

"FROM NOWHERE TO
SOMEWHERE": AN
EVALUATION OF THE UNHCR
2ND TRACK GLOBAL
CONSULTATIONS ON
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EXPERTS ROUNDTABLE ON THE
IPA/IRA/IFA ALTERNATIVE

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If ever a topic was prime material for UNHCR's 2001 Global Consultation exercise, the IPA/IRA/IFA¹ was it. As an identifiable body of refugee law, IFA analysis had really got nowhere. Major variations between national case laws on the subject abounded. As Judge Gaeten de Moffarts identified in his 1997 paper

* Vice President, Immigration Appeal Tribunal (UK); Council member, IARLJ. The views expressed here are my own and do not necessarily reflect those of the UKIAT. Lack of time has prevented giving detailed citations of cases.

¹ "IFA" (Internal Flight Alternative) is used elsewhere in this paper only because it is the best-known name for the test. I consider both "IRA" (Internal Relocation Alternative) and "IPA" (Internal Protection Alternative) less misleading descriptions.

for the IARLJ on this topic,² international jurisprudence was characterised by eclectic, ad hoc decision-making. The NGO lobby had identified increased use of the IFA as a symptom of "restrictionism" in the interpretation of the 1951 Convention.³ The UNHCR's 1999 Note on the topic⁴ had been one of the least coherent of its position papers. In April 1999 under the leadership of James Hathaway, the Michigan Guidelines on the Internal Protection Alternative were published. Highly critical of the UNHCR Note, these called for a new, more structured, approach.⁵ A proposed EU Refugee Qualifications Directive followed Hathaway's lead, entitling its provisions on the subject, "Internal Protection".⁶

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- 2 Gaetan de Moffarts, "Refugee Status and the Internal Flight or Protection Alternative", published in *Refugee and Asylum Law: Assessing the Scope for Judicial Protection*, Nijmegen 9-11 June 1997 (hereafter "de Moffarts"). A revised but unpublished version of this paper was produced in June 2001.
- 3 European Legal Network on Asylum (ELENA), "Research Paper on the Application of the Concept of Internal Protection Alternative", 1998 (updated 2000).
- 4 UNHCR, "Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called "Internal Flight Alternative" or "Relocation Principle" (hereafter "UNHCR Note").
- 5 (1999) 21(1) Michigan Journal of International Law 131, also published as an annex to the New Zealand case, *Refugee Appeal No. 71684/99* reported in [2000] INLR 165.
- 6 Proposal for a Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM (2001) 510 final). Article 10 headed: "Internal protection" stated:
1. Once they have established that the fear of being persecuted or of otherwise suffering serious and unjustified harm is well-founded, Member States may examine whether this fear is clearly confined to a specific part of the territory of the country of origin and, if so, whether the applicant could reasonably be returned to another part of the country where there would be no well-founded fear of being persecuted or of otherwise suffering serious and unjustified harm.
 2. In carrying out this examination there shall be a strong presumption against finding internal protection to be a viable alternative to international protection if the agent of persecution is, or is associated with the national government.
 3. In examining whether an applicant can be reasonably returned to another part of the country in accordance with paragraph 1, Member States shall have regard to the security, political and social circumstances prevailing in that part of the country, including respect for human rights,

But, apart from New Zealand,⁷ no country embraced the Michigan Guidelines immediately, thus leaving jurisprudence on the issue still in a no man's land waiting for deliverance.

In short the subject bristled with controversy and the stage was set for an eventful Roundtable.

The San Remo Experts Roundtable of 6-8 September 2001 did not disappoint. The main discussion paper, written by James Hathaway and Michelle Foster,⁸ provided an incisive and comprehensive analysis of theories about the IFA, past and present, reconfirming adherence to the Michigan Guidelines. The IARLJ Working Party on IFA had circulated to its membership beforehand an "IFA Questionnaire" designed to obtain responses from as many countries as possible on key issues which could then be fed in to the IARLJ contribution to the Round Table. There were several excellent papers submitted by other San Remo participants. The Round Table session itself was extremely animated. Even more animated was the e-mail debate which then ensued about the draft Summary Conclusions.

The Summary of Conclusions (SCs) which was eventually agreed read as follows:

San Remo Expert Roundtable 6-8 September 2001 Organised by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law

and to the personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links.

Under the July 2002 Danish Presidency's proposed amendments, Member States can look for a portion of the country of origin which is safe, rather than assess whether the persecution is confined to a specific area; the test is whether return to that area would be "unduly harsh", rather than whether "the applicant could reasonably be returned"; the provision setting out a "strong presumption against" the internal protection alternative where the agent of persecution was the state (or associated with it) is deleted; the principle can apply in spite of "technical obstacles to return"; and the list of circumstances Member States must consider before applying the principle is greatly shortened.

⁷ *Refugee Appeal No. 71684/99* reported in [2000] INLR 165.

⁸ James Hathaway and Michelle Foster, "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination", September 2001 (hereafter "Roundtable paper").

Summary Conclusions – Internal Protection/Relocation/Flight Alternative

The San Remo Expert Roundtable addressed the question of the internal protection/relocation/flight alternative as it relates to the 1951 Convention relating to the Status of Refugees. The discussion was based on a background paper by James C Hathaway and Michelle Foster, University of Michigan, entitled *Internal Protection/Relocation/ Flight Alternative as an Aspect of Refugee Status Determination*. In addition, Roundtable participants were provided with written contributions including from Justice Baragwanath, High Court of New Zealand, Hugh Massey, United Kingdom, Marc Vincent, Norwegian Refugee Council, Reinhard Marx, Practitioner, Germany, and the Medical Foundation for the Care of Victims of Torture. Participants included 33 experts from 23 countries, drawn from governments, NGOs, academia, the judiciary and the legal profession. Hugo Storey, from the International Association of Refugee Law Judges (IARLJ), moderated the discussion.

There has been no consistent approach taken to the notion of IPA/IRA/IFA by States parties: a number of States apply a reasonableness test, others apply varying criteria, including in one jurisdiction, the "internal protection alternative" approach as defined in the background paper. UNHCR has expressed its concern over recent years that some states have resorted to IPA/IRA/IFA as a procedural short-cut for deciding the admissibility of claims. Given the varying approaches, it was considered timely to take stock of the different international practices with a view to offering decision-makers a more structured analysis to this aspect of refugee status determination. These summary conclusions do not finally settle that structure, but may be useful in informing the application, and further developing the parameters, of this notion.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

- (1) IPA/IRA/IFA can sometimes be a relevant consideration in the analysis of whether an asylum-seeker's claim to refugee status is valid, in line with the object and purpose of the Refugee Convention. The relevance of considering IPA/IRA/IFA will depend on the particular factual circumstances of an individual case.
- (2) Where the risk of being persecuted emanates from the State (including the national government and its agents), IPA/IRA/IFA is not normally a relevant consideration as it can be presumed that the state is entitled to act throughout

the country of origin. Where the risk of being persecuted emanates from local or regional governments within that State, IPA/IRA/IFA may only be relevant in some cases, as it can generally be presumed that local or regional governments derive their authority from the national government. Where the risk of being persecuted emanates from a non-state actor, IPA/IRA/IFA may more often be a relevant consideration which has though to be determined on the particular circumstances of each individual case.

