CHAPTER 14

Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm

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The modern refugee definition contained in Article 1A(2) of the Convention relating to the Status of Refugees (Refugee Convention)[1] is currently interpreted in a number of countries through what has been sometimes called a 'human rights paradigm'.[2] That is to say, the legal interpretation of certain elements of Article 1A(2) takes place by reference to the standards expressed in international human rights law. The manner in which this human rights paradigm has been adopted and articulated by a range of different refugee law jurisdictions across the world is amply demonstrated by the present volume. The rich and distinctive contributions to the book equally serve to illustrate a range of important continuities, as well as some apparent differences, in the comparative refugee law practice on this topic.

The present chapter, though, takes a different starting point to many of the contributions to this volume. Rather than charting the expression of this paradigm for a particular jurisdiction or thematic concern, this chapter instead seeks to interrogate the underlying conceptual model upon which much of the subsequent legal development of the paradigm has been based. Specifically, it analyses the model of refugee law as surrogate human rights protection proposed by the eminent refugee law scholar James C. Hathaway in his seminal

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1 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered in force 22 April 1954). References to the Refugee Convention in this chapter relate to the Convention as modified by its Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).or only to the Protocol with respect to States that ratified the Protocol but not the Convention.

2 See, for example, D.E. Anker, 'Boundaries in the Field of Human Rights: Refugee Law, Gender and the Human Rights Paradigm?' (2002) 15 Harvard Human Rights Journal 133; H. Storey, 'The Law of Refugee Status, 2nd edition: Paradigm Lost' (2015) 27 IJRL 348, 352–356.

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1991 treatise *The Law of Refugee Status*.[3] Although Hathaway was not the first (or last) to argue for a human rights approach to the refugee definition, the elegant and appealing model that he elucidated in 1991 has served as a conceptual cornerstone for the increasing consolidation of this human rights paradigm in refugee law practice over the last 25 years.

The chapter begins by briefly describing certain salient features of Hathaway's 1991 model of refugee law as a regime of surrogate human rights protection. Set against the backdrop of earlier efforts to explain how human rights standards assist interpretation of the refugee definition, the theoretical coherence of Hathaway's model is evident. Indeed, this chapter shows that his model not only proposes a novel interpretation of the refugee definition that revolves around the Article 1A(2) element of 'being persecuted' but that it simultaneously advances a highly original theoretical conception of refugee law as a regime of surrogate human rights protection. These considerations underpin much of the subsequent jurisprudence that develops the human rights paradigm in refugee law.

The chapter engages with Hathaway's model from three distinct perspectives. Firstly, it interrogates the model's theoretical conception of refugee law as surrogate human rights protection, identifying a number of challenges to its integrity. Secondly, it examines the legal basis for this model in the Refugee Convention, questioning current orthodoxy that the treaty's preamble offers a hook for using the model to interpret the Article 1A(2) refugee definition. Finally, it reviews the model in light of its impact on the jurisprudence. Here, although subsequent case-law frequently refers to Hathaway's model as offering a theoretical basis for the human rights paradigm, it has been adopted only partially by government decision-makers and courts as a means of interpreting the legal scope of the Article 1A(2) refugee definition by reference to human rights standards. As a result, the chapter concludes that a number of different approaches now prevail in practice.

Taking Hathaway's 1991 model as its object of study, this chapter aligns itself with an emerging body of scholarship that critically evaluates the human rights paradigm and its effects.[4] Yet this is not to undermine the creativity of

3 J.C. Hathaway, *The Law of Refugee Status* (Butterworths 1991). Following the presentation of this chapter as a paper at the Refugee Law Initiative conference in November 2013, a second edition of the book was published in June 2014 by J.C. Hathaway and M. Foster (2nd edn, CUP 2014). The present chapter does not engage substantively with that edition of the book since it is principally interested in the model originally presented by Hathaway and how it has subsequently influenced refugee law practice.

4 See, for example, S. Meili, 'Do Human Rights Treaties Help Asylum-Seekers?: Lessons from the United Kingdom' (2015) 48 Vanderbilt Journal of Transnational Law 123. See also the chapter by H. Crawley in this volume.

the original model. Nor does it imply, in any way, that the human rights paradigm fostered by his model has resulted in an overly inclusive approach to refugee status (indeed, the manner of its adoption in practice sometimes suggests the reverse has been true) or that the paradigm should be totally discarded. Rather, this chapter identifies renewed debate consolidating itself around the emerging fault lines in the theorising and application of Hathaway's 1991 model. A new intellectual terrain, this debate offers fertile ground for the future development of refugee law theory and practice.

1 The Human Rights Paradigm in Refugee Law

This chapter – and the volume as a whole – explores the important contemporary legal problem of whether, where and how human rights law can be used to interpret the refugee definition in Article 1A(2) of the Refugee Convention. Yet this circumscribed enquiry speaks to only one of the many ways in which human rights law may prove relevant to the regime of international protection. These modes of interaction include the use of human rights law: as a complement to the rights afforded by refugee status in the host country;[5] as a set of procedural guarantees for the determination of refugee status;[6] as a definitional element in certain regional refugee definitions;[7] and as the body of law underpinning the regime of complementary protection.[8]

5 This aspect of the interaction of human rights law and refugee law has also been the subject of an intensive study by J.C. Hathaway, *The Rights of Refugees under International Law* (CUP 2005).

6 See, for example, D.J. Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' (2015) 34 Refugee Survey Quarterly 79.

7 This is the case, for instance, in Conclusion 3 of the 1984 Cartagena Declaration on Refugees, which recommends a complementary definition of refugees as 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, *massive violation of human rights* or other circumstances which have seriously disturbed public order'. The original text of the Declaration can be found in -, *La protección internacional de los refugiados en América Central, México y Panamá: Problemas jurídicos y humanitarios – Memorias del Coloquio en Cartagena de Indias 1983* (UNHCR/Centro Regional de Estudios del Tercer Mundo/UNAC 1984) 332–339.

8 This term refers to the forms of protection against *refoulement* that 'complement' those existing in refugee law. They are usually provided by human rights provisions such as Article 3 of the Convention against Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). For a detailed discussion of complementary protection, see the study by J. McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

In each case, important questions arise about the role of international human rights law in the construction of the international protection regime and its specific mode of interaction with refugee law *stricto sensu*. Nonetheless, what is missing from this picture overall is a coherent explanation of how these two bodies of law interact in general. Although the outer parameters of any such analysis would naturally be structured by existing norms of international law concerning the interpretation of treaties, and theories of complementarity,[9] this does not itself establish the specific configuration that would be assumed in this instance. In this respect, the effort by scholars such as Hathaway to provide a model of how this interaction is structured – even if just in the specific context of the refugee definition – offers an important starting point for such future thinking. It is to this assessment of the role of human rights concepts in framing our understanding of Article 1A(2) of the Refugee Convention that we turn now.

1.1 *Early Approaches*

The idea that human rights concepts – and specifically the corpus of international human rights law – can act as an aid in interpreting the refugee definition of Article 1A(2) of the Refugee Convention is not new. For instance, the *Handbook on Procedures and Criteria for Determining Refugee Status*, first published in 1979 (reedited in 1992 and reissued in 2011) by the office of the United Nations High Commissioner for Refugees (UNHCR) as an exercise in doctrinal guidance and development in the field of refugee law, stands out as but one early and influential example of this approach.[10]

Nonetheless, in common with other early attempts to use human rights principles to illuminate the Article 1A(2) definition, the manner in which the UNHCR Handbook integrates international human rights law into its interpretative analysis seems somewhat haphazard. For instance, whilst human rights standards are used to illustrate the scope of 'being persecuted'[11] and human

9 For a brief discussion of the basic rules of treaty interpretation, see below Section 3.1. For more general discussion of issues arising this context of potential regime overlap or interaction, see International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by M. Koskenniemi* (ILC, 13 April 2006).

10 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 1979, reprinted December 2011). Another early example is that of A. Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff 1966) 195.

11 Ibid, para 51.

rights concepts are said to underpin certain Convention grounds – namely 'race' and 'religion'[12] – their role in relation to the other Convention grounds and Article 1A(2) elements is not specified. On this approach, the use of human rights law to interpret the refugee definition appears rather marginal and *ad hoc*.

1.2 *Hathaway's 1991 Model*

Set against this background, the logical appeal of Hathaway's seminal analysis of the refugee definition in his monograph on *The Law of Refugee Status* is immediately apparent. As the book's chapters work their way through assessing the distinct elements of Article 1 of the Refugee Convention, a coherent general model emerges. Crucially, this model explains how and why human rights concepts are integral both to the task of interpreting the various elements of the refugee definition and to conceiving the Convention refugee regime as a whole and as more than just the sum of its parts. Over the past 25 years, the far-reaching theoretical ambitions of Hathaway's model have distinguished it from earlier attempts to explain how human rights concepts play into interpretation of the refugee definition.

For these same reasons, Hathaway's model has played an influential role in shaping relevant areas of refugee law practice and scholarship internationally. This substantial legal impact is amply demonstrated in many of the country and thematic case studies contained in the present volume. Indeed, Hathaway's model of conventional refugee law as surrogate human rights protection has been cited approvingly by leading courts across the world as the basis for much of the precedential jurisprudence through which the human rights paradigm in refugee law has been advanced.[13] Meanwhile, in the academic field, an extensive and largely sympathetic literature on the human rights paradigm in refugee law exists that engages with, and builds on, the surrogate human rights protection model advanced by Hathaway in 1991.[14]

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12 Ibid, see paras 68–69 and para 71 respectively.

13 The model developed by Hathaway in his 1991 *The Law of Refugee Status* has been cited in such leading judgments by the highest courts of the land as: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 in Canada; *Islam v SSSHD; R v IAT and Another, ex parte Shah* [1999] UKHL 20 (*Shah and Islam*) and *Horvath v SSHD* [2000] UKHL 37 in the United Kingdom; and *MIMA v Khawar* [2002] HCA 14 in Australia. For other examples of such citation cross-jurisdictionally, see the country case study chapters of the present volume.

14 For example, alongside a number of the chapters of the present volume, see also N. Blake, 'Entitlement to Protection: A Human Rights-Based Approach to Refugee Protection in the United Kingdom', in F. Nicholson and P. Twomey (eds), *Current Issues of UK Asylum Law and Policy* (Ashgate 1998); Anker, 'Boundaries in the Field of Human Rights'; J.C. Hathaway

What, then, are the principal features of Hathaway's influential 1991 model of refugee law as surrogate human rights protection? At the outset, it is important to clarify that, whilst his treatise on *The Law of Refugee Status* addresses qualification for refugee status in all of its major contemporary aspects, it is his ground-breaking analysis of how human rights law shapes our understanding of the refugee definition that is of interest here and it is to this which the shorthand of 'Hathaway's model' refers in this chapter. For our purposes, we can identify a number of structural tenets, deduced directly from Hathaway's writing in *The Law of Refugee Status*, that together give form to his 1991 model.

Overall, Hathaway's model is built on a long-standing discursive construction of refugee law as a form of 'surrogate' protection. As Hathaway notes, refugee law has often been described as a regime of 'surrogate' or 'substitute' protection, in the sense that it is 'a response to disfranchisement from the usual benefits of nationality'.[15] In other words, the failure of a country of origin to perform its basic duty of national protection activates the surrogate protection of refugee law.[16] Hathaway was not (and would not claim to be) the first to coin the idea of refugee protection as 'surrogate' in nature. However, the novelty of his model lies in giving this concept both a principal theoretical significance and a particular legal meaning.

Firstly, Hathaway describes the 'failure of national protection' for which refugee protection substitutes exclusively in terms of a failure of 'internal' – rather than 'external' – protection by the country of origin. Traditionally, the distinction between these two modalities of State protection is seen as that between, respectively, 'the protection of the Law' in that country (internal) and the protection of its nationals abroad through consular assistance and diplomatic protection (external).[17] The fact that Hathaway's model frames the 'surrogate' nature of refugee protection exclusively as a response to the failure of internal protection by the country of origin is important for the human rights

and M. Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination', in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003); M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007); H. Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26 IJRL 272.

