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Student Articles

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International Focus at
Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

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We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

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Coming Full Circle on Human Rights in the Global Economy: International Economic Law Tools to Realize the Right to Development

Diane A. Desierto*

Abstract

This article argues that the discipline and profession of international economic law has undergone a significant architectural change to focus on human rights law as both the premise and promise of the international economic system. Contrary to prevailing currents that focus on the irrelevance of the global economic system to realize human rights, this article argues that international economic law tools have already been converging within the last decade to authentically realize the Right to Development of individuals, groups, and populations. The Draft Convention on the Right to Development defines the right as the enjoyment, participation, and contribution of individuals, groups, and populations towards their civil, economic, political, social, and cultural development, in a manner that is based on and consistent with all human rights and fundamental freedoms. The tools of treaty reform, accountability processes and mechanisms, adjudication innovations, civil society engagement, and the pedagogic transformation of international economic law critique the realization and implementation of human rights. All are converging to place human rights at the center of global economic decision-making. The global COVID-19 pandemic and its associated economic, social, and political crises sharpen the necessity for international economic law to evolve towards the definition of the right to development as development that is "based on and consistent with all human rights and fundamental freedoms."

Keywords

International economic law, international human rights law, treaty reform, accountability, right to development, civil society, teaching and practice of international economic law

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I. Introduction: The Global Economic System and the State of Global Development

Permit me to extend my gratitude to the organizers of this Conference for the opportunity to address fellow scholars and practitioners of international economic law in this Closing Keynote.[1] I have just concluded Expert duties at this week's 21st Session of the United Nations Working Group on the Right to Development,[2] where States are deliberating on the Draft Convention on the Right to Development[3] that was authored by a Drafting Group of which I am a member. If this Draft Convention is approved, this legally binding instrument on the Right to Development would be the tenth major human rights treaty, and the first to be concluded since the Convention on the Rights of Persons with Disabilities, over fourteen years ago.

On this note, I find it quite crucial to observe that, in 2021, it is no longer controversial to speak of human rights at this premier global international eco-

[1] This article was delivered as the Closing Keynote of the 10th Conference of the Postgraduate and Early Professionals/Academics Network of the Society of International Economic Law, May 2021 Scotland, organized by the University of Dundee, the University of Edinburgh, and the University of Glasgow. I am grateful to Andrew Lang, Christian Tams, and my colleagues and fellow participants at SIEL for the fruitful exchanges.

[2] *See* U.N. Office of the High Commissioner for Human Rights, 21st Session of the Working Group on the Right to Development (May 17-21, 2021), https://www.ohchr.org/EN/Issues/Development/Pages/21stSession.aspx (access to view reports and working documents).

[3] U.N. Human Rights Council, Working Group on the Right to Development, 21st Session, *Draft Convention on the Right to Development, with Commentaries*, U.N. Doc. A/HRC/WG.2/21/2/Add.1 (Jan. 20, 2021), https://undocs.org/A/HRC/WG.2/21/2/Add.1.

nomic law conference. This was not always the case. I still recall speaking at SIEL's 3rd Biennial Conference in 2012, hosted by the National University of Singapore, presenting some of my initial work on the topic entitled *Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions*,[4] at the Society's Investment Law Network session. As I recall, that work elicited strong reactions from a few voices who literally yelled questions and strong objections while I was presenting the paper. The comments were, in nature, substantive (e.g., *how could human rights norms be legally internalized in the complex web of international economic law treaties and customary law*?), as well as defensive of the technical rigors of the discipline (e.g., *international economic law and regulation should be seen and evaluated wholly from its own architecture*). The reactions reminded me of the classic debates hosted by the European Journal of International Law between Professor Ernst Ulrich-Petersmann (who saw certain pathways for the multilevel governance of international economic law to accommodate human rights concerns) and Professor Philip Alston (who at that time appeared resistant to complicating human rights with the technical premises and utilitarian tools of international economic law).[5] So much of the literature then was about navigating the interaction between the legal systems of international human rights and international economic law.[6]

What prompted my own work[7] on this subject were the seeming monolithic approaches that were being taken to the interaction of these two fields. Such approaches were, in my view, conceptually valuable from a systemic point of view, but not from the standpoint of granular implementation of each and every human right involved in an economic transaction, especially considering States' counterpart international economic law obligations. While in and of themselves useful from a general perspective, systemic approaches[8] did not often assist policymaking with the operational details necessary for translating the normative intricacies and policy complexities of individual and collective civil, political, economic, social, and cultural rights, into the equally vast and differentiated subdisciplines within international economic law. These subdisciplines range from

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[4] Diane A. Desierto, *Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises,* 10 TRANSNAT'L DISP. MGMT. 1 (2013).

[5] *See* Ernst Ulrich-Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration,* 13 EUR. J. INT'L L. 621 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann,* 13 EUR. J. INT'L L. 815 (2002).

[6] *See, e.g.*, HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds. 2005); HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009); ISABELLA D. BUNN, THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS (Frederico Ortino et al. eds., 2012).

[7] *See* DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT (2015).

[8] *See, e.g.*, Elizabeth M. Iglesias, *Human Rights in International Economic Law,* 28 UNIV. MIA. INTER-AM. L. REV. 361 (1997); BARNALI CHOUDHURY, PUBLIC SERVICES AND INTERNATIONAL TRADE LIBERALIZATION: HUMAN RIGHTS AND GENDER IMPLICATIONS, 15-43 (2012) (discussing international economic law and human rights); Ernst Ulrich-Petersmann, *Human Rights and International Economic Law,* 4 TRADE L. & DEV. 283 (2012); HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 6.

the main fields of world trade law, foreign investment law, international financial law, international monetary law, international intellectual property law, international tax law, to the burgeoning frontiers of global digital governance and international law regulating the internet economy. Many systemic approaches, for example, focused on using treaty interpretation techniques to expand the reach of international economic law treaties to "accommodate"[9] human rights norms. However, this type of academic scholarship rarely, if at all, strategized specific correspondences between an individual yet complex human right (e.g., the right to work and just and favorable conditions of work) and existing treaty-based guarantees. Building such relationships might have included guarantees such as non-discriminatory foreign market access in world trade law, protected investment in foreign investment law, prudential regulation, and stable credit systems in international financial law.[10] My own journey into rethinking the operational intersections of human rights law and international economic policy grew out of this perceived vacuum.

Around a decade ago, the academic focus was on the nature of the duality between "public" and "private" spheres of law and regulation governing the interaction of human rights and economic law.[11] Of course, this question is critical to understanding the design of international economic law norms and institutions as well as the evolution of international human rights law norms and institutions. However, it has unfortunately left little space for more archaeological explorations of underlying questions of values represented,[12] ideologies contested,[13] and political economy paradigms[14] that prevail in the international economic system in its current architecture. In these more modern times, the question becomes,

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[9] *See e.g.*, Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'L ECON. L. 133 (2002); Dinah Shelton, *Protecting Human Rights in a Globalized World,* 25 B.C. INT'L & COMPAR. L. REV. 273 (2002); HEEJIN KIM, REGIME ACCOMMODATION IN INTERNATIONAL LAW: HUMAN RIGHTS IN INTERNATIONAL ECONOMIC LAW AND POLICY (2016).

[10] *But see, e.g.*, LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALISED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW (2013); ANA GONZALEZ-PELAEZ, HUMAN RIGHTS AND WORLD TRADE: HUNGER IN INTERNATIONAL SOCIETY (2005); WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION (Alvaro Santos et al. eds., 2019); ANETA TYC, GLOBAL TRADE, LABOUR RIGHTS AND INTERNATIONAL LAW: A MULTILEVEL APPROACH (2021).

[11] *See, e.g.*, Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy,* 34 J. LEGAL STUD. 631 (2005); Sungjoon Cho & Jurgen Kurtz, *Convergence and Divergence in International Economic Law and Politics,* 29 EUR. J. INT'L L. 169 (2018); Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367 (2014); Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469 (2011); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013).

[12] *See* DONATELLA ALESSANDRINI, VALUE MAKING IN INTERNATIONAL ECONOMIC LAW AND REGULATION: ALTERNATIVE POSSIBILITIES (2016); MARIANA MAZZUCATO, THE VALUE OF EVERYTHING: MAKING AND TAKING IN THE GLOBAL ECONOMY (2018).

[13] *See* JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018).

[14] *See* THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF THE LAW (Poul F. Kjaer ed., 2020); Marc D. Froese, *Political Economy and International Economic Law*, *in* THE PALGRAVE HANDBOOK OF CONTEMPORARY INTERNATIONAL POLITICAL ECONOMY 59 (Timothy M. Shaw et al. eds., 2019).

what do we, as *a collective humanity* composed of a multitude of diversities as *individuals* from the ideological, ideational, cultural, political, sociological, and existential senses, ultimately value when our respective States reach decisions on how to regulate, configure, arrange, use, and distribute natural, human, and capital resources? Much has been written about the Manichaean polarities of globalization from its critics and advocates, and what these discourses mean for the future of international economic law.[15] There are significant works that challenge the historically perpetuated narratives about the international economic order.[16] These challenges are raised predominantly by TWAIL scholars (Third World Approaches to International Law), whose international law scholarship is fast becoming the new mainstream.[17]

My focus here is not to summarize the long-standing debates on the techniques and scope of the interaction between international economic law and human rights. Neither do I intend to focus on the merits and demerits of globalization – its consequences, inequalities, and the many well-established (and almost self-evident) cyclical discontents that exist in its wake.[18] This is the tenth conference of SIEL/PEPA. In the past decade of global and regional economic and financial crises and ensuing related conflicts, all the way through the most recent months of this COVID-19 pandemic, another Thomas Piketty epic should not be required to provoke us into seriously rethinking how capitalism creates wealth but also generates massive income inequality within and among societies.[19]

We have lived the consequences of inequality in all its forms sharply in the time since emergency measures and lockdowns have become internationally ubiquitous.[20] Since then, some have had faster access to vaccines and health facilities and resources more than millions of others.[21] Some have had the luxury of

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[15] *See* Alessandra Arcuri, *International Economic Law and Disintegration: Beware the Schmittean Moment,* 23 J. Int'l Econ. L. 323 (2020); Gregory Shaffer, *How Do We Get Along? International Economic Law and the Nation-State,* 117 Mich. L. Rev. 1229 (2019); Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 Brook. J. Int'l L. 113 (1999); Michael J. Trebilcock, *Critiquing the Critics of Economic Globalization*, 1 J. of Int'l L. & Int'l Rel. 213 (2004); Jochen von Bernstorff, *International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization*, 26 Eur. J. Int'l L. 279 (2015).

[16] *See, e.g.*, Bandung, Global History, and International Law: Critical Pasts and Pending Futures (Luis Eslava et al. eds., 2017).

[17] *See, e.g.*, Sundhya Pahuja, Decolonizing International Law: Development, Economic Growth, and the Politics of Universality 3 (James Crawford & John Bell eds., 2011); James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, *in* International Legal Theory: Foundations and Frontiers (manuscript at 3) (Jeffrey Dunoff & Mark Pollack eds., forthcoming 2019) (available at SSRN: https://ssrn.com/abstract=3304767).

[18] Joseph E. Stiglitz, Globalization and its Discontents xiv-v (W.W. Norton & Co. 2003); Joseph E. Stiglitz, Globalization and its Discontents Revisited: Anti-Globalization in the Era of Trump 2 (W.W. Norton & Co. 2017).

[19] *See* Thomas Piketty, Capital and Ideology (Arthur Goldhammer trans., 2020); Thomas Piketty, Capital in the Twenty-First Century (Arthur Goldhammer trans., 2014).

[20] U.N. Comm. on Coordination of Stat. Activities, *How COVID-19 is Changing the World: A Statistical Perspective* (2020), https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf.

[21] *See* N. Jensen et al., *The COVID-19 Pandemic Underscores the Need for an Equity-Focused Global Health Agenda*, 8 Humanities & Soc. Sci. Commc'ns 1 (2021), https://www.nature.com/articles/s41599-020-00700-x.

stocking up on food supplies, with the full resources to work from home, even as millions of others lost jobs, businesses, and livelihoods. Even more around the world remain without the cushion of social protection and welfare safety nets they never had access to even *before* pandemic times.[22] Further, the pace of decarbonization in the global economy for humanity to survive is uneven throughout the world and hardly on track as a whole in relation to Paris Agreement targets.[23] This is literally a time, more than any other, where geography determines one's chances of survival,[24] let alone any notion of resilience, recovery, success, thriving, or flourishing. The stakes for the international economic system – and the current global, regional, and national legal systems that undergird it – could not be higher.

In 2021, we are certainly no longer in the era of just trying to "accommodate"[25] human rights that are often otherwise depicted as "social constitutions"[26] or "non-trade concerns" in international economic law.[27] Our individual and collective experiences during the COVID-19 pandemic this far can attest to the normalization of the wholesale erosion of human rights in every sphere of life.[28] Some may say this erosion stems from civil and political restrictions on freedom of speech, expression, privacy, and assembly. Others claim it arises from limitations on our economic, social and cultural rights to education, the right to work and just and favorable conditions of work, the right to the highest attainable standard of physical and mental health, the right to social security, the right to an adequate standard of living which includes food security, water, and housing, as

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[22] *See, e.g.*, Paul Blake & Divyanshi Wadhwa, *2020 Year in Review: The Impact of COVID-19 in Charts*, World Bank Voices (Dec. 14, 2020), https://blogs.worldbank.org/voices/2020-year-review-impact-covid-19-12-charts; U.N. Comm. for Dev. Pol'y, *Comprehensive Study on the Impact of COVID-19 on the Least Developed Country Category* (Apr. 2021).

[23] *See generally* David G. Victor, *Deep Decarbonization: A Realistic Way Forward on Climate Change*, Yale Env't 360 (Jan. 28, 2020), https://e360.yale.edu/features/deep-decarbonization-a-realistic-way-forward-on-climate-change; Deloitte, *The 2030 Decarbonization Challenge: The Path to the Future of Energy* (2020), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-eri-decarbonization-report.pdf; Kemal Dervis & Sebastian Strauss, *The Decarbonization Paradox,* Brookings (Feb. 18, 2021), https://www.brookings.edu/opinions/the-decarbonization-paradox/ .

[24] *See e.g.*, Brea L. Perry et al., *Pandemic Precarity: COVID-19 is Exposing and Exacerbating Inequalities in the American Heartland*, 118 J. Proc. Nat'l Acad. Scis. U.S., no. 8, 2021, at 1, https://www.pnas.org/content/118/8/e2020685118; Esmé Berkhout et al., *The Inequality Virus,* Oxfam International 11 (Jan. 2021); U.N. Dep't of Economic and Social Affsairs, *The Sustainable Development Goals Report 2020* (2020), https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf.

[25] Regime Accommodation in International Law, *supra* note 9, at 266.

[26] Cecilia J. Flores Elizondo, *Social Constitutions in International Economic Law: Power Differentiation as a Construct for Resistance in the Making of Law*, 13 Manchester J. Int'l Econ. L. 186 (2016).

[27] Regis Y. Simo, *Trade and Morality: Balancing Between the Pursuit of Non-Trade Concerns and the Fears of Opening the Floodgates*, 51 Geo. Wash. Int'l L. Rev. 407 (2019).

[28] U.N. Sustainable Development Group, *COVID-19 and Human Rights: We Are All in This Together* (Apr. 2020), https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf.

well as protection against forced evictions.[29] Whether either view or a combination of both are true, with the very fabric of our existence at stake, the issue for international economic law is no longer the mere accommodation of human rights, but rather how best to use the tools of international economic law to realize our individual and collective human rights. These are rights that, during this pandemic, States have imperiled, suppressed, muted, and reinterpreted both through rhetoric and actual implementation of 'emergency measures'[30] all over the world. With progress on achieving the Sustainable Development Goals severely set back by this pandemic – a pandemic which, by the way, has exposed all the fissures of inequality within our societies[31] – is there space for those of us in international economic law to enquire, *what is the nature of our vision of the 'development' that animates the current state of international economic law and regulation?* Classical and neoclassical efficiency[32] rationales abound in international law. These include ensuring fair and non-discriminatory market access in world trade law, protection of investor property rights in many early foreign investment law treaties, prudential risk regulation in international financial law, incentivization and protection of innovation in international intellectual property law, and ensuring level playing fields in international competition and global antitrust law, among all other fields of international economic law. The most pertinent question today is, do these rationales hold up in times of worsening precarity, growing extreme poverty and instability, more rampant racism and discrimination, and rapidly widening inequalities within and among countries in the international system?[33] Should the *raison d'etre* of international economic law remain regulation of market conditions for economic growth?[34]

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[29] *See* Sarah Repucci & Amy Slipowitz, *Democracy Under Lockdown: The Impact of COVID-19 on the Global Struggle for Freedom*, Freedom House (2020), https://freedomhouse.org/sites/default/files/2020-10/COVID-19_Special_Report_Final_.pdf.

[30] *See* Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and The Impending Authoritarian Pandemic*, 7 J.L. Biosciences, Jan.–June 2020, at 1.

[31] *See* Barry B. Hughes et al., *Pursuing the Sustainable Development Goals in a World Reshaped by COVID-19*, Frederick S. Pardee Ctr. for Int'l Futures & U.N. Dev. Programme (2021), https://sdgintegration.undp.org/sites/default/files/Foundational_research_report.pdf; Org. for Econ. Coop. & Dev. (OECD), *Social Economy and the COVID-19 Crisis: Current and Future Roles* (July 30, 2020), https://read.oecd-ilibrary.org/view/?ref=135_135367-031kjiq7v4&title=social-economy-and-the-COVID-19-crisis-current-and-future-roles&_ga=2.108058050.1931404398.1622564986-240774934.1622564986.

[32] Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. Pa. J. Int'l Econ. L. 33 (1996); John H. Jackson, *Reflections on International Economic Law*, 17 U. Pa. J. Int'l Econ. L. 17 (1996).

[33] *See, e.g.*, Margot E. Salomon, *Better Development Decision-Making: Applying International Human Rights Law to Neoclassical Economics*, 32 Nordic J. Hum. Rts. 44 (2014); Andy Sumner et al., U.N. University World Institute for Development Economics Research (WIDER), *Precarity and the Pandemic: COVID-19 and Poverty Incidence, Intensity, and Severity in Developing Countries* (Working Paper 2020/77) (June 2020) (available at https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2020-77.pdf).

[34] *See* Georg Schwarzenberger, *The Principles and Standards of International Economic Law* 117 Collected Courses Hague Acad. Int'l L. 1, 7-8 (1966); Ignaz Seidl-Hohenveldern, *International Economic Law: General Course on Public International Law*, 198 Collected Courses Hague Acad. Int'l L. 9, 21-22 (1986).

My own intuition – drawn from both developing world lived realities of this pandemic as well as from the stark contrast of developed world counterparts – says that the last decade of international economic law scholarship, which has already been incrementally moving towards human rights internalization in various forms (whether through the amendment, revision, or wholesale redesign of international economic law treaties, or through the adaptation or restructuring of institutions and dispute resolution processes),[35] will be due for a sharp interrogation of *what international economic law can do to help reinstate human rights into the fabric of our vision of what 'development'*[36] *looks like.* In the last ten years, we have learned much about the multidimensionality of poverty and extreme poverty,[37] and the intersectionality[38] of human rights violations with the populations hardest hit or most neglected by decisions related to development.[39] We have also witnessed the need for deeper international cooperation to address a full spectrum of connected transnational threats[40] towards the pillar inputs of capital, labor, human, and natural resources in the international economic system. These threats include climate change and the uneven transition to decarbonized economies;[41] labor and environmental violations in global business supply chains;[42] forced displacement and human trafficking that can infiltrate labor markets;[43] the appropriation of cultural heritage and cultural knowledge using intellectual property paradigms inaccessible to the indigenous peoples whose heritage and knowledge is being appropriated;[44] the deprivations of economic, social, and cultural rights that can arise from mass austerity measures during economic cri-

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[35] *See, e.g.*, JAMES HARRISON, REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE (Ernst Ulrich-Petersmann ed., 2005); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861 (2015); THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE (Antonio Segura Serrano ed., 2018); Stephan W. Schill, *Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649 (2017).

[36] *See* Bunn, *supra* note 6, at 151-76.

[37] *See* U.N. Dev. Programme & Oxford Poverty & Hum. Dev. Initiative, *Global Multidimensional Poverty Index 2020: Charting Pathways Out of Multidimensional Poverty: Achieving the SDGs* (2020), http://hdr.undp.org/sites/default/files/2020_mpi_report_en.pdf; *see also* Share of Multidimensional Poverty, *infra* note 68.

[38] *See* INTERSECTIONALITY AND HUMAN RIGHTS LAW (Shreya Atrey & Peter Dunne eds., 2020).

[39] *See* Global Multidimensional Poverty, *supra* at 37.

[40] *See* JEAN-HERVÉ LORENZI & MICKAËL BERREBI, A VIOLENT WORLD: MODERN THREATS TO ECONOMIC STABILITY 1-5 (2016).

[41] DECARBONISATION AND THE ENERGY INDUSTRY: LAW, POLICY, AND REGULATION IN LOW-CARBON ENERGY MARKETS, GLOB. ENERGY L. & POL'Y (Tade Oyewunmi et al. eds., 2020).

[42] *See Human Rights in Supply Chains: A Call for a Binding Global Standard in Due Diligence,* HUMAN RIGHTS WATCH (May 30, 2016), https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence#.

[43] International Labour Organization, *Ending Forced Labour by 2030: A Review of Policies and Programmes* (2018), https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-ipec/documents/publication/wcms_653986.pdf (last visited Dec. 21, 2021).

[44] *See* INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH (Matthew Rimmer ed., 2015); INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES (Christoph C. Graber et al. eds., 2012).

ses;[45] fewer employment and professional opportunities for women and girls,[46] the disabled,[47] the elderly,[48] persons of color,[49] persons adhering to certain religions or belief systems,[50] ethnic minorities,[51] refugees,[52] migrants,[53] and internally displaced peoples; the manipulation and mass surveillance by authoritarian regimes[54] – sometimes even tapping the behemoth technology companies[55] themselves – of consumer electronic data;[56] and, the distortion of online informa-

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45 U.N. Office of the High Commissioner for Human Rights, *Report on Austerity Measures and Economic and Social Rights* (2013), https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf; Diane A. Desierto, *Austerity Measures and International Economic, Social and Cultural Rights*, *in* HUMAN RIGHTS IN EMERGENCIES 241-276 (Evan J. Criddle ed., 2016).

46 *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development*, U.N. WOMEN, (2018), https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf?la=en&vs=4332.

47 U.N. Dep't of Econ. & Soc. Affs., *Disability and Development Report: Realizing the Sustainable Development Goals for and with Persons with Disabilities* (2018), https://social.un.org/publications/UN-Flagship-Report-Disability-Final.pdf.

48 U.N. Dep't of Econ. & Social Affs., *World Population Ageing 2020 Highlights: Living Arrangements of Older Persons* (2020), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesa_pd-2020_world_population_ageing_highlights.pdf.

49 *See, e.g.*, Joe Lasavio, *What Racism Costs Us All,* INT'L MONETARY FUND FIN. (Fall 2020), https://www.imf.org/external/pubs/ft/fandd/2020/09/pdf/the-economic-cost-of-racism-losavio.pdf; Beth Maina Ahlberg et al., *Invisibility of Racism in the Global Neoliberal Era: Implications for Researching Racism in Healthcare*, FRONTIERS IN SOCIO. (Aug. 14, 2019), https://www.frontiersin.org/articles/10.3389/fsoc.2019.00061/full; Anthony D. Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy,* 44 DUKE L.J. 928 (1995).

50 *See* U.S. Dep't of State, *2020 Report on International Religious Freedom* (May 21, 2021), https://www.state.gov/reports/2020-report-on-international-religious-freedom/; Brian J. Grim, *The Link Between Economic and Religious Freedoms*, WORLD ECON. F. (Dec. 18, 2014), https://www.weforum.org/agenda/2014/12/the-link-between-economic-and-religious-freedoms/.

51 *See generally* Jessica Belmont, *Everyone Equal: Making Inclusive Growth a Priority for Ethnic Minorities*, WORLD BANK (July 13, 2020), https://www.worldbank.org/en/news/feature/2020/07/13/everyone-equal-making-inclusive-growth-a-priority-for-ethnic-minorities.

52 Dany Bahar & Meagan Dooley, Brookings, *Refugees as Assets Not Burdens: The Role of Policy*, 8 BROOKE SHEARER SERIES (Feb. 6, 2020).

53 TIMOTHY J. HATTON & JEFFREY G. WILLIAMSON, GLOBAL MIGRATION AND THE WORLD ECONOMY: TWO CENTURIES OF POLICY AND PERFORMANCE (2008).

54 Alina Polyakova & Chris Meserole, BROOKINGS, *Exporting Digital Authoritarianism* (Aug. 2019), https://www.brookings.edu/research/exporting-digital-authoritarianism/ (select the "Download the full policy brief" hyperlink for a PDF edition of the report); Tiberiu Dragu & Yonatan Lupu, *Digital Authoritarianism and the Future of Human Rights*, INT'L ORG. 1 (2020); Adrian Shahbaz, *The Rise of Digital Authoritarianism: Fake News, Data Colletion, and the Challenge to Democracy*, FREEDOM HOUSE (2018), https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism; Darren Linvill & Patrick Warren, *The Real Target of Authoritarian Disinformation: Autocrats Care More About Domestic Control than Influence*, FOREIGN AFFS. (Mar. 24, 2021), https://www.foreignaffairs.com/articles/russian-federation/2021-03-24/real-target-authoritarian-disinformation.

55 Robert Morgus & Justin Sherman, *How U.S. Surveillance Technology is Propping Up Authoritarian Regimes*, WASH. POST (Jan. 17, 2019) https://www.washingtonpost.com/outlook/2019/01/17/how-us-surveillance-technology-is-propping-up-authoritarian-regimes/; Lydia Khalil, *Digital Authoritarianism, China, and COVID*, LOWY INST. ANALYSIS (Nov. 2, 2020), https://www.lowyinstitute.org/publications/digital-authoritarianism-china-and-covid.

56 Erol Yayboke & Sam Brannen, Cent. for Strategic & Int'l Stud. (CSIS), *Promote and Build: A Strategic Approach to Digital Authoritarianism*, CSIS BRIEFS (Oct. 2020), https://csis-website-

tion for political or ideological ends.[57] These human rights violations, deprivations, and erosions operate and proliferate by drawing on the key regulatory levers (as well as gaps[58]) of the global economy.[59] On this front, international economic law can therefore do more than just 'accommodate' human rights. International economic law can help realize, if not help respect, protect, and fulfil *all* human rights. I lay this somewhat unconventional gauntlet down for all of us in international economic law who know this history and have lived during these pandemic times and continue living related consequences throughout the world.

The particular frame in which I think international economic law tools can be of deep significance is in realizing the Right to Development which, as defined in Article 4(1) of the Draft Convention on the Right to Development, is the right of "[e]very human person and all peoples [. . .] to participate in, contribute to and enjoy economic, social, cultural, civil and political development *that is consistent with and based on all human rights and fundamental freedoms*."[60] This is a multidimensional and intersectional vision of development that transcends the material concerns of economic growth,[61] because it strives for consistency and is based on all human rights and fundamental freedoms. In my view, international economic law tools can indeed contribute to widening participation in, incentivizing contribution to, and furthering the enjoyment of development. Beyond the critiques of international economic law that we have witnessed in the past decade, there has also been some measure of progress.[62]

But before I elaborate on what international economic law tools can do in our legal and judicial imaginations, permit me to briefly give the state of play on the global economic system and the most vulnerable within this system since the COVID-19 pandemic began.

It is useful to remember, at the outset, that the pace of globalization has been steep and rapid only in the last century (*see Figure 1*).[63]

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prod.s3.amazonaws.com/s3fs-public/publication/201015_Yayboke_Brannen_PromoteAndBuild_Brief.pdf.

[57] Samantha Bradshaw & Philip N. Howard, *The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation*, Univ. of Oxford (2019), https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf.

[58] *See* Diane A. Desierto, *Shifting Sands in the International Economic System: Arbitrage in International Economic Law and International Human Rights*, 49 Geo. J. of Int'l L. 1019 (2018).

[59] *See* Subhan Ullah et al., *Multinational Corporations and Human Rights Violations in Emerging Economies: Does Commitment to Social and Environmental Responsibility Matter?*,]280 J.Envtl. Mgmt. 1 (2021).

[60] *See* U.N. Hum. Rts. Council, Draft Convention on the Right to Development, art. 4(1), U.N. Doc. A/HRC/WG.2/21/2 (Jan. 17, 2020) (emphasis added).

[61] *See, e.g.*, Hum. Rts. Council of the U.N., Draft Convention on the Right to Development, with Commentaries, U.N. Doc, art. 4(1) cmt. 7, A/HRC/WG.2/21/2/Add.1 (Jan. 20, 2020).

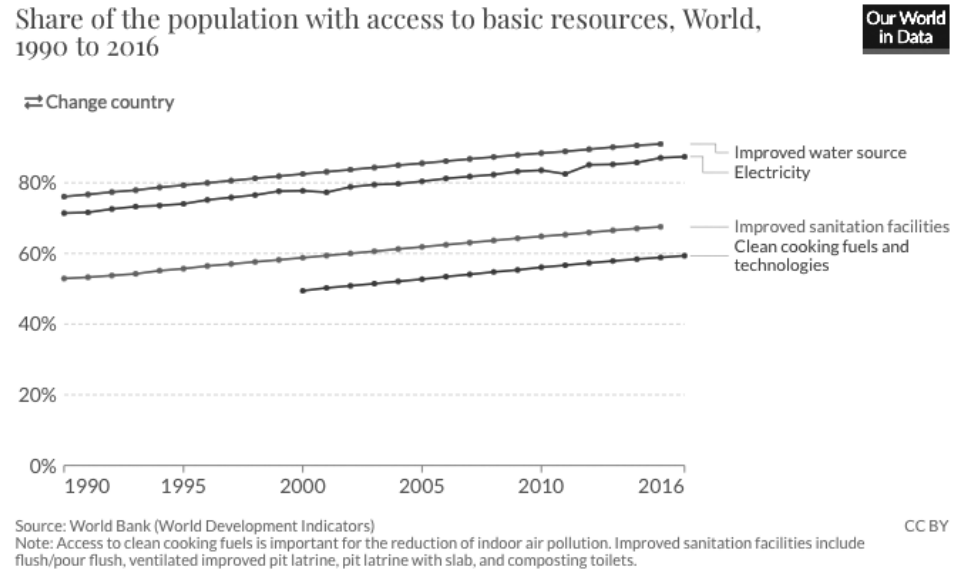
[62] *See, e.g.*, Edward A. Laing, *International Economic Law and Public Order in the Age of Equality*, 12 L. & Pol'y Int'l Bus. 727 (1980); Frank J. Garcia, *Globalization, Inequality, and International Law*, 8 Religions 1 (2017); Joel Niyobuhungiro, *International Economic Law, International Environmental Law, and Sustainable Development: The Need for Complementarity and Equal Implementation*, 49 Envtl. Pol'y & L 36 (2019); Marc D. Froese, Sovereign Rules and the Politics of International Economic Law 185-212 (2018).

[63] *Globalization Over 5 Centuries, World*, Our World in Data, https://ourworldindata.org/grapher/globalization-over-5-centuries?country=~OWID_WRL (last visited Dec. 26, 2021).

Figure 1: Globalization tracking chart

Arguably, globalization under international economic law has widened access to basic resources around the world (*see Figure 2*).[64]

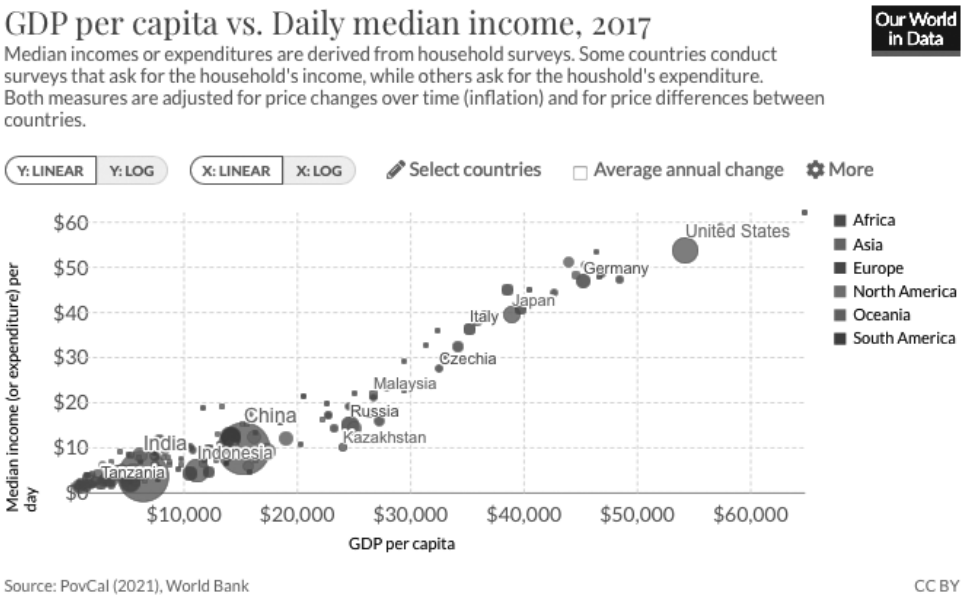
Figure 2: Access to basic resources



[64] *Share of the Population with Access to Basic Resources, World*, 1990-2016, Our World in Data, https://ourworldindata.org/grapher/access-to-basic-resources?country=~OWID_WRL (last visited Dec 26, 2021).

However, there remains a wide disparity among economic options for billions of people in the world – most of the world's human population live on income of less than $20 per day (*see Figure 3*).[65]

Figure 3: GDP per capita vs. daily median income, 2017

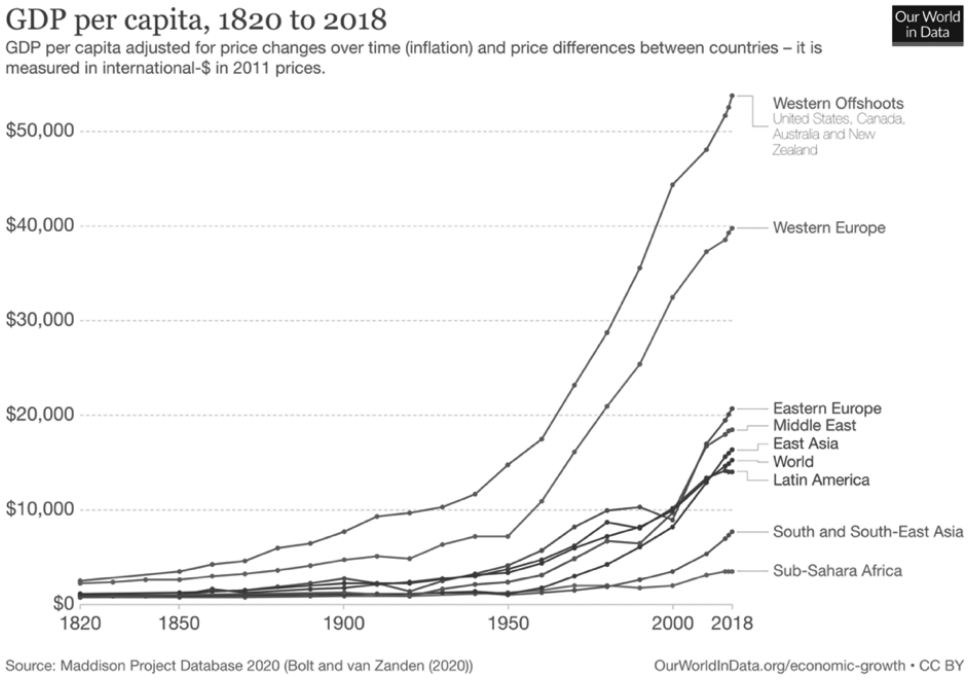


Without a doubt, economic growth over the last century has heavily favored the United States, Canada, New Zealand, and Western Europe, notwithstanding the rapid increases of wealth in a single generation in the People's Republic of China (*see Figure 4*).[66]

[65] *GDP Per Captia vs. Daily Median Income or Expenditure, 2017*, Our World in Data, https://ourworldindata.org/grapher/median-daily-per-capita-expenditure-vs-gdp-per-capita (last visited Dec 26, 2021).

[66] *GDP Per Capita, 1820 to* 2018, Our World in Data, https://ourworldindata.org/grapher/gdp-per-capita-maddison-2020 (last visited Dec. 26, 2021).

Figure 4: Historical figures of per capita GDP

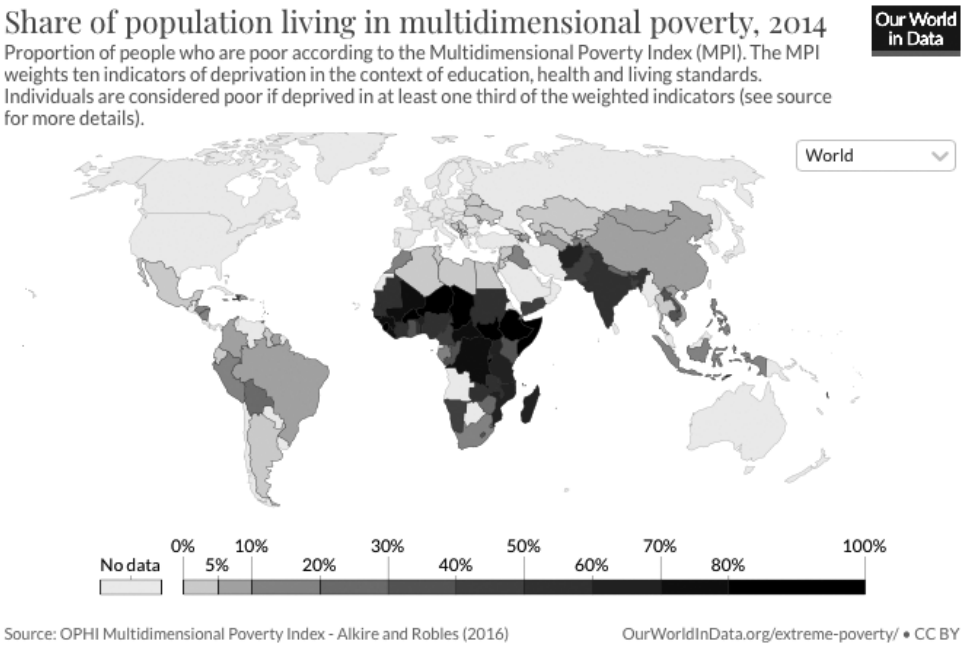


We have also barely scratched the surface towards meeting the U.N.'s Sustainable Development Goal 1 (zero poverty).[67] The percentage of people living in extreme poverty – those unable to secure basic goods and services such as food and nutrition, heating and energy, and housing – remains highest in sub-Saharan Africa, Latin America and the Caribbean, and South and Southeast Asia (*see Figure 5*).[68]

[67] *The Sustainable Development Goals Report 2020*, *supra* note 24.

[68] *Share of Multidimensional Poverty*, *2014*, Our World in Data, https://ourworldindata.org/grapher/share-multi-poverty (last visited Dec. 26, 2021).

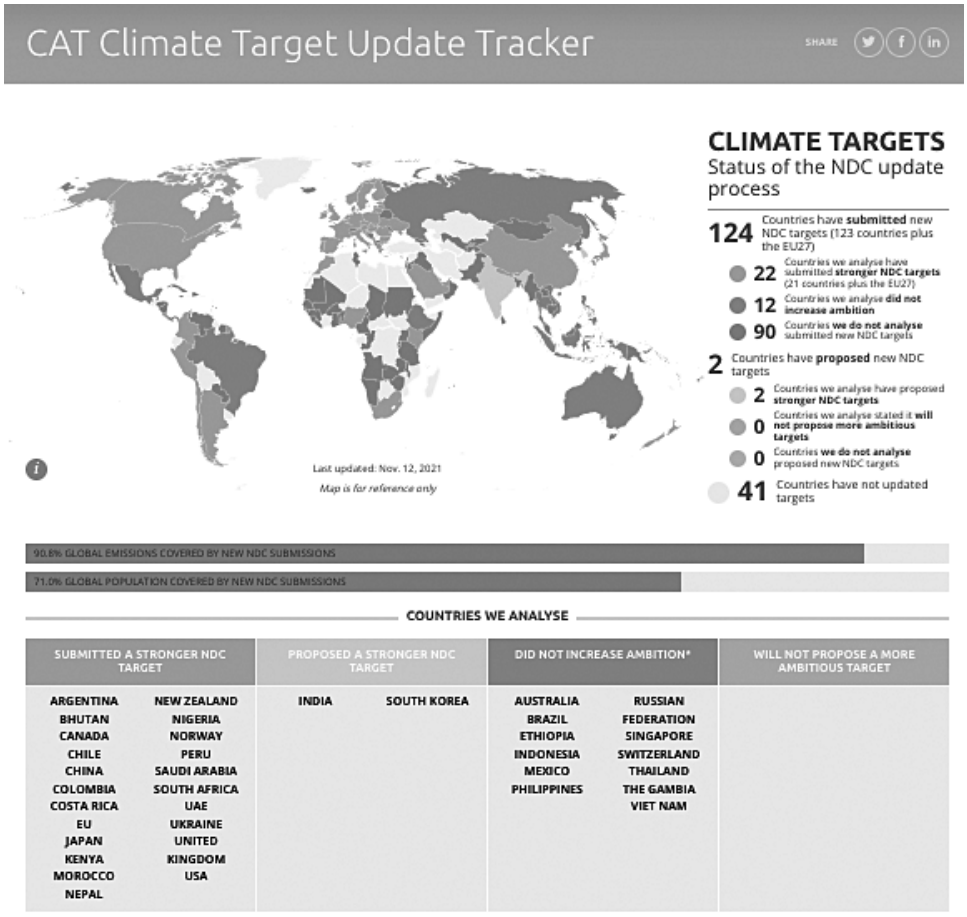
Figure 5: Map of extreme poverty



Compounding the challenges of continuing extreme poverty is ongoing failure to achieve decarbonization consistent with the Paris Agreement commitments. As the Climate Action Tracker allows us to see (*see Figure 6*),[69] virtually no region of the world is even close to taking sufficient action to address climate change, although several States are increasing their Nationally Determined Contributions (NDC) targets.

[69] *CAT Climate Target Update Tracker*, CLIMATE ACTION TRACKER, https://climateactiontracker.org/climate-target-update-tracker/ (last visited Dec. 26, 2021).

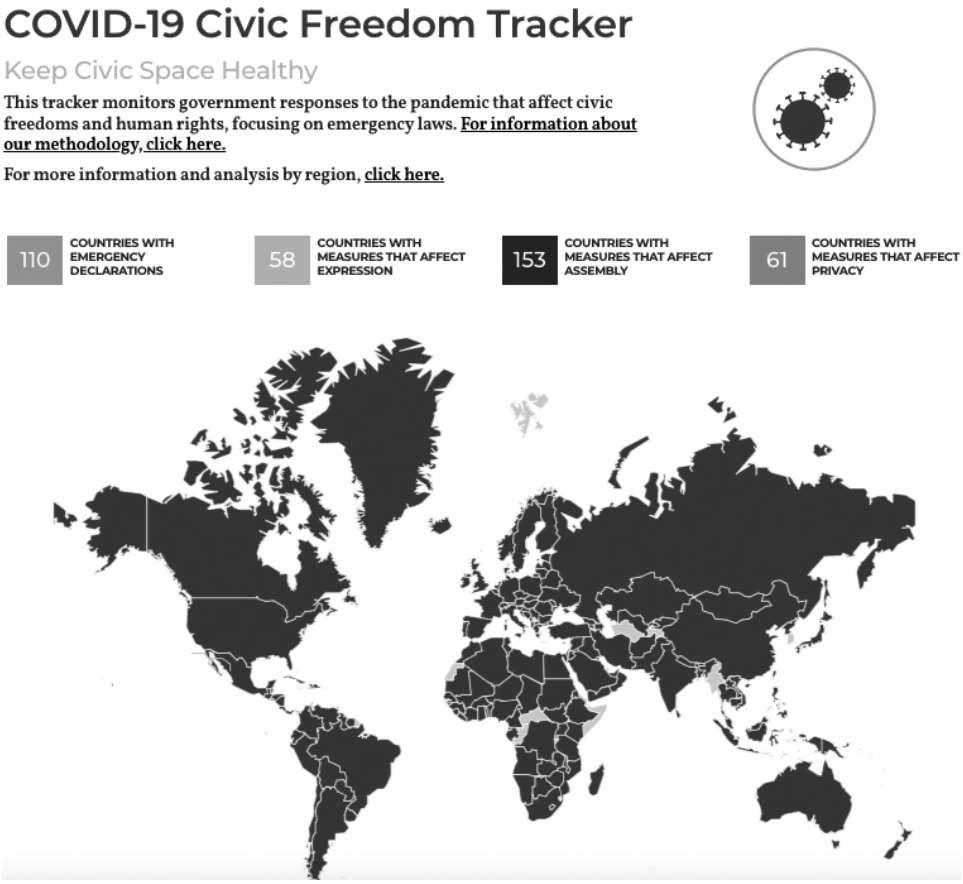
Figure 6: Climate action tracker



During these pandemic times, most of the world has been (and continues to be) subject to emergency declarations and other measures affecting freedoms of expression, assembly, and privacy (*see Figure 7*).[70]

[70] *COVID-19 Civic Freedom Tracker*, Int'l Center for Non-profit Law, https://www.icnl.org/covid19tracker/ (last visited Dec. 26, 2021).

Figure 7: COVID-19 civic freedom tracker



Unsurprisingly, the United Nations has emphasized the human rights as crucially central for all COVID-19 responses, noting, "[t]he COVID-19 crisis has exacerbated the vulnerability of the least protected in society. It is highlighting deep economic and social inequalities and inadequate health and social protection systems that require urgent attention as part of the public health response."[71]

II. International Economic Law Tools to Realize the Right to Development

The previous section's data-driven snapshot of the state of the most vulnerable in the international economic system should drive home the urgency of re-examining how international and domestic economic decision-making in the areas of trade, investment, finance, digital regulation, intellectual property, antitrust and competition, risk regulation, corporate social responsibility, and business and human rights regulation and adjudication, among others, ultimately impact the right to development. *How do these decisions impact the ways by which all peo-*

[71] U.N., *We Are All In This Together*, *supra* note 28, at 2.

ples participate in, contribute to, and enjoy economic, social, cultural, civil, and political development that is consistent with all human rights and fundamental freedoms? Somewhat counter-intuitive for those who focus mainly on the backlash against the neoliberal political economy paradigm in the international economic system,[72] my own lens focuses on the limited set of international economic law tools that still *do* exist to strengthen how we participate in, contribute to, and enjoy such human rights-based and human rights-consistent development. The remainder of this paper focuses its observations on five ongoing phenomena in international economic law.

a. Ongoing International Economic Law Treaty Evaluation and Human Rights-Driven Reform as the Norm.

The decade leading up to the global pandemic saw a global financial crisis and associated emergencies and political upheavals (particularly those engineered by the populist resurgence against international law and multilateral institutions, emphasizing the destructive consequences, asymmetries, and disparities of protection, voice, participation, accountability in trade, investment, sovereign debt financing, and international economic dispute resolution).[73] Since then, we have witnessed a distinct shift towards populations and voters pushing their respective governments to review, reassess, recalibrate, and reform their respective international economic partnership treaties.[74] Human rights due diligence,[75] and to a certain extent, human rights auditing or impact assessments[76] for baseline intergenerational impacts of trade concessions, foreign investment commitments, public-private partnership projects, foreign debt incurred, international tax rules, and others, are steadily gaining traction inside and outside governments.[77] Dia-

[72] *See* WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST (2019); ECONOMICS AFTER NEOLIBERALISM (Joshua Cohen ed., 2019).

