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DENIAL OF NON-REFOULEMENT PROTECTION ON THE BASIS OF PARTICULARLY SERIOUS CRIMINALITY: THE CONCEPT OF A 'DANGER TO THE COMMUNITY'

AIDAN HAMMERSCHMID*

I INTRODUCTION

This article seeks to understand the international legal concept of a 'danger to the community' of a state party to the 1951 *Convention relating to the Status of Refugees* ('*Refugee Convention*' or '*Convention*')[1] or, as applicable, a state party to the 1967 *Protocol relating to the Status of Refugees* ('*Refugee Protocol*' or '*Protocol*').[2] This concept appears in both the second limb of art 33(2) of the *Convention* and its statutory analogue in s 36(1C)(b) of the *Migration Act 1958* (Cth) ('*Migration Act*'). While the present article identifies and applies the relevant legal principles of treaty interpretation set out in arts 31–33 of the *Vienna Convention on the Law of Treaties* ('*VCLT*'),[3] its primary aim is not to ascertain the meaning of art 33(2), but to illustrate how the decision of the Full Court of the Federal Court of Australia in *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*DMQ20*')[4] is methodologically deficient because it fails to apply, correctly and completely, the *VCLT*'s interpretive framework when construing art 33(2) and s 36(1C). Part II of the article sets out the applicable interpretive methodology and explains how *VCLT* arts 31–33 apply, at the level of customary international law, to the task of interpreting the *Refugee Convention*. It also introduces the core principle of statutory interpretation that directly links the process of treaty interpretation under the *VCLT* to the process of interpreting s 36(1C) of the *Migration Act*. Part III proceeds to catalogue the shortcomings of the Full Court's decision in *DMQ20* by reference to each *VCLT* interpretive factor. Its three sections reflect the three broad stages of the process of treaty interpretation contemplated by *VCLT* arts 31–33.

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[1] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*').

[2] *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugee Protocol*'). The *Protocol* effectively removes the temporal and geographical limits on the scope and application of the *Refugee Convention* (n 1): art I(2), (3).

[3] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

[4] [2023] FCAFC 84 ('*DMQ20 2023 Decision*').

II METHODOLOGY

Article 33 of the *Refugee Convention* (entitled 'Prohibition of Expulsion or Return ("Refoulement")') provides:

> 1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The present article adopts a reasonably simple methodology to interpreting art 33. The *Convention* itself reveals how any dispute about its interpretation and/or application must be resolved. Article 38 (entitled 'Settlement of Disputes') provides:

> Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article IV of the *Refugee Protocol* (also entitled 'Settlement of Disputes') uses a substantially similar formulation:

> Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

When ascertaining the international legal meaning of art 33(2) of the *Convention*, then, the present article will seek to understand how the International Court of Justice ('ICJ') would construe the provision. This produces an important methodological result: while the *VCLT* is formally non-retroactive and does not apply as a treaty itself to treaties concluded prior to the *VCLT*'s entry into force,[5] such as the *Refugee Convention*[6] and its *Protocol*,[7] the *VCLT*'s interpretive framework as set out in arts 31–33 nonetheless applies because, as the ICJ has consistently recognized,[8] it is expressive of customary

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[5] *VCLT* (n 3) art 4.

[6] The non-retroactivity of the *VCLT* (n 3) recognized in art 4 limits the application of its rules to 'treaties which are concluded by States after the entry into force of the present Convention with regard to such States' but, despite s 1 ('Conclusion of Treaties') of pt II ('Conclusion and Entry into Force of Treaties') of the *Convention* containing 13 articles relating to the subject of conclusion, the *VCLT* itself does not contain any definition of the term 'conclusion': see especially Frédéric Dopagne, 'Art.4 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press, 2011) 79, 81–2 [7]–[8]. The latest conceivable stage of conclusion, however, at least must take place before the treaty's entry into force: see, eg, Eric Suy, 'Art.53 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press, 2011) 1224, 1230 [19]. Here, the *Refugee Convention* (n 1) entered into force on 22 April 1954.

[7] The latest conceivable stage of a treaty's conclusion at least must take place before the treaty's entry into force: see above n 6. The *Refugee Protocol* (n 2) entered into force on 4 October 1967, over 12 years prior to the entry into force of the *VCLT* (n 3) on 27 January 1980.

[8] See especially *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) (Preliminary Objections)* [2016] ICJ Rep 3, 19 [35]; *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia) (Preliminary Objections)* [2016] ICJ Rep 100, 116 [33]; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections)* [2017] ICJ Rep 3, 29 [63], 36 [89]; *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Preliminary Objections)* [2018] ICJ Rep 292, 320–1 [91], 332 [131]; *Jadhav Case (India v Pakistan) (Judgment)* [2019] ICJ Rep 418, 437–8 [71]; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Preliminary Objections)* [2019] ICJ Rep 558, 598 [106]; *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Judgment)* [2020] ICJ Rep 300, 319 [61]; *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Jurisdiction)* [2020] ICJ Rep 455, 475 [70]; *Application of the International Convention on the*

international law. While neither the ICJ's advisory opinions nor its judgments in contentious cases bind the Court in future proceedings before it,[9] they nonetheless exert considerable influence as 'subsidiary means for the determination of rules of law':[10] '[t]he ICJ is certainly bound to apply international law as expressed by Art 38 [of the *Statute of the International Court of Justice* ('*ICJ Statute*')] … and will therefore turn to authoritative findings on the applicable law including its own previous holdings'[11] in both its judgments and advisory opinions.[12] As such, it can be reasonably expected that the ICJ would adhere to the customary legal principles of treaty interpretation expressed in *VCLT* arts 31–33 when interpreting the *Refugee Convention* and its *Protocol*. For completeness, the twin references to 'other means' of settlement in art 38 of the *Convention* and art IV of the *Protocol* do not deny the suitability or viability of the proposed methodology: while invocation of the referral mechanism is not mandatory,[13] and while, to date, no dispute has been brought before the ICJ under either of these provisions,[14] the referral mechanism nonetheless 'offers a procedure for authentically clarifying the scope of the treaty obligations'[15] arising under these two treaties.[16]

In seeking to illuminate the shortcomings of the Full Federal Court's reasoning in *DMQ20*, this article also will attempt to discern the autonomous international legal meaning of art 33(2) of the *Refugee Convention*. To recognize that a treaty must bear a single legal meaning is not to adhere to a legal fiction; as Lord Steyn emphasized in the House of Lords' decision in *R v Secretary of State for the Home Department; Ex parte Adan*,[17]

> the inquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law.[18]

While it may be accepted that '[e]ach state [party to the *Refugee Convention* and/or its *Protocol*] … must start by determining the scope of its own obligations'[19] and that,

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Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Preliminary Objections) [2021] ICJ Rep 71, 95 [75], 104 [101]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Judgment)* (International Court of Justice, General List No 178, 22 July 2022) [87], [89]; *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Preliminary Objection)* (International Court of Justice, General List No 171, 6 April 2023) [87].

[9] A decision of the ICJ in a contentious case 'has no binding force except between the parties and in respect of that particular case': *Statute of the International Court of Justice* art 59 ('*ICJ Statute*'). A similar position obtains in the case of the Court's advisory opinions, minus the principle of *res judicata* expressed in art 59. As Thirlway explains, '[i]n the case of a declaratory judgment, the decision may contain no provision that is immediately executory, but the judgment remains binding on the parties', but '[n]o such binding force attaches to an advisory opinion': Hugh Thirlway, 'Advisory Opinions' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at April 2006) [2].

[10] *ICJ Statute* (n 9) art 38(1)(d).

[11] Guido Acquaviva and Fausto Pocar, 'Stare Decisis' in Anne Peters et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at January 2022) [12].

[12] Ibid, citing *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 229–30 [172].

[13] Karin Oellers-Frahm, 'Article 38 of the 1951 Convention/Article IV of the 1967 Protocol' in Andreas Zimmermann, Felix Machts, and Jonas Dörschner (eds), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1536, 1548 [26]. While Oellers-Frahm's observation here is directed to art 38 of the *Refugee Convention* (n 1), given 'the identity of the terms of Art IV [of the 1967 Protocol] with Art 38 of the 1951 Convention', the same observation may be extended to art IV of the *Refugee Protocol* (n 2): at 1553 [37].

[14] Oellers-Frahm (n 13) 1544 [13], 1553 [37].

[15] Ibid 1553 [38] (citations omitted).

[16] Ibid.

[17] [2001] 2 AC 477 ('*Adan*').

[18] Ibid 516–17 (Lord Steyn, Lord Slynn agreeing at 510, Lord Hobhouse agreeing at 527, Lord Scott agreeing at 531).

[19] Guy S Goodwin-Gill, 'The Search for the One True Meaning …' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*

'[i]n so doing, it cannot lay down the law for any other state',[20] this does not foreclose the existence, in principle, of a single legal meaning of these treaties. In fact, in circumstances where both the *Refugee Convention*[21] and its *Protocol*[22] expressly prohibit the making of reservations to art 33 of the *Convention*, and where interpretive declarations of art 33 that seek to exclude or modify its legal effect are also impliedly prohibited,[23] art 33(2) necessarily must have a uniform application for all states parties independently of how a particular state party construes its obligations under either or both of these treaties.

While treaty interpretation is a distinct methodological process from statutory interpretation, the two processes are inextricably linked where a statute or statutory provision seeks to implement a treaty or treaty provision at the national level. In Australia, art 33(2) of the *Refugee Convention* receives legislative expression in s 36(1C) of the *Migration Act*. Paragraph (1C) of s 36 (entitled 'Protection visas—criteria provided for by this Act') provides:

> A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:
> (a) is a danger to Australia's security; or
> (b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.
>
> Note: For paragraph (b), see section 5M.

Section 5M (entitled 'Particularly serious crime') provides:

> For the purposes of the application of this Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particularly serious crime included a reference to a crime that consists of the commission of:
> (a) a serious Australian offence; or
> (b) a serious foreign offence.

Relevantly for the present article, the expression 'serious Australian offence' is a defined statutory term. Section 5 of the Act (entitled 'Interpretation') relevantly provides (emphasis in original):

> *serious Australian offence* means an offence against a law in force in Australia, where:
> (a) the offence:
> (i) involves violence against a person; or
> (ii) is a serious drug offence; or

(Cambridge University Press, 2010) 204, 207, cited in Jane McAdam, 'Interpretation of the 1951 Convention' in Andreas Zimmermann, Felix Machts, and Jonas Dörschner (eds), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 74, 77–8.

[20] Goodwin-Gill (n 19) 207 (citations omitted), cited in McAdam (n 19) 78.

[21] *Refugee Convention* (n 1) art 42(1).

[22] *Refugee Protocol* (n 2) art VII(1).

[23] The *VCLT* (n 3) is silent on the role, legal status, and validity of interpretive declarations. The *Refugee Convention* (n 1) and its *Protocol* (n 2) each make only limited reference to interpretive declarations: art 1B(1) of the *Convention* permits a state party to select which of the two meanings of the expression 'events occurring before 1 January 1951' in art 1B(1)(a) and (b) it will apply, and art I(3) of the *Protocol* preserves existing declarations made by states parties to the *Convention* under art 1B(1)(a) who later become a party to the *Protocol*. Usefully, however, the ILC has developed a 'Guide to Practice on Reservations to Treaties' in which the Commission also examines the permissibility of interpretive declarations: International Law Commission ('ILC'), 'Report of the Commission to the General Assembly on the Work of Its Sixty-Third Session' [2011] II *Yearbook of the International Law Commission* 1, 22–38 [51]–[76]. According to the Commission, '[i]f a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7', and guideline 3.1.1(b) relevantly provides that '[a] reservation is prohibited by the treaty if it contains a provision … prohibiting reservations to specified provisions to which the reservation in question relates': at 32 (guideline 3.1.1(b)), 33 (guideline 3.5.1). A reservation is relevantly defined as 'a unilateral statement, however phrased or named, made by a State … whereby the State … purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State': at 26 (guideline 1.1(1)).

(iii) involves serious damage to property; or
(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

(b) the offence is punishable by:
(i) imprisonment for life; or
(ii) imprisonment for a fixed term of not less than 3 years; or
(iii) imprisonment for a maximum term of not less than 3 years.

In the recent decision of the Full Federal Court in *DMQ20*, the plurality explain their interpretive method for understanding s 36(1C)(b) as follows:

> The proper construction of a statutory phrase such as the one now in focus turns upon the application of well-established canons of statutory construction. Several such principles bear upon the meaning that might be attributed to the reference in s 36(1C)(b) to 'danger to the Australian community'. Amongst them is the acknowledgment that statutory provisions that give effect to matters of international law should, so far as possible, be interpreted consistently with any instruments of international law to which they were intended to give effect …[24]

According to their Honours, therefore,

> the proper construction of the phrase[] '… danger to the Australian community' falls to be determined at least partly upon consideration of the construction of its prototype in Art 33(2) of the Refugees Convention.[25]

Rares J is more explicit in revealing the process of interpretation relevant to construing s 36(1C) as a statutory analogue of art 33(2). His Honour explains:

> The statutory expression 'is a danger to the Australian community' must be construed as a cognate expression in the context of all of s 36(1C) itself, s 36 and the Act as a whole. Accordingly, while s 36(1C) must be construed as part of a domestic statute, that construction should be informed by reference to public international law principles, including Arts 31 and 32 of the [*VCLT*], and jurisprudence on Art 33(2), having regard to the section's language that clarifies the circumstances in which Australia's protection obligations will not apply to a person whom the Minister considers on reasonable grounds is a danger of one or other kind. That is the more so because statutory provisions should be interpreted, so far as possible, to be consistent with international law, especially where a provision, such as s 36(1C) of the *Migration Act*, seeks to give effect to matters of international law such as it does in respect of Art 33(2) of the *Refugee Convention* …[26]

Later, his Honour reiterates this interpretive approach, observing that

> the words 'a danger to the Australian community' as used in s 36(1C) should be given the same meaning (adapted for the substitution of 'Australia' for 'of that country') as they have in Art 33(2) and interpreted in accordance with Arts 31 and 32 of the [*VCLT*], subject to the Parliament's specification of the meaning of 'particularly serious crime' in defining the extent of Australia's non-refoulement obligations …[27]

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[24] *DMQ20 2023 Decision* (n 4) [103] (Thomas and Snaden JJ) (emphasis in original), citing *Spain v Infrastructure Services Luxembourg SARL* [2023] HCA 11, [16] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson, and Jagot JJ) ('*Infrastructure Services Luxembourg SARL*').
[25] *DMQ20 2023 Decision* (n 4) [104] (Thomas and Snaden JJ).
[26] Ibid [32] (Rares J) (emphasis in original), citing *Infrastructure Services Luxembourg SARL* (n 24) [16] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson, and Jagot JJ).
[27] *DMQ20 2023 Decision* (n 4) [48] (Rares J) (emphasis in original), citing: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ) ('*Applicant A*'); *Queensland v Commonwealth* (1989) 167 CLR 232, 239–40 (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ).

In fact, as Brennan CJ explained in *Applicant A v Minister for Immigration and Ethnic Affairs*,[28] in a passage quoted with approval by Kiefel CJ, Bell, Gageler, Keane, and Gordon JJ in *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd*,[29] and quoted with approval by Rares J in *DMQ20*,[30]

> [i]f a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, *the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way*.[31]

This statement of principle, endorsed by five justices of the High Court of Australia, binds all courts and tribunals within the Australian legal system[32] other than the High Court itself.[33] As such, in seeking to construe s 36(1C) of the *Migration Act*, and prior to resorting to any applicable principles of statutory interpretation, the Full Court in *DMQ20* was required to apply the principles of treaty interpretation set out in *VCLT* arts 31–33. The overarching argument of the present article, however, is that both the plurality and Rares J erred in failing to adhere to this binding statement of principle because, despite referring implicitly or explicitly to the *VCLT*, their Honours failed to apply, correctly and completely, the *VCLT*'s interpretive framework.

III APPLICABLE PRINCIPLES OF INTERPRETATION

Articles 31–33 of the *VCLT* are broadly sequential[34] but there exists no strict hierarchy of rules within[35] or between[36] these three provisions. Articles 31–33 envisage three broad stages of interpretation. These are examined in turn.

1 *The General Rule of Interpretation*

The first broad stage of interpretation is set out in *VCLT* art 31 (entitled 'General rule of interpretation'). It provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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[28] *Applicant A* (n 27).
[29] (2020) 270 CLR 464, 511 [35] (Kiefel CJ, Bell, Gageler, Keane, and Gordon JJ).
[30] *DMQ20 2023 Decision* (n 4) [28] (Rares J).
[31] *Applicant A* (n 27) 230–1 (Brennan CJ) (citations omitted) (emphasis added).
[32] In a formulation of the doctrine of *stare decisis* that is particularly germane to the present article, although one inverted in time, Dawson J in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 explained that '[a] contrary view of the law subsequently expressed by this Court would, upon the ordinary principles of precedent, prevail and justify a departure from the answers given by the Full Court of the Federal Court': at 303.
[33] See especially *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ).
[34] See, eg, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2nd ed, 2007) 234; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd ed, 2015) 10.
[35] See, eg, Aust (n 34) 234; Jean-Marc Sorel and Valérie Boré Eveno, 'Art.31 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press, 2011) 804, 807–8 [8]; Gardiner (n 34) 10; Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 105, 114; Luigi Sbolci, 'Supplementary Means of Interpretation' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 145, 156. See also ILC, 'Draft Articles on the Law of Treaties with Commentaries' [1966] II *Yearbook of the International Law Commission* 187, 219–20. The singular exception is the hierarchy made explicit between art 33(1) and (4) of the *VCLT* (n 3): the principle of interpretation in para (4) is expressed to apply '[e]xcept where a particular text prevails in accordance with paragraph 1'.
[36] See, eg, Gardiner (n 34) 31–2. As Gardiner explains, '[treaty] interpretation may require going round the circle more than once if a factor presents itself under an element of the rules later in the list and which appears to outweigh one already taken up': at 32.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 31 does not endorse any particular philosophy of treaty interpretation to the exclusion of all others; rather, it draws on, and incorporates aspects of, the textualist, subjective, and teleological approaches to interpretation in a generally harmonious compromise.[37] The singular noun 'rule' in the title of art 31 also confirms that its provisions are intended to function harmoniously as 'a single, closely integrated rule'.[38] Further, paras (1)–(3) do not establish any strict hierarchy of interpretive principles, but simply 'represent a logical progression, nothing more'.[39] On the other hand, the special meaning rule in para (4) may displace the ordinary meaning rule in para (1),[40] since a special meaning involves a departure from the plain or ordinary meaning of a word or expression.[41]

Six of the seven components of art 31 – ordinary meaning, context, object and purpose, good faith, subsequent agreements and practice, and external rules of international law – are analysed in detail below. The seventh component, special meaning, is immediately discarded for lack of utility and relevance.

