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The future is now: Climate displacement and human rights obligations—a note on recent developments in the UN Human Rights Committee

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Although climate litigation—or the pursuit of legal resolve of matters stemming from anthropogenic climate change—has been growing around the world, climate mobility is seldom at the heart of relevant case law. It is human rights law bodies, in particular, which have nevertheless begun to progress legal developments in the sphere of climate mobility. This note looks at a 2022 determination by the UN Human Rights Committee concerning the habitability of a small island setting—Australia's Torres Strait Islands—under climate change conditions and the legal responsibilities of nation states to abide by their international human rights obligations in implementing timely adaptation measures now which could help to ensure continued habitation.

KEYWORDS

climate change, climate mobility, displacement, human rights, Human Rights Committee, Australia, Torres Strait, small islands

Introduction

Research and commentary concerning climate mobility revolves, fundamentally, around two major pursuits: (a) illuminating the phenomenon's causes and scope and (b) developing responses to it. Within these two connected spheres a divergent array of complex matters is investigated and debated (e.g., McAdam, 2010). The second sphere—responses—includes also an emerging body of work contemplating law, policy and governance developments and arrangements, actual and potential, that are, or may be, suitable to an array of climate mobility types (e.g., migration, displacement, relocation, immobility, etc.) (e.g., Boas, 2021). With respect to climate displacement, inherent to which is an element of force, law and policy analysis has at times revolved around the concept of the "climate refugee" (e.g., McAdam, 2012), and with this developments in asylum and refugee law and cross-border mobility. It may, however, be human rights bodies, not least those with global or regional reach, that are driving legal developments in the sphere of climate displacement (e.g., Katsoni, 2021), including that which is internal. This note analyses a recent

case (complaint) before the UN Human Rights Committee (HRC), the treaty body overseeing state party compliance with the *International Covenant on Civil and Political Rights* (ICCPR), which almost all nation states have adopted or acceded to. The note pays attention, in particular, to how the Committee evaluates threats to habitability arising with climate change in small island settings, the responsibilities as derived from international human rights law of nation states to respond to these threats, and—perhaps most importantly—the importance of timeliness and adequacy in state responses (also Voigt, 2022). The note concludes by showing how the Committee is beginning to define climate displacement as a present, and not future, issue of legal relevance.

The Human Rights Committee in Billy et al. vs. Australia

In late September 2022, the Human Rights Committee published its determination—known as views adopted [Human Rights Committee (HRC), 2022]—in response to a 2019 communication it had received alleging rights violations under the ICCPR in the climate change context by Australia, a state party to the treaty and its Optional Protocol. The communication involved a complaint against Australia for its alleged failures to reduce its greenhouse gas emissions sufficiently to prevent climate change-related harm, and in particular to implement adaptation measures in a sufficient and timely manner to counter such harms, in the Torres Strait Islands region, which is part of its territory. The Torres Strait Islands is a small-island region to the north of the Australian mainland largely inhabited by First Nations Australians, who are fearful of rights violations arising in particular (though not exclusively) in the context of climate change-driven sea level rise. The complainants, a group of eight and six of their children, highlighted that:

> ... the severe impacts (from climate change) 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 [Human Rights Committee (HRC), 2022, sec. 2.6].

They argued further that unfettered climate change and its impacts undermines their traditional way of life and threatens to displace them, resulting in "egregious and irreparable harm to their ability to enjoy their culture" [Human Rights Committee (HRC), 2022, sec. 3.5].

Rights violations alleged included the right to life (ICCPR, Art 6), the right to be free from arbitrary interference with privacy, family life, and home life (Art 17), and minority rights to enjoy one's culture (Art 27). Responding to the allegations, the former, Coalition-led Australian government responded in 2020, and again in 2021, that it considered the case inadmissible, not least because (a) it concerned "future disruptions" [Human Rights Committee (HRC), 2022, e.g., sec. 4.10, 4.11], including mere speculation on a future involving relocation [Human Rights Committee (HRC), 2022, sec. 4.11], and (b) because the alleged violations cannot causally or solely be attributed to the state party—Australia [Human Rights Committee (HRC), 2022, sec. 4.3], which (c) furthermore, it alleges, had taken measures to ensure the Torres Strait islands would remain viable for habitation [Human Rights Committee (HRC), 2022, sec 6.12]. With respect to their fears around displacement, the claimants argued that they face it within their lifetime, unless "reasonable adaptation and mitigation measures" are taken—which has not been the case—and that under "the State party's interpretation of imminence... the authors would be forced to wait until their culture and land have been lost in order to submit a claim under the Covenant" [Human Rights Committee (HRC), 2022, sec 5.3].

