



Policy Brief: Indigenous rights &

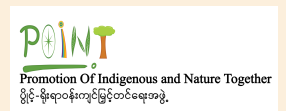
U N F C C C

United Nations Framework
Convention on Climate Change

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Introduction

The following sections collectively comprise a policy brief addressing the topic of indigenous rights under climate change, with specific focus on identifying indigenous rights available as legal rights within the international climate change system represented by the United Nations Framework Convention on Climate Change (UNFCCC) and its attendant instruments such as the Paris Agreement and Kyoto Protocol (UNFCCC 2020).

First section begins with commentary on the connection between indigenous peoples, indigenous rights, legal rights, and climate change. The discussion treats climate change—and its connection to indigenous rights—with respect to both the impacts of climate change and the policy solutions that are pursued in response to climate change. The analysis highlights the association of human rights with climate change as reflected by the calls for rights-based approaches to climate change from both the United Nations Human Rights Council (HRC) and the UNFCCC Conference of Parties (CoP) (UNFCCC 2020) which promote the association of human rights and climate change.

The analysis then clarifies the relevance of such an association in establishing 1) legal rights under international law, and 2) indigenous rights that can be exercised as legal rights against states on climate

change issues. The second section continues the analysis to identify indigenous rights available as legal rights under international law, drawing from the international human rights system to determine rights legally enforceable by indigenous peoples against states in relation to climate change problems.

The discussion notes the availability of legal rights under international law prescribed by the status of states as parties to both international human rights treaties and international climate change treaties. The third section extends discussion to address the legal rights provided by international law for indigenous peoples in Myanmar with respect to climate change grievances.



Connection between indigenous peoples, indigenous rights, and climate change

Discussion of indigenous peoples rights associated with climate change encompasses recognition of the relationship between indigenous peoples and climate along with the subsequent connection to indigenous rights and climate change. The first subsection below addresses the status of indigenous societies under the impacts of climate change. The second subsection then turns to international efforts to enable legal rights for indigenous peoples, which apply rights-based approaches that exercise international human rights treaties to develop indigenous rights available as legal rights to address the impacts of climate change.

Climate change and indigenous peoples

The identification of indigenous rights associated with climate change requires discussion of both the connection between rights and climate change and the connection between indigenous cultures and climate change, because the exercise of rights is directed at addressing underlying harms confronting indigenous peoples. With respect to climate change, the harms facing indigenous peoples involve both tangible consequences in the form of physical changes in environments hosting indigenous societies and intangible challenges in the form of moral issues arising from the affects of climate change on the marginalized status of indigenous

groups. In describing both, it should be noted that the dangers of climate change involve not only past impacts afflicting indigenous peoples ex post but also forthcoming future events threatening indigenous peoples ex ante. The nature of these elements are addressed below.

With respect to physical impacts of climate change, indigenous societies frequently lie in less-developed areas, with cultures exercising lifestyles that arose over time in response to the particular conditions of their surrounding historical environments (Gach 2019; NoiseCat 2017). To the extent that indigenous societies maintain sustenance from local natural resources,



their respective cultures are reliant upon the continued health of their associated environments. As a result, climatic events that cause ecological disturbances serve to also disrupt indigenous cultures that depend upon local eco-systems (NoiseCat 2017). Such disruptions, in the sense that they interfere with the health or practices of indigenous individuals, on a collective scale rise to threats against the larger health and culture of indigenous groups.

In addition to the physical impacts of climate change, indigenous societies also deal with moral consequences of climate change to the degree that it sustains a legacy of marginalization. Climate change is predominately driven by carbon emissions which grew in relation to historical patterns of development encompassing colonialism and industrialization. Industrialization coincided with the era of imperialism, with the Western societies that led industrialization also concurrently engaged in colonial expansion. Historical imperialism marginalized indigenous peoples to open natural resources to extractive processes that supported the wealth of industrial non-indigenous economies (NoiseCat 2017). Because of the growth-oriented nature of industrial economies, they exercised unsustainable forms of extraction that

altered indigenous eco-systems and suppressed attendant, more sustainable steward-driven indigenous cultures (Ross et al 201; Harkin & Lewis 2007). To the degree that modern economies maintain unsustainable extractive consumption of natural resources, they invariably continue a neo-colonial legacy that marginalizes indigenous peoples to support industrial processes responsible for increasing carbon emissions (Gach 2019; Whyte 2011). The linkage of industrialization and colonialism suggest that goal of countering climate change can be aided by lifting the marginal status of indigenous cultures, since they follow more sustainable lifestyles that limited environmental degradation (NoiseCat 2017).

