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# The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?

Bríd Ní Ghráinne\*

## 1. ABSTRACT

The Internal Protection Alternative ('IPA') stems from the premise that if there is a safe place within a refugee applicant's country of origin where he or she can relocate, the refugee definition is not engaged. Today, it is an inherent part of refugee status determinations in most States Parties of the 1951 Convention, and has been incorporated into Article 8 of the 2011 Recast EC Qualification Directive. The main thrust of the IPA test across various jurisdictions is that it must be reasonable, or put another way, it must not be unduly harsh. The focus of this article, however, will be on the issue upon which states have diverged widely in their jurisprudence - the relevance and applicable standard of human rights considerations in determining the existence of an IPA.

First, this article examines the position advocated by the UNHCR that protection of basic civil, political and socio-economic rights is a core requirement of the IPA. Considering that those who return to their country and are forced to relocate to obtain protection are in effect, Internally Displaced Persons, this article then discusses the relevance of the Guiding Principles on Internal Displacement to the IPA inquiry. Thirdly, this article analyses the approach put forward by the Michigan Guidelines on the Internal Protection Alternative and approved in New Zealand, and fourthly, this article examines the approach which has been established in the jurisprudence of England and Wales. This article argues that in the context of the IPA inquiry human rights considerations must be taken into account insofar as protection of human rights forms an ingredient of effective protection from the persecution feared. In addition, human rights conditions in the IPA may be of relevance when considering the possibility of indirect refoulement. Aside from these two instances, expulsion to an IPA where human rights standards are generally low is outside of the scope of the Refugee Convention. Complementary protection, however, may preclude expulsion in this regard and it is by taking such an approach to the IFA inquiry that the distinction between refugee and humanitarian claims may be appropriately maintained.

## 2. INTRODUCTION

The Internal Protection Alternative ('IPA') stems from the premise that if there is a safe place within a refugee applicant's country of origin where he or she can relocate, the refugee definition is not engaged. The IPA concept emerged in domestic German jurisprudence in the 1980s and quickly spread unevenly across the jurisprudence of developed countries. Today, it is an inherent part of refugee status determinations in most States Parties of the 1951 Convention, and has been incorporated into Article 8 of the 2011 Recast EC Qualification Directive.<sup>1</sup> The main thrust of the IPA test across various jurisdictions is that it must be reasonable,<sup>2</sup> or put another way, it must not be unduly harsh.<sup>3</sup> The focus of this article, however, will be on the issue upon which states have diverged widely in their jurisprudence - the relevance and applicable standard of human rights considerations in determining the existence of an IPA.

Two recent studies highlight the significance of this issue. The first discusses how Pakistani women fleeing domestic violence are frequently denied refugee status in the United Kingdom on the basis that they are able to relocate within Pakistan,<sup>4</sup> notwithstanding the fact that is 'difficult, if not impossible' for lone women to live safely and independently in Pakistan.<sup>5</sup> Such women are viewed with suspicion, and aside from difficulties in obtaining work and accommodation, they are highly vulnerable to arrest, ill-treatment, abduction and murder.<sup>6</sup> Those who are from affluent backgrounds are considered to be more 'visible' and are thus more likely to be pursued by their husbands, while poorer women are vulnerable to trafficking and exploitation by the sex industry and

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<sup>1</sup> Council Directive (EC) 2011/95/EU 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)

<sup>2</sup> *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 124 ALR 265, 443; *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthony Pillai Francis Robinson* [1998] QB 929; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [8]; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160; 22 Imm LR (2d) 241, 12.

<sup>3</sup> *Thirunavukkarasu*, above n 2 [13]; *Nalliah Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449, 7; *AE, FE v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531; *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678.

<sup>4</sup> N Siddiqui, S Ismail and M Allen, *Safe to Return? Pakistani women, domestic violence and access to refugee protection – A report of a trans-national research project conducted in the UK and Pakistan* (South Manchester Law Centre in Partnership with Manchester Metropolitan University, 2008).

<sup>5</sup> *ibid* 152.

<sup>6</sup> *ibid* 153.

the illegal drugs trade.<sup>7</sup> All participants in this study stated that even if their account of persecution is believed, the Home Office and immigration judiciary is generally unwilling, rather than unable, to recognize the potential harm that will arise if they are required to relocate internally.<sup>8</sup>

The second study focuses on the current policy of the United Kingdom government of returning all Afghan asylum seekers to Kabul. In this sense, Kabul is seen as an IPA for those who originate from elsewhere in the country.<sup>9</sup> Afghanistan's living standards are amongst the lowest in the world, where only 48 per cent have access to drinking water and 37 per cent have access to improved sanitation.<sup>10</sup> In Kabul, over 80 per cent of the population live in unplanned settlements,<sup>11</sup> where there is limited access to basic health services and food security and where deaths frequently occur in the harsh winter conditions.<sup>12</sup> Many of those who are sent back are unaccompanied teenagers, who face a significant risk of forced marriage and sexual abuse.<sup>13</sup> It is clear therefore, on the basis of these two studies that return to a so-called IPA may result in exposure to human rights violations. The relevance of human rights considerations in the IPA inquiry is far from certain, however. In particular, there is no clear consensus on whether the criterion of absence of persecution in itself suffices to constitute an IPA, whether a certain additional standard of human rights protection is required, and if so, what the applicable standard is.

In tacking this issue, this article sets out the IPA's relationship with the Refugee Convention before focusing on the relevance of human rights considerations (if any) in the IPA inquiry. Four different approaches are discussed in this regard. First, this article examines the position advocated by the UNHCR that protection of basic civil, political and socio-economic rights is a core requirement of the IPA.<sup>14</sup> Considering that those who return to their country and are forced to relocate to obtain protection are in effect, Internally Displaced Persons ('IDPs'), this article then discusses the relevance of the Guiding Principles

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<sup>7</sup> *ibid* 153.

<sup>8</sup> *ibid* 153.

<sup>9</sup> C Gladwell and H Elwyn, *Broken futures: Young Afghan asylum seekers in the UK and on return to their country of origin* (New Issues in Refugee Research, Research Paper 246, 2012).

<sup>10</sup> *ibid* 30.

<sup>11</sup> *ibid* 30.

<sup>12</sup> *ibid* 31.

<sup>13</sup> *ibid* 41.

<sup>14</sup> 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) UN Doc HCR/GIP/03/04 [28].

on Internal Displacement to the IPA inquiry.<sup>15</sup> Thirdly, this article analyses the approach put forward by the Michigan Guidelines on the Internal Protection Alternative and approved in New Zealand,<sup>16</sup> and fourthly, this article examines the approach which has been established in the jurisprudence of England and Wales. This article argues that the Refugee Convention ought to be interpreted in light of human rights considerations, however regard must be had to the clear limits the drafters placed on the text. In the context of the IPA inquiry, therefore, human rights considerations must be taken into account insofar as protection of human rights forms an ingredient of effective protection from the persecution feared. In addition, human rights conditions in the IPA may be of relevance when considering the possibility of indirect refoulement. Aside from these two instances, expulsion to an IPA where human rights standards are generally low is outside of the scope of the Refugee Convention. Complementary protection, however, may preclude expulsion in this regard and it is by taking such an approach to the IPA inquiry that the distinction between refugee and humanitarian claims may be appropriately maintained.

### 3. NEXUS TO THE REFUGEE CONVENTION

International law ‘has always been susceptible to the tyranny of phrases’,<sup>17</sup> and the IPA concept is an example of such a phrase. It does not appear in the refugee definition and no explicit reference was made to its existence at the time of drafting.<sup>18</sup> Nonetheless, states have held that there exists a nexus between the IPA and the refugee definition in two main respects. The first is based on the definition’s requirement that the fear must be ‘well-founded’. This has been interpreted to mean that the fear is not well-founded where the persecutory source of the fear could be avoided by relocating to a safe area within the country of origin.<sup>19</sup> The second basis for the IPA lies in the notion of ‘protection’.<sup>20</sup> The focus of the refugee definition is not upon protection in a particular region, but upon the more general notion of protection by that country.<sup>21</sup> If within that country, obtaining its ‘protection’ is merely a question of relocating, it implies that inability or the unwillingness to return is for

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<sup>15</sup> Commission on Human Rights, ‘Guiding Principles on Internal Displacement’ (1998) UN Doc E/CN.4/1998/53/Add.2.

