

RACE, GLOBAL REPARATIVE JUSTICE, AND CLIMATE CHANGE-RELATED MIGRATION

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The question of how to appropriately respond to migration linked to climate change is increasingly being debated in academia, in government and policy circles, and, crucially, in international legal and climate policy forums. These debates often center on data and on understanding the true numbers of people who might migrate in the context of climate change, and how much of this migration can accurately be linked to climate change, or on the security and logistical concerns associated with responding to this “challenge,” or on the appropriate legal box into which people migrating in this context can be shoved. Too often, what gets left out of these debates is the genuine lived experiences of the people whose homes and ways of life are threatened in a changing climate, and the historical and current economic, social, and cultural forces that created that threat.

In this article I seek to add to the growing body of literature that is remedying this oversight by looking at climate change-related migration through a climate justice lens, and particularly by calling attention to the racialization of the “climate migrant” and the ways that racialized colonial and neo-colonial systems have shaped who is subject to migration in the context of climate change and how they are received and perceived. This inquiry unites work on the racialized nature of international migration law and governance with work on the racialized nature of climate change impacts and policy, and particularly those proposing climate change reparations and migration as reparation.

I argue that these considerations of the impact of race and colonialism on climate change-related migration, and the related need for a reparative justice approach, have been particularly absent just where they are most

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needed: in the international community's efforts, through the United Nations Framework on Convention on Climate Change and related processes, to craft a meaningful global response to the climate crisis. Including a reparatory justice perspective in the international response to climate change-related migration will ensure that that response more effectively addresses the concerns and needs of affected individuals and communities and forges a future that does not perpetuate the injustices of the past.

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INTRODUCTION

As stifling heatwaves fill the summer months around the world, as images of flooded streets saturate tv screens and the front pages of newspapers, as shifting seasons threaten crop yields and food affordability – in short, as the global effects of climate change are becoming an undeniable presence in daily life – a range of stories are being told about climate change and its impacts on the world. One set of these stories involves the impacts that climate change may have on the ability of people and communities to stay in their homes. There is a story that says that human history is a tale of people moving to seek out more favorable climates, and that all that is necessary is to create better conditions for people to do as they have always done. There is a story that praises the potential of technocratic solutions to insure against risk and build resilience. There is a story that suggests that law can save us, by creating a new category of migrant that has been deemed worthy of protection. And there is a story told to concerned populations like nervous children around a campfire, of “hordes,” or “waves,” or “streams” of desperate people who will “descend upon,” “flood,” or “overwhelm” places that are less impacted by or better able to cope with the climate crisis.

In this article I seek to engage with a different set of stories, the stories that ask how some people came to be in a state of threatened “desperation” when it comes to climate impacts and other people came to be “better able” to meet those impacts. The stories that ask who caused this division and whether it can be repaired. The stories that ask what meaningful justice would look like for those moving in the context of climate change, and what international climate change law and policy would look like if it centered that kind of justice as its goal, if we put in place climate action programs that address “past harms and are also designed to assess and correct the harm and improve the lives of the victims into the future.”¹ These are stories about race and colonialism, and the racialized and colonial power structures that have dominated our past, structured our present, and threaten to dictate our future. They are stories about an international climate change response that has deliberately sought to obscure and avoid questions of justice and historical responsibility through bureaucratic jargon, technocratic solutions, and demanding sacrifice of those who have always been asked to sacrifice.

The mainstream discourse around climate change migration is not one that takes into account the historical and structural factors that influence how choices or capabilities² around moving or staying may be constrained in the

¹ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 522 (2009) (citing ALFRED BROPHY, REPARATIONS: PRO AND CON 9 (2006)).

² AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999). *See also* OLÚFÈMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 88 (2022) (discussing the capabilities approach in the context

context of climate change. As Neel Ahuja has argued, “the figures of the climate migrant and climate refugee” are “constructed in a manner that obscures how the oil economy, economic inequalities generated by neoliberal economic and development policies, and forms of warfare and imperial intervention have been integrated into massive population movements that reflect capitalist regimes of racial disposability.”³ Racism and colonialism have both enabled the extractive means of production that generated the climate crisis and have structured migration law and policy. They contribute both to our understanding of what a climate migrant looks like and what feasible and acceptable responses to the climate crisis might be. Under the global political and economic system in which we live, racial difference has long played a determinative role in the level of agency that people enjoy in choosing to move or stay, and climate change related-migration is no different.

Perhaps nowhere are racial and colonial factors influencing climate change-related migration more obscured than in the international climate change responses centered around the United Nations Framework Convention on Climate Change (UNFCCC) and related processes. In this framework, migration is subsumed under the heading of “loss and damage”: a category that has been largely sidelined in policy-making and relegated to the domain of “experts” debating incremental proposals to address risk and resilience, rather than accounting for responsibility or repair. As Julia Dehm describes, “[w]hat is constantly foreclosed in the institutional debates on loss and damage is a recognition of the ‘climate debt’ owed by Global North countries to the peoples of the Global South.”⁴ This is a debt that is deeply tied to racist history and policy.

Another story that is told about climate change is that because every life has climate and environmental impacts, everyone is accountable and so no one is accountable; some people might bear more responsibility than others, and some might bear more harm than others, but everyone is responsible and everyone is harmed and working out who should bear what blame is just too difficult in the face of a problem this universal. But, if we are to preserve cherished norms of justice and accountability, it cannot simply be that the greatest harms escape remedy or repair just because of their magnitude. As Aaron Saad articulates, “in the real world where climate change is

of reparations).

³ NEEL AHUJA, *PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY* 3 (2021).

⁴ Julia Dehm, *Addressing Loss and Damage: The Unanswered Call for Climate Reparations*, NAT’L UNIV. SINGAPORE CTR. INT’L L. (Sept. 21, 2022), <https://cil.nus.edu.sg/blogs/addressing-loss-and-damage-the-unanswered-call-for-climate-reparations/>.

disproportionately driven by some actors, just solutions must also be concerned with duties resulting from the wrongs those actors have committed by driving climate change.”⁵ However, thus far, as Maxine Burkett argues in relation to the fact that climate harms will be felt the most by those who have contributed the least, “attempts to right this imbalance between fault and consequence have resulted in a cacophony of political negotiation and legal action between and amongst various political scales that have yielded insufficient remedies, if any.”⁶ The UNFCCC processes are at the center of this cacophony and are emblematic of its insufficiency.

Calls for a reparatory justice⁷ approach to climate change are not new,⁸ nor even are calls for reparations for those migrating in the context of climate change.⁹ In this article I seek to make two contributions to this conversation: 1) bolstering the arguments of those who specifically tie these claims to those related to colonialism and racial injustice through an integrated analysis of the racialized nature of climate change-related migration and of climate reparations and migration as reparations proposals; and 2) integrating this conversation more fully with a parallel discourse around the efforts of the UNFCCC to address “loss and damage,” including climate change-related migration. Given the global and transformational nature of climate change and the need for a global and transformational response, international negotiations, with all their faults, remain the best hope for achieving a meaningful reparatory solution, making it essential that discussion and engagement around race and responsibility are not suppressed at the UNFCCC. In Part I of the article, I describe more fully the emerging discourse around climate change-related migration, and the relevance of race and colonialism for this discourse. Part II contains a brief history of efforts to address climate change-related migration and other forms of loss and damage through the UNFCCC, and the ways in which questions of race, historical responsibility, and reparative justice have been omitted from those efforts.

⁵ Aaron Saad, *Toward a Justice Framework for Understanding and Responding to Climate Migration and Displacement*, 10 ENV. JUST. 98, 99 (2017). See also Sarah Riley Case, *Looking to the Horizon: The Meanings of Reparations for Unbearable Crises*, 117 AJIL UNBOUND 49, 50 (2023) (“These structural conditions spread accumulative ways of life from Europe to the world. Yet a global reach does not imply everyone is complicit.”).

⁶ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 510 (2009).

⁷ Many of the works that I draw on here call for climate reparations, and this is a term that I will use. However, the approach that this paper argues for is not simply monetary or non-monetary recompense, but rather a systematic approach focused on repair more broadly. See Mannan Donoghoe & Andre M. Perry, *The Case for Climate Reparations in the United States*, BROOKINGS INST. (Mar. 2023), <https://www.brookings.edu/articles/the-case-for-climate-reparations-in-the-united-states/>.

⁸ E.g. Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509 (2009).

⁹ E.g. Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109 (2020).

Part III identifies some key proposals scholars have made around reparative justice for climate change, and particularly in the context of (climate change-related) migration. Finally, Part IV provides some proposals for how these considerations might be more integrated in international processes and what global reparative justice for those migrating in the context of climate change might look like.

I. RACIALIZING CLIMATE CHANGE-RELATED MIGRATION

A. *The ever-growing discourse on climate change and migration*

1. Numbers and measuring

The Intergovernmental Panel on Climate Change (IPCC) has found with “high confidence” that “[c]limate and weather extremes are increasingly driving displacement in Africa, Asia, [and] North America,” and also has “medium confidence” that the same phenomenon is present in Central and South America.¹⁰ Despite our confidence that this is already happening and will continue to happen, no one really knows how many people will be forced or driven to move because of climate change. Estimates vary widely. An early, oft-cited, estimate, which its author admitted was based on “heroic extrapolations,” suggested that at least 200 million people might experience climate change-related displacement by 2050.¹¹ Others have projected that this number could go up to one billion.¹² A widely-cited World Bank report suggests that if no action is taken, 140 million people will be internally displaced in Latin America, Asia, and Africa by that date.¹³

There are significant unknowns involved in trying to make these calculations.¹⁴ We do not know the levels of climate change mitigation or

¹⁰ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 6 (2023).

¹¹ Benoît Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT’L ENV’T L. & POL’Y 357, 367 (2011) (citing Professor Norman Myers, Green College, Oxford University, Remarks at the 13th Meeting of the OSCE Economic Forum, Session III (Environment and Migration): Environmental Refugees: An Emergent Security Issue (May 25, 2005).)

¹² INST. FOR ECON. & PEACE, ECOLOGICAL THREAT REGISTER 2020 4 (2020) (estimating that as many as 1.2 billion people around the world could be affected by environmental migration by 2050).

¹³ KANTA KUMARI RIGAUD ET AL., WORLD BANK GROUP, GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION xix (2018).

¹⁴ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 449-50 (2018). See also Chloé Anne Vassopolous, *When Climate-Induced Migration Meets Loss and Damage: A Weakened Agenda-Setting Process?*, in Research Handbook on Climate Change, Migration and the Law

adaptation that will be achieved, which might also alleviate displacement.¹⁵ We do not know how other social or economic developments might interact with climate change impacts to affect migration decisions or needs.¹⁶ We do not have certainty about exactly how high sea levels will rise or exactly where or when extreme weather will strike, even though we know that sea levels are rising and extreme weather is becoming more frequent.¹⁷ We also do not have certainty about where people who move in the context of climate change will move, although we do know that currently most displacement is internal and most cross-border movement is regional.¹⁸

Anyone engaging on the topic of climate change-related migration can exploit all this uncertainty to discuss the issue in terms and figures that suit their own political and social ends. Well-meaning individuals and groups advocating for more vigorous climate action or stronger protections for

376, 378 (Benoît Mayer & François Crépeau, eds., 2017) (discussing the debate between environmental migration "maximalists" and "minimalists"); SARAH LOUISE NASH, *NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 6* (2019) ("The standpoint that climate change and migration are linked, but in a complex, contextual way, influenced by a multitude of different factors, is much more difficult to explain and distil in a catchy headline than a large number and an assurance that this many people will move due to climate change. Despite this, a shared foundation has emerged that climate change and migration are linked, however multifaceted, complex and contextual this link may be.")

¹⁵ See, e.g., KANTA KUMARI RIGAUD ET AL., WORLD BANK GROUP, *GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION* xix-xx (2018) (discussing three different "plausible scenarios" varying in part on the level of climate action taken).

¹⁶ See, e.g., KANTA KUMARI RIGAUD ET AL., WORLD BANK GROUP, *GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION* xix-xx (2018) (discussing three different "plausible scenarios" varying in part on economic development in the regions studied). See also Benoît Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 *COLO. J. INT'L ENV'T L. & POL'Y* 357, 367 (2011) ("Distinguishing people moving because of the degradation of soil in the Sahel or a rise of the sea level in Bangladesh from those making the same journey for another reason is almost impossible.").

¹⁷ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2023: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS* 15 (2023). See also Raymond Zhong, *The Vanishing Islands that Failed to Vanish*, *NY TIMES* (June 26, 2024), <https://www.nytimes.com/interactive/2024/06/26/climate/maldives-islands-climate-change.html>.

¹⁸ E.g. Carmen Gonzalez, *Climate Change, Race, and Migration* 1 *J. L. & POL. ECON.* 109, 121 (2020) (internal citations omitted) ("The specter of climate-displaced persons crossing en masse from South to North also conflicts with documented patterns of displacement in recent years. According to the United Nations High Commissioner for Refugees (UNHCR), of the 68.5 million persons forcibly displaced worldwide in 2017, approximately 40 million remain in their country of origin. When they migrate internationally, most displaced persons settle in neighboring countries in the Global South, which currently host 85 percent of the world's refugee population.").

migrants have incentives to reach for the high end of these estimates.¹⁹ But, as we will explore more in the sections to come, so do individuals and groups who are less well-meaning, who seek to use the specter of increased climate change-related migration to raise fears and promote fear-based and exclusionary policy.

2. Names and categories

When not debating the claims regarding how many people are likely to be affected by climate change-related migration, those who concern themselves with this topic love to spend their time debating what those individuals should be called or how they should be legally categorized. The terms “climate migrant,” “climate refugee,” and “climate displacee” all have their proponents and opponents, even if the latter’s linguistic validity is questionable.²⁰ The debates over which term to use center around the legal and social implications of the potential terms. Refugee is a narrow legal category which many insist those affected by climate change do not fall into.²¹ Others, while recognizing the narrowness of the legal category of refugee, still embrace “climate refugee” for its rhetorical power,²² even as some affected communities have rejected the suggestion of desperation that can come with the term.²³ A formulation popular in UN circles is to refer to

¹⁹ Cf. Bram Frouws & Ayla Bonfiglio, *Humanitarians: Stop Using Fear of Migration to Drive Fundraising and Advocacy*, NEW HUMANITARIAN (Oct. 15, 2024), <https://www.thenewhumanitarian.org/opinion/2024/10/15/humanitarians-stop-using-fear-migration-drive-fundraising-advocacy-aid> (highlighting the potential harms of humanitarian agencies emphasizing the possibility of high numbers of migrants).

²⁰ E.g., ANDREA C. SIMONELLI, GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT 6 (2016) (“Legal and non-legal scholars alike use inconsistent language to describe what is happening; many authors have begun to define those affected by climate change in terms of refugeehood” while others use terms like “climate migrant” in recognition that refugee is a narrow legal category.).

²¹ E.g., Benoît Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT’L ENV’T L. & POL’Y 357, 380-83 (2011) (discussing “the inapplicability of refugee law” in the context of climate change-related migration).

²² E.g. *The Problem*, CLIMATE REFUGEES, <https://www.climate-refugees.org/why> (last visited July 8, 2024) (“We use the term ‘climate refugees’ to provoke conversation. To emphasize the political responsibility of climate change. To raise awareness of its ability to impact, one might even say, persecute some more than others. To contribute, provoke and challenge policy. To highlight need by giving voice to those affected and to help seek their legal protection. Ultimately, to present this as a challenge to human rights.”).

²³ E.g., Kenneth R. Weiss, *Exile by Another Name*, FOREIGN POL’Y, Jan.–Feb. 2015, at 48, 54 (documenting resistance in Kiribati to the concept of “climate refugees”); Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 467 (2018) (“Many residents of threatened islands eschew the

“climate change induced displacement, migration and planned relocation,”²⁴ which represents an effort to distinguish “voluntary” “migration” from “forced” “displacement” even as most recognize that all migration takes place along a continuum of voluntariness. Phrases like “people affected by climate change-related migration and displacement” or “people migrating in the context of climate change,” which I have tended to rely on in this article, avoid these legal and definitional pitfalls at the cost of their unwieldiness.

For many, resolving the debate over what to call those affected by climate change-related migration is highly consequential. If we are “[t]o adequately place those being displaced under the most appropriate governance structure, what is needed is a concrete definition which can be applied through policy.”²⁵ Firmly classifying people into adequate categories based on their reasons for moving, the level of agency exercised in their decision to move, and whether their movement was internal or cross-border can be seen as crucial for determining the proper response to their experience and the level of protection to which they are entitled.²⁶ As long as legal categories for climate migration remain fuzzy, “climate-induced migration can continue to evade focused attention because no one policy community is obliged to respond nor can migrants hold any one entity accountable for its failure to respond.”²⁷ There is a risk, however, that if we get bogged down in attempting to define legal categories or develop new protection frameworks, we may exclude many in need of protection or simply fail to act while we debate the accuracy of these various terms.²⁸ Focusing on sorting individuals

“refugee” categorization and resist the inevitability of losing their lands-home to the bones of their ancestors and the birthplace of the next generation.”).

