The Protection and Assistance of Internally Displaced Persons and the Creation of Customary International Law

by

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Abstract

Since the mid-1990s, internally displaced persons have outnumbered refugees 2 to 1 in most emergencies. These are dire statistics, but I have been encouraged by recent response developments: the African Union adopted in October of 2009 the Kampala Convention for the Protection and Assistance of Internally Displaced Person in Africa, and the International Conference on the Great Lakes Region Pact on Security, Stability and Development, which includes the Protocol on the Protection and Assistance to Internally Displaced Persons, and which entered into force in June of 2008. These two hard law documents are based on the 1998 Guiding Principles on Internal Displacement, which is considered to be a soft law document. With this foundation, my thesis seeks to examine whether these African responses to internal displacement can have an impact outside the continent’s borders through customary international law.

I argue that while it is still early to determine the full influence of the Kampala Convention and the Great Lakes Protocol, these two initiatives are indeed legitimate building blocks toward a generally applicable rule of customary international law. We should anticipate growing reference to them, and to the African experience in general, as issues of internal displacement increase in regions across the globe. However, before this normative framework can become binding international law, we will likely need to see more conventionally powerful states also adopt similar Guiding Principles-based initiatives. To support this statement, I outline the hardening process of soft law and the creation process of customary international law, and find that international legal theory suggests that African leadership can indeed initiate global norm development. I also found, however, that the potential of these two African instruments could not be wholly explained by law, and thus turned to international relations’ theory for supporting analysis.
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Introduction

In 2009, the highest number of internally displaced persons was recorded since 1994: 27.1 million persons displaced by conflict and violence. Though approximately 5 million people were able to return home in 22 countries, this number is overshadowed by the 6.8 million persons newly displaced in 23 countries that same year. While the greatest new displacement is from South and South East Asia, African states (Democratic Republic of Congo, Sudan, Somalia and Ethiopia) account for four of the top eight countries with the highest figures of new displacement. 2009, however, also brought positive new developments for internally displaced persons: the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) was adopted by the AU in October. Additionally, by the end of the year, a total of sixteen countries globally had “adopted a national legal or policy framework specifically pertaining to the protection of IDPs displaced by armed conflicts and violence”, nine of these referring explicitly to the United Nations (UN) Guiding

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1 The Internal Displacement Monitoring Centre *Global Trends Report*, considered by many to be the leading source on internal displacement information, does not account for persons displaced by natural disasters or development projects, though these persons are included in the definition of an internally displaced person provided by the Guiding Principles on Internal Displacement (see below). If these persons were also included, the number of internally displaced persons worldwide would be considerably higher. Internal Displacement Monitoring Centre (IDMC). *Internal Displacement: Global Overview of Trends and Development in 2009*. (Geneva: Norwegian Refugee Council, May 2010), 13

2 IDMC (2010), 15.

3 IDMC (2010), 13, 15.
Principles on Internal Displacement (Guiding Principles). These developments build on the process surrounding the International Conference on the Great Lakes Region (ICGLR) Pact on Security, Stability and Development, which included the Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol), and which entered into force in June 2008. This Protocol now commits the “11 signatory states to incorporating the Guiding Principles into their domestic laws and policies.”

Internally displaced persons are defined by the Guiding Principles as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.” The key factors are therefore that a person or group of persons is involuntarily displaced, and that they have remained within their country of origin. By not crossing into another country, internally displaced persons are ineligible for the

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5 IDMC (2010), 24.
6 UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39, Addendum, Guiding Principles on Internal Displacement. (UN Doc. E/CN.4/1998/53/Add.2. Available from http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html. Accessed December 7, 2009), para. 2. In the Annotations to the Guiding Principles, Walter Hälin, explains that the definition used above (which is also the definition used by the majority of international organizations and scholars) is actually a description of internally displaced persons and not set out to be a definition. He adds that the “words ‘in particular’ indicate that the listed examples are not exhaustive.” People involuntarily displaced by development projects may therefore still fit within the definition; however, “persons who move voluntarily from one place to another solely in order to improve their economic circumstances” do not. Walter Hälin. “Guiding Principles on Internal Displacement: Annotations (Revised Edition)”. Studies in Transnational Legal Policy, American Society of International Law, no. 38 (2008), 3-4.
assistance and protection guaranteed by the 1951 Convention relating to the Status of Refugees and the additional 1967 Protocol.\(^7\) Internally displaced persons, as citizens of the country in which their displacement occurred, already have recognized domestic and international rights through the human rights and humanitarian law available to all citizens. However, “the situation in which they find themselves differs significantly from that of the general population.”\(^8\) Internally displaced persons are particularly vulnerable: “they may lose their property and access to livelihood; they run a high risk of being separated from family members; they may be discriminated against merely for being displaced; [and] they often lack identity cards, which makes it more difficult for them to access basic services and prevents them from exercising their political rights.”\(^9\) Furthermore, “IDPs remain under the formal protection of their own state, even though officials of that state may have deliberately caused their displacement.”\(^10\) Understanding this situation

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\(^7\) This Convention defines a refugee as a person who “[o]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention and Protocol Relating to the Status of Refugees, Article 1A(2). It is interesting to note that the recognized factors creating internally displaced persons are broader than those giving rise to refugee status.


and the precariousness of the protection and assistance offered to the displaced by their own governments, the UN recognized that international standards for the care and responsibility of these persons would be required. For this reason, UN Secretary-General Boutros Boutros-Ghali appointed Francis Deng as the first Representative of the Secretary-General for Internally Displaced Persons (RSG-IDP) in 1992.11

As RSG-IDP, Deng focused his efforts on raising awareness of the plight of internally displaced persons and on “developing a normative framework to meet [their] protection, assistance and development needs”.12 To achieve this framework, Deng, with a team of legal experts (including Walter Kälin, the current RSG-IDP), compiled, analyzed and restated relevant international human rights, humanitarian and refugee law and found that “where the needs of the displaced are not sufficiently protected by international law, it is important ‘to restate general principles of protection in more specific detail’, and address the gaps in a ‘future international instrument on the protection of internally displaced persons’.”13 That instrument is the Guiding Principles, presented to the UN Commission on Human Rights (UNCHR) in 1998. The Guiding Principles “set forth the rights of internally displaced persons and the obligations of governments and the international community toward these populations.”14 The Guiding Principles are not new,

11 Since 2004, the post has been called “Representative of the Secretary-General for the human rights of Internally Displaced Persons.”
standalone law, but instead are based on articles from previously ratified treaties, supplemented by new standard-setting initiatives in an effort to “both restate existing norms and seek to clarify grey areas and fill in the gaps.”¹⁵ This foundation in existing international law, and the fact they were not written by state representatives, makes the Guiding Principles a particular case, which shall be explored further below.

As a restatement, elaboration and supplementation of existing law, the Guiding Principles arguably constitute “soft law”, which emerges from non-binding instruments such as “declarations, resolutions or recommendations by international organizations”¹⁶, like the UN General Assembly. D.J. Harris explains that “soft law” is a useful concept “to describe instruments that clearly have an impact on international relations and that may later harden into custom or become the basis of a treaty.”¹⁷ The Guiding Principles have had an important impact on international relations, most clearly demonstrated in Africa through their inclusion in the AU Kampala Convention and the Great Lakes Protocol. This thesis seeks to expand upon this possibility of hardening soft law introduced by Harris by examining whether and how these regional hard law developments can contribute to the creation of customary international law for the protection and assistance of

internally displaced persons. This will be analyzed from two perspectives: firstly, how customary international law is created, and what contribution regional organizations can make in this regard; and secondly, through an examination of power in international relations. More specifically, do African states hold sufficient influence internationally for other countries and regions to recognize the leadership role these states have taken in the protection and assistance of internally displaced persons, thus creating the *opinio juris* and state practice required to establish customary international law? It will be argued that while it is still early to determine the full influence of the Kampala Convention, as it has yet to be ratified, and of the Great Lakes Protocol, as it only came into effect in 2008, these two initiatives are indeed legitimate building blocks toward a generally applicable rule of customary international law. We should anticipate growing reference to them, and to the African experience in general, as issues of internal displacement increase in regions across the globe. However, before this normative framework can become binding international law, we will likely need to see more conventionally powerful states also adopt similar Guiding Principles-based initiatives.

