

FAX COVER SHEET

TO
COMPANY
FAX NUMBER 33390214310
FROM GretaVillacis
DATE 2021-05-06 18:34:51 GMT
RE Ref: Cláudia Duarte Agostinho and Others v. Portugal and
32 Others (Application No. 39371/20)

COVER MESSAGE

FAX

TO: Registrar, Fourth Section, European Court of Human Rights
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SUBJECT: Ref: Cláudia Duarte Agostinho and Others v. Portugal and 32 Others
(Application No. 39371/20)

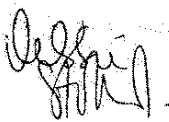
DATE: May 6, 2021

COMMENTS: Third-party intervention in Cláudia Duarte Agostinho and Others v. Portugal
and 32
Others (Application No. 39371/20)

Sincerely,



Shawan Jabarin
Al Haq



Debbie Stothard
ALTSEAN-Burma



Mauricio Ariel Albarracín Caballero
Center for the Study of Law, Justice and Society -
CIES



Javier A. Galindo
Comisión Colombiana de Juristas



Renzo Alexander García Parra
Comité Ambiental en Defensa de la Vida (CADV)



Miriam Saage-Maaß
European Centre for Constitutional and Human Rights (ECCHR)

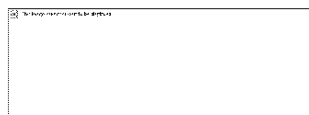


Felipe Bley-Folly
FIAN International



Eléonore MOREL
FIDH (Fédération Internationale des ligues des Droits de l'Homme)

Magdalena Sepúlveda Carmona
Global Initiative for Economic, Social and Cultural Rights
Montenegro



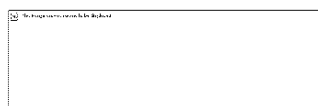
Tea Gorjanc Prelevic
Human Rights Action,



Camilo Sánchez
International Human Rights Clinic, University of Virginia School of Law

Layla Hughes
International Environmental Lawyer

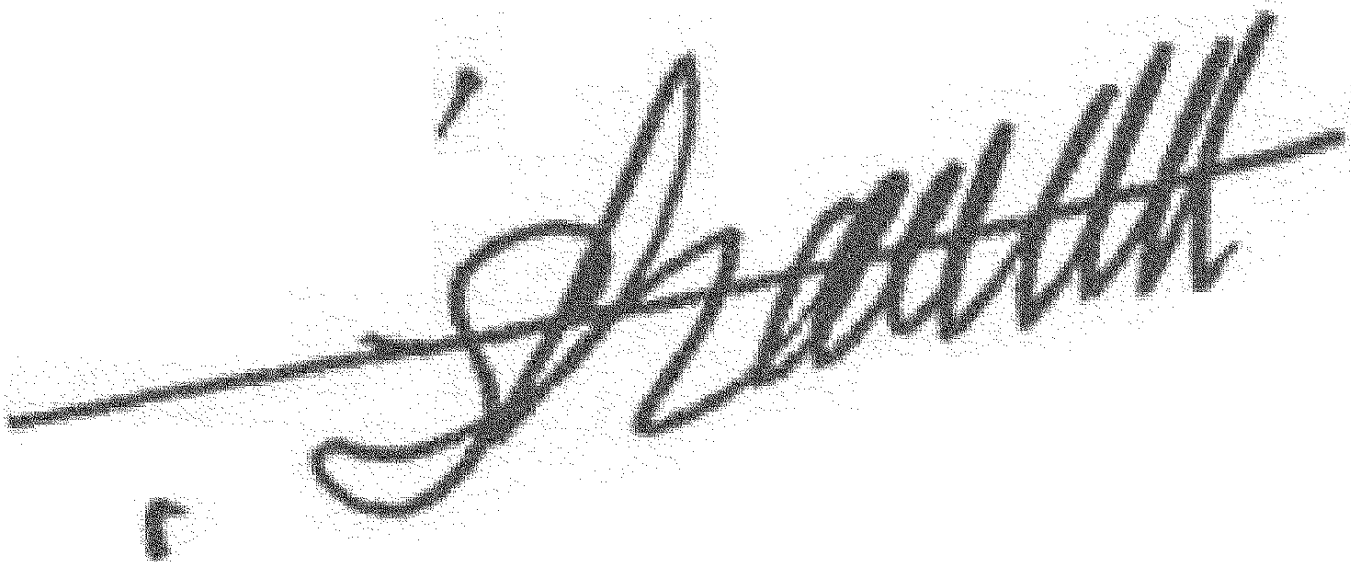
Lara Dominguez
Minority Rights Group International (MRG)



Irene Escorihucla Blasco
Observatori DESC (ESCR observatory)

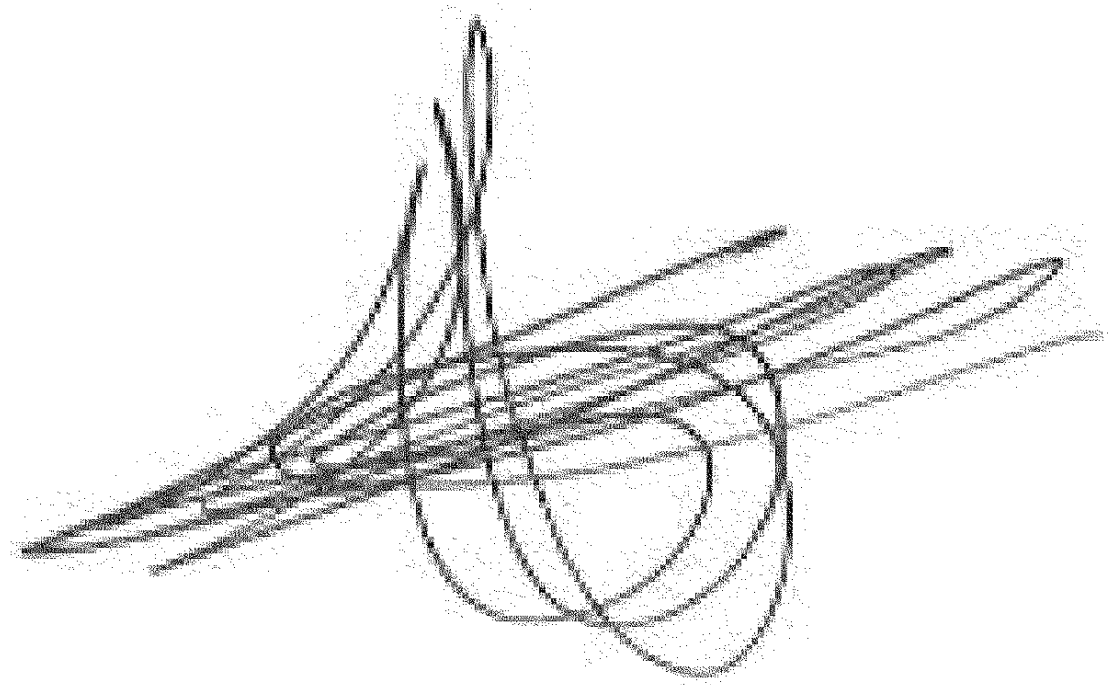
Maria Silvia Emmanuelli
Oficina para América Latina de la Coalición Internacional para el Hábitat (HIC-AL)