(a) *The Ordinary Meaning of A 'Danger to the Community'*

The starting point for analysis must be, as *VCLT* art 31(1) envisions, 'the ordinary meaning to be given to the terms of the treaty': as explained above, this is not because art 31 introduces a hierarchy of interpretive principles; rather, it is simply a product of the reality that '[o]ne has to start somewhere'.[42]

At the outset, the possibility that the expression 'a danger to the community', or its two components ('a danger' and 'the community'), were intended to bear a special meaning of the type envisaged by *VCLT* art 31(4) can be discounted with relative ease. This is not a case where, for example, the treaty terms are technical or scientific terms[43] or commercial terms with a long history of established mercantile usage.[44] Nor is this

[37] See, eg, Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 438 [34]; Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018) 557, 560 [2]; Sorel and Eveno (n 35) 808 [9]. See also ILC (n 35) 218.

[38] ILC (n 35) 220. See also Gardiner (n 34) 161–2; Aust (n 34) 234. See further Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2nd ed, 2020) 459, 464; Tamara Wood, 'Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31(2) *International Journal of Refugee Law* 290, 306.

[39] Aust (n 34) 234. See also Sorel and Eveno (n 35) 807 [8]; Gardiner (n 34) 222.

[40] See, eg, Gardiner (n 38) 465.

[41] See, eg, Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 844. A second, ostensible type of special meaning may arise because a treaty covers a particular field, but this, in fact, may be the ordinary meaning of the relevant term when situated in the particular context: Dörr (n 37) 613 [109].

[42] Gardiner (n 34) 181.

[43] See, eg, Villiger (n 37) 434–5 [26].

[44] See, eg, Roy Goode, 'The Codification of Commercial Law' (1988) 14(3) *Monash University Law Review* 135, 153.

a case where the treaty itself supplies its own dictionary in which the relevant treaty terms are defined for the purpose of the treaty,[45] or a case where the treaty refers to an external definition of the treaty terms.[46] While art 1 of the *Refugee Convention* defines the term 'refugee' for the purpose of the *Convention*, and while, in doing so, art 1F(a) refers externally to certain crimes 'as defined in the international instruments drawn up to make provision in respect of such crimes', art 1 does not deal with the concept of 'a danger to the community' as appearing in art 33(2): art 1 demarcates the class of persons to whom art 33(2) can apply,[47] and art 33(2) operates as an exception to enjoying a type of protection that follows from acquiring membership in the class of 'refugees' defined by art 1, rather than as a criterion of the refugee definition itself.[48]

The expression 'a danger to the community' instead must be understood as bearing one of its available ordinary meanings. This necessarily demands analysis of the ordinary meanings of the two individual components of the expression.

The word 'danger', outside of art 33(2), is neither defined nor used in the *Refugee Convention* (or its *Protocol*). In the *DMQ20* proceedings, the Administrative Appeals Tribunal ('AAT') below[49] did not refer to any dictionary definition of 'danger'. In contrast, the primary judge,[50] and Rares J of the Full Court,[51] each quoted with approval the current main sense of the word set out in the Oxford English Dictionary as well as the first two senses of the word set out in the Macquarie Dictionary. In the Full Court, the plurality recognized that '"danger" is a term of everyday usage, which should be understood to carry its ordinary meaning',[52] but their Honours did not make any visible reference to a dictionary definition of the word.

The Oxford English Dictionary defines the noun 'danger', in its current 'main sense',[53] as '[l]iability or exposure to harm or injury; the condition of being exposed to the chance of evil; risk, peril'.[54] When prefaced by the indefinite article 'a', the noun assumes the meaning of '[a]n instance or cause of danger'.[55] The Macquarie Dictionary contains substantially similar definitions: the first sense of the word 'danger' refers to 'liability or exposure to harm or injury; risk; peril'[56] and the second sense to 'an instance or cause of peril'.[57]

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[45] See, eg, Dörr (n 37) 614 [111].

[46] Linderfalk, for example, observes that, 'in establishing [a] special meaning, law-applying agents shall take into account … "any relevant rules of international law applicable in the relations between the parties"': Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26(1) *European Journal of International Law* 169, 172 (citations omitted).

[47] See generally Guy S Goodwin-Gill, Jane McAdam, and Emma Dunlop, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 244, 265.

[48] See especially Office of the United Nations High Commissioner for Refugees ('UNHCR'), 'Guidelines on International Protection: Application of the Exclusion Clauses', UN Doc HCR/GIP/03/05 (4 September 2003) [4] ('Exclusion Guidelines'); Protection Policy and Legal Advice Section, Department of International Protection, UNHCR, 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' (Note, 4 September 2003) [10] ('Background Note').

[49] *HYTB v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 1967 ('*HYTB*').

[50] *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 514, [39]–[40] (Collier J) ('*DMQ20 2022 Decision*').

[51] *DMQ20 2023 Decision* (n 4) [51] (Rares J).

[52] Ibid [106] (Thomas and Snaden JJ).

[53] *Oxford English Dictionary* (online at 13 June 2023) 'danger' (n, def 4a).

[54] Ibid.

[55] Ibid 'danger' (n, def 5a).

[56] *Macquarie Dictionary* (online at 13 June 2023) 'danger' (def 1).

[57] Ibid 'danger' (def 2).

While it is an impermissible technique of treaty[58] and statutory[59] interpretation to rely on the meaning of synonyms of treaty and statutory terms as a substitute for the meaning of the terms themselves, and synonyms of 'danger' (and 'community') will not be relied on in this article to interpret art 33(2) or s 36(1C), it is nonetheless insightful to highlight the imprecision inherent within the concept of 'danger' that becomes apparent when its synonyms are taken into account.

In their quantitative dimension, dictionary definitions of 'danger' produce uncertainty about the likelihood of the danger materializing: the Oxford English Dictionary treats 'danger' as a synonym of 'risk',[60] yet, according to the Dictionary itself, the noun 'risk' can refer to '([e]xposure to) the *possibility* of loss, injury, or other adverse or unwelcome circumstance; a chance or situation involving such a *possibility*',[61] or to '[a] person or thing regarded as *likely* to produce a … bad outcome in a particular respect';[62] a third sense of the word is silent on the quantitative dimension altogether and refers simply to '[a] person or thing regarded as a threat or source of danger'.[63] Further, the noun 'chance' is capable of denoting '[a] *possibility* or *probability* of anything happening: *as distinct from a certainty*'.[64] The Macquarie Dictionary produces similar uncertainties: its first definition of 'danger' regards 'risk' as a synonym,[65] and its first definition of the noun 'risk' refers to 'exposure to the chance of injury or loss; a hazard or dangerous chance',[66] yet the Dictionary itself indicates that 'chance' can denote 'a *possibility* or *probability* of anything happening'.[67] It is worth highlighting here that, according to the Oxford English Dictionary, a 'possibility' can denote '[t]he condition or quality of being *possible*; capability of existing, happening, or being done (in general, or under particular conditions)',[68] whereas a 'probability' can refer to '[t]he property or fact of being *probable*, [especially] of being uncertain *but more likely than not*',[69] or to '[a]n instance of the property or fact *of being probable*; a *probable* event or circumstance; a thing judged *likely* to be true, to exist, or to happen'.[70] The Macquarie Dictionary contains similar definitions of these words: a 'possibility' can refer to 'the state or fact of being *possible*'[71] and a 'probability' to 'the quality or fact of being *probable*'[72] or to 'a *probable* event, circumstance, etc'.[73]

In their qualitative dimension, dictionary definitions of 'danger' likewise give rise to uncertainty about the magnitude of the harm comprehended by the word 'danger': the main sense of the term appearing in the Oxford English Dictionary refers directly to such concepts as 'harm',[74] 'injury',[75] and 'evil'[76] and, when account is taken of the

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[58] See, eg, Isabelle van Damme, 'On "Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding": A Reply to Professor Chang-Fa Lo' (2011) 2(1) *Journal of International Dispute Settlement* 231, 235–6. See also Dörr (n 37) 581 [40].
[59] See especially *Norrie v New South Wales Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697, 715 [85] (Beazley ACJ), cited in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Butterworths, 9th ed, 2019) 113.
[60] *Oxford English Dictionary* (online at 13 June 2023) 'danger' (n, def 4a) (emphasis added).
[61] Ibid 'risk' (n, def 1) (emphasis added).
[62] Ibid 'risk' (n, def 4a) (emphasis added).
[63] Ibid 'risk' (n, def 4b).
[64] Ibid 'chance' (n, def 5a) (emphasis added).
[65] *Macquarie Dictionary* (online at 14 June 2023) 'danger' (def 1).
[66] Ibid 'risk' (def 1).
[67] Ibid 'chance' (def 3) (emphasis added).
[68] *Oxford English Dictionary* (online at 14 June 2023) 'possibility' (def 2a) (emphasis added).
[69] Ibid 'probability' (def 1a) (emphasis added).
[70] Ibid 'probability' (def 2a) (emphasis added).
[71] *Macquarie Dictionary* (online at 14 June 2023) 'possibility' (def 1) (emphasis added).
[72] Ibid 'probability' (def 1) (emphasis added).
[73] Ibid 'probability' (def 3) (emphasis added).
[74] *Oxford English Dictionary* (online at 13 June 2023) 'danger' (n, def 4a).
[75] Ibid.
[76] Ibid.

synonyms 'risk' and 'peril' that form part of this definition,[77] it also may be understood as referring indirectly to 'loss',[78] 'destruction',[79] or '[an]other adverse or unwelcome circumstance'.[80] Collectively, these concepts do not embody a generally comparable degree of seriousness but, instead, they reflect outcomes of varying intensity, magnitude, and severity: at the lower end, an 'unwelcome' circumstance describes a circumstance that is '[n]ot welcome or acceptable; unpleasing'[81] (with 'unpleasing', in turn, referring to that which is '[n]ot pleasing; displeasing; unpleasant');[82] towards the upper end, the noun 'evil' can denote '[w]hat is morally evil; sin, wickedness'[83] with its adjectival form, in turn, capable of referring to that which is '[m]orally depraved, bad, wicked, vicious'.[84] Similarly, the Macquarie Dictionary's first definition of 'danger' refers directly to 'harm'[85] and 'injury'[86] but, through the use of the synonyms 'risk' and 'peril' that form part of this definition,[87] the Dictionary's definition of 'danger' is also capable of referring indirectly to the consequences of 'loss'[88] and 'destruction'.[89] Yet, here, 'harm' and 'injury' can contemplate even minor or trivial distress or hardship, capable of referring respectively to 'injury; damage; hurt'[90] and 'harm *of any kind* done or sustained',[91] whereas 'loss' and 'destruction' can comprehend the elimination or extinction of the object of the danger, being capable of referring respectively to 'destruction or ruin'[92] and 'the fact or condition of being destroyed; demolition; annihilation'.[93]

As is the case with the word 'danger', the word 'community' is not defined or even used anywhere else in the *Refugee Convention* (or its *Protocol*). The Oxford English Dictionary defines the noun 'community', in its first general sense of the word, as '[a] body of people or things viewed collectively'.[94] The Dictionary proceeds to set out more specific senses of this general definition as including '[a] body of people who live in the same place, usually sharing a common cultural or ethnic identity',[95] 'a group of people distinguished by shared circumstances of nationality, race, religion, sexuality, etc … [especially] such a group living within a larger society from which it is distinct',[96] and – when prefaced with the definite article 'the' – '[t]he civic body to which all belong; the public; society'.[97] The Macquarie Dictionary likewise defines the noun 'community' as 'all the people of a specific locality or country',[98] 'a particular locality, considered together with its inhabitants',[99] 'a group of people within a society with a shared ethnic or cultural background, especially within a larger society',[100] 'a group of people with a shared profession, etc',[101] and 'a group of people living together

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[77] Ibid.
[78] Ibid 'risk' (n, def 1), 'peril' (n, def 1a).
[79] Ibid 'peril' (n, def 1a).
[80] Ibid 'risk' (n, def 1).
[81] Ibid 'unwelcome' (adj).
[82] Ibid 'unpleasing'.
[83] Ibid 'evil' (n^1, def 1b).
[84] Ibid 'evil' (adj, def 1).
[85] *Macquarie Dictionary* (online at 15 June 2023) 'danger' (def 1).
[86] Ibid.
[87] Ibid.
[88] Ibid 'risk' (def 1), 'peril' (def 1).
[89] Ibid 'peril' (def 1).
[90] Ibid 'harm' (def 1).
[91] Ibid 'injury' (def 1) (emphasis added).
[92] Ibid 'loss' (def 10).
[93] Ibid 'destruction' (def 2).
[94] *Oxford English Dictionary* (online at 13 June 2023) 'community' (def I).
[95] Ibid 'community' (def 2b).
[96] Ibid 'community' (def 5a).
[97] Ibid 'community' (def 6).
[98] *Macquarie Dictionary* (online at 14 June 2023) 'community' (n, def 1).
[99] Ibid 'community' (n, def 3).
[100] Ibid 'community' (n, def 4).
[101] Ibid 'community' (n, def 5).

and practising common ownership'.[102] When prefaced by the definite article 'the', it refers to 'the public'.[103]

Since art 33(2) of the *Convention* refers to the host state's community and s 36(1C)(b) of the *Migration Act* likewise refers to the 'Australian' community, ordinary meanings of 'community' that confine its meaning to a particular sub-group or locality of the national polity can be readily excluded. Likewise, ordinary meanings of 'community' that are wide enough to embrace these sub-groups or localities, or to embrace groups whose shared characteristic is something external to their connection to the host state, should be read down to refer only to membership of a 'community' based on this connection to their host state. At the same time, however, the precise nature of this connection remains uncertain and the strength of the connection is susceptible to substantial variation depending on which discrimen is selected to identify the connection.

In the recent decision of the Full Federal Court in *DMQ20*, neither the plurality nor Rares J probe the nature of this connection to the host state. There are several indications in the plurality judgment that membership of 'the Australian community' derives from Australian citizenship: for example, their Honours (a) refer to 'the need to distinguish, for the purposes of Art 33(2), the protection of a state from the protection of its citizens';[104] (b) observe that '[a] person … poses a danger to the Australian community if he or she poses a danger to Australians';[105] and (c) highlight that 's 36(1C) is also beneficial by operation: it serves to benefit (through protection against danger) the state and its citizens'.[106] Insofar as the plurality's reasons are to be understood as endorsing citizenship-based membership of 'the Australian community', however, they express conclusionary statements unsupported by any underlying reasoning. While Rares J refrains from assuming the correctness of, and also refrains from endorsing, a particular criterion of community membership, his Honour simultaneously fails to address the question of what criterion or criteria must be applied to determine admission to 'the Australian community'.

The legal uncertainty attending the question of community membership, and the need to make explicit the justification for selecting a particular criterion or particular criteria for admission to 'the community', become apparent from a brief survey of possible metrics for identifying membership in 'the Australian community'. Lawful presence in Australia does not appear to be capable, by itself, of establishing community membership: as Rayment DP and Fairall SM in *MHCZ v Minister for Home Affairs*[107] recognized, in a passage of their reasons quoted with approval by the AAT below in the *DMQ20* proceedings,[108] assessing the 'danger' posed by a person held in immigration detention is not restricted to possible harm to other detainees,[109] implying that these detainees are nonetheless included within the concept of 'the Australian community'. Yet, formal citizenship also does not appear capable of identifying membership, since, for example, non-citizen Australian permanent residents who were British subjects and who had enrolled to vote prior to 26 January 1984 remain entitled to vote in Australian elections[110] and therefore have the right to participate in referenda to amend the very *Commonwealth Constitution* that established the Commonwealth of Australia.[111] Further, the 'community' cannot be defined

[102] Ibid 'community' (n, def 6).
[103] Ibid 'community' (n, def 2).
[104] *DMQ20 2023 Decision* (n 4) [140] (Thomas and Snaden JJ).
[105] Ibid [144] (citations omitted).
[106] Ibid [146].
[107] [2019] AATA 4259 ('*MHCZ*').
[108] *HYTB* (n 49) [70] (Member Eteuati).
[109] *MHCZ* (n 107) [22] (Rayment DP and Fairall SM).
[110] *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(ii).
[111] *Commonwealth Constitution* ss 30, 128.

exclusively as the body of residents within a state, as this does not account for the existence of citizens of that state residing abroad who are entitled to the diplomatic protection of the citizenship state.[112] In fact, eligibility for diplomatic protection arguably is no longer strictly confined to citizenship: there now exists 'considerable support'[113] for the extension of diplomatic protection to non-citizens such as refugees and stateless persons, where the state entitled to exercise diplomatic protection is the state of residence.[114] Unlawful presence, lawful presence, residence, participation in the franchise, and citizenship reveal no clear or obvious candidate for membership of 'the Australian community'.

