

## GLOBAL SOUTHERNERS IN THE NORTH

*Ama Ruth Francis\**

### ABSTRACT

*Third World Approaches to International Law (TWAIL) scholarship contends that international law privileges nation-states in the Global North over those in the Global South. The literature primarily draws on a Westphalian conception of the North-South divide in analyzing asymmetrical issues of power in the global political economy. Given the expansion of global capitalism, however, the nation-state-based mode of analysis misses the fact that there are Global Souths in the geographic North and Global Norths in the geographic South. This Essay makes two theoretical claims.*

*First, it argues that racial capitalism renders expendable populations across the geographic North and South, destabilizing the Westphalian North-South structure. Global Southerners, defined by their positionality as capitalism's externalities, exist across the North-South schema. The Essay uses climate displacement as an example. The adverse effects of carbon pollution combine with postcolonial legacy and contemporary imperialism to transmogrify the lives, livelihoods, and homelands of Black, Indigenous, and People of Color (BIPOC) around the world into the hidden cost of industrialization. Climate change, an issue that challenges strict notions of national borders, serves as germane material in the Essay's work to deterritorialize the notion of the North-South divide.*

*Second, this Essay names the existence of Global Southerners in the geographic North as a heretofore unnamed site of resistance for reordering the North-South divide in international law. It leverages the author's deterritorialized view of the Global South to claim that Global Southerners are political agents with the capacity to shift the global political economy of international law. Although others have begun to reimagine the Global South beyond geographical lines in order to articulate a theory of resistance in international law, this Essay seeks to break new ground by highlighting the particular power of Global Southerners residing in the geographic North. As such, this Essay reinvigorates the central TWAIL question of how to shift power along the North-South divide.*

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\* The author is a nonresident fellow at the Sabin Center for Climate Change Law at Columbia Law School and the Climate Displacement Project Strategist at the International Refugee Assistance Project and Natural Resources Defense Council. All views are their own. The author is grateful to Michael Burger for his feedback on an earlier draft of this Essay and to Angela Harris, Ann Eisenberg, and Alyssa Battistoni for their insightful comments during the 2021 Yale Law School "Law and Political Economy & Environmentalism" workshop. The author also thanks Carmen Gonzalez, Elizabeth Ferris, Nisha Argawal, and Jaya Ramji-Nogales for their reactions to the oral presentation of this paper at the 2021 *Temple Law Review* symposium on climate migration. For an overview of the symposium, see Amy Sinden, *A Gathering Wave*, 93 *TEMP. L. REV.* 643 (2021).

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## INTRODUCTION

Third World Approaches to International Law (TWAIL) posits that international law unevenly structures power dynamics between nation-states.<sup>1</sup> Rather than serving as a neutral generator and arbiter of legal rules and norms, international law produces winners and losers. The winners are industrialized nation-states following the colonial period: the Global North.<sup>2</sup> The losers are developing nation-states that were formerly colonized: the Global South.<sup>3</sup> Climate change law serves as a seemingly paradigmatic example within this North-South apparatus. The United States, the European Union, and other top emitters remain responsible for 41.5% of global greenhouse gas emissions,<sup>4</sup> while climate-vulnerable states have been largely unable to leverage the United Nations

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1. 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, 12–13 (Shawkat Alam et al. eds., 2015) (arguing that TWAIL scholarship examines the colonial underpinnings of international law and critiques contemporary international law’s perpetuation of “Northern hegemony”); see also ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 78–79, 90–92 (2004) (claiming that colonialism was central to the development of international law by pointing to doctrines such as *terra nullius* and state recognition).

2. See M. Rafiqul Islam, *History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 1, at 23, 43–47; see also E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1535–36 (2019) (referring to the “colonial advantage” that European nation-states enjoyed over their colonies due to international legal doctrines such as sovereignty).

3. See Islam, *supra* note 2, at 43–47; see also Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 408–13 (2020) [hereinafter Gonzalez, *Migration as Reparation*] (arguing that the operation of the Global North through the colonial, postcolonial, and neoliberal era has undermined the adaptive capacity of the Global South).

4. Johannes Friedrich, Mengpin Ge & Andrew Pickens, *This Interactive Chart Shows Changes in the World’s Top 10 Emitters*, WORLD RESOURCES INST. (Dec. 10, 2020), <http://www.wri.org/blog/2020/12/interactive-chart-top-emitters> [<https://perma.cc/Z7TP-BSRU>].

Framework Convention on Climate Change (UNFCCC) process to produce legally binding liability.<sup>5</sup> While attending to asymmetrical relationships between nation-states remains important for any critical endeavor in international legal scholarship, this Essay proposes that understanding the North-South divide solely in terms of nation-states is misguided.

First, the emerging economic success of some developing nation-states—namely, Brazil, Russia, India, China, and South Africa—destabilizes the coherence of the Global South category.<sup>6</sup> In the climate change realm, for example, China is a major emitter of greenhouse gases, but it remains part of the Global South negotiating bloc.<sup>7</sup> Scholars insist on preserving the notion of the Global South as a set of economically disadvantaged states in Latin America and the Caribbean, Africa, Asia, and the Pacific, claiming that Global South nation-states need not all be the same.<sup>8</sup> While the Global South category may be sufficiently tensile to accommodate heterogeneity, globalization's erosion of the nation-state still calls in to question the utility of theorizing power exclusively in Westphalian terms.

Second, global capitalism operates across national borders to construct a widening divide between the rich and the poor in both the geographic North and South.<sup>9</sup> According to the U.S. Federal Reserve, in the second quarter of 2020, the top 1% of Americans held 30.7% of all household wealth in the United States, while the bottom 50% of the population held 1.9% of total wealth in the United States.<sup>10</sup> Scholars William Robinson

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5. 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, 634 (2013) (discussing the difficulty small island developing states experience in seeking climate remedies); see also Glenn Althor, James E.M. Watson & Richard A. Fuller, *Global Mismatch Between Greenhouse Gas Emissions and the Burden of Climate Change*, SCI. REPS., Feb. 5, 2016, at 1, 1 (finding that twenty of the thirty-six highest-emitting countries are among the least vulnerable to adverse climate impacts, while eleven of the seventeen countries with low to moderate greenhouse gas emissions are extremely vulnerable to adverse climate impacts).

6. See B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT'L L. 17, 32–33 (2012) [hereinafter Chimni, *Capitalism*] (responding to the critique that international law cannot be imperialist because of the economic growth of certain developing nation-states within the confines of the liberal international economic order).

7. See *The Member States of the Group of 77*, GROUP OF 77, <http://www.g77.org/doc/members.html> [<https://perma.cc/T5DD-L4K5>] (last visited June 1, 2021) (listing members of the Group of 77, an intergovernmental organization comprised of developing countries with the goal of enhancing their joint negotiating capabilities at the United Nations).

8. See, e.g., Atapattu & Gonzalez, *supra* note 1, at 2.

9. The geographic North refers to a set of wealthy nation-states predominantly in North America, Europe, East Asia, and Australasia that are high-income economies or members of the Organization for Economic Cooperation and Development. See *World Bank Country and Lending Groups*, WORLD BANK, <http://datahelpdesk.worldbank.org/knowledgebase/articles/906519> [<https://perma.cc/BV7D-DH4L>] (last visited June 1, 2021). The geographic South refers to nation-states that the World Bank classifies as upper-middle-income, lower-middle-income, or low-income economies, predominantly located in Africa, Latin America and the Caribbean, and the rest of Asia. See *id.* The terms “Global North” and “Global South” traditionally designate the geographic North and geographic South. See, e.g., Atapattu & Gonzalez, *supra* note 1, at 2. However, this Essay distinguishes between the geographic category and the sociopolitical location. In particular, the Essay uses “Global South” to designate spaces and people sharing a similar experience of oppression in order to locate Global Souths across the geographic North and South.

10. *Distribution of Household Wealth in the U.S. Since 1989*, U.S. FED. RESERVE, <http://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:0;series:Net%20worth;demogra>

and Jerry Harris argue that wealthy elites increasingly constitute a transnational capitalist class, including elites from the geographic South, who benefit from the transnational concentration of capital.<sup>11</sup> This transnational accumulation of capital operates to the exclusion of an oppressed class in both the geographic North and South.<sup>12</sup> In contemporary terms, then, the Global South, whose conceptual power lies in theorizing oppression, might more aptly encompass people and spaces commonly excluded under global capitalism regardless of their geographic location. As such, the Global South becomes a deterritorialized, socio-spatial mapping of the externalities of capitalist accumulation.<sup>13</sup>

Leveraging the analytic lens of racial capitalism allows for an even sharper view. Capitalism operates to devalue racialized humans so that their lives become externalities.<sup>14</sup> Accordingly, Black, Indigenous, and People of Color (BIPOC) around the world become disposable humanity who balance capitalist excess. In the logic of racial capitalism, Pacific Islanders rightly perish as climate change's adverse effects render atoll and low-lying nation-states increasingly uninhabitable.<sup>15</sup> Moreover, racial capitalism suggests that leaving Indigenous communities in the United States to face eroding lands, sacred sites, and cultural practices without a clear relocation plan is a necessary externality of a carbon-based economy. Global capitalism renders racialized humans as expendable across the North-South divide.

