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# ESTABLISHING A POSITIVE RIGHT TO MIGRATE AS A SOLUTION TO FOOD SCARCITY

## ABSTRACT

*Using the lenses of refugee and human rights law, this Comment examines whether food scarcity creates a positive right to migrate, and if so, what its relationship is with states' "largely unfettered domain of territorial sovereignty." If there is a right to life under human rights law, then access to food is a corollary right of equal value and any hindrance to food access is a violation of that right, regardless of whether the cause is political, civil, economic, or social. Case studies from Paraguay and Somalia illustrate how neither current refugee law nor a traditional conception of human rights remedies the situation for populations migrating due to food scarcity. Instead, this Comment proposes that where an individual's or a group's rights are being violated due to food scarcity, and where the food scarcity cannot be readily remedied in situ, then that person or group has the right to migrate internationally in order to become food secure. However, the utility of casting a positive right to migrate in the human rights mold depends on a shift to a people-centric human rights approach that transcends national borders and runs counter to the Westphalian system of state sovereignty.*

## INTRODUCTION

Between 2011 and 2013, a total of 842 million people in developing regions suffered from chronic hunger.<sup>1</sup> In 16 countries, the Food and Agriculture Organization found that food security had either not progressed at all or had deteriorated since 1990.<sup>2</sup> International conventions such as the Universal Declaration of Human Rights ("UDHR") establish that everyone has a right to life and is entitled to a standard of living that provides for adequate

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<sup>1</sup> See FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, HUNGER MAP 2013, [hereinafter HUNGER MAP] available at <http://www.fao.org/hunger/en/>. Chronic hunger, also referred to as "undernourishment," is defined by the Food and Agriculture Organization of the United Nations as "a state, lasting for at least one year, of inability to acquire enough food, defined as a level of food intake insufficient to meet dietary energy requirements." FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, HUNGER PORTAL, <http://www.fao.org/hunger/en/>.

<sup>2</sup> HUNGER MAP, *supra* note 1.

health and wellbeing, including the right to food.<sup>3</sup> Access to food is a corollary right of equal value to the right to life, and any hindrance to food access is a violation of that right, regardless of whether the cause is political, civil, economic, or social.<sup>4</sup> In addition, the UDHR, as well as other human rights conventions like the Convention on Migrant Workers, establishes that everyone is entitled to freedom of movement within one's own country and freedom to leave any country.<sup>5</sup> The question then arises, what happens when these rights are in tension with fundamental principles of state sovereignty? If one cannot achieve an "adequate standard of living," does one have the right to seek out that standard of living elsewhere, even if it is outside of one's country of origin? Freedom to move within one's country, or freedom to leave any foreign country, is not the same as a positive right<sup>6</sup> to international migration.

Using the lenses of refugee and human rights law, this Comment examines whether food scarcity creates a positive right to migrate, and if so, what its relationship is with states' "largely unfettered domain of territorial sovereignty."<sup>7</sup> Arguably, closed borders for communities facing food scarcity can cause human rights violations by the migrants' home state. In the absence of available local remedies, closed borders may prevent the vulnerable population from achieving the most basic minimum living standards recognized under customary international law<sup>8</sup> and guaranteed by binding human rights conventions.<sup>9</sup> Conversely, migration without legal recognition or international protection leaves the vulnerable population susceptible to return to their country of origin and to the same violations that prompted migration in

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<sup>3</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 25 (Dec. 10, 1948) [hereinafter UDHR].

<sup>4</sup> Ajamu Baraka, "People-Centered" Human Rights as a Framework for Social Transformation, A VOICE FROM THE MARGINS (Dec. 10, 2013), [www.ajamubaraka.com/the-human-rights-project-determined-by-the-needs-of-the-powerful/](http://www.ajamubaraka.com/the-human-rights-project-determined-by-the-needs-of-the-powerful/).

<sup>5</sup> UDHR, *supra* note 3, art. 13; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158, art. 8 (Dec. 18, 1990) [hereinafter Migrant Workers Convention].

<sup>6</sup> A positive right is "[a] right entitling a person to have another do some act for the benefit of the person entitled." BLACK'S LAW DICTIONARY (9th ed. 2009). In other words, a positive right is 'the freedom to do,' as opposed to a negative right, which is 'the freedom from.' *Id.*

<sup>7</sup> Linda S. Bosniak, *State Sovereignty, Human Right, and the New UN Migrant Workers Convention*, in WIDESPREAD MIGRATION: THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS 86 AM. SOC'Y. INT'L L. PROC. 623, 634 (1992).

<sup>8</sup> See, e.g., UDHR, *supra* note 3, art. 25.

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; see *infra* Part I.B.

the first place.<sup>10</sup> Currently, the right to migrate is granted in response to severe human rights violations in the form of refugee law.<sup>11</sup> Refugees, however, are a narrowly defined category.<sup>12</sup> Additionally, there are persuasive arguments regarding the right to not be displaced and a new and growing body of legal and political thought on environmental refugees.<sup>13</sup>

While refugee law addresses sudden, violent, or extreme deprivations, it does little to account for slow degradation of the environment or social, political, or economic changes that drive subsistence farmers from their lands and lead to international migrations. For example, in Paraguay, small family farms have slowly been taken over by large mono-crop operations run by transnational corporations.<sup>14</sup> The result has been a loss of land for small farmers and an inability to produce enough subsistence crops or to compete in the marketplace, first leading to migration to internal cities and then to migration to international destinations like Buenos Aires.<sup>15</sup> In contrast to the slow push in Paraguay, Somalis faced regional drought and famine in 2011.<sup>16</sup> As a result, more than 100,000 Somalis fled to Ethiopia and Kenya in a single year.<sup>17</sup> Neither the Paraguayan nor the Somali migrants qualified as refugees under international law.<sup>18</sup>

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<sup>10</sup> See *infra* Part I.A. Migrants without legal recognition or refugee status are not subject to the principles of non-refoulement. See INT'L ORG. FOR MIGRATION, INTERNATIONAL MIGRATION LAW: GLOSSARY ON MIGRATION, 44–45 (2004).

<sup>11</sup> Convention Relating to the Status of Refugees art. 1, 28 July 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

<sup>12</sup> A refugee is an individual who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. *Id.*

<sup>13</sup> See Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT'L L. & POL'Y 689 (1994).

<sup>14</sup> INT'L ORG. MIGRATION, PERFIL MIGRATORIO DE PARAGUAY [PARAGUAY MIGRATION PROFILE] 5 (Hugo Addone ed., 2011). [hereinafter PARAGUAY MIGRATION PROFILE].

<sup>15</sup> *Id.* at 19, 35.

<sup>16</sup> IOM Appeals for US\$ 26 Million to Assist Victims of Famine and Drought in the Horn of Africa, INT'L ORG. MIGRATION (Aug. 5, 2011), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2011/pbn-listing/iom-appeals-for-us-26-million-to-assist.html> [hereinafter *I.O.M. Appeals for US\$ 26 Million*].

<sup>17</sup> INT'L ORG. MIGRATION, *Migration Mapping Service between Somalia and Dadaab in Kenya Highlights Need for Better Protection of Drought and Famine Victims* (Nov. 22, 2011), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2011/pbn-listing/migration-mapping-service-between-somali.html>.

<sup>18</sup> See *infra* Part II.

This Comment argues that neither current refugee law nor a traditional conception of human rights remedies the situation for populations migrating due to food scarcity.<sup>19</sup> Instead, it proposes that where an individual's rights or a group's rights are being violated due to food scarcity, and where the food scarcity cannot be readily remedied *in situ*,<sup>20</sup> then that individual or group has the right to migrate internationally in order to become food secure. Establishing a positive right to migrate in the face of food scarcity may solve the problem, but it also runs the risk of leading the international community to declare victory without substantive action or security for migrants fleeing food scarcity ("food migrants"). The utility of casting a positive right to migrate in the human rights mold depends on a shift to a people-centric—as opposed to a state-centric—approach. This is because the current human rights framework is ill-equipped to handle solutions that transcend national borders and run counter to the Westphalian system of state sovereignty and nonintervention.<sup>21</sup> Further, a people-centric approach to human rights would accept non-state actors and regional actors, such as individuals, community groups, religious organizations and non-governmental organizations, as bound entities within the human rights framework and empower those entities to protect and facilitate freedom of movement for food migrants.<sup>22</sup>

Part I discusses the current state of refugee law and human rights law as the lens through which to assess the plight of food migrants. Part II examines the Paraguayan migration to Argentina and the Somali migration to Kenya following the 2011 famine. Both case studies are used to delineate the

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<sup>19</sup> See *infra* Part III.

<sup>20</sup> *In situ* refers to actions or remedies available at the location where the food scarcity or infraction occurs. Determining when *in situ* remedies are not available is a fact specific inquiry, critical to determining which food shortages give rise to the right to migrate. See, e.g., *infra* Part II.

<sup>21</sup> Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards A People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 1 (1994). The Peace of Westphalia in 1648 ended both the Eighty Years' War and Thirty Years' War and established the concept of Westphalian Sovereignty: that nation-states have complete sovereignty over their territory with no role for outside actors to influence domestic affairs. *Peace of Westphalia*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/641170/Peace-of-Westphalia> (last visited Jan. 22, 2014).

<sup>22</sup> Within the current human rights framework—where rights, like political power, is treated as zero-sum—a positive right to migrate due to food scarcity could create a conflict of rights between the rights of the migrants and the rights of the already-present, domestic population. A full analysis of this conflict of rights is beyond the scope of this Comment. However, holding all human rights as equal would naturally limit the rights of the migrants at the point in which their migration infringes upon the rights of the local population. Additionally, a people-centric approach to human rights eliminates the top-down nature of human rights and may limit or completely remove the zero-sum conflict. See *infra* Part I.C.

existence and limits of the right to migrate. Part III synthesizes the law and the case studies, and concludes that neither refugee nor human rights law, as they currently stand, provide protection for food migrants. However, establishing a positive right to migrate for communities facing food scarcity, in conjunction with a reconceptualization of the human rights framework, provides a remedy.

## I. INTERNATIONAL LAW, MIGRATION, AND HUMAN RIGHTS

Many bodies of law relate to and govern international migration, including domestic law,<sup>23</sup> conventions on refugees,<sup>24</sup> conventions on labor and migrant workers,<sup>25</sup> regional conventions,<sup>26</sup> and human rights conventions.<sup>27</sup> In order to evaluate the feasibility and implications of a positive right to migrate due to food scarcity, one must have a general understanding of the international conventions governing the principles of migration. Casting a positive right to migrate as a remedy to food scarcity raises the question: *what type of right?* Though many nations have domestic Bills of Rights,<sup>28</sup> these only provide rights to citizens and legal residents of that state, and since the problem at hand is of a global nature, an international solution is needed. Both refugee law and human rights law provide potential international frameworks for a positive right to migrate. Refugee law governs the international migration of specific vulnerable populations.<sup>29</sup> Human rights law guarantees a particular relationship between the state and all people within its jurisdiction—a relationship that is violated if the people face malnutrition.<sup>30</sup>

Part I explores the legal frameworks currently in existence, under which a positive right to migrate may be evaluated. First, Part I.A. lays the groundwork, discussing international conventions that establish a limited right to freedom of movement. Part I.B. discusses refugee law and efforts to expand the definition of refugees founded in the “right to not be displaced” and the concept of “environmental refugees.” Part I.C. addresses key internal conflicts

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<sup>23</sup> See, e.g., 8 U.S.C. § 1101.

<sup>24</sup> See, e.g., Refugee Convention, *supra* note 11.

<sup>25</sup> See, e.g., Migrant Workers Convention, *supra* note 5.

<sup>26</sup> See, e.g., American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123 (1979) [hereinafter ACHR].

<sup>27</sup> See, e.g., UDHR, *supra* note 3.

<sup>28</sup> See, e.g., art. 18 CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

<sup>29</sup> See, e.g., Refugee Convention, *supra* note 12.

<sup>30</sup> International Covenant on Civil and Political Rights, art. 4, 11, 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

of human rights law, as well as arguments that reconceiving the human rights discourse remedies those conflicts.

#### A. *International Law and Migration*

Numerous international conventions, both regional and global, contemplate a fluid global population. Indeed, freedom of movement is firmly established by international law and norms.<sup>31</sup> For example, in the UDHR, the United Nations affirmed “[e]veryone has the right to freedom of movement and residence within the borders of each State.”<sup>32</sup> The UDHR further provides: “[e]veryone has the right to leave any country, including his own, and to return to his country” but it does not provide a right to move *into* any other country.<sup>33</sup> The elevation of a limited freedom of movement to a human right has been affirmed in numerous other international conventions.<sup>34</sup> Twenty-eight years after the General Assembly adopted the UDHR, the International Covenant on Civil and Political Rights (ICCPR) reaffirmed the freedom of movement, stating: “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”<sup>35</sup>

Unlike the UDHR, the ICCPR is an international treaty that is binding on those countries that ratify it, but its guarantee of freedom of movement is restricted only to those individuals lawfully present in the country.<sup>36</sup> Further, the extent to which the freedom of movement is binding international law or that international actors obey the mandates, is debatable. For example, the United States never ratified the regional human rights convention for the Americas but did ratify the ICCPR over twenty years after it was adopted by the United Nations.<sup>37</sup> The U.S. is among many countries where treaties are not self-executing.<sup>38</sup> That is, a presidential signature on a treaty does not create a legally binding obligation unless the Senate ratifies the treaty.<sup>39</sup> In the case of

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<sup>31</sup> UDHR, *supra* note 3, art. 13.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See, e.g.*, ICCPR *supra* note 30, art. 12.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Jimmy Carter, *U.S. Finally Ratifies Human Rights Convention*, THE CARTER CENTER (June 29, 1992), <http://www.cartercenter.org/news/documents/doc1369.html>.