15 Hathaway, *Refugee Status*, 124.

16 Ibid, 110.

17 Grahl-Madsen, *The Status of Refugees in International Law*.

paradigm since it is far more amenable to construction in human rights terms than is external protection.[18]

Secondly, Hathaway's fuses the failure of internal protection by the country of origin together with the harm feared by the refugee, such that the two issues become simply two sides of the same coin. In legal terms, the model achieves this by describing the Refugee Convention Article 1A(2) element of 'being persecuted' as referring to 'injury...inconsistent with the basic duty of protection owed by a State to its population'.[19] As a result, 'surrogate protection' in Hathaway's model pivots on a totalising conception of this 'persecution' element that encompasses both internal protection and the anticipated harm.[20] Equally, by constructing 'persecution' in this way, the model opens it up to legal elaboration via the standards that regulate the internal protection provided by States on their territories.

Thirdly, it is at this point that Hathaway introduces the concept of human rights. Specifically, his model frames the basic duty of protection – i.e. internal protection by the country of origin – in terms of the international standards expressed by human rights law. As such, the Article 1A(2) element of 'persecution' – encompassing both the anticipated harm and internal protection – becomes defined as the 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.[21] Thus, according to Hathaway's model, the surrogate protection of the Convention refugee regime is triggered by the failure of the State of origin to guarantee basic human rights to the detriment of the refugee.

18 International human rights law largely imposes obligations on States to respect and ensure the human rights of persons subject to their territorial jurisdiction, although in exceptional circumstances obligations may arise in situations where they exercise their jurisdiction extraterritorially (see for example, the judgment of the European Court of Human Rights *Al-Skeini v United Kingdom* (2011) 53 EHRR 18). By contrast, human rights-based obligations to provide consular assistance or exercise diplomatic protection are only just beginning to be recognised (see the discussion in R. Ziegler, 'Protecting Recognized Geneva Convention Refugees outside their States of Asylum' (2013) 25 IJRL 235, 241–252).

19 Ibid, 103–104.

20 As such, it also side-lines or wholly subsumes under the element of 'persecution' (it is not clear which) the independent Article 1A(2) 'protection limb', i.e. the requirement that a refugee is 'unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

21 Hathaway, *Refugee Status*, 104–105.

Ultimately, though, Hathaway reins in his model of the refugee regime as 'surrogate human rights protection' by reference to the Convention grounds.[22] He argues that their inclusion in Article 1A(2) means that a refugee is not simply a victim of human rights violations but must also be 'excluded from the national community'.[23] It is this 'fundamental marginalization' that distinguishes refugees from other aliens at risk of serious harm,[24] since it is 'impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those [basic] human rights'.[25] Thus, in Hathaway's model, surrogate protection is ultimately reserved for the (potential) victim of human rights violations who is also unable to vindicate her human rights within her home State due to her membership of one of the marginalised groups listed among the Convention grounds.[26]

1.3 *The Appeal of Hathaway's Model*

The model advanced by Hathaway in *The Law of Refugee Status* offers a number of distinct advantages over other proposed approaches to interpreting the Convention refugee definition by reference to international human rights law. Most importantly, the model is comprehensive in its aspiration and links together a number of different conceptual terrains. Thus, for example, the model not only appears to explain the nature of the refugee regime but also simultaneously shapes our understanding of the individual elements of the refugee definition. Moreover, it even admits the possibility of securing refugee status due to non-State agent persecution (a controversial topic for some jurisdictions in 1991) by reference to the government's failure to 'protect' basic human rights.[27]

In practical terms, the model's straightforward linkage to international human rights law also brings benefits. Most crucially, in contrast to the easily 'politicised' dictionary-based interpretations of Article 1A(2) against which Hathaway implicitly sets his model,[28] international human rights law appears

22 The Convention 'grounds' element refers to the Article 1A(2) requirement that the putative refugee must have a well-founded fear of being persecuted 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'.

23 Hathaway, *Refugee Status*. In this respect, Hathaway rejects the claim that 'refugee law is essentially coterminous with international human rights law' (137).

24 Ibid, 135.

25 Ibid.

26 Ibid.

27 Ibid, 124–134.

28 Ibid, 101–104.

to offer an 'objective' set of internationally-agreed standards of (un)acceptable behaviour. Furthermore, the fact that these objective standards are in a constant state of progressive development means that, by linking the refugee concept to them, the Convention becomes a living instrument capable of reflecting changes in the international consensus on acceptable behaviour.

Intriguingly, it can be observed that the effect of Hathaway's model on the refugee law jurisprudence mirrors the analytical moves made by the model itself. In theoretical terms, the model shifts international human rights law from being simply a marginal (and optional) aspect of determining refugee status and instead makes it absolutely central to the question of who is a refugee. Subsequent refugee law practice has replicated this move: recourse to international human rights law is no longer just a marginal exercise but now plays a crucial role in helping to determine the scope of refugee status under Article 1A(2). It has moved from being 'on the borders' of refugee protection to occupying a central role.

2 Conceptual Challenges to the 'Surrogate' Protection Model

Hathaway's 1991 model frames the Refugee Convention as a regime of 'surrogate' protection that responds the failure of the country of origin to fulfil its national duty to protect human rights. These ideas are worked into an expanded conception of the Article 1A(2) element of persecution as encompassing both anticipated harm and internal protection by the country of origin. The element of persecution, along with the corresponding *non-refoulement* rule in Article 33(1), represents the legal core of the model. Conceptually, the Convention grounds play a secondary role as a limiting factor that requires that those persecuted belong to groups unable to vindicate their human rights, thereby also neatly explaining the 'nexus' requirement.[29] The model provides a concise and human rights-based explanation of the refugee regime, and is extended by Hathaway to underpin his interpretation of Articles 1C and 1F.[30]

However, this section suggests that the 1991 model advanced by Hathaway remains partial in a number of conceptual aspects. Firstly, it contends that the narrow focus on the definitional element of persecution (and thus also the corresponding *non-refoulement* guarantee) in the model obscures other

29 The nexus requirement refers to the need imposed by Article 1A(2) to show that the refugee's fear of being persecuted is 'for reasons of' one or more of the Convention grounds.

30 Ibid, 189–230. For reasons of space, the emphasis in this chapter will be principally upon the model's relevance to the positive refugee definition in Article 1A(2).

equally important components of the Convention refugee regime, such as the Article 1A(2) protection element and the wider set of refugee status obligations beyond the *non-refoulement* rule. By taking proper account of the wider context of these provisions, it is suggested that a more plausible account emerges as to the nature of the Refugee Convention's 'surrogate' protection regime. Secondly, it asks whether human rights law standards are able to directly articulate the refugee's broken relationship of national protection with the State of origin or the form of 'surrogate' protection by the host State.

2.1 *Surrogate Protection and National Protection*

Hathaway's 1991 model is rooted in a characterisation of refugee law as a regime of 'surrogate' protection. Certainly, at an intuitive level, the notion of 'surrogacy' is appealing as a shorthand description of how the relationship of the refugee to her new host State in some sense replaces or stands in for that which she had with her State of nationality.[31] Moreover, it is uncontroversial that the obligations towards refugees established by the Refugee Convention are activated, in part at least, by the failure of the country of origin to protect its nationals.

However, as noted above, Hathaway's model gives 'surrogate protection' a precise connotation: it is conceived as responding principally to a failure of *internal* protection in the country of origin that is located legally within the Article 1A(2) element of persecution. One important consequence of this aspect of the model is that it directs our conception of what 'surrogate' protection under the terms of the Refugee Convention is and does exclusively towards the domestic circumstances that illustrate the breakdown of internal protection. Yet, as a consequence, the model also fails to properly take account of the nature of the 'surrogate' protection provided to the alien by a host State or the reasons why it takes the form that it does.

2.1.1 The External Dimension of 'Surrogate' Protection

The protection regime established by the Refugee Convention is comprised not only by the refugee definition in Article 1 but also, *inter alia*, by the guarantees in Articles 3 to 34 to which it gives access. Indeed, these describe the form of 'surrogate' protection that a State party must provide to refugees. As such, by eliding consideration of these guarantees, and the role of the host State in observing them, Hathaway's 1991 model of 'surrogate' protection in the refugee context remains partial. By contrast, this chapter suggests that if we take them into account then a different picture of the 'surrogate' nature of the refugee

31 Or, in the case of stateless persons, the State of habitual residence.

regime emerges. In this, the host State's role as 'surrogate' protector responds principally to the refugee's lack of effective nationality in the context of alienage, i.e. her lack of external protection by the country of origin, rather than the failure of internal protection in the country of origin.

As Hathaway has rightly acknowledged elsewhere,[32] historically, the guarantees attaching to refugee status derive largely from contemporaneous international standards of treatment for aliens that, in turn, have their origin in bilateral accords and general principles of international law. Many of these standards express contingent rights that peg the level of protection for refugees in relevant social, economic and political fields to sets of legal standards pertaining to other specified categories of persons.[33] Thus, as but one example, the standard according to which refugees must be treated in their acquisition of property and property rights in any State party to the Refugee Convention must be, in the last analysis, 'not less favourable than that accorded to aliens generally in the same circumstances'.[34]

The categories of persons to which the treatment of refugees is pegged are grounded in the logic of nationality, e.g. 'their own nationals', 'most favoured nationals of a foreign country', 'aliens generally in the same circumstances' etc.[35] This responds directly to the uncertainty generated by refugees as aliens whose effective nationality is in question or non-existent regarding the legal standards to be applied to them by host States as a matter of international law. Thus, many of the guarantees of refugee status are designed to resolve this dilemma by expressly identifying for host States to which nationality-based category this class of unprotected aliens is to be assimilated for the purpose of determining the applicable legal standard of treatment.

In short, we see that the great majority of the guarantees attaching to refugee status are directed towards resolving the negative consequences of the refugee's lack of effective nationality in the context of alienage. In other words, the form of protection that the Refugee Convention requires of a host State is driven primarily by the lack of external protection by the country of origin and not the lack of internal protection suggested by Hathaway's model. Thus, to the extent that refugee protection is 'surrogate' in nature, then its form largely

32 Hathaway, *Rights of Refugees*, 75–81.

33 Hathaway, *Rights of Refugees*, 154–238.

34 Article 13.

35 For a recent analysis of these different reference points for the contingent rights framework established by the Refugee Convention, see M. Sharpe, 'The 1951 Refugee Convention's Contingent Rights Framework and Article 26 of the ICCPR: A Fundamental Incompatibility?'(2014) 30 Refuge 5, at 8 (table 3).

derives from, and responds to, the challenges resulting from the absence of 'external' protection by the State of origin.

2.1.2 Protection as an Element of Article 1A(2)

Hathaway's 1991 model is largely derived from analysis of the Article 1A(2) refugee definition and characterises refugee law as a regime of 'surrogate protection'. However, curiously in light of these considerations, the model has little to say about the element of the Convention refugee definition that refers specifically to 'protection', i.e. the requirement that a refugee 'is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. Rather, the issue of protection is subsumed under the persecution element in Article 1A(2) and dealt with exclusively there.

From the perspective of the rules of treaty interpretation, this approach unsatisfactorily ignores the plain text of the definition. Equally, from the conceptual standpoint, it is also problematic in that it decouples the form of 'surrogate' protection provided by refugee status from the definition governing qualification for that status. However, acknowledging that the 'surrogate' aspect of the refugee regime is designed principally to compensate for the lack of external protection in the context of alienage both reconnects the refugee definition to the form of refugee protection and also reinvests the 'protection' limb of Article 1A(2) with appropriate legal significance.

