Natural hazards, human actors, serious harm: Refugee protection through understanding the social construction of disasters

Matthew Scott
Natural hazards, human actors, serious harm: Refugee protection through understanding the social construction of disasters

Paper prepared for the Nordic Asylum Law Seminar
Uppsala University, Sweden
7-8 May 2015 (updated 4 August 2015)

Matthew Scott

Abstract

The occurrence of a natural hazard event is a necessary, but not sufficient condition for the unfolding of a ‘natural’ disaster. Disasters result when individuals and communities are exposed and vulnerable to natural hazards, such as droughts, floods and earthquakes. In their turn, exposure and vulnerability are social facts that are often closely correlated with discrimination, for example against women, children, older people, persons with disabilities, as well as for reasons of race, religion, nationality or political opinion. Adopting the perspective that sees disasters as socially constructed in this way, the scope of the 1951 Convention relating to the Status of Refugees appears wider than has been acknowledged in prevailing authoritative interpretations, which have not explored in depth the possibility of discriminatory ill-treatment beneath the brute force of nature. Using the experience of acute food insecurity as an example, this paper demonstrates that, in addition to already recognised scenarios involving the intentional infliction of hunger by state agents, refugee status may be appropriately recognised in scenarios involving denial of the right to food where the state is either unable or unwilling to protect individuals from the serious impacts of acute food insecurity. The existing and potential future adverse impacts of climate change entail more frequent and intense natural hazard events, so an understanding of disaster related harm is expected to become increasingly important.

1. Introduction

Climate change promises increasingly frequent and intense natural hazard events, such as droughts, storms and floods. Disasters happen when people are exposed and vulnerable to such hazards.1 ‘Natural’ disasters are often

---

1. Doctoral Candidate in Public International Law, Lund University, part-funded by the European Refugee Fund. Thanks to Professor Gregor Noll, Lund University and Associate Professor Rebecca Stern, Uppsala University, for ongoing engagement with this project.

accompanied by displacement. When displacement takes place across international borders, individuals are generally considered to fall through a protection gap, as, amongst other reasons, no international or regional legal instrument expressly addresses the rights of people who cross international borders in the context of disasters and other adverse impacts of climate change.

Apart from limited ‘pathways to recognition’ relating to the intentionally discriminatory conduct of state actors, the 1951 Convention relating to the Status of Refugees is widely understood as not extending protection to individuals in this context. In the cases that have come before the (predominantly Australian and New Zealand) courts, decisions have pointed, amongst others, to problems establishing the harm threshold, difficulties in identifying an actor of persecution, and challenges establishing a causal link between the serious harm and one of the characteristics protected by the Convention, as significant reasons why such displaced persons do not qualify for refugee status.

This paper recognises the central importance played by a human actor of persecution in international refugee law and seeks, with the assistance of literature from anthropology and disaster relief and risk reduction, to identify the operation of such actors in disaster scenarios. The thesis that this paper seeks to defend is that discrimination is an inherent feature of ‘natural’ disasters, and that disasters can transform pre-existing patterns of discrimination into persecution for a Convention reason owing to the serious nature of the harm to which groups with protected characteristics are disproportionately exposed and vulnerable. Acceptance of this argument leads to the conclusion that the scope of refugee protection from ‘natural’ disasters is broader than prevailing interpretations suggest. Nonetheless, the vast majority of people displaced in such a context will not be protected by existing international law and domestic, bilateral and regional arrangements may more comprehensively respond to the different kinds of scenarios that can arise.

The paper has the following structure: Part 1 sets out the theoretical framework for the paper and is divided into three sections. Section 2 explains the necessity of identifying a human actor of persecution in international refugee

---

2 On average 26.4 million people are newly displaced each year, not counting slow onset hazard events like drought. See Internal Displacement Monitoring Centre, Global Estimates 2015: People Displaced by Disasters (IDMC 2015) 1

3 For a detailed discussion see Walter Kälin and Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches (UNHCR Legal and Protection Policy Research Series 2012)

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

5 See the detailed discussion on the point in Jane McAdam, Climate Change Displacement and International Law: Complementary Protection Standards (UNHCR Legal and Protection Policy Research Series 2011)


law, drawing on jurisprudence from the UK, Australia, New Zealand and Canada relating to international protection in the context of ‘natural’ disasters, as well as more general commentary by UNHCR and academic publicists. Section 3 sets out briefly the concept of the social construction of disasters, which rejects the view that disasters are purely naturally occurring phenomena. Section 4 then turns to acute food insecurity as one type of disaster scenario in which persecution for a Convention reason can be identified. This section introduces the concept of acute food insecurity and describes some of its environmental and social causes. Recognising that acute food insecurity does not affect all individuals within a society to the same extent, the social construction of acute food insecurity is established. This perspective invites consideration of the circumstances in which a person facing hunger in a situation of acute food insecurity may establish a claim for international protection under the Refugee Convention.

Part 2 therefore applies principles of international refugee law to the situation of acute food insecurity, and adopts Hathaway and Foster’s definition of ‘being persecuted’ as entailing a ‘sustained and systemic denial of human rights indicative of a failure of state protection’. Section 5 evaluates the experience of hunger, being one of many forms of harm associated with acute food insecurity, in relation to the harm threshold under the Refugee Convention, considering the psychological, socio-economic and physiological impacts of the phenomenon. Section 6 examines acute food insecurity scenarios where persecution for a Convention reason is identifiable. Adopting a human rights-based approach to the notion of ‘being persecuted’, this section is divided into scenarios where there is a failure of a state to either respect, protect or fulfil the right to food owing to a person’s race, religion, nationality, membership of a particular social group or political opinion. Section 7 concludes the paper, arguing that an understanding of the social construction of ‘natural’ disasters can assist in identifying circumstances in which individuals are entitled to refugee status. As the examples provided in the paper demonstrate, the scope of protection is wider when such a perspective is adopted.

Part I: Theoretical Framework

2. The need for a human actor of persecution in international refugee law

The centrality of human agency to international refugee law cannot be overstated. Indeed, for the New Zealand Immigration and Protection Tribunal, ‘the legal concept of ‘being persecuted’ rests on human agency.’

The Qualification Directive\(^9\) carries the clear expectation that persecution or serious harm will emanate from human actors. Article 6 provides:

Actors of persecution or serious harm include:
1. the State;

---

\(^9\) *AF (Kiribati) [2013] NZIPT 800413 (unreported)* [54]
\(^10\) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
Goodwin-Gill and McAdam observe that ‘[p]ersecution is a concept only too readily filled by the latest examples of one person’s inhumanity to another’...12

Equally, Hathaway and Foster equate the notion of persecution with human agency by referring to ‘maltreatment... demonstrative of a breakdown of national protection’ (emphasis added).13 Maltreatment, in its ordinary meaning, is conduct that can only be attributed to humans. Refugee protection, it follows, is an institution reserved for individuals fearing serious harm that emanates from human actors, as distinct from ‘naturally occurring’ forms of harm.

Against this backdrop, the argument that individuals displaced in the context of ‘natural’ disasters fall through a ‘protection gap’ appears compelling. The Refugee Convention was not designed to address harm caused by the forces of nature. It would appear then that claimants pointing to a risk of harm from rising sea levels, droughts, famines, earthquakes and storms would all fall to have their claims dismissed on the basis of this distinction between harm caused by human agents and harm that emanates from the forces of nature.

As a statement of general principle, the Opinion of Lord Brown of Eaton-under-Heywood AH (Sudan)14 reflects such an assumption:

Millions living in the poorer countries of the world suffer terribly from poverty, from famine, from floods, from ill-health, from various human rights abuses. Many in addition suffer, or at any rate have a well-founded fear of, persecution. But such as suffer this additional fear, provided only that they can escape to a richer and safer country, are in a sense the lucky ones...

A similar position has been articulated in the New Zealand jurisprudence. In Refugee Appeal No. 72186/2000, the New Zealand Refugee Appeals Authority, addressing a claim by a citizen of Tuvalu facing adversity owing to increasingly high tides, expressed the view that ‘the forces of nature’ are non-discriminatory.

This is not a case where the appellant can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellant is an unfortunate victim, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family home being partially submerged at high tide.15

It may well be the case that the claimant could not establish a claim under the Refugee Convention, and that discrimination in the context of economic and environmental pressures either does not exist in Tuvalu or does not give rise to a well-founded fear of being persecuted on return. However, the determination is significant in its reflection of the prevailing assumption that the forces of nature alone lie behind disaster related harm.

---

11 The role of human agents as actors of serious harm, as opposed to actors of persecution, will be discussed in a subsequent paper.
12 Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law (Third edition Oxford University Press 1997) 93
13 Hathaway and Foster, Refugee Status, above n 8, 184
14 Secretary of State for the Home Department v. AH (Sudan) & Ors [2007] UKHL 49 [32-33]
15 Refugee Appeal No. 72186/2000, NZRAA (unreported) [16]
Equally, in *Applicant A & Anor v MIEA & Anor*, Dawson J in the High Court of Australia expressed the opinion that persons fleeing natural disasters or famines cannot satisfy the requirements of the refugee definition because the five Convention reasons clearly delimit the kinds of persons who the Convention is able to assist.

