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The Right to Refugee Status and the Internal Protection Alternative: What does the Law Say?

Jessica Schultz and Terje Einarsen[1]

1. Introduction

This article builds on research in progress concerned with the so-called 'internal protection alternative' (IPA)[2] in international refugee law, presumably one of the most important exceptions to refugee status under the 1951 Refugee Convention (hereafter 'the Refugee Convention') and especially in current asylum practice of European and Western States. The IPA is premised on the view that a person whose risk of persecution is limited to one area in the country of origin does not qualify as a refugee if he or she could resettle safely elsewhere in the same country. In the following we discuss the scope for IPA under the law of refugee status. By 'the law' we mean the 1951 Refugee Convention as amended by the 1967 Protocol,[3] and read in accordance with established principles of treaty interpretation. The most important rules in this regard are contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).[4]

Although there is consensus that an IPA is not 'safe' and thus that the exception does not apply if a real risk of persecution remains, State practice and academic commentary is conflicted about what *more* is required. In particular, debate centers on the relevant scope of human rights protection in the proposed IPA. Some decisions consider such protection as a neutral factor in the absence of

[1] Jessica Schultz is a PhD Candidate and Terje Einarsen is Professor of Law at the Faculty of Law, University of Bergen.
[2] The 'internal protection alternative' is also known as the 'internal relocation alternative' or the 'internal flight alternative'.
[3] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol 189, 137. Amended by UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol 606, 267.
[4] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol 1155, 331.

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discriminatory denial;[5] others examine the applicant´s ability to enjoy basic civil, political, and socio-economic rights.[6] A third category acknowledges an elusive 'x factor' over and above the absence of 'serious harm' without defining its substance.[7] Even within States, different approaches to human rights may be taken depending on the caseload concerned.[8]

In this paper, we consider how the IPA-concept relates to the refugee definition, and what impact its insecure anchoring in the Convention has on the resulting analysis. Second, we investigate how other parts of international human rights law (IHRL) inform the IPA criteria. In particular, what risks of human rights violations beyond the original risk of persecution must be considered? Finally, we explore possible gaps between the IPA practice of the European Court of Human Rights and the requirements according to 'what the Law says' under the Refugee Convention. **We argue that, under the Refugee Convention, there is a**

[4] *AE and FE v Secretary of State for the Home Department* [2003] EWCA Civ 1032. In Norway, the 'right to have rights' played a large role in cases involving the relocation of ethnic Serbs from Kosovo to other places in Serbia. Immigration Appeals Grand Board, *Appeal No 7160183048* (December 2006). In this case, because the applicants were unlikely to gain a legal residence permit in Serbia, which was needed to access public services like education and healthcare, internal relocation was deemed unreasonable.

[6] New Zealand Refugee Status Appeals Authority, *Refugee Appeal No 71684/99*.

[7] In Germany, the Federal Administrative Court in 2008 (with reference to 2004 Qualification Directive of the Common European Asylum System) noted that its 'subsistence minimum' approach to the reasonableness question might have to be softened: '(i)t remains open to question if broader economic and social standards must be met, as there is evidence that under Article 8 paragraph 2 of the Directive the general circumstances of the country of origin –above the threshold of subsistence – also shape the reasonableness standards.' BverwG [2008] 10 C 11.0729 [35]. See also *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]. In that case, Baroness Hale noted that 'although the test of reasonableness is a stringent one - whether it would be "unduly harsh" to expect the claimant to return - it is not to be equated with a real risk that the claimant would be subjected to inhuman or degrading treatment or punishment so serious as to meet the high threshold set by article 3 of the European Convention on Human Rights…internal relocation is a different question.' [22].

[8] Compare the position taken in Norwegian jurisprudence regarding Serbs from Kosovo, *supra* note 9, with practice regarding applicants from Chechnya who were considered to have a valid IPA despite their inability to secure a residence permit in the place of relocation. Norwegian Refugee Council, *Whose responsibility? Protection of Chechen internally displaced persons, asylum seekers and refugees* (2005) 49.

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narrow scope for application of the IPA where the consequences of return for the individual are balanced against the asylum State's interest in managing its limited resource base for international protection (see Section 4.4.2, below). A range of subjective and objective factors, including those related to human rights standards, should be considered in the proportionality analysis.

2. Origins of the IPA-limitation on international refugee protection

The IPA concept does not appear anywhere in the text of the Refugee Convention. Nor was it discussed during the drafting process of the Convention or its Protocol in 1967.[9] As far as early commentaries are concerned, a statement by Nehemiah Robinson has been invoked to support a hypothesis that a general IPA-limitation implicitly had been conceived when the Refugee Convention was enacted.[10] In his Commentary published in 1953, Robinson remarked that the refugee criteria established by Article 1A(2):

[9] Some scholars have argued that the Convention´s drafters insisted on the exclusion of internally protected persons from the ambit of Article 1A(2). A. Zimmermann and C. Mahler, 'Article 1A, para. 2 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 448; also see J. Hathaway, *The Law of Refugee Status* (Butterworths 1991) 133, citing statements by Eleanor Roosevelt of the US and Robert Rochefort of France to the effect that 'internal' refugees were not covered by the Convention. In our view, the comments referred to may more naturally be interpreted as reflections on the political and practical context in which the Convention was elaborated, which limited its scope to persons *outside* their countries of origin. Rochefort, for example, noted that protecting the internally displaced 'would involve an infringement of national sovereignty'. UN Doc E/AC.7/SR.172 (August 12, 1950). In fact, it seems that the treaty authors simply assumed that the Convention covered persons who today would be subjected to an IPA analysis. See the statement of Louis Henkin (USA), referring to ´very numerous Kashmiri and Indian refugees´ who would be included in the scope of Convention protection if the definition was not limited to events in Europe related to the Second World War. Ad Hoc Committee on Statelessness and Related Problems, UN Doc E/AC.32/SR.3 (1950) 9. We find no evidence from the drafting history that victims of regionally-contained civil wars with a well-founded fear of persecution were meant to be excluded from refugee status. Terje Einarsen, 'Drafting History of the Convention/New York Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 55.

[10] Zimmermann and Mahler 445.

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> '…would rule out happenings of a local character, for instance, riots in a certain region or events which are being combatted by the authorities because in such cases there would be no reason for a person possessing a nationality to be unwilling to avail himself of the protection of his country.' [11]

However, this statement does not relate to the personal scope of Article 1A(2), referring rather to the original *temporal limitation* set by the term 'events occurring before 1 January 1951' in Article 1 A (2), cf. also Article 1 B. It is also important to note that Nehemiah Robinson was not involved in negotiating the Refugee Convention; therefore his views cannot be presumed to reflect the drafters´ intent. Finally, the statement itself – supposing it was meant to be relevant also to an (implied) IPA-limitation on the *substance* of the refugee definition – is concerned with temporary disturbances rather than regional conflicts *per se.* An IPA-limitation on international refugee protection was not discussed either during the preparation of the 1967 Protocol, which made the refugee definition universal by effectively expanding its temporal and geographical scope to contemporary and future refugees originating from all areas of the world. The lack of a clear legal basis for the IPA-limitation in the Refugee Convention and its 1967 Protocol is thus problematic; especially since Article 1 of the Refugee Convention makes a number of explicit limitations in Articles 1 C-F.

For the first decades after the Convention came into force, in fact, a well-founded fear of Convention relevant persecution – provided that no exclusion provisions applied – was the only necessary and sufficient criterion for recognition of

[11] Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation: a Commentary* (Institute of Jewish Affairs, World Jewish Congress 1953) 46.

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refugee status.[12] This changed in the late 1970s and early 1980s, when the IPA exception gained traction in Western State practice against the backdrop of new refugee flows from Africa, Asia and Latin-America. These migration patterns, and related political pressures motivated efforts by parties to the Refugee Convention to 'more carefully delineate the limits of their legal obligations' under the treaty.[13] While aiming to limit incipient State practice from Germany and the Netherlands, the UNHCR Handbook published in 1979 arguably encouraged the concept´s spread to other jurisdictions.[14] The Handbook provides in Paragraph 91:

> The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, *if under all the circumstances it would not have been reasonable to expect him to do so*.'[15]

Accordingly, the test for an IPA has traditionally been framed as one involving both ´safety´ and ´reasonableness´.[16]

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[12] J. Hathaway and M. Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR´s Global Consultations on International Protection* (Cambridge University Press 2003) 359. Also see Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?' 14 International Journal of Refugee Law 4, 4.The earliest IPA cases we have found date from the late 1970s, involving Christian Turks seeking asylum in the Netherlands and Germany. See, for example, Court Almelo 11 May 1977 (Rechtspraak Vreemdelingenrecht 1977, 21): 'The persecution of the applicants (6 Christians from Turkey) happened only in a limited area of Turkey and certainly not in the big cities. Therefore, to escape this persecution the applicants did not need to leave their home country'. Confirmed on appeal by the Council of State, 18 August 1978. On file with authors.

[13] Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' 360.

[14] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR ed, 1979).

[15] ibid [91]. Emphasis added.

[16] This two-part test modeled on the Handbook was first articulated by the German Federal Constitutional Court in 1984. See 2 BvR 403/84 1501/84, EZAR 203 No 5; See also 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).

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Since the 1980s, the IPA doctrine has been substantially broadened in refugee law theory and State practice, and has become an integral key part of asylum adjudication throughout Europe, as well as the US, Canada, Australia and New Zealand.[17] It has also penetrated claims to 'complementary' protection and relief from deportation.[18] However, because of the limited scope for *de facto* 'revision' of the Refugee Convention through State practice, especially of Article 1,[19] it is important to take a closer look at how the presumed IPA-limitation might be legally grounded in the refugee definition.

3. What is the treaty-basis of the IPA-limitation?

How the IPA concept relates to the text of the refugee definition has been a matter of debate in the academic literature as well as State practice. Article 1A(2) of the Convention sets out the following criteria for refugee status:

> [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,

[17] For and overview of IPA practice in Europe, see ECRE, *Actors of Protection and the Application of the Internal Protection Alternative* (2014) ELENA, *The Application of the Concept of Internal Protection Alternative* (2000) UNHCR, *The Internal Flight Alternative Practices: A UNHCR Research Study in Central European Countries* (2012). For examples of the IPA approach in other countries see *Matter of M-Z-M-R-* [2012] 26 I&N Dec 28 (USA); *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (Canada); and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (Canada); *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 (Australia); Refugee Status Appeal Authority *Appeal No 76044* [2008] (New Zealand).

[18] The EU Qualification Directive provides that the possibility of national protection somewhere may defeat any claim for international protection arising under the directive. 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 eligible for subsidiary protection, and for the content of the protection granted (recast); In the removal context, see for example, *Sufi and Elmi v UK*, Application nos 8319/07 and 11449/07 (ECtHR 28 June 2011).

[19] Article 42 of the Convention exempts Articles 1, 3, 4, 16(1) 33, and 36-46 from the possibility of reservations by state parties to the treaty. Furthermore, Article 45 provides for the possibility of formal revisions following a request by a State party to the Secretary General of the United Nations.

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> 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 is unable or, owing to such fear, is unwilling to return to it.

