

UNITED NATIONS  
HUMAN RIGHTS COMMITTEE

*BILLY et al.*  
v.  
*AUSTRALIA*

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AMICI CURIAE BRIEF OF SPECIAL RAPPORTEURS  
ON HUMAN RIGHTS AND THE ENVIRONMENT

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of human rights obligations relating to the  
enjoyment of a safe, clean, healthy and  
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## **I. Statement of Interest**

1. We submit this brief in our capacities as the present and former UN Special Rapporteurs on issues relating to the enjoyment of a safe, clean, healthy and sustainable environment.<sup>1</sup> Each of us has written extensively about climate change and human rights.<sup>2</sup>

## **II. The Global Climate Crisis and its Impacts on Human Rights**

2. The world faces a climate crisis. The current level of warming is unprecedented in the last ten thousand years, an interglacial period with a stable climate that coincided with the rise of human civilization. Today's levels of carbon dioxide in the atmosphere last occurred three million years ago. Our species is in uncharted, dangerous waters.

3. Global average temperature has already increased 1°C, causing severe effects on human lives and well-being. As the Intergovernmental Panel on Climate Change (IPCC) has described, the effects of the changing climate include increased precipitation and flooding in some areas, and heat waves, drought and wildfires in others.<sup>3</sup> Sea levels are rising, endangering low-lying coastal communities. Warming oceans and acidification are destroying coral reefs. Climate change undermines production of major crops<sup>4</sup> and is one of the chief drivers of loss of biological diversity.<sup>5</sup> Most dramatic is the increase in the severity of extreme weather events such as fires, hurricanes, typhoons, monsoons and floods, which have killed thousands of people and displaced millions more.

4. In the Paris Agreement, States recognized that any further increase in average global temperature will substantially increase the number of people subjected to disasters, food insecurity, poverty, illness and death. They committed to limit global warming to 1.5°C or at the very least to well below 2°C. But their individual pledges and actions have fallen short. The UN Environment Programme (UNEP) has determined that even full implementation of their Nationally Determined Contributions (NDCs) would lead to an increase of at least 3°C.<sup>6</sup> That result would be catastrophic on a scale human civilization has never known. The fires, hurricanes, droughts and other disasters the world is facing now at one degree of warming are a small harbinger of what would come at three degrees. Small island States would disappear, coastal cities would be inundated and hundreds of millions would be displaced from their homes. Self-reinforcing feedbacks could cause long-term destabilization of the climate, with continued disruption even after greenhouse gas emissions were finally reduced.

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<sup>1</sup> Professor Knox was the mandate-holder from 2012 to 2018; Professor Boyd has been the Special Rapporteur since 2018.

<sup>2</sup> For example, see A/HRC/31/52 (Knox) and A/74/161 (Boyd).

<sup>3</sup> IPCC, *Global Warming of 1.5°C. An IPCC Special Report* (2018), p. 53.

<sup>4</sup> Id. p. 236; FAO et al., *The State of Food Security and Nutrition in the World 2018*, p. 39.

<sup>5</sup> Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers* (2018), p. 5.

<sup>6</sup> UN Environment Programme (UNEP), *The Emissions Gap Report 2017*.

[https://wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR\\_2017.pdf](https://wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf)

5. The international community has agreed that this dystopian future must be averted, and science has made clear the steps that must be taken. In 2018, the IPCC stated that urgent reductions in carbon dioxide emissions, 45% below 2010 levels by 2030, are needed to avoid crossing the 1.5°C threshold. To reduce emissions, humanity must transition away from fossil fuels as quickly as possible. To keep below 2°C, 82% of known coal reserves, 49% of gas reserves and 33% of oil reserves cannot be burned.<sup>7</sup>

6. Australia has joined the international consensus that action must be taken. It is a party to the UN Framework Convention on Climate Change (UNFCCC), wherein States pledged to “prevent dangerous anthropogenic interference with the climate system,” and the Paris Agreement, pursuant to which it submitted an NDC in 2016. Unfortunately, Australia has not taken on its fair share of the global responsibility to address the climate crisis.