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 epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees.\(^{16}\)

The Supreme Court of Canada in *Ward* succinctly expresses the view that the Convention does not apply to ‘...those of victims of natural disasters, even when the home state is unable to provide assistance...’\(^{17}\)

These views\(^{18}\), expressed by judicial authorities in four countries actively involved in the interpretation of refugee law, reflect the assumption that disasters do not discriminate and therefore a person seeking international protection in such a context cannot, by definition, satisfy the requirements of the Refugee Convention.

Some approaches to the scope of refugee protection in the context of disaster related harm take a slightly more nuanced approach, by recognising that a person may be simultaneously a victim of a natural disaster and a refugee. The UNHCR Handbook for example, states at paragraph 39:

> It [the expression 'well-founded fear of being persecuted' for a Convention reason] rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated.\(^{19}\)

The view that there need be something additional to the harm directly related to a famine or ‘natural’ disaster in order for the requirements of the refugee definition to be satisfied is echoed by Priestly J who, dismissing the appeal in *Teitiota v Minister for Business Innovation and Skills* explained:

> A person who becomes a refugee because of an earthquake or growing aridity of agricultural land cannot possibly argue, for that reason alone, that he or she is being persecuted for reasons of religion, nationality, political opinion, or membership of a particular social group.\(^{20}\)

The view that disaster related harm is necessarily distinct from persecution is even echoed in the specialist literature. Although it goes on to recognise the fact

\(^{16}\) *Applicant A & Anor v MIEA & Anor* [1997] HCA 4

\(^{17}\) *Canada (Attorney General) v. Ward* [1993] 2 SCR 689

\(^{18}\) Further examples of similar judicial thinking are cited in *McAdam, Climate Change Displacement*


\(^{20}\) *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125
that disasters exacerbate pre-existing social vulnerabilities and inequalities, the Draft Protection Agenda produced by the Nansen Initiative\textsuperscript{21} states: Displacement occurring in the contexts of disaster, unlike conflict related displacement, is characterized by the absence of persecution and violence.\textsuperscript{22}

This paper challenges the assumptions reflected in the jurisprudence and the literature that disasters are purely naturally occurring phenomena and that people affected by them cannot satisfy the conditions required to secure protection under the Refugee Convention.\textsuperscript{23} In what follows, the view that disasters are socially constructed and have a differential impact determined at times by a person’s possession of characteristics protected by the Refugee Convention is articulated.

3. The social construction of ‘natural’ disasters

As persecution must emanate from human actors, a paradigm that casts ‘natural’ disasters as resulting exclusively from the forces of nature presents clear problems for individuals seeking refugee protection in that connection. Although indications of this paradigm are clear from the case law and commentary cited above, mainstream theory in the social sciences has come to see the role of human actors as being central to the way disasters actually unfold.\textsuperscript{24}

As a point of departure, it is critical to make the distinction between natural hazard events and natural disasters express. A natural hazard is defined by the UN Office for Disaster Risk Reduction (UNISDR) as a ‘[n]atural process or phenomenon that may cause loss of life, injury or other health impacts, property damage, loss of livelihoods and services, social and economic disruption, or environmental damage.’\textsuperscript{25} Examples of natural hazard events include droughts, earthquakes, cyclones, heat waves and so forth. A disaster involves ‘severe alterations in the normal functioning of a community or a society due to hazardous physical events interacting with vulnerable social conditions, leading to widespread adverse human, material, economic, or environmental effects that require immediate emergency response to satisfy critical human needs and that may require external support for recovery.’\textsuperscript{26}

\textsuperscript{21} “The Nansen Initiative is a state-led, bottom-up consultative process intended to build consensus on the development of a protection agenda addressing the needs of people displaced across international borders in the context of natural hazards, including the effects of climate change” from <http://www.nanseninitiative.org>
\textsuperscript{22} Above n 7, 5
\textsuperscript{23} Foster has persuasively argued that both the experience of poverty and ill-health can, depending on the facts, bear all of the hallmarks of ‘being persecuted’ for a Convention reason. See Michelle Foster, \textit{International Refugee Law and Socio-Economic Rights: Refuge from Deprivation} (Cambridge University Press 2007)
\textsuperscript{24} See above n 1 for examples from the literature
\textsuperscript{25} <http://www.unisdr.org/we/inform/terminology#letter-n>
\textsuperscript{26} IPCC, \textit{Extreme Events and Disasters}, above n 1, 5 There are multiple definitions of ‘disaster’, but the one produced by the IPCC is particularly clear in its recognition of the social construction of the phenomenon. For alternative definitions, consider the one used by UNISDR and the International Law Commission: ‘A serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources’.
The idea that disasters arise in the context of vulnerable social conditions has been prominent in disaster risk reduction literature for decades. Wisner et al, in the second edition to their 1994 classic, argue that:

The crucial point about understanding why disasters happen is that it is not only natural events that cause them. They are also the product of social, political and economic environments... where people live and work, and in what kind of buildings, their level of hazard protection, preparedness, information, wealth and health have nothing to do with nature as such, but are attributes of society. So 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.27

This approach, articulated decades ago, informs contemporary approaches to understanding disasters and the displacement that can result. The Internal Displacement Monitoring Centre, for example, adopts such an approach in their 2015 publication on disaster related displacement risks, highlighting:

...the need to see disasters as primarily social, rather than natural, phenomena... Disasters are thus no longer being perceived as 'natural' or 'acts of God' but instead as something over which humans exert influence...28

Making the potential link between disasters and persecution more apparent, the IPCC recognizes the role of discrimination in determining vulnerability and exposure:

People who are socially, economically, culturally, politically, institutionally, or otherwise marginalized are especially vulnerable to [the adverse impacts of] climate change... This heightened vulnerability... is the product of intersecting social processes that result in inequalities in socioeconomic status and income, as well as in exposure. Such social processes include, for example, discrimination on the basis of gender, class, ethnicity, age and (dis)ability.29

Similarly, as indicated above, the Nansen Initiative on Disaster-Induced Cross-Border Displacement recognizes that:

Because disasters exacerbate pre-existing social vulnerabilities and inequalities, children, women, older persons, persons with disabilities, impoverished communities, indigenous people, migrants and marginalized groups are more likely to have particular protection needs.30

An understanding of this social construction of disasters is crucial for a correct application of the principles of international refugee law in the context of disasters. In order to begin to examine the implications of this theoretical approach to disasters on assessments of entitlements to refugee status, Section 4

---

27 Wisner et al. At Risk above n 1, 6
30 Nansen Initiative, Protection Agenda, above n 7, 6
describes the social construction of acute food insecurity. Part 2 will then engage in an analysis of how the social construction of acute food insecurity can engage host state protection obligations under the Refugee Convention.

4. The social construction of food insecurity

4.1 Why focus on food insecurity?

When considering the question regarding the availability of refugee protection from disaster related harm in an era of climate change, a focus on food insecurity is well justified. Recalling that disasters will generally have a natural hazard event, or series of events, acting as a trigger, the threat presented by global climate change strongly suggests that, absent substantial and wide ranging changes in nearly innumerable areas of human activity, disasters can be expected to become more frequent and more devastating in line with the increased frequency and intensity of natural hazard events predicted as part of the process.

As a starting point, the Intergovernmental Panel on Climate Change has stated with high confidence that ‘[a]ll aspects of food security are potentially affected by climate change, including food access, utilization, and price stability’. Further, ‘[m]ajor future rural impacts are expected in the near term and beyond through impacts on water availability and supply, food security, and agricultural incomes, including shifts in production areas of food and non-food crops across the world (high confidence)’. Climate change has already ‘negatively affected wheat and maize yields for many regions and in the global aggregate (medium confidence)’ and ‘there have been several periods of rapid food and cereal price increases following climate extremes in key producing regions, indicating a sensitivity of current markets to climate extremes, among other factors.’

The human impact of climate change related impacts on food security include an ‘increased likelihood of under-nutrition resulting from diminished food production in poor regions (high confidence)’. The likelihood of increased food insecurity in coming years is one factor that is expected to contribute to rising levels of cross border displacement of persons, although most displacement is expected to take place within the borders of an affected state.

