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To Have and Have Not
A critical look at current discussions on
climate change migration

Master thesis
30 credits

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Master's Programme in International Human Rights Law and
International Labour Rights

Spring 2011

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1 Summary

This thesis examines the ideas of inclusion and exclusion in international law, specifically in regards to persons migrating due to climate change. Its main focus is an examination of current discussions and proposed solutions to the issue of climate change migration and a critical analysis of the exclusion of climate change migrants within this discourse, along with a discussion of how those migrating due to climate change can challenge this discourse through affirmative political agency theory.

This thesis begins with a background to the issue of climate change and migration. It firstly attempts to apply human rights language to the scientific climate change predictions given by the IPCC in order to establish the human rights impact of climate change. It then looks at which states are most likely to be negatively affected by climate change and resultant predicted human migration patterns, before discussing the problems with climate change migrants fitting within existing migration regimes in international law.

The next section looks at current proposals for addressing climate change migration and mounts a critique against them. It uses the work of Jacques Rancière on the consensus to argue that the discourse running through the proposals, rather than recognising climate change migrants as human rights holders, is maintaining the existing excluding consensus by positing CCMs as ‘absolute victims’. This section furthermore examines why its problematic to conceive of CCMs in this way, in terms of maintaining the rules which caused the problem initially, in terms of perception of solutions proposed and in terms of consideration of arguments for acting.

The final part of this thesis addresses the issue of how CCMs can challenge the consensus, as embodied in this discourse, specifically in the context of international law. It first examines whether international law could be used in an act of dissensus, before examining whether an act of dissensus could be staged within the international legal system.

This thesis concludes that the way the international, including the academic, community is approaching the issue of climate change migration is not based on seeing climate change migrants first and foremost as subjects of human rights and whose rights need protection, rather it is based on trying to find ways to bring climate change migrants within the consensus as a path to human rights protection. That it is prioritising respect for the rule that says people are not free to move from areas where they will suffer a deterioration in their human rights, even where it is caused by other people, rather than prioritising respect for the human rights of those affected.

Preface

The idea for this thesis evolved throughout the Spring of 2011. Climate change and migration have been topics that the author has thought about separately for a number of years and this thesis represents the coming together of these two thought processes to examine an issue likely to have a great impact in the coming century. The author began by looking at whether labour migration could be ‘the solution’ to the issue of climate change migration, but began questioning his own validity to propose a solution to a problem that in all likelihood won’t affect him and started to question why others were doing the same. The result of this was a thesis far away from proposing a solution to climate change migration, and in fact one that rejects such a proposal from someone such as myself. Rather, it is a critical voice against the climate change migration discourse and an examination of the emancipatory potential of international legal institutions for those excluded by this discourse – the climate change migrants. The title of this thesis is taken from the 1944 Howard Hawks movie of the same name.

None of this would have been possible without the help, advice and support of a number of people.

I’d firstly like to thank my parents, whose support and encouragement throughout this Masters programme has been invaluable. Thanks also to my brothers and sister, all of whom have been ready to help me in any way needed and to cheer me up if I ever felt down.

Thanks also go to my supervisor, Professor Gregor Noll, for his insightful comments and thoughts, which have helped me to get to grips with this topic.

Amin Parsa, who’s constructive criticism, musings about philosophy and patience have been instrumental in this thesis. I think I can safely say that a good majority of this thesis was in some way influenced by him.

Aslihan Bilgin, Estelle Toureau and Burak Haciahmetoglu for being excellent sources of advice and help in this thesis. Mahmoud Keshavarz for helping me understand Rancière.

Andrew Hardiman for having faith. Michael Degerald for keeping me laughing. Abigail Wooding and Kate Baxter for dragging me through spells of boredom; making me cups of tea and taking me for ice-cream on Budleigh beach. Elena Dan for drinking real cups of tea with me.

Niko Tatulashvili, Ellen Sjöberg, Maria Orchard, Ashtar Yakob, Pauline Etemad, Emil Albihn Henriksson, Emily Diab, Felix Bengtson, Jessica Vindex, Mesganaw Mulegeta, Gunnar Narfi Gunnarson, Lida Ayoubi, Camilla Silva Floistrup, Joanna Nilsson and everyone else for keeping me

entertained in and out of the library and making sure that my mind was constantly refreshed through many, many tea-breaks.

Abbreviations

ACHR	American Convention on Human Rights
CCM	Climate change migrants
COMESA	Common Market for Eastern and Southern Africa
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GATS	General Agreement on Trade in Services
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
IDT	Inhuman or degrading treatment or punishment
ILC	International Labour Conference
ILO	International Labour Organisation
IOM	International Organisation for Migration
IPCC	Inter-governmental panel on climate change
RC	Convention Relating to the Status of Refugees
UNASUR	Union of South American Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs

2 Introduction

“[People] find themselves surrounded by hideous poverty, by hideous ugliness, by hideous starvation. It is inevitable that they should be strongly moved by all this...Accordingly, with admirable, though misdirected intentions, they very seriously and very sentimentally set themselves to the task of remedying the evils that they see. But their remedies do not cure the disease: they merely prolong it. Indeed, their remedies are part of the disease. They try to solve the problem of poverty, for instance, by keeping the poor alive; or, in the *case* of a very advanced school, by amusing the poor. But this is not a solution: it is an aggravation of the difficulty. The proper aim is to try and reconstruct society on such a basis that poverty will be impossible. And the altruistic virtues have really prevented the carrying out of this aim ... As the worst slave-owners were those who were kind to their slaves, and so prevented the horror of the system being realized by those who suffered from it, and understood by those who contemplated it, so,...the people who do most harm are the people who try to do most good...Charity degrades and demoralizes...Charity creates a multitude of sins.”¹

The discourse on climate change migration today could easily find resonance in Wilde’s 1915 critique of charity. Those attempting to find a solution to the issue of persons migrating due to climate change have taken up this charity-based approach to solve the issue; they have tried to fit and shape climate change migrants and existing migration systems together in order to save those migrating due to climate change, rather than recognising that it is these systems themselves that are denying climate change migrants their human rights. This critique of charity finds its clear corollary in Rancière’s notion of the consensus and the exclusion of those harmed by it from challenging its order by positing them as absolute victims.

This thesis will discuss this exclusion of climate change migrants from the current discourse on climate change migration and the problems of human rights it causes, using Rancière’s ideas of consensus/dissensus and the absolute victim. It will also try to examine ways climate change migrants can challenge the consensus, which prohibits them from leaving areas where their human rights are negatively affected by climate change, within the framework of international law.

The starting point of this thesis has to be an acknowledgement that the author is not someone likely to have to migrate due to climate change and, even were this so, he comes from the position of having a high level of

¹ O. Wilde, “The Soul of Man Under Socialism” New York: Max N. Maisel 1915 pp.3-4, quoted in S. Zizek, ‘Living in the End Times’ Verso 2010 p.118, with some additions from the original source (digital resource of The Soul of Man Under Socialism viewed: <http://www.gutenberg.org/dirs/etext97/slman10h.htm>)

freedom of movement. What has been attempted in this thesis is not to propose or suggest any solution to the issue of climate change migration, but to explore whether international law has the capability of being a stage for dissensus, should this be the route taken by those migrating due to climate change. However, it has to be recognised that in assessing international law as a forum for dissensus, I am not approaching the issue from a neutral position.

The thesis will begin by looking at definitions, delimitations and setting out the methodology. Chapter Two will then look at the background to the issue of climate change migration. It will discuss the effects of climate change through the lens of human rights and identify the main human rights likely to be affected. It will subsequently look at the areas of the world likely to suffer the greatest effects of climate change and at the migration implications of these deteriorations in human rights. It will end by considering current migration systems, both protection and labour-based, at both the international and regional levels, and discuss their inability to include climate change migrants *as a class* within their respective ambits.

Chapter Three will begin by examining the discussions and proposals made to overcome the problems identified with current migration systems. It will look at discussions by both intergovernmental and non-governmental organisations, as well as the more substantial body of academic literature on the issue, and will attempt identify threads running through the solutions offered. Using Jacques Rancière's notions of consensus/dissensus and the absolute victim, it will then go on to argue that the discourse as whole is problematic, due to its positing of climate change migrants as the 'absolute victim', and as such is trying to include them within the consensus as a path to securing their rights, rather than trying to secure their rights from the outset. Following from this, the problems with this perception, in terms of human rights, agency and justification for finding a solution will be discussed.

Chapter Four will look at the possibilities for climate change migrants to create a dissensus. It is designed to examine whether dissensus by climate change migrants is possible through the medium of international law. It will begin by making a legal, human rights law argument for the obligation on states to facilitate climate change migration and will discuss the utility of such an approach. It will continue by looking at how the International Labour Organisation could be used to stage a dissensual act. In this section, other forums for creating a dissensus within the ambit of international law will also be discussed, along with a consideration of the problems with using international law to construct a dissensus and of using the ILO as a stage for doing so.

The thesis will conclude by summarising the arguments made in the preceding chapters. It will show that there is a fundamental problem with the perception of climate change migrants in the current discourse and that there are ways for climate change migrants to challenge this through an act

of dissensus within international law. However it will highlight that the method suggested within this thesis, while being perceived by the author as being the best possible way to create a dissensus within the international legal system, is just one way of a number of possible ways for climate change migrants to create a dissensus.

2.1 Definitions

Defining those migrating due to climate change has been laborious work for a number of authors. The classic starting point in any definitional discussion within this field is the definition of ‘environmental refugee’ proposed by El-Hinnawi of the United Nations Environmental Programme in 1985, “people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.”² This has led to a number of subsequent definitions and disagreements on definition, with even the name of this class of people (environmental refugee/climate refugee/environmental migrant/climate migrant, among others) being hotly debated and in fact one of the very problems with this discourse is this classification process, which will be discussed later in this thesis.

This thesis will not address the issue of what legally constitutes or what should even be the legal title of this class of people. This thesis is concerned with people who are firstly migrating and secondly have climate change as at least one reason for doing so. However, due to the practicalities of language, this thesis will refer to this undefined class of people predominantly as climate change migrants, not as a definition, but as a description of a factor (climate change) and of a person performing an action (migrant), although other terms will be used indiscriminately, particularly when looking at current discussions, and should not be taken as an endorsement of any particular term.

2.2 Delimitations

The primary focus of this thesis is on the way those migrating due to climate change are being excluded from participation on proposals for their future, why this is occurring, problems with this exclusion and ways to demand inclusion, however it is not designed to propose any solution to climate change migration or even to suggest how climate change migrants can create a dissensus. To do so would be again to deny their agency and replace their voices with mine. Rather it will examine the possibility of different international platforms being used to stage such a dissensus and their suitability for doing so and of whether international law could be used in this way. There will also be no examination of ways to stage a dissensus

² B. Docherty and T. Giannini, ‘Confronting a rising tide: A proposal for a convention on climate change refugees’ 33 Harv. Env. L. Rev. 350 (2009), p.363

outside of the international legal framework; this is not to say that I believe that international law is the only way create a dissensus in this situation, in fact I have no authority to say how a dissensus should be created, however as a legal thesis, international law will be the sole focus of this work. Furthermore, this work will not seek to examine the validity of climate change predictions. Climate change, and the anthropocentric nature of it, has been accepted as scientific fact by the vast majority of scientists working in this field and therefore this work will use the most widely recognised data, provided by the Inter-Governmental Panel on Climate Change, as authoritative. Nor will this thesis discuss whether migration due to climate change is likely to be affected by adaption strategies; while migration predictions will be briefly looked at as a background to why these discussions are even occurring, looking in detail into these predictions is beyond the remit of this work.

2.3 Methodology

Research for this thesis was primarily textual. A number of legal and non-legal reports, documents, books and articles were consulted, as well as websites and online databases. International and regional law was looked at, as were scientific reports of the IPCC for the background on climate change migration and works on affirmative political agency for the substantive sections of the thesis. Case studies conducted by other authors were furthermore referred to for some sections of this work. A human rights and affirmative political agency perspective was followed throughout this thesis.

3 Background

Climate change is likely to cause a deterioration in the human rights of people across the globe and is likely to displace somewhere in the region of 200 million people. Current protection and labour migration regimes are unlikely to be able to encompass both displacement of this kind and on this scale.

This section will examine the statements made above in greater depth in order to provide the background on the topic of climate change and migration. It will start by examining the human rights implications of climate change, including the way in which they are going to occur disproportionately in certain areas of the world. It will then examine the predicted migration implications arising from climate change and any patterns likely to occur. Finally, it will examine current migration systems and discuss the problems faced by climate change migrants in fitting within these regimes.

3.1 Human rights and climate change

The second working group of the Intergovernmental Panel on Climate Change (IPCC) has produced some of the most respected reports assessing the likely impact of climate change on human beings. While these reports do not speak in the language of human rights, the areas they cover clearly respond to different human rights, albeit without uniformity as to rights covered across the regions. Furthermore, the World Bank has recently conducted a study identifying the states most likely to be affected by climate change. In this section, IPCC will firstly be discussed and related to a number of human rights, in an attempt to create a clear picture of how climate change will impact the realisation of these human rights. After this, the information contained within the World Bank study will be examined to determine where the impact of climate change is likely to be felt.

3.1.1 The human rights impact

The second working group of the IPCC, as stated above, does not take a human rights approach when examining the likely impacts of climate change. However, looking at their predictions through a human rights lens may help to understand the human rights dimension of climate change. The information in the IPCC reports roughly corresponds to impacts on the rights to an adequate standard of living, food, health, housing, life, social security, water and work, as well as to indigenous rights, each of which will be discussed in turn.

It should be noted that the language of violations is not used here; the nexus between climate change and human rights violations, where the violators are not solely the states who have jurisdiction over the individual, will be discussed in more depth in Chapter Four; this section rather tries to illustrate how the realisation of human rights will be affected by climate change.

3.1.1.1 The right to an adequate standard of living, the right to social security and the right to work

These rights, though covering distinct areas of the economic livelihood of individuals, have been grouped together as they are likely to be affected by similar events in the context of climate change.

Climate change is likely to negatively affect tourism in both Africa and Small Island nations, which in the latter plays a large part of many economies.³ In addition, Small Island economies are much more vulnerable to the impacts of shocks, including sudden climatic events, than larger economies.⁴ The poor in urban areas of Asia are particularly vulnerable to negative effects on their economic livelihoods due to a predicted decline in already limited access to profitable livelihood activities.⁵ Climate change is also likely to affect the ability of indigenous peoples in North America and in Polar Regions to carry out traditional livelihood activities.⁶

The rights to an adequate standard of living, to social security and to work are all likely to be affected as a consequence of this. The decrease in access to employment not only affects the right to work, but also the right to work in employment giving full-measure to the worker's skill, and may affect the right to an adequate standard of living. A consequence of decreases in the overall economy of a country may also have a negative effect on the right to social security, as states may be less able to maintain previous levels of social protection.

