CASE NOTE

AUSTRALIA'S INACTION ON CLIMATE CHANGE IS A VIOLATION OF TORRES STRAIT ISLANDERS' HUMAN RIGHTS: *BILLY V AUSTRALIA*

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CONTENTS

> Where we live is how we identify ourselves …
>
> — Ted Billy, Communication to the UN Human Rights Committee[1]

I INTRODUCTION

The United Nations Human Rights Committee ('Committee') decision that Australia is violating the human rights of Torres Strait Islanders through inadequate action on climate change was highly anticipated. Without a federal bill or charter of human rights embedded into the *Australian Constitution*, Australia has fallen behind other nations in legally recognising climate-related human rights concerns and concomitant duties to protect those vulnerable to climate change. In its decision, *Billy v Australia*,[2] the Committee examined a joint communication made by eight Torres Strait Islanders ('the authors') in their own right and on

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1 Daniel Billy et al, 'Communication under the Optional Protocol to the International Covenant on Civil and Political Rights', Communication to the Human Rights Committee in *Billy v Australia*, 13 May 2019, 6 [31] ('Complaint').

2 Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) ('*Billy v Australia*').

behalf of their children.[3] The authors complained of present and future climate change impacts threatening their subsistence and way of life. The Committee found that the rights of the authors to enjoy their culture and to be free from arbitrary interferences with their private life, family and home under arts 17 and 27 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') respectively are being violated by Australia, which has failed to adequately adapt to climate change.[4]

Each of the authors is a First Nations Australian inhabitant of the islands of Boigu, Poruma, Warraber and Masig in the Torres Strait region (a region also known as Zenadh Kes). Geographically, the islands are situated between the northern tip of mainland Australia and neighbouring Papua New Guinea, in the area that separates the Cape York Peninsula from the Melanesian island of New Guinea.[5] The authors' home islands are governed by the Torres Strait Island Regional Council, which is a local government within the Australian State of Queensland. The islands and their people have long been identified as especially vulnerable to the impacts of climate change.

The link between climate change and human rights generally is now well established, formally recognised under the *Paris Agreement*[6] by the Committee previously[7] and by international and foreign domestic courts around the world.[8] The authors' complaint asked the Committee to acknowledge that the conduct of Australia — just one nation and one of many contributors to the complex problem of climate change — amounted to a violation of individuals' *ICCPR* rights. The Committee's rejection of Australia's argument that it should not be held responsible on the basis that climate change is a multi-actor 'future' problem is significant. This case note will review the authors' complaint, Australia's

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3 A communication in this context is a claim by an individual or group of individuals to be a victim or victims of violations of any of the rights set out in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). Communications are brought under the *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) ('*Optional Protocol*').

4 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 15 [8.12], 16 [8.14], 16 [9].

5 For a detailed description of the region, see Torres Strait Regional Authority, *Land and Sea Management Strategy for Torres Strait 2016–2036* (Report, June 2016) ch 2.

6 *Paris Agreement*, opened for signature 22 April 2016, 3156 UNTS 79 (entered into force 4 November 2016) Preamble.

7 See, eg, Human Rights Committee, *General Comment No 36: Article 6: Right to Life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 13 [62].

8 See, eg, *Urgenda Foundation v Netherlands*, No C/09/456689 (Rechtbank Den Haag [The Hague District Court], 24 June 2015) ('*Urgenda Foundation v Netherlands*'); *Netherlands v Urgenda Foundation*, No 200.178.245/01 (Gerechtshof Den Haag [The Hague Court of Appeal], 9 October 2018) ('*Netherlands v Urgenda Foundation*'); Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 2656/18, 24 March 2021 reported in (2021) 157 BVerfGE 30 ('*Neubauer v Germany*'); *Future Generations v Ministry of the Environment*, No STC4360-2018 (Corte Suprema de Justicia [Supreme Court of Justice], 5 April 2018); *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 to 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*, (Inter-American Court of Human Rights, Series A No 23, 15 November 2017) ('*Environment and Human Rights Advisory Opinion*'). See generally Sabin Center for Climate Change Law, 'Human Rights', *Climate Change Litigation Databases* (Web Page) <https://perma.cc/YH45-GUAV>.

arguments in response and the Committee's decision. I will first provide a background detailing climate change in the Torres Strait (the essential context of the complaint) and the lack of domestic human rights in Australia that was a precursor to the complaint being brought to the UN.

