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‘Eaten by the sea’: human rights claims for the impacts of climate change upon remote subnational communities

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The low-lying islands and atolls of the Pacific have been among the first places to experience the most severe impacts of anthropogenic climate change. Some of the affected islands are nation-states possessing the capacity to negotiate treaties and to directly participate in international forums such as the United Nations (UN). Others, however, are subnational jurisdictions, made up of people who live remote from the governing majority and yet are extremely vulnerable to national policy decisions, especially when it comes to climate change and its impacts. This article examines one potential avenue for redress for minority populations living in remote subnational jurisdictions where national policy on climate change arguably compromises their human rights: a communication to the UN Human Rights Committee (HRC). The article takes as its primary case study the people of the Torres Strait Islands, which form part of the state of Australia.

Keywords: *climate change, human rights, internal displacement, subnational jurisdictions, UN Human Rights Committee, minorities*

1 INTRODUCTION

The Intergovernmental Panel on Climate Change (IPCC) has recognized that accelerated sea level rise together with increased swells and storm surges present ‘severe sea flood and erosion risks to low-lying coastal areas and atoll islands’.¹ The low-lying islands and atolls of the Pacific have been among the first places to experience the impacts of anthropogenic climate change, including threats to food and water resources as the increased ‘over-wash’ of salt water degrades fresh groundwater resources, and the rise in ocean surface temperatures contributes to coral bleaching and reef degradation.²

Much has been written about the possible legal remedies available to people who are displaced by the impacts of climate change.³ That scholarship considers two

1. L Nurse and R McLean, ‘Small Islands’, in Christopher Field et al. (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability. Part B: Regional Aspects. Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 1613, 1616.

2. *Ibid.*

3. See, eg, J McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, Oxford 2012); J McAdam (ed), *Climate Change and Displacement: Multi-disciplinary Perspectives* (Hart, Oxford 2010); B Mayer and F Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar, Cheltenham 2017); S Behrmann and A Kent (eds), *‘Climate Refugees’: Beyond the Legal Impasse* (Routledge, Oxford 2018).

possible scenarios: either people cross international borders, or they are ‘internally displaced’. This article contributes to the latter body of work, but distinguishes itself in that it considers legal remedies for *remote minority communities* facing displacement where domestic remedies have been exhausted and for whom the concept of ‘internal’ displacement is misleading, because such communities reside outside the geographic contours of the mainland.

A communication to the UN Human Rights Committee (HRC) offers one avenue of legal redress for people who live in places remote from the governing majority, and yet are extremely vulnerable to national policy decisions, especially in relation to climate change and its impacts. This article takes as its primary case study the people of the Torres Strait Islands, which form part of the state of Australia, although much of the legal analysis offered here could also be relevant to comparable remote sub-national jurisdictions, such as other island communities, or the Arctic.

The case study of the Torres Strait Islands has been selected in part because domestic remedies for the effects of anthropogenic climate change are likely to be more difficult to attain in Australia than in comparable jurisdictions. In the United States for instance (responsible for the subnational administrative divisions of Guam, Puerto Rico, the US Virgin Islands, American Samoa, the Northern Mariana Islands), the Supreme Court has disputed the traditional view that states cannot be held responsible for incremental contributions to climate change.⁴ In New Zealand (responsible for the non-self-governing territory of Tokelau), the High Court has relied upon that state’s participation in the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement and enabling domestic legislation to evaluate the state’s emissions policy.⁵ The Netherlands (responsible for the special municipalities of the Caribbean Netherlands) has seen judicial recognition of a causal link between Dutch greenhouse gas emissions and their effect on the Dutch climate.⁶ In contrast, for reasons that will be elaborated below, the prospect of a claim such as the present hypothetical being justiciable in Australian courts is arguably more remote, and thus, to the extent that a remedy in law is desirable, it may need to be sought elsewhere.

A potential claim to the HRC by Torres Strait Islanders for the consequences of Australian emissions policy first received scholarly attention in an article by Owen Cordes-Holland published in 2008.⁷ Four factors render the reconsideration of that topic now both worthwhile and timely. First, human rights are shifting from a peripheral consideration to a *sine qua non* of contemporary climate discussions, appearing with increased prominence in international agreements.⁸ At the same time, the environmental

4. *Massachusetts v Environmental Protection Agency* 549 US 497 (2007), 127 S CT 1438 (2007) 20–21 (per Stevens, Kennedy, Souter, Ginsburg and Breyer JJ).

5. *Thomson v The Minister for Climate Change Issues* [2017] NZHC 733 [98], [178]. Note that the Cook Islands and Niue are associated states of New Zealand and thus not subnational jurisdictions in the sense addressed here. The New Zealand Government is not empowered to pass legislation for these states, although it acts on their behalf in foreign affairs subject to each state’s consent.

6. *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and the Environment)* C/09/456689 The Hague District Court, Chamber for Commercial Affairs (24 June 2015), available from <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>> (official translation into English) accessed 1 December 2017.

7. O Cordes-Holland, ‘The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR’ (2008) 9 *Melbourne Journal of International Law* 405.

8. See the introduction to section 2 of this article.

responsibilities of states are increasingly forming part of the human rights vernacular, including within the HRC.⁹ Second, the consequences of climate change for the Torres Strait Islands and its people are now considerably more measurable than when climate change impacts were more hypothetical than apparent.¹⁰ Third, the Australian Government’s emissions policies have become less, not more, environmentally friendly in the intervening period.¹¹ And fourth, litigious action in human rights for the climate change consequences of emissions policy has recently met with relative success, and recent case law has contradicted the idea that liability can be universally avoided simply because of an inability to show direct causation by a single state.¹²

1.1 The Torres Strait Islands

The Torres Strait Islands fall between the tip of Cape York and the coast of Papua New Guinea and are comprised of 150 islands contained in shallow open seas. Their ecosystems and biodiversity are unique and delicate.¹³ Their geomorphology is such that many villages are only marginally above high tide and are already being affected by seawater inundation caused by sea level rise.¹⁴

Residents face displacement as the islands they occupy are slowly ‘eaten by the sea’.¹⁵ Rising sea levels and more frequent extreme weather events caused by climate change will also have significant consequences for the social and cultural cohesion of Island residents, who strongly connect their cultural, mental and physical well-being and identity to the health of the land around them.¹⁶

The predicament of Islanders on the mainland is that if their society can survive at all, it is only through the conscious perpetuation of island custom and the continual monitoring of its practice. The Strait does not have to worry about custom; the society of Islanders there remains axiomatic as long as they are in occupation of their ancestral islands and are living off resources which, whatever the legality, are theirs by customary right.¹⁷

9. See section 2.3 of this article.

10. See sections 1.1 and 2.1 of this article.

11. See section 4 of this article.

12. Elaborated in sections 2 and 3 of this article.

13. D Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, CSIRO Marine and Atmospheric Research Paper 11 (2006) 3.

14. Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014–2018* (2013) 9 <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> accessed 22 January 2018.

15. A Reisinger and RL Kitchen, ‘Australasia’, in Christopher Field et al. (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability. Part B: Regional Aspects. Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 1371, 1375 and 1405; B Doherty and M Slezak, ‘“The Island is Being Eaten”: How Climate Change is Threatening the Torres Strait’, *The Guardian* (online), 12 July 2017 <<https://www.theguardian.com/environment/2017/jul/13/the-island-is-being-eaten-how-climate-change-is-threatening-the-torres-strait>> accessed 23 January 2018.

16. Reisinger and Kitchen, *ibid*, 1387, 1405–6; SJ Duce et al., *A Synthesis of Climate Change and Coastal Science to Support Adaptation in the Communities of the Torres Strait* (2010) <https://researchonline.jcu.edu.au/18087/1/131_JCU_Duce_et_al._2010_Torres_Strait_Climate_Change_Adaptation_Synthesis.pdf> accessed 22 January 2018; WN Adger et al., ‘Cultural Dimensions of Climate Change Impacts and Adaptation’ (2013) 3 *Nature Climate Change* 112.

