

**Faculté de droit et de criminologie**

# **Fighting for the Right to Survive**

**Indigenous Peoples and Climate Change**

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## Chapter 1. Introduction

### 1.1. Indigenous Peoples and climate change

#### 1.1.1 Climate change

Climate change is a global issue that affects the whole planet. It's now well-established that the causes of climate change are mainly anthropogenic. The primary driver of global warming are the emissions of greenhouse gases into the atmosphere.<sup>1</sup> It's important to note that not all countries have made equal contributions to global warming. There're states and groups around the globe that have significantly lower carbon footprints. Nevertheless, some of these peoples are experiencing a disproportionate impact from the effects of climate change.<sup>2</sup> If current emissions persist, the upward trend of global warming will continue, resulting in far-reaching consequences across the globe, in particular for vulnerable peoples whose rights are most affected.<sup>3</sup> The Arctic and Small Pacific Islands are among the regions of the world, who despite their limited contribution to climate change, will be disproportionately affected.<sup>4</sup>

#### 1.1.2. Indigenous peoples

Despite the diversity within Indigenous peoples, a shared characteristic is their vulnerability to the consequences of climate change, even though they have contributed very little to its causes.<sup>5</sup> Many Indigenous peoples inhabit regions that are particularly susceptible to the impacts of climate change, and hold a special connection to their land, which is integral to their cultural and spiritual identity.<sup>6</sup> Climate change threatens the loss of this land and the disruption of their traditional lifestyles. The melting of the Arctic and the projected loss of habitable land for small Pacific islands by 2050 are just a few examples of the multiple effects of climate change on Indigenous peoples.<sup>7</sup>

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<sup>1</sup> S. ADELMAN, "Human rights in the Paris Agreement: too little, too late", *Transnational Environmental Law*, 2018, p. 18-19; IPCC, "Synthesis report of the IPCC Sixth Assessment report: summary for policymakers", found online: <https://www.ipcc.ch/report/ar6/syr/> (last consulted on 3<sup>rd</sup> April 2023), p. 4.

<sup>2</sup> R.S. ABATE and E.A. KRONK, "Commonality among unique Indigenous communities: an introduction to climate change and its impacts on Indigenous peoples", *Tulane Environmental Law Journal*, 2013, p. 179-180; IPCC, "Synthesis report of the IPCC Sixth Assessment report: summary for policymakers", found online: <https://www.ipcc.ch/report/ar6/syr/> (last consulted on 3<sup>rd</sup> April 2023), p. 6.

<sup>3</sup> S. ADELMAN, *op. cit.*, p. 20; IPCC, "Synthesis report of the IPCC Sixth Assessment report: summary for policymakers", found online: <https://www.ipcc.ch/report/ar6/syr/> (last consulted on 3<sup>rd</sup> April 2023), p. 12-13.

<sup>4</sup> R.A. WALSH and C.E. STANCIOFF, "Small island perspectives on climate change", *Island Studies Journal*, 2018, p. 13.

<sup>5</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 181-182.

<sup>6</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 182 and 187.

<sup>7</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 183-184; D. TEKAYAK, "Protecting earth rights and the rights of indigenous peoples: towards an international crime of ecocide", *Fourth World Journal*, 2016, p. 5-6; J.

## 1.2 Research question

This dissertation sets out to explore how the rights of Indigenous peoples are affected by climate change and to delve into the potential legal remedies that exist under public international law with a focus on climate change litigation.

## 1.3. Aims, purposes and methodology

### 1.3.1. Aim

The main aim will be to look at how climate change affects indigenous peoples and their rights. The focus will lie in particular on the rights recognized in the UN Declaration of Rights of Indigenous Peoples and explore whether these rights can be turned into concrete legal claims in the context of climate change litigation. It is important to note that the purpose is not to provide a comprehensive review of potential claims in climate change litigation by indigenous peoples. Rather, this dissertation aims to provide an overview of various options available under international law, while also shedding light on their strengths and weaknesses.

### 1.3.2. Structure

In the first place, this dissertation will focus on the framework of Indigenous peoples' rights on the international plane. The different international legal instruments will be given a brief overview, with a particular emphasis on the UN Declaration of Rights of Indigenous Peoples. Subsequently, the main focus of this dissertation will be to analyze how climate change specifically impacts Indigenous peoples' rights and explore measures to protect their rights in this context. In order to achieve this, a range of relevant issues will be explored: which specific rights are likely to be impacted by climate change? How are they affected? Who's responsible for ensuring that these rights are respected, and against whom can claims be made? Although there're various ways to safeguard Indigenous peoples' rights, this analysis will focus on climate change litigation.

Throughout this dissertation, we will focus on the specific circumstances of Indigenous peoples living on small Pacific islands as an illustration.

### 1.3.4. Relevance and personal motivation

The subject of this dissertation revolves around the pressing matter of climate change. In

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WILLIAMS, "The impact of climate change on Indigenous people. The implications for the cultural, spiritual and legal rights of Indigenous people", *International Journal of Human Rights*, 2012, p. 649.

particular, I find it crucial to explore the impact of climate change on Indigenous peoples. Indigenous peoples not only bear the brunt of climate change's adverse effects, but they also experience unique vulnerabilities due to their deep-rooted connection to their lands and traditional ways of life.<sup>8</sup>

The choice to delve into this topic stems both from personal interest and a compelling sense of urgency regarding climate change and its far-reaching consequences.

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<sup>8</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 181-182.

## Chapter 2. Indigenous peoples' rights framework

### 2.1. Historical perspectives

#### 1.1.1. The era of imperialism and colonization

Drawing on European doctrines of sovereignty, European powers took over indigenous peoples and their lands as early as the 16<sup>th</sup> century. For much of the 20<sup>th</sup> century, Indigenous peoples endured subjugation, being perceived as populations which needed to be civilized and integrated into mainstream society. This resulted in the suppression of their cultural practices, languages and religions.<sup>9</sup>

Originally, when their lands were discovered, Indigenous peoples were generally considered sovereign over their territories. This is shown by the many treaties that were concluded between colonial powers and Indigenous peoples. As a result, their territories could only be taken over through conquest or voluntary subjection. Mere discovery wasn't sufficient to establish the colonial power's sovereignty.<sup>10</sup>

However, this stance didn't last and by the 18<sup>th</sup> century, Western powers determined that Indigenous peoples didn't meet the criteria to be considered sovereign entities. Consequently, the lands of Indigenous peoples were appropriated on the basis of the theory of discovery and the concept of terra nullius.<sup>11</sup> Terra nullius refers to the notion that land without a sovereign power can be claimed through discovery. This allowed European powers to establish their power and sovereignty over land they deemed unoccupied, resulting in the dispossession of Indigenous peoples from their lands.<sup>12</sup>

#### 1.1.2. The United Nations

On 26<sup>th</sup> June 1945, the United Nations Charter (UN Charter) was adopted and it included a provision which would have tremendous consequences in the following decades: the right to

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<sup>9</sup> K. GÖCKE, "Indigenous Peoples in international law", *Adat and Indigeneity in Indonesia: culture and entitlements between heteronomy and self-ascription*, B. Hauser-Schäublin (dir.), Göttingen, Göttingen University Press, 2018, p. 20.

<sup>10</sup> K. GÖCKE, *ibid.*, p. 23 ; H. BAUDER and R. MUELLER, "Westphalian vs. Indigenous sovereignty: challenging colonial territorial governance", *Geopolitics*, 5<sup>th</sup> May 2021, p. 5.

<sup>11</sup> G. HERNANDEZ, *International law*, Oxford, Oxford University Press, 2019, p. 12 ; K. GÖCKE, *op. cit.*, p. 24.

<sup>12</sup> L. BENTON and B. STRAUMANN, "Acquiring empire by law: from Roman doctrine to early modern European practice", *Law and History Review*, 2010, 5-6 ; P. MACKLEM, "Indigenous recognition in international law: theoretical observations", *Michigan Journal of International Law*, 2008, p. 183-184 ; O. MAZEL, "The evolution of rights: indigenous peoples and international law", *Australian Indigenous Law Review*, 2009, p. 141.

self-determination of peoples.<sup>13</sup>

In the 1950s and 1960s, an increasing number of colonized states gained independence, resulting in a growing representation of global south states in the United Nations General Assembly (UNGA). These newly independent states used their majority to pass resolutions pushing back against the Eurocentric views which had dominated until then.<sup>14</sup> One of the main claims of these states was the right to self-determination. A pivotal moment in the process of decolonization and the development of the right to self-determination was the adoption of resolution 1514 “*Declaration on the granting of independence to colonial countries and peoples*”.<sup>15</sup> The main tenet of the resolution is that colonial people have the right to independence. This resolution was aimed at peoples living “*under alien subjugation, domination and exploitation*”.<sup>16</sup> These peoples have the right to determine their future, whether that is remain with the colonial power, become an independent state or even join another existing state.<sup>17</sup> This right to self-determination has however never been extended to indigenous peoples who reside within independent states. The concept of self-determination, in this sense, has been confined to territories which were colonized by external forces, this is commonly referred to as the “*salt-water theory*”.<sup>18</sup>

It is namely in this context that the notion of “*peoples*” led to a lot of controversy. The right to self-determination is a right of all “*peoples*”. Lots of states were reluctant to conceive of Indigenous “*peoples*” due to the potential consequences this could have in terms of the right to self-determination and especially the right to external self-determination.<sup>19</sup> As a result, the process of decolonization which took place around the world didn’t change much for Indigenous peoples.<sup>20</sup>

In that same period, Indigenous peoples started making themselves heard on the international plane. At the end of the 1970s, they started to make their demands before the UN human rights

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<sup>13</sup> P. HILPOLD, “Self-determination and autonomy: between secession and internal self-determination”, *International Journal on Minority and Group Rights*, 2017, p. 314.

<sup>14</sup> G. HERNANDEZ, *op. cit.*, p. 17.

<sup>15</sup> UN General Assembly Resolution 1514, A/RES/1514(XV) (1960), 14 December 1960 ; J. BASU-MELLISH, “UN Resolution 1514: the creation of a new post-colonial sovereignty”, *Third World Quarterly*, 1<sup>st</sup> March 2023, p. 12.

<sup>16</sup> UN General Assembly Resolution 1514, A/RES/1514(XV) (1960), 14 December 1960, §1.

<sup>17</sup> P. HILPOLD, *op. cit.*, p. 308.

<sup>18</sup> J. GILBERT, *Indigenous Peoples’ land rights under international law: from victims to actors*, Ardley, Transnational Publishers, 2006, p. 204 ; P. HILPOLD, *op. cit.*, p. 306-307.