It should be noted, however, that climate change solutions, to the extent that they focus on environmental conservation to mitigate carbon emissions, are not inherently absolved of colonialism. Climate change policies and institutions which ignore indigenous perspectives or subordinate indigenous concerns constitute forms of marginalization. Hence, they risk fostering a neo-colonial legacy in which climate change conservation replaces industrial economic growth as a vehicle for imperialism. If climate change efforts are to reverse the legacy made by the linkage of industrialization and colonialism, they must link climate change solutions with inclusive mechanisms that integrate indigenous voices and encompass indigenous issues (Gach 2019; Whyte 2011).

Climate change and indigenous peoples rights

Indigenous attempts to address the impacts of climate change via existing legal systems requires assurance that there is procedural and substantive justice available to address indigenous claims. Procedural justice relates to common law doctrines of natural justice regarding the procedures used by legal institutions (ALRC 2020: Para. 14.1; Woolf 2007). The notion of procedural justice encompasses standards of fairness regarding who is allowed to participate in a legal system and their respective levels of participation in decision-making (Dekker & Breakey 2016; Whyte 2011). For indigenous peoples, procedural justice also involves the consideration of cultural values and context in rendering decisions (Whyte 2011).

Substantive justice, in contrast, looks to the content of laws in satisfying senses of fairness in outcomes (Dekker & Breakey 2016; Kirchengast 2013; Stancil 2017). For indigenous peoples, there is a risk of having their claims addressed by laws that were created by interests ignorant or hostile to indigenous concerns, such that those laws lead to decisions contrary to indigenous wishes.

To a degree, the international climate change regime has taken steps towards providing procedural and substantive justice for indigenous peoples, adopting a rights-

based approach which asserts indigenous rights within a larger movement to integrate human rights into climate change solutions. For example, the United Nations Permanent Forum on Indigenous Issues (UNPFII) observes that a major obstacle to indigenous adaptation to climate change is a lack of recognition for indigenous human rights (Gerrard 2008). For its part, the Paris Agreement asks that states “when taking action to address climate change, respect, promote, and consider their

respective obligations on human rights,” including “the rights of indigenous peoples” (Boyle 2018: 769-770; United Nations 2015: Preamble). In regards to procedural justice,

the Office of the High Commissioner of Human Rights (OHCHR) asserts that climate change efforts must observe state duties to respect human rights, which include the need to guarantee equality, non-discrimination, and meaningful and effective participation in decision-making (Boyle 2018; OHCHR 2020a; OHCHR 2020b). For substantive justice, United Nations Framework Convention on Climate Change (UNFCCC) activities has promoted the global adoption of norms that view inequalities in vulnerability, rights, and social status as problems that must be

“when taking action to address climate change, respect, promote, and consider their respective obligations on human rights,” including “the rights of indigenous peoples”

addressed to fully counter climate change impacts (Duyck et al 2018; Gach 2019).

The adoption of a rights-based approach as exemplified by the international human rights system provides a number of advantages in addressing indigenous climate change concerns. First, the international human rights system has made progress in identifying indigenous rights, both directly as rights specific to indigenous peoples and indirectly as rights held by groups that include indigenous communities (Corrin 2009; Engel 2012; Law 2018). Second, the notion of human rights looks to the promotion of human dignity (Goodhart 2009) that implies a recognition of agency (Gewirth 1996), autonomy (Raz 1986), human potential (Sen 1999), moral worth (Dworkin 1977), and capacity to participate in collective human endeavors (Rawls 1999), and so facilitates the empowerment of indigenous movements in overcoming neo-colonial legacies of marginalization. Third, discourse over human rights has developed a global recognition that state parties to international human rights instruments hold not only duties of state compliance to such instruments but also state efforts to ensure compliance by non-state actors within their respective jurisdictions (Lane 2018), and thereby encourage respect for indigenous rights by both state and non-state entities. Last, to the extent that human rights are adopted as legal rights, they allow access to remedies articulated under domestic and international laws.

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A number of caveats should be noted regarding the use of rights-based approaches and the placement of human rights in climate change efforts. To begin, it is unclear that there is equal reciprocity between international human rights and global environmental regimes, in that even as much as human rights institutions have come to recognize the environmental components of particular human rights, there is a lower express acknowledgement by environmental institutions of the human rights complications of environmental issues (Boyle 2018; CIEL 2018).

The Special Rapporteur on Human Rights and the Environment (SRHRE) asserts that there is a connection between human rights and the environment, both in terms of recognizing a human right to a clean and healthy environment as well as affirming the need to recognize human rights within environmental conservation (SRHRE 2020). There continues to be work, however, to resolve the complications associated with linking the two areas of international law (SRHRE 2020).

