Indigenous Rights and Climate Litigation: Using the ICJ Advisory Opinion to Strengthen Legal Claims

Climate change poses an existential threat to many Indigenous peoples, who often have the smallest carbon footprints yet suffer disproportionate impacts.[1] Rising sea levels are submerging ancestral homelands[2]. Changes in temperature and precipitation patterns are disrupting traditional hunting, fishing, and agriculture systems, resulting in food insecurity and the loss of livelihoods[3]. Forest-dwelling Indigenous groups face intensified wildfires and deforestation driven by climate stress and land degradation, further compounding displacement[4]. These environmental changes directly undermine their right to self-determination, as they are no longer able to govern their lives according to traditional knowledge systems and land-based governance[5]. In essence, climate change is not just an environmental crisis for Indigenous peoples — it is a human rights crisis, eroding cultural survival, territorial sovereignty, and the ability to pass down ancestral knowledge and identity[6].

In recent years Indigenous communities around the world have begun to invoke their human rights and treaty protections to demand stronger climate action. International instruments like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[7], the Paris Agreement[8], and binding human rights treaties[9] now provide overlapping frameworks to support such claims. For example, the United Nations Human Rights Committee (UNHRC) recently found that Australia's failure to protect Torres Strait Islanders from rising seas violated their rights to private life and culture a landmark decision noting that Indigenous peoples "have the smallest ecological footprints" yet face the greatest harm.[10] This blog post examines how Indigenous rights intersect with climate litigation and explores how the forthcoming International Court of Justice (ICJ)

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[1] *Report of the Special Rapporteur on the rights of indigenous peoples* (United Nations, Human Rights Council, A/HRC/36/46, 1 Nov 2017) para 6.

[2] United Nations Human Rights Committee, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016 (2020); Human Rights Council, *Climate change and the rights of Indigenous Peoples*, A/HRC/50/26 (2022).

[3] Intergovernmental Panel on Climate Change (IPCC), *AR6 Synthesis Report: Climate Change 2023*, p. 71.

[4] Food and Agriculture Organization of the United Nations (FAO), *The Impact of Disasters and Crises on Agriculture and Food Security* (2021), Chapter 4.

[5] United Nations Permanent Forum on Indigenous Issues, *Climate change and Indigenous Peoples*, https://www.un.org/development/desa/indigenouspeoples/climate-change.html.

[6] Victoria Tauli-Corpuz, former UN Special Rapporteur on the Rights of Indigenous Peoples, *Report to the UN Human Rights Council*, A/HRC/36/46 (2017), para. 12–22.

[7] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), A/RES/61/295 (2007)

[8] *Paris Agreement*, UNFCCC, 2015

[9] International Covenant on Civil and Political Rights (ICCPR), 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; American Convention on Human Rights, 1969; African Charter on Human and Peoples' Rights, 1981; ASEAN Human Rights Declaration, 2012.

[10] *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, CCPR/C/135/D/3624/2019 (22 September 2022)

advisory opinion on states' climate obligations could be leveraged to bolster Indigenous legal claims domestically and abroad.

International Legal Frameworks

Indigenous climate claims draw on an array of international norms. UNDRIP, though non-binding, articulates key substantive and procedural rights. It affirms Indigenous peoples' rights to their traditional lands, territories and resources[11], to conserve and protect the environment on their lands[12], and to self-determination[13]. Notably, UNDRIP requires free, prior and informed consent (FPIC) for development projects on Indigenous land[14] – a procedural safeguard that climate adaptation or relocation measures must also respect.[15] These rights to land, culture and environment provide a normative backdrop. In practice, courts and bodies have used UNDRIP as an interpretive lens. For instance, the Human Rights Committee in the Torres case invoked the UNDRIP to clarify International Covenant on Civil and Political Rights (ICCPR) protections: it held that ICCPR Article 27 (minority culture) "interpreted in the light of" the UNDRIP "enshrines the inalienable right of Indigenous peoples to enjoy the territories and natural resources that they have traditionally used"[16].

