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Arléne Amparo Amarante  
arlene.amarante@lmunet.edu

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## THE THEATER OF REFUGE

*Arléne Amparo Amarante\**

At present, there are millions of mostly nonwhite men, women, and children who seek refuge and will not find it under asylum law. This is a calculated outcome and not an oversight. Asylum law functions as a theatrical production that masks the systematic exclusion of the global south under the guise of humanitarianism. The United Nations High Commissioner for Refugees (“UNHCR”) promulgates the internationally recognized definition of refugee, which was crafted to resettle displaced Europeans in the aftermath of the Second World War. The definition has never been meaningfully extended beyond the European context to include the general right to seek asylum as a member of the human family.

Like much of international law, asylum law was orchestrated by the global north to maintain the benefits of wealth and mobility that emanated from the colonial era. Exclusionary practices that reflect historical imbalances between the global north and south have long been normalized. As such, an asylum-seeker from the global south will likely be unsuccessful because their exclusion has been predetermined. Even though the United States bears responsibility for the conditions that necessitate migration, the exclusion persists.

Thus, the asylum regime is a performative façade that legitimizes the concerted exclusion of persons in need of refuge in ways that mirror colonial-era relationships among nations. By revealing the systemic biases in asylum law, this article calls for the acknowledgment and repudiation of the theater of refuge.

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\* Associate Professor, Lincoln Memorial University – Duncan School of Law. This article is informed by more than a decade spent agonizing over immigration law’s stringent requirements and structural prejudices—as an attorney, as a grad student, and now as a professor—with attorneys, students, and clients, alike. I would especially like to thank my co-panelists from last year’s Law and Society Conference in Lisbon: Paulina Vera, Valeria Gomez, Laura Barrera, and Austin Kocher. Our panel titled *Procedural Subjugation in Immigration Law* has inspired me to continue that conversation and it is precisely what led to this article. I would also like to thank Anita Revilla, Fran Ansley, Meghan Conley, Wendy Bach, Joan Heminway, William Gill, Maha Ayesh, Fatma Marouf, and Michael Kagan for inspiring me to pursue and continue this academic journey. Last, and most, I thank my husband, Eric Amarante, for being my partner. All errors are my own.

## I. BEHIND THE CURTAIN: INTRODUCTION

“Asylum is the process that keeps migration exclusion morally defensible while protecting the global gatekeeping operation as a whole.”<sup>1</sup>

The laws of asylum present a complex condition where not everything is as it seems. This article peels back the curtain to examine the asylum regime, particularly in the United States, to reveal the legal and ideological mechanisms that perpetuate inequality and exclusion around the globe. The United Nations High Commissioner for Refugees (“UNHCR”) estimated that as of May 2023, more than 110 million people worldwide had been forced to flee from their homes.<sup>2</sup> This is the highest number ever recorded by the agency. Today, less than 1% of the world’s displaced population is offered resettlement.<sup>3</sup> This means that tens of millions of displaced persons are deprived from accessing refuge as a matter of law. This is an unsettlingly large number of displaced people. For comparison, B.S. Chimni notes that, “between 1912 and 1969 nearly 50 million Europeans sought refuge abroad and *all* of them were resettled.”<sup>4</sup> As a global community,<sup>5</sup> how can we go from resettling 100% to only 1% of those in need? The answer is as deflating as it is familiar: racism. Before 1969, almost all people seeking refuge could be categorized as “white,”<sup>6</sup> while today, approximately 75% of the world’s stateless population consists of racial minorities.<sup>7</sup> The vast majority of the world’s nonwhite population lives in the global south.<sup>8</sup>

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<sup>1</sup> Jacqueline Bhabha, *Internationalist Gatekeepers? The Tension Between Asylum Advocacy & Human Rights*, 15 HARV. HUM. RTS. J. 155, 161 (2002).

<sup>2</sup> *Refugee Facts*, USA FOR UNHCR, <https://www.unrefugees.org/refugee-facts/statistics/>.

<sup>3</sup> *Id.*

<sup>4</sup> B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 363–64 (1998) (emphasis added). *But see* Amy Davidson Sorkin, *Searching for Refuge After the Second World War*, THE NEW YORKER, <https://www.newyorker.com/magazine/2020/11/09/searching-for-refuge-after-the-second-world-war> (noting that unlike their counterparts, the European Jewish population saw more doors close than open).

<sup>5</sup> I use global community in the abstract, not to refer to an organized entity.

<sup>6</sup> *See, e.g.*, Rodríguez, *infra* note 104, at 21; *see also* IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (exploring the legal history behind determinations of “whiteness” in the United States).

<sup>7</sup> U.N. HIGH COMM’R FOR REFUGEES, “THIS IS OUR HOME”: STATELESS MINORITIES AND THEIR SEARCH FOR CITIZENSHIP 1 (2017), [https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR\\_EN2\\_2017IBELONG\\_Report\\_ePub.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR_EN2_2017IBELONG_Report_ePub.pdf).

<sup>8</sup> Marlea Clarke, *Global South: what does it mean and why use the term?*, UNIV. OF VICT.: GLO. S. POL. COMMENTS. (Aug. 8, 2018), <https://onlineacademiccommunity.uvic.ca/globalsouthpolitics/2018/08/08/global-south-what-does-it-mean-and-why-use-the-term/> (citing ANNE GARLAND MAHLER, *FROM THE TRICONTINENTAL TO*

To begin, an introduction to the basic requirements necessary to establish eligibility for asylum is due. The remainder of this introduction will provide a framework for understanding how asylum law systematically delegitimizes pleas for refuge from the global south.

### A. Asylum Law in the United States.

The United States codified the UNHCR's standards for asylum as part of the Refugee Act of 1980.<sup>9</sup> Of the avenues available to those who fear returning to their countries of origin, asylum is the most stable and semi-permanent recourse available.<sup>10</sup> Asylum promises a pathway for refugees and their families to live in the United States and to acquire citizenship.<sup>11</sup> A successful applicant is not only protected from forced return to their country, but is also allowed to work in the United States, access certain federal benefits, and petition to have family members join them in the United States.<sup>12</sup> To qualify for relief under asylum law, an applicant must meet certain substantive and procedural requirements.

The substantive legal requirements are met when an asylum-seeker satisfies the definition of "refugee" according to the Immigration and Nationality Act (the "INA"), and the applicant is not otherwise barred from receiving asylum.<sup>13</sup> Among other things, the statute requires past persecution or a well-founded fear of future persecution.<sup>14</sup> But "persecution" is not defined by statute and must be determined on a case-by-case basis.<sup>15</sup> Courts around the country have opined that "actions must rise above the level of mere harassment to constitute persecution,"<sup>16</sup> and that it must

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THE GLOBAL SOUTH: RACE, RADICALISM, AND TRANSNATIONAL SOLIDARITY (Duke Univ. Press 2018)) ("Drawing on the work of Antonio Gramsci . . . scholars use the term global South to address spaces and peoples negatively impacted by globalisation, including subjugated peoples and poorer regions within wealthier countries").

<sup>9</sup> Part II will return to the history of asylum law.

<sup>10</sup> *See, e.g.*, I.N.A § 241(b)(3) (withholding of removal); 28 C.F.R § 200.1 (protection under the Convention Against Torture).

<sup>11</sup> *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/benefits-and-responsibilities-of-asylees> (Mar. 18, 2018).

<sup>12</sup> *Id.*

<sup>13</sup> For instance, filing an application more than one year after arriving in the United States could bar someone from receiving asylum. *See* 8 U.S.C. § 1158(a)(2)(B).

<sup>14</sup> 8 U.S.C.S. § 1101(a)(42)(A). The Immigration and Nationality Act defines a refugee as someone "who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion[.]"

<sup>15</sup> *See, e.g.*, *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 991 (9th Cir. 2000) ("The determination that actions rise to the level of persecution is very fact-dependent . . .").

<sup>16</sup> *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

“rise above unpleasantness, harassment and even basic suffering.”<sup>17</sup> The persecution must also be motivated by an aspect of the asylum-seeker’s identity or ideology.<sup>18</sup> The connection between the applicant’s identity and the persecution establishes a nexus, which is required for a successful asylum application.<sup>19</sup> As such, the questions of whether someone was sufficiently harmed, such that it rises to the level of persecution, and whether that harm occurred for acceptable reasons, will require separate but interconnected answers. Additionally, the persecution must be committed either by the government (or a governmental actor) or by groups that the government will not or cannot control.<sup>20</sup>

To summarize, this means that in each case, an Immigration Judge must learn more about the asylum-seeker’s home country, including its history, geography, politics, and social dynamics to determine whether the applicant was persecuted for a valid reason, by a specified party, and to a sufficient degree.

