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## THE KALEIDOSCOPE OF CLIMATE CHANGE AND HUMAN RIGHTS:

THE PROMISE OF INTERNATIONAL LITIGATION FOR WOMEN, INDIGENOUS  
PEOPLES, AND CHILDREN

*Rosa Celorio\**

*Climate change has been identified as a global emergency, a major international development issue, and a priority concern by many international and national entities. Women, Indigenous peoples, and children are some of the individuals and groups most affected by the adverse impacts of climate change. The author contends in this article that international case litigation can be a key strategy to set critical legal standards to address human rights violations suffered by women, Indigenous peoples, and children in the area of climate change. This article also proposes international litigation as a powerful catalyst to give agency, autonomy, and participation to these groups, especially in the finding of solutions and strategies to combat climate change. The author discusses cases currently before the Inter-American Commission on Human Rights, the European Court of Human Rights, the United Nations Human Rights Committee, and the United Nations Committee on the Rights of the Child alleging human rights violations under existing treaties connected to state failures in adopting measures to adequately adapt and mitigate to climate change concerns. The author explores whether the litigation of cases before global and regional human rights protection systems can serve to secure the goal of climate justice and be useful in addressing climate change issues faced by women, Indigenous peoples, and children. The article discusses important opportunities in cases to develop key concepts, legal standards, and useful guidance for states on how to best mitigate, adapt, and ensure access to justice for climate change effects. The article delves into four areas in which case litigation before global and regional human rights bodies can be helpful in defining the contours of state obligations to advance the human rights of women, Indigenous peoples, and children in the area of climate justice. These areas include due diligence, extraterritoriality, and non-state actors; a gender perspective and intersectional discrimination; consultation, consent, and effective participation; and access to information and human rights defense. This article also reviews how existing global and regional human rights treaties, as well as new agreements – such as the Escazú Agreement in Latin America and the Caribbean – can serve as*

*important references in human rights litigation efforts related to climate change. This article seeks to contribute to current scholarship exploring the synergies between climate change concerns, international human rights law, the goal of climate justice, and the human rights of women, Indigenous peoples, and children in these areas.*

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## **I. Introduction**

This article discusses litigation at the international level as a valuable strategy to address the adverse effects of climate change on women, Indigenous peoples, and children. It analyzes selected cases before global and regional human rights bodies<sup>1</sup> and suggests important opportunities to develop key concepts, legal standards, and critical guidance for states on how to best mitigate, adapt, and ensure access to justice for climate change effects.

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\* Burnett Family Associate Dean and Distinguished Professorial Lecturer for International and Comparative Law and Policy, George Washington University Law School. Former Senior Human Rights Attorney, Inter-American Commission on Human Rights. The views expressed are solely those of the author. I am grateful to Sabrina Rodriguez, Traci Emerson Spackey, and Germaine Leahy for their invaluable research support. I also share my gratitude with the staff and editors of the Arizona Journal of Environmental Law and Policy.

<sup>1</sup> This article will discuss primarily selected cases currently before the European Court of Human Rights, the Inter-American Commission on Human Rights, the United Nations Human Rights Committee, and the United Nations Committee on the Rights of the Child.

Climate change currently captivates the attention of the international community.<sup>2</sup> It has been identified as a global emergency, a major international development issue, and a priority concern by many entities.<sup>3</sup> The 2022 United Nations Climate Change Conference—referred to as “COP27”—recently confirmed the urgency of addressing climate change and established a new “loss and damage” fund to support the most vulnerable countries in addressing this issue.<sup>4</sup> The Paris Climate Change agreement was also adopted in 2015 by 195 countries, calling its state parties to limit global peaking of greenhouse gas emissions, increase national adaptation and mitigation efforts, and maintain nationally determined contributions.<sup>5</sup>

The increased attention to climate change has also promoted that this problem is analyzed from a human rights perspective and using international law as a reference.<sup>6</sup> Calls from the United Nations High Commissioner for Human Rights, United Nations Special Rapporteurs and Treaty-Based Organs, and non-profit and

<sup>2</sup> For an example of recent statements, see U.N. Secretary-General, Remarks to High-Level Opening of COP27 (Nov. 7, 2022), <https://www.un.org/sg/en/content/sg/speeches/2022-11-07/secretary-generals-remarks-high-level-opening-of-cop27> (in which the United Nations Secretary General underscores urgent concern over the growth of greenhouse gas emissions and global temperatures; calls climate change “...the defining issue of our age;” and expresses that “We are on a highway to climate hell with our foot still on the accelerator.”)

<sup>3</sup> See Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation, and Vulnerability, Technical Summary*, 44–49 (2022), [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_TechnicalSummary.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_TechnicalSummary.pdf) [hereinafter *IPCC Climate Change Report 2022, Technical Summary*]; G.A. Res. 70/1, Transforming our World: The 2030 Agenda for Sustainable Development Goals (Oct. 21, 2015), Goal 13; U.N. Env't Programme, *Climate Change and Human Rights* 2–8 (Dec. 2015); World Bank Group [WBG], *Turn Down the Heat: Confronting the New Climate Normal* at 8–21 (Nov. 23 2014).

<sup>4</sup> See U.N. Climate Change [UNCC], *COP27 Reaches Breakthrough Agreement on New “Loss and Damage” Fund for Vulnerable Countries* (Nov. 20, 2022) <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries>.

<sup>5</sup> See Paris Agreement to the United Nations Framework Convention on Climate Change, Articles 2(1)(a) and (b), 2-4, 6-9 & 11-14, Dec. 12, 2015, T.I.A.S. No. 16-1104., [hereinafter *Paris Agreement*]; UNCC, *Historic Paris Agreement on Climate Change: 195 Nations Set Path to Keep Temperature Rise Well Below 2 Degrees Celsius*, (Dec. 13, 2015), <https://unfccc.int/news/finale-cop21>.

<sup>6</sup> See, e.g., Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, *Promotion and Protection of Human Rights in the Context of Climate Change*, U.N. Doc. A/77/226 ¶¶ 1–3 (July 26, 2022) [hereinafter *Promotion and Protection of Human Rights in the Context of Climate Change*]; Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Env't, *On the Human Rights Obligations Relating to Climate Change*, U.N. Doc. A/HRC/31/52 ¶¶ 23–32 (Feb. 1, 2016) [hereinafter *Report on the Human Rights Obligations Relating to Climate Change*]; Inter-Am. Comm'n on H.R. and Rapporteurship on Econ., Soc., Cultural and Envtl. Rights, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, at 4–7, Res. No. 3/2021 (Dec. 31, 2021), [https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion\\_3-21\\_ENG.pdf](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf) [hereinafter IACHR and REDESCA Climate Change Resolution 3/2021]. See also Dinah L. Shelton, *Litigating a Rights-Based Approach to Climate Change*, PROC. OF THE INT'L CONF. ON HUMAN RIGHTS AND THE ENV'T 211, 214–21 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235179](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235179); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 168–90 (2009).

academic entities are cognizable here, especially highlighting the role of states as historical and primary contributors of greenhouse gas emissions.<sup>7</sup> Many of these developments have been connected to historical calls to codify the right to a safe, clean, and healthy environment.<sup>8</sup> Important advances were made recently by the United Nations in adopting two resolutions—one from the UN Human Rights Council and one from the UN General Assembly—recognizing the right to a safe, clean, and healthy environment, and the creation of a United Nations Special Rapporteurship on Climate Change.<sup>9</sup> There are also calls to include climate change concerns with a human rights perspective in new treaties codifying rights in the areas of development<sup>10</sup> and business and human rights.<sup>11</sup>

The United Nations Human Rights Committee has also recently affirmed that environmental degradation and climate change are serious threats to the right to live with dignity, which entails obligations for state parties to the International

<sup>7</sup> See *supra* note 6; Joint Statement of Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on Human Rights and Climate Change*, HRI/2019/1 (May 14, 2020), <https://digitallibrary.un.org/record/3871313> [hereinafter U.N. Treaty-Based Organs, *Joint Statement on Human Rights and Climate Change*]; U.N. High Comm'r for Human Rights [OHCHR], *COP27: Urgent Need to Respect Human Rights in All Climate Change Action, say UN Experts* (Nov. 4, 2022), <https://www.ohchr.org/en/statements/2022/11/cop27-urgent-need-respect-human-rights-all-climate-change-action-say-un-experts>; OHCHR, *Climate Change the Greatest Threat the World Has Ever Faced, UN Expert Warns* (Oct. 21, 2022), <https://www.ohchr.org/en/press-releases/2022/10/climate-change-greatest-threat-world-has-ever-faced-un-expert-warns>; Antonia Juhasz, *Governments Should Commit to Fossil Fuel Phase Out at COP27: Fossil Fuels Drive the Climate Crisis, Human Rights Harms*, HUMAN RIGHTS WATCH (Nov. 16, 2022), <https://www.hrw.org/news/2022/11/16/governments-should-commit-fossil-fuel-phase-out-cop27>; John H. Knox, *Human Rights Principles and Climate Change* in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 220–331 (Cinnamon P. Carlarne et al. eds., Oxford University Press, 2016).

<sup>8</sup> See, e.g., Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Env't, *Framework Principles on Human Rights and the Environment*, ¶¶ 14–16, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) [hereinafter *Framework Principles on Human Rights and the Environment*]; Marcos A. Orellana, *The Case for a Right to a Healthy Environment*, HUMAN RIGHTS WATCH (Mar. 1, 2018), <https://www.hrw.org/news/2018/03/01/case-right-healthy-environment>.

<sup>9</sup> See G.A. Res. 76/300, *The Human Right to a Clean, Healthy, and Sustainable Environment*, U.N. Doc. A/RES/76/300 (Aug. 1, 2022); H.R.C. Res. 48/13, *The Human Right to a Clean, Healthy and Sustainable environment*, U.N. Doc. A/HRC/RES/48/13 (Oct. 18, 2021); OHCHR, *Human Rights Council Appoints a Special Rapporteur on the Protection of Human Rights in the Context of Climate Change and a Special Rapporteur to Monitor the Situation of Human Rights in Burundi* (Oct. 8, 2021), <https://www.ohchr.org/en/press-releases/2021/10/human-rights-council-appoints-special-rapporteur-protection-human-rights>.

<sup>10</sup> See, e.g., Roman Girma Teshome, *The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?*, 22 HUM. RTS. L. REV. 12, 15 (June 2022) <https://doi.org/10.1093/hrlr/ngac001>.

<sup>11</sup> See generally Jacques Hartmann and Annasilva Savaresi, *Corporate actors, environmental harms and the Draft UN Treaty on Business and Human Rights: History in the making?*, QUESTIONS INT'L L. (July 31, 2021), [http://www.qil-qdi.org/wp-content/uploads/2021/07/03\\_Business-HR-\\_HARTMANN-SAVARESIS\\_FIN.pdf](http://www.qil-qdi.org/wp-content/uploads/2021/07/03_Business-HR-_HARTMANN-SAVARESIS_FIN.pdf).

Covenant on Civil and Political Rights (ICCPR) to protect the environment against harm, pollution, and climate change caused by both state and non-state actors.<sup>12</sup> The states of Colombia and Chile moreover presented a request before the Inter-American Court of Human Rights on January 9, 2023 for an Advisory Opinion to issue guidance to states on how to offer a timely and adequate response to the climate emergency taking into consideration their international human rights law obligations.<sup>13</sup> The United Nations General Assembly adopted a Resolution on March 29, 2023 requesting the International Court of Justice to issue an Advisory Opinion focused on state obligations in respect to climate change.<sup>14</sup>

Moreover, there is a cognizable trend to interpret the Paris Agreement as a human rights treaty, due to its inclusion of human rights language in its preamble.<sup>15</sup> The preamble of the Paris Agreement refers explicitly to the need for state parties to take into consideration human rights when addressing climate change, including those related to Indigenous peoples, migrants, children, persons with disabilities, and individuals in vulnerable situations.<sup>16</sup> The agreement in its preamble also calls for a climate action approach guided by gender equality and the empowerment of women.<sup>17</sup>

The tendency to recognize climate change as a human rights issue has also been palpable at the regional level. Resolutions have been adopted in Africa, the Americas, and Europe recognizing climate change as a priority human rights issue

<sup>12</sup> See U.N. Human Rights Comm. [UNHRC], *General Comment 36 On the Right to Life*, U.N. Doc. CCPR/C/GC/36 at ¶ 62 (Oct. 30. 2018).

<sup>13</sup> For more discussion, see Center for Justice and Int'l Law, *Chile and Colombia Join Forces to Ask Regional Human Rights Court for Guidelines to Respond to Climate Emergency* (Jan. 13, 2023), <https://cejil.org/en/blog/chile-and-colombia-join-forces-to-ask-regional-human-rights-court-for-guidelines-to-respond-to-climate-emergency/> (which discusses the content of this request for an advisory opinion, which is not public yet).

<sup>14</sup> See United Nations General Assembly, Resolution A/77/L.58 (2023); United Nations, *General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change* (March 29, 2023), <https://press.un.org/en/2023/ga12497.doc.htm>. The International Tribunal for the Law of the Sea has also received a request for an advisory opinion from the Commission on Small Island States on questions related to climate change and international law. For more information, see International Tribunal for the Law of the Sea, Press Release ITLOS/Press 327-12, *The International Tribunal for the Law of the Sea Receives a Request for an Advisory Opinion from the Commission of Small Island States on Climate Change and International Law* (Dec. 12, 2022), [https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR\\_327\\_EN.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_327_EN.pdf)

<sup>15</sup> See, e.g., *Promotion and Protection of Human Rights in the Context of Climate Change*, *supra* note 6, ¶¶ 3–4; John Knox, *The Paris Agreement as a Human Rights Treaty* in HUMAN RIGHTS & 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT 324–37 (Dapo Akande et al. eds., Oxford University Press 2020). See also STF, ARGUIÇÃO DE DESCUMPRIMENTO DE PRECEITO FUNDAMENTAL 708 DISTRITO FEDERAL ADPF 708 Relator, PSB v. Brazil, (July 4, 2022) ¶¶ 6–18; 27–37 (Braz.), [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220701\\_ADPF-708\\_decision-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220701_ADPF-708_decision-1.pdf) (Unofficial English Translation) (considering the Paris Agreement as a human rights treaty and affirming the constitutional obligation of the state of Brazil to address climate change and to resume the operations of its climate fund).

<sup>16</sup> See *Paris Agreement*, *supra* note 5, at preamble.

<sup>17</sup> See *id.*

and its impact on specific groups of the population.<sup>18</sup> Hearings have been called by the Inter-American Commission on Human Rights addressing concrete human rights issues derived from climate change and demanding state prioritization of these concerns.<sup>19</sup>

A very important trend in recognizing climate change as a human rights issue, has been the surge of litigation efforts before courts.<sup>20</sup> Many of these litigation efforts seek to hold states accountable for failing to adopt sufficient efforts to mitigate the adverse effects of climate change, and in particular to set nationally determined contributions and limit global greenhouse gas emissions.<sup>21</sup> Some of these efforts are also beginning to look closely at the need for states to act proactively to adapt to climate change, especially due to its pernicious impact on

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<sup>18</sup> See generally IACHR and REDESCA Climate Change Res, 3/2021, *supra* note 6; Council of Europe Parliamentary Assembly Res. 2400, *Combating Inequalities in the Right to a Safe, Healthy, and Clean Environment*, (2021), <https://pace.coe.int/pdf/d73530f6a77b1ad1238ee2d7346423fa1a4960f6711e38012ab22f456247406f/resolution%202400.pdf>; African Comm'n on Human and Peoples' Rights, *Resolution on Climate Change and Human Rights in Africa*, ACHPR/Res.342(LVIII) 2016, [www.achpr.org/sessions/resolutions?id=381](http://www.achpr.org/sessions/resolutions?id=381)

<sup>19</sup> See, e.g., Inter-Am. Comm'n on H.R. Hearing, *The Situation of Indigenous Peoples and Forced Displacement in the Context of Climate Change in the United States*, 185<sup>o</sup> Period of Sessions (Oct. 28, 2022), <http://www.oas.org/en/iachr/sessions/hearings.asp?Year=2022&Topic=0&searchText=Climate%20Change>; IACHR Hearing, *Impact of Extractive Industries on Human Rights and Climate Change in the Caribbean*, 181<sup>o</sup> Period of Sessions (Oct. 26, 2021), <http://www.oas.org/en/iachr/sessions/hearings.asp?Year=2022&searchText=Climate>; IACHR Hearing, *Climate Change and Economic, Social, Cultural, and Environmental Rights of Women, Children, Indigenous Peoples, and Rural Communities*, 174<sup>o</sup> Period of Sessions (Sept. 25, 2019), <https://www.oas.org/en/iachr/sessions/hearings.asp?Year=2019>

<sup>20</sup> For a general overview of these litigation efforts, see César-Rodríguez Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, in *LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION* 9–83 (César-Rodríguez Garavito ed., Cambridge University Press 2022); Chatham House Briefing Paper, *Climate Change and Human Rights-Based Litigation* (Nov. 11, 2021), <https://www.chathamhouse.org/2021/11/climate-change-and-human-rights-based-strategic-litigation/summary-trends>. For information on cases presented before national, regional, and global Courts, Commissions, and Bodies raising climate change concerns, see Columbia University Law School, Sabin Center for Climate Change Law, *Global Climate Change Litigation Database*, <http://climatecasechart.com/> (last visited Jan. 26, 2023).

<sup>21</sup> For example, see the following pending cases before the European Court of Human Rights: Application in the case of *KlimaSeniorinnen v. Switzerland*, App. no. 53600/20 (2020) [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126\\_Application-no.-5360020\\_application-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126_Application-no.-5360020_application-1.pdf) (in which the applicants claim that Switzerland has violated the rights to life, privacy, and family life under the European Convention on Human Rights due to its failure to mitigate climate change effects, which are resulting in severe heatwaves affecting older women); and Application in the case of *Duarte Agostinho and Others v. Portugal and Others*, <https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf> (in which the applicants—Portuguese children—claim that their generation is particularly harmed physically by the effects of climate change and state failures in reducing the release of carbon emissions and the extraction of fossil fuels, which violates their rights to life, private and family life, discrimination, torture and inhumane treatment, and to property under the European Convention on Human Rights).

specific individuals and groups of the population with pre-existing situations of inequality and exclusion.<sup>22</sup> Several of these efforts have resulted in noteworthy court judgments at the national level.<sup>23</sup> This litigation is often connected to the goal of climate justice, which was expressly identified in the Preamble of the Paris Agreement as a key ingredient in pursuing climate action.<sup>24</sup>

This article analyzes the efforts to litigate climate-change related cases at the supra-national level, with individuals and groups pursuing a second avenue of justice when this was not obtained before national institutions. There are currently cases addressing climate change concerns before influential global and regional human rights bodies such as the United Nations Human Rights Committee, the United Nations Committee on the Rights of the Child, the European Court of Human Rights, and the Inter-American Commission on Human Rights.<sup>25</sup> Some of these cases have already been decided, while others are still pending a ruling.

<sup>22</sup> See, e.g., e, UNHRC, Daniel Billy et al. (Torres Strait Region) v. Australia, CCPR/C/135/D/3624/2019 (Sept. 22, 2022) (in which the Human Rights Committee found a violation of the rights to privacy, family, and home life under the International Covenant on Civil and Political Rights due to state failures to adapt to the flooding, sea-level rise, and displacement produced by climate change effects in the Torres Strait Islands and its indigenous population).

<sup>23</sup> See Urgenda Foundation v. State of the Netherlands, H.R.(2015) Netherlands Jurisprudentie, HAZA C/09/00456689 Section 2: Assumptions and Facts and Section 5: Do Articles 2 and 8 of the ECHR Oblige the State to Take Measures?, <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>; *Neubauer et al. v. Germany* discussed in Bundesverfassungsgericht, *Constitutional Complaints against the Federal Climate Change Act Partially Successful*, Press Release No. 31/2021 (Apr. 29, 2021), Order of 24 March 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html> (for full judgment, see [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324\\_11817\\_order-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf)

<sup>24</sup> See *Paris Agreement*, *supra* note 5, at preamble. For scholarly analysis on how the call for climate justice has intensified, demanding the need to use international law to address the threats posed by climate change to life and other paramount human rights, and in particular its effects on marginalized individuals and communities, see Damilola S. Olawuyi, *Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach*, 11 FLA. A&M U. L. REV. 104–12; 122–25 (2015); Madison Shaff, *International Law and Climate Displacement: Why a Climate Justice Approach Is Needed*, 52 TEX. ENV'T L.J. 59, 72–78 (2022). For analysis on the role of courts in remedying systemic injustice in the field of climate change, see Mary Christina Wood, “*On the Eve of Destruction*”: *Courts Confronting the Climate Emergency*, 97 IND. L.J. 239, 262–65 (2022).

<sup>25</sup> Two of the cases decided with the most international attention have been UNHRC, *Daniel Billy et al.*, CCPR/C/135/D/3624/2019 (regarding state failures to adapt and mitigate to climate change effects resulting in flooding, sea-level rises, and the displacement of indigenous peoples living in the Torres Strait Islands) and U.N. Comm. on the Rights of the Child [UN CRC], *Sacchi v. Argentina*, CRC/C/88/D/104/2019 (Oct. 8, 2021) (part of five petitions filed by children from Argentina, Brazil, France, Germany, and Turkey, alleging these states failed to act diligently to reduce carbon emissions and mitigate foreseeable harm connected to climate change in violation of the UN Convention of the Rights of the Child). For other examples see the following cases, pending before the European Court of Human Rights: Application in the case of *KlimaSeniorinnen v. Switzerland* (claiming state failures to mitigate harmful climate change effects resulting in heat waves with devastating effects for older women, as a violation of the European Convention on Human Rights); Application in the case of *Duarte Agostinho and Others v. Portugal and Others* (presented by children alleging their generation is physically harmed by climate change and state failures to reduce the release of carbon emissions and the extraction of fossil fuels in contravention

Many of the cases before global and regional human rights bodies concern individuals and groups that have been historically discriminated against and marginalized from the decision-making and benefits of their societies.<sup>26</sup> Three groups in particular are prominent in these cases—children, Indigenous peoples, and women.<sup>27</sup> Women, Indigenous peoples, and children have been identified by the international community as being heavily impacted by climate change and have well-documented histories of discrimination, exclusion, and inequality.<sup>28</sup> They also have full treaties and instruments devoted to state obligations on their behalf, including the Convention on All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (UN Convention on the Rights of the Child), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>29</sup>

It is also noteworthy that human rights developments in the areas of women, Indigenous peoples, and children are some of the most cutting edge and fast evolving to adapt to contemporary challenges, such as the COVID-19 pandemic,

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with the European Convention on Human Rights); Inter-Am. Comm'n H.R., *Petition filed before the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti*, <http://www.cidh.org/> (Feb. 4, 2021), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204\\_13174\\_petition.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_13174_petition.pdf) (in which the petitioners claim that toxic trash disposal in the residential district of Cité de Soleil in Port-au-Prince is harming the health of children, with the damage aggravated by climate change, environmental displacement, and waterborne diseases, all in violation of the American Convention on Human Rights and the rights of the child, dignity, a healthy environment, and to judicial protection) [hereinafter Inter-Am. Comm'n on H.R., *Petition filed before the IACHR by Children in Cité Soleil, Haiti*].

<sup>26</sup> See, e.g., UNHRC, *Daniel Billy et al. (Torres Strait Region)* (concerning Indigenous peoples and children); UN CRC, *Sacchi v. Argentina* (presented by children); European Court of Human Rights, Application in the case of *KlimaSeniorinnen v. Switzerland* (presented by association of older women); Application in the case of *Duarte Agostinho and Others v. Portugal and Others*, *supra* note 21 (presented by children); Inter-Am. Comm'n on H.R., *Petition filed before the IACHR by Children in Cité Soleil, Haiti* (presented by children who live in Cité Soleil).

<sup>27</sup> See *id.*

<sup>28</sup> For more analysis on the adverse impacts of climate change on women, Indigenous peoples, and children, see *IPCC Climate Change Report 2022, Technical Summary*, *supra* note 3, 53, 59, 65 (2022); Mayesha Alam et al.,

Women and Climate Change: Impact and Agency in Human Rights, Security, and Economic Development 7–44 (2015), <https://giwps.georgetown.edu/wp-content/uploads/2017/09/Women-and-Climate-Change.pdf>; U.N. Children's Fund [UNICEF], *The Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index* 9–17 (2021), <https://www.unicef.org/media/105376/file/UNICEF-climate-crisis-child-rights-crisis.pdf>; Cultural Survivall, *Report on the Adverse Impact of Climate Change on the Full and Effective Enjoyment of Human Rights of Indigenous Peoples*, Submission to the OHCHR (Nov. 30, 2021), <https://www.culturalsurvival.org/sites/default/files/cultural-survival-report-to-ohchr-on-climate-change-and-human-rights-30-nov-2021.pdf>

<sup>29</sup> See generally Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 [hereinafter CEDAW]; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990 [hereinafter U.N. Convention on the Rights of the Child]; Declaration on the Rights of Indigenous Peoples [UNDRIP], G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).



the digital space, and the activity of third party actors on Indigenous lands and territories, among others.<sup>30</sup> Violence, discrimination, exclusion, and the lack of participation of these groups in most societies is still very latent and urgent, which confirms the priority nature of strategies to advance their human rights.<sup>31</sup> In the author's view, a true understanding of the rights of women, Indigenous peoples, and the rights of children today requires a close look at the context in which their rights are not only exercised, but also limited. Issues concerning women, Indigenous peoples, and children also are often interconnected, and some of those most affected by intersectional discrimination and violence are Indigenous women and girls; older women; women with disabilities; women living in rural areas; and migrant, refugee, and displaced women.

