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Human Rights Protection in the Climate Crisis 2.0: The UN Human Rights Committee's Landmark Decision in *Daniel Billy et al. v. Australia*[*]

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Abstract: On September 23, 2022, the UN Human Rights Committee (Committee) published its groundbreaking decision in *Daniel Billy et al. v. Australia*, in which it found that Australia's failure to adequately protect indigenous islanders from the Torres Strait region against adverse impacts of climate change amounted to a violation of their rights to enjoy their culture and to private life, family and home. In this contribution, I will outline the key findings of the decision and the underlying strands of the Committee's arguments, to then analyze and critically reflect upon them against the background of currently discussed challenges faced by human rights dogma in the context of climate change. I will argue that the Committee took a hesitant and restraint position regarding victim status and the right to life with dignity, thereby also failing to account for harms located in the (further) future. Furthermore, the position is taken that the Committee's questionable decision to exclusively focus on adaptation measures while remaining silent on obligations of mitigation was also owed to methodological hurdles internal to current human rights law. Despite these aforementioned shortcomings, it will be highlighted that the Committee still managed to overcome previously controversial admissibility hurdles bringing the case to the merits. Consequently, the Committee issued the first decision at the international level to tackle substantive human rights questions in the context of climate change that relate to the current situation of small islands and their indigenous inhabitants, thereby taking human rights protection in the climate change context to the next level.

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A. Introduction

On Friday September 23, 2022, only six weeks before the COP27 climate summit in Sharm El-Sheikh,[1] climate activists all over the world joined the global climate strike under the slogan #Peoplenotprofit in order to demand decision-makers take action on the ongoing climate crisis.[2] While the general debate of the UN General Assembly's 77th session was held in New York City,[3] the voices of climate protestors united to call on their governments and international leaders to provide for loss and damage finance to those most affected by the negative impacts resulting from a world continuously heating up.

The UN Human Rights Committee (Committee) could hardly have chosen better than to publish its landmark decision of July 21, 2022 in the case *Daniel Billy et al. v. Australia*[4] just one day before climate change protests took place in around 450 locations.[5] In casu, the Committee found that Australia failed to adequately protect members of an indigenous community present in four small, low-lying islands in the Torres Strait region, from adverse impacts of climate change, which resulted in the violation of the complainants' rights to enjoy their culture (Art. 27 ICCPR[6]) and to be free from arbitrary interferences with their private life, family and home (Art. 17 ICCPR).[7]

The eight islanders and their six children claimed the infringement of their rights based on Australia's twofold failure to maintain its obligations against the backdrop of sea level rise and extreme weather events. First, it failed "to implement an adaptation programme

1 The Conference of the Parties under the United Nations Framework Convention on Climate Change (COP 27) is going to take place from 6 to 18 November 2022 in Sharm el-Sheik, Egypt. For more information see Sharm el-Sheik Climate Change Conference – November 2022, https://unfccc.int/cop27 (last accessed on 24 October 2022).

2 The youth-led climate strike movement "Fridays For Future" published a call to join for a global climate strike demanding "that our Governments listen to MAPA voices and immediately work to provide Loss & Damage Finance to the communities most affected by the climate crisis." Fridays for Future, On September 23rd, we will strike for climate reparations and justice!, https://fridaysforfuture.org/september23/ (last accessed on 24 October 2022).

3 UN General Assembly, General Debate of the 77th Session: 20 September - 26 September 2022, https://gadebate.un.org/en (last accessed on 24 October 2022). For the Schedule of High-level Meetings of the 77th Session see: High Level Meetings of the 77th Session, https://www.un.org/en/ga/77/meetings/ (last on accessed 24 October 2022).

4 UN Human Rights Committee (HRC), Communication No. 3624/2019, *Daniel Billy et al. v. Australia*, 21 July 2022.

5 *Damien Gayle*, Thousands call for 'climate reparations and justice' in global protests, The Guardian (UK) of 23 September 2022, https://www.theguardian.com/environment/2022/sep/23/thousands-call-for-climate-reparations-and-justice-in-global-protests (last accessed on 24 October 2022).

6 UN General Assembly, International Covenant on Civil and Political Rights, adopted on 16 December 1966, entry into force on 23 March 1976, United Nations, Treaty Series, Vol. 999, p. 171.

