

# Climate Displacement and the Legal Gymnastics of Justice: Is It All Political?

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*Climate Change, Disasters, and the Refugee Convention*, Matthew Scott (Cambridge, U.K.: Cambridge University Press, 2020), 206 pp., cloth \$110, paperback \$34.99, eBook \$28.

*Climate Change and People on the Move: International Law and Justice*, Fanny Thornton (Oxford: Oxford University Press, 2019), 256 pp., cloth \$85, eBook \$84.99.

Climate displacement is not new, but it has recently been gaining prominence as a global issue. Media stories about “X as the new climate refugee” are hard to miss. Every time there is a hurricane, cyclone, brushfire, or other major environmental event that causes out-migration, the displacees are quickly labeled as “climate refugees.” To date, there are over eight hundred thousand news stories<sup>1</sup> citing this term to describe those who have either moved temporarily or permanently and those who may need to relocate due to future climate impacts. While the phrase “climate refugee” conjures up images of desperate human masses needing justice and protection, simply applying this label does not allow the displaced to claim the rights, protections, and benefits to which refugees are entitled. No matter the complexity of the legal gymnastics used to equate climate displacees with formal refugees, the label is not applicable. Legal scholarship on the matter has made clear the limitations of our current

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systems and definitions of justice. While the problems of the future are coming toward us fast, the opportunities for justice are constrained by historical precedent and political indifference.

That the press and many scholars seek to find protections for climate displaced under the 1951 Convention Relating to the Status of Refugees and its partner, the 1967 Protocol, is not surprising. The Refugee Convention has been successful due to the formal, legal, and internationally recognized status it confers. Its protections and the support obligations that stem from the transition from an asylum seeker to a refugee are substantial and meant to assist those being persecuted. The main analysis of *Climate Change, Disasters, and the Refugee Convention*, by Matthew Scott, revolves around the legal interpretation of persecution for those impacted by climate change and disasters. Scott asserts that the “discriminatory conduct of human actors of persecution is largely absent from the experience of disaster and climate-change-related harm” (p. 28) and proceeds to examine the application and interpretation of this critical element of refugee determination. Lack of discriminatory conduct means that “natural” disasters and climate change are indiscriminate in their impacts; humans may create hazards that can affect their level of impact on society, but the outcomes of natural carbon cycles do not.

The strength of Scott’s approach is his use of a variety of case studies of asylum seekers who make an explicit connection to either disasters and/or climate change in their claims. For example, Scott discusses the famous case of a member of the I-Kiribati community, Ioane Teitiota,<sup>2</sup> whose asylum claim in New Zealand was unsuccessful. After his family was detained for overstaying their visas in the country, Teitiota argued that he was entitled to be recognized as a refugee “on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change.”<sup>3</sup> In addition to Teitiota, there are many other claimants with differing circumstances seeking assistance. Scott categorizes these as cases that demonstrate either (1) the hazard paradigm through indiscriminate adversity due to the forces of nature, or (2) direct and intentional infliction of harm. The majority of cases fall under the first category, where climate and environmental disasters are the main factors being cited for adversity (p. 54). Teitiota’s claim fits into this category. As mentioned in the previous paragraph, the climate is not in and of itself discriminatory. The second category includes three subcategories: (a) “cases in which the state is causing environmental damage to a particular group”; (b) “cases where there are crackdowns of dissent after a disaster occurs”; and (c) cases where the claimant argues “discriminatory denial of disaster relief”

(p. 77). Some asylum seekers whose cases fall under the second and third subcategories have had success when it has been demonstrated that states were unwilling or unable to protect the claimant from environmental harms due to “reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>4</sup> Such neglect is seen as a form of persecution.

The difficulty for legal interpretations, Scott argues, is that persecution does not have a clear definition. He describes two schools of thought on how to interpret persecution: the liberal school contends that severe measures and sanctions of an arbitrary nature—acts incompatible with the Universal Declaration of Human Rights—constitute persecution; the restrictive school limits persecution only to acts that deprive a person of life or of physical freedom (p. 97). These two interpretations pose challenges to understanding persecution in the circumstance of climate impacts and disasters. The liberal school is concerned with the arbitrary nature of disaster impacts, while the restrictive school is concerned with the loss of life or imprisonment. Meanwhile, there are many situations where suffering may not lead to death, but still necessitates the protections of the state. There is also the question of whether persecution is a singular act or needs to be a sustained, continuing saga of harm. Scott points out that the liberal school approach is such that either can be possible; a single harm is capable of crossing the persecution threshold just as well as something sustained or systematic (p. 98). The harm itself may vary, but what has to be proven is that the individual faces a “risk of harm” upon return to his or her previous place of habitual residence. However, this harm has to relate to the membership this person has in a particular religion, class, creed, or nationality such that the risk is to identity, as opposed to anyone in a general circumstance.

