Climate Persecutors: Climate Change Displacement and the International Community as Persecutor

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This article responds to one interesting aspect of the recent New Zealand litigation regarding the i-Kiribati refugee applicant, Mr Teitiota. The litigation is recognised internationally as a compelling example of the legal barriers facing people displaced by climate change who seek protection under the Refugee Convention. The article discusses one specific barrier, the absence of a legitimate agent of persecution. It interrogates Mr Teitiota's creative attempt to circumvent this barrier by casting as persecutor the international community of greenhouse gas emitters, especially the high-emitting industrialised nations. This argument has been made in only a few places outside of the Teitiota *litigation; and the little attention it has received from legal academics has been almost entirely critical. The article pushes back against the common criticisms. In so doing, it raises some urgent questions about the significance and relevance of persecutory identity, especially in light of an interpretational trajectory that increasingly emphasises the Convention's protectionist object and purpose.*

1. INTRODUCTION

It is rare for one of New Zealand's judicial cases to achieve international prominence. One of the most (in)famous in the last few years is the story of

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Mr Teitiota — an applicant seeking asylum due to his fear of the effects of climate change in his home country, Kiribati. His claim failed in the New Zealand Immigration and Protection Tribunal (IPT),[1] and again on appeal in the High Court[2] and Court of Appeal.[3] His story is thus recognised across the globe as a compelling example of the legal barriers facing people displaced by climate change who seek protection under the Refugee Convention (Convention).[4] According to the New Zealand judiciary and other commentators, one of these barriers is the absence of a legitimate actor of persecution.[5] This article examines one creative and bold argument — here called the "revisionist argument" — which attempts to supply such an actor: the international community of greenhouse gas emitters, and especially the high-emitting industrialised nations. Outside of *Teitiota*,[6] the revisionist argument has been raised in only a few quarters of the academic community.[7] Indeed, as of yet there has been no comprehensive analysis of the argument, with two highly critical paragraphs from Jane McAdam being its most substantial treatment.[8]

1 *AF (Kiribati)* [2013] NZIPT 800413. The judgment has been described as, to date, the "most detailed legal analysis of an application for asylum on behalf of a climate-displaced person": V Rive "Safe Harbours, Closed Borders? New Zealand Legal and Policy Response to Climate Displacement in the South Pacific" (2013) SSRN <www.ssrn.com> at 6.

2 *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 [*Teitiota* (HC)].

3 *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173. Leave to appeal to the Supreme Court was declined in *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

4 Convention Relating to the Status of Refugees 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954), later amended by the Protocol Relating to the Status of Refugees 606 UNTS 267 (adopted 31 January 1967, entered into force 4 October 1967) [Refugee Convention]. This article only considers asylum claims made under this Convention, to the exclusion of other complementary protective schemes.

5 This article prefers the term "actor" over "agent". The latter tends to mislead as it (erroneously) implies that the persecutor acts for and on behalf of a "principal": GS Goodwin-Gill *The Refugee in International Law* (2nd ed, Oxford University Press, Oxford, 1996) at 71.

6 *Teitiota* (HC), above n 2, at [55]. For simplicity, this article refers to the four cases concerning Mr Teitiota collectively as simply *Teitiota*, without any court identifier.

7 This author could only find three explicit examples within the academic literature: T Coventry "Complementary protection: the role of courts in expanding protection to 'environmental refugees' in domestic asylum regimes" in F Gemenne and K Rosenow-Williams (eds) *Organizational Perspectives on Environmental Migration* (Routledge, Abingdon, 2016) 75 at 77; J Cooper "Environmental Refugees: Meeting the Requirements of the Refugee Definition" (1998) 6 NYU Envtl LJ 489 at 520; W Kälin and N Schrepfer *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (Legal and Protection Policy Research Series, Division of International Protection, PPLA/2012/01, February 2012) at 31.

8 J McAdam *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2012) at 45.

This article seeks to plug this gap, and to explore whether the argument merits more respect than it was afforded by McAdam and the New Zealand judiciary. In particular, it interrogates the revisionist argument's two most common objections. The first objection is that the international community fails as a candidate persecutor under the Convention; the second, that the revisionist argument fundamentally reverses the Convention's underlying paradigm.

This article endeavours to rob these objections of their sting by exposing the potentially fragile premises on which they are predicated. Most basically, both objections assume that the identity of the actor of persecution matters above and beyond the mere fact that a refugee is "being persecuted for reasons of" one of the Convention grounds.[9] The "paradigm reversal" objection further relies on a certain state-centrism — and possibly even an unconscious narrative that delineates between "good" states and "bad" states. It is argued that these premises cut against the grain of a dramatic shift in Convention interpretation over the last few decades: from holding the persecutors accountable to protecting those at risk of being persecuted. This article tracks two major developments that have catalysed this trend, namely the acceptance of non-state actors of persecution and the move away from a requirement of persecutory intention. What emerges from this discussion is a sense that the two objections are out of step with the Convention's text and especially its protectionist object and purpose.[10] Yet the blow dealt to the objections does not, ironically, translate into a victory for the revisionist argument. No: the revisionist argument is still ultimately judged inadequate to perform its two purported functions — that is, to protect climate-displaced migrants and to indict the international community for persecuting them.

2. THE REVISIONIST ARGUMENT AND ITS CONTEXT

2.1 Climate-displaced Persons

By way of preliminary, it is important to situate the revisionist argument within its broader context of climate migration. Experts describe the considerable upsurge in human migration as one of the most important consequences of

9 Refugee Convention, above n 4, art 1A(2). Subsequent citations of the phrase "being persecuted for reasons of" have been omitted.

10 This article relies on the fundamental rules of interpretation in art 31(1) of the Vienna Convention on the Law of Treaties UN Doc A/Conf 39/27, concluded at Vienna on 23 May 1969, 1155 UNTS 331, entered into force 27 January 1990 [Vienna Convention]. This stipulates that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

climate change.[11] The academic trend is to refer to this class of people as "climate-induced migrants" (or some similar term). The language of "migration" recognises that, in the majority of cases, climate change is not the sole cause of environmental effects; nor do those effects exclusively influence migration decisions.[12] In reality, migration decisions influenced by climate change fall anyway on a murky spectrum between clearly voluntary and clearly forced migration.[13] Such definitional debates need not detain us here. Nevertheless, this article opts for the language of displacement and forced migration since, after all, it is the people toward the "forced migration" pole of the spectrum who enjoy the greatest hope for securing the Convention's protection.[14]

One researcher puts the numbers of these migrants at 200 million by 2050, though admittedly such estimates are necessarily imprecise.[15] The focus of this article, however, delimits this wider group in two respects. First, this article is concerned solely with those displaced "outside the country of [their] nationality" — as is required before claiming asylum under the Convention.[16] Since much of the climate-influenced migration will be internal,[17] this significantly curtails the protective scope of the Convention.[18]

11 A Edwards "Climate Change and International Refugee Law" in R Rayfuse and SV Scott (eds) *International Law in the Era of Climate Change* (Edward Elgar, UK, 2012) 58 at 58.

