INTRODUCTION

Refugee law may be the world's most powerful international human rights mechanism. Not only do millions of people invoke its protections every year in countries spanning the globe, but they do so on the basis of a self-actuating mechanism of international law that, quite literally, allows at-risk persons to vote with their feet. This is because, as the United Nations High Commissioner for Refugees ("UNHCR") has insisted, refugee status is not a status that is granted by states; it is rather simply recognized by them:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[1]

A person who is a refugee at international law is thus entitled in any of the nearly 150 state parties to the refugee regime to claim a powerful catalog of internationally binding rights – including not only critical civil rights, but also socio-economic rights and rights that enable pursuit of a solution to refugeehood.[2] Because refugee status inheres by virtue of facts rather than formalities, the entitlement to these rights persists until and unless an individual is found not to be a refugee.[3]

The portal to this uniquely valuable protection regime is the definition of a refugee codified in the 1951 Convention relating to the Status of Refugees,[4] made both universal and applicable to contemporary refugees by the 1967 Protocol relating to the Status of Refugees[5]

[1] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011) ("*Handbook*"), at [28].

[2] Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137 ("Refugee Convention" or "Convention"), at Arts. 2–34.

[3] J. C. Hathaway, *The Rights of Refugees under International Law* (2005), at 11; A. Zimmermann and C. Mahler, "Article 1A, para. 2 (Definition of the Term 'Refugee')," in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 281, at 299. In *Németh v. Canada (Minister of Justice)*, [2010] 3 SCR 281 (Can. SC, Nov. 25, 2010) the Supreme Court of Canada affirmed this principle at 310 [50], relying on Hathaway, *ibid.*, at 158 and 278.

[4] See *supra* n. 2.

[5] Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267 ("Refugee Protocol"). The Refugee Protocol prospectively required the application of Convention norms to refugees in all parts of the world, and eliminated the possibility of restricting status to persons fleeing a pre-1951 phenomenon. While it is sometimes said that the Protocol "amended" the Convention, this is not so: see e.g. *Minister of Immigration and Multicultural Affairs v. Savvin*, (2000) 98 FCR 168

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(the "Convention refugee" definition). Article 1A(2) of the Convention provides that 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[6]

While state parties have not infrequently agreed by either regional accord[7] or national law[8] to *extend* the scope of refugee status to other persons, it is legally impossible for a state party to the Convention to in any way *limit or reduce* the scope of the Convention refugee definition.[9] In contrast, extended status – whether framed as complementary protection, subsidiary protection, or otherwise – is established and retained by states in the form preferred by them, and may not provide rights equivalent to those that inhere in Convention refugees.[10] It is thus critical that states assess refugee status as an initial matter, turning to other options only in the event that Convention status is not appropriately recognized.[11]

(Aus. FFC, Apr. 12, 2000), at 194–95, per Katz J. But for the overwhelming majority of states that are parties to the Protocol as well as or in lieu of the Convention, the refugee definition is now both universal and without temporal limitation (for the few exceptions to this principle, see Hathaway, *supra* n. 3, at 97–98).

[6] Refugee Convention, at Art. 1(A)(2).

[7] Africa is the only region to have adopted a formally binding extension of the Convention refugee definition: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, entered into force Jun. 20, 1974, 1001 UNTS 45. States of the European Union have agreed to a binding standard for interpreting and applying the Convention refugee definition, which at times goes beyond the requirements of the Convention and at times falls short of meeting them: Council Directive 2011/95/EU 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), [2011] OJ L 337/9 (Dec. 20, 2011) ("Qualification Directive"). Latin America has adopted a non-binding regional expansion of refugee status: Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/II.66/doc. 10, rev. 1 (1984–85), at 190–93, which has, however, been codified in the laws of some countries in the region (see F. Piovesan and L. Jubilut, "Regional Developments: Americas," in Zimmermann, *supra* n. 3, 205, at 215–17).

[8] See e.g. the discussion of the extension of the "compelling circumstances" proviso to modern refugees in some states, discussed *infra* Ch. 6.1.4.

[9] Article 42 of the Refugee Convention prohibits reservations in relation to Art. 1: Refugee Convention, at Art. 42(1).

[10] There is legal uncertainty as to what status is required to be accorded to those unable to be returned to their home state either on the basis of non-Refugee Convention international legal norms or on humanitarian grounds: see J. McAdam, *Complementary Protection in International Refugee Law* (2007), at 204–8; J. Pobjoy, "Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection," (2010) 34 Melb. U. L. Rev. 181. See further *Fornah v. Secretary of State for the Home Department*, [2007] 1 AC 412 (UKHL, Oct. 18, 2006), at 469 [121], per Lord Brown.

[11] As the UNHCR's Executive Committee has reaffirmed in this context, "the 1951 Convention relating to the Status of Refugees together with its 1967 Protocol continue to serve as the cornerstone of the international refugee protection regime": UNHCR Executive Committee Conclusion No. 103 (LVI), "Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection," UN Doc. A/AC.96/1021 (Oct. 7, 2005), Preamble, para. 1. For example, the Qualification Directive recognizes this in providing that, "'person eligible for subsidiary protection' means a third-country national or a

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The interpretive challenge

Given the significance of finding a person to meet the Convention definition of a refugee, it is perhaps unsurprising that its meaning is often contested. For example, is a person in an international transit zone "outside" her country? How much evidence of risk does there need to be for a fear to be "well-founded"? When is a harm serious enough to be a risk of "being persecuted"? Does an at-risk person lose her entitlement to refugee status if she can turn to militias or other non-state entities for help inside her own country? Are those at risk because of their gender or sexual orientation refugees? Can a refugee go home to "test the waters," or will doing so forfeit her protected status? And how do we deal with at-risk persons who are serious criminals, or who are thought to pose a risk to the security of an asylum country?

