

Climate Change, Displacement and International Law: Between Crisis and Ambiguity

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I. Introduction

The possibility of large-scale displacement resulting from anthropogenic climate change has been the subject of considerable media, policy and academic attention.¹ The prospect of mass displacement, climate change refugees and so-called sinking islands both excites the public and intellectual imagination and creates a sense of looming crisis. Apocalyptic visions of a billion displaced persons by mid-century² sometimes compete for attention with suggestions of entire nations drowned³ and a world in which the form and meaning of states are altered.⁴ An exhibition at the Museum of London in 2010 — *Postcards from the Future* — envisioned a climate change-affected capital city with colossal refugee camps surrounding Buckingham Palace and rice paddies at Parliament Square.⁵ Although those suggesting such spectacles may themselves admit that they are based on little more than ‘heroic extrapolation’,⁶ they continue to be persistently and often purposely enlisted,

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¹ Media: see, eg, Emma Brindal, ‘Climate Change Refugees the Forgotten People’, *The Age* (online), 18 June 2008 <<http://www.theage.com.au/opinion/climate-change-refugees-the-forgotten-people-20080617-2s5b.html>>; Policy: see, eg, Bob Sercombe and Anthony Albanese, *Our Drowning Neighbours: Labor’s Policy Discussion Paper on Climate Change in the Pacific* (2006) <<http://www.Bobsercombe.id.au/uploads/OurDrowningNeighbours.pdf>>; Academic: see, eg, Norman Meyers, ‘Environmental Refugees in a Globally Warmed World’ (1993) 43 *Bioscience* 72.

² Rachel Baird et al, *Human Tide: The Real Migration Crisis* (Christian Aid, 2007) 6.

³ See, eg, Lilian Yamamoto and Miguel Esteban, ‘Atoll Island States and Climate Change: Sovereignty Implications’ (Working Paper No 166, United Nations University - Institute of Advanced Studies, 2011); David Wroe, ‘Call for Action on “Drowning” Islands’, *The Age* (online), 5 January 2006 <<http://www.theage.com.au/news/national/labor-calls-for-action-on-drowning-islands/2006/01/04/1136050495632.html>>. Note also that in Al Gore’s 2006 documentary *An Inconvenient Truth* the island nation of Tuvalu is already uninhabitable and its population dispersed.

⁴ See Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’ (2011) 2 *Climate Law* 345.

⁵ See George Marshall, ‘Fantasy Images of Climate Migration Will Fuel Existing Prejudices’, *The Guardian* (online), 27 October 2010 <<http://www.guardian.co.uk/environment/cif-green/2010/oct/27/london-futures-climate-change-exhibition>>.

⁶ See Norman Myers, cited in Oliver Brown, ‘The Numbers Game’ (2008) 31 *Forced Migration Review* 8, 8.

especially to highlight the potentially dire consequences of inaction on climate change.⁷

Rejecting spectacle-driven accounts of mass displacement forced by climate change are those who caution that such representations, whether emanating from the academic or public realm, are the result of ‘simplistic generalizations rather than solid empirical research’.⁸ Situating the possibility of climate change-driven displacement within a larger body of work on environmental migration and displacement, they highlight the multi-causality and complexities inherent in both, arguing that environmental and climatic factors inevitably combine with other factors which encourage, but also prevent, people movement. Climate change displacement, accordingly, is a far more ambiguous and uncertain prospect than crisis-based narratives usually account for.

Academically, the battle line between crisis- and ambiguity-focused accounts of environmentally-induced displacement is principally contested between, respectively, environmentalists and social scientists. The former use their arguments as a platform to argue for reform, for example of prevailing modes of production allegedly causing climate change and with it displacement, whilst the latter are anxious that reform could include that of international protection regimes, which is undesirable or unnecessary. International lawyers have at times been drawn to both sides of the argument. On the crisis-side, arguments focus on how ill-equipped the current international regime is to deal with potential mass migration or displacement generated by climatic or environmental change, therefore requiring fundamental restructuring.⁹ More nuanced have been legal and policy approaches which articulate the need for responses that account for the ambiguous causes and multi-varied patterns of movement, or the multiple needs of those displaced, without necessarily calling for drastic reform.¹⁰ Nevertheless, and as this article will argue, international law scholarship has not always fully explored the ramifications which emanate for the discipline from oscillation between crisis and ambiguity.

This article will outline briefly the rise of competing accounts of migration or displacement generated by climatic or environmental change, focusing on how the phenomenon has been constructed in rapid succession both in terms of crisis and ambiguity.¹¹ It will then chart the international law discourse has responded to, and

⁷ See Carol Farbotko, ‘Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation’ (2010) 51 *Asia Pacific Viewpoint* 47.