<sup>19</sup> R. SHRINKHAL, “Indigenous sovereignty and right to self-determination in international law: a critical appraisal”, *Alternative*, 2021, p. 75-76.

<sup>20</sup> F. GOMEZ ISA, “The UNDRIP: an increasingly robust legal parameter”, *The International Journal of Human Rights*, 2019, p. 3.

bodies using the language of international human rights.<sup>21</sup> In 2000, the UN Permanent Forum on Indigenous Issues was established as a body which is equally representative of States and Indigenous Peoples.<sup>22</sup> These efforts continued over the years and culminated in 2007 with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.<sup>23</sup>

## 1.2. Defining Indigenous peoples

Defining Indigenous Peoples is a complex exercise. Indigenous peoples are all but a monolithic group of people. There're Indigenous peoples all over the world, they have different historical backgrounds, ethnicities and cultures, even Indigenous peoples living in the same country may present significant differences.<sup>24</sup>

### 1.2.1. A definition of Indigenous peoples

In the past, there have been attempts to define “indigenous peoples”. The definition that is most well-accepted is the one put forth by Mr. Martínez Cobo, special rapporteur for the study of the problem of discrimination against Indigenous populations. His definition is as follows: *“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”* Furthermore, M. Cobo has stressed the importance of self-identification.<sup>25</sup>

There's no universally agreed definition of Indigenous peoples and the prevailing perspective today seems to be that self-identification should be the fundamental criterion. Consequently, most international legal instruments refrain from providing a definition. Thus, aligning with the notion that self-identification is key. Although, there're some international legal instruments that outline objective criteria that Indigenous peoples commonly possess, as this helps prevent unfounded claims of indigeneity by certain groups. A characteristic that'll be found in most instruments is Indigenous peoples' profound connection to their ancestral

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<sup>21</sup> F. GOMEZ ISA, *op. cit.*, p. 2 ; L. HEINAMAKI, “Towards an equal partnership between Indigenous peoples and states: learning from Arctic experiences”, *Yearbook of Polar Law*, 2011, p. 197.

<sup>22</sup> F. GOMEZ ISA, *op. cit.*, p. 3 ; L. HEINAMAKI, *op. cit.*, p. 209.

<sup>23</sup> R. SHRINKHAL, “Indigenous sovereignty ...”, *op. cit.*, p. 67.

<sup>24</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 181.

<sup>25</sup> K. GÖCKE, *op. cit.*, p. 18.

lands.<sup>26</sup>

In the UN Declaration on the Rights of Indigenous Peoples, the main criterion to identify Indigenous peoples is self-identification, although there're mentions of several objective criteria throughout the Declaration.<sup>27</sup>

### 1.2.2. Commonalities between Indigenous peoples

Despite their many differences, Indigenous peoples have certain common experiences which makes it possible to identify them as a vulnerable group in the context of climate change. Depending on their region of origin whether that is Arctic or a small Pacific Island, Indigenous peoples will be affected differently. However, a common characteristic is that they often inhabit areas which are particularly at risk for the impacts of climate change and thus are more likely to be affected by its effects.<sup>28</sup>

### 1.3. Indigenous peoples' rights in international human rights conventions

The International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) don't explicitly address Indigenous peoples' rights. However, some of the rights enshrined in these conventions formed the basis for certain claims made by Indigenous peoples.<sup>29</sup>

The first article of both conventions upholds the right of all peoples to self-determination and the freedom to dispose of their natural resources. However, neither convention provides a definition of the term "peoples". Despite not being explicitly intended for Indigenous peoples, this provision has laid the foundation for their subsequent demands.<sup>30</sup>

Article 27 ICCPR is also pertinent as it safeguards the rights of minorities to preserve their cultural practices, religious beliefs, and linguistic traditions.<sup>31</sup> Many ICESCR rights are

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<sup>26</sup> K. GÖCKE, *op. cit.* p. 18-19.

<sup>27</sup> R. SHRINKHAL, "Indigenous sovereignty ...", *op. cit.*, p. 68-69 ; UN, "The Concept of Indigenous Peoples", found online: [https://www.un.org/esa/socdev/unpfii/documents/workshop\\_data\\_background.doc#:~:text=%E2%80%9CIndigenous%20communities%2C%20peoples%20and%20nations%20are%20those%20which%2C%20having,territories%2C%20or%20parts%20of%20them](https://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc#:~:text=%E2%80%9CIndigenous%20communities%2C%20peoples%20and%20nations%20are%20those%20which%2C%20having,territories%2C%20or%20parts%20of%20them) (last consulted on 3<sup>rd</sup> April 2023).

<sup>28</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 181-182.

<sup>29</sup> B. FLØISTAD, L. LATHE and W. ØSTRENG, "Ocean law, coastal waters, jurisdictional controversies. Indigenous peoples' rights", *Shipping in Arctic waters*, W. Østreng *et al.* (dir.), Heidelberg, Springer Berlin, 2013, p. 271.

<sup>30</sup> D.C. CAMBOU, "The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective", *The International Journal of Human Rights*, 2019, p. 36 ; R. SHRINKHAL, "Indigenous sovereignty ...", *op. cit.*, p. 75.

<sup>31</sup> B. LEWIS, "Climate change and human rights: perspectives of environmental and indigenous rights", *Journal of the Australasian Law Teachers Association*, 2008, p. 158.

relevant to Indigenous peoples, amongst which the right to culture enshrined in article 15.<sup>32</sup>

#### 1.4. International Labour Organization (ILO)

The International Labour Organization (ILO) was the first international organization to directly address Indigenous peoples. They adopted two instruments which unfortunately received few ratifications by states.<sup>33</sup>

The Indigenous and Tribal Populations Convention (ILO Convention n°107) was the first binding international convention addressing indigenous peoples. This Convention is no longer open for ratification but it's still in force in 17 States.<sup>34</sup>

It has had a restricted impact. The main reason for this limited influence that it has only been ratified by a limited amount of States<sup>35</sup>. Furthermore, it wasn't that well-received by Indigenous leaders due to some provisions considered problematic.<sup>36</sup> One of the main criticisms is that C107 promotes an assimilationist approach: it promotes the assimilation of Indigenous peoples into their respective states.<sup>37</sup> The Convention doesn't adequately protect the land rights of Indigenous peoples, as it grants states the ability to override the objections raised by Indigenous peoples in certain conditions.<sup>38</sup>

Due to the shortcomings of C107, a revised Convention was adopted in 1989: ILO Convention n°169, the Indigenous and Tribal Peoples Convention.<sup>39</sup> A considerable achievement was the use of the term "indigenous peoples". Historically this had been a controversial subject and still was at the time of the signature. As a consequence, article 1(3) of C169 makes clear that the use of "peoples" cannot be linked in any way to the right to self-determination.<sup>40</sup>

This Convention gave more agency to Indigenous peoples and did away with language

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<sup>32</sup> J. WILLIAMS, *op. cit.*, p. 664.

<sup>33</sup> M. MONTEIRO DE MATOS, "Cultural identity and self-determination as key concepts in concurring legal frameworks for the international protection of the rights of Indigenous Peoples", *Cultural Heritage and International Law*, E. Lagrange, S. Oeter et R. Uerpmann-Witzack (dir.), Cham, Springer, 2018, p. 274.

<sup>34</sup> Indigenous and Tribal Populations Convention (n°107), signed in Geneva on the 26<sup>th</sup> June 1957, *U.N.T.C.*, vol. 328, p. 247 ; T. WARD, "The right to free, prior and informed consent: Indigenous Peoples' participation rights within international law", *Northwestern University Journal of International Human Rights*, 2011, p. 59.

<sup>35</sup> It currently has 27 ratifications and 10 states have denounced the Convention. It's still in force in 17 states. See [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312252](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312252) (accessed on 6 April 2023).

<sup>36</sup> P. MACKLEM, *op. cit.*, p. 194 ; R. SHRINKHAL, "The UN Declaration on the Rights of Indigenous Peoples: a critical overview", *NUSRL Journal of Law and Policy*, 2020, p. 58.

<sup>37</sup> K. GÖCKE, *op. cit.*, p. 20.

<sup>38</sup> T. WARD, *op. cit.*, p. 59.

<sup>39</sup> Convention (n°169) concerning Indigenous and Tribal Peoples in Independent Countries, signed in Geneva on the 27<sup>th</sup> June 1969, *U.N.T.C.*, vol. 1650.

<sup>40</sup> R. SHRINKHAL, "Indigenous sovereignty ...", *op. cit.*, p. 76-77.

promoting their assimilation in their respective states.<sup>41</sup> The Convention recognizes amongst other things participation rights, consultation rights and rights to self-manage their resources.<sup>42</sup> The right to their lands and resources is another right which is expressly recognized in the C169.<sup>43</sup>

As mentioned prior, neither ILO convention has received much ratifications, the amount of ratifications for C169 totals at 24 states.<sup>44</sup> As a result, its effectiveness in safeguarding Indigenous peoples' right on a global scale has been limited once more.<sup>45</sup> Nevertheless, it remains a strong affirmation of Indigenous peoples' rights under international law as the text was adopted without dissent.<sup>46</sup>

### 1.5. UN Working Group on Indigenous Populations (WGIP)

The UN Working Group on Indigenous Populations was established in 1982 as a subsidiary organ to the Sub-Commission on the promotion and protection of human rights by the UN Economic and Social Council (ECOSOC).<sup>47</sup> WGIP was set up in order to give a voice to Indigenous peoples in the UN.

Their impact was rather limited as they only had the power to issue recommendations which had to overcome several hurdles before they could even make their way to the UNGA. Their most significant contribution was the role they played in the dissemination of information and the exchange of views between Indigenous peoples, governments and international organizations.<sup>48</sup>

The WGIP isn't active anymore, they met for the last time in 2007. In their place, the Expert Mechanism on the Rights of Indigenous Peoples was set up (EMRIP). Primarily, their role involves providing advice and expertise, as well as giving recommendations on how to apply UNDRIP to the UN Human Rights Council.<sup>49</sup>

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<sup>41</sup> K. GÖCKE, *op. cit.*, p. 21 ; S. MAKO, "Cultural genocide and key indigenous instruments: framing the indigenous experience", *International Journal on Minority and Group Rights*, 2012, p.184.

<sup>42</sup> L. HEINAMAKI, *op. cit.*, p. 200-201 ; T. WARD, *op. cit.*, p. 59-60.

<sup>43</sup> B. FLØISTAD, L. LATHE and W. ØSTRENG, *op. cit.* 13, p. 271.

<sup>44</sup> See

[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314) (accessed 5 April 2023).

<sup>45</sup> T. WARD, *op. cit.*, p. 61.