Parts II and III will examine these requirements in more depth.

## **B. Adjusting Our Lenses.**

To understand the mechanics behind the illusion, we must become aware of the lenses through which we observe the world. Among other things, these lenses alter the interpretation of asylum law. Consider, for example, the concept of borders. Borders present more than lines on a map; they are a performance—or a spectacle<sup>21</sup>—orchestrated to reinforce an ideological separation between *us* and *them*.<sup>22</sup> As Meghan Conley observed, the establishment and performance of borders “reflect broader social, political, and economic choices about nation building and boundary making.”<sup>23</sup> The performance of borders produces societal narratives about the border. Nicholas de Genova explains that the “border spectacle”

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<sup>17</sup> *Nelson v. I.N.S.*, 232 F.3d 258, 263 (1st Cir. 2000).

<sup>18</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (Applicants must possess “an immutable characteristic: a characteristic that is either beyond [their] power . . . to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”).

<sup>19</sup> *Torres v. Mukasey*, 551 F.3d 616, 628 (7th Cir. 2008) (“An applicant for asylum must demonstrate a nexus between his alleged persecution and one of five protected grounds.”).

<sup>20</sup> *See Acosta*, 19 I. & N. Dec. at 222 (The harm must be “inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”).

<sup>21</sup> GUY DEBORD, *SOCIETY OF THE SPECTACLE* 19 (D. Nicholson-Smith trans., Zone Books 1995) (1967) (“By means of the spectacle the ruling order discourses endlessly upon itself in an uninterrupted monologue of self-praise.”).

<sup>22</sup> GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA* 3 (1987) (“Borders are set up to define the places that are safe and unsafe, to distinguish *us* from *them*.”) (emphasis in original).

<sup>23</sup> MEGHAN E. CONLEY, *IMMIGRANT RIGHTS IN THE NUEVO SOUTH: ENFORCEMENT AND RESISTANCE AT THE BORDERLANDS OF ILLEGALITY* 3 (Temp. Univ. Press 2020).

sets a *scene* that appears to be all about ‘exclusion,’ where allegedly ‘unwanted’ or ‘undesirable’—and in any case, ‘unqualified’ or ‘ineligible’— migrants must be stopped, kept out, and turned around. At the same time, the border appears to demonstrate, verify, and legitimate the purported naturalness and putative necessity of such exclusion.<sup>24</sup>

In essence, the performance at the border produces a narrative about the *scene* that does more than reject the unwanted; it justifies their exclusion.<sup>25</sup> Over time, the spectacle normalizes the notion that there should be widespread exclusion at the border.<sup>26</sup>

But how do these spectacles and narratives gain such legitimacy? The answer lies within the Gramscian notion of hegemony.<sup>27</sup> Hegemony manifests when the existing system and its narratives appear not only reasonable, but inevitable to the masses, such that any underlying inequalities may be ignored. Hegemony is, Duncan Kennedy explained:

the notion of the exercise of domination through political legitimacy, rather than through force. Hegemony is the notion of the acquisition of the consent of the governed. It is the notion that, in order to understand the modern industrial state, one has to understand its ideological power to generate consent from the masses through the creation of institutions, and organizations, and social patterns that appear legitimate to the masses of the people.<sup>28</sup>

Hegemony, then, alludes to the exercise of power in the absence of force based on

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<sup>24</sup> Nicholas De Genova, *Border Spectacle of Migrant ‘Victimisation’*, OPENDEMOCRACY (May 20, 2015), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/border-spectacle-of-migrant-victimisation/>.

<sup>25</sup> See, e.g., WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 109 (Zone Books 2010) (“[N]ation-state walling responds in part to psychic fantasies, anxieties, and wishes and does so by generating visual effects and a national imaginary apart from what walls purport to ‘do.’”); see also Bill Chappell, Tamara Keith & Merrit Kennedy, *‘A Nation Without Borders is Not A Nation’: Trump Moves Forward With U.S.-Mexico Wall*, NPR (Jan. 25, 2017, 7:07 AM), <https://www.npr.org/sections/thetwo-way/2017/01/25/511565740/trump-expected-to-order-building-of-u-s-mexico-wall-wednesday>.

<sup>26</sup> Nicholas De Genova, *Anonymous brown bodies: the productive power of the deadly US-Mexico border*, 9 FROM EUR. S. 69, 76 (2021) (“Thus, the increasing fortification of the U.S.-Mexico border, in its grand and ever-increasingly deadly performance of ‘exclusion’, is permanently accompanied nonetheless by the fact of illegalized migration.”).

<sup>27</sup> See generally ANTONIO GRAMSCI, *AN ANTONIO GRAMSCI READER: SELECTED WRITINGS 1916-1935* 189–221 (David Forgacs ed., 1988).

<sup>28</sup> Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982).

the apparent consent of the governed.<sup>29</sup> Once the public has been conditioned to view the status quo as both reasonable and inevitable, force becomes unnecessary to perpetuate inequities.

Because our lenses are tainted, in that we perceive the endurance of colonial-era hierarchies as normal, an appreciation for the magnitude of disparities requires focus.

i. *Framing Our Perspective with Third-World Approaches to International Law.*

A crucial lens through which to examine the global asylum regime is Third World Approach to International Law (TWAIL). TWAIL examines International Law from a critical, historically aware perspective.<sup>30</sup> This perspective directs our attention to the laws that perpetuate the hierarchies cemented during colonialism. Under colonialism, Eurocentric worldviews supplanted non-European worldviews, and a racial hierarchy was constructed for the distribution of labor.<sup>31</sup> Through the lens of TWAIL, we can observe that ostensibly neutral laws at the global stage reproduce racially-disparate outcomes, reflecting the unacknowledged reality that most of the world's population is contained, largely along colonial lines.<sup>32</sup> This containment is enabled by structural prejudices which inhibit self-awareness and complicate the adoption of universally egalitarian norms.

To state the obvious, the presumptive exclusion of persons from the global south from entering the global north<sup>33</sup> betrays a significant structural prejudice.

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<sup>29</sup> Carmen G. Gonzalez & Athena G. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127, 136–37 (2022) (“[W]hite supremacy is hegemonic, both in the sense of being globally dominant and also in the Gramscian sense, in that it has garnered some measure of mass consent, such that direct dominance or violence is not always necessary.”).

<sup>30</sup> James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 37 (2011) (“[A] central project of TWAIL is to challenge the hegemony of the dominant narratives of international law, in large part by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade, etc – and in inter-disciplinary ways – social, theoretical, epistemological, ontological and so on.”).

<sup>31</sup> See, e.g., Anibal Quijano & Michael Ennis, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM S. 533, 535–36 (2000) (developing the framework of “coloniality of power” to appreciate the endurance of colonialism in Latin America).

<sup>32</sup> See Achiume, *infra* note 107.

<sup>33</sup> Lara Braff & Katie Nelson, *The Global North: Introducing the Region*, in GENDERED LIVES: GLOBAL ISSUES (State Univ. of New York 2022), <https://milnepublishing.geneseo.edu/genderedlives/chapter/chapter-15-the-global-north-introducing-the-region/> (“The Global North does not refer to a geographic region in any traditional sense but rather to the relative power and wealth of countries in distinct parts of the world.”).

ii. *Making the Invisible Visible with Critical Race Theory.*

Another crucial lens is that of Critical Race Theory (CRT), which illuminates the often-ignored racial underpinnings of the American legal system. Laws and norms that do not openly discriminate, but which nonetheless favor whiteness can be revealed through the lens of CRT.<sup>34</sup> While the lens of TWAIL draws our attention towards race, race is not necessarily the focus of TWAIL. By combining the lenses of TWAIL and CRT, our focus is on the role of race in the creation and establishment of an international asylum regime, as well as on the implementation of these policies domestically.<sup>35</sup> The apparent neutrality of laws that produce racially-disparate outcomes, suggested Derrick Bell, presents a unique challenge because racialized outcomes may not be immediately obvious.<sup>36</sup> When one applies the lens of CRT, the obviousness of the racial disparities enters the frame. This lens is most appropriately applied to structures and institutions, as opposed to individuals, because that focus reveals that which is reproduced in the absence of intent, with the force of law. Thus, CRT reveals how racially disparate outcomes are (re)produced by law in the absence of bad actors.

