

**GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT:
EXPRESSION OF *LEX LATA* OR *DE LEGA FERENDA*? STATUS IN
INTERNATIONAL LAW AND IMPLICATIONS ON THE LAW ON
INTERNATIONAL PEACE AND SECURITY**

Francis Tom Temprosa*

TABLE OF CONTENTS

ABSTRACT	257
I. INTRODUCTION: INTERNAL DISPLACEMENT IN TODAY'S WORLD	258
II. THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: A BRIEF GENESIS AND EXEGESIS	261
A. From A Great Lacuna in International Law	261
1. Problems of Humanitarian Access and Protection of Human Rights	261
2. Problem of Peace and Security.....	264
B. Towards the “Creation” of the Guiding Principles	265
1. Beyond the Mold: The Amorphosity of the Process	265
C. Some Observations on The Primary (General) Guiding Principles on Internal Displacement: Reflections of <i>Lex Lata</i> and Cognitive Dissonance	268
1. Principle 1: Equality, Non-Discrimination.....	269
2. Principle 2: IDP Protection as the Obligation of <i>All</i>	270
3. Principle 3: Sovereignty as a Form of Responsibility	274
4. Principle 4: Non-Discrimination Among IDPs and Attention to the Vulnerable	276
III. PROBLEMATIZING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: STATUS IN INTERNATIONAL LAW	277
A. The Status of the Guiding Principles in International Law.....	277
1. Hard Law, Soft Law, or Not Law?—Amorphosity of the Creation and a Proposal	277
IV. CONCLUSION: THE GUIDING PRINCIPLES AS PROMOTING EVOLUTIONARY CHANGES IN THE LAW	285

ABSTRACT

This article critically investigates the claim that the Guiding Principles on Internal Displacement are binding. It traces the beginnings of the Principles to a lacuna in international law and the shared concern for the human rights of individuals, international peace, and security. Despite the fact that the Principles are, indeed, not a mere re-expression of the *lex lata* during their creation, it is now more uncertain if the *lex* for the domestically displaced has evolved due to the nature

of the law being in flux. Although the Guiding Principles predate much of the developments in this field, the Principles' relationship with the "responsibility to protect" (R2P) are more pronounced today, and they are now a tool for the maintenance of international peace and security.

I. INTRODUCTION: INTERNAL DISPLACEMENT IN TODAY'S WORLD

By the end of 2016, it was estimated that more than 40 million people were "internally displaced" as a result of conflict and violence.¹ These are people uprooted from their places of residence, but within their own State's borders.² According to reports, this number has nearly doubled since 2000 and has increased sharply over the last five years.³ The number of people displaced by disasters in 2016 was 24.2 million, following occurrences of earthquakes, typhoons, and other weather and climate disturbances.⁴ "Internal displacement," as a phenomenon, has turned into a growing global crisis.⁵

The deviance has now been normalized. The modern world first saw large-scale internal displacement during the 1970s as new nations-states were formed from colonies.⁶ During that time, the phrase "internally displaced persons" was generally understood as persons who would be refugees had they left their countries.⁷ Sustained mass exodus, at many times, necessitated international

* S.J.D. Student, Michigan Grotius Fellow, University of Michigan Law School. This paper was prepared in a class under Judge Bruno Simma, William W. Cook Global Law Professor at the University of Michigan. I thank Professor Simma for his thoughtful advice and mentoring spirit. Thanks to the members of the *Journal* for their edits.

¹ *Global Report on Internal Displacement*, INTERNAL DISPLACEMENT MONITORING CTR. 10 (May 2017), <http://www.internal-displacement.org/assets/publications/2017/20170522-GRID.pdf>. This figure does not include those who remained displaced as a result of disasters that occurred in and prior to 2016.

² *Id.* at 25. At the end of 2015, 65.3 million were displaced due to conflict, generalized violence, persecution, and human rights violations. According to the report, "[t]he persistence of large numbers... reflects the intractability of conflicts and crises, notably in the Middle East and sub-Saharan Africa." *Id.*

³ *Id.*

⁴ *Id.* at 11. Displacement is a phenomenon that is not limited to the Global South. In the United States, for instance, more than a million people were displaced in 2016 due to disasters. The report also cites Japan. The United States and Japan are "regularly among the countries with the highest figures worldwide." *Global Report on Internal Displacement*, *supra* note 1, at 36.

⁵ See generally *Global Report on Internal Displacement*, *supra* note 1. Conflicts in Sub-Saharan Africa, the Middle East (Syria, Iraq and Yemen), the Congo, and the violent clashes in the provinces of North Kivu, South Kivu and Kasa, were the main causes of uprootment. *Id.* In South and East Asia (China, India, and the Philippines) disasters generated the highest absolute numbers. *Id.*

⁶ INTER-PARLIAMENTARY UNION & THE U.N. HIGH COMMISSIONER FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 3 (2001).

⁷ C. PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS

response in order to rescue states from falling into despair and into crisis proportions.⁸ The world is seeing people displaced internally—not only externally.

Yet, there is a lack of a legally binding and positive-law-based global treaty to address the phenomenon of “internal displacement.” In its 56th meeting in April 2004, the Commission on Human Rights declared the 1998 Guiding Principles on Internal Displacement (Guiding Principles) “an important tool for dealing with situations of internal displacement,” welcoming the fact that an increasing number of states, United Nations agencies, and non-governmental organizations (NGOs) were applying the Guiding Principles as a “standard” and encouraging all relevant actors to use the Guiding Principles.⁹

The Guiding Principles contain 30 principles and apply to all phases of displacement. It defines internally displaced person (IDPs) as:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.¹⁰

The standards underlying the Guiding Principles offer protection against arbitrary displacement, announcing a right to *not* be arbitrarily displaced. They also protect IDPs during displacement—“tailoring the full range of civil, political, economic, social, and cultural rights to the specific needs of IDPs”¹¹—and during return, resettlement, and reintegration. The document claims to be a comprehensive articulation of the *international minimum standard* for the treatment of IDPs.¹²

This paper critically investigates the claim that the Guiding Principles are a restatement of international human rights and humanitarian law, and concomitantly, *binding* under international law. This proposition, which is not shared by all, is based on the logical consequence that *binding* international law makes binding, or contributes to the binding nature of, the Guiding Principles. In the interest of discussion, and due to time constraints, this paper concentrates its efforts on the main principles that animate the Guiding Principles. However, references are made to the other specific (sub-)principles as appropriate. I

²⁹ (2004).

⁸ U.N. HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 79 (2000).

⁹ U.N. Commission on Human Rights, U.N. Doc. 2004/55 Internally Displaced Persons, (Apr. 20, 2004) (adopted without a vote).

¹⁰ Francis M. Deng (Representative of the Secretary-General on Internally Displaced Persons), *Addendum: Guiding Principles on Internal Displacement*, ¶ 8 (Introductory Note), U.N. Doc. E/CN.4/1996/52/Add.2 (1998) [hereinafter *Guiding Principles on Internal Displacement*].

¹¹ Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459, 465 (2004).

¹² *Id.*

incorporate a discussion of the Guiding Principles's relationship with earlier developments in field of R2P along with the maintenance of international peace and security in that regard.

I argue that the Guiding Principles, while undoubtedly concerned with human rights, is an intrinsically incoherent document that is not simply a mere restatement of international human rights and humanitarian law at the time of its creation. It fundamentally suffers from cognitive dissonance within its underlying principles. It is an exercise in the desire to progressively develop the law. In part due to this inference, it is thus an expression of *lex ferenda*—not only *lex lata*. This alone destroys the binding nature of the Guiding Principles. This is aside from the fact that the Guiding Principles, have not received the imprimatur of states at the global level to be accorded “bindingness.” However, we should not throw the baby out with the bath water, so to speak. The Guiding Principles document has played a pivotal role in the development of the law on IDPs, promoting trilateralism in humanitarian protection and assistance, strengthening a concordant pillar of the R2P, and contributing to the aim of international peace and security through occasional reference to it by UN bodies, especially the Security Council.

In Part II, I briefly discuss the document’s genesis, and how the main principles are engaged. The Guiding Principles came as a result of the international community’s concern for access to persons domestically uprooted because of conflict and natural disasters, but also, *a priori*, the concern for the maintenance of international peace and security. A discussion of the main principles that animate the document and their reflections of *lex lata* are included. With the genesis and the principles in mind, what is the status of the Guiding Principles in international law? Part III opens up this debate with a presentation of the arguments for and against the binding nature of the Guiding Principles. In Part IV, I conclude and reflect on the contributions of the Guiding Principles on the state of the law, arguing that it has contributed to an evolutionary change in the status of the law. Therefore, it is important to look at the Guiding Principles as being akin to General Comments in order to keep this evolutionary change moving, so that the law on IDPs is developed.

An investigation into the bindingness of the Guiding Principles is now apt due to their recent prominence and relevance. States now cite the Guiding Principles and incorporate them into local law.¹³ Different UN bodies, such as the General Assembly and the Human Rights Council, have been referring to them increasingly.¹⁴ In the regional setting, particularly in Africa, Member States of the International Conference of the Great Lakes Region ratified the Protocol on the Protection and Assistance to Internally Displaced Persons, which entered into force in 2008, and obliges its parties to incorporate the Guiding Principles into domestic

¹³ See, e.g., L. 387/1987, julio 24, 1997 [43.091] DIARIO OFICIAL [D.O] art. 2, (Colom.).

