"UNABLE TO RETURN" IN THE 1951 REFUGEE CONVENTION: STATELESS REFUGEES AND CLIMATE CHANGE

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> A [stateless person] does not need to show a well-founded fear of being persecuted upon his eventual return. . . . [he] need only substantiate that he is unable to return to the country in question, in order to win recognition as a refugee.
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1. ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 261 (A.W. Sijthoff 1966).

I. INTRODUCTION

The 1951 Convention Relating to the Status of Refugees (1951 Convention) is the centerpiece of the current system of international protection and is almost unique in its level of acceptance by states.[2] Its key definitional clause, article 1(A)(2), extends refugee status to any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.[3]

It is widely believed that this passage extends refugee status only to persons with a well-founded fear of persecution. Since this is the central inclusion clause of the 1951 Convention, it is therefore widely believed that a well-founded fear of persecution is a necessary condition for status as a Convention refugee, for persons with a nationality as well as those without one. This view is expressed in the preponderance of contemporary scholarship, and it is often taken for granted in judicial interpretation and asylum practice.[4] This view is so entrenched that, for

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2. Close to 150 nations have ratified either, or both, the 1951 Convention and its Protocol. *See* U.N. High Commissioner for Refugees [UNHCR], States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (Apr. 1, 2011). International protection includes the Refugee Convention, but also such instruments as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85, as well as the immigration laws of various states such as, for example, Temporary Protected Status in the United States, 8 U.S.C. § 1254a. UNHCR is attempting to strengthen protection for non-refugee stateless persons by enabling them to qualify for resettlement. However, there is no right to resettlement and, so far, the resettlement of non-refugee stateless persons is left to the discretion of states. *See* U.N. HIGH COMMISSIONER FOR REFUGEES, *Basic Procedures to Follow in Processing Resettlement Submission*, *in* UNHCR RESETTLEMENT HANDBOOK 299, 306 (July 2011).

3. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137 [hereinafter 1951 Convention]. The Convention is quoted as modified by the Protocol Relating to the Status of Refugees art. 1(2), Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (removing the temporal restriction in the 1951 Convention) [hereinafter 1967 Protocol].

4. *See* Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees Protocol Relating to the Status of Refugees,* U.N. AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008). *See also* U.N. High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N.H.C.R. Doc. HCR/1P/4/ENG/REV (Dec. 3, 2011)

example, the literature on whether climate change displaces might count as 1951 Convention refugees is primarily about whether climate change counts as persecution.[5]

Our aim in this Article is to challenge this standard interpretation in its application to some stateless persons. We shall argue that the clause of article 1(A)(2) following the semicolon and pertaining to stateless persons, makes room for a certain class of stateless refugees who are not persecuted. The issue turns on the interpretation of the phrase "unable to return." According to the standard interpretation, "unable to return" applies in a very wide range of ordinary cases of statelessness, even to those whose inability is temporary. For this reason, proponents of the standard interpretation of the 1951 Convention assume that, despite the text failing to make this clear, some further restriction must apply to persons who lack a nationality and are unable to return if they are to count as refugees: they must in addition have a well-founded fear of persecution.[6]

Our interpretation instead takes "unable to return" to have a far more stringent meaning than is usually supposed, specifying a more permanent condition that many stateless persons do not meet, but which suffices for refugee status for stateless persons who do meet it. On our interpretation, "unable to return" as it occurs in the clause following the semicolon must be understood as a legal term of art that signals irreparable, fundamental inability, rather than mere difficulty or complication with the paperwork. On our interpretation there is no need to read any restriction to persecution into the clause following the semicolon for those unable to return, but it does not follow that all displaced stateless persons are refugees. Also, on our interpretation, but not the standard interpretation, the object and purpose of the 1951 Convention is in harmony with its ordinary meaning, and the complementary relation between the 1951 Convention and the international protection regime is clearer. Finally, though there is a superficial tension between our interpretation and state practice, no municipal court or regional agreement explicitly rules against our interpretation of the 1951 Convention, meaning that there is no deep tension.[7]

(establishing persecution to be central to the determination of refugee status) [hereinafter Handbook on Procedures].

5. *E.g.*, U.N. High Commissioner for Refugees [UNHCR], Division of International Protection, *Climate Change Displacement and International Law: Complementary Protection Standards*, 13, U.N.H.C.R. Doc. PPLA/2011/03 (May 2011) (by Jane McAdam) [hereinafter McAdam]. *See also* Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. L. 365, 377–80 (2007).

6. *See, e.g.*, McAdam, *supra* note 5, at 12.

7. We discuss the case law at length in Part IV below. We will argue that rulings in cases like *Revenko v. Sec'y of State for the Home Dep't*, [2000] E.W.C.A. Civ. 500 (U.K.), *Minister for Immigration & Multicultural Affairs v Savvin* (2000), F.C.A. 478 (Austl.), *Thabet v. Canada*

Still, this dispute is more than merely academic. If sea level rise causes small island nations such as the Maldives and Kiribati to be uninhabitable, those who are thereby rendered stateless will count as 1951 Convention refugees if our interpretation is correct, even though climate change is not persecution, but they will not count as 1951 Convention refugees if the standard interpretation is correct.

Our Article divides into five parts (including this introduction). Our first topic will be the actual grammar and ordinary meaning of the 1951 Convention. The ordinary meaning of the clause of the text following the semicolon suggests that those who lack a nationality (*i.e.*, are formally stateless[8]) and are unable to return to their country of former habitual residence count as refugees whether or not they are persecuted.[9] Though there is some prima facie ambiguity in the wording of the text, on grammatical grounds, there is no restriction to persecution for stateless persons who are unable to return to their country of former habitual

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(Minister of Citizenship and Immigration), [1998] 4 F.C. 21 (Can.), Refugee Status Appeals Authority, Appeal No. 72635/01 (2002) (N.Z.), and *R v. Sec'y of State for the Home Dep't*, *Ex parte* Adan, [1999] 1 A.C. 293 (H.L.) though they all deny refugee status to un-persecuted claimants pleading inability to return, they all grant that the claimants in question are unable to return, treating a temporary inability to return sufficient for the Convention standard of inability to return. This is an open issue. Accordingly it is consistent with our interpretation that claimants in these cases do not qualify for refugee status. But none of these courts consider our interpretation, and so their rulings cannot be regarded as dispositive against it.

8. Because both terms show up in salient documents, we must both use the term "stateless" and the term "lack of nationality." The drafters of the 1951 Convention used these terms interchangeably in discussion, and in the context of discussing their remarks, as context requires, we shall do the same. The notion at issue here is the notion of de jure statelessness. This is defined in article 1.1 of the 1954 Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117 and reiterated by the 1961 Convention on the Reduction of Statelessness, Dec. 13, 1975, 989 U.N.T.S. 175. According to these documents, a person is de jure stateless if they are "not considered a national by any State under the operation of its law. Note that, as it is defined in the 1954 Statelessness Convention, to lack a nationality owing to the operation of law is a negative claim: there is no requirement that one is barred from nationality by an act of law; the only requirement is that no law exists which grants one nationality. De jure statelessness contrasts with de facto statelessness; the condition of lacking an *effective* nationality. All refugees are de facto stateless. Accordingly, the contrast relevant within 1(A)2 is the contrast between those refugees who are de jure stateless and those who are not.

9. In this Article, we will apply the most commonly accepted methods of treaty interpretation, in particular the Vienna Convention on the Law of Treaties. We do not take a stand on the relative merits of different approaches, as our reading of the 1951 Convention is consistent with all standard methods. *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention on the Law of Treaties]. *See also* Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference, in* THE LAW OF TREATIES, LIBRARY OF ESSAYS IN INTERNATIONAL LAW 297, 299–304 (Scott Davidson, ed. 2004) (discussing the merits of various approaches to treaty interpretation); TREATIES AND SUBSEQUENT PRACTICE 5–8 (Georg Nolte, ed., 2013) (discussing modification through state practice).

residence. A reading that restricts refugee status to persecuted stateless persons is therefore not in accord with the ordinary meaning of the text. If the drafters meant for there to be a restriction to persecuted persons in this clause, then the wording of 1(A)(2) is not only highly misleading, but also suffers from basic, easily avoidable grammatical flaws. We argue for this in Part II.

The text is at best ambiguous on the requirement of persecution for stateless persons; a point some courts have conceded.[10] According to modern treaty interpretation, however, we ought to interpret and implement a convention in light of its broader purpose, even when this conflicts with the literal construction of the text. This has indeed more generally been the accepted interpretive approach.[11]

To justify the standard interpretation of article 1(A)(2), attention is usually drawn to the focus on persecution in the text of the 1951 Convention as a whole, as well as to the opinions of refugee scholars and the U.N. High Commissioner for Refugees (UNHCR), such as in this statement:

> Grounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today.[12]

Attention is also drawn to those passages in the *travaux* in which it is made clear that the decision was taken to draft a separate convention for

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10. *See* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500 (U.K.) (quoting Horvath v. Sec'y of State [2000] 3 W.L.R. 379 (U.K.)); R v. Sec'y of State for the Home Dep't, *Ex parte* Adan, [1999] 1 A.C. 293, 304B (H.L.); *Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000), 98 F.C.R. 168, ¶¶ 8, 24 (Austl.).

11. *See generally* MALCOLM N. SHAW, INTERNATIONAL LAW 839 (6th ed., 2008); Jacobs, *supra* note 9, at 297; Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733 (1998) (discussing different approaches to the interpretation of the 1951 Convention). But other courts adhere to an approach more consonant with a textualist interpretation. This is the situation in the United States: "it is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." Williams v. Taylor, Warden, 529 U.S. 362 (2000). *In re* Arizona Appetito's Stores, Inc., 893 F.2d 216, 219 (9th Cir. 1990). *See also* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 7–9 (2007) (discussing the various methods of interpreting the 1951 Convention employed by municipal courts).

12. U.N. HIGH COMMISSIONER FOR REFUGEES, *Introductory Note to the Convention and Protocol Relating to the Status of Refugees*, *in* CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2 (Dec. 2010).

stateless persons so as not to count all stateless persons as refugees.[13]

In Part III, we address these arguments to show that this standard reading of the 1951 Convention's broader purpose is incorrect. We will carry out a careful examination of the text of the 1951 Convention as a whole including its preamble, the *travaux*, the changes made to the draft convention by the U.N. General Assembly, and the legal antecedents of the 1951 Convention, such as the mandate of the U.N. Relief and Rehabilitation Administration and the mandate of the Intergovernmental Committee on Refugees, as well as the International Refugee Organization (IRO) Constitution and previous refugee agreements. We will also look at relevant later documents, such as the 1967 Protocol Relating to the Status of Refugees, as well as the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (Statelessness Conventions). We will find that the standard interpretation misconstrues the broader purpose of the 1951 Convention, and by extension the protection regime for stateless persons, including, importantly, the Statelessness Conventions.[14]

We will suggest that it is consistent with the object and purpose of the 1951 Convention and the aims of the international protection regime as a whole, to allow that persecution is not a necessary condition on refugee status for displaced stateless persons who are truly unable to return to their countries of former habitual residence. This is not to suggest that all stateless persons outside their country of former habitual residence are actually refugees and qualify for asylum, for this would ignore the very tangible solutions offered by the Statelessness Conventions which, where ratified, provide solutions for the vast majority of stateless persons.[15] We

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13. U.N. Economic and Social Council, Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Fourth Meeting, ¶ 5, E/AC.32/SR.4 (Jan. 26, 1950) [hereinafter Record of the Fourth Meeting]. This decision was made early in the 1950 Ad Hoc Committee round of meetings and officially declared in an annex to the Final Act of the 1951 Conference of Plenipotentiaries round of meetings. *See* U.N. Conference of Plenipotentiaries on the Status of Refuges and Stateless Persons, *Final Act and Convention Relating to the Status of Refugees*, 138 U.N.T.S. 1954 (July 25, 1961).

14. 1954 Convention Relating to the Status of Stateless Persons, arts. 26, 31, June 6, 1960, 360 U.N.T.S. 117; 1961 Convention on the Reduction of Statelessness, Dec. 13, 1975, 989 U.N.T.S. 175 [hereinafter jointly referred to as the Statelessness Conventions].

15. Some speak in these circumstances of the "link" between citizen and state, and others speak of an "effective link". *See* RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 72 (1983); Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE LAW 156, 156–68 (1998); 1954 Convention, *supra* note 14; Jane McAdam, *'Disappearing States', Statelessness and the Boundaries of International Law*, *in* CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES (Jane McAdam, ed. 2010). The concept of an "effective link" between state and individual for the purposes of nationality was first articulated by the International Court of Justice in the *Nottebohm* case. Nottebohm (Liech. v. Guat.) [1955] I.C.J. 1. An effective link may frequently be established through presence in the territory of a state at birth either jus soli or jus sanguinis, or via residence

are instead arguing that "unable to return" has a more stringent meaning than it does on the standard construal and that, for stateless persons, this genuine "inability to return" to any country of former habitual residence gives rise to refugee status on its own, even in the absence of persecution. Inability to return may be due to persecution or it may be due to other factors, such as the destruction of one's state because of climate change.

