

BOFAXE

Climate Change and Human Rights

A NEXT BIG STEP FOR THE HUMAN RIGHTS COMMITTEE?

■ In May 2019, eight Torres Strait Islanders filed a communication alleging that the inaction of the Australian government over climate change is resulting in violations of their rights under the International Covenant on Civil and Political Rights (ICCPR). Now, news reached that Australia has asked the Human Rights Committee (HRC) to declare the communication inadmissible. Whilst the HRC examines communications in closed sessions and only releases information once it has completed its deliberations (Rule 110, Rules of procedure of the HRC), the authors of the communication have spoken about their complaint publicly. Furthermore, the communication is accompanied by the petition "Our Islands, Our Home". Pursuant to reporting by The Guardian, which includes an interview with the legal counsel of the authors, Australia seeks to have the case declared inadmissible as firstly, it concerns future risks and secondly, Australia is not the main or sole contributor to climate change, contesting that "climate change action is not its legal responsibility under human rights law". This post looks at the situation in the Torres Strait Islands and places the pending communication in the context of the HRC's pronouncements on human rights and climate change.

The Torres Strait Islands are low-lying islands situated between Australia's north coast and Papua New Guinea. Torres Strait Islanders form part of Australia's indigenous population but are distinct from aboriginal peoples. The authors of the communication are seeking protection from the effects of climate change. According to The Guardian, the communication alleges the government's insufficient actions over two issues: the reduction of emissions and the implementation of adaptation measures on the Torres Strait Islands. The communication argues that both amount to a failure of the government's human rights obligations towards the Torres Strait Islanders. A recent opinion piece by Yessie Mosby, one of the authors of the communication, also published by The Guardian, outlines how the impacts of advancing sea levels can be felt on the islands' infrastructure as well as on its flora. This destroys crops and contaminates drinking water wells. The rise in sea levels has also damaged burial sites. Beyond these immediate impacts, the threat of displacement and resettlement to the mainland looms over the Torres Strait Islanders. This threat extends to their culture. Mosby argues that as their culture is inextricably connected with the traditional (is)lands, relocation would signify its extinction. Pursuant to the petition, the authors of the communication demand that Australia rapidly reduces its emissions and immediately implements adaptation measures. More specifically, the Torres Strait Islanders will ask the HRC to find that Australia's international human rights obligations require it to "meet the 1.5 degree temperature target of the Paris Agreement by increasing its emission reduction target to at least 65% below 2005 levels by 2030, going net zero by 2050, and phasing out coal". Moreover, adaptation measures need to be predicated on a study across the islands, involving the participation and consultation of the Torres Strait Islanders in this process.

In recent years, the HRC has started to address the impacts of climate change on human rights, specifically on the right to life (Article 6 ICCPR). In 2018, the Committee asserted in general comment No. 36 that "environmental degradation, climate change and unsustainable development" form part of "the most pressing and serious threats to the ability [...] to enjoy the right to life" (para. 62). Accordingly, state parties' obligations under international environmental law "should [...] inform the contents of article 6 of the Covenant" and vice versa (para. 62). This assertion – whilst couched in soft language – might bear relevance in challenging Australia's aforementioned contestation that "climate change action is not its legal responsibility under human rights law". In January 2020, the HRC published its views in Teitiota v. New Zealand (communication No. 2728/2016), discussed here. The case concerned Ioane Teitiota, a Kiribati national and a "climate refugee", who challenged the lawfulness of his removal to Kiribati from New Zealand, where he had applied for asylum. Alleging a violation of his right to life, Teitiota *inter alia* argued that the effects of climate change, specifically the rising sea level, were rendering Kiribati uninhabitable, leading to "an untenable and violent environment" for himself and his family (para. 2.1). He cited lack of habitable space that resulted in violent land disputes as well as environmental degradation contaminating the freshwater supply (para. 3). Although the HRC found Teitiota's removal to be lawful, it held that "the effects of climate change [...] may expose individuals to a violation" of their right to life, "thereby triggering the *non-refoulement* obligation of sending states" (para. 9.11). In other words, this positioning shows that – at least in the eyes of the HRC – it is not a question anymore whether being exposed to the adverse effects of climate change can pose a threat to an individual's right to life.