3.1.1.2 The right to food

Climate change will affect the right to food in different ways in different areas. In Asia, risk of hunger could increase by forty percent by 2050 under the IPCC's A2 scenario⁷ and it is likely that agricultural, livestock and

³ IPCC 'Climate Change 2007: Impacts, adaptation and vulnerability' Working Group II Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 2007, Cambridge University Press pp. 450 and 701-702

⁴ *ibid* pgs. 701-702

⁵ *ibid* pgs. 487-489

⁶ *ibid* pgs. 632-633 and 665-668

⁷ Differentiated and regionally integrated world economy, lowest per capita growth. Continually increasing population, little regional interaction. Slowest and most fragmented development. Temperatures are expected to increase by 2.7-4.8°C from 1980-1999 by 2090. IPCC 'Climate Change 2007: Impacts, adaptation and vulnerability' Working Group II

fishery zones will move northwards,⁸ impacting the right to food for people in southern countries. In Latin America, under the A2 scenario, an additional four million people are likely to be at risk of hunger by 2080 and desertification and salinisation will affect eighty percent of agricultural land, which may increase production costs,⁹ particularly impacting the right to food for the poor.

However, in other regions the outlook is more mixed. In Africa, the IPCC predict that it is likely that access to crops will decrease in some areas, while increase in others, that fish stocks could decrease by up to eighty percent and that, while small livestock farms could increase food availability, large livestock farms are likely to have decreased production.¹⁰ Some Small Island nations are likely to suffer food insecurity, while others will increase production.¹¹ In Europe and North America, on the other hand, it is likely that food production will increase with changes to the climate.¹²

3.1.1.3 The right to housing

The right to housing is likely to be affected worldwide. Coastal cities in Asia, Africa, Latin and North America and Australia are particularly vulnerable to sea-level rise.¹³ In Small Island Nations the majority of people tend to live near the sea and sea-level rise may have catastrophic consequences, particularly as many homes are now built in a non-traditional way, making rebuilding more difficult.¹⁴

3.1.1.4 The right to health

Climate change is likely to severely impact the right to the highest attainable standard of health worldwide. In Africa, while Sahel and South-West areas are likely to become unsuitable for malarial transmission, malaria is likely to extend to highland areas in East Africa and into South Africa, severely effecting populations with little genetic resistance. Cholera, malnutrition and Rift Valley Fever could also increase across Africa.¹⁵ Climate change is likely to increase the risks of diarrhoea and malnutrition in South Asia, increase the risk of dengue fever in India and China and the risk of malaria and cholera across the whole of Asia.¹⁶ The range of malaria is likely to increase in South America, with diarrhoea and dengue fever also likely to be

Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 2007, Cambridge University Press p.147

⁸ *ibid* pp. 479-483

⁹ *ibid* pg. 597

¹⁰ *ibid* pgs. 447-448

¹¹ *ibid* pgs. 698-700

¹² *ibid* pgs. 554-556 and 631-632

¹³ *ibid* pgs. 450, 484-485, 521-522, 599, 630 and 632-633

¹⁴ *ibid* pgs. 701-702

¹⁵ *ibid* pgs. 446-447

¹⁶ *ibid* pg. 486

major climate change-induced health risks.¹⁷ Diabetes, obesity, cardiovascular disease and dental cavities may increase in Polar Regions as traditional food sources have to be replaced with non-traditional food.¹⁸ Small islands are already seeing climate change impacting the right to health through increased diarrhoea and infectious diseases, which are likely to increase.¹⁹ The risk of dengue fever is likely to increase in Australia.²⁰

3.1.1.5 Indigenous peoples rights

In addition to the human rights impacts on indigenous peoples associated with other rights, indigenous peoples in North America are likely to be particularly vulnerable to climate change²¹ and changes in the terrestrial environment have the potential to severely disrupt the traditional lifestyles of arctic peoples.²²

3.1.1.6 The right to life

Apart from the right to life implications associated with the right to health, there are likely to be severe disaster-related right to life implications of climate change. In Asia, the destructive potential of tropical cyclones is likely to increase,²³ while in North America there are likely to be more intense storms in coastal areas.²⁴ Heat waves are likely to hit Europe and North America,²⁵ jeopardising the right to life, while there is likely to be increased flooding of cities and coastal areas in Asia, Africa, Latin America and North America²⁶ and increased flood-induced infrastructure damage in Small Island Nations,²⁷ which could have severe right to life implications. In Polar Regions, deaths are expected to increase due to temperature extremes and weather events.²⁸

3.1.1.7 The right to water

While there is likely to be some positives, with Northern Europe experiencing increased run-off²⁹ and water stress reducing in Eastern and

¹⁷ *ibid* pgs. 599-601

¹⁸ *ibid* pgs. 671-672

¹⁹ *ibid* pgs. 700-701

²⁰ *ibid* pg. 524

²¹ *ibid* pgs. 632-633

²² *ibid* pgs. 665-668

²³ *ibid* pgs. 484-485

²⁴ *ibid* pg. 630

²⁵ *ibid*, pgs. 632 and 557-558

²⁶ *ibid* pgs. 450, 484-485, 599-601 and 632-633

²⁷ *ibid* pgs. 702-703

²⁸ *ibid* pgs. 671-672

²⁹ *ibid*, pgs. 549-551

Western Africa,³⁰ overall, climate change is likely to have a profoundly negative impact on the right to water. It is likely that up to six hundred million people in Northern and Southern Africa,³¹ one hundred and seventy-eight million in Latin America,³² forty-four million in the EU15, Norway and Switzerland³³ and one billion people in Asia will face increased water stress this century.³⁴ Water stress is also likely to increase in the south-west of the USA³⁵ and in south-east Australia.³⁶ Many Small Island nations are likely to face severe water stress.³⁷

3.1.2 Most vulnerable states

The states most vulnerable to climate change, and hence where people are most likely to face a deterioration in their human rights, are predominantly found in Central America, North and East Africa and South and East Asia, according to a World Bank study, which identified the twelve countries most at risk from climate change, in each of five criteria: drought, flood, storm, sea-level rise and agriculture.³⁸ Particularly at risk are: Vietnam, India, Bangladesh and China, likely to be affected by three of the five categories examined by the World Bank, and Malawi, Ethiopia, Zimbabwe, Mozambique, Mauritania, Sudan and Pakistan, likely to be affected by two.³⁹



[Shaded areas represent the countries found in at least one of the five categories]

³⁰ *ibid* pgs. 444-446

³¹ *ibid*

³² *ibid* pgs. 597-599

³³ *ibid* pgs. 549-551

³⁴ *ibid* pgs. 483-484

³⁵ *ibid* pgs. 627-629

³⁶ *ibid* pgs. 516-517

³⁷ *ibid* pgs. 695-697

³⁸ World Bank Environment Department, 'Convenient solutions to an inconvenient truth: ecosystem-based approaches to climate change' 2009, pg. 19

http://www.irinnews.org/pdf/Convenient_Solutions_to_an_Inconvenient_Truth.pdf

³⁹ *ibid*

3.2 Climate change and migration

According to Myers, one of the most widely cited authorities on climate change and migration, there were approximately 25 million ‘environmental refugees’ in 1995; these were persons who had moved as they were unable to gain a secure livelihood in their homelands, due to drought, soil erosion, desertification, deforestation and other environmental problems.⁴⁰ By 2009, a report by UNOCHA and the Internal Displacement Monitoring Centre found that over 20 million people were displaced by sudden-onset climate-related disasters in that year alone, with it likely that many more were displaced by slow-onset climate-change related drivers.⁴¹ As Reuveny points out, land degradation has already caused 12-17 million Bangladeshis to move to India and half a million to migrate internally since 1950.⁴²

Predictions for the future vary widely. The estimate tentatively used by the International Organisation for Migration (IOM) is that of Myers, namely 200 million people migrating due to climate change by 2050, however this is acknowledged as being just one of many varied predictions.⁴³ At the top end, a Christian Aid report suggests 1 billion people could be displaced due to climate change by 2050; 50 million per year by conflict, 50 million per year from natural disasters, 645 million in total by development projects, 250 million total permanently displaced by climate change related phenomena such as floods, droughts, famines and hurricanes and 5 million in total who will flee their countries and be accepted as refugees.⁴⁴

While it is possible to estimate areas with the potential for climate change-induced displacement, in particular by looking at the states listed by studies such as the World Bank, which predict states most likely to be affected by climate change, it is difficult to say for certain which areas are going to suffer climate change-induced displacement and where those displaced are likely to migrate to. Myers, in 2001, predicted that the persons most at risk of sea level rise, and therefore of having to migrate, were located in; Bangladesh, China, India, Egypt and Small Island Nations, who would constitute 75% of all environmental refugees, with the additional 25% of people migrating due to severe droughts and other climate

⁴⁰ N. Myers, ‘Environmental Refugees: An emergent security issue’ 2005 OSCE EF.NGO/4/05 <http://www.osce.org/node/14851>, p. 1

⁴¹ UNOCHA and the Internal Displacement Monitoring Centre, ‘Monitoring disaster displacement in the context of climate change’ 2009, p. 8 <http://www.internal-displacement.org/8025708F004CFA06/%28httpPublications%29/451D224B41C04246C12576390031FF63?OpenDocumentb>

⁴² R. Reuveny, ‘Climate change induced migration and violent conflict’ *Political Geography* 26 (2007) 658

⁴³ O. Brown, ‘Migration and Climate Change’ IOM 2008 p. 12 http://www.migrationdrc.org/publications/resource_guides/Migration_and_Climate_Change/MRS-31.pdf

⁴⁴ Christian Aid, ‘Human Tide: the real migration crisis’ May 2007, p. 5 <http://www.christianaid.org.uk/Images/human-tide.pdf>

dislocations,⁴⁵ which appears to be a restatement of his 1995 predictions.⁴⁶ However, as he himself admits, this is a ‘rough and ready’ prediction and designed as an initial insight only.⁴⁷ Warner et al also predict as likely; movement from irrigated areas reliant on central Asian glaciers to inland cities and coastal megacities, leading to more vulnerability to sea level rise;⁴⁸ internal or international migration from areas of Central America relying on precipitation for farming;⁴⁹ temporary migration between countries in the Sahel;⁵⁰ mass migration from flood-prone areas of Bangladesh, possibly to urban areas;⁵¹ migration away from the Mekong delta in Vietnam;⁵² migration away from areas facing desertification and areas facing sea level rise along the Nile Delta;⁵³ and migration of persons in Tuvalu and the Maldives from smaller to larger islands.⁵⁴

While it has been pointed out that climate change is unlikely to be the sole cause of migration, as McAdam states, “It is conceptually problematic and empirically flawed in most cases to suggest that climate change alone *causes* migration,”⁵⁵ climate change is a driver that exacerbates other conditions and can change a migration-decision from a possibility to a necessity.

“Climate change will have an ‘incremental impact’, ‘*add[ing]* to existing problems’ and ‘compound[ing] existing threats. As one government official in Kiribati observed, climate change overlays pre-existing pressures—overcrowding, unemployment, environmental and development concerns—which means that it may provide a ‘tipping point’ that would not have been reached in its absence.”⁵⁶

It could therefore be easily compared to the persecution requirement of Convention refugee status, for example, where other reasons, such as political powerlessness, lack of economic resources that would enable an individual to migrate to another country outside of the Refugee Convention framework and the socio-economic situation of the class of people, may be just as important reasons to migrate, despite persecution being the tipping point.

⁴⁵ N. Myers, ‘Environmental Refugees: A growing problem of the 21st Century’ The Royal Society 2001, p. 4 <http://rstb.royalsocietypublishing.org/content/357/1420/609#related-urls>

⁴⁶ N. Myers, ‘Environmental Exodus: An emergent crisis in the global arena’ Climate Institute 1995, p. 8 <http://www.climate.org/PDF/Environmental%20Exodus.pdf>

⁴⁷ *ibid* pg. 148

⁴⁸ K. Warner, C. Ehrhart, A. de Scherbinin, S. Adamo and T. Chai-Onn, ‘In search of shelter: mapping the effects of climate change on human migration and development’ Care International, Columbia University, UNHCR, UNU-EHS, World Bank 2009, p. 5 http://www.ciesin.columbia.edu/documents/clim-migr-report-june09_final.pdf

⁴⁹ *ibid* p. 7

⁵⁰ *ibid* pp. 9-10

⁵¹ *ibid* p. 13

⁵² *ibid* p. 15

⁵³ *ibid* p. 17

⁵⁴ *ibid* pp. 18-19

⁵⁵ J. McAdam, ‘Swimming Against The Tide: Why A Climate Change Displacement Treaty Is Not The Answer’ International Journal of Refugee Law, Vol. 23, No. 1, 2011 ; UNSW Law Research Paper No. 2010-61. Available at SSRN: <http://ssrn.com/abstract=1718868>, p.

10

⁵⁶ *ibid*

3.3 Climate change migration and current migration regimes

International law, as a system, is built on the premise that states have an absolute right to control the entry to and residence of non-nationals in their territory. This has been emphasised in numerous decisions of international bodies, including human rights courts.⁵⁷ Exceptions to this rule exist however in the form of migration regimes.

Current international migration regimes encompass the protection-based Refugee Convention and principle of non-refoulement and the labour-based GATS, as well as regional free movement of persons treaties. This section will briefly examine these regimes in order to demonstrate that while all of these may offer possibilities for some of those affected by climate change to migrate, none of them offers the possibility for persons to migrate away from areas where their human rights are severely affected by climate change as a class.

3.3.1 The Refugee Convention

The ability of persons migrating due to climate change to benefit from the protection of the RC is undisputed. Those migrating solely due to climate change are unable to benefit from the protection of the refugee convention as it is currently interpreted. UNHCR has categorically stated that environmental factors and climate change are not of themselves enough to amount to grounds for refugee status.⁵⁸ However, those that are migrating due to persecution for reasons of one of the Refugee Convention grounds, where climate change is one factor in that persecution, are able to claim refugee status, as in the case of the current conflict in Darfur.⁵⁹

However, while the ability of the RC to include persons migrating due to climate change is disputed, whether, through interpretation, the RC could include persons displaced due to climate change will be briefly discussed later, but suffice it to say that UNHCR is resistant to any such interpretation.⁶⁰

⁵⁷ See, for example: *Boultif v Switzerland* ECtHR (2001) 54273/00, para 46, *Saadi v United Kingdom* ECtHR (GC) (2008) 13229/03, para 64, *Maslov v Bulgaria* (GC) (2008) 1638/03, para 68 etc. etc.

⁵⁸ UNHCR, 'Climate change, natural disasters and human displacement: a UNHCR perspective' 2009, pg. 4 <http://www.unhcr.org/4901e81a4.html> pg. 9

⁵⁹ O. Brown, *supra* n. 43, p. 33

⁶⁰ UNHCR, *supra* n. 58

3.3.2 The principle of non-refoulement

Climate change migrants residing in another state may be able to use this principle to prevent their return to their home states, in the event of severe climate change. As Docherty and Gianni point out, this may be useful to forced climate migrants where return is impossible, such as when the home state has become uninhabitable⁶¹ and where it could be argued that return to such a state would amount to torture, inhuman or degrading treatment or punishment, as the person would face the anguish of waiting for a certain death.⁶² However, it would only be beneficial to those who are already outside the country of their nationality and whose situation, were they to be returned, would reach the threshold of torture or IDT.