7. Australia’s climate record is disturbing in several respects. First, between 1990 and 2018 (the latest year for which official data are available), Australian emissions of greenhouse gases *increased* 31.3%, more than those of any other wealthy industrialized nation.<sup>8</sup> Of 43 Annex I countries under the UNFCCC, Australia has the third fastest emissions growth, behind only Cyprus and Turkey. Second, Australia’s per capita carbon dioxide emissions are among the highest in the world, higher than the United States and every European country.<sup>9</sup> Third, Australia is the world’s second largest exporter of thermal coal, with exports reaching an all-time high in 2019. Coal contributes an outsized proportion of global carbon dioxide emissions, and, buoyed by government subsidies and other forms of support, Australian exports quadrupled from approximately 100 million tonnes (Mt) in 1990 to almost 400 Mt in 2019.<sup>10</sup> Fourth, in its NDC Australia pledged to reduce domestic emissions only 26-28% below 2005 levels by 2030, a weaker commitment than made by most other wealthy industrialized nations.

8. UNEP concluded in 2019 that current policies will not enable Australia to meet even its modest 2030 target.<sup>11</sup> The independent Climate Action Tracker rated Australia’s NDC pledge as “insufficient” and concluded that “Australia is still not on track to meet its 2030 target despite the expected reductions due to the pandemic.”<sup>12</sup>

9. Even worse, Australia’s pledge to reduce domestic emissions 26-28% by 2030 ignores the hundreds of millions of tonnes of emissions that will result from Australian exports of coal. Given the physical reality of the Earth’s atmosphere, combustion of exported coal will more than offset Australia’s pledged reductions, exacerbating the global climate emergency and aggravating the violations of the rights of people at the frontlines of climate change impacts, including the Torres Strait Islanders.

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<sup>7</sup> McGlade and Ekins, “The geographical distribution of fossil fuels unused when limiting global warming to 2°C”, *Nature*, vol. 517 (2015). See also International Energy Agency, *World Energy Outlook 2012*.

<sup>8</sup> [https://di.unfccc.int/time\\_series](https://di.unfccc.int/time_series)

<sup>9</sup> <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/fossil-co2-emissions-all-world-countries-2018-report>.

<sup>10</sup> International Energy Agency, 2020. <https://www.iea.org/reports/coal-information-overview>

<sup>11</sup> UNEP, *Emissions Gap Report 2019*, p. xvi.

<sup>12</sup> See <https://climateactiontracker.org/countries/australia/>.

### **III. The Relationship Between Human Rights and Climate Change**

10. The catastrophic consequences of the climate crisis pose an enormous threat to human rights. Indeed, as Michelle Bachelet, the UN High Commissioner for Human Rights, warned last year, “The world has never seen a human rights threat of this scope.” It is beyond debate that climate change is *already* interfering with the enjoyment of human rights, as recognized by UN treaty bodies, the Human Rights Council, the High Commissioner for Human Rights, special procedures, regional courts, national courts and States themselves. Among the human rights being threatened and violated by climate change are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture.

11. This Committee has stated that climate change constitutes one of “the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>13</sup> Since 2008, the Human Rights Council has repeatedly adopted resolutions expressing concern that climate change poses an immediate and far-reaching threat to people and communities around the world, with implications for the full enjoyment of human rights, particularly those of the most vulnerable people.<sup>14</sup> In 2010, the Conference of the Parties to the UNFCCC acknowledged that the adverse effects of climate change have implications for the effective enjoyment of human rights, and stated that “Parties should, in all climate change related actions, fully respect human rights.”<sup>15</sup>

12. In 2014, 27 special rapporteurs and other independent experts jointly stated:  
The most recent report of the Intergovernmental Panel on Climate Change (IPCC) brings into sharp focus the grave harm that climate change is already causing, and will continue to cause, to the environment on which we all depend. There can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law.<sup>16</sup>

13. The 2015 Paris Agreement is the first multilateral environmental agreement to explicitly make the link between human rights and climate change. The preamble provides that all States “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations.”

14. Regional and national courts, including the Inter-American Court of Human Rights, the Supreme Court of the Netherlands, the Supreme Court of Colombia and the New South Wales Land and Environment Court (Australia), have recognized that climate change is already having adverse effects on human rights and have begun to hold States responsible for the actions that they take, or fail to take, to fulfil their obligations.<sup>17</sup>

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<sup>13</sup> Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 62.

<sup>14</sup> Human Rights Council resolutions 7/23, 18/22, 26/27, 29/15, 32/33, 35/20 and 38/4.

<sup>15</sup> Decision 1/CP.16, para. 8, FCCC/CP/2010/7/Add.1.