According to one thesis, sometimes referred to as the 'holistic' or the 'well-founded fear' approach,[20] this definition is satisfied when the claimant 1) can establish a legitimate fear of persecution for a Convention ground; 2) is outside his or her country of origin; and 3) is unable or unwilling, owing to the well-founded fear, to avail him or herself of that country's protection. The lack of protection by the State of origin – either in the area from which the claimant fled *or* in another area – is relevant insofar as it may reduce the claimant's risk of persecution below the threshold required to establish a well-founded fear.[21]

According to an alternative view, the proper textual home for the IPA lies in the so-called 'protection clause' of Article 1A(2). If the claimant – despite establishing a well-founded fear of persecution in one area of a country– can nonetheless obtain protection somewhere else, then she is neither unable nor legitimately unwilling to avail herself of 'protection of that country' as contemplated by the Convention.[22] According to Hathaway and Foster, the benefit of the 'protection clause' nexus is that the claimant establishes a *prima facie* case for protection at the outset, shifting the burden of exclusion based on a valid IPA squarely onto the State's shoulders.[23]

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[20] See 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* . The reason this approach is termed 'holistic' is because the questions of persecution and protection are treated together rather than as two distinct topics of inquiry. See also Kelley 8.

[21] *Januzi (FC) (Appellant) v Secretary of State for the Home Department and Others* [2006] UKHL 5 [2006] 2 AC 426 (UK); *Szatv v Minister of Immigration and Justice* [2007] HCA 40 (Australia*).* See also and the US Immigration Regulations at 8 Code of Federal Regulations [2003] s 208.13 (2)(C)(ii)).

[22] Michigan Guidelines on the Internal Protection Alternative (1999); Refugee Status Appeals Authority, No 71684/99 [2000] INLR 165 (New Zealand).

[23] Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination'. It should be noted that in practice, some states nonetheless consider the IPA as a preliminary disqualification for refugee status. ECRE.

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In either case, the IPA concept reflects the view that international protection is subsidiary, or 'surrogate', to the protection that a State is obliged to provide to its own nationals.[24] In other words, if the country of origin can prevent the feared harm somewhere on its own territory, the back-up remedy of asylum abroad is not required.[25] State protection according to this view has both a systemic aspect (related to the State´s ability and willingness to protect from the original harm) and a territorial one (related to the possibility of State protection elsewhere in the country of origin). These two dimensions of the protection test are textually anchored, arguably, by the Convention´s reference to ´country´.[26] As the Australian Federal Court held in *Randhawa*:

> '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.'[27]

It is not immediately clear, though, that this reading reflects the ordinary meaning of 'country' in context. While the reference in Article 1A(2) to *Stateless* refugees' unwillingness or inability to return to their 'country' of habitual residence may indeed relate to a specific geographic space, the phrase 'protection of that country' for persons with citizenship connotes a legal relationship between the State and its citizen (with *both* external and internal

[24] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) Hathaway, *The Law of Refugee Status* 10.
[25] James C. Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' 4 Journal of Refugee Studies, 123
[26] Internal Flight Alternative Test: The Jurisprudence Re-examined, 501-503. See also Penelope Mathew, James C. Hathaway and Michelle Foster, 'The Role of State Protection in Refugee Analysis: Discussion Paper No. 2, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002' (Oxford) 15 International Journal of Refugee Law.
[27] *Randhawa v Minister for Immigration* (1994) 12 ALR 265 (Canada); See also *Rasaratnam v MIEA* (1992) 1 FC 706, 709-711 (Canada).

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dimensions).[28] With respect to domestic protection, it is arguable that a single failure by the State of origin in one area is consistent with the grant of refugee status.[29] The claimant's lack of protection in that place demonstrates the State's inability to fulfill its basic duties to provide security for nationals countrywide, and to protect their freedom of movement.[30] To confuse matters further, Article 33 (*non-refoulement*) refers to the frontiers of 'territories' rather than countries. This term is also used in the UNHCR Handbook, which maintains that 'the fear of being persecuted need not always extend to the whole *territory* of the refugee's country of nationality.'[31] Finally, as mentioned earlier, there is no indication from either the travaux préparatoires or the early commentaries that the drafters intended to exclude persons with domestic protection alternatives from refugee status unless they were still in their countries of origin.

In other words, while the subsidiary character of international protection is

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[28] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 8. When the Convention was drafted, the term 'protection' in Article 1A(2) connoted the diplomatic or consular protection owed by the state of origin to nationals living abroad. See A Fortin, 'The Meaning of "Protection" in the Refugee Definition' 12 International Journal of Refugee Law, 99 Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol I: Refugee Character (A.W. Sijthoff 1966) UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. At the same time, the idea that a 'refugee' is someone without protection from serious harm *within* the country of origin (domestic protection) is also clearly implicit in the Convention regime. See, for example, Articles 1C (cessation) and Article 33 (*non-refoulement*).

[29] In fact, the surrogacy principle developed in the jurisprudence of key asylum states like the UK and Canada to connect the concept of persecution under the Convention with harms by non-state actors. See *Canada (Attorney General) v. Ward*, (1993) 2 S.C.R. 689 (Canada); *Horvath v. Secretary of State for the Home Department*, 2000 UKHL 37 (UK). The application of this concept to IPA cases is effectively an extension of the principle beyond its political dimension to a territorial one. One can thus distinguish between 'thin surrogacy' (persecution = harm – state protection) and 'thick surrogacy' (persecution = harm – state protection anywhere *or* persecution = harm – state protection + no effective protection elsewhere).

[30] This was the argument advanced by Gaetan De Moffats in ELENA, "The Application of the Concept of the Internal Protection Alternative" (Brussels: ECRE, 2000), 11. On the scope of state obligations with regard to freedom of movement, and the right to stay in one´s residence, see Michèle Morel, *The Right not to be Displaced in International Law* (Intersentia 2014)

[31] [91]. Emphasis added.

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justified by the Refugee Convention as a general matter,[32] it is not obvious that this principle provides an authoritative answer to the question of refugee status when domestic protection is only *partially* available. This might be illustrated by a figure:

Figure 1: SUBSIDIARY CHARACTER OF REFUGEE STATUS

Protection against persecution by home State?	Right to international refugee protection?
1. Yes (able and willing to protect at the whole territory) →	No refugee status (no need of "surrogate" protection)
2. No (home State unable or unwilling at the whole territory) →	Yes (need of "surrogate" protection)
3. Partial protection (able and willing to protect in some part of the territory – "IPA") →	Yes/No (implied limitation applicable?)

The arrows show the legal relationship. Red signals return, green admission to international refugee protection, and yellow legal uncertainty/exceptions. *Source: Authors*.

The figure illustrates that while the principle of subsidiary ('surrogate') protection aids to solve the first two cases (boxes) in the matrix, the solution might go either way in the third case. Thus, anchoring the IPA in the text of the definition is, at best, an interpretive stretch. Instead, we propose an alternative approach. In the sections below, we explain why the IPA may best be understood as an 'implied limitation' to the right to refugee status and what this might mean in practice.

4. The IPA as an implied limitation to the right to refugee status

4.1 Interpreting Article 1A(2) of the Refugee Convention

[32] This is clear from the fact that the Convention explicitly excludes from protection persons who have access to equivalent or superior protection in other countries. See Articles 1C (the cessation provisions), 1D (covering refugees already receiving assistance from UN organizations), 1E (persons living in a country with the rights and obligations attached to the possession of the nationality of that country), as well as Article 1A, para. 2(2) (persons with more than one nationality).

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In contract law generally, as well as in international treaty law, lawyers and judicial tribunals may accept implied terms in order to accommodate unforeseen situations provided that the implications are *necessary* to achieve a just and reasonable result in line with the perceived common contractual objectives.[33] Can the IPA be considered an implied limit to the scope of Article 1A(2), a justified response to the shifting nature of refugee claims?[34] To answer this question, it is important to keep in mind the main purpose of the Refugee Convention, which according to its Preamble is extended international refugee protection. The Convention is, moreover, the first human rights treaty established by the United Nations, and, more generally, a third party agreement for the benefit of refugees.[35]

The initial hurdle, then, is to demonstrate that the IPA is 'necessary' to achieve the purpose set out in the Refugee Convention and specifically with respect to the recognition of refugee status. The provisions of the refugee definition were meticulously debated, with the balance achieved between generality and specificity the result of detailed negotiations.[36] If anything, the drafters wished to leave the door open for State parties to pursue a *more*, not less, liberal refugee policy than the Convention strictly requires. Furthermore, as noted above, the definition is not, unlike other Convention provisions, open to reservations. Therefore, as a starting point, any *de facto* reservation would probably have to be narrowly defined. This argument may be reinforced by the fact that an implied limitation on the refugee concept affects *all* rights under the Refugee Convention, including *non-refoulement*, and thus not only Article 1 itself.

Furthermore, from an empirical perspective, it is hard to see that a just and reasonable interpretation of Article 1A (2) is *dependent* on the IPA exception.

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[33] Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008).
[34] Even this justification is debatable. As mentioned above the drafters considered persons facing regionally limited harms to be covered by the scope of Article 1A(2).
[35] Einarsen.
[36] Ibid.

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Sixty years of State practice applying the definition confirm that the IPA concept is neither inherent in the text, nor so apparently obvious that the integrity of the refugee definition is comprised without it. This has been reasserted recently in the EU Qualification Directive (2011), which provides that States may (not must) consider an IPA when assessing a claim to refugee status or subsidiary protection (Article 8 QD).[37] And finally, as argued above, an alternative interpretation is possible that preserves the surrogate character of refugee protection without an IPA analysis. According to this view, a refugee is someone outside his or her country of origin because of a well-founded fear of persecution. It is *characteristic* of the refugee's condition that he or she is unable or unwilling – owing to the well-founded fear - to avail themselves of the protection of their country of origin. The absence of protection is thus, as a general rule, not a *condition* of recognition of status. The benefit of this approach is that it returns focus to what, according to Kneebone, is the 'central or primary purpose' of the Convention: the *international* duty –not the national duty – to 'confer protection from persecution.'[38]

In fact, it is arguable that the Convention´s aims, as confirmed in the Preamble, are *compromised* by a broad exclusionary practice like the IPA. In general, the

[37] Article 8 of the 2011 Qualification Directive provides that states 'may', not 'must' consider internal protection alternatives when determining a claim to refugee status or subsidiary protection. [37] 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 eligible for subsidiary protection, and for the content of the protection granted (recast).

[38] Susan Kneebone, 'Moving Beyond the State: Refugees, Accountability and Protection' in Susan Kneebone (ed), *The Refugee Convention 50 Years On* 286. This thinking was expressed early on by Grahl-Madsen who argued that the lack of protection by the country of origin is an 'ambivalent symptom' detracting from the real issue, which is that the bond between citizen and state is severed by a well-founded fear of persecution for a discriminatory reason. The Status of Refugees in International Law, I: Refugee Character: 99. Also see Nykänen, citing a 'growing body of legal thinking (that) conceptualizes refugee protection not as surrogate, but rather as complementary in relation to national protection.' Eeva Nykänen, *Fragmented State Power and Forced Migration: A Study on Non-State Actors in Refugee Law* (Martinus Nijhoff Publishers 2012) 95.

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concept seems fundamentally in tension with a humanitarian regime predicated on finding solutions to forcible displacement – not creating new ones. The Preamble also refers to burden-sharing and international cooperation in addressing the refugee 'problem'. This purpose, as discussed by the drafters, was to be achieved in a humanitarian spirit by establishing common standards of rights protection for refugees. It can hardly be argued that the IPA – which rather shifts the displacement burden back to the country of origin – facilitates this objective. Indeed, today's variable practice when it comes to the IPA arguably undermines the consistent treatment of claimants that the Convention aims to promote.