12 J McAdam "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer" (2011) 23 Int'l J Refugee L 2 at 11.

13 P Boncour and B Burson "Climate Change and Migration in the South Pacific Region: Policy Perspectives" in B Burson (ed) *Climate Change and Migration*: *South Pacific Perspectives* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 2010) 5 at 6.

14 Although note that some object that these terms relegate those it designates to a role of victimhood and passivity: J Campbell "Climate Change and Population Movement in the Pacific Island Countries" in B Burson (ed) *Climate Change and Migration*: *South Pacific Perspectives* (Institute of Policy Studies, Victoria University, Wellington, 2010) 29 at 32.

15 N Meyers *Environmental Refugees: An Emergent Security Issue* (13th Economic Forum, Prague, May 2005).

16 Refugee Convention, above n 4, art 1A(2). While states are not obliged to adopt this definition, most domestic systems do: D Steinbock "The Refugee Definition as Law: Issues of Interpretation" in F Nicholson and P Twomey (eds) *Refugee Rights and Realities: Evolving Interpretational Concepts and Regimes* (Cambridge University Press, New York, 1999) 13 at 13. In New Zealand, s 129(1) of the Immigration Act 2009 stipulates that "a person must be recognised as a refugee … if he or she is a refugee within the meaning of the Refugee Convention".

17 J Barnett and N Chamberlain "Migration as Climate Change Adaption: Implications for the Pacific" in B Burson (ed) *Climate Change and Migration*: *South Pacific Perspectives* (Institute of Policy Studies, Victoria University, Wellington, 2010) 51 at 54.

18 J McAdam *Climate Change Displacement and International Law: Complementary Protection Standards* (Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/03, May 2011) at 12.

Second, this article focuses exclusively on forced migrants who are fleeing the effects of climate change — and not because some state or non-state actor is exacerbating, facilitating, or directing these effects to target certain groups.[19] Such would render this actor the *true* persecutor, and thus potentially create pathways into the Convention that bypass any need to posit the international community as persecutor.[20] More controversially, this article takes the *Teitiota* case as paradigmatic of the kind of internal protection provided by the home-state.[21] In other words, the states have not breached any duty to their citizens but have taken what reasonable steps they can, however ultimately ineffective,[22] to address the effects of climate change.[23] This article assumes that the nature of the internal protection — specifically the absence of any breach of some duty of reasonable care — does not present any barriers for climate-displaced former residents of these nations claiming under the Convention.[24]

2.2 The Framework for Legal Protection

2.2.1 A normative gap in legal protection

The recent COP21 negotiations accorded the issue of climate displacement a level of attention unprecedented in the history of global climate change negotiations; migration issues received mention in approximately 20 per cent of the parties' intended nationally determined contributions.[25] Though some

19 McAdam *Climate Change, Forced Migration*, above n 8, at 44; Cooper, above n 7, at 520.

20 *AF (Kiribati)*, above n 1, at [55], [58]–[59]; *Teitiota* (HC), above n 2, at [55].

21 Jane McAdam observes that the other "climate change" cases heard in New Zealand also fit this mould: see J McAdam "The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement" (2015) 3 Migration Studies 131 at 134.

22 *AF (Kiribati)*, above n 1, at [30].

23 *AF (Kiribati)*, above n 1, at [20], [24], [30]; *Teitiota* (HC), above n 2, at [30].

24 As it might under some internal protection accounts, discussed further in part 4.3 below. Such accounts see the absence of internal protection as an inherent element of the definition and thus require that the inadequacy of internal protection is established against some test before this element can be satisfied. This view appears to be operating in *AF (Kiribati)*, above n 1, at [75] where the Tribunal notes that no one has suggested the Kiribati government has "in some way failed to take adequate steps to protect [the applicant]". By comparison, external protection accounts view the absence of internal protection as merely impliedly relevant to the fear of being persecuted. See S Kneebone "Moving Beyond the State: Refugees, Accountability and Protection" in S Kneebone (ed) *The Refugees Convention 50 Years On: Globalisation and International Law* (Ashgate, Aldershot, 2003) 279 at 281; and A Fortin "The Meaning of 'Protection' in the Refugee Definition" (2001) 12 Int'l J Refugee L 548 at 573.

25 K Lambert "The Paris Agreement: Spotlight on Climate Migrants" (29 December 2005) F&ES Blog <www.environment.yale.edu/blog>.

advocacy groups were no doubt disappointed,[26] climate-influenced migration did receive *some* recognition in the Annex to the Agreement,[27] but more concretely in the Paris Decision which established a task force to recommend approaches for addressing the issue.[28] Still, most scholars agree that there exists a "normative gap" in international law with respect to protecting people displaced by climate change.[29] The preponderance of scholarship and judicial decisions has located these people *outside* the Convention's protective scheme.[30] The attempt to bring them within its scope has been described as forcing the square peg of climate-displaced persons into the round hole of the Convention.[31] Naturally, this conclusion has sent many a scholar in search of creative new solutions; the proposals range from an entirely new protective scheme[32] to an expanded Convention in customary international law.[33] Yet a persistent minority maintains that these forced migrants can, against all odds, find a home in the Convention — and this article takes their hope as its starting point.

2.2.2 The Convention's definition of refugee

The Convention defines a "refugee" as a person who:[34]

> owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

26 For example, United Nations High Commissioner for Refugees *Human Mobility in the Context of Climate Change UNFCCC-Paris COP-21* (Advisory Group on Climate Change and Human Mobility, November 2015) at 4.

27 Annex to the Paris Agreement FCCC/CP/2015/L.9/Rev.1 (adopted 12 December 2015, opened for signature 22 April 2016). Parties to the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement by Decision 1/CP.21 [Paris Decision].

28 Paris Decision, above n 27, para 50. For more discussion see R Bodle, L Donat and M Duwe *The Paris Agreement: Analysis, Assessment and Outlook* (Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, Berlin, 28 January 2015) at 12.

29 McAdam *Climate Change Displacement*, above n 18, at 4.

30 Regarding the case law see *Teitiota* (HC), above n 2, at [45] and n 22.

31 E Naser-Hall "Square Pegs in Round Holes: The Case of Environmentally Displaced Persons and the Need for a Specific Protection Regime in the United States" (2014) 22 TulJIntl & CompL 263 at 269.

32 Whether international or regional: see respectively D Hodgkinson and others "Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses" NEW CRITIC (September 2008) <www.ias.uwa.edu.au/new-critic/eight/?a=87815> at 2; and A Williams *Turning the Tide: Recognizing Climate Change Refugees in International Law* (2008) 30 L & Pol'y 502.

