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Beyond Individuality: Balancing the Right to a Healthy Environment and Indigenous Rights in Renewable Energy Projects

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BEYOND INDIVIDUALITY: BALANCING THE RIGHT TO A HEALTHY ENVIRONMENT AND INDIGENOUS RIGHTS IN RENEWABLE ENERGY PROJECTS

*Nina Valentini**

Introduction

Transitioning from fossil to renewable energy sources has been a way for countries to not only meet their commitments under environmental and climate law but also contribute positively to a range of human rights affected by the advance of climate change, most notably, the right to a healthy environment.[1] Renewable energy, such as wind, solar or hydropower, however, does not only come with positive impacts. Due to their scale, renewable energy projects are both land and resource-intensive, using up to ten per cent more land than coal or oil projects.[2] Moreover, there is a 'notable overlap between land that is ripe for renewable energy generation and land that is held by Indigenous communities'.[3] This puts renewable energy projects at considerable risk of infringing local communities' land rights and principles of free, prior and informed consent. Already in 2011, the UN Special Rapporteur on Indigenous peoples warned that 'the implementation of natural resources extraction and other development projects on or near indigenous territories has become possibly […] the most pervasive source of the challenges to the full exercise of their rights'.[4] In fact, the Business and Human Rights Resource Centre has documented more than 200 allegations of adverse human rights impacts connected to renewable energy projects between 2010 and 2020, and only four of 16 examined

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[1] Steven Tully, 'The Human Right to Access Clean Energy' 3(2) Journal of Green Building 140, 140.

[2] Samantha Gross, 'Renewables, Land Use and Local Opposition in the United States' (Brookings 2020) <https://www.brookings.edu/wp-content/uploads/2020/01/FP_20200113_renewables_land_use_local_opposition_gross.pdf> accessed 3 April 2024, 1.

[3] Stephanie Williams, 'Understanding indigenous rights risks in renewables' (Schroders 2023), 1.

[4] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – Extractive industries operating within or near indigenous territories' (11 July 2011) UN Doc A/HRC/18/35, para 57.

companies in 2021 could show that they had (partial) policy commitments regarding Indigenous people's rights in place.[5]

On the one hand, States are obliged to fulfill their human rights obligations regarding climate change mitigation by increasing the availability of sustainably generated energy. On the other hand, they are obliged to respect, protect and fulfill international human rights law pertaining to Indigenous peoples, especially to their land rights and consultation processes. Both Indigenous rights and the right to a healthy environment are inherently collective in nature, distinguishing them from the traditional individual-centric nature of other human rights. Accordingly, this working paper investigates the following research question: *how does and how should international human rights law deal with conflict between two inherently collective sets of rights*?

To reach an answer, the paper first examines which principles of human rights law guide the balancing of competing human rights and interests and how adequate they are in balancing Indigenous rights with the right to a healthy environment. Concluding that current balancing principles are insufficient in the context of collective rights, it then outlines possible alternatives by considering sources outside the traditional international human rights law framework and existing case law. In this respect, the paper draws on the large body of theoretical scholarship on balancing rights and interests[6] and on the growing body of scholarship which assesses the impact of development projects on Indigenous rights.[7]

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[5] Business & Human Rights Resource Centre, 'Renewable Energy & Human Rights Benchmark' (Business & Human Rights Resource Centre 2021) <https://media.business-humanrights.org/media/documents/2021_Renewable_Energy_Benchmark_v5.pdf> accessed 17 January 2025, 4 and 14.

[6] See e.g. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943; Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans 2002); Jürgen Habermas, Between Facts and Norms (Polity Press 1996); Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 The Cambridge Law Journal 412.

[7] See e.g. Kinnari Bhatt, Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects (CUP 2020); Kamrul Hossain, 'The Realization of the Right to Environment and the Right to Development in respect to the Arctic Indigenous Peoples' (2011) 3(1) The Yearbook of Polar Law Online 129; David C. Baluarte, 'Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169' (2004) 4 Sustainable Dev L & Pol'y 9; Adem Kassie Abebe, 'Limitations to the Rights of Indigenous Peoples in Africa: A Model for Balancing National Interest in Development with the Rights of Indigenous Peoples?' (2012) 20(3) African Journal of International and Comparative Law 407; Karen E. Bravo, 'Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia' (1997) 30 Colum JL & Soc Probs 529.

The contribution of the paper to scholarship is twofold. Firstly, it makes a theoretical contribution to the debate about balancing human rights, since current principles of balancing in an individual-centric human rights framework neglect the collective dimensions of many human rights. In addition, its empirical contribution addresses the human rights impacts of large infrastructure and investment projects. These discussions usually consider the rights of Indigenous Peoples vis-à-vis the right to development of the State but neglect the environmental dimension and the consideration that a transition to renewable energy is unavoidable if humanity is to mitigate the impacts of climate change.

Considering renewable energy projects as both a vehicle for advancing the right to a healthy environment of current and future generations, but also as large infrastructure projects with the potential to create incursions on Indigenous peoples' rights allows a look at several aspects missing in existing scholarship. Firstly, it allows renewable energy to be considered in relation to the right to a healthy environment, which is underexplored in scholarship. Secondly, it allows for a broader perspective by considering not just the human rights at stake but also the legal implications of the construction of renewable energy projects for future generations and on public goods states are obliged to protect under international law.

As regards its methodology, the paper contains both legal doctrinal and normative elements. The first part is legal doctrinal but theoretical in nature and surveys the existing tools international human rights law offers for the balancing of competing interests as well as their underlying theoretical assumptions. This is necessary to nurture 'a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'.[8] The tools are first systematized and then analyzed to determine their fitness to deal with the topics under consideration.

The second part of this paper draws on theories of collective human rights and external norms from environmental law as a normative framework against which to assess international human rights law's ability to balance competing interests. Drawing conclusions as to where current approaches are lacking, this part then points to potential new balancing theories that could be better suited to evaluating competing interests in the area. The second part of this

[8] Terry Hutchinson, 'Doctrinal Research - Researching the Jury' in Dawn Watkins (ed), Research Methods in Law (2nd edn, Routledge 2017) 14.

paper therefore involves a more theoretical, policy-oriented approach, that, in line with a normative theoretical work, sets out standards for improvement of current human rights law.