II BACKGROUND TO AND SUMMARY OF THE COMPLAINT

A *Climate Change Impacts in the Torres Strait*

The authors described in their complaint impacts attributable to sea level rise which were affecting their low-lying island homes. These included ocean warming and acidification, and changed weather patterns induced by climate change. Already, villages have been inundated by flooding, causing damage to houses and family graves; beaches have succumbed to erosion and shorelines have advanced; salinification via the intrusion of saltwater into the islands' soil has rendered food sources, including coconut trees and traditional food gardens, unsuitable to provide nutrition as they once did; marine and freshwater resources have been depleted; coral has bleached, affecting all life that once relied on reefs.[9] These impacts signal that threats to life and livelihood, forced displacement, and loss of culture (which, for Torres Strait Islanders, is dependent on place) will characterise the future in what the authors describe as a 'slow-onset catastrophe'.[10]

The plight of the region with respect to climate change is recognised by the Torres Strait Regional Authority, an organ of the Australian government, which has stated:

> [S]mall increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability. Large increases would result in several Torres Strait islands being completely inundated and uninhabitable.[11]

The Intergovernmental Panel on Climate Change ('IPCC'), widely accepted as the leading global climate change authority, released its first report detailing the impacts of climate change in 1990. In this first report, as in all reports that have followed, the vulnerability of island communities is articulated:

> Most at risk are those communities in which the options for adaptability are limited ([for example] island and coastal communities …) and those communities where climatic changes add to existing stresses. The socioeconomic consequences of these impacts will be significant, especially for those regions of the globe where societies and related economies are dependent on natural terrestrial ecosystems for their welfare.[12]

The 1990s is also approximately the time when Torres Strait Islanders complained to the Australian government that climate change impacts posed a risk to their communities and that a response from the government was required.[13]

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9 Billy et al, Complaint (n 1) 9 [45], [47], 10 [49], 11 [56], [57], [63], 13 [76], 36 [155].

10 Ibid 6 [30].

11 Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014–2018: Building Community Adaptive Capacity and Resilience* (Report, July 2014) iii.

12 Intergovernmental Panel on Climate Change, *Climate Change: The IPCC 1990 and 1992 Assessments* (Report, June 1992) 55.

13 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 16 [8.14].

The particular vulnerability of people who live in the Torres Strait region was established in the intervening years. In 2008, for example, the Australian Human Rights Commission's *Native Title Report* included a case study on 'climate change and the human rights of Torres Strait Islanders'.[14] Owen Cordes-Holland wrote an article in this journal entitled 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the *ICCPR*'.[15] In 2014, globally renowned climate scientists outlined, in a report for the Climate Council, the impacts of climate change and coastal flooding in Australia and the specific risk that climate change posed for the Torres Strait:

> Many of the Torres Strait Island communities are extremely low-lying and are thus among the most vulnerable in Australia to the impacts of climate change. The shallowness of the Strait exacerbates storm surges and when such surges coincide with very high tides, extreme sea levels result. … Inundation affects houses, roads, water supply, power stations, sewage and stormwater systems, cultural sites, cemeteries, gardens, community facilities and ecosystems, and are often accompanied by severe erosion. By affecting the infrastructure of the communities and surrounding environment, climate change threatens the lives, livelihoods, and unique culture of the islanders.[16]

Therefore, by the time the authors' complaint was filed in 2019 and the Committee's decision issued in 2022, at least three decades had passed since the knowledge of climate change and its likely effects had been indicated, and at least ten years had passed since human rights risks were expressed and widely publicised.

B *Lack of Domestic Rights Recognition in Australia*

In their communication to the Committee, the authors noted the lack of human rights protection in Australian legislation and the corresponding absence of remedy or effective redress available to them domestically. This was relevant to their complaint because, as explained in Part III of this case note, the Committee needed to ascertain whether domestic remedies had been exhausted as a matter of admissibility before considering the merits of the complaint. It is therefore appropriate to recognise, as a precursor to understanding the complaint and the significance of the Committee's decision, that *ICCPR* rights are not specifically constitutionally protected in Australia via a bill or charter that safeguards individuals' rights. Australia has not implemented the *ICCPR* in its domestic law. In addition, the *Australian Constitution* does not recognise environmental rights, such as the right to a healthy environment.

Some Australian state and territory governments have enacted human rights legislation, including relevantly Queensland, whose *Human Rights Act 2019* (Qld) came into force on 1 January 2020, after the date of the complaint. Although the Queensland Act concerns *ICCPR* rights, it applies only to decisions made or

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14 Australian Human Rights Commission, *Native Title Report 2008* (Report, 18 February 2009) 229–59.

15 Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the *ICCPR*' (2008) 9(2) *Melbourne Journal of International Law* 405.

16 Climate Council, *Counting the Costs: Climate Change and Coastal Flooding* (Report, 2014) 42.

actions taken by a public entity which is 'in and for' the State of Queensland.[17] Further, it does not apply to conduct that took place before the Act's recent entry into force.[18] In addition, the powers of the Queensland Human Rights Commission under the Act are limited, and centred around conciliation and reporting: the Commission lacks coercive powers.[19] In *Waratah Coal Pty Ltd v Youth Verdict (No 6)* — a landmark decision in which the Queensland Land Court recommended the rejection of a new coal mine on the basis that it would unduly limit human rights on account of climate change — President Kingham said there was a 'bright line' drawn in the Act between a *finding* of unlawfulness with respect to a decision incompatible with human rights or a failure to properly consider human rights, and *relief* for that unlawfulness, there being no standalone right to relief.[20] Other state-level legislation can be characterised as similarly limited,[21] but the bottom line is that state-level or subnational processes are inappropriate if the alleged rights violations are occurring at the behest of the federal or national-level government, as was the situation in *Billy v Australia*.