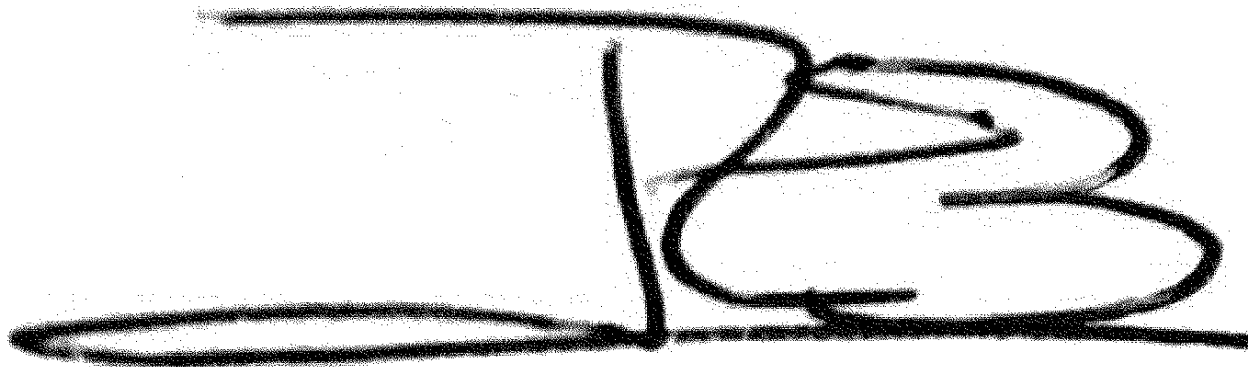
Joie Chowdhury, Mona Sabella, Fernando Ribeiro Delgado
ESCR-Net – International Network for Economic, Social and Cultural Rights secretariat

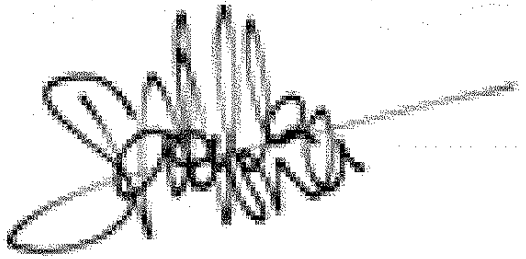
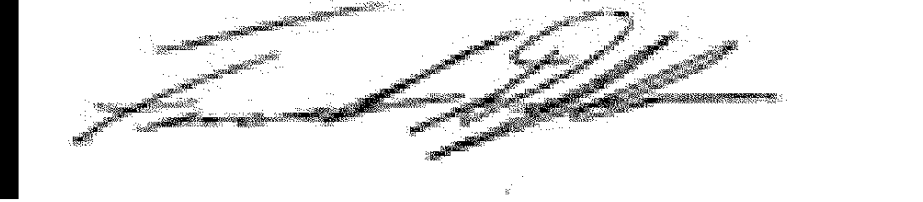
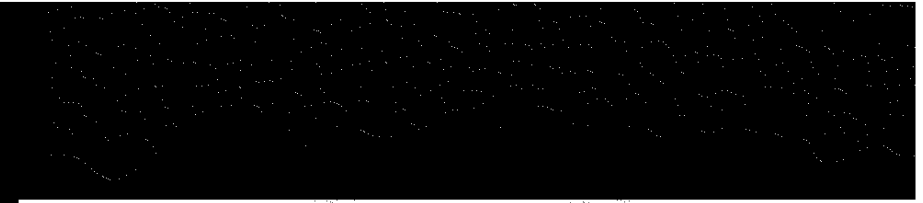
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Mauricio Albarracín.

Paul Alwiff



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A handwritten signature in black ink, appearing to be 'Greta Villacis', with a long horizontal line extending to the right.A handwritten signature in black ink, appearing to be 'Greta Villacis', which is partially obscured by a black redaction box on the left side.

FAX

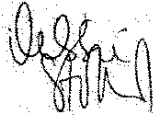
TO:	Registrar, Fourth Section, European Court of Human Rights	FROM:	Fernando Delgado, ESCR-Net secretariat (fdelgado@escr-net.org)
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SUBJECT:	Ref: Cláudia Duarte Agostinho and Others v. Portugal and 32 Others (Application No. 39371/20)	DATE:	May 6, 2021

COMMENTS: Third-party intervention in Cláudia Duarte Agostinho and Others v. Portugal and 32 Others (Application No. 39371/20)

Sincerely,



Shawan Jabarin
Al Haq



Debbie Stothard
ALTSEAN-Burma



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ESCR-Net – International Network for Economic, Social and Cultural Rights secretariat

*Third-party Intervention – Duarte Agostinho and Others v. Portugal and 32 Others - 6 May 2021***I. Introduction and Summary of arguments**

This third-party intervention is submitted by Al-Haq, ALTSEAN-Burma, Center for the Study of Law, Justice and Society – Dejusticia, Comisión Colombiana de Juristas (CCJ), Comité Ambiental en Defensa de la Vida (CADV), the European Center for Constitutional and Human Rights (ECCHR), FIAN International, Fédération Internationale des ligues des Droits de l'Homme (FIDH), the Global Initiative for Economic, Social, and Cultural Rights (GI-ESCR), Human Rights Action (HRA), the International Human Rights Clinic at the University of Virginia School of Law, Layla Hughes, Minority Rights Group International (MRG), Observatori DESC (ESCR observatory), the Oficina para América Latina de la Coalición Internacional para el Hábitat (HIC-AL), and coordinated by ESCR-Net, the International Network for Economic, Social and Cultural Rights, pursuant to the leave to submit joint written observations granted by the President of the Fourth Section on 25 March 2021 pursuant to Rule 44 § 3.

