

# Disasters Discriminate, Indigenous Life and Health in the Climate Crisis.

An intersectional analysis of the right to health and the right to life for  
Indigenous Peoples in the context of the climate crisis.

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## *Abstract.*

To say that Climate Change is a threat is an understatement. All life that exists is at risk due to its ever-worsening impacts. Environmental degradation as a result of climate change is one of the most serious and pervasive threats to both the natural and human world. All peoples, regardless of who they are or where they come from, are dependent on a healthy, functioning environment. Therefore, the realisation of the right to health and subsequently, the right to life is conditional upon the health of the environment and the threat of climate change. In the case of Indigenous Peoples, this threat has become an everyday reality. Already facing gross inequalities, Indigenous Peoples are intrinsically attached to their environment and therefore disproportionately affected by the impacts of climate change, particularly with regards to the right to health and the right to life. But how is this affecting their ability to achieve their inalienable right to health and the right to life?

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Bí cineálta leat féin.

## *Abbreviations.*

AR6	Sixth Assessment Report by the IPCC
CBD	UN Convention on Biological Diversity
CESCR	Committee on Economic, Social and Cultural Rights
CO2	Carbon Dioxide
COP	Conference of Parties
ECOSOC	Economic and Social Council
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIPFCC	International Indigenous Peoples Forum on Climate Change
ILO	International Labour Organisation
ILO NO. 169	Indigenous and Tribal Peoples Convention, 1989 (No. 169)
IPCC	Intergovernmental Panel on Climate Change
IWGIA	International Work Group for Indigenous Affairs
MRG	Minority Rights Group International
NDC	National Determined Contributions
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council
UNPFII	UN Permanent Forum on Indigenous Issues
WHO	World Health Organization

## *Chapter 1. Introduction.*

This first chapter is to introduce the topic of the thesis, so that the reader is familiar with the concepts when they are discussed in later chapters. The introduction will explain the logic behind the thesis topic. This will allow for the research question will be introduced and briefly explained. After this explanation the delimitations of the research and the thesis will be addressed. The type of resource materials used in the research of this work and the methodology of the research will also be discussed. The subchapter 1.2. will serve as an ‘explanatory chapter’, that is, it will establish the fundamentals of the thesis and explain how the research was conducted. By reading this chapter the reader will have a thorough understanding of what to expect from this work. The thesis shall follow a format and will be divided into thematic sections: Chapter 2 will give an insight into the context and background of the thesis. It will briefly discuss the right to health and the right to life, then give an overview of the history and evolution of the relationship between human rights and the environment, and finally, an explanation of the crisis that is climate change. Chapter 3 will discuss the rightsholders who are the subject of this thesis, Indigenous Peoples. Their position as a social group will be discussed and examined, after which they shall be studied in the context of climate change. Chapter 4 will focus on the law and will discuss the protection of Indigenous Peoples human rights with regard to climate change, the right to health and the right to life. Relevant caselaw shall be examined. Finally, the last chapter will answer the research question and discuss the conclusions of the thesis.



## 1.1. Introduction to the Topic.

There are many issues in today's world that warrant extensive research and even more which deserve considerably more attention. Climate Change is one such issue which claims to be both. Often hailed as mankind's biggest challenge of the 21st Century, it is an issue which is increasingly dominating the world of politics, the media, lifestyles, and pop-culture. From the heartfelt pleas of David Attenborough to the powerful cries of Greta Thunberg 'How dare you!'<sup>1</sup>, across the globe, public awareness, understanding, and concern surrounding global warming and its impacts are growing. The issues and complications stemming from climate change are seemingly endless. However, one area which is often overlooked in politics, the media, and even international human rights law, is the unique situation of Indigenous Peoples in the climate crisis.

Environmental degradation as a result of climate change is one of the most serious and pervasive threats to both the natural and human world. All peoples, regardless of who they are or where they come from, are dependent on a healthy, functioning environment. Without the natural resources of the sun, air, water, and soil, there would be no life on Earth. Human existence is made further possible by the elements, the wide range of biodiversity and the many ecosystems which enable their survival and allows them to thrive. Therefore, there can be no human existence without the environment. This makes climate change and its environmental degradation a very relevant issue in today's world. Climate change has been studied by an array of disciplines, such as, the various sciences and social sciences, politics, law, humanities and the arts, health, and business. In the field of human rights, the subject of the environment and climate change have grown at a rapid pace and has become a human rights issue in its own right. Indigenous Peoples are regarded as a vulnerable group and have their own set of protected rights under international human rights law. They are often part of the most marginalised sector in any

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<sup>1</sup> NPR Staff, 'Transcript: Greta Thunberg's Speech At The U.N. Climate Action Summit' *NPR* (23 September 2019) <<https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-u-n-climate-action-summit>> accessed 23 July 2023.

given society, Western or otherwise. Therefore, when studying human rights issues such as climate change, it is extremely important to consider the role played by Indigenous Peoples. For the populations who identify as Indigenous, the effects of climate change and the environmental degradation which follows is disproportionately affecting every aspect of their lives, but in particular their quality of health, their entire way of life, and life itself .

Human Health is dependent on the health of the environment. Climate change is a threat to the right to health and the right to life of all who live on the planet. Article 25.1. of the United Nations Universal Declaration of Human Rights states that everyone is entitled to an adequate standard of living for the health and wellbeing for themselves and their families. This includes access to the basic goods and services needed to sustain life: food, water, shelter, and healthcare services. The right to health is recognised by the international human rights community and is repeatedly included in various human rights instruments, both at international and regional level. Failure to achieve an adequate standard of health can result in the failure for the realisation of other fundamental human rights. Health is an underlying determinant for the ability to enjoy other rights under the categories of civil, political, economic, social, and cultural rights. Arguably, the right to health is an essential prerequisite for the most important human right of all, the right to life. Without an adequate standard of health or even proper access to healthcare or to medicine, human life can be threatened. Therefore, it stands to reason that human life is dependent on human health, meaning that the right to life is determined by the right to health and all that it includes<sup>2</sup>. With this hypothesis it would seem that all forms of life in the world are dependent on the natural environment. Any threats to the health of the environment therefore pose a significant risk to human health, and human life. Environmental degradation is now at an unprecedented level due to the result of climate change and its adverse effects. The negative impacts of climate change are felt globally and will continue to do so unless mitigation and adaptation measures are taken seriously by the developed nations of the world. Climate change is not only affecting the right to health and life but also all of their determinants. Therefore, the realisation of the right to health and subsequently, the right to life is conditional upon the health of the environment and the threat of climate change. However, in the case of Indigenous Peoples,

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<sup>2</sup> However, there are some exceptions to this, for example, death by another's hands or weapon, accidents, cultural or religious beliefs.

this threat has become an everyday reality. Already facing gross inequalities, Indigenous Peoples are intrinsically attached to their environment and therefore disproportionately affected by the impacts of climate change, particularly with regards to the right to health and the right to life.

## 1.1. Research Question and Delimitations of Thesis.

The overarching theme of this thesis is as follows; human health is determined by the health of the environment, which in turn affects the ability to achieve an adequate standard of health and raises concern for the right to life. This relationship between human rights and the environment is widely agreed upon and recognised in the international human rights community. The climate change crisis is putting a strain on this relationship and threatening both the health of the environment and the full realisation of human rights. This strain can be seen in real time via Indigenous Peoples, who are classed as vulnerable and through their intersectional categories, already face pre-existing barriers in achieving health and accessing healthcare. The threat of climate change has become an everyday reality in the lives of Indigenous Peoples. Already facing gross inequalities, Indigenous Peoples are intrinsically linked to their environment in a multitude of ways. This connection to their land and their environment is crucial to their physical and mental health, as well as their overall wellbeing. Climate related impacts are damaging ecosystems and harming biodiversity all over the world. This is resulting in Indigenous Peoples disproportionately subjected to climate change impacts, particularly in regard to the right to health and the right to life. With this in mind consider the following:

Climate change is disproportionately affecting Indigenous Peoples, but how is this affecting their ability to achieve their inalienable right to health and the right to life? What does International Human Rights Law have to say in this regard?

It must be noted that this thesis, despite its extensive research, has its limitations. This paper acknowledges that although the underlying determinants of health are crucial in ensuring a

satisfactory standard of health, the following work will remain focused on the right to health and the right to life, for the purposes of narrowing down the scope of the research and staying true to the research question. The underlying determinants but will be mentioned only when relevant to the research. They will be discussed but not in meticulous detail. For the purposes of this thesis, when discussing health and/or the health of Indigenous Peoples, this is inclusive of the Indigenous with disabilities and preexisting health conditions. Those with disabilities have the ‘right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability’<sup>3</sup>, as do those with health conditions. The term ‘Indigenous Peoples’ shall refer to those who are Indigenous, as well as those who identify as Tribal. The International Labour Organisation (ILO) Convention No. 169 ((Indigenous and Tribal Peoples Convention) uses both ‘indigenous’ and ‘tribal’ terminology and gives a definition of both, however there is no difference in the rights attributed to either group. ‘Indigenous’ is the term most commonly used by the international instruments<sup>4</sup> and therefore will be the term to refer to both Peoples throughout this thesis. That being said, the vast majority of Tribal Peoples are Indigenous, but not all Indigenous are Tribal. As stated by the Inter-American Commission on Human Rights, who referenced the 2007 case of the Saramaka People v Suriname:

*Tribal peoples are peoples who are ‘not indigenous to the region [they inhabit], but that share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions’<sup>5</sup>.*

Although this paper focuses on the disproportionate effects of climate change on Indigenous Peoples, it also acknowledges that there are other groups who are also vulnerable and

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<sup>3</sup> ‘Convention on the Rights of Persons with Disabilities – Articles | United Nations Enable’ art 25 <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>> accessed 29 July 2023.

<sup>4</sup> International Labour Organisation, *Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169* (International labour organization 2009).

<sup>5</sup> Inter-American Commission on Human Rights, ‘Indigenous and Tribal People’s Rights Over Their Ancestral Lands and Natural Resources’ (Organisation of American States 2009) <<http://cidh.org/countryrep/indigenous-lands09/Chap.IX.htm#:~:text=Indigenous%20and%20tribal%20peoples%20have,them%2C%E2%80%9D%5B682%5D%20taking>> accessed 28 July 2023.

face unequal climate related challenges. Such groups include those living in poverty, the elderly, the disabled, youth, women and girls, isolated communities, and those living in the Global South. However, this thesis cannot discuss all groups, as important as they are. It is important to bear in mind when reading this paper that the topic of climate change, and all the data available on the topic, are subject to change as the climate crisis is a living issue which grows more in severity every day. There is continuous research on the subject and case law is constantly evolving - there are certain ongoing cases which are sure to have massive implications for climate related human rights litigation. This thesis has been researched and written by a non-Indigenous person but throughout this work the Indigenous perspective and voice will be respected and promoted. Unfortunately, it was not possible to have interviewed an Indigenous person or community given the limited timeframe of research, but it would have been beneficial to gain further insight into the issue from their perspectives. It must be remembered that Indigenous Peoples, although afforded special protection under human rights law due to their status as ‘vulnerable’, are not simply just victims of climate change. Rather, they are agents of their own change and possess the ability to combat climate change related problems through their own unique indigenous knowledge. The aim of this thesis is not to portray them as helpless victims but to demonstrate their resilience and determination, as well as their deep respect for the natural world. Their specific situation is an example of how human health is connected to environmental health and demonstrates the urgency in which the climate problem needs to be dealt with as human health and life is at immediate risk.

### 1.3. Material & Method Used in Thesis.

The materials used in the researching of this thesis will include a mixture of primary and secondary sources. Legal instruments regarding Indigenous Peoples, instruments referring to climate change, international human rights treaties and conventions, relevant and significant case law, General Comments and General Assembly Resolutions, sociological theories, and scientific and data-based reports published by human rights institutions and NGOs. Important Indigenous

specific documents are heavily referenced such as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the 1989 ILO Convention No. 169 (Indigenous and Tribal Peoples Convention). Important international instruments concerning the environment and climate change are also referred to. These include the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), the 1992 Rio Declaration on Environment and Development (Rio Declaration), the 1992 United Nations Framework Convention on Climate Change (UNFCCC), and the 2015 Paris Agreement. The core human rights instruments such as those that make up the International Bill of Human Rights are discussed. The 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) is where the right to health is found as Article 12. The right to life is found in the 1966 International Covenant on Civil and Political Rights as Article 6. Important general comments and general assembly resolutions have been consulted to provide clarity on the rights in question. The concept of intersectionality is explained and demonstrated throughout. Reports from the Intergovernmental Panel on Climate Change (IPCC), the International Work Group for Indigenous Affairs (IWGIA), the Minority Rights Group International (MRG), the Office of the High Commissioner for Human Rights (OHCHR), and the various Special Rapporteurs have been consulted and used so that the information in this thesis is relevant, correct and up to date. Legal texts, and case law regarding climate change, indigenous peoples, the right to health, and the right to life are discussed.

A goal of this thesis was to gather as much material as possible in order to deliver a full well-rounded piece of academic work. It has been conducted through a human rights-based approach with perspectives from other disciplines. Other disciplinary perspectives include law, environment, and sociology. The sociological concept of intersectionality heavily influences the direction of the thesis. By applying a multidisciplinary approach to the research, this study has benefited from a richer understanding of the subject. The language used is academic yet clear, concise, and easy to understand - as all forms of academic work should be accessible to everyone.

## *Chapter 2. Context and Background.*

This chapter will provide the context and background needed to understand the content which will be discussed in later chapters. It shall briefly discuss the meanings of the right to health and the right to life, the history of environmental human rights law and the relationship between the two. It will then discuss the evolution of this relationship through human rights law. Finally, the climate crisis will be briefly discussed so the reader can truly understand the significance of the issue.

### **2.1. The Right to Health and the Right to Life.**

The right to life is regarded as a supreme right, meaning that it cannot be violated as it is the prerequisite for all other human rights to be enjoyed. The right to health can act as a determinant to the realisation to the right to life. Often human life is dictated by the quality of one's health. These fundamental rights are universal, inalienable, indivisible, interdependent and interconnected, without which all other rights could not possibly be achieved. The right to health and the right to life are enshrined in both international and regional human rights instruments. Recognised in 1948 in the Universal Declaration of Human Rights(UDHR), the right to health and the right to life have always been part of human rights law in the modern era. Article 3 of the UDHR states that '*Everyone has the right to life, liberty and the security of person*'<sup>6</sup> whilst Article 25 declares that '*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family*'<sup>7</sup>.

The right to life was first defined by the World Health Organisation (WHO) in its 1946 Constitution: '*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*'<sup>8</sup>. The right to health is recognised in several

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<sup>6</sup> Universal Declaration of Human Rights 1948 art 3.

<sup>7</sup> *ibid* 25.1.

<sup>8</sup> Constitution of the World Health Organisation 1946 pt Preamble.

international instruments, but the most comprehensive article in international human rights law is provided by the ICESCR, twenty years after it was first introduced by the WHO. Article 12.1. of the ICESCR declares that it is ‘*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*’<sup>9</sup>. The Committee on Economic, Social and Cultural Rights (CESCR) lay out the underlying determinants of health in its General Comment No. 14 ‘The Right to the Highest Attainable Standard of Health’, which was adopted in 2011. It stated that the right to health is interrelated and interdependent upon the realisation of other rights present in the ICESCR and the ICCPR. The Committee states that the right to the highest attainable standard of physical and mental health is not merely confined to health care in the traditional sense but that:

*the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment*<sup>10</sup>.

In this regard the right to health is an inclusive right. Emphasis must be placed on the fact that the right to health does not equate to the right to be healthy or to good health. It is not possible for a State to guarantee good health as there are biological and socio-economic conditions which a State cannot possibly control, such as ‘*genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles*’<sup>11</sup>. Thus, the right is phrased as the ‘*highest attainable standard*’, but it is still to be understood that the enjoyment of ‘*a variety of facilities, goods, services and conditions [are] necessary for the realization of the highest attainable standard of health*’<sup>12</sup>.

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<sup>9</sup> International Covenant on Economic, Social and Cultural Rights 1966 art 12.1.

<sup>10</sup> ‘General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)’ para 4 <<https://www.refworld.org/docid/4538838d0.html>> accessed 15 July 2023.

<sup>11</sup> *ibid* 9.

<sup>12</sup> *ibid*.



The health facilities, goods, and services to which one is entitled to under Article 12 has to be provided in conjunction with the principle of non-discrimination. They must be available, accessible, acceptable, and of good quality. These elements must be included at all levels and forms.

Availability: *‘Functioning public health and health-care facilities, goods and services . . . have to be available in sufficient quantity’.*

Accessibility: *‘accessible to everyone without discrimination’* there are four dimensions of availability: non-discrimination, physical, economical and information accessibility.

Acceptability: *‘must be respectful of medical ethics and culturally appropriate . . . designed to respect confidentiality and improve the health status of those concerned’.*

Quality: *‘health facilities, goods and services must also be scientifically and medically appropriate and of good quality’<sup>13</sup>.*

With regards to the right to health, the underlying determinants to health must always be considered. Health does not exist solely on its own, it is influenced, shaped, and determined by a plethora of social, economic, political, and cultural factors. However, it also influences and determines other rights too. This is most evident in the right to life.

The Human Rights Committee (HRC) declares that this right is a *‘supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation’<sup>14</sup>*, that it is a fundamental right inherent in every human, it is of the utmost importance for individuals and society and is prerequisite for all other human rights to be achieved. Article 6.1. of the ICCPR declares the right as *‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’<sup>15</sup>*. The right includes the entitlement of all people to be free from actions or inactions that have the intention or the expectation to cause the individual unnatural or premature death. According to the right to life, all humans are entitled to enjoy a life with dignity. Its

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<sup>13</sup> *ibid* 12.

<sup>14</sup> ‘General Comment No. 36 - Article 6: Right to Life’ para 2 <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life>> accessed 10 July 2023.

<sup>15</sup> International Covenant on Civil and Political Rights 1966 art 6.1.

interpretation should not be narrowed down. It should be respected and ensured in the law without discrimination of any kind – with the HRC explicitly mentioning ‘*membership of an indigenous group*’<sup>16</sup>, and its legal protection must apply to all individuals equally and provide ‘*effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination*’<sup>17</sup>. The right to life is often discussed on its own due to its supreme status but it is still a right which is indivisible, interdependent, and interconnected, as all rights are, ‘*A preventable violation of one right can have far-reaching consequences for other, and in some instances, all human rights*’<sup>18</sup>.

