

The Applicability of the Internal Relocation Principle to Cessation of Refugee Status: The Surrogate Nature of International Refugee Protection

By CHAO Yi

FICHL Policy Brief Series No. 76 (2017)

1. Introduction

The Internal Relocation Principle ('IRP'), also known as the Internal Relocation/Protection/Flight Alternative, permits that refugee status not be granted to individuals who can find sufficient protection against the well-founded fear of persecution by relocating to an alternative area in his country of origin. Although without explicit reference in the 1951 Convention Relating to the Status of Refugees¹ ('1951 Convention') and its 1967 Protocol,² the applicability of IRP has been firmly established in refugee status determination ('RSD') of States Parties to the 1951 Convention,³ confirmed by the United Nations High Commissioner for Refugees ('UNHCR') official Guidelines,⁴ and extended to the interpretation of *non-refoulement* obligations under human rights treaties.

The 1951 Convention prescribes the inclusion, cessation, and exclusion of refugee status. The inclusion provision⁵ (Article 1(A)(2)) defines a refugee as an individual who, owing to the well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of origin and unable or unwilling to

avail himself of the protection of that country. The cessation provision (Article 1(C)) stipulates that a previously recognized refugee ceases to maintain refugee status when he is again able to be protected by his country of origin or obtains the protection of another country. The exclusion provision (Articles 1(F) and 33(2)) defines "some persons who face the real chance of being persecuted nonetheless to be undeserving of international protection"⁶ because they have committed international crime, committed serious nonpolitical crime outside the receiving State prior to being admitted as a refugee, been found guilty of acts contrary to the purposes and principles of the UN, or pose a danger to the security of the receiving State. The rationale behind the exclusion of refugee status is different from the inclusion and cessation of refugee status, since the exclusion provision is "completely external to [...] both the genuineness and the reasonableness of [the] fear of persecution".⁷

Current trends in academic commentaries and the UNHCR Guidelines link IRP exclusively to the inclusion provision of refugee status, applying IRP via the interpretation of "well-founded fear of being persecuted" or "unable or unwilling to avail himself to the protection of the country of origin" in Article 1(A)(2). This policy brief argues that current trends mistakenly identify the text of the inclusion provision as the source of IRP's legitimacy and therefore lose sight of *the applicability of IRP to the cessation of refugee status*. The legitimacy of IRP comes from the surrogate nature of international refugee protection, an underlying principle that international protection only comes into play when "resort to national protection [of the country of origin] is not

¹ See <http://www.legal-tools.org/doc/9b8e7a/>.

² Protocol Relating to the Status of Refugees (<http://www.legal-tools.org/doc/8f0728/>).

³ Brid Ní Ghráinne, "The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?", in *International Journal of Refugee Law*, 2015, vol. 27, p. 30.

⁴ 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, UN Doc. HCR/GIP/03/04, 23 July 2003 (hereinafter 'IFA Guidelines').

⁵ Strictly speaking, Art. 1(A)(1) also includes refugees defined by six specific international instruments prior to the 1951 Convention. However, given that Art. 1(A)(1) has lost most of its practical relevance (Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 279), the expression "inclusion provision" in this policy brief refers exclusively to Art. 1(A)(2).

⁶ James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd edn., Cambridge University Press, 2014, p. 524.

⁷ Federal Court of Canada, Court of Appeal, *Canada (Minister of Employment and Immigration) v. Mehmet* [1992] 2 F.C. 598, para. 10.

possible”,⁸ which governs both the inclusion and cessation of refugee status. Therefore, IRP is applicable to the cessation of refugee status under Article 1(C)(5)–(6) of the 1951 Convention when the circumstances in the country of origin have changed so that the previously recognized refugee can safely and reasonably return to one or some areas (but not the whole territory) of his country of origin, and lead a relatively normal life without undue hardship or risks of persecution and serious harm.