⁸ William B Wood, ‘Ecomigration: Linkages Between Environmental Change and Migration’ in Aristide R Zollberg and Peter Benda (eds), *Global Migrants, Global Refugees: Problems and Solutions* (Berghahn Books, 2001) 45.

⁹ See, eg, Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (Working Paper No 33, Global Governance Project, 2007).

¹⁰ See, eg, Jane McAdam, ‘Swimming Against the Tide: Why a Climate Change Displacement Treaty is not the Answer’ (2011) 23 *International Journal of Refugee Law* 2.

¹¹ Fuller accounts of this are provided in François Gemenne, ‘How They Became the Human Face of Climate Change: Research and Policy Interactions in the Birth of the “Environmental Migration” Concept’ in Etienne Pigué, Antoine Poudou and Paul de Guchteneire (eds), *Migration and Climate Change* (Cambridge University Press,

engaged with, this duality, before further exploring ramifications for legal developments emanating from both crisis- and ambiguity-based constructions of international phenomena.

II. Climate Change Displacement: Between Crisis and Ambiguity

(a) Crisis

The two prevailing discourses concerning environmentally-induced migration – one deterministic and emphasising crisis, the other exploring inherent ambiguities – crystallised early. Also variously described as the maximalist versus minimalist and alarmist versus sceptic schools, Astri Suhrke noted as early as 1993 that:

[w]hile the literature on environmental change and population movement is quite limited, two different and opposing perspectives can be discerned. One – which I call the minimalist view – sees environmental change as a contextual variable that can contribute to migration, but warns that we lack sufficient knowledge about the process to draw firm conclusions. The other perspective sets out a maximalist view, arguing that environmental degradation has already displaced millions of people, and more displacement is on the way.¹²

Distinctly neo-Malthusian, on the alarmist side the debate at its height was focused in particular on forecasts of apparently ever-increasing streams of displaced persons.¹³ Particularly in the years leading up to the much-anticipated climate change summit in Copenhagen in 2009, ever more staggering predictions of mass displacement emerged. In 2005, the Director of the Institute for Environment and Human Security at the United Nations University in Bonn (UNU-EHS) predicted that 50 million people would be displaced as early as 2010.¹⁴ A few years before, an early proponent of the ‘numbers game’,¹⁵ Norman Myers, had predicted that 200 million people would be overtaken by sea level rise, coastal flooding and altered rainfall patterns by 2050.¹⁶ Finally, most apocalyptically, a Christian Aid report in 2007 suggested that nearly a billion people could be permanently displaced by environment-related factors, including 250 million by climate-related slow-onset events such as droughts, floods and famines, as well as a further 50 million by rapid-onset natural disasters.¹⁷

2011) 225 and James Morrissey, ‘Environmental Change and Forced Migration: A State of the Art Review’ (Background Paper, Refugee Studies Centre, University of Oxford, 2009).

¹² Astri Suhrke, *Pressure Points: Environmental Degradation, Migration and Conflict* (American Academy of Arts and Sciences, 1991) 4.

¹³ See on this also François Gemenne, ‘Why the Numbers Don’t Add Up: A Review of Estimates and Predictions of People Displaced by Environmental Changes’ (2011) 215 *Global Environmental Change* 41.

¹⁴ UNU-EHS, *As Ranks of “Environmental Refugees” Swell Worldwide, Calls Grow for Better Definition, Recognition, Support* (11 October 2005), 1 < <http://www.ehs.unu.edu/file/get/3916>>.

¹⁵ A term coined by Oliver Brown in Myers and Brown, above n 6.

¹⁶ Norman Myers, ‘Environmental Refugees: A Growing Phenomenon of the 21st Century’ (2002) 357 *Philosophical Transactions of the Royal Society of London* 167.

¹⁷ Baird et al., above n 2.

A seemingly bizarre competition had culminated in who would dare propose the highest number of those displaced by the effects of climatic change; barely disguised was an assumption that the bigger the numbers the more the attention would be on the issue. Using numerical information to frame phenomena of global policy importance is not new, of course. Sally Engle Merry, in describing the turn to indicators in the global human rights arena, holds that '[n]umbers have become the bedrock of systematic knowledge because they seem free of interpretation, as neutral and descriptive.'¹⁸ Packaging the really rather complex climate change displacement phenomenon into easily digestible numbers therefore seemed to give the issue an aura of objective truth, a useful way to satisfy an appetite, especially of the media, for accessibility, visibility and immediacy.