Some scholars and jurists argue for a strongly teleological approach, whereby the subsequent practice of the parties modifies a treaty.[16] For this reason, in Part IV we review current state practice. We will show that our interpretation is only in superficial conflict with current state practice because it is an open question whether cases that would qualify for refugee status under our interpretation, but not under the standard interpretation, have yet come before the law. If the proper construal of the term of art "unable to return" is sufficiently stringent, many unpersecuted displaced stateless persons will not meet it. In this case our interpretation prescribes a concurring opinion with those courts who deny refugee status to such claimants and we differ only in that our concurring opinion is based on claimants not meeting our more stringent standard of inability to return, rather than on their not being persecuted. But as we will see, none of the courts have ruled against our rationale for a concurring opinion and this means that there is nothing dispositive in the case law to rule against our interpretation. Far from there being consensus in the way the clause following the semicolon is applied, we will argue the question we raise has not yet been directly addressed by municipal courts.

But this will raise a further question. If in fact our interpretation affords agreement over cases with the standard interpretation, then what is its practical upshot? In Part V, we argue that though the difference between our interpretation and the standard interpretation has been academic *so far*, this may soon change. Though it will hopefully never come to pass, environmental scientists predict that owing to a global rise in sea levels and a warming climate, some small island states may become uninhabitable in the next century.[17] We will argue that those who are

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over a set period of time in cases of naturalization. The statelessness of persons having an effective link to a certain country but not persecuted by that country is usually caused either by a conflict of nationality laws or a poorly drafted nationality law. The aim of the Statelessness Conventions can be described as the aim of providing a framework in which to assist stateless persons with an effective link to some country to obtain legal recognition of that link. However, since the terminology of "link" or "effective" link does not show up in the text of these Conventions, we shall not make explicit appeal to it in the text of this Article.

16. *See* Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318, 323–25 (1969); SHAW, *supra* note 11, at 841.

17. *See* Intergovernmental Panel on Climate Change [IPCC], *Managing the Risks of Extreme Events and Disasters to Advance* Climate Change Adaptation: Special Report of the

displaced, because their island nations are uninhabitable, will count as lacking a nationality and unable to return to their countries of former habitual residence in the sense of 1(A)(2) of the 1951 Convention. This is a limited result: for example, it does not show that those whose islands are damaged but not uninhabitable will count as refugees and it does not show that other sorts of environmental migrants will count as refugees. But the result is nevertheless significant, since the Statelessness Conventions are not suitable instruments to assist this very vulnerable group and the standard interpretation of 1(A)(2) is so widely accepted that the debate over whether displaced islanders of submerged states might count as refugees has generally become a debate about whether climate change is persecution.[18]

If our arguments are successful, we will have shown that displaced islanders of fully uninhabitable states count as refugees even though climate change cannot be regarded as persecution. There will be no need for additional regional or bilateral agreements to protect this particular class of vulnerable people; they will automatically qualify for international protection under existing law. This case will serve as an illustration of the way that, on our interpretation, the definition of a refugee in the 1951 Convention complements the definition of a stateless person in the 1954 and 1961 Statelessness Conventions, yielding a more cohesive international framework for protecting the unprotected.

II. THE ORDINARY MEANING OF 1(A)(2)

The relevant portion of article 1(A)(2) of the 1951 Convention as it was brought into force in 1951 reads:

> For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . .
> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular political group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling

Intergovernmental Panel on Climate Change 18 (2012) (predicting increased sea level rise, erosion, agricultural decimation, salinization of water supplies and tropical storms which threaten the habitability of small islands).

18. McAdam, *supra* note 5, at 12–13.

to return to it.[19]

The elements "[a]s a result of events occurring before 1 January 1951" and "as a result of such events" were removed by the 1967 Protocol, but the passage remains otherwise intact in its contemporary form.[20] The article is divided into two clauses separated by a semicolon. The first clause applies to persons with a nationality and the second applies to persons without a nationality.[21]

Well-founded fear of persecution is mentioned three times in 1(A)(2). However, only the first of these could potentially modify "unable . . . to return" in the clause following the semicolon.[22] The second and third occurrences are clearly intended only to modify "unwilling." There is no ambiguity on this score in the structure of the phrase: "is unable or, owing to such fear, is unwilling . . ."[23] The question before us is therefore whether the phrase "owing to a well-founded fear" at the beginning of 1(A)(2) modifies everything that comes after it, or only the clause before the semicolon.

If "owing to a well-founded fear" modifies everything after the semicolon, this must either be because it directly modifies "unable to return" or because it modifies "being outside the country of his former habitual residence." But the former interpretation is clearly unsound. "Unable" is twice contrasted in 1(A)(2) with "unwilling" in a way that shows that these two terms must be understood to differ in meaning.[24] But what some refer to as psychological inability must be a form of unwillingness, rather than a form of inability.[25] For an inability to be "owing to fear" is for that inability to be a psychological inability. "Unable," if it is to contrast with "unwilling," must mean some more tangible form of inability, for example the existence of some kind of legal prohibition, or perhaps an insurmountable physical obstacle, to returning, but such tangible inabilities cannot *be owed* to fears, however well-founded these fears may be.

This shows that if the "fear" clause is to be a requirement for all displaced stateless persons who are unable to return, it cannot be because the "fear" clause requires that the inability to return be owing to a

19. 1951 Convention, *supra* note 3, art. 1(A)(2).

20. *Id.*; 1967 Protocol, *supra* note 3, art. 1(2).

21. 1951 Convention, *supra* note 3, art. 1(2).

22. *Id.*

23. *Id.*; *cf. Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000), 98 F.C.R. 168, ¶ 7 (Austl.).

24. "Unable" is differentiated from "unwilling" by the word "or." 1951 Convention, *supra* note 3, art. 1(A)(2). According to the *Merriam-Webster Dictionary*, "or" is "used as a function word to indicate an alternative." MERRIAM-WEBSTER DICTIONARY 64 (11th ed. 2004) [hereinafter MERRIAM-WEBSTER].

25. Handbook on Procedures, *supra* note 4, at 37–39.

forward-looking fear. Instead, it must be because that clause requires that displaced stateless persons who are unable to return, had such fear when they were originally displaced: "owing to a well-founded fear" must modify "being outside the country of his former habitual residence."[26] It is to the cogency of this reading that we now turn. In the remainder of this part we offer a sustained textualist argument against this reading of the 1951 Convention.

There are four points of grammar and usage suggesting that the relevant passage of 1(A)(2) should not be read so that "owing to a well-founded fear" modifies "being outside the country of his former habitual residence."[27] We discuss these points in increasing order of decisiveness.

The first point is that if the drafters wished the passage to be so construed, they should have used a comma rather than a semicolon. Setting off a new clause with a semicolon signals its independence from the preceding clause, whereas a comma signals a greater degree of connection or subordination.[28] Importantly, the semi-colon in the middle of 1(A)(2) would be the only breach of this rule in the Convention. The only other use of semi-colons in article 1 of the 1951 Convention, and indeed anywhere in the text of the 1951 Convention, is to set off independent paragraphs, for example, to separate those who classify for refugee status for the reasons given in 1(A)(1) from those who classify under 1(A)(2).[29]

But this is the weakest of the four points we shall consider. Though a comma would have signaled a greater connection between the clauses following it and the clauses preceding it, it would not have guaranteed

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26. *Id.* Hathaway has argued that the assessment of a claimant's fear of returning to a country to which she could not be sent back would be "a nonsensical exercise." JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 62 (1991). Curiously, Hathaway takes this to show that such claimants cannot be refugees, which is to say that the passage of 1(A)(2) following the semi-colon is itself "non-sensical" because it necessarily cannot apply to anyone. *Id.* Hathaway's reasoning is further complicated by his claim, rejected by others that a country only counts as a country of former habitual residence if one is still legally able to return there. *E.g.*, Goodwin-Gill & McAdam, *supra* note 11, at 68 n.89. In the most recent version of his book, JAMES HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS, 69 n.321 (2014), Hathaway and Foster acknowledge that Hathaway's earlier argument on this point is "incorrect" and has not been followed by municipal courts.

27. 1951 Convention, *supra* note 3.

28. According to the *Merriam-Webster Dictionary*, a semicolon "separates items in a series."

29. This addresses the reasoning of Judge Katz in *Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000), 98 F.C.R. 168, ¶¶ 75–86 (Austl.). Judge Katz argues that semicolons do not always signal full independence of clauses. We agree: our point is that the context of 1(A) as a whole shows that semicolons were being used to signal such independence there. Note that the other two judges in the Savvin appeal, Judges Spender and Drummond, both hold that the semicolon tells in favor of our construal of the plain meaning. *Id.* ¶¶ 3–8, 24.

that connection and it would have made the passage more difficult to parse since it already contained a profusion of commas. Some commentators have remarked that a semicolon alone is too small of a discrepancy to decide such a large issue,[30] and we are inclined to agree. A comma would have been clearer than a semicolon were "owing to a well-founded fear" intended to modify "being outside the country of his former habitual residence," but not decisively so.

The second point is that there is no verb tense agreement between the clause for those who have a nationality and the clause for those who lack one. Were there such agreement, the clause would have read as follows; "any person who, owing to a well-founded fear . . . , *is* outside the country of his nationality and is unable . . . ; or who *has* no nationality and *is* outside the country of his former habitual residence *and* is unable . . ."

Instead, however, the text is worded as follows; "any person who . . . owing to a well-founded fear . . . *is* outside the country of his nationality and *is* unable . . . ; or who, *not having* a nationality and *being* outside the country of his former habitual residence, . . . is unable . . ."[31]

The way the text is actually worded, the two clauses do not agree in tense: the clause preceding the semicolon uses the indicative ("is outside"), but the clause following the semicolon uses the gerundive ("not having a nationality," "being outside"), though the indicative ("has no nationality," "is outside") could have been used without any sacrifice of clarity. If the clause for those inside their country of former habitual residence was meant to mirror and be modified by the same restriction as the clause for those outside their country of nationality, this change in verb tense would be very misleading, and would serve no clear purpose. On the other hand if the clause following the semicolon was meant to be autonomous from the clause preceding it, then the change in verb tense would be a helpful signpost to this fact.

The third point is that if the drafters had wished the passage to be so construed then they should not have used the phrase "or who" immediately after the semicolon.[32] The initial "who" of 1(A) is meant to set off a list of independent types of persons who are to qualify for refugee status under the 1951 Convention. The first item, 1(A)1, following this "who," covers those who are to count because they had been considered to be refugees under one of several earlier agreements, including some that do not require persecution.[33] Accordingly the "or who" immediately following the semicolon of 1(A)(2) very strongly suggests that another independent category of persons qualifying for refugee status is about to be described (and one for whom it is not a given that persecution is

30. *Id.* ¶ 24 (opinion of Drummond, J.).
31. 1951 Convention, *supra* note 3 (emphasis added).
32. *Id.*
33. *Id.* art. 1(A)(1).

required, since it was not required in 1(A)1). If this were not the drafters' intent, they should not have written "or who" here, but should simply have written "or" instead.

The fourth, and most compelling, point is that if the drafters had wished the passage to be so construed then they should have written "owing to a well-founded fear" again, just after "being outside the country of his former habitual residence."[34] This is the most compelling point, for the extra addition here would surely have been the easiest and most direct way to prevent ambiguity. For example they might have written the text as follows:

> any person who, as a result of events occurring before 1 January 1950 and owing to a well-founded fear . . . is outside the country of his nationality and is unable . . . ; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events and *owing to such fears*, is unable . . .

Could the failure to do so have simply been an ordinary oversight? Though this takes us away from a purely textualist analysis, it is worth noting (and it is a point to which we shall return in Part III below) that further inquiry into the drafting process shows that the omission here almost certainly was not an ordinary oversight. In fact, the *travaux* show that the drafters were well aware of the potential for ambiguity at precisely this point in Article 1(A)(2).[35] The question arose during the thirty-fourth meeting of the Conference of Plenipotentiaries. The drafters noted the "anomaly" that it was ambiguous whether the temporal restriction of eligibility for the 1951 Convention (to those whose plight was "a result of events occurring before 1 January 1951.") extended to the clause following the semicolon.[36] The drafters put the matter to a vote and purposely opted to insert the phrase "as a result of such events" in the clause following the semicolon on precisely the grounds that it might otherwise be ambiguous whether this phrase modifies "being outside the country of his former habitual residence."[37] The report from the conference reads as follows:

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34. *Id.*

35. U.N. Conference of Plenipotentiaries on the Status of Refuges and Stateless Persons, *Summary Record of the Thirty-Fourth Meeting*, U.N. Doc A/CONF.2/SR.34 ¶ (2)(i) (Nov. 30, 1951) [hereinafter Record of the Thirty-Fourth Meeting]. *See also* GOODWIN-GILL & MCADAM, *supra* note 11, at 68–70.