7 Office of the High Commissioner for Human Rights (OHCHR), Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds, 23 September 2022 https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family (last accessed on 24 October 2022).

to ensure the long-term habitability of the islands“ and second, “to mitigate the impact of climate change“.[8] Their complaint builds on the specific situation faced by the indigenous community in the Torres Strait area that many low-lying island communities are confronted with worldwide.

Even small changes in sea level rise have significant impacts on the community's viability; together with extreme weather events, it causes flooding and erosion, resulting *inter alia* in the loss of territory, family graves, and the ability to cultivate. Higher temperatures and ocean acidification further lead to severe degradation of the marine ecosystem, such as “coral bleaching, reef death, and the decline of seagrass beds and other nutritionally and culturally important marine species”,[9] which provide for the Islanders' livelihood. Additionally, the increasing unpredictability of weather events affects the reliability of traditional ecological knowledge and its transmission to future generations. In the long term, further sea level rise “would result in several Torres Strait islands being completely inundated and uninhabitable,”[10] thereby eventually provoking the community members' displacement from their islands and the potential extinction of their culture.[11]

B. Admissibility: Connecting to *Ioane Teitiota v. New Zealand*

Although the Committee declared the authors' claims under articles 6, 17, 24 (1), and 27 ICCPR admissible after rejecting several objections put forward by Australia, concerning *inter alia* the exhaustion of local remedies and inadmissibility *ratione materiae*, only two strands of the Committee's reasoning will be highlighted on account of the particular relevance for human rights claims in the context of climate change.

First, *vis-à-vis* the State's position that it cannot be held responsible for the climate change impacts that the authors claim violate their rights, the Committee had to contemplate whether “a State party may be considered to have committed a violation of the Covenant rights of an individual, where the harm to the individual allegedly resulted from the failure of the State party to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory.”[12] Concerning adaptation, the Committee briefly referred to the positive obligations arising from the human rights provisions invoked that oblige State parties to ensure the protection of individuals under their jurisdiction against their violation.[13] As regards mitigation measures, it affirmed, based on the submissions of both parties, that Australia ranks high both on emission of greenhouse

8 HRC, Daniel Billy et al. v. Australia, note 4, paras. 2.7 and 2.8.

9 A report on which the summary of the facts provided by the authors is predominantly based: Torres Strait Regional Authority, Torres Strait Climate Change Strategy 2014-18: Building Community Adaptive Capacity and Resilience, Annex 1, p. iii.

10 Ibid.

11 HRC, *Daniel Billy et al. v. Australia,* note 4, paras. 2.2-2.5 and 3.5-3.7.

12 Ibid, para. 7.6.

13 Cf, ibid, para. 7.7.

gasses as well as world and human development indicators, leading the Committee to the conclusion that the alleged actions and omissions fall under the State party's jurisdiction.[14]

Furthermore, in light of the State's objection that the authors invoked potential future harm and failed to sufficiently substantiate their claim of past or existing violations or imminent threat thereof, the Committee recalled its jurisprudence on victim status by stating that i) it required the person to be actually affected, ii) the individual needed to demonstrate that his or her rights had been impaired by the acts or omissions of the State or that impairment was imminent and iii) in absence of a concrete application of the law or practice to the detriment of the person, its risk of being affected had to be more than a theoretical possibility.[15]

With this in mind, the Committee underscored that the authors presented information indicating real personal predicaments owed to climate change that could possibly have compromised their ability to maintain their culture, subsistence and livelihoods. Interestingly, the Committee emphasized clearly and repeatedly that the authors as members of a community consisting of longstanding inhabitants of traditional lands on small, low-lying islands with little possibilities for internal relocation are highly dependent on limited natural resources and "extremely vulnerable to intensely experiencing severely disruptive climate change impacts."[16] In light of the limited territory and means of subsistence, the Committee came to the conclusion that it was unlikely that the community could finance adaptation measures at own cost in order to moderate the occurring and expected harm. Therefore, "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."[17]

Following *Ioane Teitiota v. New Zealand*[18] by the Committee, as well as the increase in domestic and regional climate change case law,[19] the Committee's positive declaration on admissibility was rather to be expected. Yet, what is striking is the ease and clarity with which it overcomes previously controversial admissibility hurdles without turning its back on established jurisprudential standards regarding victim status. Moreover, by casting a spotlight on the specific vulnerabilities of both indigenous communities and inhabitants of low-lying islands, the Committee underscored that violations may be established vis-à-vis

14 Cf, ibid, para. 7.8.

15 Cf, ibid, para. 7.9.

16 Ibid, para. 7.10.

17 Ibid.

18 HRC, Communication No. 2728/2016, *Ioane Teitiota v. New Zealand*, 24 October 2019. For an in-depth analysis of the decision regarding issues of displacement see *Joyce de Coninck* and *Anemoon Soete*, *Non-refoulement* and climate change-induced displacement: Regional and international cross-fertilization?, RECIEL 2022, pp. 1 et seqq.

