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When the Race to Net Zero Becomes A Race to the Bottom: Human Rights Violations in the Renewable Energy Transition and the Extraterritorial Obligation to Protect Human Rights

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WHEN THE RACE TO NET ZERO BECOMES A RACE TO THE BOTTOM: HUMAN RIGHTS VIOLATIONS IN THE RENEWABLE ENERGY TRANSITION AND THE EXTRATERRITORIAL OBLIGATION TO PROTECT HUMAN RIGHTS

YOGI BRATAJAYA *

I. INTRODUCTION	322
II. THE EXTRATERRITORIAL OBLIGATION OF STATES TO PROTECT HUMAN RIGHTS UNDER THE ICCPR AND ICESCR.....	327
A. THE EXTRATERRITORIAL SCOPE OF APPLICATION OF THE ICCPR AND ICESCR	328
B. THE THRESHOLD OF JURISDICTION	330
C. HOME-STATE REGULATION OF CORPORATIONS	332
III. HUMAN RIGHTS VIOLATIONS IN THE TRANSITION TO RENEWABLE ENERGY: THE CASE OF WIND FARMS IN MEXICO.....	337
A. THE RIGHT OF INDIGENOUS PEOPLES TO FREE, PRIOR, AND INFORMED CONSENT	341
B. FRANCE’S EXTRATERRITORIAL OBLIGATION TO PROTECT HUMAN RIGHTS IN THE DEVELOPMENT OF THE GUNAÁ SICARÚ WIND FARM PROJECT	345
C. RESPECTING, PROTECTING, AND FULFILLING HUMAN RIGHTS IN THE TRANSITION TO RENEWABLE ENERGY ..	347

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IV. THE NEED FOR GREATER HUMAN RIGHTS PROTECTION IN INTERNATIONAL CLIMATE CHANGE POLICY	349
A. LACK OF HUMAN RIGHTS MECHANISMS IN THE CLEAN-DEVELOPMENT MECHANISM	350
B. INTEGRATING HUMAN RIGHTS PROTECTION IN THE ARTICLE 6(4) MECHANISM OF THE PARIS AGREEMENT	352
V. CONCLUSION	357

I. INTRODUCTION

*“Transition is inevitable. Justice is not.”*¹

Recent reports published by the Intergovernmental Panel on Climate Change (IPCC) have shed light on and confirmed the extent of damages that will result if the world fails to keep global warming below 2°C.² Irreversible adverse impacts on our ecosystems and the increasing frequency and intensity of natural disasters will have a significant negative effect on the enjoyment of human rights worldwide.³ Climate change is already affecting food security through increasing temperatures, changing precipitation patterns, and greater frequency of some extreme events.⁴ Additionally, the deteriorating conditions caused by climate change will cause millions of people to leave their homes and become displaced.⁵

1. CLIMATE JUST. ALL., JUST TRANSITION PRINCIPLES 3 (2019), https://climatejusticealliance.org/wp-content/uploads/2019/11/CJA_JustTransition_highres.pdf.

2. Simon K. Allen et al. *Summary for Policymakers*, in MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION 3, 7–9 (Christopher B. Field et al. eds., 2012) (demonstrating the effects of changes in temperature and their impact on different geographical areas).

3. See Human Rights Council Res. 41/21, U.N. Doc. A/HRC/RES/41/21, ¶ 1 (July 23, 2019) (emphasizing that the effects of climate change have a range of implications and recognizing the threat climate change poses to human rights).

4. Cheikh Mbow et al., *Food Security*, in CLIMATE CHANGE AND LAND: AN IPCC SPECIAL REPORT ON CLIMATE CHANGE, DESERTIFICATION, LAND DEGRADATION, SUSTAINABLE LAND MANAGEMENT, FOOD SECURITY, AND GREENHOUSE GAS FLUXES IN TERRESTRIAL ECOSYSTEMS 439 (Noureddine Benkeblia et al. eds., 2019), <https://www.ipcc.ch/srccl/chapter/chapter-5> (noting the current effects of climate change on food security).

5. See UNHCR, *Climate Change and Disaster Displacement*, <https://www>

These adverse impacts are particularly felt by the Global South.⁶ Discussions around climate change and efforts to decrease global emissions have been largely driven by the stark inequities between the Global North and the Global South.⁷ Nowhere is this more clear than in the effects of the climate crisis on Small-Island Developing States and indigenous populations, who have contributed the least to the current climate crisis but are projected to be the most affected.⁸ Thus, substantial and meaningful climate change mitigation efforts must be implemented through international cooperation.

According to the IPCC, reaching the targets of the Paris Agreement and limiting global warming requires urgent and “far-reaching transitions in energy, land, urban infrastructure (including transport and buildings), and industrial systems.”⁹ These far-reaching transitions will be resource-intensive, requiring vast amounts of land and critical minerals to facilitate the implementation of climate change mitigation policies.¹⁰ States and investors, through international

.unhcr.org/climate-change-and-disasters.html (last visited Oct. 15, 2022) (highlighting the hazards of extreme weather events and their effect of forcing people to leave their homes).

6. See Press Release, U.N. General Assembly, *Unprecedented Impacts of Climate Change Disproportionally Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate*, U.N. Doc. GA/EF/3516 (Oct. 8, 2019) [hereinafter U.N.G.A. Press Release] (underscoring that climate change disproportionately burdens developing countries).

7. See Sinan Ülgen, *How Deep Is the North-South Divide on Climate Negotiations?*, CARNEGIE EUR. (Oct. 6, 2021), <https://carnegieeurope.eu/2021/10/06/how-deep-is-north-south-divide-on-climate-negotiations-pub-85493> (“[C]limate negotiations continue to be shaped by equity concerns between postindustrial countries in the Global North and emerging economies in the Global South.”).

8. See Adelle Thomas et al., *Climate Change and Small Island Developing States*, 45 ANN. REV. ENV'T & RES. 1, 2 (2020) (emphasizing that Small-Island Developing States are at particular risk to climate change despite being negligible contributors to climate change).

9. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], *Headline Statements—Understanding Global Warming of 1.5°C*, <https://www.ipcc.ch/sr15/resources/headline-statements> (last visited Oct. 16, 2022) (calling for action and mitigation options to slow climate change).

10. See Jack Healy & Mike Baker, *As Miners Chase Clean-Energy Minerals, Tribes Fear a Repeat of the Past*, N.Y. TIMES (Dec. 27, 2021), <https://www.nytimes.com/2021/12/27/us/mining-clean-energy-antimony-tribes.html> (highlighting the vast amount of new and different resources needed to mitigate

cooperation based on the targets set by the Paris Agreement, have begun moving vast amounts of capital to acquire such resources in order to implement climate change mitigation projects, such as transitioning to renewable energy sources.¹¹ These efforts are crucial and must be ramped up to meet the goals of the Paris Agreement and prevent irreversible damage from a climate catastrophe.

However, looking at the current situation, it would seem that human rights is noticeably absent in international climate policy. This is most evident by the fact that the Paris Agreement, the principal legal instrument that regulates the State's duty to prevent climate change, mentions human rights only once throughout the whole agreement.¹² The eleventh paragraph of the Preamble of the Paris Agreement acknowledges that:

[C]limate 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 equity¹³

This lack of human rights accountability risks exacerbating human rights violations in the transition to renewable energy. One of the most salient human risks is the adverse human rights impacts towards communities in the Global South, whose lands are used to extract critical minerals or develop renewable energy projects.¹⁴ Extracting natural resources from the Global South to fuel the renewable energy

climate change).

11. See Simon Jessop & Andrea Shalal, *COP26 Coalition Worth \$130 Trillion Vows to Put Climate at Heart of Finance*, REUTERS (Nov. 4, 2021), <https://www.reuters.com/business/cop/wrapup-politicians-exit-cop26-130tn-worth-financiers-take-stage-2021-11-03> (noting that banks, insurers, and investors have pledged trillions to mitigate climate change).

12. Paris Agreement to the United Nations Framework Convention on Climate Change, pmbL., para. 11, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

13. *Id.*

14. See U.N.G.A. Press Release, *supra* note 6 (acknowledging the disparate impact of climate change on developing countries).

transition without having due regard for the needs of the affected communities risks perpetuating extractivism, which refers to the extraction of large quantities of natural resources to be used for export.¹⁵ Extractivism embodies the stark inequalities between the Global North and the Global South. Materials extracted from the Global South are exported and generate very few benefits for the surrounding communities.¹⁶ Rather, communities are often left worse off by the harmful effects of extraction projects, such as irreversible environmental degradation from mining activities.¹⁷

Extractivism does not only refer to the extraction of minerals and oil. The notion also encompasses the extraction of other resources such as fish, agricultural goods, and land.¹⁸ The demand for land is especially relevant for the renewable energy transition, since projects such as wind farms and dams require large spaces and territories to operate.¹⁹ The development of clean energy projects has already caused severe adverse impacts on communities, especially indigenous peoples who heavily rely on the natural ecosystem to sustain their cultures.²⁰ A report by the Business and Human Rights Resource

15. See Joanna Allan et al., *An Unjust Transition: Energy, Colonialism and Extractivism in Occupied Western Sahara*, TRANSNAT'L INST. (Nov. 10, 2021), <https://longreads.tni.org/an-unjust-transition> (explaining and contextualizing extractivism in the Western Sahara).

