

‘Promising More than It Delivers’?: A Critical Reading of the HRC’s *Daniel Billy et al v. Australia* (2022) Decision Linking Climate Change and Human Rights

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ABSTRACT

The United Nations Human Rights Committee’s 2022 Decision, *Daniel Billy et al. v. Australia* (“*Daniel Billy*” or “the Decision”), brought by Indigenous Peoples residing on the Torres Strait Islands off the coast of Australia, is the first case before an international human rights body to find that a State’s failure to adopt timely climate adaptation measures violates the human rights of Indigenous Peoples living in that State. In *Daniel Billy*, the Human Rights Committee (“the Committee”) found a violation of the right to privacy, family, and home and the right to culture; but not the right to life. Drawing on the International Covenant on Civil and Political Rights (“the Covenant”), the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), and recent developments in the field of climate change and international human rights law (IHRL), this Comment discusses the significance and the limitations of *Daniel Billy* regarding the protection of the rights of Indigenous Peoples and others affected by climate change. We find that the advancements made in *Daniel Billy* are a big step toward holding states accountable for inadequate climate adaptation measures.

In our analysis of the Decision’s shortcomings, however, we argue that *Daniel Billy* promises more than it delivers on two accounts. First, we argue that the failure of the Committee to clearly determine that states have a positive obligation to adopt climate change *mitigation* measures, in addition to *adaptation* measures is a significant limitation of the Decision. Without climate change mitigation, it will not be possible for Indigenous peoples on low-lying islands or in other climate-vulnerable locations to protect their land and way of life, the basis for several human rights. Further, climate change is perpetuated by industrialized states, but its effects are most keenly felt by communities, like that of the Torres Strait Islanders, who have contributed little to climate change. Neglecting to link states’ duty to mitigate climate change to human rights violations therefore ignores the colonial nature of climate change. Second, we argue that the Committee failed to consider the interconnectedness of the

right to life with dignity in the context of climate change and Indigenous Peoples' right to enjoy their culture when it rejected the Torres Strait Islanders' claim that Australia's (in)action on climate change mitigation and adaptation violated the Islanders' right to life with dignity. Notwithstanding these limitations, we conclude that the precedent set in *Daniel Billy et al. v Australia* will have a long-lasting positive impact in the fields of international environmental and human rights law.

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TABLE OF CONTENTS

I.	INTRODUCTION.....	413
II.	CLIMATE CHANGE AND INDIGENOUS PEOPLES' RIGHTS.....	415
	A. <i>Indigenous Peoples and Climate Justice</i>	415
	B. <i>From the Inuit and Athabaskan Petitions to the Paris Agreement and UN Human Rights Proclamations: Legal Developments in Indigenous Climate Rights-based Litigation</i>	418
	C. <i>The Intersection of UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the International Covenant on Civil and Political Rights ("the Covenant")</i>	421
III.	A BRIEF SUMMARY OF THE FACTS AND CLAIMS ADDRESSED IN <i>DANIEL BILLY</i>	425
IV.	THE LEGAL SIGNIFICANCE OF THE DECISION: MILESTONES AND MISALIGNMENTS.....	426
	A. <i>Overcoming Admissibility Hurdles</i>	427
	B. <i>Linking Positive Human Rights Obligations and Climate Change Adaptation</i>	429
	C. <i>Failing to Link Positive Human Rights Obligations and Climate Change Mitigation</i>	431
	D. <i>Ignoring the Indivisibility of Cultural Integrity and the Right to Life with Dignity</i>	433
	E. <i>Finding Hope and Ambiguity in the Committee's Remedies</i>	437
	CONCLUSIONS.....	439

I. INTRODUCTION

This morning when I woke up on Masig, I saw that the sky was full of frigate birds. In my culture, we take this as a sign from my ancestors that we would be hearing good news very soon about this case.

I know that our ancestors are rejoicing knowing that Torres Strait Islander voices are being heard throughout the world through this landmark case. Climate change affects our way of life everyday. This win gives us hope that we can protect our island homes, culture and traditions for our kids and future generations to come.¹

In September 2022, the UN Human Rights Committee (“the Committee”) delivered its first positive decision linking human rights violations to a state’s failure to adapt to climate change in *Daniel Billy et al. v. Australia* (“*Daniel Billy*” or “the Decision”).² Eight members of the Indigenous Peoples residing on the Torres Strait Islands brought a complaint before the Committee as part of the communities’ wider ‘Our Islands, Our Home’ campaign. The Torres Strait, which is located between northeast Australia and New Guinea, is home to several low-lying islands that have been inhabited for at least 2,500 years, though likely much longer. The islander communities living in the Torres Strait have a long history and deep connection to the islands and surrounding coastlines. The Torres Strait Islanders who brought the complaint sought justice for the devastating effects that climate change is having on their home, which they attribute to the failure of the Australian Government (“the State”) to both curb its greenhouse gas (GHG) emissions and help the affected communities adapt to climate change in a timely manner.³

1. Yessie Mosby, one of the named plaintiffs in the *Daniel Billy* who lives on Masig, an island in the Torres Strait. *Torres Strait Climate Claimants Win Their Historic Human Rights Fight Against the Australian Government*, CLIENTEARTH (Sept. 23, 2022), <https://www.clientearth.org/latest/latest-updates/news/torres-strait-islanders-fight-to-hold-australia-accountable-for-climate-change> [https://perma.cc/HKR3-J5UD].

2. *Daniel Billy et al. v. Australia*, Communication No.3624/2019, Decision, UN Human Rts. Comm., ¶¶ 2.1–2.5, 5.2, 8.5, and 8.6 (Sept. 22, 2022). Under the UN Human Rights treaty body system, individuals or groups of individuals may bring a complaint against states who have violated the rights enshrined in International Covenant on Civil and Political Rights, given that the state in question has ratified the Covenant and the first Optional Protocol (16 December 1966). These complaints are known as ‘individual communications’ and are brought before the Human Rights Committee, which is the UN treaty body (a quasi-judicial body) that oversees implementation and enforcement of the Covenant. In individual communications to the Human Rights Committee, the individuals bringing the complaint are referred to as ‘the authors,’ the respondent as ‘the State,’ and the response of the Human Rights Committee as ‘the Decision.’ We use this terminology throughout the Comment. See *Rules of Procedure and Working Methods, Human Rights Committee*, OHRCH, <https://www.ohchr.org/en/treaty-bodies/ccpr/rules-procedure-and-working-methods> [https://perma.cc/Y4LU-D2XA] (last visited Jun. 4, 2023).

3. OUR ISLANDS, OUR HOME, <https://ourislandsourhome.com.au> (last visited Jun. 4, 2023).

The Decision follows in the footsteps of two previous attempts by Indigenous Peoples to hold states accountable for the impacts of climate change on their lives in precarious ecosystems through the Inter-American Commission of Human Rights (IACHR): the Inuit Petition brought by the Inuit Circumpolar Conference in 2005⁴ and the Athabaskan Petition brought by the Arctic Athabaskan Council in 2013.⁵ Both petitions concerned claims that the Indigenous Peoples' human rights were being violated due to material changes to their lands (including the thawing of permafrost) arising from climate change. The petitioners attempted to attribute climate change to inadequate policies on energy and carbon emissions by the U.S. and Canada respectively, so far without success. The Inuit Petition was deemed inadmissible on the grounds that the causal link between U.S. policies and climate change, a global concern, could not be established.⁶ The Athabaskan Petition has been pending without a decision on admissibility for ten years.⁷ Eighteen years after the Inuit Petition, *Daniel Billy* is the first case before an international human rights body to successfully link human rights violations (and Indigenous People's rights in particular) with climate change effects caused by states' actions and inactions regarding adaptation measures. This is a milestone both for the legal protection of Indigenous Peoples' rights and for the wider movement that seeks to achieve climate justice through international human rights law (IHRL).⁸

In this Comment, we analyze the legal significance of *Daniel Billy*. We demonstrate the ways in which the Decision advances the protection of Indigenous Peoples from human rights violations arising from climate change, as well as its limitations and the hurdles it portends for future rights-based climate litigation. Part II provides background on Indigenous Peoples' status and rights under IHRL, particularly issues related to climate justice and recent developments in linking human rights and climate change. Part III briefly outlines the

4. Petition to the Inter-Am. Comm'n on Hum. Rts, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), available at https://earthjustice.org/sites/default/files/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf [https://perma.cc/7C94-UMVC] (last visited Nov. 3, 2022), (hereinafter "Inuit Petition").

5. Inter-Am. Comm'n on Hum. Rts., *Arctic Athabaskan Peoples v. Canada*, petition submitted on April 23, 2013, case pending, https://earthjustice.org/wp-content/uploads/aac-petition_13-04-23a.pdf [https://perma.cc/PMY8-6ACF].

6. The Inuit Petition is discussed in more detail in Part II, *infra*.

7. For a contemporary discussion of the Athabaskan Petition and developed rights-based climate litigation in the Inter-American Human Rights system, see Laura C. Diaconu, *The Time Is Now for the IACHR to Address Climate Action as a Human Right: Indigenous Communities Can Lead (Again)*, 9 Am. Indian L.J. 215-40 (May. 24, 2021).

8. Christina Voigt, *UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change*, EJIL: TALK! (Sept. 26, 2022) <https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change> [https://perma.cc/Y8T9-EJTF]; Verena Kahl, *Rising Before Sinking*, VERFASSUNGSBLOG (Oct. 3, 2022) <https://verfassungsblog.de/rising-before-sinking> [https://perma.cc/337X-Z3QR].

facts of *Daniel Billy*. Finally, Part IV analyzes the Committee's main findings and elaborates on the Decision's significance and limitations for advancing human rights protections and climate justice for Indigenous Peoples.

We contend that the Decision substantially advances the legal protection of Indigenous Peoples' rights in two ways: (1) by setting the precedent that complaints of human rights violations arising from states' failure to take adequate climate change mitigation and adaptation measures are admissible before the Committee; and (2) by finding that a state's failure to take timely and adequate climate change adaptation measures can constitute human rights violations warranting costly remedies, including full compensation to the victims.

