



# Balancing Climate, Culture and Human Rights: Insights From *La Oroya*, *Fosen* and the *Torres Strait Islanders Case*

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## Abstract

As climate change accelerates, humans will need to take increasingly ambitious measures to mitigate its effects. These measures may protect human rights, ensuring people are safe from natural disasters, food insecurity and extreme temperatures, but climate management measures also have the capacity to infringe upon human rights. Balancing these interests is a growing challenge for the law, and has recently been the subject of groundbreaking jurisprudence in several international forums. This article examines the challenges of balancing human rights and climate action in the frame of two key human rights – the right to culture, and the right to a healthy environment – drawing lessons from the recent *La Oroya Case* from the Inter-American Court of Human Rights, the *Torres Strait Islanders Case* from the UN Human Rights Committee, and the *Fosen Case* from the Norwegian Supreme Court.

**Keywords:** Article 27 of ICCPR, Cultural Minorities, Due Diligence Obligations, Lansman Cases, Right to Healthy Environment

## 1. Introduction

Preventing and adapting to the most severe impacts of climate change will require a rapid transition to renewable energy, as well as new climate adaptation measures, innovations such as

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carbon capture and storage,<sup>1</sup> and potentially also measures that imitate or enhance natural systems such as marine cloud brightening.<sup>2</sup> While these measures might protect the human rights of many by preserving a safe climate, creating jobs and projects which will increase access to energy, lift communities out of poverty and improve the lives of millions, they will also require significant changes to the way we use land, the way we structure our cities and towns, and the way we interact with the natural environment. These changes have the capacity to both enforce and infringe upon established and emerging human rights. The complexity of balancing human rights, climate and environmental concerns is exemplified in the current situation in the Panama Canal. Due to a combination of El Niño weather patterns and climate change, the region has seen significantly less rainfall than average, and the canal is drying up.<sup>3</sup> This is having profound impacts on international trade, as the canal handles approximately five percent of global shipping, and the lack of water affects what types and how many ships can transit through the canal.<sup>4</sup> If ships are unable to use the canal, they will have to take longer routes, increasing fuel use and greenhouse gas emissions, thereby contributing to

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<sup>1</sup> Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation, and Vulnerability, Summary for Policymakers*, 4-16 (2023).

<sup>2</sup> David Keith, *What's the Least Bad Way to Cool the Planet?*, THE NEW YORK TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/opinion/climate-change-geoengineering.html>.

<sup>3</sup> Theo Notteboom, Athanasios Pallis and Jean-Paul Rodrigue, *Port Economics, Management and Policy* Chapter 1.6, section 3 (Routledge, 2022). See also - Rodolfo Stavenhagen, *The Right to Cultural Identity*, in Jan Berting et al (eds.), *Human Rights in a Pluralist World* 255-258, at 256-257 (Bloomsbury, 1990).

<sup>4</sup> Notteboom et al, *supra* note 3.

climate change.<sup>5</sup> However, addressing the problem also poses issues for the environment and human rights. The Panama Canal Authority proposes to build a reservoir on the Indio River, to supply water for the canal. This will destroy forests and agricultural lands, and displace the communities that depend on them.<sup>6</sup> Like so many other challenges in the climate space, it is a serious problem requiring difficult trade-offs, and one without clear, fair solutions.

This article examines case law and commentary from three cases which provide insights into the challenges of balancing human rights and climate measures: the *La Oroya Case* from the Inter-American Court of Human Rights,<sup>7</sup> the *Fosen Case* from the Norwegian Supreme Court,<sup>8</sup> and the *Torres Strait Islanders Case* from the UN Human Rights Committee (HRC).<sup>9</sup> These cases have been selected as they are recent examples of the growing challenges of balancing climate and human rights measures, and provide insights for the future direction of the law. Further, the article focuses on two key human rights: the right to culture, and the right to a healthy environment (RHE). The right to culture, enshrined in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and other international agreements, has been central to a number of

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<sup>5</sup> Nathalia Angarita, *Drought Saps the Panama Canal, Disrupting Global Trade*, The New York TIMES (Nov. 1 2023), <https://www.nytimes.com/2023/11/01/business/economy/panama-canal-drought-shipping.html>.

<sup>6</sup> Katuska Hernandez, *The board of directors of the Panama Canal proposes building a reservoir on the Indio River*, La Prensa (Sep. 22, 2023), <https://www.prensa.com/economia/junta-directiva-del-canal-de-panama-prop-one-construir-embalse-en-rio-indio/> (translated from Spanish).

<sup>7</sup> *Inhabitants of La Oroya vs Peru*, Judgment (Inter-American Court of Human Rights, Nov. 27 2023), the '*La Oroya Case*'.

<sup>8</sup> *Statnett SF v. Sør-Fosen Sijte et al*, HR-2021-1975-S, Judgment (Supreme Court of Norway Oct. 11 2021), the '*Fosen Case*'.

<sup>9</sup> *Daniel Billy et al v Australia*, Communication No. 3624/2019, CCPR/C/135/D/3624/2019, Opinion (UN Human Rights Committee, 2022), the '*Torres Strait Islanders Case*'.

climate litigation cases. The *Fosen Case*<sup>10</sup> relates to claims made successfully under Article 27, and the claimants in effect sought to limit climate-related action – specifically, the establishment of a wind farm, as its implementation infringed the right to culture.<sup>11</sup> Conversely, in the *Torres Strait Islanders Case*,<sup>12</sup> the complainants successfully argued that their right to culture had been infringed due to a lack of climate action. These two cases demonstrate the complexity of the intersection of human rights and climate measures, and as a result, the right to culture was chosen as an example. Many other established human rights are relevant in the context of balancing climate and human rights concerns, such as the right to self-determination, the right to privacy, the right to home life and the right to development, but there is not enough scope to address them in this article.

