

INTERNAL PROTECTION ALTERNATIVE AND THE ACTOR OF PROTECTION

**Boldizsár Nagy's presentation
at the ECRE regional workshop**

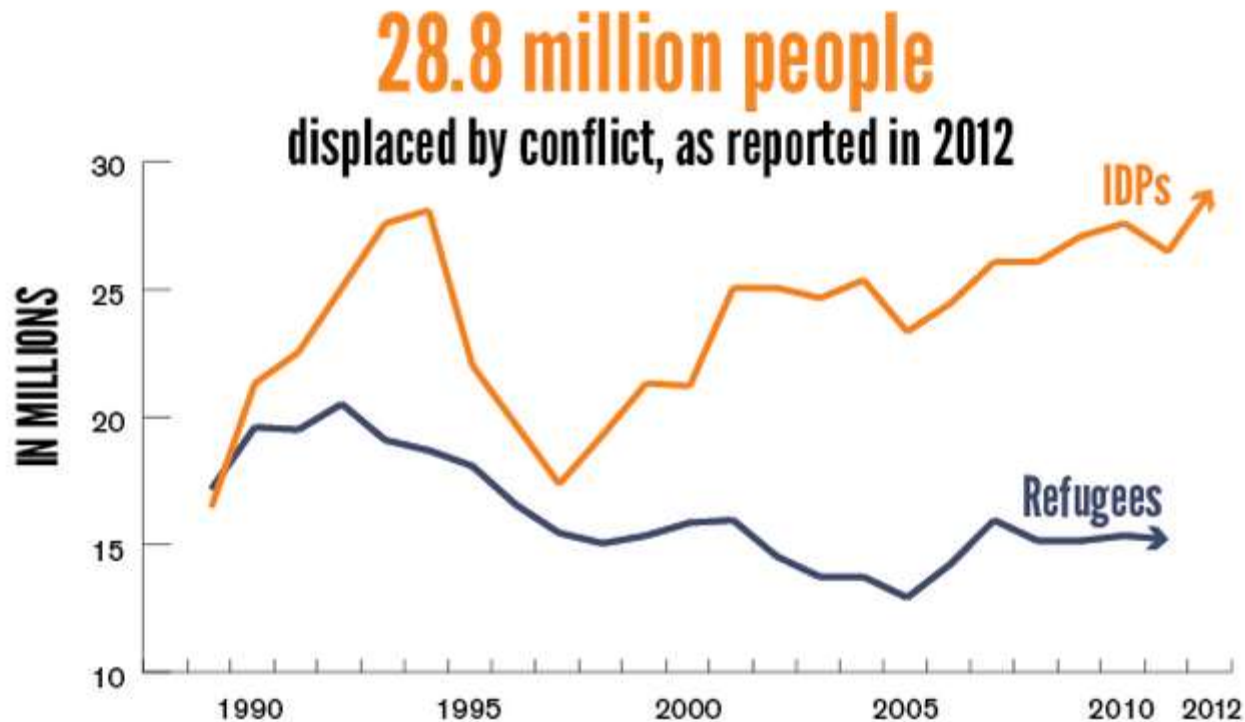
**„Actors of Protection and Internal Protection
Alternative in an Evolving European Asylum
Framework”**

Budapest, 12 May 2014

The Internal Protection Alternative

IPA – ADDING TO THE NUMBERS OF INTERNALLY DISPLACED

Global Figures



Source: <http://www.internal-displacement.org/> visited 11 May 2014

INTERNAL PROTECTION ALTERNATIVE

THE CONCEPT

Internal protection – internal relocation - internal flight
Handbook on Procedures, para 91: „**persecution** ...may occur in only **one part** of the country. In such situations, a person will **not be excluded** from refugee **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.**”

UNHCR, 2012

The concept of [internal flight alternative] – also referred to as “internal protection alternative” or “internal relocation alternative” – represents **a factual determination that an asylum seeker could access meaningful protection** in his/her country of origin by relocating to another part of the same country, **instead of** relying on **international protection**. The concept **is absent from the 1951** Convention and the 1967 Protocol. UNHCR’s primary position is that the possibility of IFA is relevant to asylum procedures only in certain limited cases.

