

## I. Introduction and Summary of arguments

This third-party intervention is submitted by ALTSEAN-Burma, Comisión Colombiana de Juristas (CCJ), Comité Ambiental en Defensa de la Vida (CADV), the European Center for Constitutional and Human Rights (ECCHR), FIAN International, 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 the Women's Legal Centre (WLC) and coordinated by ESCR-Net - International Network for Economic, Social and Cultural Rights, pursuant to the leave to granted on 20 July 2021 by the President of the Third Section (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, related economic, social and cultural rights (ESCR) and the right to life; 2) the disproportionate impacts of the climate crisis on the human rights of older women and other 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, including through progressive realisation, utilising the maximum of available resources, and effectively regulating businesses.

## II. Arguments

### A. Impacts of the climate crisis on rights pertaining to a healthy environment, related economic, social and cultural rights, and the right to life

International,<sup>1</sup> 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 (ESCER), 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 ESCER 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.”<sup>2</sup>

#### i. United Nations Human Rights System Standards

The United Nations (UN) Human Rights Council (HRC), has addressed the impact of the climate crisis on the enjoyment of a healthy environment in multiple related ESCR resolutions.<sup>3</sup> 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.”<sup>4</sup>

<sup>1</sup> 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](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/HRTB-Feb.-2019-update-2019-03-25.pdf>.

<sup>2</sup> Separate Opinion of Vice-President Weeramantry, International Court of Justice, *Gabčíkovo-Nagymaros* Project, 1997, para. 91-92: <https://www.ici-cij.org/public/files/case-related/92/092-19970925-JUD-01-03-EN.pdf>.

<sup>3</sup> 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](https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf).

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

UN human rights treaty bodies have 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.<sup>5</sup> The UN Human Rights Committee has interpreted the right to life, under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to be “*a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights*” and an entitlement “*to enjoy a life with dignity*”; the Committee 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.”<sup>6</sup> 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 noted 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*.”<sup>7</sup>

UN Special Rapporteurs have also highlighted the consequences of climate change on the enjoyment of a healthy environment and related ESCER.<sup>8</sup> The Special Rapporteur on Human Rights and the Environment issued several reports affirming that combating climate change is critical to the full realisation of the right to a healthy environment.<sup>9</sup>

## ii. Regional Human Rights Systems Standards

Regional human rights standards have also emphasized how the consequences of climate change affect the full enjoyment of human rights, particularly ESCER.<sup>10</sup> 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 realisation of ESCER, including the rights to health, water, food, housing, and participation in cultural life.<sup>11</sup>

In the same Advisory Opinion, the IACtHR recognized the right to a healthy environment as an autonomous, fundamental right,<sup>12</sup> stating that the adverse impacts of climate change put this right at risk as they “*may cause irreparable harm to human beings*.”<sup>13</sup> 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*,

<sup>5</sup> 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>.

<sup>6</sup> 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.

<sup>7</sup> 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=E>. 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://climatecaselchart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204\\_13174\\_petition.pdf](http://climatecaselchart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_13174_petition.pdf).

<sup>8</sup> 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/workstreams/the\\_2013-2015\\_review/application/pdf/cvfcf\\_submission\\_annex\\_1\\_humanrights.pdf](https://unfccc.int/files/science/workstreams/the_2013-2015_review/application/pdf/cvfcf_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](https://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf).

<sup>9</sup> 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).

<sup>10</sup> This section focuses on standards elaborated by the African Commission of Human and People’s Rights and within the inter-American human rights system. See also Council of Europe, Parliamentary Assembly, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Report, (Doc. 15367), 13 September 2021 (recommending “an additional protocol to the European Convention on Human Rights..., as well as one to the European Social Charter...on the right to a safe, clean, healthy and sustainable environment,” among other measures).

<sup>11</sup> 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.

<sup>12</sup> The Court found that though 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.

