Culture, Climate and Human Rights: How Does the Law Deal with the Consequences

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Introduction

I started with song as one way to show my respect to traditional owners of the land we meet on tonight, and because this song powerfully communicates, grounding culture in environment, connecting country to identity, and health and well-being to caring for country. It illuminates the theme for the 2025 UN Human Rights Day, that cultural rights are an everyday essential in the ordinary lives of indigenous people.

Climate change threatens that everyday essential, severing connection between people and country. How does or can the law respond?

This is not an academic exercise. Sea level rise is an imminent and existential threat to Zenadh Kes, our Torres Strait Islands, and to many of our Pacific neighbours, including Tuvalu. To begin, I look back to our law's foundation story about recognition of indigenous peoples' connection to land in this country.

Dispossession of another kind was on the minds of Eddie Mabo and his colleagues from the Miriam and Mer islands when they took their land rights claim to the High Court. It removed the obstacle to their claim when it rejected the principle of terra nullius - land over which no sovereignty has previous been exercised. Justice Brennan said this:

> 'Judged by any civilized standard, such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned…' [1]

That was 1992. I was a young lawyer and a young mother when I read that magnificent judgment on the beach at K'gari, excited by the thought my infant son would grow up in a

[1] Mabo v Queensland (No 2) [1992] HCA 23 at [28]

country reconciled with its history and offering justice for our First Nations people. By 1994, my expectations were dashed. In an early test of the Native Title Act, which introduced the process for recognising traditional title to country, the High Court found against the claim by the Yorta Yorta people to public land, rivers and lakes in north-central Victoria because:

> 'The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.[2]

That tide of history was not of the Yorta Yorta people's making and was described at the time as 'terra nullius by attrition'.[3]

It is reasonable to expect a beneficial law to grapple with this history, but that Act did not and still does not. As Justice Rangiah said in a recent judgment:

> 'It is ironic that the NTA states an intention to rectify the consequences of past injustices, yet prohibits the past injustices that resulted in loss of traditional laws and customs from being taken into account in assessing the question of continuity of traditional laws and customs.'[4]

A stronger word than ironic comes to mind. The experience of native title here shows we must critically analyse any law that purports to protect cultural rights in the context of climate change. Hortatory declarations must align with the law in operation if we are to respond more justly to the advancing tide.

What does the law say about cultural rights?

Culture featured in United Nations instruments from the outset. Article 22 of the Universal Declaration of Human Rights, adopted on this day 77 years ago, enshrined the right of every person to realization of cultural rights indispensable for their dignity.[5]

But what is culture? American anthropologist Edward T Hall said:

> Culture is not made up but something that evolves which is human.

We humans develop culture and pass it down from generation to generation. It influences how we think, behave, and feel, and marks out our identity from others.

What is indispensable for our dignity? Although I pose the question, I have no answer for you.

Cultural rights are included in numerous international and regional instruments. I will mention only a few that focus on the cultural rights of indigenous persons. Article 27 of the International Covenant on Civil and Political Rights[6], prohibits a state from denying to persons

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[2] Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 [107]
[3] As noted by ANTAR Yorta Yorta Decisions Factsheet 2022 < https://antar.org.au/wp-content/uploads/2022/06/The-Yorta-Yorta-Decision.pdf> 6
[4] Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3) [202] FCA 600 [1243]
[5] https://www.un.org/en/about-us/universal-declaration-of-human-rights
[6] https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf

belonging to minorities the right, in community with others, to enjoy their own culture. Other instruments are less constrained by the assumption an indigenous population is a minority group in their country. The most important of these is the UNDRIP, the UN Declaration on the Rights of Indigenous Peoples.[7] Art 3 recognises the right of Indigenous Peoples to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development. The Declaration also recognises and protects many manifestations of culture and its practice: traditions, customs, sites, artefacts; spiritual and religious traditions, histories, languages and oral traditions, cultural methods of teaching and learning, and traditional knowledge and manifestations of sciences, technologies and cultures.

The right to participate in cultural life is also included in the International Covenant on Economic, Social and Cultural Rights,[8] and in conventions on the rights of persons with disabilities, the rights of the child, the elimination of all forms of discrimination against women and the rights of migrant workers and their families. Cultural rights are protected in regional conventions in the Americas, in Europe, in Africa, and, closer to home, the Qld Human Rights Act 2019 recognises all person's cultural rights in s 27 and the distinct rights of Aboriginal peoples and Torres Strait Islander peoples in s28.

Getting a firm grip on the content of cultural rights is not easy. The UN Human Rights Committee says culture can manifest itself as a particular way of life associated with the use of land resources and include such traditional activities as fishing or hunting and the right to live on lands protected by law.

