

THE CONCEPT OF TIME AND THE ASSESSMENT OF RISK IN REFUGEE STATUS DETERMINATION

Presentation to Kaldor Centre Annual Conference, 18th November 2016

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I have been asked to offer some thoughts on the nature and role of time in refugee status determination (RSD). What follows are some, at this stage, tentative musings on this fascinating topic.

The main point I wish to make is that time is everywhere in RSD, albeit typically hidden or dressed-up in other concepts or principles. By way of elaboration, I will first make some general observations about the nature of time in RSD and how it relates to key refugee law principles. I will then examine how the nature of the underlying claim may impact on the degree to which time can influence the outcome.

The Concept of time in RSD

So, then, what of time? How should it be conceptualised in the RSD process? A useful analogy can in my opinion be drawn with the Roman god Janus. In Roman mythology, Janus was the god of beginnings, transitions and ends. Janus was responsible for motion, changes and time. Janus was typically depicted on coins and in statues facing both forward and backwards. And, like the mythical Janus, time in RSD can also be depicted as pointing both backwards and forwards simultaneously.

On the one hand, time points backwards because refugee claims are grounded in what has happened in the past. They take their hue from factors already in existence with the prior passage of time. Whether the claim concerns an inherent or immutable characteristic such as race, or acquired characteristics such as political opinions or religious belief, RSD reaches into the past and seeks to identify any relevant characteristics, behaviours or attributes possessed by the claimant. It also examines what social, economic, legal and political systems and processes have already been at play in the claimant's country of origin and seeks to uncover the extent to which these systems and processes have secured the enjoyment of the claimant's human rights.

RSD, however, also faces forward in time. It reaches into the future and inquires as to the predicament of the claimant in his or her country of origin. Refugee status is recognised precisely because the future there for the claimant is anticipated to be one in which some form of serious harm will accrue to him or her at some projected point in time arising from a

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failure of the state of origin to protect the enjoyment of his or her fundamental human rights by reason of a Convention-protected ground.¹

The concept of time therefore pervades the central process of RSD in Janus-like terms, delving both into the past and the future. And, when we turn from the process of determination and drill down into core principles of refugee-law which underpin that process, again we can see the presence of time.

Time as an aspect of refugee law principles

Early on, refugee law began to ask itself important questions involving time. While it is often a hidden component of the principle in question, the force it exerts is ever-present and fundamental. First, whose idea of the future matters? It has already been noted that many systems adopt the position that the RSD mandates an inquiry into the future.² But, is it sufficient that the claimant perceive some future risk of being persecuted, or must there be some externalised measurement of their future? This question has been resolved in favour of the latter argument; it is now widely accepted that when evaluating the claimant's future in terms of the existence of a 'well-founded' fear of being persecuted, an objective standard is to apply.³

If not exactly crystal-ball gazing, this assessment is fundamentally an exercise in conjecture or hypothesis.⁴ However, as the Australian High Court has reminded us in *Minister for Immigration and Ethnic Affairs v Guo*⁵, while the assessment of the future risk is of a

¹ For a detailed discussion of how this inquiry is conducted in New Zealand, see *DS (Iran)* [2016] NZIPT 800788. The Tribunal's framework approach has been recently endorsed by the New Zealand Court of Appeal in *Refugee and Protection Officer v CV and CW* [2016] NZCA 520.

² *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA) as applied, for example, in *Refugee Appeal No 81/91 (Re VA)* (6 July 1992) at 5-9 and *Refugee Appeal No. 474/92 (Re KA)* (12 May 1994) at 24. For a general review of the position as at the mid-1990s when this issue was being considered by the courts, see *Refugee Appeal No 70366/96 (Re C)* (22 September 1997). Note, here, the US position which allows more scope for refugee status to be granted on past persecution: Immigration and Nationality Act §101(a)(42)(A) and Code of Federal Regulations and in particular 8 CFR §208.13(b)(1)(i) & (ii). A closely related issue addressed early concerned the relevant point for determination of status? Was it at some past point-in-time? Or, did the Convention's definitional requirements have to be established as at the date of determination? Here, most systems have settled on the latter approach.

³ See *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L Ed 2d 434; *R v Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA). This line of authority was endorsed in New Zealand by both the RSAA in *Refugee Appeal No 72668/01* [2002] NZAR 649 at [132]-[140] and by the IPT in *BG (Fiji)* [2012] NZIPT 800091 at [74]. While some jurisdictions still retain some role for an assessment of subjective fear, this does not displace an objective assessment, but rather subjective and objective assessments constitute cumulative analytical requirements; see generally James C Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014) at pp91-105 for discussion and critique of what is described as a 'bipartite approach'.