C *The Complaint*

The initial communication in which the authors complained of the alleged rights violations was filed on 5 May 2019 under the *Optional Protocol to the International Covenant on Civil and Political Rights* ('*Optional Protocol*'),[22] which is the *ICCPR*'s complaint mechanism. Each of the complaint's eight authors is an Australian national and a resident of the Torres Strait. In respect of their complaint to the Committee as well as the broader campaign of which it is a part (Our Islands, Our Home), the authors are climate change advocates known colloquially as the 'Torres Strait 8'.[23]

In their complaint, the authors claimed that Australia has failed to take adequate and timely mitigation and adaptation measures to combat the effects of climate change, and in so failing, has violated their and their children's human rights. Specifically, they claimed violations of arts 2, 6, 17, 27 and 24(1) of the *ICCPR* which respectively are the undertaking to ensure rights; the right to life; the right to freedom from arbitrary interference with privacy, family and home life; the right to enjoy culture; and the right of the child to protective measures.[24]

An important aspect of the complaint is that, regarding the conduct and omissions alleged to have caused the claimed rights violations, it separated a failure to take adequate measures to adapt to climate change from a failure to take adequate measures to mitigate against climate change. Climate mitigation measures are measures to mitigate or lessen the extent of climate change, including greenhouse gas emissions reduction measures and measures to transition from

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17 *Human Rights Act 2019* (Qld) ss 9, 58.

18 Ibid s 108(2)(b). However, the Act applies to all legislation and statutory instruments whether passed or made before or after the commencement: at s 108.

19 Ibid pt 4.

20 *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21, 254 [1332] (Kingham P) ('*Waratah*').

21 See, eg, *Victorian Charter of Rights and Responsibilities Act 2006* (Vic).

22 *Optional Protocol* (n 3) art 2.

23 'Our Islands, Our Home', *Meet the #TorresStrait8* (Web Page) <https://perma.cc/36PU-7PEH>.

24 The full articles are detailed in the text of the *ICCPR* (n 3).

fossil fuels to renewable sources of energy. In this case, mitigation measures also specifically referred to ceasing the *promotion* of fossil fuel extraction and use, which the authors felt 'severely undermined' global efforts to address climate change.[25] Climate adaptation measures are measures designed to adapt to the impacts of climate change in such a way as to reduce the severity of harm caused as a result of these impacts. Adaptation measures in this case referred to 'infrastructure to protect the authors' lives, way of life, homes and culture against the impacts of climate change, especially sea level rise'.[26]

Australia made its submission on the admissibility and merits of the case on 29 May 2020,[27] and subsequently asked the Committee to dismiss the case.[28] The authors made additional submissions in reply on 29 September 2020, reiterating their allegations.[29] They were supported by an amici curiae brief filed by UN Special Rapporteur on Human Rights and the Environment David Boyd, together with his predecessor John Knox, in late 2020.[30] Australia eventually responded on 5 August 2021.[31] Australia's concerns with the authors' complaint and the arguments made in relation thereto included that the Australian government is already taking significant action on climate change, that it alone cannot prevent the impacts to the Torres Strait since climate change is a complex and multi-actor global problem, and that many of the impacts described by the authors are future possible effects rather than present harms.[32]

The Committee's decision was published on 22 September 2022.[33] It addresses both issues of admissibility raised by Australia (outlined further in Part III of this case note) and the merits of the authors' arguments that Australia had violated various human rights of the authors and their children (Part IV of this case note). Eighteen Committee members participated in the examination of the communication. Annexed to the majority view was the separate concurring opinion of member Gentian Zyberi, who agreed with the majority that *ICCPR* arts 17 and 27 had been violated by Australia, as well as the separate opinion of Duncan Laki Muhumuza and the separate joint opinion of three other members,

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25 Billy et al, Complaint (n 1) 26–8 [122]–[127].

26 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 3 [3.1].

27 Australian Government, 'Australian Government Submission on Admissibility and Merits to the United Nations Human Rights Committee', Communication to the Human Rights Committee in *Billy v Australia*, 29 May 2020 ('Submission on Admissibility and Merits').

28 See Katharine Murphy, 'Australia Asks UN to Dismiss Torres Strait Islanders' Claim Climate Change Affects Their Human Rights', *The Guardian* (online, 14 August 2020) <https://perma.cc/5KZ4-QH5Y>.

29 Daniel Billy et al, 'Reply to State Party's Submissions on Admissibility and Merits Dated 29 May 2020 from Authors of Communication No 3624/2019 (Billy et al v Australia) Submitted under the Optional Protocol to the International Covenant on Civil and Political Rights', Communication to the Human Rights Committee in *Billy et al v Australia*, 29 September 2020 ('Reply').

30 David R Boyd and John H Knox, 'Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment', Communication to the Human Rights Committee in *Billy v Australia*, 5 October 2020.

31 Australian Government, 'Australian Government Response to the Additional Submissions for the Authors Dated 29 September 2020 Concerning the Admissibility and Merits of the Communication', Communication to the Human Rights Committee in *Billy v Australia*, 5 August 2021 ('Response to Additional Submissions').