While the right to culture is a well-established human right, the RHE continues to emerge in terms of content and global recognition. Some expressions of the right require the protection of a healthy climate, and others focus on more traditional environmental protections such as clean air and safe drinking water. Just as the implementation of climate measures, and the lack of implementation, both have the capacity to infringe the right to culture, an ill-advised reforestation project might reduce carbon emissions, but interfere with local biodiversity and subsistence farming, simultaneously meeting and infringing the RHE. Of course, the RHE is still developing; after years of incremental progress, it was affirmed by the UN Human Rights Council<sup>13</sup> and the UN General Assembly<sup>14</sup> in 2021 and 2022 respectively, but the

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<sup>10</sup> *'Fosen Case'*, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> *'Torres Strait Islanders Case'*, *supra* note 9.

<sup>13</sup> UN Human Rights Council (2021) Res. 48/L23/Rev1, UN Doc A/HRC/RES/48/13.

<sup>14</sup> UN General Assembly 'The human right to a clean, healthy and sustainable environment' (2022) A/RES/76/300.

specific content and operation of the right are slowly being defined. This article sets out some of the key jurisprudence on the RHE, as well as scholarly interpretations of its character. Alongside discussion of the challenges of balancing environment, climate, and human rights, a thematic consideration in this article is whether the right to culture and the RHE are individual or collective in nature. The tensions between individual and collective rights can be seen as a way of introducing nuances to the rights dialogue, to ensure equitable treatment between different mindsets, cultures and ways of living. Grappling with these issues, and balancing them with environmental and climate considerations, will be increasingly important to ensure a just transition for all, as climate impacts accelerate globally.

The first section of this article examines the relevance of individual and collective rights to the weighing of human rights and climate issues. The second section examines the right to culture, and the ways in which it may both incentivise and inhibit measures to address climate change. To illustrate the ways in which the right to culture intersects with climate and environmental measures, the discussion canvasses the *Fosen Case* and the *Torres Strait Islanders Case*, as well as relevant HRC jurisprudence on the scope and application of the right. It also canvasses relevant scholarship and jurisprudence to weigh the implications of whether the right to culture is an individual or collective right. The third section examines the RHE, canvassing recent case laws providing guidance as to the scope and operation of the right, including the landmark *La Oroya* case from the Inter-American Court of Human Rights. This is followed by a brief analysis on the character of the RHE, and whether it is individual, collective or global in nature. The analysis throughout is predominantly focused on balancing climate measures and human rights, but also touches on general environmental protection, and many aspects which could equally apply to non-climate environmental issues. The

final section offers reflections on the trajectory of both the right to culture and the RHE, and the potential impacts for climate action into the future.

## 2. The Relevance of Individual and Collective Rights

The development of individual and collective rights stems from different mindsets, political systems and cultural practices, all of which must be weighed and considered when managing climate and human rights. Individual rights belong to every person, whereas collective rights belong to particular people by virtue of their membership of specific groupings, such as indigenous or religious minorities.<sup>15</sup> Notions around individual rights began to emerge as a liberal democratic reaction to the feudal system, which defined the political and economic rights of individuals according to their class membership.<sup>16</sup> The needle swung in the other direction in the 1960s and 1970s, when newly decolonised countries sought to reflect different social structures and legal and economic interests that were shared between individuals.<sup>17</sup>

The legal foundations of individual human rights, as we currently conceive of them, can be traced back to John Locke's *Two Treatises of Government*.<sup>18</sup> The text was published in 1690 and was influential towards a range of important human rights instruments including The American Declaration of Independence of 1776, the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948, and the International Covenant on Economic, Social and Cultural Rights of 1966, and the ICCPR, which is central to the below

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<sup>15</sup> Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice* 8 (2024).

<sup>16</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 34 (1996).

<sup>17</sup> Bantekas et al, *supra* note 15, at 8-20.

<sup>18</sup> John Locke, *Two Treatises of Government*, ed. Mark Goldie (London: Everyman, 1999).

discussion.<sup>19</sup> In his treatise Locke canvassed a range of human rights which can be seen as collective, such as the right to life, the right of property, and the right to freedom.<sup>20</sup> He also canvassed the foundations of collective rights such as the right of the people to choose their government, and the right of revolution.<sup>21</sup> The nuances of these concepts were further contested and expounded by legal theorists including John Stuart Mill, Jeremy Bentham and Ronald Dworkin. While human rights law and discourse has continued to develop, the tension between individual and collective rights remains a source of ongoing controversy. It is often characterised as a conflict between colonialism and indigenous freedoms, or as a clash between capitalist and communist models.<sup>22</sup> The traditional liberal view has been that collective rights are not necessary, as individual rights should extend sufficient protection to ensure the wellbeing of all members of society, including cultural minorities.<sup>23</sup> Collective rights may also be perceived to confer an additional benefit on minorities which is not enjoyed by the broader population. However, it is increasingly understood that historical conceptions of individual human rights may undervalue some aspects of cultural membership or particular cultural goods which can only be enjoyed collectively, and which are central to human wellbeing to the extent that they are connected to human rights.<sup>24</sup>

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<sup>19</sup> Franciszek Przetacznik, *Individual Human Rights in John Locke's Two Treatises of Government*, 25 NETHERLANDS INTERNATIONAL LAW REVIEW 195, (1978).

<sup>20</sup> *Id.*, at 197.

<sup>21</sup> Franciszek Przetacznik, *supra* note 19, at 195.