[73] *See* BARRY EICHENGREEN, THE POPULIST TEMPTATION: ECONOMIC GRIEVANCE AND POLITICAL REACTION IN THE MODERN ERA 1-14 (2018); Heike Krieger, *Populist Governments and International Law,* 30 EUR. J. INT'L L. 971 (2019); Dani Rodrik, *Populism and the Economics of Globalization* 1*,* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23559, Jul. 2017) (available at https://www.nber.org/system/files/working_papers/w23559/w23559.pdf).

[74] *See, e.g.*, Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 1 UNIV. ILL. L. REV. 1 (2019); Diane A. Desierto, *The Human Costs of Exiting and Revising Trade and Investment Agreements: Local Community Interests, Human Rights, and Global Politics*, 32 EMORY INT'L L. REV. 1039 (2018).

[75] *See* U.N. Off. of the High Comm. for Hum. Rts., *Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies* (Jun. 2020), https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf; David Gaukrodger, OECD, *Business Responsibilities and Investment Treaties* (Jan. 15, 2020), https://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf.

[76] *See* ETO Consortium*, Human Rights Impact Assessments for Trade and Investment Agreements, Rep. of the Expert Seminar* (June 2010), at https://www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUid%5D=44; Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 J. INT'L & COMPAR. L. Q. 573 (2011).

[77] *See* Jennifer Zerk*,* Chatham House, *Human Rights Impact Assessment of Trade Agreements* (Feb. 2019), https://www.chathamhouse.org/sites/default/files/2019-02-18HumanRightsTradeAgreements.pdf; U.N. Hum. Rts. Council, *Report of the Independent Expert on the Promotion of a Democratic and Equi-*

logues on treaty reform and related issues of what used to be dubbed "non-trade" or "non-economic" concerns are now readily taking place at the World Trade Organization,[78] UNCITRAL Working Group III on Investor-State Dispute Settlement Reform,[79] the International Monetary Fund,[80] the World Bank Group, and other multilateral and regional development institutions.[81] Such organizations no longer dismiss local protection and inclusiveness,[82] consistent with sustainable development objectives in these fora, as extraneous concerns their mandates and processes. The challenges of realizing the urgent and necessary transformation and transition towards decarbonized economies,[83] deepening gender equality in the private sector,[84] and embedding human rights-based approaches in development decision-making[85] are, at the very least, now routinely recognized in global

table International Order (2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/151/19/PDF/G1615119.pdf?OpenElement; The World Bank & The Nordic Trust Fund, *Study on Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development* (Feb. 2013), https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf.

[78] Pascal Lamy, Director-General, World Trade Org. (WTO), Speech to the U.N. Inst. for Training and Rsch. (Sept. 26, 2010) (transcript available at https://www.wto.org/english/news_e/sppl_e/sppl172_e.htm); Press Release, WTO, Director General Azevêdo Meets with Members of the United Nations Working Group on Business and Human Rights (Feb. 8, 2019), https://www.wto.org/english/news_e/news19_e/dgra_08feb19_e.htm; Joint Statement by WTO Leaders, A New Commitment for Vaccine Equity and Defeating the Pandemic (June 1, 2021), https://www.wto.org/english/news_e/roadmap_igo_01jun21_e.htm.

[79] *See* U.N. Comm'n on Int'l Trade L., *Possible Reform of Investor-State Dispute Settlement (ISDS)*, A/CN/9/WG.III/WP.166 (July 30, 2019).

[80] *See* Christine Lagarde, Int'l Monetary Fund (IMF), Forging a Stronger Social Contract – The IMF's Approach to Social Spending (Jun. 14, 2019), https://www.imf.org/en/News/Articles/2019/06/14/sp061419-md-social-spending; IMF, *A Strategy for IMF Engagement on Social Spending* (June 14, 2019), https://www.imf.org/-/media/Files/Publications/PP/2019/PPEA2019016.ashx.

[81] *See Results and Performance of the World Bank Group: An Independent Evaluation 2020*, WORLD BANK GRP. (2020), https://ieg.worldbankgroup.org/sites/default/files/Data/Evaluation/files/RAP2020.pdf; *Knowledge Flow and Collaboration Under the World Bank's New Operating Model*, WORLD BANK GRP. (Apr. 8, 2019), https://ieg.worldbankgroup.org/sites/default/files/Data/reports/kfc.pdf; OECD Dev. Ctr., *Optimising the Role of Development Partners for Social Protection* (2019), https://www.oecd.org/dev/inclusivesocietiesanddevelopment/Lessons_learned_social_development_partners_for_social_protection.pdf; Colin Andrews et al., *The State of Economic Inclusion Report 2021: The Potential to Scale*, WORLD BANK GRP. (2021), https://openknowledge.worldbank.org/bitstream/handle/10986/34917/9781464815980.pdf?sequence=24&isAllowed=CY.]

[82] *See* Lutz Leisering, *The Calls for Universal Social Protection by International Organizations: Constructing a New Global Consensus*, 8 J. SOC. INCLUSION, no. 1, 2020, at 90.

[83] *See* Grzegorz Peszko et al., *Diversification and Cooperation in a Decarbonizing World: Climate Strategies for Fossil-Fuel Dependent Countries*, WORLD BANK GRP. (2020), https://openknowledge.worldbank.org/bitstream/handle/10986/34011/9781464813405.pdf?sequence=2&isAllowed=Y; Cinnamon P. Carlarne & J.D. Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement and the Future of International Climate Change Law*, 27 N.Y. UNIV. ENV'T L.J., no. 2, 2019, at 107.

[84] *See* Taylor Stoneman, *International Economic Law, Gender Equality, and Paternity Leave: Can the WTO Be Utilized to Balance the Division of Care Labor Worldwide?*, 32 Emory INT'L L. REV. 51 (2017); Uche U. Ewelukwa, *Women and International Economic Law: An Annotated Bibliography*, 8 LAW & BUS. REV. OF THE AMERICAS 603, 603-616 (2002); Elvira Nica, *Economic Processes and Gender Equality*, 4 J. RES. IN GENDER STUDS. 1050 (2014); U.N. Women & Int'l Fin. Corp., *Bridging the Gap: Emerging Private Sector Response and Recovery Measures for Gender Equality Amid COVID-19* (2020), https://www.weps.org/sites/default/files/2020-12/Bridging_the_Gap_UN_Women_IFC_1.pdf.

[85] *See* Peter Uvin, *From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development*, 17 DEV. IN PRACTICE 597 (2007); Morten Broberg & Hans-Otto Sano,

multilateral fora, even as approaches remain heatedly contested among various constituencies.[86] Economic policy reforms are scrutinized for their promised effectiveness and overall legitimacy, often due to reasons derived from the desire to address vexing human rights concerns.[87] One can plausibly make the case, at least in 2021, that the gap between human rights and development objectives in international economic law is decreasing.[88] This is the case even as international economic lawyers finesse and socialize their respective argumentative practices[89] from a wider prism of public interest and private allocations in international economic decision-making.[90] We may rightly contest how to realize human rights and what legal pathways are better in getting us there in the international economic system,[91] but at least in the last decade a quiet consensus is emerging that that we can no longer teach, research, prescribe, or practice international economic law with any sharp isolation from human rights law. If the last decade of global financial crises and the COVID-19 pandemic are any indication, there are serious consequences for all when our international, regional, and domestic economic arrangements ignore human rights.

b. Accountability Is a Featured Agenda in International Economic Law and International Economic Institutions and No Longer Anathema.

What used to be the hermetically regulated profession of international economic law has achieved more openness over the last decade, due to demands for transparency[92] and some measure of accountability,[93] as visible in the Mauritius

Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences, 22 INT'L J. HUM. RTS. 664 (2018).

[86] *See, e.g.*, Lauge N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treaty Regime: A 'Backward-Looking' Approach*, BROOKINGS (Mar. 17, 2021), https://www.brookings.edu/research/reforming-the-investment-treaty-regime/; Rob Davies et al., U.N. Conf. on Tr. and Dev. (UNCTAD), *Reforming the International Trading System for Recovery, Resilience, and Inclusive Development*, UNCTAD Research Paper No. 65, UNCTAD/SER.RP/2021/8 (Apr. 2021), https://unctad.org/system/files/official-document/ser-rp-2021d8_en.pdf; THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE (Antonio Segura Serrano ed., 2018).

[87] Aoife Nolan & Juan Pablo Bohoslavsky, *Human Rights and Economic Policy Reforms,* 24 INT'L J. HUM. RTS. 1247 (2020).

[88] *See* Sarah Joseph, *Human Rights and International Economic Law*, 7 EUR. J. INT'L L. 461 (2016).

[89] For a significant debate, *see* Ernst Ulrich-Petersmann, *Human Rights, International Economic Law and Constitutional Justice,* 19 EUR. J. INT'L L. 769 (2008); Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply,* 19 EUR. J. INT'L L. 945 (2008); Ernst Ulrich-Petersmann, *Human Rights, International Economic Law and Constitutional Justice: A Rejoinder,* 19 EUR. J. INT'L L. 955 (2008).

[90] *See* Bradly J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law,* 17 J. INT'L ECON. L. 333 (2014).

[91] *See* M.G. Kaladharan Nayar, *Human Rights and Economic Development: The Legal Foundations,* 2 UNIVERSAL HUM. RTS. 55 (1980).

[92] *See, e.g.*, Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. OF INT'L L. 579 (2006); Anne Peters, *The Transparency Turn of International Law*, 1 CHINESE J. GLOB. GOV. 3 (2015).

[93] *See* Dirk Ulrich Gilbert et al., *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 BUS. ETHICS Q. 23 (Jan. 2011); August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOB. GOVERNANCE 131 (2001); Kate MacDonald,

Convention on Transparency in Treaty-Based Investor-State Arbitration,[94] the new World Bank Accountability Mechanism,[95] and heightened transparency obligations emphasized by WTO Director-General Azevêdo[96] during the pandemic. While the particular contours of transparency and accountability mechanisms continue to be debated,[97] at least such discussions are taking place as prominent features of the operational agendas of international economic institutions and legal regimes.[98]

Unlike a decade ago, many of our discussions are now about ensuring the quality and effectiveness of transparency and accountability mechanisms in international economic law and institutions, and the quality of such institutions' decisions in influencing development outcomes within States.[99] We have shifted ground in the international economic system away from punting these questions to domestic means of implementation.[100] This is in stark contrast to the constant refrain of those resistant to the environmental, health, and related development concerns in the failed Doha Development Round at the World Trade Organization[101] – a shift towards exploring how the international economic system can

Accountability in Global Economic Governance, *in* THE OXFORD HANDBOOK OF INTERNATIONAL POLITICAL THEORY 453 (Chris Brown & Robyn Eckersley eds., 2018).

[94] G.A. Res. 69/116, Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 18. 2014) (the "Mauritius Convention on Transparency").

[95] Press Release, World Bank, World Bank Enhances Its Accountability (Mar. 9, 2020) (available at https://www.worldbank.org/en/news/press-release/2020/03/09/world-bank-enhances-its-accountability); Diane Desierto et al., *The 'New' World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab*, EJIL:TALK! (Nov. 11, 2020), https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism/.

[96] Press Release, WTO, DG Azevêdo Requests WTO Members to Share Information on Trade Measures Related to COVID-19 (Mar. 25, 2020), https://www.wto.org/english/news_e/news20_e/dgra_24mar20_e.htm.

[97] Alex Konanykhin, *How Transparency Can Help the Global Economy to Grow*, WORLD ECONOMIC FORUM (Oct. 10, 2018), https://www.weforum.org/agenda/2018/10/how-transparency-can-help-grow-the-global-economy/; Simon Taylor, *COVID-19 Demands Global Economic Order Rethink: Address the Debt, Climate and Extinction Crises for a Sustainable and Corruption-Free Future*, TRANSPARENCY INT'L (July 23, 2020), https://www.transparency.org/en/blog/debt-covid-19-extinction-climate.

[98] *See, e.g.*, Mark Halle & Robert Wolfe, Int'l Inst. for Sust. Dev. (IISD), *A New Approach to Transparency and Accountability in the WTO*, IISD ISSUE BRIEF 1 (Sept. 16, 2010), https://www.iisd.org/system/files/publications/IssueBrief6-2010-09-14-low.pdf; Mathias Risse, *Justice, Accountability, and the World Trade Organization*, *in* LEADERSHIP AND GLOBAL JUSTICE 23 (Douglas A. Hicks & Thad Williamson eds., 2018); Miles Kahler, *Defining Accountability Up: The Global Economic Multilaterals,* 39 GOV'T & OPPOSITION 132 (2004); Jorge Dajani & Bertrand Andre Rossert, *Embedding Ethics in Organisations and Their Operations: A Dynamic Approach*, 3 J. OF FIN. COMPLIANCE 198 (2020); Bernard Hoekman & Petros C. Mavroidis, *WTO Reform: Back to the Past to Build for the Future,* 12 GLOB. POL'Y, Supp. 3, Apr. 2021, at 5.

[99] *See, e.g.*, *Reforming the WTO Towards a Sustainable and Effective Multilateral Trading System*, EUROPEAN COMMISSION, (2021), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159544.1329_EN_02.pdf; *Enhancing Government Effectiveness and Transparency: The Fight Against Corruption*, WORLD BANK GRP. (Sept. 2020), https://documents1.worldbank.org/curated/en/235541600116631094/pdf/Enhancing-Government-Effectiveness-and-Transparency-The-Fight-Against-Corruption.pdf.

[100] *See* David Blandford et al., *Nontrade Concerns: Reconciling Domestic Policy Objectives with Freer Trade in Agricultural Products*, 85 AM. J. AGRIC. ECON. 668 (2003).

[101] Fiona Smith, *Non-Trade Concerns and Agriculture in a Post-Doha Environment: Thinking Outside the Green Box*, 9 ENV'T L. REV. 89 (2007); Larry A. DiMatteo et al., *The Doha Declaration and*

intentionally confront questions of accountability and transparency. This is a welcome phenomenon, especially since accountability and transparency directly impact the Right to Development as to how individuals, groups, and peoples can themselves meaningfully participate in, contribute to, and enjoy civil, economic, social, cultural, and political development in a manner that is consistent with, and based on, all their human rights and fundamental freedoms. There are many players to be considered – communities, consumers, households, small and medium enterprises, large industries, among others. It is best when everyone directly impacted by international economic decision-making is empowered as a result of better communication and transparency of information as to what our governmental representatives commit to, negotiate, jettison, or obligate for their populations. Such transparency should apply to world trade law, foreign investment law, international financial and monetary law, intellectual property law, global law, and technology in digital governance, and many others. In this moment, there are many opportunities to seek accountability for these ultimately distributive decisions, whether at the domestic, regional, or international level. Without this needed transparency at the outset, we are all left to passively absorb externalized negative human rights impacts, and only thereafter may attempt to cobble together forms, processes, and institutions to create genuine legal accountability for the negative human rights impacts of international, regional, and domestic economic decision-making. As observed in the examples above, it is noteworthy that the international economic law profession is not undertaking transparency and accountability discussions in isolation, but rather with deliberate engagement of international human rights and global public interest constituencies.

c. Adjudication Now Integrates States' Right to Regulate Human Rights and Public Interest, Alongside Duties to Economic Partners.

It is remarkable to note that the past decades have witnessed international economic adjudication routinely taking up human rights concerns.[102] This may partly be owing to broader arguments advanced by attorneys and academics. Further, there is a significant body of jurisprudence from the WTO Appellate Body and WTO Panels on culture and trade commitments,[103] as well as environmental protection within the context of trade commitments,[104] and national security and

Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime, 36 VAND. J. TRANSNAT'L L. 95 (2003); Regis Y. Simo, *Trade and Morality: Balancing Between the Pursuit of Non-Trade Concerns and the Fear of Opening the Floodgates*, 51 GEO. WASH. INT'L J. INT'L L. & ECONS. 407 (2019).

[102] *See generally* Ernst Ulrich-Petersmann, *Need for a New Philosophy of International Economic Law and Adjudication*, 17 J. INT'L ECON. L. 639 (2014).

[103] *See, e.g.*, Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R & WT/DS401/AB/R (adopted May 22, 2014).

[104] *See, e.g.*, Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

trade commitments,[105] which are primarily anchored on GATT Article XX general exceptions, GATT Article XXI security exceptions, and the SPS and TBT Agreements, and others. However, the assault on the WTO dispute settlement system resulting from appointments the United States blocked during the Trump administration, an administration that was critical of WTO judges' encroachment on domestic prerogatives, has also stalemated many possibilities for deepening that body of jurisprudence.[106] With latest change of administration in the United States, one hopes that world trade adjudication may resume course in engaging States' rights to regulate for human rights and the public interest,[107] as well as non-discrimination and fair market access under world trade law.[108]

Foreign investment jurisprudence is also witnessing its own quiet changes, with decisions such as *Urbaser v. Argentina,*[109] Perenco v. Ecuador,[110] Aven v. Costa Rica,[111] Allard v. Barbados,[112] and others deliberately referring to international human rights law as relevant sources of law in investor-State disputes. Further, human rights issues have featured increasingly in international investment arbitration,[113] alongside parallel developments in business and human rights litigation (including victories for plaintiffs in *Urgenda v. State of the Netherlands,*[114] *Okpabi v. Royal Dutch Shell PLC*,[115] and *Vedanta Resources*

[105] *See, e.g.*, Panel Report, *Russia – Measures Concerning Traffic in Transit,* WTO Doc. WT/DS512/R (adopted April 5, 2019); Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights,* WTO Doc. WT/DS567/R (adopted June 16, 2020).

[106] Clark Packard, *Trump's Real Trade War is Being Waged on the WTO*, Foreign Policy (Jan. 9, 2020, 1:54 PM), https://foreignpolicy.com/2020/01/09/trumps-real-trade-war-is-being-waged-on-the-wto/ ("[T]he WTO will remain intact as a system of rules that will largely be adhered to, as well as a forum to negotiate new rules. But the dispute settlement system, the 'crown jewel' of the WTO, has been damaged–perhaps irrevocably so."); Gregory Shaffer et al., *U.S. Threats to the WTO Appellate Body* (Dec. 13, 2017) (Research Paper No. 2017-63, U.C. Irvine School of Law) (available at https://ssrn.com/abstract=3087524).

[107] *See* Frank J. Garcia, *Restoring Trade's Social Contract in the United States*, *in* World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization 233 (Alvaro Santos et al. eds., 2019).

[108] *See generally* William J. Davey, Non-Discrimination in the World Trade Organization: The Rules and Exceptions (2012).

[109] *Urbaser S.A. et al. v. The Argentine Republic*, Case No. ARB/07/26, Award (ICSID Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

[110] *Perenco Ecuador Limited v. The Republic of Ecuador*, Case No. ARB/08/6, Award (ICSID Sept. 27, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf.

[111] *David R. Aven et al. v. The Republic of Costa Rica*, Case No. UNCT/15/3, Award (ICSID Sept. 18, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf.

[112] *Peter A. Allard v. The Government of Barbados*, Case No. 2012-06, Award (Perm. Ct. Arb. June 27, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7594.pdf.

[113] *See* Ursula Kriebaum, *Human Rights and International Investment Arbitration*, *in* The Oxford Handbook of International Arbitration 150 (Thomas Schultz & Frederico Ortino eds., Oxford Univ. Press 2020).

[114] Hague Dist. Ct. Oct. 9, 2018, C/09/00456689 / HA ZA 13-396 (unofficial court English translation) (*Urgenda Foundation v. State of the Netherlands*) (Neth.), http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.

[115] *Okpabi et al. v. Royal Dutch Shell PLc et al.* [2021] UKSC 3 (appeal taken from EWCA Civ.), https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf.

PLC v. Lungowe[116]) and business and human rights arbitration (including the famous *Bangladesh Accord* arbitration awards[117] and the Hague Rules on Business and Human Rights Arbitration[118]). Plus, arbitral institutions such as the Permanent Court of Arbitration have developed their own rules specific to environmental disputes.[119] Climate change law is also now utilized in investor-State arbitrations pertaining to State regulations relating to transitions to renewable energies.[120] For example, States have thus far had some measure of success in defending their climate change and renewable energy regulations[121] – see, e.g., cases from Spain,[122] the Czech Republic,[123] and Italy.[124]

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116 *Vedanta Resources PLc et al. v. Lungowe et al.* [2019] UKSC 20 (appeal taken from EWCA Civ), https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment-accessible.pdf.

117 *See Industriall Global Union & Uni Global Union v. [redacted names of Respondents]*, Case No. 2016-36, Termination Order (Perm. Ct. Arb. 2018), https://pcacases.com/web/sendAttach/2438; *Industriall Global Union & Uni Global Union v. [redacted names of Respondents]*, Case No. 2016-37, Termination Order (Perm. Ct. Arb. 2018), https://pcacases.com/web/sendAttach/2439.

118 *Hague Rules on Business and Human Rights Arbitration*, Center for International Legal Cooperation (Dec. 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

119 *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, Permanent Court of Arbitration (June 19, 2001), https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf; *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or The Environment*, Permanent Court of Arbitration (Apr. 16, 2002), https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf.

120 *See generally* Anatole Boute, *Combating Climate Change Through Investment Arbitration*, 35 Fordham Int'l L.J. 613 (2012); Dae-Jung Kim, *Standards of Protection in Investment Arbitration for Upcoming Climate Change Cases*, 24 J. Arb. Studs. 33 (2014); Brian D. Burstein, *Green Investment Disputes: The Interaction Between Investment Arbitration and the Climate Change Agenda*, 17 Revista Brasileira de Arbitragem, no. 68, 2020, at 97 (2020); Lucy Greenwood, *The Canary Is Dead: Arbitration and Climate Change*, 38 J. Int'l Arb. 309 (2021).

121 *See* Charles A. Patrizia, et al., *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty*, Global Arbitration Review (Jan. 31, 2019), https://www.lexology.com/library/detail.aspx?g=301e8347-1a70-4175-b22c-97309e698cac.

122 *Charanne B.V. & Construction Investments S.A.R.L. v. The Kingdom of Spain*, Case No. 062/2012, Final Award (Stockholm Chamber Com. Arb. 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf; *Isolux Infrastructure Netherlands, B.V. v. The Kingdom of Spain*, Case No. V2013/153, Award (Stockholm Chamber Com. Arb. 2016), https://www.italaw.com/sites/default/files/case-documents/italaw9219.pdf. However, for cases where Spain was found internationally responsible, *see Eiser Infrastructure Limited & Energia Solar Luxembourg S.à.r.I. v. Kingdom of Spain,* Case No. ARB/13/36, Final Award (ICSID May 4, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf; *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain,* Case No. 2015/063, Final Award (Stockholm Chamber Com. Arb. Feb. 15, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf. *See also* Fernando Dias Simoes, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking,* 45 Den. J. Int'l L. & Pol'y 251 (2017); Isabella Reynoso, *Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development,* IISD Investment Treaty News (June 27, 2019), https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/.

123 *See, e.g.*, *Mr. Jürgen Wirtgen et al. v. The Czech Republic*, Case No. 2014-03, Final Award (Perm. Ct. Arb. Oct. 11, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9498.pdf; *Antaris Solar GmbH & Dr. Michael Göde v. The Czech Republic*, Case No. 2014-01, Award (Perm. Ct. Arb. May 2, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf; *I.C.W. Europe Investments Limited v. The Government of the Czech Republic*, Case No. 2014-22, Award (Perm. Ct. Arb. May 15, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10678.pdf.

As I have discussed in other fora, the regulatory and legal changes that will accompany the implementation of climate change law will inevitably put international economic dispute settlement front and center in the interpretation and application of a very broad spectrum of interrelated climate change, environmental law, and human rights norms vis-à-vis market access and property rights that have traditionally been asserted in world trade law and foreign investment law.[125] In turn, one can expect the expanding *ratione materiae* in international economic disputes to exert counterpart demand pressures over time for a more diversified expertise in international economic law, international human rights law, and international environmental law in the composition of international economic tribunals.[126] In global antitrust and anticompetition law, we are seeing transatlantic litigation taking place as European Union defends its values against abuse of market dominance and other public interest consequences resulting from the actions of tech giants from the United States.[127] Such issues are attracting not just the regulatory scrutiny of Margrethe Vestager at the European Commission,[128] but also the investigation of the United States Congress[129] as obviated by that body's recent inquiries over the ethics of monopolistic business practices of tech giants Facebook, Amazon, Google, Netflix, and Apple. Accountability for digital

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[124] *Blunsun S.A. et al. v. Italian Republic*, ICSID Case No. ARB/14/3, at ¶ 63-65 (2016), https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf; *but see Greentech Energy Systems A/S et al. v. The Italian Republic*, Arb. Case No. V 2015/095, Final Award (Stockholm Chamber Com. Arb. Dec. 23, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf.

[125] *See* Olivia Lu, *TagTime with Prof. Diane Desierto – Invoking Climate Change, Environmental Law, and Human Rights Law in International Arbitration: Utopia or Opportunity?*, American Review of International Arbitration Blog, TagTime (Feb. 8, 2021), http://blogs2.law.columbia.edu/aria/tagtime-with-prof-diane-desierto-invoking-climate-change-environmental-law-and-human-rights-law-in-international-arbitration-utopia-or-opportunity/; Diane Desierto, *COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?*, EJIL:Talk! (Dec. 19, 2019), https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/.

[126] *See, e.g.*, Olof Larsson et al., *Selection and Appointment of International Adjudication: Insights from Political Science*, Academic Forum on ISDS 391, 392 (Concept Paper 2019/10, Sept. 17, 2019), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/larsson-selection-and-appointment-isds-af-10-2019.pdf; Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization,* 20 Eur. J Int'l Rels. (2014), https://journals.sagepub.com/doi/abs/10.1177/1354066112448201; Robert Howse, *Appointment with Destiny: Selecting WTO Judges in the Future*, 12 Glob. Pol'y 71 (2021), https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12933.

[127] *See, e.g.*, *Amazon Charged with Abusing EU Competition Rules*, BBC News (Nov. 10, 2020), https://www.bbc.com/news/business-54887650; Jonathan Watson, *Toe to Toe with the Tech Giants*, International Bar Association, https://www.ibanet.org/article/b0cb42ca-012c-4346-b116-4f1b4d8a2ba5 (last visited Dec. 27, 2021); Javier Espinoza, *EU vs Big Tech: Brussels' Bid to Weaken the Digital Gatekeepers*, Financial Times (Dec. 8, 2020), https://www.ft.com/content/4e08efbb-dd96-4bea-8260-01502aaf1bd7.

[128] *See* Ravi Agrawal, *Margrethe Vestager is Still Coming for Big Tech*, Foreign Policy (July 4, 2020), https://foreignpolicy.com/2020/07/04/margrethe-vestager-is-still-coming-for-big-tech/.

[129] Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

governance,[130] as well as for the future of artificial intelligence,[131] is now playing out in administrative agencies' rule-making and quasi-adjudication functions in Europe and the United States,[132] and to a certain extent, in administrative agencies across Asia.[133]

Domestic business and human rights legislation and national litigation has also continuously proliferated in the international economic system.[134] In addition to the monumental *Kiobel* decision of the United States Supreme Court,[135] jurisdictions such as the United Kingdom,[136] the Netherlands,[137] Australia,[138] Canada,[139] and others have been receptive to human rights plaintiffs seeking to hold transnational and multinational corporations to account for the injurious consequences of their actions. Many corporations themselves are embracing corporate social responsibilities in the U.N. Global Compact,[140] the U.N. Principles on Responsible Investment,[141] and the Equator Principles,[142] and are also engaging in human

130 *See* Ansgar Koene et al., Eur. Parl. Rsch. Serv., *A Governance Framework for Algorithmic Accountability and Transparency*, PE 624.262 (Apr. 2019), https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624262/EPRS_STU(2019)624262_EN.pdf.

131 *See, e.g.*, Thomas Wischmeyer, *Artificial Intelligence and Transparency: Opening the Black Box*, *in* Regulating Artificial Intelligence 75 (Thomas Wischmeyer & Rimo Rademacher eds., 2020); Mark MacCarthy & Kenneth Propp, *Machines Learn that Brussels Writes the Rules: The EU's New AI Regulation*, Brookings (May 4, 2021), https://www.brookings.edu/blog/techtank/2021/05/04/machines-learn-that-brussels-writes-the-rules-the-eus-new-ai-regulation/.

132 *Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM(2021) 206 final (Apr. 21, 2021); *Legislation Related to Artificial Intelligence,* U.S. Nat'l Conference of State Legislatures (Sep. 15, 2021).

133 *See* Ayesha Khanna & Parag Khanna, *Where Asia is Taking the World with AI*, Forbes (May 21, 2020), https://www.forbes.com/sites/insights-ibmai/2020/05/21/where-asia-is-taking-the-world-with-ai/?sh=6662c01b7947.

134 *See* Danielle Anne Pamplona & Franz Christian Ebert, *Editorial: Business and Human Rights: Taking Stock of Trends in International Governance and Domestic Litigation*, 15 Revista de Direito Internactional, no. 3, 2018, at 2; Florian Wettstein, *Human Rights, Emerging Markets, and International Business*, *in* Oxford Handbook of Management in Emerging Markets (2019); Elise Groulx Diggs et al., *Business and Human Rights as a Galaxy of Norms*, 50 Geo. J.Int'l L. 309 (2019).

135 *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 569 U.S. 108 (2013).

136 Richard Meeran, *Multinational Human Rights Litigation in the UK: A Retrospective*, 6 Bus. & Hum. Rts. J. 255 (2021), https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/multinational-human-rights-litigation-in-the-uk-a-retrospective/64E3C1721B8E1BA1D929A5EE89DC6910.

137 *See* Juliane Kippenberg, *Netherlands Takes Big Step Toward Tackling Child Labor*, Hum. Rts. Watch (June 4, 2019, 1:30 AM), https://www.hrw.org/news/2019/06/04/netherlands-takes-big-step-toward-tackling-child-labor; Revision of the National Action Plan on Business and Human Rights, Gov't Neth., https://www.government.nl/topics/responsible-business-conduct-rbc/national-action-plan-on-business-and-human-rights (last visited Dec. 27, 2021).

138 Amanda Murphy et al., *First-Step Analysis: Business and Human Rights in Australia*, Lexology (Feb. 28, 2020), https://www.lexology.com/library/detail.aspx?g=79229884-c466-461f-ad12-0c51192b50c2.

139 Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (Case No. 37919) (Can.), https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do.

140 *The Ten Principles of the U.N. Global Compact*, U.N. Global Compact, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Dec. 27, 2021).

141 *About the PRI*, U.N. Principles for Responsible Investment, https://www.unpri.org/pri/about-the-pri (last visited Dec. 27, 2021).

rights benchmarking[143] and human rights due diligence.[144] Importantly, some Fortune 500 companies are markedly shifting away from the notion of strict *shareholder* accountability and towards *stakeholder* accountability.[145] The Bangladesh Accords arbitrations following the Rana Plaza tragedy involving garments sector laborers in Bangladesh[146] also paved the way for subsequent efforts on business and human rights arbitration, most recently in the adoption of the 2019 Hague Rules on Business and Human Rights Arbitration.[147]

d. International Economic Law Institutions Are Creating Space for Civil Society Participation and Contribution, Though Such Spaces Remain Contested.

As other scholars have narrated,[148] civil society actors used to operate more from the fringes of international economic decision-making at the World Trade Organization (WTO) (recall the 1997 Seattle protests),[149] UNCITRAL,[150] the World Bank Group,[151] and the United Nations,[152] as well as regional institutions

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142 THE EQUATOR PRINCIPLES (EP4) (Jul. 2020) https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf.

143 *See 2020 Methodology for the 2020 Corporate Human Rights Benchmark*, WORLD BENCHMARKING ALLIANCE (Apr. 2, 2020), https://www.worldbenchmarkingalliance.org/research/2020-methodology-for-the-2020-corporate-human-rights-benchmark/ (providing an overview of the organization's goal and providing links to updated benchmarks for several covered business sectors).

144 *See* Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L.Q. 789 (2020); Bjorn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225 (2017).

145 Vivian Hunt, *Who's Afraid of Stakeholder Capitalism*?, FORTUNE (May 16, 2021, 8:00 AM), https://fortune.com/2021/05/16/stakeholder-capitalism-milton-friedman-business-roundtable-statement-esg/; *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf.

146 Gaukrodger, *supra* note 75, at 71.

147 *Id.* at 72.

148 *See, e.g.*, Wolfgang Benedek, *The Emerging Global Civil Society: Achievements and Prospects*, *in* AUTHORITY IN THE GLOBAL POLITICAL ECONOMY 170 (Volker Rittberger et al. eds., 2008); Gordon A. Christenson, *World Civil Society and the International Rule of Law*, 19 HUM. RTS. Q. 724 (1997); Joana Gomes Beirao, *The Role of Non-Governmental Organizations in International Economic Law*, LAWYR.IT (Jun. 8, 2019), http://www.lawyr.it/index.php/articles/international-focus/1374-the-role-of-non-governmental-organisations-in-international-economic-law.

149 Gregory Scruggs, *What the Battle of Seattle Means 20 Years Later*, BLOOMBERG (Nov. 19, 2019, 9:31 AM), https://www.bloomberg.com/news/articles/2019-11-29/what-seattle-s-wto-protests-mean-20-years-later.

150 *See* IISD, *Coalition of Civil Society Groups, Trade Unions Caution Against MIC Option at UNCITRAL*, INVESTMENT TREATY NEWS (Mar. 10, 2020), https://www.iisd.org/itn/en/2020/03/10/coalition-of-civil-society-groups-trade-unions-caution-against-mic-option-at-uncitral/.

151 *See* THE WORLD BANK, CIVIL SOCIETY, https://www.worldbank.org/en/about/partners/civil-society/overview#:~:text=the%20Bank%20has%20steadily%20increased,88%25%20in%20fiscal%20year%202015 (last visited Dec. 27, 2021) (World Bank overview of its relationship with civil society organizations, or CSOs).

152 *See* U.N. High Commissioner for Human Rights, Rep. of the Hum. Rts. Council, Civil Society Space: Engagement with International and Regional Organizations, U.N. Doc. A/HRC/44/25 (Apr. 20, 2020) https://undocs.org/A/HRC/44/25.

such as the European Union[153] and more technical institutions of global economic governance such as the World Intellectual Property Organization.[154] In the span of a decade, however, more spaces for participation and contribution have gradually been made available, although many might critique these opportunities as token spaces or symbolic consultations. Participation methods include consultative mechanisms, deliberative sessions, trade and investment policy engagement, calls for inputs, and Track 1.5 events,[155] among others.[156] These spaces remain vigorously contested,[157] especially when it comes to diversifying and verifying the sources of information States and international economic institutions rely upon for international economic decision-making beyond the usual channels of State-based intelligence and information from diplomatic constituencies.[158] Participation of non-disputing parties (*amici* participation) has also become a constant feature of investor-State arbitrations.[159] However, as is the case in critiques of non-disputing member participation in WTO disputes,[160] one can certainly critique whether such participation achieves its functional objectives,[161] especially as to whether it truly assists arbitral tribunals to appreciate the essentiality and complexity of international human rights law.[162]

Notwithstanding these, in my view, welcome contestations, the push towards further mainstreaming the participation and contribution of individuals, groups, and peoples through civil society involvement in international, regional, and do-

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153 E.U. Agency for Fundamental Rights *Challenges Facing Civil Society Organisations Working on Human Rights in the EU* (2017), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf.

154 *World Intellectual Property Organisation*, Global Information Society Watch (2007), https://giswatch.org/sites/default/files/gisw_wipo_0.pdf.

155 Jennifer Staats et al., *A Primer on Multi-Track Diplomacy:How Does It Work?*, United States Inst. of Peace (July 31, 2019), https://www.usip.org/publications/2019/07/primer-multi-track-diplomacy-how-does-it-work (explaining that Track 1.5 diplomacy brings to one diplomatic table both government officials participating in unofficial capacity and non-governmental experts).

156 *See*, *e.g.*, George Ingram, *Civil Society: An Essential Ingredient of Development,* Brookings (Apr. 6, 2020), https://www.brookings.edu/blog/up-front/2020/04/06/civil-society-an-essential-ingredient-of-development/; U.N. Special Rapporteur on the Rights to Peaceful Assembly and to Association, Human Rights Council, Civil Society Participation in the Implementation of the 2030 Agenda for Sustainable Development*,* U.N. Doc. A/HRC/41/41/Add.2 (Sept. 30, 2019), https://undocs.org/A/HRC/41/41/Add.2.

157 *See, e.g.*, *Challenges Facing Civil Society Organisations*, *supra* note 153.

158 *See The Future Role of Civil Society*, World Economic Forum World Scenario Series (Jan. 2013), http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf; Agnes Köver, *The Relationship Between Government and Civil Society in the Era of COVID-19,* 12 Nonprofit Pol'y F. 1, 21 (Feb. 2021), https://www.degruyter.com/document/doi/10.1515/npf-2021-0007/html.

159 *See* Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 Int'l & Compar. L. Q. 373 (Apr. 2010); Thomas Leary, *Non-Disputing Parties and Human Rights in Investor-State Arbitration*, 18 J. World Inv. & Trade 1062 (2017); Christina Knahr, *The Role of Non-State Actors in International Investment Arbitration,* 32 S. Afr. Y.B. Int'l L. 455 (2007).

160 *See* Nick M. Covelli & Rajeev Sharma, *Due Process, Judicial Economy and Procedural Rights: Non-Disputing Member Participation in WTO Disputes*, 5 J. World Intell. Prop. 591 (2002).

161 *See* Fernando Dias Simoes, *Myopic Amici: The Participation of Non-Disputing Parties in ICSID Arbitration*, 42 N.C. J. Int'l L. 791 (2017).

162 *See* Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 Penn St. L.R. 1269 (2009); *see also* Francisco José Pascual Vives, *Amicus Curiae and Investment Arbitration*, 27 Anuario Español de Derecho Internacional 351 (2011) (in Spanish).

mestic economic decision-making still augurs well for the prospects of realizing the Right to Development in the international economic system. Civil society participation, engagement, and critique are essential to public deliberations and our continuing investigation into the values that animate and motivate State and non-State authoritative decision-making in the international economic system, and will necessarily influence which groups are favored and disfavored by these decisions.[163] Civil society participation is even more crucial when considering our daily task to realize our individual and collective human rights, which encompass civil, political, economic, social, and cultural dimensions, and which must be considered in both their territorial and extraterritorial[164] applications. Though we currently use a baseline of expected global public goods against which we measure the ultimate salience and true success of the modern global economy, civil society participation quality and quantity should in fact be considered the true rubric.[165]

III. Human Rights and the Right to Development Are Increasingly Included in International Economic Law Education, Scholarship, and Policy Practice.

Most importantly, in my view, the long-term pedagogic and epistemological landscape of international economic law is itself changing to embrace the questions, challenges, and urgencies of human rights not just as artifacts, phenomena, or occasional impacts of economic transactions but as inimitably necessary normative elements in the multitude of simultaneous decisions that States and non-State actors make in the global economic system.[166] Approaching thematic and granular questions of international economic law through an interdisciplinary lens has quickly become the methodology *de rigeur*.[167] Some have lamented the resulting loss of the law as an individual discipline in and of itself and, as it was

163 *See* Isabella D. Bunn, *Linkage Between Ethics and International Economic Laws*, 19 U. PA. J. INT'L ECON. L. 319, 320-21 (1998); *see generally* THE VALUE OF EVERYTHING, *supra* note 12; KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019); HUMAN DIGNITY AND THE FUTURE OF GLOBAL INSTITUTIONS (Mark P. Lagon & Anthony Clark Arend eds., 2014).

164 *See* YUVAL SHANY, *The Extraterritorial Application of International Human Rights Law*, 409 COLLECTED COURSES HAGUE ACAD. INT'L L. 21 (2020).

165 *See* WILLIAM F. FELICE & DIANA FUGUITT, HUMAN RIGHTS AND PUBLIC GOODS: THE GLOBAL NEW DEAL (2020).

166 *See* Hans W. Baade, *Teaching International Economic Law,* 16 J. LEGAL EDUC. 59 (1963); Myres S. McDougal, *The Teaching of International Law*, 2 GA. J. INT'L & COMP. L. 111 (1972); Egon Schwelb, *Human Rights and the Teaching of International Law*, 64 AM. J. INT'L L. 355 (1970); Duncan French, *Personal Opinion: Studying (and Teaching) International Economic Law to Undergraduates*, 10 MANCHESTER J. INT'L ECON. L. 125 (2013); Seema Sapra, *An Agenda for Teaching International Economic Law in Indian Law Schools*, 2 INDIAN J. INT'L ECON. L. 80 (2009).

167 *See, e.g.*, FRONTIERS OF INTERNATIONAL ECONOMIC LAW: LEGAL TOOLS TO CONFRONT INTERDISCIPLINARY CHALLENGES (Freya Baetens & José Caiado eds., 2014); Diane Desierto, *Remaking the World Towards 'Fair and Reciprocal Trade? The Case for (More) Interdisciplinarity in International Economic Law*, EJIL:TALK! (Nov. 17, 2017), https://www.ejiltalk.org/remaking-the-world-towards-fair-and-reciprocal-trade-the-case-for-more-interdisciplinarity-in-international-economic-law/; Outi Korhonen, *Within and Beyond Interdisciplinarity in International Law and Human Rights*, 28 EUR. J. INT'L L. 625 (May 2017).

historically considered, separate from distinct methods and approaches of the social sciences, humanities, and natural sciences.[168] However, we must welcome the proliferation of scholarship, especially from forthcoming new generations of PhD dissertations that creatively and carefully operationalize international economic law questions against more overarching questions of development and how development is both defined and realized with the agency of all populations, especially considering the most vulnerable in the international economic system.[169] The intentional pedagogic and academic engagement with these concerns is, to me, central not just to driving the global technical expertise of future international economic lawyers, but also to kindling their wider professional consciousness about the ethical consequences and human rights impacts of their own roles as counsel in the international economic system.[170] This, in my view, is what will ensure intergenerational continuity among international legal scholars, and allow populations to enjoy the Right to Development in its core authentic sense – as economic, social, cultural, civil, and political development consistent with and based on all human rights and fundamental freedoms.

IV. Conclusion

In closing, let me end with this point of reflection. We have endured almost two years of the shared predicaments stemming from this pandemic and its counterpart normalization of human rights deprivations. This, of course, withnn the context of a decade of stark political, economic, and sociological consequences ensuing from continuing inequalities in the international economic system. So, I must strongly emphasize that we are *far past* the era of 'human rights accommodation' in the teaching, study, and practice of international economic law. Instead, we are well-steeped in the pedestrian, but truly urgent, daily tasks of human rights realization and implementation *through* international economic law. We can more easily deploy its vast range of tools available in the areas of, for example, trade, finance, investment, intellectual property, taxation, digital governance, and risk regulation. Thus, the arena of 'human rights' is no longer the territorial preserve of any single professional discipline or sub-field within international law but, as Hersch Lauterpacht himself contemplated at the dawn of the Charter of the United Nations era, human rights *is* both the premise and promise of postwar international law.[171] I can recall no time in recent memory where the survival of the global economic system depends so starkly on the cooperation and solidarity of we human beings who have collectively created it.

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168 Jan Klabbers, *Counter-Disciplinarity*, 4 INT'L POL. SOCIO. 308 (2010).

169 *See* Nicolás Perrone & David Schneiderman, *International Economic Law's Wreckage, Depoliticization, Inequality, Precarity*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 446 (Emilios Christodoulidis et al. eds., 2019); Nicolas M. Perrone, *Vulnerability and the Speed of the Global Economy: Searching* [sic] *a New Vocabulary for International Economic Law*, AFRONOMICS LAW (Aug. 21, 2020), https://www.afronomicslaw.org/2020/08/21/vulnerability-and-the-speed-of-the-global-economy-searching-a-new-vocabulary-for-international-economic-law/.

170 *See, e.g.*, H. Patrick Glenn, *The Ethic of International Law*, *in* THE ROLE OF ETHICS IN INTERNATIONAL LAW 246 (Donald Earl Childress, III ed., 2011).

171 HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (Archon Books 1968).

These times should remind us that, as the Universal Declaration of Human Rights proclaims, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. [. . .] Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[172] International economic law, premised and focused on realizing human rights, can help regenerate our fractured global system to realize this coveted human rights-based social and international order. In this spirit, I congratulate all who are part of the vastly expanding international network of international economic lawyers for the human rights and development challenges of our times. It is an honor to work in these trenches together.

[172] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 1, 28 (Dec. 10, 1948).

Persecution and Labor Migrations Due to Corporate "Environmental" Exploitation: Waiting for the UNHRC's Binding Treaty on Transnational Business Activities?

Riccardo Vecellio Segate*

Abstract

Policy debates on the rights and international status of *climate refugees*, *environmental migrants*, or *environmentally displaced persons* have unleashed detailed scholarly commentaries over the last decade, and virtually all standpoints have been scrutinized in literature already. Nevertheless, one aspect of this debate has gone somewhat off the radar in recent years: the (co-)responsibilities of incorporated subsidiaries of transnational corporations in triggering or exacerbating pseudo-*environmentally* motivated mass-movements of workers and related strata of the populations domiciled where these corporations operate. Despite such neglect, mentioned exploitative occurrences only increased in recent years, and the trend speaks for their further expansion as globalization complexifies, world population increases, and climate disruption worsens. Against this backdrop of urgency, it seems essential to rediscover this angle of the debate; that is, to revitalize ethical and legal discourses on private actors and what intervention should be required of the international community in order for transnational corporations to take action and observe minimal standards of environmental good practice, especially in corporate policy areas bearing a direct impact on labor conditions, social development, and ultimately on the pulling or restraining factors of migration. The first international *binding* Treaty on business and human rights, currently being negotiated in Geneva within the United Nations Human Rights Council and apparently close to finalization, builds exactly on these concerns. In each of its 2018 Zero Draft, 2019 Revised Draft, 2020 Second Revised Draft, and 2021 Third Revised Draft, the Treaty provides protection to those workers and their families who are factually deprived of their lands due to corporate soil exploitation. In this sense, the problem will manifest itself under the new (yet not so new) terms of distinguishing between migrations fully caused or sim-

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ply catalyzed or facilitated by localized environmental pollution and/or large-scale climate-change-related phenomena. Pursuant to this new covenant, States would be compelled to ensure that companies operating within their prescriptive jurisdiction respect *all* human rights. Eventually, while this Treaty should generally be welcomed as it sheds new light on business-caused *environmental* migrations and it decompartmentalizes related human rights, its current formulation might not significantly contribute to the clarification of certain definitions. Most perplexingly, it does not establish a straightforward legal distinction between *environmental* migrations *induced* or 'simply' *precipitated* by corporate misconduct.

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I. Corporate Misconduct, the Environment, and Migration[1]

The skeptics [. . .] raise questions about the models used to generate estimates of those who will be forced to migrate and emphasize that pull factors in destination locations are often more important than push factors at home in determining whether, where, and in what volume people will migrate.[2]

Despite widespread skepticism *vis-à-vis* scientific models (which seems to be, in itself, a sign of our times), it is worth reiterating that all over the world, not only in 'developing' countries,[3] lands are under threat due to massive pollution caused by the negligent or purposely criminal behavior of transnational corporations (TNCs).[4] These corporations are exploiting natural resources, within the

[1] The reader is advised that the law and doctrines reported in the present article were last updated on and are thus accurate on September 23, 2021; this date *precedes* the seventh negotiating session towards the adoption of the Treaty under scrutiny, expected to be held in October 2021. A much earlier version of the present article was presented at the *Environmentally-Induced Migration and Human Rights' Protection* Conference organized by the Italian Society of International Law at Sapienza University of Rome on November 5, 2018; I would like to thank all participants for their insights. Comments are most welcome and can be addressed to r.vecelliosegate@connect.um.edu.mo. I am the only one responsible for any inaccuracy or omission. No conflicts of interests shall be disclosed, nor have I received any funding for accomplishing this publication.