16. See *id.* (highlighting how extractivism currently operates in developing countries); Donald v. Kingsbury, 'Green' Extractivism and the Limits of Energy Transitions: Lithium, Sacrifice, and Maldevelopment in the Americas, GEO. J. INT'L AFFS. (July 20, 2021), <https://gjia.georgetown.edu/2021/07/20/green-extractivism-and-the-limits-of-energy-transitions-lithium-sacrifice-and-maldevelopment-in-the-americas> (explaining the extractivist practice in which raw materials leave the Global South to be turned into more valuable goods in the Global North).

17. See, e.g., Healy & Baker, *supra* note 10 (underscoring concerns among Native Americans that mining could cause environmental damage to their tribal lands).

18. See Allan et al., *supra* note 15 (noting that extractivism includes resources such as fish, agricultural goods, and land).

19. See ARMELLE GOURITIN, EXTRACTIVISM AND RENEWABLE ENERGIES: HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF SOCIO-ENVIRONMENTAL CONFLICTS 5 (Jan. 24, 2018), <https://eu.boell.org/en/2018/01/24/extractivism-and-renewable-energies-human-rights-violations-context-socio-environmental> (describing wind farm projects as "megaprojects" because they require large spaces).

20. See Allan et al., *supra* note 15 (discussing the impact that clean energy products can have on indigenous lands and local wildlife).

Center recorded over 200 allegations of human rights abuses linked to renewable energy projects in the last ten years, with abuses including land and water grabs and violations of the rights of indigenous nations.²¹

Extractivism in climate change mitigation is best illustrated by the clearing of land for wind farms by Morocco in the occupied Western Sahara.²² Morocco has used the development of its wind farms in the Western Sahara to bolster its image as a nation that is leading the renewable energy transition in Africa.²³ These projects in the name of climate change prevention are used to strengthen Morocco's occupation in the Western Sahara, and communities who opposed the projects have been met with violence and other forms of retribution.²⁴ The population of Western Sahara reaps very little benefit from these projects, as the green energy is exported out of the Western Sahara to meet the energy needs of other places in Africa while locals continue to suffer power outages and water shortages.²⁵

This essay will analyze how countries in the Global North, by ramping up the transition to renewable energy in an effort to prevent climate change, violate the human rights of communities in the Global South. It will focus on the State obligation to protect human rights under two core human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). An elaboration concerning the responsibility of renewable energy companies to

21. See BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, RENEWABLE ENERGY & HUMAN RIGHTS BENCHMARK: KEY FINDINGS FROM THE WIND & SOLAR SECTORS 4 (2021), https://media.business-humanrights.org/media/documents/2021_Renewable_Energy_Benchmark_v5.pdf (recording over 200 allegations of human rights abuses linked to renewable energy projects in the last ten years).

22. See generally Allan et al., *supra* note 15 (offering a brief history and analysis of extractivism via wind farming in occupied Western Sahara).

23. See *id.* (explaining the Moroccan monarchy's role in wind farms in occupied Western Sahara).

24. See *id.* (outlining Morocco's plans to expand their solar farms in occupied Western Sahara and discussing Morocco's violent actions towards civilian protesters).

25. See *id.* (emphasizing the benefits to Morocco of investing in green energy in Western Sahara).

respect human rights in their supply chains is beyond the scope of this present essay.

The second section establishes the legal obligation of States parties to the ICCPR and ICESCR to prevent private companies from violating the human rights of individuals outside their territories. It argues that the ICCPR and ICESCR should be interpreted in a way to impose on States parties the extraterritorial obligation to protect the human rights of communities outside their territories through the strict regulation of business enterprises that each State has control over. To highlight the urgency of States to comply with extraterritorial human rights obligations, the third section elaborates on the development of wind farms in Mexico, which illustrates the ways in which renewable energy projects violate the fundamental rights of surrounding communities. The fourth section will address current developments in international climate policy. It specifically focuses on the importance of States including robust human rights safeguards in the rules of the carbon-trading mechanism under Article 6 of the Paris Agreement. Despite the vital role that the renewable energy transition plays in preventing a climate catastrophe, current projects disregard the fundamental human rights of surrounding communities. Thus, States must implement adequate safeguards to ensure that the transition does not come at the cost of fundamental human rights.

II. THE EXTRATERRITORIAL OBLIGATION OF STATES TO PROTECT HUMAN RIGHTS UNDER THE ICCPR AND ICESCR

With the increase of globalization and multilateralism, States often conduct activities beyond their own borders, or conduct activities within their territory but produce effects that are felt abroad.²⁶ To ensure that a legal vacuum does not occur which would allow a State to avoid responsibility for such extraterritorial activities, the interpretation of human rights treaties have been developed to

26. See MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* 5, 8 (2011) (highlighting that in the current age of globalization, states are increasingly impacting the human rights of individuals in other states).

encompass a State's extraterritorial actions.²⁷ This section analyzes the extraterritorial application of the ICCPR and ICESCR, arguing that States parties have the extraterritorial obligation to protect human rights by regulating the conduct of business activities.

A. THE EXTRATERRITORIAL SCOPE OF APPLICATION OF THE ICCPR AND ICESCR

The ICESCR does not have a provision which establishes its scope of application.²⁸ However, this does not prevent the extraterritorial application of the Covenant. The International Court of Justice (ICJ) in the *Palestinian Wall Advisory Opinion* held that ICESCR imposes upon States parties the extraterritorial obligation to ensure the human rights contained within the covenant, in accordance with its object and purpose, legislative history and lack of territorial limitation provisions in the text.²⁹ This view has been reaffirmed by the Committee on Economic, Social and Cultural Rights (CESCR).³⁰

As for the ICCPR, Article 2(1) establishes the nature of legal obligations imposed upon its State parties, providing that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”³¹ Under a restrictive application of Article 2(1) of the ICCPR, a State party would only be obligated to guarantee the human rights of individuals located within its sovereign territory, ruling out the extraterritorial application of the ICCPR.³² However, subsequent statements and jurisprudence of the

27. See *id.* at 8 (explaining extraterritorial applications of law).

28. See International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 9993 U.N.T.S. 3 [hereinafter ICESCR].

29. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 112 (July 2004).

30. See Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, ¶ 27, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter *General Comment No. 24*] (affirming the extraterritorial obligations of States).

31. International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

32. See Erik Roxstorm & Mark Gibney, *Human Rights and State Jurisdiction*,

Human Rights Committee (HRC) have supported an interpretation of Article 2(1) in favor of its extraterritorial application.³³ In *Lopez Burgos v. Uruguay*, the HRC underlined that a restrictive interpretation of Article 2(1) would lead to the absurd result “as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”³⁴ This conclusion was supported by the ICJ in the *Palestinian Wall Advisory Opinion*:

[I]n adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.³⁵

Pursuant to these landmark decisions, an individual may be located outside the territory of a State but still “subject to its jurisdiction,” hence triggering that State’s obligation to guarantee the human rights of the individual.³⁶ To determine whether a State party to the ICCPR

18 HUM. RTS. REV. 129, 132 (2017) (noting that the ICCPR makes an explicit link between an obligation to respect and secure the rights set forth in it and that State’s territory).

33. See Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter *General Comment No. 31*] (affirming that State parties must respect and ensure the right laid down in the Covenant); Nicola Wenzel, *Human Rights, Treaties, Extraterritorial Application and Effects*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4 (2008), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e819> (explaining that the United Nations, Human Rights Committee, and International Court of Justice consider the ICCPR to be applicable when states exercise jurisdiction outside their territory).

34. Delia Saldias de Lopez v. Uruguay [*Lopez Burgos*], Communication No. 052/1979, Human Rights Committee [HRC], ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (1984).

35. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 2004).

36. *Id.*; *Lopez Burgos*, Communication No. 052/1979, HRC, ¶ 12.3; see Wenzel, *supra* note 33, ¶ 4 (explaining that the United Nations, Human Rights Committee, and International Court of Justice consider the ICCPR to be applicable when States exercise jurisdiction outside their territory).

has treaty obligations to respect and ensure the human rights of an individual in the first place, it must be determined whether the individual is subject to the jurisdiction of the State.³⁷

B. THE THRESHOLD OF JURISDICTION

“Jurisdiction” in human rights treaties refers to a State’s exercise of actual authority and power, whether exercised lawfully or not, over an area or persons.³⁸ A close analysis of the facts of a certain case is conducted to determine whether a State has jurisdiction for the purposes of establishing its obligation to respect, protect and fulfil human rights.³⁹ This definition takes away focus from delimitation and the relationship between states, but serves to protect individuals from acts of the state that may affect their human rights.⁴⁰

Based on the jurisprudence of regional and international human rights bodies, there appear to be two models of extraterritorial application. The European Court of Human Rights (ECtHR) in *Al-Skeini* held that the two models of extraterritorial application of human rights treaties were state agent authority and control, and effective control over an area.⁴¹ An illustration for the first model is the Human Rights Committee’s (HRC) decision in *Lopez Burgos*, which concerned the forced kidnapping and detention of a victim by security forces.⁴² Although the arrest and initial detention took place outside of Uruguay’s territory, the HRC held Uruguay responsible for violating the ICCPR, noting that Article 2(1) of the ICCPR “does not imply that

37. See Tilmann Altwicker, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, 29 EUR. J. INT’L L. 581, 582–83 (2018) (underlining that judicial findings on what is owed to an individual based on his human rights are made with respect to the specific situation of that individual).