In conclusion, the IPA exception to refugee status does not seem necessary to uphold the purpose of the Refugee Convention as required by the doctrine of implied limits. Nor does the IPA meet the rigorous standards to qualify as a progressive interpretation of the Convention under Article 31(3)(b) of the VCLT.[39] Although many asylum countries do apply the IPA, the practice is hardly 'concordant, common and consistent'[40] enough to imply the agreement of all parties regarding its interpretation.[41] It is furthermore unclear whether such practice is motivated by a sense of legal obligation.[42] As UNHCR maintains, there

[39] This provision establishes that treaties should be interpreted in light of subsequent state practice 'which establishes agreement of the parties regarding its interpretation'.
[40] WTO Appellate Body in *Japan – Tax on Alcoholic Beverages*, WTO Doc WT/DSA8/AB/R, Doc WT/DS10/AB/R, DocWT/DS11/AB/R (4 October 1996).
[41] For the 45 states that had ratified the 1969 OAU Refugee Convention as of 2013, the IPA is not routinely applied. Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45. The OAU definition echoes the 1951 Convention definition but also adds, in Art. I(2) that the term 'refugee' also covers a person compelled to leave his place of habitual residence owing to 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality.' The IPA is not routinely applied in Latin America or Africa, nor is it universally applied within Europe.
[42] As Judge Fitzmaurice argued in his Separate Opinion in the ICJ opinion *Expenses*, consistent subsequent practice offers good presumptive evidence of the correct legal interpretation of a treaty. But, he says, 'where this is the case, it is so because it is possible and reasonable in the circumstances to infer from the behavior of the parties that they have regarded the interpretation they have given to the instrument in question

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is no *requirement* that the IPA is considered as part of the determination of refugee status.[43] While treaty bodies and courts have upheld State practice as determinative under less strict conditions, this has generally occurred in cases – unlike the IPA - where those practices clearly further the objective of the relevant treaty.[44] Hathaway explains why State practice is a dubious source of interpretation for a human rights instrument like the Refugee Convention:

> 'These treaties are unique applications of international law, in that they are expressly designed to constrain State conduct for the benefit of actual human beings. This purpose could be fundamentally frustrated if the construction of the duties assumed by States were to be determined by the very State practice sought to be constrained. Indeed, if refugee and other human rights treaties are interpreted in ways that defer to contemporary State practice, there is a very real risk that State auto-determination of the scope of obligations will trump the existence of obligations at all.'[45]

IPA practice depends on a dynamic interpretation of Article 1A(2) that sits uneasily with the treaty´s overall purpose. On the other hand, under certain circumstances it may still be legally justified if one understands Article 1A(2) to provide a *right* to refugee status (see below Section 4.4.1). Human rights bodies have accepted limits on rights that are not strictly 'necessary' in light of treaty objectives, but which are deemed proportional to the legitimate State aim being pursued.[46] In the following section we draw on the jurisprudence of the European Court of Human Rights (ECtHR), in which the proportionality principle

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as the legally correct one, and have tacitly recognized that, in consequence, certain behavior was legally *incumbent* upon them.' Emphasis added. *Certain Expenses of the United Nations* (Article 17, Paragraph 2 of the Charter), Advisory Opinion, [1962] ICJ Rep 151, ICGJ 221 (ICJ 1962), 20th July 1962, International Court of Justice [ICJ].

[43] In its 2003 Guidelines, UNHCR states that IPA considerations *may* arise as part of a holistic determination of refugee status (para 38). 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* [6]. Furthermore, '*if* internal flight or relocation is to be considered in the context of refugee status determination, a particular area must be identified…'. Emphasis added.

[44] The ECtHR has found less widespread conformity of state practice persuasive when the state practice that does exist is consistent with the broader goals of the ECHR. This has been true with respect to particularly vulnerable groups of persons – such as illegitimate children - whose interests were not identified or discussed in the drafting of the treaty. See *Marckx v Belgium*, *Application no. 6833/74 (ECtHR 13 June 1979).* .

[45]James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 71

[46] See, for example, *Hirst v. The United Kingdom*, Grand Chamber Judgment, Application no. 74025/01, 6 October 2005.

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plays a significant role,[47] to consider the constraints on implied limitations in the context of a human rights treaty.

4.2 Implied limitations in human rights law

In human rights law, implied terms include both rights and limitations.[48] A distinction may, however, be drawn between implied limitations to implied rights, and implied limitations to rights expressly set out in the text of a treaty or constitution. In the case of the latter, the ECtHR has come to conflicting conclusions about whether limits are legitimate. In *Campbell and Fell v. UK*, the Court held that the right to the public pronouncement of a judgment could not be subject to implied limitations, as the right is expressly provided for in the Convention.[49] It also found that the existence of limitation clauses in some provisions (Articles 8-11) precluded an inference of non-written clauses in others, since a proposed 'general limitation clause' was rejected by the drafters of the European Convention on Human Rights (ECHR).[50] On the other hand, in

[47] The ECtHR has recognized implied limitations with respect to a number of rights, including those protected by Article 6 (*Golder v. The United Kingdom*), Article 3 Protocol No. 1 (*Mathieu-Mohin v. Belgium*), and Article 2 Protocol No. 1 (*The Belgian Linguistics Case*). Although the arguments we are making pertain to an international rather than regional treaty, we borrow from the Strasbourg jurisprudence because of its weighty normative influence. The proportionality principle is also applied in similar, but not identical, ways by other human rights bodies, including the Human Rights Committee, the IACtHR, and the ACtHPR. See for example, *Mr Ali Aqsar Bakhitiyari and Mrs Roqaiha Bakhtiyari v Australia*, CCPR/C/79/D/1069/2002, para 9.3; *Usón Ramírez v. Venezuela*, IACtHR C/207, 20 November 2009, paras 76-78; *Murillo et al v Costa Rica (In Vitro Fertilization),* IACtHR, 28 November 2012, paras 113-114; *Media Rights Agenda v. Nigeria* (2000) AHRLR 200, paras 64-71; *Amnesty International v Sudan* (2000) AHRLR 297, para. 82; *Interights v. Mauritania* (2004) AHRLR 87, paras 76-85.

[48] For example, in *Golder*, the court implied the right to access from the fair trial provisions of Article 6, but also found that such an implied right was subject to limitations by the state party. *Case of Golder v. The United Kingdom*, App. no. 4451/70 (ECtHR 21 February 1975).

[49] *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 (ECtHR 28 June 1984), para. 90.

[50] See *Campbell and Fell*, supra note 47, para 90; Also see *DeWilde, Ooms and Versyp (Vagrancy Case)*, 18 June 1971, para 93 and *B and P v. the UK*, para 44 Deviations from this rule are evident in the *Kalaç* case, paras. 27 et sec and *Klamencki* (No. 2) paras. 144

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cases pertaining to the express right to cross-examine prosecution witnesses, for example, the ECtHR has alluded to competing rights enshrined in the ECHR to shape the implied external limits.[51]

When the right itself has been implied, however, the scope for judicial limitation seems broader. In *Golder*, after implying the right of access to courts as part of the fair trial provision of Article 6 ECHR, the ECtHR considered whether this right could be limited for prisoners to secure certain State objectives.[52] Although the Court acknowledged that the State had considerable freedom to imply limitations to rights not expressly set out in the Convention, it concluded that such broad based measures excluding all prisoners from the right to representation interfered with 'the very content of the right' and was therefore unjustified.[53] In other cases, the Court has adopted a pure balancing approach (when the limit protects a conflicting right) or emulated the limitation clauses provided for in Articles 8-11 ECHR. The latter provide that any limitation must 1) be prescribed by law; 2) serve a purpose specified in the respective article; and 3) be necessary in a democratic society.[54]

When the right in question is not framed as a right in the text, but nonetheless is a necessary corollary to the explicit obligations that the text imposes on State

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& 152. Cited in Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006)

[51] *Van Mechelen and Others v. The Netherlands*, 21363/93, 21364/93, 21427/93, 22056/93 (ECtHR, April 17, 1996).

[52] *Case of Golder v. the United Kingdom*, App. no. 4451/70 (ECtHR 21 February 1975). As the Court observed, Article 6-1 'does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term.' para 28.

[53] *Golder v. the UK*, *supra note* 47, para 38.

[54] See also Nicolas A.J. Croquet, 'The European Court of Human Rights´Norm-Creation and Norm-Limiting Processes: Resolving a Normative Tension' 17 Columbia Journal of European Law, 333

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parties, the Court has accepted a narrow scope for limits.[55]. An example in the ECHR context is the right to vote established by Article 3 of Protocol 1 to the ECHR. Article 3 of Protocol 1 provides that the contracting parties 'shall hold free elections at reasonable intervals…' This has been interpreted as containing an individual right to vote as well as a right to run for political office.[56]

In cases involving such 'strongly implied' rights, like the right to refugee status (below), the Court incorporates a proportionality analysis familiar from many fields of international law.[57] In *Mathieu-Mohin and Clerfayt*, the Court established that any restrictions on the right to vote must meet the following criteria: they must not deprive the right of its effectiveness or impact its 'very essence'; it must be imposed in pursuit of a legitimate aim; and the means employed must be proportionate.[58]

4.3 Proportionality in other provisions of Article 1

In fact, the proportionality test has also been acknowledged as a 'useful analytic tool' with regard to the exclusion clauses in Article 1F of the Refugee

[55] This scenario may be distinguished from *Golder*, in which the ECtHR has implied a right despite the fact that the provision in question could survive, logically, even in the absence of the implication. It may also be distinguished from the cases where the right is explicit in the text or clearly integral to the explicit right, such as the right of the accused to cross-examine the prosecution´s witnesses. In *Van Mechelen,* which involved the legality of measures curtailing the (implied) right to cross-examine prosecution witnesses, the Court found that 'any measures restricting the rights of the defense should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.'

[56] *Hirst v. UK*, Application no. 74025/01 (ECtHR judgement June 10, 2005).

[57] Emily Crawford, 'Proportionality' in The Max Planck Encyclopedia of Public International Law Vol. VIII (Oxford: Oxford University Press, 2012), 534. In the *Schräder Case*, the Court of Justice of the European Union also confirmed the principle of proportionality as one of the general principles of Community law. Cited in Crawford at 537.

[58] *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81 (ECtHR Judgement March 2, 1987) para 52. Interestingly, the court echoed this approach in a recent case involving the implied right of access to courts, with the caveat that there must be 'a *reasonable* relationship of proportionality between the means employed and the aim sought to be achieved.' Emphasis added. Case of *Jones and Others v. the United Kingdom*, Applications nos. 34356/06 and 40528/06, Judgement of 14 January 2014, para 186, with further citations.

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Convention.[59] UNHCR, in its 2003 Guidelines, advocated a balancing test with regard to claimants accused of less serious war crimes and non-political crimes (arguably the categories that cover the widest range of acts).[60] This has been justified by the 'serious consequences' of exclusion and the provision´s limited purpose of denying protection to those persons guilty of particularly grave acts.[61] Analogous to the IPA under Article 1A(2), Zieck notes that the 'the dynamic interpretation of Article 1 F (a) is denial of a particular form of protection to a categorically larger group of persons than arguably was and could have been envisaged in 1951.' [62] As a result, States are urged to mitigate the consequences of exclusion by applying a proportionality analysis which balances the (severity of the) crime against the consequences of exclusion (related to the degree and type of persecution feared).[63]

4.4 Application of a proportionality analysis to the IPA concept

Can the IPA be understood, then, as an implied limitation to the right to refugee

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[59] UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) para. 24 State practice also recognizes the utility of a balancing test under Article 33(2). See, for example, R v. SSHD (ex parte Chahal 1994); the Swiss Federal Court and the Supreme Court of the Netherlands. Cited in Kälin, The Prohibition of Inhuman Return and its Impact Upon Refugee Status, 149.