As an academic work of limited scope, this paper necessarily encounters some limitations. Despite the consensus that private actors possess obligations to safeguard human rights,[9] the paper limits itself to a discussion of State responsibilities. This is to acknowledge that human rights law is still a largely state-centric endeavor in which so far, only States can be held accountable on an international level for violations of human rights. In the same regard, the focus on norms arising from international human rights law as well as environmental law is a conscious limitation. It enables the paper to draw on scholarship regarding the 'human rights turn' in climate change questions, where it has become increasingly common to address the impacts of climate change through a human rights framework.[10] As such, the paper draws on existing scholarship, but also sheds a critical light on the limitations of an approach to climate change that is based exclusively on human rights. Moreover, as it is the main point of the paper to examine the underlying principles of balancing and their applicability to a specific situation, case law is used to illustrate the broader picture, rather than providing an account of the specific practice of a specific legal system. For further research, however, such a perspective would be a useful avenue to expand on the findings. Lastly, the paper relies heavily on English-language literature which leads to the exclusion of certain scholarship and perspectives. Even though avenues for participation exist, Indigenous voices are often excluded from discussions on international law(making),[11] leading to many research outputs on Indigenous rights being published by non-Indigenous scholars. While this paper is no exception to that, it aims to shed light on this situation and hopes to contribute to discussions on how principles from Indigenous rights law can inform international law(making) on a more general scale.

The paper proceeds in two main parts. Firstly, the theoretical principles of balancing human rights will be outlined, and limitations of their applicability to collective human rights will be highlighted. The second part highlights how current principles of balancing could be adapted

[9] Human Rights Council, 'UN Guiding Principles on Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31/Annex I.
[10] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37; Elena Cima, 'The right to a healthy environment: Reconceptualizing human rights in the face of climate change' (2022) 31 Review of European, Comparative & International Environmental Law 38.
[11] Natalie Jones, 'Self-Determination and the Right of Peoples to Participate in International Law-Making' (2021) British Yearbook of International Law 1.

to better consider the specific characteristics of collective human rights in the case of renewable energy projects. The paper concludes by proposing a set of criteria that a new theory of balancing geared at the collective dimension of human rights could consider and sets out avenues for further research.

1. Theoretical Framework - Balancing Human Rights and Interests

According to Keller and Reto, '[b]alancing is the judicial practice of determining which of two or more conflicting rights, interests or values shall decide a case'.[12] Giovanella describes balancing as 'the method by which courts "weigh" conflicting interests and rights in order to find a stable solution'.[13] Implicit to these definitions are the assumptions that (1) there can be conflicts between different rights and interests in a certain situation, that (2) in some cases, it may not be possible to realize both of them (to the same extent) and (3) that not only codified human rights, but also the public interest play a role in the balancing process.

In a first step, this working paper will systematize the underlying principles of human rights law that guide the balancing of rights and/or rights and interests. These relate to the *jus cogens* and absolute nature of some human rights, as well as the principles of non-discrimination and proportionality. It is concluded that the existing principles of balancing are first and foremost focused on balancing the rights of *individuals* against each other, neglecting that many human rights also contain a collective dimension. Lastly, therefore, with a view to the research question, the section outlines some alternative principles, such as the principle of free, prior and informed consent (FPIC) and the interests of future generations, as ways of taking into account the collective dimensions of human rights during balancing processes.

1.1. Principles of Balancing Human Rights

Considerations of competing interests form the core of almost every human rights dispute.[14] Yet, courts are notoriously silent about which principles they employ to balance competing rights against each other. Building on Keller and Reto,[15] this section therefore examines some

[12] Helen Keller and Walther Reto, 'Balancing Test: United Nations Human Rights Bodies' in Helen Keller and Walther Reto (eds), Max Planck Encyclopedia of International Procedural Law (OUP 2018) <http://opil.ouplaw.com/view/10.1093/law-mpeipro/e3422.013.3422/law-mpeipro-e3422> accessed 9 April 2024, para 2.
[13] Federica Giovanella, Copyright and Information Privacy (Edward Elgar Publishing 2017) <https://www.elgaronline.com/monochap/9781785369353/08_chapter1.xhtml> accessed 9 April 2024, 6.
[14] Keller and Reto (n 12) paras 13 and 67.
[15] ibid, para 2.

general principles of international human rights law which can be used to balance competing considerations and assesses their ability to deal with the collective human rights under consideration in this paper.

1.1.1. *Jus cogens* and absolute human rights

Some human rights have *jus cogens* status, meaning that according to the hierarchy of sources of international law they take priority in a balancing exercise by default.[16] The prohibition of torture and other forms of cruel, inhuman or degrading treatment qualifies as a *jus cogens* norm. Absolute human rights cannot be limited, even in situations of emergency, and are thus important to take into account in the context of balancing. Article 4(2) ICCPR lists the right to life, the prohibition of torture or cruel, inhuman or degrading treatment, the prohibition of slavery and servitude, liberty of person, prohibition of imprisonment except for after a criminal offense, the right to recognition before the law and the freedom of thought, conscience and religion as absolute human rights. In relation to rights from which derogation is possible, Article 4(1) ICCPR specifies that a derogation is not justified if it results in the unlawful discrimination of a group. In its General Comment No. 29, the Human Rights Committee additionally set out that rights of persons belonging to minorities contain non-derogable elements, such as the prohibition on discrimination.[17]

1.1.2. Non-discrimination

Non-discrimination is a fundamental principle of human rights law.[18] Discrimination generally refers to

> 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.[19]

Hereby, non-discrimination based on racial or ethnic origin has a particularly strong weight under international law, with prohibition of racial discrimination having attained *jus cogens*

[16] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491, 495.
[17] UN Human Rights Committee, 'CCPR General Comment No. 29: Article 4: Derogations in a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 13c.
[18] OHCHR, 'CCPR General Comment No. 18: Non-discrimination' (10 November 1989), para 1.
[19] ibid, para 7.

status.[20]

It is particularly important to consider the non-discrimination principle when discussing the human rights implications of climate change and renewable energy projects because groups who contributed least to climate change are often the ones most affected by its consequences. In addition, those groups are often the victims of long-standing structural discrimination which may prevent them from having access to the same institutions and remedies as others. Therefore, it is important to note that complying with the principle of non-discrimination sometimes includes affirmative action benefiting a particular group.[21] Accordingly, Celorio highlights that Regional Human Rights Courts increasingly adopt a vulnerability approach which emphasizes and allows consideration of the fact that some individuals suffer more discrimination than others.[22] Nevertheless, in practice, non-discrimination always involves a balancing consideration.[23] As such, 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate'.[24]

States are generally under an obligation to respect the principle of non-discrimination, 'particularly regarding equal access to the law. This is relevant, for instance, to clean development mechanisms, common but differentiated responsibility and indigenous peoples, who may be disproportionately affected by climate change'.[25] The UN High Commissioner for Human Rights (OHCHR) has emphasized that States are under an obligation to address structural inequalities that prevent affected people from participating in the decision-making processes that relate to climate mitigation or adaptation measures that directly affect them.[26]

While specific international human rights treaties outline the categories based on which a

