

Protecting the Vulnerable in the Twenty-First Century: an International Perspective

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INTRODUCTION

Walking along the Wellington waterfront one evening I came across a plaque, recognising a group of 733 Polish children (most of them orphans) and their 102 caregivers who, in 1944, arrived in Wellington on the USS General Randall after escaping Stalin's Red Army.² They came to New Zealand at the invitation of the then Prime Minister, the Rt Hon Peter Fraser,³ after appealing to the League of Nations for assistance.

The children were taken by train over the hill from Wellington to Pahiatua, a small town in the Wairarapa.⁴ Once in Pahiatua, they were housed in an old camp which had been used to intern enemy nationals during the First World War. The camp was renamed the "Polish Children's Camp". All lessons were in Polish as were the street names, reflecting the intention that all of the refugees would return to Poland at the end of the war. However, after a pro-Soviet communist government was established in Poland, the New Zealand Government assured the children and adults that they were welcome to remain in New Zealand.⁵ Many did.

¹ Judge of the Supreme Court of New Zealand. This paper is based on the Shirley Smith address given by Justice Glazebrook in Wellington on 17 September 2014. The Shirley Smith address is an annual address organised by the Women in Law Committee of the Wellington Branch of the New Zealand Law Society. The lecture was sponsored by Thorndon Chambers and the Wellington Branch of the New Zealand Law Society and given in memory of Shirley Smith, who was a prominent New Zealand legal practitioner. My thanks to Andrew Row for his excellent assistance with the research for and writing of this paper.

² For a detailed history of the harrowing journey of New Zealand's so called "first refugees" see Adam Manterys (ed) *New Zealand's First Refugees: Pahiatua's Polish Children* (2nd ed, Polish Children's Reunion Committee, Wellington, 2008). An online version is available at: <www.nzetc.victoria.ac.nz>. See also Stanislaw Manterys "Story of the Polish Children of Pahiatua" Embassy of the Republic of Poland in Wellington <www.wellington.swz.gov.pl>. Photographs of the children arriving in New Zealand and of the Polish Children's Camp are available at <www.natlib.govt.nz>.

³ Adam Manterys, above n 2, at 24.

⁴ At 24. Hundreds of New Zealand school children sent them off, waving New Zealand and Polish flags at the Wellington Train Station. All along the train tracks between Wellington and Pahiatua, many groups of children from small towns along the way gathered to wave at the train carrying the new arrivals.

⁵ Adam Manterys, above n 2, at 25.

The Polish children were not the only refugees to come to New Zealand as a result of the Second World War. After the war, the International Refugee Organization (IRO), a specialised agency of the United Nations set up in 1946, arranged for the resettlement of over a million European refugees across the globe from Israel to Oceania.⁶ Between 1949 and 1952 between 4,500 and 5,000 further European refugees were sent to New Zealand by the IRO.⁷

The mandate of the IRO only lasted to mid-1950 and, as the end of the mandate neared, the world realised a permanent solution was needed to deal with refugees from the war.⁸ This ultimately led to the establishment of the United Nations High Commissioner for Refugees (UNHCR) and the preparation of the Convention relating to the Status of Refugees.⁹ Originally the Refugee Convention had severe temporal and geographic restrictions limiting it to events that occurred before 1 January 1951 in Europe.¹⁰ A 1967 Protocol abolished these temporal and geographic restrictions and thus substantially widened the rights of refugees at international law.¹¹

While the Refugee Convention has been the main mechanism for protecting those fleeing harm in the twentieth century, this paper seeks to assess whether that instrument adequately deals with twenty-first century issues. In particular, it will assess the extent to which the Refugee Convention operates to protect women and children. I will examine that issue under four main headings: violence against women; refugee camps; climate change migrants; and victims of environmental disasters. But first, I provide a brief overview of the Refugee Convention and outline the scale of the problem worldwide.

REFUGEE CONVENTION

The Refugee Convention applies to an individual who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or

⁶ See James Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge (UK), 2007) for a discussion of the history of international refugee law.

⁷ Ann Beaglehole “Refugees” (24 May 2013) Te Ara-the Encyclopaedia of New Zealand <www.teara.govt.nz>.

⁸ Hathaway, above n 6, at 91.

⁹ Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951 and entered into force 22 April 1954) (“Refugee Convention”).

¹⁰ Hathaway, above n 6, at 91.

¹¹ Protocol relating to the Status of Refugees 606 UNTS 267 (opened for signature January 31 1967 and entered into force October 4 1967) (“Refugee Protocol”). In this paper, I refer to the Refugee Convention and the Refugee Protocol collectively as the “Refugee Convention”.

political opinion,” finds him or herself outside the country of his or her nationality “and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country”.¹²

There are currently 145 State Parties to the Refugee Convention and 146 State Parties to the Refugee Protocol. The Refugee Convention, as amended by the Refugee Protocol, has become known as the “Magna Carta” of international refugee law.¹³

Key obligations

Once an individual seeking asylum reaches the jurisdiction of a State party to the Refugee Convention, State parties cannot return or expel that person to the State where they might be persecuted, unless and until a negative determination of the refugee’s claim to protection is rendered.¹⁴ This is called the non-refoulement principle. It is contained in art 33 of the Refugee Convention and is a key pillar of international refugee law.¹⁵

¹² For the definition of “refugee” under the Refugee Convention, see art 1.

¹³ Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, New York, 2011) at vii (preface). New Zealand ratified the Refugee Convention in 1960 and the Refugee Protocol in 1973. The Refugee Convention and the Refugee Protocol were, however, incorporated into New Zealand legislation only in 1999. The provisions dealing with the Convention are now contained in Part 5 of the Immigration Act 2009. Before the provisions dealing with the Convention were incorporated into legislation, New Zealand did have administrative mechanisms for dealing with those claiming refugee status. However, because the prohibition on refoulement was not enacted in legislation, there were issues in the case of *D v Minister of Immigration* [1991] 2 NZLR 673 (CA), where the Court of Appeal said that “the present statute law does have the result that, because of the security risk in New Zealand, Government officers may have at times to send away, and perhaps back to persecution, persons who *may* have genuine reasons to fear persecution ...”. Sir David Baragwanath described the case as an example of an “unfortunate breach by our judiciary of the non-refoulement obligation”. See: David Baragwanath “Can the Judiciary Maintain its Independence? A Comment on the Address of Sir Stephen Sedley” (Paper presented at 5th conference of International Association of Refugee Law Judges, Wellington, 2002) at 3–4.

¹⁴ Hathaway, above n 6, at 278.

¹⁵ There are some exceptions to the non-refoulement principle in the Convention. For example, the Convention does not apply to persons who fall under art 1F or those who satisfy art 33(2). Article 1F specifies that the Refugee Convention does not apply to those who have committed crimes such as war crimes or crimes against humanity or those persons who are guilty of acts contrary to the purposes and principles of the United Nations. Art 33(2) states that the non-refoulement principle does not apply to those for “whom there are reasonable grounds for regarding as a danger to security in which he [or she] is” or “having been convicted ... of a particularly serious crime, constitutes a danger to the community of that country”. Other rights of refugees include the right of association (art 15), right to access the courts (art 16), various labour rights (see arts 17–19) and the right to elementary public education (art 22).

Key limitations

Before moving on, it is important to recognise some key limitations of the Refugee Convention. The first limitation is that it does not apply to internally displaced persons, meaning it does not apply to those who have been forced to flee from one part of their country to another. The second limitation is that, to claim refugee status, an asylum seeker has to reach the jurisdiction of a State party to the Convention and, as will be discussed later, in some circumstances that has to be the first country reached after fleeing persecution. The third limitation is that a claimant must come within the definition of a “refugee”. There are some complications involved in that definition, which can limit the Convention’s application in the four areas I discuss in this paper.

SCALE OF THE PROBLEM

We are witnessing a paradigm change, an unchecked slide into an era in which the scale of global forced displacement as well as the response required is now clearly dwarfing anything seen before.

*Antonio Guterres, UN High
Commissioner for Refugees¹⁶*

According to the UNHCR, a person is forced to flee from persecution every four seconds around the world.¹⁷ In 2013 there were a worldwide total of 51.2 million forcibly displaced persons including refugees asylum seekers¹⁸ and internally displaced persons. The year 2013 saw, for the first time since the Second World War, over 50 million displaced persons.¹⁹ However, by the end of 2014, this figure had increased to 59.5 million forcibly displaced persons – the highest annual increase in a single year.²⁰ Of the 59.5 million forcibly displaced persons, refugees totalled 19.5 million.²¹

¹⁶ UNHCR “Global Trends 2014: *Forced Displacement in 2014*” (Annual report, June 2015) at 3. The UNHCR kindly granted permission to show numerous videos during the oral address, including a video showing the scale of the refugee problem, available at <www.youtube.com/watch?v=CIL1mQv4vm8>.

¹⁷ UNHCR “Global Trends 2013” (Annual report, June 2014) at 52.

¹⁸ The UNHCR defines an asylum seeker as a person who claims they are a refugee, but whose claim has not yet been definitively evaluated: UNHCR “Asylum-Seekers” (2014) <www.unhcr.org>. In 2014 there were 2.9 million new refugees, 11 million newly internally displaced persons and 1.7 million new asylum seekers: UNHCR, above n 16, at 2 and 8.

¹⁹ UNHCR “World Refugee Day: Global forced displacement tops 50 million for first time in post-World War II era” (20 June 2014) <www.unhcr.org>.

²⁰ UNHCR, above n 16, at 2.

²¹ At 2.

Some further statistics highlighting the human cost: children under the age of 18 constituted more than 50 per cent of the refugee population in 2014.²² Developing countries host 86 per cent of the world's refugees.²³ In 2014, Turkey, Pakistan, Lebanon, the Islamic republic of Iran, Ethiopia and Jordan were the top hosts of refugees under the UNHCR's mandate.²⁴ The Syrian Arab Republic, Afghanistan and Somalia were the top refugee-generating countries.²⁵

PRIVATE VIOLENCE AGAINST WOMEN

I now turn to the first of my four topics for this paper: the issue of what I call private violence against women, by which I mean women subjected to violence by private persons, often family members.

The Refugee Convention deals with persecution based on five grounds: race, religion, nationality, being a member of a particular social group and political opinion. Gender is not specifically mentioned. Women are of course subjected to violence, including sexual violence, in the course of war for reasons that are squarely protected under the Refugee Convention (for example by reason of religion or ethnicity).²⁶ But does the Convention cover women subjected to private violence? The UNHCR has recognised that the refugee definition has historically "been interpreted through a framework of male experience".²⁷ The question is whether this has changed in recent years.