[60] *Ibid.*

[61] *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees;* HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, para. 149; similarly UNHCR Guidelines on Exclusion, *supra note* 54 at para. 2; UNHCR Background the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees at para. 4.

[62] Marjoleine Zieck, 'Treaties as Boundaries of Policy: Revisiting the Policies That Informed the 1951 Convention Relating to the Status of Refugees' (12th Conference of the International Association for the Study of Forced Migration) It should be noted though that even the drafters suggested that the exclusion clause should be subject to proportionality considerations. Also see Weis, *The Refugee Convention, 1951*, p. 342.

[63] UNHCR Guidelines on Exclusion, para. 24; UNHCR Background Note on the Exclusion, *supra note* 56 at para. 78. When comparatively less serious acts are alleged, for example isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent removal is likely to lead serious human rights abuses in the country of origin. *Ibid.*

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status set out in Article 1A(2)? The answer to this depends on whether the language of Article 1A (2) confers a right to status for those refugee applicants who fulfill the relevant criteria. If it does, the next question is whether any limit on that right may be legally justified: does the limit pursue a legitimate aim? Are the consequences for the individual strictly proportionate to the State interest in question?

4.4.1 Article 1A(2) and the right to refugee status

With respect to the IPA test, the first thing to observe is that Article 1A(2) does not expressly mention a right to refugee status. Although the purpose of the treaty is to secure rights for a particular class of persons – refugees - the IPA limits the scope of this class rather than the scope of the rights owed to persons within it. At the same time, a right to recognition may be inferred as a logical consequence of the definition´s own terms. The refugee definition would be bereft of meaning or purpose without a claimant having access to a member State´s territory and to effective procedures for determining status. This is reinforced by the 1979 UNHCR Handbook (reissued in 2011), which, following from UNHCR´s mandate to supervise the Convention, provides guidance on procedures and interpretation with respect to the refugee definition. As Vedsted-Hansen observes, it is clear that 'immigration authorities cannot evade the convention obligations of their State by simply *omitting* to make a decision on an asylum application.'[64] The duty to determine refugee status can be inferred from the principle that such status is a declaratory act rather than one that is dependent upon formal recognition.[65] In other words, an implicit right to recognition of status follows from the 'implicit obligation' of State parties to

[64] Jens Vedsted-Hansen, *Europe´s response to the arrival of asylum seekers: refugee protection and immigration control* (New Issues in Refugee Research, 1999) 7 See also Terje Einarsen, *Retten til Vern Som Flyktning* (1998) 615 Furthermore, the obligation of *non-refoulement* in Article 33 presupposes some sort of procedure for assessing whether the claimant is in danger in his or her country of origin.
[65] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*

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evaluate an individual application and to make a decision regarding status as formulated in the Convention. This logic has been endorsed in at least one jurisdiction, Norway, where the Immigration Act makes reference to the 'right to be recognized as a refugee' in its IPA provision:

> 'The right to be recognised as a refugee pursuant to the first paragraph shall not apply if the foreign national may obtain effective protection in other parts of his or her country of origin than the area from which the applicant has fled, and it is not unreasonable to direct the applicant to seek protection in those parts of his or her country of origin. '[66]

From the perspective of treaty interpretation, it also seems that a lawful IPA practice depends on the recognition of a converse right to refugee status.

4.4.2 Is there a legitimate State aim in restricting the right to refugee status?

There is little doubt that application of the IPA concept is used in State practice as a tool to restrict the inflow of refugee claimants. Can general concerns related to immigration control legally justify a limitation on the rights established or inferred from the text of the Refugee Convention? The ECtHR has recognized immigration control as a legitimate aim when analyzing the limits on qualified rights (Articles 8-11) of the ECHR. Although it is not specifically listed as such in the Convention´s text, it has been accepted as a medium through which the enumerated aims related to economic well-being or prevention of disorder or crime may be pursued.[67] With respect to implied limitations otherwise, the ECtHR has granted State parties a wide scope of discretion for determining the purpose for the infringement. In *Hirst v. the UK*, for example, the Court finds that because the provision concerned, Article 3 of Protocol No. 1, did not specify or

[66] Act of 15 May 2008 on the entry of foreign nationals into The Kingdom of Norway and their stay in the realm (Immigration Act) (2010), Section 28 para. 5. Section 28 establishes the obligation to recognize persons who fulfill the criteria established by law: '(a) foreign national who is in the realm or at the Norwegian border *shall*, upon application, be recognized as a refugee if the foreign national…'. Emphasis added.
[67] See, for example, *AA v. The United Kingdom, Application no. 8000/08), ECtHR 20 September, 2011, paras. 52-55*; Nicholas Blake and Raza Hussain, *Immigration, Asylum, and Human Rights* (Oxford University Press 2003) 190

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restrict legitimate aims, '(a) wide range of purposes may therefore be compatible with Article 3.'[68] From a general human rights perspective, then, the presentation of immigration control as a legitimate aim seems unproblematic.

However, the privileged status of refugees enshrined by the Refugee Convention argues against transferring norms from other treaties that leverage precisely those State interests the Convention aims to reign in. The Convention drafters were well-aware that the language of Article 1A(2) opened for an unpredictable flow of refugees to contracting States.[69]

At the same time, the lack of an explicit right to asylum or even a right to enter a contracting State´s territory in order to submit a claim does reflect an implicit recognition of limits to a State´s responsibilities towards refugees.[70] A more robust aim, in the context of the Refugee Convention, could be framed as the preservation of the State´s finite resource base for the privileged human rights protection that refugee status endows.[71] In other words, to maintain public support for the institution of asylum over time, the State has an interest in limiting the scope of refugee protection to persons without an adequate alternative in their country of origin. Indeed, Articles 1A, 1C, 1D and 1E of the Convention allow a State party to decline an otherwise valid claim to refugee status under certain circumstances if effective protection is available

[68] *Hirst v. UK*, *supra note* 56, para 74. Also see *Podkolzina v. Latvia*, Application No. 46726/99 (ECtHR 9 April 2002), para. 34.
[69] During the drafting process, temporal and geographic limits to the *application* of Article 1A(2) were agreed upon to rein in the 'blank check' represented by the *substance* of that provision. See Einarsen, 'Drafting History of the Convention/New York Protocol'
[70] Nykänen 36
[71] We adopt this from Noll´s reflections on the limited ´resource base of human rights protection´ which may justify the balancing of State and individual interests in non-refoulement cases under the ECHR. Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 471

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elsewhere.[72] Like these other provisions, then, any IPA would, as a *starting* point, have to offer durable and effective protection by the State against persecution.

Although recognition of a finite resource basis for refugee protection creates space for application of the IPA concept, it is not, importantly, one which contracts and expands in response to refugee flows. StateThus, although the State may enhance the scope of IPA referrals in the face of increased numbers of claimants from a particular country of origin, this is not a *legitimate* aim for the purposes of the proportionality analysis under the Refugee Convention. There are two main reasons for this. First, as refugee status is declaratory in nature, exclusion from such status must be based on objective, unchanging criteria.

StateSecond, the Convention regime is based on joint responsibility: no matter which country receives the refugee claim, State parties must be ready to honor refugee rights within a common legal framework (with exceptions, of course, for explicit reservations). Thus, there is a general interest that the IPA is interpreted and applied in the same way by all member States. Shifting practice would not only defeat the Convention´s purpose but also contradict the aim of upholding an *international* order in which human rights – including the right to seek and enjoy asylum – may be realized.[73] The legitimate State aim of maintaining refugee protection resources over time is thus a stable backdrop against which the proportionality of limiting protection, described below, is evaluated. On the other hand, States that rarely or never apply the IPA may increase its application as long as the practice is kept within the lawful scope of the balancing test.

4.5 The proportionality test

In the above discussion, we have ventured to illustrate how a human rights framework may be useful to analyze an IPA exception to the right to refugee

[72] See note x.
[73] United Nations Declaration of Human Rights Articles 28 and 14.

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status. This right flows from the whole text of the Convention, including its preamble which underlines the human rights context.[74] The possibility of limiting it may, however, on certain conditions be justified to advance a legitimate State interest. This would require a proportionality test. With respect to proportionality *stricto sensu*, the decision-maker must weigh the SState interest in limiting special refugee protection to persons with effective alternatives elsewhere against the impact of IPA application on the claimant. In other words, to what degree does return, which in most cases also results in internal displacement, affect the individual´s human rights situation? In this regard it noteworthy that the main object and purpose of the Refugee Convention, according to its preamble, is closely linked to the principle of the Charter of the United Nations and the Universal Declaration of Human Rights 'that human beings shall enjoy fundamental rights and freedoms without discrimination' (recital 1 of the preamble). Furthermore, recital 2 of the preamble (implicitly) claims that the humanitarian objective of the United Nations also by adopting the Refugee Convention is 'to assure refugees the widest possible exercise of these fundamental rights and freedoms.' In essence, this context for interpreting Article 1 A (2) establishes in our opinion a rather limted space for application of the IPA. i.e., when an asylum seeker who would otherwise be treated as a refugee with rights and freedoms under the Refugee Convention in the country of refuge, is instead returned by that SState to a quite different human rights situation, and indeed often much worse life situation from a humanitarian point of view, in some part of his or her country of origin. In other words, the concrete impact on the claimant of return or relocation should be carefully assessed, and then balanced against the legitimate State interest.

[74] See Ralf Allweldt, "Preamble to the 1951 Convention", in *The 1951 Convention ralting to the Status of Refugees and its 1967 Protocol -- A Commentary*, edited by Andreas Zimmermann. Oxford University Press, p. 231: 'The first two Recitals of the Premable, in particular, provide a human rights context to the 1951 Convention. Whereas the text of Arts. 3 to 33, taken literally, is describing State obligations, the Preamble makes it clear that the purpose of the whole 1951 Convention is to provide (subjective) rights to refugees.' See also pp. 232-235.

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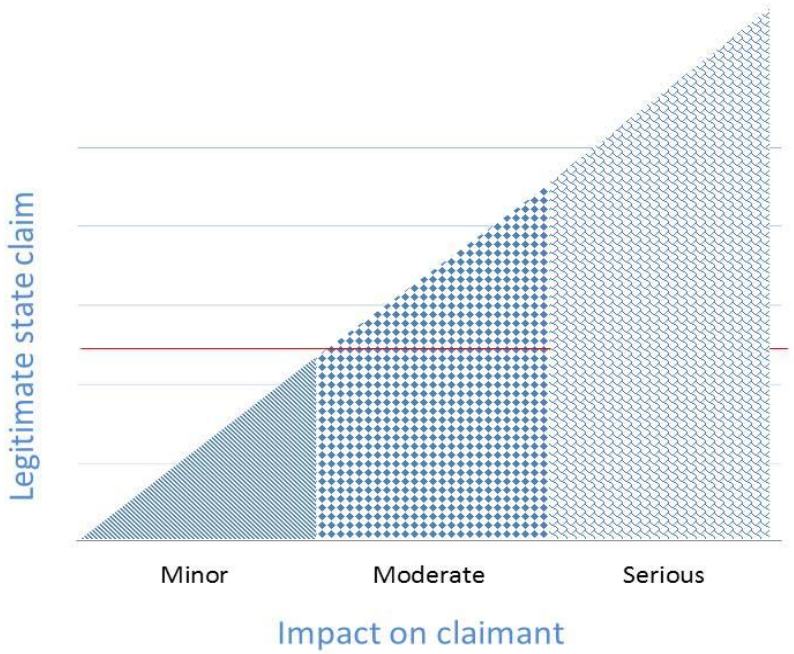
FIGURE 2: THE BALANCING TEST



This graph illustrates the relationship between the legitimate State interest in sustaining limited resources for international protection and the impact of internal displacement on the refugee claimant. While the shaded area to the right illustrates a situation in which return to an IPA would be *prima facie* disproportionate to the claimant´s right to refugee status (see below), the shaded area to the left indicates scenarios in which the interference may arguably be balanced against the SState interest. Given the inherent human rights importance of refugee status, the proportionality requirement is unlikely to be satisfied if the claimant is likely to face *real* obstacles to achieving a satisfactory humanitarian and human rights situation upon return (the 'moderate' section, above).