- (3) The individual whose claim to refugee status is under consideration must be able – practically, safely, and legally – to access the proposed IPA/IRA/IFA. This requires consideration of physical and other barriers to access, such as risks that may accrue in the process of travel or entry; and any legal barriers to travel, enter or remain in the proposed IPA/IRA/IFA.
- (4) If the asylum-seeker would be exposed to a risk of a well-founded fear of being persecuted, including being persecuted inside the proposed IPA/IRA/IFA or being forced back to and persecuted in another part of the country, an IPA/IRA/IFA does not exist.
- (5) The mere absence of a risk of a well-founded fear of being persecuted is not sufficient in itself to establish that an IPA/IRA/IFA exists. Factors that may be relevant to an assessment of the availability of an IPA/IRA/IFA include the level of respect for human rights in the proposed IPA/IRA/IFA, the asylum-seeker's personal circumstances, and/or conditions in the country at large (including risks to life, limb or freedom).
- (6) Given its complexity, the examination of IPA/IRA/IFA is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure.
- (7) More generally, basic rules of procedural fairness must be respected, including giving the asylum-seeker clear and adequate notice that an IPA/IRA/IFA is under consideration.
- (8) Caution is necessary to ensure that return of an individual to an IPA/IRA/IFA does not arbitrarily create, or exacerbate, situations of internal displacement.

I ADVANCES

How much of an advance do these Summary Conclusions represent?

On the plus side, they represent a breakthrough so far as the name of the test is concerned. The reference throughout to "IPA/IRA/IRA" reflects that, whilst

participants accepted drawbacks with the IFA and (to a lesser extent) the IRA terminology, neither was there full support for the Michigan Guidelines term "IPA". But putting "IPA" first subtly hints that this is a term fitting better with emerging refugee jurisprudence. There was broad agreement that in the end what mattered was the substance of the test, not its specific name.

Perhaps the most important advance is the endorsement of the need for a structured approach. All were agreed that the highly variable, ad hoc approaches in vogue hitherto made for unacceptable inconsistency and had to give way to an approach which gave clearer parameters to decision-makers.

On the other hand there is a clear rejection of any approach that seeks to apply the IFA concept in a mechanistic fashion, one declaring that for all persons in a particular category, for example, Sikhs in the Punjab in the 1990s, there was a viable IFA elsewhere in the country. The Summary Conclusions achieve this by reaffirming the need for an individual examination of the claim, in the light of the particular circumstances of the case. Part of what was intended here was to scotch any notion that the IFA test is a matter of law rather than a matter of fact, reminding everyone that, after all, no reference to terms like "IFA/IRA/IPA" is made in the text of Article 1A(2).

Albeit drawing short of fixing any formula, another advance was that the Summary Conclusions do identify tentatively several analytical steps essential to any proper use of the IFA. Thus at paragraph 3 it identifies the requirement of access. This requirement is identified by almost all countries as an essential prerequisite if the test is not to be unrealistic: for an IFA/IRA/IPA to be viable, a claimant has got to be able to get there.

Paragraph 4 likewise identifies the next logical step, that of requiring that the IFA/IRA/IPA obviates the risk of being persecuted. In part this reflects the common-sense notion that, if to move from one's own area to an alternative place is just to go from the frying pan into the fire, there is no viable IFA/IRA/IPA. But it also reflects the important principle of equivalence. If the conditions in the alternative site of protection are not in some way as bad as those in the area of persecution, internal protection is available. This principle enables one to say that, even if in the alternative site there is no well-founded fear of persecution directly, there will be indirectly if conditions are such as might force someone back to his home area.

Paragraph 5 identifies a further logical step, the requirement that in the alternative site the claimant is not just free of fear of persecution but will receive

adequate protection. Mere absence of a well-founded fear is not enough. As Hathaway and Foster state at page 42 of their paper, "The notion of protection clearly implies the existence of some affirmative defence or safeguard". Beyond this, however, the wording of the Summary Conclusions does no more than insist on this test being kept a multidimensional one, looking at the level of respect for human rights, the asylum-seeker's personal circumstances and/or conditions in the country at large (including risks to life, limb or freedom).

The Summary Conclusions also identify two important procedural requirements. One is that, in view of its complexity, the examination of IFA/IRA/IPA is not appropriate in accelerated or admissibility procedures. The other is that if a decision-maker intends to rely on IFA/IRA/IPA he must give the asylum-seeker adequate notice.

II FAILINGS

So much for the plus side. What about the debit side?

Here one hits the difficulty that depending from which corner of the debate one comes, everyone's "debit side" list will differ to a greater or lesser degree. However, having digested the feedback from members to our IARLJ Questionnaire, I do think it is possible to make criticisms of particular concern from a judicial point of view.⁹

A first criticism is that although the Summary Conclusions mark a move away from fixed nomenclatures, they fail to reflect the strong consensus (which was also evident at San Remo) that there are serious drawbacks to the "IFA" label. If we continue to find countries treating the test as one of whether someone availed himself of internal flight prior to leaving his country of origin, for example, we cannot pretend the Summary Conclusions do anything to disabuse them of such an error. There should in this regard have been a clear statement that, as with the test of fear in the home area, the IFA is a prospective test, concerned with whether upon return, a person would have an available IFA. It is not an historic test.

My second criticism is that the Summary Conclusions fail to condemn what was the main deficiency in IFA case law during the 1980s and 1990s, namely use of the test as a "free-floating" one capable of rendering someone a refugee on compassionate and discretionary grounds rather than on the basis of objective

⁹ I do not mean here to suggest there is some uniform judicial approach, only to identify a range of judicial (as opposed to executive) concerns.

legal criteria. I find this failure bitterly disappointing because I thought we had consensus on it at San Remo as well as during the post-San Remo e-mail discussion of the draft. What had been proposed as a short paragraph just before the numbering began was:

IPA/IRA/IFA considerations may validly inform analysis of whether the asylum-seeker's claim to refugee protection should be recognised, but only to the extent that they are firmly grounded in application of the Convention refugee definition. No IPA/IRA/IFA rule may be justified other than on the basis of standards derived from, and fully consistent with, the Refugee Convention. Thus IPA/IRA/IFA inquiry is part of the holistic analysis of whether an asylum-seeker's claim to refugee protection is made out...

From the point of view of refugee jurisprudence this approach had been firmly established by such cases as *Butler*¹⁰ (in the New Zealand Court of Appeal) and *Robinson*¹¹ (in the English Court of Appeal) and affirmed by almost all commentators. Perhaps one might say the SC's phrase "in line with the object and purpose of the Refugee Convention" was meant to affirm this approach, but the way the passage containing this phrase is worded leaves this quite unclear.

A third criticism is that the Summary Conclusions, by using words importing discretion, fail to clarify that a structured analytical framework is a prerequisite of any valid IFA assessment. Thus the first sentence of paragraph 1 ("IPA/IRA/IFA *can sometimes be* a relevant consideration..." (emphasis added)) could well be read by some States to mean that the test is not in fact an integral part of the refugee definition. Whereas, so far as refugee jurisprudence is concerned, it is long-settled that it is an integral part. If someone has a viable IFA, he is not a refugee. Similarly, the wording of paragraph 5 second sentence ("Factors that *may be relevant* to an assessment of the availability of IPA/IRA/IFA include...(emphasis added)) is a cop-out. One of the main purposes of the Roundtable was to move beyond reliance on indeterminate or overly subjective tests of "reasonableness" which have beset IFA jurisprudence for so long.¹² This

¹⁰ *Butler v Attorney-General* [1999] 114 ILR 568.

¹¹ *Robinson* [1997] Imm AR 568.

¹² De Moffarts contended that analysis in terms of "reasonableness" lent itself too easily to assessment by reference to subjective rather than objective fear. His article stated that: "[t]he reasonableness approach tends to an eclectic or ad hoc jurisprudence...". In recent New Zealand cases, eg *Butler v Attorney-General* [1999] NZAR 205 (CA) and *Refugee Appeal No 71684/99* it has been pointed out that the reasonableness test is not a

paragraph could be prayed in aid by countries intent on maintaining highly subjective and idiosyncratic tests or on devising ad hoc permutations. The paragraph did not even make clear that, as with assessment of risk in a person's home area, the examination of an IFA must always take account of both general country conditions and individual circumstances.