<sup>16</sup> First Colloquium on Challenges in Refugee Law, *The Michigan Guidelines on the Internal Protection Alternative* (1999); *Refugee Appeal No. 71684/99* [2000] INLR 165.

<sup>17</sup> J Brierly, ‘Matters of Domestic Jurisdiction’ (1925) 6 BYBIL 8, 8.

<sup>18</sup> *Robinson*, above n 2 [10]; *Januzi*, above n 2 [7]; *Randhawa*, above n 2 [441].

<sup>19</sup> *Januzi*, above n 2.

<sup>20</sup> *Refugee Appeal No 76044* [2008] NZRSAA 80 [110].

<sup>21</sup> *Randhawa*, above n 2 [8].

reasons extrinsic to those set out in the Refugee Convention and that the claimant is therefore not a refugee. The IPA, although not contained in the Refugee Convention, is thus based on the notion of ‘surrogate’ international refugee protection, which is an exception to the normal principle of international law that protection is usually the obligation of the country of nationality.<sup>22</sup>

#### 4. PROTECTION OF HUMAN RIGHTS IN THE PROPOSED INTERNAL FLIGHT ALTERNATIVE

There is ample scholarly opinion to the effect that the Refugee Convention is ‘part and parcel’ of the broader international human rights law framework.<sup>23</sup> Chetail, for example, posits that:

... [h]uman rights law has become the ultimate benchmark for determining who is a refugee. The authoritative intrusion of human rights has proved to be instrumental in infusing a common and dynamic understanding of the refugee definition that is more consonant with and loyal to the evolution of international law. It thus avoids the Geneva Convention to be a mere legal anachronism by adapting it to the changing realities of forced migrations.<sup>24</sup>

This argument finds its roots in the Convention’s preamble, which should be taken into account when assessing the Convention’s object and purpose.<sup>25</sup> The preamble shows that the States Parties were concerned ‘that human beings [should] enjoy fundamental rights and freedoms without discrimination.’ Further support for this contention lies in the interpretation of the term ‘persecution’ as found in the Convention. Despite the Convention’s silence on the definition of this term, the link between serious human rights violations and

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<sup>22</sup> *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689 [25]; *Horvath (AP) v Secretary of State for the Home Department* [2001] 1 AC 489; J Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 135; *Refugee Appeal No 76044*, above n 20 [102]; *Randhawa*, above n 2, 441.

<sup>23</sup> UNHCR ‘UNHCR and Human Rights: A Policy Paper Resulting from Deliberations in the Policy Committee on the Basis of a Paper Prepared by the Division of International Protection’ (1997) UN Doc AHC/97/325; A Edwards, ‘Human Rights, Refugees and the Right ‘to Enjoy’ Asylum’ 17 IJRL 293, 297; E Feller, ‘International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future’ 83 International Review of the Red Cross 581, 582; R Marx, ‘The Criteria of Applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures’ 14 IJRL 179, 206.

<sup>24</sup> V Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in R Rubio-Marín (ed), *Migrations and Human Rights, Collected Courses of the Academy of European Law* (Oxford University Press, 2013) 9.

<sup>25</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31(1), art 31(2).

persecution has been frequently made.<sup>26</sup> This is reflected in article 9 of the Recast EC Qualification Directive, which states that acts of persecution must ‘be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights.’<sup>27</sup> Human rights considerations have also been used to give fuller meaning to the term ‘social group’ within the refugee definition.<sup>28</sup> If the overall object and purpose of the Convention is one of protection, and in light of the fact that the Convention must be interpreted in good faith, one must question whether drawing distinctions based on IPA is compatible with the Convention’s aims.<sup>29</sup> As expressed by Kirby J in the Australian case of *SZATV v. Minister for Immigration and Citizenship [2007]*:

[It] is essential to ensure that the decision-maker never loses sight of the protective purposes of the Refugees Convention and does not read into its provisions qualifications, limitations and exceptions that are not there.<sup>30</sup>

However, a note of caution must be taken at this juncture, as the Refugee Convention’s relationship with human rights is far from certain. In particular, it is unclear whether human rights law informs the interpretation of the Refugee Convention, or whether it has a more influential role in that it defines its parameters. It has been argued that the aim of the Refugee Convention is to provide international protection to a narrowly defined category of persons who can prove a well-founded fear of persecution for enumerated Convention reasons. According to its drafters, the Refugee Convention’s goal was not of protecting those in need of human rights protection generally but to deal ‘only with the problem of legal protection and status.’<sup>31</sup> As stated by Dawson J in the Australian High Court case of *A v Minister for Immigration and Ethnic Affairs [1997]*:

... no matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee in terms of the Convention. And by

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<sup>26</sup> UNHCR ‘Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Art 1(a)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’ (2002) UN Doc HCR/GIP/02/01 [13]; Hathaway, *The Law of Refugee Status*, above n 22, 104, 105.

<sup>27</sup> Council Directive (EC) 2011/95/EU, above n 1, art 9(1)(a).

<sup>28</sup> A Edwards, ‘Human Rights, Refugees and the Right ‘to Enjoy’ Asylum’ 295; UNHCR, above n 26.

<sup>29</sup> A Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol : A Commentary* (Oxford University Press, 2010) 458.

<sup>30</sup> *SZATV v Minister for Immigration and Citizenship [2007]* HCA 40 [67].

<sup>31</sup> M Barutciski, ‘Tensions Between the Refugee Concept and the IDP Debate’ [1998] 3 Forced Migration Review 11, 12; Statement of Mr. Henkin of the USA (1950) UN Doc E/AC.7/SR 161.

incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees ... It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.<sup>32</sup>

Secondly, as Steinbock argues, it is significant that the refugee definition makes no mention of many human rights that, at the time of its drafting, had just been enunciated in the Universal Declaration of Human Rights ('UDHR'). Rather, the Convention's preamble simply refers to the UDHR and UN Charter as setting out the principle that human beings shall enjoy fundamental rights without discrimination, and the operative part of the Convention focuses on putting refugees on a more equal footing with nationals of the host state.<sup>33</sup>

Thirdly, the Convention's applicability is limited by its exclusion and cessation clauses. Human rights lawyers tend to be 'suspicious' of such concepts of deserving and undeserving persons.<sup>34</sup> In light of these considerations, one must be mindful that there may be limits as to how far the Refugee Convention may be interpreted as a human rights convention.

This discussion sets the scene for the focus of this article - the relevance of human rights protection in the proposed IPA. This issue has been discussed in relation to the 'reasonableness' criterion of the proposed IPA, and as an independent criterion in its own right. The spectrum of positions on this matter is very broad, ranging from an insistence on protection of basic civil, political and socioeconomic rights, to the proposition that human rights considerations (persecution aside) are a neutral factor for the purposes of IPA determination. The following paragraphs will outline the differing stances that have been taken with a view to determining which of these, if any, is most compatible with the Refugee Convention.

### **3.1 The Refugee Convention as a Human Rights Convention?**

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<sup>32</sup> *A v Minister for Immigration and Ethnic Affairs* 2 BHRC 143, 248. This was subsequently confirmed by the judgment of Baroness Hale in *AH (Sudan)*, above n 3.

<sup>33</sup> DJ Steinbock, 'The Refugee Definition as Law: Issues of Interpretation', in F Nicholson and PM Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) 31.

<sup>34</sup> C Harvey, 'Refugees, Rights and Human Security' [2001] 19 *New Directions for Refugee Policy* 99, 96.



As outlined above, the nexus between human rights considerations and the Refugee Convention's object, purpose, and context is not entirely clear. Nonetheless, three considerations must be borne in mind. First, the preamble, which affirms the relevance of the UDHR and UN Charter, is a mandatory source of interpretation when ascertaining the object and purpose of the Convention.<sup>35</sup> Secondly, the practice of states in taking a human rights-based approach in the interpretation of the terms 'persecution' and 'particular social group', as outlined above, ought to be taken into account. Thirdly, any relevant rules of international law applicable in the relations between the parties also form part of its context.<sup>36</sup> Thus the fact that an overwhelming majority of the Refugee Convention's States Parties are parties to at least one, if not many, human rights based treaties, is relevant in the interpretation of the Refugee's Convention's terms. Therefore, it is safe to say that human rights considerations, at the very least, inform the interpretation of the Refugee Convention.

