

INTERNATIONAL REFUGEE LAW: THE MICHIGAN GUIDELINES ON THE INTERNAL PROTECTION ALTERNATIVE

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International refugee law is designed only to provide a back-up source of protection to seriously at-risk persons. Its purpose is not to displace the primary rule that individuals should look to their state of nationality for protection, but simply to provide a safety net in the event a state fails to meet its basic protective responsibilities.¹ As observed by the Supreme Court of Canada, “[t]he international community was meant to be a forum of second resort for the persecuted, a ‘surrogate,’ approachable upon the failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but . . . to provide refuge to those whose home state cannot or does not afford them protection from persecution.”²

It follows logically that persons who face even egregious risks, but who can secure meaningful protection from their own government, are not eligible for Convention refugee status. Thus, courts in most countries have sensibly required asylum seekers to exhaust reasonable domestic protection possibilities before asserting their entitlement to refugee status. Where, for example, the risk of persecution stems from actions of a local authority or non-state entity (such as a paramilitary group, or vigilante gang) that can and will be effectively suppressed by the national government, there is no genuine risk of persecution, and hence no need for surrogate international protection.

Even though refugee law has always been understood as surrogate protection, state practice traditionally assumed that proof of a sufficiently serious risk in one part of the home country was all that was required. That is, an individual qualified for refugee status if there was a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion

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1. “[T]he existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces external to the State”: *Esshak Dankha*, Conseil d’Etat of France Decision No. 42.074 (May 27, 1983, unofficial translation).

2. *Attorney-General of Canada v. Ward*, 103 D.L.R. (4th) 1, 38–39 (1993).

. . .”³ in the town or region of origin. Until the mid-1980s, there was no practice of routinely denying asylum on the grounds that protection against an acknowledged risk could be secured in another part of the applicant’s state of origin.

To some extent, the traditional failure to explore the possibility of internal protection simply reflected both the predisposition of predominantly Western asylum states to respond generously (for political and ideological reasons) to the then-dominant stream of refugees from Communism arriving at their borders. With the arrival during the 1980s of increasing numbers of refugees from countries that were politically, racially, and culturally “different” from Western asylum countries, the historical openness of the developed world to refugee flows was displaced by a new commitment to exploit legal and other means to avoid the legal duty to admit refugees.⁴ The so-called “internal flight” doctrine emerged from this context. As formulated by the United Nations High Commissioner for Refugees (UNHCR) in its *Handbook on Procedures and Criteria for Determining Refugee Status*,

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.⁵

While framed by UNHCR as a constraint on the right of states to deny recognition of refugee status, the result in practice of the *Handbook’s* rule was to legitimate the refusal of refugee status to persons adjudged able to seek refuge within their own country. For example, Sikh activists clearly at risk in the Punjab have been denied refugee status and returned to other regions of India, Tamils to southern Sri Lanka, and Turkish Kurds to Istanbul.

In some cases, there may indeed be true protection options available inside the asylum seeker’s country of origin. Particularly because most refugees today flee internal conflict rather than monolithic aggressor

3. Convention relating to the Status of Refugees, 189 UNTS 2545, Art. 1(A)(2).

4. See J. Hathaway, “The Emerging Politics of Non-Entrée,” 91 *Refugees* 40–41 (1992); also published as “L’émergence d’une politique de non-entrée,” in F. Julien-Laferrière ed., *Frontières du droit, Frontières des droits* 65–67 (1993).

5. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 91.

states, real safety and security may be plausible today in ways not imagined during the height of the Cold War. Yet the often radically disparate ways in which the duty to seek internal protection has been conceived and implemented by states suggested the need for a clear statement of the legal foundation for this limitation on access to refugee status, as well as for a relatively precise formulation of operational safeguards. This was the task set for the University of Michigan's first *Colloquium on Challenges in International Refugee Law*.

The methodology for the *Colloquium* was novel. Drawing on a framework I prepared in conjunction with the European Council on Refugees and Exiles, a group of nine senior Michigan law students undertook a comprehensive review of the relevant jurisprudence of leading asylum countries. They synthesized their collective research by substantive sub-topics, and framed a series of critical legal and policy concerns. These were shared with a distinguished group of leading refugee law academics from around the world, each of whom contributed a brief response paper. The students and academics then worked collaboratively for three days in Ann Arbor on April 9–11, 1999 to refine an analytical framework for adjudicating internal protection concerns in consonance with general duties under the Refugee Convention. The result of that effort is *The Michigan Guidelines on the Internal Protection Alternative*.