[2] 'Push factors' are the reasons why individuals decide or are forced to move (i.e., to migrate or seek refuge), including environmental factors favored by climate migration or adaptation that may draw migrants from a place to another, as distinguished from 'pull factors' which are the reasons why a certain jurisdiction is more appealing over others as an intended (though not necessarily actual) destination for those individuals. *See, e.g.*, David James Cantor, *Environment, Mobility, and International Law: A New Approach in the Americas*, 21 CHI. J. OF INT'L L., 263, 289 (2021); Susan Martin, *Climate Change, Migration, and Governance*, 16 GLOB. GOVERNANCE 397, 397 (2010).

[3] *See, e.g.*, DAMIEN SHORT, REDEFINING GENOCIDE: SETTLER COLONIALISM, SOCIAL DEATH AND ECOCIDE, 59-66 (Bloomsbury Publ'g 2016).

[4] Because the draft Treaty being discussed in this essay employs the term *transnational*, I will adhere to the same terminology and refer to *transnational corporations* (*TNCs*); however, some direct quotes from academic sources and other legal and policy instruments mention *multinational corporations* (MNCs) instead and have been left unaltered. Indeed, there is no clear definition of either in scholarly literature; it is commonly claimed that TNCs display a less centralized management structure compared to MNCs, but these distinctions find no actual consistency in legal texts (neither regionally nor globally), nor do they bear any operative relevance in business transactions and corporate structuring. *See, e.g.*, Benedict Semple Wray, Translating Torts: A Justice Framework for Transnational Corporate Harm, 18-33 (Sept. 26, 2015) (Ph.D. Thesis in Law, European University Institute) (available at http://diana-n.iue.it:8080/bitstream/handle/1814/37582/2015_Wray.pdf?sequence=1&isAllowed=Y).

context of corrupted state complicity,[5] as well as international deregulation worsened by privatized power-politics.[6] Trapped in the vicious circle of regulatory capture, governments at the periphery of globalized markets' wealth transfers[7] subserviently withdraw their preferences over agricultural oversight and administration and instead favor lawless liberalization,[8] aggressive mercantilism,[9] and uncontrolled urbanization.[10] The cost of companies' environmental footprint include "land use, greenhouse gas emission, water consumption and air pollution,"[11] as well as "illegal wildlife trade, forestry crimes, fishery crimes, [. . .] and trafficking in waste."[12] The degradation, privatization, and 'outsourcing' of already impoverished and low-productive terrains and territories leaves populations living or therein (or relying thereon) with no choice but migration, adding

[5] *See, e.g.*, Fiona Downs, U4, *Rule of Law and Environmental Justice in the Forests: The Challenge of "Strong Law Enforcement" in Corrupt Conditions*, CHR. MICHELSEN INSTITUTE 1, 1, 19-20 (June 2013).

[6] Richard Black, *Environmental Refugees: Myth or Reality?* 10 (UNHCR New Issues in Refugee Research, Working Paper No. 34, 2001) (In Mozambique, for example, "pressure of population on resources has probably occurred, stimulated not by high population densities *per se*, but by granting of land concessions to private companies.").

[7] For a 'developed-world' example instead, *see* Stephanie M. Stern, *State Action as Political Voice in Climate Change Policy: A Case Study of the Minnesota Environmental Cost Valuation Regulation, in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, & INT'L APPROACHES 31, 40 (William C. G. Burns & Hari M. Osofsky eds., 2009). In my passage, the term 'periphery' drew conceptually on the World-Systems Theory, classifying geo-economic regions into core, semi-peripheral, and peripheral. *See, e.g.*, Arlene B. Tickner, *Core, Periphery and (Neo)Imperialist International Relations*, 19 EUR. J. INT'L RELATIONS 627 (2013); John A. Agnew, *The Origins of Critical Geopolitics*, *in* THE ASHGATE RESEARCH COMPANION TO CRITICAL GEOPOLITICS 19, 22 (Klaus Dodds et al. eds., 2016).

[8] *See, e.g.*, in the case of Senegal: Kaushalya Ramachandran & Padmaja Susarla, *Environmental Migration from Rainfed Regions in India Forced by Poor Returns from Watershed Development Projects*, *in* ENVIRONMENT, FORCED MIGRATION & SOCIAL VULNERABILITY, 117, 127-129 (Tamer Afifi et al. eds., 2010); Frauke Bleibaum, *Case Study Senegal: Environmental Degradation and Forced Migration*, *in* ENVIRONMENT, FORCED MIGRATION & SOCIAL VULNERABILITY 187, 188 (Tamer Afifi et al. eds., 2010).

[9] EUR. PARL. ASS., *Environmentally Induced Migration and Displacement: A 21st Century Challenge*, ¶ 15, Doc. No. 11785, (Dec. 23, 2008) https://pace.coe.int/pdf/759bfc82dd33b3effaa28efe0afd493ebd94d18a8f46a31d9ea927bd01533c0f/doc.%2011785.pdf ("An additional responsibility for inducing environmental migration lies on the [W]estern world and its trade policies in terms of agricultural export subsidies and import restrictions, which are undermining the livelihood of small hold farmers in marginalised regions. Also, the European and American agribusinesses and their policies, such as the patenting of genetically modified seeds, are destroying local livelihoods without providing sustainable local returns.").

[10] *See* Rabab Fatima et al., *Human Rights, Climate Change, Environmental Degradation and Migration: A New Paradigm*, 8, MIGRATION POL'Y INST. 1, 7 (2014) (available at https://www.migrationpolicy.org/research/human-rights-climate-change-environmental-degradation-and-migration-new-paradigm). Corporations can be said to force urbanisation and redesign the 'geography of labour' not only macroscopically, but on the local scale as well; they do so, for instance, by polluting, impoverishing, and/or expropriating farmers' terrains, or by compelling the abandonment thereof. *See also* Benoît Mayer, *Climate Migration and the Politics of Causal Attribution: A Case Study in Mongolia*, 5 MIGRATION & DEV. 234, 245 (2016).

[11] Ephraim Nkonya et al., *Global Cost of Land Degradation*, *in* ECONOMICS OF LAND DEGRADATION & IMPROVEMENT – A GLOBAL ASSESSMENT FOR SUSTAINABLE DEVELOPMENT 117, 121 (Ephraim Nkonya et al. eds., 2016).

[12] U.N. Environment Programme, The State of Knowledge of Crimes that Have Serious Impacts on the Environment, IX (Jul. 11, 2018), https://www.unenvironment.org/resources/publication/state-knowledge-crimes-have-serious-impacts-environment.

to both internal displacement and cross-border migratory movements. Therefore, this cannot be simplistically framed as a problem of 'environmental' migration:[13]

> [C]limate change alone does not displace people, it exacerbates social vulnerability which contributes to displacement. While addressing environmental displacement as a refugee crisis creates a sense of urgency, this framework will not adequately address the problem. Climate change is not the sole source of persecution that leads people to environmental displacement. In fact it is not a source of persecution at all because it does not discriminate. The impacts of climate change may be the reason for why people evacuate, but they alone do not explain why people do not return to their places of origin. [. . . S]ocioeconomic inequality and marginalization of vulnerable communities account for the disparity in who is displaced by the effects of climate change.[14]

Among them are the poorest workers (and their families) who face the direst consequences of their or other companies' environmentally destructive and socially degrading policies.

In international law, "[w]hereas the rights of refugees are explicit, the rights of [internally displaced persons (IDPs) and other economic migrants] are mostly implied from the fact that they are human beings and citizens or habitual residents of a State."[15] In fact, the concept of 'environmental refugees' represents a somewhat misleading expression that does not (yet) appear in international treaty or customary law.[16] Against this background, something might well improve in the relatively short run. Following a number of 'soft'[17] or 'semi-soft'[18] standards, all promulgated (the former) or last revised (the latter) in 2011, since 2014 the United Nations (UN) Human Rights Council (HRC) has been laboriously negotiating a *binding* human rights Treaty addressed to TNCs (hereinafter, the

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[13] Such a simplistic approach is perpetuated in otherwise excellent analyses, *see, e.g.*, Michael Berlemann & Max Friedrich Steinhardt, *Climate Change, Natural Disasters, and Migration—A Survey of the Empirical Evidence*, 63 CESifo Economic Studies 353 (2017).

[14] Shweta Jayawardhan, *Vulnerability and Climate Change Induced Human Displacement*, 17 Consilience: J. Sustainable Dev., no. 1, 2017, at 103, 104-105.

[15] Sara Brooks, *What Protection for the Internally Displaced in Burma/Myanmar?*, 12 Austl. J. Hum. Rts., no. 2, 2007, at 27, 29. On corporate-induced displacement in Burma, see Ana Natsvlishvili, Multinational Corporations in Resource Rich Yet Poor Countries: Human Rights Perspective, 35 (2008) (LLM Thesis, Central European University).

[16] *See* William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 Berkeley J. Int'l Law, 94, 139 (2012); Working Group II, Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability – Part A: Global and Sectoral Aspects 628, 771 (Christopher B. Field et al. eds., 2014).

[17] *See* U.N. Human Rights: Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 3-4 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; *The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights* (2011), https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf.

[18] *See* Organization for Economic Co-operation and Development ("O.E.C.D."), *Guidelines for Multinational Enterprises*, 3-4 (2011) https://www.oecd.org/daf/inv/mne/48004323.pdf.

Treaty).[19] Because the previous approach to the field was encased in the logic of 'closing the governance gap' without necessarily hardening accountability demands into legal obligations,[20] even the *initiation* of these negotiations was quite a momentous achievement. The Treaty aims to ensure corporations' responsible behavior throughout the supply chain, as well as to provide victims with appropriate fora and procedures to seek remedies. Under this Treaty, States would be responsible for failing to prevent and prosecute the misconduct of businesses or business activities falling within their prescriptive jurisdiction,[21] regardless of where the adverse effects occur. Indeed, while States cannot be held responsible under public international law (PIL) for corporate misconduct per se, nor can corporations themselves bear responsibility under PIL, a number of obligations to prevent and prosecute under the Treaty would be assigned directly to States.[22] Most of these are obligations of conduct, while a few are obligations of result.[23]

UN fora are appropriate for human rights matters involving the link between environment, migration, and business, as they accord due negotiating room to the poorest countries whose views are neglected in other diplomatic settings.[24] Remarkable progress has been made over the last eight years on both the drafting process and consensus-building,[25] and States seem poised to reach a consensus on the most disputed issues.[26] Even though the discussions are still ongoing, one might foresee the contribution the Treaty may make (or not make) to PIL and human rights discourses, and draw a few preliminary remarks as for its potential impact on public and private actors. Any of the suggestions—not 'conclusions' –

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[19] U.N. Hum. Rts. Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft 3, arts. 1 ¶¶3-5; 3 ¶1 (Aug. 17, 2021) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf (hereinafter Third Revised Draft).

[20] Michael Elliot, *Problematising the 'Governance Gap':* [sic] *Corporations, Human Rights, and the Emergence of Transnational Law*, 12 Transn'l Legal Theory 196, 197, 199 (2021).

[21] Kimberley N. Trapp, *Jurisdiction and State Responsibility*, *in* The Oxford Handbook of Jurisdiction in International Law 355, 357-65 (Stephen Allen et al. eds., 2019) (In public international law, 'prescriptive jurisdiction' stands for a State's exercise of its *legislative* -as opposed to executive or judicial- powers over its territory and/or citizens).

[22] Third Revised Draft, *supra* note 19, at PP7, PP18, arts. 2(1)(a), 8(1-6; 10).

[23] *See, e.g.*, Benoît Mayer, *Obligations of Conduct in the International Law on Climate Change: A Defence*, 27 Review European, Comparative & Int'l Envtl. L., 130, 130 (2018) (describing the difference between obligations of conduct and obligations of result).

[24] Koko Warner (Head of Environmental Migration, Social Vulnerability and Adaptation Section, U.N.H.C.R.), *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations*, U.N. Doc. PPLA/2011/02, at 13 (May 2011).

[25] By this, I do not imply that the negotiations have been characterised by straightforward, problem-free success, but rather that their engaged development is somewhat astonishing compared to the failing turn it was initially taking. *See* Riccardo Vecellio Segate, *The First Binding Treaty on Business and Human Rights: A Deconstruction of the EU's Negotiating Experience Along the Lines of Institutional Incoherence and Legal Theories*, 25 Int'l J. Hum. Rts. (2021) (outlining how the E.U. was explicitly obstructing any progress, risking jeopardization of the entire process).

[26] Which does not mean the Treaty will actually be perfected, or that it will ever gather sufficient consensus to enter into force. One looming spectre is that of overbroad reservations which would render ratifications meaningless in practice, not to mention a very probable regional disparity of degrees of support. Needless to say, because of the networked and highly volatile structure that would involve global business transactions and operations, a Treaty of this sort can only achieve its intended result if it is endowed with virtually universal consensus.

put forward here are, by their nature, tentative (which is why some Sections are opened by question marks). Due to said provisional nature, this paper aims to provide additional insights to policymakers and the scholarly communities directly or indirectly implicated in this Treaty-making process, while the latter is still ongoing.

Section 2 briefly juxtaposes the 'security narrative' of migration and climate change – which depicts the former as catastrophic and the latter as a large-scale phenomenon only – onto a narrative of climate migrations that originate every day from the specific (non-)choices of corporations, which should be prosecuted accordingly as 'push factors.'[27] It is argued that a security-termed social narrative fails to acknowledge the real source of insecurity that lies—not always, but frequently—with the exploitation pursued by private actors on a local scale, the aggregated effect thereof representing what is usually defined as 'climate migration.' After all, "a simple correlation between climate change and increasing violence does not exist."[28] Humans have always been migrating from continent to continent, and changes in the climate have accompanied or triggered most of those spontaneous exoduses and diasporas. If such migrations are now happening on a more concentrated, 'abusive,' and intensive fashion owing to abrupt changes in the climate – and waiting for international policymakers to reach consensus over common tools of law and governance to fight climate change globally and coherently – then perhaps it is worth prosecuting more thoroughly all the corporate exploiters that worsen specific conditions on the ground for many local communities, often without offering those communities any financial or collateral benefits in return. There are three elements involved in these processes: the migrants, the corporations, and the environment. Despite this, no international legal instrument exists to link all of them. Indeed, only a single *regional* arrangement, the African Union's Kampala Convention,[29] includes all three, and its implementation prospects raise significant doubts.[30]

Commenting upon a variety of other regional and international attempts at addressing climate displacement,[31] Section 3 elaborates on the reasons why any legal instrument that links only two of the actors eventually proves ineffective. Section 4 discusses the influence a new binding Treaty on business and human

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[27] Cantor, *supra* note 2.

[28] Ryan P. Harrod & Debra L. Martin, Bioarchaeology of Climate Change & Violence: Ethical Considerations 24 (2014).

[29] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Dec. 6, 2012, art. 3(1)(i) (requires State parties to "[e]nsure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to 'displacement.'").

[30] *See generally* International Committee of the Red Cross, *Translating the Kampala Convention into Practice: A Stocktaking Exercise*, 99 Int'l Rev. Red Cross 365, 366-70 (2017); Munene C. Kiura, *Kenya in* Marginalisation: The Plight of Refugees and Internally Displaced Persons in East Africa 85, 118-20 (Fountain Publishers 2012); Michael Addaney, *The Legal Challenges of Offering Protection to Climate Refugees in Africa in* Governance, Human Rights, and Political Transformation in Africa 333, 349-51 (Michael Addaney et al. eds., 2020).

[31] For an introductory overview, *see* Hitomi Kimura, *Addressing Climate-Induced Displacement: The Need for Innovation in International Law*, *in* Global Envtl. Change & Innovation in Int'l law 125 (Neil Craik et al. eds., 2018).

rights (B&HR) might have on certain aspects of these migrations (e.g., expatriation documents and consular assistance), thanks to a long-overdue holistic drafting process that acknowledges the interrelation among all three actors. The obvious danger is that such a comprehensive and ambitious goal may likely, when subjected to the crucible of politics, collapse under its own weight.

Section 5 analyzes a salient innovation of this Treaty which has been disregarded in scholarly works: the reversal of the 'persecution paradigm.'[32] Especially when framed against the rhetoric of 'climate refugees,' 'persecution States' are generally defined as the countries from which the refugees seek to escape. This Treaty operates instead to shift that paradigm towards identifying the States of persecution as *those where TNCs are based* (which are not necessarily coincident with the place where the exploitative effects occur) by attributing unambiguously to said States the responsibility for the misconduct of the businesses over which they extend their jurisdiction. Section 6 tries to balance the benefits and disadvantages of this Treaty along the lines discussed above, hypothesizing that, while the instrument as a whole deserves to be regarded under a favorable light, it does not support well-controlled, state-channeled preventive (or 'anticipatory') migrations. However, it is reasonable to think that this Treaty's primary lacuna (at this point in its development) lies in its inability to set a threshold for distinguishing the cases where corporate exploitation is the main pull factor[33] from those where such exploitation is instead an associate cause and alone would not necessarily be a substantial factor. Put differently, any 'environmental' exploitation performed by corporations is situated within broader climate-change dynam-

[32] The expression 'persecution paradigm' refers to the most doctrinally conservative, almost dogmatic reading of 'persecution' in international refugee law. For selected overviews of mentioned readings, its obsolescence, and its main limitations, *see, e.g.*, Mathilde Manon Crépin, The Notion of Persecution in the 1951 Convention Relating to the Status of Refugees and Its Relevance to the Protection Needs of Refugees in the 21st Century (2019) (Ph.D. Thesis in Law, King's College London) (on file with King's Research Portal, King's College London); José H. Fischel de Andrade, *On the Development of the Concept of 'Persecution' in International Refugee Law*, 2 ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL, 114 (2008); Gillian McFadyen, *The Contemporary Refugee: Persecution, Semantics and Universality*, (SPECIAL ISSUE), 9, 13-17 (University of Glasgow eSharp online research journal 2012); Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, *in* HUMAN RIGHTS & IMMIGRATION, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 19, 24-37 (2014).

[33] In international refugee law (and migration law more generally), 'pull factors' are the reasons that attract human beings to reach a given jurisdiction once they have planned (or been compelled) to leave their habitual place of residence. Those factors might bear a shade of voluntarism but are mostly understood as unavoidable and thus forced onto individuals, e.g., logistically, economically, for familial reasons, or through organized deception that promises rights, employment, or safety where there will in fact be none. For example, *see* Carla Ferstman, *Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya*, 21 GER. L.J. 459, 481 (2020) (noting as an example that the search-and-rescue operations in the Mediterranean Sea by, among others, Italy, may represent an unintended pull factor, because migrants from Africa are led to believe their lives will be safe when attempting to traverse the sea to Continental Europe). Some literature has opined that the language of pull and push factors is outdated, *see, e.g.*, Hein de Haas, *A Theory of Migration: The Aspirations-Capabilities Framework*, 9 COMPARATIVE MIGRATION STUD. 1, 1-2 (2021). While I selectively support this criticism, I believe that the push/pull terminology needs to be perpetuated here, as international negotiations still reflect this lexicon. It seems crucial to note that pull and push *factors* are also referred to as pull and push *forces* (and the like) in other publications, *see, e.g.*, Joseph Chamie, *International Migration Amid a World in Crisis*, 8 J. MIGRATION & HUM. SEC. 230 (2020) (also providing examples of push and pull factors, *id.* at 238).

ics to which all corporations (and thus countries) together contribute; however, there are situations where specific corporations within a well-defined territory cause local 'environmental' disasters as the primary actor and, due to contingent dynamics which could have been avoided, did so in isolation from global trends. The Treaty being negotiated fails—thus far at least—to untangle the blur between the two phenomena, which should rather entail profoundly divergent legal responses. Section 7 gathers the findings of this study, recalls that the Treaty's text is not yet finalized, and concludes by discussing next negotiating steps that should be monitored and possibly influenced for improvement.

The Treaty's guiding principle is that companies should be held accountable[34] for the workers (and their families) they exploit and contribute to displacing, because of long-standing and deliberate structures of inequality, imperialism, and wealth concentration that are too frequently misguided as—or simplistically confined to—stand-alone, insulated environmental factors. Eventually, this Treaty as it stands does not directly solve the three-element problem outlined in this article, yet it fosters the emergence of causes of action in tort and it provides room for advancing certain categories of holistic, multi-causational claims of due diligence that were precluded before, especially in times of peace. In so doing, it is conceptually sustained by two crucial paradigm shifts regarding the agents of persecution. First, the shift from States themselves to States *as those responsible for* 'their' corporations.[35] And second, and importantly, the shift from States usually associated with the Global South, whose citizens are prone to concede to the paternalistic admission-as-charity[36] discourse propounded by the wealthy club of nations and masked as international law, to States commonly belonging to the Global North whose inaction on any link of the supply chain in practice allows businesses to exploit vulnerable populations by furthering and accelerating the degradation of their living and working environment.

At the time of writing of this article, the Chair-Rapporteur has released four drafts: one in July 2018 (the "Zero Draft"),[37] another one year later (the "Revised Draft"),[38] the third one in August 2020 (the "Second Revised Draft"),[39] and the

[34] I will employ the concept of 'accountability' to argue that, for the sake of more pertinently preventing (and/or remedying) 'environmentally'-motivated displacement and migration flows, corporations should be answerable not only to the States where their parent company is located or their subsidiaries operate, but also to all those individuals (and families) who live in and depend upon the ecosystem impacted and altered by their activities, sometimes irreversibly. *See generally* Nadia Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty*, 22 HUM. RTS. REVIEW 45 (2020) (thoroughly examining defining shades of and options for corporate accountability in B&HR).

[35] *Cf.* U.N. Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act*, ¶ 20, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007).

[36] *See* Vincent Chetail, *The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction*, 111 AJIL UNBOUND 18, 19 (2017).

[37] U.N. Hum. Rts. Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (July 16, 2018) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[38] U.N. Hum. Rts. Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft, (July 16, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (hereinafter Revised Draft).

latest one in August 2021 (the "Third Revised Draft").[40] In what follows, any reference to this instrument will be based on the Third Revised Draft, which replaced the Zero, Revised, and Second Revised drafts; thus, any reference to "the draft" or "the Treaty" will pinpoint to provisions as phrased in the Third Revised Draft. When the Zero Draft, the Revised Draft, or the Second Revised Draft are explicitly mentioned, the purpose is to show the evolution—or, most plausibly, the involution—of a particular trade-off during the negotiations.

II. Corporations as Push-Factors: Displacing Security-Underpinned Narratives

In the public conversation, positing that climate change is threatening fair resource allocation and international peace[41] (as if either element were truly accomplished in the current geopolitical chessboard) is commonplace. One decade ago, even the U.N. Security Council (UNSC) voiced concerns about the impact of climate change on international peace and security.[42] Similarly, in the private conversation, the modern approach to dealing with migration is disproportionately underpinned with discourse about security, and concerned business interests often prevail over reasoned assessments of the situations on the ground. Corporate apparatuses align with bureaucracy and high-level politics to ensure militarization at countries' borders[43] in a mixed commodified competition-insecurity jargon which blurs the distinction between goods and humans, and "speak[s] to the social, political, and economic consequences of a more heavily militarized and bordered world."[44] This is apparent when discussing the US-Mexico dossier, and happens despite the evidence that most Mexican unrest involves hidden roots of environmental resistance or adaptation to neoliberal land and resource dispossession.[45] Comparable remote-control dynamics are at play in the Mediterranean,

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[39] U.N. Hum. Rts. Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft (Aug. 06, 2020) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (hereinafter Second Revised Draft).

[40] Third Revised Draft, *supra* note 19.

[41] *See, e.g.*, Camillo Boano et al., Refugee Studies Centre, University of Oxford, *Environmentally Displaced People: Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration*, Forced Migration Pol'y Briefings, Nov. 2008, at 20-23; Eur. Parl. Ass., *A Legal Status for "Climate Refugee*," Doc. No. 14955, ¶ 9 (Aug. 27, 2019).

[42] U.N. Security Council, *Security Council, in Statement, Says "Contextual Information" on Possible Security Implications of Climate Change Important When Climate Impacts Drive Conflict*, U.N. Meeting Coverage SC/10332 (July 20, 2011); s*ee also* Andreas Motzfeldt Kravik, *The Security Council and Climate Change – Too Hot to Handle?*, EJIL:Talk! (2018), https://www.ejiltalk.org/the-security-council-and-climate-change-too-hot-to-handle/.

[43] Ansgar Fellendorf & David Immer, *The EU's Responsibility to Protect Environmentally Displaced People*, E-Int'l Rel. (2015), https://www.e-ir.info/2015/08/22/the-eus-responsibility-to-protect-environmentally-displaced-people/.

[44] Wendy A. Vogt, Lives in Transit: Violence and Intimacy on the Migrant Journey 207 (2018).

[45] *See generally* Darcy Tetreault, Cindy McCulligh & Carlos Lucio, Social Environmental Conflicts in Mexico: Resistance to Dispossession and Alternatives from Below (2018).

where European countries securitize and outsource migration management by implementing "special zones for policing migrants and asylum seekers established within the territory of another [S]tate, as well as incentivizing or coercing other [S]tates to counter unauthorized migration through enhanced patrols."[46] And again, in Colombia, the Inter-American Court of Human Rights (IACtHR) argues that the grave situation in which the IDPs [internally displaced people] find themselves is not caused by the [S]tate, but by the armed conflict, and particularly by the illegal armed forces. [. . .] The Court also excluded the evaluation of the economic interests of landowners, drug traffickers, *national and transnational corporations* in forced displacement. On the other hand, the Court omitted to pronounce itself on the *link between forced displacement and development*, particularly land tenure in rural areas [. . . In fact,] land tenure was not only seen by the actors in the armed conflict as a way of gaining control over territory and population, but as a means of going back to a *development scheme of exclusion*, which secured land tenure in the hands of a few landowners, and served the development of *industrial and large scale plantations*.[47]

Against the backdrop of "securitization [. . .] as both political spectacle and technocracy[, where] contestants evoke crises, enemies, dramatic developments,"[48] these Treaty negotiations remind the international community of the true face of contemporary environmentally-induced displacement, rarely occurring due to the effects of global warming—or more broadly, climate change—alone.[49] Instead, displacement is frequently traversed by corrosive (and corrupted) business practices which *can* be isolated and prosecuted because they dramatically accelerate the degradation of a specific environment, or damage the latter from scratch.

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[46] Lama Mourad & Kelsey P. Norman, *Transforming Refugees into Migrants: Institutional Change and the Politics of International Protection*, 26 EUROPEAN J. OF INT'L RELS., no. 3, 2020, at 687, 697; *see also* Itamar Mann, *The New Anti-Impunity: Border Violence as Crime*, UNIV. PENN. J. INT'L L. (forthcoming 2021) (manuscript at 45) (https://ssrn.com/abstract=3548181).

[47] Laura Bernal Bermúdez, *A Review of the Interconnectedness and Indivisibility of the Human Rights, Human Development and Human Security Agendas: The Case of the Colombian Internally Displaced Population*, 21 INT'L LAW: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 181, 210-11 (2012) (four emphases added).

[48] Maria Julia Trombetta, *Linking Climate-Induced Migration and Security Within the EU: Insights from the Securitization Debate*, 2 CRITICAL STUD. ON SEC. no. 2, 2014, at 131, 142. For the actual court opinion, *see* The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Arts. 5, 22(7), and 22(8), in Relation to Art. 1(1), American Convention on Human Rights), Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (May 30, 2018), https://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf.

[49] SCOTT LECKIE & CHRIS HIGGINS, CONFLICT AND HOUSING, LAND, AND PROPERTY RIGHTS: A HANDBOOK ON ISSUES, FRAMEWORKS, AND SOLUTIONS 101 (Toronto: Cambridge UP 2011); Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UNHCR LEGAL AND PROT. POL'Y RSCH. SERIES 2 (2012) ("Despite the complex relationship between climate change and population movements, five scenarios can be identified that trigger such movements. These scenarios are sudden-onset disasters; slow-onset environmental degradation; the destruction of small island [S]tates by rising sea levels; areas designated as prohibited for human habitation because of mitigation and adaptation measures or because of a high risk of disasters occurring there; and unrest, violence and conflict over resources diminishing as a consequence of climate change").

Catastrophic storytelling, therefore, creates a more balanced narrative built on awareness and precise, codified, enforceable human rights granted to both individuals and affected communities. Such prophetic exclamations speak volumes on the perverse joint security-exploitation design this Treaty seeks to eradicate:

> On behalf of peasant organizations, fishermen, shepherds, and salaried rural workers, we have realized that this international binding instrument is increasingly necessary and urgent. While we peasants endeavor to defend our lands and our water, large multinationals monopolize our lands and displace our communities. And as we strive to defend our forests, our mangroves, our biodiversity, and the livelihood of our families, we confront transnational private security providers which operate in collusion with the extra-activist multinationals to obtain the repression and imprisonment of the activists, and the destitution of our democracies and governments that try to oppose their interests. On the other hand, when the expelled peasant women are forced to emigrate northward to save their lives, they are held in custody and rejected at the borders, with the intervention of security corporations, causing the suffering and death of thousands of human beings every year. And even those who manage to cross the border, are destined for the most part to fill the lowest-paid job positions, endowed with the lowest possible rights, in agribusinesses – again of a transnational nature. [. . .] The current conflicts, the climate emergency, environmental and migratory crises, the defenselessness of all those who are affected and the discounted outsourcing of our democracies and rights: are these not in fact "serious and necessary" reasons to keep striving for the adoption of binding norms?[50]

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[50] Representative from the NGO Corporate Accountability International, Oral Statement made at the Fourth Negotiating Session of the Treaty, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/CorporateAccountability.pdf (translated into English by the author, from the original Spanish) (emphases added),original text:

> Desde las organizaciones campesinas, de pescadores, pastores y trabajadores rurales asalariados constatamos que este instrumento vinculante internacional es cada vez más necesario y urgente. Cuando los campesinos/as intentamos defender nuestras tierras y nuestro agua nos encontramos con la grandes multinacionales acaparando nuestros territorios y expulsando nuestras comunidades. Y cuando queremos defender nuestros bosques, nuestros manglares, nuestra biodiversidad, y el sustento de nuestras familias, nos enfrentamos a las *transnacionales de armamentos* junto a las *multinacionales del extractivismo* al servicio de la represión y encarcelamiento de los actvistas, y de la destrucción de nuestras democracias y de los gobiernos que intentan oponerse a sus intereses. Por otra parte, cuando las campesinas expulsadas se ven obligadas a emigrar al norte para salvar su existencia son retenidas y rechazadas en las fronteras, con intervención de las *multinacionales de la seguridad*, causando el sufrimiento y la muerte de miles de seres humanos cada año. Y las que logran llegar pasan en gran medida a cubrir los puestos peor remunerados y con menos derechos en las empresas de la agroindustria, otra vez de carácter transnacional. [. . .] Los conflictos actuales, las crisis climáticas, medioambientales, migratorias, la indefensión de los afectados y la devaluación de nuestras democracias y derechos, ¿no son acaso *razones* "*serias* y necesarias" para no aminalarse frente a la adopción de normas vinculantes?).

See also Sandra Cuffe, Guatemala Mine's Ex-Security Chief Convicted of Indigenous Leader's Murder, The Guardian, (Jan. 7, 2021, 12:05 PM), https://www.theguardian.com/global-development/2021/jan/07/guatemala-nickel-mine-death-adolfo-ich. (recent conviction of the security guard Mynor Padilla by a Guatemalan judge strikingly resembles the experiences recounted by the Corporate Accountability International Representative).

'Serious reasons' come equally from daily legal practice before the domestic courts of industrialized countries, with all its shortcomings.[51] In the United States (US),

> [t]he *Flores* decisions illustrate that environmental ATS [Alien Tort Statute] claims brought *under a human rights approach* [. . .], unsurprisingly, still have to contain norms *well-established* as "law of nations." UN General Assembly resolutions, *which are not binding*, non-UN declarations, and decisions of international tribunals were rejected as evidence of a "law of nations" prohibition of *intra-national pollution* because they were not found to be authoritative sources of international law.[52]

In the United Kingdom (UK) and The Netherlands, too, "there has been a growing number of lawsuits on behalf of poor communities harmed by corporations, such as against Trafigura for dumping of toxic waste in Côte d'Ivoire and British Petroleum for oil spills in Colombia, but these have largely been couched as environmental and product liability issues rather than rights claims."[53] I will demonstrate that this 'depersonalization' of court proceedings initiated for business-caused 'environmental' disasters favors identifying corporate responsibilities, albeit accurately, over identifying the social consequences of such disasters, with particular emphasis on the ensuing displacement and migratory movements. Beyond procedural discrepancies regarding compensation, evidence, restoration, and accountability, the delinking of corporate disasters from their non-environmental human-rights dimension *in fact removes* corporate responsibility for the human unsettlement such disasters trigger. Instead, far beyond mere judicial charges of ecological disruption or commercial product safety litigation, it is my argument that said corporations should be held reasonably accountable for the displacement and migrations their 'environmental' incidents cause as well. In November 2015, the Fundão tailings dam at the Germano iron ore mine of the Samarco Mariana Mining Complex in Brazil collapsed onto downstream villages and released its pollutants in the Doce River.[54] But when Brazilian scholars testi-

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[51] *See generally* Ji Ma, *Multinational Enterprises' Liability for the Acts of Their Offshore Subsidiaries: The Aftermath of* Kiobel *and* Daimler, 23 MICH. STATE INT'L L. REV., no. 2, 2015, at 397.

[52] Kathleen Jäger, *Environmental Claims under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519, 532 (2010), (four emphases added); For a constructive criticism of this trending judicial self-restraint, *see* Anne Medlin Lowe, *Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute*, 23 IND. INT'L & COMPAR. L. REV. 523 (2013).

[53] Chandra Lekha Sriram, *Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?*, *in* JUSTICE & ECONOMIC VIOLENCE IN TRANSITION 27, 41 (Dustin N. Sharp ed., 2014).

[54] *See, e.g.*, Flávio Fonseca doCarmo et al., *Fundão Tailings Dam Failures: The Environment Tragedy of the Largest Technological Disaster of Brazilian Mining in Global Context*, 15 PERSP. IN ECOLOGY AND CONSERVATION, no. 3, 2017, at 145; Paola Pinheiro Bernardi Primo et al., *Mining Disasters in Brazil: A Case Study of Dam Ruptures in Mariana and Brumadinho*, 5 CASE STUD. ENV'T 1 (2018); Dom Phillips, *Brazil Dam Disaster: Firm Knew of Potential Impact Months in Advance*, THE GUARDIAN (Feb. 28, 2018, 1:55 AM), https://www.theguardian.com/world/2018/feb/28/brazil-dam-collapse-samarco-fundao-mining; Haruf Salmen Espindola et al., *Rio Doce: Risks and Uncertainties of the Mariana Disaster (MG)*, 39 REVISTA BRASILEIRA DE HISTÓRIA 1 (2019); Vanessa Hatje et al., *The Environmental Impacts of One of the Largest Tailing Dam Failures Worldwide*, 7 SCIENTIFIC REPS. (Sept. 6, 2017); Mauro Mendonça Magliano & Humberto Angelo, *The Lack of Economic Environmental Damage Valuation: A Critical Review of Fundão Disaster*, 26 CERNE 75 (2020).

fied to the legal significance of this occurrence,[55] they failed to mention the displacement it caused and the suffering these losses provoked in the population.[56] On top of this, while a private agreement between the responsible TNC and the Brazilian government was signed (framed in environmental and not human rights language, resulting in 'dehumanization' of both the incident and the scope of the harm as usual), proceedings taking place in the UK covered a civil-compensation aspect[57] but were later dismissed by Her Majesty's High Court of Justice in England as tantamount to an abuse of rights. [58] The court reasoned that the same claim was also brought before Brazilian courts,[59] but awards there are lower in quantum, will probably be delayed, and are arguably subjected to strong pressure on the part of politico-business cartels. The case has been recently accepted on appeal,[60] but its progress—let alone favorable outcome—is not a given. Compared to its Brazilian counterpart,[61] the 1980 U.S. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is subsumed under an even narrower logic of product liability,[62] which makes it an unsatisfactory legal response to corporate 'environmental' damage and dissipates the policy impact of its extraterritorial applicability (which was confirmed in principle—though controversially—by U.S. and Canadian courts).[63] Even those who favorably regard

[55] *See* Joana Nabuco & Leticia Aleixo, *Rights Holders' Participation and Access to Remedies: Lessons Learned from the Doce River Dam Disaster*, 4 BUS. & HUM. RTS. J., no. 1, 2019, at 147.

[56] *See, e.g.*, Andréa Zhouri et al., *The Rio Doce Mining Disaster in Brazil: Between Policies of Reparation and the Politics of Affectations,* 14 VIBRANT: VIRTUAL BRAZILIAN ANTHROPOLOGY, no. 2, 2017, at 1, 11, 17-18 (political and anthropological, i.e., non-legal, literature did in fact frame the issue in such terms); Eliana Santos Junqueira Creado & Stefan Helmreich, *A Wave of Mud: The Travel of Toxic Water, from Bento Rodrigues to the Brazilian Atlantic*, 69 REVISTA DO INSTITUTO DE ESTUDOS BRASILEIROS 33, 37 (2018); Lucas Seghezzo, *The Five Dimensions of Sustainability*, 18 ENVTL. POL., no. 4, 2009, at 539, 548 (more broadly, one's living environment embodies 'a source of facts, identities, and behaviours [that incapsulates] notions of culture, local ways of life, and human physical and psychological health'); *see also* Myriam N. Bechtoldt et al., *Addressing the Climate Change Adaptation Puzzle: A Psychological Science Perspective*, 21 CLIMATE POL'Y, no. 2, 2020, at 186.

[57] *See* Jonathan Watts, *BHP Billiton Facing £5bn Lawsuit from Brazilian Victims of Dam Disaster*, THE GUARDIAN (Nov. 6, 2018, 1:50 PM), https://www.theguardian.com/environment/2018/nov/06/bhp-billiton-facing-5bn-lawsuit-from-brazilian-victims-of-dam-disaster.

[58] *See* Neil Hume, *UK High Court Blocks £5bn Lawsuit against BHP over Brazil Disaster,* FIN. TIMES, Nov. 9, 2020, https://www.ft.com/content/2550b549-67d2-4df7-b19c-0cc14f6661bf.

[59] *See* India Jordan & Andrew Denny, *English Court Strikes Out Claims Against BHP for Brazilian Dam Collapse*, ALLEN & OVERY, Dec. 2, 2020, https://www.allenovery.com/en-gb/global/news-and-insights/publications/english-court-strikes-out-claims-against-bhp-for-brazilian-dam-collapse.

[60] Kirstin Ridley, *UK Court to Reconsider $6.9 BLN Brazil Dam Lawsuit Against BHP*, REUTERS (May 6, 2021) https://www.reuters.com/business/exclusive-uk-court-reconsider-69-bln-brazil-dam-lawsuit-against-bhp-2021-05-06/.

[61] *See* Bianca Zambão, *Brazil's Launch of Lender Environmental Liability as a Tool to Manage Environmental Impacts*, 18 UNIV. MIAMI INT'L & COMPAR. L. REV. no. 1, 2010, at 47, 86, 93.

[62] *See* GWYNNE L. SKINNER, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY 87-88 (2020).

[63] *See* Jaye Ellis, *Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns*, 25 LEIDEN J. OF INT'L L., no. 2, 2012, at 397, 399-408; Guillaume Laganière, Liability for Transboundary Pollution in Private International Law: A Duty to Ensure Prompt and Adequate Compensation 227-28 (2020) (Unpublished DCL Dissertation, McGill University); Jeffrey Gracer, Dennis Mahony & Tyson Dyck, *Cross-Border Litigation Gains Traction in U.S. and Canadian Courts*, 20 ENVTL. CLAIMS J. no. 2, 2008, at 181, 184-188.

CERCLA admit it has a limited application with respect to social aspects of environmental disasters and is instead limited to the mere cleaning-up of areas damaged by pollution, waste dumping, toxic spills, and the discharge of noxious material.[64]

Furthermore, the transformation for which this article advocates entails procedural and substantive changes that would be complicated by divergent understandings among lawmakers. As for the indeterminacy of definitions, ambiguity is not restricted to the realm of environmentally-induced migrations.[65] For instance, to date, a legal definition of *asylum* is still lacking internationally,[66] just like that of *migrant*.[67] Beyond linguistic disagreements,[68] however, the IACtHR has recently issued an advisory opinion that a number of human rights do apply in the context of migration, even extraterritorially.[69] *Non-refoulement*[70] is applied in absolute terms, and procedural rights (such as the right to a prompt and fair assessment of protection requests) are upheld accordingly. This was a regional and non-binding Opinion, and yet, it might influence international legal debate over the scope and enforceability of the right to *seek* asylum *from persecution*.[71]

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[64] *See, e.g.*, Jennifer J. Marlow & Lauren E. Sancken, *Reimagining Relocation in a Regulatory Void: The Inadequacy of Existing US Federal and State Regulatory Responses to Kivalina's Climate Displacement in the Alaskan Arctic*, 7 CLIMATE LAW, no. 4, 2017, at 290, 308-09.

[65] For a table collecting and systematizing the relevant terms, *see* Koko Warner, *Global Environmental Change and Migration: Governance Challenges*, 20 GLOBAL ENVTL. CHANGE 402, 403-04 (2010) (collecting and systematizing the relevant terms) https://www.stockholmresilience.org/download/18.3eea013f128a65019c2800010454/1459560566462/Warner+2010.pdf ; *see also* Rosalía Ibarra Sarlat, *Indeterminación del Estatus Jurídico del Migrante por Cambio Climático*, 20 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 135, 141-155 (2020); Giovanni Sciaccaluga, *Defining the Category: Who Are "Climate Refugees"?*, *in* INTERNATIONAL LAW AND THE PROTECTION OF "CLIMATE REFUGEES" 57-78 (Palgrave 2020) (a definition of "climate refugee"); Madhav Gadgil, *Social Change and Conservation*, *in* THE SAGE HANDBOOK OF ENVIRONMENT AND SOCIETY 485, 491 (Jules Pretty et al. eds., SAGE 2007). Although I will interpret rhetoric, discourses, and narratives by multiple actors throughout the piece, I am not concerned with terminology per se, but rather, with a crystal-clear matter of substance, i.e., whether the international Treaty under negotiation may help bring corporations – and humans – back to the currently state-centered law of environmental migrations/displacements. Thus, attempting a solution to unending, and possibly sterile, terminological disputes falls outside the scope of this work's purpose and ambitions.

[66] Guy S. Goodwin-Gill, *The International Law of Refugee Protection*, *in* THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 36, 42 (Elena Fiddian-Qasmiyeh et al. eds., 2014).

[67] Justin Gest et al., *Protecting and Benchmarking Migrants Rights: An Analysis of the Global Compact for Safe, Orderly and Regular Migration*, 57 INT'L MIGRATION, no. 1, 2019, at 60, 74 note 2.

[68] Maria Stavropoulou, *The Right Not to be Displaced*, 9 AM. UNIV. INT'L L. REV. 689, 692 (1994) ("[T]he definition of persecution needs to be re-interpreted along the lines of coercion and victimization, rather than targeting.").

[69] For the text of the case in Spanish, *see* The Institution of Asylum and its Recognition as a Human Right in the Interamerican System of Protection, Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (May 30, 2018).

[70] *See generally* Matthew Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?*, 26 INT'L J. REFUGEE L. 404 (2014); Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, 114 AM. J. INT'L L. 708 (2020). Simply put, the expression *non-refoulement* points to a State's obligation not to return refugees to the jurisdiction that compelled their departure in the first place, or to other deemed-unsafe jurisdictions.

[71] Massimo Frigo, *The Inter-American Court's Advisory Opinion on Asylum and Its Impact for the Human Rights of Refugees Worldwide*, OPINIO JURIS (Oct. 25, 2018), http://opiniojuris.org/2018/10/25/

It is also an important decision as to environmental migration, requiring foreign workers to receive protection from the abuses of the companies they work for or are impacted by, *not only* in the State where the company is legally domiciled *but also* before the courts of third countries (including neighboring countries). Further, the U.N. Human Rights Committee (HRCtee) has recently held that States are bound not to *refouler* those migrants whose lives would be at risk due to environmental degradation and climate change if turned back to their sending country.[72] While it phrased its opinion in traditional terms (in fact, the standard of proof with regards to life-threatening conditions is almost impossible to meet), it might signal a legal development in the near future whereby future opinions might also encompass threats from corporate hinderance to sustainable development due to pollution, land grabbing, soil contamination, and the like. "Since the exercise of virtually all other rights is contingent upon a sustainable environment[,] [the 'foundational right' to a sustainable environment] seems logical."[73]

Categorization and consensus on relevant terms are both difficult to achieve due to several factors including single and multiple causes of migration, the voluntary or involuntary nature of such migrations,[74] and their territorial scope. Whereas disaster-triggered rapid-onset migrations are "short-distance and temporary in nature[, . . .] with populations returning to their areas of origin as soon as they [a]re allowed [to]"[75] (obviously, unless the disaster permanently encumbers their home lands), slow-onset migrations caused by business behavior are usually long-distance (but not necessarily trans-border) and definitive. This is because what is disrupted is exactly the social texture: the relationship of trust amid companies, workers, suppliers, trade unions, and (local) representatives of governmental authorities. For these reasons, one could rather disagree with those who maintain the overbroad stance that disaster-induced migrants "have no opportunity to remain in their areas of origin [. . . and] when migrating abroad, should be granted the highest level of protection possible[, including] a *permanent* right to stay in the host country," while we may still agree with the idea of creating "dedicated technical bodies, and [. . .] adopt a sliding scale protection mechanism that, depending on the real needs of the migrating individual, would be capable of granting different levels of protection."[76] The draft Treaty situates itself simi-

the-inter-american-courts-advisory-opinion-on-asylum-and-its-impact-for-the-human-rights-of-refugees-worldwide/.

[72] U.N. Human Rights Committee, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol [to the ICCPR], Concerning Communication No. 2728/2016, ¶¶ 9.3-9.5, 9.14, CCPR/C/127/D/2728/2016 (Oct. 24, 2019); *cf.* U.N. Human Rights Committee, The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants, A/HRC/37/CRP.4, ¶¶ 67-68 (Mar. 22, 2018) (report from just two-and-a-half years prior).

[73] Sam Adelman, *Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse*, *in* HUMAN RIGHTS AND CLIMATE CHANGE 159, 172 (Stephen Humphreys ed., 2009).

[74] Marta Bivand Erdal & Ceri Oeppen, *Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary*, 44 J. ETHNIC & MIGRATION STUD., no. 6, 2018, at 981.

[75] Oscar Gómez, *Climate Change and Migration: A Review of the Literature* 13-14 (Int'l Inst. of Soc. Stud., The Hague, Working Paper No. 572, 2013).

[76] Giovanni Sciaccaluga, *Climate Change-Related Disasters and Human Displacement: Towards an Effective Management System* 17-18 (Int'l Fed'n of Red Cross and Red Crescent Soc'ys, Working Paper

larly when it requires State Parties to "take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure [the Treaty's] effective implementation,"[77] which will prove particularly helpful in the case of "a combination of extreme events and gradual environmental degradation"[78] in order to correctly apportion responsibilities.

III. Misinformed Rhetoric of Old-Fashioned Diplomatic (In)action

"In 2005, the Government of Bangladesh [. . .] in alignment with its obligation under the United Nations Framework Convention on Climate Change developed a National Adaption Program of Action[, identifying] fifteen priority projects. . .,"[79] none of which even loosely refers to businesses. What leaves one dismayed is that documents of this kind do not directly mention private actors at all, as if business exploitation of the environment (and consequently, of resident workers) and displacement were two distinct and independent policy areas. There certainty are war-torn or indirectly war-affected examples like those of Syria or Jordan respectively;[80] however, potential peacetime case studies are numerous, the most infamous ones including the oil-spilled Niger Delta[81] and waste-

No. 4, 2015) (emphasis added); *cf.* Douglas Stephens, *Establishing a Positive Right to Migrate as a Solution to Food Scarcity*, 29 EMORY INT'L L. REV.179, 212-14 (2014) (praiseworthy example from Argentina, when "displaced Paraguayans d[id] not fall neatly into the refugee framework. Some ha[d] 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. [. . . In response,] Argentina revised its immigration law and passed Law 25.871 in 2004. [. . .] In 2006, [it] launched a national program called "Patria Grande" designed to regularize immigrant status for irregular immigrants [. . .]. The program regularized almost half a million people in its first three years, nearly 60% of which [sic] were Paraguayan.") (emphasis added).