The difficulty with this proposition in the context of the IPA inquiry, however, is ascertaining the content of the standard that ought to be applied. This is illustrated by an examination of the UNHCR's position with regard to the IPA, which posits that the reasonableness inquiry should focus on whether adequate protection of basic civil, political and socio-economic rights is available in the proposed area of relocation.<sup>37</sup> Similar approaches are also found in literature and case-law.<sup>38</sup>

Although a welcome attempt to bring clarity to this amorphous area of refugee law, the UNHCR's approach may be criticised for two reasons. First, there is no clear basis in law for requiring the application of this particular standard, that is, 'basic norms of civil, political and socio-economic rights' to the IPA inquiry. Secondly, the UNHCR and various writers who advocate this interpretation give us little or no further clarification as to what would constitute 'basic' human rights. Indeed, Hathaway and Foster acknowledge that 'the minimum acceptable level of legal rights inherent in the notion of 'protection' is certainly open to debate'.<sup>39</sup> The lack of a definite list or standard of core human rights norms is arguably the greatest hurdle to this proposed interpretation of the IPA for numerous reasons.

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<sup>35</sup> VCLT, above n 25, art 31(2).

<sup>36</sup> VCLT, above n 25, art 31(3)(c).

<sup>37</sup> UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (European Series 1995) 64.

<sup>38</sup> *ibid* 64; H Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' 10 *IJRL* 499, 530; Zimmermann, above n 30, 458; *Butler v Attorney General* [1999] NZAR 205 [7].

<sup>39</sup> J Hathaway and M Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination* (Global Consultation on International Protection, Expert Roundtable Discussion organised by the UNHCR, 2001) 43.

First, as the human rights obligations by which different states are bound varies, and as there is no uniform and ascertainable standard of human rights for refugees upon which states have agreed upon, the human rights approach to the IPA seems to suffer from an inherent difficulty. Can there exist a hierarchy of rights under international law,<sup>40</sup> considering that ‘all human rights are universal, indivisible and interdependent and interrelated?’<sup>41</sup> Even if such a hierarchy exists, which rights constitute the list of ‘basic’ human rights? Is it formed of the so-called ‘International Bill of Rights’, consisting of the (non-binding) UDHR, the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant for Economic, Social and Cultural Rights 1966 (ICESCR)? Or does it consist of those rights which are ‘non-derogable’ under the above treaties?<sup>42</sup> Or should the hierarchy of rights consist of two further tiers - rights that are derogable in times of public emergency and certain socioeconomic rights, with socioeconomic rights and those rights that are not codified in ICESCR or ICCPR falling outside the scope of a state’s duty of protection?<sup>43</sup> Evidently, the human rights interpretation approach raises more questions than it resolves.

Even if a core human rights standard could be identified, it is doubtful that it would be an ‘objective and apolitical yardstick’ for measuring standards within the IPA as propounded by Towle.<sup>44</sup> The difficulty in measuring human rights standards in another jurisdiction is especially apparent in the realm of socioeconomic rights. Notwithstanding the fact that the Committee on Economic, Social and Cultural Rights have identified a ‘minimum core obligation’ to ensure the satisfaction of rights incumbent on States Parties,<sup>45</sup> these rights have traditionally been seen as open-ended, indeterminate and lacking conceptual clarity.<sup>46</sup> Furthermore, as the obligation on states is to ‘take steps ... to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised’ in the Convention it would be very difficult for a court to assess the situation in a foreign

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<sup>40</sup> T Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’ (2001) 12 EJIL 917, 918; T Meron, ‘On a Hierarchy of International Human Rights’ (1986) 80 AJIL 1.

<sup>41</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action (1993) [5].

<sup>42</sup> Zimmermann, n 30, 458; Koji, above n 40.

<sup>43</sup> Hathaway, *The Law of Refugee Status* above n 22, 105-112.

<sup>44</sup> R Towle, ‘Human Rights Standards: A Paradigm for Refugee Protection?’ in AF Bayefsky and J Fitzpatrick (eds), *Human Rights and Forced Displacement* (Martinus Nijhoff, 2000) 31.

<sup>45</sup> Committee on Economic Social and Cultural Rights, *General Comment No. 3, The nature of States Parties obligations (art 2, par 1)* (1990) UN Doc CESCR - E/1991/23 1990 [10].

<sup>46</sup> David Marcus, ‘The Normative Development of Socioeconomic Rights through Supranational Adjudication’ (2006) 42 Stanford Journal of International Law 59.

jurisdiction.<sup>47</sup> It would have to adjust its expectations for each state owing to the fact that states enjoy different levels of development and therefore different levels of potential for the fulfilment of rights.<sup>48</sup> Furthermore it would mean that each IPA would be subjected to a different threshold of socioeconomic provision depending on the country in which the IPA is located. Far from being a universal standard, it would vary widely depending on the level of development in the state concerned.

Finally, the human rights approach has been rejected by the Court of Appeal in England and Wales. In the words of Lord Phillips MR:

An asylum-seeker who has no well-founded fear of persecution but has left his home country because he does not there enjoy [basic norms of civil, political and socio-economic human rights] will not be entitled to refugee status. When considering whether it is reasonable for an asylum seeker to relocate in a safe haven, in the sole context of considering whether he enjoys refugee status, we cannot see how the fact that he will not there enjoy the basic norms of civil, political and socio-economic rights will normally be relevant. If that is the position in the safe haven, it is likely to be the position throughout the country. In such circumstances it will be a neutral factor when considering whether it is reasonable for him to move from the place where persecution is feared to the safe haven.<sup>49</sup>

In short a human rights interpretation of the IPA requiring the protection of ‘basic civil, political, and socio-economic rights’, although desirable, suffers from numerous inherent difficulties. It is therefore submitted that this standard is not applicable in the IPA inquiry and we must look elsewhere when ascertaining the relevant benchmark in terms of human rights considerations (if any) when assessing the existence of an IPA.

### **3.2 The Guiding Principles on Internal Displacement<sup>50</sup>**

The Guiding Principles on Internal Displacement have also been advocated as a potential yardstick by which human rights conditions within a proposed IPA could be measured.<sup>51</sup> The

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<sup>47</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(1).

<sup>48</sup> Marcus, above n 46, 61.

<sup>49</sup> *AE, FE*, above n 3 [38].

<sup>50</sup> Guiding Principles on Internal Displacement, above n 15.

Guiding Principles are made up of thirty principles identifying the rights and guarantees concerning the protection of IDPs. The principles are divided into five parts, each of which addresses a different phase of displacement – (i) General Principles; (ii) Principles Relating to Protection from Displacement; (iii) Principles Relating to Protection during Displacement; (iv) Principles Relating to Humanitarian Assistance; (v) Principles Relating to Resettlement and Reintegration. Although not a legally binding document per se, many of the principles are based on an abundance of existing legal provisions.<sup>52</sup> Their drafters maintain that they reflect and are consistent with hard law.<sup>53</sup> Further, they have been referenced in resolutions of various international organizations and several countries – including Angola, Burundi, Colombia, Peru, the Philippines, Sri Lanka and Uganda – have made explicit reference to the Principles in their national laws and policies on internal displacement.<sup>54</sup>

The Guiding Principles on Internal Displacement, in one sense, would be a logical standard by which to measure human rights in a proposed IPA. After all, if an asylum seeker is forced to relocate to a safe place within his or her country of origin, in effect, he or she will become internally displaced. Whether or not this is in itself is a breach of human rights remains a question for further research, as the prohibition of internal displacement has not yet been firmly established in general international law. For the time being, however, the Guiding Principles have the potential to provide a helpful recapitulation of the human rights applicable to persons who have been forced to relocate, framed with specific reference to their needs.<sup>55</sup>

The use of the Guiding Principles to determine the adequacy of human rights protection in a proposed IPA suffers from many of the same shortcomings as the ‘core’ human rights approach outlined above. Another problem with using the Guiding Principles as a benchmark for IPA determination is that the protections set out in the Guiding Principles

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<sup>51</sup> E Ferris, ‘Internal Displacement and the Right to Seek Asylum’ (2008) 27 RSQ 76, 88; Hathaway and Foster, above n 39, 45.

<sup>52</sup> W Kälin, ‘The Guiding Principles on Internal Displacement - Introduction’ (1998) 10 IJRL 557, 562.

