The UN Human Rights Committee’s landmark decision in Daniel Billy et al. v. Australia

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03 Oktober 2022

Rising Before Sinking

On 22 September 2022, just one day before global climate protests took place in around 450 locations, the UN Human Rights Committee (Committee) has published its landmark decision in the case *Daniel Billy et al. v. Australia*. 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 ICPPR) and to be free from arbitrary interferences with their private life, family and home (Art. 17 ICCPR).

In this blog post, 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 although the Committee takes a hesitant and restraint position regarding victim status and the right to life with dignity, failing to account for harms located in the (further) future, it still managed to overcome previously controversial admissibility hurdles taking the case to the merits. The Committee thereby 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.

The complaint: climate change impact on indigenous communities of low-lying islands

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 to ensure the long-term habitability of the islands“ and second, “to mitigate the impact of climate change“ (paras. 2.7 and 2.8). 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."[1)] 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,"[2)] thereby eventually provoking the community members' displacement from their islands and the potential extinction of their culture (paras. 2.2-2.5, 3.5-3.7).

Progressive restraint: continuing *Ioane Teitiota* within the scope of admissibility

Regarding admissibility, only two strands of the Committee's reasoning will be highlighted on account of their particular relevance for human rights claims in the context of climate change.

First, the Committee had to contemplate whether a State may have committed a violation of the Covenant, where the harm allegedly resulted from its failure to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory (para. 7.6). Concerning adaptation, the Committee briefly referred to the positive obligations arising from the invoked human rights provisions (para. 7.7). As regards mitigation measures, it affirmed that Australia ranks high both on emission of greenhouse gasses as well as world and human development indicators, leading to the conclusion that the alleged actions and omissions fall under Australia's jurisdiction (para. 7.8).

Furthermore, 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 (para. 7.9).

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, it 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 were highly dependent on limited natural resources and "extremely vulnerable to intensely experiencing severely disruptive climate change impacts." In light of the limited territory and means of subsistence, the Committee considered it unlikely that the community could finance adaptation measures at own cost in order to moderate the occurring and expected harm. Therefore, the risk of

rights impairment owed to past and ongoing serious adverse impacts was more than a theoretical possibility (para. 7.10).

Following *Ioane Teitiota v. New Zealand*, as well as the increase in domestic and regional climate change case law, 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 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.

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 reflects once more how the phenomenon of climate change does not easily fit into the human rights terminology of violation, as the negative consequences of past and present emissions only materialize and show their full extent in the (distant) future. This reluctance to capture future harm, in part because of these methodological concerns, reveals the limits of preventive protection in contemporary human rights dogma, which is also present in the decision on the merits.

Win and lose: reaching the merits and passing by 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*. First, it endorsed its former jurisprudence on the right to life with dignity and positive obligations operating therein, which may also cover threats related to climate change (possibly) resulting in the loss of life (para. 8.3). Nonetheless, regarding the case at hand, the Committee observed that it was not proven that the complainants faced or face health impairments, a real and reasonably foreseeable risk of being exposed to physical endangerment or extreme precarity that could threaten their right to life with dignity (para. 8.6).

It further considered that the main arguments made by the authors were related to their ability to maintain their culture, falling under the scope of Art. 27 ICCPR (ibid.). Building on its findings in *Ioane Teitiota v. New Zealand*, the Committee emphasized that due to the extreme risk of submergence a violation may occur even before the risk is realized (para. 8.7). Nevertheless, in the face of multiple infrastructure projects included in the 2019-23 Torres Strait Seawalls Program, other adaptive measures taken by the State and a timeframe (10-15 years) that allowed for "affirmative measures to protect and, where necessary, relocate the alleged victims", 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 (ibid.).

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 its inhabitants, 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 seems to recognize the necessity of a preventive approach that does not stick to an equation of violation and realization of risk, which 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 Art. 6 ICCPR under such risk scenarios as long as i) the 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. Besides the welcome focus on positive obligations, the Committee also puts adaptation at the center of its reasoning. Accordingly, the question 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 and developed country. 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.

