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CLIMATE CHANGE AND INDIGENOUS GROUPS: THE RISE OF INDIGENOUS VOICES IN CLIMATE LITIGATION

MUDANÇAS CLIMÁTICAS E GRUPOS INDÍGENAS: O LEVANTAMENTO DE VOZES INDÍGENAS EM LITIGÂNCIA CLIMÁTICA

MARIA ANTÓNIA TIGRE[1]
Sabin Center for Climate Change Law, Columbia Law School
435 West 116th Street, New York, NY 10027
mb4913@columbia.edu

Abstract: Climate change's pervasive human rights impacts on populations worldwide are widespread and now widely known. One avenue to address these human rights impacts is the growth of rights-based climate litigation. There are now hundreds of cases worldwide grounded on human rights claims. However, less attention has been brought to how vulnerable groups are disproportionally affected by climate change. Indigenous groups, in particular, are disproportionately affected by climate change due to their connection to their land and dependence on their ecosystems. To increase global attention and seek legal remedies to address how Indigenous communities are impacted by climate change, Indigenous groups are becoming important stakeholders in climate litigation. This article broadly discusses how Indigenous communities are negatively affected by climate change and how they use litigation to address them. The article answers these questions by bringing international, regional, and national examples.

Resumo: Os impactos das mudanças climáticas sobre os direitos humanos das populações em todo o mundo são difundidos e agora amplamente conhecidos. Um caminho para abordar esses impactos é através do crescimento da litigância climática através de argumentos baseados em direitos humanos. Existem agora centenas de casos de litigância climática em todo o mundo, que se baseiam em reivindicações de direitos humanos. No entanto, menos atenção tem sido dada à forma como os grupos vulneráveis são desproporcionalmente afetados pelas mudanças climáticas. Os grupos indígenas, em particular, são desproporcionalmente afetados pelas mudanças climáticas devido à sua conexão com seus territórios e a

1. Maria Antonia Tigre, Global climate litigation fellow at the Sabin Center for Climate Change Law at Columbia Law School, New York, USA. S.JD. at the Elisabeth Haub School of Law at Pace University. ORCID ID: https://orcid.org/0000-0003-4308-1958. The author would like to thank Fatima Maryam, J.D. Candidate 2023, CUNY School of Law and Lavinia Bhaskaruni, Esq, Research Assistant at the Global Network for Human Rights and the Environment for their incredible research assistance.

dependência de seus ecossistemas. Em um esforço para aumentar a atenção global e buscar soluções legais para abordar como as comunidades indígenas são impactadas pelas mudanças climáticas, os grupos indígenas estão se tornando importantes partes interessadas em litígios climáticos. Este artigo discute como as comunidades indígenas são impactadas negativamente pelas mudanças climáticas e como esses grupos usam a litigância climática para abordar tais impactos. Ao responder a essas perguntas, o artigo traz exemplos nos níveis internacional, regional e nacional.

Keywords: Indigenous groups, climate change, climate litigation, vulnerability.

Palavras-chave: grupos indígenas, mudanças climáticas, litigância climática, vulnerabilidade.

1. Introduction

The effects of climate change have been prevalent worldwide, from the floods in Pakistan to the droughts in China. These effects are wide ranging, encompassing physical effects on lands and territories, but also a heavy social impact. Overall, social inequality and climate change create a vicious cycle. Preexisting social imbalances cause disadvantaged groups to suffer disproportionately from the adverse effects of climate change, resulting in even more incipient inequality (Nazrul Islam S, Winkel J, 2017). Despite the global effects of climate change, these are felt differently depending on people's geography or level of vulnerability. The Intergovernmental Panel on Climate Change (IPCC) concluded that climate change "exacerbates inequalities." (Lennart O et al, 2014: 796). These include people facing discrimination based on gender, age, race, class, caste, indigeneity, and disability (Nazrul Islam S, Winkel J, 2017: 4). This article specifically addresses the challenges Indigenous groups face due to climate change, discussing some of the legal responses available to these marginalized communities.

There are an estimated 476 million Indigenous Peoples worldwide, representing 5 percent of the world's population. Indigenous and community lands, including those not formally recognized by governments, collectively cover 11 percent of the world's land (Indigenous and Community Forests | World Resources Institute Research). These include 135,400 Indigenous and community lands containing approximately 17 percent of the world's intact forest landscapes. These forests are essential sources of carbon sequestration and can significantly shift global warming trends. For example, in Brazil, Peru, Mexico, and Colombia, Indigenous and community lands sequestered more than double the amount of carbon per hectare than other areas (World Resources Institute & Climate Focus, 2022). And although Indigenous peoples comprise less than 5 percent of the world's population, these territories contain nearly 80 percent of the Earth's biodiversity, including forests, deserts, grasslands, and marine environments ("Recognizing Indigenous Peoples' Land Interests Is Critical for People and Nature"). The role of Indigenous groups is, therefore, significant in climate policy, as they have proven central to climate governance (Document Card | FAO | Food, and Agriculture Organization of the United Nations).

At the same time, Indigenous and community lands are increasingly threatened, with abuses of Indigenous peoples' land rights, the expansion of agricultural land, increased hunting and trading of wildlife, and natural resources extraction and other infrastructure activities carried out within their territories without their free, prior, and informed consent (FPIC). Furthermore, the globalization of environmental challenges like climate change and of infectious diseases such as COVID-19 have significantly impacted Indigenous communities worldwide (Tigre MA et al, 2021).

Indigenous groups in particular are disproportionately affected by climate change due to their connection to their land and dependence on their ecosystems. For example, in many places in Latin America, Afro-Latinos and Indigenous groups more prominently suffer from disproportionate climate effects (IPCC 2014: 810). According to the United Nations Report of the Special Rapporteur on the Rights of Indigenous Peoples, Indigenous peoples are among those who have least contributed to the problem of climate

change. Yet they are the ones who suffer most from its effects (OHCHR | a/HRC/36/46: Report of the Special Rapporteur on the Rights of Indigenous Peoples Climate Change).

Indigenous groups are particularly prone to extreme weather events such as floods, droughts, heatwaves, wildfires, and cyclones (IPCC 2014: 810). Many Indigenous peoples live in areas at greater risk of becoming uninhabitable, such as islands and coastal regions, as well as fragile polar and forest ecosystems. Effects on Indigenous food supply are particularly noteworthy on communities dependent on marine resources, considering the impact of climate change on oceans (IPCC: 469). In certain regions, this can force communities to abandon their lifestyles (IPCC: 448, 458). Indigenous water supply is also at risk, impacting natural resources and livelihoods, cultural identity, their capacity to pass Indigenous knowledge and culture to future generations, and, at times, their survival. (IPCC: 559, 562, 595, & 619).

Climate change also affects traditional food-gathering techniques of Indigenous communities. Rising temperatures impact frozen environments, which are integral to Indigenous culture (IPCC: 565). Glacial retreat threatens the ethnic identity of various Indigenous communities, including, for example, the Manangi community in Nepal (IPCC: 594). Furthermore, climate-related disasters will continue to worsen, significantly impacting Indigenous communities (Ranasinghe R et al, 2021). Despite these wide-ranging effects, Indigenous groups are often left out of the political discourse and climate negotiations.

Given this scenario, Indigenous groups are using a wide range of constitutional and fundamental human rights and relying on solid jurisprudence of Indigenous protection to become active players in climate litigation. As plaintiffs in climate litigation cases, Indigenous groups can level the playing field. They can compel a level of engagement and exchange often absent in standard participatory practices, allowing them more space to frame the conversation. Furthermore, they can demand to focus on the issues they want addressing, rather than relying on other people's voices, risking retelling, and reconstituting their speech. While litigation is often complex, expensive, and highly technical, it provides an opportunity for shifting the narrative of a specific project and its impacts on the affected communities. Indigenous voices in climate litigation often bring about innovative legal arguments and a wide variety of human rights uses, including the right to culture, self-determination, and the rights of nature. These constitute creative ways to use the law to compel climate action. However, without centering the voices of Indigenous people in climate change, the impact will continue to be the loss of land, culture, and lives. This article argues that climate litigation provides an additional avenue to reinforce Indigenous rights and compel further climate action.

The article is structured as follows. Section 2 provides an overview of the international law related to Indigenous groups to understand the broader context of Indigenous rights. Section 3 briefly introduces some examples of how fundamental and constitutional rights of Indigenous communities are adopted in Latin America. Section 4 introduces the topic of climate change litigation, specifically as it relates to Indigenous groups, bringing forward cases at the international level. Section 5 expressly provides an overview of

climate-related claims at the Inter-American System of Human Rights through the intersection of its Indigenous case law and its incipient green jurisprudence. Section 6 brings forward the legal theory related to the rights of nature, which is at the core of Indigenous protection of the environment. Finally, Section 7 introduces a few climate litigation claims brought by Indigenous groups at the national level. Section 8 concludes.

2. Indigenous rights in international law

Before diving into the intricacies of climate change and Indigenous groups and the legal avenues used to address their climate vulnerability through the law, it is essential to understand the broader international context of Indigenous rights. The rights of Indigenous peoples have slowly advanced at the international level. The International Labour Organisation (ILO) broadly promoted the rights of Indigenous peoples through ILO Convention No. 169 (ILO C169), concerning Indigenous and Tribal Peoples in Independent Countries (ILO C169, 1989). ILO 169 contains an environmental protection provision, ensuring a government duty to protect Indigenous territory and the environment. Article 7 states that "[Indigenous peoples] shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control [...] over their own economic, social and cultural development [...]. Governments shall take measures [...] to protect and preserve the environment of the territories they inhabit".

The Committee on the Elimination of Racial Discrimination (CERD) lays the groundwork for recognizing the collective rights of Indigenous people, particularly for religious and cultural rights and rights to own property in association with others (General Recommendation of No. 23, 1997). Activities that deprive Indigenous groups of access to resources force them to leave their territory, or negatively affect their religious practices or traditional way of life, implicating economic, social, and property rights (UNEP 2014).