<sup>22</sup> Bantekas et al, *supra* note 15, at 8-20.

<sup>23</sup> Allen Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 Ethics 852, 862 (1989).

<sup>24</sup> Leighton McDonald, *Can Collective and Individual Rights Coexist?* 22 MELBOURNE UNIVERSITY LAW REVIEW at 310, 312 (1998).

Tavani explains the push for collective rights, in the context of cultural identity, as follows:

It is believed that we have values related to the dignity and worth of human beings as such which can only be enjoyed within a collective setting, that is, within a historical, structural and cultural context. Certain groups want these moral and extra-legal values indent to be transformed into the legal right to cultural identity these are usually oppressed, suppressed and exploited groups whose identity and survival is being denied by the existing power structures and who perceive the denial of their cultural identity as an act of aggression and a violation of their human rights.<sup>25</sup>

It is important to consider individual and collective rights in any discussion on human rights law because the concepts are foundational to key human rights instruments and the broader international legal system. It is especially important to consider these concepts as courts and legal systems grapple with balancing human rights, climate, and the environment. The energy transition, and the increasing integration of nature conservation and traditional knowledge into climate action, present a once-in-history opportunity to ameliorate systemic social and economic inequalities. However, these measures are required to manage an existential threat, and historically, richer, healthier societies with strong infrastructure and technology can more easily protect themselves from, or even benefit from, conditions of risk and insecurity. Collective and individual rights must be weighed, just as we weigh up the broader human rights corpus with environmental protection, and seek to share the benefits and burdens of climate measures equally.

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<sup>25</sup> Rodolfo Stavenhagen, *The Right to Cultural Identity*, in JAN BERTING et al (eds.), *HUMAN RIGHTS IN A PLURALIST WORLD* (1990), 255-258, at 256-257.



### 3. Climate and the Right to Culture

The right to culture is relevant to climate and environmental protection for a range of reasons. Many measures designed to address climate change, such as renewable energy facilities and reforestation projects, require the requisition or repurposing of large tracts of land. This may interfere with indigenous and traditional owners using the same spaces for cultural practices such as hunting and nomadic herding. A widespread transition to a particular type of energy generation may constitute forced assimilation in some contexts, especially where it means forsaking traditional methods of cooking and heating. Environmental repair and biodiversity conservation techniques such as compensatory afforestation and the '30 x 30' target under the Kunming-Montreal Global Biodiversity Framework, requiring the protection and management of 30% of the world's terrestrial, inland water, and coastal and marine areas by 2030, also have implications for land use, cultural practices, and human rights.<sup>26</sup> Further, beyond existing methods of climate and environmental management, new, largely untested processes such as solar radiation modification have unknown side effects, and therefore the potential to profoundly affect the day-to-day lives and traditions of cultural minorities, as well as members of broader society.

Climate change itself also impacts the right to culture. For example, rising sea levels in the Pacific have inhibited traditional methods of fishing and farming, and forced low-lying communities to move to higher grounds and interact with different tribal and cultural communities.<sup>27</sup> Climate change also increases the risk of conflict, with extreme weather

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<sup>26</sup> Conference of the Parties to the Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, Fifteenth Meeting, Part II (7-19 December 2022).

<sup>27</sup> Secretariat of the Pacific Regional Environment Programme (SPREP), *Factsheet: Pacific Climate Change*, <https://www.sprep.org/attachments/Publications/FactSheet/pacificclimate.pdf>.

and resource scarcity sparking competition for resources and creating space for extremism.<sup>28</sup> This has potential impacts on the right to culture as well as a range of other human rights. Additionally, conflict may lead to mass migration and external intervention which is likely to further fracture cultures and communities. Fundamentally, if not managed carefully, climate change as well as the efforts to manage it can have negative implications for cultural rights. Elements of the right to culture are present in many international agreements, including the International Convention on the Elimination of Racial Discrimination<sup>29</sup> and the European Framework Convention for the Protection of National Minorities.<sup>30</sup> However perhaps the most important articulation of the right is in Article 27 of the ICCPR. The ICCPR has far-reaching impact, having been ratified by 167 countries globally.<sup>31</sup> Parts or the entirety of the ICCPR may be considered to enshrine *jus cogens* norms, such as the right to life<sup>32</sup> and the prohibition of torture,<sup>33</sup> meaning that some or all of the document may have universal application regardless of ratification by individual countries. Since the adoption of the ICCPR by the UN General Assembly in 1966,<sup>34</sup> the HRC has slowly detailed and expanded the content of the right through

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<sup>28</sup> Andrew Gilmour, *Climate change and conflict must be tackled together, argues a foundation head*, THE ECONOMIST (Apr. 5 2024), <https://www.economist.com/by-invitation/2024/04/05/climate-change-and-conflict-must-be-tackled-together-argues-a-foundation-head>.

<sup>29</sup> International Convention on the Elimination of Racial Discrimination, Dec. 21 1965, UN General Assembly resolution 2106 (XX), Article 7.

<sup>30</sup> Framework Convention for the Protection of National Minorities, Feb. 1995 H (95) 10, Article 5, Article 6, Article 12.

<sup>31</sup> UN Human Rights Treaty Bodies Database, Ratification Status for ICCPR, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en).

<sup>32</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976), Article 6.

<sup>33</sup> *Id.*, Article 7.

<sup>34</sup> ICCPR, *supra* note 32.

jurisprudence. While the HRC is not expressly bound by precedent,<sup>35</sup> this jurisprudence provides valuable guidance as to how the HRC and other courts and human rights bodies might engage with and interpret the law. Key cases and their applicability in the context of human rights and the environment are discussed below, alongside other relevant scholarship on the right to culture.