The intervention provides the European Court of Human Rights with observations grounded in international, regional and comparative constitutional law standards and jurisprudence in relation to: 1) the impacts of the climate crisis on the enjoyment of a healthy environment and related economic, social and cultural rights (ESCR), as well as the right to life; 2) the disproportionate impacts of the climate crisis on the human rights of specific populations and the corresponding State duty to ensure substantive equality as well as prevent and redress intersectional discrimination; and 3) the State duty to prevent climate change related human rights harm as well as foreseeable harm and effectively regulate businesses.

II. Arguments**A. Impacts of the climate crisis on rights pertaining to a healthy environment and related economic, social and cultural rights, as well as the right to life**

International,¹ regional and comparative legal standards which elucidate the impacts of the climate crisis on the full enjoyment of human rights, including economic, social, cultural and environmental rights (ESCR), can serve as complementary references when applying related standards in the European human rights system. Given the indivisibility and interdependence of economic, social, cultural, environmental, civil and political rights, the impacts of climate change on ESCR can also affect the rights to life, physical integrity, family life and non-discrimination. As stated by Judge Weeramantry in the *Gabčíkovo-Nagymaros* case before the International Court of Justice in 1997, “[t]he protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself... damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”²

¹ As of 2008, the United Nations (UN) Human Rights Council has issued nearly annual resolutions addressing the impact of climate change on the full enjoyment of human rights. Additionally, 20 out of the 44 existing thematic Special Rapporteurs have addressed climate change in their work. Six out of 10 human rights treaty bodies through several recommendations, decisions and observations have urged the States to consider human rights while tackling climate change. See UN Office of the High Commissioner for Human Rights (OHCHR), Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38, 2021, p. 48-49, 69-72:

https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf, UN OHCHR, Current mandate holders, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>, Centre for International Environmental Law (CIEL) and Global Initiative for ESCR (GI-ESCR), States' Human Rights Obligations in the Context of Climate Change 2019 Update, 2019, p. 3-4: <https://www.ciel.org/wp-content/uploads/2019/03/HRFB-Sub-2019-update-2019-03-25.pdf>

² Separate Opinion of Vice-President Weeramantry, International Court of Justice, *Gabčíkovo-Nagymaros Project*, 1997, para. 91-92: <https://www.icj-ij.org/public/files/case-related/92/092-19970925-ITJ01-03-EN.pdf>

i. *United Nations Human Rights System Standards*

The United Nations (UN) Human Rights Council (HRC), in multiple resolutions, has addressed the impact of the climate crisis on the enjoyment of a healthy environment and related ESCR.³ In 2018, for example, the HRC emphasized that: *“the impact of climate change... may interfere with the enjoyment of a safe, clean, healthy and sustainable environment, and that environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of all human rights.”*⁴

UN human rights treaty bodies have also increasingly addressed the impact of climate change on human rights, calling on States to reduce greenhouse gas emissions and take measures to mitigate the adverse consequences of climate change.⁵ The UN Human Rights Committee, for example, in interpreting the right to life, protected under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), described as *“a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights”* and the entitlement *“to enjoy a life with dignity,”* has highlighted how *“[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”*⁶ In another instance, the UN Committee on Economic, Social and Cultural Rights (CESCR) issued a statement on climate change and the Covenant in the context of the Intergovernmental Panel on Climate Change (IPCC) report on global warming by 1.5°C, which welcomed that courts had *“accepted to hear claims filed by victims of climate change or by non-governmental organisations,”* lauding the *“essential role”* played by human rights mechanisms in *“protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change.”*⁷

Additionally, UN Special Rapporteurs have highlighted the consequences of climate change on the enjoyment of a healthy environment and related ESCR.⁸ For example, the UN Special Rapporteur on Human Rights and the Environment has issued several reports which affirm that combating climate change is critical for ensuring the full realization of the right to a healthy environment.⁹

³ The resolutions are: 16/11 (2011), 19/10 (2012), 25/21 (2014), 28/11 (2015), 31/8 (2016), 34/20 (2017) and 37/8 (2018). See UN Office of the High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions on Human Rights and Climate Change*, Fact Sheet No. 38, 2021, p. 49: https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf.

⁴ UN Human Rights Council, *Human rights and the environment*, Resolution 37/8, 9 April 2018 (A/HRC/RES/37/8).

⁵ CIEL and GI-ESCR, *States' Human Rights Obligations in the Context of Climate Change 2019 Update*, 2019, p. 5-13: <https://www.ciel.org/wp-content/uploads/2019/03/HRTB-Feb-2019-update-2019-03-25.pdf>.

⁶ UN Human Rights Committee, *General Comment 36 on the right to life*, 2018 (CCPR/C/GC/36), para. 2-3, 62; See also: UN Human Rights Committee, *Ioane Teitiota v. New Zealand*, Views, 2020, para. 9.4.

⁷ UN CESCR, *Climate change and the International Covenant on Economic, Social and Cultural Rights*, 8 October 2018: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=1>; CESCR references climate change caselaw databases in its statement. One example of a case to consider from those databases is: *Petition to the Inter-American Commission on Human Rights, Six Children of Cité Soleil, Haiti and Sakala Community Center for Peaceful Alternatives*, 4 February 2021: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/nea-us-case-documents/2021/20210204_13174_petition.pdf.

