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The European Court of Human Rights and Internal Relocation: An Unduly Harsh Standard?

By Jessica Schultz[1]

1. Introduction

The possibility of returning an asylum applicant to a safe place within his or her country of origin is an integral part of refugee status determination in many state parties to the 1951 Convention on the Status of Refugees (Refugee Convention).[2] The 'internal relocation' test is also commonly used in applications for complementary protection and challenges to the deportation of refused refugee claimants.[3] In the latter case, the European Court of Human Rights (the Court) serves, *de facto,* as a regional appeals body.[4] The Court also provides a supplementary safety net for persons who do not meet the criteria for international protection in the host country but nonetheless face serious harm in their country of origin. Although the Court is not authorized under its mandate to review state compliance with the Refugee Convention, its approach to 'internal relocation' reflects the interpenetration of refugee law in regional human rights jurisprudence. Because, however, the Court´s deference to refugee law is limited, its practice

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[1] PhD Candidate, University of Bergen Faculty of Law. I am indebted to Lilian Tsourdi and Terje Einarsen for their comments on an earlier draft.
[2] Convention Relating to the Status of Refugees, Geneva (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, supplemented by the Protocol Relating to the Status of Refugees, New York (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[3] In some jurisdictions, the concept of 'internal relocation' is referred to as the 'internal flight alternative' or 'internal protection alternative'. The Court uses 'internal relocation' and 'internal flight alternative´ interchangeably, usually depending on the terminology applied by the state party concerned.
[4] Jean-François Durieux, Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection (2008) Refugee Studies Centre Working Paper No. 49, 8.

further obfuscates the criteria for the 'internal relocation' in national asylum systems.[5]

In cases involving the expulsion of a foreign national by a contracting state, the Court´s primary concern is to secure that the applicant can avoid a risk of torture, inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights (ECHR) [6] in the place of return.[7] As it stated in its seminal decision *Salah Sheekh v The Netherlands*, "Article 3 does not, as such preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual´s claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision."[8] However, importantly, certain conditions apply: "the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 [ECHR] may arise, *the more so if in the absence of such guarantees there is a possibility* of the expellee ending up in a part of the country of origin where he or she may be subjected to ill- treatment."[9]

I argue that the Court, despite clarifying critical guarantees against internal *refoulement* in *Salah Sheekh*, reinforces an unduly restrictive set of criteria for the internal relocation assessment in claims to refugee status *and* complementary protection in Europe. First, the Court´s narrow Article 3 focus excludes other risks

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[5] The law is stated as of September 2013.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[7] For early decisions of the European Commission for Human Rights involving the question of internal relocation, see Gaetan de Moffarts, 'Refugee Status and the "Internal Flight Alternative"' in Refugee and Asylum Law: Assessing the Scope for Judicial Protection: International Association of Refugee Law Judges, Second Conference, Nijmegen, January 9-11, 1997 (Nederlands Centrum Buitenlanders 1997) 126 fn. 22. Also see *Chahal v The United Kingdom*, App. no 22414/93 (ECHR, 15 November 1996); *Hilal v The United Kingdom*, App. no. 45276/99 (ECHR, 6 March 2001).

[8] *Salah Sheekh v The Netherlands*, App. no. 1948/04 (ECHR 11 January 2007) [141].

[9] ibid. My emphasis.

related to threshold safety requirement in the place of relocation. Second, the Court´s approach encourages a tendency at the national level to conflate the 'reasonableness' prong of the internal relocation test under refugee law with the risk of internal *refoulement*. A third concern is that the three conditions established by the Court - the applicant must be able to safely travel to, enter, and settle in the proposed area -– are not always applied rigorously by the Court itself in its highly influential decisions addressing general issues of risk in major refugee source countries. Therefore, in considering claims from countries like Somalia, Iraq, and Afghanistan, decision-makers influenced by the Court´s findings on internal relocation in 'leading' cases risk entrenching both a flawed analytic framework *and* a flawed application to the specific factual situation in their own jurisprudence.

2. The Internal Relocation Concept in Refugee Law

There is no reference in the Refugee Convention to internal relocation. The concept gained traction in state practice during the 1980s against the backdrop of changing refugee flows[10] Although the relocation analysis is neither a 'stand-alone principle' of refugee law nor an 'independent test' in the determination of refugee status,[11] decision-makers have linked it to the conditions set out in Article 1A(2) of the Refugee Convention:

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[10] As Hathaway and Foster explain, as a result of the "increasing numbers of refugees from countries that were politically, racially, and culturally 'different' from Western asylum countries, the historical openness of the developed world to refugee flows was replaced by a new commitment to exploit legal and other means to avoid the legal duty to admit refugees. James Hathaway and Michelle Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' in Erika Feller, Volker Türk, and Frances Nicholson (eds) UNHCR´s Global Consultations on International Protection (Cambridge University Press 2003) 359-360. Other restrictive measures that took root during same period include carrier sanctions, visa entry requirements, safe third country policies, detention, restricted access to the labor market, and fast-track asylum procedures. See, generally, Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009); Matthew Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press 2004).