The International Covenant on Civil and Political Rights (ICCPR) ensures Indigenous groups the right to enjoy their own culture, profess, and practice their religion, or use their language (ICCPR, art. 27). All peoples can freely determine their political status and pursue their economic, social, and cultural development and dispose of their natural wealth and resources (ICCPR, art. 1(1)). This grant of a collective right to control natural resources is particularly relevant for Indigenous groups as environmentally damaging activities may deny access to natural resources (UNEP & CIEL: 287). The Human Rights Committee (HRC), the treaty's supervisory body, interprets the provision to include protecting a way of life connected to Indigenous peoples' control over and use of lands and resources. Furthermore, there is a positive duty of the State to "ensure the effective participation of members of minority communities in decisions which affect them" (U.N. High Comm'r. for Human Rights-General Comment No. 23 1994, art. 27). It further states that Article 27 protects a "particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may

include traditional activities like fishing or hunting and the right to live in reserves protected by law. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole" (General Recommendation of No. 23, 1997, §§ 7,9). The HRC has used this interpretation to consistently call on State Parties to respect their duty to consult with Indigenous peoples before any economic development or granting any resource concession within their traditional lands or territories.[2]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes the right to participate in cultural life. The Committee on Economic, Social and Cultural Rights (CESCR), the treaty's supervisory body, has interpreted the provision to require consultation of Indigenous peoples to obtain consent.[3] Indeed, the CESCR has said the right to cultural life includes the rights of Indigenous peoples and called on states to respect the principle of FPIC (CESCR General Comment No. 21 2009, art. 15(1)(a)). The CESCR recognizes Indigenous peoples' collective rights to lands and resources through their right to participate in and maintain their cultures (Tigre MA, Slinger S, 2020: 13).

Land recognition is at the core of environmental protection in Indigenous territories. Recognizing Indigenous rights and protecting Indigenous lands provides a pathway for ensuring environmental protection in Indigenous and community lands (Rights and Resources Initiative 2018). As such, the right to self-determination, cultural expression, and religion include environmental aspects (Tigre MA, Slinger S, 2020).

Furthermore, the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP)[4] outlines Indigenous peoples' collective rights, including their right to practice religion, live on, and maintain their homelands, language, and collective human rights. It consists of a substantive environmental provision, although it does not refer to a quality level (UNDRIP, Art. 29(1)). Article 25 acknowledges Indigenous peoples' deep relationship with their land. The United Nations Declaration of the Rights of Indigenous Peoples, Article 1 states that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all 8 human rights and fundamental

2. Concluding observations of the Human Rights Committee: Chile at § 19 of U.N. High Comm'r. for Human Rights, U.N. Doc. CCPR/C/CHL/CO/5 on 12-30 2007); Concluding observations of the Human Rights Committee: Panama at § 21 of U.N. High Comm'r. for Human Rights, U.N. Doc. CCPR/C/PAN/CO/3 on 18 April 2008.

3. Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia, 12 and 33 of U.N. High Comm'r. for Human Rights, Committee on Economic, Social and Cultural Rights [CESCR], U.N. Doc. E/C.12/1/Add.74 on 6 December 1007); Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador, § 12 and 35 of CESCR, U.N. Doc. E/C.12/1/Add.100 on 7 June 2004.

4. United Nations Declaration on the Rights of Indigenous Peoples adopted on September 13 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].

freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[5] and international human rights law".

Another significant right of Indigenous communities relates to the duty of states to consult and seek consent (Anaya SJ, Puig S, 2017: 435). Within this context, the right to "Free, Prior, and Informed Consent" (FPIC) is particularly relevant. Recognized by ILO C169 and other sources of international law, the principle of FPIC is developed in international law as a protection mechanism for the rights of Indigenous peoples. It is imperative in investment projects and resource extraction within an Indigenous territory, as it grants the right to have a voice in decisions that concern or affect them (Ward 2011: 54). As such, it remains an essential tool in the fight against climate change, as several natural resources are located within or near Indigenous territories.

The right to FPIC derives from both hard and soft law (Tigre MA, Slinger S, 2020: 7). UNDRIP articulates FPIC concerning the right to self-determination (Ward 2011, p. 57). Consent is required for the adoption of legislation or administrative policies that affect Indigenous peoples (UNDRIP 2007, art. 19); or for undertaking a project that impacts their rights to land, territory, and resources (UNDRIP 2007, art. 32). When Indigenous peoples have unwillingly lost possession of their lands, or when those lands have been confiscated, taken, occupied, or damaged without their FPIC, they are entitled to restitution or other appropriate redress mechanisms (UNDRIP 2007, art. 28).

UNDRIP requires the participation of Indigenous peoples "in good faith" to achieve agreement or consent to the proposed measures (ILO 169, art. 6–7) and specifically compels consultation before the exploitation of resources, relocation, or transfer of land rights outside of their community (ILO 169, art. 15(2), 16(2), 17(2)). Participation shall be "meaningful and effective" and encompass "all stages of the development process," in particular when "models and priorities are discussed and decided" (International Labour Conference 2009: 672). In addition, it requires states to implement domestic legislation "to facilitate such consultations".[6] ILO C169, however, has a limited reach: it only applies to members who have ratified it (Tigre MA, Slinger S, 2020: 11). Likewise, UNDRIP is not legally binding, although it is deemed an international standard by UN human rights bodies and the Inter-American System.

The UNGA recently adopted the U.N. Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).[7] UNDROP aims to protect the rights of all rural populations, including peasants, fisherfolks,

5. UN General Assembly, Universal Declaration of Human Rights, adopted on December 10 1948, 217 A (III).

6. Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ecuador of Committee of Experts on the Application of Conventions and Recommendations [CEACR], ILO Doc. 062010ECU169 at § 4 adopted in 2010; Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala of CEACR, ILO Doc.062006GTM169, §§ 10, 13, and 15, in 2006; Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Mexico of CEACR, ILO Doc. 062006MEX169, § 10, in 2006.

7. Resolution no. A/C.3/73/L.30, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas by UNGA adopted on 30 October 30 2018.

nomads, agricultural workers, and Indigenous peoples, improve living conditions, strengthen food sovereignty, fight against climate change, and promote biodiversity conservation. The endorsement of the U.N. Declaration also constitutes an essential contribution to the international community's effort to encourage family farming and peasant agriculture. These declarations grew out of respect for the people they address and are distinct from human rights instruments. They generally recognize human rights broadly granted to humans and specific human rights characteristics of these people. Therefore, these are closer to Indigenous definitions of what they see as rights than the universal rights of all people.

The legal framework analyzed here provides examples of legal avenues that Indigenous groups can use to advance their rights related to climate-related claims. The following section examines current Indigenous claims at the international level.

3. Indigenous peoples' fundamental rights in Latin American constitutions

Most Latin American countries offer constitutional protection of Indigenous rights or state duties towards Indigenous peoples. Within Amazonia, for example, the Constitutions of Bolivia, Brazil, Colombia, Ecuador, Peru, and Venezuela all enumerate constitutional protections relating to customs and ethnic identity (Tigre MA, Slinger S, 2018). However, fewer recognize rights to land or autonomous governance and prior consultation. Beyond constitutional provisions, several countries have codified the right to consultation in federal legislation. Consultation laws can promote meaningful implementation and enforcement where international law falls short, and constitutional provisions lack concrete implementation and procedural guidance (Tigre MA, Slinger S, 2018). Most Amazonian countries have consultation and consent laws enshrined in the federal legislation, though the level of effectiveness and frequency of implementation ranges considerably. The form of federal laws also varies depending on the country, with some promulgating laws through administrative measures, others through the legislative process, and many via executive orders or decrees. This section provides an overview of the constitutional provisions related to the right to participation of Indigenous peoples in Latin America.

The Argentine constitution only briefly notes Indigenous groups through defining the powers of Congress to (art. 75(17)) to recognize the ethnic and cultural pre-existence of Indigenous Argentine peoples. Specifically, it calls for the respect to their identities, recognized legal personhood of communities, possession and property of community lands traditionally occupied, and participation in management of natural resources and other interests affecting them.

Bolivia has one of the most ambitious rights framework in Latin America, having recognized procedural and substantive constitutional environmental rights of Indigenous groups. In addition to the right to a healthy environment bestowed upon the general population, Indigenous us Bolivians were specifically granted the right to live in a healthy environment, manage and use their ecosystem (Constitución Política del Estado Plurinacional de

Bolivia Art. 30, Sec. 2(10)). They are collectively entitled to their lands and territories under Art. 20, Sec.2(6) and have the right to protect sacred places under Art. 30, Sec. 2(7). In addition, Art. 20, Sec. 2(15) mandates that groups shall be consulted by the State whenever an administrative or legislative action is taken that affects their population, as well as prior to exploitation of resources in a specific territory (Art. 352). Finally, the constitution ensures the right to participate in the benefits of natural resource exploitation in their territory under Art. 30, Sec. 2(16), as well as the right to autonomous territorial management and exclusive use and exploitation of renewable natural resources under Art. 30, Sec. 2(17).

The Brazilian Constitution ensures an Indigenous right to traditional lands within article 231. However, while Indigenous peoples have the exclusive use of its riches (Constitution of Brazil Art. 31, Sec. 2), the exploitation of Indigenous territory resources is permitted after approval by the National Congress (Const. of Brazil Art. 20, Sec. 3). Exploitation requires a constitutional hearing with affected Indigenous communities (Const. of Brazil Art. 20, Sec. 3), and is only allowed when there is a relevant public interest of the nation (Const. of Brazil Art. 20, Sec. 6). Under article 20, the exploitation is allowed because natural resources and watercourses, even inside Indigenous lands, are considered State property.

In Colombia, Indigenous groups can exercise jurisdiction and govern territories (Constitution of Colombia Art. 246, 330). Indigenous councils can supervise the application of legal regulations regarding the use of their lands, as well as design plans or policies related to economic development in their territories (Const. of Colombia Art. 330). In addition, under Art. 330, Indigenous councils can supervise natural resource conservation. However, the State has the power to manage and exploit natural resources (Const. of Colombia Art. 80). As such, the structure of Indigenous entities and their territories are subject to the oversight of the national government along with the participation of Indigenous representatives (Const. of Colombia Art. 329). It should be noted that under Art. 330 the exploitation of natural resources in Indigenous lands is not permitted where it would impair the cultural, social, and economic integrity of Indigenous communities.