⁸ See e.g. UN Special Rapporteurs on the rights of persons with disabilities, on a safe, clean, healthy, and sustainable environment, on extreme poverty, on water, and on international solidarity, *Effects of climate change on the full enjoyment of human rights*, 2015.

https://unfccc.int/files/science/worksheets/the_2013-2015_review/application/pdf/avf_submission_annex_1_humanrights.pdf; UN Special Rapporteur on the right to culture, Report, 2020 (A/HRC/41/39); UN Special Rapporteur on extreme poverty, Climate change and poverty, 2019 (A/HRC/41/39); UN Special Rapporteur on Indigenous Peoples, Impacts of climate change and climate finance on indigenous peoples' rights, 2017 (A/HRC/36/46); UN Special Rapporteur on the right to food, Impact of climate change on the right to food, 2015 (A/70/287); UN Special Rapporteur on the right to water and sanitation, Climate change and the human rights to water and sanitation: position paper, 2010: https://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf; Climate change and the right to adequate housing, 2009 (A/64/255).

⁹ See e.g. UN Special Rapporteur on human rights and the environment, *Climate change*, 2016 (A/HRC/31/52); UN Special Rapporteur on human rights and the environment, *Framework principles on human rights and the environment*, 2018 (A/HRC/37/59); UN Special Rapporteur on human rights and the environment, *Global recognition of the right to a safe, clean, healthy and sustainable environment*, 2018 (A/73/188); UN Special Rapporteur on human rights and the environment, *Safe climate*, 2019 (A/74/161).

ii. *Regional Human Rights Systems Standards*

Regional human rights bodies have also emphasized how the consequences of climate change affect the full enjoyment of human rights, particularly ESCER. Most notably, the Inter-American Court of Human Rights (IACtHR) highlighted in a binding Advisory Opinion (23/17) that environmental degradation and the adverse impacts of climate change put at risk the realization of ESCER, including the rights to health, water, food, housing, and participation in cultural life.¹⁰

In the same Advisory Opinion, the IACtHR recognized the right to a healthy environment as an autonomous, fundamental right,¹¹ stating that the adverse impacts of climate change put this right at risk as they “*may cause irreparable harm to human beings*.”¹² The Court also highlighted how the individual dimension of the right to a healthy environment demonstrates the interdependence and indivisibility of civil and political rights and ESCER, as a violation of the right to a healthy environment often has “*a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to ... personal integrity and life*.”¹³ The Court notably reiterated that civil and political rights and ESCR “*should be understood integrally and comprehensively as human rights ... and are enforceable in all cases before the competent authorities*.”¹⁴ These positions were also reflected in the recent *Lhaka Honhat* decision in which, for the first time, the Court recognized the violation of the human right to a healthy environment, in close relation to the rights to adequate food, water, and cultural identity.¹⁵

In the African human rights system, the African Commission on Human and Peoples’ Rights (ACHPR) issued a resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change, in which it highlighted the necessity to consider the rights of peoples to economic, social and cultural development and to a satisfactory environment favourable to their development.¹⁶ The Commission has also issued three other resolutions emphasizing the need to study the impacts of climate change on human rights, including ESCER; this series of resolutions recalls States’ obligations to adopt measures to mitigate the impacts of climate change on the enjoyment of human rights.¹⁷ Furthermore, the African Commission on Human and Peoples’ Rights has recognized, “*...the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual*.”¹⁸

iii. *Comparative Constitutional Law Standards*

National courts have also held that the consequences of climate change negatively affect the enjoyment of

¹⁰ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 54, 66; *See also* IACtHR, *Case of Kawas Fernández v. Honduras*, Judgment, 3 April 2009, para. 148.

¹¹ The Court found that although the right to a healthy environment is not explicitly mentioned in the American Convention on Human Rights, it is guaranteed by Article 26 of the Convention on economic, social and cultural rights. IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 57.

¹² IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 59.

¹³ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 59.

¹⁴ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 57.

¹⁵ IACtHR, *Case of the Indigenous Communities of Lhaka Honhat (Our Land Association) v. Argentina*, Judgment, 6 February 2020, para. 201-254.

¹⁶ ACHPR, *Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change*, Res. 417 (LXIV) 2019.

¹⁷ *See* ACHPR, *Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa*, Res. 153 (XLVI) 2009; ACHPR, *Resolution on Climate Change in Africa*, Res. 271 (LV) 2014; ACHPR, *Resolution on Climate Change and Human Rights in Africa*, Res. 342 (LVIII) 2016.

¹⁸ ACHPR, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, Decision, 27 October 2001, para. 51-52.

ESCR, including the right to a healthy environment. Courts and other relevant forums in domestic jurisdictions where various ESCR are constitutionally recognized, such as Colombia,¹⁹ Mexico,²⁰ Nepal,²¹ and the Philippines,²² have recognized the impacts of the climate crisis on human rights, holding that failure to adequately address climate change impedes the realization of ESCR. For example, the Supreme Court of Justice of Colombia found that the State violated 25 young people's constitutional rights to a healthy environment, health, food, and water by failing to prevent the deforestation of the Amazon rainforest, an action which the Court recognized contributes to climate change; the ruling recognized that *"the fundamental rights to life, health, basic necessities, liberty and human dignity are significantly linked and determined by the environment and ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations..."*²³

Courts in Pakistan,²⁴ India²⁵ and Nigeria²⁶ - jurisdictions where the right to a healthy environment and other ESCR are not explicitly constitutionally guaranteed - likewise found violations of ESCR in climate cases through recognizing the interdependence and indivisibility of ESCR with civil and political rights. For example, in *Leghari*, a Pakistani appellate court held that the State had violated the right to a healthy environment by failing to effectively implement regulations to prevent climate change's negative impacts; even though this right is not listed in Pakistan's constitution, the Court recognized a healthy environment as necessary to guarantee the right to life.²⁷

In *Urgenda*, the Supreme Court of the Netherlands held that insufficient action to address climate change posed a *"risk of irreversible changes to the worldwide ecosystems and liveability of our planet"*; the Court affirmed that climate change constitutes a *"real and immediate risk"* of harm that triggers the State's

¹⁹ See Supreme Court of Justice of Colombia, *Demanda Generaciones Futuras v. Minambiente*, Judgment, 5 April 2018, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf.

²⁰ See Supreme Court of Justice of the Nation of Mexico, *Amparo sobre la modificación a la norma sobre el porcentaje máximo de etanol*, Judgment, 22 January 2020, https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2020-01/AR%20610-2019.pdf.

