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The American University in Cairo

School of Global Affairs and Public Policy

**THE IMPORTANCE OF HUMAN RIGHTS PROTECTION IN THE
INTERNAL PROTECTION ALTERNATIVE INQUIRY**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Matthijs Ivo Niks

June 2020

The American University in Cairo
School of Global Affairs and Public Policy

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Master of Arts in International Human Rights Law
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DEDICATION

I dedicate this thesis to the refugee communities who are currently affected by the COVID-19 pandemic. Not only has this pandemic exacerbated their already precarious livelihoods, but many states, particularly in the Global North, have stopped admitting asylum seekers or processing their asylum claims, thereby denying them their fundamental right to seek asylum.

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First, I want to express how blessed I feel to be part of a family that has been so supportive of me through the years! My parents supported me in my decision to apply for a master's degree at the AUC and their encouraging words have helped me get through these years of living far away from home. I also want to thank my siblings, uncles and aunts who have supported me every step along the way!

I feel very privileged to have attended this Master of Arts program at the law department of the AUC. I want to thank Professor Jason Beckett for his support and guidance throughout the thesis writing process. I also want to thank him for his excellent course on human rights law, which opened my eyes to how law in many ways serves to perpetuate and exacerbate inequality. I want to thank the second readers of my thesis, Professor Ibrahim Awad and Professor Thomas Skouteris. I am grateful that Professor Awad gave me the opportunity to be his teaching assistant and I am proud to have taken two of his courses. One of the ways in which the law department impressed me was their involvement in international moot courts and the experience of participating in the ICC moot court with a team headed by Professor Skouteris is something I will never forget. I am forever grateful to Professor Tarek Badawy for inspiring me to specialize in refugee law and for giving me feedback on my drafts while I wrote my thesis. Furthermore, I want to thank Professors Hani Sayed, Mai Taha and Khaled Mansour for teaching some of the most interesting courses I have ever attended and Diana van Bogaert for giving me valuable advice throughout my time at the AUC and for her encouragement and support. I am especially grateful for the fact that she suggested me to work for Saint Andrew's Refugee Services, which has been a very valuable experience for me!

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Supervised by Professor Jason Beckett

ABSTRACT

Since the 1980s, Western states have denied refugee status for asylum seekers who can receive protection in a part of their country of nationality other than that of their habitual residence based on the principle of the internal protection alternative (IPA). Since then, this principle has been applied very inconsistently. While some jurisdictions require a high level of human rights protection in the IPA area, others return asylum seekers to such an area despite a history of significant human rights violations. The question that this thesis aims to answer is: What is the required level of human rights protection in the IPA area under the 1951 Convention Relating to the Status of Refugees? This thesis explores the current approaches to assessing the required level of human rights protection. This thesis then argues for a new approach, which is more in line with the Refugee Convention. Using a contextual approach of the legal basis of the IPA inquiry, it is argued that the new approach must assess whether basic civil and political rights are respected in the IPA zone, as “national protection” under the Refugee Convention entails at least the protection of these rights. Furthermore, states must assess whether the conditions in the IPA zone may compel someone to return to the area of persecution, as returning someone an area with such conditions violates the prohibition of *refoulement* under Article 33(1) of the Refugee Convention. This thesis explores how a lack of respect for the rights to work, education and health may result in someone returning to the area of persecution. This is because in cases where people do not receive enough remuneration or unemployment assistance to sustain themselves and their families or cannot afford to access education or health services, they typically rely on support from their family and community. If they cannot access such support in the IPA area, but they believe they can in the area of persecution, they may therefore be compelled to return. Therefore, a high level of human rights protection is required in the IPA area.

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I – Introduction

There has been a marked shift in the way that the refugee definition of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) has been interpreted and applied over the years by Western states. Until the 1980s, most Western state parties granted someone refugee status when that person had a well-founded fear of persecution in his or her area of habitual residence based on the reasons listed in the Refugee Convention.¹ As Chimni notes, during this time period Western states were quite liberal in granting asylum to refugees, most of whom were “white, male, [and] anti-communist.”² However, with the arrival of more refugees from the Global South since the 1980s, Western states have tried to find ways to justify the exclusion of refugees from international protection.³ One such way was to argue that when there is national protection available to asylum seekers in their country of nationality, even in cases where they faced persecution in their area of habitual residence, they do not meet the definition of a refugee.⁴ This thesis explores this concept further and argues that the way it is applied now is not in line with the Refugee Convention and instead calls for a different approach that is grounded more firmly in the text of the Refugee Convention.

Under the refugee definition as stipulated in Article 1A(2) of the Refugee Convention, a person must be unable or unwilling, due to the fear of persecution because of one the Convention grounds, to receive protection from his or her country of nationality.⁵ It has been argued that asylum seekers do not meet this requirement if they have an alternative location in their country of nationality, the so-called internal protection alternative (IPA),⁶ where they would be able to

¹ James C. Hathaway & Michelle Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination*, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 357, 359 (Erika Feller et al. eds., 2003).

² Bhupinder S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 *J. Refug. Stud.* 350, 357 (1998).

³ Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 1, 3 (Erika Feller et al. eds., 2003).

⁴ See James C. Hathaway, *The Law of Refugee Status* 124 (1991); Supreme Court of Canada, *Canada (Attorney-General) v. Ward* [1993], 2 SCR 689.

⁵ The relevant text of this provision reads as follows: “For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (Convention Relating to the Status of Refugees art. 1A(2), Jul. 28, 1951, 189 U.N.T.S. 137).

⁶ Alternative names of this concept include the internal flight alternative and the internal relocation alternative. However, I agree with Hathaway and Foster that the term “internal protection alternative” is “a form of words which more precisely captures the essence of the permissible range of State discretion.” (Hathaway & Foster, *supra* note 1, at 358.

receive national protection.⁷ The history of this notion can be traced back to the 1970s. One of the first times that this principle was applied was by a Dutch court in 1977, which stated that the six Turkish Christian applicants in that case could have avoided persecution, as it occurred “only in a limited area of Turkey.”⁸ Subsequently, the United Nations High Commissioner for Refugees (UNHCR) attempted to limit the states’ application of the nascent IPA principle.⁹ In 1979, it released the first *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*. In paragraph 91, it is stated that:

The fear of being persecuted need not always extend to the *whole* territory of the refugee’s country of nationality . . . a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.¹⁰ (emphasis in original)

While this paragraph is indeed phrased in a way to suggest that a person’s asylum application should not be rejected because of the presence of an alternative location where this person could take refuge, it does leave that possibility open through its addition of the last phrase. Indeed, states began to increase rather than limit the application of the IPA principle, starting with the German Higher Administrative Court in 1983.¹¹ Appellate courts in the United States, the United Kingdom and other states began to conduct the IPA inquiry soon thereafter.¹² As Kelley, Hathaway and Foster note, this happened at a time when these states were seeking ways to exclude refugees and how to legally justify these practices.¹³ As Zimmermann and Mahler observe, most Western state parties to the Refugee Convention now conduct an IPA inquiry

⁷ See Hathaway & Foster, *supra* note 1, at 357-360.

⁸ District Court of Almelo, *Rechtspraak Vreemdelingenrecht (RV) 1977 N 21* [1977] (cited in Jessica Schultz, *The Internal Protection Alternative in Refugee Law* 11-12 (2019)).

⁹ Jessica Schultz, *The Internal Protection Alternative in Refugee Law* 138-139 (2019) (“According to Gilbert Jaeger, who was UNHCR’s Director of Protection when the Handbook was drafted, paragraph 91 was inserted to *contain*, as far as possible, the incipient IPA practice emerging in some member states.” (emphasis in original)).

¹⁰ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 91 (1979), *available at* <https://www.unhcr.org/4d93528a9.pdf>.

¹¹ Hathaway & Foster, *supra* note 1, at 362.

¹² See English High Court of Justice (Queen’s Bench Division), *R v. Immigration Appeal Tribunal (IAT), ex parte Iznah* [1985], Imm AR 7; United States Board of Immigration Appeals, *Matter of Acosta* [1985], 19 I&N Decisions 211; Federal Court of Canada, *Ahmed v. Canada (Minister of Employment and Immigration)* [1993], File No. A-1017-92.

¹³ Hathaway & Foster, *supra* note 1, at 360; Ninette Kelley, *Internal Flight/Relocation/Protection Alternative: Is it Reasonable?*, 14 Int. J. Refug. Law 4, 5 (2002).

when assessing a person's asylum claim.¹⁴ It is important to note that almost all African state parties to the Refugee Convention, which form about a third of all state parties, are also party to the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 ("1969 OAU Convention"), the definition of which explicitly rules out the possibility of an IPA.¹⁵

The IPA inquiry, which consists of determining whether there is indeed an alternative location in the country of nationality where someone can receive national protection, has been conducted very inconsistently over the years. In particular, the level of human rights protection that is considered to be necessary in the IPA area differs from court to court and even the same jurisdiction sometimes makes different rulings on similar matters.¹⁶ In many cases, asylum seekers have been sent back to an IPA zone where there are serious human rights violations.¹⁷ The research question that this thesis aims to answer is: What is the required level of human rights protection in the IPA area under the Refugee Convention? This question is a very important one, as the answer will determine the outcome of the asylum claims of many applicants. If a high level of protection is required, it would disqualify any IPA area in which there is a lack of civil, political and socio-economic rights.

This thesis argues that a high level of human rights protection in the IPA zone is required under the Refugee Convention. The IPA inquiry must be in line with other provisions of the Convention, which means that a human rights assessment in the IPA zone is needed to find whether national protection is available and it must be assessed whether there are any factors that

¹⁴ Andreas Zimmermann & Claudia Mahler, *Article 1 A, Para. 2 1951 Convention*, in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 281, 449 (Andreas Zimmermann ed., 2010).

¹⁵ The Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 ("OAU Convention") has been ratified by 46 states, which is almost a third of the number of state parties to the Refugee Convention (148) (African Union, List of Countries Which Have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 2 (2019), available at <https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf>; United Nations High Commissioner for Refugees, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol 1 (2015), available at <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>). The IPA does not exist under the refugee definition of the OAU Convention, because it states that as long as persecution or one of the other recognized reasons for refugee status take place "in either part or the whole of his country of origin," the person should be recognized as a refugee (Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa art. I(2), Sept. 10, 1969, 1001 U.N.T.S. 45).

¹⁶ Hathaway & Foster, *supra* note 1, at 387.

¹⁷ See English High Court of Justice (Queen's Bench Division), *R v. Secretary of State for the Home Department, ex parte Yurekli* [1990], ImmAR 334; House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5.

could compel an asylum seeker to return to the area of persecution. Such factors may include violations of socio-economic rights. This thesis argues that if an asylum state returns someone to a proposed IPA area where these rights are violated, that state violates the principle of *non-refoulement*, as there is a high risk that the person would return to the area of persecution.

Chapter II of this thesis discusses the two current approaches to assessing the required level of human rights protection in the IPA area. It analyzes two cases of the House of Lords of the United Kingdom and two cases of the Refugee Status Appeals Authority (RSAA) of New Zealand. Based on this analysis, the thesis argues that the latter approach requires a higher level of human rights protection in the IPA area, but that the argumentation for this approach is not very strong. Chapter III then goes in-depth on why a high level of human rights protection in the IPA zone is required under the Refugee Convention. A contextual interpretation of the legal basis of the IPA inquiry makes clear that this inquiry must consider human rights in the IPA zone not only because that is an essential part of the meaning of “national protection” under the Refugee Convention, but also because there is a risk of asylum seekers being compelled to return to the area of persecution in the case of a lack of human rights protection in the IPA area, which violates the principle of *non-refoulement* as stipulated in Article 33(1) of the Refugee Convention. Chapter IV expands on this latter argument by exploring how a lack of protection of three socio-economic rights can result in *refoulement*. Specifically, this chapter argues that when such rights are violated, people rely heavily on support from their own family and community. For asylum seekers who are sent to an IPA area in a different part of their country of nationality, there is thus an incentive to return to the area of persecution if family and community support is available there, which is likely to be the case if that area was the last place of habitual residence of the asylum seeker.

II – Current Approaches to Assessing the Required Level of Human Rights Protection in the IPA Area

Since the 1980s, when Western courts first began to apply the IPA inquiry, two distinct approaches emerged to assess the required level of human rights protection in the IPA area. The first approach inquires whether the level of protection in the IPA zone is such that it would be “reasonable” for the asylum seeker to return there and the second approach assesses whether the level of protection is sufficient under the Refugee Convention. This chapter will explore and contrast these two approaches and their implications for asylum seekers for whom an IPA is being considered will be discussed. First, these two approaches will be explored more in detail, including how they developed over time. Second, two cases of the House of Lords of the United Kingdom will be explored in which the court used the reasonableness approach. These will be contrasted to two cases of the RSAA of New Zealand, which has adopted the protection-based approach. It will be argued, on the basis of these cases, that the House of Lords’ approach requires almost no human rights protection in the IPA area. The protection-based approach of the RSAA, in contrast, requires a much higher level of human rights protection in the IPA zone. This is more consistent with the obligations under the Refugee Convention, as will be explained further in chapter III.

A – The Reasonableness and Protection-Based Approaches to the IPA Inquiry

There are two main approaches that judicial authorities use for assessing whether the level of protection in the IPA area is sufficient. First, there is the reasonableness approach. This essentially means that it should be reasonable for the applicant to move to the IPA area. This applies not only to the level of protection in the IPA zone, but also, for example, to whether the asylum seeker has family residing there.¹⁸ As the UNHCR stipulates in its guidelines on the IPA, it would not be reasonable for a person to relocate if “respect for basic human rights standards, including in particular non-derogable rights,¹⁹ is clearly problematic.”²⁰ With regard to the

¹⁸ United Nations High Commissioner for Refugees, 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 ¶ 25 (2003), available at <https://www.unhcr.org/publications/legal/3f28d5cd4/guidelines-international-protection-4-internal-flight-relocation-alternative.html>.