Allied to this failing, the Summary Conclusions fail to indicate clearly any ordering of the analytical steps involved. Whilst I have previously tried to show that paragraphs 3-5 follow a logical order, to the reader it might appear they are *la carte* and that there is nothing wrong with jumping from one to the other at random. What was needed, in my view, was a set of conclusions that enjoined a step-by-step framework. Thus paragraph 3, which deals with access, should have begun "The first step in any IFA inquiry must be to ask whether an individual would be able to ...access..." etc. Then paragraph 4 should have begun with an additional sentence. "The second step in any IFA analysis should be to examine whether the proposed IFA would in fact obviate the risk of persecution. Paragraph 5 could then have begun with an additional sentence, "The final step in any IFA analysis should be to establish whether it will secure adequate protection".¹³

A fourth criticism, already intimated in my remarks on lack of guidance on structure, is that there is no real attempt to overcome the eclecticism of criteria relating to the adequacy of protection in the IFA. Most San Remo participants recognised different countries were firmly wedded to different legal vocabularies developed to address this issue: "reasonableness", "undue hardship", "safety", "meaningful protection" etc. But we did, I think, expect firstly that the SCs would identify approaches that were plainly wrong (in particular those relying on a very subjective rendering of the notion of reasonableness") and secondly that they would at least go some way to identifying an underlying human rights-based set of criteria by reference to which these different terms were to be interpreted.

"stand-alone test authorising an unconfined inquiry into all the social, economic and political circumstances of the application, including the circumstances of members of the family". The latter decision criticised the February 1999 UNHCR Position Paper for "failing to explicitly curtail the reasonableness element by requiring it to be tied back to the purpose of protection".

- 13 I recognise my reference to a three step analysis differs slightly from the Michigan Guidelines reference to a four-step inquiry, but in effect my second step formulation combines with more economy and greater simplicity what those guidelines refer to as stage 2 (the "antidote" test) and stage 3 (the "indirect refolement" test).

That the underlying set of criteria should be human rights based is a widely shared view. Whilst the UNHCR Note is not entirely consistent about this, in another publication UNHCR has said that for an IFA to exist this would require, "...in addition to security aspects,...that basic civil, political and socio-economic human rights of the individual would be accepted...".¹⁴ It is also the view expressed in the Michigan Guidelines and in Hathaway and Foster's Roundtable Paper. However, it is worth reminding ourselves why this view should be taken.

Refugee jurisprudence has now fully accepted as a fundamental principle that the key terms of the Refugee Convention, such as persecution and protection, should be given a human rights interpretation. Thus persecution is to be analysed in terms of basic attacks on core human rights. Even if some countries still do not embrace this principle, UNHCR, the IARLJ and leading commentators have been very forthright in doing so.¹⁵ Thus in my view it is simply illogical not to apply this fundamental principle to IFA analysis. If as everyone agrees the IFA analysis is integral to the refugee definition, how can it be right to apply a human rights approach to all other aspects of the definition but not to the IFA element? It is like trying, inside a global village, to keep one small field that is forever England. Yet, with respect, this is what continues to happen even within Canadian and European jurisprudence which operates the notion of "undue hardship".¹⁶ If the "undue hardship" notion is not in turn underpinned by human rights norms, then it can mean all things to all men. One's man's hardship is another man's haven. What is undue to one decision-maker is not to another. And the same could be said of most other formulations including "safety" and "reasonableness". In an article I

14 "An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR", September 1995.

15 For example see the IARLJ's Human Rights Nexus Working Party: "The Application of Human Rights Standards to the 1951 Refugee Convention – the Definition of Persecution".

16 See eg *Thirunavukkarasu v Canada*, 45 ACWS 3d 141 (1993, Canadian Federal Court of Appeal). In one of the leading UK cases on IFA/IPA, *Robinson* [1997] Imm AR 182, the English Court of Appeal accepted that a human rights analysis was valid but nevertheless preferred to adopt the test of undue hardship, thereby implying the two approaches were not identical. As regards European jurisprudence, it is intriguing that in the latest Danish Presidency proposed amendments to the Proposed Refugee Qualifications Directive's provision on "Internal Protection" the test has become whether return to the IPA would be "unduly harsh", rather than whether "the applicant could reasonably be returned".

wrote in 1998 in the IJRJ,¹⁷ I voiced this criticism. I note that Ninette Kelly's recent article on IFA, which discusses the San Remo Summary Conclusions¹⁸ emphasises much the same point.

A fifth criticism is that despite at other points failing to make essential points, the Summary Conclusions at some points opt for overdogmatic formulations. Thus in paragraph 2, they set out a presumption that when the risk of being persecuted emanates from the state (at whatever level), "IPA/IRA/IFA is not normally a relevant consideration as it can be presumed the state is entitled to act throughout the country of origin". In favour of this approach, it can be argued that adoption of a presumption acts as a useful rule to ensure the decision-maker does not deny IFA to persons threatened by State authorities unless there are exceptional circumstances. However, against this presumptive approach, it can be argued that it is simply a question of fact in each case as to whether risk in one part will create risk countrywide. Even in centralised States there may sometimes be no political will or apparatus for pursuing or detecting political opponents countrywide. This formulation prompts the question, that is to say, why presume something that may not be so in fact? Whilst it may be that such presumptions can be helpful tools, choice of such legal concepts is bound to raise difficulties for countries which prefer not to import into refugee law special rules governing the status of evidence.¹⁹

A final criticism is that the Summary Conclusions do not take the opportunity to identify areas of continuing debate. In some of the other sets of Summary Conclusions, for example, those on the Exclusion Clauses, more was done by way of sign-posting other major issues.

17 H Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined" (1998) IJRL 499.

18 Ninette Kelly, "Internal Flight/Relocation/Protection Alternative: Is It Reasonable?" (I am grateful to the author for sending me a draft of this article).

19 Interestingly, the Danish Presidency's latest (July 2002) proposed amendments to the EU Draft Refugee Qualifications Directive deletes the provision setting out "a strong presumption against" the internal protection alternative where the agent of persecution is the State (or associated with it).

III CONTINUING ISSUES

I do not propose to list here all other major issues (even if that were possible). But, on the basis of the responses to the IFA Questionnaire, it may be useful to identify a few, just to demonstrate how incomplete the Summary Conclusions are.

A The Access Issue

Whilst there is a broad consensus on the need for access to any alternative site of protection to be realistic, there are sharp divisions about from where accessibility should be assessed: from the country of asylum or from the point of return inside the country of origin. I deliberately avoid covering this issue here because it seems to me to hinge to a very considerable extent on different and sometimes technical national law provisions concerning enforcement of decisions to return.²⁰

B The "Short-Cut" Issue

One of the continuing areas of dispute concerns whether before embarking on any IFA analysis it is first necessary to make a finding on well-founded fear in a person's home area. Leading cases and academic authorities (for example, Michigan Guidelines paragraph 12) have stressed that it is erroneous for a decision-maker to address whether there is an IFA/IPA, unless he has first made a finding that there is a well-founded fear of persecution in at least one part of the country. Echoing a similar point, Hathaway,²¹ UNHCR and others have warned against using the IFA as a "short-cut" to refugee determination.

However, there remain critics of this view, particularly persons within the Australian government. They assert that there is nothing wrong with a decision-maker going straight to the IFA issue and deciding whether one exists or not. Proponents of this approach argue that it makes for more economic decision-making since, if an IFA is identified, there is no need to go through an examination of persecution in a person's home area. My own view of debate over this issue is that it is largely based on a misunderstanding. Insofar as the Australian approach has any rationale, it can only be because the decision-maker is essentially approaching the case on the assumption that the claimant has established a well founded fear of persecution in his home area. So long as that is what is involved, I see nothing wrong with this type of "even if" analysis. It could

20 For a fuller discussion, see article by Ninette Kelly, above n 18.

21 This type of short-cut it is strongly attacked in Hathaway and Foster's paper.

be described as a "short-cut" but it is not one which omits an essential step, rather it is one which simply takes the claimant's ability to satisfy the earlier essential step(s) for granted.