[20] UNGA (Human Rights Council), 'Report of the Special Rapporteur on the rights of indigenous peoples' (11 August 2016) UN Doc A/HRC/33/42, para 13.6
[21] OHCHR, 'CCPR General Comment No. 18' (n 18) paras 8 and 10. See also also Mattias Åhrén, 'International Human Rights Law Relevant to Natural Resource Extraction in Indigenous Territories – An Overview' (2014) 1 Nordic Environmental Law Journal 21 <https://nordiskmiljoratt.se/onewebmedia/Ahren%20NMT%202014-1.pdf> accessed 19 May 2024, 27; see also Thlimmenos v Greece App no 34369/97 (ECtHR, 6 April 2000).
[22] Rosa Celorio, 'Discrimination and the Regional Human Rights Protection Systems: The Enigma of Effectiveness' (2019) 40 U Pa J Int'l L 781.
[23] Keller and Reto (n 12) para 27.
[24] OHCHR, 'CCPR General Comment No. 18' (n 18) para 13.
[25] Bridget Lewis, 'Balancing Human Rights in Climate Policies' in Ottavio Quirico and Mouloud Boumghar (eds), Climate change and human rights: An international and comparative law perspective (Routledge 2016) 62.
[26] OHCHR, 'Renewable Energy and the Right to Development: Realizing Human Rights for Sustainable Development' (OHCHR 2022) <https://www.ohchr.org/sites/default/files/2022-05/KMEnergy-EN.pdf> accessed 29 February 2024, 4.

person cannot be discriminated against, they lack a fundamentally collective criterion that is hard to reconcile with the nature of climate change. Therefore, some scholars have proposed to apply the principle of non-discrimination also cross-generationally, meaning that the point in history when someone is born could also constitute a ground for discrimination.[27]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) offers some guidance on how to interpret the principle of non-discrimination regarding Indigenous Peoples, for example that non-discrimination must be interpreted in context with the collective rights Indigenous Peoples possess.[28] However, some authors argue that current principles in international human rights law may not be adequate to deal with Indigenous Peoples, whose traditional ownership and cultural rights date back way beyond the first human rights were codified in law.[29] Examining the Sámi's right to land and water, Lundmark therefore argues that Courts should also take into account the historical principles which have, among other things, led to the fact that '[t]he Sámi's collective right to survive by continuing their traditional way of life prevailed over equal treatment with other citizens'.[30]

As such, non-discrimination is potentially better suited to address collective rights, as it recognizes particular identity markers that set different groups apart from each other. Nevertheless, in the current human rights system, the enforcement of non-discrimination remains individual-centric based on standing rules which usually only allow affected persons to claim an infringement of their rights (with the exception of the African Court of Human and Peoples Rights which allows public interest litigation[31]).

1.1.3. Proportionality

When two rights are neither *jus cogens* nor absolute, or when a human right needs to be weighed against a public interest, proportionality is the most common principle underlying the balancing exercise.[32] The typical proportionality test involves a three-step process. Firstly, the measure restricting a right must be suitable. Secondly, it must be necessary and, lastly, it

[27] Christoph Herrler, 'Human Rights and Climate Risks for Future Generations: How Moral Obligations and the Non-Discrimination Principle Can Be Applied' (2022) 8 Intergenerational Justice Review 41.
[28] UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (2 October 2007) UN Doc A/RES/61/295, Preamble and art 2 and 9 [UNDRIP].
[29] Jan Mikael Lundmark, 'It is a Matter of Principle that the Indigenous Sámi People Lack Legal Protection' (2020) 1 European Human Rights Law Review 1, 3.
[30] ibid.
[31] Protocol to the African Charter of Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) art 5 and 34(6).
[32] Giovanella (n 13) 21.

must be proportional in a strict sense, i.e., making sure that the benefits of the restriction do not outweigh the costs. The last step of a proportionality test is where the actual act of balancing occurs.[33] Restrictions on human rights that do not enjoy the status of *jus cogens* or absolute rights are generally permitted as long as they are legal, temporary and necessary to achieve a legitimate purpose (sometimes with the added requirement of 'in a democratic society'). Generally, the achievement of national security, public health or morals and the protection of rights of others count as legitimate purposes for the restriction of human rights.[34] In order to find a balance, Alexy adopts a sliding scale approach which allows measuring the intensity of interference with one right against the importance of satisfying the underlying principle of the competing consideration.[35]

The proposition that public interest justifications should have the same weight in a balancing exercise as a human right codified in treaties is criticized by some scholars. Meyerson argues that instead of putting the two on equal footing, codified rights should *a priori* take precedence over public interests, and should only be deviated from when 'strong' reasons exist for a Court to decide otherwise.[36] This so-called priority-to-rights approach is applied by among others, the ECtHR, who then assesses the extent to which an existing right can be limited in the name of the public interest through proportionality.[37] As such, the codification of the right to a healthy environment as a substantive and procedural human right would be fundamental to a successful balancing exercise.[38] This way of viewing the balancing exercise once again leads to strong bias in favor of first and second generation human rights, while collective human rights or those emergent human rights like the right to a healthy environment would need to be firmly established as human rights in order to be prioritized in balancing considerations.

This discussion of human rights law principles points to important considerations regarding their ability to be applied to collective and/or third generation rights. Firstly, current theories of balancing are based on an individualistic assessment of values and preferences, making

[33] ibid, 17-18.
[34] UN Commission on Human Rights, 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) UN Doc E/CN.4/1985/4 [Siracusa Principles].
[35] Alexy (n 6) 102.
[36] Denise Meyerson, 'WHY COURTS SHOULD NOT BALANCE RIGHTS AGAINST THE PUBLIC INTEREST' (2007) 31 Melbourne University Law Review 873, 878.
[37] Emmanuelle Bribosia and Isabelle Rorive, In search of a balance between the right to equality and other fundamental rights (European Commission 2010), 20.
[38] Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stan J Int'l L 103, 111.

them difficult to apply to rights which are inherently geared towards groups of people. Secondly, they are present-oriented and disadvantage consideration of future generations—something that is essential to consider when discussing both the survival of Indigenous Peoples as well as the environment. The principle of non-discrimination offers the greatest potential to take collective dimensions of human rights into account, however, strict standing rules complicate its enforcement.

Additionally, while international human rights law has rather comprehensively addressed legitimate restrictions on first- and second-generation human rights, the issue is more complicated when it comes to third-generation human rights. It is, for example, still disputed whether climate change and its consequences can amount to a legitimate ground to restrict human rights.[64] The next subsection will therefore outline some further difficulties in balancing Indigenous and environmental rights as collective rights, as well as possible principles to take into account in the balancing exercise.