²⁴ E.g. U.N. Framework Convention on Climate Change Conference of the Parties, *Cancun Agreements*, U.N. Doc. FCCC/CP/2010/7/Add.1, ¶ 14(f) (Mar. 15, 2011). See also Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 126 (2020) (citing Koko Warner, *Human Migration and Displacement in the Context of Adaptation to Climate Change: The Cancun Adaptation Framework and Potential for Future Action* 30 ENV'T & PLANNING C: POL. & SPACE 1061, 1065-67 (2012)) (“At the insistence of the United States, the parties replaced the term ‘climate refugees’ as a subject of adaptation-related cooperation among the parties with the phrase ‘climate change induced displacement, migration and planned relocation.’”).

²⁵ ANDREA C. SIMONELLI, *GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT* 6 (2016).

²⁶ E.g. Benoît Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT’L ENV’T L. & POL’Y 357, 367-69 (2011) (discussing “definition of climate migrants” based on all of these categories necessary for the legal protection framework he is proposing).

²⁷ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 472 (2018).

²⁸ See Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L. J. 609, 614 (2017) (“The single minded focus on whether migrants in mass influx situations fit within the legal definition of a refugee has become deeply problematic as an approach to international

into legal categories also risks ignoring structural violations and community-level needs, rights, and solutions.²⁹ Even the achievement of new legal protections and terminological consistency would not necessarily ensure real protection. As Carmen Gonzalez argues,

[e]ven if states agreed to provide refugee-like protection to climate-displaced persons, these “climate refugees” would undoubtedly encounter . . . increasingly militarized borders, confinement in detention centers, lack of legal representation, and the impossible burden of demonstrating that their multi-faceted and complex decision to migrate can be attributed solely to climate change.³⁰

3. Securitization and humanitarianization

Norman Myers, who first estimated that climate change-related migration could affect 200 million people by 2050, viewed such migration as a potential security threat, asserting that, while such migration “derives primarily from environmental problems, it generates myriad problems of political, social and economic sorts. As such, it could readily become a cause of turmoil and confrontation, leading to conflict and violence.”³¹ Many others, in policy, academic, and popular discourse have embraced similar conclusions. Ahuja notes that security concerns entered the conversation regarding climate change-related migration in the early 2000s, as “liberal environmentalist thinking had at its roots assumptions about how population pressures on limited environmental resources could produce degraded land and cause resource scarcity resulting in social conflict. As such, climate migration thinking has always been a ripe arena for the development of securitizing discourses and technologies.”³²

As discussed above with regard to estimates of the number of affected individuals, this discourse around security can be mobilized to different ends. In some cases an understanding of climate change-related migration as a security threat is used by those seeking to motivate stronger and more rapid

migration. Debates center on who is a refugee and who is an economic migrant, without much thought as to whether these categories are appropriate for contemporary migration issues—issues that are very different from those facing the world in the 1950s.”).

²⁹ See, e.g., Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT’L L. 699 (2014).

³⁰ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 122 (2020).

³¹ Professor Norman Myers, Green College, Oxford University, Remarks at the 13th Meeting of the OSCE Economic Forum, Session III (Environment and Migration): Environmental Refugees: An Emergent Security Issue (May 25, 2005).

³² NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 41 (2021).

climate mitigation action.³³ But others have used this so-called threat to call for increasingly hostile and militarized responses to those who seek to migrate, “including the construction or expansion of border walls—especially in the affluent countries whose high greenhouse gas emissions contribute disproportionately to climate change.”³⁴ “Emerging environmental discourse on migration is especially notable in journalism in countries in the Global North – including the United States, the United Kingdom, and Germany – which have long been primary immigrant destinations and major polluters” and where focusing on security concerns around climate change fuel the arguments of xenophobic right-wing political movements.³⁵ This harsh and securitized approach is already reflected in the migration policies of many of these nations, and may well only be amplified in the face of climate change.³⁶ Emphasizing securitized responses also helps to distract from efforts at more meaningful climate action, like decarbonization, by focusing attention and resources on a symptom – migration – rather than the cause – climate change itself.³⁷

The securitized approach to climate change-related migration contains echoes of the odious “lifeboat ethics” metaphor for distribution of resources promulgated in the 1970s by ecologist Garrett Hardin, who argued that excluding immigrants from poor countries to the United States was necessary for resource conservation and, ultimately, for survival.³⁸ Modern arguments about climate change-related migration as a threat to security similarly evoke worry about challenges to state sovereignty, further damage to the environment from increased populations, and potential conflicts over resources.³⁹ Examples range from that of American heiress and political

³³ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 120-21 (2020) (internal citations omitted). See, e.g., Michael B. Gerrard, *America is the Worst Polluter in the History of the World. We Should Let Climate Change Refugees Resettle Here*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5_story.html (“They will cross borders, regardless of whether they are welcome. And in their desperation, they could become violent: Forced migration can exacerbate ethnic and political tensions. Studies show that more heat tends to increase violence.”).

³⁴ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 110 (2020) (internal citations omitted).

³⁵ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 7 (2021).

³⁶ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 369 (2019).

³⁷ I am grateful to Jonathan Todres for this insight.

³⁸ Garrett Hardin, *Commentary: Living on a Lifeboat*, 24 BIOSCIENCE 561 (1974).

³⁹ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 68-69 (2021). See also Betsy Hartmann, *Rethinking Climate Refugees and Climate Conflict: Rhetoric, Reality, and the Politics of Policy Discourse*, 22 J.

donor Cordelia Scaife May describing the U.S. as “‘being invaded on all fronts’ by foreigners, who ‘breed like hamsters’ and exhaust natural resources,”⁴⁰ to former British Prime Minister Boris Johnson warning that “civilization could go backward” as a result of climate change-related migration.⁴¹ The success of these arguments relies on hatred, fear, and dehumanization of people potentially migrating in the context of climate change, exploiting worries in Global North countries that it is the arrival of these darker-skinned “others” that would disrupt “our” current way of life, rather than the global climate catastrophe that precipitates their migration.⁴² As such, it is deeply racialized. “Rather than evoke empathy for the plight of migrants, or responsibility for causing climate change, the national security frame exacerbates climate injustice by constructing migrants as barbarians threatening the sovereignty of civilized nations and by reinforcing racialized distinctions.”⁴³ As will be discussed in the next section, there is good reason to believe that many of those affected by climate change-related migration will be from historically racialized and minoritized communities. But the securitized understanding of climate change-related migration relies not only on recognizing that many of those migrating may be Black or Brown, but also on a “fear of Black and Brown bodies crossing national borders”⁴⁴ and an understanding of those bodies as “barbarians crashing the gates of civilization.”⁴⁵

A “humanitarian” approach to climate change-related migration, which is offered by many as an alternative or in addition to the security-based approach, does not do much better in this regard. Under a humanitarian

INT’L DEV. 233 (2010).

⁴⁰ Nicholas Kulish & Mick McIntire, *Why an Heiress Spent Her Fortune Trying to Keep Immigrants Out*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/anti-immigration-cordelia-scaife-may.html>.

⁴¹ @Channel4News, X (Oct. 30, 2021, 10:53 AM), <https://x.com/Channel4News/status/1454461349317251072>.

⁴² Naomi Klein, *Let Them Drown: The Violence of Othering in a Warming World*, LONDON REV. BOOKS, June 2016, at 10, 13 (“[T]he same capacity for dehumanising the other that justified the bombs and drones is now being trained on these migrants, casting their need for security as a threat to ours, their desperate flight as some sort of invading army.”); Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 121 (2020) (internal citations omitted).

⁴³ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 379-80 (2019). See also ANDREW BALDWIN, *THE OTHER OF CLIMATE CHANGE: RACIAL FUTURISM, MIGRATION, HUMANISM* (2022).

⁴⁴ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 109 (2020).

⁴⁵ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 121 (2020) (internal citations omitted).

approach, those affected by climate change-related migration are understood “as passive and helpless victims of natural disasters who need to be rescued by the international community as a form of charity.”⁴⁶ Humanitarian approaches tend to deprive affected individuals and communities of agency and to treat any efforts to help or provide for them as optional acts of kindness rather than obligations.⁴⁷ And, like the securitization discourse, humanitarian discourse is fueled by dehumanization, and “recapitulates a history of racist colonial representations of Asia, Africa, and Latin America as zones of ecological degradation unable to achieve long-term development.”⁴⁸ This discourse replicates the classic victims and (white) saviors metaphor,⁴⁹ framing “Black and Brown migrants from Africa and Asia fleeing shrinking zones of habitability . . . as objects of intervention assistance and management by first-world NGOs and international agencies.”⁵⁰ Under a humanitarian framework, those moving in the context of climate change are understood as a degraded “Other,” while those in countries who perceive themselves as destination countries for climate change-related migration are cast as “a virtuous ‘Self.’”⁵¹ This obscures both the extent to which climate change-related migration also happens in the Global North and the fact that most migration is intra-regional.⁵² It ensures that the Global North is portrayed as

⁴⁶ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 123 (2020) (internal citations omitted).

⁴⁷ See, e.g., James Darcy, *Human Rights and Humanitarian Action: A Review of the Issues* (April 2004) (background paper for U.N. Inter-Agency Standing Comm. workshop on human rights and humanitarian action), <https://odi.org/documents/2209/2311.pdf> (discussing the analytical preference for a human rights-based approach as ensuring agency and protection of rights-holders). See also Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 383 (2019) (describing a humanitarian approach as “incompatible with climate justice because it absolves the North of its obligation to compensate the South for its current and historic contributions to climate change”).

⁴⁸ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 5 (2021).

⁴⁹ Makau w. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001).

⁵⁰ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 13 (2021).

⁵¹ See Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 613-14 (2009) (“At both the individual and collective level, this Self/Other dichotomy functions to create (1) a devalued and dehumanized Other, enabling differential treatment of the Other; (2) a conception of a virtuous Self and corresponding assumption that the Self (or dominant group) is representative of the norm; and (3) a distancing of the Other from the Self.”).

⁵² See Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 426 (2020). See also Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 608, 630-32 (2009) (describing this phenomenon with regard to human trafficking).

the heroes of climate action,⁵³ instead of, as will be further discussed in the next section, the perpetrators of racialized climate harms.⁵⁴

B. Adding in race

As just discussed, race is at the heart of current discourses around climate change-related migration, whether those discourses emphasize security or humanitarian action. It is also at the heart of the legal system that governs global migration, of the historical forces that led to climate change and related migration, and of the current global understanding of how to address climate change-related migration. This section will consider each of these issues in turn.

1. Race and global migration law

In existing legal logics, which define immigration law through a sovereignty lens focused on the broad power of the state to exclude, cabined only by the narrow legal category of refugee law, racialized imaginings of certain groups are used to undermine their access to protection in instances of climate change-related displacement, by construing them as groups “unfortunately” subject to generalized vulnerability to environmental harms, rather than the specific persecution necessary for refugee protections.⁵⁵ This is consistent with the historical “role that race has played in determining whose international mobility is worthy of protection, and whose international immobility is prioritized and ultimately achieved through containment to the regions of their birth.”⁵⁶ Both the idea of relatively impermeable borders of modern nation-states and the physical locations of those borders are in part constructions of colonialism.⁵⁷ Through a variety of means, either explicitly or through facially neutral measures, countries in the Global North have “encouraged the mobility of persons regarded as white while restricting the movement of those classified as non-white.”⁵⁸ These means have at times,

⁵³ Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 617 (2009) (“Imbedded in this concept of the virtuous Self is the idea that the Self acts altruistically.”)

⁵⁴ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 382 (2019).

⁵⁵ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 61-62 (2021).

⁵⁶ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1518 n. 29 (2019).

⁵⁷ Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 HARV. L. REV. F. 326, 333 (2021).

⁵⁸ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109,

especially through the 19th and early 20th centuries, included explicit bans on entry of non-white people, or restricted immigration based on racial categories.⁵⁹ International legal theory during this same time period kept pace with racialized political and cultural demands by developing and fortifying the concept of the absolute sovereign right to exclude.⁶⁰

While it is no longer acceptable to explicitly state that migration law is organized around the exclusion of certain racial categories of people, the racial operation of migration law persists.⁶¹ As Tendayi Achiume has summarized, “contemporary national borders of the international order, an order that is neocolonial, are inherently racial. That is, the default manner in which they enforce exclusion and inclusion is racially disparate.”⁶² This is accomplished through the regimes that govern migration, including who has access to visas and passports, and how categories of asylum-seekers and refugees are constructed and governed.⁶³ These mechanisms “might not discriminate on the basis of ‘race’ [but] they do invariably discriminate on the basis of nationality and poverty. And it is the history of colonialism that has generated the extensive overlap between ‘race,’ nationality[,] and poverty.”⁶⁴ And again, this is propped up by a system of international law

114 (2020). See also Natsu Saito Taylor, *Race, Indigeneity, and Migration*, 117 AJIL UNBOUND 43 (2023).

⁵⁹ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 114-15 (2020) (internal citations omitted) (“Between 1800 and 1925, for example, approximately 48 million Europeans migrated to Argentina, New Zealand, Australia, South Africa, and the United States as a consequence of migration policies designed to ‘whiten’ these states and territories. During the same period, the newly sovereign states in the Americas adopted a series of laws and policies to reduce the migration of racialized populations, including head taxes, outright prohibitions (such as the United States’ 1882 Chinese Exclusion Act), and racially coded naturalization and immigration policies. Australia adopted a “White Australia Policy” in 1904, and banned migration from Africa, Southeast Asia, and South Asia.”); E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J. 445, 458 (2022) (“[B]y the end of the nineteenth century, the rise of nationalism and protectionism led Western governments, for the first time, to start systematically denying admission to certain classes of aliens on a racial basis.”).

⁶⁰ E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J. 445, 458-59 (2022). See also Ayelet Shachar, *Severing the Gordian Knot of Sovereignty and Migration Control*, 118 AJIL UNBOUND 188, 190-91 (2024); Vincent Chetail, *Demystifying Sovereignty: Totem and Taboo of Migration Control in International Law*, 118 AJIL UNBOUND 193, 195 (2024).

⁶¹ See Ayelet Shachar, *Severing the Gordian Knot of Sovereignty and Migration Control*, 118 AJIL UNBOUND 188, 191 (2024) (“And whereas the explicit race-based legislation these cases upheld has since been disavowed and officially removed from the law books, the exclusionary legal principles they forged remain with us.”).

⁶² E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J. 445, 448 (2022).

⁶³ E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J. 445, 466-80 (2022).

⁶⁴ GRACIE MAE BRADLEY & LUKE DE NORONHA, *AGAINST BORDERS: THE CASE FOR ABOLITION* 18 (2022).

that centers and privileges the sovereign right to exclude,⁶⁵ even in legal instruments, like the International Convention on Racial Discrimination, that have the intention of addressing racism and enshrining human rights.⁶⁶ As a result of all of these mechanisms, and of the historically racially determined system and legal structure in which they operate, “[f]reedom of movement is, in effect, politically determined and racially differentiated.”⁶⁷ To put this another way, race operates as a defining factor in who has the capability to migrate or to stay in their homes in safety and dignity.⁶⁸

2. The racial history and present of climate change and related displacement

Just as race has played a key role in bringing us to where we are in global migration governance, it has also played a key role in bringing us to the present moment of ecological crises, and in ensuring the unjust distribution of those crises’ consequences. “[T]he climate crisis and racial hierarchy have long been inextricably intertwined, explaining in large part the uneven share in cause and consequence of the North and South respectively.”⁶⁹ In engaging in colonialism, European powers created an inescapable structure of “co-dependence” that persists into today, with wide-ranging social, economic, political, and ecological consequences,⁷⁰ including the foundations of climate change. The Industrial Revolution was enabled by “colonization and slavery because it depended on labor and raw materials extracted from the colonies, including cotton for European factories and energy-rich foods, such as sugar, for the industrial workforce.”⁷¹ Colonization, including the genocide,

⁶⁵ See E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AJIL Unbound 142, 143 (2017) (“In popular, policy, and even doctrinal conceptions, this discretion permits strikingly inhumane treatment that citizens of receiving states would reject out of hand but for the fact that it targets unauthorized economic migrants, who are understood to be legitimate targets of exclusion.”)

⁶⁶ E. Tendayi Achiume, *Racial Borders*, 110 GEO. L. J. 445, 489-91 (2022).

⁶⁷ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1530 (2019).

⁶⁸ See, e.g., Monica V. Iyer & Kerilyn Schewel, *Articulating and Claiming the Right to Stay in the Context of Climate Change*, 38 Geo. Immigration L. J. 207, 228-29 (2024). See also Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 407 (2020) (“Finally, racial hierarchies influence which immigrants are welcomed with open arms and which immigrants are excluded, detained, and deported.”).

⁶⁹ Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 HARV. L. REV. F. 326, 326 (2021).

⁷⁰ E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AJIL Unbound 142, 144 (2017).