Similarly, Stokely Carmichael and Charles Hamilton distinguish the acts of individuals, which require intent, from the (in)action of institutions, which do not:

When white terrorists bomb a black church and kill five black children, that is an act of individual racism, widely deplored by most segments of society. But when . . . five hundred black babies die each year because of the lack of proper food, shelter and medical facilities . . . that is a function of institutional racism.<sup>37</sup>

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<sup>34</sup> KHIARA BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 147 (West Academic Publishing 2018) (“CRT is an intellectual movement, a body of scholarship, and an analytical toolset for interrogating the relationship between law and racial inequality.”).

<sup>35</sup> See E. Tendayi Achiume & Asli Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 *UCLA L. REV.* 1386, 1391 (2021) (“By marking CRT as a lens we understand ourselves to be pursuing in tandem with TWAIL, we mean simply to highlight our efforts to center race as the critical analytical category for understanding the operation of contemporary global governance regimes.”).

<sup>36</sup> Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 *CAP. U. L. REV.* 571, 574 (1993) (“[T]he very absence of visible signs of discrimination creates an atmosphere of racial neutrality and encourages whites to believe that racism is a thing of the past. On the other hand, the general use of so-called neutral standards to continue exclusionary practices reduces the effectiveness of traditional civil rights laws, while rendering discriminatory actions more oppressive than ever.”).

<sup>37</sup> STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967) (quoted in KHIARA BRIDGES, *BRIDGES’S CRITICAL RACE THEORY: A PRIMER* 147 (West Academic Publishing 2018)).



In other words, even in the absence of a bad or otherwise interested actor, structural prejudices operate such that facially neutral policies nonetheless reproduce racially disparate outcomes.<sup>38</sup> Instructively, and as illustrated in Carmichael and Hamilton’s quote above, the inaction of institutions could very well be more damaging than the actions of individuals. But the actions of individuals are easier to repudiate than the inaction of institutions<sup>39</sup> because the effects of structural prejudice<sup>40</sup> are felt by those who are prejudiced and may be ignored by the rest of society.

The enduring power of structural prejudice inherent in international law, generally, and asylum law, specifically, is likely invisible if not uncomfortable or unfamiliar to many. This lack of perspective is to be expected. Charles Lawrence suggests that racism persists because our collective fear of experiencing guilt motivates our minds to ignore the persistence of racism, even in the face of ample proof to the contrary.<sup>41</sup> For instance, Leela Gandhi frames postcolonial theory as “a theoretical resistance to the mystifying amnesia of the colonial aftermath.”<sup>42</sup> This “mystifying amnesia” obscures the connection between colonial-era relationships and the present world order. Debra Thompson suggests that “racial aphasia” is a more apt description than amnesia because amnesia is unintentional. She explains:

Racial amnesia obscures the power involved in purposeful evasion, suggesting that, like a B-movie plot, we must have accidentally fallen, hit our heads and forgotten our racist past. Amnesia disavows intent. Aphasia, on the other hand, indicates a calculated forgetting, an obstruction of discourse, language and speech. . . . [I]nternational bodies and states alike profess normative and legal commitments to racial equality while racial stratification persists both between the

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<sup>38</sup> This is not unlike the ways in which well-meaning asylum attorneys and advocates reproduce the structural imbalances inherent in the process of obtaining asylum merely by participating in the process of helping someone obtain asylum. See Bhabha, *supra* note 1, at 160 (“By participating in the filtering process which sifts out worthy from unworthy forced migrants, [asylum advocates] contribute to legitimating the emerging global migration system.”).

<sup>39</sup> See Bell, *supra* note 36.

<sup>40</sup> I use the term “structural prejudice” interchangeably with institutional and structural racism.

<sup>41</sup> Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (“Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good and right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from his consciousness.”).

<sup>42</sup> LEELA GANDHI, *POSTCOLONIAL THEORY: A CRITICAL INTRODUCTION* 4 (Edinburgh Univ. Press 2d ed. 2019).

developed and developing worlds and within most, if not all, racially heterogeneous societies. White supremacy as a global institution and racism as a pervasive social structure are obscured . . . ; as a result, racism is instead reduced to abhorrent individualistic acts or attitudes.<sup>43</sup>

Because aphasia implies a deliberate “obstruction of discourse,” it occupies a space of knowing without knowing that is different than not knowing at all (as would be the case with amnesia). Rather, Thompson purports we can pretend that racial hierarchies do not exist or are insignificant, because they are ostensibly unintentional. Racial aphasia, thus, allows the global north to accept racial hierarchies as normal because they are lawful, and the aphasia persists because race-free discourse is imposed as a norm to avoid uncomfortable realities.<sup>44</sup> Over time, “[t]he promise of the post-racial society is realized not through reparations or substantive equality but in the imposition of race-free discourses that keep international and domestic racial orders firmly entrenched.”<sup>45</sup> Thus, to the extent that global apartheid appears normal and unproblematic to the masses of people, it has become hegemonic, and this hegemony is further enabled by racial aphasia.

This article employs the lenses of TWAIL and CRT to the theater of refuge. Part II explains how international law normalizes racial aphasia, including the widespread exclusion of the global south, while Part III examines the sociolegal landscape at play for an asylum-seeker from the global south. Finally, Parts IV and V consider the aftermath of the theater of refuge to conclude that we must confront the injustices playing out before us. Because the internationally-recognized definition of refugee legitimizes the widespread exclusion of the global south, it is unresponsive to the needs of today’s asylum-seekers and must be reformed. While there are several proposals to reimagine the global refugee regime,<sup>46</sup> too many of these reforms focus on dealing with backlogs and hiring more immigration judges.<sup>47</sup> These approaches tinker around the edges of a broken system and adhere to the vestiges of colonialism. We must instead affirmatively alter laws and narratives to recognize the fundamental right of all persons to qualify for refuge.

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<sup>43</sup> Debra Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMBRIDGE REV. INT’L AFFS. 133, 135 (2013) (quoted in E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 447 n. 4 (2022)).

<sup>44</sup> See Lawrence, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Will Jones & Alexander Teytelboym, *The international refugee match: A system that respects refugees’ preferences and the priorities of states*, 36 REFUGEE SURV. Q. 84 (2017).

<sup>47</sup> See, e.g., DORIS MEISSNER, FAYE HIPSMAN, & T. ALEXANDER ALEINIKOFF, *THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD* 15–16 (Migration Policy Institute 2018), <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward>.

## II. THE MECHANICS OF ILLUSION

“Borders are an ordering regime, both assembling and assembled through racial-capitalist accumulation and colonial relations.”<sup>48</sup>

With our lenses now adjusted, we are prepared to observe the mechanics of the illusion. International law ensures the inequitable distribution of persons and resources across the globe in ways that reflect the endurance of colonialism.<sup>49</sup> The maintenance of this asymmetry requires not only inaction—or that nothing be done to address the imbalance of power amongst nations—but also strict policing of movement to ensure that the poverty created by colonialism and globalization remains safely in the global south.<sup>50</sup>

### A. Asylum Was Crafted by and for the Global North.

While the United States did not formally adopt the internationally-recognized provisions for refuge until it passed the Refugee Act of 1980, the country has been involved in discussions about refuge with the global community since at least the 1930s.<sup>51</sup> The modern concept of “refugee” first emerged after the Russian Revolution. In 1921, the League of Nations joined forces with the Red Cross to create the first global refugee organization, the League of Nations High Commissioner for Refugees (LNHCR).<sup>52</sup> The LNHCR appointed Fridtjof Nansen as its Commissioner, and soon after, identity documents known as “Nansen passports” were issued to allow stateless persons to travel and work, subject to the receiving country’s limitations.<sup>53</sup> Additionally, protections for refugees were more inclusive during this time because there was no requirement that refugees explain the reason behind their displacement,<sup>54</sup> like there is today.<sup>55</sup>

The next major discussion about refugees on a global stage took place in Evian, France, which produced the Intergovernmental Committee on Refugees

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<sup>48</sup> HARSHA WALIA, *BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 2* (Haymarket Books 2021).

<sup>49</sup> See, e.g., Makau Mutua, *What is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31, 31 (1994) (“The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder by the West.”).