Further attention was guaranteed by tying the numbers game intimately to a securitisation of the discourse, which equated large numbers of displaced persons with localised conflict and international crisis. Thomas Homer-Dixon, for example, warned in 1991 that 'waves of environmental' refugees [would] spill across borders with destabilizing effects on the recipient's domestic order and on international stability'.¹⁹ More apocalyptically again, a 2003 report commissioned by the US Department of Defence presented a grim future of warring states, massive social disturbances and mass migration.²⁰ Tying climate change displacement to the war on terror, a later report by retired, formerly high-ranking US military officers argued that 'climate change will provide the conditions that will extend the war on terror' and that '[m]ore poverty, more forced migrations, higher unemployment[;] those conditions are ripe for extremists and terrorists'.²¹ Exaggeration and embellishment are an integral part of such constructions:

Rather than predicting how climate change will happen, our intent is to dramatize the impact climate change could have on society... [O]ur aim is to further the strategic conversation rather than to accurately forecast what is likely to happen with a high degree of certainty.²²

This approach has been the recipient of significant criticism from those who are concerned that securitisation and crisis-talk opens the possibility that victims are turned into perpetrators and that the use of force is a legitimate response to displacement, allowing militaries and private defence contractors to benefit from the plight of those ill-affected by climate change.²³

¹⁸ Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 *Current Anthropology* 83, 89.

¹⁹ Thomas F Homer Dixon, 'On the Threshold: Environmental Changes as Causes of Acute Conflict' (1991) 16 *International Security* 76.

²⁰ Peter Schwartz and Doug Randall, 'An Abrupt Climate Change Scenario and its Implications for United States National Security' (Report, Global Business Network, 2003).

²¹ Adm T Joseph Lopez, quoted in CNA Corporation, *National Security and the Threat of Climate Change* (2007), 17 <<http://securityandclimate.cna.org/report>>.

²² Schwartz and Randall, above n 20, 7.

²³ See, eg, Betsy Hartman, 'Rethinking Climate Refugees and Climate Conflict: Rhetoric, Reality and the Politics of Policy Discourse' (2010) 22 *Journal of International Development* 233; Lorraine Elliott, 'Climate Migration and Climate Migrants: What

(b) Ambiguity

Sceptics, minimalists or those interested in environmental displacement's inherent ambiguities may well have felt vindicated when UNEP was forced to remove its prediction of 50 million displaced by climate change by 2010 from one of its websites, when this figure failed to substantiate.²⁴ It certainly did not stop the media and blogosphere from accusing the UN of 'disappearing' 50 million 'climate refugees'²⁵ and encouraging those eager to sustain a culture of doubt surrounding anthropogenic climate change,²⁶ those claiming the jury is still out.

However, condemnation of alarmist approaches to environmentally motivated or induced migration and displacement did not emerge so much out of the ideological battles imbuing climate change per se. Rather, prominent sceptics²⁷ warned against the speculative nature of maximalist perspectives and argued that models used to generate flow estimates struggled to isolate particular causes of displacement or migration, especially in areas facing simultaneously issues of poverty, conflict, as well as environmental challenges. Sceptics therefore grounded their challenge methodologically, arguing that the relationship between climatic change, environmental degradation and people movement is far more ambiguous than maximalists had considered. Richard Black, specifically, argued that 'linkages between environmental change, conflict and refugees remain to be proven'.²⁸ Suhrke added that environmental degradation is at best only ever a 'proximate cause

Threats, Whose Security?' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 175.

- 24 UNEP was forced to remove the figures and accompanying map from its website, which now offers only the following explanation: 'GRID-Arendal offered a map for everybody to download and further use on Environmentally Induced Migration ("Fifty million climate refugees by 2010") at this web address. This graphic was originally produced for the Environmental Atlas of the newspaper *Le Monde diplomatique*. We have decided to withdraw the product and accompanying text. It follows some media reports suggesting the findings presented were those of UNEP and the UN which they are not. We hope this clarifies the situation.' See UNEP/GRID-Arendal, *Environmentally Induced Migration Map – Clarification* (2011) <<http://www.grida.no/general/4700.aspx>>. It may be worth noting, however, that in 2010, 42 million people were displaced by natural hazards (this includes those displaced by geophysical events), a significant rise from 17 million just the year before; see Foresight, 'Migration and Global Environmental Change: Final Project Report' (Report, The Government Office for Science, London, 2011) 9.
- 25 See, eg, Axel Bojanowski, 'UN Embarrassed by Forecast on Climate Refugees', *Der Spiegel* (online), 18 April 2011 <<http://www.spiegel.de/international/world/0,1518,757713,00.html>>.
- 26 See, eg, James Hoggan, *Climate Cover-Up: The Crusade to Deny Global Warming* (Greystone Books, 2009).
- 27 See, eg, Stephen Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate' (New Issues in Refugee Research Working Paper No 70, United Nations High Commissioner for Refugees, 2002); Richard Black, 'Environmental Refugees: Myth or Reality' (New Issues in Refugee Research Working Paper No 34, United Nations High Commissioner for Refugees, 2001); Gaim Kibreab, 'Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate' (1997) 21(1) *Disasters* 20.
- 28 Black, above n 27.