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In addition, the application of rights-based approaches is attendant with an identification of rights-holders, where holders of legal rights must be legal persons as defined by various legal systems, with the consequence that



anyone—or anything (such as an element of nature)—not recognized as a legal person is denied access to justice (Boyle 2018). For indigenous peoples, the notion of rights-holders is problematic, since it entails a recognition of legal personality in terms of being an entity with the power to exercise rights within a legal system. Legal personality requires recognition by a state. States are not always willing to grant legal personality to indigenous groups, since it implies an attendant recognition of self-determination in terms of a legal person being empowered with control over its own interests. The resulting conundrum is that an indigenous group which seeks to exercise legal rights against a state depends upon that state to recognize the group's status as a legal person capable of holding legal rights—a situation which

runs contrary to the interests of a state seeking to defend itself from indigenous claims and the interests of a state intent on maintaining its sovereignty against indigenous self-determination. As a result, rights-based approaches involve an antecedent requirement that indigenous peoples hold rights to legal personality and self-determination (Erueti 2015; Snyder 2011; Williams 2012).

Further, aspirations to address global climate change suggest the need for multi-lateral state efforts, but such collaboration implies that each participating state is trying to achieve a collective outcome beneficial to all humans, including those outside its jurisdiction. Such a framework runs counter to the orientation of human rights treaties, which largely center around an individual state's duties to respect

the human rights of people within its jurisdiction and so do not address duties to people outside its jurisdiction (Boyle 2018). There is recognition of extra-territorial state responsibility for transnational environmental harms (see for example Trail Smelter Case, United States v. Canada, 1938 & 1941) (United Nations 2006) and there has been some progress to extend such logic to human rights violations (see for example Advisory Opinion on Environment and Human Rights, Advisory Opinion OC-23/17) (IACHR 2017), but there continues to be uncertainty regarding international legal consensus about state duties to human rights of people outside a state (Boyle 2018).

Moreover, rights-based approaches require that there be some measure of transparency in terms of rights-holders being able to identify violations of rights and subsequently present evidence of such violations for legal remedies (Duyck et al 2018). The UNFCCC's Paris Agreement, however, falls short in assuring transparency. First, the Paris Agreement does not require state parties to provide information on human rights even as human rights mechanisms seek to involve information on climate (Duyck et al 2018). Second, the Paris Agreement follows the UNFCCC's state-centric framework by focusing on the collection of information from state parties but does not do so for civil society organizations (CSOs), which contrasts with other multilateral human rights and environmental instruments

that involve more participation from CSOs (Duyck et al 2018). Third, the Paris Agreement does not specify consideration of state duties to human rights in its sustainable development mechanism (Duyck et al 2018).

In clarifying the relationship between human rights and climate change, it is helpful to refer to the work of the Special Rapporteur on Human Rights and Environment (Special Rapporteur). Special Rapporteur John Knox articulated an approach that because human rights include concerns for the environment, human rights institutions can exercise powers of oversight contained within human rights instruments to monitor state behavior for both human rights and environmental norms even though environmental instruments might not (Boyle 2018). The Special Rapporteur also asserted that a state's fulfilment of its obligations to the Paris Agreement does not by itself serve to prevent climate change violations of human rights and hence, from a human rights perspective, state parties need to treat the Paris Agreement as a minimum standard of conduct such that they need to work beyond its expectations to assure respect for human rights (HRC 2016). Last, the Special Rapporteur noted that while the conception of rights-based approaches may vary across states, the universal nature of the international human rights system maintains an expectation for states to adhere to all relevant national and international standards, including those in human rights instruments (HRC 2018).

Human rights, indigenous rights, legal rights, and climate change

Having established the relevance of rights-based approaches to climate change in principle, it is possible to proceed to identify the specific international legal rights that indigenous peoples can claim within the UNFCCC regime. Within the Paris Agreement state parties recognize that human rights obligations are part of their respective National Determined Contributions (NDCs) (Duck et al 2018). As part of their commitments in NDCs to counter climate change, states acknowledge duties to human rights that call for

1. mitigation, where states must take action against climate change to prevent current and future impacts of climate change upon human rights;
2. adaptation, in that states must take adaptive measures to protect human rights violated by climate change;
3. accountability with remedies, such that states provide effective remedies for human rights violations;
4. regulation, where states must take measures to protect human rights from violations by business practices; and
5. international cooperation, such that states must participate in international efforts against climate change but ensure the adoption of mitigation and adaptation strategies which do not violate human rights (Duyck et al 2018; OHCHR 2015).