Climate change is one of the largest issues facing the world today. It is also an area of fast human rights law developments, conceptualizations, and the definition of principles. Therefore, human rights law developments concerning women, Indigenous peoples, and children are symbiotic with those pertaining to climate change, and should be studied in tandem. Justice today for women, Indigenous peoples, and children, also means climate justice. The aim of this article is to support global and regional human rights protection systems and advocates in the definition of strategies to secure this justice at the international level through the use of case litigation.

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<sup>30</sup> For a detailed overview of human rights developments concerning women in light of current challenges, see *Preface and Discrimination against Women: Doctrine, Practice, and the Path Forward* in ROSA CELORIO, *WOMEN AND INTERNATIONAL HUMAN RIGHTS IN MODERN TIMES*, xiii-xvi, 1–37 (Edward Elgar ed. 2022). For children and the application of the U.N. Convention on the Rights of the Child to emerging human rights issues in the digital space and the role of both state and non-state actors, see UN CRC, General Comment 25: *Children's Rights in Relation to the Digital Environment*, U.N. Doc. CRC/C/GC/25), ¶¶ 1–4, 22–49. (Mar. 2, 2021). For an overview of present and developing interpretations of the content of the right to property, lands, and territories for Indigenous peoples, see U.N. Expert Mechanism on the Rights of Indigenous Peoples rep. to the Human Rights Council at its 45<sup>th</sup> session, *Right to Land under the United Nations Declaration on the Rights of Indigenous Peoples: A Human Rights Focus*, ¶¶ 2–4, 14–38 (July 15, 2020).

<sup>31</sup> Violence against women is still one of the most damaging human rights violations and according to the World Health Organization one in three women have experienced either physical or sexual violence. See World Health Organization [WHO], *Global and Regional Estimates of Violence against Women* (2013), <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>. Indigenous people still face forms of oppression, colonialism, racism, violence, and the dispossession of lands and territories which are key to their identity and survival; problems which are exacerbated by crises such as the COVID-19 pandemic. For more reading, see Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, *Indigenous Peoples and Coronavirus Disease (COVID-19) Recovery*, U.N. Doc. A/75/185 ¶¶ 6–46 (2020). UNICEF documented in its 2021 annual report as priority goals the need to protect children from violence, exploitation, and their right to live free from poverty, in a safe and clean environment, and with quality education, taking account problems such as armed conflicts, climate change, and COVID-19. For more reading, see UNICEF, Annual Report 2021, *Protecting Child Rights in a Time of Crisis* 8–13 (2021), <https://www.unicef.org/media/121251/file/UNICEF%20Annual%20Report%202021.pdf>

This article contends that case litigation at the international level can be a key strategy to set paramount legal standards in addressing human rights violations suffered by women, Indigenous peoples, and children in the area of climate change. Current and future cases before global and regional human rights bodies offer important opportunities to develop key concepts and legal standards that could be useful in addressing climate change on behalf of marginalized groups. Four of these legal standards will be discussed in this article, including: due diligence, extraterritoriality, and non-state actors; a gender perspective and intersectional discrimination; consultation, consent, and effective participation; and access to information and freedom of expression.

This article suggests ways to make these litigation efforts most effective and how current treaties and rights can be used for this purpose. The article also discusses how existing global and regional human rights treaties, as well as how new agreements—such as the Escazú agreement<sup>32</sup>—can serve as important references in human rights litigation efforts related to climate change on behalf of these three groups.

The author notes that litigation is only suggested as a tool in addressing climate change efforts. The author acknowledges the limitations of international litigation, including costs, processing delays, and enforcement challenges. The breadth, magnitude, and reach of climate change demands multifaceted strategies and litigation is only one useful tool in this regard. The author moreover notes that this article only discusses some cases before global and regional bodies to illustrate the promise of international litigation to protect the rights of women, Indigenous peoples, and children in this area. There is a growing number of cases before international instances raising allegations concerning climate change and this number is sure to increase based on the international attention now commanded by climate change as an emergency.<sup>33</sup>

This article also proposes litigation as a way to advance a perspective of women, Indigenous peoples, and children, not just as victims of human rights violations in the area of climate change. In the author's view, international litigation can be a powerful catalyst to give agency, autonomy, and participation to these

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<sup>32</sup> See Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, adopted in Escazú Costa Rica (Mar. 4, 2018), [https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf) [hereinafter Escazú Agreement]. The agreement stems from the United Nations Conference on Sustainable Development (Rio + 20) and was adopted under the auspices of the United Nations Economic Commission for Latin America and the Caribbean.

<sup>33</sup> For more reading on cases related to climate change before the European Court of Human Rights, see *Fact Sheet on Climate Change* (Feb. 2023), [https://echr.coe.int/Documents/FS\\_Climate\\_change\\_ENG.pdf](https://echr.coe.int/Documents/FS_Climate_change_ENG.pdf). See also Maria Antonia Tigre et al., *Climate Change Litigation in Latin America and the Caribbean: Launching a Regional Platform for Climate Litigation*, *Climate Law: A Sabine Center Blog* (Feb. 11, 2022), <https://blogs.law.columbia.edu/climatechange/2022/02/11/climate-litigation-in-latin-america-and-the-caribbean-launching-a-regional-platform-for-climate-litigation/> (discussing the steady growth of litigation in Latin America and the Caribbean to advance human rights in the realm of climate change).

groups, especially in the finding of solutions and strategies to combat climate change.

In its analysis, this article will refer to the work of many global and regional bodies in the respect, protection, and fulfillment of human rights. The phrase *global human rights system* in this article refers to the work of the United Nations Charter and Treaty-Based Organs. *Regional human rights systems* include regional institutions, Commissions, and Courts that have been established in Africa, the Americas, and Europe and other regions to protect and promote human rights. Regional Commissions and Courts are increasingly receiving petitions raising legal arguments and claiming violations under the existing regional treaties for state failures to mitigate and adapt to climate change and other environmental challenges.

Lastly, this article seeks to contribute to current scholarship exploring the synergies between climate change concerns, international human rights law, and the goal of climate justice. The author has been working on a body of scholarship to advance the understanding of the importance of international law and human rights to address the problems of climate change, environmental harm, degradation, and their impact on marginalized individuals and groups. This article is part of this body of scholarship.

## II. The Rights of Women, Indigenous Peoples, and Children in Focus

There is an existing and lengthy body of international human rights law standards already in place which mandate the priority protection of women, Indigenous peoples, and children, which can serve as a foundation for climate change litigation.<sup>34</sup> Critical entities in both the global and regional human rights protections systems have already identified in their jurisprudence a core set of rights which are critical for each of these groups and shed light on their content.<sup>35</sup> The

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<sup>34</sup> For a broad overview of legal standards in the areas of women, Indigenous peoples, and children, see Chapters 1: *Discrimination Against Women: Doctrine, Practice, and the Path Forward*, Chapter 2: *Gender-Based Violence as a Form of Discrimination*, and Chapter 11: *Women and Regional Human Rights Protection Systems* in CELORIO, *supra* note 30, at 1–37, 38–68, 277–304; Xanharu, *Upholding Indigenous Peoples' Rights Legislation and Jurisprudence: Global, Regional, and National Developments*, Indigenous Peoples Rights International [IPRI] Digest 2 (Sept. 14, 2022), <https://indigenoustrightsinternational.org/index.php/en/component/content/article/xanharu-legislation-and-jurisprudence-global-regional-and-national-development?catid=9&Itemid=102>; Inter-American Commission on Human Rights, *Towards the Effective Fulfillment of Children's Rights: National Protection Systems*, OEA/Ser.L/V/II.166 Doc. 206/17 ¶¶ 50–59 (Nov. 30, 2017); Inter-Am. Comm'n H.R., *The Rights of Boys and Girls to a Family: Alternative Care. Ending Institutionalization in the Americas*, OEA/Ser.L/V/II. Doc. 54/13 ¶¶ 31–64 (Oct. 17, 2013).

<sup>35</sup> For some emblematic cases ruled by entities in the global and regional human rights protection systems concerning the rights of women, Indigenous peoples, and children, see González et al. (“Cotton Field”) v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Series C) No. 205 ¶¶ 232–86 (Nov. 19, 2009) (establishing the state duty to prevent and respond to gender-based violence against women and girls, and to address discrimination and

sources of these rights are often global treaties such as the International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights; the Convention on the Rights of the Child; the Convention on Racial Discrimination; the Convention on Discrimination against Women; and the United Nations Declaration on the Rights of Indigenous Peoples, as well as key regional human rights treaties such as the American Declaration and Convention on Human Rights; the European Convention on Human Rights; and the African Charter on Human and Peoples' Rights.<sup>36</sup> There is also a trend at the regional level to adopt treaties and instruments on behalf of women, Indigenous peoples, and children; instruments which are shaping jurisprudence on behalf of these groups.<sup>37</sup>

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stereotypes in the processing of these cases before justice systems); Eur. Ct. H.R., *Opuz v. Turkey*, App. No. 33401/02 ¶¶ 128–53 (2009) (underscoring the state duty to protect the life of women against domestic violence acts, even when complaints before the authorities are withdrawn, as a measure to eradicate discrimination against women); U.N. Comm. on the Elimination of Racial Discrimination [UN CERD Committee], *Lars-Arden Agren et Al. v. Sweden*, U.N. Doc. CERD/C/102/D/54/2013 ¶¶ 6.1–6.29 (Dec. 18, 2020) (reaffirming the rights to property and to free, prior, and informed consent concerning reindeer activities as part of the cultural identity and livelihood of the Sami Indigenous peoples); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R., Series C. No. 245, ¶¶ 145–211 (June 27, 2012) (establishing the rights to effective participation and consultation of Indigenous peoples before third-party economic activities are implemented in their lands and territories); *D.H. & Others v. Czech Republic*, App. No. 57235/00, Eur. Ct. H.R. ¶¶ 175–210 (2007) (establishing the right of Roma children to be free from discrimination on the basis of their race and ethnic origin in schools); "*Street Children*" (*Villagrán Morales et al.*) v. Guatemala, Merits, Inter-Am. Ct. H.R., Series C No. 63, ¶¶ 122–98 (Nov. 19, 1999) (establishing the duty of special protection of states towards children and to prevent arbitrary killings, forms of inhumane treatment, and deprivations of liberty).

<sup>36</sup> For global treaties, see International Covenant on Civil and Political Rights [ICCPR], G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights [ICESCR], G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; International Convention on the Elimination of All Forms of Racial Discrimination [UN Convention on Racial Discrimination], G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969; U.N. Convention on the Rights of the Child, *supra* note 29, CEDAW *supra* note 29, UNDRIP *supra* note 29. For Indigenous peoples, see also International Labor Organization, *Indigenous and Tribal Peoples Convention 1989* (No. 169) [ILO Convention 169].

For regional treaties, see American Declaration of the Rights and Duties of Man [hereinafter American Declaration], O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948); American Convention on Human Rights [hereinafter American Convention], Nov. 22, 1969 O.A.S.T.S. No. 36 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter European Convention on Human Rights], Nov. 4, 1950, C.E.T.S. No. 5 213 U.N.T.S. 222; African [Banjul] Charter on Human and Peoples' Rights [hereinafter African Charter], adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>37</sup> See Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women [hereinafter Convention of Belém do Pará], art. 6, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [hereinafter Maputo Protocol], Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); *reprinted in* 1 AFR. HUM. R. L.J. 40, *entered into force* Nov. 25, 2005, Articles

Even though international law was very slow at recognizing the specific needs of these groups, at this stage it can be argued that international human rights law gravitates towards a perspective which is gender-inclusive, Indigenous peoples-centered, and sensitive to the developing needs of children.<sup>38</sup> Therefore, any climate change litigation on behalf of these groups should contemplate these building blocks as a starting point. Cases raising climate-related arguments can greatly expand on these already-developed legal standards and connect them directly to environmental concerns and challenges, and the overarching right to a clean, healthy, and sustainable environment.

For the rights of women, most of the legal standards in this area have been developed acknowledging the historical discrimination, unequal citizenship, and structural inequalities that women have faced in most social areas.<sup>39</sup> This discrimination is still latent and present, and it extends to the realms of the family, education, employment, politics, health, prisons, and other sectors.<sup>40</sup> Discrimination against women has been historically connected to gender-based violence as an extreme form of this discrimination.<sup>41</sup> There is currently an evolving

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2–25; Council of Europe Convention on preventing and combating violence against women and domestic violence [hereinafter Istanbul Convention], art. 3(c), May 11, 2001, C.E.T.S. No. 210, Articles 5, 6, 12–28; American Declaration on the Rights of Indigenous Peoples [hereinafter American Declaration on Indigenous Peoples], AG/RES. 2888 (XLVI-0/16) (Adopted at the third plenary session, held on June 15, 2016); Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child [hereinafter African Charter on the Rights of the Child], 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>38</sup> For example, recent public statements and reports issued by United Nations experts and agencies have advocated for a rights-based approach to matters concerning children, women, and Indigenous peoples. See OHCHR, *Children Have Specific Rights and Should be Protected at all Times* (Oct. 6, 2022), <https://www.ohchr.org/en/statements/2022/10/children-have-specific-rights-and-should-be-protected-all-times-un-experts>; OHCHR, *Historical and ongoing discrimination threatens spiritual, cultural and physical survival of indigenous peoples says UN report* (Oct. 25, 2022), <https://www.ohchr.org/en/press-releases/2022/10/historical-and-ongoing-discrimination-threatens-spiritual-cultural-and>; UN Women, *Statement: Push forward – act now to end violence against women and girls* (Nov. 23, 2022), <https://www.unwomen.org/en/news-stories/statement/2022/11/statement-push-forward-act-now-to-end-violence-against-women-and-girls>.

<sup>39</sup> As key reference documents, see CEDAW, *supra* note 29, Preamble and Articles 1–16; U.N. Women, *Beijing Declaration and Platform of Action* (Sept. 15, 1995), ¶¶ 41–209, [https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/PFA\\_E\\_Final\\_WEB.pdf](https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/PFA_E_Final_WEB.pdf). See also Hilary Charlesworth & Christine Chinkin, *Between the Margins and the Mainstream: The Case of Women's Rights* in *THE LIMITS OF HUMAN RIGHTS* 206–13 (Bardo Fassbender & Knut Traisbach eds., Jan. 23, 2020), <https://academic.oup.com/book/36715/chapter/321786711>.

<sup>40</sup> For a general overview of forms of discrimination that still affect women, see UN Women, *GENDER EQUALITY: WOMEN'S RIGHTS IN REVIEW: 25 YEARS AFTER BEIJING* 2–23 (2020), <https://www.unwomen.org/en/digital-library/publications/2020/03/womens-rights-in-review>

<sup>41</sup> See General Recommendation 19 on Violence against Women, CEDAW Comm. U.N. Doc. A/47/38 ¶¶ 1, 6–11, 17–18, 23–24 (1992); General Recommendation 35 on Gender-Based Violence against Women, Updating General Recommendation 19, CEDAW Comm., U.N. Doc. CEDAW/C/GC/35, ¶¶ 2, 6–14, 20–23 (July 14, 2017); see also Alice Edwards, *Equality and non-discrimination on the basis of sex* in *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW*, 140–97 (2001) (in which the author reviews in detail and with a critical lens the

recognition of the problem of gender-based violence, encompassing violence which is physical, psychological, and sexual, but also that which is economic, political, obstetrics-driven, environmental, and spiritual.<sup>42</sup>

The legal standards of due diligence, access to justice, and the rights to live free from violence and discrimination have been centerpieces of all of these standards related to women.<sup>43</sup> Even though international law was not conceptualized considering the needs of women, now there is a cognizable body of legal standards mandating states to act promptly and without delay to respect the rights of women. The rights to life, personal integrity, health, family, privacy, to be free from torture, and to justice, have been prominent in these cases, as well as critical principles such as reproductive autonomy, personal liberty, privacy, and dignity.<sup>44</sup> The judgments now concerning the rights of women also reach beyond violence and discrimination and cover areas such as education, employment, and health.<sup>45</sup> The focus of international law in the area of women's rights has also evolved, now emphasizing

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connection between discrimination on the basis of sex and violence against women in international law).

<sup>42</sup> For example, both the Istanbul Convention and the Maputo Protocol recognize economic violence. *See* Istanbul Convention, *supra* note 37, at Article 3(a); Maputo Protocol, *supra* note 37, at Article 1(j). The United Nations CEDAW Committee in its recently approved General Recommendation on Indigenous Women and Girls refers concretely to violence which is in nature political, obstetrics, environmental, and spiritual. *See* CEDAW Comm., General Recommendation 39 On the Rights of Indigenous Women and Girls, U.N. Doc. CEDAW/C/GC/39 ¶¶ 7, 9, 36, and 51 (Oct. 31, 2022) (hereinafter General Recommendation No. 39).

<sup>43</sup> For recent cases on these issues, see *Guzman Albarracín et al. v. Ecuador, Merits, Reparations, and Costs*, Inter-Am. Ct. H.R., Series C, No. 405, ¶¶ 109–44 (June 24, 2020) (related to the sexual abuse of an adolescent girl who suffered sexual violence at school perpetrated by her vice-principal, which eventually led to her suicide); *Carvalho Pinto de Sousa Mourais v. Portugal*, App. No. 17484/15, Eur. Ct. H.R. ¶¶ 44–56 (July 25, 2017) <https://hudoc.echr.coe.int/fre?i=001-175659> (related to an applicant who suffered discrimination from domestic courts due to stereotypes regarding the sexuality of older women).

<sup>44</sup> *See, e.g.*, CEDAW Comm., *Alyne Da Silva Pimentel Teixeira v. Brazil*, Communication No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 ¶¶ 7.1–7.7 (Aug. 10, 2011) (in which the CEDAW Committee found violations of the rights to life and health, including the rights to safe motherhood and to live free from intersectional discrimination, when an afro-descendent woman died from complications resulting in low quality of care at a private health center); *Artavia Murillo v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs*, Inter-Am. Ct. H.R., Series C No. 257, ¶¶ 141–50, 158–228 (Nov. 28, 2012) (in which the Court found violations of the rights to personal integrity, personal liberty, private life, to form a family, and reproductive autonomy due to the prohibition of in-vitro fertilization techniques); *Aydin v. Turkey*, App. No. 57/1996/676/866, Eur. Ct. H.R. ¶¶ 13–23, 80–109 (1997) (in which the applicant was raped and subjected to various forms of ill-treatment while detained by members of the military, which the Court ruled was torture under Article 3 of the European Convention on Human Rights).

<sup>45</sup> Illustrative of this tendency is the Inter-American Court of Human Rights' judgment in the case related to the Employees of the *Fireworks Factory of Santo Antônio de Jesus v. Brazil*, in which the Court found that the state of Brazil violated the right to just and favorable conditions of work, without discrimination, as well as the right to equality under the American Convention, by failing to ensure safe working conditions which resulted in the death of 19 afro-descendent girls during an explosion. *See* *Fireworks Factory of Santo Antônio de Jesus v. Brazil, Preliminary Objections, Merits, Reparations, and Costs*, Inter-Am. Ct. H.R., Series C, No. 407, ¶¶ 148–203 (July 15, 2020).

women's leadership, autonomy, and participation, as opposed to just their experience as victims.<sup>46</sup> The term *women* has also been interpreted extensively, covering also lesbian, bisexual, and trans women.<sup>47</sup>

Key global and regional bodies—such as the CEDAW Committee—have already issued important statements on how climate change directly affects women.<sup>48</sup> Women bear in a very specific way the brunt of changes in climate conditions, disasters, and hazards, since these aggravate the discrimination and inequality they already face.<sup>49</sup> Women can be negatively affected by sea level rises, flooding, hurricanes, heat waves, cyclones, earthquakes, deforestation, water scarcity, among others.<sup>50</sup> Women face critical barriers to access food, water, and needed health services in this context, which also affects the exercise of their sexual and reproductive rights.<sup>51</sup> They also face insurmountable limitations to access needed technology, education, information, and employment.<sup>52</sup> Women are also deeply harmed by extractive industries, which can increase their exposure to

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<sup>46</sup> See, e.g., Comm. on Econ., Soc., and Cultural Rights, General Comment 22 On the Right to Sexual and Reproductive Health, U.N. Doc. E/C.12/GC/22 ¶¶ 10, 25, and 34 (May 2, 2016) (advancing the principle of autonomy as a cornerstone for the fulfillment of all the sexual and reproductive rights of women). See also, CELORIO, *supra* note 30, at 129–35; Rosa Celorio, *Autonomía, Mujeres y Derechos: Tendencias de la Corte Interamericana de Derechos Humanos [Autonomy, Women, and Rights: New Trends in the Inter-American Human Rights Court Jurisprudence]*, Electronic Journal, *Instituto de Investigaciones Ambrosio L. Gioja*, N. 20, Buenos Aires, Argentina (June–Nov. 2018), <https://www.corteidh.or.cr/tablas/r18971.pdf>

<sup>47</sup> See Vicky Hernández et al. v. Honduras, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶¶ 126–36 (Mar. 26, 2021) (extending the protections codified in the Convention of Belém do Pará to trans women, which entails an enhanced due diligence obligation from states towards acts of gender-based violence against them). See also, CEDAW Comm., General Recommendation No. 28 On the Core Obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010), ¶ 18 (confirming that discrimination on the basis of sexual orientation and gender identity is prohibited by CEDAW).

<sup>48</sup> See generally CEDAW Comm., General Recommendation 37 On the Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change, U.N. Doc. CEDAW/C/GC/37 (Mar. 13, 2018) [CEDAW Committee, General Recommendation 37 on Climate Change]. See also UN Women Explainer, *How Gender Inequality and Climate Change are Interconnected* UN Women (Feb. 28, 2022), <https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected>; Balgis Osman-Elasha, *Women...In The Shadow of Climate Change*, United Nations Chronicle, <https://www.un.org/en/chronicle/article/womenin-shadow-climate-change>.

<sup>49</sup> See CEDAW Comm., General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 55–78.

<sup>50</sup> See GEO. INST. FOR WOMEN, PEACE AND SEC., *WOMEN AND CLIMATE CHANGE IMPACT AND AGENCY IN HUMAN RIGHTS, SECURITY, AND ECONOMIC DEVELOPMENT*, *supra* note 28, at 19–31.

<sup>51</sup> See UN Women, *Fact Sheet: Women, Gender Equality, and Climate Change*, UN WomenWatch [https://www.un.org/womenwatch/feature/climate\\_change/downloads/Women\\_and\\_Climate\\_Change\\_Factsheet.pdf](https://www.un.org/womenwatch/feature/climate_change/downloads/Women_and_Climate_Change_Factsheet.pdf) (last visited Jan. 27, 2023).

<sup>52</sup> See generally CEDAW Comm., General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 58–60.

gender-based violence, especially those indigenous.<sup>53</sup> Intersectional discrimination is at the core of many of these problems, with dire effects for both girls and older women; Indigenous women; those living in poverty, women living with disabilities; and women who are refugees and those who are internally displaced.<sup>54</sup> Even though women are some of the most affected by climate change challenges, they are often absent from decision-making to find climate solutions and adopt needed policies.<sup>55</sup>

Climate change litigation efforts before international bodies can give content and exemplify for states what discrimination, violence, access to justice, and participation should look like for women in a climate change context. Climate change litigation efforts can illustrate what a gender perspective and approach should be to mitigation seeking to reduce carbon and greenhouse gas emissions. Moreover, case decisions can illustrate for states what adaptation measures can look like in an era in which climate change is already occurring with harmful impacts, and steps that states can adopt to support women in facing heat waves, floods, hurricanes, and other climate-related events, disasters, and hazards.

A very important opportunity to develop more specific legal standards concerning women is the current application before the European Court of Human Rights in the case of *KlimaSeniorinnen Schweiz vs. Switzerland*.<sup>56</sup> The case was presented by an association of more than 1,800 senior women, as well as four women between 78 and 89 years of age, who contend that their rights to life, privacy, and family life have been affected by climate-induced heatwaves. They allege that the state has failed to act proactively to reduce greenhouse gases, which has resulted in extreme heatwaves, directly increasing their levels of mortality and morbidity; the shortening of their lives; and causing life-threatening illnesses, dehydration, loss of consciousness, and their isolation from their outside world.<sup>57</sup> They claim that these state failures violate Articles 2, 6, 8, and 13 of the European Convention on Human rights and that they are particularly vulnerable to climate change effects due to their age and gender.<sup>58</sup> They refer concretely to the Paris Climate Change agreement and its targets, and how state action should be in line

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<sup>53</sup> See CEDAW Comm., General Recommendation 39 on Indigenous Women and Girls, *supra* note 42, ¶¶ 58–59.

<sup>54</sup> For more discussion on an intersectional approach to climate change concerns, see Anna Kaijser & Annica Kronsell, *Climate change through the lens of intersectionality*, 23 ENVTL. POL., 417, 417–33 (2014) <https://doi.org/10.1080/09644016.2013.835203>.

<sup>55</sup> See Caroline Kapp, *Women Underrepresented at COP27 Summit*, Council on Foreign Relations (Nov. 18, 2022), <https://www.cfr.org/blog/women-underrepresented-cop27-summit>

<sup>56</sup> See generally Application in the case of *KlimaSeniorinnen v. Switzerland*. See also Press Release, European Court of Human Rights, Grand Chamber to examine case concerning complaint by association that climate change is having an impact on their living conditions and health (Apr. 29, 2022), [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220426\\_Application-no.-5360020\\_order-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220426_Application-no.-5360020_order-1.pdf) (in which the European Court of Human Rights confirms that this case will be seen by its Grand Chamber).