Notwithstanding these milestones for rights-based climate change litigation,⁹ we argue that the Decision falls short in addressing genuine climate justice for Indigenous Peoples in two significant respects. First, we argue that the Committee's failure to declare a definitive positive obligation on states to mitigate climate change fails to acknowledge the scientific reality that without adequate mitigation, climate change effects will outpace any possible adaptation measures. Moreover, failing to impose a positive obligation for states to mitigate climate change ignores the colonial nature of climate change—the fact that it is industrial states, and not Indigenous Peoples, who bear responsibility for causing climate change, and must therefore be the ones to fix their harmful behavior. Second, we argue that the Committee's decision to find no violation of the authors' right to life with dignity because the threats to the authors' lives were insufficiently imminent raises questions around the ability of IHRL to respond to the existential threat posed to Indigenous Peoples around the world by climate change.

Despite these limitations, we posit that *Daniel Billy* has undeniably moved the international community closer toward protection of Indigenous Peoples' rights and intergenerational prosperity in the face of the ever-mounting threat of climate change.

II. CLIMATE CHANGE AND INDIGENOUS PEOPLES' RIGHTS

Before turning to a discussion of the findings in *Daniel Billy*, this Part discusses different approaches to climate justice for Indigenous Peoples and the legal developments surrounding the Decision that inform its significance and limitations.

A. *Indigenous Peoples and Climate Justice*

As anthropogenic climate change accelerates, Indigenous Peoples around the world are on the frontline of its effects, thus robust protection

9. Throughout this Comment, we will refer to "rights-based climate litigation" as a short-hand for litigation that uses the international human rights law structure to link climate change with human rights violations (as opposed to, for example, litigation that uses international environmental law treaties to address the effects of climate change).

of Indigenous Peoples' human rights is more important than ever. While Indigenous Peoples should not be reduced to a homogenous group, they are recognized in international law as the people who lived on the land before colonization.¹⁰ Indigenous Peoples thus share (hi)stories of loss and victimization through colonialism and assimilation; many experienced loss of language, ancestral lands and waters, lives, pasts, and futures.¹¹ Discrimination against Indigenous Peoples and exploitation of their territories continue to take place in new and old forms, and around the world dispossession of Indigenous Peoples' lands has been driven by extractive industry and facilitated by weak enforcement of rights.¹²

This continued marginalization propels social and environmental inequalities and leaves Indigenous Peoples among the most vulnerable populations to climate change.¹³ Communities in places like the Pacific and the Arctic are on the frontlines. In those areas, climate change is accelerated and is leading to permanent loss of territory, as the material qualities of the sea, ice, and land change rapidly and irreversibly.¹⁴ Concurrently, climate change is largely a product of the (in)actions of industrialized nation states, while Indigenous Peoples are among those who have contributed to climate change the least.¹⁵ On the contrary, 80 percent of the world's biodiversity is found on

10. Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 3, 3-18 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

11. S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (Aspen Publ'g ed., 2009); G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), at 3 (Sept. 13, 2007). In the preamble to UNDRIP, signatories express concern "that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources." Widespread practices of assimilation, e.g., through notorious boarding schools in north America or Scandinavia and forced relocation and dispossession of Indigenous Peoples' ancestral lands under colonization, have severed many Indigenous Peoples from their homes, languages, and cultural practices.

12. *A New Paradigm of Climate Partnership with Indigenous Peoples*, INT'L WORK GROUP FOR INDIGENOUS AFFS., 3-4 (June 2022).

13. U.N. Secretary-General and Off. of the U.N. High Comm'r for Hum. Rts. (OHCHR), *The Impacts of Climate Change on the Human Rights of People in Vulnerable Situations*, ¶¶ 4, 8, U.N. Doc. A/HRC/50/57 (May 6, 2022).

14. IPCC *Special Report on the Ocean and Cryosphere in a Changing Climate*, H. O. et al., (eds.) Cambridge University Press, Cambridge, UK and New York, NY, USA, ch. 4. The IPCC asserts with high confidence that "risks related to sea level rise (including erosion, flooding and salinisation) is expected to significantly increase by the end of this century along all low-lying coasts in the absence of major additional adaptation efforts"; Mika Rantanen et al., *The Arctic has warmed nearly four times faster than the globe since 1979*, COMMUNICATIONS EARTH & ENVIRONMENT, 3, 168 (2022).

15. Rebecca A. Tsosies, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1659-60 (2007)

Indigenous land.¹⁶ Indigenous Peoples often share holistic cosmologies that view “humans” and “nature” as interconnected and honor a sense of reciprocity between human and nonhuman communities’ environments, which flows from these worldviews.¹⁷ Due to this deep embeddedness in their territories, Indigenous Peoples hold critical knowledge on living harmoniously with nature.¹⁸

And yet, climate change law and policy (and global environmental policy more widely) is governed within the state-centric international legal system that grants Indigenous peoples only a subsidiary seat at the table.¹⁹ Many of the proposed solutions to the climate crisis, from wind farms or hydroelectric dams to carbon off-setting schemes take the availability of Indigenous Peoples’ lands for such projects for granted, leading to violations of the human rights to land, culture, and free, prior and informed consent, among others.²⁰ In response to this injustice and inaction, solidarity has grown between climate justice movements and the Indigenous Rights movement, who both demand that states dispense of “false solutions to the climate and biodiversity crisis” in favor of genuine, rights-based solutions, including recognizing and respecting Indigenous Peoples’ lands.²¹

16. Blair Trewin, Damian Morgan-Bulled, and Sonia Cooper, *Climate: Nat'l and Int'l Frameworks*, AUSTRALIA STATE OF THE ENV'T (2021), <https://soe.dcceew.gov.au/climate/management/national-and-international-frameworks> (last visited Jun. 12, 2023).

17. Without idealizing or romanticizing Indigenous cultures, these Indigenous cosmologies and values are inseparable from the fact that Indigenous Peoples around the world have contributed little to the global climate and biodiversity breakdown. Moreover, as many Indigenous Peoples hold a deep connection to their environments and co-species, this increases their vulnerability to climate change and biodiversity loss. This is evidenced in the authors’ argument in *Daniel Billy* that “the health of their island is closely tied to their own health” (Daniel Billy, Communication No. 3624/2019, ¶ 8.5); See also Endalew Lijalem Enyew et al., *Beyond Borders and States: Modelling Ocean Connectivity According to Indigenous Cosmovisions*, 12 ARCTIC REV. ON L. AND POL. 207 (2021).

18. T. Janke, Z. Cumpston, R. Hill, E. Woodward, P. Harkness, S. von Gavel, J. Morrison, Indigenous: Country & Connections, AUSTRALIA STATE OF THE ENV'T (2021), <https://soe.dcceew.gov.au/indigenous/environment/country-and-connections>.

19. Fernando Tormos-Aponte, *The Influence of Indigenous Peoples in Global Climate Governance*, 52 CURRENT OP. IN ENV'L SUSTAINABILITY 125 (2021). Under the 2015 Paris Agreement, Indigenous Peoples can participate in international climate negotiations through the ‘Local Communities and Indigenous Peoples Platform.’ However, despite its significance, the platform does not give Indigenous Peoples the ability to vote, nor does it frame Indigenous Peoples’ participation in negotiations under the UN Framework Convention for Climate Change as a matter of human rights or recognize continued marginalization; *Experts Lend Weight to Torres Strait Human Rights Climate Complaints*, CLIENT EARTH (Dec. 11, 2020), <https://www.clientearth.org/latest/press-office/press/un-experts-lend-weight-to-torres-strait-human-rights-climate-complaint> [https://perma.cc/E2W5-ZEK2].

20. Abate & Kronk, *supra* note 10, at 9–11. There are numerous examples of projects linked to green energy, carbon off-sets, or conservation leading to violations of Indigenous Peoples’ rights. Most infamous is perhaps the REDD (reduced emissions from deforestation and forest degradation) programmes which, in the worst cases, have led to displacement of Indigenous Peoples from their lands.

21. See, e.g., the closing statement by Indigenous youth leader Skw'akw' Sunshine

B. *From the Inuit and Athabaskan Petitions to the Paris Agreement and UN Human Rights Proclamations: Legal Developments in Indigenous Climate Rights-based Litigation*

The interplay between Indigenous Peoples' rights and climate justice was at the heart of two rights-based climate change petitions led by Indigenous Peoples that preceded *Daniel Billy*. In 2005, sixty-three Inuit from Northern Canada and Alaska brought a petition before the Inter-American Commission on Human Rights (IACHR), seeking relief for violations of their rights to *inter alia* culture, life, food, property, health, and home resulting from GHG emissions from the United States.²² The Inuit argued that global warming, manifested in the melting of sea ice, glacial recession, coastal erosion, and seasonal changes, is eroding their traditional lands and ways of life, and requested that the U.S. both reduce its GHG emissions (mitigation) and support the Inuit's climate resilience (adaptation). Importantly, the petitioners called for dialogue between the U.S. and the Inuit to facilitate the wielding of human rights law as "a vehicle for articulating and protecting traditional values" and for opening "pathways for moving forward."²³ Though the Inuit Petition led to a series of consultations, it was dismissed by the IACHR at the admissibility stage in 2006. The petitioners had not submitted sufficient evidence to link the documented harm to the acts and omissions of the U.S. in relation to climate change.²⁴

In 2013, eight years after the Inuit Petition, Earthjustice filed a petition to the IACHR on behalf of the Arctic Athabaskan Council, who represents Indigenous Peoples of Athabaskan descent in Alaska, the Yukon, and the Northwest Territories (Dene Nation).²⁵ The Athabaskan petition claimed that Canada's failure to regulate black carbon emissions is causing accelerated warming in the Arctic and undermining the traditional subsistence lifestyles of Athabaskan people. The petitioners consequently sought relief from violations of their rights to property, health, and subsistence living, and to enjoy their culture protected under the American Declaration of the Rights and Duties of Man.²⁶

Dunstan-Moore on behalf of the International Indigenous Peoples Forum at UNFCCC COP26. International Indigenous Peoples Forum, 'Indigenous Peoples Challenge Lack of Ambition and Rights at COP27,' Press release (Nov. 20, 2022).

