

REVIEW ESSAY

INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION BY MICHELLE FOSTER (CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2007) 422 PAGES. PRICE £58.00 (HARDBACK) ISBN 9780521870177.

FROM ECONOMIC REFUGEES TO CLIMATE REFUGEES?

I INTRODUCTION

Forced-migration scholars perennially grapple with the boundaries of their discipline. What is a ‘refugee’? What is a ‘migrant’? What is a ‘forced migrant’? Are phenomena such as ‘internally displaced persons’ (‘IDPs’), ‘development-induced displacement’, and ‘climate-induced displacement’ appropriate categories for academic inquiry? What do such conceptualisations imply about human movement, and how do they impact on the legal regulation of it? Some legal scholars regard such debates as esoteric, since international law defines the category of ‘refugee’ and provides a legal status for people who meet that definition. Other categories of forced migrant, however deserving of international protection they might be, are not generally entitled to it as a matter of international law.¹ Yet, state practice and the jurisprudence that has emerged over the 55 years since the *Convention relating to the Status of Refugees*² entered into force signals that, although it is uniquely provided for in international law, the ‘refugee’ definition is not fixed in a particular historical moment. Rather, its interpretation has evolved as developments in international human rights law have informed the meaning of persecution and the bases on which human beings inflict severe harm on others. While the text of the refugee definition has remained virtually static over time,³ its interpretation has not.

Michelle Foster has expertly filled a gap in the literature with her timely and comprehensive monograph examining when deprivation of social or economic rights can amount to persecution. Through systematic analysis of case law from several jurisdictions, she shows how decision-makers have considered refugee claims based on socioeconomic grounds, and her careful examination of international law outlines a normative framework for principled decision-making on this basis. Importantly, her work shows why economic, social and cultural rights are not, by their inherent nature, the poor cousins of civil and political

¹ Although note that the principle of *non-refoulement* (or non-return) has developed under human rights law to prevent states from removing people to places where they would risk arbitrary deprivation of life, the imposition of the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. See also Jane McAdam, *Complementary Protection in International Refugee Law* (2007).

² Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (*Refugee Convention*).

³ The 1967 *Protocol relating to the Status of Refugees*, opened for signature 31 January 1966, 606 UNTS 267 (entered into force 4 October 1967), removed the temporal limitation of art 1A(2) (‘[a]s a result of events occurring before 1 January 1951’) and, for new contracting parties, removed the option of entering a geographical reservation (‘events occurring in Europe’) (emphasis added).

rights, but rather that they have been misinterpreted as having a weaker normative force. Foster's work is not only important to refugee studies, but also to the wider debate about the indivisibility and interdependence of rights.

Foster does not argue that economic deprivation alone amounts to persecution capable of founding a refugee claim. Rather, she shows in what circumstances states' economic or social discrimination against people because of their race, religion, nationality, political opinion or membership of a particular social group may reach the threshold of persecution under art 1A(2) of the *Refugee Convention*.

It is the element of persecution that fundamentally distinguishes 'mere' economic deprivation from someone who is a refugee on economic grounds. In other words, while there is sometimes a very fine line between so-called 'economic migrants' and 'refugees', it is not poverty or lack of economic opportunity alone that renders a person in need of international protection, but rather the requirements that: (a) the level of deprivation amounts to 'persecution'; (b) that persecution is on account of one of the five *Refugee Convention* grounds; and (c) the person's government is unable or unwilling to shield that person from such persecution.

Foster suggests that there is an assumption implicit in the distinction drawn between economic *migrants* and economic *refugees* that the latter are seeking to fraudulently claim asylum and are thereby manipulating the rules governing domestic immigration.⁴ This binary distinction between economic migrants and so-called 'genuine' refugees is a false one. Indeed, a strength of Foster's book is showing that the complexity of why people move means that placing people into one dichotomous category or another is erroneous.

This is highlighted by the phenomenon of climate-induced displacement, which is the focus of my current research. In light of the symposium topic of this edition of the *Melbourne Journal of International Law* — climate justice and international environmental law — I have been asked to reflect upon and extend Foster's analysis of socioeconomic displacement with respect to movement induced by climate change. It has been said that within the next 50 years, small island states such as Australia's Pacific neighbours, Tuvalu and Kiribati, will disappear altogether as a result of rising sea levels attributable to climate change. There are projections that areas in Africa will become even more drought-prone, and that coastal parts of Asia will flood more extensively and more regularly than in the past. Yet, the degree to which it can be said that an 'increasing number of people [are] displaced as a direct result of climate change'⁵ remains controversial. Whereas traditional figures (based on a very rudimentary methodology and yet, absent more rigorous data, have provided the benchmark) have suggested that up to 250 million people could be displaced by the middle of

⁴ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 6 (fn 13); see also at 238–47.

⁵ Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law and Policy* 502, 504.

this century as a result of climate change,⁶ more recent analyses suggest that while many people will suffer adversely from the impacts of climate change, displacement will likely be internal and temporary.⁷ Furthermore, as is explored below, substantiating a direct causal link between climate change and movement may be very difficult.

II A CLIMATE-DISPLACEMENT TYPOLOGY

Before analysing whether people displaced by climate change or other environmental pressures could meet the refugee definition in art 1A(2) of the *Refugee Convention*, it is important to separate out the very different kinds of movement that may be precipitated by those factors, since there is no single response that is appropriate to address them. Some types of environmental impacts may be very sudden and drastic but typically lead to temporary movement, often not very far from home.⁸ Other types of change may be much slower in onset, but may require more permanent movement.⁹ And there is a range of scenarios falling in between these two extremes.

Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, has developed a typology of climate-triggering displacement scenarios,¹⁰ subsequently adopted by the Inter-Agency Standing Committee ('IASC') Working Group on Migration/Displacement and Climate

⁶ See, eg, Norman Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *BioScience* 752; Norman Myers, 'Environmentally-Induced Displacements: The State of the Art' in United Nations High Commissioner for Refugees ('UNHCR'), *Environmentally-Induced Population Displacements and Environmental Impacts resulting from Mass Migration* (1996). Richard Black and Stephen Castles argued strongly against Myers' relatively simplistic characterisation of the problem when the issue re-entered academic debate in the 1990s: Richard Black, 'Environmental Refugees: Myth or Reality?' (UNHCR New Issues in Refugee Research Working Paper No 34, 2001); Stephen Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate' (UNHCR New Issues in Refugee Research Working Paper No 70, 2002). Most recently, Myers has predicted that by 2050, some 250 million people will be displaced by climate change, a figure that may have also inspired Global Humanitarian Forum's recent report, championed by its President, Kofi Annan: see respectively Norman Myers, interview with Christian Aid (14 March 2007) cited in Rachel Baird et al, *Human Tide: The Real Migration Crisis* (Christian Aid Report, May 2007) 6, 48 (endnote 10); Global Humanitarian Forum, *Human Impact Report: Climate Change — The Anatomy of a Silent Crisis* (Global Humanitarian Forum Report, 29 May 2009) 49.

⁷ See discussion of Environmental Change and Forced Migration Scenarios' ('EACH-FOR') research in Anna Barnett, 'Report Disperses Migration Myth', *Nature Reports Climate Change* (United Kingdom) 11 June 2009, 79–80 <<http://www.nature.com/climate/2009/0907/pdf/climate.2009.56.pdf>>.

⁸ See, eg, Craig Landry et al, 'Going Home: Evacuation–Migration Decisions of Hurricane Katrina Survivors' (2007) 74 *Southern Economic Journal* 326; James R Elliott and Jeremy Pais, 'Race, Class, and Hurricane Katrina: Social Differences in Human Responses to Disaster' (2006) 35 *Social Science Research* 295.

⁹ As Jacobson notes, '[l]ong-term declines in habitability occur in stages, themselves often the result of imperceptible changes': Jodi L Jacobson, *Environmental Refugees: A Yardstick of Habitability* (Worldwatch Institute Paper No 86, 1988) 7.

¹⁰ Walter Kälin, 'The Climate Change–Displacement Nexus' (Speech delivered at UN Economic and Social Council Panel on Disaster Risk Reduction and Preparedness: Addressing the Humanitarian Consequences of Natural Disasters, New York, United States, 16 July 2008) <http://www.brookings.edu/speeches/2008/0716_climate_change_kalin.aspx>.

Change.¹¹ As this typology shows, the reasons for, and the nature of, movement from environmental or climate change ‘events’ vary considerably:

- 1 *The increase of hydro-meteorological disasters*, such as flooding, hurricanes, typhoons, cyclones and mudslides, will lead to predominantly internal displacement. IDPs should be protected and assisted in accordance with the 1998 *Guiding Principles on Internal Displacement*.¹²
- 2 *Government-initiated planned evacuation* of areas at high risk of disasters. This is likely to lead to permanent internal displacement.
- 3 *Environmental degradation and slow onset disasters*, such as reduced water availability, desertification, recurrent flooding and increased salinity in costal zones. Kälin explains that:

Such deterioration may not necessarily cause forced displacement strictly defined, but instead incite people to move to regions with better income opportunities and living conditions before it becomes impossible to stay at home. However, if areas become uninhabitable because of complete desertification or sinking coastal zones, then population movements would amount to forced displacement and become permanent.¹³

- 4 *Small island states at risk of disappearing* because of rising sea levels. At the point when the territory is no longer habitable (for example, because of the inability to grow crops or obtain fresh water), permanent relocation to other states would be necessary. Kälin notes that current international law provides no status for such people, and even if they were to be treated as ‘stateless’, ‘current legal regimes are hardly sufficient to address their very specific needs’.¹⁴ Further, although small island states (such as Kiribati and Tuvalu) emit less than one per cent of global greenhouse gases, their small physical size, exposure to natural disasters and climate

¹¹ IASC Working Group on Migration/Displacement and Climate Change, ‘Climate Change, Migration and Displacement: Who Will Be Affected?’ (IASC Working Paper, 31 October 2008). However, note that this paper omits reference to government-initiated planned evacuation. See also the six-pronged typology in International Organization for Migration, *Migration, Climate Change and the Environment* (Policy Brief, May 2009) 3–4 <http://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/policy_documents/policy_brief_envmig.pdf>.

¹² Francis M Deng, Representative of the Secretary-General, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Human Rights Mass Exoduses and Displaced Persons: Addendum — Guiding Principles on Internal Displacement*, UN ESCOR, 54th sess, Agenda Item 9(d), UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

¹³ Kälin, ‘The Climate Change–Displacement Nexus’, above n 10.

¹⁴ *Ibid.*

extremes, very open economies, and low adaptive capacity make them particularly susceptible, and less resilient, to climate change.¹⁵

- 5 *Risk of conflict over essential resources.* Even though the humanitarian community is used to dealing with internal conflict, and people displaced by conflict may be eligible for protection as refugees or assistance as IDPs, resource-based conflicts ‘may be particularly challenging’ at the operational level. In particular, where the resource scarcity cannot be resolved, ‘it will be extremely difficult to reach peace agreements providing for an equitable solution. The likely outcome is both conflict and the displacement of a protracted nature’.¹⁶ Conflict is likely to be social, rather than armed.

The nature of scenarios contemplated here may be divided into what Brown terms climate processes (2, 3, 4) and climate events (1, 5).¹⁷ Humanitarian aid agencies are more likely to respond to the latter, since climate events are more likely to cause temporary, rather than permanent, displacement. For example, a sudden disaster, such as a cyclone, may precipitate very fast flight, but it may only be temporary, and assistance in the form of humanitarian disaster relief may be a sufficient response. By contrast, climate change impacts that take place over a much longer period, through erosion, salinity, corruption of fresh water lenses, and so on, may ultimately necessitate permanent movement, in some cases across international borders.