38. See Roxstorm & Gibney, *supra* note 32, at 143–44 (noting that an individual must first be subject to a State’s authority before the state owes any rights).

39. See MILANOVIC, *supra* note 26, at 39–41 (finding that jurisdiction in human rights treaties is dependent on fact).

40. See Wenzel, *supra* note 33, ¶ 12 (explaining that in international human rights treaties, jurisdiction is used to protect individuals).

41. *Al-Skeini v. United Kingdom*, App. No. 55721/07, ¶¶ 136–42 (July 7, 2011), <https://hudoc.echr.coe.int/fre?i=001-105606>.

42. *Lopez Burgos*, Communication No. 052/1979, HRC, ¶ 2.2, U.N. Doc. CCPR/C/13/D/52/1979 (1984).

the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.”⁴³

The second model, effective control over an area, occurs in circumstances of military occupation over an area outside the State’s own territory.⁴⁴ When effective control has been established, either legally or illegally, the State is obligated to secure the human rights of individuals within the area it has control over either through its own armed forces or through a subordinate local administration.⁴⁵ In the *Palestinian Wall Advisory Opinion*, the ICJ held that Israel’s long-standing military presence in the occupied Palestinian territories meant that individuals located in the occupied territories of Israel were considered to be subject to Israel’s jurisdiction within the meaning of Article 2(1) of the ICCPR.⁴⁶

These two models of extraterritorial application help provide clearly defined circumstances by which an individual located outside a State’s territory may be considered “subject to the jurisdiction” of the state. However, a limitation imposed by these two models is the need for the State authority to be present “on the ground” where the human rights violations occur.⁴⁷ Under these two models, a State cannot be held responsible for its failure to protect human rights if the conduct is carried out within the territory of the State but produces extraterritorial effects which interfere with the human rights of individuals abroad.⁴⁸

43. *Id.* ¶ 12.3.

44. See Andreas Zimmermann, *Extraterritorial Application of Human Rights Treaties—The Case of Israel and the Palestinian Territories Revisited*, in *INTERNATIONAL LAW BETWEEN UNIVERSALISM & FRAGMENTATION* 747, 748 (I. Buffard et al. eds., 2008) (noting that effective control occurs when there is military occupation).

45. See *id.* (emphasizing the obligation of contracting parties to secure the right of all persons subject to their jurisdiction).

46. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 110–11 (July 2004).

47. See John H. Knox, *Diagonal Environmental Rights*, in *UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS* 82, 88 (Mark Gibney & Sigrun Skogly eds., 2010) (questioning State responsibility to varied human rights violations).

48. See *id.* (highlighting that the key question is whether those impacted are

C. HOME-STATE REGULATION OF CORPORATIONS

The past thirty years have witnessed a significant increase of activities of transnational corporations, growing investment and trade flows between countries, and the emergence of global supply chains.⁴⁹ In addition, major development projects have increasingly involved private investments, often in the form of public-private partnerships between State agencies and foreign private investors.⁵⁰ These developments highlight the importance of States' extraterritorial obligations to protect human rights from the conduct of corporations. This is referred to as home-State regulation of corporations, which encompasses legislation, adjudication, and other regulatory measures aimed at preventing and redressing business-related human rights violations in the host State of corporate investment.⁵¹ The most common form of home-State regulation is when States impose regulatory due diligence requirements for corporate actors within their territorial jurisdictions that apply throughout the corporate group and the global supply/value chain.⁵²

As of now, the ECtHR has not decided cases relating to home-State regulation of corporations.⁵³ However, the ECtHR in *Loizidou* held that the responsibility of contracting States to the ECtHR can be involved by acts and omissions of their authorities which produce effects outside their own territory.⁵⁴ The obligation of home-State regulation of corporations is also closely linked to transboundary environmental pollution, since both situations address conduct that is

under the State's jurisdiction).

49. *General Comment No. 24*, *supra* note 30, ¶ 25.

50. *Id.*

51. See Daniel Augenstein, *Home-State Regulation of Corporations*, in *ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS* 284, 284 (Mark Gibney et al. eds., 2022) (explaining home-State regulation of corporations).

52. See *id.* (noting that the most common form of home-state regulations is due diligence requirements).

53. See *id.* at 286 (highlighting that the European Court of Human Rights has some case-law that suggests a preparation to recognize extraterritorial human rights obligations absent effective control).

54. *Loizidou v. Turkey*, Appl. No. 15318/89, Eur. Ct. H.R., ¶ 62 (Mar. 23, 1995), <https://hudoc.echr.coe.int/fre?i=001-57920>.

located inside the State's territory but produce extraterritorial effects.⁵⁵ Recently, the Inter-American Court of Human Rights (IACtHR) *Environment and Human Rights Advisory Opinion* provided that:

Regarding transboundary damage, a person is subject to the jurisdiction of the State of origin, if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control of the activities that caused the damage and consequent violation of human rights.⁵⁶

The Advisory Opinion further stated that a State party to the Inter-American Convention on Human Rights has a due diligence obligation to take all appropriate measures to protect and guarantee human rights from environmental harm both inside and outside their territories.⁵⁷ The interpretation provided by the IACtHR defines the threshold of jurisdiction as exercising “effective control of the activities,” thus paving the way for the inclusion of home-State regulation of corporations.⁵⁸ According to this interpretation, “the focus lies on the control of the (harmful) circumstances” and does away with the need for the requirement of physical presence “on the ground” where the violations are perpetrated.⁵⁹

The obligation of States to protect human rights extraterritorially through the regulation of corporate actors was endorsed by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).⁶⁰ The Maastricht Principles were developed by experts

55. See ETO CONSORTIUM, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights*, 3 (Jan. 2013) [hereinafter *Maastricht Principles*], https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf (noting that extraterritorial obligations are a missing link in the universal human rights protection system).

56. The Environment & Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 101 (Nov. 15, 2017).

57. *Id.* ¶ 101.

58. *Id.* ¶ 103.

59. See Altwicker, *supra* note 37, at 590 (arguing that “the standard test of jurisdiction should be extended to the (effective) control over situations (with extraterritorial effects on human rights).”).

60. See generally *Maastricht Principles*, *supra* note 55, at 3 (endorsing an

from all regions of the world with the aim of clarifying the extraterritorial obligations of a State to respect, protect, and fulfill economic, social, and cultural rights.⁶¹ Principle 9 of the Maastricht Principles provides that the extraterritorial obligation of a State applies to situations “over which it exercises effective control” and “over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory.”⁶² Moreover, Principle 24 of the Maastricht Principles establishes the obligation of State to regulate:

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, . . . such as private individuals and organi[z]ations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.⁶³

This notion was supported by the CESCR in its General Comment No. 24 on business activities, which stated that a State party to the ICESCR is under the extraterritorial obligation to protect human rights by taking steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control.⁶⁴ A State party is deemed to have breached its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event.⁶⁵

In the realm of civil and political rights, the HRC in *Basem Ahmed Issa Yassin et al. v. Canada* supported home-State regulation of corporations.⁶⁶ The communication concerned Canada’s

obligation to regulate non-state actors to ensure protection or rights).

61. *See id.* at 5 (outlining the aim to clarify the content of extraterritorial State obligations).

62. *Id.* at 6–7.

63. *Id.* at 9.

64. *General Comment No. 24*, *supra* note 30, ¶ 30.

65. *Id.* ¶ 32.

66. *Basem Ahmed Issa Yassin v. Canada*, Communication No. 2285/2013, HRC, ¶ 3.10, U.N. Doc. CCPR/C/120/D/2285/2013.

responsibility for human rights violations involving Canadian building companies in the occupied Palestinian territories.⁶⁷ While the communication was deemed inadmissible, the HRC noted that “there are situations where a [S]tate party has an obligation to ensure that rights under the [ICCPR] are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction.”⁶⁸ The legal threshold of jurisdiction was elaborated within the Concurring Opinion of two Committee Members, who stated that:

Such a link of jurisdiction may be established, as the Committee suggests in this case, on the basis of: (a) the effective capacity of the State to regulate the activities of the businesses concerned and (b) the actual knowledge that the State had of those activities and their necessary and foreseeable consequences in terms of violations of human rights recognized in the Covenant.⁶⁹

An element that must be fulfilled to hold a State responsible for the failure of its extraterritorial obligation to regulate corporations under its control is to establish the causal link between the omission and the harms suffered.⁷⁰ In the *Environment and Human Rights Advisory Opinion*, the IACtHR emphasized that “a causal link must exist between the damage caused and the action or omission of the state of origin, taken within its territory or under its jurisdiction.”⁷¹ The establishment of this causal link is necessary to ensure that the threshold of jurisdiction is not rendered obsolete and so that States are not held responsible for damages they did not cause.⁷² Consistent with the decisions of international courts, a causal link is established where the damages would normally flow from the state’s act or omission,

67. *Id.* ¶ 2.2.

68. *Id.* ¶ 6.5.

69. *Id.* ¶ 10 (de Frouville, Comm. Member, & Ben Achour, Comm. Member, concurring).

70. The Environment & Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 101 (Nov. 15, 2017).

71. *Id.* ¶ 103.