Furthermore, the concept of a right to life with dignity is construed rather narrowly, as the Committee ties the proof of its violation to either adverse impacts to the inhabitants' health, reasonable foreseeable risk of physical endangerment or extreme precarity, which relates more to the physically connoted notion of "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,[3)] according to which necessary prerequisites for a decent life include *inter alia* the quality of and access to water, food and health.[4)] Based on such a broad understanding, the specific situation of the complainants could thus have provided evidence for a violation of this right in the present case in the light of occurring food insecurity, loss of land and housing as well as affectation and potential loss of their culture. Additionally, relocation would not only be not an option to protect the right to life in dignity, but could rather constitute its proper violation. This broader reading of Art. 6 ICCPR is related but can also not be reduced to the maintenance of the indigenous culture, which is why a referral to Art. 27 ICCPR seems not adequate, as it does not capture all of the components that feed into the right to life with dignity.

Getting there: climate change-related human rights violations of Art. 17 and 27 ICCPR

Having said that, much of the reasoning that could have been expected under Art. 6 ICCPR can then be found in the Committee's reasoning under the right to private life, family and home. Besides reflecting a tendency of other human rights bodies, such as the European Court of Human Rights (ECtHR), to treat environmental human rights issues under the right to private and family life, treating the case as a violation under Art. 17 (and 27) ICCPR also shows that the lack of an independent right to climate protection leads to an arbitrary normative allocation of climate change-related human rights impacts.

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 are already affecting their culture and nutrition (paras. 8.9, 8.10 and 8.12). 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 (paras. 8.9 and 8.12). The Committee further took a different path compared to its reasoning under Art. 6 ICCPR: despite acknowledging adaptation efforts made by the State, it pointed to the unjustified delay in upgrading seawalls that had been requested by the community for years (para. 8.11 and 8.12). With reference to *Benito Oliveira et al. v. Paraguay* the Committee found a violation of Art. 17 ICCPR as serious climate change impacts on the community's traditional lands affected their members' (physical and mental) wellbeing and constituted a foreseeable and serious violation of private, family life and home (para. 8.12).

Connecting to the facts and legal reasoning under Art. 17 ICCPR, it also found a violation of the right to enjoy one's own culture, which includes "the inalienable right of peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity" (para. 8.13). 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. Its violation grounds on Australia's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain and to transmit their culture to their children and future generations, including traditional fishing, farming and cultural ceremonies, from foreseeable climate change-related impacts (para. 8.14).

One Step Forward: Protecting indigenous islanders' rights in the context of climate change

While the views adopted in *Billy et al. v. Australia* do not constitute the first decision related to climate change-related human rights issues, its outcome is 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. Although in *Ioane Teitiota v. 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, in the end, the Committee found no violation of the right to life due to a timeframe that still allowed for adaptation measures. The complainants in *Sacchi et al. v. Argentina et al.* before the Committee on the Rights of the Child did also not succeed in reaching the merits stage, yet due to the failure to exhaust domestic remedies. *Billy et al. v. 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 was thus able to advance to substantive legal issues.

It 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. In this sense, it also mirrors the strive for climate justice and protection of particularly vulnerable groups by climate change activists, whose increasing political pressure on decision-makers might have influenced the Committee's decision to take the case to the merits stage.

In the end, the decision does justice to the indigenous community's interest in the maintenance of its culture and continuous existence on their traditional lands 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. This shows that the decision's relevance goes far beyond the particular case, which also lies in its radiating effect: *Billy et al. v. Australia* might well serve as a blueprint for future decisions of other human rights institutions, such as the ECtHR, before which currently several climate change-related cases are pending.

References

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

↑**2** Ibid.

References

↑**3** See IACtHR, *The Environment and Human*, Advisory Opinion OC-23/17, 15 November 2017, Serie A No. 23, para. 48. See also *Case of the Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Judgment, 17 June 2005, Series C No. 125, paras. 162 et seq.; *Case of the Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs), Judgment, 25 November 2015, Series C No. 309, para. 181.

↑**4** See IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra note* 3, para. 163, 167; *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Judgment, 24 August 2010, Series C No. 214, paras. 195 to 213; The Environment and Human Rights, *supra note* 3**,** para. 109.

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SUGGESTED CITATION Kahl, Verena: *Rising Before Sinking: The UN Human Rights Committee’s landmark decision in Daniel Billy et al. v. Australia, VerfBlog,* 2022/10/03, https://verfassungsblog.de/rising-before-sinking/, DOI: 10.17176/20221003-230341-0.

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