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**GPC Task Team Human Rights Engagement - GPC Task Team on Law and Policy**

24 March 2022, online

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**Agenda**

* Follow up on action points
* Phill Orchard – International, regional and domestic mechanisms to hold states to account for the causes of forced displacement
* Deborah Casalin – Ensuring reparation for arbitrary displacement: the role of international and regional (quasi-) judicial mechanisms
* Sharing of experiences with Korean civil society on engagement with human rights mechanisms
* HRC 49th session
* AOB: Upcoming webinar on HRE (7.4.2022)

**Follow up on action points**

No action points from last meeting.

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The focus of the first part of the meeting - on promoting accountability and reparation for arbitrary displacement - aimed to complement the recent launch of the UNHCR-GPC TTLP Paper “Making arbitrary displacement a crime: law and practice” (recording of the event available [here](https://unhcr.webex.com/webappng/sites/unhcr/recording/3060efd98b45103aba7600505681996e/playback)).

**Phill Orchard – University of Wollongong (Associate Professor of International Relations)**

The panelist raised the issue of arbitrary displacement and described how arbitrary displacement is addressed in terms of international law at the regional level.

Principle 6 of the Guiding Principles on IDPs establishes five non-exhaustive situations in which displacement would be arbitrary:

1. When it is based on policies of apartheid, “ethnic cleansing” on similar practices aimed at on resulting in alteration of the ethnic, religious or racial composition of the affected population;
2. In situation of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
3. In cases of large-scale development projects that are not justified by compelling and overriding public interests;
4. In cases of disasters, unless the safety and health of those affected requires their evacuation;
5. When it is used as a collective punishment.

As the 2021 Special Rapporteur on IDPs’ report notes, there are two thresholds to be met:

* Whether displacement is permissible or arbitrary;
* Whether arbitrary displacement constitutes an international crime.

Principle 6 includes some forms of displacement which are always arbitrary and absolutely prohibited under international law but these are not fully outlined within the Principle. In addition, international human rights law does not provide prohibitions against displacement. Instead, most international human rights treaties focus on positive rights either to movement or to seek asylum. This can be seen in 1951 Refugee Convention and 1966 ICCPR. However, there are two exceptions:

1. 1989 Indigenous and Tribal Peoples Convention (Article 16 (1) and (2):

* Indigenous and tribal people “shall not be removed from the lands which they occupy” except in exceptional circumstances.

1. 1949 Genocide Convention (Article 2 (c) and (e))

* Includes as forms of genocide the forcible transfer of children from one groups to another, and acts which are “deliberately inflicting on the groups conditions of life calculated to bring about its physical destruction in whole or in part.”
* Nevertheless, it is unclear how expansive this clause is within the Genocide Convention and it has not been tested.

The key protection is a prohibition against forcible transfers. This occurs as a war crime and a crime against humanity.

**As a war crime:**

* Geneva Convention IV establishes that in situations of international armed conflict “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive” (Article 49) and that this constitutes a grave breach (Article 147).
* Additional Protocol II (Article 17) extends this to non-international armed conflicts.​
* However, both these clauses have specific language that limits them, they allow for evacuations to occur if either “the security of the population or imperative military reasons so demand.”​
* These exceptions are narrow in scope- imperative is meant narrowly and these need to be for strictly military reasons, not political ones. ​
* Further, if invoked, occupying powers do have specific duties to the evacuees, including the provision of accommodation, food, hygiene and other crucial needs.
* These clauses are also reflected in the ICC’s Rome Statute (Article 8(2)(a)(vii) and (b)(viii). ​
* The Rome Statute also prohibits “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”​

**As a crime against humanity: ​**

* The Rome Statute specifically includes “deportation or forcible transfer of population” as crimes against humanity (Article 7(1)(d)) and defines deportation or forcible transfer in Article 7(2)(d) as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”

The Geneva Convention and Rome Statute are widely ratified by States. The Geneva Conventions have been adopted universally, have been ratified by a total of 196 States, Additional Protocol I by 174 States, and Additional Protocol II by 169. The Rome Statute of the ICC has fewer signatories, but still includes a total of 123 State parties. The ICC provides one potential international enforcement mechanism, when it comes to violations of these prohibitions. But, in addition, there is a strong record of States prohibiting these measures in domestic laws themselves (either through specific pieces of legislation or in their criminal/penal codes).