<sup>53</sup> *ibid* 562.

<sup>54</sup> W Kälin, ‘The Role of the Guiding Principles on Internal Displacement’ [2005] Forced Migration Review 8, 9; Resolutions of the UN Security Council: S/Res/1286 (2000); Resolutions of the UN General Assembly: A/Res/64/162 (2010); A/Res/63/607 (2009); A/Res/62/153 (2008); A/Res/62/249 (2008); A/Res/60/168 (2006); A/Res/58/177 (2004); A/Res/56/164 (2002); A/Res/54/167 (2000); A/RES/54/167 (1999); UN A/Res/52/130 (1998); Resolutions of the UN Commission on Human Rights: E/CN.4/RES/2005/46 (2005); Res. E/CN.4/RES/2004/55 (2004); Res. E/CN.4/RES/2003/51 (2003); Res. E./CN.4/RES/2002/56 (2002); Res. E/CN.4/RES/2001/54 (2001); Res. E/CN.4/RES/2000/53 (2000); Res. E/CN.4/RES/1999/47 (1999); Res. E/CN.4/RES/1998/50 (1998); Res. E/CN.4/RES/1996/52 (1996); Res. E/CN.4/RES/1992/73 (1992); Resolutions of the UN Human Rights Council: Res. A/HRC/13/21 (2010); Res. A/HRC/6/32 (2007). See also Council of Europe Parliamentary Assembly, Recommendation 1631 (2003).

<sup>55</sup> Hathaway and Foster, above n 39, 43.

are quite far-reaching. Situations that would violate the Guiding Principles would include the denial of the right to visit the grave sites of deceased relatives (Principle 16), lack of access to essential sanitation facilities (Principle 18), the inability to receive a passport (Principle 20), and arbitrary confiscation of property (Principle 21). Refugee status granted on the basis of risks inconsistent with the Guiding Principles could go far beyond what was intended by the drafters of the Convention as the risk of such harms would not create an entitlement to refugee status.<sup>56</sup>

Perhaps the biggest problem with using the Guiding Principles as a potential standard for IPA determination is that it is not clear whether some of the Guiding Principles are in fact hard law. Some principles may represent progressive development and are therefore not binding on states and cannot be used as a legal benchmark. The drafters of the Guiding Principles claimed they were careful ‘to not go beyond what can be based on existing international law’, yet when drafting the principles they noted that gaps remained in the protection of IDPs. Further examination reveals that some of the Guiding Principles have little or no counterparts in existing law, and thus represent the declaration of new rights. Take for example, Principle 15:

Internally displaced persons have:

...

(d) the right to be protected against forcible return to resettlement in any place where their life, safety, liberty or health would be at risk.

With regard to paragraph (d), there is no provision of international law that applies the above principle to the internally displaced. Indeed, Walter Kälin, the former Special Rapporteur for Internally Displaced Persons acknowledged that this ‘states a novel principle with no direct antecedent in existing instruments.’<sup>57</sup> In a similar vein, Principle 29 (restitution for property loss) was included in the Guiding Principles, notwithstanding the fact that at the time of drafting, ‘the question as to whether nationals are generally entitled to compensation for losses of their property ... probably [had] to be answered in the negative.’<sup>58</sup> Finally, the

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<sup>56</sup> *ibid* 44.

<sup>57</sup> W Kälin, ‘Guiding Principles on Internal Displacement Annotations’ (2008) 38 *Studies in Transnational Legal Policy* 69.

<sup>58</sup> R Hofmann, ‘International Humanitarian Law and the Law of Refugees and Internally Displaced Persons,’ in *Law in Humanitarian Crisis* (Brussels, 1995) 297 as cited in C Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press, 2004) 64.

principles on humanitarian assistance have also been ‘considered [as going] beyond those contained in the Geneva Conventions which are limited to humanitarian access.’<sup>59</sup>

It is questionable therefore whether all Guiding Principles have a solid background in international law, and indeed, Kälin could only go so far as to say that ‘no new law in the strict sense of the word was created in *most* cases’ (emphasis added).<sup>60</sup> Thus some of the Principles are not binding on states, and may go beyond what states are willing to accept in practice. Consequently the Guiding Principles are not an appropriate standard by which the measure the existence of an IPA.

### **3.3 The Michigan Guidelines on the Internal Protection Alternative/ the New Zealand approach**

The Michigan Guidelines on the Internal Protection Alternative are the product of a study convened by the Programme in Refugee and Asylum Law, The University of Michigan Law School in April 1999. The Guidelines were drafted by various students and academics in the field of refugee law, including Professor Hathaway, and have been followed in New Zealand jurisprudence.<sup>61</sup>

Paragraph 21 of the Guidelines states that when determining the existence of an IPA, reference should be made to the rights which make up what the Guidelines interpret the Refugee Convention’s definition of protection to be, notably articles 2-33. Paragraph 22 of the Guidelines states that ‘at a minimum ... 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.’<sup>62</sup> This concept of protection entails a duty of non-discrimination vis-à-vis citizens or other residents of the asylum country and refugees regarding a list of rights.<sup>63</sup> These include general provisions, administrative measures, rights relating to juridical status, and rights relating to gainful employment. The Guidelines state that if this approach is followed, there is no additional duty to assess the ‘reasonableness’ of the IPA.<sup>64</sup>

The Guidelines have been appraised by Kelley (albeit with some qualifications, as outlined below), who states that this more limited range of rights recognized by the

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<sup>59</sup> *ibid* 61.

<sup>60</sup> W Kälin, ‘The Future of the Guiding Principles on Internal Displacement’ [2006] *Forced Migration Review* 5, 5.

<sup>61</sup> *Refugee Appeal No. 71684/99*, above n 16.

<sup>62</sup> *Michigan Guidelines*, above n 16 [22].

<sup>63</sup> Hathaway and Foster, above n 39, 44.

<sup>64</sup> *Michigan Guidelines*, above n 16 [23].

Guidelines would lead to more consistent results than the broader standard advocated by the UNHCR.<sup>65</sup> The Guidelines standard was also followed in New Zealand jurisprudence. The New Zealand Refugee Status Appeals Authority in *Refugee Appeal No. 71684/99 [2000]* was ‘of the view that the Michigan Guidelines properly reflect and summarize, though more succinctly and more elegantly, the principles to be applied in New Zealand’ and that the Guidelines could ‘therefore be properly used to inform the New Zealand law.’<sup>66</sup> The judgment then reproduced the Guidelines in full. Rodger PG Haines, QC, one of the drafters of the Guidelines, was also the Chairperson of the New Zealand Appeals Authority in this particular case.

While a clearer standard for the determination of an IPA would generally be a welcome proposal, it is not evident that the rights set out in the Refugee Convention may be transposed to the IPA inquiry for numerous reasons. The first concerns the rationale behind their adoption, as was set out by the New Zealand case of *Refugee Appeal No. 76044 [2008]*. The Refugee Status Appeals Authority, quoting *SZATV v. Minister for Immigration and Citizenship [2007]*, stated that the IPA has ‘a fragile footing in the text of the ... Convention’ and that its origins were therefore ‘suspect.’<sup>67</sup> According to the Authority, it was therefore important that the principles employed in the determination of an IPA were at least consistent with the language, object and purposes of the Convention. Considering that the Refugee Convention itself defines genuine access to international surrogate protection as encapsulating, at a minimum, those rights contained in articles 2-33, the Authority held that it ‘is consistent with both principle and logic of the Convention for those same rights to be used to measure genuine access to meaningful state protection internally in the country of origin when withholding recognition of refugee status from someone who is presumptively a refugee.’<sup>68</sup>

It is submitted that this rationale misinterprets the nature of the Refugee Convention. The Convention is addressed to persons who are outside their countries of nationality and are in need of international protection. It is not addressed to determining the rights applicable to an asylum seeker within his country of origin and this is acknowledged by the drafters of the Michigan Guidelines.<sup>69</sup> In a similar vein, there is a distinction to be drawn between the meaning of the word ‘protection’ in the refugee definition, which refers to the lack of

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<sup>65</sup> N Kelley, ‘Internal Flight/Relocation/Protection Alternative: Is it Reasonable?’ 14 IJRL 4, 42.

<sup>66</sup> *Refugee Appeal No. 71684/99*, above n 16 [65].