2. Current Trends: Linking IRP Exclusively to Article 1(A)(2)

The applicability of IRP in the inclusion of refugee status has been widely accepted in international practice.⁹ The current trends of UNHCR and academic commentaries to link IRP exclusively to the inclusion of refugee status are perhaps most apparently illustrated in the UNHCR official Guidelines for IRP entitled *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*.¹⁰ It is clear that UNHCR restricted the discussion of IRP to Article 1(A)(2), and the phrase “within the context” failed to imply that IRP may also be relevant to the cessation of refugee status given the contrary statement in UNHCR’s Guidelines on the cessation provision.¹¹

There has been a certain consensus in international practice regarding what degree of domestic protection in the proposed relocation site is deemed “sufficient protection” to trigger IRP in the inclusion of refugee status. Not only can there be no real risk of persecution or serious harm for the asylum seeker, it must also be *reasonable* to expect him to relocate. This *reasonableness* test has become the “dominant”¹² legal standard of IRP which can be seen in the practice of Canada,¹³ the

United Kingdom,¹⁴ the United States,¹⁵ and the European Union.¹⁶ In order to trigger IRP, regional domestic protection must render relocation both “safe” and “reasonable” for the asylum seeker. The reasonableness test requires that the applicant can lead a relatively normal life upon relocation without facing undue hardship¹⁷ – a standard higher than the mere absence of the risk of persecution.

UNHCR and academic commentators link IRP exclusively to the inclusion of refugee status by treating Article 1(A)(2) as the “textual home” of IRP. In other words, they identify texts in Article 1(A)(2) – “well-founded fear of being persecuted” and/or “is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” – as the source of IRP’s legitimacy and therefore conclude that IRP only comes into being through the interpretation of these texts and that IRP is an implicit yet inherent element of Article 1(A)(2).

The perception that the applicability and legitimacy of IRP come from the texts of Article 1(A)(2) is not plausible for two reasons. First, before the concept of IRP was put forward in State practice in the 1980s – with German domestic jurisprudence of *inländische Fluchtalternative* (“internal flight alternative”) generally regarded as its origin¹⁸ – there was no practice of routinely considering whether the applicant was able to find sufficient protection by internal relocation, and the well-founded fear of persecution in one part of the country of origin

¹⁴ Court of Appeal (England and Wales) (Civil Division), United Kingdom, *R v. Secretary of State for the Home Department and another, ex parte Robinson* [1997] Imm AR 568; House of Lords, United Kingdom, *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5.

¹⁵ 8 CFR (United States) § 208.13(b)(3).

¹⁶ Art. 8, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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), OJ L. 337/9-337/26.

¹⁷ *Thirunavukkarasu*, p. 598, see *supra* note 13; *Robinson*, para. 29, see *supra* note 14; IFA Guidelines, para. 7, see *supra* note 4.

¹⁸ G. de Moffarts, “Refugee Status and the ‘Internal Flight Alternative’”, in International Association of Refugee Law Judges, *Refugee and Asylum Law: Assessing the Scope for Judicial Protection*, Nederlands Centrum Buitenlanders, 1997, p. 124. See also James C. Hathaway and Michelle Foster, “Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination”, in Erica Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, p. 362; Ní Ghráinne, 2015, p. 30, see *supra* note 3. A recent research of 2016, however, claimed that the origin of IRP can trace back to the late 1970s: Jessica Schultz and Terje Einarsen, “The Right to Refugee Status and the Internal Protection Alternative: What Does the Law Say?”, in Bruce Burson and David James Cantor (eds.), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory*, Brill, 2016, pp. 277–78.

⁸ James C. Hathaway, *The Law of Refugee Status*, Butterworths, 1991, p. 135. See also Supreme Court of Canada, *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, pp. 709, 716, 726, 752.

⁹ See High Court of Australia, *SZATV v. Minister for Immigration and Citizenship* [2007] HCA 40, 233 CLR 18, para. 68.

¹⁰ IFA Guidelines, see *supra* note 4.

¹¹ Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses), UN Doc HCR/GIP/03/03, 10 February 2003, para. 17 (hereinafter “Ceased Circumstances Guidelines”).

