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**THE IMPACTS OF CLIMATE CHANGE ON INDIGENOUS
PEOPLES: IN VIOLATION OF THE RIGHT TO LIFE?**

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Abstract

This paper looks at the impacts of climate change on indigenous peoples and whether States' inadequate adaptation and/or mitigation measures may constitute a violation of indigenous peoples' right to life under article 6 of the International Covenant on Civil and Political Rights. In light of the severe impacts climate change is already having globally, the paper argues that climate change is a pressing human rights, as well as an environmental issue. Moreover, climate change is disproportionately affecting indigenous peoples. Having established the international legal framework for climate change, human rights, and the rights of indigenous peoples, the paper looks at related trends in climate litigation. It focusses in particular on the recent Human Rights Committee decision of Daniel Billy and Ors v Australia, including dissenting opinions from the Committee on the right to life. Lastly, the paper analyses the implications of Billy, including pathways for future litigation by indigenous peoples based on violations of the right to life, and the range of available remedies. It also examines recent developments in climate change-related remedies including the outcomes of COP27 in Egypt and Vanuatu's ambitions for an advisory opinion on climate change from the International Court of Justice. The paper suggests that Billy and these recent developments demonstrate increasing possibilities for redress for indigenous peoples.

Word length

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Subjects and Topics

Climate change, human rights, indigenous peoples.

I Introduction

Climate change is the biggest threat facing humanity today. This is no longer only a problem for future generations: the devastating impacts of climate change are already evident across the globe.¹ Once sequestered in the realm of international environmental law, it is now clear that climate change is a multifaceted, multidimensional issue.² This is in part because climate change will affect a wide range of fundamental human rights, for example the right to health, and – in some circumstances – the right to life.³ These human rights impacts are particularly severe for indigenous peoples, who often have strong cultural and spiritual connections to their land, and have already been subject to multi-generational trauma through colonisation.⁴

This paper will look at the impacts of climate change on the human rights of indigenous peoples. Section II of the paper will review the latest scientific findings on the impacts of climate change, following the latest report of the International Panel on Climate Change (IPCC) and outcomes of the recent 27th Conference of the Parties to the UN Framework Convention on Climate Change (COP27) in Sharm-el-Sheik.⁵ It will then look at why climate change should be framed as a human rights issue – paying particular attention to recent developments in the United Nations Human Rights Council and United Nations Human Rights Committee in this area. The section will look in particular at the right to life under article 6 of the International Covenant on Civil and Political Rights (ICCPR), and its links to climate change.⁶

Having established the climate change-human rights framework, Section III will look at indigenous rights. It will firstly outline why indigenous peoples are particularly severely impacted by climate change, both in terms of overall impacts and mitigation and adaptation

¹ Intergovernmental Panel on Climate Change, 2022: Summary for Policymakers. In: *Climate Change 2022: Impacts, Adaptation, and Vulnerability IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (Cambridge University Press, Cambridge 2022) (IPCC) at 8

² See, for example, Aneta Peretko “Conceptualising climate change in law as a threat to international security and human rights” (2018) 24 Australian International Law Journal 59 at 60

³ International Convent on Civil and Political Rights 171 UNTS 999 (opened for signature 16 December 1966, entered into force 23 March 1976) (ICCPR)

⁴ Report of the Special Rapporteur on the rights of indigenous peoples, “Impacts of climate change and climate finance on indigenous peoples’ rights” UN doc A/HRC/36/46

⁵ United Nations Framework Convention on Climate Change 1771 UNTC 107 (opened for signature 4 June 1992, entered into force 21 March 1994) (UNFCCC)

⁶ ICCPR, above n3

measures. This is despite indigenous peoples being amongst those who have contributed least to climate change, and having traditional knowledge that can benefit climate solutions.⁷ Using the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Paper will examine the rights of indigenous peoples in public international law and how these rights can be applied to climate change.⁸ This includes developments in human rights fora. This section will look at issues with indigenous participation – or lack of participation - in decision-making on climate change matters that affect them.

Section IV will look at litigation relating to climate change and indigenous peoples. As with climate litigation more generally, there is a rising trend of indigenous peoples using the courts to protect their rights vis-à-vis climate change. It will examine key cases in national and regional fora, with a particular focus on the recent decision of the UN Human Rights Committee on the impacts of climate change on the indigenous peoples of Torres Strait Island in *Daniel Billy and Ors v Australia*.⁹ This will include a close analysis of the reasoning in *Billy* by the majority, as well as the majority and minority opinions on whether the Australian Government breached the right to life of the complainants.

Using the jurisprudential trends, and both the majority and minority reasoning of the *Billy* case, Section V of the paper will discuss next steps for indigenous peoples seeking climate change remedies. This will focus, in particular, on the potential for claims based on the right to life. The paper argues that while the majority Human Rights Committee in *Billy* did not find that the Australian Government breached the right to life of Torres Strait Islanders, this could be taken up in future litigation. Finally, this section examines possible remedies available, looking also at the recent outcomes of COP27 and Vanuatu’s recently released draft resolution seeking an advisory opinion from the International Court of Justice on States’ climate change obligations under international law. These significant recent developments show that “tides are changing” on this issue, and, in light of changing jurisprudence (and the severity of climate implications), avenues for redress for indigenous peoples on climate change may be increasing.

⁷ Special Rapporteur, above n4

⁸ *United Nations Declaration on the Rights of Indigenous Peoples* GA RES 61/295 (2007) (UNDRIP)

⁹ *Daniel Billy and Ors v Australia* (CCPR/C/135/D/3624/2019)

II Climate change as an urgent human rights issue

A Climate change: no longer just a problem for future generations: a real threat to current livelihoods

For a time, nations and individuals have considered climate change as an abstract threat. A problem for future generations to solve. This is no longer the case: the latest International Panel on Climate Change (IPCC) report, published in 2022, shows that the planet is set to reach the previously designated “limit” of 1.5c within the next two decades.¹⁰ Even before this date, the effects of climate change on the environment and on humanity can already be seen very clearly. The report notes that there have already been “widespread and pervasive impacts to ecosystems, people, settlements, and infrastructure”. This includes increased heat-related human mortality, adverse impacts from tropical cyclones (with related loss and damages), ocean acidification, sea-level rise and droughts. Terrestrial and marine ecosystems are substantially damaged, and increasingly have already incurred “irreversible losses”.¹¹ Across the board, the extent and magnitude of climate change losses are much worse than previously estimated, with many irreversible - including species loss and glacier retreat.¹² While it is still possible to reduce the magnitude of impacts with strong near-term mitigation and adaption actions, in the interim the impacts and risks are becoming more complex and difficult to manage.¹³ Outside of these very bleak scientific reports, rising temperatures and extreme weather reports are now a feature of everyday news updates. In 2022, for example, we have seen record-breaking temperatures and large-scale bushfires across Europe, as well as extreme flooding in Pakistan.¹⁴

The United Nations Environment Programme has also made it clear that anthropogenic climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced.¹⁵ As UN Secretary General Antonio Guterres said during the latest COP27 in Egypt, “greenhouse gas emissions keep growing. Global temperatures keep rising.

¹⁰ IPCC, above n1 at 8

¹¹ At 8

¹² At 8

¹³ At 18

¹⁴ See, for example, Kevin Trenberth “Climate change: How global warming fuelled extreme climate disasters in 2020” (21 September 2022) World Economic Forum < [How global warming fuelled extreme climate disasters in 2022 | World Economic Forum \(weforum.org\)](https://www.weforum.org/articles/2022/09/21/climate-change-how-global-warming-fuelled-extreme-climate-disasters-in-2020/)>

¹⁵ United Nations Environment Programme [UNEP] “Climate Change and Human Rights” (UNON Publishing Services Section, Nairobi, 2015) <[Climate_Change_and_Human_Rights](https://www.unep.org/publications/Climate_Change_and_Human_Rights)human-rights-climate-change.pdf.pdf (unep.org)>

And our planet is fast approaching tipping points that will make climate chaos irreversible.”¹⁶ This is not merely an abstract, future possibility. The UN, in addition to the IPCC, is clear in outlining that climate change is already affecting temperatures, hydrologic conditions, ecosystem functioning, and agricultural productivity in many regions.¹⁷ Displacement is also an imminent prospect for some communities, such as those situated in the rapidly melting Arctic and low-lying coastal areas.¹⁸ As Guterres further commented at the recent COP27, “We are on a highway to climate hell with our foot on the accelerator.”¹⁹

There is, therefore, no longer any need for explanations about why climate change matters. It is here, and it is already having severe negative impacts around the world. As seen by events even over the last year, this is having a very real effect on current livelihoods. Given the severity of the crisis, it is also increasingly evident that climate change needs to be viewed as a cross-cutting, rather than solely an environmental, issue.

B More than environmental: climate change as a human rights issue

In light of the urgency and widespread impacts outlined in the last section, over the last decade, climate change has moved from being viewed solely through an environmental lens to being considered a cross-cutting issue.²⁰ This reflects, firstly, that climate change is a complex and multifaceted crisis affecting almost all impacts of society. It may also be a result of the failure of the environmental arena to make anything approaching necessary progress on this issue.