22. Petition to the Inter-Am. Comm'n on Hum. Rts., Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005) [<https://perma.cc/FF63-3YJQ>].

23. Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of climate Change and Indigenous Peoples' Rights*, 31(2) AM. INDIAN L. REV., 675, 695 (2006).

24. For a contemporary discussion of the Inuit petition and climate change litigation before the IACHR, see Laura C. Diaconu, *The Time is Now for the IACHR to Address Climate Action as a Human Right: Indigenous Communities Can Lead (Again)*, 9 AM. INDIAN L. J. 215-40 (May, 24, 2021).

25. See ARCTIC ATHABASKAN COUNCIL, <https://arcticathabaskancouncil.com> [<https://perma.cc/2N42-A4GY>] (last visited Jun. 8 2023).

26. Petition to the Inter-Am. Comm'n on Hum. Rts., Seeking Relief from Violations

The Athabaskan petition has been pending an admissibility decision by the IACHR for ten years.²⁷

The dismissal of the Inuit petition and the ten-years-long wait for a decision on Athabaskan petition reflect the difficulty in succeeding with rights-based climate change litigation. The international human rights legal system was designed to remedy violations of human rights traditionally endured by individuals, and clearly attributable to specific state actors within a specific state's jurisdiction. The global nature of climate change and its impacts on communities means that, as illustrated in the dismissal of the Inuit Petition, claimants have struggled to demonstrate causation between one state's GHG emissions and the harm they have suffered.²⁸

Against this backdrop, the Torres Strait Islanders' win before the Committee is remarkable and concretizes a host of legal and political efforts that have taken place since the Inuit petition was dismissed in 2006. Signatories to the 2015 Paris Agreement (including Australia) pledged "to limit the global temperature increase in this century to 2 degrees Celsius while pursuing efforts to limit the increase even further to 1.5 degrees."²⁹ The preamble to the Paris Agreement explicitly acknowledges the link between climate change and human rights, the particular vulnerability of Indigenous Peoples, and the issue of intergenerational justice, stating that states should take these principles into consideration in their actions to address climate change.³⁰ Alongside the developments in international climate law, UN bodies have advanced human rights norms and policy discourse in response to the climate crisis. In 2009, the Office of the High Commissioner for Human Rights ("OHCHR") recognized that climate change undermines the realization of human rights and may thus trigger state obligations under IHRL.³¹ The OHCHR has since repeatedly recognized the vulnerability of Indigenous Peoples to climate change and the inherent threat it poses to their self-determination.³² The Committee echoed the OHCHR's statements in its 2019 General Comment on the right to life

of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada (April 23, 2013), [<https://perma.cc/K5ZX-TC48>].

27. Diaconu, *supra* note 24.

28. For further discussion on the 'rights turn' in climate change litigation, see Jaqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *Transnational Environmental Law* 37 (2018).

29. Paris Agreement, art. 2(1)(a), Dec. 12, 2015, 3156 U.N.T.S. 1.

30. *Id.* at 80.

31. U.N. Secretary-General and Off. of the U.N. High Comm'r for Hum. Rts. (OHCHR), *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

32. *Id.* ¶¶ 40–41 & 51–54; OHCHR, *The impacts of climate change on the human rights of people in vulnerable situations*, ¶ 8, UN Doc. A/HRC/50/57 (May 6, 2022).

(GC36).³³ In GC36, the Committee reaffirms that climate change presents a pressing threat to present and future generations' right to life with dignity. According to the Committee, "[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change."³⁴ Representing the Committee's interpretation of current jurisprudence on the right to life, GC36 is thus a clear indication that states *do* have obligations to ensure a healthy environment in order to respect, protect, and fulfil the right to a life with dignity.³⁵

While the Paris Agreement and the UN human rights proclamations strengthen Indigenous Peoples' legal human rights claims in the context of climate change, real protection of Indigenous Peoples' rights is grossly inadequate as state inaction on climate change prevails.³⁶ The Intergovernmental Panel on Climate Change ("IPCC") 6th Synthesis Report published in 2023 clearly states that "the pace and scale of what has been done so far, and [governments'] current plans, are insufficient to tackle climate change."³⁷ Meanwhile, industrialized, wealthy nations have failed to fulfill their commitments to the climate adaptation fund meant to support poorer nations³⁸ and have been slow to agree on how irreversible harm from climate change will be compensated through so-called 'funding for loss and damage.'³⁹

33. ICCPR, U.N. Hum. Rts. Comm., General Comment No. 36: Article 6 Right to Life, ¶ 62, U.N. Doc. CCPR/C/GC/6 (Sept. 3, 2019).

34. *Id.* ¶ 62; U.N. Doc. CCPR/C/GC/6 (Sept. 3, 2019).

35. The normative weight of GC36 is only enhanced by U.N. General Assembly's recognition of a right to a healthy environment in July 2022 and reiteration that "environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights." U.N. General Assembly, Resolution adopted by the General Assembly on 28 July 2022. U.N. Doc. A/RES/76/300 (Aug. 1, 2022).

36. LILLIAN APONTE MIRANDA, INTRODUCTION TO INDIGENOUS PEOPLES' STATUS & RTS. UNDER INTERNATIONAL LAW 60 (2013).

37. IPCC, *Key Findings of the IPCC Synthesis Report in the 6th Assessment Cycle: Addressing Slow Onset Events* 8 (Apr. 29 2023), <https://unfccc.int/documents/627980> [<https://perma.cc/736B-3SRD>].

38. UNEP, *Adaptation Gap Report 2022: Too Little, Too Slow: Climate Adaptation Failure Puts World at Risk*, U.N. Doc. DEW/2480/NA, (Nov.1, 2022) <https://www.unep.org/resources/adaptation-gap-report-2022> [<https://perma.cc/L4RG-G7KV>].

39. Press Release, U.N. Framework Convention on Climate Change, *COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries* (Nov. 20, 2022), <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries> [<https://perma.cc/68KE-9VDJ>]. An agreement was finally reached on Loss and Damage at COP27 in Egypt, November 2022. The agreement involves financial and technical assistance to "developing countries that are particularly vulnerable to the adverse effects of climate change." However, language of reparation and accountability and acknowledgment of the cultural and spiritual significance of what is 'lost' appears off the table.

Rights-based climate change litigation therefore remains a potentially powerful pathway to climate justice. Framing communities' experience of climate change in terms of human rights is empowering and asserts the role of Indigenous Peoples and other rights holders as agents in climate action.⁴⁰ Although legal remedies have hitherto been elusive, even unsuccessful cases lead to greater awareness of the injustice of climate change and invites judicial bodies to consider the legal issues that arise from anthropogenic climate change. Beyond instigating state action, climate change litigation grounded in Indigenous Peoples' rights has the potential to cut through the often-technical narrative of climate action with a sober reminder of what is at stake: the flourishing of human cultures and the more-than-human⁴¹ environments we depend on.

C. *The Intersection of UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the International Covenant on Civil and Political Rights ("the Covenant")*

Decades of resistance and mobilization by transnational Indigenous Peoples' movements culminated in the adoption of the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") in 2007. Since then, most UN human rights organs, including the Human Rights Committee ("the Committee") and UN Special Rapporteur on the Rights of Indigenous Peoples, have explicitly stated that they will interpret human rights norms within their mandate against the yardstick of UNDRIP.⁴² We thus focus our discussion on the rights enshrined in the International Covenant on Civil and Political Rights ("the Covenant") and UNDRIP, the two instruments addressed in *Daniel Billy*.

Before the adoption of UNDRIP in 2007, the Committee significantly advanced the protection of Indigenous Peoples' rights in its application of Article 27 of the Covenant, which protects the rights of minority peoples to their cultures. Originally intended to protect the culture, traditions, religion, or language of minority groups,⁴³ Article 27 has become a powerful tool for

40. See OHCHR, *supra* note 31, ¶ 37.

41. Jim Logan, *More than Human*, THE CURRENT (Mar. 2, 2021) <https://www.news.ucs.edu/2021/020179/more-human> [<https://perma.cc/9DW5-VBNH>] (discussing anthropologists Jeffrey Hoelle and Nicholas Kawa's perspective that the term "Anthropocene" too narrowly focuses on the human contribution to our world, when other beings—land, water, animals—are an integral part of our "web of life").

42. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, S. James Anaya (A/HRC/9/9), 11 Aug. 2008, ¶¶ 85, 88. The Committee reiterates this position in *Daniel Billy* at ¶ 8.13 where it interprets Article 27 of the Covenant in light of UNDRIP. For further discussion on the mainstreaming of UNDRIP across UN Human Rights bodies, see Miranda *supra* note 36, 49-51.

43. ICCPR, U.N. Hum. Rts. Comm., General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5 ¶ 1.

protecting the rights of Indigenous Peoples. This is in no small part because the Committee has determined that Article 27 may be interpreted in light of the right to self-determination, protected by Article 1 of the Covenant.⁴⁴ Specifically, the Committee suggests that “to secure the rights of all Indigenous Peoples, under Articles 1 and 27 of the Covenant,” a state should “give [Indigenous Peoples] greater influence in decision-making affecting their natural environment and their means of subsistence, as well as their own culture.”⁴⁵

Further, in a series of communications to the Committee, Indigenous Peoples have successfully argued that, although the language of the Covenant protects the human rights of individuals, Indigenous Peoples’ rights are collective in nature; Article 27 concerns the integrity of Indigenous cultures, not only the individual’s ability to partake in his or her culture. In *Kitoc v. Sweden*, concerning Swedish legislation that effectively segregated the Indigenous Sami community in northern Sweden into two groups, the Committee recognized that Indigenous Peoples’ right to culture can only be enjoyed meaningfully in a community.⁴⁶ In *Mahuika v. New Zealand*,⁴⁷ concerning Māori peoples’ fishing rights, and in the two *Länsman v. Finland* cases, concerning the rights of Sami reindeer herders, the Committee recognized that Article 27 protects Indigenous Peoples collective culture and that the right to culture and to self-determination are indivisible.⁴⁸ The collectivizing of Indigenous Peoples’ rights is significant because it underscores that what is at stake is the flourishing of a people and their distinct way of life, their *cultural integrity*, as opposed to the narrower individual formulation of the right to enjoy one’s minority culture in Article 27.