<sup>16</sup> *A new climate change agreement must include human rights protections for all* (27 October 2014), <http://srenvironment.org/wp-content/uploads/2014/10/Letter-to-UNFCCC-FINAL.pdf>

<sup>17</sup> Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017.

15. United Nations treaty bodies are also addressing States' obligations related to protecting human rights from climate change. The number of references to climate change in the concluding observations of treaty bodies increased from just one in 2008 to more than 30 in 2018.<sup>18</sup> Of particular relevance, the Committee on the Rights of the Child expressed concerns in 2019 that Australia "has made insufficient progress on the goals and targets set out in the Paris Agreement and about its continuing investment in extractive industries, in particular coal".<sup>19</sup>

16. In 2018, the Committee on Economic, Social and Cultural Rights warned States that failing to prevent foreseeable human rights harm caused by climate change, or failing to mobilize the maximum available resources in an effort to do so, could constitute a breach of their obligation to respect, protect and fulfil human rights for all.<sup>20</sup>

17. In 2019, five treaty bodies issued a Joint Statement on Human Rights and Climate Change, observing that "Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations."<sup>21</sup> The treaty bodies emphasized that "human rights mechanisms have an important role to play in ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures aimed at mitigating climate change."<sup>22</sup>

#### **IV. Admissibility**

18. This Committee clearly has jurisdiction to consider this communication. None of Australia's objections to admissibility has merit. First, Australia mischaracterizes the claim as based on treaties other than the International Covenant on Civil and Political Rights (ICCPR). This is simply not the case. The claim is that Australia has failed to comply with its obligations under Articles 2, 6, 17, 24 and 27 of the ICCPR.

19. Australia's performance in relation to other treaties can be relevant to whether it has met its obligations under the ICCPR. In particular, as this Committee has stated, "obligations of States parties under international environmental law should inform the contents of article 6 of the

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*Netherlands v Urgenda*, no. 19/00135, Supreme Court of the Netherlands (2019). *Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC No. 4360-2018, decision of 5 April 2018. *Gloucester Resources Limited v Minister of Planning*, New South Wales Land and Environment Court [2019] NSWLEC 7, 8 Feb. 2019.

<sup>18</sup> Center for International Environmental Law and Global Initiative for Economic, Social and Cultural Rights, *States' Human Rights Obligations in the Context of Climate Change: 2020 Update*.

<sup>19</sup> CRC/C/AUS/CO/5-6\* (1 November 2019), para. 40.

<sup>20</sup> Committee on Economic, Social, and Cultural Rights, "Climate change and the International Covenant on Economic, Social, and Cultural Rights", 8 October 2018.

<sup>21</sup> The Committee on the Elimination of all Forms of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, Joint Statement on Human Rights and Climate Change, September 2019, para. 1.

<sup>22</sup> *Id.* para. 7.

Covenant.”<sup>23</sup> The UNFCCC and the Paris Agreement set out the legal framework within which Australia and other States have committed to take specific actions to mitigate and adapt to the global climate crisis. Australia’s dismal performance under the Paris Agreement is therefore directly relevant to whether it has complied with its obligations under the ICCPR to protect human rights against the effects of climate change.

20. Second, Australia argues that the claim is manifestly unsubstantiated and the authors are not victims. Australia acknowledges only that “climate change *may* have adverse consequences now and in the future,” and states that “there is no evidence to support an assertion that such adverse consequences have, or will imminently, adversely affect the Authors’ enjoyment of their rights under the Covenant” (para. 30). This statement is breathtaking in its refusal to engage with the Authors’ detailed description of the ways that the climate crisis is *already* affecting their ability to enjoy their rights, the IPCC reports on the effects of climate change, and the statements of this Committee and many other human rights bodies regarding the effects of climate change on the enjoyment of human rights. Perhaps most shocking is Australia’s failure to come to grips with the conclusions of the Torres Strait Regional Authority, which has described at length the ways in which the Torres Strait Islanders are *already* affected by climate change and are certain to suffer greater adverse effects in the future if adequate steps are not taken immediately.

21. In the Witness Statements annexed to the Communication, the Authors provide extensive and compelling evidence of past, current and imminent violations of their rights. In particular, they detail specific, individual and tangible harm in relation to each alleged violation, including:

- flooding, erosion and damage to buildings;
- the decline of economically, culturally and nutritionally important marine species;
- damage to vital ecosystems including coral reefs and seagrass beds;
- saltwater contamination that is damaging or destroying gardens, coconut plantations and almond trees;
- damage to sacred sites, such as the graves of family members; and
- mental health effects including stress, anxiety and fear.