The cross-cutting nature of climate change, and in particular the human rights dimension of climate change, is a feature of the latest IPCC report. Compared to earlier publications, the latest assessment “integrates knowledge more strongly across the natural, social and economic sciences”.²¹ It also focuses on the human, as well as the environmental, consequences of climate change – given that these are interlinked. The report concludes that “human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature *and people* (emphasis added), beyond natural

¹⁶ United Nations Secretary General “Secretary-General’s remarks to High-Level opening of COP27” (7 November 2022) United Nations < [Secretary-General's remarks to High-Level opening of COP27 | United Nations Secretary-General](#)>

¹⁷ UNEP, above n15 at VII

¹⁸ UNEP, above n15 at VII

¹⁹ United Nations Secretary General, above n16

²⁰ See, for example, Aneta Peretko above n2 at 60

²¹ IPCC, above n1, at 8

climate variability”.²² The report further finds that climate change has already had adverse impacts on “human systems”, including “water security and food production, health and well-being, and cities, settlements and infrastructure”.²³ In addition to physical impacts on humans, the report also notes the impact that climate change is having on the mental health of populations in severely affected areas, through increasing temperatures, trauma from extreme weather events, and loss of livelihood and culture.²⁴ These impacts on “human systems”, which include health, mortality and morbidity, and food and water production, clearly intersect with fundamental human rights as laid out in key human rights instruments such as the ICCPR. The report therefore does not shy away from looking at climate change as a human rights issue.

Thus, human rights implications are increasingly a feature of what has traditionally been scientific climate change reporting. At the same time, climate change - alongside environmental issues more broadly - is progressively more prominent in human rights discourse. This has now come up in multiple international human rights bodies. The United Nations Human Rights Council, the UN’s key human rights body, passed its first resolution on climate change in 2008.²⁵ This resolution expressed concern that climate change “poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights,”²⁶ and commissioned a “detailed analytical study on the relationship between climate change and human rights.”²⁷ In the intervening fourteen years the UN Human Rights Council has adopted a number of other resolutions on human rights and climate change, focusing on the impact of climate change on different rights and groups, for example the right to health, and rights of the child.²⁸ The most recent resolution 50/9, in 2022, recognises that climate change negatively impacts the right to food, and requests the UN Secretary General and the High Commissioner for Human Rights to prepare reports on these issues, followed by a panel discussion and interactive dialogues on this topic.²⁹ At the same time, climate change is increasingly incorporated into Human Rights Council resolutions on other thematic human rights areas, for example in 2019 a resolution persons with disabilities.³⁰ The mainstreaming of climate change throughout the Human Rights Council, is therefore evident. While these resolutions and

²² At 7

²³ At 9

²⁴ At 9

²⁵ HRC Res 7/23 (2008)

²⁶ HRC Res 7/23, preamble

²⁷ At [1]

²⁸ See for example HRC Res 29/15 (2015) and HRC Res 32/33 (2016)

²⁹ See HRC Res 50/9 (2022) at [13-16]

³⁰ HRC Res 41/21 (2019)

mandated reports are not legally binding on States, they play an important role in the development of human rights norms and standards.

Notably, in 2021, the Human Rights Council established the first Special Rapporteur on the promotion and protection of human rights in the context of climate change.³¹ The mandate of the Special Rapporteur is broad and includes: studying how the adverse effects of climate change affect the enjoyment of human rights and making recommendations to address these adverse effects; identifying existing challenges, including financial challenges, in States' efforts to promote and protect human rights while addressing the adverse impact of climate change, and identifying good practices that address how human rights are integrated into climate change policies.³² The work of this Special Rapporteur builds on the work of the Special Rapporteur on Human Rights and the Environment, who has also published several reports on the interlinkages between climate change and human rights.³³ However, the existence of a dedicated Special Rapporteur on human rights and climate change took a step forward in terms of UN (including UN Member State) investment in this area and recognition of the importance of looking at climate change as a human rights, as well as an environmental, issue. It is a significant extra resource for the development of legal norms in this area.

In another important development, following a resolution 2021 Human Rights Council recognizing the right to a “clean, healthy and sustainable environment”,³⁴ the UN General Assembly also passed an equivalent resolution in 2022. The General Assembly resolution recognizes the right to a clean, healthy and sustainable environment as a human right, notes that this right is linked to other rights and existing international law, affirms that promotion of this right requires full implementation of existing multilateral environmental agreements, and calls up States, international organizations, business enterprises and other relevant stakeholders to scale up efforts to achieve this.³⁵ While the concept of a clean, healthy and sustainable environment is broader than climate change, the impacts of climate change will clearly have – if they are not already having -- an impact on the enjoyment of this new right.

The broad range of human rights that might be impacted by climate change is evident through actions elsewhere in the UN human rights ecosystem. In 2019 five UN treaty bodies issued a joint statement that States' “failure to take measures to prevent foreseeable human rights harm

³¹ HRC Res 48/14 (2021)

³² See HRC Res 48/14 (2021) [1](a)-(n)

³³ See, for example UN Doc A/74/161 (2019)

³⁴ HRC Res 48/13 (2021)

³⁵ GA res A/76/L.75 at [1]–[4]

caused by climate change, or to regulate activities contributing to such harm” could constitute a breach of their human rights obligations.³⁶ In November 2022, in the lead up to COP27 in Egypt, a large group of UN independent experts authored an open letter urging states to respect human rights in all climate action. They outline the impact of climate change on a very wide range of human rights and call on states to ensure that “all decisions made, and actions taken, consider their human rights implications”, noting also that “this, in turn, will lead to better policymaking in the area of climate change”.³⁷ Human rights, are, thus, edging their way into the environmental sphere, just as climate change is being taken up by human rights bodies.

C Climate change and the right to life

As outlined above, climate change can impact a wide range of human rights, such as the right to an adequate standard of living, food, water, health and the right to life. The right to life will be examined in the context of recent climate litigation in section IV. In the interim, this section provides a brief introduction to the right, and its interpretation to-date.

Enshrined in article 6 of the International Covenant on Civil and Political Rights, States parties have an obligation that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.³⁸ This has been picked up variously in regional and national human rights instruments, including article 2 of the European Convention on Human Rights (ECHR).³⁹

In 2019, the UN Human Rights Committee elaborated their views on how the right to life should be interpreted in their “General Comment no. 36”.⁴⁰ General comments or general recommendations are periodically published by UN treaty bodies, outlining their interpretation of their respective treaties.⁴¹ General Comment no. 36 therefore focusses on elaborating the

³⁶ The Committee on the Elimination of all Forms of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, Joint Statement on Human Rights and Climate Change, September 2019 at [1]

³⁷ Office of the High Commissioner for Human Rights Special Procedures “COP27: Urgent need to respect human rights in all climate change action, say UN experts” (4 November 2022) <[COP27: Urgent need to respect human rights in all climate change action, say UN experts | OHCHR](#)>

³⁸ ICCPR, above n1 article 2

³⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14* ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1956) (ECHR)

⁴⁰ UN Human Rights Committee *General Comment no. 36* CCPR/C/GC/36

⁴¹ Office of the High Commissioner for Human Rights *General Comments* <[OHCHR | General Comments](#)>

Committee's views of how the right to life under article 6 of the ICCPR should be interpreted under international law. At a high level, the Committee considers that the right to life is "the supreme right from which no derogation is permitted".⁴² They consider that it constitutes a fundamental right which is a prerequisite for the enjoyment of all other rights, and that its content can also be informed by other human rights.⁴³ It therefore "should not be interpreted narrowly", and as well as the right of individuals "to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death", it encompasses the right "to enjoy a life with dignity".⁴⁴ The right creates a positive obligation on states to ensure the right to legislative and other measures, as well as a duty to provide "effective remedies and reparation" to those whose right to life has been violated".⁴⁵ The Committee also comments that States' obligations extend to "reasonably foreseeable threats and life-threatening situations that can result in loss of life", even if loss of life does not actually occur."⁴⁶

The General Comment includes two paragraphs specifically devoted to the relationship between human rights and the environment. Paragraph 26 finds that a State's duty to protect life also extends to taking "appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity."⁴⁷ The general conditions elaborated in the paragraph include "degradation of the environment", as well as "deprivation of indigenous peoples' land, territories and resources".⁴⁸ Paragraph 62, using language taken from the Paris Agreement preamble states that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."⁴⁹ The Committee thus considers that States parties' existing obligations under international environmental law should inform the content of the right to respect and ensure the right to life, and vice versa.⁵⁰ The Committee concludes that implementation the right to life, and "in particular the right to life with dignity", requires States to take measures to "preserve the environment and protect it against harm, pollution and climate change caused by public and

⁴² General Comment no. 36, above n40 at [2]

⁴³ At [2]

⁴⁴ At [3]

⁴⁵ At [4]

⁴⁶ At [7]

⁴⁷ At [26]

⁴⁸ At [26]

⁴⁹ At [62], see also Paris Agreement 54113 (opened for signature 22 April 2016, entered into force 4 November 2016), preamble

⁵⁰ At [62]

private actors.”⁵¹ Thus, in addition to a range of other rights, the General Comment indicates that climate change can negatively impact the fulfilment of a right to life, including the right to a life with dignity. These considerations will be further examined in Section IV in the context of climate change litigation.

D The narrative as well as normative value of climate change as a human rights issue

In addition to the legal parameters outlined above, the magnitude of the climate crisis is such that framing climate change as a human rights issue may have political value. In the face of global inaction on climate change, the narrative of climate change may provide a different and compelling argument. Human rights are often considered, in light of the UDHR, “inalienable, universal, inviolable and integral to society” in ways that other laws international and domestic environmental laws and regulations may not be.⁵² As Peretko argues, alternative avenues, outside of the traditional environmental fora, may “offer as much utility in rhetoric as in action”.⁵³ Given the climate trajectory, this is a worthwhile consideration.

III Climate change as a particularly pressing human rights issue for Indigenous Peoples

Having established that climate change is a human rights issue, and now firmly part of international human rights law discourse, this section will look at why climate change is an especially pressing issue for indigenous peoples. It will also examine the international legal framework governing indigenous peoples’ rights.