77 Third Revised Draft, *supra* note 19, at ¶ 16.1.

78 Warner, *supra* note 24, at 15.

79 Abdikarim Ali, Climate-Induced Migrants, International Law, and Human Rights: An Assessment 21 (Apr. 2015) (research paper, University of Ottawa) (https://ruor.uottawa.ca/handle/10393/32316).

80 *See* Jean-François De Hertogh, Climate Change as a Threat Multiplier in the Middle East: A Comparative Analysis of Syria and Jordan (2016) (Master's thesis, Leiden University) (on file with the Leiden University Student Repository).

81 Recent press reports about these events are countless. For an academic viewpoint, *see* Iwebunor Okwechime, *Environmental Conflicts and Forced Migration in the Nigerian Niger Delta*, *in* AFRICA NOW! EMERGING ISSUES AND ALTERNATIVE PERSPECTIVES 363 (Adebusuyi Adeniran & Lanre Ikuteyijo eds., 2018); Adefolake O. Adeyeye, *Corporate Responsibility in International Law: Which Way to Go?*, 11 SING. Y.B. INT'L L. 141, 144-45 (2007); Bukola Faturoti et al., *Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue*, 27 AFR. J. INT'L & COMPAR. L., no. 2, 2019, at 225. Lawsuits about the environmental disaster in the Ogoniland failed in the US, but partly succeeded, most recently, in the UK as well as in The Netherlands, *see* James Beeton, *Supreme Court Rules in Okpabi v Royal Dutch Shell Plc and SPDC*, INT'L & TRAVEL L. BLOG (Feb. 12, 2021) (discussing related decisions in the UK), https://internationalandtravellawblog.com/2021/02/12/supreme-court-rules-in-okpabi-v-royal-dutch-shell-plc-and-spdc/; Huib Shrama, *International Parent Company Responsibility: Shell and Oil Spills in Nigeria*, LOYENS LOEFF (Feb. 2, 2021) https://www.loyensloeff.com/en/en/news/news-articles/international-parent-company-responsibility-shell-and-oil-spills-in-nigeria-n21572/ (discussing related decisions in The Netherlands); Agence-France Press, *Shell to Pay $111m over Decades-Old Oil Spills in Nigeria*, THE GUARDIAN (Aug. 11, 2021, 7:46 PM), https://www.theguardian.com/business/2021/aug/12/shell-to-pay-111m-over-decades-old-oil-spills-in-nigeria (discussing related decisions in The Netherlands). Hearings are currently

poisoned Somali coasts.[82] These events range from contaminated land and pollution of soils and rivers as the industrial legacy of the Soviet Union in Central Asia (especially in the Fergana Valley shared by Kazakhstan, Kyrgyzstan, and Tajikistan),[83] to "Ecuador and Indonesia, [where] corporate decisions caused terrible damage to the indigenous peoples, arguably seriously undermining the ability for them to survive as a culture,"[84] to Italy, where "150 people were admitted to hospital with acute poisoning because of the release of [tons] of substances containing toxic arsenic in the environment,"[85] and Siberia, where "oil spills spreading over thousands of square kilometers of swamp grasses" have led to displacement of the Khant and Mansi tribes.[86] Further,

> [i]t is not just [S]tates that can be held accountable for environmental change; large multinational corporations are another possible culprit. This legal avenue was taken by Kivalina, a 400-inhabitant Alaskan village that had to be relocated further from the coast because global warming had allegedly resulted in the reduction of sea ice, erosion and a greater vulner-

being held on the same facts in Milan, Italy as well, against both Shell and Eni, *see* Jillian Ambrose, *Prosecutors Seek Jail Terms over Shell and Eni Oil Deal in Nigeria*, THE GUARDIAN (Jul. 22, 2020, 2:17 PM), https://www.theguardian.com/business/2020/jul/22/prosecutors-seek-jail-terms-shell-eni-executives-nigeria-oil-deal. For additional human rights and environmental impacts from oil refining in the Niger Delta region, see Anna Cunningham, *Amid Pollution and Political Indifference, Nigerians Struggle to Catch Their Breath*, UNDARK (Oct. 22, 2018), https://undark.org/article/air-pollution-lagos/.

[82] The case of Somalia is particularly illustrative of a crisis—that of piracy and related migrations—which has been primarily narrated in security and counterterrorism (or, at best, "environmental," marine, and ecological) terms. However, it would be far more logical to frame the crisis in terms of root causes. logical consequences of Western waste dumping along the seacoast, which served Euro-American businesses (especially enriching transnational mafias with local ties) and resulted in infant cancer as well as the starvation of once-wealthy settled fishermen and their families facing unprecedented starvation. This seems to stand as the only rational conclusion one may draw from connecting all relevant dots in a vast amount of literature. *See, e.g.*, Rep. of the S.C. on the Protection of Somali Natural Resources and Waters, at ¶ 46, U.N. Doc. S/2011/661 (2011); Matiangai V. S. Sirleaf, *Prosecuting Dirty Dumping in Africa*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 553, 559-561 (Charles C. Jalloh et al. eds., 2019); BRITTANY GILMER VANDEBERG, POLITICAL GEOGRAPHIES OF PIRACY: CONSTRUCTING THREATS AND CONTAINING BODIES IN SOMALIA 66 (Palgrave 2014); Anna Sergi & Nigel South, *"Earth, Water, Air, and Fire": Environmental Crimes, Mafia Power and Political Negligence in Calabria*, *in* ILLEGAL ENTREPRENEURSHIP, ORGANIZED CRIME AND SOCIAL CONTROL: ESSAYS IN HONOUR OF PROFESSOR RICHARD HOBBS 85, 93 (Georgios A. Antonopoulos ed., Springer 2016); Jatin Dua & Kenneth Menkhaus, *The Context of Contemporary Piracy: The Case of Somalia*, 10 J. INT'L CRIM. JUST., no. 4, 2012, at 749, 760-65; Mohamed Abumaye, Militarism, Askar: Policing and Somali Refugees 40 (2017) (Ph.D. dissertation, University of California in San Diego) (on file with University of California San Diego eScholarship); AWET TEWELDE WELDEMICHAEL, PIRACY IN SOMALIA: VIOLENCE AND DEVELOPMENT IN THE HORN OF AFRICA 65-69 (2019); Thean D. Potgieter & Clive H. Schofield, *Poverty, Poaching and Pirates: Geopolitical Instability and Maritime Insecurity off the Horn of Africa*, 6 J. INDIAN OCEAN REGION, no. 1, 2010, at 86, 99-105.

[83] François Gemenne & Philip Reuchlin, *Climate Change and Displacement: Central Asia*, 31 FORCED MIGRATION REVIEW 14, 14-15 (2008).

[84] Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 388 (1997).

[85] Ottavio Quirico et al., *States, climate change and tripartite human rights: The missing link*, *in* CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE 7, 15 (Ottavio Quirico & Mouloud Boumghar eds., 2016).

[86] John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL'Y 133, 143 (2002).

> ability to storm waves and surges. The village sought the responsibility of 24 major industrial companies for their alleged "contributions to global warming."[87]

Besides the 'indirect' effects of emissions-caused climate change, there are two categories of environmentally-linked business harms immediately resulting in mass human displacement: technological hazards (one may think of the Bhopal or Chernobyl disasters in 1984 and 1986, respectively), and 'development' plans, mostly related to dams and irrigation projects.[88] At times the difference is not clear-cut: for example, when "an earthquake leads to a tsunami which exposes management and design flaws in a nuclear power plant, as occurred in March 2011 at the Fukushima facility in Japan [. . .], identifying the hazard cause as natural or technological is not so straightforward."[89] At any rate, the superficial attention paid in migration *and* business and human rights literature to both these typologies of phenomena, not confined to industry-caused air pollution resulting in global warming, is striking.[90] Current literature inexplicably registers States and organizations (both international organizations[91] and NGOs) as the only collective actors operating at the intersection between the environment and migrations, and entirely omits business actors.

The impact of the unhealthy relationship between businesses and environmentally related migrations is not new news, yet it has received scant attention over the last few decades, neither in grey literature[92] or academic circles. Even the latest edited collection[93] by the scholar most consistently published on the topic of climate change and migration over the past few decades includes no chapter on the present issue. Other monographs and edited volumes do not mention it at

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[87] Benoît Mayer, *Sustainable Development Law on Environmental Migration: The Story of an Obelisk, a Bag of Marbles, and a Tapestry*, 14 ENVTL. L. REV., no. 2, 2012, at 111, 127. It can prove difficult to find a legal basis to prosecute exclusively the "major" emitters, and to distinguish the latter from supposedly "minor" ones.

[88] *See* Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL'Y, Spring 2021, at 323, 333-334; Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENVTL. L. & POL'Y REV., no. 3, 2012, at 713, 740 note 229; *see also* Brooke Havard, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILLANOVA ENVTL. L.J., no. 1, 2007, at 65, 71-72.

[89] Robert Stojanov, *Contextualising Typologies of Environmentally Induced Population Movement*, 23 DISASTER PREVENTION & MGMT. 508, 512 (2014).

[90] Most scholarly and professionals' papers just mention the issue *en passant*, restating the obvious by advising, e.g., that "business companies are also important policy actors." Elin Jakobsson, Global Policy Making on Climate Refugees - What is the problem? (2010) (unpublished thesis, Göteborg University) (on file with the Department of Political Science at Göteborg University).

[91] Jan Klabbers, *Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-Making, and the Market for Migration*, 32 LEIDEN J. INT'L L. 383 (2019).

[92] *See, e.g.*, Oli Brown, *Migration and Climate Change*, *in* 31 IOM MIGRATION RESEARCH SERIES, INT'L ORG. FOR MIGRATION (2008); Government Office for Science, London, *Migration and Global Environmental Change: Future Challenges and Opportunities* (2011), https://www.gov.uk/government/publications/migration-and-global-environmental-change-future-challenges-and-opportunities.

[93] CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES (Jane McAdam ed., 2010).

all,[94] nor do extensive student endeavors.[95] Businesses are investigated for managing migration detention centers,[96] but they are virtually never examined as self-standing environmental push factors.

This is worsened by objective limitations in quantifying environmentally-related forms of persecution in empirical reviews.[97] Scholarly works redundantly acknowledge that "looking at migration uniquely from an environmental perspective consequently takes away some of the political responsibility from actions which may have deliberately been taken."[98] Yet such works keep attributing these actions to States, while failing to *legally* problematize the centrality that international relations and governance theories have long attached to transnational business activities[99] and their influence in the context of mass migratory movements. The 2008 "Malabo" Protocol to the Statute of the African Court of Justice and Human Rights, though undeniably innovative from a public international law (PIL) perspective for criminalizing serious corporate acts of illicit exploitation of natural resources,[100] ultimately fails to connect this obligation with migratory phenomena. Neither the 2016 ILC Draft Articles on the Protection of Persons in the Event of Disasters, nor the 2014 ILA Declaration of Legal Principles Relating to Climate Change, hint at such a nexus.[101] Endorsing a view whereby environmentally displaced persons (EDPs)[102] "tend to be reduced to a

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[94] Unfortunately, recent examples are uncountable. *See, e.g.*, MATTHEW SCOTT, CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION (James Hathaway & Sarah A. Degan eds., 2020); PEOPLE ON THE MOVE IN A CHANGING CLIMATE: THE REGIONAL IMPACT OF ENVIRONMENTAL CHANGE ON MIGRATION (Etienne Piguet & Frank Laczko eds., 2014); MIGRATION, RISK MANAGEMENT AND CLIMATE CHANGE: EVIDENCE AND POLICY RESPONSES (Andrea Milan et al. eds., 2014).

[95] *See, e.g.*, IMBR Contributors, *International Migrants Bill of Rights with Commentary*, 28 GEO. IMMIGR. L.J., no. 1, 2013, at 23.

[96] *See* Daria Davitti, *Beyond the Governance Gap: Accountability in Privatized Migration Control*, 21 GERMAN L.J. 487 (2020); Ioannis Kalpouzos, *International Criminal Law and the Violence Against Migrants*, 21 GERMAN L.J. 571 (2017); *see also* Michael Flynn, Global Detention Project, *Kidnapped, Trafficked, Detained? The Implications of Non-State Actor Involvement in Immigration Detention*, 5 J. ON MIGRATION & HUM. SEC. 593 (2017).

[97] Marion Borderon et al., *Migration Influenced by Environmental Change in Africa: A Systematic Review of Empirical Evidence*, 41 DEMOGRAPHIC RSCH. 491, 525 (2019).

[98] Joseph Kweku Assan & Therese Rosenfeld*, Environmentally Induced Migration, Vulnerability and Human Security: Consensus, Controversies and Conceptual Gaps for Policy Analysis*, 24 J. INT'L DEV. 1046, 1050 (2012).

[99] *See, e.g.*, In Song Kim & Helen V. Milner, *Multinational Corporations and Their Influence Through Lobbying on Foreign Policy*, Brookings Inst. 1, 2 (2019), https://www.brookings.edu/wp-content/uploads/2019/12/Kim_Milner_manuscript.pdf.

[100] *See also* Daniëlla Dam-de Jong & James Graham Stewart, *Illicit Exploitation of Natural Resources*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 590-618 (Charles C. Jalloh et al. eds., 2019).

[101] U.N. International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters (2016), available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/6_3_2016.pdf; International Law Association, Int'l Federation of the Red Cross, Declaration of Legal Principles Relating to Climate Change, Res. 2/2014 (2014), available at https://disasterlaw.ifrc.org/media/1739?language_content_entity=en.

[102] Whilst environmental migrants are not *necessarily* facing life-threatening hazards or serious deterioration of their living standards, 'environmentally displaced persons' are defined as those who flee situations which gravely undermine their existence and wellbeing. Nevertheless, the reader is advised there is no agreement on this or related terms in legal scholarship. *See* M. Rezaul Islam & Niaz Ahmed Khan,

consequence of climate change,"[103] the dominant narrative as enshrined in, for example, the Sendai Framework for Disaster Risk Reduction 2015-2030 and similar soft documents[104] indeed describes businesses as passive victims of global-warming-triggered environmental disasters, and migrants as unavoidable human influxes of apocalyptic scale,[105] which will inevitably invade the advanced countries of the industrialized hemisphere in due course.[106] This type of rhetoric of inevitability, grounded in passivity, is in my view an expression of what other scholars have "labelled an 'adaptive' model of disaster regulation, in terms of [its] relationship to the greater system of international law: [it] seek[s] to develop, adapt, and particularize the application of norms from other, more established subfields to disaster situations."[107] This is exacerbated by a debate on climate change which is, in itself, already polarized between climate-skepticism and eco-alarmism.[108] Less focus on the environment *per se*, the stigmatization of migrants, and the victimization of local businesses[109] is advisable. Instead,

Threats, Vulnerability, Resilience and Displacement Among the Climate Change and Natural Disaster-Affected People in South-East Asia: An Overview, 23 J. Asia Pac. Econ. 297, 300-301 (2018).

103 Christina Ninfa Daszkiewicz, Environmentally Displaced Persons at the Crossroad of Environmental, Human Rights, Asylum and Economic Law: A European Perspective for a Future Framework 98 (Oct. 2018) (unpublished LL.M thesis, University of Iceland) (on file with Semantic Scholar).

104 The Sendai Framework was promoted by the U.N. Office for Disaster Risk Reduction (UNDRR), *see* Sendai Framework for Disaster Risk Reduction 2015-2030, Assembly Res. A/RES/69/283 (Jun. 3, 2015). For a discussion of other soft documents deploying this narrative, *see* Elisa Fornalé & Sophia Kagan, *Climate Change and Human Mobility in the Pacific Region: Plans, Policies and Lessons Learned* 39 (Global Knowledge Partnership on Migration and Development, Working Paper No. 31, 2017).

105 *See, e.g.*, Margaret E. Peters, Trading Barriers: Immigration and the Remaking of Globalization 229 (Princeton University Press 2017) (deploying this disgracefully condescending phrasing "One could imagine that the threat of tens of millions of Bangladeshi migrants might lead the European Union to send Dutch engineers to build better dikes there. Flows of climate migrants fleeing desertification in Africa might be stopped with drought-tolerant food crops and better irrigation systems developed in California."). The urgency is more about *not* having locally incorporated subsidiaries of TNCs that pollute the environment and displace the population than about importing Dutch engineers to Bangladesh as to constrain outgoing migration flows!

106 Stephen Castles, *Concluding Remarks on the Climate Change-Migration Nexus*, *in* Migration and Climate Change 415, 419 (Etienne Piguet et al. eds., 2011) ("However well intentioned, such shock tactics are risky: not only do they present questionable data, which might undermine public trust in environmental predictions. More seriously, they reinforce existing negative images of refugees as a threat to the security, prosperity and public health of rich countries in the [G]lobal North. Thus the doomsday prophecies of environmentalists may have done more to stigmatize refugees and migrants and to support repressive state measures against them, than to raise environmental awareness. In response, refugee and migration scholars have argued that such neo-Malthusian visions are based on dubious assumptions and that it is virtually impossible to identify individuals or groups forced to move by environmental factors alone [. . .T]he politicization and polarization of the debate on migration and the environment has had quite negative consequences."). *See also* Camillo Boano et al., *Environmentally Displaced People: Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration*, Oxford Dep't of Int'l Dev. Forced Migration Policy Briefing 1, 20-21 (2008).

107 Rhys Carvosso, *The Reactive Model of Disaster Regulation in International Law and Its Shortcomings*, 34 Leiden J. Int'l L. 957, 958 (2021).

108 Benoît Mayer, *"Environmental Migration" as Advocacy: Is It Going to Work?*, 29 Refuge, no. 2, 2014, at 27, 30; Alfredo dos Santos Soares, *Protecting Environmentally Displaced Persons Under the Kampala Convention: A Brief Assessment*, 9 Revista Catalana de Dret Ambiental 1, 16 (2014).

109 Anja Mihr, *Climate Justice, Migration and Human Rights*, *in* Climate Change, Migration and Human Rights: Law and Policy Perspectives 45, 60 (Dimitra Manou, et al. eds., 2017) ("It goes without saying that climate change can have a significant impact on business activity. . . . Subsequently, climate change becomes a cost factor as well as a risk factor because it affects the cost of everything in

awareness-building[110] and responsibility-bearing policies should be designed for those in the Global North who exploit workers at the level of their sustainable survival by degrading their living environment using sub-contractual and mostly undemocratic relationships.

To overcome these short-sighted constraints, one may begin by looking at the growing inter-regime literature on migration and human rights[111] and at policy standardization in business and human rights,[112] draw analogies, and extrapolate relevant starting points for research. "There is . . . significant debate as to the definition of "climate-induced" migration; displacement due to actual loss of land, due to natural disasters, or due to development-related issues, particularly food security as arable land is affected, are all significant concerns that arise in scholarship and policymaking debates."[113] Here too, one finds no mention of either criminal or negligent business practices affecting the environment and, in turn, relevant (segments of) local[114] populations. General suggestions on explic-

the production line. *Most large multinational companies have been either indifferent or hostile to advocacy on climate change*. Now, though, an increasing number are pressing for action and calling for clear government signals and policy options to support mitigation. [. . .] Many business leaders have finally realised that they need to steer their investment decisions in a more sustainable direction *in order to keep up with their more forward-thinking competitors*.") (emphasis added).

110 In policy and disaster-management literature, it is often suggested that awareness-building is a 'soft duty' owed by corporate managers to the civil society of the territories where they operate, with regards to possible natural hazards employees might be exposed to while working in those areas, *because the latter are per se environmentally risky*, *see* Repaul Kanji & Rajat Agrawal*, Exploring the Use of Corporate Social Responsibility in Building Disaster Resilience Through Sustainable Development in India: An Interpretive Structural Modelling Approach,* 6 Progress Disaster Sci. 1, 3 (ScienceDirect Apr. 2020). Instead, here we are referring to making corporations aware of the 'environmental' hazards *they cause or escalate through their operations*.

111 *See generally* Irregular Migration and Human Rights: Theoretical, European and International Perspectives (Barbara Bogusz et al. eds., 2004); Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2017); Ariadna Estévez, Human Rights, Migration, and Social Conflict: Towards a Decolonized Global Justice (2012); Migration, Human Rights, and Development: A Global Anthology (Anne T. Gallagher ed., Int'l Debate Educ. Ass'n 2013); Challenging the Borders of Justice in the Age of Migrations (Juan Carlos Velasco & MariaCaterina La Barbera eds., 2019).

112 *See, e.g.*, *The Ten Principles of the UN Global Compact*, United Nations Global Compact, https://www.unglobalcompact.org/what-is-gc/mission/principles; *see also* Institutional Service for Human Rights, *Business and Human Rights Treaty: Key Issues Start to Crystalize but Attention on the Protection of Human Rights Defenders Remains Inadequate* (Oct 26, 2016), https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/business-and-human-rights-treaty-key-issues-start-to-crystallise-but-attention-on-the-protection-of-human-rights-defenders-remains-inadequate/. Note that this *2000 Global Compact and its 'Ten Principles,'* addressed to businesses, should not be confused with the *2018 Global Compact for Migration*, the *2018 Global Compact on Refugees*, or the 2019 unsuccessful *Global Pact for the Environment*, all three of which I briefly comment upon *infra*. There seemed to be no *legal* reason to differentiate terminologically between 'compacts' and 'pacts.' *See* Thomas Gammeltoft-Hansen, et al., What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration 12 (Raoul Wallenberg Institute of Human Rights & Development Law 2018).

113 Heather Johnson, *Immigration and International Relations*, Oxford Bibliographies (2017). In a strikingly similar vein, *see* Mehari Taddele Maru, *Causes, Dynamics, and Consequences of Internal Displacement in Ethiopia* 17 (Ger. Inst. for Int'l and Sec. Affs., Working Paper No. FG 8, May 2017).

114 'Local' should never be confused for 'small.' For example, the heavily oil-polluted area of Niger Delta is roughly as extended as one fifth of the whole territory of Italy! *See generally* David I. Little, et al., *Sediment Hydrocarbons in Former Mangrove Areas, Southern Ogoniland, Eastern Niger Delta, Ni-*

itly including people displaced by *gradual* environmental degradation within the scope of the U.N. Guiding Principles on Internal Displacement (GPID)[115] had been put forward at the Council of Europe. While case-study research has been carried out on the nexus between environmental degradation and migration,[116] the link between corporate behavior and the other two elements has rarely been legally or politically unpacked.

Globally, although multiple UN General Assembly (UNGA) Resolutions have invited corporations to join efforts with States and contribute to sustainable developmental plans,[117] no binding instrument addresses the issue. Several international industry-led frameworks do exist,[118] but they are voluntary, unaccountable to *civil society*, inefficacious,[119] and not one of them singles out migratory issues stemming from environmental degradation. When it comes to international state-driven efforts, outcomes have not proven more convincing thus far. To begin with, the Global Compact on Refugees (GCR) [120] has left the situation of 'climate refugees' (and the like) *deliberately* unaddressed.[121] Further, the Global Compact for Safe, Orderly and Regular Migration (GCM) was endorsed by the UNGA in December 2018,[122] but although celebrated for its significance as "the first international agreement to recognize climate migration,"[123] it is not an international *treaty*. Moreover, key migration 'destination' countries and TNCs' primary countries of incorporation (the U.S., Australia, Italy) either voted against the GCM or abstained, thus significantly weakening its political weight. To make things worse, even linguistically, both Compacts contributed to sanctioning the seasoned dichotomy between economic migrants and political refugees.[124] There

geria, *in* THREATS TO MANGROVE FORESTS: HAZARDS, VULNERABILITY, & MANAGEMENT 323 (Christopher Makowski & Charles Finkl eds., 2018).

115 Kälin & Schrepfer, *supra* note 49, at 46-47.

116 Tessa Schmedding, Environmental Migration: A Global Issue Under European Union Leadership? 45 (2011) (Master's Thesis) (on file at Institut Européen des Hautes Études Internationales).

117 *See, e.g.*, G.A. Res. 73/254, Towards Global Partnerships: A Principle-Based Approach to Enhanced Cooperation Between the United Nations and All Relevant Partners' (Jan. 16, 2019).

118 For instructive table of industry-specific frameworks, *see* Shiro Hori & Sachi Syugyo, *The Function of International Business Frameworks for Governing Companies' Climate Change-Related Actions Toward the 2050 Goals*, 20 INT'L ENVITL. ENVTL. AGREEMENTS: POL., L. & ECON. 541, 549 (2020).

119 Daniel Iglesias Márquez, *The Scope of Codes of Conduct for Corporate Environmental Responsibility*, 6 REVISTA CATALANA DE DRET AMBIENTAL, no. 2, 2015, at 1.

120 G.A. Res. 73/151 Global Compact for Refugees (Dec. 19, 2018).

121 *See* Gillian Doreen Triggs & Patrick C.J. Wall, *'The Makings of a Success:' The Global Compact on Refugees and the Inaugural Global Refugee Forum*, 32 INT'L J. REFUGEE L., 283, 301 (2020); *see, c.f.*, Antoine Pécoud, *Narrating an Ideal Migration World? An Analysis of the Global Compact for Safe, Orderly and Regular Migration*, 42 3D WORLD Q., no. 1, 2021, at 16, 27.

122 G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration (Dec. 19, 2018).

123 Elspeth Guild et al., *From Zero to Hero? An Analysis of the Human Rights Protections Within the Global Compact for Safe, Orderly and Regular Migration (GCM)*, 57 INT'L MIGRATION, no. 6, 2019, at 43, 51; *see also* Alan Desmond, *A New Dawn for the Human Rights of International Migrants? Protection of Migrants' Rights in Light of the UN's SDGs and Global Compact for Migration*, 16 INT'L J.L. CONTEXT 222, 229 (2020).

124 See Annick Pijnenburg & Conny Rijken *Moving Beyond Refugees and Migrants: Reconceptualising the Rights of People on the Move*, 23 INT'L J. POSTCOLONIAL STUD. 273 (2021), for an extensive discourse on the topic.

is also the Global Pact for the Environment, which was being negotiated during the first months of 2019.[125] It appeared in principle more promising due to its prospected bindingness and the large consensus it initially gathered among world powers. Still, the initiative failed[126] during its third negotiating round. However, this failure bears no appreciable consequence for the problems being raised in the present analysis. The Pact's shortcomings in this respect had been already outlined in literature, one year prior to its eventual breakdown:

> The Pact provides in draft article 2 for a broadly formulated duty of care, which might rightly be seen as a natural corollary to the right to an ecologically sound environment. [. . .] Whether or not such a broad duty of care across such a diverse range of actors could be said strictly to be an existing principle of [international environmental law], this is a comprehensive formulation establishing a thoroughgoing and all-embracing duty of care that is potentially applicable to a wide range of state and non-state entities[, . . .] such as transnational corporations. [. . .] [T]he technique [is] often used in soft law to include moral injunction opposable to all, and more precise rule opposable only to [States]. But, of course, the Pact is not meant to be soft law. And thus, how is such a provision meant to be understood? Previous attempts to impose direct legally binding international rules on transnational corporations [were] met with derision and scorn. The same would arguably be true here. If, on the other hand, there was no intention to impose such an obligation, what notion of "duty" as a legal concept is this, within a binding treaty? *Unless the Pact challenges the systemic nature of intergovernmental relations, such horizontal application will be limited to that implemented in domestic law*.[127]

On a more local note, the signing of, for example, the Escazú Agreement[128] by twelve Latin American countries, in September 2019, was welcomed widely as a

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[125] *See generally* G.A. Res. 72/277, Towards a Global Pact for the Environment (May 14, 2018). With this Resolution, the UNGA established an intergovernmental working group dedicated to the elaboration of this Pact.

[126] *See* Rep. of the Ad Hoc Open-Ended Working Group Established Pursuant to General Assembly Resolution 72/277, U.N. Doc. A/AC.289/6/Rev. 2, (June 13, 2019) (speaking only of recommendations to move forward); Follow-Up to the Report of the Ad Hoc Open-Ended Working Group Established Pursuant to General Assembly Resolution 72/277, U.N. Doc. A/RES/73/333 (Sept. 5, 2019) (acknowledging this diplomatic fiasco).

[127] Louis J. Kotzé & Duncan French, *A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for* Lex Anthropocene*?*, 18 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 811, 825-26 (2018) (emphasis added). The critique offered by these authors is exceedingly relevant, as they outline how this Pact would have had a horizontal effect on human rights domestically but *not directly under public international law*. On the distinction between the two, *see* Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 221, 237-41 (Victor Tushnet ed., 2017); C. Lottie Lane, *The Horizontal Effect of International Human Rights Law in Practice*, 5 EUROPEAN J. COMPARATIVE L. & GOVERNANCE, 5, 27-28 (2018).

[128] U.N. Economic Commission for Latin America and the Caribbean, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Mar. 4, 2018 (imposing obligations on signatory States).

landmark victory in by human-rights NGOs[129] as well as the popular press.[130] In contrast, in terms of *business and human rights*, there is almost nothing to celebrate. The only reference to corporations is traceable in Article 6(13), requiring Parties to "encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance," and to do so in accordance with their capacity. The language in this Agreement, merely mandating encouragement, echoes both the soft corporate social responsibility rhetoric[131] built on *internal* auditing and claimed self-accountability measures, and idea of 'progressive realization,' i.e., the "progressive character of the development of social, economic and cultural rights," borrowed from the International Convention on Economic, Social and Cultural Rights (ICESCR).[132] The latter concept functions as an escape route for corporate actors. Here, the requirement is not even progressive but simply tailored to the *actual* abilities of each Party, although Article 3(c) does mention progressive realization, together with 'non-regression.'[133]

IV. Featuring a New Binding Instrument Targeting Businesses

The new Treaty would take a far-reaching stance on human rights. Art. 5.3 currently states, "State Parties shall investigate all human rights abuses *covered under this (Legally Binding Instrument)*, effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural and/or legal persons found responsible, in accordance with domestic and international law."[134] An earlier formulation mentioned "*all* human rights"[135] without specifying they were those that actually would have been covered by the Treaty, but the outstanding issue concerns the clarification of what 'international law' stands for here. This legalistic, far-reaching provision did not persuade some delegations,[136]

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[129] *See, e.g.*, Duncan Tucker, *Americas: Historic Environmental and Human Rights Treaty Gains Momentum as 12 Countries Sign*, AMNESTY INT'L (Sept. 27, 2018, 12:04 PM), https://www.amnesty.org/en/latest/news/2018/09/americas-12-countries-sign-historic-environmental-treaty/.

[130] *E.g.*, Vivek H. Maru, *Why Planetary Survival Will Depend on Environmental Justice*, L.A. TIMES (Apr. 22, 2021, 3:05 AM), https://www.latimes.com/opinion/story/2021-04-22/environmental-justice-peru-escazu-agreement.

[131] *See* Ana Èertanec, *The Connection Between Corporate Social Responsibility and Corporate Respect for Human Rights*, 10 DANUBE: L., ECON. & SOCIAL ISSUES REV., no. 2, 2019, at 103 (discussing this soft rhetoric).

[132] The technical concept of the 'progressive realization' of human rights is deeply insidious, *see* Luisa Maria Silva Merico, *Environment and Development Within the Inter-American Human Rights System*, in HUM. RTS. & ENV'T, 263, 274 (César Barros Leal ed., 2017) (courts have already employed it, for instance, to dismiss developmental claims which did not feature "an adequate sample of domestic conditions.").

[133] Third Revised Draft, *supra* note 19, at art. 3(c).

[134] Third Revised Draft, *supra* note 19, at art. 5(3) (emphasis added).

[135] Revised Draft, *supra* note 38, at art. 4(10) (emphasis added).

[136] Luis Gallegos (Chair Rapporteur of the Human Rights Council), *Draft Rep. on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶ 39, U.N. Doc. A/HRC/RES/26/9 (Oct. 19, 2018) (hereinafter Fourth Session, Draft Rep.).

and the consistent reference to "all human rights" in the Preambles[137] had been (factiously, but rightly) labelled as "illogical from both a practical and legal perspective."[138] A more focused formulation would, for example, specify that 'international law' equates to the commitments States have already undertaken. Migration literature did not fail to reiterate that those displaced or migrating are in fact rights-holders under existing multilateral human rights treaties and regional arrangements although not generally as migrants or displaced people. Rather, under general multi-lateral human rights treaties such as the 1966 [Int'l Covenant on Civil and Political Rts. (ICCPR)] and 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), [S]tates already have obligations to respect, protect, and fulfil the rights contained therein of people within their jurisdiction. That these people migrate or are displaced by climate change within the [S]tate's jurisdiction does not divest them of the rights they enjoy.[139]

Second-generation rights, like those to health or to food, are particularly sensitive in this regard. Although their positive provision cannot be justiciable, Constitutions in several States have started to incorporate their functional necessity as corollaries for the enjoyment of the right to life[140] or the right not to be subjected to inhuman or degrading treatment.[141] Furthermore, the HRCtee's non-binding, yet highly authoritative General Comment (GC) No. 36 on the ICCPR Art. 6(1)'s Right to Life, referring to the U.N. Guiding Principles on Business and Human Rights, observed as follows:

> States parties must take appropriate measures to protect individuals against deprivation of life by [. . .] *foreign corporations operating within their territory or in other areas subject to their jurisdiction*. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, *including activities taken by corporate entities based in their terri-*

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[137] Revised Draft, *supra* note 38, preamble; Second Revised Draft, *supra* note 39, preamble; Third Revised Draft, *supra* note 19, preamble.

[138] Representative of the Geneva-based NGO *International Organisation of Employers*, Oral Statement made during the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Oct. 15-19, 2018), (available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/IOEArticles1_14_15.pdf).

[139] Bruce Burson, *Protecting the Rights of People Displaced by Climate Change: Global Issues and Regional Perspectives*, *in* CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 159, 169 (Bruce Burson ed., 2010); *see also* Cosmin Corendea, *Migration and Human Rights in the Wake of Climate Change: A Policy Perspective Over the Pacific*, 2 UNU-EHS PUBLICATION SERIES POLICY REPORT, at 38 (2017).

[140] Burson, *supra* note 139, at 163.

[141] *See* Colm O'Cinneide, *The Present Limits and Future Potential of European Social Constitutionalism*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 324, 333 (Katharine G. Young ed., 2019); Katie Anne Boyle & Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, 22 INT'L J. HUM. RTS., no. 1, 2018, at 43, 52; Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. UNIV. INT'L L.R. 35, 41 (2006).

> *tory or subject to their jurisdiction*, are consistent with [A]rticle 6, taking due account of related international standards of corporate responsibility, and of the right of victims to obtain an effective remedy. [. . . The i]mplementation of the obligation to respect and ensure the right to [. . .] life *with dignity*, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public *and private* actors.[142]

Provided that, "as many philosophers think, duties not to harm are generally more stringent than duties to aid,"[143] this GC properly upholds the status of "second-generation" welfare rights, which are accomplished when individuals can live their life with dignity without being harmed by irresponsible corporate conduct. "A universal environmental right cannot emerge as long as the West privileges individual rights over group rights and solidarity or third generation rights, which must be made fully justiciable. Non-state actors, especially transnational corporations, must be brought fully within the ambit of human rights law as duty bearers."[144]

The ill fate of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, with fifty-four Parties *from sending countries exclusively* to date, should have taught us that too wide-encompassing treaties should not be adopted, as their destiny will be to not solve the problems which prompted their initiation. The low ratification rate of this and the ILO Conventions "shows that few [S]tates are actually keen to recognize and protect even the [most] basic human rights in the case of economic migrants."[145] However, the subject migrants of the (hopefully) upcoming Treaty would stand halfway between economic migrants and asylum seekers. There is indeed an element of persecution, coupled with one of 'redemption' by a more prosperous, dignified life. With regards to environmental migrants, author Assan wondered, "In what way are people displaced by environmental degradation/climatic variability different from people who migrate because their sources of livelihoods are destroyed because of economic hardship?"[146] In principle there is no difference, but when business misconduct adds direct or indirect elements of persecution to unfavorable alterations of the environment, then such difference indeed emerges, and legal consequences should follow suit. That environmental migrants differ from traditional refugees is true insofar as the former may still rely on the protec-

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[142] U.N. Hum. Rts. Committee (HRCtee), General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶¶ 22, 62, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) (emphasis added). This reasoning has been already applied in several cases of 'climate change' migrations, but there have been no decisions yet regarding *business co-responsibilities* in such 'climate change' migrations. *See also* Jefferi Hamzah Sendut, *Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law*, EJIL:Talk! (Feb. 6, 2020) https://www.ejiltalk.org/climate-change-as-a-trigger-of-non-refoulement-obligations-under-international-human-rights-law/ (discussing an HRCtee decision on the right to life).

[143] James Patrick Griffin, On Human Rights, 177 (Oxford Univ. Press 2008).

[144] Adelman, *supra* note 73, at 173.

[145] Benoît Mayer, *International Law and Climate Migrants: A Human Rights Perspective* 7 (Sustainable Dev. Law on Climate Change, Legal Working Paper No. 08, 2011).

[146] Kweku Assan, *supra* note 98, at 1050.

tion of their governments;[147] self-evidently, said protection is inexistent whenever the State is not independent, resourceful, or capable enough to effectively patrol neoliberal excesses of the private sector in the realms of both prevention strategies and due punishment.

Coming back to the *business and human rights* Treaty scrutinized in this work, Article 4(1) of the Zero Draft had included the populations above among the scope of 'victims,' defined as "persons who individually *or collectively alleged* to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, *including environmental rights*, through acts *or omissions* in the context of business activities of a transnational character."[148] What remained unclear was whether, in the context of an environmentally induced migration for the aforementioned reasons, entire families would have been granted comparable standards of redress; the same Article suggested it was to be assessed "in accordance with domestic law." Such a redress was phrased as "[r]estitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" and, in the context of ecologic restoration, it included the "covering of expenses for relocation of victims."[149] This tangle was partly solved with the Revised Draft: its Article 1(1) specified that "the term 'victim' also includes the immediate family or dependents of the direct victim," but it still maintained this should have been pursued "where appropriate, in accordance with domestic law" (which could be silent on the subject). The latest draft's Article 1(1) no longer retains the domestic-law qualification.

Another potential innovation the Treaty offers can be traced to the increased scope of due diligence. Environmental due diligence is usually framed in climate-change terms, such that especially major emitters should contribute to reversing or at least delaying climate change;[150] and yet, the general prism of climate change proves a useless lens through which to view the many 'environmental' migrations triggered by specific corporate abuses. In fact, the Third Revised Draft's understanding of due diligence[151] is commendably comprehensive. As a minimum, businesses must undertake, publicize and act upon the results of impact assessment studies focused on both the environment and human rights, and

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147 Joanna Apap, Eur. Parl Rsch. Serv., *Commission Briefing on The Concept of "Climate Refugee:" Towards a Possible Definition*, at 5, PE 621.893 (Feb. 2019).

148 Zero Draft, *supra* note 37, at art. 4(1) (emphasis added).

149 *Id.* at art. 8.1(b).

150 *See generally* Chiara Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence,"* 6 Bus. & Hum. Rts. J., no. 1, 2021, at 93 (reviewing litigation related to the development of 'climate due diligence').

151 International law doctrine addresses 'due diligence' in either a narrowly legal or a broadly policy manner; in this case, we refer to the term as a component of a legal obligation stemming from a primary rule of international law. On the distinction between due diligence in legal *versus* policy terms, *see* Neil McDonald, *The Role of Due Diligence in International Law*, 68 Int'l & Compar. L.Q. 1041, 1054 (2019). For a scrutiny of due diligence in the field of B&HR, see generally Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the U.N. Guiding Principles on Business and Human Rights*, 28 Eur. J. Int'l L. 899, 899 (2017). Notably, the E.U. (namely the European Parliament) is developing normative proposals—still at an embryonic stage—for mandatory *environmental* due diligence TNCs must perform throughout their entire supply-chain; *see* Ionel Zamfir, Eur. Parl. Rsch. Serv., *Towards a Mandatory EU System of Due Diligence for Supply Chains* at 3, 7-8, PE 659.299 (Oct. 2020).

the duty is extended to companies with which they entertain any contractual relationships.[152] These assessments will later prove fundamental, from an evidentiary prospective, for separating specific corporate culprits from more general environmental trends bearing on a land, especially after the HRCtee clarified in *Teitiota v. New Zealand*[153] that, "in the climate [. . .] context, [. . .] foreseeability rather than imminence of harm, is the key test."[154] Moreover, businesses would carry out preventative talks with potentially affected groups, attaching particular importance to the claims of vulnerable population segments, including all types of potential migrants.[155] Similar attention must be paid to comparable groups when it comes to the implementation of the whole text.[156] Further definition of 'restitution,' 'compensation,' and so forth, remains in progress. However, I believe it would be appropriate if the drafters included a mobility scheme to reassign the displaced worker (not necessarily formerly employed by the displacing corporation, though *a fortiori* in that case) within the supply chain of which the polluting company is part. In this case, and if that re-assignment takes place in a different jurisdiction (cross-border relocation), the State should intervene only for visa purposes for workers (and their families). One crucial aspect of these relocations is that families in developing countries who can 'place' one member abroad for working purposes may cope more proficiently and resiliently with environmental distress, thanks to remittances they receive from abroad.[157] Arguably, the same reasoning can be extended to actual environmental disasters, but only to the extent that the environment is not so compromised that the rest of the family might be forced to emigrate as well.

In my view, a supply chain-distributed reassignment calls for a radical paradigm shift. To posit an example, in Europe, "employment-based admissions into EU Member States are generally based on the labour market needs of the receiving Member State, and not on the situation of the home country."[158] The same holds true in the United States.[159] In a market where "the most vulnerable com-

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[152] Third Revised Draft, *supra* note 19 arts. 6(3)(a), 6(4)(a) & (e-f).

[153] U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

[154] Başak Çali et al., *Hard Protection Through Soft Courts? Non-Refoulement Before the United Nations Treaty Bodies*, 21 GER. L.J. 355, 382 (2020); *see also* Simon Behrman & Avidan Kent, *The Teitiota Case and the Limitations of the Human Rights Framework*, 75 QUESTIONS INT'L L. 25, 36-37 (2020); Vernon Rive, *Is an Enhanced Non-Refoulement Regime Under the ICCPR the Answer to Climate Change-Related Human Mobility Challenges in the Pacific? Reflections on Teitiota v. New Zealand in the Human Rights Committee*, 75 QUESTIONS INT'L L. 7, 8-9, 17 (2020).

[155] Third Revised Draft, *supra* note 19, at art. 6(4)(c). The same intersectional logic of vulnerability is applied to migrants with reference to the International Fund that State parties shall establish to help victims financially, *see id*. at art.15(7).

[156] Second Revised Draft, art. 16(4) and relevant preambulatory provision; Third Revised Draft, *supra* note 19, at PP13.

[157] *See* Mostafa Mahmud Naser et al., *Climate Change, Migration and Human Rights in Bangladesh: Perspectives on Governance*, 60 ASIA PACIFIC VIEWPOINT 175, 182-83 (2019).

[158] Nicole de Moor, International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration 362 (2014) (unpublished Ph.D. dissertation, Ghent University) (on file with author).

[159] *Cf.* Alessandra Casella & Adam B. Cox, *A Property Rights Approach to Temporary Work Visas*, 47 J. LEGAL STUD. 195, 227 (2018).

munities often have difficulties to fulfil the conditions to apply for labor migration visa and work permits, given that most labor migration programs focus on higher qualified workers,"[160] companies of the Global North—where no State has signed the International Convention on the Rights of Migrant Workers[161]—must be made responsible and held accountable for the environmental damage they themselves create in the Global South through their subsidiaries, or by means of networked contractual relationships they enable.[162] State-owned companies should by definition be required to never leave displaced workers without employment guaranteeing their survival. They should sponsor either visas (in the destination countries) or insurance schemes (in the jurisdiction of displacement) covering environmental disasters, and lobby for personal income tax relief[163] on behalf of the affected employees. Former employees should be granted at least the same standard of living (wage and services) they enjoyed prior to their displacement caused by irresponsible corporate behavior (often carried out overseas in the developing world). Referring again to the EU context, it has been noted that the "establishment or extension of labour migration schemes would be a promising policy option to respond to slow-onset environmental change when migration cannot be characterized as forced migration,"[164] and one may well subscribe generally to this statement, as it is applicable far beyond Europe. Lamentably, at the time when the EU's Directive on Subsidiary Protection[165] was conceived, "consideration was also given as to whether certain environmental [. . .] triggers might justify subsidiary protection. Ultimately, the decision to restrict the Directive to simply harmonizing existing concepts and methods [. . .] means that it does not create a new system of protection per se, but rather distils State practice [as] [. . .] an instrument of compromise."[166] Moreover, remittances to family members who could not leave their original land due to severe illness *et similia* should be untaxed.

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[160] de Moor, *supra* note 158, at 361.

[161] *See* Martin, *supra* note 2, at 404; *see also* Euan MacDonald & Ryszard Cholewinski, U.N. Educational, Scientific and Cultural Organization (UNESCO), *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, 1 UNESCO MIGRATION STUD. 1, 19 (2007); Juhani Lonnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT'L MIGRATION REV. 710 (1991).

[162] *See generally* MUZAFFER EROĞLU, MULTINATIONAL ENTERPRISES AND TORT LIABILITIES: AN INTERDISCIPLINARY AND COMPARATIVE EXAMINATION (2008).

[163] Or, depending on the formulation of the law, provide tax waivers / exemptions / credits / breaks / rebates.

[164] Albert Kraler et al., Eur. Parl. Directorate Gen'l for Internal Pol'ys, *"Climate Refugees" Legal and Policy Responses to Environmentally Induced Migration*, at 66, PE 462.422 (2011).

[165] Directive 2011/95/EU on "*Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*," 2011 O.J. (L 337).

[166] JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 55-56 (Oxford Univ. Press 2007).

Unfortunately, the initial consensus among those drafting the Treaty on access to information and diplomatic assistance[167] may be vanishing[168] although it was temporarily kept in the text;[169] regrettably, the latest version[170] only retains access to information, while diplomatic assistance is no longer mentioned. As per current international refugee law (according to the United Nations High Commissioner for Refugees (UNHCR) and part of the doctrine), although the burden of proof rests on the applicant, documentary evidence is supposed to suffice for the recognition of refugee status even when such applicant provides false or contradictory statements.[171] Obviously, this view reflects neither the position nor the actual practices of most States. When it comes to civil and criminal liability of corporations, however, standards of proof are much stricter: "victims often face obstacles when seeking to access justice, such as difficulties encountered when trying to prove a *causal link* between the acts of businesses within a supply chain and damage suffered."[172] Most, however, are only in the position to prove *correlation* at best. Hence, the road towards demonstrating *corporate* persecution is bumpier. This multiplies and intersects with the already-problematic multicausality of any 'environmental' migration,[173] and also resonates with causation-related bars that various domestic courts have raised in climate change litigation against private actors such as major fossil fuel companies.[174]

V. Finally Acknowledging 'Non-state' Forms of Persecution?

A query for the terms 'persecution' and 'persecuted' in all issues of the reputable *Business and Human Rights Journal* returns a total of only four results,[175] all of which relate to classical security affairs and not at all to the environment. Regrettably, this is hardly surprising. "The issue of environmental degradation as a determinant of human mobility is part of various legal regimes that the international legal community has so far been treating with an unconnected logic,"[176] exacerbated by its own multicausality. Hence, the core argument of the present analysis is that *non-State* acts of persecution will never meet the standards under PIL to prove *state-mandated* persecution unless all three elements (migratory,

[167] Zero Draft, *supra* note 37, at art. 8(9); Revised Draft, *supra* note 38, at art. 4(6-7).