<sup>50</sup> *Id.*

<sup>51</sup> See REBECCA HAMLIN, *CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE 39* (Stanford Univ. Press 2021) (noting that US President FDR convened a conference in Evian, France to discuss the resettlement of Jewish refugees in 1938).

<sup>52</sup> *Id.* at 37.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See 8 U.S.C.S. § 1101(a)(42)(A).

(ICR).<sup>56</sup> The call to action at that time was the resettlement of European Jews, and for the first time, the definition of refuge hinged upon the reason behind the displacement.<sup>57</sup> Moreover, the definition of refugee at this time was subject to temporal and spatial restrictions, such that only those who had been displaced during a specific time and in a particular location were eligible for refuge. Every definition of refugee that the global community has since crafted similarly requires that the cause of displacement fit within a set of acceptable causes to establish a basis for relief.<sup>58</sup> Although the spatial and temporal requirements have shifted, they are still part of the definition.<sup>59</sup>

The presently recognized laws of asylum were written in the aftermath of the Second World War as an agreement among nations to care for the unprecedented number of displaced Europeans.<sup>60</sup> Asylum laws define a refugee as someone who is no longer in the country from which they seek refuge, and who was (or could be) persecuted for reasons connected to their identity.<sup>61</sup> This identity-driven definition originated from the horrors of the Nazi regime who murdered millions of people because of their identity. By extension, a legal regime emerged in direct response to the needs of those who were being persecuted because of their race, religion, nationality, or political opinions when the convention was formed in 1951.<sup>62</sup> This legal definition of refugee carved out protections only for those persecuted on similar grounds.<sup>63</sup>

As intended, this identity-driven definition crafted by the global north offered refuge to a substantial share of the displaced Europeans,<sup>64</sup> but Europeans were not the only ones in need of refuge. For example, delegates from India and Pakistan who participated in the deliberations about the definition of refuge were disappointed to learn that the international community had no intention of

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<sup>56</sup> HAMLIN, *supra* note 51.

<sup>57</sup> *Id.* at 39–40.

<sup>58</sup> *Id.* at 40.

<sup>59</sup> See 8 U.S.C.S. § 1101(a)(42)(A).

<sup>60</sup> Margaret G. Wachenfeld & Hanne Christensen, Note, *An Introduction to Refugees and Human Rights*, 59 NORDIC J. INT'L L. 178, 179 (1990).

<sup>61</sup> See 8 U.S.C.S. § 1101(a)(42)(A).

<sup>62</sup> Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

<sup>63</sup> See Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985); Sorkin, *supra* note 4 (Notably, the European Jewish population was not extended the same generosity).

<sup>64</sup> Gil Loescher, *UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy*, 33 REFUGEE 77, 78 (2017) (“When UNHCR was established in December 1950, Europe was the principal area of refugee concern for Western states, as the Cold War intensified and new refugee flows moved from east to west. While there were major refugee movements in the Middle East and in South and East Asia at this time, the Euro-centric orientation of the UNHCR reflected the foreign policy priorities of the United States, the hegemonic power within NATO and the Western alliance.”).

extending protection to those who—as was the case in their newly partitioned nations—were internally displaced.<sup>65</sup> Upon realizing that the United Nations only truly sought the protection of the global north and its interests, despite casting itself as an international agency, the delegate from India posited that

The United Nations should try to help not only special sections of the world's population, but all afflicted people everywhere. Suffering knew now racial or political boundaries; it was the same for us all. As international tension increased, vast masses of humanity might be uprooted and displaced. For the United Nations to attempt a partial remedy involving discrimination, whether accidental or deliberate, would be contrary to the great principles of the Charter.<sup>66</sup>

But asylum was never meant to be universally humanitarian,<sup>67</sup> and notions of racial justice were not given much weight as organizing principles by the drafters of the convention.<sup>68</sup> For example, countries were allowed to be openly racist while establishing race as a basis for protection under asylum law. Similarly, the participating nations rejected the right to seek asylum as a human right. James Hathaway explains that “the general human right to seek asylum [was] summarily rejected as ‘theoretical’ and ‘too far removed from reality.’”<sup>69</sup> This is, in effect, an admission by the drafters of an ostensibly universal humanitarian agreement meant to protect the displaced, that universally humanitarian outcomes were never intended.

## **B. Economic Domination as Racial Capitalism.**

According to Karl Marx, the genesis of capitalist production can be traced to the conquest of the global south by the global north. He wrote:

The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the aboriginal population,

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<sup>65</sup> Pia Oberoi, *South Asia and the Creation of the International Refugee Regime*, 19 *REFUGEE* 36, 40 (2001).

<sup>66</sup> *Id.* at 41.

<sup>67</sup> See, e.g., James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 *HARV. INT'L L.J.* 129, 148 (1990) (“There was likewise no commitment to grounding refugee law in the promotion of international human rights. . .”).

<sup>68</sup> Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 *UCLA L. REV.* 1536, 1571 (2021) (“Racism should not bar a sovereign state from being left alone to organize its own affairs . . . . At the same time, notions of racial equality could not tell sovereigns how to do the organizing.”).

<sup>69</sup> Hathaway, *supra* note 67.

the beginning of the conquest and looting of the East Indies, the turning of Africa into a warren for the commercial hunting of black-skins, signaled the rosy dawn of the era of capitalist production.<sup>70</sup>

In simpler terms, the brutalization of those beyond the bounded regions of the global north became the mighty weapon of capitalist production.<sup>71</sup> Similarly, Gonzalez and Mutua draw out the connection between race and class in the global economy through “[t]he concept of racial capitalism.”<sup>72</sup> They explain that it “provides a structural and historical account of the ways in which race and class are linked in the global economy.”<sup>73</sup> Likewise, Charles Mills understood white supremacy as a system that produces a “globally color-coded distribution of wealth and poverty” regardless of whether individual actors themselves harbor any racist or antiracist sentiments.<sup>74</sup>

Moreover, the persistence of the gulf between the relative wealth and power of countries, writes Chantal Thomas, is precisely the condition which produces such a “volatile dynamic of supply and demand.”<sup>75</sup> Chantal Thomas refers to this volatile dynamic as part of the “dark side of globalization.”<sup>76</sup> The dark side of globalization is the side of globalization that we all acknowledge exists for our benefit, but we prefer to not think about it because doing so unravels the feelings of guilt that stem from the understanding that the global north has no intention of changing the system which has delivered an economic and social surplus in its favor<sup>77</sup>—even in the face of glaring racial disparities.<sup>78</sup>

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<sup>70</sup> KARL MARX, *CAPITAL, VOLUME I* 915 (Penguin Classics 1990) (1867) (quoted in Carmen G. Gonzalez & Athena G. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 134 (2022)).

<sup>71</sup> See CARL SCHMITT, *NOMOS OF THE EARTH* 82, 84 (quoted in WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 57 (Zone Books 2010)) (“Beyond the line,” he explains, brutality may be exercised without regard to the law, “freely and ruthlessly.”).

<sup>72</sup> See generally, Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013) (“Racial capitalism [is] the process of deriving social and economic value from the racial identity of another person.”).

<sup>73</sup> Carmen G. Gonzalez & Athena G. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 128 (2022).

<sup>74</sup> CHARLES W. MILLS, *THE RACIAL CONTRACT* 1–2, 7 (1997) (“White supremacy can illuminatingly be theorized as based on a ‘contract’ between whites, a Racial Contract.”).

<sup>75</sup> Chantal Thomas, *What does the Emerging International Law of Migration Mean for Sovereignty?*, CORNELL L. SCH. LEGAL STUD. RSCH. PAPER SERIES (No. 13-72) 1, 54 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=%202231454](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=%202231454) (citing Chantal Thomas, *Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics*, 24 MICH. J. INT’L L. 188–89 (2003)).

<sup>76</sup> *Id.*

<sup>77</sup> See Lawrence, *supra* note 41.

<sup>78</sup> See Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 220 (1971); see also Antonia Darder, *Radicalizing the*

i. *Necessity is Not a Basis for Asylum.*

Migration based on economic necessity is deemed both illegitimate and illegal under the convention.<sup>79</sup> This is because asylum eligibility rests upon a fear of persecution,<sup>80</sup> and poverty, by itself, does not constitute persecution. Therefore, those who flee their homes for economic reasons do not qualify for asylum, because they have arguably not been persecuted. Even though the global north has precipitated the conditions which necessitate migration, there is no corresponding duty to offer refuge to those affected.