17. J Beckett, *Torres Strait Islanders: Custom and Colonialism* (Cambridge University Press, Cambridge, 1990) 234.

The Torres Strait Islands form part of the State of Australia, which has ratified the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol.¹⁸ This means that an individual Torres Strait Islander or a group of Islanders 'similarly affected'¹⁹ are entitled to submit a written communication to the Human Rights Committee (HRC) of the United Nations outlining an alleged violation of the Covenant.²⁰

The following part (section 2) describes the link between climate change and human rights and analyses specific rights arguably impacted by climate change in the Torres Strait Islands. For reasons of space, discussion is limited to two of the most relevant ICCPR rights – the right to life, and the rights of minorities – and the potential emergence of a right to an environment of a particular quality in light of recent legal developments. The selection of these rights should not be taken as a denial that other human rights are also arguably affected.²¹ The article then considers the admissibility of a claim to the HRC by a member or members of the Torres Strait Island community, including the exhaustion of domestic remedies and issues associated with standing and justiciability (section 3); links the violation of ICCPR rights caused by climate change to the acts and omissions of the Australian Government (section 4); and offers final reflections (section 5).

2 RIGHTS VIOLATED

There is now little doubt that climate change is having and will continue to have an impact on human rights generally.²² In the last decade especially, there has been a surge in scholarly and political advocacy and general interest in the connection between human rights and climate change.²³ This general trend has made its way into the

18. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976) (hereafter ICCPR); *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) (hereafter 'Optional Protocol').

19. *Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (10 May 1990) [32.1].

20. The claim must be one against a State Party to the Optional Protocol: Optional Protocol, arts 1 and 3.

21. ICCPR rights which require environmental quality for their realization and enjoyment include: arts 1 (right to self-determination), 2 (non-discrimination), 3 (equal rights of men and women), 6 (right to life), 17 (right to privacy), 21 (right of peaceful assembly), 22 (freedom of association), 25 (right to take part in public affairs), 27 (rights of minorities). Note that the right to self-determination is a people's right and is thus not justiciable by the HRC. Economic social and cultural rights are also undoubtedly compromised, but these cannot form part of a communication to the HRC and thus are not addressed herein, notwithstanding their overall relevance, as recognized by the UN Human Rights Council at least since 2009: *Human Rights and Climate Change*, Human Rights Council Resolution 10/4, 10th sess, UN Doc A/HRC/RES/10/4 (25 March 2009), Preamble para 7.

22. See, eg, UN Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/31/52 (1 February 2016) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/015/72/PDF/G1601572.pdf?OpenElement>> accessed 22 January 2018.

23. This was in part the result of a concerted effort by small island states to inject greater consideration of the human rights consequences of climate change into the negotiation of a new climate agreement. Following a meeting in 2007, and spearheaded by the Maldives, they

legal context and in 2010 the working text on ‘long-term cooperative action’ agreed in Cancun under the UN Framework Convention on Climate Change (UNFCCC) emphasized that parties ought to ‘fully respect human rights’ in ‘all climate change-related actions’.²⁴ The landmark 2015 Paris Agreement has since acknowledged that ‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights’, including, relevantly, the rights of indigenous peoples and local communities.²⁵ Nevertheless, human rights considerations remain in the background of international climate agreements, and thus tend to lack specificity and enforceability under these instruments.

Regional courts and tribunals in particular have elaborated the relationship between the environment and human rights in ways that may inform a similar claim based in human rights for climate change policies. The European Court of Human Rights (ECtHR) has, for instance, long acknowledged the relationship between the realization of civil and political rights under the European Convention on Human Rights (ECHR) and environmental harm.²⁶ While, the ECtHR is yet to hear a case that deals with climate-change-related displacement of minority populations, such cases are far from inconceivable given that a number of EU subnational jurisdictions with minority populations already face climate impacts and displacement.²⁷

lobbied successfully to convince the Human Rights Council to direct the Office of the High Commissioner on Human Rights to undertake research on the relationship between human rights and climate change: JH Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33 *Harvard Environmental Law Review* 477, 477.

24. *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperation Action under the Convention*, Decision 1/CP.16, UNFCCC, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) [8] in: Report of the Conference of the Parties on its 16th Session, held in Cancun 29 November–10 December 2010.

25. *Paris Agreement*, opened for signature 22 April 2016 (entered into force 4 November 2016), Preamble para 11.

26. *European Convention on Human Rights*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953). Rights that the ECtHR has recognized as compromised by environmental harm include: the right to life (see, eg, *Öneryıldız v Turkey*, Eur Court HR (Grand Chamber), Judgment, 30 November 2004; *Budayeva & Ors v Russia*, Eur Court HR (Chamber), Judgment, 20 March 2008; *Özel and Others v Turkey*, Eur Court HR (Chamber), Judgment, 17 November 2015); prohibition of inhuman or degrading treatment (see, eg, *Elefteriadis v Romania*, Eur Court HR (Chamber), Judgment, 25 January 2011); the right to a fair trial (see, eg, *L’Erablière asbl v Belgium*, Eur Court HR (Chamber), Judgment, 24 February 2009; *Vilnes and Others v Norway*, Eur Court HR (Chamber), Judgment, 5 December 2013); the right to respect for private and family life and home (see, eg, *Lopez Ostra v Spain*, Eur Court HR (Chamber), Judgment, 9 December 1994); protection of property (see, eg, *Fredin v Sweden (No. 1)*, Eur Court HR, 18 February 1991). See further: P Cullet, ‘Human Rights and Climate Change: Broadening the Right to Environment’, in CP Carlane et al. (eds), *The Oxford Handbook of International Climate Law* (Oxford University Press, Oxford 2016) 495, 504–6.

27. There are several potential examples, including, for instance, the French collectivity, Wallis and Futuna, which faces coastal erosion and rising sea levels that will force displacement of its coastal, indigenous communities. Or the Portuguese archipelagos of Azora and Madeira, home to 240 000 people. There climate change is predicted to significantly alter precipitation, which is forecast to affect water supply and cause increased frequency and intensity of landslides. See: ‘Wallis and Futuna’, COP23, UN Climate Change Conference <<https://cop23.com.fj/wallisandfutuna/>> accessed 10 December 2017; FD Santos et al., ‘Climate Change Scenarios in the Azores and Madeira Islands’ (2004) 16(4) *World Resource Review* 473, 488–9.

Jurisprudence in the inter-American human rights system has also long connected environmental damage and human rights. Two petitions received by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights (IACtHR) are broadly comparable to the present hypothetical. In 2005, the Centre for International Environmental Law together with the Inuit Circumpolar Council submitted a petition to the IACHR seeking relief from human rights violations resulting from climate change caused by the United States.²⁸ The petition asserted that ‘global warming is harming every aspect of Inuit life and culture’, including hunting and gathering, the Inuit economy and social and cultural practices.²⁹ Relevantly, it alleged violations of rights to life, liberty and personal security, and to the benefits of culture, among others, in contravention of the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.³⁰ Although the petition thoroughly detailed how anthropogenic climate change impacted the human rights of the Inuit people, the challenges associated with identifying the specific contributions of the US as directly causal ultimately defeated the claim. The IACHR concluded that the information it had been provided was ‘insufficient for making a determination’, and the petition was dismissed on 16 November 2006 without prejudice.³¹

In a similar claim in 2013, the Arctic Athabaskan Council submitted a petition to the IACHR alleging that black carbon pollution from Canada was harming the Arctic environment and ecosystems upon which the Arctic Athabaskan people depend. The petition contended that the failure by the Canadian Government to take measures to reduce ‘black carbon emissions’ violated the human rights of the indigenous Arctic Athabaskan people, and sought the intervention of the IACHR to compel Canada to take steps to slow its emissions.³² At the time of writing, the matter remains pending.³³

28. S Watt-Cloutier, Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (7 December 2005) <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>> accessed 22 January 2018.

29. *Ibid* 13–19.

30. *American Declaration on the Rights and Duties of Man*, adopted by the Ninth International Conference of American States, Bogota, Colombia (April 1948) art I; *American Convention on Human Rights*, opened for signature 22 November 1960, 1144 UNTS 123 (entered into force 18 July 1978) art 4. The petition also cited the equivalent rights in the ICCPR and other human rights instruments: Watt-Cloutier (n 28) 89.