State commitments to climate change solutions encompass human rights to the world in general rather than indigenous rights in particular, with the OHCHR identifying a range of specific human rights potentially impacted by climate change (Boyle 2018; Duyck et al 2018; OHCHR 2020):



- right to clean, healthy, safe environment (HRC 2018; HRC 2008)
- right to life (OHCHR 2009)
- right to health (OHCHR 2015)
- right to private life
- right to property
- right to water (OHCHR 2009)
- right to food (OHCHR 2009)
- right to housing (OHCHR 2009)
- right to adequate standard of living
- right to development (OHCHR 2015)
- right to education (OHCHR 2015)
- right to meaningful and informed participation (OHCHR 2015)
- right of those most affected by climate change (OHCHR 2015)
- right of future generations (OHCHR 2015)

The OHCHR also recognizes that as much as climate change may produce impacts that violate human rights, it is also possible that climate change solutions themselves may violate human rights (Duyck et al 2018; OHCHR 2009; Williams 2012). The dual threats arising from climate change to human rights lies within the origins of both in human conduct—as much as human

activities may be responsible for causing climate change, human activities are also responsible for the attempted solutions undertaken to counter climate change. Hence, in the sense that human rights violations are a result of human behavior, such behavior has the potential to either drive or mitigate climate change.

With respect to indigenous rights, it is possible to follow rights-based approaches and draw upon the association of human rights and climate change to identify indigenous rights applicable to climate change regimes. It should be noted in that there is an explicit statement of specific indigenous rights available in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), but under international law a declaration is treated as non-binding and hence UNDRIP constitutes a more aspirational expression of norms setting standards of conduct than a corpus of rights that state parties are required to enforce. The contents of UNDRIP, however, can become binding as legal rights to the extent that they overlap with existing international legal instruments that have binding authority. Examples include human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), and International Convention for the Elimination of Racial Discrimination (ICERD). States which bind themselves to a treaty, whether as signatory or by accession, render themselves as subjects bound to the obligations within the treaty.

As a result, a state that becomes party to particular human rights treaty has a duty to comply with the terms of the treaty—including the terms which correlate with indigenous rights in UNDRIP or rights otherwise sought by indigenous peoples (Erueti 2015; Pearl 2018).

Following the above, it is possible to recognize indigenous rights as legal rights if they can be found in binding international legal instruments such as human rights treaties. To the extent that they have legal authority under human rights treaties, they follow rights-based approaches that link human rights and environment to hold similar status under the international climate change regime. This means 1) so long as they fall within the purview of human rights treaties, indigenous rights are also legal rights within the UNFCCC, and 2) for states that are parties to both a human rights treaty and the UNFCCC such rights are binding.

Indigenous rights which meet the above conditions include the following (Pearl 2018; Snyder 2011; Williams 2012):

Right to equality & non-discrimination (UNDRIP Arts. 1-6; ICCPR Art. 14; ICESCR Art. 2 & 3; UDHR Art. 2; ICERD)—rights to equality and non-discrimination are contained in non-binding instruments such as UNDRIP (UNDRIP 2007) and UDHR (UDHR 1948), but they are also asserted by binding human rights treaties such as the ICERD (ICERD 1966), ICCPR (1966), and ICESCR (ICESCR 1966). The ICERD seeks to eliminate discrimination in terms

of distinction, exclusion, restriction, or preference involving race, color, ancestry, or national or ethnic origin, or which prevents equal recognition, enjoyment, or exercise of human rights (ICERD 1966: Article 1). The ICCPR requires equal access and equal treatment before courts or tribunals for all individuals regardless of status based on factors such as nationality, statelessness, race, color, sex, language, religion, political or other opinion, national or social origin, property, or birth (ICCPR 1966: Article 14; OHCHR 2007: Paragraph 9). Similarly, the ICESCR states that there shall be no discrimination based on qualities of gender, race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (ICESCR 1966: Articles 2 & 3). The inclusion of the right to equal treatment within the ICESCR implies that the principles of equal access and non-discrimination applies to other rights within the treaty, including (OHCHR 2013a; OHCHR 2009b)

- Rights to adequate housing
- Right to adequate food
- Right to education
- Right to health
- Right to water
- Right to benefits from scientific, literary, or artistic works
- Right to work
- Right to social security
- Right to language

Right to life, personal liberty, and personal security (UDHR Art. 3; UNDRIP Art. 7; ICCPR Art. 6-10)

—non-binding expressions of the rights to life, personal liberty, and personal security are expressed in both UNDRIP (UNDRIP 2007: Article 7) and UDHR (UDHR 1948: Article 3). With respect to binding international human rights instruments, they are covered by the ICCPR (ICCPR 1966: Articles 6-10). Specifically, with respect to indigenous peoples, the ICCPR expects states to take special measures to protect the right to life of persons from vulnerable groups such as indigenous peoples (OHCHR 2018: Paragraph 23). Rights to liberty and security are expected to apply everyone regardless of status (OHCHR 2014: Paragraph 3).