1.2. Balancing Third Generation and Emerging Human Rights

Human rights are often classified into three distinct generations.[39] Based on Karel Vašák, the first generation of human rights focuses on individual, liberty-centered rights as e.g. enshrined in the ICCPR, which the state has a negative obligation to respect.[40] Second-generation rights concern equality rights as e.g. enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the state has a positive obligation to respect and fulfill.[41] Finally, third-generation rights are 'solidarity rights,' such as the right to self-determination, economic and social development, a healthy environment, natural resources, and participation in cultural heritage.[42] The right to a healthy environment at issue when renewable energy projects are constructed is thus clearly a third generation right.

Indigenous rights are slightly more complicated to neatly fit into the three-generation paradigm. For example, the Indigenous right to land is generally considered to be a property right under

[39] Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Human Rights Review 423, 424; some scholars also address a 'fourth' generation of human rights connected to the digital revolution, see e.g. Manuel Jesús López Baroni, 'Fourth Generation Human Rights in View of the Fourth Industrial Revolution' (2024) 9 Philosophies 39.
[40] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR].
[41] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [ICESCR].
[42] Karel Vašák, 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (1977) 11 UNESCO Courier 29, 29.

the first generation of human rights, whereas the right to self-determination falls under the third generation. This paper therefore concerns the balancing of two (or more) third generation rights, as well as the balancing of third generation rights with Indigenous rights, which can fall in either of the three categories.[43] The situation is further complicated by the fact that neither ILO Convention 169 nor UNDRIP contain explicit limitation clauses: 'There is therefore no clear provision that governs the extent to which the rights of indigenous peoples may be limited and the standards that will govern such limitation'.[44] As such, when trying to balance Indigenous rights against the right to a healthy environment, courts need to resort to general principles of balancing.

What distinguishes third generation from other human rights is their collective nature. In contrast to first- and second- generation rights, the State is not the only guarantor of these rights. Rather, 'they can be realized only through the concerted effort of all actors of the social scene: the individual, the State, public and private bodies and the international community'.[45] This fact makes them much more difficult to enforce within the current individual-centric international human rights system.

Some scholars such as Agius also distinguish between group rights, pertaining to 'a collectivity of persons which has special and distinct characteristics and/or which finds itself in specific situations or particular conditions [based on] political, economic or cultural factors' and rights of mankind, pertaining to humanity as a whole.[46] Rights of mankind are even broader than group rights since their 'distinctive feature is the fact that solidarity among mankind as a whole is a prerequisite to their realization'.[47] The inclusion of mankind as a whole as a subject of human rights opens the door for future generations to be included in the human rights definition. According to Agius, the rights of mankind include the right to development, the right to be different, the right to peace, the right to a healthy and balanced environment, and the right to benefit from the common heritage of mankind.[48]

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[43] Claire Charters, 'Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-Making' (2017) 2017 NZ L Rev 553.
[44] Abebe (n 7) 414.
[45] Malgosia Fitzmaurice and Jill Marshall, 'The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases' (2007) 76 Nordic Journal of Int'l Law 103, 105.
[46] Emmanuel Agius, From Individual to Collective Rights, To The Rights Of Mankind: The Historical Evolution of the Subject of Human Rights' (1988) 45, 50.
[47] ibid, 57.
[48] ibid, 58.

It is important to note that different generations of human rights can be restricted in different ways. While restrictions on first generation human rights are in principle narrow, restrictions on second generation rights are allowed to be much broader. The ICCPR generally stipulates that human rights (except when they are absolute) can be restricted based on national security, public order (*ordre public*), public health or morals and to safeguard the rights and freedom of others.[49] Restrictions on the rights enshrined in the ICESCR, on the other hand, can be much broader, in that they can be for the purpose of 'promoting the general welfare in a democratic society' to the extent that this is 'compatible with the nature of Covenant rights'.[50] Third-generation rights enjoy even less guidance on how they can be restricted, given that they are often only codified in soft law. Accordingly, the existing literature tends to focus on how third-generation rights can be balanced against first- and second-generation rights, thereby suggesting that third-generation human rights pose a threat or limitation to existing human rights.

The fact that they are geared to a collectivity (be it an identifiable group or mankind as a whole) thus places third generation solidarity rights in a special position in the balancing exercise. Added to the fact that international human rights law itself provides next to no guidance on how they can be restricted, applying the abovementioned principles to third-generation rights is complicated by the fact that the interests of a group can be heterogeneous and that especially marginalized groups are often in a special position of vulnerability which should be taken into account when adjudicating questions regarding their human rights.

Nevertheless, some principles in international law exist that allow for the consideration of more collective aspects of human rights instead of overly emphasizing the individual. Three of these are especially relevant to Indigenous rights and the right to a healthy environment – free, prior and informed consent, the interests of future generations and human rights as public goods – and will be explored in the next sections.

1.2.1. Free, Prior and Informed Consent

Free, prior and informed consent (FPIC) constitutes one of the most fundamental principles of Indigenous human rights. While also categorized as a procedural human right, FPIC has been advanced as a general legal principle that can guide the balancing of human rights when

[49] UN Human Rights Committee, 'CCPR General Comment No. 29' (n 17) para 13c.
[50] ICESCR (n 41) art 4(1).

Indigenous Peoples are involved. The exact definition and scope of free, prior and informed consent is debated. However, the UN Permanent Forum on Indigenous Issues has stated that

> 'The common understanding of Free Prior and Informed Consent is that consent should be freely given without coercion, intimidation or manipulation (Free); sought sufficiently in advance of final authorization and implementation of activities (Prior); and founded upon an understanding of the full range of issues entailed by the activity or decision in question (Informed)'.[51]

As such, FPIC needs to be taken into account when deciding whether the limitation of a right is proportional. For example, when discussing the relation between Indigenous property rights over land they use or inhabit and extractive industries, the Special Rapporteur on Indigenous Peoples has stated that 'the proportionality criterion will generally be difficult to meet for extractive industries that are carried out within the territories of indigenous peoples without their consent'.[52]

FPIC as derived from various sources such as the UNDRIP and UN Human Rights Body General Comments and Guidelines yields a situation where States need to adopt 'a precautionary approach that should guide decision making affecting rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples'.[53]

Even though consent in its literal meaning implies the right to also withhold this consent, scholars have shown that in practice, FPIC is often operationalized as a form of extensive consultation, rather than actually meaning 'consent' in the sense of a veto right.[54] However, international law requires proper consent in specific circumstances, e.g. the relocation of Indigenous Peoples, when toxic waste is involved and whenever a development project is 'large scale'.[55] However, missing definitions of both what constitutes a 'large-scale development project' and what exactly is meant by 'good faith consultations' make the processes untransparent.[56]

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[51] UN Permanent Forum on Indigenous Issues, 'Analysis prepared by the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Economic and Social Development, Environment and Free, Prior and Informed Consent' UN Doc E/C.19/2011/13 (10 March 2011) para 29.
[52] Åhrén (n 21) 32.
[53] Jona Razzaque, 'A Stock-Taking of FPIC Standards in International Environmental Law' in Stephen J. Turner et al. (eds) Environmental Rights – The Development of Standards (CUP 2019).
[54] UN Human Rights Committee, Poma Poma v Peru (27 March 2009) UN Doc CCPR/C/95/D/1457/2006.
[55] International Labour Organisation, Convention (No. 169) concerning indigenous and tribal people in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 [ILO Convention 169] art 6(2) and 16; UNDRIP (n 27) art 10, 29 (2) and 32 (2).
[56] Razzaque (n 53) 203.