3.3.3 General Agreement on Trade in Services

GATS under the World Trade Organisation allows for the negotiated liberalisation of temporary migration for employment.⁶³ However, this is unlikely to be a useful solution for those migrating due to climate change. Firstly, while temporary is not defined, it cannot be defined so as to mean permanent,⁶⁴ meaning that those who cannot return would not be helped by GATS. Secondly, GATS does not allow migration to be liberalised for one nationality and not others,⁶⁵ meaning that states couldn't liberalise migration from states heavily affected by climate change and not liberalise migration from all other GATS members. This means that for climate change migrants to be able to make use of GATS migration, states would have to liberalise migration for virtually all sectors and skill-levels, something they have been very reluctant to do so far,⁶⁶ while those not working would be excluded.

3.3.4 Regional free movement of people agreements

Regional free movement areas may enable some climate change migration to occur, however, as its name implies, it will depend on the region the person lives in. Currently, the European Union is the only regional organisation which allows workers from one member state to freely move to another, although several regional blocs intend to do this in the future,

⁶¹ B. Docherty and T. Giannini, 'Confronting a rising tide' Harvard Environmental Law Review Vol. 33 2009, p. 358 (footnote)

⁶² Parallels could be drawn with the case of *Soering v UK* (1989) in the European Court of Human Rights

⁶³ Annex II of the General Agreement on Trade in Services

⁶⁴ P. Bhatnagar and C. Manning, 'Regional arrangements for mode 4 in the services trade: lessons from the ASEAN experience' World Trade Review (2005) 4:2. 174

⁶⁵ Article II of GATS

⁶⁶ R. Chanda, 'Movement in natural persons and trade in services: liberalising temporary movement of labour under GATS' ICRIER (1999) p. 23

including UNASUR⁶⁷ and COMESA.⁶⁸ Mechanisms such as this would allow persons to move from areas negatively affected by climate change to areas not so negatively affected, however outside of the EU there is no scope for free movement at the moment and it is unclear when and under what conditions other regional blocs will develop free movement of workers. There is also the problem of coverage; regional blocs do not cover all countries and are not all looking at providing free movement of workers. There is also again the problem of the exclusion of non-workers. Therefore it is unlikely that regional blocs, as they current stand, would be of use to the majority of climate change migrants.

3.4 Synthesis

Climate change is likely to result in the deterioration of human rights protection for many people across the globe, particularly the rights to an adequate standard of living, food, health, housing, life, social security, water, work, and indigenous rights. Those most likely to suffer a deterioration in their human rights due to climate change are persons living in Central America, North and East Africa and South and East Asia.

Climate change is likely to be a driver, or the ‘tipping point’ in the migration of somewhere in the region of 200 million people, who will be forced to migrate in order to prevent a deterioration in their human rights. While it cannot be predicted with certainty where the majority of migration is likely to occur, migration may be more likely to occur in states likely to be more affected by climate change.

The Refugee Convention, the principle of non-refoulement, GATS and regional free movement of people treaties may provide some scope for those affected by climate change migration to migrate, however none of the mechanisms allows for climate change migrants to migrate as a class.

⁶⁷ Bloomberg, ‘South American Presidents Agree to Form Unasur Bloc’ 23/05/08
<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abWOMOeJUK7Y&refer=home>

⁶⁸ COMESA: COMESA Policy for Immigration
http://programmes.comesa.int/index.php?option=com_content&view=article&id=199%3Acomesa-policy-for-immigration-&catid=14%3Aclimate-change-reports&Itemid=125&lang=en

4 Climate change migration discussions: reinforcing the consensus, victimising the migrant

Arising from the lack of any mechanism currently considered as being able to assist those migrating due to climate change, a number of governmental, non-governmental and academic actors have discussed ways in which climate change migration could be addressed.

This section will examine the content of these discussions and will put forward a critique of the discourse running through the literature. It will be argued that the current discourse is attempting to bring climate change migrants within the consensus as a path to human rights protection, rather than trying to secure their human rights through challenging the consensus. It will furthermore be suggested that the effect of this is the proposing of solutions which; fail to protect the human rights of those migrating, do not look to the opinions of climate change migrants and lack a human rights law-based argument for acting.

4.1 Current discussions on climate change migration

At the international level, very little has been done in the way of concrete proposals for addressing climate change migration. The UN Framework Convention on Climate Change (UNFCCC) is the only international agreement mentioning climate change migration and it does so in a very tentative manner; inviting states to take, ‘measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.’⁶⁹ Similarly, UNHCR has been reticent about proposing a solution, beyond stating that it would be ideal if there was a multilateral agreement on where and on what basis persons becoming stateless due to climate change would be permitted to move elsewhere.⁷⁰ Brown, writing for the IOM, has reviewed a range of

⁶⁹ Decisions adopted by the Conference of the Parties of the International Framework Convention on Climate Change, 16th Session Cancun 2011 FCCC/CP/2010/7/Add.1, Article 14(f)

⁷⁰ United Nations High Commissioner for Refugees (UNHCR), supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council (NRC), ‘Submission: Climate Change and Statelessness: An Overview’ to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany

possible solutions in its climate change positions papers, including an expanded refugee definition and labour migration, without endorsing any one policy⁷¹ and the Parliamentary Assembly of the Council of Europe has only encouraged that a coordination structure for environmental migration be set up.⁷² Webber and Barnett, writing for the World Bank, argue that migration is useful as an adaptation policy, without specifying how it could be organised, save for saying that forced relocation of communities should only be resorted to as a last option.⁷³

Outside of discussions on the international level however, a range of concrete suggestions have been proposed by both non-governmental organisations and academics. These suggestions can be grouped together under roughly five headings: an extension to Refugee Convention status, an alternative form of protection status, the expansion of labour migration, international supervision with regional negotiations on migration and the creation of a body to facilitate migration.

4.1.1 Refugee convention

Those arguing for an extension to refugee status can be grouped into two different sets. The first is that of Havard⁷⁴ and Conisbee and Simms,⁷⁵ who argue that persons displaced due to climate change are not currently able to be covered by the refugee convention and due to this the convention should be amended in order to include them.⁷⁶ Aminzadeh⁷⁷ has a similar line of argument, but comes to the conclusion that a new convention covering environmentally displaced persons would be just as useful, putting her somewhere between this group and the next. The second approach is that of Söderbergh⁷⁸ and Cooper,⁷⁹ who argue that (at least some kinds of) persons displaced by climate change can be accommodated within the refugee convention through progressive interpretation of its provisions.⁸⁰

⁷¹ O. Brown, *supra* n.43 pp. 36-40

⁷² Parliamentary Assembly of the Council of Europe, 'Environmentally induced migration and displacement: a 21st century challenge' Report of the Committee on Migration, Refugees and Population December 2008 Doc. 11785, p. 4 para 21

⁷³ J. Barnett and M. Webber, 'Accommodating Migration to Promote Adaptation to Climate Change' World Bank Policy Research Working Paper 5270, pp. 3, 4, 46

⁷⁴ B. Havard, 'Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law' 18 Vill. Envtl. L.J. 65 2007 65

⁷⁵ M. Conisbee and A. Simms, 'Environmental Refugees: The Case for Recognition' New Economics Foundation Pocketbook 2003

⁷⁶ Brooke Havard, *supra* n.74, p. 79, Conisbee and Simms *ibid*, p. 33, J. B. Cooper, 'Symposium on Endangered Species Act: Environmental Refugees: Meeting the Requirements of the Refugee Definition' New York University Environmental Law Journal, 1998 p. 494

⁷⁷ S. C. Aminzadeh, 'A moral imperative: the human rights implications of climate change' 30 Hastings Int'l & Comp. L. Rev. 231 2006-2007

⁷⁸ C. Söderbergh, 'Human Rights in a Warmer World: The Case of Climate Change Displacement' LUP Working Paper No. 2011-01-28

⁷⁹ J. B. Cooper *supra* n. 76

⁸⁰ C. Söderbergh *supra* n. 78, pp. 43, 51-52, J. B. Cooper *supra* n.76, pp. 502-527

4.1.2 An alternative form of protection status

Of those proposing an alternative form of refugee status, Bierman and Boas and Docherty and Giannini are probably the most cited authors. Bierman and Boas propose a protocol to the UNFCCC, which would recognise, facilitate the movement of and protect ‘climate refugees’⁸¹ based on the principles of planned relocation and resettlement, resettlement instead of temporary asylum, collective rights for local populations, international assistance for domestic measures and international burden-sharing.⁸² This idea of a protocol to the UNFCCC for climate change induced migrants is agreed upon by Shamsuddoha and Chowdhury of Equity and Justice Working Group Bangladesh.⁸³

Docherty and Giannini on the other hand favour a stand-alone climate change refugee treaty,⁸⁴ a draft of which is set out by them and would encompass human rights protections and humanitarian aid, burden-sharing amongst states and the creation of institutions for the implementation of the treaty.⁸⁵ This approach of a stand-alone convention is shared by Hodgkinson et al, who, however, suggest that the level of accommodation or assistance for those migrating could be explicitly tied to historical emissions of greenhouse gases⁸⁶ and by Falstrom, who suggests a convention aligned with the Convention Against Torture, which would offer temporary protection to those displaced by the environment and require state parties to work towards ensuring similar types of environmental problems do not reoccur.⁸⁷ Others, such as the UN High Commissioner for Refugees, Renaud, Bogardi, Dun and Warner, writing for the United Nations University Institute for Environment and Human Security and the European Union EACH-FOR project, Westra and the Environmental Justice Foundation, whilst stating the need for a legal framework that would give those forcibly displaced due to the environment a status similar to that under the Refugee Convention, leave the form of solution open-ended.⁸⁸

⁸¹ F. Bierman & I. Boas, ‘Preparing for a warmer world: towards a global governance scheme to protect climate refugees’ *Global Environmental Politics*, Volume 10, Number 1, February 2010, p. 77

⁸² *ibid* pp. 74-75

⁸³ M. Shamsuddoha and R. K. Chowdhury, ‘Climate Change Induced Forced Migrants: in need of dignified recognition under a new Protocol’ *Equity and Justice Working Group Bangladesh (Equitybd)* April 2009, p. 9

⁸⁴ B. Docherty and T. Giannini, *supra* n. 2

⁸⁵ *ibid*

⁸⁶ D. Hodgkinson, T. Burton, S. Dawkins, L. Young & A. Coram, ‘Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses’ *New Critic* Issue 8, September 2008, p. 2

⁸⁷ D. Zartner Falstrom, ‘Stemming the flow of environmental displacement: creating a convention to protect persons and preserve the environment’ *13 Colo. J. Int’l Envtl. L. & Pol’y* 1 2002, p. 18

⁸⁸ ReliefWeb, ‘UNHCR Chief calls for new tools to address climate-related displacement’ 06/06/11 <http://reliefweb.int/node/406010>, F. Renaud, J. J. Bogardi, O. Dun & K. Warner, ‘Control, adapt or flee: How to face environmental migration?’ *UNU-EHS Interdisciplinary Security Connections* no. 5/2007, pp. 35-36, Environmental Justice Foundation, ‘No Place Like Home: Where next for climate refugees?’ (2009), p. 5, L. Westra, ‘Environmental Justice and the Rights of Ecological Refugees’ *Earthscan* 2009, pp.175-206

4.1.3 Labour migration

De Moor is the main proponent of this type of solution. She argues that, ‘facilitating legal labour migration for vulnerable communities is both a way to prevent forced displacement, and to reduce vulnerability to environmental disruptions’⁸⁹ and therefore that legal, social and financial barriers to migration need to be removed,⁹⁰ whilst also not ruling out the use of asylum for some climate change migrants.⁹¹ However, she fails to propose a specific form of solution for doing so.

4.1.4 International supervision and regional negotiations

The fourth type of solution is discussed by Williams, who proposes recognition of the occurrence of climate change displacement in a post-Kyoto agreement, without necessarily defining climate change displacement or any rights and responsibilities it entails and the creation an umbrella framework at the international level to coordinate regional agreements on climate change displacement.⁹² Mayer argues that this devolved approach is useful as it is likely that, “regional negotiations will result in more ambitious decisions than universal ones.”⁹³

4.1.5 A new international organisation

A final category type of solution proposed, that of creation of a new international organisation, or the refocusing of an existing organisation, with a responsibility for those migrating due to climate change or for environmental reasons more generally is proposed by Brooks Masters, King and McAdam, Brooks Masters suggests the creation of an agency to oversee the response to environmental damage, including planned resettlement if necessary.⁹⁴ King similarly favours this non-treaty approach, but rather proposes a mechanism to coordinate the work of agencies

⁸⁹ N. de Moor, ‘Labour Migration for Vulnerable Communities: A Strategy to Adapt to a Changing Environment’ Paper presented at the ESF-UniBi-ZiF research conference on ‘Environmental Change and Migration: From Vulnerabilities to Capabilities’, Bad Salzflun, Germany, December 5-9, 2010, COMCAD Arbeitspapiere - Working Papers No. 101, 2011, February 2011-03-23, p. 6

⁹⁰ *ibid* p. 9

⁹¹ N. de Moor & A. Cliquet, ‘Seeking Refuge from the Environment: Legal Protection for Environmentally-Displaced Persons’

<http://biblio.ugent.be/input/download?func=downloadFile&fileOid=1087107>, p.14

⁹² A. Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ *Law & Policy*, Vol. 30, No. 4, October 2008 518-520

⁹³ B. Mayer, ‘The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework’ *Colorado Journal of International Environmental Law and Policy*, Vol. 22, No. 3, 2011. Available at SSRN:

<http://ssrn.com/abstract=1755622>, pp. 44-45

⁹⁴ S. Brooks Masters, ‘Environmentally induced migration: beyond a culture of reaction’ 14 *Geo. Immigr. L.J.* 855 1999-2000 874-877

working on environmental displacement, including the coordination of permanent resettlement if necessary.⁹⁵ While, McAdam also suggests that this might be a useful solution in order to overcome the complexities of environmental displacement, without endorsing a particular solution.⁹⁶

4.2 A critique of the current discourse

I change from the word discussions now to discourse, as despite the differences in the discussions and proposals suggested, similar problematic themes run throughout the majority of the literature currently addressing climate change migration.

This section will argue that a fundamental problem with this discourse is that it perceives those migrating due to climate change as ‘absolute victims’ and as such is trying to include them in the consensus as a way to protect their human rights, rather than demanding that they be given a voice and that human rights obligations be respected in relation to them. In order to do so, the nature of the ‘absolute victim’ will first be discussed and the way the literature posits climate change migrants as ‘absolute victims’ will be analysed. The problems with perceiving climate change migrants as absolute victims will then be discussed; failing to address the core issue, proposing solutions which fail to protect the human rights of those migrating, not looking to the opinions of climate change migrants and the lack of a human rights law-based argument for acting.

4.2.1 The ‘absolute victim’

The ‘absolute victim’ is a concept developed by Jacques Rancière, where, in ‘Who is the subject of the rights of man?’ he considers the Arendt paradox with regards to human rights, of:

“either the rights of the citizen are the rights of man—but the rights of man are the rights of the unpoliticized person; they are the rights of those who have no rights, which amounts to nothing—or the rights of man are the rights of the citizen, the rights attached to the fact of being a citizen of such or such constitutional state. This means that they are the rights of those who have rights, which amounts to a tautology.”⁹⁷

He argues that this paradox only works if you ignore a third formulation, that of, “the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not”,⁹⁸ i.e. human rights are

⁹⁵ T. King, ‘Environmental Displacement: Coordinating Efforts to Find Solutions’ 18 *Geo. Int’l Envtl. L. Rev.* 543 2005-2006, 559

⁹⁶ J. McAdam, ‘Environmental Migration Governance’ *Environmental Migration Governance* (February 28, 2009). UNSW Law Research Paper No. 2009-1. Available at SSRN: <http://ssrn.com/abstract=1412002>, p. 24

⁹⁷ J. Ranciere, ‘Who is the subject of the rights of man?’ *South Atlantic Quarterly* 103.2/3 (2004) p. 301

⁹⁸ *ibid*

the rights of people denied as having the rights that they have and given rights that they have not.