The *Guidelines* have been shared with policymakers, decision-makers, and advocates around the world, including with all members of the International Association of Refugee Law Judges. The first formal adoption of the *Guidelines* was by the New Zealand Refugee Status Appeals Authority, in its Decision No. 71684/99 of October 29, 1999.⁶

6. This decision is reported at <www.refugee.org.nz/index.htm>.

FIRST COLLOQUIUM ON CHALLENGES IN INTERNATIONAL REFUGEE LAW

**CONVENED BY
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THE MICHIGAN GUIDELINES ON THE INTERNAL PROTECTION ALTERNATIVE

In many jurisdictions around the world, ‘internal flight’ or ‘internal relocation’ rules are increasingly relied upon to deny refugee status to persons at risk of persecution for a Convention reason in part, but not all, of their country of origin. In this, as in so many areas of refugee law and policy, the viability of a universal commitment to protection is challenged by divergence in state practice. These Guidelines seek to define the ways in which international refugee law should inform what the authors believe is more accurately described as the ‘internal protection alternative.’ It is the product of collective study of relevant norms and state practice, debated and refined at the First Colloquium on Challenges in International Refugee Law, in April 1999.

THE ANALYTICAL FRAMEWORK

1. The essence of the refugee definition set out in Art. 1(A)(2) of the 1951 Convention relating to the Status of Refugees (‘Refugee Convention’) is the identification of persons who are entitled to claim protection in a contracting state against the risk of persecution in their own country. This duty of state parties to provide surrogate protection arises only in relation to persons who are either unable to benefit from the protection of their own state, or who are unwilling to accept that state’s protection because of a well-founded fear of persecution.

2. It therefore follows that to the extent meaningful protection against the risk of persecution is genuinely available to an asylum-seeker, Convention refugee status need not be recognized.

3. Both the risk of persecution and availability of countervailing protection were traditionally assessed simply in relation to an asylum-seeker’s place of origin. The implicit operating assumption was that evidence of a sufficiently serious risk in one part of the state of origin could

be said to give rise to a well-founded fear of persecution in the asylum-seeker's 'country.' Contemporary practice in most developed states of asylum has, however, evolved to take account of regionalized variations of risk within countries of origin. Under the rubric of so-called 'internal flight' or 'internal relocation' rules, states increasingly decline to recognize as Convention refugees persons acknowledged to be at risk in one locality on the grounds that protection should have been, or could be, sought elsewhere inside the state of origin.

4. In some circumstances, meaningful protection against the risk of persecution can be provided inside the boundaries of an asylum-seeker's state of origin. Where a careful inquiry determines that a particular asylum-seeker has an 'internal protection alternative,' it is lawful to deny recognition of Convention refugee status.

5. A lawful inquiry into the existence of an 'internal protection alternative' is not, however, simply an examination of whether an asylum-seeker might have avoided departure from her or his country of origin ('internal flight'). Nor is it only an assessment of whether the risk of persecution can presently be avoided somewhere inside the asylum-seeker's country of origin ('internal relocation'). Instead, 'internal protection alternative' analysis should be directed to the identification of asylum-seekers who do not require international protection against the risk of persecution in their own country because they can presently access meaningful protection in a part of their own country. So conceived, internal protection analysis can be carried out in full conformity with the requirements of the Refugee Convention.

6. We set out below a summary of our understanding of the circumstances under which refugee protection may lawfully be denied by a putative asylum state on the grounds that an asylum-seeker is able to avail himself or herself of an 'internal protection alternative.' Our analysis is based on the requirements of the Refugee Convention, and is informed primarily by the jurisprudence of leading developed states of asylum. No attempt is made here to address the additional limitations on removal of asylum-seekers from a state's territory that may follow from other international legal obligations, or from a given state's domestic laws. In particular, state parties to the Organization of African Unity's *Convention governing the specific aspects of refugee problems in Africa* have obligated themselves to protect not only Convention refugees, but also persons at risk due to '... external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [the] country of origin or nationality . . . (emphasis added)'

7. More generally, state parties are under no duty to decline recognition of refugee status to asylum-seekers who are able to avail

themselves of an ‘internal protection alternative.’ Because refugee status is evaluated in relation to conditions in the asylum-seeker’s *country* of nationality or former habitual residence, and because no express provision is made for the exclusion from Convention refugee status of persons able to avail themselves of meaningful internal protection, state parties remain entitled to recognize the refugee status of persons who fear persecution in only one part of their country of origin.