FPIC allows some (albeit narrow) exceptions. 'For example, consent may not be required if States impose limitations on indigenous peoples' substantive rights which are permissible by international human rights law'.[57] In general, however, there is a 'general duty to consult,' even when explicit consent is not required. As a balancing tool, therefore, FPIC is particularly strong in favor of Indigenous peoples' rights when consent in the sense of a veto power is required, however, it can be tilted in favor of the State or other actors when 'only' effective consultation is required.[58]

1.2.2. The Interests of Future Generations

The question of whether human rights can apply to future generations has not been definitively answered in the affirmative. However, especially in the area of climate change, where the future of humanity and mankind is concerned, arguments for an obligation of present generations to protect the rights of future generations are increasingly gaining strength. Accordingly, the principle has been discussed in national and regional case law.

The biggest challenge when taking future generations into account is the fact that future human beings are in fact non-existing in the present. The phrase that human rights are bestowed upon a person upon birth has led scholars to interpret that present generations do not owe obligations to future generations.[59] In addition, people in the present cannot know the interests of future generations and, accordingly, cannot know whether current generations are acting in favor or against the interests of future generations. Moreover, the actions of the present will also determine the kind of people that exist in the future, so perhaps a change in the present would lead to the fact that future generations would no longer be negatively impacted.[60]

According to Donelly, on the other hand, all human rights claims have some sort of future-orientedness since their principal aim is to change existing legal institutions and practices.[61] Elliot argues that actions in the present impact the interests of future generations and, accordingly, their ability to enjoy their human rights.[62] Furthermore, it can generally be

[57] ibid, 201.
[58] Abebe (n 7) 419.
[59] Alex Gosseries, 'On Future Generations' Future Rights' (2008) 16 Journal of Political Philosophy 446, 456.
[60] Bridget Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice' (2016) 34(3) Netherlands Quarterly of Human Rights 206, 214. <https://journals.sagepub.com/doi/epdf/10.1177/016934411603400303> accessed 29 April 2024.
[61] Jack Donelly, Universal Human Rights in Theory and Practice (1989), 14.
[62] Robert Elliot, 'The Rights of Future People' (1989) 6 Journal of Applied Philosophy 159, 162.

assumed that future generations' interests will be similar to those of present generations, particularly regarding having a habitable planet to live on.[63] Agius argues that especially collective rights documents increasingly refer to 'mankind' as interchangeable with the phrase 'present and future generations'. He sees this especially in environmental law, such as the Stockholm Declaration, as evidence that human rights need to be granted to all persons, irrespective of whether they are current or future members of humanity.[64]

However, even if it is assumed that present generations owe future generations human rights obligations, the question of whose rights should be prioritized in case of a conflict remains. Lewis argues that '[i]f one accepts the theoretical proposition […] that members of future generations possess the same interests in health, subsistence and a decent standard of living as current generations, then there is no morally significant reason to discount the interests of future generations.[65] Lewis advocates for relying on the human rights principles of tripartite obligation (respect, protect, fulfill) and the principle of progressive realization of human rights, and points to Lawrence's structural reform principle, according to which policymakers must not 'delay structural reforms necessary to ensure the protection of the long-term interests of future generations, while avoiding harm to the core rights of current generations'.[66] Lewis also argues that

> 'The interests of future generations will not be fully realized while poverty and disadvantage continue to affect contemporary generations and, in many situations, the rights of present generations will take priority in circumstances where resources are limited. This need to attend to immediate, fundamental needs before addressing the rights of future generations inevitably limits the effectiveness of human rights law in correcting the intergenerational injustice which climate change represents'.[67]

Therefore, rather than seeing future and present generations' rights as conflicting, it is useful to adopt Hiskes' view of mutual reciprocity across generations. He argues that 'even if the environmental rights of future generations infringe on some of one's actions now and the rights that attend them–for instance one's right to make money in ways that cause environmental degradation–they nevertheless strengthen one's right to a safe environment by offering additional arguments for promoting environmentally friendly policies'.[68] The principle of

[63] Lewis (n 60) 214.
[64] Agius (n 46) 45, 59 and 62-67.
[65] Lewis (n 60) 221.
[66] ibid.
[67] ibid, 225.
[68] Richard P. Hiskes, 'The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice' (2005) 27(4) Human Rights Quarterly 1346, 1356.

keeping the interests of future generations in mind when balancing human rights is therefore an important step towards a more holistic and less individualistic human rights framework.

1.2.3. Human Rights and Global Public Goods

Lastly, to remedy some of the inadequacies inherent in international human rights as individually enforceable rights, it is useful to consider the concept of public goods, which are protected as interests that, according to most balancing theories, provide a legitimate justification for the limitation of certain human rights.

Public goods are usually characterized in an economic sense through their non-exclusive character: In principle, they are available to all. Typical examples for public goods are clean air, the environment or human rights themselves.

Considering an issue as a public good allows for a scenario in which that good can be protected through human rights law mechanism without necessarily having to be a human right enshrined in a treaty. This applies especially when that same good is protected under other instruments in international law, such as public international law or environmental law, which stresses its preservation to be in the public interest. Francioni argues that a common goods perspective can also help international human rights law expand beyond its limited temporal focus as it allows to take an intergenerational justice perspective into account.[69]

Summarizing, the principle of free, prior and informed consent as a way of safeguarding the participation of Indigenous peoples is fundamental to a balancing exercise which involves the environment and Indigenous peoples. Further, taking the interest of future generations into account and adopting an intergenerational justice perspective based on seeing the environment and/or Indigenous collective rights as public goods could help human rights law better reflect the collective nature of current challenges.

2. Beyond Individuality - How to achieve balance in a collective scenario

The previous Part outlined that current approaches to balancing human rights tend to disregard the collective dimension of human rights and public interests, such as Indigenous rights and the strife for a healthy environment, by focusing on narrow standing rules,

[69] Franceso Francioni, 'International Common Goods: An Epilogue' in Federico Lenzerini and Ana Filipa Vrdoljak (eds) International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature (Hart Publishing 2005) 446.

prioritizing established first- and second-generation human rights over solidarity rights, and prioritizing the individual over the collective interest.