Indeed, there is considerable historical evidence that the protection element of Article 1A(2) refers to the absence of external protection by the putative refugee's country of origin.[36] This position is supported by reference to similar clauses in earlier instruments, the drafting history of the Refugee Convention, early jurisprudence and the views of certain eminent scholars.[37] Contextually, it follows also from the fact that, for persons not having a nationality, Article 1A(2) takes the absence of external protection for granted.[38]

36 W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2000–2001) 15 Georgetown Immigration Law Journal 415, 425–426.

37 Ibid.

38 The fact that this limb of Article 1A(2) refers to the fact that the person not having a nationality as 'is unable, or owing to such fear, is unwilling to *return* to it [the country of former habitual residence]' (emphasis added) also supports the contention of Ziegler ('Protecting Recognised Geneva Convention Refugees', 253–255) that, in cases of nationals, the State's right to offer external protection is linked to its duty to readmit these nationals should another State wish to expel them. In other words, the protection element of Article 1A(2) is concerned not only with the absence of effective external protection but also its corollary duty of readmission of the national concerned.

The approach is also supported by recognition in the Article 1C cessation clauses that national protection can be re-established through re-availing oneself of the country's internal or external protection.[39] On this reading, Article 1C now mirrors Article 1A(2).

Contrary to Hathaway's model, therefore, the absence of external protection is the basic condition that largely determines the form of 'surrogate' protection provided by refugee status and links it to the refugee definition. It is important to clarify, though, that satisfying the Article 1A(2) protection element alone is not a sufficient basis for refugee status if the other definitional elements are not also met. In other words, acknowledging that the protection element has legal significance in no way diminishes the continuing relevance of the persecution element (nor its nexus with the Convention grounds). Indeed, as a matter of evidence, the inclusion of the words 'owing to such fear' in the construction of the protection element suggests that where the persecution element is met then the absence of external protection can be presumed to follow.

2.1.3 'Surrogate' Protection beyond the Convention Refugee Regime?

Hathaway's 1991 model strongly suggests that the 'surrogate' protection regime of the Refugee Convention is *sui generis* in character, with the concept of persecution as its defining feature.[40] Indeed, his earlier writing singles out the concept of persecution as a definitional elaboration that distinguishes the modern Convention regime from earlier refugee instruments.[41] The starkness of this analysis has recently been questioned on the basis of historical research which suggests that the earlier refugee definitions were implicitly understood in similar terms, even if the word 'persecution' did not actually appear in the

39 Thus, the relationship of national protection with the State of origin can be re-established *inter alia* by the refugee voluntarily re-establishing in the country which he left (Article 1C(4)), which has a clear internal dimension, or by voluntarily re-availing himself of the protection of the country of his nationality (Article 1C(1)), which is normally understood as having an external dimension.

40 Hathaway's 1991 analysis appears to view the subsequent regional refugee definitions from Africa and Latin America slightly ambivalently as based on the breakdown of national protection, albeit not necessarily due to persecution (*Refugee Status*, 19–21). Indeed, serious questions arise as to whether Hathaway's model is able (or even intended) to account for the expanded refugee regimes in these regional instruments. Indeed, their existence seems to present further evidence to suggest that persecution is only way through which the relationship of national protection between a State and a putative refugee can be ruptured and the need for international protection arise.

41 J.C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 334 ICLQ 348.

treaties themselves.[42] This suggests greater historical continuity in the understanding of who is a refugee than Hathaway's analysis acknowledges.

Similarly, the recognition of an absence of external protection as a basic foundation for the Convention refugee regime brings into question the contention that this form of 'surrogate' protection is peculiar to the Convention refugee regime. Thus, there are clearly strong parallels with the refugee concepts expressed in earlier international instruments, which developed an increasing bundle of refugee status guarantees that were directed towards compensating for the refugee's lack of external protection by the country of origin.[43] Some even expressly made reference to this criterion in their refugee definitions.[44] Such continuities show that this form of 'surrogate' protection has a longer pedigree in the refugee field than Hathaway's model acknowledges.

Moreover, the form of 'surrogate' protection afforded by refugee status is not exclusive to refugee law. Rather, it has a strong family similarity with the guarantees attaching to the status of 'stateless person' under the 1954 Convention relating to the Status of Stateless Persons are markedly similar to those of refugee status.[45] Here, equally, the protection regime serves to compensate for the absence of an effective nationality. However, in this instance, it is based purely on the lack of nationality that is central to the treaty's definition of who qualifies as a 'stateless person'.[46] This suggests that the lack of effective nationality in the context of alienage (external protection) is what drives the form taken by both protection regimes.

2.1.4 Persecution and Surrogate Protection

The broad form of 'surrogate' protection provided both by refugee status (across the ages) and by stateless person status is thus rooted principally in a lack of effective nationality in the context of alienage. What distinguishes the (Convention) refugee is the additional requirement that alienage be driven by

42 J. McAdam, 'Rethinking the Origins of "Persecution" in Refugee Law' (2014) 25 IJRL 667.

43 See, for example, the analysis of this aspect of the earlier refugee treaty regimes by C. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (OUP 1995) 101–145.

44 For instance, Annex A of the Constitution of the International Refugee Organization (IRO), approved by UN General Assembly Resolution 62(I) (15 December 1946), refers to external protection and defines a refugee as 'a person who has no consul or diplomatic mission to whom to turn...' (cited in Kälin, 'Non-State Agents of Persecution', 425).

45 See Articles 2 to 32 of the Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

46 Ibid, Article 1, which defines a 'stateless person' for the purposes of the Stateless Persons Convention as 'a person who is not considered as a national by any State under the operation of its law'.

persecution. As such, among the wider class of unprotected aliens, the persecution element in Article 1A(2) acts to limit eligibility to refugee status to those persons who also fear persecution on the specified grounds. Thus, contrary to Hathaway's model, the element of persecution is not the root of the overarching form of 'surrogate' protection. Rather, it marks out refugees as requiring additional guarantees owing to the particular form taken by the breakdown of the relationship with their State that drives their lack of external protection.[47]

As such, the persecution element of Article 1A(2) remains crucial to defining the scope of eligibility for refugee status. Equally, it underpins certain specialised guarantees associated with this status, such as the *non-refoulement* rule in Article 33(1). Moreover, as noted above, the existence of a well-founded fear of being persecuted on Convention grounds will normally be sufficient to satisfy the protection element of Article 1A(2),[48] including in cases of non-State agent persecution.[49] However, ultimately, the persecution element is simply not capable of exhaustively describing the form of 'surrogate' protection provided by refugee law. Rather, the absence of effective nationality in the context of alienage (external protection) is the pivot on which notions of 'surrogate' protection by host States operate.

Finally, the model's subsuming of internal protection under the persecution element brings other sorts of conceptual challenges, especially in cases of non-State agent persecution. On the one hand, it undermines the Article 1A(2) element of 'well-founded fear' (to which internal protection is most relevant), either denuding it of practical significance or introducing a double protection hurdle for the putative refugee.[50] On the other, it introduces the temptation for decision-makers to construe the concept of internal protection under the

47 As such, in and of itself, the concept of persecution is also not legally capable of generating the 'surrogate' protection standards in Articles 2–34 of the Refugee Convention.

48 The wording of the protection limb, i.e. 'owing to such fear', clearly shows that the unwillingness of an alien to avail herself of the external protection of her country can be assumed legally to follow from the existence of a well-founded fear of being persecuted on Convention grounds.

49 In such cases, the legal presumption of a refugee's justified unwillingness to avail herself of the protection of her country reflects a rupturing of the State-citizenship relationship based on its inability to provide internal protection from persecution by non-State agents. Considerations of internal protection by the country of origin are still crucial to determining whether a person possesses a well-founded fear of being persecuted on Convention grounds.

50 See, for example, the reasoning of McHugh and Gummow JJ in *MIMA* v Khawar [2002] HCA14, paras 61–68.

persecution element by reference to an 'objective' minimum standard that must be plumbed in order for the need for 'surrogate' protection to be made out, without real regard to the risk of persecution actually faced by the individual refugee.[51] Meanwhile, the purported advantage of this model in the 'Jewish shopkeeper' scenario is illusory,[52] since the same result is achieved by considering the context of background State or societal discrimination under the 'for reasons of' element.[53]

2.1.5 'Surrogacy' as the Foundation of Refugee Law?

Finally, in light of the considerations outlined above, it is necessary to ask whether, by elevating the loose shorthand description of the Refugee Convention as a regime of 'surrogate' protection to the very conceptual basis of refugee protection, Hathaway's model generates more confusion than clarity. Indeed, this conceptualisation of refugee protection arguably implies that the severed State-citizen relationship between a refugee and her country is replaced by a relationship of surrogate protection by the host State. In other words, the concept of 'surrogacy' seems to be used in the field of refugee law to describe a relationship with the host State which replaces, or stands in for, that severed by the circumstances leading to refugee-hood.

However, this sits uneasily with the established understanding that the State receiving or hosting a refugee does not – by virtue of Articles 3 to 34 of the Refugee Convention – automatically acquire rights and assume obligations

51 This critique appears also in G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn OUP 2007) 8–12.

52 Lord Hoffman posited the Jewish shopkeeper scenario in his judgment in *Shah and Islam* as follows: in the early days of the German Nazi government, a Jewish shopkeeper is attacked by a gang organised by an Aryan competitor, who are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity because of the authorities' failure to provide protection to Jews. Lord Hoffman held that, in the context of the Refugee Convention, the correct answer to the question of 'why was he attacked?' is not 'because a competitor wanted to drive him out of business', but 'because the competitor knew that he would receive no protection because he was a Jew'.

53 In other words, even where the motives of the immediate persecutor are not based directly on Convention grounds, the wider context of State or societal discrimination on Convention grounds which permits or facilitates such persecution can be incorporated under the 'reasons' for persecution, thus fulfilling the nexus requirement in Article 1A(2). There is no need to subsume these considerations under the 'persecution' element as part of the consideration of internal protection, which also fails to capture wider societal discrimination.

vis-à-vis the person that are the prerogative of the State of nationality. Of course, to facilitate assimilation, Article 34 does encourage host States to consider the eventual creation of a bond of nationality through naturalisation of the refugee, but they are not required to do so. Moreover, when States opt to do so, the effective protection provided by the new nationality ceases the person's refugee status,[54] such that this is no longer the basis of protection. As such, Article 34 aside, the 'surrogate' protection provided by the host State under refugee law is not identical to that for which it supposedly substitutes.

How, then, can the protection provided by host States to refugees be conceived as 'surrogate' in nature? Indeed, in fulfilling its obligations under Articles 3 to 34 of the Refugee Convention, it is not clear that the host State is doing anything other than observing a set of rules towards a category of aliens that would, but for their refugee-hood, have been determined by reference to their nationality. An analogy will help to illustrate the point: in the parallel situation where a State observes bilateral rules on the treatment of nationals of another State who are present as aliens on its territory, would we say that it is providing them with 'surrogate' protection? Of course, we would not. How then does it help our analysis to conceive of such protection in the case of refugees as being 'surrogate' in character?

By and large, what the Refugee Convention does instead is to lay down a set of standards that are to be observed in the case of refugees, as a category of persons whose nationality is ineffective.[55] By fulfilling these legal obligations to other States parties to the Convention, it is not clear that the host State places itself in any position of 'surrogacy' vis-à-vis the State of origin. Certainly, absent naturalisation as enjoined by Article 34 (at which point, as noted above, the protection becomes 'national' and not 'surrogate' protection), the host State does not seem to assume any substantive substitute relationship with the refugee equivalent to nationality. Rather, this is a step that States have largely resisted.[56]

In conclusion, it is certainly the case that the Refugee Convention requires that the host State observe certain standards of treatment for refugees. However, contrary to Hathaway's model, it is much less clear that this treaty goes so far as to oblige States parties to assume a substantive relationship with

54 See Article 1C(3) of the Refugee Convention.

55 See Section 2.1.1 above.

56 In this context, it is of interest that the International Law Commission 2006 Draft Articles on Diplomatic Protection seek to carve out the legal space for host States to exercise diplomatic protection on behalf of recognised and habitually resident refugees (Ziegler, 'Protecting Recognized Geneva Convention Refugees', 257–262).

the refugee that one can easily characterise as substituting for that which existed between the refugee and her country.[57] Indeed, the notion of 'surrogacy' in the refugee context seems better to correspond to the role played by UNHCR in its statutory function of 'international protection of refugees',[58] which approximates more closely to the idea of standing in for the legitimate interest of a State in its nationals overseas.[59] Certainly, while the term 'surrogacy' may seem to possess instinctive appeal as a shorthand description for the kind of protection provided to refugees by host States, we need to recognise its conceptual limitations and exercise due caution in seeking to draw substantive theoretical or legal conclusions from it.

