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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019\*\*\*\*\*

<i>Communication submitted by:</i>	Daniel Billy et al. (represented by counsel, ClientEarth)
<i>Alleged victims:</i>	The authors and six of their children
<i>State party:</i>	Australia
<i>Date of communication:</i>	13 May 2019 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to former rule 92 of the Committee's rules of procedure, transmitted to the State party on 18 June 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	21 July 2022
<i>Subject matter:</i>	Failure to take mitigation and adaptation measures to combat the effects of climate change
<i>Procedural issues:</i>	Admissibility – incompatibility; admissibility – manifestly ill-founded; admissibility – <i>ratione materiae</i> ; admissibility – victim status

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\* Adopted by the Committee at its 135<sup>th</sup> session (27 June – 27 July 2022).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haïba, Shuichi Furuya, Carlos Gomez Martinez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernan Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Chongrok Soh, Kobaujah Tchamdja Kpatcha, Héléne Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

\*\*\* Individual opinions by Committee members: Duncan Laki Muhumuza, Arif Bulkan, Marcia V. J. Kran, Vasilka Sancin, Carlos Gomez Martinez, Hernan Quezada Cabrera and Gentian Zyberi are annexed to the present Views.

<i>Substantive issues:</i>	Arbitrary / unlawful interference; children rights; effective remedy; family rights; home; indigenous peoples; minorities – right to enjoy own culture; privacy; right to life
<i>Articles of the Covenant:</i>	2, read alone and in conjunction with 6, 17, 24 (1) and 27; 24 (1), read alone and in conjunction with 6, 17, and 27; and 6, 17, and 27, each read alone.
<i>Articles of the Optional Protocol:</i>	1, 2 and 3

1.1 The eight authors of the communication are Daniel Billy, Ted Billy, Nazareth Fauid, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warriia, born in 1983, 1957, 1965, 1967, 1982, 1964, 1991 and 1973, respectively. They are nationals of Australia and residents of the Torres Strait region. They act in their own names and on behalf of five children of Yessie Mosby<sup>1</sup> and the son of Kabay Tamu.<sup>2</sup> The authors claim that the State party has violated their rights under article 2, read alone and in conjunction with articles 6, 17 and 27; and articles 6, 17 and 27, each read alone. They also claim violations of the rights of the six children under article 24 (1), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. The Optional Protocol entered into force for the State party on 25 September 1991. The authors are represented by counsel.

1.2 Out of four requests received from third parties to submit interventions, the Committee granted two requests, and denied two requests as out of time.<sup>3</sup>

#### **The facts as submitted by the authors**

2.1 The authors belong to the indigenous minority group of the Torres Strait Islands and live on the four islands of Boigu (Keith Pabai and Stanley Marama), Masig (Nazareth Warriia; and Yessie, Genia, Ikasa, Awara, Santoi and Baimop Mosby), Warraber (Kabay and Tyrique Tamu; and Ted and Daniel Billy) and Poruma (Nazareth Fauid).<sup>4</sup> The indigenous people of the Torres Strait Islands, especially the authors who reside in low-lying islands, are among the most vulnerable populations to the impact of climate change.

2.2 The Torres Strait Regional Authority (TSRA), a government body, has stated that “the effects of climate change threaten the islands themselves as well as marine and coastal ecosystems and resources, and therefore the life, livelihoods and unique culture of Torres Strait Islanders.” The TSRA also noted that “even small increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability” and “large increases would result in several Torres Strait islands being completely inundated and uninhabitable.”<sup>5</sup>

2.3 Sea level rise already caused flooding and erosion on the authors’ islands, and higher temperature and ocean acidification produced coral bleaching, reef death, and the decline of seagrass beds and other nutritionally and culturally important marine species. According to the TSRA, in the Torres Strait region, sea level has risen at ~0.6 cm per year from 1993-2010 (compared to the global average of 3.2 mm/yr).

2.4 With respect to the impact of climate change on the islands, the village on Boigu – one of five communities particularly vulnerable to inundation – is flooded each year. Erosion has caused the shoreline to advance and has detached a small area from the island. On Masig,

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<sup>1</sup> Genia, Ikasa, Awara, Santoi and Baimop Mosby (born in 2010, 2012, 2014, 2015 and 2017, respectively).

<sup>2</sup> Tyrique Tamu (born in 2010).

<sup>3</sup> Requests from Martin Scheinin, and from David R. Boyd and John H. Knox) were granted; requests from Christina Voigt and from Olivier de Frouville and Nadia Seqat) were denied.

<sup>4</sup> The authors state that Torres Strait Islanders constitute 0.14% of the total population of Australia but represent almost the totality of the settled population of the Torres Strait region. Each island has its own distinctive culture.

<sup>5</sup> TSRA, “Torres Strait Climate Change Strategy 2014-18: Building Community Adaptive Capacity and Resilience,” Annex 1, p. iii.

a cyclone in March 2019 caused severe flooding and erosion and destroyed buildings. The cyclone resulted in the loss of three metres of shoreline. Approximately one metre of land is lost every year. In addition, a tidal surge in recent years has destroyed family graves, scattering human remains. On Warraber, high tides and strong winds cause seawater to flood the village centre every two to three years. On Poruma, erosion has washed away much of the island's sand over the past few decades.

2.5 Sea level rise has caused saltwater to intrude into soil of the islands, such that areas previously used for traditional gardening can no longer be cultivated. On Masig, rising sea level has caused coconut trees to become diseased, such that they do not produce fruits or coconut water, which are part of the authors' traditional diet. Such changes make the authors reliant on expensive imported goods that they often cannot afford. Patterns of seasons and winds play a key role in ensuring the authors' livelihoods and subsistence but are no longer predictable. Precipitation, temperature and monsoon seasons have changed, making it harder for the authors to pass on their traditional ecological knowledge. Seagrass beds and dependent species have disappeared. While crayfish is a fundamental source of food and income for the authors, they no longer find crayfish in areas where coral bleaching has occurred.

2.6 Referring to the TSRA report, the authors predict that the severe impacts on their traditional ways of life and subsistence and culturally important living resources will present significant social, cultural and economic challenges; impacts on infrastructure, housing, land-based food production systems and marine industries; and health problems such as increased disease and heat-related illness.

2.7 The State party has failed to implement an adaptation programme to ensure the long-term habitability of the islands. Despite numerous requests for assistance and funding made to the state and federal authorities by or on behalf of the islanders, the State party has not promptly and adequately responded. Although some works were done on Boigu and Poruma between 2017 and 2018, many of the priority actions identified in the Torres Strait Regional Adaptation and Resilience Plan 2016-21 remain unfunded. As of now, there is no further government funding confirmed. Local authorities have taken a triage approach to save homes and infrastructure, and residents of Warraber and Masig have taken matters into their own hands, using green waste and debris to secure fragile coastal ecosystems from erosion.

2.8 The State party has also failed to mitigate the impact of climate change. In 2017, the State party's per capita greenhouse gas emissions were the second highest in the world. Those emissions increased by 30.72% between 1990 and 2016. The State party ranked 43<sup>rd</sup> out of 45 developed countries in reducing its greenhouse gas emissions during that period. Since 1990, the State party has actively pursued policies that have increased emissions by promoting the extraction and use of fossil fuels, in particular thermal coal for electricity generation.

2.9 There are no available or effective domestic remedies to enforce their rights under articles 2, 6, 17, 24 and 27 of the Covenant. The authors' rights under the Covenant are not protected in the Constitution or any other legislation applicable to the federal Government. The High Court of Australia has ruled that state organs do not owe a duty of care for failing to regulate environmental harm.<sup>6</sup>

### **Complaint**

3.1 The authors claim that the State party has violated their rights under articles 2, read alone and in conjunction with articles 6, 17 and 27; and articles 6, 17 and 27, each read alone. They also claim violations of the rights of the named children under article 24 (1), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. The State party has failed to adopt adaptation measures (infrastructure to protect the authors' lives, way of life, homes and culture against the impacts of climate change, especially sea level rise.) The State party has also failed to adopt mitigation measures to reduce greenhouse gas emissions and cease the

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<sup>6</sup> *Graham Barclay Oysters v. Ryan* [2002] HCA 54.

promotion of fossil fuel extraction and use. As indicated in the Committee's general comment no. 36,<sup>7</sup> climate change is a matter of fundamental human rights.

3.2 The State party's obligations under international climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the Covenant.<sup>8</sup>

*Article 2*

3.3 The State party has failed to adopt laws or other measures necessary to give effect to the authors' Covenant rights, including those under articles 6, 17, 24 and 27 of the Covenant.