[11] UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (2003) para 2.

[A refugee is someone 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* (my italics).

If a person has a domestic protection alternative then, according to one interpretation, his or her fear of persecution may not be 'well-founded' as required by the refugee definition.[12] Another approach separates the inquiry into two discrete parts: first, is there a well-founded fear of persecution in one area? If this is established, the next question is whether the state is able and willing to provide protection elsewhere.[13] In either case, the absence of national protection is a condition for recognition of refugee status. If such protection can be secured *somewhere* in the country of origin, the reasoning goes, the need for a surrogate remedy may not arise. As Black CJ of the Federal Court of Australia explained in *Randhawa v. Minister for Immigration, Local Government and Ethnic Affairs*:

The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.[14]

According to UNHCR´s 2003 Guidelines on the 'Internal Flight or Relocation Alternative', decision-makers should consider a) whether the proposed area is safely, legally and practically accessible; b) whether it is 'safe' to stay, meaning there is no risk of persecution or other serious harm; and c) whether the claimant may

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[12] According to the US immigration regulations, for example, an applicant 'does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so'. 8 Code of Federal Regulations [2003] s 208.13 (2)(C)(ii)). Also see *Januzi (FC) (Appellant) v Secretary of State for the Home Department and Others* [2006] UKHL 5 [2006] 2 AC 426; *Szatv v Minister of Immigration and Justice* [2007] HCA 40.

[13] New Zealand Refugee Status Appeals Authority, No. 71684/99 [2000] INLR 165.

[14] *Randhawa v Minister for Immigration Local Government and Ethnic Affairs*, [1994] 124 ALR 265 [440-441]

reasonably be expected to settle there.[15] Serious harms in this context include threats to life, liberty, safety or health, and exposure to severe discrimination.[16] Furthermore "if the conditions … are such that the claimant may be compelled to go back to the original area of persecution, or indeed to another part of the country where persecution or other forms of serious harm may be a possibility" the relocation area is considered 'unsafe'.[17]

With respect to reasonableness, the question according to UNHCR is whether the claimant, in the context of the country concerned, can lead a relatively normal life without undue hardship. [18] Personal circumstances, experience of past persecution, security, respect for human rights and the possibility of economic survival are all relevant factors.[19]

Within the Common European Asylum System, Article 8(1) of the recast Qualification Directive (2011) on 'internal protection', states may determine

> … that an applicant is not in need of international protection if in a part of the country of origin, he or she:
>
> (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
>
> (b) has access to protection against persecution or serious harm as defined in Article 7;
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> *and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there*. [20]

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[15] UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1a(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, [2003].
[16] ibid para 20.
[17] ibid para 21.
[18] ibid para 7.
[19] ibid para 24.
[20] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons

Although this last clause reflects the requirements of accessibility and durability set out in *Salah Sheekh*, it importantly also includes a reference to 'reasonableness'.[21] The internal relocation test under the Qualification Directive is the same regardless of the legal basis for international protection. In other words, in order to disqualify an applicant from refugee status (Article 13) *or* complementary protection (Article 15) on the grounds of an internal relocation alternative, the alternative must be accessible, safe and reasonable.

In practice, states have taken highly divergent approaches to the 'reasonableness' requirement, particularly with regard to levels of human rights protection in the proposed haven.[22] According to German jurisprudence, for example, historically only non-persecutory threats that were equivalent to the harms faced in the home area could be considered 'unreasonable'.[23] Other states assess the likelihood of finding work, housing, and health care. Confusion remains even within jurisdictions. In Norway, two recent decisions of the same appeals court have endorsed contradictory legal parameters for the reasonableness test.[24] Although the Court of Justice of the European Union (CJEU) has yet to issue a ruling on Article 8 of the Qualification Directive, it is clear from the legislative history that the phrase 'reasonably settle' is distinct from the threshold requirement of effective protection from persecution or serious harm.[25]

3. Internal Relocation in the Jurisprudence of the European Court of

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eligible for subsidiary protection, and for the content of the protection granted [Qualification Directive]. My emphasis.

[21] The term 'reasonableness', included in Article 8 of the original Qualification Directive [2004], was removed by the European Commission in the redraft proposal. In the end, it was reinserted at the urging of UNHCR and refugee advocacy groups. UNHCR, 'UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)´.

[22] Hathaway and Foster (n 10) 386; Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?' (2002) 14 *IJRL* 1, 4.

[23] Federal Constitutional Court, 2 B v. R 403/84 1501/84, EZAR 203 No. 5.

[24] Borgarting Lagmannsrett nos 10-142363ASD-BORG/01 and LB-2011-64941.

[25] UNHCR Redraft Proposal Comments (n 21).