Rares J's reasons confront separate and additional difficulties. In rejecting the appellant's submission that 'the Australian community' in s 36(1C)(b) refers to the community collectively or as a whole rather than to a particular individual or individuals within the community,[115] his Honour invokes a counterfactual to the appellant's construction and posits that, if this construction were correct, then

> a person who expressed a determination to assassinate the King, the Governor-General as head of state, the Prime Minister or some other prominent public figure, or to overthrow the Government, would not be capable of being found to be a danger to the Australian community even though such an act would affect the nation as a whole.[116]

Recognizing this counterfactual as an example of a 'danger to the Australian community', however, is not inconsistent with treating 'the community' as the community viewed collectively or as a whole: the counterfactual can be understood as a special case of a 'danger to the Australian community' where the victims of the danger personify the Australian community as a whole because of their special legal status under Australian constitutional law. Further, the victims in the counterfactual are readily distinguishable from the 'most likely'[117] potential victims or potential classes of victims identified in the AAT's specific finding of danger posed by the appellant (namely, 'the [appellant's] former partner, any future partners, and possibly members of the community more generally').[118] There is nothing in the Tribunal's reasons to suggest that its tentative reference to 'members of the community more generally' would encompass a person who personifies the Australian community; rather, it appears that the Tribunal here was contemplating persons having a familial or other personal relationship to the appellant as well as any witnesses to any future offending: as Rares J recognized later in his reasons, 'a domestic violence offence may affect … children and other direct members of the household in which the offending occurred *and potentially, as well, a wider circle of family, friends and onlookers*'.[119]

Additionally, Rares J reasons that conduct, such as domestic violence,[120] that is 'inimical to significant norms of behaviour … can be considered as constituting or evidencing a danger to the community as a whole, because [it] undermine[s] or conflict[s] with those norms, even though there may only be one actual or potential victim'.[121] His Honour's reliance on 'norms of behaviour' to identify categories of sufficient harm to the community, however, contradicts the fact that the *Refugee*

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[112] See generally John Dugard, 'Diplomatic Protection' in Anne Peters et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at June 2021) [19]–[20].
[113] Ibid [48].
[114] Ibid.
[115] *DMQ20 2023 Decision* (n 4) [26], [57] (Rares J).
[116] Ibid [57].
[117] *HYTB* (n 49) [111] (Member Eteuati).
[118] Ibid.
[119] *DMQ20 2023 Decision* (n 4) [72] (Rares J) (emphasis added).
[120] Ibid.
[121] Ibid, citing *EN (Serbia) v Secretary of State for the Home Department* [2010] QB 633, 655 [47] (Stanley Burnton LJ, Hooper LJ agreeing at 676 [114], Laws LJ agreeing at 676 [115]) ('*EN (Serbia)*').

Convention has an autonomous international legal meaning,[122] since these 'norms' inevitably reflect national rather than international sensibilities and standards and are susceptible to substantial variation between the states parties to the *Convention*. Such a conclusion is also surprising given his Honour's observation that, but for the *Migration Act*'s own definition of a 'particularly serious crime' in s 5M, 's 36(1C) appears to reflect the extent of Australia's international obligations inherent in its ratification of Art 33(2)'.[123] Further, his Honour does not identify the source of these 'norms of behaviour' or otherwise explain what would assist in their identification. To the extent that the Commonwealth Parliament – composed of a sovereign,[124] a House of Representatives whose members are to be 'directly chosen by the people of the Commonwealth'[125] and a Senate whose members are to be 'directly chosen by the people of [each of the six] State[s]'[126] – enacts legislation that is expressive of these norms, it is significant that the Parliament, in enacting ch 9 of the Commonwealth *Criminal Code*[127] (itself entitled 'Dangers to the community'), has elected not to insert or include any domestic violence offences or domestic violence-related offences.[128]

(b) *The Surrounding Context*

The ordinary meaning rule in *VCLT* art 31(1) neither permits nor requires an approach to treaty interpretation where recourse to a dictionary is the start and end of interpretation, since – as is the case here – dictionary definitions of a term may supply multiple candidates from which to select a solution.[129] Instead, the adjacent concept of 'context' forms an essential component of the interpretive process: the meaning of treaty terms does not roam at large, but is qualified by the surrounding contextual (and other) features of the treaty.[130] The 'context' here starts most immediately with the 'text' of the treaty, including its preamble[131] and annexes,[132] which should be read in a way that promotes the treaty's coherence and internal consistency.[133] The 'context' also extends more remotely to encompass any agreements[134] or instruments[135] relating to the treaty that were made in connection with its conclusion. These agreements and instruments do not have to constitute treaties in their own right,[136] as long as the other requirements of *VCLT* art 31(2)(a) or (b) are satisfied and the documents relied on are not, for instance, mere unilateral statements produced by one party without the acceptance[137] or acquiescence[138] of the other parties.

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[122] See above n 18.
[123] *DMQ20 2023 Decision* (n 4) [29] (Rares J) (emphasis added).
[124] *Commonwealth Constitution* s 1.
[125] Ibid s 24.
[126] Ibid s 7.
[127] *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*').
[128] The existing categories of offences in ch 9 of the *Criminal Code* (n 127) relate to serious drug offences (pt 9.1), psychoactive substances (pt 9.2), dangerous weapons (pt 9.4), identity crime (part 9.5), the contamination of goods (pt 9.6), and criminal associations and organizations (pt 9.9).
[129] See, eg, Gardiner (n 38) 479. Ascertaining the ordinary meaning of a treaty term is only 'a very fleeting starting point' in the process of treaty interpretation and, even if 'a dictionary … , or a common understanding of a term, produces an apparently incontrovertible meaning, it is still necessary to locate this in its context to see if the result could be different from what the ordinary meaning produces': Gardiner (n 34) 181, 189.
[130] See, eg, Aust (n 34) 235; Gardiner (n 38) 465; Gardiner (n 34) 181, 197; Villiger (n 35) 109–10. See also ILC (n 35) 221.
[131] *VCLT* (n 3) art 31(2).
[132] Ibid.
[133] As Gardiner explains, for example, '[a]n accepted principle posits the initial position that the same word has the same meaning in the same document unless otherwise indicated': Gardiner (n 34) 36.
[134] *VCLT* (n 3) art 31(2)(a).
[135] Ibid art 31(2)(b).
[136] See, eg, Aust (n 34) 236–8.
[137] See, eg, ILC (n 35) 221.
[138] See especially *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) (Merits)* [2002] ICJ Rep 625, 648–51 [44]–[48]. This aspect of the decision relates to an explanatory memorandum and an appended map prepared by the Dutch Government. The map had been published in the Official Journal of the Netherlands and was

(i) *Context: 'Danger to the Security' of the Host State*

The word 'danger' appears twice in art 33(2): the first limb of the article refers to 'a danger to the security of the [host] country' and the second limb to 'a danger to the community of that country'. As a general principle, the same treaty terms are presumed to bear the same meaning when they appear in the same instrument,[139] and, here, not only the identity of terms ('a danger to'), but also their close proximity and the shared object and purpose of the provision[140] within which they both appear (namely, to protect the host state from a current or future threat to its safety),[141] favour a reading of 'danger' that, in its qualitative dimension, requires a danger 'to the [host state's] community' to be of a comparable intensity, magnitude, or severity to that of a danger 'to the [host state's] security'.

In its ordinary meaning, the word 'security' – when used, as it is here, in the sense of 'the security of the [host] country' – refers to '[t]he safety or safeguarding of (the interests of) a state (or, sometimes, a coalition of states) against some internal or external threat, now [especially] terrorism, espionage, etc'.[142] This definition comprehends the protection of the collective interests of the host state, rather than the interests of particular individuals or groups within the state, and any 'internal or external threat' must be referable to those collective interests. The two illustrative examples given in the definition are also consistent with a threat of harm to collective interests: while a universal international legal definition of terrorism has proved elusive,[143] sectoral approaches to defining, suppressing, and punishing terrorism and terrorism-related activities require a prohibited terrorist act, 'by its nature or context, … *to intimidate a population*, or *to compel a government* or an international organization to do or to abstain from doing any act';[144] and, additionally, while there is no distinct international legal prohibition of espionage,[145] the 'act of spying tends to implicate a state's core national security interests'.[146] This ordinary meaning of 'security' as protective of the host state's collective interests is reinforced by the use of similar language in art 32(1) of the *Refugee Convention*, which justifies the expulsion of a refugee 'on [the] ground[] of *national* security' (emphasis added).

Within the Australian legislative setting, the same logic can be extended by parity of reasoning to s 36(1C) of the *Migration Act*, since, 'according to ordinary canons of statutory construction, an Act must be construed so far as possible to give the same

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included in a report to the lower house of the Dutch legislature. Significantly, however, the Dutch Government never formally transmitted the map to the British Government. Instead, the British Government's diplomatic agent in The Hague had simply forwarded a copy of it to the British Government without drawing attention to the relevant feature of the map marked by a red line. Nor did the British Government react to the diplomatic agent's internal transmission. The ICJ concluded that, in these circumstances, the British Government's failure to respond to the transmission could not be considered acquiescence in the content of the map and specifically the red line, such as to render the map an agreement or instrument of the type identified in *VCLT* (n 3) art 31(2)(a) or (b): at 650–1 [48]. As such, while the Court declined to characterize the map as part of the 'context' of the 1891 British–Dutch Convention, it nonetheless appeared to accept in principle that acquiescence may be sufficient to bring an agreement or instrument made in connection with the conclusion of a treaty within the ambit of *VCLT* art 31(2)(a) or (b).

[139] See above n 133.

[140] The specific object and purpose of art 33(2) of the *Refugee Convention* (n 1), as distinct from the object and purpose of the *Convention* as a whole, is considered in more detail as a distinct element of 'context': see below Part III(1)(b)(iii).

[141] 'Background Note' (n 48) [10].

[142] *Oxford English Dictionary* (online at 16 June 2023) 'security' (def 2b).

[143] See, eg, Christian Walter, 'Terrorism' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at April 2011) [1].

[144] *International Convention for the Suppression of the Financing of Terrorism*, opened for signature on 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002) art 2(1)(b) (emphasis added); *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (entered into force 28 July 2010) art 3*bis*(1)(a) (emphasis added).

[145] See, eg, Christian Schaller, 'Spies' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at September 2015) [2].

[146] Ashley Deeks, 'An International Legal Framework for Surveillance' (2015) 55(2) *Virginia Journal of International Law* 291, 313 (citations omitted).

meaning to the same words wherever those words appear in the statute':[147] here, para (a) of s 36(1C) refers to '*a danger to* Australia's security' and para (b) to '*a danger to* the Australian community' (emphasis added). There is nothing to indicate that this presumption of equal meaning should be displaced: this is not a case, for example, where two terms appear in distant and remote contexts within the same statute (such that the difference in context compels a divergence of meaning);[148] where a statute has been amended in response to a judicial interpretation of the relevant terms (such that the interpreting court should not limit the effect of the amendment simply because it would involve attributing a different meaning to the same terms in different sections);[149] or where the size of the statute and its frequency of amendment render it difficult to maintain uniformity of meaning (such that the interpreting court will feel less strongly obliged to give a term the same meaning throughout the statute).[150] In this third respect, while, as the plurality observed in *DMQ20*, the *Migration Act* 'has been the subject of frequent and considerable amendment',[151] it is significant that paras (a) and (b) of s 36(1C) were introduced at the same time in the same amendment when s 36(1C) as a whole was inserted into the Act.[152]

Further, while the 'national security' analogue of art 32(1) of the *Refugee Convention* in s 36(1B) refers to 'a risk to [Australia's] security' rather than to 'a danger to Australia's security', art 32(1) itself refers to neither a 'risk' nor a 'danger' to national security and, additionally, the term 'security' for the purpose of s 36(1B) is defined referentially[153] as 'the protection of, and of the people of, the Commonwealth and the several States and Territories',[154] 'the protection of Australia's territorial and border integrity from serious threats',[155] and 'the carrying out of Australia's responsibilities to any foreign country in relation to [either of the above two categories of protection]'.[156] The clear import of these three statutory definitions is that 'security' for the purpose of s 36(1B) describes the protection of the collective safety of the Australian federation, as well as Australia's discharge of its international responsibilities in a way that gives effect to this general protective aim.

Significantly, the fact that 'security' seeks, among other things, to protect the collective interest in the safety of the Australian polity and the safety of Australians does not mean that *any* threat to safety is sufficient to establish a threat to Australia's security; in this respect, it is relevant that the definition of 'security' in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') (which is expressly picked up by the protection visa criterion in s 36(1B) of the *Migration Act*) exhaustively lists threats to 'the protection of, and of the people of, the Commonwealth

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[147] *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 21, 86 [190] (Nettle and Gordon JJ), citing *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J).
[148] Cf *Mort v Bradley* [1916] SALR 129, discussed in Pearce and Geddes (n 59) 143.
[149] Cf *Timothy v Munro* [1970] VR 528, discussed in Pearce and Geddes (n 59) 144. Section 36(1C) instead was introduced into the *Migration Act 1958* (Cth) ('*Migration Act*') in order 'to codify Article 33(2) of the Refugees Convention which provides for an exception to the principle of *non-refoulement* in Article 33(1) of the Refugees Convention': Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) [1236] (emphasis in original). In contrast, and as Rares J explained, '[t]he Parliament inserted ss 36(1A) and (1B) into the *Migration Act* … to overcome the decision of the High Court in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1': *DMQ20 2023 Decision* (n 4) [10] (Rares J) (emphasis in original).
[150] Cf *Thirteenth Beach Coast Watch Inc v Environmental Protection Authority* [2009] VSC 53, [10] (Cavanough J), discussed in Pearce and Geddes (n 59) 144.
[151] *DMQ20 2023 Decision* (n 4) [134] (Thomas and Snaden JJ).
[152] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) sch 5 item 9, inserting *Migration Act* (n 149) s 36(1C).
[153] Section 36(1B) of the *Migration Act* (n 149) refers to 'security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* [(Cth) ('*ASIO Act*')])'.
[154] *ASIO Act* (n 153) s 4 (definition of 'security' para (a)).
[155] Ibid s 4 (definition of 'security' para (b)).
[156] Ibid s 4 (definition of 'security' para (c)).

and the several States and Territories' and refers only to 'espionage',[157] 'sabotage',[158] 'politically motivated violence',[159] the 'promotion of communal violence',[160] 'attacks on Australia's defence system',[161] and 'acts of foreign interference'.[162] A threat of domestic violence manifesting in the form of 'a present risk which is real, significant and serious, which is neither remote nor fanciful[,] [of] physical harm and perhaps severe physical harm, or extreme emotional harm[,] in the present or the future',[163] while serious, is neither a distinct category of threat in s 4 of the *ASIO Act* nor capable of falling obliquely within any of the other statutory categories of threat. For the avoidance of doubt, the expression 'promotion of communal violence' here is a defined term and refers to 'activities that are directed to promoting violence *between different groups* of persons in the Australian community *so as to endanger the peace, order or good government of the Commonwealth*'.[164]

The Full Federal Court's decision in *DMQ20* does not give adequate weight to this contextual element. The plurality judgment discloses little engagement with the concept of 'security'. Their Honours quote the text of s 36(1A) and (1C) of the *Migration Act* but intentionally omit the text of s 36(1B).[165] In fact, other than when quoting the text of s 36(1C)(a)[166] and art 33(2),[167] when quoting passages of the AAT's earlier reasons referring to the (then) applicant's convictions for 'acting in a way contrary to the security or good order of a corrective services facility',[168] and when quoting passages from two extrajudicial materials relied on by the appellant,[169] the entire plurality judgment contains only two references to the word 'security'.

The first reference treats 'security' in s 36(1C)(a) as a relevant contextual feature: 'it is clear that the phrase "the Australian community" in s 36(1C)(b) of the Act—read particularly in contradistinction to the reference in s 36(1C)(a) to "danger to Australia's security"—is a short-hand reference to the people that comprise it'.[170] Yet, the inference derived from contrasting the language of s 36(1C)(a) and (b) is directly contradicted by the definition of 'security' in s 4 of the *ASIO Act*: as highlighted above, this definition, which s 36(1B) of the *Migration Act* incorporates by reference, clearly refers to 'the protection … of *the people* of[] the Commonwealth and the several States and Territories'.[171] While s 36(1B) expressly picks up the definition of 'security' in the *ASIO Act* and s 36(1C)(a) does not, this does not prevent the two provisions from having a shared sphere of operation: as Kiefel CJ, Gageler, and Jagot JJ recently explained in *ENT19 v Minister for Home Affairs*,[172] '[i]nsofar as s 36(1C) operates to deny a protection visa on national security grounds … s 36(1C) plainly overlaps with s 36(1B)'.[173]

The second reference mentions 'security' when explaining how acceptance of the appellant's interpretation of the phrase 'the Australian community' would frustrate the purpose behind art 33(2) and s 36(1C) (identified by the plurality as being 'to protect the population from danger posed by those to whom refugee or complementary

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[157] Ibid s 4 (definition of 'security' para (a)(i)).
[158] Ibid s 4 (definition of 'security' para (a)(ii)).
[159] Ibid s 4 (definition of 'security' para (a)(iii)).
[160] Ibid s 4 (definition of 'security' para (a)(iv)).
[161] Ibid s 4 (definition of 'security' para (a)(v)).
[162] Ibid s 4 (definition of 'security' para (a)(vi)).
[163] *HYTB* (n 49) [143] (Member Eteuati).
[164] *ASIO Act* (n 153) s 4 (definition of 'promotion of communal violence') (emphasis added).
[165] Cf *DMQ20 2023 Decision* (n 4) [84] (Thomas and Snaden JJ).
[166] Ibid.
[167] Ibid [102].
[168] Ibid [92].
[169] Ibid [137], [138].
[170] Ibid [144].
[171] *ASIO Act* (n 153) s 4 (definition of 'security' para (a)) (emphasis added).
[172] [2023] HCA 18.
[173] Ibid [26] (Kiefel CJ, Gageler, and Jagot JJ).

protection would otherwise be afforded'):[174] according to the plurality, to accept the appellant's submission that the phrase 'the Australian community' refers to the community collectively or as a whole as opposed to identifiable members[175]

> would excise from the realm of visa protection only those who constitute a danger to Australia's security and those who, having a history of particularly serious criminality, constitute a danger generally to the whole of the Australian community (rather than constituent members of it). It would leave the community—via the agency of its individual members—exposed to the very species of significant harm that, in this case, was found to present. We do not accept that such a construction accords with the legislative purpose that evidently underpins s 36(1C) of the Act.[176]

As explained later in this article, however, this second reference to 'security' reveals circularity in the plurality's analysis.