<sup>38</sup> *Id.*

<sup>39</sup> U.S. CONST. art. II, § 2.

the ICCPR, as with many human rights treaties, the Senate ratified with numerous reservation, abrogating the bulk of the treaty obligations.<sup>40</sup>

Regional conventions have also explicitly promoted the freedom of movement. Under the American Convention on Human Rights (ACHR), article 22, titled “Freedom of Movement and Residence,” provides for freedom of movement as well as the ability to seek asylum status, but does not guarantee receiving it.<sup>41</sup>

Noticeably absent from these documents is an affirmation of a positive right to migrate. While the conventions contemplate a freedom of movement, they are careful to set aside exceptions allowing for state sovereignty over entrants.<sup>42</sup> For example, the ICCPR states “the [rights to freedom of movement] shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. . . .”<sup>43</sup> The ACHR has a nearly identically worded provision.<sup>44</sup> These broadly worded provisions allow states to shirk the rights provided in the binding human right conventions, as illustrated by the U.S.’s 22 year ban on HIV-positive immigrants.<sup>45</sup>

Despite reservations by actors like the U.S.,<sup>46</sup> the international community has continually assumed a propensity for international movement and migration, as demonstrated by incorporating the right to freedom of movement into human rights and labor conventions such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“Convention on Migrant Workers”).<sup>47</sup> The Convention on Migrant Workers took eleven years to draft<sup>48</sup> and concerns the protection of migrants

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<sup>40</sup> See Carter, *supra* note 37.

<sup>41</sup> ACHR, *supra* note 26. The grant of asylum is legal recognition of refugee status, awarded only when the applicant demonstrates “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion.” See Refugee Convention, *supra* note 11, art. 1.

<sup>42</sup> See, e.g., ACHR, *supra* note 26.

<sup>43</sup> ICCPR, *supra* note 30, art. 12(3).

<sup>44</sup> ACHR, *supra* note 26, art. 22.

<sup>45</sup> Julia Preston, *Obama Lifts a Ban on Entry into the U.S. by H.I.V.-Positive People*, N.Y. TIMES, Oct. 31, 2009, at A9.

<sup>46</sup> See Carter, *supra* note 37; see also text accompanying note 37.

<sup>47</sup> See UDHR, *supra* note 3; Migrant Workers Convention, *supra* note 5; ICCPR, *supra* note 30; ACHR, *supra* note 26.

<sup>48</sup> Bosniak, *supra* note 7, at 635.

once they leave their home country.<sup>49</sup> Like the UDHR, the Convention on Migrant Workers explicitly provides for the limited rights to leave any state, including the migrants' state of origin, and to return to their state of origin. However, neither the UDHR nor the Convention on Migrant Workers expressly provides a right to enter a state.<sup>50</sup> Nevertheless, the Convention on Migrant Workers implies a much larger right to free movement by providing human rights protections for both regular and irregular<sup>51</sup> migrants.<sup>52</sup> That is, despite potential violations of domestic law and state sovereignty, migrant workers are guaranteed protections regardless of their means of entry.<sup>53</sup> The Convention on Migrant Workers is distinct from previous International Labor Organization (ILO) conventions in that it extends protections beyond the migrant workers to their families<sup>54</sup> and it includes "the entire panoply of civil, social, economic and cultural rights."<sup>55</sup>

Early analysts recognized that the definition of terms like "migrant worker" and "family member" would determine the real effect of the instrument and its impact on irregular migrants.<sup>56</sup> Despite the name and nominally limited purpose, the convention protects a vast majority of people residing regularly or irregularly in countries where they are not legal residents because it covers everyone in the country in which they reside, so long as they have worked at any point in that country.<sup>57</sup> These political, social, economic, cultural, and educational rights, as well as treatment equal with that of citizens,<sup>58</sup> are granted regardless of whether employment was the purpose of their migration.<sup>59</sup> However, like earlier international instruments, the convention attempts to side step the fundamental tension in international law by explicitly retaining for States their sovereign power to control the admission of migrants.<sup>60</sup> Article 79

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<sup>49</sup> The Migrant Workers Convention went into force in 2003, and by January 2014, 47 states had become parties by ratification or accession. Migrant Workers Convention, *supra* note 5.

<sup>50</sup> *Id.* art. 8.

<sup>51</sup> "Regular immigrant" refers to those immigrants in a country with legal documentation and permission. "Irregular immigrants" is used instead of the pejorative "illegal immigrant" to describe migrants who have not had their status regularized by the host state. *See id.* art. 5.

<sup>52</sup> Migrant Workers Convention, *supra* note 5.

<sup>53</sup> Migrant Workers Convention, *supra* note 5, art. 5, 7.

<sup>54</sup> Bosniak, *supra* note 7, at 635.

<sup>55</sup> *Id.* at 636.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Migrant Workers Convention, *supra* note 5, arts. 14, 16–19, 22, 23, 25, 26, 28, 30, 70.

<sup>59</sup> Bosniak, *supra* note 7, at 636.

<sup>60</sup> Migrant Workers Convention, *supra* note 5, art. 79.

reaffirms states' authority to maintain control over immigration and admission policies.<sup>61</sup> Other articles require states to take measures to end clandestine migration and stop the employment of irregular migrants.<sup>62</sup> The convention also makes it clear that states are not obligated to regularize the migrants' status,<sup>63</sup> even while guaranteeing the rights previously mentioned.<sup>64</sup> The internal tension of the Convention on Migrant Workers is clear. Irregular aliens are symbols of violated state sovereignty.<sup>65</sup> Nevertheless the Convention on Migrant Workers requires states to provide extensive labor, civil, and cultural rights to irregular immigrants "while purporting to acknowledge the states' vital interests in territorial integrity."<sup>66</sup>

As the Convention on Migrant Workers and similar instruments struggle with the tension between state sovereignty and extending human rights to all migrants, they create a strange position for a migrant. On the one hand, a migrant is free to leave their country of origin, but on the other, the migrant's ability to enter a different country may happen only at the permission of the receiving state. A more accurate term granted by these international instruments may be "freedom of departure" as opposed to freedom of movement, since the legal movement of migrants is fundamentally constrained by the willingness of states to receive the migrants.<sup>67</sup> Further, the freedom of movement is not directly tied to the *cause* of migration but to the domestic and international legal framework, though the reasons for migration may have serious impacts on the obligation of receiving states.<sup>68</sup> For instance, countries that have ratified the Convention Relating to the Status of Refugees ("Refugee Convention") have assumed an obligation with the United Nations High Commissioner for Refugees (UNHCR) to receive refugees in accordance with the Refugee Convention and their domestic laws<sup>69</sup> but have assumed no

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<sup>61</sup> *Id.*

<sup>62</sup> Bosniak, *supra* note 7, at 637.

<sup>63</sup> Status in the immigration context refers to the legal basis on which an immigrant is present in a country. Regularization of status refers to the legal procedures and processes of switching from irregular (i.e. illegal) status to a legally recognized status such as temporary worker or legal permanent resident. *See e.g.*, AM. IMMIGR. LAW. ASS'N, NAVIGATING THE FUNDAMENTALS OF IMMIGRATION LAW: GUIDANCE AND TIPS FOR SUCCESSFUL PRACTICE, 411–14 (Jill Marie Bussey et al. eds., 2014).

<sup>64</sup> Migrant Workers Convention, *supra* note 5, art. 35.

<sup>65</sup> Bosniak, *supra* note 7, at 637.

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

<sup>67</sup> *See e.g.* Migrant Workers Convention, *supra* note 5, art. 79.

<sup>68</sup> *See e.g.* Refugee Convention, *supra* note 11, art. 26.

<sup>69</sup> *Id.*, art. 35.

obligation for individuals that fall outside the scope of the convention, regardless of those individuals' humanitarian need.<sup>70</sup>

### B. Refugee Law

Refugee law provides protections for certain migrant populations that face persecution.<sup>71</sup> The Convention Relating to the Status of Refugees ("Refugee Convention") defines who qualifies as a refugee:

[A]ny person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>72</sup>

The definition does not account for "mere victims" of violence or natural disasters<sup>73</sup> and, as a result, has spawned efforts to expand the scope of protection to include anyone who has lost the prerequisites for sustaining life<sup>74</sup> including expansions to provide the "right to not be displaced"<sup>75</sup> and "environmental refugees."<sup>76</sup> Current refugee law does not provide protection for food migrants because they do not meet the persecution requirement.<sup>77</sup> Expansions geared toward the "right to not be displaced" focus on *in situ* remedies, such as preventing governments from displacing parts of their population for development projects,<sup>78</sup> but *in situ* remedies do not help in

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<sup>70</sup> See REFUGEE CONSORTIUM, *infra* note 232 and accompanying text at 34 (discussing humanitarian imperative of assisting Somali migrants during the 2011 famine).

<sup>71</sup> See Refugee Convention, *supra* note 11, art. 1.

<sup>72</sup> Refugee Convention, *supra* note 11, art. 1. The concept of refugee was originally introduced to handle the displaced populations resulting from World War II, and restricted refugee status to populations displaced prior to January 1, 1951. The definition was later expanded to include all internationally displaced individuals who met the persecution requirements. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force 4 Oct. 1967).

<sup>73</sup> See THOMAS ALEXANDER ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 798 (7th ed. 2012).

<sup>74</sup> Aristide R. Zolberg, Astri Suhrke, & Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (1989) in THOMAS ALEXANDER ALEINIKOFF, DAVI A MARTIN, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 797 (7th ed. 2012).

<sup>75</sup> Stavropoulou, *supra* note 13, at 689.

<sup>76</sup> See Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT'L L.J. 607 (2009); Gil Marvel P. Tabucanon, *Pacific Environmental Migration in a Warming World: Is There an Obligation Beyond State Borders?*, 14 VT. J. ENVTL. L. 549 (2013).

<sup>77</sup> Refugee Convention, *supra* note 11, at 28.

<sup>78</sup> Stavropoulou, *supra* note 13, at 701.

situations where there is no accountable actor controlling the drivers of migration<sup>79</sup> and is, therefore, an inadequate focus for food migrants. Expanding the concept of refugees to include environmental refugees helps in some but not all situations leading to food migration.<sup>80</sup> Part I.B.i addresses current refugee law and the “right to not be displaced” while Part I.B.ii explores possible expansions of the refugee definition to include environmental refugees.

### 1. *The Refugee Law and “The Right To Not Be Displaced”*

The line between refugees and the broader class of international migrants is notoriously difficult to draw.<sup>81</sup> The definition of refugees has both objective and subjective elements: the fear of persecution is a subjective measure of the individual experience, but actual persecution must exist objectively.<sup>82</sup> A migrant’s ability to qualify as a refugee, and to receive the legal protections that refugee status affords, is significantly constrained by the five categories of persecution.<sup>83</sup> Problematically, the common perception of refugees—individuals fleeing famine or a war zone—often do not qualify for legal refugee status because they do not have an objective fear of personal persecution under one of the five categories.<sup>84</sup> For example, in 1984, 40% of Malians migrated out of Mali. However, because drought spurred the migration and the Malians did not have fear of being persecuted for reasons of race, religion, nationality, social group, or political opinion, they did not qualify as refugees under the traditional definition.<sup>85</sup> Similarly, Malians that fled the country in 2012–2013 due to fighting between the Tuareg secessionists and government forces did not qualify as refugees unless they could demonstrate a credible fear of persecution due to political opinion, religion, or

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<sup>79</sup> See *infra* Part I.B.ii.

<sup>80</sup> See Atapattu, *supra* note 76, at 631 (noting that the environmental refugee category would exclude groups where a causal link between climate change and environmental degradation cannot be shown); see also *Environment and Heritage: Soil Degradation*, NEW S. WALES GOV’T (Sept. 26, 2013), <http://www.environment.nsw.gov.au/soildegradation/>; SARA J SCHERR & SATYA YADAV, LAND DEGRADATION IN THE DEVELOPING WORLD: IMPLICATIONS FOR FOOD, AGRICULTURE, AND THE ENVIRONMENT TO 2020, INT’L FOOD POL’Y RES. INST. (1997) (recognizing land degradation as one cause of food scarcity).

<sup>81</sup> Bosniak, *supra* note 7, at 634.

<sup>82</sup> Nicole Angelina Cudiamat, *Displacement Disparity: Filling the Gap of Protection for the Environmentally Displaced Person*, 46 VAL. U. L. REV. 891, 922, 924 (2012).

<sup>83</sup> See Refugee Convention, *supra* note 11, art. 4.

<sup>84</sup> See ALEINIKOFF, *supra* note 73, at 798.

<sup>85</sup> DIANA CARTIER, MALI CRISIS: A MIGRATION PERSPECTIVE, INT’L ORG. MIGRATION 6 (2013).

other protected grounds.<sup>86</sup> Fleeing due to fear of generalized violence does not establish grounds for refugee status under the Refugee Convention.<sup>87</sup> In other words, the Refugee Convention regime does not account for “mere victims.”<sup>88</sup>

Beyond individuals fleeing from general violence, situations in which “economic prerequisites for sustaining life have suddenly been removed equally constitute life-threatening violence” and, some argue, should also be considered as refugee generating conditions.<sup>89</sup> This would include victims of structural violence that causes starvation or victims of drought or famine, regardless of whether compounding effects of war are present.<sup>90</sup> Recognizing these deficiencies, some regional conventions have further expanded the breadth of refugee law.<sup>91</sup> For example, the African Union grants the status of refugee to internationally displaced people resulting from external aggression or “events seriously disturbing public order in either part of the whole of his country of origin or nationality.”<sup>92</sup> The Organization of American States similarly expanded its definition of refugee to people who fled their country because they were threatened by “generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>93</sup>

The counter argument against such a broad expansion of refugee law is that asylum and refugee status is a scarce political resource within the receiving country, which should be preserved for victims of persecution.<sup>94</sup> Under this

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<sup>86</sup> *Id.* at 11.

<sup>87</sup> See ALENIKOFF, *supra* note 73, at 798.

<sup>88</sup> Zolberg et al, *supra* note 74, at 797.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* A close reading of international instruments seems to favor the interpretation that states have an obligation to assist in these situations. Article 2 of the ICESCR requires states to “take steps, individually and through international assistance and co-operation . . . to the maximum of [their] available resources . . . including particularly the adoption of legislative measures.” Combined with article 11, which recognizes a right to an adequate standard of living including access to food, one could argue that states have a moral and arguably legal obligation to provide assistance to “mere victims”. ICESCR, *supra* note 9, arts. 2, 11.