To support this case, this thesis will proceed as follows: I will look first at the value of having the Guiding Principles become binding international law. Secondly, I will review the process of hardening soft law, and how this connects the Guiding Principles with the development of the Great Lakes Protocol, the Kampala Convention and other State practice. Though the adoption of the Great Lakes Protocol was the first region-wide codification of the Guiding Principles, the activities of the AU will be the predominant focus of this thesis, as the Great Lakes
region does not have a strong institutional foundation outside of the Pact on Security, Stability and Development. The AU, in contrast, has a long institutional history that encompasses responsibilities in a variety of domains, thus making it a stronger comparison and example for other regional organizations, such as the Organization of American States (OAS), the Association of South East Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC) and the Organization for Security and Cooperation in Europe (OSCE). Furthermore, the International Conference that established the Pact was a joint AU-UN initiative. As argued by Allehone Mulugeta Abebe “[t]he involvement of the AU in the ICGLR process, the role of some key drafters in both the ICGLR and the AU processes, and the similarity between the Protocol and the draft Convention signals a strong link between the ICGLR and the AU initiative to elaborate a legal framework for the protection of IDPs.”

Thirdly, I will outline the fundamental concepts involved in the creation of customary international law, and fourthly examine the roles and responsibilities of regional organizations in the creation of international law. This cursory review of the power of regional organizations is important to understanding how the Kampala Convention and the Great Lakes Protocol are contributing to the potential creation of a generally applicable rule of customary international law, both through regional organization and state practice, because these two momentous documents were the initiatives of regional organizations. The roles that the AU and ICGLR played in the

development of a normative framework is therefore also essential to understanding how this framework will grow.

Next, I will introduce a brief survey of realist, rationalist and constructivist international relations theory interpretations of international law that will provide a roadmap to understanding the power dynamics involved in creating, maintaining or changing customary international law. In a final section I will evaluate the likelihood that non-African states would be willing to take a lesson from the world’s least developed region, using both constructivist and international legal theory to explore this possibility. “Constructivists generally view international law formation as a process of interaction between state and non-state actors through which interests and ultimately identities are shaped,” and I adhere to this perspective.

This case analysis of a regional framework's capacity to contribute to the formation of customary international law, and the power dynamics within that creation, contributes to demonstrating and understanding the evolution of customary international law, and its expansion to account for the activities of an increasing set of global, regional and individual actors. Furthermore, it provides an evaluation of the progress the Guiding Principles have made over the last twelve years, and how their increasing use is strengthening states' ability and obligation to respond to internally displaced populations.
The Value of the Guiding Principles as Binding Law

A distinguishing dimension of the Guiding Principles is that there is a treaty-based source for all of the thirty principles compiled. This document is an excellent example of relying upon the codification of pre-existing law to facilitate the securing of agreement for adopting a new accord. The Guiding Principles are “a broad and progressive restatement of international law that details more precisely, and in a consolidated and, thus, more accessible and readable format, the relevant provisions of human rights and humanitarian law as they apply to the internally displaced.” As such, the Guiding Principles may also fit under Vaughan Lowe’s definition of an “interstitial norm”. Martha Finnemore and Stephen Toope describe “interstitial norms” as a growing body of law that can be characterized as “the implicit rules operating in and around explicit normative frameworks.” Lowe explains that interstitial norms emerge from within the international legal system with some assistance, and their development is open to wider participation than the creation of traditional international law. In the case of the Guiding Principles, the office of the RSG-IDP and the assembled team of legal experts that wrote, presented and promoted the document contributed to the emergence of a “new” normative

framework that operates independently, yet as part of existing international legal structures.

Finally, interstitial norms often come to reflect “the spirit of the age”, as “a much wider range of concepts and social pressures come to shape these interstitial norms than is ordinarily the case in international law.”²¹ Again, in the case of the Guiding Principles, there was an urgent need to draw attention to the plight of internally displaced persons and to provide both state and non-state actors with a framework for responding to their situation. The timing of the internal displacement crisis, and the urgent need for a response hence dictated the relatively quick and unconventional development of the Guiding Principles.

Considering, therefore, that interstitial norms operate “in and around explicit normative frameworks” and that “it is always possible to invoke the hard law that lies behind the Guiding Principles where necessary,”²² what then is the value in pursuing the prospect of the Guiding Principles becoming binding law in and of themselves?

I see four main reasons. Firstly, the Guiding Principles do not only restate existing international law; they also “seek to clarify the grey areas [where sufficient protection might not exist] by restating general principles of protection in more specific detail and to address the gaps in cases where no explicit norms exist to meet

the needs of the internally displaced.”\textsuperscript{23} These “attempts to address the gaps” remain soft law (defined in the following section), notwithstanding the hard law foundation of certain elements of the Guiding Principles. By making the entire document legally binding, internally displaced persons would be provided with a unified mechanism to ensure their rights are protected to the fullest. Secondly, “one of the common admissibility barriers to international bodies [that might otherwise provide protection and assistance to internally displaced persons] is a requirement that the victim first exhaust domestic (national) remedies.”\textsuperscript{24} Making the Guiding Principles binding international law – and by consequence opening another way for the Guiding Principles to be adopted into domestic law (since customary international law is automatically domestic law in some national legal systems) – would therefore help to create a national framework that enables the establishment of national remedies for internal displacement. Additionally, “victims should ideally be able to obtain protection and redress close to home, in the tribunals and agencies of the state that has violated their rights.”\textsuperscript{25} Making the Guiding Principles national law makes it easier for the citizens to hold the government accountable for the creation and resolution of internal displacement in that country.

Furthermore, as internal displacement became an issue of increasing concern for the international community, many states expressed hesitancy that international action in this regard would violate the principles of state sovereignty and territorial integrity. Adopting the Guiding Principles as binding international law, however,

\textsuperscript{23} Bagshaw (2005), 103.  
\textsuperscript{24} Fitzpatrick (2002), 20.  
\textsuperscript{25} Fitzpatrick (2002), 20.
circumvents potential contraventions of sovereignty by obliging all states to assume full responsibility for any displacement within their borders. In other words, the Guiding Principles make clear that states alone are responsible for responding to internal displacement, and thus have no need to fear any breach of sovereignty, unless they are unwilling or unable to provide sufficient protection and assistance themselves. Offers of assistance by international organizations shall be taken in good faith, and not refused arbitrarily, as outlined in Principle 25. This approach to upholding state sovereignty also follows Deng’s positive conception of “sovereignty as responsibility.” In the development of the Guiding Principles, and on his country missions, Deng sought to “reassure[e] states that while IDPs c[o]me under their sovereign responsibility they [have] to agree that sovereignty carrie[s] with it the obligation to protect and assist these vulnerable populations.” Deng’s objective was to demonstrate that sovereignty is a double-edged sword; that is, to have the international community respect a country’s sovereignty, the government of that country must also accept the responsibility that comes with having authority over a given territory. This state responsibility entails a responsibility to uphold its citizens’ rights.

Fourthly, “[f]rom the perspective of international organization officials, the harder the norms they can invoke, the better; because international law by definition embodies shared understandings, hard law gives them a more solid

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starting point from which to push for changes in state behavio[u]r."\textsuperscript{27} If the Guiding Principles become compulsory international law, it becomes difficult for states to escape the norm; indeed, they could be punished by the international community for breaching it. States would therefore be under greater pressure to adapt their behaviour to comply with the norm created by the Guiding Principles, and may in fact be more likely to want to comply, for reasons of self-identity as law-abiding states, as outlined in constructivist international relations theory explored further below. Finally, if the Guiding Principles were to develop into hard law, there would be a firmer outline of how to achieve the goals established within the Principles; there would also be a greater understanding of the Principles’ “limitations and restrictions” that would allow states to better understand how to operate within this norm.\textsuperscript{28} There is great value, therefore, in transforming the Guiding Principles from a soft law instrument into a legally binding one, as it would facilitate and require greater protection and assistance to internally displaced populations. The next section examines how this transformation may take place.