¹⁹ Non-derogable rights refer to the rights stipulated in the International Covenant on Civil and Political Rights from which no derogation is allowed in time of public emergency under Article 4(2). These rights are the right to life

relevance of socio-economic conditions in assessing the reasonableness of an IPA, the UNHCR is quite ambiguous. On the one hand, the guidelines note that if someone cannot earn a living or access accommodation and adequate medical care, “the area may not be a reasonable alternative.”²¹ On the other hand, the UNHCR considers that, compared to the area of habitual residence of the asylum seeker, “a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable.”²² It also appears to call for a comparison between the living standards throughout the country of nationality: “Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?”²³

Whether or not an IPA is “reasonable” has been interpreted differently by scholars and courts alike and has led to a significant disparity in the standard of protection that is considered to be necessary in the IPA area.²⁴ Some scholars have criticized this approach for being vague and indeterminate.²⁵ Frelick convincingly argues that for the person conducting the IPA inquiry in the asylum country certain conditions may not seem unreasonable, but they are for the asylum seeker who will experience these conditions up close.²⁶ Similarly, Hathaway and Foster argue

(Article 6), right to be free from torture and cruel, inhuman or degrading treatment or punishment (Article 7), right to be free from slavery and servitude (Article 8(1) and (2)), right to be free from imprisonment on the ground of inability to fulfil a contractual obligation (Article 11), right to be free from being penalized for an act or omission which did not constitute a criminal offence at the time it was committed and from a heavier penalty being imposed than was applicable at the time when the criminal offence was committed (Article 15), right to be recognized as a person before the law (Article 16) and the right to freedom of thought, conscience and religion (Article 18) (International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171). Regarding economic, social and cultural rights, there are also certain “core obligations” that a state party must fulfill regardless of the constraints on its resources. Some regard these rights to be non-derogable as well. For example, the Committee on Economic, Social and Cultural Rights has stated in General Comment 14 that with regard to the right to health, it is a core obligation that a state must ensure “the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.” It furthermore states that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.” (United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) ¶ 47 (2000), available at <https://www.refworld.org/docid/4538838d0.html>). However, most often the term “non-derogable rights” refers to the rights listed in Article 4(2) of the ICCPR. See David L. Richard & K. Chad Clay, *An Umbrella with Holes: Respect for Non-Derogable Human Rights During Declared States of Emergency, 1996-2004*, 13 Hum. Rights Rev. 443, 445 (2012).

²⁰ UNHCR, *supra* note 18, at ¶ 28.

²¹ *Id.* at ¶ 29.

²² *Id.*

²³ *Id.* at ¶ 7.

²⁴ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 124 (2007).

²⁵ See Hathaway & Foster, *supra* note 1, at 386.

²⁶ Bill Frelick, *Down the Rabbit Hole: The Strange Logic of Internal Flight Alternative*, in *World Refugee Survey* 1, 23 (U.S. Committee for Refugees, 1999).

that what is considered “reasonable” is essentially in the eye of the beholder and that the subjective nature of this term has allowed courts to pursue migration control objectives under the guise of refugee law.²⁷ They concede that it is *possible* for human rights considerations to be part of the reasonableness-test, but they note that it is problematic that this depends on the subjective views of the decision-maker.²⁸

Indeed, the reasonableness approach has not led to a uniform approach to the required level of protection in the IPA area. Some courts which applied the reasonableness approach have required a rather high level of human rights protection in the IPA zone.²⁹ However, courts have usually used the reasonableness approach in a more restrictive way.³⁰ In *R v. Secretary of State for the Home Department, ex parte Yurekli*, for example, the House of Lords found it reasonable for a Kurdish asylum seeker to relocate to Istanbul even though he would not be able to find employment there.³¹ Some courts have equated “unreasonable” with “unduly harsh” and have required quite severe human rights violations in the alternative area before they deemed it “unduly harsh” to send the applicant to that area.³² For example, the Federal Court of Appeal of Canada has held that claimants must meet a “very high threshold” to establish that it is unduly harsh for them to relocate to the IPA area, which requires “nothing less than existence of conditions which would jeopardize the life and safety of a claimant.”³³

The other approach to assessing the required level of protection in the IPA zone is the protection-based approach. This approach was developed by Hathaway and Foster during the 1990s and, rather than inquiring whether it is reasonable for an asylum seeker to relocate to an

²⁷ Hathaway & Foster, *supra* note 1, at 387; James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 353 (2014).

²⁸ James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 360-361 (2014).

²⁹ See Court of Appeal of England and Wales (Civil Division), *HC v. Secretary of State for the Home Department* [2005], EWCA Civ 893; United States Court of Appeals for the Ninth Circuit, *Boer-Sedano v. Gonzales* [2005], 418 F.3d 1082.

³⁰ See English High Court of Justice (Queen’s Bench Division), *R v. Secretary of State for the Home Department, ex parte Yurekli* [1990], ImmAR 334; House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5; Court of Appeal (Civil Division), *R v. Secretary of State for the Home Department, ex parte Robinson* [1997], FC3 96/7394/D; Federal Court of Canada, *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1993], A-81-92.

³¹ English High Court of Justice (Queen’s Bench Division), *R v. Secretary of State for the Home Department, ex parte Yurekli* [1990], ImmAR 334.

³² See Court of Appeal (Civil Division), *R v. Secretary of State for the Home Department, ex parte Robinson* [1997], FC3 96/7394/D; Federal Court of Canada, *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1993], A-81-92.

³³ Canadian Federal Court of Appeal, *Ranganathan v. Canada (Minister of Citizenship and Immigration)* [2001], A-348-99.

IPA area, seeks to assess whether there is a sufficient level of protection in that area under the Refugee Convention.³⁴ In order to determine what this level should be, Hathaway and Foster looked at the preamble of the Refugee Convention to determine the meaning of the word “protection.”³⁵ The preamble mentions that the key aim of the Refugee Convention is to “extend the scope of and the protection accorded by [previous international agreements relating to the status of refugees] by means of a new agreement.”³⁶ They conclude, therefore, that “protection” in the Refugee Convention refers to the type of legal rights that are set out by the Refugee Convention in Articles 2 to 33.³⁷ In practice, this means that in the IPA area, basic civil, political and socio-economic rights such as the right of association, to employment and health care should be protected as well.³⁸ Hathaway incorporated this rule in the Michigan Guidelines on the Internal Protection Alternative in 1999, which were intended to guide states in how to conduct IPA inquiries.³⁹

This approach has been criticized by Marx, who makes a persuasive argument that the rights enshrined in the Refugee Convention cannot easily be transposed to the IPA inquiry.⁴⁰ This is because these rights are not absolute, but measured against the situations of others.⁴¹ For example, the right to employment, as stipulated in Article 17 of the Convention, should be fulfilled to the extent that refugees are treated in the same way as “nationals of a foreign country in the same circumstances.”⁴² Indeed, such a right cannot be translated to the context of an IPA in the country of nationality. While I agree with Hathaway and Foster that a protection-based approach is to be preferred above the reasonableness approach, I do not believe that the argument deployed by Hathaway and Foster, as to why the protection-based approach should be used, is convincing. Chapter III will offer a different justification for why a high level of protection is required in the IPA area.

³⁴ Hathaway & Foster, *supra* note 28, at 354.

³⁵ *Id.* at 355.

³⁶ Convention Relating to the Status of Refugees preamble, Jul. 28, 1951, 189 U.N.T.S. 137.

³⁷ Hathaway & Foster, *supra* note 28, at 355.

³⁸ *Id.* at 356.

³⁹ James C. Hathaway, *The Michigan Guidelines on the Internal Protection Alternative*, 21 Mich. J. Int'l L. 134, 134 (1999).

⁴⁰ Reinhard Marx, *The Criteria of Applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures*, 14 Int. J. Refug. Law 179, 204 (2002).

⁴¹ *Id.*

⁴² Convention Relating to the Status of Refugees art. 17(1), Jul. 28, 1951, 189 U.N.T.S. 137.

B – The Reasonableness Approach of the House of Lords and the Protection-Based Approach of the RSAA

The reasonableness approach is by far the most commonly used approach in IPA inquiries. It is used not only by the UNHCR, which applies it in the 50 to 60 states in which it conducts refugee status determination on behalf of the local governments,⁴³ but also by the vast majority of asylum authorities and courts in Western states.⁴⁴ The courts of the United Kingdom have applied the reasonableness approach since they first started conducting IPA inquiries in the mid-1980s.⁴⁵ One of these courts was the House of Lords, which functioned as the final court of appeal in the United Kingdom, until the newly established Supreme Court took over that function in 2009.⁴⁶ This chapter will examine two cases of the House of Lords, namely *Januzi v. Secretary of State for the Home Department* (“*Januzi*”) and *Secretary of State for the Home Department v. AH (Sudan)* (“*AH (Sudan)*”). The reasons that these two cases are explored is that in these judgments, the House of Lords elaborated quite extensively on the level of protection necessary in the IPA area. Therefore, an examination of these cases will allow for a better understanding of what the reasonableness approach entails in practice and which implications it has for the required level of human rights protection in the IPA zone.

The protection-based approach has only been adopted by the RSAA of New Zealand.⁴⁷ The RSAA decided on the appeals of asylum applicants who had been rejected by the Refugee Status Branch of the New Zealand Immigration Service.⁴⁸ In 2010, it was replaced by the Immigration and Protection Tribunal.⁴⁹ The RSAA used the reasonableness approach for the IPA inquiry

⁴³ United Nations High Commissioner for Refugees, *Refugee Status Determination*, <https://www.unhcr.org/refugee-status-determination.html>.

⁴⁴ See House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5; Federal Court of Canada, *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992], 1 FC 706, 711; Federal Court of Canada, *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1993], 109 DLR (4th) 682; New Zealand Court of Appeal, *Butler v Attorney-General* [1999], NZAR 205; Federal Court of Australia, *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994], 52 FCR 437.

⁴⁵ Hathaway & Foster, *supra* note 1, at 362 (“In *R. v. Immigration Appeal Tribunal (IAT), ex parte Jonah*, [1985] Imm AR 7, the English High Court of Justice (Queen’s Bench Division) (QBD) suggested that a trade unionist from Ghana who faced persecution in his previous home might be denied refugee status if he could live safely in a distant village. The Court ultimately granted asylum because relocation would have forced him to be separated from his wife (an early application of the reasonableness test).”)

⁴⁶ UK Parliament, *Judgments*, <https://www.parliament.uk/about/how/business/judgments/>.

⁴⁷ Zimmermann & Mahler, *supra* note 14, at 455-456; Bríd Ní Ghráinne, *The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?*, 27 Int. J. Refug. Law 29, 42 (2015).

⁴⁸ Refworld, *New Zealand: Refugee Status Appeals Authority*, https://www.refworld.org/publisher/NZL_RSAA.html.

⁴⁹ Refworld, *New Zealand: Immigration and Protection Tribunal*, [https://www.refworld.org/publisher,NZ_IPT,,FJI,,0.html](https://www.refworld.org/publisher/NZ_IPT,,FJI,,0.html).

between 1991 and 1999, when it adopted the protection-based approach.⁵⁰ Two cases of this authority will be analyzed in this chapter: *Refugee Appeal No. 71684/99* (“71684/99”) and *Refugee Appeal No. 76044* (“76044”). 71684/99 is significant, in that it was the first case in which the RSAA used the protection-based approach. In 76044 the RSAA gave a response to the House of Lords’ rulings in *Januzi* and *AH (Sudan)*.

1. Januzi

On February 15, 2006, the House of Lords issued the judgment in *Januzi*.⁵¹ The case involved appeals by four appellants.⁵² Januzi was an Albanian Kosovar who had fled ethnic cleansing in his home town Mitrovica in Kosovo.⁵³ The three other appellants, Hamid, Gaafar and Mohammed, were all non-Arab Darfuris who had fled Darfur because of persecution by Arab tribes.⁵⁴ For all of them, the asylum application had been rejected on the grounds that there was an IPA in their country of nationality, with Pristina being considered an IPA for Januzi and Khartoum for the other three appellants.⁵⁵

The appellants claimed that it would be unreasonable for them to return to the IPA.⁵⁶ Januzi’s main argument in his appeal was that it would be unreasonable for him to relocate to Pristina as he would not be able to receive proper medical treatment there for his mental health problems.⁵⁷ This argument mainly rested on a UNHCR report that stated that in Kosovo access “to medical treatment by internally displaced persons [IDPs] is limited for anything beyond basic or emergency medical services by the fact that payment is required at the time of treatment.”⁵⁸ It also noted that there was a severe lack of psychiatric services in Kosovo and not a single facility where persons with acute mental health problems could receive treatment.⁵⁹ According to Januzi’s counsel, his socio-economic rights would be violated there, not only because of the lack of available medical treatment, but also because Januzi would “be required to live in a place where he has no family or friends or community ties, no independent means of subsistence and

⁵⁰ Refugee Status Appeals Authority, *Refugee Appeal No. 71684/99* [1999], ¶¶ 37-38.

⁵¹ House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5.

⁵² *Id.* at ¶ 1.

⁵³ *Id.* at ¶ 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at ¶¶ 30-32.

⁵⁸ *Id.* at ¶ 31.

⁵⁹ *Id.*

no prospect of gainful employment.”⁶⁰ The other three appellants argued that they would be discriminated against in Khartoum⁶¹ and that, as most IDPs from Darfur who relocated to Khartoum would be required to live in camps, it would be unreasonable for them to relocate there.⁶² The counsel of Mohammed specifically noted that IDPs in Khartoum were discriminated against, risked detention and ill-treatment and that the government was even pressuring IDPs to return to Darfur.⁶³

Lord Bingham, who wrote the introductory opinion of the case, noted at the beginning of his opinion that the “common issue in the appeals is whether, in judging reasonableness and undue harshness in this context [of the IPA inquiry], account should be taken of any disparity between the civil, political and socio-economic human rights” enshrined in the international human rights treaties and “those which [the asylum seeker] would enjoy at the place of relocation.”⁶⁴ He acknowledged that some scholars and courts, including the RSAA, had held that the rights as enshrined in the Refugee Convention should be protected in the proposed IPA area, which he called the “Hathaway/New Zealand rule.”⁶⁵

He contrasted this with the approach taken by Canadian courts and the Court of Appeal of England and Wales, which only require a level of protection to the extent that someone does not suffer “undue hardship” there.⁶⁶ He then advanced five reasons for why he agreed with the latter approach: 1) the Refugee Convention does not define the rights of asylum seekers in their country of nationality, 2) related to this, while the preamble of the Convention mentions the importance of human rights, it cannot be implied that this concerns the human rights of asylum seekers in their country of nationality, 3) the Qualification Directive of the European Union, which provided some guidance for the Union’s Member States in the IPA inquiry, did not mention the relevance of human rights in the IPA area,⁶⁷ 4) consideration of human rights in the

⁶⁰ *Id.* at ¶ 52.

⁶¹ *Id.* at ¶ 2.

⁶² *Id.* at ¶¶ 40, 43.

⁶³ *Id.* at ¶¶ 56-57.

⁶⁴ *Id.* at ¶ 1.

⁶⁵ *Id.* at ¶¶ 9-11, 13.

⁶⁶ *Id.* at ¶¶ 12-13.

⁶⁷ Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Sept. 30 2004, OJ L. 304/12-304/23. Article 7(2) of this Directive states that “[p]rotection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detention, prosecution and punishment of acts constituting persecution or serious harm, and the

IPA inquiry does not form part of customary international law and 5) considering rights in the IPA area would “entitle” someone who was persecuted “to escape, not only from that persecution, but from the deprivation to which his home country is subject.”⁶⁸ Lord Bingham also noted the above-cited UNHCR Guidelines, which he called “helpful” as they focus on the “standards prevailing generally in the country of nationality.”⁶⁹

Lord Hope, similar to Lord Bingham, stated that whether it would be unduly harsh or unreasonable for a claimant to live in an IPA area “is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights.”⁷⁰ He warned that requiring this would invite a comparison between the conditions in the IPA area and those in the country of asylum.⁷¹ He continued by saying that as long as the asylum seeker can “live a relatively normal life there judged by the standards that prevail in his country of nationality generally,” it would not be unreasonable for that person to relocate to that IPA zone.⁷² In other words, if human rights are violated throughout the country of nationality, including in the IPA area, it would still be considered reasonable for someone to be relocated to the IPA area.