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

such as the rights to ... personal integrity and life.”<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup>

The African Commission on Human and Peoples' Rights (ACHPR) has issued a resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change, urging the consideration of peoples' rights to economic, social and cultural development and to a satisfactory environment favourable to their development.<sup>17</sup> Three other resolutions emphasized the need to study the impacts of climate change on human rights, including ESCER, and highlighted State obligations to adopt measures to mitigate the impacts of climate change on the enjoyment of human rights.<sup>18</sup> Furthermore, the ACHPR 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.*”<sup>19</sup>

### iii. *Comparative Constitutional Law Standards*

National courts have also held that the consequences of climate change negatively affect the enjoyment of ESCER, including the right to a healthy environment. Courts and other relevant forums in domestic jurisdictions where various ESCER are constitutionally recognized, such as Colombia,<sup>20</sup> Mexico,<sup>21</sup> Nepal,<sup>22</sup> and the Philippines,<sup>23</sup> have recognized the impacts of the climate crisis on human rights and held that failure to adequately address climate change impedes the realisation of ESCER. 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, which the Court said 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....*"<sup>24</sup>

Courts in Pakistan<sup>25</sup>, India<sup>26</sup> and Nigeria<sup>27</sup> - jurisdictions where the right to a healthy environment and other ESCER are

<sup>14</sup> IACtHR, The Environment and Human Rights, Advisory Opinion 23/17, 15 November 2017, para. 59.

<sup>15</sup> IACtHR, The Environment and Human Rights, Advisory Opinion 23/17, 15 November 2017, para. 57.

<sup>16</sup> IACtHR, Case of the Indigenous Communities of Lhaka Honhat (Our Land Association) v. Argentina, Judgment, 6 February 2020, para. 201-254. See also Inter-American Commission on Human Rights, Case 12.053, Maya Indigenous Community of the Toledo District, Belize, Report No. 40/04, 12 October, 2004, para. 150, 153; Inter-American Commission on Human Rights, Special Rapporteur on Economic, Social, Cultural and Environmental Rights, About the Rapporteurship: <http://www.oas.org/en/iachr/isForm/?File=en/iachr/r/desca/default.asp> (describing the Rapporteur's mandate as containing environmental rights).

<sup>10</sup> ACHPR, Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change, Res. 417 (LXIV) 2019.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> See Supreme Court of Justice of Colombia, Demanda Generaciones Futuras v. Minambiente, Judgment, 5 April 2018: [http://climatecasereport.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405\\_11001-22-03-000-2018-00319-00\\_decision.pdf](http://climatecasereport.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf).

<sup>21</sup> See Supreme Court of Justice of the Nation of Mexico, Amparo sobre la modificación a la norma sobre el porcentaje máximo de etanol, Judgment, [https://www.scn.gob.mx/sites/default/files/listas/documento\\_dos/2020-01/AR%20610-2019.pdf](https://www.scn.gob.mx/sites/default/files/listas/documento_dos/2020-01/AR%20610-2019.pdf).

<sup>22</sup> 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](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181225_074-WO-0283_judgment-1.pdf)

<https://www.greenpeace.org/international/press-release/2/84/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://climatecaselchart.com/climate-change-litigation/non-us-case/in-re-greenpeace-southeast-asia-et-al/#:~:text=Greenpeace%20Southeast%20Asia%20and%20numerous,one%E2%80%94E2%80%9Cwhether%20the%20investor%2D>; 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/PHL/INT\\_CESCR\\_NHS\\_PHL\\_25266\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/PHL/INT_CESCR_NHS_PHL_25266_E.pdf)

<sup>22</sup> Supreme Court of Justice of Colombia, Demanda Generación Futuras v. Minambiente, Judgment, 5 April 2018, p. 13; [https://touinter.net.oncrg.org/Treaties/CE/SR/Shared%20Documentos/PLI/INT\\_CESCR\\_NHS\\_PHL\\_25200\\_E.pdf](https://touinter.net.oncrg.org/Treaties/CE/SR/Shared%20Documentos/PLI/INT_CESCR_NHS_PHL_25200_E.pdf).

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

<sup>25</sup> Lahore High Court, Leghari v. Federation of Pakistan, Judgment, 25 January 2018, para. 6-8:

<sup>29</sup> National Green Tribunal of India, *Sher Singh v. State of Himachal Pradesh*, Judgment, 6 February 2014, para. 12-17; [http://climatecaselaw.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404\\_2015-W.P.-No.-25501\\_201\\_decision.pdf](http://climatecaselaw.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501_201_decision.pdf).

<sup>24</sup> National Green Tribunal of India, Sher Singh v. State of Himachal Pradesh, Judgment, 6 February 2014, para. 13-17; <https://indiankanoon.org/doc/194586080/>.