Not only does interpretation of the Convention definition raise many complex issues, but there is no single authoritative entity entitled to resolve interpretive questions in a definitive fashion. In contrast to nearly all other international human rights treaties, the Refugee Convention does not establish an international court, tribunal, or committee for the adjudication and resolution of differences in states' interpretation of the key terms in the Convention.[12] While the UNHCR has the "duty of supervising the application of the provisions of [the Refugee] Convention,"[13] the agency has no authority to mandate any particular interpretation of the Convention definition.[14] As a matter of binding law, the task of determining the Convention's "true autonomous and international meaning"[15] has thus fallen principally to domestic decision-makers[16] – officials, specialist tribunals, and courts.

It will, however, be apparent that when a single definition is interpreted and applied by the authorities of a widely divergent group of states – with not only different legal systems, but distinct social and other lenses through which the theoretically common Convention definition might be viewed – there is a risk of fragmentation.[17] Inconsistency and divergence in interpretation of the Convention definition would clearly undermine the principled

stateless person *who does not qualify as a refugee*": Qualification Directive, *supra* n. 7, at Art. 2(f) (emphasis added).

[12] Refugee Convention, at Art. 38, provides that, "[a]ny dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute." This provision has, however, never been invoked. As such, there is an ongoing debate about the need to strengthen the supervisory mechanisms in relation to the Refugee Convention. See e.g. J. C. Hathaway, A. North, and J. Pobjoy, "Roundtable on the Future of Refugee Convention Supervision," K. O'Byrne, "Is there a *Need* for Better Supervision of the Refugee Convention?" J. Whiteman and C. Nielsen, "Lessons from Supervisory Mechanisms in International and Regional Law," and A. Blackham, "A Proposal for Enhanced Supervision of the Refugee Convention," (2013) 26(3) J. Ref. Stud. 323–415.

[13] Refugee Convention, at Art. 35(1). See O'Byrne, Whiteman and Nielsen, and Blackham, *supra* n. 12.

[14] J. McAdam, "Interpretation of the 1951 Convention," in Zimmermann, *supra* n. 3, 75, at 79.

[15] *R v. Secretary of State for the Home Department; Ex parte Adan*, [2001] 2 AC 477 (UKHL, Dec. 19, 2000), at 517, per Lord Steyn. For recent affirmation, see *MPR v. Refugee Status Appeals Authority*, [2012] NZHC 567 (NZHC, Mar. 28, 2012), at [15].

[16] Importantly, UNHCR officials often take on this role on behalf of states, especially in less developed countries. See R. Stainsby, "UNHCR and Individual Refugee Status Determination," (2009) 32 Forced Migration Rev. 52.

[17] N. Canefe, "The Fragmented Nature of the International Refugee Regime and its Consequences: A Comparative Analysis of the Applications of the 1951 Convention," in J. C. Simeon (ed.), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (2010) 174, at 178, 187.

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goal of ensuring a single, universal standard for access to refugee protection.[18] And at a political level, significant differences of interpretation could skew decisions about where refugees would be inclined to seek protection – a situation fundamentally at odds with the Convention's commitment to the equitable sharing of responsibilities among states.

The critical role of the transnational judicial dialog

The most important bulwark against a fragmented interpretation of the Convention refugee definition has come from refugee status decision-makers. Aided by the UNHCR and scholars, judges and others engaged in the assessment of refugee status have increasingly chosen to interpret the refugee definition in a manner that takes account of developments in other countries, and which strives for some sense of coherence in decisions across state parties. In a seminal decision, the House of Lords determined that

> the Refugee Convention must be given an independent meaning . . . without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty . . .
>
> In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty.[19]

This search for autonomous and international meaning has led courts carefully to consider, and often to adopt, the reasoning of their counterparts engaged in refugee status assessment in other jurisdictions. As recognized by a judge of the Full Federal Court of Australia,

> [c]onsidered decisions of foreign courts, in particular appellate decisions, should be treated as persuasive in order to strive for uniformity of interpretation of international conventions . . . It is desirable that obligations of the host states under an instrument such as the [Refugee] Convention be consistently interpreted in order that there be uniformity of approach not only as to host state rights and obligations, but also as to the derivative legal position of refugees thereunder.[20]

Refugee decision-makers, and senior appellate judges in particular, have thus engaged in a "transnational judicial conversation"[21] concerning the correct and authoritative approach to

[18] As Brennan J. of the Australian Administrative Appeals Tribunal noted in *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)*, (1979) 2 ALD 634 (Aus. AAT, Nov. 21, 1979), at 639, in relation to deportation decisions generally, "[i]nconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice."

[19] *Adan* (UKHL, 2000), at 516–17, per Lord Steyn.

[20] *NBGM v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2006) 150 FCR 522 (Aus. FFC, May 12, 2006), at 562–63 [158], per Allsop J. (in dissent). See also *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 FC 761 (Can. FCA, Apr. 4, 2003), at [97], per Nadon J.A.; *Fornah* (UKHL, 2006), at 429 [10], per Lord Bingham and 469 [121], per Lord Brown; *HJ (Iran) v. Secretary of State for the Home Department*, [2011] 1 AC 596 (UKSC, Jul. 7, 2010), at [127], per Dyson J.S.C. Even in the United States it is explained that, "[a]lthough citing foreign law is at times controversial, the broad consensus, even among opponents of its use in constitutional law cases, supports its use when determining how other signatories on a treaty interpret that treaty": *N-A-M- v. Holder*, (2009) 587 F.3d 1052 (USCA, 10th Cir., Nov. 20, 2009), at 1062.

[21] L. R. Helfer and A.-M. Slaughter, "Toward a Theory of Effective Supranational Adjudication," (1997) 107 Yale L. J. 273, at 371–72.

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interpretation of the refugee definition. The result has been a rich comparative jurisprudence concerning the key terms of the refugee definition, which shows a determined effort to engage with the international and comparative nature of the refugee definition.