31. Letter from AE Dulitzky, Assistant Executive Secretary to the Inter-American Commission on Human Rights, to Sheila Watt-Cloutier (petitioner), 16 November 2006, <<http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>> accessed 22 January 2018.

32. *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada* (23 April 2013) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2013/20130423_5082_petition.pdf> accessed 2 April 2018.

33. The IACHR does not publish the progress of each petition filed, but it does publish its decisions. At the time of writing there is no decision published for this case. It continues to be referred to as pending elsewhere, see: Sabin Centre for Climate Change Law, *Climate Change Litigation Databases* <<http://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/>> accessed 2 April 2018. Note that the IACHR has thousands of petitions in a backlog that it is now taking steps to address: Inter-American Commission on Human Rights, *Annual Report 2017* (2017) 1 <<http://www.oas.org/en/iachr/docs/annual/2017/docs/IA2017cap.2-en.pdf>> accessed 2 April 2018.

That the submission was made itself highlights that human rights mechanisms offer some legal resort for communities facing climate change impacts where domestic options have been exhausted.

Moreover, there is some legal precedent for successful human rights claims for environmental harms affecting minority communities. For example, in 2012, the IACtHR found the Government of Ecuador responsible for ‘severely jeopardizing’ the human rights of the indigenous people of Sarayaku.³⁴ The case concerned permits granted by the Ecuadorian Government to a private oil company in the 1990s. The permits permitted natural resource exploration on Sarayaku land, without the consultation or consent of the Sarayaku people. The subsequent exploration activities included the use of high-powered explosives, which risked the lives of the Sarayaku people and prevented them from accessing their means of subsistence.³⁵ Although the case is distinguishable on its facts (the Sarayaku claim did not concern emissions), the petition’s success offers some indication that remedies in human rights might be available where the policy priorities of Government deleteriously impact the natural environment in ways that compromise rights. In this instance, the Ecuadorian Government conceded liability before the case was decided, but that does not necessarily contradict the point, for the concession itself arguably signals some growing willingness by states to accept responsibility for such harm.

While the connection between environmental harm and human rights is now well established, this article is specifically concerned with the possibility of a hypothetical claim by Torres Strait Islanders to the UN HRC alleging that the Australian Government’s emissions policies are in violation of its obligations under the ICCPR. The following sections describe two rights that could form part of such a claim, and a third emerging right that the same claim could provide the HRC with an opportunity to clarify. The analysis will elaborate specific examples in regional and domestic jurisprudence, including recent litigious successes associated with state responsibility for local environmental damage caused by the climate consequences of CO₂ emissions.

2.1 Article 27: the rights of minorities

Article 27 of the ICCPR establishes that ‘ethnic, religious or linguistic minorities ... shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.³⁶ This right is conferred on minority groups in addition to and distinct from other rights under the ICCPR.³⁷

For the purposes of Article 27, there is no fixed definition of a minority; however, the HRC has clarified that ‘the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language’.³⁸ The Torres Strait Islander community clearly falls within this category. Their community

34. *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgment, merits and reparations) (27 June 2012) IACtHR (Series C No 245) 91 [3] (hereafter *Kichwa*).

35. *Kichwa* 4[2].

36. ICCPR, art 27.

37. Human Rights Committee, *Communication No 1457/2006 (Poma Poma v Peru)*, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009) 10 [7.2].

38. Human Rights Committee, *General Comment No 23: The Rights of Minorities (Art 27)*, UN Doc CCPR/21/Rev.1/Add.5 (8 April 1994) [5.1].

is made up of about 7000 people who live on 17 islands where the local language, Torres Strait Creole, is spoken throughout.³⁹ The Islander culture, or *Ailan Kastom*, is a unique blend of traditional Islander beliefs and Christianity⁴⁰ and has been formally recognized in Australian legislation.⁴¹

In its General Comment on Article 27, the HRC asserts that for indigenous communities especially, the right to enjoy a particular culture may be closely associated with certain territories and the use of resources.⁴² The HRC has also recognized the nexus between environmental damage and the right of minorities in several of its decisions on individual communications. In 2004, for instance, the HRC found that the Peruvian Government had failed in its obligations under Article 27 by intentionally redirecting the course of various waterways, which caused widespread damage to the land relied upon by the indigenous Aymara people for traditional subsistence farming. The degradation of land, loss of livestock, and forced displacement of the Aymara community amounted to a violation of this ICCPR right.⁴³

For Torres Strait Islanders, *Ailan Kastom* dictates how and by whom natural resources are harvested and restricts what species of wildlife may be caught based on season and age.⁴⁴ Natural resource dependence increases the community's exposure and sensitivity to climate. In addition, the role of traditional environmental knowledge contributes to the sustainable management of resources by Islander people.⁴⁵ Changing weather patterns combined with the rising sea levels erodes this knowledge by rendering these phenomena less predictable, and thus indigenous knowledge less accurate in relation to them. The same trend, described by the Inuit Petition as 'the entire familiar landscape is metamorphosing into an unknown land' due to climate change, is observable in the Torres Strait.⁴⁶ There is little dispute that climate-change-induced dislocation, attenuation of cultural attachment to place and loss of agency will disadvantage indigenous mental health and community identity in the Torres Strait.⁴⁷ Rising sea levels threaten to extinguish cultural

39. State Library of Queensland, 'Languages of the Torres Strait Islands', <<http://www.slq.qld.gov.au/resources/atsi/languages/torres-strait>> accessed 22 January 2018.

40. Green, above (n 13), 3–4.

41. *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 4.

42. Human Rights Committee, *General Comment No 23*, above (n 38) [3.2]. There is a General Comment corresponding to each of the ICCPR rights, each comment elucidates the HRC's interpretation of that right. General Comments are not binding statements of law but intended to guide interpretation of the Convention generally, as well as by the HRC itself in its decisions on individual cases, and states parties to the ICCPR. General Comments may be accessed here: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11> accessed 7 April 2018.

43. Human Rights Committee, *Communication No 1457 2006*, above (n 37).

44. Green, above (n 13), 4.

45. *Best Practices and Available Tools for the Use of Indigenous and Traditional Knowledge and Practices for Adaptation, and the Application of Gender-Sensitive Approaches and Tools for Understanding and Assessing Impacts, Vulnerability and Adaptation to Climate Change: Technical Paper*, United Nations Framework Convention on Climate Change, UN Doc FCCC/TP/2013/11 (31 October 2013); S Long (ed), *Traditional Knowledge is Facilitating Climate Change Adaptation in Torres Strait* (Marine and Tropical Sciences Research Facility 2010) <<http://rrrc.org.au/wp-content/uploads/2014/04/Theme-5-RRRC-Long-S-2010-Traditional-Knowledge-is-Facilitating-Climate-Change-Adaptation.pdf>> accessed 25 January 2018.

46. Watt-Cloutier, above (n 28), 21.

47. Reisinger and Kitchen, above (n 15), 1371, 1405.

identity in the Torres Strait by removing the very land with which that identity is so closely linked.⁴⁸

Within the broader UN machinery, recognition of the unique impact of climate change on the rights of minorities has evolved as the predicted consequences have increasingly come to pass. The January 2009 report on the relationship between climate change and human rights issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR), for instance, pointed out that states are under an obligation at international law to address the vulnerabilities of minority and disadvantaged groups affected by climate change in accordance with the principles of equality and non-discrimination.⁴⁹ More specifically, the report warned that despite there being no clear precedent to follow, ‘[s]tates have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples’.⁵⁰

The UN Human Rights Council has regularly expressed concern that indigenous people and minorities are more acutely affected by the adverse consequences of climate change than are other populations.⁵¹ In the 2010 Cancun Agreement, the UNFCCC noted the Human Rights Council’s concern.⁵² The 2017 resolution of the Human Rights Council was perhaps the strongest iteration by the Council to date, with separate paragraphs acknowledging the adverse consequences on indigenous children, and noting that indigenous and traditional knowledge ought to be taken into account by the UN, the IPCC and the scientific community, in formulating responses.⁵³

2.2 Article 6: the right to life

Article 6 of the ICCPR provides that ‘every human being shall have the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.