Three aspects of the Refugee Convention potentially present the most difficulties for women claiming refugee status for private violence: first, whether women are members "of a particular social group"; secondly, whether they are being "persecuted" which requires, among other

²² At 8.

²³ At 2.

²⁴ At 2.

²⁵ At 3.

²⁶ It is estimated that between 100,000 and 250,000 women were raped during the three months of genocide in Rwanda in 1994. The International Criminal Tribunal for Rwanda, in prosecuting Jean Paul Akayesu, held that rape and sexual violence could constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, the Tutsi ethnic group: *Prosecutor v Akayesu (Judgment)* ICTR ICT-96-4-T, 2 September 1998. The Statute of the International Tribunal for Rwanda (1994) also recognised that rape could constitute a crime against humanity and a war crime. For more on this topic, see Catharine A MacKinnon "The ICTR's Legacy on Sexual Violence" (2008) 14 *New Eng J of Intl & Comp L* 101.

²⁷ UNHCR *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* HCR/GIP/02/02 (2002) at [5].

things, a causal nexus with a Convention ground; and thirdly, the requirement to reach the jurisdiction of a state party to the Convention. But first some more background.

Background

It is a violation of human rights when women and girls are sold into the slavery of prostitution. It is a violation of human rights when women are doused with gasoline, set on fire and burned to death because their marriage dowries are deemed too small. It is a violation of human rights when individual women are raped in their own communities and when thousands of women are subject to rape as a tactic or prize of war. It is a violation of human rights when a leading cause of death worldwide among women ages 14 to 44 is the violence they are subjected to in their own homes. It is a violation of human rights when young girls are brutalized by the painful and degrading practice of genital mutilation.

*Hillary Clinton, United Nations Fourth World Conference on Women*²⁸

According to a report released by the World Health Organisation in 2013, over one third of women worldwide have experienced either physical or sexual domestic violence or non-domestic sexual violence.²⁹ The types of domestic abuse women face, in addition to assault and sexual violence, include: honour killings where a woman is killed by her family for bringing ‘dishonour’ upon them;³⁰ bride burning, whereby a woman is set alight often because of a perceived inadequate dowry;³¹ and genital mutilation.³²

²⁸ Hillary Rodham Clinton, “Women’s Rights are Human Rights” (United Nations Fourth World Conference on Women, Beijing China, 5 September 1995).

²⁹ World Health Organisation “Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence” (2013).

³⁰ For more on honour killings, see J Cohan “Honor Killings and the Cultural Defense” (201) 40 Cal W Intl LJ 177.

³¹ Avnita Lakhani “Bride-Burning: The ‘Elephant in the Room’ Is Out of Control” (2005) 5 Pepperdine Dispute Resolution Law Journal 249. See also N S Ravikant “Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligations” (2000) 6 Michigan Journal of Gender & Law 449 at 456 where the author explains the fact that because bride burnings usually take place in the home without non-family witnesses available, it is difficult to disprove the husband’s or in-law’s explanation of a kitchen accident or suicide.

³² The forms of female genital mutilation (often conducted without anaesthesia) can range from removal of the clitoris, all the way to infibulation which involves the removal of the clitoris, labia minora, labia majora. Then the vulva is sutured together, leaving only a small opening for the passage of urine and menstrual fluid. Female genital mutilation is considered a violation of human rights due to the severe pain and permanent physical harm caused: UNHCR *Memorandum: Female Genital Mutilation* SUS/HCR/011 (1994) at [7]. This phenomenon occurs also in developed countries. For example it is thought that over 137,000 women in the United Kingdom are living with the consequences of female genital mutilation and the first prosecution for female genital mutilation began in January 2015: see Alexandra Topping, Sandra Laville and Rowena Mason “Parents who allow female genital mutilation will be prosecuted” (22 July 2014) *The Guardian* <www.theguardian.com> and BBC “First female genital mutilation prosecution in UK starts” (20 January 2015) <www.bbc.com>. The doctor involved was acquitted. In *Fornah v Secretary of State for the Home*

Violence against women is not just a problem in developing countries – it permeates every country. For example in New Zealand, between 2009 and 2012, there were 63 intimate partner violent deaths, most of the victims being women.³³ In 2013 there were over 95,000 family violence investigations, with more than one third of those investigations resulting in at least one offence being recorded.³⁴ In 2010, there were the following numbers of intentional homicide victims killed by intimate partners or family members: the United States of America (2,779); the United Kingdom (227) and Canada (147).³⁵ One in five women surveyed across the European Union said in a recent survey that they had experienced physical and/or sexual violence from a current or previous partner.³⁶

Membership of a particular social group

As gender is not specifically mentioned in the Convention, the issue is whether women can be seen as constituting “a particular social group”.³⁷ Compared to the other Convention grounds, the scope of the “particular social group” ground is the least certain.³⁸ There is little drafting history that helps in its interpretation, as it was a last minute amendment to the Refugee Convention proposed by a Swedish delegate.³⁹ While there were originally calls for the “particular social group” ground to be a “catch-all” convention ground for all those suffering persecution for reasons other than the other four grounds, the jurisprudence has shifted towards giving the term a well formed and less amorphous interpretation.⁴⁰ La Forest J, writing for the

Department [2006] UKHL 46, [2007] 1 AC 412 female genital mutilation was recognized as a serious harm for the purposes of persecution.

³³ See Family Violence Death Review Committee “Fourth Annual Report: January 2013 to December 2013” (2014).

³⁴ New Zealand Family Violence Clearinghouse “Data Summary: Violence Against Women” (June 2014). In addition, the New Zealand Police estimated that they see only 18 per cent of all family violence: New Zealand Family Violence Clearing House “Family Violence Statistics Fact Sheet” (December 2009).

³⁵ These approximate figures were calculated using the various statistics provided by the United Nations Office on Drugs and Crime (UNODC): the data can be accessed at UNODC “Data: UNODC Homicide Statistics 2013” <www.unodc.org>.

³⁶ See the recent report by the European Union Agency for Fundamental Human Rights which surveyed 42,000 women across the EU: European Union Agency for Fundamental Rights “Violence against women: an EU-wide survey” (2014).

³⁷ Assuming violence is not being perpetrated one of the other Convention grounds.

³⁸ UNHCR, above n 27, at [1].

³⁹ Andreas Zimmermann and Claudia Mahler “Article 1A, para 2 1951 Convention” in Andreas Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, New York, 2011) 281 at 391.

⁴⁰ At 391. UNHCR, above n 27, at [2].

Canadian Supreme Court, has said that making the “social group” convention ground a safety net would render the other Refugee Convention categories superfluous.⁴¹

In 2002, the UNHCR recognised that there have been two diverging approaches in determining what constitutes a “social group” within the meaning of the Refugee Convention.⁴² The two approaches can be summarised as the “protected characteristics approach” and the “social perception approach”. Under the “protected characteristics approach” a social group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.⁴³ By contrast, the “social perception” approach examines whether or not a group shares a common characteristic which makes them a recognisable group or sets them apart from society at large.⁴⁴

In its guidelines, promulgated in 2001, the UNHCR proposed an amalgamated standard that encompasses both the “protected characteristic” approach, and the “social perception approach.” The test suggested is: “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”⁴⁵ The

⁴¹ *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 732. La Forest J was writing on behalf of the Court. The “safety net” approach was also rejected by the majority of judges of the Australian High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA). The case concerned Chinese nationals who claimed refugee status in Australia on the basis that if they were returned to China, they would face forcible sterilisation pursuant to China’s “One Child Policy”. It was not in dispute that forced sterilisation constituted persecution and that they had a well-founded fear. Instead, the issue was whether the appellant’s feared persecution “for reasons of ... membership of a particular social group”. The majority of the High Court (Kirby J dissenting) held the applicants were not refugees. See also UNHCR *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* HCR/GIP/02/01 (2002) at [28].

⁴² UNHCR, above n 27, at [5]–[9].

⁴³ The strongest authority in support for the so called “protected characteristics approach” is the Canadian Supreme Court’s decision in *Canada (Attorney-General) v Ward*, above n 41, where the Court set out the test at 739.

⁴⁴ The strongest authority in support for the “social perception” approach was that by the Australian High Court in *Applicant A v Minister for Immigration and Ethnic Affairs*, above n 41. In the House of Lords decision in *Islam v Secretary of State for the Home Department; and Regina v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 [“*Islam and Shah*”], the wording of Lord Hope’s judgment (in the majority) and Lord Millett’s judgment (in dissent) indicates the adoption of the social perception approach. Lord Steyn (at 644) and Lord Hoffmann (at 651), however, appeared to support the use of the protected characteristics approach.

⁴⁵ See UNHCR, above n 27, at [11]; and UNHCR, above n 41, at [29].

guidelines maintain that women are a “clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men”.⁴⁶

Whatever academic approach is taken to define a “particular social group”, the modern approach worldwide is to recognise women as being a particular social group for the purpose of the Refugee Convention.⁴⁷

Persecution

To claim refugee status under art 1A(2) of the Refugee Convention, there needs to be a well-founded fear of being “persecuted”. The concept of persecution has two key constituents: “the severe violation of human rights accompanied by a failure of the State to protect the individual”.⁴⁸ Or as Lord Hoffmann succinctly defined it in *Islam and Shah*, “Persecution = Serious Harm + Failure of State Protection”.⁴⁹

In terms of Lord Hoffmann’s equation, there is often little difficulty in showing that domestic violence constitutes serious harm. However, there are two issues with regards to persecution that are more problematic: first, the concept of State failure to prevent severe human rights violations; and secondly, the causal link required with a convention ground (in this case a link to membership of a particular social group).

State Failure

La Forest J stated in *Canada (Attorney General) v Ward*, that the need for a state’s failure to protect is based on the rationale that “[i]nternational refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national” and

⁴⁶ At [12].

⁴⁷ See for example *Islam and Shah*, above n 44, *Fornah v Secretary of State for the Home Department*, above n 32, and *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, (2002) 210 CLR 1. As to New Zealand, see *Refugee Appeal No 2039/93[Re MN]*, 12 February 1996; *Refugee Appeal No 71427/99*, 16 August 2000; and *BR (Fiji)* [2012] NZIPT 800391, 30 July 2012.

⁴⁸ Zimmermann and Mahler, above n 39, at 345.