<sup>22</sup> Federal High Court of Nigeria in the Benin Judicial Division, Gbemre v. Shell Petroleum Development Company of Nigeria Ltd et al., <https://tinyurl.com/yx2q76o7>.

not explicitly constitutionally guaranteed - likewise found violations of ESCER in climate cases through recognizing the interdependence and indivisibility of ESCER 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.<sup>28</sup>

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 positive obligations under Articles 2 and 8 of the European Convention of Human Rights (ECHR), drawing on analogous jurisprudence from the European Court of Human Rights (ECtHR) and explicitly linking those articles to environment-related situations.<sup>29</sup> 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.<sup>30</sup> In another recent case, the Hague District Court recognized the responsibility of a corporation based on the Civil Code’s unwritten standard of care, holding Royal Dutch Shell accountable for the impact of their CO<sub>2</sub> emissions on climate change and ordered the Shell group to reduce such emissions by net 45% in 2030, compared to 2019 levels, through their corporate policy; in its ruling, the Court factored in human rights, such as Articles 2 and 8 of the ECHR, in its interpretation regarding the civil standard of care.<sup>31</sup>

## B. The disproportionate impacts of the climate crisis on the human rights of older women and other 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.<sup>32</sup> 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.<sup>33</sup> Human rights standards require

Judgment, 14 November 2005, p. 30:

[http://climatecaselaw.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051130\\_FHCBCS5305\\_judgment-1.pdf](http://climatecaselaw.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051130_FHCBCS5305_judgment-1.pdf).

<sup>28</sup> Lahore High Court, *Leghari v. Federation of Pakistan*, Judgment, 25 January 2018, para. 7:

[http://climatecaselaw.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404\\_2015-W.P.-No.-25501\\_201\\_decision.pdf](http://climatecaselaw.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501_201_decision.pdf).

<sup>29</sup> Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, Judgment (English), 13 January 2020:

<https://uitspraken.rechtspraak.nl/inzieldocument?id=ELCI-NL-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.”)

<sup>30</sup> German Constitutional Court, *BVerfG*, Judgment, I BvR 2656/18, 24 March 2021, para. 145-150, 182-183, [www.bverfg.de/e/rs20210324\\_1bvr265618.html](http://www.bverfg.de/e/rs20210324_1bvr265618.html) (short version in english available at: [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html)).

<sup>31</sup> The Hague District Court, *Milieudefensie et al. v. Royal Dutch Shell* (English), 26 May 2021:

[https://uitspraken.rechtspraak.nl/inzieldocument?id=ELCI-NL-RBDHA-2021-5339#\\_924824fc-f061-4321-b9ec-95e763787836](https://uitspraken.rechtspraak.nl/inzieldocument?id=ELCI-NL-RBDHA-2021-5339#_924824fc-f061-4321-b9ec-95e763787836).

<sup>32</sup> 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](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/i9553en.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).

<sup>33</sup> 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

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 older women and other specific populations*

International bodies have emphasized how climate change disproportionately impacts the most vulnerable, including older women. 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 support. Impacts will also differ according to gender.”<sup>34</sup>

UN human rights standards<sup>35</sup> also highlight the disparate impacts of the climate crisis on the human rights of certain more vulnerable populations, including older women. The CEDAW Committee has explained that [s]ituations of crisis exacerbate pre-existing gender inequalities and also compound intersecting forms of discrimination against [...] older women, who are often affected disproportionately compared to men or other women.<sup>36</sup> Further, the CEDAW Committee has recognized that women and girls “are more likely to be exposed to disaster induced risks and losses related to their livelihoods and they are less able to adapt to changes in climatic conditions.”<sup>37</sup> The Committee has also articulated that the climate emergency: “impacts differently on women, especially older women who, due to their physiological differences, physical ability, age and gender; as well as social norms and roles and an inequitable distribution of aid and resources relating to social hierarchies, are particularly disadvantaged in the face of natural disasters. Their limited access to resources and decision-making processes increases their vulnerability to climate change.”<sup>38</sup>

An intersectional lens to assess discrimination ensures that older women or other groups disproportionately impacted by the climate crisis are not treated as monolithic.<sup>39</sup>

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

Women and girls, minorities, Indigenous Peoples, persons with disabilities, persons living in conflict-affected areas including situations of occupation, and persons living in extreme poverty, amongst other groups, 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

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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).

<sup>34</sup> 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.

