Refugee Status Determination in the Context of ‘Natural’ Disasters and Climate Change

A Human Rights-Based Approach

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LUND UNIVERSITY

DOCTORAL DISSERTATION
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Faculty opponent
Professor Michelle Foster
### Abstract

This thesis is concerned with refugee status determination (RSD) in the context of ‘natural’ disasters and climate change. Considering evidence that the legal predicament of people who seek recognition of refugee status in this connection has been inconsistently addressed by judicial bodies in leading refugee law jurisdictions, and identifying theoretical as well as doctrinal impediments to a clear and principled application of international refugee law in this connection, the thesis asks the question ‘in what kinds of circumstances may a person establish, within the meaning of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change?’

The thesis answers this research question by examining existing doctrinal and judicial approaches to RSD in the context of ‘natural’ disasters and climate change, and identifying their strengths as well as limitations. Arguing that RSD cannot safely be performed without a clear understanding of the relationship between natural hazards and human agency, the thesis examines competing ‘hazard’ and ‘social’ paradigms. It draws from the social paradigm an understanding of ‘natural’ disasters as processes rather than sudden events, and an appreciation of the ways in which discrimination is a contributory cause of differential exposure and vulnerability to disaster-related harm. This theoretical framework, combined with insights derived from the review of existing doctrinal and judicial approaches, prompts a critical revision of the dominant human rights-based approach to being persecuted, which is argued to be event-based and preoccupied with the nature of the harm, rather than the discriminatory context in which exposure and vulnerability arise. A novel human rights-based interpretation of the refugee definition is adopted and applied in answer to the research question.

### Key words:
refugee, disaster, climate change, interpretation, persecution, well-founded fear, discrimination

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<td>1946</td>
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<td>1948</td>
<td>Universal Declaration of Human Rights (adopted 10 December 1948)</td>
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## Abbreviations and style

### Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>CAT</td>
<td>UN Convention against Torture 1984 / Committee against Torture</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women 1979 / Committee on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination 1965 / Committee on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>CRC</td>
<td>UN Convention on the Rights of the Child 1989 / Committee on the Rights of the Child</td>
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<tr>
<td>CSR</td>
<td>Convention Relating to the Status of Refugees 1951</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights and Fundamental Freedoms 1950</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ExCom</td>
<td>Executive Committee of UN High Commissioner for Refugees</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<tr>
<td>IASC</td>
<td>Inter-Agency Standing Committee</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights 1966</td>
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<td>ICESCR</td>
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</tr>
<tr>
<td>IFRC</td>
<td>International Federation of Red Cross and Red Crescent Societies</td>
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<td>ILC</td>
<td>International Law Commission</td>
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Style

In the absence of a neutral third person singular pronoun in the English language, this thesis adopts the female pronouns ‘she’ and ‘her’, rather than opting for the clumsy ‘he or she’ and ‘his or her’.

Owing to the multiple terms applied to individuals at different stages in the process of seeking recognition of refugee status, the term ‘claimant’ is used throughout the thesis as a general term. Where appropriate, more specific terms such as ‘appellant’ or ‘applicant’ are used.
1 Setting the scene

1.1 Introduction

This is a thesis in international refugee law. In particular, the thesis is concerned with refugee status determination (RSD). Precisely, the focus of the thesis is on the determination of refugee status 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 thesis, how disasters are understood plays a role in RSD in this context.