<sup>57</sup> See Application in the Case of *KlimaSeniorinnen v. Switzerland*, Cover Letter at 1; Complaint at 5; Additional Submission with the Complaint, point 3.

<sup>58</sup> See *id.*, Complaint at 6.



with these and the best available science, as this is an “environmental emergency.”<sup>59</sup> This case is currently pending before the Grand Chamber of the European Court of Human Rights, which denotes its importance and potential for ground-breaking and innovative statements in the areas of climate change and the environment.<sup>60</sup>

The hope of the author is that in the case of the *KlimaSeniorinnen Schweiz v. Switzerland*, the European Court not only discusses important steps states should take to mitigate the effects of climate change on older women, but also sheds light on how it can help older women adapt to heat waves, since these are already occurring. It would be useful to have an overview from the Court on the minimum core obligations states have under the European Convention on Human Rights in the areas of mitigation and adaptation. The European Court of Human Rights can illustrate for states which reasonable measures they can adopt as part of their due diligence obligation to mitigate and adapt to harmful climate change effects on women. The potential of the due diligence standard in climate change litigation on behalf of marginalized groups will be discussed more fully in Section IV of this article.

Pivoting now to Indigenous peoples, there are a number of well-recognized principles which constitute the foundation for their international human rights.<sup>61</sup> These include the principle of self-determination and the right of Indigenous peoples to have their own self-governance structures and justice systems.<sup>62</sup> Very connected to these principles is the very special connection that Indigenous peoples have with their territories and lands, which constitute an integral part of their spiritual life, culture, identity, and survival.<sup>63</sup> It is important to note that many of these legal standards have been set in cases concerning harm to the environment and water resources.<sup>64</sup>

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<sup>59</sup> See *id.*, Complaint at 6; Additional Submission with the Complaint, point 29.

<sup>60</sup> See European Court of Human Rights, *Grand Chamber to examine case concerning complaint by association that climate change is having an impact on their living conditions and health*, *supra* note 56.

<sup>61</sup> See UNDRIP, *supra* note 29, at Arts. 1–40.

<sup>62</sup> See *id.* at Arts 3–5, 34. See also United Nations Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination*, A/HRC/48/75 ¶¶ 3–18 (Aug. 4, 2021).

<sup>63</sup> See *Mayagma (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) no. 79, ¶ 149 (Aug. 31, 2001) (recognizing the special link of Indigenous peoples to their lands and territories, as a key element of their culture, spiritual life, integrity, and economic survival); *Maya Indigenous Community of Toledo District v. Belize* Case 12.053, Inter-American Comm'n H.R., Report 40/04 U.N. Doc. OEA/Ser.L/V/II.122, doc. 5 rev. ¶¶ 112–15 (acknowledging that Indigenous peoples enjoy a unique relationship with the lands and resources they use and enjoy, which is vital for the full realization of their human rights).

<sup>64</sup> See, e.g., *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C No. 400, ¶¶ 202–09, 222–30, 243–89 (Feb. 6, 2020) (in which the Court found violations under the American Convention when the state failed to effectively control illegal deforestation of Indigenous territories and granted concessions for oil and gas exploration without free, prior, and informed consent and environmental impact

Many legal standards and some of the most critical challenges concerning Indigenous peoples are in the areas of consultation and consent.<sup>65</sup> The current tendency in international law is to mandate states to consult and seek the consent of Indigenous peoples before undertaking any activities affecting their lands and territories.<sup>66</sup> There are also many standards developing concerning the rights to culture,<sup>67</sup> a life with dignity,<sup>68</sup> and to be free from violence and discrimination against Indigenous peoples.<sup>69</sup>

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assessments); African Commission on Human and Peoples Rights, 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, ¶¶ 1–21, 174–238, 269–98 (finding violations of the Endorois Indigenous Peoples' property rights under the African Charter resulting from the forcible removal from their lands and Lake Bogoria, jeopardizing the community's pastoral activities, their cultural integrity, and access to clean drinking water); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., Ser. C No. 125, ¶¶ 160–76 (June 17, 2005) (in which the Court found violations to the right to a dignified life under the American Convention due to the dire living conditions of the Yakye Axa Community resulting from the dispossession of their lands and territories, including lack of access to clean water and adequate housing).

<sup>65</sup> See UNDRIP, *supra* note 29, at Arts. 10, 11, 15, 17, 18, 19, 28, 29, 30, 32, 36, and 38; ICCPR, *supra* note 36, Article 25; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R., Series C. No. 245, ¶¶ 127, 177 (June 27, 2012); Study of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: a Human Rights-Based Approach*, A/HRC/39/62 ¶ 14 (Aug. 10, 2018), [hereinafter EMRIP FPIC Report]; UNHRC, *Poma Poma v. Peru*, U.N. Doc. CCPR/C/95/D/1457/2006 ¶ 7.6 (Mar. 27, 2009).

<sup>66</sup> For more reading, see UNDRIP, *supra* note 29, at Arts. 19 and 32; American Declaration on the Rights of Indigenous Peoples, *supra* note 36, at Art. XXIX (Section 4); EMRIP FPIC Report, *supra* note 65, ¶¶ 14–16, 31–37; Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, A/HRC/45/34 ¶¶ 59–63 (June 18, 2020); UNHRC, *Benito Oliveira Pereira et. al. v. Paraguay*, U.N. Doc. CCPR/C/132/D/2552/2015 ¶ 8.7 (Oct. 12, 2021); UNHRC, *Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 ¶ 7.6; Inter-Am. Comm'n H.R., *Right to Self-Determination to Indigenous and Tribal Peoples*, OEA/Ser.L/V/II. Doc. 413 ¶¶ 187–91 (Dec. 28, 2021); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Se. C) No. 172, ¶¶ 134–36 (Nov. 28, 2007).

<sup>67</sup> See, e.g., UNHRC, *Benito Oliveira Pereira et. al. v. Paraguay*, CCPR/C/132/D/2552/2015 ¶¶ 8.5–8.8 (Sept. 21, 2022) (in which the Human Rights Committee found the state of Paraguay responsible for failing to monitor and prevent contamination by toxic pesticides from large commercial operations affecting the Indigenous community of Campo Aguaẽ, and concluded these violated their right to culture and negatively impacted their way of life and access to forms of subsistence).

<sup>68</sup> The Inter-American Court confirmed recently in its Advisory Opinion on the Environment and Human Rights (OC-23/17) the close link between the right to a dignified life and the protection of the ancestral territory and natural resources of Indigenous peoples, which demands state-led steps to protect their land and individual and collective life project. For more reading, see *The Environment and Human Rights* (Arts. 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC 23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 48, 109 (Nov. 15, 2017) [hereinafter Inter-Am. Court H.R., Advisory Opinion OC-23/17]. For more reading on the Inter-American Court of Human Rights approach to the right to a dignified life, see Thomas M. Antkowiak, *A "Dignified Life" and the Resurgence of Social Rights*, 18 NW. J. HUM. R. 1, 16–24 (2020).

<sup>69</sup> For a discussion on the connection between discrimination and gender-based violence against Indigenous women and girls see CEDAW Comm., General Recommendation 39 On Indigenous Women and Girls, *supra* note 42, ¶¶ 34–42. See also, CEDAW Comm., *Cecilia Kell v. Canada*, Communication No. 19/2018, U.N. Doc. CEDAW/C/51/D/19/2008 ¶¶ 10.1–10.7 (Apr. 27, 2012)

It is well recognized that Indigenous peoples are some of the most affected by climate change. Many live in zones frequently harmed by natural disasters and climate hazards.<sup>70</sup> They often face critical challenges to access food, water, health, and other activities vital for their survival.<sup>71</sup> Forms of environmental contamination, human-caused pollution, burning fossil fuels, deforestation, and loss of biodiversity all have very pernicious effects on Indigenous peoples, due to the vital link they have with a healthy environment and their territories.<sup>72</sup> The CEDAW Committee recently stated about Indigenous women that when states fail to take diligent action to prevent, adapt to, and remedy serious instances of environmental harm, this constitutes a form of discrimination and violence against Indigenous women and girls.<sup>73</sup> Indigenous peoples also have technical knowledge on climate change and biodiversity conservation which is often ignored in state decisions and policy-making.<sup>74</sup>

It is emblematic that one of the first cases ever decided at the global level on climate change concerns is related to Indigenous peoples and their rights, and that the authors included Indigenous children. The case of *Daniel Billy et al.* recently decided by the United Nations Human Rights Committee, was presented by a group of Indigenous residents from the Torres Strait Islands in Australia, including six children.<sup>75</sup> The authors of the communication in this case claimed that they are from low-lying islands and that these make their population extremely vulnerable to climate change.<sup>76</sup>

They alleged in particular that their islands were affected by flooding, erosion of the shoreline, cyclones, tidal surges, sea level rise, seasonal changes, and the disappearance of species; all impacting their ability to transmit their ecological knowledge, traditional way of life, subsistence activities, and culture.<sup>77</sup> They also claimed that the state had failed to implement an adaptability program to ensure the long-term habitability of the islands, and requests for support and funding had been ignored.<sup>78</sup> Concretely, the authors alleged that the government had failed to adopt

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(finding the state of Canada accountable for discrimination faced by an aboriginal woman when state agents removed the author's name from her housing lease without her consent, after suffering from domestic violence).

<sup>70</sup> See IPCC Report 2022, Technical Summary, *supra* note 3, at 53 and 65.

<sup>71</sup> See discussion in Cultural Survival, *supra* note 28, at 1–2.

<sup>72</sup> See discussion in IACHR Resolution 3/2021, *Climate Emergency* (2021), *supra* note 6, ¶¶ 23–26.

<sup>73</sup> See CEDAW Comm., General Recommendation 39 on *Indigenous Women and Girls*, *supra* note 42, ¶ 60.

<sup>74</sup> See UNCC, *How Indigenous Peoples Enrich Climate Action* (Aug. 9, 2022), <https://unfccc.int/news/how-indigenous-peoples-enrich-climate-action> (calling for more participation of Indigenous peoples in climate action and the recognition of their knowledge addressing climate change and its impacts).

<sup>75</sup> See UNHRC, *Daniel Billy et al. (Torres Strait Region) v. Australia*, CCPR/C/135/D/3624/2019 ¶ 1.1 (Sept. 22, 2022).

<sup>76</sup> See *id.* ¶ 2.1.

<sup>77</sup> See *id.* ¶¶ 2.4, 2.5, 2.6, 3.5.

<sup>78</sup> See *id.* ¶ 2.7.

the infrastructure necessary to protect their life and health, homes, and culture against the impacts of climate change, especially sea level rise.<sup>79</sup> They argued that the state party's per capita greenhouse emissions were the second highest in the world; and that it had been actively promoting the extraction and use of fossil fuels.<sup>80</sup>

The Human Rights Committee in the case of *Daniel Billy et al.* found violations of the rights of the authors to privacy, family, and home life under Article 17 of the ICCPR due to state inaction towards the flooding and ensuing displacement produced by climate change.<sup>81</sup> The Committee underscored state failures to adopt timely and adequate adaptation measures to protect the authors' ability to maintain their traditional way of life; to transmit to their children and future generations their culture and traditions; and to use their land and sea resources, all in violation of the state party's positive obligation to protect the authors' right to enjoy their minority culture.<sup>82</sup> It is noteworthy however, that the Committee refrained from finding a violation to the right to life with dignity under Article 6.1 of the ICCPR.<sup>83</sup>

The author considers that the case of *Daniel Billy et al.* is a strong point of departure to further develop the content of Indigenous peoples' rights in a context full of climate change adverse effects. The Human Rights Committee begins shedding light on the contours of the kinds of adaptation measures that states should be adopting to protect Indigenous peoples from the most severe effects of climate change. The Committee also acknowledges the negative impact of climate change effects on the culture, way of life, and subsistence of Indigenous peoples living in severely affected areas. The author, however, hopes that future cases will add more content to the rights to life, consultation, and consent in the area of climate change, as will be discussed in section IV of this article.

In regards to children, it is worth noting that they have one of the most ratified human rights treaties in the world.<sup>84</sup> Jurisprudence and legal standards have been developed around key areas of children's rights, including non-discrimination,<sup>85</sup> the right to be free from violence,<sup>86</sup> the right to life,<sup>87</sup> the best interests of the child in

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<sup>79</sup> See *id.* ¶ 3.1.

<sup>80</sup> See *id.* ¶ 2.8.

<sup>81</sup> See *id.* ¶ 8.9.

<sup>82</sup> See *id.* ¶ 8.14.

<sup>83</sup> See *id.* ¶¶ 8.3–8.8.

<sup>84</sup> See generally U.N. Convention on the Rts. of the Child, *supra* note 29.

<sup>85</sup> See, e.g., *Ramírez Escobar v. Guat.*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C No. 351, ¶¶ 264–304 (Mar. 9, 2018) (regarding the unjustified separation of two children from their families, their illegal international adoption, and the failure to grant an effective remedy, based on discrimination against their biological family due to their economic position, gender stereotypes, and sexual orientation).

<sup>86</sup> See, e.g., *E. v. U.K.*, App. No. 33218/96, ¶¶ 88–101 (Nov. 26, 2002); *Z. v. U.K.* [GC], App. No. 29392/95 ECHR 2001-V, ¶¶ 69–75 (May 10, 2001) (cases in which social services had recognized a risk of harm to children who were abused in the home setting, and the state failed to adopt positive measures to prevent further abuse from taking place).

<sup>87</sup> See, e.g., *Landaeta Mejías Bros. v. Venez.*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., Series C No. 281, ¶¶ 119–48 (Aug. 27, 2014) (finding right to life

the realm of the family,<sup>88</sup> and the right to participation in matters which concern them.<sup>89</sup> There are many areas in which children's rights legal standards have been crafted over the years, including family;<sup>90</sup> freedom of expression;<sup>91</sup> criminal justice

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violations for the extrajudicial detention and execution by police agents of two adolescent brothers in the state of Aragua in Venezuela).

<sup>88</sup> See, e.g., *Fornerón v. Arg.*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C No. 242, ¶¶ 44–57, 112–24 (Aug. 27, 2012) (finding a violation to the rights of the family and to special protection of children when a girl was given in adoption contrary to the wishes of her biological father; state action which did not take into consideration her best interests).

<sup>89</sup> See *Atala Riffo v. Chile*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., Series C No. 239, ¶¶ 196–208 (Feb. 24, 2012) (in which the Court found a violation of the right to be heard of three girls when the Supreme Court of Justice of Chile deprived their mother of custody due to her sexual orientation, without taking into consideration their views, in contravention of Article 8.1. of the American Convention, in connection with Articles 19 and 1.1. of the American Convention); see also COMM. RTS. CHILD, GENERAL COMMENT NO. 12 ON THE RIGHT OF THE CHILD TO BE HEARD, U.N. Doc. CRC/C/GC/12, ¶¶ 2, 32–34 (July 20, 2009) (establishing the right of all children to be heard and to be taken seriously as one of the main pillars of the U.N. Convention on the Rts. of the Child, especially in any administrative and judicial proceedings affecting the child).

<sup>90</sup> See *Jurid. Condition and Hum. Rts. of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R., Series A No.17, ¶¶ 62–91 (Aug. 28, 2002) (identifying the family as a focal point for protection of children; establishing that any decision separating the child from his or her family must be justified by their best interests; and setting high standards for states to protect children from violence in the family).

<sup>91</sup> For general overviews of the standards advancing the right to freedom of expression of children in different settings, including the media and in the digital space, see COMM. RTS. CHILD, GENERAL COMMENT NO. 25 ON CHILDREN'S RIGHTS IN RELATION TO THE DIGITAL ENVIRONMENT, U.N. Doc. CRC/C/GC/25, ¶¶ 8–18 (Mar. 2, 2021); INTER-AMERICAN COMM'N ON H.R. AND SPECIAL RAPPORTEURSHIP FOR FREEDOM OF EXPRESSION, CHILDHOOD, FREEDOM OF EXPRESSION, AND THE MEDIA, OEA/SER.L/V/II CIDH/RELE/INF.23/19 ¶¶ 103–93 (Feb. 2019).

systems;<sup>92</sup> girls;<sup>93</sup> national protection systems;<sup>94</sup> human mobility;<sup>95</sup> armed conflicts;<sup>96</sup> and violence,<sup>97</sup> among others.

It is noteworthy that many international cases have been presented by children, since their future is greatly at stake with climate change concerns.<sup>98</sup> Children are prominently featured in statements from global human rights bodies raising alarm over climate change adverse impacts. For example, the Committee on the Rights of the Child (CRC) is currently working on a General Comment on the environment and children.<sup>99</sup> In its Draft General Comment, the CRC identifies a critical set of state obligations in the area of climate change, including the full consideration of the rights codified in the UN Convention on the Rights of the Child in all state action; the substantive rights to life, non-discrimination, survival, health, development, and an adequate standard of living; and the procedural rights to be

<sup>92</sup> See COMM. RTS. CHILD, GENERAL COMMENT NO. 24 ON CHILDREN'S RIGHTS IN THE CHILD JUSTICE SYSTEM, U.N. Doc. CRC/C/GC/24, ¶¶ 9–104 (Sept. 18, 2019) (discussing the core elements of a criminal justice policy guided by the rights of the child and the right to a fair trial).

<sup>93</sup> See *V.R.P.v. Nicar.*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., Series C No. 350, ¶¶ 150–203 (Mar. 8, 2018) (in which the Court found a state failure to sanction with due diligence the perpetrator of rape against a girl and identified a set of core principles which should guide the investigation, prosecution, and sanction of rape cases against girls).

<sup>94</sup> See INTER-AM. COMM'N H.R., TOWARDS THE EFFECTIVE FULFILLMENT OF CHILDREN'S RIGHTS: NATIONAL PROTECTION SYSTEMS, U.N. Doc. OEA/Ser.L/V/II.166 Doc. 206/17, ¶¶ 60–98 (Nov. 30, 2017) (discussing the required components of a national policy or plan to protect the rights of children).

<sup>95</sup> See, e.g., Special Rapporteur on the Hum. Rts. of Migrants, *Report on Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, U.N. Doc. A/75/183, ¶¶ 24–32, 86 (July 20, 2020) (documenting the concerning impact of immigration detention on children and issuing recommendations urging states to end child immigration detention and provide alternative care and reception to all migrant children).

<sup>96</sup> See U.N. Secretary-General, *Report on Children and Armed Conflict*, U.N. Doc. A/76/871-S/2022/493, ¶¶ 4–8, 12–219 (June 23, 2022) (discussing trends on the impacts of armed conflicts on children and describing country situations of concern). See also INT'L COMM. ON THE RED CROSS, LEGAL PROTECTION OF CHILDREN IN ARMED CONFLICT, (Feb. 2003), <https://www.icrc.org/en/download/file/1033/children-legal-protection-factsheet.pdf> (summarizing legal provisions and treaties which afford protection to children in the field of international humanitarian law).

<sup>97</sup> See, e.g., Pinheiro, Paulo Sérgio, WORLD REPORT ON VIOLENCE AGAINST CHILDREN, ¶¶ 6–9; 31–42 (2006), [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document\\_files/world\\_report\\_on\\_violence\\_against\\_children.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document_files/world_report_on_violence_against_children.pdf) (describing the different forms of violence children suffer at the global level and international legal standards in this area).

<sup>98</sup> For examples of cases presented by children raising concerns with state failures in the areas of mitigation and adaptation to climate change, see UNCRC, *Sacchi v. Argentina*, CRC/C/88/D/104/2019 (Oct. 8, 2021); Application in the Case of Duarte Agostinho v. Port.; and Inter-American Comm'n on H.R., Petition filed before the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti, *supra* note 25.

<sup>99</sup> See generally Comm. on the Rts. of the Child, DRAFT GENERAL COMMENT NO. 26 ON CHILDREN'S RIGHTS AND THE ENVIRONMENT WITH A SPECIAL FOCUS ON CLIMATE CHANGE, <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special> (hereinafter *Drat General Comment No.26 on Children's Rights and the Environment*).

heard, free expression, and access to justice.<sup>100</sup> These principles were echoed too in a Joint Statement recently released by the CRC and several UN-Treaty based organs on climate change, calling for the consideration of children as agents and essential partners in addressing climate change; for states to act proactively to reduce emissions and adapt climate change impacts in tandem with addressing all forms of discrimination and inequality; and to defend effectively the rights of child environmental human rights defenders.<sup>101</sup> The CEDAW Committee also recently placed emphasis in its General Recommendation 39 on how the problem of climate change affects Indigenous girls, including threats on their lands, territories, and the environment caused by human-caused pollution, contamination, deforestation, the burning of fossil fuels, and the loss of diversity.<sup>102</sup> The CEDAW Committee went as far as calling these threats forms of environmental and spiritual violence against Indigenous girls.<sup>103</sup>

Some of the most well-documented climate change hazards for children are droughts, flooding, landslides, hurricanes, air pollution and water scarcity, malnutrition and diseases such as respiratory infections.<sup>104</sup> The quality of services available to children can be particularly deficient when it comes to water, food, education, and health care.<sup>105</sup> Schools can be shut due to flooding, waterborne diseases, and food insecurity.<sup>106</sup> The risk of children to discrimination and violence is also aggravated during times of crisis and climate change effects.<sup>107</sup>

The European Court of Human Rights is currently considering one of its first case applications related to climate change presented by children. In the case of *Duarte Agostinho and Others v. Portugal and Others*, it is alleged that global greenhouse gas emissions from 33 Member States of the Council of Europe are

<sup>100</sup> See *id.* ¶¶ 6–8, 16–44, 50–52, 56–70.

<sup>101</sup> See U.N. TREATY-BASED BODIES, JOINT STATEMENT ON HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 7, ¶¶ 8, 11–13, 16.

<sup>102</sup> See COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATION NO. 39 ON THE RIGHTS OF INDIGENOUS WOMEN AND GIRLS, *supra* note 42, ¶¶ 36–37, 60–61.

<sup>103</sup> See *id.* ¶¶ 36–37, 60–61.

<sup>104</sup> See UNICEF, THE CLIMATE CRISIS IS A CHILD RIGHTS CRISIS, *supra* note 28, ¶¶ 27–54 (documenting the pernicious effects of a range of climate change related hazards on children, including extreme temperatures; water scarcity; flooding; cyclone exposure; disease vector exposure; air, soil, and water pollution; and the threat of overlapping hazards).

<sup>105</sup> For a general overview, see AFRICAN COMM. OF EXPERTS ON THE RTS. AND WELFARE OF THE CHILD, STATEMENT OF THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD WORKING GROUP ON CLIMATE CHANGE AND CHILDREN'S RIGHTS ON THE AFRICA DAY FOR FOOD AND NUTRITION SECURITY (Oct. 30, 2022), <https://www.acerwc.africa/en/article/statements/statement-african-committee-experts-rights-and-welfare-child-working-group>

<sup>106</sup> See Catherine Porter, *Education is under threat from climate change - especially for women and girls*, University of Oxford (Nov. 8, 2021), <https://www.ox.ac.uk/news/features/education-under-threat-climate-change-especially-women-and-girls> (discussing how climate change intersects with another looming crisis related to the interruption of education for children living in poverty and widening inequalities resulting from the COVID-19 pandemic).

<sup>107</sup> See IACHR and REDESCA Climate Change Resolution 3/2021, *supra* note 6, ¶ 19. See also UNICEF, THE CLIMATE CRISIS IS A CHILD RIGHTS CRISIS (2021), *supra* note 28, ¶¶ 8, 77.

contributing to the harms produced by global warming and climate change.<sup>108</sup> The petition was brought by six Portuguese children and young people, with support from the Global Legal Action Network, claiming that their generation will be particularly harmed by the effects of climate change and these states' contribution to climate change.<sup>109</sup> The application alleges in particular that these states have contributed to climate change in the following ways: by permitting release of emissions in their national territories and offshore areas; by allowing the export of fossil fuels extracted on their territory; by authorizing the import of goods the production of which involves the release of emissions into the atmosphere; and by enabling entities within their jurisdiction to contribute to the release of emissions overseas.<sup>110</sup>

The applicants in *Duarte Agostinho and others* specify that they are already harmed by climate change in their respiratory and cardiovascular health from increased heat and air pollution, reflected in reduced energy levels and difficulty sleeping.<sup>111</sup> They allege that these ailments have a present and future effect, harming future generations.<sup>112</sup> The petition has been admitted by the European Court of Human Rights under the rights to life (Article 2), private and family life (Article 8), the prohibition of discrimination (Article 14), the prohibition of torture and inhumane treatment (Article 3), and the right to property (Article 1, Protocol 1 of the Convention).<sup>113</sup>

The Inter-American Commission on Human rights is also currently considering a petition on climate issues presented in 2021 by the Haitian Children in Cité de Soleil.<sup>114</sup> The petition alleges that toxic trash disposal in the residential district of Cité de Soleil in Port-au-Prince is harming the health of children; damage which will be exacerbated by climate change, environmental displacement, and waterborne diseases.<sup>115</sup> The petition was presented under the rights of the child (Article 19); to dignity (Article 11); to live in a healthy environment (articles 4 and 26); and to judicial protection (Article 25) of the American Convention.<sup>116</sup>

Also noteworthy is the recent case in the matter of *Sacchi v. Argentina*, in which five petitions were filed before the CRC, by 16 individuals under the age of 18, from Argentina, Brazil, France, Germany, and Turkey.<sup>117</sup> The claimants alleged that these states failed to act diligently to reduce carbon emissions and adapt and

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<sup>108</sup> See generally Application in the Case of Duarte Agostinho v. Portugal, *supra* note 21. For more discussion of this case, see Corina Heri, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?* (Dec. 22, 2020), <https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/>

<sup>109</sup> See generally Application in the case of *Duarte Agostinho v. Port.*, *supra* note 21.