GENERAL NATURE AND REQUIREMENTS OF ‘INTERNAL PROTECTION ALTERNATIVE’ ANALYSIS

8. There is no justification in international law to refuse recognition of refugee status on the basis of a purely retrospective assessment of conditions at the time of an asylum-seeker’s departure from the home state. The duty of protection under the Refugee Convention is explicitly premised on a prospective evaluation of risk. That is, an individual is a Convention refugee only if she or he would presently be at risk of persecution in the state of origin, whatever the circumstances at the time of departure from the home state. Internal protection analysis informs this inquiry only if directed to the identification of a present possibility of meaningful protection within the boundaries of the home state.

9. Because this prospective analysis of internal protection occurs at a point in time when the asylum-seeker has already left his or her home state, a present possibility of meaningful protection inside the home state exists only if the asylum-seeker can be returned to the internal region adjudged to satisfy the ‘internal protection alternative’ criteria. A refugee claim should not be denied on internal protection grounds unless the putative asylum state is in fact able safely and practically to return the asylum-seeker to the site of internal protection.

10. Legally relevant internal protection should ordinarily be provided by the national government of the state of origin, whether directly or by lawful delegation to a regional or local government. In keeping with the basic commitment of the Refugee Convention to respond to the fundamental breakdown of state protection by establishing surrogate state protection through an interstate treaty, return on internal protection grounds to a region controlled by a non-state entity should be contemplated only where there is compelling evidence of that entity’s ability to deliver durable protection, as described below at paras. 15–22.

11. The evaluation of internal protection is inherent in the Convention’s requirement that a refugee not only have a well-founded fear of being persecuted, but also be “unable or, owing to such fear, [be] unwilling to avail himself of the protection of [her or his] country.”

12. The first question to be considered is therefore whether the asylum-seeker faces a well-founded fear of persecution for a Convention reason in at least some part of his or her country of origin. This primary inquiry should be completed before consideration is given to the availability of an 'internal protection alternative.' The reality of internal protection can only be adequately measured on the basis of an understanding of the precise risk faced by an asylum-seeker.

13. Assessed against the backdrop of an ascertained risk of persecution for a Convention reason in at least one part of the country, the second question is whether the asylum-seeker has access to meaningful internal protection against the risk of persecution. This inquiry may, in turn, be broken down into three parts:

- (a) Does the proposed site of internal protection afford the asylum-seeker a meaningful 'antidote' to the identified risk of persecution?
- (b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?
- (c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention's minimalist conceptualization of 'protection'?

14. Because this inquiry into the existence of an 'internal protection alternative' is predicated on the existence of a well-founded fear of persecution for a Convention reason in at least one region of the asylum-seeker's state of origin, and hence on a presumptive entitlement to Convention refugee status, the burden of proof to establish the existence of countervailing internal protection as described in para. 13 should in all cases be on the government of the putative asylum state.

THE FIRST REQUIREMENT: AN 'ANTIDOTE' TO THE PRIMARY RISK OF PERSECUTION

15. First, the 'internal protection alternative' must be a place in which the asylum-seeker no longer faces the well-founded fear of persecution for a Convention reason which gave rise to her or his presumptive need for protection against the risk in one region of the country of origin. It is not enough simply to find that the original agent or author of persecution has not yet established a presence in the proposed site of internal protection. There must be reason to believe that the

reach of the agent or author of persecution is likely to remain localized outside the designated place of internal protection.

16. There should therefore be a strong presumption against finding an ‘internal protection alternative’ where the agent or author of the original risk of persecution is, or is sponsored by, the national government.

THE SECOND REQUIREMENT: NO ADDITIONAL RISK OF, OR
EQUIVALENT TO, PERSECUTION

17. A meaningful understanding of internal protection from the risk of persecution requires consideration of more than just the existence of an ‘antidote’ to the risk identified in one part of the country of origin. If a distinct risk of even generalized serious harm exists in the proposed site of internal protection, the request for recognition of refugee status may not be denied on internal protection grounds. This requirement may be justified in either of two ways.

