

# *Daniel Billy et al v Australia*

## Human Rights Committee upholds climate change complaint by Torres Strait Islanders

### A victory for climate justice

- The decision marks the first time that an international legal body has found that countries (states) are responsible for climate change impacts under human rights law.
- The finding that Australia must provide the Torres Strait Islanders adequate compensation, secure their communities' continued safe existence on their islands, and take "steps to prevent similar violations in future" is pathbreaking and sets a precedent for cases against other high-emitting states for climate-related 'loss and damage'.
- All countries must take adequate and timely positive steps to prevent harm to the homes and wellbeing of all citizens threatened by climate risks such as flooding, sea level rise and wildfires. In doing so, they must protect Indigenous populations from losing their culture and way of life due to climate change impacts.



## Submissions of the claimants

The complaint (communication) was brought by eight Torres Strait Islanders<sup>1</sup> and six of their children<sup>2</sup>. The claimants (authors) live on four low-lying islands in the Torres Strait in the State of Queensland, and are Australian citizens and First Nations Peoples. The complaint was brought under the First Optional Protocol to the International Covenant on Civil and Political Rights (**ICCPR**) against Australia, alleging substantive violations of articles 6<sup>3</sup> (right to life), 17<sup>4</sup> (right to family and home) and 27<sup>5</sup> (right to culture) (alone and in conjunction with article 2); and of article 24(1)<sup>6</sup> (rights of minority children) (alone and in conjunction with the other articles).

The claimants provided extensive evidence to the committee of their particular vulnerability to the impacts of climate change and the multitude of ways in which both current and future predicted climate impacts directly affects their rights. This included evidence of (*inter alia*) the following environmental harms directly experienced by the claimants: (1) flooding of villages and homes at high tides, (2) the destruction of buildings and ancestral grave sites by storm surges, (3) worsening erosion of coastlines, (4) loss of trees and traditional gardens due to erosion and salination, (5) seasonal changes affecting weather patterns and corresponding traditional ecological knowledge, (6) loss of marine species including economically important crayfish, ceremonially important species (turtle, dugong) due to coral bleaching and ocean acidification, and (7) the risk of dispossession of the islanders from their homes (predicted to occur in the coming decades without immediate action on the islands of Boigu and Masig and without action within the next 10-15 years on the islands of Poruma and Warraber).

The complaint argued that Australia was violating the rights of the islanders by:

- (1) failing to implement a sufficient programme of adaptation in the region and delaying investment in infrastructure such as sea walls and other actions recommended by the Government's agency, the Torres Strait Regional Authority (TSRA);
- (2) failing to implement an adequate policy of mitigation, by setting an inadequate national greenhouse gas emissions reduction target and not implementing policy to meet even that inadequate target.

The claim under article 6 was said to encompass the notion of a right to life with dignity, which was argued to include the right to a healthy environment for Indigenous people.

To ground the claims under articles 6, 17, 24(1) and 27, the claimants relied on the clear links between their unique culture and the physical environment of their islands.

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<sup>1</sup> Daniel Billy, Ted Billy, Nazareth Faud, Kabay Tamu, Yessie Mosby, Nazareth Warri, Stanley Marama, Keith Pabai.

<sup>2</sup> Genia, Awara, Ikasa, Santoi and Baimop Mosby and Tyrique Tamu.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

The claimants evidenced how they would not be whole as people should they be forced to abandon their traditional sea and land country and move to the Australian mainland due to sea level rise. For example, the claimants explained how a ceremony for first born boys in the Mosby clan is required to be practiced on a particular part of Masig, and cannot be performed “on another man’s land”.<sup>7</sup>

The claimants also filed evidence showing *current* damage to their home and family life in addition to the serious risk of future relocation was fundamentally affecting their ICCPR rights.

The claimants emphasised that climate change is a slow onset process that has already begun in the Torres Strait, and that rights can be violated before the worst impacts occur. They noted the *urgency*, *irreversibility* and *temporal* dimensions of the process of climate change, calling on the Committee to provide an effective remedy.<sup>8</sup>

## Submissions of Australia

Australia (the State party) argued that the complaint was inadmissible under the Optional Protocol, because the claimants had not substantiated ‘victim status’ by alleging “current or imminent” threats to their rights. It argued that the claimants had not shown a causal connection between the alleged effects on rights and acts of the state, and that impacts were merely “future hypothetical”. It claimed that the impacts of climate change cannot be attributed to any one country, because it is scientifically impossible to trace causation to any one state and the rules of state responsibility in international law do not allow climate harm to be attributed to Australia. Australia also provided further details about the actions that it was taking in the Torres Strait including \$AUD 40 million funding for the Torres Strait Seawalls Programme (2019-2023).