<sup>46</sup> K. GÖCKE, *op. cit.*, p. 22.

<sup>47</sup> L. HEINAMAKI, *op. cit.*, p. 198.

<sup>48</sup> L. HEINAMAKI, *op. cit.*, p. 198-199.

<sup>49</sup> G. GIACOMINI, *Indigenous peoples and climate justice. A critical analysis of international human rights law and governance*, London, Palgrave Macmillan, 2022, p. 205.

## 1.6. UN Permanent Forum on Indigenous Issues

In July 2000, the UN Permanent Forum on Indigenous Issues (UNPFII) was established as an advisory body to the Economic and Social Council. Their mandate concerns indigenous issues related to different areas including economic, social, cultural and health-related matters. They provide expert advice and recommendations, they raise awareness regarding those issues within the UN system and disseminate information.<sup>50</sup>

One of the main objectives of the UN Permanent Forum on Indigenous issues was the adoption of a declaration of rights of Indigenous Peoples.<sup>51</sup>

## 1.7. UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

On September 13<sup>th</sup>, 2007, the UNGA adopted Resolution 61/295, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) with an overwhelming majority of 144 states in favor, 11 states abstaining and only 4 states voting against. For the first time an international instrument with a universal character recognized rights for indigenous peoples.<sup>52</sup> It also constituted a major step forward due to the fact Indigenous peoples were involved in the negotiations and drafting of the Declaration.<sup>53</sup>

The adoption of the Declaration hasn't as such created these rights for Indigenous peoples but it's an explicit recognition by the international community of the existence of these rights. The Declaration builds upon preexisting conventions and legal instruments.<sup>54</sup>

Nonetheless through the adoption of UNDRIP, a series of new rights have entered the realm of human rights. An important innovation is the concept of collective rights which is introduced in the preamble of the Declaration, as well as the recognition of Indigenous peoples' right to self-determination.<sup>55</sup>

In the following sections, the most important features of UNDRIP will be discussed and some of UNDRIP's most important rights will be highlighted.

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<sup>50</sup> G. GIACOMINI, *op. cit.*, p. 208 ; United Nations, "United Nations Permanent Forum on Indigenous Issues (UNPFII)", <https://social.desa.un.org/issues/indigenous-peoples/unpfii> (Last consulted on 4th May 2023).

<sup>51</sup> L. HEINAMAKI, *op. cit.*, p. 214.

<sup>52</sup> F. GOMEZ ISA, *op. cit.*, p. 7 ; M.I. MITCHELL and D. YUZDEPSKI, "Indigenous peoples, UNDRIP and land conflict: an African perspective", *The International Journal of Human Rights*, 2019, p. 1358 ; M. MONTEIRO DE MATOS, *op. cit.*, p. 273-275 ; S. WIESSNER, "Indigenous sovereignty: a reassessment in light of the UN Declaration on the Rights of Indigenous Peoples", *Vanderbilt Journal of Transnational Law*, 2008, p. 1142.

<sup>53</sup> L. HEINAMAKI, *op. cit.*, p. 214.

<sup>54</sup> F. GOMEZ ISA, *op. cit.*, p. 5-6 ; M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1358.

<sup>55</sup> F. GOMEZ ISA, *op. cit.*, p. 4. ; L. HEINAMAKI, *op. cit.*, 2011, p. 214 ; M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1358 ; S.M. SCHWEBEL

### 1.6.1. Legal character

Although it is of significant political importance, by nature, UNDRIP isn't a legally binding instrument. Under article 13 of the UN Charter, the UNGA has the power to make recommendations to the UN member-states but they cannot make resolutions binding on them.<sup>56</sup>

Despite their formally unbinding character, UNGA resolutions can carry significant weight as they reflect a consensus amongst states. It reflects a strong vote of confidence regarding a certain position, especially when backed by a significant majority, such as is the case with UNDRIP.<sup>57</sup> This can start a process of crystallization of a norm into customary international law insofar it's backed by state practice and *opinio iuris*.<sup>58</sup>

Furthermore, UNDRIP has been granted the appellation of 'declaration'. The UNGA has reserved the use of this term to recommendations part of a special category of resolutions. Another notable example being the Universal declaration of human rights. Moreover, certain UNGA resolutions, whatever their appellation, contain general principles of law. They're known as declaratory of customary international law. They comprise principles, values or rights which are considered important for the international community and by including them in a resolution, the UNGA reaffirms their importance.<sup>59</sup>

Finally, to the extent that UNDRIP reinforces rights that are already legally binding, the states that are bound by those legal norms must adhere to it.<sup>60</sup>

The non-binding nature of UNDRIP has, in a way, proved to be advantageous. In the past, we have witnessed states being reluctant to commit themselves to binding agreements such as the ILO Conventions. The benefit of UNDRIP being a UNGA resolution is that it has been able to gain wider endorsement albeit in a non-binding manner.<sup>61</sup>

Therefore, despite not being of a binding nature, UNDRIP still has an important normative

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<sup>56</sup> M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1356 ; T. WARD, *op. cit.*, p. 58.

<sup>57</sup> J. BASU-MELLISH, *op. cit.*, p. 12 ; L. HEINAMAKI, *op. cit.*, p. 215.

<sup>58</sup> ICJ, 20 February 1969, *North Sea Continental Shelf*, Federal Republic of Germany v. Denmark, Federal Republic of Germany v Netherlands ; S. BARNABAS, "The legal status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in contemporary international human rights law", *International Human Rights Law Review*, 2017, p. 244-245 ; S. WIESSNER, "The cultural rights of Indigenous peoples: achievements and continuing challenges", *The European Journal of International Law*, 2011, p. 130.

<sup>59</sup> M. MONTEIRO DE MATOS, *op. cit.*, p. 276.

<sup>60</sup> S. BARNABAS, *op. cit.*, p. 256.

<sup>61</sup> M. DAVIS, "To bind or not to bind: the United Nations Declaration on the Rights of Indigenous Peoples five years on", *Australian International Law Journal*, 2012, p. 37-40.

value.<sup>62</sup> It increasingly gains recognition and some of its provisions may already be or in the process of becoming customary international law.<sup>63</sup>

#### 1.6.2. Response of the international community

As stated prior, UNDRIP was adopted with a great majority of states and was considered by a number of them as reaffirming existing customary international law. At the time of the adoption, this was however fiercely disputed by the four states which voted against the Declaration. The states in question are the following: Australia, Canada, New Zealand and the United States of America.<sup>64</sup> These are four states which have a significant Indigenous population making them “specially affected states”. Specially affected states which vote against such a resolution may impact its crystallization into customary international law.<sup>65</sup>

In the meantime, all four States have endorsed UNDRIP while also reiterating that they don’t view the Declaration as either legally binding or a reflection of existing international law.<sup>66</sup>

#### 1.6.2. Implementation of UNDRIP

Although UNDRIP isn’t a binding legal document, it’s still endeavors to be implemented. Implementation of UNDRIP is entrusted to the signatory states.<sup>67</sup> For states who have decided to endorse it, it doesn’t as such create obligations. However, to the extent that UNDRIP is a representation of existing customary international law, states are bound to it. As we’ve seen, not all states agree on the fact that any of UNDRIP can be said to be part of customary international law.<sup>68</sup>

The implementation of UNDRIP isn’t a task given to an external body, though certain existing international bodies are called upon to contribute to the realization of UNDRIP’s provisions.<sup>69</sup> The UN Permanent Forum on Indigenous Issues plays a significant role at the international level, as outlined in article 42 UNDRIP. At the regional level, human rights bodies such as the Inter-American Court of Human Rights draw on UNDRIP when making decisions. At the national level, some states have integrated UNDRIP or parts of it into their national legislation

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<sup>62</sup> M. MONTEIRO DE MATOS, *op. cit.*, p. 276.

<sup>63</sup> F. GOMEZ ISA, *op. cit.*, p. 9.

<sup>64</sup> F. GOMEZ ISA, *op. cit.*, p. 6.

<sup>65</sup> ICJ, 20 February 1969, *North Sea Continental Shelf*, Federal Republic of Germany v. Denmark, Federal Republic of Germany v Netherlands ; S. BARNABAS, *op. cit.*, p. 243 ; G. HERNANDEZ, *op. cit.*, p. 37.

<sup>66</sup> F. GOMEZ ISA, *op. cit.*, p. 6 ; L. HEINAMAKI, *op. cit.*, p. 215.

<sup>67</sup> K. WILKINS, “So you want to implement UNDRIP...”, *UBC Law Review*, 2021, p. 1239.

<sup>68</sup> M. DAVIS, *op. cit.*, p. 42-43.

<sup>69</sup> K. WILKINS, *op. cit.*, p. 1238-1239.

and several constitutional courts refer to the Declaration in their rulings.<sup>70</sup>

Overall, Indigenous peoples depend on their territorial state to implement UNDRIP and when UNDRIP is breached, there's no international forum which can receive their claims. If states don't comply with UNDRIP, there isn't much Indigenous peoples can do.<sup>71</sup>

### 1.6.3. Right to self-determination

A major breakthrough of UNDRIP was article 3 which recognizes the right to self-determination of Indigenous peoples, "*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*"<sup>72</sup>. It's a recognition of the collective right of indigenous peoples to self-determination.<sup>73</sup> It's the fundamental right of the declaration and the recognition of the other rights flow from this central tenet.<sup>74</sup>

As stated before, the recognition of the right to self-determination is an important step in the recognition of the rights of Indigenous peoples. However, article 3 cannot be read without article 4 according to which the exercise of the right to self-determination is confined to Indigenous peoples' "*internal and local affairs*".<sup>75</sup> Article 46 of the declaration also specifies that in exercising this right, respect should be had for the territorial integrity or political unity of sovereign and independent states.<sup>76</sup>

UNDRIP recognizes Indigenous peoples' right to govern their internal affairs.<sup>77</sup> This isn't akin to the right to self-determination in the meaning of a right to independence of peoples under colonial, foreign or alien occupation.<sup>78</sup> The language of the Declaration makes it clear that the right to self-determination corresponds to the right to internal self-determination as opposed to the right to external self-determination or secession.<sup>79</sup> Secession isn't something which indigenous typically seek.<sup>80</sup> The main claims of Indigenous peoples are usually the right to live

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<sup>70</sup> F. GOMEZ ISA, *op. cit.*, p. 7-9.

<sup>71</sup> K. WILKINS, *op. cit.*, p. 1238-1239.

<sup>72</sup> UN General Assembly Resolution 295, A/RES/61/295 (2007), *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, art 3.

<sup>73</sup> D.C. CAMBOU, *op. cit.*, p. 35.