⁷¹ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 110 (2020) (internal citations omitted). See also *id.* at 116 (“While Indigenous genocide enabled Europeans to seize vast swaths of land for mining and agriculture, the transatlantic

dispossession, and displacement of Indigenous occupants of colonized land, and slavery, in turn, were enabled by the invention and strengthening of racial categories and racial hierarchies, which served to justify exploitation and dehumanization.⁷² As in migration law, while explicit reference to these racial hierarchies has become reduced over time in systems of economic production, their effects and their implicit mobilization have continued as the global economy has become ever more dependent on fossil fuels. This is manifest not only in the environmental degradation experienced by places inhabited by racialized peoples, but also in the various forms of political, economic, and military interference and violence that these peoples are subjected to in the service of a stable economic system.⁷³ As Naomi Klein summarizes, “[i]f nations and peoples are regarded as other – exotic, primitive, bloodthirsty . . . it is far easier to wage wars and stage coups when they get the crazy idea that they should control their own oil in their own interests.”⁷⁴

While racial categories enable the fossil fuel economy, racial difference shapes its negative outcomes. It is perhaps cliché at this point to point out that those most affected by climate change are those who have benefited the least from the fossil fuel economy that caused it. It is also quite clear that, as Stephen Humphreys summarizes:

Climate change raises new 'justice' questions, but in practice these are few. For the most part it intensifies and exacerbates existing patterns of injustice. It is true that the impacts of a changing climate are felt unevenly around the world, but the most vulnerable to climate change are most vulnerable for a reason. They are those who already lack resources - who have been on the wrong end of colonialism, or who have been globalization's losers, or who have suffered neglect, exclusion or simple rapacity at the hands of their own governments.⁷⁵

slave trade supplied the workforce that fueled carbon-based industrialization. The labor of enslaved Africans provided the capital and raw materials that launched the Industrial Revolution, including gold, copper, and silver as well as sugar and cotton.”)

⁷² See, e.g., WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 102-05 (Verso, 2018) (1972).

⁷³ See Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 *LOYOLA L. REV.* 401, 409-10 (2020).

⁷⁴ Naomi Klein, *Let Them Drown: The Violence of Othering in a Warming World*, *LONDON REV. BOOKS*, June 2016, at 10, 13. See also Carmen Gonzalez, *Climate Change, Race, and Migration* 1 *J. L. & POL. ECON.* 109, 110 (2020) (“The transition to fossil energy sparked exponential economic growth initially in Europe and later all over the world while generating intense conflicts over energy supplies (especially in the Middle East) as well as unprecedented environmental degradation.”).

⁷⁵ Stephen Humphreys, *Climate Justice: The Claim of the Past*, 5 *J. HUM. RTS. ENV'T* 134, 138 (2014).

To provide just one concrete example, empirical analysis demonstrates significant overlap between mortality due to pollution and whether a country experienced colonization.⁷⁶ It is these realities that have led Anna Grear to label climate change “a crisis of human hierarchy.”⁷⁷ This involves economic and political hierarchy, but it is also very plainly a crisis of racial hierarchy, given that “those most susceptible to climate-related disasters and slow-onset events are overwhelmingly persons classified as non-white.”⁷⁸ They live in places that are physically subject to climate impacts, but beyond this, “they have been rendered socially and economically vulnerable to climate change by the North’s economic and military interventions.”⁷⁹ In this way, “environmental injustices must be understood as components of longer problems of colonialism and racial disposability generated by extractive capitalist development.”⁸⁰ As Olúfemi O. Táíwò describes, a global racial empire, starting from the colonial period, crafted “channels of wealth” leading away from places where those racialized as Black, Brown or Indigenous live, while “formations built to funnel toxins . . . direct them to accumulate where people are poor in both economic and political power.”⁸¹ While constructing new models of human stratification, this global racial empire also imposed a hegemonic legal imaginary that separated humans from nature and reduced the non-human to resources for human exploitation and consumption⁸² and definitively transformed the physical and natural world, moving plant and animal species around the globe along with people.⁸³ At the same time, it drained colonized localities of the resources that they might use to build the capability to contend with environmental changes,⁸⁴

⁷⁶ OLÚFÉMI O. TÁIWÒ, RECONSIDERING REPARATIONS 164-66 (2022) (linking this fact, as Ahuja does below, to Ruth Wilson Gilmore’s understanding of racism as vulnerability to premature death).

⁷⁷ Anna Grear, *Towards ‘Climate Justice’? A Critical Reflection on Legal Subjectivity and Climate Injustice*, 5 J. HUM. RTS. ENV’T 103, 110 (2014).

⁷⁸ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 117 (2020) (internal citations omitted).

⁷⁹ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 117 (2020) (internal citations omitted).

⁸⁰ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 11 (2021). See also Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L.J. 366, 373 (2019) (“[C]limate change is inextricably linked to broader social injustice, including the North-South power imbalances that perpetuate economic inequality and maintain an economic order that systematically exceeds the limits of the planet’s finite ecosystems.”).

⁸¹ OLÚFÉMI O. TÁIWÒ, RECONSIDERING REPARATIONS 22 (2022).

⁸² Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 HARV. L. REV. F. 326, 327-29 (2021).

⁸³ OLÚFÉMI O. TÁIWÒ, RECONSIDERING REPARATIONS 158-59 (2022).

⁸⁴ Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA

and “rendered [colonized peoples] socially and economically vulnerable to climate change [through] the North’s economic, political, and military interventions.”⁸⁵ This racial empire persists in the present day global political economy, as “the ‘slow violence’ inflicted by the fossil fuel industry on racialized and poor communities throughout the world remains a central feature of contemporary capitalism,”⁸⁶ as colonial powers continue to build geopolitical strength through exploitation and domination of formerly colonized nations,⁸⁷ and as debt burdens and policy constraints linked to conditional aid continue to hamper these nations’ ability to act to protect and preserve their people.⁸⁸ “Colonialism’s legacy of exploitation fundamentally predisposes the contemporary political economy to degradation, a predisposition that is now baked into the global economy.”⁸⁹ Every phase of fossil fuel production and use “has placed disproportionate environmental burdens on racialized communities in both the Global North and the Global South.”⁹⁰

These environmental burdens are inextricably linked to migration, mobility, and displacement.⁹¹ “The systemic expansion of capital across the sixteenth through the twenty-first centuries . . . yoked growth in fossil fuels to the privatization of land and the alienation of labor in ways that made migration central to the reproduction of capitalist systems.”⁹² Colonization

HUM. RTS. L.REV. 183, 203 (2019).

⁸⁵ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 410 (2020).

⁸⁶ Carmen Gonzalez, *Climate Change, Race, and Migration*, 1 J. L. & POL. ECON. 109, 116 (2020) (internal citations omitted).

⁸⁷ Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 210-12 (2019).

⁸⁸ E.g. Sarah Riley Case, *Looking to the Horizon: The Meanings of Reparations for Unbearable Crises*, 117 AJIL UNBOUND 49, 51 (2023); Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WISC. INT’L L. J. 1, 3, 37-39 (2004).

⁸⁹ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 459 (2018).

⁹⁰ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 116 (2020) (internal citations omitted). Although much of this article focuses on relationships between states that have historically been racialized as white or non-white, it is important to recognize that these same dynamics play out within state boundaries. See Ama Ruth Francis, *Global Southerners in the North*, 93 TEMPLE L. REV. 689, 692 (2021).

⁹¹ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 19 (2021) (“[T]o the extent that an extractive capitalist influence on the environment increased over five centuries of colonial history, it also systematically generated human migration as a concomitant process to climate change, species extinction, and other forms of environmental destruction.”).

⁹² NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 19 (2021).

shifted human geography even as it constricted freedom of movement,⁹³ and ongoing economic exploitation marks out both people and places as expendable.⁹⁴ Racialized populations are displaced in order to make way for fossil fuel extraction and exploitation.⁹⁵ Racialized peoples are driven from their homes by disproportionate violence and conflict for the sake of control of increasingly scarce fossil and land resources.⁹⁶ Racialized individuals move in order to perform the disfavored labor of fossil fuel production and transportation.⁹⁷ And racialized communities become “sacrifice zones” made unfit for human occupation through pollution, climate change, and other negative environmental impacts of fossil fuel production and use.⁹⁸ At the same time, as described above, race shapes the possibilities for people to migrate to escape these consequences, leaving racialized individuals and populations “trapped” by restrictive visa and asylum regimes and increasingly securitized borders.⁹⁹ “[R]acialized migrants fleeing climate change, poverty, and conflict continue to face death, detention, and deportation when they attempt to cross the militarized borders of the Global North.”¹⁰⁰ As Ahuja explains:

⁹³ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 468 (2018).

⁹⁴ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 407-08 (2020).

⁹⁵ E.g. E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism), *Global Extractivism and Racial Equality*, ¶¶ 55-56, U.N. Doc. A/HRC/41/54 (May 14, 2019).

⁹⁶ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 409-10 (2020).

⁹⁷ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 19 (2021).

⁹⁸ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 111 (2020) (“From Cancer Alley in Louisiana to the Pacific islands threatened by rising sea levels, carbon capitalism creates sacrifice zones populated by racialized communities whose plight is a harbinger of the harm that will eventually befall the vast majority of the world’s population as the planet is rendered increasingly uninhabitable.”).

⁹⁹ Carol Farbotko et al., *Climate Mobility Justice, the Right to Stay, and the Problem with Mobility Regimes*, RESEARCHING INTERNAL DISPLACEMENT (June 19, 2024), https://researchinginternaldisplacement.org/short_pieces/climate-mobility-justice-the-right-to-stay-and-the-problem-with-mobility-regimes/ (“Race can operate insidiously across different types of climate (im)mobility regimes, from right-wing attempts to securitize climate mobility to the most well-intentioned international humanitarian efforts to understand and protect those who might be displaced.”); Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 111 (2020) (“Although greenhouse gases do not respect national borders, national elites deploy racialized systems of border control to perpetuate the illusion that persons who are classified as white can somehow escape the economic and ecological ravages of carbon capitalism by erecting walls and fortresses.”).

¹⁰⁰ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 411 (2020).

Viewing present ecological disasters including climate change as an outgrowth of colonial forms of labor, production, and energy use helps us understand something about how race, as a flexible regime of colonial power and profit, and racism, as the structured management of group vulnerability to premature death, have shaped ecologies of migration.¹⁰¹

Ultimately this is a question of responsibility. It has been estimated that Global North “countries . . . are responsible — when taking a fair shares approach — for 90 percent of excess emissions above a carbon budget that would have kept the planet within safe climate limits.”¹⁰² This number gets even larger when one (very reasonably) allocates emissions accrued during the colonial period to the colonial power rather than the colonized country.¹⁰³ Because of the connections between slavery, colonialism (including settler colonialism), ongoing systems of racial subjugation, and the rise of the Industrial Era and the fossil fuel economy, responsibility for historical emissions is inextricably linked to responsibility for racialized and colonial harms.¹⁰⁴ To borrow terminology developed by Kyle Powys White in the specific context of Indigenous Peoples, Global North states bear both “impending” responsibility for the ongoing racialized harms of climate change, including those related to migration, and “pending” responsibility for the racialized harms that arose before climate change was known to be an issue but remain uncompensated and still structure outcomes today.¹⁰⁵

3. The racial (possible) future of climate (in)action

¹⁰¹ NEEL AHUJA, *PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY* 15 (2021). This conception of racism as “the structured management of group vulnerability to premature death” originates with Ruth Wilson Gilmore. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007).

¹⁰² CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 1* (2024) (internal citations omitted).

¹⁰³ Simon Evans & Verner Viisainen, *Revealed: How Colonial Rule Radically Shifts Historical Responsibility for Climate Change*, CARBON BRIEF (Nov. 26, 2023), <https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change/>.

¹⁰⁴ See Carmen Gonzalez, *The Sacrifice Zones of Carbon Capitalism: Race, Expendability, and Loss and Damage*, in *RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE* 43, 46-51 (Meinhard Doelle & Sara L. Seck, eds., 2021). See also Kyle Powys Whyte, *Indigenous Peoples, Climate Change Loss and Damage, and the Responsibilities of States*, in *RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE* 224 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹⁰⁵ Kyle Powys Whyte, *Indigenous Peoples, Climate Change Loss and Damage, and the Responsibilities of States*, in *RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE* 224 (Meinhard Doelle & Sara L. Seck, eds., 2021).

Just as race and racism are foundational to both migration law and governance and the causes and consequences of climate change and other ecological crises, race and racism frame our understandings of what is acceptable, possible, or feasible in the face of climate impacts and in response to climate change-related migration. It is very likely that in the context of climate change related migration, “the least responsible will be exposed to the most disruption-both as migrants and hosts of those who have moved.”¹⁰⁶ As just discussed, racism is what makes it palatable to some that communities, cities, or even entire island nations could be understood as “sacrifice zones” to be offered up so that others can continue their fossil fuel-based lifestyles.¹⁰⁷ But beyond this, racism risks turning the whole world into a sacrifice zone, by deceiving many into believing that, even if ecological crises are coming for all of us, the “worst and most immediate consequences” of climate change will be felt only by a distant, racialized other.¹⁰⁸ Dominant communities in the Global North come to understand themselves as physically, socially, culturally, and psychologically distant from those who are most affected by climate change,¹⁰⁹ people who could be noble and altruistic “rescuers,” but never really “vulnerable” “victims,”¹¹⁰ limiting possibilities for solidarity in the face of a genuinely shared, possibly existential, threat.

¹⁰⁶ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 449 (2018).

¹⁰⁷ Naomi Klein, *Let Them Drown: The Violence of Othering in a Warming World*, LONDON REV. BOOKS, June 2016, at 10, 12 (“We have dangerously warmed our world already, and our governments still refuse to take the actions necessary to halt the trend. There was a time when many had the right to claim ignorance. But for the past three decades, since the Intergovernmental Panel on Climate Change was created and climate negotiations began, this refusal to lower emissions has been accompanied with full awareness of the dangers. And this kind of recklessness would have been functionally impossible without institutional racism, even if only latent. It would have been impossible without Orientalism, without all the potent tools on offer that allow the powerful to discount the lives of the less powerful. These tools – of ranking the relative value of humans – are what allow the writing off of entire nations and ancient cultures. And they are what allowed for the digging up of all that carbon to begin with.”).

¹⁰⁸ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 111 (2020) (“Racism renders oppression socially acceptable, creates divisions between groups of people whose vulnerability to carbon capitalism should serve as the basis for solidarity, and enables states and corporations to pursue policies catastrophic to the planet and its inhabitants because the worst and most immediate consequences are borne by racialized populations.”).

¹⁰⁹ See Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 618, 620 (2009).

¹¹⁰ See Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 654, 669 (2009).

Our¹¹¹ racialized conception of some populations and groups as expendable structures and limits our imagination regarding the possibilities of climate action. It causes us to discount solutions and proposals that come from affected communities and individuals themselves.¹¹² It allows us to believe that not only can some people and communities be sacrificed for climate impacts, but also some people and communities can be sacrificed for climate mitigation.¹¹³ Through “green-grabbing,” which appropriates land to be used as carbon sinks or for renewable energy production, “racialized communities in the Global South are being displaced not only by climate change . . . but also by the measures deployed to mitigate greenhouse gas emissions.”¹¹⁴ At the same time, racism impedes our thinking around, and our perception of the need for, bold or rapid climate action. The discourse around Pacific Islands in particular as “sinking islands” implies “that there is no hope of saving them and thus no need for discussion on mitigation tactics – these islanders are simply doomed.”¹¹⁵ Similarly, as Carol Farbotko discusses, the metaphor of these islands as “canaries in the climate coal mine” both dehumanizes islanders and frames their value solely in terms of the warning that they can offer to the rest of the world (read: the Global North).¹¹⁶ Under these framings, the global community has understood that the only possibilities for these populations in the face of climate change are death or relocation; mitigation action to halt sea level rise or adaptation technologies

¹¹¹ I use the first-person plural in this section to refer to persons of privilege situated in the Global North, a category in which I am included, acknowledging myself to in many ways be part of the “Self” generated by racialized global discourse.

¹¹² Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 212 (2019).

¹¹³ See Nathalie J. Chalifour, *Equity Considerations in Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 18, 30-31 (Meinhard Doelle & Sara L. Seck, eds., 2021) (discussing the “double burden” of vulnerability to climate change and impacts of climate policies placed on already marginalized communities). Human rights expert Surya Deva goes further in referring to the “triple injustice” that “(a) the most vulnerable to the negative impacts of climate change are those who bear little responsibility for causing it; (b) these groups are limited in their resources and capacity to cope with the effects of climate change; and (c) the costs of the green transition have a greater negative impact on such low-income and vulnerable groups.” Surya Deva (Special Rapporteur on the right to development), *Climate Justice: Loss and Damage*, ¶ 17, U.N. Doc. A/79/168 (July 17, 2024). See also James Thuo Gathii, *Financing Climate Change Through a Racial Capitalism Lens*, 41 WISC. INT’L L. J. 521 (2024).

¹¹⁴ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 117 (2020).

¹¹⁵ ANDREA C. SIMONELLI, GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT 29 (2016). See also Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 186-87 (2019).

¹¹⁶ Carol Farbotko, *Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation*, 51 Asia Pacific Viewpoint 47, 53-58 (2010).

that would protect islands are written off as too difficult or expensive, even as complex and costly adaptation plans are put into place to protect primarily white communities and nations in the Global North, like Lower Manhattan or The Netherlands.¹¹⁷ Accordingly, “it is little wonder that some postcolonial, non-white communities see attempts to govern their climate mobility from outside as yet another manifestation of colonialism, racial and economic injustice, and/or dispossession.”¹¹⁸ These communities resist the narratives that their homes are doomed, through movements like the “We are not drowning, we are fighting” campaign in the Pacific Islands,¹¹⁹ and through a variety of political and legal efforts to claim their right to stay.¹²⁰ Recognizing the truth of these communities’ narratives and the racist history and present that underlie them can help to ensure genuine solutions by identifying real problems rather than focusing on potential scenarios built on racist assumptions.¹²¹ But as the next section will discuss, these narratives have been ignored and deliberately obscured in international efforts to address climate change-related migration.