⁴⁹ This formulation was accepted by Kirby J at [118] in *Minister for Immigration and Multicultural Affairs v Khawar*, above n 47, in the context of a Pakistani wife and children claiming to be victims of prolonged domestic violence on the part of her husband and members of his family.

“was meant to come into play only in situations when that protection is unavailable, and then only in certain situations.”⁵⁰

State failure to protect a claimant is obviously present when the serious harms are committed by the State.⁵¹ However, it is more difficult when the harms are committed by a private citizen (such as in domestic violence cases). In those situations a refugee claimant is required to show that the State has failed to protect the individual.

One of the main issues is the threshold when a State’s failure to protect, coupled with serious harm from a private citizen, can amount to persecution. Two tests have emerged in the jurisprudence: the “due diligence approach” and the “no well-founded fear” approach.⁵²

Under the “due diligence” approach, taken by the House of Lords in *Horvath v Secretary of State for Home Department*, a State has sufficiently protected a claimant where it has “in place a system of domestic protection and machinery for the detection, prosecution, and punishment of acts contrary to the purposes which the Convention requires to have protected” and the “ability and a readiness to operate that machinery”.⁵³

Under the “no well-founded fear” approach, a State may have domestic machinery for protection, detection, and punishment for acts constituting persecution. However, if there is still a “real chance” of that harm being committed, then there is still a “well founded fear” and thus the State has not adequately protected the claimant. This was the approach, used by the

⁵⁰ *Canada (Attorney General) v Ward*, above n 41, at 709.

⁵¹ James C Hathaway and Michelle Foster “The Law of Refugee Status” (2nd ed, Cambridge University Press, Cambridge, 2014) at 297 where the authors state “the most obvious failure of state protection occurs when the state itself is unequivocally responsible for the infliction of serious harm”. Lord Hope in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL) at 497 said that the issue of failure of state protection does not arise “[i]n a case where the allegation is of persecution by the state or its own agents”.

⁵² See Penelope Mathew, James C Hathaway and Michelle Foster “The Role of State Protection in Refugee Analysis (Discussion Paper No. 2 Advanced Refugee Law Workshop, International Association of Refugee Law Judges Auckland, New Zealand, October 2002)” (2003) 15 Intl J Refugee L 444–460 for a detailed examination of the two diverging tests.

⁵³ *Horvath v Secretary of State for the Home Department*, above n 51, at 510 per Lord Clyde. See also at 500 per Lord Hope and 507 per Lord Berwick. The case involved citizens of the republic of Slovakia who claimed asylum in the United Kingdom on the basis that they were Roma. The claimants stated they feared persecution in Slovakia by “skinheads”, against whom the Slovak police were allegedly failing to provide adequate protection for Roma. In that case, the appeal was dismissed on the basis that the Court was not satisfied the appellants had a well-founded fear of being persecuted.

Canadian Supreme Court in *Canada (Attorney-General) v Ward*.⁵⁴ In rejecting the due-diligence approach, the Court commented.⁵⁵

[I]t would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

Despite the prevalence of domestic violence in developed countries most developed countries would not fail the “due diligence” approach. As Kirby J said in *Minister for Immigration and Multicultural Affairs v Khawar*:⁵⁶

Many countries (including, at least until quite recently, Australia) have afforded imperfect protection to women who suffer domestic violence. It does not follow that it is impossible to distinguish those countries that, however imperfectly, provide agencies of the law and non-discriminatory legal rules to address the problem from those countries that ... consciously withdraw the protection of the law from a particularly vulnerable group within their society.

It is, however, much more difficult to say that developed countries would avoid the “well founded fear” approach. All too frequently, despite the legal protections afforded, the State cannot prevent domestic violence and this can even result in death. In summing up what this means in practice, James Hathaway and Michelle Foster state that:

In applying the “real chance” standard – the usual well-founded fear test – in relation to the failure of state protection limb, a decision-maker will inevitably consider what measures a home state has adopted or will embark on to provide the infrastructure of protection required – such as legislation, police protection, and other enforcement measures – and the extent to which such measures are effective, meaningful, adequate, and accessible, and whether they actually “translate ... into adequate state protection.” The ultimate question is not, however, whether the home state has complied with any

⁵⁴ *Canada (Attorney-General) v Ward*, above n 41, at 724. See also Doug Tennent *Immigration and Refugee Law* (2nd ed, LexisNexis, Wellington, 2014) at 201. The approach in *Canada (Attorney-General) v Ward* has been adopted in New Zealand and the due diligence approach from *Horvath* rejected. See *Refugee Appeal No 71427/99*, above n 47, at [64] where the Refugee Status Appeals Authority said: “[i]f the net result of a state’s “reasonable willingness” to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied that individual. The persecuted clearly do not enjoy the protection of their country.”

⁵⁵ *Canada (Attorney-General) v Ward*, above n 41, at 733.

⁵⁶ *Minister for Immigration and Multicultural Affairs v Khawar*, above n 47, at [130]. See also Lord Hoffmann’s remarks in *Islam and Shah*, above n 44, at 648 where he stated: “[d]omestic violence such as was suffered by Mrs Islam and Mrs Shah in Pakistan is regrettably by no means unknown in the United Kingdom. It would not however be regarded as persecution within the meaning of the Convention. This is because the victims of violence would be entitled to the protection of the state. The perpetrators could be prosecuted in the criminal courts and the women could obtain orders restraining further molestation or excluding their husbands from the home under the Domestic Violence and Matrimonial Proceedings Act 1976. What makes it persecution in Pakistan is the fact that according to evidence which was accepted by the special adjudicator in Mrs Islam’s case and formed the basis of findings which have not been challenged, the State was unwilling or unable to offer her any protection.”

particular standard of *conduct*, but whether the *result* of even the best intentions and most diligent efforts is to “reduce the risk of claimed harm below the well-founded fear threshold”.

Causal Requirement

The wording of Article 1A(2) of the Convention requires a causal nexus between the persecution and a Convention ground.⁵⁷ With regard to private violence, this will often be the “particular social group” Convention ground.⁵⁸ When the act of persecution directly involves a private perpetrator, either the “serious harm” or the “failure of State protection” element of the persecution equation needs to have a causal connection to a convention ground.⁵⁹ As summarised by the UNHCR, the causal link may be satisfied:⁶⁰

- (a) where there is a real risk of being persecuted at the hands of a non-state actor [private perpetrator] for reasons which are related to one of the convention grounds, whether or not the failure of these states to protect the claimant is Convention related; or
- (b) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.

In the House of Lords case of *Islam v Secretary of State for the Home Department and Regina v Immigration Appeal Tribunal and Another, ex parte Shah* (“*Islam and Shah*”) the applicants were two married Pakistani women who were either subjected to, or feared, serious domestic

⁵⁷ It has been suggested that this causal requirement could be circumvented by using the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) (Convention against Torture). See B C Alexander “Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims” (2000) 15 Am U Intl L Rev 895 at 913–921 for a discussion as to the differences between claiming asylum for domestic abuse under the Refugee Convention and operating under the Convention against Torture. In relation to harms committed by non-state actors and the Convention Against Torture, the Committee Against Torture has stated “where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts”: Committee Against Torture *General Comment 2, Implementation of article 2 by State Parties* CAT/C/GC/2/CRP.1/Rev4 (2007) at [18]. In New Zealand, the protected person regime under s 130 of the Immigration Act 2009 could be invoked in this regard.

⁵⁸ However, the “particular social group” ground is not the only ground. Sometimes women seek refuge for protection on religious or political grounds (for example, if they refuse to abide with religious or political norms): see *Refugee Appeal No 71427/99*, above n 47, at [86]–[89]; and R Haines “Advancing a Gendered Interpretation of the Refugee Convention: *Refugee Appeal No 76044*” (Presentation for 2009 National Members’ Conference of the Migration Review Tribunal and Refugee Review Tribunal, 10 September 2009) at [18]–[19].

⁵⁹ UNHCR, above n 27, at [20]–[22].

⁶⁰ At [23].

violence by their husbands and who also claimed that Pakistan was unable or unwilling to prevent further abuse if they were returned. Despite the House of Lords considering that there was no evidence that the families were targeting the claimants for a Convention ground,⁶¹ the fact that the State of Pakistan left women unprotected (both legally and through social conditions) against domestic violence meant they had satisfied the causal requirement.⁶² In essence, the House of Lords found that the Pakistani Government failed to protect the claimants because they were women. As noted by Lord Hope, the claimants feared persecution because “they are women in a society which discriminates against women”.⁶³

Jurisdiction of State party

As stated earlier, in order to claim refugee status, a claimant has to travel to a State party to the Convention. Leaving his or her country of origin and travelling to another state is going to be much harder for women than for men because of differences in economic resources. For example, women in most countries earn on average only 60 to 75 per cent of what men do.⁶⁴ In addition, women’s mobility may be further curtailed because many have the primary child rearing role.⁶⁵

There are also the dangers of flight. It is often said that the most dangerous time for women, in relation to domestic violence, is when they leave the relationship.⁶⁶ There are also dangers in the means available to arrive at a Convention country. As is discussed later in more detail, air travel is often precluded and this leaves more dangerous means of travel, including by sea through people smugglers.

What this means is that for the great majority of victims of private violence, the Refugee Convention in fact provides little protection because they cannot leave their country of origin to

⁶¹ In *Islam and Shah*, above n 44, at 653, Lord Hoffmann stated the violence posed to the women by the non-stage agents was “a personal affair, directed against them as individuals”. I have distinct reservations as to whether this is correct – it presupposes men accused of adultery would be treated in the same way.

⁶² At 654 per Lord Hoffmann.

⁶³ At 658. See also, *Refugee Appeal No 71427/99*, above n 47, at [112]–[113] for a succinct summary.

⁶⁴ See The World Bank “Key Gender-Relevant Employment Indicators from Middle and High Income Countries” <www.datatopics.worldbank.org>. For example, here are the following wage equality ratios for the year of 2014 for some select countries: Italy (0.48), India (0.56), Botswana (0.76), Malawi (0.76), Kenya (0.70): World Economic Forum “The Global Gender Gap Report 2014” (2014).

⁶⁵ Kathleen Newland *Seeking Protection: Women in Asylum and Refugee Resettlement Processes* CM/MMW/2003/EP 8 (2014) at 5.