72. See Bendetto Conforti, *Exploring the Strasbourg Case-Law: Reflections for the Breach of Positive Obligations*, in *ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL LOCAL JUDICIAL INSTITUTIONS: THE CLIFFORD CHANCE LECTURES* 129, 134–35 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (explaining the importance of upholding concept of jurisdiction in international law).

taking into account whether the state knew or should have known of the damages from its conduct or lack thereof.⁷³

This extraterritorial obligation of States to protect human rights is especially relevant in climate change mitigation efforts. Over the past few years, countries in the Global North have looked to the Global South as an opportunity to accelerate the transition to renewable energy, such as developing renewable energy projects and extracting critical minerals to facilitate renewable energy technology.⁷⁴ Despite the importance of an accelerated transition to renewable energy, investments made by the Global North risk causing or contributing to human rights violations of the surrounding communities where the projects are being developed. States must adhere to their extraterritorial obligation to protect human rights and regulate corporations under their effective control to prevent human rights violations abroad. The foundational principle behind the extraterritorial application of human rights treaties is to prevent a State party from perpetrating violations on the territory of another State—violations that it could not perpetrate on its own territory.⁷⁵ This reasoning also applies to home-State regulation of corporations. It

73. See XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 178 (2003) (describing how this causal link would be established); see also Olivier de Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 *HUM. RTS. Q.* 1109, 1112–14 (2012) (providing an overview of the ILC's commentary on important cases in this area of law).

74. See Wolfgang Obergassel et al., *Human Rights and the Clean Development Mechanism: Lessons Learned From Three Case Studies*, 8 *J. HUM. RTS. & THE ENV'T* 51, 70 (2017) (“The [Clean Development Mechanism] allows emitters in the ‘Global North’ to shift the cost of emission reductions to the ‘Global South’. This shift necessarily appropriates local productive resources, impairing local livelihoods.”); Thea Riofrancos, *Shifting Mining From the Global South Misses the Point of Climate Justice*, *THE BUSINESS STANDARD* (Feb. 7, 2022, 5:35 PM), <https://www.tbsnews.net/analysis/shifting-mining-global-south-misses-point-climate-justice-368176> (“For decades, as part of neoliberal globalization and its tenets of free trade, capital mobility, and deregulation, the governments of global north countries increasingly offshored manufacturing and extraction to the global south and replaced those sectors with services, real estate, and finance, all while starving their own states’ industrial capacity.”).

75. *Lopez Burgos*, Communication No. 052/1979, HRC, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (1984).

would be unconscionable for a State to allow a corporation under its effective control to perpetrate violations in another country—violations that it could not perpetrate on its own territory.

III. HUMAN RIGHTS VIOLATIONS IN THE TRANSITION TO RENEWABLE ENERGY: THE CASE OF WIND FARMS IN MEXICO

Data has confirmed that consumption of fossil fuels account for the majority of anthropogenic greenhouse gas emissions (GHG), with current global GHG being dominated by fossil fuel combustion associated primarily with electricity and heat generation.⁷⁶ The transition to renewable energy is thus crucial to achieve the goals of the Paris Agreement.⁷⁷ One of the major forms of renewable energy, wind energy, has long been recognized as having the potential to reduce GHG.⁷⁸ Over the past two decades, wind energy deployed on land has become the cheapest source of electricity generation, and thus many countries have developed ambitious plans to expand both onshore and offshore wind energy capacity.⁷⁹

However, wind farms are a “capital-intensive activity,” meaning that they depend heavily on the exploitation of natural resources.⁸⁰ The vast and intense requirement for resources to install wind farms is best illustrated by developments within the state of Oaxaca in Mexico, where numerous wind farms are in operation or planned to be

76. IPCC, *RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION—SPECIAL REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 7* (2012) https://www.ipcc.ch/site/assets/uploads/2018/03/SRREN_Full_Report-1.pdf; see also Rebecca J. Barthelmie & Sara C. Pryor, *Climate Change Mitigation Potential of Wind Energy*, 9 *CLIMATE* 136, 136 (2021) (providing an overview of using wind energy to mitigate climate change).

77. *A Brief Guide to Renewables*, UNFCCC (Mar. 22, 2021), <https://unfccc.int/blog/a-brief-guide-to-renewables>.

78. See Barthelmie & Pryor, *supra* note 76, at 136 (“Over the past two decades, wind energy deployed on land has become the cheapest source of electricity generation.”).

79. See generally *id.* (providing results of studies of numerous countries and their investment in wind turbine technology).

80. See GOURITIN, *supra* note 19, at 7 (noting that the exploitation exists more in the context of natural resources than of labor).

developed.⁸¹ Mainly due to its topography, the Isthmus of Tehuantepec region in Oaxaca is considered to have some of the best conditions for wind energy.⁸² The region has thus experienced large-scale wind energy development since 2006, and Mexico has prioritized wind energy development in order to reach its climate mitigation goals.⁸³ These developments require intensive land use. By 2019, the Isthmus alone had more than 1,600 turbines spread across 39 wind farms.⁸⁴

Many large-scale wind farms are located in the Isthmus of Tehuantepec, such as the Gunaá Sicarú and San Dionisio del Mar wind farms.⁸⁵ However, the operation and development of resource-intensive wind farms in the Isthmus of Tehuantepec have come at the cost of the human rights of the indigenous peoples who live in the region.⁸⁶ Former United Nations (UN) Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, stated that she was:

[P]articularly concerned over the rapid increase in such projects, commonly funded through international and bilateral investment agreements, as the financial gains primarily benefit foreign investors who have little or no

81. *See id.* (providing a case study on wind farms in Oaxaca).

82. D. ELLIOT ET AL., NAT'L RENEWABLE ENERGY LAB, WIND ENERGY RESOURCE ATLAS OF OAXACA 24 (2003), <https://www.nrel.gov/docs/fy03osti/34519.pdf>.

83. *See* Eduardo Martínez-Mendoza et al., *Social Impact of Wind Energy in the Isthmus of Tehuantepec, Mexico, Using Likert-Fuzzy*, 32 ENERGY STRATEGY REVIEWS 1, 2 (2022) (describing growth of wind energy development in this region and the related factors supporting this development).

84. *See* CAMILLE LOYER ET AL., VIGILANCE SWITCHED OFF HUMAN RIGHTS VIOLATIONS IN MEXICO: WHAT ARE THE RESPONSIBILITIES OF EDF AND THE APE? 8 (2021), https://www.ecchr.eu/fileadmin/Publikationen/2021-06-08_-_Vigilance_switched_off_-_Report_-_EN.pdf (providing information on wind turbine development in this region).

85. *See id.* at 7 (noting how the topography of this region is especially conducive to wind farming); *see also* GOURITIN, *supra* note 19, at 7. (describing topography and development of wind farming in this region).

86. *See* Nichole Vargas, *The Effects of the Wind Farms on the Indigenous Zapotec Community of the Isthmus of Tehuantepec, Mexico*, 10 OCCAM'S RAZOR 1, 3 (2020) ("Despite the partial legal protection in many countries, Indigenous land continues to be treated by settler states and international capitalist actors as *terra nullius* (in Latin: empty land) open to coercive utilization or land grabbing.").

regard for the rights of local indigenous communities and environmental protection. All too often, these projects leave affected indigenous peoples further marginalized and entrenched in poverty as their natural resources are destroyed. Furthermore, the legal construct of projects funded through investment agreements is generally designed to exclude possibilities for affected communities to seek remedies and redress.⁸⁷

The Gunaá Sicarú wind farm project, for example, is planned to be developed on the lands of the Zapotec indigenous community of Unión Hidalgo.⁸⁸ The Gunaá Sicarú project is helmed by EDF Energy, an energy company based in France and mostly owned by the French State.⁸⁹ The project comprises 115 wind turbines and has a vast land footprint of 5,000 hectares, almost half the size of Paris.⁹⁰ When completed, the wind farm is expected to cover one third of the territory of Unión Hidalgo.⁹¹ Members of the indigenous community in Unión Hidalgo have opposed the development of the Gunaá Sicarú project due to the adverse impacts on the natural environment, which forms an essential part of the traditional way of life for the indigenous community.⁹² Locals say oil runoff from the turbines pollutes waterways and the sound of the wind farms disturbs residents and local birdlife.⁹³

87. Special Rapporteur on the Rights of Indigenous Peoples, *Report on the Rights of Indigenous Peoples*, ¶ 34, U.N. Doc. A/HRC/39/17 (Aug. 10, 2018) [hereinafter *Rights of Indigenous Peoples Report*].

88. See LOYER ET AL., *supra* note 84, at 7 (providing further context for exploitation of indigenous peoples).

89. See *Capital Structure*, EDF, <https://www.edf.fr/en/the-edf-group/dedicated-sections/investors-shareholders/the-edf-share/capital-structure> (last visited Jan. 30, 2022) (graphical representation of EDF Group's share capital at the end of 2022).

90. See LOYER ET AL., *supra* note 84, at 10 (explaining sheer scale of wind farms).

91. See *id.*

92. See *id.* at 9–10 (providing further context for exploitation of indigenous peoples and their varied sentiments on these projects).

93. See Sam Edwards, *Is Mexico's Wind Sector Repeating Fossil Fuels' Mistakes?*, DEUTSCHE WELLE (May 19, 2020), https://www.dw.com/en/is-mexicos-wind-sector-repeating-fossil-fuels-mistakes/a-53492900?maca=en-VAM_volltext_ecowatch-28485-html-copy-paste (“Ramirez and other local activists say oil runoff from the turbines that already dominate the landscape pollutes waterways, while the sound of the wind farms—many of which are close to towns—disturbs residents and local birdlife.”).