<sup>74</sup> A. COWAN, "UNDRIP and the intervention: indigenous self-determination, participation and racial discrimination in the northern territory of Australia", *Pacific Rim Law & Policy Journal*, 2013, p. 256 ; R. SHRINKHAL, "Indigenous sovereignty ...", *op. cit.*, p. 71 ; T. WARD, *op. cit.*, p. 58.

<sup>75</sup> Art. 4 UNDRIP ; F. GOMEZ ISA, *op. cit.*, p. 4.

<sup>76</sup> D.C. CAMBOU, *op. cit.*, p. 35.

<sup>77</sup> H. BAUDER and R. MUELLER, *op. cit.*, p. 9.

<sup>78</sup> A. COWAN, *op. cit.*, p. 257.

<sup>79</sup> R. SHRINKHAL, "Indigenous sovereignty ...", *op. cit.*, p. 74-75.

<sup>80</sup> J. CONTASSEL, "Cultural restoration in international law: pathways to Indigenous self-determination", *Canadian Journal of Human Rights*, 2012, p. 96 ; R. SHRINKHAL, "Indigenous sovereignty ...", *op. cit.*, p. 73.

according to their practices and traditions, and land rights.<sup>81</sup> This aligns with the concept of internal self-determination which is an understanding of the right of self-determination that preserves the territorial integrity of the states concerned.<sup>82</sup>

Concretely, the right to self-determination of UNDRIP recognizes Indigenous peoples' right to determine their own political affairs and future. This is closely related to their participatory rights.<sup>83</sup>

### 1.6.3. Protection of culture

Article 8 of UNDRIP states the following “*Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. (...)*”. In addition to this broad safeguard, the Declaration also protects various aspects of culture including tangible and intangible heritage as well as spiritual and religious traditions.<sup>84</sup>

### 1.6.4. Right to land and resources

#### 1.6.4.1. General aspects

Indigenous peoples commonly exhibit a profound connection with their lands. As a result, it is not surprising that the right to land is a fundamental element of UNDRIP.<sup>85</sup> This right is closely related to the right of Indigenous peoples to self-determination.<sup>86</sup>

Article 25 of UNDRIP recognizes Indigenous peoples' right to land in a manner that acknowledges their spiritual connection with the land, as well as its intergenerational aspect.<sup>87</sup>

The central article concerning the right to land is article 26 which states that “*Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*”<sup>88</sup>

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<sup>81</sup> BAUDER H. and MUELLER R., *op. cit.*, p. 7.

<sup>82</sup> J. GILBERT, *Indigenous Peoples' land rights...*, *op. cit.*, p. 205.

<sup>83</sup> G. GIACOMINI, *op. cit.*, p. 179 ; see *infra* p. 15.

<sup>84</sup> J. GILBERT, “Indigenous peoples, human rights, and cultural heritage: towards a right to cultural integrity”, *Indigenous peoples' cultural heritage: rights, debates, challenges*, A. Xanthaki, S. Valkonen, L. HEINÄMÄKI and P.K. NUORGAM (dir.), Leiden, Martinus Nijhoff Publishers, 2017, p. 23 ; M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1359.

<sup>85</sup> M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1356.

<sup>86</sup> J. GILBERT, *Indigenous Peoples' land rights...*, *op. cit.*, p. 200 ; S. WIESSNER, “The cultural rights ...”, *op. cit.*, p. 135.

<sup>87</sup> J. GILBERT, *Indigenous Peoples' land rights...*, *op. cit.*, p. 200 ; R. SHRINKHAL, “Indigenous sovereignty ...”, *op. cit.*, p. 82-83.

<sup>88</sup> R. SHRINKHAL, “Indigenous sovereignty ...”, *op. cit.*, p. 82-83.

#### 1.6.4.2. Free, prior and informed consent

Closely linked to the right to self-determination and to the right to land and resources is the right to free, prior and informed consent (known as ‘FPIC’). This requirement is a crucial safeguard for the general rights of Indigenous peoples as it enables them to fully exercise their other rights.<sup>89</sup> FPIC is referred to in multiple articles of the Declaration. It’s namely mentioned in article 32 of UNDRIP which determines that “*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior<sup>90</sup> to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources*”.<sup>91</sup>

The idea behind FPIC is to oblige state governments to involve Indigenous peoples in decision-making in relation to projects which may impact their rights and resources. Such projects can only be allowed once free and informed consent has been given by the Indigenous peoples concerned.<sup>92</sup> It allows Indigenous peoples to effectively exercise their right to self-determination and remain in control of decisions concerning their affairs.<sup>93</sup>

The FPIC requirement is also mentioned in article 10 which safeguards the right of Indigenous right to not be forcibly removed from their lands. It prohibits any forced displacement. It emphasizes that relocation cannot occur without the free, prior and informed consent of the Indigenous peoples concerned.<sup>94</sup>

### 2.8. International climate change law

This section will outline the key components of international climate change law and how it relates to Indigenous peoples’ rights.

In the 1990s, the issue of climate change emerged as a global concern, leading to international efforts to address it. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted as a result. One of the key principles of the UNFCCC is the concept of differentiated responsibility. According to this principle, developed states bear a greater

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<sup>89</sup> M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1357.

<sup>90</sup> Emphasis is my own

<sup>91</sup> B.L. GUNN, “Protecting Indigenous peoples’ rights through Indigenous peoples’ participation in decision-making: a climate change example”, *McGill Journal of Sustainable Development Law*, 2021/1, p. 15 ; M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1359.

<sup>92</sup> T. WARD, *op. cit.*, p. 54-55.

<sup>93</sup> M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1360.

<sup>94</sup> Art. 10 UNDRIP ; G. GIACOMINI, *op. cit.*, p. 141.

responsibility for reducing emissions than developing states. In 1997, the Kyoto Protocol was adopted, which established more specific objectives regarding the reduction of greenhouse gas emissions.<sup>95</sup>

The Paris Agreement, introduced in 2015, represents the latest major addition to international climate change law. It sets ambitious objectives but offers great flexibility in how those objectives are achieved. States are granted significant autonomy, allowing them to establish their own reduction targets (known as nationally determined contributions or NDCs).<sup>96</sup>

The Paris Agreement briefly refers to human rights in its preamble but not in its operative part.<sup>97</sup> Similarly, Indigenous peoples' rights are only briefly mentioned to in the Paris Agreement. However, no binding force is attached to a preamble. At best, it can influence the interpretation of the Agreement.<sup>98</sup>

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<sup>95</sup> G. HERNANDEZ, *op. cit.*, p. 511 ; R. TSOSIE, "Indigenous people and environmental justice: the impact of climate change", *University of Colorado Law Review*, 2007, p. 1658-1659.

<sup>96</sup> B.L. GUNN, *op. cit.*, p. 10 ; A. SAVARESI, "The Paris Agreement: a new beginning", *Journal of Energy and Natural Resources Law*, 2016, p. 19-20 ; P. UPADHYAY, "Climate claimants: the prospects of suing the New Zealand government for climate inaction", *New Zealand Journal of Environmental Law*, 2019, p. 188.

<sup>97</sup> J. PEEL and H.M. OSOFSKY, "A rights turn in climate change litigation?", *Transnational Environmental Law*, 2018, p. 45.

<sup>98</sup> G. HERNANDEZ, *op. cit.*, p. 181 ; M.A. PEARL, "Human rights, Indigenous peoples, and the global climate crisis", *Wake Forest Law Review*, 2018, p. 734.

## Chapter 3. Safeguarding Indigenous peoples' rights in the context of climate change

This chapter will explore the impact of climate change on the rights of Indigenous peoples and potential remedies to address these impacts. Specifically, it will examine how climate change affects the rights protected by UNDRIP, with a focus on self-determination, the right to land and the right to culture.

Indigenous peoples and their rights are specifically highlighted in the context of climate change because, although climate change will impact everyone, Indigenous communities are particularly vulnerable. The effects of climate change that will be felt universally will likely have a more severe impact on Indigenous peoples, who are already vulnerable.<sup>99</sup>

This dissertation will then delve into climate change litigation under public international law. While there're also opportunities for legal action under domestic law, the focus will lie on international law. There'll be an examination of obstacles that may arise when endeavoring to develop a climate change litigation claim.

### 2.1. Climate change and Indigenous peoples' rights

This first section will examine the unique aspects that have led to a focus on Indigenous peoples' rights. What sets their situation apart from others? The subsequent analysis will examine the specific rights that are expected to be most affected by climate and the manner in which they may be impacted.

#### 2.1.1. How are Indigenous peoples affected differently?

It is quite obvious that climate change won't only affect Indigenous peoples. However, they are affected in a different manner because of a number of reasons.

To begin with, Indigenous peoples are particularly vulnerable to the impacts of climate change due to the regions in which they reside, whether it's the Arctic or small Pacific Islands, among other regions.<sup>100</sup> Additionally, Indigenous peoples bear little responsibility for the causes of climate change but face a disproportionate burden of its consequences.<sup>101</sup>

Most importantly, the relationship that Indigenous peoples have with their environment is

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<sup>99</sup> D. SPENTZOU, "Climate change litigation as a means to address intergenerational equity and climate change", *Queen Mary Law Journal*, 2021, p. 173.

<sup>100</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 183-185 and 189.

<sup>101</sup> B.L. GUNN, *op. cit.*, p. 7

fundamentally different from that of the general population. They share a strong bond with the land they inhabit and its resources. This connection goes beyond mere physical survival and is often linked to cultural practices and traditions. Therefore, the loss of their ancestral lands can result in significant emotional distress as well as jeopardize their survival as a culturally distinct group.<sup>102</sup>

### 2.1.2. Which rights are affected?

The profound connection that Indigenous peoples have with their lands and natural resources renders them particularly susceptible to the repercussions of climate change. It's a threat that directly undermines the exercise of their rights as a whole.<sup>103</sup>

The subsequent paragraphs will elaborate on some of the rights that are likely to be impacted. Although several rights are likely to be affected, this dissertation will concentrate on the rights that are the most relevant to its scope.

#### 2.1.1.1. *The right to self-determination*

As has been established, the right to self-determination of indigenous peoples is their right to freely determine their internal affairs. As climate change progresses, the exercise of this right will become more difficult. The effects of climate change may prevent Indigenous peoples from freely determining their future which is an important aspect of the right to self-determination.<sup>104</sup>

For low lying Pacific Islands which are home to Indigenous peoples, the worst-case scenario is complete or partial inundation of their territory, making it impossible to continue to live there. But even setting this scenario aside, there're many other potential effects of climate change which may impact the right to self-determination of Pacific Indigenous peoples. Droughts, wildfires or contamination of fresh water sources by salt water are all possible consequences of the rise of sea levels for small Pacific Islands.<sup>105</sup>

Climate change poses a challenge because recognizing Indigenous peoples' right to self-determination alone is insufficient to protect their rights. The root causes of climate change don't originate within Indigenous territories. In the case of Pacific Islands, they don't even

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<sup>102</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 187-188.