## 2.2. The Relationship between Human Rights & the Environment.

Human beings have always had an intricate relationship with mother nature and the environment, but it wasn’t until the late 1960s that this relationship was acknowledged within the international human rights community. The environmental movement began in the 1960s amidst growing worldwide environmental concerns concerning pollution and the use of fossil fuels. Significant works such as Rachel Carson’s 1962 Book ‘*Silent Spring*’<sup>19</sup> had a substantial influence on the environmental movement, which brought environmental concerns to the wider public. Scientists discovered that the environmental degradation during this time was initially caused by the Industrial Revolution in the 18th Century. This was a period where fossil fuels were extensively used to build and develop industries and machinery. Environmental concerns continued to grow and eventually became a worldwide issue. However, there was very little established international law to address the subject of environmental damage. It was the Economic and Social Council (ECOSOC) in 1968 who first suggested that there ought to be an

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<sup>16</sup> ‘General Comment No. 36 - Article 6: Right to Life’ (n 14) para 61.

<sup>17</sup> *ibid.*

<sup>18</sup> The Office of the High Commissioner for Human Rights, ‘Understanding Human Rights and Climate Change Submission of the OHCHR to the COP21 to the UNFCCC.’ (2015) 13  
<<https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>>.

<sup>19</sup> Carson’s bestseller documented the haphazard use of pesticides and the resulting harm to the local environment. Her book helped to jumpstart the environmental movement of the 1960s, and it still continues to inspire many today.

international conference to address environmental issues. In resolution 1346(XLV) the council highlighted the urgency for action at both international and national levels to tackle problems of the ‘human’ environment. The resolution recognised that *‘due attention to problems of the human environment was essential for sound economic and social development’*<sup>20</sup> and suggested that the General Assembly consider the possibility of organising a conference to discuss the problem. ECOSOC resolution 1346(XLV) culminated in the United Nations (UN) Conference on the Human Environment, in Stockholm, Sweden, from the 5th to the 16th of June 1972. It was the first major UN conference that focused solely on the environment. This conference recognised the relationship between human rights and the environment and discussed how their protections interlinked. For the first time it recognised that the environment is fundamental in the realisation of human rights and for human life itself :

*Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself*<sup>21</sup>

This recognition by the UN was instrumental and set the precedent for all following standards regarding human rights and the environment. The subsequent report stated that the Conference was *‘launching a new liberation movement to free men from the threat of their thralldom to environmental perils of their own making’*<sup>22</sup>, which could only be successful if a commitment was made to uphold human rights values in the process. It was acknowledged that positive progress had been made, but at a cost as environmental degradation was as a result of this human activity and advancement:

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<sup>20</sup> ‘Report of the UN Conference on the Human Environment’ (1973) 37 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/pdf/NL730005.pdf?OpenElement>> accessed 5 July 2023.

<sup>21</sup> Stockholm Declaration on the Human Environment 1972 pt Preamble.

<sup>22</sup> ‘Report of the UN Conference on the Human Environment’ (n 20) 45.

*The vast benefits which the new technological order had produced were undeniable, but man's activities had created serious imbalances. Not only each society but the world as a whole must achieve a better balance among the major elements that determined the level and quality of life it could provide for its members-population and its distribution, available resources and their exploitation, and pressures placed on the life systems that sustained it'*<sup>23</sup>.

The Conference was successful in its outcome as it created the United Nations Environment Programme (UNEP), a UN programme which concentrates on environmental issues. The conference also adopted the influential Stockholm Declaration and Action Plan for the Human Environment. The Stockholm Declaration comprises of a preamble with seven declarations and twenty-six principles. Unsurprisingly, the declaration is entirely anthropocentric with the environment repeatedly described as 'human'. There is no mention of non-human animals or of biodiversity. Resources are mentioned but only where they are beneficial to mankind, as mentioned in Principle 2, *'The natural resources of the earth, including the air, water, land, flora and fauna...must be safeguarded for the benefit of present and future generations'*<sup>24</sup> and in Principle 5 *'The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind'*<sup>25</sup>. The Action Plan contains a framework which is divided into three types of action: Environmental Assessment, Environmental Management, and Supporting Measures<sup>26</sup>. The 109 recommendations, covering a wide range of environmental areas and concerns, were all approved by the Stockholm Conference to be used at the international level.

On the 20th anniversary of the Stockholm Conference, a second conference on the environment was held, this time in Rio de Janeiro, Brazil. The UN Conference on Environment and Development, or alternatively known as the Earth Summit, took place from the 3rd to the 14th of June 1992. At the time of the Conference the rate of environmental damage continued to

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<sup>23</sup> *ibid.*

<sup>24</sup> Stockholm Declaration Principle 2.

<sup>25</sup> *ibid* Principle 5.

<sup>26</sup> 'Report of the UN Conference on the Human Environment' (n 20) 6.

increase at a concerning pace despite the previous acknowledgements and commitments made by the international community at Stockholm. The Earth Summit claimed that humanity stood at a historical ‘defining moment’ due to the ‘*continuing deterioration of the ecosystems on which we depend for our well-being*’<sup>27</sup>. Taking this into consideration the General Assembly adopted Resolution 44/228 which stated the goal of the Earth Summit was to:

*elaborate strategies and measures to halt and reverse the effects of environmental degradation. . .... promote sustainable and environmentally sound development in all countries [as].... the promotion of economic growth in developing countries is essential to address problems of environmental degradation*<sup>28</sup>.

Ultimately, it was hoped that the outcome of Rio would result in a plan which would guide the international community in its actions and cooperation in all environmental and development issues. The Conference resulted in many achievements such as the Rio Declaration, the 1992 UN Framework Convention on Climate Change (UNFCCC), the 1992 UN Convention on Biological Diversity (CBD), and Agenda 21.

The Rio Declaration builds on from its predecessor - the Stockholm Declaration - and continues to promote the latter’s principles whilst also incorporating a new theme of sustainable development. Its goal was to establish ‘*a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people*’<sup>29</sup>. The addition of the concept of sustainable development was a significant evolution in the relationship between human rights and the environment. Sustainable development can be described as a ‘*process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and*

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<sup>27</sup> ‘Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 2, Proceedings of the Conference.’ (UN, 1993) 12 <<https://digitallibrary.un.org/record/168679>> accessed 2 July 2023.

<sup>28</sup> *ibid* 456.

<sup>29</sup> The Rio Declaration on Environment and Development 1992 Preamble.

*enhance both current and future potential to meet human needs and aspirations*<sup>30</sup>. It was acknowledged that the ways of production and consumption had to be reassessed and approached in a new way, which would ensure that the essential resources needed for humans to survive and thrive were not depleted. By using this concept and applying it to the framework for environmental protection, the Rio Declaration guaranteed that issues concerning the environment were taken seriously, as human survival depended on it. Principle 10 of the declaration is particularly noteworthy, as it recognises a right to public participation as well as the access of information. This principle allows for the participation of individuals on environmental issues at local level and requires that all information regarding such issues made available and accessible to the public, which enables their participation in decision-making processes. Lastly this principle requires that access to *'judicial and administrative proceedings, including redress and remedy'*<sup>31</sup> must be provided and must be effective. Principle 10 was especially significant in the creation of the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention). The Rio Declaration also contains provisions on vulnerable groups such as women, young people, indigenous peoples, local communities, and those who are oppressed. The 1992 United Nations Framework Convention on Climate Change (UNFCCC) was adopted in Rio at the Earth Summit. This convention focuses solely on climate change. From the UNFCCC the 2015 Paris Agreement was created, with the goal to cut down on greenhouse gas emissions to prevent the average global temperature from reach 2°C. The UNFCCC and the Paris Agreement will be further discussed in the following chapters.

In October 2021, the Human Rights Council adopted Resolution 48/13, the Right to a Clean, Healthy and Sustainable Environment. The adoption of this resolution was crucial in confirming the link between human rights and the environment as it was the first time that the UN recognised that having a clean, healthy and sustainable environment was a human right. According to the resolution, the Human Rights Council recognises that along with sustainable development:

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<sup>30</sup> World Commission on Environment and Development, 'Our Common Future' (1987) 43 <<https://www.are.admin.ch/are/en/home/medien-und-publikationen/publikationen/nachhaltige-entwicklung/brundtland-report.html>> accessed 1 July 2023.

<sup>31</sup> Rio Declaration Principle 10.

*the protection of the environment, including ecosystems, contribute to and promote human well-being and the enjoyment of human rights, including the rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to housing, to safe drinking water and sanitation and to participation in cultural life, for present and future generations*<sup>32</sup>

Acknowledging a healthy environment as so intrinsically linked to human rights, and as a human right itself, is to acknowledge the right as universal, indivisible, interdependent, inalienable, and interrelated as all human rights are.

The international human rights system was lagging behind the regional systems in recognising the importance of the environment to human rights, in particular, the African system and the Inter-American system. Included in the 1981 African Charter on Human and People's Rights is Article 24, which states '*All peoples shall have the right to a general satisfactory environment favourable to their development*'<sup>33</sup>. The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, otherwise known as the San Salvador Protocol, is much more advanced than the African Charter. Article 11 of the San Salvador Protocol, the Right to a Healthy Environment states that '*1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment*'<sup>34</sup>. There is no mention of the natural environment in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights / ECHR) or the 1961 European Social Charter. However, the Aarhus Convention is a European creation as it was produced by the UNECE. The Aarhus Convention is open to accession by non-member States of the UNECE, although is subject to approval by the Meeting

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<sup>32</sup> Human Rights Council, 'The Human Right to a Clean, Healthy and Sustainable Environment' Preamble <<https://digitallibrary.un.org/record/3945636>> accessed 25 July 2023.

<sup>33</sup> African Charter on Human and Peoples' Rights - African Union 1981 art 24.

<sup>34</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights - Organisation of American States 1988 art 11.

of the Parties. Even the Association of Southeast Asian Nations (ASEAN) includes in its 2012 Human Rights Declaration Article 28, ‘*Every person has the right to an adequate standard of living for himself or herself and his or her family including: . . . (f) The right to a safe, clean and sustainable environment.*’<sup>35</sup>. Articles 35 and 36 on the Right to Development state that, ‘*The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.*’<sup>36</sup> and ‘*Member States should adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis*’<sup>37</sup>. Alas it must be remembered that despite the ‘progressiveness’ of the ASEAN Declaration, unfortunately it has no legal standing and is merely a political promise.

Despite the progress in recognising the importance of the relationship between human rights and the environment there are some scholars who argue that the environment is not considered a human rights issue. Piccolotti and Taillant have claimed that the two are treated through completely separate approaches and frameworks which ultimately fails to address the ‘*natural, symbiotic relationship*’<sup>38</sup> which exists between the two. Whilst this may have been the case twenty years ago, in today’s world it is an outdated statement. The evolution of the relationship between human rights and the environment has resulted in worldwide recognition of the importance of this partnership. Serious environmental issues such as the ongoing threat of climate change have demonstrated how environmental degradation plays an inherent role in the realisation of human rights. Although the degree to which States promote and protect this relationship is questionable, it is widely accepted throughout the international human rights community and beyond that the condition of the environment influences the human condition and therefore a threat to the health of the environment is a threat to human health.

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<sup>35</sup> ASEAN Human Rights Declaration - Association of Southeast Asian Nations 2012 art 28.(f).

<sup>36</sup> *ibid* 35.

<sup>37</sup> *ibid* 36.

<sup>38</sup> *Linking Human Rights and the Environment* (University of Arizona Press 2003) xv  
<<https://www.jstor.org/stable/j.ctv2vt04x7>> accessed 13 June 2023.



## 2.3. The Environment in International Human Rights Law.

Despite the importance of both the Stockholm Declaration and the Rio Declaration, neither text is legally binding. However, the two declarations proved to be highly influential in the development of the protection of the environment under international human rights law. They also symbolise a watershed development as the ‘*modern era*’ of international environmental law<sup>39</sup>. The Rio Declaration serves as the standard of a ‘*basic, normative framework*’<sup>40</sup> at global environmental assemblies. Despite not being legally binding, both declarations contain provisions which reflected customary international law at the time of adoption or were anticipated as to form the normative expectations of the future. The Rio Declaration reinforced the Stockholm Declaration in 1992 simply by building on and reaffirming the concepts of the latter. As mentioned previously, the 1998 UNECE Aarhus Convention was conceived from Principle 10 of the Rio Declaration. This proved to be a landmark convention with regards to environmental and procedural rights in international human rights law. The objective of Aarhus is:

*to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention*<sup>41</sup>.

State Parties are required to ensure that information regarding environmental matters are made available by government bodies and or public authorities to the individual(s) so that they can

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<sup>39</sup> Günther Handl, ‘Introductory Note - Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972 & Rio Declaration on Environment and Development Rio de Janeiro, 14 June 1992’ [2012] United Nations Audiovisual Library of International Law 1.

<sup>40</sup> *ibid* 3.

<sup>41</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 art 1.

have a say in the decision making process of such matters, and to ensure that in the circumstance of a violation of these rights, that the individual(s) are able to access justice and remedy.

The Earth Summit (Rio 1992) also led to the adoption of the UNFCCC. Its purpose is declared in Article 2:

*The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties [the decision-making body of the convention] may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system<sup>42</sup>.*

This international treaty aims to improve international cooperation, to tackle climate change, and to develop prevention and mitigation strategies. It is the first international agreement that recognises climate change as a global issue and also acknowledges the responsibility of State Parties in taking preventative measures against climate change impacts. It accepts that the industrialised countries (developed countries) have been the main contributors of greenhouse gas emissions, and therefore they must lead the way in reducing emissions as well as providing support to the developing countries in terms of financial aid.

Just over twenty years later, 196 State Parties of the UNFCCC adopted the Paris Agreement in 2015 at the UN Climate Change Conference (COP21) in Paris France. The Paris Agreement or the Paris Climate Accords is a legally binding international agreement which was entered into force in 2016. The goal of the agreement is stated in Article 2:

*(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions*

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<sup>42</sup> United Nations Framework Convention on Climate Change 1992 art 2.

*development. . . and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*<sup>43</sup>

The Paris Agreement is a landmark binding agreement as it was the first time that all States were bound together to combat climate change. Implementation of the agreement is in accordance with *‘equity and the principle of common but differentiated responsibilities and respective capabilities’*<sup>44</sup>. To hold the State Parties accountable to the commitments, each Party is to *‘prepare, communicate and maintain successive nationally determined contributions that it intends to achieve’*<sup>45</sup>. The Paris Agreement has resulted in *‘policy development and target-setting at national and sub-national levels, in particular in relation to mitigation, as well as enhanced transparency of climate action and support’*<sup>46</sup>. Its impact is already evident as there have been several regulatory and economic instruments successfully installed.

In conjunction with the Paris Agreement, the 2030 Agenda for Sustainable Development also provides targets for climate action. Adopted in 2015 by the UN member States, the Agenda lists 17 SDGs or Sustainable Development Goals which are a collective call to action to achieve a sustainable future by the year 2030 which will be accomplished by *‘ending extreme poverty, protecting the planet and promoting more peaceful, prosperous and inclusive societies’*<sup>47</sup>. Sustainable Development Goal 13 centres on climate action with the intent to *‘take urgent action to combat climate change and its impacts (acknowledging that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change)’*<sup>48</sup>.

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<sup>43</sup> The Paris Agreement 2015 art 2.1.

<sup>44</sup> *ibid* 2.2.

<sup>45</sup> *ibid* 4.2.

<sup>46</sup> ‘Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ (First, Intergovernmental Panel on Climate Change 2023) 10 <<https://www.ipcc.ch/report/ar6/syr/>> accessed 28 July 2023.

<sup>47</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (Intergovernmental Panel on Climate Change 2022) 126 <[https://report.ipcc.ch/ar6/wg2/IPCC\\_AR6\\_WGII\\_FullReport.pdf](https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf)> accessed 24 June 2023.

<sup>48</sup> United Nations, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ 23 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement>>.

## 2.4. Climate Change.

In July 2022 the UN General Assembly declared that ‘*Human-induced climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced*’<sup>49</sup>. It is an all-encompassing threat from which no country, society or species can evade. It poses a significant threat to all life on earth. The Human Rights Council (UNHRC) has recognised that the harmful effects of climate change can vary in severity and can directly and indirectly effect the full realisation of human rights, such as ‘*the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the right to safe drinking water and sanitation and the right to development*’<sup>50</sup>. UNHRC Resolutions 7/23, 10/4, 26/27, 29/15, and HRC General Comment (GC) No.36 all emphasise the importance of the serious consequences of climate change on the enjoyment of human rights. For the purposes of this thesis, climate change is defined according to the UNFCCC definition: ‘*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods*’<sup>51</sup>. It is caused by the release of greenhouse gases ‘*gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation*’<sup>52</sup>, such as methane, nitrous oxide, and in particular carbon dioxide (CO<sub>2</sub>). The over production and release of these gases into the atmosphere means that the heat from the sun is trapped, which then causes an increase in global temperatures. The process is not immediate but occurs over a period of time. These gases are natural but are over produced due to the burning of non-renewable resources such as fossil fuels, intensive land use systems, industries of transport, agriculture and forestry, and mass production of goods globally. According to the IPCC ‘AR6

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<sup>49</sup> Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, ‘Promotion and Protection of Human Rights in the Context of Climate Change’ para 1 <<https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change>> accessed 23 July 2023.

<sup>50</sup> Human Rights Council, ‘Human Rights and Climate Change’ 2 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/163/60/PDF/G1516360.pdf?OpenElement>> accessed 18 July 2023.

<sup>51</sup> UNFCCC art 1.2.

<sup>52</sup> *ibid* 1.5.