of migration'.²⁹ Gaim Kibreab reversed the causal chains that emanate from the alarmist discourse when he argued that rather than migration and displacement leading to insecurity, it is insecurity and human vulnerability which influences the likelihood of people movement.³⁰ Crisis, then, is not what occurs at the point of movement but imbues the conditions that precede it.

Methodological challenges to crisis-based narratives of environmental migration or displacement were quickly coupled with questions regarding the thinly-veiled motivations underpinning such accounts. Black, for example, asks 'in whose interest it is that environment degradation should be seen as a possible cause of mass displacement?'³¹ He notes that the concept has its origins with environmentalists clearly more eager to raise attention about issues of environmental degradation and the ill-effects of climate change than immigration and asylum.³² The consequence, however, is potentially undesirable attention from those working in the latter policy area. As the London-based Information Centre About Asylum and Refugees has highlighted: 'The aquatic imagery of floods and tidal waves [often evoked] is reminiscent of bygone headlines in sections of the UK press warning of floods of asylum seekers or a tidal wave of Poles.'³³ Such imagery is then easily used to justify and devise ever more restrictive asylum regimes.³⁴ Bhupinder Chimni provides a compelling reason why: he articulates a concept he calls the 'myth of difference', a post-Cold War tendency, largely emanating from the Global North, which emphasises that the world's persecuted and displaced are increasingly moving for no good reason, abusing hospitality and, importantly in the context of this article, in numbers that are too large.³⁵ The myth is then invoked to justify the imposition of non-entrée regimes and other restrictive practices concerning displaced persons and other migrants by western governments. The fact that it is factually wrong in light of historical migration flows seems irrelevant:

Popular European belief seems to be based on the conviction that the present rate of intercontinental movements of immigrants is unprecedented in history. This is completely wrong. Taking a 200-year perspective from 1800 to 2000, by far the peak of migration was reached during the years 1845-1924, when 50 million people, mainly Europeans, moved to the Western Hemisphere at a time when world population counted only somewhat more than one billion. The total number of Africans or Asians who moved (or were moved as seven million slaves) to other continents during 1500-1960 is estimated at only 15 million [...] Europe's role as a major sending partner compared with other continents was maintained up to the

²⁹ Suhrke, above n 12.

³⁰ Kibreab, above n 27; Gaim Kibreab, 'Migration, Environment and Refugeehood' in Basia Zaba and John Clarke (eds), *Environment and Population Change* (International Union for the Scientific Study of Population, 1994).

³¹ Richard Black, *Refugees, Environment and Development* (Addison Wesley Longman, 1998) 1.

³² Ibid.

³³ Information Centre About Asylum and Refugees, *Climate Change Refugees?* (15 May 2007) <www.icar.org.uk/?lid=8733>.

³⁴ See, eg, Kibreab, above nn 27, 30; Gemenne, above n 11.

³⁵ B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350, esp 355ff.

1970s... Thus it is only in the last [...] decades that the OECD region as a whole has started to experience net immigration and each of the non-OECD regions net emigration.³⁶

Alarmist embellishments of flows of migrants or asylum seekers generated by changing climatic conditions directly feeds into the myth by inciting visions of millions of the displaced potentially arriving at the doorstep of 'desirable', wealthy nations, even though evidence suggests that any movement would more likely be internal or regional.³⁷ The intention is usually to remind governments in affluent nations of the correlation between their own policies and the detrimental consequences elsewhere. The intention may even be to suggest that inaction on climate change will engender responsibility for significant flows of displaced persons. More likely, however, inciting visions of floods of arrivals will feed into increasingly systematic attempts to keep undesirable 'others' away from Western borders,³⁸ and the kind of inaction and lack of cooperation that would create diminished opportunities for mobility for those impacted by climate change. Ultimately, the question may be whether it is worthwhile and just to sacrifice one cause (asylum and immigration advocacy) to aid another (environmental advocacy).³⁹