²¹ See Climate Case Chart, Supreme Court of Nepal, *Shrestha v. Office of the Prime Minister et al.*, Judgment, 25 December 2018 (Unofficial English Translation).

http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181225_074-WO-0283_judgment-1.pdf.

²² See Greenpeace, *Greenpeace reactive on Philippine Commission on Human Rights' announcement*, 9 December 2019:

<https://www.greenpeace.org/international/press-release/27847/greenpeace-reactive-on-philippine-commission-on-human-rights-announcement/>; Climate Case Chart. In re: *Greenpeace Southeast Asia and others*, accessed on 3 May 2021:

<http://climatecasechart.com/climate-change-litigation/non-us-case/fu-rc-ursenpeace-southeast-asia-et-al/#:~:text=Greenpeace%20Southeast%20Asia%20and%20numerous,one%E2%80%94%E2%80%9Cwhether%20the%20investor%2F2>; Commission on Human Rights of the Philippines, *Written Statement on the Occasion of the Review of the Philippines combined 5th and 6th Periodic Reports to the UN Committee On Economic, Social and Cultural Rights*, 2016:

https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/PHI/INT_CESCR_NHS_PHI_25266_E.pdf.

²³ Supreme Court of Justice of Colombia, *Demanda Generaciones Futuras v. Minambiente*, Judgment, 5 April 2018, p. 13:

http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf.

²⁴ Lahore High Court, *Leghari v. Federation of Pakistan*, Judgment, 25 January 2018, para. 6-8:

http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf.

²⁵ National Green Tribunal of India, *Sher Singh v. State of Himachal Pradesh*, Judgment, 6 February 2014, para. 13-17:

<https://indiankanoon.org/doc/194585080/>.

²⁶ Federal High Court of Nigeria in the Benin Judicial Division, *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd et al.*, Judgment, 14 November 2005, p. 30:

http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051130_FHCBCS5305_judgment-1.pdf.

²⁷ Lahore High Court, *Leghari v. Federation of Pakistan*, Judgment, 25 January 2018, para. 7:

http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf.

positive obligations under Articles 2 and 8 of the European Convention of Human Rights, drawing on analogous jurisprudence from the European Court of Human Rights (ECtHR) and explicitly linking those articles to environment-related situations.²⁸ Moreover, in March 2021, the German Constitutional Court found that young people's fundamental rights, including the rights to life (and by extension, health), physical integrity and property, were threatened due to the lack of sufficient emission reduction targets in the Federal Climate Change Act; the Court held that the state has a duty to adopt precautionary steps to protect these rights of future generations.²⁹

B. The disproportionate impacts of the climate crisis on the human rights of specific populations and corresponding State duties to ensure substantive equality and prevent and redress intersectional discrimination

The climate crisis exacerbates structural inequalities, pushing marginalized individuals and communities further to the periphery.³⁰ Individuals with identities that render them more susceptible to structural discrimination may be particularly vulnerable to the negative impacts of climate change and risk becoming collateral damage if their unique experiences of marginalization are not accounted for in mitigation policies.³¹ Human rights standards require States to ensure substantive equality and prevent and redress intersectional discrimination that arises in the context of the climate crisis.

i. Climate change disproportionately impacts the human rights of certain marginalized populations

International bodies have emphasized how climate change disproportionately impacts the most vulnerable, including future generations. For example, the IPCC in 2007 had expressed that the “[i]mpacts of climate change are likely to be felt most acutely not only by the poor, but also by certain segments of the population, such as the elderly, the very young, the powerless, indigenous peoples, and recent immigrants, particularly if they are linguistically isolated, i.e. those most dependent on public

²⁸ Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, Judgment (English), 13 January 2020: <https://uitspraken.rechtspraak.nl/inzendocument?id=14C11NL:HR:2019:2007>. (“Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. According to the case law of the European Court of Human Rights (ECtHR), a contracting state is obliged by these provisions to take suitable measures if a real and immediate risk to people's lives or welfare exists and the state is aware of that risk. The obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term.”)

²⁹ German Constitutional Court, BVerfG, Judgment, 1 BvR 2656/18, 24 March 2021, para. 145-150, 182-183, www.bverfge.de/ers/20210324_1bvr265618.html (short version in english available at: www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html).

³⁰ See e.g. Anna Kaijser and Annica Kronsell, Climate change through the lens of intersectionality, *Environmental Politics*, 23:3, 2014, 417-433, p. 418. The people and communities who most suffer the consequences of environmental destruction and climate-related impacts are those who are already most vulnerable and marginalized. These include the world's 2.5 billion small-scale farmers, herders, fishers, and forest-dependent people who rely on land, water and other natural resources for their survival. They face the biggest challenges, although they have contributed least to the causes of climate change. This uneven distribution of causes, risks, and impacts has shaped the global call for environmental and climate justice. See generally Astrud Lea Beringer, *Environmental and Climate Justice*, UNDROP series, December 2020: https://www.fian.org/files/files/Andrea_20201211_Papers_5_Climate_v2.pdf. See also UN Food and Agriculture Organisation, International Fund for Agricultural Development, Children's Fund, World Food Programme and World Health Organisation, *The State of Food Security and Nutrition in the World 2018: Building climate resilience for food security and nutrition*, 2018: <http://www.fao.org/3/I9553EN/9553en.pdf>; Stephanie A. Malin and Stacia S. Ryder, Developing deeply intersectional environmental justice scholarship, *Environmental Sociology*, 11 March 2018, p. 2 (“Hundreds of studies conclude that, in general, ethnic minorities, indigenous persons, people of color, and low-income communities confront a higher burden of environmental exposure from air, water, and soil pollution from industrialization, militarization, and consumer practices”) (internal citations omitted).