33 WT Worster "The Evolving Definition of the Refugee in Contemporary International Law" (2012) 30 Berk J Int'l L 94.

34 Refugee Convention, above n 4, art 1A(2).

> outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

There are two main reasons why climate-displaced persons struggle to fall within this definition.[35]

(i) Legal problem one: substantiating persecution
For one, the effects of climate change cannot be characterised as Convention persecution.[36] Climate effects, whether considered in isolation or cumulatively, are simply insufficiently harmful or rights-infringing to reach the Convention's high threshold for establishing persecution.[37] In the IPT's now-infamous words, nothing prevents Mr Teitiota and his family from "resum[ing] their prior subsistence life with dignity".[38] McAdam writes that the issue of identifying a "persecutor" is a subpart of this first problem of classifying climate effects as persecutory.[39]

(ii) Legal problem two: substantiating discriminate persecution
But second, it is not enough that the effects cause sufficient harm, they must also do so discriminately. That is, the distribution of these effects must target the claimant "for reasons of " their possession of one (or more) of the protected characteristics. Yet as the IPT noted in *AF (Kiribati)*, the effects of climate change impact upon the people of Kiribati equally, making no distinction according to race, religion, and so on.[40]

3. THE REVISIONIST ARGUMENT — REASONS FOR INVOKING IT

In any case, the revisionist argument purports to supply an identifiable persecutor: the international community, and especially the industrialised nations whose emissions have contributed disproportionately to climate

35 For the ensuing list see McAdam *Climate Change Displacement*, above n 18, at [12]–[13]; and McAdam "The Emerging New Zealand Jurisprudence", above n 21, at 133–134.
36 McAdam *Climate Change Displacement*, above n 18, at [12]; *Teitiota* (HC), above n 2, at [29] described this as the "central issue".
37 Depending on one's understanding of "persecution". Following James Hathaway, New Zealand conceives of it as "the sustained or systemic violation of core human rights, demonstrative of a failure of state protection": *AF (Kiribati)*, above n 1, at [53].
38 At [74].
39 McAdam *Climate Change Displacement*, above n 18, at [12].
40 *AF (Kiribati)*, above n 1, at [55].

change.[41] (For ease of reference, this article denotes this candidate persecutor as simply "the international community", but this should always be read as including a strong emphasis on the high-emitting states.) There appear to be two broad intellectual or rhetorical functions that the revisionist argument might be attempting to perform. These two functions, incidentally, map very closely onto the accountability and protectionist approaches to the Convention discussed in part 4 of this article.

3.1 Function One: To Expand the Protection of the Convention

The argument's most obvious function is to shore up an applicant's asylum case by responding to one or both of the legal obstacles identified above. In this vein, the starting point is recognising what an applicant lacks without the revisionist argument — namely, the element of human agency. The main disagreement is over whether agency is required to overcome the first or second of the legal obstacles mentioned above.

3.1.1 Agency and persecution

At first blush, it would seem quite obvious that persecution requires a human agent of persecution. This likely explains why McAdam insists that persecutory identity is necessary to overcoming the first legal problem. Both parties in *Teitiota* appear to be operating from a similar framework. The applicant attempted to argue that agency was unnecessary to establish persecution, which could be instituted by the inanimate climate effects themselves. His argument drew on the Latin etymology of the word "persecute" which connotes either fleeing (in the passive voice) or pursuing (in the active voice).[42] Yet the definitional sword cuts both ways. To the contemporary reader of the text, a "plain" or "ordinary" understanding of the phrase "being persecuted" would require human agency,[43] as most modern dictionaries will affirm.[44] The IPT was certainly quite clear that "being persecuted" required a human agent of persecution.[45]

41 Intergovernmental Panel on Climate Change *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (Cambridge University Press, New York, 1990) at 8; Intergovernmental Panel on Climate Change *Climate Change 2007: Synthesis Report — Summary for Policymakers* (2007) at 5, 6, 12–13.

42 *AF (Kiribati)*, above n 1, at [52].

43 Vienna Convention, above n 10, art 31.

44 F Maiani "The Concept of 'Persecution' in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach" Les Dossiers du Grihl <www.dossiersgrihl.revues.org/3896> at [7].

45 *AF (Kiribati)*, above n 1, at [51]–[52].

3.1.2 Agency and discriminate persecution

Yet this article will contend (contra McAdam) that the identity of the persecutor is relevant *only* to the second of these two problems. That is, persecutory identity is not necessary to establish that an applicant is "being persecuted", only that their persecution is "for reasons of " one of the prohibited grounds. Drawing on the recent hermeneutical de-emphasis on the agent of persecution,[46] it is argued that a preoccupation with agency makes sense only in light of an agent's unique ability to *discriminate*.[47] Only agents intend to harm on Convention grounds for reasons of who someone is or what they believe. And while it is conceptually possible for the effects produced by an inanimate source to discriminate along these lines, this is inconceivable in reality.[48]

3.2 To Hold the Persecutor Accountable

The second function involves pointing the finger not just of identification but accusation. With the slow progress of international negotiations, climate activists are increasingly drawn to the field of litigation to achieve piecemeal legal victories.[49] A judicial pronouncement that the international community constituted a Convention persecutor would be one such victory. Indeed some scholars choose to speak of climate-displaced migrants as "refugees" precisely to preserve the legally potent implication that the industrialised nations are their persecutors.[50] Most versions of the revisionist argument share three features that insinuate the operation of this function.[51] The first is the *state-centrism* of the argument. Strictly speaking, most emissions owe to individual actors and privately owned industries whose actions "are not attributable *ipso facto* to the State".[52] This despite the fact that establishing the responsibility or complicity of these non-state actors would be an easier sell; it would not require an assessment of the state's duty of control of these non-state party activities

46 See from part 4 below.

47 The High Court in *Teitiota* (HC), above n 2, at [57]–[58] responded to the question of law concerning agency by referring to *AF (Kiribati)*, above n 1, at [74]–[76], where the IPT discussed the indiscriminate impact of the climate effects.

48 For a discussion of intention and effects as the two forms that discrimination arguments can take see part 4.1 below.

49 Hon Justice BJ Preston "Climate Change Litigation" (2009) 26 EPLJ 169 at 169.

50 M Conisbee and A Simms *Environmental Refugees: The case for Recognition* (New Economics Foundation, London, 2003).

51 The fact that these three features correspond to the three premises discussed in part 4.3 below is not incidental: see the concluding comments in part 6.

52 C Voigt "State Responsibility for Climate Change Damages" (2008) 77 Nordic Journal of International Law 1 at 9.

against some standard of care.[53] Second, the argument identifies the persecutor as precisely as possible, by emphasising the moral or legal guilt of the high-emitting nations.[54] Outside the *Teitiota* context, most versions speak only (or mainly) of the "main polluters",[55] "industrialized countries",[56] or "developed-world governments",[57] rather than the international community in general. (Though, it is worth noting that even the phrase "international community" carries, at least for Western readers, connotations of "western powers debating western concepts".[58]) This small party of states is invariably accused of a moral failure to "commit their collective resources to fight global warming";[59] or a legal failure to meet their international obligations to cut greenhouse gas emissions.[60] In so doing, third, the revisionist argument paints a picture of a world delineated between persecuting states (the culpable high-emitters) and victim states (nations like Kiribati that bear the brunt of the adverse effects of climate change).

