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The internal protection alternative and its relation to refugee status[1]

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One of the characteristics of today's practice of refugee law is the flourishing of policies and practices designed to deflect claimants towards alternative places of protection. In this contribution, I address one dimension of the "protection elsewhere" dynamic: the application of the "internal protection alternative" (IPA) to deny refugee status to persons whose risk of persecution is present in only part of a country. The IPA, also referred to as "internal relocation" or the "internal flight alternative", permits removal of refugee claimants to their home state even if they cannot safely return to their former residence. The consequence for the claimant is usually return to internal displacement. An Afghan family targeted by the Taliban in Kunduz, for example, might be referred to Kabul for protection. A decision-maker may similarly determine that a woman who escaped forced marriage in her home village could live undetected by her husband and family in a larger city.

Despite widespread acceptance among state parties to the Refugee Convention of an IPA limit, debate persists regarding the treaty basis for IPA practice and, as a consequence, its operational parameters. The focus of UNHCR guidance, and most academic commentary, has been on establishing safeguards rather than contesting the legality of IPA practice itself. This contribution, in contrast, critically considers how the IPA relates to the requirements for refugee status contained in the 1951 Refugee Convention (Convention) and its 1967 Protocol. After briefly reviewing the development of IPA practice in Part I, I analyze dominant theories concerning its legal basis (Part II). In Part III I consider how IPA practice may be reconciled with the Convention's refugee concept. The operational parameters that follow from either alternative confirm—in contrast to current trends in state practice—a narrow scope for IPA application.

[1] This contribution is based on Chapter 4 of my PhD thesis, *The Internal Protection Alternative in Refugee Law: treaty basis and scope of application under the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol* (submitted to the University of Bergen, Faculty of Law in September 2016).

Part I. The evolution of IPA practice

1.1 The origins of IPA practice

The Refugee Convention and its Protocol are silent with regard to a possible IPA limit**.** Article 1A(2) defines a "refugee" as someone who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.[2]

This provision is satisfied when the claimant is 1) outside his or her country of origin; 2) can establish a legitimate fear of persecution for a Convention ground; and 3) is unable or unwilling, owing to the well-founded fear, to avail him or herself of that country's protection. For the first three decades of practice under the Refugee Convention, refugees were found to satisfy these requirements if a well-founded fear of persecution was established *anywhere* in the country of origin. The reference to "protection" historically referred to the kind of diplomatic and consular support typically provided by a state to its nationals abroad.

The first IPA cases emerged in the mid-1970s in the Netherlands and Germany, where decision makers had begun to apply the concept (without explicitly naming it) in claims concerning religious minorities in Turkey.[3] In its 1979 Handbook, UNHCR responded to this innovative practice with a clarification that the "fear of being persecuted need not always extend to the whole territory of the refugee's country of

[2] Article 1A(2) Refugee Convention. The opening phrase of this definition, '(a)s a result of events occurring before 1 January 1951', was removed in the 1967 Protocol. Because the vast majority of state parties to the 1951 Convention are also party to the Protocol, the 'modern' refugee definition, which encompasses future refugees from any region of the world, applies in these jurisdictions. As of November 2016, there were 145 parties to the 1951 Convention and 146 parties to the 1967 Protocol. An updated list of ratifications is available at https://treaties.un.org.

[3] See, for example, the District Court of Almelo decision of 11 May 1977, Rechtspraacht Vreemdelingenrecht (RV) 1977 N 21. Cited in Roel Fernhout, *Erkenning en toelating als vluchteling I Nederland* (Kluwer 1990).

nationality" to qualify for refugee status.[4] It further stated that

> 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 circumstances it would not have been reasonable to expect him to do so.[5]

Based on this language, one could conclude that if a person's risk of persecution could be *reasonably* overcome through the act of relocation, there is no "well-founded" fear in the country of origin.

During the 1980s, the "exilic bias" dominating refugee law from World War II through the end of the Cold War shifted to source control measures: support to address "root causes" in areas of refugee origin, temporary protection at discretion, peace-building operations and facilitation of refugee returns.[6] Instead of third-country resettlement, Western states focused on finding safe alternatives as close as possible to a refugee's previous residence. Pressure to divert refugee flows increased as numbers of claimants in industrialized countries rose from 233,671 from 1975-1979 to 1,495,629 during the years 1985-1989.[7] In response, states introduced visa requirements, airline carrier sanctions, safe third country practices, first country of asylum rules, and extra-territorial processing measures. IPA practice gained legitimacy as part of this broader legal-political context, but also as a specific response to the greater number of refugees uprooted by civil conflicts and/or fleeing non-state agents in countries like Afghanistan, Angola, Bosnia and Herzegovina, Ethiopia, Ghana, Iraq, Mozambique, Somalia, Sudan, Sri Lanka, and Turkey.