INTERNAL PROTECTION ALTERNATIVE

THE HISTORY

Practice of denying status on the ground of IPA: only after the mid 1980s (Hathaway – Foster, 359)

Before: asylum a political tool the West uses – no denial even if IPA available

Mid 1980s: larger influx from outside of the political opponent's world → desire to exclude

IPA – ISSUES – IS IPA PART OF THE WELL FOUNDED FEAR ASSESSMENT OR THAT OF THE PROTECTION?

Which comes first:
Decision on
well founded fear or decision on IPA?
(UNHCR: wff)

If part of **well founded fear**: **no investigation of merits** as to whether there is a well founded fear that in the presence of an internal flight alternative the applicant would be exposed to persecution

If **part of protection** assessment, then it is assumed that there is **no** well founded fear, but it is assumed that there is a well founded fear of persecution by another state, as on the territory of the state of origin

H-F: Sequences

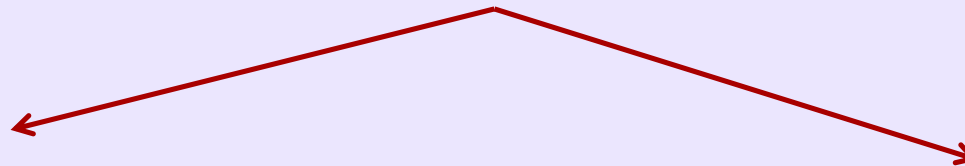
1. Applicant has a well founded fear of persecution in her location
2. Authority decides on the threat of persecution. If yes, then
3. Authority decides on IPA alternative „akin to an exclusion inquiry” (p. 370)

The nature of the feared persecution must be established first, in order to see if the IPA is real (in respect of that threat – and no other threats manifest themselves at the IPA territory)

IPA – ISSUES – SEQUENCE OF ASSESSMENT/BURDEN OF PROOF

When is fear well-founded? When it relates to persecution **somewhere** or persecution **everywhere** in the country? (Is there an implied condition in the GC def, according to which the threat of persecution must be country-wide?) (H – F, 368 – 369)

If persecution was to be country wide, on whom rests the burden of proof?



Asylum seeker showing she had no alternative

Authority proving there was a reasonably available alternative

UNHCR Guidelines, 2003, para 6: „The 1951 Convention **does not require** or even suggest that the fear of being persecuted need always **extend to the *whole territory*** of the refugee’s country of origin.”

UNHCR'S SCHEME

Reasonableness

Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?

Personal circumstances

Past persecution

Safety and security

Respect for human rights

Economic survival

Access:
reasonability
issue -BN

Is the area of relocation practically, safely, and legally accessible to the individual?

Is the agent of persecution the State?

Is the agent of persecution a non-State agent?

Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

Relevance

HATHAWAY AND FOSTER

Four criteria

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graph TD; A[Four criteria] --> B[Is access to the proposed IPA practical, safe and legal?]; A --> C[Is there less than a real chance of the original risk]; A --> D[Are there no new risks?]; A --> E[Is a minimum of state protection available??]
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Is access to the proposed IPA practical, safe and legal?

Is there less than a real chance of the original risk

Are there no new risks?

Is a minimum of state protection available??

R. Marx largely agrees (2002), p. 185

IPA ISSUES – ACCESS TO THE SAFE PART OF THE COUNTRY

Physical access (getting there)

UNHCR: mine fields, factional fighting, shifting war fronts, banditry or other forms of harassment or exploitation

+ natural barriers (e.g. mountains, rivers)

Safe access (not being exposed to danger)

UNHCR: passing through the area of persecution or dangerous airports

Legal access the territorial (state must allow moving within the country, /China?!/), if needed local authorities' permission to enter and stay must be available) (see, e.g. *A.A.M. v. SWEDEN* Kurdish territory in Iraq)

IPA ISSUES – SAFETY VERSUS PROTECTION IN THE POTENTIAL DESTINATION PART OF THE COUNTRY

Are „safety” and „protection” the same? (H-F: not, p.383)

Safety may be interpreted as entailing a duty of restraint (H-F, 385)

UNHCR, 2003, para 21:

Safety

Safety and security + no danger and risk of injury.

