

# MIGRANTS CAN MAKE INTERNATIONAL LAW

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*Migrants have the power to make international law as norm creators. The nation-state enjoys a monopoly on violence in domestic jurisgenesis, but international law's constraint on the use of force provides non-state actors the opportunity to participate in the formation of international legal doctrine without the threat of violence. Scholars have overlooked this non-state jurisgenerative potential, bound by a state-centric conception of law. This Article applies the claim that non-state actors have the power to influence international law to the transnational issue of climate-induced migration. Climate change intensifies slow- and sudden-onset events, and sudden-onset disasters already displace millions annually. Yet international law grants nation-states the right to largely exclude foreigners such that climate migrants have no right to enter another country, resettle, or be protected against forcible return when they are displaced across borders. While liberal scholars defend this right to exclude as necessary for the preservation of sovereignty, the majority of nation-states participate in free movement agreements—regional trade agreements that promote migration—demonstrating that sovereignty and exclusion are not mutually constitutive.*

*Ultimately, I leverage the challenge of climate-induced migration to ask who has the power to change international law. My response proceeds in two parts. First, the Article challenges the state-centric focus of international law to call attention to non-state actors' ability to create legal norms. Second, I draw on diasporic theory to argue that the Global South diaspora—Global Southerners living in the Global North—should leverage their hybrid positionality to create legal norms that reconstitute sovereignty through admission. International migration theorists reproduce the paradigmatic image of a Global North and Global South border contest, and foreclose the possibility of migrant's jurisgenerative capacity. This Article intentionally shifts the frame to highlight the power that a territorially-unbounded Global South people have to shape international legal norms.*

## TABLE OF CONTENTS

<i>Introduction</i> . . . . .	100
<i>I. The Climate-Induced Migration Challenge</i> . . . . .	104
<i>A. Impacts &amp; Terminology</i> . . . . .	105
<i>B. Governance Structure</i> . . . . .	109
<i>C. The Protection Gap</i> . . . . .	112
<i>II. The Constitution of Sovereignty Through Exclusion</i> . . . . .	116
<i>A. Sovereignty Constructed Through the Right to Exclude</i> . . . . .	116
<i>B. Contemporary Justifications for the Right to Exclude</i> . . . . .	121

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III.	<i>Who Creates International Law?</i> .....	123
A.	<i>The State-Centric Account of Jurisgenesis</i> .....	124
B.	<i>Non-State Actor Jurisgenesis</i> .....	126
IV.	<i>Re-constituting Sovereignty Through Admission</i> .....	133
A.	<i>Liberalizing Borders Through Free Movement Agreements</i> .....	133
B.	<i>The Global South Diaspora as Jurisgenerative Agent</i> .....	144
	<i>Conclusion</i> .....	150

## INTRODUCTION

Migrants can make international law as norm creators. The nation-state enjoys a monopoly on violence, and uses this monopoly to violently enforce domestic law. In the domestic realm, non-state actors must thus consider violent opposition when attempting to participate in jurisgenesis—the creation of legal meaning—that counters the nation-state’s interpretation of the law. However, international law constrains nation-states’ use of force. Therefore, in theory, non-state actors can participate in international legal norm creation without the threat of violence.

Most scholars overlook non-state jurisgenerative potential because of a state-centric conception of international law. The habitual lens of the Global North–Global South contest further blinds migration scholarship in particular. Migration scholars typically theorize from a position that rightly recognizes that the Global South is always set to lose in the conflict between the Global North and Global South, but wrongly conclude that Global Southerners are therefore powerless. This Article intentionally shifts the frame to name a territorially unbounded Global South people as agents of international legal norm creation.

Border contests between the Global South and Global North have been rife over the past five years, leading to significant developments in the international law of migration. In 2018, thousands of Central American migrants landed at the United States–Mexico border in Tijuana, starting off a wave of migration that has continued into 2020.<sup>1</sup> The migrants of this “Central American Exodus” arrived seeking asylum, driven by climate change, economic hardship, gang violence, and food insecurity.<sup>2</sup> President Donald Trump called the migrants criminals, declared a national emergency to build a wall at the border,

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1. See Maya Averbuch & Elisabeth Malkin, *Migrants in Tijuana Run to U.S. Border, but Fall Back in Face of Tear Gas*, N.Y. TIMES (Nov. 25, 2018), <https://perma.cc/2NW5-TMPY>; Patrick J. McDonnell & Kate Linthicum, *By Turning Back Caravans, Mexico Is Acting as Trump’s Border Wall, Critics Say*, L.A. TIMES (Jan. 24, 2020), <https://perma.cc/BM9S-M4AF>.
  2. See Oliver Milman et al., *The Unseen Driver Behind the Migrant Caravan: Climate Change*, GUARDIAN (Oct. 30, 2018), <https://perma.cc/PKY8-7AJG>.

and planned to cut \$450 million in foreign aid to Central American countries.<sup>3</sup> Migrants were held in overcrowded detention centers for prolonged periods, and children were separated from their families.<sup>4</sup>

In Europe, the death of 1,250 migrants crossing the Mediterranean in 2015 signaled the climax of a similar migration disaster.<sup>5</sup> The image of a Syrian boy washed up dead on shore later that year in Turkey became a symbolic stand-in for the record number of refugees and migrants in the twenty-first century, and the life-threatening nature of their journeys.<sup>6</sup> There were more than 270 million migrants in 2019, a fifty-one-million increase within the last decade.<sup>7</sup> The image of the dead Syrian boy also gestured towards the inadequacy of the international legal system in handling contemporary migration flows.<sup>8</sup>

In response to 2015, the “year of human suffering and migrant tragedies,” then United Nations (“U.N.”) Secretary General Ban Ki-moon called for a global compact on human mobility<sup>9</sup> that would increase “safe channels for regular migration”; foster cooperation between countries of origin, transit, and destination; and promote respect for the human rights of migrants.<sup>10</sup> Ban’s efforts crystallized in the New York Declaration for Refugees and Migrants (“New York Declaration”), a resolution adopted at the 71st Session of the U.N. Gen-

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3. See Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://perma.cc/F65K-TQ2T>. The Central American countries Trump targeted included Guatemala, Honduras, and El Salvador. See Julian Borger, *Trump Plans to Cut Central America Aid, Blaming Countries for Migrant Caravans*, GUARDIAN (Apr. 2, 2019), <https://perma.cc/7JV7-PS5M>.
  4. See Letter from Jennifer L. Castello, Acting Insp. Gen., Off. of Insp. Gen., to Hon. Kevin K. McAleenan, Acting Sec’y, Dep’t of Homeland Sec. (July 2, 2019).
  5. See Press Release, Int’l Org. for Migr. [IOM], *Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015* (Dec. 31, 2015), <https://perma.cc/Q5DD-CA6M>.
  6. See Ban Ki-moon, Sec’y-Gen., U.N., *Remarks at High-Level Meeting on Migration and Refugee Flows* (Sept. 30, 2015), <https://perma.cc/VX38-4H8P>.
  7. *The Number of International Migrants Reaches 272 Million, Continuing an Upward Trend in All World Regions*, SAYS UN, U.N. DEP’T OF ECON. & SOC. AFFS. (Sept. 17, 2019), <https://perma.cc/4FJP-FNME>.
  8. See, e.g., Ban Ki-moon, *supra* note 6.
  9. The term ‘mobility’ encompasses the spectrum of forced and voluntary, and internal and cross-border movement, as well as planned relocation. HUMAN MOBILITY IN THE CONTEXT OF CLIMATE CHANGE: ELEMENTS FOR THE UNFCCC PARIS AGREEMENT (2015), <https://perma.cc/NC98-X6PN>. See also W. Neil Adger et al., *Mobility, Displacement and Migration, and Their Interactions with Vulnerability and Adaptation to Environmental Risks*, in ROUTLEDGE HANDBOOK OF ENVIRONMENTAL MIGRATION 29 (Robert McLeman & François Gemenne eds., 2018).
  10. Press Release, U.N. Sec’y-Gen., *On International Migrants Day, Secretary-General Calls for Commitment to Human-Rights-Based Responses Guided by International Law*, U.N. Press Release SG/SM/17421-DEV/3212-OBV/1571 (Dec. 16, 2015).

eral Assembly.<sup>11</sup> A direct response to migrant death, the New York Declaration states that U.N. member states are “determined to save lives.”<sup>12</sup> The New York Declaration also committed U.N. member states to developing two mobility agreements: the Global Compact on Safe, Orderly and Regular Migration (“Global Compact”) and the Global Compact on Refugees (“GCR”).<sup>13</sup>

The emergence of the Global Compact demonstrates the power of non-state actors to drive the creation of international law. The death of more than a thousand migrants crossing the Mediterranean to Europe catalyzed the creation of the Global Compact, the first ever intergovernmentally negotiated agreement on migration. The Global Compact shifts the contemporary conception of the appropriate sovereign response towards migrants, that is, away from exclusion and towards admission. To put it in theoretical terms, the deadly interaction between migrants and Europe prompted the enunciation of a new global norm on nation-state<sup>14</sup> responsibility toward foreign nationals.<sup>15</sup> The Global Compact’s articulation that nation-states should facilitate migration will, according to Koh’s transnational legal process, become internalized in domestic law.<sup>16</sup> However, not only dead migrants can persuade the nation-state. Non-state actors, including migrants, have the jurisgenerative power to further support a normative transition in international law toward admission.

A shift in nation-state responsibility toward migrants remains necessary as various transnational challenges alter global mobility flows. In the climate change realm, for example, an overreliance on territorial sovereignty leaves international law ill-equipped to deal with climate-induced migration. International law largely grants nation-states the right to exclude foreigners, which creates a protection gap; the right to exclude leaves climate migrants with no rights to admission or to stay when they are displaced across borders. Liberal scholars defend the right to exclude as necessary for the preservation of sover-

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11. G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Oct. 3, 2016).

12. *Id.*

13. *Id.*

14. The joint term nation-state, credited to Georg W.F. Hegel, conveys the combined sense of both the nation, a community of people with a shared national character, and the state, a political entity exercising territorial dominion. See THOMAS M. FRANCK, *THE EMPOWERED SELF* 7 (1999).

15. See generally Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (describing the transnational legal process as a three-part process in which a transnational actor, or actors, provokes an interaction which prompts an interpretation of a relevant global norm that results in the internationalization of the new interpretation into a domestic legal system); see also Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). The U.N. established a financing mechanism to support countries in implementing the Global Compact nationally. See *Start-Up Fund for Safe, Orderly and Regular Migration*, U.N., <https://perma.cc/CA2H-22UJ>.

16. See Koh, *Why Do Nations Obey International Law?*, *supra* note 15, at 2603.

eignty. Yet sovereignty need not necessarily be constituted through exclusion of foreigners.

Nation-states remain sovereign even when opting for more open admission policies. For example, more than 60% of nation-states participate in free movement agreements (“FMAs”)—provisions within (sub-)regional economic integration schemes that ease migration restrictions between participating member nation-states—thereby choosing to abrogate their right to exclude in the context of regional integration.<sup>17</sup> FMAs serve as one solution to the climate-induced protection gap because of the mobility they facilitate, and further demonstrate that preserving sovereignty while limiting the exercise of the right to exclude is feasible, and even beneficial.

The benefits of more liberal migration policies extend beyond the climate context. Heightened mobility flows in response to a range of drivers, including climate change, demand increased regular migration pathways.<sup>18</sup> Favoring admission over exclusion creates economic advantages, both in terms of filling labor market shortages and enhancing development gains.<sup>19</sup> If migrants can make international law, then migrants in the Global North, and other members of the Global South diaspora, should use their jurisgenerative potential to participate in reformulating the relationship between sovereignty and the right to exclude.

Ultimately, this Article leverages the failure of international law vis-à-vis climate-induced migration to ask who has the power to change international law. My response proceeds in two turns. First, the Article challenges the state-centric focus of international law to call attention to non-state actors’ ability to create legal norms. I argue that migrants can participate in international norm creation. Second, I draw on diasporic theory to locate the Global South diaspora as a powerful non-state actor in the field of international migration law, and recommend that the Global South diaspora leverage their hybrid positionality to support the reconceptualization of sovereignty through admission rather than exclusion.<sup>20</sup>

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17. Vincent Chetail, *The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 1, 33–35 (Vincent Chetail & Céline Bauloz eds., 2014). The European Union (“EU”) serves as the most well-known example of an FMA.

18. This is the central thesis of the Global Compact, which also states that the agreement affirms “the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law.” Global Compact on Migration, Global Compact for Safe, Orderly and Regular Migration, U.N. Doc. A/CONF.231/4 (July 13, 2018).

19. See *infra* Part IV.A. for a discussion of these economic benefits at a regional level.

20. One way the international legal norms that non-state actors create might become embedded in domestic law is through a transnational legal process. See Koh, *Transnational Legal Process*, *supra* note 15. However, the precise mechanism by which these norms are generated and

Part I provides an overview of climate-induced migration. I map out the “legal void”<sup>21</sup> surrounding migrants displaced across borders by climate-related events, and identify the right to exclude as the source of this protection gap. Part II supports the argument for reconstituting sovereignty through admission by first providing an account of the right to exclude, the doctrine’s discriminatory history, and then contemporary justifications of the doctrine. I posit that the constitutive relationship between sovereignty and the right to exclude pits sovereign rights against migrant rights. Contemporary justifications for an unfettered right to exclude center on the claim that migrants pose a threat to liberal democracy, and build on the discriminatory foundation of the doctrine. Although the right to exclude produces deadly results, the doctrine goes unchallenged.

The challenge of climate-induced migration, where climate migrants remain without legal protection largely due to international law’s constitution of sovereignty through exclusion, thus leads me to the question of who has the power to change international law. Part III gives the classical response, before asserting the jurisgenerative power of non-state actors. I leverage the fact of nonviolent enforcement in international law to make the claim that non-state actors have the capacity to create legal norms in the international sphere without the threat of violence. Finally, Part IV draws on diasporic theory to first name the Global South diaspora as a collective, before arguing that the Global South diaspora can leverage their jurisgenerative capacity and multiplicitous positionality to engage in a transnational legal process that results in more liberalized borders.

## I. THE CLIMATE-INDUCED MIGRATION CHALLENGE

This Part provides a conceptual overview of climate-induced migration, and discusses the discourse on terminology. It also describes the international governance structure that has grown to address climate-induced migration over the past decade. Finally, it outlines the legal protection gap that remains despite these developments in governance, given that climate-induced migration generally does not fall under the scope of international refugee law, and contemporary constructions of sovereignty insist on the nation-state’s right to exclude.

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integrated into law merits further research, which falls outside the scope of this Article’s primary set of aims, including first naming the Global South diaspora as a non-state actor with jurisgenerative potential.

21. António Guterres, UNHCR, Statement at Intergovernmental Meeting at Ministerial Level to Mark the 60th Anniversary of the 1951 Convention Relating to the Status of Refugees (Dec. 7, 2011), <https://perma.cc/HA2Y-R9FM>.

*A. Impacts & Terminology*

Climate change refers to the increase of average global temperature above preindustrial levels caused by greenhouse gas emissions, including carbon dioxide and other air pollutants. Anthropogenic climate change has already caused 1°C of warming.<sup>22</sup> The Intergovernmental Panel on Climate Change, the leading scientific body on climate change, reports that at even 0.5°C more of warming, the effects would be catastrophic. Atoll islands would become uninhabitable,<sup>23</sup> several hundred million people would become exposed to “climate-related risks and susceptible to poverty,” and crops like maize and wheat would decline in yield, especially in sub-Saharan Africa, Southeast Asia, and Central and South America.<sup>24</sup> Disadvantaged and vulnerable populations face disproportionately higher risk of experiencing the negative consequences of climate change.<sup>25</sup> Indeed, climate change’s adverse impacts—including food insecurity, scarce water supply, risks to human health, and slowed economic growth—are and will continue to be concentrated in the Global South.<sup>26</sup> Yet the entire global community needs to achieve net-zero emissions by 2050 to avoid death-dealing effects, which will require rapid and extensive transitions in energy, land, infrastructure, and industry.<sup>27</sup>

In addition to the systemic food and water shortages caused by climate change, environmental disasters, which have long prompted human movement, will continue to increase in frequency and severity.<sup>28</sup> The risk of being displaced by a disaster has quadrupled since the 1970s.<sup>29</sup> Disasters outstripped violence

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22. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY (2018), <https://perma.cc/X9ZWW-6F5K> [hereinafter IPCC, 1.5°C REPORT].

23. See Ove Hoegh-Guldberg et al., *Impacts of 1.5°C Global Warming on Natural and Human Systems*, in IPCC, 1.5°C REPORT, *supra* note 22, at 175, 235.

24. Myles R. Allen et al., *Summary for Policymakers*, in IPCC, 1.5°C REPORT, *supra* note 22, at 1, 9.

25. *Id.*

26. See Briana Mawby & Anna Applebaum, *Future Fragility: Women, Climate Change, and Migration*, in NEW DIRECTIONS IN WOMEN, PEACE, AND SECURITY 209 (Soumita Basu et al. eds., 2020). I use the Global South to refer both to a set of countries and peoples on the margins of globalization. See *infra* Part IV.B for further discussion of the Global South.