36. Record of the Thirty-Fourth Meeting, *supra* note 35 (comment by Mr. Hoare).

37. 1951 Convention, *supra* note 3; Record of the Thirty-Fourth Meeting, *supra* note 35, ¶ (2)(i).

> Mr. HOARE (United Kingdom) drew attention to the anomaly, which was really a drafting point, in subparagraph (2) of paragraph A resulting from the omission of a reference to events occurring before 1 January 1951 from the last phrase of the paragraph, which dealt with the person who had no nationality and was outside the country of his former habitual residence. He could not imagine that those who had drafted the compromise text in question had intended to make any difference between persons having a nationality and stateless persons. He therefore proposed that the words 'as a result of such events' should be inserted after the word 'residence' in the penultimate line of subparagraph (2) of paragraph A.[38]

Accordingly, the final 1951 version of the text of 1(A)(2) reads:

> any person who . . . *as a result of events occurring before 1 January 1951* and owing to well-founded fear . . . , is outside the country of his nationality and is unable . . . ; or who not having a nationality and being outside the country of his former habitual residence *as a result of such events*, is unable or, owing to such fear, is unwilling to return to it.[39]

To some commentators, the above quote and the subsequently adopted formulation of the text is evidence that the drafters wished to treat stateless refugee claimants and those with a nationality exactly the same.[40] We disagree. It is clear from reading the Summary Record of the Thirty-Fourth meeting in its entirety that the drafters wished to treat those with a nationality and those lacking a nationality the same way *concerning the temporal restriction* added to the original Art. 1(A)(2). This was the narrow topic under consideration in this part of the meeting.

But the phrases "as a result of [such] events" and "owing to well-founded fear" occur as conjuncts of the very same conjunctive clause in the first part of 1(A)(2). It would be preposterous to accuse the drafters of observing that the "A" of "A and B" required repeating, but failing to note that the "B" therefore did as well, though the grammatical positions of "A" and "B" were in all other respects the same. We must therefore understand the decision not to reiterate the well-founded fear clause after reiterating the temporal restriction clause to be deliberate, rather than a careless oversight. The above quote is in fact evidence that the drafters meant to treat the two kinds of refugee *differently*: the requirement of

38. Record of the Thirty-Fourth Meeting, *supra* note 35, ¶ (2)(i).

39. 1951 Convention, *supra* note 3 (emphasis added).

40. *See* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500, ¶¶ 14, 62, 67 (U.K.); GOODWIN-GILL & MCADAM, *supra* note 11, at 68–70 n.92.

well-founded fear of persecution was only needed to evaluate the refugee claims of those who had a nationality, or those who were able but unwilling to return to their country of former habitual residence. Of course, the quote is not relevant to the evaluation of the plain meaning. The point about plain meaning is simply that after the semicolon, the text repeats "A" of "A and B" but not "B" and we know that the authors of the text understood this.[41]

This concludes our textual analysis of the grammar and usage of Article 1 of the 1951 Convention. We conclude that on a textualist interpretation there is no restriction to a well-founded fear of persecution for those who lack a nationality, are outside their country of former habitual residence, and are unable to return to it. But as we have noted, most of the focus in the literature and commentary has been on the broader purposes of the 1951 Convention rather than its plain meaning. For this reason, we turn now to an examination of the broader purposes of the 1951 Convention. We will defend our own construal of these and argue that according to our construal, the text of the 1951 Convention and its broader purposes are in harmony. The broader purposes of the 1951 Convention do not call for any restriction to a well-founded fear for stateless persons who are unable to return to their country of former habitual residence, though they do call for a stringent understanding of "unable to return."[42]

III. THE OBJECT AND PURPOSE OF 1(A)(2)

A. *The Standard Interpretation*

The standard interpretation of the 1951 Convention is that it was intended to cover only persecuted persons.[43] We hold that this interpretation is inadequate. We have already argued that the text of 1(A)(2) does not happily accommodate this standard interpretation. Now we shall argue that this reading also does not cohere with the object and

41. *See* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500, ¶¶ 89–93 (U.K.). Mr. Nichol advanced an argument along the present lines, and it appears to have impressed Lord Justice Clarke.

42. Our aim here shall be to establish that our interpretation is preferable on *all* standard interpretive strategies: textualist, broader purposes and subjectivist, and teleological. *See* s*upra* note 9 on treaty interpretation.

43. In particular, those who have left their country of origin owing to a well-founded fear of persecution on the basis of one of five enumerated Convention grounds: race, religion, nationality, membership in a particular social group or political opinion. 1951 Convention, *supra* note 3, art. 1(A)(2).

purpose of the 1951 Convention.[44] Nor does this interpretation do justice to the way in which (as we shall see) the 1951 Convention was intended to be complementary to the Statelessness Conventions, and so to mesh with the international protection framework as a whole.

Why is the standard interpretation so popular if, as we are about to argue, it is inadequate in these ways? Here, we will quickly canvas three reasons before going on to outline our own construal of the broader purposes of the 1951 Convention. A general theme in what follows will be that it was a difficult matter to create a single definition of a refugee that was both enforceable and simple to understand and that also stayed true to the broader considerations which guided the creation of the 1951 Convention.

One reason for the popularity of the standard interpretation is the prevalent mention of persecution in the drafting documents and in the text of the 1951 Convention, though it should be noted that persecution was not a determining factor in earlier refugee documents.[45] In some, but not all, drafts of the 1951 Convention submitted by states it is suggested that persecuted persons should be the priority, and there are statements made by various representatives to the drafting meetings emphasizing how crucial it is that the 1951 Convention offer protection for persecuted persons.[46] However, we will show below that this was not the unequivocal focus of the drafting process or of the resulting 1951 Convention. Though the specter of persecutory regimes like the National Socialist German Worker's Party state obviously loomed over the drafters, their deeper concern was with the kind of fundamental deprivation of rights that this sort of persecution brought on, not with persecution as the primary evil itself.

A second reason for the popularity of the standard interpretation is that not all stateless persons are covered by the 1951 Convention and, in particular, most un-persecuted stateless persons are not covered by it.[47] Resolving statelessness is the purpose of the Statelessness Conventions

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44. *See* Vienna Convention on the Law of Treaties, *supra* note 9, art. 31(1) (discussing the role of object and purpose in treaty interpretation).

45. For earlier documents that make provisions for unpersecuted persons, see, e.g., U.N. Constitution of the International Refugee Organization, annex 1, ¶ 1(a), Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3; Arrangement of May 12, 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees, ¶ 2, 89 L.N.T.S. 2004 (1926); 1938 League of Nations Convention concerning the Status of Refugees coming from Germany, art. I, 192 L.N.T.S. 4461 (1938).

46. *See* U.N. Ad Hoc Committee on Statelessness and Related Problems, *France: Proposal for a Draft Convention Preamble*, art. I, U.N. Doc. E/AC.32/L.3 (Jan. 17, 1950) [hereinafter France Proposal].

47. "Mr. Henkin (United States of America) said that in the view of his Government the convention should apply only to refugees . . . and not to stateless persons who were not refugees." Record of the Fourth Meeting, *supra* note 13, ¶ 5.

and these have a sphere of application distinct from that of the 1951 Convention.[48] In fact, the three documents are in many ways complementary to one another. It cannot therefore be that all stateless persons qualify for refugee status simply by virtue of being outside their country of former habitual residence. States will frequently deny repatriation to non-national former residents because, for example, the person lacks documentation. If a state denies return to a former resident because of an expired residency visa, is not that resident therefore "unable to return"?

The standard interpretation offers an accounting for this that many have accepted: such a resident would be "unable to return" and this is why there must have been some additional restriction on the "unable to return" clause in 1(A)(2). According to this reasoning, if we do not read an additional limitation into the "unable to return" clause of 1(A)(2), many stateless persons who apply for assistance under the 1951 Convention would automatically qualify for it upon leaving their countries of former habitual residence, assuming they would have a difficult time gaining permission to re-enter. This is a reason that some have cited for favoring the standard interpretation: it is difficult to see how else to construe 1(A)(2) in light of the parties' clear wish not to include all stateless persons as refugees. Below, we will show how our own reading undercuts this motivation for the standard interpretation.

A third consideration in support of the standard interpretation is the drafters' decision to limit the refugee definition to the period of the Second World War.[49] The subsequent lifting of the temporal restriction by the 1967 Protocol transformed the 1951 Convention into a law of universal applicability, but almost all of the original language of the 1951 Convention remained. This has made it challenging to parse the meaning of article 1(A)(2), as it was not originally intended to be universally applicable at the time of its drafting. But we will make clear below that the drafters' original restrictions of *when* and *where* do not entail any persecutory restriction on *how*.

We will present considerations which undercut each and every one of these defenses of the standard interpretation. In so doing, we aim to uncover a more nuanced and comprehensive interpretation of Article

48. *See generally* Statelessness Conventions, *supra* note 14. *See also* U.N. Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 58–60, U.N. Doc. E/1112; E/1112/Add.1 (Aug. 1, 1949) (discussing the need for a separate convention for non-refugee stateless persons) [hereinafter Study of Statelessness].

49. U.N. Ad Hoc Committee on Statelessness and Related Problems, *United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) (E/AC.32)*, U.N. Doc. E/AC.32/L.4 (Jan. 18, 1950) [hereinafter United States Memorandum]. This restriction was removed by the 1967 Protocol, *supra* note 3.

1(A)(2).

B. *The Object and Purpose of the 1951 Convention*

Here we take a closer look at the purpose of the 1951 Convention as evidenced by the document as a whole including its preamble. The preamble states that the United Nations wishes to protect refugees' "fundamental rights and freedoms."[50] The preamble also describes the purpose of refugee status, which is "social and humanitarian."[51] From these two statements, we may infer that the purpose of the 1951 Convention is to ensure refugee welfare by protecting their fundamental rights and freedoms.

To accomplish this purpose, the 1951 Convention is to "revise and consolidate" previous conventions and "extend" their scope.[52] From this we may infer that the 1951 Convention was intended to expand, rather than restrict, refugee status from what it had been in the past.

With this in mind, we turn to the text of the 1951 Convention itself. One word repeated multiple times within the text of the 1951 Convention itself is "protection."[53] The 1951 Convention enumerates the many fundamental rights and freedoms that make up this "protection."

The moral that we glean from this, what we learn about the object and purpose of 1(A)(2) from a broader consideration of the 1951 Convention and its Preamble, is that the purpose of the passage was expansive rather than restrictive, and concerned with restoring protection in the form of fundamental rights and freedoms to those who lack them on grounds that might be considered to be a social or humanitarian concern.

This focus on *fundamental* rights, and *social* or *humanitarian* concerns suggests that we should read "unable to return" restrictively: we should take it as a kind of inability that is fundamental, and of social or humanitarian concern, rather than simply a problem of paperwork or other comparatively superficial matters. But it equally suggests that the purpose of the passage was to be inclusive concerning all persons whose lack of protection truly was fundamental and of social or humanitarian concern. The underlying purpose of the 1951 Convention, these passages suggest, is to supply international protection to those who have irreparably lost protection in their country of origin by restoring to them their fundamental rights and freedoms in the form of asylum.[54] This claim

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50. 1951 Convention, *supra* note 3, pmbl. *See also* UNIV. OF CAMBRIDGE RESEARCH CENTRE FOR INT'L LAW, THE REFUGEE CONVENTION, 1951, at 16 (Julian Weis ed., 1995).

51. 1951 Convention, *supra* note 3, pmbl.

52. *Id.*

53. *Id.*

54. It is widely acknowledged that supplying international protection was the purpose of the Refugee Convention. That the concept of loss of national protection and the concept of

is further supported by a look at the language of the 1967 Protocol, whose principal purpose was to remove restrictions of place, time and cause on who should qualify for assistance under the 1951 Convention.[55]

But what of persecution? Reference to persecution appears in the definition of refugee status in 1(A)(2), in the definition of cessation in Article 1(C)(4)–(6) and, obliquely, in the non-refoulement clause in Article 33.[56] In the Preamble, reference is made to the Universal Declaration of Human Rights, though not specifically to Article 14. Rather, the Preamble refers to fundamental rights and freedoms more generally. Persecution is not mentioned in the Preamble. A reading of the 1951 Convention and its Preamble certainly shows that persecution is an important factor in determining if someone is a refugee. What is not obvious is that addressing persecution per se was the purpose of the 1951 Convention.