### 3.1 Climate Measures and Article 27 of the ICCPR

The right to culture in the ICCPR is framed as a negative obligation, requiring that states ensure ethnic, religious and linguistic minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture...'.<sup>36</sup> However the HRC has made clear that in some circumstances Article 27 imposes positive obligations to protect minority culture, for example where merely leaving the group to its own devices would lead to its forced assimilation into a dominant culture,<sup>37</sup> or where, in general, non-intervention would be insufficient to ensure minority protection.<sup>38</sup> As to what constitutes 'culture', the HRC has commented that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law'.<sup>39</sup> In

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<sup>35</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* at 1.78 (2013).

<sup>36</sup> ICCPR, *supra* note 32, Article 27.

<sup>37</sup> Claudia Tavani, *The Protection of the Cultural Identity of Minorities in International Law: Individual versus Collective Rights*, 9 EUROPEAN YEARBOOK OF MINORITY ISSUES 55, at 63 (2010).

<sup>38</sup> *Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN Doc A/45/40, Vol. II, App. A, Opinion, (UN Human Rights Committee, Mar. 26 1990) at 33.

<sup>39</sup> General Comment 23(50), Article 27, UN Doc. CCPR/C/21/Rev.1/Add. 5, (UN Human Rights Committee, 1994), at para. 7.

general, the HRC has taken a wide interpretation of the right, considering economic activities within scope if they relate to a core aspect of traditional culture.<sup>40</sup> The HRC has clarified that land and use of land are important aspects of culture, and accordingly must be protected,<sup>41</sup> although there are different opinions within the HRC about the extent to which land should be linked to culture.<sup>42</sup> In the Appendix I of the *Lubicon Lake Band* case<sup>43</sup> Mr. Ando had argued that land issues do not necessarily fall within the scope of the enjoyment of culture.

The three *Länsman* cases<sup>44</sup> offer further insight into how the HRC balances human rights and environmental concerns. All three cases related to interferences with reindeer husbandry areas by logging or quarrying; issues which could easily be extrapolated to land clearing and interference with the land to create renewable energy sites or to otherwise manage climate issues through activities such as compensatory afforestation. In the first two cases, the HRC clarified that interference with land which denies the right to culture violates the ICCPR, but that that the interference must be so significant as to 'effectively deny to the authors the right to enjoy their cultural rights in that region'.<sup>45</sup> In the third *Länsman* case, the HRC clarified that the effect of the interference must be assessed cumulatively over time, and that extra work and extra costs for

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<sup>40</sup> General Comment 23(5) *supra* note 39.

<sup>41</sup> Ilmari Länsman et al. v. Finland, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (UN Human Rights Committee, Nov. 8 1994).

<sup>42</sup> Ominayak and the Lubicon Lake Band v. Canada

<sup>43</sup> Ominayak and the Lubicon Lake Band v. Canada, Communication No. 167/1984, UN Doc A/45/40, Vol. II, App. A, Opinion, (UN Human Rights Committee, Mar. 26 1990)

<sup>44</sup> Ilmari Länsman et al. v. Finland *supra* note 41; Jouni E. Länsman et al v. Finland, Communication No. 671/1995; U.N. Doc. CCPR/C/58/D/671/1995 (UN Human Rights Committee, Oct. 30 1996); Jouni Länsman et al v. Finland, Communication No. 1023/2001, UN Doc CCPR/C/83/D/1023/2001 (UN Human Rights Committee, 2005).

<sup>45</sup> Ilmari Länsman, *supra* note 41, at para. 9.4.

landholders (in this case Sami reindeer herders) do not necessarily mean that the existence of a cultural practice is threatened.<sup>46</sup> Together, these three cases indicate that for climate measures to infringe the right to culture, they need to, overall, threaten the very ability of individuals or groups to undertake their cultural practices. This interpretation was confirmed by the HRC in the *Ángela Poma Poma case*, in which a member of the Peruvian Aymara people brought a complaint alleging that thousands of domestic llamas and alpacas had died due to groundwater drainage to establish a water supply plant.<sup>47</sup> Inter alia, the HRC found that there had been a violation of Article 27. It found that the activity in question must have a 'substantive negative impact' on the enjoyment of culture to constitute a violation of the ICCPR. It also noted that in balancing whether there had been a violation, it was important to consider whether the community in question had had the opportunity to participate in decision making, and whether they had provided free, prior and informed consent.<sup>48</sup>

A core aspect of the HRC's interpretation of Article 27 over the years is that states must ensure that nothing wholly prevents a group or individual from engaging in their cultural practices, without prior consultation and agreement. This may prevent challenges in dealing with climate change, as large amounts of land and ocean will need to be repurposed. However, there are also a range of opportunities to use community co-design to give communities a stake in environmental and climate measures and improve the social and economic conditions of developing countries. Land in struggling agricultural regions may be utilised for the dual

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<sup>46</sup> Jouni Lämsman (2005), *supra* note 43, at para 10.4.

<sup>47</sup> *Ángela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (UN Human Rights Committee, Mar. 27 2009).

<sup>48</sup> Franciszek Przetacznik, *Individual Human Rights in John Locke's Two Treatises of Government*, 25 NETHERLANDS INTERNATIONAL LAW REVIEW, at para. 7.6.

purpose of housing wind farms; afforestation can support communities by restoring biodiversity, stabilising the land against landslides, reducing salinity and flooding, and providing natural sources of shade and cooling, as well as providing broader climate benefits as a carbon sink. The HRC's jurisprudence underscores the need to conduct robust community consultation and provides valuable guidance to decision makers balancing human rights and environmental concerns.