<sup>67</sup> *Refugee Appeal No 76044*, above n 20 [147].

<sup>68</sup> *ibid* [147].

<sup>69</sup> Hathaway and Foster, above n 39, 45.

protection in the country of nationality, and the international ‘protection’ which accrues when the refugee is in the asylum state, as set out in articles 2-33. Only the former concept of ‘protection’ is relevant to the IPA inquiry. This is highlighted by the fact that articles 2-33 make no reference to protection from persecution, which should form the core of the IPA analysis. In addition, the Refugee Convention is not aimed at the ‘general levelling up of living standards around the world, desirable though of course that is.’<sup>70</sup> Refugees and those displaced internally are fundamentally different, in that the international community’s access to IDPs can be limited or qualified. This is not the case with refugees.<sup>71</sup> Furthermore, the rights that are set out in the Convention accrue to a person after they have satisfied the criteria of the refugee definition. To treat those rights as a standard which forms part of the refugee definition would be premature and would possibly entail extending the reach of the refugee definition beyond that which was envisaged by its drafters. As previously outlined, the travaux préparatoires show that it was the intent of the drafters that persons displaced within their countries of origin were not to be protected by the Refugee Convention. The Refugee Convention cannot therefore be used as a backdoor to provide international protection for those displaced internally.

Further, to treat articles 2-33 as part of the refugee definition would mean that the inquiry into IPA is ‘really an inquiry into whether a person who is prima facie a refugee ... should lose that status by the application of the internal protection principle.’<sup>72</sup> This rationale would entail treating the IPA as an unwritten exclusion clause, however the exclusion clauses in the Convention are exhaustive and thus the argument that an unwritten exclusion clause exists is difficult to maintain. Furthermore, this would be at odds with the logic by which exclusion clauses are applied. Such clauses come into play after an asylum seeker has fulfilled the refugee definition. Regardless of the approach taken, a person who has an IPA does not qualify as a refugee on account of a failure to meet the definition, either for lack of a well-founded fear or the ability to avail himself of the protection of his country of nationality.<sup>73</sup>

Finally, in the words of Kelley:

[The effect of the Michigan Guidelines] is ... to use the narrow standards of protection contained in the Convention as a substitute for the more extensive ones contained within subsequent human rights treaties. The approach ... would also

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<sup>70</sup> *AH (Sudan)*, above n 3 [5].

<sup>71</sup> Barutciski, above n 31, 12.

<sup>72</sup> *Refugee Appeal No. 71684/99*, above n 16 [61].

<sup>73</sup> Zimmermann, above n 29, 449.



suggest that so long as the state treats the refugee in the IPA equally with respect to the narrow range of rights in the Convention, protection would be satisfied even if a greater range of rights were accorded to the refugee's fellow citizens. In effect the state protection requirement would be met even when the refugee is denied core entitlements available to other citizens provided they are also denied to non-citizens.<sup>74</sup>

The second reason is a practical one, in that the rights which are set out in the Refugee Convention are not applicable in an internal context. It is true that the Michigan Guidelines '[do] not suggest a literal interpretation of Articles 2-33 in considering internal protection, but rather that decision makers seek inspiration from the kind of interests protected by these Articles.' Even if the Guidelines are employed in this very general manner, it nonetheless would entail reading into the Convention a standard which has clearly been set for persons in a different legal and factual scenario and thus has a different conceptual basis. While refugees and IDPs often have similar protection needs, the situation of persons who have crossed an international frontier is different from that of persons who are obliged to relocate within their country of origin to receive protection. As noted by Barutciski, refugees are granted basic socio-economic rights for the purposes of maintaining themselves in a foreign country in which they do not have citizenship status.<sup>75</sup> It would not make sense to look to these rights for guidance when considering the situation of citizens in their country of origin. Moreover, there are various levels at which the relevant rights are required to be conferred.<sup>76</sup> In the case of some rights, refugees must be treated in the same manners of nationals of the country of asylum (e.g articles 4 and 14). Some rights entail a duty to afford refugees the 'most favourable treatment accorded to nationals of another country in the same circumstances' (for example, articles 15, 17). Others must be granted in a manner at least as favourable as conditions granted to other aliens generally (for example, articles 7 and 13). This may be contrasted with the right of IDPs under the Guiding Principles to 'enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country.'<sup>77</sup> The fact that these rights are granted relative to the situation in the asylum state makes it difficult to accept that such a specific standard can be used as general guidelines to assess the situation in a country of origin.<sup>78</sup>

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<sup>74</sup> Kelley, above n 65, 35.

<sup>75</sup> Barutciski, above n 31, 12.

<sup>76</sup> Marx, above n 23, 204.

<sup>77</sup> Guiding Principles on Internal Displacement, above n 15, Principle 1.

<sup>78</sup> Marx, above n 23, 204.

Thirdly, it is important to remember, as Marx points out, that there is no obligation on parties to the Convention to abstain from deportation if the conditions in the IPA fall below the protection standard set out in the Convention.<sup>79</sup> Where a person satisfies the refugee definition, the state is bound by article 32, which prohibits the expulsion of a refugee lawfully within its territory save on the grounds of national security and public order. The state is also bound by the principle of non-refoulement, as laid down in article 33, which prohibits the return of refugees to places where their lives or freedoms are endangered on Convention grounds. As the Convention explicitly sets out the exceptions to the general right of states to deport aliens within their territory, the argument that another unenumerated exception exists is difficult to maintain.

Finally, the legal weight of the Guidelines must be borne in mind when assessing their authoritative value. As mentioned previously, the Guidelines were drafted by a team of academics led by Professor Hathaway. Such academic writings are not referred to as authoritative by the Vienna Convention on the Law of Treaties.<sup>80</sup> According to the 1945 Statute of the International Court of Justice (ICJ) however, ‘teachings of the most highly qualified publicists’ may be applied by the court as ‘a subsidiary means for the determination of the rules of law’.<sup>81</sup> Considering that the ICJ is the body to which disputes concerning the Refugee Convention are to be referred to, it is possible that the Michigan Guidelines could be considered in that context. Furthermore, the publications of eminent scholars are frequently cited by domestic asylum determination bodies.

The problem with the Michigan Guidelines as an authoritative interpretation of international law, however, is the sources upon which they are based. Their drafters maintain that they are ‘the product of collective study of relevant norms’ and that they ‘informed primarily by the jurisprudence of leading developed states of asylum.’<sup>82</sup> It is true that parts of the Guidelines do indeed reflect the jurisprudence of various domestic courts as outlined above. The applicability of articles 2-33 to the IPA, however, had not at the time of the Guidelines’ drafting been established in domestic jurisprudence, at least insofar as this author’s research has revealed. This was acknowledged by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No. 71684/99 [2000]*, which held that prior to its adoption of the Michigan Guidelines; this rule had yet to be established in the jurisprudence

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<sup>79</sup> *ibid* 203.

<sup>80</sup> VCLT, above n 25.

<sup>81</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 38(1)(d).

<sup>82</sup> *Michigan Guidelines*, above n 16 [6].

of New Zealand. It therefore appears that, at the time of drafting, the Guidelines were a declaration of *lex feranda* and as they were not drafted by states, they have little legal authority.

Fifteen years on, can it be said that the situation has changed? It is true that the Guidelines have subsequently been approved in New Zealand jurisprudence, but the practice of one state does not a rule of customary international law make. In any event, this practice has been counter-balanced by the outright rejection of the Guidelines by the House of Lords.<sup>83</sup> It is therefore submitted on the basis of the conceptual, practical and legal grounds set out above that the protection standard put forward by the Guidelines in paragraph 21 is neither binding nor evidence of the practice of states generally. That is not to say that a customary rule cannot develop from the Guidelines, nor that states are not free to adopt them, however aside from New Zealand practice such acceptance has not yet come to pass.

### 3.4 The Approach in England and Wales

The Michigan Guidelines/ New Zealand approach was rejected by the House of Lords in the case of *Januzi (FC) v Secretary of State for the Home Department and Others* [2003].<sup>84</sup> Taking a textual approach to the interpretation of the Refugee Convention, Lord Bingham noted that as a general rule, ‘the parties to an international Convention are not to be treated as having agreed something they did not agree.’<sup>85</sup> He cited with approval the broad approach taken by the case of *E and another v Secretary of State for the Home Department* [2003] which emphasised that the failure to protect (as opposed to discriminatory denial of) basic human rights does not constitute persecution under the Refugee Convention and made a distinction between (i) the right to refugee status under the refugee Convention; (ii) the right to remain by reason of the Human Rights Convention; and (iii) considerations which may be relevant to the grant of leave to remain for humanitarian reasons.<sup>86</sup> Lord Bingham stated that this approach was to be preferred to the Michigan Guidelines/ New Zealand approach and outlined numerous reasons to support this contention.