19 See *Joana Setzer* and *Catherine Higham*, Global trends in climate change litigation: 2021 snapshot, July 2021, particularly pp. 4 et seq., https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf (last accessed on 24 October 2022).

high emitting and developed States due to failure to adapt and/or mitigate climate change-related negative impacts. Likewise, the Committee affirmed that corresponding actions and omissions fall under the jurisdiction of the corresponding State party, even though climate change is a global phenomenon to which manifold greenhouse gas emitters contribute.

Still, it is clear that the Committee, despite the decision's progressiveness in terms of admissibility, preferred to stay in familiar waters when it comes to harm that materializes (further) in the future. Not moving beyond the imminent threat prerequisite also reflects the typical, climate change-specific phenomenon where the negative consequences of past and present emissions only materialize and show their full extent in the (distant) future, which, of course, does not seem to quite fit human rights terminology, particularly when it comes to violations.[20] This may also explain why the Committee focused its reasoning – both concerning admissibility and the merits – on present harm suffered by the members of the indigenous community present in the Torres Strait region. However, this reluctance to capture future harm also reveals the limits of preventive protection in contemporary human rights dogma, which is also present in the decision on the merits.

C. The Merits: Touching New Ground

I. A Missed Opportunity: The Right to Life with Dignity

Concerning Art. 6 ICCPR, the Committee declined a violation of the right to life and in the end stuck with its decision in *Ioane Teitiota v. New Zealand* (see infra). First, it endorsed its former jurisprudence by recalling that the right to life required States to adopt positive measures and included the right of individuals to enjoy a life with dignity. Furthermore, obligations to respect and ensure operating under this provision extended to reasonably foreseeable threats and life-threatening situations that could (possibly) result in loss of life. Adding to that, the Committee considered that these threats may include adverse effects of climate change and recalled that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[21]

Nonetheless, with regard to the present case, the Committee stated that

> *while the authors evoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme*

20 See *Verena Kahl*, A human right to climate protection – Necessary protection or human rights proliferation?, Netherlands Quarterly of Human Rights, 40(2) (2022), pp. 160, 164 et seqq.

21 HRC, Daniel Billy et al. v. Australia, note 4, para. 8.3.

> *precarity that could threaten their right to life, including their right to a life with dignity.*[22]

It further considered that the main arguments made by the authors in the realm of Art. 6 ICCPR were related to their ability to maintain their culture, falling within the scope of Art. 27 ICCPR.[23] Building on its findings in *Ioane Teitiota v. New Zealand*, the Committee emphasized that "the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized."[24] Nevertheless, in the face of multiple and costly infrastructure measures that form part of the 2019-23 Torres Strait Seawalls Program, other adaptive measures to reduce existing vulnerabilities and build climate change resilience already taken by the State and a timeframe (10-15 years) that allowed for "affirmative measures to protect and, where necessary, relocate the alleged victims",[25] the Committee did not see itself in the position to qualify the measures taken by the State as insufficient and thereby amounting to a direct threat to the right to life with dignity of the island inhabitants.[26]

Besides the choice of, legally speaking, weak wording ("may"), the Committee recognized the possibility of a risk of an island to submergence amounting to a violation of the right to life with dignity of the individuals living on this island, which is chronologically advancing the time of violation in relation to the realization of the risk equivalent with the materialization of the (final) harm. In this sense, the Committee seemed to acknowledge the necessity of a preventive approach that does not stick to an equation of violation and realization of risk, which – as stated before – is of particular importance in the climate change context.