In *Kitoc* and *Mahuika*, the Committee further held that the (individual or collective) right to culture “cannot be determined in abstracto but has to be placed in context.”⁴⁹ As leading Indigenous rights scholar Mattias Åhrén explains, this interpretation led to Article 27 encompassing a “material right to culture that protects Indigenous Peoples’ traditional livelihoods and other culturally based land uses.”⁵⁰ Specifically, in decisions on complaints concerning rights violations arising from environmental harm or resource extraction

44. *Mahuika et al. v. New Zealand*, Communication 547/1993, Decision, Human Rights Committee, ¶¶ 9.2 (Oct. 27, 2000)

45. Human Rights Committee, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 ¶ 37.

46. *Kitoc v. Sweden*, U.N. Doc. CCPR/C/33/D/197/1985, Judgement, Human Rights Committee (Mar. 25, 1987); MATTIAS ÅHRÉN, *INDIGENOUS PEOPLES’ STATUS IN THE INTERNATIONAL LEGAL SYSTEM 91-92* (Oxford: Oxford University Press 2016).

47. *Supra* note 44.

48. *Mahuika et al. v. New Zealand*, Communication 547/1993, Decision, Human Rights Committee, ¶¶ 9.2–9.5 (Oct. 27, 2000); *Ilmari Länsman v. Finland*, No. 511/1992, UN Doc. CCPR/52/D/511/1992; *Jouni E. Länsman v. Finland*, No. 6 671/1995, UN Doc. CCPR/C/58/D/671.1995.

49. *Mahuika et al. v. New Zealand*, *supra* note 44; *Kitoc v. Sweden*, *supra* note 46, ¶ 9.3.

50. ÅHRÉN, *supra* note 46, at 93.

on Indigenous lands, the Committee has held that states have a positive obligation to protect Indigenous Peoples' use of traditional lands and resources from any interference that would effectively destroy their abilities to maintain their cultures.⁵¹

The collective nature of Indigenous Peoples' rights and the close relationship between the rights to culture, self-determination, and traditional lands are clearly codified and elaborated in UNDRIP. Article 3 of UNDRIP restates the right to self-determination contained in the Covenant as the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."⁵² Self-determination ordinarily refers to internal self-determination, meaning autonomy implemented through self-government and participation in decision-making.⁵³ A full discussion of the right to self-determination is beyond the scope of this Comment, so we will simply recognize that self-determination is intimately tied to Indigenous Peoples' connection to their land and struggles to protect their ways of life.⁵⁴ As Indigenous rights scholar Wiessner argues, UNDRIP is motivated by the "threat to the survival of Indigenous Peoples' culture."⁵⁵ Consequently, the idea of Indigenous Peoples' self-determination and cultural integrity can be seen as the *raison d'être* of UNDRIP and permeates its provisions.⁵⁶

Article 8 of UNDRIP obligates states to protect Indigenous Peoples from actions that would deprive them of their cultural integrity or lead to dispossession of lands, forced displacement, or forced assimilation.⁵⁷ Read together, Articles 11, 12, and 13 protect Indigenous Peoples' rights to preserve, practice, and share with future generations their distinct ways of life in the form of customs, spirituality, and other modalities.⁵⁸ Article 31 places a positive duty on states to protect Indigenous Peoples' rights to control and develop their cultural heritage, traditional knowledge, and cultural expressions.⁵⁹ Article 26 is especially significant because it codifies Indigenous Peoples' rights to "lands, territories and resources" they have traditionally owned or otherwise

51. See *Lubicon Lake Band v. Canada*, Communication No. 167/1984, Decision, Human Rights Committee (Mar. 26, 1990); *Länsman et al. v. Finland*, Communication No. 511/1992, Decision, Human Rights Committee (Nov. 8, 1994); *Kitoc v. Sweden*, U.N. Doc. CCPR/C/33/D/197/1985; *Länsman v. Finland*, Communication No. 1023/2001, Decision, Human Rights Committee (Apr. 15, 2005); see also ÅHRÉN, *supra* note 46, at 93–94.

52. G.A. Res. 61/295, *supra* note 11, at 8.

53. ÅHRÉN, *supra* note 46, at 120–22, 133–38.

54. James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34, (July 15, 2009).

55. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 129 (2011).

56. *Id.*

57. G.A. Res. 61/295, *supra* note 11, at 10.

58. Especially Article 11(1) and (2) and Article 12(1) and (2). *Id.* at 11-13.

59. G.A. Res. 61/295, *supra* note 11, at 22-23.

used or occupied.⁶⁰ Human rights bodies with mandates to consider economic, social, and cultural rights, including the regional human rights commissions, have played an important role in interpreting Indigenous Peoples' right to land within the context of cultural integrity.⁶¹ The right to land has thus been linked to the right to life on the basis that Indigenous Peoples view their land as essential to their survival. For example, the IACHR ruled in *Yakya Axa v. Paraguay* that "the State, by not ensuring the right of the Community to its ancestral territory, has failed to comply with its duty to guarantee the life of its members, as it has deprived the Community of its traditional means of subsistence."⁶²

Together, the Covenant and UNDRIP recognize and offer legal protection for Indigenous Peoples' collective cultural integrity and of traditional lands and resources that underpin Indigenous cultures and self-determination. There is no complaint mechanism under UNDRIP; however, justice for the violation of Indigenous Peoples' human rights can be sought through Individual Communications⁶³ under the Covenant or through regional human rights courts and commission.⁶⁴ *Daniel Billy* is among the latest of such communications. Although the Human Rights Committee is a quasi-judicial body and not a court *per se*, meaning that its decisions lack binding power, its decisions are nonetheless significant for enforcement of human rights⁶⁵ and for the development of jurisprudence that may inform decisions in other courts and jurisdictions. In the next Part, we lay out a brief summary of the facts and claims addressed in *Daniel Billy*, setting up our analysis of the strengths and limitations of the Decision in Part IV.

60. G.A. Res. 61/295, *supra* note 11, Article 26.

61. Jérémie Gilbert, *Land Rights as Cultural Rights*, in GILBERT J. INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS, 2nd ed., Brill Academic Publishers (2016).

62. Inter-Am. Comm'n of Hum. Rts., *Yakya Axa v. Paraguay*, Merits (June 17, 2005), Series C, No. 125, ¶ 157(b).

63. See *supra* note 1 for explanation of Committee terminology like "Individual Communication."

64. G.A. Res. 2200A (XXI), Int'l Covenant on Civ. and Pol. Rts. (ICCPR), Optional Protocol, art. 2.

65. Although the Committee has no enforcement capability and its decisions are non-binding, its jurisprudence generates direct remedial instructions and international pressure on the state-party. For arguments supporting the de facto binding nature of human rights treaty bodies like the Committee, see generally R.J. STEINER, R. GOODMAN, & P. ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORAL*, 915 (3rd ed. 2008); for arguments against this proposition, see LEONARDO BORLINI & LUIGI CREMA, *The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or Mission Educatrice?*, THE GLOB. CMTY.: Y.B. OF INT'L L. & JURIS. 129, 144 (2020).

III. A BRIEF SUMMARY OF THE FACTS AND CLAIMS ADDRESSED IN *DANIEL BILLY*

The authors of the petition in *Daniel Billy* are a group of fourteen Torres Strait Islanders, eight adults and six children. They are Indigenous inhabitants of four small, low-lying islands in Australia's Torres Strait. They have experienced extreme weather changes and severe flooding in recent years that have destroyed ancestral burial grounds and "left human remains scattered across their islands."⁶⁶ In their petition to the Human Rights Committee ("the Committee"), filed in 2019, the authors describe how the ecosystems of their homes on the Torres Strait Islands are being damaged by the effects of climate change.⁶⁷ In addition to the loss of ancestral burial grounds to flooding, they document seawall breaches, coral bleaching, increasing temperatures, erosion, and the effect of those harms on their ability to conduct subsistence farming and live on their ancestral homelands.⁶⁸ According to the Torres Strait Regional Authority (TSRA), the islands may be uninhabitable in ten to fifteen years.⁶⁹ The authors argue that these effects threaten their unique culture and way of life, as well as their lives and the lives of future generations.⁷⁰ Emphasizing the importance of their connection to their land, the authors note that maintaining ancestral burial grounds, visiting the deceased, and performing coming-of-age and initiation ceremonies are all at the heart of their culture and can only carry cultural meaning if they are performed on ancestral lands.⁷¹

The authors attribute their injuries to the State party, arguing that the Australian Government has violated its obligations under Article 6, 17, 24, and 27 of the International Covenant on Civil and Political Rights ("the Covenant").⁷² Article 6 guarantees the right to life and the right not to be arbitrarily deprived of life.⁷³ According to the Committee's General Comment No. 36 on the right to life ("GC36"), the right to life includes the more broadly defined right to life with dignity.⁷⁴ Article 17 protects the right to privacy, family, and home, without arbitrary or unlawful interference.⁷⁵ Article 24 guarantees that children shall have the right to "such measures of protection as are required

66. Daniel Billy et al. v. Australia, CLIMATE CASE CHART, <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change> [<https://perma.cc/NT4Z-ZT99>] (last visited June 11, 2023).

67. Daniel Billy et al. v. Australia, Communication No. 3624/2019, Decision, UN Human Rts. Comm., ¶¶ 2.1–2.5, 5.2, 8.5, and 8.6 (Sept. 22, 2022).