They also explain how these harms interfere with their rights protected by the Covenant, including their rights to life (article 6), culture (article 27), freedom from arbitrary or unlawful interference with their privacy, family, and home (article 17), and children’s rights (Article 24). The description of these impacts leaves no possible doubt that the Authors are victims within the meaning of Article 1 of the Optional Protocol to the ICCPR.

22. Australia also misrepresents the relevant standard of admissibility. This Committee has stated that the relevant standard is that “If the law or practice has not already been concretely applied to the detriment of that individual, it must be applicable in such a way that the alleged victim’s risk of being affected is more than a theoretical possibility.”<sup>24</sup> In this case, there can be no serious doubt that the Authors’ risk of being harmed by climate disruption is more than a “theoretical possibility.”

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<sup>23</sup> General Comment 36, para. 62.

<sup>24</sup> *G v Australia*, UN Doc. CCPR/C/119/D/2172/2012 (28 June 2017), para. 6.4; see also *Aumeeruddy-Cziffra and others v. Mauritius*, Communication No. 35/1978, U.N. Doc. CCPR/C/OP/1 at 67 (1984).

23. Even if the standard is one of actual or “imminent” harm, as Australia argues, the Authors easily meet it. Again, they are *already* suffering actual harm. Moreover, the increased harm that they will suffer in the future is already “imminent.” As the International Court of Justice has explained, imminence does not require the harm to occur in the immediate future: “a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”<sup>25</sup> The rising sea levels that will inundate the Torres Strait Islands are the inevitable consequence of rising global temperatures. No wishful thinking by Australia will change the laws of physics that cause ice on land to melt and heated water in the oceans to expand. The effects of climate change on the lives and culture of the Torres Strait Islanders are not merely foreseeable. They are *certain and inevitable* if actions are not taken now to avert them.

24. Ironically, Australia invokes this Committee’s decision in *Teitiota v New Zealand* to argue that there is still sufficient time for intervening acts to take place to protect the population. This is true, but only if the responsible States take immediate and effective action, which is exactly what Australia has failed to do, and what the Authors are requesting this Committee to declare that it must do. Australia cannot argue that the mere possibility that it will take steps in the future – steps that it has shown few signs of taking – is enough to make this communication inadmissible, any more than a State can argue that the possibility that it might change its mind about executing a detainee would defeat admissibility of a claim challenging the legality of the execution. In *Teitiota*, the Committee expressed “the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant.”<sup>26</sup> In the instant case, the record clearly shows that Australia is not applying robust efforts to curb climate change or help its people adapt to the effects.

25. Australia also argues that climate change is “not the sole responsibility of the Australian Government” and Australia is not “responsible for the majority of climate change at a global level or exclusively responsible for the alleged impacts of climate change” (para 26). No one suggests that Australia is solely responsible for the harms to the Authors. However, Australia indisputably contributes directly to past, current, imminent and foreseeable harms by emitting (and allowing the emission of) greenhouse gases. While all States bear some degree of responsibility, the Authors’ claim is based strictly on Australia’s failure to do its fair share.

26. The Authors have provided compelling evidence that climate change has adversely affected their ability to enjoy their rights under Articles 2, 6, 17, 24, and 27, and that Australia has breached its obligations to respect, protect and fulfil those rights. The Communication is neither inadmissible *ratione materiae* nor manifestly unsubstantiated, and the Authors clearly meet the criteria necessary to be considered victims. Australia’s objection to the relevance of international environmental law contradicts the guidance of this Committee in General Comment 36. If this case, involving a vulnerable indigenous community and a wealthy State with an abysmal record of increasing emissions, is inadmissible, then it is difficult to imagine any case on climate change and human rights that ever would be admissible.

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<sup>25</sup> Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ 7, para. 54.

<sup>26</sup> Para. 9.11.