However, in slow-onset scenarios, it is likely that movement will happen in several stages rather than spontaneously. First, a general deterioration in conditions, which may be exacerbated — rather than directly caused — by climate change, may encourage people to look for opportunities elsewhere. For example, in Kiribati and Tuvalu, where I recently spent a month conducting field research, there has been internal migration from outer islands to the main atoll, and then in some cases, where people are eligible for visas, secondary movement to Fiji, New Zealand or Australia for work or education. The President of Kiribati, Anote Tong, is trying to secure enhanced labour migration options to Australia and New Zealand so that those who want to move have an early opportunity to do so. His long-term strategy is to slowly build up I-Kiribati communities abroad through the gradual, transitional resettlement of Kiribati citizens, so that if and when the whole population has to relocate, there will be existing communities and extended family networks that those left behind could join. The President hopes that in this way, I-Kiribati culture and traditions will be

¹⁵ Nobuo Mimura et al. ‘Small Islands’ in Working Group II, Intergovernmental Panel on Climate Change (‘IPCC’), *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC Fourth Assessment Report, 2007) 687, 689–90. The report additionally lists the impacts of globalisation; pressures on infrastructure; a scarcity of fresh water; and, in the Pacific, internal and external political and economic processes, including the imposition of western adaptation models which are not readily transposable to the island context. These features have resulted in some small island states being recognised by the UN as Least Developed Countries or Small Island Developing States (‘SIDS’): at 690–3.

¹⁶ Kälén, ‘The Climate Change–Displacement Nexus’, above n 10.

¹⁷ Oli Brown, *Migration and Climate Change* (International Organization for Migration Research Series Report No 31, 2008) 17–18.

kept alive, but that his people would also be able to slowly adapt to new cultures and ways of life.

For Tuvalu and Kiribati, like other small island states at risk, the process itself is likely to be far less dramatic than the Atlantis-style predictions that have been showcased in the media. Gradual, virtual disappearance as more people start to live outside the territory is the likely scenario. In the absence of a sudden, natural disaster, movement from these states will be a complex process. It will involve multiple motivations, inspired by a number of pressures, that may compound on individuals and families in different ways at different times. As one government official in Kiribati observed, climate change overlays pre-existing pressures — overcrowding, unemployment, environmental and development concerns — which means that it may provide a ‘tipping point’ that would not have been reached in its absence. As Kälin has stated, ‘[c]limate change *per se* does not trigger movement of persons, but some of its effects do, including sudden and slow on-set disasters’.¹⁸ In other words, climate change adds to pre-existing stressors and provides an incentive to try to relieve some of the pressure by encouraging people to move.

From my own research in Kiribati and Tuvalu, climate change is only one (if even a) factor in individual decisions to move. Overcrowding (population increase coupled with declining environmental conditions) and unemployment, exacerbated by urbanisation and industrialisation, are very obvious and acknowledged pressures, especially in Kiribati. People are not actively fleeing from their homes, but reluctantly recognising that at some point in the future, their home may no longer be able to sustain them. Many have family or friends already living abroad, and one quickly learns that mobility is, as in many Pacific countries, a historical pattern that continues to this day.

III WHY PROTECT SOCIOECONOMIC RIGHTS?

In his 1991 work, *The Law of Refugee Status*, James Hathaway argues that the meaning of ‘persecution’ in the *Refugee Convention* is ‘the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community’.¹⁹ In terms of what those ‘core entitlements’ were, he set out a taxonomy of rights arranged in four ‘tiers’.²⁰ The first tier consisted of the most basic and inalienable rights in the *International Covenant on Civil and Political Rights*, from which no derogation is permitted under any circumstances.²¹ The second tier comprised other civil and political rights from which states could derogate in exceptional circumstances (that is, a

¹⁸ Walter Kälin, ‘Climate Change, Migration Patterns and the Law’ (Address delivered at the Eighth World Conference of the International Association of Refugee Law Judges, Cape Town, South Africa, 28 January 2009) 2.

¹⁹ James C Hathaway, *The Law of Refugee Status* (1991), 112.

²⁰ *Ibid* 108–12.

²¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7, 8(1), 8(2), 11, 15, 16, 18 (‘*ICCPR*’), which relate respectively to: arbitrary deprivation of life; torture or cruel, inhuman or degrading treatment or punishment; slavery; servitude; imprisonment as a result of inability to fulfil a contractual obligation; criminal prosecution for *ex post facto* offences; respect for the right to recognition as a person before the law; and freedom of thought, conscience and religion.

‘public emergency which threatens the life of the nation’).²² The third-tier rights were those contained in the *International Covenant on Economic, Social and Cultural Rights*.²³ Finally, the fourth tier was comprised of rights in the *Universal Declaration of Human Rights* that are not codified in the *ICCPR* or *ICESCR*, which Hathaway thought probably fell outside the scope of states’ basic protection obligations.²⁴

According to Hathaway, a state would breach its duties under the third tier if it had the financial capacity to provide *ICESCR* rights but failed to, or if it excluded certain groups from *ICESCR* rights granted to the rest of the population (that is, if it engaged in discriminatory conduct).²⁵

Foster argues that Hathaway’s characterisation of rights has been misunderstood by decision-makers, who have thought that third-tier rights violations are less significant than breaches of first- and second-tier rights. Despite well-established authority that says persecution is not limited only to cases where life or freedom is at risk,²⁶ Foster notes that some decision-makers have required economic-related harm to constitute a threat to life in order to qualify as persecution. They seem to regard a ‘mere’ breach of a third-tier right as discrimination only, suggesting that these rights require fortification involving higher-level rights in order to meet the definition of persecution.²⁷ Furthermore, because of the progressive implementation of rights under the *ICESCR*, some decision-makers have thought that states do not have duties of an immediate nature in respect of them and therefore cannot be liable for persecution on that basis. Accordingly, it has traditionally been difficult to make out claims based on socioeconomic forms of harm given that decision-makers usually impose a higher standard when assessing economic persecution.²⁸

However, Foster argues that, rather than suggesting that some rights have a higher or lesser normative value than others, Hathaway sought only to differentiate between the *level of obligation* assumed by the state for each tier. While it is true that the *ICESCR* does not generally provide for immediate outcomes with respect to the rights it protects, given the institution of progressive realisation, it does impose immediate obligations in a number of important ways.²⁹ In particular, the United Nations Committee on Economic, Social and Cultural Rights (‘CESCR’) has indicated that ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential

²² Ibid art 4(1).

