
Introduction

1.1 Introduction

This book is concerned with the determination of refugee status (RSD) in the context of ‘natural’ disasters and climate change. The use of the quotation marks highlights a critical, paradigmatic understanding that registers the disasters that unfold in the context of natural hazards as deeply social processes. This approach differs from the notion of ‘natural disasters’, which tends to reflect a hazard-centric understanding of the phenomenon. As will be developed over the course of this book, how disasters are understood plays a role in RSD in this context.

Central to this book is the challenge that it presents to the dominant view that the legal meaning of the phrase ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ contained in the refugee definition at Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol¹ (the Refugee Convention) makes the Refugee Convention an inherently peripheral instrument for addressing the legal status of persons displaced across borders in the context of disasters and climate change. Critically, in this book I do not attempt to expand the refugee definition or offer any sort of policy proposal that would secure international protection for a greater number of people. Rather, I investigate assumptions underpinning the pronounced dichotomy between refugees and persons facing adversity in the context of disasters and climate change. Assumptions are both epistemological, relating to the perceived nature of ‘natural’ disasters, as well as doctrinal, concerning the meaning of the constitutive elements of the refugee definition at Article 1A(2). The result is a recalibrated human-rights-based understanding of the refugee definition that can be applied as much to claims for recognition of refugee status in the context of disasters and climate change as to other sorts of refugee claim.

1.2 The Dominant View

What in this book I refer to as the ‘dominant view’ of how the Refugee Convention applies in the context of ‘natural’ disasters and climate change is reflected in key cases that have shaped the development of international refugee law, and the writing of legal doctrinal scholars that purport to apply the law to the phenomenon of cross-border displacement in

¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 and Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

this connection. This ‘view’ is not monolithic, but key features emerge that highlight the inherent difficulties in establishing a well-founded fear of being persecuted in the context of ‘natural’ disasters and climate change.

The pronouncement in *Matter of Acosta* by the United States Board of Immigration Appeals reflects positions adopted by the High Court of Australia,² the Supreme Court of England and Wales,³ and the Canadian Supreme Court⁴ amongst others,⁵ that ‘large groups of persons displaced by civil strife and natural disasters . . . simply do not qualify under the Protocol’s limited definition of a “refugee”’.⁶

Dawson J’s obiter dictum in *A and Another* reflects the view that disaster-related harm is a phenomenon that is quite distinct from ‘persecution’:

By including in its operative provisions the requirement that a refugee fear persecution, the Convention limits its humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be the epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention.⁷

Dawson J expresses this view in the course of reaching an interpretation of the ‘particular social group’ ground within the refugee definition. Recognising that Article 31 of the Vienna Convention on the Law of Treaties⁸ (VCLT) requires reference to the context in which the term is used and the object and purpose of the treaty, he is drawn to consider what the Refugee Convention was designed to achieve. He recognises the humanitarian aim of the Convention from a reference in the preamble, but also notes the heavy burden refugees can place on host countries. From this he draws the conclusion above that the requirement that a refugee fear persecution limits the humanitarian scope of the Convention. What ‘persecution’ means is therefore crucial to understanding the scope of the refugee definition. Whatever its meaning, it would appear from the above that it does not include victims of epidemics, natural disasters, or famines.

Unfortunately, Dawson J does not dwell on disasters in the remainder of his judgment, which is more concerned with determining the meaning of the membership of a particular social group ground. However, McHugh J, in the same case, assists with his clarification of the meaning of ‘persecution for a Convention reason’ under the Refugee Convention:

Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.⁹

² *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4, [1997] 190 CLR 225.

³ *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] AC 489 (Lord Hope).

⁴ *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

⁵ Bundesverwaltungsgericht, *Beschluss vom 7. Februar 2008* – BVerwG 10 C 33.07, *S.J.L. v Refugee Appeals Tribunal and Others* [2014] IEHC 608, [43], *Matter of Maria Armida Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010), United States Board of Immigration Appeals, 23 November 2010.

⁶ *Matter of Acosta, A-24159781*, United States Board of Immigration Appeals, 1 March 1985.