[168] Fourth Session, Draft Rep., *supra* note 136, at ¶ 41.

[169] Second Revised Draft, *supra* note 39, at arts. 4(2)(f-g), 7(2), 7(3)(a).

[170] Third Revised Draft, *supra* note 19, at arts. 4(2)(f), 7(2), 12(3).

[171] Jahid Hossain Bhuiyan, *Refugee Status Determination: Analysis and Application*, *in* An Introduction to International Refugee Law 37, 61 (Rafiqul Islam & Jahid Hossain Bhuiyan eds., 2013).

[172] Fourth Session, Draft Rep., *supra* note 136, at ¶ 34. As applied to international law in general, see Roda Verheyen, Climate Change Damage and International Law: Prevention Duties and State Responsibility 251 (2005); see also Benoît Mayer, *State Responsibility and Climate Change Governance: A Light Through the Storm*, 13 Chinese J. Int'l L. 539, 550 (2014).

[173] Benoît Mayer, et al., *Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem*, 22 Asian Pacific Migration J. 177, 188-191 (2013).

[174] Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 Oxford J. Legal Stud. 841, 849, 855-858 (2018).

[175] As of Sept. 24, 2021.

[176] Fornalé & Kagan, *supra* note 104, at 5.

environmental, and corporate) are given due legal weight and addressed *together*. Otherwise, no one of them alone will ever suffice to recognize persecution in the particular situations I address here. In other words, the international community will never overcome its current inaction on such a multidisciplinary dossier, unless and until it completely reverts to considering the State in its broader contemporary scope and power struggles, starting with the role played by key 'non-State' actors like corporations. If the latter are State-owned, a stronger claim can be made that, when their polluting or exploitative operations force people to vacate their land, such "persecution is a *government* act against individuals and climate migrants are [. . .] forced to flee for environmental *and political* reasons. Many government policies can have consequences leading to natural disasters, putting certain groups of people at great risks."[177] Besides the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration in Latin America, a strong analogy can be drawn to human rights doctrine by referring to the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), where persecution is considered "in terms of reasons, *interests*, and policy measures."[178] That governments, *because of 'their' non-governmental actors* may be accepted as persecutors, is not to be taken for granted:[179] "U.S. law has readily accepted that harm or threats from non-State actors can give rise to a valid basis for asylum," but until recently, the same was not accepted in Europe.[180] One should advocate for this progressive stance to be codified within all legal systems. The 1998 GPID themselves, especially Principles 2 and 5, make no distinction among actors.[181] Further, the Principles are becoming increasingly accepted[182] – if not yet

[177] Bhuiyan, *supra* note 171, at 222. It is worth noting this HRCtee comment on the subject matter, *see* U.N. HRCtee, General Comment No. 31 (2018) on The Nature of the General Legal Obligation Imposed on States Parties to the [ICCPR], ¶¶ 8, 9, U.N. Doc. CCPR/C/21/Rev.1/Add. 1326 (May 2004) (providing that "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights' (¶ 8). The same Comment specifies that '[t]he fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals [. . .] does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights' (¶ 9)); *compare* ROBERT ESSER, PROCEDURAL ENVIRONMENTAL RIGHTS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT ON CRIMINAL PROCEDURE LAW 61, 64 (Jerzy Jendrośka & Magdalena Bar, eds., 2018) (noting the European Court of Human Rights imposes upon a State the affirmative duty to take preventative steps to protect the lives of those within their jurisdiction).

[178] GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 78 (Clarendon, 2d ed. 1996) (emphasis added).

[179] Sumudu Anopama Atapattu, Climate Change, Human Rights, and Forced Migration: Implications for International Law, 27 WIS. INT'L L.J. 607, 621-622 (2010) ("For example, the Ogoni people of Nigeria were *specifically targeted as a group* by the Nigerian government. Thus, they may have been able to fulfill the criteria for a refugee in the Refugee Convention because they were subject to repression *as well as being subjected to environmental hazards* caused by the Nigerian government and the Shell oil company. However, *this will not be the case in many other instances*.") (emphasis added).

[180] DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 161-164 (West Academic, 2d ed. 2013).

[181] Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, 38 STUD. TRANSNAT'L LEGAL POL'Y 1, 15-16; 25 (American Society of International Law 2008).

[182] Martin, *supra* note 2, at 412.

'customary' due to the ICJ-crafted "most affected" and "proximity" criteria for State practice;[183] however, addressing States' *opinio* remains problematic.[184] At any rate, the GPID have been incorporated in national legislation and cited judicially, in addition to their *de facto* incorporation into the Kampala Convention,[185] thus they are arguably undergoing their lengthy "hardening" process.[186]

Complicit in operations throughout globalized, complex, and tangled supply chains, and concerned with regulating migratory inflows more than outflows,[187] States that host such businesses (i.e., the *siège social* of the latter's 'parent companies') frequently become the new persecutors. When they pollute the environment and imperil their workers' health, the resulting environmental migrants are "not escaping [their] own government. [They] would be seeking refuge in the [S]tates that actually contribute to [polluting their environment], which means fleeing towards the persecutor. This de-linking of the persecutor from the ['sending State'] is accordingly unknown to current international refugee law,"[188] which creates "a complete reversal of the refugee paradigm"[189] and the most nonsensical contradictions of globalization.[190] Nonetheless, B&HR is not the only stream of scholarly discourse one should peruse in order to grasp this phenomenon; international economic law, paradoxically, serves a similar end (thanks to, e.g., the World Trade Organization's 'environmental exception' clause,[191] and more widely, to trade liberalization).[192] Others point to the U.N. Convention Against Torture as a model, since it "provides a good balance between affirmative obligations for [S]tates and the rights the [C]onvention grants to individuals."[193]

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183 As per International Court of Justice (ICJ) authoritative case law, State practice must be consistent and widespread, but also relevant. On these doctrines, *see, e.g.*, Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191 (2018).

184 *Opinio iuris* is one of the two elements for ascertaining the claimed validity of an international custom. For its broader relevance in the international law of disaster-prevention, *see* Anne Sophia-Marie van Aaken, *Is International Law Conducive to Preventing Looming Disasters?*, 7 GLOB. POL'Y 81, 82 (2016).

185 As the region contemplated by the Kampala Agreement was particularly prone to phenomena creating internal displacement, those using the Principles there customized and implemented them with enhanced "probative value." *See generally* Kampala Convention, *supra* note 29.

186 Sandesh Sivakumaran, *Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief*, 28 EUR. J. INT'L L. 1097, 1126-27 (2018).

187 MIGRATION AND GLOBAL GOVERNANCE xiii, xvi (Alan Gamlen & Katharine Marsh, eds., 2011).

188 Louise Olsson, Environmental Migrants in International Law: An Assessment of Protection Gaps and Solutions 13 (2015) (unpublished B.A. thesis, Örebro University).

189 Jane McAdam, *From Economic Refugees to Climate Refugees?*, 10 MELBOURNE J. INT'L L. 579, 592 (2009) (reviewing MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION (2007)).

190 In other words, migrants in this situation flee from their own State to the State of incorporation of the 'parent company,' and in doing so are not running from their own government *per se*, but rather seeking refuge in the state of persecution.

191 Daszkiewicz, *supra* note 103, at 98-99, 102.

192 Fornalé & Kagan, *supra* note 104, at 3.

193 Atapattu, *supra* note 179, at 631.

In sum, it is beneficial to dissect the long-lasting 'climate refugee' dilemma in multiple regimes only as a first step, both to identify and comprehensively address the multidimensional legal landscape, and to ensure that necessary State and international institutional capacity-building occur. However, the second step must involve a complete scrutiny of the root meaning and overall substance of 'persecution.' In fact, even in the case that protection was expanded under a legal instrument such as the 1951 [U.N. Refugee] Convention to include "climate refugees," the institutions that currently address asylum issues would not be sufficiently equipped to manage the issue. Worldwide numerous national, regional, and international systems exist to address the humanitarian and other aspects related to natural hazards, both rapid- and slow-onset.[194]

For example, the African Kampala Convention "re-conceptualiz[es . . . S]tate sovereignty as responsibility to protect,"[195] such that States "must not only protect people against arbitrary displacement, but ensure accountability of persons, groups and *non-State actors* (*including multinational companies* and private military [contractors] or security companies) responsible for arbitrary displacement as well."[196] So, what would the added value of this binding Treaty be for Africa in this specific respect? It might concern *prescriptive* jurisdiction, although it is not defined in either instrument.[197] Certainly, however, it involves *adjudicative* jurisdiction: Article 4(8) of the Revised Draft and Article 7(1) of the Second Revised Draft seemed to evoke the *forum necessitatis* (jurisdiction by necessity) doctrine,[198] whose importance for the accountability of TNCs for their environmental abuses has already been examined in legal scholarship.[199] The latest draft fails to mention any 'necessary' jurisdiction, though a limited formulation of *forum necessitatis* remains in the text.[200]

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194 Warner, *supra* note 65, at 3.

195 Mehari Taddele Maru, *The Kampala Convention and Its Contribution in Filling the Protection Gap in International Law*, 1 J. Internal Displacement 91, 126 (2011).

196 Ruth Delbaere, Internally Displaced Persons in the African Human Rights System: An Analysis of the Kampala Convention 41 (2011) (LL.M Dissertation, Universiteit Gent) (emphasis added).

197 *Compare* Kampala Convention, *supra* note 29, at art. 5(1) ("within their territory or jurisdiction"), *with* Revised Draft, *supra* note 38, preamble ("within their territory or otherwise under their jurisdiction or control"). If jurisdiction is already extraterritorial (i.e., something other than 'territory' as contemplated by the language, 'or otherwise. . .'), what is the difference between said extraterritorial jurisdiction and the 'control?' *But see* Revised Draft, *id*., at art. 5(1) (language matches that of the Kampala Convention). *Compare* Second Revised Draft, *supra* note 38 (drafters use the phrasing, "within their territory or jurisdiction,' throughout the document) *with* Third Revised Draft, *supra* note 19, at arts. 6(1), (6)2, 6(6), 8(1) (language used is now "territory, jurisdiction, or otherwise under their control").

198 Revised Draft, *supra* note 38, at art. 4(8) ("State Parties shall provide their domestic judicial and other competent authorities with the *necessary* jurisdiction") (emphasis added); Second Revised Draft, *supra* note 39, at art. 7(1) ("States [sic] Parties shall provide their courts and State-based non-judicial mechanisms, with the *necessary* jurisdiction in accordance with this [treaty]") emphasis added). Arguably, a Court's competence over a case is decided by the Court itself (*Kompetenz-Kompetenz* doctrine), not by the State to which it belongs.

199 *See* Chilenye Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, 30 Utrecht J. Int'l & Eur. L. 24 (2014).

200 Third Revised Draft, *supra* note 19, at arts. 9(4), 9(5); *see also id.* at art. 9(1) (refer to the "without prejudice" formula, i.e., assignment of jurisdiction regardless of a victim's "nationality or place of domicile").

VI. Any added value?

In an era of increasing globalization, the Treaty will fill a gap in existing options. "While it is important to design international [. . .] instruments to protect climate refugees, another effective approach may be to prevent them [from] leaving their place of residence by implementing agricultural innovations to stimulate economic growth and reduce environmental degradation;" however, although "[t]he boosting of the outsourcing potential of a country by its acting as broker between local companies and foreign partners who intend to invest in the country is an important means of enhancing innovation within a developing country,"[201] the draft Treaty is currently silent in these respects. One might suggest, therefore, that in order to do their due diligence to prevent and control potential damage, companies should take it upon themselves to provide financial or bureaucratic support to legitimate *voluntary* (that is, not *yet* strictly necessary) migration, which "can lessen the risk of displacement by reducing exposure to climate hazards, and is therefore a contribution to individual and societal adaptation."[202] Though this runs contrary to the trend—already existent in climate change practices—of denying "protection for those who flee in anticipation of future [. . .] harms,"[203] the evidence in fact shows that *voluntary* migration is more beneficial than *involuntary* migration, both for sending and for receiving communities.[204] In terms of finance, it is less disruptive, less risky, and easier to manage carefully for all parties involved. The financial burden arising from displacement caused by negligent or criminal business conduct impacting workers', customers', and clients' environments should similarly shift to large companies (particularly effective during peacetime). Shifting this financial burden would at least somewhat relieve developing States from the difficult burden they bear[205] to implement the and promote the GPID in national policy, legislation, and practice. As one scholar notes, to-date "no country has fully implemented the [GPID]. Even when they are incorporated into national laws and policies, the almost exclusive focus has been [to help] those displaced by conflict."[206]

As noted *supra*, public authorities may choose to change internal process reactions to business-*induced*, environmentally-*caused* internal displacement with re-

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[201] Lotte Geboers, Matijn Straatsma & Ayşe Wijmenga, Protecting and Preventing Climate Refugees: An Interdisciplinary Study on Climate Refugee Issues and the United Nations 30, 40 (2017) (unpublished interdisciplinary thesis, Utrecht University).

[202] Emily Wilkinson, et al., Overseas Dev. Inst., *Climate-Induced Migration and Displacement: Closing the Policy Gap* 4 (ODI 2016); *see also* Koko Warner & Tamer Afifi, *Where the Rain Falls: Evidence from Eight Countries on How Vulnerable Households Use Migration to Manage the Risk of Rainfall Variability and Food Security*, 6 Climate & Dev. 1, 11 (2014).

[203] Climate Change Justice and Human Rights Task Force, International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* 90 (2014), https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx.

[204] Daszkiewicz, *supra* note 103, at 99.

[205] Flautre, et al., The Greens/EFA in the Eur. Parl., *Position Paper on Climate Change, Refugees and Migration* 7 (2013), https://europeangreens.eu/sites/europeangreens.eu/files/news/files/Greens%20EFA%20-%20Position%20Paper%20-%20Climate%20Change%20Refugees%20and%20Migration.pdf.

[206] Elizabeth G. Ferris & Jonas Bergmann, *Soft Law, Migration and Climate Change Governance*, 8 J. Hum. Rts. & Env't 6, 15 (2017).

gard to their visa policies. For instance, they may decide to promptly turn working visas into regular or general ones if foreign individuals' inability to work is a result of health issues caused by environmental degradation. Relatedly, foreign workers often return to their original countries or seek employment in a third country anyways, but those who are unwilling to do so because of family ties *in loco* or other personal reasons should not be forced to relocate,[207] especially not when given unreasonably short deportation notice. This holds true for both seasonal and non-seasonal industries, and extends to displaced workers' families or even, in some legal systems and traditions, to entire working communities.[208] Further, we may uncover a hidden normative resonance between the pending Treaty and the primary legal source for the protection of migrants, the 1951 Refugee Convention in considering protection for migrants' families, because

> . . . four of the protected groups enumerated in the Refugee Convention—race, religion, nationality, and political opinion—reflect the core categories recognized in other instruments. The fifth group—membership of a particular social group [MPSG]—is a flexible ground that can encompass similar protections as those found in other areas of international law. Domestic jurisprudence shows that MPSG may be used for categories that are less prevalent in international instruments, [. . .] and may go further than other instruments, such as recognizing family as a PSG.[209]

Thus, if exploited workers are recognized as 'persecuted' under the new Treaty, their families will be protected accordingly thanks to this MPSG criterion. In addition, the right to family life *in the best interest of the child* rises to prominence in the context of selective relocation, because "[w]hen separated from their families, internally displaced children are at greater risk of exploitative labor. . ."[210] with cascading effects on social capital as a whole.[211] This visa extension may stand as a form of "[r]estitution, compensation, rehabilitation, rep-

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[207] Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 278, 282 (2003) (under international law, even in emergency circumstances, States "must refrain from forcibly separating families and work toward the reunification of those that have been separated.").

[208] For instance, in the case of therapeutic communities, for whom continued cohabitation is especially vital when disasters materialize. *See* Darragh Farrell, The Role of Therapeutic Communities in the Process of Desistance: A Figurational Analysis 8 (2019) (unpublished MA Dissertation in Criminology, Technological University of Dublin) ("[t]herapeutic communities are working communities where residents have jobs, responsibilities, and constant interaction with each other[, and where] social capital also develops as a by-product of daily life within a therapeutic community. This organically occurring form of social capital is likely to become the blueprint for building informal relationships beyond the therapeutic community, and as such, is vital to sustained desistance and recovery."). *See also* Apostolos Andrikopoulos & Jan Willem Duyvendak, *Migration, Mobility and the Dynamics of Kinship: New Barriers, New Assemblages*, *in* ETHNOGRAPHY 299 (2020); Adriana M. Reyes, *The Economic Organization of Extended Family Households by Race or Ethnicity and Socioeconomic Status*, 80 J. MARRIAGE & FAM. 119 (2017).

[209] Joseph Rikhof & Ashley Geerts, *Protected Groups in Refugee Law and International Law*, 8 LAWS 1, 26 (2019); *see generally* 1951 U.N. Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137.

[210] CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS 146 (2004).

aration, [and] satisfaction"[212] that victims would be entitled to under the new regime: the formulation is vague, which is exactly why calls have been issued to clarify its scope.[213]

When workers' relocation is unavoidable (and, importantly, the criteria of relocation must be strictly transparent and independently evaluated),[214] States should provide those affected with "[e]nvironmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities."[215] Indeed, the restoration of livelihood is far more urgent than monetary compensation *per se*.[216] Cases like that of the Narmada River Dam in India[217] remind us of the importance of international treaty-based supervision over direct expropriation performed by States. This is particularly critical when businesses or other profit-oriented projects ruin delicate human-environment interactions within complex ecosystems, in turn forcing resettlement and affecting or destroying the societies that built their lifestyle, cultural uniqueness, and intangible heritage[218] upon and around those equilibria.[219] Such a provision on compensation for relocation may even be deemed ground-breaking. Looking for instance at alien tort claims (ATS) case law, claims are rejected not because they fail to uphold discriminatory expropriation as unlawful under customary international law, but because they fail to demonstrate they *do not challenge a state actor as a defendant*.[220] Under the new Treaty, the cause for concern on this point *might* be relieved, as the Treaty could encourage States to oversee expropriative decisions enforced by non-State actors.

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211 Olivia Dun, *Agricultural Change, Increasing Salinisation and Migration in the Mekong Delta: Insights for Potential Future Climate Change Impacts?*, *in* CLIMATE CHANGE, MIGRATION, AND HUMAN SECURITY IN SOUTHEAST ASIA, 84, 96 (2012).

212 Third Revised Draft, *supra* note 19, at art. 4(2)(c).

213 Fourth Session, Draft Rep., *supra* note 136, at ¶ 42.

214 Fornalé & Kagan, *supra* note 104, at 40.

215 *See* Revised Draft, *supra* note 38, at art. 4(5)(b) (regrettably, the negotiators removed from the Second and Third Revised Drafts any reference to the 'covering of expenses for relocation of victims and replacement of community facilities.'); *but see* Third Revised Draft, *supra* note 19, at Art.4(2)(c) (retaining 'environmental remediation, and ecological restoration'); *but compare* Fourth Session, Draft Rep., *supra* note 136, at ¶ 42 (showing some delegation and business opposition to retaining even this language).

216 *See* Onome Lisa Ejenavi, Sustaining Oil Exploration and Exploitation in the Emerging Context of Sustainable Development: The Case of the Niger Delta 251, 258 (2018) (unpublished PhD Thesis, Lancaster University)

217 Cohan, *supra* note 86, at 144.

218 *See* Riccardo Vecellio Segate, *Protecting Cultural Heritage by Recourse to International Environmental Law: Chinese Stances on Faultless State Liability*, 27 HASTINGS ENVTL. L.J. 153, 161-79 (2021); Patrick Toussaint, *Loss and Damage and Climate Litigation: The Case for Greater Interlinkage*, 30 REV. EUR. COMPAR. & INT'L ENVTL. L. 16, 23 (2021).

219 *See also* Margaretha Wewerinke-Singh, A Right to Enjoy Culture in Face of Climate Change: Implications for "Climate Migrants" (2013) (CGHR Working Paper No. 6 / 4CMR Working Paper No. 7, University of Cambridge); Margaretha Wewerinke-Singh & Tess van Geelen, *Protection of Climate Displaced Persons Under International Law: A Case Study from Mataso Island, Vanuat*, 19 MELBOURNE J. INT'L L. 666, 700-701 (2018).

220 Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After* Sarei *and* Sosa, 41 COLUMBIA HUM. RTS. L. REV. 275, 336-37 (2009).

Nevertheless, in contrast to the burden-sharing rationale applicable to *States* upon which international agreements on climate change and industrial emissions are based,[221] this Treaty would not apply retroactively to *private actors*.[222] The foundational, unsolved problem remains *where to place the threshold* between corporate behaviors as primary pull factors and, instead, as circumstantial, tangential co-causes which should not bear all the blame. This issue shapes the discourse that tries to distinguish between ('environmental') *migrants* and ('environmental') *refugees*; however, the Treaty negotiators have yet to provide a legal solution to help draw that distinction.

Another gap that needs to be filled concerns how binding principles like the "no-harm" or the "precautionary" principles—seemingly accepted as customary international law in scholarly discourse despite minimal *authoritative and general* judicial say on the matter—are on corporations,[223] and even on States themselves.[224] In fact, if a corporation located in State *A* pollutes the ecosystem of State *B* and forces State *B*'s population to move, the rights of the latter may stand as better clarified under the upcoming B&HR regime rather than by established environmental legal governance, and this new Treaty may make such a corporation itself accountable before the judiciary of either country (needless to say, this would only be applicable if both *A* and *B* have ratified the Treaty). As a result, three *concurrent* solutions may provide a satisfactory alternative to the current state of affairs: global binding treaties on emission reductions and similar measures; the enhanced national implementation of the GPID and enforcement of the relevant regional arrangements; and finally, the protections ensured by the forthcoming Treaty over those who are affected by irresponsible corporate actions affecting the environment and its inhabitants (among whom indigenous commu-

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[221] *See* Mariya Gromilova, Legal Protection of the People at Risk of Climate-Induced Cross-Border Displacement: Application of the 1951 Refugee Convention 35 (2011) (Paper No. 158406, unpublished MA Thesis,Tilburg University); *see also* Joseph E. Aldy & William A. Pizer, *Alternative Metrics for Comparing Domestic Climate Change Mitigation Efforts and the Emerging International Climate Policy Architecture*, 10 Rev. of Envtl. Econs. & Pol'y 3, 6 (2015); Lucas Bretschger, *Climate Policy and Equity Principles: Fair Burden Sharing in a Dynamic World*, 18 Env't & Dev. Econ. 517 (2013). For context, *see* Olivier Godard, Global Climate Justice: Proposals, Arguments and Justification 56–84 (2017).

[222] This may prove problematic. *See, e.g.*, Kristian Høyer Toft, *Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology*, 5 Bus. & Hum. Rts. J. 1, 4, 18 (2019) (in the context of climate change, some academics contended that "corporations have backward-looking human rights duties to remedy harms from climate change to which they have contributed, but also forward-looking responsibilities to prevent negative impacts on human rights from climate change[, pursuant to] a more relational understanding of responsibility than the individualist one enshrined in the liability model of tort law.").

[223] Sandrine Maljean-Dubois & Vanessa Richard, *The Applicability of International Environmental Law to Private Enterprises*, *in* Harnessing Foreign Investment To Promote Environmental Protection Incentives And Safeguards 69, 74 (Pierre-Marie Dupuy & Jorge E. Viñuales eds., 2013) (Nonetheless, "binding law (treaty and customary rules) has only a limited normative power because its incidence is indirect, whereas softer normative incentives [may] have a very direct influence on the behaviour of enterprises.").

[224] Jutta Brunnée & Ellen Hey, *International Environmental Law: Mapping the Field*, *in* Oxford Handbook of International Environmental Law 2, 9 (Daniel Bodansky et al., eds., 2008) (For instance, "[a]lthough the no-harm principle has, by now, achieved canonical status, in practice, it is not consistently applied to resolve specific environmental disputes by courts or tribunals.").

nities are particularly vulnerable).[225] Thus, the new Treaty should not be conceived as an instrument to replace current arrangements, but rather as one that may fill existing gaps.[226] Yet, for it to be beneficial, negotiators must first solve the abovementioned 'threshold issue' as to allocation of blame. Optimistically, the combined effect of many negotiators' suggestions[227] in forthcoming drafts should address these shortcomings.

VII. Heading Towards a Resolutive New Treaty?

The initial observation underpinning the present analysis was that most occurrences of internal displacement or cross-border migration triggered by soil degradation, water scarcity, air pollution, and similar factors are usually labelled as 'environmental,' allowing us to simply categorize the problem as the inevitable fate of a territory's population or, at best, to general phenomena of climate change. However, the causes of a not-insignificant portion of these occurrences can be traced to the irresponsible and possibly criminal behavior of companies—mostly TNCs' subsidiaries in developing and least-developed countries—that shield them from accountability for the pollution and degradation of natural resources and ecosystems their activities cause. It would therefore be more accurate to re-categorize migration flows and internal displacements as "corporate" rather than "environmental."

Regrettably, no universal or regional international law instrument addresses this problem satisfactorily by combining the three elements of migration, environment, and corporate responsibility. The African Union's Kampala Convention marks the only exception to this rule, but its embryonic enforcement record and the regional scope of its applicability do not provide any general solutions to this issue. Furthermore, due to corruption, underfunding, weak institutional independence, understaffing, poor rule-of-law standards, and pervasive regulatory capture, the domestic courts of the State where an act of corporate misconduct

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225 *See also* Rocca Salcedo Mesa, *Environmental Degradation and Human Rights Abuses: Does the Refugee Convention Confer Protection to Environmental Refugees?*, 10 Int'l L.: Revista Columbiana De Derecho Internacional 75, 112-14 (2007).

226 *See* Hannah L. Buxbaum, *Articles by Maurer Faculty* (2861), *Public Regulation and Private Enforcement in Global Economy: Strategies for Managing Conflict*, 399 Collected Courses 277, 412 (Indiana Univ. Maurer Schl. of L. 2019) (indeed, "multinational enterprises have proved adept at operating in the gaps between legal systems. It is not evident that public regulatory bodies have adequate resources, or could secure adequate resources, to achieve appropriate levels of prosecution and deterrence in this climate.").

227 Among the most relevant suggestions, sorted by order of appearance: the negligent exposure of children to toxic chemicals, to account for the unfair power imbalance between companies and rights-holders; the two mutually-reinforcing trends of increasing recognition of the indivisibility of human rights and increasing protection in specialized areas, showcased by national implementation mechanisms; civil injunction; the primacy of human rights over trade and investment agreements; vexatious litigation; common but differentiated responsibilities; the inclusion of environmental rights, which would make "internationally recognized human rights," as defined in similar treaties, too narrow a framework, thus truly fulfilling the aspiration to address 'all human rights;' the businesses involved (all *vs.* transnational and all *vs*. for-profit); the inclusion of a "right to a sustainable environment" in the Preamble; and precautionary measures against, *inter alia*, environmental crimes. *See* Fourth Session, Draft Rep. *supra* note 136, at ¶¶ 10, 33, 35, 40, 46, 49, 93, 95, 110, 115.

unfolds—or even where the parent company resides[228]—are not necessarily the appropriate vehicle with which to compel TNCs to adjust their business model and adequately compensate those affected. This holds especially true when the latter fear violent retaliation[229] or have already been forced to flee.

Hence, a uniform, persuasive, and universal instrument of international law codifying detailed obligations for corporations through their States of incorporation, while simultaneously multiplying potential avenues for redress, is highly warranted. As international law stands today, this need remains unmet because migration, environment, and corporate responsibility are never jointly confronted. The migration and refugee legal regime concentrate on traditional security issues such as torture and cruel, inhumane, or degrading treatment or punishment, as well as surveillance,[230] terrorism, warfare, forcible eviction and transfer, forced relocation, human trafficking, piracy, smuggling, and the like. Its rhetoric focuses on border control and detention as a manifestation of biopolitical power,[231] while the prism of related international criminal law may offer only limited recompense.[232] This confirms how the exasperating prominence attributed to borders and passports is a founding myth of (post)modernity, as recently shown quite embarrassingly by a failed State and its pleonastic biometric controls.[233] As for the international environmental legal regime, it acts upon climate change and sea-level rise, transboundary harm, biodiversity preservation and so forth, or it grapples with 'natural' disasters such as droughts or 'unavoidable' trends such as the degradation of the soil and consequent food insecurity. Lastly,

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228 *See, e.g.*, Don Mayer & Ruth Jebe, *The Legal and Ethical Environment for Multinational Corporations*, *in* GOOD BUSINESS: EXERCISING EFFECTIVE AND ETHICAL LEADERSHIP 159, 168-169 (James O'Toole & Don Mayer eds., 2010).

229 *See* Gwynne L. Skinner *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1803 (2015).

230 *See* Ben Hayes, *Migration and Data Protection: Doing No Harm in an Age of Mass Displacement, Mass Surveillance and "Big Data,"* 99 INT'L REV. RED CROSS 179, 187 (2017).

231 "Biopolitics," an originally Foucauldian *concept* (though not *term*) later re-elaborated—most notably—by Agamben, has come to define (in socio-political as well as legal scholarship) a radical application of state-enforced human-life management that, while not necessarily causing the physical death of its subjects, depowers them up to the barest forms of living through the pervasive, extensive, and capillary control of their biological functions, expressive potential, and derived cognitive capabilities. *See, e.g.*, Miguel De Larrinaga & Marc G. Doucet, *Sovereign Power and the Biopolitics of Human Security*, 39 SEC. DIALOGUE 517, 520-521 (2008). On border policing and systematic detention of irregular migrants as expressions of biopolitical power, see Anne Orford, *Biopolitics and the Tragic Subject of Human Rights*, in THE LOGICS OF BIOPOWER AND THE WAR ON TERROR: LIVING, DYING, SURVIVING 205, 208-211 (Elizabeth Dauphinee & Cristina Masters eds., 2007); Daria Davitti, *Biopolitical Borders and the State of Exception in the European Migration "Crisis,"* 29 EUR. J. INT'L L. 1173 (2018); Olga Zeveleva, *Biopolitics, Borders, and Refugee Camps: Exercising Sovereign Power over Non-Members of the State*, 45 NATIONALITIES PAPERS 41 (2017); Thilo Wiertz, *Biopolitics of Migration: An Assemblage Approach*, 39 ENV'T & PLANNING C: POLITICS & SPACE 1375 (SAGE 2020) https://doi.org/10.1177%2F2399654420941854. On international migration law as the codified management of deprivation, see also Christina Oelgemöller & Kathryn L. Allinson, *The Responsible Migrant: Reading the Global Compact on Migration*, 31 L. & CRITIQUE 183, 190 (2020).

232 *See, e.g.*, Donna Minha, *The Possibility of Prosecuting Corporations for Climate Crimes Before the International Criminal Court: All Roads Lead to the Rome Statute?*, 41 MICH. J. INT'L L. 491, 521-526 (2020).

233 *See* Ferenc David Markó, *We Are Not a Failed State, We Make the Best Passports": South Sudan and Biometric Modernity*, 59 AFR. STUD. REV., no. 2, 2016, at 113-132.

B&HR scholars and advocacy groups mostly deal with labor rights and trade union grievances, modern slavery, the right to development, land grabbing, or the regulation of mining/extractive industries. Of course, these are all exceedingly important topics, and it is appropriate and urgent to pursue them under the rubric of each of these three legal regimes.

However, the issue emphasized here is in fact determining the 'law-transparent' under such well-oiled compartmentalization. Hence, there is a pressing need to conceive of these three legal spheres together and seek a tailored solution to this problem – a problem which is increasingly costly both for humans and the environment.

Besides addressing sovereign immunity[234] and *forum non conveniens*[235] obstacles, an effective dedicated legal tool should facilitate a solution to several outstanding shortcomings in the current design of international law. The lexicon conceived for public security (e.g., 'victim,' 'persecution,' and 'sending country') should be replaced by or updated to include comprehensive, multifaceted terminology created with human security in mind, which would help shift attention away from States and onto corporations, and give citizens bargaining power with TNCs in cases of local and specific misconduct. Currently, however, challenging corporations on climate change through court processes solves issues of corporate pollution and contamination only indirectly; that is, on a macro level. This does not allow for instant, on-the-ground change. An effective instrument must counter the neo-imperialist hegemony exercised by unaccountable TNCs in the poorest regions of the globe *on a systemic level*. Transnational corporations pollute the land of low-skilled workers in the developing world (sending States), while in the developed world (receiving States) the same companies lobby only to ease immigration restrictions for high-skilled, white-collar immigrantion.[236] Although at times TNCs do try to share the benefits of their industrial plans with local populations, most jobs are in fact outsourced,[237] and there are entire inhabited areas still lacking electricity while paradoxically being traversed by (spilling) oil pipes and other private infrastructure.[238] These nonsensical arrangements

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234 For a doctrinal excursus, *see* Ranabir Samaddar, *The Justice-Seeking Subject*, *in* THE BORDERS OF JUSTICE 145,148 (Étienne Balibar et al. eds, Temple Univ. Press 2012).

235 *See, e.g.*, Juan Gabriel Auz Vaca, *The Environmental Law Dimensions of an International Binding Treaty on Business and Human Rights*, 15 REVISTA DE DIREITO INTERNACIONAL, no. 2, 2018, at 150, 160-161, 175.

236 *See also* Vivienne Born, Getting the Best of Us: Multinational Corporate Networks and the Diffusion of Skill-Selective Immigration Policies (2019) (Unpublished PhD Dissertation, University of Pennsylvania); Nina Glick Schiller, *A Global Perspective on Transnational Migration: Theorising Migration Without Methodological Nationalism*, *in* DIASPORA AND TRANSNATIONALISM: CONCEPTS, THEORIES, AND METHOD 109, 127 (Rainer Bauböck & Thomas Faist eds., Amsterdam Univ. Press 2010).

237 *See* Carol Olson and Frank Lenzmann, *The Social and Economic Consequences of the Fossil Fuel Supply Chain*, 3 MRS ENERGY & SUSTAINABILITY, no. E6, 2016, at 1, 10.

238 One absurd example is that of Nigeria, where foreign multinationals' endeavors spoil the local environment and deplete energy resources to the benefit the country's ruling élites, most countryside households' demands for electricity cannot be satisfied. *See, e.g.*, Michael Watts, *Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria*, 9 GEOPOLITICS 50, 67-68 (2004); Sunday Olayinka Oyedepo, *Energy and Sustainable Development in Nigeria: The Way Forward*, ENERGY, SUSTAINABILITY & SOC'Y, no. 15, 2012, at 1.

must end, and aiming the policy narratives and legal tools currently oriented around 'environmental' migrations instead at addressing ruthless corporate misconduct seems like as good a place to start as any.

Under this Treaty, exploitative *businesses* acts might be brought *one step closer* to proximate causation theory allowable for *governmental* acts, which would help them fit well-seasoned 'persecution' narratives premised on intent.[239] Overseeing the unfolding of these negotiations and guarding the outcome is important, as the latter may potentially close one of the gaps in the protection of 'environmentally'-induced migrations, especially in times of peace. The call for protecting migrants escaping environmental disasters in wartime[240] has gone mostly unheard, and authoritative scholarship has explained the reasons why a treaty on these migrations would be unfeasible for the time being.[241] Also, corporate exploitation is worse during peacetime when cross-border business operations are not disrupted by belligerent contingencies and diplomatic frictions, although one should remain wary of potentially deadly cumulative effects in wartime,[242] too.

The attainment of long-awaited consensus to the terms of the pending Treaty would in any case mark an achievement of momentous occasion. For the first time in history, the dictum that "businesses' decisions to uphold human rights standards remain largely voluntary and thus subject to market—rather than moral—forces"[243] may lose its validity on a global scale (depending of course on the eventual signatories). In fact, international policymakers' unwillingness to admit the interrelation between transnational business exploitation, environmental degradation, (transboundary) pollution, global warming, 'novel' forms of persecution, access to justice, and ultimately 'new' migrations, is intimately connected to long-standing passive attitudes towards wider issues of neoliberal inequality, imperialism, and wealth (re)distribution. Such attitudes depict the lives of developing-world inhabitants—as well as their environments[244]—as

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239 *See, e.g.*, Nina Höing and Jona Razzaque, *Unacknowledged and Unwanted? 'Environmental refugees' in Search of Legal Status*, 8 J. GLOB. ETHICS 19, 27-28 (2012); Thea Philip, *Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia*, 19 MELB. J. INT'L. L., 639, 646 (2018).

240 *See generally* ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A "FIFTH GENEVA" CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT? (Glen Plant ed., Belhaven 1992); *see also* MÉLANIE JACQUES, ARMED CONFLICT AND DISPLACEMENT: THE PROTECTION OF REFUGEES AND DISPLACED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW (2012).

241 JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, & INTERNATIONAL LAW 210-211 (Oxford Univ. Press 2012).

242 *See e.g.*, Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. L. 365, 374, 384-385 (2007).

243 Global Governance Monitor, *The Global Human Rights Regime,* COUNCIL ON FOREIGN RELATIONS, (May 11, 2012), https://www.cfr.org/report/global-human-rights-regime. For a reasoned explanation of the structure underlying the dictum, *see* Obiora Chinedu Okafor (U.N. Hum. Rts. Council Independent Expert on Human Rights and International Solidarity), *Rep. on International Solidarity and Climate Change*, A/HRC/44/44, ¶ 36 (April 1, 2020).

244 For indigenous people, devaluing the environment is akin to devaluing the person, *see* Osofsky, *supra* note 84; Lopez, *supra* note 242.

worthy of less money and care than those in the central pulsing nerve of the empire.[245]

The trouble with the word "poverty" is that it is a passive word, suggesting a state of social affairs, which has to be confronted, *as best they can*, by state and society, and until then to be endured by those called "poor." The words "poverty" and "poor" normalize what should be centrally problematic. Impoverishment is not a natural state but a dynamic process of public decision-making in which it is considered just, right and fair that some people may become or stay impoverished.[246]

Tellingly, international arbitration "[t]ribunals have given internationalized state[-TNC] contracts priority over domestic regulatory efforts at all levels, from executive measures to legislation, and across the full range of regulatory contexts," including the environment and human rights.[247] The upcoming Treaty might contribute to reversing or at least flattening the trend by providing a competing *international* obligation.

If business-induced 'environmental' migrants face a reluctant yet mounting recognition of the second element (their being 'environmental') but a dismissal of the first (business-induced), it is mainly because of the political priorities of global governors who assume their free-market agenda to be universal (and ignore *a fortiori* interdependence of the two factors).[248] Eloquently put, "[t]he governance debate on environmental migration has generally been conceived within such a framework. If [. . .] universal standards are not appropriate, new universal standards should be found."[249] Through *moral* lenses, corporations that not only exploited the environment but also engaged in targeted misinformation and lob-

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[245] In economic terms, *see* Jack Landman Goldsmith & Alan O. Sykes, Lex Loci Delictus *and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.* 120 HARV. L. REV. 1137, 1140 (2007) ("[o]ptimal labor and environmental standards depend on a range of factors including tastes, incomes, and access to technology. Because these factors differ across nations (and especially between developed and developing nations), there is no reason to think that standards should be the same everywhere. [. . . To exemplify, t]he amount of damages payable for a typical injury or fatality in lower-income countries will be lower because [. . .] the value of life and limb is lower in such countries"). For a slightly more nuanced version posited that still mimics the same elitist rationales and hierarchical value system by other Euro-American scholars, *see* Daniel M. Weinstock, *(How) Do We Need to Change Political Philosophy to Take Risk into Account?*, *in* HUMANITY AT RISK: THE NEED FOR GLOBAL GOVERNANCE 53, 61 (Daniel Innerarity & Francisco Javier Solana de Madariaga eds., 2013) ("ordinary citizens simply lack the cognitive sophistication to deal with complex risks[; . . .] if they are given too much of a decision-making role, they will tend to make costly mistakes, by succumbing to heuristics rather than engaging in [. . .] sober, cost-benefit analysis [. . . T]he complexity inherent in modern-day risks requires [. . .] affording more discretion to experts who, having identified the errors in reasoning to which common folk are prone, can better resist those errors. They will then reach decisions in the cold light of facts and probabilities rather than in the heat produced by fear and collective dysfunctions of reasoning.").

[246] Upendra Baxi, LAW AND POVERTY: CRITICAL ESSAYS 6 (Tripathi 1988) (emphasis added).

[247] Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L. L.J. 229, 233 (2015).

[248] *See* Maxine A. Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. CIV. RTS. - CIV. LIBERTIES L. REV. 445, 456-460 (2018).

[249] Benoît Mayer, *Environmental Migration in the Asia-Pacific Region: Could We Hang Out Sometime?*, 3 ASIAN J. INT'L. L. 101, 114 (2013).

bying campaigns aimed at downplaying their willfully (or at least knowingly) harmful impact, should bear their portion of the blame.[250]

In conclusion, will the *hopefully but implausibly universal* Treaty under scrutiny be able to substantially improve access to justice mechanisms for migrants whose territory and environment has been irredeemably devastated by reckless business actions? The Treaty *is* ground-breaking in adjudicative and even prescriptive jurisdictional terms, which remains highly relevant as civil litigation around 'climate refugee' matters is set to intensify in the coming years,[251] and the idea of universal jurisdiction over TNCs' crimes betrays perhaps an overabundance of optimism.[252] Thus the new Treaty's overambitious scope covering "all human rights [. . .] in accordance with domestic and international law"[253] might risk not resolving the longstanding issue of how to identify the cases where corporate acts were the *primary* instigators of a migration rather than 'just' one tangible auxiliary cause.[254]

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[250] Säde M. Hormio *Can Corporations Have (Moral) Responsibility Regarding Climate Change Mitigation?*, 20 ETHICS, POL'Y & ENV'T 314 (2017).

[251] U.N. Environment Programme, *The Status of Climate Change Litigation: A Global Review*, DEL/2110/NA, 25 (May 2017).

[252] *Contra* Marie Davoise, *All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute*, OPINIO JURIS (Jul. 17, 2019) http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/; Cedric Ryngaert, *Accountability for Corporate Human Rights Abuses: Lessons from the Possible Exercise of Dutch National Criminal Jurisdiction Over Multinational Corporations*, 29 CRIM. L. F. 1, 18-20 (2018); Kendra Magraw, *Universally Liable – Corporate-Complicity Liability Under the Principle of Universal Jurisdiction*, 18 MINN. J. INT'L. L. 458 (2009).

[253] Third Revised Draft, *supra* note 19, at art. 5(3).

[254] Next steps towards Treaty adoption are being taken in the aftermath of the Sixth and Seventh Sessions which were convened in Geneva in October 2020 and October 2021 respectively, and that were preceded by the third and fourth full drafts of the instrument mentioned *supra*. After the Sixth Session in October 2020, the Chair-Rapporteur urged States and other non-State stakeholders to submit their desired textual integrations and amendments on the Third Revised Draft by the end of March 2021, so that the release of a fourth version may be in review by Fall 2021. It is now a matter of determining negotiating rounds of this project *de lege ferenda* to be signed into binding law.

For information on the Sixth Session, *see* U.N. Hum. Rts. Council, Rep. on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/46/73 (Jan. 14, 2021) (https://undocs.org/A/HRC/46/73) (hereinafter Sixth Session Rep.); Annex to the Sixth Session Rep. (of Compilation of Oral Statements) U.N. Doc. A/HRC/46/73, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-6th-statement-compilation-annex.pdf; for general information on the Sixth Session, *see* https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx. For information on the Fifth Session, *see* U.N. Hum. Rts. Council, Rep. on the Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/43/55 (Jan. 9, 2020), https://undocs.org/A/HRC/43/55; for general information on the Fifth Session, *see* https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx. For a succinct scholarly commentary on the latter, see Claire Methven O'Brien, *Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty*, 5 BUS. & HUM. RTS. J. 150 (2020). To explore topics from the Seventh Session, *see* U.N. Hum. Rts. Council, *Report from Seventh Session,* provisional Agenda, https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session7/Pages/Session7.aspx (last accessed Dec. 16, 2021).

Boundary Blurring in International Law: Globalization, Climate Change, and Cooperation in the Indus Basin

Michael John Cornell*

Abstract

This comment proposes that, to achieve better water cooperation in the Indus Basin, lawyers involved in hydropower development projects should factor into socio-legal research and policy-making as potentially transformative stakeholders. With climate change driving the steady reduction of shared glacially-sourced river waters in India, China, and Pakistan, the need for regional water cooperation has never been higher. The comment first considers the origins and mechanisms of the 1960 Indus Waters Treaty, signed between India and Pakistan, followed by the impact of the related 2013 Kishenganga Arbitration. Next, in light of the three countries' competing economic, political, and security interests, the comment recognizes the limited effectiveness of existing treaty-based legal relations in promoting greater water cooperation in the region. Looking instead to the spaces where local yet globally-minded lawyers practice, this comment imagines how such private sector actors could foster greater water cooperation between the three countries in a series of intercultural encounters, or "boundary-blurring" processes.

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I. Introduction

The rapidly decreasing water supply of the Indus Basin, a condition caused by climate change, has prompted discussions on regional water cooperation. The 1960 Indus Waters Treaty ("IWT," or "Treaty"), signed by Pakistan and India, has to-date provided the primary framework for resolving disputes over transboundary waters. Most recently, the two countries appeared before the Permanent Court of Arbitration, where a neutral World Bank arbitrator resolved an IWT dispute brought by Pakistan over India's construction of a diversion dam on the Kishenganga River.[1] Although certain commentators find specific aspects of the decision relatively positive,[2] others predict that alternative dispute resolution ("ADR") methods such as arbitration or mediation will not offer lasting solutions to similar India-Pakistan disputes "because of the mutual political unwillingness to compromise and the persistence upon [sic] bilateralism."[3] Despite this and

[1] *See generally* Kishor Uprety, *The Kishenganga Arbitration: Reviving the Indus Treaty and Managing Transboundary Hydropolitics*, 14 Chinese J. of Int'l L. 497 (2015) [hereinafter *Hydropolitics*] (offering a step-by-step overview of the entire arbitration, from Pakistan's May 17, 2010 request for arbitration until the Court of Arbitration's Final Award on Dec. 20, 2013).

[2] *See infra*, text accompanying notes 29-& 33.

[3] Kishala Srivastava, *The Future of India-Pakistan Relations: The Declining Role of Mediation Between These Rival States*, 34 Ohio St. J. on Disp. Resol. 221, 246 (2019). Other commentators have suggested that the World Bank's own understanding of its arbitrator role *vis-à-vis* the IWT reinforces this limiting bilateralism. *See, e.g.*, W.A. Qureshi, *The Indus Waters Treaty and the Role of World Bank as Mediator*, 24 Willamette J. Int'l L. & Dis. Res. 211, 225 (2017) [hereinafter *World Bank as Mediator*] ("An unnamed high official of the World Bank communicated that the role of the World Bank in the IWT is strictly procedural, to facilitate mediation between the two parties, and no one procedure can encompass another procedure. The official said that, although the issue or dispute is pushed back to both parties,

other past examples of successful ADR under the IWT, increasing regional economic competition and water stress may undermine the effectiveness of the IWT as a cooperative tool. In such situations, intervention by neutral third parties, such as the World Bank, has limited power. Therefore, imagining successful interventions by the legal community to promote water cooperation in the Indus Basin requires accounting for all potential actors, including the emerging corporate legal elite in countries such as Pakistan, India, and China.

This comment reframes the discussion of Indus Basin water use cooperation while assuming the absence of effective ADR options. Following a historical overview of the IWT and its ADR mechanisms, the comment considers the Treaty's overall effectiveness in promoting regional cooperation. Next, the comment provides a critical analysis of existing and proposed solutions for achieving water cooperation under the IWT. Ultimately, by integrating recent sociological research on the globalization of legal services in emerging economies, this comment proposes a more inclusive approach to identifying legal stakeholders. In the face of complex issues arising from discussions on water cooperation, attention must be paid to the experience and activism of legal professionals working at the margins of market and state power. This may, in turn, provide valuable insight into new governance paradigms for the Indus Basin.