*Article 6*

3.4 In violation of article 6 (1) of the Covenant, the State party has failed to prevent a foreseeable loss of life from the impacts of climate change,<sup>9</sup> and protect the authors' right to life with dignity. The State party has not taken adaptation and mitigation measures. It has not provided resources to adopt measures identified as necessary by the Torres Strait Island Regional Council and the TSRA, and has not met its obligations under the Paris Agreement. The State party has failed to respect the authors' right to a healthy environment, which is part of the right to life.<sup>10</sup> The State party must devote maximum available resources and all appropriate means to reduce emissions in order to comply with its obligations under article 6 of the Covenant.

*Article 27*

3.5 The authors' minority culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas.<sup>11</sup> Climate change already compromises the authors' traditional way of life and threatens to displace them from their islands. Such displacement would result in egregious and irreparable harm to their ability to enjoy their culture.

*Article 17*

3.6 Climate change already affects the private, family and home life of the authors, who face the prospect of having to abandon their homes within the lifetimes of the community members currently alive (including the authors). The State party has failed to take any or adequate adaptation and mitigation measures. When climate change threatens disruption to privacy, family and the home, States must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

*Article 24 (1)*

3.7 The State party has failed to take adequate steps to protect the rights of future generations of the authors' community, including the six named children, who are the most vulnerable and affected by climate change. The future of their survival and culture is uncertain. Future generations, including the children named in the complaint, have a fundamental right to a stable climate system capable of sustaining human life, based on the right of the child to a healthy environment. Yessie Mosby fears that his children will have to live on another man's land and will not have anything for themselves or their children, as the Masigalgal culture will be extinct.

### **Observations of the State party on admissibility and the merits**

4.1 In its submission of 29 May 2020, the State party maintains that the communication is inadmissible. The alleged violations of international climate change treaties such as the Paris Agreement, and other international treaties such as the International Covenant on Economic, Social and Cultural Rights, are inadmissible *ratione materiae* because they are

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<sup>7</sup> CCPR/C/GC/36, para. 62.

<sup>8</sup> Vienna Convention on the Law of Treaties, 23 May 1969, U.N.T.S. vol. 1155, p. 331, art. 31.

<sup>9</sup> *Urgenda Foundation v. The State of Netherlands* case, C/09/456689/ HA ZA 13-1396, judgement of 9 October 2019.

<sup>10</sup> Inter-American Court of Human Rights, Advisory Opinion 23, February 2018, para. 59.

<sup>11</sup> For example, *Ominayak v. Canada* (CCPR/C/38/D/167/1984), paras. 32.2 and 33.

outside the scope of the present Covenant. Moreover, there is no basis for the authors' argument that international climate change treaties are relevant to the interpretation of the Covenant, because there are stark and significant differences between the Paris Agreement and the Covenant. The two instruments have different aims and scopes. 16 States that have signed the Agreement have not signed the Covenant. Accordingly, interpreting the Covenant through the Paris Agreement would be contrary to the fundamental principles of international law.<sup>12</sup> The ordinary meaning of one treaty cannot be used to supplant the clear language of the Covenant.<sup>13</sup>

4.2 The authors have not substantiated their claim that they are victims of violations within the meaning of article 1 of the Optional Protocol.<sup>14</sup> There is no evidence that the authors face any current or imminent threat of a violation of any of the rights they invoked.<sup>15</sup> Moreover, the authors have not shown any meaningful causation or connection between the alleged violations of their rights and the State party's measures or alleged failure to take measures. To demonstrate victim status, the authors must show that an act or omission *by the State party* has already adversely affected their enjoyment of a Covenant right, or that such an effect is imminent. By their own admission, the authors have not met that test. It is not possible, under the rules of State responsibility under international law, to attribute climate change to Australia. Relying on the Committee's position in *Teitiota v. New Zealand*, the State party asserts that the authors invoke a risk that has not yet materialized.<sup>16</sup>

4.3 The authors' claims are also without merit. None of the alleged failures to take mitigation measures fall within the scope of the Covenant. It is not possible under international human rights law to attribute climate change to the State party.<sup>17</sup> As a legal matter, it is not possible to trace causal links between the State party's contribution to climate change, its efforts to address climate change, and the alleged effects of climate change on the enjoyment of the authors' rights. OHCHR has stated that "it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights," and that "it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming."<sup>18</sup>

4.4 The authors' claims with respect to adaptation measures are also without merit, as the alleged adverse effects of climate change have yet to be suffered, if at all, by the authors. Nor are such alleged violations imminent.

4.5 The State party describes in detail the adaptation and mitigation measures it is taking with respect to climate change.<sup>19</sup> The TSRA coordinates climate change programs and policies for the benefit of the region and its communities. It consists of both an elected arm of 20 Torres Strait Islanders and Aboriginal representatives from the region, and an administrative arm with a Chief Executive Officer and staff who implement and manage TSRA programs. To respond to coastal management and climate change issues in the Torres Strait, the TSRA established a committee from 2006 to 2013. It included representatives from the communities worst affected by coastal erosion and inundation, including Boigu, Warraber, Masig and Poruma, as well as state and federal agencies and various research institutions. The committee enabled a whole-of-government, coordinated response to coastal and climate change issues in the Torres Strait region and secured funds to progress identified priority coastal works. The State party also describes in detail the Torres Strait Climate Strategy

<sup>12</sup> See Vienna Convention on the Law of Treaties, art. 31 (3)(c).

<sup>13</sup> Ibid.

<sup>14</sup> The State party argues both that the communication is insufficiently substantiated and that the authors lack victim status.

<sup>15</sup> For example, *E.W. et al. v. Netherlands* (CCPR/C/47/D/429/1990), para. 6.4.

<sup>16</sup> CCPR/C/127/D/2728/2016, para. 9.12.

<sup>17</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1 (2001), art. 4.

<sup>18</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61) (2009), para. 70.

<sup>19</sup> The State party provides extensive further information in its submission regarding its efforts to reduce greenhouse gas emissions.

2014-18, and the Torres Strait Regional Adaptation and Resilience Plan 2016-21. The TSRA continues to be, directly involved with communities in the Torres Strait to enable them to respond to climate change impacts.

4.6 TSRA also played a lead role in securing the information and funding to progress the construction of a new seawall for the low-lying island of Saibai. TSRA is working with local councils to progress a more detailed assessment of coastal hazards to inform coastal adaptation measures. TSRA also actively seeks opportunities to reduce the region's carbon footprint through the uptake of clean energy technologies.

#### *Article 6*

4.7 Article 6 (1) of the Covenant requires States to protect against arbitrary deprivation of life for persons within its jurisdiction, but does not require States to protect those persons from the general effects of climate change.<sup>20</sup> The authors do not claim that they have been arbitrarily deprived of their lives. The *Urgenda* case was based on negligence provisions in the Dutch Civil Code. Establishing factual causation under international law is a nearly impossible barrier to such tort claims. As in *Teitiota*, the State party is taking adaptation measures in the Torres Strait, thus rendering the harm invoked by the authors too remote to demonstrate a violation of the right to life.

4.8 The authors have failed to demonstrate that article 6 (1) of the Covenant includes a generalised right of protection against the effects of climate change, and that relevant domestic legislation is manifestly insufficient or lacking altogether.<sup>21</sup> Although a laudable policy objective that is shared by the State party, the extension of article 6 (1) of the Covenant to a right to life with dignity is unsupported by the rules of treaty interpretation, the ordinary meaning of article 6 (1), and any relevant jurisprudence.

4.9 Alternately, if the Committee maintains the right to a life with dignity, it should only be recognised in limited and particular circumstances. In contrast to the situation in the Committee's recent Views on *Portillo Cáceres et al. v. Paraguay*,<sup>22</sup> the actions in the present case were not attributable to the State party, which also did not fail to enforce domestic law or infringe any domestic laws. The authors in the present case have not suffered any poor health, let alone poisoning or death.

#### *Article 27*

4.10 The State party has enacted laws to protect the survival and continued development of the Torres Strait Islanders' cultural identity. The authors merely assert future hypothetical violations of this right. All of the cases in which the Committee has found violations of this right relate to existing, not future violations. Article 27 was never intended to protect against the effects of climate change.

#### *Article 17*

4.11 The authors focus entirely on future disruptions to family that climate change *may* cause. The authors have not made any claim that their families (including extended relatives) have experienced arbitrary or unlawful interference by the State party. The prohibited interference under article 17 of the Covenant must be real and effective, not potential or future, and must emanate from State authorities or natural or legal persons authorised by the State. The authors' allegation that they could be relocated in the future is speculative.