2.1. Adapting existing balancing theories: FPIC and Indigenous land rights as minimum standards

This section argues that FPIC, especially as it relates to the inviolability of Indigenous land rights, should be seen as a minimum standard when considering a balancing exercise in which these rights are implicated. However, it is crucial that consideration does not stop at the simple question of whether FPIC and land rights have been violated. Instead, they must be taken into account together with other principles of human rights law to form a holistic assessment of a given situation. Indigenous land rights must be considered as part of a much broader cultural and spiritual framework, and Indigenous people's right to a healthy environment must be taken into account just as much as considerations of the right to a healthy environment for other human beings and humankind as a whole.

2.1.1. Beyond *jus cogens*

Some aspects of Indigenous rights have a *jus cogens* character. These include their right to self-determination and the state obligation not to discriminate against Indigenous Peoples based on their race.[70] However, as established in the previous part, the principle of FPIC, especially when the disposal of toxic waste on Indigenous land, the relocation of Indigenous peoples or large infrastructure projects are in question, is particularly suited for the balancing exercise and can be relied on even in the absence of *jus cogens* norms.

The UN Special Rapporteur on the Rights of Indigenous Peoples has defined a 'major development project' as:

> 'a process of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining and extraction plants, tourist developments, port facilities, military bases and similar

[70] International Law Commission, Peremptory norms of general international law (jus cogens) UN Doc A/74/10, Conclusion 23; Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge: Cambridge University Press, 1995) 42–43; Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11(4) Human Rights Law Review 609, 609.

undertakings'.[71]

Based on this definition, the energy projects under discussion in this paper clearly qualify as large infrastructure projects and therefore necessitate FPIC from the Indigenous groups they affect. When it comes to the practical application of FPIC, the Special Rapporteur for Indigenous Peoples has stated that FPIC must always start from an analysis of the specific substantive rights at stake in a development or investment project.[72] Therefore, a proper assessment of which substantive Indigenous rights can potentially be affected by a renewable energy project must be carried out as part of the obligation to safeguard FPIC.

In practice, this means that where the Indigenous rights of self-determination, non-discrimination or FPIC are at stake, courts and human rights bodies should follow the priority approach that *jus cogens* obligations impose on them. For example, this would have potentially led to a different analysis for a case concerning the construction of a wind farm on Sámi territory in Sweden back in 2011. In this case, the Human Rights Committee sided with Sweden, arguing that the project only minimally infringed on Indigenous people's land rights and that the affected communities had been sufficiently consulted before permits for the wind park were issued.[73] If the infringement of Indigenous land rights, however, rather than being in principle permissible, is to be considered as in principle impermissible, this would pose an obligation on states to do everything in their power to avoid causing harm. It would also contribute to shifting the FPIC obligation from a mere 'box-ticking exercise' to a genuine consultation process.[74]

A situation of balancing that does consider FPIC as a basic norm can be found in the *Unión Hidalgo v Mexico* cases. In 2017, the Mexican government granted licenses to a subsidiary of Electricité de France to build a wind farm on the territory of the Union Hidalgo Indigenous people in Oaxaca, Mexico. In the same year, local community members filed an amparo writ to demand access to information, which was authorized, and a consultation process was initiated in 2018. However, a tribunal found that the process was inadequate, violating both national

[71] ECOSOC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission on Human Rights resolution 2002/65' (5 March 2003) UN Doc E/CN.4/2003/90/Add.3, para 2.
[72] UNGA (Human Rights Council), Rights of Indigenous peoples – Report of the Special Rapporteur on the rights of indigenous peoples (18 June 2020) UN Doc A/HRC/45/34, para 49.
[73] UN Human Rights Committee, Ilmari Länsman et al. v. Finland (8 November 1994) UN Doc CCPR/C/52/D/511/1992, para 9.6.
[74] Nathan Yaffe, 'Indigenous Consent: A self-determination perspective' (2018) 19(2) Melbourne Journal of International Law 704, 704.

law as well as ILO Convention 169.[75] Similarly, in a case concerning the Munduruku Indigenous people in Brazil affected by the São Luiz do Tapajós dam project, the Brazilian Ministry of the Environment suspended licenses for the project following a notification by the UN Special Rapporteur on indigenous peoples about the 'absence of good faith consultations to obtain their free, prior and informed consent, the failure to demarcate indigenous lands affected by the project, and the inadequate environmental and social impact assessments after political decisions in regard to the dam had been taken'.[76]

What these cases have in common is that FPIC pertaining to infringements of Indigenous land rights is considered as a minimum standard to be upheld by States and companies to not infringe Indigenous human rights. This aligns with international law which envisions a customary international law dimension for FPIC in the case of relocation, and an overall consultation duty when rights are potentially adversely affected. As such, Indigenous rights are clearly favored over competing claims. However, what is striking is that in almost all cases, the lawsuits were decided when the construction of the projects was already complete; Indigenous rights had already been irreversibly infringed upon. The Fosen wind park in Norway, for example, was allowed to continue operating while Norway's Ministry of Energy decided on concrete next steps.[77] Taking into consideration a more future-oriented perspective could lead to earlier litigation of potential human rights impacts.

2.1.2. Non-discrimination

The obligation not to discriminate based on race is a *jus cogens* obligation under international law.[78] Especially the participation of Indigenous groups in decision-making processes therefore must be governed by the principle of non-discrimination. Given the historical injustices excluding Indigenous groups from many decision-making procedures and removing their access to institutions, especially the right to exercise judicial remedy needs protection under international human rights law.[79]

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[75] Armelle Gouritin, Extractivism and renewable energies: human rights violations in the context of socio-environmental conflicts (Heinrich Böll Stiftung 2017), 16-18.
[76] UNGA (Human Rights Council), Rights of Indigenous peoples – Report of the Special Rapporteur on the rights of indigenous peoples (18 June 2020) UN Doc A/HRC/45/34, para 30.
[77] Carola Lingaas, 'Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project (Kenya) Cases' (Opinio Juris, 15 December 2021) <https://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases/> accessed 16 May 2024.
[78] UNGA (Human Rights Council) (n 20) para 13.
[79] Anni Bangiev and Lucy Claridge, The Right to Remedy for Indigenous Peoples in Principle and in Practice (Forest Peoples Programme 2021) 2

Applying a collective non-discrimination perspective that focuses on the status of Indigenous peoples as vulnerable groups in international human rights law could be a step towards greater recognition of collective elements in IHRL. As such, for example, the African Commission on Human Rights (ACHPR) declared that the African Convention on Human and Peoples Rights applies to Indigenous peoples despite the fact that the Convention does not explicitly refer to Indigenous peoples.[80]

However, the right to a healthy environment also entails a non-discrimination obligation. This concerns especially its extraterritorial application, given that GHG emissions originating in one State can cause damage well beyond the State's borders. Coupled with the principle of vulnerability, an expansive reading of non-discrimination could therefore increase the chances of climate cases appearing before courts or human rights bodies and would do justice to the transnational aspect of renewable energy projects.