Unlike other Amazonian countries, Ecuador has specifically incorporated the Indigenous concept of living symbiotically with nature, the *sumak kawsay* or roughly "the good way of living", into their Constitution (Constitution of Ecuador Art. 14). Indigenous Ecuadorians have the right to maintain ownership of their ancestral lands. They have the right not to be displaced under article 14(11), and the seizure of these territories is prohibited under article 57, Sec. 4. Furthermore, they have the right to participate in the use, administration, and conservation of natural renewable resources on their lands (Const. of Ecuador Art. 57, Sec. 6). Indeed, Indigenous groups are guaranteed the right to prior consultation about any plans for development or exploitation of nonrenewable resources that could have an environmental impact on their communities, to receive this consultation within a reasonable amount of time (Const. of Ecuador Art. 57, Sec. 1), and to participate via representatives in any legislation of public policies concerning their communities (Art. 57, Sec. 16). Furthermore, Indigenous groups shall receive compensation for social, cultural, and environmental damages caused by

exploitation within their territories (Art. 57, Sec. 16). However, the State retains ownership of all non-renewable natural resources under Art. 408.

Ratified in 1980, the Guyanese Constitution makes little mention of Amerindians. No rights are specifically reserved for Indigenous groups, though Article 35 states that Guyana "honours and respects" the diversity of peoples in the country. Additionally, Article 142(2)(b) states that the Government may take property, in accordance with the law, of Amerindians for, "the purpose of its care, protection and management or any right, title or interest." In Peru, the State has the authority to determine the national environmental policy and to control the use of natural resources, which are considered patrimony of the Nation (Constitution of Peru Art. 67, 66). While Peru has several general provisions that may relate to Indigenous groups, such as language rights and property rights, there is no constitutional provision specifically defining Indigenous rights to the environment.

Suriname's Constitution includes no mention of Indigenous rights nor duties owed to Indigenous groups by the State (Constitution of Suriname 1992). To date, Suriname continues to be in violation of mandates issued through the UNDRIP agreement, which requires recognition of Indigenous rights.[8] Unlike most of Latin America, Suriname has not adopted ILO C169. In 2007, Suriname found itself in the Inter-American Court of Human Rights on this very issue in the case of *Saramaka People v. Suriname*. The Court found that Suriname had violated the Saramaku people's right to prior consultation, "regarding large-scale development or investment projects that would have a major impact within Saramaka territory". Despite finding that Suriname had a duty to consult with Indigenous groups and obtain prior consent, the country has not adopted formal measures at the federal level to recognize this right.

Venezuela ratified its current Constitution in 1999. Chapter VIII separately enumerates native rights. The document recognizes within Art. 119 the existence of Indigenous peoples and lands, the inalienability of their collective ownership of these lands, as well as the responsibility of the State to demarcate protected territories with Indigenous participation. The right to prior consultation is also reserved, providing "exploitation by the State of natural resources in Indigenous habitats shall be carried out …subject to prior information and consultation with the respective Indigenous communities" (Constitution of Venezuela Art. 121).

4. The use of litigation to advance an Indigenous climate agenda: Indigenous climate-related claims at the international level

As climate change's effects threaten Indigenous groups' lives, livelihoods, and way of life, climate litigation will likely increase, based on a broad range of human rights such as those mentioned in the preceding section. While

8. NGO Cultural Survival reports in its assessment of Indigenous rights in Suriname, *Observations on the State of Indigenous Human Rights in Suriname In Light of the UN Declaration on the Rights of Indigenous Peoples* which was prepared for the U.N. Human Rights Council, that its Constitution ignores UNDRIP requirements found in Art. 6, 26, 27, and 33 mandating recognition of Indigenous peoples.

Indigenous claims relating to climate change at the international level are still limited, the existing case law already provides a solid example of how successful Indigenous rights can be for climate litigation.

On September 23, 2022, the United Nations Human Rights Committee (UNHRC) delivered a landmark decision in *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (United Nations Human Rights Committee Case CCPR/C/135/D/3624/2019, 2022) finding that the Australian Government is violating its human rights obligations to the Indigenous Torres Strait Islanders through climate change inaction. The eight Torres Strait Islanders are Indigenous inhabitants of Boigu, Poruma, Warraber, and Masig, four small, low-lying islands in Australia. The Torres Strait Islands are a group of over 100 islands off the northern tip of Queensland, between Australia and Papua New Guinea (Native Title Report, 2008). It is home to a diverse Indigenous population of over seven thousand people in 19 communities across 16 islands. Each community is distinct, with its traditions, laws, and customs. Their cultures, societies, and economies rely heavily on their ecosystem. Yet climate change is severely impacting these low-lying island communities. Tides are rising yearly, flooding homes, lands, and important cultural sites. Rising sea temperatures impair the health of marine environments around the islands through coral bleaching and ocean acidification. As a result, the Indigenous people of the Torres Strait Islands are among the most vulnerable populations to the impact of climate change.

In May 2019, a group of eight Torres Strait Islanders and six of their children submitted a complaint (UNHRC Complaint Communication under the Optional Protocol to the ICCPR, 2019) against the Australian government to the UNHRC (Complaint of Torres Strait Islanders to the United Nations Human Rights Committee, 2019). This was the first legal action grounded in human rights brought by climate-vulnerable inhabitants of low-lying islands against a nation-state and alleges that Australia's insufficient climate action has violated their fundamental human rights under the ICCPR, specifically Article 6 (the right to life), Article 17 (the right to be free from arbitrary interference with privacy, family, and home), and Article 27 (the right to culture). They also claim violations of the rights of the six children under Article 24(1) (right of the child to protective measures) (International Covenant on Civil and Political Rights, 1966).

The Islanders claimed that changes in weather patterns have negatively impacted their livelihood, culture, and traditional way of life. Their minority culture depends on their islands' continued existence and habitability, as well as the ecological health of the surrounding seas. Recent severe flooding caused by tidal surges has destroyed family graves and left human remains scattered across their islands. For these communities, maintaining ancestral graveyards and visiting and communicating with deceased relatives are at the heart of their cultures. In addition, the most important ceremonies, such as coming-of-age and initiation ceremonies, are only culturally meaningful if performed in the community's native lands. The Islanders also argued that changes in climate with heavy rainfall and storms have degraded the land and trees and consequently reduced the amount of food available from traditional fishing and farming. Sea level rise has caused saltwater to intrude into the islands' soil, so areas previously used for traditional gardening can

no longer be cultivated. In addition, precipitation, temperature, and monsoon seasons have changed, making it harder for them to pass on their traditional ecological knowledge. The Torres Strait Regional Authority (TSRA) (Torres Strait Regional Authority, n.d.), a government body, has stated that even small increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability, and "large increases would result in several Torres Strait islands being completely inundated and uninhabitable".

The complaint argues these violations stem from insufficient climate mitigation targets and a general failure to cease to promote fossil fuel extraction and use. Australia has one of the world's highest per capita GHG emissions and has failed to commit to increased emissions reductions in recent years. Furthermore, the Islanders argue that the State has failed to adopt adaptation measures, despite numerous requests for assistance and funding by or on behalf of the Islanders.

In analyzing the complaint, the Committee contemplated whether Australia violated human rights, where the harm to the individual allegedly resulted from its failure to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory. The Committee found that Australia's failure to adequately protect Indigenous Torres Strait Islanders against the negative effects of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family, and home. As such, the Committee noted, concerning current predicaments, that "the authors – as members of peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is *uncontested* that the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them".

The Committee did not find a violation of the right to life under the Covenant since some mitigation and adaptation measures were already in place. Furthermore, there was no "real and foreseeable risk" (the standard applied in *Teitiota*) yet. Several Committee Members wrote dissents on the majority's decision that there was no violation of the right to life (Tigre MA, 2022).

In assessing a violation of their right to private, family, and home life (art. 17), the Committee considered the erosion and flooding of the islands. The Committee recalled that "when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family, and home of individuals under their jurisdiction". The Islanders' dependence on fish and other marine resources, land crops, trees, and the overall health of the surrounding ecosystem, which are essential to the traditional Indigenous way of life, requires States to adopt positive measures to ensure their rights are protected. Despite Australia's extensive efforts regarding the Torres Strait Islands, the State had failed to construct a series of adaptation measures requested by the Islanders or address the concerns over the lack of food. The Committee considered the Islanders' spiritual connection with their traditional lands and

the dependence of their cultural integrity on the health of their surrounding ecosystems. It therefore found that Australia's failure to take timely and adequate measures to protect the Indigenous Islanders against adverse climate change impacts and secure the communities' safe existence on their islands led to the violation of their rights to private life, family, and home.

Concerning the protection of the traditional Indigenous way of life (art. 27), which is closely associated with territory and the use of its resources, the Committee assessed the assertion that the Islanders' ability to maintain their culture has already been impaired by climate change. For example, climate change has impacted traditional fishing, farming, and cultural ceremonies. The Committee found that the State party's failure to adopt timely adequate adaptation measures to protect the Islanders' collective ability to maintain their traditional way of life, transmit to their children and future generations their culture and traditions, and use land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. The Committee further recalled that "article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion".

The Committee asked Australia to compensate the Indigenous Islanders for the harm suffered, engage in meaningful consultations with their communities to assess their needs, and take all necessary measures to continue to secure the communities' safe existence on their respective islands.

The decision has set several ground-breaking precedents for international human rights law and is significant for pending and future rights-based climate litigation cases (Tigre MA, 2022). First, it represents the first time a U.N. body has found a country has violated international human rights law through inadequate climate policy, adding strong support to the idea that human rights law applies to climate harm. Second, it is the first time that Indigenous peoples' right to culture has been found to be at risk from climate impacts. The protection of vulnerable groups is significant, and the case opens the door for further legal actions and compensation claims by other climate-affected people. Third, the Committee recognized that climate change was currently impacting the claimants' daily lives and that, to the extent that their rights are being violated, Australia's poor climate record is a violation of their right to family life and right to culture under the ICCPR. The recognition of Australia's responsibility further indicates – as several decisions at the national level have also – that States can no longer hide behind the drop in the ocean argument and fail to take charge of their responsibility for climate mitigation. The decision also specifically called on Australia to adopt significant climate adaptation measures. While the majority found no violation of the right to life, the arguments raised in the dissent are worth paying attention to, as these can be further developed in future cases, where the facts might be more settled for establishing a

violation of the right to life. For Australia, the government must now take decisive steps to protect the human rights of the Torres Strait Islanders, investing in adaptation measures and drastically reducing overall emissions. The Australian government can no longer ignore the fact that climate change is a human rights issue that is taking effect now. The Committee's request for compensation of the claimants further develops the concept of loss and damage, which is often neglected in Australian – and Global North countries in general – climate discourse.

In addition to the groundbreaking decision in the Torres Strait Islanders case, two pending complaints by Indigenous groups were submitted to the U.N. Special Procedures. These two petitions currently pending before the United Nations Special Procedures also bring Indigenous petitioners and rely on the rights of Indigenous groups to claim for increased climate action by the governments of the U.S. and Australia.