27. *Id.*

28. See Hoegh-Guldberg et al., *supra* note 23; Jane McAdam, *Swimming Against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer*, INT’L J. REFUGEE L. 2, 2–3 (2011).

29. Jane McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 WINDSOR Y.B. ACCESS JUST. 1, 3 (2016).

and conflict as the lead cause of displacement in the first half of 2019.<sup>30</sup> The Internal Displacement Monitoring Centre reports that approximately 265 million people have been displaced due to natural hazards since 2008.<sup>31</sup> Thirty-six million people were displaced by sudden-onset disasters in 2008, with 56% being displaced by climate-related disasters.<sup>32</sup> Almost all of this disaster displacement occurs in the Global South.<sup>33</sup>

While climate migrants enjoy no definition in international law, the standard definition of an environmental migrant provides a framework for understanding climate-induced migration. The International Organization for Migration (“IOM”) defines environmental migrants as:

[P]ersons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.<sup>34</sup>

Similarly, climate-induced migration encompasses movement that is temporary or permanent, voluntary or forced, internal or cross-border; but it describes movement that occurs in response to climate-related events. Scholars have introduced a range of terms to describe climate migrants, including climate refugees, forced climate migrants, disaster displaced persons, climate displacees, and climate-induced migrants.<sup>35</sup>

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30. INTERNAL DISPLACEMENT MONITORING CTR., MID YEAR FIGURES: INTERNAL DISPLACEMENT FROM JANUARY TO JUNE 2019, at 3 (2019).
  31. INTERNAL DISPLACEMENT MONITORING CTR., DISASTER DISPLACEMENT, A GLOBAL REVIEW 2008–2018 5 (2018).
  32. U.N. OFF. FOR THE COORD. OF HUMANITARIAN AFFS. ET AL., MONITORING DISASTER DISPLACEMENT IN THE CONTEXT OF CLIMATE CHANGE 8 (2009).
  33. See Michelle Leighton & Meredith Byrne, *With Millions Displaced by Climate Change or Extreme Weather, Is There a Role for Labor Migration Pathways?*, MIGR. POL’Y INST. (Feb. 3, 2017), <https://perma.cc/269A-G735>.
  34. IOM, Discussion Note: Migration and the Environment, 94th Sess., ¶ 6 MC/INF/288 (Nov. 1, 2007).
  35. See Sumudu Anopama Atapattu, *A New Category of Refugees? ‘Climate Refugees’ and a Gaping Hole in International Law*, in ‘CLIMATE REFUGEES’: BEYOND THE LEGAL IMPASSE? 34, 40 (Simon Berhman & Avidan Kent eds., 2018) [hereinafter ‘CLIMATE REFUGEES’]; OLI BROWN, MIGRATION AND CLIMATE CHANGE (2008). Ever since the term ‘environmental refugees’ was coined in the 1980s, responses have fallen into two camps: alarmists & skeptics. Alarmists highlight the forced nature of migration, overemphasize the role of environmental factors in migration, and predict that hundreds of millions of people will migrate. Skeptics, the category into which most climate-induced migration scholars tend to fall, offer more conservative estimates and a multi-causal view of climate-induced migration. See Susan Martin, *Climate Change, Migration & Governance*, 16 GLOB. GOVERNANCE 397, 397 (2010). Other scholars have opted for terminology that focuses on disaster-induced migration generally, embracing climate-related events as a migration driver, but not excluding

The choice of terminology is not a neutral one. As Oli Brown frames it, “which definition becomes generally accepted will have very real implications for the obligations of the international community under international law.”<sup>36</sup> International law designates those who are forced to move as “displaced persons” or “refugees,” and guarantees them more legal protection than those who are moving voluntarily, or “migrants.”<sup>37</sup> Thus some scholars have insisted on using the term “climate refugees,” implicitly arguing that the protection frameworks offered by international refugee law should apply to those moving in the climate context.<sup>38</sup> While the discourse on the forced versus voluntary nature of climate-induced migration is important, it is even more critical for the terminology to retain an emphasis on climate change specifically, versus environmental degradation generally, in order to highlight the scale of mobility rendered necessary by climate change.<sup>39</sup>

Walter Kälin and Nina Schrepfer identify five categories of movement within climate-induced migration: i) migration prompted by sudden-onset disasters, for example, flooding and hurricanes, which tends to be temporary and internal; ii) slow-onset degradation, for example, rising sea levels, and increased groundwater and soil salinization, which often results in permanent migration; iii) “‘sinking’ small island states,” which present a unique case of slow-onset

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disasters that climate change will not affect such as earthquakes and tsunamis. Walter Kälin, for example, argues that those displaced by disasters unrelated to climate change, like volcanic eruptions, deserve as much protection as those displaced by climate-related events. See Walter Kälin, *Conceptualising Climate-Induced Displacement*, in CLIMATE CHANGE AND DISPLACEMENT 82, 85 (Jane McAdam ed., 2010).

36. OLI BROWN, CLIMATE CHANGE AND FORCED MIGRATION 7 (2007).

37. WALTER KÄLIN & NINA SCHREPFER, PROTECTING PEOPLE CROSSING BORDERS IN THE CONTEXT OF CLIMATE CHANGE: NORMATIVE GAPS AND POSSIBLE APPROACHES 29 (2012). Forced displacement can trigger protection measures under international refugee law and human rights law in a way voluntary migration would not, although the line between voluntary and forced displacement remains notoriously difficult to tease apart. Kälin, *supra* note 35, at 95. There is no legal definition of a migrant, although “migrant worker” is a legal term. See G.A. Res. 45/158, art. 2(1), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990).

38. See, e.g., Atapattu, *supra* note 35. For further discussion on international refugee law’s exclusion of climate migrants, see *infra* Part I.C. I opt for the term climate-induced migration to describe movement that is forced or voluntary, permanent or temporary, cross-border or internal, prompted in part by climatic events. This definition recognizes climate change as one of the factors that drives movement, while remaining legally precise. Furthermore, acknowledging the multi-causal nature of mobility in the terminology remains important for designing solutions that address climate change and its interaction with other critical drivers, especially economic factors.

39. JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW 42 (2012); see also Maxine Burkett, *Justice and Climate Migration: The Importance of Nomenclature in the Discourse on Twenty-First-Century Mobility*, in ‘CLIMATE REFUGEES,’ *supra* note 35, at 73–74 (discussing the human rights and justice implications of climate-induced migration terminology).

disasters wherein rising sea levels combine with low-lying island topography to render islands uninhabitable; iv) high-risk zones that governments declare dangerous for human habitation, or planned relocation; and v) forced displacement due to violence, armed conflict, or unrest because of a scarcity of essential resources like water, arable land, or grazing grounds.<sup>40</sup> Notwithstanding these categories, climate change indirectly drives migration outcomes.<sup>41</sup>

Demonstrating that climate change causes migration requires two causal links: i) a link between climate change and a particular environmental event, and ii) a link between an environmental event and the decision to move.<sup>42</sup> Yet it remains challenging to establish either of the two necessary causal links.

First, although modest advances in attribution science have allowed for increased precision in connecting a single environmental event to climate change impacts, the science is still evolving.<sup>43</sup> Second, empirical studies have shown that many other factors play into the decision to move or stay.<sup>44</sup> Economic, social, and political drivers shape migration alongside climate change.<sup>45</sup> Furthermore, economic factors play a larger role in determining migration outcomes than environmental drivers at both the individual and structural level.<sup>46</sup> Given that migration requires access to financial resources, at a minimum for travel costs and fees, socioeconomic status shapes who has access to migration as an adaptation strategy.<sup>47</sup> Economic development and infrastructure quality also shape migration outcomes.<sup>48</sup> Even when noting that climate change im-

40. KÄLIN, *supra* note 37, at 13–17.

41. Jon Barnett & W. Neil Adger, *Mobile Worlds: Choice at the Intersection of Demographic and Environmental Change*, 43 ANN. REV. ENV'T & RES. 246, 255 (2018).

42. BENOÎT MAYER, CONCEPT OF CLIMATE MIGRATION ADVOCACY AND ITS PROSPECTS 17–26 (2016).

43. *See generally* Geert Jan van Oldenborgh et al., *Attribution of Extreme Rainfall from Hurricane Harvey, August 2017*, 12 ENV'T RSCH. LETTERS 124009 (2017) (demonstrating that attribution science has improved by showing that climate change increased rainfall associated with Hurricane Harvey by 15%); Pardeep Pall et al., *Diagnosing Conditional Anthropogenic Contributions to Heavy Colorado Rainfall in September 2013*, 17 WEATHER & CLIMATE EXTREMES 1, 1 (2017).

44. DOMINIC KNIVETON ET AL., IOM, CLIMATE CHANGE AND MIGRATION 6 (2008).

45. *See generally* SARAH HARPER, GOV'T OFF. FOR SCI., FORESIGHT, MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE (2011).

46. *See* JON BARNETT & MICHAEL WEBBER, ACCOMMODATING MIGRATION TO PROMOTE ADAPTATION TO CLIMATE CHANGE 6 (World Bank, Policy Working Paper No. 5270, 2010).

47. David Hodgkinson et al., *'The Hour When the Ship Comes In': A Convention for Persons Displaced by Climate Change*, 36 MONASH U. L. REV. 69, 82 n.91 (2010).

48. *See* Simon Behrman & Avidan Kent, *Overcoming the Legal Impasse?*, in 'CLIMATE REFUGEES,' *supra* note 35, at 3–4 (describing the effect of drought in Haiti versus California).

pacts contributed to their decisions to move, climate migrants cite a range of other factors.<sup>49</sup> Climate-induced migration is thus multi-causal.

The multidimensional nature of climate-induced migration has made governing and operationalizing legal responsibility for cross-border climate-induced migration, in particular, difficult.<sup>50</sup> Former Special Rapporteur on Human Rights and the Environment John Knox proposes legal responsibility in the aggregate, claiming that “the difficulty of tracing causal chains is not necessarily in itself an insuperable barrier to . . . an allocation [of legal responsibility], at least at an aggregate level,” because of the established causal links between state emissions, climate change, and impacts.<sup>51</sup> Furthermore, despite climate-induced migration’s multi-causal nature, climate change still does factor into migration decision-making.<sup>52</sup> Thus it is appropriate that significant developments in the governance structure for climate-induced migration have emerged over the past five years.

### B. Governance Structure

The governance framework for climate-induced migration has grown significantly in the past decade, with critical developments within the last five years. Although there remains no common definition of a migrant, no binding multilateral convention governing migration, and an overlapping constellation of bilateral and regional migration instruments,<sup>53</sup> advances in the international migration governance framework have cemented the importance of international migration on the international agenda, and made international migration management more coherent.

The IOM serves as the lead U.N. agency responsible for handling migration matters. Established in 1951, the IOM became affiliated with the U.N. in

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49. *See, e.g.*, ROBERT OAKES ET AL., U.N. UNIV., CLIMATE CHANGE AND MIGRATION IN THE PACIFIC 2 (2015).

50. The majority of climate-induced migration occurs within national borders, but some climate migrants are forced to move abroad. *See id.*

51. John H. Knox, *Human Rights Principles and Climate Change*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 213, 225 n.20 (Kevin R. Gray et al. eds., 2016). The United States and China are responsible for more than 40% of global carbon dioxide emissions. Sean Fleming, *These Countries Create Most of the World’s CO2 Emissions*, WORLD ECON. F. (June 7, 2019), <https://perma.cc/ZX49-VJJU>.

52. For example, in a study by the U.N. University, 23% of emigrating I-Kiribati and 8% of migrants from Tuvalu identified environmental stressors as the reason for migrating. OAKES ET AL., *supra* note 49; *see also* Burkett, *supra* note 39, at 78 (arguing for maintaining an emphasis on climate’s role in climate-induced migration).

53. *See* Elizabeth Ferris, *Governance and Climate Change-Induced Mobility: International and Regional Frameworks*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS 11, 19–20 (Dimitra Manou et al. eds., 2017).

2016.<sup>54</sup> IOM covers a wide-ranging migration portfolio, including border management, migrant health, forced displacement related to conflict and disaster, and economic migration.<sup>55</sup> The IOM aims to fulfil three major objectives related to environmental and climate-induced migration: i) prevent forced migration in the context of environmental and climate change; ii) “assist, protect and reduce” migrant vulnerability; and iii) support migration as an adaptation strategy to climate change.<sup>56</sup> The IOM conducts research and advocacy, aims to advance legal protection, promotes policy dialogue, and builds policy-maker capacity to achieve these goals at the national, regional, and global levels.<sup>57</sup>

In 2015, the IOM created the Migration, Environment and Climate Change Division in response to Member States’ desire to highlight the importance of climate-induced migration on the international policy agenda.<sup>58</sup> The IOM’s growing member base, especially among countries impacted by climate-induced migration such as small island developing states (“SIDS”) and least-developed countries, also points to increased prominence of climate-induced migration on the global stage.<sup>59</sup> A number of new members joined the organization specifically because of their interest in climate-induced migration.<sup>60</sup> The IOM reports that financial support from developed countries to implement climate-induced migration projects also underscores engagement with the issue from all sides of the aisle.<sup>61</sup>

The office of the U.N. High Commissioner for Refugees (“UNHCR”) serves as another U.N. agency relevant to climate-induced migration governance. UNHCR is the agency responsible for refugees as defined by the 1951 Convention Relating to the Status of Refugees (“1951 Refugee Convention”).<sup>62</sup> While climate migrants generally do not fall under the auspices of the 1951 Refugee Convention, UNHCR has supported the development of soft law and policy related to climate-induced migration.<sup>63</sup> UNHCR participates in the United Nations Framework Convention on Climate Change (“UNFCCC”). UNHCR also led the consultative process that resulted in the GCR, a frame-

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54. Press Release, IOM, Summit on Refugees and Migrants Opens as IOM Joins United Nations (Sept. 20, 2016), <https://perma.cc/8RA7-DR52>.

55. See Mariam Traore Chazalnoel & Dina Ionesco, *Advancing the Global Governance of Climate Migration through the United Nations Framework Convention on Climate Change and the Global Compact on Migration*, in ‘CLIMATE REFUGEES,’ *supra* note 35, at 103–04.

56. *See id.* at 104.

57. *See id.*

58. *See id.* at 105.

59. *See id.*

60. *See id.*

61. *See id.*

62. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

63. *See* UNHCR, PART II: GLOBAL COMPACT ON REFUGEES 2, U.N. Doc. A/73/12 (Part II) (2018).

work for sustainably and equitably managing refugee flows.<sup>64</sup> The GCR recognizes that forced displacement can result from sudden-onset disasters, although the framework falls short of recognizing climate change as an independent driver of migration and displacement, unlike its counterpart, the Global Compact.<sup>65</sup> Indeed, UNHCR has played a modest role in managing climate-induced migration thus far, although it may do so to a greater degree in the future.<sup>66</sup>

Besides U.N. agencies, a number of state-led and international processes advance climate-induced migration on the international agenda. The Nansen Initiative, established in 2012 as an intergovernmental initiative led by Norway and Switzerland, formalized the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (“Nansen Protection Agenda”) in 2015. The Nansen Protection Agenda synthesizes research and data on cross-border displacement and recommends policy mechanisms for reducing the vulnerability of displaced persons. The agenda was endorsed by 109 governments, signaling the Nansen Initiative’s success, and the Platform on Disaster Displacement (“PDD”) was launched as the Nansen Initiative’s successor in July 2016 by Germany and Bangladesh.<sup>67</sup>

Multilateral agreements that recognize the climate change and migration nexus have also emerged over the last decade. Within the UNFCCC framework, human mobility related to climate change was first recognized in the Cancun Adaptation Framework in 2010.<sup>68</sup> The landmark Paris Agreement built on this foundation within the UNFCCC, establishing in 2015 the Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts to address climate-in-

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64. *See id.* at 1.

65. *See id.* at 2; *see also* G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration, at 13 (Dec. 19, 2018) [hereinafter Global Compact].

66. *See Ferris, supra* note 53, at 15 (arguing that UNHCR will logically be called upon to play a more active role in climate-induced migration management in the future).

67. *See Jane McAdam, From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement*, 39 U. NEW S. WALES L.J. 1518 (2016) for an account of the PDD’s development. Other state-led policy processes that link climate change and migration and displacement, include the Global Forum on Migration and Development, Migrants in Countries in Crisis initiative, Sendai Framework for Disaster Risk Reduction, World Humanitarian Summit, United Nations Environment Assembly, United Nations Convention to Combat Desertification, and Climate Vulnerable Forum. The Peninsula Principles, developed by international experts in 2013, provide another normative framework that guides nation-states in their response to climate-induced migration.