<sup>110</sup> See *id.* at 6.

<sup>111</sup> See *id.* at 6–7.

<sup>112</sup> See *id.*

<sup>113</sup> See *Duarte Agostinho v. Port.* App. No. 39371/20, Eur. Ct. H.R., (Dec. 2020), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22002-13055%22%5D%7D>

<sup>114</sup> See generally Inter-American Comm'n on Hum. Rts., Petition filed before the IACHR by Children in Cité Soleil, Haiti, *supra* note 25.

<sup>115</sup> See *id.* at 15–32.

<sup>116</sup> See *id.* at 40–75.

<sup>117</sup> See UNCRC, *Sacchi v. Argentina*, CRC/C/88/D/104/2019 ¶¶ 1.1, 3.1–3.8 (Oct. 8, 2021).



mitigate to the negative effects of climate change; all of which they consider is foreseeable harm that these states should have addressed.<sup>118</sup> The authors claimed concretely that the 1.1 degree rise in global temperature is fueling heat waves, forest fires, flooding, sea level rise, and the spread of diseases and that children are the among the most vulnerable to these life-threatening impacts and will bear the brunt of these harms longer than adults.<sup>119</sup> The authors also requested the safeguard of the right of children to be heard and express their views freely, in international, national, and subnational efforts to mitigate or adapt to the climate crisis.<sup>120</sup>

Even though the complaints presented in the case of *Sacchi v. Argentina* were considered inadmissible due to the non-exhaustion of domestic remedies, the CRC presented bold and ground-breaking analysis concerning jurisdiction and the content of state obligations under the Convention on the Rights of the Child when transboundary harm related to climate change occurs.<sup>121</sup> The CRC referred to the important precedent set by the Inter-American Court of Human Rights in its Advisory Opinion OC-23/17 (hereinafter “OC 23/17”) on the environment and human rights, confirming that states may be held responsible for significant damage caused to persons outside their borders from human-driven activities originating in their territory, or under their effective control or authority.<sup>122</sup> The Committee also confirmed that states can be individually responsible for climate change harm, especially when they know of this harm<sup>123</sup> and that states can be responsible for transboundary harm caused by carbon emissions within their effective control.<sup>124</sup> The CRC directly called the harm in this case “foreseeable” and identified a heightened obligation for states to act immediately to prevent the damaging impacts of climate change on children throughout their lifetimes.<sup>125</sup>

In essence, concerning women, indigenous peoples, and children, existing international jurisprudence has already shed important content on human rights such as those related to life; personal integrity; non-violence; non-discrimination; property, consultation, consent, and participation; freedom of expression and access to information; life and family; and judicial protection and guarantees.<sup>126</sup> Even though these rights have not always been interpreted in the context of environmental concerns, these pre-existing interpretations are key to present and future climate change cases. Even though many of the present cases are being argued as exclusively climate change and environmental matters, combining more

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<sup>118</sup> See *id.* ¶¶ 1.1, 2, 3.1, 3.3, 3.4.

<sup>119</sup> See *id.* ¶ 3.1.

<sup>120</sup> See *id.* ¶ 3.8.

<sup>121</sup> See *id.* ¶¶ 10.5, 10.6, 10.7.

<sup>122</sup> See *id.* ¶¶ 10.5–10.7.

<sup>123</sup> See *id.* ¶¶ 10.8, 10.11.

<sup>124</sup> See *id.* ¶¶ 10.8–10.10.

<sup>125</sup> See *id.* ¶¶ 10.6–10.7, 10.11–10.14.

<sup>126</sup> For emblematic cases, see Inter-Am. Cr. H.R., *González et. al. (“Cotton Field”) v. Mex.*, Preliminary Objection, Merits, Reparations, and Costs, (Series C) No. 205 ¶¶ 232–86 (Nov. 19, 2009); Eur. Ct. H.R., *Opuz v. Turkey*, App. No. 33401/02, ¶¶ 128–53 (2009); Eur. Ct. H.R., *E. v. U.K.*, App. No. 33218/96, ¶¶ 88–101 (Nov. 26, 2002); Eur. Ct. H. R., *Z. v. U.K. [GC]*, App. No. 29392/95 ECHR 2001-V, ¶¶ 69–75 (May 10, 2001); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 145–211 (June 27, 2012).

concrete arguments related to climate change and the environment with individual and collective rights violations affecting women, Indigenous peoples, and children can be useful in this scenario.

As a prelude to the following sections, the author notes three different kinds of legal arguments frequently presented in cases concerning environmental harm at the international level. One line of argumentation has focused on the impact of environmental harm on the rights to life, health, family and private life, and property, among other rights of general content, invoking classical human rights treaties.<sup>127</sup> A second line of argumentation has focused instead on the right to a healthy environment, in particular the need to prevent environmental harm from state and non-state actors, based on specific treaty provisions protecting this right.<sup>128</sup> A third line of argumentation has offered a more specialized lens to jurisprudence, placing the emphasis more on the specific needs for human rights protection of women, Indigenous peoples, and children in cases of environmental harm, using as a foundation leading global and regional human rights treaties.<sup>129</sup> The author contends that future litigation in the area of climate change needs to weave these three layers of arguments, as this could be beneficial for women, Indigenous peoples, and children, and would result in more coherent standards for states on how to best protect human rights in this area. Litigation can also open a space to understand better the contours of the problem of intersectional discrimination, as will be discussed in the following sections of this article.

### **III. The Value of International Human Rights Litigation to Address Climate Change and its Adverse Impacts on Marginalized Individuals and Groups**

Litigation can be a very valuable tool to address the adverse impacts of climate change on marginalized individuals and groups. In the author's view, there are five reasons in particular why litigation can be particularly useful in this area. Firstly, case decisions and judgments can provide important examples to states on how to meet their obligations under global and regional human rights treaties to mitigate and adapt to climate change effects, and ensure the full respect, protection, and fulfillment of human rights in contexts disproportionately affected by this issue. Second, decisions and judgments can fill in the gaps in current global and regional

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<sup>127</sup> See, e.g., *Oneryildiz v. Turk.*, App. No. 48938/99, Eur. Ct. H.R., ¶¶ 9–17, 69–118 (2004); *Lopez Ostra v. Spain*, App. 16798/90, Eur. Ct. H.R., ¶¶ 7–22, 44–58 (Dec. 9, 1994); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 160–76 (June 17, 2005).

<sup>128</sup> See, e.g., *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C No. 400, ¶¶ 20289 (Feb. 6, 2020); *The Soc. & Econ. Rts Action Ctr. v. Nigeria*, African Comm'n on Hum. and Peoples' Rts, Communication 155/96, ¶¶ 1–9, 43–69 (2001).

<sup>129</sup> See, e.g., UNHRC, *Benito Oliveira Pereira et. al. v. Paraguay*, U.N. Doc. CCPR/C/132/D/2552/2015 ¶¶ 8.5–8.8 (Oct. 12, 2021); UN CERD Committee, *Lars-Arden Agren et Al. v. Sweden*, CERD/C/102/D/54/2013 ¶¶ 6.1–6.29 (Dec. 18, 2020).

treaties and define key concepts which are useful when determining state accountability and in the design of public policies, laws, and programs.

Third, there is already wide recognition of a significant number of rights affecting marginalized individuals and groups which need content and application in climate change and environmental matters. Case judgments and decisions can contribute to content to these rights. Fourth, there are a range of global and regional human rights treaties that are already being interpreted by global and regional human rights protection systems and implemented by specific states. Global and regional human rights protection systems can interpret and apply the content of these treaties to climate change and environmental concerns. In this interpretation, they can use as key persuasive authority current climate change-specific treaties such as the Paris Climate Change agreement, the Aarhus Convention, and the Escazú agreement. Fifth, international litigation has been vital to give a second avenue of justice and voice to those marginalized at the supranational level and to develop a legal approach that is responsive to the human rights challenges they face.

This section advances some considerations regarding these five aspects using women, Indigenous peoples, and children as examples. As discussed previously, international litigation is only one tool in the wide range of strategies that can be pursued to address climate change concerns.

#### A. Human Rights Obligations: States and Beyond

Case decisions and judgments in many ways bring to life the concept of state obligations when it comes to human rights protection. These are authorized interpretations of current treaties and instruments and their application to a specific individual or collectivity who has faced human rights violations. Many of these case decisions are the result of well-crafted strategies by advocates and civil society organizations with goals and desired impacts to bring justice to individual survivors of human rights violations, accountability for state institutions, and to transform legislative and institutional structures.<sup>130</sup> The process of litigating a case in itself can be a vehicle for the leadership, empowerment, and reparations for individuals who survive human rights violations and their family members.<sup>131</sup>

The goal of case decisions can be twofold. Firstly, they can serve to bring supranational justice to an individual or group who has not received an adequate and effective remedy at the national level. Secondly, they can offer critical

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<sup>130</sup> See, e.g., U.N. High Comm'r for Hum. Rts., Report of Workshop on Strategic Litigation for Gender-Based Violence: Experiences in Latin America, at 7–23 (2021) (discussing experiences, good practices, and challenges in the use of strategic litigation in a variety of cases in Latin America to address gender-based violence at the individual, social, and institutional levels).

<sup>131</sup> See the discussion in Jérémie Gilbert, *Indigenous Peoples and Litigation: Strategies for Legal Empowerment*, 12 J. HUM. RTS. PRAC. 2, 315–17 (July 2020) discussing the potential of a litigation process in itself to be empowering for Indigenous peoples, despite implementation challenges of case decisions, and the technicalities of the process.

guidelines to states on which actions to take to prevent and respond to human rights violations at the national level, and which interventions to prioritize in terms of legislation, policy, programs, and the workings of their Executive, Justice, and Legislative Branches. These guidelines can be in the form of legal standards or benchmarks for the state who is found responsible or accountable for human rights violations.

As the author has discussed in her scholarship in the past, a human rights standard constitutes a legal obligation for the state involved and sheds light on the content of this obligation.<sup>132</sup> A human rights standard issued by the global and regional human rights protection systems can also offer a key guideline for the state implicated on how to adequately and effectively implement at the national level the individual's rights contained in the governing instruments of these systems.<sup>133</sup>

As discussed in the previous section, there is already a cognizable line of case decisions, judgments, and views addressing human rights concerns which deeply affect women, Indigenous peoples, and children. In the case of women, these decisions have addressed different forms of gender-based violence; discrimination; torture; the dire situation of lesbian and trans women; sexual and reproductive rights; and human rights challenges in the realms of education and employment.<sup>134</sup> In the case of Indigenous peoples, there is a key line of decisions related to self-determination and their rights over their lands and territories, consultation and consent, culture, and access to water, food, and other economic, social, and cultural rights.<sup>135</sup> In the case of children, decisions have been issued by a number of global and regional human rights bodies advancing their best interests, development, and enhanced protection; rights to life, expression, and participation; rights in the realm of the family; due process and humane treatment within the criminal justice system and when deprived of liberty; and their rights as migrants, refugees, and during displacement, among other areas.<sup>136</sup> These decisions include reparations and recommendations for states on how to shape their policies, laws, programs, and services to fully respect and protect the rights of women, Indigenous peoples, and children.

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<sup>132</sup> See Rosa Celorio, *Several Steps Forward, One Backward: Climate Change, Latin America, and Human Rights Resilience*, 34 MD. J. INT'L L. 96, 108 (2019).

<sup>133</sup> See Rosa Celorio, *Discrimination and the Regional Human Rights Protection Systems: The Enigma of Effectiveness*, 40 U. PA. J. INT'L L. 781, 793–94 (2019).

<sup>134</sup> For emblematic cases, see González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 232–86 (Nov. 16, 2009); Opuz v. Turkey, 2009-III Eur. Ct. H.R. ¶¶ 128–53.

<sup>135</sup> For illustrative cases, see UN CERD, Lars-Arden Agren et Al. v. Sweden, U.N. Doc. CERD/C/102/D/54/2013 ¶¶ 6.1–6.29 (Dec. 18, 2020); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 134–36 (Nov. 28, 2007).

<sup>136</sup> For paradigmatic cases, see Angulo Losada vs. Bol., Preliminary Exceptions, Merits, and Reparations, Inter-Am. Ct. H.R., Series C No. 475, ¶¶ 92–124 (Nov. 18, 2022); Eur. Ct. H.R., D.H. v. Czech., *supra* note 35, ¶¶ 175–210.

These case decisions have also solidified and also begun adding content to key benchmarks of state responsibility that are critical for women, Indigenous peoples, and children. These include due diligence; intersectional discrimination and the right to live free from violence; rights over territories, consultation, and consent; and participation, access to information, and expression, which are all legal standards that will be discussed in more detail in the next section.

The litigation of cases before global and regional human rights systems can result in important authorized interpretations of how these legal standards apply in a context of human rights violations driven by climate change and steps states can pursue to meet their obligations to mitigate, adapt, and redress climate change effects. These interpretations can also include critical links with the right to a clean, healthy, and sustainable environment and already established environmental principles, such as the need to prevent environmental harm, the precautionary principle, and extraterritorial obligations or the duty to prevent transboundary harm.

The Inter-American Court of Human Rights already offered an example in its Advisory Opinion 23/17 on the Environment and Human Rights (hereinafter “OC 23-17”) on how a court can link classical human rights obligations to the right to a clean, healthy, and sustainable environment, and international environmental law principles.<sup>137</sup> In this Advisory Opinion, the Court carefully weaves a set of three rights which are vital to address environmental degradation, including the right to a healthy environment as an autonomous right; a set of rights for all that are particularly threatened by environmental harm, including life, personal integrity, private life, health, water, food, housing, culture, property, and to not be forcibly displaced; and the already recognized vulnerabilities of specific groups, such as women, Indigenous peoples, and children.<sup>138</sup> The author contends in this article that this multi-layered approach to rights is particularly critical in the area of marginalized groups and for women, Indigenous peoples, and children. The author hopes to see more international litigation efforts focused on defining the contours of these three sets of rights and their cross-cutting nature when it comes to women, Indigenous peoples, and children in the area of climate change. The new request for an Advisory Opinion on Climate Change submitted before the Inter-American Court of Human Rights offers an invaluable opportunity to weave these three sets of rights and offer content to a gender, Indigenous, and child-rights perspective in their implementation in the area of climate change.

It is noted that international litigation is already proving to be a useful avenue to define what state obligations are when it comes to non-state actors. Recent judgments are shedding light on state obligations to prevent, supervise, and regulate the activity of businesses and private service providers, especially when these fail to act with due diligence to prevent harm in the employment and health sectors.<sup>139</sup>

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<sup>137</sup> See Inter-Am. Court H.R., Advisory Opinion OC-23-17 ¶¶ 56–65, 66–67.

<sup>138</sup> See *id.*

<sup>139</sup> See, e.g., Inter-Am. Ct. H. R., *Fireworks Factory of Santo Antônio de Jesus v. Braz.*, *supra* note 45, ¶¶ 148–203 (confirming that states have the obligation to regulate, supervise, and

States have also been held accountable internationally when they have failed to prevent, investigate, sanction, and grant reparations in cases of gender-based violence perpetrated by private actors.<sup>140</sup> The language of these decisions has become more forceful over the years, pointing to a much more involved role from states to actively prevent and supervise the activities of private actors which could be harmful to their populations. Case decisions have filled an important void due to the absence of a global treaty that addresses businesses and their human rights responsibilities, even though discussions have been ongoing about its adoption.

A more carefully developed legal approach to the activity of businesses is critical in the area of climate change, where many of those who are failing to act without delay to limit greenhouse gasses and fossil fuels are corporations, businesses, and extractive industries. Case decisions can be impactful in defining further the scope of state obligations towards economic actors operating in their countries, but also what responsibilities these private actors have to do no harm and provide redress.<sup>141</sup> The United Nations Ruggie Principles on Business and Human Rights (hereinafter “UN Ruggie Principles”) already provide useful guidelines in regards to the role of private actors, but further insight can be offered by global and regional human rights systems—based on existing global and regional human rights treaties - on what these potential responsibilities mean in practice.<sup>142</sup> For example, the Inter-American Commission on Human Rights has already published two regional reports outlining what responsibilities non-state business actors have towards individuals under the American Declaration and the American Convention on Human Rights; an analysis which can be expanded in case decisions, judgments,

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oversee the activities of private actors which are dangerous and threaten the rights to life and personal integrity); CEDAW Committee, *Alyne Da Silva Pimentel Teixeira v. Brazil* ¶ 7.5 (confirming that the state is directly responsible for the negligent actions of private institutions when it outsources its medical services, and that the state is always mandated to regulate and monitor private health-care institutions).

<sup>140</sup> See, e.g., *Lenahan (Gonzales) v. U.S.*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/V/II, ¶¶ 122–170 (2011) (finding the state responsible for failing to properly implement a restraining order to protect Jessica Lenahan and her daughters from domestic violence by her estranged husband); *Eur. Ct. H.R., Opuz v. Turkey*, App. No. 33401/02, 2009-III Eur. Ct. H.R., ¶¶ 128–153 (2009) (finding the authorities responsible when they failed to protect a domestic violence victim and her mother from recurrent acts by a private perpetrator).

<sup>141</sup> Courts have already started ruling cases related to state obligations towards business activities which may be harmful to the environment, including oil exploration, extractive, and steel production, which contravene the rights to consultation and consent of Indigenous peoples, and the rights of residents who live close to these operations. See, e.g., *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 2, 159–239, 177 (June 27, 2012) (confirming the right to free, prior, and informed consultation and consent of Indigenous peoples before any oil exploration and exploitation activities take place in their territories); *Cordella v. It.*, App. Nos. 54414/13 and 54264/15, Eur. Ct. H.R. (Jan. 24, 2019) (holding the state responsible for its failures to halt pollution caused by a steel plant impacting the local residents).

<sup>142</sup> See U.N. OFF. OF THE HIGH COMM’R OF HUM. RTS., *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* (2011) (establishing responsibilities for corporations to respect human rights, to address adverse human rights impacts, to carry out human rights due diligence, and to remedy any harm caused) [hereinafter U.N. Ruggie Principles].

and views, and applied to climate change concerns.<sup>143</sup> Case decisions can provide key insight on the different components of the state obligation to supervise the activity of business actors. For example, case decisions can discuss the content of the requirement to conduct environmental impact assessments; to develop regulations with a content favorable to their implementation; the need to establish mechanisms to report human rights violations; and the adoption of measures to ensure that critical information is disseminated to employees to enforce their human rights in this area.

## B. Filling the Environmental Gap in Global and Regional Human Rights Treaties

There is a noticeable gap in global and regional human rights treaties – which are binding sources of law – in the protection of environmental rights. At the global level, the absence of recognition of a right to a clean, healthy, and sustainable environment has been widely noted as an important omission.<sup>144</sup> Even though the United Nations Human Rights Council and the United Nations General Assembly have attempted to fill this gap recently, with their consensus-driven recognition of the right to a clean, healthy, and sustainable environment at the global level, these resolutions are not primary sources of law in international law, only partially filling the treaty-based absence of a globally recognized right.<sup>145</sup> At the regional level, there is wider recognition of the right to a clean, healthy, and sustainable environment in regional treaties in Africa, the Americas, and the Middle East, but the right has rarely been developed in terms of content in their case decisions, judgments, and views.<sup>146</sup> Due to this gap, significant litigation efforts have been

<sup>143</sup> See INTER-AM. COMM'N H.R., BUSINESS AND HUMAN RIGHTS: INTER-AMERICAN STANDARDS, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19 ¶¶ 80–120 (Nov. 1, 2019) (discussing in detail the state obligation to prevent, supervise, and regulate the activities of businesses which may be harmful to human rights); INTER-AM. COMM'N ON H.R., INDIGENOUS PEOPLES, AFRO-DESCENDENT COMMUNITIES, AND NATURAL RESOURCES: HUMAN RIGHTS PROTECTION IN THE CONTENT OF EXTRACTION, EXPLOITATION, AND DEVELOPMENT ACTIVITIES, OEA/Ser.L/V/II. Doc. 47/15, ¶¶ 82–105 (Dec. 31, 2015) (discussing the duty to prevent, mitigate, and eradicate the negative impacts on human rights of extractive activities undertaken by private business actors and the general due diligence obligation to supervise development and extractive activities).

<sup>144</sup> See, e.g., *Framework Principles on Human Rights and the Environment*, supra note 8, ¶¶ 14–16.; U.N. ENV'T PROGRAMME, JOINT STATEMENT OF UNITED NATIONS ENTITIES ON THE RIGHT TO A HEALTHY ENVIRONMENT (Mar. 8, 2021), <https://www.unep.org/news-and-stories/statements/joint-statement-united-nations-entities-right-healthy-environment>.

<sup>145</sup> See generally G.A. Res. 76/300, *The Human Right to a Clean, Healthy, and Sustainable Environment*, supra note 9; H.R.C. Res. 48/13, *The Human Right to a Clean, Healthy and Sustainable Environment*, supra note 9.

<sup>146</sup> See African Charter, supra note 36, Art. 24 (Regional treaty provisions related to a right to a healthy environment); Org. of Am. States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Art. 11 A-52 (Nov. 16, 1999), [hereinafter Protocol of San Salvador]; Eur. Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, Article 37 (Oct. 26, 2012) [hereinafter European Union Charter of Fundamental Rights]; and League of Arab States, Arab Charter on Human Rights, Art. 38,

presented invoking classical rights recognized in human rights treaties such as life,<sup>147</sup> personal integrity,<sup>148</sup> family and privacy,<sup>149</sup> property,<sup>150</sup> dignity,<sup>151</sup> culture,<sup>152</sup> and health.<sup>153</sup>

This has led to valuable case decisions and judgments in the area of the environment, but a noticeable fragmentation in interpreting the content of these rights and in the guidelines issued to states. It has also resulted in less specific content afforded to the right to a clean, healthy, and sustainable environment, and how it applies to women, Indigenous peoples, and children in cases of environmental harm and degradation. Cases related to women, Indigenous peoples, and children are typically not presented as environment and climate change cases either, but more invoking classical legal standards and rights.

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(May 22, 2004), *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005), (*entered into force*) March 15, 2008, [hereinafter Arab Charter on Human Rights]. For case decisions issued at the regional level interpreting the scope of the right to a healthy environment, see *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C No. 400, ¶¶ 202–89 (Feb. 6, 2020) ; *African Comm'n on Hum. and Peoples' Rts., The Social and Economic Rights Action Center (SERAC) v. Nigeria*, ¶¶ 1–9, 43–69.

<sup>147</sup> *See, e.g., Oneryildiz v. Turk.*, App. No. 48938/99, Eur. Ct. H.R., ¶¶ 9–17, 69–118 (2004) (finding the state responsible for a right to life violation when it failed to protect the inhabitants of slum areas from the technical deficiencies of a municipal rubbish tip, when it knew of the risk of explosion, resulting in loss of life); *Xákmok Kásek Indigenous Community. v. Paraguay*. Merits, Reparations and Costs, Inter-Am. Ct. H.R., Series C No. 214, ¶¶ 183–217 (Aug. 24, 2010) (finding a right to life violation when the Xákmok Kásek Indigenous community could not access water of sufficient quality and quantity and restrictions to the right to food and health due to impediments to access their lands and territories).

<sup>148</sup> *See, e.g., Inter-Am. Comm'n H.R., Res. No. 12/85, Case No. 7615, Braz. (1985)*, Considerations section ¶¶ 1–12; Resolution section, ¶ 1 (in which the Inter-American Commission found a violation to the right to personal integrity when the construction of a trans-Amazonian highway and the authorization to exploit resources in the territories used and enjoyed by the Yanomami peoples resulted in the influx of diseases, in limitations to access the needed medical care, and a negative impact to their culture and traditions).

<sup>149</sup> *See, e.g., Lopez Ostra v. Spain*, App. 16798/90, Eur. Ct. H.R., ¶¶ 7–22, 44–58 (Dec. 9, 1994) (in which the Court found violations to the rights to private and family life due to state failures to protect Lorca residents from the health effects of environmental pollution and waste).

<sup>150</sup> *See, e.g., Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶ 149 (Aug. 31, 2001) (finding a violation to the right to property of the members of the Mayagna Awas Tigni Community when the state granted concessions to third parties affecting their territories and resources with harmful environmental impacts).

<sup>151</sup> *See, e.g., Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 160–76 (June 17, 2005) (in which the Court found the state responsible for a violation to the right to a dignified life when the Yakye Axa Community faced barriers to access clean water and decent housing due to the dispossession of their lands and territories).

<sup>152</sup> *See, e.g., U.N. Hum. Rts. Comm., Oliveira Pereira v. Para.* ¶¶ 8.5–8.8 (in which the state was found responsible for a violation of the right to culture of the indigenous community of Campo Agua'ê for failing to monitor and prevent contamination by toxic pesticides from large commercial operations, due to their negative impact on their way of life).

<sup>153</sup> *See, e.g., Cordella v. It.*, App. Nos. 54414/13 and 54264/15, Eur. Ct. H.R. (Jan. 24, 2019) (holding the state responsible for its failures to halt pollution caused by a steel plant impacting the health of local residents).



In the author's view, global and regional human rights systems can use case decisions to offer states an overarching framework of action when it comes to climate change concerns that affect women, Indigenous peoples, and children. They can analyze these cases using the right to a clean, healthy, and sustainable environment as an umbrella with two components. First, they can discuss this right as independent, autonomous, and as having its own content when it comes to cases of environmental damage and harm. Second, they can analyze how the right to a healthy environment intersects with already-recognized obligations and approaches when it comes to women, Indigenous peoples, and children. This multi-layered analysis is needed when examining human rights issues connected to climate change. Cases can also give insight into what a women's, Indigenous peoples, and children's perspective is when it comes to the respect, protection, and fulfillment of rights in the areas of climate change and the environment in general.