Additionally, a focus on food insecurity is justified because of its manifestly social construction. Access to land, access to markets, price fluctuations, government policies, conflict, poverty and a host of other social factors can determine the severity of food insecurity in a region. When food

31 IPCC, Fifth AR Impacts, above n 29, 488
32 IPCC, Fifth AR Impacts, above n 29, 19
33 IPCC, Fifth AR Impacts, above n 29, 47
34 IPCC, Fifth AR Impacts, above n 29, 488
35 IPCC, Fifth AR Impacts, above n 29, 19
36 IPCC, Fifth AR Impacts, above n 29, Ch 12 Human Security
38 Office of the High Commissioner for Human Rights, The Right to Adequate Food (Fact Sheet No. 34 2010)
insecurity is acute, it can be associated with widespread hunger and associated destitution, displacement, disease and death.³⁹ Where human actors demonstrably contribute to hunger, international protection obligations may arise.

In what follows, the phenomenon of acute food insecurity is introduced, along with one of the tools used by international humanitarian organizations to evaluate the severity of acute food insecurity. Some of the environmental and social causes of acute food insecurity are also discussed.

4.2 Acute food insecurity

According to the Food and Agriculture Organization (FAO), food insecurity is:

A situation that exists when people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life.⁴⁰

Food insecurity can be acute or chronic, or both at the same time. A natural hazard event may trigger a situation of food insecurity in an otherwise food secure context or it may exacerbate an already chronic situation. Given the general requirement that the harm to which an individual risks being exposed must attain a high level of severity before it can amount to persecution, this paper will focus on situations of acute food insecurity, although an understanding of the factors contributing to chronic food insecurity that can give rise to periods of acute food insecurity are also discussed.

4.2.1 The Integrated Food Security Phase Classification

The Integrated Food Security Phase Classification (IPC)⁴² is a system used by international humanitarian organizations to classify the severity of a situation of acute food insecurity with reference to a number of indicators, including crude mortality rate, malnutrition prevalence, disease, food access/ availability, dietary diversity, water access/availability, destitution / displacement, civil security, coping strategies and livelihood assets. The scale of severity is as follows:

**Phase 1 (Minimal):** More than four in five households (HHs) are able to meet essential food and non-food needs without engaging in atypical, unsustainable strategies to access food and income, including any reliance on humanitarian assistance.

**Phase 2 (Stressed):** Even with any humanitarian assistance at least one in five HHs in the area have the following or worse: Minimally adequate food consumption but are unable to afford some essential non food expenditures without engaging in irreversible coping strategies.

**Phase 3 (Crisis):** Even with any humanitarian assistance at least one in

---

³⁹ For an in-depth example, consider Alex de Waal, *Famine that Kills* (Clarendon Press 1989)
⁴⁰ Food and Agriculture Organization, *The State of Food Insecurity in the World* (FAO 2014) 50
five HHs in the area have the following or worse: Food consumption gaps with high or above usual acute malnutrition OR are marginally able to meet minimum food needs only with accelerated depletion of livelihood assets that will lead to food consumption gaps.

**Phase 4 (Emergency):** Even with any humanitarian assistance at least one in five HHs in the area have the following or worse: Large food consumption gaps resulting in very high acute malnutrition and excess mortality OR extreme loss of livelihood assets that will lead to food consumption gaps in the short term.

**Phase 5 (Famine):** Even with any humanitarian assistance at least one in five HHs in the area have an extreme lack of food and other basic needs where starvation, death, and destitution are evident. (Evidence for all three criteria of food consumption, wasting, and CDR\(^43\) is required to classify Famine.)

For the remainder of this paper, situations of acute food insecurity from Phases 3 to 5 will be described as food security crises and will not be distinguished unless required by context.

As the IPC factors relevant to assessing the severity of a situation reveal, acute food insecurity is closely associated with a host of other elements essential to human security\(^44\), including access to water, sanitation, shelter and healthcare.\(^45\) Consequently, although the focus of this paper is on acute food insecurity, an individual seeking refugee protection in this connection will often be able to point to an accumulation of pressures additional to any difficulties accessing food.

Significantly, the different levels of severity on the scale also reveal the differential impact of food insecurity, given that only one in five households needs to experience the requisite degree of harm in order for the threshold to be attained. From the perspective of international refugee law, the factors that result in some individuals being more harmed than others in a situation of acute food insecurity is of great interest. Are these households more exposed and vulnerable because of race, religion, nationality, membership of a particular social group or political opinion? If so, the elements of the refugee definition may be made out. This issue will occupy the discussion in Section 6 of the paper.

Recognition by the international humanitarian community of a state of acute food insecurity is thus an indicator that an individual may be exposed to serious harm on return, and the IPC is thus a valuable practical tool for identifying situations in which hunger-related asylum claims could be explored.

\(^{43}\) CDR is the acronym for Crude Death Rate
\(^{44}\) IPCC 5\(^{th}\) AR Impacts above n 29, 759 defines human security as ‘a condition that exists when the vital core of human lives is protected, and when people have the freedom and capacity to live with dignity. In this assessment, the vital core of human lives includes the universal and culturally specific, material and non-material elements necessary for people to act on behalf of their interests.’

4.3 The causes of acute food insecurity

The environmental and social factors contributing to food insecurity are discussed below.

4.3.1 Environmental causes of acute food insecurity

An ‘environmental supply side’ approach to acute food insecurity would explain that reduced agricultural productivity due to natural climatic variation and climate change results in insufficient calories being available to a group of people in a particular place and time. If only more food could be produced locally, or perhaps delivered from overseas, hunger could be avoided. Explanations focusing on increased demand for food as a result of population growth may be combined with supply side explanations to present an explanation and associated recommendations for technical intervention that tend to overlook the social construction of acute food insecurity.47

4.3.2 Social causes of acute food insecurity

Discussion of the social causes of food insecurity often starts with consideration of the work of Amartya Sen. A crucial contribution of Sen’s work was his demonstration that markets often play a more significant role in food security crises than environmental factors.48

Perhaps more significant for the purposes of this paper was his recognition that the phenomenon is not indiscriminate, but rather affects people differently depending on their capabilities. Despite recognizing that some famines can be very widespread indeed, he writes:

While famines involve fairly widespread acute starvation, there is no reason to think that it will affect all groups in the famine-affected nation. Indeed, it is by no means clear that there has ever occurred a famine in which all groups in a country have suffered from starvation, since different groups typically do have very different commanding powers over food, and an over-all shortage brings out the contrasting powers in stark clarity.49

This perspective is supported by the Office of the High Commissioner for Human Rights, which emphasizes the significance of social exclusion and discrimination in relation to hunger and malnutrition:

The root cause of hunger and malnutrition is not a lack of food but a lack of access to available food. For example, poverty, social exclusion and discrimination often undermine people’s access to food...50

Through the development of his entitlement theory, Sen argued that people’s ability to access food either by producing it themselves or, crucially, by purchasing it on the open market, determined the extent to which they would suffer from famine. Taking examples from the Bengal famine of 1943, the

---

46 Wisner et al. *At Risk*, above n 1, 135
47 See for example A M Abdi, J Seaquist, D E Tenenbaum, L Eklundh and J Ardö
50 Ohchr, *The Right to Adequate Food*, above n 38, 3-4
Ethiopian famine of 1972-74, the Sahel famine of 1968-1973, and the Bangladesh famine of 1974, he demonstrates that the price of food in increasingly commercialized economies was the predominate cause of famine in Bengal, Ethiopia and Bangladesh, and a significant aggravating factor in the Sahel. Consequently, groups such as ‘the urban poor’ who were unable to afford the price increases in Bengal and Bangladesh, Ethiopian Wollo agriculturalists whose purchasing power declined with the decimation of their crops, and pastoralists in the Sahel region whose livestock died in massive numbers at the same time as the market rates for selling livestock collapsed, were unable to leverage entitlements to food and were consequently disproportionately affected by the food security crisis, even though overall food supply in the Bengal, Ethiopia and Bangladesh examples did not actually decline, and did not decline drastically in the Sahel example.\(^{51}\)

Although Sen looked primarily at different occupational groups (as opposed to minority ethnic or religious groups, for example), and focused on economic data rather than observation of social dynamics in particular areas affected by acute food insecurity, his argument that famine is a social phenomenon with a differential impact provides a strong starting point from which to begin to examine more closely the ways in which social factors affect people’s access to food in different contexts.

The arguments of Sen and the OHCHR resonate clearly with the approach adopted by the Integrated Phase Classification discussed in Section 4.2.1 above, as well as with the wider theoretical perspective that sees disasters as being socially constructed. Recalling the observations of the UK, Australian, New Zealand and Canadian courts, as well as authoritative commentary cited in Section 2, the aim of this first Part has been to demonstrate that assumptions of a sharp distinction between ‘persecution’ and forms of harm that can arise in disasters is not sustainable. In Part 2, the paper will adopt this view that disasters are socially constructed and examine the implications of such a perspective for our understanding of the scope of the Refugee Convention.