18. First, the asylum-seeker may have an independent refugee claim in relation to the proposed site of internal protection. If the harm feared is of sufficient gravity to fall within the ambit of persecution, the requirement to show a nexus to a Convention reason is arguably satisfied as well. This is so since but for the fear of persecution in one part of the country of origin for a Convention reason, the asylum-seeker would not now be exposed to the risk in the proposed site of internal protection.

19. Second, the legal duty to avoid exposing the asylum-seeker to serious risk in the place of internal protection may be derived by reference to the Refugee Convention’s Art. 33(1), which requires state parties to avoid the return of a refugee ‘. . . in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . .’ for a Convention reason. Where the intensity of the harms specific to the proposed site of internal protection (such as, for example, famine or sustained conflict) rises to a particularly high level, even if not amounting to a risk of persecution, an asylum-seeker may in practice feel compelled to abandon the proposed site of protection, even if the only alternative is return to a known risk of persecution for a Convention reason elsewhere in the country of origin.

THE THIRD REQUIREMENT: EXISTENCE OF A MINIMALIST
COMMITMENT TO AFFIRMATIVE PROTECTION

20. The denial of refugee status is predicated not simply on the absence of a risk of persecution in some part of the state of origin, but on a finding that the asylum-seeker can access internal protection there. This understanding follows from the *prima facie* need for international refugee protection of all asylum-seekers whose cases are subjected to internal protection analysis. If recognition of refugee status is to be denied to such persons on the grounds that the protection to which they are presumptively entitled can in fact be accessed within their own state, then the sufficiency of that internal protection is logically measured by reference to the scope of the protection which refugee law guarantees.

21. Good reasons may be advanced to refer to a range of widely recognized international human rights in defining the irreducible core content of affirmative protection in the proposed site of internal protection. In particular, one might rely on the reference in the Refugee Convention's Preamble to the importance of '... the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.' Yet the Refugee Convention itself does not establish a duty on state parties to guarantee all such rights and freedoms to refugees. Instead, Arts. 2-33 establish an endogenous definition of the rights and freedoms viewed as requisite to '... revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and *the protection accorded by* such instruments ... (emphasis added).' These rights are for the most part framed in relative terms, effectively mandating a general duty of non-discrimination as between refugees and others.

22. At a minimum, therefore, conditions in the proposed site of internal protection ought to satisfy the affirmative, yet relative, standards set by this textually explicit definition of the content of protection. The relevant measure is the treatment of other persons in the proposed site of internal protection, not in the putative asylum country. Thus, internal protection requires not only protection against the risk of persecution, but also the assimilation of the asylum-seeker with others in the site of internal protection for purposes of access to, for example, employment, public welfare, and education.

'REASONABLENESS'

23. Most states that presently rely on either 'internal flight' or 'internal relocation' analysis also require decision-makers to consider

whether, generally or in light of a particular asylum-seeker's circumstances, it would be 'reasonable' to require return to the proposed site of internal protection. If the careful approach to identification and assessment of an 'internal protection alternative' proposed here is followed, there is no additional duty under international refugee law to assess the 'reasonableness' of return to the region identified as able to protect the asylum-seeker.

24. Assessment of the 'reasonableness' of return may nonetheless be viewed as consistent with the spirit of Recommendation E of the Conference of Plenipotentiaries, that the Refugee Convention "... have value as an example exceeding its contractual scope and that all nations ... be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

PROCEDURAL SAFEGUARDS

25. Because the viability of an 'internal protection alternative' can only be assessed with full knowledge of the risks in other regions of the state of origin (*see* paras. 15–16), internal protection analysis should never be included as a criterion for denial of refugee status under an accelerated or manifestly unfounded claims procedure.

26. To ensure that assessment of the viability of an 'internal protection alternative' meets the standards set by international refugee law, it is important that the putative asylum state clearly discloses to the asylum-seeker that internal protection is under consideration, as well as the information upon which it relies to advance this contention. The decision-maker must in all cases act fairly, and in particular ensure that no information regarding the availability of an 'internal protection alternative' is considered unless the asylum-seeker has an opportunity to respond to that information, and to present other relevant information to the decision-maker.

These Guidelines reflect the consensus of all the participants at the First Colloquium on Challenges in International Refugees Law, held at Ann Arbor, Michigan, USA, on April 9–11, 1999.

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