In the same vein, rights concerning climate change and the environment are still in evolution and many new terms are emerging that need further content to name human rights violations in this area. Particularly pertinent is the concept of *environmental violence*. This concept has been used recently by the CEDAW Committee in its General Recommendation 39 on Indigenous Women and Girls to refer to environmental harm, degradation, pollution, and state failures to prevent foreseeable harm connected to climate change, which it categorizes as a form of discrimination.<sup>154</sup> The term has also been referred to by a number of scholars to name the many impacts that environmental harm, degradation, and pollution have on Indigenous women and girls.<sup>155</sup> The author could see how case decisions could apply the term *environmental violence* to the very particular harm that women and girls face in general due to climate change effects and state failures to adapt and respond. Case law can also expand the coverage of the term to other groups gravely affected by state omissions in the area of climate change, including human rights defenders, individuals with disabilities, migrants, refugees, and those displaced. Lastly, case law can shed light for states on how to adequately ensure the prevention and non-repetition of environmental violence, through legislation, policies, early warning systems, awareness-raising campaigns, protocols, education, and access to information.

Very connected to *environmental violence* is also the term *environmental racism*. For example, a group of residents from Mossville, Louisiana and the non-profit organization Mossville Environmental Action Now, have presented a petition before the Inter-American Commission on Human Rights arguing that they are victims of *environmental racism*, due to various health problems they are suffering from toxic pollution released from fourteen chemical-producing industrial facilities

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<sup>154</sup> See *General Recommendation No. 39*, *supra* note 42, ¶¶ 7, 9, 37.

<sup>155</sup> For more reading, see Andrea Carmen, *Environmental Violence: Impacts on Indigenous Women and Girls*, in *INDIGENOUS PEOPLES' RIGHTS AND UNREPORTED STRUGGLES: CONFLICT AND PEACE* 96, 96–97, 98–102, 104–06 (Elsa Stamatopoulou ed., 2017); CELORIO, *supra* note 30, at 75–76.

that have been granted permits to operate in that city.<sup>156</sup> They argue in their petition that the majority of Mossville residents are African-American and that the disproportionate effect of pollution on them constitutes environmental racism which breaches the right to equality before the law protected under Article II of the American Declaration.<sup>157</sup> Both *environmental violence* and *environmental racism* can be useful terms to refer to state failures in taking steps to mitigate and adapt to climate change effects and their impact on women, Indigenous peoples, and children. Case decisions would provide an important avenue to exemplify and define further the content of these terms.

There are other connected concepts to *environmental violence* and *racism* that could be further developed in international jurisprudence related to climate change. For example, the CEDAW Committee has referred to *spiritual violence*, which harms the collective identity of Indigenous communities and their linkages to their spiritual life, culture, territories, the environment, and natural resources.<sup>158</sup> The Inter-American Commission of Human Rights has also been using *spiritual violence* to refer to the impacts of violence perpetrated by both state and non-state actors on Indigenous women and Indigenous peoples in general.<sup>159</sup> In the case of indigenous peoples, it has been widely recognized how they have a special connection to their lands, territories, and environment, which is often broken by the implementation of business and extractive activities without their consultation and consent.<sup>160</sup> This analysis could be extended to foreseeable harm derived from climate change which states and non-state actors fail to prevent, with cognizable impacts on Indigenous peoples, and Indigenous women and children in particular. Case law for example could shed light for states on how to properly offer a judicial remedy to cases of *spiritual violence*, through the prompt processing of these cases by administration of justice systems, the design of protocols to investigate them, the participation of indigenous experts in this area, and the crafting of judicial decisions which are in harmony with international jurisprudence and treaties. Cases

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<sup>156</sup> See *Mossville Env't Action Now v. United States*, Petition 242–05, Inter-Am. Comm'n H.R., Report No. 43/10, ¶ 2 (2010) (finding the petition admissible to the alleged violations of Articles II and V of the American Declaration).

<sup>157</sup> See *id.* ¶¶ 9–16.

<sup>158</sup> See General Recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls, *supra* note 42, ¶ 36 (describing *spiritual violence* as harmful to the “spiritual life, culture, territories, environment, and natural resources” of Indigenous women and girls).

<sup>159</sup> See Inter-Am. Comm'n H.R., *Indigenous Women and their Human Rights in the Americas* ¶ 80, OEA/Ser.L/V/II, doc. 44/17 (Apr. 17, 2017) (the IACHR uses the term *spiritual violence* to refer to “acts of violence and discrimination against Indigenous women” that harm them individually, but also those which “negatively impact the collective identity of the communities to which they belong.”).

<sup>160</sup> See EMRIP FPIC Report, *supra* note 65, ¶¶ 31–32, 49–50, 61 (discussing the need for free, prior, and informed consent before extractive and business activities are implemented impacting Indigenous lands, territories, and natural resources).

can also provide critical insight on the needed content of legislation to adequately prevent and respond to specific forms of violence against women and girls.<sup>161</sup>

### C. Offering Content to Rights for Marginalized Individuals and Groups

There is already a wide recognition of a significant number of rights affecting women, Indigenous peoples, and children in the existing jurisprudence in these fields. For women, the rights to life, personal integrity, privacy, non-discrimination and equal protection of the law, and judicial protection have received increased attention.<sup>162</sup> For Indigenous peoples, rights related to their self-determination, their lands and territories, the need to consult and consent, and their culture have been prominent in different case decisions.<sup>163</sup> For children, rights related to their best interests, development, participation, life, family, due process, and judicial protection have been cornerstones.<sup>164</sup> However, more analysis is needed on these specific rights and how they are impacted and violated in an environmental degradation context and by state failures to prevent foreseeable harm and to adapt and mitigate climate change effects. The work of regional human rights Commissions and Courts has been crucial in offering wide interpretations to rights and applying them to different contexts. For example, even though historical interpretations of the right to life have focused on the need to prevent arbitrary

<sup>161</sup> See, e.g., *Angulo Losada v. Bolivia*, Preliminary Exceptions, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 475, ¶¶ 134–56 (Nov. 18, 2022) (providing important content on the elements that legislation on sexual violence against girls should contain to be effective and to be in harmony with international standards, in particular in the area of consent).

<sup>162</sup> See, e.g., *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 232–86 (Nov. 16, 2009); *Opuz v. Turkey*, App. No. 33401/02, 2009-III Eur. Ct. H.R. ¶¶ 128–53; *Da Silva Pimentel Teixeira v. Brazil*, U.N. Doc. CEDAW/C/49/D/17/2008, Admissibility, Merits, and Recommendations, ¶¶ 7.1–7.7 (Aug. 10, 2011); *Artavia Murillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 141–50, 158–228 (Nov. 28, 2012); *Aydin v. Turkey*, App. No. 23178/94, Eur. Ct. H.R. ¶¶ 13–23, 80–109 (1997).

<sup>163</sup> See, e.g., *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001); *Maya Indigenous Cmty. of Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶¶ 112–15 (2004); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 127, 177 (June 27, 2012); UNHRC, *Poma Poma v. Peru*, U.N. Doc. CCPR/C/95/D/1457/2006, Admissibility and Merits, ¶ 7.6 (Apr. 24, 2009); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 134–36 (Nov. 28, 2007).

<sup>164</sup> See, e.g., “Street Children” (*Villagrán-Morales et al.*) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 122–98 (Nov. 19, 1999); *Guzmán Albarracín et al. v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 405, ¶¶ 109–44 (June 24, 2020); *E. and Others v. United Kingdom*, App. No. 33218/96, Eur. Ct. H.R. ¶¶ 88–101 (2002); *Landaeta Mejías Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, ¶¶ 119–48 (Aug. 27, 2014); *Forneron and Daughter v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶¶ 44–57, 112–24 (Aug. 27, 2012).

deprivations of life, it is now understood through regional case law that this right also includes living a life with dignity and to have autonomy in developing life plans.<sup>165</sup> Violence against women for example used to be analyzed in a binary sense – contemplating only differences between women and men – and now it is understood through caselaw to also include lesbian, bisexual, and trans women.<sup>166</sup> The focus of children in jurisprudence has also evolved, with an increased emphasis on participation, information, expression, and activism and the protection of these spaces for children and adolescents.<sup>167</sup>

Case decisions can shed important light on what the content of cornerstone rights for women, Indigenous peoples, and children are when it comes to climate change and environmental degradation. However, case decisions can also help give a gender, Indigenous peoples, and children's perspective to the right to a clean, healthy, and sustainable environment, and what does this entail when it comes to the adequate and effective application of this right at the domestic level and by national institutions. Case decisions can be particularly key in exemplifying for states the needed content of mitigation and adaptation plans and measures, legislation, regulations, public policies, programs, and the need for adequate justice mechanisms when human rights violations take place.

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<sup>165</sup> For more discussion on the right to life, its connection with dignity, and the principle of autonomy, see UNHRC, *General Comment 36 On the Right to Life*, *supra* note 12, ¶¶ 3, 9, 26, 50, 62; African Comm'n on Hum. and Peoples' Rts. [ACHPR], *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (Nov. 18, 2015), <https://www.refworld.org/docid/5e67c9cb4.html>; *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 160–76 (June 17, 2005).

<sup>166</sup> See, e.g., *Vicky Hernández v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶¶ 126–36 (Mar. 26, 2021) (interpreting the scope of protections included in the Convention of Belém do Pará to extend to trans women and state due diligence obligations to protect their human rights). See also CEDAW Comm., General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women ¶ 18, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) (prohibiting discrimination on the basis of sexual orientation and gender identity under CEDAW).

<sup>167</sup> See, e.g., *R.B. v. Estonia*, App. No. 22597/16, ¶¶ 78–103 (June 22, 2021), <https://hudoc.echr.coe.int/fre?i=001-210466> (finding violations under the European Convention when the testimony of a girl of sexual violence perpetrated by her father was not adequately safeguarded during a criminal proceeding); *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, (ser. C) No. 239, ¶¶ 196–208 (Feb. 24, 2012) (in which the Court found violations under the American Convention on Human Rights when a mother was deprived of the custody of her three daughters without taking into consideration their views); see also, UN CRC, General Comment No. 12 on the Right of the Child to Be Heard, *supra* note 89, ¶¶ 2, 32–34 (underscoring the importance of the right of all children to be heard as one of the main principles advanced by the UN Convention on the Rights of the Child).

#### D. Interpretations of Treaty Language and its Application to Climate Change and Environmental Degradation

One of the virtues of the human rights system today is the wide range of global and regional human rights treaties adopted to address specific concerns and rights.<sup>168</sup> The author considers that case decisions offer the opportunity to advance authorized interpretations of the dispositions of these treaties to mandate state actions to adequately adapt and mitigate to the negative effects of climate change on marginalized individuals and groups.<sup>169</sup>

The promise of United Nations Treaty-Based organs in defining the content of rights and state obligations in the area of climate change is very illustrated by the joint statement they released in September of 2019. In the joint statement, they identify a group of rights that are implicated in climate change concerns, including the rights to life, food, housing, health, water, and culture.<sup>170</sup> The statement also makes heavy emphasis on the procedural rights to participation in the area of climate change.<sup>171</sup> The joint statement mentions in particular those groups with already pre-existing vulnerabilities and inequalities and that are disproportionately affected by climate change, including children, indigenous peoples, and women.<sup>172</sup> The statement also calls for women, children, and indigenous peoples to not just be seen as victims in the area of climate change, but also as agents of change and as partners in efforts to combat climate change.<sup>173</sup> As human rights obligations, the joint statement discusses a rights-based approach to climate change, which entails the implementation of policies aimed at reducing emissions, in accordance with the Paris Agreement; the highest possible ambition; the fostering of climate resilience; and ensuring that private and public investments are in harmony with the goal of

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<sup>168</sup> See generally ICCPR, ICESCR, American Convention, European Convention on Human Rights, and African Charter, *supra* note 36 (codifying the rights to life, private and family life, non-discrimination and equality, participation, freedom of expression, and judicial protection and guarantees among others).

<sup>169</sup> See generally CEDAW, *supra* note 29 (codifying key state obligations to prevent and respond to discrimination against women); Convention on the Rights of the Child, *supra* note 29 (reflecting major principles and values related to the rights of children, including their best interests, life, and development); U.N. Convention on Racial Discrimination, *supra* note 36 (prohibiting all forms of racial discrimination and mandating prompt state action to address it). See also Convention of Belém do Pará, *supra* note 37 (mandating states to act with due diligence to address violence against women); Istanbul Convention, *supra* note 37 (including expansive prohibitions for both violence and discrimination against women, advocating for a victim-centered approach, and outlining in detail steps that states should pursue to prevent, protect, and prosecute violence against women); Maputo Protocol, *supra* note 37 (containing obligations of wide scope when it comes to the protection of the civil, political, economic, social, and cultural rights of women).

<sup>170</sup> See U.N. Treaty-Based Organs, *Joint Statement on Human Rights and Climate Change*, *supra* note 7, ¶ 3.

<sup>171</sup> See *id.* ¶ 8.

<sup>172</sup> See *id.* ¶ 3.

<sup>173</sup> See *id.* ¶ 8.

securing low carbon emissions.<sup>174</sup> These obligations are also considered extraterritorial in nature.<sup>175</sup> States are also mandated to phase out fossil fuels, promote renewable energy, combat deforestation, and discontinue financial investments in activities and infrastructure which are not consistent with low greenhouse gas emissions pathways.<sup>176</sup>

Two of the more specialized Committees – the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women – are already showing their potential when it comes to the definition of state obligations in the area of climate change. As discussed earlier, the Committee on the Rights of the Child is in the process of elaborating a General Comment concerning children and environmental protection, and the draft already alludes to how the climate crisis threatens the children's' rights to health, life, food, water, sanitation, education, housing, culture, and development, among others.<sup>177</sup> The draft General Comment focuses on four principles which have historically guided the UN Convention on the Rights of the Child, including non-discrimination, the best interests of the child, the rights to life and development, and the participation and the views of the child.<sup>178</sup> It seeks to provide authoritative guidance to state parties to take the appropriate legislative, administrative, and other measures which would reflect a “child-rights approach” to environmental issues, especially in the area of climate change, and to clarify state obligations when it comes to mitigation and adaptation.<sup>179</sup> As referred to previously, the CEDAW Committee has already made an important contribution to a gender perspective in the area of climate change, by highlighting the rights of women that are specifically impacted by climate change driven harm, including the rights to non-discrimination, to live free from gender-based violence and discrimination against women and girls, to education and information, to work and social protection, to health, to an adequate standard of living, and to freedom of movement.<sup>180</sup>

Future case decisions can give content to these rights already identified either explicitly in the UN Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination against Women, and by their specific monitoring Committees. Case decisions can exemplify what states can or cannot do to address human rights in contexts and scenarios driven by climate change. The use of the right to a clean, healthy, and sustainable environment can be particularly useful in this regard, as well as international environmental principles.

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<sup>174</sup> See *id.* ¶ 11.

<sup>175</sup> See *id.* ¶ 10.

<sup>176</sup> See *id.* ¶ 12.

<sup>177</sup> See Draft General Comment No. 26 on Children's Rights and the Environment, *supra* note 99, ¶¶ 1, 16–70.

<sup>178</sup> See *id.* ¶¶ 6, 16–22, 50–58.

<sup>179</sup> See *id.* ¶¶ 75–123.

<sup>180</sup> See CEDAW Comm., General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 55–78.

Even though the Committee on the Rights of the Child considered the *Sacchi v. Argentina* and related cases inadmissible, it gave us light on how the Committee on the Rights of Child can interpret the content of the rights to life, health, and culture in future climate change cases involving children. The Committee recognized the validity of the authors' arguments and how states can be held individually responsible for climate change harm that affects these rights, especially when they know of this harm.<sup>181</sup> The Committee also acknowledged the authors' argument that a state party can be considered to have effective control over the source of carbon emissions within its territory that have transboundary and harmful effects.<sup>182</sup> The Committee also refers to key state obligations in the areas of due diligence and extraterritorial harm, whose content can be developed in more detail in the future in light of the rights and principles codified in the Convention on the Rights of the Child.<sup>183</sup> The UN Convention on the Rights of the Child is one of the most ratified treaties in the world, which makes it a very strong setting to set legal standards on behalf of children entailing states' positive and negative obligations to offset the effects of climate change.<sup>184</sup>

Another area in which there is great potential in the realm of litigation is the specialized regional human rights treaties that have been developed, especially those in the area of violence against women. This is critical due to the effects of climate change on women, including those indigenous. Three regional treaties have been issued in the Americas, Africa, and Europe addressing violence against women. The first of these treaties was adopted in the Americas in 1994 - the Inter-American Convention on the Punishment, Prevention, and Eradication of Violence against Women (hereinafter "Convention of Belém do Pará").<sup>185</sup> The Convention of Belém do Pará explicitly prohibits violence against women and codifies the due diligence standard as a benchmark for state obligations, mandating a range of state measures to prevent, investigate, prosecute, and sanction incidents of violence against women, including the protection of women from imminent acts and the issuance of legislation, public policies, programs, and services.<sup>186</sup> The treaty also addresses physical, psychological, and sexual violence perpetrated by both state and non-state actors.<sup>187</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "Maputo Protocol") was later adopted in 2003 and contains obligations of wide scope for states to protect the civil, political,

<sup>181</sup> See UN CRC, *Sacchi v. Argentina*, U.N. Doc. CRC/C/88/D/104/2019, Admissibility, ¶¶ 10.8, 10.11 (Nov. 11, 2021).

<sup>182</sup> See *id.* ¶¶ 10.8–10.10.

<sup>183</sup> See *id.* ¶¶ 10.7–10.12.

<sup>184</sup> The United Nations Convention on the Rights of the Child has 196 ratifications as of January 31, 2023. See U.N. Treaty Collection, 11. Convention on the Rights of the Child, (Nov. 20, 1989), [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en).

<sup>185</sup> See generally Convention of Belém do Pará, *supra* note 37.

<sup>186</sup> See *id.* arts. 7–8.

<sup>187</sup> See *id.* arts. 1–2.

economic, social, and cultural rights of women.<sup>188</sup> The Maputo Protocol includes within its definition of violence against women physical, sexual, psychological, and economic harm, and mandates the elimination of harmful practices.<sup>189</sup> The Maputo Protocol also recognizes explicitly in Article 18 the right to a healthy and sustainable environment, mandating states to ensure greater participation of women in the planning and preservation of the environment and the sustainable use of natural resources; the facilitation of women's access, participation, and information on new and renewable energy sources; the protection of indigenous knowledge systems; and the proper regulation of waste.<sup>190</sup> The Maputo Protocol also codifies many other relevant rights to the environment with a gender perspective, including the right to dignity (Article 3), right to food security (Article 15), right to adequate housing (Article 16), sustainable development (Article 19), and others.<sup>191</sup>

The most recent in this line of regional treaties is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter "Istanbul Convention"), adopted in 2011.<sup>192</sup> The Istanbul Convention is a landmark treaty for the Council of Europe, that reflects the standards already codified in the Americas and African treaties, but also adds critical and innovative content to state obligations in the area of violence against women. Among its most noteworthy components are its expansive prohibition of both violence and discrimination against women; its victim-centered approach; the detailed outlining of steps that states should pursue to prevent, protect, and prosecute violence against women; and the needed gender perspective and coordinated approach to state interventions in this area.<sup>193</sup> The Explanatory Report of the Istanbul Convention acknowledges that one of the purposes of this more recent treaty is to complement and expand on the standards set by other regional treaties, including the Convention of Belém do Pará and the Maputo Protocol, and to reinforce state action to prevent and combat violence against women and domestic violence at the global level.<sup>194</sup>

These three treaties can constitute key references for the regional human rights protection systems to address issues concerning gender-based violence and discrimination in the context of climate change-oriented cases. They can be references in defining the obligation of states to act with due diligence to prevent foreseeable harm; regulate and oversee the activities of non-state actors; and in the guarantee of information, freedom of expression, and participation in the area of climate change. This can be particularly pertinent for Indigenous women and girls, and women who live with disabilities; who are older; who live in rural areas; and those who have become migrants, refugees and/or internally displaced due to

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<sup>188</sup> See Maputo Protocol, *supra* note 37, arts. 2–25.

<sup>189</sup> See *id.* arts. 1(j), 5.

<sup>190</sup> See *id.* art. 18.

<sup>191</sup> See *id.* arts. 3, 15, 16, 19.

<sup>192</sup> See generally Istanbul Convention, *supra* note 37, arts. 5, 6, 12–28.

<sup>193</sup> See *id.*

<sup>194</sup> See Eur. Consult. Ass., *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, Doc. 210, ¶ 6 (2011) [hereinafter Explanatory Report to Istanbul Convention].



climate change concerns. Specialized treaties, such as the Convention of Belém do Pará, have been crucial for the development of jurisprudence on behalf of women and girls in the inter-American system of human rights.<sup>195</sup> The author contends that the Convention of Belém do Pará, as well as the Istanbul Convention and the Maputo Protocol, can also become crucial instruments in guiding states on how to adequately and effectively protect the rights of women and girls from climate-related harm.

The author also highlights that the content of these specialized treaties – as well as the more general human rights treaties at the global and regional levels – can be honed by references to the standards and principles set in the Paris Agreement,<sup>196</sup> the Aarhus Convention,<sup>197</sup> and the Escazú Agreement<sup>198</sup> and over environmental treaties. Even though global and regional human rights mechanisms do not have jurisdiction to find human rights violations under these treaties, they can use them to interpret the content of general human rights. This is a way to include an environmental-related content to already well-recognized human rights obligations for women, Indigenous peoples, and children, as well as to expand these to reach the scope of climate change and environmental concerns.

#### E. Participation to those Marginalized and Access to Justice

International litigation historically has opened doors for individuals and groups historically marginalized to assert their rights and demand state accountability. In this regard, litigation can serve as a vehicle for the empowerment, leadership, autonomy, and agency of women, Indigenous peoples, and children.<sup>199</sup>

<sup>195</sup> See discussion of impact of Convention of Belém do Pará on the development of legislation, jurisprudence, and national policies to prevent and respond to gender-based violence in Comisión Interamericana de Derechos Humanos [Inter-Am. Comm'n H.R.], *Regional: Belém do Pará*, YOUTUBE (Mar. 27, 2014),

[https://www.youtube.com/watch?v=5jAAWqEKJvc&ab\\_channel=Comisi%C3%B3nInteramericanaDerechosHumanos](https://www.youtube.com/watch?v=5jAAWqEKJvc&ab_channel=Comisi%C3%B3nInteramericanaDerechosHumanos); Press Release, Inter-Am. Comm'n H.R., 20th Anniversary of Adoption of the Convention of Belém do Para, No. 65/14 (June 9, 2014).

<sup>196</sup> See generally Paris Agreement, *supra* note 5.

<sup>197</sup> See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, pmbl., arts. 4–9, June 25, 1998, 2161 U.N.T.S. 447 (mandating states to take steps to guarantee access to information, public participation, and access to justice in the area of environmental concerns) [hereinafter Aarhus Convention].

<sup>198</sup> See Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, pmbl., arts. 3–9, Mar. 4, 2018, U.N. Doc. C.N.195.2018.TREATIES-XXVII.18. [hereinafter Escazú Agreement] (mandating states to safeguard the right of all persons to access to information in the realm of the environment; to ensure all persons participate in decision-making concerning the environment and access justice when human rights violations occur; and to create safe conditions for the work of human rights defenders).

<sup>199</sup> For a discussion on how strategic litigation can be an important space for the empowerment and leadership of those historically marginalized, despite the inherent challenges in presenting case decisions before global and regional human rights bodies and enforcement deficiencies see *Report of Workshop on Strategic Litigation for Gender-Based Violence: Experiences in Latin America*, *supra* note 130, at 7–23; Gilbert, *supra* note 131, at 315–17.

International litigation can offer an important avenue for participation for these groups when they are lacking this opportunity at the local and national levels.<sup>200</sup> Litigation can also be a facilitator for expression and access to information critical for non-repetition and the future enforcement of rights.

For example, entire bodies of jurisprudence have been developed by the Inter-American Commission and Court on Human Rights related to women,<sup>201</sup> Indigenous peoples,<sup>202</sup> and children.<sup>203</sup> This has led to numerous hearings in which these groups come and voice their priorities and concerns before the Inter-American Commission on Human Rights and has opened spaces for them to share their concerns and discuss solutions.<sup>204</sup> Very connected to jurisprudence as well, has

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<sup>200</sup> For more discussion, see Elizabeth D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice*, 16 HEALTH & HUM. RTS. J., June 2014, at 19, 23–25 (advocating for the sustainable and effective participation of children in the finding of solutions to address climate change and its negative impacts, in accordance with the right to be heard under the CRC); Elizabeth Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, 11 TRANSNAT'L ENV'T L. 263, 270–74, 280–83 (2022) (discussing how children are well placed to make influential arguments for intergenerational justice and motivating the clarification of legal obligations towards them in the context of the climate crisis).

<sup>201</sup> For a general discussion of the jurisprudence on the rights of women issued by the Inter-American Commission and Court of Human Rights, see Inter-Am. Comm'n H.R., *Legal Standards related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application*, ¶¶16–43, OEA Ser.L/V/II.143, doc. 60 (Nov. 2011). See also CELORIO, *supra* note 30, at 278–87; Rosa M. Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, 65 U. MIA L. REV. 819, 823–41 (2011).

<sup>202</sup> For a discussion of the legal standards set by the Inter-American Commission and the Court in the areas of self-determination, self-governance, culture, property, and consultation and consent, see *Right to Self-Determination of Indigenous and Tribal Peoples*, *supra* note 66, ¶¶ 187–91, 90–203. See also Thomas M. Antkowiak, *Rights, Resources and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 137–71 (2013) (discussing the case judgments adopted by the Inter-American Court of Human Rights on property rights and the right to live with dignity of indigenous peoples).