1.2 Expansion of IPA practice

For over a decade, the IPA occupied a relatively modest place in the asylum practice

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[4] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) para 91.

[5] Ibid.

[6] The "exilic bias" refers to the fact that Western countries welcomed refugees from Communist countries on a permanent basis, with the view that they were better off in the 'civilized' West. T. Alexander Aleinikoff, 'State-Centered Refugee Law: From Resettlement to Containment' (1992) 14 Mich J Intl L, 125.

[7] UNHCR, *Asylum Applications in Industrialized Countries: 1980-1999* (2001) 5.

of Western states. In 1991, Hathaway wrote two pages on "regionalized failures to protect" in his seminal work *The Law of Refugee Status*. Drawing on social science theory and the Convention's drafting history, Hathaway concludes that the IPA concept is based on the subsidiary nature of refugee protection: "(b)ecause refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state."[8] During the 1990s, with civil wars displacing millions of people, states more frequently applied the IPA to divert at least some refugee claimants. A comparative study in 1997, which investigated the criteria for refugee status among 15 state parties to the Convention, found evidence of IPA practice in ten.[9] Groups subject to the analysis included Christians (Turkey), Kosovars, Kurds (Iraq and Turkey), Lebanese, Salvadorans, Sikhs (India), Somalis, and Tamils (Sri Lanka). By 2004, the IPA limit was codified in the EU Qualification Directive as a permissible basis for denying international protection.[10] Regional harmonization efforts have not only entrenched existing IPA practice but also spread it to new jurisdictions.[11] Proposed changes to the recast Qualification Directive announced in July 2016 would make the IPA a *mandatory* consideration when determining a claimant's need for international protection.[12]

Today, most states that assess refugee status on an individual basis consider the IPA.

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[8] James C. Hathaway, The Law of Refugee Status (Butterworths 1991) 133. It should be noted that the references to the drafting history relate to the exclusion of internally displaced persons from the scope of the Convention. Rather than indicating an implied acquiescence to some sort of IPA limit, the statements in context reflect the fact that protecting people within their borders raises different (and more controversial) legal issues than those addressed through the new international treaty. See, for example, Statement of Mrs. Roosevelt of the USA; UNGAOR, 4th Sess., Third Committee, Summary Records, 110 (2 December 1949).

[9] Jean-Yves Carlier and others (eds), *Who is a Refugee? A Comparative Case Law Study* (Kluwer Law International 1997).

[10] Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Convent of the Protection Granted (2004 EU Qualification Directive) Article 8.

[11] See, for example, UNHCR, *The Internal Flight Practices: A UNHCR Research Study in Central European Countries* (UNHCR Regional Representation for Central Europe 2012).

[12]European Commission, Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. COM (2016) 466 final.

This includes jurisdictions in Europe, Australia, New Zealand, Canada, USA, Mexico, Japan and South Africa. Despite the increasing prominence of IPA practice, however, its treaty basis is not clearly resolved. As a consequence, while many jurisdictions formally adhere to UNHCR's two-part "safety" and "reasonableness" test for assessing IPA validity, interpretations of both prongs vary among and even within states. Some jurisdictions only consider risks of persecution and harms of similar severity when assessing a potential IPA.[13] Others, meanwhile, review a broader range of factors, including the possibility to make a living and the right to family life.[14] Such diverging practice threatens regional cooperation measures like the Dublin Regulation, which depend upon common rules of refugee recognition. For the individual claimant, of course, the situation creates legal insecurity, and the possibility of return to the country of origin without adequate safeguards.