#### *Article 24*

4.12 The authors have not demonstrated that the wide range of legislative and other measures put in place by the State party to protect Australian children fail to comply with the obligation under article 24 (1) of the Covenant. Article 24 (1) does not specify which measures of protection are required; States parties have broad discretion in this regard.

#### **Authors' comments on the State party's observations on admissibility and the merits**

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<sup>20</sup> General comment No. 36, para. 20.

<sup>21</sup> Manfred Nowak, *CCPR Commentary* (2d. ed. 2005), p. 123. para. 4.

<sup>22</sup> CCPR/C/126/D/2751/2016.

5.1 In their comments of 29 September 2020, the authors maintain that the State party did not challenge their arguments regarding several issues, including the science of climate change and its current and future impacts on the islands where they live; and the interdependency between the authors' unique and vulnerable culture and the surrounding ecosystem of the islands.

5.2 The State party erred in asserting that the adverse effects of climate change have yet to be suffered, if at all, by the authors. This contradicts the evidence that the authors already provided and the reports of the TSRA, a state agency. Moreover, the State party has already violated its duty to avert devastating and future irreversible impacts on rights protected by the Covenant, including impacts caused by *existing* greenhouse gas emissions. Protective measures must be initiated today.<sup>23</sup> Climate change is a slow-onset process. Thus, a State party may violate its obligations before the worst effects occur. The authors' claims are based both on current violations and an imminent threat of violations. They already experience severe impacts from climate change, including disruption to their homes and family life. In their combined statements, the authors describe experiencing the following problems: flooding and inundation of villages; flooding and inundation of ancestral burial lands; loss by erosion of their traditional lands, including plantations and gardens; destruction or withering of traditional gardens through salinification caused by flooding or seawater ingress; decline of nutritionally and culturally important marine species caused by climate change, and associated coral bleaching (reef death) and ocean acidification; and a reduced ability to practice their traditional culture and pass it on to the next generation. They also experience anxiety and distress owing to erosion that is approaching some homes in the community. For six of the authors, upkeeping ancestral graveyards and visiting and feeling communion with deceased relatives is at the heart of their cultures, and the most important ceremonies (such as coming-of-age and initiation ceremonies) are only culturally meaningful if performed on the native lands of the community whose ceremony it is.

5.3 The authors living on Boigu and Masig face a real prospect of displacement and loss of culture within the next 10 years unless urgent and significant action is taken to enable the islands to withstand expected sea level rise. The authors living on Warraber and Poruma face such a prospect within their lifetimes unless urgent action is taken within 10-15 years. Such displacement can be prevented with reasonable adaptation and mitigation measures. If the State party's interpretation of imminence were followed, the authors would be forced to wait until their culture and land have been lost in order to submit a claim under the Covenant.

5.4 The authors have identified specific acts and omissions by the State party (relating to adaptation and mitigation) instead of relying on abstract arguments. Those acts and omissions have already and will continue to impair the authors' rights in ways that will worsen over time, because of the latent and/or irreversible nature of climate change.

5.5 The State party is responsible for its own emissions contribution, lack of due diligence, and failure to take adaptation measures to protect the authors' rights and fulfil its obligation to reduce emissions. The protection of the right to life requires States to review their energy policies and prevent the dangerous emission of greenhouse gases.

5.6 International environmental legal obligations of States are indeed relevant to interpreting the scope of their duties under the Covenant. Treaties should be interpreted in the context of their normative environment.

5.7 The State party has not so far taken any adequate concrete measures to prevent the authors' islands from becoming uninhabitable, or to address the real and foreseeable threat of the complete loss of the authors' cultures. The Committee's jurisprudence supports the notion that environmental harm can lead to violations of fundamental human rights, given the dependence of indigenous minority cultures on a healthy environment, and the strong cultural and spiritual link between indigenous peoples and their traditional lands.

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<sup>23</sup> According to Land and Sea Profiles published in 2015 and 2016, the TSRA assigned to the four islands where the authors live ratings of high vulnerability (Masig, Poruma and Warraber) or very high vulnerability (Boigu) to sea level rise, and considered them to have low (Masig, Warraber), very low (Boigu), or medium (Poruma) sea level rise response options.

5.8 With respect to article 24 of the Covenant, the principle of intergenerational equity places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs. The remedies requested by the authors are reasonable and proportionate.

#### **State party's further observations on admissibility and the merits**

6.1 In its further observations of 5 August 2021, the State party maintains that the authors' allegations (changes to seasonal patterns, erosion of ancestral land, saltwater intrusion, damage to cultural practices, species and homes) represent possible impacts of climate change, but not existing or imminent violations of Covenant rights caused by the State party, either through act or omission. Those impacts only suggest that adverse effects now may, subject to contingencies, worsen in future. The possible impacts of a slow onset process do not confer victim status on the authors.

6.2 The authors acknowledge that there is still a "window of time in which adaptation measures can... [be] planned and implemented." The authors themselves contemplate the consequences that might arise "if and when the authors' islands become unviable for habitation."

6.3 Climate change is a global phenomenon attributable to the actions of many States. It requires global action, unlike other environmental issues previously considered by the Committee. The general effects of climate change, and the effectiveness of any mitigation or adaptation measures to address those effects, are not within the complete control of any State.<sup>24</sup>

6.4 The State party's position is not, as the authors allege, that they must simply wait and suffer increasingly severe climate impacts. The international community has sought to address climate change primarily, and rightly, as a matter of international cooperation and under international environmental agreements. Notwithstanding the authors' dissatisfaction with the pace and nature of the State party's efforts, this does not mean that the State party's response to the threat of climate change, and consequently the response of many other States, amount to a violation of the Covenant.

6.5 Applying the principle of systemic integration described by the International Law Commission, relevant rules for the purpose of article 31 (3)(c) of the Vienna Convention on the Law of Treaties must concern the subject matter of the treaty term at issue.<sup>25</sup> Climate change treaties do not provide evidence of the object and purpose of the Covenant, nor the meaning of its terms.

6.6 Regarding the exhaustion of domestic remedies, States parties to the Covenant are not required to make available a domestic remedy for the purposes of article 2 (3) of the Covenant where: a) the alleged violations are outside the scope of the Covenant (as is the case here, as the allegations relate to Australia's compliance with international climate change treaties); or b) there is no breach of rights recognised by the Covenant as properly understood, as is the case for the allegations in the present communication.

6.7 The obligation to respect under article 2 (1) of the Covenant is a positive obligation of non-interference with Covenant rights that only extends to real risks against which a State party can offer protection.<sup>26</sup> The alleged threat to the authors' rights is a global phenomenon arising from myriad acts committed by innumerable private and State entities over decades that are unquestionably beyond the jurisdiction and control of the State party. It would be perverse if the Covenant were to impose a duty or obligation on the State party – to ensure that climate change does not impair the authors' rights – that the State party could not hope to fulfil. Moreover, the authors acknowledge the multiplicity of global causes of climate change, and that there is still opportunity for mitigating factors at the national and global level to intervene in order to allay the threat posed by its future impacts.

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<sup>24</sup> *Poma Poma v. Perú* (CCPR/C/95/D/145/2006).

<sup>25</sup> Report of the International Law Commission, 58<sup>th</sup> sess., U.N. Doc A/61/10, paras. 180, 413.

<sup>26</sup> The State party provided detailed further information in its submission on the measures it has taken to address the harmful effects of claims change.



6.8 Any positive obligation that arises under the Covenant is principally limited to the threat posed by the acts of private persons or entities within a State party's jurisdiction and control. This could also extend to positive obligations in respect of environmental issues that pose a direct, specific and objective threat to enjoyment of Covenant rights, such as use of pesticides (like in *Portillo Cáceres v. Paraguay*), where it is within the scope of a State's power to avoid that risk. However, it does not create an obligation to protect generally against the future effects of climate change, which, as a matter of international law, extends well beyond the scope of a single State party's jurisdiction and control.

6.9 Academic scholars have noted that "causal pathways involving anthropogenic climate change, and especially its impacts, are intricate and diffuse," and that human rights law "cannot actually address the depth and breadth of the causes and impacts of climate change."<sup>27</sup> A threat that is not attributable to a State cannot be ensured or protected by that State where such protection cannot be achieved by the State alone.

6.10 Positive obligations under the Covenant do not require maximum possible resources nor highest possible ambition. To adopt such an unprecedented test would not only place an impossible burden on States but would also displace reasonable policy choices made in good faith by States as they assess a range of threats and challenges that impact on the enjoyment of human rights under the Covenant and decide how to distribute limited resources to address them.