The main distinction between someone seeking refuge and a legally defined refugee is found in the reason that someone is experiencing a harm. For example, if a member of a political minority suddenly finds him or herself (and others in a similar situation) being arbitrarily jailed or hunted down by a government entity under the guise of “restoring order” after a major cyclone event, then this person is being targeted on the basis of his or her political views. The same goes for people not receiving any aid after such an event because of their religious affiliation. The most salient factor is not the cyclone (or storm surge, or blizzard, or bushfire); rather, it is that those in power are using that circumstance to inflict harm on those who disagree with them or those whom they do not care for based on discriminatory factors. However, Scott’s analysis highlights that while discrimination

is a feature of persecution, it is not in and of itself essential (p. 119); his recalibrated definition of persecution is as a condition of existence in which discrimination is a contributory cause of a serious denial of human rights demonstrative of a failure of state protection (p. 129).

The fact that experiencing systematic discrimination is not enough to qualify for refugee status is telling and speaks to the first subcategory of cases that Scott describes: when a state causes environmental damage. Scott mentions that this subcategory of cases is identified a number of times in his legal research, but in his evaluation, none were found to have an individual seeking refugee recognition where the state had intentionally caused environmental damage to a particular individual or group. Although Scott spends a bit of time discussing “structural violence” at the end of chapter 2, it is specifically this form of violence that is a pervasive, active, and culturally accepted form of discrimination. Like apartheid in South Africa and segregation in the United States, many forms of discrimination originated through racism and force. Its pervasive nature (enshrined through custom and legal systems) exists due to its acceptance by neocolonial powers. Passed down through generations as culturally acceptable, structural violence is difficult to fix since it is integrally entangled in day-to-day living and upheld through economic systems.

Structural violence in the West can manifest itself as environmental racism. Environmental racism is a form of systemic racism and racial discrimination in environmental policymaking and in the enforcement of regulations and laws. It describes the deliberate targeting of communities of color in the dumping of toxic waste, the sanctioning of poison and pollutants in their communities, and the history of excluding people of color from decision-making.<sup>5</sup> Moreover, one could argue that environmental racism is a problem at hand in the global sphere. Developed, often predominantly white, nations continue to impose economic hegemony on poorer, less powerful states whose populations are predominantly of color and who bear the brunt of these actions. Thus, environmental racism is an additional hazard that increases local vulnerability to disaster. If at the state level these policies are not widely challenged, and in the international realm this situation is paralleled through the interaction between states, then it should be no surprise that people are not using this as a reason to seek asylum.

Finally, every small nation has been pressured into the same cookie-cutter form of economic development such that they are all now active participants in producing and consuming the carbon that will drown them. For example, in 2016 the

Republic of the Marshall Islands (RMI) was the number-one flag state of convenience for the ship registry of the world's tanker fleet.<sup>6</sup> Since the registry's inception in 1990, more than three thousand such vessels have been registered under the Marshall Islands flag, making up more than 102 million gross tonnage, and the republic has recently become the world's second-largest ship registry in all categories.<sup>7</sup> RMI also registers oil-drilling equipment. The Deepwater Horizon oil rig, which became a massive disaster for the U.S. Gulf region, was registered in the RMI. And all of this has happened to a small nation of atolls with less than seventy thousand inhabitants.<sup>8</sup> The small country has been vocal about the potential for its eventual disappearance due to sea level rise, but even its diplomatic leadership has been unwilling to agree to stop issuing drillships—unless everyone else does so also.<sup>9</sup> With that, the international political economics of “playing chicken” keeps us all on a path toward climate devastation—even and especially those people most at risk from carbon emissions from any source.

Instead of continuing to interrogate the refugee protections gap, *Climate Change and People on the Move: International Law and Justice*, by Fanny Thornton, analyzes a broad range of justice-based solutions for climate displacement. Thornton outlines several different forms of justice that can be applied toward this issue, what prevents their application, and what possible opportunities exist for response. Thornton's contribution is an evaluation of how justice is seen in international law and how suggested solutions reflect this. She begins by providing a background of justice in international law and explains its theoretical use and application. Legal approaches to this type of justice demonstrate more challenges than opportunities. Realism posits an anarchic world order in which states pursue their own self-interest. The continual struggle for power between states is often characterized by organized violence as states fight for dominance within the international hierarchy.