Rares J analyses the concept of 'security' in more detail, although for the different purpose of contrasting a 'risk' to security in s 36(1B) with a 'danger' to security in s 36(1C)(a).[177] His Honour does not appear to detect any difference in meaning between the word 'security' in these two provisions and, in this respect, his Honour's analysis supports the inference advanced above that the respective concepts of 'security' in s 36(1B) and (1C)(a) have common content, which, in turn, supports the argument that the plurality errs in drawing a distinction between s 36(1C)(a) as protective of Australia as a polity and s 36(1C)(b) as protective of the people belonging to that polity.

(ii) *Context: 'Reasonable Grounds for Regarding'*

A second contextual element in art 33(2) is the use of the formula 'reasonable grounds for regarding'. The analytical significance of this element requires some explanation. As Jagot and Barker JJ appeared to suggest by way of an obiter dictum in *SZOQQ v Minister for Immigration and Citizenship*,[178] art 33(2) of the *Refugee Convention* fastens the 'reasonable grounds for regarding' standard only to the first limb of the provision ('a danger to the security of the [host] country').[179] The reason for the joint judgment in *SZOQQ* expressing some provisional support for this view was the potential application of 'the principle that [international treaties incorporated into domestic law must receive] a more liberal construction than [that which] might be applied to domestic legislation'.[180] This view, while tentatively expressed and the correctness of which was not necessary to their Honours' disposition of that appeal,[181] is also consistent with a syntactic analysis of art 33(2), which provides (emphasis added):

> The benefit of the present provision may not, however, be claimed by a refugee *whom* there are reasonable grounds for regarding as a danger to the security of the country in which he is, *or who*, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The pronoun 'whom', by definition, is used as the object of a verb or preposition: it refers here to a refugee *with respect to whom* there are reasonable grounds for

[174] *DMQ20 2023 Decision* (n 4) [148] (Thomas and Snaden JJ).
[175] Ibid [121].
[176] Ibid [148].
[177] Ibid [8]–[9], [46]–[50] (Rares J).
[178] (2012) 200 FCR 174 ('*SZOQQ*').
[179] Ibid 188 [49] (Jagot and Barker JJ).
[180] Ibid. A more complete statement of this principle emerges earlier in their Honours' reasons, where it is observed that 'international treaties incorporated into domestic law must be construed in a more liberal manner than domestic legislation': at 187 [40] (Jagot and Barker JJ), citing *Applicant A* (n 27).
[181] *SZOQQ* (n 178) 188 [49] (Jagot and Barker JJ).

regarding as a danger to the security of the host state. In contrast, the use of the pronoun 'who' designates the 'refugee' as the subject of the verb 'constitutes': 'a refugee … who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. It may be added here that the ICJ has treated syntax as an important contextual feature of treaty interpretation in contentious cases before it.[182] The result is that answering the question of whether a refugee 'constitutes a danger to the [host state's] community' for the purpose of art 33(2) does not involve any predictive exercise based on 'reasonable grounds'. Instead, it entails an entirely binary assessment: to 'constitute[]' something, in its ordinary meaning, is '[t]o make up, form, compose [that thing]; to be the elements or material of which the thing spoken of consists'.[183] It cannot be said that A 'constitutes' B if A theoretically could be B, A might be B, A may be B, A is probably B, or even A is virtually B.

The text of s 36(1C) of the *Migration Act* departs from its progenitor in art 33(2): its opening words provide that '[a] criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds', to meet the description of either of the two following categories of persons. That is, s 36(1C) not only substitutes the word 'considers' for the words 'for regarding' but it also extends the 'reasonable grounds' standard to its equivalent of the second limb of art 33(2) ('a danger to the community'). The statutory formula of 'reasonable grounds' is well known and well understood. In a passage from the unanimous decision of the High Court of Australia in *George v Rockett*,[184] which Rares J quoted with approval,[185] the Court held that a statutory provision requiring a decision-maker to have 'reasonable grounds' for a particular state of mind 'requires the existence of facts which are sufficient to induce that state of mind in a reasonable person'.[186] Here, the relevant state of mind is satisfaction that an applicant for a protection visa '*is* a danger to the Australian community'.[187]

In the Full Federal Court's decision in *DMQ20*, the plurality repudiated the appellant's submission that the quantitative dimension of 'danger' 'is above any form of possibility, otherwise Parliament would have used the phrase "may be a danger" not "is a danger"'.[188] Their Honours emphasized that 'it is artificial—or, at the very least, difficult—to distinguish the existence of danger from the possibility that danger exists',[189] and that '[t]here may well be no relevant distinction to be drawn between a person who *is* a danger to others and a person who *might be* such a danger'.[190] The plurality's reasoning here, however, is inconsistent with prior Full Court authority analysing express legislative distinctions between what 'constitutes' something and what 'may constitute' something. *WA Pines Pty Ltd v Bannerman*[191] concerned a statutory condition that the Trade Practices Commission, its Chairman, or its Deputy Chairman 'ha[ve] reason to believe that a person is capable of furnishing information, producing documents, or giving evidence relating to a matter *that constitutes, or may constitute,* a contravention of [the *Trade Practices Act 1974* (Cth)]',[192] a condition that had to be satisfied before the Commission, the Chairman, or the Deputy Chairman could exercise their power to compel the person to furnish the information, produce

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[182] See especially *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua Intervening) (Judgment)* [1992] ICJ Rep 351, 582–3 [373], discussed in Dörr (n 37) 582–3 [46].
[183] *Oxford English Dictionary* (online at 16 June 2023) 'constitute' (v, def 8).
[184] (1990) 170 CLR 104 ('*Rockett*').
[185] *DMQ20 2023 Decision* (n 4) [45] (Rares J).
[186] *Rockett* (n 184) 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh JJ).
[187] *Migration Act* (n 149) s 36(1C)(b) (emphasis added).
[188] *DMQ20 2023 Decision* (n 4) [108] (Thomas and Snaden JJ).
[189] Ibid [110].
[190] Ibid (emphasis in original).
[191] *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 ('*Bannerman*').
[192] *Trade Practices Act 1974* (Cth) s 155 as at 27 June 1980 (emphasis added).

the documents, or give the evidence.[193] Lockhart J, with whom Bowen CJ agreed,[194] explained:

> The words 'that constitutes or may constitute' a contravention [sic] do not govern or qualify the Commission's belief. Probably they are intended to draw a distinction between existing or past contraventions ('that constitutes') and prospective contraventions ('may constitute'); for example a proposed merger under s 50 that may be a contravention if it occurs.[195]

While tentatively expressed, this passage produces a relevant and significant result: if the use of the word 'constitutes' corresponds to the past or present existence of something, while the use of the phrase 'may constitute' corresponds to the future coming into being of that thing, then the use of the word 'constitutes' in the second limb of art 33(2) of the *Refugee Convention* requires the *present* existence of a danger to the host state's community. If it is accepted, as the plurality in *DMQ20* suggests, that 'danger' 'is a binary proposition'[196] in the sense that 'a sufficient likelihood of sufficient harm will bespeak the presence of danger'[197] (and, conversely, an insufficiency of either will bespeak the absence of danger), there is no reason in principle why the Full Court's reasoning in *Bannerman* cannot extend to art 33(2) and s 36(1C), since a 'contravention' of a statute is also a binary proposition: conduct is either lawful or unlawful under the statute. The fact that the second limb of art 33(2) does not contain any 'reasonable grounds' standard, and the fact that s 36(1C) adopts the formula of 'considers[] on reasonable grounds' rather than 'reason to believe', does not prevent the reasoning in *Bannerman* from applying to these provisions, since the quoted passage makes it clear that the statutory phrase 'that constitutes[] or may constitute' does not relate to the belief but, rather, to what is being 'constitute[d]'.

The plurality in *DMQ20* does not refer to *Bannerman*. It may be conceded, however, that, insofar as the plurality erred in this respect, the error was not material, since the AAT's overall finding below is unimpeachable in the presently relevant respect even in the absence of the plurality's engagement with *Bannerman*: the Tribunal had found that there existed 'a *present* risk … that the Applicant will cause physical harm and perhaps severe physical harm, or extreme emotional harm[,] in the present or the future'.[198] The Tribunal also had made it clear, after stating what amounts to a legally sufficient risk of 'danger', that, '[i]f no such risk is present at the time of decision, it can not [sic] be said that a person is a danger'.[199]

Critique of Rares J's reasoning on this point is straightforward. His Honour quotes with approval[200] the *George v Rockett*[201] analysis of 'reasonable grounds' set out earlier in this section, and, in the next sentence of his judgment, his Honour observes that '[a]rticle 33(2) uses a similar criterion [to "reasonable grounds"] that s 36(1C) adopted'.[202] This is not an isolated instance of Rares J regarding the 'reasonable grounds' standard as operating on both limbs of art 33(2); his Honour implies the same view when noting that

> [a] danger, in its natural and ordinary meaning *as used in Art 33(2)* and s 36(1C) (as understood by States Party to the *Refugees Convention*) conveys a threat of a

[193] Ibid.
[194] *Bannerman* (n 191) 176 (Bowen CJ).
[195] Ibid 188 (Lockhart J).
[196] *DMQ20 2023 Decision* (n 4) [110] (Thomas and Snaden JJ).
[197] Ibid.
[198] *HYTB* (n 49) [143] (Member Eteuati) (emphasis added).
[199] Ibid.
[200] *DMQ20 2023 Decision* (n 4) [45] (Rares J).
[201] See above n 186.
[202] *DMQ20 2023 Decision* (n 4) [45] (Rares J).

> substantial kind to Australia's security or the Australian community *based on objectively reasonable grounds* (or suspicion) …[203]

Similarly, later in Rares J's reasons, his Honour observes:

> Indeed, States Party to the *Refugees Convention* must have contemplated that non-refoulement obligations would not be owed by a host State *if it had reasonable grounds to consider* that *there was a danger or, using other descriptions, a future serious possibility, risk or threat that, if left in their community, a refugee, who had already been convicted of committing a particularly serious crime within the meaning of Art 33(2), would commit that particularly serious crime, or a crime of that character*.[204]

Other examples can be readily located.[205] It is perhaps most apparent that Rares J does not regard s 36(1C) as departing from art 33(2) in its prescription of 'reasonable grounds', however, when his Honour expressly detects s 36(1C) as departing from art 33(2) only in a single respect: the adoption in s 36(1C) of the legislatively defined concept of a 'particularly serious crime' in s 5M.[206] Yet, each of these instances misconceives the structure of art 33(2): as explained above, the 'reasonable grounds for regarding' standard appears in, and operates only on, the first limb of art 33(2). To suggest, as Rares J does, that the 'reasonable grounds' standard operates on both limbs of art 33(2) is to fail to have regard to the obiter dictum of the joint judgment in *SZOQQ* as well as the clear syntax of art 33(2). Rares J does not refer to *SZOQQ*. Nor does his Honour analyse the syntax of art 33(2). Since s 36(1C)(b) ultimately applies within the Australian legal context, however, it may be conceded that Rares J's error was not material to his Honour's decision.

(iii) *Context: The Specific Object and Purpose of Article 33(2)*

A third contextual element relevant to understanding the concept of a 'danger to the community' in art 33(2) is the specific object and purpose of art 33(2) as distinct from the general object and purpose of the *Refugee Convention*. While *VCLT* art 31(1) treats the object and purpose of the entire treaty as a distinct conceptual element of the interpretive process, it does not follow that the interpreter is precluded from considering the object and purpose of a particular treaty provision: this factor, in fact, can be accommodated within the concept of 'context' in art 31(1).[207] All else being equal, then, this contextual element favours a reading of art 33(2) that advances its specific object and purpose over one that frustrates this object and purpose.

As mentioned earlier, the specific object and purpose of art 33(2), unembellished by any descriptors about the requisite likelihood of harm or the requisite intensity, magnitude, or severity of harm, is to protect the host state from a current or future threat to its safety.[208] This protective function of art 33(2) can be readily distinguished from the function of art 1F, which denies refugee status to an asylum seeker who, due to their prior conduct, would threaten the integrity of the institution of asylum if formally granted refugee status:[209] no matter how undeserving a refugee may be of

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[203] Ibid [52] (emphasis altered).
[204] Ibid [59] (emphasis altered).
[205] Ibid [44], [59], [62], [67].
[206] Ibid [29].
[207] See, eg, Gardiner (n 34) 210, discussing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 110 [160], 227 [445].
[208] 'Background Note' (n 48) [10].
[209] See especially Executive Committee of the High Commissioner's Programme ('ExCom'), *Conclusion on Safeguarding Asylum: No 82 (XLVIII)*, 48th sess (17 October 1997) para (d)(v); ExCom, *General Conclusion on International Protection: No 89 (LI)*, 51st sess (13 October 2000) Preamble para 5; ExCom, *Conclusion on the Civilian and Humanitarian Character of Asylum: No 94 (LIII)*, 53rd sess (8 October 2002) para (c)(vii), (ix); 'Exclusion Guidelines', UN Doc HCR/GIP/03/05 (n 48) [2], [4]; 'Background Note' (n 48) [2], [3], [8], [73]; ExCom, *Conclusion on Protection Safeguards in Interception Measures: No 97 (LIV)*, 54th sess (10 October 2003) Preamble para 2; ExCom,

enjoying the rights and privileges attaching to refugee status on account of their being 'convicted … of a particularly serious crime', they cannot be refouled under art 33(2) unless they also pose a 'danger to the community'. Crucially, in order for the protective function of art 33(2) to be realized, there must exist a causal link between the refouling of the refugee and the protection of the host state's community. This protective object and purpose of art 33(2), then, favours a reading of the expression 'danger to the community' that requires the intensity, magnitude, or severity of the threatened harm to reach such a threshold that the only way it can be adequately addressed is by refouling the refugee. Put differently, art 33(2) requires the host state to exhaust all alternative protective measures available to it under the *Refugee Convention* and its domestic law to address the danger posed by the refugee before it can refoule them. As the Office of the United Nations High Commissioner for Refugees ('UNHCR') explains:

> Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum.[210]

The plurality's reasons in *DMQ20* analyse the specific legislative purpose behind s 36(1C) when addressing the appellant's twin submissions (a) that s 36 should be construed in a manner that 'extend[s] its benefit as fulsomely as possible'[211] and (b) that s 36 should be read with an appreciation of the prospect of the appellant facing indefinite immigration detention if denied a protection visa.[212]

The plurality begins their analysis by identifying their task as being 'to construe the provisions of present relevance in a way that accords with their legislative purpose'.[213] In addressing the appellant's first submission, their Honours proceed to identify the purpose behind art 33(2) and s 36(1C) as being 'to protect the population from danger posed by those to whom refugee or complementary protection would otherwise be afforded'.[214] The next step of the plurality's reasoning here, however, introduces circularity: after highlighting the purpose behind art 33(2) and s 36(1C), their Honours observe, in the next sentence, that '[t]he construction of "the Australian community" that the appellant favours would, if accepted, leave that purpose substantially unfulfilled',[215] yet the very reason provided to explain how the purpose behind art 33(2) and s 36(1C) would be 'substantially unfulfilled' is that these two provisions would apply only to those who 'constitute a danger to Australia's security and those who, having a history of particularly serious criminality, constitute a danger generally to the whole of the Australian community (rather than constituent members of it)';[216] that is, those who would satisfy the appellant's construction of s 36(1C).[217] The adjacent reference to how acceptance of the appellant's construction 'would leave the community—via the agency of its individual members—exposed to the very species of significant harm that, in this case, was found to [be] present'[218] also exposes an insufficient logical basis: it advances, as the reason for rejecting the appellant's

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General Conclusion on International Protection: No 102 (LVI), 56th sess (7 October 2005) para (i); ExCom, *Conclusion on the Provision of International Protection including through Complementary Forms of Protection: No 103 (LVI)*, 56th sess (7 October 2005) para (d); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.4 (1979, reissued February 2019) [140], [147]–[148] ('*2019 Handbook*').

[210] 'Background Note' (n 48) [10].

[211] *DMQ20 2023 Decision* (n 4) [145] (Thomas and Snaden JJ).

[212] Ibid.

[213] Ibid [147] (citations omitted).

[214] Ibid [148].

[215] Ibid.

[216] Ibid.

[217] Ibid [121].

[218] Ibid [148].

construction, the fact that this construction would mean that the appellant is not a 'danger to the community'.

In addressing the appellant's second submission, the plurality explains that '[t]he principle of legality does not operate as a fetter upon the ability of parliaments to remove or qualify important personal rights'[219] and, in the balance of the same paragraph of their reasons, their Honours observe:

> Here, it is plain enough that the Parliament has seen fit to require the detention of non-citizens that are not authorised by operation of a visa to remain in Australia. Even assuming that that should warrant a narrower reading of the exclusions that condition the criteria for visa protection, the court's task presently remains to give effect to the legislative purpose for which s 36(1C)(b) exists. The construction for which the appellant contends would substantially imperil the realisation of that purpose.[220]

The plurality, however, does not proceed to explain how the appellant's construction 'would substantially imperil the realisation of th[e] [legislative] purpose [behind s 36(1C)(b)]'. The quoted passage expresses a conclusionary statement lacking any underlying reasoning.

In addition to these criticisms of the Full Court's reasons in *DMQ20*, it may be added that neither the plurality nor Rares J refer to the passage quoted earlier from UNHCR's guidance that makes clear the full import of the specific object and purpose behind art 33(2): the provision does not seek simply to protect the host state's security and community from dangerous refugees, but instead provides for a protective measure whose availability is conditioned on the emergence of a threat of such intensity, magnitude, or severity that it cannot be addressed other than through the refugee's removal from the host state. Rares J simply explains, at a high level of generality, that 'the purpose of Art 33(2) is not to define who is a refugee, but to relieve the host State Party of its obligation not to refoule an actual refugee who falls within one of the criteria in that Article'.[221] His Honour also explains later in his reasons, and at an even higher level of generality, that '[t]he purpose of Art 33(2) was to allow States Party to refuse to give protection to the categories of persons that it described'.[222]

The role and relevance of UNHCR materials, such as the 'Background Note' on art 1F quoted in this section, during the *VCLT*'s process of treaty interpretation is considered in other sections of this article.