Consideration of the relationship between ‘natural’ disasters and the kind of forced displacement that is emblematic of the refugee predicament is nothing new, although renewed interest in the issue arose in the context of the 2009 climate summit in Copenhagen. For example, the then UN High Commissioner for Refugees (UNHCR) António Guterres expressed his concern at the 60th session of the Executive Committee of the High Commissioner’s Programme (ExCom) in September 2009:

Global warming threatens to contribute to massive displacement. The increase in extreme weather events also make [sic] natural disasters approximately twice as likely today as they were two decades ago. Most displacement from climate change will be internal and the primary obligation to protection will belong to

---

1 References to ‘environmental refugees’ have been traced back to the 1970s to the work of World Watch Institute founder Lester Brown. See for instance James Morrissey, ‘Rethinking the “Debate on Environmental Refugees”: From “Maximalists and Minimalists” to “Proponents and Critics”’ (2012) 19 The Journal of Political Ecology 36, 36
states. But instruments will also have to be found for populations that cross international borders and who cannot return to their countries.\(^2\)

Much can be made of the High Commissioner’s statement as a way of introducing the thesis. In particular, it is very significant that the High Commissioner for Refugees, who under the 1951 Convention Relating to the Status of Refugees (Refugee Convention)\(^3\) and the UNHCR Statute\(^4\) has a ‘supervisory role’ that extends to articulating how the refugee definition applies in certain contexts,\(^5\) but who is also charged with ‘promoting the conclusion and ratification of international conventions for the protection of refugees’, emphasises the latter in his address to the Executive Committee.\(^6\)

The Refugee Convention and its 1967 Protocol,\(^7\) it would appear, is an inadequate legal instrument for addressing the predicament of people displaced across borders in the context of ‘natural’ disasters and climate change. Something more is needed.

This was not the first time the UNHCR had called for ‘instruments to be found’. Indeed, the 1991 Report of the Working Group on Solutions and Protection recommended that ‘[t]he question of a possible application on a global basis of a refugee definition applicable to persons not protected by the


\(^3\) Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Article 35

\(^4\) UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees (14 December 1950), A/RES/428(V), [8]


\(^6\) The UNHCR Executive Committee (ExCom) is the governing body of the UNHCR that meets annually to review and approve the UNHCR’s budget and discuss matters relating to international protection. It is established by resolution 672 of the UN Economic and Social Council. See UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 672 (XXV): Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, 30 April 1958, E/RES/672 (XXV)

1951 Convention/1967 Protocol or by regional instruments could be considered further’.\(^8\) One of the groups identified by the working group was ‘persons forced to leave or prevented from returning because of natural or ecological disasters or extreme poverty’.\(^9\)

The notion that the majority of persons forced to leave or prevented from returning because of natural or ecological disasters, or climate change, are not protected by the 1951 Convention/1967 Protocol is reflected in contemporary international refugee law doctrine and jurisprudence.\(^10\) The 2011 UNHCR expert roundtable in Bellagio, Italy saw the Refugee Convention as being particularly limited in this context:

> While the 1951 Convention and some regional refugee instruments provide answers to certain cases of external displacement related to climate change, and these ought to be analysed further, they are limited.\(^11\)

Similarly, Walter Kälín and Nina Schrepfer, in a paper commissioned by the UNHCR in 2012, argue that:

> While there is little agreement on how best to address climate related displacement and (voluntary) migration and the protection of affected persons, there undoubtedly is a normative gap with respect to cross-border migration and displacement.\(^12\)

Other legal doctrinal scholars have also adopted this perspective, with Professor Jane McAdam, for example, explaining that:

> [t]hough there are some circumstances in which [international refugee law] will be applicable, it is, by and large, an inappropriate normative framework for

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\(^9\) UNHCR, ‘Report of the Working Group on Solutions and Protection’ (n 8) [8]

\(^10\) See Chapters 2, 4 and 5. Throughout this thesis, the term ‘jurisprudence’ is used to refer to judicial decisions.

\(^11\) UNHCR, ‘Summary of Deliberations on Climate Change and Displacement’ (2011) 23 IJRL 561, 562

responding to the needs of those forced to move on account of environmental or climate change impacts.\textsuperscript{13}

Hence, the High Commissioner’s concern, expressed at the 60\textsuperscript{th} ExCom meeting, reflects the prevailing view in international refugee law that most people displaced across borders in the context of ‘natural’ disasters and climate change are not refugees within the meaning of the 1951 Convention and its 1967 Protocol.