68. UNFCCC, Report of the Conference of the Parties on Its Sixteenth Session, ¶ 14(f), U.N. Doc. FCCC/CP/2010/7/Add. 1 (Mar. 15, 2011) (inviting parties to enhance action on adaptation by developing “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation”).

duced migration.<sup>69</sup> The Global Compact crystallized this momentum, recognizing climate change as a unique migration driver in 2018.<sup>70</sup>

The Global Compact, the first international cooperative agreement on migration signed by over 160 countries, evolved from the New York Declaration.<sup>71</sup> All 193 United Nations Member States adopted the New York Declaration in order to improve the international community's response to an unprecedented number of refugee and migrant flows,<sup>72</sup> which has led to death when unmanaged.<sup>73</sup> The Global Compact recommends regular migration opportunities including humanitarian visas, private sponsorships, and temporary work permits as levers to ensure that migration becomes an experience of dignity rather than an act of despair for climate migrants.<sup>74</sup> The promotion of regular migration pathways signals a dramatic departure from contemporary state approaches to migration, which have relied heavily on exclusion. I turn to the impact of the right to exclude on climate-induced migration next.

### C. *The Protection Gap*

A protection gap exists for migrants displaced across international borders by climate-related events, arising from the fact that international law does not confer a general right of entry<sup>75</sup>—although international law does prohibit non-

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69. UNFCCC, Report of the Conference of the Parties on Its Twenty-first Session, ¶ 49, U.N. Doc. FCCC/CP/2015/10/Add. 1. (Jan. 29, 2016).

70. Global Compact, *supra* note 65, ¶ 18. The Sendai Framework for Disaster Risk Reduction is another international agreement that recognizes the climate change migration nexus. See Third U.N. World Conference on Disaster Risk Reduction, *Sendai Framework for Disaster Risk Reduction 2015–2030* (Mar. 18, 2015), <https://perma.cc/T628-FKSR>.

71. See New York Declaration for Refugees and Migrants, *supra* note 11, at Annex II (launching process towards the achievement of a global compact on safe, orderly, and regular migration in 2018). See also *Global Compact for Migration*, IOM, <https://perma.cc/XT8T-NCGE>.

72. *The New York Declaration for Refugees and Migrants: Answers to Frequently Asked Questions*, UNHCR, <https://perma.cc/S9JG-QKYU>.

73. See, e.g., Helena Smith, *Shocking Images of Drowned Syrian Boy Show Tragic Plight of Refugees*, GUARDIAN (Sept. 2, 2015), <https://perma.cc/9H3H-569R>.

74. Global Compact, *supra* note 65, ¶ 21. The Global Compact names protection measures that some nation-states already practice. For example, New Zealand's Pacific Access Category offers permanent residence to 250 citizens from Fiji, 250 from Tonga, 75 from Tuvalu, and 75 from Kiribati if they have an offer of employment in New Zealand and meet specified language, income, health, and character requirements. See *Pacific Access Category Resident Visa*, N.Z. IMMIGR., <https://perma.cc/7UJT-7XKZ>.

75. The lack of a right of entry except for certain exempted categories of persons can be concomitantly described as the sovereign right to exclude. On matters of entry and exclusion, the predominant belief in international law is that these matters fall within the reserved domain of domestic jurisdiction. See GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 94 (1978). See *infra* Part II for further discussion of the right to exclude.

admission of refugees.<sup>76</sup> When displacement occurs across borders, then, climate migrants find themselves with no right to enter another nation-state, remain there, or be protected against forcible return.<sup>77</sup> Instead, the status of these climate migrants is dependent upon the “generosity of host countries.”<sup>78</sup> The only situation in which international law may allow for admission of climate migrants occurs when climate change combines with established grounds for protection under the 1951 Refugee Convention.<sup>79</sup>

Climate scholars have responded to this protection gap by arguing for the inclusion of climate migrants in international refugee law, the development of new multilateral instruments, and the creation of heretofore unimagined legal devices.<sup>80</sup> The 1951 Refugee Convention’s definition of a refugee, that is, a person with a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion, currently does not apply to climate migrants for two reasons.<sup>81</sup> First, the narrow grounds

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76. Kälin, *supra* note 35, at 94. International law only mandates that states protect three categories of forced migrants: refugees, stateless persons, and those entitled to complementary protection. Most scholars agree that climate migrants fall outside the protection of international refugee law and cannot be defined as stateless persons under the Convention Relating to the Status of Stateless Persons. See McAdam, *supra* note 29, at 2–8. Furthermore, no international decision-making body has yet confirmed the extension of the *non-refoulement* principle to those fleeing disaster. *Id.*

77. Kälin, *supra* note 35, at 86–91. This protection gap is less acute in the context of sudden-onset disasters because migration tends to be internal and temporary. When migrants are displaced within borders by sudden- or slow-onset events, their human rights remain protected by international and domestic law. See Dimitra Manou & Anja Mihr, *Climate Change, Migration, and Human Rights*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS, *supra* note 53, at 3–4.

78. Kälin, *supra* note 35, at 90.

79. *Id.* at 92 (arguing that in situations where climate change interacts with conflict, refugee law, human rights law, and international humanitarian law properly applies). In the final category of climate-induced migration, planned relocation, government-driven relocation tends to occur within national borders, where the absence of an international right of entry remains irrelevant. However, if people subject to planned relocation reject their relocation sites or find them inadequate, their legal status will remain indeterminate. *Id.* at 91.

80. The calls for reform of international refugee law were, in some cases, state-backed. The Bangladeshi Finance Minister before the Copenhagen climate change conference pushed for the revision of the 1951 Refugee Convention to include climate migrants. See Harriet Grant et al., *UK Should Open Borders to Climate Refugees Says Bangladeshi Minister*, GUARDIAN (Dec. 4, 2009), <https://perma.cc/MQP4-X5U4>. The Maldives made a similar proposal in 2006. McAdam, *supra* note 28, at 6. Some work insists on refugee law as a useful protection framework. See generally SANJULA WEERASINGHE, IN HARM’S WAY: INTERNATIONAL PROTECTION IN THE CONTEXT OF NEXUS DYNAMICS BETWEEN CONFLICT OR VIOLENCE AND DISASTER OR CLIMATE CHANGE (2018). Others propose relying on national, bilateral, and regional frameworks to fill the protection gap. See, e.g., McAdam, *supra* note 29, at 9.

81. 1951 Refugee Convention, *supra* note 62, art. 1(A)(2). Refugees must also be unwilling to avail themselves of the protection of their home countries according to the definition. *Id.* Yet

for persecution hinders the application of the 1951 Refugee Convention.<sup>82</sup> Persecution typically requires human agency, which climate impacts do not satisfy.<sup>83</sup> Second, fleeing a climate-related disaster does not trigger any Convention ground, that is, race, religion, nationality, or political opinion.<sup>84</sup> Despite academic accounts of international refugee law that would include climate migrants,<sup>85</sup> to date, the 1951 Refugee Convention has not been applied to climate-induced migration.<sup>86</sup>

Using the 1951 Refugee Convention as an imaginative launching point, scholars have also advanced proposals for new multilateral governance frameworks for climate-induced migration. The most prominent of these, proposed by Biermann and Boas, Docherty and Giannini, and Hodgkinson et al.,

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countries facing severe climate impacts often do engage in active efforts to reduce climate-related harm. This has served as another justification for excluding climate migrants from the protection of international refugee law. *See, e.g., Teitiota v. Chief Executive* [2015] NZSC 107 (N.Z.) (deciding that the 1951 Refugee Convention did not apply to an I-Kiribati seeking refuge in New Zealand due to climate change impacts in part because “there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can”).

82. *See, e.g., Teitiota* [2015] NZSC 107 (N.Z.).

83. McAdam, *supra* note 29, at 4.

84. *Id.* at 5.

85. *See, e.g., Heather Alexander & Jonathan Simon, Unable to Return in the 1951 Convention: Stateless Refugees and Climate Change*, 26 FLA. J. INT'L L. 531, 533–34 (2014) (proposing that the 1951 Refugee Convention’s language “unable to return” encompasses those fleeing climate-related events).

86. McAdam, *supra* note 29, at 5. The U.N. Human Rights Committee ruled in January 2020 that countries may have their *non-refoulement* obligations triggered if climate impacts worsen in the future and result in violations of the right to life under the International Covenant on Civil and Political Rights. The decision represents the most generous articulation a U.N. body has made on the protection international refugee and human rights law owes to climate migrants. *See* U.N. Human Rights Committee, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020). However, regional bodies have expanded the refugee definition in a way that may apply to cross-border climate migrants. The 1969 Organization of African Unity Convention extends protection to persons fleeing because of “external aggression, occupation, foreign domination or events seriously disturbing public order.” African Union, Convention Governing Specific Aspects of Refugee Problems in Africa art. 1, Sept. 10, 1969. Kenya, Ethiopia, and other East African countries mobilized the convention to accept 300,000 Somali refugees fleeing drought. Interview by Sabine Balk with Walter Kälin, Envoy of the Chair, PDD (Apr. 2019), <https://perma.cc/H6SS-SKE7>. The 1984 Cartagena Declaration’s definition similarly applies to those who move because their “lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees at III.3, Nov. 22, 1984. Significant climate events may be reasonably considered as a serious disturbance to public order.

each recommend a multilateral instrument tailored to the needs of climate migrants. Biermann and Boas suggest a UNFCCC Protocol on “Recognition, Protection and Resettlement of Climate Refugees,” while Hodgkinson et al. propose a draft convention for climate migrants displaced internally and across borders.<sup>87</sup>

Suggestions for a new convention or a protocol to the 1951 Refugee Convention that would govern climate-induced migration have been met with critique. Wyman points to three problems with these proposals: i) a new agreement that focuses solely on climate migrants would unethically privilege them over those displaced by other factors like war or poverty;<sup>88</sup> ii) it would be necessary to isolate climate change as a driver in order to guarantee protection, which is impractical;<sup>89</sup> and iii) the political appetite required for a new agreement remains lacking.<sup>90</sup> Furthermore, Wyman sees these as responsive to a rights gap, but unresponsive to the funding gap for climate-induced migration.<sup>91</sup> McAdam adds that climate-induced migration will be mostly internal and gradual, making a new multilateral treaty or protocol a distraction from responses targeted towards the type of movement that will predominantly occur.<sup>92</sup> Ultimately, the uptake of a new multilateral protection mechanism, including a new protocol to the 1951 Refugee Convention, has failed.<sup>93</sup>

The challenges of climate-induced migration have also prompted calls for entirely new legal constructs. International law, for example, does not provide rules for preservation of nationality when climate change renders a state unin-

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87. Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOB. ENV'T POL. 60, 64 (2010); Hodgkinson et al., *supra* note 47, at 69; *see also* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009) (proposing a multilateral treaty that addresses cross-border climate-induced migration).

88. Katrina M. Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167, 191–96 (2013).

89. *Id.* at 196–200. *But see* Maxine Burkett, *Migration*, in CLIMATE CHANGE, PUBLIC HEALTH, AND THE LAW 300, 304 (Michael Burger & Justin Gundlach eds., 2018) (arguing that climate change may become a clearer causal factor as climate impacts worsen).

90. Wyman, *supra* note 88, at 200–02.

91. *Id.* at 177, 181; *see also* Maxine Burkett, *Lessons from Contemporary Resettlement in the South Pacific*, 68 COLUM. J. INT'L AFFS. 75 (2015) (discussing the difficulties of accessing climate funding for planned relocation in the Carteret Islands).

92. McAdam, *supra* note 28, at 8.

93. *See* Elin Jakobsson, *Norm Formalization in International Policy Cooperation: A Framework for Analysis*, in 'CLIMATE REFUGEES,' *supra* note 35, at 61 (arguing that uptake of a new protection mechanism in international law has failed because research has not clarified the ambiguities of climate-induced migration, key figures have not championed a new instrument, and there is insufficient political will).

habitable but no successor state follows, as could be the case with some SIDS.<sup>94</sup> In response to this novel situation, Burkett proposes a new structure for the nation state—the nation *ex situ*—whereby a governance structure based on a trusteeship system would steward a dispersed population.<sup>95</sup>

The climate-induced migration protection gap demonstrates the need to reconstruct international legal doctrine to account for contemporary migration. The extent to which nation-states enjoy a right to exclude pits sovereign rights against migrant rights. In the current era, marked by increased human mobility exacerbated in some cases by transnational harms like climate change impacts, this constructed opposition is untenable. The next part narrows in on the history of the right to exclude and contemporary justifications for this key legal doctrine, which structures migration outcomes.

## II. THE CONSTITUTION OF SOVEREIGNTY THROUGH EXCLUSION

Contemporary sovereignty is constituted in part by nation-states' exercise of the right to exclude, which creates a protection gap in regard to cross-border climate-induced migration. This Part provides an account of the right to exclude as well as the discriminatory history of the doctrine. It then reviews the liberal defense of the doctrine and argues that the constitution of sovereignty through exclusion needs to shift. Thus, this Part lays the groundwork to ask who has the power to change international legal norms.

### A. *Sovereignty Constructed Through the Right to Exclude*

Sovereignty refers to the “totality of international rights and duties recognized by international law as residing in [the] independent territorial unit,” that is, the nation-state.<sup>96</sup> Sovereignty, both presupposed and produced by the exer-

94. Maxine Burkett, *The Nation Ex-Situ*, 2 CLIMATE L. 345, 354 (2011); see also Jane McAdam, 'Disappearing States,' *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT, *supra* note 35, at 105–06 (arguing that loss of population might signal the first erosion of statehood rather than loss of territory as islands will become uninhabitable before they disappear). The four elements of statehood include permanent population, effective government, capacity to enter into relations with other states, and defined territory. Convention on the Rights and Duties of States, 165 L.N.T.S. 19 (1933). The IPCC recently reported that atoll islands could be rendered uninhabitable at 1.5°C of warming above pre-industrial levels. See IPCC, 1.5°C REPORT, *supra* note 22.

95. Burkett, *supra* note 94, at 363–71. Burkett also argues that the special case of disappearing Pacific island states may challenge the Westphalian notion of the nation-state, which takes territory as one of its bases. *Id.* at 354. Other proposals for addressing this unprecedented situation include the cession of territory, purchasing land, merger, and trading exclusive economic zones for new territory. See LILIAN YAMAMOTO & MIGUEL ESTEBAN, ATOLL ISLAND STATES AND INTERNATIONAL LAW 188–91, 200–01 (2014).

96. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 32 (2d ed. 2006) (providing the most common definition of sovereignty).

cise of these rights and duties, exclusion key among them, is plastic.<sup>97</sup> In exercising the right to exclude—that is, the right to limit entry into their territorial borders by choosing not to admit aliens or place conditions on their admission<sup>98</sup>—nation-states assume and reproduce shared norms about what it means to be sovereign.<sup>99</sup> Simply, there is no sovereignty without an “other”.<sup>100</sup>

International law does limit the sovereign’s right to exclude aliens in certain instances.<sup>101</sup> Refugee and human rights law constrains nation-states’ ability to reject foreign nationals at the border where flight was prompted by certain forms of persecution,<sup>102</sup> or return would result in torture, cruel, inhuman or degrading treatment, punishment, and other irreparable harm.<sup>103</sup> While international human rights law grants the right of freedom of movement,<sup>104</sup> there is

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97. See Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 966 (2000). For other constructivist accounts of sovereignty see STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003).

98. See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 608 (8th ed. 2012).

99. Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 413 (1992).

100. *Id.* at 412. Political theorists explain the constitutive relationship between sovereignty and the right to exclude via the political community. The nation-state’s ability to determine who belongs and who does not, and therefore establish an insider political community, is a defining feature of its authority. Roxanne Lynn Doty, *Sovereignty and the Nation: Constructing the Boundaries of National Identity*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 121, 122 (Steve Smith et al. eds., 1996).

101. Nation-states can also opt into granting rights of entry via treaty. The growth of human rights law and the expansion of FMAs limit the right to exclude. See Sara Iglesias Sánchez, *Free Movement of Persons and Regional International Organisations*, in ISSUES IN INTERNATIONAL MIGRATION LAW 223, 223 (Richard Plender ed., 2015).

102. See 1951 Refugee Convention, *supra* note 62.

103. The international refugee and human rights law principle of *non-refoulement* bars nation-states from returning aliens where their life or freedom would be threatened on account of their race, religion, or political or social affiliation. *Id.* art. 33(1); see generally Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 87 (Erika Feller et al. eds., 2003).

104. The 1948 Universal Declaration of Human Rights bans nation-states from prohibiting movement within their own borders or denying re-entry to any national. The declaration also grants everyone the right to leave any country, including their own. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The International Covenant on Civil and Political Rights takes a more restrictive stance, noting that the right of freedom of movement can be restricted on the grounds of national security, public order, public health or morals, or the rights and freedoms of others. G.A. Res. 2200A, International Covenant on Civil and Political Rights, U.N. Doc. A/RES/2200A (Dec. 16, 1966); see also GOODWIN-GILL, *supra* note 75, at 136–37 (noting that a State must re-admit its own nationals, even in cases where they were lawfully expelled by

no guaranteed right of entry.<sup>105</sup> Thus, ironically, we are all promised the right to move, but promised nowhere to move to.