Part II: Legal assessment

In this Part, central elements of the refugee definition are considered in the context of acute food insecurity in order to evaluate the circumstances in which a risk of being exposed to hunger may engage protection obligations under the Refugee Convention. In light of the challenges identified in the case law highlighted in Section 2, the central question for analysis is under what circumstances will the experience of acute food insecurity amount to ‘being persecuted’ for a Convention reason. There are two elements to this analysis. First, Section 5 considers the harm threshold, which is a necessary ingredient in the persecution concept. Section 6 then considers the circumstances in which hunger may amount to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Notwithstanding hundreds of cases cited by Foster, she nevertheless observed that ‘[o]ne of the greatest limitations of the socio-economic category is that refugee claims based on socio-economic deprivation simply have not been taken up by advocates or courts in significant numbers: thus analysis is, in the

---

\(^{51}\) See Sen, Poverty and Famines, above n 48, Chapters 5-9
main, relatively limited and unsophisticated.\textsuperscript{52} Where case law carefully applies the Refugee Convention to different sets of facts relating to the kinds of risks that a particular individual may be exposed to upon return to her home country, the scope of international protection can be analyzed and gradually clarified. The case law relating to international protection in the context of disasters does not even permit Foster’s ‘limited and unsophisticated’ analysis. Moreover, country of origin reports\textsuperscript{53} are largely silent on disasters and which groups are particularly vulnerable, owing to discriminatory processes, in such situations. Unfortunately, general measures of food insecurity\textsuperscript{54} also do very little to establish the extent to which particular groups are at risk of being exposed to the harms associated with food insecurity, still less the reasons why such a risk would arise. Although the humanitarian relief community, in adopting a human rights based approach to its work, takes account of vulnerable groups such as ‘internally displaced persons, women, children and adolescents, older persons, persons with disabilities, persons living with HIV/ AIDS, single parent households without extended family support or child headed households, ethnic minority groups and indigenous peoples’\textsuperscript{55}, assessments tend to rely heavily on statistics and do not explore the social dynamics that make certain individuals more vulnerable than others. It is this information that is of crucial importance in a claim for international protection under the Refugee Convention. There is therefore a lack of readily accessible information focusing on discriminatory disaster-related harm to facilitate analysis of the application of the Refugee Convention in such circumstances. Consequently, the method in both of the coming sections involves first describing relevant concepts in international refugee law and then seeking out information and scenarios from literature produced by medical authorities, international humanitarian organizations as well as disaster anthropologists and other social scientists against which to apply those concepts. This method is a limited substitute for the more precise application of law to facts that is permitted by judicial consideration of actual refugee protection claims.

5. Hunger and the harm threshold

Under international refugee law, the severity of harm to which an individual may be exposed on return is of determinative significance. Regardless of whether a human antagonist can be identified, the claim cannot succeed unless the harm to which the individual risks being exposed on return attains the minimum level of severity.\textsuperscript{56} Adopting Hathaway and Foster’s human rights approach to the concept of ‘being persecuted’, a person facing hunger would need to demonstrate

\textsuperscript{52} Foster, \textit{Refuge from Deprivation}, above n 23, 151
\textsuperscript{53} For example those created by the UK Country of Origin Information Service or the US State Department
\textsuperscript{55} ibid, 61
\textsuperscript{56} See authorities cited at above n 41
that the experience would have a ‘clearly debilitating impact’. Hathaway and Foster conclude that

...threats to core socio-economic entitlements will frequently give rise to a risk to the internationally guaranteed right “to an adequate standard of living”. While neither the existence of financial grievances nor even poverty per se infringes this standard, there will be cases in which either an accumulation of risks, or – especially in relation to such core entitlements as the rights to food and shelter – the risk to a single core interest standing alone, will infringe this fundamental human right. Where the essentials of life are threatened in these ways, refugee law appropriately recognizes the risks to be of sufficient gravity to be persecutory.

In what follows, the position taken by Foster and Hathaway is used as a starting point for consideration of the ways in which the experience of hunger can attain the requisite level of severity as to be considered ‘being persecuted’. The actual human impacts of acute food insecurity include the psychological, socio-economic and physiological effects of hunger, in addition to harms relating to the wider disaster context, including the security, water and sanitation, shelter and other conditions. As this paper focuses narrowly on acute food insecurity, the experience of hunger as a form of ‘being persecuted’ will be considered below. It is one thing to say that a risk to the right to food can be of sufficient gravity to be persecutory, but how hungry does a person need to be before the threshold is attained? In the following three subsections, the quality of the actual harm that a person may experience is examined in further depth.

5.1 The psychological impacts of hunger

Hunger refers both to the ‘want or scarcity’ of food, as well as to the subjective experience of the same.

When examining the psychological, physiological and social forms of harm that are associated with hunger, a working definition of the experience is necessary. The Oxford English Dictionary defines hunger as ‘the uneasy or painful sensation caused by want of food.’ It is thus the psychological consequences of the lack of food that the term hunger primarily describes. The Oxford definition comes much closer to capturing this subjective experience than the depersonalized definition provided by the FAO: ‘A state, lasting for at least one year, of inability to acquire enough food, defined as a level of food intake insufficient to meet dietary energy requirements.’

The experience of hunger will vary according to an individual’s disposition along with the quantity and quality of food that is accessible and the duration of food insecurity. It therefore follows, at the risk of stating the obvious, that not all persons who feel hungry will be in need of protection.

Caveats aside, research on the psychological impacts of drastic dietary constriction reveals that the experience of hunger can be traumatic, as Fessler reports:

57 Hathaway and Foster, Refugee Status, above n 8, 228
58 Hathaway and Foster, Refugee Status, above n 8, 235
61 FAO, Food Insecurity, above n 40, 50
Investigators have noted that patients, often with no previous history of psychiatric disorder, may manifest megalomaniac and persecutory delusions, auditory hallucinations, somatisation, dissociation, suicidality, and confusion.\textsuperscript{62}

Although relevant as a way of demonstrating the strong correlation between ‘want of food’ and psychological distress, the value of evidence of the psychological impact of drastic dietary constrictions is limited because hunger in the context of food security crises tends to develop somewhat gradually as resources are depleted.\textsuperscript{63}

Research that comes closer to capturing the actual experience of food security crises is detailed in reports arising from the Minnesota Starvation Experiment, in which 36 volunteers from the US Civilian Public Service were exposed to ‘semi-starvation’ for a period of 24 weeks. Amongst the findings of the study, which must of course be recognized as being significant primarily in relation to people sharing physical and psychological characteristics similar to the volunteers, include ‘significantly increased symptoms of depression, hysteria and severe emotional distress and depression, signs of social withdrawal and isolation’.\textsuperscript{64}

Importantly, it is by no means clear that individuals experiencing food security crises in real life will experience the same symptoms as those documented in the clinical research. Indeed, as de Waal observed in his study of the 1984-1985 famine in Darfur, ‘access to ‘esh [millet and sorghum] was only one priority among several others, and in many cases it was a lesser priority’.\textsuperscript{65}

Indeed, one informant was stoical: ‘Hunger: tie your stomach tightly and wait, it will leave you’.\textsuperscript{66} Conversely, Vasiliyev notes the preponderance of alimentary and pellagra psychoses in besieged Leningrad during the Second World War.\textsuperscript{67}

From the perspective of refugee protection, the conclusion to draw about the harm threshold as it relates to the psychological experience of hunger is that an individual’s subjective experience needs to be taken into account, along with factors such as sex, age and state of health\textsuperscript{68}, and to recognize that in some cases the ‘periods of severe emotional distress’ identified in the clinical study could satisfy the threshold test.

5.2 The socio-economic impacts of hunger

\textsuperscript{63} Consider de Waal’s description of how people in Darfur responded to the likelihood of acute food insecurity in the lead up to the 1984-1985 famine, above n 39, 112
\textsuperscript{65} de Waal, Famine that Kills, above n 39, 112
\textsuperscript{66} ibid.
\textsuperscript{67} Pavel Vasiliyev, “Alimentary and Pellagra Psychoses in Beseiged Leningrad” in Zweiniger-Bargielowska, I., Duffett, R., Drouard, A (eds), Food and War in Twentieth Century Europe (Ashgate 2011)
\textsuperscript{68} In Ireland v United Kingdom Application No. 5310/71 [1978] ECHR [162] the European Court of Human Rights recognised the subjective aspect of torture, inhuman or degrading treatment or punishment, and considered these factors to be potentially relevant in determining the subjective threshold characterising these different forms of conduct.
Destitution is at times more feared by individuals facing food insecurity than hunger. As de Waal has demonstrated\(^69\), individuals will often be prepared to endure hunger in order to avoid taking economic choices that could lead to destitution, such as selling off livestock or land at cutthroat prices. Nonetheless, where no options remain, individuals can slide into destitution, which can in its turn expose individuals to exploitative labour arrangements\(^70\) including prostitution\(^71\) and bonded labour.\(^72\)

The experience of destitution itself can be sufficiently severe as to amount to being persecuted, particularly when the particular characteristics of the individual are concerned. In Januzi\(^73\), the UK House of Lords considered that it would be ‘unduly harsh’ to expect a farmer from Darfur to relocate to a slum settlement in Khartoum. Although the ‘unduly harsh’ test relates to an evaluation of the availability of an internal relocation alternative, the recognition that substantial suffering is entailed in the downward slide into destitution strongly suggests that such an experience, and particularly when combined with the psychological and physiological effects of hunger itself, can amount to ‘being persecuted’.