⁶⁶ Lyn Shipway “Domestic Violence: A Handbook for Health Professionals” (Routledge, London, 2004) at 26.

get to a State party to the Convention. The Convention does not provide assistance to those who must remain in their countries of origin as it does not apply to internal displacement.

Conclusion

It is important that the harms that women have faced, face today, and are likely to face in the future, are given due recognition at international law. Those who flee domestic violence or female genital mutilation, as Baroness Hale noted in *Fornah*, “are just as worthy of the full protection of the Refugee Convention as are the men who flee persecution because of their dissident political views”.⁶⁷

The above discussion has shown that courts are increasingly allowing women to claim refugee status for harms such as private violence and female genital mutilation where their home State has failed to protect them adequately. But, despite the development of refugee law jurisprudence, the reality is that most victims of such harms are unable to seek the protection of the Convention because they are unable to reach a State party to the Convention. As a result, few victims of such harms will benefit from the jurisprudential developments expanding the reach of the Convention to cover gender-related harm.

REFUGEE CAMPS

While refugee camps may offer protection from the original persecutors, the conditions and struggles faced in refugee camps are sometimes arguably just as harrowing as the events that forced the refugees there. This part of the paper seeks to highlight the conditions faced by millions in refugee camps, the particular plight of women and children in those camps and the barriers to effective resolution that helps maintain these makeshift cities.

⁶⁷ *Fornah*, above n 32, at [115]. See also the comment by Haines, above n 58, at [25] where he said “[f]or too long women’s experiences have been seen as problematical, lying beyond the ‘true’ scope of the Refugee Convention and requiring special interpretive ‘rules’ or guidelines. This view is fundamentally misconceived. On accepted principles of treaty interpretation, sex and gender have always been at the heart of the refugee definition. Difficulties arise only because of misinformed decision-making. The refugee definition requires the adoption of an integrative perspective of human rights generally and this includes women’s rights. By interpreting forms of human rights violations against women within mainstream human rights norms it is possible to avoid marginalising women’s rights in refugee law.”

Conditions

We are eating leaves from trees, but it is not enough, people are getting sick. There is not enough water. There was a food distribution today, but we have not received anything.

*Sudanese mother of seven children after walking with her children for six days with nothing but the clothes on their backs.*⁶⁸

In 2013, around 4 million refugees were in camps managed by the UNHCR.⁶⁹ A report by the United National Development Programme examined the conditions of refugee camps in six countries⁷⁰ with regard to basic necessities such as access to adequate nutrition and clean water.⁷¹ The report found that, while most of the individuals entitled to food aid were receiving rations, the amount of calories often fell well below the UNHCR standard of 2100 calories per day.⁷²

There are particular dangers of unclean water (assuming people can even access water) in the camps which can cause numerous diseases such as cholera. The issue of adequate and safe water supply to refugees was illustrated by those refugees fleeing the Rwandan genocide in 1994. After seeking refuge in the neighbouring Democratic Republic of Congo, close to 60,000 died as a result of a shortage in clean water supplies, disease and a resulting cholera outbreak.⁷³

The world's largest refugee camp, the Dadaab refugee camp in Kenya, has almost 350,000 refugees living there. For shelter, there are tents and wooden huts, held together by branches and topped by a plastic sheet distributed as part of the UNHCR rations.⁷⁴ There are often poor hygiene conditions, a Doctors without Borders survey finding that one in ten refugees did not

⁶⁸ Doctors without Borders (Medecins Sans Frontieres) “Refugees in South Sudan: ‘We walked for six days ... with nothing but our clothes’” (June 13, 2012) <www.doctorswithoutborders.org>.

⁶⁹ For historical reasons, the UNHCR does not include those in refugee camps resulting from the issue in Palestine as that is handled by a separate international agency.

⁷⁰ Kenya, Tanzania, Uganda, Nepal, Bangladesh and Thailand. In the year of 2008, those countries had the following number of camp-based refugees: Kenya (232,000); Tanzania (217,000); Uganda (223,000); Nepal (109,000); Bangladesh (27,000); and Thailand (128,000): Bart de Bruijn “The Living Conditions and Well-being of Refugees” (United Nations Development Programme, Human Development Research Paper 2009/25, July 2009) at 5

⁷¹ de Bruijn, above n 70, .

⁷² At 19–20.

⁷³ At 25.

⁷⁴ Azad Essa “Dadaab, the world’s biggest refugee camp” (11 July 2011) Aljazeera <www.aljazeera.com>.

have access to latrines.⁷⁵ In addition, childhood malnutrition in the camp hovers around 10 per cent.⁷⁶ To make matters worse, in May 2015, medical staff from Doctors without Borders were forced to evacuate the camp due to the dangers that the Somali Islamist militant group, Al-Shabaab, poses.⁷⁷

In addition to sustenance and health issues, refugees face threats from other refugees and locals. For example, in Kenyan refugee camps where Somali refugees had fled, there was often ethnic and tribal fighting.⁷⁸ Currently there is reported to be high tension between Syrian refugees and the local hosts in Lebanon; it is reported that as many as 100,000 Syrian refugees have returned rather than face the discrimination and destitution in Lebanon.⁷⁹ Closer to New Zealand, on the island of Nauru, there have been tensions between the locals and the more than 400 asylums seekers detained there.⁸⁰

Women and Children

We left Syria to escape death and we found something worse than death...if we had stayed in Syria to die it would have been more honourable. There death is fast, here it is slow.

*Miriam, a Syrian refugee*⁸¹

In addition to basic sustenance and security issues, women and girls face the particular threat of rape and sexual abuse in the camps.⁸² As noted by the UNHCR, women and girls trying to escape persecution face “the rigors of long journeys into exile, official harassment or

⁷⁵ Doctors without Borders “Humanitarian aid must be prioritised in Dadaab camps, despite return of refugees to Somalia” (10 March 2014) <www.msf.org>.

⁷⁶ Kevin Sieff “Kenya is threatening to close the world’s largest refugee camp” *The Washington Post* (online ed, Washington DC, 28 April 2015).

⁷⁷ Doctors without Borders “Kenya: Medical Care Suspended in Refugee Camp Amid Escalating Insecurity” (28 May 2015) <www.doctorswithoutborders.org>.

⁷⁸ Stephen Legomsky “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection” (2003) 15 Int’l J Refugee L 567 at 595.

⁷⁹ Johnny Hogg “Poverty fuels tensions as Syrian refugees brace for another winter” *Reuters* (3 December 2014) *Reuters* <www.reuters.com>.

⁸⁰ Michael Edwards “Tensions on Nauru heightened after serious of attacks on refugees by locals”(20 March 2015) ABC Australia <www.abc.net.au>.

⁸¹ Arwa Damon “No sanctuary for Syria’s female refugees” (26 June 2013) CNN <www.cnn.com>.

⁸² A video showing the problem of sexual violence currently faced by women and children in Syria’s refugee camps was shown at my Shirley Smith address. The video was shown with the permission of Channel 4 News in the United Kingdom and can be accessed at: <www.youtube.com/watch?v=uzpVhW1tXVY>. See also the video produced by UNICEF New Zealand in which UNICEF New Zealand executive director, Vivien Madaborn, tours the Syrian refugee camps in Lebanon, focussing on the plight of the children in those camps: the video can be accessed at <www.youtube.com/watch?v=czaNMANMxIc&feature=youtu.be>.

indifference, and frequent sexual abuse – even after reaching an apparent place of safety”.⁸³ Sexual attacks may come from those in the local population, other refugees or officials (border guards, police, military and international refugee workers).⁸⁴

In the UN Commission on Human Rights’ report by the Special Rapporteur on violence against women, these issues were highlighted:⁸⁵

Refugee women and girls are particularly vulnerable to sexual attacks whilst in flight. There are reports of gang-rape, forced ‘marriages’ and sexual mutilation by bandits, members of armed groups or fellow refugees. The need to cross military lines or areas affected by anarchy or civil war in order to reach safety puts women and girls in especially perilous circumstances as they are at great risk of being subjected to sexual exploitation in return for passage to safety, the grant of refugee status, or legal documentation.

Coupled with the threat of sexual violence, there is also the threat of sexual extortion for basic necessities and personal documentation.⁸⁶ Officials who determine the refugee status of an applicant may even extort sex in exchange for a positive determination as a refugee, which is the only way of being eligible for the resettlement programme run by the UNHCR.

The issues are compounded by the fact that this abuse is often not reported given the cultural stigma placed on victims of sexual violence and sexual extortion.⁸⁷ Sexual violence is not only

⁸³ UNHCR “Refugee Women” (2014) <www.unhcr.ca>.

⁸⁴ UNHCR “Sexual Violence against Refugees *Guidelines on Prevention and Response*” (1995) <www.unhcr.org>.

⁸⁵ UN Commission on Human Rights *Report of the Special Rapporteur on Violence Against Women, Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms* E/CN.4/1998/54 (1998) at [280]. For the most recent report, see Rashida Manjoo *Report of the Special Rapporteur on violence against women, its causes and consequences* A/HRC/26/38 (2014).

⁸⁶ As was concluded by the Executive Committee in *Refugee Protection and Sexual Violence* No 73 (XLIV) (8 October 1993), there is recognition of “distressing reports that refugees and asylum seekers, including children, in many instances have been subjected to rape or other forms of sexual violence during their flight or following their arrival in countries where they sought asylum, including sexual extortion ...”. See also Corinna Csaky “No One to Turn to: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers” (Report published by Save the Children (UK), London, 2008) which highlights the issue by examining towns, villages and rural areas that were receiving aid or were visited by peacekeepers. Extorting sexual favours by a person in a position of authority, whether government officials, judges, educators, law enforcement personnel, or employers, in exchange for something within their power to grant or withhold has been termed “sextortion” by the International Association of Women Judges (IAWJ). As the IAWJ states, “sextortion is a form of corruption in which sex, rather than money, is the currency of the bribe”: see further Nancy Hendry “Sextortion and a Gendered Approach to Corruption: Grassroots Women and Women Judges Take the Lead” (Speech given at the NGO Committee on the Status of Women Forum Parallel Event, New York, 6 March 2013).