68. *Id.* ¶¶ 5.2, 8.5.

69. *Id.* ¶ 5.3.

70. *Id.* ¶¶ 2.3, 2.5, 2.6.

71. Climate Case Chart, *supra* note 66.

72. Daniel Billy, Communication No. 3624/2019, ¶¶ 2.7–2.9.

73. G.A. Res. 2200A (XXI), *supra* note 64, art. 6 (Dec. 16, 1966).

74. ICCPR, U.N. Hum. Rts. Comm., General Comment No. 36: Article 6 Right to Life, U.N. Doc. CCPR/C/GC/6 (Sept. 3, 2019).

75. G.A. Res. 2200A (XXI), *supra* note 64, ICCPR, art. 17.

by [their] status as a minor.”⁷⁶ Article 27, as discussed above in Part II, protects Indigenous Peoples’ right to culture.⁷⁷ The authors highlight that Australia (“the State”) is one of the world’s largest per capita fossil fuel emitters and is among the countries that have done the least to decrease emissions.⁷⁸ Meanwhile, Australia has not supported the communities of the Torres Strait to adapt to climate change, despite many calls for assistance.⁷⁹

In response, the State argued that the claims were inadmissible and unfounded for three main reasons. First, the State argued that the authors lacked jurisdiction and victim status as their complaint addressed violations of international climate change treaties, which are outside of the Committee’s jurisdiction.⁸⁰ The State also argued that the authors’ injuries were speculative and hypothetical as they concerned climate change-induced harm yet to arise.⁸¹ Second, the State argued that even if the authors had already suffered injury, they could not prove that the State’s actions or inaction were a direct cause of it, as climate change is a global issue.⁸² Finally, the State contended that it was not in violation of the Covenant because it had taken climate adaptation measures, such as committing to spend \$15 billion on nationwide natural resource management and \$100 million on ocean management, which protected the authors’ human rights.⁸³

Ultimately, the Committee dismissed the State’s arguments that climate change mitigation and adaptation are outside the scope of the Covenant,⁸⁴ and that the effects of climate change represent only future hypothetical events, not actual rights violations, allowing the complaint to pass the admissibility stage and be considered on its merits.⁸⁵ The Committee proceeded to hold that Australia has violated the authors’ rights to culture (Article 27) and home and family life (Article 17), but found no violation of the right to life (Article 6). The rights of children (Article 24) were considered subsumed under other rights and hence not discussed.

IV. THE LEGAL SIGNIFICANCE OF THE DECISION: MILESTONES AND MISALIGNMENTS

In this Part, we turn to the legal significance of *Daniel Billy* and draw attention to both milestones for legal protection of Indigenous Peoples’ rights

76. *Id.* at art. 24(1).

77. *Id.* at art. 27.

78. Daniel Billy, Communication No. 3624/2019 ¶ 2.8.

79. *Id.* ¶ 2.5.

80. *Id.* ¶ 4.1.

81. *Id.* ¶¶ 4.10-4.11.

82. *Id.* ¶ 6.3.

83. *Id.* ¶¶ 8.11-12.

84. *Id.* ¶¶ 4.2-4.4.

85. *Id.* ¶¶ 4.10-4.11.

and apparent misalignments between IHRL and the slow-onset, but quickly accelerating, violence of climate change.

A. *Overcoming Admissibility Hurdles*

Some of the Decision's most significant findings deal with admissibility: The Decision is the first case before the Human Rights Committee ("the Committee") to find both jurisdictional and victim status requirements met for allegations of climate change related rights violations.⁸⁶ As discussed above in Part II(B), it has historically been difficult to succeed with rights-based climate litigation in regional and international human rights courts because of the challenges associated with establishing the Committee's jurisdiction. Establishing jurisdiction requires satisfying the elements of standing (including current or imminent injury and causation), attributing the injury to a state party's act or omission, and finding that a state has a positive obligation to prevent harmful effects of climate change. Each step presents unique challenges in the context of rights-based climate litigation.⁸⁷

First, the authors needed to show that the claims they brought were within the scope of the International Covenant on Civil and Political Rights ("the Covenant").⁸⁸ The State argued that the authors' claims were inadmissible *ratione materiae*, because they were about violations of international climate change treaties such as the Paris Agreement, over which the Committee lacked jurisdiction.⁸⁹ However, the Committee disagreed. Accepting the authors' holistic reading of the positive state obligations that flow from international law and the Covenant, the Committee stated that the authors "are not seeking relief for violations of the other treaties, but rather refer to them in interpreting the State party's obligations under the Covenant."⁹⁰ Thus, the Committee upheld that Australia may be in violation of the Covenant for failure to implement climate change adaptation *and* mitigation measures as laid out in the Paris Agreement.⁹¹ This sets an important precedent by rejecting the idea that climate change is a global issue which cannot give rise to state

86. See *Torres Strait Islanders Win Historic Human Rights Legal Fight Against Australia*, CLIENTEARTH, <https://www.clientearth.org/latest/press-office/press/torres-strait-islanders-win-historic-human-rights-legal-fight-against-australia/> [https://perma.cc/W99Y-Q4YN] (last visited Feb. 2, 2022).

87. See, e.g., Letter from the Organization of American States to Sheila Watt-Cloutier, et al. regarding Petition No. P-1413-05 (Nov. 16, 2006) (rejecting the Inuit Petition on grounds of inadmissibility because "the information provided does not enable [the Commission] to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration").

88. G.A. Res. 2200A (XXI), *supra* note 64, Optional Protocol, art. 3.

89. *Billy v. Australia*, Communication No. 3624/2019 ¶ 4.1.

90. *Id.* ¶ 3.2, 7.5.

91. *Id.* ¶¶ 3.1, 7.6-7.8.

responsibility or obligations—the very argument that successfully blocked the admissibility of the 2005 Inuit Petition.⁹²

Next, the authors needed to establish their victim status in order to have standing to bring each claim. To establish victim status, the authors had to show that at the time of filing they suffered a current or imminent injury that is caused by and attributable to the state party.⁹³ Imminence and causation are two of the most difficult standards to meet in rights-based climate litigation. The slow-onset nature of climate change has made it difficult for rights-holders to demonstrate that the harm is “current or imminent.”⁹⁴ In evaluating the authors’ victim status, the Committee focused on the authors’ identity as Indigenous Peoples and unique relationship to their territory:

The Committee observes that the authors – as members of peoples who are longstanding inhabitants of traditional lands . . . that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is uncontested that the authors’ lives and cultures are highly dependent on the availability of the limited natural resources . . . and on the predictability of the natural phenomena that surround them.⁹⁵

Because the authors are “extremely vulnerable to intensely experiencing severely disruptive climate change impacts” and given the harmful effects they had already experienced, the Committee found violations to be “more than a theoretical possibility,” meeting the test for imminence.⁹⁶

Establishing causation is difficult because, as the State party pointed out, “it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range or direct and indirect implications of human rights.”⁹⁷ However, the authors won on the argument that, even if climate change is a global phenomenon, the State still has a positive obligation to protect persons within its jurisdiction from foreseeable harm.⁹⁸ The authors provided evidence that the State party failed to implement an adaptation program in a timely manner or mitigate the impact

92. *Id.* ¶¶ 6.3, 6.9; Inuit Petition, *supra* note 4.

93. G.A. Res. 2200A (XXI), *supra* note 64, Optional Protocol, art. 2. “Subject to the provisions of Article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.” *Id.*

94. *Billy v. Australia*, Communication No. 3624/2019 ¶ 79.

95. *Id.* ¶ 710.

96. *Id.*

97. *Id.* ¶ 4.3 (citing Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights ¶ 70, U.N. Doc. A/HRC/10/61 (2009)). The State party’s argument here misrepresents the UNHCHR’s position, because the following sections of the report detail the positive obligations that states have to protect persons within their jurisdiction from the foreseeable harmful effects of climate change.

98. *Id.* ¶ 77.

of climate change by reducing greenhouse gas emissions, and the Committee accepted these facts as evidence of causality.⁹⁹ Therefore, within its discussion of admissibility, the Committee held that the State has a duty to mitigate *and* adapt to climate change. While the subsequent discussion on the merits primarily focuses on the duty of adaptation, the consideration of mitigation measures in the admissibility section is significant because it sets a precedent for future authors to file complaints against States for failure to reduce their greenhouse gas emissions and reduce dependency on fossil fuels.

B. *Linking Positive Human Rights Obligations and Climate Change Adaptation*

The Committee held that the State's failure to adopt climate adaptation measures in a timely manner violated the authors' rights to privacy, family, and home (Article 17) and the right to culture (Article 27). This affirms the Committee's previous jurisprudence¹⁰⁰ on Indigenous Peoples' rights to culture and expands the positive obligations of states to adopt climate change adaptation measures.

The Committee confirmed that the right to privacy, family, and home obligated the State to protect the "health of [the authors'] surrounding ecosystems for their own wellbeing" and protect their access to traditional resources, on which their livelihoods depend.¹⁰¹ The Committee further noted that the distress experienced by the authors from impending climate change-induced erosion of their territory constituted an injury to their home and their ability to commune with their ancestors.¹⁰² Though the State tried to cast the authors' claims as hypothetical and speculative, the Committee ultimately decided that the State's failure to adopt adaptation measures caused the foreseeable harms of erosion and severe weather events that destroyed the homes of their community members.¹⁰³ Therefore, the Committee determined that the State had violated the authors' Article 17 rights.¹⁰⁴

The Committee found that Australia's adaptation measures, including the Torres Strait Regional Adaptation and Resilience Plan 2016-21, commitment to \$15 billion in nation-wide natural resource management, and \$100 million investment in ocean management, were insufficient to establish compliance with Article 17 because the State had failed to explain why it delayed construction of a crucial seawall, which the authors had requested "at various points over the last decades."¹⁰⁵ This demonstrates that contemporary adaptation measures (like the Regional Adaptation and Resilience Plan) on their

99. *Id.* ¶ 78.