The following figure presents an overview of six potential factors of impact on the claimant that might be considered in any proportionality analysis.

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FIGURE 3: FACTORS RELEVANT FOR THE PROPORTIONALITY ANALYSIS WITH LEGAL SOURCES

Risk of persecution in IPA	Prima facie disproportionate to State aim *Article 33 RC*
Risk of serious harm in IPA	Prima facie disproportionate to State aim *Article 3 CAT, Article 7 ICCPR, Article 3 ECHR* *Other sufficiently serious and predictable human rights violations*
G**eneral human rights situation in proposed IPA** (control of criminality, lower level discrimination, economic and social rights protection)	Subject to proportionality review *Norms derived from ICCPR, ICESCR, ICERD, ECHR*

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Severity of displacement →**Breadth:** how geographically constricted is the IPA? → **Length:** both predictably brief or long-term periods of displacement provide the claimant with greater opportunities to plan for future →**Depth:** how far removed from social, economic and cultural networks?	Subject to proportionality review *12 ICCPR* *12 ICCPR* *non-discrimination guarantees*
Individual factors → **Special needs** (age, disability, mental or physical illness) → **Experience of past persecution**[75] → **Prospects for family unity**	Subject to balancing *CRPD* *Article 1(A) (5) RC* *Article 23 ICCPR, Article 8 ECHR*
Best interests of the child	Overriding consideration in cases involving minors *Article 3 CRC*

5. Application of human rights norms in IPA practice

As illustrated in the diagram above, human rights concerns permeate the proportionality analysis. In this section we investigate how international human

[75] By analogy to the compelling reasons exception to Article 1(C)5 of the Refugee Convention.

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rights norms inform the analysis of persecution, serious harm, and the remaining factors that need to be considered when assessing the humanitarian impact of return on the individual refugee claimant.

5.1 Protection from the risk of persecution

The applicant´s situation in the area of relocation cannot, of course, give rise to an independent claim for international protection. If a refugee faces a risk of persecution of some kind everywhere in the country of origin, return to the country of origin would be prohibited under Article 33 (*non-refoulement*) of the Convention. This means, at a minimum, that he or she must not face a continued risk of persecution for the same reasons provided in the asylum application, or any new risk of persecution for relevant reasons in the proposed IPA.

The relationship between IHRL and persecution under Article 1A(2) is an open one, accommodating both a severe violation of any human right, or an accumulation of less serious human rights violations that cumulatively affect the individual in a similar way.[76] Article 9 of the EU Qualification Directive provides that persecution must:

> (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).[77]

[76] Zimmermann and Mahler 348 Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law* (2012) 10

[77] 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 eligible for subsidiary protection, and for the content of the protection granted (recast).

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The phrase 'in particular' leaves open the possibility that a serious violation of other human right might to qualify as persecution. The Germany Federal Administrative Court, for example, in interpreting the 2004 QD, held that the deprivation of nationality may constitute persecution because of the severe consequences that follow the denial of membership in society.[78]

In addition to the violations of civil and political rights traditionally considered, denials on discriminatory grounds of economic and social rights – especially the 'minimum core' - may qualify as persecution. This implies, for example, that a young girl could not be returned to an otherwise 'secure' IPA if she would be prevented because of her sex from going to school.[79] Refugee law also recognizes that cumulative harms, while not severe enough individually, may meet the requisite threshold. The IAT in *Gudja* has usefully explained that persecution can be established by 'a concatenation of individual denials of rights; for example to the right to work, to education, to health or to welfare benefits to such an extent that it erodes the very quality of life in the result that such a combination is an interference with a basic human right to live a decent life.'[80] In the IPA context, where applicants are often asked to relocate to places where they lack family or social networks, discrimination on account of race, religion, past persecution (particularly involving sexual violence) or even the social group of internally displaced persons may create new persecutory threats.

5.1.2 IHRL and the risk of internal *refoulement*

Because they create a risk of *refoulement* within the country of origin, serious

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[78] Bundesverwaltungsgericht (Federal Administrative Court, Germany, 10 C 50.07, 26 February 2009, BVerwGE 133, 203. Cited in Andreas Zimmermann and Claudia Mahler, "Article 1A, para. 2" in Zimmermann, ed., *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford: Oxford University Press 2011), 353.

[79] See Michelle Foster, *International refugee law and socio-economic rights : refuge from deprivation* (Cambridge University Press 2007) 103

[80] Gudja (Unreported, IAT, CC/59626/97m 5 August 1999), at 2. Ibid Also see *Maksimovic v. Secretary of State for the Home Department* (2004) EWHC 1026 at para. 29, *ibid.* Add Norway/Sweden references.

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IHRL violations regardless of a Convention nexus, are generally agreed to disqualify a potential IPA. Customary international law prohibits any removal that would expose the foreign national to a real risk of torture, inhuman or degrading treatment or punishment in his or her home country (in violation of Article 3 CAT, Article 7 ICCPR, and Article 3 ECHR).[81] For many States, this is both the beginning and end of their human rights analysis for the purpose of the IPA test under the Refugee Convention.[82]

Such a limited analysis clearly does not suffice to capture the risk of internal *refoulement*. As Hathaway and Foster argue, one must further inquire 'whether this applicant – given who he is, what he believes, and his essential make-up – would in fact be exposed to the risk of return to the place of origin if required to accept an IPA in lieu of his presumptive entitlement to asylum abroad.'[83] With respect to constraints to religious activity in the proposed IPA (presumably not amounting to persecution), for example, the German Administrative Court observed that '[o]ne can, of course, see how it might logically be that strongly religious communities would feel compelled to risk persecution in order to return to a region of the country of origin in which they could practice their faith.'[84]

UNHCR argues that:

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[81] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press 2003) Also see Salah Sheekh v. the Netherlands,

[82] In *Salah Sheekh v. the Netherlands*, the Strasbourg Court clarified that protection against Article 3 ECHR harm in the IPA context requires that the applicant can access and settle in the proposed area. *Salah Sheekh v. The Netherlands*, Application no. 1948/04 (ECtHR 11 January 2007). See Section 6.

[83]Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' 403.

[84] Baden-Württemberg Administrative Court, Decision of 17 May 1990, A 12 S 533/89. Cited in ibid at 404.IbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbidIbid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.Ibid., 404.

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> 'If the claimant would be exposed to a new risk of serious harm, including a serious risk to life, safety, liberty or health, or one of serious discrimination, an internal flight or relocation alternative does not arise, irrespective of whether or not there is a link to one of the Convention grounds.'[85]

It emphasizes that these risks include, but are not restricted, to harms covered by complementary forms of international protection.[86] In theory, 'serious harm' should include, at a minimum, *any* violation sufficiently grave to give rise to a *non-refoulement* obligation on the part of the sending State.

However, the scope of serious harm is arguably broader than this. *Any* violation of a right that the sending State has a positive obligation to protect may potentially give rise to a duty of *non-refoulement*. The more predictable and serious the harm, no matter where it may occur, 'the stronger becomes the protection claim of the presumptive victim.'[87] Interestingly, in an early draft of the 2004 Qualification Directive, Article 15(b) acknowledged that a claim for international protection could arise from any human rights interference, provided that it was 'sufficiently severe to engage the Member State´s international obligations'.[88] This broad language was later, of course, limited to a subset of harms mostly overlapping with Article 3 ECHR.

Even the Strasbourg Court, focused as it is on Article 3 harms, has confirmed that the rights to life, a fair trial, and family life may operate as independent grounds for relief from removal.[89] The right to private life embodied in Article 8 ECHR

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[85] 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* para 20

[86] *Ibid.*

[87] Noll 470

[88] 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.' Cited in McAdam 81

[89] *Bensaid v The United Kingdom* App no 15225/89 (ECtHR 31 January 1995); *Beldjoudi v France* App 12083/86 (ECtHR 12 November 1990);*Othman (Abu Qatada) v The United*

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may be engaged when the mental or physical health problems likely upon return do not meet the threshold of Article 3.[90] And, as mentioned above, social and economic rights can trigger *non-refoulement* obligations when the individual faces certain denial of the right´s core minimum content.

5.1.3 IHRL and durability of protection from persecution and serious harm

The requirement that protection against persecution must be durable may be inferred from both the 'indirect' *refoulement* analysis and, by analogy, the cessation clauses of Article 1C. This criterion is also informed by IHRL. In the context of the Common European Asylum System, the link between the IPA and cessation is formalized through a shared concept of 'protection'. Article 7(2) of the Qualification Directive, which is cross-referenced to both the IPA *and* cessation provisions of that instrument (Articles 8 and 11, respectively), provides that

> 'Protection against persecution or serious harm must be *effective and of a non-temporary nature* (my emphasis). Such protection is generally provided when the actors [of protection] … take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.'[91]

From this perspective, 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.[92] UNHCR advocates a broader notion of

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Kingdom App no 8139/09 (ECtHR 17 January 2012); *A.W. Khan v The United Kingdom* App no 47486/06 (ECtHR 12 January 2010).

[90] *Costello-Roberts v. the United Kingdom*, Application no. 13134/87 (ECtHR, judgement of 25 March 1993), para. 36. In *N. v. the United Kingdom*, no violation was found under Article 3 and the Court considered that no separate issues arose under Article 8. However, the three dissenting judges criticized this conflation of the two provisions, arguing that the applicant's right to physical and psychological integrity given the 'certain death' she faced should be considered under Article 8. *N v. the United Kingdom*, application no. 26565/05 (ECtHR, judgement of 27 May 2008), dissenting opinion of Judges Tulkens, Bonello and Spielman, para. 26. New case??

[91] Qualification Directive note X.

[92] Also see *Hilal v. the UK,* Application no. 45276/99,(ECtHR, judgement of6 March 2001). In that decision, the ECtHR noted that as "long-term, endemic situation of human rights problems" persisted on the mainland, it "was not persuaded therefore that the

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'effective protection', stating that the restoration of national protection 'requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, *as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.*'[93]

5.1.4 Applying the proportionality analysis to the question of serious harm

Whether they are justified by the State´s *non-refoulement* obligation under IHRL or by reference to the Refugee Convention itself (emphasizing the risk of internal *refoulement*), serious harms arguably interfere with the 'core' of the right to recognition of refugee status. In other words, return to a persecution-like situation, particularly when the threat of persecution has already been established elsewhere in the same country, cannot possibly be outweighed by any countervailing State interest. Therefore, the IPA is automatically disqualified, precluding the need to proceed with the more involved balancing exercise. This emphasis on basic human rights guarantees as part of the *baseline* IPA assessment establishes a higher threshold for return than is often accepted in State practice, in which 'serious harm' typically falls within the 'reasonableness' (rather than 'safety') analysis. It accords, however, with UNHCR guidance as well as the Michigan Guidelines.[94]

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internal flight option offers a reliable guarantee against the risk of ill-treatment". Paras 67-68.