Although international law traditionally governs interstate relations,<sup>16</sup> making the Westphalian notion of the North-South divide a useful critical tool, global capitalism's production of Global Souths in the North calls for a more nuanced analytical lens. This

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phic:network;population:1,3,5,7;units:shares;range:2005.2,2020.2 [https://perma.cc/7AHF-5P9G] (select "Top 1%" and "Bottom 50%" in "Display" selections) (last updated Mar. 19, 2021).

11. See William I. Robinson & Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64 SCI. & SOC'Y 11, 32–36 (2000).

12. Chimni, *Capitalism*, *supra* note 6, at 19.

13. ANNE GARLAND MAHLER, FROM THE TRICONTINENTAL TO THE GLOBAL SOUTH 32–33 (2018).

14. Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 J.L. & POL. ECON. 109, 117 (2020) [hereinafter Gonzalez, *Climate Change*] (claiming that residents of racial capitalism's sacrifice zones are particularly susceptible to climate-related harms because of their status as "disposable"); see also Levi Gahman & Elise Hjalmanson, *Border Imperialism, Racial Capitalism, and Geographies of Deracination*, 18 ACME 107, 115 (2019) (describing the discursive process of "socio-spatial racialization" so that some people and places are made to be wretched and therefore "killable"). See *infra* Part II.A for further discussion of racial capitalism.

15. See Alisa Ceri Warnock, *Small Island Developing States of the Pacific and Climate Change: Adaptation and Alternatives*, 4 N.Z. Y.B. INT'L L. 247, 262, 286 (2007) (asking at "what point in the UNFCCC negotiations will the economics of cost-benefit analysis intervene and subsume any progress towards adaptation for the Pacific Islands" and arguing that given the unfeasible costs of adaptation, abandonment and islanders losing their homelands must be considered a realistic future outcome).

16. Jeremy Bentham first used the term international law to refer to the body of legal rules, standards, and norms applicable to interstate relations. M.W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 408–10 (1984). The traditional view of international law maintains this state-centric perspective, defining international law as the set of rules regulating states behavior in their relations with each other. See Math Noortmann et al., *Non State Actors*, 77 INT'L L. ASS'N REP. CONFS. 608, 610 (2016); see also REBECCA WALLACE & ANNE HOLLIDAY, NUTSHELLS: INTERNATIONAL LAW 1 (2006).

Essay proposes that the primary prism of analysis for TWAIL theorists—the geographic North-South divide—needs revising. It argues for reconceptualizing the Global South to include not only nation-states *but also* the people and spaces that racial capitalism positions as expendable in both the geographic North and South. This theoretical palimpsest is useful because it allows for the naming of a heretofore disregarded site of resistance in international law—Global Southerners in the North.

Section I pays homage to TWAIL, the nation-state-based frame of critiquing international law along the North-South divide, tracing TWAIL scholarship’s evolution from the colonial to the neoliberal period. This Section shows that the literature primarily lies on a Westphalian notion of the Global South. It then highlights an emerging thread of TWAIL scholarship that understands the Global South as a political practice in order to push for a deterritorialized view of the Global South.

Section II takes the deconstruction argument further, claiming that racial capitalism breaks down the geographic North-South divide. It posits that racial capitalism creates Global Souths and Southerners in the North—that is, racialized surplus populations that are also present in Latin America and the Caribbean, Asia, Africa, and the Pacific. Section II uses climate displacement as an example to highlight expendability as a common defining experience for BIPOC across the geographic North-South divide.

Section III builds on Section II’s claim that expendable Global South populations exist in the geographic North. It ultimately contends that Global Southerners in the geographic North are political agents with the capacity to shift the global political economy of international law. This Essay thus seeks to reinvigorate TWAIL scholarship by offering a new analytical understanding of the Global South.

## I. DECONSTRUCTING THE NORTH-SOUTH DIVIDE

This Section claims that TWAIL scholarship predominantly uses a nation-state-based frame in critiquing international legal issues along the North-South divide. While this geographical conceptualization of the North-South divide makes sense, given that international law primarily governs interstate relations, the rise of globalized racial capitalism demands the deconstruction of the Westphalian model of analysis. This Section first recounts TWAIL’s contention that international law works with imperialism and capitalism to disadvantage the Global South.<sup>17</sup> It then highlights an emerging thread in TWAIL scholarship, which frames the Global South as political practice, to argue for a deterritorialized view of the Global South.<sup>18</sup>

### A. TWAIL & International Law

TWAIL takes aim at international law’s deleterious effect on the Global South.<sup>19</sup> TWAIL scholars show that international law has historically disadvantaged people of the Global South, especially its subaltern groups, and continues to do so in an intimate

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17. See *infra* Part I.A.

18. See *infra* Part I.B.

19. This Essay uses the term “Global South” in order to engage with a wider literature in law and political science. However, TWAIL scholars use a number of equivalent terms, including Third World or developing world. See Usha Natarajan, John Reynolds, Amar Bhatia & Sujith Xavier, *Introduction: TWAIL - On Praxis and the Intellectual*, 37 *THIRD WORLD Q.* 1946, 1955 n.1 (2016).

relationship with imperialism and capitalism.<sup>20</sup> The TWAIL account has proceeded in two phases over time.<sup>21</sup> The literature first focused on the effects of colonialism, and then it excavated the impact of globalization.<sup>22</sup> Throughout these turns, scholars have maintained that international law creates and perpetuates racialized hierarchies.<sup>23</sup>

TWAIL's first central task was to elucidate the relationship between international law and colonialism in order to correct the imbalance between Global North and Global South nation-states that arose from the colonial encounter.<sup>24</sup> TWAIL, declining to view international law as a just system producing equitable results, broke new ground by claiming that international law facilitated the subordination of Global South nation-states.<sup>25</sup> In so doing, TWAIL questioned international law's legitimacy.<sup>26</sup> Scholars argued that colonialism was central to the development of international law.<sup>27</sup> For example, scholar Antony Anghie points to doctrines such as *terra nullius* and state recognition to demonstrate that international legal norms created a gateway to the group of so-called civilized nations.<sup>28</sup>

A TWAIL approach to international environmental law links the history of colonial expansion and domination to contemporary environmental degradation.<sup>29</sup> The Industrial Revolution of the nineteenth century, alongside massive development following the Second World War, fueled the current environmental crisis.<sup>30</sup> Moreover, the inputs that fueled industrialization in Europe and North America were obtained through colonialism and imperialism.<sup>31</sup> In the TWAIL account, international law justified the conquest of both nature and non-European peoples by purporting to advance civilization and development, and international law continues to bolster Northern hegemony.<sup>32</sup>

Building on the tradition of excavating the effects of colonialism, TWAIL scholars further deploy the lens of neocolonialism to analyze the continued exploitation of the

20. Chimni, *Capitalism*, *supra* note 6, at 17–18.

21. See Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 79–84 (2003) (dividing TWAIL into two generations, wherein TWAIL I refers to scholarship immediately following decolonization, and TWAIL II refers to more recent intersectional scholarship that centers the experience of Third World peoples). *But see* George R.B. Galindo, *Splitting TWAIL?*, 33 WINDSOR Y.B. ACCESS JUST. 37, 41 (2016) (arguing that periodization of TWAIL scholarship dilutes its coherence and thereby undermines its ability to influence “mainstream” international legal discourse).

22. Madhav Khosla, *The TWAIL Discourse: The Emergence of a New Phase*, 9 INT'L COMM. L. REV. 291, 293 (2007).

23. See, e.g., Makau Mutua, *What is TWAIL?*, 94 PROC. AM. SOC'Y INT'L L. ANN. MEETING 31, 31 (2000).

24. ANGHIE, *supra* note 1, at 38–39.

25. See *id.*

26. See *id.*

27. Anghie and Chimni consider the contention that colonialism is central to the formation of international law as a feature of the second generation of TWAIL scholarship, TWAIL II. Anghie & Chimni, *supra* note 21, at 84. This Essay does not strictly adhere to the TWAIL I and TWAIL II paradigm. Rather, it seeks to map an account in terms of TWAIL's engagement with colonialism and globalization.