The conception of the ‘absolute victim’ is a result of the denial of this third category by the consensus. Consensus is, according to Rancière, ‘the reduction of politics to the police.’⁹⁹ It is,

“a sharing of a “common and non-litigious experience” enabled by a particular ‘partition of the sensible’ [*le partage du sensible*]⁷ determining “a party’s share or lack of it” and which presence is the absence of any gap or supplement. Thus, a partition of the sensible gives *everyone* a specific name and a role; it is a system of coordinates defining modes of being, doing, making and communicating which will count and that which will not count. It is a configuration of inclusion and exclusion that produces a set of self-evident facts of perception and makes certain activities visible and others not, certain speech understood as discourse, and others as noise.”¹⁰⁰

The police is, “that which keeps the power-system whole, which provides a totalising account of the population by assigning everyone a title and a role within the social edifice,”¹⁰¹ it is the system that controls the exclusion and inclusion in, as well as the determination the participation of, constituents of a society, by society itself.¹⁰²

Politics, for Rancière, is an “intervention in the visible and sayable”¹⁰³ and the manifestation of a dissensus transforming the order of the police into a space for the appearance of a subject.¹⁰⁴ It is, “a reaction against the police in a process initiated when those who have no right to be counted as a speaking being make themselves of some account by setting up a ‘wrong’, a “contradiction of two worlds in a single world”, simply by appearing as the supplement that the police order denies.”¹⁰⁵

The consensus attempts to prevent a political act of dissensus against the police by excluding ‘surplus subjects and replacing them with real partners, social groups, identity groups and so on’.¹⁰⁶ It is an attempt to prevent a politics proper; to prevent dissensus external to the consensus itself.¹⁰⁷ The consensus can be maintained by the state but often society as well, “while policing may well be performed by the state, it is frequently done so also be other entities.”¹⁰⁸ To take an example from the article of Gunneflo and Selberg; they claim that the consensus in Sweden is that undocumented migrants are denied their human rights. However,

⁹⁹ J. Rancière, ‘Dissensus’ Continuum 2010 p.42

¹⁰⁰ M. Gunneflo and N. Selberg, ‘Discourse or merely noise? Regarding the disagreement on undocumented migrants’ European Journal of Migration and Law 12 (2010) 173–191, p.175

¹⁰¹ E. van den Hemel, ‘Included but not belonging’ Krisis 2008, Issue 3, p. 21

¹⁰² *ibid* p. 36

¹⁰³ J. Rancière, *supra* n.99 pp. 36-37

¹⁰⁴ *ibid* pp. 37-39

¹⁰⁵ M. Gunneflo and N. Selberg, *supra* n. 102 pp. 175-176

¹⁰⁶ J. Rancière, *supra* n. 97, p. 306

¹⁰⁷ J. Rancière, *supra* n. 99, p. 42

¹⁰⁸ M. Gunneflo and N. Selberg, *supra* n. 102, p. 180

they point out that one of the main organisations representing undocumented migrants makes strictly consensual demands; rather than demanding that the human rights of the undocumented migrants be respected, they ask first for regularisation of the undocumented migrants as a path to human rights protection,¹⁰⁹ i.e. they ask for inclusion of undocumented migrants into the consensus, rather than creating a dissensus in demanding that the human rights of undocumented migrants be respected.

The ‘absolute victim’ is the person perceived as having lost her human rights through inhuman repression and whose rights, therefore, have been inherited by another to enact in her place. It is, then, the occurrence of the consensus on the world stage. Through positing persons as absolute victims, the consensus is able to exclude these persons from having a voice with which to create a dissensus, by the presumption that their rights are transferred to others, who can enact their rights for them, but this time from within the consensus.¹¹⁰

If we relate this back to the original Oscar Wilde quote, it becomes clear that the notion of absolute victim is synonymous with his idea of the problem of charity. As can be seen in the quote above, Wilde critiques charity as prolonging ‘the disease’ rather than curing it; he suggests that charity does not solve the problems of the poor but rather aggravates their difficulty, it “degrades and demoralises”¹¹¹ and argues that the proper aim should be to, “reconstruct society on such a basis that poverty will be impossible.”¹¹² This is clearly linked to the idea of the ‘absolute victim’; it is the idea of doing ‘good’ [enacting rights in their place] for those subjected to hideousness [inhuman repression] while maintaining the construct of society [the consensus], which in reality does not address the structural problems which have created this hideousness [inhuman repression], but rather degrades and demoralises [denies them as being human rights holders].

The absolute victim can therefore be seen as the person perceived of as the subject of charity; the nature of the situation leads people to perceive of them as victims, rather than as right holding humans, which maintains the very system – the consensus – that prevents the ending of the ‘hideous’ situation in the first place.

4.2.2 Climate change migrants as the absolute victim

The consensus existing today is, as demonstrated above, that persons are not allowed to cross borders to prevent their human rights being negatively

¹⁰⁹ *ibid* pp. 178-185

¹¹⁰ Rancière, *supra* n. 97 pp. 306-308

¹¹¹ O. Wilde, quoted in S. Žižek, *supra* n. 1

¹¹² O. Wilde, quoted in S. Žižek, *supra* n. 1

affected, including due to anthropocentric climate change, unless they can fit themselves within the narrow exceptions to this rule provided in international law. Human rights law is a part of the police order which maintains this consensus, through only allowing narrow – and agreed – exceptions to this rule. The inevitably mentioned phrase at the start of any judgement of the ECtHR concerning an individual’s right to stay in a member state on the grounds of one or more of the convention articles, that “the Court recalls that it is for the contracting state to maintain public order, in particular by exercising their right...to control the entry and residence of aliens,”¹¹³ is a prime example of this.

The current discourse accepts this consensus and tries to include CCMs within it as a path to their human rights protection; it tries to provide an exception to the rule which excludes them from migrating in the first place, rather than challenging the rule on the grounds of the human rights of those migrating. In order to do this, the climate change migration discourse polices the consensus by perceiving climate change migrants as the ‘absolute victim’; denying them the opportunity to claim their human rights and to create a dissensus, by refusing climate migrants a voice and instead speaking for them.

How is this the case? If the absolute victim is not considered to be a holder of human rights, then a clear indication of placing people as an absolute victim must be this denial of a capacity of these people to voice their human rights claims and the replacement of the voices of these people with the voices of those who are considered to have inherited these rights; it is the denial that, as a group, they have the right to create a discourse and not just noise.¹¹⁴ This is evident throughout much of the literature.

If we look on a general level, virtually none of the articles include or considering including participation of those affected by the decision, either at the level of input into what the suggested solution should be or at the level of participation into the system proposed, if it were adopted,¹¹⁵ which seems to be a clear indication that climate change migrants are perceived as not having the capacity to participate in these discussions. More specifically, three different forms of denial of climate change migrants having the capacity to speak can be seen in the literature.

In some of the articles, there are clear omissions in thought, which seem to imply non-consideration of this capacity to speak. Bierman and Boas, for example, consider, when looking at constraints and limitations, “to what extent this proposal would be acceptable to decision-makers,”¹¹⁶ and omit to

¹¹³ *Boultif v Switzerland* ECtHR (2001) 54273/00, para 46 – however this could equally have been taken from the cases of: *Saadi v United Kingdom* ECtHR (GC) (2008) 13229/03, para 64, *Maslov v Bulgaria* (GC) (2008) 1638/03, para 68 etc.

¹¹⁴ M. Gunneflo and N. Selberg, *supra* n. 102, p. 175

¹¹⁵ For example there is no mention of even consulting with those affected in the policy recommendations of of Renaud, Bogardi, Dun & Warner, or in the principles for a sui generis regime of Bierman and Boas or in the proposed solution of Brooks Masters

¹¹⁶ F. Bierman & I. Boas, *supra* n. 81, p. 82

ask to what extent their proposal would be acceptable to those facing migration. Similarly, King states clearly in her proposal that host communities should be involved in planned resettlement to their areas, without stating the correlate that persons moving should also be involved.¹¹⁷

There are also inconsistencies in some articles; in that they both recognise that those induced to migrate should participate in decisions about their lives, and then deny them a voice. An example of this is the proposal of Docherty and Giannini, who state clearly that any solution needs to be negotiated by affected communities and civil society,¹¹⁸ but who then propose a solution apparently without the input of these groups. Consibee and Simms also seem to have some inconsistency in their article. They state explicitly, “The people most likely to be displaced by environmental crisis and degradation are amongst the world’s poorest, with the least political muscle. Their voices, in effect, are being drowned out in a fog of car fumes, power stations, air miles and fast food. They need to be heard, and listened to,”¹¹⁹ yet then seemingly exclude the voices of those displaced in the next chapter, where they discuss solutions without referring to the opinions of those displaced.¹²⁰ Mayer also acts in this way, stating that it is important that the human rights of climate-induced migrants are protected,¹²¹ while also questioning how we would deal with those who do not want to migrate away from an area against the wishes of their community¹²² and stating that, “most Bangladeshis will naturally want to go to India, and the Tuvalu will try to resettle on other Pacific islands or in Australia rather than in the suburbs of American or European cities,”¹²³ statements which both deny that climate-induced migrants have rights and have a voice to speak for themselves.

There additionally appear to be some articles with a seemingly more explicit endorsement of climate change migrants as absolute victims, albeit not necessarily intended as such. Williams, for example, attempts to classify climate change-induced migrants as two types; those that are in an acute situation, such as from a Small Island state becoming uninhabitable, and those in a chronic situation, such as those in areas where degrading resources are making life more difficult, and suggests that higher protection could be offered to those who are ‘acute’, while the ‘chronic’, as they, “could remain within that same environment albeit under increasingly onerous and challenging conditions” could be given a lesser form of protection,¹²⁴ which clearly indicates a perception that it is acceptable to let the human rights of persons deteriorate due to climate change. The Environmental Justice Foundation is another example of this. The images they use to portray climate change migrants are that of the victim; a child in

¹¹⁷ T. King, *supra* n. 95, p.564

¹¹⁸ B. Docherty and T. Giannini, *supra* n. 2 pp. 398-400

¹¹⁹ M. Consibee and A. Simms, *supra* n. 75, p. 29

¹²⁰ *ibid* pp. 30-35

¹²¹ B. Mayer, *supra* n. 93, p. 38

¹²² *ibid*

¹²³ *ibid* p.43

¹²⁴ A. Williams, *supra* n. 92, p. 522

a destroyed home and a woman and child in flooded lands for example,¹²⁵ which coupled with their statement that they are dedicated to “arguing their case”¹²⁶, rather than letting climate change migrants argue their own case, and in concluding that a new legal agreement is needed “on both humanitarian and practical grounds”¹²⁷ and, “in whichever formulation proves to be most politically, technically and financially viable,”¹²⁸ rather than on human rights grounds and in a formulation suited to those affected by the legal agreement. A final example is Warner, who suggests inclusion of migrants based on the high social and network-based costs they will have to pay in moving,¹²⁹ i.e. as a good-will gesture, rather than because they should be included in decisions about their lives.

This positing of climate change migrants as the absolute victim therefore seems to have taken place, to varying degrees, throughout the literature. As Gunneflo and Selberg mention in the context of undocumented migrants in Sweden, climate change migrants are, “included but not belonging;”¹³⁰ within the discourse; they are discussed heavily in the literature but as objects to be included within the system, rather than as participants with human rights.

4.2.3 Problems with this perception

As Ranciere states, perceiving persons as ‘absolute victims’, means that they must be a victim of absolute evil. As victims of an absolute evil, any actions taken to restore their rights become both acts of infinite justice¹³¹ and are equated with good intentions,¹³² rather than being obligations owed to the subjects of human rights.¹³³ To put it into the context of climate change-induced migration, if the general perception of those writing about this issue is that climate change migrants are ‘absolute victims’, then any action proposed to allow migration away from areas severely affected by climate change firstly maintains the consensus which was the problem in the first place, secondly becomes ‘just’ regardless of what it entails, as it counters the absolute evil of leaving persons to their fate and thirdly is perceived of as ‘good intentions’ rather than an obligation. This appears to be what has happened in the current discourse.

¹²⁵ Environmental Justice Foundation, *supra* note 88 pp. 7 and title page

¹²⁶ Environmental Justice Foundation, *supra* note 88, p. 2

¹²⁷ *ibid* p. 25

¹²⁸ *ibid* p. 25

¹²⁹ K. Warner, ‘Global environmental change and migration: Governance challenges’ *Global Environmental Change* 20 (2010) 411

¹³⁰ E. van den Hemel, ‘Included but not belonging’ *Krisis* 2008, Issue 3, cited in M. Gunneflo and N. Selberg, *supra* n. 102, p. 178

¹³¹ Ranciere, *supra* n. 97 p. 110

¹³² *ibid*, p. 109

¹³³ *ibid*, p. 109

4.2.3.1 Maintaining the consensus

Firstly and perhaps most importantly, positing persons as the absolute victim maintains the consensus which prevented them from realising their rights in the first place. It does not address the central problem of climate change migrants; that they are not able to move away from areas where their rights are likely to be affected by climate change, rather it maintains this rule and provides exceptions to it; if X meets this definition and crosses legally or illegally this border, X can have protection from deportation due to X convention, while those outside of the parameters of the exception are still excluded from it.

As Žižek says, when talking of charity, “When, confronted with the starving child, we are told: “For the price of a couple of cappuccinos, you can save her life!”, the true message is: “For the price of a couple of cappuccinos, you can continue in your ignorant and pleasurable life, not only not feeling any guilt, but even feeling good for having participated in the struggle against suffering!””¹³⁴ Creating these ‘solutions’ to climate change migration allows us to feel good about our actions, without addressing the structural problem created by the consensual order.

4.2.3.2 ‘Just’ solutions

The second problem is that the majority of writers on climate change migration, either overtly or through acknowledgement of it as the most practical solution, have come to the conclusion that refugee status or something similar is the solution to climate-change induced migration. There are a number of problems with this result, which is indicative of the problems of seeing persons as ‘absolute victims’.