¹² Hathaway and Foster, 2014, p. 350, see *supra* note 6.

¹³ Federal Court of Canada, Court of Appeal, *Rasaratnam v. Canada (Minister of Employment & Immigration)* [1992] 1 F.C. 706; Federal Court of Canada, Court of Appeal, *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 589.

was sufficient for refugee status.¹⁹ IRP was not a part, let alone an “inherent” part, of Article 1(A)(2) before the 1980s. Second, the essence of IRP – the reasonableness test – does not come from the texts of Article 1(A)(2), but is the product of State practice.

3. The Surrogate Nature of International Protection as the Source of IRP’s Applicability and Legitimacy

The narrative that the applicability and legitimacy of IRP come from the texts of Article 1(A)(2) misperceives the causality between the “establishment of IRP’s applicability and legitimacy” and “interpreting IRP through Art. 1(A)(2)”. It is because IRP’s applicability and legitimacy had been established beforehand that States Parties started to interpret IRP through Article 1(A)(2) and not the other way around. Therefore, to include IRP in Article 1(A)(2) is the *result* instead of the *source* of IRP’s applicability and legitimacy.

The applicability and legitimacy of IRP come directly from the surrogate nature of international refugee protection.²⁰ As a doctrine proposed in 1991 by Hathaway in his first edition of *The Law of Refugee Status*, the surrogate nature has been widely accepted as the fundamental premise of the contemporary understanding of international refugee protection.²¹ It stresses the primary obligation of the country of origin to protect its citizens from persecution²² and emphasizes that international refugee protection in the form of the receiving State granting refugee status and providing protection accordingly only comes into play when the individual is unable to obtain sufficient protection from his country of origin. This surrogate nature is pertinent and necessary to international refugee protection in today’s world especially given that protection of the receiving State is a scarce resource and that international refugee law only constitutes a narrow

exception to the receiving State’s auto-determination on the entry of non-citizens.²³ The regime of international refugee protection cannot be sustained without the primary obligation of the country of origin to protect its citizens from persecution and the liability of refugee-generating States being properly addressed.²⁴

Therefore, as a fundamental principle underlying the interpretation of the 1951 Convention and the 1967 Protocol, the surrogate nature of international refugee protection has two implications: (1) refugee status cannot be granted to anyone who remains in the territory of the country of origin because its primary obligation to protect must be respected; and (2) a receiving State is entitled not to grant an asylum seeker in its territory refugee status based on the finding that he can find sufficient protection against feared persecution in his country of origin. IRP finds its applicability and legitimacy directly from the second implication. As the Federal Court of Appeal in Canada already so delicately put it as early as 1993, “[IRP], derived from the surrogate nature of international refugee protection, requires a finding that the claimant can reasonably and without undue hardship find, in his own country, a secure substitute home away from the place where he was or may be persecuted”.²⁵

4. IRP is Applicable to the Cessation Provision: Consistent Interpretation of Refugee Status

The re-identification of the source of IRP’s legitimacy reopens the question of IRP’s applicability to the cessation provision, since IRP is no longer exclusively tied to the texts in Article 1(A)(2) of the 1951 Convention. As the surrogate nature of international refugee protection governs the 1951 Convention and 1967 Protocol as a whole, IRP should apply to both the inclusion and cessation of refugee status.

The gist of the cessation provision in Article 1(C) of the 1951 Convention is that refugee status ceases to apply when a previously recognized refugee can find sufficient protection in his country of origin or country of new nationality. Refugee status can cease in accordance with voluntary acts of the refugee (Article 1(C)(1)–(4)) or the change of circumstances in the country of origin (Article 1(C)(5)–(6)). IRP is especially pertinent to cessation of refugee status due to changing circumstances in the country of origin.

Article 1(C)(5) and (6) stipulate, respectively to refugees with and without nationality, that refugee status

¹⁹ Ninette Kelley, “Internal Flight/Relocation/Protection Alternative: Is it Reasonable?”, in *International Journal of Refugee Law*, 2002, vol. 14, pp. 4–5; Hathaway and Foster, 2003, p. 359, see *supra* note 18.