⁷ *Applicant A* (n 2) 248.

⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁹ *Applicant A* (n 2) 258.

This broad characterisation incorporates denials of both civil and political as well as economic and social rights. It recognises the centrality of discrimination to the predicament faced by the claimant, a point that is further developed in Chapter 6. Although McHugh J does not address himself to the difference between ‘persecution’ and ‘natural disasters’, if his characterisation is taken as being to some extent indicative of what Dawson J had in mind when making his distinction between persecution and ‘natural’ disasters, it would suggest that ‘natural’ disasters lack the quality of discrimination that underpins all forms of persecution under the Convention. This construction does seem to reflect Dawson J’s approach, as he explains later in his judgment:

No doubt many of those limits in the present context spring from the well-accepted fact that international refugee law was meant to serve as a ‘substitute’ for national protection where the latter was not provided due to discrimination against persons on grounds of their civil and political status. It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.¹⁰

Although there is some limited legal doctrinal work challenging this view,¹¹ the notion that ‘natural disasters’ do not discriminate is reflected at the highest levels of scholarship. Jane McAdam, for example, cites Dawson J’s opinion in *Applicant A* after affirming that:

even if the impacts of climate change could be characterized as ‘persecution’, the Refugee Convention requires such persecution to be *for reasons of* an individual’s race, religion, nationality, political opinion, or membership of a particular social group. Persecution is not enough. The difficulty in the present context is that the impacts of climate change are largely indiscriminate, rather than tied to particular characteristics such as a person’s background or beliefs.¹²

Interestingly, whereas Dawson J locates the requisite discriminatory quality of the refugee definition within the ‘persecution’ element, McAdam appears to see this quality as residing within the nexus to the five Convention reasons. Already, how the constitutive elements of the refugee definition are interpreted can be seen to have an impact on how RSD is conducted in this context. This point will be explored more closely in Chapter 6. For now, the epistemological point that people fleeing ‘natural disasters’ are not refugees because ‘natural disasters’ do not have the quality of discrimination that is integral to the notion of persecution for a Convention reason is in focus. This epistemology of disasters reflects the understanding articulated by Dr Jacob Robinson, Israeli Ambassador Plenipotentiary to the Refugee Convention at the Twenty-Second Meeting of the Conference of Plenipotentiaries:

The text of sub-paragraph (2) obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion or political opinion. Nor did that text cover all man-made events.¹³

¹⁰ Ibid 248 (Dawson J). ¹¹ See Section 1.3.

¹² Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP 2012) 46.

¹³ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting (26 November 1951) UN Doc A/CONF.2/SR.22.

This view is reinforced in more contemporary times by António Guterres, then UN High Commissioner for Refugees:

As the refugee definition only applies to those who have crossed an international border, the difficulties in characterising climate change as ‘persecution’, and the indiscriminate nature of its impacts, it does not expressly cover those fleeing a natural disaster or slow-onset degradation in living conditions owing to the environment.¹⁴

Thus, the dominant view in international refugee law is that the Refugee Convention rarely applies in the context of ‘natural disasters’ and climate change because these phenomena do not discriminate, and discrimination is an integral feature of the refugee definition. Closely related is the view that harm associated with ‘natural disasters’ cannot amount to ‘persecution’ because the necessary quality of human agency is missing. As McAdam frames this, ‘[p]art of the problem in the climate change context is identifying a “persecutor”’.¹⁵

This view that the discriminatory conduct of human actors of persecution is largely absent from the experience of disaster and climate-change-related harm appears to resonate with senior judges in other common law jurisdictions. Indeed, Dawson J’s comment is quoted verbatim by Lord Hope in *Horvath*. Lord Hope is drawn to Dawson J’s reasoning in another context where the limits of the Refugee Convention were required to be delineated. *Horvath* concerned the question of state protection and when a person could be said to have a well-founded fear of being persecuted in situations where the state was taking steps to protect the population from non-state actors. Recognising that the question the Court had to address went to the heart of the meaning of ‘persecution’, Lord Hope sought interpretative guidance in the underlying purpose of the Convention, which he construed thus:

The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.¹⁶

Understanding this purpose from the perspective articulated by Hathaway,¹⁷ Lord Hope continued:

If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unwilling or unable to discharge its duty to establish and operate a system for the protection against persecution of its own nationals.¹⁸

It is in this connection that Lord Hope found assistance in the reasoning of Dawson J. Although Lord Hope is not concerned specifically with ‘natural disasters’, his adoption of Dawson J’s reasoning in this context suggests a second distinction between ‘natural disasters’ and ‘persecution’. In addition to the apparent lack of discrimination, people fleeing from ‘natural’ disasters would appear to still enjoy the protection of the state:

¹⁴ UN High Commissioner for Refugees António Guterres, ‘Migration, Displacement and Planned Relocation’ (31 December 2012) fn 22 <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=342&docid=55535d6a9&query=water#_edn22>, accessed 4 April 2019.

¹⁵ Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP 2012), 45.

¹⁶ *Horvath* (n 3) (Lord Hope). ¹⁷ James Hathaway, *The Law of Refugee Status* (Butterworths 1991).

¹⁸ *Horvath* (n 3), citing Hathaway, *Refugee Status* (n 17) 112.

I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist [*sic*] of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy.¹⁹

What the approach of Lord Hope in *Horvath* reveals for the immediate purposes of this introductory chapter is the assumption that the state will ‘do its best’ in the context of ‘natural disasters’; therefore, even when individuals risk dying in such a context, there is no need for surrogate international protection.²⁰

Kälin and Schrepfer endorse this view in their policy paper prepared for UNHCR:

from a legal perspective, *there is an intrinsic difference between the two categories: international refugee law is rooted in the notion of the surrogate nature of international protection . . . [whereas] in the case of cross-border displacement caused by effects of climate change, the country of origin normally does not turn against affected people but remains willing to assist and protect them.*²¹

This framing corresponds to Shacknove’s formulation that the need for international protection arises when the ‘bond of trust, loyalty, protection, and assistance between the citizen and the state’ is severed.²² Indeed, Shacknove summarises clearly the dominant view expressed by the judicial authorities highlighted above:

When determining who is, or is not, entitled to refugee status, natural disasters, such as floods and droughts, are usually dismissed as the bases for justified claims. Unlike the violent acts one person perpetrates against another, such disasters are not considered ‘political’ events. They are, supposedly, sources of vulnerability beyond social control which therefore impose no obligation on a government to secure a remedy. The bonds uniting citizen and state are said to endure even when the infrastructure or harvest of a region is obliterated. For even an ideally just state cannot save us from earthquakes, hurricanes, or eventual death.²³

Clearly, the disaster imagined in these cases is intimately connected to the forces of nature. A drought does not discriminate and nor does a cyclone. State conduct is not implicated, nor is the conduct of non-state actors. Provided a state remains willing to assist victims in situations of disaster, such victims will not acquire refugee status upon crossing an international border. They fall outside of the refugee paradigm. With the combined legal

¹⁹ Ibid 499 (Lord Hope).

²⁰ The approach to state protection adopted in *Horvath*, and reflected here, has been heavily criticised as being more concerned with process than result, and accepts that a person may have a well-founded fear of being persecuted but will nevertheless be unable to secure refugee status because the state has exercised due diligence. See James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 314

²¹ Walter Kälin and Nina Schrepfer, ‘Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches’ (2012) UNHCR Legal and Protection Policy Research Series PPLA/2012/01, 31–32 (emphasis added) <<http://www.unhcr.org/4f33f1729.pdf>> accessed 4 April 2019.

²² Andrew Shacknove, ‘Who Is a Refugee?’ (1985) 95 *Ethics* 274, 275. ²³ Ibid 279.

authority of senior courts, the UNHCR, and authoritative scholars of international refugee law, it is easy to see how the dominant view strongly supports the conclusion that the Refugee Convention has only peripheral relevance to the legal predicament of people displaced across borders in the context of ‘natural’ disasters and climate change.