2.2 *'Surrogate' Protection and Human Rights*

Hathaway's model rests on a conception of the refugee regime as 'surrogate' protection triggered by the country of origin's failure to fulfil its 'basic duty of national protection'. However, the latter not only focuses on internal protection in the country of origin – as subsumed under the Article 1A(2) element of persecution – but also constructs such protection by reference to human rights standards. As such, the notion of persecution as the failure to uphold and vindicate human rights standards forms a core tenet of Hathaway's model

57 Indeed, perhaps the strongest Refugee Convention provision on which an argument in favour of such a relationship could be premised is the obligation under Article 25(1) for the host State to 'arrange' administrative assistance for a refugee residing in its territory when 'the exercise of a right by [the] refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse'. Hathaway argues that this places 'the primary responsibility to assist refugees to enforce their rights... [on] the state parties themselves' (*Rights of Refugees*, 628). Even so, the arrangements required by Article 25 remain of a practical nature and derive from the fact that the refugee's severed relationship with her country of origin no longer allows recourse to administrative assistance to exercise certain related rights.

58 UNHCR, Statute, annexed to UN General Assembly, Resolution 428 (V) (14 Dec. 1950), see paras. 1 and 8.

59 Hathaway is correct to observe that the UNHCR Statute does not expressly authorise the agency to provide consular assistance (*Rights of Refugees*, 628). Nonetheless, the explicit mandate for the 'international protection' of refugees and the functions that this involves (see para 8 of the Statute) suggest that UNHCR has a legitimate interest in the protection of refugees vis-à-vis States that corresponds more closely than does that of host States (parties to the Refugee Convention) to the legitimate interest of States in their nationals when overseas. The evolution in the role played by UNHCR on the ground in countries where it is present, and the expansion of its activities beyond those originally envisaged in para. 8 of the Statute, provides further support for this observation.

of refugee law as 'surrogate' protection. However, here equally, questions exist about the conceptual sustainability of this means of using human rights standards to articulate the refugee-State relationship in refugee law.

2.2.1 'Surrogate' Protection by the Host State

The conceptual challenges involved are immediately apparent if we consider the manner in which the Refugee Convention constructs the 'surrogate' protection relationship between the refugee and the host State. From the outset, it is clear that the substantive content of refugee status is not directly configured via recourse to human rights standards, even the nascent ones in existence at the time of drafting.[60] Quite simply, even if the ultimate aim of refugee status may have been to ensure refugees' human rights as broadly conceived, the protection provided by Articles 3 to 34 of the Refugee Convention does not take the form of human rights.[61] They are largely contingent rights pegged to the treatment of specific categories of nationals and aliens or, in a few cases, individual refugee-specific rights rather than human rights as such.

Of course, the body of human rights law that has developed from the 1950s onwards now provides an independent basis for protecting refugees.[62] Indeed, following the entry into force of binding human rights law treaties such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR),[63] human rights in refugee-hosting States parties are enjoyed by all persons whether or not they are refugees.[64] However, this fact represents an additional argument against articulating the 'surrogate' protection relationship between the refugee and host State in terms of human rights, since they are enjoyed by all regardless of the failure, or not, of national protection in the putative refugee's country of origin. In short, the form of 'surrogate' protection

60 See further, Section 2.1.1 above.

61 Ibid.

62 For relevant refugee rights, Hathaway devotes considerable attention in the *Rights of Refugees* to the question of how international human rights law may assist in this regard.

63 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

64 See, for instance, Article 1(1) of the ICCPR, which requires the State party to 'respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant' (emphasis added). This, indeed, is part of the idea of 'human' rights.

provided by the host State under refugee law is not premised conceptually on human rights standards.[65]

2.2.2 National Protection by the Country of Origin

A similar conceptual challenge presents itself when human rights standards are used to try and substantiate the relationship with the State of origin that is assumed to be severed in the case of refugees. In particular, the human rights guarantees established by international law are not, for the most part, dependent on possessing the nationality or citizenship of the State concerned. Rather, with but a few limited exceptions,[66] human rights under international treaties are enjoyed on an equal footing not just by nationals of the State but by all persons subject to its jurisdiction, including aliens.[67] As such, human rights standards in the country of origin approximate poorly to the 'national protection' that must be ruptured in order for the 'substitute' protection regime of the Refugee Convention to be triggered.

This conclusion finds some additional support in the fact that the exercise of external protection by States of their nationals overseas – i.e. in the form of consular assistance or diplomatic protection – tends to be seen as having a separate legal basis to that of human rights law. Thus, whereas the International Court of Justice has recognised the individual basis of the right to consular assistance under the 1963 Vienna Convention on Consular Relations,[68] the Court has consistently declined to recognise it as a 'human right' with corresponding obligations on the State of nationality.[69] A similar view emerges from State practice,[70] with the contrary view finding acceptance only in the jurisprudence of the Inter-American Court of Human Rights.[71]

Finally, the refugee law concept of persecution, as the definitional element through which Hathaway's model conceives of international human rights law

65 However, in practice, it is important to note the potential role of international human rights standards in helping to frame in national law both the rights of nationals of the host State and the rights of aliens present there, where the guarantees of refugee status are pegged to one of other of these nationality-based categories of person.

66 The political rights in Article 26 of the ICCPR constitute one such exception, being limited as they are to 'every citizen'.

67 See footnote 64 above.

68 Vienna Convention on Consular Relations, 24 April 1963 (entered into force 19 March 1967).

69 See Ziegler, 'Protected Recognised Geneva convention Refugees', 240–248.

70 Ibid, 248–250.

71 Ibid, 244–245.

entering into the refugee definition, appears to long predate the consolidation of international human rights law. Indeed, the concept not only seems to have been implicit in antecedent international refugee law treaties,[72] but was also expressed directly in earlier national legislation concerning refugees.[73] This fact suggests that, at least at the time of drafting of the Refugee Convention, the concept of persecution had an independent meaning that did not draw on human rights concepts. Moreover, despite the existence of nascent UN human rights standards in the form of the 1948 Universal Declaration on Human Rights and their citation in the Refugee Convention's preamble, it is telling that the drafters of the Refugee Convention never expressly linked the concept of persecution to the violation of those standards.[74]

2.2.3 Making the Links: Internal and External Protection by the Country of Origin

For the purposes of refugee law, general human rights standards struggle at a theoretical level to properly articulate either the severed relationship between the refugee and her State of origin or the 'surrogate' protection relationship between the refugee and her host State. Put quite simply, it seems that these standards just cannot be shoehorned into Convention refugee law – via an expanded concept of the Article 1A(2) element of persecution – as a model for explaining the basic quality of the protection regime established by the Refugee Convention. As a result, Hathaway's inventive attempt to develop a theoretical model of this regime by drawing upon the rationale of human right law faces real challenges.

Of course, this is not to suggest that certain acts capable of constituting persecution in the sense demanded by Article 1A(2) of the Refugee Convention may not equally represent violations of the general human rights standards consecrated by international human rights law. Moreover, where a well-founded fear of persecution on Convention grounds exists, then the relationship of national protection between a State and a putative refugee can be assumed to be ruptured such that the Convention obligations are activated for a host State in the context of alienage. The conclusion here is simply that neither relationship, nor the form of protection on which they turn, is defined principally in terms of the rationale of international human rights law.

72 McAdam, 'Rethinking the Origins of "Persecution" in Refugee Law'.

73 A. Bashford and J. McAdam, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32 Law and History Review 309.

74 On this point, and in relation to the citing of those standards in the preamble to the Refugee Convention, see Section 3 below.

2.3 *Conclusions: Conceptaul Challenges*

If we look beyond the Article 1A(2) persecution-oriented perspective of Hathaway's model and consider the refugee regime also in terms of the content of refugee status, then it is not clear that refugee protection is in fact 'surrogate' in Hathaway's sense. Rather, the Refugee Convention establishes a set of rules for States parties that is directed mainly towards clarifying how the refugee, as an alien without effective nationality, must be treated by the host State. As such, the refugee regime compensates principally for a lack of external protection by the country of origin rather than substituting directly for a failure of internal protection. This understanding is reflected in the protection limb of Article 1A(2), which operates to connect the refugee definition with the protection regime associated with refugee status.

Moreover, ultimately, human rights law struggles to adequately describe the nature of national protection by the country of origin (in either its internal or external aspects) or the quality of protection afforded by refugee status. In contrast to the particular nature of each of these forms of protection – i.e. national protection and refugee protection – the concept of human rights is rooted in considerations that apply to all human beings. From the conceptual standpoint, international human rights law thus falls short of satisfactorily describing the special situation of refugees. Overall, then, conceptual challenges exist to Hathaway's 1991 model of Convention refugee law as a regime of 'surrogate' protection that responds to the failure of the country of origin to fulfil its basic duty to observe human rights standards.

3 Legal Basis for Human Rights in the 'Surrogacy' Model

The interpretation of treaties such as the Refugee Convention is governed by its own branch of international law, the law of treaties. Any interpretation of a treaty provision can only be legally sustained to the extent that it accords with these well-established rules of treaty interpretation. It is from this standpoint that the analysis now proceeds to examine the legal basis for the human rights aspect of Hathaway's 1991 'surrogate' protection model in the text of the Refugee Convention itself. It focuses on the main legal argument usually advanced for interpreting the Article 1A(2) persecution element in light of human rights standards, which is rooted in the reference to such standards in the preamble to the Refugee Convention.

As yet, this argument has received little in the way of critical reflection. Thus, after rehearsing the argument, the present analysis proceeds to question this current orthodoxy and suggests that – in light of the law of treaties

– the Convention's preamble fails to offer an adequate legal basis for interpreting the persecution element of the Article 1A(2) refugee definition in light of human rights law. It draws attention to the fact that none of the preambular paragraphs, including those mentioning human rights, directly address themselves to the class of persons to benefit from the protection of the Convention. Rather, they reinforce the arguments made earlier in this chapter for a conception of the Convention protection regime that sits at odds with that described by Hathaway's model. Nonetheless, the analysis acknowledges alternatives to the preambular argument might be put forward to sustain a legal basis for the kind of recourse to human rights standards proposed in Hathaway's model.

3.1 *Law of Treaties, Article 1A(2) and the Convention's Preamble*

Under the law of treaties, Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provide a framework for the interpretation of treaties.[75] The basic rule, expressed at Article 31(1) of the VCLT, states that 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'. Although this rule is broad enough to encompass various distinct interpretative approaches, the fact remains that any exercise in treaty interpretation must be rooted in the actual language agreed by the States concluding the treaty.

In this respect, the language of Article 1A(2) appears to offer an unpromising basis for Hathaway's model since it makes no direct reference to human rights law, nor does it provide any indication that the 'persecution' or 'protection' elements should be construed in terms of human rights standards. In fact, in *The Law of Refugee Status*, Hathaway does not expressly set out the legal basis for his interpretative use of human rights law justifying it rather via its humane objective and envisaged procedural advantages such as improving the consistency and quality of decision-making on refugee status applications.[76] Yet the practical advantages of any particular interpretation, however compelling, do not obviate the need for a clear legal basis in the treaty to be advanced.