A Why does climate change have a particularly negative impact on indigenous peoples?

Climate change is having a disproportionately severe impact on indigenous peoples, even though they are amongst those who have contributed least to the problem. This is partly due to location and resource-dependence. Indigenous peoples often live in areas such as small islands, high altitudes, humid tropics, coastal regions, deserts and polar areas.⁵⁴ Climate change has a number

⁵¹ At [62]

⁵² Peretko, above n2 at 70

⁵³ At 60

⁵⁴ UNEP, above n15 pp. 2-8

of negative impacts on these regions, including increasing the risk of disease, reducing biodiversity, and resulting in food insecurity.⁵⁵ In the Pacific region, warming waters are impacting the migratory patterns of key fish stocks – impacting livelihoods and food security, while coastal erosion will impact fishing, economic development and transportation.⁵⁶ Climate change’s impact on water resources will be particularly damaging for indigenous peoples, who, in many parts of the world, already face water insecurity.⁵⁷ In fact, many of the realities outlined in Section II will have a particularly severe impact on indigenous peoples. The specific impacts of climate change on indigenous peoples are also recognised in the latest IPCC report, which notes that “across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected”.⁵⁸

There is also a socio-economic dimension to the disproportionate impact of climate change on indigenous peoples. Indigenous peoples are among the poorest in the world: while comprising only 5 percent of the world’s population, they account for 15 percent of those living in poverty, and 33 percent of those living in extreme rural poverty.⁵⁹ With an estimated 100 million people at risk of being forced into extreme poverty by 2030 due to climate change,⁶⁰ this will further impact socio-economic inequalities for indigenous peoples. The colonial history of political and economic marginalisation, and existing social, political and health disparities are also reasons for increased vulnerabilities. As noted in the latest IPCC report, vulnerability of people to climate change differs within and between regions due to factors including “ongoing patterns of inequity such as colonialism and governance” and “present development challenges causing high vulnerability are influenced by historical and ongoing patterns of inequity such as colonialism, especially for many Indigenous Peoples and local communities”.⁶¹ For example, indigenous peoples’ housing insecurity will be exacerbated by climate change, with homes becoming more impacted through extreme heat, cold, mold, and overcrowding.⁶² This will in turn have health impacts including risks of infections, respiratory and gastro-intestinal diseases.⁶³

⁵⁵ Ibid

⁵⁶ Center for Indigenous Environmental Resources, *How Climate Change Uniquely Impacts the Physical, Social and Cultural Aspects of First Nations, Report 2* (The Assembly of First Nations, March 2006) at 14; Secretariat of the Pacific Community [SPC] “Pacific island fisheries and climate change” Policy Brief 24/2014 (Secretariat of the Pacific Community, 2014)

⁵⁷ UN Department of Economic and Social Affairs “Indigenous Peoples>Climate Change” <[Climate Change | United Nations For Indigenous Peoples](#)>

⁵⁸ IPCC, above n1 at 7

⁵⁹ Special Rapporteur on the rights of indigenous peoples, above n4, at 3

⁶⁰ World Bank, *Shock Waves: Managing the Impacts of Climate Change on Poverty* (Washington, D.C., 2016) at 2

⁶¹ IPCC, above n1 at 11 and 12

⁶² Brenda L Gunn “Protecting indigenous peoples’ rights through indigenous peoples’ participating in decision-making: a climate change example” (2021) 17 *McGill Journal of Sustainable Development Law* 1, at 8; see also

In addition to vulnerabilities due to their dependence on traditional lands for food, culture and sustenance, climate change impacts on indigenous peoples' cultural and spiritual relationship with nature. As the Inter-American Court of Justice has commented, "the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival."⁶⁴ These impacts risk "the loss of some of the oldest cultural traditions in the world."⁶⁵ Loss of indigenous cultural sites, for example ceremonial sites which are at risk of flooding due to sea-level rise, would have significant impacts on life, spirituality, and culture.⁶⁶ Many indigenous groups have a "comprehensive" relationship with nature – encompassing place and surroundings – this incorporates culture, economy, and self-identity.⁶⁷ Concepts of self and mental wellness are sometimes linked to their relationship with the environment.⁶⁸ Climate change can also negatively impact the retention of traditional knowledge of indigenous peoples, as "changes are occurring too quickly to integrate the knowledge with traditional understandings that have been developed over generations."⁶⁹ For example, the migration patterns, harvest times, and knowledge of ice conditions and sea level are all being impacted by climate change.⁷⁰ Yet traditional knowledge is an extremely important tool to bring to discussions on climate change adaptation and mitigation.

B Indigenous traditional knowledge: a value-add for climate change

Indeed, despite being so disproportionately impacted by climate change, indigenous peoples have considerable value and knowledge to contribute to climate solutions. This is in part due to indigenous peoples' close relationship with the environment, which makes them uniquely

James D Ford et al, "Vulnerability of Aboriginal health systems in Canada due to climate change" (2010) 20:4 Global Environmental Change 668

⁶³ Ford, above n62 at 673

⁶⁴ Inter-American Court of Justice, CCPR/C/95/D/1457/2006 at [7.2]

⁶⁵ Peretko, above n2 at 63

⁶⁶ CIER, above n56 at 17

⁶⁷ M Alexander Pearl "Human rights, indigenous peoples, and the global climate crisis" (2018) 53 Wake Forest Law Review 713 at 713

⁶⁸ Gunn, above n62 at 8; Ashlee Willcox et al, "Climate change and mental health: an exploratory case study from Rigolet, Nunatsiavut, Canada" (2013) 121:2 Climatic Change 255 at 262

⁶⁹ Gunn above n62 at 9; CIER above n56 at 33

⁷⁰ Gunn, above n62 at 9; referencing Melissa Guyot et al, "Local observations of climate change and impacts on traditional food security in two northern aboriginal communities (2006) 65:5 International Journal of Circumpolar Health 403, at 404 and 412.

positioned to contribute to environmentally friendly adaptation processes. As the Special Rapporteur on Human Rights and Climate Change has commented, indigenous peoples are “repositories of learning and knowledge about how to cope successfully with local-level climate change,” and this knowledge extends to ideas on how to respond effectively to major climate-change-induced environmental changes, such as natural disasters.”⁷¹ The existing and important role of indigenous peoples in the conservation of biological diversity, and the protection of a wide range of natural resources, together with their traditional knowledge of the environment can be of major benefit to global climate action. As the Special Rapporteur has further commented, they can “substantively enrich scientific knowledge and adaptation activities” in this context.⁷²

The benefits of indigenous knowledge are increasingly accepted globally as being advantageous for climate solutions. The latest IPCC report directly references indigenous participation and the importance of traditional knowledge. It recognises that diverse forms of knowledge, including not just scientific knowledge but also “Indigenous knowledge and local knowledge” are valuable in evaluating climate adaptation processes and actions to reduce risks from anthropogenic climate change.⁷³ It finds that “climate resilient development” requires, among other factors, developing partnerships with indigenous peoples, local communities and ethnic minorities”.⁷⁴

C Potentially negative impacts of mitigation and adaptation measures

Unfortunately, although traditional knowledge can make a positive contribution to climate mitigation and adaptation, programmes to mitigate and adapt to climate change have the potential to adversely affect the rights of indigenous peoples’.⁷⁵ If designed without adequate consultation, and implemented without the participation of indigenous peoples, these may undermine customary rights to lands and natural resources.⁷⁶ There are increasing instances of climate change mitigation and/or adaptation projects, for example renewable energy projects (such as biofuel productions and hydroelectric dams) negatively impacting indigenous rights.⁷⁷

⁷¹ Special Rapporteur on the rights of indigenous peoples, above n4, at 5

⁷² Special Rapporteur on the rights of indigenous peoples, above n4, at 5

⁷³ IPCC, above n1 at 5 and 29

⁷⁴ At 32

⁷⁵ Special Rapporteur on the rights of indigenous peoples, above n4 at 4

⁷⁶ Ibid

⁷⁷ At 5; see also Sofie Van Canegem “Renewable energy and indigenous peoples’ rights: a comparative study of New Zealand, Norway and Canada” (2021) 25 NZJEL 61

D Rights of indigenous peoples under international law

Indigenous peoples have rights as individuals, the same as any other individuals, under core international human rights treaties.⁷⁸ Indigenous rights are therefore human rights, but they are also unique. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the key international instrument on the rights of indigenous peoples.⁷⁹ UNDRIP was adopted in 2007 after several decades of negotiations.⁸⁰ The core human rights of indigenous peoples would seem self-evident, but, in light of historical denial of indigenous rights in many parts of the world, this is affirmed under article 1 of UNDRIP.⁸¹ Article 1 also affirms that indigenous peoples have the right to full enjoyment of human rights and fundamental freedoms as found in the UN Charter, Universal Declaration of Human Rights, and international human rights law - “as a collective or as individuals”.⁸² UNDRIP also affirms a number of other rights, for example freedom from discrimination and the right to self-determination.⁸³ Relevant to the discussion of climate change and traditional knowledge, article 31 of UNDRIP states that “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.”⁸⁴

Following on from the discussion of the right to life in the previous section, it is notable that indigenous peoples’ right to life is also enshrined in UNDRIP at both an individual and a collective level. Article 7.1 of UNDRIP states that “Indigenous individuals have the right to life, physical and mental integrity, liberty and security of person”, while article 7.2 provides that Indigenous peoples “have the collective right to live in freedom, peace and security”.⁸⁵ As will be discussed in the following section, the links between the right to life, indigenous peoples, and climate change, are numerous.