⁴ Guy S Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford, 2007) at p54 observe, correctly, that:

“a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, and attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin.”

⁵ *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 (HCA) at 572:

conjectural nature, mere conjecture or surmise is insufficient. There must be something more than the subjective view of the claimant as to the content of future time. The conjectural exercise must be informed by a body of evidence which transcends even the genuine concerns of the claimant. There must be a sufficiently solid and objective evidential foundation to enable informed assessments to be made about what future time means for the claimant if returned to their country of origin. Future time is, therefore, fundamentally objective in nature for the purposes of RSD.

As second time-pregnant principle of refugee law relates to the function of past persecution in the assessment of risk. This principle holds that where the inquiry reveals the existence of past persecution, this may be a powerful indicator of the future, absent any relevant change in the underlying conditions in the country of origin.⁶ At the core of this principle lies recognition of the Janus-like function of time in terms of the existence of an inherent – but not necessarily linear – relationship between the past and the future which is relevant to the inquiry. Moreover, the application of this principle in any single case is shaped and

“... it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. In the present case, for example, Einfeld J thought that the “real chance” test invited speculation and that the Tribunal had erred because it “has shunned speculation”. If, by speculation, his Honour meant making a finding as to whether or not an event might or might not occur in the future, no criticism could be made of his use of the term. But it seems likely, having regard to the context and his Honour’s conclusions concerning the Tribunal’s reasoning process that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is “well-founded” when there is a real substantial basis for it. As *Chan* shows, a substantial basis for a fear may exist even though there is far less than a 50 percent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the Tribunal and the Federal Court have used the term “real chance” not as epexegetic of “well-founded” but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate.”

This passage was expressly adopted in New Zealand in *Refugee Appeal No 71404/99* (29 October 1999) at [37], and *Refugee Appeal No 71729/99* (22 June 2000) at [61].

⁶ In the US system, this is given regulatory expression in the Code of Federal Regulations. In common law systems the point is well articulated in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567 (HCA) at 578 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ:

“The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability – high or low – of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur.”

moderated by time. In particular, the temporal distribution of any episodes of past persecution will be highly important in shaping the outcome.

Where there have been instances of past persecution, the inquiry will seek to understand just how far in the past this has arisen. In those cases where past persecution has arisen only at some point in the distant past, the impact of time on the application of this past persecution principle to the facts, and hence the outcome, will be relatively greater than in cases where the episode or episodes of past persecution have arisen more recently.

Equally, where there have been changes in the country conditions, the inquiry must encompass not simply the nature of those changes but their durability.⁷ The point here is that a non-durable change is unlikely to be sufficient to effectively reduce the underlying risk to the claimant. However, buried within the concept of durability sits time. To say something is 'durable' is to necessarily imply a foreseeable continuation of that thing's existence over time. If the relevant change in country conditions arises in the near past relative to the date of determination then, depending on the country concerned, the passage of time between the change and the date of determination may be insufficient to find that the change is of a durable nature. Think here of changes to the government in Somalia. They have come and gone in one form or another over the past 20 years. The issue of the durability of the governance arrangements in existence at the date of determination should, therefore, properly form a critical component of the analysis of future risk in Somali cases.

Time, predictive certainty and the nature of the claim

What these principles reveal is that, albeit hidden from view, time is at heart of the assessment of risk. To say that there is a 'risk' of something arising is to make a statement about the anticipated content of future time. That 'something' in RSD terms is the predicament of being persecuted for a Convention reason. RSD is, fundamentally, an exercise resting on a *minimum degree of predictive certainty* as to the content of future time and, in particular, the effect or impact of time on this specific risk. In order for the claimant to be recognised as a refugee, the evidence before the decision-maker must present with sufficient predictive certainty as to the claimant's risk of being persecuted for a Convention ground at some relevant point in future time. This, however, presages two questions: how much predictive certainty is enough, and where does the relevant point in future time lie? In my view, the first is amenable to absolute or categorical annunciation, and has been; the second is not and is highly context-specific.

As to the first issue, refugee law has settled on an approach which only requires that the claimant establish a *low* degree of predictive certainty. Various called a 'real chance', 'real risk' or 'reasonable degree of likelihood', judges and scholars alike agree that the degree of certainty as to the potentially persecutory content of future time, while something more than mere conjecture or surmise, nevertheless sits well below the balance of probabilities standard.⁸ While purely statistical approaches to the assessment of risk are to be avoided,

⁷ See, here, discussion in Hathaway and Foster, *op cit* at pp132-133.

