**Double Standards in Forced Migration Law**

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1. **Introduction**

Internally Displaced Persons (IDPs) and refugees are similar in many ways: they have fled their homes often in the context of war and/or human rights violations; they may fear persecution; and they are unable or unwilling to return so long as the circumstances in connection with their flight persist. They are often separated from family members, experience discrimination in their new environments, and are particularly vulnerable to violence and exploitation. They often have the same needs such as shelter, education, documentation, food, and medical care. Both IDPs and refugees can live in protracted displacement for decades, even for their entire lifetimes. IDPs and refugees often live side by side, many IDPs go on to cross a border and become refugees, and many refugees eventually return to their own states and become IDPs. The very same person can be an IDP in the morning and a refugee by the evening, provided they crossed an international border in the meantime.[[1]](#footnote-1)

Yet, international law treats IDPs and refugees very differently. Refugees are granted legal status under the 1951 Refugee Convention and protection from the UN High Commissioner for Refugees,[[2]](#footnote-2) whereas IDPs have no global (as opposed to regional) binding treaty or international organization dedicated specifically for their protection. The responsibility for the protection of IDPs lies primarily with their government, which may be the entity that caused their displacement in the first place.

The differential treatment of IDPs and refugees in international law is primarily tied to the fact that IDPs remain within their states, whereas refugees have crossed an international border. This paper asks whether this justification holds. Is there a normative justification for the seemingly arbitrary distinction between internal displacement and cross-border displacement, and if so, what is it? If not, is there a practical need for the distinction?

This paper represents an important contribution to scholarship in many ways. IDPs are significantly under-studied in scholarship – especially compared to refugees – and there are very few studies that examine these two categories of individuals together. The main text in this area – my own *Internally Displaced Persons and International Refugee Law* – examines the relationship between IDP protection and refugee law but does not provide a detailed examination of the reasons why these two categories of forced migrants are treated differently by the law.[[3]](#footnote-3) Although there are some pieces from the 2000s examining why IDPs are treated differently from refugees,[[4]](#footnote-4) the issue has not been addressed in scholarship since then. These double standards merit a fresh analysis for four reasons: (1) most displaced persons in the world are IDPs: forced displacement figures are now the highest on record, with IDPs outnumbering refugees by 2:1;[[5]](#footnote-5) (2) many IDPs cannot leave their countries and claim asylum. For example, approximately 9 out of 10 people in Gaza are now estimated to be displaced - many multiple times – because of unlawful Israeli actions in the Gaza strip.[[6]](#footnote-6) The vast majority of IDPs in Gaza cannot leave their country to claim refugee status because of border closures. In other words, refugee protection is becoming more and more unobtainable to those who would qualify as refugees were they to cross a border, further underscoring the importance of protecting those displaced within their country’s borders; (3) the issue of differential treatment continues today, with the controversial exclusion of IDPs from the Global Compact of Refugees and Migrants;[[7]](#footnote-7) (4) although the case for treating IDPs a separate category of concern was the subject of debate particularly in early 2000s, the issue seems largely settled in international law and policy. It is now well-accepted that IDPs have specific needs that distinguish them sufficiently from the non-displaced population to merit specific attention, such as a need for shelter and protection from discrimination as a result of being displaced.[[8]](#footnote-8) Moreover, the scholarship on vulnerability and human rights has highlighted IDPs as a particular category meriting special attention. Given that IDPs are now widely accepted as meriting protection as a result of their displacement, and given their significant similarities to refugees, the question of why this differential treatment continues merits renewed attention.

The paper’s structure will be as follows. This introductory part has introduced the paper’s focus, contribution to literature, key arguments, and structure. Part 2 will explain the similarities between IDPs and refugees. Part 3 will identify four ways in which the law treats IDPs and refugees differently, the reasons behind this differential treatment, and whether this reasoning holds today. Part 4 will conclude by advancing the paper’s main argument: that even though the law treats IDPs and refugees very differently, that differential treatment is justified for two primary reasons: (1) IDPs remain within their states and are the primary responsibility of their own government whereas refugees are abroad and are the primary responsibility of their host state; (2) IDPs, as citizens of their own countries, do not need IDP-specific legal protection. Refugees, on the other hand, as foreigners in their host states, are in a special legal position meriting a refugee-specific legal regime. As such, the apparent double standards in forced migration law are logical and justified.