<sup>103</sup> R.S. ABATE and E.A. KRONK, *op. cit.*, p. 190.

<sup>104</sup> G. GIACOMINI, *op. cit.*, p. 141.

<sup>105</sup> N. JONES, "Prospects for invoking the law of self-determination in international climate litigation", *Review of European, comparative & international environmental law*, 2023, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12494> (Consulted on 30<sup>th</sup> April 2023) ; R. TSOSIE, *op. cit.*, p. 1636.

occur within their country. Indigenous peoples have limited control over the actions of states that emit greenhouse gases.<sup>106</sup>

The effects of climate change and the fact that its causes are foreign to the territories of Indigenous peoples will make it extremely difficult to exercise the right to self-determination in a meaningful way.

#### *2.1.1.2. The right to land and resources*

The right of Indigenous peoples to their ancestral lands and resources is fundamental. However, for Indigenous Pacific Islanders, the consequences of rising sea-levels pose a significant threat to their traditional lands. In addition to the risk of territory loss, other adverse effects could make life on these islands unviable, such as the contamination of freshwater resources, loss of traditional food sources and extreme weather patterns.<sup>107</sup> Indigenous peoples are often characterized by their relationship to their environment. In many instances, they strongly rely on it for their physical and spiritual sustenance.<sup>108</sup>

#### *2.1.1.3. The right to not be forcibly removed*

UNDRIP protects the right of Indigenous peoples not to be forcibly removed from their territories without their free, prior and informed consent.<sup>109</sup>

The right to remain on their ancestral lands is evidently endangered in the context of climate change. The adverse impacts of climate change raise the possibility of Indigenous peoples being compelled to abandon their traditional territories. The violation of this right, in turn, has a profound impact on the exercise of their other fundamental rights, including the right to self-determination and the right to culture.<sup>110</sup>

Indigenous Pacific Islanders have made it increasingly clear that their focus is mitigating the effects of the effects of climate change in order to be able to stay on their ancestral lands.<sup>111</sup>

An entire discussion exists in international law regarding the situation of “climate change refugees”.<sup>112</sup> While this topic is undoubtedly intriguing, it falls outside the scope of this

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<sup>106</sup> R. TSOSIE, *op. cit.*, p. 1644.

<sup>107</sup> B.L. GUNN, *op. cit.*, p. 7-9.

<sup>108</sup> A. MBOYA, “Vulnerability and the climate change regime”, *UCLA Journal of Environmental Law and Policy*, 2018, p. 79.

<sup>109</sup> Art. 10 UNDRIP

<sup>110</sup> G. GIACOMINI, *op. cit.*, p. 141.

<sup>111</sup> M. WEWERINKE-SINGH, “Litigating human rights violations related to the adverse effects of climate change in the Pacific Islands”, *Climate change litigation in the Asia Pacific*, J. Lin and D. Kysar (dir.), Cambridge, Cambridge University Press, 2020, p. 95.

<sup>112</sup> G. GIACOMINI, *op. cit.*, p. 142.

dissertation and will not be explored further.

#### *2.1.1.4. The right to culture*

Due to the deep spiritual and cultural bond Indigenous peoples have with their ancestral lands, the deprivation of those lands results in significant cultural and religious losses. Numerous Indigenous cultural traditions are linked to specific locations, making the loss of land even more detrimental. Additionally, the disappearance of land adversely impacts various species of fauna and flora, subsequently undermining the traditional knowledge and cultural of Indigenous peoples.<sup>113</sup>

While some Pacific Islands are considering relocating their populations, this option isn't suitable for Indigenous peoples due to the profound disruption it would cause to their cultural practices and traditions, which are deeply intertwined with their land and integral to their identity. Relocation would disrupt their traditional knowledge systems, including oral traditions and pose an even greater threat to the survival of Indigenous languages.<sup>114</sup>

## 2.2. Who is responsible?

Naturally, the next question arises regarding responsibility. Who can be held liable and pursued in tribunals and courts? Who bears responsibility for ensuring the protection of Indigenous peoples' rights? Is it possible to invoke third states' responsibility for their greenhouse gas emissions, which impact Indigenous peoples beyond their own territories?

### 2.2.1. States' obligations towards Indigenous peoples

When addressing the issue of responsibility for climate change concerning the rights of Indigenous peoples, the primary focus naturally turns to the state within which these Indigenous peoples reside. Regardless of the non-binding nature of UNDRIP, it's the state's duty to respect and protect the rights of its Indigenous peoples. These obligations are owed by the state to its own citizens residing within its territory, placing the responsibility on each individual state.<sup>115</sup> However, given the nature of climate change and the limited role of small Pacific islands in its causation, their capacity to respect and protect the rights of their

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<sup>113</sup> B.L. GUNN, *op. cit.*, p. 9 ; D. KAPUA'ALA SPROAT, "An Indigenous people's right to environmental self-determination: native Hawaiians and the struggle against climate change devastation", *Stanford Environmental Law Journal*, 2016, p. 164 ; R. TSOSIE, *op. cit.*, p. 1638.

<sup>114</sup> R. TSOSIE, *op. cit.*, p. 1644.

<sup>115</sup> M. GIBNEY, K. TOMASEVSKI and J. VEDSTED-HANSEN, "Transnational state responsibility for violations of human rights", *Harvard Human Rights Journal*, 1999, p. 267 ; K. WILKINS, *op. cit.*, p. 1249.

Indigenous peoples is constrained.<sup>116</sup>

### 2.2.2. Third states and Indigenous peoples' rights

When considering the situation of Indigenous peoples residing on small Pacific islands, pursuing their own states for inaction on climate change will most likely prove ineffective, as these states aren't major contributors to greenhouse gas emissions. These islands cannot single-handedly halt climate change. Consequently, it is challenging to hold them accountable for the effects of climate change.<sup>117</sup>

As a result, an important question arises as to whether Indigenous peoples can seek recourse against third states that are substantial contributors to climate change. Do these third states bear obligations toward Indigenous peoples beyond their own territories?

When it comes to climate change, UN treaty bodies have repeatedly recognized that states have extraterritorial obligations<sup>118</sup>. This has been the case especially when it comes to rights of children.<sup>119</sup> This has been developed in particular in the case of *Chiara Sacchi et al. v. Argentina et al.* which came before the Committee on the Rights of the Child. Despite the case being ultimately dismissed, the Committee determined that the emission of greenhouse gases could have an impact on the enjoyment of human rights including beyond the borders of the state in question. This Committee decision was based upon an advisory opinion of the Inter-American Court of Human Rights<sup>120</sup> where the potential establishment of jurisdiction for human rights violations stemming from transboundary environmental harm occurring outside the state's territory was discussed. This possibility was conditioned upon two factors: the state must exercise effective control over the dangerous activity and the harm must be foreseeable.<sup>121</sup> UN treaty bodies are quasi-judicial entities, and while their decisions may not be legally enforceable, they still hold significant weight. The ICJ has affirmed the significance

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<sup>116</sup> T. NERONI SLADE, "Climate change: the human rights implications for small island developing states", *Environmental Policy and Law*, 2007, p. 216.

<sup>117</sup> L. HORN, "Is litigation an effective weapon for Pacific Island Nations in the War against climate change", *Asia Pacific Journal of Environmental Law*, 2009, p. 195.

<sup>118</sup> E.g. OHCHR, Joint Statement on "Human Rights and Climate Change", <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and> (Accessed on 14<sup>th</sup> May 2023).

<sup>119</sup> Y. SUEDE, "Litigating climate change before the Committee on the Rights of the Child in *Sacchi v. Argentina et al.*: Breaking new ground?", *Nordic Journal of Human Rights*, 2022, p. 557.

<sup>120</sup> Inter-American Court of Human Rights (advisory opinion), 15 November 2017, OC-23/17, *The environment and human rights*, §81.

<sup>121</sup> R. LUPORINI and A. SAVARESI, "International human rights bodies and climate change litigation: don't look up", *The Review of European, Comparative & International Environmental Law*, 29<sup>th</sup> August 2022, p. 10-11.

of these decisions.<sup>122</sup> This line of reasoning might be of interest to Indigenous peoples seeking to litigate against third states for the consequences of climate change.

Another important aspect to consider when looking to go after third states is attribution. As we have observed, climate change is primarily caused by the emission of greenhouse gases. The combined emissions of states contribute to climate change and its associated impacts. When seeking to establish state liability, the claimant must provide evidence demonstrating a link between the alleged violation/damage and the emissions of greenhouse gases by the state in question.<sup>123</sup>

### 2.2.3. Other actors

In addition to states, there are other actors that can impact the rights of Indigenous peoples in relation to climate change. The role of corporations in emitting greenhouse gases and contributing to pollution has been the subject of significant discussion and there is a rising trend of pursuing legal claims against private corporations.<sup>124</sup> However, this aspect is beyond the scope of my dissertation and won't be discussed further.

### 2.2.4. States obligations in relation to climate change

International climate change law notably lacks clear and precise obligations. The obligations outlined in the UNFCCC are generally defined in broad terms. The Kyoto Protocol<sup>125</sup>, which was adopted in 1997, failed to gain the support of significant players like the United States, as they did not ratify the protocol. Furthermore, numerous other major emitters refrained from setting new targets once the initial commitment period had concluded.<sup>126</sup>

The Paris Agreement adopted in 2015 marked a significant step forward in terms of ratification, however it necessitated substantial compromises.<sup>127</sup> While the Paris Agreement does require states to undertake mitigation measures, it grants them the freedom to decide on the specific approach to adopt. It is distinguished by a combination of both soft and hard obligations, as indicated by the use of terms like “encourage” or “should” for softer obligations, and “shall”

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<sup>122</sup> Y. SUEDE, *op. cit.*, p. 557.

<sup>123</sup> L. HORN, *op. cit.*, p. 196 ; P. UPADHYAY, *op. cit.*, p. 192.

<sup>124</sup> G. GIACOMINI, *op. cit.*, p. 322 and 343.

<sup>125</sup> Given its limited relevance, the Kyoto Protocol will not be further discussed in this dissertation.

<sup>126</sup> A. SAVARESI, “The Paris Agreement...”, *op. cit.*, p. 16-17.