II. THE DE-RACIALIZED SPACE OF THE LOSS AND DAMAGE REGIME

Racialized exploitation is at the root of climate change and of many of the drivers of climate change-related migration. Responsibility for climate change is not evenly distributed, and those who bear the most responsibility are often those who also continue to reap the benefits of racial capitalism and

¹¹⁷ Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 187-88, 215-16 (2019).

¹¹⁸ Carol Farbotko et al., *Climate Mobility Justice, the Right to Stay, and the Problem with Mobility Regimes*, RESEARCHING INTERNAL DISPLACEMENT (June 19, 2024), https://researchinginternaldisplacement.org/short_pieces/climate-mobility-justice-the-right-to-stay-and-the-problem-with-mobility-regimes/.

¹¹⁹ E.g., Hannah Fair, *Not Drowning but Fighting: Pacific Islands Activists*, 49 FORCED MIGRATION REV. 58 (2015). See also Dylan Asafo, *The Racism in Climate Change Law: Critiquing the Law on Climate Change-Related Displacement with Critical Race Theory*, 39 BERKELEY J. INT’L L. 249, 277-80 (2021) (discussing the complexities of Pacific Islander resistance to relocation as a climate solution); Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 198-200 (2019) (chronicling interviews with actors in the Marshall Islands seeking non-migration options in response to climate change).

¹²⁰ See, e.g., Monica V. Iyer & Kerilyn Schewel, *Articulating and Claiming the Right to Stay in the Context of Climate Change*, 38 GEO. J. IMMIGRATION L. 207 (2024).

¹²¹ E.g., NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 133-37 (2021) (discussing how, with the Syrian War as a case study, “depictions of the figure of the climate refugee reify a racialized first world-third world division that grafts anthropogenic climate change onto a neocolonial racial map” complete with assumptions about the tendency towards conflict and environmental destruction of racialized groups).

colonial extractivism. At the same time, those who are most likely to lose their homes, livelihoods, or lives because of climate impacts are often those whose ancestors were brutalized and dehumanized to build the fossil fuel economy, and those who continue to face discrimination and marginalization today. Reckoning with these truths should be considered an essential element of a meaningful climate response, but thus far they have been at best absent and at worst deliberately suppressed in the global climate change negotiations in the auspices of the United Nations Framework Convention on Climate Change (UNFCCC), which subsume climate change-related migration and displacement under the broader heading of “loss and damage.”

There is no single agreed definition of “loss and damage,” and a number of complexities are inherent in attempting to explain the term,¹²² but one working definition suggested by the UNFCCC includes “the actual and/or potential manifestation of impacts associated with climate change ... that negatively affect human and natural systems.”¹²³ Another effort to provide more clarity suggests that the term covers “two categories of harm:” “permanent harm, or irrecoverable ‘loss,’ such as the loss of landmass from sea-level rise” and “reparable or recoverable ‘damage,’ such as shoreline damage from storms.”¹²⁴ Linnea Nordlander, after engaging in a careful review of the literature on the topic, proposes as a working definition: “the actual manifestation of adverse impacts of climate change which may be caused by sudden and/or slow-onset events and be economic and/or non-economic in nature.”¹²⁵ Migration is understood to both be driven by or a response to loss and damage and to potentially itself constitute an element of loss and damage, in the sense that forced migration, or migration under unsafe circumstances, can be perceived as a loss in and of itself.¹²⁶ In hostile and

¹²² See Meinhard Doelle & Sara L. Seck, *Introducing Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 1, 1-2 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹²³ U.N. Framework Convention on Climate Change, *A Literature Review on the Topics in the Context of Thematic Area 2 of the Work Programme on Loss and Damage: A Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change*, ¶ 2, UN Doc. FCCC/SBI/2012/INF.14 (Nov. 15 2012), <http://unfccc.int/resource/docs/2012/sbi/eng/inf14.pdf> (cited in Benoît Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Responses*, 6 TRANSNAT’L ENV. L. 107, 108 (2017)).

¹²⁴ Meinhard Doelle & Sara L. Seck, *Introducing Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 1, 1 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹²⁵ LINNEA NORDLANDER, HUMAN RIGHTS AND CLIMATE CHANGE: THE LAW ON LOSS AND DAMAGE 34 (2024).

¹²⁶ Benoît Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Responses*, 6 TRANSNAT’L ENV. L. 107, 115-17 (2017). See also Chloé Anne Vassopolous, *When Climate-Induced Migration*

securitized understandings it can also be viewed as causing loss and damage for communities that receive migrants.¹²⁷

This section traces the history of the struggle to get the UNFCCC processes to include climate change-related “loss and damage,” including migration, and looks at two key current mechanisms related to climate change-related migration at the UNFCCC, the Warsaw International Mechanism on Loss and Damage (WIM) Task Force on Displacement (TFD), and the newly-created Loss & Damage Fund. In all of these processes, as will be discussed further, historical responsibility has been occluded, and the racialized roots of that historical responsibility has been completely disregarded.

A. History of global loss & damage efforts

The UNFCCC was adopted in 1992 and has been ratified by 197 countries and the European Union.¹²⁸ As a Framework Treaty, it is designed to be an evolving process, allowing space for new actions, agreements, and commitments between the Parties, many of which are adopted at annual conferences of the parties (COPs). One notable element of the UNFCCC framework is the inclusion of the international environmental law principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR), which theoretically suggests that the burden of taking climate action should be distributed according at least in part based on equity concerns, considering both States’ responsibility for climate harms and their ability to act given resource constraints and the needs of their citizens.¹²⁹ Despite the

Meets Loss and Damage: A Weakening Agenda-Setting Process?, in *Research Handbook on Climate Change, Migration and the Law* 376, 377 (Benoît Mayer & François Crépeau, eds. 2017) (“In the last decades, the concept of climate migration has been framed alternatively as a problem in itself, the cause of a problem, or the solution to a problem. A new definitional process is now replacing the initial confusion with the risk of diluting climate migration in the broad category of loss and damage.”)

¹²⁷ Benoît Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Responses*, 6 *TRANSNAT’L ENV. L.* 107, 117-18 (2017).

¹²⁸ *Status of Ratification of the Convention*, UNFCCC, <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification-of-the-convention> (last visited July 29, 2024).

¹²⁹ See Nathalie J. Chalifour, *Equity Considerations in Loss and Damage*, in *RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE* 18, 32-33 (Meinhard Doelle & Sara L. Seck, eds., 2021); Sumudu Atapattu, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH* 74, 94-98 (Shawkat Alam et al., eds., 2015) (also discussing efforts by the United States and other Northern countries to avoid a historical responsibility-focused interpretation of Common but Differentiated Responsibilities).

emphasis on this principle, ensuring that climate action is equitable has been a struggle throughout the UNFCCC process,¹³⁰ and the effort to focus attention on loss and damage has been an exemplar of that struggle.

As originally conceived, “the UNFCCC process lack[ed] a coherent framework to provide recourse to the vulnerable when damage becomes too severe for adaptation to be possible, or where there is unavowed or unavoidable damage.”¹³¹ This included any effort to address climate change-related migration and displacement.¹³² This was not for lack of trying. From the very beginning of the UNFCCC processes, the Alliance of Small Island States (AOSIS) suggested that agreements under the UNFCCC should include insurance and risk management measures around climate change-related loss and damage, as well as some sort of recompense for those countries that were bearing the worst impacts of climate change while having contributed the least,¹³³ but States in the Global North blocked any discussion of responsibility or liability.¹³⁴ This is in part due to a broader global power imbalance that minimizes the voice and influence of Global South in

¹³⁰ See Nathalie J. Chalifour, *Equity Considerations in Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 18, 18 (Meinhard Doelle & Sara L. Seck, eds., 2021) (“While principles such as Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) have played a role in forging a path forward, the path has not been a clear or simple one.”).

¹³¹ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 516 (2009).

¹³² See, e.g., ANDREA C. SIMONELLI, GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT 5 (2016) (“The global governance of climate change induced displacement is currently at the stage of ad hoc development. Legal and conceptual categorization of this phenomenon has been difficult and slow moving.”).

¹³³ Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 120 (2016) (“Initially a proposal seeking insurance-related action, the AOSIS proposal evolved into a three-part mechanism seeking: (i) an insurance component to help vulnerable countries share and transfer risk from increasingly severe weather events; (ii) a rehabilitation and compensatory component to address progressive negative impacts of climate change for which measurable loss and damage is unavoidable, including slow-onset events and unprecedented phenomena such as climate-induced migration; and, (iii) a risk-management component to promote risk assessment and management, as well as to facilitate and inform the other components of the proposal.”).

¹³⁴ Julia Dehm, *Climate Change, 'Slow Violence' and the Indefinite Deferral of Responsibility for 'Loss and Damage'*, 29 GRIFFITH L. REV. 220, 226 (2020) (“For the first 15 years of UNFCCC negotiations, questions of loss and damage were essentially evaded. Questions raised by the Alliance of Small Island States (AOSIS) within the UNFCCC of responsibility - and therefore financial liability - were too complex and politically unpalatable for the powerful industrialised countries who bear the greatest historical responsibility for the crisis now facing the planet.”). See also Julia Dehm, *Addressing Loss and Damage: The Unanswered Call for Climate Reparations*, NAT'L UNIV. SINGAPORE CTR. INT'L L. (Sept. 21, 2022), <https://cil.nus.edu.sg/blogs/addressing-loss-and-damage-the-unanswered-call-for-climate-reparations/>.

international negotiations,¹³⁵ as well as practicalities about who is financially able to fully participate in international processes.¹³⁶ Even where Southern states, like those in AOSIS, have made strong and persuasive arguments for climate accountability, they have achieved little in the way of concrete commitments.¹³⁷ As Gonzalez summarizes, “the North dominates the institutions of global economic and environmental governance . . . and frequently ignores Southern perspectives and priorities.”¹³⁸ Global North nations have used their power in UNFCCC spaces to shift focus away from historical responsibility and towards forcing those in the Global South to engage in self-help efforts to address climate risk without assistance,¹³⁹ and

¹³⁵ J. TIMMONS ROBERTS & BRADLEY PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 6 (2006) (“Climate negotiations do not take place in a vacuum. They are taking place at a time when concerns about Northern callousness and opportunism in matters of international political economy are rising, levels of generalized trust are declining, and calls for fair processes and fair outcomes are being marginalized. The North-South impasse on climate policy is, in other words, linked to larger systemic problems that hinder cooperation between rich and poor nations more generally.”). See also Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 372-73 (2019).

¹³⁶ J. TIMMONS ROBERTS & BRADLEY PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 14-18 (2006).

¹³⁷ Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1621 (2007) (contrasting the climate diplomacy efforts of small island states with African states and noting that island nations “have achieved little more than African states, and it is because of the profound inequality that characterizes the international system”).

¹³⁸ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 373 (2019). See also Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1561 (2007) (“The agreements that address climate change, to the extent the problem is being confronted, do incorporate Third World nations, but the emphasis and reality is that large industrializing nations are the intended and primary beneficiaries.”); Nathalie J. Chalifour, *Equity Considerations in Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 18, 37 (Meinhard Doelle & Sara L. Seck, eds., 2021) (“The slow speed at which the international community is a manifestation of inequities faced by countries within the AOSIS and other highly vulnerable states.”).

¹³⁹ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 221 (2020) (“[W]ithin the UNFCCC framework, such demands and obligations have been persistently evaded, as the question of loss and damage from climate change has enlivened legal and institutional responses focused on disaster risk reduction and financialised insurance frameworks that fail to locate responsibility with historical polluters, and instead seek to responsabilise those most vulnerable to the impact of climate change to anticipate and prepare for climate risk.”). See also Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND

to accept equal burdens of climate action despite having caused significantly less climate harm.¹⁴⁰ Even efforts that engage in discussion of compensation or liability for loss and damage tend to shy away from recognizing the root causes of historical injustice underlying climate impacts, or the need for a reparative approach.¹⁴¹ As Burkett summarizes, “The solutions to climate migration proffered to date have not, on balance, meaningfully engaged with the historical and contemporary injustices animating the phenomenon.”¹⁴² And as Ruth Gordon suggests, “[t]his stance is not surprising, as the industrialized West has consistently rejected any responsibility for injury to the Third World.”¹⁴³

It was 15 years after the adoption of the UNFCCC when countries first referenced loss and damage, “when it was included under ‘enhanced adaptation actions’ as part of the 2007 Bali Action Plan.”¹⁴⁴ This framed addressing loss and damage as an element of climate change adaptation, and did not include any mention of historical responsibility.¹⁴⁵ Two years later, in the lead-up to COP15 in Copenhagen in 2009, discourse around “climate justice” and “climate debt” became prominent, including calls “for a 1.5% GDP of wealthy nations to be earmarked for climate adaptation and mitigation support.”¹⁴⁶ The Climate Justice Action Network, a significant civil society coalition working on climate justice issues, was formed at the same time.¹⁴⁷ And “numerous countries and country groupings included

THE GLOBAL SOUTH 1, 5-12 (Shawkat Alam et al., eds., 2015).

¹⁴⁰ J. TIMMONS ROBERTS & BRADLEY PARKS, *A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY* 1-2 (2006) (illustrating the course of global climate negotiations with an illuminating analogy regarding polluting landowners).

¹⁴¹ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 517 (2009). See also Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1604 (2007) (“Interestingly, industrialized countries agreed that funding was necessary, but eschewed acceding that they were responsible for damages, only agreeing that they should provide financing based on their greater capacity to pay.”).

¹⁴² Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 469 (2018).

¹⁴³ Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1604 (2007).

¹⁴⁴ Julia Dehm, *Addressing Loss and Damage: The Unanswered Call for Climate Reparations*, NAT’L UNIV. SINGAPORE CTR. INT’L L. (Sept. 21, 2022), <https://cil.nus.edu.sg/blogs/addressing-loss-and-damage-the-unanswered-call-for-climate-reparations/>.

¹⁴⁵ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage’*, 29 GRIFFITH L. REV. 220, 225-26 (2020).

¹⁴⁶ ANDREA C. SIMONELLI, *GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT* 118 (2016).

¹⁴⁷ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the*

provisions on loss and damage in their submissions proposing text for the Copenhagen outcome.”¹⁴⁸ But Copenhagen slipped away in a moment of time, it was never ours.¹⁴⁹ Finally, at COP16 in Cancun, the parties to the UNFCCC created a “work programme” “to consider . . . approaches to address loss and damage.”¹⁵⁰ The Cancun Agreement was also the first to specifically reference the need to address climate change-related migration and displacement.¹⁵¹ A year later, “assessing loss and damage; approaches to address loss and damage; and the role of the Convention in enhancing efforts to address loss and damage” were included as themes for discussion in the workplan for COP17, which “allowed for the institutionalisation of loss and damage in the UNFCCC regime,”¹⁵² and the year after that the parties decided that the year after *that* they would create some sort of mechanism to address loss and damage at the UNFCCC.¹⁵³

As a result, COP19, in Warsaw, which took place immediately after Typhoon Haiyan hit the Philippines, underscoring the urgent need for action on loss and damage, saw the creation of the Warsaw International Mechanism on Loss and Damage (WIM).¹⁵⁴ The WIM was charged with three main tasks: “to enhance knowledge around risk management approaches for climate change loss and damage; to strengthen dialogue and collaboration amongst stakeholders; and to enhance ‘support’ to address climate change loss and damage including technical support, guidance and facilitating the mobilisation and securing of expertise.”¹⁵⁵ While “support” is referenced in

Emerging Legal and Policy Responses, 36 WIS. INT’L L. J. 366, 372 (2019).

¹⁴⁸ Linda Siegele, *Loss and Damage under the Convention*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 75, 80 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹⁴⁹ ANDREA C. SIMONELLI, GOVERNING CLIMATE INDUCED MIGRATION AND DISPLACEMENT 119 (2016).

¹⁵⁰ Benoit Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Results*, 6 TRANSNAT’L ENV’T L. 107, 112 (2016) (citing *Decision 1/CP.16, ‘The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention’*, ¶ 26, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011)).

¹⁵¹ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 465 (2018).

¹⁵² Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 228 (2020) (internal citations omitted).

¹⁵³ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 228 (2020) (internal citations omitted).

¹⁵⁴ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 228 (2020) (internal citations omitted).

¹⁵⁵ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of*

these goals, they certainly do not include any reference to reparation or acknowledgement of differing levels of responsibility for loss and damage, and also do not include any clear reference to communities or individuals most affected by loss and damage. Nathalie Chalifour has also observed that the WIM lacks “any means to ensure that the dialogue and coordination is undertaken in a way that engages the voices of individuals and groups that may be the most vulnerable to loss and damage.”¹⁵⁶

COP21 in Paris, in 2015, was a key moment for global climate action, and Global South countries sought to ensure that loss and damage was not ignored. The Paris Agreement initially did not reference loss and damage,¹⁵⁷ but ultimately ended up including a separate article on the topic, in article 8, which “recognize[s] the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage,”¹⁵⁸ and acknowledges the key role of the WIM and grounds the WIM in the Paris Agreement.¹⁵⁹ The Paris Agreement also notably includes a specific reference to the rights of migrants in its Preamble.¹⁶⁰ While inclusion of any references to human rights and loss and damage in the Agreement was an important accomplishment for those advocating for a more just and comprehensive approach to climate impacts, Article 8 is limited in its force. It does not cross-reference other Articles, nor is it cross-referenced in other Articles, and as such it is largely delinked from the rest of the Agreement, and Global North countries have generally blocked consideration of loss and damage in other aspects or mechanisms of the Paris Agreement.¹⁶¹ It has been recognized that Article 8 “is largely hortatory in nature. The article uses encouraging, not mandatory, language and as such does not appear to require particular action of (particular) states.”¹⁶² Further, and most importantly, the

Responsibility for ‘Loss and Damage,’ 29 GRIFFITH L. REV. 220, 228 (2020) (internal citations omitted).