This book both celebrates and draws on the extraordinary judicial engagement with the Convention definition, especially the case law emanating from the key common law jurisdictions of Australia, Canada, New Zealand, the United Kingdom, and the United States, and to a lesser extent of Ireland and South Africa. While the transnational judicial dialog has no doubt been richest among states of the common law tradition, an increasing number of civil law countries – in particular European Union states now bound by the common Qualification Directive and hence by the resultant refugee opinions of the Court of Justice of the European Union – are now engaged in a comparable effort to forge common standards. We therefore look also, if somewhat more selectively, to the jurisprudence of European states – including Austria, Belgium, France, Germany, Spain, and Switzerland – and note critical developments in a variety of other countries as well.

A principled approach to treaty interpretation

To be clear, however, our goal in this book is not simply to provide a digest or comprehensive assessment of the current state of transnational jurisprudence interpreting the Convention refugee definition. To the contrary, the analysis presented here is explicitly normative: we engage with the jurisprudence as a means of positing and testing a comprehensive and principled analysis of the Convention refugee definition. The analysis of leading courts and tribunals is, in our view, owed special deference – tested and justified as it is against the hard facts of real cases. But at the end of the day, "[h]owever wide the canvas facing the judge's brush, the image he makes has to be firmly based on some conception of objective principle which is recognised as a legitimate source of law."[22]

For international refugee law, that conception of objective interpretive principle is found in the rules codified in the Vienna Convention on the Law of Treaties ("Vienna Convention").[23] While it is beyond the scope of this Introduction fully to set out all our views on the issue of treaty interpretation,[24] we briefly note here our understanding of the most critical questions that shape our analysis in this book, and which we believe should similarly inform the efforts of those charged with the interpretation and application of the Convention definition as imported into their national law and practice.

The most fundamental principle is that a treaty "be interpreted in **good faith**."[25] The normative content of "good faith" or *bona fides* can be distilled to the proposition that those engaged in the interpretation of treaties are bound to act in a way that honors the spirit as

[22] *Sepet v. Secretary of State for the Home Department*, [2001] Imm AR 452 (Eng. CA, May 11, 2001), at 477 [66].

[23] Vienna Convention on the Law of Treaties, adopted May 23, 1969, entered into force Jan. 27, 1980, 1155 UNTS 331 ("Vienna Convention"). We note that although the Vienna Convention post-dates and therefore does not technically apply to the Refugee Convention, it is widely understood to reflect principles of customary international law and hence is clearly applicable: *Savvin* (Aus. FFC, 2000), at 187–88.

[24] For a more thorough treatment of our views on questions of treaty interpretation see Hathaway, *supra* n. 3, at Ch. 1.3; and M. Foster, *International Law and Socio-Economic Rights: Refuge from Deprivation* (2007), at Ch. 2.

[25] Vienna Convention, *supra* n. 23, at Art. 31(1) provides: "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."

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well as the letter of the law.[26] More specifically, Art. 31 of the Vienna Convention makes clear that a "good faith" interpretation will demonstrate fidelity to the context, object, and purpose of a treaty as well as to its text. Any interpretation of the treaty's text that defeats or is manifestly incompatible with the context, object, and purpose of the treaty will not be an interpretation rendered in good faith.

Two critical insights follow from the overarching duty to interpret the Refugee Convention in good faith. First, those interpreting the Convention must seek to promote the Convention's **effectiveness**.[27] As framed by the International Law Commission, "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[28] Second, and related,[29] the duty of good faith requires an effort to ensure that the treaty can continue to function within its **present social reality and contemporary legal context**.[30] Because the refugee definition is framed in general terms,[31] an evolutive or intertemporal approach[32] is required to ensure that refugee law not be left to stagnate.[33] As observed by Lord Bingham,

> the Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will. I would agree with the observation [that] . . . "[u]nless it . . . is seen as a living thing, adopted by civilized countries for a

[26] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law," (1950) 27 B. Ybk. Intl. L. 1, 12–13. It is clear, however, that the obligation does not amount to an independent source of substantive obligation: *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2005] 2 AC 1 (UKHL, Dec. 9, 2004), at 32 [19], per Lord Bingham and 52 [62], per Lord Hope. See also S. Rosenne, *Developments in the Law of Treaties: 1945–1986* (1989), at 179 n. 67.

[27] H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 304; *Corfu Channel Case (United Kingdom v. Albania)*, [1949] ICJ Rep 4 (ICJ, Mar. 25, 1948), at 24–26; *Canada – Term of Patent Protection*, WT/DS170/AB/R (WTO AB, Sept. 18, 2000), *passim*; see further J.-M. Sorel and V. Boré-Eveno, "Article 31: General Rule of Interpretation," in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. I (2011) 804, at 830–34. See also Hathaway, *supra* n. 3, at 64–68.

[28] International Law Commission, "Draft Articles on the Law of Treaties with Commentaries," [1966] 2 Ybk. Intl. L. Com. 187, at 219.

[29] Frédéric Vanneste also examines this link: F. Vanneste, *General International Law Before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law* (2010), at 243–44.

[30] "[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation": *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 (ICJ, Jun. 21, 1971), at 31. "Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application": *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ Rep 7 (ICJ, Sept. 25, 1997), at 114–15, per Judge Weeramantry.

[31] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (Apr. 13, 2006), at 242–43.

[32] See e.g. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, [2010] ICJ Rep 639 (ICJ, Nov. 30, 2010), Separate Opinion of Judge Cançado Trindade, at [86]–[89]. See also *Islands of Palmas (Netherlands/USA)*, (1928) II UNRIAA 829 (PCA, Apr. 4, 1928); J.-M. Sorel and V. Boré-Eveno, "Article 31: General Rule of Interpretation," in Corten and Klein, *supra* n. 27, 804, at 834–35.