²³ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*).

²⁴ See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948) arts 17 (right to property), 23 (certain labour rights).

²⁵ Hathaway, above n 19, 111. US decisions and executive guidelines indicate that in many cases involving children, a lower level of discrimination will suffice to demonstrate that the claim is one of persecution: see the discussion in Foster, above n 4, 206–12.

²⁶ See Foster, above n 4, 131–2.

²⁷ Ibid 133.

²⁸ See also Kate Jastram’s analysis of case law from the US, UK, Canada, Australia and New Zealand, which leads to the same conclusion: Kate Jastram, ‘Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution’ in James Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (forthcoming 2010).

²⁹ See Foster, above n 4, 137–8. Furthermore, all *ICESCR* rights are non-derogable: at 176.

levels of each of the rights is incumbent upon every State party',³⁰ and it is in the process of defining the minimum core obligation for each *ICESCR* right.³¹ In the same way that states have an immediate obligation to respect the principle of nondiscrimination and to take steps towards progressive realisation of the treaty, they also have an immediate duty to accord the minimum core obligation of each *ICESCR* right. This has ramifications for refugee claims where a person's economic and social rights are actively withdrawn, or where there is discrimination for a *Refugee Convention* reason in providing such rights, since according to Foster, a violation of a core obligation may amount to persecution.³² In other words, the programmatic nature of these rights is irrelevant to such cases.³³

Foster queries whether the higher test that decision-makers tend to impose on socioeconomic claims implies a certain discomfort with the connection between economic refugee claims and the rhetoric of economic migration,³⁴ and a related fear of 'opening the floodgates' to all the 'poor people' in the world.³⁵ Such

³⁰ CESCR, *General Comment No 3: The Nature of States Parties' Obligations*, [10] as contained in *Report on the Fifth Session (Art 2, Para 1, of the Covenant)*, UN ESCOR, 5th sess, 3rd Annex, Supp 3, UN Doc E/1991/23 (14 December 1990).

³¹ In defining the core obligations for each *ICESCR* right, the CESCR has produced General Comments on specific rights: see *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)* as contained in *Report on the Sixth Session*, UN ESCOR, 6th sess, 3rd Annex, UN Doc E/1992/23 (13 December 1991); *General Comment No 7: The Right to Adequate Housing (Art 11(1) of the Covenant): Forced Evictions* as contained in *Report on the Sixteenth and Seventeenth Session*, UN ESCOR, 16th sess, 22nd mtg, 4th Annex, UN Doc E/1998/22 (14 May 1997); *General Comment No 12: The Right to Adequate Food*, UN ESCOR, 20th sess, Agenda Item 7, UN Doc E/C.12/1999/5 (12 May 1999); *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, UN ESCOR, 21st sess, UN Doc E/C.12/1999/10 (3 December 1999); *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)*, UN ESCOR, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (12 May 2000); *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)*, UN ESCOR, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (29 November 2002); *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of Covenant)*, UN ESCOR, 34th sess, Agenda Item 5, UN Doc E/C.12/2005/4 (13 May 2005); *General Comment No 18: The Right to Work (Art 6 of the Covenant)*, UN ESCOR, 35th sess, Agenda Item 3, UN Doc E/C.12/GC/18 (24 November 2005); *General Comment No 19: The Right to Social Security (Art 9)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (23 November 2007); *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2, of the Covenant)*, UN ESCOR, 42nd sess, Agenda Item 3, UN Doc E/C.12/GC/20 (22 May 2009).

³² See Foster, above n 4, 197–8. Foster also notes that the minimum core obligation may vary depending on the particular vulnerabilities of the individual: at 205.

³³ The present thinking is that, rather than having a categorical distinction between economic and social rights on the one hand, and civil and political rights on the other, a 'typology' of rights is more appropriate. This has been adopted by the CESCR and implicitly by the UN Human Rights Committee. It is a useful way of identifying the different types of obligations that each treaty has for states parties. For references and discussion, see *ibid* 173.

³⁴ *Ibid* 132.

³⁵ *Ibid* 134–5. See also the remarks of Judges Tulkens, Bonello and Spielmann in their joint dissenting opinion in *N v UK*, Application No 26565/05 (European Court of Human Rights, Grand Chamber, 27 May 2008) [O-18] (Dissenting Opinion), where they stated that the majority's view 'reflects the real concern that they had in mind: if the applicant were allowed to remain in the United Kingdom to benefit from the care that her survival requires, then the resources of the State would be overstretched'. They also regarded the majority's opinion as implicitly accepting that 'finding a breach of Art 3 in the present case would open up the floodgates to medical immigration and make Europe vulnerable to becoming the "sick-bay" of the world'.

thinking has pervaded the jurisprudence relating to health and medical cases in the area of human rights law. Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR') provides that no state may subject a person to torture or inhuman or degrading treatment or punishment,³⁶ and this has been interpreted as including a prohibition on *refoulement* to such treatment.³⁷ The European Court of Human Rights in Strasbourg and the UK House of Lords have held that only in 'exceptional' cases will removal to a country where the applicant would not have access to adequate health care or medical treatment constitute a breach of this right.³⁸ The standard is extremely high. In the seminal case of *D v UK*, the European Court of Human Rights stressed that it was the exceptional combination of factors that made the applicant's removal incompatible with art 3:³⁹ the abrupt withdrawal of medical facilities; poor medical conditions in the home country (St Kitts) that could 'further reduce his already limited life expectancy and subject him to acute mental and physical suffering';⁴⁰ no assurance that he would get a hospital bed; no strong family ties or other moral or social support at home;⁴¹ the fact that his lack of shelter and proper diet in St Kitts could expose him to infections unable to be properly treated; and the country's *general* health and sanitation problems.⁴²