1. **Similarities between Internally Displaced Persons and Refugees**

The predominant current conceptualisation of IDP is found in the 1998 Guiding Principles on Internal Displacement. It describes IDPs as:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognised state border.[[9]](#footnote-9)

The legal definition of refugee is found in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (‘Refugee Convention’). It defines ‘refugee’ as any person who:

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]

Refugees and IDPs are similar in many ways. They are similar in the sense that their movement is involuntary and/or coerced and often both categories of persons may have fled their places of habitual residence for similar reasons. In fact, the very same person might have been an IDP and a refugee at different times of their life, because many IDPs go on to cross a border and qualify as refugees and many refugees become IDPs in their host countries.[[10]](#footnote-10) This is reflected by the fact that many countries (e.g. Syria, Afghanistan, South Sudan, Myanmar, and Somalia) have significant IDP populations and generate huge numbers of refugees.[[11]](#footnote-11)

In addition, both IDPs and refugees might have experienced violence or trauma which can have long-lasting effects. Both IDPs and refugees find themselves away from their homes, often in a place that is unfamiliar to them. Both IDPs and refugees often face a breakdown of social norms: they are often separated from family members, lose social networks and new tensions may arise within IDP or refugee families. Most of the world’s IDPs and refugees are in developing countries and live in urban areas. IDPs and refugees often also live in rural areas, sometimes in camps and sometimes in host communities. They can experience tension and/or discrimination in their new environment.

The global IDP and refugee population is made up of people of every age and gender and every form of diversity. IDPs and refugees often face the same practical problems such as lack of documentation (which may be necessary to enjoy certain rights or access services), adequate shelter, food, water, sanitation, and healthcare. IDPs and refugees are often also impoverished. They may have fled in a hurry, bringing very little with them. They may have lost their property back home and have also lost their livelihood. Even when their assets remain, they often cannot recover them. Because of poverty, exacerbated by displacement, both IDPs and refugees may be more vulnerable to exploitation and gender-based violence, and they often have inadequate access to justice. Being an IDP or refugee also compounds existing vulnerabilities, such as for people with disabilities, elderly people, and children It can also exacerbate pre-existing risks of violence, discrimination, or marginalization. Often displacement can last years, decades, or a lifetime, and imagining a future, planning one’s life trajectory, and acting in the present become difficult.[[12]](#footnote-12) Both IDPs and refugees face significant uncertainty about the future and are often unsure about when their situation of displacement will come to an end, if at all.

There is also a close nexus between internal displacement and refugee flows. Internal displacement often has spillover effects, resulting in IDPs leaving their state and claiming asylum elsewhere. Refugees might also return to their own countries and become IDPs. Often, refugees flee to countries where there are large numbers of IDPs and may live side by side with them.[[13]](#footnote-13) The global refugee problem and IDP problem therefore cannot be considered separate – rather, they are intertwined and cannot be effectively addressed without a holistic approach that considers both categories of forced migrant and the relationship between them.

1. **Double Standards: are they Justified?**

Even though there are many practical similarities between IDPs and refugees, the law treats them very differently. Each of the following sub-sections will address one way in which the law treats IDPs differently to refugees, the reason behind this differential treatment, and whether this reasoning holds today.

*3.1 Refugee Convention v Guiding Principles on Internal Displacement*

As aforementioned refugees are protected by the 1951 Refugee Convention (and its regional counterparts),[[14]](#footnote-14) which defines who is a refugee and provides them with rights. Arguably, the most important right is protection against *refoulement*: individuals cannot be expelled or retuned to places if their ‘life or freedom would be threatened’ on account of one of the grounds in Article 1A of the Refugee Convention.[[15]](#footnote-15) This guarantee is not absolute, and states need not apply it for persons ‘whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’ The prohibition of refoulment is particularly relevant in today’s world, where many refugee-receiving states are employing increasingly creative and legally questionable measures to repel and remove asylum-seekers and refugees from their territories .