This asymmetry of movement rights finds its basis in historical and contemporary constructions of sovereignty. Although free movement characterized most human migration before the late nineteenth century, by the end of the nineteenth century, international law began analogizing between territorial sovereignty and the ownership of land.<sup>106</sup> The analogy posits that nation-states, like private property owners, have a right to deny admission to aliens seeking entry into their territory.<sup>107</sup> As Emmerich de Vattel, author of the eminent international law treatise *The Law of Nations*, writes, “since the lord of the territory may, whenever he thinks proper, forbid its being entered . . . he has no doubt a power to annex what conditions he pleases to the permission to enter.”<sup>108</sup> The Westphalian notion of the nation-state, which hardened territorial borders, underpinned the rise of the right to exclude.<sup>109</sup> Today, the right to exclude functions as the bedrock of the international law of migration, built on the principle of sovereignty.<sup>110</sup>

But the notion that territorial sovereignty and immigration restrictions go hand in hand is not natural.<sup>111</sup> A suite of critical scholars have chipped away at the notion that the right to exclude rests on legitimate legal authority, and

another State). The extranationalization of border control policies may undercut the right to leave any state. See COUNCIL OF EUR. COMM’R FOR HUM. RTS., *THE RIGHT TO LEAVE A COUNTRY* 7 (2013) (describing the EU’s externalization of border control policies as problematic).

105. See Christopher Wellman, *Freedom of Movement and the Right to Enter & Exit*, in *MIGRATION IN POLITICAL THEORY* 80, 91 (Sarah Fine & Lea Ypi eds., 2016). Climate scholars have pointed out this asymmetry in international law. See generally ‘CLIMATE REFUGEES,’ *supra* note 35.

106. See James Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT’L L. 804, 809 (1983); see also Lynch v. Clarke, 1 Sand. Ch. 583, 661 (N.Y. Ch. 1844) (articulating the pre-twentieth century practice of generous admission: “The policy of our nation has always been to bestow the right of citizenship freely, and with a liberality unknown to the old world.”); see also CRAWFORD, *supra* note 96, at 48 (noting that the analogy between private landowners and nation-states was of limited value even in the era of colonialism). To be clear, this Article does not make a case for open borders, although it does recommend liberalizing borders through regional measures such as FMAs. See *infra* Part IV.A.

107. Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EUR. J. INT’L L. 901, 902 (2017); see also Wyman, *supra* note 88, at 195–96 (deconstructing the analogy by pointing to restrictions on private property owners).

108. EMER DE VATTEL, *THE LAW OF NATIONS* 312 (Béla Kaposy & Richard Whatmore eds., 2008).

109. Nafziger, *supra* note 106, at 810.

110. Ferris, *supra* note 53, at 11–12.

111. See Chetail, *supra* note 107, at 922.

pointed to the discriminatory origins of the doctrine.<sup>112</sup> As Nafziger puts it, “the sovereign’s right to exclude aliens is simply a maxim” based on Anglo-American case law from 1889 to 1893, selective quotes from Vattel, excerpts of nineteenth century U.S. diplomatic correspondence, and “black letter pronouncements apparently rendered *ex cathedra* by earlier publicists.”<sup>113</sup> Immigration controls only cropped up at the turn of the twentieth century.<sup>114</sup> Munshi frames the rise of immigration controls in the United States as a response to Asian immigrants so that now “invented notions of territorial belonging have become natural or self-evident, rendering immigrant exclusion and the relative immobility of racialized populations” seemingly natural.<sup>115</sup>

Anglo-American case law that articulated the right to exclude at the turn of the century has continued relevance in jurisprudence today.<sup>116</sup> The U.S. Supreme Court first held that Congress has plenary authority to exclude aliens in the context of racial discrimination.<sup>117</sup> In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*,<sup>118</sup> the Court upheld the constitutionality of an 1888 federal statute that prohibited the admission of Chinese nationals. The 1888 statute was an expression of anti-Chinese sentiment that motivated a series of federal laws and treaties, including the Chinese Exclusion Acts of 1882<sup>119</sup> and

112. *See id.*; Nafziger, *supra* note 106; Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN. 51 (2016). These scholars make a move similar to that made by critical legal scholars by showing how the law naturalizes a social order instead of itself being natural. *See* KHIARA BRIDGES, CRITICAL RACE THEORY 26 (2019).

113. Nafziger, *supra* note 106, at 807. Nafziger goes on to give a historical explanation, noting that the proposition of exclusion arose when American and other frontiers were disappearing and Europeans and the Orient were migrating to the U.S. and the British Empires. Along with a wave of positivism, this led the “nativistic pronouncements of courts” to become “engraved in stone.” *Id.* at 808.

114. Chetail, *supra* note 107, at 922. With the advent of World War I, early nation-state limitations on admission began to shift away from presumed admission, where nation-states denied aliens entry only if the migrant posed a threat. *See* AOIFE MCMAHON, THE ROLE OF THE STATE IN MIGRATION CONTROL 7 (2017). During World War I, the United States and later Europe adopted the stance that admission would be barred “unless we want you.” *Id.* Although such exclusion served as a war-time emergency measure, the flipped presumption became permanent. *But see* Nafziger, *supra* note 106, at 816 (Nafziger proposes that Western nation-states’ adoption of increasingly restrictive immigration measures arose with the death of the frontier at the end of the nineteenth century. For example, the United States, Australia, New Zealand, and Canada limited migration from Asian countries at the end of the nineteenth century. These measures became the basis for the “landmark judicial decisions that upheld exclusionary laws.”).

115. Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 250 (2016).

116. Nafziger, *supra* note 106, at 807–08.

117. 130 U.S. 581, 609 (1889).

118. *See id.*

119. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58–59 (establishing the Chinese certificate requirements and suspending Chinese immigration for a decade).

1884.<sup>120</sup> The Court based its holding on the right to exclude, framing “[t]he power of exclusion of foreigners,” as “being an incident of sovereignty belonging to the government of the United States” such that it “cannot be granted away or restrained on behalf of anyone.”<sup>121</sup>

The Supreme Court went on to further articulate the right to exclude for the United States, and indeed much of the modern world, in *Nishimura Ekiu v. United States*<sup>122</sup> in 1892.<sup>123</sup> Citing Vattel, the Court declared that:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.<sup>124</sup>

However, the Court’s position derives from a misreading of Vattel.<sup>125</sup> Unlike the Court’s framing of the right to exclude as absolute, Vattel framed the right as qualified.<sup>126</sup> For example, Vattel counseled that individuals have a right to procure provisions “when a foreign nations [sic] refuses them a just assistance.”<sup>127</sup> Yet misinterpretations of Vattel’s work combined with nineteenth-century positivism conditioned U.S. and British judicial decisions to uphold the exclusion of aliens, which then became authority cited worldwide.<sup>128</sup>

The U.S. Supreme Court recently upheld the logic of exclusion in *Trump v. Hawaii*,<sup>129</sup> a case rejecting a challenge to Donald Trump’s Executive Order 13,769 that restricted immigration for nationals of six predominantly Muslim countries.<sup>130</sup> The Court again asserted that “the admission and exclusion of foreign nationals” is a fundamental sovereign right of the government’s political branch, shielded from “judicial control.”<sup>131</sup> Framing the admission and exclu-

120. H.R. Res. 1798, 48th Cong., 23 Stat. 115 (1884) (enacted) (requiring a certificate for entry of Chinese nationals into the United States).

121. *Chae Chan Ping*, 130 U.S. at 609.

122. 142 U.S. 651 (1892).

123. See Nafziger, *supra* note 106, at 826.

124. 142 U.S. at 659.

125. See Nafziger, *supra* note 106, at 826 for an analysis of the Court’s erroneous interpretation of Vattel’s position.

126. See Munshi, *supra* note 115, at 259–60.

127. EMMERICH DE VATTEL, *THE LAW OF NATIONS* 178 (Edward Ingraham & Joseph Chitty eds., 1883).

128. Nafziger, *supra* note 106, at 823.

129. 138 S. Ct. 2392 (2018).

130. *Id.* at 2418 (“For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)(1)).

131. *Id.*

sion of foreign nationals in terms of separation of powers, the Court's reasoning points to how deeply embedded the right to exclude remains in contemporary renderings of U.S. law.

Yet the right to exclude not only serves to justify federal immigration law and policy with discriminatory effect, the doctrine's continued operation also ignores the racialized history that underpins this jurisprudence.<sup>132</sup> If the right to exclude rests on such a questionable foundation, why does it persist? I analyze contemporary defenses of the right to exclude next.

### B. *Contemporary Justifications for the Right to Exclude*

The right to exclude plays a central role in the contemporary construction of sovereignty. Two strands within liberal theory support the notion that control over territorial borders is determinative of sovereignty.<sup>133</sup> First, liberal nationalists, political theorists who attempt to wed national identity and liberal values,<sup>134</sup> defend the right to exclude as necessary to national self-determination.<sup>135</sup> According to this line of argument, the nation-state mediates its national identity by controlling who may or may not enter its territory and thereby join the national community.<sup>136</sup> Generous admission policies would "change not just the size, but to a greater or lesser extent the political *complexion*, of the citizen body,"<sup>137</sup> and result in "externally generated cultural change,"<sup>138</sup> thus undermining the nation-state's right to self-determination. Therefore, the nation-state's interest in preserving its national identity justifies the right to exclude.<sup>139</sup>

Second, democratic theorists argue that democratic self-governance requires being able to control borders. Contemporary democratic theory claims that democratic self-rule necessarily includes exclusion, because democracy requires a defined body of members, the demos, to engage in democratic deci-

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132. See McMAHON, *supra* note 114, at 7 (arguing that the widespread presumption "that the control of migration can be justified on a traditional basis . . . fails to appreciate this significant turning point or the racist origins of such measures").

133. See E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1525 (2019).

134. See Sara Amighetti & Alasia Nuti, *A Nation's Right to Exclude and the Colonies*, 44 POL. THEORY 541, 561 n.10 (2016).

135. See *id.* at 545.

136. See *id.*

137. David Miller, *Is There a Human Right to Immigrate?*, in *MIGRATION IN POLITICAL THEORY*, *supra* note 105, at 29 (emphasis added).

138. *Id.* at 29.

139. See JOHN RAWLS, *THE LAW OF PEOPLES* 38–39 (1999); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 51 (1983); see also DAVID MILLER, *STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION* 26–29 (2016) (explaining the value of national identity, and claiming that a commitment to preserving national identity bears on admission policies).

sion-making.<sup>140</sup> Thus, “the legal exclusion of some individuals from the people is constitutive of the procedures required for democratic legitimacy.”<sup>141</sup> The demos, in other words, must be bounded,<sup>142</sup> an effect that nation-states achieve by exercising the right to exclude.

Yet establishing “the *boundaries* of the demos . . . is one the most vexing theoretical problems in liberal-democratic theory.”<sup>143</sup> Although international law has been marked by a posture of openness in other regards, trade, for example, the ‘closed’ nation-state still serves as the “primary vehicle for the collective self-determination of political communities.”<sup>144</sup> However, as Jennifer Gordon has quipped, “people are not bananas.”<sup>145</sup> Unlike capital and goods, migrants can acquire legal rights and protections in liberal states, including social or welfare rights and political or voting rights.<sup>146</sup>

The tension between markets, which would counsel for open migration policies, and rights, which liberals claim demand closure, results in a “liberal paradox.”<sup>147</sup> Hollifield writes, “Rules of the market require openness and factor mobility; but rules of the liberal polity, especially citizenship, require some degree of closure . . . to have a clear definition of the citizenry and to protect the sanctity of the social contract—the legal cornerstone of every liberal polity.”<sup>148</sup> Although borders have been liberalized to facilitate the trade of goods and services, national self-determination and democratic interest continue to justify the nation-state’s right to largely exclude foreigners. Taking a constructivist view, sovereignty then becomes constituted by norms of exclusion.

Indeed, international constructivist scholars point to the fact that nation-states are constituted through “commonly held philosophical principles, identities, norms of behavior, or shared terms of discourse.”<sup>149</sup> The right to exclude is

140. Arash Abizadeh, *On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem*, 106 AM. POL. SCI. REV. 867, 876 (2012).

141. *Id.* at 878.

142. *Id.* International law does not require states to be democratic but similarly treats the right to exclude as necessary to protecting a political community’s right to self-determination.

143. Seyla Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, 2 JUS COGENS 75, 92 (2020).

144. Achiume, *supra* note 133, at 1526.

145. Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 104 NW. U. L. REV. 1109 (2010).

146. James F. Hollifield, *Migration, Trade, and the Nation-State: The Myth of Globalization*, 3 UCLA J. INT’L L. & FOREIGN AFFS. 595, 619 (1998).

147. *Id.* at 623.

148. *Id.*; see also Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELBOURNE J. INT’L L. 392, 426 (2013) (acknowledging that alien exclusion can follow rationally from “the terms of the social compact,” but calling attention to the “competing and potentially irrational impulses behind exclusionary migration policy”).

149. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996).

one such norm.<sup>150</sup> In highlighting the central role of the right to exclude in the character of the liberal state, liberal scholars helpfully point to the way in which exclusion of foreigners constructs sovereignty.

Trump's exposition on the reasons for U.S. withdrawal from the Global Compact further exposes the constitutive process between sovereignty and exclusion. Trump announced in front of the U.N. General Assembly:

We recognize the right of every nation in this room to set its own immigration policy in accordance with its national interests, just as we ask other countries to respect our own right to do the same—which we are doing. That is one reason the United States will not participate in the new Global Compact on Migration.<sup>151</sup>

Couching his statement in terms of respect for U.S. sovereignty, Trump further noted that “[t]he United States is also working . . . to confront threats to sovereignty from uncontrolled migration.”<sup>152</sup> Trump's framing, far from a right-wing deviation, mirrors international law's framing of the relationship between sovereignty and exclusion.

By pinning sovereignty to the right to exclude foreigners, international law sets up an opposition between the nation-state on the one hand and the alien on the other; although sovereignty can be preserved even while nation-states adopt more liberal admission policies, as will be later demonstrated through the example of FMAs. The imagined threats to the nation-state that the right to exclude enables then justify widespread migrant exclusion. But if the right to exclude arose from a discriminatory past and continues to operate to that effect, who has the power to change it? Part III addresses this question next.

### III. WHO CREATES INTERNATIONAL LAW?

This Part takes as its starting point the reality of international legal doctrine that arose from a discriminatory past and asks who has the power to change international law. First, I provide a traditional account of how international law is made, based on the state-centric conception of international law that privileges the nation-state as the center of theoretical inquiry. Next, I argue that this state-centric focus misses the ways non-state actors participate in in-

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150. See Nafziger, *supra* note 106, at 841 (describing state practice as conforming with a “qualified duty to admit some aliens under some circumstances” in determining whether the right to exclude is customary international law).

151. Donald Trump, President, United States, Remarks to the 73rd Session of the U.N. General Assembly (Sept. 25, 2018). Trump's position is not new. See Kristin E. Heyer, *Internationalized Borders: Immigration Ethics in the Age of Trump*, 79 THEO. STUD. 146, 153 (2018) (arguing that the “dangerously porous border” has “long shaped U.S. society's collective imagination”).

152. Trump, *supra* note 151.

ternational norm-creation, and that non-state actors have the power to shift international legal doctrine because of international law's constraint on the use of force.

### A. *The State-Centric Account of Jurisgenesis*

The predominant conception of international law presents it as a “collective expression of sovereign wills.”<sup>153</sup> When Bentham first coined the term he posited that international law comprised a body of legal rules, standards, and norms applicable to sovereign state relations.<sup>154</sup> Traditional definitions of international law continue to reproduce that state-centric notion, characterizing international law as the set of rules regulating state behavior in their relations with each other.<sup>155</sup>

The International Court of Justice's (“ICJ's”) construal of the sources of international law accords with the state-centric conception, which credits states as the only authoritative promulgators of law. According to the ICJ, public international law is derived from primary and secondary sources. Primary sources include i) treaties and ii) international custom.<sup>156</sup> Treaties, written international agreements concluded between consenting states, create legal rights and duties that serve as the basis for the majority of international law.<sup>157</sup> Customary international law originates from general practices that states accept as law.<sup>158</sup> Customary international law requires two elements: i) state practice and ii) adherence to the practice because states perceive it to be law, thereby satisfying *opinio juris*.<sup>159</sup> Secondary sources of international law include judicial decisions and teachings of the most highly qualified publicists.<sup>160</sup> While treaties and international custom are the only formal sources of international law, subsidiary

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153. Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 7 (1998). Schachter and others frame this conception as positivist, but positivists have critiqued international law as not being law at all. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 129 (2d ed. 1861) (“It follows from the foregoing reasons, that a so-called law set by general opinion is not a law in the proper signification of the term.”).

154. M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT'L L. 405, 408–10 (1984).

155. Math Noortmann et al., *Non State Actors*, 77 INT'L L. ASS'N REPS. CONFS. 608, 610 (2016) [hereinafter *Non State Actors* 2016]; see also REBECCA WALLACE & ANNE HOLLIDAY, *INTERNATIONAL LAW IN A NUTSHELL* 1, 1 (2006).

156. See Statute of the International Court of Justice art. 38, ¶ 1(a)–(b).

157. See Vienna Convention on the Law of Treaties art. 2(a), May 23, 1969, 1155 U.N.T.S. 331 (defining a treaty as an “international agreement concluded between states in written form and governed by international law”).