<sup>127</sup> MCCREATH M., “The potential for UNCLOS climate change litigation to achieve mitigation outcomes”, *Climate change litigation in the Asia Pacific*, J. Lin and D. Kysar (dir.), Cambridge, Cambridge University Press, 2020, p. 121.

for more binding obligations.<sup>128</sup>

A notable advancement of the Paris Agreement is the introduction of a review mechanism. According to this system, states are expected to submit NDCs every five years with the aim of increasing their level of ambition. The purpose being to encourage states to continually enhance their commitments to address climate change.<sup>129</sup> The issue with the Paris Agreement is the lack of a mechanism to hold states accountable in the case they don't respect their NDCs.<sup>130</sup> This lack of "hard obligations" presents challenges in effectively holding states accountable for their actions and contributions to climate and emissions.

### 2.3. How to hold states accountable?

In the case of Indigenous Pacific Islanders, the primary challenge lies in the fact that their own states are often not the main contributors to emissions and causes of climate change. The key question is how can Indigenous peoples go after third states? Through which mechanisms can they be held responsible for their greenhouse gas emissions?

While options may exist under domestic law, this dissertation will focus on exploring the mechanisms available under international law.

#### 2.3.1. UNDRIP

Although UNDRIP is an important document in the recognition of Indigenous peoples' rights, it remains a non-binding legal instrument. As a result, states aren't bound, and it isn't possible to go before a court or tribunal to require that UNDRIP as such is enforced. UNDRIP serves a valuable purpose in acknowledging the fundamental rights of Indigenous peoples. But to initiate legal action, an alternative legal basis must be identified.<sup>131</sup>

Several states have incorporated UNDRIP in their national legislation, it is then binding as a matter of national law. In that case, there may be legal remedies under their domestic law.<sup>132</sup> This won't be further discussed as it falls beyond the scope of this dissertation.

#### 2.3.2. States claiming on behalf of their Indigenous peoples

There are several avenues through which states can potentially undertake action to advocate for the rights of their Indigenous peoples. Despite the perceived challenges, there can be

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<sup>128</sup> L. HORN, *op. cit.*, p. 177 ; A. SAVARESI, "The Paris Agreement...", *op. cit.*, p. 19-20.

<sup>129</sup> A. SAVARESI, "The Paris Agreement...", *op. cit.*, p. 21.

<sup>130</sup> A. SAVARESI, "Human rights ...", *op. cit.*, p. 239.

<sup>131</sup> M.I. MITCHELL and D. YUZDEPSKI, *op. cit.*, p. 1356 ; T. WARD, *op. cit.*, p. 58.

<sup>132</sup> F. GOMEZ ISA, *op. cit.*, p. 7-9.

instances where the interests of the state align with those of Indigenous peoples, namely in the case of small Pacific Islands, which could facilitate the initiation of a claim on their behalf.<sup>133</sup>

### 2.3.2.1. *International Climate Change Conventions*

The climate change conventions aren't the most promising avenues for climate change litigation aimed at protecting Indigenous peoples' rights. As we have seen UNFCCC obligations tend to be broadly defined, granting significant discretion to individual states. As a result, establishing a precise obligation that has been violated becomes challenging. A similar situation arises with the Paris Agreement, where it is inappropriate to accuse states of breaching the agreement solely based on their low reduction target. Failure to increase the ambition of their NDCs over time could potentially constitute a breach. But, if states have established their NDCs and are meeting their procedural obligations, there is limited room for further action.<sup>134</sup>

### 2.3.2.2. *The law of state responsibility*

The classic means to hold other states accountable are the principles of state responsibility which are reflected in the 'ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (ARSIWA).<sup>135</sup> Article 55 of ARSIWA stipulates that the rules on state responsibility won't apply in the situation where a specific legal regime contains its own distinctive rules. The climate change conventions, UNFCCC, the Kyoto Protocol and the Paris Agreement, don't contain any specific provisions on state responsibility. They don't preclude the application of traditional principles of state responsibility in climate change litigation.<sup>136</sup>

The fundamental principle of state responsibility is that a state bears responsibility for a wrongful act if it violates international law, provided that the act can be attributed to the state and the state was obligated to comply with that rule of international law.<sup>137</sup>

Apart from the climate change conventions, customary international law pertaining to environmental matters can play a role when considering relevant international obligations. One of the principles is the so-called 'no-harm principle'. This principle requires from states to

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<sup>133</sup> L. HORN, *op. cit.*, p. 172-173.

<sup>134</sup> A. ROCHA, "Suing States: the role of courts in promoting States' responsibility for climate change", *Blue planet law. The ecology of our economic and technological world*, M. da Gloria Garcia and A. Cortês (dir.), Cham, Springer, 2020, p. 104

<sup>135</sup> International Law Commission, *Draft Articles on responsibility of states for internationally wrongful acts* (2001), [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) (Accessed on 19th May 2023) ; G. HERNANDEZ, *op. cit.*, p. 248.

<sup>136</sup> H.S. TURKAMANI, "From Kyoto to Paris: problematic route of state responsibility for climate change", *Environmental Law Review*, 2021, p. 323.

<sup>137</sup> J. WILLIAMS, *op. cit.*, p. 668.

make sure that activities on their territory don't cause transboundary harm beyond their territory. The first articulation of this principle was in the Trail Smelter arbitration case between the United States and Canada. Numerous international authorities have since affirmed this principle, which was later reaffirmed by the ICJ in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. The ICJ recognized it as a customary international law principle.<sup>138</sup>

The violation of the no-harm principle occurs when three conditions are met: there is environmental damage that extends across borders, a causal connection is established with the actions of the relevant state, and the state in question has failed to take reasonable measures to prevent the inflicted harm.<sup>139</sup>

There're difficulties associated with this approach.<sup>140</sup> Firstly, the causal relation between the harm and climate change. It'd require to demonstrate that the emission of greenhouse gases is the cause of the transboundary harm affecting the Indigenous peoples on small Pacific Islands. While for some phenomena such as the rise of sea-levels, causation is well-established, it is less so the case for others such as extreme weather events. It is especially difficult to establish links between climate change and specific events.<sup>141</sup> Secondly, it is important to establish that the damage resulting from greenhouse gas emissions can be attributed to the specific state under consideration.<sup>142</sup> In order to establish liability, the small Pacific Islands must demonstrate the adverse effects inflicted upon their islands by greenhouse gas emissions originating from the state they're suing.<sup>143</sup>

### 2.3.2.2. *International Court of Justice (ICJ)*

The following major issue would be finding a forum to hear the claim.<sup>144</sup> As evident from the preceding developments, initiating a contentious case appears to be challenging. Various additional factors come into play beyond the ones already discussed. One notable concern is the potential reluctance of states to initiate a case against another state, as they may prefer less

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<sup>138</sup> G. HERNANDEZ, *op. cit.*, p. 504 ; B. MAYER, "The relevance of the no-harm principle to climate change law and politics", *Asia Pacific Journal of Environmental Law*, 2016, p. 81-82 ; J. WILLIAMS, *op. cit.*, p. 668.

<sup>139</sup> B. MAYER, *op. cit.*, p. 85.

<sup>140</sup> L.A. OMUKO, "Applying the precautionary principle to address the proof problem in climate change litigation", *Tilburg Law Review*, 2016, p. 54.

<sup>141</sup> B. MAYER, *op. cit.*, p. 91 ; O. QUIRICO, "Climate change and state responsibility for human rights violations: causation and imputation", *Netherlands International Law Review*, 2018, p. 190.

<sup>142</sup> O. QUIRICO, *op. cit.*, p. 197.

<sup>143</sup> R.E. JACOBS, "Treading deep waters: substantive law issues in Tuvalu's threat to sue the United States in the International Court of Justice", *Pacific Rim Law & Policy Journal*, 2005, p. 120.

<sup>144</sup> M. WEWERINKE-SINGH and D. HINGE SALILI, "Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change", *Climate Policy*, 2020, p.687

contentious methods such as negotiations.<sup>145</sup> Additionally, the jurisdiction of the ICJ depends on the consent of the involved states. Consequently, if a state doesn't provide consent to the Court's jurisdiction, a case cannot be brought before it.<sup>146</sup>

Nonetheless, it's important to note that the ICJ also possesses an advisory jurisdiction. While pursuing contentious jurisdiction may seem unlikely, an alternative option is to seek an advisory opinion from the Court. This avenue has been utilized, as there is presently a pending request before the Court for an advisory opinion on the obligations of states regarding climate change.<sup>147</sup> It is important to note that an advisory opinion though not legally binding, has the potential to provide clarity on the states' obligations. In this regard, it can assist Indigenous peoples in formulating additional claims by providing clarity on their rights and the responsibilities of states.<sup>148</sup>

### 2.3.2.3. *Law of the sea*

The UN Convention on the Law of the Sea (UNCLOS) contains provisions aimed at safeguarding the marine environment. Some consequences of climate change, like sea-level rise and ocean acidification, can be considered as forms of "pollution of the marine environment" within the UNCLOS. Art. 194(2) requires states to undertake all necessary measures to ensure that activities within their jurisdiction or control do not result in transboundary pollution damage.<sup>149</sup> While the Convention doesn't specifically mention Indigenous peoples or their rights, it could still be a relevant option to explore for Indigenous communities residing on low-lying Pacific Islands.<sup>150</sup>

To initiate a case, several obstacles must be overcome, including establishing the existence of a dispute related to marine pollution and demonstrating that that dispute pertains to the interpretation or application of UNCLOS.<sup>151</sup> UNCLOS holds a notable advantage by including mandatory dispute settlement procedures. However, precedence is given to other relevant procedures agreed upon by the parties. The UNCLOS procedures can be invoked when the parties fail to reach a settlement through an alternative agreed means and if such agreement

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<sup>145</sup> A. ROCHA, *op. cit.*, p. 107.

<sup>146</sup> L. HORN, *op. cit.*, p. 197.

<sup>147</sup> International Court of Justice, "Obligations of states in respect of climate change", <https://www.icj-cij.org/case/187> (Accessed on 19th May 2023).

<sup>148</sup> L. HORN, *op. cit.*, p. 176.

<sup>149</sup> L. HORN, *op. cit.*, p. 182-183 ; M. MCCREATH, *op. cit.*, p. 125 ; A. ROCHA, *op. cit.*, p. 107.

<sup>150</sup> L. HORN, *op. cit.*, p. 182 ; A. ROCHA, *op. cit.*, p. 107.