In addition to UNDRIP, rights of indigenous peoples are an important component of international human rights law institutions – with the establishment, through the Human Rights

⁷⁸ For example the ICCPR, above n3

⁷⁹ UNDRIP, above n8

⁸⁰ United Nations Department of Economic and Social Affairs “United Nations Declaration on the Rights of Indigenous Peoples <[United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples](#)>

⁸¹ UNDRIP, above n8, article 1

⁸² Article 1

⁸³ Articles 2 and 3

⁸⁴ Article 31

⁸⁵ Articles 7.1 and 7.2

Council, of mechanisms such as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Special Rapporteur on the Rights of Indigenous Peoples.⁸⁶ EMRIP and the Special Rapporteur are mandated to consider different issues that may affect the rights of indigenous peoples. Unsurprisingly, climate change is a frequent feature of this.⁸⁷

At the same time, recent Human Rights Council resolutions on climate change also make specific references to the rights of indigenous peoples. For example, recalling the Paris Agreement's acknowledgement that parties are obliged to respect, promote and consider human rights, and the rights of indigenous peoples in the context of climate change.⁸⁸ It also expresses concern that "the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations", owing to factors such as "indigenous or minority status."⁸⁹

While not the core focus of this Paper, it is worth noting that academic literature on indigenous rights and climate change often focusses on the issue of indigenous participation in climate change-related decision-making.⁹⁰ The historical lack of indigenous participation in climate decision-making at both the national and international levels is at odds with rights under UNDRIP for indigenous peoples to participate in decisions that affect them.⁹¹ At the national level, indigenous peoples are often without "plausible means to engage in traditional democratic processes with any hope of success".⁹² Further, while the Paris agreement's preamble does make specific reference to indigenous peoples, there is no dedicated mechanism for participation, for example, in the formation of countries' National Determined Contributions (NDCs). The Paris agreement preamble acknowledges that climate change is a "common concern of humankind", and that when taking action to address climate change, states should "respect, promote and consider their respective obligations on human rights, the right to health, [and] the rights of indigenous peoples."⁹³ While at first very few countries consulted indigenous peoples on their Paris Agreement NDCs, this is slowly improving. Similarly, new indigenous participation

⁸⁶ EMRIP was established through HRC Res 6/36 (2007); the mandate of the Special Rapporteur was most recently renewed through HRC res 51/16 (2022)

⁸⁷ See, for example, Special Rapporteur on the rights of indigenous peoples, above n4

⁸⁸ HRC Res 47/24, referencing Paris Agreement, above n49, preamble.

⁸⁹ HRC Res 47/24, preamble

⁹⁰ See, for example, Gunn, above n62; Emily Gerrard "Climate change and human rights: issues and opportunities for indigenous peoples" (2008) 31(3) UNSW Law Journal 941

⁹¹ UNDRIP, article 18

⁹² Alexander Pearl, above n67 at 713

⁹³ Paris Agreement, above n49, preamble

mechanisms under the UNFCCC provide greater participation opportunities than were previously available, but still leave much room for improvement.⁹⁴

Self-evidently, the collective nature of climate change requires collective solutions. In this context, human rights law – and the collective nature of indigenous rights - may provide a useful hook for indigenous engagement in human rights issues. This is another example of human rights law having a narrative value, as well as a legal value, for pursuing urgent action on climate change issues.

This section has outlined why climate change has a particularly severe impact on Indigenous Peoples as well as the relevant international legal framework under which Indigenous Peoples rights are protected. The next section will look at recent jurisprudence concerning climate change, human rights, and indigenous peoples.

IV A wave of climate change litigation

Climate change-related litigation is increasing at the national, regional, and international levels. Claims are being taken against governments, corporations, and individuals. Importantly, many of these claims specific concern climate change-related human rights obligations, and the rights of indigenous peoples. This section will principally focus on the recent Human Rights Committee decision of *Billy et al v Australia*, in the context of increasing litigation pertaining to climate change and human rights, and climate change and indigenous peoples.

A Litigation on climate change and human rights

The Sabin Centre for Climate Change tracks climate litigation through comprehensive database (one for US law, one for the rest of the world).⁹⁵ At the time of writing this Paper, the Sabin

⁹⁴ See, for example, UNFCCC “COP 26 strengthens role of indigenous experts and stewardship of nature” (23 November 2021) <[COP26 Strengthens Role of Indigenous Experts and Stewardship of Nature | UNFCCC](#)>

⁹⁵ Columbia Sabin Centre for Climate Change Law “Global Climate Litigation <[Global Climate Change Litigation - Climate Change Litigation \(climatecasechart.com\)](#)>

Centre’s global database contained 112 cases against governments pertaining to human rights, and as a subset, ten cases pertaining to the rights of indigenous peoples.⁹⁶

At the national level, a key case where plaintiffs have successfully sued a government for insufficient climate policy amounting to a breach of human rights is the Dutch Supreme Court case of the *Urgenda*.⁹⁷ The Supreme Court in *Urgenda* upheld the view of the Court of Appeal, and found in favour of the plaintiffs (Dutch environmental group Urgenda, and 900 Dutch citizens), ruling that the Dutch Government’s climate change policies were not sufficient to meet global climate change targets under the Paris agreement, and that this breached the plaintiff’s right to life (under article 2 of the ECHR) and right to family and private life (article 8).⁹⁸ The Court ruled that in order to “do its part” to combat global emissions, the Government needed to reduce its emissions by 25% by 2020 from 1990 levels, rather than the 20% target initially planned by the Government.⁹⁹ As noted by the current and former UN Special Rapporteurs on Human Rights and the Environment, *Urgenda* shows that “it is possible to assign responsibility to an individual State for its contribution to the effects of climate disruption on human rights”, and to “clarify the State’s human rights obligations to protect against such effects.”¹⁰⁰

One pending regional decision of note is the case of *Duarte Agostinho and Others v Portugal and 32 Other States* in the European Court of Human Rights (ECHR).¹⁰¹ The claimants in this case are a group of Portuguese young people aged between 18 and 23 who claim that the forest fires occurring in Portugal annually since 2017 are causing a number of negative health impacts, including on their physical and mental health.¹⁰² They claim that the fires are the result of climate change. Thus, they claim that 33 states (EU members plus Norway, Russia, Ukraine, Turkey Switzerland and the United Kingdom), are breaching their right to life (as well as other

⁹⁶ Ibid, see also Annalisa Savaresi and Joana Setzer “Rights-based litigation in the climate emergency: Mapping the landscape and new knowledge frontiers” 2022 13(1) *Journal of Human Rights and the Environment* 7

⁹⁷ *Netherlands v Urgenda*, no 19/00135, Supreme Court of the Netherlands (2019) (hereafter *Urgenda*) The (unofficial) English translation of the decision is found at <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>>

⁹⁸ *Urgenda Foundation v The State of The Netherlands (Ministry of Infrastructure and the Environment)* [2015] Case C/09/456689/HA_ZA 13-1396 (District Court of The Hague, Chamber for Commercial Affairs); upheld by Court of Appeal 2018 in *Urgenda Foundation v Kingdom of the Netherlands* (The Hague Court of Appeal, [2018] HAZAC/09/456689). On 20 December 2019 the Netherlands Supreme Court dismissed a further government appeal, and affirmed the Court of Appeal’s decision.

⁹⁹ *Urgenda*, above n97 at [5.7.1] and [6.1]

¹⁰⁰ *Billy et al v Australia*, Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment, Communication No 3624/2019 at [48]

¹⁰¹ *Duarte Agostinho and Others v Portugal and 32 Other States*, ECHR Case No: 39371/20

¹⁰² *Duarte*, Statement of 13 November 2020, ECHR Fourth Section 39371/20 (30 November 2020) at 1

rights), read in conjunction with the Paris Agreement on Climate Change.¹⁰³ The applicants claim that these 33 states have failed to discharge their obligations under article 2 of the ECHR (the right to life, equivalent to article 6 of the ICCPR), as they have failed to take adequate climate mitigation measures. The complainants allege that the respondents have fallen short of their human rights obligations by failing to agree to emissions reductions that will keep temperature rise to 1.5 degrees Celsius, as envisioned by the Paris Agreement.¹⁰⁴ The case was fast tracked to the Grand Chamber of the European Court in June 2022, meaning a decision should be forthcoming relatively soon.

B Litigation on indigenous rights and climate change

While not a human rights claim, it is worth briefly mentioning that the issue of climate change and its impact on indigenous people is also appearing in private law claims. The case of *Smith v Fonterra* is currently awaiting judgment from the Supreme Court of New Zealand on an appeal against the striking out of such claims.¹⁰⁵ The appellant in the case, Mr Smith, is an elder indigenous spokesperson from two Iwi in Aotearoa New Zealand, and the climate change spokesperson for the Iwi Chairs' Forum. Mr Smith claims customary interests in lands and other resources situated in or around a specific area in New Zealand (Mahinepua in Northland), and asserts that various sites of customary, cultural, historical, nutritional and spiritual significance to him are close to the coast, on low-lying land or are in the sea.¹⁰⁶ His claim is against a number of large private enterprises in New Zealand that operate facilities emitting greenhouse gases. These include dairy farms, a power station, a steelmaking operation, and an oil refinery. Mr Smith alleges that the defendants' contributions to climate change constitute a public nuisance, negligence, and breach of a duty cognizable at law to cease contributing to climate change.¹⁰⁷

Mr Smith claims that “too little is being done in the political sphere and that the crisis calls for a bold response from the common law”.¹⁰⁸ The case was allowed on the third ground in the High Court, dismissed by the Court of Appeal, and then granted leave to appeal to the Supreme Court

¹⁰³ Ibid

¹⁰⁴ Ibid.