Thornton keeps her focus on Aristotle's corrective and distributive justice, arguing that the dichotomy between “pure” and “rough” corrective justice informs the book and its analysis (p. 55). Pure corrective justice is when a wrongdoer is held responsible for its actions toward others and the wrong is corrected or the harm is reversed. In this view, the wrongdoer is liable for compensation and other measures that would make right the damage caused. Thornton argues that international opportunities to respond to climate displacement in this vein are severely curtailed. While greenhouse gas (GHG) emissions have been challenged in domestic settings, courts have been unwilling to hold an emitter accountable as would be

required by pure corrective justice. For example, U.S. courts dismissed a case concerning the displacement of the Alaskan village of Kivalina noting that Congress should be the entity to resolve these issues. Furthermore, no judicial body has been willing to ascribe a sufficient causal relationship between GHG emissions and specific instances of harm, loss, or damage in order to establish liability (p. 69). While it is the responsibility of states to regulate GHGs within their jurisdiction, numerous industries (including international manufacturing and transportation) produce GHGs; thus the liability is spread out. For pure corrective justice to be achieved, any and all carbon that contributed to the heating of earth, and in turn the damage to certain locales, would have to be divided by origination and proportioned, and then given a price. However, there is no easy way to identify all contributors to the problem, and there is no way to collect compensation from every contributor. Some individual contributors will be dead, some corporate or collective entities will no longer be in existence (representing historical emissions), and some individuals will have only emitted negligible amounts of GHGs.

Rough corrective justice also has its challenges. Its conception of responsibility is wider than pure corrective justice in that while there needs to be a loss bearer and recovery from loss, compensation does not have to be provided by the particular party that acted unjustly (p. 55). On the surface, this looks like a more promising principle because it avoids the epistemic and practical objections to pure corrective justice. While Thornton finds existing legal mechanisms that demonstrate this approach, they are still inadequate for climate displacement. For example, national no-fault, or social security, insurance is funded by all and spent when individuals need assistance. In this manner, the burden is shared and those in need receive help. However, microinsurance functions differently, and unfairly places the burden on those most vulnerable. Microinsurance is underwritten by corporate entities, not governments, and the premiums are paid only by those who will use it. This means that people whose hazard exposure is increasing over time are bearing the brunt of climate impacts *and* paying for them through monthly dues. If a person misses a payment, his or her insurance is usually cancelled, which leads to there being no room for error in the budgets of those on the front lines, those whose finances will be most precarious. Furthermore, insurance payouts are triggered by a specific event, but policies often contain exclusions that void payouts caused by certain types of events. For example, many insurance companies avoid paying out in cyclone-prone areas by covering wind damage but not damage caused by storm surges because it is more expensive.

Thornton argues that rough corrective justice should be approached via a mechanism akin to no-fault insurance (p. 97). Insurance, as a form of disaster response, goes back to the Babylonian empire, making it a risk management strategy that has stood the test of time. When organized by the state, various forms of social security as no-fault insurance are funded by taxation—everyone contributes and then it is used when needed. At the international level, several similar mechanisms have been suggested. These programs would rely on developing countries to contribute premiums and larger developed nations to possibly add subsidies or provide risk pooling as a form of aid. During the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, proposals regarding compensation were introduced but ultimately rejected. Multiple negotiation attempts have led to even the term “compensation” stalling forward progress, with the eventual compromise outcome being its continual removal from treaties.<sup>10</sup>

What limits the ability of insurance companies to serve justice is that insurance companies are just that: companies. They pool premiums, but in the end intend to make a profit. Insurance schemes may be a form of rough corrective justice for those negatively affected by climate change, but the compensation for those most impacted ultimately comes from those most affected. An ethical pause is called for once we consider that many people living through climate impacts are only having to do so because companies have already been allowed to profit off of fossil fuel exploitation. For justice to be served, it matters who pays. Unless insurance is organized as an international social security mechanism, insurance-based proposals simply shift the burden back to those with the least ability to pay. In the case of climate displacement, reinsurers—specifically the ones cited in Thornton’s book—have publicly stated that microinsurance for sea level rise and desertification would not be viable for their companies.<sup>11</sup> With this being the case, it is clear that any market-based mechanism would fail, thus placing the onus back on the state or the international realm of state cooperation.