1.3 A Different Perspective

The opinions cited above reflect a conception of people fearing exposure to climate- and disaster-related harm as being immediate victims of the storms, droughts, and floods whose indiscriminate impact causes adversity, which is the unfortunate consequence of the uncontrollable forces of nature, rather than the consequence of existing patterns of discrimination and marginalisation that generate unsafe conditions where individuals are exposed and vulnerable to natural hazard events. ‘Natural disasters’, according to this view, engender adversity. The role of human agents is entirely absent from the frame.

But Shacknove is alert to the operation of a different paradigm. Whereas one view is that disasters have nothing to do with violence and the state, an alternative view sees human agency pervading ‘natural’ disasters:

But as writers such as Lofiche, Sen, and Shue have demonstrated, ‘natural disasters’ are frequently complicated by human actions. The devastation of a flood or a supposedly natural famine can be minimized or exacerbated by social policies and institutions. As Lofchie says: ‘The point of departure for a political understanding of African hunger is so obvious it is almost always overlooked: the distinction between drought and famine . . . To the extent that there is a connection between drought and famine, it is mediated by the political and economic arrangements of society. These can either minimize the human consequences of drought or accentuate its effects’.²⁴

From the above it would appear that to answer Shacknove’s question of ‘who is a refugee?’ in the context of ‘natural’ disasters and climate change, it is necessary not only to understand the meaning of the inclusion criteria in Article 1A(2), but also to have a clear conception of what a ‘natural’ disaster actually is. Where disasters are equated with natural hazards, people displaced in that connection may appear to fall outside of the refugee law paradigm. However, when disasters are understood from a more social perspective, the relevance of the Refugee Convention to the predicament of displaced persons appears far less remote.

Other legal doctrinal scholars have examined the significance of a clear focus on the social context in which disasters and environmental degradation take place. Although his engagement is not as far reaching as others, Hathaway’s treatment of the application of the Refugee Convention in the context of disasters warrants attention because it is amongst the earliest. It has also been incompletely construed by some judicial authorities, who cite *The Law of Refugee Status* as academic authority for the proposition that a person fleeing in the context of a ‘natural disaster’ cannot establish eligibility for recognition of refugee status. In the section ‘assessing risk within the context of generalised oppression’, Hathaway approves of the view expressed by Robinson above, explaining:

²⁴ Ibid

The rationale for considering the victims of natural disasters or widespread turmoil to be outside the scope of the Convention is not, however, their adverse impact on large numbers of persons, but is rather the non-discriminatory nature of the risk.²⁵

However, although some of the judicial authorities that will be surveyed in Chapter 3 stop at this point, Hathaway's approach is not as unequivocal as the above statement would suggest. He instead explains that, in accordance with his general human-rights-based approach to RSD, a person should establish eligibility for refugee status when, owing to a discriminatory state response to a situation of disaster, a person is exposed to serious harm:

By way of example, the victims of a flood or earthquake are not *per se* Convention refugees, even if they have fled to a neighbouring state because their own government was unable or unwilling to provide them with relief assistance. If, on the other hand, the government of the home state chose to limit its relief efforts to those victims who were members of the majority race, forcing a minority group to flee to another country in order to avoid starvation or exposure, a claim to refugee status should succeed because the harm feared is serious and connected to the state, and the requisite element of civil and political differentiation is present.²⁶

Hathaway develops his approach further in a much later article focusing on food deprivation, developing the argument that:

Because the link to a 'failure' of state protection is all that must be shown under the bifurcated approach, it is sufficient to show that the government simply could not be bothered to protect a portion of the at-risk group – reasoning, for example, that because they are 'only' women or indigenous persons they were not worthy of an expenditure of government resources. In such circumstances, the failure of protection is causally connected to a Convention ground and refugee status should be recognised.²⁷

Failures of state protection even before a disaster unfolds may also have a bearing on a claim for recognition of refugee status. Kolmannskog identifies that marginalised groups may be differentially exposed and vulnerable to disaster-related harm, and that this fact may have significance for RSD:

Certain marginalised groups of people such as ethnic minorities and political dissidents are often more vulnerable and exposed to disasters in the first place and receive less protection and assistance during and after a disaster. In a similar manner to gender cases, the nexus requirement of the Convention could be fulfilled when lack of protection from the state is linked to one of the five grounds (race, religion, nationality, membership of a particular social group or political opinion).²⁸

Burson also takes pains to emphasise this social and historical context in which displacement in the context of environmental degradation and disasters needs to be understood in order for RSD to be safely performed. Expressly identifying the danger of judicial comments

²⁵ Hathaway, *Refugee Status* (n 17) 92–93. ²⁶ *Ibid* 94.