\textsuperscript{27} Johnstone (2009), 122.
\textsuperscript{28} Bagshaw (2005), 101.
The “Hardening” of Soft Law

The necessity of a normative framework for the protection of internally displaced persons followed the explosion of civil conflicts that came at the end of the Cold War. In the years following the collapse of the Berlin Wall, these conflicts resulted in tens of millions of persons being displaced within their own borders.29 At this same time, states were beginning to reconsider their willingness to provide asylum to the outflow of victims of conflict. In Africa in particular, where displacement has historically been the most acute, it has been noted that “[i]nstead of opening their doors to persons fearing harm in their own states, African countries now prefer refugees to receive protection in ‘safe zones’ or similar areas within their countries of origin.”30 Consequently, the number of internally displaced persons slowly began to surpass the number of refugees worldwide; since the 1990s, “in most emergencies, [internally displaced persons] began to outnumber refugees two to one.”31 As mentioned earlier, however, in the case of conflicts, the governments responsible for protecting the internally displaced are also often at the source of their displacement, either by being a party to the conflict, or by deliberately neglecting a disfavoured minority population, for example. With these millions of people in refugee-like situations, but without a specific international institution designated for their care (such as the United Nations High Commissioner

29 Cohen and Deng (2008), 4.
for Refugees), and with the barrier presented by the principles of state sovereignty that at times prevented humanitarian organizations from accessing these populations, international standards that outlined the responsibility for and status of internally displaced persons were urgently required. Considering these critical factors, RSG-IDP Deng opted to avoid “the traditional intergovernmental law-making process of negotiating, drafting and adopting a ‘hard’ treaty in favour of a more flexible and nuanced approach. This approach resulted in the ‘soft’ restatement of existing international norms.”

Influencing factors behind choosing this approach include the lack of governmental support for a legally binding convention for what was seen as an internal matter; the fact that treaties can take years or even decades to accomplish; and the belief that “sufficient international law existed to make it possible to bring together in one document, adapted to the needs of the internally displaced, the myriad of provisions dispersed in a large number of instruments.”

The Guiding Principles were constructed in such a way as to appeal to the greatest number of states possible, in the shortest time-span possible. With this approach in mind, we must also question whether Deng and his team of legal

33 It must be noted, however, that in addition to the time consideration, there was a perceived danger that since the Guiding Principles were based upon already existing international law, that a treaty negotiation process “could lead to the watering down of accepted provisions of international law on which the Principles are based.” (Roberta Cohen. “Developing an International System for Internally Displaced Person.” [International Studies Perspectives, no. 7, 2006], 96). Incorporating the Guiding Principles into customary international law would thus allows all states to participate in the creation of new law, through state practice, but does not also risk changes to the instruments upon which the Guiding Principles are based.
34 Cohen (2006), 92.
experts also had the strategic intent of creating the Guiding Principles in such a way as to allow them to develop into hard law later on. While the writings of Deng, Cohen and Kälin do not explicitly allude to a desire or goal for the Guiding Principles to become binding in and of themselves, the legal team that wrote the Principles would have most likely been aware of the various theories on soft law when adopting this approach to the creation of a normative framework. These theories include the understanding that soft and hard law may be complementary, wherein soft law promotes the education, compromise and understanding that can constitute preparation for the development of hard law. Consequently, we are able to deduce that while the RSG-IDP’s moral motivation to develop a tool to respond to internal displacement crises as soon as possible led the Guiding Principles to be soft law, the soft law method was also adopted to permit the Guiding Principles to be as effective and flexible as possible. The consideration of effectiveness and flexibility in terms of application and adherence further opens the possibility to the Guiding Principles maturing into a hard law framework. Thus while it may not be the precise intention of the RSG-IDP to eventually create hard law, the soft law method adopted does not preclude this development from occurring.

With the normative structure for the protection of internally displaced persons established as a set of guiding and not binding principles, there remains debate, however, as to whether the Guiding Principles may actually be considered “soft law.” Soft law, like hard law, is normally derived from government activity –

negotiations, declarations, recommendations, etc. Kälin, in defining soft law, further explains that the Guiding Principles

“do not even constitute typical soft law, i.e. recommendations that rest on the consensus of States and thereby assume some authority that may be taken into account in legal proceedings, but whose breach does not constitute a violation of international law in the strict sense, and thus does not entail State responsibility.”

The Guiding Principles are atypical soft law as they were composed by a small group of legal experts (including Walter Kälin) and not written by state representatives. Considering the exceptional nature of their creation, Kälin has further suggested that “[o]ne might argue that [the Guiding Principles] are even softer than soft law. In a state-centred international legal system, a group of well-intentioned legal experts simply does not have the power to create law.” I would argue additionally, however, that through the state support demonstrated for the Guiding Principles in UN General Assembly (UNGA) resolutions and reports, for example, the international community has embraced, restated and referred, and thus consented, to the Principles in such a way that is reminiscent of the “normal” soft law creation process. This adoption of the Guiding Principles gives the document the requisite authority mentioned by Kälin, and also provides a venue in which relevant state practice and use of the Principles can be noted. Consequently, the debate on the extent to which the Guiding Principles are or are not soft law is largely addressed, and the Guiding Principles are effectively comparable to soft law established by more conventional means.

38 See for example, UN GA A RES/62/153 “Protection of and assistance to internally displaced persons” (March 6, 2008) and 60/168 (December 16, 2005).
This soft law legitimacy puts the Guiding Principles on the path that allows them to potentially develop into hard law. Schmidt, in his 2003 assessment of the potential for the Guiding Principles to become hard law, advanced that tools such as the Guiding Principles “can have a significant impact in facilitating consensus on contentious issues, which otherwise would be difficult to achieve on ‘hard law’ instruments”.39 Johnstone, furthermore, in discussing the operational activities of international organizations, describes one way in which the hardening process can occur:

“operational activities occur against the backdrop of widely acknowledged but not well-specified norms; in carrying out those activities, international organizations do not seek to enforce the norms *per se* but typically act in a manner that conforms to them; these activities generate friction, triggering bouts of legal argumentation; the reaction of affected governments – and the discourse that surrounds the action and reaction – can cause the law to harden. As a result, future operational activities meet less resistance, or at least those who would object feel more compelled to use legal language in defending their positions. Compliance with the norm is thus more likely because the demanding discourse associated with hard law increases the pressure on states to act in accordance with it.”40

Another way that soft law can develop is by its explicit acceptance by states, either as soft law as such, or through its incorporation into new and binding legal instruments. The Guiding Principles’ generally warm reception in 199841

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41 Mexico was initially hesitant to accept the Guiding Principles, believing that they may be an attempt to create international law “through the backdoor.” In understanding, however, that the Guiding Principles consist of already recognized and ratified international norms, they have since come to support the document. India, Sudan and Egypt believed that a normative framework for the protection of internally displaced persons was a breach of sovereignty, and therefore did not (and do not, in the case of India) support the Guiding Principles. Their protest has limited
progressed into more than 190 countries “recognis[ing] the Guiding Principles as an important international framework for the protection of IDPs” in 2005 at the United Nations World Summit. This act of recognition does not transform the Guiding Principles into hard law, but rather contributes to increasing state practice that is potentially relevant to the creation of customary international law, as will be explored in the following section.

The creation of soft law may be pursued in “situations in which states find themselves in fundamental agreement on norms of conduct, but [in which] they may not be ready to agree to bind themselves legally”43; some authors have even suggested that soft law is used “in order to cover up [states’] unwillingness to achieve more substantial law-making results.”44 We have seen, however, both on an individual state level, and now at a regional level, that numerous states are progressively prepared to legally bind themselves to what is outlined in the Guiding Principles. The following are examples of ways in which certain state practices are contributing to the hardening of the Guiding Principles in their current soft law state.

Sixteen countries have varying laws and policies pertaining to the protection of internally displaced persons from armed conflict, violence and human rights

42 Cohen and Deng, FMR GP10, 5.
43 Schmidt (2006), 516.
44 Bagshaw, 100, citing Ian Brownlie “To What Extent are the Traditional Categories of Lex Lata and Lex Ferenda still Viable?” in A. Cassese and J.H.H Weiler, Change and Stability in International Law-Making 66 (1988), 82.
violations. As mentioned earlier, nine of these sixteen countries include explicit reference to the Guiding Principles. Additionally, three peace agreements – those in Bangladesh, Burundi and Guatemala – include provisions for the protection of the internally displaced; while in Kosovo and Afghanistan there are also arrangements between parties and international partners for the protection of internally displaced persons. In Afghanistan, these arrangements include durable solution initiatives co-sponsored by the United Nations High Commissioner for Refugees and the Government of Afghanistan; and in Kosovo, various UN organizations and the OSCE are all actively engaged with both Kosovar and Serbian officials to assist and monitor the return and resettlement of internally displaced persons. These programmes are not required by or inscribed in international law, but do contribute to building relevant State practice in regards to the use of the Guiding Principles and the protection and assistance of internally displaced persons.