However, the Committee remained silent on the question under which circumstances the risk of submergence leads to such a violation. Its reasoning – that is rather constructed from the opposite – suggests that there is at least no violation of the right to life with dignity under such risk scenarios as long as i) the corresponding State is undertaking measures that assists the community in adapting to a continuously changing climate in order to protect itself from the negative impacts associated with it, and ii) there is still enough time to plan and implement further adaptation measures to protect the right to life with dignity from violation. Yet, these adaptation measures are seemingly not required to be effective, successful or completed in a specific timeframe.[27] Besides the welcome focus on positive obligations, it also puts adaptation at the center of its reasoning. Accordingly, the question

22 Ibid, para. 8.6.

23 Cf, ibid.

24 Ibid, para. 8.7.

25 Ibid.

26 Cf, ibid.

27 Similarly *Christina Voigt*, UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change, 26 September 2022, https://www.ejiltalk.org/un

if and how excessive greenhouse gas emissions contributing to slow onset phenomena like sea level rise may result in a violation of the right to life with dignity is left aside, recalling the fact that the Committee itself explicitly pointed to Australia being a high emitting country.[28] Still, it has long been clear that the fight against the ongoing climate crisis cannot be won with adaptation measures alone; somehow building and upgrading seawalls will simply not be enough.[29] At worst, this could mean that complainants are referred to and have to settle with adaptation measures that are not effective and/or will never take place at all, while the State continues to permit excessive greenhouse gas emissions under its jurisdiction that fuel the ongoing climate crisis, contributing to extreme weather events and slow-onset phenomena from which complainants are precisely seeking protection.

This is a reflection of the great paradox, with which human rights protection is confronted in the context of climate change-related harm: While climate science has advanced in such ways that we know fairly well at present what will be the future catastrophic if not apocalyptic effects of unregulated, excessive greenhouse gas release,[30] in human rights dogma monitoring bodies, that build on normative frameworks that mostly came into being decades ago and long before climate protection norms and movements had been installed,[31] seem poorly equipped to tackle the greatest and most urgent, albeit future threat

hrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change/ (last accessed on 24 October 2022).

28 Regarding this and other shortcomings of the Committee's decision see also ibid.

29 See ibid. For a critical evaluation of the denial of a violation of positive obligations under the right to life and the right to physical integrity put forward by the Federal German Constitutional Court in its climate decision, which also referred to possible future adaptation measures, see *Verena Kahl* and *Ammar Bustami*, Auf den zweiten Blick – BVerfG zwischen innovativem Klimarechtsschutz und Pflicht ohne Schutz?, 7 May 2021, https://www.juwiss.de/46-2021/ (last accessed on 24 October 2022).

30 Main sources of knowledge on future climate change impacts are the reports of the Intergovernmental Panel on Climate Change (IPCC). See, for example, IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022, https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf (last accessed on 24 October 2022).

31 The modern environmental movement is said to be rooted in early concerns for conserving natural resources and preserving natural areas in the late 19th Century, while its beginnings are associated with the 1960ies and 1970ies. See inter alia *Angela G. Mertig* and *Riley E. Dunlap*, Environmentalism: Preservation and Conservation, in: Neil J. Smelser and Paul B. Baltes (eds.), International Encyclopedia of the Social and Behavioral Sciences, New York 2001, pp. 4687 et seq. with further references; *Juan Martinez-Alier*, The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation, Cheltenham 2002, pp. 5 et seqq. It was not until 1979 that the first World Climate Conference took place in the circle of scientists and under the leadership of the World Meteorological Organization and it took until 1992 for the United Nations Framework Convention on Climate Change to be adopted. See World Meteorological Organization (WMO), Proceedings of the World Climate Conference: A Conference of Experts on Climate and Mankind, 1979, https://library.wmo.int/doc_num.php?explnum_id=8346 (last accessed on 10 November 2022); United Nations Framework Convention on Climate Change (UNFCCC), adopted on 9 May 1992, entry into force 21 March 1994, United Nations, Treaty Series, Vol. 1771, p. 107.

to human rights emanating from climate change and therefore unable to ask member States for preventive measures. In a way, the hidden message to (potential) complainants is: We are not there yet, just sit and wait until the harm of apocalyptic proportions is done and then return to us, because then your claim might very well be successful.