III. International Law: Between Crisis and Ambiguity

The international legal discourse has not escaped the tension emanating from non-legal debates. Concurrent with the rise of crisis-based accounts of migration or displacement in response to climatic and environmental change was a marked rise in analysis that portrayed an international legal order potentially in crisis in the face of such movement of people. Authors were quick to point out that neither refugee, nor asylum or statelessness regimes would apply,⁴⁰ or only minimally so, to those who might have to move in response to deteriorating livelihoods and welfare resulting from changing climatic or environmental conditions. Calls for regime reform soon followed, which mostly culminated in proposals for a new treaty or protocol that would address specifically so-called 'environmental refugees', or their inclusion under the Refugee Convention.⁴¹

³⁶ Jonas Widgren, 'International Migration and Regional Stability' (1990) 66 *International Affairs* 749, 752 quoted in Chimni, above n 35.

³⁷ See, eg, UNFCCC, 'Climate Change, Migration and Displacement: Who Will Be Affected?' (Working Paper submitted by the Informal Group on Migration/Displacement and Climate Change of the IASC, 31 October 2008), 1 <<http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>>.

³⁸ Adam Roberts, 'More Refugees, Less Asylum' (1998) 11 *Journal of Refugee Studies* 375.

³⁹ This dynamic is explored on a larger scale in Mark Dowie, *Conservation Refugees: The Hundred-Year Conflict Between Global Conservation and Native Peoples* (MIT Press, 2009).

⁴⁰ See, eg, Aurelie Lopez, 'The Protection of Environmentally-Displaced Persons in International Law' (2007) 37 *Environmental Law* 365.

⁴¹ See, eg, Bonny Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349; *Draft Convention on the International Status of Environmentally-*

A new generation of legal and policy scholarship has questioned the likelihood or utility of new or revised treaty instruments and with it a protection-based approach.⁴² Relying in part on the more nuanced approach emanating from the social science debates on environmental migration, such scholars indicate that given environmental migration's multi-causality and inherent complexities, likely movement patterns, as well as the needs of those affected, a multi-pronged approach that could rely on, and advocate the strengthening or expansion of, a variety of (usually soft law) instruments or other (usually non-binding) pathways already available to the international community would usefully address many gaps. This has included arguments supporting the utility of human rights-type instruments such as the Guiding Principles on Internal Displacement,⁴³ as well as disaster relief pathways that would assist at least with temporary relocation following rapid onset events as envisioned by the Hyogo Framework for Action,⁴⁴ and development pathways by which foreign aid and development assistance could improve adaptive capacity to the effects of climate change in affected communities and nations, thereby preventing displacement where possible or facilitating and managing it when it is not.⁴⁵

The debate, in other words, is focused on whether the correct international legal response to migration and displacement emanating from climatic and environmental change could or should be fairly deterministic, bold and substantial or less robust but better able to take account of the many ambiguities, complexities and uncertainties involved. What is sometimes missing from this debate, however, is a more internally focused dialogue that engages also with how international law itself constructs and engages with both ambiguity and crisis, determinism and uncertainty, and how this in turn enables or hinders the extent to which it is relevant in responding to displacement in the climate change context.

Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) in (2008) 4 *Revue Européenne de Droit de l'Environnement* 375.

42 See, eg, Jane McAdam, 'Refusing Refuge in the Pacific: (De)Constructing Climate-Induced Displacement in International Law' in Pigué, P. and Guchteneire, above n 11; McAdam, above n 10.

43 Francis M. Deng, 'Guiding Principles on Internal Displacement' (1999) 33 *International Migration Review* 484.

44 *Hyogo Framework for Action 2005 - 2015: Building the Resilience of Nations and Communities to Disaster* (Extract from the Final Report of the World Conference on Disaster Risk Reduction), UN Doc A/CONF.206/6 (16 March 2005).

45 See, eg, Walter Kälin, 'Conceptualising Climate-Induced Displacement' in McAdam, above n 23, 81; Michelle Leighton, 'Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons' (German Marshall Fund of the United States, 2010); Koko Warner, 'Migration and Displacement in the Context of Adaptation to Climate Change: Developments in the UNFCCC Climate Negotiations and Potential for Future Action' (Foresight, 2011).