28. See ANGHIE, *supra* note 1, at 78–79, 90–92.

29. Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 387 (1997) [hereinafter Mickelson, *Rhetoric and Rage*].

30. *Id.*

31. *Id.*

32. Atapattu & Gonzalez, *supra* note 1, at 12–13.

Global South in the postcolonial period.<sup>33</sup> Following political independence, the majority of Global Southern nation-states entered the global economy as raw materials exporters and manufactured goods importers.<sup>34</sup> This economic specialization rendered them vulnerable to unfavorable terms for primary commodities relative to manufactured goods and to foreign investors in resource-extractive industries seeking to secure their investments by undercutting national sovereignty.<sup>35</sup> Recognizing that the legal architecture of international economic law was erected while most Global Southern nation-states were still under colonial rule, the newly independent Southern nation-states demanded that global rules be rewritten to include their interests—articulating a New International Economic Order (NIEO).<sup>36</sup> Included in the NIEO's call for full equality among nation-states in solving global economic challenges was an invitation to pay special attention to countries severely impacted by economic crises and natural calamities.<sup>37</sup>

More recent TWAIL scholarship proposes that global imperialism continues through an economic and legal structure “backed by a political formation constituted of the advanced capitalist states and a complex network of international institutions having the capability of using unrivalled force to realize the interests of global imperialism.”<sup>38</sup> The liberal mobility of goods, capital, and services, but not people, functions as one of the defining features of global imperialism.<sup>39</sup> Rather than a disparate set of subjugating ideologies, the need for capitalism to expand into noncapitalist spaces renders a through-line across colonialism, neocolonialism, and contemporary global imperialism.<sup>40</sup> Yet contemporary global imperialism produces a distinct erosion of the traditional North-South divide.

Accounting for the economic rise of Brazil, Russia, India, China, and South Africa, scholar B.S. Chimni claims that globalized capitalism superimposes a global class divide onto the North-South split.<sup>41</sup> Chimni identifies a transnational class constituted by “segments of the capitalist class in the advanced capitalist countries and emerging economies that gain from the globalization process at the expense of the subaltern classes in both the First and the Third Worlds,” what Chimni calls the transnational oppressed

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33. Chimni, *Capitalism*, *supra* note 6, at 27–28; *see also* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 108 (2003) [hereinafter RAJAGOPAL, INTERNATIONAL LAW FROM BELOW] (noting international law's construction of structural poverty as the “working principle of the process whereby the domain of interaction between the West and the non-West was defined”). Although this Essay presents TWAIL scholarship as following a linear progression, TWAIL scholars across time revisit central questions that arose from decolonization. *See* Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT'L COMM. L. REV. 355, 361 (2008).

34. Atapattu & Gonzalez, *supra* note 1, at 6.

35. *Id.*; LIZ YOUNG, WORLD HUNGER 41 (1997); *see also* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 78–100 (2013).

36. *See* G.A. Res. 3201 (S-VI), Declaration of the Establishment of a New International Economic Order (May 1, 1974). For a historical account of the NIEO, *see generally* QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018).

37. G.A. Res. 3201 (S-VI), *supra* note 36, § 4(c).

38. Chimni, *Capitalism*, *supra* note 6, at 32.

39. *Id.* at 31.

40. *Id.* at 24.

41. *Id.* at 18–19.

classes.<sup>42</sup> As such, it becomes impossible to discuss the Global North and South solely in geographic terms, especially given that the utility of the concept of the Global North and South is to articulate differences in power.<sup>43</sup> Thus TWAIL's commitment to contemporary forms of imperialism has itself eroded its primary prism of analysis: the divide between Global South and Global North nation-states. Rather than a theoretical crisis, this Essay takes this problem as a theoretical opportunity.<sup>44</sup>

### B. Deterritorializing the Global South

TWAIL scholarship gestures toward a deterritorialized view of the Global South. Theorists originally conceived of the "Third World" as a geographical space non-aligned with the dimensions that the Cold War shaped.<sup>45</sup> Contemporary scholars now use an array of terms, including the Third World, Global South, and developing world, to refer to spaces that did not directly participate in the evolution of the institutions of modern capitalist democracy, which are home to more than three-fourths of contemporary humanity.<sup>46</sup> Yet, theorists have increasingly complicated the terms.

A first problematization of the Global South renders the notion as a positioning of the global poor within the global political economy. In this account, the Global South "consists of the victims and the powerless in the international economy," which constitutes the majority of the world's population but enjoys limited influence "over the manner in which the nations of the world arrange their economic affairs."<sup>47</sup> Although this Essay ultimately opposes the framing of Global Southerners as recipients rather than participants in international rulemaking, what is important here is the theoretical move to define the Global South by conditions, not geography.<sup>48</sup>

Other theorists concerned with the power of the global majority conceive of the Global South as a social movement—"an international protest of the weak against the strong, or the poor against the rich."<sup>49</sup> In making room to view the Global South as a counterhegemonic discursive practice, these scholars seem to liberate the Global South from its geographic and nation-state-based moorings.<sup>50</sup> Although various theoretical works cast the Global South as a political mechanism for transnational oppressed classes rather than a set of nation-states, the literature predominantly reproduces the Westphalian

42. *Id.* at 19.

43. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 334–35 (2000).

44. This Essay makes the case that the erosion of the geographical conception of the Global South makes it possible to locate a heretofore unnamed political power in Section III.

45. Mark T. Berger, *The End of the 'Third World'?*, 15 *THIRD WORLD Q.* 257, 259 (1994). The end of the Cold War rendered the term "Third World" less resonant by some accounts. *See, e.g.*, GUY ARNOLD, *THE END OF THE THIRD WORLD* 14 (1993) (explaining that the Third World concept depended on a division between "East" and "West" that was later replaced with a divide between prosperity and poverty).

46. *See* PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED* 3 (2004).

47. Julius K. Nyerere, *South-South Option*, in *THE THIRD WORLD STRATEGY: ECONOMIC AND POLITICAL COHESION IN THE SOUTH* 9, 10 (Altaf Gauhar ed., 1983).

48. *See, e.g., id.* In *Migrants Can Make International Law*, I argue that Global Southerners, including migrants from the Global South, can be international norm creators. *See* Ama Ruth Francis, *Migrants Can Make International Law*, 45 *HARV. ENV'T L. REV.* 99, 149 (2021) [hereinafter Francis, *Migrants Can*].

49. Mickelson, *Rhetoric and Rage*, *supra* note 29, at 357.

50. Balakrishnan Rajagopal, Comment, *Locating the Third World in Cultural Geography*, 1998 *THIRD WORLD LEGAL STUD.* 1, 20 [hereinafter Rajagopal, *Locating the Third World*].



framing of the North-South divide. Legal theorist Karin Mickelson, for example, critiques the framing of the Global South as a social movement because it violates the sanctity of the nation-state as the primary prism of analysis for TWAIL scholars.<sup>51</sup>

Thus, the literature remains caught between understanding international law as structuring a subordinate relationship between Global North and Global South nation-states, and increasingly framing the Global South as a political practice. However, unmooring the Global South from geography is useful. If the Global South “is not defined by political geography, but by the actual contestation of power formations such as gender oppression, it is possible to think of transnational linkages among the oppressed.”<sup>52</sup> The rest of this Essay seeks to liberate the literature from its ambivalence by building on the conception of the Global South as a deterritorialized political practice and further claims that doing so makes it possible to locate Global Southern political power within the Global North as a form of resistance in international law.

## II. GLOBAL SOUTHERNERS AS EXTERNALITIES ACROSS THE NORTH-SOUTH DIVIDE

Although scholars primarily analyze Global South international legal issues through a strict nation-state-based lens, contemporary racial capitalism operates to create Global Souths in the North. As such, understanding the Global South as a collection of nation-states that international law disadvantages erases the people and spaces who experience disenfranchisement under globalized capitalism in the geographic North. This Section argues that racial capitalism renders Global Souths in the North, and further, that Global Southern people in the North—like the oppressed class in Latin America and the Caribbean, Asia, Africa, and the Pacific—are made to be capitalism’s externalities.<sup>53</sup> It then uses climate displacement as an example, demonstrating that hegemonic human rights approaches will not correct the asymmetrical balance of power in the global political economy.<sup>54</sup>

### A. Racial Capitalism Renders Global Souths in the North

Capitalism operates through the logic of racism.<sup>55</sup> Although law and economy literature views capitalism to operate as a neutral arbiter of cost-benefit tradeoffs, critical

51. Mickelson, *Rhetoric and Rage*, *supra* note 29, at 358–59. This is ironic because for scholar Robert Rothstein, whose work Mickelson draws on to point to the Global South as a social movement, the members of the international protest are states. Robert L. Rothstein, *Limits and Possibilities of Weak Theory: Interpreting North-South*, 44 J. INT’L AFF. 159, 175–76 (1990); *see also* Valerie Phillips, *Indigenous Peoples and the Role of the Nation-State*, 101 AM. SOC’Y INT’L L. PROC. 319, 320 (2007) [hereinafter Phillips, *Indigenous Peoples*] (pointing to TWAIL scholars’ resistance to central assumptions in international law but unwillingness to challenge the concept of the nation-state itself).