Moreover, migrants from the global south are routinely categorized as “economic migrants” and, in this way, their exclusion is legitimized because it is lawful.<sup>81</sup> Ultimately, narratives about an immigrant’s motivations matter because they often allow politicians to create a distinction between immigrants who are fleeing harm from immigrants who are seeking employment.<sup>82</sup> Both could be true at the same time, but this false distinction allows politicians to delegitimize pleas for refuge.

ii. *Climate Change is Not a Basis for Asylum.*

Climate disasters are accelerating in frequency and severity, and yet, there is no mechanism for nations to accept persons who have been displaced by climate change. The Institute for Economics and Peace has predicted that by 2050, as many as 1.2 billion people around the globe will be displaced.<sup>83</sup> Over the next 30 years,

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*Immigrant Debate in the United States: A Call for Open Borders and Global Human Rights*, 29 NEW POL. SCI. 369, 383 (2007) (“If we were to begin with an understanding that the freedom of movement constitutes a fundamental human right, then the integration of a globalizing human rights agenda, within debates on immigration policy and reform, can be understood as a most reasonable and logical conclusion.”).

<sup>79</sup> See Carlos Fernandez, et al., *Erasing the Line, or, the Politics of the Border*, 6 EPHEMERA 466, 472 (2006) (“Further, the convention specifically excludes economic grounds for refugee status, thus de-legitimizing, and so effectively illegalizing, movement that is motivated by great economic inequality and the devastation produced by the globalisation of neo-liberal capitalism.”).

<sup>80</sup> *Id.*

<sup>81</sup> Valeria Gomez & Karla M. McKanders, *Refugee Reception and Perception: U.S. Detention Camps and German Welcome Centers*, 40 FORDHAM INT’L L. J. 523, 560 (2017) (“Unfortunately, in various countries, the Refugee Convention has become an extension of migration laws to exclude individuals who are not deemed worthy of inclusion. In both Germany and the United States, the labeling of a migrant as economic has been used as a shield to exclude access to protections under the Convention.”).

<sup>82</sup> *Id.*

<sup>83</sup> INSTITUTE FOR ECONOMICS AND PEACE, ECOLOGICAL THREAT REGISTER 2020: UNDERSTANDING ECOLOGICAL THREATS, RESILIENCE, AND PEACE 4 (2020), [https://www.economicsandpeace.org/wp-content/uploads/2020/09/ETR\\_2020\\_web-1.pdf](https://www.economicsandpeace.org/wp-content/uploads/2020/09/ETR_2020_web-1.pdf).

as many as 30 million climate refugees are projected to travel to the U.S. border in search of refuge.<sup>84</sup> However, under asylum law, those displaced due to climate change do not satisfy the definition of refugee, because they arguably have not been persecuted.<sup>85</sup> Neither do climate disasters discriminate based on “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>86</sup>

The United States has not only caused and exacerbated climate change, but it has also conspired to prevent the inhabitants of afflicted lands from leaving. For example, “El Salvador and Guatemala are among the fifteen countries most at risk from environmental disaster, despite contributing the least to climate change.”<sup>87</sup> At the same time, “US-based industries have polluted our world with seven hundred times more emissions than the entire Northern Triangle of Central America, and the overall ecological debt owed to poor countries by rich ones is estimated at forty-seven trillion dollars.”<sup>88</sup> However, instead of addressing the extensive ecological debt owed to Central Americans, the United States excludes them from its borders.

Even though climate disasters can invariably be traced to activities conducted by the global north, and even though the effects of climate change disproportionately affect the global south,<sup>89</sup> there is no corresponding duty to protect foreigners from the inhospitable lands to which they are bound.<sup>90</sup> The absence of a persecutor will doom asylum claims where poverty or climate change

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<sup>84</sup> RUTH MILKMAN, DEEPAK BHARGAVA, & PENNY LEWIS, *IMMIGRATION MATTERS: MOVEMENTS, VISIONS, AND STRATEGIES FOR A PROGRESSIVE FUTURE* 293 (The New Press 2021) (citing Abraham Lustgarten, *Refugees from the Earth*, N.Y. TIMES MAG., July 26, 2020 at 8(L); John Podesta, *The climate crisis, migration, and refugees*, BROOKINGS INST. (July 25, 2019), <https://www.brookings.edu/articles/the-climate-crisis-migration-and-refugees/>).

<sup>85</sup> See Avner de Shalit, *Climate change refugees, compensation, and rectification*, 94 THE MONIST 310 (2011); Jamie Draper, *Responsibility and climate-induced displacement*, 11 GLOB. JUST.: THEORY PRAC. RHETORIC 59 (2018). *But see* Heather Alexander & Jonathan Simon, “Unable to Return” in the 1951 Refugee Convention: Stateless Refugees and Climate Change, 26 FLA. J. INT’L L. 531, 533–34 (2014) (arguing that “unable to return” could include those fleeing climate and environmental disasters).

<sup>86</sup> See 8 U.S.C.S. § 1101(a)(42)(A).

<sup>87</sup> WALIA, *supra* note 48, at 73 (citing Susan Bibler Coutin, *Exiled by Law: Deportability and the Inviability of Life*, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 357 (Nicholas de Genova & Nathalie Peutz, eds., Duke Univ. Press 2010)).

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Madeleine Diouf Sarr, *We Didn’t Start the Fire*, PROJECT SYNDICATE (Sept. 12, 2022), [https://www.project-syndicate.org/magazine/cop27-loss-and-damage-funding-least-developed-countries-by-madeleine-diouf-sarr-2022-08?utm\\_source=Project+Syndicate+Newsletter&utm\\_campaign=b8cd8efa03-sunday\\_newsletter\\_10\\_02\\_2022&utm\\_medium=email&utm\\_term=0\\_73bad5b7d8-b8cd8efa03-106587903&mc\\_cid=b8cd8efa03&mc\\_eid=9094d57b13](https://www.project-syndicate.org/magazine/cop27-loss-and-damage-funding-least-developed-countries-by-madeleine-diouf-sarr-2022-08?utm_source=Project+Syndicate+Newsletter&utm_campaign=b8cd8efa03-sunday_newsletter_10_02_2022&utm_medium=email&utm_term=0_73bad5b7d8-b8cd8efa03-106587903&mc_cid=b8cd8efa03&mc_eid=9094d57b13).

<sup>90</sup> See Luke Glanville, *Hypocritical Inhospitability: The Global Refugee Crisis in the Light of History*, 34 ETHICS & INT’L AFFS. 3, 8 (2020).



form the basis for migration.<sup>91</sup> As a result, millions of people who have fled their homes in search of shelter will not be eligible for protection.<sup>92</sup> Because the parameters of protection have never been extended beyond the European context, the mass exclusion of the global south through strict immigration and asylum laws has become normalized.<sup>93</sup> The exclusion of the global south appears so normal that it ought to be inconsequential. That is, until the reality of global apartheid settles in, revealing the spectacle.

In short, the global north spent centuries robbing the global south<sup>94</sup> and then established laws not only to ensure that they got to keep their plunder,<sup>95</sup> but also to contain the descendants of the plundered lands. The remainder of this section considers the tacit priorities at play for the global community based on the concerted exclusions reinforced by asylum law.

### C. Apartheid is Obscured by Racial Aphasia.

The most sophisticated illusion in this performance is the obscuring of global apartheid. While in theory, all persons are eligible for refuge, in practice, nations have preferences that are often, but not necessarily, in line with their geopolitical interests. In the United States, “whiteness” has long been recognized as a proxy for belonging.<sup>96</sup> Even several decades after explicitly racist laws were stricken from immigration law policy,<sup>97</sup> the globe remains racially segregated by operation of facially race-neutral policies that nonetheless trigger racially-disparate outcomes.<sup>98</sup> Consider, for example, that only the citizens of nonwhite countries are excluded from entering the global north for leisure—that is, unless they have the

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<sup>91</sup> *Id.*

<sup>92</sup> Anne Althaus, *The False Dichotomy Between ‘Economic Migrants’ and Refugees*, IOM UN MIGRATION: BLOG, <https://weblog.iom.int/false-dichotomy-between-economic-migrants-and-refugees>.

<sup>93</sup> See *supra* Part I(b).

<sup>94</sup> See generally EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF THE CONTINENT* 120 (Cedric Belfrage trans., 1973); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972).

<sup>95</sup> This is a central theme of TWAIL. See Mutua, *supra* note 49.