And yet, empirical evidence suggests that this fear of opening the floodgates is misplaced, and that potentially large numbers of claimants should not deter findings that protection is required. In their dissenting opinion in *N v UK*, Judges Tulkens, Bonello and Spielmann stated that:

A glance at the Court's Rule 39 statistics concerning the United Kingdom shows that, when one compares the total number of requests received (and those refused and accepted) as against the number of HIV cases, the so-called 'floodgate' argument is totally misconceived.⁴³

The jurisprudential trend with respect to socioeconomic rights suggests that people seeking to bring claims on the basis of deprivation resulting in part from climate change will face considerable challenges. As Antonio Cassese observed

³⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³⁷ *Soering v UK* (1989) 161 Eur Court HR (ser A) 8, 34–6; *Chahal v UK* [1996] V Eur Court HR 1831, 1853, 1855.

³⁸ *D v UK* [1997] III Eur Court HR 777; *N v Secretary of State for the Home Department* [2005] 2 AC 296; *N v UK*, Application No 26565/05 (European Court of Human Rights, Grand Chamber, 27 May 2008).

³⁹ The Court noted that the source of risk stems from factors which 'taken alone, do not in themselves infringe the standards of that Article': *D v UK* [1997] III Eur Court HR 777, 792 [49]. See also *BB v France* [1998] VI Eur Court HR 2595; *Bensaid v UK* [2001] I Eur Court HR 303; and most recently *N v UK*, Application No 26565/05 (European Court of Human Rights, Grand Chamber, 27 May 2008).

⁴⁰ *D v UK* [1997] III Eur Court HR 777, 793.

⁴¹ In *BB v France* [1998] VI Eur Court HR 2595, annex (Opinion of the European Commission of Human Rights), the Commission observed that facing AIDS alone at an advanced stage would constitute degrading treatment: at 2613–14. Ultimately, a friendly settlement was reached in this matter so the European Court did not have to determine the issue definitively.

⁴² *D v UK* [1997] III Eur Court HR 777, 793.

⁴³ *N v UK*, Application No 26565/05 (European Court of Human Rights, Grand Chamber, 27 May 2008) [O-18] (Dissenting Opinion).

early on with respect to the Strasbourg case law concerning art 3, there has been a reluctance to delineate ‘the circumstances under which one can conclude that practical measures bearing on social life and the daily living conditions of a person may amount to inhuman or degrading treatment’,⁴⁴ and a lack of clear reasoning as to the ‘level of humiliation or debasement’⁴⁵ required to meet the threshold of art 3 of the *ECHR*. Foster’s analysis may help decision-makers assess alleged breaches of socioeconomic rights in a more principled manner, in particular by focusing their attention on legal questions, rather than political considerations.

IV DO ‘CLIMATE CHANGE REFUGEES’ EXIST?

In small island states such as Kiribati and Tuvalu, there are very real concerns about the long-term viability of economic, social and cultural rights given that they may be disrupted as climate change slowly erodes the territories’ habitability.

The types of factors that might motivate movement from Tuvalu and Kiribati would typically be characterised as falling into the ‘economic migration’ category: a search for a better livelihood and educational opportunities and securing a better future for their children. This is what people typically said when asked if or why they might move abroad. But could the combination of pressures, exacerbated by the predicted long-term impacts of climate change, be sufficient to constitute a kind of forced migration that could come within the scope of the ‘refugee’ definition in art 1A(2) of the *Refugee Convention*?⁴⁶

This is where Foster’s work becomes important, since the impacts of climate change are felt predominantly in the enjoyment of socioeconomic rights. For example, the rights ‘at risk’ in Kiribati and Tuvalu are chiefly socioeconomic ones. Kiribati experiences significant overcrowding that is only set to worsen as the population naturally increases, and unemployment is high in both countries. Climate change threatens to reduce habitable land in a number of ways, including through coastal erosion and increased salination. This will impact upon agricultural capacity and, in turn, is likely to lead to greater urbanisation and more pressure on the labour market. There are also negative health consequences as people become increasingly reliant on imported processed foods.

These pressures will be felt generally by the population as a whole, not by particular sectors as a result of discriminatory or targeted government policies. In

⁴⁴ Antonio Cassese, ‘Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?’ (1991) 2(2) *European Journal of International Law* 141 (reproduced in Paola Gaeta and Salvatore Zappala (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (2008) 335).

⁴⁵ *Van Volsem v Belgium*, Application No 14641/89 (European Commission of Human Rights, 9 May 1990), cited in *ibid*.

⁴⁶ As Foster reminds us, international refugee law does not require fear of persecution to be the sole motivating factor for moving: Foster, above n 4, 247–8. See also Hathaway, above n 19, 117–19. There is an implicit recognition that people’s reasons for moving are generally multifarious, again disrupting the simple dichotomy of ‘forced’ versus ‘voluntary’ movement, on which see Anthony Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (1994) 58–61; Nicholas Van Hear, *New Diasporas: The Mass Exodus, Dispersal and Regrouping of Migrant Communities* (1998) 40–9; Graeme Hugo, ‘Environmental Concerns and International Migration’ (1996) 30 *International Migration Review* 105.

my view, one would be hard-pressed to find that the resource constraints in these Pacific nations amount to violations of human rights, constituting persecution within the meaning of the *Refugee Convention*. Although, as Foster's book shows, social or economic deprivations can amount to persecution, it is not enough simply to show the 'sad fact of life' that poverty is widespread; it remains necessary to demonstrate a discriminatory element in how rights are restricted or withheld by (or with the acquiescence of) the state.