100. *See supra* Part II(C).

101. *Billy v. Australia*, Communication No. 3624/2019 ¶ 8.10.

102. *Id.* ¶ 8.12.

103. *Id.*

104. *Id.*

105. *Id.* ¶¶ 8.11–12.

own cannot erase a State's responsibility for past actions (such as the delayed construction of the seawall) that led to flooding of ancestral lands and thus the violation of the authors' rights to privacy, family, and home as well as their right to enjoy their culture. This finding grants future authors leeway to file complaints against states, even after a more climate-conscious regime takes power.

In finding a violation of the right to culture, the Committee emphasized how important traditional land and resources, including traditional foods, hunting and fishing grounds, and lands used for ceremonies are to the authors.¹⁰⁶ As discussed above in Part II(C), past Committee jurisprudence has held that the Article 27 protects not only Indigenous and minority people's right to enjoy their culture, but also the *material foundation* of that culture—such as the lands, waters, or animals around which the culture is based. The Committee reaffirmed that opinion in this Decision, holding that Article 27 protects an “inalienable right...to enjoy the territories and natural resources [the authors] have traditionally used.”¹⁰⁷ Importantly, this material dimension of the right to culture led the Committee to accept the authors' argument that relocation is not a suitable response to the effects of climate change, as they cannot practice their traditional way of life in mainland Australia.¹⁰⁸ As explained in Client Earth's 2019 press release about the authors' petition, “[t]he islanders have inhabited the region for thousands of years, making it one of the oldest continuous cultures in the world. Although similar, each island is culturally unique and has its own practices and traditions, with culture and spiritual beliefs intrinsically linked to the islands and marine environment.”¹⁰⁹ Given that the islands form the material foundation of the authors' centuries-old culture, the Committee agreed with the authors that relocation to mainland Australia would be a violation of their Article 27 rights.

Like with the right to privacy, family, and home, the Committee found that the right to culture confers a positive obligation on states to implement climate change adaptation measures for foreseeable climate harm:¹¹⁰

[T]he State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the author's right [to culture].¹¹¹

106. *Id.* ¶ 8.14.

107. *Id.* ¶ 8.13 (citing Benito Oliviera et al. v. Paraguay, U.N. Doc CCPR/C132/D/2552/2015, Judgment, United Nations Human Rights Committee [U.N. Hum. Rts. Comm.] (Oct. 12, 2021)).

108. *Id.* ¶ 8.14.

109. ClientEarth, *Torres Strait FAQ*, CLIMATE CASE CHART (May 13, 2019), <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change> [<https://perma.cc/AC28-PXE5>]

110. Billy v. Australia, Communication No. 3624/2019 ¶¶ 8.12, 8.14.

111. *Id.* ¶ 8.14.

As the Committee pointed out, the harm of climate change was clearly foreseeable, because members of the authors' community had been raising awareness about climate change's effects on the Torres Strait Islands since the 1990s.¹¹² The Committee's finding that Australia's adaptation measures were neither 'timely' nor 'adequate' to discharge this positive obligation, read together with the remedies in the Decision—mandating that Australia “engag[e] the effected communities in meaningful consultations on the necessary measures to secure their continued existence on their islands”¹¹³—sets a precedent for a required standard of care: climate change adaptation measures must be both well-designed in consultation with the peoples they protect and implemented effectively without delay.¹¹⁴

While it is certainly a victory that the Committee mandates timely, adequate, and consultation-based climate change adaptation measures, important questions remain: what about climate impacts that cannot be adapted to? If a state is not obligated to mitigate climate change, won't the effects of climate change inevitably outpace any adaptation measures?

C. *Failing to Link Positive Human Rights Obligations and Climate Change Mitigation*

Despite finding that the Committee has jurisdiction over cases where a state fails to effectively mitigate climate change,¹¹⁵ the Committee did not address *on the merits* whether the State's failure to mitigate climate change effectively violated the Covenant. One (weak) explanation for this may be that reducing greenhouse gas emissions (the core idea of mitigation measures) relates to the global causes and effects of climate change, for which responsibility is difficult to disentangle.¹¹⁶ In contrast, adaptation measures (such as building a seawall) are more place-specific, making it more straightforward to determine whether a state has discharged its obligations to help communities adapt to climate change. That said, since the ratification of the Paris Agreement, international law has concretized state duties to mitigate climate change.¹¹⁷ The significance of such duties should not be ignored merely because causation is harder to prove on the merits. As the Inter-American Commission on Human Rights has recently stated, “obligations [to mitigate climate change] should not be neglected because of the multi-causal nature of the climate crisis, as all States have common but differentiated obligations in the context of climate action.” By simply leaving out mitigation measures, the

112. *Id.*

113. *Id.* ¶ 11.

114. Voigt, *supra* note 8, at 3.

115. Billy v. Australia, Communication No. 3624/2019 ¶ 78.

116. *Id.* ¶¶ 6.3, 6.9.

117. See Voigt, *supra* note 8.

Committee missed an opportunity to link these principles of international climate change law to IHRL.¹¹⁸

Failing to address mitigation on the merits also means the Committee missed an opportunity to establish a more stringent and meaningful remedy to address human rights violated by climate change impacts. In his dissenting opinion, Committee member Gentian Zyberi argued that the Committee should have established the positive obligation under Article 27 to mitigate climate change because

[I]t is mitigation actions which are aimed at addressing the root cause of the problem and not just remedy the effects. If no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible.¹¹⁹

Indigenous lands are already being destroyed by climate change at an alarming rate. As Zyberi points out, making land and sea resources available for Indigenous Peoples in the future requires both “concerted mitigation actions of the organized international community” and “diligent national efforts.”¹²⁰ Had the Committee incorporated Zyberi’s viewpoint into the majority opinion, the Decision would have set an important precedent that effective protection of Indigenous rights requires holistic action on climate change adaptation *and* mitigation and that states have a role to play in their own jurisdictions and internationally.

Finally, the Committee missed an opportunity to specify that mitigation measures taken by the state must involve consultation with Indigenous communities. The Torres Strait Islanders, following in the footsteps of the Inuit and Athabaskan petitioners, insisted upon consultation and collaborative environmental governance between Indigenous Peoples and the State as a remedy in *Daniel Billy*.¹²¹ Historically and to this day, states often place climate mitigation projects, such as the construction of wind power farms or hydroelectric dams, on Indigenous Peoples’ land. These projects interfere with cultural and subsistence practices like reindeer herding or fishing—and in the worst cases, lead to outright displacement.¹²² Had the Committee found a positive obli-

118. INTER-AM. COMM’N ON H.R., CLIMATE EMERGENCY: SCOPE OF INTER-AM. H.R. OBLIGATIONS 15 (Mar. 2021).

119. *Billy v. Australia*, Communication No. 3624/2019 at annex II, ¶ 6.

120. *Id.*

121. *Billy et al. v. Australia*, CCPR/C135/D/3624/2019, Complaint at 48-49 (U.N. Hum. Rts. Comm. May 13, 2019) [<https://perma.cc/63QF-PF7U>].

122. See e.g., Nora Buli, *Norway Wind Farms at Heart of Sami Protest Violate Human Rights, Minister Says*, REUTERS (Mar. 2, 2023), <https://www.reuters.com/world/europe/norway-wind-farms-heart-sami-protest-violate-human-rights-minister-says-2023-03-02> [<https://perma.cc/C2X7-R8SJ>] (reporting on the continued existence of Fosen Wind in Southern Norway, a year and a half after the Norwegian Supreme Court held that the wind project, which breaks up traditional Sami reindeer pastures, was a violation of Sami people’s right to culture); *Case Study: Alta Hydropower Station*, ARCTIC PORTAL, <https://portlets.arcticportal.org/casesexploitation/158-case-study-alta-hydropower-station> [<https://perma.cc/63QF-PF7U>].

gation for the State to mitigate climate change, it could have articulated a consultation requirement consistent with UNDRIP.¹²³ Ideally, this consultation would be particularly valuable to states because, often by virtue of the same geographical and cultural factors that cause their vulnerability to climate change, Indigenous Peoples hold important place-based knowledge that can inform climate change policy and co-management principles.¹²⁴

Though we argue that the Committee should have taken a stronger stance on the merits, the Committee's consideration of mitigation and Australia's high greenhouse gas emissions at the admissibility stage is an important development that may support future litigation to establish mitigation duties more clearly. As we discuss in Part IV(E), the Committee at least hints at an indirect obligation¹²⁵ to mitigate climate change when it requires Australia to "take steps to prevent similar violations in the future."¹²⁶

D. *Ignoring the Indivisibility of Cultural Integrity and the Right to Life with Dignity*

In General Comment No. 36 ("GC36"), the Committee defined the right to life, protected by Article 6, as "a right that inheres in every human being . . . a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights."¹²⁷ The Decision reaffirms this broad reading of Article 6 as "the right to life *with dignity*," conferring positive State obligations.¹²⁸ The Committee also reaffirmed its reasoning in GC36 that climate change poses pressing and foreseeable threats to life for present and future generations.¹²⁹ However, in this case, the Committee interpreted the right to life with dignity narrowly, requiring the authors to demonstrate imminent adverse health impacts or reasonable risk of physical endangerment.¹³⁰ In the words of the dissenting members of the Committee, this jurisprudence "promises far more than the majority delivers."¹³¹

cc/5JSQ-4ZM4] (last visited June 11, 2023) (detailing the historic Alta Controversy in the 1970s, during which the Norwegian government planned to place a hydroelectric dam in an area where it would flood a Sami village and disrupt traditional reindeer pastures and fishing areas).

123. UNDRIP Articles 19 and 32(2) discuss Free, Prior, and Informed Consent.

124. MAURO BARELLI, *SEEKING JUSTICE IN INTERNATIONAL LAW* 135–38 (London and New York: Routledge, 2016); see Abate & Kronk, *supra* note 10; see Int'l Work Group for Indigenous Affs. *supra* note 12.