II. Background

This section provides an overview of the history and basic features of the IWT. Next, it describes the events leading up to the 2013 Kishenganga Arbitration. This section accordingly foregrounds a more detailed analysis of the Kishenganga Arbitration, considered alongside regional economic development projects and the escalating effects of climate change on the Indus Basin.

a. Creation and Elements of the IWT

Following the partition of India and Pakistan in 1947 and the apportionment of Indus River waters per the 1948 Inter-Dominion Accord,[4] India "suspended all the river water flowing to Pakistan, which threatened Pakistan's agricultural and agrarian infrastructure because it was heavily reliant on the river water for irrigation."[5] Pakistan appealed for assistance to the international community for the next decade. The World Bank mediated negotiations between India and Pakistan for their mutual allocation and distribution of transboundary river waters, ultimately leading to the 1960 signing of the IWT.[6]

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the World Bank would send an envoy, Jan Solomon, and others in an attempt to engage Islamabad and New Delhi and establish a peaceful mutual agreement between hostile neighboring states without endangering the IWT. He added: 'It [is] still up to the two countries to mutually discuss and resolve the differences in accordance with the treaty.'").

[4] *See* Uprety, *Hydropolitics*, *supra* note 1, at 498 (noting that the Accord "required India to release sufficient waters to the Pakistani regions of the basin in return for annual payments.").

[5] W.A. Qureshi, *Water as a Human Right: A Case Study of the Pakistan-India Water Conflict*, 5 PENN ST. J.L. & INT'L AFFS. 374, 377 (2017).

[6] *Id.*

In addition to allocating eastern rivers to India and western rivers to Pakistan, the IWT gave both countries "the right of conditional usage of water of each other's rivers for domestic reasons, such as power generation, agricultural, and other non-consumptive purposes; however, it was required that such usage must not lower the quantity and natural flow of the water in the river of the other country."[7] The IWT also established three mechanisms for binding resolution of differences arising between India and Pakistan: first, it created the Permanent Indus Commission (PIC), composed of representatives of both countries who would try and decide such differences; second, upon failure to resolve the issue through the PIC, the IWT provides for the appointment of a "Neutral Expert" per mutual agreement between the countries; and third, in case a Neutral Expert cannot be agreed upon by the countries, the World Bank becomes responsible for appointing such an expert, subject to the countries' consent.[8] Further, if the PIC instead determines the difference rises to the level of a Dispute, the Neutral Expert is not used and instead India, Pakistan, and the World Bank appoint among them a seven-member arbitral court (a Court of Arbitration, or COA).[9]

b. The Road to the Kishenganga Arbitration

Although the IWT improved India and Pakistan's water relations for three decades, the 1990s saw India proceed, in spite of Pakistan's protests, to construct large water-storage dams on western rivers running through the Indian states of Jammu and Kashmir.[10] India's Baglihar Dam, located on the Chenab River in Ramban District of Jammu Province, was the subject of legal controversy after India announced its construction in 1999.[11] Tensions intensified following the dam's initial filling in 2008.[12] Pakistan's alarm stemmed from the dam's potential to store "substantial quantities of Pakistani western river water, which can eventually result in shortage of water [sic] in the western rivers within Pakistan."[13] Ultimately, India and Pakistan successfully used the PIC to resolve the dispute.[14] However, Pakistan voiced similar alarm over India's construction of what it calls the "Wullar Barrage,"[15] located on the Jhelum River at Wullar Lake

[7] *See* Qureshi, *World Bank as Mediator*, *supra* note 3, at 377-78 (noting that "eastern rivers" included the Ravi, Sutlej, and Bias, and "western rivers" included the Sindh, Chenab, and Jhelum).

[8] *Id.* at 218-19.

[9] *Id.* at 220.

[10] W.A. Qureshi, *Equitable Apportionment of Shared Transboundary River Waters: A Case Study of Modifications of the Indus Waters Treaty*, 18 San Diego Int'l L.J. 199, 211 (2017) [hereinafter *Modifications*]. Misunderstandings with Pakistan have been aggravated by India's non-sharing of information related to twenty-seven water-management projects. *See* W.A. Qureshi, *Indus Basin Water Management Under International Law*, 25 U. Miami Int'l & Comp. L. Rev. 63, 105-06 (2017).

[11] *See* W.A. Qureshi, *Water as Human Right*, *supra* note 5, at 378 ("India . . . completely disregarded Pakistan's concerns over the design of the dam").

[12] Gargi Parsai, *India, Pakistan Resolve Baglihar Dam Issue*, The Hindu (June 1, 2010, 11:39 PM), https://www.thehindu.com/news/India-Pakistan-resolve-Baglihar-dam-issue/article16240199.ece.

[13] *See* Qureshi, *Equitable Apportionment*, *supra* note 10, at 216.

[14] *See* Parsai, *supra* note 12.

[15] Or, as it is referred to in India, the Tulbul Navigation Project.

in Kashmir Province,[16] and despite several attempts by India and Pakistan to resolve issues with the PIC, construction remains stalled pending future talks.[17]

However, India's most controversial project for its relations with Pakistan to date has been the Kishenganga Hydroelectric Project ("KHEP"). India began constructing the KHEP in 2009 on the Kisheganga tributary of the Jhelum River in Bandipora District of Kashmir Province.[18] Pakistan raised its concerns that all three dams (i.e. Baghliar Dam, Wullar Barrage, and KHEP) violated the IWT.[19] Thus, the PIC first referred Pakistan's concerns to a Neutral Expert from the World Bank and, subsequently, to a COA.[20] Although the COA's decisions rendered were not in Pakistan's favor regarding the Baglihar Dam and the Wullar Barrage, they were in regards to the KHEP.[21] In the next section, after reviewing the outcome of the Kishenganga Arbitration in more detail, the discussion shifts to the impact of regional economic development policies and climate change on water relations in the Indus Basin.

III. Discussion

This section begins with a detailed overview of the Kishenganga Arbitration and its impact on legal relations under the IWT and international law. Then, following a discussion of economic development initiatives by the Indus Basin countries, it describes the growing threat of climate change to their water security.

a. The Kishenganga Arbitration and Resulting Legal Relations under the IWT

The Kishenganga Arbitration began when Pakistan made a "Request for Arbitration" on May 17, 2010.[22] The COA, which convened in The Hague following its constitution, ultimately issued its decision [hereinafter referred to as the Kishinganga Arbitration] in three separate documents,[23] including a Partial Award,[24]

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[16] Zaffar Bhutta, *Pakistan-India Water Disputes: No Headway in Wullar Barrage Negotiations*, The Express Tribune (May 13, 2011), https://tribune.com.pk/story/167610/pakistan-india-water-disputes-no-headway-in-wullar-barrage-negotiations.

[17] Lt. General K. J. Singh, *Must Focus on Harnessing Indus Waters Treaty Better*, Times of India (Sept. 27, 2020), https://timesofindia.indiatimes.com/blogs/generals-jottings/must-focus-on-harnessing-indus-water-treaty-better/.

[18] Uptal Bhaskar, *Narendra Modi Inaugurates Kishenganga Hydropower Project in Kashmir*, LiveMint (May 19, 2018, 7:57 PM), https://www.livemint.com/Politics/1d6mcw4oPoymB4h2g40GiK/Narendra-Modi-inaugurates-Kishanganga-hydropower-project-in.html.

[19] *See* Qureshi, *World Bank as Mediator*, *supra* note 3, at 220.

[20] *Id.* at 221.

[21] *Id.* at 220-21.

[22] Gargi Parsai, *ICA Gives Go Ahead to Kishenganga Project*, The Hindu (Dec. 22, 2013, 12:47 AM), https://www.thehindu.com/news/national/ica-gives-go-ahead-to-kishenganga-project/article5486957.ece.

[23] These decisions were preceded by an order issued pursuant to Pakistan's application for interim measures to prevent India's further construction activities pending the outcome of the litigation. Kishenganga Arbitration (Pak. v. Ind.), Case No. PCA 59368, Order on Interim Measures (Perm. Ct. Arb. 2011), https://pcacases.com/web/sendAttach/1682.

an answer to India's Request for Clarification or Interpretation dated May 20, 2013,[25] and a Final Award.[26]

Commentators have emphasized that the Kishenganga decision "revives the IWT as a central and viable instrument for cooperation on the use of the waters of the Indus Basin."[27] Like the IWT, other international law provisions require cooperation between riparian states to ensure the equitable utilization of jointly-managed watercourses.[28] Thus, another positive aspect of the decision is its "[clarification], for the first time in an international judicial decision, [of] the modalities for distinguishing between existing and potential uses of a watercourse."[29] Furthermore, the decision reaffirmed principles of international environmental law, including "the duty of due diligence, prevention and continuous environmental impact assessment, and confirmed the customary international law status of the obligation to avoid transboundary harm."[30]

However, there is a concern that the Kishenganga tribunal arrived at the Partial Award through a "selective methodology" of treaty interpretation, allowing it to "assert its jurisdiction and deliver a decision split the difference between the parties, while securing some positive environmental outcomes."[31] Such inconsistencies are ill-advised, because tribunals may alter their approach based on the outcome they wish to reach.[32] Another perceived drawback of the decision is that it "undermines the principle of equality of right by implying that upstream states have more extensive rights than downstream states under customary international law."[33]

In addition to these legal observations, subsequent economic development plans must be accounted for when discussing water relations between the Indus Basin countries, a detailed account of which follows in the subsection below.

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[24] Kishenganga Arbitration (Pak v. Ind.), Case No. PK-IN 82842, Partial Award (Perm. Ct. Arb. 2013), https://pcacases.com/web/sendAttach/1681.

[25] Kishenganga Arbitration, Case No. PK-IN 109923, Decision on India's Request for Clarification or Interpretation 20 May 2013 (Perm. Ct. Arb. 2013), https://pcacases.com/web/sendAttach/1680.

[26] Kishenganga Arbitration, Case No. PK-IN 109924, Final Award (Perm. Ct. Arb. 2013), https://pcacases.com/web/sendAttach/48.

[27] *See* Uprety, *Hydropolitics*, *supra* note 1, at 541-42.

[28] Waseem Ahmad Qureshi, *The Indus Basin: Water Cooperation, International Law and the Indus Waters Treaty*, 26 MICH. ST. INT'L L. REV. 43, 62-74 (2017).

[29] Jasmine Moussa, *Implications of the Indus Water* [sic] *Kishenganga Arbitration for the International Law of Watercourses and the Environment*, 64 INT'L & COMP. L.Q. 697, 715 (2015) (noting that the distinction was previously ambiguous under Article 6 of the United Nations Watercourses Convention).

[30] *Id.*

[31] *Id.* at 703.

[32] *Id.*

[33] *Id.* at 715. *See also* Qureshi, *Modifications*, *supra* note 10, at 202-06 (describing two inequitable water-apportionment frameworks, namely the absolute territorial sovereignty and territorial integrity theories).

b. Regional Economic Development and Hydro-hegemony

India, China, and Pakistan have each recently announced significant regional development initiatives in which energy infrastructure, including hydropower projects, play a central role. The first two subsections conduct overviews of those initiatives, which provides the foundation for a subsequent discussion of the legal challenges these countries face as water stress from climate change escalates and the need for cooperation grows.

i. India's "Connect Central Asia" Policy (CCAP)

India initiated CCAP in 2012 to advance five primary interests, namely: 1) revising failed past paradigms; 2) strengthening bilateral relations regarding energy cooperation; 3) improving anti-terrorism and security cooperation, particularly as regards the situation in Afghanistan; 4) mitigating a lack of trade routes by exploring multi-path connectivity; and 5) signaling its political power and influence in Central Asia. [34] CCAP looks to advance these interests through geopolitical connectivity, efficient use of overseas development assistance for India's Central Asian partnerships, multilateral economic cooperation, and encouraging private sector participation.[35] Thus far, progress has been most limited with respect to plans for upscaling economic and trade cooperation, and for strengthening connectivity.[36] The implementation has been further complicated by India's "relative lack of hard power" as a developing economy, by its being a relative "latecomer" to the region's power structure, and by restrictions upon India imposed by its relations with Pakistan and Afghanistan.[37]

Additionally, CCAP stands to buttress diplomatic relations between India and China. Recent meetings between Indian Prime Minister Narendra Modi and Chinese President Xi Jinping have come to embody moods known as the "Wuhan Spirit" and the "Chennai Connect," owing to perceived synergies between "the Chinese Dream and the 'New India' vision."[38] With India hosting the 2023 G20 Summit,[39] India and China shall have opportunities to "deepen coordination on

[34] Wu Zhaoli, *India's "Connect Central Asia" Policy: Elements and Outcomes*, 80 China Int'l Stud. 103, 107-11 (2020).

[35] *Id.* at 111-14.

[36] *Id.*

[37] *Id.* at 120-21.

[38] Rong Ying & Zhang Lei, *The New India Vision and the Building of a Closer China-India Partnership*, 80 China Int'l Stud. 28, 38-39 (2020). For more on "Chennai Connect" and "Wuhan Spirit," see Sudha Ramachandran, *India-China Relations: From the "Wuhan Spirit" to the "Chennai Connect"*, 19 China Brief (Nov. 1, 2019, 3:32 PM), https://jamestown.org/program/india-china-relations-from-the-wuhan-spirit-to-the-chennai-connect/.

[39] *See, e.g.*, Dipanjan Roy Chaudhury, *India to Host G20 Summit in 2023;* [sic] *Riyadh Summit Eyes to Spur Growth & Control Virus*, Econ. Times (Nov. 23, 2020, 7:45 AM), https://economictimes.indiatimes.com/news/politics-and-nation/india-to-host-g20-summit-in-2023-riyadh-summit-eyes-to-spur-growth-control-virus/articleshow/79360599.cms.

the issue of global economic governance reform, and enhance the collective voice of developing countries."[40]

ii. China's "One Belt, One Road" (OBOR) / Belt and Road Initiative (BRI)

In 2013, China initiated OBOR, an investment strategy targeting "a highly varied foreign investment landscape [with] a host of international interests" and regulatory regimes, in order to finance deals for developing land-based infrastructure (the "Silk Road Economic Belt" (SREB)) and sea ports (the "Maritime Silk Road" (MSR)).[41] The initiatives were named "as an evocative reference to the old caravan trade routes in which Chinese silk was a major commodity," but the new silk roads cross three continents (Asia, Europe, and Africa, all connected by the Middle East), two seas (the South China Sea and the Mediterranean Sea), and two oceans (the Indian Ocean and the southern Pacific Ocean).[42] Since 2015, OBOR has become known as the Belt and Road Initiative ("BRI"), although related literature tends to use the terms interchangeably.[43] China views BRI "as an evolving initiative that will engage new states, partners, sources of funding and projects over coming decades."[44]

China's shift from OBOR to BRI has expanded the program from two routes to five. In addition to SREB and MSR, BRI has added Polar, Green, and Digital Silk Roads.[45] With plans to continue through 2049, BRI stands to advance Chinese policy.[46] For China's developing partners, the program could help close gaps between supply and demand for infrastructure financing.[47] Thus far, China has invested no less than $1 trillion in the initiative, though some estimates go as high as $8 trillion.[48] China has traditionally been a land-based power, but these recent events have shown China's desire to expand its presence on and access to the seas – as of July 2018, it had funded projects in forty-two foreign ports in over thirty countries.[49] This in fact complements land-based initiatives "facilitating mega-connectivity through railways and roads, information and communica-

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[40] *See* Ying & Lei, *supra* note 38, at 40-41; *see also* Dipanjan Roy Chaudhury, *India to Host G20 Summit in 2022*, Economic Times (Dec. 18, 2018, 12:57 PM), https://economictimes.indiatimes.com/news/politics-and-nation/india-to-host-g20-summit-in-2022/articleshow/66900904.cms?from=mdr (referring to the same G20 summit as *id.* that was postponed due to Covid).

[41] Zachary Strom, *A Silk Road for Capital: Trade Policy and Foreign Investment Laws for China's Neighbors*, 38 NW. J. of Int'l L. & Bus. 475, 476-77 (2018).

[42] Rosita Dellios & R. James Ferguson, *The Human Security Dimension of China's Belt and Road Initiative*, 7 J. Mgmt. & Sustainability 48, 50 (2017).

[43] *Id.*

[44] *Id.*

[45] Jin Sheng, *The "One Belt, One Road" Initiative as Regional Public Good: Opportunities and Risks*, 21 Or. Rev. Int'l L. 75, 78 (2020).

[46] *Id.* (describing China's priorities as "exporting overcapacity, soft power, and [Chinese currency] internationalization.").

[47] *See* Sheng, *supra* note 45, at 86.

[48] *Id.* at 86-87.

[49] *Id.* at 87.

tions technology [. . .] projects, and special economic zones."[50] To date, over sixty countries on multiple continents have joined BRI.[51]

Critics have emphasized the China-centric aspects of BRI, including lopsided gains from deals and "debt-trap" diplomacy.[52] Additionally, BRI invests in infrastructure projects in developing countries but simultaneously lacks insurance mechanisms such as the Multilateral Investment Guarantee Agency (MIGA) to mitigate the risk of political instability.[53] Such instability is common in the areas in which the BRI works, and magnifies "geopolitical events such as international conflicts, power shifts, policy shifts, [. . .] social unrest, and political interventions."[54] BRI also involves a plethora of legal risks.[55] Finally, BRI implicates security concerns, since extending the reach of its "Go West" strategy – which has "sought to develop Xinjiang as an oil and gas center and to build infrastructure networks that would connect the province to coastal areas within China as well as to neighboring states in Central and South Asia"[56] – depends on a stable situation in Afghanistan.[57] Thus, BRI may evolve into "a patchwork of uncoordinated but overlapping initiatives driven by the interests of regional states."[58]

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[50] *Id. See* Sheng, *supra* note 45, at 87.

[51] *Id.* ("[I]ncluding eight South Asian countries, eleven Southeast Asian countries, five Central Asian countries, sixteen West Asian and North African countries, sixteen Central Asian countries, six countries of the Commonwealth of Independent States (CIS), as well as Mongolia and Russia.").

[52] *Id.* at 95, 111 (For example, "[o]f the sixty-eight BRI partner countries, twenty-seven countries' sovereign debt was 'junk rated,' or below investment grade, and fourteen countries' sovereign debt was not rated at all, according to the three major international credit rating agencies: Standard & Poor's, Moody's, and Fitch Ratings. In addition, eight countries [. . .] are at risk of debt distress due to BRI lending." *Id.* at 111). For a different author's discussion of a similar China-centric mindset underpinning BRI development strategy, *see* Asif H. Qureshi, *China/Pakistan Economic Corridor: A Critical National and International Law Policy Based Perspective*, 14 CHINESE J. INT'L L. 777, 784 (2015) ("The principles [behind BRI] are aspirational and not set out as conditions for the development package. Thus, fundamentally market rules do not apply to the awarding of contracts under certain projects-which seem to be confined to Chinese bidders alone.").

[53] *See* Sheng, *supra* note 45, at 96.

[54] *Id.*

[55] *Id.* at 98-99 (The author outlines the legal risks as follows: "the fairness, speediness, and effectiveness of the judicial system; enforceability of contracts; discrimination against foreign companies; antitrust and unfair competition; lack of safeguards for intellectual and other property; and the integrity of accounting standards. Generally speaking, regulatory risks concern changes in laws and regulations that affect a certain industry or market. Delays in acquiring necessary licenses or permits, stalled transfers of ownership, difficulties in acquiring land, contractual risks, and transparency of procurement procedures—all of which are legal or regulatory risks-may disrupt infrastructure projects.").

[56] Elizabeth Wishnick, *There Goes the Neighborhood: Afghanistan's Challenges to China's Regional Security Goals*, 19 BROWN J. WORLD AFFS. 83, 84 (2012).

[57] *Id.* ("Xinjiang in Western China shares borders with Afghanistan, Pakistan, and three Central Asian states Kazakhstan, Kyrgyzstan and Tajikistan.").

[58] *Id.* at 96.

iii. China-Pakistan Economic Corridor (CPEC)

CPEC falls within the BRI's purview, and it is the most recent example in a history of similar bilateral agreements between Pakistan and China.[59] However, CPEC's scope surpasses that of prior agreements, leading to its characterization as China's "response" to the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).[60] Financed with Chinese investments and loans, CPEC's projects aim to develop Pakistan's energy and transportation infrastructure, to coordinate investment and industry, and to cultivate other mutual interests.[61] Along with bolstering China-Pakistan connectivity through the construction of Karakoram Highway,[62] CPEC's primary focus is developing Pakistan's energy sector, with approximately "61 percent of the total investment . . . specifically targeted at energy infrastructure development, enhancing capacity, distribution and transmission networks."[63] CPEC energy projects will contract with private companies and be paid for through China's Export-Import (Ex-Im) Bank.[64]

One of CPEC's most substantial undertakings is the upgrade of Gwadar Port, located on the Balochistan coast of the Arabian Sea. Modeled after Chinese Special Economic Zones (such as the Kashgar Economic Development Zone in Xinjiang),[65] Gwadar Port has been leased to China for a forty-three-year term, terminating in 2059.[66] The contract contemplates the construction of an airport, a free trade area, and a port servicing and management company.[67] Like in Xinji-

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[59] *See* Strom, *supra* note 41, at 479-80 (explaining that "Pakistan was one of first countries to get a bilateral trade agreement with China, and in 2008 China and Pakistan amended their FTA, a combination of five smaller agreements, to promote bilateral investment. [There were] four stages in the evolution of trade relations: first, the 2003 agreement for preferential tariffs towards each other's exports, followed by an "Early Harvest" program providing for more tariff elimination. This led the way to the 2008 amendments and a 2009 agreement on trade and services[. . .]"). *See also* A.H. Qureshi, *supra* note 48, at 795 (providing an overview of Pakistan's bilateral trade agreements from the 1990s onwards); Shirin Lakhani, *The China-Pakistan Economic Corridor: Regional Effects and Recommendations for Sustainable Development and Trade*, 45 DENV. J. INT'L L. & POL'Y 417, 417 (2017); Rohimi Shapiee & Rao Qasim Idrees, *China Pakistan Economic Corridor (CPEC); Most Valuable Dream for Pakistan Through Economic Integration in the Region but May Not Become True Without Upgradation* [sic] *of Physical Infrastructure and Legal System!*, 8 BEIJING L. REV. 481, 483 (2017).

[60] *See* Lakhani, *supra* note 59, at 418.

[61] *Id.* at 484. *See also* Gurmeet Kanwal, *Pakistan's Gwadar Port: A New Naval Base in China's String of Pearls in the Indo-Pacific* 1, 2 (Ctr. for Strategic & Int'l Stud., Apr. 2, 2018), https://www.csis.org/analysis/pakistans-gwadar-port-new-naval-base-chinas-string-pearls-indo-pacific.

[62] *See* Kanwal, *supra* note 61, at 3.

[63] Khuram Iqbal, *Significance and Security of CPEC: A Pakistani Perspective*, 66 CHINA INT'L STUD. 132, 138 (2017).

[64] *See* Strom, *supra* note 41, at 485.

[65] *Id*; *see also Special Economic Zone*, GWADAR PORT AUTHORITY (last visited Dec. 20, 2021), http://www.gwadarport.gov.pk/ecnomiczone.aspx.

[66] *Pakistan Hands Over 2000 Acres to China in Gwadar Port City*, INDIAN EXPRESS (Nov. 12, 2015, 5:50 PM), https://indianexpress.com/article/india/india-news-india/pakistan-hands-over-2000-acres-to-china-in-gwadar-port-city/.

[67] *Id.*

ang, Gwadar's Special Economic Zone provides tax breaks to benefit Chinese investors during the construction process.[68]

Both Pakistan and China stand to benefit from access to financing and increased regional connectivity through CPEC. CPEC provides Pakistan with means to increase foreign direct investment (FDI) and make it more attractive to foreign investors.[69] For Pakistan, after CPEC, other States in the region may begin using the new transit route "to diversify their economic ventures across Europe and Africa via the Middle Eastern states."[70] China, as the world's largest energy consumer, has hitherto depended on crude oil imports from Africa and the Middle East which must pass through the Malacca Strait (passing between Malaysia and Indonesia).[71] CPEC allows China to diversify its energy sources and supply routes: Gwadar Port provides China with easy access to the Arabian Sea and the Indian Ocean, bypasses the Malacca Strait, and reduces the shipping distance by 9,000 kilometers.[72]

Under CPEC, Pakistan has been one of the first countries to obtain OBOR/BRI's development benefits, but also bears the burdens of being the focus of massive Chinese investment efforts.[73] Although CPEC may strengthen China's influence in the greater region and among world trade leaders,[74] CPEC also poses foreseeable political and security challenges. CPEC connects Kashgar to Gwadar with road projects leading through Pakistan's volatile tribal areas, in addition to Balochistan, a province fraught with insurgency for over a decade.[75] Since these measures provide China with easy access to Indian seaports, India has criticized CPEC as a ploy "entrenching China's role in the Indian Ocean, supporting Pakistan's claims to disputed areas of Kashmir, and undermining India's own developmental project running from Chabahar in Iran to Central Asia."[76] CPEC may also lead to objections from local communities in Pakistan who may not stand to "benefit proportionately from such megaprojects unless inclusive growth is generated fairly rapidly."[77] Insurgents could easily coopt these local concerns and resist national development projects under CPEC which in turn may yield increased police and military action.[78] Furthermore, CPEC has raised concerns as to whether all of Pakistan will benefit from civil projects as mandated by the Pakistani constitution.[79]

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[68] *See* Strom, *supra* note 41, at 485.

[69] *See* Iqbal, *supra* note 63, at 138.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *See* Strom, *supra* note 41, at 497. For more on Pakistan's debt burdens to China under CPEC, see Lakhani, *supra* note 59, at 420.

[74] *See* Strom, *supra* note 41, at 498.

[75] *See* Dellios & Ferguson, *supra* note 42, at 55.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *See* Strom, *supra* note 41, at 485.

c. Climate Change and Hydropower on the Indus Basin

The rivers of the Indus Basin, whose water supply and flow depend on seasonal melt from mountain glaciers in the Hindu Kush Himalaya ("HKH") region, support the livelihood of an estimated 270 million people.[80] However, environmental researchers have recently projected that rising temperatures linked to global climate change will significantly reduce the snow, ice, and permafrost making up the HKH's cryosphere.[81] Thus, even if countries were to eliminate all greenhouse gas emissions by 2050,[82] the researchers predict that HKH glaciers will still lose more than one third of their volume.[83] Further, if emissions remain at current global levels, researchers forecast a loss of more than half of HKH glacier volume by 2100.[84] Therefore, in the very near future, affected communities, countries, and the international community will witness and need to address the irreversible consequences of the world's vanishing "third pole."[85]

The degradation of HKH glaciers threatens water, food, and economic security across the Indus Basin,[86] which encompasses Pakistan, India, China, and Afghanistan.[87] These countries remain uncommitted to regional cooperation to forecast and mitigate growing water stress and declining water productivity.[88] Rather, in

[80] *See* Alice Albinia, *A Water Crisis Looms for 270 Million People as South Asia's Glaciers Shrink*, NAT'L GEOGRAPHIC (June 16, 2020), https://www.nationalgeographic.com/magazine/2020/07/water-crisis-looms-for-270-million-people-south-asia-perpetual-feature/.

[81] Tobias Bolch et al., *Status and Change of the Cryosphere in the Extended Hindu Kush Himalaya Region*, *in* THE HINDU KUSH HIMALAYA ASSESSMENT: MOUNTAINS, CLIMATE CHANGE, SUSTAINABILITY AND PEOPLE 209, 211 (Philippus Wester et al., eds., Int'l Ctr. for Integrated Mountain Dev. 2019).

[82] Joe McCarthy & Erica Sanchez, *Billions Rely on Himalayan Glaciers for Water. But They're Disappearing.*, GLOB. CITIZEN (Feb. 5, 2019), https://www.globalcitizen.org/en/content/himalayas-melting-climate-change/.

[83] *See* Bolch et al., *supra* note 81, at 231.

[84] *Id.*; *see also* Damian Carrington, *A Third of Himalayan Ice Cap Doomed, Finds Report*, THE GUARDIAN (Feb. 4, 2019, 6:45 PM), https://www.theguardian.com/environment/2019/feb/04/a-third-of-himalayan-ice-cap-doomed-finds-shocking-report.

[85] The sheer volume of HKH glaciers has led to their colloquial naming as the "third pole." *See, e.g.*, Chelsea Harvey, *World's "Third Pole" Is Melting Away*, SCI. AM. (Feb. 4, 2019), https://www.scientificamerican.com/article/worlds-third-pole-is-melting-away/.

[86] *See, e.g.*, Aamir Saeed, *Water and Food Shortage Imminent in the Himalayas*, THE THIRD POLE (Nov. 13, 2019), https://www.thethirdpole.net/2019/11/13/water-and-food-shortage-imminent-in-the-himalayas/; Albinia, *supra* note 80.

[87] Sadiq I. Khan & Thomas E. Adams III, *Introduction of Indus River Basin: Water Security and Sustainability*, *in* INDUS RIVER BASIN: WATER SECURITY AND SUSTAINABILITY 3 (Sadiq I. Khan & Thomas E. Adams III, eds., Science Direct 2019) (The authors order the countries according to their share of the basin area: Pakistan (61%), India (29%), and China and Afghanistan (8%). *Id.* The order holds when considering total share of the affected population: Pakistan (61%), India (35%), and China and Afghanistan (4%)).

[88] Archana Chaudhary & Faseeh Mangi, *New Weather Patterns Are Turning Water into a Weapon*, BLOOMBERG (Mar. 11, 2020, 4:00 PM), https://www.bloomberg.com/features/2020-indus-river. "Water stress" occurs where countries withdraw too much water from their systems and "water productivity" refers to the extent of economic value derived from waters so withdrawn. *See* Ryan Morris et al., *Indus Lifeline*, NAT'L GEOGRAPHIC (July 2020), https://www.nationalgeographic.com/magazine/2020/07/the-indus-river-is-a-lifeline-for-millions-this-map-shows-the-threats-it-faces-feature/. Although Afghanistan is relevant to the conversation, see Wishnick, *supra* note 56, at 83-100 (providing an analysis of Afghanistan's impact on China's post-2000 "Go West" strategy), this comment only considers the situation as it relates to China, India, and Pakistan.

light of a long history of territorial and power struggles, the countries have pursued unilateral and bilateral measures to capture and capitalize on precious water resources, in turn stoking apprehensions of water becoming increasingly "weaponized."[89]

Of the Indus Basin countries, Pakistan is the most dependent on irrigation for its agricultural production, and therefore remains the most vulnerable to increasing water stress.[90] Moreover, HKH glacial melting threatens the long-term viability of hydropower projects built and planned throughout the Indus Basin,[91] and Pakistan recently partnered with China on two such projects.[92] On June 25, 2020, Pakistan and China signed an implementation agreement to begin constructing the Kohala Hydroelectric Project, a run-of-river hydroelectric plant located on the Jhelum River in Pakistan's Azad Jammu and Kashmir region.[93] A few months later, on December 1, 2020, representatives from the two countries signed a separate implementation agreement to begin constructing the Azad Pattan Hydroelectric Project, another run-of-the-river plant to be situated about 100 km further south on the same river.[94] Given the looming water crisis in the region, the continuation of such projects would be difficult to justify absent other overriding interests.

One explanation for the ongoing development of such hydroelectric projects is Pakistan's desire to both honor and benefit optimally from foreign investment secured through agreements with China.[95] Falling within the purview of CPEC[96]

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[89] *See* Chaudhary & Mangi, *supra* note 83; *see also infra* text accompanying note 111; Sovacool & Walter, *infra* note 98, at 50-51, 56-57 (providing an overview of research opposing hydroelectric dams for political, economic, environmental, and social reasons).

[90] *See* Morris et al., *supra* note 88.

[91] While rising temperatures are anticipated to cause an initial increase in water flow, future decline in flow is practically certain. *See, e.g.*, A.F. Lutz et al., *Climate Change Impacts on the Upper Indus Hydrology: Sources, Shifts and Extremes*, 11 PLoS One 1, 3 (2016).

[92] *See, e.g.*, Iqbal, *supra* note 63, at 138.

[93] Press Release, Priv. Power & Infrastructure Bd., Power Div., Ministry of Energy, Gov't of Pak., Security Package Agreements for 1,124 MW Kohala Hydropower Project (June 25, 2020), http://www.ppib.gov.pk/kohala25jun20.htm [hereinafter Kohala Press Release]; *1,124 MW Kohala Hydropower Project: Pakistan Signs $2.4bn Tripartite Agreement with China*, The News (June 26, 2020), https://www.thenews.com.pk/print/677782-1-124mw-kohala-hydropower-project-pakistan-signs-2-4b-tripartite-agreement; *China to Construct 1,124-Megawatt Power Project in PoK Under CPEC*, Econ. Times (June 2, 2020, 2:40 PM), https://economictimes.indiatimes.com/news/international/business/china-to-construct-1124-megawatt-power-project-in-pok-under-cpec/articleshow/76153010.cms. A 'run-of-river,' or diversion facility, channels part of a river through a canal without blocking flow like a traditional dam would do, *see Types of Hydropower Plants*, U.S. Dept. of Energy (last visited Dec. 20, 2020), https://www.energy.gov/eere/water/types-hydropower-plants.

[94] Press Release, Priv. Power & Infrastructure Bd., Project Agreements Inked for 700.7 MW Hydropower Project under CPEC (Dec. 1, 2020), http://www.ppib.gov.pk/azad1dec20.htm [hereinafter Azad Pattan Press Release]; *Agreements Signed on 700MW Kashmir Hydropower Project*, The News (Dec. 2, 2020), https://www.thenews.com.pk/print/752231-agreements-signed-on-700mw-kashmir-hydropower-project; *PoK Government Signs Agreements with Chinese Firm to Build 700MW Hydropower Project*, The Hindu (Dec. 2, 2020), https://www.thehindu.com/news/international/pok-government-signs-agreements-with-chinese-firm-to-build-700mw-hydropower-project/article33230584.ece.

[95] *See* A.H. Qureshi, *China/Pakistan*, *supra* note 52, at 778.

and calling for nearly $3 billion in FDI,[97] the Kohala and Azad Pattan hydroelectric projects also reflect the emergence of sustainable energy, especially low-carbon forms of electricity, as a policy priority in global governance.[98] Negotiated and realized within a complex security, economic, and political environment, development initiatives in the Indus Basin reflect a gradual shift from an attitude of collaboration common in the 1900s towards a competitive one where "major economic powers each negotiate separate, competing agreements to create trade cartels that might influence future multilateral trade negotiations."[99] Furthermore, the projects demonstrate the growing economic leverage of the BRICS countries (an acronym for Brazil, Russia, India, China, and South Africa) which, since 2000, have generally shifted from primarily being recipients of FDI to expanding their own outbound investments.[100] Project agreements, like those between Pakistan and China, may provide a workable model for increasing energy independence for emerging markets and developing countries where infrastructural needs often exceed available financing. [101]

However, India and Pakistan's history of transboundary water disputes,[102] in addition to the three countries' conflicting claims to the Kashmir territory,[103] turn such hydropower projects into potential sources of increased tension by aggravating water and food insecurity, or even spurring violence.[104] Although India and Pakistan agreed to ensure unrestricted flow of transboundary river waters under the IWT,[105] the two countries have brought numerous subsequent legal disputes

[96] Launched in 2013, CPEC delivers investment primarily from Chinese state and non-state actors into Pakistan to support an array of Pakistani energy development projects. *Id.* The agreement also forwards the countries' mutual interests in connectivity. *Id.*

[97] *See* Kohala Press Release, *supra* note 93 (stating that the project requires $2.4 billion in FDI); Azad Pattan Press Release, *supra* note 94 (explaining that the project requires $1.35 billion in FDI).

[98] Benjamin K. Sovacool & Götz Walter, *Internationalizing the Political Economy of Hydroelectricity: Security, Development and Sustainability in Hydropower States*, 26 Rev. Int'l Pol. Econ. 49, 50 (2019).

[99] *See* Strom, *supra* note 41, at 476.

[100] David B. Wilkins & Mihaela Papa, *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance*, 54 B.C.L. Rev. 1149, 1150 (2013).

[101] Jin Sheng, *The "One Belt, One Road" Initiative as Regional Public Good: Opportunities and Risks*, 21 Or. Rev. Int'l L. 75, 81-82 (2020) (The United Nations Conference on Trade and Development noted that, as of 2018, China accounted for 34% of global infrastructure investment needs, followed by India at 8%, the Middle East at 4%, and "Other Emerging Asia" at 6%, also noting that Eastern Europe, Africa, and Latin America represent 12% of needs).

[102] *See* Qureshi, *Water as Human Right*, *supra* note 5, at 376-81 (noting Pakistan's concern regarding India's construction of hydropower facilities on other westbound rivers in the Indus Basin, such as the Ratle Dam on the Chenab River); Qureshi, *World Bank as Mediator*, *supra* note 3, at 221.

[103] *See generally* Kamran Bokhari, *China Joins India and Pakistan in the Kashmir Battlespace*, Newlines Inst. for Strategy & Pol'y (June 18, 2020), https://newlinesinstitute.org/kashmir/china-joins-india-and-pakistan-in-the-kashmir-battlespace/ (providing an overview of Indian, Pakistani, and Chinese positions and involvement in disputes over Kashmir).

[104] *See, e.g.*, Syed Shafiq, *Not Nuclear Bombs, but Climate Change the Biggest Threat to India, Pakistan, China*, The Eurasian Times (Nov. 15, 2019), https://eurasiantimes.com/not-nuclear-bombs-but-climate-change-biggest-threat-to-india-pakistan-china/; McCarthy & Sanchez, *supra* note 82; Chaudhary & Mangi, *supra* note 88.

[105] The Indus Waters Treaty 1960, Ind.-Pak., Sep. 19, 1960, 6032 U.N.T.S. 126 (signed in Karachi by India, Pakistan, and the International Bank for Reconstruction and Development [i.e., the World Bank]).

under the treaty as discussed *infra*.[106] In addition, the three countries figure into the Kashmir territorial dispute, which has been the source of ongoing diplomatic and security tensions, including military standoffs, between the three, who also happen to be nuclear powers.[107] Given the potentially limited effectiveness of mediation and the obvious risks to human security involved,[108] imagining effective legal frameworks for future Indus Basin water cooperation becomes even more urgent.

IV. Analysis

This section begins with an assessment of existing and proposed avenues to Indus Basin water cooperation both under and beyond the IWT. The section then reframes the discussion of water cooperation within the context of globalization by integrating perspectives from recent socio-legal research.

a. Assessing Existing and Proposed Avenues to Indus Waters Cooperation

One potential method to increase water cooperation in the Indus Basin involves modifications to the IWT.[109] Some argue that the original IWT "is the finest example of the pragmatic implementation of the equitable apportionment and equitable utilization concepts" embraced under the international law of waterways.[110] However, the issue of modification would depend heavily on the diverging perspectives India and Pakistan of the IWT's dispute resolution mechanism.

For Pakistan, the ineffectiveness of IWT dispute resolution mechanisms can be explained through several factors. The politics of hydro-hegemony, for one, underlies India's noncompliance with and attempts at modifying or discarding IWT provisions.[111] India's continual failure to provide six months' advance notice to

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[106] *See generally* SALMAN M. A. SALMAN & KISHOR UPRETY, CONFLICT AND COOPERATION ON SOUTH ASIA'S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE 38-61 (2002) (providing an historical overview of India-Pakistan water relations before and after the IWT's signing).

[107] *See generally* Lowell Dittmer, *Introduction*, *in* SOUTH ASIA'S NUCLEAR SECURITY DILEMMA: INDIA, PAKISTAN, & CHINA vii-xxi (Lowell Dittmer ed., 2005) (offering a concise historical overview of nuclear proliferation and post-1947 relations between the three countries in the Kashmir region).

[108] *See* Dellios & Ferguson, *supra* note 42, at 48 ("Human security focuses on individuals, families, local communities and indigenous groups who face a wide range of threats, including natural disasters, environmental collapse, poverty, and civil war.").

[109] For a thorough discussion on modification of the IWT from both India and Pakistan's perspectives, *see* Qureshi, *Modifications*, *supra* note 10, at 223-238.

[110] *Id*. at 220.

[111] W.A. Qureshi, *Indus Waters Treaty: An Impediment to the Indian Hydrohegemony*, 46 DENV. J. INT'L L. & POL'Y, 45, 70 (2017) ("Over time, and through the construction of numerous, massive water storage and management facilities, India has managed to acquire considerable storage and managerial capability over the western tributaries. With this ability, India can cause droughts and floods in Pakistan at whim. It is calculated that India can stop all water supplies of Pakistan in a conflict for twenty-eight consecutive days. As such, India's capacity to hold Pakistan's water supplies is tantamount to a political maneuver to ensure Indian political supremacy in times of war or conflict. Additionally, this translates into Indian hydro-hegemony over Pakistan, so that India can use hydropolitics to influence Pakistan during conflicts and political disputes, which will ensure Indian political supremacy in the regional politics as well.").

Pakistan before initiating construction projects has further aggravated trust issues between the two countries in matters of IWT implementation.[112] Further, the IWT's mechanisms have proven to be so slow that by the time Pakistan can finally fully invoke dispute resolution processes, Indian construction projects are either completed or so substantially advanced that justice has become unavailable.[113]

India, on the other hand, has justified its construction of dams on westbound rivers flowing towards Pakistan by pointing to the absence of relevant restrictions in the IWT.[114] However, India has favored modification of the IWT in order to secure "a greater share of the waters of the Indus basin to satisfy the agrarian and electricity demands of its growing population[.]"[115] The obvious schism between India and Pakistan's practices and postures may account for the challenges these two countries have had in achieving constructive direct diplomacy, arguably the most fundamental mechanism for dispute resolution under the IWT.

Another avenue for cooperation involves China's potential role in balancing Indian water aggression. Pakistan's good relations with China could motivate China to threaten curtailing water flows into India, since China is an upper riparian state for India on the Brahmaputra River.[116] However, based on China and India's recent diplomatic exchanges, China would be unlikely to employ such an extreme strategy that appears more like brinksmanship than cooperation.

Under such circumstances, efforts in ADR like the Kishenganga Arbitration may not be able to overcome underlying tensions in the India-Pakistan relationship in order to move towards regional water cooperation. Historically, among the different choices for types of mediators in international disputes,[117] the only parties who have had relative success in resolving India-Pakistan tensions have been international organizations and individual countries.[118] In spite of these limited successes, several factors make mediation unlikely to significantly or constructively alter existing India-Pakistan tensions.[119] As a result, water

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112 *See* Qureshi, *Indus Waters Treaty*, *supra* note 111, at 66, 71 (exploring how India's actions prevent Pakistan from raising timely objections to planned construction).

113 *Id.* at 70.

114 *See* Qureshi, *Modifications*, *supra* note 10, at 225-26.

115 *Id.* at 230.

116 *See* Qureshi, *World Bank as Mediator*, *supra* note 3, at 231; Qureshi, *Water as Human Right*, *supra* note 5, at 394.

117 *See* Srivastava, *supra* note 3, at 233 ("There are five types of mediators that are typically involved in international disputes: (1) international organizations (e.g., the UN, World Trade Organization); (2) regional governmental organizations (e.g., Organization of American States, European Union); (3) individuals (e.g., U. Thant); (4) states (in the instant issue, China and United States); and (5) non-governmental organizations.").

118 *Id.*

119 *Id.* at 240 ("Mediation will not be a viable option in resolving the tension between the two states for a multitude of reasons: (1) the deep-rooted animosity is difficult to alleviate; (2) the issue of sovereignty prevents the acceptance of a mediated resolution; (3) the lack of a viable actor to serve as a mediator due to a large sense of distrust; and (4) India's focus upon bilateralism as the sole means of achieving peace between India and Pakistan.").

cooperation may require the input of different legal actors, including those in the region's growing corporate sector.

b. Reframing Cooperation Within the Context of Globalization

The activities and position of the corporate legal elite emerging in countries like China and India may offer an alternative means of promoting regional water cooperation. This comment builds on recent work by sociologists researching the legal services sector in emerging economies in the age of globalization. These legal professionals, increasingly outside of the realms of state and market, provide a marginal perspective that can lead to the kind of "boundary-blurring" necessary to imagine complex solutions in a context where cooperation may prevent tragedy.[120]

As the rising global market presence of the BRICS countries has increased demand within each of them for means through which to govern new economic activities and "interface with the broader economic and political environment," so too has the need emerged for lawyers able to practice in this new legal ecosystem.[121] Emerging corporate elites may impact the direction of global governance by driving the emergence of transnational law,[122] apparent in an era when "liberal internationalism" has been giving way to increasing privatization.[123] In particular, "the emergence of a new globalizing corporate sector might spur broader cooperation in the legal field."[124] Future research may reveal further interplay between emerging corporate elites and global governance by considering the identity of members of the elite, their means of influence, their engagement in processes of global integration, and their impact on the (dis)continuation of the "global rule of capital."[125]

To more fully comprehend the constitution and organization of social spaces in international law, one legal sociologist has advocated a hybrid approach based on field and ecological theories.[126] She explains that field theory views society as structured social spaces in which agents mobilize resources to achieve dominant

120 *See generally* Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 L. & Soc. Rev. 771 [hereinafter *Boundary-Blurring*] (discussing how market boundaries usually present between local and foreign law firms are blurred in an atmosphere lacking clear governmental regulation of transnational legal practice).

121 *See* Wilkins & Papa, *supra* note 100, at 1150.

122 *See* Wilkins & Papa, *supra* note 100, at 1179 (noting how, "at the global level, there is also a trend toward creating a legal order that is increasingly private, autonomous, and transnational in that the laws are removed from local and national legal systems.").

123 *Id.* at 1154. With respect to the BRICS, the term "global governance" changes, *see Id.* at 1157-58 ("The concept has been used to describe various forms of coordination of regulatory activities in the global sphere, where demand for regulation cannot be met by a single state, the world government does not exist, and many non-state actors—such as international organizations, civil society organizations, and businesses—contribute to regulatory outcomes. [. . .and] [a]s economic power becomes concentrated in the BRICS, private actors from these jurisdictions will be able to shape global governance according to their own experiences and value systems.").

124 *Id.* at 1160.

125 *See id.* at 1158-61.

126 *See* Sida Liu & Mustafa Emirbayer, *Field and Ecology*, 34 Socio. Theory 62, 62-63, 65 (2016).

positions.[127] In contrast, ecological theory describes society as fluid interactional spaces where competition between agents leads to a more cooperative equilibrium.[128] The interaction of the two theories lays the foundation for the possibility of "boundary-blurring," assessing the ways that foreign and local agents negotiate their market boundaries "when formal government regulation of transnational law practice is ambiguous[.]"[129] Importantly, boundary-blurring does not amount to institutional "diffusion or structural isomorphism."[130] Instead, boundary-blurring allows a social actor engaged in an interaction "to mimic the other and blur the spatial or cultural boundary between them."[131] Effectuating a "hybridization between the global formal structure and the local cultural substance,"[132] boundary-blurring leads to "the production of localized expertise that is experience-based and highly adaptive to the local political and social environment in which . . . global-looking corporate lawyers are embedded."[133] Ultimately, this legal sociologist concludes that, "[i]n this boundary-blurring process, the structural barriers of legal practice might be gradually removed, but the cultural substance of this expertise will never disappear."[134]

Another author supports the theory of boundary-blurring in the context of globalization, in that "the basic architecture of legal systems consisting of different patterns and systems in different countries persists even under effect of significant legal transformations like the process of global professionalization as a result of ongoing 'Americanization.'"[135] In effect, corporate legal elites may be instrumental in realizing a cooperative framework in which a state's responsibilities do not center on the hierarchy of politics, but instead on a system of ethics and support that respond to "societal and ecological needs of human security."[136]

V. Proposal

Corporate legal professionals working at the intersection of the global and the local may be best suited to achieving the cooperative principle of subsidiarity

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127 *See Field and Ecology*, *supra* note 126, at 62.