### **3.2 Right to Culture - An Individual or Collective Right?**

There are different opinions in the scholarship about whether the human right to culture is individual or collective in nature.<sup>49</sup> If culture is seen as something that everyone can practice and enjoy, whether through traditional dance practices, collective methods of farming, or through engaging in pastimes such as sports and hobbies, then the right could be considered an individual right. However, if culture in the human rights context only refers to special types of behaviours and practices belonging to minorities, it would be considered a collective right. The wording of Article 27 refers to 'ethnic, religious or linguistic minorities',<sup>50</sup> which indicates a collective right, but the meaning of the term "minorities", and other characterisations of the right beyond the ICCPR, remain open to ongoing interpretation.

The Norwegian *Fosen Case* demonstrates how the right to culture can operate as a collective right in the context of climate and environmental measures.<sup>51</sup> A group of indigenous Sámi claimed a violation of Article 27 because the establishment of two wind farms in northern Norway inhibited their access to traditional reindeer grazing and husbandry sites. The Grand

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<sup>49</sup> Rodolfo Stavenhagen, *supra note 25*, at 258.

<sup>50</sup> ICCPR, *supra note 32*.

<sup>51</sup> Statnett SF v. Sør-Fosen Sijte et al, HR-2021-1975-S, Judgment (Supreme Court of Norway Oct. 11 2021), the '*Fosen Case*'.

Chamber of the Norwegian Supreme Court unanimously found that a violation had taken place.<sup>52</sup> In doing so it relied on previous decisions of the HRC, including the *Länsman cases*<sup>53</sup> and the *Ángela Poma Poma case*<sup>54</sup> discussed above. The wind farms in dispute in the *Fosen Case* had already been established by the time of the Court's ruling and continue to operate,<sup>55</sup> so the findings have not had any substantive effect on climate mitigation or the energy transition. But the case demonstrates the ways in which human rights in this area can conflict, with the collective right to culture clashing with the need for a safe climate to support other individual or collective rights, such as the right to life and the RHE.

Another recent important case relating to Article 27 of the ICCPR is the *Torres Strait Islanders Case*. The case was brought by a group of indigenous Australian Torres Strait Islanders, inhabitants of low-lying islands located to the north of the Australian mainland. The islands have experienced a range of severe environmental consequences as a result of climate change, including sea level rise, flooding, seawater inundation of agricultural lands and severe storms.<sup>56</sup> The claimants submitted a petition to the HRC alleging multiple human rights violations against the Australian government, stemming from inadequate climate change mitigation and adaptation.

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<sup>52</sup> *Id.*, at para. 35.

<sup>53</sup> Ilmari Länsman et al. v. Finland *supra* note 41; Jouni Länsman (2005), *supra* note 43.

<sup>54</sup> *Ángela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (UN Human Rights Committee, Mar. 27 2009).

<sup>55</sup> Reuters newsroom, *Norway ends dispute with reindeer herders over wind farm*, REUTERS, (Mar. 6 2024, 2:30 PM), <https://www.reuters.com/sustain-ability/norway-ends-fosen-wind-farm-dispute-2024-03-06/>.

<sup>56</sup> Maria Antonia Tigre and Katherine Quinn, *Trends in Human Rights Law-making: the Implications of 'Norming' Climate Rights*, in *Human Rights and Investment Law for Climate Change: Trends and Prospects* (Beatriz Martinez Romera, Alessandro Monti, Linnéa Nordlander and Jens Elo Rytter eds., forthcoming 2025).

Ultimately, a majority of the HRC found violations of Article 27 and Article 17 (the right to be free from arbitrary interference with privacy, family and home), and a minority of five members also found a violation of a right to life with dignity under Article 6.<sup>57</sup> The HRC noted that '[t]he authors' minority culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas'.<sup>58</sup> Whereas in the *Fosen Case* the Court found a violation on the basis that the Sami were unable to continue a particular cultural practice, in this case the HRC found that climate change presented an existential threat to the Islanders and accordingly, to their culture.

Like in the *Fosen Case*, the right to culture operated as a collective right in the Torres Strait Islanders case. However, in the *Torres Strait Islanders Case* it impelled climate action which could be seen as simultaneously supporting wider individual rights, such as the right to life and the RHE. The right to culture operating as a collective right is potentially controversial when it can be seen to inhibit activity which benefits the broader population. Balancing these interests in a way that is fair and acceptable to the broader community is one of the crucial, and growing, challenges of tackling climate change and ensuring a just energy transition. On the other hand, if the right to culture is an individual right, enjoyed by members of society at large, this could also give rise to some profound dilemmas when it comes to climate action and the energy transition. For example, if there is a state-mandated phase out of petrol cars in favour of electric vehicles, this could infringe upon the right to culture of Formula One fans and vintage car enthusiasts. Similarly, if the state limits or heavily taxes meat consumption to reduce the climate impacts of livestock farming, this could have

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<sup>57</sup> '*Torres Strait Islanders Case*', *supra* note 9. Committee Members Arif Bulkan, Marcia V. J. Kran, Vasilka Sancin, Hernán Quezada, Duncan Laki Muhumuza found a violation under Article 6.

<sup>58</sup> *Id* at para. 3.5.



detrimental impacts on those seeking to enjoy the meat pie culture of Australia, or a traditional Argentinian steak. While these might sound like minor or whimsical examples, they are in fact significant as food and sports are regularly acknowledged as important cultural practices.<sup>59</sup> To enable the balancing of climate, environmental measures and human rights, it will be important to continue to strive to establish the boundaries of the right to culture, and when and whether it operates as an individual or collective right.