In the consultation process to develop the Gunaá Sicarú project, reports indicated an escalation of violence and attacks against human rights and environmental defenders in Unión Hidalgo.⁹⁴ Community members report being subjected to death threats and criminalization simply for speaking out against the development of the project.⁹⁵ Furthermore, the project has created a deep division within the community and a destruction of the social fabric.⁹⁶ Corporations and government authorities are breaking down community-based decision-making processes, forcing people to negotiate the land contracts on an individual basis and sowing mistrust among the population by co-opting local leaders.⁹⁷

In line with the observations of the former UN Special Rapporteur on the Rights of Indigenous Peoples, the indigenous communities in the Isthmus whose lands are being exploited to build wind farms do not receive any percentage of the electricity generated by the existing wind farms, and continue to pay for the electricity they consume.⁹⁸ Some households in the region do not even have access to electricity, highlighting the deep injustices faced by indigenous peoples caused by the renewable energy transition.⁹⁹ Additionally, the operation of wind farms have barely benefitted the local economy, as reports indicate that municipalities have not received taxes from the wind

94. See, e.g., LOYER ET AL., *supra* note 84, at 12 (“Many of them have received death threats to dissuade them from taking part in the consultation process and one of the women community leaders was involved in a suspicious car accident in May 2018.”).

95. See *id.* (further describing specific instances of violence).

96. See OBSERVATORIO DE MULTINACIONALES EN AMÉRICA LATINA [OMAL], THE WIND FARM CORRIDOR ON THE ISTHMUS OF TEHUANTEPEC (OAXACA, MEXICO) 2 (2019), https://multinationales.org/IMG/pdf/enco_iberdrola_def.pdf (noting threats and violence against communities opposed to wind farming as a challenge of deploying wind energy in Mexico).

97. See LOYER ET AL., *supra* note 84, at 12 (“[T]estimonies from human rights defenders in Unión Hidalgo state that EDF’s subsidiaries have been interacting individually with community members, offering them benefits or pressuring them to persuade the community to consent to the wind project.”); see also OMAL, *supra* note 96, at 2 (describing types of discord sown by larger entities).

98. See LOYER ET AL., *supra* note 84, at 9 (noting that some households do not have electricity at all).

99. See *id.*

companies for the past three years.¹⁰⁰

A. THE RIGHT OF INDIGENOUS PEOPLES TO FREE, PRIOR, AND INFORMED CONSENT

The facts above demonstrate a violation of the right of indigenous peoples to free, prior, and informed consent (FPIC). The principle of FPIC is recognized as integral to the preservation of indigenous culture and essential towards its survival, since projects that are built on indigenous lands most often have far-reaching adverse environmental impacts, which severely harm the indigenous way of life.¹⁰¹ The obligation of States to respect the right to FPIC is found within ILO Convention No. 169 on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁰² Article 10 of UNDRIP provides that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.¹⁰³

While FPIC is not explicitly mentioned anywhere within the ICCPR nor the ICESCR, subsequent interpretations made by the relevant treaty bodies have recognized the right to FPIC as necessary to ensure the full enjoyment of the rights contained within both treaties.¹⁰⁴ The

100. See Peter Millard et al., *Wind Project Splinters a Mexico Region Prized for Powerful Gusts*, BLOOMBERG (July 9, 2021), <https://www.bloomberg.com/news/features/2021-07-09/mexico-wind-farms-divide-communities> (highlighting the continued disparity between the value to the energy companies and the value to the communities in which these companies operate).

101. See James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 7 (2005) (noting the significant ways in which indigenous peoples are exploited and harmed by the use of their land).

102. Int'l Lab. Org., *Indigenous and Tribal Peoples Convention, 1989* (No. 169), preamble, June 27, 1989, 1650 U.N.T.S. 383; G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

103. *Id.* art. 10.

104. *Rights of Indigenous Peoples Report*, *supra* note 87, ¶ 19.

HRC in its General Comment on Article 27 of the ICCPR, which guarantees the rights of minorities, highlighted that the exercise of cultural rights, especially for indigenous peoples, may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁰⁵ The requirement of effective participation was elaborated in the case of *Länsman v. Finland*, which concerned the decision of the Finnish Central Forestry Board to pass a contract with a private company to allow stone quarrying in a reindeer-herding area, home to an indigenous Saami community.¹⁰⁶ The HRC held that Finland had not violated Article 27 of the ICCPR for two main reasons, one of which was that the authors of the communication were consulted and their interests were considered during the proceedings leading to the delivery of the relevant permit.¹⁰⁷ This was reaffirmed in the case of *Mahuika v. New Zealand*, where the HRC held that New Zealand did not violate the rights of the indigenous Maori since broad consultations were undertaken before proceeding to legislate.¹⁰⁸ The HRC noted that New Zealand, in the consultation process, had paid specific attention to the sustainability of Maori fishing activities, and taken the necessary steps to ensure that the legislation which affected their rights were compatible with New Zealand's international obligations.¹⁰⁹

The CESCR's General Comment on Article 15 of the ICESCR guaranteeing the right to take part in cultural life recognized the relationship between indigenous peoples' cultural values and their relationship with nature.¹¹⁰ The General Comment highlighted that the

105. Hum. Rts. Comm., *General Comment Adopted By The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant on Civil and Political Rights*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994).

106. *Länsman v. Finland*, Communication No. 511/1992, HRC, ¶ 2.1, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

107. *Id.* ¶ 9.6.

108. *Apirana Mahuika v. New Zealand*, Communication No. 547/1993, HRC, ¶ 9.8, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

109. *Id.*

110. Comm. on Econ., Social & Cultural Rts., *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 36, U.N. Doc. E/C.12/GC/21

cultural identity of indigenous peoples would be jeopardized by environmental degradation and the loss of their natural resources.¹¹¹ States parties are therefore obligated under the ICESCR to take measures to recognize and protect the rights of indigenous peoples to FPIC.¹¹²

According to Barrelli, FPIC requires, at a minimum, that the relevant consultations are not conducted as a mere formality, but are conducted in good faith and with the objective of finding a common agreement.¹¹³ The principle of FPIC contains four elements.¹¹⁴ First, the term “free” implies that the process of consultation should be conducted in the spirit of good faith between the parties and in the absence of any type of coercion and pressure.¹¹⁵ Second, “prior” means that the consultations should take place before making a decision or undertaking an action that is likely to affect indigenous peoples, including before the authorization and commencement of a project.¹¹⁶ Activities related to development plans should not start until the completion of the consultation process so that indigenous peoples have a real chance to decide whether and how actions that would affect their livelihoods are taken.¹¹⁷ Third, “informed” means that indigenous peoples should be provided with adequate information in relation to the relevant measure or project.¹¹⁸ The information received by indigenous peoples should be objective, accurate and clear, and presented in a language understood by the communities in question, and should cover the nature, scale, pace, reversibility and scope of the

(Dec. 21, 2009) [hereinafter *General Comment No. 21*].

111. *Id.*

112. *Id.*

113. See Mauro Barelli, *Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)*, in *THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY* 247, 248 (Jessie Hohmann & Marc Weller eds., 2018) (providing an overview of the concept of FPIC).

114. See *id.* at 250 (identifying the key elements of FPIC to provide a practical understanding of the principle).

115. *Id.* (“Consultations carried out in a climate of harassment, let alone violence, would therefore be incompatible with the principle of FPIC.”).

116. See *id.* (recommending that consultations with indigenous peoples should take place during various stages as documents are drafted).

117. *Id.*

118. *Id.* at 250–51 (defining “informed consent”).

project.¹¹⁹

Lastly, the term “consent” does not necessarily require States to obtain the consent of Indigenous peoples before implementing a measure or project affecting them, in other words giving indigenous peoples the general right to veto.¹²⁰ However, interpretation of FPIC by human rights courts and UN human rights bodies have implemented a “sliding scale approach” to FPIC, where States have the obligation to obtain FPIC in cases of large-scale developments or investment projects that would have a major impact within indigenous peoples’ territories.¹²¹

Taking the aforementioned standards into account, the consultation process to develop the Gunaá Sicarú project violated the right of the indigenous community to FPIC. The presence of threats and violence against community members who spoke against the development of the project meant that the consultation process was not free nor conducted in good-faith.¹²² Authorities and company officials used divide and conquer tactics to obtain approval from the community by interacting individually with community members, offering them benefits or pressuring them to persuade the community to provide consent.¹²³ Additionally, the Gunaá Sicarú project would cover a

119. See *id.* at 251 (discussing the meaning of consent within the context of Articles 19 and 32 of the UNDRIP); JENNIFER LAUGHLIN, UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 19 (2013), unclearn.org/wp-content/uploads/library/un-redd05.pdf.

120. See Hans M. Haugen, *The Right To Veto or Emphasising Adequate Decision-Making Processes? Clarifying the Scope of Free, Prior and Informed Consent (FPIC) Requirement*, 44 NETH. Q. HUM. RTS. 250, 272–73 (2016) (describing shortcomings in the application and receipt of consent).

121. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007); James Anaya (Special Rapporteur on the Situation 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*, ¶ 47, U.N. Doc. A/HRC/12/34 (July 15, 2009); see Barelli, *supra* note 113, at 269.