In *The Law of Refugee Status*, the closest that Hathaway comes to identifying a legal lynchpin for his model is a passing reference in a footnote to one of the key passages in the book that speaks to the relevance of human rights to inter-

75 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

76 See Section 1.3 above.

preting Article 1A(2).[77] This footnote cites the following paragraph from the preamble to the Refugee Convention as indicative of 'the inter-relationships between refugee protection and international human rights law':[78]

> The High Contracting Parties, [c]onsidering that the Charter of the United Nations and the Universal Declaration of Human Rights [UDHR]...have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination...Have agreed as follows...[79]

Hathaway makes no further comment on this paragraph. However, in the absence of any alternative legal basis for the model he proposes, this seems to be the legal hook for his argument. In any event, this preambular passage, and the one that follows – affirming the interest of the United Nations (UN) in affording 'refugees the widest possible exercise of these fundamental rights and freedoms'[80] – are frequently recalled and repeated in refugee law jurisprudence and commentary as the legal basis for having recourse to human rights law as a means of interpreting the persecution element of Article 1A(2).[81]

The rules of treaty interpretation provide some support for this method. Indeed, the preamble to a treaty is expressly considered as part of the 'context' that the basic rule of treaty interpretation requires be taken into account in interpreting the terms of its operative provisions.[82] Alternatively, treaty law acknowledges that the language of a treaty's preamble can equally provide insight into the 'object and purpose' of the treaty, in light of which its operative provisions must be interpreted.[83] The question, though, is whether the preambular passage that Hathaway cites in that footnote to *The Law of Refugee Status* offers an adequate basis for interpreting the terms of Article 1A(2) – and, in particular, the persecution element – via human rights standards derived from other sources of international law.

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77 Hathaway, *Refugee Status*, 105, footnote 41.

78 Ibid.

79 Refugee Convention, Preamble, first paragraph.

80 Ibid, second paragraph.

81 See, for example, *Ward v Canada; Applicant A (1996) 190 CLR 225*; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982; *Refugee Appeal No. 76044* [2008] NZAR 719.

82 VCLT, Article 31(2).

83 Ibid, Article 31(1).

3.2 *Challenges to the Preambular Argument*

Even at the outset, one is struck by the conceptual leap required by the argument that the isolated allusion to human rights in the Refugee Convention's preamble constitutes a sufficient basis on which to read its Article 1A(2) definitional element of persecution in light of human rights standards. Crucially, not only is the preamble the only part of the entire treaty to refer to human rights, but the totality of the Convention's operative provisions are also based on a language and rationale distinct from that of human rights.[84] Thus, whether treated as 'context' for Article 1A(2) or as indicative of the treaty's 'object and purpose' overall, questions remain as to the weight to be attributed to the mention of human rights in the preamble.

This sense of unease is compounded when we read the two passages referring to human rights in the context of the preamble as a whole. For ease of reference, the preamble is reproduced here in its entirety:

> The High Contracting Parties,
>
> Considering 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,
>
> Considering 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,
>
> Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,
>
> Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,
>
> Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,
>
> Have agreed as follows...[85]

84 See Section 2.1.1 above.

85 Refugee Convention, Preamble.

Even if we were to ignore the fact that the Convention's operative provisions are based on a rationale other than that of human rights law and focus solely on the preamble, it is somewhat questionable whether those two passages are capable of sustaining legal recourse to human rights standards in order to interpret the Article 1A(2) refugee definition. Indeed, there is little in either of the first two paragraphs to suggest that the refugee definition should be read in light of human rights standards in future. Instead, their orientation is distinctly backwards-looking, speaking to a past concern voiced by the UN. This is in sharp contrast to the forward-looking tenor of the following three paragraphs, which offer a different rationale for the Refugee Convention and one that is not grounded in remedying human rights failures in the country of origin.[86]

Indeed, the reference in the second preambular paragraph to UN efforts 'to assure refugees the widest possible exercise of these [human rights]' needs to be read in light of the specific concerns to which it refers. Crucially, the relevant UN General Assembly resolutions do not use human rights standards to speak of persecution or the breakdown of internal protection in the country of origin.[87] Rather, they express a narrow criticism of certain host States violating the 'principle of non-discrimination embodied in the [UDHR]' by limiting refugees' 'access to facilities for accommodation, food, education, recreation and medical assistance...which are provided for the community'.[88] In other words, the mention of human rights in the second preambular paragraph is concerned with problems of discrimination arising from the lack of external protection in the host country. The concern is met directly by the operative provisions of the Refugee Convention, which designate specified standards of treatment for refugees that must be observed by the host State in order to prevent such discrimination. In short, these two preambular paragraphs do not address the issue of the scope of persons intended to benefit from the Convention protection regime.

3.3 *The Preamble and its General Relationship to Human Rights*

The conclusion that the Refugee Convention's preamble offers a meagre basis on which to ground a human rights-based interpretation of Article 1A(2) is fortified by the distinct logic behind the three preambular paragraphs that

86 See, further, Section 2.2.4 below.

87 See, for example, UNGA Resolution 315 (IV), 'Discrimination practised by certain States against immigrating labour and, in particular, against labour recruited from the ranks of refugees', 17 November 1949.

88 Ibid.

do not refer to human rights. Crucially, unlike the first two paragraphs, the other three paragraphs are distinctly forward-looking and also speak directly to the treaty's object and purpose. Arguably therefore, the specific rationale that they express should carry greater weight when it comes to interpreting the substantive provisions of the treaty.

Tellingly, despite the reference to human rights in the first two paragraphs of the preamble, these three subsequent paragraphs deliberately avoid characterising refugees as a human rights problem and instead present refugees as a 'social and humanitarian' problem. Moreover, they state that this problem is to be addressed not through the nascent UN human rights framework but by extending the protection framework developed by pre-existing refugee instruments. This framework is largely oriented towards stabilising the refugee's situation in the host country and it long predates the development of UN human rights standards.[89] Thus, as seen through the Convention's preamble, the drafters' aim is to create the refugee regime afresh on its own intrinsic terms rather than via (at the time) novel UN human rights concepts.[90]

Interestingly, the one point of real cross-over with the contemporary UN human rights standards is in their articulation of a right to seek and to enjoy asylum from persecution by Article 14 UDHR.[91] In this regard, the Refugee Convention can be seen instead as legally developing certain key elements of Article 14. For instance, there is clearly a parallel between the concept of 'persecution' as it appears in Article 14(1) UDHR and in Articles 1A(2) and 33(1) of the Refugee Convention. The same is true as between Article 14(2) UDHR and the exclusion clauses in Article 1F of the Refugee Convention. The concept of asylum from persecution predates the UDHR and other UN human rights law standards and was not ordinarily construed as a breach of embryonic UN human rights standards in the country of origin.[92]

89 See Skran, *Refugees in Inter-War Europe*, 101–145.

90 This sense of continuity between the Refugee Convention and earlier international instruments on refugee protection has also been noted in the drafters' understanding (implicit in the earlier instruments) of the refugee's special situation of lacking external protection as driven by persecution in the country of origin (McAdam, 'Rethinking the Origins of "Persecution" in Refugee Law').

91 Article 14 of the UDHR proclaims that:
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

92 See, for example, the study by A. Grahl-Madsen on *Territorial Asylum* (Almqvist and Wiksell 1980).

Overall, then, the preambular paragraphs provide a somewhat shaky basis for attempting to develop a model of the Refugee Convention as a regime of 'surrogate' protection for persecution in the form of human rights violations in the country of origin. Rather, those paragraphs reinforce the perception that the Convention is intended principally to redress the long-standing problem of a lack of external protection for refugees in the host country. In this context, the preamble's reference to human rights standards seems to indicate a relationship between refugee law and human rights law that inverts the rationale of Hathaway's model. Rather than the breach of general human rights standards underpinning the refugee definition, the Refugee Convention as a whole affords progressive development of the human right to seek and to enjoy asylum from persecution that is consecrated by the UDHR.

3.4 *Conclusions: Alternatives for a Human Rights-Based Interpretation of Persecution*

Overall, the Refugee Convention's preamble seems to offer a poor hook on which to hang the argument of recourse to human rights law in interpreting the persecution element of Article 1A(2) as per Hathaway's 1991 'surrogate' protection model. However, this conclusion is not necessarily determinative of the legal validity or otherwise of the model or the human rights paradigm more generally. Indeed, the rules of treaty interpretation provide that, alongside context, account shall be taken also of 'any relevant rules of international law applicable in the relations between the parties' when interpreting treaty provisions.[93] Some commentators have identified this consideration as providing a separate legal basis for States parties to the Convention to interpret its refugee definition in light of international human rights law.[94]

In principle, and on the basis of Hathaway's model of refugee law as 'surrogate' protection, it might plausibly be contended that the rules of human rights law are 'relevant' for informing our legal interpretation of the persecution element in Article 1A(2) of the Refugee Convention.[95] However, this raises the question: which set of human rights rules? The UDHR might represent a good option, but its provisions are not 'rules of international law' and cannot be

93 VCLT, Article 31(3)(c).

94 See, for example, Foster, *International Refugee Law*, 51–70.

95 Note, however, that the interpretation of Article 31(3)(c) itself generates a great deal of controversy, including whether 'the parties' have to be the same. See the discussion in R. Gardiner, *Treaty Interpretation* (OUP 2010) 250–290.

introduced under this approach.[96] The UN Charter,[97] by contrast, is both binding and fully 'applicable in the relations between the parties' to the Refugee Convention.[98] However, it does not define specific human rights standards, but instead imposes a general obligation to act to promote respect for human rights.[99] The detailed and binding standards of the International Bill of Rights look more promising under the 'living tree' approach to interpretation but, even today, neither constituent treaty (ICCPR and ICESCR) is universally ratified by Convention parties. Whether their ratification by Refugee Convention parties is sufficiently widespread to engage this rule of treaty interpretation is thus more a matter for debate than a settled question.

The fact that there is no set of common human rights rules applicable between all of the parties to the Refugee Convention raises an element of doubt as to whether the law of treaties permits recourse to human rights standards in the manner proposed.[100] Against that, it might be said that such a strict 'black letter' approach to legal interpretation is inappropriate when a softer stance by States parties interpreting the Refugee Convention is taken in practice.[101] However, allowances of this kind instead fall under a separate rule of treaty interpretation that requires that 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' be taken into account.[102]

96 The non-binding nature of the rules in the UDHR is recognised implicitly by Hathaway, who designates rights contained in the UDHR but not in treaties as comprising the fourth and final category of his four-part typology of rights, i.e. not ordinarily capable of founding a claim of failure of State protection (*Refugee Status*, 111).

97 Charter of the United Nations, 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

98 This is because all parties to the Refugee Convention are UN Member States and thus bound by the UN Charter either through having ratified it or by virtue of having been admitted to the UN in accordance with Article 4.

99 UN Charter, Article 55.

100 In this respect, the question of precisely which norms of human rights law have achieved customary status is a matter of debate (see, for example, the discussion in B. Simma and P. Alston, 'The sources of human rights law: custom, jus cogens, and general principles' (1988–1989) 12 Aust YBIL 82).

101 A similar argument might suggest that the teleological approach to interpretation has a particular resonance in contexts where human rights or similar interests are at issue. For example, in its judgment in *Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*) [1997] ICJ Rep 7, the International Court of Justice affirmed: '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' (ibid, 114–15, emphasis added).

102 VCLT, Article 31(3)(b).

This recognition that subsequent practice may contribute to establishing the validity of a particular interpretation of the terms of Article 1A(2), by evidencing the agreement of the States parties, is an important device for ensuring that treaties such as the Refugee Convention retain relevance in the face of State practice. In later work, Hathaway himself sometimes seems to suggest that acceptance of the human rights paradigm in interpreting the refugee definition is sufficiently widespread among States parties so as to fulfil this criterion.[103] However, here also the correct method of interpreting the 'subsequent practice' rule of treaty interpretation is hardly uncontroversial.[104] Even so, it is important to keep in mind this approach – and the question about how it should be applied – as we turn to consider how Hathaway's 1991 model has been implemented in practice by States parties to the Refugee Convention.

4 Adoption of the Model in Practice

The doctrine of sources in international law recognises that 'the teachings of the most highly qualified publicists of the various nations' represent a 'subsidiary means for the determination of rules of law'.[105] In other words, the scholarship of academics such as Hathaway is acknowledged formally as capable of shedding light on the existence, development and interpretation of international law. Consonant with this approach, the chapter turns now to examine Hathaway's 1991 model of the Refugee Convention as a regime of 'surrogate' protection from a third distinct analytical standpoint, namely the national jurisprudence and international instruments that have served subsequently to consolidate the human rights paradigm as a mode of interpreting the Article 1A(2) refugee definition.