¹⁰⁵ *Smith v Fonterra Co-operative Group Limited and others* 149/2021 [2022] NZSC 35

¹⁰⁶ *Smith v Fonterra Co-operative Group Limited and others* [2020] NZHC 419 at [5]

¹⁰⁷ At [10]-[16]

¹⁰⁸ *Smith v Fonterra Co-operative Group Limited and others* [2021] NZCA 552 at [3]

of New Zealand.¹⁰⁹ In his amended statement of claim for the appeal, Mr Smith has sought to include an additional clause referencing tikanga Māori (indigenous custom of New Zealand), and that this principle and value should “infuse the court’s consideration of the issues in relation to all three causes of action. The proposed new clause reads: ¹¹⁰

Kaitiakitanga as a principle of tikanga Māori incorporates concepts of guardianship, protection and stewardship of the natural environment including recognising that a right in a resource carries with it a reciprocal obligation to care for its physical and spiritual welfare as part of an ongoing relationship.

Smith v Fonterra is, to date, a tortious rather than human rights-based case, and the claims are against private enterprises rather than governments. Nevertheless, it illustrates how indigenous rights are coming to the fore in a variety of climate-change related litigation.

C Breaking new ground: Daniel Billy and Ors v Australia (Torres Strait Islanders Petition)

Building on national and regional developments, the recent decision by the United Nations Human Rights Committee in *Billy v Australia* is a potentially ground-breaking decision in its determination that a state may have breached its human rights obligations by failing to take adequate measures to protect indigenous peoples from the impact of climate change.¹¹¹

States parties to Second Optional Protocol of the ICCPR allow for a process of individual complaints to be brought to the Human Rights Committee.¹¹² The complaint was submitted by members of the indigenous minority group of the Torres Strait Islands, living on four low-lying islands that are particularly vulnerable to the impacts of climate change.¹¹³ The authors submitted that the Australian Government had violated their rights under a number of articles of the ICCPR. Specifically, they claimed their rights were violated under articles 2, read alone and in conjunction with articles 6, 13 and 27; and articles 6, 17, and 27, each read alone.¹¹⁴ The

¹⁰⁹ *Smith*, High Court; Court of Appeal; Supreme Court. See also Maria Hook, Ceri Warnock, Barry Allan and Mihiata Pirini “Tort to the environment: a stretch too far of a simple step forward? *Smith v Fonterra Co-operative Group Limited and others* [2020] NZHC 419” (2021) 33:1 *Journal of Environmental Law* 195

¹¹⁰ *Smith*, Court of Appeal, at [7]

¹¹¹ *Billy*, above n9

¹¹² *Optional Protocol to the International Covenant on Civil and Political Rights* GA Res 2200A (XXI) (opened for signature 16 December 1966; entered into force 23 March 1976)

¹¹³ *Billy*, above n9 at [2.1]

¹¹⁴ At [3.1]

authors submitted that the Australian Government had failed to adopt sufficient adaptation measures, such as adequate sea-wall construction, and had also failed to adopt mitigation measures to reduce greenhouse gas emissions, and that these acts and omissions constituted a violation of their human rights.¹¹⁵ As remedies for these violations, the authors sought declaratory relief in the form of a decision from the Committee, and that Australia take a number of further adaptation and mitigation actions.

Before turning to the merits of the decision, it is important to note two important developments by the Committee on long-standing questions of admissibility for climate change cases in human rights settings: firstly, that claims under the Paris Agreement are not relevant or judiciable under human rights courts, and secondly, that climate change harm cannot be attributed to a specific country. On the first ground, the Australian Government argued that claims under other international agreements (e.g. the Paris Agreement) were inadmissible on the basis that the subject matter lies outside of the scope of the ICCPR.¹¹⁶ While the Committee agreed that it did not have the competence to determine compliance with other international treaties or agreements, it reasoned that other treaties could be referred to in interpreting the State party's obligations under the ICCPR.¹¹⁷

On the issue of attribution, the Australian Government argued that it could not be held responsible for the impacts of climate change on these particular individuals, as there was no clear evidence of any current or imminent threat of violations.¹¹⁸ Further, it was not possible to establish a causal link between the Government's contribution to climate change, its efforts to address this issue, and the violations alleged by the individual authors.¹¹⁹ Australia also outlined in detail various mitigation and adaptation taken by the Government with respect to climate change.¹²⁰ In response, the Committee emphasised that, in terms of adaptation measures, the provisions of the ICCPR invoked by the authors all entail positive obligations on States to ensure the protection of individuals under their jurisdiction from human rights violations.¹²¹ In relation to mitigation measures, the Committee found Australia's track record as a developed country with a high emissions profile to be relevant, including that it "is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been

¹¹⁵ At [3.1]

¹¹⁶ At [4.1]

¹¹⁷ At [7.5]

¹¹⁸ At [4.2]

¹¹⁹ At [4.3] and [4.4]

¹²⁰ At [4.5]

¹²¹ *Billy*, above n9 at [7.7], referencing General Comment no 36, above n40 at [21]

produced.”¹²² The Committee determined that the evidence presented by the authors of the complaint on the continued occurrence of human rights breaches, and attribution to Australia, showed that this was “more than a theoretical possibility”.¹²³ In light of these factors, the Committee considered that it was not precluded from examining the complaint.¹²⁴

1 A violation of articles 17 and 27 of the ICCPR

The majority of the Committee found that the Australian Government’s failure to adequately protect Torres Strait Islanders from the adverse impacts of climate change constituted a violation of their human rights obligations under the ICCPR. Specifically, the Committee found that Australia had violated indigenous Torres Strait Islanders right to enjoy their culture (article 27) and to be free from arbitrary interferences with their private family and home life (article 17).

In relation to article 17, the Committee found relevant the prospect of the authors needing to abandon their homes due to the impact of climate change, and noted that erosion and flooding on the islands was already causing significant distress.¹²⁵ The Committee further took into account the authors’ dependence on fish, other marine resources, land crops and trees for their subsistence and livelihoods, as well as their dependence on healthy ecosystems for their well-being.¹²⁶ They found that these elements constituted “components of the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory,” and that these elements could be considered to fall under the scope of protection of article 17 of the ICCPR.¹²⁷ The Committee considered that article 17 requires positive measures from states to ensure the effective exercise of rights therein. While acknowledging Australia had taken a number of adaptation measures in the Torres Strait Islands, such as infrastructure investments, it did not consider these sufficient to protect Torres Strait Islanders’ home, private life and family. In falling short, Australia violated article 17.¹²⁸

In relation to article 27, which recognises a specific right for minority indigenous groups, the Committee reiterated the principle that for indigenous peoples, “the enjoyment of culture may relate to a way of life which is closely associated with the territory and the use of its resources,

¹²² *Billy* at [7.8]

¹²³ At [7.10]

¹²⁴ At [7.11]

¹²⁵ At [8.9]

¹²⁶ At [8.10]

¹²⁷ At [8.10]

¹²⁸ At [8.12]

including such traditional activities as fishing or hunting”.¹²⁹ This principle stems from the Human Rights Council case of *Benito Oliveira et al. v Paraguay*, where the Committee found that Paraguay’s failure to prevent toxic contamination of traditional lands due to the intensive use of pesticides by neighbouring farms constituted a violation of the indigenous community’s rights.¹³⁰ The Committee recalled that article 27 interpreted together with UNDRIP “enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity.”¹³¹ These rights, according to the Committee, depend on the minority group being able to maintain its culture, language or religion.¹³² The Committee noted the authors’ claims that climate change was impacting the viability of their islands and the surrounding seas, which was in turn eroding their cultural integrity as traditional fishing and farming and cultural ceremonies could no longer be performed on the island, and that these activities could not be performed on mainland Australia.¹³³ The Committee also found that the violation of article 27 could have been reasonably foreseen, including because community members had been raising the issue since the 1990s.¹³⁴ While Australia had made some efforts in adaptation, including the construction of seawalls, these steps were insufficient. The Committee found that delays in construction, and the limited scope of construction, amounted to a failure by Australia to adopt “timely adequate adaptation measures to protect the authors’ collective ability to maintain their traditional way of life,” including transmitting to “their children and future generations their culture and traditions and use of land and sea resources.”¹³⁵ This demonstrated a violation of Australia’s positive obligation under article 27 to protect the authors’ right to enjoy their minority culture.¹³⁶

2 No violation of the right to life

The Committee’s majority decision included significant deliberations on whether Australia had violated the authors’ right to life under article 6 of the ICCPR. The authors claimed that the Australian Government’s failure to provide adequate climate adaptation and mitigation measures

¹²⁹ At [8.13], referencing *Benito Oliveira et al v Paraguay* (CCPR/C/132/D/2552/2015) at [8.6]

¹³⁰ *Benito Oliveira et al. v Paraguay* (CCPR/C/132/D/2552/2015)

¹³¹ *Billy* at [8.13], ref Benito at [8.6]

¹³² *Billy* at [8.13]; this principle comes from *Käkkäljärvi v. Finland* (CCPR/C/124/D/2950/2017) at [9.9]

¹³³ *Billy* at [8.14]

¹³⁴ At [8.14]

¹³⁵ *Ibid*

¹³⁶ *Ibid*

constituted a violation of their rights under article 6 both by act and by omission.¹³⁷ Australia, meanwhile, argued that, while article 6(1) of the ICCPR required it to “protect against arbitrary deprivation of life for persons within its jurisdiction”, it did not require states to protect citizens from the general effects of climate change.¹³⁸ Australia also did not consider the *Urgenda* decision to be sufficiently analogous on the basis of negligence provisions specific to the Dutch Civil Code, and posited that “establishing factual causal under international law is a nearly impossible barrier” to such claims.¹³⁹