(a) Ambiguity

Following early suggestions, often driven by (international) environmental lawyers,⁴⁶ for some kind of status for, or recognition of, so-called ‘environmental refugees’, international refugee lawyers soon agreed that the refugee designation was ill-suited because it implied causality which was unlikely to have occurred in the case of those who had moved in connection with climatic or environmental change.⁴⁷ And indeed, the widely-cited definition of who amounts to a refugee under international law holds that the term should apply only to any person who:

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁸

Clearly, this does impose several characteristics that a refugee must possess before he or she is recognisable as such under international law – crossing a border, persecution, for one of the reasons enumerated, etc. — which is not usually or necessarily the case with the environmentally-displaced. But to insist that the problem is purely one of positive law is to insist also that the refugee is reduced to a legal construction. This assumes that the ‘refugee’ can simply be recognised as what he or she is (or is not), which denies the ambiguities and arbitrariness that underpins the framing of the ‘legal’ refugee in the first place and the bureaucratic priorities this serves.⁴⁹ Definitions, like identities, are constructions and invariably, often purposely, exclude, as well as include. The Convention definition leads to an inevitable ‘reduction of refugee identities’⁵⁰ by attaining its clarity through the suppression of other possible refugee claims that may fall outside this definition, of which the environmentally-displaced form just one of many possible categories. It includes in ‘the inner circle of certified sufferers’⁵¹ some, but not others.

Of course, the list of ‘others’ is long. Why should it not also include those subjected to poverty and state fragility as generated by the global economic order? Is it morally supportable that we single out some but not others for inclusion in new

⁴⁶ See, eg. Gregory S McCue, ‘Environmental Refugees: Applying International Environmental Law to Involuntary Migration’ (1993) 6 *Georgetown International Environmental Law Review* 151.

⁴⁷ See, eg. Jane McAdam, ‘The Normative Framework of Climate Change-Related Displacement’ (Paper presented at the event ‘Addressing the Legal Gaps in Climate Change Migration, Displacement and Resettlement: From Sinking Islands to Flooded Deltas’, The Brookings Institution, 3 April 2012) 1.

⁴⁸ Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1(A)2.

⁴⁹ Regarding bureaucratic priorities, see Roger Zetter, ‘Labelling Refugees: Forming and Transforming a Bureaucratic Identity’ (1991) 4 *Journal of Refugee Studies* 39.

⁵⁰ Patricia Tuit, *False Images: The Law’s Construction of the Refugee* (Pluto Press, 1996) 14.

⁵¹ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011) 47.

or revised protection regimes?⁵² Likely not. But exclusion has also meant conceptualisation of the environmentally-displaced within a profusion of alternative designations, proposed by jurists, activists and international organizations alike.⁵³ The ‘environmental refugee’ or ‘climate refugee’ is joined by the ‘environmental migrant’, ‘climate exile’ and the ‘eco migrant’. The ‘migrant’ label, in particular, has many proponents. For example, the International Organization for Migration holds that those compelled to move in response to climatic change are ‘environmental migrants’, when:

... persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual home, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.⁵⁴

Commendably, this manages to articulate many of the complexities evolving around the movement of people in the face of climatic and environmental change by framing the phenomenon along a time-space continuum and permitting consideration of a complex array of drivers. However, it is also surprising for the ambiguity it creates about other issues of causality. As Anthony Oliver-Smith has pointed out, such conceptualisations usually tend ‘to suggest that nature is at fault, when in fact humans are deeply implicated in the environmental changes that make life impossible in certain circumstances.’⁵⁵ They suggest that there is no ‘persecutor’, no man-made ‘force’, with nature the only entity responsible for dislocation.

This is not to say that those potentially affected desire to be recognised as refugees instead, especially because of widespread awareness of both the stigma and ill-treatment often involved in the refugee experience.⁵⁶ However, insisting that they are anything but refugees also feeds into what Roger Zetter has described as an ongoing ‘deliberately transformative process to create far less preferential categories’⁵⁷ of protection. Filling a bureaucratic and political need to differentially label those migrating for increasingly complex reasons has, in other words, led to a plethora of descriptors that ‘institutionalize and differentiate categories of eligibility

⁵² See Jane McAdam, above n 10. Arguing for the more inclusive designation of survival migrant, Alexander Betts has persuasively argued in favour of protection of all who have left their country of origin due to an existential threat for which there is no domestic remedy; eg, in Alexander Betts, ‘Survival Migration: A New Protection Framework’ (2010) 16 *Global Governance* 361.

⁵³ See Olivia Dun and François Gemenne, ‘Defining Environmental Migration: Why it Matters so Much, Why it is Controversial and Some Practical Processes Which May Help Move it Forward’ (2008) 6 *REVUE Asylon(s)* 1.