### 5.3 The physiological impacts of hunger

Malnutrition is a key indicator of food insecurity according to the IPC manual. The condition is defined in the Merck Manual as ‘an imbalance between the nutrients the body needs and the nutrients it gets’.\(^74\) The Merck Manual identifies undernutrition as a form of malnutrition involving ‘a deficiency primarily of calories (that is, overall food consumption) or of protein’. Starvation is ‘the most extreme form’ of undernutrition.

Although severe forms of undernutrition are typically found in children, adults are also affected in food security crises.\(^75\) The main physiological effects of acute malnutrition in adults include:

- Impaired immune responses, with increased risks of infection
- Reduced muscle strength and fatigue
- Reduced respiratory muscle function, resulting in increased difficulties in breathing and expectoration. These can in turn increase the risk of chest infection and respiratory failure
- Impaired thermoregulation with predisposition to hypothermia, particularly during infections
- Impaired wound healing and delayed recovery from illness
- Poor libido, impotence and infertility. Poor pregnancy outcomes.\(^76\)

---

\(^{69}\) de Waal, *Famine that Kills*, above n 39, 112


\(^{71}\) See for example Ayalaw Gebre, ”Migration Patterns of Children Exposed to Sexual Exploitation in Selected Zones of Ethiopia”, *Journal of Children's Services*, Vol. 7 Iss 4 (2012) 262 - 274

\(^{72}\) Wisner et al. *At Risk* above n 1, 158

\(^{73}\) Januzi v Secretary of State for the Home Department & Ors [2006] UKHL 5

\(^{74}\) Merck Manual,


<http://www.actioncontrelafaim.org/fr/content/adult-malnutrition-emergencies>

\(^{76}\) *ibid*, 8
Severe cases of malnutrition can result in death, either from diarrhoea, heart failure, respiratory failure or secondary infection or disease.\textsuperscript{77} It is therefore not surprising that a real risk of starvation has been held to permit a finding of “being persecuted”.\textsuperscript{78}

Most apparent in the literature is the high prevalence of infant mortality in situations of both chronic and acute food insecurity. Indeed, one of the ‘reference outcomes’ used by the IPC is ‘under 5 years death rate’, which refers to the number of deaths due to inadequate food consumption per 10,000 children under 5 years per day.\textsuperscript{79} When more than 4 children per 10,000 begin dying each day due to inadequate food insecurity, a famine level situation of acute food insecurity is indicated.\textsuperscript{80}

More generalized morality is also an indicator of acute food insecurity, with more than 2 deaths per 10,000 people per day indicating famine type conditions.\textsuperscript{81} Consideration of this measure draws into clear relief a central issue relevant to the question of refugee protection from acute food insecurity, namely the differential impact of the crisis. In a situation where 2 people in 10,000 are dying per day, a remaining 9,998 people are not dying. Although they may be exposed to other, less final, forms of harm as discussed above, it is crucial for refugee status determination to be able to identify what factors make an individual more vulnerable to harm than others.\textsuperscript{82} As already observed in Section 4.2, where the factors include a person’s race, religion, nationality, membership of a particular social group or political opinion, the risk of being exposed to hunger can engage protection obligations under the Refugee Convention. The role of discrimination in situations of food insecurity is therefore considered in detail in the next section.

6. Denial of the right to food amounting to persecution for a Convention reason

6.1 The right to food

Until this point, discussion of disaster related harm has focused on the concepts of acute food insecurity and hunger. In order for these concepts to have currency in international refugee law they need to be situated within the existing conceptual framework. Thus, adopting a human rights-based approach to the notion of ‘being persecuted’, acute food insecurity and hunger are to be understood in relation to the right to food, as guaranteed under Article 11 of the

\textsuperscript{78} Refugee Appeal 74665/03, RSAA, 7 July 2004, cited in Foster, \textit{Refugee from Deprivation}, above n 23
\textsuperscript{79} IPC v 2.0, above n 42, 30
\textsuperscript{80} IPC v 2.0, above n 42, 32. Although not the focus of this paper, even when the elements of the Refugee Convention definition at 1A(2) are not made out, there are clearly relevant arguments that can be advanced in relation to host state non-refoulement obligations under the Convention on the Rights of the Child see Jane McAdam, “Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection”, \textit{International Journal of Children’s Rights}, 14, 3 (2006), 251-274 and Committee on the Rights of the Child, \textit{General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin} (2005)
\textsuperscript{81} IPC v 2.0, above n 42, 32
\textsuperscript{82} Consider Secretary of State for the Home Department, \textit{Ex parte Adan}, [1998] UKHL 15
International Covenant on Economic, Social and Cultural Rights (ICESCR). The former reflects the general situation in which the state is failing to respect, protect and fulfil the right, whereas the latter reflects the individual experience of the denial of this right. Denial of the right to food could amount to persecution and could thus support a claim for refugee status in jurisdictions where a human rights based approach to ‘being persecuted’ is applied.

6.2 Persecution and denial of the right to food

Persecution is the conduct that the Refugee Convention was designed to provide international protection against. Although the Convention itself contains no definition of the term, Hathaway’s thesis that persecution entails a sustained or systemic denial of human rights evident of a failure of state protection has received widespread support both amongst academics and from the judiciary.

As discussed in Section 5, the harm that an individual fears being exposed to must attain a minimum level of severity in order for the experience to be considered ‘being persecuted’. In addition, it must be evident that the state would fail to protect the claimant.

Apart from a handful of examples from the jurisprudence that will be considered in more detail in Section 6.4, most states presiding over a situation of acute food insecurity do not directly seek to deprive people within their jurisdiction of adequate food. Indeed, many will contend that they are doing the best they have with limited resources. However, notwithstanding the recognition in the ICESCR that the right to an adequate standard of living is subject to progressive realisation, states are nevertheless bound to ensure a minimum standard of food security even in disasters.

6.2.1 Sufficiency of state protection

Thus, in addition to clearly intentional breaches, the right to food can also be denied where states fail to ensure a minimum standard of food security, for example by failing to regulate the conduct of non-state actors or by failing to request or facilitate international assistance in a disaster. Consequently, the concept of ‘sufficiency of state protection’ is central to the determination of whether being exposed to hunger would amount to ‘being persecuted’ under the Refugee Convention.

In situations where the state is unwilling to comply with its international obligations, whether by directly causing harm or by electing not to regulate the conduct of non-state actors, a failure of state protection will be established. The position is slightly less clear in situations where the state is actually unable to

83 11(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
84 See footnote 18 on page 185 of Hathaway and Foster, Refugee Status, above n 8, for details of academic and judicial endorsement of the definition
85 See Article 2 ICESCR
86 Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (1999), [15]
87 Hathaway and Foster, Refugee Status, above n 8, 295
provide a sufficiency of protection. In these cases, Hathaway and Foster note that some common law jurisdictions have introduced a requirement of a sort of “due diligence” on the part of the state to protect individuals and groups from the persecutory conduct of non-state agents. The decision of the House of Lords in Horvath is cited, in which Lord Clyde expressed his view that the sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it.

As Hathaway and Foster observe, what is far more common [than situations where there is no effective state apparatus] is that the home country has a functioning government which is embarking on measures designed to provide protection against harm, sometimes including measures specifically targeted to protect the at-risk group...

Is it the case then, following Horvath, that a person will not be able to establish a claim for refugee status where the state has in place systems for addressing food insecurity, including targeting vulnerable individuals? Is it sufficient for the state to be exercising “due diligence” in this connection? There is something of a clash between the absolute obligation to provide a minimum standard of food security to the population under the CESC and the tolerance of “due diligence” allowed under this interpretation of the ‘sufficiency of protection’ concept in international refugee law. Although Horvath remains good authority in the United Kingdom, Hathaway and Foster argue that the “due diligence” approach is an inappropriate standard for refugee status determination and point to a range of international jurisprudence focusing instead on the actual effectiveness of any protection purportedly available.

Particularly relevant in the context of the obligation to provide a minimum standard of food security, which is an obligation of immediate result, is their observation that the due diligence test’... is ultimately a duty of process, not of result... and conclude that ‘the ultimate question is not, however, whether the home state has complied with any particular standard of conduct, but whether the result of even the best intentions and most diligent efforts is to “reduce the risk of harm below the well-founded fear threshold.”

On this analysis, any situation in which a person had a well-founded fear of being exposed to serious harm owing to the failure of the state to respect, protect or fulfil the right to food can be described as 'being persecuted' for the purpose of the Refugee Convention.