[33] In *R v. Secretary of State for the Home Department; Ex parte Adan*, [1999] 3 WLR 1274 (Eng. CA, Jul. 23, 1999), Laws L.J. explained, "[i]n our view the Convention has to be regarded as a living instrument": at 1296.

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> humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism."[34]

In rendering a good faith interpretation of the Refugee Convention, a decision-maker must take account of each of the factors mandated by Art. 31 of the Vienna Convention – text, context, object, and purpose.[35] Conceived as a single "general rule of interpretation,"[36] Art. 31 must be applied in a "single combined operation":

> All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus [Art. 31] is entitled "General *rule* of interpretation" in the singular, not "General *rules*" in the plural, because the [International Law] Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.[37]

In carrying out this single combined operation of interpreting text in light of context, object, and purpose, Art. 32 of the Vienna Convention provides for reliance on "supplementary means of interpretation,"[38] and specifically authorizes reliance on the **drafting history** (*travaux préparatoires*) of a treaty in order to confirm or determine meaning in the event of ambiguity.[39] The status of the *travaux* as supplementary signals that a treaty's drafting history is not a free-standing interpretive source, but rather a privileged source of *evidence* on the true meaning of a treaty's text construed purposively, in context, and with a view to ensuring its effectiveness.[40] As the House of Lords observed,

> one is more likely to arrive at the true construction of Article 1(A)(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.[41]

[34] *Sepet v. Secretary of State for the Home Department*, [2003] 1 WLR 856 (UKHL, Mar. 20, 2003), at 862 [6]. See also *R v. Asfaw*, [2008] 1 AC 1061 (UKHL, May 21, 2008), at 1095 [54], per Lord Hope.

[35] See Vienna Convention, *supra* n. 23, at Art. 31.

[36] According to Anthony Aust, "Article 31 is entitled 'General *rule* of interpretation'. The singular noun emphasizes that the article contains only one rule, that set out in paragraph 1": A. Aust, *Modern Treaty Law and Practice* (2nd edn., 2007), at 234 (emphasis in original); *Golder v. United Kingdom*, (1975) 1 EHRR 524 (ECtHR, Feb. 21, 1975), at [30], per Zekia J. In the refugee context, see *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225 (Aus. HC, Feb. 24, 1997), at 231, per Brennan C.J. and 254, per McHugh J.; *Re C, Refugee Appeal No. 70366/96* (NZ RSAA, Sept. 22, 1997), at [105] ff; Hathaway, *supra* n. 3, at 49–51. *Cf.* A. Orakhelashvili, "The Recent Practice on the Principles of Treaty Interpretation," in A. Orakhelashvili and S. Williams (eds.), *40 Years of the Vienna Convention on the Law of Treaties* (2010), at 120–21. Orakhelashvili relies heavily on a quotation by Professor Abi-Saab to support his case for "a hierarchy of interpretation methods which expresses the primacy of some methods of interpretation over others," but this arguably misrepresents Abi-Saab, who does not seek to explain what the law is but rather its "laborious and mechanistic handling" by the Appellate Body: see G. Abi-Saab, "The Appellate Body and Treaty Interpretation," in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), at 458–59.

[37] International Law Commission, *supra* n. 28, at 219–20.

[38] Vienna Convention, *supra* n. 23, at Art. 32.

[39] *Ibid.*, at Art. 32(a).

[40] See e.g. the use of *travaux* as an interpretive aid in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 (ICJ, Jul. 9, 2004), at [95].

[41] *Adan v. Secretary of State for the Home Department*, [1999] 1 AC 293 (UKHL, Apr. 2, 1998), at 305, per Lord Lloyd (Lord Goff, Lord Slynn, Lord Nolan, and Lord Hope agreeing).

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As this quotation makes clear, the duty under Art. 31(1) to give consideration to the **"ordinary meaning" of the terms**[42] of a treaty does not justify a literalist approach to interpretation. To the contrary,

> [i]t is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims.[43]

In practice, overemphasis on literalism has led some courts to rely on (usually English) dictionaries in order to construe the meaning of the Convention – particularly, as is later discussed, to understand what kinds of harms legitimately fall within the notion of "being persecuted."[44] While there is, of course, nothing wrong with looking to dictionaries as an interpretive aid in the construction of text, challenges nonetheless arise.[45] For a start, both the English and French texts of the Refugee Convention are equally authentic. Because "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,"[46] both English and French dictionaries must, at a minimum, be consulted. But even assuming this is done, how does one choose among dictionaries, none of which has any particular legal standing? And what if the dictionaries themselves suggest multiple "ordinary meanings"?[47]

Recognizing the perils of literalism, the Vienna Convention treats "the terms" of a treaty as simply one of four factors – not as primary, much less as dispositive. The deliberate use of the linking phrase "ordinary meaning to be given to the terms of the treaty" indicates that context, object, and purpose are not "only . . . a means of explicating the text,"[48] but are rather crucial elements which must be integrated into the process of interpretation.[49] The interactive process of treaty interpretation thereby produces what Judge Torres Bernárdez referred to as "a fully qualified 'ordinary meaning.'"[50]

In addition to considering the ordinary meaning of its terms, a decision-maker must therefore take account of the Refugee Convention's **context**.[51] Most obviously, for the refugee

[42] Vienna Convention, *supra* n. 23, at Art. 31.

[43] *Asfaw* (UKHL, 2008), at 1079–80 [11].

[44] See *infra* Ch. 3.

[45] In *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) 210 CLR 1, Kirby J. noted that reliance on dictionaries is "a natural enough course to adopt, common in elucidating the meaning of statutes and other written instruments expressed in words": at 35 [106], but admitted that while "I have myself followed the same course in this context," at 35 [106], "I am now inclined to see more clearly than before the dangers in the use of dictionary definitions of the word 'persecuted' in the Convention definition": at 35 [108]. Similarly, reliance on dictionaries to elucidate the meaning of "persecution" in the context of international criminal law has been found to be inappropriate given the dissonance between the "non-legal" dictionary meaning and the specific context of international criminal law. See *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment (ICTY, Jan. 14, 2000), at [569], rejecting a "non-legal" or "common understanding" based on dictionaries.