Durable = not illusory or unpredictable.

In most cases of armed conflict: no safety as fronts move

Where control is exercised by an armed group and/or State-like entity, careful examination must be made of the durability of the situation there and the ability of the controlling entity to provide protection and stability.

IPA ISSUES – REASONABLY EXPECTED TO MOVE THERE AND STAY THERE – LESS THAN REASONABLE CHANCE OF ORIGINAL RISK

„Reasonableness, as Alice no doubt would observe, depends on which side of the looking glass one is standing”
Bill Frelick

Hathaway and Foster challenge the use of the reasonability test as it is prone to arbitrariness

- Courts are divided on the weight of
- family links
 - language knowledge
 - economic prosperity

Hathaway – Foster:

Is there no real chance of being persecuted for the original reason („antidote”)

Answers: as UNHCR guidelines

+

Occasional restraint of the authorities from persecution does not create IPA

UNHCR „Relevance”

- If the state is the persecutor – no IPA, unless purely regional/local
- If the non-state agent is the persecutor is the state able and willing to protect *there*, even otherwise unable or unwilling *in the original place*
- International organisations’ presence is normally NOT enough
- Clans, militias: if they exercise effective control

LACK OF NEW RISK OF PERSECUTION OR OF REFOULEMENT TO THE UNSAFE PART OF THE COUNTRY

Hathaway – Foster

The generalised harm still fits the Convention (and need not be considered for humanitarian /reasonableness/ grounds) if it reaches the level of persecution as exposure to it is the consequence of the original persecution based on the five grounds. (Indirect nexus)

If harm is not as egregious as to qualify as persecution, but harsh conditions would still force the claimant to return to other (persecutory) parts of the country, then it would amount to refoulement (Indirect refoulement)

UNHCR Guidelines, 2003, paras 18 - 23:

- Original persecutor must be localised: it is **not enough** that it has **not yet** reached the IPA area
- **No self-restraint** from the claimant to be expected (e.g. religious freedom)
- There must **not** be **serious risk** to life, safety, liberty or health, or one of serious discrimination, **irrespective of whether or not** there is a **link to** one of the **Convention grounds**. „The assessment of new risks would therefore also need to take into account serious harm generally covered under complementary forms of protection.”

REFUGEE REVIEW TRIBUNAL, AUSTRALIA

1318100 [2014] RRTA 126 (19 FEBRUARY 2014)

Facts: Ethiopian Christian man marries an Ethiopian Muslim woman and he fears the retaliation of his father in law, who threatens to kill him if he does not divorce.

„50. In determining this question, the Tribunal has been mindful of the judgment in *MZYLH v Minister for Immigration & Anor* [2011] FMCA 888 (17 November 2011), where there was evidence that the applicant in that matter was suffering from severe depression and severe post-traumatic stress disorder. The court said at [137]-[138]:

‘137. The Tribunal is required to consider the practical realities facing a person in determining whether it is reasonable to expect them to relocate. Those practical realities are not limited to matters related to persecution for a Convention reason:

A well founded fear of persecution for a Convention reason having been shown, a refugee does not also have to show a Convention reason behind every difficulty or danger which makes some suggestion of relocation unreasonable.[146]

138. The issue is ... whether he could relocate within Pakistan and maintain himself given the state of his health. As Branson J said in NAIZ, the approach set down in Randhawa requires the Tribunal to consider the practical realities facing the Applicant to consider how, in a practical sense, he could reasonably be expected to relocate.[147]’ ”

(Emphasis added [by the RRTA –NBN].)