32 Ibid 6 [10], 8–9 [17].

33 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 1.

who each felt that in addition to having violated arts 17 and 27, Australia had also violated art 6 (the right to life).[34]

III ADMISSIBILITY

Several matters relating to the admissibility of the communication were considered by the Committee, it being ultimately determined that the Committee was not precluded from proceeding to consider the merits of the complaint.[35] Three important admissibility issues relevant to potential future climate change-related human rights claims, and to climate change law more generally, are outlined below. Pertinent to understanding these arguments are arts 1 and 2 of the *Optional Protocol*:

> Article 1: A State Party to the [*ICCPR*] that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the [*ICCPR*] …
>
> Article 2: Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the [*ICCPR*] have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.[36]

A *Exhaustion of Domestic Remedies*

Article 5(2) of the *Optional Protocol* required the Committee to ascertain whether (in light of art 2, extracted above) the authors had exhausted all available domestic remedies before coming to the Committee.[37] Outlining first the lack of domestic remedies available to them in Australia on account of Australia not having implemented the *ICCPR* in its domestic law (discussed above in Part II, and supported by legal advice provided to the authors),[38] the authors asserted in their complaint that there is no need to exhaust domestic remedies that do not offer a reasonable prospect of success.[39] The Committee agreed, interpreting its obligation as meaning that it needed to ascertain whether domestic remedies had been exhausted insofar as such remedies offer a reasonable prospect of redress proportionate to the harm occasioned, and are de facto available.[40]

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34 Ibid annex II 20 [1], annex I 18 [2], annex III 22 [1].

35 Note the Committee did determine that claims made by the authors regarding art 2 of the *ICCPR* were inadmissible, and it did not consider these claims further. Article 2 contains a general obligation with respect to ensuring rights. The Committee felt that an examination of whether Australia violated its general obligations under art 2 read in conjunction with arts 6, 17, 24(1) and 27 of the *ICCPR* 'would not be distinct', in the requisite sense, from the examination of those rights separately: *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 10 [7.4].

36 *Optional Protocol* (n 3) arts 1, 2.

37 Ibid art 5(2).

38 Billy et al, Complaint (n 1) 4 [20]–[22].

39 Ibid 3 [12].

40 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 10 [7.3], citing Human Rights Committee, *Decision Adopted by the Committee under the Optional Protocol, Concerning Communication No 2568/2015*, 128th sess, UN Doc CCPR/C/128/D/2568/2015 (26 May 2020) 11 [6.3] ('*DG v Philippines*').

In particular, the Committee noted the authors' submission that the highest court in Australia has ruled in *Graham Barclay Oysters Pty Ltd v Ryan* ('*Graham Barclay Oysters*') that state organs do not owe a duty of care for failing to regulate environmental harm.[41] The complaint preceded the decision of the Full Court of the Federal Court of Australia in *Minister for the Environment v Sharma* in which, citing *Graham Barclay Oysters*, the Court found that the federal Minister for the Environment does not owe a duty of care to vulnerable Australians to protect them from the future impacts of climate change, including death and personal injury as a result of extreme weather events.[42] Given the absence of available remedies with reasonable prospects of success, the Committee was satisfied that the authors had, for the purpose of art 5(2) of the *ICCPR*, exhausted domestic remedies.[43]

B *Shared Responsibility over Climate Change*

Australia submitted that it cannot be held responsible, either in a practical or a legal sense, for the climate change impacts alleged by the authors, and that the authors' claim was inadmissible on this basis.[44] Australia maintained that the authors had not shown any meaningful causal connection between the alleged violations of their rights and Australia's alleged failures with respect to adaptation and mitigation.[45] The Committee rejected this assertion and determined that it was not precluded from examining the communication on such a basis. The Committee considered as relevant Australia's status as a large producer of greenhouse gas emissions and its high ranking on world economic and human development indicators.[46]

The authors argued that Australia's obligations under international climate change treaties, including the *Paris Agreement*, constitute part of the 'overarching system' that is relevant to the examination of Australia's alleged violations under the *ICCPR*,[47] and therefore that Australia's lack (in their view) of ambition in contributing to the collective goals and objectives of the *Paris Agreement* could support their case.[48] Australia contested this argument on the basis of 'stark and significant' differences between the *ICCPR* and the *Paris Agreement*, rendering (in its view) the *Paris Agreement* and other international treaties inadmissible *ratione materiae*.[49] The Committee noted that it is not competent to determine compliance with other international agreements, but that since the authors were not seeking relief for violations of other instruments such as the *Paris Agreement*, the appropriateness of interpreting Australia's *ICCPR* obligations in light of such instruments related to the merits of the authors' claim and was not a barrier to admissibility.[50]

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41 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 3 [2.9].
42 See generally Laura Schuijers, 'Minister for the Environment v Sharma: Death by a Thousand Coal Mines' (2022) 37(1) *Australian Environment Review* 14, 14.
43 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 10 [7.3].
44 Ibid 11 [7.6].
45 Australian Government, Response to Additional Submissions (n 31) 7 [19].
46 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 11 [7.8].
47 Ibid 4 [3.2].
48 Billy et al, Complaint (n 1) 2 [7].
49 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 5 [4.1].
50 Ibid 10–11 [7.5].

