

**THE MICHIGAN GUIDELINES
ON PROTECTION ELSEWHERE**

ADOPTED JANUARY 3, 2007

**LES RECOMMANDATIONS DE MICHIGAN
SUR LA PROTECTION AILLEURS**

ADOPTÉES LE 3 JANVIER 2007

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Refugees increasingly encounter laws and policies which provide that their protection needs will be considered or addressed somewhere other than in the territory of the state where they have sought, or intend to seek, protection.

Such policies—including “country of first arrival,” “safe third country,” and extraterritorial processing rules and practices—raise both opportunities and challenges for international refugee law. They have the potential to respond to the Refugee Convention’s concern “that the grant of asylum may place unduly heavy burdens on certain countries” by more fairly allocating protection responsibilities among states. But insistence that protection be provided elsewhere may also result in the denial to refugees of their rights under the Refugee Convention and international law more generally. The challenge is to identify the ways in which the protection regime may be made more flexible without compromising the entitlements of refugees.

To this end, we have engaged in sustained collaborative study and reflection on the legal basis of protection elsewhere policies. Research conducted by the University of Melbourne’s Research Programme in International Refugee Law was debated and refined at the Fourth Colloquium on Challenges in International Refugee Law, convened in November 2006 by the University of Michigan’s Program in Refugee and Asylum Law. These Guidelines are the product of that endeavor. They reflect the consensus of Colloquium participants on the minimum international legal requirements for valid protection elsewhere policies, as well as our views on the procedures by which international legal obligations may reliably be fulfilled in the implementation of such policies.

WHEN STATES MAY IMPLEMENT
PROTECTION ELSEWHERE POLICIES

1. The 1951 Convention and 1967 Protocol relating to the Status of Refugees (“Convention”) neither expressly authorize nor prohibit reliance on protection elsewhere policies. As such, protection elsewhere policies are compatible with the Convention so long as they ensure that refugees defined by Art. 1 enjoy the rights set by Arts. 2–34 of the Convention.
2. Because the Convention does not contemplate the devolution of protection responsibilities to a non-state entity, any sharing-out of protection responsibility must take place between and among states. While it is preferable that the state to which protection is assigned (“receiving state”) be a party to the Convention, such status is not a requirement for implementation of a protection elsewhere policy which respects international law.
3. Reliance on a protection elsewhere policy must be preceded by a good faith empirical assessment by the state which proposes to effect the transfer (“sending state”) that refugees defined by Art. 1 will in practice enjoy the rights set by Arts. 2–34 of the Convention in the receiving state. Formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state.
4. Unless the receiving state acknowledges the refugee status of the person to be transferred or will in fact ensure that all rights set by Arts. 2–34 of the Convention are granted to him or her without need for recognition of refugee status, every transfer of protection responsibility must be predicated on a commitment by the receiving state to afford the person transferred a meaningful legal and factual opportunity to make his or her claim to protection. The sending state must in particular satisfy itself that the receiving state interprets refugee status in a manner that respects the true and autonomous meaning of the refugee definition set by Art. 1 of the Convention.

5. Absent individuated evidence of risk based on national security or public order grounds, Art. 32 of the Convention prohibits the expulsion of a lawfully present refugee to any other state, even if there is no risk of being persecuted there. A transfer of protection responsibility which respects the requirements of international law may therefore be made only before the refugee concerned is “lawfully present” in the sending state. Lawful presence must be defined by the sending state in good faith and in accordance with the requirements of international law. Lawful presence is in any event established not later than such time as a decision is reached on the admissibility of the protection claim.

RESPECT FOR REFUGEE RIGHTS

6. The most fundamental constraint on implementation of a protection elsewhere policy is the duty of *non-refoulement*, set by Art. 33 of the Convention. Because the duty is to avoid acts which result in a refugee’s expulsion or return to the frontiers of a territory where life or freedom would be threatened “in any manner whatsoever,” Art. 33 prohibits indirect *refoulement* of the kind that occurs when a refugee is sent to a state in which there is a foreseeable risk of subsequent *refoulement*. For the same reason, actions which amount to aiding, abetting, or otherwise assisting another state to breach Art. 33 are themselves in breach of the duty of *non-refoulement*.
7. A state is in violation of Art. 33 where a prohibited return or expulsion is attributable to that state under international law. An attribution of responsibility follows *inter alia* where the return or expulsion is effected by a state official, even if he or she is acting in excess of authority or in contravention of instructions; by a private person or entity acting on the instructions of, or under the direction or control of, the state; or by officials or organs of another state placed at the disposal of the state.