The IPA is also applied in claims to subsidiary protection based on the removing state's obligations under human rights law. In cases challenging expulsion orders issued by state parties to the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has frequently assessed the respondent state's reference to an IPA.[15] The UN Committee against Torture has done the same.[16] In these decisions, the treaty body determines whether removal to an IPA provides an *effective guarantee* against the real risk of prohibited treatment in some part of the country. In *Salah Sheekh v the Netherlands*, the ECtHR laid out the following principles for IPA application under Article 3 ECHR:

> [A]s a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel

[13] In Germany, the traditional position was that an IPA may be valid provided that the claimant would not face a 'desperate situation' there. This standard has softened somewhat, but it is still not clear what the additional requirement of 'reasonableness' involves. BVerwG 10 C 11/07 [2008]. Canada and the UK apply an 'unduly harsh' standard that is also very restrictive. *Ramanathan v Canada (Minister of Citizenship and Immigration)* [1998] IMM-5091-97 (Federal Court of Canada); *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 (UK House of Lords).

[14] See, for example, Migration Court of Appeal judgments *MIG 2007:33* and *MIG 2009:4* (Swedish Migration Court of Appeal); *Mlle F no 332491 A* [2012] (French Council of State).

[15] See, for example, *Chahal v the United Kingdom*, App no 70/1995/576/662, judgment, 11 November 1996 (Grand Chamber); *Salah Sheekh v the Netherlands*, App no 1984/04, judgment, 11 January 2007; *H. and B. v the United Kingdom*, App nos 70073/10 and 44539/11, judgment, 9 April 2013.

[16] See, for example, UN Committee against Torture, *Alan v Switzerland* [1996] CAT/C/16/D/21/1995 para 11.4.

> to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 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. [17]

In other words, removal to an IPA would violate Article 3 if it amounts to direct or indirect *refoulement* (return) to the area of immediate risk. This test does *not* include other factors, such as the experience of past persecution, lack of a religious community, or livelihood opportunities, which might make relocation unsustainable for the person involved. UNHCR, by contrast, considers that the litmus test for IPA practice is whether the claimant can achieve a "normal life" in the proposed area.[18] This requires careful assessment of general conditions and individual circumstances.

In the absence of an international refugee law court, this ECtHR jurisprudence has arguably influenced states' understanding of IPA practice also under the Refugee Convention.[19] It is undisputably an important point of reference in European jurisdictions for IPA application. In the UK, the House of Lords has acknowledged that the test of "reasonableness" requires something more than the absence of harm in breach of Article 3 ECHR.[20] In Norway, meanwhile, the Government has achieved complete convergence between the IPA test and the absence of persecution and/or Article 3 harm with its recent amendments to the Immigration Act.[21] The current test of "effective protection" against persecution or serious harm applies to all claims to international protection whether based on obligations under the Convention or other human rights instruments. A similar position was endorsed in Australia, where the Migration and Maritime Powers Legislation Amendment to the Migration Act (2014) specifies that the well-founded fear requirement for refugee status is only met if the claimant has a "real chance" of persecution *in all areas* of the receiving country.[22] The

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[17] *Salah Sheekh* para 141. Article 3 ECHR prohibits torture, inhuman or degrading treatment or punishment.

[18] 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) paras 6 and 29.

[19] See, generally, Jessica Schultz, "The European Court of Human Rights and Internal Relocation: An Unduly Harsh Standard?" in Gaudi, Giuffré, and Tsourdi (eds) *Exploring the Boundaries of Refugee Law* (Brill 2015).

[20] *Secretary of State for the Home Department v AH (Sudan) and Others,* [2007] UKHL 49 (UK House of Lords).

[21] The Law on Changes to the Immigration Act, LOV-2016-06-17-58 (in force October 1, 2016).

[22] The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 5J(1)(c). This bill amends the Migration Act of 1958.

accompanying Explanatory Memorandum clarifies that the intention was to remove the reasonableness test previously required by law, which was, in the Government's view, not strictly required under the Refugee Convention.[23] These developments underscore the need to assess critically the relationship of the IPA test to the refugee concept codified in Article 1 of the Convention.

1.3 The treaty basis for IPA practice: current perspectives in theory and practice

The view that refugee law is a regime of "surrogate" protection, providing a back-up remedy when the country of origin cannot or will not offer protection itself, implicitly underpins the IPA concept. As Zimmermann and Mahler explain

> the evolution of the internal flight concept draws heavily on the notion of surrogacy as a basic principle of refugee law, according to which international protection only comes into play when national protection within the country of origin is not available. Given that refugee law is intended to protect persons who have *no alternative* but to seek international protection, it also seems fair to conclude that a person cannot be said to be at risk of persecution if he or she can seek protection in some other part or parts of his or her State of origin.[24]

The concept of surrogacy supports at least three proposed treaty bases for IPA application in current theory and practice, although not all are *dependent* on recognition of a "surrogacy principle." These proposals focus on the IPA as an element of the "well-founded fear" analysis or a "holistic" reading of Article 1A(2), as a limit on the "protection clause" of that same provision, or as an unwritten exclusion clause within Article 1. As illustrated in the table, the first two bases frame the IPA as an implied limit on *the scope* of refugee status. That is, persons for whom a

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[23] The Parliament of the Commonwealth of Australia, Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment, 2.