Against this backdrop, it is unfortunate, but also understandable, that in the course of its reasoning the Committee has focused on omitted adaptation measures. Otherwise, in order to deal with future harm and potential obligations of mitigation it would have had to address complicated issues of causality, attribution and jurisdiction also in the context of admissibility.[32]

That left aside, in the specific case there had still been convincing reasons to articulate a violation of Art. 6 ICCPR. For in the present case, the concept of a right to life with dignity has been construed rather narrowly, as the Committee tied the proof of a violation of this right to either adverse impacts to the inhabitants' health, reasonable foreseeable risk of physical endangerment or extreme precarity, which relates more to the physical notion attached to the term "life" and less to the broader spectrum of what can be subsumed under the term "dignity". In contrast, the Inter-American Court of Human Rights (IACtHR) has defined the right to a dignified life in a much broader sense, particularly taking into account the specific situation of indigenous communities:

> *[B]ecause indigenous and tribal peoples are in a situation of special vulnerability, States must take positive measures to ensure that the members of these peoples have access to a dignified life – which includes the protection of their close relationship with the land – and to their life project, in both its individual and collective dimension.*[33]

According to the IACtHR, necessary prerequisites for a decent life in this sense include *inter alia* the quality of and access to water, food and health, as they have a major impact

By contrast, the modern human rights regime had already been kicked off with the Universal Declaration of Human Rights in 1948 and continued with the adoption of the two International Human Rights Covenants in 1966. See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, UN Doc. 217 A (III); UN General Assembly, International Covenant on Civil and Political Rights, note 6; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, adopted on16 December 1966, entry into force on 9 January 1976, United Nations, Treaty Series, Vol. 993, p. 3.

32 For further details see *Kahl*, note 20, pp. 164 et seqq.

33 *The Environment and Human Rights – State Obligations in relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23 (15 November 2017), para. 48. See also: *Case of the Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 125 (17 June 2005), paras. 162 et seq.; *Case of the Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 309 (25 November 2015), para. 181.

on the right to a decent existence and form the basis for the exercise of other human rights.[34] Based on such a broad understanding, the specific situation of the island inhabitants of the Torres Strait region could thus have provided evidence for a violation of this right in the case at hand, in the light of occurring food insecurity, loss of land and housing as well as affectation and potential loss of their culture. Additionally, in the situation of the Torres Strait islanders relocation would not only be not an option to protect the complainants' right to life with dignity, but could rather constitute its proper violation. For the right to life would then not be limited to preventing the deprivation of life, but also guarantee a life with dignity, which in the case of the complainants would boil down to a life in their homeland with access to water, traditional food and the continuation of their original way of life. This broader reading of a right to life with dignity is related to but can also not be reduced to the maintenance of the indigenous culture, which is why a mere referral to Art. 27 ICCPR at the exclusion of the right to life with dignity seems not adequate, as it does not capture all of the components that feed into the right to life with dignity that are also reflected in the complainants' statements.

The decision to deny a violation of the right to life with dignity in the present case was also not shared by all members of the Committee. In their joint partially dissenting opinions, Committee Members *Arif Bulkan*, *Marcia V. Kran* and *Vasilka Sancin* pointed out that the Committee had borrowed a narrow standard of a dissimilar refugee case instead of applying the "reasonable foreseeable threat"-criterion used in *Portillo Cáceres. v. Paraguay*, which was fulfilled by the stated facts, including "flood related damage, water temperature increases, loss of food sources, and most importantly, [the uninhabitability of] the islands they live on […] in a mere 10-15 years."[35] According to the partially dissenting members, the restricted interpretation of Art. 6 ICCPR led to a conflation of Art. 27 ICCPR, although "the risks to the authors' right to life are independent and qualitatively different from the risks to their right to enjoy their culture."[36] These opinions therefore called for the application of a precautionary approach in light of "the urgency and permanence of climate change" and emphasized that focusing on the possibility of future adaptation measures overlooked the harm the complainants experience in the very present: "promises of future projects are insufficient remedies as they have not yet occurred whereas damage to the foundation of the authors' homes has already occurred."[37] Similarly, in his individual opinion, Committee Member *Duncan Laki Muhumuza* considered the complainants' right to life with dignity violated as Australia had failed to prevent a foreseeable loss of life from the

34 Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*, note 33, paras. 163 and 167; *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 214 (24 August 2010), paras. 195-213; *The Environment and Human Rights*, note 33**,** para. 109.

35 HRC, *Daniel Billy et al. v. Australia,* note 4, Annex III, joint opinions by Committee Members Arif Bulkan, Marcia V. Kran and Vasilka Sancin (partially dissenting), para. 2.

36 Ibid, para. 3.

37 Ibid, para. 4.

impact of climate change by not reducing "greenhouse gas emissions and cease the promotion of fossil fuel extraction" and not taking "effective protective measures to enable the people to adapt to the climate change."[38] Although these views have not found their way into the majority decision, they might well serve as blueprints for successful arguments brought forward in future climate change litigation before human rights monitoring bodies.