C *Victim Status and Future Harm*

Australia attempted to argue that the complaint was inadmissible on the basis that the authors were invoking potential future harms, and needed to show (but had not shown) a past or existing violation, or imminent threat of violation, of their rights by Australia.[51] The Committee, in interpreting art 1 of the *Optional Protocol* (extracted above), noted that a 'victim' should be 'actually affected' by any alleged rights violations; that either rights must already have been impaired or impairment must be imminent; and that regarding a risk of being affected in the future, the risk must amount to more than a 'theoretical possibility'.[52]

The authors argued that *existing* greenhouse gases are the cause of the impacts from which they have already suffered, are suffering, and will suffer in future, and that if they were to adopt Australia's definition of 'imminent' before making a complaint, their homes and culture would already be irrevocably lost.[53] Australia maintained that there is still a window of time, and that '[t]he possible impacts of a slow onset process do not confer victim status on the authors'.[54]

The Committee considered that the future risk of the authors being affected by climate change in the manner described in their communication is owed to serious adverse impacts that have already occurred and which are ongoing, making the risk of future harm more than a theoretical possibility.[55] In so considering, it took into account the extreme vulnerability of Torres Strait Islanders who have limited resources and no prospect of internal relocation.[56]

IV MERITS: HUMAN RIGHTS VIOLATIONS

The authors submitted that the following *ICCPR* articles had been violated by Australia's inadequate response to climate change:[57]

1 art 2 (the undertaking to ensure rights), read alone and in conjunction with arts 6, 17 and 27;
2 art 6 (the right to life);
3 art 17 (the right to be free from arbitrary interference with privacy, family and home); and
4 art 27 (the right to enjoy culture).

The authors also claimed violations of the rights of their children under art 24(1) of the *ICCPR* (the right of the child to protective measures).[58] Having found a violation of arts 17 and 27, the Committee did not deem it necessary to examine the authors' claims under art 24(1) in relation to the children.[59] The complaint in relation to art 2 was rejected at the admissibility stage.[60]

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51 Australian Government, Submission on Admissibility and Merits (n 27) 8 [24]–[25].
52 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 11 [7.9], citing Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (7 January 2020) 8 [8.4] ('*Teitiota v New Zealand*').
53 Billy et al, Reply (n 29) 8–12 [36]–[47].
54 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 8 [6.1].
55 Ibid 11–12 [7.10].
56 Ibid.
57 Ibid 2 [1.1].
58 Ibid.
59 Ibid 16 [10].
60 Ibid 10 [7.4].

A *Right to Privacy, Family and Home (Article 17)*

Article 17 of the *ICCPR* states: 'No one shall be subjected to arbitrary or unlawful interference with his [sic] privacy, family, home or correspondence, nor to unlawful attacks on his [sic] honour and reputation.'[61]

In their complaint, the authors described the prospect they face of having to abandon their homes, being the respective islands on which they each live. One of the authors' houses has already been destroyed once due to flooding.[62] As earlier mentioned, flooding has caused and continues to threaten the washing away of graves and burial sites, which are important to the authors in honouring their ancestral history. Sea level rise and the further prospect of erosion continue to threaten the authors' homes and home lives.

As First Nations inhabitants of the Torres Strait region, the authors were recognised by the Committee as having a special relationship with their territory that characterises their family or community and home lives and which cannot exist in the same way in a different location. For example, coming-of-age and initiation ceremonies are only culturally meaningful if performed on traditional lands.[63] As well as acknowledging this connection between private or home life and place, the Committee also acknowledged the authors' more general dependence on the health of their surrounding ecosystems for their wellbeing; specifically, it acknowledged a connection between environmental and climate change and mental or physical harm that could constitute an interference with family and home.[64]

The Committee noted that nation states must prevent interference with a person's privacy, family or home even if it arises from conduct not attributable to the state, 'at least where such interference is foreseeable and serious'.[65] It also considered that art 17 'should not be understood as being limited to the act of refraining from arbitrary interference', instead obligating states 'to adopt positive measures that are needed to ensure the effective exercise of the rights under article 17'.[66] Applying this to the authors' complaint, the Committee recognised Australia's efforts to address the impacts of climate change in the Torres Strait, including the building of seawalls on the authors' home islands due for completion in 2023.[67] But the Committee also noted that the authors had requested upgraded seawalls at various points over the past decades (with the delay in construction unexplained by Australia) and concluded that Australia's efforts, at least partly because they were not timely, were inadequate to prevent a violation of art 17.[68]

B *Right to Enjoy Culture (Article 27)*

Article 27 of the *ICCPR* states:

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61 *ICCPR* (n 3) art 17(1).

62 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 14 [8.9].

63 Ibid 7 [5.2].

64 Ibid 15 [8.12].

65 Ibid 14 [8.9], citing Human Rights Committee, *General Comment No 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, 32nd sess, UN Doc HRI/GEN/1/Rev.9 (8 April 1988) [1], [9].