⁸⁷ LaShawn Jefferson and others (eds) *Seeking Protection: Addressing Sexual Violence in Tanzania’s refugee camps* (Report prepared for Human Rights Watch, United States of America, 2000) at 89–90.

traumatising, physically, emotionally and psychologically, but reporting of it may lead to the victim or the victim's family being ostracised.⁸⁸

The issue of sexual violence against women and girls in refugee camps is currently highlighted by the refugee camps in Jordan accommodating Syria's refugees. There have been reports in these camps of marriage markets between young Syrian refugees and non-refugee suitors. The funds received from such "marriages" can help the remaining members of the family survive by enabling them to get the necessities of life.⁸⁹ Further, daughters have been sold off to protect them from rape and the harsh living conditions that refugee camps present.⁹⁰ However, some of these marriages end up being short marriages (termed "pleasure marriages") whereby the man divorces the girl shortly after consummating the marriage.⁹¹ The Scottish Catholic International Aid Fund reported that more than 50 per cent of women who seek aid from them in Jordanian refugee camps have been sexually abused while in refugee camps.⁹² The term "survival sex" has been coined to label having sex in return for basic goods or services.⁹³

Leaving the camps

There are four ways that people can leave refugee camps: resettlement, voluntary repatriation, local integration and seeking asylum in the jurisdiction of a State party to the Refugee Convention. For obvious reasons, the UNHCR's most desired outcome is voluntary repatriation.⁹⁴ However, the problem is that the causes of people becoming refugees are often not temporary or transient issues and realistically individuals are unable to return home. As to the solution of local integration into the countries where refugee camps are situated, unfortunately those countries are often just not in a position to accommodate refugees in any number as many are in poverty themselves, face sustenance issues and consequently may avoid granting rights (such as employment) to refugees to protect the interests of their own citizens.⁹⁵

⁸⁸ At 90.

⁸⁹ Beth McLeod "Syrian refugees sold for marriage in Jordan" (10 May 2013) BBC <www.bbc.com>.

⁹⁰ See Samar Najjar "Some Syrian Refugees Adopt Early Marriage as Survival Plan" (25 July 2012) Al-monitor <www.al-monitor.com>; and Brenda Stoter "Teenage Syrian refugees wed 'for protection'" (12 November 2013) Aljazeera <www.aljazeera.com>.

⁹¹ Stoter, above n 90.

⁹² "Syria's Women, Many Raped in Refugee Centres, Long to Return Home" (26 October 2013) Huffington Post <www.huffingtonpost.co.uk>.

⁹³ McLeod, above n 89.

⁹⁴ UNHCR, above n 17, at 19.

⁹⁵ As recognised by Legomsky, above n 78, at 595. See also de Bruijn, above n 70, at 18.

As a result, the two main methods of leaving refugees camps are resettlement through the UNHCR's resettlement programme and seeking asylum.

Resettlement through the UNHCR

... going overseas is just like a dream. ... You want to go away from the situation you are in because it is not a good situation. It is a bad situation. You are looking for a better life, and this is the first thing that comes to your mind.

*Somali refugee at Dadaab
Refugee Camp, Kenya*⁹⁶

The UNHCR resettlement programme is administered through agreements with States to accept and resettle refugees in their jurisdiction. These agreements may be ad hoc in response to special appeals by the UNCHR⁹⁷ or they may involve a State's continued commitment to resettle refugees by having a resettlement programme. In 2014, 26 resettlement states admitted 105,200 refugees for resettlement.⁹⁸ However, chances of resettlement through the UNHCR are slim; less than one per cent of world refugees are ever offered resettlement to a third country.⁹⁹ As a result, refugees often risk life, limb, and their life savings, seeking a permanent home for resettlement themselves.

⁹⁶ Julius M Marete "The Resettlement Journey of Somali and Sudanese Refugees from Camps in Kenya to New Zealand" (2012) 2 Oxford Monitor of Forced Migration 48 at 49.

⁹⁷ For example, in 2013 the UNHCR called on countries to admit 30,000 Syrian refugees for resettlement or humanitarian admission by the end of 2014, with a focus on protecting the most vulnerable refugees: UNHCR, above n 17, at 19.

⁹⁸ UNHCR, above n 16, at 3. As to the main resettlement countries, the United States of America received the highest number under the resettlement programme in 2014 (73,000 refugees); Canada received 12,300; Australia received 11,600; and Sweden received 2,000: UNHCR, above n 16, at 22. The United State's population in mid-2014 was estimated to be 318,881,992: see United States Census "US and World Population Clock" <www.census.gov>. Canada's population in mid-2014 was estimated to be 35,540,400: Statistics Canada "Canada's population estimates: Age and sex, 2014" (26 September 2014) <www.statcan.gc.ca>. At the end of 2014, Australia's population was estimated to be 23, 625,600: Australian Bureau of Statistics "Australian Demographic Statistics, Dec 2014" (25 June 2015) <www.abs.gov.au>. Sweden's estimated population at the end of 2014 was 9,747,355: Statistics Sweden "Summary of Population Statistics 1960–2014" <www.scb.se>. New Zealand has an annual resettlement quota of approximately (plus or minus 10 per cent) 750 refugees: Immigration New Zealand "Refugee resettlement factsheet" (21 November 2013)<www.immigration.govt.nz>. There have been recent calls in New Zealand for the Government to increase the quota: see for example, Nicholas Jones "Plea to increase refugee numbers" *New Zealand Herald* (online ed, Auckland, 4 June 2015). Those offered permanent residence in New Zealand under the resettlement programme spend their first six weeks at the Department of Immigration's Mangere Refugee Resettlement Centre to assist them to acclimatise to New Zealand's culture and way of life. For some context, at the end of 2014, New Zealand's population was estimated to be 4,543,100: see Statistics New Zealand "Population Estimates" <www.stats.govt.nz>.

⁹⁹ UNHCR "Resettlement" <www.unhcr.org>.

Seeking asylum

When we got to the boat, he forced us to enter with a gun, if you don't enter he will shoot you.

*Ali, an asylum seeker from The Gambia, describes being forced to enter an unsafe boat to cross the Mediterranean Sea by a Libyan people smuggler.*¹⁰⁰

The second main method of resettlement is seeking asylum by entering a State party's jurisdiction and claiming refugee status. It is, however, often very expensive to travel to a foreign jurisdiction to seek asylum and often only the most mobile undertake the journey. In addition to the monetary and mobility restrictions on seeking asylum, there are barriers (physical and legal) for asylum seekers and in many cases dangers.

Some barriers to entry have been called "relatively invisible *non entrée* policies".¹⁰¹ A classic example of such a policy is imposing "a visa requirement on the nations of genuine refugee-producing countries, enforced by sanction against any carrier that agrees to transport a person without a visa".¹⁰² These policies have the result of inhibiting those seeking asylum entering a foreign jurisdiction: only those with forged documentation or who can successfully lie about their intentions have a chance in reaching such jurisdictions and claiming refugee status.¹⁰³ The policies are not specifically aimed at stopping refugees, but rather illegal immigration. Unfortunately, refugees, as well as the true targets, are excluded. In addition to these invisible barriers, there can be physical barriers to entering countries. For example, the United States-Mexico border is, at parts, heavily fortified and patrolled.

These measures mean that often the only real hope for some refugees is through people smugglers. As well as being expensive, there are major physical dangers involved in this

¹⁰⁰ BBC "Migrant crisis: Who are Africa's people smugglers" (23 April 2015) <www.bbc.com>.

¹⁰¹ Hathaway, above n 6, at 291. Hathaway says, at 291, "*Non entrée* is a term coined to describe the array of legalized policies adopted by states to stymie access by refugees to their territories."

¹⁰² At 291. See also Tilman Rodenhauer "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control" (2014) 26 Intl J Refugee L 223.

¹⁰³ Hathaway, above n 6, at 292. In 2004, New Zealand introduced an Advance Passenger Processing scheme which requires international airline carriers to pre-screen passengers before they depart for New Zealand. Once these controls were introduced the number of asylum seekers applying for refugee status at New Zealand airports significantly dropped: for further statistics, see Susan Glazebrook "From *Zaoui* to Today: a Review of Recent Developments in New Zealand's Refugee and Protected Persons Law" (Paper prepared for the International Association of Refugee Law Judges Regional Conference, Sydney, 23 March 2013) available at <www.courtsofnz.govt.nz> at 9.

method of travel. The physical dangers are illustrated by the numerous deaths of asylum seekers at sea. In the ten-day period from 14 to 24 July 2014, 260 people died or were reported missing attempting to cross the Mediterranean Sea seeking asylum.¹⁰⁴ If the treacherous conditions at sea and the lack of seaworthiness of many boats do not present enough danger, smugglers have also been known to dump their passengers at sea for fear of arrest at the destination State.¹⁰⁵

In addition, some States try to intercept individuals at sea prior to them entering a State's jurisdiction and either return them or take them to a third country for processing.¹⁰⁶ Australia is an example of a State using both measures.¹⁰⁷ In March 2015, the Special Rapporteur on Torture

¹⁰⁴ UNHCR "UNHCR calls for urgent European action to end refugee and migrant deaths at sea" (24 July 2014) <www.unhcr.org>. During the oral address, the following UNHCR video was shown describing the ordeal of people trying to flee Libya by boat: see <https://www.youtube.com/watch?v=m_4tYAmhrp8>. In April 2015, in a maritime tragedy occurred off the coast of Libya and up to 700 migrants are feared dead – only a small number of the bodies have been recovered: see Patrick Kingsley and Stephanie Kirchgaessner "700 migrants feared dead in Mediterranean shipwreck" *The Guardian* (online ed, London, 19 April 2015). It is estimated that so far in 2015, approximately 1,800 have drowned attempting to cross the Mediterranean Sea to reach Europe: Sarah Almkhatar and others "What's Behind the Surge in Refugees Crossing the Mediterranean Sea" *New York Times* (online ed, New York, 21 May 2015). However, recent reports indicate that since the EU's border control agency, Frontex, introduced "Operation Triton" in which funding and the amount of resources to prevent further tragedies at sea was increased, the number of deaths at sea have reduced dramatically: see Alice Philipson "Fewer migrant deaths after EU steps in" *New Zealand Herald* (online ed, Auckland, 13 July 2015).

¹⁰⁵ For example, in 2006 refugees attempting to cross from Somalia to Yemen and were forced to jump off of the boat by the heavily-armed crew: see Xan Rice "Washed up on the beach – hidden half of Africa's people smuggling epidemic" *The Guardian* (online ed, London, 10 May 2006). On a similar note, mass graves of Rohingya Muslims, fleeing alleged persecution in Western Myanmar, have recently been found near human trafficking detention camps on the border of Thailand: see Jethro Mullen "Malaysia finds human-trafficking mass graves near Thai Border" (25 May 2015) CNN <www.cnn.com>. Similarly, in May 2015, an estimated 6,000 Rohingya Muslims and Bangladeshis were stranded at sea as Malaysia and Thailand refused to allow the boats to land; officials, however, have provided them with food and water: see "Malaysia and Thailand turn away hundreds on migrant boats" *The Guardian* (online ed, London, 14 May 2015).