Right to social security (UNDRIP Art. 21; UDHR Art. 22, ICESCR Art. 9)—the right to social security is referenced in UNDRIP (UNDRIP 2007: Article 21) and UDHR (UDHR 1948: Article 22). It also appears in the ICESCR (ICESCR 1966: Article 9), which specifies that the right applies to everyone and so presents an expansive definition encompassing indigenous peoples.

Right to freedom of thought, conscience, religion (UNDRIP Arts. 11-13; UDHR Art. 18 & 19; ICCPR Art. 18 & 27)

—non-binding aspirations for the rights to freedom of thought, conscience, and religion are contained in both UNDRIP (UNDRIP 2007: Articles 11-13) and UDHR (UDHR 1948, Articles 18 & 19). In terms of binding international human rights instruments, they are expressed in the ICCPR (ICCPR 1966: Article 18). The ICCPR recognizes the rights to religion both for individuals and groups in public or private, as well as a right to not profess a religion of belief (OHCHR 1993: Article 2). In addition, the ICCPR also recognizes that minorities hold rights to practice their religion (ICCPR 1966: Article 27; OHCHR 1994). While the ICCPR does not explicitly reference indigenous peoples, its language provides a broad conception that can be construed as including indigenous communities (OHCHR 2020c: 3-4).

Right to language (UNDRIP Arts. 13; 1992 Declaration on Rights of National, Ethnic, Religious, & Linguistic Minorities; ICESCR Arts. 2 & 3)

—the right to language is contained in non-binding declarations such as UNDRIP (UNDRIP 2007: Article 13) and the Declaration on Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities (Declaration on Minorities 1992: Article 2), and can be interpreted as being within the scope of rights protecting free expression (UDHR 1948:

Art. 19). It is protected by binding international human rights treaties, including the ICCPR and the ICESCR. Under the ICCPR the right to language is distinguished from the right to free expression, in that the right to language is accorded to minorities while the right to free expression is held by individuals (OHCHR 1994: Paragraph 5.3). With respect to the former, the ICCPR explicitly states that minorities have the right to use their own language (ICCPR 1966: Article 27). It also recognizes that every individual has the right to choose oral, written, or printed receipt or expression of ideas (ICCPR 1966: Article 19). The ICESCR states that language cannot be used as a base of discrimination for any of the rights contained within the treaty (ICESCR 1966: Articles 2 & 3).

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Right to food, health, housing, adequate standard of living (UNDRIP Arts. 20-24; UDHR Art. 25; ICESCR Art. 11)

—both UNDRIP and UDHR recognize the rights to food, health, housing, and standard of living (UNDRIP 2007: Articles 20-24; UDHR 1948: Article 25). They are also addressed by the ICESCR (ICESCR 1966: Article 11).

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Right to education (UNDRIP Art. 13-15; UDHR Art. 26; ICESCR Art. 13)

—the right to education is expressed by both UNDRIP (UNDRIP 2007: Articles 13-15) and UDHR (UDHR 1948: Article 25). The ICESCR also presents the right to education in Article 13 (ICESCR 1966: Article 13).

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Right to subsistence (UNDRIP Art. 20; ICCPR Art. 1; ICESCR Art. 1)

—the right to subsistence is asserted by UNDRIP (UNDRIP 2007: Article 20), and can be construed as within the scope of a right to adequate standard of living sufficient for health and well-being given within the UDHR (UDHR 1948: Article 25). It is, however, explicitly addressed by both the ICCPR and the ICESCR, both of which have identical language stating that there is no case where a people can be denied their own means of subsistence (ICCPR 1966: Article 1; ICESCR 1966: Article 1).

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Right to culture (UNDRIP Arts. 11-13; ICESCR Art. 15; ICCPR Art. 27; UDHR Art. 27)

—non-binding declarations such as the UNDRIP and UDHR assert a right to culture (UNDRIP 2007: Articles 11-13; UDHR 1948: Article 27), but it is also included in binding human rights

instruments such as the ICCPR (ICCPR 1966: Article 27; OHCHR 2020c: 3-4) and the ICESCR (ICESCR 1966: Article 15). The ICCPR states that minorities cannot be denied the right to practice their own culture, where minorities are groups of people sharing a common culture, religion, or language (OHCHR 1994: Paragraph 5.1). States are expected to protect minorities to enable them to exercise their right to culture (OHCHR 1994: Paragraphs 6.1 & 6.2). The ICESCR describes the right to culture as involving cultural life, along with steps “necessary for the conservation, the development, and the diffusion of science and culture” (ICESCR 1966: Article 15). Under the ICESCR, culture is something exercised both individually or in association with others (OHCHR 2009c: Paragraph 7), with culture defined as

“...ways of life, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities...build their world view” (OHCHR 2009c: Paragraph 13).