Our considered view is that the focus on protection in the 1951 Convention and the Preamble settles the question of broader purpose: the broader purpose of the 1951 Convention is to offer international protection to those who have irreparably lost national protection by restoring to them their fundamental rights and freedoms in the form of asylum. Nevertheless, though many scholars mention protection of fundamental rights and freedoms as a purpose of the 1951 Convention,[57] there is disagreement on the matter.[58] In light of this disagreement, we turn now to an analysis of the drafting history and historical context to offer further support for our interpretation of 1(A)(2).

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persecution are so frequently used interchangeably by scholars and refugee lawyers does not mean that the two concepts do not come apart, nor does it mean that "lack of protection" must, by default, require persecution. *See* Walter Kälin, *Non-State Agents of Persecution and the Inability of States to Protect*, 15 GEO. IMMIGR. L.J. 415, 417 (2001). Kälin acknowledges that the purpose of the Convention is commonly thought of as "an instrument protecting persons whose relationship of trust with the State of origin no longer exists." *Id. See also* Antonio Fortin, *The Meaning of 'Protection' in the Refugee Definition*, 12 INT'L J. REFUGEE L. 548, 548 (2000) (stating that "lack of national protection is one of the constituent elements of the refugee definition").

55. 1967 Protocol, *supra* note 3.

56. Article 33 of the 1951 Refugee Convention articulates the principle of non-refoulement, or non-expulsion, so that no refugee should be expelled "to the frontiers of territories where his life or freedom may be threatened on account . . ." of one of the enumerated grounds. It has long been established, however, that the principle of non-refoulement applies to asylum-seekers, torture victims and others who may not qualify for refugee status. The non-refoulement clause in the 1951 Refugee Convention therefore is not a limiting factor on who qualifies as a refugee. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, *in* U.N. HIGH COMMISSIONER FOR REFUGEES GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, REFUGEE PROTECTION IN INTERNATIONAL LAW 116 (Erika Feller et al. eds., 2001).

57. For example, Kalin & Fortin, *supra* note 53.

58. *See, e.g.*, Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 770, 774 (1998). Steinbock identifies three possible purposes of the Refugee Convention, one of which is "protection of persons facing human rights violations." *Id.*

C. *The Subjective Approach and the Drafting History*

While the Preamble does not reference persecution, focusing instead on protection of fundamental rights and freedoms, reference to persecution appears in 1(A)(2) as a key part of the definition of a refugee. Persecution is obviously an important criterion in the characterization of refugee status. Our view is that this is because persecution is *typical* of irreparable loss of national protection, but not essential to it, in roughly the way that smoking is a typical cause of lung cancer, though not essential to it. So too we claim that, though most refugees so far have been persecuted, in principle not all refugees must be persecuted. But as we shall see, the typicality of persecution as the cause of irreparable loss of protection explains the prevalence of its mention in the 1951 Convention and its drafting documents.

We will now begin our substantive analysis of the drafting history and historical context of 1(A)(2) of the 1951 Convention.[59] We will organize this argument chronologically into three subsections. The first of these, Part III.D, will discuss refugee agreements antecedent to the 1951 Convention. We will see that in these antecedents, such as the IRO Constitution, persecution is not the exclusive concern even in cases where a distinction between refugees and stateless persons is drawn.

In the next part, Part III.E, we will examine the *travaux* of the preliminary round of meetings of states' representatives on the drafting of the 1951 Convention: the Ad Hoc Committee on the Reduction of Statelessness and Related Problems. Here we will see that, when the states' representatives reached the decision not to cover all stateless persons under the 1951 Convention they were to draft, their aim was not to focus on persecution *per se*, but rather to find a way to offer protection for those whose loss of national protection was truly fundamental and irreparable. The desire was to draw a distinction between those persons eligible for a rehabilitation of national protection under what would become the Statelessness Conventions, and those persons requiring international protection under the 1951 Convention. As we shall argue in

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59. We reiterate, concerning treaty interpretation, that our aim is to show that our interpretation of the 1951 Convention satisfies all of the usual methods of treaty interpretation, including a strict textualist approach, a subjective approach focusing on the drafting history, as well as the commonly applied teleological approach. For this reason, it is unnecessary to argue the relative merits of one approach over another. Our interpretation is justified by all of the commonly accepted methods proscribed by the Vienna Convention as well as more modern approaches. For discussion of these distinct principles of international treaty interpretation, see Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969) (for discussion of these distinct principles of international treaty interpretation). For a discussion of the methods applied to the 1951 Convention, see GOODWIN-GILL & MCADAM, *supra* note 11.

Part III.E, the intention of the drafters at this stage was that there should be a complementarity between these conventions: those who could not be assisted by the 1951 Convention were to be the provision of the to-be-drafted Statelessness Conventions.[60]

Then in Part III.F, we will focus on the actual moment at which the language of the clause following the semicolon was introduced in its final form to the draft document, with specific attention to the addition of "unable to return." What is striking here, as we shall see below, is that the introduction of this language into the clause of 1(A)(2) following the semicolon was one of the very few changes that the General Assembly of the United Nations (UNGA) itself made to the draft after the conclusion of the Ad Hoc Committee and before approving it for a final round of review by the Conference of Plenipotentiaries (who for their part left the phrase unaltered, except for the reintroduction of the temporal restriction which is a further point in favor of our interpretation). The only clear way to understand this change by the UNGA is that it was meant to *remove* a restriction to persecution, since as we shall see below, such a restriction is clear in the version of the text that the UNGA modified.

This will conclude our review of the history and context of the drafting of the 1951 Convention. After this, in Part IV, we will examine state practice in the years following the adoption of the 1951 Convention. As the International Court of Justice has never been asked to interpret 1(A)(2) or any other article of the 1951 Convention, we must rely on state practice as evidenced by municipal court decisions.[61] In particular, we will look at the sparse case history that provides the only examples of interpretation of the clause following the semicolon in 1(A)(2). We will argue that the issue in dispute between our interpretation and the standard interpretation has never been properly before the courts. For a court ruling to tell against our interpretation, that court would have to offer up a construal of our more stringent reading of "unable to return," grant that a claimant was unable even in this more stringent sense, and argue that nevertheless that claimant does not merit refugee status. But this has yet

60. The drafting history of the Statelessness Conventions were deeply intertwined with that of the 1951 Convention. The 1954 Statelessness Convention began life as a draft protocol to the 1951 Convention. It was determined by the UNGA that further work was required before ratification, but as we shall see below, the document was originally intended as an extension of the 1951 Convention to those stateless persons in need of assistance but not covered by its provisions. *See, e.g.*, Record of the Fourth Meeting, *supra* note 13, ¶ 30; UNHCR Ad Hoc Committee on Statelessness and Related Problems, Statelessness Conference, Jan. 26, 1950, First Session: Summary Record of the Third Meeting Held at Lake Success, New York, on Tuesday, 17 Jan. 1950, 3 p.m., ¶ 15 [hereinafter Record of Third Meeting].

61. Bruno Simma, *Miscellaneous Thoughts on Subsequent Agreement and Practice*, *in* TREATIES AND SUBSEQUENT PRACTICE 46, 49 (Georg Nolte ed., 2013) (stating that "[Courts] apply such [fixed] meaning of a treaty provision to its environment" giving rise to an "evolutionary/dynamic interpretation").

to happen. It is consistent with our interpretation that "unable to return" gets a very stringent reading indeed, one that excludes many who have claimed refugee status under the "inability" clause so far.

D. *Displaced Persons and Refugees Before the 1951 Convention*

The purpose of offering international protection to those who had lost national protection is common to all of the refugee definitions in the period leading up to the drafting of the 1951 Convention.[62] A series of refugee agreements under the auspices of the League of Nations in the 1920s and 1930s define refugees as those persons of a relevant social group who lack the protection of their state or country of former habitual residence, if stateless.[63] Persecution does not explicitly enter the discussion of the definition of a refugee until the period of the Second World War.[64] During this period, lack of protection tended to result from persecution and we see a shift in focus from the condition, lack of protection, to its cause, persecution, as refugee documents seek to expand provisions for persons fleeing persecution in fascist states.[65]

The shift to a focus on cause appears to have been for purposes of inclusion rather than exclusion: securing that anyone who truly needed international protection could access it. Notably, the most important international refugee document of this period, the IRO Constitution, also includes provisions for displaced persons who cannot be repatriated, whether or not their displacement was brought on or sustained by persecution.[66] Equally notably, the U.S. working draft submitted to the Ad Hoc Committee on Statelessness and Related Problems was drawn directly from the IRO Constitution and included a provision for displaced

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62. *See* Kälin & Fortin, *supra* note 53.

63. Some of these documents require the formal statelessness of claimants while others do not. *See* Arrangement of 12 May 1926 and Convention concerning the Status of Refugees coming from Germany, *supra* note 44. *See also* James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348 (1984); Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT'L REV. RED CROSS 727, 727 (2001).

64. While protection from political and religious persecution had been part of the common conception of asylum before the Second World War, persecution was not explicitly part of the legal definition in earlier refugee instruments. *See* Jane McAdam, *Rethinking the Origins of 'Persecution' in Refugee Law*, 25 INT'L J. REFUGEE L. 667, 679 (2014). *See also* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 149–50 (1990).

65. Hathaway, *supra* note 62.

66. Constitution of the International Refugee Organization, *supra* note 44. *See also* Kälin, *supra* note 23, at 420. Kälin also notes that the IRO Constitution distinguishes between the factors causing flight and the purpose of the IRO: restoring protection. *Id. See also* LOUIS W. HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION, A SPECIALIZED AGENCY OF THE UNITED NATIONS, ITS HISTORY AND WORK 1946–1952, at 339–46 (1956).

persons with no requirement of persecution.[67]

E. *The Drafting of the 1951 Convention*

The focus in the drafting history of the 1951 Convention was not exclusively centered on persecution. Persecution was one important component of those discussions but it was not their exclusive focal point. For example, early in the preliminary round of drafting meetings, in 1950, the French delegation proposed a draft convention which would have explicitly centered the 1951 Convention on the right to asylum from persecution in Article 14 of the 1948 Universal Declaration of Human Rights.[68] But in fact, that same French draft proposal also includes a separate clause covering all persons unable to obtain permission to return to their countries of origin.[69] Though the draft was eventually rejected, it was not because of the inclusion of this latter clause.[70] The draft that the Ad Hoc Committee determined to work from was the preliminary U.S. draft,[71] which was based on the IRO Constitution.[72] Like the IRO Constitution, it includes provisions for displaced persons who had been deported for forced labor and could not be repatriated, whether they had been persecuted or not.[73]

The *travaux* of the Ad Hoc Committee show that the drafters understood their initial task to be determining whether all persons who lack state protection should be covered under the new 1951 Convention, or only some of them.[74] The question was not which protections were at issue. The drafters appear to have been unconflicted on this score: the protections they understood to be under the purview of international law were diplomatic and consular protections, stemming from the right of a state to protect its citizens while abroad; protections that included the

67. United States Memorandum, *supra* note 48.

68. France Proposal, *supra* note 45.

69. *Id.*

70. *Id.* This draft was rejected because the drafters worried that the persecution clause was too inclusive and difficult to enforce. It was decided instead to enumerate grounds of possible causes of persecution. One might object that, in light of the exclusionary intent of the enumeration of grounds, it is unlikely that the "unable to return" clause would have been intended in as inclusive of a spirit as we suggest. Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifth Meeting Held at Lake Success, New York, on Wednesday, Jan. 18, 1950, 2:15 PM, ¶ 8. But as we see in the French Proposal, this clause has a different genealogy from the clauses in the passage preceding the semicolon of article 1(A)(2). Also, the aims of the enumeration of grounds were *specificity* rather than *exclusivity*, except perhaps in the sense that they may have meant to exclude those whose lack of protection was repairable rather than irreparable. *Id.*

71. United States Memorandum, *supra* note 48.

72. Constitution of the International Refugee Organization, *supra* note 44.

73. United States Memorandum, *supra* note 48.

74. Record of Third Meeting, *supra* note 59, ¶¶ 2–3.

right of repatriation, that is, the right to return to one's country of nationality.[75] The question was whether a distinction should be drawn regarding *how* protections are lacked: whether the lack of protection should be sufficiently severe. Some participants wished to include all "unprotected persons," arguing that the difference between refugees and stateless persons was one of degree and not kind.[76] Others wished to focus only on "the humanitarian problem of the refugees," leaving the "legal problem" of statelessness either to a protocol to the 1951 Convention or to another document entirely.[77] This latter opinion prevailed. The committee eventually agreed that their task should be to draft a document targeted specifically at refugees (though they had not yet defined this term), whether legally stateless or not, though they decided that this document should have a protocol declaring that stateless persons should receive the same treatment to the extent possible. The protocol would eventually lead to the 1954 Convention Relating to the Status of Stateless Persons.[78]

The Committee emphasized the difference between the "more urgent," "more unfortunately placed," "humanitarian"[79] nature of the problems of refugees, contrasted with the merely "legal" problems of stateless persons.[80] The drafters appear to have been influenced at this

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75. *See* Fortin, *supra* note 53, at 554; Kälin, *supra* note 53, at 417–48. *See also* PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 45 (2d ed. 1979); UNHCR Expert Meeting, May 27–28, 2010, *The Concept of Stateless Persons Under International Law Summary Conclusions*, § II(A)(2) (Sept. 26, 2010). Grahl-Madsen argues that the drafters had (or anyway should have had) a broader conception of relevant protections, because the basic point of refugee status is the "breakdown" of the relationship between state and individual, and loss of diplomatic or consular protection is only an effect of that breakdown. *See* GRAHL-MADSEN, *supra* note 1, at 97–99.