[24] Andreas Zimmermann and Claudia Mahler, 'Article 1A, para. 2 1951 Convention' in A. Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 448. See also *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 709 (Supreme Court of Canada). It should be noted that *Ward* is not an IPA case, but concerned a member of the Irish National Liberation Army who feared reprisals from members of the group for helping some hostages facing execution to escape. The issue of surrogacy comes up twice in the judgment. The first time related to whether the UK government could protect the claimant from persecution by a non-state actor (in this case the INLA). The second related to whether the claimant´s well-founded fear of persecution also extended to his other country of nationality, Ireland.

valid IPA exists do not fulfil the conditions set out in Article 1A(2). As an unwritten exclusion clause, the IPA would be a restriction on the Convention's *application*. In other words, conditions for refugee status are satisfied but the claimant cannot benefit from the treaty's protection because he or she has a domestic alternative. The three proposals are further described in the sections that follow.

Table 1. Possible treaty bases for IPA practice under the 1951 Refugee Convention

Treaty basis	Criteria under Article 1A(2) fulfilled?
Well-founded fear clause/holistic approach	No
Protection clause	No
Unwritten exclusion clause	Yes

1.3.1 A well-founded fear of persecution

Inspired by the language of UNHCR's Handbook, states and scholars have often linked IPA practice to the "well-founded fear of persecution" requirement for refugee status. In *Januzi,* the UK House of Lords explained this position as follows:

> If a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he would have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is *not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason.*[25]

As a home for the IPA concept, the well-founded fear approach permits an integrated reading of Article 1A(2) in the sense that a risk of persecution indicates a lack of state protection. This basis for IPA practice has been endorsed by a number of states besides the UK, including the US, Canada and Australia.[26] UNHCR's position has shifted over time, but in a 1999 paper it stated that the IPA *may* "be a legitimate part

[25] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, para 7 (UK House of Lords). Emphasis added .This decision was cited with approval by the High Court of Australia in *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, para 19.
[26] See, for example, United States Code of Federal Regulations §208.13(b)(2)(ii) and *Rasaratnam v Canada* (*Minister of Employment and Immigration*) [1992] 1 FC 706 (Federal Court of Canada).

of the holistic analysis of whether the asylum-seeker's fear of persecution is in fact well-founded."[27] In its current IPA Guidelines (2003), UNHCR repeats this view, describing the IPA test as part of the "holistic assessment of refugee status."[28]

1.3.2 The protection basis for IPA practice

According to an alternative view, the IPA is implicit in the "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, she is neither "unable" nor legitimately "unwilling to avail" herself of "protection of that country" as required by the refugee definition. The 1996 EU Joint Position on the term "refugee" reflects this position,[29] as do the 1999 Michigan Guidelines on the Internal Protection Alternative.[30] The Guidelines, which were developed by a group of refugee law experts under the leadership of James Hathaway, have been endorsed by New Zealand.[31] According to Hathaway and Foster, this treaty basis "more dependably directs attention to the core question whether affirmative protection is available, not merely whether a well-founded fear can be avoided in the alternative region."[32]

1.3.3 The IPA as an implied exclusion clause

The third potential basis for IPA practice frames the IPA as an *exception* to refugee status compelled by the subsidiary character of the international protection regime. As an implied exclusion clause, the IPA functions in an analogous way to the explicit

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[27] UNHCR, *UNHCR Position Paper on Relocating Internally as a Reasonable Alternative to Seeking Asylum (the So-Called 'Internal Flight' or 'Internal Relocation Principle')* (1999) para 9.
[28] UNHCR, *Guidelines on Internal protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (2003) para 3.
[29] Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, 96/196/JHA para 8.
[30] University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, 11 April 1999. Available at: http://www.refworld.org/docid/3dca73274.html.
[31] *Refugee Appeal No 71684/99* [2000] (New Zealand Refugee Status Appeals Authority).
[32] Hathaway and Foster, *The Law of Refugee Status, 2nd Edition* (Cambridge University Press 2014) 341-342.