[46] Vienna Convention, *supra* n. 23, at Art. 33(1).

[47] Hence reliance on dictionaries requires the exercise of selective skills by the interpreter at the outset: R. A. Falk, "On Treaty Interpretation and the New Haven Approach: Achievements and Prospects," (1968) 8 Va. J. Intl. L. 323, at 324.

[48] D. Steinbock, "Interpreting the Refugee Definition," (1998) 45 UCLA L. Rev. 733, at 772.

[49] *Applicant A* (Aus. HC, 1997), per McHugh J.

[50] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, [1992] ICJ Rep 351 (ICJ, Sept. 30, 1990), Separate Opinion of Judge Torres Bernárdez, at 719 [190].

[51] Vienna Convention, *supra* n. 23, at Art. 31(1).

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definition set by Art. 1 of the Refugee Convention, "the context is not merely the article or section of the treaty in which the term occurs, but also the context of the treaty as a whole."[52] More specifically, Art. 31(2) of the Vienna Convention, supplemented by Art. 31(3), requires consideration of a treaty's preambles and annexes as well as of agreements between the parties in connection with the treaty's conclusion. Nor is context a static or purely historical concept, including as it does also subsequent agreements among the parties on how the treaty is to be interpreted, and "any relevant rules of international law applicable in the relations between the parties."[53]

A sound understanding of context thus affirms the human rights orientation of the Refugee Convention. Not only do the first two paragraphs of the Preamble expressly link refugee law and international human rights law,[54] but international human rights law has, of course, also evolved since the drafting of the Convention to become a body of law applicable in relations between the state parties.[55] Consideration of those human rights treaties that have achieved wide, almost universal, ratification ensures that the Refugee Convention is interpreted by reference to the prevailing system of international law, thus promoting systemic integration[56] and normative consistency.[57]

A sound understanding of context also affirms the duty to interpret refugee law in a way that allows it to evolve so as to meet contemporary protection imperatives. Indeed, even as they adopted the Convention, governments agreed to a Final Act in which they made clear their determination that the Convention should "have value as an example exceeding its contractual scope."[58] Perhaps most critically, the decision of states to supplement the

[52] H. Waldock, "Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur," [1964] 2 Ybk. Intl. L. Com. 5, at [14].

[53] Vienna Convention, *supra* n. 23, at Art. 31(3)(c).

[54] Refugee Convention, Preamble, at para. 1 notes "that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination," and at para. 2 recalls "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms."

[55] Vienna Convention, *supra* n. 23, at Art. 31(3)(c) requires interpreters of the Refugee Convention to take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties." This embodies the well-established principle that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation": *South West Africa* (ICJ, 1971), at 31 [53].

[56] See generally C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention," (2005) 54 ICLQ 279.

[57] See e.g. International Law Commission, *supra* n. 31, especially at [37] ff; P. Sands, "Treaty, Custom and the Cross-Fertilization of International Law," (1998) 1 Yale Hum. Rts. & Dev. L.J. 85, at 87. See also Vanneste, *supra* n. 29, at 312. In the refugee context, see J. C. Hathaway, "The Relationship between Human Rights and Refugee Law: What Refugee Judges can Contribute," in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (1999) 80, at 85. As recently observed in the context of European human rights law, "in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialized international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases": *Bayatyan v. Armenia*, (2012) 54 EHRR 15 (ECtHR, Jul. 7, 2011), at [102], citing *Demir and Baykara v. Turkey*, Application No. 34503/97 (Nov. 12, 2008), at [85].

[58] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN Doc. A/CONF.2/108/Rev.1, at 9 (Recommendation E).

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Convention by a Protocol in 1967 – prospectively mandating a geopolitically inclusive and modern understanding of the refugee definition[59] – is an extraordinarily powerful contextual indicator of the duty to interpret the definition in a broad and inclusive way, in line with the general duty of good faith interpretation.

There is some disagreement about whether the UNHCR's published positions – including the agency's *Handbook on Procedures and Criteria for Determining Refugee Status*,[60] its more recent Guidelines, and even the Conclusions on International Protection issued by the state members of the UNHCR's Executive Committee ("ExCom") – are properly treated as "subsequent agreements between the parties" that must inform the interpretive process as an aspect of the treaty's context.[61] In truth, most policy documents issued by the UNHCR are produced by the agency without the sort of active deliberation and agreement of state parties that would ordinarily be expected of a "subsequent agreement" between the parties. Indeed, even ExCom conclusions are agreed by only a select number of states, including non-party states. Refugee case law has thus sensibly refrained from assigning any particular interpretive status to the UNHCR's published positions, even as it has clearly recognized the frequent value of the agency's advice in the interpretive process.[62] While we agree that the UNHCR's views are not binding on state parties as a matter of treaty interpretation, we nonetheless believe that serious engagement with UNHCR advice is to be expected, in particular given the duty of state parties under Art. 35 of the Convention to cooperate with the UNHCR in the exercise of its supervisory functions.[63]

Perhaps the clearest evidence that a purely literal construction of the Refugee Convention is impermissible is the requirement that a treaty's ordinary meaning take account of "its **object and purpose**."[64] The usual starting point for analysis of object and purpose is a treaty's preamble,[65] which in the case of the Refugee Convention notes in particular the importance of solving an international problem through state cooperation in a manner that promotes "the widest possible exercise of . . . fundamental rights and freedoms."[66] As the UNHCR has explained, this "strong human rights language" in the Preamble indicates that "the aim of the drafters [was] to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Convention, of the provisions of the 1951 Convention."[67]

[59] See *supra* n. 5. [60] See *supra* n. 1.