52. Rajagopal, *Locating the Third World*, *supra* note 50, at 20. Note that Rajagopal, in saying this, was speaking to transnational linkages at the local level, including the voices of indigenous people and women. *Id.* at 19–20.

53. *See infra* Part II.A.

54. *See infra* Part II.B.

55. *See* CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 9 (2000).

race scholars show that the market consistently produces losers along racialized lines.<sup>56</sup> Scholar Ruth Wilson Gilmore thus defines racism not as the operation of discrimination based on the social construct of race but rather as “state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.”<sup>57</sup> This Essay argues that racial capitalism generates a disposable humanity through its hierarchical construction of presumably valuable and worthless humans.<sup>58</sup>

Racial capitalism renders the lives of racialized classes of humans as externalities across the North-South divide. Legal scholar Carmen Gonzalez points out that racialized exclusion creates “stigmatized geographic locations—including reservations, ghettos, export-processing zones, extractive zones, and the Third World—where the land and the people have been rendered expendable and disposable.”<sup>59</sup> Indeed, these expendable people and spaces are made across the geographic Global North and Global South. Geographer Laura Pulido refers to “surplus populations” in the United States, claiming that these surplus humans are disproportionately nonwhite by design, given that “[t]he devaluation of Black (and other nonwhite) bodies has been a central feature of global capitalism for centuries.”<sup>60</sup> Flint, Michigan, serves as a bleak example. It was possible for state officials to poison Flint’s mostly Black residents because their lives purportedly did not matter.<sup>61</sup>

Environmental issues, and climate change in particular, demonstrate with stark clarity racial capitalism’s devaluing of nonwhite people and its transformation of the places they call home into sacrifice zones.<sup>62</sup> As Pulido so clearly puts it, “[p]oor, segregated, people of color, whether on a reservation, el campo, or in the inner city, experience a distinct, brutal reality that is key to accumulation of power and profits for elites. Their ‘value,’ if one can call it that, is in their general expendability.”<sup>63</sup> The fact

56. See, e.g., Elizabeth M. Iglesias, *Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 310, 320–21 (Francisco Valdes et al. eds., 2002) (defining new racialism as the view that racial differences, including wealth inequality, are the natural outcomes of the free market). *But see* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1761 (2003) (reviewing *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY*, *supra*) (arguing that law and economics and critical race theory can be mutually generative discourses).

57. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007).

58. See JULIAN AGUON, *WHAT WE BURY AT NIGHT: DISPOSABLE HUMANITY* 226 (2008) (using the term “disposable humanity” to describe Pacific Islanders in the face of the existential threat of climate change).

59. Gonzalez, *Migration as Reparation*, *supra* note 3, at 407–08.

60. Laura Pulido, *Flint, Environmental Racism, and Racial Capitalism*, *CAPITALISM NATURE SOCIALISM*, July 27, 2016, at 1, 1; see also HILARY MCD. BECKLES, *THE FIRST BLACK SLAVE SOCIETY: BRITAIN’S “BARBARITY TIME” IN BARBADOS, 1636–1876*, at xiv (2016) (describing Black death under plantation slavery as a new era in global economic development and race relations).

61. Pulido points out that although White residents were also affected, the analysis holds given that Flint is racialized as Black. Pulido, *supra* note 60, at 2, 8.

62. See STEVE LERNER, *SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES* 5 (2010) (highlighting that low-income communities and communities of color in the United States live in the most heavily polluted neighborhoods); see also Gonzalez, *Migration as Reparation*, *supra* note 3, at 408–13 (applying the lens of racial capitalism to climate change to point to the operation of a carbon capitalism that exploits racialized human beings).

63. Pulido, *supra* note 60, at 8 (footnote omitted) (citation omitted).

that the cost is borne by “expendable” people and places is what allows both capital and the law to advance deadly norms and practice in the environmental context.<sup>64</sup>

Scholars of the Global South point to the negative experiences under contemporary global capitalism, environmental and otherwise, to deterritorialize the North-South divide.<sup>65</sup> As such, the Global South becomes “a geographically flexible, sociospatial mapping of the so-called externalities of capitalist accumulation.”<sup>66</sup> Expendability is what defines the Global South, not national borders; and racial capitalism renders Global Southerners as externalities across the North-South divide.

### B. The Example of Climate Displacement

Climate displacement refers to the forced movement of primarily BIPOC within or across national borders due to climate-related disasters.<sup>67</sup> The majority of people are displaced within their own nation-states, primarily in Latin America and the Caribbean, as well as Africa.<sup>68</sup> Yet, climate displacement also occurs in North America, especially in Black and Indigenous communities.<sup>69</sup> Although scholars commonly frame climate displacement as a North-South issue where carbon pollution exported from the

64. *Id.*; see also Michael McIntyre & Heidi J. Nast, *Bio(necro)polis: Marx, Surplus Populations, and the Spatial Dialectics of Reproduction and “Race,”* 43 *ANTIPODE* 1465, 1467 (2011) (referring to disposable people as a necropolis in contrast to the “biopolis,” where the lives and well-being of subjects matter).

65. See, e.g., Eric Sheppard & Richa Nagar, *From East-West to North-South*, 36 *ANTIPODE* 557, 558 (2004) (“[T]he [G]lobal North is constituted through a network of political and economic elites spanning privileged localities across the globe.”); see also *GLOBALIZATION AND THE SOUTH 3* (Caroline Thomas & Peter Wilkin eds., 1997) (calling theorists to “liberate our thinking from the constraints imposed by interpretation within a territorially-based state-centric worldview, which concentrates on a North/South gap in terms of states”).

66. MAHLER, *supra* note 13, at 33 (describing the Global South as “an emergent political imagination undergirding contemporary social movements”).

67. See Walter Kälin, *Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Framework for Their Protection?*, *BROOKINGS* (Oct. 10, 2008), <http://www.brookings.edu/research/displacement-caused-by-the-effects-of-climate-change-who-will-be-affected-and-what-are-the-gaps-in-the-normative-framework-for-their-protection/> [<https://perma.cc/S22F-W8YS>] (discussing various scenarios to help identify whether movement is forced or voluntary, among other things). Scholars use a range of terms to describe climate displacement, including climate-induced migration and climate mobility. This Essay uses the term climate displacement to clearly bring into view the involuntary nature of some climate-related movement.

68. Khalid Koser, *Climate Change and Internal Displacement: Challenges to the Normative Framework*, in *MIGRATION AND CLIMATE CHANGE* 289, 289 (Étienne Piguet et al. eds., 2011) (showing that the majority of environmental migration occurs within national borders); Roman Hoffmann, Anna Dimitrova, Raya Muttarak, Jesus Crespo Cuaresma & Jonas Peisker, *A Meta-Analysis of Country-Level Studies on Environmental Change and Migration*, 10 *NATURE CLIMATE CHANGE* 904, 904 (2020) (surveying studies on environmental migration to show that the strongest relationship between environmental events and migration outcomes occurs in Latin America and the Caribbean, and Africa).

69. The first communities in the United States to undergo planned relocation due to climate-related impacts are Indigenous. See, e.g., Adam Creppelle, *The United States First Climate Relocation: Recognition, Relocation, and Indigenous Rights at the Isle de Jean Charles*, 6 *BELMONT L. REV.* 1, 3 (2018). African Americans have also been disproportionately displaced by both environmental events and climate gentrification. See, e.g., Lauren Phillips, Comment, *Go North, Young Man: The Great Climate Migration and America’s Shrinking Cities*, 10 *SEA GRANT L. & POL’Y J.* 74, 79 (2020) (describing the effects of Hurricane Katrina on African Americans and climate gentrification’s impact on Little Haiti).

geographic North displaces people from the geographic South,<sup>70</sup> the experience of racialized communities in the geographic North disrupts this framing.