The Paris Agreement similarly acknowledges Indigenous rights in the climate context. Its Preamble urges Parties, "when taking action to address climate change," to "respect, promote and consider their obligations on … the rights of Indigenous peoples".[17] Paris also recognises Indigenous knowledge and invites "engagement of … various actors" in climate action, implicitly supporting participation by Indigenous communities.[18] Likewise, decisions by the Conference of the Parties (COP) and nationally determined contributions (NDCs) increasingly mention Indigenous peoples, though with uneven implementation.[19] Other instruments like International Labour Organisation (ILO) Convention 169[20] and regional human rights treaties (e.g. the ECHR, ACHR, AFCHPR[21]) also underscore consultation and participation requirements. Together these norms create a structural link between climate policy and Indigenous rights: climate measures on Indigenous lands implicate the rights to land, resources, culture, health and self-determination embodied in UNDRIP and other treaties.[22]

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[11] Art. 26, UNDRIP 2007

[12] Art. 29, UNDRIP 2007

[13] Art. 3, UNDRIP 2007

[14] Art. 32(2) and Art. 19, UNDRIP 2007

[15] Wayúu Indigenous community and others v. Ministry of Environment and others, 2019

[16] Human Rights Committee, *Daniel Billy and Others v Australia* (2022) CCPR/C/135/D/3624/2019, para 8.14.

[17] Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1, Preamble (2015).

[18] Paris Agreement, arts 7.5 and 11.2.

[19] See e.g., COP24 Decision 18/CP.24 (Katowice Climate Package) and various Indigenous references in national NDC submissions on the UNFCCC NDC Registry

[20] 'C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)

[21] See n.10.

[22] See generally, S Jodoin and A Cordonier Segger (eds), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge UP 2013), ch 6.

Human rights law further buttresses Indigenous climate claims. While no global treaty explicitly guarantees "a right to a healthy environment," rights to life, health, culture and property can be interpreted to cover climate harms.[23] Moreover, as many have argued before the International Court of Justice (ICJ), the right to a healthy environment may now be considered a norm of customary international law, and would thus be universally binding.[24] Domestic courts have increasingly recognised that climate change can threaten basic rights. In Torres, for example, petitioners cited ICCPR Article 6 (right to life), Article 17 (privacy and family home) and Article 27 (culture)[25]. The Committee found a violation of Articles 17 and 27, noting that sea-level rise threatening Islanders' homes and culture fell squarely within those protections[26]. Similarly, UN human rights bodies and regional courts have linked climate inaction to violations of the rights to health, food, and self-determination.[27] The Inter-American Court of Human Rights (IACtHR), in particular, has developed extensive jurisprudence recognising the strong relationship between Indigenous peoples, their environment, and their fundamental rights including in its Advisory Opinion on the Environment and Human Rights.[28] Procedural rights like participation and access to justice are also key: Indigenous claimants often argue that failure to consult or accommodate them in climate policy breaches rights recognised under UNDRIP, ILO 169 or domestic constitutions (for example, via Charter equality guarantees[29]). In short, the intersection of human rights and environmental law provides multiple entry points for Indigenous climate litigation.

Case Study: Torres Strait Islanders v. Australia

A compelling illustration is the Torres Strait case, in which the UN Human Rights Committee found in 2022 that Australia's failure to protect Indigenous communities from the effects of climate change violated their rights to family life and culture under the ICCPR.[30] In 2019, a group of Torres Strait Islanders petitioned the Committee alleging that Australia's climate inaction violated their rights under the ICCPR[31]. The Islanders, whose homelands lie on low-lying coral islets between Australia and Papua New Guinea,

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[23] John H Knox, *Report of the Special Rapporteur on Human Rights and the Environment* (2018), UN Doc A/HRC/37/59, paras 8–13.

[24] See *Written Observations of the Republic of Vanuatu on the Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change* (2023) para 64 https://www.icj-cij.org/sites/default/files/case-related/187/187-20230920-WRI-01-00-EN.pdf

[25] *Daniel Billy v Australia* (n 11), para 2.1.

[26] Ibid, paras 8.11–8.12.

[27] UN Human Rights Council, *Climate Change and the Full Realization of the Rights of the Child*, A/HRC/35/13 (2017), paras 9–10.

[28] Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/17, Environment and Human Rights* (15 November 2017) Series A No 23, paras 47–62, 197–229; IACtHR, *Request for Advisory Opinion Submitted by the Republic of Colombia Regarding the Climate Emergency and Human Rights* (21 January 2023) https://www.corteidh.or.cr/docs/solicitudoc/solicitud_21_01_23_eng.pdf

[29] See e.g., *Tsilhqot'in Nation v British Columbia* [2014] SCC 44; Canadian Charter of Rights and Freedoms, s 15.

[30] UN Human Rights Committee, *Daniel Billy et al v Australia* (Views adopted 22 September 2022) CCPR/C/135/D/3624/2019, para 11.1.