<sup>35</sup> See e.g., UN Human Rights Council, Human rights and climate change, Resolution 35/20, 19 June 2017 (A/HRC/35/L.32); UN Human Rights Council, Analytical study on the promotion and protection of the rights of older persons in the context of climate change, Report of the Office of the United Nations High Commissioner for Human Rights, 2021, (A/HRC/47/46), para. 9, 29, 34-36; UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, 2018, (A/HRC/RES/39/12). Notably, in relation to the rights of older adults in the context of climate change, the UN Periodic Review process has included greater attention to the disproportionate impacts of climate change on older adults. UN Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Grenada, 2020, (A/HRC/44/13), para. 94.68; UN Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Dominica, 2019, (A/HRC/42/9), para. 104.63; UN Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Costa Rica, 2019, (A/HRC/42/12), para. 111.46; UN Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Albania, 2019: A/HRC/42/4, para. 95.29; UN Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Equatorial Guinea, 2019, (A/HRC/42/13), para. 122.52. Also, the Inter-American Court of Human Rights 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. IACtHR, The Environment and Human Rights, Advisory Opinion 23/17, 15 November 2017, para. 59, 67.

<sup>36</sup> UN CEDAW Committee, General Recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change, 2018, (CEDAW/C/GC/37), para. 2.

<sup>37</sup> UN CEDAW Committee, General Recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change, 2018, (CEDAW/C/GC/37), para. 3.

<sup>38</sup> UN CEDAW Committee, General Recommendation No. 27 on older women and protection of their human rights, 2010, (CEDAW/C/GC/27), para. 25.

<sup>39</sup> 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.

rights law framework, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ICCPR.<sup>40</sup> States have a duty to ensure the substantive equality of rights-holders.<sup>41</sup> 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.”<sup>42</sup>

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 interventions,<sup>43</sup> and is arguably a framework better suited than a single-axis approach to addressing the multi-faceted and inter-generational challenges climate change poses.

The notion of intersectional discrimination, coined by legal scholar Kimberlé Crenshaw,<sup>44</sup> is premised on the idea that each person is a composite of traits and identities that cannot be artificially dissected, and that various social categories and individual characteristics compound to create a distinct lived experience.<sup>45</sup> Intersectionality, as an analytical framework, recognizes that the human experience is a layered and constantly evolving “relationship between identities...and structures,”<sup>46</sup> and invites courts to consider the social constructions, historical legacies and systemic policies that foster systemic inequities.

This concept and analytical framework have 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...”<sup>47</sup> In relation to the climate crisis, the Committee has articulated that: “States parties should ensure that climate change and

<sup>40</sup> 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”).

<sup>41</sup> 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).

<sup>42</sup> UN CESCR, General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights, 2009, (E/C.12/GC/20), para. 8.

<sup>43</sup> See Dimitrina Petrova, *Intersectionality Editorial*, The Equal Rights Review, Vol. Sixteen (2016), p. 6.

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> 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.

<sup>47</sup> 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. See also: 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. In addition, see 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.

disaster risk-reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women. States parties should also facilitate the participation of older women in decision-making for climate change mitigation and adaptation.”<sup>48</sup> The Committee has called on State parties to “[i]dentify and eliminate all forms of discrimination, including intersecting forms of discrimination, against women in disaster risk reduction and climate change policies, legislation, policies, programmes, plans, and other activities”<sup>49</sup> as well as to “improve coordination between different sectors involved in disaster risk management, climate change, gender equality, health care, education, social protection, agriculture, environmental protection, urban planning etc. This could be done through the adoption of integrated national disaster risk reduction and climate change strategies and plans that explicitly integrate a gender equality approach.”<sup>50</sup> Specifically in relation to the right to health, the Committee has explained that measures should be taken to ensure that gender responsive climate change and disaster resilience policies, budgets and monitoring activities are fully integrated within health services and systems.<sup>51</sup>

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.<sup>52</sup>

### C. The State duty to prevent climate change related human rights harm, including through progressive realisation, utilising the maximum available resources, and effectively regulating businesses

UN and regional human rights bodies have established that States have a duty to adopt legal and institutional frameworks to prevent human rights harms that arise from environmental damage and climate change. This includes obligations of progressive realisation and use of maximum available resources. It also entails holding business enterprises accountable for their role in environmental degradation and the accelerating climate crisis.<sup>53</sup> In doing so, States must build economies of life, centered in the protection of people and the right to a healthy environment.<sup>54</sup>

#### i. United Nations Human Rights System Standards

The obligation of progressive realisation is anchored in ICESCR Article 2.1 and the Paris Agreement’s Articles 3 and 4(3). Under the ICESCR, progressive realisation duty, States must take deliberate, concrete and targeted steps towards the fulfilment of the Covenant rights.<sup>55</sup> Such steps should be measured with indicators and benchmarks. Some rights in the Covenant, however, are not subject to progressive realisation and must be immediately respected, protected, and fulfilled, such as the right to non-discrimination.<sup>56</sup> CESCR has established that each right has minimum core obligations that are also not subject to progressive realisation.<sup>57</sup> Furthermore, “particular attention should be given to measures to improve the

<sup>48</sup> UN CEDAW Committee, General Recommendation No. 27 on older women and protection of their human rights, 2010, (CEDAW/C/GC/27), para. 35.