In terms of forcible transfers as a war crime, a total of **120 States have some form of prohibition**:

* 86 States have prohibited them (an additional 8 States have prohibited deportations only).
* Another 26 States have not specifically prohibited these acts but have prohibited “grave breaches of the Geneva Conventions”
* 102 States define specific custodial sentences following conviction, ranging from 2 years or more to maximum sentences of life imprisonment (24 States) or even the death penalty (8 States).

In terms of forcible transfers as a crime against humanity, **105 States have some form of prohibition**:

* + 65 States have prohibited them, while 12 prohibit deportation only.
  + In addition, 13 States define some forms of forced displacement as genocide, whether including “forcible relocation” as in the case of Turkmenistan or “forcible resettlement” as in the case of Russia.
  + A further 15 States prohibit crimes against humanity in general such as by prohibiting as a crime the acts specified in article 7 of the Rome Statute.
  + 96 States providing some form of sentence ranging from not less than five years to maximum sentences of life imprisonment (35 States) and even the death penalty (10 States).

1. **States have prohibited both forms of crime**.

Important developments can be seen at the regional level and there are different variances of how arbitrary displacement or forms of forcible displacement are understood.

* **Kampala Convention** - African Union’s Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Adopts wholesale the Guiding Principles’ definition of arbitrary displacement (Art 4(4) (a-h). Also requires that “State Parties shall declare as offences punishable by law acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity” (Art 4(6)). Ratified by 31 and signed by 40 of the 54 member States of the African Union.
  + Some domestication has occurred (ie Kenya’s 2012 Law on Prevention, Protection, and Assistance to Internally Displaced Persons; Niger’s 2018 Law on Protection and Assistance to Internally Displaced Persons).

**Inter-American Court on Human Rights** has similarly viewed displacement as a crime under the American Convention on Human Rights:

* The Court has noted that the Convention protects the right not to be forcibly displaced within the State Party to the Convention.
* This is with reference to both the Guiding Principles and APII Article 17, which is a restatement of Geneva Convention IV.
* It requires States to effectively investigate supposed violations of these rights (Chitay Nech et al. v. Guatemala) and “obliges the States to adopt positive measures to reverse the effects of the said condition of weakness, vulnerability and defencelessness, including vis-à-vis the actions and practices of private individuals” (Case of the Rio Negro Massacres v. Guatemala).

**Council of Europe** has also moved forward on defining arbitrary displacement as well. This began with Recommendation 6 of 2006. Committee of Ministers of the Council of Europe notes that in accordance with the European Convention on Human Rights: “member states shall… take appropriate measures, on the one hand, to prevent acts that may violate internally displaced persons’ right to life, to physical integrity and to liberty and security and, on the other, to effectively investigate alleged violations of these rights.”

Further developments can be seen within the **Council of Europe Parliamentary Assembly**, which in 2010 resolution noted “that all member states must refrain from and prevent arbitrary displacement and dispossession and provide effective domestic remedies and redress where they fail to do so.” Recommendation 2367 on the Protection of Victims of Arbitrary Displacement defines that arbitrary displacement as occurring “where the civilian population is targeted intentionally in armed conflicts and where homes and civilian infrastructure are destroyed. In its most heinous form, such displacement is perpetrated for the political purpose of displacing an ethnic group from a conflict area, which is euphemistically referred to as “ethnic cleansing.”

The recommendation calls on member States to introduce their own national laws as well as to consider creating specific international criminal tribunals and to use “all avenues available under national and international law, any violations of human rights committed by third parties abroad against persons who have subsequently received international protection status in the respective member State.”

**Deborah Casalin – University of Antwerp (Doctoral researcher, Law & Development Research Group)**

The panelist carried out a study on how reparation had been ensured for arbitrary displacement based on state responsibility, rather than International Criminal responsibility. The reason the research was conducted is that literature on displacement, particularly the legal and rights-based one, has not focused much on reparation in recent years as opposed to protection and also many of the studies, which have been done, focused on domestic or transitional mechanisms that are not permanently accessible to displaced people under their jurisdiction. The goal of the research was to explore what a comprehensive right to reparation for arbitrary detention would look like.

* **Arbitrary displacement** – any coerced or involuntary population movement, which is contrary to one or other norm of international law;
* **Reparation** – any means by which a State my repair the consequence of a breach of international law;

The reason why international and regional (quasi-) judicial mechanisms were selected was due to the fact that they have been set up by international agreements. Thus, this mechanisms are available to displaced persons today and they have mandates, which are relevant to the prohibition of displacement, have issued specific and concrete decisions about reparation.