Most of the other articles in the 1951 Refugee Convention set out the standard of protection owed to refugees. This concept of protection entails a duty of non-discrimination vis a vis citizens or other residents of the asylum country and refugees regarding a list of rights.[[16]](#footnote-16) These include general provisions, administrative measures, rights relating to juridical status, and rights relating to gainful employment. Refugee status also brings a person within the protection mandate of the UN Refugee Agency, the United Nations High Commissioner for Refugees.[[17]](#footnote-17)

The globally recognized standard for IDP protection is the Guiding Principles on Internal Displacement. Unlike the 1951 Refugee Convention, the Guiding Principles are not a treaty and were drafted by experts, rather than states. Rather than creating ‘new’ law, the Guiding Principles elucidate what existing binding guarantees in human rights and humanitarian law mean in the IDP context and draw analogies from international refugee law. For example, freedom of movement as per Article 12 of the ICCPR implies a right not to be arbitrarily displaced which is set out in Guiding Principle 6.[[18]](#footnote-18) The Guiding Principles are divided into five parts: Part 1 (General Principles) sets out overarching principles, such as the principle of sovereignty as responsibility. Which provides that the state has primary responsibility for the protection of IDPs in its territory. Part 2 (Principles Relating to Protection from Displacement) sets out the prohibition of arbitrary displacement. It also identifies, inter alia, the duties on authorities before carrying out displacement, and groups that have special protection in respect of displacement. Part 3 (Principles Relating to Protection During Displacement) sets out the rights that ought to be protected during the displacement phase such as the right to liberty and security, the right to education, and the right to an adequate standard of living. Part 4 (Principles Relating to Humanitarian Assistance) includes principles such as the importance of humanity and impartiality when providing humanitarian assistance, the special protections of persons delivering humanitarian assistance, and the obligation to consider offers of humanitarian aid in good faith. Finally, Part 5 (Principles Relating to Return, Resettlement and Reintegration) includes principles relating to, inter alia, return and resettlement of IDPs, recovery of property, and compensation.

The question thus arises as to why refugees are protected by a binding treaty, whereas IDPs are primarily protected by a soft law instrument (albeit based on binding law). Although at first glance, it may have been preferable to draft a treaty for IDP protection, the decision to create the Guiding Principles was probably a wise one because IDPs are in a fundamentally different position to refugees. The crossing of a border represents the breaking of the bond between the refugee and their own country and thus puts the refugee within the protection reach of the international community.[[19]](#footnote-19) International refugee protection has thus been described as ‘surrogate’ to national protection, in the sense that refugee protection is only applicable where protection is not available from the state of nationality.[[20]](#footnote-20) The responsibility for IDP protection on the other hand stems from the notion of sovereignty as responsibility. The responsibility to protect IDPs thus primarily lies with their governments even though these may, but by no means necessarily, be the very actors that have caused the displacement in the first place. IDP protection thus raises additional issues of state sovereignty that are not applicable in the refugee protection context. Thus, when deciding what form the global IDP protection framework would take, the drafters likely correctly anticipated that states would not be supportive of a global treaty for IDPs. The drafting of the Guiding Principles in the late 1990s coincided with the NATO bombing of Kosovo – seen by some as an unlawful interference in domestic affairs – which left states particularly cynical towards any purported effort of the international community to encourage domestic human rights reforms.[[21]](#footnote-21) Moreover, beyond the general resistance to the prospect of an international legal standard on IDPs, it would be a huge challenge to develop criteria or a formal international definition of IDP that would be amenable to states but at the same time broad enough to capture the complexity of the phenomenon of internal displacement.