II. Moving Forward: The Right to Enjoy Culture and the Right to Private Life, Family and Home

Having said that, much of the reasoning that could have been expected to take place under the right to life with dignity can then be found in the Committee's reasoning under the right to private life, family and home enshrined in Art. 17 ICCPR. Besides reflecting a tendency of other human rights bodies, such as the European Court of Human Rights (ECtHR), to allocate environmental human rights issues to the right to private and family life (Art. 8 European Convention of Human Rights),[39] treating the present case under Art. 17 (and 27) ICCPR also illustrates that the lack of an independent right to climate protection leads to a seemingly arbitrary normative allocation of climate change-related human rights impacts.[40]

In its argumentation the Committee referred to the specific relation of the community to its ancestral lands, its dependency on the natural resources provided by the islands and how climate change induced sea level rise and extreme weather phenomena already affect their culture and nutrition as of today.[41] Besides the physical effects, it also took into account the anxiety and distress resulting from the continuing loss of land, which puts the inhabitants' very existence at risk.[42] The Committee further took a different path compared to its reasoning under the right to life with dignity: despite acknowledging adaptation efforts made by the State to protect the Islanders from climate change-related harm, it pointed to the unjustified delay in upgrading seawalls that had been requested by the community for years.[43] With reference to *Benito Oliveira et al. v. Paraguay*[44] the Committee found a violation of Art. 17 ICCPR based on the following reasoning:

> *[W]hen 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*

38 HRC, *Daniel Billy et al. v. Australia*, note 4, Annex I, paras. 10-13.

39 See Council of Europe, Manual on Human Rights and the Environment (3rd edition), 2022, pp. 8, 33 et seqq., https://rm.coe.int/manual-environment-3rd-edition/1680a56197 (last accessed on 24 October 2022).

40 See *Kahl*, note 20, p. 174.

41 See HRC, *Daniel Billy et al. v. Australia*, note 4, paras. 8.9, 8.10 and 8.12.

42 Cf, ibid, paras. 8.9 and 8.12.

43 See ibid, paras. 8.11 and 8.12.

44 HRC, Communication No. 2552/2015, *Benito Oliveira et al. v. Paraguay*, 14 July 2021, available in Spanish only.

> *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.*[45]

In short, the States' omission to protect the complainants from serious climate change impacts on the community's traditional lands, that in turn affected their members' (physical and mental) wellbeing, constituted a foreseeable and serious violation of private, family life and home.

Connecting to the facts and legal reasoning provided by the Committee in the realm of Art. 17 ICCPR, it also found a violation of a minority's and its members' right to enjoy their own culture, which is "directed towards ensuring the survival and continued development of the cultural identity" and includes "the inalienable right of peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity."[46] In summary, the Committee recognized that the State's delay in the initiation of adaptation measures despite the foreseeable negative impacts on the community contributed to the past and present impairment of the complainants' ability to maintain their culture – including traditional fishing, farming and cultural ceremonies – owed to the climate change-related reduced viability of their territory and the surrounding marine environment.[47] While in the context of Art. 6 ICCPR the Committee seemed to consider relocation as a possibility to protect the right to life with dignity, it accepted the argument of the inhabitants that "they could not practice their culture on mainland Australia" in the realm of Art. 17 ICCPR.[48] Therefore, Australia failed "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."[49]

Having found a violation of articles 17 and 27 ICCPR, the Committee did not deem it necessary to examine the authors' remaining claims under Art. 24 (1) ICCPR.[50] While it would have been particularly interesting to see how the Committee would have handled the intergenerational issues arising from the ongoing climate crisis, particularly regarding children's rights under Art. 24 ICCPR, there is hope that these issues might be addressed in future cases, either before the Committee itself or before other human rights monitoring bodies.

45 HRC, *Daniel Billy et al. v. Australia*, note 4, para. 8.12.
46 Ibid, para. 8.13.
47 Cf, ibid, para. 8.14.
48 Ibid.
49 Ibid.
50 Cf, ibid, para. 10.