REFUGEE REVIEW TRIBUNAL, AUSTRALIA
1318100 [2014] RRT (19 FEBRUARY 2014)

Applicant is credible – the th... are the
couples' family live is no IPA as...
other parts of Ethiopia? Neither:

„58. While it **may be expected that some level of hardship**...
the sake of relocating in a place safe from persecution, the...
there is very grave suffering for a very **high proportion of the population**
outside [City 1]. The applicant has **no friends or relatives or other**
connections outside [City 1] who could help him and his wife to relocate
outside the capital, and to get a living. He is married and **hopes to live with**
his wife, and they may have children for whom they would need to care. The
Tribunal therefore does not regard it as reasonable in all the circumstances
of the applicant for him to relocate with his wife to a place in Ethiopia
outside [City 1], or even to do so alone, if he should be unable initially, or for
some time, to arrange her escape from her family”

= the person is in need of protection by Australia

Tribunals' considerations:
- General economic and social conditions
- Personal contacts, supporting network
- Expected personal aspirations (children)

NO SELF-RESTRAINT TO BE EXPECTED

FROM THE GUIDE TO REFUGEE LAW IN AUSTRALIA

In „the context of relocation, it **cannot be a reasonable adjustment**, contemplated by the Convention, **that a person should have to relocate internally by sacrificing one of the fundamental attributes of human existence** which the specified grounds in **the Convention** are **intended to protect and uphold**.

In *SZATV v MIAC*, the Tribunal had found that, although the applicant may not be able to work as a journalist (which had been the source of the feared persecution in his home region), internal relocation was a realistic option for him. The High Court unanimously held that the Tribunal had, in effect, **impermissibly expected him to move elsewhere, not work as a journalist, and live discreetly so as not to attract the adverse attention of the authorities** in his new location, lest he be further persecuted by reason of his political opinions.”

Guide to Refugee Law in Australia, p 6-7

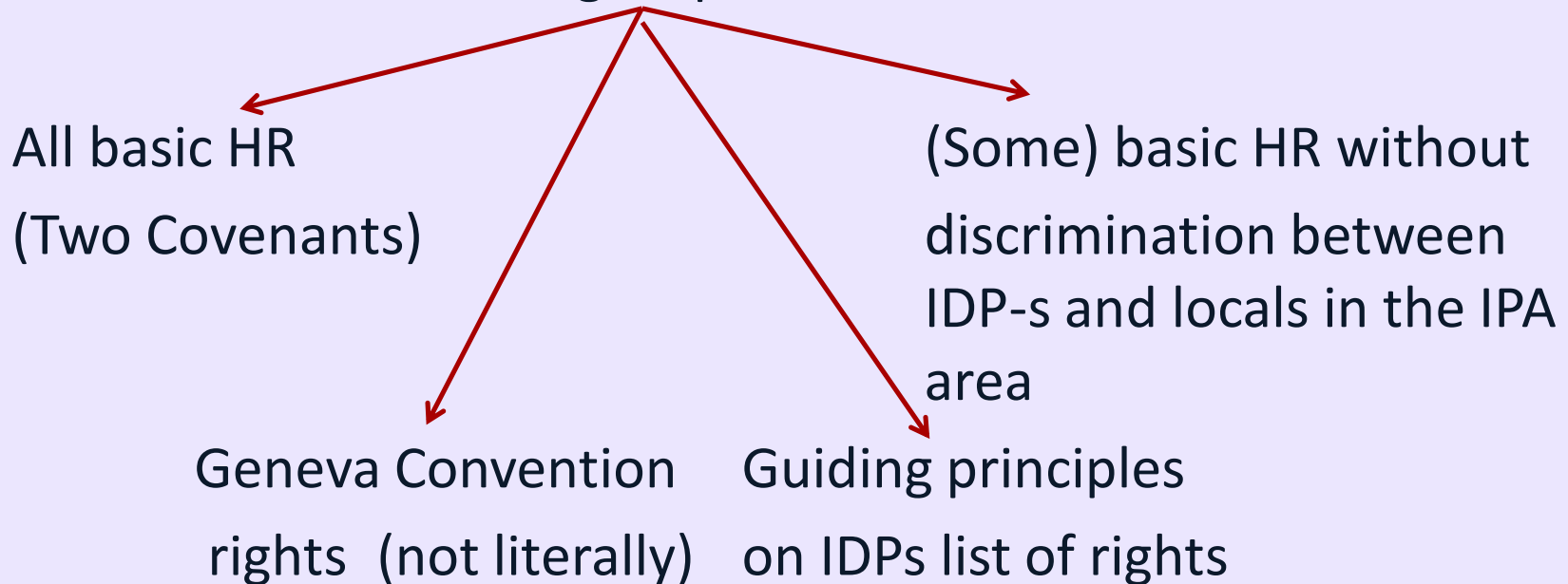
<http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=9df34d56-a6bd-4676-9362-523339c768fd>