Australia argued that as climate change is a global problem requiring a global response, the general effects, and the adequacy of a country’s acts to address that challenge does not amount to a violation of rights or the ICCPR. Australia cannot take steps to limit the effects of an international problem that is beyond the jurisdiction and control of a single country. States must make complex political choices involving trade-offs regarding the allocation of resources that would be inappropriate for the Committee to interfere in its decisions.

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<sup>7</sup> Yessie Mosby’s Witness Statement.

<sup>8</sup> All Submissions filed in the case can be found at <https://ourislandsourhome.com.au/legal/>.



*Infrastructure on Masig destroyed by storm surge in a 2019 cyclone. Photo by ClientEarth.*

## Decision of the Human Rights Committee

### *Admissibility*

The Committee found the complaint admissible, recalling that under article 5(2)(b) of the Protocol, claimants need only exhaust domestic remedies that have a reasonable prospect of success. It noted that Australia's highest court had ruled that state organs do not owe a duty of care for failing to regulate environmental harm.<sup>9</sup> It found that the claim under article 2 (failure to ensure the rights protected by the Covenant) was indistinguishable from the merits of the claims under articles 6, 17, 24(1) and 27 and that this part of the claim (which argued that Australia had violated the ICCPR by failing to provide effective domestic remedies) was therefore inadmissible.

It also found that it was able to take other international treaties and agreements into account when interpreting the state's duties under the ICCPR, consistently with its General Comment No 6.<sup>10</sup> This was a clear rebuke of Australia's submissions on this point and reveals a harmonised view of international law in which international treaties such as the Paris Agreement influence and inform human rights obligations.

Importantly, the Committee rejected Australia's argument that the complaint was inadmissible because no one country can be held responsible for climate impacts – as a legal or practical matter. Here the Committee found that *both* the adaptation and mitigation claims were admissible, finding that the ICCPR imposes positive obligations on states to ensure the protection of individuals in their jurisdiction, regardless of the origin of the threats to human rights. It also found that "acts and omissions" related to greenhouse gas emissions fell under the state's jurisdiction and were not precluded from consideration. This finding opens the door to future complaints relating to climate change, and is consistent with the decision of the Committee on the Rights of the Child in the *Saachi et al v Argentina*<sup>11</sup>, by confirming that

<sup>9</sup> *Graham Barclay Oysters v. Ryan* [2002] HCA 54.

<sup>10</sup> UN Human Rights Committee, *General Comment No. 36* (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018. CCPR/C/GC/36 §62.

<sup>11</sup> *Saachi et al v Argentina* CRC/C/88/D/104/2019.

under the law of “state responsibility”, each country is responsible (and potentially liable) for the effects of emissions originating within its own territory.

In applying the test for victim status, requiring that harm be ‘more than a theoretical possibility’, the Committee concluded:

*“...the Committee observes that the authors – as members of peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is uncontested that the authors’ lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them. The Committee observes that in light of their limited resources and location, the authors would likely be unable to finance adequate adaptation measures themselves, on an individual or community level, to adjust to actual or expected climate and its effects in order to moderate harm. The Committee therefore considers that the authors are among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts. The Committee considers, based on the information provided by the authors that the risk of impairment of those rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility.”*

#### Merits – article 6 ICCPR

The claimants’ case under article 6 was based on an enlarged concept of the right to life, a “right to life with dignity”, as set out in the Committee’s General Comment 36 and developed in Latin American case law on Indigenous rights.<sup>12</sup> It was argued, based on witness evidence from the claimants, that the “tragedy of uprootedness” violates the right to life for the claimants, whose spiritual, cultural and material connection to land is of utmost importance. Yessie Mosby stated:

*“[o]ur land is the string connecting us to our culture. It ties us to who we are. If we were to have to move we would be like helium balloons disconnected from our culture. Our culture would become extinct. We would be a dying race of people.”*

In respect of the concept of a right to life with dignity, the Committee defended its General Comment 36 where it explained that the right to life also includes the right of individuals to enjoy a life with dignity, referring to the Preamble of the ICCPR, which “recognizes...rights derive from the inherent dignity of the human person.”