Importantly, the Committee dismissed the argument put forward by Australia that the right to life does not obligate a state to prevent foreseeable loss of life from climate change. The Committee followed their reasoning in General comment 36, that this right cannot be properly understood if it is interpreted in a restrictive manner, and that States parties must adopt positive measure in order to protect the right to life, to ensure that individuals are “free from acts or omissions that would cause their unnatural or premature death.”¹⁴⁰ The Committee also reinforced that the threat to a life with dignity can be “reasonably foreseeable”, even if such a threat does not actually result in loss of life, and that such threats may include adverse climate change impacts.¹⁴¹ This recalls the position elaborated in General Comment 36 that “environmental degradation, climate change and unsustainable development constitute some of the pressing and serious threats to the ability of present and future generations to enjoy the right to life”.¹⁴²

Ultimately, however, the Committee found that there was no violation of article 6 in this particular factual scenario.¹⁴³ The Committee accepted that the authors “invoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources”.¹⁴⁴ Yet, based on the facts presented, the majority did not reach a conclusion that the authors had faced or were currently facing adverse health impacts or a “real and reasonable foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their

¹³⁷ Daniel Billy et al, Communication CCPR/C/135/D/3624 (13 May 2019), sourced from Sabin Centre Climate Litigation Database <[20190513_CCPRC135D36242019_complaint.pdf](#) ([climatecasechart.com](#))> (hereafter “Billy Communication”) at [166]-[172]

¹³⁸ *Billy* above n at [4.7], referencing General comment no. 36, above n40 at [20]

¹³⁹ *Billy* at [4.7]

¹⁴⁰ At [8.3]

¹⁴¹ *Ibid*

¹⁴² *Ibid*

¹⁴³ At [8.8]

¹⁴⁴ At [8.6]

right to life”¹⁴⁵ They also considered that claims under article 6 overlapped with article 27, where it ruled that there had been a violation.¹⁴⁶

Nor was the Committee convinced by claims from the authors that the fact of these islands becoming uninhabitable in 10-15 years constituted a violation of the right to life. Regarding this claim, the Committee again expressed a view that the risk of a whole country being underwater is an extreme risk, and could “become incompatible with the right to life with dignity”, even before the risk is realised.¹⁴⁷ This claim was therefore plausible. This reasoning closely followed that of the Committee in *Teitiota v New Zealand*, where an individual from Kiribati sought refugee status in New Zealand due to the impacts of climate change in his own country. In *Teitiota*, while the Committee acknowledged that climate change impacts could violate an individual’s right to life, it found that New Zealand’s decision to deport Mr Teitiota did not meet this threshold as Kiribati still had time to take actions to improve conditions before there was a breach of article 6.¹⁴⁸ Similar to *Teitiota*, the majority of the Committee in *Billy* considered that various adaptation measures planned by the Australian Government over the same time period, including large scale seawall construction to address coastal erosion, may be able to offset this risk.¹⁴⁹ The proposed timeframe therefore allowed the possibility of intervening positive acts by the State party to address this issue, and measures were not sufficiently inadequate as to be a direct and foreseeable threat to the authors’ right to life.

3 *Dissenting opinions from the Committee on the right to life*

While the Committee did not conclude that there was a violation of the right to life on the particular facts of this case, its reasoning clearly indicates that, in the right factual scenario, a violation of the right to life due to “reasonably foreseeable” climate change impacts would be possible. Moreover, there were a number of dissenting opinions from Committee members, who considered that the facts did show a violation of the authors’ right to life by the Australian Government’s acts and omissions.

Committee member Duncan Laki Muhumuza concluded that there has been a breach of the right to life through Australia’s failure to prevent a foreseeable loss of life from the impact of climate

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ *Billy* at [8.7], referencing *Teitiota v New Zealand* (CCPR/C/127/D/2728/2016) at [9.11]

¹⁴⁸ *Teitiota*, above n147, at [1.1]

¹⁴⁹ *Billy*, above n9 at [8.7]

change.¹⁵⁰ Muhumuza reasoned that the Australian Government had not taken “any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use” and that this lack of action continued to endanger the livelihoods of Torres Strait Islanders (including the authors), resulting in a violation of article 6 of the ICCPR.¹⁵¹ Specific factors included saltwater entering soils due to sea level rise, and coral bleaching leading to the disappearance of crayfish as a source of food and incomes.¹⁵² Referencing the reasoning in *Urgenda*, where the Court found that climate change is a “real and imminent threat” and requires the State to take precautionary measures, Muhumuza concluded that the facts of the case did point to an “imminent danger or threat posed to people’s lives which is already affecting their lives”.¹⁵³

A joint opinion by Committee Members Arif Bulkan, Marica VJ Kran and Vasilka Sancin also partially disagreed with the majority, finding that the authors’ right to life had been violated.¹⁵⁴ Bulkan, Kran and Sancin argued that, in applying a standard of “real and foreseeable risk”, the Committee had, in fact, interpreted article 6 restrictively, which goes against the Committee’s own pronouncements following General Comment 36 to take a non-restrictive approach.¹⁵⁵ They also considered that *Teitiota* is not a sufficiently factually analogous case to be used for reasoning on the facts of *Billy v Australia*, given that *Teitiota* specifically relates to a claim for refugee status.¹⁵⁶ Contrary to the majority, Bulkan, Marica and Kran find that the evidence of flooding of the Torres Strait Islands presented in the complaint does demonstrate real and foreseeable risk to the lives of the authors.¹⁵⁷

Finally, Committee member Hernan Quezada reiterated the Committee’s observations that article 6 should not be interpreted restrictively.¹⁵⁸ He noted Australia’s status as a major greenhouse gas emitter over the last few decades and found that any adaptation measures taken by the Australian Government were not sufficient to guarantee the plaintiffs the enjoyment of a life with dignity in the islands they live on in the Torres Strait.¹⁵⁹ Important to his considerations was the evidence

¹⁵⁰ *Billy*, Annex I at [1] and [10]

¹⁵¹ Annex I at [11]

¹⁵² Annex I at [12]

¹⁵³ Annex I at [13] and [14]

¹⁵⁴ *Billy*, Annex III at [1]

¹⁵⁵ Annex III at [2]

¹⁵⁶ Annex III at [2]

¹⁵⁷ Annex III at [3]

¹⁵⁸ Annex V at [3]

¹⁵⁹ Annex V at [3] and [4]

presented of erosion, salination, diminishing marine species, coral bleaching and ocean acidification, and the fact of eventual inhabitability of the islands due to sea level rise.¹⁶⁰

This section has outlined key developments in national and regional climate change and human rights litigation, as well as highlighting some important non-human rights based indigenous climate change litigation. It has outlined the recent decision in *Billy v Australia*, with a particular focus on the right to life and including dissenting opinions on this topic. In light of the surge of climate litigation, and particularly the ground-breaking *Billy* case, the next section will consider implications for future claims by indigenous peoples.

V After Billy v Australia: implications for indigenous peoples

The decision by the Human Rights Committee in *Billy* is significant for international climate change jurisprudence. Irrespective of arguments on the right to life, *Billy* is the first international decision that one country's inadequate climate change mitigation and adaptation policies amount to a violation of their international human rights obligations. It is also, importantly, the first decision where an indigenous peoples' culture has been found to be threatened by the adverse impacts of climate change, thus amounting to a violation of international human rights obligations.

This section will examine the post-*Billy* landscape: in the courts and more broadly. While *Billy* has laid a clear precedent for future cases based on articles 17 and 27 of the ICCPR, this section will argue that the right to life is still a possible ground for future indigenous human rights claims, drawing on arguments from the dissenting opinions in *Billy*. Following the Committee's comments on remedies in *Billy*, this section will also briefly look at the difficult issue of climate change remedies, including State action on mitigation and adaptation, as well as compensation. Finally, it will highlight two important developments related to climate change remedies in the wider UN landscape: the recently established loss and damage fund at COP27, and the Vanuatu-led draft General Assembly resolution requesting an Advisory Opinion from the International Court of Justice on States' climate change obligations under international law. As this section will demonstrate, this is a dynamic area of international law and policy.

¹⁶⁰ Annex V at [4] and [5]

A Future claims on violations of the right to life

The decision from the Committee in *Billy* on violations of indigenous culture and a right to family life due to climate change provide a clear precedent for future climate change cases against governments to be brought by indigenous peoples. The decision will be material for future (and pending) climate litigation cases, including those at the regional and national level. The discussion on the right to life also opens possible future avenues.

As outlined in the previous section, even though the majority did not find a violation of the right to life on this particular factual scenario, they did clearly indicate that a State's failure to take adequate climate change mitigation and/or adaptation measures could, in principle, amount to a breach of the right to life with dignity. On different factual scenarios, for example where there was no ability for a State to take adaptation measures in the intervening 10-15 years, the threshold may have been met. In addition, the various dissenting opinions demonstrate divergent views amongst the Committee on this issue. These views could be used in the future to support certain climate change factual scenarios and arguments for indigenous peoples, strengthening the argument for a breach of the right to life. To this end, two arguments made by the Committee on why the facts of *Billy* did not amount to a breach of the right to life warrant further consideration.