Human Rights

How compatible is the Court´s jurisprudence with the internal relocation requirements elaborated in European refugee law? A review of practice illustrates a dynamic relationship with regional developments, particularly following the adoption of the original Qualification Directive in 2004. However, although state parties to the Refugee Convention have, as noted above, tried to anchor the internal relocation analysis in the language of Article 1A(2), the Strasbourg Court has not explicitly articulated its conceptual approach to the issue. It has simply observed that internal relocation raises the same concerns as *any* act of removal, including transfers to 'safe third countries'. In *Salah Sheekh*, it explained: "indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention … (The Court) sees no reason to hold differently where the expulsion is, as in the present case, not to an intermediary country but to a particular region in the country of origin."[26] Thus, for the Court, the analysis for an internal and external protection alternative is the same.

In two early relocation cases, the Court found that state agents in the country of origin were either unable or unwilling to provide adequate protection against the harms perpetrated by regional authorities. *Chahal v. the United Kingdom* (1996) and *Hilal v. the United Kingdom* (2001) both involved political activists associated with separatist causes (in India and Tanzania, respectively), who feared harm at the hands of the regional police.[27] In *Chahal,* the UK government argued that even if the applicant, a Sikh activist, risked treatment contrary to Article 3 in Punjab, he could safely relocate elsewhere in India. The Court, however, disagreed, noting that "elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets

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[26] *Salah Sheekh v The Netherlands* (n 8)[141].

[27] *Chahal v The United Kingdom* App no 22414/93 (ECtHR, 15 November 1996); *Hilal v. The United Kingdom* App no 45276/99 (ECtHR, 6 June 2011).

into areas of India far away from Punjab."[28]

In *Hilal v. the UK* (2001), the government similarly alleged that the applicant (an opposition party member in Zanzibar) was not of interest to mainland authorities, and therefore could relocate in Tanzania. The Court again ruled in the applicant's favour, considering that a "long-term, endemic situation of human rights problems" persisted on the mainland, and that it "was not persuaded therefore that the internal flight option offers a reliable guarantee against the risk of ill-treatment."[29]

In *Salah Sheekh v the Netherlands*, the Court essentially clarified that protection from Article 3 harm must be practical and effective. This case involved a young Somali man born in 1986 in Mogadishu. As a young child, Salah moved with his family to a village to escape fighting in the capital.[30] Salah´s family was a member of the minority Ashraf clan and suffered constant harassment from the majority Abgal clan in their new home. Over time, intimidation and extortion escalated into more serious abuses. Salah´s father and brother were eventually killed, and his sister raped multiple times, by the local Abgal militia.[31] Salah himself was beaten up badly on several occasions. With his mother and uncle´s support, he managed to escape in 2003 to the Netherlands. There, his first asylum claim and then the appeal were refused in part because he could relocate internally to the 'relatively safe' areas of Puntland, Somaliland, the south of Mudug and the islands off the southern coast of the country.

The Court held that internal relocation would not mitigate the risk established elsewhere in Somalia because there was no guarantee that the applicant would be allowed to enter and settle in either of the proposed areas of relocation.[32] Essentially, these criteria rendered the controversial provision 8(3) of the 2004

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[28] *Chahal v The United Kingdom* (n 27) [100].
[29] *Hilal v The United Kingdom* (n 27) [67]-[68].
[30] *Salah Sheekh* (n 8) [6],
[31] ibid [9]-[13].
[32] ibid [143]-[144].

Qualification Directive, which had enabled application of the internal relocation concept ‘notwithstanding technical obstacles’, illegal.[33]

It is worth noting two other aspects of this decision. First, the choice of the word ‘settle’ (as opposed, for example, to ‘stay’ – the language used in the 2004 Qualification Directive) suggests that the applicant should be able to establish him or herself on a non-temporary basis. And second, the Court draws attention to the possibility of indirect *refoulement* – the danger that the applicant would end up in the area where risk of treatment contrary to Article 3 has already been established. Taken together, these requirements for a meaningful and durable refuge echo the doctrine of ‘effective protection’ established in Article 7(2) of the Qualification Directive, to which Article 8 on internal protection refers. This provision states, *inter alia*, that “protection against persecution or serious harm must be effective and of a non-temporary nature.”[34]

3.1 An unduly restrictive approach to the ‘safety’ analysis?

Despite establishing a welcome reference point for the internal relocation analysis, the *Salah Sheekh* decision was far from groundbreaking compared to the Court´s previous practice. The question addressed was still, fundamentally, whether the applicant enjoys an *adequate guarantee* against the threat of Article 3 harm. While the Court´s concern with safe and legal access reflects *part* of UNHCR´s guidance on internal relocation, its focus on Article 3 guarantees diverts attention from *other* harms that may render the area either ‘unsafe’ or ‘unreasonable’.

3.1.1 The Article 3 channel

To start with the threshold ‘safety’ assessment: which threats outside the

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[33] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004 Qualification Directive).
[34] Qualification Directive (n 20.

scope of Article 3 might render the proposed area too insecure for resettlement? To answer this question it is useful to consider Article 3´s key position in the Court´s *non-refoulement* jurisprudence.