²⁷ James Hathaway, 'Food Deprivation: A Basis for Refugee Status?' (2014) 81 Soc Res 327, 336 <<http://repository.law.umich.edu/articles/1076/>> accessed 4 April 2019.

²⁸ Vikram Kolmannskog, 'Climate Change, Environmental Displacement and International Law' (2012) 24 J Int Dev 1071, 1076.

‘that persons “fleeing natural disasters” cannot obtain Convention-based protection . . . being relied on more broadly than warranted’,²⁹ he explains:

Environmental degradation is intimately bound up with long-term issues of development, population growth, and economic and social policy choices . . . This is particularly true in relation to climate change . . . This historical context, when mixed with activity of a discriminatory nature, can in principle produce environmentally displaced persons who meet the Convention’s definition.³⁰

Unfortunately, the full implications of this clear adoption of what in Chapter 2 will be described as the ‘social paradigm’ are not explored, as the scenarios Burson identifies as potentially engendering eligibility for refugee status are familiar examples of violence enacted against a backdrop of disasters and climate change.³¹

At the same time, Burson argues that RSD ought not focus exclusively on *violence*, as ‘contemporary approaches to this issue may bring more environmentally displaced persons within the scope of the Convention than those where violence is imminent’.³² Following Hathaway, Burson argues that:

[a]t the heart of the Convention is the avoidance of discrimination in the enjoyment of basic human rights. Where the discrimination encountered in the context of environmental degradation interferes with the basic human rights of a marginalised group, this provides a clear avenue by which the circumstances of the marginalised group may fall within the scope of the Convention. This is not to say that they automatically will. The legal condition of ‘being persecuted’ connotes a particular form of discrimination. Whether their circumstances reach the Convention’s threshold will depend on the nature and extent of the discrimination encountered.³³

Clearly countering the view that environmental degradation or disasters have an indiscriminate impact, Burson expressly invites decision-makers to examine the social context, including in situations of mass-influx, recognising that certain individuals amongst a wider group may satisfy the eligibility requirements for recognition of refugee status.³⁴

1.4 Structure of the Book

Having in this introductory chapter identified how important it is to understand what disasters actually are, Chapter 2 presents the two competing ‘hazard’ and ‘social’ paradigms. Chapter 3 then presents the findings of a review of jurisprudence addressing actual claims for recognition of refugee status in the context of disasters and climate change. This chapter highlights how both epistemological and doctrinal assumptions affect how refugee status is determined on a case-by-case basis. Finding much to commend in the clear and principled

²⁹ Bruce Burson, ‘Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition’, in T Afifi and J Jäger (eds), *Environment, Forced Migration and Social Vulnerability* (Springer 2010) 9.

³⁰ Ibid 7.

³¹ Burson notes, for example, that states intentionally destroy certain environments in order to cause harm to certain groups, as occurred under Saddam Hussein’s campaign against the Marsh Arabs. He further notes scenarios where activists protesting against failures by the state to prevent environmental degradation are singled out for ill treatment by the regime. See *ibid* 7.

³² Ibid 8. ³³ Ibid 10. ³⁴ Ibid 9.

human-rights-based approach adopted by the New Zealand Immigration and Protection Tribunal, Chapters 4–6 are devoted to what appear as limitations in the approach, from whence a recalibrated human-rights-based interpretation of the refugee definition is proposed. Finally, Chapter 7 examines how this recalibrated interpretation, informed by the social paradigm developed in Chapter 2, may be applied to claims for recognition of refugee status in the context of disasters and climate change.