The nexus between protection of the environment and the right to life is now widely acknowledged.⁵⁴ In a 1997 decision in the International Court of Justice (ICJ), Justice Weeramantry found that protection of the environment is ‘a vital part of contemporary human rights doctrine and a *sine qua non* for numerous human rights, such as ... the right to life’.⁵⁵ The nexus between environmental protection and the right to life has received similar acknowledgement by, inter alia, the

48. Office of the United Nations High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009), 17 [51].

49. *Ibid* 13 [42].

50. *Ibid* 14–15.

51. *Human Rights and Climate Change*, Human Rights Council Resolution 35/20, 35th sess, Agenda Item 3, UN Doc A/HRC/RES/35/20 (7 July 2017); *Human Rights and Climate Change*, Human Rights Council Resolution 29/15, 29th sess, Agenda Item 3, UN Doc A/HRC/RES/29/15 (22 July 2015); *Human Rights and Climate Change*, Human Rights Council Resolution 26/27, 28th sess, Agenda Item 3, UN Doc A/HRC/RES/26/27 (15 July 2014).

52. *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperation Action under the Convention*, above (n 24), Preamble para 7.

53. *Human Rights and Climate Change*, Human Rights Council Resolution 35/20, 35th sess, Agenda Item 3, UN Doc A/HRC/RES/35/20 (7 July 2017), Preamble paras 9, 10, 14, 28.

54. See, eg, *The Hague Declaration on the Environment* 28 ILM 1308 (11 March 1989), Preamble para 1.

55. *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97, 110 (per Weeramantry J).

OHCHR, the European Court of Human Rights⁵⁶ and the IACHR,⁵⁷ and, in the latter respect, constituted a key element of each Inuit petition mentioned above.⁵⁸

Also in 1997, the IACHR released its report on the situation of human rights in Ecuador, its interest having been initially piqued by a 1990 petition filed on behalf of the Huaorani people. The petition alleged that Texaco's planned oil exploitation activities in the Huaorani's traditional lands amounted to an imminent threat of 'profound human rights violations'.⁵⁹ The petition led the Commission to conclude that the situation for indigenous communities as a whole warranted further investigation. Of particular concern were the actions of oil companies operating in the Ecuadorean Amazon, in this regard the IACHR found that:

The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.⁶⁰

Some 20 years later, in 2017, the IACtHR delivered an Advisory Opinion on the interpretation of the American Convention on Human Rights in the context of environmental law. Among other things, the Court found that protection of the environment is critical to the enjoyment of other human rights, including the right to life.⁶¹

In separate cases in 2004 and 2008, the ECtHR found a violation of the right to life because the authorities in each instance had not discharged positive obligations to protect life against risks from known and imminent environmental hazards.⁶² In national jurisdictions, the right to life has been accepted as including the right to pollution-free water and air as well as placing positive obligations on the state to remedy environmental risks that threaten life.⁶³ The right to life has also been invoked specifically to pursue national

56. *Öneryıldız v Turkey*, Eur Court HR (Grand Chamber), Judgment, 30 November 2004.

57. *Yanomami v Brazil*, Inter-American Commission on Human Rights, Res No 12/85, Case No 7615 (5 March 1985); *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* Advisory Opinion OC-23/17, IACtHR Ser A No 23 (15 November 2017).

58. Watt-Cloutier, above (n 28), 89–92.

59. Inter-American Commission on Human Rights, *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L/V/II.96, ch 9 <<http://www.cidh.org/countryrep/ecuador-eng/chaper-9.htm>> accessed 28 March 2018.

60. Inter-American Commission on Human Rights, *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L/V/II.96, ch 9 <<http://www.cidh.org/countryrep/ecuador-eng/chaper-9.htm>> accessed 28 March 2018, ch 8 <<http://cidh.org/countryrep/ecuador-eng/chaper-8.htm>> accessed 28 March 2018.

61. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* Advisory Opinion OC-23/17, IACtHR Ser A No 23 (15 November 2017).

62. *Öneryıldız v Turkey*, Eur Court HR (Grand Chamber), Judgment, 30 November 2004; *Budayeva & Ors v Russia*, Eur Court HR (Chamber), Judgment, 20 March 2008. A similar case was pending at the time of writing which concerns polluting emissions from the Taranto Ilva steel plant, in applications communicated to the Italian Government on 27 April 2016: *Cordella & Ors v Italy* (case no 54414/13) and *Ambrogi Melle and Others v Italy* (case no 54264/15).

63. See, eg, the Indian cases: *Charan Lal Sahu v Union of India* AIR 1990 SCF 1480 and *Kumar v State of Bihar* (1991) 1 SCC 598; *Farooque v Bangladesh* (1997) 49 Khaka Law Reports (AD) 1; and the Pakistani case: *Laghari v Republic of Pakistan* (2015) W.P. No 25501/2015.

CO₂ emissions reduction. In litigation currently pending before the Oregon District Court in the United States, the plaintiffs argue that the right to life, as enshrined in the Fifth Amendment to the US Constitution, is infringed by the defendants’ ‘causing dangerous CO₂ concentrations’ in the atmosphere.⁶⁴ The plaintiffs are seeking an order compelling the federal agencies and officials, including the President, to ‘phase-down’ carbon emissions.⁶⁵ Litigation in the Netherlands has already been successful (outlined below) and a Belgian case is pending.⁶⁶

Threats to life from climate change have already been experienced in the Torres Strait. Since 2006, sea level rise has contributed to extraordinarily high tides and storm surges, causing severe flooding of houses, roads and airstrips, and destroying infrastructure. Flooding due to high tides has placed the local population at increased risk of water-borne disease, and also changed the character and increased the frequency of vector-borne diseases. Increased levels of dengue fever and malaria have already been experienced across parts of the Pacific as a result of the effects of climate change.⁶⁷

The current HRC General Comment on the Right to Life contains no elaboration on how the threats posed to human life from anthropogenic climate change or environmental damage might give rise to state responsibility for this harm. No doubt this silence is partly the result of the General Comment having not been updated since 1984. The General Comment has been under review since July 2015, and in its July 2017 session, the HRC published a draft General Comment for input from stakeholders by 6 October 2017. A concluded version is yet to be released at the time of writing.⁶⁸ The revised draft includes some hopeful signals for the present hypothetical claim. In particular, the new draft adds that ‘the ability of individuals to enjoy the right to life, and in particular life with dignity, depends on measures taken by States parties to protect the environment against harm and pollution’.⁶⁹ It furthermore acknowledges that the general duty to protect life requires states to take measures

64. *Juliana v United States*, Complaint for Declaratory and Injunctive Relief, Oregon District Court (12 August 2015) 86 [282], 88 [289], 94 <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150812_docket-615-cv-1517_complaint.pdf> accessed 7 April 2018.

65. *Ibid* 7 [12].

66. *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and the Environment) C/09/456689* The Hague District Court, Chamber for Commercial Affairs (24 June 2015), available from <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>> (official translation into English) accessed 1 December 2017; *VZW Klimatzaak v Kingdom of Belgium et al.*, Court of First Instance, Brussels, Belgium [2015] pending appeal.

67. World Health Organization, *Human Health and Climate Change in Pacific Island Countries* (2015) 28; R Aisi, ‘Facing Extinction: Climate Change and the Threat to Pacific Island Countries’ (2007) Winter (90) Reform 65, 65.

68. United Nations Office of the High Commissioner for Human Rights, Human Rights Committee, ‘Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life’ <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>> accessed 16 May 2018.