<sup>96</sup> See, e.g., Kitty Calavita, *Immigration Law, Race and Identity*, 3 ANN. REV. L. & SOC. SCI. 1, 7 (2007) (“Americanness itself was constituted as white.”); see also HANEY LÓPEZ, *supra* note 6.

<sup>97</sup> Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 203 (2019) (“The immigration statute imposed racially-based national-origin restrictions until 1965.”).

<sup>98</sup> See, e.g., Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 799 (2020) (“In immigration law, this effort to address inequality has been characterized by superficial or incomplete attempts to rid immigration law of racial or ethnic bias and discourage discrimination, while remediating expressly racialized harm to national origin and ethnicity as proxies for race. In this manner, immigration law is formally colorblind and race neutral regardless of its racialized impacts.”).

financial resources to convince immigration officials that they would not become paupers or economic migrants.<sup>99</sup> At the same time, citizens from Europe can travel to the United States for any purpose without having to seek a visa.<sup>100</sup> Consequently, immigration laws in the U.S.—and throughout the global north—routinely exclude nonwhite people,<sup>101</sup> even in the absence of any mention of race.<sup>102</sup>

The long-standing and lawful practice of excluding nationals of nonwhite countries, while actively admitting nationals from white countries, is part of the border spectacle. Our lenses are tainted in such a way that all we take away from the exchange is a presumption that those who belong are largely white and those who do not belong are largely not white. Thus, our lenses are tainted to obscure the reality of global apartheid.

The racial hierarchies cemented during colonialism have continued, in part, because they are upheld by international law.<sup>103</sup> As such, the persistence of the unequal distribution of wealth, territory, and opportunities based on race should not be surprising.<sup>104</sup> In fact, Patrick Wolfe defines race as “colonialism speaking, in idioms whose diversity reflects the variety of unequal relationships into which Europeans have co-opted conquered populations.”<sup>105</sup> The very existence of race, in other words, reveals the residue of unequal relationships. Hierarchies remain unacknowledged—or conveniently forgotten—in the public consciousness, such

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<sup>99</sup> See Fernandez, et al., *supra* note 79.

<sup>100</sup> This reciprocal policy between the United States and Europe, among other countries, is known as the Visa Waiver Program. See *Visa Waiver Program*, U.S. DEP’T OF STATE – BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>.

<sup>101</sup> See, e.g., Steven Sacco, *Abolishing Citizenship: Resolving the Irreconcilability Between “Soil” and “Blood” Political Membership and Anti-Racist Democracy*, 36 GEO. IMMIGR. L.J. 693, 704–05 (2022) (“In 1924, eugenics-inspired laws were passed to enforce ‘national origins’ numerical limitations (called ‘quotas’) for each country. Their goal, as U.S. Senator David Reed explained, was that “[t]he racial composition of America at the present time [] is made permanent,” by keeping out people then racialized as nonwhite. Various pretextual conditions like English literacy tests and one’s future likelihood of dependency on public assistance (becoming a “public charge”), as well as border-crossing without a visa, were deployed with the intention of further winnowing down nonwhite entry.”) (internal citations omitted).

<sup>102</sup> Of the 40 countries on the Visa Waiver Program list, most are European, but also on the list are Iceland, Australia, New Zealand, Taiwan, Japan, South Korea, and Chile. See *Visa Waiver Program*, *supra* note 100.

<sup>103</sup> See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

<sup>104</sup> See, e.g., Encarnación Gutiérrez Rodríguez, *The Coloniality of Migration and the “Refugee Crisis”*: *On the Asylum-Migration Nexus, The Transatlantic White European Settler Colonialism-Migration and Racial Capitalism*, 34 REFUGE 16, 20 (“[R]acism is the basis of the constitution of the world order and the division of the world’s population.”).

<sup>105</sup> PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE* 3, 27 (2016).

that we can ignore the persistence of global apartheid.<sup>106</sup>

While citizens from the global north tend to have access to much of the world, whether they wish to travel for leisure, education, or employment,<sup>107</sup> citizens from the global south do not have such permissive access. By virtue of their birth alone, they are presumptively barred from entering the global north.<sup>108</sup> Jacques Derrida contends that if one group in a dichotomy is subjugated, then by extension, the other group is elevated and vice versa.<sup>109</sup> Thus, belonging afforded to a particular group comes at the exclusion of others.<sup>110</sup> Those who benefit from the endurance of racial aphasia have an interest in maintaining existing structures as they are. After all, the ultimate prize is unfettered access to most of the world's territory, wealth, and opportunities. On the other side of this equation, is restricted access to most of the world's territory, wealth, and opportunities.<sup>111</sup> Thus, the most promising avenue for a citizen of the global south to escape their containment is through asylum.

Decades after the emergence of a global asylum regime, the promise of refuge remains elusive for tens of millions of asylum-seekers from the global south. In this way, as an extension of international law, asylum law helps maintain the asymmetrical legal, social, and economic advantages enjoyed by the global north over the global south. This generational windfall enjoyed by the global north extends beyond simply taking a larger part of the world's economic pie and leaving a smaller amount for the global south. Instead, the global north has leveraged the imbalance first introduced by colonialism—and presently enabled by the descendants of the same colonizers under the guise of international law—to increase its share of the pie<sup>112</sup> while containing the global south.<sup>113</sup> Stringent

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<sup>106</sup> See Thompson, *supra* note 43 (explaining racial aphasia).

<sup>107</sup> See E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 449 (2022) (“[W]hiteness confers privileges of international mobility and migration.”).

<sup>108</sup> See Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws*, 44 NOMOS: CHILD, FAM., & STATE 345, 348 (2003); Evelyn Marcelina Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B.U. L. Rev. (forthcoming 2024).

<sup>109</sup> JACQUES DERRIDA, POSITIONS (Alan Bass trans., 1972) (“[O]ne of the two terms governs the other . . . or has the upper hand.”) (cited in REBECCA HAMLIN, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE 6 (2021)).

<sup>110</sup> See, e.g., Leslie Espinoza & Angela Harris, *Afterword: Embracing the Tar-Baby – LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1597 (1997) (“Our slavery became their freedom: our degraded labor produced their ‘free labor,’ our political nonexistence, their political belonging.”).

<sup>111</sup> See Shachar, *supra* note 108 (reframing citizenship in the Global North as a form of property that is guaranteed to some and denied to others based largely on their place of birth).

<sup>112</sup> See, e.g., Paula Chakravarty & Denise Ferreira da Silva, *Accumulation, Dispossession, and Debt: The Racial Logic of Global Capitalism – An Introduction*, 64 AM. Q. 361, 364 (2012) (arguing that racial hierarchies are embedded into global institutions that reproduce the asymmetrical distribution of power and wealth across the globe).

<sup>113</sup> See, e.g., B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J.

exclusions are enabled at the global level because this ensures that global goods will be distributed in a way that continues to benefit the global north at the detriment of the south.<sup>114</sup> But rather than recognizing that the standard for protection was custom-tailored to protect non-Jewish Europeans and never meaningfully revised again, or that the standard excludes millions of nonwhite men women and children, as intended, we cling to our spectacles, through which outdated, structurally racist laws are an acceptable reality.

In sum, international law and asylum law are vestiges of colonialism that ensure the systematic exclusion of asylum-seekers from the global south under the guise of humanitarianism. While this section addressed the mechanics of illusion—including the development of asylum law and its Eurocentric and individualistic focus—the following section considers the application of these mechanics to asylum-seekers from the global south.

### III. THE MINDLESS (RE)PRODUCTION OF THE ILLUSION

The theater of refuge normalizes an inadequate system of refuge that compounds harm by upholding outdated parameters which lawfully exclude most of those in need. Under the present system, the everyday realities of the billions of people who live in the global south are preconstructed to justify their exclusion.<sup>115</sup> These preconstructed narratives permeate our everyday lives as a collection of images and understandings that inform our social perceptions surrounding the asylum regime.<sup>116</sup> As such, the spectacle is subject to structural and implicit

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REFUGEE STUD. 350, 367 (1998) (arguing that most post-Cold War policies implemented by the UNHCR “have sought to operationalize the vision of containment of the powerful donor countries.”).

<sup>114</sup> See e.g., ANTHONY H. RICHMOND, *GLOBAL APARTHEID: REFUGEES, RACISM, AND THE NEW WORLD ORDER* 71 (Oxford Univ. Press 2014) (arguing that international migration has increasingly been in response to “the uneven development of the global economy, the demands for labour in oil-rich and economically advanced societies, and the displacement consequent upon urbanization in the Third World.”).