In speaking of a human rights 'paradigm' when interpreting the refugee definition in practice, though, we need to be careful not to overestimate the coherence of this purported paradigm. Thus, whereas the use of human rights standards to interpret elements of Article 1A(2) is relatively common in at least

103 See, for example, Hathaway and Foster, *The Law of Refugee Status*, where the theme of State practice establishing the validity of a human rights-based interpretation is one of the key themes running through the book (see, especially, 196 onwards). Note, however, that in the same text Hathaway and Foster seem equally to caution against relying on State practice to interpret a treaty such as the Refugee Convention (ibid, 11–12).

104 Gardiner, *Treaty Interpretation*, 225–249.

105 Statute of the International Court of Justice, annexed to the UN Charter, 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) Article 38(1)(d).

the leading jurisprudence from parts of Europe, North America and Australasia,[106] there is much less evidence that the practice among States parties to the Convention in other regions of the world is oriented around this approach to anything like the same extent.[107] Moreover, even in countries where the approach is followed, the degree to which it permeates all refugee decision-making, as opposed to just in important test cases determined by the higher judicial instances, is less than evident.[108] Finally, this human rights 'paradigm' is not cohesive but rather, across the different jurisdictions, seems to reflect a number of divergent understandings of the role of human rights in the interpretative exercise. This last point is developed by, and indeed forms the basis of, the analysis that follows.

Even so, to the extent that refugee decision-makers operate a theoretical model, it is fair to say that the human rights approach represents an important aspect of contemporary refugee decision-making in a large number of influential jurisdictions. Moreover, Hathaway's influence on this body of jurisprudence, and within this human rights 'paradigm', is evident in the frequent citation by such leading judgments of his 1991 model of refugee law as a regime of surrogate human rights protection.[109] The importance of his model in providing a theoretical basis for relevant aspects of the principal European Union (EU) instrument guiding Member States' interpretation of the refugee definition – the 2004 EU Qualification Directive (recast in 2011)[110]

106 This is amply demonstrated by the chapters concerning the countries from these regions in this volume.

107 In this volume, see, for example, the chapter containing a country case study of Brazil.

108 In the case of Canada, for example, a jurisdiction where the higher courts have been responsible for developing and promoting the human rights paradigm in an important way (see the chapter by Simeon in this volume), quantitative studies suggest that this approach is not expressly followed in the majority of the cases determined at lower levels (S. Meili, 'When Do Human Rights Treaties Help Asylum Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990' (2014) 51 Osgoode Hall Law Journal 627).

109 Indeed, at least among the common law countries surveyed in this volume (with the exception of the USA), it is rare to find a leading judgment by the higher courts that addresses the role of human rights law in the interpretation of the refugee definition but that does not refer to Hathaway's 1991 model.

110 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9–23.

– has also been acknowledged.[111] As such it is appropriate to briefly examine some of the pertinent refugee law practice constitutive of this human rights paradigm to assess Hathaway's model from the perspective of subsequent legal development in this field.

A rigorous in-depth global study of this topic plainly falls outside the scope of this chapter. Thus, what follows instead represents a more impressionistic and subjective perspective from the scholarly standpoint of the author of the present chapter, but which draws also on observations from his own earlier experience of litigating refugee and human rights cases. The analysis focuses principally on the Article 1A(2) element of persecution, since this constitutes the legal core of Hathaway's 1991 model. However, it also considers the framing of internal protection and the construction of the Convention grounds in the legal interpretation of the refugee definition in practice. Its conclusions, although tentative, are as follows. Firstly, recourse to human rights law has not necessarily resolved the challenge of interpreting Article 1A(2) but rather shifted it to a new discursive terrain that comes with its own distinct challenges. Secondly, Hathaway's 1991 model has not been entirely faithfully adopted in practice, with the result that new interpretative models are gradually beginning to emerge in this field of law.

4.1 *Persecution as an Element of Article 1A(2)*

At the heart of Hathaway's 1991 model of the Refugee Convention as a 'surrogate' protection regime is the expansive understanding of the Article 1A(2) element of persecution as 'the sustained or systemic violation of basic human rights resulting from a failure of State protection'. This theoretical tenet has been cited by many leading judgments as the basis for the human rights paradigm in refugee law and the broader conception of refugee law as 'surrogate' protection. However, this section suggests that the specific legal approach through which Hathaway developed this aspect of the model in *The Law of Refugee Status* has been less enthusiastically adopted by the pertinent jurisprudence and international instruments.

4.1.1 Identifying the Relevant Set of Human Rights Standards

At the outset, any attempt to link the Article 1A(2) persecution element to the violation of human rights standards immediately runs into the question of which articulation of these standards to use. In *The Law of Refugee Status*, Hathaway rightly recognises that human rights standards are expressed in a

111 Storey, 'What Constitutes Persecution?' 280.

range of instruments of both global and regional origins. However, his 1991 model proposes that the relevant human rights standards for interpreting the Article 1A(2) element of persecution be drawn principally from the ICCPR and the ICESCR due to the 'extraordinary consensus' at the global level surrounding these UN standards.[112] In conceptual terms, the logic behind this proposal is appealing.[113]

However, State practice on this point is distinctly mixed. Certainly, some States that are not party to strong sets of regional human rights frameworks – such as New Zealand, Australia and Canada – do follow Hathaway's legal approach and draw on the relevant UN human rights standards to interpret the 'persecution' element.[114] Yet, by contrast, many other States that cite Hathaway's model in their jurisprudence instead appear to privilege the use of influential regional human rights instruments to construe this element. For instance, EU Member States are guided by the terms of Article 9(1) of the Qualification Directive,[115] which defines persecution primarily via the European Convention on Human Rights (ECHR).[116] Similarly, in those instances where States in Latin America have purported to adopt a human rights approach, they tend to draw on standards from the regional Inter-American system.[117]

112 Hathaway, *Refugee Status*, 106–107.

113 However, it does not resolve the separate legal question as to how the use of these covenants to interpret the Refugee Convention is to be legally justified (see Section 3 above).

114 See, respectively, the chapters in this volume by B. Burson, L. Kirk and J. Simeon.

115 Article 9(1) of the recast Qualification Directive reads:

1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
   (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
   (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

116 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 005 CETS (entered into force 3 September 1953), 1 as amended by Protocol 14, 13 May 2004, 194 CETS 1 (entered into force 1 June 2010) (ECHR).

117 Based on interviews by the author with refugee protection officials across Latin America. For a parallel example of this tendency to rely on regional rather than universal human rights standards in the refugee law context, see UNHCR, 'Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration', Expert roundtable, Montevideo, Uruguay, 15 and 16 October 2013 <http://www.unhcr.org/53bd4doc9.html> accessed 7 October 2015, especially paras 21, 22 and 25 and footnote 5.

Clearly, given the considerable convergence between these different sets of human rights standards, the risk of such divergence promoting legal fragmentation should not be overstated. Nonetheless, it does indicate that difficulties may arise in using human rights standards to promote a common approach to the refugee definition at those points where the distinct frameworks adopt divergent standards. Moreover, such divergence often reflects controversy about the right (or aspects of the right) in play. Thus, such differences may be most likely on precisely those difficult issues where one might hope that recourse to human rights standards would provide a definitive and uniform answer. The scope and non-/derogability of the freedom of religion in, respectively, the ICCPR and the ECHR is a topical case in point.[118]

4.1.2 Identifying the Relevant Rights

A second (and separate) question that arises from the attempt to link the persecution element to human rights standards is whether the violation of just any human right is sufficient to amount to persecution in the terms of Article 1A(2). In principle, Hathaway seems to answer this question in the affirmative in *The Law of Refugee Status*. However, he makes it clear that not all rights carry the same weight in establishing persecution under Article 1A(2). He thus introduces a four-part typology that divides and ranks rights according to the kind of obligation that they would entail for States under human rights law.[119] On this point also, the internal logic of his model is extremely compelling, although the four-part typology has come in for criticism over the years.[120]

In practice, few States have specifically rejected Hathaway's basic contention that all human rights – or at least those expressed in 'hard' legal form by treaties – may be relevant to framing the concept of persecution. Indeed, this is one of the asserted practical advantages of Hathaway's model (and the human rights paradigm more generally): it provides decision-makers with a set of 'objective' standards that can help to illustrate the multiplicity of ways in

118 The relevance of human rights law to refugee cases based on religion was recently addressed by the Court of Justice of the European Union in *Joined Cases C-71/11 and C-99/11, Y & Z* [2012] ECR I-0000. Even so, in such cases, any individual State party to both treaties must fulfil its obligations under one treaty in such a way as to ensure that overlapping duties in the other treaty are not impaired. As such, at least where its standards require a greater level of protection, the ICCPR should still remain the ultimate point of reference.

119 Hathaway, *Refugee Status*, 108–112.

120 See, for example, Foster, *International Refugee Law*, 113–123.

which persecution can take place. In practice, though, the author's strong impression is that everyday State practice tends to foreground the use of certain civil and political rights to frame the element of persecution.[121] Moreover, particularly where this practice draws on regional instruments that express only a limited range of rights, such as the ECHR, the ensuing interpretation of persecution risks being quite narrow.[122]

However, a still more acute difficulty arises in State practice on to the related question of how recourse to human rights standards can help to establish the minimum threshold of mistreatment implicit in the Article 1A(2) concept of persecution. Indeed, it appears that most States do not apply the four-part typology proposed in Hathaway's 1991 model, most likely due to the fact that it implies that the violation of almost any civil and political right expressed by the ICCPR would amount to persecution.[123] Instead, in its place, a multiplicity of subtly-different 'practical' approaches has taken shape, a fact that challenges the expectation that recourse to human rights law will help to promote greater consistency in refugee law. These various 'practical' approaches seem to reflect a generalised unwillingness on the part of States to countenance the idea that the mere violation of any human right, or at least any civil and political right in the ICCPR, might be sufficient to meet the persecution threshold in refugee law. Equally, though, they represent attempts to grapple with the more fundamental difficulty that there is no natural equivalence between human rights standards and the persecution concept in refugee law.

As one example, even in New Zealand, arguably the jurisdiction where Hathaway's model has been most faithfully adopted and developed, the resulting refugee law jurisprudence has invoked a supplementary 'practical' concept of 'serious harm' in order to modulate the relationship between human rights standards and the persecution element.[124] Under the EU asylum law framework, by contrast, Article 9(1) of the Qualification Directive equates the minimum threshold for persecution with that required for the violation of non-derogable civil and political rights expressed in the ECHR, i.e. implicitly also a version of 'serious harm'. In both the New Zealand and EU cases, albeit

121 This impression is confirmed by the contributions to this volume which suggest that the use of other human rights instruments remains notable largely due to its exceptionality in the jurisprudence.

122 See, for instance, Article 9(1) of the Qualification Directive.

123 Hathaway, *Refugee Status*, 109–110.

124 See, as an example of this approach, *Refugee Appeal No 74665/03* [2005] NZAR 60, para. 114, and the description of this approach in the chapter by Burson in this volume.See also the very recent revisiting of this term and extensive discussion in *DS (Iran)* [2016] NZIPT 800788.

by different methods, the bar for meeting the minimum threshold implicit in the persecution element is raised beyond the simple fact of a rights violation to requiring 'something else'. This EU law approach has been advanced by some as a template for a 'universal working definition' of persecution.[125]

Under these two new related approaches, that 'something else' now represents the pivot on which the minimum threshold for persecution is defined. Yet what it consists of is ultimately not defined by the logic of human rights law: either it introduces a non-human rights concept such as 'serious harm' (New Zealand) or it seeks to rank types of human rights in a manner alien to international human rights law (EU Qualification Directive). The internal consistency of Hathaway's 1991 model is thus lost as in neither case does the logic of human rights law provide the basis on which the minimum threshold for persecution is established.[126] In fact, despite the 'human rights' discourse that is used to justify these new approaches, such State practice actually seems to confirm (unintentionally, one presumes) the view that human rights standards are indeed ultimately legally distinct from the Article 1A(2) element of persecution, with no automatic equivalence between the two concepts.