Regionally, we have seen the OAS, the OSCE, the Council for Europe, the East African Intergovernmental Authority on Development (IGAD), and the Economic Community of West Africa (ECOWAS) all acknowledge and support the use of the

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45 IDMC (2010), 24. These countries include (in alphabetical order) Angola, Azerbaijan, Bosnia and Herzegovina, Colombia, Croatia, Cyprus, Georgia, Iraq, Liberia, Nepal, Peru, Russian Federation, Serbia, Sudan, Turkey, and Uganda.
46 IDMC (2010), 76.
47 The United Nations Development Programme, United Nations High Commissioner for Refugees, and the United Nations Interim Administration Mission in Kosovo have all undertaken projects and partnerships with local authorities in finding durable solutions for internally displaced persons.
Guiding Principles.\textsuperscript{48} More substantially, however, in 2006, the Member States of the ICGLR adopted the Protocol on the Protection and Assistance to Internally Displaced Persons as part of the Pact on Security, Stability and Development in the Great Lakes Region. This Protocol “is the first instrument incorporating the Guiding Principles’ notion of internally displaced persons into binding international law (Article 1, paragraph 4) and explicitly extending it to those displaced ‘as a result of or in order to avoid the effects of large scale development projects’ (Article 1, paragraph 5).”\textsuperscript{49} This Protocol received the full number of ratifications in June 2008,\textsuperscript{50} and thus now legally requires the eleven Member States to domestically codify the Guiding Principles into law, as laid out in Article 2, paragraph 3.\textsuperscript{51} Furthermore, the Protocol “also establishes a sub-regional supervisory mechanism for monitoring the protection of internally displaced persons”, and thus also monitors compliance with the agreement.\textsuperscript{52}

On a broader regional level, the AU adopted the Kampala Convention in October 2009 at the AU Special Summit on Refugees, Returnees and IDPs. It is already signed by twenty-six of the fifty-three Member States,\textsuperscript{53} and will come into

\begin{footnotesize}
\begin{enumerate}
\item[48] Johnstone (2009), 113.
\item[52] Abebe (2009), 166.
\item[53] Signatory States include Benin, Burundi, Central African Republic, Comoros, Côte d’Ivoire, Congo, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Liberia, Mali, Namibia, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sierra Leone, Somalia, Sao Tome & Principe, Togo, Uganda.
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effect once it has been ratified by fifteen Member States.\textsuperscript{54} The Kampala Convention is “widely recognized as a historic achievement”.\textsuperscript{55} Like the Guiding Principles, the Kampala Convention’s “content draws on the existing and applicable branches of human rights and international humanitarian law, and synthesizes these whilst seeking to incorporate directly, where relevant, aspects of the Guiding Principles”.\textsuperscript{56} As it is broadly based on the Guiding Principles, it requires that states protect and assist internally displaced persons before, during and after displacement. Additionally, the Kampala Convention also “highlights the duties and responsibilities of international humanitarian organizations and civil society, and imposes obligations on state parties to grant access to IDPs in need of protection and assistance and to prohibit non-state armed groups from obstructing such access or violating the rights of IDPs.”\textsuperscript{57} The Kampala Convention exemplifies the process through which soft law can be hardened. This momentous document, however, also demonstrates the central role that regional organizations can play in contributing to the creation of international law.

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\textsuperscript{54} Orchard (2010), 296. Currently (as of March 26, 2010), only Uganda has ratified the Convention.

\textsuperscript{55} IDMC (2010), 30.


\textsuperscript{57} IDMC (2010), 30.
The Creation of Customary International Law

Thus far, we have seen the difference between soft and hard law, and how the first may solidify into the second. I will now examine the potential for regional treaty law, such as the Kampala Convention and the Great Lakes Protocol, to impact the creation of globally binding international law. Firstly, it is possible that with greater use and understanding, and the consensus-building made possible through the soft law stage, that a global UN treaty on the protection and assistance of internally displaced persons would come to be. To date, however, there is little evidence that such an initiative is formulating within the UN. The second possibility then, is for the Guiding Principles to become binding international law through custom. Article 38 of the Statute of the International Court of Justice cites that there are four sources of international law – treaties; custom, which is described as “evidence of a general practice accepted as law”; general principles and the writings of the most highly qualified publicists\(^58\) – though treaties and custom are generally considered to be the most important. Thirdly, it is additionally possible that the norms of the Guiding Principles become regional customary law; as in, the custom may only be binding in the region of Africa, and not on the entire international community. This alternative will be further explored below.

Customary international law has two components: state practice and *opinio juris*. The first constitutes the objective or material dimension of observable state

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activity regarding the application of a certain norm. State practice can be also found in published materials, including “from newspaper reports of actions taken by states, and from statements made by government spokes[persons] to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state's laws and judicial decisions.”

There is, however, also an existing scholarly debate as to whether statements can count as state practice in the development, maintenance or change of a customary rule. Byers discusses this debate in *Custom, Power and the Power of Rules*, where he cites D'Amato and Wolfke as believing that for states to demonstrate any support for or opposition to “the development, maintenance or change of a customary rule [they] must engage in some sort of act, and that statement or claims alone do not suffice.”

Other authors have taken the contrary position, and advance that “any instance of State behaviour – including acts, omissions, statements, treaty ratifications, negotiating positions (as reflected in *travaux préparatoires*) and votes for or against resolutions and declarations – may constitute state practice for the purposes of customary international law.” Sloan takes a more blunt position when stating that “[u]nless one takes the extreme, and untenable, position that only physical acts constitute practice, General Assembly resolutions which are collective

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61 Byers (1999), 134.
pronouncements of states must be considered a part of state practice.” It may be noted, as well, that the UN International Law Commission also treats statements as state practice in their work. While this thesis acknowledges that this issue is not fully settled in the literature, it adheres, for the sake of discussion, more closely to the second assumption, proceeding on the notion that indications of state behaviour complement tangible state acts in defining state practice.

Furthermore, it is believed that “states are only bound by those rules to which they have consented.” Consent, however, does not need to be given actively; in fact, it rarely is in cases of customary international law. Rather, consent to the processes of customary international law is generally provided through acquiescence, which is described as “silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.” Harris adds, however, that the Anglo-Norwegian Fisheries case demonstrates that “acquiescence cannot be established unless a state has actual or constructive knowledge of the claim being made.” International organizations, in this regard, facilitate the flow of information and provide fora for states to remain engaged with norm-creation procedures. With little reason to be unaware of the claims being made internationally, “silence may denote either tacit agreement or a simple lack of

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63 Byers (1999), 7.
64 Byers (1999), 142.
66 Harris (2004), 40.
interest in the issue,” 67 and this passive state practice may “produce a binding effect creating legal obligations for the silent state”. 68 If a state wishes to “avoid being bound by a newly developed rule”, 69 it must “both violate a norm in practice and reject it as a matter of opinio juris to qualify as a persistent objector to an emergent customary norm.” 70 Additionally, there are no set requirements as to the length of time state practice must be enacted before the practice constitutes customary law. Rather, “it must be followed long enough to show that the other requirements of custom are met.” 71

The second element of customary international law is opinio juris, 72 which is considered to be the more subjective or psychological element of custom, as it comprises the legal motivations for complying with a norm. It is best described by Georges Scelle, who states that opinio juris “signifie d’abord que les actes générateurs doivent avoir été accomplis avec le sentiment, ou tout au moins l’instinct, d’obéir à une nécessité sociale.” 73 States must believe that they are legally obligated to comply with a norm. This sense of legal obligation presents what Byers calls a “chronological paradox” as states must believe that their compliance with a norm is

68 Malanczuk (1997), 43.
69 Byers (1999), 103.
71 Harris (2004), 37.
72 Also called opinio juris sive necessitatis and spelled opinio iuris.
73 Skordas (2003), 320-321, citing Georges Scelle (1933), 434. My translation reads: opinio juris “firstly signifies that the actions that generate customary international law have to be accomplished with the feeling, or at the very least the instinct, of obeying a social necessity.”
already required by law; they are therefore obeying – and believing in the existence of – a law that may not yet exist as such. As state practice often takes primacy over opinio juris in the evaluation of the development, maintenance or change of customary rules, certain writers contend that the second requirement of custom is often limited to the realm of legal theory. A positivist conception of law requires opinio juris as this theory advances “that laws are to be understood as social rules, valid because they are enacted by authority or derive logically from existing decisions.” Opinio juris, then, is just as Scelle defines it: an enactment of social necessity. Thus while theory requires the social obligation to follow a rule, practice shows that it is nearly impossible to prove this obligation. Judge Tanaka clearly illustrates this difficulty in his dissenting opinion on the North Sea Continental Shelf Cases (1969). He states,

“Next, so far as ... opinio juris sive necessitatis is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to international motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of opinio juris from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement.”