<sup>115</sup> See, e.g., SARAH C. BISHOP, *A STORY TO SAVE YOUR LIFE, COMMUNICATION AND CULTURE IN MIGRANTS’ SEARCH FOR ASYLUM* 192 (Columbia Univ. Press 2022) (“News media and political discourse render immigrants faceless and voiceless in portrayals that show them only as problems to be solved.”).

<sup>116</sup> See De Genova, *supra* note 26, at 73; see also Michael Kagan, *Believable Victims: Asylum Credibility and the Struggle for Objectivity*, 16 *GEO. J. INT’L AFF.* 123, 125–26 (2015); Liisa H. Malkki, *Speechless Emissaries, Refugees, Humanitarianism, and Dehistoricization*, 11 *CULTURAL ANTHROPOLOGY* 377, 388 (1996) (“The bodies and faces of refugees that flicker onto our television screens and the glossy refugee portraiture in news magazines and wall calendars constitute spectacles that preclude the ‘involved’ narratives and historical or political details that originate among refugees.”).

biases<sup>117</sup> that stem from the scene at the border.<sup>118</sup>

Recall that an asylum applicant must demonstrate persecution at the hands of the right party, for the right reasons, and to a sufficient degree.<sup>119</sup> The next subsection considers what it takes to establish the right reason in the context of a particular social group. Just as with the other categories for protection, the particular social group requires applicants to articulate how they are perceived by others in their society and to establish that similarly-situated persons are also in danger.

### A. The Particulars of the Particular Social Group.

Membership in a particular social group requires an asylum-seeker to become self-aware enough to articulate how she stands apart from others in her society. Such an exercise belies an individual's multifaceted identities and experiences. She will only be eligible for refuge if she can demonstrate harm that goes beyond mere generalized violence.<sup>120</sup> If the harm feared could happen to a substantial segment of the population, or if it is not inflicted because of a characteristic of her identity, then there can be no protection under asylum law.<sup>121</sup>

In many ways, the definition of "particular social group" appears arbitrary. For instance, examples of groups that have succeeded include "Salvadoran men with tattoos erroneously perceived to be gang members,"<sup>122</sup> and "former members of the national police of El Salvador," while groups that have been rejected include "Salvadoran draft-age males not in the army,"<sup>123</sup> as well as "former members of the Mara 18 gang in El Salvador who have renounced their gang membership."<sup>124</sup>

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<sup>117</sup> *Implicit Bias*, NAT'L INSTS. OF HEALTH, <https://diversity.nih.gov/sociocultural-factors/implicit-bias> (last visited Oct. 8, 2023) ("Implicit bias is a form of bias that occurs automatically and unintentionally, that nevertheless affects judgments, decisions, and behaviors.").

<sup>118</sup> See De Genova, *supra* note 24.

<sup>119</sup> See SUSAN B. COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY 121 (2003) ("Instantiating prototypes requires not only distinguishing oneself from general populations and constructing temporally coherent narratives but also making lived realities meet legal standards.").

<sup>120</sup> See *Singh v. I.N.S.*, 134 F.3d 962, 967 (3d Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not [enough to establish] asylum . . .").

<sup>121</sup> See Anna C. Smedley-López, Heidi R. Johnson & Arléne Amarante, *SLICES: Critical Theory as Praxis and Research-Based Service Learning*, 1 HUMBOLDT J. SOC. REL. 176, 182 (2017).

<sup>122</sup> Elizabeth James, *Denver IJ Grants CAT, Withholding Relief (El Salvador, PSG)*, LEXISNEXIS (Apr. 5, 2023), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/denver-ij-grants-cat-withholding-relief-el-salvador-psg#>.

<sup>123</sup> T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 936 (1992).

<sup>124</sup> *Matter of W-G-R-*, 26 I. & N. Dec. 208, 209 (BIA 2014).

Evidently, the standard for protection requires a skillful blend of our ever-changing legal precedent and the socio-political environment of the asylum-seeker's home country.<sup>125</sup> This is an unfair and unrealistic expectation that we require for asylum-seekers to establish eligibility for refuge.

### **B. Irrelevant Trauma is Tantamount to Legal Violence.**

The UNHCR legitimizes the production of trauma when it limits the parameters of protection to such a meaningless degree. Preconstructed narratives<sup>126</sup> and restrictive laws<sup>127</sup> prejudice adjudicators who might unwittingly minimize the credibility of an asylum seeker's eligibility for refuge. And worst, much of an applicant's trauma is not legally relevant, which means that even the most patient adjudicator would not spend much time listening to the parts of an individual's personal saga that do not lead to protection. The parameters are painfully narrow, and whether an asylum-seeker wins or loses, she will likely be traumatized by the immigration machinery.<sup>128</sup>

In their article, *Legal Violence: Immigration Law & the Lives of Central American Migrants*, Menjívar and Abrego refer to this systematic delegitimization of claims as a form of legal violence.<sup>129</sup> Legal violence, they argue, “is embedded in the body of law that, while it purports to have the positive objective of protecting rights or controlling behavior for the general good, simultaneously gives rise to practices that harm a particular social group.”<sup>130</sup> For example, asylum purports to have the positive objective of refuge, but because Central Americans are routinely rejected by an ostensibly humanitarian regime,<sup>131</sup> these legally sanctioned exclusions normalize the brutalization of unsuccessful migrants.<sup>132</sup> In this way, asylum becomes legal violence when it legitimizes the disproportionate exclusion of the global south by routinely dismissing millions of pleas for refuge as irrelevant

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<sup>125</sup> See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); Fatma Marouf, *Becoming Unconventional: Constricting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. INT'L L. 487, 492 (2019) (explaining how the particular social group has become more difficult to establish).

<sup>126</sup> These include the assumption that migrants from the global south are mere “economic migrants” who are not equally entitled to protection.

<sup>127</sup> See, e.g., Shachar *supra* note 108.

<sup>128</sup> Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. L. REV. 709, 711 (2015) (describing the multiple dimensions of psychic trauma for noncitizens who “live on the edge of banishment”).

<sup>129</sup> Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law & the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380 (2012).

<sup>130</sup> *Id.* at 1387.

<sup>131</sup> Bill Ong Hing, *Mistreating Central American Refugees: Repeating History in Response to Humanitarian Challenges*, 17 HASTINGS RACE & POVERTY L.J. 359 (2020).

<sup>132</sup> See De Genova, *supra* note 24 (explaining “the border spectacle of migrant victimization”).

because their trauma does not fit within the narrow categories of protection. This exclusion can be traced from colonial-era relationships to the present. The mental images produced by such widespread exclusion, in turn, normalize the futility as well as the brutal consequences of soliciting asylum, undergoing the immigration court process,<sup>133</sup> and potentially being deported.<sup>134</sup>

The continued reproduction and normalization of this brutality should be recognized as legal violence.<sup>135</sup>

#### IV. REVEALING THE ILLUSION

“[T]he process of saving innocent victims often promises absolution to the saviours. It leaves little room to think that we might also be responsible for...migrants’ plight.”<sup>136</sup>

The final act of this inquiry is to reveal the illusion that sustains the theater of refuge. The unavoidable truth is that the United States is not the humanitarian nation it perceives itself to be. We already know why millions of people are displaced and in search of refuge; that colonialism, climate change, and restrictive, racist migration regimes are largely responsible for the displacement and containment of millions of people from the global south.<sup>137</sup> Part I introduced the lenses of TWAIL and CRT to make sense of the endurance of colonial-era notions of hierarchy. Part II explained how these notions of hierarchy were cemented through international law and why the global north still has a vested interest in maintaining these structures. Part II also explained how the UNHCR was erected by the global north to resettle displaced Europeans, and that the parameters of protection remain Eurocentric and individualistic to this day.<sup>138</sup> Part III examined and applied the standard of protection to the needs of asylum-seekers from the global south in the context of a particular social group, revealing that even the most

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<sup>133</sup> Laura Barrera, *A Better Way: Uncoupling the Right to Counsel with the Threat of Deportation for Unaccompanied Immigrant Children and Beyond*, 36 J. C. R. & ECON. DEV. 267, 269 (2023) (explaining that these court proceedings are “hostile, traumatizing, and victimizing.”).