2.1.3. Proportionality

Because Indigenous rights to FPIC and land rights must be especially protected under IHRL, the proportionality requirement must be adapted in this light. Accordingly, the ACHPR emphasized in *Endorois* that the proportionality threshold with regards to Indigenous rights is stricter than when discussing another population group, especially when it concerns the Indigenous ownership of land as opposed to individual property rights.[81] Indeed, Abebe argues that '[a]pplying a higher threshold for the limitation of the rights of indigenous peoples appears to consider the middle ground between the particular vulnerabilities of indigenous peoples and the rights of states to engage in development activities'.[82] Similarly, a Kenyan Court ruled in the case of a wind farm being constructed on Indigenous territory that '"[n]o amount of public interest or public good (…) can sanitize illegality, unconstitutionality and unlawfulness", if the clean energy source was constructed on faulty legal grounds.'[83]

Accordingly, the requirement of proportionality warrants a revisiting of the debate whether

<https://www.forestpeoples.org/sites/default/files/documents/The%20Right%20to%20Remedy%20Brief%20EN G%20v4.pdf> accessed 7 June 2024.

[80] AComHPR, Advisory opinion of the African Commission on Human and People's Rights on the United Nations Declaration on the Rights of Indigenous Peoples / adopted by the African Commission on Human and People's Rights at its 41st ordinary session held in May 2007 in Accra, Ghana (4 August 2009) UN Doc A/HRC/EMRIP/2009/CRP.2.

[81] AComHPR, Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council vs. Kenya (2003) Case No 276/2003, paras 211-13.

[82] Abebe (n 7) 420.

[83] Lingaas (n 77).

only human rights on an equal level can be balanced against each other or whether the same weight should be accorded to public interests such as a healthy environment as a public good. While it is helpful for the codification of the right to a healthy environment that it is widely enshrined in national constitutions and has now been recognized by the UN, a relative lack of jurisprudence—especially compared to cases involving Indigenous rights—leaves significant uncertainty around its practical application.

Nonetheless, treating the right to a healthy environment conceptually as a human right rather than a public good has the advantage of elevating it to the same status as other human rights: As Shelton emphasizes when addressing the potential conflicts between human rights law and environmental interests:

> 'the essential concern of human rights law is to protect existing individuals within a given society, while the purpose of environmental law is to sustain life globally by balancing the needs and capacities of the present with those of the future. Therefore, protection of nature at time may conflict with the preservation of individual rights. This problem cannot be avoided by developing a right to environment, but developing such a right would place environmental protection on an equal level with other human rights for balancing purposes, rather than subordinating it to human rights, such as the right to property'.[84]

However, regardless of its status as a human right, the protection of a healthy environment is a public interest that needs to be safeguarded by governments. Firstly, this opens the door to enforcement through non-judicial means, such as national commissions that supervise the impact of state actions on the environment and/or on future generations.[85] Secondly, it allows principles from other branches of international law, most notably international environmental law, to enter the human rights discourse.

International conventions such as the Paris Agreement, the 1998 Aarhus Convention on procedural rights in connection to the environment, or the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context contains obligations that closely relate to human rights, emphasizing the overlap and interrelatedness of both areas of law.[86] They also contain core principles of international environmental law such as the polluter

[84] Shelton (n 38) 110.
[85] Lewis (n 60) 221-224.
[86] UNFCCC, Decision 1/CP.21 Adoption of the Paris Agreement (29 January 2016) United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, Preamble; Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447; Convention on Environmental Impact Assessment in Transboundary Context (adopted 25 February 1991; entry

pays principle or the principle of common but differentiated responsibilities, according to which the (financial) obligations to mitigate climate change vary depending on a county's capabilities and historical responsibilities contributing to GHG emissions. Another principle vital to environmental law and to renewable energy projects constructed on Indigenous lands is that of benefit-sharing. Originating from the law on biodiversity, benefit-sharing means that 'benefits arising from the utilization of genetic resources that are held by indigenous and local communities [...] are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms'.[87] According to this principle, local communities are therefore entitled to a 'piece of the cake' whenever large development projects are constructed in their area even after FPIC has been fulfilled.[88]

Alternatively, in legal systems such as the European Convention of Human Rights that do not include a self-standing right to a healthy environment, claimants could invoke the effects of renewable energy projects on recognized human rights, such as the rights to life, health, food, water, housing or self-determination.[89]

2.2. The interest of future generations

The interests of future generations are not only an important principle to take into account when balancing rights concerned with the survival of Indigenous peoples and/or the environment but can also constitute a public good by themselves. Their special and contested status in IHRL, however, makes some further exploration necessary.

The concept of the interest of future generations is closely linked to the principle of intergenerational equity. According to Brown Weiss, intergenerational equity can be achieved by requiring that future generations have comparable options in terms of which natural resources to use to satisfy their needs , preserving the quality of these resources, and ensuring non-discriminatory access.[90] While the right to a healthy environment is clearly

into force 10 September 1997) 1989 UNTS 309.

[87] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) 3008 UNTS 3, article 5(2).

[88] Christopher Schulz and Jamie Skinner, 'Hydropower benefit-sharing and resettlement: A conceptual review' (2022) 83 Energy Research & Social Science 1.

[89] UNGA, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (24 December 2012) UN Doc A/HRC/22/43, para 19.

[90] Edith Brown Weiss, 'Climate Change, Intergenerational Equity and International Law' (2008) 9 Vt. J. Envtl. L.

future-oriented as established in Chapter 2(b)(iii), Indigenous rights also contain an intertemporal dimension. Indigenous Peoples' rights to land ownership and culture include an intergenerational dimension, as, for example, the intergenerational aspect of the spiritual and political connection between land and Indigenous Peoples is 'crucial to indigenous peoples' identity, survival, and cultural viability'.[91] Similarly, Lundmark argues that historically, indigenous property rights, especially for the Sámi, were established with the goal of ensuring the *future* survival of Indigenous populations.[92] The Indigenous right to culture contains a future component as Article 29 UNDRIP also protects the future exercise of cultural activities.

Agius distinguishes between collective rights as group rights (e.g. Indigenous rights) and 'rights of mankind' whose subject is humanity as a whole, and to which all humans, irrespective of current or future existence, can lay claim (e.g. the right to a healthy environment).[93] When it comes to balancing these, Buchanan argues that group rights may prevail over individual rights if they prove to be '"indispensable for preserving minority cultures."'[94] Human rights law therefore does offer avenues of giving priority to collective considerations, which can be enhanced through taking the principle of interests of future generations into account.