Firstly, the use of *Teitiota v New Zealand* as a basis for reasoning in this scenario is not necessarily analogous for cases based on a country's own human rights obligations to its citizens. In *Teitiota*, the Committee found that New Zealand's process and judgement for refusing Mr Teitiota refugee status was not "clearly arbitrary", and did not constitute a "manifest error or denial of justice".¹⁶¹ However, in the *Teitiota* judgement (released in 2019), the Committee found that "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant", and that this would trigger non-refoulement obligations for sending states.¹⁶² They further considered that "given the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realised".¹⁶³ Yet, similarly to *Billy*, they felt that the intervening 10-15 years may allow sufficient time for Kiribati to address risks to the right to life.¹⁶⁴

¹⁶¹ *Teitiota*, above n147, at [9.13]

¹⁶² *Teitiota*, above n147 at [9.11].

¹⁶³ *Ibid*

¹⁶⁴ At [9.12]

As argued by Bulkan, Kran and Sancin in their partially dissenting opinion in *Billy*, the factual determination of seeking refugee status under international refugee law, as opposed to a country's human rights obligations towards its own citizens, is an important distinction.¹⁶⁵ The principle of non-refoulement includes ensuring that a person is not returning where they are likely to suffer grave human rights violations, most frequently torture or other forms of ill-treatment.¹⁶⁶ This is, in any case, distinct from the question of whether acts or omissions of a State (in the form of inadequate climate mitigation and/or adaption actions) are the cause of alleged violations of the right to life. Another distinction is the timeframe from 2015 (when the decision was taken by the New Zealand Government to deport Teitiota) and 2022 (when the judgement on *Billy v Australia* was released). In the interim, as outlined in Section II, new evidence demonstrates that the impacts of climate change are significantly worse and more immediate than anticipated, and climate change jurisprudence has been gaining momentum.

Secondly, the Committee found that, for indigenous peoples, there was an overlap in arguments from the authors on violation of a right to culture, and the violation of a right to life.¹⁶⁷ They considered that claims under article 6 of the ICCPR mainly related to the authors' ability to maintain their culture, which was covered by article 29.¹⁶⁸ This point requires further examination. Under article 7.1 of UNDRIP, indigenous peoples, as individuals, are entitled to "the rights to life, physical and mental integrity, liberty and security of person."¹⁶⁹ In the Committee's own General Recommendation 36 on the right to life, they outline that States parties should, firstly, take "appropriate measure to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to a life with dignity", and that these "general conditions" may include deprivation of indigenous peoples' land, territories and resources".¹⁷⁰ There is, thus, a clear interlinkage between indigenous rights and a non-restrictive interpretation of the right to life. This is because the loss of culture in many circumstances will equate to the violation of an expanded definition of the right to life.. However, this does not mean that arguments for violation of a right to life based on a right to culture for indigenous peoples should be disregarded. As noted by Bulkan, Kran and Sancin, the

¹⁶⁵ *Billy*, above n9, Annex III at [2]

¹⁶⁶ Office of the High Commissioner for Human Rights, "Technical note: the principles of non-refoulement under international human rights law (2018)" (5 July 2018) <[ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf \(ohchr.org\)](#)>

¹⁶⁷ *Billy*, above n9 at [8.6]

¹⁶⁸ *Ibid*

¹⁶⁹ UNDRIP, above n8, article 7.1

¹⁷⁰ General Comment no. 36, above n40 at [26]

Committee’s jurisprudence does not require that “different violations arise from different sets of facts.”¹⁷¹

This Paper has some sympathy with the minority opinions espoused in *Billy v Australia*. Yet, regardless, looking ahead the reasoning in *Billy* provides room for future claims to be made by indigenous peoples in the Human Rights Committee or elsewhere on the right to life. This is particularly in light of the rapidly increasing severity of scientific climate assessments, and the comparatively limited time for states to take adequate mitigation or adaptation actions. What remedies indigenous peoples may receive will be examined in the following section.

B Remedies

The issue of climate change-related remedies is not straightforward. In *Billy*, in addition to declaratory relief, remedies elaborated by the Committee covered adaptation, mitigation, and general compensation. This section will briefly examine each of these outcomes.

1 Next steps in Australia

Firstly, it should be noted that Australia does not have a legally enforceable obligation to act on the decision in *Billy*. Decisions of the Human Rights Committee are not legally binding on UN member states, rather, Australia has 180 days to respond in writing to the Committee, providing information on the steps it has taken to implement the recommendations.¹⁷² If it does not take appropriate action, the case is kept under consideration by the Committee under a “follow-up procedure”.¹⁷³ At the time of writing this Paper, Australia was “considering the Committee’s views” and had not yet made an official response to the Committee.¹⁷⁴ Australia’s current Attorney-General has emphasised that the complaint was made under the previous government, and that the current Labor government is “committed to working with Torres Strait islanders on climate change”.¹⁷⁵ The Australian Prime Minister and the Indigenous Australians Minister travelled to the Torres Strait shortly after being elected (in May 2022) to talk with Torres Strait

¹⁷¹ *Billy*, above n9, Annex III at [3]

¹⁷² Office of the High Commissioner for Human Rights “Individual Communications” <[OHCHR | Individual Communications](#)>

¹⁷³ *Ibid*

¹⁷⁴ Marian Faa “UN Human Rights Committee finds Australia violated Torres Strait Islanders’ rights by failing to protect them from climate change” ABC News <[UN Human Rights Committee finds Australia violated Torres Strait Islanders' rights by failing to protect them from climate change - ABC News](#)>

¹⁷⁵ *Ibid*

Islanders about the impacts of climate change.¹⁷⁶ It is also noteworthy that these issues are not new to the Australian Government. As far back as 2008, the former Australian Human Rights and Equal Opportunity Commission had identified the potential impact of climate change on human rights - including the right to life and the rights of First Nations peoples – commenting that there will be “no people in Australia more affected by climate change than First Nations peoples.”¹⁷⁷

2 *Declaratory relief*

In the Torres’ Strait Islanders’ communication to the Committee, their first request from the Committee was declaratory relief – in the form of a statement of law by the Committee that Australia’s actions and omission of climate change constituted a violation of their rights under the ICCPR had been violated.¹⁷⁸ As outlined in detail in the previous sections, the request for declaratory relief on article 6 was not granted, but the declarations of a violation of articles 17 and 27 are significant. In terms of global precedent-setting and government reputational risk, as also established, declaratory relief is very important. Further on findings of a violation of ICCPR rights, the Committee can set out measures to “make full reparation” to the victims, and prevent recurrence of similar violations in the future.¹⁷⁹ The authors, in their complaint, argued that both adaptation and mitigation measures were necessary to prevent non-recurrence.¹⁸⁰

3 *Adaptation*

In terms of adaptation, the Committee has asked Australia to engage in meaningful consultations with their communities to conduct needs assessments, and take measures to continue to secure the indigenous communities’ safe existence on their respective islands.¹⁸¹ This is more general than the specific requests made by the authors’ of the complaint, which included that Australia

¹⁷⁶ Ibid

¹⁷⁷ John von Doussa, “Human Rights and Climate Change: A Tragedy in the Making” (Speech, HREOC Seminar Series for the 60th Anniversary of the Universal Declaration of Human Rights, 20 August 2008); see also Narelle Bedford, Tony McAvoy SC, and Lindsey Stevenson-Graf ‘First Nations Peoples, Climate Change, Human Rights and Legal Rights’ *University of Queensland Law Journal* 40(3) 371 at 377.

¹⁷⁸ Billy Communication, above n137, at [210]

¹⁷⁹ Human Rights Committee “Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights” (30 November 2016) <[Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights](#)> at [2]

¹⁸⁰ Billy Communication, above n137 at [213]

¹⁸¹ *Billy*, above n9 at [11]

commit at least \$20 million for emergency measures such as seawalls, and sustained investment in long-term adaptation measures to ensure the islands can continue to be inhabited.¹⁸² Nevertheless, taking action on adaptation would likely be the easiest option for the Australian Government, and would, in any case, be required to offset the risk of future violations of Torres Strait Islanders right to life.

4 Mitigation

On mitigation, the Committee again made a very general comment on Australia's "obligation to take steps to prevent similar violations in the future."¹⁸³ This is far less specific than the authors' request for Australia to take a broad range of mitigation actions including reducing its emissions by at least 65% below 2005 levels by 2030 (and net zero before 2050) and phasing out thermal coal, both for domestic electricity generation and export markets.¹⁸⁴ *Urgenda*, outlined in Section IV, provides a strong precedent for remedies based on greater government mitigation action. The Dutch Government in that case was required to strengthen its emissions reductions objectives so as to be in line with the Paris Agreement targets. In the Special Rapporteurs on Human Rights and the Environment' submission on *Billy*, they argue that the Australian Government has a human rights obligation to file a new Nationally Determined Contribution (NDC) under the Paris Agreement, reflecting its "highest possible ambition", so as to do its fair share of the collective effort.¹⁸⁵ This is in part because Australia is not "blameless" for climate change, and "Australia's choices have contributed to its relatively high level of greenhouse gas emissions".¹⁸⁶ It is therefore interesting that the Committee was not more explicit in terms of mitigation actions, especially in light of the *Urgenda* precedent. Given the political sensitivity of this issue in Australia, they may have been hoping that declaratory relief alone would more helpfully provide political impetus for greater domestic mitigation (and adaptation) action by the Australian Government.

5 Compensation

The Committee in *Billy* further states that Australia should provide compensation to the claimants for harm suffered, but does not make any specifications as to how much or how this

¹⁸² *Billy* Communication, above n137, at [214] to [215].

¹⁸³ *Billy*, above n9 at [11]

¹⁸⁴ *Billy* Communication, above n137 at [216].