In addition, the right to culture also extends to include the right to traditional lands, territories, and resources, such that state parties to the ICESCR are expected to protect ancestral lands in order to prevent the degradation of indigenous ways of life (OHCHR 2009c: Paragraph 36).

Right to own, control, develop, and use traditional land (UNDRIP Arts. 24-30; ICCPR Art. 27; ICESCR Art. 15)

—an aspirational declaration of rights regarding traditional lands are contained within UNDRIP (UNDRIP 2007: Articles 24-30). They are, however, also encompassed within binding human rights treaties like the ICCPR and ICESCR. While the ICCPR does not explicitly mention traditional lands, the statement of Article 27 on rights to culture, religion, and language is interpreted to imply a recognition that culture includes “a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” (OHCHR 1994: Paragraph 7). The ICESCR extends the right to culture granted in Article 15 to include traditional lands and waters associated with particular ways of life (ICESCR 1966: Article 15; OHCHR 2009c: Paragraphs 13, 15(b), 16(a)). With respect to indigenous peoples, ICESCR Article 15 is taken to imply an expectation that indigenous groups’ relationships with ancestral lands and nature “should be regarded with respect and protected” so that state parties “must therefore take measures to recognize and protect the rights of indigenous

peoples to own, develop, control, and use their communal lands, territories, and resources” (OHCHR 2009c: Paragraph 36).

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Right to collective identity and nationality (UNDRIP Arts. 1-6; UDHR Art. 15; ICCPR Arts. 2,3, 23, & 24; ICESCR Art. 15)

—rights regarding collective identity are addressed by declarations like UNDRIP (UNDRIP 2007: Articles 1-6) and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, or Linguistic Minorities (Declaration on Minorities 1992: Article 1). With respect to human rights treaties, the ICCPR deals with identity indirectly, with Article 2 preventing discrimination based on factors such as race, color, gender, language, or religion that can characterize the identity of groups of people (ICCPR 1966: Articles 2, 3, & 23), and Article 24 asserting the right of a child to acquire nationality (ICCPR 1966: Article 24). The ICESCR, in recognizing the right to culture, can be interpreted to address identity to the extent that elements of culture comprise a group’s identity. In particular, ICESCR Article 15 is taken to imply that minorities have rights to manifestations of cultural identity that include traditions, customs, religion, and languages and indigenous peoples have rights to values that contribute to a sense of communal indigeneity (OHCHR 2009c: Paragraphs 32, 33, & 36).

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Right to self-determination (UNDRIP Art. 3; ICESCR Art. 1; ICCPR Art. 1)

—UNDRIP asserts that indigenous peoples have a right to self-determination (UNDRIP 2007: Article 3). The right to self-determination is also presented in both the ICCPR and ICESCR, both of which share identical language explicitly stating that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development” (ICCPR 1966: Article 1; ICESCR 1966: Article 1).

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Right to free, prior, informed consent (UNDRIP Art. 10, 11, 19, 28, 29; ILO Convention 169; customary international law – Mengden 2017)

—the right to Free Prior Informed Consent (FPIC) is addressed by UNDRIP (UNDRIP 2007: Articles 10, 11, 19, 28, & 29). While it is not explicitly mentioned in binding human rights treaties, elements of FPIC exist in other binding international treaties such as International Labor Organization Convention Number 169 (ILO Convention 169), the ICERD, and the Convention on Biological Diversity (FAO 2016; AIPP 2014).

Myanmar indigenous rights regarding climate change

The preceding sections followed international movements towards rights-based approaches that connect human rights with environmental conservation, where human rights treaties provide a vehicle to identify rights that can be exercised to defend indigenous rights within international climate change treaties. Because treaties are binding upon state parties under international law, linking human rights treaties and environmental treaties clarifies which rights hold status as legal rights that state parties are obligated to enforce. However, such a strategy to identify indigenous rights as legal rights within the UNFCCC is only applicable to states that are parties to human rights and UNFCCC-related treaties. For indigenous peoples in Myanmar, this means that legal rights under the UNFCCC only exist for rights in the treaties where Myanmar is a party.