The extraterritorial reach of Article 3 was confirmed in the case of *Soering vs. the United Kingdom* in 1989.[35] In *Soering*, the Court noted that "the common heritage of political traditions, ideals, freedom and rule of law" referred to in the Convention´s preamble, may be undermined if someone is returned from a contracting state to face torture or inhuman or degrading treatment in another country.[36] Protection from Article 3 harm, then, constitutes a core value of the European human rights system. State responsibility is incurred from the foreseeable consequences of a removal decision that exposes an individual to a 'real risk' of ill-treatment. While *Soering* involved the extradition of a German national to face the death penalty in the US, the Court in *Cruz Varas* clarified that the same principle applies to the expulsion of a foreign national from a state party to the ECHR.[37]

While other articles of the ECHR may be raised in an asylum case, the absolute terms of Article 3 make it a useful hook for applicants who are excluded from refugee status or face deportation resulting from an immigration or criminal law violation. Under Article 3, unlike other sources of refugee protection, the behaviour of the applicant is irrelevant, as is the source of the risk.[38] Because the

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[35] *Soering v the United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989).
[36] ibid [88].
[37] *Cruz Varas and others v Sweden* App no 15576/89 (ECtHR, 20 March 1991) [70].
[38] According to the 'exclusion clauses' of the Refugee Convention, the provisions of the Convention do not apply to anyone with respect to whom "there are serious reasons for considering" that he or she has committed a crime against peace, a war crime, a crime against humanity, a non-political crime outside the country of refuge prior to admission as a refugee, or are guilty of acts "contrary to the purposes and principles of the United Nations." Refugee Convention (n 2) Article 1(F). Article 17 of the Qualification Directive repeats these provisions and also excludes anyone who "constitutes a danger to the community or to the security of the Member State in which he or she is present." Qualification Directive (n 20). When it comes to the actor of persecution, in contrast to Article 3 CAT, Article 3 ECHR does not specify state culpability. The Convention against Torture requires that the "pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The Convention against Torture

protection of Article 3 is non-derogable, the state may not balance this protection against other policy interests, or suspend it in times of emergency.[39] The Court itself has channelled expulsion cases through Article 3 even when other articles have been raised in the applicant´s complaint. Article 2 (the right to life) is considered equally fundamental by the Court, but is considered part of the Article 3 analysis when both provisions are raised.[40] Even the incipient case law on generalized violence (*Sufi and Elmi*), considers that the possibility of bodily harm raises issues under Article 3 rather than Article 2.

The Court´s jurisprudence suggests that qualified ECHR rights give rise to a *non-refoulement* obligation only exceptionally, since they involve a balancing of the rights of the individual vis-à-vis the state. While immigration is not – with the exception of Article 5(1)(f) -explicitly provided as a legitimate state interest, it has been recognized as "the medium through which other legitimate aims are promoted."[41]

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and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 1(1). That said, the Committee against Torture has clarified that state responsibility is engaged when it has grounds to believe that acts of torture are being committed by non-state or private actors, and it fails to exercise due diligence to prevent, investigate, prosecute and punish these acts. Committee against Torture [2007] General Comment 2, Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2/CRP 1/Rev 4 para 18.

[39]Article 8(2) ECHR, for example, which has also been successfully invoked to challenge expulsion orders, provides that an interference may be justified if carried out "in accordance with the law" and "is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". ECHR [6] art 8(2). However, as Battje explains, the distinction between absolute and qualified rights does not hold up in practice, as Article 3 ECHR is also clearly subject to balancing by the Court. Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22 Leiden Journal of International Law 583.

[40] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2010) 89. Eg *NA v the United Kingdom* App no 25904/70 (ECtHR 17 July 2008); *H. and B. v The United Kingdom*, App nos 70073/10 and 44539/11 (ECtHR 9 April 2013).

[41] Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (OUP 2003) 190. Article 5(1)f ECHR provides that a person may be deprived of liberty in accordance with a procedure established by law if, among other reasons, the arrest or detention is undertaken to "prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". ECHR [6] art 5(1)f.

The UK House of Lords in *Ullah* observed that, for the Court, it is "necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged."[42] Given that serious breaches of other rights may usually be expressed as inhuman or degrading treatment, there is a "reassuring simplicity in tying ECHR protection needs to Article 3."[43] A narrow focus and high threshold also serve the Court´s own interests in judicial economy and optimal state compliance with its judgments.

3.1.1.1 Critiques of the Article 3 channel

The privileged position of Article 3 as the gateway to extraterritorial protection can be criticized on several grounds. Battjes has noted that the "difference between so-called absolute prohibitions and other ones is quite relative."[44] He points out that Article 3 prohibition of expulsion *does* implicitly allow for balancing and exceptions: the Court considers, in fact, whether the interference with human dignity or physical integrity serves a legitimate aim, and whether the scope of the treatment or punishment is proportionate to that aim. On the other hand, certain aspects of other rights, for example Article 9 (freedom of religion) are framed in equally 'absolute' terms as Article 3. It is only the public manifestation of religion or belief that may be limited under the second paragraph of Article 9.