#### **4. Climate and the Right to a Healthy Environment**

The wide-ranging impacts of climate change, and the growing understanding of the important links between climate, nature, and human health mean that climate measures and the RHE are inextricably linked. As climate-related challenges accelerate and become more severe and widespread,<sup>60</sup> it will be important to understand how the RHE interacts with other human rights, and the role it plays in the broader social, economic and political context of climate change. Notions around the RHE have been embedded in the foundations of international environmental law since the 1970s.<sup>61</sup> Over several decades, environmental issues were increasingly considered alongside human rights protections, in the so-called the 'greening' of human rights law. A number of treaties,

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<sup>59</sup> E.g., UNESCO, *Artisanal know-how and culture of baguette bread*, inscribed in 2022 (17.COM) on the Representative List of the Intangible Heritage of Humanity.

<sup>60</sup> Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Summary for Policymakers, 4-16 (2003).

<sup>61</sup> Stockholm Declaration on the Human Environment, in Report of the UN Conference on the Human Environment, 1972, A/CONF 48/1 at 2; European Parliamentary Research Service, *At a glance: a universal right to a healthy environment*, PE 698.846, Background Information (Dec. 2021).

including the ICCPR, make reference to versions of the right,<sup>62</sup> and widespread international recognition was finally achieved via the UN Human Rights Council in 2021 and the UN General Assembly in 2022.<sup>63</sup> Different characterisations of the RHE can now be found in the constitutions of at least 110 countries.<sup>64</sup> The specific scope and content of the RHE are being incrementally defined via commentary and jurisprudence, as global recognition of the right continues to grow.

#### 4.1 Content of the Right to a Healthy Environment

The RHE is generally understood to include procedural elements such as access to information and the right to participate in decision-making, and substantive elements such as the right to clean air and water.<sup>65</sup> Many of these elements are already established as separate rights within the broader corpus of international law, in human rights agreements or in treaties such as the Aarhus Convention<sup>66</sup> and the Escazu

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<sup>62</sup> *E.g.*, Article 12 of the ICCPR proscribes the right to the highest attainable standard of physical and mental health, to be realised through the improvement of all aspects of environmental and industrial hygiene; Article 24 of the UN Convention on the Rights of the Child, UN General Assembly (1989) UNTS 1577 specifically recognises clean drinking water, nutritious foods and protection from environmental pollution as fundamental to the right to healthcare.

<sup>63</sup> UN Human Rights Council (2021), *supra note 13*, UN General Assembly (2022), *supra note 14*.

<sup>64</sup> *The Human Right to a Healthy Environment*, (2018) at 18; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/43/53 (Human Rights Council, 2020).

<sup>65</sup> United Nations Human Rights, Office of the High Commissioner, UN Environment Programme and UN Development Programme, *What is the Right to a Healthy Environment?* (2023), <https://www.unep.org/resource/s/publication/what-right-healthy-environment-information-note>, at 9.

<sup>66</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [UNECE], Jun. 25, 1998, 2161 UNTS 447 (entered into force Oct. 30, 2001).

Agreement<sup>67</sup>. The former UN Special Rapporteur on Human Rights and the Environment, John Knox summarised this neatly, saying that some aspects of the RHE have ‘already evolved on the basis of an interlocking web of rights’.<sup>68</sup> Others have characterised the RHE as an umbrella, a composite<sup>69</sup> or a corollary to existing rights.<sup>70</sup> The growing recognition of the RHE reaffirms the existing jurisprudence, while also offering the opportunity to fill in gaps or further advance the extent of state responsibility in this area.<sup>71</sup> This interpretation of the RHE as a web of existing and expanded rights was confirmed in the recent case of *La Oroya v Peru*,<sup>72</sup> brought before the Inter-American Court of Human Rights. The case related to a metallurgical complex which had poisoned the surrounding environment with toxic substances including lead and arsenic, leading to generations of people living in the surrounding community suffering a range of extremely serious mental and physical illnesses, some of which led to death. The Court found that the pollution constituted a systematic violation of the human rights of its residents, and outlined numerous specific breaches.<sup>73</sup> In its judgment, the Court confirmed that the RHE encompasses both procedural and substantive elements.<sup>74</sup> The procedural elements include access to information, public

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<sup>67</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean [UN ECLAC], Mar. 4 2018, vol. 3388C.N.195.2018 UNTS (entered into force Apr. 22, 2021).

<sup>68</sup> John Knox and Ramin Pejan, *Introduction*, in John Knox and Ramin Pejan (eds.) *The Human Right to a Healthy Environment*, (2018) at 5.

<sup>69</sup> Azadeh Chalabi, *A New Theoretical Model of the Right to Environment and its Practical Advantages*, 23(4) HUMAN RIGHTS LAW REVIEW, 1, 11 (Dec. 2023).

<sup>70</sup> Maria Antonia Tigre and Katherine Quinn, *supra note* 55.

<sup>71</sup> John Knox, *supra note* 67.

<sup>72</sup> *Inhabitants of La Oroya vs Peru*, Judgment (Inter-American Court of Human Rights, Nov. 27 2023), the ‘*La Oroya Case*’.

