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

*James C. Hathaway**

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

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

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

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

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

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

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

The fear of being persecuted need not always extend to the *whole* territory of the refugee’s country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.⁵

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

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

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

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

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

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

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

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

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