6.3 The nexus clause

Whether such a risk of being persecuted can engage protection under the Refugee Convention depends on the reasons why particular individuals or groups are exposed to harm. A well-founded fear of being persecuted will only

---

88 Hathaway and Foster, Refugee Status, above n 8, 307
89 Horvath, above n 41, cited in Hathaway and Foster, Refugee Status, above n 8, 308
90 see for example AA003882014 & Ors. [2015] UKAITUR (20 May 2015)
91 Hathaway and Foster, Refugee Status, above n 8, 309-318, especially fn 160-171
92 Hathaway and Foster, Refugee Status, above n 8, 314
93 Hathaway and Foster, Refugee Status, above n 8, 319
give rise to refugee status where it is for reasons of race, religion, nationality, membership of a particular social group or political opinion. Satisfying this 'nexus clause' in the context of generalised acute food insecurity is thus of determinative significance.

Section 6.4 will highlight the widely recognised scenarios where state actors single out individuals or groups possessing protected characteristics, by for example denying them food relief or depriving them of their means of subsistence. In these cases, the nexus clause is easily established, reflecting familiar patterns of state violence against, for example, political opponents or minority ethnic groups.

Section 6.5 looks more closely at circumstances in which the ‘mere’ discrimination that individuals with protected characteristics experience in ‘normal’ times makes them disproportionately exposed and vulnerable to serious disaster-related harm. Whereas such everyday discrimination may not attain the severity threshold required to constitute persecution, the disaster scenario has the potential to exacerbate its impact, resulting in serious harm amounting to persecution for a Convention reason. In this connection, serious harm is not necessarily the intended outcome of the discriminatory conduct of state and non-state actors.

The thesis that disasters can transform ‘mere’ discrimination into persecution for a Convention reason is supported by a 2007 report from the International Federation of the Red Cross: ‘Discrimination in an emergency setting is life-threatening. And it affects not only people’s ability to survive the crisis, but also to recover and to regain their livelihoods afterwards.’ The report continues:

Discrimination was and is inherent in many societies, with disasters often magnifying the problem... Every emergency involves people who cannot access food and shelter simply because of their age, ethnicity, gender or disability. People already on the margins of society as a result of discrimination are made even more vulnerable through a crisis.

This observation is echoed by the Inter-Agency Standing Committee:

Experience has also shown that pre-existing vulnerabilities and patterns of discrimination usually become exacerbated in situations of natural disasters.

UNHCR, following a review of its intervention in six disaster scenarios, has also recognised how vulnerable groups often suffer disproportionately in disasters:

In general, the natural disasters heightened the protection risks facing women, children, older persons, people with disabilities, and other vulnerable groups specific to a country context (religious or ethnic minorities, indigenous groups, landless, etc.).

That such a state of affairs can correctly be described as persecution for a Convention reason depends on the prevailing approach to the nexus clause. In

---

94 Wisner et al At Risk, above n 1, 10 challenge the view that disasters represent an exception to otherwise ‘normal’ life for people who are vulnerable and exposed to disasters.


96 ibid, 12


some jurisdictions, a clear requirement that the actor of persecution *intends* to persecute an individual or group is articulated. People who are exposed and vulnerable to disasters because everyday discrimination makes them poor in terms of financial, social, physical, natural and human capital may trace the roots of their predicament back decades or even centuries.\(^9^9\) In situations of disaster, it may well be difficult to identify any clear actor of persecution who intends to cause harm. Where the requirement that an actor of persecution intends to cause harm prevails, claimants will struggle to establish an entitlement to refugee status on the basis that the disaster has transformed everyday discrimination into persecution for a Convention reason.

By contrast, under the Michigan Guidelines, the focus is on the ‘predicament’ of the claimant, as opposed to the motivation or intent of the actors of persecution. Thus, a claimant ought not be required to prove that the actors of persecution *intend* to cause harm *because* the person has or is ascribed a protected characteristic. Rather, the impact of the conduct itself is determinative.

The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant’s exposure to the risk of being persecuted.\(^1^0^0\)

In jurisdictions where this ‘predicament’ approach prevails, individuals who in their country of origin are exposed and vulnerable to serious disaster-related harm owing to their race, religion, nationality, membership of a particular social group or political opinion, will satisfy the nexus clause.

In what follows, the principles or international refugee law outlined above are applied in the context of a state’s failure to respect, protect or fulfil the right to food. State failure to protect the right to food is explored in close detail as it is in this connection that the scope of refugee protection appears wider when the social construction of disasters is appreciated.

### 6.4 Failure to respect the right to food

States have to respect people’s existing access to food and means of obtaining food. This means that any measure that results in preventing access to food, for example denying food assistance to political opponents, is prohibited.\(^1^0^1\) Hathaway and Foster identify a number of cases from common law jurisdictions establishing that ‘denial of access to food’\(^1^0^2\), ‘denial of famine relief in antigovernment areas’\(^1^0^3\), discriminatory ‘allocation of basic foodstuffs’\(^1^0^4\) ‘taking of harvests of those perceived as ‘enemies’\(^1^0^5\) and ‘discriminatory exclusion from

---

\(^9^9\) Wisner *et al.*, *At Risk*, above n 1, Ch 2


\(^1^0^1\) OHCHR, *The Right to Adequate Food*, above n 38, 18

\(^1^0^2\) Chen Shi Hai (Aus. HC, 2000), at 303, per Gleeson C.J., Gaudron, Gummow, and Hayne J.J.

\(^1^0^3\) Chan (Can. FCC, 1993), at 724

\(^1^0^4\) Vidya Ajodha, IABD M85-1709 (Can. IAB, Nov. 12, 1987)

\(^1^0^5\) Hagi-Mohamed v. Minister for Immigration and Multicultural Affairs, [2001] FCA 1156 (Aus. FFC, Aug. 23, 2001)
access to food aid\textsuperscript{106} can constitute persecution. These scenarios entail either direct state interference with people’s access to food (for example, taking of harvests) or withholding of food aid and are not difficult to reconcile with conventional approaches to international protection where the state intentionally singles out individuals for persecutory treatment because of their possession of a protected characteristic. These are the cases that are routinely cited when the narrow scope of the Refugee Convention in the context of disasters and the adverse impacts of climate change is discussed in the literature.

A third category of conduct that falls within the failure to respect the right to food ground relates to scenarios where hunger is a foreseeable consequence of a course of action, which in itself is not carried out with persecutory intent. The ‘predicament’ approach would enable affected individuals to satisfy the nexus clause.

There are abundant examples of state conduct that has hunger as a foreseeable consequence. For example, Human Rights Watch has documented how a government led initiative to develop sugarcane production in the Omo region of Ethiopia was accompanied by the forced displacement of indigenous Omo people, leading to food insecurity\textsuperscript{107}. Similarly, in Mozambique, largely self-sufficient farming communities have been uprooted by mining interests acting in collaboration with the government, exposing them to periods of food insecurity in the arid land to which they have been resettled, far from rivers and markets\textsuperscript{108}. In both of these scenarios it would be necessary to consider both the harm threshold as discussed in Section 5 as well as the nexus clause.

6.5 Failure to protect the right to food

States have to protect individuals’ enjoyment of the right to food against violations by third parties (e.g., other individuals, groups, private enterprises and other entities)\textsuperscript{109}. It is in relation to the state’s failure to protect the right to food that an understanding of the social construction of disasters can offer the greatest contribution. In what follows, some examples from anthropological literature are provided in order to illustrate the concept of discriminatory disaster-related harm within the context of a human rights-based approach to the notion of ‘being persecuted’. This brief survey reveals that, while not every failure to protect the right to food will amount to a sustained or systemic denial of human rights evident of a failure of state protection, and still fewer instances will entail the discriminatory conduct on the part of state or non-state actors necessary to satisfy the requirements of the refugee definition, persecution for a Convention reason is identifiable on a case by case basis.

6.5.1 Discrimination within the family

\textsuperscript{106} RN (Returnees) Zimbabwe CG, [2008] UKAIT 00083 (UKAIT, Nov. 19, 2008)

\textsuperscript{107} Human Rights Watch, “Waiting Here for Death”: Forced Displacement and “Villagization” in Ethiopia’s Gambella Region (2012)

\textsuperscript{108} Human Rights Watch, “What is a House without Food?”: Mozambique’s Coal Mining Boom and Resettlements (2013)

\textsuperscript{109} OHCHR, The Right to Adequate Food, above n 38, 18
At the household level ‘it is important to distinguish between people of different gender and status...’\textsuperscript{110} Whilst there is disagreement among commentators, some see ‘considerable struggle between men and women over food resources during times of stress’.\textsuperscript{111} Survival strategies in times of famine do not always reveal family unity, but may instead reflect ‘the contested interests within the household (between women and men, perhaps between generations, and between siblings).’\textsuperscript{112} As with domestic violence, where unequal access to food within the family is tolerated by the institutions of the state, or where the state is unable to provide effective protection, the elements of persecution for a Convention reason can be made out. Clearly, in an actual asylum claim, the individual facing hunger on account of her gender would also be able to point to other forms of discriminatory ill-treatment and an associated failure of state protection to support her claim.