Against this backdrop of refugee law practice, it is notable that in the 2nd edition of *The Law of Refugee Status*, published in 2014, Hathaway and his new co-author (Michelle Foster) have also shelved the 1991 model's four-part typology of human rights and instead propose a new approach.[127] This attempts to avoid the notion of 'serious harm' as a minimum threshold for persecution implicit in the practice cited above and instead argues for a three-stage evaluation, i.e. (i) whether the anticipated situation interferes with a human right; if so, (ii) whether this is permissible by reference to restrictions on the exercise of the right or derogation from its duties; and, if so, (iii) whether the interference is *de minimis* in the circumstances of that particular case.[128] This new formulation has received criticism for relying on concepts that are not present in human rights treaties from scholars who defend the use of a lower threshold for persecution based on non-derogable human rights duties.[129] Nonetheless,

125 Storey, 'What Constitutes Persecution'.

126 As a consequence, where the 'persecution' line is drawn also remains fairly arbitrary. This is the case even where a flat dichotomy between non-/derogable rights is used, since different treaties define different rights as non-derogable and, even in the same treaty, the rationale for making a right non-derogable can vary quite considerably. What emerges, in effect, is a strange species of 'human rights for the purpose of refugee law'.

127 Hathaway and Foster, *The Law of Refugee Status*.

128 Ibid, 203–207.

129 Storey, 'Paradigm Lost?' 353–356.

the crucial point for the purpose of our analysis here is that it represents another new attempt to theorise the issue of which human rights standards can be used to frame the persecution element as a reaction to the perceived limitations of Hathaway's 1991 model.

Finally, alongside these new approaches, it is important to recognise that the approach indicated in the UNHCR Handbook is still in existence and sometimes applied in practice. It stands in contrast to those approaches that mirror the tenets of Hathaway's 1991 model by incorporating human rights standards as a distinct legal framework that exhaustively describes the content of the persecution element in Article 1A(2) of the Refugee Convention. Rather, the UNHCR Handbook indicates that human rights standards offer merely one touchstone for determining the existence of persecution, such that whether prejudicial actions or threats other than 'serious violations of human rights' amount to persecution 'will depend on the circumstances of each case'.[130] This approach continues to be represented in such UNHCR doctrine and in the scholarship.[131] Moreover, despite criticism for encouraging subjective decision-making and divergent law-based jurisprudence,[132] such a non-exhaustive approach to using human rights standards might be read into the language of Article 9(1) of the EU Qualification Directive.[133]

4.1.3 Challenges in Applying the Interpretative Approach

Contrary to the aspirations of Hathaway's 1991 model, contemporary refugee law practice seems to suggest that recourse to human rights standards does not resolve – or even necessarily ameliorate – the challenge of interpreting the persecution element. Rather, what the attempt to draw on human rights law does is to shift the interpretative exercise from the terms of the Refugee Convention to a new discursive terrain that is constituted by the standards

130 UNHCR, *Handbook*, paras 51–52.

131 A. Edwards, 'Age and Gender Dimensions in International Refugee Law', in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 50.

132 Storey, 'What Constitutes Persecution?' 277–278.

133 Article 9(1)(b) provides, as an alternative to the acts described in Article 9(1)(a), that an act of persecution can also: 'be an accumulation of various measures, *including* violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)' (emphasis added). Arguably, the word 'including' (i.e. but not limited to) might be taken to signal that measures that do not in themselves constitute human rights violations may also constitute persecution so long as they are sufficiently severe in their effect on the individual.

expressed in human rights law instruments. However, the human rights law field comes with its own set of interpretative challenges that are merely accentuated when transposed to the refugee law context. Three different examples of such challenges will be presented here to illustrate both the general point and its implications for refugee law practice.

First of all, the apparent indeterminacy of Article 1A(2) terms such as 'persecution' partly drives the search for meaning and, thereby, recourse to human rights law. However, human rights treaties are as much beasts of international law as is the Refugee Convention and their language is equally abstract. Thus, the prohibition of 'torture' or 'inhuman and degrading treatment' – the breach of which is tantamount to persecution in Hathaway's model – receives no further gloss in the ICCPR.[134] Rather, the significance of this ICCPR term is interpreted through soft law comment that exists alongside different understandings of similar terms in other treaties such as the 1984 Convention against Torture (CAT) and ECHR.[135] As such, suggesting that 'torture' constitutes a form of persecution in refugee law does not resolve the enquiry but rather shifts it to a parallel field of no less contested or complicated understandings in human rights law.

Secondly, it is unclear whether the use of human rights law has developed a progressive understanding of the element of persecution. To the practising refugee lawyer, human rights standards sometimes appear to be cited by lower-level courts merely in order to add a legal flourish to decisions in cases where persecution is evident already on the basis of serious physical mistreatment. By contrast, in cases involving more subtle questions about the boundaries of persecution, recourse to human rights standards seems not infrequently to serve as a justification for restrictive interpretation of this element.[136] Moreover, where progressive interpretations of persecution do appear in such cases, they do not necessarily derive from direct recourse to human rights law standards, as the refugee case-law from the United States on social and economic deprivation suggests:[137] can one really suggest that a

134 ICCPR, Article 7.

135 See the discussion in N. Rodley and M. Pollard, *The Treatment of Prisoners under International Law* (3rd edn OUP 2009) 82–144.

136 Arguably, certain recent judgments by the Court of Justice of the European Union such as in the *Joined Cases C-71/11 and C-99/11, Y & Z* (5 September 2012) and *Joined Cases C-199/12, C-200/12 and C-201/12 X, Y & Z* [2013] ECR I-0000 are but one far-reaching example of this trend.

137 See the chapter in this volume by D.E. Anker and J. Vittor.

progressive decision results from the use of human rights law where human rights are not directly cited in the *ratio* of the judgment?

Ultimately, it is also open to question whether such recourse to human rights standards has really minimised the inconsistency in refugee status determination attributed to the use of dictionary-based definitions of 'persecution' by decision-makers.[138] Rather, in practice, it appears that instinctive or dictionary-based understandings of persecution continue to be foremost in the minds of decision-makers as they struggle to negotiate their way through the complex new discursive terrain of interpreting human rights for the purpose of refugee law. Indeed, on occasion, one can almost hear the old dictionary definitions ('pursue with malignancy' etc.) echoing between the lines of judgments as decision-makers strive to draw the dividing line on whether a particular form of human rights abuse constitutes persecution.[139]

4.2 *Internal Protection by the Country of Origin as a Component of Persecution*

Hathaway's 1991 model conceives the Article 1A(2) persecution element as encapsulating considerations of internal protection by the country of origin, framed as the State's duty to provide 'adequate national protection of core human rights'. It allows Hathaway to argue that anticipated harm at the hands of non-State actors engages the refugee definition not just where the State is complicit in the persecution but also where it fails to protect the putative

138 Hathaway, *Refugee Status*, 101–102; Storey, 'What Constitutes Persecution?' 275.

139 Thus, to take but one example from the United Kingdom case-law, the Upper Tribunal (Immigration and Asylum Chamber) in its reported country-guidance determination in the case of NM (*documented/undocumented Bidoon: risk*) *Kuwait CG* [2013] UKUT 00356(IAC) cited the ECHR human rights-based standards of Article 9(1) of the EU Qualification Directive before proceeding to render them in a form more amenable to its own understanding. The language of its interpretation directly recalls that of the earlier dictionary-based definitions:

> 93. ...For discrimination to amount to persecution, measures must involve persistent and serious ill-treatment without just cause, and must be of a substantially prejudicial nature and must affect a significant part of the individual's or group's existence, to the extent that it would make their life intolerable if they were to return.

Storey has also identified instances of this tendency in his original and extended piece on 'What Constitutes Persecution?' (H. Storey, 'Persecution: Towards a Working Definition', in V. Chetail and C. Bauloz (eds), Research Handbook on International Law and Migration (Edward Elgar 2014) 464).

refugee.[140] This aspect of his model has been taken up in the refugee law jurisprudence of certain countries, where it has sometimes been expressed in formulaic terms as 'persecution = serious harm + the failure of State protection'.[141] It reflects the fundamental conception in Hathaway's model of the Refugee Convention as a regime of 'surrogate' protection.

A relatively well-developed scholarly critique has emerged of the application of this 'surrogate' protection approach based on Hathaway's 1991 model.[142] The critique persuasively argues that the adoption of this 'surrogacy' model in the jurisprudence of countries such as Australia, Canada, the UK and USA has diverted the attention of decision-makers in the courts towards the adequacy (rather than the effectiveness) of the internal protection provided by the country of origin and away from proper consideration of the well-foundedness of the putative refugee's fear of persecution.[143] Similar concerns might also be raised about the stipulation in Article 7(2) of the EU Qualification Directive that internal protection is deemed to be provided by the country of origin when the State (or other 'actors of protection') takes 'reasonable steps to prevent the persecution', suggesting that the need for international protection might not be made out in these circumstances even though the putative refugee still holds a well-founded fear of persecution.

Moreover, attempts to draw on human rights law to define the appropriate level of internal protection capable of negating the need for surrogate protection may generate certain paradoxes, especially in cases involving non-State agents of persecution. Indeed, under human rights law, the State duty to protect rights from third-party interference is context-sensitive and its reach hinges on what can be reasonably expected in the circumstances.[144] Pertinent

140 Hathaway, *Refugee Status*, 124–134. See the critique of this position developed in Section 2.1.4 above.

141 This formulation was originally coined by the Refugee Women's Legal Group, 'Gender Guidelines for the Determination of Asylum Claims in the UK' (Refugee Women's Legal Group, July 1998) and adopted by leading courts such as the UK House of Lords in *Shah and Islam* and the High Court of Australia in *MIMA v Khawar*, paras 31 and 118.

142 See, for example, Goodwin-Gill and McAdam, *The Refugee in International Law*, 8–12; P. Zambelli, 'Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law' (2011) 23 IJRL 252; S. Kneebone, 'Refugees as Objects of Surrogate Protection: Shifting Identities' in S. Kneebone, D. Stevens L. Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 106–114.

143 Ibid.

144 See, for instance, the judgment of the European Court of Human Rights in the case of *Osman v United Kingdom* (1998) 29 EHRR 245.

human rights jurisprudence suggests that a State with little actual control over certain parts of its territory – due, for example, to the presence of armed non-State actors – may have relatively circumscribed duties to protect human rights from third-party violations.[145] Could a refugee law decision-maker thus find those duties discharged by a quite minimal effort and refuse refugee status on the grounds of a sufficiency of protection in the case of a person whose fear of harm remains well-founded? One answer to this conundrum may be to assert that certain minimum standards apply to the duty on States to protect individuals from third party violations but, if so, then they are not clearly specified by international human rights law.

Finally, and paradoxically, the use of international human rights law to articulate the relationship of national protection in Hathaway's 1991 model as a means of facilitating the recognition of non-State agent persecution may equally provide a legal basis on which to justify recognising their capacity to protect human rights. A groundswell of opinion in the human rights field suggests that at least some non-State actors are bound by international human rights norms.[146] If correct, then the use of human rights law to inform the scope of internal protection under the Article 1A(2) persecution element would provide a legal basis for affirming that such actors are equally capable of providing internal protection for the purposes of Article 1A(2), a possibility now expressed *inter alia* by Article 7(1) of the EU Qualification Directive. Such developments seem to push refugee law ever further from its premise that national protection has external as well as internal aspects,[147] as well as calling into question Hathaway's notion of surrogacy as a concept that results from the breakdown of 'national' protection by States.[148]

4.3 *Scope of the Convention Grounds in Article 1A(2)*

The 1991 edition of Hathaway's *The Law of Refugee Status* extends his human rights-based interpretation to the analysis of the Convention grounds specified in Article 1A(2) of the Refugee Convention, i.e. that the fear of persecution must be for reasons of 'race, religion, nationality, membership of a particular social group or political opinions'. In general, his model frames these grounds

145 See, for example, the judgment of the European Court of Human Rights in the cases of *Issa v Turkey* (2004) 41 EHRR 567 and *Ilaşcu v Moldova and Russia* (48787/99) [2005] 40 EHRR 46.