¹⁴ E.g., G.A. Res. 165 (LXX) (Dec. 17, 2015); Human Rights Council Res. 32/11, U.N. Doc. A/HRC/RES/32/11 (July 1, 2016). These are the most recent resolutions in a series of documents that have referred to the Guiding Principles for 20 years now, more or less.

legal systems.¹⁵ Now more than ever, the human rights and peace-related dimensions of the IDP phenomenology are gaining currency in the global scene among millions of people in various stages of displacement.

II. THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: A BRIEF GENESIS AND EXEGESIS

In this section of the paper, I introduce the Guiding Principles through a brief overview of their beginnings in order to understand the rationale behind their creation and development, and lead one to comprehend the animating intents behind the Guiding Principles.

A. From A Great Lacuna in International Law

1. Problems of Humanitarian Access and Protection of Human Rights

The Guiding Principles were borne out of Cold War-era humanitarian crises, in the midst of a perceived lacuna in international law during the 1990s. The number of IDPs continued to increase. The Bosnian War, during which approximately 2.7 million people were displaced, was the largest displacement of people since the Second World War.¹⁶ Internal displacement was also rampant due to internal conflicts in other places, such as in the Great Lakes region¹⁷ and in Colombia.¹⁸ The decade saw continued suffering from the lingering effects of the Cold War and the proxy wars in the Global South that characterized the globe in the 1980s, especially in the Horn of Africa, Afghanistan, and Central America.¹⁹

As the UN High Commissioner for Refugees (UNHCR), along with other UN agencies and NGOs, assisted IDPs after the collapse of the Soviet Union, humanitarians realized that a set of principles or a treaty for humanitarian access could facilitate their work.²⁰ Since time immemorial, humanitarian actors have faced inabilities and challenges in entering areas of conflict to provide humanitarian aid, and monitor and promote human rights, despite the dictates of humanitarian

¹⁵ J. Oloka-Onyango, *Movement-Related Rights in the Context of Internal Displacement*, in INCORPORATING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTO DOMESTIC LAW: ISSUES AND CHALLENGES 19, 19 (Walter Kälin et al., eds., 2010).

¹⁶ Mona Chalabi, *What Happened to History's Refugees?*, GUARDIAN (July 25, 2013), <http://www.theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees#Israelites>.

¹⁷ See Kristen Wagner, *UNHCR's Involvement in the Great Lakes Refugee Crisis*, 21 PACE INT'L L. REV. 365 (2009).

¹⁸ Chris Arsenault, *Colombia: Refugees in Their Own Country*, ALJAZEERA (May 18, 2014), <http://www.aljazeera.com/indepth/features/2014/05/colombia-refugees-their-own-country-internally-displace-2014518113412911761.html>.

¹⁹ U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 8, at 105.

²⁰ See Cohen, *supra* note 11.

law. Multiple constraints impede access, including bureaucratic restrictions from state and non-state actors, the intensity of hostilities in civilian areas, attacks on humanitarian personnel, and theft of assets.²¹

External assistance to and human rights protection of the displaced is relevant to any project of co-existence in a state-to-state relation. It has been instrumental in displays of goodwill and friendly relations. States have aided each other as a conflict or disaster rolled on, providing critical life-saving and life-preserving interventions for food, shelter, and human rights monitoring, where the state in conflict or disaster is faced with innumerable demands and constraints.²² In the process, states have allowed the United Nations, other states' agents, and NGOs to monitor and attempt to protect the human rights of vulnerable people in a conflict setting. Conflicts can produce the gravest of tragedies, like genocides and crimes against humanity. Displacement has been documented to break up families and sever community ties; lead to unemployment, and cause problems of access to shelter, land, food, water, medicine, and other basic needs.²³

The glaring problem is that no treaty addresses these acute and complex humanitarian needs. A treaty is seen as important in directing the actions of actors in a situation of displacement. Nothing is currently binding in international law to compel the domestic state to open up to humanitarian assistance, except in cases of invasion and when the Security Council so requires, in the context of an internal displacement.²⁴ More importantly, the consent of concerned states is generally required before offers to provide humanitarian relief operations may be implemented.²⁵ This is implicit in Common Article 3(2) of the Geneva Conventions,²⁶ in Article 70 of Additional Protocol I,²⁷ and in Article 18(2) of

²¹ See U.N. Office for the Coordination of Humanitarian Affairs, *Thematic Areas: Humanitarian Access*, OCHA, <https://www.unocha.org/legacy/what-we-do/policy/thematic-areas/humanitarian-access> (last visited Mar. 1, 2018); U.N. Secretary-General, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, U.N. Doc. S/2017/414 (May 10, 2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/N1713265.pdf>.

²² See U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, PD-ACA-558, USAID ASSISTANCE TO INTERNALLY DISPLACED PERSONS POLICY (Oct. 2004).

²³ U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 8, at 155.

²⁴ Cohen, *supra* note 11, at 459–61.

²⁵ Dapo Akande & Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, UNOCHA 16 (2016), <https://www.unocha.org/sites/unocha/files/Oxford%20Guidance%20pdf.pdf>. Exceptions to this general rule: first, in situations of occupation; and second, where the UN Security Council has adopted a binding decision to require access. *Id.* It is also asserted that consent may not be arbitrarily withheld. *Id.* at 21.

²⁶ See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(2), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 70, June 8, 1977, 1125

Additional Protocol II.²⁸ Further, it is unclear who should give consent to access. Common Article 3(2), in situations of non-international armed conflict, is silent as to whose consent is required. International humanitarian law does not specify which entity or persons within a state must provide consent for humanitarian operations.²⁹

The UN system, recognizing that in-state displacements are internal matters, does not designate the main UN agency-responder for in-state crises of displacement in spite of failed or broken state systems. To the contrary, whenever a refugee movement arises, states can expect the UNHCR to be on the scene as it is internationalized. This is not yet the case with respect to so-called “internal refugees” (displaced).³⁰

The state, even in armed conflict or disaster situations, still controls its borders. It is a hallmark of sovereignty, recognized both in customary³¹ and Charter law:³² a state stands supreme within its territorial borders. The mere fact that the concerned state’s *ex ante* consent is required for a humanitarian operation is a testament and expression of this supremacy. Those are among the reasons why lobbyists for the rights of the domestically displaced thought in the 1990s that the status quo ought to be changed. However, expanded humanitarianism should not come at the expense of frustrating time-honored principles of state sovereignty. On the other hand, humanitarianism should not be unduly constrained, especially by the emasculating powers of the state.

The growing concern for the human rights of IDPs has indeed snowballed in the 1990s.³³ Antonio Cassese writes that the monitoring mechanisms established in the 1990s included country or thematic special rapporteurs.³⁴ One of the areas of concern established by the Commission on Human Rights was the rights of IDPs (a major human rights theme) on account of their special needs.³⁵ The international community became concerned with monitoring the rights of the displaced within the borders of their respective states. These were also part of the precursors to the

U.N.T.S. 51 [hereinafter Geneva Protocol on Protection of Victims of International Armed Conflicts].

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 5, June 8, 1977, 1125 U.N.T.S.8–9 [hereinafter Geneva Protocol on Protection of Victims of Non-International Armed Conflicts].

²⁹ Akande & Gillard, *supra* note 25, at 16–20.

³⁰ Cohen, *supra* note 11, at 461–62.

³¹ See, e.g., as evidence of customary law, G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

³² U.N. Charter art. 2, ¶ 7.

³³ Roberta Cohen, *Lessons Learned from the Development of the Guiding Principles on Internal Displacement*, 1–2 (Georgetown Univ. Inst. for the Study of Int’l Migration, Working Paper of the Crisis Migration Project, 2013), https://www.brookings.edu/wp-content/uploads/2016/06/Lessons_Learned_GPs_Cohen_Oct2013.pdf.

³⁴ ANTONIO CASSESE, INTERNATIONAL LAW 387–88 (2d. ed., 2005).

³⁵ *Id.*

movement towards a document enumerating the human rights of the domestically displaced.

2. Problem of Peace and Security

The movement for a document stating the rights of IDPs also engaged state-to-state, peace-related dimensions. The problem besetting IDPs is not only about humanitarian access, but also political stability, peace, and security. Conflict and displacement in a state could disrupt stability and create turmoil throughout geographic regions. As demonstrated by events in the Great Lakes region of Africa, the former Yugoslavia, and West Africa, displacement can bring about strained borders, overwhelm neighboring countries, and ignite regional wars. While there is strikingly no consensus over what “peace” actually means, according to studies,³⁶ resolving the domestic uprootment of people is linked to achieving peace. Unresolved displacement may cause instability and threaten peace processes and peace-building.³⁷

In this context, issues in peace processes and agreements (*lex pacificatoria*) and peace-building are differentiated on the basis of not being displacement-specific or displacement-related. The discourse on displacement addresses exclusively, or at least primarily, the needs of the displaced. *Lex pacificatoria* focuses on the needs of the civilian population in general, with indirect attention to those uprooted; but the issues blur and there are no brightline distinctions. This is where authors have noted the need for a treaty—or any other instrument—for the internally displaced, and have noted that specificity has value:

The case is sometimes made, for example, that they should be conceived as part of the wider civilian population affected by armed conflict. Yet even though IDPs are not always necessarily worse off than non-displaced populations, there is considerable evidence that they have specific needs and face special vulnerabilities rarely encountered by other people affected by conflict.³⁸

³⁶ See Khalid Koser, *The Displacement-Peace Nexus*, 30 FMR 73, 73 (2008) (also discussing the participation of IDPs in peace negotiations).

