

# TORRES STRAIT ISLANDERS LEADING THE CHARGE ON THE HUMAN RIGHTS IMPLICATIONS OF CLIMATE CHANGE: *DANIEL BILLY ET AL V AUSTRALIA*

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*Daniel Billy et al. v Australia is the first successful climate litigation case before a United Nations (‘UN’) human rights body. On September 23 2022, the UN Human Rights Committee found in favour of a group of eight Torres Strait Islanders, concluding that Australia’s failure to adequately protect them against adverse impacts of climate change violated their rights to enjoy their culture under Article 27 of the International Covenant on Civil and Political Rights, and be free from arbitrary interferences with their private life, family and home under Article 17. Here, we discuss the decision and its broader context and significance in Australia and globally.\*\*\*\**

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## I INTRODUCTION

The Torres Strait is a pristine wilderness region, containing the most northerly part of the Great Barrier Reef and comprising around 300 islands.<sup>1</sup> Torres Strait Islander peoples are First Nations peoples who are increasingly encountering severe climate impacts on their lands and waters, and consequential impacts on their capacity to practice their laws and culture.<sup>2</sup> Advancing seas are already threatening homes, as

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<sup>1</sup> See, eg, Torres Strait Regional Authority, ‘Land and Sea Management Strategy for Torres Strait 2016-2036’ (Report prepared by the Land and Sea Management Unit, Torres Strait Regional Authority, June 2016, Australian Government). (‘*TRSA*’)

<sup>2</sup> Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 3624/2019*, 135<sup>th</sup> sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) [2.1-2.2] (‘*Daniel Billy et al v Australia*’).

well as damaging burial grounds and sacred cultural sites.<sup>3</sup> Many Torres Strait Islanders are worried that their islands could quite literally disappear in their lifetimes without urgent action.<sup>4</sup> Rising sea temperatures are also affecting the health of marine environments throughout the Torres Strait, through coral bleaching and ocean acidification.<sup>5</sup>

Eight Torres Strait Islanders - Daniel Billy, Ted Billy, Nazareth Faud, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warri - took a case against Australia to the United Nations (UN) Human Rights Committee ('the Committee') in 2019, on their own behalf and on behalf of six of their children.<sup>6</sup> The Committee handed down its landmark decision on 23 September 2022, finding that Australia's failure to adequately protect Torres Strait Islanders from the adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interference with their private life, family, and home under the International Covenant on Civil and Political Rights ('ICCPR').<sup>7</sup> In this case note, we discuss the significance of the case in Australia and internationally. There has been some international commentary on the case,<sup>8</sup> and we propose to add an Australian and Torres Strait Island perspective to this existing commentary. Our approach is informed by the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research,<sup>9</sup> through consultation with First Nations colleagues and co-authorship with a Torres Strait Islander scholar.

In Section II, we explain the nature of the Committee as a human rights jurisdiction and outline the features of the complaint by Daniel Billy et al. In Section III we discuss the Committee's decisions, and in Section IV we assess the significance of this case in Australian and global contexts.

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<sup>3</sup> Ibid [5.2, 8.12].

<sup>4</sup> ClientEarth, 'Climate threatened Torres Strait Islanders bring human rights claim against Australia' (Press Release, 12 May 2019) <[<sup>5</sup> \*Daniel Billy et al v Australia\* \(n 2\) \[5.2\].](https://www.clientearth.org/latest/press-office/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/#:~:text=Advancing%20seas%20are%20already%20threatening,practice%20their%20law%20and%20culture.></a></p></div><div data-bbox=)

<sup>6</sup> Ibid [1.1].

<sup>7</sup> Ibid; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>8</sup> See, for example, ESCR-Net, 'Daniel Billy et al. vs. Australia (Torres Strait Islanders Petition)', *ESCR-Net* (Casenote, 2022) <<https://www.escr-net.org/caselaw/2022/daniel-billy-et-al-vs-australia-torres-strait-islanders-petition>> ('*ESCR-Net*'); Maria Antonia Tigre, 'U.N. Human Rights Committee finds that Australia is violating human rights obligations towards Torres Strait Islanders for climate inaction', *Sabin Centre for Climate Change Law* (Blog Post, 27 September 2022) <<https://blogs.law.columbia.edu/climatechange/2022/09/27/u-n-human-rights-committee-finds-that-australia-is-violating-human-rights-obligations-towards-torres-strait-islanders-for-climate-inaction/>>. See also: Martin Scheinin, 'Amicus Brief in the Case of Billy et al v. Australia' (Bonaverò Report no 2/2022, Bonaverò Institute of Human Rights, 15 September 2020) <[https://www.law.ox.ac.uk/sites/default/files/2022-11/Amicus%20Brief%20Bonaverò%20Report\\_0.pdf](https://www.law.ox.ac.uk/sites/default/files/2022-11/Amicus%20Brief%20Bonaverò%20Report_0.pdf)>.