8. A refugee is entitled not simply to protection against *refoulement*, but more generally to benefit from the civil and socioeconomic rights set by Arts. 2–34 of the Convention. As such, any refugee transferred must benefit in the receiving state from all Convention rights to which he or she is entitled at the time of transfer. He or she must also acquire in the receiving state such additional rights as are mandated by the requirements of the Convention.
9. The assessment of respect for refugee rights shall take account of the fact that most such rights are neither immediately owed nor absolute in character. In particular, the rights owed to a refugee increase as the level of attachment to the protecting state increases over time. Some rights inhere as soon as a refugee comes under a state's control or authority (e.g. *non-refoulement*); others once the refugee is physically present in a state's territory (e.g. right to identity documents); additional rights are owed once lawful presence is established (e.g. self-employment); lawful stay gives rise to a more inclusive set of rights (e.g. access to public housing and welfare systems); and a small number of rights are owed only once durable residence is established (e.g. exemption from legislative reciprocity).
10. The assessment of respect for refugee rights shall also take account of the fact that satisfaction of Convention rights is in most cases not conceived in absolute terms, but is rather defined by reference to the rights enjoyed by others in the receiving state. For example, refugees are entitled to the same rights to elementary education as citizens; the same right to engage in employment as most favored non-citizens; and the same right to freedom of movement as aliens generally.
11. Beyond ensuring that any refugee transferred to the receiving state will in practice enjoy rights in line with the requirements of Arts. 2–34 of the Convention, the sending state also must give effect to its obligations under international human rights law and international humanitarian law. The duty not to return anyone to the risk of torture is a clear example of a constraint arising outside the Refugee Convention which limits reliance on an otherwise lawful protection elsewhere policy.

SAFEGUARDS

12. Any person to be transferred to another state under a protection elsewhere policy must be able to contest the legality of the proposed transfer before it is effected. The sending state shall notify any person to be transferred of this entitlement, and shall consider in good faith any challenge to the legality of transfer under a procedure that meets international standards of procedural fairness. Such procedure must in particular afford an effective remedy bearing in mind the nature of the rights alleged to be at risk in the receiving state.
13. In line with the requirements of Art. 31(2) of the Convention, any refugee whose removal is contemplated under a protection elsewhere policy shall first be granted “a reasonable period and all the necessary facilities to obtain admission into another country” of his or her choosing.
14. If a receiving state fails to ensure that a transferred person who meets the requirements of Art. 1 of the Convention receives the benefit of Arts. 2–34 of the Convention, the sending state’s original obligations to that refugee are no longer satisfied by reliance on the transfer of protection responsibility. The sending state in such circumstances should facilitate the return and readmission of the refugee in question to its territory, and ensure respect for his or her rights there in line with the requirements of the Convention.
15. A sending state whose officials or decision-makers have actual or constructive knowledge of breach by a receiving state of the latter state’s duty to respect the requirements of Arts. 1–34 of the Convention will ordinarily be unable to assert that Convention obligations are respected in the receiving state. It is thus disentitled from effecting any further transfers to that state under a protection elsewhere policy until and unless there is clear evidence that the breach has ceased.

16. Transfer under a protection elsewhere policy should ideally take place only under the auspices of a written agreement between the states in question. At a minimum, such an agreement should stipulate the duty of the receiving state to respect the refugee status of persons defined by Art. 1 of the Convention; to provide transferred refugees the rights set by Arts. 2–34 of the Convention; to ensure the right and ability of transferred refugees to notify the United Nations High Commissioner for Refugees (UNHCR) of any alleged breach of the responsibilities of the receiving state; to grant UNHCR the right to be present in the receiving state and to enjoy unhindered access to transferred refugees in order to monitor compliance with the receiving state's responsibilities towards them; and to abide by a procedure (whether established by the agreement or otherwise) for the settlement of any disagreement arising out of interpretation or implementation of the agreement.

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James C. Hathaway
Colloquium Convener
University of Michigan

Rodger P.G. Haines
Colloquium Chair
University of Auckland

Michelle Foster
Colloquium Rapporteur
University of Melbourne

Mariano-Florentino Cuellar
Stanford University

Maryellen Fullerton
Brooklyn Law School

Justice A.M. North
Federal Court of Australia
President, Intl. Association of
Refugee Law Judges

Mary Ellen O'Connell
University of Notre Dame

Guglielmo Verdirame
Cambridge University

Marjoleine Zieck
University of Amsterdam

Hedy Chang
Student
University of Michigan

Martin Jones
Research Scholar
University of Michigan

Alla Karagodin
Student
University of Michigan

Sarah Kamiski
Student
University of Michigan

Allison Kent
Student
University of Michigan

Alicia Kinsey
Student
University of Michigan

Abby Rubinson
Student
University of Michigan

Lindsey Schatzberg
Student
University of Michigan

Rachel Simmons
Student
University of Michigan

Aref Wardak
Student
University of Michigan

The Colloquium benefited from the counsel of
Ms Judith Kumin
Regional Representative for the Benelux and the European Institutions
United Nations High Commissioner for Refugees