THE PROTECTION IN THE IPA AREA

Availment of the protection of the country – not being a refugee

Protection: more than absence of risk

What level of human rights protection/enforcement?



THE STATUS AND CONTENT OF IPA - SUMMARY

- It is **neither a principle, nor an exclusion ground**
- It is part of the **assessment of facts** based on the subsidiarity of international protection
- Its existence is only relevant **concerning the future** – past IPAs must not lead to denial
- IPA means **meaningful protection** = more than lack of Convention based persecution or serious harm. The standard which should be achieved is debated
- **Access to the territory and life there** are to be **assessed** from the **practical point of view**
- Only a **durable** IPA is IPA

Possible connection (and new conceptual foundation) to (in) the **„responsibility to protect” concept**, stressing the duty of the sovereign state towards its own population?

Should the person not have a choice of the site of protection –as part of Human rights – her liberty?

The Protector

THE PROTECTOR

Basis: if HR-s are violated by fellow inhabitants, the state redresses those violations by punishment and (enforcing) compensation. As long as there is effective protection there is no persecution. (Debates on the duty to prevent!)

Traditional view (Nazi Germany, Fascist States, Communist Eastern Europe) the state is the persecutor and another (democratic, human rights observing) state is the protector

Modern constellation: the territorial state is

- non functioning
- controls only parts of the state territory

→ can protection be realised in the non-state controlled territories?

Who may provide protection?

What amounts to effective protection?

UNHCR ON THE PROTECTOR

Guidelines 2003, paras 13 - 17,

State

- against local persecution: only if explained why the state does not counteract the local persecution but is capable to protect in other parts of the state
- against non-state actor: ability and willingness (laws and practice matter)

International organisation against non-state actor: certain administrative authority and control over territory by international organisations on a transitional or temporary basis is not equal with protection provided by States = there is in general no IPA!

Non-state actor against non-state actor: Only if the local clan or militia provides an organised and stable authority exercising full control over the territory and population in question.

The DM /Somalia/ case, 2005 UKIAT 00150

Q: Are Somali clans actors of protection?

Applicant's view

1. Protection under the Refugee Convention and the HR Human Rights Conventions are predicated on the existence of *“state” protection*.
2. The protector must meet or seek to meet obligations under international human rights law and humanitarian law, it must be capable to be held responsible under international law (clans, gangs may maintain order, but flout i.l.)

Court's view

Ad 1: The Court juxtaposes Hathaway – Foster, with the Michigan guidelines. The guidelines state that a non-state actor may be protector

+ GC does not mention „state”, it speaks of „country of nationality”

Ad 2. The only real question is factual: is protection afforded or not?

(The court does not explicitly address the international accountability of the protector)

The DM /Somalia/ case, 2005 UKIAT 00150Q: Are Somali clans actors of protection

Applicant's view

3. The Qualification Directive (§ 7) requires state actors, or actors controlling part of the state and the operation of an „effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.” and to make reasonable steps to prevent persecution or serious harm

Court's view

Ad 3. The QD claims these are „generally” means of protection (not an exhaustive list).

One of the „three noble clans, the Hawiye, controls a major part of the territory”.

The QD does not elaborate on what it means that actors must take „reasonable steps”

The Tribunal's conclusion:

„[P]rotection ... can be afforded by de facto or quasi-state entities. That view is now reinforced by Article 7 of the EU Refugee Qualifications Directive. [of 2004-BN] ... Whether majority clans in Somalia are willing and able to protect is a factual question.”