In order to determine what a comprehensive right to reparation for arbitrary displacement could look like, a range of legal sources was examined, which incorporate some aspect of a right to reparation and tight not to be displaced. With this analytical framework the concrete contribution of the mechanisms and their concrete decisions were compared. Over 70 cases of mass displacement were examined, which have been issued by UN treaty bodies and others. In order to see how the mechanism decisions have contributed to potentially developing the scope of such a right. To see how these mechanisms may have contribute to realizing reparation in practice, the panelist then focused on case studies that spanned three different systems, three different types of displacement, including conflict displacement, development induced.

The legal analysis showed that the potential scope of reparation for displacement could be quite broad, in terms of who can claim, what forms of displacement could be covered, the temporal scope of this reparation which could be geographic scope and forms of reparation that can be foreseen, ranging from restitution to compensation, satisfaction, rehabilitation.

The analysis provided the following findings:

* A broad scope of reputation for displacement was confirmed;
* The type of cases that have been comprehensively addressed were conflict, mass violence, indigenous dispossession or forced eviction;
* There was no prescription of claims in time, although the jurisdiction was sometimes limited
* A broad range of forms of reparation was recognized with different forms of displacement specific reparation being developed in some cases;
* Options of restitution and return have been safeguarded by the bodies.

The analysis was based on examination of documentation. The panelist explored compliance and extra-compliance effects as well as conceptual conditions. The measures which were met with most compliance were once-off and case specific. In extra-compliance, rights-holders were strengthened, supportive networks and follow-up were activated by the bodies themselves. As for the conceptual conditions, the social conditions improved with the recognition of claims and rights of displaced people at the regional and international level. In cases where legal and political conditions were improved, the underlying blockage to realizing reparation was often the underlying economic conditions which could be linked to the commodification of housing, land, property.

The overall conclusions were the following:

* **Normative role**

At the normative level, the activity of these mechanism in response to rights-holders’ initiatives has overall consolidate rights based norms on reparation for displacement.

* **Role in practice**

In practice, they have assisted in shifting the balance of interests in favor of displaced people.

* **Optimization**

The panelist provided a reflection on how theses bodies could optimize their role in the future. This will always be context specific.

The ICRC customary study includes a consideration whether there is potentially an emerging prohibition on displacement by unlawful acts and right to reparation as a result. The analysis of the panelist considered that the work of human rights bodies and the application of human rights law as a complementary source to humanitarian law would support the emergence of such prohibition on displacement cause by unlawful acts and responsibility for this. It is crucial to keep in mind those exceptions which permits displacement.

**DISCUSSION:**

**Phill Orchard – University of Wollongong (Associate Professor of International Relations)**

The panelist is currently working on the book on the regime induced displacement, which is planned to be finished this year. The book reflects on how forced displacement crimes are addressed. The idea of the project is to examine the existing mechanisms of international, regional and domestic levels that are not currently used to respond to forced displacement but could be applied. Universal Periodic Review is one of such mechanism, which has a great potential to contribute to some development and improvements but should be exploited better. Within the project it was figured out that a lot of States have proper policies to deal with forced displacement, but they are not properly implemented.

**Igor Cvetkovski – Reparations and Land and Property Restitution Specialist**

It is very important to take an intersectional approach. It is crucial to address the causes and roots of displacement. Therefore, displacement should be considered not only as a crime, but as a goal of those who commit other types of violations and abuses. Displacement is caused by murder of civilians, by destruction of property, by torture, sexual violence and other crimes. Therefore, victims of forced displacement should be regarded as victims of a multitude of crimes, which led to the displacement. There has not been much progress on this, but in some countries, there has been some cross-references in some situations between justice and solution approaches, for example, in Colombia and Sri Lanka.

**Jeanie Kim – Doula Association for Public Interest Law, Chair of the Asia Pacific Refugee Rights Network**

The panelist talked about the engagement of civil society organizations with the human rights mechanism in the Republic of Korea.

The Constitution of the Republic of Korea states that verified treaties have the same effect as the domestic law of the country. However, the reality is quite different. Almost all international human rights treaties have been ratified, except for the UN Convention on Migrant Workers.

The panelist provided an overview of the situation of asylum seekers in the Republic of Korea. In 2018, there was a refugee crisis in Jeju Island caused by the influx of nearly 550 migrants from Yemen. As the population of the Republic of Korea was not familiar with the issues of refugees, there was a growth of hatred and racism towards refugees. The civil society addressed this issue by holding seminars on hate speech, working on the problems of migrants, migrant children. Symposium on the rights of children was organized, raising the problems of migrant children as well. 47 organizations and 7 independent experts participated. The report prepared within the framework of the symposium included such issues as: birth registration and statelessness; detention and deportation of undocumented migrant children; problem on the RSD procedure; treatment of refugees; situation of Yemeni refugees in Jeju Island and the display of hatred against refugees.

