

**REFUGEE LAW INITIATIVE: 7<sup>th</sup> annual conference, June 2023**

**Open Panel Discussion: CODIFICATION OF KEY ELEMENTS OF THE REFUGEE DEFINITION: THE GOOD, THE BAD AND THE UGY, Wed 21<sup>st</sup> June**

**Presentation by Hugo Storey:- 'The Search for an International Meaning'**

- Progressive codification**
- Neutral codification**
- Regressive codification**

### 3 examples of regressive codification

- **Trump Administration** (Att-Gen William Barr) ruling in 2019 that **victims of domestic violence and gang violence do not qualify as a PSG** (*Matter of L-E-A-*, 27 I&N Dec. 581);
- **Australian Liberal government's** legislative amendments in 2001 and 2014:
  - e.g. in 2001, requiring that **persecution must involve 'systematic and discriminatory conduct'**. (Migration Legislation Amendment Act (no 6) 2001 s91R)
  - e.g. in 2014, **requiring applicants to establish a real chance of persecution 'in all areas of the receiving country'** (Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Act 2014 – s5J(1)(c));
- **U.K. Conservative government's** Nationality and Borders Act 2022, ss 30-38, whose s32 **definition of well-founded fear imposes a higher standard of proof in relation to past and present facts than applied by the UK courts and tribunals over more than two decades.**

## ‘International meaning’

*Adan (Lul Omar) v SSHD* [2000] UKHL 67, Lord Steyn:

‘[The national court or tribunal] must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.’

## Article 27, Vienna Convention on the Law of Treaties:

‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

### Contrast:

-Australian government's 2014 Explanatory Memorandum: ‘[i]t was not the intention of the Government to resile from Australia's protection obligations under the Refugee Convention but rather to codify Australian's interpretation of these obligations within certain sections of the Migration Act.’ (Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 (Cth), p.170 at [1169]).

-Scott Morrison MP, Minister for Immigration and Border Protection, 2014: [the intention was to ensure that Australia is] ‘not subject to the interpretations of foreign courts or judicial bodies which seek to expand the scope of the Refugee Convention well beyond what was ever intended by this country or this Parliament’ and that ‘[t]his parliament should decide what our obligations are under these conventions—not those who seek to direct us otherwise from places outside this country.’ (Second Reading speech, House of Representatives, Hansard, 25 September 2014, 10545-10546).