[31] ibid para 2.1.

argued that accelerated flooding and erosion were irreversibly damaging their homes, culture and way of life.[32] The Committee's 2022 Views represent the first time an international tribunal found climate inaction violated treaty rights of Indigenous peoples.[33]

The Committee held that Australia's failure to adopt adequate mitigation and adaptation measures amounted to a breach of the petitioners' rights.[34] It found that inundation of villages disrupted the Islanders' rights to private life, home and family (Article 17) and their rights to enjoy their culture (Article 27).[35] Notably, the Committee explicitly invoked Indigenous rights law: it interpreted Art. 27 "in the light of" UNDRIP and emphasised the Islanders' "inalienable right…to enjoy the territories and natural resources" they have traditionally used.[36] Although the majority declined to find a violation of the right to life (Art. 6)[37] the decision recognised that the government's delay in protecting the Islanders' existence and cultural integrity violated Australia's duty of care. The Committee ordered Australia to compensate the claimants, take "appropriate measures" to secure their future existence and culture, and undertake a "participatory and consultative" process to address climate threats.[38]

This case underscores how procedural and substantive Indigenous rights can fortify climate claims. The Committee's reliance on Art. 27 and UNDRIP highlights that loss of land and resources is not merely environmental harm but a breach of protected cultural rights.[39] It also illustrates due diligence obligations: as one judge noted, high-emitting States owe a particularly strict duty to mitigate, since failure to do so infringes Indigenous peoples' right to culture. While the Human Rights Committee's decisions are formally issued as "Views" and not legally binding in the same way as a court judgment, they are the most authoritative interpretation of binding obligations under the ICCPR. The law being interpreted—Articles 17 and 27 of the ICCPR—is binding on Australia, and unless the Committee's interpretation were directly challenged, Australia remains obligated to comply. Thus, a failure to act in accordance with the Committee's Views may amount to a violation of its international human rights obligations. This makes the decision a highly persuasive authority and provides a roadmap for other litigants asserting that climate policies must respect Indigenous rights.

Other jurisdictions have seen similar claims. For example, in Canada *Lho'imggin v. Canada*[40], *Wet'suwet'en* hereditary chiefs have argued their Charter rights (life and equality) are infringed by federal approval of Liquefied Natural Gas (LNG) projects that undermine climate stability.[41] In Latin America, Indigenous communities are challenging

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[32] ibid paras 2.3–2.5.

[33] ibid para 11.1.

[34] ibid paras 8.8–8.10.

[35] ibid paras 8.9–8.10.

[36] ibid para 8.13.

[37] ibid para 8.6.

[38] ibid para 11.

[39] ibid paras 8.10, 8.13.

[40] 'Lho'imggin et al. v. Her Majesty the Queen' (*Climate Change Litigation*) <https://climatecasechart.com/non-us-case/gagnon-et-al-v-her-majesty-the-queen/>

[41] *Lho'imggin v Canada* (ongoing litigation); see Wet'suwet'en Hereditary Chiefs, *Statement on LNG Projects and Climate Impacts* (2023); Canadian Charter of Rights and Freedoms, ss 7, 15.

fossil fuel projects for breaching their rights to consent and a healthy environment.[42] A landmark example is the *Lhaka Honhat* case, in which the Inter-American Court of Human Rights held in 2020 that Argentina had violated the rights of Indigenous communities by failing to protect their rights to a healthy environment, adequate food, cultural identity, and access to water—marking the first time the Court recognised an autonomous right to a healthy environment in its contentious jurisdiction.[43] In the United States and Europe, Indigenous plaintiffs have started to raise climate concerns in land and resource disputes.[44] Though outcomes vary, these cases all invoke core rights – right to a healthy environment, land title, self-determination, cultural integrity, and procedural guarantees – linking them to States' climate duties. This global trend shows Indigenous plaintiffs turning to constitutional and human rights law to fill gaps in environmental protection.