69. Human Rights Committee, *General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life* (revised draft) advance unedited version [65] <http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 25 January 2018.

to address ‘the general conditions in society *that may eventually* give rise to direct threats to life’, including ‘pollution of the environment’.⁷⁰

Australia’s submission on the draft General Comment indicates that any communication made by Torres Strait Islanders on these grounds is likely to be resisted. Australia objected to the inclusion of reference to conditions in society that ‘may eventually give rise to direct threats to life’ and also asserted that rights arising under international environmental law ought not to be included. Overall, Australia was of the view that the language contained in the draft was ‘too broad’ for useful legal application.⁷¹

Notwithstanding potential resistance, a claim such as the present hypothetical would allow the HRC to clarify the application of the right to life in light of the new General Comment – in particular, to elaborate how state responsibility for the human rights consequences of contributions to anthropogenic climate change might arise. Such a decision could also serve to guide comparable domestic and regional human rights claims.⁷²

2.3 An emerging right to an environment of a particular quality?

The ICCPR does not formally recognize a right to an environment of a particular quality. On the face of it, then, whether or not such a right exists is moot in the present context because the HRC is limited to consideration of ICCPR rights, and a claim based exclusively on this right would be dismissed as inadmissible *rationae materiae*. That notwithstanding, a communication from Torres Strait Islanders would offer the HRC an opportunity to proffer some comment on whether an emerging right to an environment of a particular quality either exists or forms some part of an existing ICCPR right, be that the right to life or any other. Such elaboration would be valuable given that an emerging body of state practice, and several regional human rights instruments, have recognized such a right; but these vary widely in approach and scope.⁷³

Proponents of the existence of this right suggest that if we consider environmental degradation to be a breach of human rights only when the degradation is so severe that it threatens human life, then we are limiting this right to a minimalist

70. Ibid [30] (emphasis added).

71. *Submission of the Australian Government, Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to life* (2017) [3], [5] and [7] <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>> accessed 25 January 2018.

72. Which are on the rise. See, eg, *Verein KlimaSeniorinnen Schweiz v Bundesrat [Union of Swiss Senior Women for Climate Protection v Swiss Federal Council]*, petition filed 2016, in which a group of older women argued that a maximum increase in temperature of 2 per cent above pre-industrial levels was, among other things, a violation of the constitutionally enshrined right to life.

73. See, eg, *African Charter of Human and Peoples Rights*, opened for signature 27 June 1981, 1520 UNTS I-26363 (entered into force 21 October 1986) art 24; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 14 November 1988 (entered into force 16 November 1999) art 11; *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* Advisory Opinion OC-23/17, IACtHR Ser A No 23 (15 November 2017). See also Cullet, above (n 26), 507–10.

conception which is not reflective of the international agreements which appear to establish it.⁷⁴ While international instruments have recognized that human existence relies upon the environment in which we live, the question as to whether there is a separate right to a healthy environment is essentially one of degree:

[T]he scope of the right to a healthy environment goes beyond what is required to meet basic human needs. Whatever the actual language used ... the minimum standard that can be deduced from all the relevant instruments is that of environmental conditions which do not adversely affect human health.⁷⁵

As outlined above, the link between environmental protection and human rights is now broadly recognized, and has been explicitly included in a number of international agreements, including human rights instruments.⁷⁶ A standalone right to an environment of a particular quality would arguably extend this link. This extension is necessary, proponents argue, because existing rights offer inadequate protection from environmental damage,⁷⁷ and because it would elevate the status of environmental rights.⁷⁸ A substantive right to an environment of a particular quality has been on the political radar for some time, having first emerged in the 1972 Stockholm Declaration, which provides, inter alia, that ‘man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’.⁷⁹ Although these words established a starting point for discussions of a substantive right, initial interest following the 1992 Rio Summit ultimately gave way to political resistance.⁸⁰

74. M Pallemerts, ‘The Human Right to a Healthy Environment as a Substantive Right’, in M Déjeant-Pons and M Pallemerts (eds), *Human Rights and the Environment* (Council of Europe Publishing 2002) 17, 19.

75. *Ibid.*, 20.

76. Starting as early as 1968, when the UN General Assembly recognized the connection between impairment of the environment and the enjoyment of human rights: *Problems of the Human Environment*, GA Res 2398, UN GAOR, 23rd sess, 1733rd mtg (3 December 1968); see also *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14 (1972), Preamble (Stockholm Declaration); *World Charter for Nature*, GA Res 37/7, UN GAOR, 37th Sess, UN Doc A/RES/37/7 (1982); *The Hague Declaration on the Environment* 28 ILM 1308 (11 March 1989); *Need to Ensure a Healthy Environment for the Well-Being of Individuals*, GA Res 45/94, UN GAOR, 45th Sess, 2, UN Doc A/RES/45/94 (14 December 1990). Human rights instruments include; *African Charter of Human and Peoples Rights*, opened for signature 27 June 1981, 1520 UNTS I-26363 (entered into force 21 October 1986) art 24; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 14 November 1988 (entered into force 16 November 1999) art 11.

77. See, eg, S Glazebrook, ‘Human Rights and the Environment’ in Paul Martin et al. (eds), *The Search for Environmental Justice* (Edward Elgar, Cheltenham 2015) 85.

78. S Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, Oxford 2016) 49.

79. *Declaration of the United Nations Conference on the Human Environment* (June 1972) Principle 1.

80. The initial enthusiasm is evidenced in, for example: *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and the Protection of Minorities*, UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994), in which Chapter I is dedicated to describing the legal foundations for ‘the right to a satisfactory environment’.

There has long been an objection to adding new substantive human rights norms to the body of human rights law on the basis that to do so will dilute the existing rights regime.⁸¹ Accordingly, some have argued that the better avenue for ensuring adequate protection is the ‘greening’ of existing rights (see the section above on the right to life for example).⁸² Moreover, in pragmatic terms, the enforcement of a right to an environment of a particular quality would require proving a nexus between the harm suffered by the individual as the subject of human rights protection, and the responsibility of the state. That connection is difficult to establish where the relevant damage has taken place as a result of myriad acts and omissions, most of which fall outside a single state’s control.

3 ADMISSIBILITY

This section analyses the potential obstacles to admissibility before the HRC for the present hypothetical claim, focusing in particular on challenges associated with the exhaustion of domestic remedies, and issues of standing.

3.1 Exhaustion of domestic remedies

Communications to the HRC are often deemed inadmissible because domestic remedies have not been exhausted.⁸³ The exhaustion of domestic remedies requires that the complainant provide evidence that he or she has already taken the complaint to local courts and administrative authorities, up to the highest level available.⁸⁴ That Torres Strait Islanders have no domestic filings to show, might not present an obstacle to admissibility in the present hypothetical scenario because domestic remedies are not readily available. Despite a ‘rising tide’ of climate litigation in Australia in general,⁸⁵ opportunities for any judicial or merits review of administrative decisions are limited because few statutory provisions directly mention climate change issues. As a result, ‘the relative paucity of laws directly addressing climate change concerns has ... compelled litigants to ventilate such concerns by circuitous means’, although this approach has generally failed in litigation.⁸⁶ In any case, judicial or merits-based review of administrative

81. See P Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 28 *American Journal of International Law* 607.

82. A Boyle, ‘Human Rights or Environmental Rights? A Reassessment’ (2007) 18 *Fordham Environmental Law Review* 471.

83. Optional Protocol, arts 2 and 5(2)(b).

84. See also: United Nations Office of the High Commissioner for Human Rights, *FAQ About Treaty Body Complaint Procedures: Procedure for Complaints by Individuals under Human Rights Treaty Bodies* <<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx>> accessed 7 April 2018.

85. A Rose, ‘*Gray v Minister for Planning*: The Rising Tide of Climate Litigation in Australia’ (2007) 29 *Sydney Law Review* 725.