It is thus the combination of theory and practice that leads us to the chronological paradox presented by opinio juris.

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74 Byers (1999), 131.
Malanczuk offers, however, that this paradox may be superseded by another consideration: that “what matters is not what states believe, but what they say.”

The purpose then of maintaining *opinio juris*, as Byers further argues, is that it serves to distinguish between legally relevant and irrelevant behaviour, and in a related manner, it controls for “abuse of power by states within the process of customary international law” by requiring that legally relevant behaviour be supported by a preceding sense of legal obligation. *Opinio juris* is consequently useful for a political analysis of the creation of customary international law, and as we shall see, will help to determine if non-African and traditionally more powerful states will agree to come under the developing norm of protection and assistance of internally displaced persons.

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78 Malanczuk (1997), 45.
79 Byers (1999), 212.
Regional Organizations and the Creation of Customary International Law

Byers has written that "the role of international organizations in the customary process would seem in most respects to be a collective role played by their member states." Building upon this statement, this thesis seeks to understand if the practice of international organizations, as their own legal entities and central norm instigators, cannot also contribute to the development, maintenance or change of customary rules, in a parallel manner to state practice. Johnstone argues that international organizations are not just the sum of their membership: “[i]nternational organizations are not mere instruments of states in [the international law] process. International officials act autonomously, one step removed from state consent. They often initiate the activity and interpret their mandates creatively in carrying them out.” This creativity of international organizations will come from their constructed identity, and how this identity leads them to pursue their interests, such as the “promotion of peace, security and stability” for the AU.

In discussing regional organizations’ potential role in international law-making, it is important to examine the concept of international legal personality, as this concept delineates what rights and responsibilities an actor may have in international law. Byers explains that “[w]hen used in the legal sense, the term

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80 Byers (1999), 78.
81 Johnstone (2009), 118.
‘personality’ usually refers to the *capacity* of an individual or entity to hold rights and be subject to obligations within a particular legal system.”

States are undoubtedly the actors with the fullest, most incontestable standing as international legal persons, supported by the fact they are the main actors in international law. However, according to Brownlie, “[t]he most viable type of organization will have a number of legal powers similar to those normally associated with statehood.”

This would suggest that international organizations, like the AU, would have the ability to contribute to the creation of international law and the responsibility to respect it.

Paul Szasz is clear on this issue:

“Activities by international entities may, just like the activities of states, create international law if carried out – as is usual for organizations created by international law and subject to the scrutiny of many states – in a regular manner and in the conviction that even if not responding to positive requirements of international law they are at least authorized by and in conformity with such law.”

Consequently, if international organizations act out of a sense of legal obligation, and establish practice in this regard, their activity is conceivably able to contribute to the development, maintenance and change of customary international law.

Their practice complements overall state practice, which can contribute to the development of customary international law that is binding upon even states and international organizations that are not members of the initiating international organization.

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83 Byers (1999), 75.
84 Brownlie (2008), 679.
Additionally, as independent actors, regional organizations are able to undertake a number of activities that complement state practice. They “construct the social world in which cooperation and choice take place. They help define the interests that states and other actors come to hold.”\(^87\) As such, regional organizations are able to exercise an authority that “gives them a sphere of autonomy and a resource they can use to shape the behavio[u]r of others in both direct and indirect ways.”\(^88\) The ICGLR’s authority is evident in the influence it exerted to have Sudan join the Protocol. Constructivists argue that “to the degree that states and state elites fashion a political self or identity in relation to the international community, the concept of socialization suggests that the cumulative effect of many countries in a region adopting new norms ‘may be analogous to ‘peer pressure’ among countries.’ Three possible motivations for responding to such ‘peer pressure’ are legitimation, conformity, and esteem.”\(^89\) Sudan was initially opposed to adopting the Guiding Principles when they were first introduced, even in soft law, but has now ratified the Great Lakes Protocol.\(^90\) The Great Lakes process, in facilitating collective action, created increased pressure for Sudan to join and conform to regional behaviour, and now this state is legally bound to provide protection and assistance to its internally displaced population. This is an important achievement for a regional organization considering that Sudan is the country most affected by internal displacement.\(^91\) Furthermore, a regional organization is able to monitor and enforce its hard law initiatives both through the peer pressure of its normative community, and as an independent actor through


\(^{88}\) Barnett and Finnemore (2005), 163.

\(^{89}\) Finnemore and Sikkink (1998), 903.

\(^{90}\) IDMC (2010), 24.

\(^{91}\) IDMC (2010), 29.
various measures and sanctions outlined within the organization’s charter. Through this creation and compliance, a regional organization, such as the AU, is able to nurture both state practice and *opinio juris* among the states in its mandate, and thus serve as a legally relevant example to other regional organizations, and contribute to the creation of customary international law.

It must be noted, however, that whether or not the practice of AU Member States is able to create generally applicable customary international law, the Kampala Convention and the Great Lakes Protocol have laid the foundation for a regional customary law to be established. The ICJ recognized the possibility for regional or local custom most explicitly in the *Asylum Case* (1950). The Court’s ruling read that “although Art.38(1)(b) refers to ‘a general’ practice, it allows for local (or regional) customs amongst a group of states or just two states in their relations *inter se* as well as for general customs binding upon the international community as a whole.”\(^92\) This possibility means that the established legal frameworks for the protection and assistance of internally displaced persons may become binding upon African states that have not yet ratified the treaties, without necessarily being binding on non-African states. While the success of norm development in Africa is to be applauded, this thesis seeks to understand if the norm development stemming from this region can also grow beyond the continent’s borders. In other words, since the relevant African states have already ratified the protocol, the issue of regional customary law is less important that that of generally applicable customary international law. To understand however, the dynamics

\(^{92}\) Harris (2004), 22.
involved in encouraging norm development beyond one's borders, we must look to more than legal theory and turn to the instruction of international relations theory.
International Law and International Relations

International law and international relations are inseparable fields of study: one informs the other. In discussing the emergence of new and binding norms, we must also investigate the politics behind these developments. We will analyze briefly here three international relations theories’ considerations of international law: realism, rationalism and constructivism. These theories will help to determine the potential for the creation of customary international law on the protection and assistance of internally displaced persons.

From a realist point of view, states are rational unitary actors in an anarchic international system. They act in their own self-interest, and “are seen as engaged in a continuous struggle with each other to maximize their relative material power.”93 Realists believe that international law mirrors the international distribution of power, and consequently perceive it as epiphenomenal.94 Kenneth Abbott and Duncan Snidal argue that this dismissal of international law stems from the fact that “powerful states have greater control over international outcomes, are less in need of protection, and face higher sovereignty costs. They have less need for legalization and more reason to resist it, even though their adherence is crucial to its success.”95 Furthermore, powerful nations are perceived to dominate international relations, and thus the content of international law, as law is seen as “fundamentally

95 Abbott and Snidal (2000), 448.
political”.

As the content of international law is dependent on the will of powerful states, realists explain compliance with international law as a “coincidence between international law [...] and the self-interest of nations.”

In other words, according to realist theory, new international law emerges when it fits the interests and pursuits of powerful nations.