6.11 It would be both inappropriate and unfounded for the Committee to interpret the Covenant in such a way as to allow it to re-make the informed, good faith and difficult policy decisions of a democratically elected government that inherently involve compromises, trade-offs and the allocation of limited resources across the range of challenges to the full enjoyment of human rights. In urging the Committee to adopt an unduly broad interpretation of a positive obligation, the authors invite the Committee to disregard States' discretion in making relevant decisions, even if exercised in good faith. Fulfilment of positive obligations under the Covenant must recognise competing challenges to limited State resources.

6.12 The authors' claims under article 27 of the Covenant are both factually and legally incorrect. The State party is taking measures to prevent the islands from becoming unviable for habitation, through the adaptation and mitigation measures described at length in its observations. The State party provides detailed information about legislation, policies and practices designed to protect the cultural rights of Torres Strait Islanders. Such measures include the Torres Strait Islander Cultural Heritage Act 2003 (Qld), the Torres Strait Islander Traditional Child Rearing Practice Act 2020 (Qld), the Traditional Ecological Knowledge Project of the TSRA, the declaration of three Indigenous Protected Areas in the Torres Strait region, the use of Torres Strait Infrastructure and Housing Indigenous Land Use Agreements, and the Local Thriving Communities program. As a matter of international law, article 27 of the Covenant does not involve any positive obligation to prevent slow-onset risks that might arise in future. A breach of article 27 of the Covenant only arises at the time of any denial – it does not convert a risk of future denial into a present breach. Even if the Committee were to admit an intergenerational element of cultural transmission, nothing suggests that the State party has directly interfered in or failed to protect the authors' ability to transmit their culture across generations.

6.13 Article 24 (1) of the Covenant does not itself set out the rights of children but refers to necessary measures of protection for children. Instead of identifying any measures specifically sought by the authors to obtain such protection for children, their additional submissions only describe climate change impacts which affect the Torres Strait population generally – adults and children alike. The special measures warranted by article 24 of the Covenant seek to protect children *because of* their status as minors. The effects of climate change do not depend upon a person's status as a minor.

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<sup>27</sup> For example, Fanny Thornton, "The Absurdity of Relying on Human Rights Law to Go After Emitters," in Benoit Mayer and Alexander Zahar (eds.), *Debating Climate Law* (Cambridge University Press, 2021) p. 159.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not currently being examined under another procedure of international investigation or settlement.

7.3 The Committee recalls the requirement under article 5 (2) (b) of the Optional Protocol that the author of a communication must exhaust all judicial or administrative domestic remedies, insofar as such remedies offer a reasonable prospect of redress and are *de facto* available to the author.<sup>28</sup> The Committee recalls that for the purpose of article 5 (2) (b) of the Optional Protocol, authors must only make use of all those avenues that offer them a reasonable prospect of redress, that relate to the alleged violation and that offer redress that would be proportionate to the harm done.<sup>29</sup> In this regard, the Committee notes the authors' uncontested statement that the highest court in Australia has ruled that state organs do not owe a duty of care for failing to regulate environmental harm. The Committee takes note of the State party's position that States parties to the Covenant are not required to make available domestic remedies in cases where – as in the present case – there is no breach of rights recognised by the Covenant as properly understood. With due regard for its remaining findings on admissibility in the paragraphs below, the Committee considers that the issue of whether the authors' Covenant rights were breached cannot be dissociated from the merits of the case. In the above circumstances, and in the absence of information from the State party indicating that effective and available domestic remedies existed at the relevant time for the authors to raise the alleged Covenant violations before competent state bodies, the Committee considers that article 5 (2) (b) of the Covenant does not preclude it from examining the communication.

7.4 The Committee notes the authors' claims under article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant. The Committee recalls that according to its jurisprudence, the provisions of article 2 of the Covenant lay down a general obligation for States parties and do not give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>30</sup> Furthermore, article 2 of the Covenant may not be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.<sup>31</sup> In the present case, the Committee observes that the authors' claims under article 2, read in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant lie in the alleged failure of the State party's policies to give effect to their rights in relation to life, private life, family, home and culture. The Committee notes, however, that the authors have already alleged violations of their rights under article 6, 17, 24 (1) and 27, resulting from alleged defects in the legislative and policy framework and practices of the State party regarding causes, effects and responses relating to climate change. The Committee considers that an examination of whether the State party violated its general obligations under article 2 of the Covenant, read in conjunction with articles 6, 17, 24 (1) or 27 of the Covenant, would not be distinct from the examination of the violation of the authors' rights under article 6, 17, 24 (1) or 27 of the Covenant. The Committee therefore considers that the authors' claims under article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant are inadmissible under article 3 of the Optional Protocol.

7.5 The Committee takes note of the State party's argument that the authors' claims under other international treaties are inadmissible *ratione materiae* because they lie outside the scope of the Covenant. The Committee observes that it is not competent to determine

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<sup>28</sup> See, for example, *D.G. et al. v. the Philippines* (CCPR/C/128/D/2568/2015), para. 6.3.

<sup>29</sup> *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), para. 6.5.

<sup>30</sup> See, for example, *D.M. Nepal v. Nepal* (CCPR/C/132/DR/2615/2015), para. 6.6.

<sup>31</sup> *Ibid.*

compliance with other international treaties or agreements. However, to the extent that the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant, the Committee considers that the appropriateness of such interpretations relates to the merits of the authors' claims under the Covenant. Accordingly, the Committee considers that in this respect, article 3 of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

7.6 The Committee notes the State party's position that the communication is inadmissible under articles 1 and 2 of the Optional Protocol because the State party cannot be held responsible – as a legal or practical matter – for the climate change impacts that the authors allege in their communication. The arguments raised by the parties require the Committee to contemplate whether, under article 1 of the Optional Protocol, a State party may be considered to have committed a violation of the Covenant rights of an individual, where the harm to the individual allegedly resulted from the failure of the State party to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory.

7.7 With respect to adaptation measures, the Committee recalls that the authors in the present communication have invoked articles 6, 17, 24 (1) and 27, each of which entails positive obligations of States parties to ensure the protection of individuals under their jurisdiction against violations of those provisions.<sup>32</sup>

7.8 With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory, and as to whether those emissions are significantly decreasing or increasing, the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee also notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction under articles 1 or 2 of the Optional Protocol and therefore, it is not precluded from examining the present communication.

7.9 The Committee further notes the State party's position that the communication is also inadmissible under articles 1 and 2 of the Optional Protocol because the authors invoke potential future harms and have not sufficiently substantiated their claim that they are victims of a past or existing violation or imminent threat of a violation of their rights by the State party. The Committee recalls its jurisprudence in which it stated that a person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected.<sup>33</sup> It is a matter of degree how concretely that requirement should be taken. However, individuals claiming to be a victim of a violation of a right protected under the Covenant must demonstrate either that a State party has, by act or omission, already impaired the exercise of their right or that such impairment is imminent, basing their arguments for example on legislation in force or on a judicial or administrative decision or practice.<sup>34</sup> If the law or practice has not already been concretely applied to the detriment of such an individual, it must in any event be applicable in such a way that the individual's risk of being affected is more than a theoretical possibility.<sup>35</sup>

7.10 The Committee notes that the authors presented in their communication information indicating the existence of real predicaments that they have personally and actually experienced owing to disruptive climate events and slow-onset processes such as flooding and erosion. The authors argue in part that those predicaments have already compromised their ability to maintain their livelihoods, subsistence and culture. While noting the State party's argument that the authors have not substantiated that present and future climate change impacts and the State party's role in mitigating those impacts have violated the

<sup>32</sup> See general comment No. 36, para. 21; general comment No. 16, para. 1; general comment No. 17, para. 1; general comment No. 23, para. 6.1; *Abdoellaevna v. the Netherlands* (CCPR/C/125/DR/2498/2014), para. 7.3.

<sup>33</sup> For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 8.4.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

authors' Covenant rights, the Committee observes that the authors – as members of peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is uncontested that the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them. The Committee observes that in light of their limited resources and location, the authors would likely be unable to finance adequate adaptation measures themselves, on an individual or community level, to adjust to actual or expected climate and its effects in order to moderate harm. The Committee therefore considers that the authors are among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts. The Committee considers, based on the information provided by the authors that the risk of impairment of those rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility. Accordingly, the Committee considers that articles 1 and 2 of the Optional Protocol do not constitute an obstacle to the admissibility of the claims under articles 6, 17, 24 (1) and 27 of the Covenant.

7.11 The Committee thus declares the authors' claims under articles 6, 17, 24 (1) and 27 of the Covenant admissible, and proceeds to examine them on the merits.