Finally, regarding effective remedy, the Committee determined that Australia is obliged to provide for adequate compensation, engage in meaningful consultations in order to assess the complainants' needs, continue implementing measures that are required to ensure the communities' continued safe existence on their respective islands as well as monitor and review the measures' effectiveness and resolve any deficiencies.[51] Although future harm was, as discussed above, not adequately considered in the merits, the Committee's decision on compensation at least indicates a preemptive approach when it further considered Australia obliged "to take steps to prevent similar violations in the future."[52]

D. Conclusion

Even though the views adopted in *Billy et al. v. Australia* do not constitute the first decision related to climate change-related human rights issues, neither in the International Human Rights Regime in general nor in the previous case law of the Committee in particular, its outcome is – despite the aforementioned shortcomings – remarkable for several reasons:

It is the Committee's first climate change-related decision where petitioners were able to jump the hurdle of the merits. While in *Ioane Teitiota Vs. New Zealand* it granted victim status to a Kiribati citizen, who had been denied refugee status and claimed that the effects of climate change forced him to migrate from his home country,[53] in the end, the Committee found no violation of the right to life due to a timeframe that still allowed for adaptation measures.[54] In the broader international human rights context, the Committee on the Rights of the Child made groundbreaking findings regarding jurisdiction in *Sacchi et al. Vs. Argentina et al*.[55] However, the complaints did not succeed in reaching the merits stage, as – due to complainants' failure to exhaust domestic remedies – they were ultimately declared inadmissible.[56] *Daniel Billy et al. Vs. Australia* is therefore the first climate change-related case before an international human rights monitoring body that has triggered a decision on the merits and thus was able to advance to substantive law issues.

Billy et al. v. Australia is also the first decision at the international level to tackle substantive human rights questions in the context of climate change that relate to the current situation of small islands and their indigenous inhabitants, who belong to those territories and communities most vulnerable to climate change induced extreme weather events and slow onset phenomena, such as sea level rise, and feel the negative consequences of

51 Cf, ibid, para. 11.

52 Ibid. See also *Voigt*, note 27.

53 See HRC, *Ioane Teitiota v. New Zealand,* note 18, paras. 1.1 and 8.6.

54 See ibid, para. 9.12.

55 See Committee of the Rights of the Child, Communication No. 104/2019, *Sacchi et al v Argentina*, 22 September 2021, paras. 10.4-10.12.

56 See ibid, para. 10.21.

climate change specifically early on.[57] In this sense, the decision of the Committee also mirrors the strive for climate justice and protection of particularly vulnerable groups by climate change activists, whose increasing political pressure on decision-makers could have possibly influenced the Committee's decision to take the case to the merits.

In the end, the views taken in *Daniel Billy et al v. Australia* do justice to the indigenous community's interest in the maintenance of its culture and continuous existence on the Torres Strait islands and provides one of many possible answers to the climate protection calls of individuals, communities, States, organizations and social movements, which seems even more important in the light of stagnating negotiations under the UNFCCC regime. The Committee's views echo these calls for further action as it translates them into the human rights context by adopting a legalistic human rights-based approach to climate change.[58] This shows that the decision's relevance goes far beyond the particular case, as it also lies in its radiating effect: For *Billy et al. v. Australia* might serve as a blueprint for future decisions of other human rights institutions,[59] such as the ECtHR, before which currently several climate change-related cases are pending.[60] At the same time, the Committee's reasoning has also shown the limitations of human rights protection in the context of climate change, specifically when it comes to dealing with future harm and obligations of mitigation. Nevertheless, this could provide the impetus to think about new methodological tools to handle climate change-related (future) harm, one possible solution of which could be an independent human right to climate protection.[61]

57 A presentation of several groundbreaking precedents in the decision can be found in *Monica Feria Tinta*, Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights, 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/ (last accessed on 24 October 2022).

58 For a definition of and distinction between legalistic and rhetoric human rights-based approaches to climate change see *Kahl*, note 20, p. 163.

59 See also *Feria Tinta*, note 57.

60 *Duarte Agostinho and Others v. Portugal and Others*, App no 39371/20 (ECtHR, 13 November 2020); *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App no. 53600/20 (ECtHR, 17 March 2021); *Greenpeace Nordic and Others v. Norway*, App no. 34068/21 (ECtHR, 16 December 2021). See also a yet-uncommunicated case brought against Austria on 25 March 2021 concerning the exacerbation of the applicant's chronic illness by climate change-related warming, *Müllner v. Austria*, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf (last accessed on 24 October 2022).

61 A corresponding proposition has been brought forward in *Kahl*, note 20.