The ICJ Advisory Opinion: A New Legal Lever

In this evolving landscape, the ICJ's forthcoming advisory opinion on climate change obligations represents a potential game-changer. In March 2023 the UN General Assembly (by consensus) asked the ICJ to clarify: (a) *States' obligations under international law to protect the climate system from the emission of anthropogenic greenhouse gases (for present and future generations)* and (b) *the legal consequences of significant climate harm, particularly for vulnerable States (like SIDS) and for "peoples and individuals" of present and future generations harmed by climate change*.[45] The Court received an unprecedented volume of submissions – 91 written statements, 96 States presenting oral arguments in 2024, plus 11 organisations – making it "the biggest-ever" advisory proceeding.[46] Notably, the questions explicitly includes"Peoples and individuals of the present and future generations," raising the prospect that Indigenous Peoples (as self-identified Peoples) are encompassed. Although UNDRIP itself is not listed, the request cites several human rights instruments (UDHR, ICCPR, ICESCR, etc.) and the UN Charter, signalling that human rights norms – including collective and cultural rights – are on the table.

During the December 2024 hearings, many States and experts stressed the impacts of climate change on Indigenous communities. For example, Vanuatu and the Melanesian Spearhead Group submitted a joint oral statement emphasising that climate change is stripping Indigenous peoples of their "traditional territories, cultures, political systems,

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[42] See, e.g., *Kichwa Peoples v Ecuador* (2018) Inter-American Court of Human Rights; *Saramaka People v Suriname*, Case No. 12.051, Inter-American Commission on Human Rights (2007); and reports by the UN Special Rapporteur on the Rights of Indigenous Peoples emphasizing FPIC and environmental protection.

[43] *Lhaka Honhat Association v Argentina* (IACtHR, Judgment of 6 February 2020) Series C No 400.

[44] See *Juliana v United States*, 217 F.Supp.3d 1224 (D. Or. 2016); *Cherokee Nation v. United States* (climate claims raised in land dispute context); and European cases such as *Saami Council v Norway*, European Court of Human Rights (pending).

[45] International Court of Justice, *Request for Advisory Opinion on Obligations of States in respect of Climate Change*, transmitted pursuant to UNGA Res 77/276 (29 March 2023), ICJ General List No 187 (12 April 2023) https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf

[46] ibid.

and means of self-governance" – linking climate harm to the peremptory right of self-determination[47]. Several Small Island Developing States (SIDS) and developing countries referred to the rights of Indigenous Peoples as part of the "different human rights impacts" that climate change brings, arguing these rights should apply extraterritorially.[48] Even Canada noted that the duty to prevent transboundary harm includes Indigenous rights implications. This rich testimony suggests that the Court is hearing arguments positioning Indigenous rights at the heart of climate obligations: to act with due diligence, prevent harm, and protect vulnerable "peoples and individuals" abroad.

One key issue is how the ICJ will interpret the interplay between climate treaties and human rights law. Several high-emitting states have urged that the Paris Agreement should be viewed as the *lex specialis* governing climate action. In contrast, many States argued that other international norms – including human rights law instruments – continue to impose additional and separate duties. They pointed out [in line with the International Tribunal for the Law of the Sea (ITLOS) advisory opinion] that the Paris Agreement is, in fact, not *lex specialis* and *does not* "limit or modify" customary obligations such as the no-harm rule or due diligence[49]. According to these States, harmonisation under the Vienna Convention requires a mutual strengthening of climate, human rights and environmental obligations. If the ICJ accepts this integrative approach, it could explicitly recognise that States' human rights obligations (to life, culture, health, etc.) require them to curb emissions and protect climate-vulnerable communities. That outcome would directly bolster Indigenous claims: it would confirm that States cannot hide behind climate treaties to evade their duties to Indigenous rights.

Leveraging the Advisory Opinion in Litigation

Once rendered, the ICJ advisory opinion will carry significant moral and interpretive weight. While advisory opinions are not legally binding on States or courts, they are highly persuasive in filling legal gaps. As scholars note, courts "do read each other's opinions," and a global ruling may influence national litigation more psychologically than strictly legally.[50] Indeed, litigants are already gearing up to cite such pronouncements. For example, following the Inter-American Court's climate hearing, one Brazilian lawyer stated: "We will also knock on judges' doors and say, 'We have this internationally

[47] ICJ, *Conclusion of the public hearings held from 2 to 13 December 2024 in the Advisory Opinion on Obligations of States in respect of Climate Change* (Press Release No 2024/81, 13 December 2024) (recording that "Vanuatu and the Melanesian Spearhead Group" spoke jointly) https://www.icj-cij.org/node/205011

[48] See, e.g., Written Reply of the Commission of Small Island States on Climate Change and International Law, submitted to the ICJ in *Obligations of States in respect of Climate Change* (General List No 187), Q. 4 (20 December 2024) (recalling the *CESCR*'s 2018 statement that States Parties must "respect, protect and fulfil all human rights for all … not only to their own populations, but also to populations outside their territories") and citing *CESCR*, "Climate change and the ICESCR" E/C.12/2018/1, para 5.