## V. Merits

27. Australia's principal argument is that climate change cannot be attributed to it, so it has no obligations to take steps to protect against its effects on human rights. It cites an OHCHR report from 2009 for the proposition 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" (para. 38). This position is based on outdated scientific and legal arguments and, as the Authors explain, does not reflect the current views of the OHCHR. The science of climate attribution has greatly evolved since 2009, so that it is now possible to attribute particular types of harm to climate change with much more certainty than ever before.<sup>27</sup> More fundamentally, Australia's obligations with respect to protection against environmental harm do not depend on proving causal chains with absolute certainty; rather they have obligations to act in order to prevent foreseeable risks of harm to human rights.

28. The obligation of Australia under article 2(1) to respect and to ensure the rights recognized in the ICCPR is not limited to threats that are exclusively caused by or attributable to Australia itself. As this Committee has repeatedly said, States must exercise due diligence to protect the rights of individuals against interference and deprivations caused by entities or persons whose conduct is not attributable to the State.<sup>28</sup> Nor can States excuse their non-compliance by pointing to the difficulty of the challenge or the need for efforts by others. As the International Court of Justice held in the Bosnian Genocide case,

"it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result [...] which the efforts of only one State were insufficient to produce."<sup>29</sup>

29. Climate change is already interfering with the Torres Strait Islanders' full enjoyment of a wide range of human rights, and it is foreseeable – even certain – to cause even greater disruption to their rights in the near future. As a result, Australia has a positive obligation to take measures to protect the enjoyment of their rights.

30. One critical aspect of this obligation is to ensure that all persons within its territory and subject to its jurisdiction, particularly those in vulnerable situations, have adequate capacity to adapt to the climate crisis. Australia would be under an obligation to take effective adaptation measures even if it was not contributing to climate change at all, or was doing everything it could to mitigate its contribution.

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<sup>27</sup> M. Burger et al., 2020, "The Law and Science of Climate Change Attribution," *Columbia Journal of Environmental Law* [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=3051178](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3051178).

<sup>28</sup> General Comment No. 31, para. 8; General Comment No. 36, para. 7.

<sup>29</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports [2007] 43, paras 5.7.1-5.8.

31. Australia’s argument that it need not take adaptation measures until the harm is already being suffered contradicts this Committee’s statements, those of other human rights bodies, and common sense. The point of the duty to protect is to avoid harm as soon as it is reasonably foreseeable, not to wait until it is too late. The evidence shows that Australia is *not* taking effective adaptation measures to protect the petitioners. It has failed to heed the warnings of its own state agency and has not consulted with the Torres Strait Islanders themselves as to the steps needed.

32. Moreover, Australia is hardly blameless for climate change. This is not a meteor hurtling towards its country. The climate crisis is the result of human choices, not a natural disaster, and Australia’s choices have contributed to its relatively high levels of greenhouse gas emissions. From a human rights perspective, Australia must take additional actions on an urgent basis to implement its NDC, and must apply the “maximum available resources” to achieving the target that it established for itself. It is currently failing to do so. Its failure to take effective measures to protect against sea level rise and the other foreseeable human rights harms caused by climate change breaches its human rights obligations.

33. Pursuant to the Paris Agreement, Australia has an obligation to file a new NDC that reflects “its highest possible ambition” (Art. 4.3) in order to do its fair share of the collective effort. UNEP reports that States must increase their NDC ambitions threefold to achieve the well below 2°C goal and fivefold to achieve the within 1.5°C goal.<sup>30</sup> This indicates how far Australia is from doing its fair share of the collective global effort required to address the climate crisis.

## **Right to life**

34. States have a clear obligation under international law to protect the right to life against foreseeable threats, including environmental degradation. This obligation applies to both public and private activities that endanger the right to life. The obligation of prevention arises when there is a risk of “significant damage.”<sup>31</sup> If the government knows that there is a present, imminent or foreseeable environmental threat, the State must take precautionary measures to prevent infringement as far as possible. As this Committee recently stated, “environmental degradation can compromise effective enjoyment of the right to life”, and “severe environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life.”<sup>32</sup> The Committee applied these principles in *Portillo Cáceres et al. v. Paraguay*.<sup>33</sup>

35. Similarly, the European Court of Human Rights has held that governments must effectively deter foreseeable threats to the right to life from dangerous human activities and natural disasters. In *Öneriyildiz*, at least 26 people died in an explosion at a municipal landfill site, with evidence that the Turkish government knew for years about the danger of such an event.<sup>34</sup> The Court held the government liable because it failed to take adequate action to protect the right to life from a

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<sup>30</sup> UNEP, *Emissions Gap Report 2019*, p. xvi.