⁵⁴ International Organization for Migration, *Migration, Climate Change and the Environment: Definitional Issues* <<http://www.iom.int/jahia/Jahia/definitional-issues>>.

⁵⁵ Anthony Oliver-Smith, cited in Stefan Lovgren, *Climate Change Creating Millions of “Eco Refugees”, UN Warns* (18 November 2005) National Geographic News <http://news.nationalgeographic.com/news/2005/11/1118_051118_disaster_refugee.html>.

⁵⁶ See, eg, McAdam, above n 47, 1.

⁵⁷ Roger Zetter, ‘More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization’ (2007) 20 *Journal of Refugee Studies* 172, 182.

and entitlements',⁵⁸ and which largely serves the exclusionary practices of states. Although it is true to say that the legal category 'refugee' has limited content, to insist that the environmentally-displaced cannot fit this designation, that they are something else instead, may also condemn them to be conceptualised within an array of other, more pejorative labels often associated with the 'illegal' or 'bogus' migrant (as opposed, for example, to the 'genuine' refugee) now so pernicious in political discourse, especially in many affluent countries.⁵⁹

(b) Crisis

Giorgio Agamben has insisted that it is the refugee who reveals the circumstances of growing sections of humankind.⁶⁰ It is also undeniable that the refugee is frequently colonised to highlight climate change's potentially dire consequences – often in the form of images of the nearly-drowned islander fleeing to the safety of metropolitan neighbours.⁶¹ As commentators have persistently pointed out, however, such spectacle-focused representations are misleading,⁶² suggesting instead that the phenomenon would be framed more realistically within the context of the growing body of those moving within the confines of the nation or their local region (and not across borders)⁶³ or even within the context of what Rob Nixon has called 'displacement without movement', affecting individuals or communities that refuse to, or cannot, move at all but become stranded in places becoming increasingly devoid of the characteristics that once made them habitable.⁶⁴ Those moving (or 'stuck'), in other words, will belong to what Patricia Tuit calls the "excess" of the refugee definition,⁶⁵ a more 'elusive, intractable and amorphous "bulk"'.⁶⁶

Being elusive and amorphous, however, raises obstacles regarding international attention and response. Several authors have pointed out international law and policy's tendency to be overwhelmingly responsive only to crisis,⁶⁷ or ruptive,

58 Ibid 180.

59 See Catherine Dauvergne, 'Making People "Illegal"', in Peter Fitzpatrick and Patricia Tuit (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate, 2004) 83.

60 Giorgio Agamben, *Notes on Politics: Means Without End* (Minnesota Press, 2000) 20.

61 See Farbotko, above n 7.

62 And, as Carol Farbotko points out, are disparaging and denying agency. See *ibid*.

63 See UNFCCC, above n 37. Note that UNHCR has also for some years now included significantly larger numbers of IDPs (internally displaced persons) than refugees (cross-border) figures in its list of total population of concern to the organisation. In 2010, for example, it included 10.55 million refugees but 14.7 million IDPs in its statistics; see United Nations High Commissioner for Refugees, *UNHCR Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions* (2011) 6.

64 Nixon, above n 51, 19; see also Foresight, above n 24, on 'trapped populations'.

65 Patricia Tuit, 'Refugees, Nations, Laws and the Territorialization of Violence' in Fitzpatrick and Tuit, above n 59, 37, 51.

66 *Ibid*.

67 Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

decisive events or instances.⁶⁸ Fleur Johns et al. argue that it is among events – spectacular, acute moments — that international lawyers usually prospect for certain possibilities of international law.⁶⁹ Martti Koskenniemi shows how highlighting such instances ‘appeals to the imagination and a sense of (informal) justice’, and stipulates ‘that the routine of patterned choices ought not to be applied now’.⁷⁰ Emphasising the special character of phenomena is therefore often critical to break through barriers of disinterest and condemnation to the realm of the unremarkable. The nearly-drowned islander is consequently the bearer of much greater representational potential than the person who may simply move from one village to the next, or village to town, in response to nearly imperceptible climatic and environmental change. The person who will not or cannot move in the face of climatic change, though he or she faces diminished prospects of well-being and prosperity, may equally be so spectacle-deficient as arguably not to warrant any attention or a response at all.