125. Christina Voigt outlines what such obligations might look like. Voigt, *supra* note 8.

126. *Billy v. Australia*, Communication No. 3624/2019 ¶ 11.

127. *Billy v. Australia*, Communication No. 3624/2019 ¶ 2; ICCPR, U.N. Hum. Rts. Comm., General Comment No. 36: Article 6 Right to Life, ¶ 2, U.N. Doc. CCPR/C/GC/6 (Sept. 3, 2019).

128. *Billy v. Australia*, Communication No. 3624/2019 ¶ 8.4

129. *Id.* ¶ 8.3.

130. *Id.* ¶ 8.6.

131. *Id.* annex III, ¶ 4.

Considering the merits of the case, the Committee justified its finding of no violation of the right to life on two accounts. First, the Committee considered the authors' argument that "the health of their islands is closely tied to their own lives," and thus the devastation of the island and wider ecosystems causes loss and distress incompatible with the right to life with dignity.¹³² As evidence of an Article 6 violation, the authors argued that climate change harms inhibited their ability to conduct subsistence farming and live on their ancestral homelands.¹³³ However, the Committee concluded that the authors failed to demonstrate "adverse impacts to their own health" or "a real and reasonably foreseeable risk" of a situation that threatens their right to life.¹³⁴

Second, the Committee recognized that because of the extreme risk of "an entire country becoming submerged under water," life in such a place may be "incompatible with the right to life with dignity" before submergence occurs.¹³⁵ Despite this statement, the Committee determined that Article 6 was not *yet* violated because the State had taken "adequate" adaptation measures (e.g., starting a project to build a seawall) to protect the authors' right to life.¹³⁶ Since there are still ten to fifteen years remaining before the island becomes uninhabitable, the Committee concluded that there was still time "for intervening acts by the State party to...protect and, where necessary, relocate the alleged victims."¹³⁷

The Committee's determination that relocation is an appropriate way to ensure the right to life, but incompatible with the right to culture, defies reason.¹³⁸ It is unjust and illogical to uphold that protecting the right to life with dignity may involve violating both the right to culture and the prohibition of displacement recognized in UNDRIP.¹³⁹ Especially considering historical forced dispossession of Indigenous Peoples' lands and the indivisibility of all human rights, it is important that states protect *all* Indigenous Peoples' rights enumerated by the Covenant and UNDRIP, not just the ones that are most convenient.

One explanation for the Committee's finding of a violation of the right to culture, but not the right to life, is that the Committee has established precedent interpreting Article 27 in terms of UNDRIP but has not established a similar practice regarding Article 6. While Committee jurisprudence regarding Article 27 clearly protects the material foundation of Indigenous culture—land, animals, water, etc.—there is no analogous consideration of the uniqueness

132. *Id.* ¶¶ 8.6, 2.4–2.6.

133. *Id.* ¶ 8.5.

134. *Id.* ¶ 8.6.

135. *Id.* ¶ 8.7 (citing *Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, United Nations Human Rights Committee, ¶¶ 9.9-9.11 (Oct. 24, 2019)).

136. *Id.* ¶ 8.7.

137. *Id.*

138. *See id.* ¶ 8.14.

139. UNDRIP Articles 8 and 10 explicitly prohibit forced relocation, displacement and dispossession of territory. G.A. Res. 61/295, *supra* note 11, at 10-11.

of Indigeneity under the Committee's Article 6 jurisprudence. This ignores the fact that Indigenous cultural integrity and Indigenous life are inextricably linked. While non-Native people could be relocated away from climate-vulnerable areas, Indigenous communities who are separated from their land face a kind of cultural extinction that is incompatible with a life with dignity. Rejecting the Article 6 violation argument on these facts—when ancestral burial grounds are destroyed, subsistence farming is hindered, and homelands will be uninhabitable in ten to fifteen years—narrows the scope of Article 6 to such an extent that it appears that the right to life with dignity would only be violated in extreme cases, where a remedy would be a mere consolation prize.¹⁴⁰

The Committee's use of a submergence timeline for the authors' island highlights the difficult issue of temporality in human rights violations from climate change.¹⁴¹ As discussed above, IHRL is usually invoked to remedy harm that has already occurred, within a Western epistemology of linear time and cause-and-effect thinking.¹⁴² Whether we as a global community can afford to adopt this approach comes to the fore in the dissenting opinions.

Before turning to these, it is worth noting another temporal question regarding state obligations arising from climate change: Can states be held responsible for harm that will occur to their inhabitants not yet born? The authors raised the issue of intergenerational equity¹⁴³ in relation to Article 24(1), which protects the rights of children and which the Committee did not address.¹⁴⁴ Intergenerational equity is an emerging (if thus far mainly theoretical) concept in international human rights and environmental law, which recognizes a "duty on current generations to act as responsible stewards of the planet and ensure the right of future generations to meet their developmental

140. See, e.g., *Portillo Cáceres et al. v. Paraguay*, Communication No. 2751/2016, U.N. Doc. CCPR/C/126/D/2751/2016, Decision, United Nations Human Rights Committee (Sept. 20, 2019) (finding a violation of Article 6 because the State's use of pesticides had actually killed a 26-year-old member of the petitioner's family and caused severe environmental degradation and crop damage).

141. See generally Justine Bell-James & Briana Collins, *Human Rights and Climate Change Litigation: Should Temporal Imminence Form Part of Positive Rights Obligations?*, 13 J. HUM. RTS. & ENV'T 212, 212-237 (2022).

142. Marie-Catherine Petersmann, *Response-abilities of Care in More-than-Human Worlds*, 12 J. HUM. RTS. & ENV'T 102, 113 (2021).

143. EDITH BROWN WEISS, *Intergenerational Equity*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2021).

144. Daniel Billy et al. v. Australia (Torres Strait Islanders Petition), Communication No. 3624/2019, Decision, United Nations Human Rights Commission [U.N. Hum. Rts. Comm'n] (Sept. 22, 2022). The authors of the petition define intergenerational equity as "the duty on current generations to act as responsible stewards of the planet and ensure the right of future generations to meet their developmental and environmental needs," but the Committee "[did] not deem it necessary to examine the authors' remaining claims under article 24(1)" having already found a violation of articles 17 and 27. *Id.* ¶¶ 5.8, 10.

and environmental needs.”¹⁴⁵ Landmark IHRL decisions concerning Indigenous Peoples have recognized the principle, which also flows from UNDRIP:

[f]or Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.¹⁴⁶

At a deeper level, the idea of intergenerational equity finds resonance in many Indigenous worldviews that take such complex relations (between multiple generations of people and the wider environment and more-than-human kin) as a starting point for legal principles.¹⁴⁷ The Committee’s decision not to find a violation of the rights of future generations—together with its narrow interpretation of the right to life in dignity for Indigenous Peoples residing on islands due to become submerged—points to a wider, epistemic limitation on the protection of Indigenous rights under IHRL.

It is nonetheless promising for the legal protection of Indigenous Peoples’ rights that several Committee members found the majority’s interpretation of the right to life too restrictive.¹⁴⁸ In his dissent, Committee member Duncan Laki Muhumuza argues that given the authors’ living conditions, Australia has already failed to discharge a precautionary duty to protect lives through adaptation and mitigation measures.¹⁴⁹ In another case, concerning climate refugees, Muhumuza has similarly argued in dissent that it is “counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable” before finding a violation.¹⁵⁰ Committee members Arif Bulkan, Marcia V.J. Kran, and Vasilka Sancin likewise dissented in *Daniel Billy* and interpreted that states have a duty to take a precautionary approach to climate change.¹⁵¹ In line with Muhumuza, they argue that Australia has not fulfilled this duty because the right to life in dignity has already been violated. Here, they submit that the conditions eroding the material basis for the authors’ enjoyment of their culture, family, and home life, especially the lack of access to traditional foods, are incompatible with a life with dignity.¹⁵² Given the strong dissenting opinions, there is hope that future cases may develop the jurisprudence on

145. *Id.* ¶ 5.8.

146. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11,577, ¶ 149 (Aug. 31, 2001).

147. KRUSHIL WATENE, UNITED NATIONS ENV’T PROGRAMME, REIMAGINING THE HUMAN-ENVIRONMENT RELATIONSHIP: INDIGENOUS PHILOSOPHY AND INTERGENERATIONAL JUSTICE, UNITED NATIONS ENVIRONMENT PROGRAMME (May 2022).

148. *Billy v. Australia*, Communication No. 3624/2019 annex I (Muhumuza). *Id.* at annex III (Kran & Sancin, partially dissenting). *Id.* at annex V (Quezada, partially dissenting).

149. *Id.* at annex I (citing *Urgenda Foundation v. The State of Netherlands*, C/09/456689/HA ZA 13–1396, (Oct. 9, 2019)).

150. *Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016, United Nations Human Rights Committee, annex 2, ¶ 5 (Oct. 24, 2019) (Muhumuza, dissenting).

151. *Billy v. Australia*, Communication No. 3624/2019 annex III, ¶ 4.

152. *Id.* annex I, ¶ 12; *Id.* annex III, ¶ 3.

Article 6 to consider the application of the right to life with dignity to Indigenous Peoples bearing the brunt of climate change.