Firstly, this approach is, as the approach of the Swedish undocumented migrant organisation, an attempt to co-opt climate change migrants into the consensus and then ensure their human rights, rather than demand their human rights first and foremost. Refugee or a similar status could in fact lead in reality to a deterioration in human rights for those migrating. To start with, it may be a solution which discriminates based on economic class. The requirement to cross an international border may effectively rule out this as an option for groups outside of the elite, due to both the cost of making the trip to the border and the cost of crossing the border, including visa fees or fees for smugglers, if the border is well-guarded. Furthermore, it could also lead to a deterioration in the human rights of the ‘refugee’ who has got the means to cross an international border. Abuse by smugglers, maritime interception and the forcible depositing of asylum seekers in non-territorial islands, to name but a few examples of current practices, could all lead to serious human rights violations at the time of crossing the border. Indefinite detention during refugee status determination regularly occurs in some states¹³⁵ once the crossing has been made and, as Westra says, “life in

¹³⁴ S. Žižek, *supra* n. 1, p. 117

¹³⁵ L. Westra *supra* n.88, p. 70

a refugee camp is a life deprived of dignity, and of the conditions required for basic health.”¹³⁶ Furthermore, even those granted asylum can face societal-level discrimination.¹³⁷

Another repeatedly mentioned suggestion, managed resettlement away from areas suffering the impacts of climate change, faces similar human rights problems. Barnett and Webber, writing for the World Bank, analyse the suitability of community resettlement as an adaptive strategy for climate change. Acknowledging that the empirical evidence is primarily taken from resettlement for development projects,¹³⁸ they suggest that;

“The principal risks to which resettlers are exposed include: (a) landlessness; (b) joblessness; (c) homelessness; (d) marginalization; (e) food insecurity; (f) loss of access to common property resources; (g) increased morbidity; and (h) community disarticulation (Cernea 1997)...involuntary resettlement still typically entails impoverishment. In other words, the methods applied by national governments, international institutions and private consultants typically condemn displaced people to conditions of chronic impoverishment (Cernea and Kanbur 2002) because they assume that compensation for basic material losses in cash or in kind is sufficient to resettle people successfully.”¹³⁹

and that, “the resettlement process creates opportunities for corruption, and in some circumstances resettled communities are the subjects of sporadic and at times organized violence.”¹⁴⁰ Despite this, resettlement is put forward readily as a possible solution by a number of authors,¹⁴¹ who fail to question the impact this may have on the rights of CCMs and the possibilities of having a truly voluntary resettlement in the first place.

Secondly, the refugee or similar solutions proposed seem to suffer from a lack of alignment with the communities they are trying to assist. For example, McAdam cites field research she has undertaken in Tuvalu and Kiribati, states which could possibly become uninhabitable due to climate change, where she records that, when asking about the term ‘climate refugee’,

“In Kiribati and Tuvalu, it is resoundingly rejected both at the official and the personal levels. This is because it is seen as invoking a sense of helplessness and a lack of dignity which contradicts the very strong sense of Pacific pride. Rather than regarding ‘refugees’ as people with resilience, who have actively fled situations of violence or conflict, they are seen as passive victims, waiting helplessly in camps, relying on handouts, with no prospects for the future. Some men explain that being described as a ‘refugee’ would signal a failure on their behalf to provide for and protect their family. Tuvaluans and i-Kiribati people do not want to be seen in this way. When they speak of their own possible movement to countries like Australia or

¹³⁶ *ibid* p. 106

¹³⁷ *ibid*, p. 47

¹³⁸ J. Barnett and M. Webber, *supra* n. 73, p. 27

¹³⁹ *ibid*, p. 28

¹⁴⁰ *ibid* p. 29

¹⁴¹ F. Bierman and I. Boas, *supra* n. 81, p. 76 suggest resettlement with costs of doing so on host states reimbursed, S. Brooks Masters, *supra* n. 94, pp. 877-879, envisions planned resettlement as a function of her supervisory body GEMA, B. Mayer, *supra* n. 93, p. 38 also considers community resettlement as an option

New Zealand, they describe the importance of being seen as active, valued members of a community who can positively contribute to it”¹⁴²

Furthermore, as McAdam also notes, while the Government of Kiribati would like to see recognition of obligations to assist in migration at the international level, the Governments of Tuvalu and Micronesia are resisting the inclusion of resettlement in any international agreements, as they believe a focus on relocation will undermine assistance in adaptation. As she quotes from the Prime Minister of Tuvalu,

“While Tuvalu faces an uncertain future because of climate change, it is our view that Tuvaluans will remain in Tuvalu. We will fight to keep our country, our culture and our way of living. We are not considering any migration scheme. We believe if the right actions are taken to address climate change, Tuvalu will survive.”¹⁴³

These arguments are not made to say that resettlement and refugee status are not the answer to displacement due to climate change, rather they are problematic as they are born directly out of a perception dominating this discourse that the persons most affected by climate change are ‘absolute victims’ and they therefore sacrifice human rights protection in favour of inclusion within the consensus. It may very well be that these are the solutions most favoured by those migrating or potentially migrating, but without including them as human rights holders in making a decision, it is impossible to know.

4.2.3.3 A missing argument

Finally, there is the problem of a lack of legal, human rights argumentation. One of the predominant arguments made for states to address the issue of climate change across the current discourse is that of a moral obligation to act. King summaries a number of these very succinctly,

“First, humanitarian concerns demand some response to the plight of environmentally displaced persons... ..environmentally displaced persons display many of the same characteristics as refugees they are powerless and vulnerable. They have been forced to flee their homes with little time and few resources...Second, equity dictates that the international community address environmental displacement. The developed world is responsible for many of the serious environmental problems faced in the world today...In many ways, the developed world is directly and indirectly responsible for the developing world's environmental deterioration...Third, many suggest that environmental degradation and the resulting displacement may lead to conflict on a global scale. Massive movements caused by environmental crises may lead to instability in receiving countries and around the world...Finally, the international community has an interest in protecting the global environment. The environmental degradation that

¹⁴² J. McAdam, ‘Refusing ‘Refuge’ In The Pacific: (De)Constructing Climate-Induced Displacement in International Law’ (July 8, 2010). Migration, Environment and Climate Change, E. Piguet, A. Pécoud and P. de Guchteneire, eds., UNESCO, Paris, Forthcoming; UNSW Law Research Paper No. 2010-27. Available at SSRN: <http://ssrn.com/abstract=1636187>, pp. 12-13

¹⁴³ *ibid* p.8

leads to displacement also often has negative repercussions for the global community”¹⁴⁴

Another frequently made argument is that of filling the governance or legal gap with regards climate change migrants, This is the argument made by both Bierman and Boas¹⁴⁵ and Docherty and Giannini,¹⁴⁶ as well as Williams,¹⁴⁷ who also links the moral obligation on states to address climate change to the obligation to address climate change-induced migration,¹⁴⁸ something agreed on by Mayer,¹⁴⁹ while Aminzadeh argues that human rights are the foundation of a moral obligation to address climate change.¹⁵⁰

De Moor and Cliquet on the other hand emphasise the benefits of acting, rather than on obligations to act, with their ‘win-win-win’ paradigm.

“Firstly, host countries will benefit from additional labour forces to fill gaps in labour demand. Secondly, countries of origin are relieved from some of the population pressure on the environment, and can benefit from remittances. Environmental diasporas can contribute to development and adaptation measures by transferring remittances and know-how to their country of origin. Finally, the affected persons would be voluntary migrants instead of forcibly displaced persons, turning their decision to migrate into a choice rather than a compulsion.”¹⁵¹

The area where predominantly legal arguments have been used is in arguments by those who suggest that the refugee convention should extend to climate change-induced or environmentally-displaced migrants, with both Söderbergh and Cooper arguing that a progressive interpretation of the provisions of the convention would give rise to state obligations for those migrating due to environmental displacement.¹⁵² However these legal argument don’t address why states should act. There are also legal arguments used by Falstrom, who suggests that the concept of protecting environmentally displaced persons can be found in customary international law; that the international community has shown its intent to be bound by environmental and human rights protections as principles of customary international law.¹⁵³ However, this argument is not very articulated, with no indication of evidence of state practice or *opinio juris* given, and is used more as an argument as to why states would agree to the treaty proposed and not as to why they should agree to having a treaty in the first place.

It is not disputed that these arguments are extremely persuasive and relevant for any discussion on climate change-induced migration. However, a key point that seems to be missing in these discussions, even where law is

¹⁴⁴T. King, *supra* note 95, pp. 557-558

¹⁴⁵F. Biermann and I. Boas, *supra* note 81, pp. 60-61

¹⁴⁶B. Docherty and T. Giannani, *supra* note 2, p. 361

¹⁴⁷A. Williams, *supra* note 92, p. 517

¹⁴⁸*ibid* pp.503-506

¹⁴⁹B. Mayer, *supra* note 93, p. 13

¹⁵⁰S. C. Aminzadeh, *supra* note 77, pp. 245-258, 265

¹⁵¹N. de Moor and A. Cliquet, *supra* note 91, p. 13

¹⁵²C. Söderbergh, *supra* note 78, pp. 36-40, J. B. Cooper, *supra* note 76, pp. 492-522

¹⁵³D. Zartner Falstrom, *supra* n. 87, p. 24

discussed, is a detailed consideration of whether any legal human rights obligations arise to compel states to address this issue.

This then also seems to be a direct result of perceiving climate change migrants as absolute victims; the argument is reduced to only half an argument and the part that remains only reflects either the role of those within the consensus – the ones with the moral obligation based on their abuses of the environment – or an attempt to directly restore the consensus to its place, by filling in the governance gap. Rancière highlights this as a result of perceiving people as the absolute victim,

“As a consequence, the political space, which was shaped in the very gap between the abstract literalness of the rights and the polemic about their verification, turns out to diminish more and more every day. Ultimately, those rights appear actually empty. They seem to be of no use. And when they are of no use, you do the same as charitable persons do with their old clothes. You give them to the poor. Those rights that appear to be useless in their place are sent abroad, along with medicine and clothes, to people deprived of medicine, clothes, and rights.”¹⁵⁴

In other words, in perceiving climate change migrants as the absolute victim, all thoughts about legal obligations are banished as rights become charity – something to give to those in need, rather than something that CCMs have.

4.3 Synthesis

Current discussions on climate change migration are varied in their argumentation and the solutions they propose. However, the discourse running through the literature is one that seeks to uphold the consensus through maintaining a perception of climate change migrants as absolute victims.

This perception of the absolute victim is seen across the discussions, with a failure to include those actually migrating due to climate change either at the level of input into what the suggested solution should be or at the level of participation into the system proposed, if it were adopted. This perception has led to the creation of solutions that try to bring climate change migrants within the consensus as a path to protect their human rights, rather than recognise them as existing human rights holders. As a result, solutions proposed uphold the consensus which first created the problem, may have the effect of reducing the level of human rights protection of climate change migrants, may be unaligned with the philosophy of those likely to migrate and have excluded arguments based on human rights law.

¹⁵⁴ J. Rancière, *supra* n. 97, p. 307

5 Creating a dissensus

So how is this remedied? As Rancière says, “these rights [the rights of man] are theirs when they can do something with them to construct a dissensus against the denial of rights they suffer.”¹⁵⁵ The rights of man, or human rights, do not disappear just because the consensus¹⁵⁶ denies a group these rights; they are theirs again when they choose to claim them through an act of politics to construct a dissensus, i.e. climate change migrants have the rights that they have, and in order to challenge the consensus which denies this, they can claim their rights as an act of politics, a dissensus. Transforming the noise of climate change migrants to a discourse is done through politics, as Rancière says, it is the space between the bare life¹⁵⁷ and the citizen¹⁵⁸ in which the political occurs – the attempt to transform the police order to create a politics proper.¹⁵⁹

The ways to stage an act of politics are many and it is outside the remit of this thesis, and also illegitimate, for the author to discuss how CCMs should construct a dissensus. This section will however examine the nature of dissensus in relation to international law.

It will look at whether climate change migrants could use international law as a way to stage a dissensus against their exclusion. It will firstly seek to answer the missing argument of those writing about climate change and will discuss whether international law can show the hypocrisy within itself regarding for migration away from areas negatively affected by climate change. The second part will then discuss whether the international legal system can be a suitable forum for the staging of a dissensus and problems inherent in doing so.

This section should not be read as a suggested course of action for climate change migrants, merely as an examination of the possibilities and effects of using international law as a way to create a dissensus.

5.1 Using human rights law to create dissensus

As explained above, human rights law arguments for why the issue of climate change migration should be addressed have not been discussed in the climate change migration discourse. The language of international law

¹⁵⁵ Rancière, *supra* n. 97, pp. 305-306

¹⁵⁶ *ibid* p. 306

¹⁵⁷ In an Agamban sense

¹⁵⁸ As the terminal holder of rights

¹⁵⁹ Rancière, *supra* n. 97, pp. 306-307

however needs to be used; international law is the police order which is excluding climate change migrants, yet is also the law to which they are entitled, as the subjects of human rights. However, approaching international law using international law arguments could be regarded as being problematic; on the one hand this thesis is arguing against bringing climate change migrants within the consensus as a path to respecting their human rights, while on the other hand it an argument is being made as to how their rights can be claimed using international law, part of the police order.

A big question can be raised over whether building a human rights law argument for climate change migration is, rather than creating a dissensus, asking for inclusion into the consensus as a path to human rights protection. This is a danger, however I believe it could be avoided, and this argument could therefore be useful, as a corollary to pure human rights claims to also show that the very order – international law - that excludes climate change migrants and prevents them from migrating, can also be read in a way which demands that they be allowed to migrate away from areas negatively affected by climate change. Thereby using existing norms in a way not normally used, not in order to enter the consensus, but to create space to show the hypocrisy of existing norms.

When looking at what claims could be made under international law, it has to be kept in mind that in the context of climate change it is not a question of the state violating human rights of people in its territory, but of all states violating the human rights of people across many territories. The central question for this argument is therefore: do states have any legal responsibility to address climate change migration? To answer this question, three sub-questions need to be asked; firstly is there any collective responsibility in general on states regarding the human rights of people outside their own jurisdictions? Secondly, are any of these responsibilities present in the context of anthropocentric climate change? And thirdly, do any of these responsibilities create an obligation on states to address climate change-induced migration?

This section will focus on trying to answer these questions first, before looking at whether formulating a claim in this way could actually be an act of dissensus.

5.1.1 In general, is there a collective responsibility on state to respect, protect or fulfil the human rights of persons outside their jurisdictions?

The International Covenant on Civil and Political Rights (ICCPR), as well as the European Convention on Human Rights and the American Convention on Human Rights expressly delimit the applicability of the

rights contained within to persons within the jurisdiction of the state.¹⁶⁰ The African Charter on Human and Peoples' Rights does not contain a limitation clause, however there has been a similar jurisdictional requirement set out in case law.¹⁶¹ Nevertheless, under both international human rights law and through membership of international organisations, there exist at least four areas where states have a collective responsibility for the human rights of persons outside of their jurisdictions.