The delegation of NGOs went to Geneva to advocate for ideal recommendations. Another meeting dedicated to this issue was held in the Republic of Korea and was broadcasted via UN TV, therefore, ensuring communication with the colleagues in Geneva. Before the CRC session, there was an issue of a migrant family from Angola that was detained at the airport in Seoul. An urgent appeal was submitted to the Working Group on Arbitrary Detention to call attention of the global community to this problem. After the CRC session, members of the Working Group on Arbitrary Detention were asked to provide final recommendations that could be presented to the authorities of the Republic of Korea. Later, a Conference on Implementation of the Concluding Observation was held with the participation of the speakers from the relevant ministries.

Individual communication was used by the civil society for the urgent appeal to address deportation of asylum seekers from the airport. Nevertheless, the individual complaints are very time consuming. The urgent appeal to the Working Group was very helpful and facilitated bringing the issue to the Court and the Ministry of Justice.

Doula Association for Public Interest Law has been working on submitting of alternative report on migrants and children with disabilities, UPR sessions, individual complaints on indefinite detention of asylum seekers and unlawful detention and the right to compensation

As for the engagement with regional organizations, the panelists mentioned close cooperation with the Asia Pacific and Refugee Rights Network.

Civil society faced financial issues and language barriers, as not all activists speak UN languages. Funding was received from other NGOs or organizations located in Geneva, as well as UNHCR.

**References**

* New UNHCR - GPC Task Team on Law and Policy “Making arbitrary displacement a crime: law and practice” is available [here](https://www.globalprotectioncluster.org/2022/03/23/making-arbitrary-displacement-a-crime-law-and-practice/)
* A longer version of this presentation has been prepared as a reference paper for UNHCR’s *People Forced To Flee* can be viewed [here](https://www.unhcr.org/people-forced-to-flee-book/wp-content/uploads/sites/137/2021/10/Phil-Orchard_International-Regional-and-Domestic-Mechanisms-to-Hold-States-to-Account-for-the-Causes-of-Forced-Displacement.pdf)
* Presentation of Phill Orchard can be viewed [here](https://unhcr365.sharepoint.com/:p:/t/dip-gpc-HRE-TT/EVFju7pAoN5PoQdSp6fHVhwBbKN6wlSKArJMKCb2t_uV5w?wdOrigin=TEAMS-ELECTRON.p2p.bim&wdExp=TEAMS-CONTROL&wdhostclicktime=1648467802860)
* Interaction between IHL & IHRL prohibitions can be viewed [here](https://www.cambridge.org/core/books/abs/convergences-and-divergences-between-international-human-rights-international-humanitarian-and-international-criminal-law/prohibitions-on-arbitrary-displacement-in-international-humanitarian-law-and-human-rights-a-time-and-a-place-for-everything/9F7E2F0FDA1C0165246649389FA9B74C)
* Discussion on restitution, compensation, satisfaction: transnational reparations and Colombia’s Victims’ Law can be viewed [here](https://www.unhcr.org/uk/research/working/4e423f6c9/restitution-compensation-satisfaction-transnational-reparations-colombias.html)
* Compilation of good practices on engaging with human rights systems can be viewed [here](https://www.unhcr.org/62331d73c/compilation-good-practices-engaging-human-rights-systems)

**49th HRC’s session**

The 49th HRC session continues, and summaries of all interactive dialogues and general debates are prepared and circulated. A final summary of the full 49th session will be presented after it finishes.

**AOB**

* The next thematic webinar will be on 7th of April. It will be on the human rights education in displacement context. The invitation and the resources have been shared.
* The GPC Task Team on Law and Policy is undertaking a study on legal aid in humanitarian settings. In this framework, a survey has been developed. Everyone is encouraged to share this study with their colleagues. The survey is available in three languages. The link to the survey in English here: [Online Survey on Legal Aid in Humanitarian Settings](https://enketo.unhcr.org/x/jmpF9LUE)(English), in [Spanish](https://enketo.unhcr.org/x/0MunX5Ab) and [French](https://enketo.unhcr.org/x/485ZZu7L).

**Next meeting - 20 April 2022 (14:00 Geneva time)**

* ODI to share the main trends of the new research project
* Presentation of HRE training package