<sup>31</sup> International Court of Justice, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, para. 101; *Certain Activities and Construction of a Road (Costa Rica v. Nicaragua)*, I.C.J Rep. 2015, para. 104.

<sup>32</sup> CCPR/C/127/D/2728/2016, para 9.4.

<sup>33</sup> CCPR/C/126/D/2751/2016), para. 7.4

<sup>34</sup> *Öneriyildiz/Turkey* (ECtHR 30 November 2004, no. 48939/99).

foreseeable danger. In *Budayeva*, mudslides killed several inhabitants of the town of Tyrnauz. While the Government of Russia did not cause the mudslides, the European Court held that it had failed to fulfil its obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>35</sup>

36. With respect to environmental threats to the right to life, including climate change, this Committee has noted that States should take “pay due regard to the precautionary approach.”<sup>36</sup> Article 3 of the UNFCCC provides that “The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>37</sup> The Inter-American Court of Human Rights confirmed that:

States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to prevent possible damage.<sup>38</sup>

37. The precautionary principle is particularly important in relation to climate change, given the IPCC’s warning that “pathways that overshoot 1.5°C run a greater risk of passing through ‘tipping points’, thresholds beyond which certain impacts can no longer be avoided even if temperatures are brought back down later.”<sup>39</sup>

38. The Authors have clearly established that climate change is both a present and future threat to their right to life. Australia has failed to take adequate steps to protect the right to life of the Torres Strait Islanders, by failing to do its fair share to reduce greenhouse gas emissions and by failing to take effective action to enable the Authors to adapt to the impacts of climate change and continue to safely inhabit their islands. Australia’s dismal record on mitigation and adaptation is the direct opposite of the preventive and precautionary approach required by human rights law, as informed by international environmental law.

## **Right to Culture**

39. Climate change interferes with the full enjoyment of the right to culture for individuals and communities around the world, but the risks are particularly acute for Indigenous peoples such as the Torres Strait Islanders.<sup>40</sup> As noted in the UN Framework Principles on Human Rights and the Environment, States have specific responsibilities to recognize, respect and protect the rights of Indigenous peoples to the lands, territories, and resources that they own, occupy, or use.<sup>41</sup>

40. A leading case is *Poma Poma v Peru*, where the draining of wetlands inhabited by the indigenous Aymara people degraded the lands on which they traditionally raised llamas. This

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<sup>35</sup> *Budayeva and others v. Russia*, no. 15339/02 (2008).

<sup>36</sup> General Comment No. 36, para. 62.

<sup>37</sup> UNFCCC Article 3.3.

<sup>38</sup> Advisory Opinion 23/17, para. 180.

<sup>39</sup> IPCC, *Global Warming of 1.5°C*, p. 283.

<sup>40</sup> Special Rapporteur in the field of cultural rights, Report on climate change and culture, A/75/298.

<sup>41</sup> A/HRC/37/59, Principle 15.

Committee considered, “with regard to the exercise of the cultural rights protected under article 27, that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.”<sup>42</sup> The Committee observed that “the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock.”<sup>43</sup> The Committee concluded, therefore, “that the State’s action has substantively compromised the way of life and culture of the author, as a member of her community” and found Peru in violation of article 27.<sup>44</sup>

41. Similarly, the Inter-American Court has reasoned that, “The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>45</sup>

42. It is clear from the facts established by the Authors that climate disruption is a dire threat to their right to culture, both today and in the future. Australia has an obligation not only to protect their right to culture through effective mitigation and adaptation actions, but also to respect the right of Torres Strait Islanders to participate fully in decisions that have implications for their culture.

### **The *Urgenda* case in the Netherlands**

43. The leading decision on human rights and climate change from a national court is the decision of the Supreme Court of the Netherlands in the *Urgenda* case.<sup>46</sup> The Supreme Court ruled that the Netherlands had violated Articles 2 (right to life) and 8 (right to family and private life) of the European Convention on Human Rights.

44. After surveying the science on climate change, including the danger of tipping points that may change the climate abruptly and irreversibly, the Court noted that “The need to reduce greenhouse gas emissions is becoming ever more urgent. Every emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere, and thus contributes to reaching the critical limits of 450 ppm [to keep at 2°C] and 430 ppm [to keep at 1.5°C].”<sup>47</sup>

45. The Supreme Court concluded that the Netherlands had an obligation “to do ‘its part’ in order to prevent dangerous climate change, even if it is a global problem.”<sup>48</sup> The Court rejected the government’s arguments, similar to those made by Australia in the present case, that a State

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<sup>42</sup> Communication No. 1457/2006, Views of 27 March 2009, CCPR/C/95/D/1457/2006, para. 7.2.