Ruling on Januzi’s appeal, Lord Hope agreed with the ruling by the Court of Appeal that the violations of Januzi’s human rights were present not only in the IPA area, but throughout Kosovo.⁷³ He specifically noted that “the difficulties, both in terms of their likely effect on him and also of the availability of treatment for his mental condition should it deteriorate, extended throughout Kosovo” and that there was no evidence that the issues he “would face in obtaining accommodation and enjoying other civil, political or socio-economic rights, were not a pan-Kosovo problem also.”⁷⁴ Therefore, it would not be unreasonable for him to relocate to

applicant has access to such protection.” The Recast Qualification Directive, which the European Union adopted in 2011 as the successor of the Qualification Directive, has left this provision largely unchanged, only adding a sentence at the beginning: “Protection against persecution or serious harm must be effective and of a non-temporary nature.” (Council of the European Union, 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) art 7(2), Dec. 20, 2011, OJ L. 337/9-337/26.

⁶⁸ House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5, ¶¶ 15-19.

⁶⁹ *Id.* at ¶ 20.

⁷⁰ *Id.* at ¶ 45.

⁷¹ *Id.* at ¶ 46.

⁷² *Id.* at ¶ 47.

⁷³ *Id.* at ¶¶ 53-54.

⁷⁴ *Id.* at ¶ 53.

Pristina.⁷⁵ When discussing the cases of Mohammed, Hamid and Gaafar, Lord Hope noted that, while the “almost total absence of civil, political and socio-economic rights which those in the camps experience is not in itself . . . a ground for holding that it would be unduly harsh” for the appellants to return there, he did acknowledge that they faced a risk of persecution there and a risk of being forced by the state to return to Darfur.⁷⁶ Therefore, he allowed their appeals to be remitted to the Asylum and Immigration Tribunal (AIT).⁷⁷

2. AH (Sudan)

After the ruling in *Januzi*, the AIT reconsidered the cases of the three Sudanese appellants.⁷⁸ The AIT essentially repeated its previous finding that it would not be unreasonable for the appellants to return to Khartoum and, with regard to the relevance of the level of human rights protection in the IPA zone, noted that “[a]t most all that can be expected is that basic human rights standards, in particular non-derogable rights, are not breached.”⁷⁹ It furthermore held that even if the claimants would be forced to live in IDP camps near Khartoum, the conditions there are “not significantly worse than the subsistence level existence in which people in Sudan generally live” and therefore it would not be unreasonable for them to relocate there.⁸⁰ Therefore, the AIT rejected their asylum applications again.⁸¹ The appellants appealed to the Court of Appeal and this time, the Court of Appeal ruled in their favor, as it considered that the AIT had made two legal errors in the way it had conducted the IPA inquiry.⁸² Specifically, it held that the AIT’s argument that the level of human rights protection in the IPA area would only be unreasonable if non-derogable rights are not protected was an error of law and in contravention of *Januzi*.⁸³ Furthermore, it held that it was a legal error for the AIT to compare the conditions in the country as a whole with those in the IPA zone, rather than the conditions in the place of habitual

⁷⁵ *Id.* at ¶¶ 53-54.

⁷⁶ *Id.* at ¶ 59.

⁷⁷ *Id.* at ¶ 60.

⁷⁸ House of Lords, *Secretary of State for the Home Department v. AH (Sudan)* [2007], UKHL 49, ¶ 1.

⁷⁹ *Id.* at ¶ 6.

⁸⁰ *Id.* at ¶ 7.

⁸¹ *Id.* at ¶ 2.

⁸² *Id.*

⁸³ *Id.* at ¶ 8.

residence with those in the IPA zone.⁸⁴ The Secretary of State appealed and the case was therefore brought before the House of Lords for the second time in October 2007.⁸⁵

In the House of Lords' judgment, issued on November 14, 2007, three important points were made. First, as Lord Bingham wrote in his opinion, the House of Lords considered that the goal of the Refugee Convention is "not to procure a general levelling-up of living standards around the world . . ."⁸⁶ Baroness Hale agreed with Lord Bingham's opinion in *Januzi* that persons who are persecuted "cannot take advantage of past persecution to achieve a better life in the country to which they have fled."⁸⁷ Lord Brown restated the argument that those who are persecuted are "in a sense the lucky ones" as they "can escape to a richer and safer country."⁸⁸

Second, Lord Bingham, Lord Hope and Baroness Hale did express some concerns about the fact that the AIT appeared to hold that unless there is a lack of protection of non-derogable rights in the IPA area, this IPA should be considered reasonable.⁸⁹ They agreed that this would indeed be in contravention of the House of Lords' judgment in *Januzi*.⁹⁰ However, they all expressed the opinion that, as an expert tribunal, the AIT should be given the benefit of the doubt.⁹¹ Therefore, the Court of Appeal should have respected the decision of the AIT, unless it had been "quite clear" that it had misapplied the law.⁹²

Third, regarding the comparison of conditions, Lord Bingham stated that the AIT had been correct in comparing the living conditions in the IPA area with those in the country as a whole.⁹³ Baroness Hale was the only member of the House of Lords who criticized the AIT, as she considered the AIT's comparison of the living conditions in the IPA area with "the lives of the poorest of the poor" to be the wrong approach.⁹⁴ Lord Brown agreed with Lord Bingham and took it further by stating that is not necessary to find that a majority of the population of the country of nationality lives at subsistence level for it to be considered reasonable for asylum seekers to return to an IPA zone, but rather if "a significant minority suffer equivalent hardship

⁸⁴ *Id.*

⁸⁵ *Id.* at ¶ 1.

⁸⁶ *Id.* at ¶ 5.

⁸⁷ *Id.* at ¶ 27.

⁸⁸ *Id.* at ¶ 32.

⁸⁹ *Id.* at ¶¶ 11, 19, 23.

⁹⁰ *Id.* at ¶¶ 9, 22.

⁹¹ *Id.* at ¶¶ 11, 30, 43.

⁹² *Id.* at ¶ 30.

⁹³ *Id.* at ¶¶ 13-14.

⁹⁴ *Id.* at ¶ 28.

to that likely to be suffered by a claimant on relocation and if the claimant is as well able to bear it as most,” this person’s asylum application can be rejected on the ground that it is reasonable for that person to relocate to the IPA area.⁹⁵ As the House of Lords held that there had been no error of law in the AIT’s judgment, it allowed the Secretary of State’s appeal and the asylum applications of Mohammed, Hamid and Gaafar were rejected.⁹⁶

3. 71684/99

The ruling of *71684/99* was made by the RSAA on October 29, 1999.⁹⁷ The appellant in this case was an Indian national who had been living in the Punjab region of India and who was a member of the Sikh religious community.⁹⁸ The Refugee Status Branch had rejected his asylum application on the basis that he could relocate to a different place in India where he would not be persecuted.⁹⁹ He argued that it would be unreasonable for him to relocate, because of his prior persecution at the hands of the authorities.¹⁰⁰ Furthermore, he claimed that, because of his Punjabi accent, he would not be able to live and work outside of the Punjab because people would be suspicious of him.¹⁰¹

In deciding on the appellant’s case, the RSAA discussed the concept of IPA at some length.¹⁰² It held that the reasonableness approach is problematic “because of its potential looseness” and that it “facilitates the intrusion of factors not related to the purposes of the Refugee Convention.”¹⁰³ Instead, it held that there must be “meaningful internal protection” which must go further than the mere absence of persecution.¹⁰⁴ It must also form protection against risks, which “have the potential of forcing the refugee claimant back to the original area of persecution.”¹⁰⁵ It agreed with the view of Hathaway and Foster that the rights listed in the Refugee Convention provide guidance for assessing the level of protection in the IPA zone.¹⁰⁶ It stated that “refugee status should only be lost if the individual can access in his or her own

⁹⁵ *Id.* at ¶ 42.

⁹⁶ *Id.* at ¶ 43.

⁹⁷ Refugee Status Appeals Authority, *Refugee Appeal No. 71684/99* [1999].

⁹⁸ *Id.* at ¶ 1.

⁹⁹ *Id.* at ¶ 5.

¹⁰⁰ *Id.* at ¶ 6.

¹⁰¹ *Id.* at ¶ 18.

¹⁰² *Id.* at ¶¶ 28-74.

¹⁰³ *Id.* at ¶ 53.

¹⁰⁴ *Id.* at ¶ 56.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶¶ 57-62.

country of origin the same level of protection he or she would be entitled to under the Refugee Convention in one of the state parties to the Convention.”¹⁰⁷ The benefit of this approach, the RSAA explained, is that it allows for a more objective and fair IPA inquiry to be conducted.¹⁰⁸ Following this, the RSAA explicitly adopted the Michigan Guidelines as formulated by Hathaway.¹⁰⁹

The RSAA then applied the protection-based approach to the case of the appellant.¹¹⁰ It took into consideration whether there were risks in the proposed IPA zone which could drive the appellant back to the area of persecution. In that context, it noted that “Sikhs outside Punjab are predominantly urban and generally prosperous . . . They control important trades and occupy a predominant position within the central and regional administration.”¹¹¹ It also disputed the appellant’s claim that Sikhs were viewed with suspicion, and cited a report that stated that “Sikhs are typically an economically thriving group and tend to be regarded with envy . . .”¹¹² Therefore, the RSAA concluded that the appellant would not “encounter factors which have the potential of forcing him back to the original area of persecution.”¹¹³

Similarly, the RSAA noted that “the appellant will have the benefit of access to the same basic norms of civil, political and socio-economic rights which have allowed the numerous Sikh communities outside Punjab to generally prosper.”¹¹⁴ Therefore, the RSAA concluded that, as the appellant could access meaningful domestic protection, he could relocate to an IPA area and his asylum application was rejected.¹¹⁵

4. 76044

On September 11, 2008, the RSAA issued its decision in *76044*.¹¹⁶ The appellant was an Alevi Kurd from southeastern Turkey who had been forced into marriage and was physically abused by her husband.¹¹⁷ She divorced him and filed an asylum application in New Zealand because she was afraid that if she were to return to Turkey, she would be killed by her ex-husband, his family

¹⁰⁷ *Id.* at ¶ 61.

¹⁰⁸ *Id.* at ¶ 62.

¹⁰⁹ *Id.* at ¶¶ 65-67.

¹¹⁰ *Id.* at ¶¶ 75-81.

¹¹¹ *Id.* at ¶ 76.

¹¹² *Id.* at ¶ 77.

¹¹³ *Id.* at ¶ 78.

¹¹⁴ *Id.* at ¶ 79.

¹¹⁵ *Id.* at ¶¶ 80-81.

¹¹⁶ Refugee Status Appeals Authority, *Refugee Appeal No. 76044* [2008].

¹¹⁷ *Id.* at ¶¶ 3-6.

or her own family.¹¹⁸ Her first application, which had been on a different ground, had been rejected and her second application came before the RSAA.¹¹⁹

The RSAA reiterated that the protection-based approach is to be preferred over the reasonableness approach.¹²⁰ It agreed with Hathaway and Foster that the term “reasonableness” is “vague and open to vastly divergent subjective interpretation.”¹²¹ It criticized the UNHCR Guidelines for maintaining the reasonableness approach and for placing “insufficient emphasis on rights” in the IPA area.¹²² The RSAA noted that this is odd, given the fact that the UNHCR noted in a different handbook that “protection is, fundamentally, about rights.”¹²³

The RSAA then went on to critique the decisions of the House of Lords in *Januzi* and *AH (Sudan)*. It first stated that the House of Lords had made a straw man fallacy by claiming that the “Hathaway/New Zealand rule” consisted of applying in the IPA inquiry the rights regime of Articles 2 to 33 of the Refugee Convention as a prescription.¹²⁴ Rather, the RSAA explained that it was supposed to serve as a guide, from which “decision-makers are to take inspiration . . . as a way of defining affirmative protection in the refugee context when deciding whether recognition of refugee status is to be withheld.”¹²⁵ It also disagreed with the claim made by the House of Lords in *Januzi* that the protection-based approach has no basis in the Refugee Convention. It stated, similar to what Hathaway and Foster also asserted, that because the Refugee Convention defines access to international protection as entailing the provision of the rights set out in Articles 2 to 33, the same rights must be used as a benchmark for assessing whether there is meaningful national protection available to the asylum seeker.¹²⁶ Furthermore, the RSAA noted the peculiarity of Lord Bingham first rejecting the “Hathaway/New Zealand rule” and then endorsing the UNHCR Guidelines which take the provision of civil, political and socio-economic rights into consideration in the IPA inquiry.¹²⁷

¹¹⁸ *Id.* at ¶ 17.

¹¹⁹ *Id.* at ¶¶ 11-14.

¹²⁰ *Id.* at ¶ 134.

¹²¹ *Id.* at ¶ 136.

¹²² *Id.* at ¶ 138.

¹²³ *Id.* (The RSAA cited: United Nations High Commissioner for Refugees, Handbook for the Protection of Women and Girls ¶ 4.1.2 (2008), available at <https://www.unhcr.org/protection/women/47cfa9fe2/unhcr-handbook-protection-women-girls-first-edition-complete-publication.html>).

¹²⁴ *Id.* at ¶ 142.

¹²⁵ *Id.* at ¶¶ 140, 142.

¹²⁶ *Id.* at ¶ 147.

¹²⁷ *Id.* at ¶¶ 150-152.

The RSAA critiqued the House of Lords' approach of comparing the living conditions in the IPA area with that of the country of nationality at large.¹²⁸ They illustrated the negative implications of this approach by citing the AIT's decision in *AA (Uganda) v Secretary of State for the Home Department* ("AA (Uganda)"). In that case, the AIT held that a Ugandan woman had an IPA in Kampala, even though she would have almost no chance of obtaining employment in the formal sector and she would most likely be forced to work as a prostitute.¹²⁹ The AIT, quoting the previously-cited opinion of Lord Hope in *Januzi*, held that it was still reasonable for her to relocate to Kampala as there are "many young women" who, "without access to social or familial networks have great difficulty finding employment and . . . have difficulty finding accommodation without employment . . ."¹³⁰ This decision was subsequently annulled by the Court of Appeal on the basis that "enforced prostitution" does not fall "within the category of normal country conditions that the refugee must be expected to put up with."¹³¹ The RSAA held that the protection-based approach would entail a more objective and consistent determination of whether the level of protection in the IPA area is sufficient.¹³²

After this critique of the decisions by the House of Lords, the RSAA applied the protection-based approach to the case at hand. It first noted that in Turkey there is a lack of available shelters for female victims of domestic violence such as the appellant.¹³³ It noted that the appellant, because of her ethnicity, gender, age and lack of education would face significant problems in finding shelter, employment and food.¹³⁴ It cited a report on the prevailing discrimination in the Turkish labor market to support that claim.¹³⁵ It noted that in these circumstances, "there is a real risk that the appellant might feel driven to seek the assistance of her family in the hope that on seeing her predicament they will withdraw the threats to kill her and offer assistance."¹³⁶ The likelihood of this was particularly great because of the lack of protection of socio-economic rights in Turkey, including the requirement that someone needs to be legally employed, self-employed or the dependent of someone in that situation in order to be

¹²⁸ *Id.* at ¶ 164.