<sup>49</sup> UN CEDAW Committee, General Recommendation No. 37 on gender-Related dimensions of disaster risk reduction in the context of climate change, 2018, (CEDAW/C/GC/37), para. 31(a).

<sup>50</sup> UN CEDAW Committee, General Recommendation No. 37 on gender-Related dimensions of disaster risk reduction in the context of climate change, 2018, (CEDAW/C/GC/37), para. 42(b).

<sup>51</sup> UN CEDAW Committee, General Recommendation No. 37 on gender-Related dimensions of disaster risk reduction in the context of climate change, 2018, (CEDAW/C/GC/37), para. 65, 68.

<sup>52</sup> 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-Flannery 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 Cnty. Actoin 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”).

<sup>53</sup> See UN OHCHR, Human Rights, Climate Change and Business: Key Messages, p. 1, 5, 7; <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>. See also UN Guiding Principles on Business and Human Rights, 2011, Principle 1.

<sup>54</sup> 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).

<sup>55</sup> UN CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant), 1990, para. 2, 8.

<sup>56</sup> UN CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant), 1990, para. 5.

<sup>57</sup> UN CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant), 1990, para. 10. States must also act in good faith to fulfil the obligations under the Covenant. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, para.

*standard of living of the poor and other disadvantaged groups.*<sup>58</sup> States are obliged to use their maximum available resources to achieve progressively realized rights, including seeking international assistance and cooperation. States are not allowed to take retrogressive measures that would impede the fulfilment of ICESCR rights, unless it can be proven by the State that the measures were justified “*by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*”<sup>59</sup> Per the Limburg Principles, “*all appropriate means*” in ICESCR Article 2 is not limited to legislative means, but also “*administrative, judicial, economic, social and educational measures.*”<sup>60</sup> Thus, according to CESCR, a failure to prevent foreseeable human rights harm caused by climate change, or to mobilize the maximum available resources to do so, could violate a State Party’s Covenant obligations.<sup>61</sup> The obligation of non-retrogression, as anchored in CESCR’s Article 3, highlights that States cannot go back on achieved rights. Under the Paris Agreement’s Article 2.1(b), States must increase the ability to adapt to the adverse impact of climate change, thus incorporating States’ obligation to progressively realize and to prevent retrogression on ESCR.

The Paris Agreement references human rights in its preamble.<sup>62</sup> Read holistically and considering international human rights law, it is clear that the parties are expected to take human rights implications into account when defining their ambitions, including under Article 3 of the Paris Agreement.<sup>63</sup> This includes the right to health, which is specifically mentioned in the preamble, as well as gender equality and empowerment of women. Article 3 is overarching and “*extends to all parties the obligation to undertake and communicate ambitious efforts in mitigation, adaptation, finance, technology, capacity-building, and transparency to achieve the purpose of the Paris Agreement. It sets an expectation that efforts of all parties will represent a progression across all these areas.*”<sup>64</sup> This includes areas of mitigation, as elaborated under Article 4(3), through which States are obliged to set nationally determined contributions (NDCs) that it intends to achieve, adaptation planning and implementation, in line with Article 7.9, and provision of financial resources to developing countries, according to Article 9.1. Article 2 of the Paris Agreement sets the aim of the Agreement as “*strengthen[ing] the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty.*”

CESCR has recognized that NDCs “*should be revised to better reflect the ‘highest possible ambition’ referred to in the Paris Agreement (art. 4 (3))*”, for States to act consistently with their human rights obligations.<sup>65</sup> Moreover, the CEDAW Committee has highlighted that this obligation applies to the whole life cycle of women and in the “*event of any man-made and/or natural disaster.*”<sup>66</sup> States need to have indicators and benchmarks in place to measure their progress and intervention, while ensuring that these indicators and benchmarks are gender disaggregated, in line with the enhanced Lima work plan on gender.<sup>67</sup> The UN Resolution on climate change of the 44th Human Rights Council session further highlighted that States are called upon to “*adopt a comprehensive, integrated, gender-responsive, age-inclusive and disability-inclusive approach to climate change adaptation and mitigation policies, consistent with the United Nations Framework Convention on Climate Change and the objective and principles thereof, to address efficiently the economic, cultural and social impact and human rights challenges that climate change presents, for the full and effective enjoyment of human rights for all, and particularly to support the resilience and adaptive capacities of older persons, both in rural*

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<sup>58</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, para. 14.