<sup>151</sup> M. MCCREATH, *op. cit.*, p. 133-135.

does not prevent further proceedings.<sup>152</sup>

Lastly, an important aspect of the law of the sea regime which may be relevant for climate change litigation is the advisory jurisdiction of the International Tribunal of the Sea (ITLOS). Through its advisory jurisdiction, states and international organizations have the opportunity to request advisory opinions on matters pertaining to the Convention.<sup>153</sup> Antigua and Barbuda, and Tuvalu, two small island states have utilized this avenue by establishing an international organization with the intention of requesting an advisory opinion from ITLOS.<sup>154</sup> While the initiative wasn't directly initiated by Indigenous peoples, it is worth noting that a majority of Tuvaluans are indigenous Polynesians. Moreover, the questions posed, and subsequent answers obtained through this process may still hold relevance for Indigenous peoples seeking to initiate litigation.<sup>155</sup>

#### 2.3.2.4. Concluding remarks

The challenges surrounding states suing other states on behalf of their Indigenous peoples have been illustrated. Undoubtedly, these challenges are not insignificant, and pursuing this avenue may not be the most straightforward approach to safeguarding the rights of Indigenous peoples, although it has its merits as well. The distinct advantage of states undertaking litigation on behalf of their Indigenous peoples is the heightened international attention it brings to their cause, which in turn exerts pressure on states at the international level to enhance their mitigation efforts.<sup>156</sup>

#### 2.3.3. International human rights

One of the approaches that has been discussed in recent years to combat climate change is utilizing the human rights framework in order to prompt state action. Climate change affects human rights in multiple ways, we have previously highlighted how that is the case for Indigenous peoples' rights in particular. The link between human rights and climate change is

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<sup>152</sup> M. MCCREATH, *op. cit.*, p. 121 and 136 ; A. SAVARESI, "Inter-state climate change litigation: 'neither a chimera nor a panacea'", *Climate change litigation: global perspectives*, I. Alogna, C. Bakker and J.-P. Gauci (dir.), Leiden, Martinus Nijhoff Publishers, 2021, p. 366-392 p. 381.

<sup>153</sup> A. ROCHA, *op. cit.*, p. 107.

<sup>154</sup> Request for an advisory opinion submitted by the Commission of Small States on Climate Change and International Law, <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> (Accessed on 18<sup>th</sup> May 2023).

<sup>155</sup> S.N. ISLAM *et al.*, "Climate change versus livelihoods, heritage and ecosystems in small Island states of the Pacific: a case study on Tuvalu", found online on Springer <https://link.springer.com/article/10.1007/s10668-022-02367-7> (Last consulted on 3rd May 2023) ; A. ROCHA, *op. cit.*, p. 107.

<sup>156</sup> M. MCCREATH, *op. cit.*, p. 142.

well-recognized nowadays. In 2008, the UN Human Rights Council recognized that climate change negatively impacts the effective enjoyment of human rights. This connection has consistently been reaffirmed by multiple human rights bodies.<sup>157</sup>

Therefore, one of the ways to hold states responsible for climate change is by utilizing human rights frameworks. International human rights law presents a distinct advantage through the availability of individual petitions before human rights bodies and courts. This would enable Indigenous peoples to directly bring their claims before a judicial or quasi-judicial entity.<sup>158</sup>

### 2.3.2.2. *Regional human rights courts*

There're regional courts of human rights which could receive claims of Indigenous peoples in the context of climate change.

In Europe, the European Court of Human Rights (ECHR) is the regional court with the most extensive body of case law on the connection between environmental protection and human rights.<sup>159</sup> In the Americas, the Inter-American Court of Human Rights (IACtHR) has developed the most comprehensive caselaw concerning the rights of Indigenous peoples and have also touched on environmental issues.<sup>160</sup> In 2017, they delivered an advisory opinion where they recognized the linkage between the protection of the environment and the realization of human rights.<sup>161</sup>

A question that arises is that of extraterritorial jurisdiction. The ECHR does not rule out the potential for states to be held liable for extraterritorial actions. Although the conditions for such liability are quite strict, Indigenous Pacific Islanders could theoretically file a complaint with the Strasbourg Court.<sup>162</sup> The conception of extraterritorial jurisdiction of the IACtHR aligns closely with that of the Strasbourg Court. Both courts operate on the principle of “effective control” as the basis for establishing jurisdiction.<sup>163</sup> It's important to note that aside

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<sup>157</sup> J. PEEL and H.M. OSOFSKY, *op. cit.*, p. 42-45 ; A. SAVARESI and J. HARTMANN, “Using human rights law to address the impacts of climate change: early reflections on the carbon majors inquiry”, *Climate change litigation in the Asia Pacific*, J. Lin and D. Kysar (dir.), Cambridge, Cambridge University Press, 2020, p. 76 ; M. WEWERINKE-SINGH, *op. cit.*, p. 109.

<sup>158</sup> A. ROCHA, *op. cit.*, p. 107.

<sup>159</sup> J. PEEL and H.M. OSOFSKY, *op. cit.*, p. 64.

<sup>160</sup> T. WARD, *op. cit.*, p. 61.

<sup>161</sup> G. LE MOLI, “The human rights committee, environmental protection and the right to life”, *International and Comparative Law Quarterly*, 2020, p. 749.

<sup>162</sup> K.F. BRAIG and S. PANOV, “The doctrine of positive obligations as a starting point for climate litigation in Strasbourg: the European Court of Human Rights as a Hilfssheriff in combating climate change?”, *Journal of Environmental Law and Litigation*, 2020, p. 290-291.

<sup>163</sup> R. ABELLO-GALVIS and W. AREVALO-RAMIREZ, “Inter-American Court of Human Rights advisory opinion OC-23/17: jurisdictional, procedural and substantive implications of human rights duties in the context

from the question of extraterritoriality, other factors like causality and attribution also come into play.<sup>164</sup>

The African Commission of Human Rights has also delivered noteworthy judgments pertaining to Indigenous peoples and environmental matters. However, their extraterritorial jurisdiction isn't as relevant to Indigenous Pacific Islanders as the African continent accounts for less than 5% of the world's global emissions.<sup>165</sup>

Currently, there is no regional court of human rights established for the Asia-Pacific region.<sup>166</sup>

### 2.3.2.3. *Quasi-judicial international bodies*

In addition to the regional human rights courts, there are various quasi-judicial UN human rights bodies. These bodies are attached to treaties and they typically allow individuals to file complaints regarding alleged human rights violations they have suffered.<sup>167</sup>

One of them is the UN Human Rights Committee which is the committee supervising the implementation of the ICCPR.<sup>168</sup> As we've seen this Convention contains provisions which are relevant to Indigenous peoples, in particular article 27 which protects the right of minorities and amongst others the right to culture.<sup>169</sup> Decisions of the Human Rights Committee have been referred to by regional courts of human rights and the ICJ.<sup>170</sup> The Committee on Economic, Social and Cultural rights is responsible for complaints related to ICESCR which includes the right to culture along other fundamental rights.<sup>171</sup>

Although ratifications by Pacific Islands of the Optional Protocols which establish the complaint mechanisms are quite low, individuals could still file claims against high emitters which are at the origin of the effects of climate on their rights insofar the state in question has ratified the Optional Protocols.<sup>172</sup> However, it is important to note that the Optional Protocols

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of environmental protection”, *Review of European, Comparative & International Environmental Law*, 2019, p. 220

<sup>164</sup> See *infra* p. 30.

<sup>165</sup> CDP, “Africa Report”, <https://www.cdp.net/en/research/global-reports/africa-report> (Accessed on 18th May 2023) ; J. WILLIAMS, *op. cit.*, p. 662-663.

<sup>166</sup> C.-H. CHUNG, “The emerging Asian-Pacific Court of Human Rights in the context of state and non-state liability”, *Harvard International Law Journal*, 2016, p. 45.

<sup>167</sup> M. WEWERINKE-SINGH, *op. cit.*, p. 111-112.

<sup>168</sup> Office of the High Commissioner for Human Rights, “Human Rights Committee”, <https://www.ohchr.org/en/treaty-bodies/ccpr> (Last consulted on 4th May 2023).

<sup>169</sup> Art. 27 ICCPR ; J. WILLIAMS, *op. cit.*, p. 664.

<sup>170</sup> G. LE MOLI, *op. cit.*, p. 737.

<sup>171</sup> Art. 15 ICESCR ; OHCHR, “Committee on Economic, Social and Cultural Rights”, <https://www.ohchr.org/en/treaty-bodies/cescr> (Accessed on 18th May 2023).

<sup>172</sup> M. WEWERINKE-SINGH, *op. cit.*, p. 112 and 114.

have not been ratified by some of the world's biggest emitters. Consequently, this may not be the most effective avenue for pursuing climate change litigation against these states.<sup>173</sup>

As before the regional court of human rights, the issue of extraterritorial jurisdiction could be raised. However, human rights bodies are quite open to consider the extraterritorial dimension of human rights obligations, including in the context of climate change.<sup>174</sup>

#### 2.3.2.4. Challenges affecting human rights climate change litigation

Before international human rights bodies, similar challenges to other climate change litigation claims present themselves.

One of the major issues with bringing a claim is the need to show that there's been a concrete violation of a human right. This requires establishing a causal link between the State's action or omissions related to climate change, and the adverse effects on the human rights of Indigenous Pacific Islanders.<sup>175</sup> It has become increasingly feasible to establish a clear connection between excessive greenhouse gas emissions and certain consequences of climate change. Certain effects, such as the rise in sea-levels, have been extensively documented and attributed to climate change resulting from excessive emissions.<sup>176</sup> The second aspect of this undertaking involves attributing the excessive emissions, causing the adverse impacts, to specific states. While it is widely acknowledged that certain states hold a greater responsibility for emissions, it remains challenging to assign specific impacts exclusively to individual states. The difficulty arises due to the global nature of climate change, which transcends national boundaries.<sup>177</sup>

The Sacchi decision taken by the UN Committee on the Rights of the Child could potentially offer a solution if its reasoning is adopted by other human rights bodies. Regarding the matter of causality, they determined that when states contribute to climate change as a whole, it is

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<sup>173</sup> OHCHR, "Status of ratifications: Optional Protocol to the International Covenant on Civil and Political Rights", <https://indicators.ohchr.org/> (Accessed on 18<sup>th</sup> May 2023) ; OHCHR, "Status of ratifications: Optional Protocol to the International Covenant on Economic, Social and Cultural rights", <https://indicators.ohchr.org/> (Accessed on 17<sup>th</sup> May 2023).

<sup>174</sup> R. LUPORINI and A. SAVARESI, *op. cit.*, p. 10-11 ; E. PRIBYTKOVA, "Extraterritorial obligations in the United Nations system: UN treaty bodies", *The Routledge Handbook on Extraterritorial Human Rights Obligations*, M. Gibney *et al.* (dir.), London and New York, Routledge, 2022, p. 96 ; M. WEWERINKE-SINGH, *op. cit.*, p. 114-115.