The resulting Guiding Principles were non-binding in nature (albeit drawing from existing law) and emphasized the primary responsibility of states for the protection of their own IDP populations. In my view, these two factors made states with IDP populations more receptive to them than if there had been a treaty on IDP protection. In the 27 years since the drafting of the Guiding Principles, they have become the globally recognised standard on IDPs, having been widely endorsed by states;[[22]](#footnote-22) regional organizations such as the Council of Europe and African Union;[[23]](#footnote-23) international organizations such as the UN and IOM;[[24]](#footnote-24) and scholars .[[25]](#footnote-25) In addition, the UN Secretary-General’s Action Agenda on Internal Displacement has referred to the Guiding Principles as a ‘globally recognised standard’ and has called on states to protect the rights and respond to the needs of IDPs in line with the Guiding Principles.’[[26]](#footnote-26) Moreover, the Guiding Principles have significantly influenced domestic law and policy. At the time of writing, approximately xx states have developed law and policies on internal displacement, most of which were developed after the conclusion of the Guiding Principles and many which either refer to them directly or indirectly (i.e. incorporate their substance without referring to the Guiding Principles explicitly).[[27]](#footnote-27) In addition, African states have overcome the initial resistance to the negotiation of binding, international legal agreements on IDPs, creating important regional standards, building on the Guiding Principles. For example, the 2006 Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons uses the Guiding Principles’ description of ‘IDP’ but also includes development-induced displacement as one of the listed reasons why an individual may be an IDP.[[28]](#footnote-28) The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), the first international (but regionally-specific) convention on IDPs,[[29]](#footnote-29) uses the Guiding Principles’ description of IDPs but also highlights how internal displacement may include those who are evacuated and relocated involuntarily. Put simply, the Guiding Principles have ‘shaped the global narrative on internal displacement’[[30]](#footnote-30) and have become the primary reference point in the protection and assistance of IDPs.[[31]](#footnote-31)

Hence at first glance, it may seem that double standards are being applied in this context. IDPs and refugees are fundamentally similar, but refugees appear to benefit from a much stronger protection regime. However, the fact that IDPs remain within their states meant that those states had to be fully on board with any purported legal framework for the protection of IDPs. By presenting a set of ‘guiding’ principles – rather than a binding framework, states with IDP problems were able to adapt the Principles to their own specific contexts and incorporate them into legislation or non-binding policy. Moreover, the non-binding Guiding Principles were eventually the basis for two regional treaties. As such, the allegation that IDPs have a somewhat lower standard of legal protection than refugees is not true – it is simply different, but no less impactful. At the end of the day, both IDPs and refugees can invoke IDP rights (in states that have adopted legislation based on the Guiding Principles) and refugee rights (in states that have implemented the 1951 Refugee Convention) vis a vis the state in which they are located and can challenge violations of those rights in courts if necessary.

*3.2 Narrow Refugee Definition v Broad description of Internally Displaced Person*

The refugee definition is deliberately narrow whereas the IDP description is deliberately broad. The refugee definition is made up of number of cumulative criteria, all of which must be satisfied for an individual to qualify as a refugee. These criteria have been analysed in detail elsewhere, hence this section will be concise in its analysis.[[32]](#footnote-32) First, the individual must have a ‘well-founded fear of being persecuted.’ There is no definition of what constitutes persecution in the Refugee Convention and it is generally accepted that the drafters intentionally declined to define ‘being persecuted’ because they recognized the impossibility of exhaustively listing all the forms of maltreatment that might entitle persons to refugee status.[[33]](#footnote-33) However, many scholarly authorities propose a human rights interpretation of the term ‘persecution’[[34]](#footnote-34) and this approach is generally accepted in State practice.[[35]](#footnote-35) Yet not all human rights violations will necessarily constitute persecution. Assessment will turn on factors including (i) the nature of the freedom threatened; (ii) the nature and severity of the restriction; and (iii) the likelihood of the restriction eventuating in the individual case.[[36]](#footnote-36) In addition, persecution is not confined to acts by state authorities. Acts by non-state actors may constitute persecution if the state is unwilling or unable to provide persecution from those acts.[[37]](#footnote-37) Finally, it should be noted that the requirement of a ‘well-founded fear of being persecuted’ is a forward-looking test, which focuses on the likelihood of future persecution.[[38]](#footnote-38) Persecution need not actually have occurred in the past, although past persecution may be evidence in favour that a risk of future persecution exists.[[39]](#footnote-39) This issue is addressed in more detail below.