However, the Committee split on the article 6 claim, which was the most contentious part of the decision. 11 members, the majority, found no violation, despite clearly stating that adverse climate change impacts can violate the right “even if such threats and situations do not result in the loss of life”.<sup>13</sup> Despite agreeing that the claimants were at a “heightened risk of vulnerability to the adverse effects of climate change”, they concluded that the “the authors’ claims under article 6 of the Covenant mainly relate to their ability to maintain their culture”. In relation to the risk of dispossession, the Committee followed its decision in *Teitiota v. New Zealand*<sup>14</sup> concluding that in “the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims.” However, this finding relied on a

<sup>12</sup> IACtHR, *Yakye Axa Indigenous Community v Paraguay*, judgment of 17 June 2005, IACtHR, *Moiwana Community v Suriname*, judgment of 15 June 2005.

<sup>13</sup> GC36 §7.

<sup>14</sup> *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016).

mischaracterisation of the claimants' evidence, which was that there was a risk of dispossession on two of the authors' islands without *immediate* action.

Five members of the Committee would have found a violation of article 6. In a joint opinion, Bulkan, Kran and Sancin argued that the majority's reasoning was flawed, concluding that the test should be whether there is a "reasonably foreseeable threat" to the right to life. They concluded that the evidence of loss of food sources, flooding and salination affecting gardens, loss of marine species, and damage to homes constituted sufficient evidence of real and foreseeable risks to food, livelihood and shelter. They disagreed with the majority view that a violation of article 27 sufficiently addresses the claimants' case.

#### *Merits – article 17*

Referring to its General Comment 16 on article 17, the Committee recalled that state parties must prevent foreseeable and serious interference with a person's privacy, family or home including where that interference results from environmental damage and it arises from conduct not attributable to the state. States must adopt positive measures as necessary to ensure the effective exercise of article 17 rights.

The Committee noted the evidence of erosion and flooding damage to the homes of the claimants and their communities, as well as the risk of dispossession. It also noted the claimants' dependence on the health of surrounding ecosystems, as part of the Indigenous way of life. The Committee concluded (§8.12):

*"[t]he Committee considers that when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant."*

#### *Merits – article 27*

The right to culture under article 27 is a right specific to Indigenous minorities, and is linked to the fundamental right of peoples to self-determination protected by article 1 of the ICCPR. The Committee has previously found that the right to self-determination cannot be enforced under the Covenant by individuals, as it is a collective right.<sup>15</sup> Accordingly, the complaint was brought by the eight Torres Strait Islanders and their children individually, and not on behalf of their people or communities.

The Committee noted that the claimants traditional way of life was currently being impacted by environmental degradation, and that the risk of permanent dispossession from their islands would irrevocably damage their culture, which was uncontested by Australia. The Committee concluded (§8.14):

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<sup>15</sup> Howard v Canada CCPR/C/84/D/879/1999

*“The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors’ community members began raising the issue in the 1990s. While noting the completed and ongoing seawall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors. ... [T]he Committee considers that the information made available to it indicates that the State party’s failure to adopt timely adequate adaptation measures to protect the authors’ collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party’s positive obligation to protect the authors’ right to enjoy their minority culture.”*

Having found violations under articles 17 and 27, the Committee did not deem it necessary to examine the claims under article 24(1).

#### *Remedy for violations of the ICCPR*

One of the most significant aspects of the decision is the remedy.

Australia must implement measures “*necessary to secure the communities’ continued safe existence on their respective islands*” and do so on the basis of meaningful consultation with the communities and needs assessments. It must also monitor the effectiveness of these measures and “*resolve any deficiencies as soon as practicable*”. This remedy is without limitation, that is, there is no margin of appreciation provided to Australia to implement these measures subject to other financial constraints. This is a crucial outcome for the Islanders, who are concerned to ensure that they have the necessary resources to protect their way of life and their communities.

The committee also found that Australia is obligated to provide adequate compensation to the claimants for the harm that they have suffered. This is a world-first in climate change litigation, being the first finding of a legal obligation to pay for what the United Nations Framework Convention on Climate Change terms ‘loss and damage’.

Finally, the Committee concluded that Australia “*is also under an obligation to take steps to prevent similar violations in the future.*” This is a wide and unlimited finding that has implications that go beyond adaptation assistance to the communities. Given that the acknowledged cause of the human rights violations is the environmental degradation resulting from climate change (loss of traditional food, sea level rise causing flooding and erosion, need to ensure the transmittal of culture to future generations, *inter alia*), this must imply that Australia must also take steps to address the root cause of the problem – that is, by reducing its greenhouse gas emissions.