#### *Consideration of the merits*

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the authors' claim that by failing to implement adequate mitigation and adaptation measures to prevent negative climate change impacts on the authors and the islands where they live, the State party has violated their Covenant rights.

#### *Article 6*

8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the Covenant, owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures to protect the right to life.<sup>36</sup> The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3).<sup>37</sup> The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.<sup>38</sup> States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life.<sup>39</sup> The Committee considers that such threats may include adverse climate change impacts, and recalls 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.<sup>40</sup> The Committee recalls that States parties should take all appropriate measures to address the general conditions in

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<sup>36</sup> For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.4; *Toussaint v. Canada*, para. 11.3.

<sup>37</sup> See also *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), para. 7.3.

<sup>38</sup> *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3; *Portillo Cáceres et al. v. Paraguay*, para. 7.5.

<sup>39</sup> General comment No. 36, para. 7.

<sup>40</sup> *Ibid.*, para. 62.

society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.<sup>41</sup>

8.4 The Committee takes note of the State party's position that the extension of article 6 (1) of the Covenant to a right to life with dignity through general comment No. 36 is unsupported by the rules of treaty interpretation, with reference to article 31 of the 1969 Vienna Convention on the Law of Treaties. However, the Committee is of the view that the language at issue is compatible with the latter provision, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, the Committee notes that under article 31 of the Convention, the context for interpretation of a treaty includes in the first place the text of the treaty, including its preamble and annexes. The preamble of the Covenant initially recognizes that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and further recognizes that those rights derive from the inherent dignity of the human person. While the State party notes that socioeconomic entitlements are protected under a separate Covenant, the Committee observes that the preamble of the present Covenant recognizes that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

8.5 The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.<sup>42</sup> In the present case, the Committee notes that the TSRA, a government agency, recognised in its report entitled "Torres Strait Climate Change Strategy 2014-18" the vulnerability of the Torres Strait Islands to significant and adverse climate change impacts that affect ecosystems and livelihoods of the Islands' inhabitants.<sup>43</sup> The Committee also notes the authors' claims regarding their islands (paras. 2.3-2.5 and 5.2), regarding flood-related damage, seawall breaches, coral bleaching, increasing temperatures, erosion, reduction of the number of coconut trees and marine life used for food and cultural purposes, and a lack of rain and its effect on crop cultivation.

8.6 The Committee recalls that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change.<sup>44</sup> The Committee takes into account the authors' argument that the health of their islands is closely tied to their own lives. However, the Committee notes that while the authors evoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or presently face adverse impacts to their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity. The Committee further notes that the authors' claims under article 6 of the Covenant mainly relate to their ability to maintain their culture, which falls under the scope of article 27 of the Covenant.

8.7 Regarding the authors' assertion that their islands will become uninhabitable in 10 years (Boigu and Masig) or 10 to 15 years (Poruma and Warraber) in the absence of urgent action, the Committee recalls that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant.<sup>45</sup> Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.<sup>46</sup> The Committee notes that under the Torres Strait Seawalls Program (2019-23), multiple infrastructures will

<sup>41</sup> Ibid., para. 26.

<sup>42</sup> *Portillo Cáceres et al. v. Paraguay*, para. 7.4 and notes 45 and 46.

<sup>43</sup> P. 1-2.

<sup>44</sup> *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.9.

<sup>45</sup> Ibid., para. 9.11.

<sup>46</sup> Ibid.

be constructed and upgraded to address ongoing coastal erosion and storm surge impacts at Poruma, Warraber, Masig, Boigu and Iama. The Committee notes that by 2022, several coastal mitigation works had been completed on Boigu with funding of \$15 million: the construction of a 1,022 metre long wave return wall, the raising and extension of an existing bund wall to 450 metres, and the upgrading of stormwater drainage infrastructure. The Committee also observes that under the Program, coastal mitigation works on Poruma, Warraber and Masig were scheduled to begin in 2021 or 2022 and be completed by 2023. The Committee also takes note of the other adaptation and mitigation measures mentioned by the State party. The Committee considers that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors' right to life with dignity.

8.8 In view of the foregoing, the Committee considers that the information before it does not disclose a violation by the State party of the authors' rights under article 6 of the Covenant.

*Article 17*

8.9 The Committee notes the authors' claims that climate change already affects their private, family and home life, as they face the prospect of having to abandon their homes. The Committee notes that the erosion of their islands causes the authors significant distress, and that flooding occurs on the islands. The Committee also notes Stanley Marama's allegation that his home was destroyed due to flooding in 2010. The Committee recalls that States parties must prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious.<sup>47</sup> Thus, when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

8.10 The Committee recalls that the authors depend on fish, other marine resources, land crops, and trees for their subsistence and livelihoods, and depend on the health of their surrounding ecosystems for their own wellbeing. The State party has not contested the authors' assertions in that regard. The Committee considers that the aforementioned elements constitute components of the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can be considered to fall under the scope of protection of article 17 of the Covenant.<sup>48</sup> In addition, the Committee considers that article 17 should not be understood as being limited to the act of refraining from arbitrary interference, but rather also obligates States parties to adopt positive measures that are needed to ensure the effective exercise of the rights under article 17 in the presence of interference by the State authorities and physical or legal persons.<sup>49</sup>

8.11 The Committee takes note of the State party's extensive and detailed information that it has taken numerous actions to address adverse impacts caused by climate change and carbon emissions generated within its territory. Those actions include, with relevance to the authors' claims, release of the Torres Strait Regional Adaptation and Resilience Plan 2016-21, which focused both on climate impacts and reducing vulnerability through resilience; direct involvement of the TSRA with communities in the region to enable them to respond to climate change impacts; community heat mapping to monitor and reduce heat risk; installation of monitoring sites relating to tides, sea level, temperature and rainfall; commitment of over \$15 billion for country-wide natural resource management, water infrastructure, drought and disaster resilience and recovery funding; investment of \$100 million or management of ocean habitats and coastal environments; provision of regional and

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<sup>47</sup> General comment no. 16 on article 17 (1988), paras. 1 and 9.

<sup>48</sup> See *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015), para. 8.3; *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), para. 7.8.

<sup>49</sup> See general comment No. 16, para. 1.

global climate finance of \$1.4 billion (2015-20) and \$1.5 billion (2020-25), with a strong focus on achieving adaptation outcomes; reduction of its carbon emissions by 20.1% (from 2005 to 2020) and by 46.7% per person (from 1990 to 2020); investment of an estimated \$20 billion in low emissions technologies (2020-30) and \$3.5 billion in the Emissions Reduction Fund; ; initiation or completion of 58 actions identified in the Torres Strait Regional Adaptation and Resilience Plan 2016-21; development of local adaptation and resilience plans for the 14 outer island communities; development by the TSRA of a draft regional resilience framework to help build greater local and regional resilience to climate change impacts, informed by discussions with community representatives; ongoing assessment of climate change impacts for Torres Strait communities; coastal mapping on the Torres Strait Islands to inform coastal adaptation planning; continuation of coastal protection initiatives by the TSRA to address erosion and storm surge impacts on local communities; and investment of \$40 million in Stage 2 of the Torres Strait Seawalls Program (2019-23). The Committee recalls the information contained in para. 8.7 concerning the State party's completed and ongoing efforts to build new or updated seawalls on the islands where the authors live, and notes that the seawalls are all expected to be completed by 2023.

8.12 However, the Committee notes that the State party has not specifically commented on the authors' allegations that they attempted to request the construction of adaptation measures, in particular upgraded seawalls, at various points over the last decades. While welcoming the new construction of seawalls on the four islands at issue, the Committee observes that the State party has not explained the delay in seawall construction with respect to the islands where the authors live. It has not contested the factual allegations set forth by the authors concerning the concrete climate change impacts on their home, private life and family. The Committee notes that the State party has not provided alternative explanations concerning the reduction of marine resources used for food, and the loss of crops and fruit trees on the land on which the authors live and grow crops, elements that constitute components of the authors' private life, family and home. The Committee notes the authors' specific descriptions of the ways in which their lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands; destruction or withering of their traditional gardens through salinification caused by flooding or seawater ingress; decline of nutritionally and culturally important marine species and associated coral bleaching and ocean acidification. The Committee also notes the authors' allegations that they experience anxiety and distress owing to erosion that is approaching some homes in their communities, and that the upkeep and visiting of ancestral graveyards relates to the heart of their culture, which requires feeling communion with deceased relatives. The Committee further notes the authors' statement that their most important cultural ceremonies are only meaningful if performed on native community lands. The Committee considers that when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home.<sup>50</sup> The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.