Although calls for a new binding international legal instrument have been criticised,\textsuperscript{14} and the UNHCR itself no longer endorses such an approach,\textsuperscript{15} the impetus to find solutions beyond the Refugee Convention has continued apace, culminating in the adoption in October 2015 of the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (‘the Protection Agenda’ or ‘the Agenda’).\textsuperscript{16}

The Nansen Initiative behind the Protection Agenda described itself as

\begin{quote}

a state-led, bottom-up consultative process intended to identify effective practices and build consensus on key principles and elements to address the protection and assistance needs of persons displaced across borders in the context of disasters, including the adverse effects of climate change.\textsuperscript{17}
\end{quote}

The Initiative was designed as an information-gathering exercise, and was expressly \textit{not} concerned with developing new legal guidelines.\textsuperscript{18} Rather, the objective was to formulate an agenda, which could then be pursued in different settings in the future.\textsuperscript{19}

\textsuperscript{13} Jane McAdam, \textit{Climate Change, Forced Migration and International Law} (OUP 2012) 39
\textsuperscript{14} Jane McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23 IJRL 2
\textsuperscript{15} UNHCR is a key participant in the Nansen Initiative, and endorses its Protection Agenda. It has also produced Guidelines on Temporary Protection and Stay Arrangements. See UNHCR, ‘Guidelines on Temporary Protection and Stay Arrangements’ (February 2014) <http://www.refworld.org/docid/52fba2404.html> accessed 18 March 2018
\textsuperscript{17} ibid I
\textsuperscript{18} ibid 7
\textsuperscript{19} The Platform on Disaster Displacement, the successor to the Nansen Initiative, pursues this objective. See <http://disasterdisplacement.org> accessed 17 March 2018
The consultative process referred to in the description entailed a series of five regional consultations with representatives of states, civil society, academia, and the UNHCR, which took place between 2013 and 2015. The consultations were held in the Pacific, Central America, the Greater Horn of Africa, Southeast Asia and South Asia. No consultations were held in countries of the global North, for example Australia, New Zealand, the United States of America, Canada, and the Member States of the European Union, although representatives of these states participated in the Initiative and endorsed the Protection Agenda.20

The Protection Agenda, which was endorsed by 109 states at a Global Consultation in Geneva, Switzerland in October 2015, represents the culmination of the work of the Nansen Initiative. Its first stated objective is

… to enhance understanding, provide a conceptual framework, and identify effective practices for strengthening the protection of cross-border disaster-displaced persons. In particular, it explores potential measures that States may voluntarily adopt and harmonize to admit such persons on the grounds of humanitarian considerations and international solidarity with disaster affected countries and communities.21

In addition to identifying a wide range of effective practices, the Agenda was also successful in reconceptualising the phenomenon itself. Whereas earlier approaches focused either on environmental degradation or the potential future adverse impacts of climate change,22 the Nansen Initiative explored contemporary experiences of people already facing increasingly difficult conditions of existence as changing climatic conditions interact with people’s vulnerability and exposure to droughts, storms, floods, rising sea levels, and so forth. Hence, the focus was on protection in the context of ‘natural’ disasters and climate change, as distinct from protection for ‘climate refugees’ or


21 Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons’ (n 16) 15

22 IOM, in a major study on migration, environment and climate change, noted in 2009 that ‘[a]lthough the connections seem evident, there is surprisingly little reference, to date, on natural disasters in the literature on climate change and displacement’. See IOM, Migration, Environment and Climate Change: Assessing the Evidence (IOM 2009) <http://publications.iom.int/books/migration-environment-and-climate-change-assessing-evidence> accessed 17 March 2018
‘environmental migrants’. A substantial knowledge base was collated and developed, and the phenomenon of cross-border displacement in this regard was articulated in relation to ongoing global initiatives relating to disaster risk reduction, climate change adaptation and mitigation, international development and humanitarian relief.