The first is under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2(1) includes the obligation on state parties to work cooperatively for the progressive realisation of the rights contained within it.¹⁶² While the formulation used is imprecise, the Committee on Economic, Social and Cultural rights has identified obligations to respect, protect and fulfil this article. The obligation to respect under Article 2(1) requires states to, 'refrain from actions that interfere, directly or indirectly, with the progressive realisation of ESC rights in other states,'¹⁶³ and to refrain from participation in decisions of intergovernmental bodies that would restrict access to these rights in other states.¹⁶⁴ This includes, for example, a prohibition on taking measures which would restrict the supply of water¹⁶⁵ or would impair food production or access to food for persons in other states.¹⁶⁶ The obligation to protect under Article 2(1) requires states to take measures to prevent private actors, including citizens and companies, from violating economic, social and cultural rights in other states.¹⁶⁷ This includes, for example, taking legal and political steps to prevent non-state actors from violating the right to social security or the right to water in a third state.¹⁶⁸ The obligation to fulfil under Article 2 (1) is, as Ssenyonjo says, much more uncertain.¹⁶⁹ General Comments 12, 14, 15 and 19 of the CESCR affirm that states are required to assist in the realisation of rights in other states, if they have the resources to do so, with General Comment 14 additionally asserting the 'joint and individual' responsibility on states to cooperate in providing disaster relief and humanitarian assistance in times of emergency.¹⁷⁰

The second area of collective responsibility is under the prohibition on torture found in Article 7 of the ICCPR, which corresponds to a customary,

¹⁶⁰ ICCPR Article 2, ECHR Article 1, ACHR Article 1

¹⁶¹ F. Viljoen, 'Admissibility under the African Charter' in Evans and Murray, 'The African Charter on Human and Peoples' Rights; the system of practice 1986-2000' Cambridge University Press 2002, p. 78

¹⁶² ICESCR Article 2 (1)

¹⁶³ M. Ssenyonjo, 'Economic, Social and Cultural Rights in International Law' Hart Publishing 2009 p. 72

¹⁶⁴ *ibid* pp. 72-73, CESCR General Comment 15 E/C.12/2002/11, paras 30-36

¹⁶⁵ CESCR General Comment 15 E/C.12/2002/11, para 32

¹⁶⁶ CESCR General Comment 12 E/C.12/1999/5, para 36

¹⁶⁷ M. Ssenyonjo *supra* n. 163, pp. 73-74, CESCR General Comment 15 *supra* n.164, para 33, CESCR General Comment 14 E/C.12/2000/4, para 39

¹⁶⁸ CESCR General Comment 19 E/C.12/GC/19, para 54 and CESCR General Comment 15 *supra* n.164, para 33

¹⁶⁹ M. Ssenyonjo *supra* n. 163, p.74

¹⁷⁰ CESCR General Comment 14 *supra* n. 167, para 40

peremptory norm prohibiting torture. Under this prohibition, deportation and extradition to a country where the person in question may be at risk of torture, inhuman or degrading treatment or punishment is not allowed¹⁷¹ and nor is the use of evidence obtained by torture, including where the torture has been committed outside the state's jurisdiction.¹⁷² In both these latter situations, the person's human rights are not being violated by the state they are in, but by another state. Yet here human rights law requires the host state to protect the individual from human rights violations that would occur outside their jurisdiction and thereby gives the prohibition on torture a form of extra-jurisdictional character.

The third area is through membership of the UN, namely the responsibility to protect. This is a doctrine developed in the early twenty-first century and accepted, albeit in a watered-down form,¹⁷³ by the UN General Assembly in 2005,¹⁷⁴ and Security Council in 2006,¹⁷⁵ which declares that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. It also declares that the international community has the responsibility to; encourage and assist states in meeting their responsibilities, to use diplomatic, humanitarian and other peaceful means to help to protect populations from the four crimes enumerated above, to take collective action through Security Council resolution if peaceful means are inadequate and the state in question manifestly fails to protect its population from the four crimes, to assist states in building capacity to protect their populations from the four crimes and to assist states under stress before crises and conflicts break out.¹⁷⁶ This then amounts to a form of extra-jurisdictional responsibility on states to protect the right to life of persons outside their territories, under certain circumstances.

The fourth area is through membership of the International Labour Organisation (ILO). Article V of the Declaration of Philadelphia, incorporated into the ILO constitution, states that the principles set out within the declaration are a matter of concern for the whole world,¹⁷⁷ and not just the country an individual lives in. This seems to imply that these principles, including *inter alia* equality of education, full employment and raising of the standards of living,¹⁷⁸ are obligations member states have with regards to citizens of other member states, similar to Article 2(1) of the ICESCR above. This is reinforced by both the ILO's 2008 Declaration on Social Justice for a Fair Globalisation and the 1998 Declaration of Fundamental Principles and Rights at Work, which state that members

¹⁷¹ Human Rights Committee General Comment 20 (1993), M. Janis, R. Kay and A. Bradley, 'European Human Rights Law: Text and Materials' 3rd Edition OUP 2008, pgs. 215-226

¹⁷² Convention Against Torture, Article 15

¹⁷³ A. J. Bellamy, 'Responsibility to Protect' Polity Press 2009, pp. 90-91

¹⁷⁴ UN General Assembly Resolution A/RES/60/1 24/10/2005, paras 138-140

¹⁷⁵ UN Security Council Resolution S/RES/1674 (2006)

¹⁷⁶ UNGA Resolution, *supra* n.174, para 139

¹⁷⁷ ILO Constitution Annex – Declaration of Philadelphia, Article V

¹⁷⁸ *ibid*, Article III

should work collectively to achieve the goals contained within these documents,¹⁷⁹ including; the extension of social security to all,¹⁸⁰ the abolition of child labour¹⁸¹ and the promotion of employment.¹⁸²

There are then clearly responsibilities on states for the economic, social and cultural rights of persons outside their territories; these are primarily obligations to respect, protect and, as far as is possible and bearing in mind the circumstances of the state, to assist in fulfilling these obligations. However there are also responsibilities with regards to torture which exist extra-jurisdictionally, as well as the right to life, when an international crime is in progress. Acknowledging that there exists collective responsibility in certain circumstances for the human rights of persons living outside a state's jurisdiction, the question then arises as to the extent these responsibilities are enacted in the context of climate change.

5.1.2 Are these responsibilities present in the context of climate change?

The context of climate change brings a dimension to human rights law which hasn't yet been addressed at the international level. In the following, the argument will be made that, without taking illogical steps, these four areas of collective responsibility bring obligations on states when looked at through the prism of climate change.

Firstly, under Article 2 (1) of the ICESCR, as stated above, all states have the responsibility to ensure that their actions do not interfere with another state's ability to realise these rights, that the actions of private actors under their jurisdiction do not interfere with another state's ability to realise these rights and that, where possible, they contribute towards the fulfilment of these rights in other states. In the context of anthropocentric climate change, clear obligations arise out of this. On one level, as climate change is likely to interfere with states' abilities to realise economic, social and cultural rights and as states and private actors are the primary cause of these environmental changes, there is a clear obligation on states to both ensure that their actions and the actions of private actors within their jurisdiction do not accelerate aspects of climate change likely to lead to a deterioration in economic, social and cultural rights in areas outside of their jurisdictions. On another level, as climate change is likely to impair the realisation of economic, social and cultural rights in some states, where a state has the resources to be able to do so, they are obliged under Article 2 (1) to assist states outside of their jurisdiction in the realisation of those rights.

¹⁷⁹ ILO Declaration on Social Justice for a Fair Globalisation 2008, Articles I C (ii) and II B, ILO Declaration on Fundamental Principles and Rights at Work, Articles 2 and 3

¹⁸⁰ Declaration on Social Justice for a Fair Globalisation 2008, Article I A (ii)

¹⁸¹ Declaration on Fundamental Principles and Rights at Work, Article 2 (c)

¹⁸² Declaration on Social Justice for a Fair Globalisation 2008, Article I A (i)

Secondly, obligations may arise under the prohibition on torture or inhuman or degrading treatment or punishment. On one hand, states may be forbidden from returning persons to states where environmental conditions are extremely poor. The European Court of Human Rights has already accepted that deportation to a country that practises the death penalty,¹⁸³ where the applicant faces ill-treatment at the hands of the state¹⁸⁴ or a private actor,¹⁸⁵ stoning¹⁸⁶ or female genital mutilation¹⁸⁷ and, in exceptional circumstances and where the humanitarian grounds are compelling,¹⁸⁸ where medical facilities are unable to treat a terminal disease,¹⁸⁹ may amount to a breach of the prohibition on inhuman treatment. An analogy here could be the medical cases in the European Court of Human Rights; while rejecting a number of cases, the Court and Commission have found violations of the prohibition on torture or inhuman or degrading treatment or punishment when the person is to be deported to a state has been considered completely unable to offer treatment which would mitigate the effects of the disease and when there has been an absence of family members able to ease the suffering of the applicant.¹⁹⁰ This could conceivably be the case in some states affected by climate change where the state is unable to mitigate the effects of the environment change and families are unable to support each other, for example in Small Island states. It therefore would not be a stretch to suggest that human rights bodies may find a breach of the prohibition if a person is returned to an area in which the environmental conditions are so poor as to amount to returning them to a situation where they would face inhuman or degrading treatment. On the other hand, it is also arguable that states may be held responsible under the prohibition for persons already in an area where environmental conditions have deteriorated to a level that puts people in a situation of inhuman or degrading treatment, due to anthropocentric climate change. This responsibility would arise based on an analysis of how the prohibition on torture or inhuman or degrading treatment or punishment works.

It is argued that the prohibition on torture and IDT is based on holding states accountable for acts committed as a result of their actions or inactions. This argument explains why states are prohibited not only from torture and IDT, but also from letting third parties commit torture or IDT within their jurisdictions and from putting persons in danger of torture or IDT outside their jurisdictions, even where the person is not at danger from an action of the state they are being sent to, but by its inability to act, as in the D v UK case. This corresponds with the statement of the ICTY in the Prosecutor v Furundžija case, “States are obliged not only to prohibit and punish torture, but also to forestall its occurrence; it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human

¹⁸³ Soering v UK Grand Chamber ECtHR 14038/88 (1989)

¹⁸⁴ Chahal v UK ECtHR 22414/93 (1997)

¹⁸⁵ HLR v France ECtHR 24573/94 (1998)

¹⁸⁶ Jabari v Turkey ECtHR 40035/98 (2000)

¹⁸⁷ Collins and Azaziebe v Sweden ECtHR 23944/05 (2007)

¹⁸⁸ N v UK ECtHR 26565/05 (2008)

¹⁸⁹ D v UK ECtHR 21627/93 (1998), although N v UK (ibid) limits this principle.

¹⁹⁰ As in D v UK (ibid) and in BB v France ECtHR 30930/96 (1998)

beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture.”¹⁹¹ It is this acting to put a person in danger of torture or IDT that could be argued to invoke state responsibility extra-jurisdictionally for persons suffering from the effects of climate change. This argument can be made through analogy to the D v UK and Soering v UK cases; in both of these situations, the UK was seeking to remove the applicants to a third country, where they would face inhuman or degrading treatment or punishment. Therefore, the action the UK was barred from doing was not committing inhuman or degrading treatment or punishment, but from performing *an action that results* in inhuman or degrading treatment or punishment, i.e. putting D and Soering onto aeroplanes flying to the Americas. The action of all states in allowing greenhouse gas emissions is also *an action that results*, or will result, in inhuman treatment for some persons living in vulnerable areas and therefore could be argued to also be prohibited under the prohibition on IDT. The action of putting someone on an aeroplane and the action of allowing greenhouse gas emissions do differ in the degree of control; the state is directly acting in the former example and predominantly passively allowing others to act in the second, however this can be overcome by looking at general human rights principles; it is not enough for a state to just refrain from an action that violates human rights, it must also protect people from violations by others, i.e. it is not enough that a state refrains from performing its own action that would result in inhuman or degrading treatment, the state must also prevent others from performing actions that would result in IDT. If we also argue that the prohibition on torture and IDT is based on deterring the use of torture or IDT by states, the strength of this argument is increased. As stated in the Furundžija case, ‘this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.’¹⁹² This argument would explain why states are not allowed to use evidence obtained by torture in a third country¹⁹³ and why the prohibition on torture is a universal crime.¹⁹⁴ If states are allowed to leave persons in a situation where they are suffering inhuman treatment, due to the effects of anthropocentric climate change, for which every state has partial responsibility, then states are not being deterred from creating conditions where people face torture and IDT, but are able to benefit from it through continuing to emit greenhouse gases, which is advantageous a carbon-based economy. By this logic, therefore, the prohibition on torture and inhuman or degrading treatment or punishment in this conception must prohibit states from putting people in this situation, in order to deter the use of torture and inhuman or degrading treatment or punishment.

This line of argument leads to the conclusion that states are obligated to prevent the conditions leading to inhuman treatment of persons in areas

¹⁹¹ Prosecutor v Furundžija ICTY Trial Chamber Judgement 10 December 1998, p. 56

¹⁹² *ibid*, p. 59

¹⁹³ Convention Against Torture, Article 15

¹⁹⁴ Prosecutor v Furundžija *supra* n. 191, pp. 55, 58-59

affected by climate change. However, the problem in the context of climate change is that states have already committed and continue to commit the actions that will create this situation. Therefore, as the cause cannot be addressed, this responsibility must therefore logically place a collective responsibility on states address the effect; to remedy the situation of persons in areas severely affected by climate change, so that they do not suffer inhuman treatment.

Thirdly, the responsibility to protect also gives rise to obligations in the context of climate change. As stated above, the General Assembly has only accepted that the responsibility exists in the case of one or more of four international crimes occurring; genocide, war crimes, ethnic cleansing and crimes against humanity. However, noting that climate change has been rejected as grounds of itself,¹⁹⁵ these existing grounds may enact state responsibility in the context of climate change, through mandating states to act to prevent these crimes occurring due to climate change. Many authors assessing the impact of climate change have posited that it is likely that environmental stress is likely to lead to conflict between and within states over resources, as well as between persons migrating due to climate change and local populations.¹⁹⁶ Reuveny, for example, having identified thirty-eight cases of migration which have already occurred where climate was a factor, identifies nineteen cases where conflict subsequently broke out, including two where there was war between two states, three where there was ethnic tension or violence and one where genocide occurred.¹⁹⁷ The most high-profile of these are; the genocide in Rwanda 1990s, where he maps arable land and water scarcity, land degradation and deforestation as factors in causing the genocide¹⁹⁸ and the ethnic violence in Mauritania in the 1980s, where he counts drought, desertification, deforestation, soil erosion and water scarcity as factors in the conflict.¹⁹⁹ Indeed, the current violence in Darfur, for which Sudanese President Omar Al-Bashir has been charged by the International Criminal Court with genocide, crimes against humanity and war crimes,²⁰⁰ has been widely described as a climate change-induced conflict.²⁰¹ Smith and Vivekananda for SIDA and International

¹⁹⁵ Which was ruled out in the report of the UN Secretary General to the 2009 General Assembly Session on the Responsibility to Protect, A/63/677, paragraph 8

¹⁹⁶ See, for example, P. Schwartz and D. Randall, 'An abrupt climate change scenario and its implications for US national security' October 2003, N. P. Gleditsch, R. Nordas and I. Salehyan, 'Climate change and conflict: the migration link' International Peace Academy May 2007, J. Mazo, 'Climate conflict: how global warming threatens security and what to do about it,' Routledge for the International Institute of Strategic Studies 2010 and R. Reuveny *supra* n. 42, pp. 656-673

¹⁹⁷ R. Reuveny *supra* n. 42, pp. 662-668

¹⁹⁸ *ibid* pg. 663

¹⁹⁹ *ibid* pg. 664

²⁰⁰ International Criminal Court- Situations: Omar Hassan Ahmad Al-Bashir

<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB>

²⁰¹ For example by Ban Ki Moon, Ban Ki Moon, 'A climate culprit in Darfur' Washington Post 16/06/2007 <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501857.html>

Alert have furthermore conducted a study into conflicts likely to occur due to climate change, and have identified forty-six countries with a high risk of conflict as a consequence of climate change,²⁰² all of which could involve the perpetration of one or more of the four international crimes. The responsibility to protect, as stated above includes a responsibility to prevent the four international crimes occurring before they happen, including, as Ban Ki Moon stated in his 2009 report, the responsibility of the international community to work with states to reduce the conditions within states that could lead to one or more of the crimes occurring, including inequality.²⁰³ There appears to be, therefore, an obligation, when looking at the responsibility to protect in the context of anthropocentric climate change, on states to work to reduce the possibility of climate-induced international crimes occurring in states other than their own.