#### *Article 27*

8.13 The Committee recalls that article 27 establishes and recognizes a right which is conferred on individuals belonging to minority indigenous groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.<sup>51</sup> The Committee recalls that, in the case of indigenous peoples, the enjoyment of culture may

<sup>50</sup> See *mutatis mutandis Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015); general comment No. 23 (1994).

<sup>51</sup> CCPR/C/21/Rev.1/Add.5, paras. 1 and 6.1.

relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting.<sup>52</sup> Thus, the protection of this right is directed towards ensuring the survival and continued development of the cultural identity.<sup>53</sup> The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, 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. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.<sup>54</sup>

8.14 The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts. The Committee notes the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can only be performed on the islands. The Committee notes their claim that the health of their land and the surrounding seas are closely linked to their cultural integrity. The Committee notes that the State party has not refuted the authors' arguments that they could not practice their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing seawall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors. With reference to its findings in para. 8.14, the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the authors' rights under articles 17 and 27 of the Covenant.

10. Having found a violation of articles 17 and 27, the Committee does not deem it necessary to examine the authors' remaining claims under article 24 (1) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State

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<sup>52</sup> *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015), para. 8.6.

<sup>53</sup> *Ibid*, para. 8.3.

<sup>54</sup> See *Käkkäläjärvä et al. v. Finland* (CCPR/C/124/D/2950/2017), para. 9.9.



party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

## Annex I

### Individual opinion by Committee Member Duncan Laki Muhumuza.

1. The Committee found that there was no violation of Article 6 based on the information provided by the State Party.

2. I have comprehensively perused the information provided by both the authors and the State Party and I am convinced that there is a violation of Article 6 of the Covenant, which states that;

3. “Every human being has the inherent right to life... protected by law, and that no one shall be arbitrarily deprived of his life.”

The Committee found that there was no violation of Article 6 by the State Party based on the information provided by the State Party.

4. The Committee considered the information provided by the State Party in as far as the adaptative measures put in place to reduce the existing vulnerabilities and build resilience to climate change-related harms to the islands and it was on those grounds that the Committee found that there was no violation of Article 6.

5. I am cognisant of the adaptive measures that the State Party has taken under the Torres Strait Seawalls Program (2019-23), where:

- a) Multiple infrastructures will be constructed and upgraded to address ongoing coastal erosion and storm surge impacts at Poruma, Warraber, Masig, Boigu and Iama.
- b) By 2022, several coastal mitigation works had been completed on Boigu with funding of \$15 million, the construction of a 1,022-metre-long wave return wall, the raising and extension of an existing bund wall to 450 metres, and the upgrading of stormwater drainage infrastructure.
- c) Coastal mitigation works on Poruma, Warraber and Masig were scheduled to begin in 2021 or 2022 and be completed by 2023.

9. These efforts and measures taken/and or yet to be taken are commendable and appreciated. However, there is an appalling outcry from the authors that has not been addressed and hence, the authors’ right to life will continue to be violated and their lives endangered.

10. I am of the considered view that the State party has failed to prevent a foreseeable loss of life from the impact of climate change. As highlighted by the *Urgenda Foundation v. the State of Netherlands case*<sup>1</sup>, the State Party is tasked with an obligation to prevent a foreseeable loss of life from the impacts of climate change, and to protect the authors’ right to life with dignity.

11. In the instant case before us, the State Party has not taken any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use, which continue to affect the authors and other islanders, endangering their livelihood, resulting in the violation their rights under article 6 of the Covenant.

12. The citizens of Torres Strait Islands have also lost their livelihood at the island due to the on-going climate changes and the State Party has not taken any measures to mitigate this factor. As a result of rise in the sea levels, saltwater intruded into the soils of the islands and as such lands previously used for traditional gardening could no longer be cultivated. The coral bleaching that occurred has led to the disappearance of crayfish which is a fundamental source of food and income for the authors.

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<sup>1</sup> *Urgenda Foundation v. The State of Netherlands case*, C/09/456689/ HA ZA 13-1396, judgement of 9 October 2019.

13. These factors combined point to the imminent danger or threat posed to people's lives which is already affecting their lives, yet the State Party being aware has not taken effective protective measures to enable the people to adapt to the climate change.

14. The *Urgenda* case defined "Climate change as a real and imminent threat and requires the State to take precautionary measures to prevent infringement of rights "as far as possible."

15. The Court further held that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life/or a disruption of family life.

16. The authors have ably informed the Committee that the current state of affairs and existence in the Torres Strait Islands is under imminent threat due to the on-going climate change and therefore, the State Party should take immediate adaptive precautionary measures to thwart the climate changes, and preserve the lives of the islanders including their health and livelihood. Any further delays or non-action by the State Party will continue to risk the lives of the citizens which is a blatant violation of Article 6 (1) of the Covenant.

17. Accordingly, I find that there is a violation of Article 6 and as a Committee, we should implore the State Party to take immediate measures to protect and preserve the lives of the people at Torres Strait Islands. In order to uphold the right to life, States must take effective measures (which cannot be undertaken individually) to mitigate and adapt to climate change and prevent foreseeable loss of life.

## Annex II

### Individual opinion by Committee Member Gentian Zyberi (concurring)

1. I am generally agreed with the Committee's findings.<sup>1</sup> In this individual opinion, I explain my position on adaptation and mitigation measures, the law on international responsibility for countering climate change effects and adequate measures, and the violation of Article 27.
2. After having acknowledged climate change as a common concern of humankind in its preamble, the 2015 Paris Agreement addresses mitigation and adaptation respectively under Articles 4 and 7. Mitigation efforts are aimed at addressing the causes of climate change by preventing or reducing the emission of greenhouse gases (GHG) into the atmosphere. Adaptation efforts are aimed towards adjusting to the current and future effects of climate change. Both types of measures are intrinsically connected and require action by States (and non-State actors), individually and jointly through international cooperation.
3. The State party in this case has taken both mitigation and adaptation measures. When it comes to mitigation measures, assessing the nationally determined contributions taken by States parties to the ICCPR under the 2015 Paris Agreement, when the State is party to both treaties, is an important starting point. States are under a positive obligation to take all appropriate measures to ensure the protection of human rights. In this context, the due diligence standard requires States to set their national climate mitigation targets at the level of their highest possible ambition and to pursue effective domestic mitigation measures with the aim of achieving those targets.<sup>2</sup> When a State is found to not have fulfilled these commitments, such a finding should constitute grounds for satisfaction for the complainant/s, while the State concerned should be required to step up its efforts and prevent similar violations in the future. The requirement of due diligence applies also to adaptation measures.
4. It has been 30 years since States have recognized climate change as a cause of common concern and action in the 1992 Earth Summit, but despite important developments in the form of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, and the 2015 Paris Agreement, individual and joint State efforts at addressing the climate crisis remain insufficient.<sup>3</sup> Over the years, the law on international responsibility on climate change has developed progressively.<sup>4</sup>
5. A clear limitation of the law on international responsibility in cases of climate change and related litigation, is the difficulty involved in addressing what constitutes shared responsibility.<sup>5</sup> Since it is the atmospheric accumulation of CO<sub>2</sub> and other GHGs that, over time, gives rise to global warming and climate change,<sup>6</sup> States should act with due diligence when taking mitigation and adaptation action, based on the best science. This is an individual responsibility of the State, relative to the risk at stake and its capacity to address it. A higher standard of due diligence applies in respect of those States with significant total emissions or very high per capita emissions (whether these are past or current emissions), given the greater

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<sup>1</sup> On Article 6, the Committee follows largely its reasoning in *Teitiota v. New Zealand*, Communication No. 2728/2016, para. 9.12.

<sup>2</sup> Paris Agreement, Art. 4(3) and 4(2).

<sup>3</sup> For more information on the UNFCCC and related documents and activities, see UN Climate Change at <https://unfccc.int>.

<sup>4</sup> See among others Voigt, "State Responsibility for Damages Associated with Climate Change", in Doelle and Seck (eds), *Research Handbook on Loss and Damage* (Edward Elgar Publishing), pp. 166-183.

<sup>5</sup> See among others, Article 47, 2001 ILC Articles on State Responsibility and related commentary; Nollkaemper, d'Aspremont, Ahlborn, Boutin, Nedeski, and Plakokefalos, in collaboration with Jacobs, *Guiding Principles on Shared Responsibility in International Law*, 31(1) *European Journal of International Law* (2020), pp. 15-72 – Principles 2, 4, 10, 11 and 14.

<sup>6</sup> Peel, "Climate Change", in Nollkaemper and Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017), pp. 1009-1050, at 1031.

burden that their emissions place on the global climate system, as well as to States with higher capacities to take high ambitious mitigation action.<sup>7</sup> This higher standard applies to the State party in this case.

