Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020) ISBN 9781108747127, 206 pages

Although the interconnectedness of environmental, economic, social and political factors makes it virtually impossible to provide an accurate estimate of the numbers involved, it is hardly disputed today that climate change is a driver of human mobility and displacement, including across international borders. The ‘climate refugee’ label is routinely affixed, in common parlance and in public media, upon people who flee the devastating impacts of climate change on their environments, livelihoods and fundamental rights. Several objections can be raised, however, against this terminology. Social scientists rightly point out that migration has always been a form of adaptation to external stressors, and that the language of forced migration – inherent in the word ‘refugee’ – obviates the roles of choice and agency in climate change-related movement. The governments of states affected by climate change, for their part, feel offended by the suggestion that they may “produce” refugees, which would deflect the implicit blame from often distant and dispersed climate polluters towards states that are, more often than not, victims rather than culprits. Finally, refugee law specialists and refugee advocates understandably object to what they see as an attempt to push the boundaries of an internationally recognised legal concept – ‘refugee’ – beyond what is both legally correct and politically tenable. By stretching the concept, the phrase ‘climate refugee’ engenders confusion, and ultimately suspicion, about a normative category that has served to protect millions of people in need of asylum since the UN Convention relating to the Status of Refugees (the Refugee Convention) was adopted in 1951.

This last objection provides the background for Matthew Scott’s important monograph, published in 2020 by Cambridge University Press. Readers of the Yearbook of International Disaster Law must be warned: this is above all an essay in international refugee law, and a pretty sophisticated one, for that matter. One of its many merits, however, is a deep engagement with concepts and issues – the contested ‘naturalness’ of natural disasters; risk reduction; vulnerability; adaptation, to name a few – that are familiar not only to disaster law experts, but also to disaster anthropologists and political ecologists. Insights from disaster studies shed a fascinating new light on the refugee definition contained in article 1A (2) of the Refugee Convention, according to which a refugee is a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and

is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.

Though the practice is common, I am not fully at ease with book titles such as this – ‘Climate Change, Disasters, and the Refugee Convention’ – that join words with the ambiguous conjunction ‘and’. Surely in this instance, the conjunction must connote more than mere juxtaposition, hinting instead at some deeper connections. It is necessary, therefore, to first clarify the relationship between climate change and disasters. The latter concept proves to be central to Scott’s thesis, climate change being regarded as a multiplier of the threat or impact of “natural” disasters, magnifying existing vulnerabilities. At the same time, the specificity of climate change as a process invites a reflection on the time dimension of international protection – that is, whether this mechanism, also known as asylum, is meant to prevent exposure to a harm that is not only likely, but also imminent. In the context of climate change, rapid-onset catastrophic events may be manifestations of a longer-term, slow-onset disaster (such as desertification or the much-touted “sinking” of small island states), testing the resilience of individuals and communities as living conditions turn increasingly unbearable. This long-term perspective, Scott explains, is highly relevant to refugee status determination, which is nothing less than an essay in prediction: the determining factor is not past persecution, but the likelihood of persecution upon return. Taking his cues from recent New Zealand jurisprudence, Scott explores the relevance of ‘imminence of risk’ to determining the degree of reasonableness of a fear of returning to a state affected by slow-onset disasters: should international protection (in the form of asylum in a foreign state) only kick in once the situation in the country of origin is absolutely desperate? If future floods or droughts are scientifically inevitable, if the writing is on the wall that the situation can only worsen over time, is the fear of ‘the next event’ the kind of ‘well-founded fear of being persecuted’ that – alongside other features – defines the condition of being a refugee? Scott cleverly addresses this issue by contrasting the ‘hazard’ and ‘social’ paradigms of disaster, on the one hand, and on the other hand the ‘event’ and ‘predicament’ paradigms of persecution. In the same way as the social paradigm of disaster ‘invites consideration of how [the forces of nature] interact with exposed and vulnerable social conditions in the unfolding of disaster’, the predicament paradigm of ‘being persecuted’ requires attention to structural forms of violence, which inevitably unfold in a wider temporal frame than isolated ‘acts’ of persecution.

In her seminal 2012 monograph ‘Climate Change, Forced Migration, and International Law’, Jane McAdam argued that international refugee law was

a cumbersome framework for addressing flight from climate change-related impacts: 'in cases where the impacts of climate change are slow-onset in nature, the overarching objective should be to avoid the protection discourse needing to be engaged at all, by developing other methods for movement that give more choice to affected communities about if and when they wish to move'.¹ Scott does not dispute this. His work provides, however, a useful complement to McAdam's in that it takes on board jurisprudential developments in the intervening period, particularly in Australia and New Zealand. Scott's review of case law is comprehensive, detailed and astutely structured (as a bonus, a helpful taxonomy is offered as an appendix). It constitutes, in and by itself, a major contribution to the study of international refugee law. The author's ambition is, however, significantly further reaching.

The fact is that very few refugee claims based predominantly or exclusively on the feared impacts of climate change (and/or disasters) have thus far been successful. While Scott meticulously catches flaws and ambiguities in the court decisions under review, his stance is clearly not that claims made 'in the context of climate change and disasters' ought to succeed as a matter of principle. As the series editor observes in his preface to the book, '[t]his is no glib recipe for a reform that might be as unrealistic as it is appealing'. The convincing argument advanced by Scott is, rather, that such claims compel us to reflect on the contemporary meaning of the legal category 'refugee', because of the interpretative questions they raise – which may also be apparent in, and relevant to, claims arising in other contexts.