66 Ibid 14 [8.10].

67 Ibid 13–14 [8.7].

68 Ibid 15 [8.11]–[8.12].

> 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.[69]

The authors are part of a minority for the purposes of art 27, being numerically inferior in Australia as a whole.[70] Encompassed within art 27 is a right for minority *indigenous* groups; the minority right to culture allows First Peoples to enjoy the territories and the resources that they have traditionally used.[71]

The authors again emphasised the distinct connection in their culture to place. They told the Committee of the importance of conducting cultural ceremonies and practicing traditional ways of subsistence, and that these would lose meaning if conducted elsewhere, or would not be possible in a different environment.[72] Passing down traditional ecological and environmental knowledge is a critical intergenerational practice to First Nations Torres Strait Islanders, but climate change renders environmental patterns less predictable.[73] Forced displacement would affect this practice to the point that traditional knowledge might one day be considered effectively lost; the authors feared that climate change could relegate Torres Strait Islander culture to the past.[74]

The Committee, which has previously recognised environmental degradation as founding a breach of art 27,[75] considered that climate change impacts to the Torres Strait region could have been reasonably foreseen by Australia, and that Australia had therefore violated art 27 on account of its failure to prevent and adapt to climate change impacts.[76] In a separate but concurring opinion, Committee member Gentian Zyberi emphasised in particular the relevance of mitigation measures to art 27, as mitigation rather than adaptation addresses the root cause of the problem of climate change.[77]

C *Right to Life (Article 6)*

Article 6 of the *ICCPR* states: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [sic] life.'[78]

The authors claimed that Australia has failed to prevent a foreseeable loss of life from the impacts of climate change, and that it has also failed to protect their

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69 *ICCPR* (n 3) art 27.

70 'Minority' can be given its ordinary meaning: Fernand de Varennes, Special Rapporteur, *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 74th sess, UN Doc A/74/160 (15 July 2019) 14 [41].

71 Office of the High Commissioner for Human Rights, *General Comment No 23: Article 27 (Rights of Minorities)*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) [3.2], [7].

72 Billy et al, Reply (n 29) 13–16 [55].

73 Billy et al, Complaint (n 1) 6 [31]–[34].

74 Ibid 46 [198].

75 Human Rights Committee, *Views: Communication No 1457/2006*, 95th sess, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009) 10–11 [7.5], 11 [7.7] ('*Poma Poma v Peru*').

76 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 16 [8.14].

77 Ibid annex II 21 [6].

78 *ICCPR* (n 3) art 6(1).

right to life with dignity.[79] Citing the conduct and omissions already described, the authors contended that 'Australia has failed to do what is necessary to avoid a human rights crisis'.[80] The authors additionally alleged that a right to a healthy environment is part of the right to life.[81]

Australia argued that it is not under any obligation to prevent foreseeable loss of life from climate change, in response to which the Committee recalled that art 6 cannot be properly understood if interpreted in a restrictive manner; the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life, and such threats may include adverse climate change impacts.[82] The Committee nonetheless felt that the authors had shown 'insecurity' but not adverse impacts to their health or a real and reasonably foreseeable risk of exposure to a situation of 'physical endangerment or extreme precarity' that could threaten their right to life or life with dignity.[83] The Committee felt that the authors' claims regarding their right to life mainly related to their ability to maintain their culture.[84]

Four Committee members disagreed with the majority on this point. Committee member Duncan Laki Muhumuza, in his individual opinion annexed to the decision,[85] implored Australia to take immediate action to protect the lives of vulnerable citizens such as the authors of the complaint.[86] Citing *Urgenda v Netherlands*,[87] he felt that climate change presented an imminent threat to life.[88] The joint opinion of Committee members Arif Bulkan, Marcia VJ Kran and Vasilka Sancin considered the approach of the majority too restrictive.[89] They felt that significant loss of food sources, livelihood and shelter was a risk to life demonstrated by the authors and that the majority need not have focused on finding adverse health impacts to demonstrate an art 6 violation.[90] They felt the risks to the authors' right to life were 'independent and qualitatively different from' the risks to their right to enjoy their culture.[91]

V REMEDIES AND RESPONSE

Pursuant to art 2(3)(a) of the *ICCPR*, state parties must ensure any person whose rights or freedoms are violated shall have an effective remedy. Australia is a party to the *ICCPR* and its *Optional Protocol*, meaning it has agreed to comply with the *ICCPR* and has accepted the jurisdiction of the Committee.[92] The Committee expressed the view that Australia is obligated to, inter alia, (i) provide compensation for the harm suffered by the authors; (ii) engage in meaningful

79 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 4 [3.4].
80 Billy et al, Complaint (n 1) 29 [166].
81 Ibid 36–7 [156]–[157], citing *Environment and Human Rights Advisory Opinion* (n 8) 26 [59].
82 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 12–13 [8.3].
83 Ibid 13 [8.6].
84 Ibid.
85 Ibid annex I.
86 Ibid annex I 19 [17].
87 *Urgenda Foundation v Netherlands* (n 8); *Netherlands v Urgenda Foundation* (n 8).
88 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) annex I 19 [14]–[16].
89 Ibid annex III 22 [2].
90 Ibid annex III 22 [3].
91 Ibid.
92 *Optional Protocol* (n 3) art 1.