Global warming may, of course, contribute to turning ‘inhabitants’ into ‘uninhabitants’ in breathtaking fashion. For example, increases in tropical cyclone occurrence or intensity could have devastating effects on low-lying coastal areas and human settlements located there,⁷¹ rendering them instantly uninhabitable, at least for the short-term. Although there is a lack of binding normative frameworks to respond to such events, they may well trigger immediate humanitarian concern and emergency assistance to protect and shelter those affected. Although this, in the words of Chimni, may ‘legitimise a range of dubious practices’ which ‘establish and sustain global relations of domination’,⁷² it may also bring relief to the plight of those affected, at least in the short-term.⁷³ But what about other calamities? How is international concern triggered for the person whose life is becoming incrementally and imperceptibly more difficult, whose circumstances are marred by a slow loss of economic and livelihood security? How can the international legal order be relevant in light of a violence that dispenses its devastation slowly and steadily in discreet fashion? Nixon has called this the ‘elusive violence of delayed effects’,⁷⁴ ‘a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all’⁷⁵ and which is therefore difficult to source, oppose or reverse.⁷⁶ Also drawing attention to human-made menaces that are nearly invisible

⁶⁸ Fleur Johns, Richard Joyce and Sundhya Pahuja, ‘Introduction’ in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2010) 1.

⁶⁹ *Ibid* 2.

⁷⁰ Martti Koskenniemi, ‘Foreword’ in *ibid* xvii, xix.

⁷¹ See, eg, Thomas R Knutson et al, ‘Tropical Cyclones and Climate Change’ (2010) 3 *Nature Geoscience* 157; Yamamoto and Esteban, above n 3, 18.

⁷² B S Chimni, ‘Globalisation, Humanitarianism and the Erosion of Refugee Protection’ (Working Paper No 3, Refugee Studies Centre, University of Oxford, 2000) 3.

⁷³ Much less attention is paid to the long-term needs of those impacted or displaced by natural disasters; see Gemenne, above n 11, 245.

⁷⁴ Nixon, above n 51, 3.

⁷⁵ *Ibid* 2.

⁷⁶ *Ibid* 7.

and dispersed, Rachel Carson similarly called it ‘a shadow that is no less ominous because it is formless and obscure.’⁷⁷ Both point out that such menaces usually preclude the pursuit of justice, redress or restitution.⁷⁸

What we seemingly cannot demand of the international (legal) order, then, is that it can encapsulate also crises that do not erupt into instant, sensational visibility. Crisis is not that which is silent, or nearly so, or unspectacular. It is not what affects the everyday.⁷⁹ Crisis is noisy, explosive, singular and ostensibly obvious. It is what can command a response — though it rarely permits pause to ask breathlessly ‘how did we actually get here?’ For the international law discourse on climate change migration and displacement this raises difficult tactical challenges: there have been many good reasons to contest overly deterministic, crisis-focused portrayals of, and responses to, climate change-driven people movement. But the stakes are also high as the discourse veers towards portrayal of such movement as uncertain, indistinct and sometimes invisible, something which may ‘slowly disappear as part of the background so that we can no longer distinguish anything remarkable in it’.⁸⁰ The effect this produces is that we conceive of it as ‘business as usual’, demanding a response no more than ‘business as usual’ and thereby condemnation to an international law and policy arena marred by indifference, uncertainty or unenforceability.

IV. Conclusion

Portrayals of climate change-driven migration or displacement have not been ‘neutral’. They have oscillated between deterministic, crisis-driven accounts and more nuanced narratives highlighting inherent ambiguities. One position seeks to make the phenomenon stick out, thereby drawing attention to it, including from those that should act on climate change. The other hesitates to attribute something particularly singular to it and accuses those making a spectacle out of it of caring little about those actually affected. Legal debates have not been disinterested in this duality and have oscillated between proposals for big, bold, new, singular and allegedly unlikely responses and an array of options both arguably more politically palatable and more responsive to varied or uncertain causes and patterns of movement and the needs of those affected. It is important to remember, however, also that it is not only the inherent ambiguities of movement which preclude a bolder response but also the ambiguities purposely built into international protection regimes, which seemingly arbitrarily condemns some but not others to less certain and resolute attention, assistance or protection. Equally, although crisis-talk may well encourage an ‘international law world’ prone to support muscular, militant response,⁸¹ crisis is also where that world pays attention and not to the nearly inaudible hum of indistinct, ambiguous, illusive, non-ruptive instances. The

⁷⁷ Rachel Carson, *Silent Spring* (Houghton Mifflin, 1962, rep 1992) 238.

⁷⁸ See also John Galtung, who first elaborated the concept of structural violence in John Galtung, *Peace: Research, Education, Action* (Ejlers, 1975).

⁷⁹ Charlesworth, above n 67.

⁸⁰ Koskenniemi, above n 70.

⁸¹ Charlesworth, above n 67.

challenge for international lawyers may be how to discourage the former but overcome the latter.