[49] 'FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW - Report of the Study Group of the International Law Commission' 13.

[50] *Jake Spring, "Climate lawsuits build as a Latin American court hears largest case ever" (Reuters, 29 May 2024).*

defined obligation and the state isn't following it'".[51] Similarly, environmental NGOs in Latin America say an ICJ opinion could "set off a wave of new litigation" against governments failing to act.[52]

For Indigenous claimants, the advisory opinion could be a powerful tool. If the ICJ emphasises obligations to protect vulnerable peoples and future generations from climate harm, Indigenous litigants can cite it to argue that domestic law must be interpreted in line with these obligations. For instance, a national court in Canada or New Zealand might cite the ICJ's guidance on due diligence and the no-harm rule when evaluating a Section 91 challenge (as in *Lho'imggin*[53]). Or a tribunal applying UNDRIP or ILO 169 (as in some Latin American or Pacific contexts[54]) could view the advisory opinion as confirming that States must secure Indigenous lands and ways of life from climate change. Moreover, if the advisory recognises a link between State climate action and the preservation of Indigenous cultures and environments, it could be cited in constitutional proceedings (as with the Ontario youth case[55]) to show that government policies must respect entrenched rights.

Procedural gains are also possible. The ICJ may underscore the importance of participation and consultation in climate-related decision-making, echoing the procedural rights already in UNDRIP. This can strengthen claims for FPIC in climate adaptation projects or relocation schemes. For example, if relocation of a coastal Indigenous village is planned, plaintiffs could invoke the ICJ's reasoning to argue they must be meaningfully consulted and accommodated. Even if the advisory opinion does not mention UNDRIP by name, the Court's reaffirmation of Indigenous Peoples' status as "peoples" whose well-being is tied to the environment can empower domestic judges to read human rights protections broadly.

In summary, the ICJ advisory opinion is poised to unify and elevate the normative context for climate litigation. By clarifying that States' climate commitments are embedded in international law (including human rights law), it can deprive governments of the ability to claim that climate treaties alone define their obligations. Indigenous litigants and their counsel should be prepared to leverage any pronouncements on State duties, historical responsibility, and extraterritorial effects. Ultimately, the advisory opinion will not by itself enforce any claim, but it could serve as a "legal blueprint" for holding states accountable to Indigenous rights in the climate era.[56]

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[51] Jake Spring and Jake Spring, 'Climate Lawsuits Build as a Latin American Court Hears Largest Case Ever' *Reuters* (29 May 2024) <https://www.reuters.com/business/environment/wave-climate-lawsuits-builds-court-hears-largest-case-ever-2024-05-29/> accessed 10 June 2025.

[52] ibid.

[53] Lho'imggin et al. v. Her Majesty the Queen (n-29).

[54] See, e.g., *Kichwa Peoples v Ecuador* (2018) Inter-American Court of Human Rights; *Saramaka People v Suriname*, Case No. 12.051; *Juliana v United States*, 217 F.Supp.3d 1224 (D. Or. 2016); *Cherokee Nation v. United States*

[55] 'Canada Supreme Court Rejects Appeal in Climate Case | ASIL' <https://www.asil.org/ILIB/canada-supreme-court-rejects-appeal-climate-case> accessed 10 June 2025.

[56] Maria Antonia Tigre, 'Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation' (2022) 9.

Conclusion

Indigenous rights and climate protection are profoundly intertwined. The UNDRIP and Paris frameworks affirm that respecting Indigenous sovereignty, culture, and lands is integral to just climate action. In turn, climate litigation is increasingly recognising that environmental harms to Indigenous territories are human rights harms. The approaching ICJ advisory opinion offers a unique opportunity: to publicly consolidate States' obligations to safeguard the climate for all peoples, including Indigenous communities. Once issued, it is likely to be cited around the world – by courts, tribunals, civil society, negotiators, diplomats, and lawmakers – as a touchstone of climate justice. For Indigenous communities, that international legal guidance can tip the scales in pending cases and future suits. As climate impacts intensify, clarifying these obligations through the ICJ can strengthen the hand of those at the frontlines, ensuring that legal systems recognise and reinforce Indigenous claims to survival, culture and self-determination in a warming world.