<sup>59</sup> UN CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant), 1990, para. 9.

<sup>60</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, para. 17.

<sup>61</sup> UN CESCR, Climate change and the International Covenant on Economic, Social and Cultural Rights, 2018, (E/C.12/2018/1), para. 6.

<sup>62</sup> 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), preambular paragraph 11.

<sup>63</sup> See UN Special Rapporteur on human rights and the environment, Climate change, 2016, (A/HRC/31/52), para. 15, 17, 65.

<sup>64</sup> Lavanya Rajamani, “Guiding Principles and General Obligation (Article 2.2 and Article 3)”, in Daniel Klein et al. (eds.), The Paris Agreement on Climate Change: Analysis and Commentary, Oxford University Press, 2017, p. 136.

<sup>65</sup> UN CESCR, Climate change and the International Covenant on Economic, Social and Cultural Rights, 2018, (E/C.12/2018/1), para. 6.

<sup>66</sup> UN CEDAW Committee, General Recommendation No. 27 on older women and protection of their human rights, 2010, (CEDAW/C/GC/27), para. 30.

<sup>67</sup> See UN Framework Convention on Climate Change, Decision 3/CP.25: Enhanced Lima work programme on gender and its gender action plan, 2019, (FCCC/CP/2019/13/Add.1).

and urban areas, to respond to the adverse impact of climate change.”<sup>68</sup>

Furthermore, 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.”<sup>69</sup> 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.”<sup>70</sup> 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.”<sup>71</sup> This is supported by General Comment 36 of the Human 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.”<sup>72</sup> 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.”<sup>73</sup> 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.<sup>74</sup> Five UN human rights treaty bodies jointly 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.”<sup>75</sup> Further, the pronouncement highlights that “States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially.”<sup>76</sup> Moreover, the UN Special Rapporteur on human rights and the environment clarified in 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.”<sup>77</sup>

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

<sup>68</sup> UN General Assembly, Resolution on human rights and climate change, 2020, (A/HRC/44/L.5), para. 4.

<sup>69</sup> UN CESCR, Climate change and the International Covenant on Economic, Social and Cultural Rights, 2018, (E/C.12/2018/1), para. 5.

<sup>70</sup> 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, 2018, (E/C.12/2018/1), para. 6. 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.

<sup>71</sup> 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.

<sup>72</sup> 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.

<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> 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=24998&LangID=E>.

<sup>76</sup> 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=24998&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.”)

<sup>77</sup> 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.

*obligations under environmental law.”<sup>78</sup> 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.”<sup>79</sup> 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 territory and/or jurisdiction by third parties, including business enterprises.”<sup>80</sup> 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,”<sup>81</sup> 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.<sup>82</sup>*

#### ii. *Regional Human Rights Systems Standards*

Regional human rights bodies recognize 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.”<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup>

Regional human rights bodies also recognize 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.”<sup>86</sup> 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.”<sup>87</sup> 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.”<sup>88</sup>

### **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 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 communities facing greater risks, such as older women.

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<sup>78</sup> UN Human Rights Committee, General Comment 36 on the right to life, 2018 (CCPR/C/GC/36), para. 62.

<sup>79</sup> International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, para. 29.

<sup>80</sup> UN Guiding Principles on Business and Human Rights, 2011.

<sup>81</sup> UN Guiding Principles on Business and Human Rights, 2011, Principle 2.

<sup>82</sup> UN Guiding Principles on Business and Human Rights, 2011.

<sup>83</sup> IACtHR, The Environment and Human Rights, Advisory Opinion 23/17, 15 November 2017, para. 140.

<sup>84</sup> IACtHR, The Environment and Human Rights, Advisory Opinion 23/17, 15 November 2017, para. 141-174.

<sup>85</sup> 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.

<sup>86</sup> IACtHR, The Environment and Human Rights, Advisory Opinion 23/17, 15 November 2017, para. 149.

<sup>87</sup> IACtHR, *Case of the Kalîña and Lokono Peoples v. Suriname*, Judgment, 25 November 2015, para. 224-226.

<sup>88</sup> 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.