<sup>9</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (AIATSIS, 2020).

## II CONTEXT

The UN Human Rights Committee is a treaty body, established under Article 28(1) of the ICCPR.<sup>10</sup> The Committee is comprised of 18 independent experts,<sup>11</sup> each elected to serve a four-year term.<sup>12</sup> They are independent of States, expert in human rights and judged to be of high moral character.<sup>13</sup> The Committee monitors States' implementation of treaty obligations in two key ways – through a reporting procedure for all States parties, and through an individual complaints procedure for States which have ratified or acceded to both the ICCPR and its first optional protocol (Article 1).<sup>14</sup> An important pre-condition is that complainants must have exhausted any available domestic remedies,<sup>15</sup> and as we discuss below, this has previously been a stumbling block for climate change related cases.

This complaint was brought by eight Torres Strait Islanders. The Torres Strait is home to one of the world's oldest living cultures,<sup>16</sup> as well as rare species such as endangered turtles and dugongs.<sup>17</sup> Around 17 of the approximately 300 islands in the region are inhabited by First Nations peoples.<sup>18</sup> The case of Daniel Billy et al was lodged on 13 May 2019 and alleged breaches of several provisions in the ICCPR. The complainants argued that Australia had 'failed to adopt adaptation measures (infrastructure to protect the authors' lives, way of life, homes and culture against the impacts of climate change, especially sea level rise)' and 'failed to adopt mitigation measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use'.<sup>19</sup> They asserted that their islands would become 'uninhabitable in 10 years (Boigu and Masig islands) or 10 to 15 years (Poruma and Warraber islands) in the absence of urgent action'.<sup>20</sup> The Committee publishes guidance and interpretive comments on the Covenant and its General Comment no. 36 clarifies that climate change is a matter of fundamental human rights.<sup>21</sup> The complainants argue that Australia had not established the policies and plans required to meet its low emissions

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<sup>10</sup> ICCPR (n 7) art 28(1).

<sup>11</sup> Ibid.

<sup>12</sup> Ibid art 32(1).

<sup>13</sup> Ibid arts 28(2)-(3).

<sup>14</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR First Optional Protocol'). For further discussion of the role of treaty bodies, see Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge University Press, 2012).

<sup>15</sup> ICCPR First Optional Protocol (n 14) arts 2, 5(2)(b).

<sup>16</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Australia's First Peoples' <[<sup>17</sup> Torres Strait Regional Authority, 'Sea' <<https://torresstraitsoe.org.au/sea>>.](https://aiatsis.gov.au/explore/australias-first-peoples#:~:text=There%20are%20varying%20estimates%20for,of%20over%20two%20hundred%20islands.></a>>.</p>
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<sup>18</sup> TRSA (n 1).

<sup>19</sup> *Daniel Billy et al v Australia* (n 2) [3.1].

<sup>20</sup> Ibid [8.7].

<sup>21</sup> Human Rights Committee, *General Comment No. 36 on Article 6: right to life*. 124<sup>th</sup> sess, UN Doc CCPR/C/GC/36 (3 September 2019) ('General Comment No. 36') [62].

reduction target of 26-28 per cent by 2030 in accordance with the Paris Agreement.<sup>22</sup> Australia's 'obligations under international climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the Covenant'.<sup>23</sup>

The complainants claimed that Australia had violated their rights under Article 2 (non-discrimination), read alone and in conjunction with Articles 6 (right to life), 17 (privacy, family, home) and 27 (right to minority culture); and Articles 6, 17 and 27, each read alone. In addition, they claimed violations of the rights of the named children under article 24 (1) (protection of children, non-discrimination), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. These articles provide as follows:

*Article 6*

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

*Article 17*

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

*Article 24*

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

*Article 27*

In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This was not the first climate change related case brought to a UN human rights body. In 2019, a group of 16 children lodged complaints against their States (Argentina, Brazil, France, Germany and Turkey) with the UN Committee on the Rights of the Child ('CRoC') - *Sacchi v Argentina*.<sup>24</sup> They alleged that, 'by failing to prevent and

<sup>22</sup> *Daniel Billy et al v Australia* (n 2) [3.1], [3.4].