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<sup>83</sup> *Januzi*, above n 2.

<sup>84</sup> *ibid*, approved in *AH (Sudan)*, above n 3.

<sup>85</sup> *Januzi*, above n 2 [4].

<sup>86</sup> *E v Secretary of State for the Home Department* [2003] EWCA Civ 1032; [2004] QB 531 [16]; *AE, FE*, above n 3 [67].

First, he noted that the Convention is addressed to the rights in the country of asylum of refugees recognized as such.<sup>87</sup> As discussed above, the Convention is not explicitly directed to defining the rights in the country of their nationality of claimants for asylum who may be able to relocate.

Secondly, he argued that acceptance of that rule could not be implied into the Convention. Acknowledging the human rights overtones in the Convention's preamble, he emphasised that the thrust of the Convention is to provide effective protection against persecution for Convention reasons. It was not directed (persecution apart) to the level of rights prevailing in the country of nationality.<sup>88</sup> He noted the non-binding character of the UDHR and that the ICCPR and the ICESCR had yet to be adopted when the Convention was completed.<sup>89</sup> On this point, it must be remembered that subsequent practice of States Parties may under some circumstances be relevant for the purposes of treaty interpretation.<sup>90</sup> The fact that the ICCPR and ICESCR were drafted after the completion of the Refugee Convention therefore does not, of itself, rule them out as a relevant source of interpretation. Lord Bingham may thus have gone too far by dismissing human rights instruments on the grounds that the Refugee Convention preceded their conclusion.

Thirdly, he drew attention to the fact that the rule is not expressed in the 2004 EC Qualification Directive.<sup>91</sup> He noted that the Directive is binding on Member States of the European Union who could not, consistently with their obligations under the Convention, have bound themselves to observe a standard lower than it required. This point is not entirely convincing. The Directive set a minimum standard only and it explicitly acknowledges that the primary instrument binding on states is the Refugee Convention.<sup>92</sup> States are therefore free to employ higher standards when determining whether to return an asylum-seeker to his country of origin, and this may include the 'Hathaway/ New Zealand rule.' The fact that the rule is not included in the Directive therefore does not clarify its standing in international law. This point was made in New Zealand Refugee Status Appeals Authority in *Refugee Appeal No. 76044 [2008]* when analysing *Januzi*.<sup>93</sup>

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<sup>87</sup> *Januzi*, above n 2 [15].

<sup>88</sup> *ibid* [16].

<sup>89</sup> *ibid* [16].

<sup>90</sup> VCLT, above n 25, art 31(3)(b).

<sup>91</sup> *Januzi*, above n 2 [17].

<sup>92</sup> H Storey, 'EU Refugee Qualification Directive: a Brave New World?' (2008) 20 *IJRL* 1, 7; Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12, Recital 2, 16.

<sup>93</sup> *Refugee Appeal No 76044*, above n 20 [149].

Fourthly, he stated that the rule is not, currently, supported by such uniformity of state practice based on *opinio juris* and such consensus of professional and academic opinion as would be necessary to establish a rule of customary international law.<sup>94</sup> On this ground, it should be noted that it is unnecessary to establish a consensus of academic and professional opinion to establish the existence of a customary norm – the relevant criteria is the degree of state practice and *opinio juris* supporting the rule.<sup>95</sup> In any event, as the judgment of *Refugee Appeal No. 76044 [2008]* pointed out, the rule was never advocated as one that was customary in nature.<sup>96</sup> However as previously outlined, prior to its adoption by the New Zealand Refugee Status Appeals Authority there was not a single example of state practice to support its existence. The Refugee Convention is applied by states in asylum determination proceedings. It is not self-applying, desirable as that may be. The pertinent evidence for the existence of a customary rule is what states do in practice, not declarations made within the academic community. Nonetheless, although Lord Bingham was correct in stating that he was not bound by this rule, there was nothing prohibiting him from adopting the rule and contributing to state practice in this regard. As is evident from the judgment, this was not his desire.

Finally, Lord Bingham stated that the adoption of the rule would give the Convention an effect which is not only unintended but also anomalous in its consequences:

Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject. It would, of course, be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment.<sup>97</sup>

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<sup>94</sup> *Januzi*, above n 2 [18].

<sup>95</sup> *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3 [77].

<sup>96</sup> *Refugee Appeal No 76044*, above n 20 [149].

<sup>97</sup> *Januzi*, above n 2 [19].

This point was confirmed by Baroness Hale in *Secretary of State for the Home Department v AH (Sudan) and others (FC)* [2007]:

If people can return to live a life which is normal in that context, and free from the well-founded fear of persecution, they cannot take advantage of past persecution to achieve a better life in the country to which they have fled.<sup>98</sup>

The thrust of this point is that the application of the Michigan Guidelines rule to the IPA would expand the applicability net of the Refugee Convention far beyond that was anticipated by its drafters and that this result would be too far removed from the purposes of the Convention. According to *Januzi*, if the issue of an IPA is raised, the relevant comparison would be between conditions in the place of relocation and those which prevailed elsewhere in the country of nationality.<sup>99</sup> By contrast, a comparison between the asylum seeker's circumstances in the receiving country with the place of relocation was not relevant, though it could be relevant within the framework of complementary protection. Thus humanitarian considerations (persecution apart) did not form part of the IPA inquiry for the purposes of the refugee definition, but such considerations fell within the realm of other conventions.

The logic of this conclusion is best illustrated by direct application to the facts of the case: the first applicant, Mr. Januzi, was resisting expulsion not because of fear of persecution in Pristina, but because for medical reasons, it would be unduly harsh for him to relocate there. If he were to succeed on the basis of the Refugee Convention, he would be a refugee for socioeconomic reasons, rather than for a well-founded fear of persecution, and thus in refusing his refugee status, this case seemed to reflect a desire to maintain the distinction between refugee and humanitarian claims. That said, human rights considerations did influence this decision in three respects. First, Lord Bingham acknowledged that the Refugee Convention, as a human rights convention, should not be given a narrow meaning, although he qualified this statement by referring to the obligation not to allow an interpretation grounded in human rights considerations to override the textual meaning of the Convention.<sup>100</sup> Secondly, Lord Bingham accepted that the Convention's preamble seeks to assure refugees the widest possible exercise of the fundamental rights and freedoms affirmed in the UDHR

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<sup>98</sup> *AH (Sudan)* [27], above n 3.

<sup>99</sup> *Januzi*, above n 2 [46].

<sup>100</sup> *ibid* [4].

and the UN Charter.<sup>101</sup> Thirdly, and most importantly, the House of Lords indirectly supported a human rights-based approach to the IPA inquiry by stating that ‘valuable guidance’ in this respect is to be found in the UNHCR Guidelines on International Protection of 23 July 2003.<sup>102</sup> In doing so, Lord Bingham made endorsed paragraph 28 of this document which emphasises the need to have respect for ‘basic human rights standards, in particular non-derogable rights’ when determining whether an IPA is reasonable.<sup>103</sup>

Thus what we are left with in *Januzi* is a somewhat curious conclusion. On the one hand, Lord Bingham is clear in his assertion that human rights considerations (persecution apart) do not form part of the IPA inquiry but are more appropriately addressed by the framework of complementary protection. On the other hand, the importance of basic human rights, in particular non-derogable rights, in determining the reasonableness of a proposed IPA is indirectly endorsed by reference to the UNHCR guidelines. The logic behind this reference to the UNHCR’s undefined standard is unclear, particularly when earlier in the judgment Lord Bingham placed emphasis on employing a textual interpretation of the Refugee Convention and insisted that the parties are ‘not to be treated as having agreed something they did not agree’.<sup>104</sup> In addition, as stated by Mathew, the prioritisation of non-derogable rights is arbitrary, as the classification of a right as non-derogable does not indicate higher importance, but rather that the rights are given special treatment during a public emergency threatening the life of the nation.<sup>105</sup> Further, the inclusion of non-derogable rights may result in further confusion about the role of complementary protection vis a vis refugee law, considering that complementary protection is based on key non-derogable human rights such as the prohibition of torture.<sup>106</sup>

The confusing nature of this decision could perhaps be attributed to the fact that Lord Bingham focused his discussion on the reasonableness of the IPA rather than the protection available in the proposed location.<sup>107</sup> Although this standard is, as mentioned previously, well-established in domestic jurisprudence, by framing the discussion in terms of protection,

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<sup>101</sup> *ibid* [4].