Fourthly, membership of the ILO may also give rise to collective responsibility in the context of climate change. The obligations to; raise standards of living, to ensure the employment of workers in positions in which they can have the satisfaction of the giving the fullest measure of their skill, to develop policies to ensure a just share of the fruits of progress and a minimum living wage to all employed and in need of protection, to extend social security to all in need, to give adequate protection to the life and health of workers in all circumstances and to provide for adequate nutrition and housing,²⁰⁴ are all likely to be negatively affected by anthropocentric climate change. Therefore, as ILO member states have an obligation to work collectively to realise these principles,²⁰⁵ the negative correlate of this must mean that they have an obligation to prevent the deterioration of these rights due to climate change. Similarly, the principles set out in the 2008 Declaration on Social Justice for a Fair Globalisation are likely to be negatively affected by climate change, particularly the objectives of promoting employment and of social protection.²⁰⁶ Again here, with the obligation to work collectively to realise these rights, it can be argued that there is an obligation to work to prevent the impacts of climate change that are likely to make it harder for states to meet these principles.

5.1.3 Do any of these responsibilities create an obligation on states to address climate change migration?

The final question is whether, looking at these obligations in respect to climate change, obligations exist in regards to climate change migration.

²⁰² D. Smith and J. Vivekananda, "A climate of conflict" Swedish International Development and Cooperation Agency and International Alert 2008, pp. 26-27

²⁰³ 'Implementing the responsibility to protect' Report of the Secretary General 12/01/2009 A/63/677, paras 2-8-48, particularly para 43

²⁰⁴ Declaration of Philadelphia Article III, annexed to the Constitution of the ILO

²⁰⁵ *ibid*, Art. V

²⁰⁶ Declaration on Social Justice for a Fair Globalisation 2008, Articles I A (i) and (ii)

Firstly, as stated above, Article 2 (1) of the ICESCR puts obligations on all states assist in fulfilling progressively economic, social and cultural rights, including the rights of persons affected by climate change, albeit with different obligations depending on the state's abilities. This obligation would not cease just because it is environmentally impossible for a person's rights to be progressively realised in a certain area. Therefore, the obligation must include supporting the host state in assisting people to migrate away from areas where their rights are progressively deteriorating and, where it is impossible to realise their rights in the area they are currently living, this would include international migration if it is not possible to continue to progressively realise their rights domestically or where it would lead to the progressive deterioration of others' rights.

Secondly if, as stated above, the prohibition on torture includes an obligation on states to prevent situations of inhuman treatment outside their jurisdiction in the context of anthropocentric climate change, then here too there must arise an obligation under both conceptions to look at ways to facilitate migration. This is because, in some situations, it may not be possible to prevent the inhuman treatment through adaptation and mitigation strategies alone and therefore, in order to end the inhuman treatment, migration away from the degraded area must be facilitated.

Thirdly, as stated above, out of thirty-eight migrations in the twentieth and early-twenty-first centuries where climate was a factor, conflict has occurred in nineteen and events amounting to a level that would engage the responsibility to protect have occurred in four. As states have an obligation to assist in the prevention of these events, i.e. the effects of uncontrolled migration, under the responsibility to protect, this results in two options under this principle; either a tightening of restrictions on migration or the facilitation and regulation of it. However, the former option is not a true option as restricting people from migrating from areas severely affected by climate change could also engage the responsibility to protect, as climate change is likely to increase the number of weak and fragile states, unable to maintain the state's monopoly on the use of force,²⁰⁷ as well as inducing internal conflicts over water, food and as a result of storm and flood disasters.²⁰⁸ Therefore, the responsibility to protect must also place an obligation on states to address climate change induced migration through the facilitation and regulation of it, to ensure that it does not lead to an international crime.

Fourthly, the ILO constitution clearly puts forward migration as a way to achieve decent work. Article III (c) of the Declaration of Philadelphia states the obligation to provide facilities for the training and transfer of labour, including through migration and settlement, as a method to achieving full employment, adequate standards of living and decent work. In the context of ILO member states' collective responsibility to protect the worker-related

²⁰⁷ German Advisory Council on Global Change, 'World in Transition: Climate change as a security risk – summary for policy-makers' Earthscan Publications 2008, p. 5

²⁰⁸ *ibid* pp. 2-3

human rights explained above, this would seem to require that states have a collective responsibility to facilitate migration from areas where people are unable to achieve an adequate standard of living, employment or decent work, which is likely to be the case in some areas affected by climate change, to areas where this is possible.

Each of these different collective responsibilities then can be said to make the case that there is an obligation on states to protect and fulfil the economic, social, cultural and labour rights of persons affected by climate change outside their jurisdiction, including through allowing persons to migrate away from areas negatively affected by climate change, either in order to protect rights under the ICESCR, to prevent the situation falling into one where persons are suffering inhuman treatment, to avoid the potential of an international crime occurring or to fulfil membership obligations of the ILO.

5.1.4 Would using the international law argument risk the act becoming a demand for inclusion?

As mentioned above, the utility in using this argument lies not in trying to convince states that through these arguments CCMs should be included within the consensus, but in showing the hypocrisy of denial of the rights of CCMs to move away from areas where their human rights are negatively affected by climate change, when the very law that enforces this exclusion also says that CCMs shouldn't be left in situations where their human rights are deteriorating. However, the danger is that it could be seen as a consensual demand for inclusion into the existing consensus; that it could become an argument as to why states should bring climate change migrants within existing norms. In effect, why CCMs should be 'regularised'.

This argument, in addition to an argument purely based on the hypocrisy of claiming the universality of human rights while allowing the rights of some to be abused by human action, would be useful however in demonstrating that international law itself conforms to consensual interpretations. However it is also problematic and should CCMs choose to use this as a part of any act of dissensus, the danger of it being seen as or becoming a call for inclusion should be noted.

5.2 The international system as a forum of dissensus

Regardless of the utility or not of an international law argument for dissensus, there are also the questions of whether the staging of an act of dissensus is possible within the international legal framework and whether it

would be possible to do so without risking the creation of purely consensual demands? This section will attempt to answer these questions.

The main focus will be on examining the ILO as a forum for an act of dissensus, this is because, while acknowledging the illegitimacy of the author in trying to answer this question, it is suggested that the International Labour Organisation may be a good way for climate change migrants to create this dissensus. However it will also look at and compare the ILO to other international bodies to assess whether they might offer a better platform. It will then try to assess whether international bodies could act as a forum for dissensus and the problems with doing so.

5.2.1 What is the ILO?

The International Labour Organisation (ILO) was founded in 1919 by the Treaty of Versailles with the express purpose of “pursuing the vision that universal, lasting peace can be established only if it is based on social justice.”²⁰⁹ The five basic principles of the ILO are; lasting peace can only be achieved based on social justice; labour should not be regarded as a commodity; workers and employers have the rights to freedom of association, freedom of expression and collective bargaining; poverty anywhere constitutes a danger to prosperity everywhere; and that these principles are applicable to all human beings.²¹⁰ The main policy fields the ILO works in to achieve these goals are; full employment and rising standards of living; an adequate living wage; the regulation of hours of work, the protection of children, young-persons and women; the protection of the economic and social interests of persons working outside their home country; adequate protection for workers against sickness, death and injury arising from employment; and social security measures.²¹¹ It does this through four governance systems; the adoption of conventions and recommendations; inspection to ensure enforcement of laws and regulations; collaboration with other international bodies; and tripartism.²¹² Tripartism is a feature that fundamentally differentiates the ILO from other international organizations. In the decision making process, employers’ and workers’ organizations have an equal voice to that of governments; in the Governing Body, which is the executive organ of the ILO, there are twenty-eight government members and fourteen each of workers’ and employers’ representatives,²¹³ while in the International Labour Conference, which is the general assembly of the ILO, each state brings two government representatives, one workers’ representative and one employers’

²⁰⁹ ILO: About the ILO <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>

²¹⁰ G. Rodgers, E. Lee, L. Swepston and J. Van Daele, ‘The ILO and the Quest for Social Justice, 1919-2009’ ILO 2009, p. 7

²¹¹ *ibid*, p.8

²¹² *ibid*, p. 9

²¹³ Constitution of the ILO, Article 7

representative.²¹⁴ The ILO is able to create conventions, recommendations, declarations and codes of practice.²¹⁵

5.2.2 Does the ILO have a mandate for looking at climate change migration?

The ILO clearly has the mandate to address climate change migration. As cited above, Article III of the Declaration of Philadelphia, annexed to the constitution of the ILO, states that one of the ways the ILO should achieve full employment and rising standards of living is through the provision of facilities for the training and transfer of labour, including migration for employment and settlement,²¹⁶ which means that the ILO has a mandate to address labour and resettlement migration in the context of raising standards of living, which would be the case with respect to climate change-induced migration. Furthermore, the argument made above that states, through the ILO, have an obligation to address climate change migration specifically puts it within the ILO's remit.

Moreover, the ILO has showed itself to be flexible in its approach to identifying matters within its mandate. As Swepston discusses in the context of the Indigenous and Tribal Peoples Convention C169, to be discussed in greater detail later, the ILO considered itself to have a mandate over matters much broader than the scope of indigenous and tribal workers; as their social situation in general impacted on both their vulnerability to abuses in the workplace and on the kind of work they could undertake, as well as their susceptibility to working in the informal economy.²¹⁷ Therefore it would not seem to be a problem for the ILO to address the issue from this kind of perspective either; addressing climate change migration prevents a rise in the informal economy and reduces susceptibility to abuses and a lack of decent work, which would occur if people had to migrate clandestinely.

5.2.3 How could climate change migrants use the ILO to create a dissensus?

As a first stage in doing so, climate change migrants would need to get the issue of climate change migration onto the agenda of the ILO. This section will deal with this functional side of using the ILO as a stage, while the issue of whether the ILO could actually function as a forum for dissensus will be discussed later.

²¹⁴ *ibid*, Article 3

²¹⁵ L. Swepston, 'Adoption of labour standards by the International Labour Organisation: Lessons and Limitations' International Council on Human Rights Policy 2005, p. 5

²¹⁶ Declaration of Philadelphia Article III (e), annexed to the Constitution of the ILO

²¹⁷ G. Rodgers, E. Lee, L. Swepston and J. Van Daele *supra* n.210, pp. 85-86

To bring an issue to the attention of the ILO, matters need to be tabled for a discussion at the International Labour Conference (ILC) by the Governing Body or by the ILC itself. These subjects are usually proposed by the Office of the ILO but can come from a variety of sources, including; member states, employers' organizations, worker's organizations, regional conferences, technical meetings, public international organizations or the treaty monitoring bodies of the ILO, including the Committee of Experts.²¹⁸ After a motion has been approved for discussion, it will appear on the agenda of the ILC to occur two years later. In the meantime, a report will be sent to members states to comment on, after consultation with workers' and employers' representatives. A second report will be drafted and sent to states on the basis of comments made. If the report is approved at the first conference, it is placed on the agenda for the next conference in one year. Two drafts of the convention or recommendation are sent to member states again during that year for comments and it is finally voted on at the second conference, needing two-thirds approval to pass.²¹⁹

Therefore, in order for the issue of climate change migration to be brought to the ILO's attention and for a convention, recommendation or declaration to be passed, persons affected by climate change would then need to bring it to the attention of one of the bodies listed above who can propose it to the Governing Body or International Labour Conference. They would then need to convince the Governing Body to put it on the agenda for the ILC two years later and would furthermore need to then convince the ILC to pass it by a two-thirds majority at the final session a year after that. This seems like a difficult task, however it is not without precedent.

5.2.4 Why the ILO? A case study: indigenous and tribal peoples

A study in point is the relation between indigenous peoples and the ILO, from which clear parallels can be drawn with the situation of climate change migrants. As Swepston says, "the first international action in this area [the rights of indigenous and tribal peoples], from the early 1950s to the early 1970s, reflected the 'top-down' development approach of the time, with the international community deciding what was best for indigenous peoples without consulting those directly concerned,"²²⁰ which is clearly shown in the first ILO convention on indigenous peoples, C107 of 1957, which, "took a patronising attitude towards indigenous and tribal peoples."²²¹ Yet, by 1989, the ILO had passed C169, the Indigenous and Tribal People's Convention, which goes beyond a treaty regulating the labour conditions of indigenous and tribal peoples and contains provisions related to respect for their customs and traditions, as well as the rights to land, use of resources

²¹⁸ L. Swepston, *supra* n.215, p. 3

²¹⁹ *ibid* pp. 4-6

²²⁰ L. Swepston, 'Indigenous Peoples in International Law and Organisations' in J. Castellino and N. Walsh, 'International Law and Indigenous Peoples' Martinus Nijhoff Publishers 2005, p.53

²²¹ *ibid* p. 55

and participation.²²² This convention, despite only being ratified by twenty-two countries as of today,²²³ is used as an “indisputable floor for action”²²⁴ by the World Bank, regional development banks and governments.²²⁵

How did indigenous peoples manage to change the discourse from the top-down, non-consultative approach of the early 1950s to early 1970s and the patronizing and integrationist C107,²²⁶ to successfully obtaining a specific convention that protects their rights? As Swepston says, “Indigenous peoples represent virtually a unique subject in modern international law, in that the groups directly concerned have staged a campaign since the early 1970s to make their situation a subject of international law and international programmes – and have done so successfully.”²²⁷ By 1972 indigenous people had begun to mobilize themselves and began to create, what is described as, “one of the most active lobbying interests in international organizations.”²²⁸ They began to put pressure on the ILO over C107 as being, “the embodiment of the assimilation policies they sought to reverse,”²²⁹ leading to the Office of the ILO to begin to review the convention and take an active role in discussions emerging on the issue at the international level.²³⁰ In 1986 the ILO held a Meeting of Experts to consider revising C107, where usual government, employer and trade union representatives were replaced by indigenous members of government, trade unions and employers organizations, as well as including a selection of NGOs working on the issue. As a result of this, the Governing Body of the ILO put the issue on the agenda for the International Labour Conference for 1988-1989, where the issue was adopted by participants representing indigenous and tribal peoples,²³¹ despite resistance from governments and employers organizations over the term ‘peoples’,²³² with 328 in favour, 1 against and 49 abstentions.²³³ During the consultation period, described above, the ILO, for the first time, asked governments to consult with indigenous and tribal groups in addition to employers’ and workers’ organisations,²³⁴ during the ILC time was made for NGOs representing indigenous groups to address both the committee dealing with the convention and the plenary body and NGO amendments to the draft were allowed to be submitted, through passing them to the workers’ representatives on the committee.²³⁵

²²² ILO Convention 169: Indigenous and Tribal Peoples Convention 1989

²²³ ILO Ratifications of C169 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>

²²⁴ G. Rodgers, E. Lee, L. Swepston and J. Van Daele *supra* n.210, p.89

²²⁵ *ibid*

²²⁶ L. Swepston, *supra* n.220, p.55

²²⁷ *ibid*, p.53

²²⁸ *ibid*

²²⁹ G. Rodgers, E. Lee, L. Swepston and J. Van Daele *supra* n.210, pp.87-88

²³⁰ *ibid* p.88

²³¹ *ibid*

²³² U. Johannson Dahre, ‘The International Discourse on Indigenous Peoples: A compilation of legal and political documents’ IWGIA 2002, p. 195

²³³ L. Swepston, *supra* n.220, p.685

²³⁴ *ibid*

²³⁵ *ibid* p. 686

This example clearly shows that the ILO system is amenable to use by groups which have been excluded and victimized by the consensus; through lobbying the Office of the ILO, indigenous and tribal peoples were able to harness its ability to push for a new convention to protect their rights. They were also able to actively participate in determining the content of this convention, through being present from the time of the initial proposal until the treaty was passed.