But territory is not just terrestrial. For ocean people, attachment to land is not static. The ocean can be seen as a sacred vast highway joining interconnected islands. For ocean people, cultural connection to sea country is central.

References to culture in international instruments embrace the social and economic activities that are part of the group's tradition, although many use a triptych of economic, social and cultural rights inviting consideration of each as distinct, rather than composite, concepts. This is risky for cultural rights, the least material and tangible, and the least understood by those from a different culture.

As the law of cultural rights matures, so does its conception, with a shift from the tangible - items, things and places – to the intangible. This is well articulated by the UN Expert Mechanism on the Rights of Indigenous Peoples which advises the UN HRC on UNDRIP. It says Indigenous peoples' culture includes:

> '…intangible manifestations of their ways of life, world views, achievements and creativity… the preservation of heritage is deeply embedded and linked to the protection of traditional territories. Indigenous cultural heritage is a

[7] https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

[8] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

holistic and inter-generational concept based on common material and spiritual values influenced by the environment.'[9]

This formulation couples spiritual connection to the environment. Embeds beliefs and traditional knowledge in land and seascapes. In Australia, it incorporates songlines. To illustrate, in a recent case involving the proposal by Santos to build a gas export pipeline in the Timor Sea, Tiwi Islanders argued the pipeline would affect their song lines; the pathways of ancestral beings of fundamental importance to their culture, a rainbow serpent known as Ampiji and Jikakupai, a shapeshifting Crocodile Man.[10] Although they were unsuccessful in their bid to stop the pipeline, the Court accepted intangible heritage *could* be affected.

This is important for our Pacific neighbours as well. For the Tuvalu people, te Pusi mo te Ali (the Eel and the Flounder) are creation spirits.[11] As I understand it, they explain the formation of the islands, the sea and the breaking of darkness. This is not my culture, and others here tonight can speak to it. I raise these 2 examples of what the law calls intangible cultural heritage to pose a question – how does the law respond to the impact on intangible cultural heritage when a people are displaced from their land or sea country?

Returning to the native title here, the High Court accepts the spiritual connection but admits that translating that to the legal is difficult. It carries risks. It fragments the integrated view of indigenous peoples about the ordering of affairs into discrete rights and interests considered apart from the duties and obligations which accompany them.[12] Further, the focus on the spiritual can downplay the social and economic aspects of cultural connection, essential to the experience of cultural rights in ordinary life. Being the people who speak for country, who have the authority to decide how its natural resources are used and protected, and to benefit from their bounty. Yes culture is spiritual, but it is so much more than that.

How does climate change affect cultural rights

Cultural rights are intended to prevent the destruction of culture. And that brings me to sea level rise. In Australia, the people of Zenadh Kes are disproportionately vulnerable. In the last 30 years, sea level has risen higher in northern Australia than the rest of the country as well as the global average. Predicted levels will dramatically increase the frequency of extreme coastal flooding events. By 2100, one-in-100 year events will occur several times per year. This poses an existential threat to peoples who have lived on these islands for tens of thousands of years. CSIRO advised government to make long-term relocation plans for approximately 2,000 Torres Strait Islander people.

Disproportionate vulnerability is also a present reality for Pacific Island States, despite contributing the least to climate change. The Intergovernmental Panel on Climate Change (IPCC) predicts a number of them will be completely submerged within the next seventy

[9] United Nations, Expert Mechanism on the Rights of Indigenous Peoples (Web Page, accessed 30 October 2022) <https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenouspeoples>
[10] Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9
[11] https://www.tidridge.com/uploads/3/8/4/1/3841927/tuvalu_a_history.pdf accessed on 7 Dec 2025
[12] Western Australia v Ward (2002) 213 CLR 1 [14]

years.[13] The UN identified Tuvalu as a country at most risk. With its highest point about 5 meters above sea level, and most land below 2 meters, much of the country is expected to be below the average high tide by 2050.[14] That is a blink of an eye in geohistorical terms. Even before the land disappears human survival is threatened by saltwater intrusion and the loss of freshwater.

We know we are not doing enough to counter this phenomenon. Today's policies lock in long-term sea level rise. The scale and sense of urgency of the threat prompted the 18 member Pacific Islands Forum to assert ongoing statehood and sovereignty despite sea level rise.[15] This idea has found favour, with most of those who referred to this in submissions to the ICJ supporting the declaration. Further, in its Advisory Opinion, the ICJ endorsed the concept when it said:

> "in the event of the complete loss of a State's territory and the displacement of its population, a strong presumption of continued statehood should apply…(and the loss of territory)…would not necessarily entail the loss of its statehood."[16]

We must wait to see how ongoing statehood manifests in real terms and what remedy it might provide to the displaced for their cultural loss. I suggest it will provide an ongoing legal identity, and, as a result, a voice on the international stage and the status to seek redress under international law.