Synthesis Report: Climate Change 2023’, the global surface temperature from 2001 to 2020 has increased by 0.99°C (being the median of 0.84 to 1.10°C) since the years 1850 to 1900, and that the global surface temperature has ‘*increased faster since 1970 than in any other 50-year period over at least the last 2000 years*’<sup>53</sup>. The warming of the earth is leading to changes in weather patterns and resulting in extreme weather events. These effects are visible throughout the world’s ecosystems, with some effects occurring at a rapid pace and others at a slower, less visible rate. Ice is melting in the polar regions, global sea level is rising, freshwater resources are compromised. Flooding, drought and desertification are affecting access to and availability of land, causing havoc to vital infrastructure and services, food security, livelihoods, economies, biodiversity, and human wellbeing. Unfortunately, this environmental degradation has progressed to such an extent that some effects are now irreversible. A number of biodiversity species have been declared extinct and ecosystems near destroyed<sup>54</sup>. Climate related disasters are on the rise, as are the number of people affected and killed by these events. A report by the Centre for Research on the Epidemiology of Disasters (CRED) in collaboration with the UN Office For Disaster Risk Reduction (UNDRR) highlighted that between the period of 2000 to 2019, there were 6,681 climate-related disasters from which 510,387 people died and a further 3.9 billion were affected<sup>55</sup>. Whereas in comparison, the period of 1990 to 1999, where 3,656 climate-related disasters led to 995,330 deaths and 3.2 billion people affected<sup>56</sup>. The report notes that of the latter figures, 47% of deaths can be attributed to drought and famine. Although it is possible that an improvement in recording and reporting on climate-related disasters could be the reason for the increase in the 2000 to 2019 figures, the statistics would suggest that climate change is the cause. It also must be noted that there are gaps in reporting on climate-related disasters and impacts as the locations where these disasters occur are usually in regions that lack resources and funding to carry out such research. As well, some areas may not be accounted for

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<sup>53</sup> ‘Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ (n 46) 4.

<sup>54</sup> The damage to the Australian Great Barrier Reef is infamous.

<sup>55</sup> United Nations Office for Disarmament Affairs, ‘Human Cost of Disasters: An Overview of the Last 20 Years 2000-2019’ (United Nations 2020) 6 <<https://www.un-ilibrary.org/content/books/9789210054478>> accessed 17 July 2023.

<sup>56</sup> *ibid.*

in the data, such as rural isolated communities and indigenous communities. Therefore, it is very likely that the true numbers overwhelmingly higher.

Climate change can be seen as a danger to human security as it threatens human health all over the globe. In the UNHRC Panel Discussion of December 2022, a panellist remarked that *‘the air that we breathed, our food, our water and our health depended on a clean, healthy and sustainable environment’*<sup>57</sup>. Human health is dependent on environmental health in various ways. In fact, human health, environmental health, and biodiversity health are all interlinked. The condition of the environment enables a functional biodiversity, which in turn supports human health and well-being. The Director General of WHO outlined the interrelation between human health and biodiversity:

*Human health ultimately depends on ecosystems for elements essential to human health and well-being. . . Biodiversity underpins the ecological functions and processes that give rise to the benefits provided by ecosystems (‘ecosystem services’) . . . and resilience to climate change. . . . At the same time, biodiversity can sometimes be a source of pathogens and, when unsustainably managed, can exacerbate negative health outcomes*<sup>58</sup>.

The effects of climate change can affect health and biodiversity, separately and simultaneously, but also directly or indirectly through each other. The linkages can be clear or complex, and linear or non-linear. For example, severe heat waves can exacerbate health issues in a population as well as depleting water resources and contaminating water quality, which in turn leads to spread of contagious diseases, unsafe drinking water and insufficient drinking water, thus contributing to malnutrition and dehydration<sup>59</sup>. Climate change is not a solitary issue, rather as

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<sup>57</sup> Office of the High Commissioner for Human Rights, ‘Panel Discussion on the Adverse Impact of Climate Change on the Full and Effective Enjoyment of Human Rights by People in Vulnerable Situations’ 5 <<https://www.ohchr.org/en/documents/reports/ahrc5248-panel-discussion-adverse-impact-climate-change-full-and-effective>> accessed 27 July 2023.

<sup>58</sup> Director General WHO, ‘Health, Environment and Climate Change’ 2 <[https://cdn.who.int/media/docs/default-source/climate-change/wha-report-on-biodiversity-and-health.pdf?sfvrsn=c9fdae95\\_2](https://cdn.who.int/media/docs/default-source/climate-change/wha-report-on-biodiversity-and-health.pdf?sfvrsn=c9fdae95_2)>.

<sup>59</sup> ‘Human Health and Adaptation: Understanding Climate Impacts on Health and Opportunities for Action. Synthesis Paper.’ para 8 <<https://unfccc.int/documents/9661>> accessed 19 July 2023.

demonstrated above, it is linked to human health and biodiversity health, however it is also intertwined with other factors which result in global environmental change, such as political, social and economic factors.

Also complicating the matter further are the many underlying determinants of health. It follows then that the right to health is determined by other fundamental human rights. The violation of one amounts to the violation of another, just as the effect of an underlying health determinant will affect the quality of health. In view of this line of thinking, it ensues that if human health is affected to such an extent that life itself is at risk, this is also grounds for the fundamental right to life to be in breach. Considering the relevance of human rights in climate change effects on human health and life, a human rights perspective is critical in approaching any and all climate action strategies.

According to a study carried out by the secretariat of the UNFCCC there are three ways in which climate change affects human health:

- (1) directly through weather variables (such as heat and storms);*
- (2) indirectly through natural systems such as disease vectors;*
- (3) through pathways heavily mediated by human systems such as undernutrition<sup>60</sup>*

The many impacts of climate change, heat and wildfires, flooding, drought, and extreme weather events, in combination with social and economic conditions, existing social issues, relevant infrastructure and the capacity of health systems and services, all lead to differing health impacts. Disturbingly, according to WHO climate change is estimated to result in 250,000 deaths annually between the years 2030 and 2050, on account of malnutrition, heat stress, and preventable illnesses<sup>61</sup>, whereas a report by the Climate Vulnerable Forum and DARA International contended that an overwhelming approximate 400,000 deaths a year have occurred due to climate change with the number expected to increase to 700,000 by 2030<sup>62</sup>. In the meantime, the

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<sup>60</sup> *ibid* 15.

<sup>61</sup> Office of the United Nations High Commissioner for Human Rights, 'Fact Sheet No. 38: Frequently Asked Questions on Human Rights and Climate Change' 2 <<https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-38-frequently-asked-questions-human-rights-and-climate>> accessed 5 July 2023.

<sup>62</sup>The Office of the High Commissioner for Human Rights (n 18) 14.

World Bank projects that by 2030 climate change impacts will push a further 100 million people into poverty<sup>63</sup>. Health can be affected by climate change impacts in multiple ways, both directly and indirectly. Clean air is polluted, safe drinking water is contaminated, sanitary water is rife with disease, food production is compromised, existing health conditions are exacerbated, the poverty gap is intensified, secure shelter can be jeopardised, societal issues are aggravated, and access to vital services and infrastructure impeded. Extreme weather events are becoming more common and widespread, with over 25 million people affected (and often displaced) every year over the last ten years<sup>64</sup>.

As mentioned previously, the correlation between human health and biodiversity health cannot be overstated. Biodiversity supports all life on this planet and therefore is critical to human health. It provides essential products and services necessary for the physical and social well-being of individuals and communities. Freshwater, food security, fuel and energy, medicine, shelter, livelihoods, and ways of life are all supported by biodiversity. This thesis will use the definition provided by the CBD diversity:

*Biological diversity' means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.*<sup>65</sup>.

Climate change, the unsustainable and harmful use of land, *'pollution, poor water quality, chemical and waste contamination. . . all contribute to biodiversity loss and, can pose considerable threats to human health'*<sup>66</sup>. Poor land management and unsustainable agricultural practices resulting in environmental degradation has caused water degradation and food insecurity - food production is determined by biodiversity, as is its nutritional value. This is

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<sup>63</sup> Office of the United Nations High Commissioner for Human Rights (n 61) 2.

<sup>64</sup> W Adger and others, 'Climate Change Affects Multiple Dimensions of Well-Being through Impacts, Information and Policy Responses' (2022) 6 Nature Human Behaviour 1, 3.

<sup>65</sup> Convention on Biological Diversity 1992 art 2.

<sup>66</sup> 'Biodiversity and Health' (World Health Organisation, 2015) <<https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health>> accessed 28 June 2023.



evident amongst communities across Africa, Asia, Central and South America, the Arctic, and Small Island Nations, especially within Indigenous or low-income populations. The climate crisis has created ‘*substantial damages, and increasingly irreversible losses*’<sup>67</sup> in vital ecosystems such as coastal and open ocean, cryospheric<sup>68</sup>, freshwater, and terrestrial. Losses include biodiversity loss, extinction of plant and animal species, and land loss. The damage done to cryospheric ecosystems in particular, is extremely concerning. Glaciers and permafrost melting regularly over sustained periods of time in the polar regions have resulted in sea levels rising. Unfortunately, even if lowering the global surface temperature were achieved it would not undo the decades of damage. In the Synthesis Report of AR6 the IPCC states that rising sea levels are ‘*unavoidable for centuries to millennia due to continuing deep ocean warming and ice sheet melt*’<sup>69</sup> thus the levels will continue to remain elevated for centuries.

Rising sea levels have led to an increase in tropical cyclones, heavy precipitation, and flooding. Between 1970 to 2019, droughts have caused the deaths of 650,000 individuals globally, with 90% of fatalities in developing countries<sup>70</sup>. Approximately 55 million people<sup>71</sup> are directly affected each year making drought and its impacts a concerning climate-related threat. From 2000 to 2019 alone, over 1.4 billion people felt the damaging impacts of drought - Africa has suffered from droughts more often than other continents, with 134 droughts occurring in the same time period, with 70 taking place in East Africa<sup>72</sup>.

Flooding is high in human and economic cost. In 2020, after two years of severe drought which affected around 2,444,959 people, the Philippines was a victim of three consecutive typhoons<sup>73</sup>. The following year the Super Typhoon Odette caused damages and losses of \$336 million to agricultural goods, \$75 million to fishing boats and equipment, \$565 million to homes,

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<sup>67</sup> ‘Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ (n 46) 5.

<sup>68</sup> Cryosphere refers to all regions of the globe where water exists in a solid form: ice, snow, permafrost

<sup>69</sup> ‘AR6 Synthesis Report: Climate Change 2023, Summary for Policymakers’ (Intergovernmental Panel on Climate Change 2023) 18 <<https://www.ipcc.ch/report/ar6/syr/>> accessed 25 July 2023.

<sup>70</sup> UNCCD, ‘Drought in Numbers 2022 - Restoration for Readiness and Resilience’ (2022) 8 <<https://www.unccd.int/resources/publications/drought-numbers>> accessed 5 July 2023.

<sup>71</sup> *ibid.*

<sup>72</sup> Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change (n 49)

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<sup>73</sup> *ibid* 10.

infrastructure, electricity, and water lines and caused the deaths of 407 people<sup>74</sup>. Regions which are socioeconomically vulnerable are hit the hardest by events such as flooding. The KwaZulu-Natal province in South Africa faced flooding from April to May 2022 where 461 people died, 88 people were unaccounted for, and 6,000 left homeless after 8,584 houses were destroyed and a further 13,536 damaged<sup>75</sup>. This particular province is home to mostly the Zulu, South Africa's largest ethnic minority group. Flash flooding and subsequent landslides affected over 21,000 Rohingya living in refugee camps in Cox's Bazar, Bangladesh<sup>76</sup>. Already suffering as stateless refugees living in crowded, infrastructurally unsound shelters, this ethnic minority were not equipped to deal with this disaster.

Severe heat waves and devastating wildfires have increased dramatically in recent years and have caused excessive damage and loss to people's lives, infrastructure, and the surrounding ecosystems and biodiversity. Heat waves can result in heat exhaustion, heat cramps, heatstroke and even hyperthermia, especially in vulnerable groups such as children, those with a disability or compromised health, and the elderly. With the increase in severity and occurrence of heat waves, already understaffed, underfunded hospitals and medical services can be overwhelmed with patients and therefore left unable to provide satisfactory treatment to all in need. Wildfires have been known to burn uncontrollably, destroying important infrastructure, homes, communities and harming human and animal life. The 'megafires' that plagued Australia from 2019 to 2020 was a result of the country's 'megadrought' and led to *'the most dramatic loss of habitat for threatened species in postcolonial history'*<sup>77</sup> as roughly 3 billion animals were killed or displaced in these fires. Wildfire smoke adds to the outdoor air pollutants which can cause and aggravate respiratory conditions like asthma, pneumonia, and bronchitis, among others<sup>78</sup>. Working Group II in their contribution to the IPCC Sixth Assessment Report, estimated with

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<sup>74</sup> *ibid.*

<sup>75</sup> *ibid* 9., These were the official figures as of 13 June 2022.

<sup>76</sup> *ibid* 10.

<sup>77</sup> UNCCD (n 70) 16.

<sup>78</sup> OAR US EPA, 'Climate Change and the Health of Indigenous Populations' (21 March 2022) <<https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations>> accessed 3 July 2023.

high confidence that an increase in heat-related mortality and morbidity is highly likely, even with adaptation measures in place<sup>79</sup>.

No State will escape the threats of climate change, although the degree to which they are impacted will vary. Even Europe, arguably the least affected region and the most capable of adaptation, recognises air pollution due to climate change as a major health crisis that causes half a million premature deaths annually<sup>80</sup>. The effects of climate change are inescapable, but their varied distribution only highlights existing socioeconomic and health inequalities in the world. Of the countries that have contributed the most to climate change via their CO<sub>2</sub> emissions, the G20 countries<sup>81</sup>, only a third will face an increase in deaths due to climate impacts whereas the countries who are the least developed will face an increase of up to three quarters in death rates<sup>82</sup>. Climate change not only threatens human health and life, but also threatens the socioeconomic circumstances of individuals and furthers existing inequalities, therefore it also threatens a significant number of fundamental human rights.

Climate change is a global issue which threatens the health and subsequently, the lives of all individuals on earth. Its adverse impacts will only continue to worsen and develop at a much faster pace if serious action is not taken. It is estimated that in this century, an additional warming above 1.5°C will guarantee irreversible effects on ecosystems with a lower resilience to change, for example, the coastal, mountain and polar regions which will feel the impacts of sea level rise due to ice sheets and glaciers melting<sup>83</sup>. Any increase in warming will trickle down to affect humans in various ways. The recent Covid-19 Pandemic demonstrated how unprepared States are, as around the globe governments struggled to cope with the health, social and economic challenges that the Corona Virus presented. Covid-19 proved that the existing health

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<sup>79</sup> 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.' (n 47) 63.

<sup>80</sup> 'Minority and Indigenous Trends 2019 - Focus on Climate Justice' (Minority Rights Group International 2019) 135 <<https://minorityrights.org/publications/minority-and-indigenous-trends-2019/>> accessed 20 July 2023.

<sup>81</sup> G20 Countries include: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Türkiye, the United Kingdom, the United States and the European Union.

<sup>82</sup> 'Climate Change Could Be as Deadly as Cancer in Parts of the World According to New Data' (*Press Release*, 2022) <<https://www.undp.org/press-releases/climate-change-could-be-deadly-cancer-parts-world-according-new-data>> accessed 10 July 2023.

<sup>83</sup> 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.' (n 47) 19.

systems in both developed and developing countries are fragile, with many collapsing under the demands of the pandemic. Hospitals, emergency rooms, medical centres, medical services, pharmacies, and medical supplies were stretched to their limit and beyond during the pandemic. The indirect effects of Covid-19 on health systems meant that other illnesses, for instance cancer, were left undiagnosed and untreated, resulting in many deaths and the reliance of those in need on already overburdened healthcare services. In fact, the pandemic also highlighted inequalities between developed and developing countries, as when rollout of the vaccines began it was the developed countries who received it first. The effects of the Covid-19 pandemic are still visible but in conjunction with rising inflation, the cost-of-living crisis, and Russia's war in Ukraine, intensifies the economic challenges of climate change. In 2017 the economic losses resulting from climate change-related natural disasters amounted to \$330 billion, the costliest year so far<sup>84</sup>.

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<sup>84</sup> 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment 2019) 5 <<https://www.ohchr.org/en/special-procedures/sr-environment/safe-climate-report>> accessed 29 July 2023.

## Chapter 3. Indigenous Peoples.

As the title suggests, this chapter will focus on Indigenous Peoples. It will explain Indigenous Peoples as a group in society - what makes them Indigenous and their own special group with specialised rights. It will also discuss their standing or position in society. The concept of intersectionality will be discussed. The issues they face due to climate change regarding their health will also be discussed. As mentioned previously in the delimitations, this thesis is not focusing on a particular Indigenous group. Rather, by focusing on Indigenous Peoples as a whole in the context of climate change, it allows for a better understanding of the difficulties in protecting and achieving their right to health and right to life.

### 3.1. A Marginalised People.

According to the International Work Group for Indigenous Affairs (IWGIA), a ‘marginalised people’ suggests that those concerned are ‘*pushed to the edge of society*’<sup>85</sup>. Explained further by the IWGIA, marginalisation happens when ‘*people are excluded, power degraded, forceful driven, or alienated from the society [the society being the majority of peoples in a setting]*’ and as a result ‘*drawn into the process that makes them marginalized, meaning, the more they participate, the more they become marginalized*’<sup>86</sup>. Vulnerability - using the definition provided by Working Group II to AR6 – it is the ‘*propensity or predisposition to be adversely affected. It encompasses a variety of concepts and elements, including sensitivity or susceptibility to harm and lack of capacity to cope and adapt*’<sup>87</sup>. It is a condition which changes through time but also varies within communities and among societies. Vulnerability is shaped by the intersections of marginalisation, which can include gender and gender orientation, race,

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<sup>85</sup> ‘Synthesis Report: Marginalisation of Vulnerable Indigenous Peoples in Thailand’ (International Work Group for Indigenous Affairs 2018) 3 <<https://www.iwgia.org/en/resources/publications/3356-synthesis-report-marginalization-of-vulnerable-indigenous-peoples-in-thailand.html>> accessed 25 July 2023.

<sup>86</sup> *ibid.*

<sup>87</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 133.

social class, ethnicity, sexuality, age, income/economic status, and religion<sup>88</sup>. In the case of Indigenous Peoples, it is also shaped by the history of colonialism and its current ongoing legacy. Working Group II describes human vulnerability as being influenced by ‘*the adaptive capacity of physical (built) structures, social processes (economic, well-being and health) and institutional structures (organisations, laws, cultural and political systems/norms)*’<sup>89</sup>.

Throughout history Indigenous Peoples have suffered on account of their marginalisation. Afterall, the word ‘*Indígena*’ can be traced back to 15<sup>th</sup> Century colonial Latin America<sup>90</sup>. The term refers to the original people of the land, the people who were there before the invaders. McIntosh argues that it was the practice of colonisation that created the concept of Indigeneity, ‘*there were only peoples – no matter how they were to be placed within one’s hierarchical or evolutionist worldview*’<sup>91</sup>. In other words, there were no Indigenous Peoples or communities, rather they were simply individuals and communities who merely existed as they were.