[93] UNHCR, *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 Circumstances" Clauses)* (2003) Emphasis added.

[94] The Michigan Guidelines on the Internal Protection Alternative distinguishes between risks of Convention persecution and risks 'equivalent to persecution'. If the proposed IPA is free from both, the decision-maker must evaluate the affirmative minimum standards of protection in the area. University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, 11 April 1999.

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5.2 Beyond persecution and serious harm

5.2.1 Current trends in theory and practice

There is broad agreement among scholars and practitioners that the existence of a well-founded fear in one place triggers a heightened threshold for returning the applicant to safety somewhere else within the country of origin. In other words, the IPA analysis involves something more than the absence of persecution or, arguably, 'serious harm' in the proposed refuge. Reflecting on the UK´s 'unduly harsh' test, Justice Brooks explained in *Karanakaran* that one must temper the strict interpretation of … 'is unable to avail himself of the protection of that country' by a 'small amount of humanity.'[95] This was confirmed at the EU level by the recast Qualification Directive, which not only requires the provision of *protection* against persecution or serious harm in the proposed IPA but also that the applicant can *reasonably* settle there.[96] Therefore, the two concepts cannot be completely coterminous.[97] In the United States, the Board of Immigration Appeals noted that, 'because the purpose of the relocation rule is not to require an applicant to stay one step ahead of persecution', the situation in the IPA must be *'substantially better* than those giving rise to a well-founded fear of persecution on the basis of the original claim.'[98]

How have these additional requirements been justified? Some jurisdictions, such as New Zealand, reason that claimant is a putative refugee, having filled the criteria of Article 1A(2) with respect to one area. Therefore, the applicant may only be excluded from Convention protection if the rights provided through refugee status may be obtained domestically instead.[99] The place of return cannot simply be 'safe'; instead, it should offer an alternative *refuge* of the same

[95] *Karanakaran v SSHD* 2000 Imm AR 271 (UK Court of Appeal).
[96] Qualification Directive (2011), *supra note* 36, Article 8.
[97] This was also observed by Baroness Hale in *SSHD v AH (Sudan)* [2007] UKHL 49, paras. 21-22.
[98] 26 I&N Dec. 28 (BIA 2012). Emphasis added.
[99] Refugee Appeal No. 71684/99 (New Zealand Refugee Appeals Authority).

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quality as that which could be obtained elsewhere. As Hathaway and Foster argue, the IPA must provide an 'antidote' to the persecution feared in the home area, as well as a certain level of affirmative human rights protection.[100]

In Kelley's view, the need to consider human rights protection beyond the direct risk of persecution stems from 'the acknowledgement that but for the risk of persecution for a Convention ground in the displacement area and the absence of protection from that harm there, the person would not have to relocate.'[101]In other words, conditions in the IPA must compensate for the initial wrong of forced displacement by providing a secure refuge.[102] Bradley similarly argues, in the context of refugee repatriation, that the country of origin has *remedial* responsibility to its citizens.[103] From the perspective of implied limits, the State´s interest in protecting its resource base for protection must be recognized as a relatively weak aim considering that other exceptions to refugee status are explicitly Stated in the Convention. It follows that an IPA is only acceptable if the negative consequences for the claimant are minimal.

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[100] Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' 392-400.

[101] Kelley 23 Also see the Immigration and Refugee Board of Canada (1994) (find title) at 13. On the other hand, Storey views the additional criteria 'not as a criterion divorced from the ongoing test of fear of persecution, but as an ameliorative formula for assessing the latter in the context of the greater difficulties facing a claimant in having to contemplate uprooting and having to find another place that is genuinely safe.' Hugo Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' 10 International Journal of Refugee Law 499, 527

[102] The principle of state responsibility establishes a duty to compensate for any injury resulting from a violation of international law. James Crawford, ed., *Brownlie's Principles of Public International Law, 8th ed*. (Oxford: Oxford University Press 2012), 568.

[103] Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge University Press 2013) 187 Although one may distinguish between repatriation processes (which frequently involves support from UNHCR and other international actors) and return to internal displacement for persons deemed not to fall within the ambit of the Refugee Convention, the similarities on the ground make repatriation a compelling analogy. First, in practice, many persons subject to formal repatriation schemes are 'refugees' under regional agreements that legitimize flight from regionally-contained risks. Second, the underlying crime of forced displacement is the same in both cases.

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The following subsections describe how these additional requirements have been assessed in State practice, looking at both the broadly adopted 'reasonableness' test as well as alternatives grounded more explicitly in human rights law. We conclude with some reflections about how human rights norms should influence the proportionality analysis outlined above.

5.2.2 Human rights norms within the flexible 'reasonable' test

Paragraph 91 of the UNHCR Handbook introduced the 'reasonableness' or 'unduly harsh' test that is currently applied in many jurisdictions. While UNHCR has addressed the IPA in various documents since the Handbook was published, the most recent and authoritative iteration of its view on the subject is found in the 2003 Guidelines on the Internal Flight/Relocation Alternative.[104] When it comes to whether relocation is reasonable, the key question is whether 'the claimant, in the context of the country concerned, can lead a relatively normal life without facing undue hardship'.[105] As part of this assessment, the Guidelines State that human rights – particularly non-derogable rights – must be respected and protected in the proposed IPA.

With regard to socio-economic conditions, however, the Guidelines are less clear, noting that

> it would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable.[106]

Although the Guidelines establish a 'basic human rights' threshold for the reasonableness assessment, the focus on a 'normal life' in the country of origin has, in practice, led to considerable confusion about *whose* normal life should be

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[104] 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*
[105] *Ibid*
[106] Ibid

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the point of departure, and whether a comparison with the standard of living in the original area is relevant. In some cases, courts have adopted a relativistic approach that compares the applicant´s situation with that of other internally displaced persons (IDPs) in the same region of return. Consequently, the human rights situation is regarded as a neutral factor, only relevant if they are violated in a discriminatory manner. For example, in *AH (Sudan),* Baroness Hall observed that while the conditions in Khartoum to which the Darfurians would be returned to could be 'appalling' they would be 'no worse than those faced by other Sudanese IDPs [and] it would not be unduly harsh to expect them to return'.[107] In the *AA (Uganda)* decision, the UK Asylum and Immigration Tribunal even found that it would be 'reasonable' to return a young woman who had fled to the Lord´s Resistance Army in the northern part of the country to conditions of 'enforced prostitution, homeless and destitution' elsewhere on the grounds that 'there are however many young women in that situation'.[108] While the Court of Appeal overruled this decision by stating that enforced prostitution does not come 'within the category of normal country conditions that the refugee must be expected to put up with', it too avoided a reference to the applicant´s human rights situation.[109]

Another problem with the 'reasonableness' standard is that many decision-makers see the human rights aspects as subjective or even discretionary. Kelley has noted that decisions about the relevance of factors such as arbitrary arrests, detentions, and beating by police in the proposed IPA 'reflect a remarkable lack of consistency' both within and between jurisdictions.[110] In Norway, for example, which has a system of statutes and regulations mostly in compliance with refugee and human rights law, the reasonableness standard expands and

[107] *The Secretary of State for the Home Department (Appellant AH) v AH (Sudan) and others (FC) v (Respondents) House of Lords* [2007] UKHL 49.
[108] Asylum and Immigration Tribunal (AA/03084/2006).
[109] *AA (Uganda) v. Secretary of State for the Home Department*, [2008] EWCA Civ 579, United Kingdom: Court of Appeal (England and Wales).
[110] Kelley 26

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contracts according to political interests. In the current regulation, the 'reasonableness' test is linked to the criteria *and* threshold for leave to remain based on 'strong humanitarian considerations'. [111] The high threshold needed to establish leave to remain on this basis is moreover balanced against the State's interest in immigration control. Therefore, the relevant human rights norms are determined not by international law but by shifting domestic priorities.

These examples demonstrate that although 'reasonableness' and a human rights analysis are theoretically compatible, the selective incorporation of the Guidelines has, in practice, justified exclusion of even core human rights protection from the IPA analysis.[112]

5.2.3 A human rights approach to affirmative IPA standards of protection

In response to the weaknesses associated with flexible criteria, significant efforts have been made to replace the reasonableness analysis with more objective standards grounded explicitly in IHRL. The following section describes the human rights approach adopted in the Michigan Guidelines on the Internal Protection Alternative with alternatives that draw from a broader base of human rights standards.

5.2.3.1 The Michigan Guidelines on the Internal Protection Alternative

[111] Norwegian Immigration Regulation para 7-1.

[112] In the UK context, it remains unclear the degree to which the *Januzi* 'unduly harsh' standard imposes a human rights analysis beyond a consideration of non-derogable rights. See, for example, a recent Country Guidance case from the UK Upper Tribunal: 'it is arguable therefore that *Januzi* and *AH* (Sudan) do not furnish a complete answer to the question of a human rights approach to internal relocation', noting however that 'it is difficult to conclude that the Law Lords in either *Januzi* or *AH (Sudan)* intended to reject all recourse to human rights norms.' *AK (Article 15(c)) Afghanistan v. Secretary of State for the Home Department*, CG [2012] UKUT 00163(IAC). Ultimately, however, the tribunal declines to resolve the issue because 'the application or not of a human rights approach to internal relocation does not obviously impact on the issues of fact identified in this appeal.'

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The 'Michigan Guidelines on the Internal Protection Alternative' were developed in 1999 by Professor James Hathaway and a group of his students at the University of Michigan, in collaboration with leading refugee law scholars. [113] In an explanatory paper published in 2002, Hathaway and co-author Foster elaborated the legal justification for the 4-step 'test' set out in the Guidelines. For the purpose of our discussion here, the final step, related to the content of 'affirmative protection' in the proposed IPA is most relevant.

According to the Michigan approach, once a person has fulfilled the requirements of a well-founded fear of persecution with respect to one area, he or she is a 'putative refugee' and is therefore entitled to protection. If such protection can be accessed within the country of origin, 'then the sufficiency of that internal protection is logically measured by reference to the scope of the protection which refugee law guarantees.'[114] In other words, the rights guaranteed in Articles 2-33 of the Refugee Convention provide the 'context-specific touchstone' for determining the adequacy of national protection for the purpose of refugee status.[115] In particular, this means that the decision maker may consider whether rights such as freedom of religion, freedom of movement, access to courts, and rights to work, social assistance and primary education would be enjoyed in a non-discriminatory manner.

This bold effort to peg domestic protection standards to refugee rights has enjoyed little traction in practice. Only one jurisdiction, New Zealand, has formally adopted the Michigan Guidelines, while others have considered and rejected them.[116] At the theoretical level, the Guidelines have been criticized for

[113] J. C. Hathaway, 'The Michigan Guidelines on the Internal Protection Alternative', 21(1) *Michigan Journal of International Law*, 1999,131.
[114] Michigan Guidelines para. 20.
[115] Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' 405
[116] In the UK House of Lords decision *Januzi* , Lord Bingham found, among other problems, that the New Zealand approach would give the Convention an effect 'anomalous in its consequences'. 'It would be strange', he claimed, 'if the accident of

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introducing relative standards – in the sense that the Convention rights are cast in terms of equal treatment with specific groups (other foreigners, nationals, persons lawfully present, etc).[117] Another concern is that the MGs may close off other relevant avenues of inquiry. As Kelley explains, decision-makers could view them as the 'ceiling rather than the floor upon which guarantees found in later human rights treaties build'.[118] Confining the IPA inquiry to the subset of rights that the Convention addresses would exclude, for example, later developments with respect to the rights of children elaborated in the CRC. In some respects, the Articles 2-33 sets a lower standard than that established by internationally accepted levels. For example, the access to courts provision in Article 16 of the Convention is not as comprehensive as the human rights guarantee to the right to a fair hearing. Thus, following the Michigan Guidelines, a persecuted person would be entitled to a lower level of protection than fellow citizens. [119]

5.2.3.2 A broader human rights approach

If the Refugee Convention seems an imperfect source of human rights standards for the purpose of 'domestic protection', where else can one look? A number of academic writers and practitioners have advocated that 'basic civil, political and socio-economic rights as expressed in the Refugee Convention and other major human rights instruments' are all fair game for the analysis, irrespective of

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persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject.' Januzi (FC) v Secretary of State for the Home Department [2006] UKHL 5, para 19.