Customary international law is not considered to have an impact on state behaviour in the realist school of thought. Jack Goldsmith and Eric Posner, leading realist writers, take issue with customary international law; they say that “[i]t lacks a centralized lawmaker, a centralized executive enforcer, and a centralized authoritative decisionmaker.”

Rather than rejecting the concept of customary international law altogether, however, Goldsmith and Posner advance their own paradigm that “rejects the usual explanations of [customary international law] based on opinio juris legality, morality, and related concepts.”

Rather, their theory views the emergence of and compliance with customary international law as part of “one of four different behavioral logics”: coincidence of interest, coercion by a powerful state, true cooperation (as seen through the prisoner’s dilemma), and the resolution of coordination problems.

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96 Reus-Smit (2004), 16.
100 Goldsmith and Posner (1999), 1114-1115.
There are a number of issues with Goldsmith and Posner’s theory, and with the realist approach to international law in general. This author believes that it is not mere coincidence that a significant body of law – customary international law – is consistently reproduced and upheld. If this is so, why is customary international law growing, and more broadly, why is so much time, energy and money spent on the creation of international law? While the motivation of state-interest cannot be dismissed, realism fails to explain “how law comes to constrain strong states”. Being constrained is most assuredly not in a state’s interest, and when this occurs to strong states, it is presumably not because they are being coerced by other states, but rather constrained by the power of international law. Reus-Smit further critiques realism in stating that “it has no account of how weak states and other actors use the law to shape outcomes.” As that is precisely the concern of this thesis, realism is considered to have insufficient explanatory power for the task at hand.

Rationalism – an offshoot of neoliberal institutionalism – has a similar focus on state self-interest, manifested “primarily as reputation.” Rationalists, however, “reimagine politics as a form of utility-maximising strategic action, with states portrayed as rational egoists, seeking the most effective and efficient means

102 Guzman (2002), 1837.
103 Reus-Smit (2004), 17.
104 Reus-Smit (2004), 17.
available to realize their individual and collective interests.”

Rather than disparage international law, as do realists, rationalists see it as “a functional, regulatory institution of international society.” The strength of international law operates on a spectrum, however, with customary international law as “perhaps the weakest form of international law.” Andrew Guzman, a prominent rationalist, advances a reputational conception of international law compliance. He believes that customary international law “consists of legal norms whose violation will harm a country’s reputation as a law-abiding state.” States rationally choose their course of action in international law with their reputation in mind: “by developing and preserving a good reputation, states are able to extract greater concessions for future promises.”

This theory, as part of rational-choice theory applied to international law, has been critiqued for portraying “states as the only actors in international affairs.” As this thesis has demonstrated, however, non-state actors have played an important role in bringing the Guiding Principles to where they are today, including the UN, the RSG-IDP, legal experts who compiled the document, non-governmental organizations (NGOs) through advocacy and dissemination, and regional organizations. These other actors have played such a essential role in the development of a normative framework for the protection and assistance of

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108 Guzman (200), 1878.
109 Guzman (2002), 1876.
110 Guzman (2002), 1886.
111 Byers (2008), 618.
internally displaced persons, that state-centric rationalism is not an appropriate lens through which to examine the Guiding Principles’ further progress.

Constructivism is a more social theory than realism or rationalism. For constructivists, “to the extent that structures shape the behaviour of states and other actors, normative and ideational structures are as important as material structures.”\textsuperscript{112} Martha Finnemore and Kathryn Sikkink add that “the international structure is determined by the international distribution of ideas. Shared ideas, expectations, and beliefs about appropriate behaviour are what give the world structure, order and stability.”\textsuperscript{113} While they are strong proponents of ideational considerations, constructivists also acknowledge that states act in their own interest and with concern for power (constituting material structures), similarly to realists and rationalists. Constructivists differ in these considerations, however, through “the sources that they identify for state interests, and the content of those interests.”\textsuperscript{114} Indeed it is “intersubjective beliefs [that] shape actors’ identities and in turn their interests.”\textsuperscript{115} Constructivism is a relational theory: identities are constructed and learned through social interaction; “actors are in a constant dialogue with the prevailing norms of legitimate agency that constitute role

\textsuperscript{112} Reus-Smit (2004), 21.  
\textsuperscript{115} Reus-Smit (2004), 21.
identities to define their senses of self.”

In relation to conforming with norms and international law, March and Olsen advance a “logic of appropriateness,’ in which actors internalize roles and rules as scripts to which they conform, not for instrumental reasons – to get what they want [as in other international relations theories] – but because they understand the behavior to be good, desirable and appropriate.” The objective of appropriate behaviour leads us to understand that international norms are also “often motivated by moral or social concerns.”

Because constructivism is “better suited to explaining morally infused developments”, this theory is preferred for examining the advancement of the Guiding Principles. The protection and assistance of internally displaced persons is a profoundly social and moral objective. Acting to undertake these objectives may thus be perceived as seeking to behave in a “good, desirable and appropriate” manner, and to adhere to the socially accepted international identity of states. Intersubjective beliefs in the importance and critical necessity of a normative framework for the protection and assistance of these vulnerable persons come to inform the identity of a state with these concerns, and becomes part of their state interest to construct and adhere to such norms as the Guiding Principles. Additionally, constructivists focus on non-state and intergovernmental actors in addition to states. This broader perspective allows us to incorporate

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119 Byers (2008), 620.
120 Abbott and Snidal (2000), 425.
considerations of the motivations and behaviours of institutions like the RSG-IDP, the UN, the AU and the ICGLR. These actors also have socially constructed identities that lead them to pursue specific interests, such as encouraging and facilitating relevant state practice, and nurturing the emergence of *opinio juris*. Finally, we note that constructivism pairs naturally with the study of international law, believing that “[i]nternational law is by its very nature situated within the practices of international relations since it describes and prescribes norms, rules, and procedures that are crystallising or emerging from social practice.”\(^{121}\) The constructivist perspective will be applied in the examination of the various power considerations in the potential development of the protection and assistance of internally displaced persons becoming generally applicable customary international law.

Power and Customary International Law

With the Kampala Convention procedurally prepared to contribute to the creation of customary international law through legal theory, we must look further into the power dynamics involved in this creation process. “Power is intrinsic to both elements of customary international law” – state practice and opinio juris – and is therefore undeniably important to the assessment of the development, maintenance or change of customary international law. Power, however is manifest in many forms. This section will examine the concept of “legally relevant” state practice; Finnemore and Sikkink’s norm “life cycle” theory; generalized expressions of support for the normative development of the protection and assistance of internally displaced persons; legal and political costs of action; and the inherent challenges to AU Member States being leaders in global norm development.

We can evaluate the potential of the Kampala Convention in applying the principle of relevant or specially affected state – and by analogy international organization – practice. The International Court of Justice’s (ICJ) approach to outlining the number and kind of states and their practice required for customary international law “demonstrates that a practice does not have to be followed by all states for it to be the basis of general custom and that the practice of states with a particular interest in the subject matter is the most relevant.”  

Traditionally,

122 Harris (2004), 37. This understanding is gleaned from the Legality of the Threat or Use of Nuclear Weapons case (United Nations), para. 96, where it was the practice of states possessing nuclear weapons that helped to determine the legality of the issue.
however, the interpretation of “states with a particular interest” often suggested that this was in reference to wealthy states, as they would have widespread political and economic interests likely to be affected by new legal developments. This essay questions, however, if relevant states can be states other than the most powerful. An initial reading of Lauterpacht would suggest that this is possible:

“...assuming here that we are confronted with the creation of new international law by custom, what matters is not so much the number of states participating in its creation and the length of the period within which that change is taking place, as the relative importance, in any particular sphere, of states inaugurating the change.”

We are indeed being “confronted with the creation of new international law by custom”, and African states are of primary importance in the sphere of internally displaced persons.