<sup>102</sup> 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), above n 14.

<sup>103</sup> *Januzi*, above n 2 [20].

<sup>104</sup> *ibid* [4].

<sup>105</sup> P Mathew, ‘The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited’ in SS Juss, *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 204.

<sup>106</sup> *ibid* 201.

<sup>107</sup> J Eaton, ‘The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive’ 24 *IJRL* 765.

or availability thereof in Pristina, Lord Bingham could have made a stronger argument in favour of expulsion that was anchored in the terms of the refugee definition. On either the reasonableness or protection approach, however, it is submitted that the same conclusion would have been reached and Mr. Januzi would have been denied refugee status.

Subsequent jurisprudence has clarified the position in *Januzi*. In *Secretary of State for the Home Department v. AH (Sudan) and others* [2007], Baroness Hale viewed the UNHCR's position as no different to the approach put forward by Lord Bingham in *Januzi*.<sup>108</sup> In addition, all members of House of Lords were in agreement that the test set out in *Januzi* did not necessitate that conditions in the IPA should infringe rights under Article 3 of the European Convention on Human Rights ('ECHR') in order to qualify as unreasonable.<sup>109</sup> A similar point was made in *AK (Article 15(c)) Afghanistan CG* [2012], where it was held that it was unlikely that *Januzi* and *AH (Sudan)* intended to reject all recourse to human rights considerations.<sup>110</sup> Thus in determining that an IPA is unreasonable, the level of human rights violations did not have to reach the threshold of a 'severe violation of basic human rights, in particular the rights from which derogation cannot be made' as set out in Article 9(1) of the recast 2011 EC Qualification Directive.<sup>111</sup> Nonetheless, as Lord Brown observed in *AH (Sudan)*, citing Brooke LJ in *Karanakaran v. Secretary of State for the Home Department* [2000],<sup>112</sup> the IPA inquiry 'is still a very rigorous test'.<sup>113</sup> The issue at hand is whether the claimant can live a 'relatively normal life'. However if the claimant is able to bear the significant hardship experienced by a minority in the place of relocation, it may still be found to constitute an IPA.<sup>114</sup> This, in the words of Lord Brown, is because the 'Refugee Convention ... is really intended only to protect those threatened with specific forms of persecution. It is not a general humanitarian measure.'<sup>115</sup>

Although a welcome attempt to bring clarity to the amorphous IPA test, the jurisprudence in England and Wales does little to assist in overcoming the difficulties inherent in the human rights approach to the IPA inquiry as set out in the beginning of this article. In particular, we are still left with the question as to the content of the 'basic human rights' standard and the relationship of human rights considerations to the Refugee Convention remains unclear. The

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<sup>108</sup> *AH (Sudan)*, above n 3.

<sup>109</sup> *AH (Sudan)*, above n 3.

<sup>110</sup> *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163(IAC) [240].

<sup>111</sup> Council Directive (EC) 2011/95/EU, above n 1.

<sup>112</sup> *Karanakaran*, above n 3, 456.

<sup>113</sup> *AH (Sudan)*, above n 3 [41].

<sup>114</sup> *ibid* [42].

<sup>115</sup> *AH (Sudan)*, above n 3 [42].



result is that decision-makers are left with a wide range of discretion when determining refugee claims, and the broader relevance of this jurisprudence is that New Zealand and England and Wales now have significantly contrasting interpretations on the question of what constitutes a ‘reasonable’ IPA. Such divergent jurisprudence will negatively impact on what should be the primary goal of states: that is, to interpret the Refugee Convention, insofar as possible, in a harmonious manner. As there does not exist a treaty monitoring body to provide an authoritative interpretation of the Refugee Convention, consistent interpretation of this instrument is of particular importance.

#### 5. A different approach: ‘Reasonableness’ and ‘Protection’ combined?

As the above discussion illustrates, there is no clearly defined, accepted approach regarding the relevance of human rights considerations in the IPA inquiry. This stems largely from the fact that there is no reference to human rights in the refugee definition, and because it is unclear whether the primary aim of the Refugee Convention is to protect the human rights of refugees, or whether it has the more narrow, state-centric purpose of protecting only those who have a well-founded fear of persecution on Convention grounds. As outlined above, however, the Refugee Convention’s preamble and subsequent interpretation by states indicate that it cannot be construed entirely independently of human rights considerations.

State practice to date has shown a divergence in positions between the Michigan Guidelines/ New Zealand approach, and the jurisprudence of England and Wales. Although both positions stem from the premise that general human rights considerations do not play a part in the IPA inquiry, they differ as to the relevance of the ‘reasonableness’ standard. Rather than employ the ‘reasonableness’ approach, the ‘Michigan Guidelines/ New Zealand’ approach puts forward a standard based on the rights which accrue to refugees recognized as such. The ‘*Januzi*’ approach, on the other hand, accepts the ‘reasonableness’ standard and rejects the Michigan Guidelines for numerous reasons, holding that human rights considerations (persecution aside) do not generally play a part in the IPA inquiry, while at the same time indirectly endorsing the UNHCR’s position that basic human rights standards, non-derogable rights in particular, are relevant to the reasonableness inquiry.

Where then does that then leave the IPA inquiry? And can either or both of these positions be reconciled with the Refugee Convention? It is submitted that primary recourse should be had to the Refugee Convention itself, and in particular to the prohibition of *non-*

refoulement and the refugee definition, when determining the relevance of human rights standards in the IPA inquiry.

States are bound by the principle of non-refoulement, as laid down in article 33, which prohibits the return of refugees to territories where their lives or freedoms are endangered on Convention grounds. Refugee status is declaratory in nature, which means that a person does not become a refugee because of recognition as such; rather, refugee status is recognised because the person is a refugee.<sup>116</sup> As asylum seekers may be refugees, the principle of *non-refoulement* also applies to them and thus they should not be returned or expelled pending a final determination of status.<sup>117</sup>

Article 33 is one of just two provisions in the Refugee Convention that limits the power of states to expel aliens and thus it is logical to have recourse to article 33 when determining whether an asylum seeker may be sent to an IPA. As article 33 applies to asylum seekers, it arguably expresses a general principle of protection which can and should be factored into the IPA inquiry. In employing article 33 in this manner, the question of ‘reasonableness’ is really an inquiry as to whether it is reasonable to expect the asylum seeker to remain in the IPA, or whether the conditions there are such as to compel return to a location where he will be exposed to persecution and thus constitute indirect refoulement. In this sense, the focus is anchored in the text of the Convention, and thus has a sounder basis in international law.

Secondly, a core element of the refugee definition is that the asylum seeker is unable to obtain protection from the persecution feared. This is the only qualifying condition concerning standards prevailing in the country of origin referred to in the refugee definition. Therefore in order for an IPA to exist, it must be illustrated that there exists ‘protection’ in the place of relocation. This may seem somewhat obvious, given that IPA refers to an internal ‘protection’ alternative but one should bear in mind that this term provides the crucial nexus between the requirements of the IPA and the requirements of the refugee definition.

The meaning of the term ‘protection’ is not elaborated upon in the Refugee Convention and therefore it is unclear what exactly will satisfy the protection element of the refugee definition. The standard of protection necessary will be intrinsically linked with the type and severity of the persecution feared and for this reason it is not possible to devise any complete or comprehensive exposition which would exhaustively define the relevant level of

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<sup>116</sup> UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (1979) UN Doc HCR/IP/4/Eng/REV.1 1979 [28].

<sup>117</sup> UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (2007) [6].

protection required by the Refugee Convention. The protection necessary in each case will depend on the precise circumstances of persecution.