[117] Hugo Storey, "From Nowhere to Somewhere: An Evaluation if the UNHCR 2nd Track Global Consultations on International Protection: San Remo 8-10 September 2001 Experts Roundtable on the IPA/IRA/IFA Alternative, at 378.

[118] Kelley 36 But see rebuttal from Hathaway and Foster in the Law of Refugee Status (2014).

[119] Volker Türk and Frances Nicholson, "Refugee protection in international law: an overall perspective" in Feller, E., Türk, V., Nicholson, F. (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press 2003), 27.

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whether the receiving country has ratified the treaty in question.[120] According to Kelley, the IPA test 'would require the refugee to show what rights he or she will not be accorded … and in what way they are fundamental to him or her.'[121] Thus, 'credible evidence that derogations are not in conformity with the relevant limitations ... would render the IFA unreasonable.'[122]

Some scholars have argued that the Guiding Principles on Internal Displacement (GPs)[123] provide a logical reference for the IPA inquiry.[124] The GPs were developed pursuant to a mandate from the UN Commission on Human Rights in 1992 to the Representative to the Secretary General on Internally Displaced Persons at that time, Francis Deng. While the Principles themselves are not legally binding, they usefully reflect existing obligations under international human rights law, international humanitarian law and, by analogy, refugee law.[125] In other words, they provide a helpful summary of the rights frequently impacted in an IDP situation and therefore highlight for the decision-maker the range of protection issues that should be considered as part of both the safety and reasonableness analysis. Select rights have also been formalized in the Kampala Convention which entered into force in 2012 and now has 17 State

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[120] In the *Law of Refugee Status*, Hathaway argues that 'where the quality of internal protection fails to meet the basic norms of civil, political and socio-economic rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.' Hathaway, *The Law of Refugee Status* 135 Also see Storey

[121] Kelley 39

[122] The decision-maker would have to assess, for example, whether any interference is strictly required, in conflict with the state´s other international law obligations or results from discriminatory implementation of the right.

[123] Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), noted in Comm. Hum. Rts. res. 1998/50.

[124] Monette Zard,"Towards a Comprehensive Approach to Protecting Refugees and the Internally Displaced," 34-39; E. Ferris, 'Internal Displacement and the Right to Seek Asylum' Refugee Survey Quarterly

[125] Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (The American Society of International Law ed, The American Society of International Law
The Brookings Institution Project on Internal Displacement 2000) ibid

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parties in Africa.[126] The Guiding Principles would require the decision-maker to assess, among other things, the claimant´s access to humanitarian assistance (Principle 3), protection from arbitrary displacement (Principle 6) and, importantly, the right to dignity and physical, mental and moral integrity that covers gender-specific violence (Principle 11).

5.2.3.3 Challenges to a broad-based human rights approach

The challenge of an open-ended human rights analysis is that the content and scope of these rights may be as susceptible to inconsistent interpretation as the flexible 'reasonableness' alternative. One question, of course, is whether interference with any human right would disqualify a proposed IPA. Some scholars and courts have argued that granting refugee status on the basis of risks on this basis could stretch the Convention´s protective purpose too far.'[127] However, this problem could arguably be mitigated through the combined subjective/objective approach proposed by Kelley; that is, the right must be shown to be 'fundamental' to the person concerned.

The second question is what *level of possible interference* with a particular human right is required to disqualify the IPA? Is it a 'real risk' of a less-than-serious violation? In *AK (Article 15© Afghanistan)*, the UK AIT suggested using the same framework established for evaluating serious harm 'subject to recognizing that even violations falling short of (serious harm) levels may

[126] Among other things, this treaty reiterates the right of IDPs to adequate humanitarian assistance 'which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services.' As of June 2013 the Convention had been signed by 39 and ratified by 17 of the 54 member states of the African Union. State parties include: Benin, Burkina Faso, Central African Republic, Chad, Gabon, Gambia, Guinea Bissau, Lesotho, Mali, Niger, Nigeria, Sierra Leone, Togo, Swaziland, Uganda, Zambia, and Rwanda.

[127] R. Piotrowicz, "Comment on the Draft Summary Conclusions", 1 Oct. 2001, cited in Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' 407 Also see *Januzi*, supra note x.

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suffice…'.[128] Economic and social rights present particular interpretive challenges. While there is consensus that a State is immediately obliged to provide a 'core minimum' of the rights set out in the ICESCR, even this baseline is relative, depending on the available resources of the country in question. [129]

A final concern with regard to any approach predicated on respect of human rights is that it may detract from an individualized assessment of the claimant's situation. For example, the reasonableness test 'more readily points to age and gender inclusiveness.'[130] For children, the idea of being sent from a safe haven back to a country they associate only with harm and uncertainty might unleash terrible psychological effects.[131] The experience of severe past persecution, which may or may not impact the claimant's human rights situation upon return, is also, arguably, an important consideration for the IPA analysis.[132]

5.3 Proportionality and other human rights factors

Despite the uncertainties arising with respect to the sources, standards, and inclusiveness of a human rights framework, it is clear that the proportionality assessment compelled by the IPA´s status as an implied limitation, still involves a broad human rights inquiry. As described earlier, the question can be framed as follows: given that the claimant fulfills the *prima facie* criteria for refugee status, is the interference that internal displacement would impose on his or her human rights situation proportionate to the legitimate aim pursued by the sending

[128] *AK (Article 15 (c)Afghanistan),* supra note 63.
[129] Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' 33 Yale Journal of International Law 113, 114
[130] Alice Edwards, «Age and gender dimensions in international refugee law» in Feller, Türk, and Nicholson, *Refugee Protection in International Law*, at 72.
[131] Ibid at 73.
[132] This consideration is grounded in the spirit of the 'compelling reasons' exception to cessation set out in Articles 1C(5) and (6), which 'deal with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in the country of origin'. *UNHCR Handbook* (1979), para. 136.

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State? Any risk of persecution of 'serious harm' would unquestionably render return illegitimate under international law. However, other human rights factors must also be considered. The general human rights situation in the proposed IPA, the ´severity´ of displacement (in terms of breadth, depth, and length), best interests of any children involved, and personal factors such as special needs, the possibility of family reunification, and experience of past persecution are all relevant to an evaluation of the claimant´s ability to reintegrate elsewhere in his or her country of origin.

In terms of direct human rights factors, the 'best interests of the child' principle established in Article 3 CRC requires a comparison of conditions in the IPA and host country. All rights in the CRC are relevant and in addition the child´s future development (both psychological and physical) must probably be considered.[133] The ability of the claimant to live in security can be assessed by reference to the State´s human rights record, including not only rule of law indicators but also its ability to ensure an adequate standard of living for its nationals (Article 11 ECHR). Non-discrimination guarantees in the major human rights instruments (ICCPR, ICESCR, CERD, CEDAW, and CRDP) provide a touchstone for assessing whether the claimant can integrate meaningfully in the community of return. And, of course, the extent to which the scope of the IPA would constrict the claimant´s ability to move freely in country is important. IPAs confined to a single city or even to a specific region are problematic if the displacement is likely to be long-term. Factors that are not captured by human rights standards include the claimant´s subjective fear, which may make the prospect of return unbearable, as well as experience of particularly severe past persecution.[134] In

[133] Committee on the Rights of the Child, General Comment no. 14 (2013).
[134] As UNHCR noted in its 1995 overview paper, 'In some situations, the experience may be so severe and the subjective fear so great that the applicant, quite understandably, is unwilling to avail him/herself of the protection of his or her country regardless of the absence of real danger elsewhere in the country. This must remain an important consideration, and in many cases will constitute a persuasive factor in the overall claim.' UNHCR Regional Bureau for Europe, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (European Series, 1995) 65 For

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the latter case it is arguable that the claimant´s bond with his or her State is irretrievably broken.[135] In practice, the proposed model provides a legally sound basis for considering many of the same factors advocated by UNHCR in its general as well as country-specific guidance on the topic.

While adopting a proportionality analysis is no guarantee of more *consistent* outcomes, it potentially promotes a more robust analysis in four ways: first, it establishes a relatively high threshold of human rights protection that exceeds the 'unduly harsh' approach to reasonableness frequently adopted by State parties to the Convention. Second, it reinforces subjective aspects of the analysis that tend to get lost in a 'rights only' approach. Third, it takes seriously the threats to human dignity often exacerbated by the fact of internal displacement.[136] And finally, it recognizes a legitimate State interest in a transparent and structured manner without compromising refugee protection.

5.4 Some further considerations

More broadly, it is worth noting that human rights law may also impose obligations that could negate the legitimacy of a *general* IPA practice *vis-a-vis* a specific group or country of origin. For example, both the International Covenant on Economic and Cultural Rights (ICESCR), as well as the CRC require State parties to 'contribute, through international cooperation, to global

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reflections about the tension between IPA practice and subjective aspects of the claimant´s experience, see Bill Frelick, 'Down the Rabit Hole: The Strange Logic of Internal Flight Alternative' US Committee for Refugees World Refugee Survey

[135] For analogous argumentation with respect to the cessation clauses of Article 1A, see UNHCR, *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 Circumstances" Clauses)* In both scenarios, the expectation of return is suspended despite the possibility of achieving full protection in the home country.

[136] It therefore clarifies that the appropriate point of reference is not the situation for other IDPs, but rather the applicant´s relative ability to secure a normal life with a certain human rights standard. See p.

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implementation of the instruments´ provisions.'[137] Widespread application of the IPA will likely *exacerbate* rather than improve a poor humanitarian situation in places struggling with a swelling population of IDPs and other urban migrants.[138]

Also, returns to a 'safe' place may reinforce illegal acts of arbitrary displacement by the home country authorities in violation of human rights and humanitarian law. At the extreme, these include 'apartheid, ethnic cleansing or similar practices aimed at or resulting in the alteration of the ethnic, religious or racial composition of the affected population.'[139] This was arguably the case regarding the return of minorities from Kosovo to IPAs in Serbia and Montenegro and indeed is a general risk when the applicant is fleeing ethnic or religious persecution in a conflict-affected country.[140]

It is arguable that return to ethnic enclaves even in peacetime should, at a minimum, raise red flags for the decision-maker considering an IPA. The frequent referral of Amadjis, a minority Muslim group in Pakistan, to their spiritual home Rabwah is one example. Where deep-seated discrimination elsewhere in the country effectively contains a community within the bounds of a particular city, its designation as a potential IPA for members of that community reinforces policies and practices that led to the current segregation.

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[137] Committee on the Rights of the Child, General Comment 5 (2003). Article 2 (1) of the ICESCR requires that each state party 'undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the Covenant.'