158. *Id.*

159. MALCOLM SHAW, *INTERNATIONAL LAW* 53 (7th ed. 2014).

160. Statute of the International Court of Justice, *supra* note 114, art. 38, ¶ 1(d).

sources contribute to the content and support the interpretation of primary sources of law.<sup>161</sup>

However, contemporary international law constitutes a complex hybrid of positive, customary, and soft law operating through and promoted by a range of fora and transnational actors since the Cold War.<sup>162</sup> In contrast to hard law, which includes treaty law and international custom, soft law includes a range of non-treaty agreements that are non-binding.<sup>163</sup> Soft law has significantly supported the development of international environmental law.<sup>164</sup> For example, the 1972 Stockholm Conference, the U.N. Environmental Program, and various regional and non-governmental international organizations have all articulated “soft law” norms based on state behavior that resulted in “hard” customary international law.<sup>165</sup>

Indeed, soft law can function as a precursor to the development of international customary law, if state practice is accompanied by *opinio juris*.<sup>166</sup> Soft law has considerable potential for shaping international migration law in particular where divergent political interests interrupt multilateral efforts to develop hard law.<sup>167</sup> States may be more willing to enter into ambitious agreements where there is no threat of legal sanction.

Contemporary international law has evolved not only in terms of its sources, but also its promulgators. International lawmaking has shifted away from the Westphalian model of jurisgenesis to include “new processes outside traditional diplomatic channels and involving non-state actors,” the products of which constitute “genuine legal rules.”<sup>168</sup> Contemporary definitions of interna-

161. *Non State Actors*, *supra* note 155, at 619. General principles of law serve as another source of international law, although scholars debate its categorization as a primary or subsidiary source. *Id.*

162. Koh, *Why Do Nations Obey International Law?*, *supra* note 15, at 2630–31.

163. Elizabeth Ferris, *Soft Law, Migration and Climate Change Governance*, 8 J. HUM. RTS. & ENV'T 6, 12 (2017); *see also* SHAW, *supra* note 159, at 83–84.

164. MARK WESTON JANIS, *INTERNATIONAL LAW* 55 (7th ed. 2016).

165. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 422–23.

166. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 83–84 (6th ed. 2008).

167. Ferris argues that soft law might be particularly effective in closing the protection gap for cross-border climate migrants because soft law is nimbler and can appeal to states where hard law might alienate hesitant state actors. Elizabeth Ferris, *supra* note 163, at 12–14; *see also* PDD, *State-Led, Regional, Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement*, in ‘CLIMATE REFUGEES,’ *supra* note 35, at 126, 137 (claiming that multilateral and/or bilateral agreements could serve as a basis for new norms on migration and displacement).

168. Jean d'Aspremont, *Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship*, 46 VAND. J. TRANSNAT'L L. 1119, 1120 (2013); *see generally* Peter M. R. Stirk, *The Westphalian Model and Sovereign Equality*, 38 REV. INT'L STUD. 641, 641–60 (2012) (describing the recent shift away from a state-centric model of lawmaking).

tional law thus prove more capacious than the traditional account that international law is interstate law. Indeed, contemporary public international law regulates the behavior of states, in addition to other entities that possess some international legal personality “in their relations with each other, at any given time.”<sup>169</sup> I turn more fully to non-state actors’ ability to participate in the formation of international legal norms next.

### B. *Non-State Actor Jurisgenesis*

International scholars have historically centered the nation-state as the site of theoretical inquiry, thereby missing the ways in which non-state actors can and do influence international law.<sup>170</sup> This Section draws on Robert Cover’s framing of law as a normative universe to argue that non-state actors hold the power to participate in international norm-making because of the absence of a state monopoly of violence in the international realm. To make this claim, I would like to begin by returning to an age-old contention, that is, the realist contention that international law is not really law.

Realist scholars argue that international law cannot be enforced, is therefore not law, and accordingly does not matter.<sup>171</sup> In response, international relations and legal scholars have sought to substantiate the fact that “almost all nations observe all principles of international law and almost all of their obligations almost all of the time” by providing theoretical grounding for the fact of state compliance.<sup>172</sup> This compliance literature has followed three distinct tracks.

First, rationalist international relations scholars posit that nation-states comply with international law when it serves their own interests.<sup>173</sup> Traditional rational theorists use game theory to explain interstate cooperation.<sup>174</sup> According to this model, nation-states pursue their interests with norms such as legal

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169. WALLACE & HOLLIDAY, *supra* note 155, at 1 (referring principally to international organizations and individuals).

170. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 485 (2005) for a critique of the nation-state centered focus of international legal scholarship, and an argument that state-centered inquiries miss the nuances of norm dissemination and diffusion.

171. See AUSTIN, *supra* note 153, at 378 (presenting the classic argument that international law is not real law).

172. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (emphasis omitted).

173. See Koh, *Why Do Nations Obey International Law?*, *supra* note 15, at 2632.

174. See Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345, 351 (1998); ROBERT O. KEOHANE, *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* (2002) (presenting a further account of rational choice theory); Duncan Snidal, *Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 923 (1985).

rules factoring into nation-states' rational decision-making.<sup>175</sup> The fact that nation-states comply with international law frequently without severe sanctions leads rationalism proponent Oran Young to propose that "sanctions or even threats to impose sanctions seldom constitute the most important determinant of observed levels of compliance with institutionalized rights and rules."<sup>176</sup> Rather, a nation-state will comply with international law when the benefits of doing so outweigh the costs, and breach when the costs of compliance outweigh the benefits.<sup>177</sup> Consequently, while international law may not be enforced through sanction, in the rationalist view, self-interest can nonetheless explain compliance with international law.

The second strand of compliance theory postulates that nation-states obey international law if they are liberal. Liberal international relations theorists such as Anne-Marie Slaughter point to empirical evidence that liberal democracies rarely go to war with each other in order to argue that liberal states make law, not war.<sup>178</sup> Unlike rationalist theorists, liberal theorists assume that the primary actors in the international system are individuals and groups rather than nation-states because of their influence on national governments.<sup>179</sup> Thus, a liberal approach to international law would first attend to relations among individuals and groups, then state institutions in relation to those social actors, and finally focus on "inter-state interactions where nation-state preferences are a changing function of individual and group interests as those interests are themselves defined in domestic and transnational society."<sup>180</sup> Although liberal international theorists consider the influence of individual actors on state preferences via a democratic structure, the liberal approach does not explicitly leave space for unrepresented actors, such as undocumented migrants, to exert pressure on international law.

The third vein of compliance theory is constructivist. According to the constructivist view of compliance, nation-states obey international rules "not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance."<sup>181</sup> While rationalist theorists argue that states comply with international law when it serves their interests, constructivists treat national interest and identity as con-

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175. See Kingsbury, *supra* note 174, at 351–52.

176. ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE* 195 (1994).

177. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1860–71.

178. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 504–05 (1995).

179. *Id.* at 508.

180. *Id.* at 516.

181. Koh, *Why Do Nations Obey International Law?*, *supra* note 15, at 2634.

stituted by international rules and norms.<sup>182</sup> Harold Koh leverages the constructivist view to generate a theory of transnational legal process, whereby international law is integrated into domestic law via a three part process of interaction, interpretation, and internationalization.<sup>183</sup> In Koh's telling, nation-states do not only conform to international law out of self-interest, identity, or norm compliance; but also because they have internalized global norms into domestic legal systems.<sup>184</sup>

Hathaway and Shapiro rebuke the realist claim that international law is not law because it cannot be enforced by highlighting the use of nonviolent sanctions.<sup>185</sup> Hathaway and Shapiro re-cast the realist critique as containing two interrelated objections: i) international law is not law because it is not enforced through "the threat and exercise of physical coercion" (the "Brute Force Objection"),<sup>186</sup> and ii) international law is not law because enforcement is not necessarily carried out by the regime itself (the "Internality Objection").<sup>187</sup>

Hathaway and Shapiro then oppose the realist attack by arguing that international law is enforced via nonviolent mechanisms, which they call "outcasting."<sup>188</sup> Hathaway and Shapiro claim that the realist critique of what international law is not—a legal regime violently enforced by the regime itself—entirely misses that "international legal institutions use others (usually states) to enforce their rules, and they typically deploy outcasting—denying individuals the benefits of social cooperation—rather than physical force."<sup>189</sup> Thus Hathaway and Shapiro conclude that international law is law; it is simply enforced differently than modern domestic law.

While the lack of violent enforcement has been used both to challenge and defend international law, I would like to introduce a new way to think about the compliance question. The lack of violent enforcement in international law, while relevant to the question of whether international law is law, also points to an open epistemic space in which non-state actors can come to play an influential role in jurisgenesis. The lack of a state monopoly on violence in interna-

182. See Ngairé Woods, *The Uses of Theory in the Study of International Relations*, in *EXPLAINING INTERNATIONAL RELATIONS SINCE 1945* 9, 26–27 (Ngairé Woods ed., 1996).

183. Koh, *Why Do Nations Obey International Law?*, *supra* note 15, at 2602–03.

184. *Id.* at 2634.

185. See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011).

186. *Id.* at 267–68.

187. *Id.* at 264–67. Hathaway and Shapiro offer the World Trade Organization ("WTO") as an example. The WTO Dispute Settlement Body authorizes retaliation by state parties who have been aggrieved by another state's failure to comply with trade law principles. This is external enforcement because nation-states, not the legal regime itself, enact sanctions. *Id.* at 307.

188. *Id.* at 258.

189. *Id.* at 302.

tional law means that non-state actors may participate in legal norm creation without having to consider the same threat of nation-state violence.

Here, Cover's seminal framing of the law as constitutive of a normative universe, a *nomos*, is particularly useful.<sup>190</sup> Cover, in his essay, *Nomos and Narrative*, presents the law as embedded in narrative, and "not merely a system of rules to be observed, but a world in which we live."<sup>191</sup> This normative universe is as real as energy, mass, and momentum, with law acting like the force of gravity, the normative worlds it creates influencing,<sup>192</sup> and indeed colliding against each other.<sup>193</sup> The stakes are both physical and epistemic.

In describing the process by which the law generates normative reality, Cover hinges his theory on legal interpretation: communities compete to establish their divergent narratives on the meaning a legal text creates, which then forms the basis of a normative world.<sup>194</sup> Because there is always a "multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis," imperialism becomes necessary.<sup>195</sup> Communities must compete to impose their normative worldview upon others. The nation-state enjoys an advantage in this contest; its monopoly on violence allows it to enforce its own interpretive meaning, while other communities must always consider the nation-state's resistance when fighting to create alternative legal meaning.<sup>196</sup>

Yet in the international legal realm, the nation-state does not enjoy the same monopoly on violence as it does in the domestic realm. Although the legal regime promulgated by European states sanctioned and rewarded war from the seventeenth through to the twentieth centuries, the 1928 Kellogg-Briand Pact introduced a new world order in international law.<sup>197</sup> In this new world order,

190. See Robert M. Cover, Foreword, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4–6 (1983).

191. *Id.* at 4–5.

192. *Id.* at 10.

193. Other scholars have pointed to the normative contest at play regarding the law's meaning. Monica Bell, for example, offers a theory of legal estrangement to articulate the tension between black and poor communities and the U.S. legal system. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017) (defining legal estrangement as "a theory of detachment and eventual alienation from the law's enforcers [which] reflects the intuition among many people in poor communities of color that the law operates to exclude them from society").

194. See Cover, *supra* note 190, at 5.

195. *Id.* at 16. Cover famously describes the relationship between law and violence as one where "legal interpretation takes place in a field of pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted).

196. See Cover, *supra* note 190, at 52–53 ("The state's claims over legal meaning are, at bottom, so closely tied to the state's imperfect monopoly over the domain of violence that the claim of a community to an autonomous meaning must be linked to the community's willingness to live out its meaning in defiance.").

197. See generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017) for a history of

war, including the spoils of war, became illegitimate. The 1945 Charter of the U.N. enshrines this principle of nonviolence, prohibiting the use of force by member states with limited exceptions.<sup>198</sup> Furthermore, modern international law does not have an enforcement apparatus that depends on violence akin to an army or police force, perhaps locating international legal interpretation *outside* “a field of pain and death.”<sup>199</sup> Thus, in theory, non-state actors have an opportunity to participate in international legal jurisgenesis, where their influence is more tightly constrained in domestic lawmaking.<sup>200</sup>

Indeed, a growing body of literature highlights the contribution non-state actors make to international law.<sup>201</sup> Hollis claims that non-state actors ranging from international organizations to individuals contribute to the creation of international law.<sup>202</sup> Olivier argues that international legal theory should assess the normative role of non-state actors in an international legal rule-making process that now centers only nation-states.<sup>203</sup> The International Law Association considered whether “ascension of non-state actors could bring about more radical changes of international law,”<sup>204</sup> and concluded that non-state actors can, at very least, engage in norm creation.<sup>205</sup>

Empirical evidence also points to the pluralization of international law-making.<sup>206</sup> Although non-state actors have been participating in international

violence in international law, with particular attention to the Kellogg-Briand Pact’s role in ushering in a new world order where the use of force was outlawed in international law.

198. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”). Articles 24 and 25 grant the Security Council the power to authorize collective action to maintain or enforce international peace and security. *Id.* arts. 24, 25. U.N. Charter Article 51 also allows for the use of force for self-defense. *Id.* art. 51.
199. Cover, *supra* note 195, at 1601.
200. In practice, nation-states also use violence to enforce their interpretation of the law in the international realm. For example, the United States has used violent means at the Mexico border, potentially undermining the right to seek asylum. *See, e.g.,* Megan Specia & Rick Gladstone, *Border Agents Shot Tear Gas into Mexico: Was It Legal?*, N.Y. TIMES (Nov. 28, 2018), <https://perma.cc/E8E6-E3WG>.
201. For a description of the range of non-state actors and their international legal personality *see* SHAW, *supra* note 159, at 201–46; ANTONIO CASSESE, *INTERNATIONAL LAW* 124–50 (2d ed. 2005).
202. Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT’L L. 1, 2 (2005).
203. Michele Olivier, *Exploring Approaches to Accommodating Non-State Actors within Traditional International Law*, 4 HUM. RTS. & INT’L LEGAL DISCOURSE 15, 15 (2010).
204. *Non State Actors* 2016, *supra* note 155, at 611.
205. *See Non State Actors*, 75 INT’L L. ASS’N REPS. CONFS. 658, 662–65 (2012) [hereinafter *Non State Actors* 2012].
206. D’Aspremont, *supra* note 168, at 1128. D’Aspremont thus claims that the pluralization of international law is undisputed. *Id.* at 1120–23.

processes for over two hundred years,<sup>207</sup> the twentieth century was marked by an increased intensity of non-state actor participation in international lawmaking.<sup>208</sup> Many scholars attribute the field's increasing openness to non-state actors to globalization's effect of decentralizing the importance of nation-states.<sup>209</sup> Koh claims that the declining importance of sovereignty allows non-state actors to conduct global decision-making.<sup>210</sup> Thus legal "normative authority" can no longer be considered the sole purview of the nation-state, but rather "a tangle of complex procedures involving various state and non-state actors."<sup>211</sup>

Within the discourse emphasizing non-state actor jurisgenesis, scholars have highlighted that individuals can have international legal personality. The recognition of individual criminal responsibility in international law, prompting the Nuremberg and Tokyo Tribunals and the formation of the International Criminal Court, catalyzed "the process of internationalising the role of the individual."<sup>212</sup> The Optional Protocol to the International Covenant on Civil and Political Rights allows individuals to allege violations by state parties.<sup>213</sup> The Convention on the Elimination of All Forms of Racial Discrimination allows individuals to lodge complaints for treaty violations.<sup>214</sup>

Individuals may also have obligations under international law. The establishment of individual criminal responsibility in particular has changed the conception of non-state actor responsibility. The Convention on the Prevention and Punishment of the Crime of Genocide declares that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."<sup>215</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Commit-

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207. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 184–85 (1997) (describing the involvement of non-governmental organizations within the international community).

208. See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 44 (Malcolm Evans & Phoebe Okowa eds., 2007) (noting the "exponential growth" of non-state actor activity in the international arena).

209. See, e.g., Berman, *supra* note 170, at 490 ("[T]he idea of law and globalization provides a useful lens for viewing the way legal norms are constructed and disseminated in an era when the prerogatives of territorially delimited nation-states, while not unimportant, have at the very least become less salient than they once were.").

210. Koh, *Why Do Nations Obey International Law?*, *supra* note 15, at 2631.

211. D'Aspremont, *supra* note 168, at 1124.

212. Olivier, *supra* note 203, at 19.

213. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 302.

214. International Convention on the Elimination of All Forms of Racial Discrimination art. 14(1), Dec. 21, 1965, 660 U.N.T.S. 195.

215. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277.

ted in the Territory of the Former Yugoslavia has jurisdiction over natural persons and individuals responsible for crimes defined by the statute.<sup>216</sup> The Statute of the International Criminal Court also establishes jurisdiction over natural persons.<sup>217</sup> The subjecthood of individuals under international law includes not only rights, capacities, and duties, but also the ability to participate in the formation of international law.<sup>218</sup>

Non-state participation in norm creation may be particularly effective in the realm of soft law.<sup>219</sup> For example, non-state actors play an important role in shaping how states vote in U.N. General Assembly resolutions, and whether a resolution will be submitted at all.<sup>220</sup> The Global Compact, a critical piece of migration soft law, was developed in response to the crisis of non-state actors' death.