Understanding ‘natural’ disasters and climate change as context rather than cause significantly alters the frame of reference for considering eligibility for refugee status, as it rejects the notion that displacement is solely caused by ‘natural’ disasters and climate change. This thesis largely adopts this contextual approach, with minor clarifications as set out in Chapter 2.7.2.1. Although numerous references are made throughout the Protection Agenda to the Refugee Convention and states’ obligations under international human rights law in relation to people displaced across borders in the context of ‘natural’ disasters and climate change, only one paragraph in the Protection Agenda discusses ‘refugee protection and similar protection under human rights law’:

In general, disaster situations do not as such fall within the scope of application of international or regional refugee protection instruments. However, in some cases, refugee law or similar protection under human rights law will be applicable. For instance, the effects of a disaster may create international protection concerns by generating violence and persecution, such as when a collapse of governmental authority leads to violence and unrest or when a government uses a disaster as a pretext to persecute its opponents. Thus, it is still necessary for competent authorities to carefully scrutinize cases from a disaster-affected country with a view to assessing if refugee status, or similar protection from return under applicable human rights law, is required due to any such negative consequences of the disaster.

The scenario in which a government uses the ‘natural’ disaster as a pretext to persecute opponents refers to a case arising in the aftermath of Cyclone Nargis that struck Myanmar in May 2008, in which an activist faced being arrested

23 On challenges associated with terminology relating to the phenomenon of cross-border displacement in the context of environmental degradation, disasters and climate change, see Maria Stavropoulou, ‘Drowned in Definitions’ (2008) 31 Forced Migration Review: Climate Change and Displacement, 11

24 Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons’ (n 16) 17–18

25 Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons’ (n 16) 27
because she ‘had distributed humanitarian aid purchased by foreigners who supported an opposition’.26 This case is frequently cited as a clear example of the kind of circumstance in which a person may establish a well-founded fear of being persecuted in the context of ‘natural’ disasters and climate change,27 and is considered in detail in Chapter 4.

The scenario where the collapse of government authority in the aftermath of a ‘natural’ disaster leads to violence and unrest is derived from research conducted under the auspices of the Nansen Initiative. This research found that

... a few States (Panama, Peru) found that asylum seekers from Haiti had a ‘well-founded fear of persecution by non-State actors that arose from the vacuum of governmental authority after the earthquake in Haiti,’ thus applying the 1951 Refugee Convention.28

These examples are derived from a report prepared for the Nansen Initiative by David Cantor, which examined the response by states in the Americas to cross-border displacement in the context of ‘natural’ disasters, and represent exceptions to what Cantor found to be ‘the dominant view among States ... that persons who cross an international border on account of disasters will not qualify as refugees’.29

26 ibid 27, fn 48
28 Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons’ (n 16) 27, fn 47
Note is also made in the Protection Agenda of the application by Kenyan authorities of the ‘events seriously disrupting public order’ provision under the OAU Refugee Convention 1969\(^{30}\) in the context of the 2011–12 droughts in Somalia,\(^{31}\) as well as the latent potential of the EU Temporary Protection Directive to address ‘refugee-like’ situations.\(^{32}\)

However, recognising the limitations of international refugee law and international human rights law, the Protection Agenda encourages states to consider ‘harmonization of humanitarian protection measures at the (sub-) regional level’.\(^{33}\) Humanitarian Protection Measures entail the non-return of foreigners abroad at the time of a ‘natural’ disaster in their country of origin, and ‘effective practices’ may include:

Providing such persons with humanitarian protection measures such as suspending their deportation or extending or changing their existing migration status on humanitarian grounds if:

- They would experience extreme hardship as a consequence of the disaster in case of return to the country of origin; or
- Their country of origin has declared a disaster and is temporarily unable to manage the return of its citizens for reasons related to the disaster.\(^{34}\)