4. THE TWO OBJECTIONS

This article concludes with an assessment of the arguments' effectiveness with respect to these two functions; the route it takes to reach this destination is by deconstructing the two kinds of objections that are typically raised against the revisionist argument.

4.1 Objection One: A Failed Persecutor

The first objection is that the international community is legally inadequate to qualify as a Convention persecutor. The alleged failure is twofold: the international community lacks, first, a sufficiently strong nexus to the harm suffered by the applicant; and second, any persecutory intention to discriminate for reasons of the Convention grounds.

53 That is, assuming that something like the laws of state attribution are relevant here: at 9.

54 A more precise identification is impossible given the uniform mixing of greenhouse gases: K Wyman "Are we Morally Obligated to Assist Climate Migrants?" 7 The Law & Ethics of Human Rights 185 at 195.

55 Kälin and Schrepfer, above n 7, at 31.

56 Coventry, above n 7, at 77.

57 Cooper, above n 7, at 520.

58 J Mertus "The State and the Post-Cold War Refugee Regime: New Models, New Questions" (1988) 10 Int'l J Refugee L 321 at n 19 rejects the phrase for just this reason.

59 Cooper, above n 7, at 520.

60 Coventry, above n 7, at 77.

4.1.1 Nexus between persecutor and harm

The international community cannot be held responsible (let alone culpable), runs this objection, because there is no strong nexus between either their intentions or actions and the specific harm suffered by the Kiribati people. Regarding intention, it is not entirely clear when the adverse consequences of climate change became sufficiently foreseeable.[61] But even after this point, it remains impossible to establish a *specific* intention to harm a particular climate-displaced group or person.[62] Establishing that the persecutor's *actions* (or inactions) are causally linked to the harmful acts is even more fraught with complications.[63] Granted, there is no disputing the generic causal nexus between anthropogenic activities and climate change. Yet expecting to establish a *specific* causal nexus between a particular act of (over-)emitting and the damage suffered by, say, Kiribati people is once again entirely unrealistic.[64] Climate effects are inextricably multi-causal,[65] and our legal and scientific tools cannot disentangle them.[66] Even if they could, a more fundamental problem is that current emissions are causally linked not with contemporaneous climate-related harms, but with harms suffered in the future by victims whose claims have not yet matured.[67]

4.1.2 Discrimination on Convention grounds

The international community also fails insofar as it cannot point to any intention to discriminate on Convention grounds; indeed, the *fact* that climate change impacts indiscriminately weighs against such an intention. The High Court relies on this form of the "failed persecutor" objections in its citation of an Australian asylum case similarly concerning a climate-displaced migrant.[68] Unaccompanied by any commentary, the Court appears to endorse the quotation's core message: that persecutory intention is a required element of the refugee definition and that such intention was not supplied by the revisionist

61 EA Posner and CR Sunstein "Climate Change Justice" (2007) 96 Geo LJ 1565 at 1593–1597.

62 0907346 [2009] RRTA 1168 (10 December 2009) at [30], [37], [50]; Posner and Sunstein, above n 61, at 1592.

63 Kälin and Schrepfer, above n 7, at 31 reject the revisionist argument for just this reason.

64 Voigt, above n 52, at 15; Wyman, above n 54, at 12.

65 Wyman, above n 54, at 195.

66 Posner and Sunstein, above n 61, at 1592.

67 At 1595–1597.

68 *Teitiota* (HC), above n 2, at [51]; 0907346, above n 62, at [21].

argument.[69] Persecutory intention is addressed at more length in the following part of this article.

4.2 Objection Two: Reversing the Convention Paradigm

The second objection attacks the revisionist argument at a more fundamental level. As the High Court described it, the argument "completely reverses the traditional refugee paradigm".[70] This objection is most forcefully presented by McAdam:[71]

> [W]hereas Convention refugees flee their own government (or private 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 — countries that have contributed to climate change.

This formulation indicates that the "paradigm reversal" objection seeks to restrict persecutors' relationships both with the home-state and also the state which provides asylum.

4.2.1 Restriction one: persecutor's relationship with the home-state

McAdam's paradigm appears to require that the actor of persecution operate within the territory of the home-state from which those who fear persecution flee. McAdam invokes this restriction when she objects that the revisionist argument entails the "delinking of the actor of persecution from the territory from which flight occurs".[72] But, of course, the revisionist argument involves a persecutor situated extra-territorially, whose effects (but not direct presence) are felt within the borders of the home-state.

4.2.2 Restriction two: persecutor's relationship with the provider of asylum

McAdam's Convention paradigm is offended by the notion of refugees seeking refuge both "from" and "yet within" the same state. The implication is that the actor of persecution must not be one and the same with, or probably even

69 Note that this diverges from the dominant ("predicament") approach in New Zealand represented by *AC (Russia)* [2012] NZIPT 800151 (26 June 2012), as cited in JC Hathaway and M Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014) at 380.

70 *Teitiota* (HC), above n 2, at [55].

71 McAdam *Climate Change, Forced Migration*, above n 8, at 45.

72 At 45.

emanate from within the same territory as, the provider of asylum. The problem is most acute when, in the High Court's wording, "the claimant is seeking refuge within the very countries that are allegedly 'persecuting' him".[73] Yet given the territorial focus of the first restriction it is not unnatural to discern a broader implication precluding any persecution originating from the same territory in which the refugee seeks asylum.

4.3 The Premises Undergirding the Objections

Rather than attacking the objections directly, a more effective approach is to isolate the premises which comprise their surprisingly shaky foundations. The "paradigm reversal objection" relies on all three premises, while the "failed persecutor" objection shares only the first.

4.3.1 A preoccupation with the persecutor and their identity

Both objections presume that the identity of the persecutor matters above and beyond the mere fact of the claimant "being persecuted for reasons of" one of the Convention grounds. Regarding the first objection, identifying a specific candidate persecutor is a clear prerequisite to demonstrating their unsuitability for the role. This objection is, in fact, quite obsessed with the would-be persecutor, placing under the microscope their subjective motivations and causal relation to the harm suffered. If anything, the preoccupation is equally obvious in the second objection, which obsesses over the persecutor's relationships with the home-state and the state providing asylum.

4.3.2 (Territorial) state-centrism

The "paradigm reversal" objection further relies on a state-centrism — an interest in states, governments and especially territorial boundaries that (this article argues) goes beyond what is strictly required by the Convention itself. There is some evidence of this state-centric bias in McAdam's quotation above: she not only parenthesises the non-state persecutor alternative, but also presumes that a refugee should be escaping "his or her government".[74] Admittedly, state-centrism is to some extent indispensable to the very logic of the Convention's protective scheme. A global arrangement of territorially defined states is implied, for one, in the requirement for claimants to migrate extra-territorially before claiming asylum.[75] Moreover, this arrangement

73 *Teitiota* (HC), above n 2, at [55].