³¹ See e.g. Anna Kaijser and Annica Kronsell, Climate change through the lens of intersectionality, *Environmental Politics*, 23:3, 2014, 417-433, p. 420 (“The responsibility, vulnerability, and decision-making power of individuals and groups in relation to climate change can be attributed to social structures based on characteristics such as gender, socio-economic status, ethnicity, nationality, health, sexual orientation, age, and place. Moreover, the impacts of climate change, as well as strategies for mitigation and adaptation, may reinforce such structures and categorisations.”). It is also worth noting that under the 2015 Paris Agreement, “when taking action to address climate change” Respondent States must “respect, promote and consider their respective obligations on human rights... as well as gender equality, empowerment of women and intergenerational equity.” See Paris Agreement, Conference of the Parties to the UN Framework Convention on Climate Change, Paris Agreement, 12 December 2015 (FCCC/CP/2015/L.9/Rev.1).

support. Impacts will also differ according to gender.”³²

UN human rights standards also highlight the disparate impacts of the climate crisis on the human rights of certain marginalized populations, including UN Human Rights Council Resolution 35/20 on Human Rights and Climate Change, United Nations Declaration on the Rights of Peasants (UNDRP) (recognizing that peasants and other people working in rural areas suffer from the burdens caused by environmental degradation and climate change) and the Committee against the Elimination of All Discrimination against Women (CEDAW Committee) General Recommendation No. 37 (identifying the differentiated gender impacts of climate change).³³ The IACtHR has also emphasized that the adverse effects of environmental degradation and climate change on human rights may be felt with greater intensity by certain groups in vulnerable situations, including children, noting that the right to a healthy environment constitutes “a universal value that is owed to both present and future generations.”³⁴

An intersectional lens to assess discrimination ensures that youth or other protected groups disproportionately impacted by the climate crisis are not treated as monolithic.³⁵

ii. States have an obligation to prevent and redress intersectional discrimination that communities disproportionately impacted by the climate crisis experience

Right-holders who belong to ethnic minorities or Indigenous populations, women and girls, persons with disabilities, persons living in conflict-affected areas including situations of occupation,³⁶ and persons living in extreme poverty, often experience intersecting forms of marginalization that each deserve targeted attention and tailored policy responses. The multi-layered forms of discrimination that such groups experience is no different in the context of climate change.

The prohibition of discrimination is a fundamental principle of human rights protection that lays at the heart of the international human rights law framework, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ICCPR.³⁷ States have a duty to ensure the

³² See IPCC, *Climate Change 2007 – Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Fourth Assessment Report of the IPCC*, p. 374. See also IPCC, 2018 Special Report: *Global Warming of 1.5°C*, Summary for Policy Makers, at B.5.1 (“Populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond include disadvantaged and vulnerable populations: some indigenous peoples, and local communities dependent on agricultural or coastal livelihoods (high confidence)”). See generally IPCC, 2018 Special Report: *Global Warming of 1.5°C*, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems.

³³ See e.g. UN Human Rights Council, *Human rights and climate change*, Resolution 35/20, 19 June 2017 (A/HRC/35/L.32); UNDRP, 2018. (A/HRC/RES/39/12), Preamble; UN CEDAW Committee, *General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change*, 7 February 2018, para. 1-9. In terms of disproportionate impacts of the climate crisis on children, relevant resources include: OHCHR, *Report on the relationship between climate change and human rights*, 15 January 2009, (A/HRC/10/61), para. 48; UN Independent Expert on human rights and the environment, *Report*, 30 December 2010, (A/HRC/25/53), para. 73-75.

³⁴ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 59, 67.

³⁵ Aspects of their identity, including but not limited to their ethnicity, sex, gender expression / identity or health, may compound, creating variations in their lived experiences and increasing the likelihood that some have or will experience intersectional forms of discrimination.

³⁶ Al-Haq, *Adaptation Under Occupation: Climate Change Vulnerability in the Occupied Palestinian Territory*, 2 October 2019: <https://www.alhaq.org/publications/15261.html>

³⁷ UN International Covenant on Civil and Political Rights, 16 December 1966, Art. 2(1), 26; UN International Covenant on Economic, Social and Cultural Rights, Art. 2(2); See also Universal Declaration of Human Rights, 10 December 1948, Art. 2, International Convention on the Elimination of All forms of Racial Discrimination, 21 December 1965, Art. 2(1)(a); UN Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979; UN Convention on the Rights of the Child, Art. 2; UN Convention on the Rights of Persons with Disabilities, Arts. 5-7 (recognising women and children with disabilities encounter multiple forms of discrimination based on their identity). UN treaty bodies have given further content to the scope of States’ obligations in this respect. See e.g. UN Human Rights Committee, *General Comment 18: Non-discrimination*, 1989, para. 12; UN CESCR, *General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights*, 2009 (E/C.12/GC/20); UN CEDAW Committee, *General Recommendation 34 on the rights of rural women*, 2016, (CEDAW/C/GC/34) para. 9-10, 12; UN Committee on the Rights of the Child, *General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, (CRC/C/GC/15), para. 50 (noting that States should “put children’s health concerns at the centre of their climate change adaptation and mitigation strategies”).

substantive equality of rights-holders.³⁸ CESCR has clarified the scope of state obligations under the principle of non-discrimination, explaining that: “[e]liminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.”³⁹

Substantive or material equality seeks to advance beyond a purely formal approach that is confined to requiring objective and reasonable distinction criteria to justify differences in treatment that would otherwise be arbitrary or unreasonable. It recognizes that certain sectors of the population require the adoption of affirmative action measures to ensure not just equality of opportunity but equality of outcomes. The scope of these obligations will vary depending on the positionality and life circumstances of each individual. Thus, an intersectional approach to non-discrimination can help illuminate complexity and guide interventions⁴⁰ and is arguably a framework better suited than a single-axis approach to address the multi-faceted and inter-generational challenges climate change poses.

The notion of intersectional discrimination, coined by legal scholar Kimberlé Crenshaw,⁴¹ is premised on the idea that each person is a composite of various traits and identities that cannot be artificially dissected, and that various social categories and individual characteristics compound to create a distinct lived experience.⁴² Intersectionality, as an analytical framework, recognizes that the human experience is a layered and constantly evolving “relationship between identities...and structures,”⁴³ and invites courts to consider the social constructions, historical legacies and systemic policies that foster systemic inequities.