<sup>91</sup> O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa, art. I, Sept. 10, 1969, 1001 U.N.T.S. 46 [hereinafter O.A.U. Refugee Convention].

<sup>92</sup> *Id.*

<sup>93</sup> Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, art. 3 (1984–1985), 17 Apr. 1998.

<sup>94</sup> The Refugee Convention is about the status and treatment of refugees that a state has chosen to treat as lawfully present and does not provide an individual right to asylum. Refugee status does not guarantee a right to permanent residence or a range of other rights guaranteed to asylum recipients but in practice the *nonrefoulement* obligation (not expel or return a refugee to territories where his life or freedom would be threatened on account of the five protected categories) creates a de facto asylum status with all the entitlements

theory, drivers of migration other than persecution are best remedied *in situ* and should not be grounds for refugee status.<sup>95</sup> In a similar vein, Maria Stavropoulou, noted immigration and refugee scholar, argues that there exists a qualified human right not to be displaced.<sup>96</sup> Displacement in this context is defined as forced, involuntary movement of people from their home or habitual residence.<sup>97</sup> Stavropoulou argues that the right not to be displaced fulfills seven key requirements necessary to be considered a human right, including being a fundamentally important social value, relevancy throughout the world, and consistency of existing law without repetition.<sup>98</sup> While this right addresses a significantly broader population than the Refugee Convention, it narrowly focuses on the countries of origin. The problem with maintaining narrow grounds for refugee status by arguing for *in situ* remedies and the right not to be displaced is that events that cause displacement are often beyond the control of the home state or any accountable political entity.<sup>99</sup> Even if the right not to be displaced can be defined clearly enough to be applied, it does not provide a remedy for the millions who are displaced but do not qualify as refugees. As such, an alternative approach is needed to provide a remedy for non-refugee displaced persons. One possibility is to expand the definition of refugee to include environmental refugees.

## 2. *Environmental Refugees As An Emerging Category*

Environmental refugee refers to a group whose right not to be displaced has been violated due to an environmental cause.<sup>100</sup> Long-term environmental degradation caused by growing populations, overuse of land, and poor farming is “becoming the most pervasive and problematic form of forced migration to

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enumerated in the Refugee Convention. The concern is over states losing control over admission and permanent residence. David A. Martin, *The Refugee Concept: on Definitions, Politics, and the Careful Use of a Scarce Resource* (1991) in THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 804–06 (7th ed. 2012); Refugee Convention, *supra* note 11, art. 33.

<sup>95</sup> Martin, *supra* note 94, at 804–06.

<sup>96</sup> Stavropoulou, *supra* note 13, at 89.

<sup>97</sup> *Id.*; REFUGEES AND DEVELOPMENT 15 (Ernst Boesch et al. eds., 1983).

<sup>98</sup> The other requirements are (1) eligibility for recognition as an interpretation of the U.N. Charter, reflection of customary law, or declaration of general principles of law; (2) cable of achieving a high degree of international consensus; (3) compatibility with the general practice of states; and (4) is precise enough to give identifiable rights and obligations. Stavropoulou, *supra* note 13, at 694; Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 615 (1984).

<sup>99</sup> See *infra* Part I.B.2.

<sup>100</sup> Atapattu, *supra* note 76, at 608.

occur.”<sup>101</sup> Scientists now estimate that millions of people will be displaced from their homes because of climate change in the coming century.<sup>102</sup> As many as 25 million displaced people will result from environmental degradation alone.<sup>103</sup> Indeed, large numbers of people around the world have already been displaced for environmental reasons, including the Yanomani in Brazil, Ogoni in Nigeria, and Bhopal in India.<sup>104</sup> However, despite the growing recognition of the environment’s role in forced migrations, there is minimal to no legal protection for people displaced because of environmental damage, mostly because of the difficulty in defining and prohibiting the actions that cause environmental displacement.<sup>105</sup>

Typically, environmental refugees arise from three situations: desertification,<sup>106</sup> rising sea levels,<sup>107</sup> and environmental conflict.<sup>108</sup> The idea of environmental refugees has been gaining traction. In 1992, the International Organization for Migration (IOM) drew distinctions between different categories of environmental refugees, contrasting emergency situations from slow onset situations; between temporary, extended, and permanent departure from homelands; and between internal and international refugees.<sup>109</sup> Subsequently, there have been numerous proposals to adopt a new Protocol on the Recognition, Protection, and Resettlement of Environmental Refugees.<sup>110</sup>

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<sup>101</sup> Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 484 (1998); Brooke Havard, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. L.J. 65, 69–70 (2007).

<sup>102</sup> Atapattu, *supra* note 76, at 636.

<sup>103</sup> Cooper, *supra* note 100, at 484; Havard, *supra* note 101, at 70.

<sup>104</sup> Atapattu, *supra* note 76, at 623; Dana Zartner, Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 1, 3 (2001).

<sup>105</sup> Stavropoulou, *supra* note 13, at 690. Consider the daunting task of defining and prohibiting all of the global factors that contribute to climate change and the subsequent rising sea levels; see Pauline Kleingeld, *Kant’s Cosmopolitan Law: World Citizenship for a Global Order*, 2 KANTIAN REV. 72, 84 (1998). See generally Tabucanon, *supra* note 76.

<sup>106</sup> Desertification refers to the slow but relentless encroachment of the deserts into previously arable land due to climate change and human-caused environmental degradation. Richard Black, *Environmental Refugees: Myth or Reality?* 4 (UNHCR, Working Paper No. 34, 2011).

<sup>107</sup> Rising sea levels will make coastal and low lying islands uninhabitable and displace populations currently living in these regions. Tabucanon, *supra* note 76, at 564.

<sup>108</sup> Environmental conflict “is the notion that environmental degradation is increasingly at the root of conflicts that feed back into refugee movements.” Black, *supra* note 106, at 8.

<sup>109</sup> *Id.* at 2.

<sup>110</sup> Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVTL. POLS. 60, 79 (2010).

Critics of the environmental refugee category note that it would exclude a large number of victims of environmental degradation where the causal link between degradation and climate change cannot be shown.<sup>111</sup> These critics argue that the legal vacuum regarding environmental refugees should be addressed generally, but it is not advisable to create an entirely new and separate legal regime.<sup>112</sup> Others contest the general idea of environmental refugees as an unhelpful and intellectually unsound category.<sup>113</sup> They view the academic case as weak because there are various explanations for migration and most significant studies have failed to demonstrate a linkage between environmental degradation and migration.<sup>114</sup>

Richard Black—a noted Geographer, who is head of the School of Global Studies at the University of Sussex and Co-Chair of the Sussex Centre for Migration Research—disputes the premise of desertification as a cause of environmental refugees.<sup>115</sup> Black also disputes the idea of environmental conflict by noting that most recent wars, like Iraq and the Congo, are more about controlling rich resources than about resource degradation.<sup>116</sup> He does concede, however, that in some instances, such as Somalia, a case can be made that environmental degradation is one of the root causes of the conflict.<sup>117</sup> Black views the idea of environmental refugee as a “seductive” creation of Northern policy makers who want to “restrict asylum laws and thus invented [the term environmental refugee] at least in part to depoliticize the causes of displacement, so enabling states to derogate their obligation to provide

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<sup>111</sup> *Id.* at 631.

<sup>112</sup> *Id.* at 636.

<sup>113</sup> *See generally* Black, *supra* note 106, at 1. By definition refugee status requires persecution and therefore a persecutor; the implication is that if Environmentally Displace Persons or Famine victims were to qualify as refugees the environment would have to be recognized as the persecuting agent. *See* Cudiamat, *supra* note 82, at 925.

<sup>114</sup> *See* Black, *supra* note 106, at 2–3.

<sup>115</sup> *Id.* at 5. Black looks to two frequently cited regions, the central Mexico and the Sahel. *Id.* He argues that, in Mexico, statistics do not show a correlation between emigration and aridity (desertification), and that there is no study showing that arid areas are necessarily degraded. *Id.* As for the Sahel, Black argues that “[f]actors such as the decline of markets for traditional cash crops . . . the development of Senegal’s groundnut basin, and subsequent mechanization of agriculture in the delta provide additional and more recent motivations to move out of the middle and upper parts of the Senegal River Valley. Moreover, such conclusions are not limited to the western Sahel, but can be extended across the continent.” *Id.*

<sup>116</sup> *See id.* at 8–9.

<sup>117</sup> “[I]n some cases, and particularly in the ‘complex political emergencies’ of the Great Lakes, Sierra Leone/Liberia, and Somalia, environmental issues can be seen to have some relevance in the development of hostilities, and a case can be made that environmental degradation forms an important root cause of the conflict.” *Id.* at 9.

asylum.”<sup>118</sup> This analysis, however, ignores the fact that the literature mostly argues for an extension of asylum to environmentally displaced persons.<sup>119</sup> Black’s refutations are useful in demonstrating the difficulties presented by an effort to expand the definition of refugee. However, they are unpersuasive because they do not account for the fact that environmental degradation and climate change have undoubtedly resulted in displaced populations,<sup>120</sup> despite the difficulty of isolating environmental changes as a driver for migration in many circumstances.<sup>121</sup>

The discussion of environmental refugees is enlightening for two reasons. One, it illustrates one attempt at expanding the refugee concept from strict persecution of individuals to a broader relief for “mere victims” of rising sea levels, environmental degradation, and environmental conflict.<sup>122</sup> The subtle underlying discourse involves the tension of the individual’s freedom of movement and the sovereign state’s prerogative to close its borders.<sup>123</sup> Assigning refugee status to a group creates a moral and legal imperative to admit the migrant.<sup>124</sup> Second, environmental degradation is one cause of food scarcity<sup>125</sup> and the resulting migration. These migrants have been forced from their homes and, therefore, represent an obligation by states to receive migrants who’s right not to be displaced has been violated.<sup>126</sup>

### C. Human Rights

Vulnerable populations facing food scarcity are unable to achieve the most basic human rights, such as the right to life and the right to adequate food.<sup>127</sup> Creating a new human right—such as the positive right to migrate—may offer a limited solution because it establishes both a moral foundation and

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<sup>118</sup> *Id.* at 10–11.

<sup>119</sup> *Id.* at 11.

<sup>120</sup> Atapattu, *supra* note 76, at 607.

<sup>121</sup> *Id.* at 630–31.

<sup>122</sup> See Black, *supra* note 106, at 8.

<sup>123</sup> Martin, *supra* note 94, at 804–06.

<sup>124</sup> *Id.*

<sup>125</sup> New South Wales Government, *Environment and Heritage: Soil Degradation* (Sept. 26, 2013), <http://www.environment.nsw.gov.au/soildegradation/>. Land degradation—such as desertification—results from improper agriculture, pastoral, or industrial use and is often exacerbated by climate change. *Id.* Land degradation results in reduced yields and, if left un-remedied, will lead to abandonment of the degraded land. See generally Sara J SCHERR & SATYA YADAV, *supra* note 80.

<sup>126</sup> See e.g., ICCPR, *supra* note 30, art. 6.

<sup>127</sup> See *infra* Part II.

international legal standard to guide international behavior.<sup>128</sup> However, human rights have a complex history fraught with internal tension and cultural dissonance.<sup>129</sup> The viability of a human rights solution hinges on reframing the dialogue from a state-centric to a people-centric approach. That is, it should move away from an explicit focus on constraining state actions, to an approach that focuses on the general population to establish, enforce, and obey, human rights obligations.<sup>130</sup>

### 1. *Evolving Concepts of Human Rights Law*

Human rights are, tautologically, rights that every human is entitled to enjoy as a function of his or her humanity.<sup>131</sup> Most law can be described as functioning on two congruent levels: prescriptive rules of conduct and procedural rules.<sup>132</sup> Similarly, rights exist on two corresponding levels.<sup>133</sup> The correlative of prescriptive procedural rules and duties are statutes and case law.<sup>134</sup> The prescriptive laws stem from underlying positive rights—divine, natural, or ideological in origin.<sup>135</sup> The general concept of human rights comes from this second, higher level of natural law.<sup>136</sup> However, the effectiveness of protection depends directly on the liberties established in the relevant prescriptive law.<sup>137</sup>

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<sup>128</sup> ANDREWS, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 6 (1987) (describing how human rights law translates moral-laden natural law into prescriptive statutory law).

<sup>129</sup> See Makau Matua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201 (2001) [hereinafter *Savages, Victims, and Saviors*].

<sup>130</sup> See Baraka, *supra* note 4, at 204; Makau Matua, *The Transformation of Africa. A Critique of the Rights Discourse*, in INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT (Felipe Gomez Isa & Koen de Feyter, eds., 2009) [hereinafter *The Transformation of Africa*].

<sup>131</sup> Abdullah Ahmed An-Na'im, *Introduction: Expanding Legal Protection of Human Rights in African Contexts*, in HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 3 (Abdullah Ahmed An-Na'im ed., 2003).

<sup>132</sup> ANDREWS, *supra* note 128, at 5.

<sup>133</sup> See *id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* For instance, the law "you shall not kill" is both a prescription on the act of killing and the grant of a positive right to not be killed. The second level is the higher moral founding of these prescriptive laws. *Id.*

<sup>136</sup> See *Savages, Victims, and Saviors*, *supra* note 129, at 202. To take two examples from the UDHR: Article 1 establishes that "[a]ll human beings are born free and equal" and Article 21 states that everyone "has the right to take part in the government of his country." UDHR, *supra* note 3, arts. 1, 21. The equality of human beings or the superiority of democratic government are clear examples of rights do not have their origins in codified prescriptive laws but in moral value judgments.