<sup>23</sup> *Ibid* [3.2] citing *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

<sup>24</sup> Committee on the Rights of the Child, *Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication No. 104/2019*, 88<sup>th</sup> sess, UN Doc CRC/C/88/D/104/2019 (11 November 2021) ('*Sacchi et al v Argentina*'); Committee on the Rights of the Child, *Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication No. 105/2019*, 88<sup>th</sup> sess, UN Doc CRC/C/88/D/105/2019 (9 November 2021) ('*Sacchi et al v Brazil*'); Committee on the Rights of the Child, *Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication No. 106/2019*, 88<sup>th</sup> sess, UN Doc CRC/C/88/D/106/2019 (10 November 2021) ('*Sacchi et al v France*'); Committee on the Rights of the Child, *Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights*

mitigate the consequences of climate change’, the State parties had ‘violated their rights under articles 6, 24 and 30, read in conjunction with article 3, of the Covenant’.<sup>25</sup> The complaint was found inadmissible in that case as domestic remedies had not been exhausted.<sup>26</sup> The lodging of the complaint and the later decision received widespread media coverage, in part because climate activist Greta Thunberg was one of the complainants.<sup>27</sup> Although the complaint was deemed inadmissible, Nolan has noted that it left the door open for future cases.<sup>28</sup> In that case, the Committee made clear that the Convention gives rise to extra-territorial obligations to address climate change and that there was scientific evidence that the carbon emissions originating in the respondent States parties contribute to the worsening of climate change. The Committee stated that climate change has an adverse effect over ‘the enjoyment of rights by individuals both within and beyond the territory of the State party’ and that States have an ability to regulate activities that cause emissions and hence had responsibility.<sup>29</sup> The Committee on the Rights of the Child cases were cited by Human Rights Committee member Gentian Zyberi (concurring) in an individual opinion in the *Daniel Billy et al* case.<sup>30</sup>

### III THE DECISION

Unlike *Sacchi v Argentina*, in the *Daniel Billy et al* case, the Committee found that the claimants had exhausted domestic remedies. The complainants in their petition relied on the High Court decision which found ‘that state organs do not owe a duty of care for failing to regulate environmental harm’.<sup>31</sup> The Australian government did not contest this position in their submissions to the Committee.<sup>32</sup> Subsequent to the filing of the *Daniel Billy et al* complaint, the Federal Court of Australia had also found in *Sharma and Others v. Minister for the Environment* that the Minister for the Environment did not have a duty of care to young people to mitigate climate harm.<sup>33</sup>

On September 23, 2022, the Committee found that Australia’s failure to adequately protect Torres Islanders against adverse impacts of climate change violated

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of the Child on a communications procedure, concerning Communication No. 107/2019, 88<sup>th</sup> sess, UN Doc CRC/C/88/D/107/2019 (11 November 2021) (*Sacchi et al v Germany*); Committee on the Rights of the Child, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication No. 108/2019, 88<sup>th</sup> sess, UN Doc CRC/C/88/D/108/2019 (9 November 2021) (*Sacchi et al v Türkiye*).

<sup>25</sup> *Sacchi et al v Argentina* (n 24) [1.1].

<sup>26</sup> *Ibid* [10.21].

<sup>27</sup> Aoife Nolan, ‘Children’s Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*’, *EJIL: Talk!* (Blog Post, 20 October 2021) <<https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/>>.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Sacchi et al v Argentina* (n 24) [10.9].

<sup>30</sup> *Daniel Billy et al v Australia* (n 2) Annex II, [7].

<sup>31</sup> *Ibid* at [2.9] citing *Graham Barclay Oysters v. Ryan* (2002) 211 CLR 540, [2002] HCA 54.

<sup>32</sup> *Ibid* [7.3].