(iv) *Context: Agreements and Instruments at the Time of Conclusion*

A fourth contextual element, and one whose consideration is mandated[223] by the expanded concept of 'context' in *VCLT* art 31(2), encompasses, where they exist, 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty'[224] and 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.[225] Once again, these materials 'may help

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[219] Ibid [150] (citations omitted).
[220] Ibid.
[221] Ibid [37].
[222] Ibid [58].
[223] Article 31(1) of the *VCLT* (n 3) provides that '[a] treaty *shall* be interpreted … in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*', and the opening words of art 31(2) provide that '[t]he context for the purpose of the interpretation of a treaty *shall* comprise' the agreements and instruments identified respectively in paras (a) and (b) (emphasis added). As Gardiner explains, '[c]ontext [in art 31(1)] … [is] not [an] additional or optional element[]', but instead is a 'pointer[] to the appropriate ordinary meaning and thus must also be put in the crucible': Gardiner (n 38) 465. See also Aust (n 34) 235; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 367; Dörr (n 37) 582 [43]; Gardiner (n 34) 181, 184–5, 197; Villiger (n 37) 427 [10].
[224] *VCLT* (n 3) art 31(2)(a).
[225] Ibid art 31(2)(b).

to determine which of the various ordinary meanings of [the treaty's] terms shall prevail'.[226]

Statements made during the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons do not constitute 'agreement[s]' or 'instrument[s]' for the purpose of *VCLT* art 31(2) since, at the stage of a diplomatic conference, 'it is then not clear whether the treaty will be concluded and which States will become parties'.[227] A fortiori, statements made by members of the earlier 1950 Ad Hoc Committee cannot be considered for the purpose of art 31(2). The Final Act of the 1951 Conference,[228] however, can be readily regarded as an art 31(2)(a) 'agreement'[229] or an art 31(2)(b) 'instrument'.[230] Relevantly, it records that the Conference unanimously[231] adopted the following recommendation:

> THE CONFERENCE,
>
> CONSIDERING that many persons still leave their country of origin for reasons of persecution and are entitled to *special protection* on account of their position,
>
> RECOMMENDS that Governments continue to receive refugees in their territories and that they act in concert *in a true spirit of international co-operation* in order that these refugees may find asylum and the possibility of resettlement.[232]

Its preamble emphasizes that refugees are entitled not simply to 'protection' but to 'special protection'. It fortifies the view that refugees are entitled to the full enjoyment of the rights and privileges attaching to refugee status that are set out in arts 2–34 of the *Convention*. More fundamentally, the recommendation itself stresses the importance of the international community of states acting in concert to achieve durable solutions for refugees. Since a refugee to whom art 33(2) applies does not cease to enjoy their international legal status as a refugee[233] and, if refouled, will continue to be in need of international protection and, ultimately, a durable solution, unduly expansive interpretations of art 33(2) risk impairing the burden-sharing arrangements envisaged by the *Convention*.[234] It may be added that the preamble to the *Convention* expresses 'the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, *will do everything within their power to prevent this problem from becoming a cause of tension between States*'.[235]

This contextual element, while more remote in its relevance and more slight in its significance than the preceding contextual elements, nonetheless reinforces the importance of selecting a meaning of the statutory phrase 'danger to the Australian community' in s 36(1C)(b) that, as far as possible, accords with the international legal meaning of the second limb of art 33(2). An understanding of the concept of a 'danger to the community' based on (expansive) national standards, rather than on international standards, threatens to distort the autonomous international meaning of art 33(2) and

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[226] Dörr (n 37) 590 [64].
[227] Villiger (n 37) 430 [17].
[228] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN Doc A/CONF.2/108/Rev.1 (25 July 1951) ('*Final Act*').
[229] Dörr treats final acts as one manifestation of 'agreement[s]' captured by *VCLT* (n 3) art 31(2)(a): Dörr (n 37) 591 [66]. See also Michael Wood, 'Final Act' in Anne Peters et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at April 2021) [11].
[230] In contrast to Dörr (n 37) and Wood (n 229), Villiger treats final acts as one example of the 'instrument[s]' captured by *VCLT* (n 3) art 31(2)(b): Villiger (n 37) 430 [19]. See also Gardiner (n 34) 241.
[231] *Final Act*, UN Doc A/CONF.2/108/Rev.1 (n 228) para IV.
[232] Ibid para IV (Recommendation D) (emphasis added).
[233] See, eg, Andreas Zimmermann and Philipp Wennholz, 'Article 33, Para 2' in Andreas Zimmermann, Felix Machts, and Jonas Dörschner (eds), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1396, 1413 [72].
[234] *Refugee Convention* (n 1) Preamble para 4.
[235] Ibid Preamble para 5 (emphasis added).

to produce varying and inconsistent protection outcomes across host states, contrary to the imperative to act in 'a true spirit of international co-operation'.

In the Full Federal Court's decision in *DMQ20*, neither the plurality nor Rares J consider, or proceed to give any weight to, this contextual element. The plurality makes no direct reference to the *VCLT* or its interpretive framework set out in arts 31–33 and their Honours do not analyse the Final Act of the 1951 Conference. Rares J does recognize that, 'while s 36(1C) must be construed as part of a domestic statute, that construction should be informed by reference to public international law principles, including Arts 31 and 32 of the [*VCLT*]',[236] yet his Honour does not analyse any agreements or instruments connected to the conclusion of the *Refugee Convention* and, in any event, his Honour does not refer to the Final Act, despite *VCLT* art 31(2)(a)–(b) forming a mandatory[237] component of the *VCLT*'s interpretive process.

(c) *The Object and Purpose of the* Refugee Convention

The ordinary meaning of treaty terms, construed in their context, also must be read in light of the object and purpose of the treaty.[238] A treaty's object and purpose may confirm, but not alter,[239] the ordinary meaning of a treaty term[240] or, where multiple constructions are available, a treaty's object and purpose may favour an interpretation that promotes this object and purpose over one that frustrates it.[241] The true object or purpose of a treaty may be 'elusive'[242] and a treaty may pursue multiple competing objects and purposes.[243] Here, 'it is possible to discern various, and possibly conflicting, objects and purposes from the Preamble to the [Refugee] Convention'.[244] Even where a treaty does pursue multiple and even conflicting objects and purposes, however, one necessarily 'will be to maintain the balance of rights and obligations created by the treaty',[245] and the *Refugee Convention* itself supplies clear guidance for how tensions between the rights and obligations it creates should be balanced: its preamble, one source of a treaty's object and purpose,[246] recounts the United Nations' 'profound concern for refugees'[247] and, crucially, its desire 'to assure refugees the widest possible exercise of … fundamental rights and freedoms'.[248] Non-refoulement protection conferred by art 33(1) constitutes 'the most fundamental of all obligations owed to refugees'.[249] Since art 33(2) operates as an exception to enjoying the benefit of art 33(1), and since a more restrictive reading of an exception to accessing a human rights guarantee expands the scope of enjoyment of that guarantee, then, all else being equal, a reading of art 33(2) that confers 'the widest possible exercise of' non-refoulement protection conferred by art 33(1) should be adopted in preference to a reading that restricts or impairs a refugee's full enjoyment of this protection.

In the Full Federal Court's decision in *DMQ20*, neither the plurality nor Rares J refer to the object and purpose of the *Refugee Convention* as a whole. This is despite the fact that the purposive element of *VCLT* art 31(1) is a mandatory component of the

[236] *DMQ20 2023 Decision* (n 4) [32] (Rares J) (emphasis in original). See also [48] (Rares J).
[237] See above n 223.
[238] See, eg, Aust (n 34) 235; Gardiner (n 38) 465; Gardiner (n 34) 164, 211, 222; Villiger (n 35) 110. See also ILC (n 35) 221.
[239] See, eg, Gardiner (n 34) 218–19; Villiger (n 35) 110.
[240] See, eg, Aust (n 34) 235.
[241] See, eg, Dörr (n 37) 585 [54].
[242] Aust (n 34) 235.
[243] See, eg, Villiger (n 35) 110.
[244] McAdam (n 19) 91 [43].
[245] Villiger (n 35) 110. See also Villiger (n 37) 427 [11].
[246] See, eg, Gardiner (n 34) 205–6, 218; Villiger (n 35) 110; ILC (n 35) 221.
[247] *Refugee Convention* (n 1) Preamble para 2.
[248] Ibid.
[249] Penelope Mathew, 'Non-Refoulement' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 899, 899.

interpretive process.[250] Reference to the *Convention*'s object and purpose would have reinforced the logic in the present context of selecting a narrow(er) ordinary meaning of the expression 'a danger to the community'. Further, Rares J's reference to two dictionary definitions of the word 'danger',[251] when viewed together with his Honour's failure to refer to the *Convention*'s object and purpose, lends support to the criticism advanced by refugee law scholars that 'reliance on a dictionary can lead a decision-maker to adopt an interpretation inconsistent with the [*Convention*'s] object and purpose'.[252]

(d) *A 'Good Faith' Reading of Article 33(2)*

Together with the adjacent requirement in *VCLT* art 31(1) to construe treaties in good faith, the 'object and purpose' component of the analysis also favours an interpretation that gives meaning to a treaty term or provision over one that deprives it of effect.[253] The application of this principle produces a relevant and significant result: if the concept of a 'danger to the community' of the host state were wholly subsumed within the concept of a 'convict[ion] [for] a particularly serious crime', such that the conviction by itself established the existence of the danger, then it would have been unnecessary for the drafters to insert the concluding words of the second limb of art 33(2); it would have sufficed simply to provide that '[t]he benefit of the present provision may not, however, be claimed by a refugee [who has] been convicted by a final judgment of a particularly serious crime'. Precisely how the concept of 'a danger to the community' is additive to the second limb of art 33(2) can be discerned from what is already inherent in the concept of a 'convict[ion] [for] a particularly serious crime'. If it is accepted, as the plurality reasoned in *DMQ20*, that 'a person … that presents a sufficient likelihood of sufficient harm will bespeak the presence of danger',[254] then, in order for the 'danger' to be established, either its likelihood (quantitative dimension), or the nature of the threatened harm (qualitative dimension), or both, must exceed what the 'convict[ion] [for] a particularly serious crime' alone discloses in these two respects.

As a general proposition, a conviction establishes not only that the offender is capable of committing the underlying offence (or, according to applicable principles of extended criminal liability, being complicit in the commission of that offence), but also that the offender exercised a choice to perpetrate the offence: as Barwick CJ observed in *Ryan*,[255] 'the deed which was not the result of the accused's will to act cannot … be made the source of criminal responsibility in him',[256] an observation that was quoted with approval[257] by Mason CJ, Brennan, and McHugh JJ in *Falconer*[258] when their Honours discussed 'the common law requirement that an offender's act be done with volition, or voluntarily'.[259] A conviction also establishes that the offender's satisfaction, to the criminal standard, of the mental and physical elements of the crime was not displaced by the application of any available defences, whether full defences extinguishing criminal liability for an offence whose elements were otherwise proven,

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[250] As Gardiner explains, 'object and purpose [in art 31(1)] [is] not [an] additional or optional element[]', but instead is a 'pointer[] to the appropriate ordinary meaning and thus must also be put in the crucible': Gardiner (n 38) 465. See also Aust (n 34) 235; Crawford (n 223) 367; Dörr (n 37) 561 [5]; Villiger (n 37) 427 [11].
[251] *DMQ20 2023 Decision* (n 4) [51] (Rares J).
[252] Michelle Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge University Press, 2007) 47–8 (citations omitted), cited in McAdam (n 19) 87 [29].
[253] See, eg, ILC (n 35) 219. See also Sorel and Eveno (n 35) 818 [29]; Gardiner (n 38) 480–1; Villiger (n 35) 110.
[254] *DMQ20 2023 Decision* (n 4) [110] (Thomas and Snaden JJ).
[255] *Ryan v The Queen* (1967) 121 CLR 205 ('*Ryan*').
[256] Ibid 213 (Barwick CJ).
[257] *R v Falconer* (1990) 171 CLR 30, 40 (Mason CJ, Brennan, and McHugh JJ) ('*Falconer*').
[258] *Falconer* (n 257).
[259] Ibid 40 (Mason CJ, Brennan, and McHugh JJ) (citations omitted).

or partial defences reducing the person's criminal liability for the offence charged to criminal liability for a lesser offence.

The existence of the conviction converts an undefined theoretical possibility of the person perpetrating the relevant offence into a concrete juridical fact that they have perpetrated the offence. What can be inferred from the existence of the conviction alone, then, is that the offender exhibits an elevated capability and willingness to perpetrate the underlying crime over and above that exhibited by persons who have not been convicted of the offence. Where, as art 33(2) requires, the crime behind the conviction must be a particularly serious crime, the existence of a conviction for such a crime establishes that the offender exhibits an elevated capability and willingness to perpetrate that crime not only over and above that exhibited by persons who have not been convicted of any offence, but also over and above that exhibited by persons who have been convicted of only 'serious crime[s]'. Since UNHCR defines a 'serious … crime' for the purpose of art 1F(b) as 'a capital crime or a very grave punishable act',[260] and since this constitutes the most serious category of offending conceivable, then – transitively – the only way for a 'serious crime' to become a '*particularly* serious crime' is through the perpetration of 'a capital crime or a very grave punishable act' attended by the presence of aggravating factors.

Under a host state's criminal law, these aggravating factors will formally translate into either a conviction for an aggravated version of the (already) serious offence or a harsher sentence for the serious offence that takes into account the aggravation. A general example of the first is s 71.13 of the Commonwealth *Criminal Code*, which creates a set of aggravated offences defined as offences under ss 71.4–71.10 (certain types of harm to UN personnel or associated persons) that are committed 'during the deliberate and systematic infliction of severe pain over a period of time',[261] 'by the use or threatened use of an offensive weapon',[262] or 'against a person in an abuse of authority'.[263] A general example of the second is the federal sentencing regime established under pt IB of the *Crimes Act 1914* (Cth), which provides that a court, in determining the sentence for a person convicted of a federal offence, 'must take into account … (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character[]–[]that course of conduct'.[264]

If it is accepted, as UNHCR instructs,[265] that a 'serious crime' is a capital crime or a very grave punishable act, and that a '*particularly* serious crime' necessarily requires an additional element of aggravation, then the qualitative dimension of a 'danger' cannot be additive to the concept of a 'convict[ion] [for] a particularly serious crime' by requiring the refugee to perpetrate a crime of a higher order of seriousness, since no such category exists. Instead, one must look to the quantitative dimension of 'danger': in order to find that a 'danger' exists, one must discern a likelihood of harm higher than that which can be inferred from the conviction alone.

At this juncture, it is necessary to take into account Australia's particular legislative arrangements and to highlight that the category of 'particularly serious crime[s]' defined in s 5M of the *Migration Act* is wider than the category of capital crimes or very grave punishable acts, such that an offender convicted in name of a 'particularly serious crime' in Australia remains capable of perpetrating what is in substance a crime of a higher order of seriousness (including a 'capital crime' or a 'very grave punishable act'). This, however, does not detract from the argument here. Like the principle of treaty interpretation set out at the start of this section, it is a well-

[260] *2019 Handbook*, UN Doc HCR/1P/4/ENG/REV.4 (n 209) [155].
[261] *Criminal Code* (n 127) s 71.13(1)(a).
[262] Ibid s 71.13(1)(b).
[263] Ibid s 71.13(1)(c).
[264] *Crimes Act 1914* (Cth) s 16A(2)(c).
[265] See above n 260.

established principle of statutory interpretation that '[a]s a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains'.[266] Once again, if the mere fact of the 'convict[ion] [for] a particularly serious crime' (in the sense used in s 5M) was sufficient to establish the existence of 'a danger to the Australian community' for the purpose of s 36(1C)(b), then there would have been no need to insert the 'danger' component of this provision because it would be wholly comprehended by the fact of the conviction alone. In order to give the last seven words of s 36(1C)(b) legal effect, it is necessary to construe them in a way that renders them additive to this criterion for a protection visa.

Accepting, as the plurality of the Full Court in *DMQ20* observed,[267] that a 'danger' has both a qualitative and a quantitative dimension, these seven words must be additive to either or both of these two dimensions. That is, for a 'danger to the Australian community' to exist, (a) the apprehended harm must exceed the harm inflicted by the offending behind the 'convict[ion] [for] a particularly serious crime' and/or (b) the likelihood of the apprehended harm materializing must exceed that which can be inferred from the conviction alone. This leads to an important corollary: in evidentiary terms, a finding that a refugee is 'a danger to the Australian community' will be legally insufficient if (a) the only material relied on to reach that finding is the record of the refugee's conviction for a particularly serious crime, or (b) the only reasons advanced to justify making the finding are those that can be inferred from the fact and circumstances of the conviction alone.

In *DMQ20*, the Full Court's reasons reveal some analysis of the relationship between the 'convict[ion] [for] a particularly serious crime' and the concept of a 'danger to the community'. The plurality observed:

> It is plain that s 36(1C)(b) contemplates that a person who is convicted of an offence involving violence against a person might thereby (or partly thereby) be thought to constitute a danger to the Australian community. Obviously enough, that danger inures in the prospect, to be assessed in the usual ways (including by reference to concepts such as recidivism, remorse and rehabilitation), that the convicted person might repeat his or her conduct.[268]

Insofar as their Honours accept that a person who is convicted of a particularly serious crime 'might thereby' constitute a danger to the Australian community, however, this is contradicted by the outcome of applying the twin principles of interpretation set out earlier in this section. This outcome requires the 'danger' to be established, at least in part, by something external to the 'convict[ion] [for] a particularly serious crime'. It is not apparent that the plurality had regard to, or applied, either of the twin principles of interpretation set out earlier. Further, if it is to be accepted that the relevant 'danger', in its qualitative dimension, 'inures in the prospect … that the convicted person might repeat his or her conduct', then, in order for the 'danger' assessment to be additive to the 'convict[ion] [for] a particularly serious crime', the quantitative dimension – the likelihood of the danger materializing – must exceed that which can be inferred from the offender's willingness and capability to perpetrate the 'particularly serious crime'.