[61] Hathaway, *supra* n. 3, at 54, 175; Aust, *supra* n. 36, at 238; Foster, *supra* n. 24, at 72; McAdam, *supra* n. 14, at 110, 112; G. S. Goodwin-Gill, "The Search for the One, True Meaning . . . ," in G. S. Goodwin-Gill and H. Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010), at 212–13.

[62] See generally *R (Hoxha) v. Special Adjudicator*, [2003] 1 WLR 241 (Eng. CA, Oct. 14, 2002); *cf. R v. Secretary of State for the Home Department; Ex parte Adan*, [1999] 3 WLR 1274 (Eng. CA, Jul. 23, 1999), at 1286. See also *MM (Iran) v. Secretary of State for the Home Department*, [2011] INLR 206 (Nov. 17, 2010), at [25]–[27].

[63] Refugee Convention, at Art. 35. [64] Vienna Convention, *supra* n. 23, at Art. 31(1).

[65] Judge Weeramantry has explained that, "[t]he preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes": *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] ICJ Rep 53 (ICJ, Nov. 12, 1991), Dissenting Opinion of Judge Weeramantry, at 142 (dissenting on another matter). This is well accepted in interpreting human rights treaties, see e.g. *Golder v. United Kingdom*, (1975) 1 EHRR 524 (ECtHR, Feb. 21, 1975), at [34].

[66] Refugee Convention, Preamble, at para. 2.

[67] UNHCR, "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees," (2001) 20(3) Ref. Survey Q. 77, at 78. See further Foster, *supra* n. 24,

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More generally, the object and purpose of the Refugee Convention must be broadly informed by consideration of a range of extrinsic sources, as was noted by Chief Justice Brennan of the Australian High Court:

> Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the history of its negotiations and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.[68]

As this passage makes clear, reference to the drafting history often provides vital insight into the rationale and intended purpose of elements of the refugee definition.[69] This is not to suggest, of course, that the *travaux* should be given weight disproportionate to their probative value, much less that they should be used in a cut-and-paste fashion to dictate object and purpose.[70] But both for formal reasons – the *travaux* being the only supplementary source explicitly named in the Vienna Convention – and especially by virtue of the fact that the extraordinarily detailed record of the Refugee Convention's drafting often provides quite compelling insights into the Convention's object and purpose, it would be unreasonable not to include consideration of the "original" object and purpose as a critical component of the interactive process of understanding the object and purpose of the refugee definition. At the end of the day, of course, such historical intentions must be reconciled to more general human rights goals, mandating an interpretation of the refugee definition that ensures that the Convention is seen "as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form."[71]

In contrast to the importance of considering text, context, object, and purpose in arriving at a principled and legally authentic interpretation of the refugee definition, we believe that a narrow view of the interpretive relevance of **state practice**[72] is warranted in refugee law, as in the context of human rights law more generally.[73] As a preliminary point, the Vienna Convention does not sanction interpretive reliance on *all* state practice, but only on such practice as "establishes the agreement of the parties regarding its interpretation"[74] – thus requiring in effect that legally relevant practice have been motivated by a sense of legal

at 43–47; see in particular *R v. Immigration Appeal Tribunal; Ex parte Shah*, [1999] 2 AC 629 (UKHL, Mar. 25, 1999), at 639, per Lord Steyn.

68 *Applicant A* (Aus. HC, 1997), at 231, per Brennan C.J.

69 See I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., 1984), at 117.

70 *Ibid.*, at 142; Steinbock, *supra* n. 48, at 772.

71 *R v. Immigration Appeal Tribunal; Ex parte Shah*, [1997] Imm AR 145 (Eng. HC, Oct. 25, 1996), per Sedley J., adopted by Lord Bingham in *Sepet* (UKHL, 2003), at 862 [6]. As Simma has explained, "[w]ere a human rights convention to be interpreted statically, it would soon prove to be an impediment to the achievement of its own aims": B. Simma, "Consent: Strains in the Treaty System," in R. St. J. Macdonald and D. M. Johnston, *The Structure and Process of International Law* (1983) 485, at 497.

72 See Vienna Convention, *supra* n. 23, at Art. 31(3)(b).

73 According automatic interpretive force to state conduct is dangerous in the refugee law and broader human rights context, where frequent self-interested behavior by governments frustrates the very purpose of obligations to constrain state conduct for the benefit of human beings: J. Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences," (2010) 9 *The Law and Practice of International Courts and Tribunals* 443, at 486–87.

74 Vienna Convention, *supra* n. 23, at Art. 31(3)(b).

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obligation or *opinio juris*.[75] And as a practical matter, reliance on what will usually be less-than-unanimous state practice or conduct by some parties to a treaty in order to interpret the obligations of all parties to that treaty raises a problem of consent.[76] In the words of Judge Spender, "that conduct stands upon the same footing as the unilateral conduct of one party to a bilateral treaty [and] could not of itself have any probative value."[77]

Thus, even where an important subset of state parties takes a view on interpretation of the refugee definition – as is the case in the European Union, where the Qualification Directive sets minimum standards for its member states[78] – there is no basis to view such positions as necessarily amounting to authoritative understandings of the Refugee Convention. To the contrary, such regional law normally acknowledges that it is subordinate to international law, and must be interpreted in line with it – not the other way around.[79]

Most fundamentally, there is a conceptual disjuncture in relying on state practice to interpret a human rights treaty the very purpose of which is to constrain state practice for the benefit of human beings.[80] As is the case of the classic approach to the construction of "lawmaking treaties" – that is, treaties under which states have no interests of their own but only a common interest in "those high purposes which are the *raison d'être* of the convention"[81] – it is right to see refugee and other human rights law as "less a contract than universally valid recognition of objective law . . . [I]n the matter of interpretation, validity of the convention [should be] placed outside the sphere of the will of the Contracting Parties."[82]

Methodology and approach

Our goal, then, is to provide a comprehensive normative framework for interpretation of the Convention refugee definition. We do so by engaging in substantial depth with the transnational judicial conversation on the scope of Convention refugee status, and by subjecting the jurisprudence that has resulted from that conversation to rigorous scrutiny in line with the principles of treaty interpretation set out above.