V APPLYING A REFUGEE LAW FRAMEWORK

Certainly, there are normative gaps that mean people who move in response to an environmental disaster or climate change, who have not obtained permission to move on other grounds (such as a labour visa), are in a legal limbo. If and when such people spontaneously flee across an international border, decision-makers may have to determine whether there are any bases in existing law that would permit them to remain.⁴⁷

International refugee law is a clunky tool for trying to address flight from habitat destruction. It was devised for a very different context and is an inappropriate framework for most cases of environmental displacement. As Kälén has observed, '[t]here is a temptation to start with definitions that would be derivative of existing concepts'.⁴⁸ While it is an attractive ready-made tool for certain displacement contexts, it does not, in my view, adequately address the time dimension of pre-emptive and staggered movement (and the fact that in some cases it will be permanent); the maintenance of culture and statehood; or the fact that the juridical aspect of protection by the home state remains forthcoming. In other contexts, it may be inappropriate because movement is only internal, in which case the *Guiding Principles on Internal Displacement* will be instructive.

There are a number of obstacles that make it very difficult to argue that people displaced by climate change are refugees within the meaning of the *Refugee Convention*. The difficulty stems not from the fact that the key rights

⁴⁷ Note that Sweden has a category of 'persons otherwise in need of protection' in its *Aliens Act* (which entered into force 31 March 2006), encompassing, inter alia, people who are 'unable to return to the country of origin because of an environmental disaster': *Aliens Act 2005* (Sweden) ch 4, s 2(3). It is unclear if this would extend to people displaced by climate change, or whether it is intended only to cover people fleeing environmental disasters such as Chernobyl: see Brown, above n 17, 39 referring to personal communication with Helené Lackenbauer of the International Federation of Red Cross and Red Crescent Societies, who stated that parliamentary discussions of this category, prior to the passing of the legislation, referred to nuclear disasters. Section 88 of the *Aliens Act 2004* (Finland) provides that an alien may be granted asylum if he or she faces a 'threat of death penalty, torture or other inhuman treatment or treatment violating human dignity, or if they cannot return [to the country of origin] because of an armed conflict or environmental disaster'. See also at ss 89 (residence permits), 109 (temporary protection in cases of mass displacement). According to the Finnish Immigration Service, this includes where the environment has become uninhabitable owing to human actions: Benjamin Glahn, 'Climate Refugees? Addressing the International Legal Gaps' (Pt II), *International Bar News* (UK) August 2009, available from <http://www.ibanet.org/Publications/publications_home.aspx>. The US provides for a grant of 'Temporary Protected Status' for displacement as a result of, inter alia, environmental disasters, but this status is necessarily temporary and can only be granted to citizens of designated countries who are already in the US at the time of the disaster: *Immigration and Nationality Act*, 8 USC §§ 244, 1254 (1952).

⁴⁸ Kälén, 'Climate Change, Migration Patterns and the Law', above n 18, 1.

affected are socioeconomic ones, but rather in characterising their deprivation as ‘persecution’ for a *Refugee Convention* reason.

At the outset, the refugee definition only applies to those who have already crossed an international border. Since most of the discussion about ‘climate change refugees’ refers to pre-emptive or internal movement, this element of exile imposes the first definitional hurdle under the *Refugee Convention*.

Second, there are difficulties in characterising ‘climate change’ as ‘persecution’. While some have sought to argue the case,⁴⁹ I find their arguments unconvincing. ‘Persecution’ entails violations of human rights that are sufficiently serious owing to their nature or repetition (for example, an accumulation of breaches which, if considered individually, would not be so serious but which together constitute a severe violation).⁵⁰ It remains very much a question of degree and proportion, and is assessed according to the nature of the right at risk, the nature and severity of the restriction, and the likelihood of the restriction eventuating in the individual case.⁵¹

The idea that persecution can be economic in nature ‘is not a modern construct or radical notion; rather there is evidence that from the earliest days of its operation some types of socio-economic claims were considered to fall within the purview of the *Refugee Convention* definition’.⁵² But, for something to move beyond the ‘mere’ non-realisation of a right to the violation of a right in a manner that amounts to persecution, an additional element is necessary. As Foster’s case law examples show,⁵³ a discriminatory element is required; in other words, it needs to be shown that the persecutor is engaging in such acts because of an attribute — real or perceived — of the person being persecuted, rather than simply being a random attack. That attribute must be linked to at least one of the five *Refugee Convention* grounds.

Although adverse climate impacts such as rising sea levels, salination, and increases in the frequency and severity of extreme weather events (for example storms, cyclones, floods) are harmful (and in some cases fatal) they do not meet the legal threshold of ‘persecution’ as currently understood in international and domestic law.⁵⁴ The problem is not an insufficient severity of harm, especially where the knock-on effects of climate change jeopardise rights relating to health, employment, housing and so on (which, as Foster’s work shows, can be sufficiently severe to amount to persecution); but rather, demonstrating that the

⁴⁹ See, eg, Jessica Cooper, ‘Environmental Refugees: Meeting the Requirements of the Refugee Definition’ (1998) 6 *NYU Environmental Law Journal* 480; Christopher Kozoll, ‘Poisoning the Well: Persecution, the Environment, and Refugee Status’ (2004) 15 *Colorado Journal of International Environmental Law and Policy* 271.

⁵⁰ See also *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L 304/12, art 9. It may include a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: *Migration Act 1958* (Cth) s 91R(2).

⁵¹ See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) 92.

⁵² Foster, above n 4, 88.

⁵³ *Ibid* 104–5.