On January 15, 2020, five U.S. tribes in Alaska and Louisiana submitted a complaint to multiple U.N. special rapporteurs, claiming that the U.S. government is violating its international human rights obligations by failing to address climate change impacts that result in forced displacement (Rights of Indigenous People in Addressing Climate-Forced Displacement v United States, 2020). The complaint is the first to address internal displacement due to climate-related effects specifically (Francis A, 2020). Framing climate displacement as a human rights issue, the complaint joins many legal challenges that use international human rights law to hold governments accountable for climate change. Tribal leaders claim that climate change compromises their human rights, including rights to life, health, housing, water, sanitation, and a healthy environment, and point to various impacts as evidence, such as their lost ability to trap, fish, and farm; increased flooding and saltwater intrusion; and exceedingly high rates of coastal erosion in Louisiana.

The Alaska and Louisiana Tribes call on the U.N. special rapporteurs to pressure the U.S. to recognize climate-forced displacement as a human rights crisis and take actions to address displacement; including by acknowledging self-determination and inherent sovereignty of all of the tribes, funding the tribal-led relocation processes for the native village of Kivalina and Isle de Jean Charles, and granting federal recognition to the named tribal nations in Louisiana so they can access federal resources for adaptation and disaster response. The complaint, which brings forth five U.S. Indian tribes, the Point-au-Chien Indian Tribe, Grand Caillou/Dulac Band of Biloxi-Citimacha-Cochtow Tribe, the Atakapa-Ishak Chawasha Tribe of the Grand Bayou Indian Village, and the Native Village of Kivalina, alleges the U.S. government violated their human rights in failing to address climate displacement (United Nations, Special Rapporteurs, 2020). This failure has resulted in these tribes' ancestral homes being buried and lost due to severe flooding caused by climate change (Rights of Indigenous People in Addressing Climate-Forced Displacement v United States, 2020: 9). The complaint further notes that the U.S.' inaction goes beyond regular negligence and puts these tribes at risk of ceasing to exist (Rights of Indigenous People in Addressing Climate-Forced Displacement v United States, 2020: 9). The complaint also asks the special rapporteurs to

recommend that the federal, Alaska, and Louisiana state governments set up an institutional relocation framework that guarantees the protection of the right to culture, health, safe drinking water, and adequate housing. Within the request for such complaint, it elaborates on the international legal framework that the U.S. is allegedly violating, such as the Declaration on the Rights of Indigenous Peoples and the Guiding Principles on Internal Displacement (Rights of Indigenous People in Addressing Climate-Forced Displacement v United States, 2020: 11-12). The case provides an additional avenue for the claim that grows out of the Indigenous relationship with nature. Importantly, any response from the complaint will not binding. However, it might effectively draw the U.S.'s attention to climate change affecting those within its borders.

In October 2021 a petition was submitted to United Nations Special Procedures by Environmental Justice Australia (EJA) on behalf of several young Australians. The petition relies on the climate vulnerability of young people, First Nations people, and people with disabilities. It argues that climate change exacerbates existing inequalities and directly undermines their health and cultural rights (Environmental Justice Australia, 2021). The complaint explicitly mentions harm suffered and future harm that may be suffered due to climate change (Environmental Justice Australia v. Australians, 2021: 3-4). Akin to the case of the Indigenous in the preceding paragraph, the Indigenous in Australia also assert that their right to culture is being infringed upon due to climate change destroying First Nations' connection to their country (Environmental Justice Australia v. Australians, 2021: 2-3). The complaint calls on the Special Rapporteurs to seek an explanation from Australia on (i) how the State's climate inaction is consistent with its human rights obligations; and (ii) how the current conduct is compatible with the human rights of young Australians and a pathway towards limiting the temperature increase to 1.5°C above pre-industrial levels; and (iii) how the current NDC has involved young people in Australia and whether the State will establish a permanent forum to include young people from impacted communities. In addition, the complaint calls on the Special Rapporteurs to urge Australia to set a 2030 emissions reduction target consistent with its human rights obligations.

Indigenous people in the United States have difficulty litigating cases based on international law because of the U.S.'s notorious reluctance to ratify international treaties. Although the U.S. is a party to the ICCPR, it is not a party to any other international human rights law treaty. Despite this lack of ratification, per the U.S. Constitution's Supremacy Clause, international legal tenants supersede federal law of the U.S. Hence, for claims based on international human rights law to succeed within a court of law in the U.S., they should be based on one of the few treaties of which the U.S. is part. If choosing a forum outside of the U.S., parties must be prepared for the U.S. to not adhere to any penalty given. Furthermore, the U.S. does not recognize judgments from international courts, like the International Criminal Court, as it does not acknowledge these courts' jurisdiction.

5. Indigenous climate claims at the Inter-American System of Human Rights

At the regional level, the American Declaration of the Rights of Indigenous Peoples, adopted in 2016, recognizes that the rights of Indigenous peoples are both "essential and of historical significance to the present and future of the Americas (American Declaration on the Rights of Indigenous Peoples, 2016)". An essential forum for adjudicating Indigenous rights lies in regional human rights courts. The Inter-American System of Human Rights (IASHR), through its bodies, the Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), has been particularly active in ensuring Indigenous rights to lands, water, and nature.[9] The rich jurisprudence related to Indigenous rights in the IASHR has been widely studied in legal scholarship. For example, in *Sawhoyamaxa Indigenous Community v. Paraguay*, the IACtHR demanded Paraguay to return land stolen from the Sawhoyamaxa community, as it cut off the Sawhoyamaxas' source of water.[10] Yet, more recently, the IACtHR has taken a "green turn" by explicitly recognizing the right to a healthy environment and opening doors for the advancement of the rights of nature (as discussed in the next section) and climate change claims. This section analyzes this recent jurisprudence and the two climate-related claims at the IASHR.

The IACtHR's Advisory Opinion 23/17 significantly advanced environmental rights by relying both on traditional human rights law and on an autonomous right to a healthy environment that is "fundamental to the existence of humanity" (OC23-17, § 59). The Court underscored the unquestionable link between environmental protection and the realization of other human rights affected by environmental degradation, thus reaffirming the interdependence and indivisibility of human rights (OC23-17, § 47, § 54, § 55, § 57, § 192; Tigre MA, Urzola N, 2021: 43).

Given the worsening of an already deteriorating environment, the Court's environmental and human rights development is essential. Citing precedents from regional and international courts, international instruments, and U.N. resolutions, the Court made clear that a wide range of rights could be adversely affected by the lack of a healthy environment. The Court has interpreted the American Convention as a living instrument, using a transformational and systematic approach (OC23-17, § 43-44). The majority invoked the reasoning in *Lagos del Campo v. Peru*, where the Court had previously declared a violation of the right to a healthy environment, considering it directly 'justiciable', as it falls under the Declaration-based contentious jurisdiction of the San José Tribunal.[11] This development is

9. Inter-American Commission on Human Rights, Indigenous and Tribal Peoples' Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, American Indian Law Review, 263 - 2017; 35 Am. Indian L. Rev. 263; 356 (2017).

10. Inter-American Court of Human Right decision of 29/03/2006, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, (ser. C) No. 146, 117.

11. Inter-Am. Ct.H.R. Ruling of 31/08/2017, *Lagos del Campo v Peru* (Preliminary objections, merits, reparations, and costs). Delivered in IACHR (ser C.) No. 340.

critical as it brings a particular cause of action for environmental degradation and climate change, specifically within the IAHRS.

In addition to recognizing the right to a healthy environment, the Court expressly acknowledged the right to life related to the environment, noting that an adequate environment, with access to water and food, is essential to human life. It emphasized the interdependence and indivisibility between human rights, the environment, and sustainable development. This interpretation relies on how the full enjoyment of all human rights depends on a favorable environment (Campbell-Duruflé C, Atapattu SA, 2018: 321-337). The Court further emphasized the mechanisms necessary to ensure that such rights are enforced in line with those recognized in the Escazú Agreement. It recognized the obligation of States to, for example, abstain from any practice that denies or restricts access to water or food and that illicitly contaminates the environment, affecting the conditions required for a dignified life (Tigre MA, Urzola N, 2021: 117). This requirement implies a 'positive environmental justice', which concerns itself with human impact on the environment and the benefits it provides us, which should be equitably accessed (Cordella EC, Burdiles G, 2019).

The Court highlighted that this right has both individual and collective dimensions: it refers to direct and indirect repercussions according to its connection with other human rights while also applying to present and future generations (Tigre MA, Urzola N, 2021). Reaffirming the interdependence and indivisibility of human rights, the IACtHR noted the unquestionable link between environmental protection and the realization of other human rights affected by environmental degradation and the adverse effects of climate change (OC23/17, § 47, § 54, § 55, § 57, § 192. Without a healthy environment, human rights may be extensively violated (Tigre MA, Urzola N, 2021; OC23/17, § 59). The Court notably recognized the impact of climate change on vulnerable populations, such as Indigenous peoples, children, and those living in extreme poverty (OC23/17, § 47-48).

The Opinion extends and strengthens the growing body of law confirming States' obligations to protect the right to a healthy environment. The possibility of holding States responsible for failing to regulate and control environmental damage is one of the significant contributions of an autonomous right to a healthy environment. The precedent that the IACtHR set will likely empower communities within and beyond Latin America to ensure that legislation follows regional human rights standards.

The Court's Opinion was groundbreaking as it strengthened the relationship between human rights and the environment and rendered the right to a healthy environment directly 'justiciable' under the Convention (Tigre MA, Urzola N, 2021: 44). The Court's jurisprudence advanced the protection and enforcement of environmental rights, which is essential in the context of climate change. One of the main contributions of the Advisory Opinion is the possibility of holding States responsible for failing to regulate and control environmental damage (Peel J, Osofsky HM, 2013: 166). The use of the right to a healthy environment could prove beneficial to questioning activities that increase GHG emissions, such as deforestation or building critical habitats for biodiversity.

In 2020, the IACtHR declared in *Indigenous Communities Members of the Lhaka Honhat Association v. Argentina* (*Lhaka Honhat*, 2020) that Argentina violated Indigenous groups' communal property, the rights to a healthy environment, cultural identity, food, and water (Cabrera A et al, 2020). Unprecedented in a contentious case, the Court analyzed these rights autonomously, based on Article 26 of the American Convention, and ordered specific restitution measures, including the recovery of forest resources (*Lhaka Honhat*, 2020: § 201). The decision marks a significant milestone for expanding autonomous rights to a healthy environment, water, and food. These rights, which were not expressly included in the American Convention previously, are now directly justiciable under the IAHRS (Tigre MA, 2021: 706).