<sup>137</sup> ANDREWS, *supra* note 128, at 6. In the United States, the equality of human beings was not achieved until prescriptive laws—namely the 13 and 14 amendments and civil rights legislation—afforded protection to that right. See *id.*

Though not formulated as “human rights” until the creation of the UDHR in 1948, there have been multiple historical stages of development of human rights.<sup>138</sup> Beginning in the Enlightenment, European philosophy was focused on economic and political rights.<sup>139</sup> These first generation rights were mostly negative obligations for the government not to interfere with individual liberties.<sup>140</sup> They eventually expanded to include standards of justice, freedom of trade, and expression.<sup>141</sup> Second generation human rights focused on rights of working class, including rights of assembly, suffrage, antidiscrimination and the extension of rights to members of various classes, races, and genders.<sup>142</sup> These second generation rights created a positive duty on governments to act in order to ensure the realization of these rights.<sup>143</sup> The third generation of human rights development is the ongoing inclusion of socio-economic rights, such as protection for the elderly, unemployed, destitute, and infirm, and the obligation of providing education, and healthcare.<sup>144</sup> However, many countries have “balked at enshrining these as fundamental human rights.”<sup>145</sup> These third generation rights place an emphasis on solidarity and are most closely associated with collectives, as opposed to the individual emphasis of first generation Western rights.<sup>146</sup>

Within the category of third generation rights, human rights law establishes that everyone is entitled to an adequate standard of living.<sup>147</sup> The UDHR states that it is the right of everyone to obtain a standard of living “adequate for the health and well-being of himself and of his family, including food.”<sup>148</sup> It is important to note that the UDHR is a General Assembly resolution and is not a legally binding instrument: “[i]t includes rights which have only limited legal substance in international law . . . and it is more a statement of principle than a treaty.”<sup>149</sup> Nevertheless, in identical language, the International Covenant on

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<sup>138</sup> *Id.* at 8; see e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 76 (Thomas J. Cook ed., 1947) (proposing a social contract between the state and citizens).

<sup>139</sup> ANDREWS, *supra* note 128, at 8.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* These rights rose out of the industrial revolution and social unrest of the late 19<sup>th</sup> and early 20<sup>th</sup> century.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> ICESCR *supra* note 9, art. 11.

<sup>148</sup> UDHR, *supra* note 3, art. 25.

<sup>149</sup> ANDREWS, *supra* note 128, at 11.

Economic, Social, and Cultural Rights (ICESCR), which is a binding agreement, affirms the rights to health and food.<sup>150</sup> The ICESCR goes further to state that it is “the fundamental right of everyone to be free from hunger,” and calls for international cooperation in order to improve production, conservation, and distribution of food and to educate on nutrition, as well as reforming agrarian systems to utilize efficiently and develop natural resources.<sup>151</sup> The ICESCR also calls for international cooperation to balance food import and export to “ensure and equitable distribution of world food.”<sup>152</sup> This seems to recognize the fact that food scarcity, including famines, is a preventable man-made occurrence resulting from poor distribution and not from natural disasters.<sup>153</sup> The ICESCR also implies that each state has a duty to monitor food supplies and preventing scarcity, a duty clearly articulated in later conventions.<sup>154</sup>

The human rights discourse emphasizes the conflict of political philosophies and pits the first and second generational rights of the individuals against the third generational principle of collective solidarity.<sup>155</sup> Nevertheless, there appears to be general agreement on a few core human rights.<sup>156</sup> These accepted human rights include the rights to life, liberty, freedom from slavery, freedom from torture, due process, freedom of thought, freedom of speech, and freedom of assembly.<sup>157</sup> The right to life is arguably the most fundamental and universally accepted of all human rights.<sup>158</sup> What remains disputed is the universality of human rights—to what extent there should be a “margin of appreciation” that allows treatment of even these core human rights to vary between different communities<sup>159</sup>—and if human rights can be validated through a state-centric approach.<sup>160</sup>

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<sup>150</sup> ICESCR *supra* note 9, arts. 11, 12.

<sup>151</sup> *Id.* art. 11.2(a).

<sup>152</sup> *Id.* art. 11.2(b).

<sup>153</sup> See *infra* Part II.A; AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 2 (1981) (Arguing that famines result from people not having enough food to eat due to changing entitlements, not due to actual food scarcity in the market).

<sup>154</sup> See Food Assistance Convention, arts. 2, 4, C.N.215.2012.TREATIES-XIX.48 (May 9, 2012); see also *infra* Part III.

<sup>155</sup> ANDREWS, *supra* note 128, at 23.

<sup>156</sup> *Id.* at 26.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; see e.g., Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 Dec. 1948) 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (144 states are parties to the convention).

<sup>159</sup> ANDREWS, *supra* note 128, at 24.

<sup>160</sup> See Baraka, *supra* note 4.

## 2. *The Movement Toward People-Centric Human Rights*

The value of international human rights standards, aside from helping establish customary international law, is that they are legally binding and universally valid on all states that have ratified the relevant treaty.<sup>161</sup> Human rights law is state-centric, focusing on constraining state action and relying on states to self-regulate and enforce the international doctrine.<sup>162</sup> The law affords fundamental rights and freedoms to all persons subject to the jurisdiction of the state, making human rights “a matter of state responsibility, [which] means that an injury or harm is not a human rights violation unless the state is implicated in its happening.”<sup>163</sup> Human rights law is composed of binding treaties that are negotiated by states that intend to respect the rights set forth.<sup>164</sup>

The state-centric structure of human rights is cogent since all of international law is organized around the fundamental concept of state sovereignty.<sup>165</sup> However, a state-centric approach is ill-equipped to handle human rights for two reasons. First, socio-economic interdependence and political interactions now regularly transcend national borders.<sup>166</sup> Since the enshrinement of human rights in the UDHR, there has been a marked growth of international activities—like global climate change and refugees—that cannot be regulated by a single state.<sup>167</sup> Additionally, there has been a staggering growth in international actors, such as international non-governmental organizations, and transnational corporations, which are not recognized by the state-centric international human rights law.<sup>168</sup> Second, human rights should represent the rights of all humans, but the formalization of human rights in the state-centric system resulted in a few powerful states

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<sup>161</sup> An-Na'im, *supra* note 131, at 1.

<sup>162</sup> *Id.*; see also *Savages, Victims, and Saviors*, *supra* note 129, at 211 (noting that the UDHR represented “the first time [that] the major powers drew a line demarcating impermissible conduct by states toward their own people and created the concept of collective responsibility for human rights”).

<sup>163</sup> An-Na'im, *supra* note 131, at 1.

<sup>164</sup> *Savages, Victims, and Saviors*, *supra* note 129, at n.76. For example, the ICCPR sets forth the rights of the individual and then declares the intent to bind the parties, stating: “[e]ach State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” *Id.* (quoting ICCPR, *supra* note 30, art. 2).

<sup>165</sup> Claudio Grossman & Daniel D. Bradlow, *supra* note 21, at 1 (1994). Sovereignty is defined as the principle that each state is the master of its own territory except where limited by treaties or international law. *Id.*

<sup>166</sup> See *id.* at 1–2.

<sup>167</sup> *Id.* at 6.

<sup>168</sup> *Id.* at 7.

bequeathing their rights framework to the rest of the world,<sup>169</sup> as opposed to the bulk of humanity declaring these (or other) rights for themselves.<sup>170</sup> The result is a lack of universal acceptance that threatens to cripple the human rights system.<sup>171</sup>

Because the foundation of human rights lies in a moral grounding, and because there are few rules that have received universal moral acceptance, there is no universal agreement on the exact content of Human Rights.<sup>172</sup> Nevertheless, for most of the human rights establishment the universality of human rights—including the assumptions, values, and legal framework—is seen as “a natural evolution of progressive global relations” and is uncontested.<sup>173</sup> In many ways this is a gross mischaracterization that ignores the influences of power, race, and ideology.<sup>174</sup> The body of human rights law is fundamentally Eurocentric and stems from a time when Western, white supremacist, colonial, capitalist, and patriarchal states dominated the international community.<sup>175</sup>

As noted human rights scholar Makau Mutua points out, it is “[p]recisely because of this cultural and historical context, [that] the human rights movement’s basic claim of universality is undermined.”<sup>176</sup> For example, only “individuals who have suffered specific abuses arising from the state’s transgression of *internationally recognized human rights* [such as] an individual subjected to torture by a state” are treated as victims, “whereas a person who dies of starvation due to famine or suffers malnutrition for lack of a balanced diet is not regarded as a human rights victim.”<sup>177</sup> Mutua highlights an important element of the current human rights regime that drives at the heart of violations faced by food migrants: the system first defines who is a victim of human rights abuses and then seeks to reconstruct societies to reduce the

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<sup>169</sup> See Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1109 (2011).

<sup>170</sup> See Baraka, *supra* note 4.

<sup>171</sup> *The Transformation of Africa*, *supra* note 130, at 899.

<sup>172</sup> ANDREWS, *supra* note 128, at 6; *Savages, Victims, and Saviors*, *supra* note 129, at 206 (“What, for example, are fundamental human rights, and how are they determined? Do such rights have cultural, religious, ethical, moral, political, or other biases?”).

<sup>173</sup> Baraka, *supra* note 4.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; *Savages, Victims, and Saviors*, *supra* note 129, at 204.

<sup>176</sup> *Savages, Victims, and Saviors*, *supra* note 129, at 204–05.

<sup>177</sup> *Id.* at n.11.

number of victims only of the type that it recognizes.<sup>178</sup> This narrow definition of victim highlights the second-class status of economic and social rights within the human rights discourse.<sup>179</sup>

The Western traditions emphasize political and civil liberties of the individual, as well as the right to life and property.<sup>180</sup> However, for people lacking a fundamental means of survival, traditional Western rights pale in significance to rights that guarantee the basic necessities.<sup>181</sup> Therefore, it may be “morally repugnant” to place the Western rights above economic or social rights.<sup>182</sup> This distinction shows the sharp divide between the West, or global North, and the global South on the content of human rights.<sup>183</sup>

Legitimization of the human rights regime requires a participatory, bottom-up process that is driven by the experiences of the afflicted.<sup>184</sup> Further, collectives and communities are integral to the functioning of many societies around the world.<sup>185</sup> If human rights are going to enjoy universal legitimacy, the Western individualist focus must be “tempered with communalist or group oriented approaches”<sup>186</sup> that provide for third generation human rights. The current system fails to wrestle with the underlying economic and political philosophy and indirectly sanctions political democracy and free market capitalism.<sup>187</sup> Critically, the current system wrongly equates achieving human dignity with containing despotism and therefore seeks a society that avoids political tyranny but makes no effort to remedy economic tyranny.<sup>188</sup> Economic powerlessness must be addressed.<sup>189</sup>

This again emphasizes a startling dichotomy. Countries may recognize the right to life but not recognize economic rights. Yet economic and social rights are necessary for one to earn enough, or grow enough food, to survive. Is access to food the equivalent of a right to life or, because it is removed by the

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<sup>178</sup> *Id.* at 203.

<sup>179</sup> *Id.* at n.11.

<sup>180</sup> ANDREWS, *supra* note 128, at 7.

<sup>181</sup> *Id.* at 8.

<sup>182</sup> *Id.* at 7.

<sup>183</sup> *Id.*

<sup>184</sup> Baraka, *supra* note 4.

<sup>185</sup> *The Transformation of Africa*, *supra* note 130, at 899.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 922.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

necessity of work (either by subsistence agriculture or earning enough money to buy food), is it “merely” an economic right?<sup>190</sup> If access to food is an economic right that is not valued by the West, then the fundamental right to life is a misnomer. It is not a positive right to life, but rather freedom from a state arbitrarily taking one’s life. However, if the former is true, and access to food stands on par with a right to life, secondary questions are raised: is the right to migrate due to food scarcity an individual right, a collective right, a political right, an economic right, or some combination thereof and how does this influence the ability to migrate between states and the obligation of receiving states?

Since food scarcity has social, economic, political, and environmental causes,<sup>191</sup> this Comment argues that the right to migrate due to food scarcity is a complex amalgamation of these human rights categories. However, trying to categorize this proposed right into the old generational distinctions is like trying to force a square peg into a round hole. Much of the confusion is due to the state-centered treaty process that creates a “top-down and conservative understanding of available human rights.”<sup>192</sup> There is no problem translating the global ideals to local realities if the structural process is inverted.<sup>193</sup> Reversing the perspective, it is easy to see that if there is a right to life, then access to food is a corollary right of equal importance and any hindrance to food access is a violation of that right, regardless of whether the cause is political, civil, economic, or social.

To analyze the right to migrate based on food scarcity, the right must be removed from the theoretical and placed in the actual. An examination of famine situations and economic-driven food scarcity provide a means to delineate the scope of the right to migrate based on food scarcity.

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<sup>190</sup> See *infra* Part II.

<sup>191</sup> *Id.*

<sup>192</sup> Baraka, *supra* note 4.

<sup>193</sup> *Id.*

## II. EXAMINING GLOBAL SITUATIONS OF FOOD SCARCITY: FAMINES AND THE DISPLACEMENT OF SMALL FARMERS.

Famines present a particularly stark and mortal form of food scarcity.<sup>194</sup> However, famines have significant economic underpinnings, and it is not always easy to draw the line between famine and less extreme forms of food scarcity.<sup>195</sup> Part II examines the general causes of famine-type food scarcity, two situations of food migration, and the reactions of the primary receiving state. Section A discusses Somalia, a country that faced a famine in 2011, in which more than a 150,000 people migrated to Kenya.<sup>196</sup> Section B focuses on Paraguay and the complex relationship with its neighboring states that has created food scarcity for small farmers and driven many to migrate to Argentina.<sup>197</sup> The drivers of Paraguayan rural migration are examined, followed by a brief look of the liberalization of Argentine immigration laws.

### *A. Famine Situations and the Case of the 2011 Somali Famine*

Famines present an extreme food scarcity situation where the right to life is unambiguously threatened. Despite the clear humanitarian threat presented by famines, their causes are not solely political, environmental or economic, which makes addressing famines particularly difficult within the current refugee or human rights regimes. Part II.A.i explores the intricacies of the causes of famines. Part II.A.ii addresses the Somali Famine of 2011 and the Kenyan response, showing that the displaced populations occupy an ambiguous status somewhere between economic migrants and environmental refugees.

#### *1. Understanding Famines*

To the mind of most Westerners, the word famine conjures images of dry fields and starving subsistence farmers. However, famine is often a man-made,

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<sup>194</sup> SEN, *supra* note 153, at 40. It is estimated that 260,000 Somalis died from the 2011 famine, half of them under the age of six. Associated Press, *Somalia: Famine Toll in 2011 Was Larger Than Previously Reported*, N.Y. TIMES (Apr. 29, 2013), <http://www.nytimes.com/2013/04/30/world/africa/somalia-famine-toll-in-2011-was-larger-than-previously-reported.html>.