Africa, as a region, has forty percent of the world's internally displaced population. There are 11.6 million internally displaced persons in twenty-one countries on the continent. Sudan has the highest internally displaced population in the world, with 4.9 million people forced to flee from their homes. Also among the top six countries with the largest internally displaced populations is the Democratic Republic of Congo with 1.9 million people (one million of which were

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123 Harris (2004), 37, citing Lauterpacht (1950) 27, B.Y.I.L 376 at 394.
124 IDMC (2010), 29. The 21 African countries monitored by the IDMC include: Algeria, Niger, Nigeria, Chad, Central African Republic, Congo, Senegal, Liberia, Côte d'Ivoire, Togo, Angola, Democratic Republic of Congo, Burundi, Rwanda, Uganda, Kenya, Somalia, Ethiopia, Eritrea, Sudan, Zimbabwe. Other countries may have smaller scale displacement that is not monitored by the IDMC, like South Africa, for example, where people were forced to flee their habitual places of residence due to the xenophobic attacks that occurred in 2008.
125 IDMC (2010), 8.
newly displaced persons in 2009), and Somalia with 1.5 million people.\textsuperscript{127} By comparison, the Americas have 5 million internally displaced; South and South-East Asia have 4.3 million; the Middle East has 3.8 million; and, Europe and Central Asia have 2.4 million.\textsuperscript{128} We see clearly that if state practice by the most important states with respect to a particular issue is paramount for the creation of customary international law, then African state practice in regard to the protection and assistance of internally displaced persons is highly, or even the most, relevant. The Kampala Convention and the Great Lakes Protocol are two strong examples of both state and regional organization practice. We have seen above that regional organization practice, independent of, yet complementary to, state practice should also be able to contribute to the creation of customary international law. Consequently, the statistics above and the pursuant treaty responses would indicate that African regional initiatives for the protection and assistance of internally displaced persons could, in theory, create a comparable behavioural trend and sense of normative obligation in other regions, especially those affected by internal displacement.

Finnemore and Sikkink, from a constructivist perspective, have developed a theory called “the Norm ‘Life Cycle’” that lays out the stages through which norms pass to be adopted and normalized in international society.\textsuperscript{129} The first stage, “norm

\textsuperscript{127} IDMC (2010), 13.
\textsuperscript{128} IDMC (2010), 13.
emergence”, is led by norm entrepreneurs that “convince a critical mass of states (norm leaders) to embrace a new norm.”\textsuperscript{130} In the case of the protection and assistance of internally displaced persons, the norm entrepreneurs may be considered to be the RSG-IDP, NGOs, and the AU. Their work helped lead to the widespread support of the Guiding Principles as demonstrated notably in the UNGA in 2005, and in the progress of African countries working toward legally binding themselves to protecting and assisting internally displaced persons. The goal of the first stage is for the promoted norm to reach a tipping point, upon which time the norm “cascades”, which is the second stage. Cascading means that “[m]ore countries begin to adopt new norms more rapidly even without domestic pressure for such change.”\textsuperscript{131} These new countries are socialized by the norm leaders, and comply with the new norm as a way of fulfilling their identity as members of international society. We see that “state identity fundamentally shapes state behavio[u]r, and that state identity is, in turn, shaped by the cultural-institutional context within which states act.”\textsuperscript{132} As an increasing number of states comply with the new norm, we reach the third stage, internalization, at which point the norm becomes “taken for granted” and complied with almost automatically. If this is stage is reached in the

\textsuperscript{130} Finnemore and Sikkink (1998), 895.
\textsuperscript{131} Finnemore and Sikkink (1998), 902.
\textsuperscript{132} Finnemore and Sikkink (1998), 902.
case of the internally displaced persons, adherence to the Guiding Principles would become a highly normalized activity.

To date, a normative framework for the protection and assistance of internally displaced persons can arguably be found to have progressed within the first stage of the norm life cycle. It is difficult to determine whether a sufficient number of critical states has been amassed to bring the Guiding Principles to a tipping point, "because states are not equal when it comes to normative weight".\textsuperscript{133} As argued above, the most “critical” states for the creation of customary international law are the states with the greatest relative importance for the issue – in this case, many African states.

In addition to the states with existing or pending legal regimes for the protection and assistance of internally displaced persons, there is evidence of generalized support for the creation of a legally binding a normative framework. This support also demonstrates a widening socialization to the importance and interest in pursuing this normative development. Conventionally important and influential states have already demonstrated support for the Guiding Principles through the UNGA. For example, when the UNCHR adopted the Guiding Principles in 1998, the resolution to do so was sponsored by fifty-five countries – some with histories of internal displacement, and others not. There were countries from every continent supporting the resolution; of note is the support from Canada, the Scandinavian countries, France, Germany, the Russian Federation and the United

\textsuperscript{133} Finnemore and Sikkink (1998), 901.
Additional statements of support have been made by Switzerland, Austria, and Belgium on “behalf of the European Member States and [its] associated countries”. This state practice through statements comes in addition to the aforementioned endorsement of the Guiding Principles demonstrated by 190 countries at the UN World Summit in 2005, and the adoption of a number of UNGA and UNCHR resolutions since then. This degree of activity, while not specifically related to the Kampala Convention, lends support to the foundations of that Convention – the Guiding Principles, and to internal displacement issues in general. This support, furthermore, is also evidence of states being socialized to the importance and value of a normative framework for the protection and assistance of internally displaced persons.

Moreover, by expressing support for the Guiding Principles, states are expressing support for the rules pulled from existing treaties, and doing so in a context that does extend beyond those treaties. This support can help constitute the state practice and opinio juris required to establish a generally applicable rule of customary international law for the protection and assistance of internally displaced persons. Consequently, we can see this state practice as gradually contributing to the normalization of the rights and responsibilities laid out in the Guiding Principles. This activity, and lack of objection to the adoption of the Kampala Convention, would further suggest either a lack of interest or a tacit acceptance of the treaty, and the progressive implications this may have for customary international law.

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134 Schmidt (2004), 503.
135 Schmidt (2004), 503-504.
In some analyses, state practice is generally taken in consideration of the costs – legal, political and economic – of that action. Byers explains that the greater the cost of a certain state practice, the greater weight that activity would have in contributing to the development, maintenance or change of customary international law. Because a treaty has legally binding consequences for its participants, while resolutions and declarations do not, treaties may contribute more substantially to the customary international law process.\(^{136}\) Considering this, the practice of the AU as the initiating body and of its Member States in adopting the Convention has substantially contributed to the development of an international protection and assistance regime for internally displaced persons.\(^{137}\) The international community, as a whole, has contributed to a lesser degree, as the costs of supporting soft law have been less substantial than pursuing hard law.\(^{138}\) It should also be recognized that the costs of adopting the Guiding Principles are more substantial for states with larger internally displaced populations than for states without internal displacement.

Building on this existing level of support, costs of further, more substantial, adoption of the Guiding Principles may be minimal for non-African countries including a number of developed and wealthy countries. Their important state


\(^{137}\) Malanczuk adds that “If the treaty claims to be declaratory of customary law, or is intended to codify customary law, it can be quoted as evidence of customary law even against a state which is not a party to the treaty. This is so even if the treaty has not received enough ratifications to come into force.” Malanczuk (1997), 40.

\(^{138}\) Byers explains that in instances of declarations and resolutions, cost “may be associated with political rather than legal commitment such that failure to fulfil such a commitment is somehow detrimental to a participating State’s future international relations, for example, in affecting its credibility.” Byers (1999), 157.
practice would strengthen the custom of the Guiding Principles, thus creating a greater pull on other states to comply. As mentioned in the definition of an internally displaced person, displacement can be caused by conflict, human rights violations, human-made and natural disasters and large-scale development projects. Considering this definition, countries like Canada, the US and European Union Member States presumably face little risk of incurring sizable internally displaced populations. Hurricane Katrina, however, which struck the US Gulf Coast in August 2005, is a considerable exception. Over one million people were forced to flee from their homes, and tens of thousands currently remain displaced.\(^{139}\) The US Government’s response to the disaster did not follow the Guiding Principles before, during or after displacement, despite the fact that President George W. Bush had called for “wider international recognition” of the Principles, calling them “a useful framework for dealing with internal displacement.”\(^{140}\) One of the challenges to adopting legislation on internal displacement is that addressing issues of internal displacement requires a certain degree of self-reflection that is not present in the adoption of the Refugee Convention, for example. Accepting refugees following the definition outlined in the 1951 Convention\(^{141}\) is an acknowledgement of another country’s problems. Agreeing to protect and assist the internally displaced within


\(^{140}\) Kromm and Sturgis (2008), 5.