¹²⁹ *Id.* at ¶ 166.

¹³⁰ *Id.*

¹³¹ *Id.* at ¶ 167.

¹³² *Id.* at ¶ 169.

¹³³ *Id.* at ¶ 182.

¹³⁴ *Id.* at ¶ 184.

¹³⁵ *Id.*

¹³⁶ *Id.*

covered by a social security program.¹³⁷ For these reasons, the RSAA ruled that the level of protection in the proposed IPA zone was insufficient and that she should be granted asylum in New Zealand.¹³⁸

5. Discussion

From these four cases, the vast differences between the reasonableness and protection-based approaches become clear. The House of Lords, which used the reasonableness approach in *Januzi* and *AH (Sudan)*, rejected the appeal cases of all four appellants on the basis that it would be “reasonable” for them to return to the IPA area. It dismissed the relevancy of human rights protection in the IPA zone beyond that of the protection of rights which are enjoyed by people throughout the country of nationality, even if that is a very low level. Lord Brown took it further and held that as long as the conditions in the IPA zone are no more harsh as those experienced by a significant minority of the country of nationality, it should still be considered reasonable for them to relocate to the IPA zone.

This approach requires only a very low level of human rights protection in the IPA area for it to be considered “reasonable” for someone to relocate there, as it compares the level of human rights protection in the proposed IPA area with the situation of those who face the most hardship in the country of nationality. As the House of Lords’ comments on the AIT’s decision on the appeals of Mohammed, Hamid and Gaafar show, it appears that as long as non-derogable rights are protected in the IPA zone, it would already be reasonable for someone to relocate there.

The reasonableness approach as it is currently applied in the IPA inquiry makes this inquiry very arbitrary, because it is unclear what would count as the type of hardship that someone is “as well able to bear . . . as most,” and what does not. The cases of *AA (Uganda)*, *Januzi* and *AH (Sudan)* reflect this. The AIT considered in *AA (Uganda)* that enforced prostitution is a type of hardship that someone can be expected to put up with, while the Court of Appeal disagreed. The House of Lords, in the cases of *Januzi* and *AH (Sudan)*, evidently considered that a lack of access to basic medical treatment for mental health problems and a life below subsistence level in an IDP camp with a high incidence of discrimination and detention are the types of hardship that ought to be put up with.

¹³⁷ *Id.* at ¶ 186.

¹³⁸ *Id.* at ¶ 189.

The critique made by Hathaway and Foster that the reasonableness approach facilitates the pursuit of migration control objectives by courts certainly seems valid for the judgments by the House of Lords in *Januzi* and *AH (Sudan)*. First, the requirement of only a low level of human rights protection in the IPA area would enable the court to reject a large number of asylum seekers from the Global South. Second, the House of Lords made it quite explicit in its judgments that the fact that someone would, as a result of persecution, gain legal access to a country with higher living standards through asylum, should have a negative bearing on the asylum application of that person. Human rights violations in the IPA area would not suffice for it to be considered unreasonable for asylum seekers to relocate there as that would allow asylum seekers to “take advantage of past persecution to achieve a better life in the country to which they have fled,” in Baroness Hale’s words.

The RSAA took a very different approach in *71684/99* and *76044*. Instead of inquiring whether it would be “reasonable” for someone to relocate to the IPA area or whether the conditions in the IPA area were more or less deplorable than those experienced by “a significant minority of the population,” the RSAA posed the question of whether the level of protection was sufficient under the Refugee Convention. It used the rights listed in Articles 2 to 33 of the Convention as a benchmark. It also looked at whether any risks would emerge in the proposed IPA zone that might cause someone to return back to the area of persecution.

This approach requires a higher level of human rights protection in the proposed IPA zone. As Articles 2 to 33 of the Refugee Convention contain many basic civil, political and socio-economic rights, these must be respected in the IPA area as well. In the case of the Punjabi appellant, the RSAA found that most Sikhs who live outside of Punjab are prosperous and enjoyed the type of rights contained in the Refugee Convention. However, in the case of the Alevi Kurd, it was considered that she, as a divorced woman, would find it difficult to access employment and, as a result, social security benefits. Therefore, there was meaningful protection available in the IPA area for the Punjabi appellant, but not for the Kurdish appellant. Furthermore, because of the protection of the type of rights enshrined in the Refugee Convention in the IPA area for the Punjabi appellant and the lack of protection of these rights in the IPA area for the Kurdish appellant, the RSAA also concluded that there would be a low risk of the Punjabi appellant being forced to return to the area of persecution and a high risk for the Kurdish appellant.

Finally, it is important to bear in mind that there are political factors that influenced the House of Lords and the RSAA in their decisions to use the approaches that they did. For example, the fact that a significant lower number of asylum applications are made annually in New Zealand compared to the United Kingdom made it easier politically for the RSAA to adopt the more lenient protection-based approach. In the United Kingdom, there were 23,608 asylum applications in 2006 and 23,431 applications in 2007, the years of the House of Lords' rulings in *Januzi* and *AH (Sudan)* respectively.¹³⁹ In contrast, the number of annual asylum applications in New Zealand has been consistently lower than 500 since 2003.¹⁴⁰ Even taking into consideration the fact that the population of the United Kingdom is approximately 13 times the size of New Zealand,¹⁴¹ there is still relatively speaking a much lower number of asylum applications in New Zealand than in the United Kingdom. This does not justify the House of Lords' usage of the reasonableness approach, but it does help explain why the House of Lords used an approach that leads to more rejections of asylum applications on the grounds of the existence of an IPA in the country of nationality, while the RSAA of New Zealand used the more lenient protection-based approach.

C – Conclusion

This chapter has discussed the two current approaches to how to assess the required level of human rights protection in a proposed IPA area. It examined two cases of the House of Lords in which the reasonableness approach was used and two cases of the RSAA in which the protection-based approach was taken. On the basis of these cases, it can be said that the reasonableness approach by the House of Lords requires a lower level of human rights protection in the IPA zone, as it compares the living conditions there with the rest of the country. In contrast, the protection-based approach requires a higher level of human rights compliance as it seeks to determine whether the types of human rights enshrined in the Refugee Convention are fulfilled.

¹³⁹ Georgina Sturge, *Asylum Statistics 9 (2020)*, available at <https://commonslibrary.parliament.uk/research-briefings/sn01403/>.

¹⁴⁰ Refugee and Protection Unit, *Statistics Pack 3-4 (2020)*, available at <https://www.immigration.govt.nz/documents/statistics/statistics-refugee-and-protection.pdf>.

¹⁴¹ Office for National Statistics, *Population Estimates*, <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates>; Statistics New Zealand, *Population*, <https://www.stats.govt.nz/topics/population>.

III – Why a High Level of Human Rights Protection in the IPA Area is Required under the Refugee Convention

As the previous chapter has shown, the two current approaches to assessing the required level of human rights protection in the IPA area lead to very different requirements. This chapter will argue that the Refugee Convention requires a high level of human rights protection in the IPA zone. For this argument, this chapter relies on a contextual interpretation of Article 1A(2), which forms the legal basis of the IPA inquiry. It will be argued that the IPA inquiry should be in line with the other provisions of the Refugee Convention as well.

However, unlike the line of argumentation followed by some academic scholars,¹⁴² this chapter considers not just the preamble of the Convention, but the Convention as a whole. Specifically, it argues that the IPA inquiry must be in line with Article 1C(5) and Article 33(1). The former stipulates that someone's refugee status can be revoked when protection has become available to that person in the country of nationality and the latter prohibits state parties from returning persons to an area where they would face persecution. It will be argued that both of these provisions are relevant for the IPA inquiry and, using sources on how these provisions have been interpreted, the legal requirements of an IPA under the Refugee Convention will be defined.

This chapter will first address why a contextual interpretation is important to understand legal provisions in general and provisions of the Refugee Convention in specific. Second, the linkage between the legal basis of the IPA inquiry and Article 1C(5) will be explained and how this provision can inform the IPA inquiry. Third, the relevance of Article 33(1) in the context of the IPA will be explained. The concept of indirect *refoulement* will be explained and how it relates to the IPA inquiry. Finally, the types of actions that amount to *refoulement* will be explained, again making a link to how that should guide the IPA inquiry. All in all, it will be argued that a contextual interpretation of Article 1A(2) shows that, for there to be an IPA within the meaning of the Refugee Convention, a high level of human rights protection in that area is required.

A – The Importance of a Contextual Interpretation of Article 1A(2)

¹⁴² See Hathaway & Foster, *supra* note 28, at 355; Zimmermann & Mahler, *supra* note 14, at 458.

1. Context as Part of the Means of Interpretation

There are multiple approaches to the interpretation of legal provisions such as Article 1A(2). The three approaches that are particularly relevant for the interpretation of international legal provisions are the grammatical or textual approach, the systematic approach, and the teleological approach.¹⁴³ The textual approach essentially interprets a treaty provision by looking at the ordinary meaning of the contents of that provision.¹⁴⁴ The systematic approach seeks to interpret a legal provision by looking at the context of that provision.¹⁴⁵ Finally, the teleological approach examines the treaty's object and purpose when interpreting a provision of that treaty.¹⁴⁶ These means of interpretation are not mutually exclusive. They can be, and have often been, used together by courts to interpret legal provisions.¹⁴⁷

The rules of interpretation in international law are codified in the Vienna Convention on the Law of Treaties (VCLT), which entered into force in 1980.¹⁴⁸ Although this agreement has not been ratified by all states¹⁴⁹ and includes a provision that stipulates that it does not apply to treaties that had entered into force before the VCLT,¹⁵⁰ it is now considered that the rules of interpretation as stipulated in the VCLT reflect customary international law which means that

¹⁴³ Jane McAdam, *Interpretation of the 1951 Convention*, in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 75, 83 (Andreas Zimmermann ed., 2010).

¹⁴⁴ Jean-Marc Sorel & Valérie Boré Eveno, *Article 31 Convention of 1969*, in *The Vienna Conventions on the Law of Treaties: A Commentary* 804, 808 (Olivier Corten & Pierre Klein eds., 2011).

¹⁴⁵ McAdam, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ See Permanent Court of International Justice, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2 (Aug. 12). In this Advisory Opinion, one of the first of the Permanent Court of International Justice, the Court combined the three approaches in interpreting whether the Versailles Treaty of 28 June 1919 gave the ILO the competence to regulate the employment conditions of workers in the agricultural sector. See also Permanent Court of International Justice, *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11 (May 16). The International Court of Justice has also combined the different means of interpretation since International Court of Justice, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, I.C.J. Reports 1948, 57.

¹⁴⁸ Sorel & Eveno, *supra* note 148, at 804-806; United Nations Treaty Collection, *Vienna Convention on the Law of Treaties*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

¹⁴⁹ The VCLT has been ratified by 116 states as of 13 February 2020. Major states that have not ratified this agreement include France, India, South Africa and the United States (United Nations Treaty Collection, *Vienna Convention on the Law of Treaties*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en).

¹⁵⁰ Article 4 of the VCLT stipulates that this agreement “applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.” (Vienna Convention on the Law of Treaties art. 4, May 23, 1969, 1155 U.N.T.S. 331).

they are binding on all states and that those rules predate the VCLT itself.¹⁵¹ These rules are listed in Articles 31, 32 and 33 of the Convention. For the purpose of this thesis, Article 31 in particular is relevant as it lays out the general rule of interpretation. It stipulates that:

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c. Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.¹⁵²

Article 32 focuses on supplementary means of interpretation, “including the preparatory work of the treaty and the circumstances of its conclusion,” but this provision stipulates that these means can only be used if the interpretation of a provision according to Article 31 “[l]eaves the meaning ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.”¹⁵³ Indeed, in practice international courts are hesitant to resort to the supplementary means of interpretation, other than for the purpose of confirming the meaning given to a provision by means of the general rule of interpretation listed in Article 31.¹⁵⁴ The International Court of Justice (ICJ), for instance, has held that the preparatory work of a treaty should not be used for the interpretation of that treaty when its text is sufficiently clear.¹⁵⁵ It is also important to note

¹⁵¹ See Frédéric Dopagne, *Article 4 Convention of 1969*, in *The Vienna Conventions on the Law of Treaties: A Commentary* 79, 84-85 (Olivier Corten & Pierre Klein eds., 2011).

¹⁵² Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

¹⁵³ *Id.* at art. 32.

¹⁵⁴ Yves le Bouthillier, *Article 32 Convention of 1969*, in *The Vienna Conventions on the Law of Treaties: A Commentary* 841, 846-850 (Olivier Corten & Pierre Klein eds., 2011).

¹⁵⁵ International Court of Justice, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, 8 (“In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the

that, while the intention of the drafters of an international agreement certainly is relevant for the interpretation, it should be considered along with how a provision has subsequently been applied by the state parties to that treaty.¹⁵⁶ This is why Article 31(3)(b) was included in the VCLT, which requires the application of a treaty after its entry into force to be taken into consideration for its interpretation.¹⁵⁷ Article 33 discusses the interpretation of treaties which were authenticated in multiple languages,¹⁵⁸ which is not relevant for this thesis.

As is clear from the wording of Article 31, the VCLT combines the three aforementioned approaches to interpretation.¹⁵⁹ It is important to note that Article 31 does not place the rules of interpretation in a hierarchy, but rather lists them as steps which need to be taken when interpreting a provision.¹⁶⁰ Therefore, when interpreting a legal provision a holistic approach needs to be taken which takes various factors into consideration, including the context of the provision.¹⁶¹ As stated in Article 31, the context of the treaty includes the text of the treaty as a whole, including its preamble and annexes.

The importance of a provision's context for its interpretation has been underlined by judicial authorities.¹⁶² An illustrative example of this is how the ICJ interpreted a legal provision in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*.¹⁶³ The ICJ held that a word "obtains its meaning from the context in which it is used."¹⁶⁴ It interpreted the meaning of the word "elected" in one of the provisions in the context of the Convention in question as a whole, by referring to how the word had been interpreted in different provisions of the same Convention.¹⁶⁵ Similarly, the European Court of Human Rights

written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*").

¹⁵⁶ McAdam, *supra* note 143, at 103.

¹⁵⁷ Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

¹⁵⁸ *Id.* at art. 33.

¹⁵⁹ McAdam, *supra* note 143.

¹⁶⁰ *Id.*

¹⁶¹ Sorel & Eveno, *supra* note 144, at 807-808.

¹⁶² See Permanent Court of International Justice, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50 (Nov. 15); International Court of Justice, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, I.C.J. Reports 1960, 150; International Court of Justice, *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment of Aug. 27, 1952, I.C.J. Reports 1952, 176.

¹⁶³ International Court of Justice, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, I.C.J. Reports 1960, 150.

¹⁶⁴ *Id.* at 158.

¹⁶⁵ *Id.* at 158-159.