86. The relative success of the applicants in the New South Wales Land and Environment Court in *Gray v Minister for Planning* [2006] NSWLEC 720, in which Pain J held that the Director General of the Department of Planning was under an obligation to consider principles of ecologically sustainable development, was anomalous and has been mitigated by subsequent case law. See further: R Abbs et al., ‘Australia’ in R Lord et al. (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, Cambridge 2012) 67, 75–81.

decisions is simply not possible where the goal of litigation is to challenge the Government’s general policy failures on climate change.⁸⁷

Cases based in tort are also unlikely to be justiciable for similar reasons.⁸⁸ A duty of care might arise where a public authority exercises a ‘significant and special’ measure of control over an individual’s safety.⁸⁹ However, such control cannot be said to exist solely because the authority has the power to regulate certain conduct. Rather, the authority must be directly responsible for the *source* of the risk of harm.⁹⁰ Moreover, to acknowledge liability for emissions with worldwide effects would run the risk of indeterminate liability, and the High Court has exhibited a strong disinclination to impose a duty of care where such a risk arises.⁹¹

Other policy considerations would also likely impede a claim. Australian courts are reluctant to intrude upon the policy decisions of Government because of the implications for the separation of powers. In *Graham Barclay Oysters Pty Ltd v Ryan*, the plaintiff brought an action in negligence, alleging that he was poisoned by oysters in part because the New South Wales Government failed to properly regulate commercial behaviour in relation to oyster farming.⁹² In dismissing the case, the High Court held that the issue was non-justiciable because it involved questions of a political nature. Gleeson CJ explained that decisions about the extent of government regulation of commercial behavior are essentially political and that ‘[c]ourts have long recognized the inappropriateness of judicial resolution of complaints about the reasonableness of government conduct where such complaints are political in nature’, and that the scope for judicial review of the reasonableness of government decisions ‘cannot be at large’.⁹³ Accordingly, even in the context of circuitous attempts to ventilate climate change concerns in the courts, none have as yet pursued a cause of action in tort for the emissions policies of government.⁹⁴

Torres Strait Islanders could submit a complaint to the Australian Human Rights Commission or to the Commonwealth Ombudsman. However, because neither of these bodies possesses the power to enforce remedies, the failure to make such an application would not be a bar to admissibility in the HRC.⁹⁵ Moreover, and for the same reason, the likelihood of obtaining a satisfactory remedy through either of these legal avenues is questionable.

In addition to the above constraints on domestic remedies for the Torres Strait Islander community, Australian courts are powerless to enforce Australia’s international

87. As also recognized in Cordes-Holland, above (n 7), 414.

88. Ibid 415.

89. *Brodie v Singleton Shire Council* (2001) 206 CLR 512 [102].

90. Ibid [103]; *Crimmins v Stevedoring Committee* (1999) 200 CLR 1.

91. Abbs et al., above (n 86), 88.

92. [2002] HCA 54 (5 December 2002) 541.

93. Ibid 553–4.

94. Abbs et al, above (n 86).

95. See: UN Human Rights Committee, *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/900/1999 (28 October 1992) 18 [7.3] in which the HRC noted that while ‘... certain administrative remedies (the Commonwealth Ombudsman and HREOC) have not been pursued by the author ... any decision of these bodies, even if they had decided the author’s claims in his favour, would only have had recommendatory rather than binding effect, by which the Executive would, at its discretion, have been free to disregard. As such, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective’.

obligations unless they have been enshrined in enabling legislation. Thus the customary international law that requires states to refrain from causing environmental damage to the global commons, or to other states, is unenforceable in Australia's domestic court system. The content of this customary norm is therefore moot in relation to the present discussion and will not be elaborated here, notwithstanding its relevance to the topic more broadly and also notwithstanding that Australia, and others, are undoubtedly violating it.⁹⁶

There is also a general requirement that a communication to the HRC must relate to a violation that occurred when the alleged violating country was a State Party to the Optional Protocol. Theoretically this could *prima facie* prevent a communication being admitted in the present instance because Australia's contribution to greenhouse gas emissions began before it became a State Party to the Optional Protocol. However, there is an exception to this rule where an alleged violation is continuing. To be considered a continuing violation there must be 'an affirmation ... by act or clear implication, of the previous violations'.⁹⁷ Given that Australia's emissions continue to rise (and indeed, as will be examined in the next section, that its emissions reductions have weakened rather than strengthened over time), it is clear that the alleged violation is continuing.⁹⁸

3.2 Standing before the Human Rights Committee

For a person to successfully claim that an ICCPR right has been violated 'he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of such a right, or that such an effect is imminent ...'.⁹⁹ Those Torres Strait Islanders who have already sustained severe flooding and ocean inundation have been directly affected, and will have standing to bring a complaint. People who are facing imminent violations of their human rights are not necessarily excluded from having standing. A future violation is not necessarily inadmissible provided that it is reasonably foreseeable.¹⁰⁰ At minimum, states were aware of the impacts of unchecked greenhouse gas emissions by 1992, when the UN Framework Convention

96. Cordes-Holland, above (n 7), 416; see also section 4 of this article describing Australia's violating acts and omissions.

97. See, eg, UN Human Rights Committee, *Könye and Könye v Hungary*, Communication No 520/1992, UN Doc CCPR/C/50/D/520/1992 (7 April 1994) [6.4].

98. Australia recorded a 0.7 per cent rise in emissions between July 2016 and July 2017: Department of Environment and Energy, *Quarterly Update of Australia's National Greenhouse Gas Inventory: June 2017. Incorporating NEM Electricity Emissions up to September 2017* (December 2017) <<http://www.environment.gov.au/system/files/resources/62506dca-2cb1-4613-82cd-fa46c7a0df42/files/nggi-quarterly-update-june-2017.pdf>> accessed 22 January 2018; see also Climate Council (Australia), 'Making Sense of the Australian Government's Data Dump: Carbon Pollution and Climate Review' (Media Release, 19 December 2017, online) <<https://www.climatecouncil.org.au/auspol-climate>> accessed 22 January 2018.

99. UN Human Rights Committee, *EW v The Netherlands*, Communication No 429/1990, UN Doc CCPR/C/47/D/429/1990 (1993) [6.4]; see also UN Human Rights Committee, *Consideration by the Human Rights Committee at its 117th, 118th and 119th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/119/3 (6 October 2017) 5 [13].

100. S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (Oxford University Press, Oxford 2005, 2nd edn) 74.

on Climate Change was adopted. That the Torres Strait Islands are under imminent threat from rising sea levels is unquestionable. However, to meet the requisite ‘victim status’ the HRC would also have to accept that the people of the Torres Strait Islands are being affected by *Australia’s* emissions, and this is more difficult to prove.¹⁰¹ To do so would require connecting the relevant conduct to the harm caused in a way that would attribute responsibility in accordance with legal principles and to a legally recognized standard. Recent case law in comparable jurisdictions (the United States, the Netherlands and New Zealand) indicates some judicial willingness to recognize such a connection.

Certainly some human rights claims have faltered due to the difficulties associated with proving the claim to the requisite legal standard. But the challenges associated with proving a case at law might not nullify the value of making a legal claim. The IACHR dismissed the 2005 Inuit petition on the grounds of a lack of evidence, but only a few months later, invited the petitioners to give evidence on ‘matters relating to global warming and human rights’.¹⁰² Thus, the human rights impact of climate change on Inuit life received broad publicity as a result of that petition, notwithstanding that the claim itself failed at law.

Furthermore, the idea that liability can be universally avoided because of an inability to prove sole, direct causation has been disputed. The US Supreme Court decision in *Massachusetts v the Environmental Protection Agency* provides an example. In that case, the defendant (the Environmental Protection Agency (EPA)) argued, inter alia, that because greenhouse gas emissions from new motor vehicles in the US constitute only a marginal contribution to global emissions, any regulation it established would offer the plaintiffs no real relief. The majority of the US Supreme Court rejected the EPA’s reasoning. It found that the ‘argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in federal judicial forum ... [but] Agencies, like legislatures, do not generally resolve massive problems in one fell swoop’.¹⁰³ On this basis, one could argue that it is not necessary to connect a specific emission to a specific harm in order to hold a state responsible. Rather, responsibility is a question of degree. As Knox has suggested, ‘since all greenhouse gas emissions contribute to climate change, wherever they are released, responsibility could be allocated according to states’ shares of global emissions’.¹⁰⁴

Nevertheless, traditionally, domestic litigation for damage caused by climate emissions has met with limited success. In a case typical of many, *Lliuya v RWE*, the Essen Regional Court dismissed a claim for damages, as well as for declaratory and injunctive relief, in which a Peruvian farmer, Saúl Luciano Lliuya, alleged that RWE knowingly emitted substantial greenhouse gases, which contributed to the melting of glaciers and local flood risks. Lliuya sought 0.47% of the costs that he and others bore in protecting the local town of Huaraz against foreseeable flood damage – an amount that was directly proportionate to the share of total greenhouse

101. Optional Protocol, art 1. Cordes-Holland, above (n 7), 436.

102. Letter from AE Dulitzky, above (n 31); J Gordon, ‘Inter-American Commission on Human Rights to Hold Hearing after Rejecting Inuit Climate Change Petition’ (2007) 7(2) Sustainable Development Law and Policy 55.