<sup>175</sup> J. PEEL and H.M. OSOFSKY, *op. cit.*, p. 46 ; M. WEWERINKE-SINGH, *op. cit.*, p. 115.

<sup>176</sup> IPCC, "Synthesis report of the IPCC Sixth Assessment report: summary for policymakers", found online: <https://www.ipcc.ch/report/ar6/syr/> (last consulted on 3<sup>rd</sup> April 2023) ; A. SAVARESI and J. HARTMANN, "Using human rights law to address the impacts of climate change: early reflections on the carbon majors inquiry", *Climate change litigation in the Asia Pacific*, J. Lin and D. Kysar (dir.), Cambridge, Cambridge University Press, 2020, p. 78.

<sup>177</sup> L. HORN, *op. cit.*, p. 196 ; M. WEWERINKE-SINGH, *op. cit.*, p. 115-116.

sufficient to establish a causal connection.<sup>178</sup>

Lastly, many human rights bodies require the exhaustion of local remedies before a claim can be brought at the international or regional level. In the case of Indigenous Pacific Islanders this might not be too major an issue. This is because the doctrine of state immunity often prevents domestic litigation against third state, making international or regional human rights bodies the more suitable venue for addressing their claims.<sup>179</sup>

#### 2.3.4. International criminal law

There has been a recent emergence of claims that the effects of climate change on Indigenous peoples could be considered as genocide. The rationale behind this assertion is that given the well-established causes and consequences of climate change on Indigenous peoples, it could be framed in such a manner.<sup>180</sup>

##### 2.3.3.1. *The definition of genocide*

The concept of genocide was coined by law professor Raphael Lemkin following the atrocities of World War II. He lobbied to make genocide an international crime.<sup>181</sup> In 1948, the Convention on the prevention and punishment of the crime of genocide was adopted (after: Genocide Convention) which defines genocide as “*the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*”<sup>182</sup> through a series of acts, amongst others killing, causing serious bodily harm or prevention of birth. In this conceptualization of genocide, the emphasis lies on the physical destruction of a group. However, Lemkin’s original notion went further this, also encompassing “*coordinated actions aimed at the destruction of essential foundations of group life*”<sup>183</sup>. He saw genocide as a process which could be reached through different means and wasn’t limited to the physical destruction of peoples.<sup>184</sup>

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<sup>178</sup> S. THEIL, “A cause worthy of more effort: the Committee on the Rights of the Child and the climate change decision”, *Cambridge Law Journal*, March 2022, p. 1.

<sup>179</sup> M. WEWERINKE-SINGH, *op. cit.*, p. 116.

<sup>180</sup> J. WILLIAMS, *op. cit.*, p. 669.

<sup>181</sup> K. HON, “Bringing cultural genocide in by the backdoor: victim participation at the ICC”, *Seton Hall Law Review*, 2013, p. 361.

<sup>182</sup> Convention on the Prevention and Punishment of the Crime of Genocide, signed in Paris on the 9<sup>th</sup> December 1948, *U.N.T.C.*, 1948, vol. 78, p. 277, art. 2.

<sup>183</sup> L. KINGSTON, “The destruction of identity: cultural genocide and Indigenous peoples”, *Journal of Human Rights*, 2015, p. 66.

<sup>184</sup> J. ZIMMERER, “Climate change: environmental violence and genocide”, *International Journal of Human Rights*, 2014, p. 274.

### 2.3.3.2. *Genocide and Indigenous peoples*

Indigenous peoples have argued that the loss of their land as a consequence of global warming and the rise of the ocean levels constitutes cultural genocide. As we have established previously, the lands and culture of Indigenous peoples are interconnected. If Pacific Islands become submerged, the loss of land will necessarily result in cultural loss as many cultural practices of Indigenous peoples are place-based.<sup>185</sup>

Adaptation strategies such as forced relocation will deeply affect traditional knowledge systems and will further impact the existence of Indigenous languages which further leads to cultural loss and as a result, threatens the survival of Indigenous peoples as a distinct group.<sup>186</sup>

This argument is based on Lemkin's view according to which cultural destruction could lead to the disintegration of the group itself.<sup>187</sup> The idea is that the effects of climate change are endangering their survival as peoples and can thus be construed as cultural genocide.

### 2.3.3.4. *Challenges*

Although morally there may be an argument here, it's rather difficult to argue legally. There're multiple obstacles.

The first hindrance is the fact that cultural genocide isn't recognized under international law. This has been confirmed by the ICJ in the *Bosnia v. Serbia* case.<sup>188</sup>

Another major obstacle to framing climate change as cultural genocide is the issue of intent which is a crucial element of the definition of genocide under the Genocide Convention. In particular for an act to be considered genocide, it must be committed with special intent.<sup>189</sup> Proving intent in court is already a challenging task. There have been cases where intent has been inferred from speeches, acts and writings such as propaganda.<sup>190</sup> In the case of climate change, pinpointing a specific perpetrator is already a difficult task as the issue of attribution poses significant challenges in litigation. This complexity adds an additional layer of difficulty

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<sup>185</sup> D. KAPUA'ALA SPROAT, *op. cit.*, p. 164-165 and 171 ; R. REED, "Rising seas and disappearing islands: can island inhabitants seek redress under the alien tort claims act?", *Washington International Law Journal*, 2002, p. 425.

<sup>186</sup> C. FARBOTKO and C. MCMICHAEL, "Voluntary immobility and existential security in a changing climate in the Pacific", *Asia Pacific Viewpoint*, 2019, p. 151-152 ; D. SHORT, "Cultural genocide and Indigenous peoples: a sociological approach", *The International Journal of Human Rights*, 2010, p. 837 ; D. KAPUA'ALA SPROAT, *op. cit.*, p. 164-165.

<sup>187</sup> D. KAPUA'ALA SPROAT, *op. cit.*, p. 165.

<sup>188</sup> J. WILLIAMS, *op. cit.*, p. 670-671.

<sup>189</sup> J. ZIMMERER, *op. cit.*, p. 270.

<sup>190</sup> J. ZIMMERER, *op. cit.*, p. 270.

when it comes to establishing intent. Moreover, greenhouse gas emissions aren't specifically targeted towards harming Indigenous Pacific Islanders as a group. Emitters of greenhouse gases aren't acting according to a determinate plan in order to sink Pacific Islands or harm Indigenous peoples directly, which makes proving intent in this regard impossible. While it can be argued that states are aware of the impact greenhouse gas emissions have on small Pacific Islands and Indigenous Pacific Islanders, this knowledge alone does not constitute intent to destroy.<sup>191</sup>

Currently, the argument of cultural genocide may hold moral weight and help raise awareness about the dire situation of Indigenous Pacific Islanders. However, in terms of legal enforceability, it is unlikely to yield significant results based on the existing state of the law.

#### 2.4. Concluding remarks

The possibilities for litigation are numerous and each is accompanied by its own set of challenges. Depending on the chosen legal approach, the difficulties are more or less surmountable. However, it is crucial to emphasize that litigation offers benefits beyond the mere success or failure of claim. These additional advantages shouldn't be underestimated. Litigation plays a vital role in raising awareness, particularly in cases involving interstate claims, as it draws the attention of the international community. While certain claims, such as that of cultural genocide, may face challenges in terms of success, they have the potential to generate significant attention. Such attention can be undesirable for states and may serve as a catalyst for action. Simultaneously, it is important to recognize that litigation alone isn't the ultimate solution, and alternative approaches to protect the rights of Indigenous peoples mustn't be overlooked.<sup>192</sup>

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<sup>191</sup> R. REED, *op. cit.*, p. 426 ; P. STEPHENS, "Applying human rights norms to climate change: the elusive remedy", *Colorado Journal of International Environmental Law and Policy*, 2010, p. 57 ; J. WILLIAMS, *op. cit.*, p. 670.

<sup>192</sup> L. HORN, *op. cit.*, p. 193-194.

## Chapter 4. Conclusion

This dissertation aimed to investigate the preservation of Indigenous peoples' rights in the face of climate change. To achieve this objective, an examination of the legal framework surrounding Indigenous peoples' rights was undertaken. The recognition of their rights in international law has been a gradual process, culminating in the adoption of UNDRIP in 2007. Climate change poses a significant risk to various rights of Indigenous peoples, particularly to their right to self-determination, land rights and cultural rights, as their way of life is intimately intertwined with their natural environment.

The next step involved an analysis of the obligations of states in relation to Indigenous peoples' rights. While the primary responsibility for protecting these rights lies with the state, it was determined that there're arguments to be made for third states having certain responsibilities in the context of climate change.

In the pursuit of examining strategies to protect the rights of Indigenous peoples, this dissertation delved into the potential of climate change litigation within the framework of international law.

Various avenues were explored, starting with the option for states to bring claims on behalf of their Indigenous peoples. Within this possibility, multiple approaches were investigated. The classic means of invoking a state's responsibility, as reflected in the law of state responsibility, was considered. It was noted that UNDRIP, while significant, lacks legal enforceability, necessitating the search for alternative sources of states' obligations. The climate change conventions, being relatively vague, do not provide strong grounds for litigating against another state. The no-harm principle which exists under customary international law was examined and it was determined that while it's an interesting option, it isn't without its challenges either.

Regarding the forum to bring claims, it was acknowledged that the International Court of Justice may not be the most accessible venue due to its jurisdiction based on consent, and states may be hesitant to engage in disputes for diplomatic or political reasons. However, the dissertation highlighted the potential of the request for an advisory opinion by the UNGA currently pending at the ICJ, which could yield interesting outcomes.

Another option for states is to initiate a claim under UNCLOS which benefits from a compulsory settlement provision though it comports it challenges as well.

These possibilities are intriguing but they all face similar challenges, including issues of causality and attribution.

The dissertation then shifted attention to litigation under the human rights framework. Although this approach offers advantages such as enabling direct individual petitions from Indigenous peoples, it also presents numerous challenges, including extraterritorial jurisdiction issues and once again, difficulties related to causality and attribution.

Finally, the concept of cultural genocide was examined. The main finding was that while it raises relevant points regarding the impact of climate change on Indigenous peoples' livelihoods, it is not a concept firmly established under international law. Consequently, it's unlikely to be a successful claim in a court or tribunal.

In conclusion, it is important to note that while climate change litigation can exert pressure on the international community to adopt more ambitious emission reduction targets and fulfill climate change obligations, the potential for enforceable judgments remains uncertain. Therefore, it is crucial to continue respecting Indigenous peoples' rights and to recognize that litigation is just one of many options available to strengthen their rights in the face of climate change.<sup>193</sup>

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<sup>193</sup> L. HORN, *op. cit.*, p. 194.

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