74 McAdam *Climate Change, Forced Migration*, above n 8, at 45.

75 M O'Sullivan "Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?" (2012) 24 Int'l J Refugee L 85 at 89.

necessarily involves both sending-states and receiving-states. Even if the persecutor is a non-state actor, the sending-state's unwillingness or inability to protect is still implicated.[76] Only a *state*, moreover, can provide what refugees uniquely need: asylum in a new state.[77]

Yet McAdam's paradigm moves past this minimum state-centrism. No doubt, she accepts the prevailing view that the home-state neither has to be the persecutor nor complicit in the persecution. While rejecting such *jurisdictional* state-centrism, however, McAdam preserves a *territorial* state-centrism. Her efforts to control the persecutor's relationships indicate a desire to impugn the home-state's territory by association with the persecutor; and to inoculate the state providing asylum (or even the territory where it is provided) from such damaging associations.

4.3.3 An ethical narrative

The upshot (and perhaps intention) of this territorial state-centrism is that it enforces a strict ethical disjunction between sending-states and receiving-states. The former are coloured, however indistinctly, with the persecutor's moral vice; the latter, by the moral virtue of offering asylum to those in need. This narrative is most obvious in the Cold War refugee regime, in which the United States and its allies perceived every refugee received from the communist regimes as an indictment on the sending-states and a boost to the humanitarian reputation of the receiving-state.[78] The analogy should not be overdone, of course. Today's arrivals no longer have the same "ideological or geopolitical value",[79] and so receiving-states cannot select refugees on clear-cut ideological grounds.[80] Nonetheless, McAdam's paradigm arguably supports the broad contours of this ethical narrative more than one might expect. In her paradigmatic world, if not in reality, refugees flee "bad" state territories into the arms of "good" state territories.

76 On the nature and extent of this implication see nn 24 and 137 of this article.
77 Mertus, above n 58, at 335.
78 At 324–325.
79 At 336
80 At 326.

5. THE INTERPRETATIONAL SHIFT FROM ACCOUNTABILITY TO PROTECTION

Over the last few decades, interpretations of the Convention have undergone a notable shift: from a focus on accountability towards a protectionist emphasis.[81] For the accountability approach, the Convention functions at least in part to hold sending-states accountable — in a fashion, to indict them for creating or allowing circumstances in which people are forced to flee and claim asylum elsewhere. This approach has largely been replaced by a protectionist perspective, which views the Convention's purpose as to "help victims of persecution in need of international protection".[82] This is to paint with too broad a brush, perhaps, yet it suffices to demonstrate that the three premises discussed above are out of kilter with the broad sweep of interpretational developments. This article now details the two most significant of these developments concerning, respectively, the requirement of persecutory intention and the role of non-state actors of persecution.

5.1 Persecutory Intention

5.1.1 The nature of the debate

The Convention requires that persecution be "for reasons of" one of the prohibited grounds, and this expression is taken to necessitate some kind of causal nexus. A claimant cannot establish both the risk of persecution and, in isolation of that risk, her possession of a Convention attribute. Rather, she must establish that her risk of persecution relates, somehow, to who she is or what she believes.[83] The nature of this nexus has proved controversial, however. Broadly speaking, accountability accounts have argued that the Convention ground must be causally linked to some form of intention.[84] (Under the bifurcated approach this persecutory intention can be located either in the home-state or in the persecutor.[85]) Protectionist accounts, by contrast, favour what is called the "predicament approach" which sees the nexus as between the Convention ground and the applicant's predicament.[86]

81 This article coins the term "protectionist accounts" to distinguish the broad interpretational shift — towards protecting refugees rather than holding states accountable — from the various specific internal or external protection accounts. See the discussion in part 6.2 below.

82 W Kälin "Non-State Agents of Persecution and the Inability of the State to Protect" (2001–2002) 15 Geo Immigr LJ 415 at 423.

83 Hathaway and Foster, above n 69, at 362.

84 Kneebone "Moving Beyond the State", above n 24, at 293.

85 Hathaway and Foster, above n 69, at 373.

86 At 367–381.

5.1.2 The shift to protectionism

Most jurisdictions have now abandoned the intention requirement, in favour of the view that intention is sufficient but not necessary to satisfy the causal nexus.[87] Even in jurisdictions which historically supported the requirement there are indications of a move away from it.[88] All have certainly abandoned the stricter "intention plus animosity" requirement, that the persecutor had to exhibit "malignity, enmity or other adverse intention".[89] This trend is hardly surprising. This predicament approach enjoys the support of sober treaty interpretation, to say nothing of pragmatic considerations.[90] Regarding the plain reading of the text, the passive voice of "being persecuted" places the emphasis on the claimant's precarious position not the persecutor's motivation for putting her there.[91] As Roger Haines observes, the text "draws attention to the fact of exposure to harm, rather than to the act of inflicting harm".[92] The drafting history is also illuminating: at no point is it suggested that persecutory intention was a "controlling factor" in the refugee definition; the only subjective consideration at issue was the mind-set of the persecuted not the persecutor.[93] But considerations of object and purpose also loomed large in these debates. James Hathaway and Michelle Foster put it best: "[i]ntention may well be critical if one's goal is to hold a person accountable … to show *mens rea* in order to establish criminal liability".[94] One of the main reasons for the predicament approach's success, then, is growing support for the view that the Convention's fundamental goal is not to prosecute the persecutor, but to protect those at risk of persecution.

87 Goodwin-Gill, above n 5, at 50–52; Hathaway and Foster, above n 69, at 367.
88 Hathaway and Foster, above n 69, at 380–381.
89 At 369–370.
90 At 369–371. In particular, the motivation requirement burdens applicants with the impossible task of expounding the persecutor's motivations, past and present.
91 *Refugee Appeal No 72635/01* (NZRSAA, 2002) at [168].
92 S Kneebone "Refugees as objects of surrogate protection: shifting identities" in S Kneebone, D Stevens and L Baldassar (eds) *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, Abingdon, 2014) 98 at 104.
93 Goodwin-Gill, above n 5, at 51. The preparation documents are of supplementary benefit only: Vienna Convention, above n 10, arts 31, 32 and 35.
94 Hathaway and Foster, above n 69, at 378.

5.2 Non-state Actors of Persecution

5.2.1 A challenge to state-centrism

Since 1951, when the Convention was signed, "the Westphalian vision of states has undergone an erosion of sorts".[95] Over the last two decades in particular, the "twin forces" of privatisation and globalisation have birthed new sources of power and law-making that seriously challenge the model of the Hobbesian sovereign state.[96] The challengers have staked their claim above and below the Leviathan.[97] Above the state is an ever-more specialised body of international law (including the Convention itself) and intergovernmental organisations (IGOs). From below comes the mounting influence of non-state actors, both nation and transnational, and private voluntary organisations (PVOs). An increasing number of today's refugees fear persecution from non-state actors such as transnational terrorist networks, private security contractors, and (one might add) high-emitting carbon-based industries.[98] These developments soon raised the urgent question as to whether the concept of the Convention refugee was "tied to a model of the state that is appropriate for refugee protection in the 21st century?"[99]

5.2.2 The nature of the debate

The flashpoint of this wider debate was the issue of non-state persecutors. Commentators distinguish four circumstances in which non-state persecution might occur; namely, where the home-state government:[100]

1. Instigates, condones or tolerates the persecution;
2. Has lost control over some or all of its territory to the non-state actor such that this actor can properly be spoken of as a de facto authority or quasi-state organ;
3. Has become so weak or destabilised that there is no real state authority to protect the victim from persecution;

95 EC Ip "Globalisation and the future of the law of the sovereign state" (2010) 8 I-Con Book Forum 636 at 636–637.

96 At 638.

97 At 636–637; Mertus, above n 58, at 330.

98 Kälin, above n 82, at 415. The list comes from J Cerone "Much Ado about Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law" (2009) 10 San Diego Int'l LJ 335 at 335.