Many of the humanitarian protection measures are also expressly endorsed by the UNHCR in its 2014 Guidelines on Temporary Protection or Stay Arrangements (TPSAs). Indeed, the UNHCR has supported Temporary Protection or Stay Arrangements since at least 2010, when Erika Feller, confirming that the Refugee Convention ‘at least as it currently stands, is


\[^{31}\text{A detailed report on the application of this provision was drafted under the auspices of the Nansen Initiative. See Tamara Wood, ‘Technical Paper: Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts’ (Nansen Initiative, January 2013) <https://www.nanseninitiative.org/pacific-consultations-civil-society-2> accessed 17 March 2018. Note that the information obtained by Wood is based on interviews, not reported cases that could be reviewed as part of this thesis.}\]

\[^{32}\text{Nansen Initiative, ‘Agenda for the Protection of Cross-Border Displaced Persons’ (n 16) 28}\]

\[^{33}\text{ibid}\]

\[^{34}\text{ibid 29}\]
unlikely to be applicable or be applied’ in the context of ‘natural’ disasters, climate change and other ‘environmental factors’, expressed the position that:

In our assessment the time has come to work with States to develop an internationally agreed doctrine of temporary protection, which would ensure the availability of interim protection to people in temporary need.35

There are many reasons why the Refugee Convention is considered inadequate for addressing the challenges presented by cross-border displacement in the context of ‘natural’ disasters and climate change. Put briefly, although examples are identified in the literature, it is generally the case that ‘natural’ disasters and the adverse effects of climate change do not tend to generate scenarios that readily reflect recognisable forms of persecution, particularly as this legal term of art requires a human agent acting in a way that is connected to a person’s race, religion, nationality, membership of a particular social group or political opinion. Unlike in classic scenarios reflecting the direct and intentional infliction of serious harm by the state for a Convention reason, in ‘natural’ disasters the apparent cause of harm is the cyclone, earthquake or flood, and the impacts appear indiscriminate, rather than directly and intentionally inflicted for a Convention reason. However, as this thesis will demonstrate, the stark distinction between discriminatory conduct and the apparently indiscriminate impacts of ‘natural’ disasters is in fact blurred when disasters are understood as social, rather than purely naturally occurring, phenomena.

1.2 The problem

The Refugee Convention is indeed inadequate for addressing the protection needs of most people displaced across borders in the context of ‘natural’ disasters and climate change. There is a clear need to develop complementary responses, and the Protection Agenda sets out a cogent framework within which such responses can be developed and strengthened. There is evidence that this is happening in some regions.36 However, there is a danger that the


36 See for example the adoption of a guide to effective practices by states in the Central America Region – Nansen Initiative, Guide to Effective Practices for RCM Member
consensus reflected in the Protection Agenda is seen to reflect the limits of international refugee law in the context of ‘natural’ disasters and climate change, discouraging further doctrinal consideration of the scope of the Refugee Convention in this connection as focus shifts towards attempts to develop more comprehensive solutions.

If the kinds of circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change had been rigorously mapped against a clear conceptual framework taking into consideration the full range of international refugee law doctrine, then it may be appropriate to leave refugee status determination in this connection to practitioners, who may potentially develop the law on a case by case basis. The problem, however, is that the approach reflected in the Protection Agenda and other sources identified in this introduction, in combination with statements by senior courts in leading common law jurisdictions,\(^{37}\) risks supporting a conclusion about the application of the Refugee Convention in the context of ‘natural’ disasters and climate change that may not reflect the current state of international refugee law.

Hence, there is reason to undertake a comprehensive consideration of the kinds of circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change.

1.3 Aim and research question

1.3.1 Aim

The thesis is therefore concerned with the determination of refugee status under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol in the context of ‘natural’ disasters and climate change. It aims to discern, more precisely than has been achieved to date, the kinds of

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\(^{37}\) Considered in Chapter 2.4.1
circumstances in which some people displaced across international borders in this connection may satisfy the requirements of the refugee definition.