(ECtHR) held in *Abdulaziz v. the United Kingdom*, when referring to the European Convention on Human Rights and its Protocols, that these instruments “must be read as a whole” and that “a matter dealt with mainly by one of their provisions may also, in some of its aspects, be subject to other provisions thereof.”¹⁶⁶

2. Contextual Interpretation in International Refugee Law

As the rules of interpretation form part of customary international law, they can be applied to the Refugee Convention as well, despite the fact that it preceded the VCLT.¹⁶⁷ Indeed, courts have used these rules to interpret provisions of the Refugee Convention.¹⁶⁸ In doing so, many judicial authorities have used the context of the Convention, including its articles and preamble. Interestingly, the House of Lords affirmed in *Januzi* that the provisions of the Convention “must be read as a whole, in the context of the Convention as a whole, taking account of the Convention’s historical setting and its objects and purposes, to be derived from its articles, and also from the recitals of its preamble.”¹⁶⁹ This chapter argues that while the House of Lords was correct in stating this, it did not actually properly place the legal basis of the IPA inquiry in the context of the Refugee Convention.

An illustrative example of how courts have analyzed the context of a legal provision of the Refugee Convention is the case of *Zaoui* before the New Zealand Supreme Court. As the approach of this chapter is similar to the Supreme Court’s, this case warrants further examination. In *Zaoui*, the Supreme Court had to interpret the meaning of Article 33(2) of the Refugee Convention, which forms the exception to the general prohibition of *refoulement*. This provision can only be applied in cases where the refugee is considered to form a danger to the security of the asylum country or has been convicted “of a particularly serious crime.”¹⁷⁰ The Director of Security of New Zealand had ordered the expulsion of the claimant, Mr. Zaoui, under

¹⁶⁶ European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Apr. 24, 1985, 15/1983/71/107-109, ¶ 60.

¹⁶⁷ The Refugee Convention entered into force on 22 April 1954, approximately 26 years before the VCLT (United Nations High Commissioner for Refugees, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol 1 (2015), available at <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>).

¹⁶⁸ See House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5; House of Lords, *R v. Secretary of State for the Home Department, ex parte Adan* [1998], CO/872/98; Refugee Status Appeals Authority, *Refugee Appeal No. 76044* [2008].

¹⁶⁹ House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5, ¶ 4.

¹⁷⁰ Convention Relating to the Status of Refugees art. 33(2), Jul. 28, 1951, 189 U.N.T.S. 137.

that provision.¹⁷¹ When Mr. Zaoui’s case reached the Supreme Court, the Court sought to establish whether Article 33(2) requires a balancing test between the security risk that an individual poses and the dangers that this individual would face as a result of the deportation.¹⁷² In order to do this, the Court applied the rules of the VCLT and placed the provision in the context of the Convention as a whole.¹⁷³ Specifically, it compared Article 33(2) to Article 1F(b).¹⁷⁴ The latter stipulates that a person “with respect to whom there are serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee” shall be excluded from refugee status.¹⁷⁵ Thus, similar to Article 33(2), this provision deals with the issue of when someone can be excluded from refugee protection due to the commission of crimes, which is why the Supreme Court found it relevant to analyze this provision to gain a better understanding of the meaning of Article 33(2).¹⁷⁶ It held that, since there is no balancing test required for Article 1F(b), it is not likely to apply to Article 33(2) either.¹⁷⁷

B – Interpretation of the IPA Inquiry under Article 1A(2)

This chapter will now make an in-depth analysis of the interpretation of Article 1A(2), the provision which forms the legal basis for the IPA inquiry. The relevant part of this provision states that:

For the purposes of the present Convention, the term “refugee” shall apply to any person who:

...

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and *is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*¹⁷⁸ (emphasis added)

As explained in the introduction, the IPA inquiry is essentially about establishing whether or not a person can receive protection in the country of nationality in a different area than where the

¹⁷¹ Supreme Court of New Zealand, *Attorney-General v. Zaoui and Ors (Zaoui No. 2)* [2005], NZSC 38, ¶ 3.

¹⁷² *Id.* at ¶ 22.

¹⁷³ *Id.* at ¶ 24.

¹⁷⁴ *Id.* at ¶ 28.

¹⁷⁵ Convention Relating to the Status of Refugees art. 1F(b), Jul. 28, 1951, 189 U.N.T.S. 137.

¹⁷⁶ Supreme Court of New Zealand, *Attorney-General v. Zaoui and Ors (Zaoui No. 2)* [2005], NZSC 38, ¶ 28.

¹⁷⁷ *Id.* at ¶ 30.

¹⁷⁸ Convention Relating to the Status of Refugees art. 1A(2), Jul. 28, 1951, 189 U.N.T.S. 137.

person is facing persecution. However, Article 1A(2) itself is not clear about the level of protection that would be required in this IPA area. This chapter will interpret this clause using the means listed in Article 31 of the VCLT.¹⁷⁹ Special attention will be given to the context of Article 1A(2). There are four main reasons for why the context is more helpful in determining the requirements of the IPA inquiry under this provision than the other means listed in Article 31. First, interpreting this inquiry using the ordinary meaning of the word “protection” does not help much, as this word has different meanings according to the context in which it is used.¹⁸⁰ Second, the object and purpose of the Refugee Convention and how this relates to the IPA inquiry is also not very clear. As McAdam notes, “it is possible to discern various, and possibly conflicting, objects and purposes from the Preamble to the 1951 Convention.”¹⁸¹ Third, state practice is not very helpful for the interpretation of Article 1A(2), as the IPA inquiry has been applied differently by different states.¹⁸² While it is true that a significant number of state parties to the Refugee Convention are applying the reasonableness approach, the way that it is being applied is so different from state to state that it does not shed light on the interpretation of Article 1A(2). As seen in chapter II, even within the same court judges have very different interpretations of what level of national protection makes it reasonable for someone to relocate to the IPA area. For example, Baroness Hale considered it wrong to compare the living conditions in the IPA area with those of the “poorest of the poor,” while Lord Brown considered it reasonable for someone to relocate as long as the conditions in the IPA zone were similar to those faced by a significant minority of the population.¹⁸³ Instead, in order to get a better understanding of the meaning of “protection” in Article 1A(2), this chapter will place it in the context of the Refugee Convention as a whole. Specifically, a comparison will be made to Article 1C(5), which also deals with the matter of national protection and Article 33(1), which

¹⁷⁹ As discussed before, judicial authorities typically do not resort to the preparatory work of a treaty if the meaning of the legal provision can be established through the means listed in Article 31 of the VCLT. Therefore, this chapter will not explore the *travaux préparatoires* of the Refugee Convention, except when it confirms the meaning of a provision as interpreted by the means listed in Article 31.

¹⁸⁰ According to Merriam-Webster, “protection” means “the state of being protected.” (Merriam-Webster, *Protection*, <https://www.merriam-webster.com/dictionary/protection>). “Protect” in turn means “to cover or shield from exposure, injury, damage, or destruction.” (Merriam-Webster, *Protect*, <https://www.merriam-webster.com/dictionary/protect>). However, “protection” can have a broader interpretation as well beyond merely physical protection in the ordinary sense of the word. For example, many argue that human rights ought to be “protected,” see Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* 1 (2009).

¹⁸¹ McAdam, *supra* note 143, at 91.

¹⁸² See Hathaway & Foster, *supra* note 1, at 387.

¹⁸³ House of Lords, *Secretary of State for the Home Department v. AH (Sudan)* [2007], UKHL 49, ¶¶ 28, 42.

prohibits *refoulement* which encompasses actions that directly or indirectly lead to a person returning to an area of persecution, including, as this thesis argues, returning someone to an area inside the country of nationality with a low level of human rights protection. Given the fact that the way that Article 1A(2) is to be applied must at least be consistent with the rest of the Refugee Convention, it is helpful to see how other relevant provisions of the Convention have been interpreted and how that should inform the IPA inquiry.

Finally, a possible counterargument to the argument made in this chapter is that the way that the IPA inquiry is currently being conducted shows the emergence of a new rule in customary international law. If true, this would supersede the rules listed in the Refugee Convention according to the principle of *lex posterior derogat priori*.¹⁸⁴ According to this principle, any rule of international law that emerged after an earlier rule that covers the same issue, supersedes the earlier rule.¹⁸⁵ For a rule to become part of customary international law, two elements are required: “an established, widespread, and consistent practice on the part of States” and *opinio juris sive necessitatis*, which essentially means that the practice must be “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”¹⁸⁶ However, there is no widespread and uniform state practice that confirms the emergence of a new rule. As discussed earlier, although a significant number of Western state parties do apply the reasonableness approach, they apply it in many different ways. Furthermore, a significant number of state parties do not even conduct an IPA inquiry, as they have agreed in a more recent agreement, namely the 1969 OAU Convention, that as long as persecution occurs in a part of the country of nationality and someone has been compelled to flee as a result of that persecution, that person is already a refugee.¹⁸⁷ As this element is missing, it cannot be stated that the reasonableness approach has crystalized in a new rule in customary international law.

1. National Protection and the Cessation Clause

When the Refugee Convention was drafted, it was made very clear by the state parties involved that asylum states should only be obliged to provide refugee protection to someone for as long as

¹⁸⁴ Hugh Thirlway, *The Sources of International Law*, in *International Law* 117, 136 (Malcolm D. Evans ed., 2003).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 125 (citing International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of Feb. 20, 1969, I.C.J. Reports 1969, 3, ¶ 77).

¹⁸⁷ *Supra* note 15.

that person cannot obtain protection in his or her country of nationality.¹⁸⁸ Therefore, the drafters included provisions which stipulated when refugee status could be revoked. These are contained in Article 1C. Under this article, anyone who was recognized as a refugee under Article 1A(2) can lose that recognition when he or she re-avails him- or herself of the protection of the country of nationality.¹⁸⁹ This happens, for example, when a refugee returns to the country of nationality and voluntarily re-establishes there.¹⁹⁰ The most controversial provision related to cessation is Article 1C(5),¹⁹¹ which stipulates that the status of a refugee will cease when this person “can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.”¹⁹² In practice, this provision has often been used by states as a justification for sending back refugees to their country of nationality, even if the persecution there was still ongoing.¹⁹³

While the IPA inquiry and the ceased circumstances clause are different in that the former occurs before the refugee status is granted and the latter only applies afterwards, there is also an important similarity: both the IPA inquiry and the inquiry under Article 1C(5) are essentially inquiries regarding the protection available in the country of nationality. For Article 1C(5), this is because a lack of persecution means that there is national protection available, as persecution consists of both the risk of serious harm and the lack availability of national protection.¹⁹⁴ In other words, if there is national protection available, there is no persecution.

¹⁸⁸ Hathaway & Foster, *supra* note 28, at 477.

¹⁸⁹ Convention Relating to the Status of Refugees arts. 1C(1)-1C(4), Jul. 28, 1951, 189 U.N.T.S. 137.

¹⁹⁰ *Id.* at art. 1C(4).

¹⁹¹ In this chapter, the terms “ceased circumstances clause” and “cessation” will be used interchangeably to refer to this provision, along with “Article 1C(5).”

¹⁹² Convention Relating to the Status of Refugees art. 1C(5), Jul. 28, 1951, 189 U.N.T.S. 137. The second paragraph of this provision forms a partial exception to this rule:

“Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;”

However, it is important to note that there is substantial debate regarding whether the second paragraph of Article 1C(5) applies to refugees under Article 1A(2) (*see* James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 Ohio St. J. Disp. Resol. 175, 203-206 (2005)). In practice, it is rarely applied by states and therefore this thesis will not discuss this part of Article 1C(5).

¹⁹³ *See* James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 Ohio St. J. Disp. Resol. 175, 193-198 (2005); Maria O’Sullivan, *Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons From Australia*, 20 Int. J. Refug. Law 586, 587 (2008).

¹⁹⁴ *See* House of Lords, *Islam (A.P.) v. Secretary of State for the Home Department R v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)* [1999], Session 1998-1999.

The UNHCR has stated that states should be cautious when applying Article 1C(5), as the revocation of refugee status may cause the former refugee to return to the country of nationality.¹⁹⁵ Therefore, there is a risk of *refoulement*, especially if the conditions in the country of nationality have not been properly assessed. The UNHCR, which has the mandate to supervise the application of the Refugee Convention,¹⁹⁶ has drafted a series of guidelines on how it interprets the ceased circumstances clause.¹⁹⁷ While the UNHCR's guidelines are legally non-binding, they are still considered authoritative by most courts and are often referred to in jurisprudence.¹⁹⁸

In its guidelines on when the ceased circumstances clause can be invoked, the UNHCR is explicit that the changes in the country of nationality must be fundamental, enduring and lead to the restoration of national protection.¹⁹⁹ The first two criteria essentially require changes in the country of nationality to be substantial and to have lasted for a considerable amount of time. The final criterion is more relevant to this thesis, as it shows how UNHCR defines national protection, which is clearer and more detailed than in the context of the IPA, as described in chapter II.

National protection, according to the UNHCR guidelines on cessation, means that there must be functioning administrative and governmental structures as well as a system of law and justice.²⁰⁰ Furthermore, there must be “significant improvements” in the human rights compliance of the country of nationality, in particular with regard to rights such as the right to life, liberty, non-discrimination, freedom of expression, association, peaceful assembly, movement and access to courts and rule of law.²⁰¹ Also, the judiciary must be independent with fair and open trials as well as a presumption of innocence.²⁰² This is significant, because this is a

¹⁹⁵ United Nations High Commissioner for Refugees, 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) ¶ 7 (2003), available at <https://www.unhcr.org/publications/legal/3e637a202/guidelines-international-protection-3-cessation-refugee-status-under-article.html>.

¹⁹⁶ United Nations High Commissioner for Refugees, Statute of the Office of the United Nations High Commissioner for Refugees art. 8(a) (1950), available at <https://www.unhcr.org/4d944e589.pdf>.

¹⁹⁷ United Nations High Commissioner for Refugees, *Note on the Cessation Clauses EC/47/SC/CRP.30* (May 30, 1997), <https://www.unhcr.org/excom/standcom/3ae68cf610/note-cessation-clauses.html>; UNHCR, *supra* note 195.

¹⁹⁸ See House of Lords, *Januzi v. Secretary of State for the Home Department* [2006], UKHL 5, ¶ 20; Federal Court of Australia, *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994], 52 FCR 437.

¹⁹⁹ UNHCR, *supra* note 195, at ¶¶ 10-16.

²⁰⁰ *Id.* at ¶ 15.

²⁰¹ *Id.* at ¶ 16; UNHCR, *supra* note 197, at ¶ 23.

²⁰² UNHCR, *supra* note 195, at ¶ 16.

higher human rights standard than simply the absence of persecution, which would only require the most basic human rights to be protected.²⁰³

The UNHCR guidelines on cessation do not require the protection of socio-economic rights in the country of nationality before refugee status can be revoked. This is because violations of these rights are generally not considered to amount to persecution under the Refugee Convention.²⁰⁴ Therefore, “protection” within the meaning of Article 1A(2) does not require the protection of these rights. However, this does not mean that these rights do not need to be protected in an IPA area. This is because there is an important difference between the ceased circumstances clause and the IPA. In the former, the protection must be available throughout the country. As the UNCHR has stipulated in its guidelines, changes that affect “only part of the territory should not, in principle, lead to cessation of refugee status.”²⁰⁵ This is different from the IPA, in which there is protection available in only part of the country of nationality. As chapter IV will explain, a lack of protection of socio-economic rights in an IPA area may compel persons to return to the area of persecution. There is no such risk in the context of the ceased circumstances clause, as the protection must be available throughout the territory. This chapter will now explore the principle of *non-refoulement* and argue that asylum states, by returning persons to an IPA zone where there is a lack of protection of such rights, may violate the prohibition of *non-refoulement*.