5.2.5 Can the ILO really be used create a dissensus?

Despite the, at least superficial, success of indigenous and tribal peoples, the question still needs to be raised of whether the ILO really can provide a suitable forum for creating a dissensus. To answer this, questions of; accessibility to the ILO, voice within the ILO and whether the ILO would result in a call for inclusion in the consensus rather than creating a dissensus, need to be addressed.

5.2.5.1 Accessibility of the ILO

As shown above, groups of indigenous and tribal peoples were able to access the ILO as an arena to bring their claims against the consensus that the international community should decide what is best for their development. However, it was 14 years from the first serious organisation of indigenous groups to create an act of politics before the ILO heard their claims.²³⁶

Can the ILO then be seen as an adequate forum for climate change migrants to create a dissensus? The answer, in short, is no. The ILO alone is too inaccessible for it to be the only path of dissensus pursued. As shown above with indigenous and tribal peoples, despite trade unions representing at least 176 million workers,²³⁷ (outside of China, which alone has 170 million members²³⁸) and being able to bring matters to the attention of the Governing Body of the ILO, it was eventually through the ILO Office, or secretariat, that the issue was brought up. While climate change migrants are potentially more likely to have access to trade unions, this is no guarantee that trade unions are going to see it as an important or relevant enough issue to merit discussion at the ILO. Furthermore if it is raised, there is the problem of convincing enough trade union, government and employer representative partners in the Governing Body to put it on the agenda of the International Labour Conference.

However, despite all of that, the ILO is not completely inaccessible. Indigenous and tribal peoples were able to raise their issues in the ILO and

²³⁶ To paraphrase M. Gunneflo and N. Selberg, *supra* n. 102

²³⁷ Based on ITUC membership – ITUC: About Us, <http://www.ituc-csi.org/about-us.html?lang=en>

²³⁸ All China Federation of Trade Unions: A Brief Introduction of the All-China Federation of Trade Unions <http://www.acftu.org.cn/template/10002/file.jsp?cid=63&aid=156>

it could be done again. Trade unions are able to raise issues on behalf of their constituents, the only place a non-government body is able to do so in an international organisation. The ILO has also shown a willingness to take a broad interpretation of its remit and look into issues other organisations have not. Furthermore, it may also be the most accessible system of international law available to those migrating due to climate change.

Success at human rights courts or treaty bodies may be more difficult to obtain than at the ILO. The benefit of using such an approach would be, as Aminzadeh states, that a report or ruling by a human rights body against a state for breaching its obligations could be a powerful incentive for states to act,²³⁹ in this case with regards climate change-induced migration, and, “at the very least...would demonstrate that climate change not only affects the environment, but people as well.”²⁴⁰ However, the problem lies in getting the affirmative result. There is the issue of applicant and defendant identity; who has standing to bring the claim, individual groups or a representative of all climate change migrants and against which state or states should a claim be brought? It is for these reasons, among others, that no claim regarding climate change has been successful in front of international bodies, let alone climate change migration claims. The closest being the Inuit Circumpolar Conference case before the Inter-American Commission, where a hearing on the issue was held, but the case was rejected as inadmissible.²⁴¹

Similarly, and perhaps while also being useful, using the UN system may also be more difficult than the ILO. The UN political bodies, including the Human Rights Council, would have the benefit of legitimacy of the system to address the issue; the questions raised over why the ILO was dealing with indigenous and tribal peoples would not be raised here, and, to analogise again, as in the case of indigenous groups, the UN approach has led to the setting up of a number of forums and mechanisms for indigenous peoples,²⁴² as well as the 2007 Declaration on the Rights of Indigenous Peoples. However, accessing the system would be difficult. Firstly, there is the problem of physical accessibility here; to participate in a UN meeting, people have to travel to Geneva or New York, which may exclude NGOs representing certain groups from participating. This can be contrasted with the ILO mandating that the state bring workers and employers organisation representatives with them to the ILC. Secondly, any solution proposed may take an extremely long time to be agreed; in the case of indigenous peoples, as explained by Swepston above, their campaign for change began in the early 1970s, however the UN Declaration was not passed by the General Assembly until 2007, or thirty-seven years later. Thirdly, it is not even clear that states would be inclined to take up the issue; the talks to agree a successor to the Kyoto protocol have so far been unsuccessful and states

²³⁹ S. C. Aminzadeh, *supra* note 77, p. 241

²⁴⁰ *ibid*

²⁴¹ P. Stephens, ‘Applying Human Rights Norms to Climate Change: The Elusive Remedy’ 21 *Colo. J. Int’l Envtl. L. & Pol’y* 49 2010, p. 82

²⁴² For example: the UN Permanent Forum on Indigenous Issues and the Working Group on Indigenous Populations.

discussing climate change in the Human Rights Council have been extremely tentative in their resolutions.²⁴³

The ILO has drawbacks in terms of accessibility and cannot be said to be an adequately accessible forum for a human rights claim to be made. However it is more accessible than other international law systems and therefore, as part of a campaign, it may indeed be the best international law solution in terms of accessibility.

5.2.5.2 A voice within the ILO?

The second question to be raised is whether climate change migrants would really be able to have a voice in the ILO; even if the issue was put onto the agenda of the ILC, would those migrating due to climate change be able to participate in the discussions?

The answer to this question is difficult. The approach the ILO took in C169 was to include groups representing indigenous and tribal peoples in the process, as well as including indigenous and tribal peoples as the representatives of the governments, trade unions and employers organisations. This could therefore be used as a precedent by climate change migrants to demand a similar level of inclusion in any discussion on climate change migration. The tripartite nature of the ILO could also work in favour of this; the membership of trade unions is far greater than that of NGOs and therefore could be said to provide a more representative voice than if it were solely NGOs speaking for climate change migrants. On the other hand of course, trade unions solely represent those in the unionised formal economy, an issue that will be greater discussed later. Furthermore, Venne, a member of the Cree nation speaking with regards to C169, suggests that the structure of the ILO predisposed the organisation to approach the issue from non-indigenous standpoint²⁴⁴ - seemingly because structurally it is geared towards the interests of the non-indigenous majority and perhaps because its focus is on employment - and claims that most decisions were taken behind closed doors, which excluded indigenous groups.²⁴⁵ This ultimately led to, according to Venne, the walking out of over 300 indigenous participants of the UN Working Group on Indigenous Populations when the ILO representative explained the convention there and the adoption of a resolution by indigenous groups in the Indigenous Peoples Preparatory Meeting to the Working Group on Indigenous Populations, condemning C169.²⁴⁶ At least some indigenous groups therefore felt that their voice was not being heard in the ILO discussions and in fact created a dissensus against the convention.

²⁴³ UN Human Rights Council Resolutions 7/23 and 10/4

²⁴⁴ S. Venne, 'A new language of assimilation: A brief analysis of ILO convention 169' Without Prejudice: The EAFORD International Review of Racial Discrimination Volume 2 II, 1989, p. 54

²⁴⁵ *ibid* p. 64

²⁴⁶ *ibid* p. 65

When looking at other options in international law though, again the ILO seems to have greater scope for allowing persons to voice their claims than other mechanisms. Bringing a case before a court or tribunal would allow a climate change migrant or a group of climate change migrants a clear voice, however it would simultaneously exclude those not participating in the case. While using the UN bodies would exclude any right of participation in discussions completely, as only states have the right to inclusion within the UN, and at most would only include the voices of NGOs representing climate change migrants invited to be present in discussions.

Again then, the ILO is not a perfect or even good system for allowing the voices of those migrating due to climate change to be heard and structurally it may work to exclude CCMs as some indigenous groups claim it did. However, it does have the capacity to go a long way in being a platform within the international law system for climate change migrants to get their voices heard beyond being mere ‘noise’.

5.2.5.3 Demanding rights or demanding inclusion into the consensus? Creation of a new ‘absolute victim’?

A question over using the ILO as a forum to create a dissensus is whether it would actually allow for this or whether at best it would just provide for the inclusion of those represented at the ILO into a new consensus.

This is not a question that can be answered definitively, but would be one dependent on the process using the ILO as a forum would take. However, the focus of the ILO is on unionised persons working in the formal economy, as Rodgers et al say, “employers’ and workers’ organisations necessarily represent the formal economy rather than the huge – and growing – informal economy, especially in developing nations. In addition, with membership of trade unions shrinking in many industrialised states, the representativeness of these organisations even in the formal sector is often questioned.”²⁴⁷ This indicates that there is a danger that any action taking in the ILO could include workers in the formal economy within a consensus which still prohibited the movement of those not in the unions, outside the working formal economy and those outside of work from migration, in effect repositioning who is seen as the ‘absolute victim’ of climate change.

However, this is not to say that individual or group complaints or using the UN system would avoid this problem; in both of these mechanisms there is still the danger that those not represented would be recast as the ‘absolute victims’ if those represented are more eager to join the consensus rather than campaign for the human rights of all climate change migrants. Using the ILO however could at least bring the awareness of non-inclusivity to the debate, due to its recognised focus on the unionised, formal workers, which might not occur in other forums.

²⁴⁷ G. Rodgers, E. Lee, L. Swepston and J. Van Daele *supra* n.210, p. 17

If we look at the Indigenous and Tribal Peoples Convention again, as an example, it can clearly be seen that its success as an act of dissensus is flawed. Article 1, for example, clearly denies indigenous and tribal peoples the right to self-determination – by recognising indigenous and tribal peoples as *peoples*, while simultaneously stating that this does not mean that they have the rights that *peoples* have in international law. Furthermore, while highlighting that for some groups land, belief and culture are implicitly tied, it reserves the right of the state to take land from groups,²⁴⁸ and, as Venne states, it says nothing about land already taken, which is of spiritual or cultural importance to indigenous peoples.²⁴⁹

However, this does not mean that all outcomes of using the ILO as a stage would lead to the creation of a new consensus which excludes, nor that it did in this case. While the convention falls short of recognising the rights of indigenous and tribal peoples, the ILO provided space on the international level for indigenous groups to claim their rights and allowed them to continue to stage acts of dissensus against the convention itself – as has been described above with the Indigenous Peoples Preparatory Meeting to the Working Group on Indigenous Populations – and it is in this way that the ILO could be useful to climate change migrants.

5.3 Synthesis

This section has tried to describe and analyse one way climate change migrants can create a dissensus, specifically through using international law. As stated above, it should not be taken as a suggested path for dissensus for those migrating due to climate change, more an examination of, if this route was taken, what would be the positives and negatives of doing so.

Looking firstly at international human rights law, it is clear that it is possible to make an argument that states are obliged to allow migration away from areas negatively affected by climate change, which could therefore be used to show the hypocrisy of international law in both prohibiting migration and demanding it. However, it would have the danger of becoming or being perceived as a demand for inclusion into existing systems.

Looking to a forum, it has been suggested here that the ILO could be the best forum for staging a dissensus within the international legal system; it has the benefits of a history of inclusion of affected groups into discussions, it gives non-governmental organisations, in the form of trade unions, the right to participate and it has the potential to overcome many of the obstacles other international institutions face. However, even so, it faces many limitations in terms of accessibility and real participation in the process, as well as questions over its ability to really be a forum for

²⁴⁸ ILO Indigenous and Tribal Peoples Convention C168, Articles 13, 16

²⁴⁹ S. Venne, *supra* n. 244, p. 61

dissensus. If climate change migrants were to use the ILO as part of a campaign of dissensus, these limitations would have to be noted. There is a real danger that the using the ILO as a forum for a political act, could result in the inclusion of some climate change migrants within the consensus, while still leaving the consensual principle, of climate change migrants being unable to migrate away from areas where climate change is leading to deterioration in their human rights, in place.

6 Conclusion

Oscar Wilde's critique of charity still holds true today; charity does not challenge structural inequalities, rather it works to disguise the fact that structural inequalities exist. This critique also holds true in the context of proposed solutions to climate change migration; rather than seeking to address the structural inequalities within international law which prevent persons from migrating away from areas where their human rights are in jeopardy, the current discourse maintains the structure, while trying to be kind to the persons affected by it by offering limited and defined exceptions which maintain the structure. In other words, the discourse maintains the consensus, through positing climate change migrants as absolute victims; persons who have lost their human rights due to climate change and are unable to claim them; it prioritises respect for the rule that says people are not free to move from areas where they will suffer a deterioration in their human rights, even where it is caused by other people, rather than prioritising respect for the human rights of those affected.

As a result, through being cast as the absolute victims of climate change, those migrating have had their voices silenced and solutions have been proposed for them which neither respect their human rights nor respect their agency to make decisions about their own future. These solutions have also failed to deal with any legal obligation on states to act and, moreover and fundamentally, have failed to address the rule – the structure – the consensus – which has prevented them from being able to migrate away from areas negatively affected by climate change.

An act of dissensus is needed by climate change migrants to challenge this consensus and the final part of this thesis has focussed on looking at whether such an act of dissensus could be performed within the framework of international law - using the police order against itself – by using existing norms to show the hypocrisy of those norms and whether an international forum could work as a stage for dissensus. An argument was made here to show that climate change migrants can use international law, in this case the ICESCR, prohibition on torture and IDT, responsibility to protect and ILO constitution, to show that they have a right to migrate away from areas negatively affected by climate change, which the consensus denies, and the ILO was suggested as perhaps being the best international legal forum for staging an act of dissensus. This approach though is extremely flawed and using international law as a stage for dissensus has the danger of any act becoming a call for inclusion into the consensus rather than an act against it, while using an international forum could purely result in the creation of a new and limited exception to the rule, which itself stands unchallenged.

This thesis has not - and does not want to - make any suggestions or recommendations as to how climate change migrants should challenge the consensus, should they seek to. Rather, it has been designed merely to show the fundamental flaw in current approaches to climate change migration and to examine a way it could be challenged by those affected by it. Climate change is going to result in the migration of around 200 million people and yet recognition of their humanity and their resulting human rights is lacking in the current discourse. The author has no legitimacy to propose a way to 'solve' a problem he is not affected by, but positioning climate change migrants as 'absolute victims', looking to solutions that don't recognise climate change migrants as human rights holders and excluding climate change migrants from participation in those decisions, is not the way to address this issue.

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