[138] Amnesty International, *Fleeing War, Finding Misery: The Plight of the Internally Displaced in Afghanistan* (2012)

[139] Add footnote. Also note that the International Committee of the Red Cross has repeatedly stated that the obligation to 'ensure respect' is not limited to behavior by parties to a conflict, but includes the requirement that third states also promote compliance with international humanitarian law. The Rome Statute for the International Criminal Court includes most of the primary obligations first established by the Geneva Convention regime. Articles 8(e)(8), Article 8(2)(a)(vii) and Article 7(1)(d) of the Rome Statute relate to unjustified civilian transfers.

[140] UNHCR, *The Possibility of Applying the Internal Flight or Relocation Alternative Within Serbia and Montenegro to Certain Persons Originating from Kosovo and Belonging to Ethnic Minorities There* (2004)

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It is also arguable that returns to such areas engage the sending State´s responsibility not to facilitate unlawful restrictions on the residents´ right to freedom of movement.[141] And finally, the IPA´s small geographic scope is likely to be an indicator of limited job opportunities, high pressure on available resources, and not least – depending on its distance from the persecutory risk – the fragility of the protection provided there.[142]

5.5.1 Conclusion on the application of IHRL in the IPA assessment

The above analysis has identified four areas in which IHRL is relevant for assessing the legitimacy of a proposed IPA. First, IHRL is the basis for identifying the types of harm that can be considered 'persecution' if committed for one of the five grounds specified by the Convention. Second, IHRL is the source of other 'serious harms' that operate to disqualify a proposed IPA. These serious harms are relevant to the IPA inquiry because they establish a risk of chain *refoulement* and because they independently trigger a non-removal obligation for the sending State under public international law. Third, IHRL informs, in a broad sense, the standards of affirmative protection required to make the IPA a legitimate and lawful limitation on the right to refugee status. And finally, IHRL may impose general constraints on a pattern or practice of using the IPA too broadly with respect to concrete return situations, in particular when return is motivated by immigration concerns of the potential asylum State.

6. Beyond the Refugee Convention: practice of the ECtHR[143]

An alternative model for the role of IHRL in the IPA analysis – especially but not exclusively in Europe - may be derived from the practice of the ECtHR.[144]

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[141] See, generally, Morel

[142] These were identified as potential concerns related to IPA practice in UNHCR´s Eligibility Guidelines for Assessing the International Protection Needs of Members of Religious Minorities from Pakistan, 14 May 2012, 43.

[143] For a more detailed analysis of recent developments and the perils of partial integration of IHRL in the practice of the ECtHR, see Jessica Schultz, 'The European Court of Human Rights and Internal Relocation: An Unduly Harsh Standard?' published in X, Brill Publishers (2014).

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Although the ECtHR is not authorized under its mandate to review State compliance with the Refugee Convention, its approach to the IPA reflects the interpenetration of refugee law in regional human rights jurisprudence. Because, however, the Court´s deference to refugee law is limited, it has arguably contributed to a restrictive idea of 'fundamental rights' as the touchstone for the IPA analysis in domestic asylum systems.[145]

Since its 1989 judgment *Soering v. the UK*, the ECtHR has recognized that State responsibility is incurred from the foreseeable consequences of a removal decision that exposes an individual to a 'real risk' of ill-treatment contrary to Article 3 ECHR. Although the Court, as noted above, has acknowledged the extraterritorial scope of other ECHR rights, Article 3 remains the main channel through which these cases are decided. Article 3, it has confirmed, does not preclude reliance upon an IPA by the sending State. As it Stated in its seminal decision *Salah Sheekh v The Netherlands*, however 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.'[146]

In other words, the primary concern of the Court is to secure that the applicant will not be subject to either direct or indirect risks of torture, inhuman or degrading treatment or punishment in violation of Article 3. In some of the cases, the Court starts its analysis from the area of return proposed by the State,

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[145] In *AH (Sudan) and others*, Baroness Hale notes that the Asylum and Immigration Authority seemed to conflate the requirements for 'undue harshness' with Article 3. *The Secretary of State for the Home Department (Appellant AH) v AH (Sudan) and others (FC) v (Respondents) House of Lords* [2007] UKHL 49. The AIT had concluded that the relocation of the applicants to squatter camps outside Khartoum would not be 'unduly harsh' 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." *Ibid* para 25.
[146] *Salah Sheekh v The Netherlands*, App. no. 1948/04 (ECHR 11 January 2007), para 141. Emphasis added.

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without considering whether it actually involves relocation away from the applicant´s home area.

The Court´s approach may be justified in light of its own mandate under the Convention it is interpreting. In these cases the Court is, in fact, interpreting an implied limitation to an implied right (of *non-refoulement*) rather than an implied limitation to the right to international protection of the Refugee Convention. The Court´s own jurisprudence suggests that the State enjoys a broader margin of appreciation in this context.[147] That said, the Court´s selective use of criteria familiar from the IPA context in refugee claims may create – perhaps unintentionally - a misleading impression that its case law also reflects Refugee Convention (and Qualification Directive) requirements. [148]Two examples are illustrative. First, in the *Salah Sheekh* decision, the guarantees regarding travel and admittance to the proposed IPA echo the 'accessibility' requirements in the UNHCR Guidelines. Second, and more importantly, the Court has recently – influenced perhaps by the language of the Qualification Directive – Stated referring to the 'reasonableness' concept in its Article 3 analysis without clarifying what – if anything – it adds. 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.[149]

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[147] *Hirst v. UK*, supra note 24.

[148] Storey has noted that the fact that regional and international human rights bodies are 'emerging as important touchstones represents something of a paradox', considering that Article 38 of the Refugee Convention identifies the ICJ as the dispute settling forum. The fact that it has never been asked to do so indicates the sensitive nature of asylum issues for state parties. Storey Add page number.

[149] *N.A.N.S. v Sweden* App no 68411/10 (ECtHR 27 June 2013), para 38. Emphasis added. It should be noted that while *N.A.N.S. v. Sweden* is a Fifth Chamber decision, references to reasonableness can be traced Grand Chamber judgments as well. See,

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Because the term 'unreasonable' seems to qualify Article 3 treatment, this reinforces a tendency by national courts to conflate serious harms with affirmative protection standards in the proposed IPA. For example, the UK Asylum and Immigration Tribunal (AIT), when considering the conditions awaiting the Darfuri applicants in the squatter camps of Khartoum would be 'unduly harsh' (unreasonable), 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.'[150] Protection from 'inhuman and degrading treatment' –even generously defined – potentially excludes other harms relevant to an analysis of indirect *refoulement*.[151] In addition, while the Court insists that the applicant can 'settle' in the place of relocation, this term seems to reflect a concern about legal residence rather than about the durability of protection. In Somalia, for example, it has accepted armed groups with tenuous control as actors of 'protection' against Article 3 infringements.[152] Nor does this jurisprudence accommodate affirmative human rights protections – opportunities to pursue a livelihood, the possibility of reuniting with family, etc – that are relevant to the IPA inquiry. Finally, of course, the Article 3 risk analysis does not address compelling circumstances that might justify an exemption from return under the Convention.

A final point about the ECtHR IPA jurisprudence is that the three conditions established by the Court, that 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

[150] *Ibid,* para 25.
[151] For example, in a recent case involving a severely disabled man from Kandahar province in Afghanistan, the Court held that the applicant could potentially be returned to Kabul despite lacking a social or economic network there. *S.H.H. v. The United Kingdom*, Application No. 60367/10 (ECtHR judgment of 8 July 2013).
[152] *Sufi and Elmi.,* paras. 272-277.

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refugee source countries.[153] In *M.Y.H. and Others v. Sweden*, the Court completely failed to consider transit risks along insecure roads to Kurdistan.[154] 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.[155] Therefore, in considering claims from major refugee source countries, 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.

The Strasbourg Court´s relocation jurisprudence is arguably justified by its legal (and political) context. The removing State may be attempting to deport an individual who is excluded from refugee status or complementary protection because they pose a threat to national security or have committed violent crimes. In these cases, effective protection from Article 3 harms is arguably the relevant legal standard for return anywhere in the country of origin. As illustrated by the review of ECtHR jurisprudence in Section 1, if Article 3 provides an *implied* right to protection,[156] there may be a broader scope for limits by the State than if the right is explicitly provided in the text of a treaty.[157]

On the other hand, there are good reasons to argue that the approach under the

[153] For an overview of the Court´s leading case approach, see Hugo Storey, 'Briefing Note for Participants' (2013) 25 IJRL 329. Examples involving internal relocation include *Salah Sheekh v. the Netherlands* (the Ashraf clan in Somalia); *NA. v. the UK* (Tamils in Sri Lanka), *N. v. Sweden* (single women from Afghanistan); *M.S.S. v. Belgium and Greece* (asylum claimants in Greece); and *H. and B. v. the UK* (interpreters in Afghanistan).
[154] *M.Y.H. and Others v Sweden,* Application no. 50859/10 (ECtHR judgment of 9 December 2013). See Dissenting Opinion of Judge Power-Forde joined by Judge Zupančič.
[155] *D.N.M. v Sweden* (2013) (add para.)
[156] Terje Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum' 2 International Journal of Refugee Law 361
[157] See *Golder v. the UK*, supra note 47.

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Refugee Convention and the ECHR should be harmonized. The first is practical. In many cases, there is nothing uniquely 'undesirable' about the claimant seeking relief from removal under Article 3. In many cases, the Court is essentially reviewing an asylum claim that may have been improperly decided at the national level.[158] The applicant is in a refugee-like situation precisely because he or she faces a real risk of serious harm (and often persecution for Convention grounds) somewhere in the country of origin. Providing two separate tests for the legitimacy of returns to internal displacement risks being under-inclusive. From a legal perspective, one could argue that the right to *de facto* asylum is not implied at all, but a necessary consequence of the returning State´s positive obligation to secure protection of ECHR rights to persons on its territory (Article 1).[159] Therefore, any infringement on that right must be – as in the case under the Refugee Convention – narrowly defined. That said, because of the negative impact that criminal refugees have on long-term support for asylum, the legitimate State interest in these cases may arguably be given greater weight than it would otherwise.

7. Conclusion

Despite having an uncertain legal basis in the Refugee Convention, evidence suggests that the broad IPA practice of many European and Western States, involving a search for domestic protection 'somewhere', threatens to overshadow the well-founded persecutory fear in the inclusion analysis of the refugee definition. This suggests a need to rethink the treaty law premises of the whole IPA concept.

With this contribution we have argued that the IPA may lawfully represent an implied limitation on the right to refugee status under the Refugee Convention. As a result of this, however, the IPA concept should be narrowly construed. It

[158] Jean-Francois Durieux, 'Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection' (Oxford) [Oxford University] Refugee Studies Centre Working Paper, 1
[159] See *M.S.S. v. Belgium and Greece*, supra note x.

requires that a fair balance is struck between the legitimate but quite narrow State interest in protecting the common resource base among United Nations and Refugee Convention member States for privileged refugee protection under international law, and the concrete impact on the claimant from a humanitarian and human rights perspective. This proportionality test, it is suggested, provides an appropriate rights-based approach, consistent with the purpose of the Refugee Convention and its character as a human rights treaty.

One should not forget that the Refugee Convention was one of the first principled acts of solidarity among 'the Peoples of the United Nations', in the attempt 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' (see preamble to the Charter of the United Nations). The practice of States that apply an IPA exception to refugee statusStateshould thus reflect what the *law* tells us, rather than seeking to exploit imagined treaty loopholes that are inconsistent with a proper understanding of the Refugee Convention.

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