Indigenous Peoples as described in ILO No. 169 are as follows:

*Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions*<sup>92</sup>.

The reference to conquest or colonisation is critical as this marks the beginning of Indigenous marginalisation, in their respective lands. Colonialism was when a country enabled with sufficient resources - the colonial power- took over another country using military power in order

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<sup>88</sup> Important to note that the two terms are not interchangeable, one can be vulnerable and not marginalised (for example someone from the mainstream society living on a coastline, in danger of extreme weather events).

<sup>89</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 928–929.

<sup>90</sup> Claudia Comberti and others, ‘Adaptation and Resilience at the Margins: Addressing Indigenous Peoples’ Marginalization at International Climate Negotiations’ (2019) 61 *Environment: Science and Policy for Sustainable Development* 14, 5.

<sup>91</sup> Ian McIntosh and others, ‘Defining Oneself, and Being Defined as, Indigenous: A Comment on J. Bowen (AT 16,4) and M. Colchester (AT 18,1)’ (2002) 18 *Anthropology Today* 23, 23.

<sup>92</sup> ILO 169 Art. 1(b)

to politically control the local people. Its objective aside from completely dominating the local population, was ‘*economic exploitation through the control of colonial resources and the use of colonies as markets for products*’<sup>93</sup>. This practice resulted in countless atrocities around the world, total annihilation of cultures and left generation after generation in extreme poverty. The preamble of UNDRIP also addresses colonisation and the negative impacts it had on Indigenous groups, as they:

*have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests*<sup>94</sup>.

To understand why or how Indigenous Peoples are marginalised and discriminated against in the present it is necessary to understand the legacy of colonisation and its long-lasting impacts which have become ingrained within many societies. This legacy is often overlooked, for example, the IPCC which has released numerous publications and reports regarding Indigenous Peoples, have for the first time, recognised in AR6 that the vulnerability of this group is ‘*produced and exacerbated*’<sup>95</sup> by the institution of colonialism.

Indigenous Peoples exist in all regions in the world. According to 2019 figures, it is estimated that there are approximately 370 million Indigenous living in 90 countries around the globe<sup>96</sup>. Of course, any figures recorded cannot be entirely accurate as there are Indigenous communities who are extremely hidden from the rest of the world. They represent only 5% of the global population but account for the majority of global cultural diversity and make up a third of the extremely poor<sup>97</sup>. Due to this they are one of the most marginalised, disadvantaged, and poverty-stricken groups in the world. They are also excluded politically, socially, and

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<sup>93</sup> Eduardo Faleiro, ‘Colonialism, Neo-Colonialism And Beyond’ (2012) 16 World Affairs: The Journal of International Issues 12, 13.

<sup>94</sup> United Nations Declaration on the Rights of Indigenous Peoples 2007 s Preamble.

<sup>95</sup> ‘The Indigenous World 2023’ (International Work Group for Indigenous Affairs 2023) 60 <<https://www.iwgia.org/en/resources/indigenous-world>> accessed 27 July 2023.

<sup>96</sup> Rhys Jones, ‘Climate Change and Indigenous Health Promotion’ (2019) 26 Global Health Promotion 73, 74.

<sup>97</sup> Comberti and others (n 90) 3.

economically. Routinely facing systematic racism and discrimination in both the public and private sphere, their inequality is reinforced by legislation and laws which are discriminatory in nature or simply lack the basic protections required. Indigenous culture, customs and practices are ignored or oppressed. As many Indigenous live in regions which are less developed in developed states or countries which are classed as under-developed, their vulnerability is further increased due to a weak economy, a lack of resources, essential infrastructure, or services, or even aid when needed. Their geographical locations are in remote places, deep within forests or high in the mountains, often in places deemed uninhabitable by non-indigenous. Living in harsh, isolated landscapes can be a direct consequence of the invaders from long ago, when the Indigenous were ‘forced out of native homelands into isolated, barren, or otherwise ‘undesirable’ spaces’<sup>98</sup>, this can be seen with many indigenous groups across America, Canada, and Australia. Considering this reality, Comberti et al. claim that Indigenous Peoples face ‘three tiers of marginalisation’<sup>99</sup>, economic, geographical, and political.

Marginalisation of Indigenous Peoples increase their vulnerability status when it comes to their health. Difficulties in accessing healthcare are a trend which is seen all over the globe as ‘Indigenous peoples worldwide do not have appropriate access to health facilities and social services’<sup>100</sup>. Indigenous Peoples face many obstacles in regard to caring for their health. The barriers can be physical as there are no means to travel from a remote area, or they can be economic as healthcare can be costly. In a joint publication by the IWGIA and ILO, an Indigenous interviewee from Latin America claimed that ‘The nearest health post is two hours away [by river boat] and we do not always have [money] for gasoline or what drivers charge us’<sup>101</sup>, whilst another Indigenous interviewee from Asia disclosed that their pregnant Indigenous women could not give birth at any hospital due to the extensive distance to all healthcare facilities. The social barriers to healthcare stem from discrimination or stigma in society. The OHCHR defines discrimination as ‘any distinction, exclusion or restriction made on the basis of

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<sup>98</sup> *ibid.*

<sup>99</sup> *ibid* 2.

<sup>100</sup> ‘The Impact of COVID-19 on Indigenous Communities: Insights from the Indigenous Navigator’ (IWGIA and ILO 2020) Publication 36 <[http://www.ilo.org/gender/Informationresources/Publications/WCMS\\_757475/lang--en/index.htm](http://www.ilo.org/gender/Informationresources/Publications/WCMS_757475/lang--en/index.htm)> accessed 23 July 2023.

<sup>101</sup> *ibid* 26.



*various grounds which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms*<sup>102</sup>. From its roots stem the fundamental structural inequalities that support society. It is a force that fuels the marginalisation of specific groups. With regards to health, it increases the vulnerability of marginalised groups. In the IWGIA and ILO collaboration discrimination was highlighted amongst the participants: ‘

*There’s also that aspect [of] discrimination now on access for example, (...) even before COVID when somebody gets sick, when a member of their community gets sick, and they go to the hospital, they’re given [the] least attention (...) in terms of medical services. And many of them (...) don’t have the transportation also (...) to be able to go to the hospital (...), some have clinics in the villages, but there are no doctors in most instances. (...) It’s also the language (...) the difficulty in communication because some of them don’t speak (...) the language of the majority*<sup>103</sup>.

When medical services are available to Indigenous Peoples, they are often under-resourced and inadequately equipped due to the location of the facilities. Through lack of education and sensitivity awareness, or due to racism or discrimination, medical professionals are not aware of the cultural differences, language barriers or specific issues which affect Indigenous health. Accessing healthcare is made considerably more difficult if the individual has a disability.

The Covid-19 Pandemic is an excellent example and insight into how Indigenous Peoples are affected by a crisis which targets their health. It was ‘*a crisis within a crisis*’<sup>104</sup> as throughout the world the systematic lack of recognition and regard for Indigenous rights resulted in their disproportionate suffering of the effects of the pandemic. Speaking at a media briefing on Covid-19 on July 20<sup>th</sup>, 2020, the WHO Director General - Tedros Adhanom Ghebreyesus -

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<sup>102</sup> ‘Fact Sheet No. 31: The Right to Health’ 7 <<https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health>> accessed 5 July 2023.

<sup>103</sup> ‘The Impact of COVID-19 on Indigenous Communities: Insights from the Indigenous Navigator’ (n 100) 36.

<sup>104</sup> ‘Panel Discussion on the Rights of Indigenous Peoples’ 4 <<https://www.ohchr.org/en/documents/reports/ahrc5343-panel-discussion-rights-indigenous-peoples>> accessed 27 July 2023.

acknowledged that the ‘the world’s poorest and most vulnerable are especially at risk. That is true of indigenous peoples all over the world, in urban or remote areas’<sup>105</sup>. He further explained that the virus is a risk for all Indigenous Peoples as they ‘often have a high burden of poverty, unemployment, malnutrition and both communicable and non-communicable diseases’<sup>106</sup> which makes them more susceptible to Covid-19 and the consequences which follow it. He highlighted the situation in the Americas (it was the epicentre of the pandemic at the time in 2020), ‘As of the 6th of July, more than 70,000 cases have been reported among indigenous peoples in the Americas, and more than 2,000 deaths’<sup>107</sup>, concerning figures as many of these deaths were preventable. Lack of access to PPE (Personal Protective Equipment), such as masks or gloves, or hand sanitiser, clean household water, soap, and suitable medicines left entire communities vulnerable. The importance of suitable, safe sanitation services and access to information became very apparent in the midst of the pandemic. As daily updates were released and advice and measures updated frequently, many Indigenous were left in the dark. The guidelines released to the public were not always translated into Indigenous language, and were disseminated through the internet, radio, television or in leaflets – to certain Indigenous communities these formats would not be accessible. Through cooperation between government and Indigenous leaders’ information was enabled to be dispersed. For example, in Argentina and Paraguay Covid-19 information was broadcast in Indigenous language via a radio station which reached remote areas and through the social media messenger Whatsapp – in India it was common for the elders of the village council to translate information into the appropriate languages of their surrounding area<sup>108</sup>.

During the Panel Discussion on the rights of Indigenous Peoples, Assistant Secretary General for Human Rights, Ilze Brands Kehris spoke about the various reports which showed that Indigenous Peoples around the world faced an exacerbation of their already pre-existing

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<sup>105</sup> Tedros Adhanom Ghebreyesus, ‘WHO Director General’s Opening Remarks at the Media Briefing on COVID-19’ (2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---20-july-2020>> accessed 21 July 2023.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> ‘Report on the Impact of COVID-19 on the Rights of Indigenous Peoples’ (Special Rapporteur on the rights of indigenous peoples 2020) A/75/185 11 <<https://www.ohchr.org/en/documents/thematic-reports/a75185-report-impact-covid-19-rights-indigenous-peoples>> accessed 21 July 2023.

inequalities due to the pandemic, which risked the targets of the 2030 Agenda for Sustainable Development and its SDGs<sup>109</sup>. She noted that food insecurity worsened, due to the lockdowns but also as a result of the *‘denial of Indigenous land rights, the lack of respect for the right to self-determination and the disruption of local and traditional economies’*<sup>110</sup>. The Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, highlighted that during the pandemic there was a lack of protection for Indigenous lands, which led to *‘deforestation, violence, killings, resource extraction, food insecurity, pollution and forced evictions of Indigenous Peoples’*<sup>111</sup>, unfortunately these events continued after the pandemic too. Whilst enforcing COVID-19 measures some States took the opportunity to criminalise Indigenous Human Rights Defenders, restrict their human right to protest peacefully, and employ the military or State police force in response to such matters. With regards to deforestation and resource extraction, this was justified as necessary in order to promote economic recovery and continued without the free, prior, and informed consent of Indigenous communities<sup>112</sup>. During this panel discussion it was emphasised that without access to their traditional land, Indigenous Peoples were unable to ensure food security, and therefore the health and well-being of their communities. Lastly, the Chair of the Expert Mechanism on the Rights of Indigenous Peoples, Binota Moy Dhamai described how the effects of COVID-19 had exposed the extent of the inequality that is faced all over the world by the vulnerable group. The pandemic had furthered the disadvantage and pushed many into worse conditions of poverty. It also highlighted the socioeconomic disparity between Indigenous and non-indigenous societies. Although pandemics are not new to Indigenous Peoples – diseases and viruses were spread by colonisers at first contact – they can wreak havoc on their communities. Prevention and treatment pose challenges. Isolation can be very difficult to accomplish within tightknit communities, traditional medicine may not be suitable to treat foreign illnesses, and the difficulty in accessing adequate healthcare from healthcare services can take form in discrimination, expense, or travel. By exacerbating existing inequalities and the furthering marginalisation, recovery can take years if not decades.

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<sup>109</sup> ‘Panel Discussion on the Rights of Indigenous Peoples’ (n 104) 2.

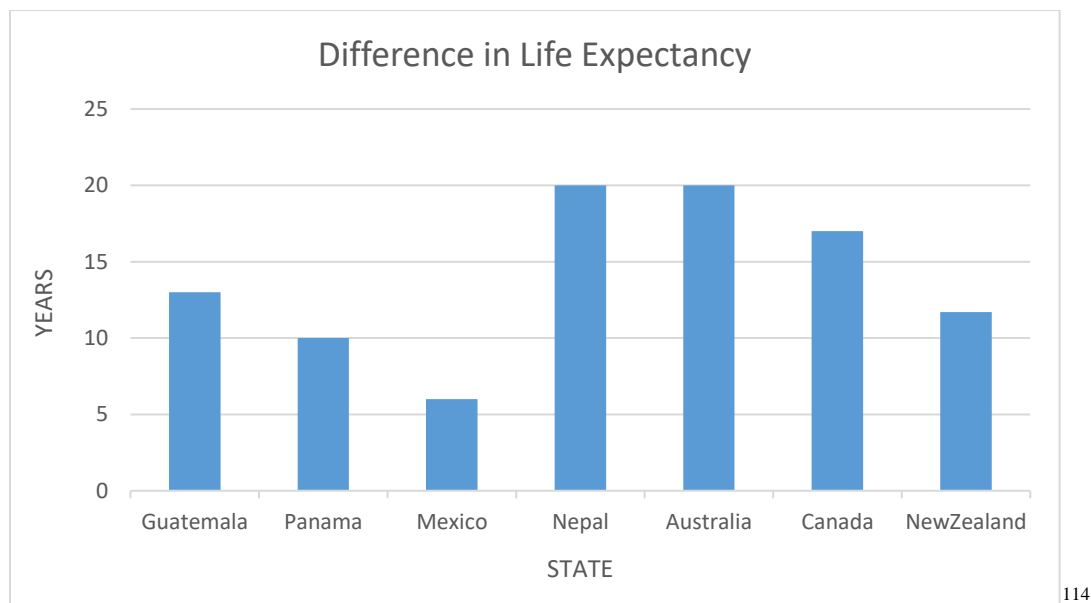
<sup>110</sup> *ibid.*

<sup>111</sup> *ibid* 3.

<sup>112</sup> For more information see A/75/185

## 3.2. Health Determinants & Intersectionality.

As the WHO Constitution states, ‘*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*’<sup>113</sup>, which rings true in the case of Indigenous Peoples as their health is deeply intertwined with the social determinants of health. Indigenous health includes the physical and mental well-being, and the spiritual and cultural well-being of the individual and the community. Access to their traditional lands and territories, ability to practice their culture and language, and the extent to which they’re able to self-govern can all influence the condition of health. The disparities of Indigenous health in comparison to the surrounding general population is staggering, this is evident in the life expectancy figures. Indigenous Peoples have been recorded to live 20 years less than their counterparts:



<sup>113</sup> WHO Constitution.

<sup>114</sup> ‘Post 2015 Development Process: Health’ (International Work Group for Indigenous Affairs 2014) <<https://www.iwgia.org/en/resources/publications/3159-post-2015-development-process-health.html>> accessed 15 July 2023.

The situation of Indigenous health is well known in the international human rights community. The former UN Special Rapporteur on the Right to Health Paul Hunt wrote that in nearly every country in the world Indigenous Peoples are one of the:

*poorest and most vulnerable groups, [they] suffer greater ill-health and receive poorer quality of care than other segments of the population. They die younger, suffer from higher rates of disease and struggle more to access health services compared to the rest of the population. More often than not, this ill-health and poor healthcare is a symptom of poverty and discrimination<sup>115</sup>.*

Modern medicine and new developments in understanding health, and the treatment and prevention of illnesses has enabled mankind to live longer than was previously possible. Though the benefits of these developments are not distributed around the globe in an even fashion, Indigenous Peoples are least likely to reap the rewards. In comparison to other poverty-stricken, vulnerable population groups, Indigenous health has not improved to the same extent in the past few decades. They are more likely to be of poor health, or experience disability and/or mental illness and reduced quality of life leading to a shorter life expectancy, as highlighted above. It must be noted there are significant gaps in the existing health data for Indigenous communities, particularly in the more remote, isolated parts of the world, but where the data exists it reveals the concerning difference between Indigenous and non-indigenous health. The data includes the standard indicators of health, such as infant and maternal mortality and morbidity, nutrition levels, chronic illnesses, preventable illnesses and infectious diseases, and mental health outcomes. The data also reaffirms the vital underlying role the determinants of health play. The difference between the health of Indigenous Peoples to their non-indigenous neighbours can be understood by taking the social determinants of health into consideration, but ultimately health and its social determinants are underpinned by the lasting legacies of colonisation.

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<sup>115</sup> ‘State of the World’s Minorities and Indigenous Peoples 2013’ (Minority Rights Group International 2013) 7 <<https://minorityrights.org/publications/state-of-the-worlds-minorities-and-indigenous-peoples-2013-september-2013/>> accessed 24 July 2023.

Land is integral to the health and well-being of Indigenous Peoples and their communities. Land is a fundamental to their identity and without access to it they are unable to practice their culture, ensure food security, protect their livelihood, fully utilise traditional medicine or live their traditional way of life. The cultural and physical survival of entire Indigenous communities are dependent on the land that they preserve, protect, and maintain. The CESCR commented on the importance of land to Indigenous Peoples in General Comment No. 26:

*land is closely and often intrinsically related to the enjoyment of the right to take part in cultural life owing to the particular spiritual or religious significance of land to many communities, for example, when land serves as a basis for social, cultural and religious practices or the expression of cultural identity. This is particularly relevant for Indigenous Peoples*<sup>116</sup>.

The committee further recognised that spiritual relationship between land and people includes everything from spiritual ceremonies to hunting. Indigenous Peoples uphold respect and appreciation for nature and all of its creatures. In their own words, ‘*We belong to the land; land does not belong to us*’<sup>117</sup>. They practice sustainable use of resources and ensure that they are in harmony with their ecosystems. A healthy, functioning environment is a crucial determinant for health and enables other basic needs to be met - shelter, education of traditional Indigenous knowledge, livelihoods etc. Any changes to their land imposed or caused by non-indigenous outsiders - resulting in problems furthering Indigenous vulnerability and marginalisation – are ‘*influenced by historical and ongoing patterns of inequity such as colonialism*’<sup>118</sup>. As a consequence, Indigenous health and well-being is still to this day underlined by the everlasting effects of colonialism through the ‘*complex interaction of historical, political, social, economic,*

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<sup>116</sup> ‘General Comment No. 26 (2022) on Land and Economic, Social and Cultural Rights’ 3 <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec12gc26-general-comment-no-26-2022-land-and>> accessed 15 July 2023.