128 *Id. at* 62, 68-69.

129 *See Boundary-Blurring*, *supra* note 120, at 773.

130 *Id.* at 774 (defining structural isomorphism as "the diffusion of new institutional models from the core countries of the global market to the periphery, during which the institutional forms largely remain the same").

131 *Id.*

132 *Id.* at 801.

133 *Id.*

134 *Id.* at 802.

135 Lukas Frederik Müller, *The Taxonomy of Legal Systems Under Effect of Globalization: Classification of China and the United States*, 16 GLOB. JURIST 51, 57 (2016). The author's model classifies legal systems in the era of globalization into three types: "rule of professional law" systems (in which legal systems remain uninfluenced by other aspects of society due to, e.g., secularization); "political rule of law" systems (where "political forces act within autonomous fields of operation, which are not controlled by paramount legal principles"); and, "traditional rule of law" systems ("in which the law is not separate from religious or philosophical ideas"). *Id.* at 53.

136 *See* Dellios & Ferguson, *supra* note 42, at 56.

among the State powers at play in the Indus Basin situation examined here. The socio-legal theorists *supra* situate the transformation of the contemporary legal profession within "a narrative of globalization wherein individuals acting at the junction of various social systems are able to create and then maintain a new transnational space."[137] Legal professionals in the corporate sector may thus increase their influence "by occupying and building on a strategic position as brokers among the key players" in a dispute.[138] Since globalization involves "the gradual convergence between national and transnational institutions and normative orders," a more adequate optic for understanding the position of these lawyers involves "boundary-blurring," referring to "a process of hybridization in which local actors become structurally global-looking while global actors [become] localized."[139]

Among the many social and legal policy considerations for successful hydropower development, "stable, local, and flexible local licensing policies," as well as a well-informed local community and workforce, are crucial.[140] The theory of subsidiarity suggests that competent authorities at lower, more local levels in licensing and regulatory processes tend to be the most efficient regulators.[141] Subsidiarity applied by localizing licensing responsibilities can ensure the efficient development, as well as the economic and environmental viability, of such hydropower projects.[142] The principle also points to more transparent involvement and education of the public, in turn potentiating significant reduction in project costs through use of local resources.[143]

For this reason, commentators have even recommended creating centralized local agencies for managing the small hydropower licensing process.[144] This comment highlights a need for additional empirical research regarding the lawyers involved in these hydropower transactions. Better insight into the work of lawyers situated at the boundary of the local and the global would highlight the potential constructive role such lawyers may play in bolstering regional cooperation and mitigating the effects of future unavoidable water disputes.

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[137] Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 L. & Soc. Rev. 790, 822 (2017).

[138] Bryant G. Garth, *Corporate Lawyers in Emerging Markets*, 12 Ann. Rev. L. & Soc. Sci. 441, 452 (2016).

[139] *See* Liu, *supra* note 120, at 774.

[140] Gina S. Warren et al., *Small Hydropower Toolkit: Considerations for Improving Global Development and an Accompanying Case Study for Pakistan*, 80 U. Pitt. L. Rev. 137, 160 (2018). The authors restate the minimum conditions for the successful development of small hydropower as follows: "(1) technical, site-specific data; (2) a stable, yet flexible regulatory scheme with incentives for investment; and (3) an educated and involved community and workforce." *Id.* at 174.

[141] *Id.* at 160.

[142] *Id.*

[143] *Id.* at 170 (defining "resources" as materials, labor, and knowledge).

[144] *Id.* at 173.

VI. Conclusion

While the Indus Basin situation confirms the characterization of the "political economy of hydroelectricity" as "perpetually managing a series of pernicious risks, not always optimally," this comment suggests decentering the question of "who wins and loses" at the state level.[145] Rather, researching lawyers "whose efficacy flows from their positions as skilled actors along systemic borders" may kindle the necessary shift from competition to cooperation among stakeholders.[146] Accordingly, the legal methodology of traditional State diplomacy may be insufficient to address the need for water security in the Indus Basin. Studying alternative legal spaces, including the increasingly transnational regime comprised of corporate legal elites, may be crucial for regional water cooperation. Moreover, a theoretical posture adequate to ensure comprehension of the complex intersection of interests, disciplines, and communities at issue here calls for expanding beyond a field orientation, to including an ecological orientation, and remaining open to their interplay. In other words, water cooperation is a problem that "boundary-blurring" in the global legal services sector may in fact help to address.[147]

[145] *See* Sovacool & Walter, *supra* note 98, at 73.

[146] *See* Grisel, *supra* note 137, at 794.

[147] *See* Liu, *supra* note 120, at 801.

Monasky v. Taglieri: The Supreme Court's Interpretation of Habitual Residency and its Impact on International Child Abduction

Abigail Leann Heeter*

Abstract

The most common form of kidnapping is when a child is taken by a parent from a co-parent. When the kidnapping parent is native to another country, navigating the international family courts can be more than challenging. Because of this, the Hague Convention on the Civil Aspects of International Child Abduction created an order that all signatory countries must return an abducted child to their location of habitual residency. However, the Hague Convention declined to define what habitual residency meant, leaving it up to the determination of the Courts.

Recently, the U.S. Supreme Court confronted this issue in the landmark case of *Monasky v. Taglieri.* Based on precedent from other countries and the drafter's intent of the international agreement, habitual residency is based on a factual inquiry as to where the child is "more than just transitory and it is customary, usual, and of the nature of a habit." This decision does not encompass the many challenges that are faced with international familial relationships. Particularly the Court failed to fully consider instances of domestic violence and how this decision forces many families to be returned to their abusers.

This note will focus on this decision and its impact on the hundreds of thousands of families attempting to recover a wrongly taken child across international borders and the parents who flee from unsafe circumstances with their children. The first section will discuss the legal background of the Hague Convention and its previous interpretation in the U.S. courts, leading up to the decision in Monasky. The second section will discuss the holding in Monasky and how the Supreme Court arrived at this decision. Next, it will discuss the Court's reasoning for this decision. Finally, the fourth section will discuss the impact of this decision on international custody issues and how this will affect children who are victims of international child abduction and the parents that are fighting international custodial disputes.

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I. Introduction

The term *kidnapping* typically invokes an image of a child being taken by someone they do not know. However, each year, hundreds of children are victims of international kidnapping, taken by someone they likely know quite well – their parent.[1] International parental kidnapping occurs when a non-custodial parent or a parent involved in a tumultuous marital dispute takes the child out of the country of which it is a resident.[2] This not only devastates the family left behind, but also can have an adverse effect on the dislocated child that is taken from their familiar environment.[3] When children are wrongfully taken abroad, they often face many challenges that can be traumatizing, such as language barriers, differences in customs, separation from friends and family, and difficulties completing education in an unfamiliar environment.[4] Because of the negative effect that in-

[1] *International Parental Kidnapping*, U.S. DEP'T OF JUST. (last updated May 5, 2021), https://www.justice.gov/criminal-ceos/international-parental-kidnapping; *see also* Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT'L L. REV. 277, 277 (2007).

[2] U.S. DEP'T OF JUST., *supra* note 1.

[3] *Id.*; Jeffrey L. Edleson, Ph.D. et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases*, NAT'L CRIM. JUSTICE REFERENCE SERVS. (Dec. 2010), https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf (site funded by the U.S. Department of Justice but not published by the U.S. Department of Justice and does not represent their points of view that are expressed by the authors and does not reflect U.S. policies or positions).

[4] *A Law Enforcement Guide on International Parental Kidnapping*, U.S. DEPARTMENT OF JUSTICE 1, 3 (July 2018), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250606.pdf.

ternational child abduction causes, experts consider it to be a form of child abuse.[5]

In 1999, it was estimated that 203,900 children were victims of a familial kidnapping that year.[6] Of this reported number, 53 percent were reported to be abducted by their biological father, and 25 percent of these children were abducted by their biological mother.[7] Given this information, parental kidnapping is substantially the most common type of familial kidnapping.[8]

In these cases, because the child's kidnapper is a parent, locating the child can be easier than in a case of abduction where the perpetrator's identity is unknown. However, this does not correlate to the success rate of returning the child to its resident country. In most cases, the abductor takes the child to a country that is easily reached by airline and the courts in that country are unwilling to enforce foreign custody orders. Commonly, this is a country where they may have previously resided and where they have family to support them.[9] These elements provide legal obstacles for the custodial parent to have their child returned to them.

The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") offers an opportunity of relief for these families of internationally abducted children.[10] The Hague Convention provides that any member country must judicially order an abducted child that is being kept in their county back to the country in which the child has habitual residence, if invoked by a custodial parent within the first year of the child's abduction.[11] A monumental decision regarding the Hague Convention was recently decided by the Supreme Court of the United States on February 25th, 2020 in the landmark case of *Monasky v. Taglieri*.[12] In this case, the Supreme Court created a test for determining habitual residence for children who were victims of international abduction, but too young to testify about their life prior to their kidnapping.[13] The Court held that the habitual residence of a child is determined by a totality of the circumstances and not categorical elements.[14] The Hague Convention does not define how to determine habitual residency, but instead dictates that habitual residence is where a child is 'at home.' This was the first instance that the U.S.

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[5] *International Parental Child Abduction*, Comm'n on Sec. & Cooperation in Eur. (2016), https://www.csce.gov/issue/international-parental-child-abduction.

[6] H. Hammer et al., U.S. Dep't of Justice, Children Abducted by Family Members: National Estimates and Characteristics 2 (2002).

[7] *Id.*

[8] *Id.*

[9] Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, Juvenile Just. Bull. 1, 2 (Dec. 2001), https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf.

[10] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M, 1501 [hereinafter Hague Convention].

[11] *Id*. at art. 10. *See also* Hammer et al., supra note 6.

[12] *Monasky v. Taglieri*, 140 S.Ct. 719 (2020).

[13] *Id.*

[14] *Id.*

Supreme Court expressly provided a test for determining what 'at home' means.[15]

II. Analyzing the Legal Landscape of International Parental Kidnapping

In 1993, Congress first enacted the International Parental Kidnapping Crime Act, making it a federal crime for a parent to remove or attempt to remove a child from the U.S. or retain a child from outside the U.S. with obstruction of another's custodial rights.[16] This, however, only provided a remedy to families in the U.S. The issue becomes much more drastic when dealing with other countries' familial laws. When the child crosses international borders, many countries do not want to attempt to enforce a U.S. parental agreement or custody order, or even accept them as binding. For example, in *Ahmed v. Naviwala*, the mother had been awarded sole custody of her children by a U.S. Court but allowed their father to take the children to Saudi Arabia for a vacation.[17] Once in international territory, the father refused to return the children to the U.S. and he would not let their mother contact them.[18] Eventually, the father retained a court order from a Saudi Arabian court granting him sole custody, despite the previous order from the U.S. court and without notifying the mother of the proceedings, depriving her the opportunity to represent herself.[19] This conflict of court orders was able to happen because Sadia Arabia is not a member to the Hague Convention and did not have an obligation to enforce a U.S. custody agreement.[20] Often, in circumstances such as these where one parent holds a child hostage in another country, the other parent's only chance to get their child back is to invoke the Hague Convention if possible, forcing a government in a foreign jurisdiction to take judicial action.

A. The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention was adopted in 1980 at the fourteenth session of the Hague Conference on Private International Law with the purpose of providing a procedure for the return of children that have been abducted and retained across

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[15] Hague Convention, *supra* note 10; *see also* Elisa Perez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, HCCH 1, 32. https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf; *see also* Elizabeth Slattery, *Monasky v. Taglieri*, A.B.A. (Feb. 25, 2020), https://www.americanbar.org/groups/public_education/publications/preview_home/volume/47/issue-3/article-11/.

[16] International Parental Kidnapping, 18 U.S.C. § 1204 (2003).

[17] *Matter of Ahmad v. Naviwala*, 306 A.D.2d 588, 589 (N.Y.App.Div. 2003) (wherein the mother testified that she was in communication with the children while they were abroad over a three-month period and then suddenly the father terminated all contact between the two parties).

[18] *Id*.

[19] *Id.* at 590.

[20] Enforcing custody agreements in countries that are not signatories to the Hague Convention will not be discussed in depth in this note, but many of the same issues of enforcement still overlap. *See* Aiyar, *supra* note 1, at 319.

international borders.[21] As international travel began to increase, so did international relationships, presenting new issues such as children who possessed citizenship in multiple countries because of international parents.[22]

Due to the prevalence of international relationships, the United States ("U.S."), joining approximately 75 other countries, signed the Convention on December 23, 1981.[23] However, the Convention did not go into effect in the U.S. until Congress enacted the International Child Abduction Remedies Act ("ICARA") on July 1, 1988.[24]

If a party invokes the Hague Convention within one year of the child's abduction, the judge in a Convention party country must order the child be returned to its country of habitual residence.[25] However, if more than one year has passed, the child's return is discretionary and the judge can deny the Hague Convention because it is arguable that the child's new 'habitual residence' is the country where it has resided for the past year.[26] Additionally, if the child is of a certain age and maturity, the Court can take into account which country in which it would prefer to be.[27]

To have a case fall under the protection of the Hague Convention, the child must have been a habitual resident of a country that is a party to the Convention and is now being wrongfully retained in a country that *also* is a party to the Convention; the removal of the child was wrongful and a violation of a parent's custodial rights; and, the child is under the age of 16.[28] The purpose of the Con-

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[21] Hague Convention, *supra* note 10; *see also* Perez-Vera, *supra* note 15 (stating that a custody battle should occur in a location that is most comfortable for the child, making a need for a jurisdictional determination and the matter of custody is not one for international courts).

[22] Ericka A. Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. J. INT'L HUM. RTS. 1, 4 (2004); *see* Aiyar, *supra* note 1, at 277.

[23] Letter of Submittal fr. George P. Shultz, Secretary of State, to President Ronald Reagan, 51 Fed. Reg. 10,496 (Mar. 26, 1986). *U.S. Hague Convention Treaty Partners*, U.S. DEP'T OF STATE- BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (listing signatories to the 1980 Hague Convention on the Civil Aspects of International Child Abduction to include Andorra, Argentina, Armenia, Australia, Austria, the Bahamas, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, Columbia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Lithuania, Luxembourg, Republic of Macedonia, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Saint Kitts and Nevis, San Marino, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, territories of the United Kingdom, United States, Uruguay, Venezuela, and Zimbabwe) [hereinafter Letter to Ronald Reagan].

[24] International Child Abduction Remedies Act, 22 U.S.C. § 9001 (1988).

[25] *Important Features of the Hague Abduction Convention- Why the Hague Convention Matters*, U.S. DEP'T OF STATE- BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html.

[26] *Id.*

[27] *Id.*

[28] *Id.*; s*ee also* Letter to Ronald Reagan, *supra* note 23 (noting that two or more countries can choose to extend the coverage past the age of 16 and can use discretion to determine to implement the convention retroactively).

vention is not to adjudicate the best interests of the child, but instead to ensure that the child is returned to the country that has jurisdiction over the child, so a custody matter can be properly heard.[29] Because of this, the abducting parent does not have a great number of available defenses.[30] This can be particularly difficult for the abductor in cases where they took the child when fleeing from abuse, or when the abductor believes they are acting in the best interest of the child for other reasons.[31] Determining a child's habitual residence for the purposes of appropriate jurisdiction over custody claims is crucial under the Hague Convention.[32]

The recent decision in *Monasky v. Taglieri* is monumental to Hague Convention jurisprudence because the Supreme Court has only decided a limited number of cases in relation to the Convention.[33] Prior to this decision, the Court had not expressly defined what 'habitual residence' meant.[34] The Court has only discussed habitual residence in the case of *Abbot v. Abbot*, where it reiterated the importance of determining where the child is acclimated but did not give a definition.[35] Lower courts have used the 'shared intent' standard to look at the facts of the case and determine what the shared intent of the parents was regarding where they would raise their child, in order to determine the child's habitual residence.[36] The absence of a steadfast definition left great deference to U.S. courts to interpret how to determine habitual residence for a young child that could not testify as to where it felt acclimated, and where the parents' shared intent could not be deciphered.

III. Monasky v. Taglieri

This section will discuss the Supreme Court's recent decision in *Monasky v. Taglieri*. First, this section will provide a factual background of the case. Second, it will discuss the procedural history of the case and the opinions of the lower courts before the case reached the Supreme Court. Finally, it will discuss the holding of the Supreme Court and how the Justices reached their decision.

Michelle Monasky, a U.S. citizen, and Domenico Taglieri, an Italian native, were both residing in the U.S. when they began a relationship and eventually

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[29] Chiancone et al., *supra* note 9.

[30] *Id.*

[31] Edleson et al., *supra* note 3, at 24 (finding that most parents who abduct their children internationally are fleeing volatile situations from a partner or co-parent).

[32] *Id.*

[33] *Monasky*, 140 S.Ct. at 724; Slattery, *supra* note 15.

[34] Slattery, *supra* note 15. (Some critiques claim that too explicit of a definition would be too harmful to this area of jurisprudence as it would create too strict of an analysis that may not give judges enough deference).

[35] *See Abbot v. Abbot*, 560 U.S. 1 (2010).

[36] *See Mozes v. Mozes*, 239 F.3d 1067 (2001) (holding that there must be given significant weight to the intent of the parents when determining habitual residence); *Ahmed v. Ahmed*, 867 F.3d 682 (2017) (holding that the abducting parent has the burden to prove the shared intent of the parents or where the child is more acclimatized).

married in 2011.[37] Two years after they wed, the couple relocated to Milan, Italy, where they both found work and appeared to intend to reside indefinitely based on their actions.[38] Shortly after this, Monasky alleged that Taglieri began to become physically abusive towards her, causing her to be fearful for her life, and that he would force himself onto her.[39] After one of these incidents, Monasky discovered that she was pregnant.[40] Taglieri subsequently moved from Milan by himself and the couple were effectively separated for the duration of her pregnancy.[41] During this period of time, Monasky made plans to return to the U.S. by looking for new employment, divorce lawyers, and logistical arrangements for moving.[42] However, she did not inform Taglieri of her plans to move and allowed preparations for them to raise the child in Italy together to continue.[43] By the time that Monasky went into labor with their child, the relationship was so deteriorated that Taglieri refused to take her to the hospital to give birth.[44] Their baby, referred to as A.M.T, was born in February 2015 and in the effort of raising the child, the two attempted to reconcile.[45] However, in late March, after another physical argument, Monasky left Taglieri and went to an Italian police station to report the incident.[46] After reporting, Monasky then fled to the U.S. with A.M.T. and went to her mother's residence in Ohio, fearing for the safety of her eight-week-old newborn.[47]

After discovering that his wife and child were missing from Italy, Taglieri filed a petition with the Italian courts to grant him sole custody of A.M.T.[48] Because Monasky was unaware of these proceedings and thus unable to represent herself, Taglieri was awarded his request by the Italian court.[49] Subsequently, Taglieri filed an action with the U.S. District Court for the Northern District of Ohio for the return of A.M.T. to Italy under the Hague Convention pursuant to U.S.C. § 9003 (b).[50] In analyzing the Hague Convention claim, the District Court applied the standard that a child is a habitual resident where it has become "acclimatized" to its surroundings; however, when a child is too young to testify where it is acclimatized, the court must look to the evidence on the record to determine

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[37] *Monasky*, 140 S.Ct. at 724.

[38] *Id.*

[39] *Monasky*, 140 S.Ct. at 724.; *see also Monasky v. Taglieri*, 907 F.3d 404, 406 (6th Cir. 2018).

[40] *Monasky*, 140 S.Ct. at 724.

[41] *Id.*

[42] *Id*.

[43] *Id.*

[44] *Monasky*, 907 F.3d at 406.

[45] *Id.*

[46] *Id.*

[47] *Monasky*, 140 S.Ct. at 724 (Monasky testified that she feared for her daughter's safety after Taglieri made explicit threats towards A.M.T. when she would not stop crying and refusing to allow Monasky to change her diaper when needed).

[48] *Id.*

[49] *Monasky v. Taglieri*, 907 F.3d 404, 407 (6th Cir. 2018).

[50] *Id.*; U.S.C. § 9003 (b).

the "shared intent" of the parent's choice of location to raise the child.[51] The District Court found that Monasky and Taglieri had a shared intent to raise A.M.T. in Italy and that Monasky made no definite plan to return to the U.S., ordering A.M.T.'s return to Italy in accordance with the Hague Convention.[52]

Monasky appealed this decision, and the U.S. Sixth Circuit Court of Appeals granted a petition for a rehearing en banc and held that the District Court applied the correct legal standard and made no clear errors in determining A.M.T.'s habitual residence, affirming the judgment.[53] Monasky then appealed to the Supreme Court.[54]

A. How The Supreme Court defines habitual residency

Certiorari was granted by the Supreme Court for the purpose of clarifying the standard of habitual residence.[55] Habitual residence is not explicitly defined by the Hague Convention.[56] However, the Convention's explanatory report stated that this phrase was chosen intentionally to instruct the use of a factual inquiry, while also reserving the ability of courts to have "maximum flexibility" when making this determination.[57] One of the purposes of the Hague Convention is to have uniformity in making these determinations.[58] Because of this, the Supreme Court looked to what other treaty signatories had done, the consensus being those signatories applied a fact-driven inquiry into the particular circumstances of each case.[59] The Supreme Court cited the United Kingdom's Supreme Court determination that a child's habitual residence "depends on numerous factors. . . with the purposes and intentions of the parents being merely one of the relevant factors. . . the essentially factual and individual nature of the inquiry."[60] The highest courts of the European Union, Canada, and Australia also used similar tests for determining habitual residence.[61] Monasky argued that the Court should look to the

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[51] *Taglieri v. Monasky*, 2016 WL 10951269 6 (2016) (using the "shared intent" standard to determine A.M.T.'s habitual residency was proper in Italy).

[52] *Taglieri v. Monasky*, 2016 WL 10951269 6 (2016)

[53] *Monasky v. Taglieri*, 907 F.3d 404, 411 (6th Cir. 2018).

[54] *Monasky*, 140 S.Ct. at 728.

[55] *Monasky*, 140 S.Ct. at 728.

[56] *Id*. at 726; *see also* S. Treaty. Doc. No. 11, 99th Cong., 1st Sess., 19 I.L.M, 1501 (1980) [hereinafter S. Treaty].

[57] *Id.* at 727; *see also* Elisa Perez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, HCCH, 1, 32 https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf; *see also* Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L. Q. 537, 544 (1981); *see also* P. Beaumont & P. McEleavy, *The Hague Convention on International Child Abduction* 89, 89-90 (1999).

[58] U.S. Dept. of State – Bureau of Consular Affs., *Important Features of the Hague Abduction Convention - Why the Hague Convention Matters*, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html (last accessed Dec. 23, 2021).

[59] *Monasky*, 140 S.Ct. at 727-728.

[60] *Id.* at 728 (citing *A*, [2014] A. C., at ¶ 54).

[61] S. Treaty, *supra* note 56; *see also OL v.PQ*, 2017 E. C. R. No. C-111/17, ¶ 42 (holding that the habitual residence of a child must be established, taking account all of the circumstances of the case*);*

actual agreement between the parties; however, she was unsuccessful in citing to a single country that adopted her "actual-agreement proposal."[62]

Accordingly, the Supreme Court found that to not "thwart the objectives and purposes of the Convention," they would adopt a factual inquiry approach similar to the other signatory countries.[63] The Court held that the proper approach was to look at "a wide range of facts other than an actual agreement, including facts indicating that the parents have made their home in a particular place, can enable a trier to determine whether an infant's residence in that place has the quality of being habitual."[64] They defined the standard for habitual residence is present when the residence is "more than just transitory" and it is "customary, usual, and of the nature of a habit."[65] The Court found that to make a determination of habitual residency courts must look to extrinsic evidence, inducing a fact-sensitive inquiry, not one that is categorical.[66]

The Court also held that appeals of habitual residence determinations were to be reviewed on a clear-error basis to further promote the purposes of the Convention of a swift resolution so that a proper custody dispute can be fought in the proper jurisdiction.[67] Because of this, the lower court's judgment was to be given great deference.[68] Accordingly, because the District Court looked at all the facts relevant to the dispute, the Supreme Court found this sufficient to affirm their judgment.[69]

The District Court looked at the totality of the circumstances to determine that A.M.T. was born into a marital home in Italy and that there was no definitive plan to return to the U.S.[70] Monasky argued that there was both an "absence of settled ties in Italy" and that there were "unstable" conditions for A.M.T. in Italy.[71] However, the court found the circumstances of the marriage, as unstable as they were, to be insufficient evidence to find that Italy was not A.M.T's habitual residence.[72] The district court thus found that Italy was the best location for

Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R., at 421, 423-430, ¶¶ 43, 48-71, 424 D. L. R. (4th), at 410-417, ¶¶ 43, 48-71 (holding that a determination of habitual residence must look to all relevant considerations); *LK v. Director-General, Dept. of Community Servs.*, [2009] 237 C.L.R. 582, 596, ¶35 (Austl.) (holding that an attempt to identify a set list of criteria that bear upon where a child is habitually resident would deny the simple observation that the question of habitual residence will fall for decision in a very wide range of circumstances); *LCYP v. JEK*, [2015] 4 H.K.L.R.D. 798, 809-810, ¶ 7.7; *Punter v. Secretary for Justice*, [2007] 1 N. Z. L. R. 40, 71, ¶ 130 (N.Z.).

62 *Monasky*, 140 S.Ct. at 727-728.

63 *Id.* at 728.

64 *Id.* at 729.

65 *Id.* at 726 (citing *Black's Law Dictionary* 1176 (5th ed. 1979)).

66 *Id* at. 726.

67 *Id.* at 730.

68 *Id.* at 731.

69 *Id.*

70 *Id.*

71 *Monasky*, 140 S.Ct. at 731.

72 *Id.*

A.M.T to return to continue custody proceedings based on the Hague Convention.[73]

The decision to affirm was unanimous, with two separate concurring opinions.[74] Justice Thomas wrote a concurring opinion stating that he agreed with the Court's determination regarding habitual residence as a fact-driven inquiry that requires taking all the circumstances into account.[75] However, Thomas believes that the Court should have reached this decision by looking at the plain meaning of the text as opposed to the precedent that the other signatory countries set forth.[76] Because other countries have only recently agreed on this approach in the past ten years, Thomas believes the Court may be relying on this reasoning too heavily.[77] He states that, by relying on other countries precedent, the Court risks being "persuaded to reach the popular answer, but possibly not the correct one."[78] He proposes that a more uniform approach that better conforms to the Convention's purposes would be to follow the Hague Convention text's intention, such as the Convention's preamble and explanatory report, that also results in the same conclusion.[79]

Justice Alito also wrote a concurring opinion, agreeing that the question of habitual residence should be a factual inquiry, which can be determined without a parental agreement, and that the District Court's decision should be upheld because it deserves deference.[80] However, Justice Alito disagrees with Justice Thomas – that the U.S. should not align our definition of habitual residence with our fellow Hague Convention signatories, and rather that this should be used as a guidepost for the Supreme Court to create its own definition of 'habitual residence' that is more satisfying for addressing future Hague Convention issues.[81] Due to the broad range of definitions of 'habitual residency,' Alito finds that this is a factual inquiry, where the standard of review should look at abuse of discretion, not clear error.[82]

IV. Analyzing the Effects of International Parental Abduction and *Monasky v. Taglieri's* Impact

This section will analyze the Supreme Court's decision in *Monasky v. Taglieri*. First, it will discuss the defenses that can be raised under the Hague Convention and how the Court's decision impacts their application in future cases. Second, it

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[73] *Monasky*, 140 S.Ct. at 731.

[74] *Id.* Justice Ginsburg wrote the majority opinion joined by Justice Roberts, Justice Breyer, Justice Sotomayor, Justice Kagan, Justice Gorsuch, and Justice Kavanaugh. Concurring opinions written by Justice Thomas and Justice Alito.

[75] *Id.* at 732.

[76] *Id.* at 733.

[77] *Id.* at 719, 733.

[78] *Id.* at 734.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 735.

will discuss the grave risk defense and why it is so closely intertwined with Hague Convention petitions. Third, it will discuss how the Court reached its decision and the goals of this decision. Finally, this section will discuss how the Court could have analyzed this case in a different way based on Justice Thomas's concurring opinion.

The effects of abduction to a child can be devastating. Extensive research has shown that the result of being taken from a parent has long-term effects on the child, and the length of separation and location of where the child was taken can impact how severe these effects are.[83] Victims who are abducted for an extended period of time, which in some cases is long enough for the child to lose memory of the parent from whom they were abducted, results in increased rage and grief which manifests in anxiety, aggressive behavior, poor peer relations, distrust, and resentment.[84]

Additionally, in cases where children were relocated to countries where they were not familiar with the language or culture, these children often experienced developmental delays.[85] In many instances, a kidnapping parent takes their child back to the country that parent considers home but is also a location that their child has never been. In a recent study, left-behind parents that were victims of international parental kidnapping reported that the abducting parent usually took the child to a country that spoke the parent's native language (reported by 83 percent), had family that resided there (reported by 76 percent), lived in that country as a child (reported by 69 percent), or considered that their primary place of residence while growing up (reported by 68 percent).[86] Situations where a parent abducted their child to a country with which the abducting parent was familiar, but the co-parent was not, could present disadvantages to both the left-behind parent and the abducted child.

Because of the severity of the damage that abduction can cause a child in their formative years, child abduction is viewed by some to be a form of child abuse.[87] Additionally, the parents that are left behind when their child is abducted can be dealing with monumental grief caused by the loss of their child.

A. Defenses under the Hague Convention for parental child abduction

There may be certain circumstances where abduction is justified. A parent may find a large array of reasons to relocate internationally with their child, particularly when they fear for their own safety or the safety of their child. Because of this, the Convention allocated three defenses that can be raised in a petition that can prevent the child from being returned to the left-behind parent when the

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[83] Chiancone et al., *supra* note 9.

[84] Chiancone et al., *supra* note 9, at 4.

[85] U.S. Dept. of Justice, *A Law Enforcement Guide on International Parental Kidnapping* (July 2018), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250606.pdf.

[86] Chiancone et al, *supra* note 9, at 4.

[87] Commission on Security and Cooperation, *International Parental Child Abduction*, https://www.csce.gov/issue/international-parental-child-abduction (last visited Dec 26, 2021).

case is adjudicated.[88] First, if the child has "attained an age and degree of maturity at which it is appropriate to take account of its views," then the child can testify as to which parent it would prefer to live with.[89] The child's choice is not conclusive but it is highly instructive to a court making the discretionary determination of what is best for the child.[90] Second, if over a year has elapsed after the child has been abducted the court is encouraged to look at if it would be beneficial to uproot the child yet again or allow the child to establish roots in where they have been relocated.[91]

Finally, the third defense involves the 'grave risk' provision in Article 13(b) of the Hague Convention that allows the court to consider whether there is a grave risk that, if returned, the child would be exposed to physical or psychological harm, or place the child in an intolerable situation that the child should not be returned to their habitual residence.[92] This defense has instigated the most litigation surrounding its application due to the difficulty of determining what constitutes grave harm, and there has been considerable inconsistency of this determination between state, district, and federal courts.[93]

In *Blondin v. Dubois*, the Second Circuit expressed that neither inconvenience, economic hardship, nor a child's preference constitute grave harm that could prevent repatriation of a child; however, evidence of physical or psychological harm would constitute such risk of grave harm. The court described this dichotomy with the goal of encapsulating the protection from abuse by custodial parents.[94] *Blandin* instructs that courts may look to factors such as where the child is settled and where it would experience the least amount of unsettling activity, to determine if psychological harm would occur in a new environment.[95] The Ninth Circuit has also weighed in on this analysis and described that grave risk exists only if the child will personally suffer serious abuse if returned.[96] Meanwhile, one District Court has held that a history of abuse to the petitioner is not sufficient to meet this standard and that the abuse must be suffered, prior to abduction, by the

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[88] Jennifer Baum, *Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified*, AMERICAN BAR ASS'N (July 14, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/ready-set-go-fed-court-hague-child-abduction-treaty-demystified/; *see also* Hague Convention, *supra* note 10.

[89] Hague Convention, *supra* note 10.

[90] *Id.*

[91] *Id*. art. 12; *see also Lozano v. Alvarez*, 572 U.S. 1, 18-19 (2014) (Alito, J., concurring) (discussing "why courts have equitable discretion under the Hague Convention to order a child's return even after the child has become settled").

[92] Hague Convention, *supra* note 10; *see also* Sara Ainsworth, *The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence*, *in* DOMESTIC VIOLENCE MANUAL FOR JUDGES 2015, (Oct. 2014), https://www.courts.wa.gov/content/manuals/domViol/appendixG.pdf (discussing that courts have traditionally found the grave risk of harm must be directed at the child and they must have experienced it prior to abduction).

[93] Ainsworth, *supra* note 92.

[94] *Blondin v. Dubois*, 238 F.3d 153, 167-68 (2nd Cir. 2001) (holding that the lower court properly applied Article 13(b), as repatriation of children would subject them to a 'grave risk of psychological harm' due to previous abuse by a parent).

[95] *Id.* at 156.

[96] *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005).

child.[97] In contrast, another District Court held the opposite, that spousal abuse is a factor in determining whether there is a grave risk to the child upon return.[98] Consequently, there is no clear test for determining the proper standard to prove grave harm, and thus its application is not trustworthy.

B. The intersection between domestic abuse and Hague Convention petitions

A history of abuse is common in Hague Convention cases, and often is the instigating factor as to why a parent flees a country with their child without the other parent's consent.[99] A recent study funded by the U.S. Department of Justice that examined over 300 Hague Convention cases found that a significant number of the abducting parents were mothers fleeing violence from the child's father.[100] Additionally, from this survey, out of 30% of left behind parents admitted to being accused of abuse by their spouse or family prior to having their child taken from them.[101] As seen in the *Monasky v. Taglieri* decision, under the Court's current analysis, an abused parent may be ordered to return their children to their abusers.[102] This approach neglects the fact that batterers who abuse their partners often abuse their children as well.[103] Essentially, the mothers in these cases are being ordered to place their children in situations that have the potential to be dangerous.[104] The decision ordered that an abducting parent who had reported abuse to authorities return her child to their abuser.[105] In making its determination, the Court ruled that habitual residency was not an inquiry that considered surrounding circumstances to be analyzed as circumstantial evidence leading up to the abduction, such as abuse of the fleeing parent.[106]

In *Monasky*, A.M.T.'s mother fled because she feared for her safety based on the abuse that she had faced for years, making her attempted defense of the Article 13(b) protection viable.[107] However, the Court held that because A.M.T. had not previously experienced any physical abuse at the hands of her father, she was

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[97] *Tabacchi v. Harrsion*, No. 99 C 4130, 2000 WL 190576, at *12-13 (N.D. Ill. Feb. 10, 2000).

[98] *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057-58 (E.D. Wash. 2001).

[99] *Litigating International Child Abduction Cases Under the Hague Convention*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN & KILPATRICK TOWNSEND 53 (2012) https://www.missingkids.org/content/dam/missingkids/pdfs/publications/pdf3a.pdf.

[100] Edleson et al., *supra* note 3, at 9.

[101] *Id.* at 22.

[102] *Monasky*, 140 S.Ct. at 729 (Taglieri testified that she experienced abuse at the hands of Monasky, yet the Supreme Court reasoned that under the habitual residency test A.M.T. was to be returned to Italy).

[103] Misha Valencia, *When Protecting Your Children is a Crime*, DAME MAGAZINE (Feb. 10, 2020) https://www.damemagazine.com/2020/02/10/when-protecting-your-children-is-a-crime/.

[104] *Id.*

[105] *Monasky*, 140 S.Ct. at 729.

[106] *Id.* (The Court stating, "[w]e doubt, however, that imposing a categorical actual-agreement requirement is an appropriate solution, for it would leave many infants without a habitual residence, and therefore outside the Convention's domain. Settling the forum for adjudication of a dispute over a child's custody, of course, does not dispose of the merits of the controversy over custody. Domestic violence should be an issue fully explored in the custody adjudication upon the child's return.").

[107] *Monasky*, 140 S.Ct. at 729.

not in danger of grave harm by being returned to her father in Italy, and thus Monasky could not be protected by Article 13(b).[108] The Supreme Court declined to consider Monasky's history of abuse by Taglieri as meeting the standard of danger of grave harm that would apply to A.M.T. because A.M.T. *herself* had not experienced it, despite verbal threats that Taglieri made referencing physically harming A.M.T.[109] In its decision, the Supreme Court acknowledged that A.M.T.'s familial situation was "tumultuous" but determined that this did not impact a determination of her habitual residence.[110] While this decision was in accordance with the Hague Convention's purpose of returning the child to its habitual residence to continue custody proceedings if necessary, this objective can be problematic when a child's safety is of concern, as it was for Monasky here.

Monasky was even successful in reporting this abuse to Italian police, which resulted in Taglieri being held accountable in court, where he was found liable for assault and battery and subsequently ordered to pay $100,000 in damages.[111] Despite this conviction, the Supreme Court ruled that this shouldn't be a factor in determining where A.M.T. should live.[112] In a study of Hague Convention cases, 85.7% of the women fleeing from abuse party to a Hague Convention petition had reported the abuse to at least one resource.[113] Reporting these incidents of abuse is already difficult for women living with a co-parent in a country foreign to them because these reports are often met with skepticism and, in some cultures, abuse is accepted behavior.[114] Even if such reports are taken seriously and acted upon, they do not have a significant effect on a Hague Convention analysis, according to the Supreme Court, because this does not pose a "grave risk" specifically to the child.[115]

The biggest issue with the Supreme Court's conclusion is that there is evidence that abusers who batter their partners often abuse their children as well.[116] Sarah Gundle, a psychotherapist who specializes in treating trauma survivors stated she has found that "if a parent has abused their partner, the risk increases significantly to the child. . . if the [father] can no longer control the mother, their anger and rage is very often displaced on the children."[117] The complexities of

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[108] *Monasky*, 140 S.Ct. at 729.

[109] *Id.* at 731.

[110] *Id.*

[111] Valencia, *supra* note 103.

[112] *Monasky,* 140 S.Ct. at 731.

[113] Edleson et al., *supra* note 3.

[114] Edleson et al., *supra* note 3, at 127.

[115] *See Monasky*, 140 S.Ct. at 723 (holding that grave risk to a child is present if that child has personally suffered abuse at the hands of the left behind parent, but not if only witnessed the abuse to another family member).

[116] Edleson et al., *supra* note 3; Valencia, *supra* note 103.

[117] Valencia, *supra* note 103; *see generally* SARAH GUNDLE, PSY.D., https://www.sarahgundlepsyd.com (Sarah Gundle is an Israeli Immigrant that focuses her trauma recovery work on international cases and has worked with the United Nations, Burma Border Projects, the 9-11 Trauma Commission Therapists Network, and Physicians for Human Rights).

custodial battles often do not adequately protect children from an abusive parent. Even in domestic custody disputes, a study by the Center for Judicial Excellence found that in the short period between June 2009 and January 2010, there were 75 children murdered by an abusive father involved in custody proceedings.[118] Furthermore, many of the countries where the U.S. repatriates children lack comprehensive domestic violence legislation or otherwise have ineffective legal enforcement of these laws when they are present.[119]

The Supreme Court's recent interpretation of how a court is to determine habitual residency of a child fails to fully encompass the evidence of what could constitute grave harm to a child. By neglecting the father's history of abusing the mother, ostensibly because it does not directly impact A.M.T., the Court is ignoring the statistical evidence of how these patterns of abuse overlap. Ordering A.M.T.'s return to Italy despite awareness of the father's abusive behavior likely puts her at risk of grave harm. The ability of Courts to step in to save children from potentially dangerous situations should not be undervalued. U.S. courts need to look at the issue of habitual residency more broadly and should incorporate the use of extrinsic evidence to properly determine where a child is most safe. Doing so would not frustrate the purposes of the Convention as it would fall under the grave harm defense that exists to help ensure safety when undergoing Hague Convention analyses.

Another difficulty presented by the Supreme Court's interpretation of the Hague Convention is that there is no guarantee that, once returned to the child's location of habitual residence, the custodial parent will comply with subsequent proceedings as purported.[120] Even if the disobeying parent is held in contempt of court, courts may find difficulty enforcing such court orders across international borders.[121] It was found that many mothers who were engaged in an international custody battle lost contact with their children when fathers refused to comply with visitation orders from foreign courts.[122] Concerningly, the abducting parent may not have standing in foreign court systems where they are not citizens. The visiting parent is often at a disadvantage due to customary and language barriers that are presented when attempting to litigate in a foreign court system.

V. Impact

The determination of a child's habitual residency is particularly important in cases where the child itself cannot testify because it is too young. While the

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[118] Cara Tabachnick, *Failure to Protect: The Crisis in America's Family Courts*, THE CRIME REPORT (May 6, 2010), https://thecrimereport.org/2010/05/06/failure-to-protect-the-crisis-in-americae28099s-family-courts/.

[119] Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 624 (2000) (citing the Bureau of Democracy, Human Rights, and Labor, United States Dep't of State, Country Reports on Human Rights (1999)).

[120] Christine Powers Leatherberry, *International Custody 101: Helpful Tips for Parents*, CONNATSER FAM. L. (Apr. 25, 2017), https://connatserfamilylaw.com/international-custody-101-helpful-tips-for-parents/.

[121] *Id.*

[122] Edleson et al., *supra* note 3, at 178.

recent *Monasky* decision is narrowly applied to children abducted by a parent when they were too young to discern their place of residency, this issue is nevertheless widespread among Hague Convention petitions.[123] International parental abduction is one of the only crimes against children that is more likely to occur the younger the child is.[124] A 1999 study found that 44 percent of children abducted by a family member were younger than six years old.[125] At this age, children are not able to properly identify or testify to their surroundings prior to abduction, creating the need for an unbiased court to make the determination for the family.[126] Based on these statistics, the Supreme Court's decision will have an implication on many future U.S. Hague Convention petitions.

Additionally, the Supreme Court's decision to make a factual inquiry of a child's location of habitual residency, and not to look just to what the parents purport to be the agreement of where they had previously decided to raise the child, is monumental – such was the precedent in the U.S. prior to *Monasky*.[127] This may positively impact cases where the intent is difficult to discern or shared intent by the parents is not possible as they could not have a meeting of the minds. However, the change of precedent can negatively impact cases where an explicit agreement is made between parents that is later broken by one party. While a court would still be obligated to look at explicit agreement as a factor of the case, it would not be dispositive but rather included alongside other relevant evidence.

Overall, this recent decision will have a large impact on litigation surrounding Hague Convention petitions adjudicated in U.S. court systems. The new framework for determining a child's habitual residence is now to be looked at using a more holistic approach in an effort to follow the Convention's purposes by objectively finding where the child should return. However, this approach is still not perfect. There is room for error in many cases where there may be reasons that the abducting parent fled, such as abuse, and where the parents may have had an agreement on where the child should be raised that was breached in abduction.

A. International Uniformity of Application in the Hague Convention

The purpose of the Convention was to create a uniform approach of application among signatory countries, which, as a member, the U.S. must strive to achieve.[128] As mentioned above, uniformity is particularly important in international kidnapping cases because of the high risk of returning children to an abusive parent. Additionally, compliance with these purposes promotes other

123 Hammer et al., *supra* note 6, at 9.

124 *Id.*

125 *Id.* at 4.

126 Hammer et al., *supra* note 6, at 5.

127 *See Mozes*, 239 F.3d at 1084 (2001) (holding that there must be given significant weight to the intent of the parents when determining habitual residence); *see also Ahmed*, 867 F.3d at 690 (2017) (holding that the abducting parent has the burden to prove the shared intent of the parents or where the child is more acclimatized).

128 Letter of Submittal from George P. Shultz, *supra* note 23.

countries to follow suit and avoid international disputes, keeping these disputes in the respective custodial courts of each country. This idea is based in the value of comity, the voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another for the purpose of international harmony.[129]

In *Monasky*, the Supreme Court indicated that it approached the case with a main goal of comity, achieving this by giving the opinions of other signatory country "considerable weight."[130] The Supreme Court cited precedent from the United Kingdom, Canada, Australia, Hong Kong, and New Zealand, all of whom indicated that determining habitual residence is a factual inquiry in which the Court is entitled to look at all relevant circumstances, and that an actual agreement between the parents is not dispositive.[131] Following this analysis, the U.S. Supreme Court agreed that, in order to avoid thwarting the purposes of the Convention, it would apply the same approach.[132]

This attempt of complying with speculation of how other signatories would approach this issue is beneficial in pursuing the goal of comity. However, as Justice Thomas expressed in his concurrence, the Supreme Court could have reached the same conclusion based on its own judgment.[133] By not following other countries' precedent, the Court could have created a test for habitual residency using the explanatory materials and the language of the Convention itself to reach a conclusion that better follows the purposes of the treaty itself. Additionally, the Court could have tailored the test to better fit the unique position of the U.S. regarding the adjudication of these petitions. The U.S. government submitted an amicus curiae brief in support of neither party, advocating that the Convention used the phrase habitual residence intentionally because it was different than both the terms domicile and nationality- which would have resulted in too rigid of an application.[134] The term habitual residence instead allows for the flexibility of familial circumstances.[135] The Supreme Court, nevertheless, attempted to create a narrower definition despite this opinion. By creating too narrow of an exception for the habitual residency rule, it appears as though the Court placed higher value on comity with other nations over the safety of children that go through U.S. court systems.

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[129] *Comity*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/comity (last visited Jan. 9, 2022); *Comity*, BLACK'S LAW DICTIONARY, (ONLINE LEGAL DICTIONARY 2DED.) (last visited Jan. 9, 2022).

[130] *Monasky*, 140 S.Ct. at 727.

[131] *Id.* at 728 (indicating these were just some of the other signatories' decisions, and there were other countries with conflicting legislatures).

[132] *Id.* (stating that it is important to look towards other signatories' opinions on the same issue for the purpose of uniform application).

[133] *Id.* at 733 (Thomas, J., concurring).

[134] Brief for the United States as Amicus Curiae Supporting Neither Party, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935).

[135] *Id.*

VI. Conclusion

Every year, a significant number of children are wrongfully taken across international borders by a family member, leaving another family member behind.[136] While there are various reasons why this happens, the child's safety is what is most important when adjudicating these cases – something the 1980 Hague Convention of International Kidnapping strives to ensure by mandating that signatories return children to the location of the child's habitual residency. The instability already present in the child victim's life is clear, but can be further aggravated by other factors, such as the duration of relocation or familiarity with the culture in which they are forcibly immersed. This situation can become even more grievous if the child is suffering abuse at the hands of a parent.

In *Monasky v. Taglieri*, the Supreme Court held that habitual residency is not only established solely by an agreement between a child's parents, but by looking at the totality of the circumstances to include discerning where the parents intended to raise the child. By doing this, however, the Supreme Court neglected to consider certain evidence such as the kidnapper fleeing an abusive family member, holding that this did not constitute grave risk to the child unless abuse happened directly to the child—an enumerated defense for international kidnapping that would have allowed the child to stay in the U.S. This decision was made in accordance with the goal of comity through adhering to precedent established by other signatory nations while simultaneously neglecting possible indicators of what constitutes grave risk to a child.

This decision will likely have a large impact on families involved in international relationships hoping to invoke the Hague Convention, but where an implicated child is too young to testify as to its place of habitual residency This change will likely be positive for those who hope to get a wrongfully taken child returned, but could negatively impact those who are fleeing abusive partners.

[136] Hammer et al., *supra* note 6, at 2.