The Pacific serves as one example of expendability in this context. The population from low-lying atoll nations face near complete dispossession of their lands and territorial waters due to sea level rise and its corresponding effects on habitability.<sup>71</sup> Saltwater intrusion, soil salinization, and flooding in Pacific nation-states undermine fresh water availability and agricultural capacity, which are necessary for sustaining human life.<sup>72</sup> Similarly, Indigenous communities in the United States have started relocation processes due to the existential threat that the climate-related hazards of erosion and flooding pose.<sup>73</sup>

The normative response to the challenge of climate displacement across the geographic North and South draws principally from international human rights law.<sup>74</sup> Climate change and displacement undermine the enjoyment of individual human rights, including rights to life, health, housing, food, water, and education, as well as cultural and collective rights, including the right to self-determination and the rights of Indigenous peoples.<sup>75</sup> When climate displacement occurs within national borders, nation-states remain obligated to protect the rights of internally displaced persons (IDPs) under international human rights law<sup>76</sup> and in accordance with the 1998 U.N. Guiding

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70. See, e.g., Gonzalez, *Migration as Reparation*, *supra* note 3, at 403–04.

71. The Intergovernmental Panel on Climate Change recently reported that atoll islands could be rendered uninhabitable in the event of a 1.5 degrees Celsius temperature increase scenario. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C, at 234 box 3.5 (2018); see also Jane McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 WINDSOR Y.B. ACCESS JUST. 1, 7–8 (2016) [hereinafter McAdam, *Building International Approaches*] (noting that various elements of statehood may be undermined before the entire territory of an island state disappears).

72. See McAdam, *Building International Approaches*, *supra* note 71, at 7–8.

73. The U.S. government identified thirty-one Alaskan Native communities that are facing imminent threats caused by flooding and erosion, twelve of which considered or decided on planned relocation. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 12 (2009). As of 2020, two Indigenous communities in the United States have started relocation processes. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-488, CLIMATE CHANGE: A CLIMATE MIGRATION PILOT PROGRAM COULD ENHANCE THE NATION'S RESILIENCE AND REDUCE FEDERAL FISCAL EXPOSURE 13 (2020).

74. The literature increasingly promotes the use of migration pathways within the framework of immigration law as a climate displacement response. See, e.g., G.A. Res. 73/195, annex, Global Compact for Safe, Orderly and Regular Migration ¶ 21 (Dec. 19, 2018) [hereinafter Global Compact]; see also David James Cantor, *Environment, Mobility, and International Law: A New Approach in the Americas*, 21 CHI. J. INT'L L. 263, 297–98 (2021).

75. Cecilia Jimenez-Damary (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Rep. on the Human Rights of Internally Displaced Persons*, ¶ 6, U.N. Doc. A/75/207 (July 21, 2020); U.N. High Comm'r for Human Rights, *Rep. on the Relationship Between Climate Change and Human Rights*, ¶¶ 20–44, 51–54, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009). The U.N. Human Rights Committee has adopted the view that climate change constitutes one of the “most pressing and serious threats to the ability of present and future generations to enjoy the right to life,” alongside environmental degradation and unsustainable development, under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Human Rights Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, ¶ 62, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

76. Jimenez-Damary, *supra* note 75, ¶ 41.

Principles on Internal Displacement.<sup>77</sup> Nation-states must also take affirmative and remedial steps to protect people from threats to life and other rights-related impacts of natural hazards and displacement.<sup>78</sup>

The International Law Commission (ILC) recently provided guidance on the protection of rights and the needs of people when disaster occurs. The ILC's Draft Articles on the Protection of Persons in the Event of Disasters (ILC Draft Articles) define disaster to include mass displacement and affirm the duty of states to protect their human rights and accord with humanitarian principles.<sup>79</sup> Similar to the ILC Draft Articles, the International Law Association (ILA) Committee on International Law and Sea Level Rise's 2018 Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise affirms the importance of human rights in this context and further encourages states to "facilitate cross-border migration in anticipation of, or in reaction to, irreversible environmental degradation or sudden-onset disasters linked to sea level rise."<sup>80</sup> Drawing on the principle of common but differentiated responsibilities from the UNFCCC, the ILA recommends that states amend domestic law to facilitate cross-border migration.<sup>81</sup> Nation-states remain obligated to protect human rights regardless of immigration status.<sup>82</sup>

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77. Francis M. Deng (U.N. Secretary-General's Representative on Internally Displaced Persons), *Rep. of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39: Addendum, Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*]; see also U.N. High Comm'r for Refugees, Summary of Deliberations on Climate Change and Displacement 5 (Apr. 2011), <http://www.unhcr.org/4da2b5e19.pdf> [<https://perma.cc/B2L6-9HY5>] (noting that no new principles need to be developed on international displacement in the context change given that the U.N. Guiding Principles on Internal Displacement cover climate-related processes).

78. David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment), *Rep. on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶¶ 62–70, U.N. Doc. A/74/161 (July 15, 2019); see also Bruce Burson, Walter Kälin, Jane McAdam & Sanjula Weerasinghe, *The Duty To Move People Out of Harm's Way in the Context of Climate Change and Disasters*, 37 REFUGEE SURV. Q. 379, 384–88 (2018).

79. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, ¶ 48 (2016).

80. Int'l Law Ass'n Comm. on Int'l Law & Sea Level Rise Res. 6/2018, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, at princ. 4(2)(a)(iii) (2018) [hereinafter Sydney Declaration].

81. The ILA's report following the Sydney Conference states that, "[i]n order to make migration a realistic and manageable option, States of destination should review or amend their domestic laws to facilitate such migration, building on existing good practices in the spirit of the principle of common but differentiated responsibilities." Int'l Law Ass'n, *Sydney Conference on International Law and Sea Level Rise* 38 (2018), [http://www.ila-hq.org/images/ILA/DraftReports/DraftReport\\_SeaLevelRise.pdf](http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_SeaLevelRise.pdf) [<https://perma.cc/X5GQ-AQFC>]. Note also that UNFCCC parties endorsed the recommendation of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts to formulate law, policy, and strategies to address climate mobility, while considering human rights obligations. U.N. Framework Convention on Climate Change, *Rep. of the Executive Comm. of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, ¶ 1(g)(i), Dec. 10/CP.24, annex, U.N. Doc. FCCC/CP/2018/10/Add.1, at 43 (Mar. 19, 2019).

82. *Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons*, 32 INT'L J. REFUGEE L. 549, 549 (2020).

Reflecting the normative framework's focus, climate displacement jurisprudence is grounded primarily in international human rights and refugee law.<sup>83</sup> Here, this Essay presents two petitions that highlight climate displacement as an issue impacting Global Southerners across the North-South divide: *Teitiota v. New Zealand*<sup>84</sup> and *Rights of Indigenous People in Addressing Climate-Forced Displacement*.<sup>85</sup> First, in *Teitiota*, a Kiribati national claimed in a communication to the U.N. Human Rights Committee (UNHRC) that New Zealand had violated his right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) by removing him to Kiribati where the impacts of climate change posed life-threatening conditions.<sup>86</sup> Sea level rise in Kiribati, the petitioner claimed, had resulted in land scarcity and subsequent disputes that endangered Teitiota's life, and saltwater contamination had limited the availability of potable water.<sup>87</sup> The UNHRC ruled that the communication was admissible; the petitioner sufficiently showed that he faced a real risk of impairment to his right to life due to climate change and sea level rise impacts as a result of New Zealand's decision to remove him.<sup>88</sup>

The UNHRC ultimately decided against the petitioner, noting that it could determine only whether New Zealand's consideration of the risks to Teitiota's life was arbitrary or a manifest error or denial of justice.<sup>89</sup> Based on that standard, the UNHRC upheld New Zealand's assessment that Teitiota had not provided sufficient evidence that

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83. This Essay includes within the scope of climate displacement jurisprudence any communication, petition, or complaint that raises a material issue of law or fact concerning mobility in the context of disasters and climate change. This definition draws on the one used by the Sabin Center for Climate Change Law and the Grantham Research Institute at the London School of Economics to collect cases within the Sabin Center for Climate Change Law's United States and Non-U.S. Climate Change Litigation charts. See Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. L. STUD. 1, 3 (2018) (defining climate change litigation as the "rapidly growing body of lawsuits in which climate change and its impacts are either a contributing or key consideration in legal argumentation and adjudication").

84. U.N. Doc. CCPR/C/127/D/2728/2016, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016 (U.N. Hum. Rts. Comm. Oct. 24, 2019).

85. Alaska Institute for Justice, *Rights of Indigenous People in Addressing Climate-Forced Displacement*, in a complaint dated Jan. 15, 2020 from the Alaska Institute for Justice addressed to Cecilia Jimenez-Damary et al. (Special Rapporteurs) (Jan. 15, 2020), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116\\_NA\\_complaint-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_NA_complaint-1.pdf) [<https://perma.cc/2HLP-EN2T>].