As an autonomous right, the Court recognized that the right to a healthy environment protects several components of the environment, including forests, seas, and rivers. This interpretation indicates an openness to recognizing the rights of nature (Tigre MA, 2021: 706). The IACtHR specified that the right to a healthy environment requires not only an obligation to respect but also to guarantee compliance to prevent violations (American Convention, Art. 1.1). The duty to prevent covers legal, political, administrative, and cultural measures that safeguard human rights and ensure that violations are treated as unlawful facts. This obligation relates to the behavior; non-compliance is not demonstrated simply by a rights violation (*Lhaka Honhat*, 2020: § 207).

The clarification of this positive obligation is crucial. Clarifying the autonomous right to a healthy environment can imply greater security for environmental standards through the progressive development of international environmental law when States must prevent environmental damage from a human rights perspective (Boyle A, 2021). The principle of prevention implies the States' obligation to carry out the necessary measures *ex-ante* of environmental damage, considering that, due to their particularities, it will often not be possible to restore the situation after the damage. Therefore, through a standard of appropriate due diligence, which shall be proportionate to the risk of environmental harm, States must use all means to prevent activities carried out under their jurisdiction from causing significant environmental damage (Tigre MA, 2020). States can fulfill this duty by (i) regulating, (ii) supervising, (iii) requiring and approving environmental impact assessments, (iv) establishing contingency plans, and (v) mitigating in cases of environmental damage (*Lhaka Honhat*, 2020: § 208).

The fact that the Court is starting to take positive action towards clarifying the autonomous right to a healthy environment could help secure environmental standards through the progressive development of international environmental law, strengthening the emergent obligation to prevent environmental harm from a human rights perspective (Boyle A, 2021: 613, 641). The interpretation of the right to a healthy environment as an 'autonomous' right indicates its dissociation, mainly from property rights, which may lead to more suitable forms of reparation for environmental damages already suffered by Indigenous communities and likely to continue in the absence of state action and supervision by the IACtHR (Garcia B,

Lixinski L, 2020). Clarifying the autonomous right to a healthy environment could thus entail securing environmental standards through the progressive development of international environmental law, strengthening the emergent obligation to prevent environmental harm from a human rights perspective (Boyle A, 2021: 613). Indigenous claims based on environmental damage, lack of access to water, or the effects of climate change could soon be brought based on the Court's evolving jurisprudence.

Concomitantly to developing a green jurisprudence of the IAHRS, there are four climate cases at the IACHR – one dismissed and three pending. Two specifically relate to Indigenous groups. The increase in cases results from recognizing the link between human and social dimensions of climate change to pursue climate justice (Pillay N, 2012). Human rights remedies can provide some redress for climate-related harms framed in terms of human rights violations. While still embryonic within the IAHRS and with one unsuccessful decision, human rights violations from climate change have recently taken prominence at the regional level.

Given the prevailing jurisprudence on Indigenous rights, claims by Indigenous groups have a more straightforward pathway toward recognition (Abate RS, Kronk EA, 2013). As one of the earliest attempts to use international human rights law in climate litigation, the Inuit Circumpolar Conference (ICC)'s petition to the Commission sought relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States (Osofsky HM, 2007: 675). The Inuit petition articulated a novel "climate rights" frame that emphasized climate change's moral dimensions and brought forward marginalized communities' voices (Allan JI, Hadden J, 2017). For the first time, plaintiffs presented a novel set of legal arguments to hold a state responsible for the human rights impacts of climate change (Jodoin S et al, 2020: 168-169). The claim was lodged in 2005 by a group of Inuit petitioners challenging the U.S.' historical GHG emissions (Petition to the Inter-American Commission on Human Rights on 07/12/2005, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States). The petitioners argued that climate policy failures contributed to the harmful effects of climate change damage in the Arctic.

The petition had mitigation and adaptation claims, and questioned the adverse effects of climate change on vulnerable populations. It sought relief from ESCR violations and requested (i) the adoption of mandatory measures to limit GHG emissions, (ii) consider their impacts on the Arctic, (iii) establish and implement a plan to protect Inuit culture and resources, and (iv) provide necessary assistance to the Inuit to adapt to unavoidable climate impacts. The dominant argument for this type of case is that the governments most responsible for global emissions should transform their energy policies and assist communities in other countries suffering from climate-related harm and lacking means of their own to adapt despite their low emissions.

Climate displacement evidences the significant vulnerability of cultural rights and the rights of indigenous peoples. The Inuit people alleged that the impacts of global warming constituted a violation of their human rights, including their right to the benefits of culture, property, the preservation of health, life, physical integrity, security, and a means of subsistence, and

residence, movement, and inviolability of the home (Tsosie R, 2007: 1663). The case is based on the Inuit's status as a distinct people, unified in their cultural values and practices and belonging to their traditional lands and territories irrespective of the political boundaries of the nation-states. The petition is illustrative of recent environmental justice claims, as this is not a sovereignty claim but rather a claim for "environmental self-determination" (Tsosie R, 2007: 1670). While unsuccessful, the case opened the door for future ones, especially regarding the recognition of the claims of Arctic people and "the right to be cold" (Jodoin S et al, 2020).

One of the reasons for the barriers to legal adjudication of climate change is the difficulty of proving harms under traditional legal frameworks of individual causality due to scientific uncertainty and the 'drop in the ocean' arguments (Gloppen S, Vallejo C, 2020). In this early climate litigation case, the IACHR rejected the petition arguing a lack of proof of actual rights violation and damages suffered by the Inuit peoples and issued no precautionary measures. The application was deemed inadmissible because it had not sufficiently determined whether the alleged facts would characterize a violation of rights protected by the American Declaration (Dulitzky AE, 2006).

While this line of litigation has not yet been successful, litigation on the right to family, culture, and livelihood specific to migration is likely to gain momentum with more widespread human displacement related to the effects of climate change (Gloppen S, Vallejo C, supra note 94). While the petition ultimately failed to assign any climate responsibility to the United States, it exerted legal influence at the international level by jumpstarting the connection between human rights and climate change (Jodoin S et al, 2020: 22-24). In addition, the petition "has had some indirect regulatory influence, particularly in terms of changing norms and values through increasing the public profile of Arctic climate change impacts (Peel J & Osofsky HM, 2013)". It also advanced the development of environmental justice claims of indigenous groups by opening the dialogue about the link between climate change and human rights and its effects on indigenous communities (Jaimes V de la R, 2014).

The second petition presented to the IACHR alleging violation of human rights caused by the adverse effects of climate change concerns the rights of Arctic Athabaskan peoples resulting from rapid Arctic warming caused by Canada's carbon emissions (Petition to the Inter-American Commission on Human Rights on 04/13/2013, Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada). In 2013, the Arctic Athabaskan Council (ACC) asked the IACHR to declare that Canada's failure to implement adequate measures to reduce its black carbon emissions substantially violates rights affirmed in the American Declaration; and recommend that Canada take steps to protect the rights of Athabaskan peoples within and without Canada, by adopting measures to limit emissions of black carbon (Black Carbon Petition, 2013: 86). The petition is still pending.

The Athabaskan petition bears several similarities with the Inuit petition. Like the Inuit, the Athabaskan peoples depend on natural resources for their

livelihood and acutely feel the effects of climate change. The petitioners claim that Canada's failure to implement adequate measures to reduce black carbon emissions potentially violates the rights to the benefits of culture, property, health, and the means of subsistence (Black Carbon Petition, 2013: 3-5; 78). They further argue that Canada has a duty under the American Declaration not to degrade the Arctic environment, and continued degradation infringes upon the Athabaskan peoples' right to enjoy the benefits of their culture.

The petitioners comprehensively analyzed and evidenced the human rights violations suffered by them. Given their close ties to their lands and environment, Arctic warming and melting adversely affect their traditional knowledge and ability to educate future generations, which is vital to their survival (Szpak A, 2020: 1576-1577). Additionally, the preservation of cultural and historic sites has been threatened. Climate change compromises the integrity of the land, as waterways, riverbanks, airstrips, roads, and houses are destroyed. Further, the use and enjoyment of their lands are threatened as ice is traditionally used for travel, hunting, camping, and accessing resources necessary for their subsistence and traditional knowledge. The loss of traditional foods and water pollution further influence their health.

The pending petitions on climate change before the Commission now count on the Court's recognition of an autonomous right to a healthy environment, which could pave the way for a different result from the Inuit petition. The Court's openness to the recognition of environmental rights - and extraterritorial jurisdiction, as explained below - suggests fertile ground for future litigation across the IAHRS. Auz argued that one of the most salient reasons for the dismissal of the Inuit petition was the absence of a right to a healthy environment in the American Convention (Auz J, 2018). With the advent of the advisory opinion and the *Lhaka Honhat* decision, the arguments posed by the petitioners gained force as a State's actions not only infringed on the mentioned human rights but also the right to a healthy environment, which is now part of the human rights protected by the IAHRS.

Similarly, within the African context, the Ogoni Case before the African Commission on Human and People's Rights related to the withholding of information by the oil company Shell on the dangers of oil activities from the Ogoni communities. The complaint addressed the obligations of the Nigerian state to refrain from violating the rights to health, the right to a healthy environment, the right to housing and the right to food (The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 2001). The African Commission found that the former military government of Nigeria violated rights of the Ogoni people in connection with state violence and abuses around oil development in the Niger Delta. The Commission called on the Nigerian government to ensure protection of the environment, health, and livelihood of the people of Ogoniland.

6. Rights of Nature

In parallel with more direct climate-related claims, essential in Indigenous environmental protection is the recognition of the rights of nature. Given Indigenous peoples' direct connection to nature and the development of the rights of nature from Indigenous knowledge and tradition, this innovative rights-based approach become an important avenue for climate cases. Since 2009, states and civil society have progressively acknowledged the interdependence between humans and nature under the umbrella of the U.N. Harmony with Nature (HwN) framework (UN Harmony with Nature Programme) Appreciation of the intrinsic value of nature, regardless of its usefulness to humans and its role in sustaining human well-being, complementing human rights, is expressed as the Rights of Nature.