In response to the parties' statements and submissions, the Human Rights Committee adopted the following views: First, it held the case admissible. Under Article 1 and 2 of the Optional Protocol to the ICCPR, by which state parties can agree to permit individual complaints under the ICCPR for alleged rights breaches under their jurisdiction, cases are admissible only for actual breaches by the state party—facts which Australia disputed in this case. The Committee, however, concluded that based on the information provided, there is "more than a theoretical possibility" of rights impairment as alleged by the complainant, who are "longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumable offer scant opportunities for safe internal relocation," and who are thus "highly exposed to adverse climate change impacts" [Human Rights Committee (HRC), 2022, 7.10]. At the same time, the complainants themselves are likely unable to "finance adequate adaptation measures themselves" or to "moderate harm" (Ibid), whilst the state party indisputably ranks amongst those states with high greenhouse gas emissions, whilst simultaneously being able to do something about this on account of its advanced economic development (HRC 2002, sec. 7.8). The Committee used these facts to support admission of the case for consideration.

On the merits, the Committee found violations of Articles 17 and 27, ICCPR (also Feria-Tinta, 2022). With respect to the prohibition of arbitrary interference in private, family and home life (Art 17), the Committee reaffirmed positive state party obligations to prevent interference in their enjoyment [Human Rights Committee (HRC), 2022, sec 8.9, 8.10]. Although Australia had implemented adaptation measures, broadly, and in its Torres Strait region in particular, the Committee disputed their sufficiency and implementation in a timely fashion, especially noting ill-explained delays in the implementation of requested key infrastructure measures (e.g., sea wall construction) in the region in recent decades, all

in the face of apparent adverse effects on individual physical and mental wellbeing stemming from climate change in the Torres Strait Islands region. With respect to the right to culture stemming from membership in a minority group (Art 27), the Committee confirmed that enjoyment of this right in the context of indigenous peoples may fundamentally be tied to territory and use of its resources, which can form an inimical part of cultural identity [Human Rights Committee (HRC), 2022, sec. 8.13]. Article 27 of the ICCPR is interpreted in light of obligations under the *UN Declaration on the Rights of Indigenous Peoples*, which grants inalienable rights to enjoy territory and natural resources that have been in traditional use (Ibid). The Committee then notes the complainants' descriptions of the impacts upon their enjoyment of land and resources in the Torres Strait, and their further effect on cultural integrity. It notes additionally that the state party, Australia, did not dispute the complainants' argument that they could not continue with their traditional cultural practice upon relocation to the Australian mainland. The Committee then again raises concern about the sufficiency and timeliness of delaying infrastructure which would support the maintenance of indigenous land, resources use and cultural practice in the Torres Strait Islands region [Human Rights Committee (HRC), 2022, 8.14]. It thus finds the inadequate actions of the state party to amount to a breach of Article 27, IPCCR. The Committee also elaborated on alleged Article 6 (the right to life) breaches but found no violation.

The state party, since May 2022 under a Labor government, has been given 180 days (from 22 September 2022) to respond as to how it intends "to give effect to the Committee's Views" [Human Rights Committee (HRC), 2022, sec.12] and noted that it is reviewing its options. The Committee has indicated that it considers amongst the measures now required adequate compensation and consultation with the complainants' communities about needs assessment and timely implementation of measures (now and into the future) that would ensure their "continued safe existence" in their island region [Human Rights Committee (HRC), 2022, sec. 11].

Conclusion: Human rights law and climate displacement—the future is now

The case is important in several ways with respect to climate displacement: First, it evidences that human rights law frameworks are responsive to countering the harms arising in the context of this type of mobility. Those that emit excessively, and that counter climate harms insufficiently—in this case a nation state—can be held accountable on human rights grounds for their actions and inactions, at least in-country, and mandated to take action that is sufficient and timely, rather than haphazard, including where the prevention of actual and cultural dislocation is concerned. Secondly, the case frames harms and human rights obligations that arise in the climate change context as a present—and not future—issue or concern. When considering climate displacement in particular, this matters. In early 2020, the Human Rights Committee published its adopted views in the matter of *Teitiota v New Zealand* [Human Rights Committee (HRC), 2020], which concerned the legality of the return, by New Zealand, of a national of the Republic of Kiribati to his low-lying atoll home nation. The Committee here, too, considered timescales as import. It argued then, exclusively under Article 6, ICCPR (right to life) in this case, that the threats stemming from climate change in Kiribati were not yet serious enough to engage another state party's (New Zealand) *non-refoulement* (non-return) obligations, noting furthermore that the government of Kiribati was engaged in implementing adaptation measures to counter such threats to the best of its abilities. It noted that protection obligations might only arise in future, as climate change impacts in Kiribati (and, by implication, elsewhere) would become more serious, a finding subject to critique since (e.g., Foster and McAdam, 2022). The present case is different—it concerns broader human rights matters (culture, private and home life, etc.) and internal mobility not involving a national border. Nevertheless, it highlights that human rights-based legal obligations of nation states in the climate displacement context exist *now*—as the climate crisis is already upon us—and not at some future point in time. These obligations include, according to the HRC, community consultation and rectification (including through compensation) and non-repetition of harm. Nation states with obligations under the IPCCR (nearly all existing states) ought to pay attention, as the ramifications are not geographically contained. States, within their own borders at least, are not free to ignore the physical and cultural displacement consequences that arise with climate change.

Author contributions

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Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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