⁸ See, here, Goodwin-Gill and McAdam, *op cit* at p54 and cases at fn 3 above. As long ago as 1971 it had been recognised by the House of Lords that, when a court is tasked with assessing what may happen in the future, it was inappropriate to apply a balance of probabilities approach: see *Fernandez v Government of Singapore*

Grahl-Madsen's⁹ statement of a one-in-ten ratio is widely understood to accurately encapsulate the low degree of predictive certainty that underpins the real chance threshold.¹⁰

But, what is 'real' in terms of the content of future time is context dependent. The effect of time is not uniformly felt across cases. I have already noted how the temporal distribution of any episodes of past persecution may affect the calculus as to the content of future time. The force exerted by time on the assessment will, however, also vary according to the nature of the claim and, in particular, will differ between more individualised claims and claims of a more generalised nature.

The impact of time on the assessment of risk is less critical to the outcome where the accepted basis of a claim comprises individualised action by the claimant, even where there are no instances of past persecution. Take, for example, a claim based on extensive anti-regime activity in a country with an entrenched repressive political environment in which the arbitrary detention and serious ill-treatment of detainees is pervasive. The claimant may have been able to get away with it so far, but is worried his or her luck may run out. Resembling the classic 'political refugee' archetype, this remains an all-too-common staple of the RSD diet.¹¹ In such a claim, and drawing on the claimant's entitlement to be able to continue to undertake the activity as an aspect of his or her enjoyment of the relevant human right (i.e no issue of a permissible limitation arises), a risk of persecutory harm occurring at the real chance threshold will arise in a foreshortened time-frame, particularly if the accepted evidence discloses that the regime in question is already aware of the claimant's activities. The relevant point in future time at which the decision-maker will need to project in order to be satisfied that the low degree of predictive certainty is met is comparatively near relative to the date of determination. Over a longer time-frame, the certainty of harm occurring in such cases would transcend the real chance threshold to something approximating, at the very least, a balance of probabilities threshold. In extreme cases, over extended timeframes, the probability of harm arising may approach the level of a near certainty.

[1971] UKHL 6, [1971] 2 All ER 691 per Lord Diplock; Lords Donovan and Pearson, Viscount Dilhorne agreeing.

⁹ Grahl-Madsen *The Status of Refugees in International Law*, Vol 1 (Leyden, 1966) p180:

"Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote 'labour camp', or that people are arrested and detained for an indefinite period on the slightest suspicion of political non-conformity. ... In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return. It cannot – and should not – be required that an applicant shall prove that the police have already knocked on his door."

¹⁰ See also *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L Ed 2d 434, 447 per Stevens J; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), at 388-389 per Mason CJ, at p407 per Toohey J; *Refugee Appeal No 71404/99* (29 October 1999) at [26]–[27] per Haines QC.

¹¹ Although commenting on Iran in the context of the disputed 2009 Presidential elections, the IPT in *AR (Iran)* [2011] NZIPT 800209 at [49] made observations on the use of state violence applicable to many refugee producing countries:

"The disproportionate and severe punishment of persons who have played no major role in opposition movements is an integral part of oppression, sowing fear amongst the ordinary population. The deliberate and arbitrary use of disproportionate violence to inculcate fear in ordinary persons against seeking to exercise their right to freedom of expression through peaceful protest is the keystone upon which the whole edifice of state repression of its citizens rests."

In other words, in these more individuated types of claim, the further the assessment projects outwards into future time, the more predictive certainty the decision-maker will have as to risk; there is quite simply more time available to the agent of persecution to deploy resources to apprehend the claimant and inflict harm. While it is of course possible that, over time, repressive regimes may collapse and risk reduce, the impact of time in such claims becomes less about recognition as a refugee under Article 1A(2), but whether the grounds for cessation of status under Article 1C(5) are met.

But what of a more generalised claim, where the risk is grounded not in any particular activity of the claimant, but in events or processes of a generalised nature affecting society-at-large or significant portions of it, and the claimant fears that, in time, he or she, too, will be affected? In my view, time weighs more heavily on the claim than in the more individuated type of case in terms of the predictive certainty required as to the persecutory content of future time. The climate change cases I recently dealt with at the Immigration and Protection Tribunal are a good example of this. Both *AF (Kiribati)* and *AC (Tuvalu)*¹² were claims grounded in the current and anticipated adverse effects of climate change. These included slow-onset processes, such as sea-level rise and rising sea temperatures, and more sudden-onset events, such as hurricanes and associated storm-surges.