76. Record of the Fourth Meeting, *supra* note 13, ¶ 7. The U.K. draft proposal primarily focuses on "unprotected persons" and would have included all stateless persons. UNHCR Ad Hoc Committee on Statelessness and Related Problems, Statelessness Conference, Jan. 17, 1950, *United Kingdom: Draft proposal for Article 1*, E/AC.32/2 (Jan. 1950) [hereinafter U.K. Draft]. *See also* U.N. Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Second Meeting Held at Lake Success, New York, on Tuesday, 17 Jan. 1930, 11 AM, ¶ 20 (remarks of the U.K. delegate, Sir Leslie Brass) [hereinafter Record of Second Meeting].

77. Record of Second Meeting, *supra* note 75, ¶¶ 18 & 19 (Remarks of the U.S. delegate, Mr. Henkin).

78. *See* Record of the Fourth Meeting, *supra* note 13. *See also* Record of Third Meeting, *supra* note 59, ¶¶ 12–15 (This protocol was drafted but was not incorporated into the final draft. Instead, another committee was convened on a separate occasion to finalize it, and this ended up becoming the 1954 Convention Relating to the Status of Stateless Persons).

79. Record of Third Meeting, *supra* note 59, ¶¶ 11, 13, 34.

80. Record of the Second Meeting, *supra* note 75, ¶ 19. It should be noted that for Henkin and the drafters, the term "humanitarian" had a less technical meaning than it does today: it included also what we now think of as "human rights" concerns. For a history of the relationship between humanitarian law, refugee law and human rights law, see Jane McAdam, *Humane Rights:*

point by one of the texts that was designated as a guide for their work, the 1949 *U.N. Study of Statelessness*, which declares that the position of stateless persons who are not refugees is "more favourable" than that of stateless refugees because; "the stateless person who is not a refugee can obtain documents establishing his civil status from the authorities of the countries where these documents were originally issued, because these authorities have no reason to refuse them to him."[81] Crucially, at this pivotal stage the drafters did not appeal to the idea that the problems of refugees must essentially be problems of a persecutory nature. Rather they appealed to the more encompassing idea that the problems of refugees were, in the language of the preamble of the 1951 Convention, "social and humanitarian" in nature, rather than merely, as U.S. Representative Henkin expresses it, "legal."[82] What guided the drafters' thinking concerning who should be covered by the convention for refugees (on which they had determined to focus) and who should be covered by the convention for stateless persons who were not refugees (which they had determined to begin then, but complete later) was not per se the question of who was persecuted, but the question of who could not be repatriated because they suffered from a fundamental "breakdown"[83] that required surrogate international protection in the form of asylum.[84]

Nevertheless, by the time of the conclusion of the sessions of the Ad Hoc Committee, the drafters had provisionally settled on a formulation that very clearly made persecution or fear thereof a requirement on any refugee. Were this the final form that the 1951 Convention took, our argument would be very different. Then the textualist argument would be against us and the object and purpose of the 1951 Convention would be less clear.

But even in that alternative, there would remain a reason for us to think that the object and purpose of the 1951 Convention was not to focus on persecution for its own sake. Persecution appears to have played the role it did at this stage because persecution was then, and remains now, a factor in the clearest cases of fundamental, irreparable lack of protection on which the drafters had determined to focus. Generally speaking, if you are not being persecuted, there are legal avenues to the rehabilitation of your relationship with your country of origin, such as approaching your embassy to obtain a replacement passport or register the birth of a child

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The Refugee Convention as a Blueprint for Complementary Protection Status, *in* FORCED MIGRATION, HUMAN RIGHTS AND SECURITY 7–11 (Jane McAdam ed., 2008).

81. Study of Statelessness, *supra* note 47, § IV.

82. Ad Hoc Committee on Statelessness and Related Problems, First Session: *Summary Record of the Second Meeting*, *supra* note 75, ¶ 19.

83. DONNER, *supra* note 15, at 44–96; Batchelor, *supra* note 15, at 156–58.

84. GRAHL-MADSEN, *supra* note 1, at 97.

born abroad.[85]

Since the 1951 Convention was intended to be an enforceable document that would affect the lives of millions, it was deemed very important that its criteria of classification were practically implementable. This was in fact the subject of much debate during the Ad Hoc Committee sessions and it was in response to this debate that the drafters ultimately determined to enumerate grounds of well-founded fear, despite some earlier drafts not doing so.[86] The concern was that a document that was too open-ended would either not be ratified, or would be subject to different standards of enforcement by different nations.[87]

For this reason, even if the final draft of the 1951 Convention were the version that the Ad Hoc Committee submitted to the UNGA, via the Economic and Social Council (ECOSOC), for approval in August 1950, we should not assume that redressing persecution was its sole object, despite the fact that it would then only cover persecuted persons. Here is the language of that draft, as submitted by the Ad Hoc Committee to the UNGA:

> For the purposes of this Convention, the term refugee shall apply to any person . . . (3) Who has had, or has, well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, as a result of events in Europe before 1 January 1951, or circumstances directly resulting from such events, and, owing to such fear, has had to leave, shall leave, or remains outside the country of his nationality, before or after 1 January 1951, and is unable, or, owing to such fear or for reasons other than personal convenience, unwilling, to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, has left, shall leave, or remains outside the country of his former habitual residence.[88]

Even if the UNGA had accepted the language of this draft, which as we will see in a moment it did not, in light of what we have seen of the

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85. Recall that at this time, international protection was limited to redressing a lack of consular and diplomatic protection abroad.

86. France Proposal, *supra* note 45; U.K. Draft, *supra* note 75.

87. Record of Second Meeting, *supra* note 75, ¶ 29. (Remarks of the Chairman on his preference for a limited convention); UNHCR Ad Hoc Committee on Statelessness and Related Problems, Statelessness Conference, Jan. 26, 1950, *First Session: Summary Records of the First-Tenth Meetings Held at Lake Success*, *New York* (discussing the balance between a limited and more extensive convention over multiple meetings).

88. Note that (2) admitted all those who were recognized by the IRO as falling under its mandate, a group that, as we have noted, included displaced persons unable to return, whether persecuted or no. So even here, the focus on persecution is not exclusive. ECOSOC Res. 319 (XI), U.N. Economic and Social Council, E/RES/319 (XI) (Aug. 16, 1950).

preliminary meetings of the Ad Hoc Committee as well as the earlier documents on which they drew, it would still be reasonable to hold that the object and purpose was to identify those who fundamentally and irreparably lacked protection given that at the time of the drafting of the 1951 Convention these persons were, in the vast preponderance of cases, persecuted persons. Read in the context of the Second World War and its aftermath in Europe, it is obvious that persecution was at the forefront of the drafters' minds as being the key cause of permanent displacement during the war years. But the object and purpose is here still better thought of as the aim of assisting anyone suffering from the relevant condition, and not only those who have the condition for the usual reasons.

But all of this is by way of a hypothetical, since the language of that draft was not the language of the final version. As things actually turned out, the UNGA did not accept the Ad Hoc Committee's suggested formulation of the crucial definitional clause. Notably, the UNGA accepted the wording of almost every other clause and article of the 1951 Convention.[89] The primary change that the UNGA made to the text was to alter the structure of the clause following the semicolon in 1(A)(2) from one that unambiguously restricted that clause to persons outside their country due to a well-founded fear of persecution, to the final version.[90]

F. *"Unable to Return"*

We turn now to a review of the development of the language of "unable to return" into its final form in 1(A)(2). The phrase first appears in a memorandum of the Intergovernmental Committee on Refugees (ICR), a predecessor to UNHCR. The ICR was the leading body for refugee issues during and immediately following the war.[91] Created in 1938 as a result of the Evian Conference,[92] its initial purpose was to assist all persons who had to flee Greater Germany owing to persecution.[93]

By 1943, the ICR's mandate had expanded and was understood to be the protection of all persons who were outside their countries of origin

89. An examination of the two texts shows that the final version of the 1951 Convention and the draft submitted by the Ad Hoc Committee were very similar. 1951 Convention, *supra* note 3; ECOSOC Res., *supra* note 87.

90. 1951 Convention, *supra* note 3.

91. The ICR was responsible for assisting refugees, for example, by issuing travel documents. *See generally* Intergovernmental Conference on the Adoption of a Travel Document for Refugees, Oct. 15, 1946, 11 U.N.T.S. 150 (Oct. 1946).

92. *See generally* JOHN MENDELSOHN & DONALD DETWILER, JEWISH EMIGRATION FROM 1933 TO THE EVIAN CONFERENCE OF 1938 (2009).

93. Evian Conference on Jewish Refugees, July 6–13, 1938, *Decisions Taken at the Evian Conference on Jewish Refugees* (July 14, 1938).

owing to persecution.[94] In a memorandum on the expansion of its practical programme in 1946, the ICR recognized as a category "displaced persons who are unwilling or unable to return to their countries of nationality or former habitual residence."[95]

James Hathaway, in *The Evolution of Refugee Status in International Law*, suggests that the ICR's expansion of its practical programme was in answer to the UNRRA's need for alternate solutions for those who could not be repatriated.[96] The U.N. Relief and Rehabilitation Commission (UNRRA) was created to repatriate displaced persons during and after the war.[97] In Resolution 10 of its mandate, the UNRRA indicates its intention to engage in the "closest cooperation" with the ICR (along with the International Red Cross), "with a view to invoking their collaboration in the work of the repatriation of displaced persons."[98] By the end of the war, there were people stranded outside of their former countries for a host of complex reasons, many of whom could not be, or did not wish to be, repatriated.[99]

These facts support Hathaway's suggestion that the aim of the ICR's expansion of program was inclusive in nature; designed to offer coverage to this group of persons whose plight was not remedied by the sort of assistance offered by the UNRRA. If Hathaway is correct, then the language of "unable to return" at this stage was intended to extend protection to a group that would not otherwise have been protected.[100]

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94. For a good overview of the history of refugee protection in Europe prior to the creation of the International Refugee Organization, including the mandate of the Intergovernmental Committee on Refugees, see UNHCR, "An Introduction to the International Protection of Refugees (RLD 1)," June 1992, at 3.

95. Intergovernmental Committee on Refugees, Memorandum, Extension of Activities of the Intergovernmental Committee, Doc ID IC/EX/75 (July 8, 1946).

96. James Hathaway, *The Evolution of Refugee Status in International Law*, 33 INT'L & COMP. L.Q. 370, 372 (1984) (stating that "[t]he initial policy adopted by UNRRA was that individuals unable for any reason to return to their countries of nationality or former habitual residence should be referred to the Intergovernmental Committee on Refugees.").

97. The UNRRA was created in November 1943, *inter alia* to help repatriate displaced persons. *Id.* at 372. The right to return was an important state protection guaranteed by international law. WEIS, *supra* note 74, at 124.

98. U.N. Relief and Rehab. Admin. [UNRRA] Council, *Resolutions on Policy of the First Session of the Council*, res. 10 (1943) [hereinafter UNRRA Resolutions].

99. *See* LOUIS W. HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION, A SPECIALIZED AGENCY OF THE UNITED NATIONS, ITS HISTORY AND WORK 345–46 (1956) (discussion of Romanian Repatriation mission's refusal to cooperate with the IRO).

100. There was a restriction of attention to cases of persecution in the mandate of the ICR. The mandate of the UNRRA is a more complicated story. *See* UNRRA Resolutions, *supra* note 97, res. 10 (invoking such a restriction). But shortly thereafter, in Resolution 57, in an expansion of its mandate to cover displaced persons in formerly enemy territories, it includes also displaced persons who had been obliged to leave because of "activities in favor of the United Nations" or who had been obliged to leave by the United Nations on grounds of health and sanitation. *See id.* res. 57.