In pursuit of this aim, the thesis will need to develop an understanding of the phenomenon under consideration, namely the predicament of individuals in the context of ‘natural’ disasters and climate change. Such an understanding cannot hope to reflect the depth and breadth of human experience, which comes out much more clearly in individual claims for refugee status. Rather, the thesis aims to articulate a way of understanding the phenomenon that is relevant to RSD. Additionally, the thesis will also need to adopt an interpretation of the refugee definition that complies with the requirements of treaty interpretation established at Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties.38

1.3.2 Research question

In order to achieve its aim of discerning the kinds of circumstances in which some people displaced in the context of ‘natural’ disasters and climate change may satisfy the requirements of the refugee definition, the thesis is guided by the following question:

In what kinds of circumstances may a person establish, within the meaning of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change?

Four sub-questions help to target the research:

1. How does existing doctrine approach eligibility for refugee status in the context of ‘natural’ disasters and climate change? (Part I, Chapter 2)

2. How should the predicament of people in the context of ‘natural’ disasters and climate change be understood against the background of disaster research? (Part I, Chapter 3)

3. How have judicial authorities determined refugee status in the context of ‘natural’ disasters and climate change? (Part II, Chapters 4–5)

4. What is the interpretation of being persecuted at Article 1A(2) of the 1951 Refugee Convention and its 1967 Protocol that is most faithful to the principles of treaty interpretation at Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties? (Part III, Chapters 6–8)

1.4 Contribution

As potentially the only monograph to focus exclusively on the determination of refugee status in the context of ‘natural’ disasters and climate change, this thesis makes three specific contributions to the scholarship.

First, the thesis consolidates the scholarship and jurisprudence in the field and subjects the material to critical analysis. The research therefore provides a clear introduction to the range of approaches that have been taken by legal doctrinal scholars, the UNHCR, and judicial authorities whilst also constructing from those contributions a conceptual framework that reveals questions that existing approaches have not fully examined.

Second, this research expressly identifies the interplay of two competing paradigms that determine how to approach the question concerning the kinds of circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change. A significant contribution of the thesis is the argument it advances in relation to how the context is to be understood in order for refugee status to be safely determined.

Third, this thesis contributes to ongoing legal doctrinal debates about the meaning of core elements of the refugee definition at Article 1A(2) of the Refugee Convention. In answering the question as to what kinds of circumstances may a person establish a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change, it articulates, on the basis of limitations identified in existing approaches, a novel definition of being persecuted, and a recalibrated interpretation of the meaning of the core elements of the refugee definition, that is more faithful to the principles of treaty interpretation set out at Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties.

The outcome of these three specific contributions is a taxonomy of the kinds of circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in the context of ‘natural’ disasters and climate change that is supported by a clear and principled approach to determining refugee status in this regard.
1.5 Methodology and structure

This thesis may be described as an exercise in critical legal research. The ‘critical’ element refers to an interest in exploring assumptions that underlie established approaches to legal questions. For the purposes of this thesis, the critical element invites a questioning of how the law has been interpreted, and how the facts are understood.

The answer to the research question is first sought in international refugee law doctrine and jurisprudence. The majority of the material used for Chapter 2 was collected by searching electronic databases and websites, visiting libraries and participating in conferences.

The purpose of Chapter 2 is not to state what counts as valid law, but rather to determine how authorities working in this field have applied the law to the specific context under consideration, namely the context of ‘natural’ disasters and climate change. If these sources can answer the question regarding the kinds of circumstances in which a person may establish a well-founded fear of being persecuted for a Convention reason in this context, then further research is not indicated.

However, as Chapter 2 demonstrates, existing doctrine does not provide a satisfactory answer to the research question. Instead, one finds a range of approaches influenced by how the context is understood, and how Article 1A(2) of the Refugee Convention is interpreted. Consequently, further research is shown to be required into how the context may be understood, as well as how Article 1A(2) is to be interpreted.