While commending the principled, human rights-based approach to interpreting article 1A (2) reflected in recent decisions of the New Zealand Immigration and Protection Tribunal² (which he analyses at length), Scott contends that even the best argued determinations remain 'based on an interpretation of the refugee definition that appears to cast the temporal scope too narrowly and the personal scope too widely'. One may not share this assessment – I, for one, consider that the Tribunal has in fact distanced itself from the 'too narrow but too wide' interpretation that used to prevail in that jurisdiction (and which, I concede, seems to continue to influence higher

¹ Jane McAdam, 'Climate Change, Forced Migration, and International Law' (Oxford University Press 2012) 268. More recently, Cantor has studied the practice of Latin American states in response to cross-border displacement in the context of disasters, which highlights the relevance of immigration pathways and other alternatives to asylum: David J Cantor, 'Environment, Mobility, and International Law: A New Approach in the Americas', (2021) 21/2 *Chicago Journal of International Law*, 263.

² *AF (Kiribati)* [2013] NZIPT 800413; *AC (Tuvalu)* [2014] 800515–520.

courts). In the end, however, it does not matter whether one shares Scott's urge to address the 'unresolved doctrinal issues' arising from his review, or one does not. In either case one feels irresistibly drawn into his sharp, methodical critique, which scrutinises every element of the refugee definition with a sharp eye on current doctrinal and jurisprudential debates. How he engages with 'imminence of risk' – mentioned above – and, above all, with the 'distinctive, discrimination-based nature of the experience of being persecuted', is truly impressive.

There is tamed passion within Scott's rigorous and patient legal arguments. It is true that his remarkable persistency at times verges on obstinacy, and the relentless demonstration is not devoid of repetitions – but aren't such minor sins inherent in the deployment of a thesis? Where Scott wishes to lead us is a significantly recalibrated interpretation of the refugee definition, more precisely of the phrase 'well-founded fear of being persecuted'. His detailed critique's conclusion is that 'being persecuted' in the context of the Refugee Convention 'entails a condition of existence in which discrimination is a contributory cause of (a real chance of being exposed to) serious denials of human rights demonstrative of a failure of state protection'. In his final chapter, closing the loop so to speak, he applies this recalibrated interpretation to refugee claims arising in the context of disasters and climate change by proposing a three-step test. Perhaps unsurprisingly, he finds that his 'recalibrated human rights approach' to the refugee definition is particularly helpful in complex cases, such as those in which return to a country affected by a mix of rapid- and slow-onset disasters is at stake. In such cases it may be impossible to identify a single actor or persecution, but systemic discrimination may engender differential exposure and vulnerability to a range of denials of human rights.

Proof of the proverbial pudding being in the eating, the ultimate validation test of Scott's theoretical construct can only be provided by refugee status determination administrations and courts. Thus far, the most elaborate judicial interpretations of the refugee definition 'in the context of climate change and disasters' have resulted in negative decisions. What remains to be seen is whether Scott's analytical framework is capable of either triggering a spate of positive determinations, or at least making the reasons for negative determinations more consistent. Several obstacles seem to stand in the way of such an outcome. The author identifies one of these challenges in the critical area of country-of-origin information: systemic discrimination demonstrative of a failure of state protection is not easy to prove, let alone to forecast. Aware that the burden of proof in refugee status determination should be shared between the claimant and the determining authority, Scott takes care to survey a number

of publicly available sources on which the latter can rely in order to build their knowledge base on disaster-prone countries and regions: his references to the worldwide disaster risk index, the FAO integrated phase classification, and regional forecasts of food insecurity are extremely interesting. He concedes, however, that such sources and tools seldom provide the level of data granularity that would allow an objective assessment of 'differential' impacts according to ethnicity, religion or membership in a particular social group – which is what his 'social perspective' on disaster and his focus on discrimination would require.

Additional challenges lie in applying the proposed 'test'. Scott's recalibrated definition of 'being persecuted' is packed with delicate concepts, which he would like adjudicators to unpack in one single step, consisting of three seemingly straightforward questions. This may be far-fetched, as it is possible to argue that either the definition is too long and verbose, or the questions in the test are too short and simple. At what stage of the inquiry, for example, and through what specific questions, should the decision-maker consider the sufficiency, or lack thereof, of state protection against serious denials of human rights – and/or against a 'condition of existence' marked by discrimination? This is a critical element of the refugee definition, which Scott analyses in depth in the body of the book but which seems to get somewhat lost or neglected in the line of questioning. The chasm between the complexity of the definition and the apparent simplicity of the test also highlights, in my view, the difficulty – which is conceptual as well as practical within the judicial inquiry – of jettisoning the notion of 'risk' and making a 'real chance of being exposed' an integral part of the definition of 'being persecuted'. Even assuming that 'chance' in fact means risk as long as the possible outcome one has in mind is a harmful one, isn't it counter-intuitive to present risk as a feature of the "experience" of being persecuted? Following Scott's interesting discussion of the predicament of Anne Frank as she was hiding from her Nazi persecutors, I am prepared to accept that the "threat" of a serious harm (or denial of human rights) may in effect be tantamount to the harm (or denial) itself in the experience of the victim. However, the "risk" of such harm, which may be a threat, occurring must still be assessed with an eye on what is likely to happen, should the claimant be returned to her country of origin. I submit that this assessment belongs, not in the first, but in the second step of the proposed model, which examines the well-founded character of the claimant's fear to return.

That these may be areas for further critical reflection or clarification does not in any way diminish the importance of Scott's contribution to one of the most challenging contemporary debates about refugeehood. To a significant

extent, 'Climate Change, Disasters, and the Refugee Convention' redefines the terms of this debate, and his insights deserve the full attention of both practitioners and academics, whether their main interest is in disaster studies or in forced migration studies.

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