6. The Committee has significant practice on Article 27, with much of its case law concerning the rights of indigenous peoples.<sup>8</sup> In this case, it has found a violation because of the State party's failure to adopt timely adequate adaptation measures to protect the authors' right to enjoy their minority culture under article 27 of the Covenant. In my view, the Committee should have linked the State obligation to "protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources"<sup>9</sup> more clearly to mitigation measures, based on national commitments and international cooperation – as it is mitigation actions which are aimed at addressing the root cause of the problem and not just remedy the effects. If no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible. Such land and sea resources will not be available for indigenous peoples or even for humanity more generally, without diligent national efforts, as well as joint and concerted mitigation actions of the organized international community.

7. Climate change concerns have been addressed over the years by the Committee and other UN human rights treaty bodies,<sup>10</sup> the UN Special Procedures,<sup>11</sup> and more generally by the UN<sup>12</sup>. This case shows the possibilities and limitations of human rights-based litigation. That said, alongside other general or specific institutional arrangements addressing climate change issues, the Committee provides a suitable venue for addressing some concerns, especially under articles 6, 7, 17 and 27, both under the Optional Protocol, as well as under Article 41 of the Covenant.

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<sup>7</sup> Peel, p. 1035.

<sup>8</sup> See among others Schabas, Nowak's CCPR Commentary, 3rd revised edition (N.P.Engel, Publisher, 2019), pp. 795-837, especially 809-812.

<sup>9</sup> Views, para. 8.14.

<sup>10</sup> *Teitiota v. New Zealand*, Communication No. 2728/2016, 24 October 2019; CESCR Committee Statement on "Climate Change and the CESCR", UN Doc. E/C.12/2018/1, 31 October 2018; CEDAW, CESC, CMW, CRC, CRPD Committees' Joint Statement on "Human Rights and Climate Change", UN Doc. HRI/2019/1, 14 May 2020. See also CRC Committee cases against Argentina (Communication No. 104/2019); Brazil (Communication No. 105/2019); France (Communication No. 106/2019); Germany (Communication No. 107/2019); Switzerland (Communication No. 95/2019); and Turkey (Communication No. 108/2019); all decided on 22 September 2021.

<sup>11</sup> See the reports of the Special Rapporteur on the right to food (A/70/287 and A/70/287); Special Rapporteur on the environment (A/HRC/43/53, A/74/161, and A/HRC/40/55); Special Rapporteur on extreme poverty and human rights (A/HRC/41/39); and the establishment of the mandate of Special Rapporteur on climate change in 2021 (A/HRC/RES/48/14).

<sup>12</sup> For more information, see [www.un.org/en/climatechange](http://www.un.org/en/climatechange). See also UNSG Report "The impacts of climate change on the human rights of people in vulnerable situations", UN Doc. A/HRC/50/57, 6 May 2022.

## Annex III

### **Joint opinion by Committee Members Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin (partially dissenting).**

1. In addition to a violation of articles 17 and 27 found by the majority of the Committee, we would also find a violation of the right to life under article 6 of the Covenant.
2. The majority opinion correctly states that article 6 should not be interpreted restrictively.<sup>1</sup> Yet, the “real and foreseeable risk” standard employed by the majority interprets article 6 restrictively, and was borrowed from the dissimilar context of refugee cases.<sup>2</sup> In *Teitiota* the Committee concluded that due to insufficient information from the author, climate change was not a real or foreseeable enough risk to require the State party grant him refugee status. In contrast, here the primary question is whether the alleged violations of article 6 themselves ensue from inadequate mitigation and/or adaptation measures on climate change by the State party. Using a more accurate standard, from a factually similar case relating to environmental damage by pesticides, the question becomes whether there is “a reasonably foreseeable threat” to the authors’ right to life.<sup>3</sup> The authors detail flood related damage, water temperature increases, loss of food sources, and most importantly, explain that the islands they live on will become uninhabitable in a mere 10-15 years according to the Torres Strait Regional Authority (TSRA), a governmental body. Together, this evidence provides “a reasonably foreseeable threat” constituting a violation of article 6.
3. Using the “real and foreseeable risk” standard, the majority opinion requires adverse health impacts to demonstrate an article 6 violation. Not finding such impacts, the majority fails to find a violation of article 6. Nonetheless, the authors detail “real and foreseeable risks” to their lives resulting from the flooding of the Torres Strait islands. First, the authors provide evidence of significant loss of food sources on which they rely to sustain themselves and their families. The crops lost include sweet potato, coconuts, and banana, which are required food sources and livelihood for the authors. The authors demonstrate that flooding has caused land erosion making food production impossible. They also detail that warmer waters due to climate change reduced the availability of cray fish, another primary food source. Second, the authors detail repeated damage to their homes, including significant water damage to the foundation of one author’s home. Thus the authors have demonstrated “real and foreseeable risks” to their lives through significant loss of food sources, livelihood, and shelter.
3. Interpreting article 6 restrictively, the majority opinion observes that the authors conflate violations of the article 27 guarantee of minority rights to enjoy culture with violations under the article 6 guarantee of the right to life.<sup>4</sup> Accordingly, the majority finds a violation of article 27 but not of article 6. While the authors do discuss these violations as related, citing similar facts, the Committee’s jurisprudence does not require that facts relating to different violations arise from different sets of facts. The risks to the authors’ right to life are independent and qualitatively different from the risks to their right to enjoy their culture. Consequently, we are unable to agree that a violation of article 27 sufficiently addresses the authors’ claims.
4. We endorse the view that integral to article 6 is the right to live with dignity.<sup>5</sup> It is, however, critical to do more than simply reference the Committee’s jurisprudence, it must also be used progressively, based on current realities. This jurisprudence unequivocally notes that no derogation is permitted from article 6.<sup>6</sup> Moreover, it clarifies the direct connection

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<sup>1</sup> Para 8.3, majority opinion. See generally William A. Schabas, Nowak’s CCPR Commentary, 3<sup>rd</sup> revised edition p 122.

<sup>2</sup> *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 8.4.

<sup>3</sup> *Portillo Cáceres v. Paraguay*, (CCPR/C/126/D/2751/2016), para. 7.5.

<sup>4</sup> Para. 8.6, majority opinion.

<sup>5</sup> Paras. 8.3 - 8.4, majority opinion.

<sup>6</sup> General comment No. 36, para. 2.

between environmental harms, the right to life, and the right to live with dignity;<sup>7</sup> and that State parties must duly consider the precautionary approach on climate change.<sup>8</sup> Given the urgency and permanence of climate change, the need to adhere to the precautionary approach is imperative. In addition, the singular focus on the future obscures consideration of the harms being experienced by the authors, which negatively impact on their right to a life with dignity in the present. The unfortunate outcome is that the Committee's jurisprudence promises far more than the majority delivers.

5. While we agree that the State party is not solely responsible for climate change, the main question before the Committee is significantly narrower: has the State party violated the Covenant by failing to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory resulting in harms to the authors? The majority opinion relies on projects initiated by the State party since 2019, which might be completed by 2023.<sup>9</sup> While these measures help build climate change resilience, the majority does not sufficiently consider the violations of article 6 that had already occurred at the time of filing this communication. Indeed, promises of future projects are insufficient remedies as they have not yet occurred whereas damage to the foundation of the authors' homes has already occurred. Soil where the authors grow food for subsistence has already been eroded, and crops lost. These violations are a direct result of flooding which could have been prevented by adaptation measures including the timely construction of a seawall to protect the islands where the authors live. Indeed, in its 2014 report, the TSRA concluded that Australia had yet to take any steps on 33 out of the 34 adaptation measures suggested.

6. The State party has a positive obligation to minimize "reasonably foreseeable threats to life"<sup>10</sup> and should remedy these violations by implementing adaptation measures including those identified by the TSRA in 2019. Despite multiple requests and knowledge of the ongoing impacts on the lives of the authors, the State party did not undertake adaptation measures in a timely manner. Consequently, we would find that the State party violated the authors' right to life under article 6 of the Covenant in addition to the violations found by the majority.

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<sup>7</sup> General comment No. 36, para. 62.

<sup>8</sup> Ibid. paras. 26 and 62.

<sup>9</sup> Para 8.7, majority opinion.

<sup>10</sup> General comment No. 36, para. 21.