Human rights considerations therefore form part of the IPA analysis only to the extent that respect for such rights is a necessary ingredient of protection from the persecution feared, or that such conditions may result in indirect refoulement.<sup>118</sup> Respect for the rule of law, for example, may be of relevance in this respect. In the case of *Horvath v. Secretary of State for the Home Department*, the House of Lords held that there must be laws in force in the country which make violent attacks by perpetrators punishable by sentences commensurate with the gravity of the offences. Furthermore, there must be a reasonable willingness by law enforcement agencies to prosecute and punish offenders and the victim must not have been exempt from the protection of the law.<sup>119</sup> A similar standard of protection is found in article 7(2) of the Recast EC Qualification Directive.<sup>120</sup>

What is the relevance of those human rights provisions that do not necessarily need to be respected in order that the asylum seeker no longer fears persecution, or where a danger of indirect refoulement does not exist? For example, is it compatible with the Refugee Convention to require an asylum seeker to relocate to an IDP camp where living standards are low, but where effective protection is available from the persecution feared? It is submitted that this example would fall outside the remit of the Refugee Convention, as the refugee definition applies where there is no protection from the persecution feared, not necessarily where there is exposure to poor socioeconomic conditions that do not affect the extent of protection from persecution.

However, that is not to say that it is permitted under international law to return an asylum seeker to a place where such low standards of human rights protection exist. It is precisely in such situations that complementary protection can offer assistance. The European Court of Human Rights, for example, has held that a contracting state may not expel a person to the territory of a non-contracting state where there is a real risk of exposure to treatment contrary to article 3, which prohibits torture, or inhuman or degrading treatment or punishment.<sup>121</sup> It has been held that ‘inhuman treatment’ covers:

... at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable ... treatment or

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<sup>118</sup> Other authors have noted the relevance of indirect refoulement, amongst other factors, when determining the reasonableness of a proposed IPA. See, for example, Eaton; Hathaway and Foster, above n 39.

<sup>119</sup> *Horvath (AP)*, above n 22.

<sup>120</sup> Council Directive (EC) 2011/95/EU, above n 1.

<sup>121</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413.

punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.<sup>122</sup>

In *Sufi and Elmi v the United Kingdom* [2012], the Court found that conditions in the proposed IPA amounted to inhumane treatment as prohibited by article 3 of the ECHR, and that consequently, deportation to Somalia would be a violation of the ECHR.<sup>123</sup>

EU asylum law may also offer protection to a person contesting expulsion to a country where he will be subjected to human rights violations. Subsidiary protection, for example, protects third-country nationals who do not qualify as refugees but where expulsion may expose them to ‘a real risk of serious harm.’<sup>124</sup> Such harm includes ‘inhuman or degrading treatment.’<sup>125</sup> Similarly, protection could, in theory, also be claimed under the Temporary Protection Directive where expulsion could result in exposure to ‘systematic or generalised violations’ of human rights.<sup>126</sup> This Directive is not self-executing, however as it cannot take effect unless and until the Council of the EU decides, following a proposal by the Commission, that a mass influx exists.<sup>127</sup>

As for states not bound by EU law or the ECHR, the ICCPR, which has 167 States Parties, prohibits the exposure of ‘individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement’.<sup>128</sup> In the case of *Kindler v. Canada* [1993], the Human Rights Committee suggested that:

... If a State Party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.<sup>129</sup>

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<sup>122</sup> *The Greek Case* 12 Yearbook 1.

<sup>123</sup> *Sufi and Elmi v. the United Kingdom* (2012) 54 EHRR 9.

<sup>124</sup> Council Directive (EC) 2011/95/EU, above n 1, art 2(f).

<sup>125</sup> Council Directive (EC) 2011/95/EU, above n 1, art 15(b).

<sup>126</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such persons and Bearing the Consequences Thereof, art 2(c)(ii).

<sup>127</sup> *ibid*, art 5(1).

<sup>128</sup> Human Rights Committee, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (Art. 7) (1992) UN Doc HRI/GEN/1/Rev.1 [9].

<sup>129</sup> *Kindler v Canada* Communication No 470/1991 (1991) UN Doc CCPR/C/48/D/470/1991[13.1]

In addition, the 1984 Convention against Torture provides that a non-removal obligation arises where there are substantial grounds for believing that the individual in question would be subjected to torture.<sup>130</sup>

Finally, the 1989 Convention on the Rights of the Child offers additional protection for children facing expulsion proceedings.<sup>131</sup> Article 3(1) of the Convention provides that ‘the best interests of the child’ are a primary consideration in all actions concerning children. In addition article 37(a) protects against torture or other cruel, inhuman, or degrading treatment or punishment. McAdam argues that if a child risks being subjected to such treatment if her or she is removed, or denied entry, then a protection obligation may arise.<sup>132</sup>

## 6. CONCLUSION

There is little to be achieved in asylum determination proceedings by claiming that the IPA is not compatible with the Refugee Convention. Regardless of the IPA’s basis in law, or of the underlying principles and purposes of the Convention, the IPA has clearly been established in domestic jurisprudence and now forms an inherent part of the refugee definition. The aspect upon which states and academic opinion has diverged, however, is the standard of human rights protection (if any) that needs to be satisfied before an IPA can be said to exist.

This article has attempted to set out the differing stances that have been taken in this regard with an aim of assessing which, if any, is most compatible with the Convention. It has been illustrated that a standard of ‘core’ human rights norms has yet to be established in international law and that a general and undefined human rights approach to the IPA has various drawbacks. It has also been shown that while the Guiding Principles on Internal Displacement may, at first instance, seem a logical benchmark by which to assess standards in the proposed IPA, the Guiding Principles suffer from many of the shortcomings of the human rights approach and their employment in the IPA analysis may go far beyond the intentions of the drafters of the Refugee Convention. Furthermore, the legal basis for some of the Principles is questionable and thus the use of the Principles as a legal benchmark would be inappropriate in this regard, and may go beyond what states are prepared to accept in practice.

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<sup>130</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 3(1).

<sup>131</sup> 1989 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 December 1990) 1577 UNTS 3 .

<sup>132</sup> J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 194.

The Michigan Guidelines approach has also been demonstrated to have questionable origins, in that they represent an attempt to apply refugee rights, albeit at a general level, to persons who remain within their country of origin. Furthermore, as they do not represent state practice (with the exception of New Zealand jurisprudence), they hold the same legal weight as academic writing in international law, which has, at most, persuasive value. These Guidelines were rejected in the House of Lords case of *Januzi*, which held that generally speaking, humanitarian considerations (persecution apart) did not form part of the IPA inquiry for the purposes of the refugee definition, while at the same time indirectly endorsing the approach put forward by the UNHCR as regards the relevance of human rights in the IPA inquiry.

What then, is the role (if any) of human rights considerations in the determination of an IPA? The analysis in this article leads to a modified and more protection-orientated version of the conclusion in *Januzi*. The Convention as a whole is influenced by human rights considerations. However regard must be had to the textual limits of the Convention. Human rights considerations therefore enter the IPA inquiry in two respects; first, insofar as a state is prohibited from engaging in indirect refoulement; and secondly, to determine whether effective protection from persecution exists in the IPA. That is not to say that a state may send an asylum seeker back to an IPA where there is scant regard for human rights. In addition to the Refugee Convention, states are bound by their obligations under human rights treaties and customary international law. It is in determining whether to grant leave to remain on humanitarian grounds that human rights law may complement the Refugee Convention and the standard of human rights protection in the place of relocation may therefore be of relevance in this respect.

This approach is attractive as it maintains the distinction between refugee and humanitarian claims and it is firmly based in the text of the Refugee Convention. Human rights considerations only enter the IPA inquiry where relevant to a state's obligations under the Refugee Convention. For this reason, only those who fit the refugee definition will be able to invoke the Refugee Convention to preclude expulsion and it will not be possible to invoke the Refugee Convention to provide international protection for so-called 'economic refugees'. Those who do not fit the refugee definition will nonetheless have an alternative avenue of redress under complementary protection. The benefit of using complementary protection as a benchmark is that reliance will be placed on international treaties and established international jurisprudence, rather than on the vague and undefined 'core human rights approach' which has been put forward by the UNHCR. Finally, this approach provides

some clarity as to what is meant by 'reasonable' by linking it to the prohibition of refoulement as set out in article 33. To conclude, it is hoped that this more textual approach to the IPA analysis will add clarity to this ambiguous and undefined concept.