C The Convention Ground Issue

It is a basic axiom of refugee law that, in order to show he or she is a refugee, a claimant must establish not only a well-founded fear or persecution but also that this fear is on account of one of only five enumerated grounds: race, religion, political opinion, etc. On one view, it would appear that establishing both of these things has to be done at the first stage of inquiry into whether there is a well-founded fear of persecution in at least one part of the country. It would seem to follow that, if there is no Convention ground, a claim should never progress to the stage of being considered under the IFA/IPA test.

Conversely, if that is right, then once a claimant stands to be considered under the IFA/IPA test, he no longer needs to show a Convention ground or a causal nexus inside the IFA area.

However, another possible view might be that, even if a claimant has not been able to show a Convention ground for his or her well-founded fear of persecution in at least one part of his or her country, he might be able to show it by reference to his situation elsewhere, for example, if in his own area he faces persecution from a criminal gang yet elsewhere would face serious racial discrimination. But the question then arises, how could there be a causal nexus between the well-founded fear and that Convention ground.

D The Conceptual Basis Issue

Hathaway and Foster in their Roundtable paper argue that a proper analysis of the IPA/IRA/IFA requires basing it directly on the concept of protection. This entails, they say, rejecting all approaches that analyse IFA in terms of whether or not an applicant's fear is well-founded. The distinction arises from the fact that Article 1A(2) includes two key clauses: the well-founded fear clause ("owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion") and the protection clause ("is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country"). In the course of criticising several formulations that locate the IFA test within the well-founded fear clause or a mixture of the two, Hathaway and Foster at pages 8-9 note:

However, it is crucial to understand that the analysis shifts significantly once it has already been established that a person has a well-founded fear of being persecuted in a particular region in the country (region "A") which of course implies that the state is unable or unwilling to protect the person in that region. Once this is established, it is neither logical nor realistic to find that the fact that the state can protect the person in some *other* region of the country (region "B") means that she no longer has a well-founded fear of being persecuted in region A. The well-founded fear of being persecuted in region A has not been negated or removed by the provision of national protection in region B, just as the risk would not be removed or negated by the availability of protection in a country of second nationality or in an asylum state. In all these cases, the refugee continues to face a well-founded fear of being persecuted in region A of her country of origin, but is able to avail herself of countervailing national protection. To hold otherwise is to construct a legal fiction fundamentally at odds with common sense.

Hathaway and Foster see approaches that tie the IFA/IPA to the fear element as prone to a number of errors, including asserting a requirement that the applicant must establish persecution countrywide or opting for a short-cut analysis which omits the first stage of establishing whether there is a well-founded fear in the first region and instead starts with the question of IFA/IPA. They warn that "to collapse protection considerations into the well-founded fear element makes the protection aspect of the definition largely superfluous".

Whilst Hathaway and Foster's analysis fits best with recent trends in international decisions on IFA/IPA, it is not clear to what extent it is compatible with a "holistic" approach to interpretation of Article 1A(2). Under the influence of certain individuals who believe the refugee definition consists in a "fear" test only and not in a twofold "fear" and "protection" test, UNHCR appears to think that accepting the Michigan Guidelines criteria commit it to abandoning its ideological commitment to a single "fear" test.

In my view, some way must be found to bring these two seemingly irreconcilable viewpoints into some kind of synthesis, at least in respect of the IFA issue. At present it threatens to stall progress on more than one front.

E The Level of Harm Issue

This can be subdivided into three issues:

1 The "generalised danger" issue

Generally speaking, in order to establish a well-founded fear of persecution, it is not sufficient to show a "generalised danger": some type of personal risk or specific targeting must be shown.

However, it is arguable that, read in full, paragraph 91 of the UNHCR Handbook implies that for persons in special situations, for example, civil war or ethnic clashes, it is enough, for the claimant to succeed, once one has moved on to consider his or her claim by reference to the IFA/IPA test, merely by showing a "generalised danger". A contrary view would be that to make mere "generalised danger" an IFA/IPA criterion would be to open the flood-gates and allow even de facto refugees to qualify under the 1951 Convention.

A possible way of resolving this difference would be for the "generalised danger" approach to accept that it is only when that danger personally threatens citizens generally and for the "personal risk" approach to accept that, where the level of generalised danger is so pervasive it affects all individuals, an IFA is unavailable even if they have not been/will not be singled out.

2 The equivalence issue

As explained earlier, the Summary Conclusions did endorse at paragraph 4 what I term a "principle of equivalence".

Whether by use of the terminology of "undue hardship", "reasonableness", "safety" or "lack of meaningful protection", there is broad agreement that a person will have an IFA unless he can show some level of harm [difficulty, danger, hardship] there. The question then arises, does that mean that in the IFA/IPA there must be harms [difficulties, dangers, hardships] of at least equal seriousness to the harms [difficulties, dangers, hardships] which comprise the persecution in the claimant's home area? This notion of equivalence is used expressly in the German jurisprudence²² and seems to be implicit in the Michigan Guidelines (see paragraph 19's reference to the "intensity of harms...rises to a particularly high level...").

In my view this is a valid criterion, because it is the only one which ensures that the IFA is tied back to the overall question of well-founded fear of persecution [ie serious harm against which the state cannot protect]. However, it is

²² See H Storey, IJRL, above n 17.

far from clear that in practice judges and others are prepared to adhere to what in many ways is a tough criterion. For example, under it a person who has been moderately traumatised as a result of persecution in her home area (which remains a current risk), may not qualify as a refugee in an IFA where the normal machinery of protection is available.

A related question here is, does showing their equivalent seriousness mean that the harm(s) in the IFA/IPA must amount to serious harm? Or can harms of a lesser kind, ie ones that fall below the high threshold of serious harm, qualify? My own view is that the principle of equivalence dictates that they must be as serious, individually or cumulatively.

3 The relevant human rights framework issue

Assuming that the criteria should be human rights-based, what should be the relevant framework? There are two competing approaches.

On one approach (UNHCR, also Hathaway in his book, *Law of Refugee Status* and seemingly also in his recent article published by *Kluwer Law International*²³), it should be the international human rights system.

On the other approach the criteria should be those rights set out in Articles 2-33 of the Refugee Convention.

IV REFUGEE CONVENTION'S ARTICLES 2-33 FRAMEWORK

This is the approach recently adopted by Hathaway and others in the Michigan Guidelines and approved further in New Zealand: see *Refugee Appeal No 71684/99* reported in [2000] INLR 165 at 177. Hathaway and Foster in their Roundtable paper reconfirm it. In championing the Michigan Guidelines approach, the New Zealand decision (Chairman Rodger Haines) argues that it overcomes two main drawbacks to the international human rights approach. The MGs/NZ decision sees these drawbacks as being:

- (1) the failure of the major international human rights instruments (which at least include the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)) to yield a "... uniform and ascertainable standard of rights for refugees...." The New Zealand decision states that

23 "The International Refugee Rights Regime" in (2000) 8(2) *Collected Courses of the Academy of European Law* 91-139.

"[there is an] absence of an agreed standard of minimum rights for refugees";

- (2) "[i]nsistence on these human rights instruments would also potentially involve measuring the proposed site of internal protection against a standard which is possibly unobtainable in many States party to the Refugee Convention".

The New Zealand decision then sets out the preferred alternative as follows:

Until a greater consensus has emerged as to the integration of refugee rights with international human rights law, we prefer to adopt the already established refugee-specific statement of rights found in the Refugee Convention itself. It contains express, binding obligations, including duties owed in relation to employment (Articles 17 and 18) and welfare (Articles 20, 21, 22, 23 and 24)...