Non-state participation in norm creation plays a crucial role in adapting international law to demands that extend beyond territorial confines. An inclusive vision of international law as including non-state actors, for example, helped energize Global South claims for a New International Economic Order.<sup>221</sup> Non-state actor participation has also proved crucial when norm creation runs counter to the nation-state's interest, as was the case with the development of the right to self-determination.<sup>222</sup> In the climate change context, wherein international law has not yet grown to fully prevent transnational harm, non-state actors' jurisgenerative capacity presents a chance to promulgate more effective law.<sup>223</sup>

216. S.C. Res. 827, ¶ 2 (May 25, 1993).

217. Rome Statute of the International Criminal Court art. 25(1), U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998).

218. *See* Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT'L L. 477, 485–92 (2004) (destabilizing the distinction between the subjects and objects of international law, and arguing for an inclusive international legal system that recognizes the expanding role of non-state actors throughout the twenty-first century).

219. The International Law Association argues that non-state actors contribute to both hard and soft law. *Non State Actors* 2012, *supra* note 205, at 691.

220. Olivier, *supra* note 203, at 25.

221. *See* McCorquodale, *supra* note 218, at 482. *See* QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018) for an account of the New International Economic Order as part of the backdrop against the rise of neoliberal globalism.

222. *See id.* at 492 (positioning the right to self-determination as counter to the interest of powerful colonial states).

223. The major mechanism to manage the transnational impact of greenhouse gas emissions, the UNFCCC, has failed to achieve its stated objective, that is, to limit global warming. Although 185 states agreed to limit average temperature increase to 2°C above preindustrial levels in the Paris Agreement, current commitments under the agreement are set to lead to approximately 3°C of warming. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/10/Add.1.; *Addressing Global Warming*, CLIMATE ACTION TRACKER, <https://perma.cc/KE3M-VUXN>.

Given globalization's transformation of sovereignty alongside the lack of violent enforcement in international law, non-state actors are positioned to generate international legal norms that respond to the reality of transnational impacts in a globalized world.<sup>224</sup> Yet the reconstruction of sovereignty serves not only as a condition for, but also a possible outcome of non-state actor jurisgenesis. Next, I claim that as the centrality of the nation-state erodes, non-state actors have the power to participate in re-constituting sovereignty through admission.

#### IV. RE-CONSTITUTING SOVEREIGNTY THROUGH ADMISSION

To this point, I have argued that international law creates a protection gap vis-à-vis climate-induced migration because contemporary sovereignty is constituted through exclusion. I have also made the theoretical claim that non-state actors have the power to change international law. This Part proposes that non-state actors—the Global South diaspora in particular—should use their jurisgenerative capacity to create legal norms that re-constitute sovereignty through admission. To support this claim, this Part uses FMAs to demonstrate that nation-states can preserve sovereignty while abrogating their right to exclude. It also highlights the benefits of using FMAs to address the climate-induced migration protection gap. Finally, this Part names the Global South diaspora as a particularly powerful norm creator on trans-regional migration.

##### *A. Liberalizing Borders Through Free Movement Agreements*

Although the contemporary constitution of sovereignty hinges on exclusion of foreigners, many nation-states demonstrate that preserving sovereignty and liberalizing admission can occur contemporaneously by participating in FMAs. FMAs are provisions within (sub-)regional economic integration schemes that liberalize migration restrictions between participating member states.<sup>225</sup> These agreements arose within the context of increased international

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Climate scientists predict that this level of warming will result in catastrophic effects on human life, especially the global poor, and ecosystems. See IPCC, 1.5°C REPORT, *supra* note 22.

224. For a theory of the weakening of state sovereignty, see Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times*, in DEMOCRACY, STATES, AND THE STRUGGLE FOR GLOBAL JUSTICE 79, 89 (Heather Gautney et al. eds., 2009) (“[A]n epochal change is under way in which aspects of state sovereignty are being dismantled chip by chip.”).

225. FMAs play an expanding role in the growing body of international migration law. Chetail refers to these as free movement regimes, but I use the term free movement agreement to point to their legally binding nature. Chetail, *supra* note 17, at 33. Ferris calls FMAs Free Movement Protocols. Ferris, *supra* note 53, at 23. McMahon calls FMAs regional migration regimes. McMAHON, *supra* note 114, at 78.

economic integration.<sup>226</sup> The explosion of regional free trade agreements that attended the establishment of the World Trade Organization in 1995, along with earlier efforts at regional integration following World War II, led to increased facilitation of both the movement of goods and people.<sup>227</sup> The trend toward regional free movement points to the notion that nation-states can maintain their sovereignty while agreeing to liberalize borders.

FMA's range from agreements that remove visa requirements for entry into member states to agreements that provide more comprehensive rights to reside and work.<sup>228</sup> The agreements may be applied unevenly, with rights and benefits extended to pre-defined categories of people, including migrant workers, business people, students, and refugees.<sup>229</sup> In most regions, FMA's are linked to a common market, where free movement of goods, services, capital, and labor serve as the basis of economic integration, and workers are granted the right to enter, work, and/or settle in member states.<sup>230</sup>

226. International Political Economy scholars have framed the expansion of economic integration measures in terms of two waves of regionalism. In regionalism's first iteration, cooperative agreements between neighboring states focused on economic integration. Second-generation regionalism integrates social, political and cultural cooperation into economic integration aims. For example, in second wave agreements, mobility rights may extend to both those who can contribute to the labor market, and those who cannot. Others have proposed a third generation of regionalism, wherein regional organizations act collectively in global politics. While this remains a normative idea at present, it may become more common. See MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION xvi–xviii (Phillipe de Lombaerde et al. eds., 2017) [hereinafter UNESCO FMA Essays]. For a discussion of regionalism and regional trade agreements, see Chad Damro, *The Political Economy of Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 23, 26–29 (Lorand Bartels & Federico Ortino eds., 2006).

227. FMA's run counter to the traditional view that increased free trade has occurred without increased mobility. The assertion that free trade happened without liberalized migration stems from the scholarly focus on South-North migratory flows. See, e.g., Gustavo A. Flores-Macías, *Migration and Free Trade Agreements: Lessons from NAFTA and Perspectives for CAFTA-DR*, in INTERNATIONAL MIGRATION LAW 147, 147–48 (Ryszard Cholewinski et al. eds., 2007) (discussing the North American Free Trade Agreement (“NAFTA”) to claim that although NAFTA aimed to stem unauthorized migration from Mexico by reducing economic inequality between Canada, Mexico, and the United States, it increased migratory flows without increasing regular migration pathways).

228. UNESCO FMA Essays, *supra* note 226, at xv.

229. *Id.* at xx.

230. Sonja Nita, *Free Movement of People within Regional Integration Processes: A Comparative View*, in UNESCO FMA Essays, *supra* note 226 at 3, 7. The EU, ECOWAS, MERCOSUR, and CARICOM all adhere to this rubric of free movement within a common market. *Id.* at xxi–xxiii. See also PETER ROBSON, THE ECONOMICS OF INTERNATIONAL INTEGRATION 2 (1980) (defining a common market as a form of regional integration in which there is not only a common external tariff and tariff-free movement of goods and services, but also freedom of movement for factors of production—labor, capital, and enterprise).

While the European Union (“EU”) receives the most scholarly attention, FMAs exist across all continents, with approximately 120 nation-states participating in regional arrangements that include free movement provisions.<sup>231</sup> African countries participate in the largest number of FMAs as members of the Economic Community of West African States (“ECOWAS”), the Common Market for Eastern and Southern Africa, the East Africa Community, the Southern Africa Development Community (“SADC”), and the Economic Community of Central African States.<sup>232</sup> Asia-Pacific FMAs are embedded within the Association of South East Asian Nations and the Asia-Pacific Economic Cooperation. In Latin America and the Caribbean, the Common Market of the South (“MERCOSUR”) and the Caribbean Community (“CARICOM”) also contain FMAs.<sup>233</sup>

The array of rights FMAs offer to citizens of participating nation-states varies. Most agreements grant as-of-right temporary visa extensions, while others provide for visa-free travel.<sup>234</sup> In most cases, FMAs provide that entry of a foreign national can be barred if admission would contravene public policy, public security, or public health.<sup>235</sup> Beyond the right to temporary admission, some FMAs also provide pathways to residence, with most agreements conditioning residence rights on employment.<sup>236</sup> Granting residence to foreign nationals in the work force accords with the aim of most FMAs, that is, to facilitate the movement of labor.

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231. See Chetail, *supra* note 17, at 33–35.

232. *Id.* at 33–34. The Intergovernmental Authority on Development (“IGAD”) is currently developing a protocol on the free movement of persons to implement article 7(b) of the agreement establishing IGAD to “promote free movement of goods, services, and people and the establishment of residence.” Nita, *supra* note 230, at 9. IGAD recently entered the final phases of negotiations on its Protocol on Free Movement of Persons. *IGAD Member States to Refine the Draft Protocol on Free Movement of Persons*, IGAD (Oct. 14, 2019), <https://perma.cc/5B65-ZSLX>.

233. The Andean Pact (“CAN”) contains another FMA in the region. However, implementation has been uneven. Mercedes Eguiguren, *Regional Migratory Policies Within the Andean Community of Nations: Crisis vs. Reinforcement of Freedom of Movement Within the Region*, in UNESCO FMA Essays, *supra* note 226, at 237, 245. NAFTA might have been a prominent FMA within the Western Hemisphere. Yet the 1993 NAFTA text contains only one migration provision, related to the temporary entry of business persons. Flores-Macias, *supra* note 227, at 147. The United States–Mexico–Canada Agreement, which will replace NAFTA when it comes into force, maintains a chapter on the temporary admission of business persons. United States–Mexico–Canada Agreement ch.16, *opened for signature* Sept. 20, 2018.

234. Nita, *supra* note 230, at 15. The EU is an outlier in stipulating visa-free travel—most agreements grant only temporary visa exemption. Within the EU and Schengen Area, for example, visa-free travel allows every citizen of member states to the Schengen *acquis* entry into other member states without a visa. *Id.* at 11.

235. *Id.* at 11.

236. *Id.* at 25.

FMA typically address labor directly, either offering mobility or granting access to labor markets for certain categories of workers, often highly skilled ones.<sup>237</sup> Some FMAs follow the General Agreement on Trade in Services model by granting labor market access to only service providers on a temporary basis, while others aim to protect the rights of migrant workers.<sup>238</sup>

Indeed, some FMAs have evolved beyond the original conception of liberalizing movement of labor, and have transitioned toward creating regional citizenship. For example, MERCOSUR—originally a common market established by the Treaty of Asunción between Brazil, Argentina, Uruguay, and Paraguay—has expanded to include other countries and now aims to “promote channels for social participation as a key way of strengthening regional integration.”<sup>239</sup> Mutual recognition of skills and qualifications is one aspect of FMAs that coheres to both the economic and social aims of these agreements,<sup>240</sup> alongside social, health, and labor regulations.<sup>241</sup>

Within international trade law, FMAs’ first legal home, regionalism, has “sometimes been interpreted as a new way of governing competition among states with respect to the regulation of all issues related with international trade,”<sup>242</sup> a challenge to the multilateral regime,<sup>243</sup> an expression of neoliberalism,<sup>244</sup> or an abrogation of sovereignty.<sup>245</sup> However, most nation-states opt to structure FMAs as intergovernmental agreements, rather than establish a su-

237. For example, article 45 of the Treaty on the Functioning of the EU grants nationals of EU Member States the right to work in any other Member State without a work permit. Consolidated Version of the Treaty on the Functioning of the European Union art. 45, 2008 O.J. C 115/47, Sept. 5, 2008. This right includes equality of treatment, remuneration, and working conditions compared to nationals of the host State. *Id.*

238. Nita, *supra* note 230, at 18.

239. Carla Gallinati & Natalia Gavazzo, *We Are All MERCOSUR: Discourses and Practices About Free Movement in the Current Regional Integration of South-America*, in UNESCO FMA Essays, *supra* note 226, at 201–02. For a discussion of MERCOSUR’s potential as a protective framework for climate migrants, see PDD, *supra* note 167, at 142.

240. See Nita, *supra* note 230, at 29–35 for an overview of mutual recognition of skills and qualifications in FMAs.

241. UNESCO FMA Essays, *supra* note 226, at xxv.

242. Phillippe de Lombaerde & Liliana Lizarazo Rodriguez, *International Regionalism and National Constitutions: A Jurimetric Assessment*, 24 J. TRANSNAT’L L. & POL’Y 23, 28 (2014).

243. See Alberta Fabbriotti, *Multilateralizing Regionalism and the Future Architecture of International Trade Law*, 103 AM. SOC’Y INT’L L. PROC. 119, 128 (2009); see also Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement*, 35 CAL. W. INT’L L.J. 275 (2005) (claiming that regionalization in international human rights law results in the dilution of human rights).

244. See David Grewal, *Globalism and the Dialectic of Globalization*, L. & POL. ECON. PROJECT (Apr. 17, 2019), <https://perma.cc/ZE3D-SQAT>.

245. See M.I. Anushiem & Kingsley C. Ehujuo, *Implementation of Treaty as Basis for Regional Cooperation Vis-à-vis Absolute Sovereignty: Nigeria in Perspective*, 8 NNAMDI AZIKIWE U. J. INT’L L. & JURIS. 161 (2017).

pranational structure of governance, because of a reluctance to abdicate sovereignty.<sup>246</sup> Thus, FMAs demonstrate that nation-states can maintain sovereignty even while agreeing to limit the exercise of their right to exclude in the context of regional agreements.

Separating sovereignty from exclusion is useful because of the demands of climate change, as well as the scale of contemporary mobility.<sup>247</sup> Yet scant attention has been paid to FMAs as a climate-induced migration solution, with limited exceptions. PDD identifies FMAs as one framework through which nation-state humanitarian protection measures can operate.<sup>248</sup> Ferris proposes FMAs as a protection framework in passing.<sup>249</sup> Wood reports on free movement within Africa, but as Wood herself notes, no academic literature has yet been produced on FMAs' potential to address climate-induced migration concerns.<sup>250</sup>

Although scholars have overlooked FMAs, these agreements serve as a useful protection framework for three reasons: i) FMAs respond to the complex and regional nature of climate-induced migration; ii) the expansion of FMAs to account for climate-induced migration is politically feasible; and iii) FMAs build structural and individual resilience.<sup>251</sup>

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246. See MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION xxiv (Phillipe de Lombaerde et al. eds., 2017); de Lombaerde & Lizarazo Rodriguez, *supra* note 242, at 27 (framing intergovernmental agreements as more horizontal structures than supranational institutions).

247. See Katrina M. Wyman, *Limiting the National Right to Exclude*, 72 U. MIAMI L. REV. 425, 429–32 (2018) (arguing that climate change may justify limiting the right to exclude).

248. PDD, *supra* note 167, at 135. PDD mentions that the SADC, ECOWAS, or the EU could provide the basis for new norms on migration and displacement. *Id.* at 137. For further discussion of PDD, see *supra* Part I.B.

249. Ferris, *supra* note 53, at 24 (“[T]here are uneven but promising efforts to develop regional protocols for free movement of people, which might well be the most productive means to address future cross-border movements resulting from the effects of climate change.”). Ramos and Cavedon-Capdeville also discuss free movement within the Southern Common Market (MERCOSUR) while generally advocating for regional responses to climate-induced migration. See Erika Pires Ramos & Fernanda de Salles Cavedon-Capdeville, *Regional Responses to Climate Change and Migration in Latin America*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 262, 274–75 (Benoît Mayer & François Crépeau eds., 2017).

250. TAMARA WOOD, THE ROLE OF FREE MOVEMENT OF PERSONS AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT 12–13 (2019), <https://perma.cc/3QZG-ZJPU>.

251. In presenting FMAs as a solution for climate-induced migration, this Article does not minimize the importance of mitigation. However, climate change impacts already exacerbate migration and displacement, making legal frameworks that account for the cross-border climate-induced migration gap relevant whether or not the global community limits the increase of average global temperature to below 2°C as agreed in Paris, and 1.5°C as necessary for the survival of SIDS.

First, FMAs provide a flexible mobility management structure.<sup>252</sup> The agreements allow for movement before, during, or after a sudden- or slow-onset event, thereby increasing mobility options regardless of whether movement was forced or voluntary, is temporary or permanent, or was directly caused by a climate-related event.<sup>253</sup> FMAs respond not to the root cause of migration but to its effects.<sup>254</sup> In so doing, FMAs eradicate the causality barrier migrants face when seeking protection under international refugee law or would face under a multilateral convention modeled on the 1951 Refugee Convention, that is, having to prove they were displaced by a climate-related event.<sup>255</sup> Moreover, in increasing mobility pathways for all eligible migrants, FMAs avoid the issue of privileging climate migrants in particular.<sup>256</sup>

In addition to accommodating the temporal and causal complexity of climate-induced migration, FMAs also respond to the regional nature of migration. Regional movement is especially common between countries that share a

252. The complex nature of climate-induced migration has frustrated attempts to theorize appropriate responses. See Jakobsson, *supra* note 93, at 62.