consultations with the authors' communities to assess their needs; (iii) continue to implement measures necessary to ensure the communities' safe existence on their islands; (iv) monitor and review the effectiveness of these measures, resolving any deficiencies as soon as practicable; and (v) take steps to prevent future violations.[93] Australia was given 180 days in which to provide to the Committee information about what measures it has taken.[94]

The view of the Committee is not legally binding in the sense that Australia does not face legal sanctions if it does not adopt the measures suggested. As further described in Part VI of this case note, the decision may nonetheless be relevant in domestic decisions in Australia, including the *Pabai Pabai v Commonwealth* case currently afoot.[95] Were that case to succeed, the Australian government would be recognised as owing a duty of care to Torres Strait Islanders relating to the same harms and risks complained of in *Billy v Australia*, breach of which would potentially be actionable under domestic law.

The authors have also advanced a petition urging Australian Prime Minister Anthony Albanese to adopt five demands outlined in their broader 'Our Islands, Our Home' campaign. These demands are to (i) fund adaptation programs in the Torres Strait; (ii) commit to 100% renewable energy within the next 10 years; (iii) support Torres Strait Island communities to build community-owned renewable energy; (iv) transition away from fossil fuels as rapidly as possible through a just transition for workers; and (v) push the world to increase global ambition and keep global warming to less than 1.5°C above pre-industrial levels.[96] The Australian government formally responded to the Committee's decision in March 2023.[97] In its response, Australia outlined new legislation and policy measures designed to address climate change, including the *Climate Change Act 2022* (Cth) and an associated stronger mitigation commitment under the *Paris Agreement*, as well as the establishment of the Torres Strait Climate Centre of Excellence which is intended to support a regional response to climate impacts in the Torres Strait.[98] Regarding the Committee's findings that Australia breached arts 17 and 27 of the *ICCPR*, Australia said the Committee 'did not apply an appropriately high threshold in considering the obligations to take positive measures'.[99] More specifically, it disagreed with the Committee's views that foreseeability of harm should enliven positive obligations.[100] It said further that its policy reforms and commitments to collaborate with First Nations Australians would be the most appropriate remedies for the breaches found by the Committee,[101] without specifically addressing the Committee's suggestion that it also provide adequate compensation for the harm suffered.

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93 *Billy v Australia*, UN Doc CCPR/C/135/D/3624/2019 (n 2) 16 [11].

94 Ibid 16–17 [12].

95 See *Pabai Pabai v Commonwealth* (Federal Court of Australia, VID622/2021, commenced 26 October 2021) ('*Pabai Pabai v Commonwealth*').

96 'Our Islands, Our Home' (n 23), *About* (Web Page) <https://perma.cc/7479-HUZR>.

97 Australian Government, 'Response of Australia to the Views of the Human Rights Committee in Communication No. 3624/2019 (Billy et al v Australia)', Communication to the Human Rights Committee in *Billy v Australia*, 30 March 2023, 4 [18], 8 [31]–[34].

98 Ibid 13 [54].

99 Ibid.

100 Ibid 13–14 [55]–[56].

101 Ibid 14 [58].

VI REFLECTIONS

Billy v Australia marks the first time a nation state has been deemed responsible by a UN body for the rights of individual citizens on account of inadequate climate policy. In finding that the *ICCPR* art 17 right to privacy, family and home and the art 27 right to enjoy culture were each violated by one nation's failure to adequately address climate change in a sufficiently timely manner, the Committee has allowed a group of individuals to hold a national-level government to account for its response to a complex problem of which it is not the sole cause, but to which it is a contributor.

Although the decision is important, and has advanced rights-based climate jurisprudence, it is not wholly unprecedented: foreign courts in recent years have found that individual governments must respond to climate change by implementing mitigation measures,[102] and many other cases are in progress.[103] An emerging body of law is developing on the failure to adapt, with several cases pending before courts around the world.[104] Adaptation failure is likely to be a fast-growing area of climate litigation, to which *Billy v Australia* has now contributed.

To date, most climate change cases are brought domestically. The role of international fora in the adjudication of climate change complaints will be conditional where there are requirements to first exhaust domestic remedies. In many jurisdictions, such remedies will be considered more readily available than they were to the authors. Note for example *Sacchi v Argentina*, which involved complaints by a group of young people to the UN Committee on the Rights of the Child ('CRC') alleging failures by Argentina, Brazil, France, Germany and Turkey to address the climate crisis.[105] The CRC sympathised with the group's concerns but found, with respect to each of the five countries, a failure to exhaust domestic remedies which meant it could not adjudicate the complaints.[106]

The Committee's decision in *Billy v Australia* clearly shows that action per se is not enough: action must be timely as well as sufficient. What that means may be open to interpretation. The legal findings of the Committee principally relate to adaptation. With respect to mitigation, although the Committee did not discuss concepts of proportionality or capacity, it alluded to each, recognising that Australia has taken *some* action on climate change, but not going so far as to

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102 See, eg, *Urgenda Foundation v Netherlands* (n 8); *Netherlands v Urgenda Foundation* (n 8); *Neubauer v Germany* (n 8).