¹⁸⁵ Special Rapporteurs Amici Curiae brief, above n100 at [33]

¹⁸⁶ At [32]

should be measured.¹⁸⁷ This is consistent with the Committee’s general rule not to specify sums of money.¹⁸⁸ While specific damage from, for example, flooding, would be easily quantifiable through existing insurance structures, questions of how to compensate in monetary terms other harms suffered by Torres Strait Islanders, including loss of culture, would be more complex to determine. This would similarly be true for claims of violation of the right to life.

For overall global climate emissions, some early work has been done to attempt to assess monetary compensation that large developed countries with a high percentage of historical emissions could be expected to pay developing countries that are experiencing the brunt of climate change impacts.¹⁸⁹ Without commenting on the merits of such calculations, it is difficult, at this point in time, to imagine developed countries being prepared to make such payments. At the same time, developed countries have long objected to the concept of “loss and damage” in the context of climate change, yet, the latest COP27 demonstrated that attitudes to this issue may well be evolving with the establishment of a new fund – as will be discussed in the following section.

Moreover, compensation for violations of international law is not an abstract concept. A notable example of successful compensation is the United Nations Compensation Commission. Established in 1991 through a UN Security Council resolution, the Commission is closing in 2022. To date, Iraq has paid Kuwait \$52.4 billion in compensation for their unlawful invasion of Kuwait in 1990-91.¹⁹⁰ These funds – drawn from a tax on Iraqi oil exports - have been distributed to 1.5 million separate claimants, including governments, international organisations, companies and individuals. While the Compensation Commission is unrelated to climate change or the rights of indigenous peoples, it is a useful reminder that there are precedents for effective compensation mechanisms within the UN system.

The context of climate change as a human rights issue, unlike the above examples, which deal with one State’s obligation to another State, would centre on a State’s obligations to its own citizens. In this instance, those citizens being indigenous peoples. This Paper will not attempt to suggest what adequate financial compensation for indigenous peoples for climate change damage would be. However, in the context of changing attitudes to loss and damage at COP, perspectives

¹⁸⁷ *Billy*, above n9 at [11]

¹⁸⁸ Committee Guidelines, above n179 at [9]

¹⁸⁹ See, for example, Audrey Chapman and A Karim Ahmed “Climate justice, human rights, and the case for reparations” (2021) 23 (2) *Health and Human Rights Journal* 81; see also Lindene Patton and Felicia Barnes “Science and the law: how will developments in attribution science affect how the law addresses compensation for climate change effects” in Bridget Hutter (ed) *Risk Resilience, Inequality and Environmental Law* (Elgar, UK, 2017)

¹⁹⁰ United Nations Compensation Commission website: <[Home | UNCC](#)>

on the issue of financial compensation may quickly be changing. Though complex, and politically sensitive, such calculations for monetary compensation would be possible and may be necessary in the future.

C The issue of compensation in recent developments: COP27 and Vanuatu’s quest for an ICJ Advisory Opinion

These issues, and the recent judgement of *Billy*, are relevant to other major developments in the climate change space: two notable developments, very recent at the time of writing this Paper, are the outcomes of COP27 and Vanuatu’s request for an advisory opinion on climate change from the International Court of Justice (ICJ).

In their submission in *Billy*, the authors of the complaint argued that the Australian Government had violated its human rights obligations in not protecting Torres Strait Islanders from known impacts of climate change, and consequently, was liable for climate-related loss and damage.¹⁹¹ The issue of loss and damage has long been a difficult one in the context of climate negotiations, with, at a high level, developing countries advocating this and developed countries hesitant. The most recent outcomes of the Conference of the State Parties of the UNFCCC (COP27), held in November 2022 in Egypt, should be briefly noted. The most significant outcome of the meeting was the establishment of a new fund on climate change loss and damage for vulnerable countries.¹⁹² The fund is designed to provide financial assistance for countries for losses arising from climate-attributable events including droughts, floods, rising seas, and other disasters.¹⁹³ Many crucial details of the fund need to be negotiated, including core elements such as who should may into the fund, where this money should come from, and which countries should benefit.¹⁹⁴ However, its mere establishment can be seen as a step forward in terms of countries willingness to acknowledge climate change loss and damage in the UNFCCC context.

In addition to COP27, climate change will likely soon be taken up by the ICJ. Vanuatu has led the development of a draft resolution in the United Nations General Assembly to seek an

¹⁹¹ *Billy* Complaint, above, n137 at [86]

¹⁹² UNFCC, “COP27 reaches breakthrough agreement on new “loss and damage” fund for vulnerable countries” (20 November 2022) UN Climate Press Release <[COP27 Reaches Breakthrough Agreement on New “Loss and Damage” Fund for Vulnerable Countries | UNFCCC](#)>

¹⁹³ UN Environment Programme, “COP27 ends with announcement of historic loss and damage fund” (22 November 2022) <[COP27 ends with announcement of historic loss and damage fund \(unep.org\)](#)>

¹⁹⁴ *Ibid*

advisory opinion from the ICJ, on “the obligations of states in respect to climate change”.¹⁹⁵ Vanuatu has indicated that the resolution has the support of over 100 countries.¹⁹⁶ The question outlined to put to the ICJ has a strong human rights dimension. It has regard to the “applicable treaties”, which includes the UDHR and ICCPR, as well as the rules of general international law. The resolution then asks the ICJ to clarify what States obligations are under this body of international law, to “ensure the protection of the climate system and other parts of the environment for present and future generations”. This will, necessarily, cover obligations under the ICCPR including the right to life. The resolution further asks the ICJ what the legal consequences are, under the aforementioned obligations, for States “which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment”. This is a clear question around obligations in terms of remedies, possibly including reparations, for large green-house gas emitting countries, including historical emitters. This question is asked, firstly, in respect of small island developing states and other states which are particularly injured, affected or vulnerable to the adverse impacts of climate change, and, secondly, in respect of “peoples and individuals of the present and future generations affected by the adverse effects of climate change”.¹⁹⁷ It therefore covers both State-State obligations and States’ obligations to their citizens. The reference to “peoples” as a collective, in addition to individuals, suggests that this element would encompass indigenous peoples. If successful, an advisory opinion will be a significant addition to the existing body of jurisprudence on international human rights law and climate change, including the rights of indigenous peoples. We can expect cases such as *Billy* to feature in the ICJ’s considerations, and for the ICJ’s reasoning to inform future such cases in the Human Rights Committee and elsewhere. Like other developments on remedies outlined in this section, including at COP, the Vanuatu resolution demonstrates that legal and policy developments in this area are evolving rapidly.

VI Conclusion

The impacts of climate change are here – much earlier and more severe than expected. These impacts, and indeed the continued global challenge of climate change, are not easily reversible without immediate major emissions reductions, and regardless, large-scale adaption measures are essential. Section II of this Paper demonstrated that climate change impacts were multi-dimensional, and that framing climate change through a human rights lens is increasingly

¹⁹⁵ Vanuatu ICJ Initiative, “Resolution” <[Vanuatu ICJ Initiative - Resolution](#)>

¹⁹⁶ Chloe Farand “Vanuatu publishes draft resolution seeking climate justice at the UN” (30 November 2022) Climate Change News <[Vanuatu publishes draft resolution seeking climate justice at the UN \(climatechangenews.com\)](#)>

¹⁹⁷ Vanuatu ICJ resolution, above nx, at 2(a) and (b).

prominent. This reflects the impacts climate change is having, and has the potential to have, on fundamental human rights such as the right to health, culture and the right to life. The concept of the right to life was examined in some detail, including the Human Rights Committee's General Comment 36, establishing a clear view that environmental degradation can reasonably foreseeably impact the right to a life with dignity. In addition to the legal reality of seeing climate change as a human rights issue, this may have a legitimate advocacy role as another way to motivate government action in the face of imminent climate disaster.

Furthermore, it is clear that climate change is disproportionality impacting indigenous peoples. Section III outlined the specific and concerning impacts of climate change on indigenous peoples, even though they have not been major contributors to the problem. Also concerning is the disproportionate impact that climate change emissions reduction and/or adaption projects can have on indigenous peoples. Meanwhile, indigenous traditional knowledge is invaluable for both mitigation and adaption projects. Section III also outlined the international human rights framework for indigenous peoples, including UNDRIP and developments in the Human Rights Council.

Having established the broad scientific realities, and international legal framework for climate change, human rights, and the rights of indigenous peoples, Section IV examined trends in climate litigation. It specifically focused on climate change and human rights cases such as *Urgenda*, at the national level, and *Duarte*, at the regional level, noting that developments were also taking place in private law such as the New Zealand case of *Smith v Fonterra*. This section focused in detail on the case of *Billy v Australia*, where the Human Rights Committee found that the Australian Government had violated the human rights of Torres Strait Islanders. Though the majority of Committee members did not consider, on the facts, that Australia's actions constituted a violation of the claimants' right, they did not rule out the impacts climate change constituting a violation of the right to life in other circumstances.

Finally, Section V looked at implications of *Billy* case. While it is clear that the case is an important precedent for articles 17 and 27 of the ICCPR, it also argued that the case, and its dissenting opinions, provide useful arguments for future claims by indigenous peoples that insufficient climate change mitigation and adaptation measures by governments constitute a violation of their right to life. This section also examined the remedies recommended by the Committee, including mitigation, adaption and compensation. Finally, following *Billy*, recent developments such as the establishment of a loss and damage fund at COP27, and Vanuatu's resolution requesting an ICJ opinion on States' climate change obligations, show that issues of State responsibility and remedies – including compensation – are rapidly evolving. The

international legal frameworks for human rights, climate change, and indigenous peoples provide a sound foundation for greater protection of indigenous peoples affected by climate change. Given the urgency of the climate crisis and its already disproportionately negative impact on the human rights of indigenous peoples, *Billy* and other recent developments show positive signs of much needed progress.

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