Neither are the severity or irreparability of the treatment satisfying explanatory factors. There is no logical reason for considering that degrading treatment, for example, is inherently more damaging than the intentional

[42] *Regina v Special Adjudicator ex parte Ullah (FC)* [2004] UKHL 26 [50]. In *Mamatkulov and Askarov v Turkey*, the partly dissenting opinion of Judges Sir Nicolas Bratza, Bonello and Hedigan observed with respect to Article 6 that "what the word ´flagrant´ is intended to convey is a breach…which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article." App nos. 46827/99 and 46951/99 (ECtHR, 4 February 2005) [14].
[43] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford 2007) 145.
[44] Hemme Battjes, 'The Soering Threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law' [2009] 11 European Journal of Migration and Law 211.

deprivation of life.[45] The suppression of Article 2 claims is especially puzzling since the Court has emphasized in removal cases the 'irreparable nature' of damage where there is a risk of treatment contrary to Article 3 ECHR.[46] On the other hand, inhuman and degrading treatment is not *always* irreparable. The assessment of irreparability will, as Noll observes, often rely on "medical, psychological, or otherwise technical" facts, rather than purely legal arguments.[47]

Although they may be important factors, especially when considered together, neither the 'absolute character' of Article 3, nor the seriousness or irreparability of Article 3 harm justify such a dominant position as the gatekeeper for international protection. Conceptually, a state´s positive obligation to protect against third party harms applies to *any* right, if the consequences of a breach are serious enough and predictable.[48] Indeed, the original version of the 2004 Qualification Directive recognized in paragraph 15(b) that serious and unjustified harm triggering a need for protection could consist of a "violation of a human right, sufficiently severe to engage the member state´s international obligation."[49] Even in the ECHR

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[45] Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 459.

[46]ibid 464 – 467; for an example of the overlaps between Articles 2 and 3 see *Jabari v Turkey*, App no 40035/98 (ECtHR 11 July 2000).

[47] Noll, *Negotiating Asylum* (n 45) 466.

[48] As Noll explains, "(t)the basic assumption … is that states are responsible for violations of human rights or humanitarian law by other actors to the extent their own action or omissions contribute to such violations..." Gregor Noll, 'Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection Ratione Personae' (2002) UNHCR New Issues in Refugee Research Working Paper No. 55, 3. The more probable and serious the harm, the stronger the protection claim of the presumed victim. Noll, *Negotiating Asylum* (n 46) 470.

[49] Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 September 2001). According to the Proposal´s 'Explanatory Memorandum', member states should 'consider whether the return of an applicant to his or her country of origin or habitual origin would result in serious unjustified harm on the basis of a violation of a human rights and whether they have an extraterritorial obligation to protect in this context.' ibid 26.

context, the Court has recognized that the rights to moral integrity,[50] a fair trial,[51] and family life[52] can operate as independent grounds for relief from removal.

A broad analysis of 'safety' is especially important in the internal relocation context, where the concern centers on chain *refoulement* within the country of origin. Physical insecurity, the inability to practice one´s religion freely, infringements with one´s private life, or other factors, could compel the applicant to return home.

3.1.2 Other rights relevant to the safety assessment

Two examples illustrate the limitations of Article 3 as the blanket provision for serious harms. The first relates to economic and social rights issues. In the extraterritorial context, the Court has generally required evidence of exceptionally compelling circumstances to engage the responsibility of member states under Article 3.[53] In *N v. the United Kingdom*, for example, the Court denied relief to an HIV-positive applicant from Uganda, whose lifespan would likely be shortened as a result of removal. In *Salah Sheekh*, the Court reiterated this restrictive tone, noting that humanitarian "considerations do not necessarily have a bearing, and certainly not a decisive one, on the question whether the person concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas."[54] In *M.S.S. v. Belgium and Greece* and *Sufi and Elmi*, however, the Court distinguished *N,* where the threat emanated from Uganda´s lack of capacity to provide adequate treatment, from situations where the state was somehow complicit (through its actions or omissions) in the alleged harms.[55] In *Sufi and Elmi,*

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[50] See, for example, *Bensaid v The United Kingdom* App no 15225/89 (ECtHR 31 January 1995); *Beldjoudi v France* App 12083/86 (ECtHR 12 November 1990).
[51] *Othman (Abu Qatada) v The United Kingdom* App no 8139/09 (ECtHR 17 January 2012).
[52] *A.W. Khan v The United Kingdom* App no 47486/06 (ECtHR 12 January 2010).
[53] *N v The United Kingdom* App No 26565/05 (ECtHR 27 May 2008). In contrast, the Court found that return of an applicant suffering from AIDS to his imminent death without any access to basic support in St. Kitts did engage Article 3. *D v The United Kingdom* App No 30240/96 (2 May 1997).
[54] *Salah Sheekh v The Netherlands* (n 8) [141].
[55] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011); *Sufi and Elmi v The United Kingdom* App nos 8319/07 and 11449/07 (ECtHR 28 June 2011).