At this point, it is useful to revisit Hiskes' argument that environmental rights are governed by reciprocity across generations: 'even if the environmental rights of future generations infringe on some of one's actions now and the rights that attend them—for instance one's right to make money in ways that cause environmental degradation—they nevertheless strengthen one's right to a safe environment by offering additional arguments for promoting environmentally friendly policies.'[95] In addition, it is useful to recount Lewis' argument of relying on the obligations to respect, protect and fulfill human for *both* present and future generations because a lack of human rights protection in the present will likely translate into a lack of human rights protection in the future.[96]

Therefore, the impact of renewable energies needs to be assessed from two perspectives. Firstly, how the harm incurred by Indigenous peoples in the present will affect future generations, both of Indigenous peoples and humankind more generally, needs to be

615, 616.
[91] Mirodrag A. Jovanović, 'Are There Universal Collective Rights?' (2010) 11 Human Rights Rev 17, 36.
[92] Lundmark (n 29) 5.
[93] Agius (n 46) 58.
[94] Mirodrag A. Jovanović, 'Are There Universal Collective Rights?' (2010) 11 Human Rights Rev 17, 27.
[95] Hiskes (n 68) 1356.
[96] Lewis (n 60) 225.

considered. Secondly, whether the potential benefit of reduced GHG emissions is sufficient to justify the negative effects of renewable energy projects in the long-term needs to be assessed.

2.3. Towards a new theory of balancing?

While the development of a new theory of balancing human rights is beyond the scope of this paper, this last subsection will briefly set out some criteria a theory of balancing that is more suitable to collective interests, especially when marginalized groups are involved, should pay attention to.

The first criterion is the acknowledgement of the connectedness of the human rights of present generations to that of future generations. The fact that both Indigenous rights as well as the right to a healthy, safe and sustainable environment contain a collective and intertemporal dimension affecting both specific groups and humanity as a whole adds many complex layers to the balancing process. The earlier discussions in this paper have also shown that these intersecting aspects sometimes make it difficult to paint a clear picture of whose rights need to be balanced against whose rights and interests. Indigenous groups, for example, are both the most important stewards of the environment, but at the same time would also benefit most from greater access to renewable energies. In addition, while renewable energy projects on Indigenous land may work positively towards realizing humanity's right to a healthy environment on a global scale, the project might significantly infringe on the right to a healthy environment of local communities. Instead of considering balancing a momentary exercise in which the concrete impacts of human rights at a specific time and place are measured, a theory of balancing that is mindful of these elements would take the global context into account, striking a balance both between long-term and short-term goals and between local and global impacts.

Secondly, and more importantly, a new theory of balancing should demonstrate openness towards the collective interest instead of sticking to the strict individualized paradigm of human rights. Rather than an *a priori* rights-first approach, a new theory should consider that human rights law develops slowly, as seen by the fact that the right to a healthy environment was not universally endorsed until 2021, even though the detrimental effects of climate change and environmental degradation have been experienced across the world since at least the 1970s. Therefore, while paying due regard to human rights enshrined in treaties, a theory of balancing that is sensitive to a temporal and collective element must also accord weight to collective

interest considerations that (as of yet) lie outside the formal scope of human rights law. Such a perspective would allow courts to consider future generations in their jurisprudence.

Conclusion

This working paper examined how human rights should be balanced in the case of renewable energy projects on Indigenous lands. While renewable energy projects have the potential to drastically reduce GHG emissions and thereby contribute to a healthier environment on a global scale, their scale and lacking consultation procedures have the potential to infringe on Indigenous land and consultation rights. Balancing these two competing interests necessitates careful consideration of several factors related to the collective character of both categories of rights under discussion.

Existing balancing theories focused on legitimate restrictions of human rights and balancing costs against benefits show several flaws when it comes to questions going beyond the human rights of single individuals. Existing balancing theories based on absolute rights, proportionality and non-discrimination are individual-centric, in that they are usually limited to the consideration of human rights and/or conflicts of interest between individuals as opposed to collectivities. Especially when examining third generation human rights like the right to a healthy environment or Indigenous self-determination, this approach becomes problematic. Third generation rights need more than just action on part of the state for their effective guarantee. Instead, they apply to groups and/or humankind as a whole, and humankind as a whole is involved in the process of bringing them to their effective realization.

Existing balancing theories are also present-oriented, in that they address conflicts between rights and/or interests in the present without paying much regard to how the current solution could affect future generations. The introduction of principles such as free, prior and informed consent as well as the interests of future generations could help make existing theories more adaptable to the collective dimension of human rights. Another option would be to not just consider conflicts between codified human rights, but to also view human rights and the environment as public goods which should be protected through political and judicial action. However, balancing theories are conflicting when the distinction between rights and interests are concerned, with some scholars proposing a rights-first approach and others arguing that in a balancing exercise, both rights and interests should have equal weight.

Applying a collectivity perspective to the traditional balancing perspectives would

significantly enhance their utility to deal with cases that involve renewable energy projects on Indigenous territories. In this respect, the paper first reiterates the obligation to respect the parts of Indigenous rights that have attained *jus cogens* status, namely the indigenous right to self-determination and the state obligation to not discriminate against them based on race. Added is the obligation to enforce FPIC in situations involving relocation of Indigenous peoples, the disposal of toxic waste on Indigenous territory and in the case of large infrastructure projects, which include large renewable energy projects. A balancing exercise should therefore involve careful consideration of which substantive and procedural rights of Indigenous peoples are implicated, as well as their status under international law. The balancing principle of non-discrimination could be enhanced by considering the exterritoriality of environmental impacts and focusing on Indigenous peoples' status as vulnerable groups under IHRL. Lastly, case law points to approaches to proportionality which are attuned to the specificities related to collective rights. For example, while dealing with the customary nature of land rights, the ACHPR has set out stricter requirements for a restriction on Indigenous land rights to be considered proportionate, as compared to other conflicting human rights.

Even when these adaptations to existing human rights balancing principles are fulfilled, however, some flaws remain. The paper therefore concludes by proposing some criteria that alternative theories of balancing, either in relation to balancing rights or balancing goods in the public interest, could incorporate. Further research could address the development of these criteria into a comprehensive theoretical approach to balancing, fleshing out the criteria individually. In addition, practical feasibility of alternative balancing approaches in a human rights system that remains individual-centric could be explored. Lastly, the topic of collectivity versus individuality in international human rights law is receiving increased attention. This paper hopes to have contributed to existing scholarship, but more studies of the precise way in which IHRL reinforces the division between collective and individual are needed.

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