After discussing these two forms of corrective justice, Thornton moves on to distributive justice. Distributive justice is a way in which resource transfers and concerns about unequal burdens are situated in the international climate change regime. Individual National Adaptation Programmes of Action have been a resource that small nations can use to outline their migration and displacement concerns, which provides a limited opportunity for distributive resolve if funded

by other states. The UNFCCC works through voluntary commitments to cut emissions as well as to fund adaptation and other needs. But this depends on more than commitments (p. 140). At the Copenhagen Summit in 2009, countries agreed to contribute \$100 billion a year to help developing countries deal with climate change, incrementally hitting the goal by 2020. While this may sound like a lot of money, the amount includes many questionably qualifying items counted together, such as public, private, loans, and grants.<sup>12</sup> Further, pledges cannot be considered real money until they have been delivered. Loans require the most vulnerable to take on the burden of repayment with interest. Voluntary commitments to climate aid may demonstrate trust and shared norms in the international realm, but they do not always hold up. Therefore, small nations participate in their own undoing through fossil fuel-based development that was made possible through shared norms and similar cooperation in the transfer of technology and funding.

Where does this leave climate displacees, the Refugee Convention, and other forms of international justice? For all the scholarship and legal gymnastics, the ethical question remains: *Should* climate displacees be protected under the convention (and subsequent protocol)? The legal definition of a refugee was conceived at a specific moment in time when the world was healing from a global trauma. While Scott is correct that there is not a formal definition of “persecution,” the writers of the convention were clear about what they were doing. With the experience of two world wars and the realization of a vast, organized, and unforgivable genocide, those drafting the document had a specific vision in mind. The former United Nations high commissioner for refugees (UNHCR) stood by his protection regime “as is,” voicing concerns that incorporating climate “refugees” would overstretch the organization’s activities.<sup>13</sup> Those fleeing persecution, as conceptualized post World War II, continue to be its top priority. Is it ethical to dilute these protections for those who may not be in immediate harm? With limited funding, the triaging of assistance to those who are fleeing immediate life-threatening situations needs to come first. The term “refugee” is well known and assumes a level of urgency, legal protections, and an apparatus for assistance. However, the UNCHR has made it a point (as has its high commissioner) to classify “climate refugees” outside of its mandate—not to offer them specific material assistance, but to only provide legal expertise when it comes to human rights. Its response has been hands off, and there is no indication of this changing.<sup>14</sup> Thornton’s exploration of additional forms of justice-based solutions has shown where states have been willing to assist on this issue. Unfortunately, their



cooperation has not been urgent enough and has mostly depended on market mechanisms. Today's politicians will not be in office as things get worse, and their desire to postpone dealing with climate displacement until a later date will only cause the situation to deteriorate. Fully funding programs to assist the needs of disaster displacees, as well as to mitigate the forces causing their loss, needs to happen now. If international norm diffusion has taught us anything, it is that when developed nations internalize the need to change their behaviors to mitigate climate impacts at home, they will be more active in the international realm. By not moving fast enough to fund mitigation internally, states are making it more expensive to provide sufficient external assistance. Aid can be considered an apology for the status quo; justice requires the wrongdoer to cease doing the wrong. In this way, the challenge for those in the developed world is to acknowledge that justice for the developing world requires a reevaluation of their own lifestyle. After coercing other states to go along with their form of development, bringing about justice will require developed states to have the humbling realization that those in developing nations were often already living sustainable lives before they were pressured to develop in a particular way. Retaining development's prosperity while trying to provide justice for those most acutely affected by fossil fuel pollution is a primarily political dilemma. The way forward is not ethically ambiguous, but moving in that direction requires traversing a minefield of subsidized interests, challenging path-dependent decision making, and finding a lot of courage.