<sup>195</sup> SEN, *supra* note 153, at 162.

<sup>196</sup> I.O.M. *Appeals for US \$26 Million*, *supra* note 16.

<sup>197</sup> See *infra* Part II.B.i.

and therefore avoidable, phenomenon.<sup>198</sup> While a full examination of the causes of famine exceeds the scope of this Comment, a secondary effect of famine is the tendency for communities to migrate away from the affected areas.<sup>199</sup> Therefore, a general understanding of the factors that cause famine-related migration assists in understanding how famine victims fit within the international migration framework.

Famine is a widespread, extreme, and protracted shortage of food that often results in starvation.<sup>200</sup> A lack in the actual quantity of food is only one possible cause of famines.<sup>201</sup> Professor Amartya Sen views famines as economic disasters, not just food crisis,<sup>202</sup> noting that starvation results from people not *having* enough food to eat, which does not necessarily equate with there not *being* enough to eat.<sup>203</sup> The extent to which food supply influences famine and starvation is dependent upon entitlement relations<sup>204</sup> that determine the distribution of food between different parts of the community.<sup>205</sup> The mismanagement of food distribution can create famine.<sup>206</sup> The ECESCR, which calls for governments to cooperate in the equal distribution of food, apparently recognizes this reality.<sup>207</sup>

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<sup>198</sup> See Cudiamat, *supra* note 82, at 922; Andrew E. Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 279–80 (Jan. 1995).

<sup>199</sup> See generally SEN, *supra* note 153, at 56, 87–88, 119. During the Great Bengal Famine of 1942–43 there was mass peasant immigration to Calcutta; at the peak of the Ethiopian Famine of 1972–74, 60,000 people had migrated to Addis Ababa and were living in refugee camps; the famines which plagued the Sahel in 1972–1973 drove the pastoral population to camps in the South. *Id.*

<sup>200</sup> *Id.* at n.2 (reporting that various scholars define famine as: (1) “food shortage [that] is either widespread or extreme if not both, and that the degree of extremity is best measured by human mortality from starvation;” (2) “[a]n extreme and protracted shortage of food resulting in widespread and persistent hunger, evidenced by loss of body weight and emaciation and increase in the death rate caused either by starvation or disease resulting from the weakened condition of the population;” and (3) “an economic and social phenomenon characterized by the widespread lack of food resources which, in the absence of outside aid, leads to death of those affected.”).

<sup>201</sup> *Id.* at 162.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1. But see Peter Bowbrick, *The Causes of Famine: A refutation of Professor Sen’s Theory*, FOOD POLICY, 105 (May 1986) (using the Bengali Famine to contest Sen’s “demand side analysis”).

<sup>204</sup> Exchange entitlement is the bundle of commodities that an individual can acquire in exchange for what he owns. Exchange occurs either through trading, production, or a combination of the two. Exchange entitlements are determined by (1) if an individual can find employment, at what wage and for how long; (2) what he can earn by selling non-labor assets; (3) what he can produce on his own; (4) the cost of purchasing resources and the value of the products he can sell; and (5) social security benefits and entitlements and the cost of taxes. SEN, *supra* note 153, at 3–4.

<sup>205</sup> *I.O.M. Appeals for US\$ 26 Million*, *supra* note 16.

<sup>206</sup> Shacknove, *supra* note 198, at 922.

<sup>207</sup> ICESCR, *supra* note 9, art. 11.2(b).

Famine-driven migrants are not always permanent “refugees,” even in the broad sense of the word.<sup>208</sup> Many Ethiopians in the 1970s avoided institutionally distributed relief and “feeding points” that would have potentially resulted in large numbers of permanent internally displaced persons or “refugees,” and returned to their homelands when the crisis passed.<sup>209</sup> Similarly, the people that migrated south during the Sahel droughts and famines of the 1970s returned north afterwards.<sup>210</sup> As Professor Sen notes, the problem for the Sahel is one of fluctuating economic circumstance between wet and dry years, as opposed to a complete collapse of economic potential in the North.<sup>211</sup> In both cases, the vulnerable populations did not suffer from persecution as defined in the Refugee Convention and, therefore, did not qualify as refugees under international law.<sup>212</sup> Nevertheless, in most situations, the government’s inability to support famine victims directly enhances the vulnerability of environmental and economic refugees that are forced to relocate because of a shortage of food.<sup>213</sup>

In Africa, food shortages have traditionally been attributed to four factors: inadequate education of African farmers, low consumer prices for agricultural products, unstable political climate, and growing population.<sup>214</sup> Both the first and fourth factors address farmers’ actual ability to produce sufficient food for the population, but in most famines it is the distribution, not the food quantity, which is the underlying culprit for shortages.<sup>215</sup> African governments have historically been criticized for implementing self-defeating policies that promote low consumer prices for food, which provides “little incentive for the primary producers, the small African farmers, to contribute to agricultural output even when weather conditions are favorable, since their crops will not yield profits.”<sup>216</sup> Yet the food price crisis of 2008<sup>217</sup> was not beneficial to rural

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<sup>208</sup> Black, *supra* note 106. In fact they do not qualify for any refugee status because they are not the victims of persecution. *See supra* Part I.B.

<sup>209</sup> Black, *supra* note 106, at 6.

<sup>210</sup> SEN, *supra* note 153, at 124.

<sup>211</sup> *Id.*

<sup>212</sup> *See* Refugee Convention, *supra* note 11.

<sup>213</sup> Cudiamat, *supra* note 82, at 922.

<sup>214</sup> Joy A. Weber, *Famine Aid to Africa: An International Legal Obligation*, 15 BROOK. J. INT’L L. 369, 373 (1989).

<sup>215</sup> *See* Cudiamat, *supra* note 82, at 922.

<sup>216</sup> Weber, *supra* note 214, at 374–75.

<sup>217</sup> The economic down turn of 2008 caused global food prices to rise by 25%, with the price of corn doubling from the price in 2006 and wheat prices reaching a 28-year high. *The World Food Crisis*, N.Y. TIMES (Apr. 10, 2008) available at, <http://www.nytimes.com/2008/04/10/opinion/10thu1.html>.

households because, despite also being producers, many rural households are net purchasers of staple food.<sup>218</sup> In fact, pastoralists, small farmers, ranked among the most adversely affected populations.<sup>219</sup> This leaves the third factor, which most significantly implicates the obligation of governments to ensure access to food.

## 2. *The 2011 Somali Famine and Kenya's Response*

In the summer of 2011, famine was declared in five parts of southern Somalia.<sup>220</sup> The famine was partially the result of a severe regional drought that also affected parts of Kenya, Ethiopia, and Djibouti,<sup>221</sup> increased food prices,<sup>222</sup> and al-Shabaab militants preventing food deliveries.<sup>223</sup> Ongoing fighting between Somali militias and the Transitional Federal Government since May 2009 had resulted in increasing levels of displacement and made humanitarian assistance difficult.<sup>224</sup> As a result, many Somalis sought refuge and relief in Kenya and Ethiopia.<sup>225</sup> At the peak of the migration, approximately 1,400 Somalis arrived in Kenya each day.<sup>226</sup> The IOM and its partners transported 100,000 dehydrated and starved Somalis from the border to camps in Kenya and Ethiopia.<sup>227</sup>

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<sup>218</sup> PAUL HARVEY, KAREN PROUDLOCK, EDWARD CLAY, BARRY RILEY, & SUSANNE JASPARS, FOOD AID AND FOOD ASSISTANCE IN EMERGENCY AND TRANSITIONAL CONTEXTS: A REVIEW OF CURRENT THINKING, 7 (Humanitarian Policy Group, June 2010).

<sup>219</sup> Other significantly affected populations were the rural landless, displaced persons, and urban poor. *Id.*

<sup>220</sup> *I.O.M. Appeals for US\$ 26 Million*, *supra* note 16.

<sup>221</sup> *Id.*

<sup>222</sup> *Horn of Africa Famine*, UNICEF <http://www.unicefusa.org/work/emergencies/horn-of-africa/> (last visited Feb. 12, 2014).

<sup>223</sup> Associated Press, *Somalia: Famine Toll in 2011 Was Larger Than Previously Reported*, NEW YORK TIMES (Apr. 29, 2013) <http://www.nytimes.com/2013/04/30/world/africa/somalia-famine-toll-in-2011-was-larger-than-previously-reported.html>.

<sup>224</sup> *Somalia Country Profile*, INT'L ORG. MIGRATION (Aug. 2014) [www.iom.int/cms/en/sites/iom/home/where-we-work/africa-and-the-middle-east/east-africa/somalia-1/somalia-country-profile.html](http://www.iom.int/cms/en/sites/iom/home/where-we-work/africa-and-the-middle-east/east-africa/somalia-1/somalia-country-profile.html).

<sup>225</sup> *I.O.M. Appeals for US\$ 26 Million*, *supra* note 16.

<sup>226</sup> *Thirty Thousand Somalis Given Shelter as IOM Pitches Last Tents at Camp in Kenya*, INT'L ORG. MIGRATION (Dec. 16, 2011), <https://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2011/pbn-listing/thirty-thousand-somalis-given-shelter-as.html>.

<sup>227</sup> *100,000 Displaced Somalis Assisted By IOM To Reach Camps In Kenya And Ethiopia Since The Influx*, INT'L ORG. MIGRATION (Jan. 31, 2012), <http://appablog.wordpress.com/2012/01/31/100000-displaced-somalis-assisted-by-iom-to-reach-camps-in-kenya-and-ethiopia-since-the-influx/>.

Somalia presents an interesting and difficult case study because it is, in effect, a failed state.<sup>228</sup> While there is a preference in the international community for *in situ* solutions for food crises,<sup>229</sup> it is clear that no such remedies are available in Somalia.<sup>230</sup> However, the famine provides an opportunity to examine the international response to famine “refugees.” Around 152,000 Somalis fled to the Dadaab refugee camp in eastern Kenya.<sup>231</sup> Kenya has been providing asylum to regional refugees for decades and Dadaab—the world’s largest refugee camp—houses the largest Somali population outside of Somalia.<sup>232</sup> Kenya’s legal obligations to refugees are clear: Kenya ratified both the 1951 Refugee convention and the 1969 OAU convention without reservations.<sup>233</sup> In addition, the Kenyan constitution integrates the “general rules of international law” as part of Kenyan law<sup>234</sup> and the constitution’s Bill of Rights provide civil, political, economic, cultural, and group rights to all persons.<sup>235</sup>

Prior to 2006, Kenya had no refugee-specific laws.<sup>236</sup> In 1992, on the invitation of the Kenyan government, the UNHCR assumed responsibility for refugee protection in Kenya, including determinations of status.<sup>237</sup> The UNHCR recognized two classes of refugees: (1) mandate refugees, who constituted all refugees that had undergone some form of individual status determination; and (2) *prima facie* refugees based on regions suffering from generalized conflict, notably Somalia and Sudan.<sup>238</sup> When Kenya passed the 2006 Refugee Act and assumed responsibility for refugee administration, it

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<sup>228</sup> See MARY HARPER, GETTING SOMALIA WRONG?: FAITH, WAR, AND HOPE IN A SHATTERED STATE 105–06 (2012) (defining failed state as one “that can no longer perform its basic security and development functions and that has no effective control over its territory and borders.”).

<sup>229</sup> See INT’L ORG. MIGRATION, MIGRANTS IN TIMES OF CRISIS: AN EMERGING PROTECTION CHALLENGE, INTERNATIONAL DIALOGUE ON MIGRATION 4 (2012) (“First, States bear the primary responsibility to protect and assist crisis-affected persons residing on their territory.”) [hereinafter MIGRANTS IN TIMES OF CRISIS].

<sup>230</sup> See HARPER, *supra* note 228, at 104–06.

<sup>231</sup> Int’l Org. Migration, *Migration Mapping Service between Somalia and Dadaab in Kenya Highlights Need for Better Protection of Drought and Famine Victims*, RELIEFWEB (Nov. 22, 2011), <http://reliefweb.int/report/kenya/migration-mapping-service-between-somalia-and-dadaab-kenya-highlights-need-better> [hereinafter *Migration Mapping Service*].

<sup>232</sup> REFUGEE CONSORTIUM OF KENYA, ASYLUM UNDER THREAT: ASSESSING THE PROTECTION OF SOMALI REFUGEES IN DADAAB REFUGEE CAMPS AND ALONG THE MIGRATION CORRIDOR 9 (2012).

<sup>233</sup> *Id.* at 7.

<sup>234</sup> CONSTITUTION, art. 2, §5 (2010) (Kenya).

<sup>235</sup> See CONSTITUTION, art. 26–51 (2010) (Kenya).

<sup>236</sup> REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 20.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

maintained the mandate and *prima facie* distinctions.<sup>239</sup> Historically, most Somali refugees have cited conflict as their motivation for fleeing, but a survey of the newly arrived Somali “refugees” found that 43% had come to the camp predominately as a result of the drought and famine,<sup>240</sup> which does not comport with the legal requirements of the Refugee Convention.<sup>241</sup> There is concern that these new “refugees” may undermine the *prima facie* refugee status of Somali immigrants.<sup>242</sup>

Despite their ambiguous status, “[o]ther rights - housing, health, food, safe and adequate drinking water-[were] provided as part of the humanitarian assistance for refugees” though they were not always sufficient.<sup>243</sup> Due to the regional conflict, Kenya closed its border with Somalia in 2007 and maintained the closure throughout the 2011 crisis.<sup>244</sup> Yet Kenya made no effort to stop famine refugees from crossing in 2011, which some view as “a tacit recognition of the overwhelming humanitarian imperative of the famine.”<sup>245</sup> However, knowledge of the border closure led many Somalis to use unofficial crossing points because they believed that Kenyan officials would refuse them entry.<sup>246</sup>

The Somali example shows that, while famines present a clear need for humanitarian aid, the displaced populations occupy an ambiguous status somewhere between economic migrants and environmental refugees. Additionally, Somalia clearly demonstrates a situation where *in situ* remedies to food scarcity are simply not available. The international community and

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<sup>239</sup> The Mandate’s refugee definition was expanded beyond the Refugee Convention to include sex as a ground for persecution. The Prima Facie definition was changed to the language in the expanded OAU Convention definition that includes “events seriously disturbing public order” REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 21.