Upon ratifying the Optional Protocol to the ICCPR, Australia recognised the HRC's competence to receive and consider communications. The Torres Strait Islanders' communication focuses on the human rights obligations of Australia towards its own citizens. Broader in terms of allegations of violations than its "predecessor", Teitiota v. New Zealand, the communication not only alleges a violation of the right to life (Article 6 ICCPR) but also of the right to be free from arbitrary interference with privacy, family, and home (Article 17 ICCPR) and of the right of minorities to enjoy their own culture (Article 27 ICCPR).

Engaging with the question of attribution in the pending communication will constitute a significant next step for the Committee. The 2009 report on the relationship between climate change and human rights by the Office of the UN High Commissioner for Human Rights concluded that "the physical impacts of global warming cannot easily be classified as human rights violations" chiefly because "climate change-related harm often cannot clearly be attributed to acts or omissions of specific States" (para. 96). Australia's dismissal of the allegations *inter alia* on the grounds that it is not the main or sole contributor to climate change reflects this. The circumstances in Teitiota v. New Zealand did not render attribution difficult. In the pending communication, attributing the climate change-related impacts on the human rights of Torres Strait Islanders to Australia's failure to reduce its emission levels, could prove more difficult in light of causation, as pointed out here. Yet, the communication does not hinge on this claim but also alleges the concrete failure to implement sufficient adaptation measures on the islands. If the HRC finds the communication admissible, it will be of interest to see if and how it concretises Australia's positive obligations concerning Articles 6, 17, and 27 ICCPR vis-à-vis the adverse impacts of climate change.

In Teitiota v. New Zealand, the Committee's reasoning focused on the suggested timeframe of 10 to 15 years – an estimate of when the island would become uninhabitable. According to the Committee, this timeframe could allow for intervention by Kiribati and the international community to protect the population, including through relocation (paras. 9.10–9.12). It is evident that the pending communication precisely seeks to prevent relocation to the mainland, as this would result in *inter alia* a denial of the Torres Strait Islanders' right to culture and way of life. In December 2019, Australia announced a \$25 million sea wall in the Torres Strait that seeks to reduce the risk of flooding. This has been perceived as "a start" but has not satisfied the authors of the communication, arguing that the sea wall needs to be split over 18 islands already adversely impacted, and indeed does not address Australia's continuous contribution to climate change, and thus the rising sea levels.

As previously highlighted, the HRC's views in Teitiota v. New Zealand opened the door to asylum claims by individuals seeking protection from the effects of climate change. They, however, also show how the treaty bodies, as part of the international human rights system, can be utilised "to exert pressure on the international community to address issues of climate change effectively", as argued here. Precisely by addressing the scope of human rights obligations and by engaging state parties through *inter alia* their views, treaty bodies can have a subtle yet formative influence on international human rights law (see e.g. the work of the International Law Commission, McCall-Smith). Beyond the communications received by the HRC on the effects of climate change, another communication is currently pending before the Committee on the Rights of the Child. That communication, discussed here, was filed by sixteen children from various nationalities that claim to be victims of climate change.

Although the communication by the Torres Strait Islanders is just one of three communications before the UN treaty bodies, it may be indicative of the significance attributed to human rights bodies in the context of climate change. Although the HRC cannot render legally binding decisions, its interpretation of human rights law has been ascribed "great weight" by the International Court of Justice (Diallo, para. 66). After the HRC addressed the international community in Teitiota v. New Zealand (paras. 9.12–9.13), the anticipated views in the pending communication may indicate the course the HRC will take on the issue of human rights obligations in the context of climate change in the future. The views will therefore be of interest to all state parties of the ICCPR. It is to be hoped that the Committee's views – and the pronouncements of the treaty bodies more generally – will continue to expound on states' human rights obligations vis-à-vis the impacts of climate change.