253. In the case of forced displacement, other measures that address the difficulty forced migrants experience in resettlement might be more appropriate. See Graeme Hugo, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in CLIMATE CHANGE AND DISPLACEMENT, *supra* note 35, at 9–10.

254. As noted in Part I, sudden-onset disasters tend to result in short-term internal displacements, while slow-onset events tend to result in more permanent migration over longer distances, including across borders. However, in the case of small countries, especially those where disaster overwhelms capacity, sudden-onset disasters can result in cross-border migration. The literature further complicates the story. Reuveny and Moore, Drabo and Mbaye, and Naudé all find a positive relationship between natural disasters and international migration. See Rafael Reuveny & Will H. Moore, *Does Environmental Degradation Influence Migration? Emigration to Developed Countries in the Late 1980s and 1990s*, 90 SOC. SCI. Q. 461 (2009); ALASSANE DRABO & LINGUÈRE M. MBAYE, CLIMATE CHANGE, NATURAL DISASTERS & MIGRATION (2011); WIM NAUDÉ, CONFLICT, DISASTERS AND NO JOBS: REASONS FOR INTERNATIONAL MIGRATION IN SUB-SAHARAN AFRICA (2008). In regions with “porous borders,” like Africa, crossing an international border may be more feasible than internal migration over long distances. See Michel Beine & Christopher Parsons, *Climate Factors as Determinants of International Migration* 14 (Institut de Recherches Économiques et Sociales de l’Université Catholique de Louvain, Discussion Paper No. 2012-2, 2012). Furthermore, sudden- and slow-onset events can feed into each other, causing temporary displacement to become more permanent. See DAVID CANTOR, CROSS-BORDER DISPLACEMENT, CLIMATE CHANGE AND DISASTERS 14 (2018). FMAs can be responsive to migrant needs in the absence of sharply delineated causal factors.

255. See WOOD, *supra* note 250, at 27 (“[T]his is a significant advantage given the multi-causal nature of disaster displacement and the well-recognized difficulties associated with identifying ‘disaster displaced persons.’”). For a discussion on climate-induced migration and causality, see *supra* Part I.A.

256. See Benoît Mayer, *Critical Perspective on the Identification of ‘Environmental Refugees’ as a Category of Human Rights Concern*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS, *supra* note 53, at 28, 35–37 (discussing the ethical implications of the normative discourse on “environmental refugees”).

common border, making shorter distances more characteristic of migration in the Global South, where the majority of migration occurs.<sup>257</sup> FMAs can capture this short-range cross-border movement.<sup>258</sup> Because climate impacts vary across regions, regional responses to migration may also be more appropriate.<sup>259</sup>

From a theoretical perspective, FMAs cohere with scholarly calls for regional approaches to migration management.<sup>260</sup> Migration scholars note that managing migration at the regional level provides important advantages. Nation-states are more likely to abrogate their authority at the regional rather than international level, and are also more open to negotiations with similarly-situated nation-states.<sup>261</sup> Furthermore, regional agreements can result in a more balanced distribution of benefits than bilateral agreements, which tend to favor the receiving country.<sup>262</sup>

Second, FMAs are more politically feasible than a global multilateral agreement on climate-induced migration and nimble enough to adapt to the particular needs of climate migrants. Neighboring nation-states share similar concerns and thus can reach consensus more quickly than in a global multilat-

257. See Beine & Parsons, *supra* note 254, at 11, 19. As is true of global migration generally, most cross-border climate-induced migration is regional, including in Europe, Africa, Asia, and Southern and Central America. *But see* Diego Acosta, *Global Migration Law and Regional Free Movement: Compliance and Adjudication – the Case of South America*, 111 AM. J. INT'L L. UNBOUND 159, 159 n.4 (2017) (noting that North America (Canada and USA) and Oceania (Australia and New Zealand) are exceptions).

258. Most climate migrants would prefer to stay in place, with evidence showing that the majority of migrants return home when possible. See Graeme Hugo, *Future Demographic Change and Its Interactions with Migration and Climate Change*, 21S GLOB. ENV'T CHANGE, S21–33 (2011); Karen E. McNamara & Chris Gibson, 'We Do Not Want to Leave our Land': Pacific Ambassadors at the United Nations Resist the Category of 'Climate Refugees,' 40 GEOFORUM 475 (2009). The fact that FMAs facilitate movement intra-regionally may also allow migrants to relocate to countries that share similar cultures and values. This might improve the resettlement experience when cross-border migration is the only viable option.

259. See PDD, *supra* note 167, at 137 (noting that disaster displacement experiences tend to be similar by region). The Brazil Declaration and Plan of Action serves as one example of a regional response. See Regional Refugee Instruments & Related, Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean at 3–4, Dec. 3, 2014, 989 U.N.T.S. 175.

260. See McMAHON, *supra* note 114, at 10 (arguing for a supranational approach at the regional level as “the most sustainable long-term step towards legitimate migration control”); Benoît Mayer, *Environmental Migration: Prospects for a Regional Governance in the Asia-Pacific*, 16 ASIA-PAC. J. ENV'T L. 77, 91–103 (2013) (arguing that regional responses may be more effective than other proposals like a new global multilateral convention).

261. See Mayer, *supra* note 260, at 92–93.

262. See UNESCO FMA Essays, *supra* note 226, at xv. *But see* Bimal Ghosh, *Managing Migration: Towards the Missing Regime?*, in MIGRATION WITHOUT BORDERS, ESSAYS ON THE FREE MOVEMENT OF PEOPLE 113–14 (Paul De Guchteneire & Antoine Pécoud eds., 2007) (noting that sending and receiving countries may not always be in the same region).

eral process.<sup>263</sup> Additionally, regional agreements are easier to achieve because fewer states are involved than at a global multilateral level, and regions may demonstrate greater levels of mutual trust.<sup>264</sup> For these reasons, “[d]iscussions at the regional level” can “bring the issue of protection of disaster-displaced persons back to the affected population at the regional, national, and even local levels, rather than leaving it within the international impasse.”<sup>265</sup> McMahon argues that a regional, supranational approach would be the most sustainable pathway towards legitimate migration management because it is more likely to eschew political weaknesses.<sup>266</sup>

Because of the comparative ease of negotiating regional versus multilateral agreements, FMAs can be more readily adapted to the demands of climate-induced migration. Given that few FMAs currently guarantee regional citizenship, these frameworks would need to be redesigned to fully be protective.<sup>267</sup> Granting migrants access to territory without access to residence, citizenship, or social benefits can render migrants second-rate members of their host societies. The Compact of Free Association with Palau, Federated States of Micronesia, and Marshall Islands, for example, allows visa-free entry into the United States but does not authorize citizenship or access to all federal benefits, at times hindering access to health care.<sup>268</sup> FMAs would need to guarantee access to economic, social, and political rights to circumvent discrimination against foreign nationals.<sup>269</sup> Such redesign remains more easily achieved at the regional versus multilateral level.

Third, FMAs increase economic resilience at both the structural and individual level, reducing the need for migration as a response to slow- and sudden-onset disasters. Economic factors play a larger role in determining migration outcomes than environmental drivers.<sup>270</sup> In attending to this fact, scholars have highlighted that legal solutions that target climate migrants should include economic migrants.<sup>271</sup> Although the way economic and environmental drivers interact have stymied attempts to create solutions that target climate migrants, scholars have largely missed the silver lining. As Barnett and Webber put it, “[r]educing the likelihood of migration arising from climate change is . . .

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263. See PDD, *supra* note 167, at 137 (arguing for a regional approach to enhancing protection for disaster displaced persons).

264. See UNESCO FMA Essays, *supra* note 226, at xiv.

265. PDD, *supra* note 167, at 137.

266. McMAHON, *supra* note 114, at 203.

267. FMAs would also need to protect against forcible return. Many FMAs prohibit mass expulsion, cautioning that individual cases for deportation be considered on their own merits. WOOD, *supra* note 250, at 38. However, provisions that limit state discretion to suspend FMAs or the rights of migrants would add further protection.

268. U.S. GOV'T ACCOUNT. OFF., COMPACTS OF FREE ASSOCIATION 11 (2020).

269. UNESCO FMA Essays, *supra* note 226, at xxiv.

270. BARNETT & WEBBER, *supra* note 46, at 6.

271. See, e.g., Mayer, *supra* note 256, at 35–37.

something that in theory is largely within the control of the people.”<sup>272</sup> By enhancing economic resilience, FMAs can also allow migrants to stay in place in the long term.

Economists have touted the benefits of liberalizing the movement of labor, and its attendant benefits on global income gaps.<sup>273</sup> Development economist Michael Clemens argues that reducing migration barriers would lead to greater global gains than the gains that arise from the reduction of barriers to capital and trade.<sup>274</sup> Rodrik also supports this position, arguing that micro-expansions of labor mobility would generate economic gains for migrant workers and their home countries.<sup>275</sup> Although these economists have focused on South-North migratory flows, research on international economic integration indicates that FMAs do have important economic benefits intra-regionally.<sup>276</sup>

Indeed, migration can serve as a development strategy. African states supported the Global Compact, emphasizing the need to mainstream “migration into development strategies that include gainful employment, remittances and financial inclusion and the circulation of professionals of all skill levels, and arrangements for free movement.”<sup>277</sup> CARICOM frames its FMA as a matter of development policy.<sup>278</sup> In this vein, CARICOM aims to expand the categories of professionals covered under the FMA to include agricultural, security

272. BARNETT & WEBBER, *supra* note 46, at 6.

273. While expanding labor mobility, the rights of migrant workers must be protected. *See* Nita, *supra* note 230, at 23. New Zealand’s Recognised Seasonal Employer (“RSE”) and Australia’s Seasonal Worker Program, for example, generally protect migrant workers’ rights, making these schemes more effective for migrants and their families. *See generally* Richard Bedford et al., *Managed Temporary Labour Migration of Pacific Islanders to Australia and New Zealand in the Early Twenty-first Century*, 48 *AUSTL. GEOGRAPHER* 37 (2017).

274. Michael A. Clemens, *Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?*, 25 *J. ECON. PERSPS.* 83, 84–86 (2011).

275. Dani Rodrik, *Labor Markets: The Unexploited Frontier of Globalization*, *GLOBALIST* (May 31, 2011), <https://perma.cc/4T3R-HFEF>. *See also* Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 *CORNELL INT’L L.J.* 1 (2008) (adding a distributive justice argument to the economic finding that liberalizing movement of labor would result in global economic welfare gains).

276. *See generally* ROBSON, *supra* note 230 (outlining gains from increased specialization among countries with different economic characters, capital accumulation and growth, economic stability among other benefits).

277. AFRICAN UNION, *DRAFT COMMON AFRICAN POSITION ON THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION* 5 (2017). For a discussion of regionalism’s development benefits through trade expansion in Africa, see Olasupo Owoye, *Regionalism and WTO Multilateralism: The Case for an African Continental Free Trade Area*, 50 *J. WORLD TRADE* 1085 (2016).

278. *See Officials Look at Free Movement of Skills, Facilitation of Travel for CARICOM Nationals*, *ST. LUCIA NEWS ONLINE* (Oct. 1, 2018), <https://perma.cc/Y67G-TYTN> (quoting Barbados Ambassador to CARICOM as saying “[t]his is the heart and core of CARICOM. CARICOM is about facilitating business people, [and] workers, to move across the region to pursue career opportunities, to pursue business opportunities, and by so doing, to raise

and domestic workers.<sup>279</sup> In the Pacific, Australia's Seasonal Worker Program originally aimed to promote economic development in the Pacific Islands, but is now used to facilitate adaptation.<sup>280</sup> FMAs capture these migration-development co-benefits.

Furthermore, FMAs can increase economic resilience at a community and individual level. Circular, temporary, and permanent migratory flows facilitated by FMAs can expand livelihood options.<sup>281</sup> The majority of migrants of working age participate in the labor market,<sup>282</sup> earning income that can flow back to communities in countries of origin. Remittances, money transfers from migrants to their home countries, play a key role in increasing community resilience in countries of origin,<sup>283</sup> with payments supporting investments in housing, health, education, and daily subsistence needs.<sup>284</sup> A U.N. University study in the Pacific found that remittances can help households adapt to climate change impacts.<sup>285</sup>

FMAs hold the potential to serve as a critical tool in addressing climate-induced migration. The liberalized mobility they allow, however, grates against international law's general affirmation of the right to exclude.<sup>286</sup> Although

productivity within the region; to raise employment levels and to raise investment levels within the region.”).

279. See *CARICOM Labour Ministers to Meet Wednesday to Discuss Free Movement for Security Guards and Agricultural Workers*, ST. LUCIA NEWS ONLINE (Feb. 5, 2019), <https://perma.cc/CDW4-S5AA>.

280. See Bedford et al., *supra* note 273, at 40.

281. See *Can Free-Movement Agreements Help People Displaced by Climate Change & Disaster*, KANDOR CTR. FOR INT'L REFUGEE L. (Feb. 6, 2018), <https://perma.cc/E93T-T6XK>.

282. See Leighton & Byrne, *supra* note 33.

283. See BARNETT & WEBBER, *supra* note 46, at 22.

284. See Nicholas Van Hear, “I Went as Far as My Money Would Take Me”: Conflict, Forced Migration and Class, in *FORCED MIGRATION AND GLOBAL PROCESSES* 125, 137 (François Crépeau & Delphine Nakache eds., 2006); see also RICHARD CURTAIN ET AL., *PACIFIC POSSIBLE: LABOUR MOBILITY* 7–8 (July 2016) (arguing that remittances correlate with development indicators and opportunities for migration incentivize human capital development in countries of origin).

285. Compare OAKES ET AL., *supra* note 49, at 1 (finding that remittances are not significant enough to support Kiribati households in adapting to climate impacts), with Issah Justice Musah-Surugu et al., *Migrants' Remittances: A Complementary Source of Financing Adaptation to Climate Change at the Local Level in Ghana*, 10 INT'L J. CLIMATE CHANGE STRATEGIES & MGMT. 178, 191–92 (2017) (arguing that remittances are a complementary source of adaptation finance).

286. Migration discourse creates the impression that all people cannot move freely. But race and class influence access to mobility. See Munshi, *supra* note 115, at 247 (“The notion that different peoples are naturally endowed with different capacities for free movement . . . finds expression in U.S. immigration law and policy, which has long encouraged the free movement of certain peoples, especially white Europeans, while frustrating the movement of racialized others, particularly through policies of exclusion.”); see also Steffen Mau, *Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies*, 4 INT'L POL. SOCIO.

FMAAs serve as a useful mechanism for facilitating migration, driven by climate change and other factors, their operation solely within the Global South also limits their distributive potential. FMAAs that included both rich and poor countries would allow for migration to serve as a re-distributive strategy. This would be particularly appropriate in the climate context where excessive extraction in the Global North has resulted, in part, in Global Southerners fleeing their homes.

Admittedly, the normative proposal of liberalizing borders in the context of regional agreements must contend with the reality of geopolitical power imbalances. Intra-regional economic disparity can hinder attempts at securing FMAA.<sup>287</sup> SADC's goal of full free movement by 2005 was scaled back, for example, due to concerns that economic disparity within the region would lead to mass migration to South Africa.<sup>288</sup> Inter-regional economic disparities could also undermine attempts to broaden the scope of FMAAs. Furthermore, formerly colonized nation-states have expressed difficulty in shaping international law.

Attapattu argues that the conflict between rich and poor nations, or the North-South divide, undermines the effectiveness of international law.<sup>289</sup> In the climate arena, friction between the developing countries negotiating bloc, the Group of 77, and other UNFCCC Parties over climate finance point to the challenges formerly colonized States face in multilateral processes.<sup>290</sup> Outside of the environmental context, Third World Approaches to International Law ("TWAAIL") scholars have outlined a colonial legacy that has endured.

If formerly colonized nation-states must achieve both political and economic equality to be able to meaningfully participate in multilateral jurisgenesis, then people of the Global South may also need political and economic gains to become jurisgenerative agents.<sup>291</sup> Yet the positionality of the Global

339, 349 (2010) (concluding that "the freedom of movement people enjoy depends greatly on their being citizens of rich democracies" after analyzing the visa regimes of 193 countries).

287. See UNESCO FMA Essays, *supra* note 226, at xxiii.

288. See John O. Oucho & J. Crush, *Contra Free Movement: South Africa and the SADC Migration Protocols*, 48 AFR. TODAY 139, 146 (2001); Jonathan Martens, *Moving Freely on the African Continent: The Experiences of ECOWAS and SADC with Free Movement Protocols*, in INTERNATIONAL MIGRATION LAW, *supra* note 227, at 358.

289. Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 1-2 (Shawkat Alam et al. eds., 2015).

290. Maxine Burkett calls this a justice paradox. Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633 (2013).

291. Critical legal scholars have undone the notion that lawmaking does not require power. See Mark V. Tushnet, *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984) (explaining the traditional view that the rule of law is meant to guarantee that individuals cannot co-opt the coercive power of institutions, primarily the nation-state).

diaspora becomes important here. Global Southerners located within the Global North could amplify their power by recognizing themselves as a collective.