Older and younger family members may also suffer disproportionately in food security crises.

Not only do the poor and infirm suffer first and most, but usually elders (i.e. those over about 45 in Africa), young children (particularly girls) and women have tended to suffer or starve before men in their young’ and middle years. The skews have seldom been reliably quantified—a hard thing to do. Who eats first at mealtimes (usually men, in most African societies, though women sample while cooking) appears to make a bigger difference than usual to nutrition when supplies dwindle.\textsuperscript{113} Equating discriminatory food distribution within the family accompanied by a failure of state protection with the notion of ‘being persecuted’ is, however, more challenging than seeking to make out the same, now established, argument in the context of domestic violence. Whereas physical and/or psychological violence directed against women in a society where the state proves unwilling to provide effective protection can be illustrated with the help of medical reports recounting cuts, bruises and mental trauma, socio-cultural norms that require women to eat last and least are less readily conceived within the modern refugee context. There are ample examples of women seeking, and failing to receive, state protection from domestic violence. No examples could be found of women invoking state protection obligations when there is not enough food to go round. Consequently, whilst in principle it is conceivable that a person may satisfy the definition of ‘being persecuted’ for a Convention reason in the context of discriminatory food distribution within the family, from a practical perspective such claims are unlikely to be both raised and successful.\textsuperscript{114}

\textbf{6.5.2 Discrimination at the community level}

Discriminatory conduct by non-state actors outside of the family is, perhaps not unsurprisingly, more diverse, visible and tangible than household-level conduct. In what follows, examples of situations where persons possessing protected characteristics are persecuted in the context of a food security crisis are

\textsuperscript{110} Wisner et al. \textit{At Risk} above n 1, 154
\textsuperscript{111} ibid, 154
\textsuperscript{112} ibid
\textsuperscript{114} The author is grateful to Professor … for discussion around this point.
provided. The first example comes from de Waal’s study of the 1984-1985 famine in Darfur. The second example comes from Majid and McDowell’s study of the 2011 famine in Somalia.

The 1984-1985 famine in Darfur, Sudan

de Waal’s study of the Mawashei famine camp in Darfur provides a clear insight into how discrimination by non-state agents on the basis of (imputed) nationality can expose a person to serious harm in the context of a food security crisis. Describing the camp itself as ‘one of the most dreadful places in Darfur’115 in 1985, de Waal noted that:

'[p]eople were iller and thinner than almost anywhere else; every day people were dying. It was a place where people were competing for the most unpleasant, unprofitable, and lowest-status trades. Everyone was poor and getting poorer. Among these trades there was a definite hierarchy, and certain groups of people were gradually forced down this hierarchy, and in some cases out of it altogether.”116

The social profile of the camp included a ‘core’ of historically marginalized members of the Tunjur and Zaghawa ethnic group who had resided there since the 1970s and had established themselves in low status activities such as petty trade, craft work, selling water, charcoal and firewood, as well as some labouring on farms and in town. These marginal inhabitants competed against a series of new ‘famine migrants’ from 1983 onwards, with each successive wave of arrivals coming into competition with others. The famine migrants from the north of the country faced greater challenges than others, being labelled ‘thieves’, ‘beggars’, ‘lazy’, and ‘rich’, not to mention ‘Chadians”117 [a form of imputed nationality] and denied relief from local charitable organisations on that basis.

de Waal does not go into detail about what kind of ‘greater challenges’ the famine migrants from the north faced, but in a situation where people were dying every day, restrictions on access even to menial work, denial of charitable relief, perhaps relegation to the most undesirable, contaminated parts of the camp, amongst other challenges, would expose this group, with an imputed national identity, to serious harm sufficient to engage protection under the Refugee Convention.

Indeed, members of the Tunjur and Zaghawa ethnic group, who de Waal describes as having occupied marginal social space around Mawashei since the 1970s, may also establish a claim under the Refugee Convention at the point where their experience of ‘mere’ discrimination was transformed into serious harm in the context of the famine.

The 2011 famine in Somalia

A more contemporary example is provided by Majid and McDowell, who have examined the ‘hidden dimensions’ of the Somalia famine in 2011. By October 2011, seventeen per cent of the population of south/central Somalia were classified as being ‘in Famine conditions’118. As highlighted in Section 5.3, the

---

115 de Waal, Famine that Kills, above n 39, 164
116 ibid.
117 de Waal, Famine that Kills, above n 39, 169
118 Majid and McDowell, Hidden Dimensions, above n 106, 36
designation of an area as being in famine conditions does not entail uniform levels of harm. A key question that flowed from this observation asked who those persons whose suffering provided the statistics necessary for the famine to be declared were, and why they happened to be more exposed to food insecurity than others.

According to Majid and McDowell, members of the Reewin and Bantu populations, who the authors identify as ‘marginalized’ were ‘by far the biggest victims’.

The Reewin are described as ‘more sedentary’ ‘agro-pastoralists’ who are ‘part of the Somali segmentary lineage system, but considered distinct from the ‘noble’ or major clans’. The Bantu are ‘riverine farmers’ who are not part of the Somali clan system, and considered a ‘minority’ group. The poorer of both groups rely on agricultural and/or urban-based labour for access to food/income.

Drawing on work by de Waal and Hansch et al, the authors note that these two groups comprised the bulk of the 200,000-300,000 people who died during Somalia’s last major famine in 1991-1992. Identifying what they consider to be the main cause of Reewin and Bantu vulnerability, the authors argue:

Their main food, income and coping sources were strongly connected (their main sources of income and coping were derived by labouring on the farms which produced the food they purchased) creating high levels of vulnerability to a production shock, which in turn would diminish their principal source of coping.

They go on to argue that:

‘clan and identity... important in understanding long-term marginalization processes and outcomes, also help to understand the differential vulnerability to covariate risk, such as concurrent crop failure and related agricultural labor market collapse.’

Taking a historical perspective, the authors identify the marginalization of more sedentary livelihood systems since the formation of the state in the early 1960s, combined with targeted violence. Referring back to the 1991-1992 famine, the authors explain that the Reewin and Bantu ‘were the target of looting and violence by the more powerful major clan militias. Livestock and food stores were targeted.’

In relation to the Bantu, they explain that ‘the Bantu have a long history of forced removal from the most productive land by successive political authorities and exploitative relations with politically or militarily dominant groups. Large numbers became landless wage labourers under the Siad Barre regime.’

The socio-economic marginalization of these populations help to explain, according

119 ibid.
122 Majid and McDowell, Hidden Dimensions, above n 54, 37
123 ibid, 41
to the authors, why the above ‘proximate and complicating factors’ caused famine ‘predominantly in these communities and not others’.\textsuperscript{125}

This characterization of Bantu and Reewin groups as being particularly vulnerable to the effects of drought and conflict is supported by Lindley\textsuperscript{126}, who, reflecting the view of disasters as being socially constructed, argues:

...both routine mobility and displacement in the wake of natural hazards have been recurring features of Somali livelihoods, but these dynamics cannot be understood without reference to the political context in which they occur... since the collapse of the state in 1991, violent and predatory political actors have exacerbated the impact of environmental hazards on vulnerable groups...\textsuperscript{127}

The examples provided in this sub-section are intended to illustrate the reality of non-state actor discrimination for a Convention reason in the context of disasters. They further illustrate how ‘mere’ discrimination can be transformed into serious harm amounting to persecution in the context of disasters. In what follows, the fact of discriminatory conduct by non-state actors in the context of disasters is considered against the criterion of state protection and the nexus clause in an effort to identify some of the prospects and limitations that would accompany such claims.