³⁷ Cohen, *supra* note 11, at 461. Yet, returning to homes after a displacement may not be a viable option when there is a lack of security, property is not restored, and conditions for sustainable solutions are not in place. *Id.*

³⁸ University of Bern Project on Internal Displacement, *Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building*, BROOKINGS INST. 16–17 (Sept. 2007), https://www.brookings.edu/wp-content/uploads/2016/06/2007_peace_processes.pdf.

B. Towards the “Creation” of the Guiding Principles

1. Beyond the Mold: The Amorphosity of the Process

Realizing the above concerns for humanitarian access, human rights, peace, and security, a largely NGO-driven campaign lobbied for the appointment of a UN representative for displaced persons, the “creation” of instruments before different UN bodies for the rights of humanitarian workers to access displaced populations, and the rights of displaced populations themselves.³⁹ At the incipient stage of the civil-society-led campaign, it was not yet clear what form the instruments should take.

Roberta Cohen’s article is one of the foremost works on the development of the Guiding Principles. This is a direct account of the creation of the Guiding Principles, as she was involved in the process. According to Cohen, the Guiding Principles’s background and development were unusual in the history of international standard setting.⁴⁰ She eloquently describes the atypicality as follows:

“Unlike other standards accepted and widely used by the international community, the principles were not drafted by an expert body of the commission, such as the Sub-Commission on the Promotion and Protection of Human Rights. Nor were they later revised or formally ‘adopted’ by a governmental body. Rather, they were prepared and finalized by outside international experts, albeit under the direction of the representative of the UN secretary-general on internally displaced persons.”⁴¹

a. From NGOs’ Attention to Resolutions of the UN Commission on Human Rights

In 1990, the Economic and Social Council requested the Secretary-General “to initiate a United Nations system-wide review to assess the experience and capacity of various organizations, in the coordination of assistance to all refugees, displaced persons and returnees, and the full spectrum of their needs.”⁴² The UN Commission on Human Rights, via resolution, requested that the Secretary-General concretely study the condition of IDPs.⁴³ That resolution was one of the first documents that used the term “internally displaced persons.” Resolutions after it laid down concrete concerns over the “large number of internally displaced displaced throughout the world.”⁴⁴ This attention shift occurred alongside the

³⁹ Cohen, *supra* note 11, at 462. NGOs included the Friends World Committee for Consultation (Quakers), the Refugee Policy Group, and the World Council of Churches. *Id.*

⁴⁰ *Id.* at 460.

⁴¹ *Id.*

⁴² Economic and Social Council Res. 1990/78 (July 27, 1990).

⁴³ Commission on Human Rights Res. 1991/25 (Mar. 5, 1991).

⁴⁴ See, e.g., Commission on Human Rights Res. 1992/73 (Mar. 5, 1992). *See also*

sustained lobbying of NGOs for the world to turn its eyes to the plight of those displaced within the four corners of the state.

The *Analytical Report of the Secretary-General on Internally Displaced Persons*, submitted in February 1992, is a high watermark early study of IDPs. The broader context of the Report is the evolution of the refugee problem in recent years. The international system for protection of refugees was created after the Second World War, but as the system for refugee protection became more flexible, people in “refugee-like” situations, who were excluded from the system for refugee protection because they had not fled their countries or origin, were left in the margins to fend for themselves.⁴⁵ The necessity of establishing a working definition for “IDPs” was suggested, and introduced two elements in this regard: being forced to flee one’s home, and remaining in the territory of one’s own country.⁴⁶ It identified the causes of displacement⁴⁷ and their consequences, which include suffering from a wide range of human rights violations.

On the *lex lata*, the Report concluded that existing international standards specifically concerning the rights of displaced persons are limited. Article 17 of the Additional Protocol II to the Geneva Conventions of 1949, for instance, directly applies to the situation of IDPs, which provides that “should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.”⁴⁸ But, that provision applies only to IDPs whose situation was created by armed conflict. There is no doubt, however, that in all circumstances, existing human rights standards applicable to the general population are also applicable to IDPs.⁴⁹

Despite the first Report, the Commission again asked the Secretary-General to designate a Representative to study the issue further and present a study at its next session.⁵⁰ It was in this regard that the Commission realized that a new human rights mechanism relating to IDPs could be established, but it proved to be “impossible.”⁵¹ Later on, Francis M. Deng, from Sudan, was appointed as

Commission on Human Rights Res. 1993/95 (Mar. 11, 1993). There were also resolutions on “human rights and mass exodus.”

⁴⁵ U.N. Secretary-General, *Analytical Report of the Secretary-General on Internally Displaced Persons*, ¶4–5, U.N. Doc. E/CN.4/1992/23 (Feb. 14, 1992) [hereinafter *Analytical Report on Internally Displaced Persons*]. This was based on the report of Jacques Cuénod to the Commission, which found that the number of domestically displaced people is even greater than the number of all refugees combined (then 17 million compared to 24 million) in the period of his study. *Id.* at 1, ¶3.

⁴⁶ *Id.* at ¶¶ 10–11.

⁴⁷ E.g., Armed conflict and internal strife, forced relocation, communal violence, natural disasters, ecological disasters, and systematic human rights violations. *Id.* at ¶¶ 18–39.

⁴⁸ Geneva Protocol on Protection of Victims of Non-International Armed Conflicts, *supra* note 28, at 616.

⁴⁹ *Analytical Report on Internally Displaced Persons*, *supra* note 45, at ¶¶ 88–89.

⁵⁰ Commission on Human Rights Res. 1992/73 (Mar. 5, 1992).

⁵¹ Joe W. (Chip) Pitts III & David Weissbrodt, *Major Developments at the UN Commission on Human Rights in 1992*, 15 HUM. RTS. Q. 122, 133 (1993).

Representative of the Secretary-General.⁵² He was tasked with examining the applicability of human rights, humanitarian law, and refugee law to the protection of IDPs. Deng presented a comprehensive study on IDPs in 1996.⁵³

b. Drafting the Guiding Principles from Studies of the *Lex Lata*

The Representative of the Secretary-General, along with a legal team, worked to seek the involvement of lawyers, foundations, and donors to support the work and produced a *Compilation and Analysis of Legal Norms*. The document concluded that there are two principal categories of insufficient protection for IDPs: one area results from *gaps* in legal protection, which occur where no explicit norms exist to address identifiable needs of the displaced, and the second area results where a general norm exists, but a corollary, more specific right has not been articulated that would ensure implementation of the general norm.⁵⁴ Examples of the first are protections from non-state actors who create tensions and disturbances, since “human rights law is usually binding on State actors only.”⁵⁵ Examples of the second include the prohibition of discrimination, the protection of life, gender-specific violence, protections during detention, and the provision of medical care.⁵⁶

These studies on the *lex lata*, aside from expert consultation and presentations, were the main bases for the formulation of the Guiding Principles. It is a curious case that the studies on the rights of IDPs, and also the resulting Guiding Principles, approached the phenomenon by looking at areas where the law does *not* provide “sufficient”⁵⁷ protection for IDPs. From my review of the literature, I advance that there is only one explanation for this: *the crafters of the studies and the resulting principles adopted a “needs-based approach” to the law*. Cohen’s account confirms that adopting the needs-based approach was among the first decisions made in the drafting of the *Compilation and Analysis* that led to the Guiding Principles, as the needs of the IDPs and the extent to which they are adequately addressed were identified.⁵⁸

⁵² See U.N. Office of the High Commissioner for Human Rights, *Special Rapporteur on the Human Rights of Internally Displaced Persons*, <http://www.ohchr.org/EN/Issues/IDPersons/Pages/IDPersonsIndex.aspx>. The seat eventually became a rapporteurial commission. The following are the rapporteurs that serve(d) after Francis Deng: Walter Kälin (2004–2010), Dr. Chaloka Beyani (2010–2016), and Cecilia Jimenez-Damary (2016–present).

⁵³ Francis M. Deng (Representative of the Secretary-General on Internally Displaced Persons), *Compilation and Analysis of Legal Norms*, Introduction: Scope and Purpose, U.N. Doc. E/CN.4/1996/52/Add.2 (Feb. 22, 1996).

⁵⁴ *Id.* at ¶ 411.

⁵⁵ *Id.* at ¶ 412.

⁵⁶ *Id.* at ¶ 415.

⁵⁷ Used 23 times in the *Compilation and Analysis*. The document speaks of the needs of the IDPs, brought about by previous studies. *Id.*

⁵⁸ Cohen, *supra* note 11, at 463.

Other principles, such as the Guiding Principles on Business and Human Rights (Ruggie Principles)⁵⁹ adopted a rights-based or responsibility-based approach. The Guiding Principles for IDPs individuated the law, and the needs-based dimensions were at the forefront. This is not to say that the Ruggie Principles did not inquire into the social milieu of the people affected by the Ruggie Principles, but unlike the Guiding Principles for IDPs, the Ruggie Principles kept this at bay and concentrated itself with an articulation of the *lex lata*, ensuring that advocacy did not get into the way of a clear pronouncement of the law. The Guiding Principles for IDPs, on the other hand, aside from illuminating the *lex lata*, contextualized and re-imagined the *lex lata*.