The rights of nature movement originate from two sources. First, customary indigenous jurisprudence emphasizes nature's living and indivisible qualities (Tigre MA, 2022: 223-313). The traditional Indigenous ideology of Mother Earth is grounded on protecting nature as a whole (Shelton D, 2013: 104). Building on this notion, the rights of nature were first proposed in the Western legal world in the 1970s and further expanded more recently (Stone CD, 1972). Scholars have argued that human beings are merely one element of a complex, global system, which should be preserved for its own sake. Philosophically, it is a pushback from the anthropocentric view of the environment as an instrument for providing human health and well-being (Boyd DR, 2017: 40). There is an important moral dimension to supporting the broader case for environmental entities as rights-bearing subjects: that as a matter of justice and socially agreed-upon rights, the environment is entitled to specific claims regarding the nature of its existence.

The rights of nature, also called Pachamama, go beyond a human rights approach to the environment. Instead, it recognizes standing for the natural environment, based on the notion that non-humans (including trees, rivers, and mountains, among other living beings) should also have legal rights. It thus invokes a rights-based approach that recognizes the ecosystem as a right-bearing entity that holds value in itself, apart from its human use. This procedural aspect is crucial as it provides an additional avenue for the advancement of climate litigation by Indigenous groups.

Historically, the rights of nature have been featured in many systems of indigenous customary law (Pecahrroman LC, 2018). The widely-held notion of Mother Earth or Pachamama evokes the idea of nature as having legal personality and rights. Many indigenous communities recognized nature as a subject with personhood deserving of protection and respect rather than a commodity over which a property right could be exercised (Herold K, 2017). Such systems often identify humans as part of a larger, indivisible natural order rather than masters over it. In this model, human beings are subsumed by the natural environment and owe duties towards it as stewards of natural resources searching for a harmonious relationship with nature. For example, the New Zealand Māori concept of *kaitiakitanga* emphasizes stewardship, rather than ownership, over natural resources (New Zealand Law Commission, 2001). The South American Kichwan notion of Sumak Kawsay renders a harmonious relationship with nature essential to leading a good life and rejects the need for continuous accumulation and

exploitation of resources (Lalander R, 2014). Indigenous legal systems provide an important precedent for developing the modern-day rights of nature movement.

The rights of nature mean that justice is owed to nature due to its intrinsic characteristics (Tanasecu M, 2016: 80). The view fits with the rights-reasoning and has been used by advocates to justify why anything is owed to the environment. Similarly, indigenous wisdom and traditions have been brought to substantiate the claim of our moral debt to nature, with deep indigenous and philosophical roots (Tanasecu M, 2016: Chapter II). The notion that we are all in an ecologically interconnected web also supports the idea of owing nature its demands (Tanasecu M, 2016: Chapter II).

Those who recognize the rights of nature seek to promote a worldview whereby human rights are dependent on, and cannot be realized without, the recognition and defense of the rights of Mother Earth. The relationship between the rights of nature and human rights is thus seen not as one of equivalence. Instead, what is proposed is for the rights of nature to trump those of humans, with the latter proscribed by the former (Humphreys D, 2015). However, evidencing how our legal systems failed to prevent habitat destruction, more people are questioning the continued refusal to expand the scope of legal rights to encompass rights for nature (Cullinan C, 2008).

The modern rights of nature movement is often traced to Christopher Stone's 1972 article, *Should Trees Have Standing?* (1972). The starting point of Stone's analysis is that it was no more absurd for nature to have rights than any other routinely recognized nonhuman legal persons, such as ships or corporations (Stone CD, 1972: 452). Stone analyzed the history of the rights-bearing subject, noting that the line of who or what is legally a person has permanently shifted. From slaves to women, African Americans, fetuses, animals, and corporations, Stone argued that the answer to the question 'who is entitled to rights?' has changed over time. Based on this rationale, there is no intrinsic reason why environmental entities could not lay claim to legal rights (Stone, 1972: 452). For Stone, the need for such a right was clear: in the absence of a right of standing, neither environmental groups nor nature itself could defend itself in court. Stone argued that the right incorporated due process and planning rights found in traditional environmental protection law (Stone CD, 1972: 482-85), as well as a substantive right to protection against irreparable damage (Stone CD, 1972: 485-86). Procedurally, he argued that a right of nature must be more than symbolic. Instead, the right must include powers to bring legal proceedings, receive relief for injury, and apply that relief for nature's benefit (Stone CD, 1972: 458). Stone thus conceived of the right as incorporating a right of standing to be exercised by a 'friend' of the natural object through an application for guardianship who could claim relief for the injury incurred by nature as a consequence of human activity (Stone CD, 1972: 464-465; 475-480).

Stone's conception of a right of nature as a right for others to litigate on its behalf has been influential in the U.S. and abroad. His 1972 article was cited with approval by Justice Douglas in the U.S. Supreme Court, dissenting in the case of *Sierra Club v. Morton.* 405 U.S. 727 (1972). His ideas were further developed by the environmental historian Roderick Nash in 1989. Drawing

heavily on parallels to the antislavery movement, Nash maintained that rights of nature were the logical extension of a gradual move to extend the scope of natural rights within humankind and then to nonhuman phenomena (Nash R, 1989: 4-9). For Nash, the rights of nature are the inevitable culmination of the rights project.

Other scholars have developed different theoretical explanations for the right. For example, Leimbacher adopts a utilitarian approach, arguing that a right of nature is necessary to avoid global environmental catastrophe (Leimacher H, 1997: 146). Bosselman's influential 1992 work argued for a complete redesign of the state to recognize equivalence between human and natural rights, shifting away from the anthropocentric nature of law and providing a radical alternative to Stone's modest conceptualization of rights of standing (Bosselmann K, 1992). Some constitutional theorists have argued that the rights of nature are necessary to preserve conditions to allow future generations to participate in the constitutional project (Colón-Rios J, 2014; Brei AT, 2013). There is now a developed body of scholarship promoting the rights of nature on a range of philosophical justifications.

Berry's jurisprudence also expanded the rights of nature. Because the universe is "a communion of subjects and not a collection of objects," he contends that "each component of the universe is capable of having rights" (2006). Berry's approach to the debate is unique, and his use of the term 'rights' is more comprehensive than commonly employed in law, as it relies on the principle that other natural entities are entitled to fulfill their role within the Earth Community (Cullinan C, 2011). In this sense, Berry differentiates the type of rights granted to nature from that given to humans (Tanasescu M, 2016: 77).

An important question, however, is which specific rights each member of the 'earth community' is entitled to (Cullinan C, 2008: 16). Stone clarifies that "to say that the environment should have rights is not to say that it should have every right we can imagine or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment" (1972). Tanasescu clarifies that the idea of nature rights rests on a cluster of related concepts, which, from a theoretical and practical point of view, can be applied to the environment as such without formal contradiction (2017: 77).

There are three basic rights that Cullinan, following Berry, proposes: "the right to be, the right to habitat, and the right to fulfill [one's] role in the ever-renewing process of the Earth Community" (Cullinan C, 2008: 22). The Ecuadorian constitution granted these rights to nature in 2008. Ecuador was the first country to establish the constitutional rights of nature. By recognizing that nature has the fundamental and inalienable right as a valuable entity in and of itself, the constitution opened the possibility to assign liability for damage and hold the government responsible for any reparations.

Defining the rights of nature requires identifying its practical meaning. The holder of rights is entitled to call upon the courts to enforce that right in relation to others. Additionally, having rights mean that there is a corresponding duty – from someone else or the world – not to infringe on

that right (Cullinan C, 2008: 17). A distinguishing feature of a legal right is that the law provides a remedy to rectify any breach of that right. The existence of a remedy is essential to transform an abstract expression of social value, such as a right, into specific, tangible consequences (Thomas TA, 2004). This remains the main challenge in developing the rights of nature since it still lacks implementation in several jurisdictions that have recognized it.

Although no rights of nature exist at the level of international law, there is growing acknowledgment within the U.N. system. In 1982, the UNGA recognized the value of nature in the World Charter for Nature, which proclaimed that "every form of life is unique, warranting respect regardless of its worth to man". (UNGA Res 37/7, Annex, World Charter on Nature, § 2(a), available at https://undocs.org/en/A/RES/37/7). Since 1992, resolutions of the UNGA have increasingly acknowledged these rights, developing from Principle 1 of the Rio Declaration, which provides that "[human beings] are entitled to a healthy and productive life in *harmony with nature*". (Rio Declaration on Environment and Development, adopted on 12/08/1992 of UNGA, U.N. Doc A/CONF.151/26 (Vol. 1). This paradigm of "harmony with nature" as a condition of human development has provided the touchstone for international recognition (Tigre MA, 2021). In "The Future We Want," the UNGA reaffirmed the rights of nature at the international level (The Future we Want, G.A. Res. 66/288, § 39, U.N. Doc. A/RES/66 (Sept. 11, 2012)). In addition, the 2015 Paris Climate Agreement preamble notes "the protection of biodiversity recognized by some cultures as Mother Earth". Thus, although rights of nature have not been formally enshrined at the international level, this evolving movement provides substantive support for the recognition of the rights of nature across jurisdictions.

At the domestic level, the rights of nature movement have developed through different frameworks: constitutional amendments, national, state, and local level legislation, and judicial rulings (U.N. Harmony with Nature. Rights of Nature and Policy). Ecuador was the first country to establish the rights of nature in its 2008 national constitution (Ecuadorian Constitution, art. 71-72). Based on the indigenous concept of *Pacha Mama*, a goddess revered in the Andes region that means Mother Earth, Ecuador granted nature the right to exist, persist, maintain itself, and regenerate its vital cycles, structure, functions, and evolutionary processes (Ecuadorian Constitution, art. 71). The Ecuadorian experience is significant because it marks the most comprehensive attempt to incorporate the rights of nature within a national constitutional order. The Constitution combines the two strands of the rights of nature movement: the holistic values inherited from indigenous law and the more formal rights of standing advocated by Western theorists such as Stone. The substance of the rights, which includes both restitution and preventive measures, is potentially wide-ranging and suggests the possibility of extensive remedies.