\subsection*{6.5.3 State protection and the nexus clause}

Even those states affected by protracted chronic food insecurity tend to take steps to protect their populations for hunger. Reports by the former Special Rapporteur on the Right to food on his visits to Niger, Brazil, Bangladesh, the Occupied Palestinian Territories, Mongolia, Guatemala, Lebanon, Bolivia and Cuba reveal that in each of these states the authorities had in place programmes to protect and fulfil the right to food.\textsuperscript{128} Nonetheless, there is also recognition that vulnerable groups, such as women, children, indigenous people and others suffer disproportionately from food insecurity.\textsuperscript{129}

In the Sudanese example, the limited information provided by de Waal regarding the intervention of the state in the famine suggests that the authorities were unwilling and unable to assist anyone apart from particular groups to whom they felt a ‘special obligation’, including their own employees in particular, but also townspeople.\textsuperscript{130} He writes:

In practice these distributions were small and urban-centred, hampered by lack of grain, money, and transport. The main reason for this was the refusal by the central government to recognize the existence of the famine, and co-operate with attempts to relieve it.\textsuperscript{131}

\begin{flushright}
\textsuperscript{125}\textit{ibid} \\
\textsuperscript{126}Anna Lindley, “Environmental Processes, Political Conflict and Migration: A Somali Case Study” in Martin, S., Weerasinghe, S., and Taylor, A. (eds) \textit{Humanitarian Crises and Migration: Causes, Consequences and Responses} (Routledge 2014), 165-167 \\
\textsuperscript{127}\textit{ibid}, 167 \\
\textsuperscript{128}Jean Ziegler et al, \textit{The Fight for the Right to Food: Lessons Learned} (Palgrave Macmillan 2011) \\
\textsuperscript{129}Human Rights Council, Study on \textit{Discrimination in the Context of the Right to Food} (A/HRC/AC/6/CRP.1, 2010) \\
\textsuperscript{130}de Waal, \textit{Famine that Kills}, above n 39, 205 \\
\textsuperscript{131}\textit{ibid}
\end{flushright}
Hence, even on a due diligence model, it would appear that there was a failure of state protection of the Tunjur and Zaghawa ethnic groups as well as the famine migrants with an imputed Chadian nationality, thus supporting a conclusion that members of these groups were persecuted for a Convention reason in the context of the 1984-1985 famine. Had they managed to cross an international border and sought international protection in a jurisdiction where the ‘predicament’ approach to the nexus clause applied, they would have, depending on a full assessment of their individual circumstances, been entitled to refugee status. Refugee status would be less clearly available in jurisdictions where it is necessary to establish intention as part of the nexus requirement.

Equally, in the context of the Somalia famine, members of the Bantu and Reewin minority groups who managed to cross an international border would be entitled to refugee status where the predicament approach to nexus applies and regardless of whether a due diligence or effectiveness approach to the state protection requirement was adopted. The Transitional Federal Government at the time of the famine controlled only a small part of the country132 and was therefore clearly unable to protect the right to food of the Bantu and Reewin minority groups who were the primary victims of the famine in South/Central Somalia.

The frailty of the Transitional Federal Government during the famine raises an interesting, if perhaps technical, point regarding the human rights based approach to the notion of ‘being persecuted’. Can such an approach apply in failed or failing states, where there may be no effective state authority to whom responsibility to respect, protect and fulfil human rights may be attributed? Is the potential to establish a breach a necessary element of a human rights based approach to the notion of ‘being persecuted’? This author would argue against such an approach on the basis that the alternative would give rise to an absurdity where inhabitants of a weak or corrupt state can secure international protection where their human rights are violated, but inhabitants of a failed or failing state cannot. Further, the definition adopted by Hathaway and Foster looks for evidence of a ‘denial’ of human rights, as opposed to a breach, thus basing an assessment of whether a person faces a well-founded fear of being persecuted on the factual predicament of the individual, as opposed to the question of whether there has been an actual breach on the part of the state.133

6.5.4 Conclusion

This section has sought to provide insight into a potential refugee-producing scenario that has not been considered in the literature to date, and which emerges when a perspective that sees disasters as being socially constructed and infused with discrimination is adopted.

Although the chronic food insecurity that counts for ‘normal’ life for the 805 million ‘chronically undernourished’ people on Earth134 may not always result from discriminatory conduct, this paper contends that there is

\footnotesize{132 See for example Jeffrey Gettleman and Mohammed Ibrahim, ‘Shabab Concede Control of Capital to Somalia Government’ New York Times (6 August 2011)
133 The author thanks Professor for discussion regarding this potential weakness in the human rights based approach to ‘being persecuted’.
134 FAO, Food Insecurity, above n 40, 8}
considerable variation in the level of vulnerability amongst the wider group of people exposed to food insecurity. Whereas discrimination may not be the reason why millions go hungry, it can help to explain why some go more hungry than others, both in ‘normal’ times and particularly in disaster situations.

The state has a duty under international law to protect its population from the conduct of non-state agents, and evidence of its failure to provide effective protection is essential for establishing a claim for refugee status. The examples provided in this section reveal that, even where the state is ‘doing its best’, individuals and groups will still find themselves exposed to serious harm on account of their race, religion, nationality, membership of a particular social group or political opinion. In such scenarios, the recognition of refugee status would be appropriate for individuals who have crossed an international border onto the territory of a signatory state.

6.6 Failure to fulfil the right to food

Whenever individuals or groups are unable, for reasons beyond their control, to enjoy the right to food by the means at their disposal, States have the obligation to fulfil (provide) it, for example by providing food assistance or ensuring social safety nets for the most deprived and for victims of natural or other disasters.\(^{135}\)

This paper treats situations where disaster relief is distributed in a deliberately discriminatory way by the state as examples of a failure to respect the right to food, notwithstanding clear elements of a failure to fulfil the right to food as well. Hence, to avoid duplication, the examples of a state failure to respect the right to food in the context of disaster relief provided in section 6.4 can be taken as examples of a state failure to fulfil the right to food as well.

Where the state does respond in a disaster, another level of indirect discrimination can be identified. Here, vulnerable individuals, such as women, children, older people and people with disabilities, may simply have to struggle harder to access the services being provided as part of the relief effort, with potential adverse impacts. An example from the IFRC is illustrative:

...indirect discrimination often creates additional problems for older people in emergency situations. They may find it difficult to travel to distribution sites and often do not have the strength to carry the goods back to their shelters. This is especially the case when sites are placed on high points away from populated areas for security reasons. But this process discriminates against the elderly and the housebound.\(^{136}\)

As with the example of discriminatory distribution of food at the household level, the example of indirect discrimination in the distribution of disaster relief contains facts that would in principle engage the Refugee Convention. There is the potential for serious harm attaining the requisite severity threshold. There is a predicament wherein persons with protected characteristics (elderly people or persons with disabilities as members of a particular social group) suffer disproportionately from disaster related harm, owing to their possession of the protected characteristic. The state is unable or unwilling to provide effective

---

\(^{135}\) OHCHR, *The Right to Adequate Food*, above n 38, 18-19, emphasis added

\(^{136}\) IFRC, *World Disasters Report 2007*, above n 95, 24
protection, even if it may be said that state agents are doing their best in difficult circumstances.

The prospects of success of a claim based on an indirectly discriminatory failure to fulfil the right to food in the context of a disaster would clearly depend heavily on the interpretation of the Refugee Convention applied in the host country. Indeed, although the formal elements of the refugee definition could potentially be satisfied in such a case, public policy considerations as well as reflection on the intention of the drafters of the Convention may well outweigh a human rights based approach at this far end of the spectrum of socio-economic rights protection claims.

7. Conclusion

This paper set out to challenge the notion that refugee status is not available to individuals who have a well-founded fear of disaster related harm that has been repeatedly articulated in jurisprudence from at least four of the leading common law jurisdictions involved in the interpretation of the Refugee Convention. The paradigm that sees ‘natural’ disasters as being unrelated to the social dynamics within the communities affected by hazard events such as droughts, floods and earthquakes was shown to be out of step with the prevailing view within the disaster risk reduction community that understands disasters to be inherently social phenomena. Evidence was also provided to demonstrate the discriminatory nature of disasters, where women, children, older people, persons with disabilities, members of minority ethnic, religious, political or other groups are disproportionately adversely affected. The paper’s main argument was that where a person’s race, religion, nationality, membership of a particular social group or political opinion exposes them disproportionately to serious disaster related harm, that person would be entitled to refugee status if she managed to seek asylum in a signatory state.

In order to develop the argument, the experience of food insecurity was examined in some detail, including by considering its environmental and social causes as well as the psychological, socio-economic and physiological effects. Substantial support was found from the disaster risk reduction literature, as well as from the Committee on Economic, Social and Cultural Rights and the Office of the High Commissioner for Human Rights for the contention that food insecurity is manifestly not a consequence food shortage, but of power relations and a failure of state protection. Routinely, vulnerable groups are disproportionately adversely affected. Where the psychological, socio-economic and/or physiological impacts are, sufficiently severe, the harm threshold that is a necessary component of the concept of ‘being persecuted’, will be attained.

Although cases recognizing breaches of the right to food have been held to amount to persecution for a Convention reason, the limited case law is largely restricted to classic scenarios where the state intentionally seeks to cause harm for reasons of race, religion, nationality, membership of a particular social group or political opinion. This paper has, by drawing on disaster anthropology and wider social science literature, identified persecution for a Convention reason in circumstances where the state has failed to protect the enjoyment of the right to food from interference by non-state actors, as well as theoretically, where the state has failed to fulfil the right to food, in particular in disaster situations.
The paper does not suggest that the possibility of securing refugee status by identifying instances of persecution within a situation of acute food insecurity has dramatic practical consequences for people affected. The vulnerable groups described in this paper will tend to be precisely those persons who are unable to leave areas affected by disasters, a phenomenon referred to in the literature as ‘trapped populations’. Nonetheless, cross-border disaster-related displacement is likely to increase in a changing climate, making this article a timely theoretical intervention.