<sup>117</sup> ‘Panel Discussion on the Rights of Indigenous Peoples’ (n 104) 3.

<sup>118</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 12.

*cultural, and environmental factors*<sup>119</sup>. In a report to the General Assembly in 2020, Mr. Cali Tzay wrote that all across the globe it is neo-colonialism and globalisation which leads to the dispossession of traditional land and keeps Indigenous societies in poverty and continues their marginalisation status<sup>120</sup>. Neo-colonialism is today's 'version' of colonialism. It is perhaps less visible and violent than its predecessor as there are no military takeovers, but the goal remains - *'the control of markets and natural resources'*<sup>121</sup>. Consider this potential threat to Indigenous land, along with the loss of land, harmful development projects, forced evictions, environmental degradation, pollution from agriculture and extractive industries, and armed conflicts – in combination with poverty, pre-existing social and economic inequalities, and constant systematic discrimination. Indigenous Peoples are left significantly disadvantaged and vulnerable in all aspects, particularly with their health. This is extremely concerning when considering the impacts of Climate Change.

Central to understanding the vulnerability is the concept of intersectionality and its applicability to Indigenous Peoples health in the context of climate change. Intersectionality originated as part of feminist theory in the 1980s. Coined by Kimberlé Crenshaw, an American critical race theorist, it was used to explain the double discrimination of black women. The aim of intersectionality is to analyse the categories of identities in combination with each other, against the backdrop of societal power structures. It is used as a tool to examine the emergence and interaction of the structures of power. Crenshaw defines the concept as *'a metaphor for understanding the ways that multiple forms of inequality or disadvantage sometimes compound themselves and create obstacles that often are not understood among conventional ways of thinking'*<sup>122</sup>. The power structures can be economical, social or cultural in nature. The categories of identity, also known as social categorisations, determine the grounds for inclusion and exclusion and what society considers normal and deviant. These categorisations most often include race, gender, ethnicity, class, religion, gender identity, sexual orientation, socio-

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<sup>119</sup> Jones (n 96) 73.

<sup>120</sup> 'Report on the Impact of COVID-19 on the Rights of Indigenous Peoples' (n 108) 9.

<sup>121</sup> Faleiro (n 93) 14.

<sup>122</sup> Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (2015) 1989 University of Chicago Legal Forum 149 <<https://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>>.

economic status, education, etc. These identifiers are separate to each other but can also join together to form an individual's social position with their respective system of power. Underlying these categorisations are reflections of discriminatory practices, stemming from the colonial mindset. Kaijser and Kronsell emphasise that the social categorisations are not 'fixed' and they have to be understood '*in their specific historical and spatial context and as embedded in power patterns*'<sup>123</sup>. They do not act independently of each other, rather their interaction creates '*interrelated systems of oppression and domination*'<sup>124</sup>.

In applying the intersectional theory to analyse climate change, it can be used to understand the complex dimensions of the climate crisis. The use of intersectionality as a means to formulate critical and constructive insights into the existing power relations and the current institutional practices of climate change related issues has been recommended by various scholars<sup>125</sup>. Its use has the potential to identify the social and systematic inequalities which makes individuals vulnerable - and more susceptible to climate related impacts – therefore, informing the appropriate action to take in addressing such inequalities. The categorisations in the context of climate change are as follows: gender, race, class, ethnicity, sexuality, age, disability, income, migrant status, geographical location, and Indigenous identity<sup>126</sup>. The various intersections of these categorisations combine to exacerbate existing inequality, discrimination, and vulnerability of individuals. Huff makes an excellent argument in favour for using an intersectional approach in understanding climate change. She argues that in calculating the human exposure to climate events, scientists will determine groups as vulnerable or resilient. Relying solely on social inequality places the responsibility on the individual instead of faulting the wider global systems and structures that originally created the inequalities<sup>127</sup>. Supporting the intersectional approach Huff explains that the concept takes a holistic approach that considers

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<sup>123</sup> Anna Kaijser and Annica Kronsell, 'Climate Change through the Lens of Intersectionality' (2014) 23 *Environmental Politics* 417, 422.

<sup>124</sup> Alan Gutterman, 'Climate Change and Older Persons' [2022] *SSRN Electronic Journal* 1 <<https://www.ssrn.com/abstract=4044003>> accessed 20 July 2023.

<sup>125</sup> *ibid.*

<sup>126</sup> 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.' (n 47) 53.

<sup>127</sup> Stephanie Huff, 'A Wider Lens: Intersectionality & Climate Equity : The Institute for Science and Policy' (2021) <<https://institute.dmns.org/perspectives/posts/a-wider-lens-intersectionality-climate-equity/>> accessed 4 May 2023.



the diversity of people and how they have been affected by the ‘historical, cultural, environmental, economic, and socio-political contexts’ surrounding them<sup>128</sup>.

### 3.3. Contribute the Least, Affected the Most.

In March 2009, the HRC resolution 10/4 acknowledged that ‘*climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights*’ with climate related effects ‘*felt most acutely by those segments of the population who are already in a vulnerable situation*’<sup>129</sup>. In 2015 the OHCHR asserted in its submission to COP21 that the crisis ‘*poses a threat to the lives of individuals; but also to their ways of life and livelihoods, and to the survival of entire peoples*’<sup>130</sup>. On estimation there are 3.3 to 3.6 billion people who currently live in circumstances which are extremely vulnerable to climate change<sup>131</sup>. Climate change will affect all populations and societies, but it is the degree of vulnerability which will dictate the severity of the impacts. As discussed, the intersections of marginalism contribute to an individual or a community’s vulnerability, and it is the complexity of the types of marginalisation which will determine the severity to which climate related impacts will affect the individual or community. These intersections of marginalisation are shaped by gender and gender orientation, race, social class, ethnicity, sexuality, age, income/economic status, and religion, and in regard to Indigenous Peoples’ situation, colonial legacy (the foundations of the current power structure systems). Another factor which leaves Indigenous Peoples particularly vulnerable to climate change is their deep connection to land, which is at risk of environmental degradation. Without their sacred land, many Indigenous populations are unable to survive as Indigenous, thus their health, lives and human rights are threatened and at incredible risk. The various intersections of Indigeneity marginalisation exacerbate existing inequalities, poverty, discrimination, and injustice, which only increases the threat of climate change to this

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<sup>128</sup> *ibid.*

<sup>129</sup> The Office of the High Commissioner for Human Rights (n 18) 10.

<sup>130</sup> *ibid* 14.

<sup>131</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 12.

population. Climate change and its impacts do not consider the disadvantage facing Indigenous Peoples, nor does it consider that they have contributed the least to the greenhouse gas emissions responsible for the crisis – the harsh reality is that ‘*disasters discriminate*’<sup>132</sup>. The role which discrimination plays in the distribution of climate change impacts cannot and must not be overlooked. Until the underlying currents of discrimination are addressed, meaningful climate action, mitigation and adaptation measures are unable to be achieved.

The distribution of the climate change related impacts amongst the global population can be summarised as contributed the least but affected the most. Roughly 3.9 billion people account for the world’s poorest, but they only produce 10% of global emissions<sup>133</sup>. The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd reported that ‘*the 20 wealthiest billionaires generate 8,000 times as much carbon pollution as the poorest billion people combined*’<sup>134</sup>. This disparity between the few excessively rich and the many terribly poor will only continue under climate change. Meanwhile the Special Rapporteur on extreme poverty and human rights predicted that a ‘*climate apartheid scenario*’ is possible where ‘*the wealthy pay to escape overheating, hunger and conflict, while the rest of the world [the world’s poor] is left to suffer*’<sup>135</sup>. It is acknowledged over and over again that those with the economic means are the ones who have contributed to climate change the most and therefore are not only responsible but have the means for the ‘*highest potential for emissions reductions*’<sup>136</sup>. This is one of many injustices resulting from the climate crisis, an injustice which is felt in particular by Indigenous Peoples. Indigenous communities all over the globe are the first to feel the effects of climate change. Due to their close, spiritual connection to nature and their dependence on the land, any changes to their local climate or their surrounding environment is a change in their everyday lives. In this regard climate change is an attack on the human rights of Indigenous Peoples, it

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<sup>132</sup> minorityrights, ‘Minorities and Indigenous Peoples at the Frontline of Climate Change’ (*Minority Rights Group*, 10 October 2019) <<https://minorityrights.org/2019/10/10/frontline-of-climate-change/>> accessed 10 July 2023.

<sup>133</sup> ‘Report on Climate Change, Culture and Cultural Rights’ (Special Rapporteur in the field of cultural rights 2020) 5 <<https://www.ohchr.org/en/documents/thematic-reports/a75298-report-climate-change-culture-and-cultural-rights>> accessed 16 July 2023.

<sup>134</sup> ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (n 84) 3.

<sup>136</sup> ‘AR6 Synthesis Report: Climate Change 2023, Summary for Policymakers’ (n 69) 33.

threatens the most basic human rights such as the right to health, the right to food, the right to water and proper sanitation, the right to shelter, and for some Indigenous populations the right to self-determination and even existence. The former UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, confirmed at COP21 that Indigenous Peoples *‘are among those who have least contributed to the problem of climate change, but are the ones suffering from the worst impacts’*<sup>137</sup>, as they depend on their local ecosystems for their physical and cultural survival.

As discussed in the previous chapter, wildfires are increasing in frequency and severity due to the increasing conditions of high temperatures, longer droughts, and strong winds. The Emergency Management Director of Indigenous Services Canada Todd Kujack has reported that *‘over the last 30 years the chance of being evacuated and displaced due to wildfires is 33 times higher for people living in First Nations reserves compared to people living off reserve’*<sup>138</sup>. Research conducted at the University of California found that in California during 2000 to 2020, the areas which experienced frequent and extreme wildfires were areas in which there was a high percentage (three times higher than the average) of Indigenous Peoples. The research demonstrated that Indigenous communities were *‘marginalised disproportionately’* before and after the fires and following the Thomas Fire in December 2017, both the emergency response and the recovery efforts *‘largely ignored the needs of such communities, with resources instead being directed toward more privileged individuals’*<sup>139</sup>. The research also noted that due to the language barriers Indigenous and other minority communities are at a disadvantage with regards to evacuation warnings, health guidelines and communicating with emergency responders and health providers<sup>140</sup>. In Australia Indigenous Peoples have also faced discrimination whilst

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<sup>137</sup>The Office of the High Commissioner for Human Rights (n 18) 24.

<sup>138</sup> ‘Minority and Indigenous Trends 2019 - Focus on Climate Justice’ (n 80) 60–61.

<sup>139</sup> Shahir Masri and others, ‘Disproportionate Impacts of Wildfires among Elderly and Low-Income Communities in California from 2000–2020’ (2021) 18 International Journal of Environmental Research and Public Health 3921.

<sup>140</sup> *ibid.*

enduring extreme heat, with studies suggesting that they are denied access to public swimming pools due to racist segregation policies<sup>141</sup>.

Indigenous health is already vulnerable due to the intersections of poverty, discrimination and marginalisation which results in difficulties in accessing appropriate healthcare, but climate related impacts have aggravated the situation. Chronic illnesses can develop or can worsen for those already afflicted. Indigenous populations in the US are prone to serious medical conditions such as asthma, heart disease, diabetes, obesity, and dementia, and have higher rates of these illnesses than the non-indigenous population<sup>142</sup>. Such conditions are sensitive to climate related impacts as extreme weather events have the potential exacerbate the condition – for example wildfire smoke and asthma. The fallout from extreme weather events may prevent the sick from reaching urgent emergency care. It is worth noting that even within Indigenous communities there are some more vulnerable than others; the elderly, the children, pregnant women, and those with disabilities. Indigenous mental health suffers with an increase in temperatures<sup>143</sup>. According to Working Group II of AR6, this is because of the trauma, and loss of livelihood and culture associated with extreme weather. The fear of losing cultural practices has been recorded in the Pacific Island nation of Tuvalu, where locals experience anxiety, worry and sadness over potential cultural loss<sup>144</sup>. Individuals and communities can also suffer from trauma due to loss of land and forced evictions. For some communities, this trauma can unearth the previous collective traumas from colonisation. The impacts of climate change on Indigenous mental health are often overlooked in academic research.

Indigenous territories account for 24% of all land throughout the world<sup>145</sup>, and within those territories 80% of the world's biodiversity is protected and cared for<sup>146</sup>. Indigenous land

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<sup>141</sup>Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change (n 49) 12–13.

<sup>142</sup>US EPA (n 78).

<sup>143</sup> 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.' (n 47) 594.

<sup>144</sup> *ibid.*

<sup>145</sup> This is what remains after colonisation/forced evictions, etc.

<sup>146</sup> Linda Etchart, 'The Role of Indigenous Peoples in Combating Climate Change' (2017) 3 *Palgrave Communications* 17085, 2.

has been subject to environmental degradation, exploitation, loss of biodiversity, and conflict. Further violation of traditional land is not only putting health at risk but there is a fear that mortality rates will increase significantly as accessing healthcare and services will become even more difficult<sup>147</sup>. The degradation and loss of biodiversity are another consequence of existing patterns of discrimination against Indigenous populations, which are subsequently reinforced through this environmental harm<sup>148</sup>. By damaging the forests, jungles, rivers, lakes, coastal areas, wetlands, and oceans – regions in which Indigenous survive - results in further marginalisation and inequality of these peoples. The decline of these ecosystems and the biodiversity within them not only affect human health and life, but also the determinants of health. Environmental degradation harms food and water security, medicinal plants, livestock, livelihoods, and cultural and spiritual practices. Due to histories of violence, discrimination and forced removal, Indigenous Peoples tend to dwell in geographical areas which are exposed to the impacts of climate change. They can include dry desert lands, tropical forests and jungles, mountainous and coastal regions. For example, the exposure of Louisiana’s Isle de Jean Charles is very evident as it has shrunk from 22,400 acres to just 320 acres due to sea level rise, erosion, storms, and extreme weather events such as hurricanes<sup>149</sup>. The Biloxi-Chitimacha-Choctaw who live on the island have been forced to relocate due to the uninhabitable conditions and the dangers posed by the ever-encroaching sea. In the Amazon the many Indigenous Populations who dwell there are under threat from rapid deforestation. During the term of former Brazilian President Jair Bolsonaro, the Amazon lost 45,586 km<sup>2</sup> to deforestation, and in August 2022 alone 638 km<sup>2</sup> of forest was destroyed – the highest rate in 10 years<sup>150</sup>. The Indigenous living in the Amazon Basin rely on specific plants for traditional medicines which are no longer able to survive due to the change in climate or due to deforestation. When the local Indigenous population protest against the destruction of their land they are met with violence and threats to their lives. Lenca woman Berta Cáceres, an environmental activist and Indigenous Leader was murdered for protecting her land and culture as a result of protesting against the construction of a dam on Lenca land<sup>151</sup>

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<sup>147</sup> ‘The Impact of COVID-19 on Indigenous Communities: Insights from the Indigenous Navigator’ (n 100) 32.

<sup>148</sup> ‘Human rights and the environment’ 2 <<https://digitallibrary.un.org/record/3927166>> accessed 16 July 2023.

<sup>149</sup> ‘Minority and Indigenous Trends 2019 - Focus on Climate Justice’ (n 80) 25.

<sup>150</sup> ‘The Indigenous World 2023’ (n 95) 14.

<sup>151</sup> ‘Report on Climate Change, Culture and Cultural Rights’ (n 133) 7.

(Honduras ,2016). Similar development projects have been known to displace Indigenous communities and interfere with their sources of food and water. The Special Rapporteur reported that *‘changes to river flows have had significant implications for the ecological maintenance of riverine systems, which in turn affect the ability for indigenous peoples to seek sources of sustenance’*<sup>152</sup>.

Food insecurity is caused by climate related interruptions in the productivity in the Indigenous related sectors – agricultural, fishery and forestry – however this reduces food availability and drives up prices. For Indigenous Peoples, food insecurity can result in malnutrition and an increase in disease. Working Group II for AR6 predicts that with an increase of 2°C in warming, there will be an increase of malnourishment and nutrition related diseases in vulnerable groups by 2050, which could affect tens to hundreds of millions<sup>153</sup>. *‘These days we go to the forest with hunger, and return bringing more hunger’*<sup>154</sup>, the words of a Shawi individual, the Shawi being Indigenous to the northern Peruvian Amazon. This population is hungry as a result of deforestation, loss of plant and wildlife species and also discrimination. The lack of traditional food is leading to malnutrition, starvation and threatening the entire Shawi existence. Government led development projects have scared animals away, destroyed the land and have introduced new populations of non-indigenous people who have introduced alcohol and low quality, less nutritious food to the area. The decline in quantity and quality of traditional and subsistence foods is causing food insecurity amongst Indigenous populations. With no other alternatives communities like the Shawi are reaching out to non-indigenous food (processed food with high salt or sugar contents) which is leading to obesity, diabetes, heart disease, etc. Native Alaskan tribes such as the Yupik, Inuit, Iñupiat, and Aleut have always lived in their ancestral villages along the Alaskan coast, fishing and hunting mammals such as seals and walrus for food and supplies. Due to the speed of sea ice melting their entire food source is under threat as well as their homes, 87% of ancestral villages are affected by erosion, forcing tribes to move

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<sup>152</sup> Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change (n 49) 7.

<sup>153</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 60.

<sup>154</sup> minorityrights (n 132).

from their traditional lands<sup>155</sup>. At this moment, a severe drought is affecting the people of Ethiopia. There are many different Indigenous populations, ranging from pastoralists, hunter-gatherers and forest-dwellers. The drought is aggravating the existing problems caused by desert locust infestations, outbreaks of disease, the COVID-19 pandemic, reoccurring conflict and the millions of people who have fled from the neighbouring Somali conflict. The pasture conditions are amongst the driest ever recorded with roughly 3.5 million livestock dying as a result between late 2021 to mid-2022, and a further 25 million who are weak and emaciated, at risk<sup>156</sup>. With little to no water available, the loss of livestock is worrying for the large Indigenous populations who depend on their animals for food and income. On the other hand, heavy floods are causing devastation in the Gambella region of the country. Heavy rains have caused extreme flooding throughout 12 districts, resulting in damage to 72% of land used for crop cultivation, the destruction of property and essential infrastructure such as 250 water schemes and over 70 healthcare facilities<sup>157</sup>. With contaminated water supplies and no access to medical treatment water-borne diseases have become rampant amongst the Indigenous population.