\(^{141}\) See footnote 7 for the Convention definition of a refugee.
one’s own country is to acknowledge that one’s own country may have challenges relating to the role and responsibility of government. In the case of Hurricane Katrina, for example, following the Guiding Principles would have obliged the US Government to prepare better disaster prevention measures; would have better guaranteed the rights of the displaced, notably vulnerable populations, during displacement; would have better regulated humanitarian assistance; and improved the process of return, resettlement and reintegration, as each of these issues is covered by a different section within the Guiding Principles. In terms of legal and political costs of incorporating a new international norm, the US Government would arguably benefit from the domestic implementation of the Guiding Principles as they provide clear direction for action; and its citizens would benefit from the rights enshrined therein.

Other wealthy and developed countries stand to gain from adopting the Guiding Principles. The Guiding Principles are both a preventative and responsive instrument: they require governments to pre-empt displacement by planning and preparing for its potential causes.\(^\text{142}\) If displacement does occur, the Guiding Principles provide a roadmap of rights and responsibilities to consider, thus facilitating a government’s response to the crisis. It is consequently in the material interest of even wealthy states to adopt the Guiding Principles, at least as a planning strategy. Ideationally, the Guiding Principles reinforce the identities of states that

\(^{142}\) This would arguably even include taking measures to prevent climate change migration within one’s own country, which may add economic costs for a government that has adopted the Guiding Principles, but would also demonstrate important political leadership and responsibility that would potentially off-set the economic costs, depending on one’s perspective.
prioritize respect for human rights, regulate to prevent human-made disasters, prepare for natural disasters, and demonstrate concern for minority populations and vulnerable persons. This relation to the values and identities claimed by many Western states, among others, further suggests that it is in their interest to pursue a generally applicable rule for the protection and assistance of internally displaced persons.

Developed-state practice combined with the initiative of the AU and its Member States’ practice would provide leadership, initiative and a growing sense of obligation for states and regional organizations in Latin America and Asia, for example, to also adopt the Guiding Principles as binding law. While the Kampala Convention and the Great Lakes Protocol broke the ground for region-wide adoption of legally binding measures for the protection and assistance of internally displaced persons, an African initiative alone, without the legal support of developed nations, would face three important and related challenges in creating new customary international law. Firstly, while it is a strong move to be able to lead the internal displacement protection and assistance initiative with the creation of a Convention and related relevant state practice, Africa’s position as the region most affected by internal displacement is not a desirable title to hold. Having significant internally displaced populations suggests that something is going wrong with the given country – that there has been a natural disaster that the government has insufficiently or neglectfully responded to, thus making certain areas inhospitable; that a given community has been uprooted for industrial projects to replace their farming land; that warfare or the threat of conflict has forced people to flee their
homes with nothing but what they are wearing. Can being the region host to such a negative situation positively incite other regions to adopt measures similar to the Kampala Convention? Do African countries have the power to be the socializing agents of an emerging norm? On the one hand, it could, if SAARC, for example, were to acknowledge that they do not want to be faced with similar displacement challenges to Africa, and thus undertake to institute measures that would oblige them to prevent them and respond to those currently displaced. On the other hand, however, other regions may believe that their displacement situation is not as severe as Africa’s and thus, that they do not require such a Convention or parallel rule of customary international law. This second response follows on the necessity for self-reflection that responding (either preventatively or actively) to internal displacement requires. 143

Secondly, displacement often persists when governments are unable or unwilling to respond to it, thus leading to violations of the displaced’s human rights. Numerous African states are often ranked among the worst countries on most systematic evaluations of various political and economic conditions. For example, on the UN Development Program’s human development index (HDI) 144 report, of those countries listed with “Low Human Development” (numbers 159-182, the lowest twenty-four countries) only two countries (Timor Leste and Afghanistan) are

143 On self-reflection, it is interesting to note that among the first twenty-six countries to sign the AU Kampala Convention, twelve are considered to have important internally displaced populations, while the fourteen others currently have none reported.

144 A country’s HDI is a composite measurement of life expectancy, education, and standard of living (purchasing power parity and income).
not African states.\textsuperscript{145} Also, of the lowest twenty-four ranked by Transparency International’s Corruption Perception Index, eleven are African.\textsuperscript{146} Similarly, among the twenty-four lowest ranked countries for freedom of press, six are African countries.\textsuperscript{147} These statistics paint a grim picture of development in Africa, and one that begs the question: what countries would want to take lessons from Africa? Though being at the forefront of the globally important issue of internal displacement is an inherently positive advance, it is difficult to anticipate that other regions, with their own climate, development and conflict troubles, would rise above their prejudice of the challenges facing many African countries, and follow their lead. The value of this African initiative in responsibility and self-help may be blurred by low-rankings and negative media reports. Thirdly, it is difficult for other countries to take seriously the law-making efforts of AU, as a number of its Member States have poor records in fulfilling other international legal obligations. In addition to prejudice, the AU initiative is therefore also hampered by a lack of credibility, and norm-building leadership requires credibility. However, by overlooking an African initiative responding to a perceived “African problem”, other countries and regional organizations risk also overlooking the intrinsic value of the hardening of the soft law of the Guiding Principles through customary international law.

Related to credibility is also the potential for tensions to arise between state rhetoric and action that may hinder the development of law. If a country’s practice derogates from a ratified treaty, the treaty is not weakened; it remains international law. This has been demonstrated most clearly by the Convention on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984), for example, where over 180 countries have ratified the treaty, but a number of countries are known to have transgressed from the treaty’s provisions since ratification. Therefore, if a ratified member of the Great Lakes Protocol breaches the norms agreed to in that treaty, the treaty still stands. However, in analysing how state practice related to the Great Lakes Protocol can develop customary international law, the picture becomes less clear. In the Nicaragua (Merits) case (1986), the ICJ stated that it “does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.”

The creation of a customary rule can be sufficiently flexible and open that occasional breaches in conduct by a small number of states may not be fatal to the law making process. Furthermore, Harris adds that, in regards to the maintenance and development of custom, “it is sufficient that any departure from the practice is recognised as illegal.” If the violating state justifies or explains their contravention in terms of the recognized rule, “the significance of that attitude is to

150 Harris (2004), 41.
confirm rather than to weaken the rule.”\textsuperscript{151} This appeal to the rule strengthens its \textit{opinio juris} in regards to the creation of customary international law. The irony of the states creating internally displaced persons also being the states creating hard international law for their protection and assistance may therefore be addressed by the fact that occasional breaches do not always detract from the custom-creating process. Additionally, it is these same states that have recognized the need for a normative framework that would provide them the tools with which to respond to their internal displacement crises.

\textsuperscript{151} \textit{Nicaragua (Merits)} [1986], para. 186. Cited in Harris (2004), 897.
Conclusion

This thesis has outlined the theoretical processes through which soft law, such as the Guiding Principles in their original form, can become hard law, such as the Kampala Convention and the Great Lakes Protocol. Through state practice and *opinio juris* surrounding these hard legal developments, they can grow to be customary international law. The Kampala Convention has had an important impact on increasing legally relevant African state practice in regards to the protection and assistance of internally displaced persons. This impact is notable because it establishes legally relevant and influential regional and international organization practice, such that the Kampala Convention may have a tangible socializing effect on other regional organizations to also advance legally binding measures for their Member States. More consequentially, the Kampala Convention has elicited relevant legal practice from the most important states in terms of internal displacement. Following the theory of customary international law creation, the practices of states like Sudan and the Democratic Republic of Congo should have an important influence on globally generalized practice and *opinio juris*. This theoretical truth, however, creates a strange power-dynamic where historically weaker states may influence traditionally stronger ones. Though African states and the AU should be recognized for their initiative, the creation of a generalized sense among states globally that compliance is necessary would be facilitated if developed countries without seemingly immediate or foreseeable necessity for the Guiding Principles, but with a general interest in demonstrating replicable state responsibility, would
build upon their demonstrated interest in the Principles and actually adopt them as legally binding instruments within their own borders.

From a constructivist perspective, the Kampala Convention and Great Lakes Protocol processes have socialized African states toward adopting an identity that brings the states together in solidarity for a preparedness to take responsibility for a situation that leaves them internally weak and vulnerable to international scrutiny. Non-African states, in adopting similar initiatives based on the Guiding Principles would not only be making efforts to prevent situations of internal displacement within their own borders, but would also be joining in the solidarity of states interpreting sovereignty as a responsibility.
Works Cited