CRITICAL VIEWS ON THE „PROTECTION AS MERE FACT BY ANY EFFECTIVE AGENT” APPROACH (DM, UKAIT)

Main issue – raised in DM: Should the actor be accountable i.e. legally bound by human rights and humanitarian law obligations and capable of being held responsible for their violation?

ECRE 2008: „ ECRE has emphasised that the use of non-state actors of protection per se raises concerns, as currently *only states can be parties to international human rights instruments*. This makes it *impossible for persons within their jurisdiction to hold non-state entities internationally responsible* for ensuring that human rights standards are safeguarded.” (p. 16)

ILPA (not dated) „ We do not accept that, as a matter of international law, non-State or quasi-State bodies can provide protection that is equivalent to that provided by a State: *they are not parties to international law human rights instruments and are therefore do not have the same accountability in international law*. The European Court of Human Rights has set standards for protection that it would be difficult for a non-State to meet and there will be *grave practical problems* in implementation *if an actor of protection is deemed inadequate for ECHR purposes but adequate for claims under the Refugee Convention*.” (para 10)

„The fundamental problem ... is that **none of the proposed protectors – whether it is ethnic leaders in Liberia, clans in Somalia, or embryonic local authorities in portions of northern Iraq – is positioned to deliver what ... the 1951 Convention requires, namely, the protection of a State accountable under international law.** The protective obligations of the 1951 Convention ... are specifically addressed to ‘States’. The very structure of the 1951 Convention requires that protection will be provided **not by some legally unaccountable entity with *de facto control, but rather by a government capable of assuming and being held responsible under international law*** for its actions. ...[T]he rights enumerated in the 1951 Convention similarly **envisage that protection will be provided by an entity that has established, *inter alia, a formal system for regulating aliens’ social and economic rights, a legal and judicial system, and a mechanism for issuing identity and travel documents.*** Indeed, ... refugee protection ... assumes the right of at-risk persons to **access a legally accountable State – not just some (hopefully) sympathetic or friendly group....** There is simply no basis in law or principle to deviate from this foundational principle in the internal protection context.” (H-F, p. 410-411)

SELECT LITERATURE

- Hathaway, J, Foster, M (2003): Internal protection/relocation/flight alternative as an aspect of refugee status determination. In: : Feller, E; Türk, V; Nicholson, F (eds): *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection* Cambridge University press, Cambridge, 2003, pp 357 – 417
- Kelley, Ninette (2002) “Internal Protection/ Relocation/ Flight Alternative: Is It Reasonable?” *International Journal of Refugee Law*, vol. 14., pp. 4-44.
- Marx, Reinhard (2002) The Criteria of Applying the „Internal Flight Alternative” Test in National Refugee Status Determination Procedures, *IJRL*, vol 14., pp. 179 - 218
- Storey, Hugo (1998): The Internal Flight Alternative test: The Jurisprudence reexamined, *IJRL*, vol 10., pp. 499 - 546
- Zimmermann, A (ed) (2011): The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary, Oxford University Press, 2012

SELECT LITERATURE NON-ACADEMIC DOCUMENTS

ECRE, 2008: „*The Impact of the EU Qualification Directive on International Protection*” ELENA

ILPA: *ILPA’s response to the home office consultation on the implementation of the refugee definition directive (Undated)*

The Michigan Guidelines on the Internal Protection Alternative, 1999
http://www.refugeecaselaw.org/documents/Internal_Protection.pdf

UNHCR (2003): 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

UNHCR (2012): *The Internal Flight Alternative Practices A UNHCR Research Study in Central European Countries*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4ffaabdf2&skip=0&query=internal%20relocation%20alternative>

JUDICIAL DECISIONS

National decisions

- *DM (Majority Clan Entities Can Protect) Somalia* [2005] UKAIT 00150
- *Januzi v Secretary of State for the Home Department & Ors* [2006] 15 February 2006 UKHL 5
- *1318100* [2014] RRTA (Australia) 126 (19 February 2014)

International courts' and tribunals' decision

- *A.A.M. v. SWEDEN (Application no. 68519/10)* ECtHR Judgment 3 April 2014

THANKS!

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