<sup>240</sup> *Id.* at 42.

<sup>241</sup> *See supra* Part I.

<sup>242</sup> REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 10.

<sup>243</sup> *Id.* at 30.

<sup>244</sup> *Id.* at 34.

<sup>245</sup> *Id.* at 34.

<sup>246</sup> This lengthened the trip for many Somalis and contributed to excess mortality from the famine. *IOM Finds Life Threatening Conditions on the Road to Dadaab; Responds to Emergency in Ethiopia’s Refugee Camps*, INT’L ORG. MIGRATION (Jul. 29, 2011), <https://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2011/pbn-listing/iom-finds-life-threatening-conditions-on.html>. *See also* REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 88 (“In the context of the 2011 famine and refugee crisis, the continued refusal by the Government of Kenya to open the border, lack of access to nutrition, health, water and transport facilities at Liboi was an egregious protection failure, contributing for several months to excess mortality in the first days of arrival in the camps.”).

Kenya sought to protect the Somalis basic human rights, in accordance with international law.<sup>247</sup> However, with no legal recognition of their status, the famine refugees face possible *refoulement* to Somalia at any time.<sup>248</sup>

### *B. The Positive Right to Migrate: The Case of Paraguay and Argentina*

Paraguay is a small country in the heart of South America and has a large agrarian society.<sup>249</sup> It is one of only 16 countries in the world where the level of malnutrition since 1990 has not declined.<sup>250</sup> According to the Food and Agriculture Organization of the United Nations, 26–33% of the population suffers from undernourishment.<sup>251</sup> Facing food insecurity and a breakdown of the traditional agrarian society—due in large part to Brazilian immigration into Paraguay—many Paraguayans are migrating to Argentina.<sup>252</sup> Part II.B.i provides an overview of the factors that create structural poverty among rural Paraguayans and drive their migration to Argentina. Part II.B.ii discusses the Argentine response to Paraguayan migration as a model for a positive right to migrate.

#### *1. Paraguayan History and Migration*

To understand regional migration and the relationship between Paraguay, Argentina, and Brazil, one must begin with the Triple Alliance War of the 1860s.<sup>253</sup> The war decimated the Paraguayan population and led the post-war government to pursue a policy of agricultural colonization by immigrants with the purpose of repopulating the country,<sup>254</sup> the promotion of agrarian

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<sup>247</sup> MIGRANTS IN TIMES OF CRISIS, *supra* note 226, at 5 (“all migrants, irrespective of their status, are entitled to the full protection of their human rights by the mere virtue of their humanity.”).

<sup>248</sup> REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 88.

<sup>249</sup> See THE WORLD FACT BOOK: PARAGUAY, C.I.A., <https://www.cia.gov/library/publications/the-world-factbook/geos/pa.html> (last visited Jan. 23, 2014).

<sup>250</sup> Hunger Map, *supra* note 1.

<sup>251</sup> The level of undernourishment rises to 33%, the second highest level in Latin America, if calculated based the actual caloric expenditures due to average daily physical activity. FOOD SECURITY INDICATORS, FOOD & AGRIC. ORG. U.N. (Dec. 2013), <http://www.fao.org/economic/ess/ess-fs/ess-fadata/en/#.UuMmEWQo411>; Paraguay, FAOSTAT [http://faostat.fao.org/CountryProfiles/Country\\_Profile/Direct.aspx?lang=en&area=169](http://faostat.fao.org/CountryProfiles/Country_Profile/Direct.aspx?lang=en&area=169) (last visited Jan. 24, 2014).

<sup>252</sup> See generally PARAGUAY MIGRATION PROFILE, *supra* note 14, at 3.

<sup>253</sup> The origins of the war are beyond the scope of this paper but it was the bloodiest war in South American history and occurred between Paraguay and a triple alliance of Brazil, Argentina, Uruguay, ending in 1870. *War of the Triple Alliance*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/442711/War-of-the-Triple-Alliance> (last visited Jan. 23, 2014).

<sup>254</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 3.

immigration continued through the twentieth century.<sup>255</sup> Beginning in the 1960s, there was a large influx of Brazilian immigrants into Paraguay.<sup>256</sup> Like the Green Revolution occurring elsewhere in the world, the Brazilians consolidated a model of agricultural and livestock production that depended on a high level of technological inputs and low demand for manual laborers.<sup>257</sup> In 1996, Paraguay updated its immigration law but made no reference to the problems of Brazilian immigration.<sup>258</sup> Instead, the new law continued with the centuries-old policy, explicitly stating that its goal was to encourage (1) the immigration of foreigners with capital to establish small and medium businesses, and (2) immigration of farmers to colonize parts of the country, to diversify agricultural production, and to incorporate new technologies.<sup>259</sup>

The immigration law resulted in extensive monoculture and market domination by mostly Brazilian transnational corporations.<sup>260</sup> The profit and the production of Paraguayan agriculture increased without increasing labor demands.<sup>261</sup> The result was the displacement of small and medium Paraguayan farmers who rely on subsistence agriculture, supplemented by some small market sales.<sup>262</sup> These farmers had fewer resources than the multinationals and were unable to compete, contributing to the increase of internal and international emigration.<sup>263</sup>

Additionally, the emphasis by Brazilian and multinational owned agribusiness in Paraguay (often termed “Braziguayos”) on exportable commodities was a substantial change in the model of production of the country and occurred at a high environmental cost.<sup>264</sup> The new emphasis on large mono-crops resulted in massive deforestation, increased air pollution, and destruction of watersheds due to agrochemicals.<sup>265</sup> In some instances, entire

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 11.

<sup>257</sup> *Id.*

<sup>258</sup> Ley No. 978/1996 De Migraciones [Law No. 978/1996 Of Migrations], Art. 2(b), (c) (Para.).

<sup>259</sup> *Id.*

<sup>260</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 12.

<sup>261</sup> *Id.*

<sup>262</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 36.

<sup>263</sup> *Id.* at 3.

<sup>264</sup> *Agronegocios, Acaparamiento de Tierras y Transgénicos Detrás del Golpe de Estado en Paraguay* [Agribusiness, Land Grabbing and Transgenics behind the Coup in Paraguay], CENTRO DE DOCUMENTACIÓN Y ESTUDIOS [CTR. FOR DOCUMENTATION AND RES.] (Jun 25, 2012) <http://www.cde.org.py/web/index.php/noticias/72-agronegocios-acaparamiento-de-tierras-y-transgenicos-detras-del-golpe-de-estado-en-paraguay>.

<sup>265</sup> *Id.*

communities were poisoned and displaced due to aggressive spraying of agrotoxins.<sup>266</sup> In addition to displacement and emigration, the influx of Brazilians and Argentines has spurred a relatively large social justice movement, which operates outside of the government and attempts to create *in situ* remedies by addressing land use, continuing displacement of Paraguayan rural farmers, and environmental degradation.<sup>267</sup>

Nevertheless, the century-and-a-half of promoted agriculture colonization has generated the most unequal land distribution in the world.<sup>268</sup> Recent surveys place approximately 85% of the total land in Paraguay in the hands of 2% of the landowners.<sup>269</sup> The factors that create structural poverty in Paraguay are causes for migration.<sup>270</sup> Economic production in Paraguay is fundamentally based on agricultural activity and exports.<sup>271</sup> In 2009, the rate of underemployment hovered around 25% of the population, and 22% in rural areas.<sup>272</sup> Paraguay was ranked as the 13<sup>th</sup> highest inequality of income in the

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<sup>266</sup> See MICHAEL ANTONIOU, ET AL., GM SOY: SUSTAINABLE? RESPONSIBLE?, 25 (2010), [http://gmwatch.eu/images/pdf/gm\\_full\\_eng\\_v15.pdf](http://gmwatch.eu/images/pdf/gm_full_eng_v15.pdf) (finding about 9,000 rural families are evicted by soy production each year, by armed eviction or aerial spraying of toxic pesticides close to homes.); see also Stephanie Williamson, *Rural Communities in Paraguay Endangered by Soya Pesticides*, PESTICIDE ACTION NETWORK – UK (Sept. 2008), [http://www.pan-uk.org/pestnews/Issue/pn81/pn81\\_p12-15.pdf](http://www.pan-uk.org/pestnews/Issue/pn81/pn81_p12-15.pdf). In eight communities studied, 78% of families suffered from pesticide-related illnesses and 60% were displaced from their land do to agrochemical contamination of water sources. *Id.*

<sup>267</sup> See e.g., Movimiento Campesino Paraguayo [Paraguayan Peasant Movement], <http://www.okaraygua-paraguai.org/es/>; Coordinadora Nacional de Organizaciones de Mujeres Trabajadores Rurales e Indígenas (Conamuri) [National Coordinator of Organizations of Working Rural and Indigenous Women], <http://conamuri.org.py/index.html>.

<sup>268</sup> CONAMURI, PARAGUAY: GOLPE DE ESTADO Y ASESINATOS. MULTINACIONALES DEL AGRONEGOCIO Y RESISTENCIA CAMPESINA [PARAGUAY: COUP AND MURDERS, MULTINATIONAL AGRIBUSINESS AND PEASANT RESISTANCE] (Jan. 2013), <http://www.grain.org/fr/article/entries/4642-paraguay-golpe-de-estado-y-asesinatos-multinacionales-del-agronegocio-y-resistencia-campesina>.

<sup>269</sup> Centro De Documentación y Estudios, *supra* note 264.

<sup>270</sup> Paulo Lopez, *El éxodo paraguayo: sus causas y consecuencias* [The Paraguayan Exodus: Its Causes and Consequences], E'A (Mar. 7, 2012), [ea.com.py/el-exodo-paraguayo-sus-causas-y-consecuencias/](http://ea.com.py/el-exodo-paraguayo-sus-causas-y-consecuencias/).

<sup>271</sup> Agriculture made up 34.3% of the labor employment in the country in 2002 and 29.5% in 2009. *Id.*; Agriculture made up 34.3% of the labor employment in the country in 2002 and 29.5% in 2013. PARAGUAY MIGRATION PROFILE, *supra* note 14, at 20.

<sup>272</sup> *Id.* at 22.

world, with a GINI coefficient of 53.2 in 2009,<sup>273</sup> and has the lowest per capita income in the region.<sup>274</sup>

The issue of land distribution and territorial control by Brazilian immigrants are clear engines of Paraguayan migration.<sup>275</sup> The advance of agribusiness occurs at the expense of adaptive farming models by rural Paraguayans, resulting in an expulsion from their land.<sup>276</sup> Some of the migrations are to internal urban centers, but those areas are already saturated, impoverished, lacking even the minimum sanitation in parts.<sup>277</sup> Furthermore, it is almost impossible for an uneducated farmer to find adequate and dignified work<sup>278</sup> so many displaced Paraguayans turn their sights abroad. Estimates from 2010 indicate that around 777,000 Paraguayans, about 12% of the total population, have emigrated.<sup>279</sup> Of that, almost 73% have migrated to Argentina.<sup>280</sup> The origin of the migrants is telling—about half of the Paraguayan immigrants came from rural areas, and around 25% come from just two of the departments that received a large number of Braziguayo immigrants.<sup>281</sup>

The chain of Paraguayan migration is complex. A centuries-old national policy opened the country up to outside colonization, mechanized agriculture, and an export-based economy resulting in displacement of small to medium Paraguayan farmers who substantially rely on subsistence agriculture.<sup>282</sup> Displacement results not only in a loss of home but a loss of access to food.

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<sup>273</sup> A GINI coefficient measures the extent to which household income and consumption deviates from perfectly equal distribution, where 0 signifies perfect equality and 100 signifies perfect inequality. Of the 136 countries with available data, South Africa is the most unequal with a coefficient of 63.1 (2005), Sweden is the most equal with 23.0 (2005), and the U.S. ranks 46 with a coefficient of 45.0 (2007). *GINI index*, THE WORLD BANK, <http://data.worldbank.org/indicator/SI.POV.GINI> (last visited Jan. 23, 2014); C.I.A., *supra* note 249.

<sup>274</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 14.

<sup>275</sup> See Lopez, *supra* note 270 (noting how land sales and the establishment of foreign farms in the 1970s post-war period provoked the emigration of an evicted Paraguayan population); see also PARAGUAY MIGRATION PROFILE, *supra* note 14, at 12 (stating that subsequent to the opening of the “agriculture frontier,” immigrants were predominately Brazilian).

<sup>276</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 19; Resoluciones del 10 Congreso del MCP [Resolutions of the 10th Congress of the Paraguayan Peasant Movement], MCP (Oct. 26, 2010), [www.okaraygua-paraguai.org/news/es\\_ES/2010/10/26/0001/resoluciones-del-10o-congreso-del-mcp](http://www.okaraygua-paraguai.org/news/es_ES/2010/10/26/0001/resoluciones-del-10o-congreso-del-mcp).

<sup>277</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 19.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 4.

<sup>280</sup> *Id.* at 35.

<sup>281</sup> *Id.* at 36.

<sup>282</sup> *Id.* at 11, 36.

Not only can these displaced individuals no longer support themselves through subsistence agriculture but also, in many cases, they are unable to find employment sufficient to feed themselves and their families.<sup>283</sup> The result is a large migratory population seeking employment abroad.<sup>284</sup> While this clearly represents a crisis in food access, the displaced Paraguayans do not fall neatly into the refugee framework.<sup>285</sup> Some have been displaced because their land was surrounded and eventually purchased by multinational corporations. Others were physically forced off their land, while others faced economic dislocation because of their inability to compete in the new market.<sup>286</sup> The failure of *in situ* remedies and the unavailability of remedies within the current refugee framework indicate that a new approach is needed to provide protection to Paraguayan immigrants and others similarly situated. Establishing a positive right to migrate provides a potential alternative and the Argentine response to Paraguayan migrants illustrates how a positive right to migrate may look.