103. *Massachusetts v Environmental Protection Agency* 549 US 497 (2007), 127 S CT 1438 (2007) 20–21 (per Stevens, Kennedy, Souter, Ginsburg and Breyer JJ).

104. Knox, above (n 23), 489–90.

gas emissions for which RWE was responsible.¹⁰⁵ The claim was dismissed on the basis that causation between RWE's emissions and the specific impacts on this part of Peru could not be reliably established. That is, the injury was not directly traceable to the defendant.¹⁰⁶ Notably, the appeals court recently disagreed with the tribunal of first instance, and deemed the complaint admissible. That this case will now proceed to an evidentiary hearing is on trend with legal evolutions in other parts of the world.

Developments elsewhere might be indicative of an increased willingness to view state responsibility for consequences of anthropogenic CO₂ emissions as a justiciable concern, notwithstanding the challenges associated with proving a causal nexus between specific emissions and damage caused. These cases offer the HRC some legal precedents upon which to find that Torres Strait Islanders could meet the requisite 'victim status', and thus have standing, because they are being affected by Australia's emissions contribution. Among the earliest of such cases is that of the US Supreme Court in *Massachusetts v EPA* (outlined above), in which justiciability was perceived by the majority as being, in part, a question of standing. The majority judgment found that the State of Massachusetts is vulnerable to sea level rise caused by greenhouse gas emissions, and that the steadfast refusal of the EPA to regulate such emissions presented an actual and imminent risk of harm to that State.¹⁰⁷ The minority opinion was that the petitioners could not connect the alleged damage to the fraction of global emissions that might have been regulated by the EPA.¹⁰⁸

More recently, the District Court of The Hague found in *Urgenda* that 'a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change, and the effects ... on the Dutch living climate'.¹⁰⁹ In the Court's view, that the Dutch emissions were comparably small in total volume compared to other emitters 'did not alter the fact that these emissions contribute to climate change'.¹¹⁰ It found that Dutch emissions reduction targets were below the standard deemed necessary by climate science as set out in international agreements to which the Netherlands was a party. Rather, in order to prevent dangerous climate change, greenhouse gas emissions must be reduced by 25–40 per cent by 2020 based on 1990 levels.¹¹¹ The District Court ordered that the Government limit Dutch greenhouse gas emissions to the lower end of that estimate: 25 per cent by 2020.¹¹² The

105. *Lliua v RWE*, Essen Regional Court Germany (2015), translation to English available at <<http://www.lse.ac.uk/GranthamInstitute/litigation/liiuya-v-rwe/>> accessed 25 January 2018; original press release (in German) available here: <http://www.lg-essen.nrw.de/behoerde/presse/Presseerklarungen/Archiv-2016/Lliiuya-___-RWE-AG_/index.php> accessed 25 January 2018.

106. Although the matter was on appeal at the time of writing: *ibid*.

107. *Massachusetts v Environmental Protection Agency* 549 US 497 (2007), 127 S CT 1438 (2007) 23, 32 (per Stevens, Kennedy, Souter, Ginsburg and Breyer JJ).

108. *Massachusetts v Environmental Protection Agency* 549 US 497 (2007), 127 S CT 1438 (2007) (per Scalia, Thomas, Alito JJ, and, separately, Roberts J).

109. *Urgenda Foundation v The Netherlands (Ministry of Infrastructure and the Environment)* C/09/456689 The Hague District Court, Chamber for Commercial Affairs (24 June 2015) [4.90], available from <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>> (official translation into English) accessed 1 December 2017 (hereafter *Urgenda*).

110. *Ibid*.

111. *Ibid* [4.79].

112. *Ibid* [5.1].

decision in *Urgenda* has prompted a similar claim in Belgium, although a decision on the merits and interlocutory appeal remain pending at the time of writing.¹¹³

In November 2017, the High Court of New Zealand considered whether the Government’s legal obligations under the UNFCCC, the Paris Agreement and enabling domestic legislation required the Minister for Climate Change Issues to review the country’s emissions targets as new evidence arose. The Court found, *inter alia*, that the publication of a new IPCC report required the Minister to consider whether emissions targets ought to be reviewed and whether information contained in the IPCC report materially alters the information against which an existing target was set.¹¹⁴ It furthermore held that the New Zealand Government had failed to take appropriate action to address climate change. In this instance, court ordered relief was deemed unnecessary because in the meantime a new government had been elected and had expressed a commitment to revise the country’s 2050 emissions target.¹¹⁵

However, Australian courts are not likely to follow suit anytime soon, for the reasons discussed above. For the present hypothetical claim there is no obvious respondent to an action in private law, and the options for bringing an action against the Government are constrained by the lack of a specific administrative decision about which to object. Although not strictly relevant to a conclusion on standing before the HRC, from the perspective of Torres Strait Islanders, any victory in domestic courts may be pyrrhic in so far as legislative intervention could oust success in public law, and private law remedies are unlikely to lead to widespread policy change. Action in the HRC is comparatively more expedient, cheaper, and filings are likely to be made public more quickly. Even ‘unsuccessful’ challenges may buoy support in the court of public opinion, and the HRC has a wider global audience than domestic courts. Such publicity can place pressure on a government to meet its international legal obligations and to implement meaningful policy change.¹¹⁶ While these factors highlight the potential desirability of a claim in the HRC over a domestic one, they are also benefits of which the HRC is no doubt aware, and the Committee is therefore cautious not to entertain claims where domestic remedies exist which have yet to be exhausted.

4 AUSTRALIA’S VIOLATING ACTS AND OMISSIONS AND ITS LEGAL OBLIGATIONS

Australia’s obligations under the ICCPR are outlined in Article 2 of the Covenant. They include, *inter alia*, to ‘respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’ and to

113. *VZW Klimatzaak v Kingdom of Belgium et al.*, Court of First Instance, Brussels, Belgium [2015] pending appeal.

114. *Thomson v The Minister for Climate Change Issues* [2017] NZHC 733 [94], [178].

115. *Ibid* [98], [178].

116. See further: EA Posner, ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’ (2007) 155 *University of Pennsylvania Law Review* 1925, in particular 1931–2; HM Osofsky, ‘The Geography of Climate Change Litigation Part II: Narratives of *Massachusetts v EPA*’ (2008) 8 *Chicago Journal of International Law* 2; A Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) *European Journal of International Law* 613, 619, who notes that the benefits of a human rights approach to environmental protection is to ‘reinforce political pressure’, with its utility often ‘rhetorical rather than juridical’ *per se*.

'adopt such laws or other measures as may be necessary to give effect to the rights recognized'.¹¹⁷

Although couched in negative terms, the rights of minorities enshrined in Article 27 require states to engage in 'positive measures' of protection.¹¹⁸ Similarly, in its current General Comment on the right to life the HRC has determined that the right to life is too often narrowly interpreted: 'The expression "right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures'.¹¹⁹ Indeed, in outlining the legal obligations of States Parties to the Covenant, the HRC has explained that States must not only refrain from breaching Covenant rights through its own agents but must also take positive steps to give effect to its citizens' rights generally. Protection of citizens' rights includes the protection of citizens from acts committed by 'private persons or entities'. Where the act or omission in question has been committed by a private actor, a State can be held accountable for 'permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm' caused.¹²⁰ On this basis Torres Strait Islanders would have a strong claim that Australia has an obligation to take positive steps to reduce the effects of climate change, notwithstanding that the major emitters are private entities or persons.