Our specific focus and approach has, of course, shaped the nature of the analysis we offer here. For example, the decision to focus on comparative jurisprudence means that we engage

[75] G. McGinley, "Practice as a Guide to Treaty Interpretation," (1985) 9(1) *Fletcher Forum of World Affairs* 211, at 218; *Certain Expenses of the United Nations*, Advisory Opinion, [1962] ICJ Rep 151 (ICJ, Jul. 20, 1962), Separate Opinion of Judge Fitzmaurice at 201; see also case law of the European Court of Human Rights, which has taken this approach: *Cruz Varas v. Sweden*, (1991) 14 EHRR 1 (ECtHR, Mar. 20, 1991), at [100]; *Soering v. United Kingdom*, (1989) 11 EHRR 439 (ECtHR, Jul. 7, 1989), at [103].

[76] See Vienna Convention, *supra* n. 23, at Arts. 34 ("A treaty does not create either obligations or rights for a third State without its consent") and 35 ("An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing").

[77] *Certain Expenses* (ICJ, 1962), Separate Opinion of Judge Spender, at 191.

[78] See Qualification Directive, *supra* n. 7.

[79] *Ibid.*, Preamble, at para. 11. Further, the Court of Justice of the European Union has emphasized that the Qualification Directive must be interpreted "in a manner consistent with the 1951 Convention and the other relevant treaties": *Abdulla v. Germany*, C-175/08, C-176/08, C-178/08, and C-179/08, [2010] ECR I-01493 (CJEU, Mar. 2, 2010), at [53]–[54].

[80] Hathaway, *supra* n. 3, at 71–74; Arato, *supra* n. 73, at 486–87.

[81] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep 15 (ICJ, May 28, 1951), at 23.

[82] M. Bos, "Theory and Practice of Treaty Interpretation," (1980) 27 Netherlands Intl. L. Rev. 135, at 156.

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only selectively with the secondary scholarly literature explicating the refugee definition. Our decision is in no sense indicative of a lack of appreciation for the extraordinary contributions of scholars, but is simply a pragmatic recognition that given the constraints of space and time it made most sense for us to focus on providing a comprehensive and, we hope, unique contribution to the scholarly enterprise. And because our focus here is to provide an analysis anchored in the sources of law mandated by the Vienna Convention, we engage only selectively with the historical and policy background of the Convention, with UNHCR and other advice, and with the increasing number of guides and directives issued by national governments. While such sources, like the work of scholars, do figure regularly in our analysis, we acknowledge that it has been impossible to do them full justice in the context of a single book.

This volume is the result of deep and sustained engagement between the co-authors, aided by the valuable advice of a panel of experts on international and comparative refugee law who both reviewed every draft chapter and convened twice in Melbourne to debate nearly every issue presented here. Thus, while this is technically a second edition of *The Law of Refugee Status* (the first edition having been published by the first co-author in 1991),[83] it is in truth largely an original analysis that retains little beyond the analytical framework and core concepts adumbrated in the first edition. Yet because the analysis presented in the first edition has frequently figured in judicial and other efforts to interpret the refugee definition over the past two decades, we have noted throughout this book how ideas presented in the first edition have been received by senior courts. We hope that this approach will aid judges and others to see how our present analysis has been shaped by having joined issue with their views on the approach taken in the first edition, and more generally will be seen as a contribution to a clear and ongoing dialog between the scholarly and decision-maker communities.

Structure of our analysis

We take the view that interpretation of the Convention refugee definition requires careful analysis of each of the definition's constituent elements. This book therefore approaches the definition on an issue-by-issue basis, with a chapter devoted to each of the seven key questions that must be addressed before a decision either to recognize or to decline recognition of refugee status is fairly reached. While at the end of the day there is of course but a single question – does the person concerned meet the definition or not? – we endorse the now generally accepted view that "analysis requires consideration of the constituent elements of the definition."[84] As Lord Justice Sedley insisted in *Svazas*, "experience shows that adjudicators and tribunals give better reasoned and more lucid decisions if they go step by step."[85]

To this end, our analysis here breaks the Convention definition down into issues of (1) alienage; (2) well-founded fear; (3) serious harm; (4) failure of state protection; (5) nexus to civil or political status; (6) needing protection; and (7) deserving protection.

[83] J. C. Hathaway, *The Law of Refugee Status* (1991).
[84] *Sepet* (UKHL, 2003), at 862 [7], per Lord Bingham.
[85] *Svazas v. Secretary of State for the Home Department*, [2002] 1 WLR 1891 (Eng. CA, Jan. 31, 2002), at 1902 [30].

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In Chapter 1, we analyze the "alienage" requirement, namely that a refugee is first and foremost a person outside her country of nationality or, in the case of a stateless person, outside her country of former habitual residence. We first explain the often-controversial reasons for this requirement, including why there is a logic to having different legal regimes for refugees and internally at-risk persons. We then take up a range of issues that arise in practice, including questions surrounding access to a state party's jurisdiction; choice of the country of asylum, including the legal basis for allocating protective responsibility among states; and how to determine the state of reference, including issues arising in the context of dual or multiple nationality, inchoate nationality, and statelessness. We conclude with an analysis of the phenomenon of refugees *sur place* – that is, how to address claims in which a person *is* outside her country due to risk of being persecuted even though she did not depart the country for that reason.