## 2. *Argentina's Immigrants and Immigration Law*

Like most countries in South America, Argentina was subject to a military dictatorship during the 1960s, 1970s and into the 1980s.<sup>287</sup> During the dictatorship, the Argentinians suffered severe human rights abuses and many people were tortured and later "disappeared."<sup>288</sup> As a result of this oppressive history, the democratic Argentina that emerged in the 1980s and 1990s incorporated international law into the bedrock of the Argentine legal system.<sup>289</sup> Notably, the new constitution held that all international treaties are superior to domestic laws and elevated several human rights treaties to constitutional status.<sup>290</sup>

In accordance with this incorporation of international human rights into Argentine domestic law, Argentina revised its immigration law and passed

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<sup>283</sup> *Id.* at 19.

<sup>284</sup> *Id.* at 4.

<sup>285</sup> *See supra* Part I.B.

<sup>286</sup> *See* ANTONIOU, *supra* note 266; PARAGUAY MIGRATION PROFILE, *supra* note 14, at 3; Williamson, *supra* note 266.

<sup>287</sup> Janet Kovic Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 288 (1999).

<sup>288</sup> *Id.* at 288–89.

<sup>289</sup> *Id.* at 283, 288.

<sup>290</sup> *Id.*

Law 25.871 in 2004.<sup>291</sup> This was the first time the immigration law had been revised since the military dictatorship and represented a major step in increasing immigrant rights.<sup>292</sup> While the law improved the status of immigrants generally, the most significant change was to establish migration as a fundamental right.<sup>293</sup> Under the title “Rights and Freedoms of Foreigners,” Article 4 reads: “[t]he right of migration is an essential and inalienable individual right and the Republic of Argentina guarantees this right based in the principles of equality and universality.”<sup>294</sup>

The incorporation of the right to migrate, as opposed to a limited freedom of movement, is not found in immigration laws of other large immigrant-receiving countries or explicitly in any human rights conventions.<sup>295</sup> This concept has found traction elsewhere in the region as well.<sup>296</sup> The Argentine immigration law blends the fundamental concepts of human rights with immigration. Not only does the law establish open borders and the right to migrate, but also grants rights to healthcare access and private and public education, regardless of immigration status.<sup>297</sup> The law also gives migrants a right of family reunion, providing for the immigration of children, spouses, and parents of migrants already present in the country.<sup>298</sup>

In 2006, Argentina launched a national program called “Patria Grande” designed to regularize immigrant status for irregular immigrants who were citizens of a country belonging to the Common Market of the South (“MERCOSUR”) or associated states.<sup>299</sup> The program allows for regularization of all immigrants from Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela who arrived in Argentina before April 17, 2006 and relaxed the requirements and facilitated the process to achieve residency

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<sup>291</sup> Barbara Hines, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 CORNELL INT’L L.J. 471, 472 (2010).

<sup>292</sup> *See id.*

<sup>293</sup> *Id.*

<sup>294</sup> Law No. 25.871, art. 4, Dec. 17, 2003, [30322] B.O. 2 (Arg.).

<sup>295</sup> Hines, *supra* note 291, at 472; *cf.* Part I.A.

<sup>296</sup> INT’L ORG. MIGRATION, *supra* note 16, at 62–63. The First Forum of Migrants in Paraguay in 2009 coincided with the Third Forum on Migration and American Platense Civil Rights Community. The Forum discussed immigration, immigrant labor rights, discrimination, and xenophobia and ratified a resolution declaring the right to migrate was a human right that must be respected by nation-states. *Id.*

<sup>297</sup> Law No. 25.871, art. 7, 8, Dec. 17, 2003, [30322] B.O. 2 (Arg.).

<sup>298</sup> *Id.* art. 10.

<sup>299</sup> *Argentina*, INT’L ORG. MIGRATION (Nov. 22, 2013), <http://www.iom.int/cms/en/sites/iom/home/where-we-work/americas/south-america/argentina.html>.

for persons arriving after that date.<sup>300</sup> The program regularized almost half a million people in its first three years, nearly 60% of which were Paraguayan.<sup>301</sup>

Though the country receives a high volume of immigrants, many of whom are irregular, Argentina still recognizes a universal right to migrate.<sup>302</sup> Despite these progressive changes, there are still xenophobic and anti-immigrant sentiments.<sup>303</sup> The country has also had problems creating regulations to implement the laws.<sup>304</sup> Nevertheless, Argentina represents a unique approach to addressing food scarcity and a positive right to migrate, that casts away many of the restrictions in other countries and allows for migrants to enter the country on nearly equal footing with citizens. Though broader than a positive right to migrate due to food scarcity, the Argentine Law 25.871 and *Patria Grande* program provides a model of a broad right to migrate that emphasizes the moral imperatives underlying human rights, and migration. The Argentine system reflects the humanitarian and economic need of migrants on a regional scale and is an example of how shifting away from an exclusively state-centric approach can provide remedies for individuals that fall outside of the current legal regime.

### III. ESTABLISHING A POSITIVE RIGHT TO MIGRATE AS A SOLUTION TO FOOD SCARCITY

There is customary international law establishing the right to adequate food. Though it is not legally binding, the UDHR has been reaffirmed numerous times and no state has denounced the declaration.<sup>305</sup> Additionally, there is an affirmative practice of providing aid and food to least developed

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<sup>300</sup> Ministerio de Relaciones Exteriores y Culto [Ministry of Foreign Relations and Worship], *Programa Patria Grande* [Great Homeland Program], GOV'T ARG., <http://cpays.cancilleria.gov.ar/en/node/10066> (last visited Feb. 12, 2014).

<sup>301</sup> MINISTERIO DEL INTERIOR [MINISTRY OF THE INTERIOR], PATRIA GRANDE: PROGRAMA DE NORMALIZACIÓN DOCUMENTARIA MIGRATORIA, INFORME ESTADISTICO [GREAT HOMELAND: PROGRAM FOR STANDARDIZATION OF MIGRATION DOCUMENTARY, STATISTICAL REPORT], 5, 25 (Aug. 2010), available at [http://www.migraciones.gov.ar/pdf\\_varios/estadisticas/Patria\\_Grande.pdf](http://www.migraciones.gov.ar/pdf_varios/estadisticas/Patria_Grande.pdf).

<sup>302</sup> Law No. 25.871, art. 4, Dec. 17, 2003, [30322] B.O. 2 (Arg.).

<sup>303</sup> Eduardo E. Demenoch, *La "Nueva Política Migratoria" en la Argentina: Las Paradojas del Programa "Patria Grande"* [The "New Migration Policy" in Argentina: the Paradoxes of the "Great Homeland" Program] in *MIGRACIONES INTERNACIONALES CONTEMPORÁNEAS: ESTUDIOS PARA EL DEBATE* [CONTEMPORARY INTERNATIONAL MIGRATIONS: STUDIES FOR DEBATE] 123 (Cynthia Pizarro, Ed. 2011).

<sup>304</sup> See Hines, *supra* note 291, at 472–73, 509.

<sup>305</sup> Weber, *supra* note 214, at 384–85.

countries.<sup>306</sup> The 1996 World Food Summit declared the intention of 182 states to reduce by half the number of chronically undernourished people by 2015.<sup>307</sup> Reaffirmed multiple times, the most recent World Food Summit on Food Security declared “the right of everyone to have access to safe, sufficient, and nutritious food.”<sup>308</sup> Finally, the second iteration of the Food Assistance Convention (FAC) established principles of food assistance to low and middle-income countries and acknowledged the commitments of the World Food Summit to achieve food security in all countries as part of the elimination of poverty.<sup>309</sup> From these conventions, universal affirmation of the UDHR, and the actions of the international community in famine situations—such as those taken by Kenya and the IOM to provide aid to Somali famine victims—one may conclude that there is customary international law for those provisions of the UDHR that refer to economic rights and the right to food.<sup>310</sup> This customary international law imposes an obligation on states regardless of whether the country ratified a binding treaty such as the ICESCR. Interestingly, all fourteen signatories to the FAC are “developed” nations and only four—Australia, Canada, Japan, and the United States—are not European.<sup>311</sup> In contrast, any country listed on the OECD’s Development Assistant Committee’s list of Official Development Assistance Recipients, a list comprised predominantly of African, Latin American, and South Asian countries, is eligible to receive assistance.<sup>312</sup>

Despite the clear global agreement on reducing hunger,<sup>313</sup> the relationship found in the FAC carries echoes of colonialism and mirrors the global division

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<sup>306</sup> See e.g., Food Assistance Convention, May 8, 2012, C.N.215.2012.TREATIES-XIX.48.

<sup>307</sup> *Monitoring Progress Since the World Food Summit*, WORLD FOOD SUMMIT, available at [http://www.fao.org/wfs/index\\_en.htm](http://www.fao.org/wfs/index_en.htm) [hereinafter Declaration of the World Summit].

<sup>308</sup> WORLD SUMMIT ON FOOD SECURITY, DECLARATION OF THE WORLD SUMMIT ON FOOD SECURITY, art. 16 (Nov. 16–18, 2009).

<sup>309</sup> Food Assistance Convention, *supra* note 306, art. 2.

<sup>310</sup> See Weber, *supra* note 214, at 387.

<sup>311</sup> The other signatories are: Austria, Bulgaria, Denmark, The European Union, Finland, France, Greece, Luxembourg, Portugal, and Switzerland. Food Assistance Convention, *supra* note 306.

<sup>312</sup> Food Assistance Convention, *supra* note 306, art. 4. “The DAC List of ODA Recipients shows all countries and territories eligible to receive official development assistance (ODA). These consist of all low and middle income countries based on gross national income (GNI) per capita as published by the World Bank, with the exception of G8 members, EU members, and countries with a firm date for entry into the EU. The list also includes all of the Least Developed Countries (LDCs) as defined by the United Nations (UN).” *DAC List of ODA Recipients*, OECD, <http://www.oecd.org/dac/stats/daclistofodarecipients.htm> (last visited Jan. 11, 2014).

<sup>313</sup> See WORLD SUMMIT ON FOOD SECURITY, *supra* note 307.

in the human rights regime.<sup>314</sup> The FAC states that the purchase of food locally or regionally is an important principle in the effectiveness of food assistance,<sup>315</sup> which reflects the current realities of global food aid.<sup>316</sup> The document itself places a strong emphasis on *in situ* remedies, declaring in the preamble that states have the primary responsibility for their national food security and encouraging states to address the root causes of food insecurity.<sup>317</sup> Regardless of the preference for *in situ* remedies by all parties involved—sending states, receiving states, and food migrants themselves—local remedies are often unavailable due to lack of state capacity or lack of will.<sup>318</sup> In situations where *in situ* options are unavailable or impractical—such as Somalia where the governing body is simply incapable of providing adequate protections,<sup>319</sup> or in Paraguay where national policy has resulted in food scarcity for marginalized populations<sup>320</sup>—what remedies are available?

It appears that there are no remedies available within the current legal regime, which leads to two possibilities. First the international community does nothing to help victims of food scarcity. Not only is this position morally untenable, it contradicts the stated intent to assist victims of food scarcity that has been affirmed by various countries such as .<sup>321</sup> A second option is to maintain the current system as it is and continue to recognize the moral imperative to help famine refugees without granting them any immigration status.<sup>322</sup> However, the current system creates a false bright line distinction between famines and other food scarcity situation and fails to address the legal status of food migrants.<sup>323</sup> If no remedies exist, but there is a strong political will and moral impetus, the system could be modified to allow for remedies.

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<sup>314</sup> See *supra* Part II.C.2.

<sup>315</sup> Food Assistance Convention, *supra* note 306, art. 2.

<sup>316</sup> There are three significant trends in food aid: (1) Emergency relief is an increasingly large percentage of overall aid, with a decline in food aid for development purposes; (2) There is a movement toward procuring food aid from local and regional sources; (3) Non OECD-DAC governments are becoming increasingly important funders but major food donors remains mostly unchanged: the US provides around half of all food aid, followed by EU, Canada, and Japan while the top five recipients of food aid in 2008 were Ethiopia, Sudan, Somalia, Zimbabwe, and Afghanistan. HARVEY, *supra* note 218, at 2.

<sup>317</sup> Food Assistance Convention, *supra* note 306.

<sup>318</sup> See generally HUNGER MAP, *supra* note 1.

<sup>319</sup> See HARPER, *supra* note 228 at 105–06 (acknowledging that the government of Somalia cannot perform basic security or development functions).

<sup>320</sup> Cf. Law No. 978/1996, *supra* note 258, art. 20.

<sup>321</sup> See Declaration of the World Summit, *supra* note 307.

<sup>322</sup> See discussion *infra* Part II.A.

<sup>323</sup> *Id.*

Modification of the legal system to assist victims of food scarcity where *in situ* remedies are unavailable could be accomplished by modifying domestic laws, international refugee law or by adding to the body of international human rights to establish a positive right to migrate for these vulnerable populations. Solely relying on domestic laws is unfavorable for the same reasons that the legal community established refugee law, namely the universality of the problem and the unpredictability of where victims may arise in the future. Part III.A discusses why changing refugee law would be an ineffective solution and Part III.B examines establishing a positive right to migrate and the need of switching to a people-centered human right approach.

*A. A Positive Right to Migrate: Rejecting a Remedy Through Refugee Law*

Using refugee law to establish a right to migrate due to food scarcity should not be prohibited by the fact that many famine refugees do not seek permanent resettlement.<sup>324</sup> Though there is a *de facto* presumption of asylum and permanent resettlement for refugees,<sup>325</sup> refugee status is not always permanent, and if the persecution ceases, a refugee may be returned to their home country without violating *refoulement*.<sup>326</sup> Nevertheless, food migrants fleeing food scarcity do not qualify as refugees under the traditional definition because they are not being persecuted based on one of the five protected categories.<sup>327</sup> Shoehorning victims of famine or food scarcity into the definition of refugee would require either claiming that they are being persecuted, perhaps by the famine itself, or substantially reformulating refugee law to remove the persecution requirement. An examination of the latter exceeds the scope of this Comment, while the former appears to be little more than an exercise in semantics. Though some who argue for the creation of environmental refugee status use this semantic argument,<sup>328</sup> it is inappropriate while other solutions to the famine refugee are available.