86. Teitiota filed a communication to the UNHRC after applying for refugee status with the New Zealand Immigration and Protection Tribunal and appealing the tribunal's decision all the way to the New Zealand Supreme Court. *Teitiota*, U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 1.1. The Supreme Court noted that its ruling against the petitioner "did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction." *Teitiota v. Chief Executive of the Ministry of Business, Innovation & Employment* [2015] NZSC 107 at [13] (N.Z.). A recent U.N. guidance document clarifies that people displaced by climate change can have a valid claim for refugee status under international and regional refugee law. U.N. High Comm'r for Refugees, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* ¶¶ 3-4 (Oct. 1, 2020), <http://www.refworld.org/docid/5f75f2734.html> [<https://perma.cc/98GH-C4S6>].

87. *Teitiota*, U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 2.1.

88. *Id.* ¶ 8.6.

89. *Id.* ¶¶ 9.7-9.9.

he would face irreparable climate-related harm due to land disputes, difficulty growing food, or accessing potable water.<sup>90</sup> However, the UNHRC left the door open to future climate mobility claims, stating:

The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under [A]rticles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.<sup>91</sup>

Thus, the UNHRC asserted that the ICCPR obligates states not to return people fleeing life-threatening climate change impacts. Although the decision is not legally binding, the international legal principles upon which it is based are.<sup>92</sup> *Teitiota* indicates that individuals and groups who have crossed national borders could file subsequent petitions against deportation to the UNHRC, after exhausting domestic options, based on climate change impacts that violate the right to life.<sup>93</sup>

Second, five U.S. indigenous tribes filed a complaint with the U.N. Special Rapporteur on the Human Rights of Internally Displaced Persons among others, alleging that the United States violates their human rights by failing to address climate displacement.<sup>94</sup> The complaint highlights the combined effects of climate change and capitalism, pointing to the environmental degradation wrought by the oil and gas industry.<sup>95</sup> According to the complaint, the U.S. government's failure has resulted in destruction of life, livelihoods, health, and heritage, as well as the loss of ancestral homelands.<sup>96</sup> Across the North-South divide, climate change combined with racial capitalism threatens the lives of BIPOC, including those of future generations.<sup>97</sup>

90. *Id.*

91. *Id.* ¶ 9.11.

92. Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement*, 114 AM. J. INT'L L. 708, 708 n.2 (2020).

93. The Committee is expected to issue a view in 2021 on a communication from Torres Islanders, which could further articulate nation-state obligations to those facing displacement due to climate change impacts. In 2019, Torres Islanders filed a complaint with the UNHRC, alleging that the government of Australia had violated their fundamental rights under Articles 6 and 27 of the ICCPR by failing to take adequate climate action. See *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Action*, CLIMATE CASE CHART, <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/> [https://perma.cc/MDQ2-WRDD] (last visited June 1, 2021). The Torres Islanders, traditional owners of the Great Barrier Reef, claim that climate change will force them to move to mainland Australia, resulting in severe human rights impacts, including cultural losses. Karima Bennouna (Special Rapporteur on the Field of Cultural Rights), *International Legal Frameworks Related to Climate Change, Culture and Cultural Rights*, ¶ 30, U.N. Doc. A/75/298, annex (Oct. 10, 2020); CTR. FOR INT'L ENVTL. LAW, HUMAN RIGHTS OBLIGATIONS OF STATES IN THE CONTEXT OF CLIMATE CHANGE 3 (2020).

94. Alaska Institute for Justice, *supra* note 85, at 3.

95. *Id.* at 4.

96. *Id.* at 9.

97. A youth-led, pan-Pacific campaign has sharpened this exploration, calling on the Pacific Island Forum to seek an advisory opinion on climate change from the ICJ that asks: "What are the obligations of states under

Although climate displacement jurisprudence plays a critical role in carving avenues for justice for climate-displaced persons, human rights claims made by individual and community petitioners alone are unlikely to shift the global political economy that has unequally distributed climate change's adverse effects.<sup>98</sup> The humanitarian response prioritizes the protection of human rights but may elide climate justice by sidestepping industrialized countries' historic responsibility for climate change.<sup>99</sup>

As such, many theorists argue for a distributive response. Professor Carmen G. Gonzalez claims that "affluent countries (the Global North)" should reduce their greenhouse gas emissions, provide development assistance for adaptation that allows people to stay in place, and extend reparations to climate-displaced persons.<sup>100</sup> She argues this approach is warranted due to the Global North's disproportionate historical and current contribution to climate change and its role in producing climate vulnerability "through colonial and post-colonial military, economic, and political interventions that increased poverty and equality in much of Asia, Africa, Latin America, and the Pacific (the Global South)."<sup>101</sup>

While this Essay is sympathetic to this line of argument, the argument takes the only agent in international law to be the nation-state, thereby missing the collective power of a transnational alliance of oppressed people across the North-South divide. Professor Harold Hongju Koh has demonstrated that international law is constituted through a dynamic interplay between domestic and international legal norms, and those domestic norms are created through domestic political processes.<sup>102</sup> As such, it is possible for a transnational alliance of Global Southerners to shape international legal norms.<sup>103</sup>

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international law to protect the rights of present and future generations against the adverse effects of climate change?" PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE, BRIEFING: AN INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION ON CLIMATE CHANGE 2 (2019), <http://static1.squarespace.com/static/5d01ae3bc1dd970001e45b42/t/5d26db6211277e0001a9e903/1562827621180/PISFCC+Briefing+ICJ+AO+on+CC.pdf> [https://perma.cc/PBR3-CNAX]. In taking a rights-focused framing, the proposed question could elicit a response from the ICJ that touches on climate displacement, especially given that the most substantive jurisprudence on climate displacement has emerged from human rights bodies.

98. Research shows that some nation-states stand to gain from anthropogenic climate change, namely cooler, wealthier countries. Noah S. Diffenbaugh & Marshall Burke, *Global Warming Has Increased Global Economic Inequality*, 116 PROC. NAT'L ACAD. SCI. 9808, 9808 (2019).

99. Gonzalez, *Climate Change*, *supra* note 14, at 123–25 (characterizing the humanitarian response as superior to the national security response but claiming that the humanitarian response relies on the charity of Global North countries and is therefore "inconsistent with a climate justice approach").

100. Gonzalez, *Migration as Reparation*, *supra* note 3, at 403.

101. *Id.* at 404.

102. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646–49 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995), and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

103. For a full account of displaced persons ability to shape international law, see Francis, *Migrants Can*, *supra* note 48.



### III. GLOBAL SOUTHERNERS AS POLITICAL AGENTS IN THE “NORTH”

This Essay has argued in previous Sections that while legal scholars predominantly frame North-South issues in terms of a conflict between nation-states differently situated by and within international law, globalized capitalism erodes the geographic bounds of dispossession. Rather than solely a set of nation-states who share a postcolonial history and comparable levels of economic development, the Global South also encompasses people and spaces that contemporary global capitalism renders expendable. As such, there are Souths and Southerners within the geographic North, and Norths and Northerners within the geographic South. This Section puts this deterritorialized view of the Global South to use, claiming the existence of Global Southerners in the geographic North as political agents<sup>104</sup> with the capacity to shift the global political economy of international law.<sup>105</sup>

#### A. Global South, Global Southerners, and Political Praxis

In framing the Global South as political praxis, scholars increasingly argue that spaces marked as the Global South exist within the geographic Global North. Notable TWAIL scholar B.S. Chimni, for example, intimates that the “real concern of the North . . . is the defen[s]e of global capitalism that guarantees unprecedented affluence to certain sections of the Northern, and now small sections of the Southern, citizenry.”<sup>106</sup> Building on Chimni’s work, international legal scholar Prabhakar Singh understands the Global South as a “currency for identifying the deprived of both the North and the South” beyond the Westphalian nation-state paradigm.<sup>107</sup>

Deterritorializing the notion of the Global South within the context of global capitalism is useful because it highlights a site of political potential. Historian Vijay Prashad goes so far as to define the Global South as political resistance, calling it a “concatenation of protests against the theft of the commons, against the theft of human dignity and rights.”<sup>108</sup> If human rights frameworks dominate the response to climate displacement, then it is the Global South that pushes against the evisceration of those rights. Rethinking the Global South beyond the confines of the nation-state unites “the poor and the marginalized of the world under one umbrella,” with the capacity to resist the discriminatory operation of international law.<sup>109</sup>

Indeed, identifying a transnational class of expendable humans across the North-South divide presents an opportunity to reshape international legal norms.

104. See *infra* Part III.A.

105. See *infra* Part III.B.

106. B.S. Chimni, *The Birth of a ‘Discipline’: From Refugee to Forced Migration Studies*, 22 J. REFUGEE STUD. 11, 24 (2009) [hereinafter Chimni, *The Birth of a Discipline*].