2. Article 33(1) and Indirect *Refoulement*

One of the core obligations of the Refugee Convention is the duty to not return or refoul anyone to an area where that person would face persecution. This duty is enshrined in Article 33(1), which stipulates that:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

²⁰³ Lauren Sanders, *Finding a Reasonable Alternative: An Integrated Approach to Refugee Law, Relocation and the Internal Flight Alternative*, Honors Thesis (Nov. 3, 2008), 39, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1365043.

²⁰⁴ James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int’l. L. J. 129, 150 (1990). Only in cases which involve both discriminatory measures and grave violations of socio-economic rights, would such violations be considered as “persecution” under Article 1A(2). An example of this is the exclusion of a certain ethnic group from primary education, as held by the Refugee Review Tribunal in *Reference V95/03256*: “Discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution” (Refugee Review Tribunal, *V95/03256* [1995]).

²⁰⁵ UNHCR, *supra* note 195, at ¶ 17.

on account of his race, religion, nationality, membership of a particular social group or political opinion.²⁰⁶

Before discussing how this provision relates to the IPA inquiry, it is important to note two things about the principle of *non-refoulement*. First, Article 33(1) applies not only to refugees who have been granted refugee status, but also to those without such status who find themselves under the jurisdiction of a state party.²⁰⁷ This includes those who are still in the asylum application process. Second, although Article 33(1) contains a different wording than Article 1A(2) regarding “persecution,” the two provisions are referring to the same issue.²⁰⁸ Some have argued that Article 33(1) refers to a different group of refugees, namely those whose “life or freedom would be threatened” upon return, rather than those who face a “well-founded fear of being persecuted.”²⁰⁹ However, as Weis notes, the terms used in Articles 33(1) and 1A(2) were used interchangeably by the drafters of the Refugee Convention and were intended to apply to the same type of harm faced by refugees.²¹⁰ Therefore, Article 33(1) should be construed as applying to persons who would qualify as refugees under Article 1A(2), regardless of whether they have been granted such status by the asylum state.

There is broad agreement that the prohibition of *refoulement* under Article 33(1) does not just refer to the act of the asylum state returning a refugee to a place where that person faces persecution, but also to acts of removal to a state where that person is subsequently returned to such a place.²¹¹ This is called indirect or chain *refoulement*. This understanding of *non-refoulement* has existed since the drafting of the Refugee Convention itself. While a Swedish proposal to include an explicit mention of the prohibition of indirect *refoulement* in Article 33(1) was rejected, the main reason for this was actually that the drafters considered this prohibition to be already implicit in the wording of this provision.²¹²

²⁰⁶ Convention Relating to the Status of Refugees art. 33, Jul. 28, 1951, 189 U.N.T.S. 137.

²⁰⁷ James C. Hathaway, *The Rights of Refugees Under International Law* 303 (2005).

²⁰⁸ *Id.* at 304-306; Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With a Commentary* by Dr. Paul Weis 303 (1995); House of Lords, *R v. Secretary of State for the Home Department, ex parte Sivakumaran* [1988], 1 All ER 193.

²⁰⁹ Supreme Court of the United States, *Immigration and Naturalization Service v. Cardoza Fonseca* [1987], 480 US 421.

²¹⁰ Weis, *supra* note 208.

²¹¹ See Goodwin-Gill & McAdam, *supra* note 24, at 252-253; Hathaway, *supra* note 207, at 325; House of Lords, *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001], House of Lords, UKHL 67.

²¹² Hathaway, *supra* note 207, at 323.

The prohibition of indirect *refoulement* has been affirmed by various courts, both international and national.²¹³ They have held that in situations where states share the responsibility for asylum seekers among multiple states, the state in which the asylum seeker is located has the duty to prevent the *refoulement* of that person, whether directly or indirectly.²¹⁴ For example, while it is legal for an asylum state to return an asylum seeker to a so-called “safe third country,” which is a country through which the person traveled on the way to the asylum state, it is considered to be essential that this third country does not return the asylum seeker to the country of nationality where that person would face persecution.²¹⁵ Therefore, state parties are required to conduct a “rigorous examination” of the asylum policies of the third state.²¹⁶ Otherwise, as Goodwin-Gill and McAdam note, the asylum state which engages in indirect *refoulement* can be held jointly liable under international law for the *refoulement* of the refugee.²¹⁷

In practice, courts have ruled at various occasions that returning refugees with their specific circumstances to countries that may otherwise be considered safe third countries, is in violation of Article 33(1). For example, the House of Lords ruled that refugees who flee persecution from non-state actors cannot be returned to France and Germany, as these countries are likely to return such refugees to their country of nationality due to their lack of recognition of persecution by non-state actors.²¹⁸ Similarly, the Canadian Federal Court of Appeal held in *Canadian Council for Refugees v. Her Majesty the Queen* that the United States was not a safe third country, in part because of its broad application of Article 33(2).²¹⁹ Since the United States had a low standard of proof for a person to be excluded from the protection against *refoulement* under this provision, this put refugees at an increased risk of *refoulement*.²²⁰

²¹³ See European Court of Human Rights, *T.I. v. the United Kingdom*, Mar. 7, 2000, Appl. No. 43844/98; House of Lords, *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001], UKHL 67; Federal Court of Canada, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen* [2007], 2007 FC 1262.

²¹⁴ *Id.*

²¹⁵ Walter Kälin, Martina Caroni & Lukas Heim, *Article 33, Para. 1 1951 Convention in The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1327, 1382 (Andreas Zimmermann ed., 2010).

²¹⁶ House of Lords, *R v. Secretary of State for the Home Department, ex parte Yogathas* [2002], UKHL 36, ¶ 74.

²¹⁷ Goodwin-Gill & McAdam, *supra* note 24, at 252-253.

²¹⁸ House of Lords, *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001], UKHL 67.

²¹⁹ Federal Court of Canada, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen* [2007], 2007 FC 1262.

²²⁰ Federal Court of Canada, *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen* [2007], 2007 FC 1262.

The IPA is similar to the concept of safe third country in at least two important ways. First, in both instances the asylum country has the obligation under the Refugee Convention of ensuring that the asylum seeker does not end up in an area where that person faces persecution, as that would amount to indirect *refoulement*. Second, and related to the first similarity, both the IPA and the safe third country must have a certain level of protection against *refoulement* in place. However, in that regard there is an important difference between the two as well. In the safe third country, as seen in the aforementioned examples, the protection against *refoulement* manifests itself mostly in the characteristics of its asylum procedures and the practice of forcible removal that accompanies the rejection of someone's asylum claim. In the case of the IPA, this clearly does not apply as the IPA is located in the asylum seeker's own country of nationality. This chapter will now conclude with an examination of what type of actions, other than forcible removal, amount to *refoulement* under Article 33(1).

3. Imposing Conditions that Compel a Person to Return Amount to *Refoulement*

While some scholars agree that the risk of indirect *refoulement* should play a role in the IPA inquiry, others take an opposing view. For example, Marx argues that applying the principle of *non-refoulement* to the IPA inquiry is problematic, as the “strength of this principle lies in its strong State-centered meaning and its acceptance by States. It is state action that directly or indirectly results in *refoulement* which infringes Article 33 of the Convention.”²²¹ In contrast, in the context of the IPA, it is usually the individual him- or herself who moves to another place.²²² Therefore, he argues that this principle does not apply to the IPA inquiry, unless the authorities in the IPA area forcibly return the individual to the area of origin.²²³ Marx appears to use a narrow definition of “forcible return” here, in the sense of state authorities removing someone by physical force.

However, this view by Marx is too narrow a view of the type of actions that amount to *refoulement*. As Kälin, Caroni and Heim have noted, the inclusion of the phrase “in any manner whatsoever” in Article 33(1) means that *refoulement* includes more than just the act of forcibly removing someone in the sense that Marx used this term.²²⁴ They argue that the “prohibited

²²¹ Marx, *supra* note 40, at 197-198.

²²² *Id.*

²²³ *Id.* at 199.

²²⁴ Kälin, Caroni & Heim, *supra* note 215, at 1369.

behaviour [under Article 33(1)] can be intentional or non-intentional, and can consist of a specific action or inaction or acquiescence.”²²⁵ They mention “the withholding or reduction of life-saving assistance (especially food and water)” as examples of actions other than forcible removal that still amount to *refoulement*.²²⁶ Wouters also argues that the taking of measures that coerce refugees into accepting “voluntary” repatriation, including withholding of food, water and other essentials are prohibited under Article 33(1).²²⁷ Similarly, Hathaway notes that Article 33(1) is a forward-looking provision: “[T]he duty under Art. 33 is to avoid certain consequences (namely, return to the risk of being persecuted), whatever the nature of the actions which lead to that result.”²²⁸ Even the House of Lords appears to agree with this notion, as it affirmed in *R v. Secretary of State for the Home Department, ex parte Yogathas* that when assessing whether or not a deportation may lead to *refoulement* the focus should be “on the end result rather than the precise procedures by which the result is achieved.”²²⁹

There are many examples of these types of violations of Article 33(1).²³⁰ In 2000, hundreds of Burundian refugees who were living in Tanzania returned to Burundi, despite the fact that the civil war there was still ongoing.²³¹ Their return was the direct result of Tanzania’s reduction of the food rations for Burundian refugees, combined with the “denial of the right to earn a living through economic activity.”²³² Similarly, Pakistan induced the repatriation of Afghan refugees in early 2001.²³³ In late 2000 and early 2001 more than 230,000 refugees had crossed the border between Afghanistan and Pakistan in order to escape the drought and civil war between the Taliban and the Northern Alliance.²³⁴ Many of them stayed in the Jalozi camp, close to the border. Pakistan decided to bar humanitarian agencies from entering the camps, which led to a deterioration of living conditions there.²³⁵

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Cornelis F. Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis on the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture* 133-134 (2009).

²²⁸ Hathaway, *supra* note 207, at 318.

²²⁹ House of Lords, *R v. Secretary of State for the Home Department, ex parte Yogathas* [2002], UKHL 36, ¶ 47.

²³⁰ Hathaway, *supra* note 207, at 288-289.

²³¹ *Id.* at 288.

²³² *Id.*

²³³ *Id.* at 289.

²³⁴ Revolutionary Association of the Women of Afghanistan, *Wrapped in Plastic, the Rejected Wait to Die*, <http://www.rawa.org/jallozi-2.htm> (citing Rory McCarthy, *Wrapped in Plastic, the Rejected Wait to Die*, *The Guardian*, Mar. 16, 2001).

²³⁵ *Id.*

Some scholars have argued that states, by returning asylum seekers to an IPA area where there are conditions present that may compel them to return to the area of persecution, violate Article 33(1).²³⁶ Eaton argues that if the applicant faces destitution or a denial of basic socio-economic human rights in the IPA zone, she “may be driven back into the hands of her persecutor.”²³⁷ Therefore, he argues that a human rights assessment should form part of the IPA inquiry.²³⁸ Similarly, Ghráinne notes the importance of assessing whether the lack of human rights compliance in an area may compel a person to return to an area where that person would face persecution, which would be a form of indirect *refoulement*.²³⁹

A possible counterargument to this view is that, unlike the previously mentioned examples, the asylum state is not imposing these conditions directly on the asylum seeker. However, the text of Article 33(1), in particular the phrase “in any manner whatsoever,” makes it very clear that the focus is on the end result of the actions of states, rather than on the actions themselves. Therefore, if a state is returning someone to an area where that person would face conditions that compel that person to return to the area of persecution, this state is involved in the *refoulement* of that person. A human rights assessment of a proposed IPA area is thus essential to prevent indirect *refoulement*. While the previously mentioned scholars have reached this conclusion as well, they have not researched how exactly a low level of human rights protection in the IPA zone could lead to someone being compelled to return to the area of persecution. The next chapter will address this gap in the literature.

C – Conclusion

This chapter has explored how Article 1A(2), the legal basis for the IPA inquiry, should be interpreted. As the context of a legal provision forms an important part of the interpretation of this provision, the context of Article 1A(2) in the Refugee Convention has been explored. In order to gain a better understanding of the meaning of “protection” in this provision, the way this term has been interpreted in Article 1C(5) has been analyzed. It has been argued that “protection” in the IPA area should involve more than just protection of the most basic human rights and be in line with how that term has been interpreted in the context of the ceased

²³⁶ See Hathaway & Foster, *supra* note 28, at 348-349; Zimmermann & Mahler, *supra* note 14, at 453; Ghráinne, *supra* note 47, at 48.

²³⁷ Jonah Eaton, *The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive*, 24 Int. J. Refug. Law 765, 772 (2012).

²³⁸ *Id.*

²³⁹ Ghráinne, *supra* note 47, at 47.

circumstances clause. Furthermore, it has been argued that the IPA inquiry should assess whether there is a risk of indirect *refoulement*, which, if there is such a risk as a result of a low level of human rights protection, would violate the prohibition of *non-refoulement* under Article 33(1). This is because, even though the asylum state itself is not imposing conditions that would induce asylum seekers to return to the area of persecution, it is knowingly deporting them to an area with conditions that have such an effect. As the question of whether or not an action amounts to *refoulement* is more about the result of that action than about the action itself, this would violate Article 33(1). Therefore, for the IPA inquiry to be in compliance with the Refugee Convention, it must assess whether there is a high level of human rights protection in that area.

IV – How a Low Level of Protection in the IPA Area May Compel Someone to Return to the Area of Persecution

The previous chapter has argued that, since the IPA inquiry must be in line with Article 33(1) of the Refugee Convention, it must consider whether relocating someone to the IPA area may result in indirect *refoulement*. This chapter will expand on this and argue that a high level of human rights protection must be present in the IPA area in order avoid a person being compelled to return to the area where he or she would face persecution. Three economic rights are explored and it will be argued that a lack of protection of these rights may, depending on the circumstances of the asylum seeker, result in the person returning to the area of persecution. Specifically, the linkages between the rights to work, education and health on the one hand and the possibility of being compelled to return on the other hand will be discussed. The main reason that these three rights will be explored is that these rights are not protected in many countries around the globe and thus in many potential IPA areas, a fact which is considered irrelevant by many courts because violations of these rights are usually not recognized as amounting to persecution under Article 1A(2).²⁴⁰ However, this chapter will argue that such violations may compel people to return to the area where they are from. First, the development and content of these rights in international human rights law will be discussed, with a particular focus on the requirements of the provision of means of subsistence in the case of the right to work and of financial accessibility in the context of the rights to education of health. Second, the chapter will discuss how there is a lack of protection of these rights in many countries, with a focus on the lack of decent wages, unemployment benefits, as well as the financial inaccessibility of education and health care. Then, this chapter will discuss the concept of social capital and its importance in the context of a lack of protection of the rights to work, education and health. It will be argued that if these rights are not protected, most people rely on support from their family and community. For asylum seekers who have been returned to an IPA zone, where they often

²⁴⁰ Hathaway, *supra* note 204.

live detached from their own community and family, there is a strong incentive to return to their area of origin, even if they would face persecution there. Therefore, a state which returns asylum seekers to IPA zones with a low level of protection of these rights violates the principle of *non-refoulement*.