The provisions were strongly influenced by indigenous Kwecha concepts, including *Sumac Kawsay* (Living Well) (Kotze JL, Calzadilla PV, 2017). The Constitution asserts that nature "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes" (Ecuadorian Constitution,

art. 71). Importantly, rather than vest the legal custodianship of nature to any specific group of people, Ecuador disperses that right among all citizens of Ecuador. The rights of nature are enforced through three constitutional provisions (Tigre MA, 2013: 35). In theory, nature rights are immediately enforceable and directly applied regardless of specific enforcement or other laws that expand it (Ecuadorian Constitution, art. 11(3)). In addition, citizens can demand that the rights of nature are respected (Ecuadorian Constitution, art. 11(3)). In this sense, any person, community, town, or nation has standing to ensure that the rights of nature are adequately enforced (Tigre MA, 2013: 38). Lastly, it is incumbent upon authorities to implement it when there's a request for its protection (Ecuadorian Constitution, art. 11(1)). The initiative was highly acclaimed internationally, as it broke away from the traditional environmental regulatory system and represented a turning point in the debate by transforming abstract concepts into legally binding rights (Boyd DR, 2017: 41).

Bolivia used a broad constitutional language and extended the right to a healthy environment to other living things so that they may develop in a usual and permanent way (Bolivian Constitution, art. 33). As with many other South American and postcolonial states, Bolivian rights of nature find conceptual grounding in indigenous Kwecha jurisprudence, particularly the concepts of *Pacha Mama* (Mother Earth) and *Sumac Kawsay* (Living Well). Bolivia enacted the Law of the Rights of Mother Earth (Ley de Derechos de la Madre Tierra, Ley No. 071, de noviembre de 2010). As in the case of Ecuador, nature is presented as a personified mother, to whom respect and reverence are due, and which is unified in such a way as to have purposes and plans, 'a common destiny.' As a collective subject of public interest (art. 5), Mother Earth and other living systems, a combination of human communities and ecosystems, are titleholders of inherent rights (art. 4).

The Bolivian law exemplifies a whole variety of possible rights of nature, as seven different rights are granted to Mother Earth. Some are familiar, like the right to life, while others are similar to human rights but given to nature, such as water, clean air, and freedom from pollution. As in Ecuador, nature also has the right to be restored (article 7.6). In addition, nature has the right to the diversity of life (article 7.2), which in effect bans genetic experimentation and the right to equilibrium (article 7.5). The claims on behalf of nature rights have a theological flavor. Framed against a menacing background, nature's representation assumes a theological character that makes the moral dimension of our relation to nature central (Tanasecu M, 2016: 117-120).

Bolivia's 2010 Law was followed in 2012 by the Framework Law of Mother Earth and Holistic Development for Living Well ("Living Well/Sumac Kawsay") (Gaceata Oficial del Estado Plurinacional de Bolivia, 2012, Ley No. 300). The 2012 Law reflects an approach inherited from indigenous law that human flourishing depends on the rights of nature being upheld and establishes mechanisms for the enforcement of the rights of nature. Article 53 creates a Plurinational Authority of Mother Earth, responsible for setting policies on climate change. Significantly, art. 4.2 establishes an enforceable right to climate justice, which can be brought by victims of climate change who have been denied their right to 'live well.' To enforce those rights, the creation of a *Defensoría de la Madre Tierra*, an ombudsperson office for the

protection of nature, was established (art. 10). In addition, all citizens can enforce the rights of nature, either individually or collectively (art. 6). However, the lack of implementation of the law shows that the rights are more symbolic than practical, and are often not enforced.

Beyond Latin America, the rights of nature movement has expanded significantly in the U.S., primarily from the local government level. As noted, the first case in the history of the rights of nature resulted in the U.S. from Stone's theory (Tanaescu M, 2016: 76). In *Sierra Club v. Morton,* Justice Douglas wrote a famous dissent stating that "public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation" (Sierra Club, 1972: 741-742). Although his suggestion to allow a suit to prevent the development of the Mineral King Valley to be brought in the name of the valley itself as early as 1972, judges have not taken up this possibility and cases brought to courts are limited (Cullinan C, 2008: 17).

Stone's ideas, along with the work of other lawyers, eventually resulted in important successes, with several municipalities in the US recognizing the rights of nature (Tanaescu M, 2016: 107). Furthermore, at least two Native American tribal jurisdictions have also given effect to the rights of nature (Boyd DR, 2017: 13).

In the 2017 Advisory Opinion, the IACtHR recognized an autonomous right to the environment, which protects different elements of nature regardless of their usefulness to human beings (OC-23/17, § 62). This interpretation from the Court follows an ecocentric perspective and goes as far as to acknowledge the rights of nature as a legal trend (Tigre MA & Urzola N, 2021). The statement shows the Court is open to a favorable outcome if cases are brought based on the rights of nature.

The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of the importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature. (OC-23/17, § 62)

More recently, the rights of nature have gained increasing support worldwide through the recognition of the rights of rivers. (Morris JDK, Ruru J, 2010). In various countries, courts or lawmaking bodies have declared rivers legal entities to improve their environmental health. These attempts have had varied successes. In some cases, meaningful steps were taken by the government to address previous environmental contamination, including the participation of local communities in preventing further contamination. In others, the designation of legal personhood had little to no effect on the river's health due to political, economic, or bureaucratic issues.

There are two main justifications for granting legal rights to rivers. The first is based on indigenous or religious traditions, which have been highly influential in most cases in which rivers were given legal personhood (Herold K, 2017). For example, in the case of New Zealand, the local Māori tribe of Whanganui argued that because of their understanding of the river Te Awa Tupua as their ancestor, the river should be legally entitled to the same right as a person (Roy EA, 2017). The second theory comes from a re-evaluation of the traditional understanding of who or what is a rights-bearing subject – an argument that follows the same reasoning of the rights of nature in general. By recognizing the value of the river as more than just a physical entity but also as part of a broader unit that carries its own metaphysical properties, indigenous laws have been vital in reshaping legal codes to account for rivers as individuals (Morris JDK, Ruru J, 2020: 49).

Over time, rivers were extensively exploited to support a wide range of industries, disrupting their normal flow. As a result, rivers were disregarded for their ecosystem services for human purposes, overriding the needs of non-human species and indigenous communities. Groups such as the Kogi in South America, the Yup'ik in the Arctic, Sioux tribes in northern Dakota, Aboriginal communities in Australia, and Māori in New Zealand have articulated their cultural ideas and values, sharing common concerns about environmental destruction. Water had a central role in different societies as the essence of life, and rivers were often personified as important deities. Temples were built on the beds of rivers. Major rivers such as the Ganges, the Volga, and the Huang Ho (Yellow River) were described as the 'Great Mother'; the Tiber, and the Irrawaddy as the 'Great Father.' Indigenous groups thus generated the debate on recognizing legal rights for rivers. This philosophical movement promotes a worldview of shared independence of living beings and intersects recent efforts by indigenous communities to re-establish the notion of rivers as persons. (Strang V, 2020).

In Colombia, the rights of nature have been recognized through strategic litigation. Colombia's two highest courts, the Constitutional Court and the Supreme Court, have directly recognized nature's rights in two landmark cases. In the *Atrato River* Case, the Constitutional Court found that the river's pollution threatened the rights to water, food security, a healthy environment, and the culture and the territory of the ethnic communities that inhabit the Atrato River basin (Colombia Constitutional Court Ruling T-622 of 2016). The Court found that the rights violated were not only those of the local communities but also those of the river itself (§ 5.9). Furthermore, the Court supported its finding through the South American constitutional model of plurinationalism: the recognition of indivisible legal personality for nature could be found in indigenous custom (§ 9.27). The Court consequently adopted what it described as 'biocultural rights,' reflecting "the relationship of profound unity between nature and human species" (§ 5.17,5.19).

In the *Future Generations* case, the Supreme Court of Colombia applied the Constitutional Court's jurisprudence to protecting the Amazon rainforest (Supreme Court of Colombia, STC4360-2018 of 05/04/2018, radcación no 11001-22-03-000-2018-00319-01). The case was brought by a group of children who argued that their health would be impacted by rising

temperatures resulting from climate change throughout their lifetime. The Court found that the Colombian state authorities had failed to combat deforestation, thus violating these constitutional guarantees as construed as obligations under domestic and international law to future generations and the environment itself as an entity in its own right. The Court formally recognized the Amazon rainforest as an entity in its own right, "a holder of rights to protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it" (STC4360-2018, at 45). The Colombian experience remains one of the most promising international developments in the rights of nature movement (Giménez FP, 2018).

In New Zealand, rights of nature are framed as rights of legal personality, vested in a particular representative body with strong input from local indigenous Māori communities (Rousseau B, 2016). Like South American countries, New Zealand's rights of nature law draws heavily on indigenous jurisprudential concepts, particularly the notion of *kaitiakitanga* (guardianship; that humans are stewards, and not owners, of the environment). In addition, specific recognition of the legal personality of forests, rivers, and mountains has resulted from legislation passed under settlements of historical grievances between the government and the Māori (Boyd DR, 2017: 139).

In 2017, the New Zealand Government conceded that the ancestral river Te Awa Tupua "is a legal person and has all the rights, powers, duties, and liabilities of a legal person" (Muru-Lanning M, 2016; Strang V, 2020). Nominated individuals would speak for the river and promote its rights and interests. A new role, To Pou Tupua, was formally established to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua. Similarly, the Australian state government of Victoria embraced protection measures for the Yarra River by adopting the Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Yarra River Protection No. 49, 2017; Yarra River Protection, 2018). Although the Act does not recognize the river as possessing a distinct legal personality, it incorporates many of the features of the rights of nature regimes, including declaring the river to be "one living and integrated natural entity" (Yarra River Protection No. 49, 2017, §1(a)). In addition, the Act creates the Birrarung Council, a statutory body, to act on its behalf (§5(d); 12(2)). It further recognizes the intrinsic connection between the river and local communities, particularly the local indigenous owners who are identified as custodians of the River.

As these examples show, the rights of nature movement has been slowly growing worldwide. While it may be perceived as a bold idea, it brings an ecocentric perspective with practical ways of enforcement that extend a voice to stakeholders often left unheard. Strang notes that creating legal opportunities and responsibilities to articulate and promote the interests of non-human beings as co-inhabitants with (rather than subjects of) human societies brings a new environmental ethic into decision-making, encouraging more socially and ecologically sustainable ideas and practices (Strang V, 2020: 206). By legislating that nature has the right to exist, persist and flourish, a critical first step has been taken to shift individual and collective perceptions of nature as something with integrity and value. It is yet to be attested that this translates into actual protection of nature

(Burdon P, 2011). The rights of nature theory shows how Indigenous cultures can be successfully incorporated into international and national law, upholding environmental values like communities have done for centuries.