<sup>33</sup> *Minister for the Environment v Sharma* [2022] FCAFC 65.

their rights to enjoy their culture under Article 27 and be free from arbitrary interferences with their private life, family and home under Article 17.<sup>34</sup> In considering the case, the Committee took into account the complainants' spiritual connection with traditional lands finding that Australia's failure to take timely and adequate measures to protect against adverse climate change impacts led to the violation of their rights to enjoy their culture and to be free from arbitrary interferences with their private life, family and home.<sup>35</sup> Having found a violation of Articles 17 and 27, the Committee decided it was not necessary to examine the authors' remaining claims under Article 24 (1) of the ICCPR.<sup>36</sup>

With regard to Article 2 (non-discrimination), the Committee considered that a violation of 'general obligations under Article 2, read in conjunction with articles 6, 17, 24 (1) or 27 ... would not be distinct from the examination of the violation of the authors' rights under article 6, 17, 24 (1) or 27 of the Covenant'.<sup>37</sup> As such, 'the authors' claims under Article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27' were deemed inadmissible.<sup>38</sup>

Finally, the Committee did not conclude that Australia's adaptation and mitigation measures were so insufficient that they represented a direct threat to the authors' right to life with dignity. The Committee considered 'that the time frame of 10 to 15 years ... suggested by the authors' could allow for intervening acts by Government 'to take affirmative measures to protect and, where necessary, relocate' the claimants.<sup>39</sup> Considering the close connection with the land recognised elsewhere in the Committee's Views, the relocation solution here is somewhat surprising. The Committee did not find a violation by the State party of the authors' rights under Article 6 of the Covenant.<sup>40</sup>

In a joint, partially dissenting opinion, Committee Members Arif Bulkan, Marcia V. J. Kran, and Vasilka Sancin disagreed with the majority decision on this aspect of the case.<sup>41</sup> They viewed the majority decision as taking a narrow interpretation of Article 6, arguing that it is 'critical to do more than simply reference the Committee's jurisprudence, it must also be used progressively, based on current realities.'<sup>42</sup> Given the direct connection between environmental harms, the right to life, and the right to live with dignity,<sup>43</sup> they consider a precautionary approach to climate change to be imperative considering its urgency and permanence.<sup>44</sup> In their view, 'The unfortunate

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<sup>34</sup> *Daniel Billy et al v Australia* (n 2) [9].

<sup>35</sup> *Ibid* [5.7].

<sup>36</sup> *Ibid* [10].

<sup>37</sup> *Ibid* [7.4].

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* [8.7].

<sup>40</sup> *Ibid* [8.8].

<sup>41</sup> *Ibid* Annex III.

<sup>42</sup> *Ibid* [4].

<sup>43</sup> General Comment No. 36 (n 21) [62].

<sup>44</sup> *Daniel Billy et al v Australia* (n 2) Annex III [4], citing General Comment No. 36 (n 21) [26], [62].

outcome is that the Committee's jurisprudence promises far more than the majority delivers.<sup>45</sup>

The Committee asked Australia to compensate the complainants for the harm suffered, to engage in meaningful consultations with their communities to assess their needs, and to take measures to continue to secure the communities' safe existence on the islands.<sup>46</sup>

#### IV SIGNIFICANCE OF THE CASE IN AUSTRALIA AND GLOBALLY

On 30 March 2023,<sup>47</sup> the Australian government issued a response to the Committee's views in the Daniel Billy et al case.<sup>48</sup> While the complaint was initiated under a conservative national government that had been subject to intense critique over its climate policy, this Government response was authored by a recently elected Labor government which has taken steps to reposition Australia's climate policy. In their response, the Government acknowledged the detrimental impacts of climate change on Torres Strait Islander peoples and their prospects of living on country and practicing culture.<sup>49</sup> Its response notes meetings between some of the complainants and Government, and subsequent broader consultations with the Torres Strait Islander community.<sup>50</sup> The Government acknowledged that the complaint authors and other First Nations representatives have called on the Government to listen to their lived experiences of climate change, and make funding and other commitments to climate mitigation and adaptation.<sup>51</sup> The Government's response sets out the specific commitments that have been made since its election in 2022 to address climate change and its effects and its ongoing efforts.<sup>52</sup>

The publication of a response by the Government is unusual – the Australian government often does not respond to decisions of UN human rights bodies and has a poor track record of implementing the recommendations in their decisions and of providing remedy.<sup>53</sup> The majority of cases taken against to UN human rights bodies against Australia have related to asylum seekers and the Government's failure to

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<sup>45</sup> Ibid Annex III [4].

<sup>46</sup> Ibid [11].