With respect to the legally binding instruments referenced above, Myanmar is a state party to only some of them. In regards to climate change, Myanmar is a state party to three UNFCCC, including the Paris Agreement and Kyoto Protocol (UN Climate Change 2020). For human rights, Myanmar is a state party to the ICESCR, along with the Convention on Rights of Persons with Disabilities (CRPD), Convention on Rights of the Child (CRC),

and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), but is not a party to the ICCPR or ICERD (OHCHR 2020d). In addition, Myanmar is not a state party to ILO Convention 169 (ILO 2020). As a result, based on the list of rights and correlated human rights treaties presented in the above section, indigenous peoples in Myanmar can only exercise the rights within the ICESCR:

- Right to equality & non-discrimination—contained in the non-binding UNDRIP Articles 1-6 and UDHR Article 2, but binding upon Myanmar as a state party to ICESCR in Articles 2 & 3, with subsequent extensions for equality and non-discrimination in Myanmar's implementation of other ICESCR obligations:
 - Rights to adequate housing
 - Right to adequate food
 - Right to education
 - Right to health
 - Right to water
 - Right to benefits from scientific, literary, or artistic works
 - Right to work

- Right to social security
- Right to language
- Right to social security—presented in the non-binding UNDRIP Article 21 and UDHR Article 22, but binding upon Myanmar as a state party to ICESCR in Article 9)
- Right to language— addressed in non-binding form within the scopes of UNDRIP Article 13, Declaration on Minorities Article 2, and UDHR Article 19, but binding upon Myanmar under ICESCR Articles 2 and 3
- Right to food, health, housing, adequate standard of living—within the purview of non-binding UNDRIP Articles 20-24 and UDHR Article 11, but binding upon Myanmar under ICESCR Article 11
- Right to education—covered in non-binding form by UNDRIP Articles 13-15 and UDHR Article 26, and binding upon Myanmar via ICESCR Article 13
- Right to subsistence—non-binding under UNDRIP Article 20, but binding via ICESCR Article 1
- Right to culture—within the scope of non-binding UNDRIP Articles 11-13 and UDHR Article 27, while binding under ICESCR Article 15
- Right to own, control, develop, and use traditional land—non-binding through UNDRIP Articles 24-30, but binding

- through ICESCR Article 15
- Right to collective identity and nationality—non-binding under UNDRIP Articles 1-6 and UDHR Article 15, but within the binding scope of ICESCR Article 15
- Right to self-determination—non-binding under UNDRIP Article 3, but binding upon Myanmar under ICESCR Article 1

A number of caveats should be noted regarding the above. First, the list does not preclude indigenous rights granted status as legal rights by Myanmar that are outside the ICESCR. As a state, Myanmar has sovereign authority under international law to issue laws and rights over its own population, territory, and resources, and hence can provide legal rights beyond those available within the ICESCR. Such legal rights would be available to indigenous groups within Myanmar as potential legal tools within Myanmar's legal system to address environmental grievances such as impacts from climate change.

Second, access within Myanmar's legal system to legal rights in relation to climate change is dependent upon the implementation of those rights by the Myanmar state. With respect to the legal rights encompassed in the preceding sections, indigenous rights in Myanmar courts in response to climate change

relies upon Myanmar's implementation of its compulsory duties to the ICESCR. There are, however, legal mechanisms outside Myanmar, particularly in terms of international institutions that address Myanmar state compliance with international law. For example, the ICESCR has a treaty body in the form of the Committee on Economic, Social, and Cultural Rights that provides a grievance procedure for Myanmar's violations of the treaty (CESCR 2020). There is also the Human Rights Council, which as a United Nations body conducts Universal Periodic Review to evaluate the human rights records of Myanmar and hosts an Expert Mechanism on the Rights of Indigenous Peoples (EMRIP 2020; HRC 2020; UPR 2020). The UNFCCC, for its part, holds a periodic Conference of the Parties that engages indigenous concerns through a Local Communities and Indigenous Peoples Platform (LCIPP 2020; UNFCCC 2019). To the extent that such international

mechanisms encompass indigenous rights and engagement by indigenous groups, they provide a means by which indigenous peoples can exercise indigenous rights to address impacts from climate change.

Last, the preceding sections sought to determine indigenous rights as legal rights under climate change using international trends that link human rights treaties with climate change treaties. Such logic is tied to the underlying advantages of human rights treaties as presenting a pre-existing set of indigenous rights that were both legally enforceable under international law and which conformed to United Nations expectations for rights-based approaches to climate change solutions. The analysis, however, allows for more explicit recognition in the future of indigenous rights within international climate change regimes, whether through future international legal instruments regarding indigenous rights or climate change, separately or together.

Conclusion

This policy brief centered on identifying indigenous rights against the impacts of climate change in terms of legal rights available for indigenous peoples under international human rights treaties in association international climate change

treaties. The discussion in preceding sections explored international efforts to recognize rights granted and supported by international law, which follow United Nations work to exercise rights-based approaches to climate change that link

human rights treaties to climate change treaties. The analysis identified specific rights within such international rights-based approaches that are relevant for indigenous interests. The analysis presented a list of these indigenous rights with clarification as to the human rights treaties that make them binding upon state parties. The discussion then highlighted which of those rights are available for Myanmar indigenous peoples, noting that their access to international legal rights are a function of Myanmar's status as a state party to international human rights treaties.