¹⁵⁶ Nathalie J. Chalifour, *Equity Considerations in Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 18, 37 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹⁵⁷ Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 123 (2016) (internal citations omitted).

¹⁵⁸ Paris Agreement to the United Nations Framework Convention on Climate Change art. 8(1), Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹⁵⁹ Paris Agreement to the United Nations Framework Convention on Climate Change art. 8(2), Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹⁶⁰ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L. J. 366, 376 (2019).

¹⁶¹ Meinhard Doelle & Sara Seck, *Loss & Damage from Climate Change: From Concept to Remedy?*, 20 CLIMATE POL’Y 669, 670 (2020).

¹⁶² LINNÉA NORDLANDER, HUMAN RIGHTS AND CLIMATE CHANGE: THE LAW ON LOSS

Paris Agreement was accompanied by a decision of the Conference of the Parties that provides that Article 8 “does not involve or provide a basis for any liability or compensation.”¹⁶³ This denial of liability was considered a “compromise position” required by the United States and other powerful countries for inclusion of an article on loss and damage in the Paris Agreement,¹⁶⁴ and there is significant debate as to the actual legal import of this provision.¹⁶⁵ It is clear that whatever this language means for the Paris Agreement and UNFCCC processes, it does not foreclose the possibility of liability and compensation in other forums.¹⁶⁶ In any case, whatever its legal impact, this language, and the necessity of its inclusion in order to achieve buy-in for language on loss and damage, is clear evidence of how far nations with historical responsibility for climate change and climate injustice are from acknowledging that responsibility and taking a reparative approach. As Julia Dehm has argued, this language speaks not only to the narrow question of liability created by the Paris Agreement, but also more broadly to “the types of obligations enlivened by the inequalities of climate change and the forms of international community produced in response to such demands.”¹⁶⁷

Thus far this recounting of the history of loss and damage efforts has only minimally referenced migration. Indeed, as Benoît Mayer points out, the Cancun Agreements, while referencing migration as an adaptation measure, did not mention the relationship between migration and loss and damage,¹⁶⁸ which was introduced to the COP discourse at COP18 in Doha in 2012.¹⁶⁹ However migration has long been a relevant element of the global discourse around loss and damage.¹⁷⁰ Mayer also argues that “[t]he fear of massive

AND DAMAGE 98 (2024).

¹⁶³ U.N. Framework Convention on Climate Change, *Decision 1/CP.21: Adoption of the Paris Agreement*, ¶ 52, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

¹⁶⁴ Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 123 (2016) (“.

¹⁶⁵ See, e.g., LINNÉA NORDLANDER, HUMAN RIGHTS AND CLIMATE CHANGE: THE LAW ON LOSS AND DAMAGE 101-06 (2024) (summarizing debate).

¹⁶⁶ E.g. CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 15 (2024).

¹⁶⁷ Julia Dehm, *Climate Change, 'Slow Violence' and the Indefinite Deferral of Responsibility for 'Loss and Damage,'* 29 GRIFFITH L. REV. 220, 223 (2020).

¹⁶⁸ Benoît Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Results*, 6 TRANSNAT'L ENV'T L. 107, 112 (2016) (internal citations omitted).

¹⁶⁹ SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 41 (2019).

¹⁷⁰ Chloé Anne Vlassapolous, *When Climate-Induced Migration Meets Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 376, 387-88 (Benoît Mayer & François Crépeau, eds. 2017) (tracing the “progressive recognition of migration as a form of” loss and damage in U.N. documents starting in 2012). See also

arrivals of climate refugees in Western states (although scientifically unfounded) contributed to forging widespread support for the initiation of negotiations in this workstream, as addressing loss and damage was related to the strongly perceived interest of all states to avoid large inflows of migrants.”¹⁷¹ Sarah Louise Nash suggests that a political discourse around climate change-related migration frames migration as something to be avoided through mitigation, or as a tool of adaptation, and that introducing a loss and damage framing goes beyond these conceptions to “open[] up space for responsibility, liability and compensation to be considered in relation to unwanted but non-preventable human mobility taking place in the context of climate change.”¹⁷² However, this political potential of loss and damage discourse, she argues, is at odds with the “bureaucratic and technical” approach to loss and damage taken in the context of the UNFCCC negotiations and documents.¹⁷³

It is the bureaucratic and technical approach that won out in the approach to climate change-related migration in the COP21 negotiations in Paris in 2015. Initial proposals for the loss and damage provisions of the Paris Agreement included the creation of a global “climate change displacement coordination facility”¹⁷⁴ which “would assist with coordinated efforts to address the needs of those displaced by climate-related extreme events and plan for organized relocation.”¹⁷⁵ The facility’s role would also have included creating “procedures for coordinating compensation measures.”¹⁷⁶ The facility was included at least in part at the recommendation of the Advisory Group on Climate Change and Human Mobility, an expert group of UN and

SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 76 (2019) (“[I]t is not simply the Doha and Paris decisions that link the migration and climate change nexus to loss and damage; rather, this link is institutionally much deeper.”).

¹⁷¹ Benoit Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Results*, 6 TRANSNAT’L ENV’T L. 107, 113 (2016) (internal citations omitted).

¹⁷² SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 78 (2019).

¹⁷³ SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 78 (2019).

¹⁷⁴ See SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 66-71 (2019) for a summary of the drafting history related to the climate displacement coordination facility.

¹⁷⁵ Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 125 (2016) (internal citations omitted).

¹⁷⁶ U.N. Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Working document, Ad Hoc Working Group on the Durban Platform for Enhanced Action, second session, part nine*, ¶ 37(c) (June 11, 2015) cited in SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 60-61 (2019).

civil society actors, and supported by countries from the Global South, but opposed by Australia.¹⁷⁷ The final version of the Decision from COP21 did not include this facility, which was understood by negotiators to be “too specific,”¹⁷⁸ but did include the creation of a “task force” under the WIM, mandated to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”¹⁷⁹ This task force has become the prime global body seeking to address climate change-related migration, and, as the next section will discuss, it has been as bereft as all other UNFCCC processes in telling the story of who bears responsibility for climate change impacts, including displacement, and the racialized history that underlies that responsibility.

B. The WIM task force on displacement

After Paris, work turned to institutionalizing and strengthening the WIM, including creation and work of the task force on displacement (TFD). From the beginning, the TFD was unlikely to be transformational, given that the task force was composed entirely of “insiders to the UNFCCC process” such that “[p]erspectives that are not represented within the UNFCCC bubble are likely to be excluded, with existing dominant voices continuing to reinforce their dominance in the discourse.”¹⁸⁰ The work of the TFD has progressed in three distinct phases. The first phase involved a straight forward effort to fulfill the COP21 decision’s mandate to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change,”¹⁸¹ largely through taking stock of existing policies and efforts and mapping potential recommendations.¹⁸² In the second phase, from 2019 to 2022, the TFD worked to build on its recommendations from the first phase and “catalyzed a wide range of actions

¹⁷⁷ See Harsha Walia, *Why Migration Should be Central to the Paris COP21 Climate Talks*, TRUTHOUT (Nov. 30, 2015), <https://truthout.org/articles/why-migration-should-be-central-to-paris-cop21-climate-talks/>; See also ADVISORY GRP. CLIMATE CHANGE & HUM. MOBILITY, HUMAN MOBILITY IN THE CONTEXT OF CLIMATE CHANGE (2015).

¹⁷⁸ SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 61 (2019).

¹⁷⁹ U.N. Framework Convention on Climate Change, *Decision 1/CP.21: Adoption of the Paris Agreement*, ¶ 49, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

¹⁸⁰ SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 94 (2019).

¹⁸¹ *Task Force on Displacement*, UNFCCC, <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD> (last visited July 30, 2024).

¹⁸² *Task Force on Displacement*, UNFCCC, <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD> (last visited July 30, 2024).

and the production of knowledge products by its member organizations.”¹⁸³ In the third, ongoing, phase the task force is seeking to “enhance cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation” including through “better understanding the impacts of climate change on human mobility, disseminating and facilitating the uptake of the recommendations developed in the first phase, as well as facilitating stakeholder engagement for further action.”¹⁸⁴

If all of this sounds vague and obscure, this is because it is. The bulk of the TFD’s accomplishments have consisted of holding a number of meetings and roundtables and generating reports that summarize those meetings and other submissions on topics relating to climate change-related migration and displacement. While this has generated some recommendations and the possibility of some technical assistance in implementing those recommendations, it has not developed anything that looks like new law regarding climate change-related migration,¹⁸⁵ and there is little in the way of concrete assistance for affected individuals and communities that might serve to fulfill the responsibility owed to them. Indeed, it has been acknowledged, including by those directly involved, that the work of the TFD is likely to generate little in the way of direct impact on the lives of those moving in the context of climate change.¹⁸⁶ Andrew Baldwin goes further to argue that the ways that institutions like the TFD “seek to go about constructing [the figure of the climate migrant] through the production of knowledge” reinforces “capitalist political economy” and renders climate change-related migration “a racial project.”¹⁸⁷

In general, in the operation of the TFD and of the WIM post-Paris, debates and efforts around loss and damage have continued to ignore questions of responsibility.¹⁸⁸ “Post-Paris discussions focused on institutionalising the

¹⁸³ *Task Force on Displacement*, UNFCCC, <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD> (last visited July 30, 2024).

¹⁸⁴ *Task Force on Displacement*, UNFCCC, <https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD> (last visited July 30, 2024).

¹⁸⁵ Sumudu Atapattu, *Loss and Damage, Climate Displacement and International Law: Addressing the Protection Gap*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 245, 258 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹⁸⁶ Lisa Vanhalla & Elisa Calliari, *Governing People on the Move in a Warming World: Framing Climate Change Migration and the UNFCCC Task Force on Development*, 76 GLOBAL ENV’T L CHANGE 1, 4 (2022).

¹⁸⁷ ANDREW BALDWIN, *THE OTHER OF CLIMATE CHANGE: RACIAL FUTURISM, MIGRATION, HUMANISM* 11-12 (2022).

¹⁸⁸ LINNÉA NORDLANDER, *HUMAN RIGHTS AND CLIMATE CHANGE: THE LAW ON LOSS AND DAMAGE* 21 (2024).

WIM and commencing work on addressing loss and damage, however, in the process of doing so, gave loss and damage legal shape within the frames of disaster risk reduction or financialised insurance models of risk management. These frames locate responsibility for preparing for and preventing disaster on vulnerable nations and states and evade the question of who produced the dangerous destabilisation of the climate underlying these harms.”¹⁸⁹ The WIM has been insular, with its Executive Committee limited to 20 members who are primarily State actors, with limited civil society participation, and almost no avenues for community engagement.¹⁹⁰ Where WIM processes have looked at loss and damage financing, “emphasis was placed on how financial instruments, including insurance, could be mobilised rather than the provision of international financial support for vulnerable countries.”¹⁹¹ Such instruments, however, fail both in scale and in scope to meet the needs of those most affected by climate change.¹⁹² They are also inadequate to fill the gap in the absence of comprehensive government action on loss and damage,¹⁹³ and, as they currently operate, private insurance markets may contribute to additional climate and human rights harms,¹⁹⁴ while maintaining existing inequities in distribution of resources and power.¹⁹⁵ Further, as Dehm argues, emphasizing insurance and other risk management

¹⁸⁹ Julia Dehm, *Climate Change, 'Slow Violence' and the Indefinite Deferral of Responsibility for 'Loss and Damage,'* 29 GRIFFITH L. REV. 220, 226 (2020).

¹⁹⁰ See Chloé Anne Vlassapolous, *When Climate-Induced Migration Meets Loss and Damage,* in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 376, 391 (Benoît Mayer & François Crépeau, eds. 2017) (“The need to open the Executive Committee to broader collaboration was recognized twice but with yet no tangible outcomes.”).

¹⁹¹ Julia Dehm, *Climate Change, 'Slow Violence' and the Indefinite Deferral of Responsibility for 'Loss and Damage,'* 29 GRIFFITH L. REV. 220, 232 (2020).

¹⁹² Nathalie J. Chalifour, *Equity Considerations in Loss and Damage,* in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 18, 37 (Meinhard Doelle & Sara L. Seck, eds., 2021); Linnéa Nordlander et al., *Insurance Schemes for Loss and Damage: Fools' Gold?*, 20 CLIMATE POL'Y 704, 706-07 (2020). See also Leslie Kaufman & Brian J. Sullivan, *Helene Dumps Rain on Millions of US Homes that Lack Flood Insurance,* INS. J. (Sept. 30, 2024), <https://www.insurancejournal.com/news/national/2024/09/30/794787.htm>.

¹⁹³ See Kenneth S. Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance,* 98 IND. L.J. 215 (2022).

¹⁹⁴ See Lindsay Fenlock et al., *Insuring the Climate Crisis: New Bill Aims to Rein in Predatory Insurance Practices,* CTR. INT'L ENV'T L. (June 26, 2024), <https://www.ciel.org/insuring-the-climate-crisis-new-york-bill/>; Lindsay Fenlock, et al., *Climate Crisis Triggers Dangerous Domino Effect: Insurance, Housing, Financial Crises,* CTR. INT'L ENV'T L. (July 23, 2024), <https://www.ciel.org/climate-crisis-domino-effect/>.

¹⁹⁵ Linnéa Nordlander et al., *Insurance Schemes for Loss and Damage: Fools' Gold?*, 20 CLIMATE POL'Y 704, 710 (2020).

instruments “has foreclosed consideration of the legal, moral or ethical obligations of developed countries to contribute funds to address climate loss and damage.”¹⁹⁶ In doing so, emphasizing insurance schemes to address loss and damage may circumvent pledges to address climate change according to the principle of common but differentiated responsibilities.¹⁹⁷ Privileging insurance and risk management promotes “the responsabilisation of the vulnerable and risk-exposed subject”¹⁹⁸ (who, as we know, is likely to be a racialized individual), while “obscur[ing] the responsibility of historical polluters who have contributed most to changing the climate.”¹⁹⁹ Saad, in a similar vein, remarks that “[m]easures under which wronged parties must pay to adapt to a situation they did not cause may very well assert agency, but would not be characterized by climate justice.”²⁰⁰

The WIM’s work has also largely omitted reference to human rights or grounding in a human rights-based approach,²⁰¹ although this has been slightly more present specifically in the TFD.²⁰² This matters because a human rights-based approach would privilege duties owed to affected individuals and would require meaningful efforts to ensure non-discrimination and equality, including through addressing past inequities. In

¹⁹⁶ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 234 (2020).

¹⁹⁷ Linnéa Nordlander et al., *Insurance Schemes for Loss and Damage: Fools’ Gold?*, 20 CLIMATE POL’Y 704, 708-09 (2020).

¹⁹⁸ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 243 (2020). See also Patrícia Galvão Ferreira, *Arrested Development: The Late and Inequitable Integration of Loss and Damage Finance into the UNFCCC*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 127, 142 (Meinhard Doelle & Sara L. Seck, eds., 2021).

¹⁹⁹ Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 243 (2020) (internal citations omitted). See also Carmen Gonzalez, *The Sacrifice Zones of Carbon Capitalism: Race, Expendability, and Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 43, 57 (Meinhard Doelle & Sara L. Seck, eds., 2021). But see Koko Warner et al., *Insurance Solutions in the Context of Climate-Change-Related Loss and Damage: Needs, Gaps and Roles of the UNFCCC in Addressing Loss and Damage*, in POLICY, DIPLOMACY AND GOVERNANCE IN A CHANGING ENVIRONMENT 877, 879, 889 (Oliver C. Ruppel et al., eds. 2013) (suggesting that a risk management scheme could be constructed such that countries with historically high levels of carbon emissions “support[] the risk-management activities of the most vulnerable countries”).

²⁰⁰ Aaron Saad, *Toward a Justice Framework for Understanding and Responding to Climate Migration and Displacement*, 10 ENV. JUST. 98, 101 (2017).

²⁰¹ Katherine Lofts et al., *A Rights-Based Approach to Loss and Damage Due to Climate Change*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 201, 211 (Meinhard Doelle & Sara L. Seck, eds., 2021).

²⁰² Patrick Toussaint & Adrian Martínez Blanco, *A Human Rights-Based Approach to Loss and Damage under the Climate Change Regime*, 20 CLIMATE POL’Y 743, 747 (2020).

contrast, a review of the “Knowledge Products” and reports produced thus far by or for the Task Force on Displacement reveals passing or cursory references to Indigenous Peoples²⁰³ or “ethnic divides”²⁰⁴ and lip service to the tenets of non-discrimination and inclusion,²⁰⁵ but no meaningful recounting of historical responsibility or any mention of the ways in which race and racism have structured vulnerability to climate change-related displacement.