¹⁰⁶ As to the legal issues surrounding this, see G Goodwin-Gill "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement" (2011) 23 *Intl J Refugee L* 443; Anja Klug "Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing" (2014) 26 *Intl J Refugee L* 48; Mariagiulia Giuffrè "State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?" (2012) 24 *Intl J Refugee L* 692; A Fischer-Lescano, T Lohr and T Tohidipur "Border Controls at Sea: Requirements under International Human Rights and Refugee Law" (2009) 21(2) *Int'l J Refugee L* 256; and Patrick Emerton and Maria O'Sullivan "Rethinking Asylum Seeker Detention at Sea: the Power to Detain Asylum Seekers at Sea under the *Maritime Powers Act 2013 (Cth)*" (2015) 38 *NSWLJ* 695. According to the UNHCR, such interceptions are contrary to the Convention. For example the Executive Committee of the UNHCR has said: "[t]he need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs": see further UNHCR "Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea" (18 March 2002). I make no comment on the issue of interception. I just draw attention to the debate.

¹⁰⁷ See Tara Magner "A Less than 'Pacific' solution for Asylum Seekers in Australia" (2004) 16 *Intl J Refugee L* 53 at 56; Fiona McKay "A return to the 'Pacific Solution'" (2013) 44 *Forced Migration Review* 24 at 25; and Jane McAdam "Australia and Asylum Seekers" (2013) 25 *Intl J Refugee L* 435 at 440–441. For more commentary on Australia's various policies over the years, see for example Michelle Foster and Jason Pobjoy "A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory" (2011) 23 *Int'l J Refugee L* 583.

reported that Australia had violated the right of asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment contrary to the Convention Against Torture.¹⁰⁸ This was on the basis that Australia had, in relation to asylum seekers, failed to provide adequate detention conditions, end the practice of detention of children and put a stop to escalating violence and tension at the Manus Island (Papua New Guinea) Regional Processing Centre.¹⁰⁹ The Australian Prime Minister has rejected the criticism.¹¹⁰

Even if an individual is able to gain access to the jurisdiction of a State party, the fact that a refugee may have been afforded some sort of protection in a third country, or merely had the ability to claim asylum in a safe country, has become a ground or a consideration in favour of sending refugees back to these third countries.¹¹¹ The policy behind this ground for refusal is that refugees should not “destination shop” and, as soon as a suitable country is reached where they are safe or afforded protection, they should seek asylum there and not continue on their pilgrimage for an alternative sanctuary. In other words, any secondary movement is seen as purely for migration purposes.¹¹²

Professor Stephen Legomsky argues that the rationale or ultimate justification for sending claimants back to safe third countries, or countries of first asylum, appears to be that “under certain circumstances, an asylum seeker should be somebody else’s responsibility”.¹¹³ The policy of returning asylum seekers to safe “third countries” has the practical effect of forcing refugees to settle at their first place of relative sanctuary. While the concept of safe third countries prevents “country shopping”, it can have the result of leaving many without hope of an onward journey from refugee camps.

I finally mention that many countries also detain asylum seekers who have managed to reach their jurisdiction pending determination of their refugee status and that this detention can last

¹⁰⁸ Juan E Mendez *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/HRC/28/68/Add.1* (2015) at [19].

¹⁰⁹ At [19].

¹¹⁰ Lisa Cox “Tony Abbott: Australians ‘sick of being lectured to’ by United Nations, after report finds anti-torture breach” *Sydney Morning Herald* (online ed, Sydney, 10 March 2015). Again I make no comment on this issue.

¹¹¹ For example, see ss 134, 137 and 138 of the Immigration Act 2009 which incorporates the concept of “third countries”.

¹¹² GS Goodwin-Gill and J McAdam *The Refugee in International Law* (Oxford University Press, Oxford, 2010) at 391.

¹¹³ At 570. Hathaway states that, while these concepts are not anchored in the Refugee Convention, they are not necessarily a breach of it: Hathaway, above n 6, at 323.

some time.¹¹⁴ Also, even where a person is granted refugee status, they may have difficulty adjusting to the country of refuge, especially with the background of trauma and persecution that many refugees have suffered.¹¹⁵

Conclusion

My mum came to this camp as a refugee. She gave birth to me as a refugee. I gave birth to my daughter as a refugee.

*Sarah in Hagadera Refugee
Camp in Dadaab, Kenya*¹¹⁶

Refugee camps are not intended to be a permanent solution. As has been seen, however, there are numerous barriers to the resettlement of refugees. The causes of refugee migration are usually not temporary issues and many are not able to return home. Integration into the country where the camps are located is usually also no solution. Very few refugees are granted the chance of resettlement through the UNHCR and personally seeking asylum is not only dangerous but there are often significant barriers that hinder and discourage asylum seekers. Given these barriers, the Convention is of little practical assistance for most of those in refugee camps.

As a result, after the initial emergency phase, refugees are often left in a state of limbo. In 2009, over two-thirds of refugees were in protracted refugee situations and the average length of these

¹¹⁴ For New Zealand see *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577 (CA); *Mohebbi v Minister of Immigration* [2003] NZAR 685 (HC); and *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 496. In 2012, the Immigration Act 2009 was amended and provisions dealing with the detention of “mass arrival groups” which are defined as a group of more than 30 people were inserted: see ss 9A, 317A, 317B, 317C, 317D, 317E and 324A of the Immigration Act 2009. With regards to the Australian detention centres (both onshore and offshore) for asylum seekers, see for example Australian Human Rights Commission “Asylum seekers, refugees and human rights: Snapshot Report” (2013) and Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) “Last Resort? National Inquiry into Children in Immigration Detention” (2004). See also the Australian High Court case of *Al-Ketab v Godwin* [2004] HCA 37, (2004) 219 CLR 562; for criticism of that case, see Juliet Curtin “‘Never Say Never’: *Al-Kateb v Godwin*” (2005) 27 Syd LR 355. There have been numerous British cases on the right to detain immigrants: see for example, *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68; *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 4 All ER 785 and the appeal to the Grand Chamber of the European Court of Human Rights in *Saadi v United Kingdom* (2008) 47 EHRR 17 (Grand Chamber, ECHR).

¹¹⁵ For a discussion of these issues, see for example, R Schweitzer, F Melville, and Z Steel “Trauma, Post-Migration Living Difficulties, and Social Support as Predictors of Psychological Adjustment in Resettled Sudanese Refugees” (2006) 40 Australian and New Zealand Journal of Psychiatry 179.

¹¹⁶ Quote taken from a UNHCR video shown during the Shirley Smith address: the video is available at https://www.youtube.com/watch?v=m_4tYAmhrp8.

situations is approaching 20 years.¹¹⁷ These refugees have little hope and are effectively forced to live out their lives at refugee camps, where conditions are often grim and where women in particular face the particular threat of sexual violence and sexual extortion.

CLIMATE CHANGE

Background

In 2014 the Intergovernmental Panel on Climate Change (IPCC) produced its fifth assessment report.¹¹⁸ In addition to numerous other findings, the report concluded that carbon dioxide, methane and nitrous oxide levels have increased to unprecedented levels.¹¹⁹ In addition to changes in the global water cycle,¹²⁰ the report concludes that the increase in carbon dioxide will lead to ocean acidification and that the rate of sea level rise will exceed very likely exceed anything that we have seen before, due to the melting of glaciers and ice sheets.¹²¹ Some of the key risks identified by the IPCC include:¹²²

- (a) Increased risk of death, injury, ill-health or disrupted livelihoods in low-lying coastal zones or small islands due to storm surges, coastal flooding and sea level rise, inland flooding in some urban areas and periods of extreme heat;
- (b) Systemic risks due to extreme weather events leading to a breakdown of infrastructure and critical services;
- (c) Risk of food and water insecurity and loss of rural livelihoods and income, particularly for poorer populations; and
- (d) Risk of loss of ecosystems, biodiversity, and ecosystem goods, functions and services.

Displacement

tell them we are afraid

...

¹¹⁷ Gil Loescher and James Milner “Understanding the challenge” (2009) 33 *Forced Migration Review* 9.

¹¹⁸ The fifth assessment report comprises four documents: IPCC Working Group I Contribution to AR5 “Climate Change 2013: The Physical Science Basis” (2013); IPCC Working Group II Contribution to AR5 “Climate Change 2014: Impacts, Adaptation, and Vulnerability” (2014); IPCC Working Group III Contribution to AR5 “Climate Change 2014: Mitigation of Climate Change” (2014) IPCC; and IPCC “Climate Change 2014: Synthesis Report” (2014).

¹¹⁹ IPCC “Climate Change 2014: Synthesis Report”, above n 118, at 42.

¹²⁰ At 47.

¹²¹ See 55–74.

¹²² At 65.

but most importantly tell them
we don't want to leave
we've never wanted to leave
and that we
are nothing without our islands

*Marshall Island resident and poet,
Kathy Jetnil-Kijiner,
from her poem "Tell them"*¹²³

Human migration as a result of environmental change is not a new phenomenon: "it is considered 'one of the oldest coping strategies' in the face of life-threatening environmental crises."¹²⁴ Climate change impacts (including rises in sea levels), however, have the potential to displace millions of people.¹²⁵ For example, over 200 million people around the world live along coastlines less than 5 metres above sea level and this is estimated to increase to close to 500 million by the end of the twenty-first century.¹²⁶

While violence and conflict tended to be the major reason for cross-border movements in the twentieth century, the findings of the IPCC indicate that climate change may be the major reason for population displacement in the twenty-first century and beyond.

The threat is not merely hypothetical; for example, in late 2014 the authorities of a provincial capital, Choiseul, in the Solomon Islands decided to relocate due to the threat of rising sea levels and storm surges.¹²⁷ However, relocation has its own issues for small nations and in 2012, the Prime Minister of Tuvalu, another vulnerable low-lying atoll in the Pacific, said relocation "should never be an option because it is self defeating in itself" but instead urged world-wide law makers to have "some sort of moral obligation ... to do the right thing".¹²⁸

¹²³ Kathy Jetnil-Kijiner "Poem: Tell Them" (13 April 2011) <www.jkijiner.wordpress.com>.