Second, the persecution must be ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion.’ The term ‘membership of a particular social group’ merits some attention, as the meaning of this term is perhaps more unclear than that of the other terms. ‘Membership of a particular social group’ is not defined by the Refugee Convention, but domestic court decisions and scholarly authorities have developed indicators of what might constitute membership of a particular social group, such as voluntary association with the social group, involuntary linkages (e.g. family, shared past experiences, innate characteristics), and the perception of others. Examples of particular social groups for the purposes of the refugee definition might include women, members of the LGBTQIA community, and individuals living with HIV/ AIDS.[[40]](#footnote-40) The requirement that persecution must be linked with one of the Refugee Convention reasons has meant that the Refugee Convention will not generally apply to those who fear other forms of generalised harm, such as those fleeing from natural disasters, civil war, or economic crises. However, removal of individuals at real risk of these types of harms may give rise to violations of other international law rules.[[41]](#footnote-41)

Third, a refugee 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.’ It is therefore not possible to be a refugee inside one’s own country, even if all the other criteria of the Refugee Convention are satisfied. In such a situation, an individual will likely fall within the description of an IDP, which was explained above.

Finally, an individual can be excluded from refugee status if there are serious reasons for considering that they have committed certain crimes or are guilty of certain acts. Refugee status can also come to an end upon the happening of certain events, for example, the individual has acquired a new nationality and enjoys the protection of that country, or the circumstances in connection with which they have been recognised as a refugee no longer exist and they can no longer therefore continue to refuse to avail themselves of the protection of their country of nationality. More details on the Refugee Convention’s exclusion and cessation clauses are in section 3 below. Suffice it to say for now, however, that the Convention’s exclusion and cessation clauses, together with its exhaustive definition of who counts as a refugee, means that is only in very narrow circumstances that an individual will qualify as a refugee.

The IDP description is far broader than the refugee definition. As previously mentioned, a refugee has, inter alia, fled his country of nationality owing to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion. This list of persecutory grounds is exhaustive. However, there is no need to show an element of persecution to be described as an IDP. Moreover, as aforementioned, the list of reasons for which an IDP has fled or left their home or place of habitual residence is not exhaustive (Guiding Principles, Principle 1). An individual who is forcibly displaced within their country’s borders because of natural or man-made disasters, or as result of development projects would fall within the IDP definition, but an individual who had left their country for the same reasons would probably not qualify as a refugee. It is noteworthy that although conflict and violence is a major driver of both refugee flows and internal displacement, disaster was the biggest cause of internal displacement in 2023.[[42]](#footnote-42) All of this serves to emphasize that the IDP description is far broader than the refugee definition as the IDP description encompasses a far broader range of circumstances in connection with which individuals have left their homes.

In addition, IDP description is both forward and backward-looking. It refers to people who ‘*have been* forced or obliged’ to leave their homes or places of habitual residence (emphasis added), and those whose departure was anticipatory, ‘in order to avoid the effects of’ the non-exhaustive list of circumstances. Refugee status, on the other hand, is often described as forward-looking.[[43]](#footnote-43) The issue is not whether the claimant had good reason to fear persecution in the past, but whether, at the time the claim is being assessed, the claimant has a ‘well-founded fear’ of future persecution. Evidence of past persecution may nonetheless support the likelihood of exposure to future persecution. This further supports the contention that the description of an IDP is broader than the refugee definition. It is easier to show that past events have taken place than it is to convince an adjudicator that certain events or treatment will likely come to pass, as the future is always inherently uncertain.

The reason why the refugee description is narrower than the IDP description is that refugees are protected by a refugee-specific treaty which creates refugee-specific rights, and IDPs are protected by pre-existing guarantees in human rights and humanitarian law, which are spelled out in more detail in the Guiding Principles on Internal Displacement. Each of these reasons will be dealt with in more detail in the below sections.