A – The Rights to Work, Education and Health in Human Rights Law

Long before the right to work was recognized as an international human right, it was already included in national human rights instruments.²⁴¹ The French Constitution of 1793, for instance, stipulated that work must be provided for everyone and those who cannot work should be given a means of existence.²⁴² With the emergence of welfare systems in many states in the Global North in the late 19th and 20th century, these states increasingly recognized that it is the government's responsibility to ensure that there are sufficient employment opportunities for its citizens and that those who cannot find work, receive support in order to subsist.²⁴³ In 1948, the right to work was first recognized as an international human right²⁴⁴ in both the American Declaration of the Rights and Duties of Man²⁴⁵ and the Universal Declaration of Human Rights (UDHR).²⁴⁶ Since then, it has been codified in multiple regional human rights conventions²⁴⁷ and, most significantly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, which has been ratified by 170 states.²⁴⁸ Both the UDHR and the ICESCR recognize that the right to work means more than just people having access to employment. Article 23 of the UDHR stipulates

²⁴¹ Manuel C. Branco, *Economics for the Right to Work*, 158 Int. Labour Rev. 63, 65 (2019).

²⁴² Columbia University, *Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793)*, <http://www.columbia.edu/~iw6/docs/dec1793.html>.

²⁴³ Ian Gough, *The Political Economy of the Welfare State* 46-49 (1979).

²⁴⁴ Branco, *supra* note 241.

²⁴⁵ Organization of American States, *American Declaration of the Rights and Duties of Man* Art. 14 (1948), *available at*

https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

²⁴⁶ United Nations General Assembly, *Universal Declaration of Human Rights* (1948), *available at* <https://www.refworld.org/docid/3ae6b3712c.html>.

²⁴⁷ See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Nov. 4, 1950, ETS 5, *available at* <https://www.refworld.org/docid/3ae6b3b04.html>; Organization of African Unity, *African Charter on Human and Peoples' Rights*, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, *available at* <http://hrlibrary.umn.edu/instree/z1afchar.htm>.

²⁴⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Office of the United Nations High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard*, <https://indicators.ohchr.org/>.

that everyone has the right to “just and favourable conditions of work and protection against unemployment,” as well as “just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”²⁴⁹ This is also underlined in Article 25, where everyone’s right to “security in the event of unemployment” is enshrined.²⁵⁰ Similarly, Articles 6 and 7 of the ICESCR stipulate that workers have the right to remuneration that provides them with “a decent living for themselves and their families.”²⁵¹ The Committee on Economic, Social and Cultural Rights (CESCR) has clarified that under the ICESCR, state parties are required to take measures to “reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection.”²⁵² Finally, those who lose their job for any reason should receive compensation.²⁵³ Although this obligation, as with all economic rights, is one that must be progressively realized,²⁵⁴ there are certain minimum core obligations that must be respected regardless of the circumstances that the country is in.²⁵⁵ The CESCR has clarified in General Comment 23 that this includes the introduction of a minimum wage which takes the cost of living into account “so as to ensure a decent living for workers and their families.”²⁵⁶

²⁴⁹ United Nations General Assembly, Universal Declaration of Human Rights Art. 23 (1948), *available at* <https://www.refworld.org/docid/3ae6b3712c.html>.

²⁵⁰ *Id.* at Art. 25.

²⁵¹ International Covenant on Economic, Social and Cultural Rights arts. 6-7, Dec. 16, 1966, 993 U.N.T.S. 3.

²⁵² United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Art. 6 of the Covenant) ¶ 10 (2006), *available at* <https://www.refworld.org/docid/4415453b4.html>.

²⁵³ *Id.* at ¶ 26.

²⁵⁴ *See* International Covenant on Economic, Social and Cultural Rights art 2(1), Dec. 16, 1966, 993 U.N.T.S. 3; United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) ¶ 1 (1990), *available at* <https://www.refworld.org/docid/4538838e10.html>.

²⁵⁵ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) ¶ 10 (1990), *available at* <https://www.refworld.org/docid/4538838e10.html>. Although this General Comment does state that “it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned,” the CESCR has since then taken a different approach. For instance, in General Comment 14 it stated that: “It should be stressed . . . that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.” (CESCR, *supra* note 19).

²⁵⁶ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) ¶ 65(c) (2016), *available at* <https://www.refworld.org/docid/5550a0b14.html>.

For a long time, most countries in the Global North considered education to be the responsibility of parents and the church, rather than the state.²⁵⁷ This helps explain why the first major human rights instruments in the West of the late 18th century made no mention of the right to education.²⁵⁸ It was not until 1936 that, for the first time, the right to education was recognized in a national human rights instrument.²⁵⁹ The Soviet Constitution of that year obliged the state to provide free and compulsory education at every level, as well as a system of state scholarships.²⁶⁰ Since then, it was incorporated in both the UDHR and the ICESCR. More recently, the Convention on the Rights of the Child (CRC), which has been ratified by 196 states, has also incorporated the right to education.²⁶¹ In comparison to other economic rights, education was given quite detailed attention in the UDHR. It should be free and compulsory at the elementary level and “higher education shall be equally accessible to all on the basis of merit.”²⁶² In the ICESCR, it was further specified that secondary education should be “made generally available and accessible to all by every appropriate means.”²⁶³ As a minimum core obligation, state parties have to provide primary education for all and “ensure the right of access to public educational institutions and programmes on a non-discriminatory basis.”²⁶⁴ “Accessibility” in these treaties refers to the idea that education must be accessible on a non-discriminatory basis, physically accessible and economically accessible, i.e. affordable for everyone.²⁶⁵ The CRC contains similar obligations, as well as a note that financial assistance must be offered in case of need.²⁶⁶

Similar to the right to education, the right to health was missing from the human rights instruments of the late 18th and 19th centuries.²⁶⁷ Tobin notes that this right was first recognized in Latin American constitutions in the early 20th century, many of them containing the right to

²⁵⁷ Klaus D. Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* 21 (2006).

²⁵⁸ *Id.* at 22.

²⁵⁹ *Id.* at 23.

²⁶⁰ *Id.*

²⁶¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Office of the United Nations High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard*, <https://indicators.ohchr.org/>.

²⁶² United Nations General Assembly, Universal Declaration of Human Rights Art. 26 (1948), available at <https://www.refworld.org/docid/3ae6b3712c.html>.

²⁶³ International Covenant on Economic, Social and Cultural Rights art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

²⁶⁴ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13) ¶ 57 (1999), available at <https://www.refworld.org/pdfid/4538838c22.pdf>.

²⁶⁵ *Id.* at ¶ 6(b).

²⁶⁶ Convention on the Rights of the Child art. 28, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁶⁷ John Tobin, *The Right to Health in International Law* 16-17 (2012).

health care and an obligation for states to take preventive measures regarding diseases.²⁶⁸ At the international level, the attainment of a higher standard of health was given greater importance with the establishment of the Health Organization in 1920 and its successor the World Health Organization in 1946.²⁶⁹ It was not until 1948, however, that the right to health was explicitly recognized as an international human right. The UDHR makes only a brief mention of the right to health, lumping it together with other socio-economic rights: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services . . .”²⁷⁰ The ICESCR contains a separate article for the right to health and goes further than the UDHR by stipulating that everyone has the right “to the enjoyment of the highest attainable standard of physical and mental health.”²⁷¹ The CESCR has clarified that this includes an obligation to make health facilities, goods and services affordable for everyone, including “socially disadvantaged groups.”²⁷² As a minimum core obligation, states should grant people the “right of access to health facilities, goods and services on a non-discriminatory basis especially for vulnerable and marginalized groups.”²⁷³

B – Lack of Protection of Rights to Work, Education and Health

In many countries, a significant part of the population does not earn enough to sustain themselves or their families. This is particularly true for persons working in the informal sector, where the lack of contractual protections makes workers vulnerable to wage exploitation.²⁷⁴ As the International Labour Organization (ILO) has noted, “many of those engaged in the informal sector are not able to work their way out of poverty; in fact for many the conditions under which they work serve to perpetuate their disadvantaged position and the poverty in which they live.”²⁷⁵ In most countries in the Global South, the majority of workers are employed in the informal sector. The ILO estimates that 85.8% of employment is informal in Africa, 68.2% in Asia and

²⁶⁸ *Id.* at 22.

²⁶⁹ *Id.* at 23-27.

²⁷⁰ United Nations General Assembly, Universal Declaration of Human Rights Art. 25 (1948), *available at* <https://www.refworld.org/docid/3ae6b3712c.html>.

²⁷¹ International Covenant on Economic, Social and Cultural Rights art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3.

²⁷² CESCR, *supra* note 19, at ¶ 12(b)(ii).

²⁷³ *Id.* at ¶ 43(a).

²⁷⁴ International Labour Organization, *Measuring Informality: A Statistical Manual on the Informal Sector and Informal Employment 4-5* (2013), *available at* https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_222979.pdf.

²⁷⁵ *Id.* at 4.

the Pacific and 68.6% in the Arab World.²⁷⁶ This, along with other factors of course, explains why the level of wages in the Global South are very low. Most people earn no more than \$1 or \$2 per day, adjusted for Purchasing Power Parity.²⁷⁷ Furthermore, many countries lack unemployment benefits. According to the ILO, 75% of the world's unemployed do not have any unemployment insurance protection.²⁷⁸ Therefore, the lack of protection of the right to work means that many people around the globe cannot sustain themselves or their families from their wage and/or unemployment benefits.

Furthermore, in many countries across the globe, education is financially inaccessible for most people, in particular education after the primary level.²⁷⁹ Statistics show that approximately 35% of the world population aged 15 or above did not attend secondary education and 13% did not attend any education at all.²⁸⁰ A lack of education makes it more difficult for someone to find employment that would allow them to earn enough to sustain themselves. The importance of education has been underlined by judicial authorities and scholars alike.²⁸¹ The Supreme Court of the United States, for example, held in the landmark ruling of *Brown v. Board of Education* that education is a “*sine qua non* for the ability eventually to perform a chosen vocation or profession and, in so doing, to earn a living.”²⁸² Furthermore, as noted by the CESCR, education is one of the main means through which “economically and socially marginalized adults and children can lift themselves out of poverty.”²⁸³ Although the extent to which education affects the social mobility of people has been disputed by researchers,²⁸⁴ it is generally recognized that a lack of

²⁷⁶ International Labour Organization, *More than 60 Per Cent of the World's Employed Population Are in the Informal Economy*, Apr. 30, 2018, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang-en/index.htm.

²⁷⁷ Gary S. Fields, *Poverty and Low Earnings in the Developing World*, Working Paper (2011), 6, available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1151&context=workingpapers>.

²⁷⁸ International Labour Organization, *Most of World Lacks Unemployment Insurance*, June 21, 2000, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007901/lang-en/index.htm.

²⁷⁹ Beiter, *supra* note 257, 490-491.

²⁸⁰ Max Roser & Esteban Ortiz-Ospina, *Global Education* <https://ourworldindata.org/global-education>.

²⁸¹ See Beiter, *supra* note 257, at 18; House of Lords, *Horvath v. Secretary of State for the Home Department* [2000], UKHL 37.

²⁸² Supreme Court of the United States, *Brown v Board of Education of Topeka* [1954], 347 US 483.

²⁸³ CESCR, *supra* note 264, at ¶ 1.

²⁸⁴ See Ron Thompson & Robin Simmons, *Social Mobility and Post-Compulsory Education: Revisiting Boudon's Model of Social Opportunity*, 34 Br. J. Sociol. Educ. 744-765 (2013); Phillip Brown, *Education, Opportunity and the Prospects for Social Mobility*, 34 Br. J. Sociol. Educ. 678-700 (2013).

education makes it more difficult for people to find employment and even if they find employment it is typically a low-paying job.²⁸⁵

Similar to the problem of financial inaccessibility of education, health care is unaffordable for many people around the globe. This is in itself a violation of the right to health. As noted by Tobin, a “health system that is beyond the financial means of people cannot be said to promote the effective enjoyment of the right to health.”²⁸⁶ In many countries in the Global South, mainly as a result of a lack of public financing, user fees are the main source of financing of the health care system.²⁸⁷ This has made health care inaccessible for many.²⁸⁸ In Uganda, for example, although 72% of the population lives within five kilometers of a health facility, less than half of expectant mothers give birth at official health facilities.²⁸⁹ Inaccessibility to health care contributes to high mortality rates from preventable diseases, as well high mortality rates among young children and pregnant women.²⁹⁰ Furthermore, the high costs of health care and the resulting loss of household income in the event of illness, is a contributing factor to the perpetuation of chronic poverty in many countries in the Global South.²⁹¹

C – How a Lack of Protection of Rights to Work, Education and Health May Compel People to Return to the Area of Persecution

1. Family and Community Support

There are multiple ways in which a lack of protection of the three rights described in this chapter may compel people to return to the area where they face persecution. The two most important ways that will be analyzed in this chapter are the presence of family and community support in the area of persecution for those who do not have sufficient means to support themselves as a result of unemployment or low-wage work and who cannot gain access to education or health care in the IPA area.

²⁸⁵ See Faiz Bilquees & Shahnaz Hamid, *Lack of Education and Employment Patterns of Poor Urban Women in Rawalpindi City*, 28 Pak. Dev. Rev. 791-801 (1989).

²⁸⁶ Tobin, *supra* note 267, at 169.

²⁸⁷ David H. Peters et al., *Poverty and Access to Health Care in Developing Countries*, 1136 Ann. N.Y. Acad. Sci. 161, 165 (2008).

²⁸⁸ Tobin, *supra* note 267.

²⁸⁹ Laban K. Musinguzi et al., *Linking Communities to Formal Health Care Providers Through Village Health Teams in Rural Uganda: Lessons from Linking Social Capital*, 15 Hum. Resour. Health 1, 2 (2017).

²⁹⁰ Owen O'Donnell, *Access to Health Care in Developing Countries: Breaking Down Demand Side Barriers*, 23 Cad. Saúde Pública 2820, 2821 (2007).

²⁹¹ Jane Goudge et al., *The Household Costs of Health Care in Rural South Africa with Free Public Primary Care and Hospital Exemptions for the Poor*, 14 Trop. Med. Int. Health 458, 458 (2009).

The availability of such support depends on the level of social capital one has. This concept has been defined differently by different scholars, but essentially means “the ability of actors to secure benefits by virtue of membership in social networks or other social structures.”²⁹² These benefits include the facilitation of exchange of information,²⁹³ improvement of the quality of public goods provided by the community²⁹⁴ and the pooling of resources from which members of the social structure can draw.²⁹⁵ These benefits may be inaccessible if the community in the IPA area is very different from the one in which the asylum seeker lived in the area from where he or she fled. This is particularly true in cases of ethnic divisions.