<sup>47</sup> See 'Billy et al v Australia (3624/2019) Australian Government Response', *Attorney-General's Department* (Web Publication, 30 March 2023) <https://www.ag.gov.au/rights-and-protections/publications/billy-et-al-v-australia-36242019-australian-government-response>>.

<sup>48</sup> 'Response of Australia to the Views of the Human Rights Committee in Communication No. 3624/2019 (Billy et al v Australia)', *Attorney-General's Department* (Rights and Protections Publications, 30 March 2023) <[https://www.ag.gov.au/sites/default/files/2023-03/3624-2019\\_australian-government-response.PDF](https://www.ag.gov.au/sites/default/files/2023-03/3624-2019_australian-government-response.PDF)>

<sup>49</sup> Ibid [5].

<sup>50</sup> Ibid [10], [12].

<sup>51</sup> Ibid [10]-[14].

<sup>52</sup> Ibid [18]-[22], [31]-[32].

<sup>53</sup> Fiona McGaughey, Tamara Tulich, Harry Blagg, 'UN Decision on Marlon Noble case - imprisonment of an Aboriginal man with intellectual disability found unfit to stand trial in Western Australia' (2017) 42(1) *Alternative Law Journal* 67. See also 'Complaints upheld against Australia', *Remedy Australia* (Database, ND) <<https://www.remedy.org.au/cases>>.

remedy may be influenced by the lack of public support for changes to the current policies. In other cases, the Australian Government *has* implemented the views of the Committee, one notable example being the landmark case *Toonen v Australia*.<sup>54</sup> In that case, the Committee found that the criminal offence of sex between consenting adult males which existed in Tasmania at the time (1994), was a breach of the right to privacy.<sup>55</sup> Tasmania was the only Australian State or Territory retaining laws criminalising homosexuality, suggesting that public opinion would have been supportive of the views of the Committee. The case was described by former UN High Commissioner for Human Rights Navi Pillay as a historical case whose ‘result reverberated around the world’.<sup>56</sup> The current case of *Daniel Billy et al.* has some similarities in that the decision broadly aligns with government policy directions and public opinion in Australia indicates general support for tackling climate change with 75 per cent of Australians concerned about climate change, and record high levels of those who are ‘very concerned’ (42 per cent).<sup>57</sup>

Globally, the decision is significant in terms of climate litigation, and in terms of the rights of Indigenous peoples. The explicit linking of climate harms and human rights obligations is significant, particularly given that international climate change law is yet to incorporate explicit human rights obligations.<sup>58</sup> The International Network for Economic, Social and Cultural Rights welcomed the Committee’s views as representing several significant ‘firsts’, namely; the first *successful* human rights complaint against a State by inhabitants of low-lying territory; the first such finding that climate change impacts pose risks to the cultures of Indigenous peoples, and:

It also represents the first time that a United Nations body has found a State violated international human rights law through inadequate climate policy, establishing that human rights law applies to climate harm.<sup>59</sup>

The Committee’s views do not have precedential value in the sense of binding international or domestic courts or tribunals but they have been greeted as having such precedential value in the sense of informing future climate litigation in the human rights field.<sup>60</sup> Although, we also note its limitations. For those hoping that the decision might pave the way for further complaints related to breaches of human rights due to

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<sup>54</sup> Human Rights Committee, *Views: Communication No 488/1992*, 50<sup>th</sup> sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) (*Toonen v Australia*) [6.3].

<sup>55</sup> *Ibid* [9].

<sup>56</sup> Australian Human Rights Commission, ‘UN Human Rights Chief highlights Australian sexuality case’ (Youtube, 26 July 2011 AEDT) <<http://www.youtube.com/watch?v=NT5aBa-1bXs>>.

<sup>57</sup> Audrey Quicke and Sumithri Venketasubramaniann, ‘Climate of the Nation 2022: Tracking Australia’s attitudes towards climate change and energy’ (Research Report, Australia Institute, 3 November 2022) 4 <<https://australiainstitute.org.au/wp-content/uploads/2022/11/Climate-of-the-Nation-2022.pdf>>.

<sup>58</sup> See discussion in Amy Maguire and Jeffrey McGee, ‘A universal human right to shape responses to a global problem? The role of self-determination in guiding the international legal response to climate change’ (2017) 26 *Review of European Community and International Environmental Law* 54, 58.

<sup>59</sup> ESCR-Net (n 8).