Yet, the AAT below not only found that, qualitatively, the nature of the threatened harm rose no higher than 'conduct *similar* to [the applicant's] conduct which gave rise to his offences for contravention of a domestic violence order',[269] but it also found that, quantitatively, 'the Applicant's long and frequent history of offences, including his very serious violent offences committed against his former partner'[270] was the decisive

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[266] *Beckwith v The Queen* (1976) 135 CLR 569, 574 (Gibbs J).
[267] *DMQ20 2023 Decision* (n 4) [107], [113] (Thomas and Snaden JJ).
[268] Ibid [128].
[269] *HYTB* (n 49) [114] (Member Eteuati) (emphasis added). See also [142] (Member Eteuati).
[270] Ibid [140].

factor in the Tribunal concluding that 'there is a real, significant and serious risk which is neither remote nor fanciful that the Applicant will cause harm to members of the Australian community if he remains in Australia'.[271] In fact, on closer inspection, other than the applicant's singular conviction for a 'particularly serious crime', none of the other matters referred to by the Tribunal when evaluating the likelihood of the danger materializing (a) ultimately underpinned the Tribunal's finding about that likelihood or (b) were additive to the 'danger' assessment by establishing a fact about the likelihood of the threatened harm materializing that the applicant's conviction for a 'particularly serious crime' did not already establish:

(a) While the Tribunal had before it three risk of reoffending assessments produced by Queensland Corrective Services,[272] the Tribunal placed only 'some low weight'[273] on these assessments because '[t]here was no expert witness before the Tribunal to fully explain the scores'[274] recorded in the assessments.[275] The Tribunal also conceded that, while some scores appeared to indicate 'a not insignificant risk of reoffending'[276] (a risk that had increased 'significant[ly]'[277] between 2013–16),[278] 'there [was] no *recent* risk of reoffending assessment and it ha[d] now been some time since the Applicant offended and there [we]re a number of matters … which may [have] indicate[d] that the Applicant's risk of reoffending ha[d] decreased'.[279] In circumstances where the Tribunal's overall finding of 'danger' found that there existed 'a *present* risk'[280] of danger, it may be inferred that whatever 'low weight' was placed on the three risk of reoffending assessments was displaced by the weight accorded to the countervailing factors that indicated that the applicant's risk of reoffending had decreased.

(b) Similarly, the fact that the applicant shared a son with his former partner and might, as a result, come into contact with her again[281] cannot be understood as having underpinned the Tribunal's finding of 'a *present* risk'[282] of the apprehended harm materializing: the applicant's coming into contact again with his former partner was conditional on the applicant being 'granted a form of custody or visitation rights in the future';[283] in other words, the risk of harm to the applicant's former partner amounted to a *future*, rather than a *present*, risk of harm.

(c) Similarly again, the possibility that 'a return to drug consumption [might have] affect[ed] the risk that the Applicant [would] continue to engage in violent behaviour'[284] could not ultimately have underpinned the Tribunal's finding of 'a *present* risk'[285] of the apprehended harm materializing: a possibility of a *future* drug relapse cannot establish a *present* risk of violent offending in circumstances where the arrow of causation points from the drug relapse to the violent offending.

(d) While the Tribunal had regard to the applicant's earlier convictions (and sentences) for contravening a domestic violence order,[286] this could not have been additive to the 'danger' assessment: the particular offence behind the applicant's conviction for a 'particularly serious crime' was an aggravated form of the offence

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[271] Ibid [139].
[272] Ibid [120].
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid (emphasis added).
[280] Ibid [143] (emphasis added).
[281] Ibid [138].
[282] Ibid [143] (emphasis added).
[283] Ibid [138].
[284] Ibid [118].
[285] Ibid [143] (emphasis added).
[286] Ibid [99], [101]–[105], [109].

of contravening a domestic violence order where the aggravated character of the offence was based on the *repetition* of prior contraventions of a domestic violence order;[287] that is, the fact of the prior convictions for contravening a domestic violence order was necessarily subsumed within the applicant's conviction for the aggravated offence, which was the only conviction capable of constituting a conviction for a 'particularly serious crime'.[288]

(e) Finally, the fact that 'some of the behaviour engaged in [during] those incidents [where the applicant committed public nuisance offences] ha[d] been aggressive including towards police',[289] and that 'repeat of that type of aggressive behaviour could escalate into serious physical violence',[290] could not be additive to the 'danger' assessment in circumstances where the applicant's conviction for a 'particularly serious crime' was for an 'offence … involv[ing] violence against a person' within the meaning of para (a)(i) of the statutory definition of a 'serious Australian offence' and where that conviction already established a willingness and capability to perpetrate serious physical violence. As the sentencing judge observed, the conduct leading to the applicant's conviction for the 'particularly serious crime' was 'violent';[291] it 'involve[d] [the applicant] striking the aggrieved to the head on multiple occasions, to the body on multiple occasions, and … [the applicant] dragging her in a way that must have been painful and humiliating';[292] and it was 'a serious example of domestic violence'.[293]

It is arguable, therefore, that the AAT's overall finding of 'danger' was legally insufficient because, in substance, it rested exclusively on what the applicant's conviction for a particularly serious crime already established.

Rares J is more explicit in clarifying the relationship between the 'convict[ion] [for] a particularly serious crime' and the concept of a 'danger to the community'. His Honour observes that '[i]n most Convention jurisdictions, some material in addition to the refugee's conviction for a particularly serious crime is necessary to establish, for the purposes of Art 33(2), that he or she is a danger to the host State Party's community'.[294] His Honour proceeds to quote with approval[295] the comments of Stanley Burnton LJ in *EN (Serbia) v Secretary of State for the Home Department*[296] that 'normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence, or the recurrence of a similar offence',[297] and that 'a disregard for the law, demonstrated by the conviction, would be sufficient to establish a connection between the conviction and the danger'.[298] Later in Rares J's reasons, his Honour reiterates that 's 36(1C) prescribes something more than the mere fact of the conviction, by requiring that, in addition, there be reasonable grounds to consider that the person is to be refused eligibility for a protection visa because he or she "*is* a danger to the Australian community"'.[299] To express and/or endorse all of these propositions, however, is to express and endorse a set of internally inconsistent propositions: for example, if there must exist 'something more than the mere fact of the conviction [for a particularly serious crime]' in order to establish that the offender 'is a danger to the Australian community', then what the 'mere fact of the conviction' establishes cannot

[287] *Domestic and Family Violence Protection Act 2012* (Qld) s 177(2)(a).
[288] *HYTB* (n 49) [53], [58] (Member Eteuati).
[289] Ibid [119].
[290] Ibid.
[291] Ibid [54].
[292] Ibid.
[293] Ibid.
[294] *DMQ20 2023 Decision* (n 4) [39] (Rares J).
[295] Ibid [56].
[296] *EN (Serbia)* (n 121).
[297] Ibid 655 [46] (Stanley Burnton LJ, Hooper LJ agreeing at 676 [114], Laws LJ agreeing at 676 [115]).
[298] Ibid.
[299] *DMQ20 2023 Decision* (n 4) [61] (Rares J) (emphasis in original).

prove that the offender meets that description, yet Stanley Burnton LJ reasons that 'a disregard for the law, *demonstrated by the conviction*, would be *sufficient* to establish a connection between the conviction and the danger'.

(f) *Subsequent Agreements and Subsequent Practice*

Next, *VCLT* art 31(3) requires the interpreter to 'take[] into account' (a) any subsequent agreements between the parties regarding the interpretation or application of the *Refugee Convention*, as well as (b) any subsequent practice in the *Convention*'s application establishing the agreement of the parties regarding its interpretation. Two categories of material are presently relevant: UNHCR guidance and national case law.

Whether UNHCR guidance constitutes a subsequent agreement, subsequent practice, or even a supplementary means of interpretation remains contested.[300] It is generally accepted, however, that the 'Conclusions on International Protection' issued by UNHCR's Executive Committee ('ExCom'),[301] UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* ('*Handbook*'),[302] and UNHCR's 'Guidelines on International Protection' ('Guidelines')[303] can be considered as persuasive sources of guidance under the *VCLT*'s principles of treaty interpretation. While ExCom 'Conclusions' arguably have the strongest evidentiary weight as they are adopted by consensus and perform a standard-setting role in state practice,[304] none of them refer to the concept of a 'danger to the community'. The other two types of UNHCR guidance are considered throughout the present article as applicable. In the Full Federal Court's decision in *DMQ20*, however, neither the plurality nor Rares J refer to UNHCR materials belonging to the three categories above. Insofar as these materials may constitute subsequent agreements and/or subsequent practice for the purpose of *VCLT* art 31(3)(a) and/or (b), the Full Court's reasons fail to engage with a mandatory component of the *VCLT*'s interpretive process.[305]

Subsequent practice in the application of the *Refugee Convention* manifesting in the form of national case law also must be 'taken into account' under *VCLT* art 31(3)(b), provided that it 'establishes the agreement of the parties regarding [the *Convention*'s] interpretation'.[306] In *DMQ20*, however, the Full Court's reasons do not disclose adequate engagement with foreign case law. Rares J observes that the construction of s 36(1C) 'should be informed by reference to public international law principles, including Arts 31 and 32 of the [*VCLT*], and jurisprudence on Art 33(2)'.[307] His Honour's analysis of the 'jurisprudence on Art 33(2)', however, does not adhere to the express textual requirement in *VCLT* art 31(3)(b). Rares J discusses four foreign cases interpreting art 33(2) and its domestic equivalents (two cases emanating from the Supreme Court of Canada,[308] one from the Supreme Court of New Zealand,[309] and

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[300] See generally McAdam (n 19) 96 [61], 110–12 [109]–[116].
[301] See especially ibid 112–13 [117]–[118].
[302] See especially ibid 110 [109].
[303] See especially ibid 113 [119].
[304] See generally Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at January 2013) [25], [81]. Materials adopted by consensus by the Executive Committee of the High Commissioner's Programme express the position of a subsidiary organ of the UN General Assembly composed of approximately 100 member states and, as such, also may supply evidence of existing and emerging rules of customary international law: at [16], [21], [25].
[305] As Villiger explains, 'the various means mentioned in Article 31 [of the *VCLT* (n 3)], on the one hand, are all to be employed and, on the other, are all of equal value; none is of an inferior character': Villiger (n 35) 113–14 (citations omitted).
[306] See generally McAdam (n 19) 96–8 [62]–[68].
[307] *DMQ20 2023 Decision* (n 4) [32] (Rares J) (emphasis in original).
[308] *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, discussed in *DMQ20 2023 Decision* (n 4) [33], [35], [42], [52] (Rares J); *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, discussed in *DMQ20 2023 Decision* (n 4) [37] (Rares J).
[309] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289, discussed in *DMQ20 2023 Decision* (n 4) [35], [52] (Rares J).

one from the Court of Appeal of England and Wales).[310] Yet, four national judicial decisions cannot be regarded as expressive of 'the agreement of the parties [to the *Refugee Convention*] regarding its interpretation' for the purpose of *VCLT* art 31(3)(b), since the ICJ has understood this article as requiring unanimity among all states parties to the treaty being interpreted.[311] Insofar as the plurality agrees with the findings of Rares J's survey of foreign case law and the 'limited assistance afforded by [these] international authorities',[312] the same shortcoming appears in the plurality judgment.

(g) *Relevant Rules of International Law*

Article 31(3)(c) of the *VCLT* requires the interpreter to 'take[] into account' any 'relevant rules of international law applicable in the relations between the parties' to the *Refugee Convention*. The 'rules of international law' here refer to those of public rather than private international law.[313] For an external rule to be 'relevant', it merely has to 'assist[] in the interpretation of [the treaty]':[314] it is not necessary for the rule (a) to have a formal nexus with the treaty under interpretation,[315] (b) to provide 'specific operational guidance as to the [treaty's] practical application',[316] (c) to be framed with any precision or particularity,[317] or (d) to concern the same subject matter as the treaty being interpreted.[318] The rule, however, must be binding,[319] and it is reasonably clear that the rule also must be binding on every party to the treaty being interpreted.[320] Finally, there exists general agreement that the relevant rules can encompass those in existence at the time of interpretation.[321]

In the present context, it is relevant that complementary protection conferred by art 7 of the *International Covenant on Civil and Political Rights* ('*ICCPR*')[322] and art 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*')[323] is non-derogable insofar as these provisions safeguard a person against refoulement to a state with respect to which there exist substantial grounds for believing that the person would be subjected to qualifying forms of torture or cruel, inhuman, or degrading treatment or punishment.[324] While there is no precise identity between the states parties to the *Refugee Convention* and those to the *ICCPR* and *CAT*, such that the latter two treaties cannot be said to bind, by force of being a treaty, every host state that is party to the *Refugee Convention*, the above two provisions nonetheless can be 'taken into account' under *VCLT* art 31(3)(c) on the basis that they reflect customary international law.[325]

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[310] *EN (Serbia)* (n 121), discussed in *DMQ20 2023 Decision* (n 4) [36], [52], [56], [57] (Rares J).
[311] *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening) (Judgment)* [2014] ICJ Rep 226, 257 [83].
[312] *DMQ20 2023 Decision* (n 4) [112] (Thomas and Snaden JJ).
[313] See, eg, Gardiner (n 34) 299; Villiger (n 37) 433 [25].
[314] Villiger (n 37) 432 [24].
[315] See, eg, Villiger (n 35) 111.
[316] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177, 219 [113].
[317] Ibid.
[318] See especially Bruno Simma and Theodore Kill, 'Harmonising Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 678, 695–6.
[319] See, eg, Villiger (n 35) 112.
[320] Ibid.
[321] See, eg, Aust (n 34) 243–4.
[322] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1976, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[323] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*').
[324] See generally Goodwin-Gill, McAdam, and Dunlop (n 47) 364–72.
[325] See generally David Kretzmer, 'Torture, Prohibition of' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at May 2022) [38]; Gerrit Zach, 'Article 2 Obligation to Prevent Torture' in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds), *The United Nations Convention against Torture and Its Optional Protocol: A Commentary* (Oxford University Press, 2nd ed, 2019) 72, 91 [57].

It is also relevant that rules of international human rights law prohibit the type of mandatory and indefinite immigration detention that continues to exist in Australia and in designated regional processing countries.[326] Article 9(1) of the *ICCPR* prohibits the arbitrary detention of any person and reflects customary international law,[327] such that the prohibition can be regarded as binding on the states parties to the *Refugee Convention* despite the absence of any precise coincidence between these states parties and those to the *Covenant*. Relevantly, the UN Human Rights Committee has reviewed the international lawfulness of Australia's immigration detention regime against the prohibition of arbitrary detention in *ICCPR* art 9(1). In *FJ v Australia*,[328] and relevantly to the present section of this article, the Committee explained:

> Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention.[329]

The Committee concluded that Australia's detention in immigration facilities of the authors of the individual communication was arbitrary and contrary to art 9(1) of the *Covenant*.[330] While the Committee's 'views' adopted through this individual communications procedure established under the *First Optional Protocol to the ICCPR*[331] are not formally binding on states parties,[332] they nonetheless exert a persuasive influence during the process of interpreting the *Covenant*. As the ICJ observed in its *Diallo*[333] judgment:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[334]

In ascertaining the international legal meaning of art 33(2), then, an interpretation that is compatible with states parties' customary international legal obligations under human rights law should be favoured over one that does not. In circumstances where refoulement under art 33(2) will contravene the non-derogable customary prohibition of non-refoulement because the feared persecution also will constitute a qualifying form of harm under human rights law, this favours an interpretation of art 33(2) that limits its sphere of operation to cases where the feared persecution does not rise to the threshold of torture or cruel, inhuman, or degrading treatment or punishment. At the same time, the imperative to avoid outcomes where art 33(2) operates to place a non-removable refugee in indefinite immigration detention – in violation of international

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[326] *Migration Act* (n 149) pt 2 div 8 subdiv B.
[327] See especially Human Rights Committee, *General Comment No 24: Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, 52nd sess, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) 3 [8].
[328] Human Rights Committee, *Views: Communication No 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016) ('*FJ v Australia*').
[329] Ibid 17 [10.3] (citations omitted).
[330] Ibid 17 [10.4].
[331] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 1–2 ('*First Optional Protocol to the ICCPR*').
[332] See generally Christian Tomuschat, 'Human Rights Committee' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at April 2019) [14].
[333] *Diallo (Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639 ('*Diallo*').
[334] Ibid 664 [66]. The ICJ explained that its interpretation of art 13 of the *ICCPR* (n 322) was 'fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties': at 663 [66], citing: Human Rights Committee, *Views: Communication No 58/1979*, 12th sess, UN Doc CCPR/C/12/D/58/1979 (9 April 1981) [9.3] ('*Maroufidou v Sweden*'); Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess, UN Doc HRI/GEN/1/Rev.1 (11 April 1986).

human rights law – justifies a restrictive interpretation of art 33(2). As Zimmermann and Wennholz explain,

> indefinite detention … of dangerous refugees, is a means not provided for in the 1951 Convention. As such a measure would severely affect the personal liberty protected under most human rights instruments and presently lacks any legal basis … in practical terms it appears hardly conceivable to apply it as a 'minus' to *refoulement*.[335]

Neither Rares J nor the plurality in *DMQ20* refer to the international legal prohibition of refoulement under human rights law beyond the plurality's cursory reference to the fact that it was not contested that the appellant satisfied both the refugee protection criterion in s 36(2)(a) and the complementary protection criterion in s 36(2)(aa) of the *Migration Act*.[336] Further, the Full Court's reasons disclose only limited engagement with the prospect of indefinite immigration detention as a possible adverse consequence of the appellant being denied a protection visa. Rares J referred to the appellant's argument that, due to the enactment of s 197C of the Act in 2021, he no longer could be refouled to Sudan and instead was at risk of being placed in indefinite immigration detention,[337] but his Honour summarily rejected the argument on the basis that it had not been sufficiently developed.[338] The plurality addressed in more detail the possibility of the appellant being detained indefinitely in immigration detention but, even here, their Honours confined their analysis to the Australian common law principle of legality.[339] The inadequacy of this reasoning, separately from, and additional to, its lack of engagement with the international legal prohibition of arbitrary detention, has been highlighted earlier in this article.