The New Zealand decision goes on to comment:

The added attraction of this approach is that it provides a decision-maker with an identified, quantified and standard set of rights common to all State parties, thereby facilitating consistent and fair decision-making.

V DIFFICULTIES WITH USE OF THE ARTICLES 2-33 FRAMEWORK FOR ASSESSING IFA/IPA CONDITIONS

Whilst broadly speaking I consider the Michigan Guidelines to represent a great leap forward, I am not persuaded that this aspect of the MGs is at all sound. In my view, the MGs' critique of the international human rights approach, at least as elaborated in the New Zealand decision, is largely misconceived. And there are difficulties with the MGs' own Articles 2-33 approach.

The first main New Zealand objection to the international human rights approach is that there is "no uniform and ascertainable standard"...to which State Parties to the Refugee Convention are agreed. However, lack of uniformity is not a problem peculiar to elaboration of IFA/IPA criteria; it is equally a problem which afflicts attempts to define the concepts of persecution and protection, for example. Yet lack of uniformity has not stopped the authors of the MGs from striving to establish an agreed international meaning in relation to these other elements of the refugee definition. Hence it is not clear why lack of uniformity should be seen as fatal to formulation of the IFA/IPA test, but not to a human rights approach in respect of other essential tests used to determine refugee status.

As for lack of ascertainability, it is not entirely clear what is meant here. If the New Zealand decision simply means that the rights are not identifiable, that is incorrect. Whether taken as the "International Bill of Rights" or as a broader list, the human rights approach consists not of *de lege ferenda* but of *lex lata* human rights contained in international treaties or accepted as part of customary international law. Rights which are on the list can be identified at any particular time, although the list is added to as new human rights treaties are ratified. If on the other hand what the MGs mean by ascertainable standards is not so much the list or catalogue of rights involved but their scope and meaning, then their argument is on stronger ground. But even here, the same difficulty afflicts the ascertainability of those rights contained in Articles 2-33: for example, what precisely are the components of the Article 16 right to access to courts? Indeed, given that in contrast to the ICCPR in respect of which there is a rich body of (Human Rights Committee) case law, there is virtually none covering Articles 2-33 of the Refugee Convention, the MGs' approach also deprives decision-makers of a valuable source for helping them apply human rights standard to particular IFA situations.

Much of the New Zealand argument centres on the inadequacies of the rights set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR) many of which are in programmatic rather than strict legal form. However, insofar as such rights are of relevance to refugee determination, the question of how enforceable such rights are is irrelevant. All that is relevant (so as to assess whether the refugee claimant is at risk in his country of origin) is evaluation of to what extent that country of origin respects such rights. What matters is human rights performance, not enforceability.

The New Zealand decision's other main criticism is that: "Insistence on these human rights instruments would also potentially involve measuring the proposed site of internal protection against a standard which is possibly unobtainable in many States party to the Refugee Convention". With respect, that observation overlooks the fact that the human rights approach to refugee determination has always based itself upon a notion of a hierarchy of rights. Only in respect of nonderogable rights will a real risk of their violation give rise to persecution *ipso facto*. In relation to the derogable rights, their violation will only give rise to persecution if sufficiently severe. The human rights approach does not require that a State must protect against all harms or that it must provide its citizens with an absolute guarantee to uphold their human rights; the standard is a practical one. A human rights approach is not, therefore, to be equated with the view that violation of any fundamental human right amounts to persecution. (Under the Refugee

Convention, of course, even when persecution in terms of basic attacks on a person's human rights is established, a claimant cannot succeed unless he can further show that his well-founded fear of persecution is on account of a Convention reason). So the international human rights standard is a workable as well as an objective one. It is not necessarily a threat to Realpolitik.

Reference to obtainability is also apt to mislead. The test is not one of what is obtainable in the country of origin but is rather one of the extent to which the authorities in the country of origin are able to effectively secure the human rights of its citizens against serious harm. If they do not secure or "obtain" them, there is a need for surrogate international protection. If they do secure or "obtain" them, there is no such need.

Furthermore, and this brings us back to an earlier point of criticism, the MGs' and New Zealand decision's logic would appear to undermine a human rights approach to refugee determination in its entirety. If the relevant IFA/IPA human rights standard is to be rejected because it is unobtainable in many countries of origin, then the same could be said of the relevant human rights standards applied when assessing other key elements of the refugee definition: for example, persecution or membership of a particular social group. The MGs seriously risk throwing the human rights baby out with the bathwater.

There are also difficulties with the MGs'/New Zealand decision's proposed alternative approach.

One is their relativity. Certainly the MGs' approach does result in a finite and identifiable set of rights. However, almost all of the rights set out at Articles 2-33 are inherently defined in comparative terms, mandating a general duty of non-discrimination between refugees and host country residents (resident nationals or resident aliens). With slight variations, the standard is set as either treatment at least as favourable to that accorded to their nationals (for example, Article 6, Article 14, Article 15, Article 16, Article 17, 20, etc) or the same treatment as is accorded to aliens generally (Article 7, Article 13, Article 18, etc). Being inherently comparative, they do not and cannot set an objective international minimum standard.

Whilst some of the rights set forth in major international instruments also express relative standards, especially those contained in the ICESCR, the standard is for the most part set in non-comparative terms. The right to freedom of expression, for example, is not conditioned by reference to any concepts of

national treatment.²⁴ Ironically the modern international human rights system was predicated on a rejection of relativist and comparative theories cast in terms of equal treatment with nationals or renvoi to national law standards etc. The MGs in this respect would have us turn back the clock.

Another difficulty is that the Article 2-33 framework overall sets a lower standard, for example, whereas international human rights provisions guarantee the right to a fair hearing, the only procedural justice guarantee in the Refugee Convention is confined to a right of free access to the courts. It would be odd indeed if what the Michigan Guidelines calls a "minimalist" human rights standard were tantamount to one which even fell below internationally accepted minimum standards.²⁵

A further difficulty is that the rights set out at Articles 2-33 of the Refugee Convention are clearly designed to address the needs of refugees in the host country: for example, Articles 27-28 on the right to identity papers and travel documents.²⁶ It would seem extremely inverted logic to say that host country – specific rights should form the template for guarantees for persons facing country of origin – specific problems. As a further illustration of this mismatch, one of the Refugee Convention rights – Article 26 on freedom of movement – is patently inapplicable to an assessment of an IFA/IPA candidate, since by definition there is

24 Although being a qualified right it is nevertheless subject to specified restrictions on its scope which allow for some degree of national variation.

25 I agree with Ninette Kelly's assessment that the Arts 2-33 standard is necessarily harder for a claimant to satisfy than the international human rights standard. (She writes: "The effect is then 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 guarantees in the Convention become the ceiling rather than the floor upon which guarantees found in subsequent human rights treaties build").

26 In his recent article, "The International Refugee Rights Regime", in *Collected Courses of the Academy of European Law*, Volume VIII, Book 2, 91-139 at 115 Hathaway himself analyses Arts 2-33 as follows: "The rights established by the Convention may be grouped under three categories: *rights of primary protection*, which constitute a basic response to the immediate and sometimes unique vulnerabilities faced by refugees; *rights of surrogate protection*, including key civil and socio-economic rights that ensure fair and decent treatment of refugees in an asylum state; and *rights of solution*, intended to facilitate the acquisition by refugees of a more permanent status that would bring the need for refugee protection to an end". This characterisation co-exists uneasily with his endorsement of an Arts 2-33 as a benchmark for assessing country of origin conditions in the Michigan Guidelines.

already one part of his country where he has no freedom of movement – the part of his country where he faces persecution.