<sup>134</sup> Sibylla Brodzinsky & Ed Pilkington, *US Government deporting Central American migrants to their deaths*, THE GUARDIAN (Oct. 12, 2015) (noting “three separate cases of Honduran men who have been gunned down shortly after being deported by the US government. Each was murdered in their hometowns, soon after their return – one just a few days after he was expelled from the US.”).

<sup>135</sup> See Menjivar & Abrego, *supra* note 129.

<sup>136</sup> Miriam Ticktin, *Thinking beyond humanitarian borders*, 83 SOC. RSCH. INT’L Q. 255, 260–61 (2016) (quoted in JAMES SOUTER, *ASYLUM AS REPARATION: REFUGE AND RESPONSIBILITY FOR THE HARMS OF DISPLACEMENT* 36 (Palgrave Macmillan 2022)).

<sup>137</sup> CONLEY, *supra* note 23, at 171.

<sup>138</sup> See Loescher, *supra* note 64.

generous reform to the existing system of refuge will not be sufficient.<sup>139</sup>

In its present composition, the UNHCR is a vehicle to help countries in the global north operationalize and legitimize the exclusion of migrants from the global south. The validity of all claims made by those in search of refuge, no matter who they are or where they come from, must be recognized under international law without prejudice. But before laws can change, public narratives must change, and this is not likely to happen unless the urgency of the need is widely affirmed.<sup>140</sup> What is necessary now is a narrative reorientation about who we are as a nation and as a global community.<sup>141</sup> What this means is that we must renegotiate the terms of refuge as a global community of equals.

However, the global north's persistent self-mythology makes it difficult to honestly reckon with the consequences of its actions. And the mere existence of a solution for the rare person who somehow navigates the U.S. asylum system, no matter how inadequate, encourages the unearned presumption that we are saviors, such that we foreclose the possibility of guilt before it can even emerge. For as long as we continue to fear facing the realities of the racist foundations upon which international law and asylum law rest, we will only deepen the wounds of division between the north and south. Inhabitants of the global north may absolve themselves of guilt where refugees are concerned without having to think too deeply about their passive complicity in perpetuating a system of refuge that only extends protection to one percent of those in need.<sup>142</sup>

The global north's collective fear of experiencing guilt motivates our minds to ignore the persistence and severity of racism.<sup>143</sup> Because racial hierarchies cemented during colonialism have persisted even in the absence of bad actors, merely tweaking the existing asylum system would only reproduce the unjust and openly racist motivations of the drafters of the convention.<sup>144</sup> And because the motivations of the drafters continue to have the effect of excluding millions of asylum-seekers from the global south—as intended—a conscious approach to remediate harm must be similarly intentional.

To this end, I propose a few parameters. First, any attempt to remediate harm must be both history and color-conscious. In the words of Fran Ansley

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<sup>139</sup> Jaya Ramji-Nogales, *Moving Beyond the Refugee Law Paradigm*, 111 AJIL UNBOUND 8 (2017) (suggesting that merely expanding the definition of refugee is not enough and that “the inadequacies of the current approach and the political consequences underline the urgency and importance of envisioning a new legal framework.”).

<sup>140</sup> See Oberoi, *supra* note 65.

<sup>141</sup> See, e.g., E. Tendayi Achiume, *Migration as decolonization*, 71 STAN. L. REV. 1509, 1553 (2019) (arguing that in light of colonialism, the debt owed is such that beyond entry, citizenship is also warranted “as primarily remedial rather than fully reparatory.”).

<sup>142</sup> See *Refugee Facts*, *supra* note 2.

<sup>143</sup> See Lawrence, *supra* note 41.

<sup>144</sup> See Desautels-Stein, *supra* note 68.



Racial subordination has been such a lynchpin of our social system for so long and has been built into our lives in so many destructive ways that I believe nothing but a color-conscious movement (and a color-conscious jurisprudence) stands a chance of successfully analyzing or opposing that subordination.<sup>145</sup>

And second, the validation of belonging should be taken as an affirmative step to remediate past harm, especially in light of the enduring effects of colonialism. Amighetti and Nuti argue that the former colonizers should incorporate into their national identities that the formerly colonized also belong.<sup>146</sup> For this to happen, a narrative reorientation is necessary. Crucially, the United States needs to “imagine a very different world,” Nevins writes,

one in which the US government does not undermine the very conditions that make life viable in migrant-sending countries such as Honduras. This would be a world in which the US state does not block those fleeing the ravages Washington has helped to produce from seeking a better life in US territorial confines—if not for reasons of common humanity, then, at the very least, as compensation for the conditions it created.<sup>147</sup>

Inaction is perhaps especially galling given the role the global north has played in creating and sustaining the conditions that continue to disproportionately benefit the north to the detriment of the south. Continued inaction—particularly in the face of such need—constitutes its own form of violence.<sup>148</sup> We can only end apartheid after we become conscious of its prevalence and begin to question the permanence of the privileges bestowed by colonialism. We cannot overcome the obfuscation of our reality until we realize that our lenses are tainted. A collective reckoning with history is necessary to disrupt this exclusionary thinking.<sup>149</sup>

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<sup>145</sup> Frances Lee Ansley, *A Civil Rights Agenda for the Year 2000: Confessions of an Identity Politician*, 59 TENN. L. REV. 593, 599 (1992).

<sup>146</sup> Sara Amighetti & Alesia Nuti, *A Nation’s Right to Exclude and the Colonies*, 44 POL. THEORY 541, 543 (2016) (“[Liberal nationalists] should accept that postcolonial migrants have a right to enter their former colonizing nation (because, historically, they are already in) . . .”).

<sup>147</sup> JOSEPH NEVINS, *MIGRATION AS REPARATIONS IN OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT*, 137 (Reece Jones ed., 2019).

<sup>148</sup> See Menjivar & Abrego, *supra* note 129; see also, *World more violent and unstable because of inaction in protecting rights of minorities, UN expert warns*, UNITED NATIONS: THE OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Oct. 21, 2022) <https://www.ohchr.org/en/press-releases/2022/10/world-more-violent-and-unstable-because-inaction-protecting-rights>.

<sup>149</sup> See Anita Tijerina Revilla, *Inmensa Fe en la Victoria: Social Justice through Education*, 24 FRONTIERS: J. WOMEN STUD. 282 (2003); Jose-Manuel Barreto, *Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto*, 3 TRANSNAT’L LEGAL THEORY 1, 3 (2012)

Having unveiled the mechanics of this illusion, we must reorient our perspectives and our narratives to affirm our shared humanity. The presumption in asylum and refugee law should be that all persons in need of refuge should be extended refuge as a matter of law. If the tables were turned, this would be the standard we would want to apply.

## V. CONCLUSION

We live in a world where the citizens of the global north enjoy nearly unrestricted mobility across the globe while they are simultaneously invested in erecting laws and borders to contain the global south. The normalization of these exclusions is a vestige of colonialism, which has managed to become hegemonic long after the formal end of colonialism. Furthermore, the United States is largely responsible for driving migration by exacerbating climate change, orchestrating forced regime changes, and facilitating economic dominance. But since its inception, the organizing principles of the UNHCR have neglected to address the asymmetric arrangements which consistently function against the interests of the global south in favor of the global north.

Our collective failure to extend meaningful refuge to the citizens of the global south exposes the illusory nature of the asylum system and calls for a radical reimagining of its founding principles. Decades after its inception, the global asylum law framework remains Eurocentric in language, application, and spirit. In this context, the UNHCR must do more to earn its legitimacy as the sole instrument dictating the terms of the global asylum regime. As the sole instrument for protection, asylum law is inadequate. The very existence of an international agreement to accept refugees offers a false promise of refuge, because the laws of asylum continue to operate under the guise of humanitarianism, even when most people in need cannot satisfy the legal definition.

Asylum law purports to aid singular individuals who merit protection upon satisfying the internationally accepted definition of refugee. But under this sorting mechanism, only one percent of the world's displaced persons are offered resettlement<sup>150</sup> while millions of claims from the global south are deemed illegitimate, regardless of their life experiences. Thus, this regime does little more than justify the existence of a system of refuge merely because it exists.

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(“The labour of constructing a Third World interpretation of human rights entails a departure from Eurocentric theories—the corpus of today’s dominant conceptualisations of rights inspired by different schools of thought. Pointing to the Eurocentric character of a certain body of knowledge is simultaneously an epistemological and a geopolitical issue, as it comprises the unveiling of a genealogical link between knowledge and history.”).

<sup>150</sup> See *Refugee Facts*, *supra* note 2.