The Indigenous Alternative: TEK, IEL, and Solutions for the Unsolvable

Cara Victoria Sawyer*

Abstract

This comment addresses the intentional exclusion of Indigenous nations from the United Nations and, consequently, from the UNFCCC and subsequent climate regime. It cautions of the adverse consequences that have resulted from such exclusion, both to the warming planet and to all its human residents. Critics say that the climate regime has fallen woefully short of reaching its goals. However, this comment suggests that including Indigenous nations in substantial international climate change conversations and decisions could result in yet-to-be-made progress toward reducing global warming. The permanent position status that the Inuit people hold on the Arctic Council, for example, helped empower them to envisage a unique solution to the impact climate change was having on their lives and take action in an international court to plant their idea in the international consciousness—that human rights and environmental rights are inextricably intertwined.

This comment posits that the clean development mechanism ("CDM") is not inherently broken, but rather that carbon markets have been poorly deployed and can be reimagined to substantially address climate change. Including Indigenous experts with traditional ecological knowledge ("TEK") on the expert committee mandated by the Paris Agreement and granting permanent position or voting status to Indigenous nations within the UN climate regime could bring alternate and lasting solutions in climate change. To illustrate how Indigenous philosophies might bear on reimagining carbon markets, the comment compares current carbon market implementation with how two different Indigenous philosophies might alter them such that they in fact operate to achieve the goals of the Paris Agreement.

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I. Introduction

To understand why Indigenous voices are conspicuously missing from international conversations around climate change and the disastrous fallout such omission entails, we must begin with the colonialism that was foundational in building the international legal structure. As a result, the United Nations Framework Convention on Climate Change ("UNFCCC") and other international environmental governance mechanisms intentionally exclude Indigenous peoples and traditional ecological knowledge ("TEK") from discussions and decision-making in international environmental law ("IEL"). At a basic level, tribal governance structures are generally excluded from United Nations ("UN") governance bodies because they are not a State. This and other systematic exclusion tactics are a gross lapse in judgment that negatively affects us all and require remedy.

This comment insists that all Indigenous nations should participate in international organizations not just because it is their right, but because consideration of all cultural viewpoints has the potential to yield creative solutions. The Inuit possess the right to permanent participation in an international body and, with such support, are able to connect human rights infringements from climate change with human rights violations on the international stage. The comment then examines alternative economic theories propounded by two different Indigenous nations as applied to the climate regime's Clean Development Mechanism ("CDM"). Each proposes a viable alternative application of the CDM. It concludes that the CDM is not inherently broken but incorrectly deployed, holding out hope that the goals of the Paris Agreement may still be met, and that climate change may still be addressed.

II. Background

The climate regime (describing the body of IEL agreements created under the UNFCCC framework)[1] has proven woefully inadequate in addressing principle causes of climate change, as evinced both by our own senses and a massive and ever-growing body of science,[2] while often exacerbating the problem. The "historic" Paris Agreement ("Agreement") came into force in 2015, but many scientists, scholars, and civil society groups point out critical flaws.[3] Solutions are almost entirely non-binding and enable major polluters to abrogate responsibility for the harms they cause.[4] The Agreement and underlying UNFCCC create "false solutions," such as carbon markets and carbon offset mechanisms.[5] These market mechanisms purport to offer a solution, but in effect allow polluters to continue with business as usual and even profit in the meantime.[6] An Indigenous Environment Network report describes carbon markets as a privatization of our shared atmosphere.[7] Other climate justice groups demonstrate how climate markets further compromise the rights of communities disproportionately affected by climate change, such as Indigenous nations, who hold little or no responsibility for it.[8]

A. IEL, the Climate Regime, and Flawed Economic Mechanisms

The UN climate regime created and continues to justify global carbon markets, which are criticized as ineffective at best and actively detrimental at worst.[9] In the face of developed countries' resistance to binding treaty regulations or contingent liability, the climate regime employed nationally determined contributions ("NDCs"), whereby each Party voluntarily declares how much they will reduce emissions.[10] The Kyoto Protocol created three "flexibility mechanisms."[11]

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[1] United Nations Framework Convention on Climate Change art. 4, Mar. 21, 1994, 1771 U.N.T.S. 107, 170 [hereinafter UNFCCC].

[2] *See generally* MILLENNIUM ECOSYSTEM ASSESSMENT: ECOSYSTEMS AND HUMAN WELL-BEING SYNTHESIS (Millennium Assessment Board of Review Editors et al. eds, 2005) [hereinafter MEA Report].

[3] Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective*, 33 WINDSOR Y.B. ACCESS JUST. no. 3, 2016, 129, 130-32.

[4] Dehm, *supra* note 3, at 130.

[5] *Id.*

[6] Dehm, *Carbon Colonialism*, at 131; UNFCCC, *supra* note 1; Paris Agreement, Dec. 12, 1995, Registration No. 54113 [hereinafter Paris Agreement].

[7] Indigenous Environment Network, *No to Colonialism: Indigenous Peoples' Guide False Solutions to Climate Change* 4 (2009).

[8] Dehm, *supra* note 3, at 130; Elizabeth Ann Kronk Warner, *South of South: Examining the International Climate Regime from an Indigenous Perspective*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 451, 451 (Shawkat Alam et al. eds., 2016).

[9] Dehm, *supra* note 3, at 134; Chuwumerije Okerere & Philip Coventry, *Climate Justice and the International Regime: Before, During, and After Paris*, 7 WILEY PERIODICALS 834, 838 (2016).

[10] Paris Agreement, *supra* note 6, Art. 4, ¶ 2]; Dehm, *supra* note 3, at 132; Claudia Comberti, Thomas F. Thornton, & Michaela Korodimu, *Addressing Indigenous Peoples' Marginalisation at International Climate Negotiations: Adaptation and Resilience at the Margins* 11 (Envtl. Change Institute, Univ. of Oxford, Working Paper 2016) (available at https://ssrn.com/abstract=2870412).

Parties could save or prevent emissions using any of the three.[12] Reducing Emissions from Deforestation and Forest Degradation ("REDD+") enables credit production from forest conservation-based projects.[13] Joint Implementation ("JI") consists of a State or company sponsoring a project in another State that would otherwise not occur, with such projects' goals being to reduce anthropogenic (i.e., human-created, emissions).[14] Finally, the CDM is the method by which carbon trading is enabled.[15] The Paris Agreement expanded carbon markets, whereby a country that was under its NDC allowance could either sell or trade representative credits with another State that needed to buy or trade in order to "reduce" its emissions to meet its NDC.[16] Reimagining the CDM is the focus of this comment's proposal.

Author Julia Dehm provides a Third World Approach to International Law ("TWAIL") perspective of the CDM, noting that although many studies demonstrate how futile it is to achieve any significant emissions reductions through the CDM, the climate regime nonetheless continues to justify carbon markets because they take a global perspective and thus provide commonality.[17] Though this is perhaps technically accurate, it is nonetheless over-simplified and inadequate.[18] Both emissions (sources) and 'sinks' (carbon storage mechanisms) could be viewed as an aggregate. However, the idea is inherently flawed because it fails to address root causes of climate change.[19] Carbon markets instead use a 'free market' mechanism to financially allocate usage of sinks and sources.[20] The carbon offset credit systems allow emitters to purchase the right to pollute, thus creating *no actual reduction* of emissions and failing to achieve the reason the CDM was created in the first place—to actually reduce the increasing of the Earth's temperature.[21] Indeed, the Paris Agreement aimed to hold global temperature increase to a maximum of 2° C with a nod towards adhering to 1.5°,[22] but were all countries to meet their NDCs, scientific projections show the planet will still ultimately warm by 2.7-3.7 °C.[23] Not only do carbon markets fail to sufficiently reduce emissions to meet Paris Agreement goals, but what is worse, the

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[11] Kyoto Protocol to the United Nations Framework Convention on Climate Change Art. 12, Feb. 16, 2005, 2303 U.N.T.S. 162, 224 [hereinafter Kyoto Protocol]; Dehm, *supra* note 3, at 133.

[12] Kyoto Protocol, *supra* note 11.

[13] Dehm, *supra* note 3, at 132-33.

[14] *Id.*

[15] Kronk Warner, *supra* note 8, at 451.

[16] Paris Agreement, *supra* note 6, Art. 4, ¶ 2(a); *see also* Dehm, *supra* note 3, at 133.

[17] Dehm, *supra* note 3, at 142, 145-46 (in this context, commonality implies that the solution is common to all who are impacted).

[18] Dehm, *supra* note 3, at 145-46.

[19] Dehm, *supra* note 3, at 137, 145-46.

[20] *Id.*

[21] Dehm, *supra* note 3, at 132-34.

[22] Paris Agreement, *supra* note 6, Art. 2, ¶ 1(a); *see also* Okerere & Coventry, *supra* note 9, at 839.

[23] Okerere & Coventry, *supra* note 9, at 839.

implementation of these mechanisms often leave chaos in their wake.[24] There are several issues.

First, carbon offset markets promote "a system of technocratic rule managed by experts."[25] Such systems take power from local actors and place decision making in the hands of scientists and "experts" who dictate from the top down what will be done to solve the problem of climate change.

Additionally, when land is restricted to carbon offset purposes, those living traditionally on land can be ousted, and any resulting benefit is funneled to the purses of a few.[26] For example, under REDD+, General Motors, American Electric Power, and Chevron purchased carbon offset credits to offset their emissions and make money on the carbon market by 'helping' to save the Amazon.[27] After creating forest reserves under REDD+, they hired local Green Police to enforce protection of their 'investment,' with the resultant "green grabbing" forcing Indigenous peoples off of lands they had traditionally inhabited – and, ironically, helped to sustainably manage.[28]

For these and other reasons, the current approach to carbon offsetting does not work. However, though Dehm argues carbon markets do not work as a matter of course, it may instead be possible to address climate change and achieve the goals of the Paris Agreement through other means.

B. Marginalization of Indigenous Peoples in International Law

There have been limited opportunities for Indigenous peoples to present their concerns, ideas, or knowledge, including TEK, in the UN or other important international fora, and similarly the climate regime has yet to truly consider Indigenous perspectives.[29]

To find out why, we must look to the history and philosophy behind international law. International law distinguishes between the global North and the global South. Northern[30] countries with technological and industrial advance-

[24] Kronk Warner, *supra* note 8, at 451; Okerere & Coventry, *supra* note 9, at 839.

[25] Dehm, *supra* note 3, at 135.

[26] Dehm, *supra* note 3, at 136.

[27] Kronk Warner, *supra* note 8, at 451; *see also* Dehm, *supra* note 3, at 134-35.

[28] Kronk Warner, *supra* note 8, at 451; *see also* Dehm, *supra* note 3, at 134-35.

[29] Comberti et al. *supra* note 10, at 2; Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, COLO. J. INT'L ENVTL. L.& POL'Y 127, 133-34 (1994); Kronk Warner, *supra* note 8, at 451; Sabaa Ahmad Khan, *Rebalancing State and Indigenous Sovereignties in International Law: An Artic Lens on Trajectories for Global Governance*, LEIDEN J. INT'L. L. 675, 685 (2019).

[30] This paper distinguishes the global North (wealthy, industrialized countries such as the United States, members of the European Union, Japan, Canada, New Zealand, and Australia who hold more economic power and whose economic interests diverge from those of the global South), from Western culture or society (the homogeneous cultural concept of a modern, industrialized, and Americanized culture that rejects values arising from differing or traditional cultures). *See, e.g.*, Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues, in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 2 (Alam et al. eds., 2016) (defining the global North); Samuel P. Huntington, *The West Unique, Not Universal*, 75 FOREIGN AFFS., no. 6, 1996, at 28, 28(defining Western culture).

ments are often referred to as civilized, developed, or first-world.[31] Whereas these terms evoke positive imagery of arrival and top-tier positioning, in contrast, the countries of the global South are considered primitive, referred to as developing or third-world, and hold a predictably lower position in the global power hierarchy.[32] This hierarchical system undergirded colonialism, and the resulting international laws were designed to civilize the cultures who Europeans cased as uncivilized.[33] Northern mainstream cultures and methodologies came to dominate international governance, policy, cultural, and economic spheres, while States of the global South continue to hold significantly less power and exert less influence.[34]

However marginalized the South may be, Indigenous nations regardless of location are further marginalized, or "South of South."[35] The United Nations General Assembly ("UNGA") does not recognize "nations," though they are a group of people with a common language, common lands, history, and culture.[36] Instead, only States can be members of the UN.[37] So even though there are over 5,000 nations, most go unrepresented amongst the 193 UN member-States.[38] Created under the UN structure, the climate regime similarly only recognizes States.[39]

Though countries in which Indigenous populations reside do hold seats, representation is nonetheless minimal, for several reasons.[40] First, Indigenous people and ideas remain underrepresented in State governance.[41] Second, States often discriminate against Indigenous peoples.[42] Third, Indigenous non-Western self-governance methods frequently go unrecognized by their States of residence.[43] As a result, Indigenous viewpoints remain un- or under-represented in climate governance.[44]

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[31] M. Rafiqul Islam, *History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 23, 23 (Shawkat Alam et al. eds., 2016).

[32] *Id.*

[33] Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 3D WORLD Q. 739, 741-42 (2006).

[34] Atapattu, *supra* note 30, at 2; Anghie, *supra* note 33, at 741.

[35] Kronk Warner, *supra* note 8, at 453-56.

[36] LaDuke, *supra* note 29, at 132; U.N. Charter, Art. 4, ¶ 2.

[37] LaDuke, *supra* note 29, at 132; U.N. Charter, Art. 4, ¶ 2.

[38] LaDuke, *supra* note 29, at 132; Comberti et al., *supra* note 10, at 3; *Member States*, UNITED NATIONS, https://www.un.org/about-us/member-states (last visited Dec. 26, 2021).

[39] U.N. Charter, Art. 4, ¶ 2; UNFCCC, *supra* note 1, Art. 20; Kyoto Protocol, *supra* note 11, at Art. 13, ¶ 8; Paris Agreement, *supra* note 6, at Art. 16, ¶ 8.

[40] Comberti et al., *supra* note 10, at 23.

[41] Comberti et al., *supra* note 10, at 23.

[42] *Id.*

[43] *Id.*; Kronk Warner, *supra* note 8, at 453-56.

[44] Kronk Warner, *supra* note 8, 453-56.

C. TEK and IEL

Indigenous ways of thinking tend to differ from those of the global North.[45] "Integrated system[s] of knowledge, practice, and beliefs" are considered TEK.[46] Indigenous leaders in their own words describe TEK as:

> ". . .a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment. Further, TEK is an attribute of societies with historical continuity in resource use practices; by and large, these are non-industrial or less technologically advanced societies, many of them Indigenous or tribal."[47]

TEK is critically important in the context of climate change because a group of people with personal, group, and generational knowledge hold a holistic and contextualized perception of their environment impossible to envision by any other means. As one leader noted:

> ". . .we spend a great deal of our time, through all seasons of the year, travelling over, drinking, eating, smelling and living with the ecological system which surrounds us. Aboriginal people often notice very minor changes in quality, odour and vitality long before it comes obvious to government enforcement agencies, scientists or other observers of the same ecological system."[48]

Thus, while Western scientists define their scope of study by *excluding* everything except a specific subject matter, Indigenous peoples instead define their scope of study by *including* every aspect of an ecosystem.[49]

TEK is clearly invaluable to assessing the extent of climate change and creating solutions. However, to date, TEK is generally ignored in IEL fora.[50] On the rare occasion a Conference of the Parties ("COP")[51] allows an Indigenous voice to be heard, cultural barriers or differences in rhetorical modes can obscure the message.[52] As one Indigenous leader at COP21 succinctly stated, "we are the

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[45] Fikret Birkes, *Traditional Ecological Knowledge in Perspective*, *in* TRADITIONAL ECOLOGICAL KNOWLEDGE: CONCEPTS AND CASES, 1, 5 (Julian T. Inglis, ed., Int'l Dev. Res. Ctr. 1993); Comberti et al., *supra* note 10, at 5.

[46] Birkes, *supra* note 45, at 5; Comberti et al., *supra* note 10, at 3.

[47] Birkes, *supra* note 45, at 3.

[48] Chief Robert Wavey, *International Workshop on Indigenous Knowledge and Community-Based Resource Management: Keynote Address*, *in* TRADITIONAL ECOLOGICAL KNOWLEDGE: CONCEPTS AND CASES 11, 11-12 (Julian T. Inglis ed., Int'l Dev. Res. Ctr. 1993).

[49] Chief Wavey, *supra* note 48, at 11-12; Comberti et al., *supra* note 10, at 18-19 (documenting Indigenous peoples' awareness of exceptional manners in which their environment is changing as evidence of climate change at subtle ecosystemic levels).

[50] Khan, *supra* note 29, at 675-78.

[51] Conference of the Parties, i.e., Parties to the climate regime.

[52] Comberti et al., *supra* note 10, at 15 (personal anecdote from a COP, where after an Indigenous leader's speech, an audience member commented, "[i]t's nice for them that they are here, but it wasn't a very well-structured presentation. I mean, they didn't really convey any ideas very clearly, so I didn't really follow." The author notes that this is a result of the audience member confronting an unrecogniz-

ones already providing solutions to climate change and we are completely being ignored."[53]

D. Intentional Muting of Indigenous Voices

The climate regime is a reflection of South-of-South marginalization and resultant silencing.[54] First, only States already members of the UN can adopt and be Parties to the UNFCCC.[55] Further, as discussed above, only States can be UN members.[56] Non-State Indigenous peoples, tribes, or nations are therefore not Parties to any of the major environmental treaties and therefore have no say in shaping IEL. One may counter that UNFCCC, the Kyoto Protocol, and the Paris Agreement all contain the provision that any observer who is not a Party may attend COP sessions. But the provision contains a massive caveat—they ". . .may be so admitted *unless at least one third of the Parties present object*" (emphasis added).[57] In practice, this means that any observer wanting to remain in attendance has to continuously appeal to at least two thirds of the parties present, which can place one in the unfortunate position of having to choose between voicing an opinion or remaining in the room.

Second, IEL leadership unfortunately physically marginalizes Indigenous peoples at the COPs. This intentional distancing can be seen in the spatial design of the 2015 Paris COP21 that yielded the Paris Agreement. A November 2016 paper by authors Comberti, Thornton, and Korodimou provides a first-hand account as experienced by a translator for several Indigenous Amazonian leaders at the COP.[58] COP meetings are already confusing to the uninitiated, and require fluency in navigating the proceedings in order to even get 'inside' the conference.[59] The translator noted that Hall 6, the space set aside for important discussions, was placed far from civil society discussions in Hall 4. Also, the "green space" set aside for Indigenous peoples (confusingly colored orange on notably uninformative maps) was located outside, not inside, the main conference, resulting not in automatic *inclusion* of Indigenous attendees but rather automatic *exclusion*.[60]

These are only a few examples of a calculated, or perhaps worse, mindless silencing of voices with alternative points of view. Such silencing has enabled a

able mode of discourse). *See also*, Edward T. Hall, THE SILENT LANGUAGE (Doubleday & Co. 1959) (whereby Western society will often speak of conclusions and personal beliefs, members of Indigenous and other ethnic groups may speak in stories. They objectively convey no less accurate or clear information, but an individual less familiar with listening to a discursive communication style may be left with the impression of a lower educational level or simply with confusion).

53 Comberti et al., *supra* note 10, at 15.

54 *Id.* at 13.

55 UNFCCC, *supra* note 1 Art. 7, ¶ 6.

56 U.N. Charter, Art. 4, ¶ 2.

57 UNFCCC, *supra* note 1, Art. 7, ¶ 6; Kyoto Protocol, *supra* note 11, at Art. 13, ¶ 8; Paris Agreement, *supra* note 6, at Art. 16, ¶ 8.

58 Comberti et al., *supra* note 10, at 13-14.

59 Comberti et al., *supra* note 10, at 14-15.

60 Comberti et al., *supra* note 10, at 13-15.

broken carbon market structure and continues to distract us from making urgently necessary improvements to global human systems and infrastructure.[61]

III. Discussion

A. The ICC: Linking Climate Change and Human Rights

The Artic Environmental Protection Strategy ("AEPS"), which later became the Artic Council ("AC"),[62] is significant in this conversation. This international organization gave Permanent Participant (PP) status to six Artic Indigenous Peoples Organizations (IPOs).[63] The AC's member IPOs include the Inuit Circumpolar Council ("ICC") and five other Indigenous groups from the Artic region, most of whose memberships are not defined by national borders, but rather by tribal affiliation.[64] According to the ICC's Circumpolar Inuit Declaration on Sovereignty in the Artic ("Inuit Declaration"), "Inuit are permanent participants in the Artic Council with a *direct and meaningful seat at discussion and negotiating tables* (emphasis added)."[65] Explicit in this statement is the fact that they cannot be removed from the AC, and implicit in it is that their voices are heard. This is currently a unique position for an Indigenous nation.

Thus empowered, in 2005 the president of the ICC petitioned the Inter-American Commission on Human Rights ("IAHCR") with a claim against the United States ("U.S.").[66] The claim pointed to the U.S. government's knowledge about links between rising global temperatures and greenhouse gasses ("GHGs"), the U.S. being the largest emitter of GHGs, its failure to ratify the Kyoto Protocol, and its negligible efforts to reduce emissions.[67] Most importantly, the Inuit Petition presented the idea that the U.S. government knew the impacts these decisions were having on the Artic, and by extension, on the Inuit people.[68] Though the IACHR did not proceed with the Petition, it nonetheless was the first instance of international legal action establishing a link between climate change and human rights.[69] The Petition was featured in the front section of the New York Times[70] and given press coverage by the BBC.[71] It subsequently contributed to

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[61] Dehm, *supra* note 3, at 134.

[62] *History of the Arctic Council Permanent Participants*, The Arctic Council (Aug. 28, 2015) https://arctic-council.org/en/news/history-of-the-arctic-council-permanent-participants/.

[63] *Id.*

[64] *Id.*

[65] *A Circumpolar Inuit Declaration on Sovereignty in the Arctic, adopted by the Inuit Circumpolar Council*, Inuit Circumpolar Council – Alaska (Apr. 2009), https://iccalaska.org/wp-icc/wp-content/uploads/2016/01/Signed-Inuit-Sovereignty-Declaration-11x17.pdf [hereinafter *Inuit Declaration*].

[66] *Inuit Petition and the IAHCR*, Center for International Environmental Law, https://www.ciel.org/project-update/inuit-petition-and-the-iachr/ (last visited Dec. 26, 2021) [hereinafter CIEL].

[67] Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation?*, 7 Transnat'l Envtl. L. 37, 47 (2018).

[68] *Id.*

[69] *Id.*

[70] Andrew C. Revkin, *Eskimos Seek to Recast Global Warming as a Rights Issue*, N.Y. Times, Dec. 15, 2004, at A3.

an IAHCR decision to investigate this crucial link on its own a year later, bringing the plight of the Inuit into the eye of the public and creating a new legal avenue for climate change redress.[72] This was the first time an international human rights tribunal was asked to consider the human rights implications of climate change.[73]

The claim holds two important considerations and is not insignificant, even in its lack of apparent success. First, it exposed to the public *for the first time* the concept that climate change violates human rights. This accomplished several things. It shed light on and publicized a critical but under-examined aspect of climate change. It also humanized an otherwise-marginalized and possibly unknown South-of-South nation. People who may have been unaware of the Inuit would have read or heard about them as a people fighting for rights that the readers might also want for themselves. Or, there are those who may have read about the claims of injustice and identified with the Inuit. Further, such press may shed light on the plight of other Indigenous people whose human rights are similarly affected by the effects of climate change or bring public awareness to the plight of all those who live off the land, including other Indigenous peoples.

The second important consideration the claim implicates is that, as the first legal claim of its kind,[74] it created the possibility of human rights claims against States, and possibly non-States, who have contributed to GHGs and thus caused harm to myriad individuals as well as groups or other Indigenous nations. The fact that the ICC president filed the Inuit Petition on behalf of a group that is representative of her tribe is significant for three reasons. First, it has motivated other peoples to follow suit.[75] The Arctic Athabaskan Peoples filed a complaint against the Canadian government in 2013, arguing that Canada violated their human rights due to high levels of Canadian black carbon emissions, and asked for a remedy based on the implications of the impact such emissions have on their human rights.[76] Second, the Inuit Petition was filed on behalf of a community of people whose bonds cross international borders.[77] As international law is so State-centric, the ICC approach is an important reminder that alternative governance schema are not just possible but functional. Last, it is not a suit by an individual against a State requesting redress for harms to that individual, but rather a suit brought by representatives of a *nation* claiming redress for the impact a State's actions had on that community's way of life. This is empowering for nations who might want to make claims against States in the future.

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[71] Richard Black, *Inuit Sue U.S. Over Climate Policy*, BBC NEWS (Dec. 8, 2005, 6:53 PM GMT), http://news.bbc.co.uk/2/hi/science/nature/4511556.stm.

[72] CIEL, *supra* note 66; Revkin, *supra* note 70; Peel & Osofsky, *supra* note 67, at 46.

[73] Peel & Osofsky, *supra* note 67, at 46.

[74] Peel & Osofsky, *supra* note 67, at 46.

[75] Peel & Osofsky, *supra* note 67, at 64.

[76] Peel & Osofsky, *supra* note 67, at 64.

[77] *Inuit Declaration*, *supra* note 65.

However, the case was not made possible in isolation. It was only with both the support of the AC and under several principles of international law delineated in two international treaties that the Inuit were able to file their Petition.

B. The Significance of Permanent Position Status

The Arctic Council ("AC") was instrumental in assisting the Inuit to bring the Petition. The AC is an international organization comprised of eight member-nations, including the U.S. and Canada.[78] Its mission is to promote "cooperation, coordination, and interaction among the Artic States, Arctic Indigenous communities, and other Arctic inhabitants on common Arctic issues."[79] Participation in the AC gave the Inuit a legitimate voice in international decision-making on matters that affect them. As mentioned above, it is rare that a non-State group or tribe has any status whatsoever in international environmental law.[80] When the UNGA was crafting the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), Australia, New Zealand, Canada, and the U.S. loudly voiced their opinion against providing Indigenous groups too much power. They claimed that giving Indigenous peoples a voice in international governance might provide them veto power over domestic policy and legislation.[81] If the ICC did not have PP status, the ICC president's bold move might have been used to silence the Inuit voice on the AC or, worse, see them expelled from the organization by the U.S. or Canada. Alternatively, the knowledge of this possibility could have precluded the ICC president from filing in the first place.

C. International Indigenous Legal Rights

The Inuit were able to file their Petition based upon several principles guiding international law that grant the Inuit – and indeed, all Indigenous peoples – the right to an active voice in international environmental governance.[82]

First, the UNDRIP affirms that Indigenous peoples have the right to self-determination, noting "the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development."[83] Second, the right to self-determination goes hand in hand with the right to sovereignty, by which one is deemed to have "authority over territory, resources, and 'peoples.'"[84] The International Labor Organization Convention 169 ("ILO 169") re-

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78 The Arctic Council, https://arctic-council.org/index.php/en/about-us (last visited Dec. 26, 2021).

79 *About*, The Arctic Council, https://arctic-council.org/en/about/ (last visited Dec. 26, 2021).

80 Peel & Osofsky, *supra* note 67, at 46.

81 Sarah Nykolaishen, *Customary International Law and the Declaration on the Rights of Indigenous Peoples*, 17 Appeal 111, 122 (2012).

82 Khan, *supra* note 29, at 676.

83 G.A. Res. 61/295, U.N. Doc. A/RES/61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

84 Khan, *supra* note 29, at 676.

inforces Indigenous rights to land and resources, as it is the only internationally binding treaty related to Indigenous peoples.[85]

The Inuit Declaration interprets self-determination more broadly than did UNDRIP.[86] The Inuit Declaration states, "It is our right to freely determine our political status, freely pursue our economic, social, cultural and linguistic development, and freely dispose of our natural wealth and resources. States are obligated to respect and promote the realization of our right to self-determination."[87] Plus, for the Inuit, self-determination is impossible without sovereignty, because their ability to continue as a society depends on the health and vitality of the tundra, sea, land, and ice that comprise their traditional hunting, gathering, and fishing grounds.[88]

UNDRIP and ILO 169 are clearly important; however, treaties are binding solely on countries that have ratified them.[89] Over 150,000 Inuit[90] live in a territory stretching across international borders.[91] As a result, the decisions of any one of Denmark, Greenland, Canada, the U.S., or Russia can impact *Inuit Nunaat*, the Inuit homeland.[92] Of those countries, only Denmark has ratified ILO 169.[93] So, though ILO 169 and UNDRIP delineate important principles for Indigenous nations in international law, they do not afford the Inuit or other Indigenous peoples any protection on the international stage. For example, the Inuit have taken issue with the United Nations Convention on the Laws of the Sea ("UNCLOS") for failing to include their nation's concerns and voices in UNCLOS processes and thus impinging on their right to sovereignty under UNDRIP, but UNCLOS's own framework provides only for State sovereignty.[94] So, although UNDRIP and ILO 169 are available as evidence of the Indigenous right to sovereignty and self-determination, in practice they provide no real rights or power.[95]

The Inuit Petition is therefore particularly important. Against the backdrop of UNDRIP and ILO 169, its filing furthered the process by which to create customary international law to recognize Indigenous rights. In the absence of State ratification, customary international law is the primary way principles of self-determination and sovereignty under UNDRIP and ILO 169 will gain weight in international governance. The situation the Inuit experienced in contending with

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[85] Khan, *supra* note 29, at 683.

[86] *Inuit Declaration*, *supra* note 65.

[87] *Id.*

[88] *Id.*

[89] United Nations, *Ratification,* The Dag Hammarskjöld Library at the United Nations, https://ask.un.org/faq/14594 (last visited Dec. 26, 2021).

[90] Revkin, *supra* note 70.

[91] *Inuit Declaration*, *supra* note 65.

[92] *Inuit Declaration*, *supra* note 65.

[93] International Labour Organization, *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, https://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314.

[94] Khan, *supra* note 29*,* at 663.

[95] *Id.*

UNCLOS is clear proof international law "still does not recognize Indigenous peoples as full and equal participants in international law-making."[96] However, UNDRIP continues to acknowledge Indigenous peoples as international legal actors.[97] Therefore, active Indigenous participation in climate regime governance may yield not only workable solutions to climate change but also promote Indigenous rights.

IV. Proposal: Reimagining the Climate Regime's CDM

Reimagining the CDM is particularly crucial at this moment in time, considering both that the Paris Agreement's global temperature increase limitation goals[98] are likely to go unmet, and that the looming impacts of such a prognosis are so severe.[99] Increasing Indigenous participation in the climate regime may serve not only to support Indigenous rights but also to address seemingly inherent problems with carbon markets and the CDM.[100] Civil society movements are highly critical of the carbon market system as a primary cause of this failure, concerned about resulting environmental and social justice fallout.[101] It is possible, however, that the carbon market system is not inherently broken.

We must first address a common misconception. It would be easy to assume that the "Indigenous voice" is unified or consistent, or that "Indigenous peoples" are all the same simply by virtue of certain parallel facts, but this is not the case. Certainly, the term often refers to a country's original population.[102] However, other definitions include (1) self-identification as Indigenous; (2) being the non-European group living in an area colonized by Europeans; (3) remaining socially isolated from mainstream society; (4) identification to certain territories and natural resources; and/or, (5) maintaining traditions despite surroundings or land being transformed by outside societies.[103] There is no one definition of "Indigenous,"[104] and it is in this diversity of world views, outlooks, and history that the power of Indigenous participation may reside. As is demonstrated by the Inuit Petition, Indigenous participation in international law-making uncovers creative and perhaps new solutions to seemingly unsolvable problems.

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[96] Khan, *supra* note 29, at 11.

[97] *Id.* at 3.

[98] Paris Agreement, *supra* note 6, Art. 2, ¶ 1(a) (stating a goal to hold the global temperature increase to below 2° C and if possible, below 1.5° C).

[99] Okereke & Coventry, *supra* note 9, at 6.

[100] Dehm, *supra* note 3, at 145-46.

[101] Dehm, *supra* note 3, at 134; Okereke & Coventry, *supra* note 9, at 5.

[102] Robert Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, *in* ENDANGERED PEOPLES: INDIGENOUS RIGHTS AND THE ENVIRONMENT 1, 2 (Univ. Press of Colorado 1994).

[103] Hitchcock, *supra* note 102, at 2, 4.

[104] *Id.* at 2.

A. First Steps

Indigenous voices must first be given voice in climate regime fora before any solutions may be brought. This is in perfect keeping with the Paris Agreement Article 7, par. 5, which states, ". . .adaptation action should be based on and guided by. . .as appropriate, traditional knowledge, knowledge of Indigenous peoples and local knowledge systems."[105] When those educated in TEK are not present at key moments in decision-making, this mandate is severely impaired if not entirely eschewed. The question becomes, how could giving non-State actors unprecedented status at climate regime COPs be achieved and justified, e.g., "appropriate?" There are two possible answers.

First, Indigenous peoples might be included in a key Paris Agreement compliance mechanism, the expert committee of Article 15, par. 2.[106] This would undoubtedly bring fresh, unique, and practical ideas, and perhaps address the concern that the climate regime is a technocratic, top-down system because Indigenous experts are, in many cases, both scientific experts and local actors.[107]

Though Western society tends to define 'experts' only as those who have gone through the rigors of a university or other Western-accredited methods, Indigenous experts have different but comparable levels of knowledge. Consider that a scientist's background and working situation(s) play a critical role in determining "their scientific socialization and the research they engage with."[108] Though members of Indigenous societies, nations, and tribes may not always attain their scientific knowledge through a university education, Indigenous experts nonetheless possess extensive and valuable scientific traditional knowledge, different from but complementary to knowledge held by Western scientists. Their TEK provides not only data but unique temporal and historical place-based information, as well as distinctive methods of environmental best practices.[109] One notable example comes from anthropologists' work with Philippine horticulturalists, one of whom possessed incredibly detailed knowledge about over 1,600 plant species.[110] Another example comes again from the Inuit, whose numerous words for different types of snow were adopted by Western science when English vocabulary on the topic was not sufficiently accurate.[111] A last critical example comes from the Zuni people. Where modern industrial agriculture removes groundwater faster than it is replaced, applies over 500,000 tons of pesticides per year, and loses seven tons of topsoil to erosion each year, Zuni "dry farming" practices have allowed them to survive and thrive in the dry, arid lands of the American southwest for 1,500 years without detrimental effect to the environ-

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[105] Paris Agreement, *supra* note 6, at Art. 7, ¶ 5.

[106] Paris Agreement, *supra* note 6, at Art. 15, ¶ 2.

[107] Dehm, *supra* note 3, at 135; *see section supra*, "IEL, the Climate Regime, and Flawed Economic Mechanisms."

[108] Frank Biermann & Ina Möller, *Rich Man's Solution? Climate Engineering Discourses and the Marginalization of the Global South*, Int'l Envtl. Agreements: Pol. L. & Econ. 1, 7 (Mar. 6, 2019).

[109] LaDuke, *supra* note 29, at 127.

[110] Berkes, *supra* note 45, at 1.

[111] *Id.* at 2.

ment or to their ability to produce food.[112] Indigenous individuals with such irreplaceable, valuable knowledge are indeed experts, though it may have been gathered through non-Western means. Including those with such relevant, critical, and timely knowledge in expert panels is clearly a winning situation for Indigenous rights and for the climate regime – to do otherwise is a loss for both.

Another option would be to grant either permanent participant ("PP") status, which the Inuit enjoy in the Artic Council, or voting status, to Indigenous nations in climate governance structures. In politics, decisions are made largely by those present in the room at the time.[113] Either position would enable Indigenous voices to remain in the room regardless of the power, status, or opinions of other actors. PP or voting status would ensure that TEK and the abovementioned expert knowledge would be present during important discussions. To ensure both that customary international law evolves to recognize Indigenous nations' rights,[114] and that effective means develop to truly address climate change, overt inclusion of Indigenous peoples in the climate regime is a logical conclusion.

Once there is a platform for the diversity of Indigenous voices to be expressed on the international stage without fear of retribution, any number of solutions may present themselves. As will be explored below, incorporating and considering TEK and Indigenous ideas may in fact address and remedy seemingly unsolvable problems with the CDM.

B. Carbon Offsetting Reimagined

What if the CDM is not inherently broken?[115] True, carbon markets in their current iteration have done damage[116] while failing to address root causes of climate change.[117] It is possible, however, that global aggregation and market mechanisms are salvageable component aspects of the system.[118] To properly utilize the CDM per Article 6 of the Paris Agreement, States shall (par. 2) "promote sustainable development" and "ensure environmental integrity."[119] Orienting the CDM to ensure these goals are met could ensure the CDM be redeployed properly. To come into compliance with Article 6, any reimagined method would have to reduce *real aggregate emissions* instead of allowing the global North to purchase offset credits and simply continue emitting.[120] Thus, any reimagined CDM must disincentivize and ultimately decrease overall carbon consumption. Below are two possible applicable Indigenous philosophies.

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112 LaDuke, *supra* note 29, at 139-40.

113 Kris Manjapra, *When Will Britain Face Up to Its Crimes Against Humanity?*, The Guardian (Mar. 29, 2018, 1:00 AM EDT), https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity.

114 Khan, *supra* note 29, at 678.

115 *But see* Dehm, *supra* note 3, at 145-46, refuting this supposition.

116 Kronk Warner, *supra* note 8, at 451; *see also* Dehm, *supra* note 3, at 134.

117 Dehm, *supra* note 3, at 133-34.

118 *Id.* at 145-46.

119 Paris Agreement, *supra* note 6, Art. 6, ¶ 2.

120 Dehm, *supra* note 3, at 134.

i. Chipko Economics

The Chipko, a people of the Himalayan mountains in India whose name means "Hug-to-the-tree people" in their language, began a movement to save their forests in the 1970s,[121] with the slogan of "What do the forests bear? Soil, water, and pure air."[122] In 1977, the Chipko halted commercial harvesting of trees in their region.[123] With three members of the tribe literally hugging the base of each tree, contractors and truckloads of police found themselves unable to cut down the trees and withdrew.[124] The Chipko were subsequently able to convince the government to ban Himalayan logging.[125]

The Chipko understand economics in an entirely different – but no less valid – manner from the West. Sundral Bahuguna, one of the leaders of the Chipko Movement, notes how modern "economic growth is based on the plunder of nature – the great treasure of hundreds of thousands of years. . . . The irony is that this type of economics is actually uneconomical, because. . .you undermine your basic capital."[126] This "basic capital" consists of soil, water, and air, the foundation for the healthy existence of all life. Bahuguna explains that Western economics has created an inaccurate distinction between *development*, defined as the materialistic accumulation of things, and *ecology*, defined as an aesthetically pleasing natural setting.[127] However, Bahuguna states that the real distinction should be made between Western "economic growth," generally destructive of the environment, and true sustainable ecological development.[128] Thus while Western economics positions human improvement as defined by financial accumulation of personal material wealth often in opposition to ecological health, Chipko economic theory instead explains that long-term growth is only possible with an absence of environmental destruction. Healthy ecological systems are a 'permanent economy' based on three self-renewing pillars of ecological capital – clean water, air, and land.[129]

Sustainable ecological development would therefore be a basic tenet of a CDM operating under Chipko economics. Instead of defining development as enabling Western economic success as measured by level of income per household or quantities of cars driven, success instead would be measured by resultant quality of local, national, and/or international basic capital. Thus, for example,

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[121] Chipko Information Centre, *The Chipko Message*, Uttar Pradesh, India 8, http://www.uky.edu/~tmute2/nature-society/password-protect/nature-society-pdfs/chipkoMovementStatement.pdf [hereinafter Chipko Message].

[122] *Id.* at 7.

[123] *Id.* at 9.

[124] Chipko Message, *supra* note 121, at 9-10.

[125] *Id.* at 6, 8 (describing how the Chipko name was derived from a similar successful protest against a Maharajah almost 250 years prior, though the historical protest yielded substantially higher loss of arboreal and human life).

[126] Chipko Message, *supra* note 121, at 11.

[127] Chipko Message, *supra* note 121, at 10.

[128] *Id.*

[129] *Id.* at 10-11.

any company or State engaged in JI projects in a developing country would have to ensure that any and all results of the project would also entail true ecological development and leave the water, air, and soil significantly and measurably cleaner at local, national, and international levels than before the project had commenced and for the lifecycle of the project.

Under a Chipko model, money exchanged in carbon markets would disincentivize fossil fuel production and consumption because both damage all three ecological pillars. Currently, carbon markets are a simple exchange of capital where a country or company polluting over their NDC purchases credits on an open market from a country or entity that is polluting less, and in return is relieved of NDC contribution violations.[130] This type of detached market transaction offends Chipko ideals and also violates the Paris Agreement as discussed above because it neither promotes sustainable development nor ensures environmental integrity[131] – the purchaser is free to continue degrading soil, water, and air at will.

A carbon market approach under Chipko theory may remedy this issue if it were to grant polluters the right to purchase offset credits only within a broader ecological context. First, as a policy matter Indigenous peoples employing TEK would be considered experts on the topic of ecological development – after all, they are often the single example of truly sustainable existence in a given region or country.[132] A system operating under Chipko theory may therefore employ them to advise, teach, or help polluters reduce their carbon footprint. Further, Indigenous sellers in possession of valuable TEK that encourages rehabilitation or support of the ecological pillars might be granted higher-value credits to sell. Such high-value credits could require that purchasers commit to more significant reductions in energy consumption, or to a timeline by which to eliminate their fossil fuel dependence entirely. Alternatively, all carbon offset credit buyers might be required as a condition of purchase to present a plan to reduce real emissions, receive fines if they prove unable or unwilling to achieve their plan's results over a reasonable period of time, and require advising by appropriate abovementioned Indigenous experts. Chipko economic theory is therefore one way to reimagine the CDM while meeting Paris Agreement goals.

ii. Buen Vivir

Buen vivir is a movement and philosophy that has somewhat recently become well-known from and among a variety of South American Indigenous peoples.[133] The concepts embodied in *buen vivir* analogously present themselves in various South American tribes – as *sumac kawasy* in the Quichua language, *suma qamaña* in Aymara, *shiir waras* by the Shuars, *küme mongen* by the Mapuche, and in various ideas present in the Guaraní culture.[134] Literally translated from

[130] Dehm, *supra* note 3, at 133.

[131] Paris Agreement, *supra* note 6, at Art. 6, ¶ 2.

[132] LaDuke, *supra* note 29, at 129.

[133] Eduardo Gudynas, *Buen Vivir: Today's Tomorrow* 442 Soc'y Int'l Dev. 441, 442-44 (2011).

[134] *Id.* at 443.

the Spanish as "the good life," *buen vivir* is best thought of a way of living well, which requires living a full life in community with both other people and nature.[135] Its popularity came largely from South American outrage to the negative environmental and human rights impacts of large-scale, top-down development projects funded by multilateral, multinational financial institutions.[136] As it made its way through Latin American culture, concepts taken from *buen vivir* have been incorporated in both the Ecuadorian and Bolivian constitutions in 2008 and 2009, respectively.[137]

Though there are many ways in which *buen vivir* is employed and deployed, for our purposes we will consider how it envisions development – or rather, how it does not. Unlike the Chipko Movement which accepts but redefines development, *buen vivir* is predicated on the idea that it is important not to seek 'alternative development,' but rather to seek 'alternatives to development.'[138] That is, that the goal of society orienting around development and economic growth is inherently flawed. In fact, the language and traditions of several Indigenous cultures in South America entirely lack the concept of Western progress or economic development.[139]

Reimagining the CDM in light of *buen vivir* ideology, then, development would clearly not be a goal. That is not to say, however, that *buen vivir* can't apply to and transform carbon markets and in doing so achieve real reductions in GHG emissions.

In keeping with the community orientation so central to *buen vivir*, carbon credit buyers become part of the community whose carbon offset credits it offers to purchase. Though it would be most logical under this theory to buy and sell credits in the immediate physical vicinity to any polluting entity – for example, within a 200-mile radius – buyers might solicit credits from any seller in its "community," as appropriately defined. In any case, exchanges under *buen vivir* would be significantly more than a single monetary transfer of funds. To ensure the health of the whole community, which includes not only people but nature as well, a buyer perhaps must demonstrate measurable reduction its GHG emissions as well as reduction in fossil fuel reliance, dependence, and/or production as applicable. There would be an objective standard of required reduction per dollar spent or per credit purchased. If the purchaser is or becomes unable or unwilling to meet these requirements, the community offering carbon credits for sale refuses the transaction or the contract is considered breached with remedies available to the seller. It would not be in keeping with *buen vivir* that money would be exchanged to do good on one level while harm on another level would continue with impunity. Alternatively, the buyer might be allowed to defer compliance if it demonstrates inability or incapacity to comply at the time of purchase, and instead opt to educate its members in the plight that its violations cause other mem-

[135] Gudynas, *supra* note 133, at 442.

[136] Gudynas, *supra* note 133, at 442.

[137] Gudynas, *supra* note 133, at 443.

[138] *Id.* at 442.

[139] *Id.*

bers of the community. There would of course be a compliance timeline with penalties imposed as well as additional fees for this option.

JI projects would have to comply with goals set forth by *buen vivir* philosophy. Carbon market-based funding for projects would not be channeled through the State but rather go directly to the local economy. For example, a project to build a bridge under *buen vivir* ideology would be made with local and biodegradable materials to local specifications in a place and in a manner not dictated by a foreign bank or by the government. The bridge is a success if it did minimal damage to nature and natural resources, and if it successfully served local and regional, not international, needs.[140]

Buen vivir has been applied in many ways with various interpretations across the countries whose Indigenous and non-Indigenous populations use it.[141] There are doubtless other methods of deploying its concepts, with the above examples as just one possibility.

V. Conclusion

Though this comment has applied Chipko[142] and *buen vivir*[143] philosophies to climate change, many sustainable economic systems may exist within other Indigenous communities,[144] as of yet unheard. Were an Indigenous expert to hold a position of real authority on a UN committee, and/or a tribe to obtain voting status in the IEL regime, true progress towards addressing climate change might finally be made. Indigenous individuals, nations, and tribes would be properly equipped, situated, and empowered to suggest and help deploy actually sustainable TEK and, for example, reimagine the CDM such that climate change mitigation or sustainable adaptation would be possible. Such methods would not just put money into the pockets of an elite few[145] but employ Indigenous peoples and educate others in sustainable TEK methodologies that create clean water, clean air, and healthy soil, and ensure ecological sustainability for future generations.

It is entirely possible that the aforementioned unmet goals of the Paris Agreement[146] can still be achieved. Important to recall is the history of international law, still operating upon antiquated international legal concepts of the civilizing mission of colonialization.[147] State-centric decision-making methodologies have implemented a system that negatively impacts the human rights of those already

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[140] Gudynas, *supra* note 133, at 446.

[141] *Id.* at 441-47.

[142] *See generally* Chipko Message, *supra* note 121.

[143] *See generally* Gudynas, *supra* note 133.

[144] *See* LaDuke, *supra* note 29, at 129, generally, (exploring Indigenous approaches to economic sustainability and land use).

[145] Dehm, *supra* note 3, at 135-36.

[146] Paris Agreement, *supra* note 6, at Art. 6, ¶ 2 (defining goals to "promote sustainable development" and "ensure environmental integrity"); at Art. 2, ¶ 1(a) (establishing the goal to hold the global temperature increase to below 2°C and if possible, below 1.5°C).

[147] Anghie, *supra* note 33, at 742.

affected while failing to address the root causes of climate change,[148] as the planet grows ever warmer.[149] Carbon markets are currently being implemented using flawed ideas and corrupt methodologies, but this comment asserts that the CDM is not necessarily inherently broken. If Indigenous experts are appropriately recognized for their vast wealth of knowledge[150] and empowered with a permanent voice in the international climate regime, it may well be possible to successfully reimagine carbon markets and actually achieve the goals of the Paris Agreement.

[148] Dehm, *supra* note 3, at 133-34.

[149] Paris Agreement, *supra* note 6, Art. 2, ¶ 1(a); *see also* Okerere & Coventry, *supra* note 9, at 7.

[150] Berkes, *supra* note 45, at 1.