146 See, for example, A. Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006).

147 See Section 2.1 above.

148 They do so by making non-State actors capable of 'surrogating' for the failure of human rights protection by States of origin.

as reflecting an implicit requirement in the Refugee Convention that refugees belong to marginalised groups that are unable to obtain redress for human rights violations in their countries of origin. Secondarily, he also analyses the scope of a number of the Convention grounds in relation to international human rights law concepts,[149] including a useful endorsement and discussion of the 'fundamental characteristic' approach to defining a 'particular social group' expressed by the US courts in *Acosta*.[150]

Hathaway's broader view of the Convention grounds in terms of groups unable to vindicate their human rights in the country of origin has not gained a great deal of traction in the jurisprudence. By contrast, the influential *Acosta*-based approach to the Convention grounds as expressing 'fundamental characteristics that cannot, or should not, be renounced' is widely recognised and forges a direct link to the concept of human rights. Moreover, as a result, the more detailed description in international human rights law of certain concepts inherent in the Convention grounds is sometimes used to illuminate the latter. This is apparent in the application of human rights law to confirm that Convention grounds such as 'political opinions' also include not holding a political opinion.[151] Similarly, linking the Convention grounds to the concept of human rights has promoted an understanding of the 'membership of a particular social group' ground as capable of encompassing forms of identity protected by international human rights law, such as gender.[152]

It is perhaps unsurprising that international human rights law has proved useful to clarifying the nature and scope of the Convention grounds since it is here where the overlap between the two fields of law is at its strongest and the potential for human rights concepts to fertilise refugee law is at its highest. Indeed, particularly in the higher courts of the United Kingdom, there is an emerging line of jurisprudence that is beginning to interpret the Convention grounds – and the Article 1A(2) refugee definition as a whole – as rooted in the concept of non-discrimination,[153] a free-standing principle of law that also

149 Hathaway, *Refugee Status*, 141–161.

150 Board of Immigration Appeals (US), *Matter of Acosta* [1985] 19 I&N Dec. 211at 233.

151 See, for example, Supreme Court (UK), *RT (Zimbabwe)* [2012] UKSC 38.

152 See, for instance, the judgment in *Shah and Islam*.

153 This line of reasoning in judicial decisions can be traced to the House of Lords' judgment in *Shah and Islam*. Here, Lord Steyn affirmed that 'counteracting discrimination' was a fundamental purpose of the Convention and Lord Hoffman observed that the Convention is 'not concerned with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination'. For further discussion of this approach as represented in the United Kingdom case-law, see the chapter by Husein in this volume.

underpins much of the framework of human rights law.[154] On this reading, the parallel interest across both fields of law in addressing discrimination against persons on the basis of some fundamental characteristic provides the major point of legal intersection between them.

Crucially, this approach to interpreting the Convention grounds implies that the starting point for understanding the relationship between the Article 1A(2) refugee definition and international human rights law is the concept of non-discrimination expressed by the element of the Convention grounds rather than the persecution element. In other words, it turns Hathaway's 1991 model of the human rights paradigm in refugee law on its head as, after the fact of alienage, it is the concept of discrimination expressed by the Convention grounds rather than the harm implicit in the element of persecution that forms the starting point for interpreting the refugee definition in Article 1A(2). By focusing first on the discrimination, rather than the harm to which it leads, this approach seeks to avoid putting the cart before the horse. Ultimately, this emphasis on the centrality of the principle of non-discrimination to Article 1A(2) represents another emerging alternative interpretation to that proposed by Hathaway's 1991 model.

5 Conclusion

In many national jurisdictions, the human rights 'paradigm' presently forms an important point of reference for assisting the interpretation of the refugee definition in Article 1A(2) of the Refugee Convention. At the same time, the considerable body of scholarship that has coalesced around this paradigm both reflects upon, and feeds into, the increasing consolidation in law of this particular means of apprehending the refugee definition. From the interpretative standpoint, the human rights paradigm seems to offer the advantage of both providing a solution to the refugee law conundrum of how to conceptualise Article 1A(2) and its discrete elements in a principled and coherent manner and also facilitating more consistent and fairer decisions through its practical application during refugee status determination.

Evidently, in these jurisdictions and in the scholarship on this topic, recourse to human rights as a mode of interpreting Article 1A(2) is no longer but a marginal exercise that exists merely 'on the borders of refugee protection' (to quote the title of the conference where this chapter was first presented) but instead

154 As to the broader character of the legal principle of non-discrimination see S. Fredman, *Discrimination Law* (2nd edn OUP 2011) esp. 108 et seq.

has become a significant aspect of contemporary theory and practice. There is no doubt that this process has been invigorated by the theoretical model of the Convention refugee regime as 'surrogate' protection that was proposed by Hathaway in 1991, in which human rights standards occupy a central explanatory role. 25 years later, this model of Hathaway's remains one of the few genuine attempts to provide an integrated theory of Convention refugee law and its consequential influence on the field should be rightly recognised.

However, this chapter suggests that, alongside acknowledging the considerable traction that Hathaway's 1991 model has achieved in the jurisprudence and scholarship, we must retain a critical perspective as to its constraints. In this regard, three principal contentions have been advanced here. Firstly, that the tenets underpinning Hathaway's model of the Refugee Convention as a regime of 'surrogate' protection generate a number of conceptual and legal questions that invite deeper reflection on the coherence of the model and the wider human rights paradigm to which it has contributed. Secondly, that other legal and conceptual challenges have become evident as a consequence of the attempt to draw on Hathaway's 1991 model in practice. Finally, that the growing recognition of these challenges has resulted in the recent emergence of a number of alternative approaches to interpreting the Article 1A(2) Convention refugee definition in light of international standards.

The sheer variety of human rights-based approaches to Article 1A(2) that are currently discernible in refugee law practice and scholarship calls into question the existence of a single interpretative 'paradigm'. Whereas many of these human rights-based approaches start from the 'persecution-centric' focus of Hathaway's 1991 model, their attempt to translate this into practice has generated a range of distinct methods for determining how human rights standards can inform the concept of persecution. The point was illustrated in this chapter by the two contrasting examples of the refugee law jurisprudence of New Zealand and the provisions of the EU Qualification Directive. In neither case are States willing to countenance the idea that the violation of human rights *per se* constitutes persecution, but they differ as to how and where human rights can help to determine the parameters of the imported concept of 'serious harm'.

New scholarly models are also in evidence. Some parallel the practice of States, as with Storey's modelling of persecution by reference to the rationale of non-/derogability of human rights obligations in the EU Qualification Directive. Others, such as Hathaway and Foster in the new 2nd edition of *The Law of Refugee Status*, seek to develop an alternative configuration of the persecution/human rights nexus based on other human rights concepts. However,

the fact that human rights law does not contain a concept of persecution means that these new jurisprudential and scholarly approaches inevitably have to modulate their recourse to human rights standards through some other concept. Often, this concept derives from an intuitive or dictionary-based understanding of the term 'persecution' (such as 'serious harm') and can give rise to the creation of a strange species of 'human rights law for the purpose of interpreting the refugee definition' that sits uneasily with the rationale of international human rights law itself.

A long-standing alternative to these newer models that remains present in practice today is to use human rights standards as illustrative rather than determinative of the concept of persecution. Thus, the more recent legal and scholarly approaches take the prescriptive position that human rights law can exhaustively describe the Article 1A(2) element of persecution. By contrast, the UNHCR Handbook and some scholars take the contrary position that, whereas some forms of persecution can also be classified as human rights violations, the latter does not exhaustively define the former, which instead has independent significance. This approach has the advantage that it does not require the introduction of dubious conceptual distinctions to decide which human rights abuses 'count' as persecution and which do not. However, it has also been criticised for ultimately not providing a satisfactory affirmative answer to the question of where the parameters of the persecution concept lie.

Finally, against the persecution-centric approach of many human rights-based models, another alternative identifies the principle of non-discrimination as the basis for refugee law. It suggests that the Hathaway model's overemphasis on the harm implicit in the persecution element obscures the principle of non-discrimination expressed by the Convention grounds as a more productive starting point for legal interpretation of the refugee definition. Rather than being a human rights violation that certain groups of putative refugees cannot remedy in the country of origin, persecution is instead viewed as an exacerbated form of discrimination that follows from the making of unjust distinctions recognised by the Convention grounds. In practice, aspects of this 'non-discrimination' approach can be discerned in the jurisprudence of the higher courts of the United Kingdom.

Implicit in this approach are the ingredients for developing a distinct new theoretical model in the field that may be capable of explaining not only the scope of the refugee definition but also, potentially, the nature of the Convention protection regime as a whole. Indeed, the principle of non-discrimination runs through the Convention regime and forms an important building block for refugee law in general. For instance, this chapter has shown that the principle of non-discrimination was a key concern motivating the

Refugee Convention's drafters to delineate the standards of treatment for refugees contained in Articles 3 to 34 (as indicated by the preamble to that treaty).[155] Moreover, the fact that the principle of non-discrimination underpins not only the Refugee Convention but also the separate body of human rights law provides an independent basis for considering interpretative recourse to human rights standards in defining and protecting refugees. In short, this approach offers an intriguing basis for researching into the development of a new theoretical model of refugee law in the future to supersede the innovative and influential model proposed by Hathaway in 1991.

Overall, the sheer variety of emerging and competing approaches to using human rights standards to interpret the Convention refugee definition signals this area as one of vibrant contemporary and future debate in the refugee law field. As a means of further promoting this reinvigorated debate on the refugee definition, the present chapter has sought also to reflect critically on the abstract conceptual and legal underpinnings of Hathaway's 1991 'surrogacy' model. As part of its critique of the 'surrogacy' approach, the chapter has probed that model's expansive conceptualisation of the role played by human rights law in framing certain elements of the refugee definition and the 'surrogate' nature of the refugee regime itself. It was suggested that, if we shift our analysis of the regime away from an overemphasis on the Article 1A(2) element of persecution to take account also of the wider framework of the Refugee Convention, then this helps us to better understand both the nature of the ensuing regime and the construction of the refugee definition itself.

On this point, the present chapter has argued that, to the extent that refugee protection compensates for the lack of national protection, then this refers not only to internal protection considerations but also has a strong external component that reflects the challenges posed by the refugee as an alien lacking effective nationality. Acknowledgement of this aspect of refugee protection reinstates substantive legal significance to the 'protection' limb of Article 1A(2) that is absent from Hathaway's model and also connects the definition back to the content of refugee status. On this reading, the standards of treatment in Articles 3 to 34 reflect a special 'human rights' concern on the part of drafters with ensuring that refugees are not unduly discriminated against in access to services and similar nationality-derived benefits in the host country.

155 This concern with equal treatment can be evidenced even in the Convention's free-standing guarantees. For example, Article 25, which pertains to the provision of administrative assistance, actually seeks to level the playing field for refugees based on the particular vulnerabilities resulting from their lack of national protection.

In general, the universal 'human' character of human rights law means that it struggles to adequately convey the specialised nature of either the refugee's ruptured relationship of national protection or her treatment by the host State. Indeed, at least by reference to the terms of its preamble, the Refugee Convention's general relationship with human rights standards is more modest than was suggested by Hathaway and those who have sought to develop his model in this direction. Instead of the refugee regime defining 'persecution' as the violation of general human rights standards, the preamble rather suggests that the Convention represents merely one framework through which the standalone right to seek 'asylum from persecution' proclaimed in Article 14 UDHR is given a degree of international legal development.

Looking to the future, this chapter points towards an increasingly compelling and crucial debate around the question of how and where human rights standards may play a useful role in helping to interpret the Convention refugee definition. In this regard, the analysis suggests that the application of Hathaway's 1991 'surrogacy' model – and the wider human rights paradigm to which it has contributed – now raises as many questions as it answers. Indeed, it may simply shift the exercise of interpretation to a more complicated discursive terrain that comes with its own complex conceptual problems. Equally importantly, and perhaps contrary to expectations, it is not clear that the adoption of a human rights paradigm has been necessarily to the ultimate benefit of persons seeking protection as refugees, especially as intuitive understandings of the 'persecution' element continue *sotto voce*. Perhaps the time has arrived to properly investigate the potential for new theoretical models that speak not only to the refugee definition but also to the general structural relationship between refugee law and human rights law.