Morbidity and mortality caused by waterborne diseases pose a real threat, especially in lower income countries with a warm climate. In the more vulnerable populations such as the Indigenous, a small increase in incidence can result in significant morbidity and mortality for the entire community. Working Group II for the IPCC AR6 reported that ‘*diarrhoea incidence is associated with a 1°C increase in ambient temperature*’ and diarrhoea in particular is associated with heavy rainfalls and flooding events, which are expected to increase with climate change<sup>158</sup>. Although diarrhoea is a preventable disease, vulnerable regions or communities in climate temperatures can be extremely susceptible to it as they lack the proper medical care to treat it. Infants are particularly at risk. The natural water sources that Indigenous communities depend on are threatened due to the rising sea levels and temperatures, drought and change in rainfall

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<sup>155</sup> <https://www.kcet.org/people/paige-laduzinsky>, ‘The Disproportionate Impact of Climate Change on Indigenous Communities’ (KCET, 19 December 2019) <<https://www.kcet.org/shows/tending-nature/the-disproportionate-impact-of-climate-change-on-indigenous-communities>> accessed 24 July 2023.

<sup>156</sup> ‘The Indigenous World 2023’ (n 95) 70.

<sup>157</sup> *ibid* 71. 1

<sup>158</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 2462.

patterns. Already lacking safe drinking water due to the contamination of their traditional sources, or unsuitable drinking water and sanitation infrastructure, the danger of dehydration and spread of waterborne disease is ever present. Infants living in the Fort Apache reservation have higher rates for hospitalisation for diarrhoea related disease than those in the non-indigenous population<sup>159</sup>. As well as endangering health with the spread of disease, flooding can also result in loss of fresh water and sanitation infrastructure, as well as death from drowning. AR6 revealed that human mortality from floods, droughts and storms were 15 times higher in extremely vulnerable regions than to regions with low vulnerability<sup>160</sup>.

*Perceived Climatic Changes noted by Indigenous Leaders, Representatives and Peoples at COP21*

Perceived Climatic Change	Detail/Quote	Indigenous Group & Region	Source
Changing Seasonality	‘the seasons have changed. There are droughts when it should be winters’	Witoto, Amazonia, Peru	Edwin Vasquez Campos, General Coordinator, COICA
Unpredictable Rainfall	‘Sometimes people’s expecting rain but the rain doesn’t arrive in the right time. That’s the time people hunt and fish ... Like in state of Acre in 2008, for the first time it [didn’t] rain, [there was a delay] for more than five months’	Yawanawa; Amazonia (Brazil)	Tashka Yawanawa, Chief of the Yawanawa People of the Brazilian Amazon
Extreme Events	‘we’re seeing a huge increase in the size of cyclones, tsunamis. There was a devastating tsunami that happened in 2009. And that’s been the biggest so far’	Samoa, Polynesia	Carinnya Feaunati, Architect, Samoa/New Zealand

<sup>159</sup>US EPA (n 78).

<sup>160</sup> ‘AR6 Synthesis Report: Climate Change 2023, Summary for Policymakers’ (n 69) 5.



Droughts	‘ We’ve just had a summer [dry season] that lasted for seven months in the region. And generally the summers were not for more than two or three months. Seven months without water’	Inga de Aponte, Colombia, South America	Hernado Chindoi, President of the Court of Indigenous Peoples of Southwest Columbia; former Governor of the Inga people.
	‘A lot of our water systems are completely depleted, there’s areas in CA that don’t have access to water the whole week ... its pretty severe’	Meshica, California, Western USA	Teresa Almaguer, representing environmental justice order PODER
Sea Level Rise	‘At the moment SLR is currently the worst impacts we’re facing. The sea keeps rising and all the coastlines keep eroding and we’re trying to protect that but we can’t . . . The mangrove preserve has been damaged a lot because of the sea water rising’	Polynesia	Isso Nihmei of Vanuatu, representing the Pacific Indigenous Network

Source: Comberti, Thornton & Korodimou (2016) <sup>161</sup>

Similar to the example of COVID-19 used previously in this chapter, another example will be used to demonstrate discrimination in the aftermath of an extreme weather event. In 2005, two Hurricanes devastated the US Gulf Coast. Hurricane Katrina and Hurricane Rita brought complete devastation to all in the Southern State of Louisiana, especially those living in New Orleans. However, this devastation was not equally distributed. Despite the extensive media coverage and aid sent to the area, the Indigenous tribes were overlooked by the media, aid relief and the federal government. Chief Brenda Dardar-Robichaux of the United Houma Nation said at the time and spoke on behalf of her people, ‘*We are an Indian tribe here that is falling through the cracks. Nobody has made contact with us except the native media. Everything we are doing has been a grassroots effort, and it’s taken weeks to get this far with the help of many volunteers*

<sup>161</sup> Comberti and others (n 90) 18.

and private donations. We're basically doing it on our own'<sup>162</sup>. Chief Dardar-Robichaux described how aid came, not from aid organisations or the government, but from other Indigenous Tribes throughout the country 'we are blessed that Indian tribes and Indian communities and people from throughout the United States have come to help us in our relief efforts'<sup>163</sup>. The Houma People are one of the local tribes which are not recognised by the Federal Government, which contributed to their marginalisation as it prevented them from receiving State funded aid. The American Indian Culture and Research Journal reported in 2008 that 'Centuries of neglect and disinvestment in the indigenous and tribal communities of Louisiana would reach an all-time high in the aftermath of the storm'<sup>164</sup>. The failure of the media and of subsequent academic discourse to report on the situation of the various local Indigenous Tribes rendered their experience invisible, thus contributing to their neglect in the recovery<sup>165</sup>. Systematic discrimination ingrained in the Federal government exacerbated the already difficult situation of the local tribes. Their refusal to recognise tribes like the United Houma Nation further marginalised the tribe as well as harming the population's overall wellbeing. It is important to note that although these disasters hit a developed country with a strong economy, the US still struggled to cope in the aftermath, despite having the resources to do so. If recovery was difficult for a global power, then to consider a similar scenario taking place in a developing country is frightening.

An interesting view on Indigenous health, Dr Rhys Jones (an Indigenous Māori) claims that climate change can be viewed as an '*intensification of colonialism*'. He argues that the worldviews, values, and systems which underpinned Indigenous colonisation, currently underpin the environmental changes that threaten ecosystems all over the world. According to this his

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<sup>162</sup> Interview with Principal Chief of United Houma Nation, Brenda Dardar-Robichaux, 'Indian Tribes and Hurricane Katrina: Overlooked by the Federal Government, Relief Organizations and the Corporate Media | Democracy Now!' <[https://www.democracynow.org/2005/10/10/indian\\_tribes\\_and\\_hurricane\\_katrina\\_overlooked](https://www.democracynow.org/2005/10/10/indian_tribes_and_hurricane_katrina_overlooked)> accessed 20 July 2023.

<sup>163</sup> *ibid.*

<sup>164</sup> Kirsten Vinyeta, Kyle Powys Whyte and Kathy Lynn, 'Climate Change through an Intersectional Lens: Gendered Vulnerability and Resilience in Indigenous Communities in the United States' (2015) 923 Gen. Tech. Rep. PNW-GTR-923. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. 72 p. 23 <<https://www.fs.usda.gov/research/treesearch/49888>> accessed 23 July 2023.

<sup>165</sup> Catherine E McKinley and others, 'Hurricanes and Indigenous Families: Understanding Connections with Discrimination, Social Support, and Violence on PTSD' (2019) 19 Journal of family strengths 10, 4.

theory the modern western societies hold values which are anthropocentric and individualistic in nature, which link improvements in the quality of life with capitalist over-consumption patterns. Thus, capitalism has driven commodification and the exploitation of natural resources (renewable and non-renewable), prioritised economic growth and gain over the resulting negative environmental impacts. He surmises that ‘*Colonial expansion into Indigenous peoples’* lands in pursuit of capital has led to an escalating process of environmental degeneration and destruction’<sup>166</sup> which has resulted in the climate crisis. Therefore, in order to address Indigenous health in the context of climate change impacts and to create meaningful mitigation and adaptation measures, the repercussions of colonial legacy and its resulting negative social conditions for Indigenous Peoples must be acknowledged and confronted. If these prerequisites are not met then the impacts of climate change shall continue to harm the health, lives, and human rights of Indigenous Peoples.

Indigenous Peoples are bearing the brunt of climate change related impacts. The impacts are felt unequally throughout the world but Indigenous Peoples, due to their dependence and unique connection to their land are among the most vulnerable, as environmental harm is threatening their health, their life, and their very existence as Indigenous. Although contributing very little to the climate crisis, they are the first to feel its effects. According to a Sámi researcher and member of the Galggojávri Sámi reindeer-herding community, Klemetti Näkkäljärvi, it was the Sámi reindeer owners who first recorded the signs of a changing climate in the 1960s, ‘*changes observed relate to seasons, temperature, extreme conditions, vegetation, fauna, wind, snow and reindeer life. The most significant changes, however, concern uncertainty*’<sup>167</sup>. Climate change impacts also disproportionately affect Indigenous Peoples due to their marginalisation status in society which contributes to their overall vulnerability to climate change. Their marginalisation can be traced back to colonial times when their land was taken from them, they were first subject to discrimination, exploited, and prevented from practicing their culture. Marginalisation can extend into poverty which in turn increases their vulnerability by reducing their economic means for adaptation to extreme weather events. Working Group II for AR6 found that those with the fewest resources and ‘*already constrained life chances*’ that losses

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<sup>166</sup> Jones (n 96) 76.

<sup>167</sup> ‘Minority and Indigenous Trends 2019 - Focus on Climate Justice’ (n 80) 143.

resulting from climate change related events have the capacity to reduce wellbeing and further exacerbate vulnerability<sup>168</sup>. It is important to remember that when considering the climate change crisis and any adaptation or mitigation measures, that the intersections of marginality must be considered and included in all discussions. Without their consideration the vulnerability of Indigenous Peoples to climate change will continue to increase, and as a result their health and lives will suffer for it. The right to health and the right to life are fundamental human rights and as such are non-negotiable. Applying an intersectional approach to climate change will see that all aspects of Indigenous health are accounted for, and therefore will enable and empower Indigenous realisation of these essential human rights.

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<sup>168</sup> ‘Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.’ (n 47) 928–929.

## *Chapter 4. Indigenous Human Rights Law.*

The following chapter will focus solely on Indigenous Peoples within International Human Rights Law. The key instruments relating to Indigenous rights shall be discussed, as well as any other human rights doctrine which is relevant. The application of the instruments in regard to the right to health and the right to life will be discussed in the context of Indigenous Peoples and climate change. Lastly, climate litigation shall be examined, with examples from past cases, recent cases and ongoing cases.

### 4.1. Legal Definition of Indigenous Peoples.

Under International Human Rights Law, States have an obligation to ensure, protect and respect all human rights for all peoples without discrimination. Within the obligation is a commitment to protect people and their rights from all foreseeable harm. The harm resulting from the climate change crisis is no longer foreseeable but present and threatening. As established in the previous chapter it is Indigenous Peoples who are bearing the brunt of climate change related impacts. These impacts are affecting their health and existence and will only continue to worsen as the crisis further develops. The inability to achieve an adequate standard of health is a violation of the right to health, as is the threat to life a threat to the right to life.

There is no particular or universally accepted definition of ‘Indigenous Peoples’ as a term in international law, but there is reasoning behind this logic. The term Indigenous can be used as an overarching or umbrella term – as mentioned there are roughly 370 million Indigenous in the world, constituting at least 5,000 different distinct peoples and culture, spread over seventy countries<sup>169</sup>. The extent of this diversity is impossible to reduce to one definition – the Sámi people of Northern Europe are polar opposites to the Aboriginal people of Australia. It is for this reason there is no set definition, with the ILO reasoning that a ‘formal’ definition is ‘*neither*

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<sup>169</sup>International Labour Organisation (n 4) 9.

*necessary nor desirable*<sup>170</sup>, and in its place criteria to be met to determine Indigenous status. This criterion has critical importance in the determination of Indigeneity in international law. There are some commonalities amongst Indigenous Peoples despite their vast differences. Such similarities include the historical continuity of the people that are belonging to the societies that existed before conquest or colonisation of the region/country, and the continuation of distinct economic, social, cultural, and political institutions and practices (although some forms may have been lost to conquest or colonisation). ILO Convention 169 does not give a specific definition but establishes the criteria to be met in order for the convention to be applicable to Indigenous populations and used in their protection. ILO 169:

*Article 1.1. (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*

*(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions*<sup>171</sup>.

To repeat what was explained in the delimitations of this thesis, ILO 169 uses both ‘Tribal’ and ‘Indigenous’ synonymously due to the reluctance to use an official definition. There is however no difference in the rights attributed to either group, therefore as ‘Indigenous’ is the most commonly used term to describe both groups in international human rights law, this thesis will follow suit for the sake of continuity with international law. The above establishes the criteria for the objective determination of Indigenous status, whilst Article 1.2. establishes the subjective determination through the critical importance for self-determination as an element of criteria.

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<sup>170</sup>ibid.

<sup>171</sup> Indigenous and Tribal Peoples Convention, 1989 (No.169) 1989 art 1.(a) and (b).

*Article 1.2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply*<sup>172</sup>

ILO Convention 169 was the first international instrument which recognised and highlighted self-identification as an important aspect of Indigenous determination. Its inclusive approach to determination enables the conventions equal applicability to Indigenous and Tribal Peoples. These criteria set by ILO 169 has been used widely in international and regional systems to correctly identify Indigenous Peoples. This ‘working definition’ is included in the application of UNDRIP and used as the basis for which other UN specialised agencies develop their own operational definitions<sup>173</sup>. As thorough and inclusive as this definition is, it is lacking in its description of the unique connection Indigenous share to past and future generations and to their ancestral land. The UN Special Rapporteur for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo used the following definition in the sub-commissions 1986 study;

*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*<sup>174</sup>.

Perhaps in the future, a more thorough description such as the above can be added to the definition provided by ILO, so as to reiterate and reaffirm the importance of land and culture for Indigenous Peoples in international human rights law.

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<sup>172</sup> *ibid* 1.2.

<sup>173</sup> International Labour Organisation (n 4) 10.

<sup>174</sup> ‘Report of the Workshop on Data Collection and Disaggregation for Indigenous Peoples’ (UN, 2004) 2 <<https://digitallibrary.un.org/record/517063>> accessed 1 July 2023.

## 4.2. Recognition and Protection under International Human Rights Law.

Along with the inalienable and universal rights afforded to all individuals under International Human Rights Law there is an established set of specific rights for Indigenous Peoples. These set of rights are individual and collective in nature. There are two main legal instruments, ILO 169 and UNDRIP. Convention 169 was adopted in 1989. Article 7 references environmental protection of Indigenous land, they:

*shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development*<sup>175</sup>

and that they should be involved in any development plans which concern their lands. Article 7 also emphasises that the ‘*improvement of the conditions of life . . . and levels of health*’<sup>176</sup> are to be prioritised over development activities and that States should ensure the protection and preservation of relevant territories. The ILO Convention entered into force on the 5<sup>th</sup> of September 1991 and laid the foundations for the 2007 UNDRIP.

UNDRIP was adopted on the 13<sup>th</sup> of September 2007 and a remarkable achievement (for the time) in the recognition of the rights of Indigenous Peoples internationally. It is the most comprehensive instrument in ensuring the ‘*minimum standards of recognising, promoting and protecting Indigenous Peoples’ rights*’<sup>177</sup>. Unfortunately, there is a significant difference in what the declaration guarantees and how they are implemented by States who have signed. The Special Rapporteur on the Rights of Indigenous Peoples follow a mandate which promotes

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<sup>175</sup> ILO 169 art 7.1.

<sup>176</sup> *ibid* 7.2.

<sup>177</sup> ‘The Indigenous World 2023’ (n 95) 17.



UNDRIP, the mandate includes the legal framework for their activities which include thematic work, country visits, and finding ways to overcoming obstacles faced by Indigenous Peoples in the realisation of their human rights. The current Special Rapporteur is Mr. José Francisco Calí Tzay from Guatemala, who was a former member on the Committee on the Elimination of Racial Discrimination, he assumed the role in May 2020<sup>178</sup>.

There is no mention of Indigenous Peoples in the International Covenant on Civil and Political Rights (ICCPR) or in the International Covenant on Economic, Social and Cultural Rights (ICESCR) – both drafted in 1966 and entered into force in 1976. However, both these core international human rights instruments are applicable to Indigenous Peoples for the sole reason that they are human beings ‘*these rights derive from the inherent dignity of the human person*’<sup>179</sup>. Both covenants establish that to be free as humans, and to be free from fear and want are only possible in conditions where every human being can enjoy their civil, political, economic, social, and cultural rights. All rights set out in the covenants are universal in scope and inalienable, indivisible, interdependent and interconnected in nature. The International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) is applicable too, although it also fails to make any reference towards Indigenous Peoples. According to Article 1.1. racial discrimination refers to

*any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*<sup>180</sup>

It is applicable to Indigenous Peoples as the convention states in its preamble that all humans ‘*are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms*’<sup>181</sup> set out in ICERD without subjection to racial discrimination. ICERD guarantees Indigenous Peoples their civil, political, economic, social, and cultural rights to be free from racial discrimination or prejudice.

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<sup>178</sup> ibid 694.

<sup>179</sup> ICCPR pt Preamble; ICESCR pt Preamble.

<sup>180</sup> International Convention on the Elimination of All Forms of Racial Discrimination 1965 art 1.1.

<sup>181</sup> ibid Preamble.

The preamble of ICERD states that the entirety of the UN has ‘*condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist*’<sup>182</sup> and states that with General Assembly Resolution 1514 (XV)<sup>183</sup> the institution of colonialism will be ended. Consider the argument put forward by Dr Rhys Jones (climate change as an intensification of colonialism) – if this claim were to be accepted than it would mean over 60 years after its condemnation it is still at large but has taken on a new form. Any negotiations on climate change action are essentially futile because as long as colonialism exists it ‘*prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples*’<sup>184</sup> and is an obstacle to universal peace. Human rights can never be truly achieved as ‘*subjection of peoples to alien subjugation, domination and exploitation*’<sup>185</sup> amounts to their complete denial which is the ultimate barrier to achieving peace and cooperation in the world. This argument would be a controversial one in the world of international human rights but it is an argument worth considering as it was developed by an Indigenous mind and adds a different but important perspective on the crisis:

The Stockholm Declaration does not mention Indigenous Peoples but the Rio Declaration, in Principle 22 highlights the crucial role played by Indigenous Peoples:

*in environmental management and development because of their knowledge and traditional practices’ and recommends State Parties to ‘recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development*<sup>186</sup>.