Chapter 2 examines the requirement that the fear of being persecuted for a Convention reason be "well-founded." Though commonly assumed to require evidence both of subjective fear and of objective risk, we begin by explaining why this bipartite test is not only unworkable in practice but unprincipled in light of the object and purpose of the Convention. Building on our conclusion that establishing "well-founded fear" mandates only evidence of a "real chance" of objective risk, the remainder of the chapter is devoted to explaining how that evidentiary standard is to be satisfied in practice. We set out the nature of the shared duty of fact-finding in refugee law, and look specifically to the relevance of both country of origin information and the claimant's evidence, including the assessment of credibility. Particular attention is given to the relevance of evidence of individuated past persecution, and of the way in which well-founded fear should be assessed when it arises in the context of generalized risk, including war.

Chapter 3 turns to the first aspect of what is arguably the central concept of the refugee definition, namely that there be a risk of "being persecuted." After explaining the bipartite nature of the notion of "being persecuted" – requiring evidence of the sustained or systemic denial of human rights demonstrative of a failure of state protection – this chapter focuses on why a principled approach to interpretation of serious harm for refugee law purposes requires reference to widely ratified standards of international human rights law. Not only does this frame of reference facilitate a structured and methodical assessment of the scope of relevant harms, but it does so in a way that enables a truly common international standard of serious harm to be defined and to evolve by reference to standards of indisputable authority. We proceed to apply this framework in some detail to the forms of serious harm most commonly advanced as the basis for refugee claims, organizing our analysis under the broad categories of risks to physical security, threats to liberty and freedom, and infringements of autonomy and self-realization.

Chapter 4 considers the increasingly critical question of the duty to establish a failure of protection by the home state. We begin by explaining why the only relevant protector for refugee law purposes is the state. We then apply this foundational principle to elucidate the content of the second aspect of the "being persecuted" requirement, canvassing the meaning of both state unwillingness to protect and state inability to protect, including in particular the reasons why a "due diligence" approach to measuring the presence or absence of state protection must be rejected. The latter part of this chapter takes up the question of the "internal protection alternative" (sometimes referred to as internal flight or internal relocation), examining under what circumstances it may be said that despite evidence of a well-founded fear in an applicant's place of origin there is nonetheless an internal protection

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alternative that obviates the need for refugee protection abroad. After explaining the basis for our view that the appropriate textual home for any such analysis is the "protection limb" of the definition, we set out in some detail the elements of a four-part test for assessing the viability of internal protection.

Chapter 5 takes up the final element of the inclusion clause, namely the requirement that any well-founded fear of being persecuted be "for reasons of" a Convention ground: race, religion, nationality, political opinion, or membership of a particular social group. We begin by analyzing the meaning of the "for reasons of" clause, canvassing the role and nature of the causal link in refugee law, including whether intention is required and whether it is possible to quantify the strength of the causal link. The second part of the chapter then analyzes in turn each of the Convention grounds with particular emphasis on the more controversial grounds of religion, political opinion, and membership of a particular social group. We consider, for example, the question whether and to what extent claims based on the Convention ground "religion" include as refugees persons at risk not simply for their beliefs, but for actions allegedly grounded in those beliefs. In the context of political opinion we take up such challenging questions as whether opposition to corruption or other crimes is properly understood to evince a political opinion, and whether women at risk for acts that assert gender equality are in substance expressing a political opinion. The chapter concludes with detailed examination of the most contested of the Convention grounds, membership of a particular social group. We explain why the only principled method of interpreting this ground is to engage the *ejusdem generis* approach, and then apply this approach to claims based on gender, sexual orientation and gender identity, family, age, disability, economic or social class, voluntary associations, and former status or associations.

Chapter 6 moves from consideration of the question of who *is* a refugee to examine the circumstances in which refugee status is not necessary because the refugee either has or can regain the protection of her own country, or because she has access to an alternative form of protection deemed tantamount to national protection. We examine each of the situations in which Art. 1(C) of the Convention deems the resumption or establishment of meaningful national protection to have displaced any continuing need for refugee status, with particular emphasis on the often-misunderstood test defining the circumstances in which refugee status comes to an end as the result of fundamental changes in the country of origin. This chapter also takes up the two remaining contexts in which the Convention deems protection to be unnecessary: where a person enjoys *de facto* nationality in a third state (Art. 1(E)) and the very limited and specific situation in which a person is in receipt of the protection or assistance of a specialized international agency (Art. 1(D)).

Chapter 7 explores in some depth a matter that has taken on special significance over the course of the last decade, namely the circumstances in which a relevantly at-risk person may be nonetheless excluded from refugee protection because her criminal or quasi-criminal actions mean that she does not deserve international protection (Art. 1(F)). This chapter makes clear the reasons that exclusion is not appropriately considered on the basis of perceived risk to the asylum country, that being instead the role of the more demanding Art. 33(2). The criminal exclusion clauses exist instead to safeguard the integrity of the international refugee regime, and are thus carefully framed to avoid exclusion in other than three carefully constrained situations. First, exclusion will follow in the case of a person seeking to escape prosecution or punishment for a truly serious domestic crime committed outside the asylum state. Second, exclusion is to be ordered for a person who is shown to have committed crimes against peace, war crimes, or crimes against humanity, applying

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the standards for the assessment of these forms of criminality derived from international criminal law. Third, the Convention requires the exclusion of persons guilty of acts contrary to the purposes and principles of the United Nations. In each case, however, exclusion is appropriate only if the asylum country demonstrates "serious reasons for considering" that the person concerned has committed the stipulated crime. We explain in some detail why this standard is not simply evidentiary in nature, but rather requires an assessment of substantive sufficiency. Decision-makers must engage in careful analysis of the legal elements of the relevant crimes, thus ensuring that persons otherwise able to meet the Convention definition are denied protection only on the basis of clear and convincing evidence of guilt.

In each chapter, we adumbrate our vision of a contextualized, principled, and evolutionary interpretation of the refugee definition. Our hope and belief is that the resultant integrated legal framework will position refugee law to continue to play its critical role of responding to the principled imperative to shelter those who have no choice but to seek protection abroad.

We have made every effort to ensure that the law reported here is up to date as of January 1, 2013, although select subsequent developments have also been taken into account.

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