⁵⁴ See Goodwin-Gill and McAdam, above n 51, 90–134.

violation has the necessary discriminatory content to amount to *persecution*. This is closely linked to the absence of a ‘persecutor’.⁵⁵

Foster’s analysis of economic persecution provides a useful analogy here. General poverty is not sufficient for claiming refugee status.⁵⁶ Rather, there must be a differential impact as against the rest of society (in other words, because the group is marginalised). For example, one must be able to demonstrate that one is poor because government policy, inaction or discrimination treats one group in society differently from others. Indeed, as the New Zealand Refugee Status Appeals Authority affirmed that, in relation to very poor refugee claimants from Tuvalu, they could not be refugees if they had not been treated differently from anyone else:

Clearly, none of the fears articulated by the appellants *vis-à-vis* their return to Tuvalu, can be said to be *for reason of* any one of the five Convention grounds in terms of the Refugee Convention, namely race, religion, nationality, membership of a particular group and political opinion. This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any one of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluan citizens, of the forces of nature leading to the erosion of coastland and the family property being partially submerged at high tide. As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services of Tuvalu that apply indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the appellants for reason of their civil or political status.⁵⁷

By contrast, if behind economic measures there are racial, religious or political aims or intentions directed at a particular group, then that may result in recognition of refugee status.⁵⁸ For example, courts have recognised claims relating to an inability to obtain employment or earn a livelihood, especially where the government interferes in a state-controlled economy. Furthermore, continual discrimination by state or non-state actors that prevents a person from obtaining or continuing in work has also been found to amount to *Refugee Convention* persecution.⁵⁹ Political persecution can also take the form of economic punishment or deprivation.⁶⁰

⁵⁵ This is also said to be a limitation in economic claims: see Foster, above n 4, 9. Jeremy Harding argues that refugees generally attract greater international sympathy than economic migrants because there is an identifiable persecutor, as opposed to a general degree of economic difficulty that prevails in some parts of the world: see Jeremy Harding, *The Uninvited: Refugees at the Rich Man’s Gate* (2000) 122, cited in Foster, above n 4.

⁵⁶ See Foster, above n 4, 310 and relevant cases cited therein.

⁵⁷ *Refugee Appeal No 72189/00* (New Zealand Refugee Status Appeals Authority, Member Joe, 17 August 2000) [13] (emphasis in original); see also *Refugee Appeal No 72179/00* (New Zealand Refugee Status Appeals Authority, Member Millar, 31 August 2000), cited in *ibid* 310. See also the quote from *Subramaniam v Immigration and Naturalization Service*, 724 F Supp 799 (9th Cir, 1989) 801, cited in *ibid* 288.

⁵⁸ Foster, above n 4, 12, referring to UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/Rev.1 (January 1992) [64].

⁵⁹ Foster, above n 4, 94–5.

⁶⁰ *Ibid* 13.

General claims based on ‘climate change’ do not meet this persecution mould. For example, the governments of both Kiribati and Tuvalu are not responsible for climate change, nor are they developing policies that increase its negative impacts on particular sectors of the population. Indeed, if anything, the persecutor in such cases might be described as the ‘international community’, and industrialised states in particular — the very states to which movement might be sought if the land becomes unsustainable — whose failure to cut greenhouse gas emissions has led to the predicament now being faced.⁶¹ This de-linking of the actor of persecution from the territory from which flight occurs is unknown to refugee law, and in fact represents a complete reversal of the refugee paradigm. Whereas refugees within the *Refugee Convention* definition flee their own government (or actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from — yet within — states that have contributed to climate change. This, in turn, poses another problem in terms of the legal definition of ‘refugee’: in the case of Tuvalu and Kiribati, the government remains able and willing to protect its citizens.

Finally, even if it were possible to establish that the impacts of climate change constituted ‘persecution’, the *Refugee Convention* poses an additional hurdle for those displaced by climate change: namely, that persecution is *for reasons of* an individual’s race, religion, nationality, political opinion, or membership of a particular social group. The impacts of climate change on the livelihoods of the people of Kiribati and Tuvalu are largely indiscriminate, rather than tied to particular characteristics. An argument that such people might together constitute a ‘particular social group’ would be difficult to establish, since to do this, the group must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.⁶² As McHugh J explained in *Applicant A*, although a shared fear may help to define a group, it is the particular attribute ascribed to them, rather than the persecutory acts themselves, that serves to ‘create’ them as a ‘particular social group’:

the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed

⁶¹ See Working Group I, IPCC, *Climate Change, The IPCC Scientific Assessment* (IPCC First Assessment Report, 1990) 8–33; Core Writing Team, Rajendra K Pachauri and Andy Reisinger (eds), *Climate Change 2007: Synthesis Report* (IPCC Fourth Assessment Report, 2007) 5–6, 12–13.

⁶² Goodwin-Gill and McAdam, above n 51, 79–80; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 241 (Dawson J) (*‘Applicant A’*). Note, however, Foster’s remark that: ‘it is clear that the poor can properly be considered a [particular social group], such that if being poor makes one vulnerable to persecutory types of harm, whether socio-economic or not, then a refugee claim may be established’: Foster, above n 4, 310 (citation omitted). Even if this test could be met by certain people displaced by climate change, the difficulty would remain in establishing ‘persecution’ in the context of climate-induced displacement.

and not the persecutory acts that would identify them as a particular social group.⁶³

There are, however, exceptions where exposure to climate impacts or environmental degradation might themselves amount to persecution, although meeting the legal threshold in such cases would be very much dependent on the particular facts. An example might be if government policies targeted particular groups reliant on agriculture for survival; used starvation or famine as a political tool (for example, by destroying crops or poisoning water);⁶⁴ or contributed to environmental destruction (such as having ‘no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways’).⁶⁵ In each case, of course, a persecutory element for *Refugee Convention* reasons would need to be shown.

That such policies can have serious human rights implications was recognised in a 1994 decision of the European Court of Human Rights, where it was said that serious environmental damage and accompanying health problems could amount to a violation of art 8 of the *ECHR*, which protects the right to respect for private and family life.⁶⁶ But even in such cases, it is not clear-cut whether such policies would amount to ‘persecution’ as legally understood.⁶⁷ The utility of Foster’s work here is to highlight that there is nothing implicit in the *Refugee Convention* that would preclude recognition of environmental harms amounting to persecution, provided the requisite elements of art 1A(2) could be established. But it would be going beyond the presently-recognised bounds of the *Refugee Convention* to argue that climate change *per se* would meet the requisite threshold. In many cases, environmental harms may be bound up in other practices that are persecutory, thereby avoiding the need to base a claim solely on such grounds.