¹²⁴ Mostafa Mahmud Naser "Climate Change, Environmental Degradation, and Migration: A Complex Nexus" (2012) 36 WM & Mary Envtl L & Poly Rev 713 at 717.

¹²⁵ For example see N Myers and J Kent "Environmental Exodus: An Emergent Crisis in the Global Arena" (Paper for the Climate Institute, Washington DC, 1995) where they estimated up to 200 million people may be displaced by climate change by 2050.

¹²⁶ Mortiz Bollmann and others "World Ocean Review 1: Living with the oceans – A report on the state of the world's oceans" (2010) at 68.

¹²⁷ "Solomons town first in Pacific to relocate due to climate change" (15 August 2014) Reuters <www.reuters.com>. Choiseul is less than two metres above sea level and has a population of around 1,000 people; the authorities are planning to build a new town on the adjacent mainland.

¹²⁸ Radio New Zealand International "Relocation for climate change victims is no answer, says Tuvalu PM" (3 September 2013)

Women and climate change

Poverty and a person's susceptibility to the effect of climate change are inherently linked.¹²⁹ This is because the poor place heavy reliance on ecological resources. This, coupled with existing stresses on health, well-being, financial, institutional and human resources, leaves the poor least able to cope with the impacts of climate change.¹³⁰ Given that 70 per cent of the world's poor are women, the impacts of climate change will disproportionately affect women.¹³¹

Further, women's sociological and economic roles makes them even more vulnerable. Women farmers currently account for 45–80 per cent of all food production in the world; two thirds of the female labour force in developing countries; and more than 90 per cent of women in many African countries are engaged in agricultural work.¹³² Agricultural and crop harvests are likely to become more unpredictable and scarce due to climatic change.¹³³ As a result, this may lead to mass migration for more fertile grounds. Given women are predominately involved in agriculture, many of these migrants will likely be women.

In addition to affecting the livelihood and work of women, decreased food availability is often managed at the expense of the most vulnerable members of a household (women and children) resulting in under-nourishment and malnutrition.¹³⁴ Climate change is likely to exacerbate this malnourishment.

Further, as women traditionally have the role of gathering resources for homes such as timber and water in developing countries, the effects of climate change will likely see these resources become sparse and women will have to search farther afield for resources.¹³⁵ As a result, women are likely to become more vulnerable to injuries by carrying heavy loads for longer distances and

¹²⁹ United Nations Economic Commission for Africa "Gender and Climate Change – Women matter" (2009) \ at 1.

¹³⁰ At 1.

¹³¹ International Union for Conservation of Nature (IUCN) "Gender and Climate Change – Women as agents of Change" (December 2007).

¹³² UN Women "Watch Fact Sheet: Women, Gender Equality and Climate Change" <www.un.org > at 1–2. See this article for an in-depth discussion of all the impacts that climate change is likely to have on women.

¹³³ United Nations Economic Commission for Africa, above n 129, at 5.

¹³⁴ At 5. For example, 50 per cent of women and children and developing countries are already anaemic: see IUCN, above n 131.

¹³⁵ UN Women, above n 132, at 2.

the increased distance to fetch resources will increase their susceptibility to sexual violation and assault.¹³⁶

The disproportionate effects of climate change on women are likely to be further exacerbated due to the lack of decision making power afforded to women regarding climate issues. For example, at the 7th Conference of the Parties Convention on Biological Diversity, the ratio of male to female professionals deciding on forestry and energy projects was 11 to 1.¹³⁷ The danger of this is that key decision makers could ignore the gender-related dimension of climate change. If any future international instrument fails to recognise the particular plight of women in the face of climate change, women are susceptible to being further marginalised.

Refugee Convention and climate change

Where a State is unable to accommodate the displacement of its own citizens (because of lack of resources or because the state ceases to exist due to rising sea levels), the issue is how the Refugee Convention (and the international community more generally) will deal with climate change induced cross-border migration. There is debate about whether the Refugee Convention can, and should, encompass those who are forced to migrate because of environmental reasons.

Those who support the inclusion of such groups argue that because “environmental refugees” are involuntary migrants who are unable to return to their homeland, they are just as deserving of international protection as those are fleeing serious human rights violations.¹³⁸ By contrast, those who do not consider such “refugees” come within the Convention argue that, given the Refugee Convention contemplates an individual fleeing intentional acts directed at him or her

¹³⁶ At 2. See also United Nations Economic Commission for Africa, above n 129, at 3. For example, in Darfur refugee camps women were having to travel further distances to collect water and were thus more susceptible to rape and violence: see A Brody, J Demetriades and E Esplen “Gender and Climate Change; Mapping the Linkages – A Scoping Study on Knowledge and Gaps” (Report prepared for the UK’s Department of Internal Development and Institute of Development Studies, University of Essex, Brighton (UK), 2008).

¹³⁷ IUCN, above n 131.

¹³⁸ See for example, Christopher M Kozoll “Poisoning the Well: Persecution, the Environment, and Refugee Status” (2004) 15 Col J Intl Env’t L & Poly 271 at 272; Jessica Cooper “Environmental Refugees: Meeting the Requirements of the Refugee Definition” (1998) 6 NYU Env’t LJ 480; and Tiffany Duong “When Islands Drown: The Plight of ‘Climate Change Refugees’ and Recourse to International Human Rights Law” (2010) 31 U Pa J Intl L 1239 at 1261–1265 where the author argues the definition of “refugee” can be expanded to include climate change refugees.

for one of the Refugee Convention reasons, climate change migrants do not fall under this umbrella of protection.¹³⁹

The prevailing academic view appears to prefer the second view.¹⁴⁰ The second view has also been accepted in a recent New Zealand case with the Immigration and Protection Tribunal, the High Court and the Court of Appeal refusing a Kiribati claimant refugee status on the basis of climate change.¹⁴¹ If climate change cross-border migrants are not protected under the Refugee Convention, however, it has been said that “we’re looking at a gaping legal hole”.¹⁴²

But, regardless of whether climate change migrants can come within the protection of the Refugee Convention, the practical reality is that there are many barriers in seeking asylum (discussed above) and, in any event, the Refugee Convention does not cover internally displaced persons.

Alternative Solutions

So what are the alternative solutions? Those displaced domestically by climate change do come within the ambit of various instruments such as the UN Guiding Principles on Internal Displacement (which is a restatement and compilation of human rights and humanitarian law relevant to internally displaced persons). However, while these principles are theoretically helpful, they are aspirational in many respects as they presuppose financial resources and a

¹³⁹ Kozoll, above n 138, at 273.

¹⁴⁰ For further discussion of the issue, see for example: Angela Williams “Turning the Tide: Recognizing Climate Change Refugees in International Law” (2008) 30 *Law & Policy* 502 at 508; Lauren Nishimura “‘Climate Change Migrant’s’: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies” (2015) 27 *Intl J Refugee L* 107 at 114–115; Jane McAdam “From Economic Refugees to Climate Refugees” (2009) 10 *Melbourne Journal of International Law* 579; and Xing-Yin Ni “A Nation Going Under: Legal Protection for ‘Climate Change Refugees’” (2015) 38 *Boston College Intl and Comp L Rev* 329.

¹⁴¹ See *AF (Kiribati)* [2013] NZIPT 800413; *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125, [2014] NZAR 162; and *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688. For commentary on these issues and these New Zealand cases, see Ni, above n 140. On 20 July 2015, leave to appeal to the Supreme Court was refused. The Court held that Mr Teitiota would face no “serious harm” if returned and there was no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can. However, the Court stated its decision did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction: *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 at [13].

¹⁴² Comment made by Jose Riera, Senior Advisor in the UNHCR Division of International Protection: “Feature: Should international refugee law accommodate climate change?” (3 July 2014) UN News Centre <www.un.org>.

State's administrative ability to deal with the issue. Given that mass internal displacements are often in less developed countries, international humanitarian assistance and intervention is often required.¹⁴³

In terms of cross border migrants displaced by climate change, the current international climate migration framework creates two main gaps: first, there is a rights gap due to the fact that, under the existing law,¹⁴⁴ persons who seek to migrate to another country due to climate change have no general right (either under domestic or international law) to remain permanently in another country; and secondly, there is a funding gap as there is a lack of “dedicated international source of funds to help offset the costs of climate migration, especially in the developing world” and this includes international as well as internal migration.¹⁴⁵

While the Refugee Convention could be amended to include environmental refugees (as suggested by the Maldives in 2006),¹⁴⁶ others have proposed alternative and new legal frameworks to cope with the issue of climate change displacement on both an international and domestic level. All of these provide different mechanisms for combating the problems but share common characteristics such as cost-sharing across the international community climate change induced migration.¹⁴⁷

¹⁴³ *Guiding Principles on Internal Displacement* E/CN.4/1998/53/Add.2 (1998).

¹⁴⁴ Assuming for these purposes that the Refugee Convention does not apply and that other instruments such as the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) and the right to life under art 6 would not assist.

¹⁴⁵ Katrina M Wyman “Responses to Climate Migration” (2013) 37 *Harv Envtl L Rev* 167 at 175–185.

¹⁴⁶ The Maldives recommended a new protocol to the Refugee Convention to cover environmental refugees. *Maldives Draft Protocol on Environmental Refugees: A Report on the Original Meeting and the Proposed Amendments to the 1951 Convention and 1967 Protocol* (Sept 18, 2007). See also Jane McAdam “Climate Change ‘Refugees’ and International Law” (Paper prepared for NSW Bar Association, 2007).

¹⁴⁷ Numerous legal academics have put forward proposals for new binding multilateral instruments for the protection of climate change migrants. There are three prominent proposals by. See Frank Biermann and Ingrid Boas “Preparing for a Warmer World: Towards a Global Governance System To Protect Climate Refugees” (2010) 10 *Global Envtl Pol* 60; Bonnie Docherty & Tyler Giannini “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees” (2009) 33 *Harv Envtl L Rev* 349; David Hodgkinson and others “‘The Hour When the Ship Comes In’: A Convention for Persons Displaced by Climate Change,” (2010) 36 *Monash Univ L Rev* 69. For a detailed comparison of these proposals, see Wyman, above n 145; and M K Solomon and K Warner “Protection of Persons Displaced as a Result of Climate Change” in M B Gerrard and G E Wannier *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, New York, 2013) 243 at 271–273. For a perspective as to why an international instrument may not be the answer, see Jane McAdam “Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer” (2011) 23 *Intl J Refugee L* 2. McAdam suggests that the more pragmatic solution is through national and regional responses (such as bilateral or regional agreements) rather than multilateral treaties.