The language in the memorandum of the ICR does not reappear until a later stage of the drafting of the 1951 Convention. Though at various points in the proceedings of the Ad Hoc Committee, the first drafting round of the 1951 Convention, the inclusion of "displaced persons" as a category distinct from persecuted persons is considered, the only appearance of "unable to return" in those proceedings is in the preliminary French draft, which recommends that refugee status be granted to all persons who seek asylum from persecution as per Article 14 of the Universal Declaration of Human Rights and, notably, also to persons who are unable to obtain permission to return to their countries of origin.[101] But, the drafters elected to work instead from the U.S. draft.[102]

Importantly, the rejection of the French draft had nothing to do with the fact that it contained the phrase "unable [to obtain permission] to return." The French draft was rejected because it was feared that the unqualified appeal to Article 14 was too open-ended and that the 1951 Convention should enumerate specific grounds of persecution rather than leave the construal of "persecution" up to the discretion of member states.[103] It was feared that without enumerated types of persecution, it would not be "possible to ascertain, at any moment which were the groups entitled to effective international protection"[104] but that this was necessary if the 1951 Convention were to be widely ratified.[105]

The language of "unable to return" was reintroduced independently in a resolution of the UNGA finalizing the draft which was the ultimate recommendation of the Ad Hoc Committee. This addition is one of the few changes that the UNGA made to the final draft submitted to it by the Ad Hoc Committee (via ECOSOC). The Secretary-General notes that Article 1 was the only article of the Ad Hoc Committee draft to be altered by the General Assembly.[106]

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101. France Proposal, *supra* note 45.

102. United States Memorandum, *supra* note 48. It might be alleged that it was for this reason that the "unable to obtain permission to return" provision was dropped. However, that provision is as ascertainable as any other that was enumerated. Also, the U.S. draft which the drafters elected to work from at this point contained a clause for "displaced persons" and "unaccompanied children" which would be no less ascertainable than the analogous category of the French draft.

103. *See supra* note 69 and accompanying text. *See also* Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifth Meeting Held at Lake Success, New York, on Wednesday, Jan. 18, 1950, 2:15 PM, ¶ 8.

104. Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifth Meeting held at Lake Success, New York, on Wednesday, 18, Jan. 1950, 2:15 PM, ¶ 8.

105. *Id.*

106. U.N. Secretary-General, *Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference: Note from the Secretary-General*, A/CONF.2/1 (Mar. 12, 1951).

The draft text submitted by the Ad Hoc Committee to the UNGA in August of 1950, as we saw in the previous subsection, reads as follows:

> For the purposes of this Convention, the term 'refugee' shall apply to any person . . . (3) Who has had, or has, well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, as a result of events in Europe before 1 January 1951, or circumstances directly resulting from such events, and, owing to such fear, has had to leave, shall leave, or remains outside the country of his nationality, before or after 1 January 1951, and is unable, or, owing to such fear or for reasons other than personal convenience, unwilling, to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, has left, shall leave, or remains outside the country of his former habitual residence.[107]

Note the grammar of this draft, in light of what we discuss above in Part II: there is a comma rather than a semicolon, there is agreement in verb-tense, and "who" is not repeated. In contrast, the text as modified and approved by the UNGA in December of that year reads:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: . . . (2) As a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it; . . .[108]

What could possibly have been the purpose of these changes, from a text whose grammar very clearly calls for a single test, to one whose grammar suggests otherwise, if not for a recognition that lacking a nationality and being unable to return (in the stringent sense of unable that we have argued would have been germane in this context) was in and of itself sufficient for meriting asylum?

One hypothesis is that the change reflects a recognition that some displaced stateless persons might not require refugee status: those who were both willing and able to return by reestablishing their nationality

107. ECOSOC Res., *supra* note 87.

108. G.A. Res. 429/5, 48–49, U.N. Doc. A/RES/429/5 (Dec. 14, 1950).

with the proper authorities.

But this further qualification could have been added, in ways we suggest in Part II above, without also changing the comma to a semicolon, bringing the verb tenses of the clauses out of agreement, or introducing the extra "who." If the purpose of the UNGA at this stage was not to capriciously introduce grammatical discrepancies to entertain future generations of interpreters, we must conclude that in making explicit that affected stateless persons must either be unable to return or unwilling, it became obvious to the assembly that there was no need to require that persons in this group who were unable to return had fled owing to a well-founded fear. After all the mere fact of lacking a nationality and being unable to return is already, in the stringent sense in which we hold that they understood "unable to return," a dire enough lack of fundamental protection as to merit inclusion in the 1951 Convention. It may well have been assumed that persecution was the usual cause of this condition, but that did not matter since the condition speaks for itself.[109]

The Conference of Plenipotentiaries accepted the text of the article that the UNGA gave them as it stood, except for two alterations. First, they removed the proviso "for reasons other than personal convenience" as a ground for unwillingness aside from a well-founded fear of persecution. We may understand this revision in light of the concerns with enforceability and enumerability that we have discussed above.[110]

The second change is a change that we have already considered in Part II above: the addition of the temporal restriction phrase "owing to such events" after the semicolon, to clarify that it was to modify "being outside the country of his former habitual residence" just as it modified "is outside the country of his nationality."[111] The drafters' reasoning at this stage very clearly demonstrates an awareness of the relevant point of grammar: if such a restriction were not made explicit following the semicolon, it would be unclear whether it were implicitly meant to apply there or not. But, as we explain above, "owing to a well-founded fear" occurs in precisely the same grammatical position as "owing to such events." The only reasonable conclusion is that the drafters did not require this restriction to apply to the clause following the semicolon. It

109. One may argue that the term "unable to return" is too difficult to define to form part of the test for refugee status. We invite the reader to recall that "persecution" is similarly vague. As UNHCR admits, "[t]here is no universally accepted definition of 'persecution,' and various attempts to formulate such a definition have met with little success." Handbook on Procedures, *supra* note 4, ¶ 51. Our suggestion is that, like "persecution," "unable to return" is a legal term of art calling for the appropriate level of intellectual care in its interpretation.

110. *See supra* note 69 and accompanying text.

111. Record of the Thirty-Fourth Meeting, *supra* note 36, ¶ (2)(i) (discussing the modification made by the Conference of Plenipotentiaries). *See also* U.N. Conference of Plenipotentiaries on the Status of Refuges and Stateless Persons, *Draft Convention Relating to the Status of Refugees, Style Committee, United Kingdom: Amendment to Article 1*, (July 23, 1951).

follows that the drafters must have understood "unable to return" stringently, as an irreparable inability, as otherwise it would have been obvious that a further restriction was called for.

This concludes our review of the object and purpose of the 1951 Convention. We find that, contrary to the standard interpretation, the object and purpose of the 1951 Convention, as understood first from a reading of the 1951 Convention in full with its Preamble, and second, through a careful analysis of legal antecedents to the 1951 Convention, and third, through an analysis of the *travaux* themselves, is to extend surrogate international protection to all those persons who truly needed it; *viz.* all persons who suffered from a fundamental or humanitarian loss of national protection. "Unable to return" covers stateless people who were vulnerable to falling through the cracks during the scrambling of states and territories by the war. The generality of this wording was not an oversight, but may be seen as a deliberate means of solving the very practical problem of repatriation for people who had nowhere to go (according to the standards and norms of the laws of nationality then in effect[112]) by giving them the legal right to make a new home where they found themselves.

Our account of the object and purpose of the 1951 Convention allows us to say something that proponents of the standard interpretation cannot: the object and purpose of the 1951 Convention is in harmony with its ordinary meaning. The standard interpretation holds there to be a conflict, and asks us to choose its construal of object and purpose over the document's ordinary meaning, a construal we argue is incorrect. We hold that the condition of "unable to return" for stateless people speaks for itself, requiring no further restriction to persecution, and this is something about which the ordinary meaning and the object and purpose of the 1951 Convention are in accord.

Once again, this is not to say that we hold that all displaced stateless persons are refugees. To the contrary; our interpretation gives us a way of dividing the sphere of application of the 1951 Convention from that of the Statelessness Conventions so that the two may be understood as deliberately complementary. The 1951 Convention was intended to assist all of those displaced stateless persons that the Statelessness Conventions could not, as the latter Conventions' aims are repatriation and integration rather than the provision of permanent surrogate international protection. The Statelessness Conventions are intended to assist claimants who enjoy a link to some country of origin that the norms of nationality law recognize, and who do not also face a "social or humanitarian" threat like persecution, by repatriating them. The 1951 Convention picks up where

112. *See* Convention on Certain Questions Relating to the Conflict of Nationality Law, 179 L.N.T.S. 4137 (1937).

the Statelessness Convention leaves off: by helping those who face some such "social or humanitarian" threat in returning home, or those who literally have no home to return to. Only such persons are unable to return. If the Statelessness Conventions are suited to help a claimant return home, then that claimant is not unable to return, even if there are various practical obstacles to their doing so.

To further elaborate on this point, and also to further defend our interpretation, we turn now to a review of the most relevant state practice. We will argue here that our issue has never come before the courts. No court has yet shown a case to be a case of inability to return in our stringent sense, and yet ineligible for refugee status. This is because courts have not considered our more stringent conception of "unable to return," and also because many of the claimants in relevant cases fail to fall clearly in this category. Thus far, all of those who have clearly and unquestionably been unable to return in our stringent sense have been persecuted. We have to look to the future to imagine cases where this is not so, as we shall do in Part V. For this reason we hold there to be no substantive conflict between our interpretation and state practice, despite the fact that many courts have declared that all refugees must be persecuted. Because these courts have not considered our alternative interpretation, their declarations to this effect are unnecessary.

The reader who makes it this far will begin to wonder whether the divergence between our interpretation and the standard interpretation is anything more than academic. To address this, after we review state practice, we will consider a scenario that may one day yield a real divergence between our interpretation and the standard one: persons rendered stateless owing to the complete submergence of their state beneath the sea.

IV. STATE PRACTICE AND SUBSEQUENT MODIFICATION OF THE 1951 CONVENTION

It may be argued that our interpretation is contrary to existing state practice. Some courts have ruled that unpersecuted claimants may be eligible for refugee status, but these rulings have for the most part been overturned on appeal.[113] Here, we examine the municipal case law and find that there is only a superficial tension; those rulings which conflict with our interpretation are unnecessary to the justification of the relevant verdicts, and do not reflect a direct judgment on the validity of our interpretation. In effect, what is at stake between our interpretation and

113. Two such cases are *R v. Sec'y of State for the Home Dep't*, *Ex parte* Adan, [1999] 1 A.C. 293 (H.L.); *Minister for Immigration & Multicultural Affairs v. Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000), 98 F.C.R. 168 (Austl.).

the standard interpretation has never been decisively tested.

We divide the cases to be considered into two categories. In the first class are those cases where the claimant is not stateless. In the second class are cases where the claimant is stateless. In cases from both categories judges have reasoned that all refugees must be persecuted. But in neither class of cases is such a pronouncement necessary to justify the ruling of the court. In the first class of cases, where the claimant is not stateless, no pronouncement on the interpretation of the clause following the semicolon is required, beyond the fact that it applies only to those who are stateless. In the second class of cases, the question of whether the claimants are unable to return in our stringent sense is not addressed. But this could provide an alternative rationale for denying refugee status to relevant claimants.

The principally important case in the first category is *Ex parte Adan.* Mr. Adan had left his country, Somalia, due to a well-founded fear of persecution, but was later unable to return, he argued, due to the ongoing civil war, though the causes of his persecution no longer existed.[114] Accordingly he applied for protection under the clause following the semicolon. Lord Lloyd of Berwick stated that, "Mr. Adan must show that he is (not was) unable to avail himself of the protection of his country. If one asks 'protection against what?' the answer must surely be, or at least include, protection against persecution."[115] Lord Lloyd here expresses a view on why the claimant should not qualify as a refugee under the clause preceding the semicolon. But these remarks are not germane to the question of whether Mr. Adan qualified under the clause following the semicolon. This question was settled in the negative by the fact that Mr. Adan was in fact a citizen of Somalia.[116] Though Somalia arguably lacked a centralized government at the time, Mr. Adan was not de jure stateless. Though in this case Lord Lloyd has occasion to argue that all refugees must have a forward looking fear of persecution in reply to some comments made by the lower court,[117] this is dicta not necessary to the decision.

Another case worth mentioning is *AF (Kiribati) (2013) Immigration and Protection Tribunal, New Zealand in which* the appellant, a native of Kiribati, asked for asylum from sea level rise associated with climate change, which threatens his livelihood and well-being on Kiribati, a low lying island state at extreme risk from climate change.[118] The court denied

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114. R v. Sec'y of State for the Home Dep't*, Ex parte* Adan, [1999] 1 A.C. 293 (H.L.).

115. *Id.*

116. *Id.* We do not here discuss whether or not a "failed state" may qualify as a state for purposes of citizenship rights, as this is beyond the limits of this Article.