#### NOTES

- <sup>1</sup> A Google News search for "climate refugee," performed on February 1, 2021, returned 803,000 results.
- <sup>2</sup> "New Zealand: 'Climate Change Refugee' Case Overview," Library of Congress, updated December 30, 2020, [www.loc.gov/law/help/climate-change-refugee/new-zealand.php](http://www.loc.gov/law/help/climate-change-refugee/new-zealand.php).
- <sup>3</sup> AF (Kiribati) [2013] NZIPT 800413 (25 June 2013), New Zealand Immigration and Protection Tribunal, para 2, [www.nzlii.org/nz/cases/NZIPT/2013/800413.html](http://www.nzlii.org/nz/cases/NZIPT/2013/800413.html).
- <sup>4</sup> United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Article 1(2), "Convention Relating to the Status of Refugees" (adopted July 28, 1951), [www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx](http://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx).
- <sup>5</sup> Peter Beech, "What Is Environmental Racism?," World Economic Forum, July 31, 2020, [www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic/](http://www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic/).
- <sup>6</sup> "Marshall Islands Becomes Top Flag for World's Tanker Fleet," *gCaptain* (blog), October 10, 2016, [gcaptain.com/marshall-islands-becomes-top-flag-for-worlds-tanker-fleet/](http://gcaptain.com/marshall-islands-becomes-top-flag-for-worlds-tanker-fleet/).
- <sup>7</sup> Lawrence Rutkowski, "The Marshall Islands," in George Eddings, Andrew Chamberlain, and Holly Colaço, eds., *Shipping Law Review*, 7th ed. (London: Law Business Research, 2020), p. 641.
- <sup>8</sup> Kate Galbraith, "Marshall Islands, the Flag for Many Ships, Seeks to Rein in Emissions," *New York Times*, June 3, 2015, [www.nytimes.com/2015/06/04/business/international/marshall-islands-shipping-green-house-gas-emissions.html](http://www.nytimes.com/2015/06/04/business/international/marshall-islands-shipping-green-house-gas-emissions.html).
- <sup>9</sup> Andrew Clark, "BP Oil Rig Registration Raised in Congress over Safety Concerns," *Guardian*, May 30, 2010, [www.theguardian.com/environment/2010/may/30/oil-spill-deepwater-horizon-marshall-islands](http://www.theguardian.com/environment/2010/may/30/oil-spill-deepwater-horizon-marshall-islands).

- <sup>10</sup> Maxine Burkett, “Loss and Damage,” *Climate Law* 4, nos. 1–2 (2014), pp. 119–30; United Nations, Decision/CP.16, “The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention,” in “Framework Convention on Climate Change,” FCCC/CP/2010/7/Add.1, March 15, 2011; Darragh Conway, *Loss and Damage in the Paris Agreement* (briefing note, Climate Focus, Amsterdam, 2015); and Andrea C. Simonelli, “Migration and Climate Change,” in Trevor Lechter, ed., *Managing Global Warming: An Interface of Technology and Human Issues* (Amsterdam: Elsevier, 2019).
- <sup>11</sup> Andrea C. Simonelli specifically posed the question “Would reinsurance work for slow impact disasters such as sea level rise and desertification?” to the reinsurer on the panel at the United Nations Framework Convention on Climate Change (UNFCCC) side event for Where the Rain Falls held on December 3, 2012. The reinsurer replied that because so many people would be impacted at once and the risk is basically “certain,” microinsurance would not be able to pay out under these conditions. Insurance like this still needs to spread around the risk. Andrea C. Simonelli, “How to Integrate Migration into Adaptation Strategies and Planning,” side event, International Organization for Migration at UNFCCC Conference 18, PowerPoint, *Where the Rain Falls*, side event, UNFCCC Conference, Doha, Qatar, December 3, 2012), [www.iom.int/fr/iom-unfccc-conference-18-doha](http://www.iom.int/fr/iom-unfccc-conference-18-doha).
- <sup>12</sup> Sophie Yeo, “Where Climate Cash Is Flowing and Why It’s Not Enough,” *Nature*, September 17, 2019.
- <sup>13</sup> At the Nansen Conference: Climate Change and Displacement in the 21st Century, held in Oslo, Norway, in June 2011, António Guterres, the UN high commissioner for refugees, offered an opening statement in which he said that the UNHCR had refused to accept any label such as “climate refugee” or “environmental refugee,” as doing so would confuse the UNHCR’s efforts to protect those who are persecuted.
- <sup>14</sup> Andrea C. Simonelli, *Governing Climate Induced Migration and Displacement: IGO Expansion and Global Policy Implications* (London: Palgrave Macmillan, 2016).

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Abstract: The future for people becoming displaced due to climate processes is still unknown. The effects of climate change are more apparent every day, and those most acutely impacted are still unable to access an appropriate legal remedy for their woes. Two new books evaluate the limits to international legal protections and the application of justice. *Climate Change, Disasters, and the Refugee Convention*, by Matthew Scott, investigates the assumptions underpinning the dichotomy between refugees and those facing adversity due to climate-induced disasters. *Climate Change and People on the Move: International Law and Justice*, by Fanny Thornton, goes further by examining how justice is used—and curtailed—by international instruments of protection. Thornton’s legal analysis is thorough and thoughtful, but also demonstrative of the limitations of justice when confined by historical precedent and political indifference. With so little still being done to hold industries to account, is it any surprise that the legal system is not yet ready to protect those harmed by carbon pollution? Demanding justice for climate displacees is an indictment of modern Western economics and development; it implicates entire national lifestyles and the institutions and people that support them.

Keywords: climate change, displacement, migration, refugee, disaster, justice