<sup>73</sup> *Id.*, at para. 180

<sup>74</sup> *Id.*, at para. 118.

participation in decision-making, and access to justice with effective remedies, and the substantive elements encompass clean air, safe and sufficient water, healthy and sustainably produced food, non-toxic environments where people can safely live, work, learn and play, healthy ecosystems and biodiversity, and importantly, a safe, liveable climate. The Court also extrapolated on the obligations the RHE imposes upon states:

This substantive element of the right to a healthy environment imposes the obligation on States to:

- a) design norms and policies that define water and wastewater quality standards that are compatible with human and ecosystem health;
- b) monitor the levels of contamination of water bodies and, if applicable, report possible risks to human and ecosystem health;
- c) make plans and policies with the purpose of controlling water quality that include the identification of main causes of contamination;
- d) implement measures to enforce water quality standards, and
- e) adopt actions that ensure the management of water resources in a sustainable manner.<sup>75</sup>

While this part of the judgment relates to water quality, the Court made similar observations about air quality too.<sup>76</sup> The obligations set out by the Court in this section are general in nature and could arguably be applied to all aspects of the right, requiring standard-setting, monitoring, supportive policies and enforcement for aspects of the environment which may be under threat or which may have detrimental impacts on humans. In a similar vein, in the same judgment the Court found that Peru had failed in its obligations to regulate,

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<sup>75</sup> *Id.*, at para. 121.

<sup>76</sup> *Id.*, at para. 120.

supervise, inspect, monitor and enforce rules against business enterprises, which it held constituted a breach of the RHE.<sup>77</sup>

The La Oroya judgment is one of the clearest articulations of the content of the RHE in international jurisprudence to date. The Court provides useful colour and detail about the RHE, and the ways the RHE interacts with other established areas of international and domestic law. It also imposes a suitably heavy burden on states to protect their citizens from the impacts of environmental degradation. However, looking at the breadth of the Court's articulation, and the wide range of areas it includes, it is easy to see how elements of the RHE may conflict internally or with other human rights. For example, creating a hydroelectric dam might contribute to a safe and liveable climate, but diverting water to the dam might infringe a community's right to water or food. As in the *Fosen Case*, creating a safe and liveable climate for one community may infringe another's right to culture. All of this requires a delicate balancing of interests, risks, and scale of harm that will become increasingly necessary as climate and environmental issues accelerate.

## 4.2 Due Diligence and the Right to a Healthy Environment

Recent international jurisprudence also indicates that the RHE entails due diligence obligations. In the *La Oroya* judgment, the Court emphasised the need for states to prevent significant harm to the environment, and identified a due diligence standard which is 'appropriate and proportional to the degree of risk of environmental damage'.<sup>78</sup> In cases where the harm is likely to be severe, such as the harm caused by arsenic and lead in the *La Oroya* case, the due diligence obligation has a higher standard.<sup>79</sup> Due diligence was also a theme in an earlier determination from the Inter-American Court of Human

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<sup>77</sup> *Id.*, at para. 176.

<sup>78</sup> *Id.*, at para. 126.

<sup>79</sup> *Id.*

Rights, in its advisory opinion issued at the request of Colombia.<sup>80</sup> In that opinion, the Court held that states have due diligence obligations both for conduct within the states' territory, and for activities which may cause transboundary harm.<sup>81</sup> This means that states could be held accountable for the impacts of pollution and fossil fuel use even if the consequences of those activities manifest beyond state borders; for example, in climate-related disasters or warming temperatures. This finding is consequential, as it is difficult to attribute the specific effects of climate change to a particular state or activity. Recklessness towards, or choosing to ignore, the potential consequences of an activity – especially if those consequences are scientifically predictable – may lead a state to fall short of the requisite due diligence standard and accordingly be held accountable.

The recent *Torres Strait Islanders Case* from the HRC also emphasised the importance of due diligence, albeit without directly linking it to the RHE. The majority judgment is discussed above. In a separate concurring judgment, Committee Member Zyberi asserted that since Australia is a signatory of both the ICCPR and the Paris Agreement, the due diligence requirements enshrined in the Paris Agreement provisions relating to state conduct and best efforts<sup>82</sup> could be considered in determining the claim.<sup>83</sup> This interpretation is ambitious, and has significant potential; it arguably broadens the remit of the ICCPR and the HRC considerably, and opens

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<sup>80</sup> Advisory Opinion issued at the Request of the Republic of Colombia, OC-23/17 (Inter-American Court of Human Rights, 2017).

<sup>81</sup> *Id.*, at 59.

<sup>82</sup> UN Framework Convention on Climate Change, Conference of the Parties, 'Paris Agreement' Article 4(3) and 4(2) (2015), U.N. Doc. FCCC/CP/2015/L.9/Rev/.

<sup>83</sup> Daniel Billy et al v Australia, Communication No. 3624/2019, CCPR/C/135/D/3624/2019, Opinion (UN Human Rights Committee, 2022), the '*Torres Strait Islanders Case*', Opinion of Committee Member Gentian Zyberi, at 3.

the door for other treaties and multilateral environmental agreements to be considered in the HRC and similar forums. Further, in a similar line of reasoning to that set out by the Inter-American Court in *La Oroya*, Committee Member Zyberi asserted that a higher standard of due diligence applies to states with higher emissions per capita,<sup>84</sup> specifically: '[acting] with due diligence based on the best science when taking mitigation and adaptation action... is an individual responsibility of the State, relative to the risk at stake and its capacity to address it'.<sup>85</sup> While Committee Member Zyberi and the broader HRC did not expressly mention the RHE in the judgement, this may be because the HRC was set up to deal only with cases brought under the ICCPR, which does not include a standalone RHE.<sup>86</sup>

Together, the references to due diligence by the Inter-American Court of Human Rights and the HRC, all of which are linked either impliedly or explicitly with the RHE, add growing credence to the notion that the RHE includes due diligence obligations. Further, these cases indicate the standard may be linked to state obligations in other contexts, such as treaty obligations, and also tied to the scale, risk and seriousness of harm. The incorporation of due diligence obligations could be highly beneficial when it comes to balancing human rights and climate concerns, as it requires decision makers to grapple with risk and assess competing interests and consequences before acting. As the very notion of due diligence intends, hopefully this will prevent serious human rights and environmental infringements.