In light of this, it is curious that no treaty was concluded regarding IDPs despite the drive to reimagine the *lex lata* for IDP protection. Authors note three reasons for the decision to develop a set of principles rather than a treaty: (1) the lack of support from governments for a convention as the IDP issue was seen as a sensitive matter, as demonstrated by the Commission's decision not to describe the proposed framework as "legal"; (2) states and relevant actors thought that treaty negotiation and conclusion demanded too much time, while IDPs had pressing needs that necessitated fast and quick action; and (3) there was also a perception that "sufficiently international law applicable to internally displaced persons already existed."⁶⁰ Both the Commission and the General Assembly requested that Deng prepare a framework for the protection and assistance of IDPs.⁶¹ The resulting draft was presented in an expert consultation in Vienna in January 1998 for the purpose of finalizing the Guiding Principles. The Government of Vienna hosted the consultation.⁶²

C. Some Observations on The Primary (General) Guiding Principles on Internal Displacement: Reflections of Lex Lata and Cognitive Dissonance

Having looked into the genesis of the Guiding Principles, I now examine the major principles that animate the document. Whereas the Ruggie Principles have three pillars, the Guiding Principles for IDPs have four general principles: (1) "full equality" of IDPs with others in the state (Principle 1);⁶³ (2) the obligation of

⁵⁹ See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. No. A/HRC/8/5 (Apr. 7, 2008).

⁶⁰ Cohen, *supra* note 11, at 464–65.

⁶¹ See G.A. Res. 49/169, ¶ 13 (Dec. 22, 1995); G.A. Res. 50/195 (Mar. 11, 1996); Commission on Human Rights Res. 1996/52 (Apr. 19, 1996). From 1996 to 1998, using previous studies and a consultation process that required a series of meetings in Europe and the United States, the Guiding Principles were drafted and finalized (with the help of a legal team chaired by Walter Kälin). See generally *Guiding Principles on Internal Displacement*, *supra* note 10.

⁶² *Guiding Principles on Internal Displacement*, *supra* note 10, at ¶ 15.

⁶³ *Id.* at Principle 1 (Section I- General Principles) ("1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic

“everyone” to observe the Guiding Principles (Principle 2);⁶⁴ (3) the primary duty of states and the right of IDPs to request assistance (Principle 3);⁶⁵ and (4) non-discrimination and special attention to the vulnerable (Principle 4).⁶⁶ These are the main drivers for the (sub-)principles that provide specificity to the Guiding Principles.

In this section, I offer two main observations: (1) that the principles are grounded in certain international law principles that have been “universalized,” thus supporting Walter Kälin’s proposition, with some exemplary exceptions; and (2) that the Guiding Principles suffer from cognitive dissonance within themselves, so they are not entirely an expression of the *lex lata*, but also advocacy tools.

1. Principle 1: Equality, Non-Discrimination

It is evident that the general principles reflect some generalized norm of international human rights law. But, the general principles insert the situations of IDPs within the general norms and draw out conclusions from them for the benefit of IDPs. For instance, Principle 1 on equality is rooted in the principle of non-discrimination. Indeed, virtually all human rights treaties, even Article 7 of the Universal Declaration of Human Rights (UDHR), recognize the equality of every person before the law and his or her entitlement to non-discrimination.⁶⁷ This is,

law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced. 2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.”).

⁶⁴ *Id.* at Principle 2 (Section I- General Principles) (“1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved. 2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.”).

⁶⁵ *Id.* at Principle 3 (Section I- General Principles) (“1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction. 2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.”).

⁶⁶ *Id.* at Principle 4 (Section I- General Principles) (“1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria. 2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.”).

⁶⁷ Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc.

for example, also mentioned in Article 26 of the International Covenant on Civil and Political Rights (ICCPR).⁶⁸

According to Kälin, international humanitarian law likewise addresses the principles of equal treatment, as reflected illustratively in Common Article 3 of the Geneva Conventions. Civilians should be treated “humanely, without adverse distinction founded on race, color, religion or faith, sex, birth, wealth or any other similar criteria.”⁶⁹ It is safe to say that non-discrimination rights have grounding in both treaty and customary law, in both peace time and war time (with special emphasis on the fact that human rights law applies at all times, subject to derogations and/or suspensions, as appropriate and permitted by international law). The norms of non-discrimination and equality before the law do not, in themselves, admit exceptions to international law.

The first paragraph of Principle 1 of the Guiding Principles (on equality and non-discrimination) is thus well within the generalized norms of international law. But, the non-exemption of persons from criminal responsibility due to the principle of non-discrimination (second paragraph of Principle 1) is itself admitted by Kälin to “not have an exact counterpart in existing law.”⁷⁰ Therefore, one could argue that it required mental excursion on the part of the framers to come up with the second paragraph. Kälin admits: “The closest parallel, albeit one that should be clearly distinguished, is the concept of exclusion under refugee law.”⁷¹

Here is where I disagree with the approach of the framers of the Guiding Principles. Why should the concept in international refugee law, which has not been accepted as customary, be in a general instrument of principles that articulate the *lex lata* of IDP rights? Not all principles of refugee law are customary, including its approach to exclusion under Article 1(F) of the 1951 Convention Relating to the Status of Refugees (Refugee Convention)⁷² (whose states parties are not as many as the major international human rights treaties). The Convention is also not universally ratified. It is hard to prove that the import of its exclusion provision is customary because there is no universal and consistent state practice on exclusion.

2. Principle 2: IDP Protection as the Obligation of All

Of the four General Principles, Principle 2 is the most difficult to accept as an expression of generalized international law, whether customarily or in the corpus of the generally accepted principles of international law.

A/RES/3/217/A, art. 7 (Dec. 10, 1948).

⁶⁸ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976).

⁶⁹ WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 12 (2008).

⁷⁰ *Id.* at 14.

⁷¹ *Id.*

⁷² Convention relating to the Status of Refugees, art. 1(F), opened for signature Jul. 28, 1951, 189 U.N.T.S. 150.

Principle 2, which essentially states that the Guiding Principles shall be observed by “all authorities, groups and persons irrespective of their status,”⁷³ runs counter to the main principle in human rights law that it is the state which is the duty-bearer in human rights law. While other actors, including individuals, may also have obligations under international law, we know that States cannot be placed on the same level as individuals with regard to their obligations in international law, and the reasons are multifarious.

States, on the one hand, are legally equal to one another. Despite the different characters of states in terms of territory, geography, population, and religious and cultural imprints, this has always been the hallmark principle in international law. It is a matter of dispute if Grotius established this principle, but there is broad agreement that it is inspired by the analogy between individuals in a utopian human society and states in the society of states.⁷⁴ States enjoy substantive equality and right equality.⁷⁵ The UN Charter legally sanctions the system of equality of states by formally proclaiming it and requiring the peaceful settlement of disputes, among others, though it is admittedly difficult to maintain due to real inequality of states in material power.⁷⁶

On the other hand, states and individuals can never be equal. In fact, traditionally, individuals are objects of international law, and are at the mercy of the state of nationality or habitual residence for human rights and diplomatic protection. While individuals can now bring claims against states in various fora and through multiple causes of action, they are not equal to states. Individuals are not the main holders of rights and obligations under international law. It is the state which is required to perform obligations in international human rights law. I note the words of Michael Glennon: “Treating States as equals prevents treating individuals as equals....”⁷⁷ Possessed with the complete arsenal of a country’s infrastructure, including governmental and societal resources, states are supreme in their own spheres and territories. The individual is not and can never be equal to the state. States can enjoy rights and incur liabilities in a different manner than individuals do.

With this in mind, there should be a binary differentiation between the situation of a state and an individual (including transnational businesses/corporations and like entities) with regard to duties towards persons in

⁷³ *Guiding Principles on Internal Displacement*, *supra* note 10, at Principle 2 (Section I- General Principles).

⁷⁴ Ulrich K. Preuss, *Equality of States – Its Meaning in a Constitutionalized Global Order*, 9 CHICAGO J. INT’L. L. 17, 18 (2008).

⁷⁵ Behrooz Moslemi & Ali Babaimehr, *Principle of Sovereign Equality of States in the Light of the Doctrine of Responsibility to Protect*, Special Issue, INT’L. J. HUMAN. & CULT. STUD. (SPECIAL ISSUE) 687, 692 (2015).

⁷⁶ Quincy Wright, *The Equality of States*, 3 CORNELL INT’L. L. J. 1, 6 (1970). See U.N. Charter art. 2, ¶ 1.

⁷⁷ Janne E. Nijman, *Human Inequality Puts Sovereign Equality to the Test*, BROKER (Mar. 27, 2013), <http://www.thebrokeronline.eu/Articles/Human-inequality-puts-sovereign-equality-to-the-test>.

situations of displacement. I call this a *principled bifurcation* of the duties and responsibilities of actors vis-à-vis their personalities under international law.

This is where the Guiding Principles greatly differ from the Ruggie Principles, another soft law instrument.⁷⁸ Under the Ruggie Principles for the “protection” of human rights, transnational corporations are only given a moral duty to protect human rights, as evidenced by the use of the word “responsibility” rather than “obligation.”⁷⁹ It is recognized, and rightly so, that corporations cannot be imbued with obligations as states can under international law.