ones contained in Articles 1A(2) para 2 (dual/multiple nationals), 1D (Palestinian refugees) and 1F (undeserving persons). In other words, the claimant meets the criteria for refugee status, but the Convention does not apply because a domestic alternative is available. This approach facilitates, importantly, a common IPA test in claims for Convention status and complementary protection. In such contexts, it is easier to carve out a general exception not explicitly linked to the terms of any one treaty. For example, the EU Qualification Directive (2011) provides that Member States may determine that an applicant is "not in need of international protection" if a safe and reasonable IPA exists.[33] Similarly, Norwegian legislation states that the "right to international protection shall not apply" if effective protection is available in the country of origin.[34]

Part II. Analysis

2.1 The IPA as an integral aspect of refugee status

The core requirement of refugee status is a "well-founded fear of persecution" with a discriminatory intent or effect.[35] Because the words of the Convention—and particularly Article 1A(2) —were the product of intense and detailed negotiations, caution should be exercised not to attribute a new meaning. As Lord Hope of Craighead in *Hoxha* remarked:

> It is generally to be assumed that the parties included the terms that they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were unable to agree…. It is not open to a court … to expand the limits which the language of the treaty itself has set for it.[36]

This argument is even more relevant in the context of the refugee definition because of its importance as the gateway provision unlocking the other rights and benefits contained in the Convention. Because state parties may not make reservations to

[33] Article 8 of the EU Qualification Directive (2011 recast).
[34] Section 28(5) of the Norwegian Immigration Act (2008).
[35] As affirmed by UNHCR, 'the key to the characterization of a person as a refugee is risk of persecution for a Convention reason.' UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugee' para 7.
[36] R (*Hoxha) v Special Adjudicator* [2005] UKHL 19, para 19 (UK House of Lords).

Article 1, any modifications to the definition should occur through a protocol or other formal procedure.[37]

Starting with the ordinary meaning of the words in their context, as required by the Vienna Convention on the Law of Treaties (VCLT), one observes that there is nothing in the language of Article 1A(2) which indicates that the risk of persecution in a single area is inadequate for the purpose of establishing refugee status. When a woman fleeing ethnically motivated rebel attacks in eastern Congo crosses an international border, she is logically outside her country of origin owing to a well-founded fear of persecution. Battjes observes that "this fear is not removed or otherwise affected by the finding that protection is available for (her) *elsewhere* in that country."[38] Inserting a requirement that such fear must be present *everywhere*, as the Australian legislation has done, does even greater violence to the natural limits of the treaty language. It also violates basic norms of due process by imposing a burden on the claimant to demonstrate the persecutor's ability and willingness to pursue him or her countrywide.

With regard to the protection clause, meanwhile, a plain reading confirms that even if the term "protection" is understood to have external and internal dimensions,[39] an IPA would only be available if the claimant is able *and* willing (despite a well-founded fear of persecution) to receive such protection. Presuming that most people who leave their country owing to a well-founded fear of persecution are unwilling to return, any significant scope for IPA practice depends on inverting the terms: rather than the claimant's ability or willingness to receive protection, the relevant point would be the state's ability and willingness to provide it. This sleight of hand

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[37] Article 42 of the Refugee Convention.

[38] Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006) 249. Emphasis added. Justice Kirby of the Australian High Court has also commented that anchoring the IPA in the well-founded fear requirement puts 'a great deal of strain on the language of the Refugee Convention.' *SZATV v Minister for Immigration and Citizenship,* para 62 (High Court of Australia).

[39] Although the concept of protection in Article 1A(2) technically and historically refers to protection available to nationals in third countries, there is increasing authority for the view that the refugee definition is primarily concerned with the possibility of protection in the claimant's home country. Even UNHCR essentially endorses an extended meaning of the protection clause as "an additional – though not necessary – argument in favour of the applicability of the Convention to those threatened by non-state agents of persecution." UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugee' para 36.

contradicts the basic rules of treaty interpretation, which require that meaning be given to every word. It also seems to conflict with the Convention's overriding concern with the individual's perspective. Under the protection approach, for example, the objective availability of protection somewhere could override the claimant's subjective but legitimate fear, or deep-seated apathy towards the home country owing to an experience of past persecution.