*3.2 Refugee definition v IDP Description*

Both the IDP definition and the IDP description are declaratory, meaning that once an individual satisfies the criteria of the definition or description, they are automatically an IDP or refugee, respectively. However, the legal consequences of falling within these concepts differ significantly. The definition of refugee is legal in nature whereas the definition of IDP is descriptive in nature. This means that the refugee has a legal status under international law and is entitled to the range of rights set out in the Refugee Convention by virtue of qualifying as a refugee. In contrast, being categorised as an IDP does not, *ipso facto*, entitle a person to any additional rights under international law. This is because the Guiding Principles are drawn from pre-existing international human rights law and international humanitarian law. Thus, the Guiding Principles were not meant to regulate access to special benefits, contingent on a status determination procedure. [[44]](#footnote-44) This contention is supported by the requirement in the IDP description in the Guiding Principles that IDPs have not crossed a border. As such, IDPs are generally nationals of the relevant state and are entitled to the same rights as everyone else in the state. In this sense, the IDP description less like the refugee definition in the 1951 Refugee Convention and more like the definition of a child in the 1989 Convention on the Rights of the Child– which does not create a legal status but rather sets out the Convention’s scope of application. [[45]](#footnote-45)

*3.3 Exclusion clauses for refugees v no exclusion clauses for IDPs*

The lack of IDP status in international law is also the reason that – unlike in the refugee convention – there are no exclusion clauses in the Guiding Principles. As there is no IDP status, there is no need to create exclusion clauses for that status. In addition, the logic behind the exclusion clauses in the refugee context do not apply in the IDP context. For example, Article 1F(b) excludes individuals from the refugee definition where there are serious reasons for considering that they have committed a serious non-political crime outside their country of refuge prior to admission as a refugee.[[46]](#footnote-46) Like any group of individuals, there is a reasonable chance that IDPs may have committed serious non-political crimes akin to those set out above. However, the rationale for the inclusion of Article 1F(b) in the 1951 Refugee Convention does not hold in the IDP context. The fact that refugees are generally outside their state of nationality and have protections against removal mean that they are fundamentally in a different position to IDPs. An asylum-seeker who has committed a crime might apply for refugee status in the hope that they would use the associated protection against removal to evade criminal responsibility in their own state (although the likelihood of evasion is now significantly lower than it was at the time of the 1951 Refugee Convention’s drafting owing to the development of extradition law).[[47]](#footnote-47) An IDP is not abroad and thus not outside the criminal jurisdiction of their state. This supports the contention that there should not be an exclusion clause like Article 1(f)(b) of the 1951 Refugee Convention in the IDP context.

The 1951 Refugee Convention also provides, in Article 1(F)(a), that an individual will be excluded from the scope of the Convention if they have committed a war crime, crime against humanity and/or a crime against peace ‘as defined in the international instruments drawn up to make provision in respect of such crimes.’ In addition, Article 1F(c) excludes individuals from the refugee definition who have been guilty of acts contrary to the purposes and principles of the UN. The scope of this provision has been applied broadly, including to serious and systematic violations of human rights and acts of terrorism,[[48]](#footnote-48) as well as more widely than simply to persons in senior government positions.[[49]](#footnote-49) These two clauses were added because it was felt that there may be certain individuals, by virtue of their behaviour, that are undeserving of international protection.[[50]](#footnote-50) The question thus arises: are there any circumstances under which an individual’s behaviour should exclude them from being an IDP? An argument might be made, for example, that an individual who has instigated mass displacement should not be considered an IDP as they would have contravened the core ideals underpinning the Guiding Principles.

To answer this question, it is appropriate to turn to human rights law because, unlike refugee law, the latter is inclusive and does not make any distinction on the protection offered to individuals because of their behaviour.[[51]](#footnote-51) This is because human rights are conferred to all individuals simply based on being human, and everyone is viewed as deserving of protection of human rights regardless of their behaviour. As noted in the correspondence between the drafters of the Guiding Principles, even persons suspected of or guilty of genocide should be arrested and tried but still have basic human rights and should even get assistance if necessary for their survival.[[52]](#footnote-52) This approach is reflected in Guiding Principle 4, which states that the Guiding Principles shall be applied ‘without discrimination of any kind such as race, colour, sex [….] or on any similar criteria.’ It is also confirmed by the drafters of the Guiding Principles, who stated that ‘the rights and guarantees to which internally displaced persons are entitled stem from the fact that they are human beings […]’[[53]](#footnote-53) Kälin further adds that IDPs are entitled to the human rights based on their needs, rather than based on falling within a legally binding definition.[[54]](#footnote-54)