<sup>60</sup> Tigre (n 8).



climate change, the decision in this case was centred on the claimants' Indigenous identity, way of life and connection with the land – under Article 27 but also in the Committee's interpretation of Article 17, relying on the 2015 and 2016 cases of *Benito Oliveira et al. v. Paraguay* and *Portillo Cáceres et al. v. Paraguay*.<sup>61</sup> They concluded:

The Committee recalls that the authors depend on fish, other marine resources, land crops, and trees for their subsistence and livelihoods, and depend on the health of their surrounding ecosystems for their own wellbeing. The State party has not contested the authors' assertions in that regard. The Committee considers that the aforementioned elements constitute components of the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can be considered to fall under the scope of protection of article 17 of the Covenant.<sup>62</sup>

This, and the Committee's failure to find a breach of the right to life under Article 6, impose limitations on the scope of the decision for broader categories of claimants. The Article 6 finding is broadly aligned with previous views of the Committee including the 2019 decision in *Teitiota v. New Zealand*, where the claimant argued that his removal to Kiribati breached Article 6(1) due to freshwater scarcity and ineffective action on climate-induced sea level rises.<sup>63</sup> In that case, the Committee accepted that sea level rise is likely to render the island inhabitable in 10-15 years but did not find that this satisfied the need for the risk to be real, personal, and imminent in order for his removal to Kiribati to violate Article 6 of the ICCPR. Hagiarian argues that because the complainants are Indigenous that their right to life must be seen as tied to their cultural rights and that this understanding could lead to a non-refoulement obligation if the inhabitants had to leave the Islands due to climate change.<sup>64</sup> Interestingly, as noted above, the Committee suggested in their decision with regard to the right to life, that relocation could be part of the ultimate solution.

Returning to Australia's track record, States' compliance with the non-binding views of treaty bodies varies,<sup>65</sup> and so we must question why these relatively ineffective mechanisms are used to tackle such an egregious global issue? One response is that international human rights law is one of the few options left to ameliorate action on tackling climate change, given the slow progress and ineffectiveness of international

<sup>61</sup> Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 2552/2015*, 132<sup>nd</sup> sess, UN Doc CCPR/C/132/D/2552/2015 (21 September 2022) (*Benito Oliveira et al v Paraguay*) [8.3]; Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 2751/2016*, 126<sup>th</sup> sess, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019) (*Portillo Cáceres et al v Paraguay*) [7.8].

<sup>62</sup> *Daniel Billy et al v Australia* (n 2) [8.10], citing *Benito Oliveira et al v Paraguay* (n 61) [8.3] and *Portillo Cáceres et al v Paraguay* (n 61) [7.8].

<sup>63</sup> Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 2728/2016*, 127<sup>th</sup> sess, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) (*Teitiota v. New Zealand*).

<sup>64</sup> Benjamin Hagiarian, 'The Daniel Billy v Australia case: its semantics and the characterization of a climate threat as a cause for migration' (2023) 15(1) *Amsterdam Law Forum* 10.

<sup>65</sup> For discussion, see Andreas J. Ullmann and Andreas von Staden, 'A Room Full of 'Views': Introducing a New Dataset to Explore Compliance with the Decisions of the UN Human Rights Treaty Bodies' Individual Complaints Procedures' (2023) *Journal of Conflict Resolution* (ahead of print) 1.

climate change law. Discussing the Paris Agreement, Bodansky suggests it is ‘a Goldilocks solution that is neither too strong (and hence unacceptable to key states) nor too weak (and hence ineffective)’.<sup>66</sup> And so while new climate-related treaties remain hampered by State interests, we argue that the existing and widely ratified human rights treaties are being used as a Trojan Horse for climate change concerns.

Çali argues that despite their limitations, UN human rights complaints mechanisms present distinct opportunities for impact.<sup>67</sup> First, they enable civil society, media and academia to engage with UN human rights treaties and to consider a human story which may focus the attention of domestic compliance constituents to the effective implementation of UN human rights treaties than a more abstract engagement. Second, UN human rights treaty body decisions offer a unique opportunity for judicial impact which can take place directly, through the domestic courts, regional courts, and other UN treaty bodies engaging with individual remedies required in a case; or indirectly, by courts considering the case law of UN treaty bodies in comparable cases.<sup>68</sup>