On a global level, it is true that compared to just a few decades ago, tremendous progress has been made in ensuring that environmental entities – particularly rivers – are granted legal personhood. As many of these cases have also shown, however, there are also significant obstacles that have yet to be adequately addressed. The rights of nature provide a substantial avenue for adjudicating for increased climate action by Indigenous groups, as has been shown by the cases noted here. But while this represents a legal breakthrough and an innovative way to establish environmental protection, it remains to be seen whether it is successful. Since cases are still limited, it is open to debate whether they are effective, especially as an avenue for climate litigation.

7. Indigenous claims in national courts

The link between the protection of ecosystems, climate change, and Indigenous rights provides another avenue for climate protection. Importantly, the cases are mostly decided on the ground of constitutional fundamental rights – rather than on international human right law. While these legal frameworks often overlap, they represent different legal tools for climate litigation cases brought by Indigenous groups. For decades, Indigenous groups have fought for territorial recognition. Following the increased recognition of rights at the international and regional levels and the growth of related jurisprudence, recent cases involving Indigenous groups have peripherally addressed climate change, as seen in *Lhaka Honhat* (Tigre MA, 2021; Awas Tingi Community v. Nicaragua, 2001: § 149; Saramaka People v. Suriname, 2007: § 122). Indigenous groups are particularly vulnerable to climate change and other inter-state disaster risks (UNHCR U.N. Doc. A/HRC/36/46, 2017), as most recently seen with Covid-19 (Tigre MA, 2020). With continuing tension between socio-economic development through energy and extractive industries and the protection of traditional lands (Schettini A, 2012), Indigenous groups are at constant risk (Burgorgue-Larsen L, 2011).

The connection between Indigenous rights and climate protection reflects the synergies between ecological challenges and human rights (Fisher AD, Lundberg M, 2015). Through Indigenous people's ecological rights, claims could link Indigenous rights, such as the rights to life, traditional territories, and culture (Shelton D, 2013; Antkowiak TM, 2013), and climate protection (Westra L, 2013). Claims can be grounded in protecting fundamental rights to life and health, which requires protecting their land from external threats such as extractive industry and deforestation.

The vulnerability of Indigenous groups is slowly finding representation in a small but growing number of climate litigation claims (UNEP, forthcoming). Examples can be found in Argentina, Australia, Brazil, Canada, Ecuador, New Zealand, South Korea, and the United States. Several of these cases are still pending. However, they already provide some insight into how Indigenous-

led legal approaches may shape climate-related adjudication going forward. These claims rely on FPIC, cultural rights, self-determination, and the rights to life and health. Progressive judicial processes are crucial in upholding the law's dynamism while protecting the climate.

In one of the few successful cases so far, a Colombian court recognized the impact of climate change on natural water supply due to mining activities and the specific violation of fundamental rights of indigenous groups due to their relationship with water bodies following their worldviews.

Overall, the cases with indigenous groups as plaintiffs that have been decided have been met with limited success. In *Lho'imggin et al. v. Her Majesty the Queen*, the Wet'suwet'en indigenous group argue, amongst other claims, that Canada has failed to use discretionary decision-making power under its environmental assessment legislation to withhold approval of greenhouse gas emitting projects, particularly liquefied natural gas exports facilities (T-211-20, pending). The lack of action undermines Canada's trajectory to reduce annual greenhouse gas emissions by 30% below 2005 levels by 2030, significantly affecting Indigenous communities, who continually experience warming effects on their territories. They alleged that the Canadian government's approach to climate change had violated their constitutional and human rights. The plaintiffs allege that Canada has failed to meet its international climate commitments and that the mitigation targets in the Nationally Determined Contribution are insufficient under the goals of the Paris Agreement. Plaintiffs contend that they have experienced significant warming effects on their territories and expect to experience negative health impacts due to climate change. The Federal Court granted the motion to strike on the grounds that the case was not justiciable, had no reasonable cause of action, and the remedies were not legally available. The Court found that the case was not justiciable because it did not have a sufficient legal component to anchor the analysis and that climate change is an inherently political issue, which shall be left to the executive and legislative branches of government. Concerning remedies, the Court found that the multifaceted problem of climate change would make judicial supervision meaningless. Therefore the Court could not take on a supervisory role to ensure adequate laws were passed. The decision is currently under appeal.

In *Baihua Caiga et al. v. PetroOriental S.A.*, indigenous groups brought a case against the oil company PetroOriental for the impacts of gas flaring from an oil concession on climate change in Ecuador (*Baihua Caiga et al. v. PetroOriental S.A.*, 2021). Applicants claimed that climate change produces irregular and unpredictable floods, disturbance in the natural cycles of plants, loss of ancestral knowledge, droughts, and other climatic phenomena, all of which have human rights implications. As such, the company has violated several constitutional rights and human rights due to the impacts of climate change, including the rights of nature as GHG emissions altered the carbon cycle and the right to land and territory because their ability to enjoy natural resources through ancestral practices has been limited, among others. However, the court of first instance did not admit the claim as the plaintiffs had not sufficiently demonstrated the violation of rights.

In *Youth Verdict v. Waratah Coal*, Indigenous youth plaintiffs of the Youth Verdict environment group challenged a coal mining project that would significantly contribute to climate change and limit the cultural rights of First Nations Queenslanders to maintain their unique relationship with the land (*Youth Verdict v. Waratah Coal*, 2022). The case represents the first time the 2019 Queensland Human Rights Act is considered with the environmental impacts of a resource project.

In *Smith v. Attorney General*, a Māori landowner and tribal climate spokesperson filed a claim against New Zealand, arguing that the government had successfully failed to adequately address the effects of climate change on New Zealand and its citizens, especially the Māori (*Smith v. Attorney General*, 2022). Specifically, the plaintiff argued that the government had failed to incorporate international obligations into domestic law and to reduce the carbon emissions produced by government activities. Furthermore, although the government had introduced an emissions trading scheme, the plaintiff argued that the overall emissions cap was too high and contained unjustifiable exemptions. In 2022, the High Court struck out all of the plaintiff's claims as untenable. First, it found that the common law duty of care lacked reference to any recognized legal obligations and went beyond mere incremental development of new commitments. Furthermore, it was beyond a court's democratic role and institutional competence to "monitor" the full scope of the government's climate change response. Next, the court found that the right to life claim was untenable because the plaintiff had not pointed to a "real and identifiable" risk to a specified individual. Furthermore, the minority rights claim had failed to particularize specific breaches. The Court found that the Non-Discrimination and Minority Rights in New Zealand's Bill of Rights Act (Section 20) does not impose positive duties on the State and that the Crown had taken adequate steps to consider the interests of Māori. Finally, the Court found that Te Tiriti does not give rise to free-standing obligations. Furthermore, the plaintiff's claim was too wide-ranging to give rise to fiduciary duties to the Te Tiriti because such commitments would be untenably owed to the public. Even if such duties were to be developed, they would need to rely on the common law duty advanced in the first cause of action, which the Court deemed untenable.

Several other climate litigation cases brought by Indigenous groups are still pending. For example, in the Colombian case *Wayúu Indigenous community and others v. Ministry of Environment and others*, plaintiffs claim that the environmental permitting process of a coal mining project failed to comply with environmental provisions and principles, violating the rights of the Wayúu community and the general population to a healthy environment, human health, and FPIC (Council of First State Colombia, 2019). The plaintiffs argue that the project should address climate change impacts and Colombia's obligations to address climate change. Among the plaintiffs' arguments is that the Colombian government failed to consider the effect of coal mining on climate change when studying the environmental permit request. In addition, plaintiffs invoked the correlation between coal mining and GHG emissions to ask for the mine's closure as a pathway to decarbonization and Colombia's compliance with its international commitments.

In *Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia*, First Nation leaders from the Gudamalulgal nation of the Torres Strait Islands challenged Australia's failure to cut emissions, asserting that the government's inaction will force their communities into climate migration (*Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia*, 2021). The plaintiffs detail the climate vulnerability of Torres Strait Islander communities, including loss of stable fisheries and damages due to sea level rises, including to sacred sites and cemeteries. The effects of climate change also impair the observance of traditional practices and ceremonies. The applicants allege that the Australian Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them, their culture and traditional way of life, and their environment from harms caused by climate change and that the government has breached this duty as the targets are not consistent with the best available science.

In *Mataatua District Māori Council v. New Zealand*, claimants allege that New Zealand has breached its obligations to Māori by failing to take adequate steps to reduce its fair share of GHG emissions (Waitangi Tribunal, 2017). The claim relies on the importance of the natural ecosystem to the Māori culture. The lawsuit is pending at the Waitangi Tribunal, the forum where disputes over the performance of the Treaty of Waitangi between Māori and the government of New Zealand are heard and resolved. In both cases, the plaintiffs seek systemic emissions reductions from the governments.

In the South Korean case *Kang et al. v. KSURE and KEXIM*, members of an indigenous community in the Tiwi Islands, Northern Territory, brought a claim against the Korea Trade Insurance Corporation and Korea Export Import Bank, Korean public financial institutions that are functioning as export credit agencies planning to provide financial support a fossil gas reserve project off the coast of Northern Territory, Australia, near the Tiwi Islands (*Kang et al. v. KSURE and KEXIM*, 2022). The plaintiffs argued that the project would cause significant environmental harm due to increased GHG emissions, its impact on the marine ecosystem, specifically the endangered sea turtle species, and the livelihood of the indigenous communities. The plaintiffs also argued that there was no FPIC of the indigenous communities. Plaintiffs further argued that the project is incompatible with the goals under the Paris Agreement, the IEA projection of the 2050 Net Zero scenario, and CCS technologies are not mature enough to guarantee reliable capture and storage of the CO2 emissions, creating a severe risk of cost overrun. The claim is based, among others, on the environmental rights stipulated under Art. 35 of the Korean Constitution and property rights of the indigenous individuals living in the Tiwi Islands.

8. Conclusion

While Indigenous peoples remain disproportionally affected by the climate crisis, they are seeking climate justice through litigation. The legal arguments used in the sample of cases cited in this article are diverse: from Indigenous rights, such as the right to FPIC, to traditional human rights, such as the right to life and health, to the innovative rights of nature, which were more recently recognized. Climate litigation cases brought by Indigenous peoples

are still few and far between. However, they represent a crucial aspect of rights-based climate litigation as it underlines how courts are prompted to tip the scale on climate injustices and vulnerabilities. While several cases are still pending, the decision related to the Torres Strait Islanders represents a significant advancement in climate litigation, showing the power of these communities to get their voices finally heard.

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