²⁰ Federal Court of Canada, *Ahmed v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 718, 156 N.R. 221, para. 5; Refugee Status Appeals Authority, New Zealand, *Re RS*, Refugee Appeal No. 523/92. See also Hathaway and Foster, 2014, pp. 332–3, see *supra* note 6; Ní Ghráinne, 2015, p. 32, see *supra* note 3.

²¹ See, e.g., *Ward*, see *supra* note 8; House of Lords, United Kingdom, *Horvath (AP) v Secretary of State for the Home Department* [2001] 1 AC 489; *Re RS*, *ibid.*; Federal Court of Australia, *Randhawa v. Minister for Immigration, Local Government and Ethnic Affairs* [1994] 52 FCR 437.

²² The responsibility to protect its citizens is “first and foremost... a matter of State responsibility” deriving “both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States”, *Implementing the responsibility to protect, Report of the Secretary-General*, UN Doc. A/63/677, pp. 8, 10 (<http://www.legal-tools.org/doc/0d8171/>).

²³ See *Januzi*, para. 6, see *supra* note 14; Hathaway, 1991, p. 231, see *supra* note 8.

²⁴ Unfortunately, international law remains weak in imposing and enforcing liability to refugee-generating States. See Guy, S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn, Oxford University Press, 2007, pp. 2–3.

²⁵ *Ahmed*, para. 5, see *supra* note 20.

shall cease to apply to a previously recognized refugee if:

(5) he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality;

(6) being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.²⁶

Therefore, refugee status ceases when the circumstances in the country of origin change so that a previously recognized refugee can find sufficient protection if relocated to that country.

According to the UNHCR Guidelines on Article 1(C) (5)–(6), IRP is not applicable because:

changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status. Refugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution.²⁷

The above-cited guideline is invalid because it creates an artificial inconsistency in the interpretation of refugee status which cannot be justified by the texts, context, or object and purpose of the 1951 Convention.²⁸

A previously recognized refugee who can find sufficient protection from one or some areas (but not the whole territory) of the country of origin, faces exactly the same circumstances as the asylum seeker who can find sufficient protection from one or some areas (but not the whole territory) of the country of origin. There is no justification to treat these two individuals differently on the sole ground that the former concerns the cessation but the latter concerns the inclusion of refugee status. Since there has been no doubt that IRP applies to the latter under Article 1(A)(2), there is no reason to deny the applicability of IRP to the former under Article 1(C)

(5) or (6). The surrogate nature of international refugee protection governs both the inclusion and cessation of refugee status equally.

Therefore, the same standard of the 'reasonableness' of internal relocation applies to the cessation of refugee status. IRP is applicable to Article 1(C)(5) and (6) only when the individual is able to practically, safely, and legally relocate from the receiving State to the area of the country of origin in which he can lead a relatively normal life without facing undue hardship or risks of persecution and serious harm.²⁹ States Parties are free to provide protection exceeding their international obligations under the 1951 Convention and 1967 Protocol by granting or maintaining refugee status to individuals to whom IRP is applicable. But they should know the extent of their actual obligations.

CHAO Yi is a doctoral candidate at McGill University, Faculty of Law. He holds LL.M. and LL.B. degrees from Peking University Law School.

ISBN: 978-82-8348-061-0.

TOAEP-PURL: www.toaep.org/pbs-pdf/76-chao/.

LTD-PURL: www.legal-tools.org/doc/9b96b0/.

²⁶ Exception to the cessation of refugee status obtained via Art. 1(A) (1) is omitted here, since this policy brief only discusses refugee status obtained via Art. 1(A)(2), see *supra* note 5.

²⁷ Ceased Circumstances Guidelines, see *supra* note 11.

²⁸ According to Art. 31(1) of the Vienna Convention on the Law of Treaties (<http://www.legal-tools.org/doc/6bfcd4/>), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

²⁹ IFA Guidelines, para. 7, see *supra* note 4.