122. See LOYER ET AL., *supra* note 84, at 12 (emphasizing how the violence against community members is at odds with the free nature required for actual free and informed consent).

123. See *id.* at 12.

major part of Unión Hidalgo and have far-reaching effects on the territory of the indigenous communities who live there.¹²⁴ Hence, mere consultation is not enough, and the State of Mexico and EDF should obtain consent from the indigenous community before taking any steps to develop the Gunaá Sicarú project.¹²⁵ In 2018, a Mexican Federal Court ordered that consultations must be carried out in accordance with the international standards defined under ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples.¹²⁶

B. FRANCE'S EXTRATERRITORIAL OBLIGATION TO PROTECT HUMAN RIGHTS IN THE DEVELOPMENT OF THE GUNAÁ SICARÚ WIND FARM PROJECT

The French State is a majority shareholder of EDF, and thus has significant authority to control the activities and operations of the EDF.¹²⁷ The power that the French State has over the EDF establishes a “State-business nexus” which heightens France’s responsibility to control EDF and take measures to prevent it from causing adverse human rights impacts.¹²⁸ Upon the establishment of this “State-business nexus,” the State has greatest means within their powers to

124. *See id.* at 10.

125. *See* LOYER ET AL., *supra* note 84, at 5 (stating that the industrial and intensive exploitation of natural resources in this region, which is home to a majority of indigenous peoples, has generated violent social conflicts and human rights abuses in the local communities).

126. *Id.* at 12 (“The beginning of the consultation process and the legal action taken by the community marked an escalation of violence and attacks against the land and human rights defenders of Unión Hidalgo”).

127. *Id.* at 20–25 (“The French State holds 83.6% of EDF’s capital, with a shareholder commitment of around 21 billion euros. This represents no less than 40% of the portfolio held by the APE33—the public agency that manages the French State’s public shareholding strategy as a “shareholder entity.”).

128. *See* John Ruggie (U.N. Office of the High Commissioner for Human Rights), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 6–7 U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs] (“States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.”).

ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented.¹²⁹ This heightened obligation is based on the reasoning that, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.¹³⁰

Having established that France has effective control over the situation through its majority ownership of EDF, under the ICCPR and ICESCR, France has the extraterritorial obligation to ensure that the business operations of EDF do not violate human rights abroad.¹³¹ Hence, in light of the fact that the development process of the Gunaá Sicarú wind farm project breached the right of indigenous peoples to FPIC, as guaranteed by Article 27 of the ICCPR and Article 15 of the ICESCR, France has breached its extraterritorial obligation to protect human rights.

On October 13, 2020, representatives of Unión Hidalgo together with the Mexican human rights organization Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC) and the European Center for Constitutional and Human Rights (ECCHR) began legal proceedings against EDF, alleging, among others, that France has failed to fulfil its due diligence obligation to protect human rights under international law.¹³² The allegation that France has breached its

129. *Id.* at 7 (“Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented.”).

130. *Id.* (stating that the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale); see Human Rights Council, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 12 U.N. Doc. A/HRC/32/45 (May 4, 2016) (examining the duty of States to protect against human rights abuses involving those business enterprises that they own or control, generally referred to as State-owned enterprises (SOEs)).

131. ICCPR, *supra* note 31, art. 2; ICESCR, *supra* note 28, art. 2; see UNGPs, *supra* note 128, at 3 (stating that States should clearly set the expectation that all business enterprises domiciled in their territory or jurisdiction respect human rights throughout their operations).

132. See LOYER ET AL., *supra* note 84, at 7 (stating that the indigenous community of Unión Hidalgo had not actually been consulted, which is a violation of their rights as defined under the Mexican constitution and international law).

due diligence obligations is supported by evidence that French authorities, based on multiple warnings and communications with the indigenous community, knew of the violations taking place against the indigenous community in Unión Hidalgo yet failed to intervene or take any measures to prevent such violations from occurring.¹³³ As of December 2021, a civil court in Paris dismissed the request partially on formal/procedural grounds.¹³⁴

C. RESPECTING, PROTECTING, AND FULFILLING HUMAN RIGHTS IN THE TRANSITION TO RENEWABLE ENERGY

At the domestic level, States are increasingly recognizing the adverse human rights impacts of renewable energy projects. Two recent cases highlight this development. In 2021, the Grand Chamber of Norway in the *Fosen* case held that a wind park infringed reindeer grazing lands and therefore violated the right to culture of the Sámi indigenous people in the Fosen area.¹³⁵ The Norwegian Court made specific reference to Article 27 of the ICCPR, noting that the wind farm directly caused the reduction of reindeer numbers, which threatened the continued existence of the Fosen Sámi's reindeer husbandry.¹³⁶ In the same year, the Kenyan Environment and Land

133. *Id.* at 41 (“[I]t is impossible to assert that the French State, represented within EDF by the APE, was unaware that EDF’s activities in Mexico were a source of human rights violations. In any case, the position of the French State as a majority shareholder and investor in EDF subjects it to the obligation to develop its knowledge and respond to the risks of human rights abuses by means of the tools prescribed by the law on the duty of vigilance and by the standards of due diligence for public actors.”).

134. See PRODESC, *Press Release EDF in Mexico: Paris Court Misses Opportunity to Prevent Human Rights Violations* (Dec. 1, 2021), <https://prodesc.org.mx/en/press-release-edf-in-mexico-paris-court-misses-opportunity-to-prevent-human-rights-violations> (explaining that the procedural issue was that the lawsuit filed in October 2020 did not refer to the correct vigilance plan of EDF, an annual document on risk analysis and mitigation measures regarding possible human rights violations).

135. See Carola Lingaas, *Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project (Kenya) Cases*, OPINIOJURIS (Dec. 15, 2021), <http://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases> (discussing some of the international legal aspects of the *Fosen* and the *Lake Turkana Wind Project* cases).

136. See *id.* at 4 (noting that the Norwegian case was the first judgement that

Court ruled that the title deeds of land used to build windmills was unlawful.¹³⁷ The Kenyan court highlighted that although the wind farm was producing a substantial amount of the national electricity needs, “national exigencies cannot cure blatant illegalities.”¹³⁸

Where the recent cases in Norway and Kenya demonstrate a State’s ability to protect human rights by condemning the activities of corporations and providing redress for human rights violations, it would be unreasonable to say that the State has no responsibility for the mere reason that the violations are conducted abroad. The case of the Gunaá Sicarú project emphasizes the necessity that States, especially those from the Global North, comply with the extraterritorial obligation to protect human rights by taking measures to ensure that business activities, which they have effective control over, do not cause or contribute to human rights violations abroad.

Climate change mitigation efforts should not be built on injustices against indigenous communities, especially since they have contributed the least to climate change. Research demonstrates that projects in which the affected local communities have a decision-making role are more likely to meet their stated development and environmental goals than those that exclude affected peoples or deny them the exercise of their participatory rights.¹³⁹ Therefore, heightened due diligence is required to ensure that effective participation of surrounding communities is undertaken prior to the establishment of climate change mitigation projects, such as wind farms.

interference into reindeer grazing areas violates Art. 27 of the ICCPR).

137. *Id.* at 2 (“In the Lake Turkana Wind Project (LTWP), on 19 October 2021, the Kenyan Environment and Land Court ruled that the title deeds of the land, on which the windmills were built, were unlawful.”).

138. *Id.* at 5 (discussing the remedies provided in the Kenyan and Norwegian cases, and that the Kenyan court gave the defendants one year to make the required corrections).

139. See Jonathan Isham et al., *Does Participation Improve Performance? Establishing Causality with Subjective Data*, 9 WORLD BANK ECON. REV. 176, 178, 180–81 (1995) (finding that data from 121 diverse rural water projects support the conclusion that increasing beneficiary participation directly causes better project outcomes).

IV. THE NEED FOR GREATER HUMAN RIGHTS PROTECTION IN INTERNATIONAL CLIMATE CHANGE POLICY

One of the driving factors behind the proliferation of climate change mitigation projects, such as wind and solar farms, is the establishment of carbon-market or carbon-trading mechanisms.¹⁴⁰ Carbon-markets are seen as a key tool to achieve emissions reductions and climate commitments, as they allow entities and/or States to reduce emissions by “trading” emissions from one entity to another.¹⁴¹ An economic analysis from the Environmental Defense Fund found that the international trading of emissions could double the emissions reductions that would be achieved using only current policies.¹⁴² These mechanisms are one of the most fundamental aspects of international regulation on climate change, being a focal point of negotiations by States parties to the Kyoto Protocol and the Paris Agreement.¹⁴³

Notwithstanding the effectiveness of carbon-markets in reducing global emissions, projects which are developed under carbon-trading schemes risk causing or contributing to human rights violations. Often times human rights standards are overlooked in the development of carbon-market mechanisms, leading to human rights violations in the

140. See CARBON MKT. WATCH, *Carbon Markets 101: The Ultimate Guide to Global Offsetting Mechanisms*, 3 (June 2019) <https://carbonmarketwatch.org/wp-content/uploads/2019/06/CMW-CARBON-MARKETS-101-THE-ULTIMATE-GUIDE-TO-MARKET-BASED-CLIMATE-MECHANISMS-WEB-FINAL-SINGLE-1.pdf> (providing the reasoning behind carbon markets).