As Kawachi and Berkman argue, people may be excluded from the benefits of social capital through racial discrimination, for example by residential segregation or labor market segmentation.²⁹⁶ Similarly, Hollard and Sene argue that the level of social capital is lower in ethnically heterogeneous communities, which is largely due to the fact that there is typically less communication across ethnic lines than inside someone’s own ethnic group.²⁹⁷ Alternatively, a high level of social capital is not a guarantee of access to resources. In other words, even if asylum seekers are able to build social networks in the IPA zone, the community may not have sufficient resources to support their own members. Furthermore, if the family of the asylum seeker does not live in the IPA zone, it may be difficult for that person to receive support from them.

The research that has been done on the importance of community and family support in the absence of decent wages, unemployment benefits, affordable education or health care is rather scarce. Furthermore, no research has attempted to link the availability of community and family support with the possibility of asylum seekers moving from an IPA area to an area of persecution. However, the studies cited in this chapter do give a better understanding of how important such support is and how poor socio-economic conditions in an IPA zone could lead to someone being compelled to return to an area where such support is available.

²⁹² Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 *Annu. Rev. Sociol.* 1, 6 (1998).

²⁹³ Tu Chi Nguyen & Matthias Rieger, *Community-Driven Development and Social Capital: Evidence from Morocco*, 91 *World Dev.* 28, 30 (2017).

²⁹⁴ Guillaume Hollard & Omar Sene, *What Drives the Quality of Schools in Africa? Disentangling Social Capital and Ethnic Divisions*, 74 *Econ. Educ. Rev.* 1, 2 (2020).

²⁹⁵ Nguyen & Rieger, *supra* note 293.

²⁹⁶ Ichiro Kawachi & Lisa F. Berkman, *Social Cohesion, Social Capital and Health*, in *Social Epidemiology* 174, 181 (Lisa F. Berkman & Ichiro Kawachi eds., 2000).

²⁹⁷ Hollard & Sene, *supra* note 294, at 3.

2. Family and Community Support in Cases of Unemployment and Low-Wage Employment

Research has shown that in the event of unemployment or poor employment conditions, family support is an important way in which persons are able to sustain themselves and their family. This is even the case in countries where there are social safety nets in place. For example, Binns and Mars show in their study on how unemployed persons in Glasgow sustain themselves that many rely, at least partly, on support from their kin even though they have access to unemployment benefits.²⁹⁸ Similarly, Edin and Lein show that single mothers in some urban areas in the United States who are struggling to make ends meet rely on relatives for cash support, as well as important non-cash resources.²⁹⁹ Examples of the latter include relatives offering to take care of their children for free or driving them to their work.³⁰⁰ This kind of family support is especially important in countries where there is limited or no governmental assistance. McManus and DiPrete argue that when “institutional features of the labor market and the welfare state leave individuals exposed to market risk, they may respond by relying more heavily on family-based strategies of income stabilization.”³⁰¹ They illustrate this by contrasting Germany, where the state has a financial safety net in place for persons who lose their job, with the United States, where the family is an important source of income after unemployment.³⁰²

In the Global South, family and community support are even more important. As the ILO has noted in a report on income security for unemployed persons, financial support from family, kinship and the community has “always been the main source of support . . . – and usually only – source in developing countries.”³⁰³ Several studies have shown that high levels of social capital tend to be associated with a reduction in the poverty rate.³⁰⁴ Grootaert argues that someone who has a high level of social capital, by which he means that the person is involved in the

²⁹⁸ David Binns and Gerald Mars, *Family, Community and Unemployment: A Study in Change*, 32 *Sociol. Rev.* 662, 668 (1984).

²⁹⁹ Kathryn Edin & Laura Lein, *Work, Welfare, and Single Mothers' Economic Survival Strategies*, 62 *Am. Sociol. Rev.* 253, 258-259 (1997).

³⁰⁰ *Id.* at 262..

³⁰¹ Patricia A. McManus & Thomas A. DiPrete, *Market, Family, and State Sources of Income Stability in Germany and the United States*, 29 *Soc. Sci. Res.* 405, 429 (2000).

³⁰² *Id.*

³⁰³ Guy Standing, *Unemployment and Income Security*, International Labour Organization, June 2000, 6.

³⁰⁴ See Christiaan Grootaert & Thierry van Bastelaer, *The Role of Social Capital in Development: An Empirical Assessment* 72-73 (2002); Deepa Narayan & Lant Pritchett, *Cents and Sociability: Household Income and Social Capital in Rural Tanzania*, 47 *Econ. Dev. Cult. Change* 871, 890 (1999).

community by being a member of local associations, allows persons to gain access to credit, which is essential in times of financial difficulty.³⁰⁵ In Indonesia, for example, there is a strong correlation between household membership of associations in the community and household expenditure, which is likely the result of this increased access to credit.³⁰⁶ Similar research on the impact of social capital on household income in Tanzania finds that an increase in involvement in the community leads to a significant rise in the household expenditure.³⁰⁷ Apart from gaining access to credit, a high level of social capital may help in finding job opportunities.³⁰⁸ This is because members of the community may know of certain job openings that would otherwise be unknown to the job seeker.

3. Family and Community Support for Accessing Education

In the event of inaccessibility of education as a result of high financial costs, people may be able to overcome this issue through financial support from their family and/or community. This applies not only to education in the Global South, but to any context of high education costs in combination with little government subsidy for the education. For example, in the United States most young adults receive financial assistance and housing support from their parents.³⁰⁹ Research has indicated that there is a positive correlation between family income and the college enrollment of young adults in that family, which is like due to the higher amount of financial resources available to them through intergenerational transfers.³¹⁰ In Honduras, like many other countries in the Global South, there are very few government loans for university students.³¹¹ Because of this, most students from poor or “modest” economic backgrounds relied heavily on financial support from their family.³¹² While the same may hold true for students from wealthier backgrounds, tuition fees impose less of a burden on their family’s financial resources. As previously mentioned, education is one the main means through which people from poor socio-

³⁰⁵ Christiaan Grootaert, *Social Capital, Household Welfare and Poverty in Indonesia*, World Bank, Apr. 2009, 39.

³⁰⁶ *Id.* at 42.

³⁰⁷ Narayan & Pritchett, *supra* note 304.

³⁰⁸ Lisa F. Berkman & Thomas Glass, *Social Integration, Social Networks, Social Support and Health*, in *Social Epidemiology* 137, 150-151 (Lisa F. Berkman & Ichiro Kawachi eds., 2000).

³⁰⁹ Patricia Tevington et al., *Financing Children’s Futures: Economic Strategies for Postsecondary Education Among Middle-Income Families*, 32 *Sociol. Forum* 726, 730 (2017).

³¹⁰ *Id.*

³¹¹ Peter C. Mather et al., “*Gaining Power Through Education*”: *Experiences of Honduran Students from High Poverty Backgrounds*, 54 *J. of Stud. Aff. Res. Pract.* 217, 224 (2017).

³¹² *Id.*

economic backgrounds can move to higher ones. This is one of the main reasons for families to invest in the education of their younger members. As Grootaert and Van Bastelaer note, when the family provides financial assistance it is bearing “present costs in order to secure uncertain future payoffs.”³¹³ For the possibility of children receiving financial assistance from their parents, the financial situation of the family is clearly important. Another important factor is the closeness of the ties of the family. Research has shown that young adults who had poor relations with their parents and family at-large were significantly less likely to be engaged in education than those who had better relations.³¹⁴ Similarly, asylum seekers who return to an IPA zone without their family may find it difficult to maintain contact with their family and while relations may have been good before, the lack of regular contact may make it more challenging to access financial assistance from the family.

Community support for education is another important means through which persons can gain access to education. The clearest way in which this can be seen is the emergence of community schools. These types of schools are quite common in most countries in the Global South and are typically constructed, financed and managed for the most part by the local community.³¹⁵ They are usually more affordable than government schools, which has helped expand access to education, in particular among students from neglected areas.³¹⁶ Also, compared to government schools, the local community is much more involved in the procurement of school supplies, which is paid for not only with the financial resources of the community members, but also with non-cash resources. For example, teachers at community schools in Mali are often paid with sacks of millet, firewood or services.³¹⁷ While community schools generally are open to those who are not members of the community, it may be difficult for them to do well in such schools. This can be for many different reasons, including language barriers, cultural differences and discrimination.

4. Family and Community Support for Accessing Health Care

³¹³ Grootaert & Van Bastelaer, *supra* note 304, at 313.

³¹⁴ Rose Butler & Kristy Muir, *Young People's Education Biographies: Family Relationships, Social Capital and Belonging*, 20 *J. Youth Stud.* 316, 323 (2017).

³¹⁵ Karen Tietjen, *Community Schools in Mali: A Comparative Cost Study*, United States Agency for International Development, June 1999, 8.

³¹⁶ Yolande Miller-Grandvaux & Karla Yoder, *A Literature Review of Community Schools in Africa*, United States Agency for International Development, Feb. 2002, 5-6.

³¹⁷ Tietjen, *supra* note 315, at 38.

Similar to the way that individuals cope with financial inaccessibility of education, those who face difficulties in accessing health care because of financial constraints often rely on family and community support. Most research on the linkage between social capital and health has focused on the health benefits that result from social networks, including positive peer influence on health behaviors, reduction of stress and the provision of social support.³¹⁸ Relatively little research has discussed the way in which participation in social networks can allow a person to gain access to financial resources and material goods.³¹⁹ However, this is an important means through which people are able to gain access to health care.³²⁰ Indeed, research on access to modern health care services in the Ivory Coast shows that, despite the high costs of such services, many people from low socio-economic backgrounds are still able to access them.³²¹ The main “factor that allows this access lies within the solidarity of parents, friends or members of a social network.”³²² An example of this is family support of the elderly, which is very common in many countries. In China, for example, adult children are expected to take care of their older relatives and “provide a wide range of care, including emotional support, financial assistance, personal care, and health care expenses.”³²³

However, financial support does not just allow for the problem of financial inaccessibility of the health care services themselves to be overcome. For many in the Global South, transportation costs, in particular in cases where health facilities are located far from those in need of medical help, can be a significant obstacle for persons trying to get treatment.³²⁴ As Musinguzi et al. learned from interviews with community members in Uganda, such obstacles would be overcome by mobilization of the community, “which meant actively marshalling resources including borrowing money from friends and neighbours, organizing transport and caring for ‘unable’ community members.”³²⁵

³¹⁸ Malin Eriksson, *Social Capital and Health – Implications for Health Promotion*, 4 *Glob. Health Action* 1, 2-3 (2011).

³¹⁹ Berkman & Glass, *supra* note 308.

³²⁰ Kathryn P. Derosé & Danielle M. Varda, *Social Capital and Health Care Access: A Systematic Review*, 66 *Med. Care Res. Rev.* 272, 273 (2009).

³²¹ Marcellin Ayé et al., *Economic Role of Solidarity and Social Capital in Accessing Modern Health Care Services in the Ivory Coast*, *Soc. Sci. Med.* 1929, 1929 (2002).

³²² *Id.*

³²³ Hong Li & Martin B. Tracy, *Family Support, Financial Needs, and Health Care Needs of Rural Elderly in China: A Field Study*, 14 *J. Cross-Cult. Gerontol.* 357, 359 (1999).

³²⁴ Laban K. Musinguzi et al., *Linking Communities to Formal Health Care Providers Through Village Health Teams in Rural Uganda: Lessons from Linking Social Capital*, 15 *Hum. Resour. Health* 1, 10 (2017).

³²⁵ *Id.*

Another important way in which the community can provide support to those who would otherwise not be able to access health care, is through the provision of community-based health care. As mentioned earlier, there is only limited government funding for the provision of health services in many countries in the Global South, thereby making these services inaccessible for many. Instead, a significant share of health services is provided by the community. As noted by Hollard and Sene, “basic health services are now in community hands in Sub-Saharan Africa.”³²⁶ Similar to community schools, community-based health care typically employs trained local professionals, is more focused on the needs of the community and is more affordable than the formal health care system.³²⁷ As with community schools, persons who are detached from the community, for example because of ethnic differences, may find it difficult to access such community-based health services.

D – Conclusion

This chapter has shown some of the reasons why a high level of protection is necessary in an IPA area in order to avoid asylum seekers being compelled to return to the area of persecution. While there are other reasons as well for why people may return to such an area, this chapter has mostly focused on the presence of family and community support in that area. If there is a low level of protection in the IPA area, a person may be required to fall back on such support and return to the area of persecution. This chapter has looked specifically at the ways in which a lack of protection of the rights to work, education and health would compel persons to return. Given the fact that, in the absence of decent wages, unemployment benefits, government funding of education and funding of health care, most people tend to rely on financial assistance from their own family and community, there is a strong incentive for asylum seekers to return to the area where such assistance *is* available, even if they would face persecution there. Even if not all asylum seekers who are returned to an IPA zone with a low level of human rights protection would return to the area of persecution, it is the risk of it that makes a state violate the principle of *non-refoulement* under the Refugee Convention.

³²⁶ Guillaume Hollard & Omar Sene, *Social Capital and Access to Primary Health Care in Developing Countries: Evidence from Sub-Saharan Africa*, 45 J. Health Econ. 1, 1 (2016).

³²⁷ Khary A. Rigg et al., *A Community-Based Approach to Primary Health Care*, in *Dimensions of Community-Based Projects in Health Care* 105, 108-109 (Steven L. Arxer & John W. Murphy eds., 2018).

V – Conclusion

This thesis has demonstrated that the Refugee Convention requires a high level of human rights protection in the IPA area. This is because “national protection” under the Refugee Convention requires the protection of certain civil and political rights and the prohibition of *non-refoulement* requires a high level of human rights protection in the IPA area to avoid someone being compelled to return to the area of persecution. The finding that a high level of human rights protection is required in the IPA zone is important for three main reasons. First, it will decrease the likelihood of people being compelled to return to the area of persecution as it removes the incentive to do so, namely the disparity in available family and community support between the IPA area and area of persecution. Second, it will make it less likely that someone who is returned to an IPA zone will be compelled to flee once again to another place in the country of nationality or abroad and, as a result, be displaced once more. Finally, it will protect those who have suffered persecution in their country of nationality from having to return and face human rights violations once again, even if these violations do not amount to persecution.

As Western state parties to the Refugee Convention have tried to find ways to exclude asylum seekers from refugee protection, they have violated this Convention by sending back asylum seekers to areas with a low level of human rights protection. The reasonableness approach that they have used has also led to vastly different determinations of IPA inquiries. Those who conduct such inquiries should do away with the reasonableness approach and instead ask themselves whether the level of protection in the IPA area is sufficient under the Refugee Convention, in other words, whether it can be said that the protection of human rights is sufficient to qualify as “national protection” and whether the protection is sufficient to prevent persons from being compelled to return to the area of persecution. This would bring the IPA

inquiry much more in line with the Refugee Convention than ways in which the inquiry is currently being conducted.