The 1951 Refugee Convention was thus drafted in a very different era to the Guiding Principles on Internal Displacement. The former pre-dates major human rights treaties (such as 1965 Convention on the Elimination of Racial Discrimination; 1966 International Covenant on Civil and Political Rights,1966 International Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of Discrimination against Women; 1989 Convention on the Rights of the Child; 2007 Convention on the Rights of Persons with Disabilities)[[55]](#footnote-55) by at least 24 years. As such, the 1951 Refugee Convention reflected a balance between the protection of the individual with the capacity of the host state to withdraw or deny protection to those considered ‘undeserving’,[[56]](#footnote-56) whereas international human rights law – and the Guiding Principles – are predominantly focused on the protection of individuals without similar concessions to state sovereignty.

That is not to say that human rights cannot be limited or derogated from in certain contexts. For example, everyone – including IDPs – has the right to liberty, but the state can prosecute an individual and imprison them in certain circumstances.[[57]](#footnote-57) This approach is reflected in the Guiding Principles. For example, Principle 6 prohibits *arbitrary* displacement (emphasis added), which means that displacement which is not arbitrary (for example to isolate and control suspected criminals) would not be contrary to the Guiding Principles. Similarly, *arbitrary* arrest and detention (emphasis added) is prohibited by Principle 12, which means that arrest and detention which is not arbitrary is generally permissible.[[58]](#footnote-58) However, it has been firmly rejected that individuals can be denied key protections on account of criminal behaviour.[[59]](#footnote-59)

International human rights law, therefore, does not support the contention that there should be exclusion clauses for the IDP definition because: (1) international human rights law does not make distinctions between individuals deserving and non-deserving of protection; (2) Human rights can be limited in certain circumstances, which means that IDPs cannot use international human rights law – and by extension, the Guiding Principles – to evade criminal responsibility. This position is reflected in Principle 1(2) of the Guiding Principles, which provides that they ‘are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity, and war crimes.’ As such, individuals who commit these crimes can still be IDPs, but they cannot invoke the Guiding Principles to evade criminal responsibility. This distinguishes the law of internal displacement from refugee law, whereby individuals can be excluded from the refugee definition if they have engaged in certain types of behaviour.

1. **Conclusion**

This paper asks whether the differential treatment afforded to IDPs and refugees in international law is justified. The answer to this question is yes. Even though IDPs and refugees are similar in many ways, differential treatment is justified for two primary reasons: (1) IDPs remain within their states and are the primary responsibility of their own government whereas refugees are abroad and are the primary responsibility of their host state; (2) IDPs, as citizens of their own countries, do not need IDP-specific legal protection. Refugees, on the other hand, as foreigners in their host states, are in a special legal position meriting a refugee-specific legal regime. As such, the apparent double standards in forced migration law are logical and justified.

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   Bríd Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (OUP 2022). [↑](#footnote-ref-1)
2. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention). [↑](#footnote-ref-2)
3. Bríd Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (OUP 2022). [↑](#footnote-ref-3)
4. Hathaway, James C. (2007), ‘Forced Migration Studies: Could We Agree to “Just Date?”’ Journal of Refugee Studies, 20(3), 349 – 369; Cohen, Roberta (2007), ‘Response to Hathaway’, Journal of Refugee Studies, 20(3) 370-376; Adelman, Howard and McGrath, Susan (2007), ‘To Date or To Marry: That is the Question’ Journal of Refugee Studies 20(3), 376-380. [↑](#footnote-ref-4)
5. <https://www.unhcr.org/ie/about-unhcr/who-we-are/figures-glance> [↑](#footnote-ref-5)
6. <https://www.un.org/unispal/document/sitrep-187-ocha-05jul24/#:~:text=The%20United%20Nations%20and%20its,internally%20displaced%2C%20many%20multiple%20times>. [↑](#footnote-ref-6)
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