Ruggie’s framework, unlike the subject Guiding Principles for IDPs, “rests on differentiated but complementary responsibilities of States and businesses (third persons).”⁸⁰ This approach is evidently absent in the Guiding Principles for IDPs. The Guiding Principles lump states with other actors “irrespective of their legal status”⁸¹ in their obligations with regard to IDPs, including the essentially state-centric function of providing for the basic sustenance of IDPs during a displacement (Principle 18(1) of the Guiding Principles), and engaging the obligation not to cause another’s arbitrary displacement (Principle 6 of the Guiding Principles). One does not know how an individual can realistically have all these obligations under international law.

Kälin, in his annotations of the Guiding Principles, relates that Principle 2 is indeed an *advocacy measure* as it “advocates the widest possible scope of observance for the Guiding Principles [...] emphasizes their impartial and neutral nature [and] seeks to preempt their use for political ends.”⁸² He also says that this “might go beyond human rights provisions, which usually impose direct obligations only on states and state actors.”⁸³ Yet, Kälin justifies this by adding that behavior of private actors that is incompatible with human rights standards is attributable to the state.⁸⁴

I disagree with Kälin. Articles 8–10 of the International Law Commission’s Articles on State Responsibility are precise in the nature and requirements on when acts of third-parties, including individuals and transnational corporations, may be attributed to the state for purposes of invoking the state’s responsibility. It is true, however, that the situation may be different when rules of international humanitarian law are interpreted, because “individuals are indirectly bound by human rights and humanitarian law insofar as they can be prosecuted for

⁷⁸ See generally Ingrid Wuerth, *Custom in the Age of Soft Law* (Vanderbilt University Law School Working Paper), <http://www.iilj.org/wp-content/uploads/2016/07/WuerthIILJColloq2014.pdf>.

⁷⁹ Ruggie, *supra* note 59.

⁸⁰ WATERLEX, NATIONAL HUMAN RIGHTS INSTITUTIONS’ ROLES IN ACHIEVING HUMAN RIGHTS-BASED WATER GOVERNANCE 62 (2015).

⁸¹ *Guiding Principles on Internal Displacement*, *supra* note 10, at Principle 2 (Section I- General Principles).

⁸² KÄLIN, *supra* note 69, at 15.

⁸³ *Id.* at 16.

⁸⁴ *Id.*

violations of these obligations if they amount to war crimes.”⁸⁵ But this does not justify Kälin’s unqualified statement about the Guiding Principles.

Furthermore, in my opinion, Principle 2 is in direct conflict with Principle 3, which states that “national authorities” have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs. While Principle 2 states that “all persons irrespective of status” are to observe the Guiding Principles, Principle 3 puts the burden primarily on national authorities. It is then unclear, operationally, who is truly required to fulfill human rights obligations under the Guiding Principles. Moreover, in federated states and other permutations of local autonomy, it is less clear who should carry out the responsibility. The Guiding Principles seem to only ascribe the responsibility to national authorities, and it is understood in international law that the state is responsible. But this articulation in the Guiding Principles only raises more questions than resolving problems in the context of situations on the ground.

Paragraph 2 of Principle 2 assures us that the document incorporates only the minimum standards of treatment for IDPs, and IDPs can be accorded with higher standards of treatment. This is true to the character of general human rights law as articulating only the minimum guarantees for the enjoyment of rights and freedoms by individuals. Related to this, Paragraph 2 of Principle 2 affirms that the individual IDP has the right to seek asylum. In consonance with Article 14(1) of the UDHR,⁸⁶ individuals have the right to seek and enjoy asylum in other countries.

While this is indeed an articulation of the UDHR, and it is understandable that the right was made explicit in the Guiding Principles because it has the purpose of countering “any argument that assuring protection for [IDPs] can somehow justify restricting their access to asylum,”⁸⁷ it is not so clear in international law if seeking asylum is a customary right. A number of scholars, like S.R. Chowdhury and Alice Edwards, have referred to it as an emerging norm of customary law.⁸⁸ Others have dismissed it as customary. Goodwin-Gill, for instance, believes that it has not yet achieved customary status.⁸⁹ Certainly, it is implicitly recognized as a right by the Refugee Convention; then again, the Refugee Convention is not as widely signed/ratified as the UDHR—nor are its principles found in the customary practice of states.

⁸⁵ KÄLIN, *supra* note 69, at 17.

⁸⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

⁸⁷ KÄLIN, *supra* note 69, at 18.

⁸⁸ See, e.g., S.R. Chowdhury, *Post Cold War Era: Some Existing and Emerging Norms of International Law*, 7 INT’L J. REFUGEE L. 100, 105 (1995); Alice Edwards, *Human Rights, Refugees and the Right ‘To Enjoy’ Asylum*, 17 INT’L J. REFUGEE L. 293, 301 (2005).

⁸⁹ See, e.g., Guy S. Goodwin-Gill & Jane McAdam, THE REFUGEE IN INTERNATIONAL LAW 358 (2007).

3. Principle 3: Sovereignty as a Form of Responsibility

Principle 3 expresses the *philosophical basis* of the Guiding Principles. Paragraph 1 of the Principle holds that national authorities have the “primary duty and responsibility” to protect and assist IDPs within their jurisdiction.⁹⁰ In the same breath, Paragraph 2 prescribes the “right” of IDPs to request and receive protection and assistance from authorities.⁹¹ Kälin reasons that the Principle encapsulates sovereignty, magnifying the state’s duty towards its citizens and/or residents in its territory. He cites the UN Charter and UN General Assembly resolutions to support this claim.⁹²

However, the Guiding Principles do not merely engage the state’s obligation towards its people. Francis M. Deng and other legal scholars pioneered the conceptualization of *sovereignty as a form of responsibility*, and according to Cohen, this concept influenced their draft of the Guiding Principles:

Besides positing primary responsibility for the welfare and safety of IDPs with their governments, the concept also considers it an obligation of the international community to provide humanitarian assistance and protection to IDPs when the governments concerned are unable to fulfill their responsibilities. In such an instance, governments are supposed to request and accept outside offers of aid. If they refuse or deliberately obstruct access and put large numbers of persons at risk, the international community, under this concept, has a right—and even a responsibility—to step in and assert its concern.⁹³ This is also seen in Principles 25⁹⁴ and 27.⁹⁵

⁹⁰ *Guiding Principles on Internal Displacement*, *supra* note 10, at Principle 3 (Section I- General Principles).

⁹¹ *Id.*

⁹² KÄLIN, *supra* note 69, at 19 (citing U.N. Charter art. 2, ¶ 7; G.A. Res. 45/100 (Dec. 14, 1990); G.A. Res. 46/182 (Dec. 19, 1991)).

⁹³ Cohen, *supra* note 11, at 466.

⁹⁴ *Guiding Principles on Internal Displacement*, *supra* note 10, at Principle 25 (Section IV- Principles relating to Humanitarian Assistance) (“1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities. 2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a state’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance. 3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.”).

⁹⁵ *Id.* at Principle 27 (“1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards

Several issues arise from this concept. Is it really the state's responsibility, under international law, to ask for aid from other states if its resources are overstretched or when it is facing a disaster? If the state refuses to do so, is it a violation of a norm of international law? Also, if there is a violation of international law, will the rules on State Responsibility be engaged? I answer these questions in the negative. There will be no norm of international law violated, and rules on state responsibility will not be engaged. However, I qualify my answer.

According to Kälin, Principle 3 is justified based on the following: (1) that under international humanitarian law, "an impartial body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict,"⁹⁶ so offers of assistance may not be regarded as interference; and (2) that under human rights covenants, such a principle can also be deduced and refusal of a state "to consent" to an offer of relief might amount to a violation of the right to life in certain circumstances.⁹⁷

I take exception in the sweeping use of the principles of international humanitarian law, which apply only to armed conflict situations, to all situations of displacement—even those caused by natural disasters and evictions in the wake of relocation projects. While it is true that international humanitarian law provides a higher threshold for protection during situations of armed conflict, the same may not be said, at all times, about other scenarios of displacement. But even then, a state's consent is needed for the entry of foreign assistance. This is explicit even under Protocol I, which provides that it shall be "subject to the agreement of the Parties concerned."⁹⁸ Further, it is not true that, at all times, offers of assistance may not be construed as violations of the principle of non-intervention. In *Nicaragua v. United States*, the International Court of Justice stated that for humanitarian assistance to *not* be construed as an intervention, it "must be . . . limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering,' and 'to protect life and health and to ensure respect for the human being;' it must also, and above all, be given without discrimination to all in need."⁹⁹ Those are the conditions that must be present during an offer of assistance, its acceptance, and the performance of the humanitarian assistance.

A recent Oxford study on the matter, conducted by a group of experts, found that a state's consent is generally required for offers of humanitarian

and codes of conduct. 2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by states.").

⁹⁶ KÄLIN, *supra* note 69, at 115 (citing art. 3(2) of the Geneva Conventions, art. 18(1) of Additional Protocol II, along with the ICRC's opinion that such is "only an example" and other organizations enjoy such right, etc.).

⁹⁷ *Id.* at 117 (citing art. 2(1) of the International Covenant on Economic, Social and Cultural Rights (on international cooperation for development), and art. 6 of the ICCPR (provision on the right to life)). Note that Kälin admits in the annotation that this is a principle "deduced, to a certain extent." *Id.*

⁹⁸ Geneva Protocol on Protection of Victims of Non-International Armed Conflicts, *supra* note 28, at art. 70, ¶ 1.