Unfortunately only two members made direct findings on mitigation, with Zyberi concluding that:

*“[s]ince it is the atmospheric accumulation of CO2 and other GHGs that, over time, gives rise to global warming and climate change, States should act with due diligence when taking mitigation and adaptation action, based on the best science. This is an individual responsibility of the State, relative to the risk at stake and its capacity to address it. A higher standard of due diligence applies in respect of those States with significant total emissions or very high per capita emissions (whether these are past or current emissions), given the greater burden that their emissions place on the global climate system, as well as to States with higher capacities to take high ambitious mitigation action. This higher standard applies to the State party in this case.”*

Nevertheless, the clear remedy and obligation on Australia to guarantee non-repetition of the acknowledged violation requires Australia to take urgent action in reducing greenhouse gas emissions.<sup>16</sup> As Zyberi notes:

*“[i]f no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible. Such land and sea resources will not be available for indigenous peoples or even for humanity more generally, without diligent national efforts, as well as joint and concerted mitigation actions of the organized international community.”*

This finding is implicit in the remedy defined by the Committee, which implies that States must **also** reduce their emissions in order to meet their human rights obligations in respect of climate change harms. This finding will certainly be expanded on in future cases.

Australia must report to the Committee on what steps it has taken to comply with the decision within six months (180 days).

## Implications for climate-vulnerable peoples

- The decision should give hope to Indigenous and other Pacific Peoples who are on the frontlines of climate change. It has found that the devastating effects of climate change on people who are deeply connected to the land, or those living on very low-lying islands where retreat is not possible, have remedies under human rights law against those countries who are obligated to protect them. At a minimum, this is their home state, but may also include other high-emitting countries, applying the test for harm in transboundary claims, as applied previously in the context of climate change by the Committee on the Rights of the Child in the *Saachi* case<sup>17</sup>.
- The decision has also clarified that states have a duty to protect all persons from climate damage that seriously threatens their private, family and home lives and wellbeing. This right is also protected in article 8 of the European Convention on Human Rights with several climate change-related cases pending before the ECtHR. Victims of extreme weather around the world could have claims for compensation or preventative measures where their home state has failed to adequately prepare and protect their homes from foreseeable climate damage.
- The Committee clearly recognised, in line with an intervention received from Professor Martin Scheinin, the inter-generational element of the right to culture, and relied on this in its decision under article 27 of the ICCPR. They accepted that the claimants, as with many Indigenous cultures, are dependent on a healthy environment in order to be able to transmit their culture to their children and to ensure its survival. The Committee recognised for the first time in its jurisprudence the fundamental threat that climate change poses to Indigenous cultures around the world.

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<sup>16</sup> Feria-Tinta, M, *Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights* – Blog of the European Journal of International Law available at <https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/> accessed 5 October 2022.

<sup>17</sup> Saachi et al, 10.5-7.



## Implications for governments and policymakers

- This decision is one of the most important adaptation cases to have been decided to date. It clarifies the duties of governments to protect their citizens from a changing climate by helping them to avoid physical interference with their homes and land, as well as impacts on the natural environment on which they depend. This has significant implications for governments around the world, not only those who owe duties to vulnerable Indigenous populations, and means that all governments need to ensure they have timely and adequate adaptation measures in place or risk legal liability.
- In order to prevent violations of the ICCPR, Governments also need to address the root cause of climate change, greenhouse gas emissions, which is connected to the loss of the rights to culture and family/home life. As noted by two members of the Committee, without mitigation measures, the duty to help vulnerable populations to adapt, and the cost of those efforts, will only increase exponentially in scope and scale and may eventually become impossible. States must therefore set and meet ambitious mitigation targets in line with the Paris Agreement and Glasgow Pact.

## Implications for climate lawyers and litigators

- This decision opens the door for claims from other climate-vulnerable Indigenous communities around the world, as well as those relying on nature for their subsistence, a very large pool of potential plaintiffs. It could also ground claims by those that have been failed by their governments and have lost their homes or whose homes are at risk due to climate impacts, possibly an even larger pool of potential plaintiffs.
- This decision could also be influential in corporate litigation – as it confirms that emitters with effective control can be found liable for the diffuse effects of those emissions at law. Equally, the decision confirms that a compensation obligation can be owed by a country for failing to take adequate steps to protect vulnerable people from climate-related harms that are reasonably foreseeable – a test that is also relevant in civil law claims.

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