<sup>203</sup> See *Towards the Effective Fulfillment of Children's Rights: National Protection Systems*, *supra* note 34, ¶¶ 50–59; Inter-Am. Ct. H. R., *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 5: Derechos de los Niños, Niñas y Adolescentes [Booklet of Jurisprudence of the Inter-American Court of Human Rights: Rights of Children and Adolescents]*, at 5–56, No. 5 (2018) (summarizing many of the cornerstone judgments issued by the Inter-American Court of Human Rights advancing the rights of children to special protection, life, personal integrity, their best interests, family life, non-discrimination, and the right to be heard).

<sup>204</sup> For examples of recent Inter-American Commission on Human Rights hearings on the rights of women, see Inter-Am. Comm'n H.R., *Sexual Violence, Forced Pregnancy, and Access to Health Services/ COVID-19* (Oct. 8. 2020), <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=177>, and Inter-Am. Comm'n H.R., *Missing Indigenous Women and Girls in Canada* (Oct. 8. 2020), <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=177> (both took place during the 177<sup>o</sup> Virtual Period of Sessions). For IACHR hearings on the rights of children, see Inter-Am. Comm'n H.R., *Comprehensive protection of children and adolescents in Chile* (Oct. 5, 2020), <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=177>, and Inter-Am. Comm'n H.R., *Sexual Violence against Children and Adolescents in Peru* (Nov. 11, 2019), <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=174>. For IACHR hearings on the rights of indigenous peoples, see Inter-Am. Comm'n H.R., *Situation of Indigenous Peoples in Isolation and*

been the increasing participation of these groups in the shaping of international law related to their rights. The CEDAW Committee in its newly-released General Recommendation 39 on Indigenous Women and Girls begins the Recommendation by stating that it is a reflection of the voices and agency of Indigenous women and girls and the result of an extensive consultation process, which involved hundreds of Indigenous women and experts who gave feedback on drafts of the Recommendation.<sup>205</sup> There is an increasing need for more participation spaces for women, Indigenous peoples, and children in the area of climate change, and international litigation can be a key strategy to amplify their voices and secure climate justice.

Litigation has also opened a second avenue of justice for many individuals and groups before the regional and global human rights systems. This has led to the issuance of reparations in case decisions which are gender-sensitive, reflective of an intercultural perspective, and more geared towards transformation of discriminatory social structures, as opposed to just restitution.<sup>206</sup> These principles can be expanded to the areas of climate change and environmental degradation. Reparations for example can be developed combining a perspective that is gender-sensitive, Indigenous peoples-oriented, and child-rights focused, but also a lens that includes the right to a clean, healthy, and sustainable environment as central. Litigation can be unique and vital in this regard in its contributions to reparations that accomplish this goal, with a participatory approach, including the meaningful and effective participation of women, Indigenous peoples, and children.

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*Initial Contact in Peru* (Dec. 9, 2020),

<https://www.oas.org/en/IACHR/Sessions/Default.asp?S=178>, and Inter-Am. Comm'n H.R., *The Right to Consultation and Free, Prior and Informed Consent of Indigenous Peoples* (Oct. 9, 2020), <https://www.oas.org/en/IACHR/Sessions/Default.asp?S=177>.

<sup>205</sup> See General Recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls, *supra* note 42, ¶ 2. For more discussion, see *CEDAW Adopts General Recommendation No. 39 on the Rights of Indigenous Women and Girls*, CULTURAL SURVIVAL (Nov. 2, 2022), <https://www.culturalsurvival.org/news/cedaw-adopts-general-recommendation-no-39-rights-indigenous-women-and-girls> (discussing the consultations undertaken by the CEDAW Committee with indigenous women as part of the preparation of General Recommendation 39).

<sup>206</sup> See *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 450 (Nov. 19, 2009) (establishing that reparations aimed at rectification and transformation of contexts of discrimination should be a priority in gender-based violence cases, as opposed to just focusing on restitution); *Indigenous Cmty. of the Lhaka Honhat Ass'n (Our Land) v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶¶ 60–63 (Feb. 6, 2020) (advancing a multi-layered understanding of reparations in cases related to the lands, territories, and environment of Indigenous peoples, including the delimitation, demarcation, and titling of property; the removal of non-indigenous population; and restitution measures to specifically address violations of the rights to a healthy environment, adequate food, water, and cultural identity).

#### IV. Promising Legal Standards and Arguments before Global and Regional Human Rights Protection Systems

This section will discuss a number of globally-recognized legal standards that can be further applied and developed in international case decisions raising human rights issues in the area of climate change affecting women, Indigenous peoples, and children. It will suggest potential legal arguments which could be presented in case petitions in four areas in particular: due diligence, extraterritoriality, and non-state actors; a gender perspective and intersectional discrimination; consultation, consent, and effective participation; and access to information and freedom of expression.

The author will delve in particular on the due diligence standard as an overarching obligation that can be further developed in cases concerning climate change effects, extraterritorial and transboundary harm, and non-state actors, in tandem with the right to a clean, healthy, and sustainable environment. The section will also discuss an approach to case litigation guided by gender equality and intersectional discrimination as cross-cutting themes and foundational points in the interpretation of the content of rights in this area. The rights to consultation, consent, effective participation, access to information, and free expression are also presented as critical procedural rights to facilitate the implementation of all the human rights of Indigenous peoples, women, and children. Lastly, the analysis will at times discuss selected cases before global and regional human rights systems which the author considers particularly promising to develop legal standards on behalf of women, Indigenous peoples, and children in this area.

##### A. Due Diligence, Extraterritoriality, and Non-State Actors

One of the most historically-invoked legal standards of state responsibility is the obligation to act with due diligence. This is a standard that has its origins in international law<sup>207</sup> and has been extended to human rights concerns, especially in the areas of gender-based violence against women and violence against children.<sup>208</sup> The inter-American system of human rights has been an important leading force on this aspect, but the standard and its components have also been referenced either

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<sup>207</sup> For a general overview, see Jan A. Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. 265, 287–306 (2004); Robert P. Barnidge, Jr., *The Due Diligence Principle Under International Law*, 8 INT'L CMTY. L. REV. 81, 91–121 (2006); Yakin Ertürk (Special Rapporteur), Rep. of the Special Rapporteur on Violence against Women, its Causes and Consequences: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, ¶¶ 29–39, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

<sup>208</sup> See González et al. (“Cotton Field”), Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 2, 111–306 (confirming the state’s duty to act with due diligence when acts of gender-based violence against women and girls occur); *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. ¶¶ 1–27 (confirming the state’s duty to protect women against domestic violence when they know of risks to their right to life, even when the applicants had withdrawn their complaints before the authorities).

directly or indirectly by the European Court of Human Rights and several United Nations treaty-based organs.<sup>209</sup> Several regional human rights treaties also reference due diligence explicitly in their provisions, including the Convention of Belém do Pará and the Istanbul Convention.<sup>210</sup>

Due diligence has been interpreted to mandate the state prevention, investigation, sanction, and grant of reparations for all human rights violations, and a general obligation to give effect to the human rights contained in treaties and other legal instruments.<sup>211</sup> It also demands from states the obligation to prevent, supervise, and regulate the activities of non-state and private entities.<sup>212</sup> The United Nations Ruggie Principles even reference due diligence in mandating states to prevent and supervise the activities of business actors.<sup>213</sup>

Even though the European Court of Human Rights has not referred explicitly to due diligence many times, it does have a key line of jurisprudence confirming the positive obligations of states to act to protect human rights under the European Convention on Human Rights. The European Court of Human Rights has found human rights violations when states knew of potential risk of harm and they failed to adopt reasonable measures to prevent it.<sup>214</sup> There are a number of cases in which this legal standard has developed when it comes to women and children in situations of domestic violence and some resulting in loss of life due to state omissions and failures, when the harm was considered foreseeable.<sup>215</sup> This is an obligation of

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<sup>209</sup> See, e.g., *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 13, 159–68 (July 29, 1988) (in which the Inter-American Court establishes that states have an obligation to respect and ensure rights under the American Convention and its Article 1(1), which entails the organization of the state structures to ensure the free and full enjoyment of human rights to prevent, investigate, and punish these violations when they occur); *Kontrová v. Slovakia*, App. No. 7510/04, Eur. Ct. H.R. ¶¶ 46–66 (May 31, 2007) (in which the European Court of Human Rights found violations to the rights to life and an effective remedy under the European Convention for failure to protect a domestic violence victim and her deceased children when the family members had filed complaints before the police authorities); *A.T. v. Hungary*, U.N. Doc. CEDAW/C/32/D/2/2003, Admissibility and Merits, ¶¶ 9.1–9.6 (Jan. 26, 2005, 2005) (in which the CEDAW Committee found failures to act with due diligence when a victim of domestic violence did not have the possibility to apply for restraining orders and other measures to protect her from immediate and ongoing acts by her former partner).

<sup>210</sup> See Istanbul Convention, *supra* note 37, art. 5; Convention of Belém do Pará, *supra* note 37, art. 7(b).

<sup>211</sup> See, e.g., *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 13, 159–72.

<sup>212</sup> See, e.g., *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II, ¶¶ 126–32 (2011) (establishing that states can be responsible under the due diligence standard for failures to protect individuals from imminent harm committed by non-state actors, such as perpetrators of domestic violence).

<sup>213</sup> See U.N. Ruggie Principles, *supra* note 142, at 4–10, 15–16, 17–20, and 22–23 (promoting human rights due diligence in the prevention, investigation, and sanction of human rights violations committed by business entities, with components applicable to states and businesses).

<sup>214</sup> See, e.g., *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. HR. ¶¶ 9–18, 69–118 (finding a right to life violation when the state authorities failed to take proactive steps to prevent a methane explosion and a landslide resulting in the death of 39 people, even though they had knowledge that the activities of a rubbish tip were dangerous); *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. ¶¶ 128–53; *Kontrová*, App. No. 7510/04, Eur. Ct. H.R. ¶¶ 46–66.

<sup>215</sup> See, e.g., *Talpis v. Italy*, App. No. 41237/14 (Mar. 21, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-171994%22%5D%7D>; *Branko Tomašić v.*

means and not results and it often entails from the state showing that it adopted reasonable efforts to prevent and respond to harmful human rights violations.<sup>216</sup> It is noteworthy however that the Istanbul Convention does directly reference due diligence in the set of state obligations it identifies for states to address gender-based violence against women.<sup>217</sup>

The Inter-American Court of Human Rights in particular has underscored that due diligence can be enhanced or reinforced when it comes to girls,<sup>218</sup> human rights defenders,<sup>219</sup> journalists,<sup>220</sup> and other groups of the population at particular risk to human rights violations. It has urged for a perspective in state action that considers the historical and present discrimination and forms of violence that women and children continue to face due to their sex, gender, and age.<sup>221</sup> The European Court of Human Rights has also made great strides when it comes to the development of a vulnerability approach, which demands enhanced protection efforts from states towards certain individuals and groups at increased risk to human rights violations, including women and children.<sup>222</sup>

One of the most important virtues of the due diligence standard is the space it has created in litigation to exemplify concrete steps states should be adopting to adequately and effectively address the rights of women and children, especially when they suffer violence. The state obligations delineated by jurisprudence to act with due diligence are broad, specific, and immediate, entailing the establishment

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Croatia, App. No. 46598/06, Eur. Ct. H.R. ¶¶ 46–74 (2009); *E. and Others v. United Kingdom*, App. No. 33218/96, Eur. Ct. H.R. ¶ 99 (2002).

<sup>216</sup> See *Opuz*, 2009-III Eur. Ct. H.R. ¶ 136 (clarifying that states can be internationally responsible for failing to take reasonable steps to prevent and/or mitigate harm at issue); *E. and Others*, App. No. 33218/96, Eur. Ct. H.R. ¶ 99 (in which the Court confirmed that a finding of state responsibility does not depend on showing that “‘but for’ the failing of the public authority, ill treatment would not have happened.”).

<sup>217</sup> See Istanbul Convention, *supra* note 37, art. 5.

<sup>218</sup> See *V.R.P., V.P.C. et al. v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 350, ¶¶ 158–203 (Mar. 8, 2018) (advancing the standards of enhanced due diligence and special protection in the investigation of cases involving violence against girls).

<sup>219</sup> See *Yarce et al. v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 325, ¶¶ 181–96 (Nov. 22, 2016) (underscoring the duty of states to diligently protect the life of women human rights defenders in known contexts of risk).

<sup>220</sup> See *Bedoya Lima v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 431, ¶¶ 86–91 (Aug. 26, 2021) (establishing that states should adopt a differentiated approach when adopting measures to protect women journalists that takes into account gender consideration and their history of gender-based violence).

<sup>221</sup> See, for example, the connections made by the Inter-American Court of Human Rights between gender-based violence, discrimination, and due diligence in the cases of *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 390–402 (Nov. 16, 2009), and *Guzmán Albarracín et al. v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 405, ¶¶ 109–20 (June 24, 2020).

<sup>222</sup> See, e.g., the application of the vulnerability approach to Roma women and children, as well as victims of domestic violence, in the cases of *D. H. and Others v. Czech Republic*, 2007-IV Eur. Ct. H.R. ¶¶ 175–210; *V. C. v. Slovakia*, 2011-V Eur. Ct. H.R. ¶¶ 100–20; *Talpis v. Italy*, App. No. 41237/14, ¶¶ 95–106, 126–31 (Mar. 21, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-171994%22%5D%7D>.

of government branches that are ready to act to address these problems. These include a wide obligation of prevention, which requires the adoption of laws, policies, programs, reporting mechanisms, education, and measures to ensure access to information vital to the exercise of human rights.<sup>223</sup> Legislation should conform to global and regional human rights standards and should be joined by measures guiding its effective implementation.<sup>224</sup> States are also encouraged to train public officials and to distribute among the general public information of where to report these crimes.<sup>225</sup> States should also have in place a justice system which is trained, capable, and committed to the prompt and exhaustive investigation, judgment, and sanction of all acts of violence against women and children.<sup>226</sup> Much of the adoption of the due diligence standard in these cases has centered on a presumption that violence against women and children can be considered foreseeable and therefore preventable by effective states and their mechanisms.

The Inter-American Court of Human Rights in its Advisory Opinion 23/17 (OC 23/17) on the environment and human rights has already given us an important snapshot on how to apply the due diligence standard to environmental law matters and the right to a healthy environment.<sup>227</sup> OC 23/17 confirms that environmental harm can be human-caused and foreseeable, which triggers a due diligence obligation from states to prevent and remedy its effects.<sup>228</sup>

This foreseeability extends to the harmful activity of non-state actors, which states have a duty to prevent, oversee, and regulate according to OC 27/37.<sup>229</sup> Environmental impact assessments are also key to shed light on potential degradation, pollution, contamination, and other forms of harm before any business and extractive activities are implemented.<sup>230</sup> OC 23/37 also emphasizes the overarching duty of states to mitigate environmental harm, and the principles of precaution and the need for international cooperation.<sup>231</sup> OC 23/37 moreover underscores the issue of extraterritorial and transboundary harm, and confirms that states may be found legally accountable before international bodies for harm affecting individuals and groups in other countries which was under their effective control.<sup>232</sup>

The heart of OC 23/17 is the understanding of the right to a healthy environment as an autonomous and independent right under the American Convention and the

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<sup>223</sup> See, e.g., *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. ¶¶ 128–53; *González et al. (“Cotton Field”)*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 249–86.

<sup>224</sup> See *M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. ¶¶ 167–87.

<sup>225</sup> See *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 61(4)(a) (2000).

<sup>226</sup> See *V.R.P., V.P.C. et al. v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 350, ¶¶ 158–203 (Mar. 8, 2018).

<sup>227</sup> See generally Inter-Am. Ct. H.R., Advisory Opinion OC-23/17, *supra* note 68.

<sup>228</sup> See *id.* ¶¶ 123–44.

<sup>229</sup> See *id.* ¶¶ 146–51.

<sup>230</sup> See *id.* ¶¶ 156–61.

<sup>231</sup> See *id.* ¶¶ 172–73, 175–208.

<sup>232</sup> See *id.* ¶¶ 95–103.

Protocol of San Salvador.<sup>233</sup> This is also a right of individual and collective implications, which entails actions from states to prevent environmental degradation which not only harms one person, but also entire groups, collectivities, and populations.<sup>234</sup> The Inter-American Court of Human Rights has already begun applying the principles advanced in OC 23/17 in its judgments. For example, in its case decision of *Lhaka Honhat Association v. Argentina*, the Inter-American Court highlighted the pernicious impact of environmental harm induced by third parties on indigenous territories, basing its analysis partly on OC 23/17.<sup>235</sup> The Inter-American Court underscored the state failures in this case to establish adequate mechanisms to monitor and supervise the activities of private actors and to prevent damage to the environment and territories of the indigenous communities of the Lhaka Honhat Association in Argentina.<sup>236</sup> The Court will also have another opportunity to discuss OC 23/17 in the emblematic case of La Oroya, related to the harmful impact of pollution caused by a metallurgical complex in the community in the city of La Oroya in Peru.<sup>237</sup> The author urges other global and regional human rights bodies to use Advisory Opinion OC 23/17 as a starting point to further develop the contours of the due diligence standard for women, children, and Indigenous peoples in cases of climate change and other forms of environmental harm and degradation.

The new request for an Advisory Opinion on Climate Change before the Inter-American Court of Human Rights offers the opportunity to add a gender, Indigenous peoples, and child-rights perspective to the content of critical obligations, including legal standards related to due diligence and accountability for transboundary harm; the responsibility for non-state actor activity; and participation, expression, and access to information in this challenging context. A new Advisory Opinion from the Inter-American Court of Human Rights could provide key insight on the intersection between the right to a clean, healthy, and sustainable environment to cornerstone rights for women, Indigenous peoples, and children, including to equality and non-discrimination; to live free from all forms of violence; to territories, land, consultation, and consent; and the best interests of the child in this area. Along with OC 23/17, this new Advisory Opinion on Climate Change could serve as a critical reference for both the Inter-American Commission and Court of Human Rights in processing case petitions in this area in the future, as well as for the European Court of Human Rights and other regional bodies, the United Nations treaty-based organs, and even the International Court of Justice.

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<sup>233</sup> See *id.* ¶¶ 60, 62.

<sup>234</sup> See *id.* ¶ 59.

<sup>235</sup> See *Indigenous Cmty of the Lhaka Honhat (Our Land) Ass'n v. Argentina, Merits, Reparations and Costs*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶¶ 202–09 (Feb. 6, 2020) (underscoring the right to a healthy environment as an autonomous right, entailing the adoption of “legal, political, administrative, and cultural measures” to effectively supervise non-state actors and private parties).

<sup>236</sup> See *id.* ¶¶ 207–09, 273–89.

<sup>237</sup> See *generally* Press Release, Inter-Am. Comm'n H.R., IACHR Files Case Before IA Court on Peru's Responsibility for the Effects of Contamination in La Oroya Community, No. 274/21 (Oct. 14, 2021); *Cmty. of La Oroya v. Peru*, Petition 1473-06, Inter-Am. Comm'n H.R., Report No. 76/09 (2009).



In the same vein, a key void currently in international human rights jurisprudence are case decisions holding states responsible for violations connected to climate change and the environment directly affecting women, children, and Indigenous peoples. The existing lines of jurisprudence protecting the rights of women, Indigenous peoples, and children have not fully converged yet with the emerging cases concerning climate change and the environment. It is critical that future case decisions analyze state obligations in this area considering international environmental law and human rights principles, as well as all the legal standards developed over the years to prevent and respond to human rights violations with a gender, Indigenous peoples, and child-rights perspective. It is only then that we will have a fuller view of the wide scope of needed state actions in this area. The author contends that the due diligence standard and its application can be essential to connect legal interpretations of these rights to advance climate justice. A gender, child-rights, and Indigenous peoples' perspective is key to the full effectiveness of the strong principles advanced by the Inter-American Court of Human Rights in OC 23/17.

We are already seeing hints of the promise of the due diligence standard in the newer cases decided on climate change by United Nations Treaty-Based Organs. Even though the UN Committee on the Rights of the Child (CRC) dismissed *Sacchi v. Argentina* and related cases, it did take advantage of this opportunity to make several noteworthy statements on how the due diligence standard could apply as a benchmark for state responsibility in children's rights cases in the future. By espousing OC 23/17, the CRC makes clear that states may be responsible for climate change harm, especially when they know of this harm.<sup>238</sup> The Committee also confirmed that there are ways to connect state failures to reduce carbon emissions with harm to the life and health of children.<sup>239</sup> The Committee lastly and most importantly acknowledges that states may be held responsible for significant damage caused to persons beyond their borders from human-driven activities that occur under their effective control or authority.<sup>240</sup>

The recent United Nations Human Rights Committee decision in the case of *Daniel Billy et. al.* illustrates how arguments on behalf of Indigenous peoples, as well as women and children, can be presented emphasizing state failures to comply with the due diligence standard to effectively mitigate and adapt to climate change-related harm.<sup>241</sup>

A cornerstone and successful argument from the authors in this case was that the state was in full knowledge of the vulnerability of the Indigenous population in the low-lying islands to climate change effects.<sup>242</sup> In terms of mitigation, the authors argued that the state party's per capita greenhouse emissions were still the second highest in the world and that the state was actively pursuing policies to

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<sup>238</sup> See *Sacchi v. Argentina*, U.N. Doc. CRC/C/88/D/104/2019, Admissibility, ¶¶ 10.8, 10.11 (Comm. Rts. Child Nov. 11, 2021).

<sup>239</sup> See *id.* ¶¶ 10.12–14.

<sup>240</sup> See *id.* ¶¶ 10.5–0.7.

<sup>241</sup> See U.N. Hum. Rts. Comm., *supra* note 22, ¶¶ 2.7–2.8, 8.1–14.

<sup>242</sup> See *id.* ¶¶ 2.1–2.2, 4.5, 8.5.

increase these emissions by promoting the extraction and use of fossil fuels.<sup>243</sup> In terms of adaptation, the authors alleged that the state had failed to establish an adaptability program to ensure the long-term habitability of the islands and to fund the infrastructure necessary to protect them from sea-level rises.<sup>244</sup> The Human Rights Committee underscored the state's omission in failing to pursue adaptation measures to protect the authors' "traditional way of life, to transmit to their children and future generations their culture and traditions," and to continue to use their land and natural resources.<sup>245</sup>

The *Sacchi* and *Daniel Billy et al.* cases illustrate how the due diligence standard can be argued in the future to advance international justice for women, Indigenous peoples, and children in the realm of climate change. These cases offer a glimpse on how arguments can be crafted alleging state failures to adopt reasonable mitigation and adaptation measures with due diligence to prevent foreseeable harm and the right to a clean, healthy, and sustainable environment. Future cases can also raise claims related to state failures to take into consideration a gender, indigenous, and child-rights perspective in its exercise of due diligence in the face of well-known climate change driven harm.

Despite these considerations, it is important to recognize the ongoing challenge of how to reach a determination that harm is human driven and therefore foreseeable. Fortunately, there is now helpful scientific work confirming that climate change can be the product of human-driven harm.<sup>246</sup> State and business entities are mostly responsible for unregulated carbon emissions and greenhouse gases.<sup>247</sup> Particularly egregious are numerous human activities in the form of extractive, tourism, development, and investment projects which promote pollution; contamination of land, water, and air; deforestation; and damage to ecosystems and biodiversity.<sup>248</sup> It has also been widely documented how the preexisting discrimination and inequalities that affect women, Indigenous peoples, and children are worsened by unregulated climate change effects.<sup>249</sup> Therefore, these problems can justify case petitions before global and regional human rights systems as they constitute foreseeable harm that states are failing to address

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<sup>243</sup> See *id.* ¶ 2.8.

<sup>244</sup> See *id.* ¶¶ 2.7, 3.1.

<sup>245</sup> See *id.* ¶ 8.14.

<sup>246</sup> See, e.g., IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability* at 12, 387–88 (2022) (discussing how the unsustainable use of natural resources, pollution to *ecosystems*, damaging impact of emissions of greenhouse gases on marine ecosystems, impact of methane emissions on crop yields, and mineral exploitation can be human-induced impacts on climate change).

<sup>247</sup> For a broad overview of needed steps from states and business entities in reducing harmful activity contributing to climate change, see UNEP, *Emissions Gap Rep. 2022: The Closing Window-- Climate Crises Calls for Rapid Transformation of Societies XVI–XXV*, 32–34.

<sup>248</sup> See generally *Promotion and Protection of Human Rights in the Context of Climate Change*, *supra* note 6, ¶¶ 10–15, 17; IACHR and REDESCA *Climate Change Resolution 3/2021*, *supra* note 6, ¶¶ 11–15, 44.

<sup>249</sup> See, e.g., General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 55–78; CULTURAL SURVIVAL, *supra* note 28, at 1–2, 5; U.N. Children's Fund, *supra* note 28, at 27–54.

adequately in the area of climate change. Case litigation can also shed light on how this harm affects in a very particular way women, indigenous peoples, and children, and how states are in knowledge of this damage.