⁹⁹ See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Judgment, 1986 I.C.J. 14, ¶ 243 (June 27).

assistance.¹⁰⁰ Exceptions to this general rule are situations of occupation, and when the UN Security Council has adopted a binding decision to that effect.¹⁰¹ Consent may not be arbitrarily withheld, but consent is required.¹⁰²

To be sure, I understand that there are arguments for the position taken by the drafters of the Guiding Principles. Suffice it to say that this question is an open debate in which there is no black letter law, and thus, this state of the law must be reflected in the Guiding Principles in order to stay true to the faithful and effective restatement of the *lex lata*.

The doctrine of the *responsibility to protect* also shares an aspect of this debate, as it involves an invocation of “intervention.” Under its second prong, the international community has the responsibility to protect domestic populations. “If the international community realize[s] that citizens suffer from one form of identified damage and the country is not able or willing to protect the public, the international community is committed to initiate and support measures.”¹⁰³ But, unlike the Guiding Principles, in the doctrinal document on the responsibility to protect, the language of an obligation is changed to a moral responsibility only. States are also encouraged to use appropriate diplomatic, humanitarian, and other peaceful means to accomplish this purpose.¹⁰⁴ The Guiding Principles for IDPs and the R2P are thus in a continuum on the debate relating to international action in response to the acute human rights needs of people within the *domaine réservé* of the state.

4. Principle 4: Non-Discrimination Among IDPs and Attention to the Vulnerable

Principle 4 prohibits discrimination among IDPs themselves, but it also allows the provision of special attention to the vulnerable among them. Similar to Principle 1, this Principle is rooted in the provisions on non-discrimination in various human rights treaties and instruments. Providing special attention to vulnerable groups is also an established practice in international human rights law.¹⁰⁵ I think that even without Principle 4, Principle 1 provides a proper basis to develop the practice of non-discrimination within the *lex* for IDPs.

¹⁰⁰ See Akande & Gillard, *supra* note 25.

¹⁰¹ *Id.* at 18–19.

¹⁰² *Id.* at 21.

¹⁰³ Moslemi & Babaeimehr, *supra* note 75, at 693.

¹⁰⁴ See G.A. Res. 60/1, ¶¶ 138–39 (Oct. 24, 2005). The Report of the World Summit Outcome (2005) also recognizes the Guiding Principles on Internal Displacement “as an important international framework for the protection of internally displaced persons.” *Id.* ¶ 132.

¹⁰⁵ KÄLIN, *supra* note 69, at 21–22.

III. PROBLEMATIZING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: STATUS IN INTERNATIONAL LAW

With the genesis, animating intents, and philosophy behind the Guiding Principles, one may ask what status the Guiding Principles hold under international law. This question comes to the forefront as the Principles are asserted now, more than ever, in order to effect change in states' domestic laws. Are they hard law, soft law, or not law at all?

A. The Status of the Guiding Principles in International Law

1. Hard Law, Soft Law, or Not Law?—Amorphosity of the Creation and a Proposal

Based on my research, there are two schools of thought, and scholars are in diametric positions with regard to the binding nature of the Guiding Principles.

a. Binding International Law

First, there are those who assert that the Guiding Principles, individually as they stand, are binding due to the fact that they are from binding sources of international law: general international law, international human rights law, international humanitarian law, and refugee law. This also makes the *entire* document binding on all four of the Guiding Principles. According to the UN High Commissioner for Human Rights, “[t]he Guiding Principles... restate and compile human rights and humanitarian law relevant to internally displaced persons.”¹⁰⁶ In Cohen’s words, “[a]lthough not a binding document like a treaty, the Guiding Principles are based on binding law—human rights law, humanitarian law, and refugee law by analogy—and their provisions are consistent with that law.”¹⁰⁷ While such scholars do not outwardly state that the Guiding Principles in themselves are binding, the inferences from their statements are that the Guiding Principles must be followed for they are mere expressions of the *lex lata*, and are therefore binding.

The clearest proponent of this view is Walter Kälin, who posits that the principles may even be “harder”¹⁰⁸ than as previously understood. In his view:

¹⁰⁶ U.N. Office of the High Commissioner for Human Rights, *International Standards*, <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx> (last visited Mar. 2, 2018) [hereinafter *International Standards*].

¹⁰⁷ Roberta Cohen, *On the Record: Introduction to the Guiding Principles on Internal Displacement*, BROOKINGS (Sept. 23, 2001), <https://www.brookings.edu/on-the-record/introduction-to-the-guiding-principles-on-internal-displacement-2/>.

¹⁰⁸ Walter Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*, BROOKINGS 6 (Dec. 19, 2001), <https://www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf>.

“[A] closer look at the Guiding Principles might reveal that this very soft instrument might actually turn out to be much harder than many well-known soft law instruments. The reason for this is that the Guiding Principles are very well grounded in international law. It is possible to cite a multitude of existing legal provisions for almost every principle, which actually provided the drafters strong normative guidance. Even where language was used that was not to be found in existing treaty law, no new law in the strict sense of the word was created in most cases.”¹⁰⁹

In addition to stating that there is no paucity of support for the Guiding Principles, Kälin adds that they are *not* typical soft law. To recall, the formulation of the Guiding Principles adopted what I call a *judge-like attitude*: imagining “what human rights guarantees invoked by an IDP can provide protection to that person, thereby deducing specific norms from more general principles that are part of existing international law.” Kälin says that the drafters of the Guiding Principles, despite this “judicial attitude,” were careful and reticent in *not* going beyond what can be based on existing international law. Paragraph 3 of the introduction to the Guiding Principles also states that they “reflect and are consistent with international human rights law and international humanitarian law.”¹¹⁰

Additionally, Kälin defends the process through which the Guiding Principles were developed. The creation and application of the law cannot be separated from each other so it was advisable to move from so-called “traditional channels and forms of standard-setting.”¹¹¹ Admittedly, the Guiding Principles were developed in a manner that diverged from the procedure of the formulation of other principles like those for business and human rights. “In that sense, the Guiding Principles may provide a model on how to promote human rights standards at a time when all basic human rights have found a sound basis in international law and, at the same time, treaty making has become difficult.”¹¹² I posit that there are a couple of concerns that arise from these statements.

The assertion of bindingness, due to the existence of binding international law principles within the document, will take an *in seriatim* analysis of each of the Guiding Principles in order for the claim to be verified. In the previous part of this paper, I attempted to look into this proposition by inquiring into the bindingness of the four main Guiding Principles, and there are unresolved controversies on this. Be that as it may, assuming that the Guiding Principles are all indeed binding, and find support in international law, *not all* the Guiding Principles must be followed by all states at all times. In the consent-based system of international law, the universalization of a concept confronts the problem of an expanding need to

¹⁰⁹ Kälin, *supra* note 108, at 6.

¹¹⁰ *Guiding Principles on Internal Displacement*, *supra* note 10, at ¶ 3 (Introduction: Scope and Purpose).

¹¹¹ Kälin, *supra* note 108, at 7.

¹¹² *Id.*

develop norms.¹¹³ The Guiding Principles cite both treaty law and customary law to support their assertions,¹¹⁴ but not all states are bound by all treaties cited by the Guiding Principles. In terms of customary law, it also fails to take into account the persistent objections of states and the non-applicability of certain norms to some states. It is therefore built on a false, idealistic presumption that every state is bound by all human rights, international humanitarian law, and refugee law treaties, and simultaneously bound by all customary laws.

Aside from the consent-based arguments in international law, as Verdross, Brierly and others have noted, “the real foundation of authority . . . resides . . . in the fact that States making up the international society recognise it as binding upon them.”¹¹⁵ Distinctly, states have not declared the Guiding Principles document to be binding, and as something that should be followed. The Commission on Human Rights and other UN bodies have appreciated it as a tool for dealing with situations of internal displacement and has called on states to promote and apply the Guiding Principles, perhaps realizing its potential to affect the future direction of the law.¹¹⁶ Certainly, the Guiding Principles came close to unqualified endorsement, if not adoption. Even the Security Council made reference to internal displacement. In the period from 1999 to 2010, a study found that the Council adopted 747 resolutions—142 of which referenced internal displacement, and one mentioned the Guiding Principles explicitly.¹¹⁷ But, the Guiding Principles have not been called as “binding” *per se* by the groups of states.

The Guiding Principles do not make natural law-related arguments to appropriate binding force, and because of this, arguments theorizing its applicability from a natural law standpoint lose ground. To note, the Guiding Principles allegedly owe its bindingness to the binding nature of its “source” principles.

While there is indeed a case to make for the universalization of human rights, anthropological and ontological universality of all “rights” are empirically, philosophically, or politically indefensible. Conceptual universality (implied by the very idea of human rights, which is universal) and substantive universality (the universality of a particular conception or list of human rights) must be distinguished.¹¹⁸ Engaging in a “wholesale” list of rights for IDPs poses risks of playing upon the substantive questions of rights.

Kälin does not also claim that all of the Guiding Principles have grounding in international law—he noticeably uses the qualifier “almost every”¹¹⁹ in reference

¹¹³ See e.g., Jonathan I. Charney, *Universal International Law*, 87 AM. J. INTL. L. 529, 543 (1993).