99 Kneebone "Moving Beyond the State", above n 24, at 280; Mertus, above n 58, at 335.

100 Kälin, above n 82, at 416–417. He notes that state practice in scenario (3) usually, though not always, follows practice in scenario (4).

4. Does not condone but is unable to provide adequate protection against the persecution.

It is almost uniformly accepted that the first two circumstances support Convention asylum claims. In both cases, there is a close nexus between the home-state and the persecution — either through its complicity or through its replacement by a new state that is itself complicit in the persecution. The other two situations are more controversial, but it is scenario (4) that caused the most consternation and that also concerns us presently. This scenario not only characterises a growing number of asylum claims,[101] but also raises the protection–accountability debate most directly.

5.2.3 The shift to protectionism

The two approaches offer alternative readings for scenario (4). Accountability proponents would refuse asylum on the grounds that state responsibility for the persecutory acts is a constitutive element of the Refugee definition.[102] The language of "accountability" (and especially "complicity") is out of place in the context of a mere, well-intentioned *inability* to protect.[103] For a long time states endorsed this accountability logic.[104] In the last two decades, however, this logic has been subjected to fulsome critique in many jurisdictions, including New Zealand.[105] Its replacement is a protectionist view that is quite content with non-state persecutors in scenario (4).[106]

Advocates of this protectionist view marshal considerable evidence in their favour. On a "good faith" reading, for one, it is highly suggestive that the Convention omits any reference to the source of persecution.[107] The linchpin of the textual debate, however, is correctly interpreting what the Convention means when it says a refugee is "owing to [his] fear … unwilling to avail himself of the protection of that country".[108] An accountability reading provides an obvious explanation for their unwillingness: those who fear persecution do not solicit the help of those they fear. The early interlocutors of the accountability proponents advocated for the "internal protection view", which located the rationale for their unwillingness in the home-state's inability to adequately protect them from

101 Kneebone "Moving Beyond the State", above n 24, at 279.
102 Kälin, above n 82, at 417.
103 Kneebone "Moving Beyond the State", above n 24, at 282.
104 C Phuong "Persecution by Non-state Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention" (2003) 4 EJML 521 at 522.
105 *Refugee Appeal No 71462/99* (NZRSAA, 27 September 1999) at [36]–[48].
106 Hathaway and Foster, above n 69, at 304.
107 Kälin, above n 82, at 418.
108 Refugee Convention, above n 4, art 1A(2).

persecution.[109] But the framework of the whole debate was soon called into question by a later body of scholarship supporting the external or diplomatic protection view.[110] These scholars argued that the protection that the refugee is unwilling to avail themselves of is, in fact, the consular protection of the refugee's home-nation situated abroad.[111] For the accountability proponent, the refugee's unwillingness is justified by the refugee's quite reasonable fear that the persecutory elements of the home-state will extend to the foreign consulate.[112] Prima facie, it is difficult to see why a lack of internal protection would render a refugee unwilling to seek the support of their foreign consulate. Yet, as Fortin stresses, by seeking their home-nation's diplomatic protection a refugee implicitly accepts the risk of their home-country lawfully expelling them back home — to the place from which they first fled.[113] Either way — whether on an internal or external protection view — there is therefore no need to fall back on an accountable position to explain a refugee's unwillingness to avail themselves of protection.

Other sources of evidence are found in the Convention's *travaux preparatoires*[114] and early commentaries,[115] neither of which mention any condition that persecutors must be state agents. Although, admittedly, this evidence remains inconclusive, since nor do they explicitly endorse non-state persecutors.[116] Still, it is telling that the League of Nations' post-WWI refugee protection regime did not require state responsibility for the persecution, as the Convention drafters would surely have been well aware.[117] But once again, a growing appreciation for the protection-focused object and purpose of the Convention was particularly influential. As Kälin reasons, if the purpose of the Convention is to "help victims of persecution in need of international protection", why refuse protection to legitimate victims in situations of state unwillingness?[118] After all, their need may be just as pressing.[119]

109 See nn 24 and 137 of this article.

110 Kneebone "Moving Beyond the State", above n 24, at 28.

111 This special interpretation is supported (its proponents maintain) by considerable evidence of the parties' intentions from the historical context and especially in the preparation documents: Kälin, above n 82, at 425.

112 Fortin, above n 24, at 564–566.

113 At 575.

114 Goodwin-Gill, above n 5, at 280.

115 For instance, the commentaries of Nehemiah Robinson and Paul Weis: Kälin, above n 82, at 419.

116 Kälin, above n 82, at 421.

117 At 418–419.

118 At 423.

119 Hathaway and Foster, above n 69, at 304.

6. WHAT IS AT STAKE IN THIS DISCUSSION?

6.1 The Implications of the Protectionist Victories

The ascendancy of the protectionist approach in both arenas has notable implications for the three premises discussed above.

6.1.1 The accountability approach and the three premises

For it is quite plain that the accountability approach has strong affinities with each of these premises. It isolates an identifiable actor of persecution for the express purpose of holding that actor accountable. With respect to its strongest forms, at least, the preoccupation with the persecutor can be expressed in the language of criminal law. To achieve an indictment, both the mens rea (persecutory intention) and actus reus (the offending behaviour, with its causal connection to the harm suffered) must be established. It is also unabashedly state-centric, quite at home within the context of a global order neatly divided into distinct territories, each ruled by a single sovereign state.[120] Indeed, while McAdam's paradigm is *territorially* state-centric, the accountability approach seeks to control the relationships between the persecutor and the *jurisdiction* of the home-state. It coheres with a model of statehood advocated by the old German school of political theorists[121] — an authoritarian state with a monopoly on the exercise of power; but also with the specific obligation to safeguard its citizens from abusive power.[122] Persecution is *necessarily* the abuse of such jurisdictional power entrusted in the state over its citizens. Only state actors are subjected to this accountability. Finally, each refugee represents an indictment on the sending-state from the rest of the international community but especially the receiving-state. To this extent, the accountability logic is embedded in an ethical narrative of "good" and "bad" states.

6.1.2 The implications of the two interpretational developments

Yet the discussion on the two interpretational developments demonstrated that international refugee law has moved past its dependence on this accountability logic. The interpreting community has seen fit to relocate attention from the persecutor and their subjective state of mind to the refugee's predicament. And this because, as Andrew I Schoenholtz observes in the context of the non-state persecutor debate, "the refugee definition focuses on the act of persecution

120 TA Aleinikoff "State-Centered Refugee Law: From Resettlement to Containment" Michigan Journal of International Law 14 (1992) 120.