However, it was modest statement even at the time of drafting as both ILO 169 (1989) and CBD (1992) had addressed this aspect of Indigeneity, with the CBD and Agenda 21 further elaborating on the importance of traditional knowledge. The Aarhus Convention fails to mention Indigenous Peoples but nonetheless is applicable as the convention recognises:

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<sup>182</sup> *ibid.*

<sup>183</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples. 1961.

<sup>184</sup> *ibid* Preamble.

<sup>185</sup> *ibid* 1.

<sup>186</sup> Rio Declaration Principle 22.

*that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations’ therefore, ‘to assert this right and observe this duty, citizens must have access to information . . . [be able to]. participate in decision-making and have access to justice in environmental matters<sup>187</sup>.*

The UNFCCC, being an international environmental treaty was important in its role of establishing climate change as a human rights issue, but both the 1992 convention (adopted 1994) and its 1997 Kyoto Protocol failed to make any reference or mention of Indigenous Peoples<sup>188</sup>. The UN body dedicated to producing periodic assessment reports under the UNFCCC, the IPCC also failed to mention Indigenous Peoples initially in its reports however throughout the years it has rectified this issue<sup>189</sup>. The 2015 Paris Agreement not only mentions them but, in the preamble, specifically references the rights of Indigenous Peoples in regard to the obligations of Party members in their actions to address climate change<sup>190</sup>. Further on in Article 7.5. they are once again mentioned but in the acknowledgement that adaptation needs to consider vulnerable groups and should be:

*based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate<sup>191</sup>.*

Adopted in 2015 by the State Parties of the UNFCCC, the Paris Agreement was the first treaty on climate change to mention and acknowledge the rights of Indigenous Peoples, and rightfully allowed the inclusion of Indigenous leaders in global climate discussions and resulting

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<sup>187</sup> ‘The Aarhus Convention | OSCE Aarhus’ pt Preamble <<https://aarhus.osce.org/about/aarhus-convention>> accessed 29 July 2023.

<sup>188</sup> ‘Minority and Indigenous Trends 2019 - Focus on Climate Justice’ (n 80) 21.

<sup>189</sup> ‘IPCC reports play a decisive role in how climate policy is defined, what issues are prioritized and what responses are made visible and promoted.4 It is therefore crucial to understand what they say about Indigenous Peoples’ ‘The Indigenous World 2023’ (n 95) 358.

<sup>190</sup> Paris Agreement pt Preamble.

<sup>191</sup> *ibid* 7.5.

the negotiation process<sup>192</sup>. Despite the positive progress of the inclusion of Indigenous Peoples in the Paris Agreement, it is made redundant by those of the total 196 State Parties who do not recognise their own Indigenous population(s) or participate in discriminatory practices towards them. For example, at the time of the Minority Rights Group International report, as of January 2019 44 out of 54 members from the African system had submitted their NDCs but only nine signatories made references to Indigenous Peoples or their traditional knowledge<sup>193</sup>.

It has been well established by declarations and instruments such as the UDHR, the ICCPR AND ICESCR that States are the duty bearers of human rights. They have obligations which require individual and collective action at a national and international level. The duty to respect, protect and fulfil the human rights of all individuals is non-negotiable, this responsibility is in accordance with Articles 55 and 56 of the UN Charter: the '*universal respect for, and observance of, human rights and fundamental freedoms for all*'<sup>194</sup>. These obligations must be achieved without discrimination. In this regard States have a positive obligation to protect rights by taking measures to mitigate and adapt to climate change. By failing to take adequate measures to prevent the climate related harms, including those which are foreseeable, the State is in breach of the obligation. To ensure all human rights, in line with the principles of international cooperation and solidarity, States have the duty to share the necessary knowledge, resources and technologies to address climate change, particularly with the States most affected without the means to accomplish the feat on their own. Another principle which is relevant to climate change action is the principle of common but differentiated responsibilities and respective capacities. This principle dictates that all States have common responsibilities to protect the environment and people from climate change, but their burdens vary on account of their contributions to cause of the climate crisis (e.g., greenhouse gas emissions) and their capacities to contribute. International cooperation between States is key in bringing together the collective efforts to '*effectively and fairly address the global climate crisis*'<sup>195</sup>. Actions to combat climate change must consider those who vulnerable to the impacts, in particular Indigenous Peoples who are disproportionately burdened by the crisis. Those who are affected by climate change and face a

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<sup>192</sup> 'Minority and Indigenous Trends 2019 - Focus on Climate Justice' (n 80) 41.

<sup>193</sup> *ibid* 51–52.

<sup>194</sup> United Nations Charter 1945 art 55.

<sup>195</sup> Office of the United Nations High Commissioner for Human Rights (n 61) 65.

violation of their rights must have access to effective remedies. States must take accountability in their failure to respect, protect and fulfil human rights in their contribution to climate change.

The Paris Agreement is the most promising framework for States to deliver on their human rights obligations in regard to climate change. The NDCs are a driving force to produce real climate action, the benefits of which will be evident to those worst affected. NDCs are produced every 5 years and enable the promotion of human rights policy coherence by *'building upon existing good practices and experiences'*<sup>196</sup> amongst States. Each State's successive NDC will represent a progression beyond the previous NDC and will *'reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'*<sup>197</sup>. States are to ensure their national climate policies are in line with human rights obligations and climate commitments. However, despite the groundbreaking achievement that was the Paris Agreement, there is no way to enforce it or to hold States accountable for not meeting the targets they set themselves in the NDCs, other than peer pressure or by shaming the State in question at the COP. Bodansky surmises that although the agreement is a treaty – as per the definition of the Vienna Convention on the Law of Treaties - however *'not every provision of the agreement creates a legal obligation. It contains a mix of mandatory and non-mandatory provisions relating to parties' mitigation contributions'*<sup>198</sup>.

Unfortunately, the established human rights framework to protect the rights of Indigenous Peoples shall never be achieved unless the underlying currents of racial discrimination and the ongoing legacies of colonialism are addressed at State level. The Indigenous populations of the world continue to face human rights violations as a result of State actions and inactions, and private enterprises. The IWGIA claims that the former ignores international human rights instruments through the means of national *'explicit laws and court decisions that deny the rights of Indigenous Peoples or, at other times, simply pay lip service to Indigenous Peoples, their rights and the UNDRIP'*<sup>199</sup>. There are still States which do not recognise Indigenous Peoples in the national governments with some claiming that all people in the country are Indigenous<sup>200</sup>,

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<sup>196</sup> *ibid* 66.

<sup>197</sup> Paris Agreement art 4.3.

<sup>198</sup> Daniel Bodansky, 'The Legal Character of the Paris Agreement' [2016] SSRN Electronic Journal.

<sup>199</sup> 'The Indigenous World 2023' (n 95) 17.

<sup>200</sup> For example, Botswana and Cuba are countries which claims all their peoples are Indigenous.

therefore there is no need for UNDRIP and its special protections. This undermines the self-identification of groups as Indigenous and enables national governments to entirely bypass UNDRIP. States who are home to significant numbers of Indigenous Peoples show their support to UNDRIP but in reality, are reluctant to implement its provisions. Māori representatives at the UN Permanent Forum on Indigenous Issues (UNPFII) have called on the New Zealand State to fully implement UNDRIP so that they can take part in national climate change discussions. A member of the UNPFII explained that there is a common reluctance worldwide in implementing UNDRIP, the US, Canada and Australia have also been called out at UNPFII for this reason ‘[there is] *too great a gap between the declaration principles and the actions and conduct of countries globally*’<sup>201</sup>. It is significant to note that the aforementioned States are developed countries with histories steeped in colonialism and have substantial Indigenous Populations. It is not unrealistic to suggest that the underlying cause for this reluctance is rooted in the old colonial mindset. In a display of blatant discrimination against Indigenous Peoples, former Brazilian President Jair Bolsonaro attempted to dissolve his government’s Ministry of the Environment and Climate Change and tried to leave the Paris Agreement so that there were no obstacles to developments in the Amazon. At the time he had declared that he refused to ‘*give the Indians another inch of land*’<sup>202</sup>, during his presidency deforestation in the Amazon had increased by 56%.

It is clear that Indigenous Peoples across the world lack faith in the national, regional and international laws that are in place to protect their rights as Indigenous and their rights as human beings:

*As Indigenous peoples, the only thing that we receive from the government is contempt. They despise us because we are just a hindrance to them, because we still hold large*

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<sup>201</sup> Joseph Lee, ‘In the Wake of Historic Storms, Māori Leaders Call for Disaster Relief and Rights’ (*Grist*, 19 April 2023) <<https://grist.org/global-indigenous-affairs-desk/in-the-wake-of-historic-storms-maori-leaders-call-for-disaster-relief-and-rights/>> accessed 20 July 2023.

<sup>202</sup> Lyric Aquino, ‘2022 Was a Particularly Deadly Year for Land and Environmental Activists’ (*Grist*, 11 April 2023) <<https://grist.org/global-indigenous-affairs-desk/2022-was-a-particularly-deadly-year-for-land-and-environmental-activists/>> accessed 14 June 2023.

*amounts of land and because of our identity and the worldview that we hold in connection with the natural world*<sup>203</sup>

These words by Nahua Leader Miguel López resonate with many across the globe. The UNFCCC framework has allowed for Indigenous inclusion in the global conversation on climate change. The International Indigenous Peoples Forum on Climate Change (IIPFCC) was founded in 2008 in order to facilitate Indigenous involvement in the frameworks processes so that they play a role in all global climate discussions and negotiations. The forum serves as a mechanism *‘for developing common positions and statements of Indigenous Peoples, and for undertaking effective strategies, lobbying and advocacy work at UNFCCC meetings and sessions’*<sup>204</sup>. The Local Communities and Indigenous Peoples Platform was established in 2015 but was not operationalised at first, and in 2018 saw the formation of a Facilitative Working Group. The latter was the *‘first constituted body under the UNFCCC with equal representation between Indigenous Peoples and States’*<sup>205</sup>. Despite such encouraging developments for Indigenous participation at an international level, the IIPFCC has no enforcement power over UN Bodies and has very little influence over States. Their capability is hindered by States which do not recognise their own Indigenous populations. The IWGIA observes the challenge laid before Indigenous representatives, to defend that due to their status as specific rights-holders their participation in climate talk negotiations must differ from other specific rights-holders and civil society<sup>206</sup>. As an IIPFCC Indigenous representative stated at COP 21, *‘we are the ones already providing solutions to climate change and we are completely being ignored’*<sup>207</sup>. Much of the world’s Indigenous population come from developing countries – these countries have less negotiating power or influence compared to the developed countries at global climate talks. This makes Indigenous representation that much difficult, therefore their impact at COP meetings remains low. Comberti et. Al, attribute their further marginalisation at COP meetings to the

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<sup>203</sup> ‘A Look at Violence and Conflict over Indigenous Lands in Nine Latin American Countries’ (*Mongabay Environmental News*, 31 May 2022) <<https://news.mongabay.com/2022/05/a-look-at-violence-and-conflict-over-indigenous-lands-in-nine-latin-american-countries/>> accessed 26 June 2023.

<sup>204</sup> ‘The Indigenous World 2023’ (n 95) 676–677.

<sup>205</sup> *ibid* 677.

<sup>206</sup> *ibid*.

<sup>207</sup> Comberti and others (n 90) 15.

*‘economic interests of influential stakeholders in developing states [playing] an outsized role in shaping climate change negotiations’*<sup>208</sup>. Further disappointment can be seen through decisions of the courts. Romina Picolotti and Jorge Daniel Taillant argue that when denial of human rights is due to environmental degradation, if the issue is brought to court, it will not be seen as a human rights issue, and instead will be treated with a lower set of standards and priority than if it were viewed as such<sup>209</sup>. It is highly likely that the dismissal of Indigenous Peoples at global climate change meetings, stems from underlying attitudes and stigmas of discrimination. They are left to depend on the State in which they reside/where their traditional land is, to speak on their behalf. The histories of colonialism and its long-lasting repercussions of marginalisation, and discrimination undermine the capability of such representation<sup>210</sup>.

### 4.3. Achieving the Right to Health and Right to Life in the Context of Climate Change.

The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental health had stated in 2007 that the effects on health due to climate change were concerning - they were a threat to human health and wellbeing which would result in morbidity and mortality. The Special Rapporteur emphasised that:

*failure of the international community to take the health impact of global warming seriously will endanger the lives of millions of people across the world*<sup>211</sup>.

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<sup>208</sup>ibid 6–7.

<sup>209</sup> *Linking Human Rights and the Environment* (n 38) xv.

<sup>210</sup> Comberti and others (n 90) 7.

<sup>211</sup> ‘Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’ (Special Rapporteur on the right to health 2007) para 102 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/453/79/PDF/N0745379.pdf?OpenElement>> accessed 16 July 2023.



The threats to human health and human life have been made clear, climate change is a danger to the realisation of the right to health and the right to life. However for Indigenous Peoples, their identity as a marginalised group, combined with their vulnerability to the effects of climate change on account of their identity and also the difficulty achieving their right to health and right to life because of their identity and the impacts of climate change – these intersections have made the challenge to Indigenous realisation of the right to health and the right life in the context of climate change all the more complex and difficult.

Although the UN oversees the international human rights framework and monitors its implementation, it is ultimately up to the State to fulfil their primary obligation to promote, protect and achieve human rights within their domain. These obligations are set out, defined, and guaranteed by international human rights treaties and by international customary law<sup>212</sup>, which creates legally binding obligations for the States who have ratified the former. In the case of the ICESCR, Article 2.1. outlines that these obligations it sets out are to be progressively achieved, which considers the constraints on resources that are faced by States. Obligations are to be achieved by States individually and by international cooperation<sup>213</sup>, the latter coming into effect if a State is unable to carry out these obligations on its own and needs assistance from other States. Other States meaning those who are in a position to help<sup>214</sup>. Through international cooperation and assistance all States in theory should be able to progressively realise their obligations to human rights. The CESCR considers the right to health subject to progressive realisation. However, the covenant imposes obligations which must take immediate effect, such as taking steps towards the fulfilment of the right and guaranteeing its exercise without discrimination<sup>215</sup>. The right to health imposes three obligations on State parties, they are: the obligation to respect, to protect, and to fulfil. The obligation to respect requires that States do not directly or indirectly interfere with the enjoyment of the right, the obligation to protect requires the adopting of measures to prevent third parties from interfering with the right, and the

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<sup>212</sup> Customary law being evidence of a general practice of States which is accepted as law and adhered to out of a sense of legal obligation.

<sup>213</sup>ICESCR art 2.1.

<sup>214</sup> ‘General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)’ (n 10) para 45.

<sup>215</sup>ibid 30.

obligation to fulfil requires the State to adopt any appropriate measures so that the right may be fully realised<sup>216</sup>. Within the obligation to fulfil there are three more obligations: to facilitate, provide, and promote the right to health. These are the general legal obligations of the obligation to respect, protect and fulfil but there are specific duties attached to them as part of the right to health.

The obligation to respect includes the abstention of imposing discriminatory practices by States, as well as respecting and ensuring the continuation of traditional health practices and medicines. The CESCR further elaborates on this commitment by declaring that States should ‘*refrain from unlawfully polluting air, water and soil*’<sup>217</sup> however, their understanding of this does not include environmental protection in regard to climate change. With regards to the obligation to protect, States ought to take measures to ensure healthcare and services provided by third parties, are equally accessible and available and of good quality, without discrimination. The obligation to fulfil entails that States recognise the right to health by way of legislative implementation and its inclusion in national legal and political systems. State parties must guarantee that healthcare is provided for, and that equal access extends to the underlying determinants of health<sup>218</sup>. This includes the State ensuring that doctors, nurses, and other healthcare professionals receive the appropriate training, that there is an adequate number of hospitals, clinics, health-related institutions (including mental health facilities) operating evenly across the State. The CESCR includes the adoption of measures to protect against environmental and occupational health hazards in the obligation to fulfil but does not refer explicitly to climate change<sup>219</sup>. Lastly, the specific duties of the obligation to fulfil requires that States take positive measures to enable the enjoyment of the right to health for everyone (facilitate), to provide for those who cannot achieve that right by themselves for reasons beyond control or due to financial means (provide), and finally States must take actions to safeguard the health of its population. The latter obligation in regard to Indigenous Peoples, include ensuring healthcare facilities and services are culturally appropriate and that staff are ‘*trained to recognize and respond to the*

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<sup>216</sup>ibid 33.

<sup>217</sup> ibid 34.

<sup>218</sup> ibid 36.

<sup>219</sup> ibid.

*specific needs of vulnerable or marginalized group*<sup>220</sup>. The right to health requires, on an international level, that all State parties must take steps towards the full realisation of the right to health. The CESCR recalls the Alma-Ata Declaration on Primary Health Care which states that the existing inequality in the health of people within countries and from developed and developing countries is ‘*politically, socially and economically unacceptable and is, therefore, of common concern to all countries*’<sup>221</sup>. Therefore, in the context of climate change, there is a legal obligation on States to take measures for the purpose of mitigation to and adaptation of climate change so as to prevent the foreseeable harms to human health and thereby fulfilling the right to health. Failure to ensure any of the above obligations results in a violation of the right to health by the State and therefore amounts to a violation of a number of human rights as determined by the right to health. Violations can take the form of the State unwilling to use its resources to ensure the realisation to health, through the failure to take necessary actions arising from the general, specific, and international legal obligations, and in particular, the failure to take all necessary steps in ensuring the right to health.

The Committee recognises that Indigenous Peoples:

*have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines*<sup>222</sup>

and should be designed, delivered by Indigenous Peoples. The products necessary to sustain Indigenous life such as the plants used for medicinal purposes, animals and minerals ought to be protected to protect Indigenous health. The Committee made an important statement in the general comment, by way of acknowledging that the health of the individual is linked to the health of the entire community thereby having a collective dimension to health. Considering this, the CESCR highlights that:

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<sup>220</sup> *ibid* 37.