While a major goal of this Article is to make the theoretical claim that migrants can make international law, a second goal of this Article is to shift the frame to focus on the Global South. I turn more fully to this aim in the final section. In particular, I name the Global South diaspora as a powerful non-state actor that can help reformulate conceptions of sovereignty.

### B. *The Global South Diaspora as Jurisgenerative Agent*

Although FMAs may have some beneficial outcomes for communities displaced by the effects of climate change, there is also room for Global Southerners located within the Global North to create broader international legal norms surrounding trans-regional migration. While the Global South diaspora can leverage their jurisgenerative power to advocate for more liberalized borders through FMAs, the Global South diaspora can also engage in norm creation to undo the constitutive relationship between sovereignty and exclusion. Naming the Global South diaspora as a jurisgenerative agent makes it possible to locate their power to bring a much-needed hybrid perspective to transnational dilemmas.

In the realm of the international law of migration, the Global South diaspora is particularly well suited for legal norm creation because of its transnational character and the territorially unbounded nature of activity in which the diaspora already engages. The Global South diaspora also embodies a hybridity that contains the potential for reconceptualizing North-South relations, a reconceptualization that remains critically important for climate-induced migration, where the plundering of the global commons by the North contributes to the destabilization of residents from the South.

My naming of Global Southerners residing in the Global North as a diaspora builds on the conceptualization of the Global South as a political economy category beyond the confines of geography.<sup>292</sup> The term Global South first emerged in the 1970s as part of efforts to categorize a set of economically disadvantaged nation-states and replace the term “Third World.”<sup>293</sup> Since then, scholars have shifted the concept of the Global South beyond the confines of the nation-state to designate people and spaces joined by negative experiences under contemporary global capitalism.<sup>294</sup> In this rendering, the Global South

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292. Cf. ANNE G. MAHLER, FROM THE TRICONTINENTAL TO THE GLOBAL SOUTH 33 (2018) (describing the Global South as “an emergent political imagination undergirding contemporary social movements”).

293. Arif Dirlik, *Global South: Predicament and Promise*, 1 GLOB. S. 12, 12–13 (2007).

294. See GLOBALIZATION AND THE SOUTH 3 (Caroline Thomas & Peter Wilkin eds., 1997) (calling scholars to “liberate our thinking from the constraints imposed by interpretation

becomes “a geographically flexible, sociospatial mapping of the so-called externalities of capitalist accumulation.”<sup>295</sup> This de-territorialized view of the Global South makes it possible to locate “Souths in the geographic North and Norths in the Geographic South.”<sup>296</sup> A de-territorialized view of the Global South also makes it possible to locate Southerners in the Global North and name them as a collective.

Indeed, the Global South has evolved to articulate a contemporary theory of transnational political resistance led by a subaltern collective so that the Global South is now a “transnational political imaginary.”<sup>297</sup> Prashad highlights the political potential of this subaltern collective, defining the Global South as a “concatenation of protests against the theft of the commons, against the theft of human dignity and rights” so that “the global South is this: a world of protest, a whirlwind of creative activity.”<sup>298</sup> López claims that any understanding of the contemporary Global South requires centralizing “a global subaltern that increasingly recognizes itself as such.”<sup>299</sup> Within this framing of the Global South as a subaltern political imaginary, diasporic theory serves to emphasize the collective power of the subaltern community residing in the Global North. I define the Global South diaspora as people descended from the Global South residing in the Global North.<sup>300</sup>

Dániel Gzásó defines diaspora generally as “geographically dispersed macro communities of migratory origin,” who have “integrated into the society surrounding them, but have not fully assimilated,” and have “symbolic or objective relationships with kin communities living in other areas, but believed to be of identical origin, and with their real or imagined ancestral homeland or kin

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within a territorially-based state-centric worldview, which concentrates on a North/South gap in terms of *states*” (emphasis in original); Eric Sheppard & Richa Nagar, *From East-West to North-South*, 36 *ANTIPODE* 557, 558 (2004) (“[T]he global North is constituted through a network of political and economic elites spanning privileged localities across the globe.”).

295. MAHLER, *supra* note 292, at 33.

296. *Id.* at 32.

297. *Id.* at 33.

298. VIJAY PRASHAD, *THE POORER NATIONS* 9 (2012).

299. Alfred J. López, *Introduction: The (Post)global South*, 1 *GLOB. S.* 1, 5 (2007).

300. More than 230 million people lived outside their country of origin at the beginning of this century, most of whom relocated regionally. Although the majority of migrants in sub-Saharan Africa (89%), Eastern and South-Eastern Asia (83%), Latin America and the Caribbean (73%), and Central and Southern Asia (63%), moved within their region of residence, most migrants living in North America (98%), Oceania (88%), and Northern Africa and Western Asia (59%), were born outside their home region. See James Hollifield & Rahfin Faruk, *Governing Migration in an Age of Globalization*, in *MIGRATION ON THE MOVE* 118, 119 (Carolus Grüters et al. eds., 2017); United Nations, *The Number of International Migrants Reaches 272 Million, Continuing an Upward Trend in All World Regions*, Says U.N., (Sept. 17, 2019), <https://perma.cc/7SYD-3KTR>.

state.”<sup>301</sup> Although the definition Gatzsó and others provide ties each diaspora to a particular homeland state,<sup>302</sup> the term’s original connotation is much broader. Diaspora originates from the Greek word for geographical “scattering” or “dispersion.”<sup>303</sup>

Because of the territorially unmoored nature of diasporic communities who maintain ties to real and imagined homelands while physically residing abroad, the diaspora is “rooted in ideas rather than places.”<sup>304</sup> As such, the diaspora is a powerful imaginative community. Addis claims that “imagining is an important defining feature of all diasporas.”<sup>305</sup> Yet, this imagining has not yet been used to shape the law. Although “[d]iasporas are the exemplary communities of the transnational moment,” their jurisgenerative power has heretofore been overlooked.

While diaspora has been extensively theorized by humanists and social scientists, legal theorists have fallen behind in considering the legal and political implications of diasporic communities. Chander, whose work introduced diaspora as a subject of legal inquiry, proposes diaspora as a way to theorize a middle ground between statist and cosmopolitan conceptions of the law.<sup>306</sup> “The dominant statist model of international law, which limits the reach of a state’s laws to its own geographic boundaries,” Chander writes, “allows no legal connection between a diaspora and its homeland.”<sup>307</sup> Cosmopolitan models of international law advanced by scholars such as Brian Barry, Charles Beitz, Martha Nussbaum, Thomas Pogge, and Jeremy Waldron also deny the validity of diasporic legal ties to homeland.<sup>308</sup> According to the cosmopolitan model, allegiance should serve humankind, not any one nation’s flag.<sup>309</sup>

Chander offers a third paradigm—the diaspora model. The diaspora model “finds in the hybridity and dual loyalty of diaspora the basis for reconceiving the citizen as able to live and thrive with multiple and overlapping loy-

301. Dániel Gatzsó, *Diaspora Policies in Theory and Practice*, 1 HUNG. J. MINORITY STUD. 65, 66 (2017); see also Yossi Shain & Aharon Barth, *Diasporas and International Relations Theory*, 57 INT’L ORG. 449, 452 (2001) (defining diaspora as “a people with common origin who reside, more or less on a permanent basis, outside the borders of their ethnic or religious homeland—whether that homeland is real or symbolic, independent or under foreign control”).

302. See, e.g., Judith M. Brown, *Global South Asians* 4 (2006).

303. Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1015 (2001).

304. Pico Iyer, *Living in the Transit Lounge*, in UNROOTED CHILDHOODS 7, 11 (Faith Eidsé & Nina Sichel eds., 2004).

305. Adeno Addis, *Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora*, 45 VAND. J. TRANSNAT’L L. 963, 985 (2012).

306. See Chander, *supra* note 303, at 1029–60.

307. *Id.* at 1005.

308. See *id.* at 1007.

309. See *id.* Chander considers economist proponents of free movement of capital and labor cosmopolitan as well. See *id.* at 1045.

alties and sovereigns.”<sup>310</sup> Because of the economic, legal, and political relationships diasporas maintain across national borders, diasporas problematize “the Westphalian cartography of territorially defined sovereigns and the cosmopolitan utopia of a united mankind.”<sup>311</sup> Thus, Chander uses diaspora to reconceive the relationship between the citizen and the nation-state.<sup>312</sup>

A diasporic approach to liberal theory reveals the possibility of a polity unbound by territoriality. Diasporic communities often engage in the political process in their home countries. Members of the Caribbean diaspora, for example, regularly return home to vote.<sup>313</sup> Transnational communities may also wish to leverage their presence in host countries to advocate for political issues relevant to their home nation-states.<sup>314</sup> Thus, in contrast to the liberal notion that a territorially bound polity is necessary to preserve national character, diaspora expresses the possibility of political community across national borders.<sup>315</sup> Diaspora forces us to rethink “legitimate political participation in essentially territorial terms.”<sup>316</sup>

Emigration states may also actively promote diasporic engagement in political life. Homeland governments increasingly nurture relationships with the diaspora in order to support economic development.<sup>317</sup> In some cases, host states afford diaspora members political and voting rights in host states, even

310. *Id.* at 1008.

311. *Id.* at 1048.

312. *See id.* at 1008.

313. *See* Org. of Am. States [OAS], Final Report of the OAS Electoral Observation Mission to the General Elections in the Commonwealth of Dominica 15-16, CP/Doc.4474/10 (Mar. 8, 2010); *see generally* Addis, *supra* note 305, at 1022–27 (discussing political representation of various diasporas).

314. *See* Chander, *supra* note 303, at 1029. Diasporic political engagement in Organization for Economic Co-operation and Development countries could provide a way to circumvent the lack of transboundary accountability for certain issues like climate change. For example, SIDS have unsuccessfully tried to seek climate redress in international courts, yet are affected by outcomes of U.S. presidential elections (for example, President Trump’s selection and subsequent withdrawal from the Paris Agreement). Islanders abroad could shape politics in host states to create accountability across borders on issues that affect them.

315. *See id.* at 1006 (“Because they maintain important relationships that defy national borders, diasporas today do not fit easily into the simple Cartesian geography of the nation-state system, which conceives of political communities expressed only *within* a nation-state, not *across* nation-states.”(emphasis in original)). For further discussion of the liberal conception of the relationship between territory and political and cultural belonging, *see supra* Part II.B.

316. Addis, *supra* note 305, at 988.

317. *See* Anupam Chander, *Homeward Bound*, 81 N.Y.U. L. REV. 60, 72–76 (2006) (discussing how national policies aimed at tapping the economic resources the diaspora can provide toward economic development in emigrant states). More than 50% of U.N. Member States have institutions that target their diaspora. Alan Gamlen, *Diaspora Institutions and Diaspora Governance*, 48 INT’L MIGR. REV. S180 (2014).

when they cannot access full citizenship. For example, the Netherlands and Sweden grant resident aliens the right to participate in local elections.<sup>318</sup>

The political activity of the diaspora across international borders points to an “emerging transnational space.”<sup>319</sup> As Kastoryano writes, “where the country of origin becomes a source of identity, the country of residence a source of rights,” “the emerging transnational space” between them becomes “a space of political action combining the two or more countries.”<sup>320</sup> I propose that this emergent transnational space holds not only political potential, but also juris-generative possibilities.

The juris-generative potential of the Global South diaspora finds precedent in other norm-generating groups. Communities within the confines of the nation-state already engage in private legal orderings to enforce norms outside those preferred by the “dominant polity.”<sup>321</sup> For example, diamond merchants have created a complex dispute resolution system outside of state-sponsored law;<sup>322</sup> immigrant communities establish community-based savings and credit associations;<sup>323</sup> and Romani people maintain autonomous laws and legal processes among transnational communities.<sup>324</sup> Alternative lawmaking also exists among religious organizations,<sup>325</sup> private actors,<sup>326</sup> and through social customs.<sup>327</sup> Diasporic communities, however, can integrate their norm preferences into the polity of host states, in order to express their allegiances to multiple states.

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318. Hollifield, *supra* note 146, at 619; *see also* Aaron Bady, *Jedediah Purdy Has an Idea that Could Save Us from Capitalism and the Climate Crisis*, NATION (Oct. 16, 2019), <https://perma.cc/23GQ-UPJM>.

319. Riva Kastoryano, *Settlement, Transnational Communities and Citizenship*, 52 INT'L SOC. SCI. J. 307, 311 (2000).

320. *Id.* at 311. *See generally* Osman Antwi-Boateng, *After War Then Peace: The US-Based Liberian Diaspora as Peace-Building Norm Entrepreneurs*, 25 J. REFUGEE STUD. 93 (2012) (offering an example of diaspora-led political action combining U.S. and Liberian perspectives).

321. Chander, *supra* note 303, at 1010.

322. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamonds Industry*, 21 J. LEGAL STUD. 115, 138–41 (1992).

323. *See* Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 874–78 (1999).

324. *See generally* Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 YALE L.J. 323 (1993).

325. *See generally* CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988) (taking a pluralist approach to church-state relations in the United States).

326. *See* Bernstein, *supra* note 322 (using the New York Diamond Dealers Club as an instance of “private law-making”); *see generally* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724 (2001).

327. *See* LON L. FULLER, *ANATOMY OF THE LAW* 43–49 (1968).

What differentiates diaspora from other norm-generating communities is its “privileging of hybrid possibilities.”<sup>328</sup> The diaspora can offer norms not as an alternative to a hegemonic domestic legal order in the pluralist sense,<sup>329</sup> but rather as integrated within a single domestic legal order, while being constitutive of multiple jurisdictions. In other words, the Global South diaspora has the opportunity to embed legal norms within the Global North that address Global South needs. Thus, naming the Global South as a diaspora reveals the power of their hybridity. As Katyal elegantly puts it, “[T]he notion of a diaspora, by denaturalizing the centrality of the nation-state, offers a powerful undercurrent of reconciliation between the destination country and the homeland, because the very character of a diaspora is characterized by dispersion and variation across transnational loyalties and differences.”<sup>330</sup> In the migration context, where divergent interests between rich and poor countries abound, this hybridity remains particularly useful.

This Article opens with the stated objective of destabilizing the conflict between the Global North and the Global South as the primary site of migration scholarship. Here, that objective resurfaces. The Global South diaspora, understood as a community of overlapping allegiances, helps us to reimagine “the lines that we draw between North and South . . . and the inside and outside of the law.”<sup>331</sup> Global Southerners that reside in the Global North have the potential to shape international law in reconciliatory ways that would be impossible if they were wholly bound by territory.<sup>332</sup>

Leveraging their hybrid positionality would make the Global South diaspora valuable non-state actor contributors to international norm creation. As climate change impacts worsen, likely rendering swaths of the globe unfit for human habitation,<sup>333</sup> the imperative of responding to global injustice will intensify. Thus, understanding the Global South as a political community protesting “the theft of the commons”<sup>334</sup> allows us to imagine the ways that climate change will further strengthen the Global South diaspora as a collective, and therefore enhance their capacity to influence international law.

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328. Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415, 1422 (2010).

329. See generally, e.g., AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM (1995) (for an account of pluralist scholarship).

330. Katyal, *supra* note 328, at 1429.

331. *Id.* at 1422.

332. Chander also frames members of the diaspora as creators of transnational law. Chander, *supra* note 303, at 1005. Shah argues that the positivist view that only states can create law overlooks the ways in which unofficial non-state actors such as diasporic communities shape international law. Prakash Shah, *Diasporas as Legal Actors: Implications for Established Legal Boundaries*, 5 NON-STATE ACTORS & INT’L L. 153, 153 (2005).

333. See Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES (July 23, 2020), <https://perma.cc/Y4S7-3BEU>.

334. PRASHAD, *supra* note 298, at 9.

## CONCLUSION

This Article uses the problem of climate-induced migration, where climate migrants remain without legal protection largely due to international law's constitution of sovereignty through exclusion, to ask who has the power to change international law. I argue that the answer to this question can include non-state actors. Due to international law's constraint on the use of force, non-state actors can participate in legal norm creation in the international realm more extensively than in the domestic realm because of the theoretical absence of the threat of violence. The jurisgenerative capacity of non-state actors is important as an additional source of international legal norm creation given that international law has not developed to fully address various transnational problems, including climate change. Thus, the answer to the question—who has the power to change international law—extends beyond the challenge of climate-induced migration. The answer could be applied to any transnational challenge that outpaces the legal structures available to resolve it.

This Article also locates and names the Global South diaspora as a powerful non-state actor. Theoretical discourse framing the discussion on the international law of migration typically casts a scene of a sovereign Global North nation-state pitted against a helpless migrant from the Global South. Scholars reproduce this narrative *ad infinitum*. However, conceptualizing the international law of migration as only mediating conflict between the Global North and Global Southerners misses critical migration frameworks arising within the Global South, like FMAs; and also creates an *a priori* rendering of migrants as powerless. This Article de-territorializes the notion of the Global South and asserts the agency of Global Southerners in order to claim the Global South diaspora as an international legal norm creator. As the harmful effects of global capitalism extend beyond territorial limits, the capacity of Global Southerners in the Global North to assert hybrid positionalities can help articulate legal norms that account not just for the enfranchised, but also for the global dispossessed.