A narrow scope for IPA practice may arguably exist, however, if the claimant's unwillingness to avail him or herself of home state protection is unreasonable given the nature of the well-founded fear. In these cases, although the condition of unreasonableness is implied, it is consistent with the rational approach to interpreting the Convention that runs through UNHCR's guidance, especially its Handbook.[40] Since refugee status is declaratory not constitutive, it is relevant whether such unwillingness was unreasonable also at the time of flight.[41]

2.2 The IPA as an implied exclusion clause

Precisely because the IPA notion is absent from the text of the Convention, the principle *expressio unius* – "the expression of one thing is the exclusion of another" – offers a strong basis for rejecting the "unwritten exclusion clause" theory. Article 1 of the Refugee Convention provides explicit exceptions to Convention protection in Articles 1D, 1E and 1F. One should be hesitant, then, to imply an additional exception.

Nevertheless, it could be argued that the Convention's dynamic nature, responding to changes in refugee flows, justifies a modified interpretation of Article 1. 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 or

[40] According to Gilbert Jaeger, who was UNHCR's Director of Protection when the Handbook was drafted, paragraph 91 was inserted to *contain*, as far as possible, the incipient IPA practice emerging in some member states. Jeager expressed this opinion during an oral hearing before the Dutch Council of State, Rechtspraak Vreemdelingenrecht 1988, 4 (24 February 1988). Source: email correspondence from Professor Roel Fernhout, who also discussed this in his published PhD thesis (February 15, 2013).
[41] UNHCR Handbook (reissued 2011) para 28.

unintended consequences, provide that the implications are necessary to achieve a just and reasonable result in line with common contractual objectives.[42]

Do current patterns of refugee flows satisfy these conditions? Although there was no discussion of regionally-limited harms during the drafting process, the Convention's authors did recognize non-state actors as potential agents of persecution, including in civil war contexts.[43] The definition they settled on was intentionally broad in substantive scope, limited only in application at the time by geographic and temporal restrictions. These limits were removed by the Protocol in 1967, making the Convention relevant for refugees from all regions. As a point of departure, one should be careful then to distinguish between unforeseen situations related to the *nature* of refugee flows and unforeseen situations regarding their *direction* and *scope*. The latter, which appears to be the main impetus for IPA practice, cannot be the basis of an evolved meaning that runs contrary to the spirit of international cooperation upon which the Convention is premised.[44] In fact, parties with no IPA practice are among those that bear the heaviest responsibility for refugee protection today.

Even if today's flows are unique, recognition of an IPA limit is hardly *necessary* to secure either of the treaty's main purpose(s): to protect persons from return to the territory where a well-founded fear of persecution is present, and to ensure the "widest possible" exercise of rights in the country of refuge.[45] Some states, however, consider that the surrogate role of refugee law in *general* compels an IPA limit. This argument, given its increasing prominence in support of (expanded) IPA practice, deserves closer attention.

2.2.1 The surrogate role of refugee law: justification for the IPA concept?

Refugee law regulates the international duty of states to protect persons with a well-founded fear of persecution in their countries of origin. Article 1 of the Convention sets the parameters of this protection through inclusion, exclusion, and cessation

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[42] For judicial expressions of this rule, see *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1977] (High Court of Australia) para 9; *Mediterranean Salvage v Seamar Trading* [2009] EWCA Civ 531 (Court of Appeals for England and Wales).

[43] Terje Einarsen, 'Drafting History of the Convention/New York Protocol' in Zimmermann A (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 67.

[44] Preamble para 4.

[45] Preamble para 2.

provisions. While Article 1A(2) para 1 establishes conditions for refugee status, 1A(2) para 2 clarifies that these criteria must be met with respect to *each of the countries* of which the claimant is a national. According to Article 1C(2), meanwhile, the acquisition of a *new nationality* may be grounds for cessation of refugee status. The same consequence follows when an individual "can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality" or, in the case of a stateless refugee, is "able to return to the country of his former habitual residence" (Articles 1C(5) and 1C(6)). In this case the source of persecution has gone, so the country as a whole is presumably safe for the claimant. Finally, Article 1E clarifies that the Convention does not apply to "a person who is recognized (in the country of residence) as having the rights and obligations which are attached to the possession of the nationality of that country."[46] These provisions broadly confirm refugee law's surrogate role vis-à-vis a state of nationality (or former habitual residence if the claimant is stateless). When that third state *fails* its core duty of protection, as indicated by a claimant's well-founded fear, Article 1 exceptions do not clearly apply. In other words, the surrogate role of refugee law does not mandate IPA practice.[47]

Part III. The IPA as an implied limit on the right to refugee status

3.1 An alternative basis for IPA practice?

Despite the IPA's fragile legal footing, common sense suggests that a certain scope for IPA practice, particularly when the claimant has substantial ties to the return area, may be reconciled with the humanitarian aims of refugee law. This instinct is supported by the weight of secondary sources—UNHCR, key state parties to the Convention, and refugee law scholars—who endorse IPA application under certain conditions.