121 Kälin, above n 82, at 422.

122 Kneebone "Moving Beyond the State", above n 24, at 282, 285.

rather than the identity of the persecutor".[123] Moreover, this textual emphasis is unremarkable, Schoenholtz continues, given the Convention's purpose "to protect people from serious harm".[124] Both debates also signify a departure from state-centrism. Most markedly, the allowance of non-state persecutors problematises the "statist paradigm" which conceives of the states as the only, or at least the most basic, unit of analysis.[125] But both developments also weaken efforts to control the persecutor's relationships with the home-state and the state providing asylum. The predicament approach undermines a jurisdictional state-centrism that seeks to impugn the home-state in the persecutory activities; this preserves, of course, the possibility of *territorial* state-centrism. Yet in the context of the non-state persecutor debate, Hathaway and Foster refer to a wide agreement:[126]

> that the *source of persecution is irrelevant* so long as the state is unable or unwilling to provide protection against harm emanating from either state or non-state actors.

This statement appears to give no warrant for McAdam's attempt to delimit the persecutory source to the home-state territory. Granted, academics and practitioners still frequently assumed that the (only) alternative to a state actor of persecution is non-state persecution which "emanate[s] from sections of the population that do not respect … the laws of the [home] country".[127] It remains unclear, however, on what grounds an interpreter could preclude non-state actors or even foreign state-actors situated extra-territorially so long as the persecutor effects were felt within a territory whose state is unable (or unwilling) to provide adequate protection. What else could it mean to say "the source of persecution is irrelevant"? Finally, in undermining the connection between the home-state and the persecution — indeed, the whole focus on holding states accountable — the two developments deconstruct ethical

123 AI Schoenholtz "The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century" (2015) 16 Chi J Int'l L 81 at 101–102. The same could be said of the wider context. Article 33(1) of the Refugee Convention, for instance, stipulates that a refugee shall not be returned "to the frontiers *of territories where* his life or freedom would be threatened" (emphasis added). The persecution is linked to the persecutory effects, not their source.

124 At 102.

125 Mertus, above n 58, at 323; see also Kneebone "Moving Beyond the State", above n 24, at 285.

126 Hathaway and Foster, above n 69, at 304 (emphasis added).

127 United Nations High Commissioner for Refugees *Handbook and Guidelines 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.3 (reissued December 2011) at [65].

narratives of "good" and "bad" states. It is the refugees at risk of persecution that matter, not the ethical virtues and vices of states.

6.2 The Heart of the Protectionist Logic

The seeming disconnect between recent interpretational developments and the three premises necessitates an urgent consideration of what lies at the heart of the protectionist vision. What might it mean to describe the Convention's purpose as, for instance, "protection against the infliction of harm on the basis of differences in personal status or characteristics"?[128] After all, utopian protectionist visions must soon confront the fact that the Convention is "a very narrow instrument",[129] offering asylum to a very specific group of people.[130] Any attempt to ferret out the "spirit"[131] of the Convention must make sense of its sharp delineation between Convention refugees and other migrants or refugee-like people who nonetheless fall outside the scope of the Convention's protection.[132] Matthew Lister properly locates the normative distinctiveness of Convention refugees in the fact that this group "could only, or at least could best, be helped" by the remedy of asylum.[133] It is this "underlying logic" that defines the contours of the Convention's protectionist purpose.[134] The Convention protects those people whose well-founded fear of persecution on Convention grounds renders them uniquely in need of this remedy, because their home-state is no longer a viable option. The source or identity of both the persecutor and the provider of asylum should be immaterial — that is, as long as someone genuinely at risk of being persecuted is being granted genuine asylum.

128 Steinbock, above n 16, at 21, as cited in (and positively endorsed) in Schoenholtz, above n 123, at 120.

129 Worster, above n 33, at 94.

130 Indeed some criticise the Convention precisely for its narrowness and/or advocate a much broader protective scheme: J Carens "Migration and Morality: A Liberal Egalitarian Perspective" in B Barry and RE Goodin (eds) *Free Movement: Ethical Issues in Transnational Migration of People and of Money* (University of Pennsylvania Press, University of Pennsylvania, 1992) 25 at 25, 30, 42.

131 Cooper, above n 7, at 528.

132 M Lister "Who Are Refugees?" (2013) 32 Law and Philosophy 645 at 653; M Cherem "Refugee Rights: Against Expanding the Definition of a 'Refugee' and Unilateral Protection Elsewhere" (2016) 24 The Journal of Political Philosophy 183 at 187. Matthew J Gibney calls accounts that do not make (sense of) this distinction "impartialist accounts" in MJ Gibney *The Ethics and Politics of Asylum* (Cambridge University Press, Cambridge, 2004) at 84.

133 Lister, above n 132, at 620. Lister takes "asylum" to mean both non-refoulement and a durable solution.

134 At 620.

But the three premises go beyond this essential protectionist logic. In particular, they expect the actor of persecution to be identified; and its relationships with the home-state and the provider of asylum delimited. The upshot of these "add-ons" is that a would-be refugee could theoretically be excluded *simply* for reason of upholding one or more of these premises. This article is not arguing for an explicit (re)interpretation of the Convention in opposition to the three premises. Certainly, the refugee definition has proved "an extremely malleable legal concept" and it is not impossible that the interpretational trajectory may continue in this direction.[135] Yet political realities, if nothing else, would weigh against this likelihood. Hathaway gives us the realpolitik perspective on the Convention's driving purpose in practice: neither protection nor accountability but "to govern disruptions of regulated international migration in accordance with the interests of states".[136] On this perspective, the politically more powerful receiving-states may have a self-interest in a certain view of statehood and an ethical narrative that colours them virtuous; certainly they have a desire to limit the number of refugees. Yet this article does aim to clarify precisely what is at stake in this discussion. And the answer is nothing less than the legitimacy of the three premises curtailing the Convention's protectionist ambition.[137] The author's contention is that, at the very least, the onus of justification should rest squarely on those making the curtailments — and therefore so too on those who would advance one of the two objections. And yet such justification is rarely, if ever, provided in the all-too-quick dismissals of the revisionist argument by McAdam, the New Zealand judiciary and others.

135 JC Hathaway "The Evolution of Refugee Status in International Law: 1920–1950" (1984) 33 ICLQ 384 at 380.

136 JC Hathaway "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 HILJ 129 at 133.

137 Of course, many "protectionist" accounts quite self-consciously limit this protectionist logic for reasons similar to the three premises. Most notably, many internal protection accounts are accused of shifting the Convention's focus from protecting individuals at risk of persecution to assessing the home-state's capacity to protect: GS Goodwin-Gill and J McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) at 10, as cited in O'Sullivan, above n 75, at 90. Such accounts also involve an implicit accusation against the home-state for failing its duty to protect its citizens, and it is this failure that justifies international intervention under the surrogate protection theory: Kälin, above n 82, at 423. All this has led some scholars to draw strong parallels between the accountability and internal protection views: Kneebone "Moving Beyond the State", above n 24, at 104.