E. *Finding Hope and Ambiguity in the Committee's Remedies*

To remedy the rights violated,¹⁵³ the Committee held that Australia must make full reparations, including: 1) providing adequate compensation for the harm suffered; 2) engaging the effected communities in meaningful consultations on the necessary measures to secure their continued existence on their islands; 3) monitoring, reviewing, and resolving deficiencies of remedial measures; and 4) “[taking] steps to prevent similar violations in the future.”¹⁵⁴

As mentioned in Part IV(C), given that adaptation measures can only be successful if performed in conjunction with mitigation measures, these last two remedies raise the question of whether the Committee is imposing a duty on the State party to engage in mitigation measures such as reducing dependency on fossil fuels and cutting carbon emissions. Arguably, “tak[ing] steps to prevent similar violations in the future” would require mitigating climate change, i.e., reducing greenhouse gas emissions. If the Committee intended to impose mitigation obligations on Australia, the international community would have benefited from the Committee being explicit about that expectation.¹⁵⁵

The Decision also sets an important precedent that high-emitting states may have to financially compensate for climate change harms to Indigenous Peoples under human rights law. It remains to be seen how (and whether) Australia will calculate “adequate” compensation, but as ClientEarth attorney Sophie Marjanac notes, “This is an historic victory for climate justice. It is a victory for all peoples who are the most vulnerable to runaway climate change and opens the door to further legal action and compensation claims in international and domestic law.”¹⁵⁶ Of course, the Committee’s findings are not binding and there is no formal enforcement mechanism compelling Australia to comply with the remedy. So, it is possible that Australia will follow the example of other states and ignore the findings of the Committee.¹⁵⁷ That said, the high-profile nature of this case puts public pressure on Australia to comply and raises awareness globally for the rights of Indigenous Peoples in relation to climate change. This raised global awareness is likely to advance protection of

153. Article 17 (right to privacy, family, and home) and Article 27 (right to culture).

154. *Billy v. Australia*, Communication No. 3624/2019 ¶ 11.

155. *Id.* annex II, ¶ 6 (“The Committee should have linked the State obligation . . . more clearly to mitigation measures, based on national commitments and international cooperation”).

156. *Billy v. Australia*, Communication No. 3624/2019 ¶ 11; *Torres Strait Climate Claimants Win Their Historic Human Rights Fight Against the Australian Government*, CLIENTEARTH (Sept. 23, 2022), <https://www.clientearth.org/latest/latest-updates/news/torres-strait-islanders-fight-to-hold-australia-accountable-for-climate-change/> [https://perma.cc/5WZH-HSUF].

157. Øyvind Ravna, *The Fosen Case and the Protection of Sámi Culture in Norway Pursuant to Article 27 ICCPR*, 30 INT’L J. MINORITY & GRP. RTS. 156, 175 (2023).

Indigenous Peoples' rights by influencing the decisions of domestic, regional, and international courts and other human rights bodies in similar, pending, and future cases.¹⁵⁸

Finally, the Committee asked the State to “engage in meaningful consultations with the [authors’] communities in order to conduct need assessments,” an order which the newly minted Australian government appears to be taking seriously.¹⁵⁹ This consultation requirement reflects the rights laid out in UNDRIP Article 19 and 32(2), requiring the State to receive the free, prior, and informed consent of Indigenous Peoples before starting any development projects that may affect them.¹⁶⁰ This is especially salient considering the track record of mitigation measures violating Indigenous Peoples’ right to land and natural resources.¹⁶¹ By remaining silent on mitigation measures as a state obligation and remedy, the Committee missed an opportunity to stress Indigenous Peoples’ rights to consultation and free, informed, and prior consent.¹⁶² The duty to engage in consultations also reflects the views of the UNCHR, which acknowledged that, “as a study cited by the IPCC in its Fourth Assessment Report observes, ‘Incorporating Indigenous knowledge into climate change policies can lead to the development of effective adaptation strategies that are cost-effective, participatory, and sustainable.’”¹⁶³ Reflecting on the Decision, Yessie Mosby, one of the Torres Strait Island authors, expressed that the most meaningful remedy would be for the government to “sit with us at the grassroots and discuss what we do with this situation.”¹⁶⁴ Mosby’s words echo

158. Sarah Joseph, *Climate Change and the Torres Strait Islanders: UN Condemns Australia*, GRIFFITH UNIV. L. FUTURES CTR. BLOG (Sept. 26, 2022) <https://blogs.griffith.edu.au/law-futures-centre/2022/09/26/climate-change-and-the-torres-strait-islands-un-condemns-australia/> [<https://perma.cc/ZE9D-R5R4>].

159. *Billy v. Australia*, Communication No. 3624/2019 ¶ 11; On June 30, 2022, three months before the *Daniel Billy* decision came down, “following a change in government, Australia’s new Climate Change Minister, Chris Bowen, did what his predecessors hadn’t, and met with some of the claimants during a visit to the Torres Strait Islands. The minister concluded that climate change poses a ‘real and substantial’ threat to the people of the Torres Strait/Zenadh Kes.” *Torres Strait Climate Claimants Win Their Historic Human Rights Fight Against the Australian Government*, CLIENTEARTH (Sept. 23, 2022), <https://www.clientearth.org/latest/latest-updates/news/torres-strait-islanders-fight-to-hold-australia-accountable-for-climate-change/> [<https://perma.cc/2T79-JYJ5>]; see also Chris Bowen, TWITTER (June 29, 2022) (tweeting “Visiting our Torres Strait islands today to hear from elders and leaders about the impacts of climate change.”).

160. G.A. Res. 61/295, *supra* note 11, at 16, 23. See also International Labour Organization, *Indigenous and Tribal Peoples Convention No. 169, 1989*, arts. 6(1), 15(2) (the right to consultation).

161. See *supra* Part IV(C) and examples in note 20.

162. See Abate & Kronk, *supra* note 10, at 9–11.

163. U.N. Secretary-General and Off. of the U.N. High Comm’r for Hum. Rts. (OHCHR), *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, ¶ 52, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

164. Yessie Mosby, Sophie Marjanac, & Martin Scheinin, Webinar for the Bonavero

Watt Cloutier, who brought the Inuit Petition and framed Indigenous Peoples' rights claims as a catalyst for dialogue and collective action on climate change by states and Indigenous Peoples.¹⁶⁵

CONCLUSIONS

Daniel Billy is indeed a milestone for rights-based climate litigation and Indigenous Peoples' rights protection. It is the first ruling before an international human rights body to recognize the relationship between climate change and human rights, translating normative elaborations on climate justice for Indigenous Peoples into legal precedent, and obligating states to protect their people from foreseeable harm from climate change. The Decision established a clear, positive duty to adopt timely and adequate adaptation measures to protect Indigenous Peoples' rights. Furthermore, the Committee articulated what full reparations might look like for rights violations arising from the effects of climate change, prescribing not only adequate compensation for the injured party, but also meaningful collaboration in the adoption of adaptation and—as argued in Part IV(E)—mitigation measures.

One of the most groundbreaking findings in *Daniel Billy* is that the authors established admissibility on almost all their claims. Compared with the Inuit Petition, which was rejected for failing to demonstrate an injury caused by climate change that could be attributed to the state party, the *Daniel Billy* case provides the first-ever viable strategy for establishing injury and causation in rights-based climate litigation. Rather than trying to do the impossible—linking the State's greenhouse gas emissions to concrete harms suffered by the petitioners—the petitioners made the logical argument that the State's *failure* to engage in adequate mitigation and adaptation measures was a breach of its duty to protect the petitioners, who are particularly vulnerable to climate change.

Here, the Committee's holistic reading of IHRL, which read the Paris Agreement into the Covenant, signals a promising interaction between international environmental law and human rights law. It is disappointing, however, that the Committee bypassed ruling on the merits that a state has an obligation to adopt climate change mitigation measures. Instead, the Committee focused its findings on the easier-to-prove causal relationship between Australia's failure to adopt timely climate change adaptation measures and the violations of the rights to culture and private life. This foregrounds IHRL's limitations in addressing the root causes and complexity of climate change and industrial nations' historical and continued role herein.¹⁶⁶

Institute of Human Rights: Rising Tides in Climate Change Litigation: The Case of the Torres Strait Islanders at the UN Human Rights Committee (Nov. 2, 2022), <https://www.law.ox.ac.uk/content/event/rising-tides-climate-change-litigation-case-torres-strait-islanders-un-human-rights> (from authors' observation notes from unrecorded webinar).

165. Osofsky, *supra* note 28, at 694.

166. *UN Experts Lend Weight to Torres Strait Human Rights Climate Complaints*, CLIENT

We identify similar limitations in the Committee's finding on Article 6. The Committee affirmed that Article 6 confers a right to life with dignity and that climate change poses a pressing threat to this right.¹⁶⁷ However, "promis[ing] far more than it delivers,"¹⁶⁸ the majority determined that the authors' loss of ancestral lands central to their livelihoods and wellbeing and the threat of relocation constitute a violation of the right to culture, but not the right to life. This outcome leaves us wondering: What does the right to life with dignity protect if not Indigenous Peoples' right to live safely and sustainably on their ancestral lands? Perhaps in time, akin to the evolution of Article 27, Article 6 jurisprudence will use the Indigenous rights enshrined in UNDRIP to protect the right to life with dignity more holistically. For now, the Committee disappointingly bypassed both this question and the questions of intergenerational equity and climate change mitigation, pointing to serious limitations of IHRL in addressing the violence of climate change.

Despite its limitations and the theoretical questions raised regarding the ability of IHRL to respond to the reality of climate change, the Decision represents an important step towards protecting Indigenous Peoples' rights through rights-based climate litigation. A milestone, rather than the end of the road, the Decision opens the door for future cases to address climate change mitigation, Indigenous Peoples' rights, and intergenerational equity even further. In particular, hopefully, the Decision will influence the IACHR to admit the claims made in the pending 2013 Athabaskan Petition and tackle the question of whether a state's failure to *mitigate* climate change can be construed as a violation of human rights. Litigation is a slow-moving process, however. Part of the way forward may therefore also lie in seeing the case as a vehicle for building bridges¹⁶⁹ and generating discourse on taking seriously the rights, values, and views of Indigenous Peoples in collective efforts to tackle climate change.

EARTH (Dec. 11, 2020), <https://www.clientearth.org/latest/press-office/press/un-experts-lend-weight-to-torres-strait-human-rights-climate-complaint/> [<https://perma.cc/6WXXN-QAD8>].

167. *Billy v. Australia*, Communication No. 3624/2019, ¶ 8.4.

168. *Id.*, annex III, ¶ 4.

169. Ososky, *supra* note 28, at 695.