The above analysis identified a narrow opportunity for IPA practice provided that a

[46] In practice, this provision refers to ethnic Germans, the so-called Volksdeutsche, residing in Germany. More generally, however, it covers "national refugees" living in a country where their ethnic group dominates.

[47] For more discussion, see Jessica Schultz and Terje Einarsen, "The Right to Refugee Status and the Internal Protection Alternative: What Does the Law Say?" in Burson, B and Cantor, D (eds) Human Rights and the Refugee Definition: Comparative Legal Practice and Theory (Brill Nijhoff 2016) 282.

well-founded fear of persecution (in a specific area of the home country) retains its central role in the determination of refugee status. Essentially, the proposal conditions the claimant's unwillingness to accept meaningful protection by the home state with a requirement of reasonable**n**ess. Unlike other readings which emphasize the state's ability or willingness to protect, this formulation keeps the individual perspective in focus. As a general rule, one can assume that a claimant compelled to leave her home to avoid persecution is justified to refuse that state's protection. This is clearly so when state authorities are the source of the risk.

As an integrated part of refugee status assessment, this approach has significant drawbacks. First, it suggests no clear parameters for IPA practice. Under what conditions would a claimant's refusal of home state protection be valid? Recourse to a flexible "reasonableness" standard would entrench the same problems that plague current state practice: inconsistency and a restrictive focus on the risk of (indirect) *refoulement*. Second, because the IPA is considered as part of the primary claim, the claimant arguably bears (or at least shares) the burden of proof. This poses a significant obstacle for those who are unfamiliar with conditions throughout their countries of origin. These weaknesses suggest the need to explore whether another treaty basis might better guarantee a principled application of the IPA concept.

3.2 The doctrine of implied limits in human rights law

A final option to consider is whether the IPA can be framed as an implied limit on the right to refugee status. Regional and national courts have recognized unwritten limits on rights that are not strictly "necessary" in light of treaty objectives but which are proportionate to a legitimate state aim.[48] The principle of proportionality is a well-known method in many fields of law for establishing the correct balance between the state´s interference and the interests that it affects.[49] In human rights jurisprudence, the ECtHR maintains that a limit may not compromise the core of a right (making it *de facto* disproportionate); a further balancing of the impact on an

[48] *Mathieu-Mohin and Clerfayt v Belgium*, App No 9267/81 (ECtHR March 2, 1987) para 52.
[49] On the origins of the principle in 19th century German administrative law, see Gertrude Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34 Human Rights Law Journal, 12. On the current status of proportionality in legal systems worldwide and in EU law under the Lisbon Treaty, see Barak, *Proportionality: Constitutional Rights and their Limitations* 145-210.

individual level against the state interest is also required.[50] In *Golder v the UK*, the ECtHR determined that a blanket prohibition on legal representation for prisoners was a disproportionate interference in Article 6 ECHR (the right to a fair trial).[51]

Can the doctrine of implied rights provide a legitimate treaty basis for IPA practice? While there is no explicit "right" to refugee status, Article 1A(2) would have no meaning if states could avoid evaluating a refugee claim.[52] It follows that those who are determined to fulfill the criteria for refugee status are entitled to recognition.[53]

In terms of identifying a legitimate state aim, human rights bodies like the ECtHR recognize that a broad range of objectives may be considered.[54] In the present context, IPA practice permits the state to preserve limited resources for privileged international protection for those without an effective alternative. Importantly, this is not an aim whose importance expands and contracts in response to refugee flows. It does not accommodate a margin of appreciation for each individual state party. Rather, it transparently presents a stable interest against which to assess the impact of IPA application on the particular claimant.