141. *Id.*

142. See ENV'T DEF.FUND, *How Carbon Markets Can Increase Climate Ambition* (Dec. 4, 2019), <https://www.edf.org/climate/how-carbon-markets-can-increase-climate-ambition> (noting that an economic analysis found that the cost savings from international trading of emissions could bring direct gains for the atmosphere and increase climate ambition).

143. See Nina Chestney, *Explainer: The Toughest of Tasks at U.N. Climate Talks: Article 6 on CO2 Markets*, REUTERS (Nov. 5, 2021), <https://www.reuters.com/business/cop/toughest-tasks-un-climate-talks-article-6-co2-markets-2021-10-26> (explaining that an agreement on a market-based mechanism to allow countries to use international carbon offsets to meet goals set under the 2015 Paris climate agreement is among the most complex and most important of the tasks facing U.N. negotiators).

name of achieving emissions reduction.¹⁴⁴ The coming years marks a crucial turning point as States have begun to finalize the rulebook of the mechanism established under Article 6 of the Paris Agreement.¹⁴⁵ To ensure that projects developed under the Article 6 mechanism do not cause adverse human rights impacts, States must integrate adequate human rights safeguards into their rulebook.

A. LACK OF HUMAN RIGHTS MECHANISMS IN THE CLEAN-DEVELOPMENT MECHANISM

The Clean Development Mechanism (CDM) was established by Article 12 of the Kyoto Protocol with the purpose of assisting countries to achieve sustainable development and comply with their quantified emission limitation and reduction commitments.¹⁴⁶ The CDM allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries.¹⁴⁷ Once a CDM project has completed a predetermined project cycle, the project participants receive certified emission reductions (CERs), which are credits that industrialized countries can purchase and count towards their commitments under the Kyoto Protocol.¹⁴⁸

144. See generally NATHANIEL EISEN, CIEL, RIGHTS, CARBON, CAUTION – UPHOLDING HUMAN RIGHTS UNDER ARTICLE 6 OF THE PARIS AGREEMENT 8 (2021) (“For example, the Barro Blanco dam in Panama has been associated with well-documented FPIC violations, forced evictions, violence against protestors, and destruction of livelihoods.”).

145. See CLIFFORD CHANCE, *COP26: Article 6 Rulebook for the New Global Carbon Market Mechanism Agreed* (Nov. 2021), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/11/cop26-article-6-rulebook-for-the-new-global-carbon-market-agreed.pdf>. (discussing the key elements of the Article 6 Rulebook, and their likely impact on the compliance markets and voluntary carbon markets).

146. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 12, Dec. 10, 1997, 2303 U.N.T.S. 162.

147. See U.N. CLIMATE CHANGE, *The Clean Development Mechanism*, <https://unfccc.int/process-and-meetings/the-kyoto-protocol/mechanisms-under-the-kyoto-protocol/the-clean-development-mechanism> (last visited Jan. 31, 2022) (stating that the CDM defined in Article 12 of the Protocol allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol to implement an emission-reduction project in developing countries).

148. See Jeanette Schade & Wolfgang Obergassel, *Human Rights and the Clean*

Throughout the operation of the CDM, there were inadequate safeguards put in place to ensure that registered projects did not violate human rights and harm the surrounding communities.¹⁴⁹ Attempts to incorporate further requirements to respect human rights in the CDM's standards and procedures were consistently rejected by developing countries on the basis that such obligations were incompatible with national sovereignty.¹⁵⁰

One of the most notable examples of the adverse human rights impacts of CDM projects is the development of the Barro Blanco dam in Peru. Prior to the operation of the Barro Blanco hydroelectric dam, reports indicated that the dam would severely affect the cultural heritage and means of subsistence of the Ngäbe indigenous community.¹⁵¹ The dam was projected to flood homes, schools, and transform the Tabasará River—critical to the Ngäbe's physical, cultural, and economic survival—from a flowing river to a stagnant lake ecosystem.¹⁵² Moreover, neither the Panamanian government nor the company building the dam, Generadra del Istmo S.A., adequately consulted the indigenous communities that will be affected by the project, in violation of the community's right to FPIC.¹⁵³ Despite the well-documented human rights violations, in breach of the CDM's own rules on stakeholder consultation, in 2011 the CDM Executive Board registered the Barro Blanco as a CDM project.¹⁵⁴ It was only in

Development Mechanism, 27 CAMBRIDGE REV. INT'L AFFS. 717, 722 (2014) (explaining the function of CERs within CDM project cycles).

149. *Id.* at 717, 722–23 (outlining a case in Bajo Aguán, Honduras that shows the current absence of any international safeguards can lead to the registration of highly problematic projects).

150. *Id.* at 723 (explaining that despite the EU's suggestion to include such standards and procedures during negotiations of the Marrakesh Accord, ultimately host countries are only required to confirm that the project assists in achieving sustainable development).

151. See Alyssa Johl et al., *Human Rights in the CDM*, CIEL (June 10, 2013), <https://www.ciel.org/human-rights-in-the-cdm> (providing an update on the CDM's relationship with human rights).

152. *Id.*

153. See *Barro Blanco Hydroelectric Dam Threatens Indigenous Communities, Panama*, CIEL (Dec. 2016), <https://www.ciel.org/project-update/barro-blanco> (explaining the Barro Blanco Project's impact on indigenous people's rights and resources).

154. See generally Wolfgang Obergassel et al., *supra* note 74, at 61 (providing an

October of 2017 that the project was removed from the CDM, upon a request made by Panama's Ministry of Environment.¹⁵⁵

The Barro Blanco hydroelectric dam is only one example out of numerous other projects which threatens to breach the human rights of surrounding communities.¹⁵⁶ These projects are able to be registered and earn CERs due to the absence of robust human rights policies and inadequate human rights monitoring mechanisms.¹⁵⁷

B. INTEGRATING HUMAN RIGHTS PROTECTION IN THE ARTICLE 6(4) MECHANISM OF THE PARIS AGREEMENT

With the adoption of the Paris Agreement, State parties have the opportunity to learn from the mistakes of the CDM and develop a carbon-trading mechanism that incorporates strict obligations for participants to respect human rights when registering new projects. The basis for the establishment of the carbon-market mechanism under the Paris Agreement is Article 6(4):

A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis.¹⁵⁸

Article 2(1) of the ICESCR establishes the obligation for States parties to take collective action, including through international

overview of the Barro Blanco Project's registration).

155. See Camilo Mejia Giraldo, *Panama's Barro Blanco Dam to Begin Operation, Indigenous Pleas Refused*, MONGABAY (Mar. 24, 2017) <https://news.mongabay.com/2017/03/panamas-barro-blanco-dam-to-begin-operation-indigenous-pleas-refused> (noting that the project has also had two legal pleas rejected by Panama's Supreme court, which may open the door to the forceful expulsion of the indigenous people from their lands).

156. See CULTURAL SURVIVAL, OBSERVATIONS ON THE STATE OF INDIGENOUS HUMAN RIGHTS IN PANAMA 3–4 (October 2019), https://www.culturalsurvival.org/sites/default/files/media/panamaupr_2014.pdf (“[T]he government prioritizes large-scale national development projects, which lead to human rights abuses such as displacement without compensation, violent eviction, food insecurity, and loss of cultural and spiritual sites, among others.”).

157. See Giraldo, *supra* note 155.

158. Paris Agreement, *supra* note 12, art. 6(4).

cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories.¹⁵⁹ This encompasses the duty to “create an international enabling environment” through interactions in their “foreign relations, including actions within international organizations.”¹⁶⁰ Additionally, States parties are encouraged to include provisions explicitly referring to their human rights obligations, and to ensure that dispute-settlement mechanisms take human rights into account.¹⁶¹

The CESCR has stated that States parties to the ICESCR have an obligation as members of international organizations to adopt whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the ICESCR.¹⁶² This obligation was further emphasized by the CESCR in their recent statement concerning the equitable distribution of COVID-19 vaccines.¹⁶³ In its statement, the CESCR highlighted that States must use their voting rights as members of international organizations to guarantee all persons access to vaccines against COVID-19.¹⁶⁴

COP26 in Glasgow marked a significant step in the implementation

159. ICESCR, *supra* note 28, art. 2; see Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 36, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (detailing a plan for realizing the right to health).

160. See Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084, 1104 (2012) (“It also includes an obligation to refrain from nullifying or impairing human rights in other countries and to ensure that non-state actors whose conduct the state is in a position to influence are prohibited from impairing the enjoyment of such rights.”).

161. See *General Comment No. 24, supra* note 30, ¶ 13 (detailing the obligation to respect economic, social and cultural rights).

162. See *General Comment No. 21, supra* note 110, ¶ 75 (detailing the obligation of actors other than States).

163. See Comm. on Econ., Social & Cultural Rts., *Statement on Universal Affordable Vaccination Against Coronavirus Disease (COVID-19), International Cooperation and Intellectual Property*, U.N. Doc. E/C.12/2021/1 (Apr. 23, 2021) (reminding States of their obligations under the Covenant in relation to universal access and affordability of vaccines against Covid-19, particularly with regard to international cooperation and intellectual property).