The first issue to consider was what time-related threshold was applicable to the assessment of risk. Unlike the individuated activity type of case, the claims were not grounded in anything particular to the claimants themselves. Rather, the asserted drivers of risk were conditions of a more generalised impact affecting society-at-large, albeit not uniformly. Did this context call for a different set of rules? In the *Kiribati* case, I noted that in *Aaldersberg and Ors v Netherlands*¹³ – which was also a complaint grounded in a conditions of general impact – the UN Human Rights Committee applied an ‘imminence’ standard. In that case, a complaint was made by over 2,000 Dutch citizens that Dutch law, which recognised the lawfulness of the potential use of nuclear weapons, put their and many others’ lives at risk. The Committee rejected the argument and ruled the complaint inadmissible because the risk was not sufficiently ‘imminent’.¹⁴ While the Committee’s approach was informed by its own case law which requires that, to be a victim for the purposes of bringing a complaint under the First Optional Protocol, the risk of violation of an ICCPR right must be ‘imminent’,¹⁵ it was important in my view to say something about imminence as a time-related concept for assessing future risk.

If one looks at how imminence is understood in other contexts, it seems clear that it contemplates a more immediate band of future time for the qualifying harm to arise than that which may satisfy the real chance or risk threshold for the purposes of RSD. For example, the right to self-defence under Article 51 of the UN Charter is widely, but not universally,

¹² *AF (Kiribati)* [2013] NZIPT 800413; *AC (Tuvalu)* [2015] NZIPT 800517-520.

¹³ *Aaldersberg and Ors v Netherlands* CCPR/C/87/D/1440/2005 (14 August 2006).

¹⁴ At [6.3].

¹⁵ The authors argued that ‘imminence’ in the context of the actual use of nuclear weapons was “of a completely different order than discussing imminence in connection with any other subject.” See [5.2].

recognised¹⁶ to include a right to pre-emptive self defence in order to avert the threat of an imminent attack. Proponents of such a right argue that the criteria set out in the exchange between the US and the UK governments in the *Caroline* case (which concerned the pre-emptive destruction by the British of a US vessel in the mid-1800s) must be met in relation to an ‘imminent’ attack. This approach, however, requires that there be “a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation”.¹⁷

So understood, this conceptualisation of ‘imminence’ envisages a more immediate time-frame for the anticipated qualifying harm to arise than that contemplated by the real chance standard in refugee law. To say something is ‘imminent’ therefore implies a far greater degree of predictive certainty than the one-in-ten probability that characterises the real chance standard. This heightened degree of predictive certainty as to the content of future time, which underpins at least this conceptualisation of ‘imminence’ under international law, seems obverse to the real chance standard which, as has been noted, is characterised by a low degree of predictive certainty. For this reason, although the Human Rights Committee had applied an imminence standard in the context of the generalised claim in *Aaldersberg*, in the *Tuvalu* case,¹⁸ I decided that no special rules were to apply in climate cases, even though they were similarly based on generalised conditions. Rather, it was the ordinary real chance standard that was to apply, and ‘imminence’, at least in the context of refugee and protection claims, should not be understood as imposing any higher degree of predictive certainty.

In retrospect, I would phrase the decision slightly differently as I believe it is a mistake to import even the language of imminence into RSD. Whatever its merits for other branches of international law, it is fundamentally ill-suited to the task of RSD, particularly once the well-understood evidential handicaps typically faced by claimants is acknowledged. It is a far more onerous task for the claimant to discharge the evidential burden typically resting on him or her to establish the claim if imminent risk has to be established.

¹⁶ For a contrary view, see Ian Brownlie *International Law and the Use of Force by States* (Clarendon Press, 1963); A Randelzhofer in Bruno Simma et al (eds) *The Charter of the United Nations, A Commentary* (Oxford University Press, Oxford 2012).

¹⁷ See, for example, outline in Anthony Clark Arend “International Law and the Pre-Emptive Use of Military Force” (2003) 26 *The Washington Quarterly* 89 at 90-91. In short, in 1837, the British attacked the US ship *Caroline* which it believed was preparing to transport guerrilla forces and ammunition to assist rebels who were challenging British rule in Upper Canada. The British sent it over Niagara Falls. In an exchange of letters between the British and American Governments during the subsequent treaty negotiations, the general criteria for exercising a right of anticipatory self-defence emerged. The British Foreign Secretary defended attacking the *Caroline* on grounds of self-defence. In response, the American Secretary of State stated that for the plea of self-defence to be accepted, the British Government would have ‘to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’.