NATURAL DISASTERS

By God's will we survived. All our houses were washed out. There was nothing I could save. Nothing was left.

*Mary Ann Agujero, internally displaced person
and survivor of Typhoon Haiyan, the Philippines*¹⁴⁸

Natural disasters have the ability to kill or displace millions of people. The IPCC Working Group I's latest report predicts that by the end of the twenty-first century, changes in the increased frequency of many extreme weather events will range from likely to virtually certain.¹⁴⁹ Whatever the correlation between climate change and extreme weather events, the early part of the twenty-first century has seen catastrophic natural disasters (and some clearly not climate related).¹⁵⁰ These disasters have demonstrated the ability of natural disasters to force thousands of people to migrate either internally or across borders.

Women and Natural Disasters

While disasters can affect the rich or the poor, a study by academics at the London School of Economics and University of Essex examined over 4,600 disasters in 141 countries between 1981 and 2002 and found that women had a higher mortality rate resulting from natural disasters and this was linked to their social and economic position.¹⁵¹ Just as women are more susceptible than men to the impacts of climate change, the research on natural disasters indicates that women also face disproportionate hardship from natural disasters and this is due to their marginalisation in many parts of the world.

¹⁴⁸ Quote taken from a UNHCR video shown at the Shirley Smith Address: the video is available at <<https://www.youtube.com/watch?v=FnijzL89TP8>>.

¹⁴⁹ See IPCC Working Group I "Summary Policy Makers" (2013); for a summary of different natural disasters and their changes throughout the twentieth century and predicted changes throughout the twenty-first century at 5–7.

¹⁵⁰ For a list of the natural disasters see Teresa Thorp "International Climate Law and the Protection of Persons in The Event of Disasters" (2013) 11 NZJPIL 427 at 429–430. These disasters included the 2003 European heat wave that killed more than 66,000 people, the Asian tsunami that killed hundreds of thousands of people, Hurricane Katrina which was the deadliest hurricanes to strike the United States of America since 1928. Russia suffered an extreme heat wave in 2010 that caused over 55,000 deaths. Another natural disaster in my own country was the February 2011 Christchurch Earthquake that killed 185 people and injured thousands of others and caused significant property damage.

¹⁵¹ See E Neumayer and T Plümpert "The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002" (2007) 97 Annals of the Association of American Geographers 551–566.

The vulnerability of women post-disasters is the result of a number of factors: first, after a disaster women are likely to be placed in unsafe and overcrowded shelters due to lack of assets; secondly, cultural constraints on women's movements may hinder their escape and access to shelter or health care; thirdly, in countries where women have lower status in society, they are less likely to receive adequate health care and resources in times of disaster.¹⁵² For example: in the 1991 cyclone disaster in Bangladesh, 90 per cent of the 140,000 people killed were women.¹⁵³ In the 2004 Asian Tsunami, in many parts of Sri Lanka, Indonesia and India, three times as many women as men died.¹⁵⁴

The Refugee Convention

The inability of those fleeing “epidemics, natural disasters, or famines” to seek refuge under the Convention was discussed by Dawson J in the High Court of Australia in *A v Minister for Immigration and Ethnic Affairs*. Writing separately, he stated:¹⁵⁵

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.

...

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

These comments have found acceptance in other cases.¹⁵⁶ Even if the Refugee Convention were to cover victims of natural disasters, however, the practical barriers in seeking asylum would still be present.

¹⁵² At 555 the researchers commented that boys were given preferential treatment during rescue efforts and both women and girls suffered more from shortages of food and economic resources.

¹⁵³ Keiko Ikeda “Gender Differences in Human Loss and Vulnerability in Natural Disasters: A Case Study from Bangladesh” (1995) 2 *Indian Journal of Gender Studies* 171–193.

¹⁵⁴ Oxfam “The Tsunami’s Impact on Women” (2005) <www.oxfam.org.uk>

¹⁵⁵ *A v Minister for Immigration and Ethnic Affairs*, above n 41, at 248. Gummow J, in a separate judgment, endorsed Dawson J’s comment that the language should not be departed from by invoking “humanitarian objectives of the Convention”: at 283.

¹⁵⁶ See *Horvath v Secretary of State for the Home Department*, above n 51, at 498 per Lord Hope; and *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856 at [7] per Lord Bingham.

Solutions for natural disaster migration

As with those who may be displaced by global warming, there have been similar calls for international frameworks to deal with displacement of people due to natural disaster. If the correlation between natural disasters and climate change can be substantiated, many persons fleeing natural disasters would be protected by any international frameworks with regards to climate change. However, many natural disasters are not related to climate change (for example volcanic eruptions and earthquakes) or the causal link with climate change may be hard to establish. As a result, even if there is an international framework dealing with climate change migrants, not all victims of natural disasters will be covered.

International disaster relief and response is currently ad hoc, with a range of governments, international bodies¹⁵⁷ and private entities¹⁵⁸ assisting. There have been steps to create a more generalised framework for international natural disaster response. For example in 2007, the International Law Commission turned its attention to the topic of the “Protection of persons in the event of disasters.”¹⁵⁹ It has published numerous draft articles that setting out numerous principles for international assistance in the case of natural disasters affirming such things as a duty to co-operate, a duty of an affected state to seek assistance and the right for other states to offer assistance.¹⁶⁰ Reflected in these principles is the idea of State sovereignty which was central to the International Law Commission’s drafting committee.¹⁶¹

¹⁵⁷ See for example the United Nations Office for the Coordination of Humanitarian Affairs.

¹⁵⁸ There are numerous international bodies, such as: Oxfam, Red Cross, Red Crescent, Save the Children, Doctors without Borders, Care, and World Vision.

¹⁵⁹ International Law Commission *Report of the International Law Commission on the work of its fifty-ninth session* GA Res 62/6, A/RES/62/66 (2007) at [7]. See also the International Disaster Response Laws, Rules and Principles (IDRL) that were unanimously adopted by the state parties to the Geneva Conventions and the International Red Cross Red Crescent Movement on 30 November 2007: see further International Federation of Red Cross and Red Crescent Societies “IDRL Guidelines” <www.ifrc.org>.

¹⁶⁰ See generally International Law Commission *Report of the International Law Commission on the work of its sixty-fourth session* A/67/10 (2012). State sovereignty was central to the recommendations.

¹⁶¹ At 468. See also J B Heath “Disasters, Relief, and Neglect: the Duty to Accept Humanitarian Assistance and the Work of the International Law Commission” (2011) 43 NYU J Intl Law & Pol 419 as to the scope of the duty for affected states to accept humanitarian assistance; and A de Urioste “When Will Help Be on the Way? The Status of International Disaster Response Law” (2006) 15 Tul J Intl & Comp L 181. In her paper, Teresa Thorp puts forward the argument for a more cohesive and binding “laws of the people” for disaster relief based on the United Nation’s Framework Convention on Climate Change’s five principles of: equity, solidarity, precaution, sustainable development, and “good neighbourliness”: Teresa Thorp, above n 150, at 446. Many of Teresa Thorp’s proposals are predicated on the assumption of a climate change and natural disaster nexus. A more unified and better international disaster response framework may not only reduce the

In addition to movements for better disaster responses from the international community, there have been calls for a unified framework to deal with disaster-induced cross-border displacement. In 2011, Switzerland and Norway developed the “Nansen Initiative” which is aimed at addressing the protection gap regarding forced cross-border displacement in the context of natural disasters, including those triggered by climate change.¹⁶² This gap arises because the initiative considers that such displaced people are not likely to be considered refugees under intentional refugee law and human rights law does not address critical issues such as their admission to States, short-term and long-term stay, and other basic rights.¹⁶³ Regional workshops have already begun and will conclude in 2015 with the hope of stimulating a global dialogue to establish an international protection agenda. The agenda is expected to have three core pillars: standards for the treatment of people displaced by natural disasters, international cooperation, and solidarity and operational responses.

Proposals such as the Nansen Initiative give due recognition to the fact that a large portion of cross-border displacements in the twenty-first century will be induced by climate change and/or natural disasters. While the world has international law frameworks for those fleeing persecution, (but subject to the practical limitations earlier discussed), the world is yet to develop a complete framework for those fleeing the harms caused by natural forces or climate change. In light of the research of how disasters affect women in particular, any initiative should ensure it recognises and mitigates the disproportionate harm faced by women.

CONCLUSION

This paper has examined four groups of particularly vulnerable persons and their ability to seek protection under the Refugee Convention: woman subjected to private violence; those in refugee camps; those forced to migrate because of climate change; and those affected by natural disasters.

impacts of disasters, but also reduce disaster related cross-border migration; in essence, if individuals are able to cope better in their own State, they will not need to seek refuge in another.

¹⁶² The Nansen Initiative “Towards protection Agenda for Disaster-Induced Cross-Border Displacement-Information Note” (20 October 2013) <www.nanseninitiative.org>.

¹⁶³ The Nansen Initiative “Nansen Initiative Leaflet” <www.nanseninitiative.org>.

There is no doubt that the Refugee Convention is now more and more being seen not just through the prism of male experience but also taking into account the different experiences of women, particularly in relation to what I have called private violence. There are, however, gaps in the coverage of the Refugee Convention in the sense that it does not cover internal displacement and it seems unlikely to cover displacement due to natural disasters or climate change. This is not a criticism of the Refugee Convention. The Refugee Convention was not designed to deal with these issues. It was designed to deal with the issues arising in the aftermath of the Second World War.

Probably the most telling reason that the Refugee Convention does not provide a solution for women and children, however, is the practical reality. The Refugee Convention is unlikely to assist many women because they will not be able, for a variety of reasons, to reach the jurisdiction of a State party to the Convention, a requirement before the Convention is engaged. Thus, many female refugees and their children are left in refugee camps with bad conditions and facing the added issues of sexual violence and exploitation.

This suggests that other international solutions are needed and preferably solutions that recognise the particular issues faced by women and children and, as far as possible, reduce the need for people to flee their homes, concentrating on giving them a better life in their own countries.¹⁶⁴

¹⁶⁴ The oral address concluded with a UNHCR video showing the pressing need for solutions: see <<https://www.youtube.com/watch?v=h-W6heWJ9hc>>. The video highlighted the stark refugee statistics and the terrible refugee situations in Syria, Mali, South Sudan, and the Democratic Republic of Congo.