Moreover, the breadth of Australian Climate policy over time is apt for consideration, that is, a claim is not limited to a single government action. In a 2005 decision, the HRC considered whether the Finnish Government had violated Article 27 through the effect of logging on the traditional reindeer husbandry activities of the Muotkatunturi people. The decision clarified, among other things, that a communication alleging a breach of Article 27 need not hinge on a single act or omission, but 'may result from the combined effects of a series of actions or measures taken by a State party over a period of time'. Accordingly, the HRC took into account 'the effects of past, present and planned future logging on the authors' ability to enjoy their culture ...'.¹²¹

The question is then, what positive steps, if any, has Australia taken to address climate change? And if Australia has taken positive steps, are they sufficient to meet Australia's legal obligations to protect the human rights of Torres Strait Islander people?

In December 2007 Australia ratified the Kyoto Protocol, then the most significant international instrument addressing climate change involving actual targets for emission reduction. It could be suggested that this step redresses any previous imbalance in its climate change policy and brings the country into line with its obligations under the Covenant. However, Australia was one of few developed countries to have negotiated an increase in emissions at the summit that led to the Protocol (to 108 per cent of 1990 levels), thus even if Australia met its target, it would still be exacerbating the problem.

Successive Labor Governments (2007–2013) took a more aggressive approach to climate change policy, including through the creation of a separate government

117. ICCPR, art 2(1).

118. UN Human Rights Committee, *General Comment No 23*, above (n 38), [6.1]–[6.2].

119. UN Human Rights Committee, *General Comment No 6: The Right to Life (Art 6)* (1982) [5].

120. UN Human Rights Committee, *General Comment No 31: Nature of the Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6] and [8].

121. UN Human Rights Committee, *Jouni Lämsman et al. v Finland*, Communication No 1023/2001, UN Doc CCPR/C/83/D/1023/2001 (15 April 2005) [10.2].

department on climate change. Practical measures included the introduction of a target of a 60 per cent reduction in emissions based on 2000 levels by 2050, a carbon trading scheme by 2010 and a target of 20 per cent of power being obtained from renewable energy by 2020, as well as investment in research and the development of low emissions technologies. After several failed attempts, in 2011, a series of bills passed through parliament to provide a framework for an emissions trading scheme, and in July 2013 the Government announced plans to move to a full emissions trading scheme in 2014.¹²²

However, the 2013 Australian national election saw a change in government to one more skeptical of both climate change and any national responsibility for its consequences. The new Government took several steps away from emission mitigation initiatives, its first legislative act being to abolish the government-funded independent Climate Commission.¹²³ In July 2014, Australia became the first state to reverse action on climate change when eight ‘carbon tax repeal’ bills passed through the Senate.¹²⁴

In 2016 after the conservative government was again elected, it established the Department of Environment and Energy, through which Australia’s climate change policies were reviewed, with the final report released in December 2017.¹²⁵ The terms of reference focused on energy and jobs and the final report makes no mention of the Torres Strait or its people. Moreover, the Government’s emissions reduction target was not subject to review, but was noted as a set figure in the report’s terms of reference. The preamble of those terms reads, inter alia, that ‘in setting its 2030 target of reducing emissions to 26–28 per cent below 2005 levels, the Government committed to reviewing its policies during 2017’.¹²⁶ That target is far lower than that required of Annex I countries (including Australia) to prevent dangerous climate change. As the Dutch Court recognized in the *Urgenda* decision, to meet that target, Annex I countries must reduce greenhouse gas emissions by 25–40 per cent below 1990 levels by 2020.¹²⁷ According to the December 2017 Quarterly Update of Australia’s National Greenhouse Gas Inventory, Australia has reduced its emissions per capita by 9 per cent compared with 1990 levels, and thus it appears unlikely that it will meet its commitments.¹²⁸

122. A Talberg et al., *Australian Climate Change Policy to 2015: A Chronology* (Australian Parliamentary Library 2015, as updated 5 May 2016).

123. Although by then it was ‘the Department of Climate Change and Energy Efficiency’. The Climate Commission has since been revived as an independently funded not-for-profit organization, the ‘Climate Council’: <<https://www.climatecouncil.org.au/>>.

124. Talberg et al., above (n 122), 22.

125. Department of the Environment and Energy (Australia), *2017 Review of Climate Change Policies* (2017) <www.environment.gov.au/system/files/resources/18690271-59ac-43c8-ae1-92d930141f54/files/2017-review-of-climate-change-policies.pdf> accessed 26 January 2018.

126. Department of the Environment and Energy (Australia), *2017 Review of Climate Change Policies: Terms of Reference* (2017) <<http://www.environment.gov.au/system/files/pages/64722841-01ab-4067-a978-40d63174d4c7/files/tor-climate-change-review.pdf>> accessed 26 January 2018; Department of Energy and the Environment (Australia), *Quarterly Update of Australia’s National Greenhouse Gas Inventory: December 2017: Incorporating NEM Electricity Emissions UP to June 2017* (2017) <<http://www.environment.gov.au/system/files/resources/62506dca-2cb1-4613-82cd-fa46c7a0df42/files/nggi-quarterly-update-june-2017.pdf>> accessed 26 January 2018 (hereafter ‘Quarterly Update’).

127. *Urgenda* [4.79].

128. Quarterly Update, 19.

Rather than advance the reduction of emissions through targeted climate policy, developments in Australian climate policy over the past 10 years indicate a regression away from such ambitions. Australia remains among the highest emitters in the world, ranked in the top 16 of all nations.¹²⁹ These 16 countries produce about 80 per cent of all greenhouse gas emissions.¹³⁰ For Torres Strait Islanders, the implications of nominal emissions reduction are urgent. Floods and storm surges are likely to become more frequent and intense as climate change continues and a significant loss of biodiversity can also be expected to occur.¹³¹ The capacity of the Torres Strait Island community to adapt to extreme weather events without displacement will be nil when rising sea levels cause the lands the community occupies to disappear.

5 CONCLUSION

Minority communities who reside in places remote from a governing majority have fallen through the gaps of legal and scholarly attention, but are among the most vulnerable to climate change. Different legal remedies are available for people in subnational remote jurisdictions than for those whose entire country is facing inundation. In fact, the options are *prima facie* more diverse because, theoretically at least, the domestic legal infrastructure offers some opportunity for redress. The usual questions of ('climate') refugee status do not arise because there is no need to cross international borders to get to safety: affected communities can relocate to the mainland. However, for Torres Strait Islanders, as for many others, relocation to the mainland does not address their true loss – and, as has been argued here, remedies under Australian law are limited.

Human rights are claims of last resort. Standing will always rest on the impact to an individual or individuals, and enforcement mechanisms are weak. Nevertheless, the protection of minority populations from environmental degradation is increasingly recognized as a priority in the international system, and relevant legal standards are rapidly evolving.¹³² Recent domestic cases have, for instance, trended away from the assumption that the challenges associated with proving the causal nexus between a specific set of emissions and the damage caused blocks any opportunity for remedy. Increasingly courts are willing to accept that although an emitter has contributed only a portion of global emissions, this does not exclude the possibility of relief. Thus, while proving the link between *Australia's* greenhouse gas emissions and the threats to the Torres Strait Islanders caused by rising sea levels and extreme weather events would be difficult, such challenges – as this analysis has suggested – would not bar a claim.

129. Union of Concerned Scientists, 'Each Country's Share of CO₂ Emissions', 20 November 2017 (based on 2015 figures) <<https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html#.W3LPRLu0Wpo>> accessed 4 December 2017.

130. *Ibid.*

131. Reisinger and Kitchen, above (n 15); K Hennessy et al., 'Australia and New Zealand' in ML Parry et al. (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 509.

132. F Mackay, 'The Rights of Indigenous People in International Law', in L Zarsky (ed), *Human Rights and the Environment: Conflicts and Norms in a Globalizing World* (Earthscan, London 2002) 9, 19–24.

The nexus between human rights and the environment is no longer seriously disputed, but as that nexus attracts greater recognition, questions arise as to its scope. A claim to the HRC on behalf of Torres Strait Islanders could clarify whether the right to an environment of a particular quality exists only as part of other ICCPR rights, or whether there might be value in its recognition as a standalone human right. The same claim could further advance legal recognition of the consequences of climate change for other minority communities in similar sub-national jurisdictions, such as other island territories, and the Arctic.