387/1814

The remedies

What might that redress be and what role will cultural rights play? For some time, domestic and regional human rights instruments have been used by climate litigators, and it is fair to say the link between climate impacts and breaches of human rights is accepted in Australia and in specialist regional human rights courts in Europe and the Americas. At the international level, it can no longer be contested following the ICJ's Advisory Opinion on State responsibilities for climate change.

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[13] Curt D. Storlazzi, Stephen B. Gingerich, Ap van Dongeren, Olivia M. Cheriton, Peter W. Swarzenski, Ellen Quataert, Clifford L. Voss, Donald W. Field, Hariharasubramanian Annamalai, Greg A. Piniak & Robert Call, *Most Atolls Will Be Uninhabitableb y the Mid-21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding,* Sci. ADvANCES, Apr. 25, 2018, at 1, 4-5, https://doi.org/10.1126/sciadv.aap9741.
[14] P. Brennan, "NASA-UN Partnership Gauges Sea Level Threat to Tuvalu", *Sea Level Change. Observations from space*, 15 August 2023.
[15] *Who We Are,* PAC. ISLANDS F., https://forumsec.org/pacific-islands-forum [https://perma.cc/D3CS-5P53]; *see also Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise,* PAc. ISLANDS F. (Aug. 6, 2023) [hereinafter *PIFDeclaration]*h, ttps://forumsec.org/sites/default/files/2024-05/2023%20Declaration%20on%20the%20Continuity%20of%20Statehood%20and%20the%20Protection%20of%20Persons.pdf [https://perma.cc/2XH2-ASJB].
[16] Obligations of States in respect of Climate Change (Advisory Opinion) ICJ Reports 2025, [363]

In its submissions in that case, Australia[17] and other developed countries argued climate change responsibilities should be quarantined from broader international obligations, including human rights. The climate instruments, most notably the Paris Agreement were put forward as a specialist law that excluded more general instruments and customary law. That was soundly rejected by the ICJ[18] which noted the Paris Agreement itself declared climate change to be a common concern of mankind and references human rights, including of indigenous peoples.

The ICJ acknowledged the possibility of claims being made against a State for an internationally wrongful act with respect to climate change. That could be failing to take appropriate action to protect the climate system — such as granting fossil fuel exploration licences or providing fossil fuel subsidies. The wrongful act is not the emission of GHGs, but the breach of conventional and customary obligations to protect the climate system. The State's responsibility for private actors arises because the States must regulate those activities as a matter of due diligence.

Yet there remains an unanswered question, and it is about standing – the qualification of an individual or group to bring a claim in this context. What mechanism do they use? What forum do they take their claim to. I suggest, at least for the short term, it will depend on the mechanisms developed under particular conventions, which leaves gaps and tensions in the available remedies and weak enforcement measures.

One of the gaps is illustrated by the case of Ioane Teitiota, a Kiribati national who fled to New Zealand to avoid the consequences of climate change, including sea level rise. His complaint to the UN HRC was rejected.[19] The Committee's remit does not include the 1951 Convention on the Status of Refugees. In any case to qualify as a refugee a person must be at risk of persecution due to race, religion, nationality, membership of a particular social group or political opinion.[20] The indiscriminate nature of climate change impacts does not fit well in that framework. Without amendment, which seems unlikely, the Refugee Convention offers nothing.

The HRC does have a remit for breaches of the International Convention on Civil and Political Rights. On the facts of that case, the HRC found there was no breach, because the threat was not then considered sufficiently imminent.

It did accept the possibility that a State could breach Convention rights by sending people back to a country where the effects of climate change could threaten their health. Although it was

[17] https://www.icj-cij.org/sites/default/files/case-related/187/187-20240326-wri-02-00-en.pdf
[18] Obligations of States in respect of Climate Change (Advisory Opinion) ICJ Reports 2025, [162]-[170]
[19] No. 2828/2016, *Ioane Teitiota v. New Zealand*
[20] Art 2A(2)

decided only 9 years ago, I wonder if the HRC would take a different view now about the imminence of that threat.

The UN HRC considered climate change again in the complaint against Australia by Daniel Billy and others from Zenadh Kes.[21] The HRC recognised relocation might protect the right to life. This is important because planned resettlement is recognised as an adaptation strategy to climate change by the Conference of the Parties to the UN Framework Convention on Climate Change.