It should be noted that the UN framework of rights-based approaches to climate change makes the exercise of legal rights against a given state a function of the individual state's status as a party to international human rights treaties and climate change treaties. A state which is party to a human rights treaty has duties to implement the rights in the treaty as legal rights. This makes it possible for people under the jurisdiction of the state to pursue legally enforceable rights for human rights violations against the state, either within the state's legal system or relevant human rights treaty mechanism. The ability to claim such rights within climate change mechanisms, however, requires an extension. Specifically, access to international climate change mechanisms requires that the given state also be a party to climate change treaties. Consistent with UN rights-based approaches explored in preceding sections,

the exercise of indigenous rights against a state within a climate change treaty mechanism requires that the given state be a party to both 1) a human rights treaty containing the rights being claimed and 2) a climate change treaty that hosts the mechanism accommodating those rights. As a result, the freedom of indigenous groups to enforce indigenous legal rights under international law to address climate change problems varies from state to state. For cases like Myanmar, this means a constriction of the available rights, since Myanmar may be a party to the UNFCCC but is a party to only a limited number of human rights treaties.

The limitations posed above result from rights-based approaches' reliance on human rights treaties to identify indigenous rights in relation to climate change points. Such limitations point to future directions for indigenous activism. Specifically, for those indigenous peoples operating through international climate change regimes, it suggests a need to seek further amendments that ensure climate change mechanisms articulate indigenous rights. Following the discussion of preceding sections, amendments to climate change mechanisms would need to provide procedural and substantive justice concerns for indigenous peoples. Making these types of additions to existing international climate change treaties would ensure that all state parties holding obligations to climate change solutions also simultaneously hold obligations to

indigenous rights, such that international law would require state parties to accept duties to both climate change solutions and indigenous peoples as binding.

To a degree, a potentially opportunity currently exists to pursue the aforementioned direction of activism. The International Indigenous Peoples Forum on Climate Change (IIPFCC) was established in 2008 to serve as a caucus for indigenous activists in the UNFCCC (IIPFCC 2020). In 2015 the UNFCCC CoP 21 established the Local Communities and Indigenous Peoples Platform (LCIPP) for the purpose of enabling greater inclusion of indigenous perspectives within the UNFCCC, with an agenda that sought to 1) document and share indigenous practices, 2) integrate indigenous perspectives into climate change solutions, and 3) build capacity among indigenous groups to engage with UNFCCC mechanisms

(Shawoo & Thornton 2019; UNFCCC 2019a; UNFCCC 2019c). To a degree, the UNFCCC efforts have suffered from structural issues that have impeded indigenous involvement ((Shawoo & Thornton 2019:2; Etchart 2017; Comberti et al 2016; Ford et al 2016). In 2018, however, the UNFCCC CoP 24 formed the LCIPP Facilitative Working Group to direct the implementation of the LCIPP findings within UNFCCC activities (UNFCCC 2019a; UNFCCC 2019b). IN addition, the United Nations system also hosts

" The International Indigenous Peoples Forum on Climate Change (IIPFCC) was established in 2008 to serve as a caucus for indigenous activists in the UNFCCC (IIPFCC 2020). "

indigenous bodies outside climate change, including the United Nations Permanent Forum on Indigenous Issues (UNPFII), the advisory body on indigenous issues for the Economic and Social Council; the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP); and the Special Rapporteur on the Rights of Indigenous Peoples (SRRIP) (UNPFII 2020; EMRIP 2020; SRRIP 2020). In total, the assembly of climate change and more general indigenous bodies offer a range of potential avenues through which indigenous activists can advance a movement to add indigenous rights into international climate change instruments, and thereby directly link indigenous rights with climate change treaties

without having to work through the limitations posed by rights-based approaches' attention to human rights treaties.

On a final note, it should be stressed that the UN framework of rights-based approaches to climate change has space to identify rights granted outside of international treaties. Rights-based approaches look to treaties because under international law treaties are binding upon state parties and hence require state parties to enforce their contents within each state party's legal system. In essence, they provide a means by which human rights—including indigenous rights—can become legal rights.

There are, however, other ways to make rights legally enforceable. International law further recognizes that rights can be made binding through customary international law, where the practice of states over time generate internationally recognized rights that states are expected to follow. Within domestic jurisdictions, it is also possible for individual states to grant legal rights not contained in international treaties or custom. The potential to locate

indigenous rights outside of human rights treaties is outside the scope of the analysis in preceding sections, since their focus is on identifying current UN approaches that follow rights-based approaches which connect human rights to climate change. As a result, there are additional avenues for indigenous activists to explore further linkages between indigenous rights and climate change.

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