2 *Supplementary Means of Interpretation*

The second broad stage of the interpretive process set out in the *VCLT* deals with supplementary means of treaty interpretation. This is regulated by art 32 (entitled 'Supplementary means of interpretation'), which provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

Article 32 is a discretionary, rather than mandatory, stage of the interpretive process:[340] 'recourse' denotes nothing more than that supplementary means of interpretation may be considered and utilized for the purposes set out in the balance of the provision,[341] and 'the greater the reliance to be placed on supplementary means, the more closely defined are the circumstances in which they may be used'.[342] The first limb of art 32 permits recourse to supplementary means for the purpose of confirming a meaning derived from the application of the general rule of interpretation in art 31. This limb is susceptible to an expansive application because the use of art 32 to confirm an interpretation supplied by art 31 does not have to fulfil any specific or express

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[335] Zimmermann and Wennholz (n 233) 1422 [106] (emphasis in original).
[336] *DMQ20 2023 Decision* (n 4) [83] (Thomas and Snaden JJ).
[337] Ibid [27] (Rares J).
[338] Ibid.
[339] Ibid [149]–[150] (Thomas and Snaden JJ).
[340] See, eg, Oliver Dörr, 'Article 32' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018) 617, 628 [29]. See also ILC (n 35) 223.
[341] See, eg, Gardiner (n 34) 356. See also Dörr (n 340) 631 [37].
[342] Gardiner (n 38) 471. See also Gardiner (n 34) 347, 358.

purpose.[343] By contrast, the second limb of art 32 permits recourse to supplementary means to determine the meaning of a treaty term only when the interpretation supplied by art 31 is inadequate or incomplete. Its use, which is rare in practice,[344] is expressly conditioned on the existence of either an ambiguous or obscure meaning or a manifestly absurd or unreasonable result.

(a) *Preparatory Work Leading to the Adoption of the* Refugee Convention

(i) *General Principles: Use of Preparatory Work*

The first supplementary means mentioned in *VCLT* art 32, the 'preparatory work of the treaty', is uncertain in scope but at least refers to 'all documents relevant to the forthcoming treaty and generated by the parties during the treaty's preparation up to its conclusion'.[345] More specifically,

> it is generally understood to include … successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretive statements by the chairman of a drafting committee and ILC Commentaries.[346]

The preparatory work, however, must be used with caution because it may be incomplete or misleading,[347] may be irrelevant,[348] may lack objectivity,[349] may be confidential and inaccessible to the interpreter,[350] is often heterogeneous and even contradictory,[351] may be exploited by states wishing to record their own position on an issue knowing that this can influence the interpretation of the treaty after it enters into force,[352] and may not accurately reflect or capture states' positions on certain issues, which can change over time.[353] Recognizing these as potential methodological constraints on the course of research undertaken in this article, this section proceeds to consider what insight can be gained from the available materials belonging to this category of 'supplementary means'.

In the immediate context of the *travaux préparatoires* leading to the adoption of the *Refugee Convention*, the 'preparatory work of the treaty'

> typically refers to the drafting records and related documents of the Ad Hoc Committee on Statelessness and Related Problems (later renamed the Ad Hoc Committee on Refugees and Stateless Persons) (1950) and the Conference of Plenipotentiaries (1951), including successive drafts of the treaty text, written interventions by delegates, and minutes of meetings.[354]

(ii) *The Work of the 1950 Ad Hoc Committee*

During the first session of the 1950 Ad Hoc Committee on Refugees and Stateless Persons, the Committee adopted the following draft text of art 33 (then draft art 28):

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[343] See, eg, Gardiner (n 34) 348–9, 459. Gardiner observes that '[t]he use of preparatory work, though supplementary rather than part of the general rule, extends from assisting a general understanding, through a very wide notion of "confirming" meaning, to a much more closely conditioned role of "determining" meaning': at 459. See also Gardiner (n 38) 471. See further Sbolci (n 35) 150–1.
[344] See, eg, Gardiner (n 38) 473.
[345] Villiger (n 35) 112.
[346] Aust (n 34) 246 (citations omitted).
[347] See especially ILC (n 35) 220; Aust (n 34) 244.
[348] See, eg, Villiger (n 35) 113.
[349] See, eg, Frank Berman and David Bentley, 'Interpretation, Reservations, Termination, The Effect of War, Ius Cogens' in Sir Ivor Roberts (ed), *Satow's Diplomatic Practice* (Oxford University Press, 7th ed, 2016) 644, 647 [35.9].
[350] See, eg, Sbolci (n 35) 152; Aust (n 34) 246; Villiger (n 35) 113.
[351] See, eg, Sbolci (n 35) 152; Villiger (n 35) 113.
[352] See, eg, Sbolci (n 35) 152.
[353] Ibid.
[354] McAdam (n 19) 99–100 [74].

> No Contracting State shall expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.[355]

It did not contain any exceptions to the prohibition of refoulement: the Committee considered that '[t]he turning back of a refugee to the frontiers of a country where his life or freedom would be threatened on account of [one of the then four *Convention* grounds] would be tantamount to delivering him into the hands of his persecutors'.[356] In his comments on the Committee's report recording the above adoption of draft art 28, however, the British representative ventilated the option of converting draft art 28 from an absolute prohibition to a qualified prohibition. He explained that

> His Majesty's Government … have in mind … certain exceptional cases, including those in which an alien, despite warning, persists in conduct prejudicial to good order and government and the ordinary sanctions of the law have failed to stop such conduct; or those in which an alien, although technically a refugee within the meaning of article 1 of the Convention, is known to be a criminal. In such and similar exceptional cases His Majesty's Government must reserve the right to deport or return the alien to whatever country is prepared to receive him, even though this involved his return to his own country.[357]

During the Committee's second session, the British representative distilled his essential dilemma as being that 'the United Kingdom Government did not know exactly how to deal with cases where a refugee was disturbing the public order of the United Kingdom'.[358] The British representative here 'referred not to ordinary crimes, but to such activities as inciting disorder'[359] where, 'without the declaration of a state of emergency, the presence of a refugee might still be deemed highly undesirable'.[360] He expressed his government's reluctance to deprive itself of a power to refoule a refugee as a last resort[361] in 'special circumstances'.[362] The Swiss representative appears to have shared the British position, indicating that his government 'wished to reserve the right in quite exceptional circumstances to expel an undesirable alien … since the [Swiss] Government might easily find itself so placed that there was no other means of getting rid of an alien who had seriously compromised himself'.[363]

The Israeli representative was sympathetic to the British representative's concern but identified the source of the British dilemma as being the 'problem of a socially dangerous individual still legally entitled to liberty':[364] under British law, such a person, after having served a prison sentence, 'retained unimpaired his power to do more evil'.[365] The Israeli representative suggested that a better solution might be to insert an 'internal measures' provision of the type now existing in the second sentence of art 32(3) (then draft art 27(3));[366] while he conceded that the United Kingdom would

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[355] *Report of the Ad Hoc Committee on Statelessness and Related Problems*, UN ESCOR, UN Doc E/1618 and E/AC.32/5 (17 February 1950) annex I ('*Text of Proposed Draft Convention relating to the Status of Refugees*') art 28.
[356] Ibid 61.
[357] Ad Hoc Committee on Refugees and Stateless Persons, *Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems*, UN ESCOR, UN Doc E/AC.32/L.40 (10 August 1950) 57.
[358] Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Fortieth Meeting*, UN ESCOR, UN Doc E/AC.32/SR.40 (27 September 1950) 30 ('*Fortieth Meeting Summary Record*').
[359] Ibid.
[360] Ibid.
[361] Ibid 30–1.
[362] Ibid 31.
[363] Ibid 32.
[364] Ibid 31.
[365] Ibid.
[366] Ibid. The second sentence of draft art 27(3), as it stood when the Ad Hoc Committee adopted the draft convention in its first session, provided that, during the reasonable period that must be afforded to a refugee allowing them to seek legal admission into another country, the host state 'reserve[s] the right to apply during that period such internal

need to enact legislation to provide an adequate domestic legal basis for the use of such measures, he suggested that this solution might assist other states.[367] The representative of the International Refugee Organization added that, while draft art 28 'imposed a negative duty forbidding the expulsion of any refugee to certain territories',[368] it 'did not impose the obligation to allow a refugee to take up residence'.[369]

Other representatives firmly opposed the British position. The French representative 'considered that any possibility, even in exceptional circumstances, of a genuine refugee … being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention'.[370] The United States representative likewise 'felt that it would be highly undesirable to suggest in the text of [draft] article [28] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution'.[371] He also regarded Israel's solution as unnecessary as draft art 28 did not preclude host states from pursuing other alternatives to deportation.[372]

The Committee proceeded to adopt draft art 28 in the following form:

> No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.[373]

In so adopting draft art 28, the Committee made the following comment:

> While some question was raised as to the possibility of exceptions to Article 28, the Committee felt strongly that the principle here expressed was fundamental and that it should not be impaired.[374]

(iii) *The Work of the 1951 Conference of Plenipotentiaries*

During the 1951 Conference of Plenipotentiaries, the question of introducing exceptions into draft art 28 was revisited and, this time, two proposals were advanced: a joint British–French proposal and a Swedish proposal. The joint proposal suggested inserting into draft art 28 a second paragraph in the following terms:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is residing, or who, having been lawfully convicted in that country of particularly serious crimes or offences, constitutes a danger to the community thereof.[375]

The French representative explained that the joint proposal sought to prevent refugees from abusing their right to asylum and to allow host states 'to punish … activities directed against national security or constituting a danger to the community',[376] with these grounds being exhaustive[377] and other possible grounds, such as indigence,[378] being excluded. Drawing an apparent link to exclusion under what is now art 1F, he

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measures as [it] may deem necessary': *Text of Proposed Draft Convention relating to the Status of Refugees*, UN Doc E/1618 and E/AC.32/5 (n 355) art 27(3).

[367] *Fortieth Meeting Summary Record*, UN Doc E/AC.32/SR.40 (n 358) 31.

[368] Ibid 33.

[369] Ibid.

[370] Ibid.

[371] Ibid 31.

[372] Ibid 32.

[373] *Report of the Ad Hoc Committee on Statelessness and Related Problems*, UN ESCOR, UN Doc E/1850 and E/AC.32/8 (25 August 1950) annex I ('*Revised Draft Convention*') art 28.

[374] Ibid 13.

[375] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *France/United Kingdom: Amendment to Article 28*, UN GAOR, UN Doc A/CONF.2/69 (11 July 1951) 1.

[376] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting*, UN GAOR, UN Doc A/CONF.2/SR.16 (23 November 1951) 7 ('*Sixteenth Meeting Summary Record*').

[377] Ibid.

[378] Ibid.

also observed that 'the text of the draft Convention admitted the principle that a State could refuse the right of asylum'[379] and that '[i]t was therefore only just that countries which granted that right should be able to withdraw it in certain circumstances'.[380] The British representative 'associated himself with the remarks made by the French representative'[381] and likewise explained that the authors of the proposal 'had sought to restrict its scope, so as not to prejudice the efficacy of [draft] article [28] as a whole'.[382] He added that '[i]t must be left to States to decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay',[383] and continued:

> Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency. To condemn such persons to lifelong imprisonment, even if that were a practicable course, would be no better solution.[384]

While the Canadian representative agreed with the comments of the French and British representatives and supported the joint proposal,[385] many of the other representatives sought clarification.

As to the meaning of 'reasonable grounds' in the first limb of the second paragraph, which the representative of the Holy See regarded as an imprecise expression (preferring instead the wording 'may not, however, be claimed by a refugee *who constitutes* a danger to the security of the country'),[386] the British representative explained that the motivation behind the use of the words 'reasonable grounds' was that 'it must be left to States to determine whether there were sufficient grounds for regarding any refugee as a danger to the security of the country'.[387]

As to the meaning of having been 'lawfully convicted' of particularly serious crimes or offences, which the Belgian[388] and Israeli[389] representatives had queried, the British representative considered that 'final conviction … was meant, … after any appeal had been heard or after the term of appeal had expired'.[390] He added that '[t]he word "convicted" could stand, because it implied final conviction, sometimes after appeal or after the term of appeal had expired',[391] but did not object to an addition to the text 'to show quite clearly that final conviction was meant',[392] and he remained receptive to other drafting suggestions.[393] At this juncture, the Belgian representative considered that a consensus had emerged that the word 'finally' should be substituted for the word 'lawfully'.[394]

As to the meaning of the expression 'in which he is residing', which the President of the Conference had queried (specifically, whether it 'was to be interpreted in the broadest sense, namely "in which he finds himself"'),[395] the British representative confirmed that the President's broad interpretation was the correct reading of the

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[379] Ibid 6.
[380] Ibid.
[381] Ibid 8.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid.
[386] Ibid (emphasis in original).
[387] Ibid.
[388] Ibid 10.
[389] Ibid 14.
[390] Ibid 12–13.
[391] Ibid 14.
[392] Ibid.
[393] Ibid.
[394] Ibid.
[395] Ibid 12.

English text of the joint proposal.[396] The Belgian representative later discerned a general consensus that the words 'in which he finds himself' should be substituted for the words 'in which he is residing'.[397]

The apparent divergence of meaning between the English and French texts about the concept of 'particularly serious crimes or offences' provoked more spirited debate. Even after agreeing that the words 'or offences' should be jettisoned from the English text,[398] the British representative acknowledged that discrepancies persisted since 'the French text referred to "*crimes ou délits*", whereas the word "crimes" was sufficient in the English text'.[399] The Belgian representative 'thought it would be preferable to retain both the word "*crimes*" and the word "*délits*" in the French text'.[400] The President, however, cautioned that the French and English texts 'were not intended merely for French-speaking and English-speaking countries respectively; they might later have to be translated into other languages, including Chinese, Russian and Spanish, as provided for in article 40 of the draft Convention',[401] adding that '[o]ther countries might interpret the words "crimes or offences" in different ways'.[402]

To help achieve universality of meaning, the French representative suggested the formulation 'convicted because of particularly serious acts'.[403] The Belgian representative, however, considered that this formulation would be susceptible to arbitrary interpretations.[404] The Israeli representative suggested that the Style Committee could harmonize the two texts[405] and was also 'somewhat puzzled by the French representative's suggestion that the concept should be reduced to the word "acts", because an act was not criminal unless legally designated as such'.[406] The Swiss representative recognized the force of the concerns of the Belgian and Israeli representatives but considered it 'preferable to adopt the French proposal in view of the difficulty of finding adequate translations for the words "*crimes*" and "*délits*"'.[407] The Dutch representative drew attention to an identical difficulty emerging during the drafting of another treaty that had been resolved by using the word 'offence' in the English text and the word '*infraction*'[408] in the French text.[409]

The Italian representative proposed that 'the words "or having been declared by the Court a habitual offender" should be inserted in the joint amendment immediately after the words "crimes or offences", in order to provide for the case of habitual criminals'.[410] The British representative appreciated the intent behind this proposal but 'wished to point out that to be classified by the courts as a hardened or habitual criminal, a person must have committed either serious crimes, or an accumulation of petty crimes'.[411] In his view, '[t]he first case would be covered by the joint amendment'[412] and he was 'quite content to leave the second outside the scope of the provision'.[413]

The Swedish proposal suggested revising draft art 28 entirely as follows:

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[396] Ibid.
[397] Ibid 14.
[398] Ibid.
[399] Ibid 13 (emphasis in original).
[400] Ibid 14 (emphasis in original).
[401] Ibid 15. Draft art 40 is now art 46 of the *Refugee Convention* (n 1).
[402] *Sixteenth Meeting Summary Record*, UN Doc A/CONF.2/SR.16 (n 376) 15.
[403] Ibid.
[404] Ibid.
[405] Ibid.
[406] Ibid 15–16.
[407] Ibid 16 (emphasis in original).
[408] Ibid (emphasis in original).
[409] Ibid.
[410] Ibid.
[411] Ibid 16–17.
[412] Ibid 17.
[413] Ibid.

> No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion, or where he would be exposed to the risk of being sent to a territory where his life or freedom would thereby be endangered.
>
> By way of exception, however, such measures shall be permitted in the case where the presence of a refugee in the territory of a Contracting State would constitute a danger to national security or public order.[414]

The first paragraph of this proposal sought to safeguard refugees against the prospect of chain refoulement[415] and to introduce 'membership of a particular social group' into the prohibition of refoulement in order to achieve symmetry with what would become the five *Convention* grounds recognized by the universal refugee definition in art 1A(2).[416] Neither facet is presently material. The Swedish representative, however, also explained that the second paragraph of the proposal 'had been moved for more or less the same reasons as the joint [British–French] amendment'[417] and was

> intended to meet the case of refugees engaged in subversive activities threatening the security of their country of asylum, refugees who, after having been accepted as residents, were found to have been fugitives from justice in their own country, and refugees who failed to comply with the conditions of residence.[418]

He also drew attention to the possibility of 'a compromise text'[419] of a second paragraph of draft art 28 based on both proposals before the Conference.[420]

The second paragraph of the Swedish proposal attracted little visible discussion distinct from the joint proposal, but some representatives voiced concerns common to both proposals. The representative of the Holy See perceived some imprecision in the opening words of the second paragraph of the Swedish proposal and preferred the joint proposal as it 'afforded greater safeguards to the refugee'.[421] Nonetheless, he appeared to prefer the original, unqualified draft art 28 to either proposal, since this version 'was in itself sufficient to furnish those safeguards, as no exceptions were provided for'.[422] He even appeared to consider it inconceivable that the deportation of a refugee ever would be necessary: '[a] State would always be in a position to protect itself against refugees who constituted a danger to national security or public order'.[423]

The Danish representative wished to be assured that a host state could not interpret either proposal in a way that would permit the host state to deport a refugee to their state of origin in order to avert a political crisis that otherwise might ensue if the state of origin were an influential global power and had demanded the refugee's return.[424] The British representative replied that the operation of extradition treaties between host states and states of origin was a matter beyond the purview of the (then draft) *Refugee Convention*[425] and that, further, most extradition treaties, or at least those signed by the United Kingdom, contained safeguards against, for example, prosecutions for political offences.[426]

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[414] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Sweden: Amendment to Article 28*, UN GAOR, UN Doc A/CONF.2/70 (11 July 1951) 1.
[415] *Sixteenth Meeting Summary Record*, UN Doc A/CONF.2/SR.16 (n 376) 4.
[416] Ibid.
[417] Ibid 9.
[418] Ibid.
[419] Ibid.
[420] Ibid.
[421] Ibid 5.
[422] Ibid.
[423] Ibid.
[424] Ibid 10–11.
[425] Ibid 13.
[426] Ibid.