Furthermore, although there is a superficial attraction to a closed list, any use of such a list would appear to freeze the relevant standard in time. It is not easy to see how such a closed list is compatible with a consistently dynamic approach to human rights. Essentially for Refugee Convention protection against persecution to comply with international law standards it must be protection which reflects developments in international law (one example would be the emergence of the principle that states have positive as well as negative obligations to protect their citizens). Although the international human rights approach to refugee determination dictates primary reference to the finite list of rights contained in the "International Bill of Rights" (for example, the UDHR, ICCPR and ICESCR), it also allows for recourse to other international human rights instruments.²⁷ Whereas the list of rights accorded to refugees in the host country is fixed by the Convention itself, the human rights approach to protection is able to take account of developments since 1950 – for example, the 1989 Convention on the Rights of the Child.

The New Zealand decision seems at one point to virtually recognise that its own account is discordant with the purpose of the Refugee Convention itself, when it states:

Good reasons may be advanced to refer to a range of widely recognised international human rights in defining the irreducible core content of affirmative protection in the proposed site of internal protection. In particular, one might rely on the reference in the Refugee Convention's Preamble to the importance of "...the principle that human beings shall enjoy fundamental rights and freedoms without discrimination".

In contrast to the MGs' closed list approach, the international human rights approach, like the 1951 Convention's Preamble, does not limit itself to a closed number of fundamental rights and freedoms.

In response to criticisms of this kind, Hathaway and Foster seek to describe them as difficulties that only arise if a "literal application" is taken to Articles 2-33:

²⁷ See IARLJ Human Rights Nexus paper, above n 15.

However, it is important to understand that the IPA approach does not suggest a literal application of Articles 2-33 in considering internal protection, but rather that decision-makers seek inspiration from the kind of interest protected by these articles as a way of defining an endogenous notion of affirmative protection in the refugee context.

However, if all that is sought from Articles 2-33 is inspiration, then it may be thought hard to see how proponents of an Articles 2-33 approach can maintain that these offer a concrete and quantifiable framework. A rights-based approach must be based on rights, not on inspirations.

VI BURDEN AND STANDARD OF PROOF

In general refugee law, subject always to the 1979 Handbook's reference to a "shared burden", sees the onus of proof as resting on the claimant, albeit there remains controversy over whether in this field of law it assists to demarcate burdens and standards at all.²⁸ In the view of some, the IFA/IPA calls for at least one qualification to this rule, namely that it requires the burden to shift to the decision-taker. That is the position asserted in the Michigan Guidelines:

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

Hathaway and Foster's Roundtable contains a spirited reassertion of this position:

A protection-based understanding of IFA reinforces the fact that once the applicant has established a well-founded fear in one location, she is entitled to the full weight of the establishment of a prima facie case. In this way, the IFA analysis is understood as akin to an exclusion inquiry such that the onus is then on the party asserting an IFA to establish that it exists. (p 12)

Against this perspective it can be asked: why should fear in one part of the country give rise to "presumptive entitlement to Convention refugee status"? The principle of surrogacy requires in all cases surely that the claimant show that he

28 A leading UK case disapproving of reference to burden and standards is *Karanakaran* [2000] Imm AR 271.

cannot obtain protection in his country of origin, for example, his country as a whole, not part of his country.

VII THE PARTICULAR AREA ISSUE

There is a broad consensus that it would impose too heavy a burden on the claimant to have to show a real risk of persecution in every unspecified part of his country. However, some have gone to the other extreme and argued that, as part of the requirement of procedural fairness and having to give notice of an IFA, the onus is on the decision-taker to specify a particular geographical area where he considers the claimant would be safe.²⁹ I must confess to finding the reasoning behind this latter view hard to follow. Once a claimant has been put on notice that IFA is an issue, he knows he has to answer the question, "Why can't you secure protection elsewhere within your own country?". On what basis can this be narrowed down to a question just about place X, for example, just about one part of his country?³⁰ To so narrow the question does not accord with the principle of surrogacy.

VIII THE ISSUE OF THE HOME AREA CONCEPT

Is it sufficient for the IFA to come into play that there be a part of the country where the claimant faces a real risk of persecution; or must that part be the claimant's home area?

On one viewpoint refugee law has always taken care to avoid any reference to a "home area test". Paragraph 91 of the 1979 Handbook, for example, is non-committal and refers to "*one part* of the country...another part of the same country". Similarly the Michigan Guidelines state at paragraph 12:

The first question to be considered is therefore whether the asylum-seeker faces a well-founded fear of persecution for a Convention reason in at least *some part* of his or her country of origin.

On another viewpoint, a home area test is an integral part of any credible IFA/IPA theory. This viewpoint has been most forcibly expressed in recent UK

29 This is the view taken by Ninette Kelly in her recent article, above n 18 (which also includes an analysis of cases which take positions for and against this view).

30 For leading cases rejecting the argument that a specific place must be identified, see the Australian case, *Randhawa v Minister for Immigration* (1994) 12 ALR 265 and the Canadian case, *Gosal v Canada MEI* [1998] FCJ No 346.

decisions, that of *Dyli*³¹ (an Immigration Appeal Tribunal decision) and *Canaj and Vallaj* (a Court of Appeal judgment). In both the issue was whether the return of Kosovans to Kosovo should be considered with or without reference to the IFA/IPA test. In both cases it was an agreed fact that in at least one part of the Federal Republic of Yugoslavia (their country of nationality), namely Belgrade, they would face a real risk of persecution.

In *Dyli* the Tribunal wrote:

34. Thus the expectation of internal flight is transformed into a rule of internal protection: on return to his own country a person may have to live in an area that is different from his own home area. It is, however, important to remember the origins of the rule. The question of internal flight only arises when a claimant has a well-founded fear of persecution in his own home area. If he has no such fear there, the possibility of his own movement elsewhere simply does not arise. He is not a refugee. If, on the other hand, he has such a fear in his own home area, he may be a refugee: but only if he can show that there is no other part of his own country where he would be safe, which he can reach in safety and where it would be reasonable (that is to say not unduly harsh) to expect him to live.

35...No questions of unreasonableness or undue harshness arise if the claimant has no well-founded fear of persecution in his home area. That is so even if there are other areas of his country where he might have such a fear.

In *Canaj and Vallaj*,³² a judgment of 24 May 2001, the Court of Appeal endorsed the position taken in *Dyli*. Rejecting counter-arguments, Simon Brown, LJ wrote:

...Paragraph 91 of the UNHCR handbook in terms postulates that the fear of persecution is in the claimant's part of the country and that the contemplated "refuge" is in "another part of the same country". Paragraph 8 of the Joint Position [of the Council of the European Union] ...expressly raises the question of whether a claimant can find "effective protection in another part of his own country, to which he may reasonably be expected to *move*" (emphasis added). The Federal Court of Australia in *Randhawa* (1994) 124 ALR 265...expressly considers whether it is reasonable "to expect a person who has a well-founded fear of persecution in relation to the part of the country from which he or she has fled to relocate to

31 *Dyli* [2000] INLR 372.

32 *Canaj and Vallaj* [2001] INLR 342.

another part of the country of nationality". Similarly the Federal Court of Canada in *Thirunavakkarasu* 109 DLR (4th) 682 asked whether it would be "unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country". Even in Refugee Appeal No 71684/99...one of the specific questions to be asked in an internal protection case in determining whether meaningful question can be accessed is:

Is the proposed site of internal protection one in which there is no real chance of persecution, or of other particularly serious harms of the mind that might give rise to the risk of return to the place of origin?

It is, of course, implicit in that question that the "place of origin" is somewhere different to "the proposed site of internal protection"....