¹⁸ *AF (Kiribati)* [2013] NZIPT 800413 at [90]:

“Imminence should not be understood as imposing a test which requires the risk to life be something which is, at least, likely to occur. Rather, the concept of an ‘imminent’ risk to life is to be interpreted in light of the express wording of section 131. This requires no more than sufficient evidence to establish substantial grounds for believing the appellant would be in danger. In other words, these standards should be seen as largely synonymous requiring something akin to the refugee ‘real chance’ standard. That is to say, something which is more than above mere speculation and conjecture, but sitting below the civil balance of probability standard. See here *AI (South Africa)* [2011] NZIPT 80050 at [80]-[85].”

Yet, even if we accept that the more immediate band of future time encapsulated by the concept of imminence is inappropriate to RSD, nevertheless, time still weighs heavily in cases grounded in generalised conditions. It is true that the generalised nature of the underlying drivers of such claims necessarily imports a degree of predictive certainty which can and must be factored into the assessment. In the climate cases, sudden-onset events such as monsoon flooding, hurricanes and king tides regularly occur, and slow-onset processes such as sea-level rise, by their very nature, are perpetually in motion. However, this degree of predictive certainty is insufficient. This is predictive certainty *as to context*, not as to risk. The assessment of risk is a far more complex exercise in such cases. It is well understood among scholars and practitioners specialising in the field of disaster-related migration and displacement that a range of factors existing at the community, household and individual levels will determine the degree of linkage between the over-arching disaster context and the risk.¹⁹

To properly understand risk in such cases, we need to drill deeper. Who exactly is affected, in what way and in what circumstances? How has the state responded to disasters in the past and what may influence or affect state response in the future? The complexity of analysis required in such cases is reflected in the *Tuvalu* case where it was noted:

[69] Just as in the refugee context past persecution can be a powerful indicator of the risk of future persecution, so too can the existence of a historical failure to discharge positive duties to protect against known environmental hazards be a similar indicator in the protected person jurisdiction. Nevertheless, given the forward looking nature of the inquiry, the nature of the hazard, including its intensity and frequency, as well as any positive changes in disaster risk reduction and operational responses in the country of origin, or improvements in its adaptive capacity, will need to be accounted for.

Another common type of generalised claim concerns the impacts of armed conflict. In New Zealand, we have no legislative equivalent to Articles 2(f) and 15(c) of the EU Qualification Directive (QD),²⁰ which together allow for a complementary protection status (called subsidiary protection) to be granted where there exists a “real risk of suffering serious harm” in the form of a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

It is fair to say the rather clumsy language arising from these separate provisions in the QD has generated a fair amount of judicial and scholarly debate over exactly what it means.²¹ I do

¹⁹ In the technical terms of disaster studies, the environmental driver of the claim would constitute the hazard, but this is only one component of disaster risk. Risk is a function of the person’s exposure and vulnerability to the hazard, as well as adaptive capacity.

²⁰ EU *Directive 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* Qualification Council Directive 2004/83/EC (29 April 2004) and the 2011 Recast Version (Directive 2011/95/EU (13 December 2011)) at Articles 2(f) and 15(c).

²¹ One particular trenchant debate revolves around the role, if at all, that international humanitarian law should play in guiding the interpretation. An early approach by the UK Immigration Appeal Tribunal insisting on a

think, however, that member states were correct to peg the degree of predictive certainty at the real risk level, without the need to show an imminent risk. I also think that, in terms of the jurisprudence on the application of Article 15(c), there is some commonality of approach with the climate cases in that, while there may be a certain degree of predictive certainty as to the overall context of the conflict, this is generally insufficient to establish a risk of qualifying harm at the real chance or real risk level. Thus, it may well be understood that the conflict has particular religious and/or ethnic dimensions, or is occurring in a particular part of the country, but this context will not necessarily translate into a situation where all those possessing the relevant religious or ethnic characteristic, or living in the area of conflict, will be at risk.

For example, in the *Elgafaji* case²² the CJEU held that, so far as protection under the QD was concerned, risk linked merely to the general situation in a country is not, as a rule, sufficient. While the Court accepted that there could be situations where the degree of indiscriminate violence was of such a high level that an individual would face a real risk solely on account of his or her presence, these would be ‘exceptional’ situations. In other words, conflict context was not ordinarily synonymous with conflict risk. As with the climate cases in New Zealand, more is needed to establish risk than pointing to the generalised context.