117. *See id*. at 304 (statement by Lord Lloyd). *See also* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500, ¶¶ 139–40 (U.K.).

118. Kiribati [2013] NXIPT 800413 (N.Z).

the refugee claim based on the argument that climate change is not persecution.[119] Notably, the court recognized that climate change is affecting the entire population of Kiribati, not just the applicant, and that it might one day cause the destruction of the entire chain of islands.[120] Yet while the threat of annihilation to the population of Kiribati was touched upon during the case, the court found this event was not "imminent," and the issue of statelessness never arose.[121] We will discuss further the issue of sinking states. But even in our view, such an applicant is not stateless, though his great-grandchildren may one day be.

We come now to cases of more direct concern: cases where the claimants are indeed stateless, and so potentially eligible for refugee status under the clause following the semicolon. We will argue that in such cases as they have come before the courts so far, no verdict has yet been issued which addresses and rejects our interpretation. Also, our interpretation as we have defended it here is not committed to a fixed construal of just exactly how dire one's circumstances must be for one's difficulties in returning to count as an inability: as "unable to return" is a term of art, this is for the courts to decide. Thus our interpretation is consistent with many denials of refugee status: one needs simply take such a verdict as in part a verdict on the proper construal of "unable to return."

There are several recent cases where the court has reasoned, in justifying its verdict, that stateless persons may only be eligible for refugee status if they have a well-founded fear of persecution. In some of these cases the court also finds the claimant to be able to return. Accordingly the reasoning that all stateless persons must have a well-founded fear of persecution to qualify for refugee status is clearly dicta in these cases, since the claimant's ineligibility under the "unable to return" test is already established. Cases fitting this pattern include *Thabet v. Canada*[122] and *Maarouf v. Canada*.[123]

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119. *Id.* ¶ 54.

120. *Id.* ¶ 75.

121. *Id.* ¶ 91.

122. Thabet v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 21 (Can.). The claimant, a stateless Palestinian, argued he was unable to return to any of his countries of former habitual residence, which included the United States and Kuwait. The court acknowledged that stateless persons would be frequently denied the right to return to countries of habitual residence, but that such a denial did not always constitute persecution. We concur, and we note in addition that in some cases being denied the right to return also does not amount to an inability to return in our stringent sense: to evaluate this we should have to look into the specifics of the case, and whether the provisions of the Statelessness Conventions could at least in principle be brought to bear. However, this is academic here since the court ultimately found that the claimant was able to return to one of his former countries of residence, Kuwait, without any trouble, and therefore that the Convention did not apply.

123. Maarouf v. Canada (Minister of Employment and Immigration), [1993] 93 A. 343

In other cases, the court considers the claimant unable to return, and rules that such claimants must also show a well-founded fear of persecution. Cases of this sort include *Revenko v. Secretary of State for the Home Department*[124] and *Minister for Immigration & Multicultural Affairs v Savvin*.[125] Our primary contention concerning both of these cases is that the justices did not consider the question of ability to return in the stringent light that it should have been considered. These are both difficult cases, but this is precisely because it is difficult to assess whether these claimants really were unable to return (in the stringent sense). However, in neither case is this difficulty addressed: in both cases the justices take the inability of the claimants to return to be a given. But this

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(Can.). The claimant, a stateless Palestinian, argued he had no legal right to return to his country of former residence, Kuwait, at the time the case was adjudicated. While the court found it was true that the claimant had no right to return to Kuwait at the time, they found he was able to return to Lebanon, another country of former residence. Incidentally, it is not the case that on our interpretation the claimant would have passed the "inability" test if Kuwait were the only country to which he enjoyed any link. "Unable to return" for us does not simply mean that one faces some legal impediment to returning, even if this is in the form of having been deprived of the right to return. The question is whether this right may be restored under the provisions of the Statelessness Conventions. The court makes an interesting comment on this score:

> The argument that habitual residence necessitates the claimant be legally able to return to that state is contrary to the shelter rationale underlying international refugee protection. Once a stateless persons has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return. As a final act of persecution a state could strip a person of his right to return to that country. Thus, to require that a claimant have a legal right of return would allow the persecuting state control over the claimant's recourse to the Convention and effectively undermine its humanitarian purpose.

Id. at 2.

124. *See* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500 (U.K.). Revenko was born in Moldova. He claimed asylum in the United Kingdom in 1991. The special adjudicator found him to be stateless, and the IAT found him to be unable to return to Moldova. This did not come into question during the trial; the question was whether this alone sufficed to render him eligible for refugee status, despite his lack of any well-founded fear of persecution.

125. *See Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000), 98 F.C.R. 168 (Austl.). The claimants, who lacked a nationality because they lost their citizenship during the breakup of the Soviet Union and failed to acquire a new citizenship, applied for refugee status on the basis of inability to return. The primary judge, Judge Dowsett, had ruled in their favor, but the appellate judges Spender, Drummond and Katz overturned the ruling. Drummond rules, "I do not think that as much weight can be given to the semicolon in the Article as [the lower court judge] ascribes to it in the task of interpreting an international treaty." *Id.* ¶ 24. *See also inter alia*, ¶¶ 7, 8, 22, 23, 72, 75. None of the three appellate justices consider the possibility that "unable to return" in the 1951 Convention has a more stringent meaning. The claimants were able to return to Latvia and apply for citizenship based on their residence in that country. The claimants faced no significant "social or humanitarian" impediment to doing so. For this reason, we hold it to be far from established that the claimants should count as "unable to return."

is just to say that they do not consider our interpretation, since on our interpretation this would be a matter that would call for expert reasoning and judgment, and indeed it might be found that the claimants were not unable to return.

Perhaps more importantly, in both of these cases, the judges put a considerable amount of weight on the fact of the drafters' clear intention to treat the majority of stateless persons separately from refugees, and indeed to draft a separate convention (or two, as it turned out) on their behalf.[126] But this assumes that if "unable to return" is not supplemented with some further test, all displaced stateless persons would count as refugees, and as we have argued, this is unwarranted. Moreover, the circumstances of the decision to draft separate conventions are evidence in favor of our interpretation: the reasoning was not that the persecuted should be treated separately from the non-persecuted, but that those whose lack of protection was a "humanitarian" concern should be differentiated from those whose lack was a merely "legal" matter. This supports a reading of "unable to return" as characterizing a more fundamental or "humanitarian" kind of difficulty in returning as opposed to a merely temporary or legal problem. Thus, this fact about the drafting to which the judges in *Revenko* and *Savvin* appeal does not favor the standard interpretation over our interpretation.

Another contention that shows up regularly in the case law is that the persecution test must be applied to all stateless claimants because there should be a "single test" for refugee status. Lord Justice Pill states in *Revenko*, "Article1A(2) . . . set[s] out a single test for refugee status."[127] In *Thabet*, Judge Linden states:

> Statelessness does not give a person an advantage over those who are not stateless . . . [t]he definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one

126. *See* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500, ¶¶ 8–11, 60, 64, 94, 95, 143, 144 (U.K.); *Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000), 98 F.C.R. 168, ¶¶ 20, 23, 72 (Austl.).

127. Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500 (U.K.). For a summary of the "view now generally accepted" on a single test for refugee status, see GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 68–70 (2007). We are not alone in questioning that the drafters intended a single test, or that a single test is the appropriate conclusion to draw from the drafting history. *See* Guy S. Goodwin-Gill, "Report on Behalf of the Appellant," July 23, 2000 (unpublished), prepared for Revenko v. Secretary of State for the Home Dep't United Kingdom: Court of Appeal (England and Wales), July 31, 2000, ¶¶ 36–40, cited by permission.

should seek to be as consistent as possible.[128]

Other courts concur.[129]

Insofar as these claims purport to be claims about the broader purpose of the 1951 Convention, we have addressed them above. For example, as we have seen, the moment in the *travaux* most naturally taken to provide most support to the "single test" approach advocated by Justice Pill and others, in fact supports the opposite conclusion. This is the moment where the drafters at the Conference of Plenipotentiaries elected to treat stateless persons and non-stateless persons as equal in that both should be bound by the *temporal restriction* included in the text at that time, but they did not choose to repeat the restriction to persecution. The temporal restriction and the restriction to a well-founded fear of persecution were parts of the very same conjunctive clause, but the drafters chose to repeat only one of those conjuncts, the temporal restriction, in the clause following the semicolon.[130]

But if the "single test" approach was not part of the object and purpose of the 1951 Convention, there is little else to speak for it. It is far from clear that there is anything inherently wrong in treating stateless and non-stateless persons by different criteria, appropriate to the different ways in which they are vulnerable. There are very real differences between stateless and non-stateless persons. Nor are we alone in saying so. Though the court in *Thabet* may have taken persecution to be a constraint on any claimant, it nevertheless displays a willingness to treat stateless and non-stateless persons to a different standard. The court held that a stateless person did not need to show persecution in all of his or her countries of former habitual residence, but rather must; "demonstrate that one country was guilty of persecution and that the claimant is unable or unwilling to return to any of the states where he [or she] formerly habitually resided . . . We must . . . properly take into account the situations where claimants have other possible safe havens."[131] But this reasoning suggests that inability to return without persecution *can* play a determinative role. It follows from this reasoning that if two stateless claimants, both persecuted in one country, differ only in whether they are able to return to a second, then they differ over eligibility for refugee status.

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128. Thabet v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 21 (Can.).

129. *See, e.g.*, Refugee Status Appeals Authority, Appeal No. 72635/01, (2002) ¶¶ 65–68 (N.Z.) (noting concurrence of opinion in multiple other cases).

130. *See* Goodwin-Gill & McAdam, *supra* note 11, at 68–70, n.92; Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500, ¶¶ 89–93 (U.K.); our discussion *supra* parts II & III.F.

131. Thabet v. Canada (Minister of Citizenship and Immigration), [1998] 4 F.C. 21, 13 (Can.).

The "single test" approach has also led to problematic results, generally in contexts where "protection" is thought of as "protection from" a persecutory regime, rather than the provision of the basic rights associated with nationality. For example, the Board whose ruling was overturned in *Maarouf* held; "since by his own evidence he cannot be returned there it is patently absurd to argue that he requires protection from being there."[132] But as the court found in *Maarouf*, this is to miss the critical point that the right to reside is itself a fundamental protection.[133]

There is an inherent flaw, as the courts in *Thabet* and *Maarouf* appear to have implicitly recognized, in treating stateless persons and non-stateless persons to the identical standard in claiming international protection, for if stateless persons truly, fundamentally are unable to return to any country of former habitual residence then their protection relationships with those countries have irreparably broken down and they require surrogate international protection in the form of asylum, whether or not they are persecuted.

The rationale underlying international refugee protection is as the Supreme Court of Canada stated in *Canada v. Ward*, "to serve as 'surrogate shelter' coming into play only upon failure of national support."[134] Arguably, this specifies the "single test" which all refugees must pass. We concur that the category of refugee was meant to be unified; we only disagree that what unifies it is the persecution test.

We now briefly discuss here several other themes of argumentation present in *Revenko* and elsewhere: the question of whether the enumeration of grounds in Article 33 of the 1951 Convention, on non-refoulement, may inform the interpretation of 1(A)(2),[135] the question of whether the UNHCR Handbook or other guidelines, such as those adopted in 1996 by the Council of Europe, may inform the interpretation of 1(A)(2),[136] and finally the question of whether it is not misguided to attach any weight to the literal construction of the text of an international treaty.[137]

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132. Maarouf v. Canada (Minister of Employment and Immigration), [1993] 93 A 343 (Can.). *See also* HATHAWAY, *supra* note 26.

133. *Maarouf*, [1993] 93 A 343, 12 (Can.).

134. Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 752 (Can.).

135. In Revenko, two of the three justices hold that article 33 may be read so as to constrain the interpretation of 1(A)(2). *See* Revenko v. Sec'y of State for the Home Dep't, [2000] E.W.C.A. Civ. 500, ¶¶ 69–74 (Lord Justice Pill), ¶ 115 (Lord Justice Clarke) (U.K.). However, Lord Justice Bennett dissents. *Id.* ¶ 126.

136. *Revenko*, [2000] E.W.C.A. Civ. 500, ¶¶ 41–46, 65, 97–103, 136 (U.K.). *Id.* ¶¶ 35, 103 (concerning the Council of Europe's guidelines).

137. *Id.* ¶¶ 18–20, 68, 80, 81, 92, 107, 108, 122–24; *Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J as of 26 Apr. 2000) (2000), 98 F.C.R. 168, ¶¶ 3, 8, 24 (Austl.).