107. Prabhakar Singh, *Indian International Law: From a Colonized Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT’L L. 79, 97 (2010). Singh does not argue for the dissolution of the nation-state, but rather seeks to highlight the potential for resistance that emerges when rethinking the Global South beyond geographical lines. See *id.*

108. VIJAY PRASHAD, *THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH* 9 (2012); see also Prem Kumar Rajaram, *Refugees as Surplus Population: Race, Migration and Capitalist Value Regimes*, 23 NEW POL. ECON. 627, 637 (2018) (arguing that seeing refugees and migrants as surplus populations alongside other marginalized groups provides a basis for a politics of solidarity).

109. Singh, *supra* note 107, at 97.

Resistance within and against international law would benefit from new actors, emerging from new geographies, of disparate colors.<sup>110</sup> Reconceptualizing the Global South also expands the notion of the participants in and sources of international law. Legal scholar Amar Bhatia, in naming North American Indigenous perspectives as South of the North, for example, claims that international law would benefit from Indigenous legal traditions and inter-National laws.<sup>111</sup>

This Essay proposes building on the scholarship that understands the Global South as a transnational subaltern resistance to highlight the particular potential of Global Southerners in the geographic North to overcome intransigent issues of the North-South divide. While an increasing number of theorists refer to Global Souths in the North, this Essay takes their thinking further by understanding the Global South to include a collectivized set of political agents. It is not just Souths in the North but also *Southerners* in the North. This distinction is important for linking Global South theory to a larger discourse on how private actors influence international law through the domestic political process.<sup>112</sup> The agency of Global Southerners in the geographic North in particular has the potential to overcome intransigent issues of the North-South divide by producing resistance from the inside out. The next Part contextualizes this argument within climate displacement discourse.

#### *B. Global South Organizing for Anticipatory Approaches to Climate Displacement*

Locating the collective power of Global Southerners within Northern nation-states is important for climate displacement because it highlights a heretofore overlooked source of power within national borders for advocating for climate solutions. Global Southerners in the North could catalyze domestic efforts in at least three ways. First, Global Southerners could mobilize to advance climate action within the judicial system. Second, Global Southerners could join with other groups to further advocacy efforts. Third, Global Southerners could organize politically to push for the adoption of relevant legislation.

Given that the majority of climate displacement occurs within national borders,<sup>113</sup> and further, that international adjudication and multilateral agreements require domestic

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110. *See id.*

111. *See* Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT'L L. 131, 173 (2012). There is some debate over the inclusion of Indigenous peoples within TWAIL scholarship, but Bhatia argues that identifying the particular Southern experience of Indigenous peoples living in the North would enrich TWAIL's perspective. *Id.* at 157–58; *see also* Phillips, *Indigenous Peoples*, *supra* note 51, at 319 (advocating for the recognition of Indigenous peoples in reimagining the modern nation-state).

112. *See* ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 43–44 (Malcolm Evans & Phoebe Okowa eds., 2007) (describing the “exponential growth” of nonstate actor activity in the international arena); 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, 1126–28 (2013) (pointing to empirical evidence that demonstrates the expansion of private actors in international law from the twentieth century onwards); Koh, *supra* note 102, at 2631 (attributing the rise in nonstate actors to the declining importance of sovereignty).

113. *Environmental Migration*, MIGRATION DATA PORTAL, [http://migrationdataportal.org/themes/environmental\\_migration](http://migrationdataportal.org/themes/environmental_migration) [<https://perma.cc/B4YZ-5GZ5>] (last updated May 6, 2021).

enforcement,<sup>114</sup> national efforts to address climate displacement are integral. National governments are required to protect the human rights of those citizens displaced within their borders by climate-related events as codified by the 1998 U.N. Guiding Principles on Internal Displacement.<sup>115</sup> Yet incorporating this framework into domestic law, and strengthening the capacity of national and local actors to implement it, remains a challenge.<sup>116</sup> Furthermore, in the absence of an international oversight body to guarantee enforcement of relevant legal norms, domestic legal action will play a critical response in building the climate displacement response.<sup>117</sup>

However, without a shift in the conditions of power, national efforts to address climate displacement are likely to remain concentrated in countries marked by limited resource capacity. Here, international refugee and migration law is illustrative. The developing world hosts eighty percent of all refugees.<sup>118</sup> The United States, Australia, and a handful of other industrialized countries refused to sign the first intergovernmental migration agreement, the Global Compact on Safe, Orderly, and Regular Migration (Global Compact).<sup>119</sup> Without restructurings in the global political economy, Global South nation-states will continue to lead the effort to address climate displacement, both internal and cross-border, without corresponding action from Global North nation-states.<sup>120</sup> This unequal burden sharing constitutes a “justice paradox,” where the

114. See Alexandra Huneus, *Compliance with Judgments and Decisions*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 437, 443–45 (Cesare P.R. Romano et al. eds., 2013) (showing that compliance with international judicial decisions is uneven).

115. See *Guiding Principles*, *supra* note 77, at princ. 3.

116. Walter Kälin, *Conceptualising Climate-Induced Displacement*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 81, 93–94 (Jane McAdam ed., 2010); see also Alaska Institute for Justice, *supra* note 85, at 1 (claiming that the United States violated the human rights of five U.S. tribes by failing to address climate-forced displacement).

117. Charles Beauregard, D’Arcy Carlson, Stacy-ann Robinson, Charles Cobb & Mykela Patton, *Climate Justice and Rights-Based Litigation in a Post-Paris World*, CLIMATE POL’Y, Jan. 8, 2021, at 1, 10. Transnational movements can also push international courts to articulate legal norms related to climate displacement. International jurist Philippe Sands contends that an advisory opinion from the International Court of Justice (ICJ) on climate change is ripe. Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENVTL. L. 19, 33 (2016). The International Tribunal for the Law of the Sea (ITLOS) could also issue an advisory opinion that clarifies nation-state obligations to reduce greenhouse gas emissions. Drastically reducing global greenhouse gas emissions would limit the extent of force displacement linked to climate change’s adverse effects. The ICJ enjoys greater authority than ITLOS to deal with the key legal issues on climate change and could issue an opinion whose scope includes climate mobility. Climate displacement, however, might be considered a highly politicized issue that an international court or tribunal would want to avoid. Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689, 708 (2017) (arguing that if the ICJ were to issue an advisory opinion on a hot-button climate issue, it could damage its reputation and further entrench differences in state opinion). For further discussion on the potential of the U.N. Convention on the Law of the Sea to offer litigious options on climate, see Alan Boyle, *Litigating Climate Change Under Part XII of the LOSC*, 34 INT’L J. MARINE & COASTAL L. 458 (2019).

118. Daniel Endres, Director for Comprehensive Responses, U.N. High Commissioner for Refugees, Opening Plenary Introductory Remarks: Towards a Global Compact on Refugees: Thematic Discussion Two (Oct. 17, 2017), <http://www.unhcr.org/59e747f37.pdf> [<https://perma.cc/PP92-JSYB>].

119. Jack Goodman, *What’s the UN Global Compact on Migration?*, BBC (Dec. 20, 2018), <http://www.bbc.com/news/world-46607015> [<https://perma.cc/J2LQ-2A4K>].

120. In the Americas, for example, Latin American and Caribbean countries outpace the United States and Canada in their responses to climate mobility. See Ama Francis, *Global Governance of Environmental*

nation-states who have least contributed to climate change face its most severe impacts and demonstrate the greatest political will for climate action.<sup>121</sup> Reconceptualizing the Global South beyond territorial borders can help rebalance this asymmetry of power by locating Global Southern power within the geographic North.

Advocacy to bolster anticipatory responses to climate displacement remains particularly important given the significant normative counterweight of nation-state sovereignty. The literature has increasingly shifted away from proposing remedial protective measures, such as the application of international refugee law and complementary protection, towards promoting *ex ante* approaches that allow people to move before disaster occurs.<sup>122</sup> Climate displacement scholar Jane McAdam argues that legal, policy, and technical interventions such as disaster risk reduction, mitigation and adaptation, and migration pathways all contribute to how long people can stay in countries of origin and the extent to which migration becomes an experience of dignity rather than increased exposure to risk.<sup>123</sup> Legal scholar Katrina Wyman recommends increasing immigration quotas in developed countries.<sup>124</sup> The Nansen Initiative, now the Platform on Disaster Displacement, lays out a number of policy measures that pave the way for people to move in advance of harm.<sup>125</sup>

The international community has endorsed the anticipatory approach as the favored response to climate displacement by ratifying the Global Compact.<sup>126</sup> Signed by more than 160 countries,<sup>127</sup> the Global Compact recommends that national governments implement anticipatory measures in response to climate displacement, including humanitarian visas, private sponsorships, and work permits,<sup>128</sup> in order to ensure that

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*Mobility: Latin America & the Caribbean*, in GLOBAL KNOWLEDGE PARTNERSHIP ON MIGRATION & DEVELOPMENT (forthcoming 2021) [hereinafter Francis, *Global Governance*] (manuscript at 13–14) (on file with author). Many Latin American and Caribbean countries recognize humanitarian considerations as grounds for temporary protection, and in some cases, national immigration laws include environmental events within the scope of humanitarian considerations. *Id.* This is the case in Mexico, Guatemala, Brazil, Ecuador, Peru, and Argentina. *Id.* Bolivia adopted its own definition of a climate migrant that allows for admission of “persons who are forced to move from one State to another due to climate effects, when a risk or threat to their life may exist, whether due to natural causes, environmental, nuclear [or] chemical disasters or hunger.” Ley de Migración No. 370, art. 4(16) (2013) (Bol.); *see also* Francis, *Global Governance*, *supra*.