103 See, eg, *KlimaSeniorinnen v Switzerland* (European Court of Human Rights, 53600/20, commenced 26 November 2020; *Carême v France* (European Court of Human Rights, 7189/21, commenced 19 November 2018); *Duarte Agostinho v Portugal* (European Court of Human Rights, 39371/20, commenced 2 September 2020).

104 See, eg, Tsama William et al, 'Applicants' Written Submissions', Submission in *William v Attorney General*, Miscellaneous Cause No 024 of 2020, 3 May 2021; Abdul Malik Akdom and Margaretha Quina, 'Complaints to the National Commission on Human Rights of the Republic of Indonesia: "Negligence of the Climate Crisis is a Violation of Human Rights"' Complaint to the National Commission of Human Rights, 14 July 2022 < https://perma.cc/8PNP-BPCD>.

105 See, eg, 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*, 88th sess, UN Doc CRC/C/88/D/104/2019 (11 November 2021) 2 [2] ('*Sacchi v Argentina*').

106 Ibid 13–14 [10.18], 14 [10.21]. See also related decisions: Sabin Center for Climate Change Law, 'Sacchi et al v Argentina et al', *Climate Change Litigation Databases* (Web Page) <https://perma.cc/9SZ5-3FQE>.

suggest that such action relieves Australia of the responsibility to uphold the rights of its citizens. The Committee was persuaded of Australia's significant contribution to global climate change, reflecting a trend away from divorcing fossil fuel consumption from its production and promotion.[107] The decision paves the way for future decisions from international courts and tribunals if confronted by those vulnerable to and suffering because of climate change.

The International Court of Justice has recently been so confronted. In November 2022, a group of nation states led by Vanuatu, a low-lying island state also in Melanesia, requested an advisory opinion on the obligation of states under international law to protect the rights of present and future generations against the adverse effects of climate change.[108] In January 2023, Chile and Colombia also requested an advisory opinion from the Inter-American Court of Human Rights, to similarly clarify the scope of state obligations under international human rights law.[109]

At the time of writing, it is unknown what practical impact the decision will have in influencing Australia to take stronger rights-oriented action in the Torres Strait. As mentioned, the campaign of the Torres Strait 8 is ongoing. Given the manifest vulnerability of mainland Australia to riverine flooding and bushfire, the Committee's decision may have ramifications outside the Torres Strait region, in the sense that Australia is now 'on notice' that it cannot wait to take action to prevent loss of home life and culture in its broader jurisdiction.

Currently before the Australian Federal Court, the case of *Pabai Pabai v Commonwealth* will test in an Australian court whether Australia's national-level government has and has breached an alleged duty of care to protect Torres Strait Islanders and the marine environment in the Torres Strait from the current and projected impacts of climate change.[110] Pabai Pabai and Guy Paul Kabai are arguing, inter alia, that a duty is owed to them under the *Torres Strait Treaty*.[111] In a judgment concerning the case procedure in July 2022, Mortimer J said:

> There is no denying the unremitting march of the sea onto the islands of the Torres Strait. The reality for the people of the Torres Strait is that they risk losing their way of life, their homes, their gardens, the resources of the sea on which they have always depended and the graves of their ancestors. Whether the Commonwealth has legal responsibility for that reality, as the applicants allege in this proceeding, is a different question. However, the reality facing Torres Strait Islanders gives this proceeding some considerable urgency. The applicants, and the Torres Strait Islanders they represent, are entitled to know whether the Commonwealth is legally responsible in the way alleged, or not.[112]

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107 Some Australian courts have adopted this view: see, eg, *Waratah* (n 20) 118–200 [571]–[1015]; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [422]–[556].

108 *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, 77th sess, 64th plen mtg, Agenda Item 40, UN Doc A/RES/77/276 (4 April 2023).

109 *Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile (Advisory Opinion)* (Request No 1/2023, 9 January 2023).

110 *Pabai Pabai v Commowealth* (n 95).

111 Pabai Pabai and Guy Paul Kabai, 'Concise Statement', Submission in *Pabai Pabai v Commonwealth*, VID622/2021, 31 March 2022, 3 [20].

112 *Pabai Pabai v Commonwealth* [2022] FCA 836, 10 [28]–[29].

Climate change is an ongoing process. Scientists' current understanding of climate change indicates that, in essentially all hypothetical trajectories, climate change impacts will worsen in coming years.[113] This presents an incredible challenge for the law, which must effectively determine who is responsible for redressing climate change impacts and who, of those who will suffer, is entitled to relief (and from whom). The scale of the problem is as broad as anything humanity has dealt with for a long time, perhaps ever. Piecemeal decisions can and do inspire others to take action (as we have seen following every major successful climate case), cumulatively generating a self-reinforcing momentum and the advancement of an important jurisprudence around climate change and people's rights. This in turn influences societal expectations as to the standard of response to which citizens are entitled. *Billy v Australia*, in supporting the rights of First Peoples, may be the first of many decisions of its kind and will serve as a caution for nations who are not responding with gusto to the threats posed by climate change to their citizens.

[113] Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report* (Report, 2022) 6.