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<sup>84</sup> *Id.*

<sup>85</sup> *Torres Strait Islanders Case*, opinion of Committee Member Gentian Zyberi, *supra* note 82 at 5.

<sup>86</sup> ICCPR, *supra* note 32.

### 4.3 The Right to a Healthy Environment - An Individual Or Collective Right?

It is difficult to assess whether the emerging RHE is an individual or collective right. It seems to be an individual right that belongs to each person, since the subject matter is general in character, and not associated with particular groups or identities. Further, it has been seen to encompass rights such as the right to life, the right to safe drinking water and the right to clean air, all of which are individual in character.<sup>87</sup> However looking at the *Torres Strait Islanders Case* as one of the cases where a human rights body came closest to articulating the RHE, the identity of the complainants – an indigenous minority group – indicates the right may have more of a collective character. It also arguably has the spirit of a collective right – divorced from capitalist-driven power structures, incorporating notions of community, shared resources, traditional knowledge and intrinsic value.

In her robust assessment of the RHE, Chalabi argues that ‘the right to environment is not just an ‘umbrella’ right, or the sum of the already existing rights, but rather a composite right’.<sup>88</sup> She suggests a three-tiered approach in which the RHE can operate as an individual right, a collective right and a global right.<sup>89</sup> Under this model, if the right was exercised as an individual right, the number of people affected would have to be low, focusing on current or ‘near future’ harms, e.g. a woman filing a lawsuit due to noise pollution from a rock crusher near her house.<sup>90</sup> At the collective level, it would

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<sup>87</sup> David Boyd, *Good practices on the right to a safe, clean, healthy and sustainable environment*, Office of the High Commissioner on Human Rights, (2019) A/HRC/43/53, <https://www.ohchr.org/en/documents/thematic-reports/ahrc4353-good-practices-right-safe-clean-healthy-and-sustainable>.

<sup>88</sup> Azadeh Chalabi, *supra note* 68, 11.

<sup>89</sup> *Id.*, at 12-13.

<sup>90</sup> E.g., *Andrae v Selfridge and Co Ltd* [1938] Ch 1, (1937) All ER 255; *Cocking v Eacott and Waring* (2016) EWCA Civ 140.



require the preservation of certain qualities within the environment to protect the collective interest, and ensure sustainability and biodiversity conservation in the long term, e.g. pollution affecting the enjoyment of a public beach. Finally, at the global level, it relates to the interdependent nature of global ecosystems, and the notion that large-scale environment damage can threaten life on earth. While the global characterisation links with the collective right described by Chalani, the scale, severity and irreversibility of the prospective environmental harm give the right a different quality in extreme circumstances. Each level – individual, collective and global – requires different forms of environmental protection.<sup>91</sup>

The flexibility of this approach is appealing, as it recognises the diversity of the natural environment, the innumerable ways that humans are impacted by it and can interact with it, and the impossibility of a one-size-fits-all approach to the RHE and human rights in general. However, it also widens the scope of the right to such a degree that it can be all things to all people, making it difficult to apply consistently, especially across jurisdictions, and even more difficult to balance it with other rights, with the elements of environmental and climate protection which are outside the human rights sphere. While some claim that more clarity about the scope and operation of the RHE is required before it can be relied upon or legally enforced in a meaningful way,<sup>92</sup> we are now at the point where those details are beginning to emerge, as in the cases discussed above. The next step is to understand how to apply them, which will require further case law and scholarly analysis.

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<sup>91</sup> Azadeh Chalabi, *supra* note 68, at 16.

<sup>92</sup> John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law* 25 COLUMBIA J ENVIRON LAW, 283, 297 (2000).

## 5. Conclusion

Many challenges lie ahead for humanity in terms of tackling the accelerating impacts of climate change. Whether implementing mitigation and adaptation measures which are now considered 'traditional', or experimenting with new technology such as carbon capture and storage and solar geoengineering, all of these activities are likely to have an impact on humans and consequentially on human rights. However, leaving climate change unchecked would also have profound effects on a broad range of human rights, driving conflict and displacement, undermining traditional farming and fishing practices, and making extreme weather events more severe and prolonged, thereby jeopardising human lives. Weighing collective and individual rights, alongside a balancing of human rights and climate considerations, will be crucial to ensuring the benefits and burdens of the energy transition and other climate measures are shared equitably across nations and socioeconomic groups. Increasingly, the law will need to be equipped to grapple with these complex issues to ensure that tackling climate change is both as fair and as effective as possible.

While the law in this area continues to develop, the *La Oroya*, *Fosen* and *Torres Strait Islanders* cases provide useful insights into how nations and regions can meet emerging legal standards, and how to prioritise and balance competing interests. The *Torres Strait Islanders Case* outlines elements later echoed in the *La Oroya* judgment, including the application of a due diligence standard as part of the RHE. It indicates that international commitments by states can be harmonised or considered together so that states hold a more stringent standard for climate action, and it provides a vivid depiction of how the right to culture can be impacted in the climate context. The *La Oroya Case* expands on the fundamentals of the HRC's findings in the *Torres Strait Islander Case*, and provides more detail on the content of the human right to a healthy

environment and its place in the broader corpus of international law than any previous judgment from an international court. The *Fosen Case* provides an understanding of how the right to culture can conflict with climate action and efforts to protect the RHE if climate measures are taken without community consultation and consent, and consideration for broader human rights. While each case represents the view of a regional and/or specialised court, together, the cases provide important understanding of the legal landscape going forward. International courts are taking a proactive stance in dealing with these issues; let us hope the momentum continues, and translates into tangible and equitable outcomes at national and subnational levels.