## Annex IV

### Opinión individual del miembro del Comité Carlos Gómez Martínez

1. El calentamiento global coloca en situación de grave riesgo la vida familiar de los demandantes (artículo 17 del Pacto) y también la supervivencia de las comunidades indígenas a las que pertenecen (artículo 27 del Pacto) dada la circunstancia de que habitan islas de muy escasa altitud en el estrecho de Torres, fácilmente inundables por la subida del nivel del mar, lo cual evidencia su extrema vulnerabilidad y les otorga la condición de víctimas potenciales de violación de los derechos humanos que antes se han mencionado y de los que son titulares.
2. Sin embargo, la evitación total del riesgo y de los daños derivados del cambio climático está fuera del alcance de la actuación aislada del Estado parte dado que el calentamiento de la tierra es un fenómeno global al que solo se puede dar respuesta mundial en una lucha en la que han de implicarse todos o, al menos, una parte significativa de los Estados del planeta. Por ello no puede concluirse que el Estado parte haya violado los derechos de los demandantes por no haber evitado los riesgos o no haber eliminado totalmente los daños que puedan sufrir, derivados del cambio climático.
3. Por esta razón, el Comité se centra en las medidas de adaptación al cambio climático. El dictamen admite, en sus párrafos 8.9 y 8.11, que el Estado parte ha llevado a cabo acciones concretas para la adaptación de la vida de los demandantes al nuevo entorno que traerá consigo el cambio climático, siendo de especial relevancia la construcción de muros de contención de las aguas del mar, obras ya iniciadas y cuya finalización se espera para 2023.
4. Cuestión distinta es si las medidas de adaptación son o no las exigibles hasta el punto de que, por no ser suficientes, puedan suponer la violación de los derechos humanos de los demandantes. La adaptación al cambio climático es un concepto indeterminado que puede ir desde una leve acomodación hasta la drástica configuración de un nuevo entorno plenamente resiliente que permita la vida en plenitud de los demandantes en las nuevas circunstancias climáticas. En cualquier caso, corresponde al Estado parte decidir el curso de acción que debe emprender para adaptar su país al cambio climático atendiendo a los intereses de toda la ciudadanía y a la posible opción por distintas políticas, tanto ambientales, como pueden ser la reforestación con especies resistentes o la facilitación de la transición energética, como de otra índole, como puede ser la reducción de la pobreza, que también tiene importante repercusión en el disfrute de los derechos humanos.
5. El propio dictamen señala en el párrafo 8.9 *in fine* que “el Comité no está en condiciones de concluir que las medidas de adaptación adoptadas por el Estado parte sean insuficientes para representar una amenaza directa al derecho de los autores a una vida digna”, por lo que excluye la violación del artículo 6 del Pacto. Si ello es así, no se entiende como el Comité sí se considera a sí mismo en condiciones de concluir que las medidas de adaptación emprendidas por el Estado parte sean insuficientes a los efectos de apreciar una violación de los artículos 17 y 27 del Pacto. No se explica por qué el juicio de suficiencia no es válido a unos efectos (no violación del artículo 6) y sí lo es a otros (violación de los artículos 17 y 27).
6. En definitiva, el dictamen no explica la razón por la cual el Comité considera que las medidas de adaptación llevadas a cabo por el Estado parte (la construcción de diques de contención del agua del mar), o el retraso en ejecutarlas (iniciadas en 2017 y 2018 en los malecones de Boigu y Poruma, párrafo 2.7), han sido insuficientes hasta el punto de constituir una violación de los artículos 17 y 27 del Pacto Internacional de Derechos Civiles y Políticos y tampoco explica qué otra actuación suplementaria le hubiera sido exigible al Estado parte para poder concluir que no se había producido dicha violación.



## Annex V

### Opinión individual del miembro del Comité Hernán Quezada (parcialmente disidente)

1. Respecto de la Comunicación 3624/2019 (Daniel Billy y otros vs Australia), comparto la decisión del Comité en el sentido de que los hechos examinados ponen de manifiesto una violación de los derechos de los autores en virtud de los artículos 17 y 27 del Pacto, al no cumplir el Estado Parte con su obligación de aplicar medidas adecuadas para proteger el hogar, la vida privada y la familia de los autores, y para proteger el derecho de los autores a disfrutar de su cultura minoritaria, respectivamente.

2. Sin embargo, en lo relativo al derecho a la vida, lamento no poder unirme a la mayoría del Comité, la cual concluyó que la información disponible no revela una violación por el Estado Parte de los derechos de los autores en virtud del artículo 6 del Pacto.

3. El propio Comité entiende (párr. 8.3) que el derecho a la vida no debe interpretarse en forma restrictiva y que su protección requiere de la adopción de medidas positivas<sup>1</sup>. En este sentido el Comité ha establecido en su Observación General N°36 que las amenazas al derecho a la vida pueden incluir “los efectos adversos del cambio climático”, lo que obliga a los Estados Partes a “adoptar todas las medidas apropiadas para hacer frente a las condiciones generales de la sociedad que puedan dar lugar a amenazas directas al derecho a la vida o impedir que las personas disfruten de su derecho a la vida con dignidad”<sup>2</sup>. Al respecto, debe tenerse presente que el Estado Parte durante las últimas décadas es y ha sido uno de los países que han producido grandes cantidades de emisiones de gases de efecto invernadero (párr. 7.8).

4. Según los hechos denunciados y no rebatidos por el Estado Parte, los autores han experimentado y experimentan una serie de problemas derivados de los efectos del cambio climático que afectan sus vidas y la existencia misma de las islas que habitan: la inundación de aldeas y de tierras funerarias ancestrales; la pérdida por erosión de sus tierras tradicionales, incluidas las plantaciones y los jardines; la destrucción o marchitamiento de los jardines tradicionales por la salinización causada por las inundaciones o la entrada de agua de mar; la disminución de especies marinas de importancia nutricional y cultural; la decoloración de los corales, y la acidificación de los océanos, entre otros. A todo ello se suma el riesgo de inhabitabilidad de sus islas debido al persistente aumento del nivel del mar.

5. Si bien el Estado Parte ha adoptado en los últimos años diversas medidas para hacer frente a los efectos adversos del cambio climático y las emisiones de carbono generadas en su territorio, esto es aún insuficiente para garantizar a los autores el disfrute de una vida digna en las islas que habitan en el Estrecho de Torres. En efecto, el Comité ha constatado (párr. 8.12) que el Estado Parte no ha respondido varias alegaciones de los autores en este sentido, en particular la no construcción de medidas de adaptación para mejorar los malecones y el retraso en la construcción de diques, y tampoco ha dado explicaciones alternativas sobre la reducción de los recursos marinos necesarios para la alimentación y la pérdida de cultivos y árboles frutales. Aun cuando dichas constataciones del Comité están relacionadas con la violación del Artículo 17 del Pacto, la falta o la insuficiencia de medidas de adaptación para enfrentar las consecuencias adversas del cambio climático ha repercutido negativamente en las condiciones de vida de los autores. Por lo demás, las amenazas que se ciernen sobre sus medios de subsistencia y sobre la existencia misma de las islas, han creado una situación de incertidumbre y, por lo mismo, afectan su salud mental y su bienestar, impidiendo el derecho a disfrutar de una vida digna<sup>3</sup>. En este contexto, los autores y sus familias ya han sufrido y

<sup>1</sup> Ver también Portillo Cáceres y otros c. Paraguay (CCPR/C/126/D/2751/2016), párr. 7.3.

<sup>2</sup> Observación General N°36, párrafos 62 y 66.

<sup>3</sup> Según el párr. 3 de la Observación General N°36, el derecho a la vida es “el derecho a no ser objeto de acciones u omisiones que causen o puedan causar una muerte no natural o prematura y a **disfrutar de una vida digna**” (énfasis agregado).

aún sufren una violación al derecho a la vida, en el sentido de “vida digna”, lo que es una realidad concreta que requiere reparación, independientemente de las futuras mejoras que puedan lograrse con las medidas de mitigación y adaptación que el Estado Parte ha comenzado a implementar en los últimos años o que estarían por iniciarse, según la información obtenida por el Comité (párr. 8.7).

6. Con respecto a la oportunidad en la adopción de medidas, cabe tener presente que la comunicación de los autores (presentación inicial) es de fecha 13 de mayo de 2019, cuando los efectos adversos del cambio climático en las islas del Estrecho de Torres ya habían producido, durante largo tiempo, serios impactos negativos en sus vidas. Sin embargo, la mayor parte de las obras de mitigación costera emprendidas por el Estado Parte, según lo constatado por el Comité, estaban programadas para comenzar recién en 2021 o 2022 y estar terminadas en 2023 (islas Poruma, Warraber y Masig). Solamente en la costa de una de las islas (Boigu) se habían completado en 2022 varias obras de mitigación.

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