32. None of this, moreover, is to my mind in the least surprising. As a matter of principle it would be remarkable were it necessary to ask in every case: is there a part of the claimant's home country in which he would be unsafe? That would be an entirely hypothetical and academic question if in fact the claimant had never been there and was never going to be returned there. If it is plain that the claimant can safely be returned to his own home area, and so is not being required to uproot himself and move to a different area, there is simply no reason to temper the strict interpretation of words in article 1A(2) "is unable to avail himself of the protection of that country" by "a small amount of humanity", as Brooks LJ put it in *Karanakaran*³³... Why ever should it be "unduly harsh" to expect a claimant to return to live in his own home area once it is accepted that is safe for him to do so?

IX CRITIQUE OF THE HOME TEST

Seen from the opposing viewpoint, the answer to this last question is quite simple: "because within his own country of nationality there is a place where he has been found to face persecution and in certain circumstances having to relocate can give rise to undue hardship/a lack of meaningful protection". Not to accord the existence of a place of persecution within the country of origin any weight as a relevant factor would effectively be to equate such a claimant's position with that of a person who faces no real risk of persecution anywhere.

Furthermore, the home area test/approach would seem to have the following unacceptable consequence. If a claimant's home area, albeit free from a risk of persecution, has become uninhabitable or cannot be lived in (for example,

33 [2000] Imm AR 271.

because it is a nuclear wasteland or permanently flooded) he would not be able to succeed under the IFA/IPA even though (let us assume) the only other area in which he could live would be one where he faced a real risk of persecution.

It is also highly questionable to treat the home area concept as being implicit in previous formulations. That approach overlooks that such formulations have for the most part expressly eschewed reference to a "one's home area" test. They have employed the indefinite article, making reference to "a place" or "one place" advisedly. Therefore to interpolate a "home area" test into refugee law appears to add an additional or super-added restriction not found in the text of the Convention itself.

There are also complex problems associated with the operation of the home area test as such. What about claimants who have never lived in their country of nationality, because for example their parents had previously moved outside its borders due to civil war? What about cases where a claimant sometimes lives in his home area (for example, south-eastern Turkey) but sometimes in an area where he would not be at risk (for example, Istanbul): How does one establish which area is his true domicile?

Proponents of the home area test maintain that if a claimant is to be returned to his home area without risk of persecution it is "academic" whether in another part of the country he faces persecution. Against this it could be argued, using Belgrade (Baghdad) in relation to Albanian Kosovans (Iraqi Kurds) as a recent example, that it is never possible to say that the risk posed to a claimant by the existence of a part of his country where he would face persecution is purely "academic", since in the real world what happens in one part always interconnects with what happens in another. Risk of this kind may be more or less real or more or less remote, but never purely academic. In all cases assessment will be a question of fact. The difference in the degree of relevance goes to the issue of how unduly harsh relocation would be or how unmeaningful protection would be in an alternative site.

X THE CONCEPT OF PROTECTION

There is an issue here as to whether protection in an IFA can only be afforded by entities which are proper states. What about de facto state entities? The issue here is sometimes posed as "Protection by Whom?".

Refugee case law in most countries adopts a factual or functional approach which accepts that, in exceptional situations where State authorities are absent or

ineffective, other entities may afford meaningful protection (or be assessed as to whether they do). These situations include:

- (In an armed conflict situation) other organised entities possessing control over territory and resources;
- De facto State authorities executing State-like functions;
- Private persons or non-governmental organisations;³⁴
- Any entity in fact providing such protection with or without a duty under international law to do so and with or without the consent of the country of nationality (see *Canaj and Vallaj* on KFOR and UNMIK as protective entities in current-day Kosovo).

Some of these sub-categories overlap. However, in relation to all of them, there are differences over the significance of international law recognition and over the need or lack of need for consent of any legitimate government that exists.

In their Roundtable paper at page 46, Hathaway and Foster strongly attack a factual approach and argue for a strictly formal approach:

The fundamental problem with such decisions is that none of the proposed protectors – whether it is ethnic leaders in Liberia, clans in Somalia, or embryonic local authorities in portions of northern Iraq – is positioned to deliver what Article 1(A)(2) of the Refugee Convention requires, namely the protection of a state accountable under international law. The protective obligations of the Convention require that protection will be provided not by some legally unaccountable entity with de facto control, but rather by a government capable of assuming and being held responsible under international law for its actions. In practical terms, the rights enumerated in the Convention similarly envisage that protection will be provided by an entity that has established, inter alia, a formal system for regulating aliens' social and economic rights, a legal and judicial system, and a mechanism for issuing identity and travel documents. Indeed, the fundamental premise that refugee protection is an inter-state system intended to deliver surrogate or substitute protection assumes the right of at-risk persons to access a legally accountable state – not just some (hopefully) sympathetic or friendly group – if and when the individual's own state fails fundamentally to protect his or her basic rights. There is

³⁴ De Moffarts, above n 2.

simply no basis in law or principle to deviate from this foundation principle in the internal protection context.

Arguably, however, this call for a formal approach rests on at least three serious misconceptions.

First, it wrongly overlooks that the responsibilities assumed by States party to the Refugee Convention are for them to afford surrogate protection, not to ensure that countries of origin are accountable or capable of being held responsible under international law for their actions. Refugee determination is not an exercise in imputing (country of origin) State responsibility for wrongdoing States commit against their own citizenry.³⁵

Second, from the point of view of international law principles, the concept of the state which underlies the notion of "State protection" is not to be equated with the current government of a country. If the practical effect of the actions of de facto entities within a State is to discharge or perform international obligations placed upon that State (for example, to prevent piracy), then from the point of international law the "State" has discharged its international responsibilities. Conversely, just because a State has no effective government does not exempt it from a wide range of international responsibilities.³⁶

Thirdly, the formal approach conflates the notion of a (de jure or de facto) State with that of a good ("legally accountable", "democratic") State. The

35 Nor is there any real question of asylum States (in Hathaway and Foster's words) "legally requiring" at-risk persons to ally themselves with a clan or faction in order to receive protection. A decision to return amounts to no more than an assessment that within the asylum-seeker's own country a source of protection is available.

36 "It is true that the existence of a country of origin (or of former habitual residence in the case of stateless persons) is a necessary element of the notion of refugee. However, a collapse of governmental power does not terminate the existence of a State. Failed States remain subjects of international law even if they no longer have any functioning authorities: they usually do not terminate their membership of international organisations; their territory cannot be annexed by another state as stateless land, and an invasion of this territory still constitutes, according to the UN Charter, a violation of the prohibition of the use of force and it leads to an interstate armed conflict in the sense of 1949 Geneva Conventions on humanitarian law." (Walter Kalin, "Persecution by non-state agents" in *The Changing Nature of Persecution*, papers for IARLJ Conference Bern Oct 2000, published Institute of Public Law, Bern, Switzerland 2001). See also M Ruffert "The Administration of Kosovo and East-Timor by The International Community" (2001) 50 ICLQ 613-631.

underlying thinking behind it appears to be that adequate protection can only be afforded by entities capable of entering into international obligations, especially international treaties guaranteeing human rights. However, whilst the extent to which States sign up to and conform to international human rights obligations is important evidence of their ability to protect, it is not what defines whether a State can afford adequate protection (otherwise, bearing in mind that China during the latter half of the 20th century signed up to virtually no international human rights treaties, every Chinese claimant asylum-seeker able to satisfy the fear test and alleging inadequate protection would have succeeded in his refugee claim as a matter of course). The test is not whether the de jure or de facto State is democratic, but whether it can deliver protection against persecutory harm.

The trouble with the formal approach is that it prevents pragmatic and common sense analysis of just what range of protective functions are performed by particular de facto entities. It may well be that some leading cases have been too ready to accept ad hoc de facto groups as protective entities, but that is scarcely a reason for discarding a factual or functional approach. It is also odd that in order to shore up the argument in favour of the formal approach, Hathaway and Foster fall back on reliance on Article 2-33 norms, some of which (as already explained) are host-country specific. Under the alternative international human rights system, issues such as whether de facto entities can guarantee juridical status or access to courts are dealt with by reference to the notion of a hierarchy of rights examined on a purely factual basis.