the Court found that a real risk of ill-treatment existed in the camps for internally displaced persons in southern Somalia on account of the poor humanitarian conditions for which the warring parties were primarily responsible. In particular, the Court focused on shortage of food, overcrowded shelters, lack of sanitation, and the high prevalence of sexual violence and other criminal activity.[56]

The impact of the Court's jurisprudence has been, as described below, to reinforce the idea that only cumulative economic and social harms equivalent to Article 3 are relevant to the internal relocation analysis in domestic asylum decisions. From the state perspective, however, a more principled starting point would be to assess whether *any* right it has a duty to protect would be denied upon the applicant´s return. Parties to the International Covenant on Economic and Social Rights are immediately obliged to provide the minimum core content of rights on a non-discriminatory basis.[57] Expulsion to a place where the authorities obstruct access to basic services, then, may give rise to an independent obligation of *non-refoulement*. Serious discrimination in the provision of basic shelter, education or health care – which is a common experience for the internally displaced - would also render the relocation area 'unsafe', not just 'unreasonable'.

The second pitfall is that by only considering guarantees against the risk of treatment in violation of Article 3, the Court excludes other rights that may be relevant to the safety analysis. Protection of mental health, an aspect of the right to privacy (Article 8), is an obvious example. Individuals who have *already* suffered inhuman or degrading treatment, of course, are at particular risk of lingering psychological consequences. Being returned to an area without any social or family support could exacerbate any future risk without, necessarily, reaching the threshold

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[56] ibid [284]-[286]. In contrast, see *Case of S.H.H. v The United Kingdom*, App no 60367/10 (ECtHR 29 January 2013). In this decision, the Court found that the return of a disabled man from Nangarhar province in Afghanistan to Kabul did not engage Article 3 on account of the humanitarian situation he was likely to face, in part because the risk of socio- and economic harms did not emanate from the intentional acts or omissions of the Afghan authorities.
[57] Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties' Obligations' (1990) UN Doc E/1991/23 annex III (1991).

of 'inhuman or degrading treatment'. McAdam also points out that Article 8 could apply "where extreme subjective fear does not match the actual risk of harm, but nonetheless constitutes real fear in the applicant´s mind."[58]

Finally, it is worth noting other gaps between the Court´s mandate (which is bound to the ECHR) and 'serious harms' that disqualify the area as unsafe according to UNHCR´s interpretation of the Refugee Convention and the Qualification Directive requirements. These include exposure to insecurity and conflict and, related to this, a poor human rights situation broadly considered. The latter can undermine the *durability* of the protection provided against persecution and Article 3 harm. The link between 'non-temporary' protection from persecution and fundamental human rights norms was recently recognized by the Court of Justice of the European Union (CJEU) in *Abdulla*.[59] In *Abdulla*, the CJEU held that sending state authorities, when applying the concept of 'protection' in Article 7 of the Qualification Directive, may consider "the laws and regulations of the country of origin and the manner in which they are applied, and the *extent to which basic human rights are guaranteed* in that country" (my emphasis).[60] In other words, human rights standards are an indicator not only of the quality of protection (would the applicant have access to justice?) but also of how *stable* such protection would be. The power to protect general human rights is a useful indicator of the state´s ability to offer specific protection to the applicant.

3.2 Beyond safety: Assessing the 'reasonableness' of internal relocation

In addition to reinforcing an overly narrow approach to the serious harm assessment, the Strasbourg jurisprudence also encourages a conflation in state practice of the requirements to settle and to 'reasonably settle' established in the 2011 QD. In other words, by echoing part of UNHCR´s guidance (with respect to accessibility), the Court feeds a misperception that its approach to internal

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[58] McAdam, *Complementary Protection* (n 43) 160.
[59] CJEU, Joined Cases C-175/08, C-176/08, C-178/08, and C-179/08 *Salahadin Abdulla and Others v Germany* , ECR [2010] I-1493.
[60] ibid [71].

relocation is consistent with the requirements of refugee law. This risk is compounded by the increasing prominence of 'leading' cases in the Court´s practice.[61] By leading cases here I mean those that clarify the proper interpretation and application of Article 3 to questions of generalized risk in a particular country of origin or transfer.[62] Examples involving internal relocation include *Salah Sheekh v. the Netherlands* (the Ashraf clan in Somalia)[63]; *NA. v. the UK* (Tamils in Sri Lanka)[64], *N. v. Sweden* (single women from Afghanistan)[65]; *M.S.S. v. Belgium and Greece* (asylum claimants in Greece)[66]; and *H. and B. v. the UK* (interpreters in Afghanistan).[67]

Recently, the Court has more explicitly suggested that it might accommodate a kind of reasonableness analysis within the framework of Article 3. In *N.A.N.S. v. Sweden*, for example, it observed:

Internal relocation inevitably involves certain hardship. Various sources have attested that people who return to the Kurdistan Region may face difficulties, for instance, in finding proper jobs and housing there, not the least if they do not speak Kurdish. Nevertheless, the evidence before the Court suggests that there are jobs available and that settlers have access to health care as well as financial and other support from the UNHCR and local authorities. In any event, there is no indication that the general living conditions in the KRI for a Christian settler would be *unreasonable or in any way amount to treatment prohibited by Article 3*. Nor is there a real risk of his or her ending up in the other parts of Iraq (my emphasis).[68]

However, because the term 'unreasonable' seems to qualify Article 3 treatment, these kinds of references are particularly unhelpful to decision-makers at the national level who already struggle to distinguish the two. For example, in the UK House of Lords decision *AH (Sudan) and Others*, Baroness Hale observed that the

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[61] For more on the concept of 'leading' asylum cases, see Ledi Bianku, 'Roundtable Discussion with the IARLJ, the CJEU and the ECtHR on Leading Asylum Cases' (2013) 25 IJRL 382-393.
[62] Hugo Storey, 'Briefing Note for Participants' (2013) 25 IJRL 329.
[63] *Salah Sheekh v The Netherlands* (n 8).
[64] *NA. v The United Kingdom* App no 25904/07 (ECtHR 17 July 2008).
[65] *N. v Sweden* App no 23505/09 (ECtHR 20 July 2010).
[66] *M.S.S. v Belgium and Greece* (n 55).
[67] *H. and B. v The United Kingdom* App nos *70073/10* and *44539/11* (ECtHR 9 April 2013).
[68] *N.A.N.S. v Sweden* App no 68411/10 (ECtHR 27 June 2013) [38].

Asylum and Immigration Tribunal (AIT), when considering the conditions awaiting the applicants in the squatter camps of Khartoum, repeatedly referred to a "real risk of serious harm or of ill-treatment contrary to article 3 or of unduly harsh conditions" as if these phrases referred to the same concept.[69] And indeed, when the AIT considered whether internal relocation was 'unduly harsh', it concluded in the negative, since the health facilities, while dismal, did not deprive the people who lived there of "the most basic of human rights that are universally recognised – the right to life, and the right not to be subjected to cruel or inhuman treatment."[70] She noted that in *Januzi*, Lord Bingham confirmed that a fundamental human rights protection was a prerequisite for relocation but not the *only* consideration for the reasonableness assessment.[71] In that decision, Lord Bingham cited with approval the 2003 UNHCR Guidelines, which state:

If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life *at more than just a minimum subsistence level* (my emphasis).[72]

Even if a distinctive Article 3 approach develops to accommodate less severe human rights harms in the case of internal relocation, it would still be an unworkable proxy for the reasonableness requirement in refugee law. Protection from 'inhuman and degrading treatment' –even generously defined – is not the only factor relevant to the applicant´s ability to achieve a normal life in the context of the country concerned. Opportunities to pursue a livelihood, the impact of relocation on children, and the possibility to reunite with family are also important considerations.[73]

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[69] *The Secretary of State for the Home Department (Appellant AH) v AH (Sudan) and others (FC) v (Respondents) House of Lords* [2007] UKHL 49, [200] 1 AC 678 [24].
[70] ibid [25].
[71] ibid [22].
[72] UNHCR Guidelines (n 11) para 29.
[73] For example, in an early relocation case, the English High Court of Justice granted asylum to a trade unionist from Ghana despite the possibility of safely relocating elsewhere, because it would force him to be separated from his wife. *R. v Immigration Appeal Tribunal (IAT), ex parte Jonah*, [1985] Imm AR 7 (QB).

In addition, the Court´s return analysis, with its focus on future risk, does not accommodate the fact that – under refugee law - particularly egregious acts of past persecution may defeat the reasonableness of return. The Refugee Convention insists on the individual applicant –not the state - as the subject of the protection analysis. Rather than refer to the state´s ability and willingness to protect, Article 1A(2) provides that a *refugee* may be able but unwilling, 'owing to the fear', to secure state protection. Considering the plain language of Article 1A(2) and the symmetry between the internal relocation and cessation analyses, the 'compelling reasons' exceptions to cessation set out in Articles 1C(5) and (6) could arguably apply to *any* situation in which the possibility of domestic protection is proposed as a substitute for asylum abroad.[74] Among other situations these are 'intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution.'[75] In Grahl-Madsen´s words, such persons may have developed a "distrust of the country itself and a disinclination to be associated with it as its national."[76]

The 'reasonableness' analysis thus involves an individualized assessment of both subjective and objective factors. In terms of the subjective factors, refugee law recognizes that previous trauma may be relevant even if it does not affect future risks of harm. In terms of objective factors, the achievement of a normal life in the area of return - in accordance with UNHCR guidance - implies not only the absence of Article 3 ill-treatment (however defined) but also a certain level of affirmative human rights protection. Therefore, even if the Court adopts a more explicit version of the reasonableness analysis under Article 3, it still will not capture the requirements of the Refugee Convention or the Qualification Directive.