¹¹⁴ See *International Standards*, *supra* note 106.

¹¹⁵ Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 8–9 (1956).

¹¹⁶ See e.g., U.N. Commission on Human Rights Res. 2004/55, ¶¶ 6–7 (Apr. 20, 2004).

¹¹⁷ SANJULA WEERASINGHE & ELIZABETH FERRIS, SECURITY COUNCIL, INTERNAL DISPLACEMENT AND PROTECTION: RECOMMENDATIONS FOR STRENGTHENING ACTION THROUGH RESOLUTIONS (2011).

¹¹⁸ See Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007).

¹¹⁹ Kälin, *supra* note 108, at 6.

to principles that find support in law. He had written an annotation on the Guiding Principles, which lists the “source” principles of every Guiding Principle. However, his statement has been carefully calibrated and reflects the nuance that not all “rights” in the document have admitted grounding in international law. Thus, *not all* Guiding Principles find concrete expression in binding international law.

Related to this, I take issue with the process of developing a set of *lex lata* principles through imagining the needs of IDPs as invoked before a judiciary. For obvious reasons, while one may argue that not adopting this attitude may be a missed opportunity to clarify the law, I advance that it leads to more confusing propositions. There are needs, claims, and causes of action which the limited mind might not imagine, as (to use the trite expression) “the life of the law has not been logic; it has been experience.”¹²⁰ It is not the function of restatement drafters to (re)imagine *every* conceivable situation which calls for determining the state of the law for IDPs. This exposes the drafter to a pick-choose-and-refuse attitude in which he or she imagines situations and cherry-picks those who get to be in the text of the Guiding Principles out of all the probable ones. Rather, I believe that the attitude of the drafter must be one of sober and astute reflection on the state of the law as it stands, with reason and logic on hand.

Furthermore, it is one thing to promote human rights; it is quite another to find the *lex lata* applicable to human rights situations. While both are legitimate undertakings, the examination of the *lex lata* should not be confused with advocacy. As Amartya Sen wrote:

If we have reason to go beyond existing laws to give human rights their due, we also have good reason to focus particularly on the importance of public reasoning. Indeed, public discussion is centrally important both for the recognition of human rights, and for their realization and advancement. That understanding is also an invitation to look beyond the rigid box of currently legislated rights. There is a huge world of legitimate human rights beyond the limits of law.¹²¹

b. Soft Law

Secondly, there are those who assert that the Guiding Principles (collectively) constitute a soft law instrument, and hence, are non-binding. The International Committee of the Red Cross (ICRC) takes this position, saying that:

Although the Guiding Principles can thus be viewed as falling within the province of soft law, they contain numerous rules that form part of treaty law and that are therefore legally binding. It is

¹²⁰ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

¹²¹ Amartya Sen, *Human Rights and the Limits of Law*, 27 *CARDOZO L. REV.* 2913, 2927 (2006).

crucial to bear this in mind and to invoke first and foremost the relevant binding rules, such as the detailed provisions of international humanitarian law in situations of armed conflict.¹²²

I submit that this is a principled description of the Guiding Principles under international law, but an incomplete one.

Soft law is loosely defined as an international commitment among government actors that is not legally binding.¹²³ The Guiding Principles have been the subject of resolutions of different UN bodies, be it the Security Council, the Commission on Human Rights, and the Human Rights Council. They have referred to the document and somewhat called for States' "soft" compliance with the instrument.¹²⁴ Considering the document as soft law is also consistent with a "flexible" positivist perspective. The purposes and processes related to the formulation of the Guiding Principles were akin to the compilation of norms towards the building of a regime. It was one in which "all the rules and principles that regulate a certain problem area are collected together so as to express a 'special regime'."¹²⁵ Like many soft law instruments, the Guiding Principles are a collection of normative provisions contained in a non-binding text.¹²⁶

To categorize the Guiding Principles as soft law does not undermine the existence of the binding principles within its contents. As Simma and Alston note, instruments in international law are not free from inspection and circumspect examination.¹²⁷ The *droit de regard* "is comprehensive and embraces all of the dimensions of international human rights law ... takes full account of customary norms, norms based on authentic interpretation, and general principles and extends also to soft law norms."¹²⁸

¹²² Jean-Philippe Lavoyer, *Comments on the Guiding Principles on Internal Displacement: A Few Comments on the Contribution of International Humanitarian Law*, INT'L REV. RED CROSS (Sept. 30, 1998), <https://www.icrc.org/eng/resources/documents/article/other/57jpg9.htm>.

¹²³ Wuerth, *supra* note 78.

¹²⁴ E.g., S.C. Res. 1286, Preamble (Jan. 19, 2000) (stating conspicuously on the situation in Burundi, says: "Noting that the United Nations agencies, regional and non-governmental organizations, in cooperation with host Governments, are making use of the Guiding Principles on Internal Displacement (E/bkc CN.4/1998/53 and Add.1-2), inter alia, in Africa.").

¹²⁵ See ANTHONY E. CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW: THE LEGALITY OF TRADE MEASURES IMPOSED IN RESPONSE TO VIOLATIONS OF HUMAN RIGHTS OBLIGATIONS UNDER GENERAL INTERNATIONAL LAW 14–15 (2007) (citing the decision of the International Court of Justice in the *Tehran Hostages Case* and the 2006 report on the fragmentation of international law by the International Law Commission Study Group on Fragmentation).

¹²⁶ See, e.g., COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed., 2000).

¹²⁷ Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 106 (1992).

¹²⁸ *Id.* at 99.

Soft laws appear at times “when positivist theories [are] compelled to confront the regulation of new legal issues that formerly had belonged to the *domaine réservé*.¹²⁹ IDPs are a relatively new concern for international law and there are many facets of IDP protection that are ripe for debate. While the binary distinction in the status of the Guiding Principles—soft law as opposed to hard law—may be questioned,¹³⁰ the international legal architecture has designed the binary so that in soft law, states may see different intensities of agreement with regard to formative and formed principles.¹³¹ States may realize the impact of soft law in law-making processes and in the implementation of international law.¹³² Calling the Guiding Principles soft law will free up the space for social conversation between states to take place, wherein states will be free to negotiate and conclude normative instruments for the treatment of IDPs. States will not be bound by claims that the Guiding Principles are the embodiment of the current state of the law. States are free, to a large extent, to conclude treaties that change the *status quo*.

The Guiding Principles do not neatly fall within the traditional sources of international law under Article 38(1) of the Statute of the International Court of Justice. To argue that they belong to a category within this article violates the doctrine of sources in international law; the fact that the Guidelines were developed by experts through studies, and not by states themselves, reflects that they are soft law.

The Guiding Principles also do not engage state responsibility like much of soft law; as such, their violation may not subject a state to action, retaliatory or otherwise, by another state. “Although non-legal obligation can also be relevant in a legal dispute … it cannot constitute the basis for a legal judgment.”¹³³ Some soft law instruments may engage the liability of other third-party actors (e.g., Guiding Principles on Business and Human Rights), in particular, in the context of codes of conduct and other “soft law” that is reflective of this development. In some cases, soft law texts (e.g., Voluntary Principles for Security and Human Rights in the Extractive Industries) allow non-state actors to sign instruments and participate in compliance mechanisms, which are far more difficult to accomplish with treaties.¹³⁴

Characterizing the Guiding Principles as soft law is useful for developing the direction of the future *lex* on IDPs. The Guiding Principles can have significant impact in facilitating consensus on contentious issues. This would have been

¹²⁹ Teresa Fajardo, *Soft Law*, OXFORD BIBLIOGRAPHIES (Jan. 30, 2014), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml#obo-9780199796953-0040-bibItem-0002>.

¹³⁰ See Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDISK J. INT'L L. 167 (1996) (questioning the binary distinction in other cases).

¹³¹ Richard R. Baxter, *International Law in ‘Her Infinite Variety’*, 29 INT'L & COMP. L.Q. 549, 566 (1980).

¹³² See Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

¹³³ İlhami Alkan Olsson, *Four Competing Approaches to International Soft Law*, SCANDANAVIAN STUD. L., 2013, at 193.

¹³⁴ See Dinah L. Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW (D. Armstrong, ed., 2009).

difficult to achieve if it were considered hard law.¹³⁵ States, assuming that they regularly follow binding international law, will be constrained to “stick” to the letter and dynamics of the Guiding Principles, thus hindering the will of the states and eroding the base of the law-making enterprise that is embedded within international law.

The characterization of the Guiding Principles as soft law is powerful in that it exposes the Guiding Principles for what they are. But while it honors the persuasive (yet non-binding) character of the Guiding Principles, it does not completely paint the picture of the drafting process (relatively close with a few consultations, drafted by a panel of experts, and informed by studies).

c. Guiding Principles as General Comments: My Proposed Approach

A *third approach* to looking at the status of the Guiding Principles in international law is possible. The Guiding Principles is an instrument that is of similar standing in international law as the General Comments of the Human Rights Committee. Like the Guiding Principles, General Comments are non-binding, but possess normative significance. Guiding Principles reflect on the *lex lata* of the law governing the rights of IDPs, and similarly, General Comments interpret the state of the law relating to the human rights treaty.