Certainly I do not think this debate will be settled by reference to the text of the Refugee Convention which neither specifies that protection must be by a State (the phrase is "protection of that country") nor that protection can be by de facto State entities. In my view an object and purposes approach to interpretation should yield a conclusion that the reference to "country" is merely geographical.³⁷ Commentators should let contemporary interpretation of the Refugee Convention evolve to reflect the reality of de facto protection and get on with setting out criteria which de facto entities need to meet in order to be capable of affording protection (being "durable, organised, effective, stable etc.").

³⁷ Also the conclusion reached in *Dyli* [2000] INLR 372. More recently in an English Court of Appeal case, *Gardi* [2002] EWCA Civ 759 (UKCA, May 24, 2002) Keene, LJ in obiter remarks endorsed the views expressed in Hathaway and Foster's article. It does not appear that authorities in support of the opposite viewpoint were put to him. It is therefore somewhat circular to find Hathaway now citing *Gardi* in support of his approach.

**XI INTERRELATIONSHIP BETWEEN REFUGEE
CONVENTION AND HUMAN RIGHTS CONVENTIONS'
CONCEPT OF IFA/IPA**

Are the Refugee Convention criteria governing the use of the IFA/IPA test different from those used in human rights jurisprudence: see recent European Court of Human Rights judgment in the case of *Hilal v UK*? Arguably, from a public international law perspective, there should be no significant difference, except that the person's situation in the country of asylum may be a more directly relevant factor under human rights criteria than under 1951 Convention criteria (for example, in another Strasbourg case, *D v UK*, albeit not an IFA case, it was highly material to the issue of whether the claimant, an AIDS sufferer, would be exposed to a real risk of torture or inhuman or degrading treatment upon return to St Kitts that he had become dependent on a certain level of medical assistance in the UK).

XII PROCEDURAL ISSUES

Frequent concern has been expressed about the validity of deciding cases in which IFA/IPA issues are involved within accelerated or manifestly unfounded procedures. The Michigan Guidelines express this concern as follows:

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

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

It is questionable whether paragraph 26 should be taken as an absolute rule. Even the New Zealand decision which endorses the Michigan Guidelines – Refugee Appeal No 71684/99 - recognises at 46(c) that:

This obligation, however, must be tempered with common-sense. There are certain categories of cases where it is self-evident that internal protection is an issue either

because of the nature of the case (particularly if it involves a non-State agent of persecution) or because of the country of origin (for example, the Republic of India) or both.

As regards paragraph 25, it is not entirely clear why the need to take account of risks in other regions of the State of origin should prevent consideration within accelerated procedures. If it is well-established by objective country materials, for example, that save for special cases, the risk of persecution in one part of the country does not prevent claimants from relocating safely in another part of the country, then (it can be argued) why should accelerated or manifestly unfounded procedures be avoided?

Hathaway and Foster in their Roundtable paper at pages 47-48 consider that such an approach is tantamount to a denial of individualised assessment of risk. However arguably that would only be the case if generalisations based on case experience and objective country materials were seen as a substitute for rather than as an aid to individual examination.

XIII CONCLUSIONS

It is manifest I think that the Summary Conclusions, galvanised by the Michigan Guidelines, have moved the prospects of achieving a global consensus on IFA from virtually nowhere to somewhere. But plainly they did not get us far enough.

Rather than repeat any of the points I have made about content, I want to end with a number of process points.

A The Need for Further International Collaboration in a Judicial Forum

Although the Summary Conclusions did not take matters as far as they could and should have, enough progress was made to suggest that more could be achieved by further international collaboration.

But should it be in the same form: a sort of San Remo Part Two? I think not. In my view the Global Consultation exercise has highlighted the need for any further initiative to be a specifically judicial one.

Ideally any further initiative should be under UNHCR auspices, issues of interpretation being part of its mandate. But I doubt that any further or revised set of UNHCR guidelines will be any less problematic than the last. For certain leading figures within UNHCR it would appear that issues relating to IFA can only be resolved by rejection of any approach which anchors the IFA in a separate

"protection test". But such an approach is at odds not just with that set out in the Michigan Guidelines but with jurisprudential trends in several countries. Proceeding under UNHCR auspices is desirable, but not if the price is UNHCR editorial control.

The Michigan Guidelines on IFA were a welcome addition, but being just a product of a small group of academics (two or three of whom double as judges) they have too much of a special interest group appearance. In addition I think they lose much of their credence by insistence on the Articles 2-31 human rights framework. There was a feeling amongst the more diverse participants at the San Remo Roundtable that if we had a further "second half" we could have thrashed out more issues. But I doubt, given the draft discussion phase, that so diverse a group of people, which included those from governments, NGOs, academia etc, is the best choice for careful drafting of guidelines designed in part for judicial decision-makers. At least in that respect the Michigan Guidelines offer a better model: a group of people with a close grasp of refugee jurisprudence but without a political agenda.

Of course it would be no less "elitist" if a small group of judges tried something similar to the Michigan Guidelines. Hence any judicial initiative must seek to draw on, or result from consultation with, diverse sources in some structured way. To my mind the Global Consultations model could be preserved for the first stage of any fresh attempt. But it would need to have a new final stage added. The drafting of Summary Conclusions should be done by a panel of expert refugee law judges who have listened to all the Roundtable arguments. One can understand UNHCR wanting to draft the Global Consultation conclusions themselves: after all, it was their initiative. But if ever there is to be a next time something more independent is necessary and judges would not have a fixed philosophical viewpoint concerning the "fear" and "protection" tests.

I should add that in my view recent European developments give added urgency to the need for further judicial collaboration (ideally conducted under UNHCR auspices). As we speak the EU is taking steps to finalise a draft of a proposed Refugee Qualifications Directive aimed at furnishing an EU-wide definition of basic IFA principles. Although the drafters have consulted with many sources, including UNHCR and the IARLJ, the eventual decision as to the final text rests with national governments and their representatives. Unless as an alternative there is a visible and authoritative set of guidelines and principles, this EU text is likely to be seized on by many non-EU States as a global reference-

point, irrespective of the fact that it does not necessarily reflect informed jurisprudence.

B The Need for a Short Summary of Basic Principles and Analytical Steps for use by Decision-Makers

If there are to be IFA guidelines then they need to set out in a clear step-by-step and brief form the basic principles that should govern IFA analysis and the basic analytical steps to be used when examining IFA. One of the reasons why the Michigan Guidelines have failed to take hold in more countries is that its basic principles and its 4-step analytical framework is not set out anywhere in a clear summary form. If they are to be easily accessible, there is an argument for reducing them to a summary of basic propositions. Albeit these could be amplified through footnotes or the like, this line of argument urges that the guidelines be capable of brief recital. Both the UNHCR Position Paper and the Michigan Guidelines lack a condensed summary. Hathaway and Foster in their Roundtable paper identify a 4-stage inquiry, but do not set out all the relevant criteria in summary

C Many Vocabularies, one Set of Underlying Standards

Given that national case laws have built up distinct IFA vocabularies (ranging from the name of the test through to distinct terms for identifying underlying criteria "reasonableness", "safety", "undue hardship", "meaningful protection" etc), it is doubtful that any step short of a new Refugee Convention could impose a uniform vocabulary.

However, a more realistic route to take internationally is, I think, not to urge different countries - or blocs of countries - to adopt a specific vocabulary, but rather to make each of the existing formulations subject to the same underlying criteria. Then there would be nothing wrong with talk of "safety" or "undue hardship" or even "reasonableness", since each would be defined by reference to core human rights norms. Such an approach would achieve greater consistency, avoid discontinuity but at the same time ensure that existing formulations had to place themselves consciously on a more objective footing.