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[74] On the symmetries between the IFA and Cessation Clause, see Maria O´Sullivan, 'Territorial Protection: Cessation of Refugee Status and Internal Flight Alternative Compared' in S Juss (ed), *Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2013).
[75] UNHCR, (2003) 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstance Clauses") para 20.
[76] Atle Grahl-Madsen, *The Status of Refugees in International Law* Vol 1 (AW Sijthoff 1966) 410.

3.3 Problems of application

A final way in which the Court's jurisprudence reflects or reinforces a flawed approach to internal relocation in European states' practice is through the problematic application of the Court´s own standards in its decisions. Despite repeating the *Salah Sheekh* requirements in cases involving internal relocation, at times the Court fails in practice to ensure that the place of 'refuge' is safely accessible and offers a degree of stability (i.e. there is no risk of internal *refoulement*).

Judge Power-Forde noted in her dissenting opinion in *M.Y.H. and Others v. Sweden* that the guarantees required by *Salah Sheekh* regarding travel to, admittance and settlement in the proposed area of return impose a high burden of proof on the sending state. "Positive indications" alone are inadequate.[77] In *Salah Sheekh*, the technical possibility of 'return' to the relatively safe territories of Somaliland or Puntland did not mean that the applicant would be enabled to stay in either place. Furthermore, the Court noted, in the absence of any post-return monitoring, the state could not verify that the applicant was even admitted.[78]

However, in *M.Y.H. and Others v. Sweden*, the Court did not demand the same due diligence on the part of the contracting state. In that case, as Power-Forde notes, the Court completely failed to consider transit risks along insecure roads to Kurdistan.[79] It also dismissed reports documenting the unpredictable practice of border guards, which raised a real, if small, possibility that the Christian Iraqi applicants could be refused entry. In *D.N.M v. Sweden*, involving an Iraqi man who fled an honor-related conflict, the Court simply observed that he could "find a place to settle" outside his home region.[80] Without identifying where this area might be, of course, it was impossible to ensure that the criteria set out in *Salah Sheekh* were fulfilled. At the

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[77] *M.Y.H. and Others v Sweden* App no 50859/10 (ECtHR 27 July 2013). Dissenting opinion of Judge Power-Forde joined by Judge Zupančič, 33.
[78] Salah Sheekh (n 8) [143].
[79] *M.Y.H. and Others v Sweden* (n 77).
[80] *D.N.M. v Sweden*, App no 28379/11 (ECtHR 27 June 2013)

domestic level, it is likely that decision-makers will refer to these cases in support of a finding that internal relocation is safe and accessible for certain categories of applicants from Iraq.[81]

The Court's acceptance of non-state actors of protection is also at odds with its concern with the risk of internal *refoulement.* In *Sufi and Elmi*, which also involved return to Somalia, the fact that the 'safe' area was controlled by armed groups with a tenuous hold over the territory did not disqualify it on durability grounds.[82]

4. Conclusion

The Strasbourg Court´s relocation jurisprudence can be justified, in some cases, for the removal context in which it operates. The sending state may, for example, be attempting to deport an individual who is excluded from refugee status or complementary protection under international law because they pose a threat to national security or have committed violent felonies. In these cases, effective protection from Article 3 harms is arguably the relevant legal standard for return anywhere in the country of origin.

In other cases, though, the Court is considering, essentially, a defensive claim for international protection. Although the Court has obliged itself to interpret the ECHR "in harmony with the general principles of international law", its internal relocation decisions reflect only a partial incorporation of refugee standards combined with a strong reaffirmation of Article 3´s central role in *any* return

[81] In Norway, for example, select ECtHR decisions are included as legal sources on the website of the Immigration Directorate with a note concerning the category of cases for which they are relevant. One admissibility decision, *Omeredo v Austria*, was deemed useful for assessing the possibility of internal flight for single females from Nigeria. UDI Regelverk, online at http://www.udiregelverk.no/no/rettskilder/emd-avgjorelser/application-no-896910/. Here, though, the Court again took a few shortcuts and accepted, after only a cursory review of the applicant's work experience and education, the state's assertion that the she could find some (unspecified) place to settle. *Omeredo v Austria*, App no 8969/10 (ECtHR 20 September 2011).

[82] *Sufi and Elmi* (n 55). Rather, for persons with close family connections in parts of southern or central Somalia, the transit risks associated with Al-Shabaab checkpoints, and the risk of human rights violations within Al-Shabaab areas, were the main factors precluding relocation. [272] –[277].

analysis.[83] As such, they do not model the legal requirements for internal relocation under either the Refugee Convention or the Qualification Directive. One obvious point of divergence relates to the distinct reasonableness requirement imposed by these instruments. However, as this paper illustrates, the Court´s restrictive approach to 'safety' and uneven application of its own criteria also make it an unreliable source of guidance for decision-makers tasked with analyzing the compatibility of return with international and regional obligations.

[83] See, *inter alia, S.H.H. v. The United Kingdom*, App no 60367/10 (ECtHR 29 January 2013) [94]; *Neulinger and Shuruk v. Switzerland* App no 41615/07 (ECtHR 6 July 2010) [131]-[132].