C. The loss and damage fund: a new hope?

Following the Paris Agreement, Global South countries and climate justice advocates continued to call for greater emphasis on loss and damage in international climate negotiations and climate policy, particularly for measures relating to just financing for loss and damage, and at COP27 in 2022 the parties finally agreed on the creation of a global fund to respond to

²⁰³ See, e.g., TASK FORCE ON DISPLACEMENT, REPORT OF THE TASK FORCE ON DISPLACEMENT 65 (2018) (“Take into account the specific needs of migrants, youth, children, members of indigenous peoples and other persons in vulnerable situations when developing national policies and practices.”); TASK FORCE ON DISPLACEMENT, SUMMARY REPORT OF OUTPUTS OF ACTIVITY I.2: SYNTHESIZING THE STATE OF KNOWLEDGE TO BETTER UNDERSTAND DISPLACEMENT RELATED TO SLOW ONSET EVENTS 12 (2019) (“Improve enablement of local communities, including for women, children, Indigenous peoples, and other groups in decision-making and driving solutions and experience sharing.”).

²⁰⁴ See, e.g., TASK FORCE ON DISPLACEMENT, REPORT OF THE TASK FORCE ON DISPLACEMENT 14-15 (2018) (“[C]onflict, violence and other polarized societies, political ideologies and social and ethnic divides can further contribute to the disruption of livelihoods.”); TASK FORCE ON DISPLACEMENT, SUMMARY REPORT OF OUTPUTS OF ACTIVITY I.2: SYNTHESIZING THE STATE OF KNOWLEDGE TO BETTER UNDERSTAND DISPLACEMENT RELATED TO SLOW ONSET EVENTS 6 (2019) (“On the other hand, conflict, violence and other polarized societies, political ideologies and social and ethnic divides can further contribute to the disruption of livelihoods. Such disruptions may render populations more vulnerable and further exposed to slow onset events, while accelerating their vulnerability to other more acute political factors. Thus, in cases where conflict and/or other economic, social, cultural, and political instability factors are present simultaneously with slow-onset events, such factors may amplify the effects of the slow-onset events, as well as the slow-onset events multiply the other instability factors already present in the community, ultimately leading to potential migration.”).

²⁰⁵ See, e.g., TASK FORCE ON DISPLACEMENT, REPORT OF THE TASK FORCE ON DISPLACEMENT 5 (2018) (“The Task Force recognizes that work to avert, minimize and address displacement related to the adverse impacts of climate change needs to be done in a manner that is consistent with respective international human rights obligations, and should take into account principles such as non-discrimination, participation and inclusion, gender; and the significance of non-economic losses, including loss of cultural heritage and social capital. Against this background, there is a need to consult widely with and involve communities and people affected by climate change.”).

loss and damage, which was formalized a year later at COP28 in Dubai.²⁰⁶ The fund's "Board was appointed by respective Parties in early 2024 and first met in April and May" of that year.²⁰⁷ The fund is mandated to receive and distribute funds with "a focus on addressing loss and damage to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events."²⁰⁸ While it represents an important accomplishment, there are some concerns about early decisions regarding operationalization of the fund that raise doubts regarding the kind of impact the fund might have, and whether it will actually enhance climate justice.

To start, "[d]espite grave reservations from many developing countries" the Parties agreed that the World Bank would serve as an interim host and trustee for the fund, "and potentially as a permanent solution, provided it meets certain conditions."²⁰⁹ Although the conditions are designed to alleviate some of the concerns about the World Bank as host, many climate justice advocates continue to oppose this hosting arrangement, arguing that "the World Bank in its staff and institutional culture as well as through its operational and policy history and track record is not 'fit-for-purpose.'"²¹⁰

²⁰⁶ Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT'L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/> (internal citations omitted).

²⁰⁷ Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT'L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/> (internal citations omitted). The Board is made up of "26 members from Parties to the [UNFCCC] and Paris Agreement, with 12 members from developed country Parties and 14 members from developing country Parties." *Fund for responding to Loss and Damage*, UNFCCC, <https://unfccc.int/loss-and-damage-fund-joint-interim-secretariat> (last visited Sept. 26, 2024).

²⁰⁸ *Fund for responding to Loss and Damage*, UNFCCC, <https://unfccc.int/loss-and-damage-fund-joint-interim-secretariat> (last visited Sept. 26, 2024).

²⁰⁹ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²¹⁰ Liane Schalatek, *Compromise Transitional Committee Outcome Falls Short of Expectations and Climate Justice*, HEINRICH BÖLL STIFTUNG (Nov. 15, 2023), <https://us.boell.org/en/2023/11/15/compromise-transitional-committee-outcome-falls-short-expectations-and-climate-justice>. See also *Conflicts of Interest: A Briefer on the World Bank's Hosting of the Loss and Damage Fund*, ASIAN PEOPLES' MOVEMENT ON DEBT & DEV'T (July 5, 2024), <https://apmdd.org/conflicts-of-interest-ldf-briefer/>.

Advocates ground these arguments in the Bank’s “continued funding of fossil fuel projects and support for export-oriented extractivism,” as well as its tendency to “push[] loans and private sector engagement over safeguarding developing countries’ fiscal space and strengthening systems for public safety nets and service provision.”²¹¹ The World Bank, like other International Financial Institutions, has tended to operate in a manner that minimizes the agency and power of Global South countries and communities,²¹² particularly as exemplified by the “Structural Adjustment Programs” of the 1980s, which are critiqued as having caused lasting damage to the economic and social welfare and policy autonomy of Global South nations.²¹³ The conditions imposed by World Bank engagement in Global

²¹¹ Liane Schalatek, *Compromise Transitional Committee Outcome Falls Short of Expectations and Climate Justice*, HEINRICH BÖLL STIFTUNG (Nov. 15, 2023), <https://us.boell.org/en/2023/11/15/compromise-transitional-committee-outcome-falls-short-expectations-and-climate-justice>. See also J. TIMMONS ROBERTS & BRADLEY PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 13 (2006) (“Through international financial institution (IFI) conditionality, bilateral reprisals, tariff escalation policies, restrictive multilateral and bilateral trade and investment agreements, and “expert advice,” poor nations have been strongly encouraged to develop in line with their comparative advantage. Yet, many of these very same comparative advantages have left developing countries at the bottom of the global income pyramid after generations of working in mining, agriculture, and low-wage labor.”); RECOURSE, A SAFE PAIR OF HANDS? HOW THE MULTILATERAL DEVELOPMENT BANKS FAIL TO LIVE UP TO EXPECTATIONS ON CLIMATE FINANCE (2024) (evaluating climate investments of multilateral development banks including the World Bank and finding that they tend to favor investment in Europe rather than the Global South, emphasize loans rather than grants, and lack transparency).

²¹² Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WISC. INT’L L. J. 1, 25-26 (2004). See also J. TIMMONS ROBERTS & BRADLEY PARKS, A CLIMATE OF INJUSTICE: GLOBAL INEQUALITY, NORTH-SOUTH POLITICS, AND CLIMATE POLICY 14 (2006) (“A whole range of Western policies that fail to acknowledge, or deliberately overlook, the structural dilemma of developing countries are also fatefully unhelpful to North-South climate negotiations. These include austere bilateral and multilateral conditionalities that limit national autonomy in setting policy, tariff escalation, agricultural protectionism, bilateral investment treaties and other “deep integration” agreements, commodity support funds that offer loans rather than grants, and IFI governance structures that prevent the institution’s main clients from having any significant voting power.”); Lara Merling, “Greenwashing” Structural Adjustment, PHENOMENAL WORLD (Oct. 22, 2024), <https://www.phenomenalworld.org/analysis/greenwashing-structural-adjustment/> (“The structures of the IMF and World Bank are remnants of the world order established at the Bretton Woods Conference eighty years ago. While these institutions were created to promote global stability, this ‘rules-based’ multilateral system has excluded developing countries from having a meaningful voice in shaping those rules. The track record of the IMF and World Bank, and their reluctance to change, is rooted in the fundamental governance of the international financial system. These institutions are thus shielded from accountability to their borrowers.”).

²¹³ E.g., Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WISC.

South states²¹⁴ and the debt that they have incurred through World Bank programs²¹⁵ have been among the very factors that have constrained these countries and communities' resilience in the face of climate change. Its approach has been argued to have been grounded in an assumption that racialized others in "underdeveloped" nations are inferior to those in the "developed" world.²¹⁶ These characteristics make it unlikely that the fund's hosts will pursue a transformative, reparative, or climate justice-oriented approach to projects funded. Indeed, there is good reason for skepticism that an institution notorious for promoting a neo-colonial approach to economic development might steer the loss and damage fund in a manner that seeks to repair colonial wrongs. Rather, there is a danger that the fund will recreate already persistent tendencies in climate finance, where power imbalances between donors and recipients of funding lead to replication of colonial dynamics.²¹⁷

Other decisions made in the initial stages of the fund's operation reinforce these fears. While human rights were referenced in the agreement creating the fund, they have been largely omitted from the fund's governing documents thus far, raising concerns that a human rights-based approach will be lacking in the fund's projects.²¹⁸ The process of getting the fund up and running, as well as initial governing documents have also provided little in the way of opportunities for meaningful participation by civil society or affected communities.²¹⁹ In particular, while some countries argued for civil society and affected community representatives to have voting power on the fund's board, ultimately the fund has only committed to allow them to participate as observers, without specifics for the modalities of observer engagement.²²⁰

INT'L L. J. 1, 39-44 (2004).

²¹⁴ Aaron Saad, *Toward a Justice Framework for Understanding and Responding to Climate Migration and Displacement*, 10 ENV. JUST. 98, 100 (2017).

²¹⁵ CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 17-18 (2024).

²¹⁶ Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WISC. INT'L L. J. 1, 5 (2004).

²¹⁷ Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 219-21 (2019).

²¹⁸ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²¹⁹ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²²⁰ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting*

A final concern regarding the potential effectiveness of the loss and damage fund is the question of whether it will provide sufficient financial support to address the ever-rising costs of climate change-related loss and damage and do so in a manner consistent with acknowledgement of historical responsibility. “As of March 2024, USD 661 million was pledged to the Fund,”²²¹ a number that only seems large when one fails to consider that the actual cost for addressing loss and damage in Global South countries has been estimated at around USD 400 billion annually.²²² It is particularly noteworthy that the United States, the country responsible for the highest share of historic carbon emissions, has pledged only USD 17.5 million to the fund thus far.²²³ All of these pledges, consistent with the agreement creating the fund, are understood as voluntary.²²⁴ “In discussing contributions to the Fund, the decision [creating the fund] has stepped away from obligatory language on rich, historically high polluting developed countries having a responsibility to provide adequate, new and additional finance.”²²⁵ This was a result of Global North countries during negotiations around the fund deliberately advocating for a rejection of any language of obligation,²²⁶ consistent with the approach these countries have taken throughout UNFCCC negotiations and inconsistent with any approach to global climate policy that is grounded in remedying historical wrongs. These tactics have created a situation where, as the UN Secretary-General recently asserted, “the United Nations Framework Convention on Climate Change loss and damage mechanisms are

It Right from the Start, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²²¹ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²²² Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²²³ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start> (internal citations omitted).

²²⁴ CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 15-16 (2024).

²²⁵ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start>.

²²⁶ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start>.

not currently designed or intended, in and of themselves, to fulfil the human rights obligations of States to provide effective remedies for climate harms.”²²⁷ In contrast to these tactics, the next section of this paper considers proposals that point the way towards a reparative justice approach to climate change-related migration.

III. REMEDIES THAT CONSIDER RACE

A. *Climate change reparations*

A number of scholars and activists have called for climate change reparations, even if not all of these calls tie their reparations project to those that seek to repair the harms of colonialism and slavery. Burkett, a key thinker in this space, has characterized “[c]limate reparations” as “the effort to assess the harm caused by the past emissions of the major polluters and to improve the lives of the climate vulnerable through direct programs, policies and/or mechanisms for significant resource transfers, to assure the ability of the climate vulnerable to contemplate a better livelihood in light of future climate challenges.”²²⁸ Her understanding of the “climate vulnerable” includes “the poor and those living in island states,”²²⁹ and she highlights the harms that these communities have experienced, including their “lack of meaningful participation in international negotiations” or “the very determination of what is considered ‘dangerous’ climate change.”²³⁰ Although Burkett does not explicitly characterize climate change reparations as a racial reparations project, she does argue for reparations as an acknowledgement of historical responsibility in a manner that has been lacking from international climate action.²³¹

One vision of climate change reparations that explicitly links race and climate change impacts comes from Manann Donoghoe and Andre M. Perry, who focus on a domestic reparations program within the United States. They argue that such an effort should “begin[] with granting reparations for Black Americans and advancing land reclamation for Native Americans—first as a moral responsibility, but also as an adaptation response to minimize climate change impacts for some of the most vulnerable.”²³² With regard to

²²⁷ U.N. Secretary-General, *Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same*, ¶ 25, U.N. Doc. A/HRC/57/30 (Aug. 28, 2024).

²²⁸ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 523 (2009).

²²⁹ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 514 (2009).

²³⁰ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 527 (2009).

²³¹ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 510 (2009).

²³² Manann Donoghoe & Andre M. Perry, *The Case for Climate Reparations for the*

reparations movements in the Caribbean, Sarah Riley Case observes that “two framings of reparations—for ecological and racial injustices—are not being discussed together in international legal scholarship. However, the climate reparations claim is rooted in the understanding that ecological harms arise from imperial relations that ground the broader appeal,” such that “these reparations claims are indissociable.”²³³ On a global scale, perhaps the most explicit link between climate change and reparations for historical racial injustice is made by Táíwò, who essentially equates climate justice and reparations for slavery and colonialism, saying:

climate justice and reparations are the same project: climate crisis arises from the same political history as racial injustice and presents a challenge of the same scale and scope. The transformations we succeed or fail to make in the face of the climate crisis will be decisive for the project of racial injustice and vice versa.²³⁴

He elaborates that this equation of climate justice and racial justice is not necessary or intuitive, but is based on the historical fact of how fossil fuel economies interact with racial hierarchies to create systems of injustice.²³⁵

Táíwò’s vision of climate action as “constructive reparations” is “a worldmaking project” that he characterizes as “intimately tied” to historical post-colonial movements like the call for a New International Economic Order.²³⁶ To this end, he offers a suite of “tactics” and “targets” that provide potential elements of a reparations program grounded in principles of self-determination and progressive action.²³⁷ These include proposals such as cash payments to climate-affected individuals and communities,²³⁸ more complete funding for international climate assistance,²³⁹ global tax justice to stop funds that could be used for national climate action in Global South countries from being diverted by multi-national corporations,²⁴⁰ and ensuring that affected communities have the ability to determine the use and allocation of their lands and resources.²⁴¹ Táíwò does not explicitly address migration in these plans for climate reparations, but he does draw on the work of historic reparations scholar and advocate Nkechi Taifa, whose reparations plan

United States, BROOKINGS INST. (Mar. 2023), <https://www.brookings.edu/articles/the-case-for-climate-reparations-in-the-united-states/>.

²³³ Sarah Riley Case, *Looking to the Horizon: The Meanings of Reparations for Unbearable Crises*, 117 AJIL UNBOUND 49, 50 (2023).

²³⁴ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 149 (2022).

²³⁵ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 158 (2022).

²³⁶ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 5 (2022).

²³⁷ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 172-73 (2022).

²³⁸ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 174-75 (2022).

²³⁹ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 176-78 (2022).

²⁴⁰ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 179-80 (2022).

²⁴¹ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 180-81 (2022).

“involve[d] giving each Black American descendant of slavery the choice between staying in the United States, emigrating to the Republic of New Afrika[, a proposed independent nation to be formed by the United States ceding land to Black Americans], or emigrating elsewhere.”²⁴² This idea that a free choice of movement could be an element of a reparatory justice program is one that has been taken up by E. Tendayi Achiume, as discussed in the next section.

B. (Climate change-related) migration as decolonization

In “Migration as Decolonization,” Achiume argues that “global interconnection and political subordination, initiated over the course of . . . history, generate a theory of sovereignty that obligates former colonial powers to open their borders to former colonial subjects.”²⁴³ Achiume’s argument starts with the injustices of the colonial period, during which, while Europeans migrated in large numbers to colonized nations, “imperial interconnection politically and economically subordinated Third World peoples for the purposes of shoring up the prosperous, collective self-determination of First World nations.”²⁴⁴ Through these processes of colonization, a “transnational political community” formed between “metropolitan and colonial peoples.”²⁴⁵ However, this interconnection did not end with the formal end of colonization; rather, “for former colonies nation-statehood hardly did enough to disrupt relations of colonial exploitation.”²⁴⁶ Indeed, the interconnection founded through colonial empire continues to the present global system, which “is defined by neocolonial imperialism,” a continuing “projection of political and economic power beyond the territorial borders of the power-wielding political community.”²⁴⁷ Achiume points to various specific manifestations of neocolonial empire, including trade law, “exploitative development aid,” and the failure to provide reparation for colonial exploitation.²⁴⁸

²⁴² OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 99-100 (2022).

²⁴³ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2019).

²⁴⁴ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1518 (2019).

²⁴⁵ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1539 (2019).

²⁴⁶ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1518 (2019).

²⁴⁷ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1541 (2019).

²⁴⁸ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1542-44 (2019).