However, the HRC implied that relocation could threaten other rights. Most pertinent for tonight's discussion, it found Australia had breached the right to culture, religion and language of minorities (Article 27 of the Covenant) by failing to take adequate adaptation measures in time. This decision claims a number of firsts - the first time an international tribunal found a country violated human rights through inadequate climate policy; the first time a nation state has been found responsible for their greenhouse gas emissions under international human rights law; and, the first time peoples' right to culture has been found to be violated by climate impacts.

So, while the Teitiota case revealed a gap in human rights protection for climate refugees, the Billy case displays the tension between rights – to life and to culture – for those who want to maintain their culture by staying on country.

Billy and his colleagues argued successfully that relocation would damage their culture. Not everyone agrees that culture cannot be maintained through relocation.

Panama has recently relocated a community from an island Gardi Subdug to the mainland. These quotes express divergent views about this:

> 'The people that lose their tradition lose their soul. The essence of our culture is on the islands[.]' ("Climate change: The Panama community that fled its drowning island - BBC")

> 'My identity and my culture aren't going to change, it's just the houses that have changed[.] . . . [T]he heart of the Guna people will be alive.' [22]

Tuvalu's creation of a digital nation is an optimistic project to maintain culture in the digital megaverse. It created a digital replica of the country, to function as its "defined territory" once the physical territory disappears. I understand the government is building a cultural archive, to digitally preserve its citizens' personal possessions, and a blockchain identification system to enable them to connect with each other and "participate in Tuvaluan life" from anywhere in the world. Virtual and augmented reality will be used to allow Tuvaluans to explore the islands they used to inhabit and to interact with cultural artifacts. Will this ameliorate the injury of relocating to another country as stateless persons. Will this allow them to retain their national identities. Most importantly, will it allow the people of Tuvalu to maintain and evolve

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[21] Billy & ors v Australia CCPR/C/135/D/3624/2019

[22] *See* Gonzalo Canada & Agustina Latourrette, *"We Left Pieces of Our Life Behind": Indigenous Group Flees Drowning Island*, BBC (Feb. 7, 2025), https://www.bbc.com/news/articles/cz01g9pedzlo [https://perma.cc/U3V7-ALVC].

their distinctive culture. Unfortunately, we may soon be able to answer a question which, only a few years ago, I would have considered a worthy subject for science fiction.

What about reparation? The ICJ acknowledged the possibility of a State being held to account for breaching its responsibilities with respect to climate change but provided little guidance about how reparation might be determined. It acknowledged the difficulties and said this could not be considered in the abstract and required a case by case consideration.

This provides no assistance with the real difficulty in monetising cultural loss in a western conception of property that does not encompass cultural connection. The HRC accepts culture embraces social and economic activities that are part of the group's tradition, but is that how compensation will be determined. Again I look to the experience of native title. In the Timber Creek case,[23] the first native title compensation case to reach the High Court, it drew a sharp distinction between economic and non-economic loss. This is an orthodox approach to valuing the loss of land in a western system of land ownership. The physical or material aspect of land – the right to do something in relation to land – is assessed by according to the market for ownership or use of land. The non-economic loss, cultural loss – which the Court related to connection to country – could not.[24] The High Court recognised this type of loss as beyond any notion of hurt feelings or distress, which, in valuation terms is considered solatium, a concept derived from the Latin word for solace. In effect, a monetary apology.

Nevertheless, the High Court struggled to place a monetary value on the permanent and intergenerational nature of the loss of connection and the social impacts that accompany it. It also disagreed with the trial judge's view that the spiritual importance of material rights to use and benefit from land added to their economic value.

The reasoning is not surprising from a western perspective, but I suggest it is inappropriate to tease out the triptych of social, economic and cultural loss in this way. Perhaps the answer is in taking a more expansive and directive approach to reparation, with less focus on value and more on the mechanisms to support cultural rights.

The IACtHR was expansive in its reparation findings in its AO. It declared States must create effective administrative and judicial mechanisms tailored to climate-related harms, measures to protect and restore nature, medical care for climate-related illness, compensation, and guarantees of non-repetition, including preventative measures and monitoring.[25] This is a more comprehensive and, I suggest, a more creative response.

I referred to the weak enforcement under international law. States are wary of paying compensation, with the acknowledgement of liability that entails. They may be more open to the sorts of mechanisms identified by the IACtHR identified.