Concerning the relevance of Article 33 on non-refoulement, it has long been the established view of the UNHCR that Article 33 cannot be used to restrict the interpretation of Article 1, and should itself be construed broadly.[138] According to Lauterpacht, non-refoulement has its own jus cogens history, and is held to apply (as a jus cogens principle) even in cases where refugee status does not apply, such as cases of torture, and in such cases the question of the applicability of the enumerated grounds (the exact cause of the threat of torture or other serious harm) is "not material."[139]

Concerning the applicability of the UNHCR handbook, as the justices in *Revenko* note, the Handbook is not law.[140] Lord Justice Pill notes that the 1988 edition of the Handbook states, "[a]s the Handbook has been conceived as a practical guide and not as a treatise on refugee law, references to literature, etc. have purposely been omitted."[141] Accordingly, the Handbook is at best only indirect evidence of the direction state practice has taken, and does not constitute criterial elements of that practice.

In contrast, the actions of regional bodies like the Council of Europe, as well as the introduction of various domestic laws and regional agreements concerning refugees, may well constitute state practice. However, if we are to appeal to such elements we must be comprehensive. While the Council of Europe's 1996 guidelines may understand refugee status in terms of persecution, other more binding documents, such as the 1984 Cartagena Declaration,[142] or the 1974 Organization of African Unity Convention,[143] allow for refugees that are not persecuted. The upshot of an analysis of state practice on this score generally speaking is therefore inconclusive, but there is at least as powerful of a case that it calls for a more inclusive definition of refugee that does not in all cases restrict attention to persecuted persons.

Finally, we have not offered any challenge here to the thesis that where there is a conflict between literal construction and the object and purpose of an international treaty, that the correct interpretation will look to the object and purpose. What we have argued is that the 1951 Convention is not an example of such a conflict: its literal construction is

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138. Lauterpacht & Bethlehem, *supra* note 55, ¶¶ 99, 111, 128, 133, 139, 219, 253.

139. *Id. See also Revenko*, [2000] E.W.C.A. Civ. 500, ¶ 126 (U.K.) (noting the concurring opinion of Justice Bennet).

140. *Revenko*, [2000] E.W.C.A. Civ. 500, ¶¶ 42, 97 (U.K.).

141. *Id.*

142. U.N. High Commissioner for Refugees, Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (Nov. 22, 1984), http://www.refworld.org/docid/3ae6b36ec.html.

143. Convention Governing the Specific Aspects of Refugee Problems in Africa, Organization of African Unity (OAU), Sept. 10, 1969, 1001 U.N.T.S. 45.

in harmony with its object and purpose.

We conclude that the case law has nothing dispositive to say against the correctness of our interpretation: no case has tested the question of whether the 1951 Convention involves a stringent reading of "unable to return" or whether instead the 1951 Convention involves a less stringent reading of "unable to return" taken together with some additional requirement of persecution. We conclude more generally that the grammar of the 1951 Convention is not mistaken or misleading. The grammar deliberately reflects the distinction between the Statelessness Conventions and the 1951 Convention, between those who require international protection and those who require assistance in the restoration of protection in their country of origin. It coherently reflects that someone who lacks a nationality and is unable to return to their country of former habitual residence is a refugee, whether or not this inability is a result of persecution. "Inability" as it occurs in the clause following the semicolon means irreparable, fundamental inability, not mere difficulty or complication with the paperwork or conflict of laws along the way. The broader purpose of the 1951 Convention was to offer protection to those whose protection relationship with their country of origin was irreparable, and for whom a surrogate relationship was therefore required. We suggest that the language of the 1951 Convention, including the phrase "unable to return," was crafted with that aim in mind.[144]

We turn now to the final aim of our Article. We have seen that the difference between our interpretation and the standard interpretation has not yet been tested. But the difference is not merely academic. Should it come to pass, displaced inhabitants of uninhabitable island nations will be 1951 Convention refugees if our interpretation is correct, but not if the standard interpretation is correct. We turn now to a brief account of why

144. We have not argued that the ordinary meaning of the 1951 Convention includes provisions for all persons who irreparably lack protection in their country of nationality or former habitual residence. It is an open question whether persons with a nationality may fall in this category without being persecuted, but the ordinary meaning of the 1951 Convention obviously requires persecution for those claimants with a nationality. Other issues arise because, though "unable to return" had a more stringent meaning than some commentators have held, it is not clear just exactly how stringent it must be. A curious case is that of nomadic migrants who have no effective link to any state but who also cannot be said to have had a former habitual residence, because they resided in no place in any habitual way. Nottebohm (Liech. v. Guat.) [1955] I.C.J. 1. If such persons found themselves unable to enter any country they might count as irreparably unprotected, though whether they fall through the cracks of the Convention would hinge on how "former habitual residence" is assessed. *See, e.g.*, Council of Europe, Committee of Ministers, *Recommendation No. R(83)1, Of the Committee of Ministers to Member States on Stateless Nomads And Nomads of Undetermined Nationality* (Feb. 22, 1983). More generally, the ordinary meaning of the 1951 Convention obviously does not make provisions for all persons who are, given today's broader conception of the class of state protections that are the legitimate concern of international human rights law, irreparably lacking in any of that broader set of protections.

this is so.

V. SUBMERGED STATES

Sea levels are rising so fast that, within a hundred years, low lying island states such as Kiribati and the Maldives may become permanently uninhabitable, or even completely submerged underwater.[145] It is to be hoped that some environmental, technological or political solution will be found in time, but if not, then eventually the citizens of these states will be forced to migrate abroad. We claim that in the worst-case scenario, if no solution for them is found, these forced migrants will qualify for refugee status, though they will not be persecuted.

For this to be true, they must satisfy three conditions: they must lack a nationality, they must be outside of their country of former habitual residence, and they must be unable to return to that country.[146] In our paper *Sinking into Stateless*,[147] we argue at length that these persons will indeed lack a nationality in the sense of the 1951 Convention and the Statelessness Conventions, because their submerged nations will lose their legal status as nations, though they may retain some degree of non-state sovereignty, similar to that enjoyed by the Sovereign Military Order of Malta, or the Holy See.[148] Accordingly, recognition as a national of

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145. CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 694 (Martin L. Parry et al. eds., 2007). *See also* JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 124 (2012).

146. Helene Lambert, *Arbitrary Deprivation of Nationality and Refugee Status: Comparative Perspectives on the Overlap Between Statelessness and Refugee Status*, INT'L COMP. L.Q. 26 (forthcoming Jan. 2015). Lambert points out that state practice "is consistent in denying protection if obstacles are purely practical," but that "practical" means "a lack of proper ID or travel documents." As we have discussed, our definition of "unable" is much more stringent in keeping with the drafters' intention to provide a humanitarian solution for the dire situation of refugees.

147. Heather Alexander & Jonathan Simon, *Sinking into Statelessness*, 19 TILBURG L. REV. 20 (2014).

148. To establish this claim, we first review the law of nations as it has developed since the Treaty of Westphalia, and we find an almost universal consensus that control of habitable territory is a necessary precondition for an entity to be a State. This view is expressed ubiquitously in commentary and through practice, and also explicitly in the Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 I.N.T.S. 19. *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 71 (6th ed. 2003); JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 46 (2d. ed. 2006); MALCOLM SHAW, INTERNATIONAL LAW 409 (5th ed. 2003). We then consider an objection, given voice at a recent U.N. expert meeting at Bellagio, to the effect that the principle of presumption of continuity of state existence tells against applying this criterion in the case of sinking island states. The focus of our previous article is in showing why the principle of presumption of continuity of state existence is not dispositive here. Alexander & Simon, *supra* note 142; UNHCR Expert Meeting on Climate Change and Displacement, Feb. 22-25, 2011, *Summary of Deliberations on Climate Change and*

one of these entities will no longer amount to being considered as a national *by a State*. Accordingly, those in this position who lack any other nationality will no longer be considered a national by any State under the operation of its law. They will therefore meet the legal definition of de jure statelessness as it occurs in the Statelessness Conventions.[149]

But if we are correct that completely and permanently uninhabitable island nations will not in the legal sense be States, then it follows that those who have had to flee them will be outside of their countries of former habitual residence and be unable to return. We argue for this now.

First, "outside of their countries of former habitual residence": there is no requirement that the country of one's former habitual residence still exists in order that one count as being outside of it. In many documented cases of statelessness, it is precisely because one's former country of residence has ceased to exist that one is now stateless.[150]

This leaves "unable to return." The aim of this Article has been to show that this phrase must be understood far more stringently than many commentators have done. The mere existence of some hindrances and obstacles to returning, even legal ones, does not necessarily indicate a genuine inability to return in the sense of the 1951 Convention.

But the case we are considering here is a case of perhaps the most stringent sense of inability to return imaginable: the physical impossibility of returning. We are considering the possibility that a country like the Maldives or Kiribati becomes completely submerged beneath the sea, or comes close enough to it as to become completely uninhabitable. Of course, it will still be possible to return in a boat to the water where the land once was and perhaps to make a temporary landing on the rocky outcroppings that remain, but "return" means return with the purpose of residing. Such a return will in the cases we are considering be something that claimants are unable to achieve in the most stringent sense imaginable: it will be physically impossible.

Again, we only consider here the case where it is reasonable to expect that the uninhabitability of the relevant territory is *permanent*. If some technological, environmental or political solution were to present itself, so that we might expect that the relevant land would soon be reclaimed from the sea, or that land from elsewhere would be ceded in perpetuity to the affected state, it would no longer be clear that affected persons would lack a nationality and be unable to return, for the stringent sense of "inability" that we take to be operative in the 1951 Convention might arguably be thought of as owing to some condition that possibly will not

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Displacement, ¶¶ 2, 30. *See also* Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-climate Era*, 2 CLIMATE LAW 345 (2011).

149. 1954 Convention Relating to the Status of Stateless Persons, *supra* note 14, art. 1.1.

150. *See, e.g.*, *Minister for Immigration & Multicultural Affairs v Savvin* (& statement by Katz J. as of 26 Apr. 2000) (2000) 98 F.C.R. 168 (Austl.).

change.[151]

But our result is significant even with this proviso: should worst come to worst for this vulnerable group, and no technological, environmental or political solution present itself, if the interpretation of the 1951 Convention that we have here defended is correct, then these persons will be eligible to claim asylum under that 1951 Convention, even if they suffer neither persecution nor fear thereof. Refugee status may be a solution of last resort for these persons, but this is exactly what asylum has always been.

VI. CONCLUSION

We have argued that the ordinary meaning, the object and purpose, and state practice concerning the 1951 Convention are in accord: the clause following the semicolon of 1(A)(2) does not involve any restriction to a well-founded fear of persecution for those who lack a nationality and are unable to return. They may be outside of their countries of former habitual residence for any reason whatever: if they lack a nationality and are truly unable to return, they qualify for 1951 Convention refugee status. "Unable to return" is a more stringent constraint than some commentators have taken it to be, but the hypothetical case of displaced islanders shows that it need not, in principle, be due to persecution. Our argument also establishes a natural complementarity between the 1951 Convention and the Statelessness Conventions: a stateless person who cannot be assisted by the latter will, as a rule, be eligible for assistance under the former.

Our result has a limited but welcome practical consequence: in order to legally grant asylum to the displaced inhabitants of completely submerged or uninhabitable states, we need not advocate for an expansion of refugee law to cover all climate migrants, nor need we twist the characterization of persecution so that displaced islanders somehow count as persecuted by their own submerged countries. We need only bear in mind that it is fundamental lack of basic national protection, rather than persecution that is at the heart of the 1951 Convention.

We reiterate that this is a limited result. By no means does it obviate

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151. In such a case, cessation of refugee status would perhaps become appropriate. The relevant clause of the 1951 Convention states; "He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality . . ." 1951 Convention, *supra* note 3, art. 1(C)(5). Cessation of refugee status is an entire topic within itself, but an overview is contained within U.N. High Commissioner for Refugees, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees*, HCR/GIP/03/03 (Feb. 10, 2003).

the need for further international and legal agreements to assist the plight of those affected by climate change. First of all, if our argument is correct, one does not count as a refugee just because one's island is *submerging*; one only counts as a refugee once one's island is submerged, or uninhabitable. But the consequences of waiting until then to begin to manage migratory flows would be disastrous.[152] Second of all, many people's lives may be ruined by climate change though their countries are not rendered entirely uninhabitable. The more general problem is not whether a country is habitable, strictly speaking, but whether a country will have the resources to sustain its population. Our result here does little to remedy this more general problem and in no way should be considered to be a substitute or replacement for the needed further developments of international and regional law. These are developments that we will only achieve though the concentrated and coordinated efforts of the international community.

Nevertheless, our result offers some small glimmer of hope for those in this most direly imperiled group. In a time of devastating international policy failures, we may hope, in at least some cases, to return to the principles of basic human dignity won by an earlier generation.

152. Though preventative measures are called for here, they would not be without precedent. Consider, for example, the application of refugee status to a forward-looking fear of persecution, or assistance to persons at risk of statelessness.