As a consequence of this ongoing interconnectedness, Achiume argues, those states that she refers to as “First World” do not have the right to exclude from their borders people from “Third World” countries with whom they exist in equal political community.²⁴⁹ As she summarizes, “if First World national sovereignty and its political and economic benefits remain significantly predicated on Third World subordination and exploitation, keeping First and Third World peoples bound in neocolonial empire, and if Third World peoples remain subjected by and to First World nation-states (often with Third World state complicity), this relationship gives Third World persons a valid claim to membership in First World nation-states.”²⁵⁰ Similarly, Sara Amighetti and Alasia Nuti have argued that their “intertwined histories” and the contribution of colonized states to the “national identity” of colonizing states should bar former colonizers from excluding the formerly colonized.²⁵¹ Crucially, these claims are limited to those that are “responsive[] to neocolonial subordination and diminished sovereignty.”²⁵² Thus these authors do not call for unrestricted free movement between Global South and Global North countries, but rather the possibility of a claim of freedom of movement and of citizenship for those whose reasons to migrate are shaped by neocolonial exploitation and injustice.

Ultimately, Achiume’s project seeks to craft migration law and policy consistent “with the logic and ethics of imperial interconnection (specifically, colonial and neocolonial interconnection) that actually exists today.”²⁵³ Climate change, in the form of its globalized impacts, but also the neocolonial and exploitative structures of the fossil fuel industry and industrialized agriculture that sustain it, forms a part of that imperial interconnection.²⁵⁴ The

²⁴⁹ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1547 (2019).

²⁵⁰ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1550 (2019). This relationship extends to nations such as the United States, despite their lack of past participation in the classical form of colonialism “because settler-colonial nations, including the United States, are central beneficiaries of neocolonial empire, wielding power and influence within and through neocolonial, transnational economic and political institutions to their benefit, and at the expense of the Third World.” E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1563 (2019).

²⁵¹ Sara Amighetti & Alasia Nuti, *A Nation’s Right to Exclude and the Colonies*, 44 POL. THEORY 541, 543 (2016).

²⁵² E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1559 (2019).

²⁵³ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1520-21 (2019).

²⁵⁴ See NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 43 (2021) (“[T]he racial and gendered spectacle of the climate migrant can mask the structural and historic forces that have produced systemic vulnerability for a variety of subaltern national, racial, and class groups, especially with the

conditions that make racialized groups vulnerable to climate change related-displacement, including their location in places at high risk of environmental disaster, are linked to colonial structures and policies.²⁵⁵ Ahuja traces how “oil’s restructuring of geopolitics” created “shifts in labor migration routes” that fed into “racialized structures of labor in advance of intensified and rapid climate changes.”²⁵⁶ As such, “the imperial relations of oil generate forms of racial displacement and vulnerability to violence.”²⁵⁷ These interactions generate a shared political economy: “West Asian oil production, South Asian migrant labor, and East Asian manufacturing played conjoined roles in transforming the logics of U.S. power.”²⁵⁸

Others have suggested that creating possibilities for migration or possibilities to avoid displacement might be an element of addressing climate responsibility. Autumn Skye Bordner argues that the legal and moral responsibilities of colonizing states to ensure the self-determination of former colonies requires that assistance be rendered to those states in order to allow for community-led *in situ* adaptation that avoids forced displacement, or for migration along the lines of that proposed by Achiume.²⁵⁹ Michael Gerrard has suggested that, according to norms of fairness, nations should agree to take in those displaced by climate impacts, with shares distributed according to their historical responsibility for greenhouse gas emissions.²⁶⁰ Sujatha Byravan and Sudhir Chella Ravan offer a similar suggestion to Gerrard’s, arguing that this is “merely an obvious solution for fulfilling the historically generated obligations of these countries to provide downstream victims of environmental pollution a fair option, while adhering to widely shared principles of global justice.”²⁶¹ Gonzalez offers an understanding of “migration as reparation” that draws on both Gerrard and Achiume’s

rise of the oil economy in the twentieth century.”).

²⁵⁵ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 49 (2021).

²⁵⁶ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 70 (2021).

²⁵⁷ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 72 (2021).

²⁵⁸ NEEL AHUJA, PLANETARY SPECTERS: RACE, MIGRATION, AND CLIMATE CHANGE IN THE TWENTY-FIRST CENTURY 82 (2021).

²⁵⁹ Autumn Skye Bordner, *Climate Migration and Self Determination*, 51 COLUMBIA HUM. RTS. L.REV. 183, 224-37 (2019).

²⁶⁰ Michael B. Gerrard, *America is the Worst Polluter in the History of the World. We Should Let Climate Change Refugees Resettle Here*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5_story.html.

²⁶¹ Sujatha Byravan & Sudhir Chella Rajan, *Providing New Homes for Climate Change Exiles*, 6 *Climate Pol’y* 247, 249 (2006).

proposals to “integrat[e] the environmental, social, and economic factors that drive migration”²⁶² and address climate change-related migration in a manner consistent with the principle of common but differentiated responsibilities.²⁶³ Suketu Mehta, drawing in part on Gerrard’s recommendation, tells the Global North:

If the rich countries *don’t* want the poor countries to migrate, then there’s another solution. Pay them what they’re owed. Pay the costs of colonialism, of the wars you imposed on them, of the inequality you’ve built into the world order, and the carbon you’ve put into the atmosphere. Settle the account and the creditors will have will have no reason to come to your house. Reparations or migration: choose.²⁶⁴

IV. TOWARDS A REMEDY FOR RACIALIZED CLIMATE MIGRANTS

In reading Mehta’s trenchant articulation of these binary options, some, including this author, might be tempted to say, “why not both?”²⁶⁵ Or, to put it another way, why should this choice be in the hands of Mehta’s “rich countries” rather than in the hands of those individuals and communities actually affected by climate change-related migration? This section will begin to articulate what a reparative justice approach to climate change-related migration at the global level – one that takes into account the racialized nature of climate change-related migration’s causes and consequences – might look like. I emphasize that in order to fully embrace the leadership and agency of affected communities and thereby ensure a just and successful response, Global North countries must commit to a program of action that includes both expanded possibilities for people to stay in their homes and to move in safety, dignity, and full protection of their human rights. The section starts with general and theoretical considerations, including the need for a transformational approach, a related commitment to non-repetition, and grounding action in human rights and centering it around the needs and preferences of affected communities. This is followed by practical and specific suggestions for implementation or enhancement of the WIM Task Force, the Loss and Damage Fund, and other efforts at the global

²⁶² Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 433 (2020).

²⁶³ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 438 (2020).

²⁶⁴ SUKETU MEHTA, THIS LAND IS OUR LAND: AN IMMIGRANT’S MANIFESTO 208 (2019) (emphasis in original).

²⁶⁵ Or perhaps even, “¿por qué no los dos?” Brooke Freeman, *Old El Paso Hard and Soft Tacos – Little Girl*, YOUTUBE (July 29, 2011), https://www.youtube.com/watch?v=vqgSO8_cRio.

level.

A. Global reparative justice for climate change-related migration: in theory

1. A global and transformational approach

A reparative effort to address climate change-related migration should be global and must encompass broad and transformational projects. As Táíwò explains, “[i]njustice and oppression are global in scale. Why? Because Trans-Atlantic slavery and colonialism built the world we live in. If we want reparations, we should be thinking broadly about how to remake the world system.”²⁶⁶ Burkett similarly argues that “[i]n the climate context, the reparations frame should be steeped in the possibility of a moral discourse and the reconstitution of society, promoting a more expansive and comprehensive concept of how to compensate for this moral wrong.”²⁶⁷ Donoghue and Perry frame their call for reparations not simply as asking for a “wealth transfer,” but rather as a “reparative stance” that “goes further, aiming to dismantle the structural determinants of inequity that affect Black Americans and other marginalized groups, and that are likely to be amplified in emissions mitigation and climate change adaptation policies without an equity and antiracist lens.”²⁶⁸ Riley Case argues “that reparations are foremost a horizon of transformation away from accumulative ways of life that spread from Europe to the world, structuring the present reality,” although they are also “immediate justices that meet the demands of those who are harmed, because this prefigures the horizon of transformation by disrupting imperialism.”²⁶⁹ The global nature of both the system that creates climate change and climate change itself means that individualized responses like awards in litigation will struggle to craft effective solutions,²⁷⁰ especially

²⁶⁶ OLÚFÉMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 1 (2022).

²⁶⁷ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 524 (2009). See also U.N. Secretary-General, *Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same*, ¶¶ 19, U.N. Doc. A/HRC/57/30 (Aug. 28, 2024) (“Remedies and reparatory justice require a comprehensive and multipronged approach grounded in international human rights law, including, where appropriate, the right to reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”).

²⁶⁸ Manann Donoghoe & Andre M. Perry, *The Case for Climate Reparations in the United States*, BROOKINGS INST. (Mar. 2023), <https://www.brookings.edu/articles/the-case-for-climate-reparations-in-the-united-states/>.

²⁶⁹ Sarah Riley Case, *Looking to the Horizon: The Meanings of Reparations for Unbearable Crises*, 117 AJIL UNBOUND 49, 49 (2023).

²⁷⁰ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 510 (2009).

in the context of migration, which involves complex drivers and cross-border interactions. Climate change impacts, including in particular climate change-related migration, are deeply interrelated with global racial hierarchy, inequitable intra- and international distributions of power, and profound economic injustice.²⁷¹

It should be noted that some have raised legitimate concerns about addressing climate change-related migration through the global system. Mayer fears that “international guidance in addressing loss and damage could become a Trojan horse for a Western influence in the migration policies of the developing states most vulnerable to climate change impacts.”²⁷² However, the complexity and trans-border implications of these issues cry out for a comprehensive and systemic approach that is achieved through honest and equitable international negotiation.²⁷³ Acknowledgement of historic responsibility and a good-faith commitment to genuine transformation will mitigate the possibility of these actions transforming into Mayer’s “Trojan horse.” And, consistent with Derrick Bell’s interest convergence theory,²⁷⁴ there may be good reasons for Global North states to finally come to the table on these issues, as climate impacts worsen and the failings of the business-as-usual approach become more and more clear. Global North states have consistently asked that those in the Global South sacrifice opportunities for fossil fuel-based development in the service of addressing climate change; acknowledgement of historical responsibility and a meaningful reparations program might be powerful negotiating tools in this context. Indeed, the most recent COP as of this writing, COP29, held in Baku in November 2024, demonstrated the sharp divide between Global North and Global South countries specifically around acknowledgement of and accountability for historical responsibility, with key Global South actors like India and Nigeria refusing to sign on to the COP outcome because of a sense

²⁷¹ Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 HARV. L. REV. F. 326, 339 (2021).

²⁷² Benoit Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Results*, 6 TRANSNAT’L ENV’T L. 107, 109 (2016).

²⁷³ See Julia Dehm, *Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘Loss and Damage,’* 29 GRIFFITH L. REV. 220, 244 (2020) (“For many reasons it is less than ideal that complex legal questions of liability, justice and compensation are addressed in an ad hoc and piecemeal fashion in different jurisdictions rather than through a negotiated international process. The need to pursue such litigation is thus also an indictment on the international climate regime’s failure to articulate principles of historical responsibility or engage with questions of accountability, compensation and reparative justice.”) (internal citations omitted).

²⁷⁴ See Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

of bad faith engagement and lack of solidarity from the Global North.²⁷⁵ Global North countries may also need Global South cooperation in other climate change-related endeavors, such as carbon markets, or simply recognize that a proactive and cooperative approach to migration is preferable to one where they ultimately lack control. Addressing concerns around equity, solidarity, and responsibility might be key to ensuring that the UNFCCC process functions in the future.²⁷⁶

2. A guarantee of non-repetition through policy action

The need for a transformative approach places an emphasis on guarantees of non-repetition, which, together with apology and compensation, constitute the three necessary prongs of a reparations program.²⁷⁷ An emphasis on non-repetition is key for transformative justice: “in seeking an apology, economic parity, and equality of opportunity, the reparations advocate must consider the ways in which the sociopolitical structures can be made receptive to these remedies and begin the long and arduous task of disarming the structural and systemic perpetrators.”²⁷⁸ While somewhat less expansive than the structural transformation that reparations theorists envision, international law concepts of guarantees of non-repetition also provide that they might include “[r]eviewing and reforming laws contributing to or allowing gross violations of international human rights law.”²⁷⁹ Emphasizing this element ensures that

²⁷⁵ See, e.g., David Vetter, *Developing Nations and Nonprofits Reject “Disaster” COP29 Climate Deal*, FORBES (Nov. 24, 2024), <https://www.forbes.com/sites/davidrvetter/2024/11/24/developing-nations-and-nonprofits-reject-disaster-cop29-climate-deal/>.

²⁷⁶ See Nathalie J. Chalifour, *Equity Considerations in Loss and Damage*, in RESEARCH HANDBOOK ON CLIMATE CHANGE LAW AND LOSS & DAMAGE 18, 18-19 (Meinhard Doelle & Sara L. Seck, eds., 2021) (“Indeed, the refusal by many developed countries to view their responsibilities under the United Nations climate regime through the lens of equity is arguably at the heart of the failure of that regime to date.”).

²⁷⁷ See Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 531 (2009). Note that international law offers a slightly different conception of the elements of reparations from theorists like Burkett, providing that reparations include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.” GA Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, ¶ 18 (Mar. 21, 2006). See further CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 4, 6-7 (2024) (providing definitions for each of these elements and examples of how they could be achieved in the climate context).

²⁷⁸ Maxine Burkett, *Reconciliation and Non-Repetition: A New Paradigm for African-American Reparations*, 86 OREGON L. REV. 99, 130 (2007).

²⁷⁹ GA Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious*

reparations, while atoning for the past, are primarily concerned with impacting, and improving the future.²⁸⁰ Such a program would be "more likely to prove capable in managing the complex web of social risks stemming from climate change impacts and providing a foundation for climate change policy that can meaningfully address legacies of racist structures."²⁸¹ Ensuring non-repetition calls for "measures of creative satisfaction like policy shifts;"²⁸² in the context of climate change-related migration this means both taking climate mitigation action to forestall whatever measure we still can of climate change-related displacement as well as providing a full range of *in situ* adaptation options accessible to all those affected *and* transforming migration law and policy to ensure that migration does not happen in the racialized and securitized atmosphere that has deprived so many migrants of their rights and dignity.

3. Grounding in human rights and centering community

Indeed, another key element of a reparative justice approach to climate change-related migration is understanding those impacted by climate change-related migration as rights-holders. In contrast to the security-based or humanitarian approach to migration, a rights-based approach emphasizes the agency, power, and human worth and human dignity of affected communities and individuals. And it frames state action vis-à-vis these communities and individuals not as a matter of control or charity, but rather as one of duty and obligation – obligation that stems from the law and from centuries of racialized harm.²⁸³ Further, it mandates the provision of effective remedies

Violations of International Humanitarian Law, ¶ 23(h) (Mar. 21, 2006).

²⁸⁰ Maxine Burkett, *Reconciliation and Non-Repetition: A New Paradigm for African-American Reparations*, 86 OREGON L. REV. 99, 134-35 (2007).

²⁸¹ Manann Donoghoe & Andre M. Perry, *The Case for Climate Reparations in the United States*, BROOKINGS INST. (Mar. 2023), <https://www.brookings.edu/articles/the-case-for-climate-reparations-in-the-united-states/>.

²⁸² Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 534 (2009).

²⁸³ For a similar point framed in terms of climate justice, see Aaron Saad, *Toward a Justice Framework for Understanding and Responding to Climate Migration and Displacement*, 10 ENV. JUST. 98, 99 (2017) ("Climate justice concerns the identification of the moral dimensions of climate change and the duties they create for actors according to their (1) capacity to carry them out and (2) responsibility for contributing to moral wrongs associated with climate change. Because of this concern with duties (e.g., as opposed to individual voluntary acts of humanitarianism or charity), climate justice is best carried out through policies and institutional arrangements reflecting points (1) and (2) legitimized and funded by states."). See also Surya Deva (Special Rapporteur on the right to development), *Climate Justice: Loss and Damage*, ¶ 17, U.N. Doc. A/79/168 (July 17, 2024) ("Moreover, since climate change affects all human rights, international climate law must be interpreted and developed in future in line with international human rights law. Otherwise, climate

for those subject to rights violations,²⁸⁴ and allows for this mandate to be interpreted in light of other international law, including the polluter pays principle and CBDR.²⁸⁵ A human rights-based approach also grounds action around climate change-related migration in existing human rights law and the inherent dignity and worth of each affected individual as a human being, thus eschewing the debate over determining which exclusionary legal categories to apply in this case and instead focusing on actual human needs. At the same time, it requires an intersectional analysis, such that “that rights holders experiencing intersecting forms of marginalization merit targeted attention and tailored remediation responses.”²⁸⁶ Finally, a human rights-based approach offers a set of grounding principles designed to ensure that action is both equitable and effective.²⁸⁷

One of the most important pieces of a rights-based approach is centering the voice and volition of affected communities and individuals. Gonzalez describes this as a self-determination approach to climate change-related migration, which “should respect the perspectives and priorities of states and peoples who face actual or imminent displacement, including their demands for self-determination with respect to migration pathways and for resources to support their mobility decisions.”²⁸⁸ Those who have experienced or may experience climate change-related migration have plenty to say about those experiences and their preferences going forward. Cynthia Houniuihi, the President of the organization Pacific Islands Students Fighting Climate Change has summarized the situation as she sees it:

Scattered in the relocation are the children of the land and sea. Their future is uncertain, reliant upon the decision-making of a handful of

actions will not be just.”).