121. Burkett, *supra* note 5, at 634.

122. Remedial protective measures apply only after a humanitarian crisis has occurred and miss the opportunity to defer crisis, or at very least, lessen its scope by applying anticipatory measures. Harriet Farquhar, “Migration with Dignity”: Towards a New Zealand Response to Climate Change Displacement in the Pacific, 46 VICTORIA U. WELLINGTON L. REV. 29, 42 (2015).

123. McAdam, *Building International Approaches*, *supra* note 71, at 1.

124. *See* Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167, 206–11 (2013).

125. *See* 1 THE NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE paras. 87–93, 119–20 (2015).

126. *See* Global Compact, *supra* note 74, ¶ 21.

127. Goodman, *supra* note 119.

128. Global Compact, *supra* note 74, ¶ 21. The Global Compact draws on anticipatory measures that some nation-states already practice. For example, New Zealand’s Pacific Access Category offers permanent residence to Pacific Islanders from Fiji, Tonga, Tuvalu, and Kiribati if they have an offer of employment in New Zealand and meet specified language, income, health, and character requirements. *See Information About Pacific Access Category Resident Visa*, NEW ZEALAND IMMIGR., <http://www.immigration.govt.nz/new-zealand-visas/>

migration becomes an experience of dignity rather than despair.<sup>129</sup> The Global Compact, like other legal instruments that propose an anticipatory approach, carefully affirms the sovereign right of nation-states to determine admission into their territory.<sup>130</sup> Yet, given that sovereignty—constituted by the right to exclude—is the defining doctrine of international law, counterhegemonic resistance will be crucial to ensuring that nation-states choose admission policies that favor Global Southerners.<sup>131</sup>

Precedent in the literature on international law and social movements, especially in relation to environmental matters, supports the potential of private actors to influence international law through organizing.<sup>132</sup> Geographic South social movements with support from the geographic North, including environmental movements, catalyzed the expansion of international institutions from the late 1960s onwards, thus playing a central role in the evolution of international law.<sup>133</sup> Bretton Woods Institutions, in particular, turned to address the environment, poverty, and equity because of a “complex and ambivalent alliance with and in opposition to” popular movements in the geographic South.<sup>134</sup> For example, the World Bank integrated the environment into its central affairs as a result of a transnational grassroots resistance in the 1980s.<sup>135</sup> The protests in Seattle against the World Trade Organization in 1999 also foreground the impact social movements can have on international law.<sup>136</sup>

Despite the statist stance, international law, defined by evolving norms and standards, is by its nature participatory.<sup>137</sup> As such, it becomes possible for social movements to shape the contents of international law, including human rights, so that “the content[s] of rights are to be found in the dynamic interplay between social movement praxis and the legal formulations of international lawyers and

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apply-for-a-visa/visa-factsheet/pacific-access-category-resident-visa [https://perma.cc/7UJT-7XKZ] (last visited June 1, 2021).

129. Global Compact, *supra* note 74, ¶ 13.

130. *See id.* ¶ 7.

131. *See* Rajagopal, *Locating the Third World*, *supra* note 50, at 19–20. These anticipatory approaches—for example, the extension of humanitarian visas on the basis of climate-related disasters may not even go far enough. *See* Chimni, *The Birth of a Discipline*, *supra* note 106, at 24 (defining displacement as a “site of power to embed selective humanitarian practices that facilitate the exercise of hegemony”).

132. *See, e.g.*, Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT’L L.J. 529, 532 (2000) [hereinafter Rajagopal, *From Resistance to Renewal*].

133. *Id.*

134. *Id.* at 539.

135. *Id.* at 559. Rajagopal gives two examples. First, the Polonoeste Project, which sought to develop infrastructure in the Brazilian Amazon, received resistance from western NGOs and Amerindians because of the project’s ecological and human impacts. As a result, the World Bank created a Central Environmental Department and mandatory environmental clearance procedures. *Id.* at 562–65. Second, a national coalition of human rights activists and a U.S. NGO, the Environmental Defense Fund, opposed the World Bank-sponsored project to harness hydropower from the Narmanda River in India. Their transnational resistance to the project’s social and ecological costs led to the bank’s creation of an inspection panel. *Id.* at 565–68.

136. Deena R. Hurwitz, *The Politics of the People, Human Rights, and What is Hidden from View*, 37 GEO. WASH. INT’L L. REV. 293, 294 (2005) (reviewing RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 33).

137. *Id.* at 293.

policy-makers.”<sup>138</sup> In the climate displacement realm, this co-optation of rights discourse by Global Southerners would be particularly appropriate given that the predominant approach to climate displacement stems from human rights law.<sup>139</sup> Yet shaping international law would be useful for other Global Southern social movements, “for whom the struggle against globalization is the struggle to live.”<sup>140</sup>

Certainly, the predominant approach to the law, with its commitment to both source and method, prevents a clear view of the role social movements play in shaping legal discourse. For example, environmental scholarship typically privileges the regulatory behavior of the state over the rise of the environmental movement in recounting the development of environmental law.<sup>141</sup> Yet this focus has the effect of erasing the social origins of the law and therefore the role that organized people play in shaping legal discourse.<sup>142</sup> Furthermore, legal analysis typically focuses on the textual confines of the language of the law, again obscuring a social movement lens.<sup>143</sup>

A substantial body of social movement literature pushes back against this predominant approach, allowing for the importance of extra-institutional forms of mobilization and private actors in shaping legal discourse. Critical race theory, feminist, and LGBTQ+ scholarship posit that organized ordinary people can be agents of legal transformation.<sup>144</sup> Within international law, incorporating a social movement lens allows for an emphatic shift of focus to those whose voice the legal system discredits and highlights the need to reformulate the law to account for their interests.

#### CONCLUSION

Although TWAIL scholarship’s aim to analyze questions of power within international law is a central one, the literature’s primary mode of analysis—that is, a Westphalian-framed North-South divide—needs revision. This Essay argues that global capitalism renders racialized humans in both the geographic North and South expendable. As such, there are Global Southerners in the North and Global Northerners

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138. *Id.* at 307. Indigenous organizing efforts, for example, successfully led to the creation of a range of soft law instruments, including the U.N. Declaration on the Rights of Indigenous Peoples. *Id.* at 298–99.

139. Multiple international guidelines recommend a human rights approach to climate displacement. *See, e.g.,* Int’l Law Comm’n, *supra* note 79, ¶ 48; Sydney Declaration, *supra* note 80, at princ. 2. The UN promotes a human rights approach to climate displacement. *See* Jimenez-Damary, *supra* note 75, ¶ 2. When climate displacement occurs within national borders, nation-states remain obligated to protect the rights of IDPs under international human rights law. *Id.* ¶ 41.

140. Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT’L L. 397, 409 (2003) [hereinafter Rajagopal, *International Law*].

141. *Id.* at 402.

142. *Id.* For a discussion of how ordinary people shape the law, see Anna-Maria Marshall & Scott Barclay, *In Their Own Words: How Ordinary People Construct the Legal World*, 28 L. & SOC. INQUIRY 617 (2003).

143. Rajagopal, *International Law*, *supra* note 140, at 402.

144. *See id.* at 403 (citing CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995)); *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, at xv (1989); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 413–15 (2018) (arguing that social movements can push the bounds of the law through the example of Black Lives Matter); Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115, 115 (David Kairys ed., 3d ed. 1998).

in the South. It is therefore no longer appropriate to analyze the power imbalances that international law shapes solely in terms of inequality between nation-states. Instead, this Essay proposes that people and spaces across the North-South divide share common negative experiences under global capitalism. This claim allows the Essay to argue that Global Southerners in the North serve as a heretofore unnamed site of resistance in international law. Their hybrid positionality offers useful potential for overcoming intransigent issues across the North-South divide. This Essay therefore offers a new perspective to the central debate in the literature over international law's disadvantaging of Global Southerners.