One significant feature of the Committee’s views is the rejection of Australia’s ‘drop in the ocean’ argument – the idea that a State can escape responsibility for climate change impacts by claiming that its carbon emissions cannot be regarded as causative of the catastrophic scale of climate change resulting from global historical emissions.<sup>69</sup> The decision also sits within the context of growing UN activity on the relationship between climate change and human rights in recent years, including the adoption of a UN General Assembly Resolution in March 2023 requesting an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change,<sup>70</sup> and the adoption of a UN Human Rights Council Resolution in July 2022 making explicit links between human rights and climate change.<sup>71</sup> The issue of climate change is more frequently tackled at the Human Rights Council’s Universal Periodic Review, with climate change-related recommendations to States increasing from 29 recommendations in Cycle 1 (2008-2012), to 67 recommendations in Cycle 2 (2012-

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<sup>66</sup> Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’ (2017) 110(2) *American Journal of International Law* 288, 289.

<sup>67</sup> Başak Çali, ‘UN treaty body views: a distinct pathway to UN human rights treaty impact?’ in Frans Viljoen et al (eds), *A Life Interrupted: Essays in honour of the lives and legacies of Christof Heyns* (Pretoria University Law Press, 2022) 443.

<sup>68</sup> Ibid.

<sup>69</sup> Monica Faria-Tinta, ‘Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground Breaking Decision on Climate Change Impacts on Human Rights’ *EJIL: Talk!* (Blog Post, 27 September 2022) <<https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/>>

<sup>70</sup> *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, GA Res 77/276, 77<sup>th</sup> sess, 64<sup>th</sup> plen mtg, Agenda Item 70, UN Doc A/RES/77/276 (4 April 2023, adopted 29 March 2023).

<sup>71</sup> Human Rights Council, *Human Rights and Climate Change*, Res 50/9, 50<sup>th</sup> sess, 39<sup>th</sup> mtg, Agenda Item 3, UN Doc A/HRC/RES/50/9 (14 July 2022, adopted 7 July 2022).

2016), and 214 recommendations in Cycle 3 (2017-2021).<sup>72</sup> The Human Rights Council also established a dedicated UN Special Rapporteur on Climate Change mandate in 2021.<sup>73</sup>

The decision has been welcomed by the claimants in the Torres Strait including Nazareth Fauid who said:

This is a happy moment for me. I can feel the heartbeat of my people from the past, to the present and the future. Our stories are echoing across the world. This is about protecting our culture and identity. Our people living in the low-lying islands have been struggling and suffering because of climate change and the decisions of others. We are now celebrating history in the making. This is for future generations so that they won't be disconnected from their island homes of the Torres Strait.<sup>74</sup>

## V CONCLUSION

Daniel Billy et al v Australia is a significant case – the first successful climate litigation before a UN human rights body, brought by eight Torres Strait Islanders. International human rights law, despite its many limitations, is one of the few options left to ameliorate action on tackling climate change, given the relative ineffectiveness of international climate change law. Here we have discussed the significance of the case in Australia and internationally, adding important Australian and Torres Strait Islander perspectives to existing commentary. The UN Human Rights Committee handed down its landmark decision on 23 September 2022, finding that Australia's failure to adequately protect Torres Strait Islanders from the adverse impacts of climate change violated their ICCPR rights to enjoy their culture (Article 27) and be free from arbitrary interference with their private life, family, and home (Article 17). We note that the Committee did not conclude that Australia's adaptation and mitigation measures were so insufficient that they represented a direct threat to the authors' right to life with dignity and so did not find a violation by the State party of the authors' rights under Article 6 of the Covenant, although dissenting opinions provide additional perspectives on Article 6 for future reference. As such, the significance of the case remains within the domain of Indigenous rights. As claimant Nazareth Fauid said, 'Our stories are echoing across the world. This is about protecting our culture and identity.'<sup>75</sup>

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<sup>72</sup> From a search for 'climate change' on the database maintained by UPR-Info (Web Page, ND) <<https://www.upr-info.org/en>>.

<sup>73</sup> Human Rights Council, *Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change*, Res 48/14, 48<sup>th</sup> sess, 44<sup>th</sup> mtg, Agenda Item 3, UN Doc A/HRC/RES/48/14 (13 October 2021, adopted 8 October 2021).

<sup>74</sup> ClientEarth, 'Torres Strait Islanders win historic human rights legal fight against Australia' (Press Release, 23 September 2022) <<https://www.clientearth.org/latest/press-office/press/torres-strait-islanders-win-historic-human-rights-legal-fight-against-australia/>>.

<sup>75</sup> Ibid.