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Refugee Status Determination in the Context of ‘Natural Disasters’ and Climate Change: A Human Rights-Based Approach



Overview

- Intro
- Doctrine
- Theory
- Jurisprudence

BREAK

- Revisiting doctrine
- Taxonomy



Intro

- 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 states. But instruments will also have to be found for populations that cross international borders and who cannot return to their

countries. / UNHCR, 'Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, at the 60th Session of the Executive Committee of the High Commissioner's Programme (ExCom) (Geneva, 28 September 2009)' <<http://www.unhcr.org/admin/hcspeeches/4ac314009/opening-statement-mr-antonio-guterres-united-nations-high-commissioner.html>>



Doctrine

- 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. *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4, (1997) 190 CLR 225 (Dawson J)
- 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

Bruce Burson, 'Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition' in Tamer Afifi and Jill Jäger (eds), *Environment, Forced Migration and Social Vulnerability* (Springer 2010)



Theory

- A disaster is ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society’ / ILC Draft Articles on the Protection of Persons in Situations of Disaster
- ... people’s exposure to risk differs according to their class (which affects their income, how they live and where), whether they are male or female, what their ethnicity is, what age group they belong to, whether they are disabled or not, their immigration status, and so forth / Ben Wisner et al, *At Risk: Natural Hazards, People’s Vulnerability and Disasters* (2nd edn, Routledge 2004), 6



Jurisprudence

- The applicant claims to fear harm because of rising sea levels around his island nation. He fears that in 10 or so years, his country will be covered by the sea. It may be that this will happen, however if it does, it would be an act of nature and as such, would not and could not bring the applicant within the Convention. The Convention is not directed towards the victims of natural disasters.
RRT Case No. N99/30231 [2000] RRTA 17 (10 January 2000)
- whilst ‘the effects of natural disasters are often felt indiscriminately... broad generalisations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes including Convention-based recognition’ *AF (Kiribati) [2013] NZIPT 800413*



Break



Revisiting doctrine

- A) VCLT
- B) Temporal Scope
- C) Personal Scope



A) VCLT

Article 31, GENERAL RULE OF INTERPRETATION

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.
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 connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion 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



B) Temporal Scope

- ... [T]he requirement that violations of human rights must always be ‘sustained or systemic’ and must involve some level of persistency or repetition would, however, entail treating single acts of serious harm as non-persecutory, even if they took the form of murder or torture. That is plainly too restrictive /
Hugo Storey, ‘Persecution: Towards a Working Definition’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 472–73
- being persecuted is a condition of existence, rather than a specific instance of serious harm / Matthew Scott, Refugee Status Determination in the Context of ‘Natural’ Disasters and Climate Change: A Human Rights-Based Approach



C) Personal Scope

1. Is there a well-founded fear of being persecuted?
 2. Is there a connection to one or more of the Convention reasons? / *Refugee Appeal No. 70074/96*
1. Does the claim taken as a whole suggest that the claimant fears being persecuted for a Convention reason in her country of origin or former habitual residence, where that predicament is understood as a condition of existence in which discrimination on grounds of race, religion, nationality, membership of a particular social group or political opinion is a contributing cause of (a real chance of being exposed to) serious denials of human rights demonstrative of a failure of state protection?
 - If no, the person is not a refugee.
 2. If yes, has the claim been established to the 'well-founded' standard?
 - If no, the person is not a refugee.
 3. If yes, is the person able to relocate internally?
 - If yes, the person is not a refugee.
 - If no, the person is a refugee.



Taxonomy

Category 1: Direct and international infliction of harm	Recognition of refugee status on the facts of the case	Recognition in principle	Suggested in doctrine or asserted in a claim for recognition of refugee status
Intentional environmental damage, as reflected in the predicament of the Marsh Arabs under Saddam Hussein	X	AF (Kiribati) (n 623)	Kálin and Schrepfer (n 12) McAdam (n 13) King (n 185) Burson (n 262)
Crackdowns on (perceived) dissent relating to the causes and/or management of environmental degradation or disasters	Refugee Appeal No. 76374 (n 416) RRT Case No. 0903555 (n 424)	AF (Kiribati) (n 623)	Kálin and Schrepfer (n 12) AL v Austria (n 426) YC v Holder (n 429) RRT Case No. 1001325 (n 431) RRT Case No. 060926579 (n 432) RRT Case No. 1104064 (n 433)
Denial of disaster relief to members of opposition political parties, minority ethnic or religious groups and so forth	RN (Returnees) Zimbabwe CG (n 183) Refugee Appeal No. 76237 (n 453)	Chan v Canada (n 160) Hagi-Mohammed (n 437) RS and Others (Zimbabwe - AIDS) (n 456) AF (Kiribati) (n 623)	Kálin and Schrepfer (n 12) McAdam (n 13) HS (returning asylum seekers) Zimbabwe CG (n 451)
Category 2: Other failures of state protection	Recognition of refugee status on the facts of the case	Recognition in principle	Suggested in doctrine or asserted in a claim for recognition of refugee status
The state causes damage to the environment, or allows such conduct to be perpetrated by non-state actors, not caring about the adverse human impacts because of who the victims are	X	X	Kozoll (n 159) Marcs (n 174) RRT Case N93/00894 (the 'Bangladesh cyclone case') (n 245)
The state simply not 'being bothered' to protect a population facing adversity in the context of a disaster, or arbitrary refusal of international assistance for disaster relief	X	X	McAdam (n 13) Hathaway (n 69) RRT Case No. 0907346 (n 233) Refugee Appeal No. 70965/98 (n 247) Ferguson v Canada (n 476) RRT Case No. 071295385 ('the Sri Lanka tsunami case') (n 477) RRT Case No. 1200203 ('the Australian Fukushima case') (n 495)
Disaster risk management and response measures that amount to human rights violations for a Convention reason, such as in the context of forced relocation	X	X	Kálin and Schrepfer (n 12)
Failure of disaster risk reduction and scenarios where state policies expose certain groups to disaster-related harm	X	AF (Kiribati) (n 623) AC (Tuvalu) (n 624)	McAdam (n 13) Kálin and Schrepfer (n 12)
Disasters engender serious threats to public order	Latin American cases referred to by Cantor (n 29) and potentially Kenyan cases referred to by Wood (n 31)	AC (Tuvalu) (n 624)	Kálin and Schrepfer (n 12)
Ex-ante discrimination is a contributory cause of (a real chance of being exposed to) serious denials of human rights demonstrative of a failure of state protection in circumstances where a person is exposed and vulnerable to disaster-related harm	X	X	This thesis