Like the Guiding Principles, General Comments have experienced “mixed fortunes in the domestic and not all jurisdictions”¹³⁶ adopt them. According to Conway Blake, this is seen when one examines judicial attitudes towards General Comments in the United Kingdom. UK courts seem to apply or cite them when they accord textual meaning to a treaty norm in question or when they reflect generally accepted jurisprudential advances in the European human rights system. Nonetheless, when they provide a novel interpretation, the courts have been cautious and quick to highlight the non-judicial nature of the human rights treaty and assert the General Comments’ non-binding nature. In *R (On the Application of Al-Skeini and Others) v. Sec'y. of State for Defense*, the UK Court of Appeals did rely, *inter alia*, on General Comment No. 31 of the Human Rights Committee to support the finding of the extra-territorial reach of the European Convention of Human Rights and the UK law on human rights.¹³⁷ In *A v. Sec'y. of State for the Home Department*,¹³⁸ Blake writes that the House of Lords drew from the Committee’s General Comments to establish an exclusionary rule of evidence

¹³⁵ See Patrick L. Schmidt, *The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment*, 40 GEO. J. INT'L L. 88 (2009).

¹³⁶ Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment 20* (Center for Human Rights and Global Justice Working Paper) (Nov. 17, 2008), <http://chrgj.org/wp-content/uploads/2012/07/blake.pdf>.

¹³⁷ *R (On the Application of Al-Skeini and Others) v. Sec'y. of State for Defense* [2006] 3 WLR 508 (U.K.).

¹³⁸ *A v. Sec'y. of State for the Home Department* [2005] UKHL 71 (U.K.).

obtained from torture.¹³⁹ Whereas, in *Sepet and Another v. Sec'y. of State for the Home Department*,¹⁴⁰ the House of Lords rejected General Comment No. 22 of the Committee from which a right to conscientious objection to military service was drawn as it was a “derivation of an unarticulated right from the ICCPR.”¹⁴¹ This is also the reticent and diffident attitude of the South African Court towards the General Comments of treaty bodies.¹⁴²

In parallel, some courts around the world have effectively intervened to ensure that governments abide by their commitments, in line with some accepted principle in the Guiding Principles.¹⁴³ For instance, the Colombian Constitutional Court has held that the Colombian government violated the rights of IDPs by failing to allocate resources for their assistance and protection.¹⁴⁴ However, many courts are not as receptive to the Guiding Principles. As an example, although the Guiding Principles enjoin states to issue IDPs all documents necessary for the enjoyment and exercise of legal rights,¹⁴⁵ courts in Kosovo did not recognize birth, death, and other registry book certificates that parallel registry offices in Southern and Central Serbia have issued.¹⁴⁶

Akin to General Comments (whose normative contents have been incorporated in regional instruments), the Guiding Principles, since their creation, have also influenced the birth of treaties that protect and assist IDPs at the regional level. This is seen in the African continent where the Kampala Convention (African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, entered into force in 2012) and the Great Lakes Protocol (Protocol on the Protection and Assistance to Internally Displaced Persons, entered into force in 2008); two initiatives that are legitimate building blocks of the *lex* on IDPs. Yet, it is still too early to determine the full influence of the treaties on the state of the law.

The processes of planning, formulating, and drafting General Comments are similar to those undertaken for the Guiding Principles. They are both from UN-related processes. In drafting General Comments, imaginative and purposive action transforms “once innocuous devices into important normative instruments.”¹⁴⁷ States communicate in the frameworks set forth in the General Comments through

¹³⁹ Blake, *supra* note 136.

¹⁴⁰ *Sepet and Another v. Sec'y. of State for the Home Department* [2003] UKHL 15 (U.K.).

¹⁴¹ Blake, *supra* note 136, at 21.

¹⁴² *Id.* (citing *Government of South Africa v. Grootboom* (CCT 11/00, Oct. 4, 2000) and *Minister of Health v. Treatment Action Campaign* (CCT 8/02, July 5, 2002)).

¹⁴³ David Fisher, *The Right to Humanitarian Assistance*, in INCORPORATING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTO DOMESTIC LAW: ISSUES AND CHALLENGES 113 (Walter Kälin, et al., eds., 2010).

¹⁴⁴ *Id.*, at 94 (citing Corte Constitucional de Colombia, Sentencia N° T—025/04. Abel Antonio Jaramillo y otros v Red de Solidaridad Social y otros (2004)).

¹⁴⁵ *Guiding Principles on Internal Displacement*, *supra* note 10, at Principle 20, ¶ 2.

¹⁴⁶ Conor Foley & Barbara McCallin, *The Recovery of Personal Documentation*, in INCORPORATING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTO DOMESTIC LAW: ISSUES AND CHALLENGES 344 (Walter Kälin, et al., eds., 2010).

¹⁴⁷ Blake, *supra* note 136, at 22.

treaty bodies.¹⁴⁸ Similar to this, as noted above, states have now also already engaged the Guiding Principles through the invocation of the Guiding Principles in several resolutions of different UN bodies. Activists and NGOs have referred to both as authorities for the interpretation of human rights law. In line with this, where human rights “principles” are cited to agitate states for compliance, Bruno Simma and Philip Alston urge critical thinking and discernment in relation to the various sources of human rights norms that are invoked.¹⁴⁹

IV. CONCLUSION: THE GUIDING PRINCIPLES AS PROMOTING EVOLUTIONARY CHANGES IN THE LAW

This paper has presented the Guiding Principles on Internal Displacement, which were developed because of the twin concerns for the human rights of the displaced and the maintenance of international peace and security. The Guiding Principles are a very unique instrument, as shown in the process of its formation, the claims of its authors (mere restatement of the *lex lata*), and the status of its bindingness. I proposed, that while it should be characterized as soft law, it should properly be considered as akin to the status of General Comments in international law. This will be more in line with the initial purposes behind the Guiding Principles: to develop a specific corpus of law (within human rights law) for the internally displaced.

While I have engaged in a legal analysis of the main principles of the Guiding Principles, testing them against universalized norms and treaties/customs in international law, I must admit that the Guiding Principles have engaged in an evolutionary process of changing the law. Despite the fact that the Guiding Principles are, indeed, not a mere re-expression of the *lex lata* during their creation, it is now more uncertain if the *lex* for IDPs has evolved due to the nature of the law being in flux.

This is most pronounced in the area of peace-making through humanitarian assistance and access. Since the 1990s, the UN Security Council has repeatedly insisted that states grant immediate and unimpeded access to humanitarian organizations and countries aiding in situations of displacement, while also attempting to (re)affirm the sovereignty, territorial integrity, and political independence of states where displacements occur. In an earlier crisis in Guinea, the Council, in Resolution No. 1216, raised this concern. Later, specific country situations attested to this pattern,¹⁵⁰ and the Council allowed access (not to be called “intervention”) when there were situations of displacement. In 2006, the Council had recognized that denial of humanitarian access *may* violate international law.¹⁵¹ This development could have an impact on Charter law, *jus ad bellum*, and other related branches of international law, although it may be too early to tell. It may

¹⁴⁸ Blake, *supra* note 136, at 22.

¹⁴⁹ Simma & Alston, *supra* note 127.

¹⁵⁰ KÄLIN, *supra* note 69, at 117–18 (citing S.C. Res. 668 (Sept. 20, 1991); S.C. Res. 770 (Aug. 13, 1992); S.C. Res. 794 (Dec. 3, 1992); S.C. Res. 929 (June 22, 1994)).

¹⁵¹ *Id.*; S.C. Res. 1674 (Apr. 28, 2006).

also impact general principles of law as some states have now incorporated a part of the Guiding Principles in domestic legislation.

What may also be emerging is a norm of trilateralism in humanitarian protection and assistance, where states, NGOs, and the United Nations now operate during disasters where there are displacements. This is where the participation of the United States in forming the Guiding Principles has had the greatest impact. While realizing early on that there is relatively little explicit international law regarding the rights of IDPs, the United States strongly supported establishing a mandate which has held states to account.¹⁵² The United States now uses the Guiding Principles in order to support the sending of its troops and the delivery of humanitarian aid and protection in war-torn and disaster-stricken countries.¹⁵³

The Guiding Principles's relationship with the R2P is now more pronounced. At the World Summit in 2005, the Guiding Principles were also recognized as a framework.¹⁵⁴ The doctrine of R2P, similar to the Guiding Principles, aspires to promote international responsibility in the domestic legal sphere. The General Assembly has taken a progressive approach to the Guiding Principles;¹⁵⁵ there is also a part that the Security Council is now playing in developing the law on internal displacement, and it could play a much greater role. In a resolution on Burundi, the Security Council referred to the Guiding Principles, noting that various national and international actors are using them in Africa.¹⁵⁶

There are a lot of areas in law to which the Guiding Principles may relate or that the Guiding Principles may affect as the law for IDP protection develops and matures. While the Guiding Principles may not have been a faithful restatement of the law at the time that they were drafted (this was admitted by the framers of the document upon analysis of its provisions), the Guiding Principles are now shaping the future direction of the law. Categorizing the Guiding Principles as soft law, akin to General Comments, will help move the debate forward and further develop the state of the law.



¹⁵² See PHUONG, *supra* note 7.

¹⁵³ E.g., Operations in the Philippines and Haiti.

¹⁵⁴ G.A. Res. 60/1, *supra* note 104, ¶ 132.

¹⁵⁵ WEERASINGHE & FERRIS, *supra* note 117, at 10.

¹⁵⁶ *Id.*, at 9.