²⁸⁴ E.g. U.N. Secretary-General, *Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same*, ¶¶ 16-18, U.N. Doc. A/HRC/57/30 (Aug. 28, 2024).

²⁸⁵ CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 4 (2024).

²⁸⁶ CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 7 (2024).

²⁸⁷ See Surya Deva (Special Rapporteur on the right to development), *Climate Justice: Loss and Damage*, ¶ 33, U.N. Doc. A/79/168 (July 17, 2024) (articulating 12 key principles for a human rights-based approach to climate justice and loss and damage).

²⁸⁸ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 110 (2020). See also SARAH LOUISE NASH, NEGOTIATING MIGRATION IN THE CONTEXT OF CLIMATE CHANGE: INTERNATIONAL POLICY AND DISCOURSE 156 (2019) (“Actively including the voices of people whose mobilities are affected by climate change into the policy-making discourse is a process that would move the policy-making discourse away from bureaucratic and technocratic language towards lived experience and modulate the narrator’s voice away from advocacy actors.”).

large-emitting States that are responsible for climate change. These States have not only enabled but proactively encouraged the production and consumption of fossil fuels and continue to do so today and every day. For my people, and for the world's youth and future generations, the consequences are existential.²⁸⁹

A young man who migrated away from the Sundurbans region of Bangladesh after Cyclone Aila and faced precarity in the informal sector testified: "Now, I am fishing in the river again. I do not want to go out to find work. I want to restore our land, return to farming, and make a life free from these traps and deceptions."²⁹⁰ A Haitian woman who migrated to the United States in the aftermath of a hurricane which damaged her house explained that "[m]any difficulties arose at that moment. That day left a scar on my heart and mind because we truly suffered. Our children were suffering as they couldn't go to school. We also lost our garden, which was our only resource. The whole family was in tears."²⁹¹ Reflection of these stories and these voices is critical to an effective approach to climate change-related migration. As Mohammed Jimale, an advocate living in the Dadaab refugee camp in Kenya insists:

We need to be engaged; we need the national government, the county government, the international partners to engage us so we can raise our voices, what we face as refugees. We are the best people to tell the world what it means for climate displacement. The problems it puts on us, the measures that can be taken. We want people to listen to us so they can streamline their policies with the recommendations that we give, so that we can improve our lives.²⁹²

Beyond incorporating the voices of those moving in the context of climate change, "successful implementation of the self-determination approach requires a responsibility-based framework that imposes obligations on Northern states based on their contribution to climate change"²⁹³ as well as their contributions to the racial harms that magnify climate impacts for marginalized states, communities, and individuals.

²⁸⁹ WORLD'S YOUTH FOR CLIMATE JUSTICE ET AL., HISTORIC CLIMATE HEARINGS AT THE INTERNATIONAL COURT OF JUSTICE: DAILY DEBRIEF: DECEMBER 2ND, 2024 2 (2024).

²⁹⁰ OKUP, TESTIMONIES OF CLIMATE MIGRANTS AND FAMILIES IN THE SUNDURBANS REGION OF BANGLADESH 9 (2024).

²⁹¹ INT'L REFUGEE ASSISTANCE PROJ., ENDURING CHANGE: A DATA REVIEW OF FIRST HAND ACCOUNTS OF CLIMATE MOBILITY IMPACTS 9 (2024).

²⁹² JOCELYN PERRY, REFUGEES INTERNATIONAL, LOCALIZING CLIMATE ADAPTATION PLANNING IN KENYA'S REFUGEE-HOSTING COUNTIES 19 (2024).

²⁹³ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 J. L. & POL. ECON. 109, 130 (2020).

B. Global reparative justice for climate change-related migration: in practice

1. Implementing climate change-related migration as reparations

As emphasized above, a reparatory approach to climate change-related migration will involve a combination of measures that allow for migration and measures that allow the avoidance of displacement, according to the preferences and needs of those affected. Achiume views her argument for decolonial migration as “primarily remedial, rather than fully reparatory.”²⁹⁴ However, she also acknowledges “that arguments for colonial reparations could include claims to First World admission and inclusion.”²⁹⁵ The possibility of legal migration and admittance to communities that are responsible for climate harms is an essential element of a comprehensive reparations program, and States should create migration regimes that allow for this entry and admittance,²⁹⁶ whether allocating admittance based on shared political community, as advocated by Achiume, or based on historical climate (and racial) responsibility, along the lines of Gerrard’s proposal. There should be a range of policy options implemented as part of this program, including the possibility of community-led planned relocation for entire communities as well as passports or other admittance mechanisms for individuals to enter and secure their rights in destination States.²⁹⁷ In implementing a program to enable migration as climate reparations, states should be attentive to the current failings of international migration and refugee law, avoiding the bottlenecks, securitized barriers, racial hierarchization, and rights deprivations that characterize the existing system. They should recognize that “[l]oss and damage are likely to arise because of inadequate legal or institutional frameworks which either fail to offer effective protection to migrants, or try to oppose migration through non-liberal measures Going further, it must be kept in mind that what is regrettable about forced migration is not the migration itself so much as the factors that force individuals to flee (such as from war, persecution, or

²⁹⁴ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1553 (2019).

²⁹⁵ E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1553 n. 177 (2019).

²⁹⁶ See U.N. Secretary-General, *Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same*, ¶ 35, U.N. Doc. A/HRC/57/30 (Aug. 28, 2024).

²⁹⁷ See Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 433 (2020).

adverse environmental conditions).”²⁹⁸ Accordingly, possibilities for migration should be created that allow people to move in ease and security, and that recognize and acknowledge the role of states in the Global North in creating the circumstances that impel that movement. As a practical matter, this includes eliminating physical and logistical barriers to migration, including ending pushback practices, combatting racism and xenophobia, ensuring human rights training and a human rights-based approach for all responsible for implementing migration policy, and creating community-based integration programs that maximize benefits and protections for both migrants and destination communities.

2. Ensuring a comprehensive reparations program

At the same time, migration is just one element of a comprehensive reparations program. Other measures would include direct payment for addressing loss and damage, as through the loss and damage fund. In addition, “[a]daptation measures, like insurance plans or technology transfers previously floated, are also methods of compensation. In short, the developed world could execute the many adaptation proposals and provide, without delay or distraction, the tens of billions of dollars needed to prepare the developing world.”²⁹⁹ As Gonzalez summarizes, “[i]f mitigation, adaptation, and disaster risk reduction are not sufficient to avert displacement, then the leading greenhouse gas-emitting states have a moral duty to make the victims whole by providing financial compensation, relocation assistance, and a mechanism to finance and facilitate migration.”³⁰⁰ To reemphasize, this should very much be up to the choices of affected communities: “consistent with the self-determination approach, a responsibility-based legal framework should require high-emitting states to finance and facilitate the mobility decisions of climate-vulnerable people rather than dictating the terms and destination of migration.”³⁰¹ Further, a global regime to address climate change-related migration should not seek to dictate policy for Global South states that have too long been subject to crippling conditionalities when they seek the assistance they are entitled to from the international community.³⁰²

²⁹⁸ Benoit Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Results*, 6 *TRANSNAT’L ENVT’L L.* 107, 118 (2016) (internal citations omitted).

²⁹⁹ Maxine Burkett, *Climate Reparations*, 10 *MELB. J. INT’L L.* 509, 532 (2009).

³⁰⁰ Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 *WIS. INT’L L. J.* 366, 396 (2019).

³⁰¹ Carmen Gonzalez, *Climate Change, Race, and Migration* 1 *J. L. & POL. ECON.* 109, 130 (2020).

³⁰² Benoit Mayer, *Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Results*, 6 *TRANSNAT’L ENVT’L L.* 107,

3. Strengthening and building on existing global efforts

These reparatory justice measures can potentially be accomplished through transformation, modification, or careful operationalization of the existing global mechanisms addressing climate change-related migration and loss and damage. The WIM Task Force should be transformed into the global “climate change displacement coordination facility” that was originally proposed for the Paris Agreement. Such a facility could eschew the technocratic guidance and knowledge production approach modeled by the WIM Task Force in favor of coordinating enforceable commitments and genuine action by states to facilitate the movement of those who wish to migrate. Such coordination might include determining a fair allocation of migration quotas as proposed by Gerrard, promoting and facilitating regional free movement agreements³⁰³ or developing model policies, procedures, and legislation to provide for safe and legal migration of affected individuals and communities. It could bring together states and private actors to develop insurance and risk-management programs that act for the benefit of affected communities without charging them with the burden of adaptation. It could also provide a space for the negotiation of new treaties governing migration law, provided such treaties do not seek to simply recreate and reinforce the current racialized limitations on migration but rather enshrine transformed notions of sovereignty and freedom of movement.³⁰⁴

In crafting a climate change displacement coordination facility, however, States would have to ensure that they will not merely replicate past mistakes or reinforce existing inequities. In part this requires ensuring that neither a humanitarian nor a securitized response dominates the approach of the facility, and also avoiding a “migration management” response that reduces migrants to economic actors through a focus on temporary labor migration as the solution to climate impacts.³⁰⁵ It would also need to be structured in a manner that allocates significant decision-making power to and facilitates

129 (2016).

³⁰³ See AMA FRANCIS, FREE MOVEMENT AGREEMENTS & CLIMATE-INDUCED MIGRATION: A CARIBBEAN CASE STUDY (2019), <http://columbiaclimatelaw.com/files/2019/09/FMAs-Climate-Induced-Migration-AFrancis.pdf>.

³⁰⁴ See also JESSICA WENTZ & MICHAEL BURGER, DESIGNING A CLIMATE CHANGE DISPLACEMENT COORDINATION FACILITY: KEY ISSUES FOR COP 21 (2015), <https://climate.law.columbia.edu/sites/default/files/content/docs/Wentz-and-Burger-2015-09-Displacement-Coordination-Facility.pdf> (suggesting possible functions for the proposed facility).

³⁰⁵ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 428-30 (2020).

significant participation of not only Global South states, but also affected individuals and communities. Such a structure would go beyond a State-centric cooperation model and form an element of what Gonzalez terms a “self-determination response” to climate change-related migration.³⁰⁶

Meanwhile, reparatory measures that allow individuals and communities to choose to stay in their homes may be achieved through the loss and damage fund, if it is properly operationalized. This is contingent on the fund actually being “filled” by “ensuring that countries increase their pledges of support to it and that they ultimately deliver on these pledges.”³⁰⁷ Such pledges “must be available at the scale necessary to meet the needs of affected communities and operationalized urgently as communities have been facing loss and damage for years already.”³⁰⁸ Loss and damage financing should be understood as a reparatory obligation of those most responsible for climate change and related racial injustice: “[c]ommitments to the [fund] should be guided by the principles of the [UNFCCC] - including the principle of equity and polluter pays and with it the obligation of developed countries under the Convention and broader international law to provide finance to address the impacts of the climate pollution they are responsible for.”³⁰⁹ The U.N. Special Rapporteur on the right to development has suggested that states have “obligations under international human rights law to contribute to the Fund in proportion to their contribution to greenhouse gas emissions over the years.”³¹⁰ The modalities of funding and the types of programs funded also matter – funding should be in the form of unconditional grants, rather than loans, and, among other local priorities, emphasize “ecosystem restoration to maintain connections between traditional environmental practices and

³⁰⁶ Carmen Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOYOLA L. REV. 401, 431-32 (2020).

³⁰⁷ Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT’L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/>.

³⁰⁸ Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT’L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/>.

³⁰⁹ Liane Schalatek & Julie-Anne Richards, *The Loss and Damage Fund Board: Getting It Right from the Start*, HEINRICH BÖLL STIFTUNG (Mar. 18, 2024), <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start>. See also U.N. Secretary-General, *Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same*, ¶¶ 41, U.N. Doc. A/HRC/57/30 (Aug. 28, 2024).

³¹⁰ Surya Deva (Special Rapporteur on the right to development), *Climate Justice: Loss and Damage*, ¶ 85(d), U.N. Doc. A/79/168 (July 17, 2024).

communities, respect Indigenous knowledge, support biodiversity and environmental health, and continue to build local resilience to climate change.”³¹¹

Any mechanism seeking to address climate change-related migration, including the loss and damage fund and a prospective coordination facility, should incorporate a human rights-based approach, which “could help refocus the political narrative on the fundamental rights of the individual that must be protected through, and when taking, climate actions in accordance with a pre-established normative framework” and which “requires consideration of the intersectionality of loss and damage impacts, including questions of race, gender, class, age, and economic well-being.”³¹² As an element of the human rights-based approach, it is essential to ensure meaningful civil society and affected community access to and ownership of all aspects of mechanisms’ management and processes.³¹³ This means that affected communities and civil society groups should have adequate seats at the tables where the policies and practices of these mechanisms are being determined. The solutions offered by these mechanisms should be made easily accessible to affected communities,³¹⁴ including taking into account the constraints that might affect people on the move. Additionally, a community access window should be incorporated within the loss and damage fund, providing for direct funding for affected communities, especially those from historically marginalized groups.³¹⁵ “The tenets of community-based adaptation - that is, initiatives aimed at helping villages most at risk to launch projects with the money going to them rather than

³¹¹ Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT’L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/>.

³¹² Patrick Toussaint & Adrian Martínez Blanco, *A Human Rights-Based Approach to Loss and Damage under the Climate Change Regime*, 20 CLIMATE POL’Y 743, 749 (2020). See also Surya Deva (Special Rapporteur on the right to development), *Climate Justice: Loss and Damage*, ¶¶ 71-80, U.N. Doc. A/79/168 (July 17, 2024) (enumerating human rights principles to be embedded in the operation of the loss and damage fund).

³¹³ E.g., OXFAM, COMMUNITIES IN CHARGE: LESSONS FOR THE GLOBAL FUND FOR RESPONDING TO LOSS AND DAMAGE FROM A LOCALLY LED PROJECT IN KENYA (2024); Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT’L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/>.

³¹⁴ See CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, REMEDY AND REPARATIONS FOR CLIMATE HARM: THE HUMAN RIGHTS CASE 36 (2024).

³¹⁵ E.g., Jocelyn Perry, *The Fund for Responding to Loss and Damage Must Listen to Affected Communities*, REFUGEES INT’L (July 9, 2024), <https://www.refugeesinternational.org/perspectives-and-commentaries/the-fund-for-responding-to-loss-and-damage-must-listen-to-affected-communities/>.

trickling down through global and national funds - will be paramount.”³¹⁶ While the majority of loss and damage funding should rightly go to the Global South, and while the loss and damage fund is designated as being for the assistance of developing countries, there is also a need for some measure of support to racialized and marginalized communities within the Global North who have also experienced climate harms linked to global racial empire,³¹⁷ as well as those territories that persist as colonized entities in the present day.³¹⁸

CONCLUSION

Other works that address the themes that this article has dealt with tend to end on a down note. They often acknowledge the improbability of real solutions being achieved, given the complexity of the issues and the Global North’s historic intransigence when asked to take responsibility for the racialized harms that we have caused and continue to cause. Or they close with dire warnings about the urgent need for climate action, the devastation that is already taking place, and the desperately short window of time that we have to ensure that that devastation does not reach unimaginable proportions. All of this is true, and I must admit that it will be very, very, difficult to get states to affirm the historical narrative that I have laid out above and adopt the proposals that I argue that this history demands. At the same time, climate impacts are growing and are having disproportionate and calamitous effects on the homes, lives, and livelihoods of communities that have always been subject to sacrifice and exploitation according to the dictates of racial capitalism, and we are not taking nearly enough, or nearly fast enough, action to stave off those impacts.

But this is not, ultimately, the story that I wish to tell. Because while there is despair in what global racial empire has wrought, we are not bereft of possibility and hope. There is still an opportunity for transformation through solidarity in the face of the threat that we all face. With climate change, transformation is inevitable. But we have a choice as to whether the world transforms into Garrett Hardin’s gruesome image of isolated lifeboats trying desperately to stay afloat by keeping out drowning souls, or whether instead

³¹⁶ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 533 (2009) (internal citations omitted).

³¹⁷ See Ama Ruth Francis, *Global Southerners in the North*, 93 TEMPLE L. REV. 689 (2021).

³¹⁸ Ashley Otilia Nemeth & Jacob Metz-Lerman, *Blind spots in climate funding: Island colonies go overlooked*, OPEN GLOBAL RIGHTS (Sept. 18, 2024), <https://www.openglobalrights.org/blind-spots-in-climate-funding-island-colonies-go-overlooked/>.

we opt for a different image, one of a connected and cooperative planet, with all of us fighting together to reject the fragmentation and hierarchization of the past and to keep all of us alive and afloat for the future. And so I close with the words of Octavia Butler, who also told stories of climate catastrophe and of solidarity rising out of those ashes: “The human species is a kind of animal, of course. But we can do something no other animal species has ever had the option to do. We can choose: We can go on building and destroying until we either destroy ourselves or destroy the ability of our world to sustain us. Or we can make something more of ourselves.”³¹⁹ A reparative approach to climate change-related migration will help us to make something more than we have always been.

* * *

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³¹⁹ OCTAVIA E. BUTLER, PARABLE OF THE TALENTS 321 (1998).