And this may prove to be the more effective response. Australia's attitude to the HRC decision in the Billy case is an example. The HRC found Australia was obliged to provide adequate

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[23] *Northern Territory v Mr A Griffiths (decd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples (2019)* 269 CLR 1 (Timber Creek)

[24] Timber Creek [44]

[25] https://www.corteidh.or.cr/docs/opiniones/seriea_32_en.pdf AO-32/25 at [558]

compensation to the authors for the harm that they have suffered. In its official reply, the Australian government refused to do so, a great disappointment to the claimants. However, the HRC also recommended Australia engage in meaningful consultations with the claimant's communities, conduct needs assessments; continue implementing measures to secure the communities' continued safe existence on their islands; evaluate the effectiveness of these measures and resolve any deficiencies as soon as practicable. Tthrough the Torres Strait and Northern Peninsula Area Climate Resilience Centre, the government has taken some steps to do this. Regional leaders and Traditional Owners are designing, establishing and delivering a coordinated regional response to climate change. This includes recruiting and training local climate resilience officers to lead practical climate adaptation projects and community education. Small steps, and laudable. They will not hold back the tide,. Much more is required.

Turning to our Pacific Island neighbours, I want to discuss the Falepili Union, an agreement with Australia initiated by Tuvalu which came into force in August 2024. 'Falepili' is a Tuvaluan term for 'neighbours who live in close houses.' It is the 'world['s] first' legally binding Treaty recognising Tuvalu's sovereignty, continuing statehood, and rights inherent thereto in response to sea-level rise (Article 2(2)(b)).[26] It is also promoted as the first climate resettlement treaty adopted in history. It allows up to 280 permanent residency visas annually, with access to the same citizenship processes that apply to other permanent residents. The Tuvalu government has said that taking up Australian citizenship would not affect Tuvaluan citizenship.[27]

The treaty has attracted some criticism, including a lack of consultation within Tuvalu. Some suggest the climate narrative diverts attention from the security provisions which are more detailed and specific than the climate commitments. The treaty provides Tuvalu 'shall mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-related matters…' It seems to me that Tuvalu has ceded sovereign decision-making in exchange for migration rights. Perhaps that was a better deal than that offered by a previous Australian government that proposed Tuvalu exchange resource rights for migration rights. A Trumpian strategy to international diplomacy that precedes President Trump.

DFAT's fact sheet on the Union[28] describes 'Tuvaluan's cultural and natural heritage as a value embedded in the core of the partnership and, as a primary form of climate resilience-building measure,' and that Australia will maintain connections to Tuvaluan culture in Australia.' In fact, there is little about cultural preservation in the treaty. The parties recognise the desire of Tuvalu's people to continue to live in their territory where possible and Tuvalu's deep, ancestral connections to land and sea'. It also notes the possibility of recent technological developments to provide additional adaptation opportunities.

These are vague and non-specific platitudes. They could prompt Australia to assist Tuvaluan people here to maintain their cultural connection. Whether and how that is done is an open

[26] https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty
[27] Report 219, quoting Ms Powell, DFAT, *Committee Hansard*, Canberra 19 June 2024, p. 3
[28] Department of Foreign Affairs and Trade (DFAT), 'Australia-Tuvalu Falepili Union', https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union, accessed 03 December 2025.

question. Perhaps meaningful support will be provided for the maintenance of Tuvaluan and Nui language and to establish cultural centres as meeting places.

In theory, at least, it could address the conflicting rights highlighted by the Billy case. Australia committing itself to help Tuvalu stay on its territory, recognizes the desire of Tuvalu's people to continue to do so, while establishing its special human mobility pathway . Returning to the UN Declaration on Human Rights, is this the realization of cultural rights indispensable for their dignity?

Conclusion

My son in law has recently published an excellent book "Or Something Worse: Why we need to disrupt the climate transition.' I asked my 16 year old granddaughter to sum up the debates she heard at the various launch events she attended. This is what she said:

> 'I think the main message is how important it will be in the upcoming years to further fight for social justice because climate change will only worsen discrimination and prejudice.'

Pithy and astute, this message applies forcefully to cultural loss as well.

The AOs of the ICJ and the IACtHR provide the normative basis for climate justice. But the legal remedies are fragile and underdeveloped. Participatory justice mechanisms are required to give operational effect to the principles enunciated by these courts, including and led by the people who suffer the loss.

The Torres Strait and Northern Peninsula Area Climate Resilience Centre[29] might be a useful model. The Falepili Treaty could provide an umbrella for meaningful support for the people of Tuvalu. We live in timid times, though. We cannot conceptualise culture as exclusively spiritual . We need to bring a social justice lens to the response. We must enable and encourage greater ambition by our leaders and call on them to give meaningful shape to these principles, lest they remain hortatory statements creating expectations that we fail to meet.

[29] https://www.dcceew.gov.au/climate-change/policy/torres-strait-northern-peninsula-area-climate-resilience-centre