VI A QUESTION OF DIGNITY?

Finally, Foster raises the important question of whether, in the protection of socioeconomic rights, we should only be concerned with pure economic impact

⁶³ *Applicant A* (1997) 190 CLR 225, 264 (McHugh J). Further, the size of a group does not necessarily preclude the possibility of refugee status being recognised. For example, courts have recognised women in Iran as constituting a particular social group: see, eg, *Refugee Appeal No 71427/99* (New Zealand Refugee Status Appeals Authority, Chairperson Haines and Member Tremewan, 16 August 2000).

⁶⁴ See Susanne Schmeidl, ‘Conflict and Forced Migration: A Quantitative Review, 1964–1995’ in Aristide Zolberg and Peter Benda (eds), *Global Migrants, Global Refugees: Problems and Solutions* (2001) 62, 82–3, cited in Foster, above n 4, 10.

⁶⁵ *Social and Economic Rights Action Center v Nigeria*, Communication No 155/96 (2001), reproduced in African Commission on Human and Peoples’ Rights, *Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights 2001–2002* (7 May 2002) annex V, 31 ([2]), cited in Foster, above n 4, 233. Cooper argues that desertification in the African Sahel and the nuclear explosion at Chernobyl constituted persecution: see Cooper, above n 49, 291.

⁶⁶ Foster, above n 4, 187, citing *López Ostra v Spain* (1995) 303-C Eur Court HR (ser A) 38.

⁶⁷ Williams, above n 5, 508, argues that it might be limited to claims of contributory negligence or liability, and notes:

Where government responsibility or negligence can be established, the persecution suffered by the resulting environmental refugees is nonetheless evidence and worthy of recognition and remedial action, but it clearly does not fall within the scope of the *Refugee Convention* as defined by present interpretations.

relating to the denial of work, or whether there is something more fundamental about work (and other socioeconomic rights) that goes to the heart of human dignity, identity and self-worth.⁶⁸ As the South African Supreme Court of Appeal has observed:

The freedom to engage in productive work — even where that is not required in order to survive — is indeed an important component of human dignity, ... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self worth — the fulfilment of what it is to be human — is most often bound up with being accepted as socially useful.⁶⁹

As true as this statement is, it is worth noting that the issue of dignity is not necessarily resolved by according refugee status. This may address the legal problem — a lack of protection — but may not ameliorate the personal sense of loss. Justice Albie Sachs of the Constitutional Court of South Africa has himself spoken of the lack of dignity he felt as a refugee having to survive on welfare from the British Government and the generosity of charitable organisations, even though he was very grateful to have protection.⁷⁰ Similarly, the people of Tuvalu and Kiribati equate the concept of ‘refugee’ with people waiting helplessly in camps, relying on handouts, with no prospects for the future.⁷¹ In their eyes, to be a refugee is to lack dignity. These concerns, in part, speak to some of the key failures of the international protection regime, such as burden-sharing and protracted refugee situations. While these perceptions should not be read as reasons *not* to recognise certain socioeconomic rights as fundamental to self-esteem and identity, or, moreover, as the basis for refugee claims, one should be mindful that for some people, as much as the institution of asylum may assist them, being recognised as a refugee also detracts from their sense of human agency and self-worth.

In any event, it is not self-evident that refugee-like protection is the most appropriate response to climate-induced displacement. As I have argued elsewhere⁷² and alluded to above, in the Pacific at least, the development of enhanced voluntary labour migration programs that are recognised as part of a larger adaptation response to climate change would enable planned, sustainable movement for those who wish to move now. This would help to create communities abroad that could support other family members who may move

⁶⁸ Foster, above n 4, 101. She also notes that while the incorporation of socioeconomic grounds of persecution in the Australian *Migration Act 1958* (Cth) is significant, linking them to subsistence levels means that there is a tendency to exclude harms that would violate dignity and potentially have significant long-term consequences for the individual concerned, but which may not have an immediate economic outcome or harm: at 130. On the concept of dignity and human rights, see Christopher McCrudden, ‘Human Dignity and Judicial Interpretations of Human Rights’ (2008) 19 *European Journal of International Law* 655; Paolo Carroza, ‘Human Dignity and Judicial Interpretations of Human Rights: A Reply’ (2008) 19 *European Journal of International Law* 931.

⁶⁹ *Minister of Home Affairs v Watchenuka* [2004] 4 SA 326 (Supreme Court of Appeal) [27], cited in Foster, above n 4, 102.

⁷⁰ Justice Albie Sachs, ‘From Refugee Judge to Refugee Law’ in James Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (forthcoming 2010).

⁷¹ See Jane McAdam and Maryanne Loughry, ‘We Aren’t Refugees’, *Inside Story: Current Affairs and Culture* (Australia) 30 June 2009 <<http://inside.org.au/we-arent-refugees>>.

⁷² *Ibid.*

over time (including if and when an additional humanitarian response becomes necessary).

In conclusion, Foster's book makes an important contribution to breaking down the divide between economic, social and cultural rights on the one hand, and civil and political rights on the other, premised on the 'universality, indivisibility, interdependence and interrelatedness of all human rights'.⁷³ Understanding the intersections of these rights in human rights law is central to appreciating how violations of those rights may, in certain circumstances, amount to persecution within the meaning of art 1A(2) of the *Refugee Convention*. It is in taking the analysis this extra step that Foster's book is particularly significant. Her work contributes to eroding the traditional division between 'political persecution' as involving 'positive action by an entity targeted at a particular individual or group' and economic degradation as 'uncontrollable, inevitable and just a sad fact of life'.⁷⁴

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⁷³ *Vienna Declaration and Programme of Action*, UN Doc A/CONF./57/23 (12 July 1993), cited in Foster, above n 4, 102.

⁷⁴ Foster, above n 4, 19.

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