In terms of the additional risk-specific inquiry, through its decisions in *Elgafaji* and, more recently, *Diakité*,²³ the CJEU has adopted a ‘sliding scale’ approach: the more the claimant can establish that he or she is specifically affected by reason of factors particular to themselves, the lower the level of indiscriminate violence is required for him or her to be eligible for subsidiary protection.²⁴ As with the climate-related cases in New Zealand, the practice of national courts in implementing this approach has been to look beyond the predictive certainty of the overall context, and to undertake a more fine-grained analysis as to risk. Indeed, a highly nuanced approach appears to be emerging which focuses not simply on quantitative analysis in the form of a crude body count of civilian casualties, but includes something of a qualitative analysis which looks at indirect threats such as displacement, food and housing insecurity, and increasing criminality.²⁵

Of course, conflict may have been going on for months, if not years, and with particular patterns of associated violence by the time it comes for determination. This would need to be factored into the inquiry. In the context of the QD, the UK Upper Tribunal has expressly

strong role was firmly rebuffed by the Court of Justice of the European Union; see Case C-285/12 *Aboubacar Diakité v Commissaire Général aux Réfugiés et aux Apatrides* (30 January 2014) at [35].

²² Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, (17 February 2009).

²³ *Elgafaji*, *ibid* at [39]; *Diakité*, *ibid* at [31].

²⁴ For a review of developments, see E Tsourdi “What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime” in D Cantor and J-F Durieux (eds) *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Martinus Nijhoff, 2014) pp270-94.

²⁵ *HM and Others (Article 15(c)) Iraq CG v. the Secretary of State for the Home Department*, [2012] UKUT 00409 (IAC.) See in particular the statement at [274].

accepted in a case concerning Iraq that a relevant dimension of the assessment is to take proper account of time.²⁶

Nevertheless, whether it be climate or conflict-related, time weighs more heavily in cases grounded in generalised conditions. While at certain thresholds or magnitudes, such generalised conditions may create broad-based risks of qualifying harm to affected populations at the real chance level, short of those thresholds being already in existence at the date of determination, the impact of time is heavier. Compared to the more individuated archetypal claim described earlier, where the contextual driver (the existence of an entrenched repressive state apparatus) is already of sufficient ‘magnitude’ as at the date of determination, the general nature of the underlying drivers of less individuated claims influences the relevant point of future time at which the real chance threshold of risk may be reached. And herein lies the problem.

By projecting the relevant point in future time outwards from the date of determination to longer time-horizons, it may be possible for the decision-maker to conclude that increasing numbers of people will, for example, be affected by an ongoing and worsening conflict, or by the adverse effects of more frequent and intense disasters linked to climate change. Yet, the longer the time-horizon contemplated for these thresholds or magnitudes to be reached, the less real and more speculative becomes the risk of qualifying harm as at the time of the decision. This is because there is more opportunity for risk-reducing factors to intrude. In the context of climate-related cases for example, there is greater opportunity for physical adaptation measures to be taken, or disaster-risk reduction and disaster-risk management policies to be developed and implemented. As for conflicts, they are rarely static: they escalate and deescalate; they change vectors; interventions by new actors may occur.

What this means is that, contrary to the more individuated archetype of claim, in cases where generalised conditions form the underlying driver of the claim, extending the relevant point-in-time further into the future may not operate so as to elevate the risk of qualifying harm to a near predictive certainty, but may instead operate so as to reduce the predictive certainty to the level of conjecture or surmise.

Summary conclusion

In summary, time has a complex, hidden but central role in RSD. It pervades the task-at-hand for all of us. As decision-makers, lawyers and advocates, I think we need to be more sensitive to the role time plays in both the process and law of refugee status, and better understand how time may relate to different types of claims. We need to better understand how our view of the relevant point in future time, at which the minimum degree of predictive certainty as to the persecutory content of future time encapsulated in the real risk or real chance threshold is established, influences the outcome. Time, as they say, does not stand still. Nor should we.

²⁶ *HM and others (Article 15(c)) Iraq CG*, *ibid* at [273]. The Tribunal expressly acknowledged that “where armed conflict has been ongoing for some time – and in Iraq it has been going for fifteen years – assessment must take into account its long-term cumulative effects, not just annualised figures.”