clerks@ftbchambers.co.uk 020 7643 5000

Torres Strait Islanders Decision: Admissibility, Article 6 and Adaptation

19 January, 2023

The Torres Strait Islands, a group of islands situated between Australia and New Guinea, are home to one of the most vulnerable populations to the impact of climate change.

In 2019, eight indigenous residents ("the Islanders") alleged that Australia had failed to implement an adaptation programme to ensure the long-term habitability of the islands and failed to mitigate the impact of climate change, and that these failures resulted in human rights violations under the International Covenant on Civil and Political Rights ("the ICCPR"). On 22 September 2022, the UN Human Rights Committee ("the Committee") issued its decision in respect of this complaint.

The Committee found violations of the Islanders' rights under article 17 (unlawful interference with privacy, family, home, or correspondence) and article 27 (right of persons belonging to ethnic, religious, or linguistic minorities to enjoy their own culture, profess or practise their own religion or use their own language). Having found such violations, the Committee held that it was not necessary to examine the remaining claims under article 24(1) of the ICCPR (right of every child to protection). The Committee did not find a violation of article 6 (right to life).

The decision, including the five individual opinions by Committee members, provides an interesting example of how human rights adjudication is grappling with climate change litigation. A detailed summary and analysis has already been written on this decision by David Hart KC. This blog post therefore focuses on three features of this case that may have wider implications for such claims in other human rights jurisdictions: (i) the decision on admissibility in relation to state responsibility; (ii) the article 6 finding; and, (iii) the Committee's focus on adaptation measures rather than mitigation of climate change.

1. Admissibility and state responsibility

Australia raised several points regarding admissibility. One of Australia's submissions was that the claim was inadmissible under articles 1 and 2 of the Optional Protocol to the ICCPR as Australia could not be

held responsible legally, or practically, for harm arising from failure to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory.

In relation to claims alleging a failure to implement adaptation measures, the Committee noted that articles 6, 17, 24(1) and 27 all contained positive obligations of States to ensure the protection of individuals under their jurisdiction against violations of those provisions [1]. It followed that these claims were admissible.

The Committee found that claims alleging a failure to implement mitigation measures were also admissible since *"the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced"* and *"ranks high on world economic and human development indicators"* [2]. This is perhaps the more interesting finding of the two and raises several questions. Would this mean a claim alleging a failure to mitigate would not be admissible against a State that has only recently (e.g., in the last 10 years) begun emitting high levels of greenhouse gases? And how about claims against States with high emissions that perform well on economic indicators but poorly on human development indicators? It will be interesting to see not only how this approach is applied going forward, but also whether a similar approach will be adopted in other human rights jurisdictions.

2. Breaches of articles 17 and 27 but not article 6

Having found that the claims under articles 6, 17, 24(1) and 27 were admissible, the Committee proceeded to consider the merits.

In relation to article 17, the Committee enumerated the ways in which the Islanders' private life, family and homes have been adversely affected by climate change. These included flooding and inundation of villages and burial lands; destruction or damage to traditional gardens and land used for cultivation of food; and the decline of nutritionally and culturally important marine species. The Committee found that failure to implement adequate adaptation measures to protect the Islanders' home, private and family life (namely, the unexplained delay in seawall construction) resulted in a violation of the State's duties under this article [3]

Similarly, in relation to article 27, the Committee found that there was a failure to adopt *"timely adequate adaptation measures"* [4] to protect the Islanders' ability to maintain their traditional way of life and pass on their culture. This resulted in a violation of the State's duty to protect the Islanders' right to enjoy their minority culture under this article [5].

By contrast, the Committee held that there was no violation of the Islanders right to life under Article 6, making two main findings.

First, the Committee held that whilst the Islanders might be at a heightened risk of vulnerability to climate change, there were no existing impacts or reasonably foreseeably risks that would amount to a violation of article 6:

"[The Islanders] have not indicated that they have faced or presently face adverse impacts to their own health or a real or reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity." [6]

As the adverse impacts currently experienced by the Islanders amounted to violations of article 17 and article 27, this begs the question as to why those same harms did not also constitute existing impacts on the right to a life *with dignity* under article 6 [7]. Indeed, several members partially dissented on this issue, finding that Australia also breached its obligations under article 6. As for the majority, it may be

that the Committee sought to interpret the ICCPR in such a way as to prevent too great an overlap between different rights. This appears to be supported by the Committee's observation that the Islanders' claims under article 6 mainly relate to the ability to maintain their culture [8]. Put another way, whilst article 6 includes a 'right to a life with dignity', where the same type of dignity is protected by other rights, the Committee may be reluctant to find a violation of article 6 without some other impact specifically relating to article 6.