By framing the IPA as an implied limit on the right to refugee status, the validity of IPA application in each individual case depends on whether the impact on the claimant of losing refugee status is proportionate to the marginal gains accrued to the state. The principle of systemic integration expressed in Article 31(3)(c) VCLT

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[50] See, for example, *Mathieu-Mohin and Clerfayt v Belgium,* para 52; *Hirst v UK*, App no 74025/01 (ECtHR judgment, 10 June 2005) para 62 (Grand Chamber); *Case of Jones and Others v the United Kingdom*, App nos 34356/06 and 40528/06 (ECtHR judgment, 14 January 2014) para 186 (Fourth Section).

[51] *Case of Golder v the United Kingdom*, App no 4451/70 (ECtHR judgment, 21 February 1975).

[52] Jens Vedsted-Hansen, UNHCR, *Europe´s response to the arrival of asylum seekers: refugee protection and immigration control* (New Issues in Refugee Research 1999) 7. The duty to provide a procedure for determining a claim (on an individual or group basis) is further inferred by the reference to a well-founded fear (Article 1) and a corresponding duty of *non-refoulement* (Article 33).

[53] The right to recognition as a refugee is explicitly mentioned in the Norwegian Immigration Act, Section 28(5).

[54] In *Hirst v the UK*, the ECtHR held that because the provision concerned, Article 3 of Protocol No. 1, did not specify or restrict legitimate aims, "(a) wide range of purposes may therefore be compatible with Article 3." *Hirst v UK* App no 74025/01, judgment, 6 October 2005 para 74 (Grand Chamber).

permits a broad range of interests to shape interpretation of the IPA concept.[55] These include direct human rights factors related to physical security, the possibility of sustaining an adequate standard of living, freedom of movement, and family life. The best interests of any children, special needs based on disability, age or gender, statelessness and the experience of past persecution are other relevant factors. The basic question is whether the claimant, despite a well-founded fear of persecution in the same country, can relocate with minimal negative consequences from a humanitarian and human rights perspective.

The implied limit approach has some clear benefits over current understandings of the treaty basis for IPA practice. First, it transparently recognizes that host states have an interest in preserving limited resources for privileged human rights protection. There is no need read additional terms into the text, or for that matter to ignore others. By divorcing the IPA concept from the question of a well-founded fear, this framework directs the decision-maker to consider factors beyond the risk of direct or indirect *refoulement.* It also has procedural consequences, in that the burden of proof to demonstrate a valid IPA lies clearly on the state's shoulders.[56]

3.3 Conclusion

In his groundbreaking study on the refugee concept, Grahl-Madsen observed already in the 1960s a tendency by states to overemphasize the "protection" discourse in the determination of refugee status:

> The preoccupation with the refugee´s lack of protection leads to concerning oneself with ambivalent symptoms rather than with the real issue, namely that it is characteristic for a refugee that his relations to the authorities of his home country have become the negation of the normal relationship between a State and its nationals.[57]

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[55] This provision provides that "(t)here *shall* be taken into account, together with the context …(a)ny relevant rules of international law applicable in the relations" when interpreting a treaty. Emphasis added. See, generally, Colin McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 International & Comparative Law Quarterly.

[56] According to the doctrine of implied limits in human rights law, the applicant has the burden of proving the applicability of a right while the state must demonstrate that a limit is justified. See David Harris and others, *Harris, O´Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 148.

[57] Atle Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff 1966) 98-99.

While this statement has broader implications as well, it is strikingly relevant to the current discussion on IPA practice.

Recently, host states' efforts to deflect and deter protection seekers have led to an expansion of IPA practice. For the first time, some states have asserted that IPA application only requires protection from persecution in the proposed return area. Additional human rights or humanitarian considerations arising from the fact of internal displacement and/or the experience of persecution are not, in their view, required by refugee law. While the "effective protection" test aligns with jurisprudence by human rights bodies examining state compliance with other international instruments, it is not clearly compatible with the Refugee Convention. Article 1A(2) directs parties to recognize claimants who, owing to a well-founded fear, are legitimately unwilling to accept protection by their home states.

This contribution has identified two possible treaty bases for IPA practice. The first introduces an (implied) condition on refugee status: the claimant's unwillingness to return must have a rational basis in the well-founded fear. Alternatively, and perhaps preferably, the IPA concept may be framed as a limit on the reach of Convention protection. The proportionality analysis required by the doctrine of 'implied limits' in human rights and constitutional law provides a structured way to contain the adverse impact of internal displacement.