The Swedish representative ultimately withdrew the second paragraph of his proposal.[427]

The Swedish proposal, confined to its first paragraph (and as amended in light of other discussions during the Conference), was adopted by six votes to four, with 12 abstentions.[428] The joint proposal, as amended, was adopted by 19 votes to none, with three abstentions.[429] Draft art 28, then, and as amended, was adopted by 19 votes to none, with three abstentions.[430]

Following the Style Committee's drafting of a proposed form of the text and its renumbering of draft art 28 to draft art 33,[431] the British representative suggested,[432] and it was agreed,[433] that the word 'trial' in the Style Committee's draft should be replaced with 'final' so that the relevant text read 'convicted by a final judgment of a particularly serious crime'. As a result of a proposal of the British representative seeking to clarify that the conviction must have been sustained in the host state, debate about draft art 33(2) then focused on the question of whether the host state could refoule a refugee no matter where the 'particularly serious crime' was committed,[434] although the British representative later withdrew his proposal in apparent deference to the views expressed that draft art 33(2) could apply to refugees who had been convicted of particularly serious crimes in states other than the host state.[435]

The matter proceeded to a vote. Draft art 33(1) was adopted by 21 votes to none, with two abstentions,[436] and draft art 33(2) was adopted by 20 votes to none, with three abstentions.[437] Article 33, then, and as amended, was adopted by 20 votes to none, with three abstentions.[438]

(iv) *Findings of Survey of Preparatory Work*

This survey of the preparatory work leading to the adoption of the *Refugee Convention* yields four insights that, to varying degrees, confirm specific facets of the meaning of art 33(2) derived from the application of *VCLT* art 31.

First, the survey confirms that the principle of non-refoulement is a hallowed legal principle and that a host state's invocation of an exception to the general prohibition of refoulement is necessary only in exceptional circumstances. It reinforces the need for a restrictive interpretation of art 33(2). Second, the survey confirms that the object and purpose of art 33(2) is to protect the host state. Third, the survey reveals that the motivation of the state that originally mooted the possibility of an exception to the prohibition of refoulement, which was also one of the two states sponsoring the joint proposal that ultimately became art 33(2), was a need to cure a domestic legislative deficit to respond to situations where a refugee has served a custodial sentence after being convicted of a particularly serious crime but is not rehabilitated. The survey, then, confirms that refoulement permitted by art 33(2) was intended to operate as a protective measure of last resort where the host state is otherwise unable to address the danger posed by a refugee. It may be noted in passing that, in circumstances where, as Rares J highlighted in *DMQ20*, '[o]ver at least the last 30 years Australian legislatures

[427] Ibid 17.
[428] Ibid.
[429] Ibid.
[430] Ibid.
[431] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Report of the Style Committee*, UN GAOR, UN Doc A/CONF.2/102/ADD.1 (24 July 1951) 4.
[432] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-Fifth Meeting*, UN GAOR, UN Doc A/CONF.2/SR.35 (3 December 1951) 22.
[433] Ibid.
[434] Ibid 22–4.
[435] Ibid 24.
[436] Ibid 25.
[437] Ibid.
[438] Ibid.

have enacted statutes that authorise subsequent, non-punitive detention or lesser restraints on freedom of persons who have been convicted of crimes and served their sentences of imprisonment',[439] and where 'many other democratic nations have enacted legislation authorising preventative detention to deal with, or guard against ongoing, threats to their communities from terrorism and persons who have fanatical beliefs',[440] it is clear that the historical justification for art 33(2) has substantially diminished. Fourth, the British representative's view that the indefinite detention of dangerous refugees would be no better a solution than refoulement, while the view of only one representative participating in the 1951 Conference, nonetheless provides some slender support in confirming that the need to construe art 33(2) restrictively in light of the possible adverse consequences of its application is equally important irrespective of whether the possible adverse consequence to the refugee is refoulement or, where refoulement is not practicable, indefinite immigration detention.

In the Full Federal Court's decision in *DMQ20*, the plurality made a singular, indirect reference to the preparatory work of the *Refugee Convention*: their Honours quoted a passage from an extrajudicial opinion relied on by the appellant in which the author referred to the British representative's view during the 1951 Conference that a refugee who commits serious crimes would be refoulable under the British–French joint proposal but a refugee who commits an accumulation of petty crimes would not be.[441] The plurality, however, did not, on their own motion, survey the *Convention*'s preparatory work or otherwise seek to apply this component of *VCLT* art 32. Rares J's judgment reveals slightly more visible engagement with the preparatory work: his Honour quoted the same extract from the same extrajudicial opinion but added emphasis to the British representative's explanation of those to whom the joint proposal was intended to apply and not apply.[442] His Honour also observed that, 'in negotiating Art 33(2), the States Party considered that the risk of recidivism was, itself, not sufficient'[443] to justify refoulement.[444] Strictly speaking, however, this observation is merely an endorsement of a second-hand account, provided by the author of the same extrajudicial opinion, about this aspect of the preparatory work.[445] Further, like the plurality, and despite referring expressly to *VCLT* art 32 on two occasions,[446] Rares J did not survey the preparatory work in any detail.

(b) *The Circumstances of the* Refugee Convention*'s Conclusion*

The adjacent concept of the 'circumstances of [the treaty's] conclusion' in *VCLT* art 32, while overlapping with other elements of the interpretive process in arts 31–33,[447] refers to all relevant circumstances external to the actual development process of a treaty that are contemporaneous with its conclusion,[448] such as 'the political, economical, social, or other situation of the parties at the time of conclusion'.[449] Here, the contemporaneous accounts of the state representatives during the 1951 Conference of Plenipotentiaries reveal the source of the prevailing international anxiety that had emerged since a year earlier: the British representative highlighted that 'the climate of

[439] *DMQ20 2023 Decision* (n 4) [63] (Rares J).
[440] Ibid.
[441] Ibid [137] (Thomas and Snaden JJ).
[442] Ibid [40] (Rares J).
[443] Ibid [59].
[444] Ibid.
[445] Cf ibid.
[446] Ibid [32], [48].
[447] As Gardiner observes, '[t]hey overlap or interact with other elements in the Vienna rules, such as the object and purpose of a treaty, instruments which may be made in connection with [the] conclusion of a treaty, and the preparatory work': Gardiner (n 34) 398.
[448] See, eg, Yves le Bouthillier, 'Art.32 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press, 2011) 841, 859 [39].
[449] Ibid 860 [40] (citations omitted).

opinion had altered since [draft] article 28 had been drafted, and … each government had become more keenly aware of the current dangers to its national security',[450] and the Canadian representative noted that '[s]ince [the time of drafting art 28] … the international situation had deteriorated, and it must be recognized, albeit with reluctance, that at present many governments would find difficulty in accepting unconditionally the principle embodied in article 28'.[451] As Zimmerman and Wennholz infer, '[u]nder the influence of recent historical developments connected to the emerging Cold War, national security concerns gained significant ground [during the Conference]'.[452] This element of the interpretive process, then, confirms that the apprehended harm must be of such a magnitude as to be capable of threatening the collective interests of the host state, of the type that might be posed, for example, by an agent of a hostile foreign power.

In the Full Federal Court's decision in *DMQ20*, neither the plurality nor Rares J refer, or appear to give any weight, to this *VCLT* element. The plurality does not refer to any surrounding circumstances contemporaneous with the *Refugee Convention*'s conclusion. Rares J does refer, albeit briefly, to the historical context giving rise to the drafting and adoption of the *Convention*: his Honour observes that '[n]o doubt the drafters of the *Refugees Convention* were concerned that no host State Party should be bound to accept a refugee who, objectively, could be regarded as posing a danger to its community, especially after the horrors of World War II'.[453] This reference to the Second World War, however, appears to conflate the circumstances giving rise to the insertion of art 33(2) with the circumstances giving rise to the insertion of the exclusion clauses in art 1F. As UNHCR explains in its *Handbook* when explaining the historical impetus for the insertion of art 1F, '[a]t the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected'.[454] While UNHCR proceeds to explain, in the next sentence, that '[t]here was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order',[455] this comment is inconsistent with UNHCR's 'Guidelines' on art 1F and their accompanying 'Background Note', which emphasize that art 1F is 'not to be confused with Articles 32 and 33(2) of the Convention[,] which deal respectively with the expulsion of, and the withdrawal of protection from refoulement from, recognised refugees who pose a danger to the host State';[456] that 'Article 1F should not be confused with Article 33(2)';[457] and that 'Articles 1F and 33(2) are … distinct legal provisions serving very different purposes'.[458]

(c) *Other Supplementary Means of Interpretation*

Finally, *VCLT* art 32 is framed in inclusive language and permits recourse not only to 'the preparatory work of the treaty' and 'the circumstances of its conclusion', but also to an open category of other supplementary means of interpretation.[459] Here, UNHCR's *Handbook*[460] and 'Guidelines on International Protection',[461] as well as academic commentaries,[462] have been highlighted as further supplementary means of

[450] *Sixteenth Meeting Summary Record*, UN Doc A/CONF.2/SR.16 (n 376) 8.
[451] Ibid 8–9.
[452] Zimmermann and Wennholz (n 233) 1403 [20] (citations omitted).
[453] *DMQ20 2023 Decision* (n 4) [62] (Rares J) (emphasis in original).
[454] *2019 Handbook*, UN Doc HCR/1P/4/ENG/REV.4 (n 209) [148].
[455] Ibid.
[456] 'Exclusion Guidelines', UN Doc HCR/GIP/03/05 (n 48) [4].
[457] 'Background Note' (n 48) [10].
[458] Ibid.
[459] See, eg, Gardiner (n 34) 357; Sbolci (n 35) 151, 158; Aust (n 34) 248; Le Bouthillier (n 448) 861 [42], 863 [47].
[460] McAdam (n 19) 110–12 [109]–[116].
[461] Ibid 113–14 [119]–[122].
[462] Ibid 114–15 [123].

interpretation and, to the extent that these materials are referred to, and relied on, in the present article, *VCLT* art 32 permits recourse to these materials to confirm the meaning of art 33(2) of the *Refugee Convention* derived from other *VCLT* factors. Criticisms of the Full Court's reasons in *DMQ20* based on their lack of adequate engagement with, in particular, UNHCR materials can be amplified here because *VCLT* art 32 supplies a separate and additional legal basis for considering these materials, one whose invocation to confirm the meaning derived from applying art 31 is unrestricted,[463] yet the Full Court declined to make use of this readily available option to consider UNHCR materials more thoroughly.

3 *Treaties Authenticated in Multiple Languages*

The third broad stage of the interpretive process deals with the study of treaties authenticated in multiple languages. This is regulated by *VCLT* art 33 (entitled 'Interpretation of treaties authenticated in two or more languages'), which provides:

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

The basic principle underlying art 33 is the unity of the treaty: despite being manifested in different texts and multiple languages, there exists one singular treaty.[464] This principle receives specific expression in paras (1) and (3). It is also clear from para (4) that the interpretive framework set out in arts 31–33 is broadly sequential and that the application of arts 31 and 32 must precede any reliance on art 33 to resolve linguistic differences.[465] Not all formal textual differences reflect a substantive divergence of meaning.[466] Where a true divergence does emerge, one solution may be to reconcile the conflicting texts by selecting the narrower of the available interpretive solutions.[467] As the International Law Commission observes, however, this maxim cannot be elevated to the status of a general principle that applies inflexibly to every interpretive exercise involving art 33.[468] Nor is it sound to apply automatically a presumption in favour of either the text with the greatest clarity[469] or the language used in the drafting of the treaty.[470] The decisive factor, as mandated by art 33(4), remains the object and purpose of the treaty.

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[463] Ibid.
[464] See, eg, Alain Papaux and Rémi Samson, 'Art.33 1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press, 2011) 866, 869–70 [11]–[12], 872 [26]; Gardiner (n 34) 447.
[465] See, eg, Gardiner (n 34) 423, 430, 442; Aust (n 34) 254.
[466] See especially Papaux and Samson (n 464) 874 [40].
[467] See, eg, *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 19, discussed in ILC (n 35) 225–6.
[468] ILC (n 35) 225–6.
[469] Ibid 226.
[470] Ibid. Aust observes, however, that, '[i]f the treaty was negotiated and drafted in only one of the authentic languages, it is natural to place more reliance on that text, particularly if it is unambiguous', and that such an approach 'is not incompatible with paragraph 4 [of *VCLT* (n 3) art 33]': Aust (n 34) 254.

In its application to the *Refugee Convention*, *VCLT* art 33 on its face appears to have some present relevance: the *Refugee Convention* not only is authenticated in both English and French,[471] but linguistic differences between the English and French texts of art 1F(b) of the *Convention* also have provoked an appreciable level of scholarly, judicial, and administrative analysis. In particular, the legal concept of a 'serious … crime' in art 1F(b) ('*un crime grave*'), when juxtaposed against the related concept of a 'particularly serious crime' in art 33(2) ('*un crime ou délit particulièrement grave*'), has produced uncertainty about whether art 1F(b) extends to both 'crimes' and 'delicts' under French national law, the former category of which encompasses a more serious set of criminal offences.[472] It may be reiterated, however, that, even if the crime–delict distinction is relevant to understanding art 33(2) of the *Refugee Convention*, in the present context the international legal meaning of this provision must account for the fact that s 5M of the *Migration Act* supplies its own definition of a 'particularly serious crime' for the purpose of s 36(1C)(b). The effect of this statutory deviation from the international legal meaning of art 33(2) has been considered above.

To the extent that variations in the meaning between the English and French texts of the *Refugee Convention* do exist, this introduces a methodological constraint on the course of legal research available to the present article. This constraint cannot be addressed by obtaining a translation of the French text of art 33(2), as these translations likely, and perhaps even inevitably, would simply restate the existing meaning conveyed by the English text. Rather, gaining a nuanced understanding of treaties authenticated in multiple languages requires expert evidence about the commonalities of, and divergences between, the different treaty texts. It also requires expert evidence from a comparative law perspective, as legal concepts belonging to one legal system may be entirely foreign to another legal system and may not lend themselves to a one-to-one equivalence or to a direct translation into another language.[473]

In the absence of authoritative and accessible expert evidence on these two subjects,[474] this article adopts a presumption that the English and French texts of art 33(2) of the *Refugee Convention* bear the same meaning. This presumption is consistent with *VCLT* art 33(3), which provides that '[t]he terms of the treaty are presumed to have the same meaning in each authentic text'. Any adverse effect of relying on the presumption is also attenuated by the important role of *VCLT* arts 31–32 in the interpretive process, which, as illustrated above, must be applied prior to resorting to art 33. Additionally, the presumption is consistent with the approach adopted by the ICJ in its judgment in *Kasikili/Sedudu Island*,[475] which, in the absence of any opposing argument advanced by Botswana or Namibia, was prepared to treat as identical in meaning the expressions 'centre of the main channel' and 'Thalweg des Hauptlaufes' in an 1890 Anglo–German treaty settling a territorial dispute over a fluvial island in the Chobe River.[476]

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[471] *Refugee Convention* (n 1) art 46.

[472] See, eg, Andreas Zimmermann and Philipp Wennholz, 'Article 1F (Definition of the Term "Refugee"/Définition du Terme "Réfugié")' in Andreas Zimmermann, Felix Machts, and Jonas Dörschner (eds), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 579, 598 [65]. See also *Zrig v Canada (Minister of Citizenship and Immigration)* [2003] 3 FC 761, [135] (Décary JA); *AH (Algeria)* [2013] UKUT 00382, [87]–[88] (Blake P, Gleeson, and King JJ), discussed in *Febles v Minister of Citizenship and Immigration (Canada)* [2014] 3 SCR 431, 484–5 [124]–[126] (Abella and Cromwell JJ); *AH (Algeria) v Secretary of State for the Home Department* [2015] EWCA Civ 1003, [34]–[36] (Laws LJ, Burnett LJ agreeing at [48], Sir Colin Rimer agreeing at [49]).

[473] See, eg, Papaux and Samson (n 464) 868–9 [2]–[6].

[474] The difficulty of obtaining such expert evidence is recognized in practice. As Gardiner observes, '[c]omparison of the text [of a treaty] in different authentic languages is routine in international litigation but the resources necessary to carry this out may make such comparison impracticable in everyday interpretation, or at least until a sufficiently critical issue emerges': Gardiner (n 34) 423 (citations omitted).

[475] *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045 ('*Kasikili/Sedudu Island*').

[476] Ibid 1062 [25].

In the Full Federal Court's decision in *DMQ20*, neither the plurality nor Rares J refer to *VCLT* art 33. The plurality makes only implicit reference to the *VCLT*[477] and does not refer to any non-English text of the *Refugee Convention* or its *Protocol*. Rares J, despite referring to the *VCLT* and its interpretive framework on two occasions,[478] each time refers only to *VCLT* arts 31–32.[479] This omission is striking in circumstances where the *Refugee Convention* has been authenticated in two languages[480] and where, further, its *Protocol* has been authenticated in five languages.[481] While the appellant, before both the primary judge and the Full Court, did not adduce any expert evidence of either kind mentioned above that would assist in identifying and explaining any divergences in the meaning of relevant treaty terms or their underlying legal concepts, it remained open to the Full Court, pursuant to r 1.40 of the *Federal Court Rules 2011* (Cth), to make an order of its own motion appointing an expert 'to inquire into and report on any question or on any facts relevant to any question arising in a proceeding'.[482] That is, the methodological constraint on the course of legal research available to the present article did not apply to the primary judge or the Full Court.

[477] *DMQ20 2023 Decision* (n 4) [104] (Thomas and Snaden JJ).
[478] Ibid [32], [48] (Rares J).
[479] Ibid.
[480] See above n 471.
[481] *Refugee Protocol* (n 2) art XI.
[482] *Federal Court Rules 2011* (Cth) r 23.01(1)(a).