<sup>43</sup> *Id.*, at para 7.7.

<sup>44</sup> *Id.*

<sup>45</sup> Para. 149.

<sup>46</sup> *Netherlands v Urgenda*, no. 19/00135, Supreme Court of the Netherlands, (2019) (hereinafter *Urgenda*).

<sup>47</sup> *Urgenda*, para. 4.6.

<sup>48</sup> *Urgenda*, para. 5.7.1.

does not have to take any responsibility if other States do not comply with their responsibilities or if its contribution to emissions is very small on a global scale.<sup>49</sup> The Court stated that while initially the fair share of the State is to be determined by the government in light of its international obligations, “the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share.”<sup>50</sup>

46. The Supreme Court relied on fundamental principles of international environmental law in reaching its decision, including the precautionary principle, prevention and common but differentiated responsibilities. The Court held that a State is obliged to take preventive measures against the foreseeable risks of climate change, even if it is not certain that they will materialize, and that courts can investigate whether the measures the State takes are “reasonable and appropriate.”<sup>51</sup> States with greater capabilities, like the Netherlands and Australia, are required to do more to reduce emissions and facilitate adaptation to climate impacts.<sup>52</sup>

47. The application of these principles resulted in the Supreme Court’s conclusion that the Netherlands was obligated to reduce emissions more deeply and quickly in order to protect the rights to life and to family and private life. The Supreme Court determined that by planning to reduce emissions 20% by 2020 from 1990 levels, the Netherlands was not doing its part, and ordered a reduction of 25% by 2020.

48. *Urgenda* is not binding on this Committee and it is not the only possible approach. However, it shows that it is possible to assign responsibility to an individual State for its contribution to the effects of climate disruption on human rights and to clarify the State’s human rights obligations to protect against such effects. Based on the facts of this case as set out by the Authors, Australia’s weak NDC, the unsatisfactory progress to meet even that modest target, and the inadequate adaptation measures taken to date, Australia is clearly doing “too little” to protect the rights of the Torres Strait Islanders.

## **VI. Conclusion**

49. The world faces a dire and unprecedented global climate emergency that is already inflicting grievous impacts on human rights, disproportionately affecting poor, vulnerable and marginalized people such as the Torres Strait Islanders.

50. Australia has clear, positive and enforceable obligations under the ICCPR to prevent climate change from interfering with the human rights of those within its jurisdiction. We respectfully submit that Australia must apply the maximum available resources to reduce emissions as rapidly as possible and empower the Authors to adapt to the impacts of climate change. Given Australia’s wealth and its failure to reduce greenhouse gas emissions over the last three decades, and given the existing rights violations and foreseeable existential threat to the Torres Strait Islanders, we respectfully submit that Australia should be required to submit a new NDC reflecting its highest possible ambition. The IPCC’s calculation of the global imperative of

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<sup>49</sup> *Urgenda*, para. 5.7.7.

<sup>50</sup> *Urgenda*, para. 6.3.

<sup>51</sup> *Urgenda*, paras. 5.3.2, 5.3.3.

<sup>52</sup> UNFCCC Article 3.

reducing carbon dioxide emissions 45% below 2010 levels by 2030 establishes an appropriate minimum level of ambition for Australia's emissions reduction commitment over that timeframe. As well, we respectfully submit that it is incumbent upon Australia, as a wealthy State, to take more ambitious action, after appropriate consultation with the Torres Strait Islanders, to finance the infrastructure and other measures required to enable them to adapt to the changes that are already underway as a result of climate change and to continue to safely inhabit their islands now and in the future. These enhanced mitigation and adaptation actions would be consistent with Australia's international obligations pursuant to the ICCPR and the Paris Agreement.

51. The time for action to address the climate crisis and prevent catastrophic impacts on human rights is rapidly running out. As the IPCC has stated, "Every bit of warming matters, every year matters, every choice matters."<sup>53</sup>

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<sup>53</sup> IPCC, *Global Warming of 1.5°C*, Foreword at (vi).