164. *Id.* ¶ 3.

of Article 6 as State parties finally agreed to overarching rules governing offsets and cross-border cooperation.¹⁶⁵ While State delegates and private actors have lauded the decision as a positive development in the efforts to limit global warming,¹⁶⁶ members of civil society have criticized the decision as a potentially harmful tool due to the absence of human rights considerations.¹⁶⁷ For example, human rights was only mentioned once within the decision regulating the mechanism of Article 6(4) of the Paris Agreement.¹⁶⁸ The decision merely states that the Supervisory Body of the mechanism shall establish the requirements and processes in relation to the eleventh preambular paragraph of the Paris Agreement.¹⁶⁹ The obligation to ensure respect for human rights, especially the rights of indigenous peoples, are excluded from crucial aspects of the mechanism, such as provisions regulating its design, requirements for authorization, and monitoring process.¹⁷⁰

165. See U.N. CLIMATE CHANGE, *COP26 Reaches Consensus on Key Actions to Address Climate Change* (Nov. 13, 2021), <https://unfccc.int/news/cop26-reaches-consensus-on-key-actions-to-address-climate-change> (stating that this agreement will give certainty and predictability to both market and non-market approaches in support of mitigation as well as adaptation).

166. See *id.* (providing statements of State delegates who approved of the agreement); see also Christina Brooks & Kevin Adler, *COP26: Article 6 Rulebook Updated, but Remains Work in Progress*, IHS MARKIT (Nov. 15, 2021), <https://cleanenergynews.ihsmarkit.com/research-analysis/cop26-article-6-rulebook-update-but-remains-work-in-progress.html> (providing statements of State delegates' approval).

167. See *Latest COP26 Draft Text Failing on Human Rights*, CIEL (Nov. 12, 2021), <https://www.ciel.org/news/latest-cop26-draft-text-failing-on-human-rights> (stating that international charities are urging governments not to miss their chance to embed human rights in the final text of COP26, as they have a responsibility to make sure that human rights are not diluted).

168. See U.N. Framework Convention on Climate Change, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on its Third Session, § 3 ¶4, U.N. Doc. FCCP/PA/CMA/2021/10/Add.1 (Nov. 13, 2021).

169. See U.N. Framework Convention on Climate Change, *Decision -/CMA.3: Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement*, ¶ 62, U.N. Doc. FCCC/PA/CMA/2021/L.9 (Nov. 13, 2021) [hereinafter *Decision -/CMA.3*] (outlining the governance of function of the procedures for the mechanism established by Article 6, paragraph 4 of the Paris Agreement).

170. See Cate Bonacini, *Exclusion of Human Rights from Article 6 "A Dereliction*

In the final hours before the adoption of the Article 6(4) rulebook, States inserted a paragraph which made reference to an independent grievance process.¹⁷¹ The paragraph provided that “[s]takeholders, activity participants and participating Parties may appeal decisions of the Supervisory Body or request that a grievance be addressed by an independent grievance process.”¹⁷² However, no further elaboration of the grievance process was inserted and the negotiators stopped short of guaranteeing an institutional structure for grievance redress.¹⁷³

Guaranteeing effective access to remedy is crucial to the fulfilment of human rights abroad. The obligation of States to guarantee access to remedy for human rights violations is based on Article 2(3) of the ICCPR and the State obligation to protect economic, social, and cultural rights under the ICESCR.¹⁷⁴ To ensure a just transition to renewable energy and the prevention of human rights abuses in climate mitigation efforts, States must implement an effective institutional grievance mechanism within the Article 6(4) rulebook. According to the UNGPs, an effective grievance mechanism is one that is legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.¹⁷⁵

One of the most notable examples of the implementation of a grievance mechanism in climate mitigation projects is the grievance

of Duty,” CIEL (Nov. 10, 2021), <https://www.ciel.org/news/exclusion-of-human-rights-from-article-6-a-dereliction-of-duty> (calling for the inclusion of protections for human rights and Indigenous Peoples in the rules for every part of the mechanism, days before the adoption of Article 6).

171. See Decision -/CMA.3, *supra* note 169, ¶ 62.

172. *Id.*

173. See Erika Lennon et al., *False Solutions Prevail over Real Ambition at COP26*, HEINRICH BOELI STIFUNG (Dec. 16, 2021), <https://www.boell.de/en/2021/12/16/false-solutions-prevail-over-real-ambition-cop26> (asserting that it will be necessary to ensure the development of robust standards under these rules so that countries and companies aren’t infringing on human rights in an effort to offset their emissions).

174. ICCPR, *supra* note 31, art. 2(3); see *General Comment No. 24*, *supra* note 30, ¶ 38 (providing remedies for those whose Covenant rights have been violated in the context of business).

175. UNGPs, *supra* note 128, at 33 (outlining the effectiveness criteria for non-judicial grievance mechanisms).

mechanism of the World Bank.¹⁷⁶ In 2014, stakeholders submitted complaints to the World Bank Inspection Panel arguing that the resettlement process in the establishment of the Olkaria IV geothermal power plant, located in Kenya, violated their human rights.¹⁷⁷ The main points raised by the complaining community members include flaws in the census, the inadequate quality of land, and incidents of intimidation and exclusion of outspoken community representatives.¹⁷⁸ The Inspection Panel confirmed the allegations made by the complainants, finding that donors did not apply the World Bank's Operational Policy 4.10 on Indigenous Peoples, that the World Bank insufficiently monitored the resettlement, and that the donors failed to conduct adequate due diligence.¹⁷⁹

State parties, when negotiating the rules of the Article 6(4) mechanism, should take into account cases such as these to develop an institutional grievance mechanism within the framework of the Paris Agreement that can effectively address human rights violations and provide effective redress. It is crucial that the independent grievance body be authorized with the power to revoke approval for projects which have been found to cause adverse human rights impacts.

If States Parties fail to integrate robust human rights mechanisms in further decisions regarding Article 6(4) of the Paris Agreement, the established mechanism will risk repeating the mistakes of the CDM and further exacerbate human rights violations in the renewable energy transition.

176. See THE WORLD BANK, ANNUAL REPORT FY20: GRIEVANCE REDRESS SERVICES—FINDING SOLUTIONS TOGETHER 4 (2020), <https://thedocs.worldbank.org/en/doc/735981610131855597-0290022021/original/GRSAnnualReportFY20.pdf> (“The GRS was created following a review of the World Bank’s safeguard policies by the Independent Evaluation Group (IEG) in 2010, which recommended that the World Bank create a grievance redress and conflict resolution mechanism to complement the independent Inspection Panel”).

177. See Wolfgang Obergassel et al., *supra* note 74, at 67 (showing that CDM projects, while in formal compliance with CDM rules, can lead to a number of human rights infringements through three case studies, including the geothermal energy project in Olkaria, Kenya).

178. *Id.* at 67–68.

179. *Id.* at 68.

V. CONCLUSION

A rapid transition to renewable energy is crucial to achieve the goals of the Paris Agreement and prevent the devastating human rights impacts of a climate emergency. However, such a transition must not come at the sacrifice of the human rights of the most vulnerable. Where countries in the Global North are increasingly investing in the development of renewable energy projects in the Global South to offset their emissions, such countries must comply with their extraterritorial obligations under the ICCPR and ICESCR.¹⁸⁰ This obligation encompasses the duty to protect human rights by taking measures to ensure that private corporations do not cause or contribute towards human rights violations abroad.¹⁸¹ The obligation to regulate and intervene in corporate activities is heightened when corporations are owned by the State.¹⁸²

Special emphasis must be placed on the protection of the human rights of indigenous peoples. Meaningful consultation with indigenous communities should be conducted and the right to FPIC should be respected to ensure that renewable energy projects do not deprive them of their cultural values and means of subsistence. The current international legal framework for climate change mitigation is deeply flawed and crucially lacks human rights safeguards. Moving forward with a renewable energy transition based on a “business as usual model,” which places emphasis on market mechanisms and considers human rights as an afterthought, not only risks exacerbating human rights violations, but also risks rendering climate change mitigation efforts ineffective. A successful and just transition to renewable energy is thus dependent upon State compliance with the obligation to

180. See Beniot Mayer, *Climate Change Mitigation as an Obligation under Human Rights Treaties?*, 115 AM. J. INT’L L. 409, 449 (2021). (“[T]here is no denial that the Human Rights Committee and the CESCR may be able to interpret the obligation of some states to protect some rights under, respectively, the ICCPR and ICESCR, as implying substantive mitigation obligations, given in particular the broad personal scope of these treaties and the potential benefits of climate change mitigation for the enjoyment of these rights in many countries.”).

181. See *General Comment No. 24*, *supra* note 30, ¶¶ 30–32 (outlining State parties’ extraterritorial obligation to protect).

182. See UNGPs, *supra* note 128, at 6.

respect, protect, and fulfil human rights. As Desierto rightly puts it, “[t]he last thing we all need . . . is for a new set of oppressive measures to be imposed to reach carbon neutrality at all costs, and in utter disregard of, and indifference to, our individual and collective civil, political, economic, social, and cultural rights.”¹⁸³

183. Diane Desierto, *Just Transitions in Climate Change Actions: Are States Respecting, Promoting, and Considering Human Rights Obligations in Setting and Implementing NDCs?*, EJIL:TALK! (Oct. 8, 2021), <https://www.ejiltalk.org/respecting-human-rights-obligations-in-climate-change-actions-are-states-evaluating-ndcs-human-rights-impacts> (critiquing States’ approaches to climate change that fail to incorporate or consider adequate human rights safeguards).