At first blush, expanding refugee law to include environmental refugees appears to be a promising strategy. It directly wrestles with a “mere victim’s”

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<sup>324</sup> Black, *supra* note 106, at 6.

<sup>325</sup> See Martin, *supra* note 94, at 804–06.

<sup>326</sup> See Immigration and Naturalization Act, 8 U.S.C. § 1158(c)(2) (2009).

<sup>327</sup> See Refugee Convention, *supra* note 11, at 152–54.

<sup>328</sup> See *e.g.*, Cudiamat, *supra* note 82, at 925 (arguing that for environmental refugees, the environment is the persecuting agent).

right to movement and the sovereign state's interest in territorial integrity.<sup>329</sup> However, environmental factors are only one potential cause of food migrants. In the case of Somalia, regional drought clearly played a role in causing the 2011 famine.<sup>330</sup> However, parts of pastoral Kenya suffered from the same drought but did not experience famines.<sup>331</sup> This is a clear indication that, as Professor Sen argues, more than simple environmental factors cause famines.<sup>332</sup> In the case of Paraguay, food scarcity and migration is not driven by traditional environmental factors like drought or desertification.<sup>333</sup> While large mono-cropping and modern agriculture may destroy the land and aerial spraying of agrochemicals on communities could conceivably fall within the category of environmental conflict,<sup>334</sup> the drivers of the food scarcity and migration in Paraguay are substantially socio-economic.<sup>335</sup>

Augmenting the refugee law to establish a right not to be displaced also has limited effectiveness because it assumes a local actor that can be held accountable for failure to provide an *in situ* remedy. In the case of Somalia, there is no actor to hold accountable for the displacement.<sup>336</sup> In the case of Paraguay, there are clearly actors responsible for the displaced communities.<sup>337</sup> Both government actions and the actions of private entities have led to displacement and food scarcity in Paraguay.<sup>338</sup> However, establishing a right not to be displaced does not protect the individuals already displaced but focuses instead on the actors causing the displacement. While this is certainly an important objective, it is not clear how enforcement of such a right would differ substantially from domestic tort or criminal law. For all of these reasons, refugee law does not present itself as a body of law that can provide security to food migrants or in which to incorporate a positive right to migrate.

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<sup>329</sup> Martin, *supra* note 94, at 804–06.

<sup>330</sup> IOM Appeals for US \$26 Million, *supra* note 16.

<sup>331</sup> *Id.*

<sup>332</sup> *See id.*

<sup>333</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 5–6.

<sup>334</sup> *See* ANTONIOU, *supra* note 266; Williamson, *supra* note 266, at 5. However, the forced removals and aerial spraying seem best remedied by human rights or domestic civil and criminal law.

<sup>335</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 3.

<sup>336</sup> *See generally* HARPER, *supra* note 228, at 105–06.

<sup>337</sup> PARAGUAY MIGRATION PROFILE, *supra* note 14, at 5–6.

<sup>338</sup> *See* Ley No. 978/1996 De Migraciones [Law No. 978/1996 Of Migrations], Art. 20 (Para.); PARAGUAY MIGRATION PROFILE, *supra* note 14, at 5–6.

## B. *Human Rights Law and the Incorporation of a Positive Right to Migrate*

A positive right to migrate due to food scarcity closely aligns with the humanitarian aims of the human rights regime.<sup>339</sup> Viewing the right to migrate due to food scarcity through the lens of human rights law highlights the underlying right to adequate food. Since food scarcity has social, economic, political, and environmental causes,<sup>340</sup> the right to migrate due to food scarcity is a complex amalgamation of human rights law categories. Establishing a positive right to migrate due to food scarcity does not create a whole new human right, rather it blends existing human rights to allow for legal status and recognition of recurring migratory populations. In famine situations similar to Somalia, countless lives could be saved if food migrants avoid dangerous and furtive border crossings because they know the receiving state will accept and help them. In a situation such as Paraguay, where there is no famine to establish immigrants as *prima facie* food migrants, implementation of the right could ease of entry for populations suffering from food scarcity, perhaps through an expedited border crossing system. Finally, establishing a positive right to migrate would help protect the full panoply of human rights by giving legal status to food migrants and empowering them to challenge violations of other rights.<sup>341</sup> Part III.B.i discusses why a state-centric approach to human rights is not the best forum to establish a positive right to migrate. Part III.B.I examines the benefits of switching to a people-centric approach.

### 1. *Deficiencies in a State-Centric Approach to Human Rights*

A traditional human rights approach fails to address adequately the problem of food scarcity because human rights law focuses only on the relationships between States and the populous.<sup>342</sup> Therefore, the right to adequate food is invoked only if the state is somehow implicated in creating the food scarcity.<sup>343</sup> If the right to life and the corresponding right to sufficient food—with all of its economic implications—have equal status under the law, the establishment of a right to food as a human right creates a positive obligation to act on the part

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<sup>339</sup> See REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 30.

<sup>340</sup> See *supra* Part II.

<sup>341</sup> See REFUGEE CONSORTIUM OF KENYA, *supra* note 232, at 23–26 (noting how Somali refugees in Dadaab are often denied guaranteed rights including right to engage in wage-earning employment, right to own property, right to practice a profession, right to self-employment, access to housing and right to choose place of residence).

<sup>342</sup> See Ahmed An-Na'im, *supra* note 131, at 1.

<sup>343</sup> See *id.* at 1–2.

of the State and calls for an entitlement system. This is not inherently bad, but it does cut against the domestic norms of the U.S. and other liberal democracies that have, wittingly or not, promulgated human rights as a means to fight political tyranny but have not concerned themselves with economic tyranny.<sup>344</sup> Not only is an entitlement solution untenable to some political actors in the West, but it presumes a state run *in situ* remedy, failing to address situations in which states are powerless to meet their obligations (Somalia), or where state complicity is only one of many intertwining political, economic and social factors that lead to violations (Paraguay).<sup>345</sup> The right to food highlights the near impossibility to impose affirmative duties upon states.<sup>346</sup>

A positive right to migrate in the human rights framework raises the additional issue of state sovereignty. The human rights regime was born into a Westphalian world and it is ill-equipped to handle the socio-economic interdependence that transcends national borders.<sup>347</sup> Nowhere is this more evident than in a positive right to migrate, which would effectively declare an exception to territorial integrity: where an individual's or group's rights are being violated due to food scarcity, and where the food scarcity cannot be readily remedied *in situ*, then that individual or group has the right to migrate internationally in order to become food secure. State sovereignty does not come into play in this definition; in fact, the definition operates in derogation of the exclusion principle of state sovereignty.<sup>348</sup> Nor does the proposed right establish an obligation from the state to the individual,<sup>349</sup> except to oblige the state to disregard, in particular circumstances of food scarcity, a fundamental element of the state's own sovereignty. While this may appear radical, it is, in fact, what occurred for both Paraguayan and Somali migrants.<sup>350</sup> Paraguayans migrating to Argentina, especially those arriving after 2004, were met with an open door policy and legal efforts to secure their rights and residency

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<sup>344</sup> *The Transformation of Africa*, *supra* note 130, at 922.

<sup>345</sup> See discussion *infra* Part II.

<sup>346</sup> Weber, *supra* note 214, at 386–87 (it is much easier to persuade states to abstain from certain activities).

<sup>347</sup> See generally Grossman, *supra* note 165, at 1–2.

<sup>348</sup> See Parrish, *supra* note 169, at 1100–01.

<sup>349</sup> See Ahmed An-Na'im, *supra* note 131, at 1; see also *Savages, Victims, and Saviors*, *supra* note 129, at 202–03.

<sup>350</sup> See discussion *infra* Part II.

regardless of their migration status.<sup>351</sup> For Somalis, Kenya has allowed international aid agencies to shuttle migrants from the border to refugee camps in Kenya.<sup>352</sup>

## 2. *Shifting to a People-Centric Approach to Human Rights*

The proposal of the right to migrate due to food scarcity by a Western academic poses a clear danger of perpetuating a Western and Eurocentric perspective, the exact opposite of what a change to people-centric framework hopes to achieve.<sup>353</sup> However, the positive right to migrate due to food scarcity finds its origin, not in political negotiations of powerful Western states, but in the economic realities and habitual actions of vulnerable populations.<sup>354</sup> Establishing a right from the manifest need of vulnerable populations embodies the shift from a state-centric to people-centric approach to human rights.<sup>355</sup> As shown in the case of Paraguayan and Somali migrants,<sup>356</sup> as well as the traditional migratory patterns of Malian and other pastoralists,<sup>357</sup> vulnerable populations facing food scarcity regularly engage in international migrations. The legal foundations in terms of the right to life,<sup>358</sup> the right to adequate food,<sup>359</sup> and the limited right to freedom of movement<sup>360</sup> already exist. Therefore, establishing a positive right to migrate due to food scarcity does not create a new human right wholesale, so much as weave together existing rights to establish legal status for certain recurring migratory populations.

Since the right to migrate due to food scarcity represents a legal elevation of societal behavior that runs counter to a fundamental principle of state

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<sup>351</sup> See Law No. 25.871, art. 4, Dec. 17, 2003, [30322] B.O. 2 (Arg); Ministerio de Relaciones Exteriores y Culto [Ministry of Foreign Relations and Worship], *Programa Patria Grande [Great Homeland Program]*, GOV'T ARG., <http://cpays.cancilleria.gov.ar/en/node/10066> (last visited Feb. 12, 2014).

<sup>352</sup> *100,000 Displaced Somalis*, *supra* note 227.

<sup>353</sup> See e.g. Baraka, *supra* note 4; *Savages, Victims, and Saviors*, *supra* note 129, at 204.

<sup>354</sup> See discussion *infra* Part II.

<sup>355</sup> See Baraka, *supra* note 4; see generally *Savages, Victims, and Saviors*, *supra* note 129.

<sup>356</sup> See discussion *infra* Parts II.A, II.B.

<sup>357</sup> CARTIER, *supra* note 85, at 8 (traditional circular migration patterns of pastoralist and nomadic groups is used to gain access to better pasture, land, and water and is viewed as a positive adaptation for insecure climates).

<sup>358</sup> See, e.g., UDHR, *supra* note 3, art. 25.

<sup>359</sup> *Id.*

<sup>360</sup> See e.g., *id.* art. 13; Migrant Workers Convention, *supra* note 5, art. 8.

sovereignty,<sup>361</sup> a positive right to migrate will most likely not find a foothold in a state-centric approach to human rights. Expanding to people-centric human rights from a unilateral, state-to-citizen relationship allows economic, cultural, and social rights to operate on multiple levels that invoke state, individual, and community participation and responsibility.<sup>362</sup> Such an expansion would not only temper the individualist focus of the current human rights regime<sup>363</sup> but would recognize the growing and critical roles of non-state actors in the international community<sup>364</sup> as bound entities within the human rights framework.<sup>365</sup> The change would enable those entities to protect and facilitate freedom of movement for food migrants. In the case of the Food Assistance Convention, creating obligations for regional entities comports with the goal of securing food aid from local sources and could remove the colonial undertones of the current food aid system.<sup>366</sup> Instead of Western states providing assistance to former colonies, the paradigm could shift to local and regional communities and organizations providing support to local and regional communities in need.

Nevertheless, switching to a people-centric approach to human rights does not require a complete removal of state sovereignty or negate the value of state actors.<sup>367</sup> In many situations the human rights community relies on strong states to act on their behalf.<sup>368</sup> While there are still significant questions of what implementation of the new right might look like, Argentina's immigration laws provide a clear example of how a positive right to migrate due to food scarcity could operate within the State-dominated international system.<sup>369</sup>

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<sup>361</sup> See Parrish, *supra* note 169, at 1100–01 (territoriality has been the cornerstone of an international system that, for centuries, has operated on the Westphalian principles of state sovereignty and nonintervention).

<sup>362</sup> See, e.g., *The Transformation of Africa*, *supra* note 130, at 899.

<sup>363</sup> *Id.*

<sup>364</sup> See e.g., *infra* Part II.A.ii (discussing the role of NGOs in assisting Somali refugees).

<sup>365</sup> The belief that there is a “clear distinction between domestic and international legal issues is fundamentally flawed” and international law needs to be recognized and incorporate all international actors into its jurisdiction. Grossman, *supra* note 165, at 22–23. However, the exact means of creating this new regime should be the product of collaboration between diverse international actors that exceeds the scope of this Comment.

<sup>366</sup> Food Assistance Convention, *supra* note 306, art. 2; see *infra* Part I.C.

<sup>367</sup> *But cf.* Parrish, *supra* note 169, at 1136 (recognizing and arguing against the new discourse that places the person at the center of the international legal system and favors non-territorial models).

<sup>368</sup> *Id.*

<sup>369</sup> See *infra* Part II.B.ii (discussing Argentine Law No. 25.871 and *Patria Grande*).

## CONCLUSION

Current human rights conventions guarantee a right to adequate food. This Comment proposes that where an individual's or group's right rights are being violated due to food scarcity, and where the food scarcity cannot be readily remedied *in situ*, then that individual or group has the right to migrate internationally in order to become food secure. This positive right to migrate due to food scarcity does not comfortably fit within the confines of refugee law or the current human rights system. Nevertheless, the right fits closely with the humanitarian aims of the human rights regime and may be appropriately cast in the human rights framework if that framework is modified beyond its current state-centric approach.

The establishment of a positive right to migrate due to food scarcity and the shift to a people-centric human rights framework does not necessitate a complete removal of state sovereignty or negate the importance of state actors. In many situations the human rights community relies on strong states to act on their behalf.<sup>370</sup> However, the system needs to recognize the importance and obligations of non-state actors, communal perspectives, and socio-economic rights that can only be actualized outside the boundaries of the traditional Westphalian system. The utility of casting a positive right to migrate in the human rights mold depends on shifting to a people-centric as opposed to a state-centric approach in order to accept non-state actors and regional actors as bound entities within the human rights framework and empower those entities to protect and facilitate freedom of movement for food migrants.

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<sup>370</sup> See Parrish, *supra* note 169, at 1136.

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