This concept and analytical framework has been embraced by international human rights bodies and national courts, departing from the single-axis approach to assess discrimination. The CEDAW Committee, for example, has recognized that “*intersectionality is a basic concept for understanding the scope of the general obligations of States parties...*”⁴⁴ In the context of the climate crisis, the CEDAW Committee has found that “*women, girls, men and boys are affected differently by climate change and disasters, with many women and girls experiencing greater risks, burdens and impacts,*” stressing that “*situations of crisis exacerbate pre-existing gender inequalities and also compound intersecting forms of discrimination.*”⁴⁵ The UN Committee on the Rights of People with Disabilities, in turn, has described intersectional discrimination as “*a situation where several grounds interact with each other at the same time in such a way as to be inseparable,*” explaining that “*individuals...experience discrimination...as*

³⁸ See e.g. UN CESCR, General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights, 2009 (E/C.12/GC/20), para. 8; UN CESCR General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights, 2005 (E/C.12/2005/3).

³⁹ UN CESCR, General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights, 2009 (E/C.12/GC/20), para. 8.

⁴⁰ See Dimitrina Petrova, *Intersectionality Editorial*, *The Equal Rights Review*, Vol. Sixteen (2016), p. 6.

⁴¹ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, *The University of Chicago Legal Forum*, 1989; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, *Stanford Law Review*, Vol. 43, 1991.

⁴² See generally *Intersectionality in Promoting Equality*, Interview of Kimberlé Crenshaw and Patricia Schulz, *The Equality Review*, Vol. 16, 2016. See also Lorena Sosa, *Inter-American case law on femicide: Obscuring intersections?*, *Netherlands Quarterly of Human Rights*, 2017 (“intersectionality addresses the layered nature of oppression and the complexity of inequality, leaving traditional one-dimensional understandings behind”); Maria Caterina La Barbera, Marta Cruells Lopez, *Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v. Spain*, *Law & Society Review*, Volume 53, Number 4, 2019.

⁴³ Kimberlé Crenshaw, *Intersectionality in Promoting Equality*, Interview of Kimberlé Crenshaw and Patricia Schulz, *The Equality Review*, Vol. 16, 2016, p. 211. See also Maria Caterina La Barbera, Marta Cruells Lopez, *Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v. Spain*, *Law & Society Review*, Volume 53, Number 4, 2019, p. 1196-1197.

⁴⁴ UN CEDAW Committee, General Comment 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2010, (CEDAW/C/GC/28), para. 18.

⁴⁵ UN CEDAW Committee, General Recommendation 37 on Gender-related dimensions of disaster risk education in the context of climate change, 2018, (CEDAW/C/GC/37), para. 2.

*individuals with multidimensional layers of identities, statuses and life circumstances.*⁴⁶ Additionally, UN treaty body jurisprudence and national courts in various jurisdictions, such as the United States, the United Kingdom, South Africa, and Canada, have adopted an intersectional lens to assess multi-layered discrimination claims, recognizing the unique nature of compounding forms of social exclusion.⁴⁷

C. The State duty to prevent climate change related human rights harm as well as foreseeable harm and to effectively regulate businesses

UN and regional human rights bodies have established that States are under a duty to adopt legal and institutional frameworks to prevent human rights harms that arise from environmental damage and climate change. This includes holding business enterprises accountable for their role in environmental degradation and the accelerating climate crisis.⁴⁸ In doing so, States must build economies of life, centered in the protection of people and the right to a healthy environment.⁴⁹

i. United Nations Human Rights System Standards

CESCR has highlighted that States parties are “required to respect, protect and fulfil all human rights” and owe “such duties not only to their own populations, but also to populations outside their territories.”⁵⁰ It has specified that “a failure to prevent foreseeable harm to human rights caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation.”⁵¹ In General Comment 14, CESCR clarifies, in relation to the right to health, that States are “required to adopt measures against environmental and occupational health hazards” and for this purpose, “should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil.”⁵² This is supported by General Comment 36 of the Human

⁴⁶ UN Committee on the Rights of Persons with Disabilities, General Comment 3 on women and girls with disabilities, 2016 (CRPD/C/GC/3), para. 4, 16. Notably as early as 2009, the UN Committee on the Elimination of All Forms of Racial Discrimination has stressed that “...The ‘grounds’ of discrimination are extended in practice by the notion of ‘intersectionality.’” UN Committee on the Elimination of Racial Discrimination, General Recommendation 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, 2009 (CERD/C/GC/32), para. 7.

⁴⁷ Before UN treaty bodies, see e.g. UN CEDAW Committee, da Silva Pimentel v. Brazil, Communication No. 17/2008, 2 September 2011 (CEDAW/C/49/D/17/2008); UN CEDAW Committee, Cecilia Kell v. Canada, Communication No. 19/2008, 2 March 2012, (CEDAW/C/51/D/19/2008), para. 10.2. In the United Kingdom, see e.g. United Kingdom Employment Appeal Tribunal, Ministry of Defence v. DeBique, Judgment, UKEAT 0048/09, 2009, para. 82. In South Africa, see e.g. Constitutional Court of South Africa, Mahlangu and Another v. Minister of Labour and Others, ZACC 24, Judgment, 2020, para. 76. In Canada, see e.g. Ontario Human Rights Tribunal, Baylis-Flaunary v. DeWilde, Judgment, 28 CarswellOnt 8050, para. 143-4 (emphasizing “reliance on a single axis analysis where multiple grounds of discrimination are found, tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against... rather than recognize the possibility of the compound discrimination that may have occurred”). In the United States, see e.g. 5th Circuit, *Jeffries v. Harris Cmty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980); *Lam v. Univ. of Hawai’i*, 40 F.3d 1551, 1561-62 (9th Cir. 1994) (“where two bases for discrimination exist, they cannot be neatly reduced to distinct components”); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (“we are persuaded that the *Jeffries* ruling is correct”).

⁴⁸ See UN OHCHR, Human Rights, Climate Change and Business: Key Messages, p. 1, 5, 7.

⁴⁹ <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMIbusiness.pdf>. See also UN Guiding Principles on Business and Human Rights, 2011, Principle 1.

⁵⁰ The right to a safe, clean, healthy and sustainable environment is formalized in international and/or domestic law across at least 155 States. See UN Special Rapporteur on human rights and the environment, Report, 8 January 2019, (A/HRC/40/55), para. 16; UN Special Rapporteur on human rights and the environment, Report, 19 July 2018, (A/73/188).