Moreover, case decisions can also be useful in clarifying steps that states should adopt to address this foreseeable harm. Several mitigation actions can be in the control of states which can be discussed and expanded upon in case decisions, including efforts to reduce carbon emissions and greenhouse gases; measures to transition to sources of renewable energy; and adequate regulation and supervision of business entities which contribute to fossil fuel emissions. In terms of adaptation, case decisions can call on states to establish adaptation plans and fund the needed infrastructure to confront sea level rises, natural disasters, flooding, and fires. Global and regional human rights systems can also call on states to institutionalize spaces and opportunities to ensure the participation of women, Indigenous peoples, and children, as they should have an active role in decision-making concerning climate change concerns, and make key education and information available to the public. Case decisions can also identify the need for states to act proactively to guarantee the safety of environmental human rights defenders who are women, Indigenous peoples, and children. States can be called to ensure that their gender-based violence policies have an environmental component and reflect the link between gender-based violence and climate change effects. These are just some of the areas that global and regional human rights bodies can explore in terms of state accountability and to promote more active state action to comply with their human rights obligations in the area of climate change.

The author considers that when referring to women, Indigenous peoples, and children, it is key that future case litigation focuses on adaptation. Most of the cases presented before international bodies emphasize mitigation, which is important, but not the only needed component of state action when it comes to women, Indigenous peoples, and children. Cases can exemplify for states the kinds of structures, processes, and practices that should be in place to reduce the harmful impact, damages, and loss that groups like women, indigenous peoples, and children face due to climate change. Jurisprudence can advance human rights criteria which should guide adaptation efforts, plans, and measures from states. State legislation, policies, and programs—or the lack thereof—can be the subject of future litigation in this area. The reality is that climate change is already taking place, and it is important that states respond to it proactively and promptly. Critical adaptation measures can ensure that during moments of crisis, natural disasters, and climate-related hazards these groups have sufficient access to quality food and water; needed health services; shelters; services; housing; economic resources; and information, among other forms of adaptation.

I believe the cases currently before the European Court of Human Rights offer an invaluable opportunity to shed light for states on the content of due diligence to address climate change harm, in terms of both mitigation and adaptation. In the case of *KlimaSeniorinnen Schweiz* for example, the European Court of Human Rights has a great opportunity to apply the due diligence standard and discuss steps states should take to mitigate and adapt to climate-induced heatwaves, and to meet their core obligations under the rights to life, privacy, and family life in the

European Convention on Human Rights.<sup>250</sup> The European Court can discuss key steps that the state of Switzerland should adopt to reduce their greenhouse emissions in accordance with the Paris Climate Change agreement, using as a reference national case judgments in this area such as the *Urgenda* and *Neubauer* cases. Moreover, the European Court can make a critical contribution in the area of adaptation, since climate change related heatwaves are already occurring and are direly affecting the health of older women. The Court can discuss needed adaptation plans, infrastructure, services, and participation from the affected women themselves to meet the state's due diligence obligations in this area. The author also hopes that developments concerning the content of the right to a healthy environment in the form of UN resolutions in this area, but also OC 23/17, influence the way the European Court rules on due diligence and access to justice. This would make the Grand Chamber decision stronger in its guidance for states of which actions to take to address climate change concerns under the European Convention on Human Rights, focusing not only on the need to mitigate climate change effects, but also adapt to them in the case of older women.

In *Duarte Agostinho*, the European Court can apply the principles already advanced by the Committee on the Rights of the Child in *Sacchi v. Argentina*<sup>251</sup> and related cases to define the contours of the content of rights under the European Convention on Human Rights when it comes to the impact of state failures to reduce carbon emissions on children and responsibility for transboundary harm. However, the author also hopes that the European Court of Human Rights delves into adaptation measures that states should be taking to address the harms on children claimed by the applicants, including damage to their respiratory and cardiovascular health from increased heat and air pollution, and other physical ailments, which in the author's view affects their rights to life (Article 1), private and family life (Article 8), the prohibition of torture and humane treatment (Article 3), and the prohibition of discrimination (Article 14). Legal standards set in cases like *KlimaSeniorinnen Schweiz* and *Duarte Agostinho* can be critical to illustrate what a perspective based on gender, children, and Indigenous peoples should be when it comes to mitigation and adaptation measures, and to hold states accountable when they do not have adequate mitigation and adaptation plans in place.

Moreover, future case decisions in the area of climate change should connect the due diligence standard with more content on transboundary harm or damage and the meaning of effective control in this area. The Inter-American Court of Human Rights has taken the lead in this area in its OC 23/17, advancing very important language when it comes to extraterritorial obligations that the author hopes informs the future interpretation of United Nations treaties, as well as

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<sup>250</sup> The European Court of Human Rights held on March 29, 2023 a Grand Chamber Hearing in the case of *KlimaSeniorinnen Schweiz and Others v. Switzerland*. For the webcast of the hearing, see [https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=5360020\\_29032023&language=en&c=&py=2023](https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=5360020_29032023&language=en&c=&py=2023)

<sup>251</sup> See *Sacchi v. Argentina*, U.N. Doc. CRC/C/88/D/104/2019, Admissibility, ¶¶ 10.2–12 (Comm. Rts. Child Nov. 11, 2021) (discussing extraterritorial jurisdiction, the contribution of state action to climate change, and the foreseeability of harm).

regional ones.<sup>252</sup> OC 23/17 reaffirms a number of obligations that states have to address transboundary damage, including the overarching obligation to prevent harm on other states; to refrain from violating the human rights of persons residing outside of their territories; to cooperate internationally to address this harm; and to provide redress when this harm occurs.<sup>253</sup> Case litigation can provide a great roadmap for states on how to effectively supervise and regulate the activities of its corporations operating extraterritorially. This is particularly critical in the realm of extractive industries, since more than half of the world's carbon emissions and their impact tends to be transboundary and harmful on women, children, and Indigenous peoples.<sup>254</sup>

Case litigation can also be very useful in defining further which responsibilities businesses have to do no harm and provide redress in the area of climate change. Even though we frequently refer to states when discussing climate change, many of the relevant actors causing harm are third parties. Corporations and businesses in particular have a very important role in the production of carbon emissions and greenhouse gases.<sup>255</sup> We are still far from all of the state regulation needed to oversee, supervise, and regulate business activities in this area.<sup>256</sup> It has been well documented how corporations and businesses frequently harm women, indigenous peoples, and children.<sup>257</sup> There is a developing body of legal standards related to

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<sup>252</sup> For a discussion of state obligations relating to the possibility of environmental damage crossing the borders of a specific state see *The Environment and Human Rights* (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 95–103 (Nov. 15, 2017).

<sup>253</sup> *See id.* ¶¶ 97, 101–03.

<sup>254</sup> For discussion on the negative impact of extractive industries on climate change, women, and Indigenous peoples, see generally UNEP, Policy Brief: Transforming Extractive Industries for Sustainable Development 6–7 (May 2021). *See also* Reem Alsalem (Special Rapporteur), Rep. of the Special Rapporteur on Violence Against Women and Girls, its Causes, and Consequences: Violence against Women and Girls in the Context of Climate Crisis, including Environmental Degradation and Related Risk Mitigation and Response, transmitted by Secretary-General, U.N. Doc. A/77/136, ¶¶ 29, 38 (July 11, 2022) [hereinafter *Violence against Women and Girls in the Context of the Climate Crisis*] (highlighting the impact of extractive industries on the rise of violence against women, including sexual violence, and their depleting impact on the quantity and quality of resources women depend on for food and income).

<sup>255</sup> *See, e.g.*, Paul Griffin (Energy Data Analyst), *The Carbon Majors Database: CDP Carbon Majors Report 2017*, at 7 (July 2017) (documenting how 100 corporate fossil fuel producers are linked to over 70% of industrial gas emissions since 1988).

<sup>256</sup> *See* Hum. R. Council, Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, regarding the Tenth Anniversary of the Guiding Principles on Business and Human Rights: A Roadmap for the Next Decade of Business and Human Rights – Raising the Ambition, Increasing the Pace ¶¶ 7–20, U.N. Doc. A/HRC/50/40/Add.3 (June 8, 2020) (discussing the need for both states and business actors to adopt more ambitious action to promote the respect of human rights as a core component of investment governance frameworks and public-private partnerships).

<sup>257</sup> *See, e.g.*, Inter-Am. Comm'n H.R., *Business and Human Rights: Inter-American Standards*, *supra* note 143, ¶¶ 331–61.

private actors in jurisprudence concerning violence against women and children that can be applied and expanded in climate change cases.<sup>258</sup>

Lastly, another area in which due diligence can be critical when it comes to climate change is the courts and access to justice. A solid line of legal standards have been established mandating access to justice when human rights violations take place and the criteria that should guide the investigation, judgment, and sanction of crimes against women,<sup>259</sup> Indigenous peoples,<sup>260</sup> and children.<sup>261</sup> Case decisions can illustrate what should be critical components of the investigation, judgment, and sanction of cases in which the rights to life, personal integrity, health, non-discrimination, violence, and a healthy environment were violated to the detriment of women, Indigenous peoples, and children in the area of climate change. They can also exemplify potential judicial remedies when there is a state failure to regulate, supervise, and monitor business activities which are harmful to the environment; when there is a failure to comply with environmental impact assessments; and when there are omissions in the areas of mitigation and adaptation.

### B. Gender Perspective and Intersectional Discrimination

Case law has been alluding frequently to the need for a gender perspective in the adoption of legislation, public policies, programs, and the activity of the administration of justice at the national level in order to protect rights.<sup>262</sup> This echoes what many international, regional, and national organizations have been calling for years, to better take into consideration the discrimination, inequality, exclusion, and limited citizenship that women have had historically and still have

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<sup>258</sup> A good example is the Inter-Am. Ct. H. R. decision of *Fireworks Factory of Santo Antônio de Jesus v. Brazil*, in which the Court advanced key standards related to the rights to equality and non-discrimination and just and favorable conditions of work when a state failed to properly safeguard the working conditions of a privately-owned factory which resulted in the death of women and girl workers during an explosion. *Fireworks Factory of Santo Antônio de Jesus v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 407, ¶¶ 148–203 (July 15, 2020).

<sup>259</sup> *See, e.g., J.L. v. Italy*, App. No. 5671/16, ¶¶ 117–43 (May 27, 2021) (underscoring the importance of criminal proceedings and sanctions in response to gender-based violence and to combat gender inequality), <https://hudoc.echr.coe.int/eng?i=001-210299>.

<sup>260</sup> *See, e.g., Tiu Tojín v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶¶ 97–100 (Nov. 26, 2008) (highlighting the importance of access to justice for disappearances affecting Indigenous women and girls during armed conflicts).

<sup>261</sup> *See, e.g., Mendoza et al. v. Argentina*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Court H.R., Series C No. 260, ¶¶ 144–48 (May 14, 2013) (underscoring the need to take into consideration the specific needs of children in criminal justice proceedings).

<sup>262</sup> *See, e.g., Velásquez Paiz et al. v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 307, ¶¶ 173–99 (Nov. 19, 2015) (calling for judicial investigations of the murders of women with a gender perspective, free from stereotypes and taking into consideration the history of sexual violence faced by women); *Opuz v. Turkey*, 2009-III Eur. Ct. H.R. ¶¶ 191–202 (considering that the failure to properly investigate acts of domestic violence is a form of discrimination against women).

in the present in many countries.<sup>263</sup> A gender perspective is also mentioned in newer treaties addressing the needs of women and girls.<sup>264</sup> A gender perspective today also contemplates human rights protection considering discrimination on the basis of sexual orientation, gender identity, gender expression, and sex characteristics.<sup>265</sup>

This pre-existing history of inequalities, discrimination, and exclusion worsens in times of crisis and unrest. Climate change is considered one of the most pressing emergencies of our time and therefore a gender perspective lens is critical in order for any actions concerning climate change to truly benefit women and girls.<sup>266</sup> Several key entities have already shed light on how climate change and its harmful effects aggravate gender inequality and worsen the situation of women living in poverty and rural areas, in particular those Indigenous and afro-descendent.<sup>267</sup> Climate change also results in migration and forced displacement, with very particular burdens and effects on women and children.<sup>268</sup> Climate change intensifies the barriers that women face to access food, water, land, credit, energy, technology, education, health services, housing, social protection, and employment.<sup>269</sup> Despite the dire effects of climate change on women and girls, they are often excluded from decision-making, participation, and critical information in this area.<sup>270</sup>

As the author has indicated in the past, a gender perspective to any issue includes several components.<sup>271</sup> One is that it should take into consideration the historical and present discrimination that women and girls face. Secondly, it is factoring the social causes of this discrimination, including stereotypes and the general tolerance of an inferior treatment and limited citizenship. Thirdly, the

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<sup>263</sup> See, e.g., UN Women, At ECOSOC UN Women Calls for the mainstreaming of a Gender Perspective into all Policies and Programmes: Statement by Deputy Executive Director Lakshmi Puri (June 12, 2014); Press Release, Inter-Am. Comm'n H.R., The IACHR calls on Member States to Adopt a Gender Perspective in the Response to the COVID-19 Pandemic and to Combat Sexual and Domestic Violence in this Context, No. 074/20 (Apr. 11, 2020).

<sup>264</sup> See, e.g., Istanbul Convention, *supra* note 37, art. 6 (mandates that state parties incorporate a gender perspective in the implementation and assessment of the impact of all Convention provisions, to promote the empowerment of women).

<sup>265</sup> For an overview of developments concerning gender equality, sexual orientation, and gender identity, expression, and sex characteristics, see CELORIO, *supra* note 30, at 87–113.

<sup>266</sup> A gender perspective to state mitigation and adaptation efforts has been one of the most consistent calls in the movement to address climate change. See, e.g., Sima Bahous (U.N. Women Executive Director), Op-ed: Three Asks on Gender Equality to COP27 (Nov. 14, 2022); Fiona Harvey, *Cop26: Women Must Be Heard on Climate, Say Rights Groups*, THE GUARDIAN (Sept. 25, 2021), <https://www.theguardian.com/global-development/2021/sep/25/cop26-women-must-be-heard-on-climate-say-rights-groups>.

<sup>267</sup> See CEDAW Committee, General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 1–7.

<sup>268</sup> See generally U.N. Refugee Agency, Gender, Displacement and Climate Change (Nov. 2022).

<sup>269</sup> See ALAM ET AL., *supra* note 28, at 19–44.

<sup>270</sup> See CEDAW Committee, General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 32–36.

<sup>271</sup> See Celorio, *supra* note 132, at 134–35.

connection between gender-based violence and discrimination is still paramount and these problems fuel and sustain one another. Discrimination is still a form of control over women and girls and their life plans, liberty, and autonomy, thereby facilitating the conditions for many forms of violence to take place. Fourthly, impunity, state omissions, and a “culture of silence” promotes the recurrence of gender-based violence and discrimination; which has been very confirmed by the *MeToo* movement and the wave of social protests in recent years demanding state accountability for these issues.<sup>272</sup> Fifth, women still suffer many social burdens, responsibility for the care of their families, and ongoing barriers to access decision-making roles in politics, family, education, employment, health, and economic development. Sixth, it is key to understand all the factors that shape a woman’s experience with discrimination, including race; ethnic background; age; economic position; national origin; disability; sexual orientation, gender identity and expression and sex characteristics; migration and displacement; deprivation of liberty; and others. Seventh, a gender perspective entails a reading of the term *women* as an expansive and highly evolving term, with extension to women with non-conforming sexual orientations, gender expression and identities, and sex characteristics.

We have learned much over the years on how a gender perspective should be applied at the national level. Legislation should be in harmony with the global and regional human rights treaties ratified by states, as a reflection of obligations that they have assumed to treat human rights violations affecting women and girls. Legislation should be monitored frequently to evaluate potential discrimination. Policies meant to benefit women should be adopted including their meaningful participation and women should be decision-makers, shapers, and influencers. States should adopt educational programs and awareness-raising campaigns to make sure that women and girls know where to report acts of gender-based violence and discrimination. State officials in the Executive, Legislative, and Judicial Branches should be trained on how to properly apply existing international and national law concerning women and girls. Cases of gender-based violence should be investigated by the justice system without delay and thoroughly, and survivors and their family members should be treated with dignity, humanely, and with ample participation and information on the legal process and its developments. The obligation of due diligence can be enhanced in cases concerning girls, human rights defenders, and journalists.

All of these principles already developed in jurisprudence and in other settings can be applied to climate change cases affecting women and girls. This would offer a good roadmap to states on how a gender perspective can be properly applied in climate mitigation, adaptation, action, and resilience. The case of

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<sup>272</sup> For more reading on the MeToo Movement and the wave of social protests demanding justice for actions of gender-based violence, *see* CELORIO, *supra* note 30, at 136–59.



*KlimaSeniorinnen Schweiz*<sup>273</sup> to be ruled by the Grand Chamber of the European Court of Human Rights offers a great opportunity for one of the leading Human Rights Courts to begin defining the contours of what a gender perspective can be in the mitigation and adaptation efforts in the area of heat waves and their effects on older women. The author hopes that the decision discusses core minimum obligations of states to fully incorporate a gender perspective in mitigation efforts to reduce carbon emissions and fulfill their Paris Agreement obligations, but also reasonable efforts from states to adapt and implement the needed infrastructure to curb the impact on older women of heat waves.

More case decisions are needed to also exemplify for states what intersectional discrimination means in the area of climate change. Factors like sex, gender, race, ethnicity, and age often combine to impact negatively the experience of discrimination faced by women, Indigenous peoples, and children.<sup>274</sup> This can be particularly endemic in the case of Indigenous women and girls, who often face discrimination, exclusion, poverty, the dispossession of their lands, territories, and natural resources, and the implementation of many economic activities without their consultation and consent.<sup>275</sup> Indigenous women are also often excluded from decision-making concerning climate change and its effects, even though the impact on them is dire.<sup>276</sup>

Intersectional discrimination is increasingly referred to by global and regional human rights organs to underscore the different social factors which women and girls may face to increase their exposure to gender-based violence and discrimination.<sup>277</sup> As indicated by the CEDAW Committee in its new General Recommendation 39 on Indigenous Women and Girls, an intersectional perspective calls on states to consider the various factors which combine to increase the risk of indigenous women and girls to different and arbitrary treatment on the basis of their

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<sup>273</sup> See generally Bundesgericht Tribunal Fédéral [BGer] [Federal Supreme Court] May 5, 2020, IC\_37/2019 (Switz.).

<sup>274</sup> For an overview of legal developments and theoretical notions underlying an intersectional approach to discrimination, see LORENA SOSA, UTRECHT U., INTERSECTIONALITY IN THE HUMAN RIGHTS LEGAL FRAMEWORK ON VIOLENCE AGAINST WOMEN: AT THE CENTRE OR THE MARGINS? 7–9; 16–39 (2017).

<sup>275</sup> For a broad overview of forms of intersectional discrimination faced by Indigenous women, see CEDAW Committee, General Recommendation 39 on the Rights of Indigenous Women and Girls, *supra* note 42, ¶¶ 16–23.

<sup>276</sup> See Kavita Nandini Ramdas & Laura Garcia, *Indigenous Women Are Championing Climate Justice*, OPEN SOC'Y FOUNDS. (Jan. 9, 2021), <https://www.opensocietyfoundations.org/voices/indigenous-women-are-championing-climate-justice>.

<sup>277</sup> The United Nations Rapporteur on violence against women, its causes and consequences, recently released a report describing the serious impacts of climate change on women, directly applying an intersectional approach which takes into consideration the situation of women who are girls, displaced, elderly, living with disabilities, and affected by poverty. See *Violence against Women and Girls in the Context of the Climate Crisis*, *supra* note 254, ¶¶ 13, 23–45, 49–56. For an overview of legal developments concerning intersectionality in the work of the European and Inter-American Human Rights Systems, see Celorio, *Discrimination and the Regional Human Rights Protection Systems: The Enigma of Effectiveness*, *supra* note 133, at 814–18.

sex, gender, and indigenous origin, status, and identity, among other factors; which also increase their exposure to human rights violations in a context of climate change effects.<sup>278</sup>

The term *intersectionality* found early expressions in the scholarship of Professor Kimberlé Crenshaw, as a way to describe the different facets of the discrimination faced by women on the basis of their sex and race, which has resulted in their inferior treatment, limited citizenship, situation of disadvantage, and marginalization in most societies.<sup>279</sup> As noted by the author in her scholarship, an intersectional perspective requires taking into consideration the different dimensions of the experience of discrimination women face.<sup>280</sup> In the case of Indigenous women for example, this means taking into consideration their experience as women, with high rates of discrimination and gender-based violence by both state and non-state actors, but also their experience as Indigenous peoples, including the dispossession of their lands, territories, and natural resources due to colonialization, militarization, armed conflicts, forced migration, and displacement, and the execution of economic projects without their free, prior, and informed consultation and consent. This requires also combining two areas of international law standards that have been traditionally siloed – the rights of women and the rights of indigenous peoples - to advance and shape further the rights of indigenous women and state interventions in this area. It also demands extensive participation from indigenous women and girls in the definition of legislation, policies, programs, and in the response of the administrative justice system to the human rights violations they face and their experiences.

As discussed previously, the case of *Daniel Billy et al.* recently decided by the United Nations Human Rights Committee, presented by a group of indigenous residents from the Torres Strait Islands in Australia, illustrates the potential that case litigation can have to carve legal standards related to Indigenous peoples in the area of climate change.<sup>281</sup> The Committee found violations of the rights of the authors to privacy, family, and home life under Article 17 of the ICCPR due to the flooding and ensuing displacement produced by climate change.<sup>282</sup> However, the author does hope that more cases are presented and decided in the future with an intersectional discrimination lens, explaining how different factors historically used to discriminate can enhance the effects of state failures to properly mitigate and adapt to climate change. The CEDAW Committee and the United Nations Rapporteur on Violence against Women already very gracefully documented how

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<sup>278</sup> See CEDAW Committee, General Recommendation 39 on the Rights of Indigenous Women and Girls, *supra* note 42, ¶¶ 4, 60–61.

<sup>279</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. L. F. 139, 139–40, 150–67 (1989).

<sup>280</sup> See CELORIO, *supra* note 30, at 69–71.

<sup>281</sup> See generally UNHRC, *Daniel Billy et al. (Torres Strait Region) v. Australia*, CCPR/C/135/D/3624/2019 (Sept. 22, 2022).

<sup>282</sup> See *id.* ¶¶ 8.9–12.

pre-existing inequalities, discrimination, and gender-based violence are greatly enhanced during climate-induced hazards, disasters, and weather conditions, and how one of the driest areas of impact are limitations to access to food, water, health services, and housing.<sup>283</sup> It would be great to see more cases presented at the international level alleging forms of discrimination against women and girls in these areas with an intersectional perspective.

There is already a line of case law in the inter-American system of human rights alluding to intersectional forms of discrimination in the areas of gender-based violence, education, and sexual and reproductive rights.<sup>284</sup> The European Court of Human Rights has also begun alluding to how different factors can combine to enhance the exposure to discrimination and gender-based violence in its cases related to women.<sup>285</sup> It would be great and beneficial to see a line of cases related to intersectional discrimination in the area of climate change. The cases can illustrate for states how women and girls, such as those who are Indigenous, afro-descendent, low-income, living with disabilities, deprived of their liberty, and those migrants and displaced are affected by state failures to meet their minimum core obligations to mitigate and adapt to climate change, and can exemplify for states what legislation, policies, programs, plans, services, infrastructure, and justice can look like at the national level in this area. In the author's view, the new request for an Advisory Opinion on Climate Change before the Inter-American Court of Human Rights, provides a critical opportunity for this tribunal to add major content to the obligation to prevent and respond to intersectional discrimination in the area of climate change, and how this applies to women, Indigenous peoples, and children, among other highly affected groups.

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<sup>283</sup> See CEDAW Committee, General Recommendation 37 on Climate Change, *supra* note 48, ¶¶ 61–72; *Violence against Women and Girls in the Context of the Climate Crisis*, *supra* note 253, ¶¶ 23–48.

<sup>284</sup> See, e.g., Vicky Hernández et al. v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶¶ 126–36 (Mar. 26, 2021) (highlighting the experience of intersectional discrimination of the victim, as a trans woman sex worker living with HIV); Guzmán Albarracín et al. v. Ecuador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 405, ¶¶ 122–46 (June 24, 2020) (noting the discrimination faced by the victim on the basis of her gender and age, which increased her exposure to sexual violence in the school setting); I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶¶ 318–21 (Nov. 30, 2016) (underscoring that the victim suffered intersectional discrimination in her access to justice based on her sex, socio-economic situation, and refugee status); Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ¶¶ 290–91 (Sept. 1, 2015) (highlighting the discrimination suffered by Talía Gonzalez Lluy as a person living with HIV, a child, female, and living in conditions of poverty).

<sup>285</sup> See, e.g., Carvalho Pinto de Sousa Morais v. Portugal, App. No. 17484/15, ¶¶ 44–56 (July 25, 2017), <https://hudoc.echr.coe.int/eng?i=001-175659> (finding that the applicant has suffered discrimination by the domestic courts due to assumptions of her sexuality based on her age and sex); B.S. v. Spain, App. No. 47159/08, Eur. Ct. H.R. ¶¶ 58–63 (July 24, 2012) (highlighting how the domestic courts should have taken into consideration the vulnerability to discrimination of the applicant as a woman of African descent working as a prostitute).

The international community is still trying to define the contours of the problem of discrimination in general and in particular the concept of intersectional discrimination. More cases can be presented before global and regional human rights bodies claiming intersectional discrimination due to voids in state mitigation and adaptation actions in the area of climate change. Some important groups affected by intersectional discrimination in this area are Indigenous women and girls, afro-descendent women and girls, women with disabilities, women affected by displacement, and women living in poverty conditions and rural areas. Case decisions underscoring intersectional discrimination in the area of climate action can also open more spaces for the participation of these groups in the development and adoption of policies and solutions.

