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Riccardo Vecellio Segate

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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-

* Mr. Riccardo Vecellio Segate is the Talent Program PhD Candidate in International Law at the University of Macau, and a Visiting Student Researcher at the University of California, Berkeley. He previously served as an Exchange Scholar at Tsinghua Law School in Beijing and was selected as a Visiting Fellow at the Law & Technology Centre of the University of Hong Kong. He has completed, *inter alia*, a Postgraduate Diploma in European and Global Governance at the University of Bristol, a Master of Laws in Public International Law at Utrecht University, and three Diplomas in geopolitical affairs at ISPI in Milan. Prior to that, he enjoyed touring as a classical pianist. As a legal scholar, he has published peer-reviewed journal articles and delivered academic conferences worldwide and was awarded leading international research prizes. Furthermore, Mr. Vecellio Segate has volunteered for UNESCO and worked extensively in policymaking and legal consulting all over North America, Europe, and Asia, including for the European Commission, EXPO2015, Oxford University Press, and Rouse & Co. International LLP (Shanghai office). He sits on the International Advisory Board of the *International Journal for the Semiotics of Law* and has served as an ad-hoc peer reviewer for a wide range.

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).