Chapter 3 seeks insight from the existing literature in the fields of disaster risk reduction, disaster anthropology, and political ecology, which offers a coherent ‘social paradigm’ for understanding the context. This research was driven by the need to understand what actually happens to people in the context of ‘natural’ disasters. At an early stage of the research, it was recognised that understanding the phenomenon itself is crucial to a faithful application of the law. Hence, the prohibition on torture or inhuman or degrading treatment or punishment would be difficult to apply without a clear understanding of the actual experiences to which these terms refer. But there is a host of sources that provide insight into what it means to be tortured or to be exposed to inhuman or degrading treatment or punishment. Indeed, it is hard to avoid seeing torture represented in films or on television, or described in books, newspaper articles, and so forth. Lawyers working in this field represent individuals who have been exposed to such treatment, and how this phenomenon is presented then
informs the development of jurisprudence. A Google image search for ‘torture’ leaves one in no doubt what the practice entails.

In a similar vein, there is an abundance of images and representations of ‘natural’ disasters and climate change. Satellite imagery shows a powerful while cloud identifiable by meteorologists as a cyclone. An enormous wave dwarfs a city. There are images of flattened towns, perhaps even strewn with dead bodies in the aftermath of a major event. Climate change is often represented by glaciers melting into the sea, or by dry, cracked earth. Where humans are visible, it is as a mass of starving people, or a group of displaced persons, or a single individual who has lost everything.

If these images are reflective of the context that is the subject of this thesis, then the kinds of circumstances in which an individual may establish a well-founded fear of being persecuted for a Convention reason in this connection will indeed be limited, and the kinds of circumstances identified in doctrine and jurisprudence would represent a satisfactory accounting. But a critical approach demands that one ask whether the phenomenon can be understood differently, and Chapter 3 of the thesis therefore reflects a different way of understanding the phenomenon beyond the forces of nature that are often foregrounded.

The methodology guiding this chapter was clearly influenced by the objective of highlighting the social context in which ‘natural’ disasters unfold. Hence, after first encountering the social paradigm reflected in the work of Ben Wisner, Piers Blaikie, Terry Cannon, and Ian Davis,39 a snowball method was employed to identify similar literature within the fields of disaster risk reduction, political ecology, and disaster anthropology. The project was not preoccupied with the physical science behind ‘natural’ disasters and climate change, but instead focused on developing a deeper awareness of the social context within which such phenomena unfold. Hence, the literature reviewed was chosen to inform an understanding of the social paradigm, rather than to educate the reader about the range of approaches to understanding the phenomena at hand. Having surveyed legal doctrinal approaches to RSD in the context of ‘natural’ disasters and climate change, and articulated a vision of how the phenomenon should be approached, in Part II the thesis turns to a survey of judicial decisions that apply the Refugee Convention in this context. The methodology is set out in Chapter 4.

As Part II reveals at least two different approaches to determining refugee status in the context of ‘natural’ disasters and climate change, and as neither approach is without its limitations, Part III endeavours to articulate an interpretation of being persecuted that more faithfully complies with the methodology set out at Articles 31–33 of the VCLT. The text of Articles 31–33 of the VCLT is set out in Chapter 6.

In order to perform this task, the sources of international refugee law must also be identified. As with any branch of international law, the starting point for identifying the sources of law is Article 38 of the Statute of the International Court of Justice, which provides that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Refugee Convention is the international convention scrutinised by this thesis. Indeed, the thesis turns around the interpretation and application of the refugee definition at Article 1A(2) of that instrument. Custom, as well as judicial decisions and the teaching of the most highly qualified publicists, provides important insights into the meaning of terms within that definition. Methodological considerations regarding treaty interpretation are set out in Chapter 6.

Part IV concludes the thesis by answering the thesis question.