⁵¹ UN CESCR, Climate change and the International Covenant on Economic, Social and Cultural Rights, 8 October 2018, para. 5: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>.

⁵² CESCR also advised that “States parties should adopt measures to adapt to the negative consequences of climate change, and integrate such measures within existing social, environmental and budgetary policies at domestic level.” UN CESCR, Climate change and the International Covenant on Economic, Social and Cultural Rights, 8 October 2018, para. 6: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>. Moreover, CESCR has clarified that, “[t]here are also a large number of domestic laws designed to protect specific economic, social and cultural rights, that apply directly to business entities, such as in the areas of non-discrimination, health-care provision, education, the environment”; it has also recalled that, “[c]ustomary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law.” UN CESCR, General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 2017, (E/C.12/GC/24), para. 4, 27.

⁵³ UN CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 2000 (E/C.12/2000/4), para. 36.

Rights Committee stressing that “[i]mplementation of the obligation to respect and ensure the right to life, and in particular 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.”⁵³ In General Recommendation 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, the CEDAW Committee stated that “States parties should regulate the activities of non-State actors within their jurisdiction, including when they operate extraterritorially.”⁵⁴ The Committee on the Rights of the Child, in its General Comment 15 on the right to health noted “a growing understanding of the impact of climate change ... on children’s health” and emphasized the obligation of States to take immediate action “to protect both freedoms and entitlements from third parties” (or from social or environmental threats).⁵⁵ In a joint statement on human rights and climate change, five UN human rights treaty bodies clarified that “[f]ailure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.”⁵⁶ Further, the pronouncement highlights that “States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially.”⁵⁷ Moreover, the UN Special Rapporteur on human rights and the environment clarified in his 2019 Safe Climate report that States “must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right.”⁵⁸

Broader human rights standards further illuminate these questions. The UN Human Rights Committee has stated that “[o]bligations of States parties under international environmental law should...inform the contents of article 6 of the [ICCPR], and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under environmental law.”⁵⁹ Furthermore, according to the International Court of Justice, “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”⁶⁰ Finally, Principle 1 of the UN Guiding Principles on Business and Human Rights (UNGPs) states that, under existing international human rights law, “States must protect against human rights abuse within their

⁵³ Further, according to the Human Rights Committee, “[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity,” adding that these include the “degradation of the environment.” UN Human Rights Committee, General Comment 36 on the right to life, 2018 (CCPR/C/GC/36), para. 26, 62.

⁵⁴ UN CEDAW Committee, General Recommendation 37 on Gender-related dimensions of disaster risk education in the context of climate change, 2018 (CEDAW/C/GC/37), para. 49.

⁵⁵ UN Committee on the Rights of the Child, General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health, 2013 (CRC/C/GC/15), para. 5, 71.

⁵⁶ UN CEDAW Committee, CESCR, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, Joint Statement on Human Rights and Climate Change, 16 September 2019: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24928&LangID=E>.

⁵⁷ UN CEDAW Committee, CESCR, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, Joint Statement on Human Rights and Climate Change, 16 September 2019: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24928&LangID=E> (also noting that “States should...discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk.”)

⁵⁸ According to the Rapporteur, “[t]he purpose of the United Nations Framework Convention on Climate Change is to achieve ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (see article 2). In other words, States committed themselves to ensuring a safe climate, which is vital to the enjoyment of a broad range of human rights.” UN Special Rapporteur on human rights and the environment, *Safe climate*, 2019 (A/74/161), para. 52, 65.

⁵⁹ UN Human Rights Committee, General Comment 36 on the right to life, 2018 (CCPR/C/GC/36), para. 62.

⁶⁰ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 29.

*territory and/or jurisdiction by third parties, including business enterprises.*⁶¹ The UNGPs also highlight that “*States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations,*”⁶² which should be applied extraterritorially. Principle 8 requires States to ensure policy coherence with their human rights obligations in all their decisions that shape business practices.⁶³

ii. Regional Human Rights Systems Standards

Regional human rights bodies have also recognized State duties to protect against environmental harm that interferes with human rights. The IACtHR concluded that the rights to life and personal integrity demand that “*States must take measures to prevent significant harm or damage to the environment, within or outside their territory.*”⁶⁴ It further detailed corresponding State obligations to “*(i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred.*”⁶⁵ Similarly in the ACHPR stated that the right to a healthy environment “*requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.*”⁶⁶

Regional human rights bodies have also recognized State obligations to effectively regulate businesses so as to protect against environmental harm that interferes with human rights. For example, the IACtHR has stated that “*States, taking into account the existing level of risk, must regulate activities that could cause significant environmental damage in a way that reduces any threat to the rights to life and to personal integrity.*”⁶⁷ Moreover, the IACtHR has affirmed, citing the UNGPs, that, “*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.*”⁶⁸ The ACHPR, in turn, has held that the State failing to protect against human rights abuses stemming from companies’ environmental degradation “*falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.*”⁶⁹

III. Conclusion

Given the foregoing, States have clear human rights obligations in the context of the climate crisis, including in relation to ESCER. In line with international, regional and comparative constitutional law frameworks, States must adopt and enforce adequate and effective legislative and administrative measures to reduce emissions within their territories and extraterritorially, based on the best available science and consistent with the Paris Agreement, in conformity with human rights standards, and with a focus on protecting vulnerable communities, such as future generations.

⁶¹ UN Guiding Principles on Business and Human Rights, 2011.

⁶² UN Guiding Principles on Business and Human Rights, 2011, Principle 2.

⁶³ UN Guiding Principles on Business and Human Rights, 2011.

⁶⁴ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 140.

⁶⁵ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 141-174.

⁶⁶ ACHPR, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, Decision, 27 October 2001, para. 52.

⁶⁷ IACtHR, *The Environment and Human Rights*, Advisory Opinion 23/17, 15 November 2017, para. 149.

⁶⁸ IACtHR, *Case of the Kabiña and Lokono Peoples v. Suriname*, Judgment, 25 November 2015, para. 224-226.

⁶⁹ ACHPR, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, Decision, 27 October 2001, para. 58.