### C. Consultation, Consent, and Effective Participation

One of the groups most affected by climate change effects is Indigenous peoples. Indigenous lands and territories tend to be located in areas negatively impacted by natural disasters, climate-induced hazards, environmental pollution, and degradation.<sup>286</sup> Their lands and territories are also attractive to the execution of extractive, investment, tourism, and development projects.<sup>287</sup> Indigenous peoples have a very special connection to their lands, territories, environment, natural resources, ecosystems, and biodiversity, which makes any kind of climate-induced harm particularly damaging.<sup>288</sup> The Paris Climate Change agreement even mentions Indigenous peoples in its preamble, calling states to respect the rights of Indigenous peoples when taking actions to address climate change.<sup>289</sup>

A foundational pillar of the rights of Indigenous peoples has been the respect, protection, and fulfillment of their right to self-determination.<sup>290</sup> This has been interpreted as the right to have their own self-governance structures and to establish their own Indigenous justice systems.<sup>291</sup> These rights are also very closely intertwined with the need to provide legal certainty and title to Indigenous peoples' lands, territories, and natural resources, as a key ingredient for them to access and

<sup>286</sup> See *IPCC Climate Change Report 2022, Technical Summary*, *supra* note 3, at 47, 49, 53, 65.

<sup>287</sup> See *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, *supra* note 144, ¶¶ 250–63.

<sup>288</sup> See CEDAW Committee, General Recommendation 39 on Indigenous Women and Girls, *supra* note 42, ¶¶ 7, 11, 37, 54, 58, 60–61.

<sup>289</sup> See *Paris Agreement*, *supra* note 5, pmbl. The Paris Agreement preamble reads in part: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”

*Id.*

<sup>290</sup> See UNDRIP, *supra* note 29, art. 3, 4.

<sup>291</sup> For more discussion on the right to self-determination and its content in international law see U.N. Hum. Rts. Council, Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 62, ¶¶ 8–18.

transmit their identity and culture, and to access quality and sufficient food, water, and other activities vital for their survival.<sup>292</sup> These core elements of the rights of Indigenous peoples are reflected in the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter “UNDRIP”), which has become a cornerstone reference in the interpretation of most global and regional human rights treaties.<sup>293</sup>

These instruments and jurisprudential developments confirm that the rights to effective participation and consultation have become integral to the rights of Indigenous peoples.<sup>294</sup> They are paramount to the respect of Indigenous territories and lands, the preservation of their livelihoods, their cultural integrity, and their rights to self-determination and self-governance. Relations to land are a defining feature of the identity, culture, and history of Indigenous peoples.<sup>295</sup> Accordingly, states must take special care in complying with the rights to effective participation and consultation in good faith, without delay, and comprehensively.<sup>296</sup> In order to ensure the effective participation of the members of an Indigenous community before the authorization of any activities, licenses, permits, and concessions, states have an obligation to consult with said community in an active and informed manner, taking into account their customs, traditions, and governance structures.<sup>297</sup>

The trend in international law today is to mandate not only consultation, but also consent when it comes to the implementation of economic activities with direct impacts on the lands and territories of Indigenous peoples.<sup>298</sup> There is also a developing body of legal standards related to the content of the term *consent*.<sup>299</sup>

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<sup>292</sup> See Right to Self-Determination of Indigenous and Tribal Peoples, *supra* note 66, ¶¶ 125–27.

<sup>293</sup> UNDRIP, *supra* note 29, at 1–8; CEDAW Committee, General Recommendation 39 on the Rights of Indigenous Women and Girls, *supra* note 42, ¶ 13 (considering UNDRIP an authoritative source to interpret the scope of state party core obligations under CEDAW).

<sup>294</sup> See UNDRIP, *supra* note 29, art. 10, 11, 15, 17, 18, 19, 28, 29, 30, 32, 36, 38; ICCPR, *supra* note 36, art. 25; *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 127, 177 (June 27, 2012)*; EMRIP FPIC Report, *supra* note 65, ¶ 6–7.

<sup>295</sup> See U.N. Hum. Rts. Council, Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 30, ¶ 5.

<sup>296</sup> See James Anaya (Special Rapporteur on the Situations of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/12/34, ¶¶ 36–57 (July 15, 2009); *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 102, 129, 133–40 (Nov. 28, 2007)*; *Kichwa Indigenous People of Sarayaku, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 180–211*.

<sup>297</sup> See, e.g., UNDRIP, *supra* note 29, arts. 10–11, 15, 17, 19, 28–29, 30, 32, 36, 38; EMRIP FPIC Report, *supra* note 65, ¶¶ 3–5, 11–23; *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, supra* note 295, ¶¶ 36–57; *Saramaka People, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 133–40*; *Kichwa Indigenous People of Sarayaku, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 180–211*.

<sup>298</sup> See UNDRIP, *supra* note 29, arts. 19, 32; American Declaration on Indigenous Peoples, *supra* note 37, art. XXIX; EMRIP FPIC Report, *supra* note 65, ¶¶ 14–16, 24–41, 31–37; *Rights of Indigenous Peoples, supra* note 66, ¶¶ 59–63; *Oliveira Pereira v. Paraguay, U.N. Doc. CCPR/C/132/D/2552/2015, Admissibility and Merits, ¶ 8.7 (U.N. Hum. Rts. Comm. Oct. 12, 2021)*; *Poma Poma v. Peru, U.N. Doc. CCPR/C/95/D/1457/2006, Admissibility and Merits, ¶ 7.6 (U.N. H.R. Comm. Apr. 24, 2009)*; *Right to Self-Determination of Indigenous and Tribal Peoples, supra* note 66, ¶¶ 187–91; *Saramaka People, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 134–36*.

<sup>299</sup> See *id.*

Consent can only be achieved when it is preceded by a free, prior, and informed consultation process, and is evidenced by an explicit statement of agreement.<sup>300</sup> The Indigenous peoples affected should have a significant influence in the consultation process and the decisions made. Consultations should not be spaces in which only information is shared with Indigenous peoples, without them having a significant impact in decision making.<sup>301</sup> Indigenous Peoples can choose whether to enter into a consultation process or not.<sup>302</sup> Obtaining consent is also crucial *before* the granting of any licenses and authorizations, and the execution of any economic and logging activities, with potential impacts on the lands, environment, life plans, and means of survival of Indigenous peoples.<sup>303</sup> Consultations should also be undertaken with due diligence before extractive and development activities begin, and the state is obligated to hold them.<sup>304</sup> The obligation to consult cannot be delegated to the third party or company who is proposing the extractive activities.<sup>305</sup>

Even though the trend in international, regional, and national law is to require consent and not just consultation, this is an area that would benefit from many more detailed global and regional legal standards developed through case law. Otherwise, this lends itself to restrictive interpretations of the scope of consultation and consent, which go contrary to the values of international law when it comes to the protection of Indigenous peoples and their rights. There are many case scenarios that could be presented before global and regional bodies that could provide an opportunity to add content to the requirement of consent in the area of climate change, among these but not exclusively, in cases in which mitigation and adaptation plans are implemented with direct and harmful impacts on Indigenous territories without their free, prior, and informed consent; when state and third-party economic activities, including development, investment, extractive, and deforestation projects are implemented in Indigenous territories without their consultation and consent; when environmental impact assessments are not undertaken before the authorization of activities which could be damaging to the environment; and in instances in which unregulated state and non-state actor activities promoting carbon emissions have resulted in the migration, displacement, and dispossession of Indigenous territories.

Climate change cases could also offer the opportunity to develop the content of other cornerstone rights for Indigenous peoples. For example, there are already important legal developments concerning the right to live with dignity and its content, and these could be applied to cases in which Indigenous peoples are facing

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<sup>300</sup> See EMRIP FPIC Report, *supra* note 65, ¶ 24.

<sup>301</sup> See *id.* ¶ 16.

<sup>302</sup> See *id.* ¶¶ 15, 26(a)–(b).

<sup>303</sup> See *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 134–36.

<sup>304</sup> See *Rights of Indigenous Peoples*, *supra* note 66, ¶¶ 47–57; *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 102, 129, 133–40; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am Ct. H.R. (ser. C) No. 245, ¶¶ 180–211 (June 27, 2011).

<sup>305</sup> See *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, *supra* note 143, ¶ 178.

deficiencies and shortages in the areas of food, water, housing, health services, and social protection due to climate-induced events.<sup>306</sup> These could be due to state failures to prevent foreseeable harm or the failure to adapt to well-known climate related impacts on the life, personal integrity, ecosystems, biodiversity, and the environment and territories of Indigenous peoples. This analysis could be greatly reinforced with the gender and intersectional perspective discussed in the previous section, a focus on the best interests of the Indigenous children affected, and a connection between these individual rights to the overarching right to a clean, healthy, and sustainable environment.

In the case of *Daniel Billy et al.*, the Human Rights Committee refers to key Indigenous peoples' rights that can be gravely impacted by mitigation and adaptation failures in the area of climate change. The Committee refers concretely to the state failure to adopt timely and adequate adaptation measures to protect the authors' ability to maintain their way of life, to transmit to their children and future generations their culture and traditions, and to use their land and sea resources.<sup>307</sup> However, the author would like to see more analysis in the future of the content of critical rights such as the right to life and its different layers, and how these rights are impacted by state failures in mitigation and adaptation. The author also urges global and regional human rights bodies to better integrate an intersectional perspective in their analysis concerning Indigenous peoples, contemplating not only the legal standards developed on behalf of Indigenous peoples, but also those related to women and children.

Participation is also a cornerstone right when it comes to the environment and climate change.<sup>308</sup> It is paramount to give voice and influence to women, Indigenous peoples, and children in decision-making concerning climate change.<sup>309</sup> Major environmental treaties such as the Aarhus Convention and the Escazú agreement place heavy emphasis on participation when it comes to environmental decision-making.<sup>310</sup> For the author, the right to participation is multi-faceted, demanding the establishment of government and public spaces to influence the development of climate change policy, to discuss these issues, to shape

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<sup>306</sup> See discussion on the content of the right to live with dignity in Inter-Am. Court H.R., *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 160–76 (June 17, 2005); General Comment 36 On the Right to Life, Human Rights Committee, *supra* note 12, ¶¶ 3, 9, 26, 50, 62; African Comm'n on Hum. and Peoples' Rts. [ACHPR], *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, ¶¶ 3, 22. (Nov. 18, 2015), <https://www.refworld.org/docid/5e67c9cb4.html>.

<sup>307</sup> See UNHRC, *Daniel Billy et al. (Torres Strait Region) v. Australia*, CCPR/C/135/D/3624/2019 ¶ 8.14 (Sept. 22, 2022).

<sup>308</sup> See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princ. 10, 20, 22, U.N. Doc. A/CONF.151/26/ Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*] (underscoring the importance of the right to participation of women and Indigenous peoples in matters concerning the environment and sustainable development).

<sup>309</sup> See *Promotion and Protection of Human Rights in the Context of Climate Change*, *supra* note 6, ¶¶ 73–83 (highlighting concern with the fact that those most harmed by climate change have the least participation, and advocating for increased participation of young people, Indigenous peoples, and women).

<sup>310</sup> See Escazú Agreement, *supra* note 32, art. 7; Aarhus Convention, *supra* note 197, arts. 6–8.

interventions intended to benefit specific groups of the population, and to prevent harm. Participation can also foster the leadership of women, Indigenous peoples, and children in the response to climate change. The increased presentation of litigation by children and Indigenous peoples illustrates the dire effects of this problem on them, and the push from these groups to have more of a voice on climate justice efforts.<sup>311</sup> Case decisions can illustrate for states the content of the right to participation – in an effective, real, and meaningful way – in the area of climate change and what state's positive and negative obligations are in this area.

The case presented by the Haitian Children in Cité de Soleil before the Inter-American Commission on Human Rights can be a good opportunity to develop more legal standards concerning participation in the area of climate change.<sup>312</sup> Even though the petition is presented mostly referencing the rights to dignity, a healthy environment, and judicial protection, cases like this offer a great opportunity for the Inter-American Commission on Human Rights to find state failures in creating participation spaces for the children and residents of Cité de Soleil to have influence in policies that directly affect them, such as those concerning toxic trash disposal.

In this petition, the petitioners describe negative climate change effects – in the form of flooding and intense storms – which fuel the spread of waterborne diseases in an already heavily contaminated area.<sup>313</sup> They refer concretely to “reduced access to information, participation, and justice” for children.<sup>314</sup> This reference to climate-related adverse effects on participation offers the Inter-American Commission on Human Rights the opportunity to explore further the content of the right to participation for children and its features in a context of environmental pollution and formidable health challenges. The Commission can do this by admitting Article 23 of the American Convention, in connection with the general obligation to respect and ensure rights and to not discriminate under Article 1.1, even though Article 23 is not explicitly included in the petition. It can be inferred from the facts narrated, that the state failure in creating spaces for children and other residents of Cité de Soleil in Port-au-Prince to participate in a real, meaningful, and effective way in policies related to toxic trash disposal that are harmful to them is fueling the disrespect of their rights as children, negating their rights to live with dignity, in a healthy environment, and with an adequate and effective access to justice. Moreover, the failure to prevent foreseeable environmental harm and to adapt to climate change effects – which are illustrated in this case – greatly impedes the participation of these children in society in general, which is another aspect of the right to participation that could be discussed.

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<sup>311</sup> See Maria Antonia Tigre, *Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation*, 9 E-PUBLICA PUB L. J. 214, 224–235 (2022) (discussing how indigenous peoples are using litigation as a critical strategy to advance human rights in the realm of climate change); Donger, *supra* note 200, at 280–85 (discussing how the involvement of children and youth in strategic climate litigation can meaningfully contribute to the enforcement of their procedural rights and enhance their influence in climate solutions).

<sup>312</sup> See generally *Petition and Request for Precautionary Measures (With Exhibits), Six Child. of Cité Soileil, Haiti et al. v. Haiti* (2004).

<sup>313</sup> See *id.* at 31–32.

<sup>314</sup> See *id.* at 32.



#### D. Access to Information and Human Rights Defense

Access to information has been identified as a major procedural right when it comes to environmental concerns. It has been salient since the inception of international environmental law, reflected in key instruments such as the Rio Declaration,<sup>315</sup> and has also been codified in other global and regional human rights treaties.<sup>316</sup> Limitations in access to information concerning climate change and environmental matters have been identified by a number of global and regional human rights systems as an impediment to the full exercise of the human rights of women, children, and Indigenous peoples.<sup>317</sup>

Effective access to information has also been a resounding theme in the work of the United Nations Rapporteur on Human Rights and the Environment. In its Framework Principles, the Rapporteurship encouraged states to collect, update, and disseminate information related to the quality of the environment and potential negative impacts on human health and well-being.<sup>318</sup> Information should also be provided by states in an affordable, effective, and timely way.<sup>319</sup> Access to information in this area offers individuals the opportunity to understand how environmental harm and degradation may impact their lives.<sup>320</sup> The refusal of a request should be clearly and narrowly presented, and states should provide guidance to the public on how to obtain environmental information.<sup>321</sup>

These principles are also reflected in the jurisprudence of the European Court of Human Rights. The European Court of Human Rights in its judgments has made clear that states have a duty under the European Convention of Human Rights to ensure that its population is made aware of potential environmental pollution and harm, especially when this has been documented by state assessments.<sup>322</sup> This is

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<sup>315</sup> See Rio Declaration, *supra* note 307, princ. 10 (establishing that individuals shall have appropriate access to information concerning environmental matters held by public authorities, including that related to hazardous materials and activities in their communities).

<sup>316</sup> See G.A. Res. 48/189, art. 6(a)(ii) (Jan. 20, 1994) (mandating states to promote public access to information on climate change); Escazú agreement, *supra* note 32, arts. 5–6 (promoting that state parties facilitate access to environmental information for persons in vulnerable situations, and that they publicize and disseminate environmental information); Aarhus Convention, *supra* note 197, pmb., art. 3 (mandating states to promote environmental awareness and education among the public, especially on how to obtain access to information, participate in decision-making, and seek access to justice in environmental matters).

<sup>317</sup> For more discussion, see *Violence against Women and Girls in the Context of the Climate Crisis*, *supra* note 253, ¶¶ 23, 72; General Recommendation 39 on Indigenous Women and Girls, *supra* note 42, ¶¶ 21, 23(f), 33(j); IACHR and REDESCA Climate Change Resolution 3/2021, *supra* note 6, at 9, 19–20 ¶¶ 32–38.

<sup>318</sup> See *Framework Principles on Human Rights and the Environment*, *supra* note 8, ¶¶ 17–19.

<sup>319</sup> See *id.* ¶ 19.

<sup>320</sup> See *id.* ¶ 17.

<sup>321</sup> See *id.* ¶ 19.

<sup>322</sup> See, e.g., *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. ¶¶ 9–17, 62, 86–118 (holding the state responsible for a right to life violation for failing to inform the inhabitants of specific slum areas

particularly critical in cases in which the authorities are engaging in hazardous activities that could negatively impact the health of individuals and groups.<sup>323</sup> Effective and adequate procedures should be in place so members of the public can access all relevant and appropriate information and are able to assess the danger to which they are exposed.

The Inter-American Court of Human Rights has also indicated that in environmental matters Article 13 of the American Convention protects the right of individuals to request access to information held by the state, based on the principles of disclosure and transparency.<sup>324</sup> Access to information should be guaranteed in a manner which is effective, accessible, and prompt, without the specific individual having to show a concrete interest in obtaining this information.<sup>325</sup> Mechanisms should also be in place for individuals to request information from the state and the information should be provided in a culturally appropriate way and respecting local languages.<sup>326</sup> The Inter-American Court of Human Rights in its jurisprudence has underscored the priority nature of the right to access information when it comes to forestry exploitation projects and their potential environmental impacts, and the state's positive obligation to provide information from individuals when they request it.<sup>327</sup> The Inter-American Court of Human Rights has also underscored that this right admits restrictions, but any restrictions have to be established by law, justified by a purpose, and must be necessary in a democratic society.<sup>328</sup>

The author considers that access to information can be a fertile area for the development of legal standards through case litigation which benefit women, Indigenous peoples, and children in the area of climate change. Case litigation can define and shed light on steps states should take to ensure the accessibility of information to individuals and groups in an affordable, effective, and timely way. This is critical when the information concerns environmental harm, pollution, and degradation, and is related to harmful climate-induced impacts on women, Indigenous peoples, and children. Information can empower and be a critical facilitator to the exercise of rights for these three social groups. Case litigation can shed light on negative and positive state obligations in this area. Moreover, this

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that their physical integrity was under threat due to the deficiencies of a municipal rubbish tip, resulting in tragic deaths).

<sup>323</sup> See, e.g., *Guerra and Others v. Italy*, App. No. 14967/89, Eur. Ct. H.R. ¶¶ 12–18, 47 (1998) (finding a violation of the right to private and family life of the applicants when the government failed to inform them that they lived close to a high-risk factory for major accidents and toxic emissions).

<sup>324</sup> See Inter-Am. Ct. H.R., Advisory Opinion OC-23/17, *supra* note 68, ¶ 213.

<sup>325</sup> See *id.* ¶¶ 213–25.

<sup>326</sup> See *id.*; *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, *supra* note 144, ¶¶ 106–18.

<sup>327</sup> See *Claude Reyes et al. v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶¶ 66, 77 (Sept. 19, 2006).

<sup>328</sup> See *id.* ¶¶ 89–91.

can be paramount in cases in which the one conducting harmful activities is a business or corporation. Case decisions can discuss the state duties to regulate and oversee the provision of information by these private actors which can be harmful to the environment, and underscore the need for environmental impact assessments and to share their findings with women, children, and Indigenous peoples who can be affected by these effects.

It has been well-documented how dire the situation of environmental human rights defenders is in different regions of the world.<sup>329</sup> They face forms of intimidation, harassment, discrediting, killings, victimization, and criminalization due to the environmental causes they address.<sup>330</sup> The harassment can come from both state and non-state actors and it is meant to silence their activities and voices.<sup>331</sup> This has particularly harmful effects on environmental human rights defenders who are women, Indigenous, and children.<sup>332</sup> Some of these cases have had global attention including the killing of Berta Cáceres in Honduras and others.<sup>333</sup>

Courts have begun developing legal standards mandating states to take proactive steps to protect the life and personal integrity of human rights defenders—especially when they work in contexts of known risk—and when they defy socially expected roles with their leadership activities.<sup>334</sup> Different regional human rights courts have also ordered states to cease the criminalization of the work of human rights defenders; to prevent their arbitrary detention, torture, and ill-treatment; and to establish adequate and effective reporting and early warning systems of risk.<sup>335</sup> Case litigation can be an important complementary avenue to

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<sup>329</sup> For a general overview of the forms of hostility, violence, and discrimination faced by environmental human rights defenders globally, see Michel Forst (Special Rapporteur), Rep. of the Special Rapporteur on the Situation of Human Rights Defenders, transmitted from the Secretary-General, ¶¶ 24–40, U.N. Doc. A/71/281 (Aug. 3, 2016).

<sup>330</sup> See Press Release, Inter-Am. Comm'n H.R., *IACHR: Increased Violence Against Human Rights Defenders during the First Four Months of 2022 Makes It More Urgent for States to Protect Their Lives and Work*, No. 114/22 (May 25, 2022) (warning that the Americas continues to be one of the world's most dangerous regions to exercise the defense of human rights).

<sup>331</sup> See, e.g., ACHPR, ACHPR Res. 376(LX)2017, Point 2 (May 22, 2017) (calling on states to adopt the needed measures to provide human rights defenders with a conducive environment to carry out their activities free from violence, harassment, and discrimination from non-state actors).

<sup>332</sup> See, e.g., General Recommendation 39 On the Rights of Indigenous Women and Girls, *supra* note 42, ¶¶ 7, 19, 43, 45 (underscoring the killings, threats, harassment, arbitrary detentions, forms of torture, and criminalization faced by indigenous women and girls' human rights defenders).

<sup>333</sup> For more reading on the human rights defense work and death of Berta Cáceres, see *Honduras: Investigate Environmental Activist's Killing: Had Reported Being Followed and Threatened*, *Human Rights Watch* (Mar. 4, 2016), <https://www.hrw.org/news/2016/03/05/honduras-investigate-environmental-activists-killing>.

<sup>334</sup> See, e.g., *Yarce et al. v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 325, ¶¶ 160–64, 179–202, 271–77 (Nov. 22, 2016) (highlighting the need for states to protect the life and personal integrity of women human rights defenders operating in known-contexts of risk, such as armed conflicts).

<sup>335</sup> See, e.g., *Bedoya Lima v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 431, ¶¶ 88–115 (Aug. 26, 2021) (finding violations under the American Convention and the Convention of Belém do Pará for the kidnapping, torture, and rape of a

call states to act expeditiously to create safe conditions for environmental human rights defenders to undertake their work free from all forms of violence and discrimination. Case law can also provide important guidance to states on how to implement a gender, children's rights, and Indigenous peoples' perspective and approach to their national and local protection of the work of human rights defenders. This can be particularly useful for states with already-existing national systems and programs to protect the life and personal integrity of human rights defenders and to encourage other states to adopt these measures.

## V. Concluding Thoughts

Climate change is undoubtedly the crisis of our times. Its impacts are already very evident and even though progress has been made, state mitigation, adaptation, and ambition could be stronger. At this stage, it is well known and documented how this problem has a very dire effect on women, Indigenous peoples, and children, who are also the groups with the least contribution to climate induced-harm. These are also groups with pre-existing situations of discrimination, violence, inequality, and exclusion, which greatly worsen with human-driven climate change effects, natural disasters, damaging weather conditions, and insufficiencies in access to food, water, housing, health services, and other basic needs. COP27 has confirmed that the response to climate change needs to be urgent, exhaustive, and far-reaching, and must take into consideration these groups, not only in terms of impacts. Their leadership and influence in decision-making to find climate solutions is also critical.

International case litigation will not resolve all of the looming issues concerning climate change. But it can be a useful tool in the definition and guidance to states on how to mitigate, adapt, and remedy human-caused harm and foreseeable damage connected to climate change. Several international lines of jurisprudence and legal standards are already showing their promise in the protection of the rights of women, Indigenous peoples, and children. It is indeed time to expand these legal standards, give them an environmental content, and connect them directly to the right to a clean, healthy, and sustainable environment. The author hopes to encourage through this article the presentation of case petitions before global and regional human rights protection systems as a strategy to pursue climate justice and increased human rights protection, in particular for those who need it the most.

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woman journalist reporting on human rights violations); *Aliyev v. Azerbaijan*, Apps. Nos. 68762/14 & 71200/14, Eur. Ct. H.R. ¶¶ 109–13, 152–66, 171–73, 178–89, 206–16 (Sept. 20, 2018) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-186126%22%5D%7D> (finding several human rights violations when a human rights defender was arrested and detained without justification, subjected to forms of inhumane and degrading treatment, and had not received adequate medical assistance during detention); *Kawas-Fernández v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶¶ 71–121 (Apr. 3, 2009) (underscoring the duty to protect environmental human rights defenders from killings and forms of harassment and to investigate their deaths with due diligence).

Addressing climate change requires not only states with full commitments to set their nationally-determined contributions and to actively take measures to reduce carbon emissions. It also demands conscientious and multi-faceted state action to address the harmful activities of third-party actors; steps to act with due diligence to prevent harm, violence, and discrimination in this area; to ensure that information is received by marginalized groups to enforce their rights; and to set the conditions for full participation, consultation, and consent to occur. States need to act with an approach guided by gender equality and the rights of women, children, and Indigenous peoples. The need to address intersectional discrimination and to safeguard access to justice should also be priorities. International case litigation can serve as an important accountability mechanism for states and a guide on how to navigate the weave of rights involved and impacted by climate change.

At the core of all of this is the need for all individuals and groups to live in dignity and in a healthy environment, in which they can fully exercise their human rights, and where justice exists when harm occurs. These are aspirations that bind us all. The author concludes this article hopeful that international litigation can be a useful tool to advance these goals.