6.3 A Metaphorical Caricature

Indeed, the lack of justification leads one to suspect that the two objections are grounded less in the rules of treaty interpretation than in a subconscious and untested metaphorical caricature of the revisionist argument. One imagines that the argument's detractors have in mind something like the metaphorical analogy of a child at risk of abuse, not from her own parents but from another adult. The revisionist argument then proposes that the agency set up to help such children hand over the child into the "care" of the would-be abuser.[138] Rather than focusing on holding the would-be abuser accountable, modern accounts profess to care instead about ensuring the child is granted a new home safe from the risk of abuse. Yet the two objections want more than this. The first objection investigates the candidate abuser and declares him inadequate to fulfil the role for lack of a sufficiently culpable state of mind or causal connection to the abuse. This article has argued that the identity and "adequacy" of the abuser is immaterial so long as it is established that the child has a well-founded fear of abuse for reason for some protected characteristic. McAdam's paradigm then comes along insisting on some connection between the child's parents and her abuser (what else would justify taking the child away?); and objecting in principle to the abuser having any connection to the child's new home. Such measures would be entirely sensible if the metaphor accurately mapped onto reality, yet it does not. Instead, it caricatures a messier reality in which persecutors do indeed act extra-territorially; a more complicated world in which an industrialised nation, whose over-emitting has breached international law, can indeed provide genuine asylum to those who have fled the effects of climate change.

It is difficult to understand the almost knee-jerk dismissal of the revisionist argument from those who most engage with it; unless, of course, one presumes that a metaphorical caricature of this sort is lurking in the background. Either way, sober hermeneutics has no time for such caricatures, and those who object to the revisionist argument are certainly not excused from the task of defending their unacknowledged assumptions.

138 This author accepts that this image unfairly relegates refugees to a role of passive victimhood. Yet one suspects the metaphor has imaginative traction precisely because the international refugee law literature is replete with metaphors of surrogacy, implicit connotations of the state as parent, and even descriptions of refugees as babies "left on one's doorstep in the dead of winter": CH Wellman "Freedom of association and the right to exclude" in CH Wellman and P Cole *Debating the Ethics of Immigration: Is there a Right to Exclude?* (Oxford University Press, Oxford, 2011) 13 at 120, as cited in M Cherem "Refugee Rights: Against Expanding the Definition of a 'Refugee' and Unilateral Protection Elsewhere" (2016) 24 The Journal of Political Philosophy 183 at 185.

7. CONCLUSIONS: THE REVISIONIST ARGUMENT AND ITS FUNCTIONS

This article has taken issue with the two objections most commonly raised against the revisionist argument. From pointing out the objections' shaky foundations, however, it does not follow that the revisionist argument is successful in what it sets out to achieve. Such a determination requires an assessment of the argument's effectiveness in light of its two core functions detailed earlier in the article.

7.1 The Protective Function

The first function, again, was to shore up the legal weaknesses in a climate-displaced migrant's claim for asylum under the Convention. McAdam considered the lack of an identifiable and "legitimate" persecutor an obstacle to establishing that the applicant was being persecuted. This article has challenged this finding but not on the grounds that the revisionist argument supplies a successful candidate persecutor. The "failed persecutor" objection was overcome, rather, by contending that an identifiable, legitimate persecutor was not required at all; all that matters was that the harm suffered or fear amounted to the interpretational threshold for Convention persecution. Thus the revisionist argument is left with no role to perform. This article suggested instead that the revisionist argument purported to add agency where agency was most required: to establish *discriminate* persecution. With respect to this second legal problem, however, the argument is entirely unhelpful. The effects of climate change do not discriminate for reasons of one of the Convention grounds whether they are attributed to the international community or to the inanimate forces of nature. In sum, it is far from clear that the revisionist argument performs any protective legwork at all.

7.2 The Accountable Function

Perhaps, then, the revisionist argument's true purpose resides in this second function of securing a legal pronouncement to the effect that the international community is a persecutor under the Convention. Such an ambition does not seem quite so strange in light of the Convention's long-standing accountability-focused tradition. Yet again, the argument manifestly fails to perform this function. For one, the first objection hits right on target: the international community is simply inadequate to qualify as a Convention persecutor. Placed under the microscope, this candidate cannot withstand the scrutiny of probing questions regarding intention and causality. The second issue is that the revisionist argument does indeed reverse the ethical narrative of McAdam's

paradigm: the receiving-states are indicted while the sending-states are cast into the role of victims. This article has responded to both these objections by deconstructing the premises on which they are built as remnants of a now-outed accountability perspective. Yet accountability is precisely what this function aims at. The performance of this function is predicated on a preoccupation with the persecutor's identity, a jurisdictional state-centrism, and an ethical narrative that delineates the "good" states from the "bad". The revisionist argument thereby lands squarely on the horns of a dilemma. It either accepts that its accountability-oriented project has no place in the Convention, or it relies on an accountability logic with a set of ethical assumptions that point in exactly the opposite direction. If anything, this function appears a lot like a poorly disguised attempt to force into the Convention notions of corrective justice: the idea that an actor is liable for rectifying the harm caused by her actions.[139] Corrective justice arguments are well-worn in debates concerning climate justice.[140] Not a few have argued that "rich democratic states" should be obligated to assist people displaced by climate change to discharge their liability for contributing disproportionately to their plight.[141] Whatever its merits, this corrective justice narrative finds no home within the Convention's protective scheme. On the one horn, the Convention is concerned with refugees not as liability but as potential victims entitled to protection; on the other, the liability falls on entirely the wrong shoulders.

7.3 Closing Remarks

So, yes, the revisionist argument probably does deserve a confident rejection; yet not a quick one. For the two objections commonly invoked against the argument may well also merit a confident — yet considered — rejection. Indeed, it was in the process of discovering how these two conclusions might fit together that this article unearthed some truly urgent questions: What is the driving objective of the Convention? What is the interpretational trajectory of the protectionist victories in the arena of persecutory intention and non-state persecutors? And most fundamentally: What does a protectionist object and

139 Wyman, above n 54, at 194.

140 Posner and Sunstein, above n 61; DA Farber "The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World" (2008) 2 Utah L Rev 377.

141 Wyman, above n 54, at 194. For a discussion of how migration debates fit into discussions regarding "loss and damages" see J Spector "Why COP21 Won't Solve the 'Climate Refugee' Problem" (4 December 2015) CITYLAB <www.citylab.com>; Bodle, Donat and Duwe, above n 28; and The Advisory Group on Climate Change and Human Mobility, above n 26, at 4.

purpose look like, and does this cohere with the three premises on which the two objections are constructed? At the end of the day, it is not so much the revisionist argument itself that requires sustained and careful attention. Rather, it is the burning questions it incites among those who take the time to properly engage with it.