choose to do so to reclaim and resume residency in their original homes or places of habitual residence has been popularized. Without discounting the salience of this influential interpretation of the right of return, I have suggested that IDP advocates should be wary of overly narrow conceptualisations as the baseline for understanding what the right of return entails. For IDPs as

⁷⁵ J Unruh, 'The Role of Land Conflict and Land Conflict Resolution in a Peace Process: Mozambique's Return to Agriculture' (1997) 16 *Refuge* 28-33; J Unruh, 'Property Restitution Laws in a Post-War Context: The Case of Mozambique' (2005) 3 *African Journal of Legal Studies* 147-165.

for refugees, the meaning of the right of return is often a highly personal question, and there are innumerable variations on how it may be framed and pursued by individuals, families and communities. The intersecting interpretations that I have discussed reflect only some of the ways in which the right of return has been understood and advanced by key actors involved in durable solutions for IDPs. My aim has not been to evaluate the relative merits or legitimacy of these interpretations in particular cases, but to highlight the diversity of meanings attributed to this idea, and the variety of claims that are implicit in calls for the right of return. In many cases the domicile return interpretation of the right of return may be highly compelling, and over the past twenty years a strong foundation of hard and soft law has developed, strengthening IDPs' capacity—in principle if not in practice—to claim this right. However, it is far from the only way of understanding what is at stake in the right of return. Moving forward, the pursuit of durable solutions for IDPs may be strengthened by careful, context-specific analysis of the right of return not only as a legal principle but also as a complex political claim.