<sup>221</sup> *ibid* 38.

<sup>222</sup> *ibid* 27. CESCR GC No. 14 Para 27.

*development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health*<sup>223</sup>.

The committee stresses that discrimination of any kind in the access to health care and the underlying determinants of health which has the intention to adversely affect the equal realisation or exercise of the right to health is prohibited<sup>224</sup>. There must be a satisfactory quality and an equal access to healthcare and health services for each individual – for those who do not have the means to obtain necessary health services the State has a special obligation to provide in order to prevent discrimination in accessing healthcare and services, in regard to the core obligations of the right to health<sup>225</sup>.

Perhaps it is time that the CESCR issue a new general comment relating to the right to health. Since the COVID-19 pandemic, there were many issues highlighted in the realisation of the right, from all over the world. The crisis of climate change and its impact on achieving the right to health must also be included. With regards to Indigenous Peoples the general comment is quite mindful of their particular struggles in achieving the right. However more detail could be given, especially in regard to the difficulties in accessing healthcare due to the remoteness of Indigenous communities, the language barriers in accessing health and understanding health promotion and addressing health conditions commonly associated with Indigeneity. Of course, the impacts of climate change to Indigenous health should be included, taking note that they are to first to feel these impacts and are currently facing issues in regard to their right to health. In general comment no. 14, paragraph 34 refers to the obligation to protect the right to health by abstaining from pollution, however the Committee's understanding is limited and does not include protection of the environment as an extension of the right to health – especially in the context of Indigenous health. With regarding the remedies and accountability, a person or group who's right has been denied or violated ought to have access at national and international levels,

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<sup>223</sup> *ibid.*

<sup>224</sup> *ibid* 18.

<sup>225</sup> *ibid* 19.

to effective judicial remedies, or other remedies deemed appropriate. ‘*All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition*’<sup>226</sup> but for Indigenous Peoples, are such remedies and accountability irrelevant? Assuming in the context of climate change, a community is affected by an extreme weather event which causes injuries that need medical attention, however due to said event there is no way to access appropriate healthcare. Who in a legal sense is to blame for the resulting suffering and or possible death? Let’s assume further that sacred land was damaged in the event, possibly where sacred rituals or cultural practices take place (it has been previously established that loss of land and culture can adversely impact Indigenous health): is there truly any appropriate reparation which can compensate for such loss? Yes, the community in question may receive aid which would benefit them or possibly even improve their economic situation but to Indigenous Peoples, land is life and there would be no true way to heal from loss of sacred and traditional land, ‘Everything we are is from the land. With indigenous communities, it always comes back to the land’<sup>227</sup> - Kanahus Manuel, of the Secwepemc nation and Tanaka nation. For Indigenous communities such a loss can be detrimental to the wellbeing of the entire community, or even their entire existence.

In General Comment No. 36 (2019) the HRC discusses Article 6 of the ICCPR, the Right to Life. The HRC addressed climate change as serious threat to the enjoyment of the right to life for those in the present day and for those of the future. As such, article 6 needs to be included in all relevant State obligations under international environmental law. The HRC acknowledges that it is the responsibility of the State to ensure the implementation of the obligations to respect and guarantee the right to life, therefore preservation and protection of the environment in the context of climate change falls on State shoulders<sup>228</sup>. Above all State parties must respect the right to life and exercise due diligence so that lives are protected against actions or inactions caused by others. Therefore, protection of the right to life extends to the ‘*reasonably foreseeable threats and life-threatening situations that can result in loss of life*’<sup>229</sup>, however this duty to protect may find the State itself in violation of the right at a later stage. As part of the duty to protect Article

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<sup>226</sup> *ibid* 59.

<sup>227</sup> ‘Minority and Indigenous Trends 2019 - Focus on Climate Justice’ (n 80) 96.

<sup>228</sup> ‘General Comment No. 36 - Article 6: Right to Life’ (n 14) para 62.

<sup>229</sup> *ibid* 7.

6 the State is required to adopt special measures for ‘*persons in vulnerable situations whose lives have been placed at particular risk because of specific threats*’, which according to the HRC also includes Indigenous Peoples<sup>230</sup>. The HRC further elaborates on the duty to protect the vulnerable in society who face specific threats, and continues to expand on the duty to protect life by addressing the conditions in society that have made the vulnerable – vulnerable, and to address the subsequent threats posed to life. Included in these conditions and threats are:

*degradation of the environment, deprivation of indigenous peoples’ land, territories and resources, the prevalence of life-threatening diseases.... widespread hunger and malnutrition and extreme poverty*<sup>231</sup>

The measures to address such issues include immediate access to goods and services necessary for human life and the development of contingency and disaster management plans to address climate-related disasters which can negatively affect the enjoyment of the right to life. By including in the duty to protect the obligation to address the conditions in society which have caused vulnerability, it could be said that the HRC invertedly implied that ongoing legacies of colonialism and colonial mindsets ought to be addressed also. A difficult case to make as any threats to life which could possibly be attributed to colonialism are too indirect to hold up in court.

#### 4.4. Climate Litigation.

Climate litigation has been growing in scope and importance in recent years. Since 2015, climate change related cases around the world have more than doubled. Between 1986 and 2014 there were 800 cases filed, whereas as of 2022 there have been a whopping 1,200 cases filed in

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<sup>230</sup>ibid 23.

<sup>231</sup> ibid 26.

the 8 short years since 2014<sup>232</sup>. The cases are usually brought by NGOs or individuals against a government or a corporation. Emerging trends focus on:

*personal responsibility, such as criminal actions against the directors of polluting entities, as well as international litigation directed at attempting to gain redress for the loss and damage caused by climate change*<sup>233</sup>.

A joint report by the Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy found that cases, where the claimant has a motive beyond an individual concern and is attempting bring about a shift in society, are on the rise<sup>234</sup>. These cases are part of what's known as strategic climate litigation, whereby the outcome is hoped to advance climate policies, change the behaviour of governments or private actors, and to create public awareness. The rise in climate change related cases suggests that it is an effective strategy amongst climate activists. The IPCC affirmed that climate litigation is a potential way to influence climate policy outside of UNFCCC processes<sup>235</sup>. Climate litigation has become a tool used worldwide to enforce climate commitments made by States (Paris Agreement NDCs), and to hold States accountable to respect, protect and fulfil human rights in the face of the climate crisis.

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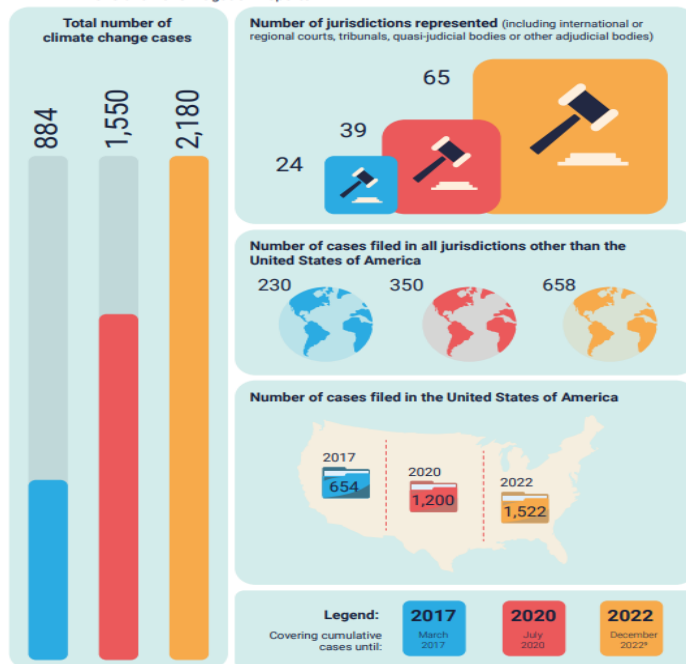
<sup>232</sup> Nigel Brook, Wynne Lawrence, Zanita Sedilekova., 'Insight on the Global Trends in Climate Change Litigation: 2022 Snapshot' (2022) <<https://www.clydeco.com:443/insights/2022/07/insight-on-the-global-trends-in-climate-change-lit>> accessed 24 July 2023. <sup>232</sup>

<sup>233</sup> *ibid.*

<sup>234</sup> *ibid.*

<sup>235</sup> 'Global Climate Litigation Report: 2023 Status Review' (UNEP - UN Environment Programme, 25 July 2023) 7 <<http://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review>> accessed 28 July 2023.

Figure 1. Growth of climate litigation as represented in UNEP's 2017, 2020 and 2023 Litigation Reports



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Climate litigation refers to ‘cases that raise material issues of law or fact relating to climate change mitigation, adaptation or the science of climate change’<sup>237</sup>. The cases can be brought before administrative, judicial, and other adjudicatory bodies. This type of litigation provides all individuals, and groups the facility to address the inadequate response to the crisis by governments and private sectors.

Successful cases have influenced other similar claims to be filed, regardless of their jurisdictions. *Urgenda Foundation v. State of the Netherlands* was a case which had this impact. This was the first time a government was found by a court to be responsible for mitigating greenhouse gas emissions. The Supreme Court of the Netherlands found that the State has obligations to combat climate change and therefore with regard to lowering greenhouse gas emissions is ‘obliged to achieve that reduction, due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents of the Netherlands’<sup>238</sup>. This landmark judgement set the precedent that the State must take sufficient climate action to protect human rights from the effects of climate change. With this decision it was confirmed that States have legally binding obligations that are based on international human rights law to substantially reduce harmful emissions.

There is a slow but growing number of climate change related cases filed by Indigenous Peoples. This is an encouraging sign. At the same it proves that there are barriers in place which makes this task difficult to achieve because of financial challenges, language barriers, lack of

<sup>236</sup> ibid 12.

<sup>237</sup> ibid 3.

<sup>238</sup> *Urgenda Foundation v State of the Netherlands* (The Supreme Court of the Netherlands)..



legal knowledge, and the threat of intimidation and violence from other actors. One case that did break through these barriers was the Torres Strait Islanders Petition. The UN HRC delivered the landmark decision in September 2022, finding that the Australian Government had, through climate change inaction, violated its human rights obligations to the Torres Strait Islanders. The Indigenous group brought the petition against the Australian Government for violating several rights of the ICCPR. The rights in question were Article 6 (right to life), Article 17 (right to private, family and home life), and Article 27 (right to culture). It was claimed that Australia's inadequate action on climate change had violated these rights under the ICCPR. The HRC did not find an Article 6 violation, stating that the suggested harms in the case were too far into the future to be a '*foreseeable risk of being exposed to physical endangerment or extreme precarity that could threaten their right to life*'<sup>239</sup>. Despite this, the HRC did acknowledge that reasonably foreseeable threats '*may include adverse climate change impacts*'<sup>240</sup>, but it did not apply in this circumstance. Both Article 17 and 27 were found to be violated. The Committee stated of Article 27 that it is '*the right of Indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity*'<sup>241</sup> and observed that the climate change has eroded their traditional lands and upset the natural resources the Islanders use for the traditional practices of fishing, farming, and ceremonies. The case was an achievement for environmental protection at an international level and the advancing of Indigenous rights. Its outcome is significant as it represents the successful use of human rights law by a climate-vulnerable Indigenous group against a (developed) Nation State. It set the precedent that human rights law applies to cases of environmental harm or threat, and that States can violate international human rights law through insufficient climate action and policy. With this ruling the HRC recognised that Indigenous culture is subject to climate change impacts.

The much anticipated, upcoming case of Duarte Agostinho et al. v Portugal and 32 Others is to be heard by the European Court of Human Rights (ECtHR) in September 2023. This case is unique as it was filed by six children and young people, it has been brought against 33 States and the applicants did not exhaust all domestic remedies in any of the States. The

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<sup>239</sup> *Daniel Billy et al vs Australia (Torres Strait Islanders Petition)* (HRC).

<sup>240</sup> *ibid.*

<sup>241</sup> *ibid.*

argument is simple; the States in question have not met their commitments under the Paris Agreement and have failed to cut down their greenhouse gas emissions. It is argued that Article 2 (right to life), Article 8 (right to privacy) and Article 14 (prohibition of discrimination) under the ECHR are under threat. Article 2 is threatened due to forest fires, an effect of climate change. They argue that Article 8 includes physical and mental wellbeing which is threatened by having to spend long periods of time indoors due to severe heatwaves. Finally, due to their age they will disproportionately experience the worst effects of climate change, therefore Article 14 is at risk<sup>242</sup>. The outcomes of this case will have significant implications for climate litigation.

With regards to Indigenous Peoples, the Court's decision on the outcome of the latter case may recognise the barriers in accessing climate justice for groups vulnerable to climate change. There have been very few successful Indigenous led climate change cases. However, climate litigation has the potential to expand, evolve and achieve enormous potential in achieving effective action on climate change. It plays a key role in challenging international human rights law and is the only truly effective way in which States can be held accountable for not adhering to the agreed upon climate commitments.

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<sup>242</sup> *Duarte Agostinho and Others v Portugal and 32 Other States* (European Court of Human Rights).

## Chapter 5. Conclusion.

Although considered a vulnerable group, Indigenous Peoples are so much more than ‘victims’ of climate change, colonisation, or the intersections of marginalisation that they are afflicted by. In academia there is a tendency to frame the group as victims, incapable of adapting to the modern world. However, among the populations of the world it is the Indigenous who have the most capacity to adapt, as this is how they have been able to survive as a collective from days of old to the present. They have adapted along with a variety of environmental and social changes. They have survived through colonisation and its adverse long-lasting impacts. ‘*We have been adapting since the conception of the world. Because if we had not been adapting . . . [we] would have died*’<sup>243</sup>. This resilience comes mainly from their collective knowledge, but also from their respect for nature and the resources which has enabled them to live off the land for centuries. Indigenous knowledge according to Dalee Sambo Dorough, Chair of the Inuit Circumpolar Council, is:

*a systematic way of knowing. It holds its own methodologies and validation processes, and it cannot be and should not be validated by science. It’s a living process that continues to build upon the knowledge acquired today as well as from the past and will manifest itself in different ways into the future*<sup>244</sup>

This evolving form of knowledge has been passed down for generations, with each generation contributing to the vast collection. The knowledge is specific to region it comes from. From it, the intricacies of ecosystems can be understood in a completely new light. For example, in Mongolia Indigenous herders reported changes in the type of rain, it resulted in the life-supporting pastures to weaken in quality<sup>245</sup>. This slight but crucial change would go unnoticed by modern standard measurements. Indigenous populations are the guardians and protectors of the environment. The

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<sup>243</sup> Comberti and others (n 90) 19.

<sup>244</sup> ‘Minority and Indigenous Trends 2019 - Focus on Climate Justice’ (n 80) 44.

<sup>245</sup> *ibid* 45.

remaining 80% of the world's biodiversity is within Indigenous territory<sup>246</sup>, making Indigenous inclusion in all climate change talks vital. However, their role in climate talk negotiations has been limited and at times ignored due to the existing power structures at play in the international community. Scientific knowledge is vital but Indigenous knowledge enables other perspectives for climate solutions. The combination of Indigenous knowledge, local knowledge, and scientific knowledge will ensure climate issues are addressed at local, regional, and international levels. Therefore, helping to address the disproportionate nature of its impacts. Including valuable Indigenous knowledge will facilitate climate resilient policies, builds capacity, and enables solutions which are appropriate to the region. By including the use of Indigenous knowledge in mitigation and adaptation plans further harm can be prevented against Indigenous communities. It has the potential to address historical injustice committed against them whilst recognising that they are agents capable of their own change. Indigenous knowledge can be used in early warning systems, it was after all the Sámi people who first recorded changes in the climate in the 1960s. It should be noted that this knowledge is sacred and cannot always be shared outside of the community. It should be treated as a sacred produce of Indigenous culture which can only be shared with the consent of the community. Repeating the past actions of colonialism must not be allowed to happen. If climate mitigation and adaptation plans are to continue as they are - ineffective and non-inclusive, then the traditional Indigenous knowledge would for sure be lost. Such loss would be to the detriment of effective climate action. The threat of climate change to health, life and all of its underlying determinants will result in the loss of the culture and way of live for these peoples.

Herein lies an opportunity to address not only the impacts of climate change, but also the systems which created it. The inequalities of today should be confronted along with climate action. The underlying tones of prejudice will be hard to fully eradicate. Even scholars who have praised the capabilities and resilience of Indigenous Peoples have referred to them as '*uncolonised*'<sup>247</sup>. However, by addressing the underlying currents of discrimination and colonialism which the existing power structures of the world are built on, there is a chance to eliminate the various intersections that determine marginalisation. In doing this the underlying social determinants which affect the vulnerable populations

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<sup>246</sup> 'Climate Change Further Reinforces Inequalities and Disproportionately Affects Minorities and Indigenous Peoples, According to MRG's Annual Trends Report' (*Minority Rights Group*, 2019)

<<https://minorityrights.org/2019/06/27/climate-change-further-reinforces-inequalities-and-disproportionately-affects-minorities-and-indigenous-peoples-according-to-mrgs-annual-trends-report/>> accessed 13 July 2023.

<sup>247</sup> Etchart (n 146).

of the world can be challenged. If this goal were to be achieved, then effectively combatting the climate crisis could be possible. The COVID-19 pandemic demonstrated that the world is not prepared for global disasters. It highlighted the realities of intersectionality through Indigenous individuals and communities who, due to the combination of identity, poverty, and marginalisation, are vulnerable to health, and therefore were unable to access suitable healthcare. In the case that healthcare was accessed; they were subject to systematic discrimination in health services. The pandemic showed that disasters discriminate against the most vulnerable.

Through climate litigation there is a possibility to tackle climate change by holding States accountable for their lacklustre commitments, and to take real action through mitigation and adaptation measures. The Paris Agreement was a step in the right direction, but its 'legality' leaves a lot to be desired. Its lack of legal enforcement is disappointing, but with climate litigation challenging State NDCs there is hope for change.

Human health is dependent on environmental health. The link between climate change and life is clear. The disproportionality to which it affects Indigenous Peoples is worrying. Indigenous health and life are threatened everyday by climate related impacts. The underlying determinants of health (social, economic, political) which afflict them and contribute to their vulnerability, along with the categories of intersectionality (race, gender, ethnicity, religion, socioeconomic position, which marginalise them need to be addressed so that Indigenous Peoples can fully achieve their inalienable rights to health and to life.

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