The second part of the Committee's reasoning on article 6 addresses the argument that the islands would become uninhabitable in 10-15 years without urgent action [9]. In relation to this argument, the Committee appeared to accept that the risk that a country could become submerged was so extreme that there could be an incompatibility with article 6 prior to that risk materialising [10]. Nevertheless, the Committee held that:

"[…] the timeframe of 10-15 years could allow for intervening acts by the State party to take affirmative measures to protect, and, where necessary, relocate the alleged victims […] [T]he Committee is not in a position to conclude that the adaptation measures taken by the State would be insufficient so as to represent a direct threat to the authors' right to life with dignity." [11]

This conclusion largely mirrors the Committee's findings in Teitiota v New Zealand [12] (which the Committee references), where it was found that a timeframe of 10-15 years could allow for the island nation of Kiribati to take adaptation measures to protect and, where necessary, relocate its population [13]. However, the issue in Teitiota was whether the decision by New Zealand to remove a Kiribati national and his family to Kiribati was a violation of the New Zealand's obligations under Article 6. Further, New Zealand had made an assessment that the planned adaptation measures would suffice to protect Mr Teitiota's right to life despite rising sea levels and the adequacy of those measures did not appear to be challenged.

Here, the Islanders' central claim was that the adaptation measures planned by Australia were inadequate to ensure the long-term habitability of the islands. Thus, one might have expected the Committee to explain *why* the adaptation measures were sufficient in this case, rather than relying on the fact that sufficient adaptation measures 'could' be adopted. However, coming to such a conclusion on the sufficiency or otherwise of adaptation measures would be a complex task and perhaps one for which a human rights committee is not the most appropriate forum. Such a finding would arguably require examining expert evidence on issues including sea levels predictions and the necessary engineering works to mitigate the effects. It would also require a value judgement as to what level of adaptation is appropriate. By contrast, the exercise the Committee had to undertake in relation to articles 17 and 27 was more straightforward. The Committee was only concerned with events that had already occurred, namely (i) whether the flooding and its effects constituted an interference with those rights and (ii) if so, whether such an interference was justified. Further in relation to (ii), no explanation had been provided for the delay in constructing a planned seawall, enabling the Committee to answer this question in the negative without entering into questions such as what form or extent of adaptation is appropriate.

3. Adaption vs Mitigation

The third feature of the case worth noting is the Committee's focus on climate change adaption (i.e. the mitigation of the *impacts* of climate change) rather than on the alleged failure to mitigate climate change (i.e. the mitigation of *climate change itself)*. The Islanders had alleged failures on both fronts (i.e. on adaptation to, and mitigation of, climate change). Yet, whilst the Committee accepted that claims in relation to a failure to mitigate climate change were admissible, the Committee did not find that Australia had violated any articles of the ICCPR on this basis. That said, some of the partially dissenting opinions

emphasised that the decision should have had a greater emphasis on the need to mitigate [14] – which suggests that there may be an increasing willingness to use human rights frameworks for oversight of greenhouse gas emissions. Moreover, the decision also confirmed that international treaties on climate change were relevant to interpreting whether human rights had been breached [15], suggesting that a failure to meet internationally agreed emissions targets might one day constitute persuasive evidence for a finding that there was a human rights violation.

Conclusion

While greater oversight of climate commitments is welcome, there remains a question mark over whether human rights instruments or institutions are the most appropriate fora for such litigation. Environmental issues no doubt overlap with human rights and the complexity and unique nature of environmental issues, including the absence of an identifiable human victim in many cases, has generated debate on the need for legal innovations such as 'rights of nature' and 'rights to a healthy environment'. Yet, rather than introducing environmental rights into a human rights framework, it may be worth considering whether it would be more appropriate to establish an adjudicatory body to oversee the growing body of international environmental covenants. Such a body could be provided with the necessary expertise and/or procedural powers to handle the complex scientific evidence environmental cases frequently require.

In the absence of such legal innovations, we are likely to see increasing reliance on human rights as a vehicle to allege failures to mitigate, or adapt to, climate change – with perhaps far-reaching results for the interpretation of human rights instruments in other areas.

Stephanie Bruce-Smith is a Pupil Barrister at Francis Taylor Building.

[1] Daniel Billy et al. v Australia, CCPR/C/135/D/3624/2019, UN Human Rights Committee (HRC), 22 September 2022 ("Torres Strait Islanders"), 7.7 and 7.8
[2] Ibid, 7.8
[3] Ibid, 8.12
[4] Ibid, 8.14
[5] Ibid
[6] Ibid, 8.6
[7] bid, Individual Opinion by Committee Member Duncan Laki Muhumuza; Joint Opinion by Committee Members Arif Bulkan, Marcia V J Kran and Vasilka Sancin; and Individual Opinion of Committee Member Hernán Quezada
[8] Ibid, 8.6
[9] Ibid, 8.7
[10] Ibid
[11] Ibid
[12] Ioane Teitiota v New Zealand, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January
2020
[13] Ibid, 9.12
[14] Torres Strait Islanders (n.1), Individual Opinion by Committee Member Duncan Laki Muhumuza and Individual Opinion by Committee Member Gentian Zyberi
[15] Ibid, 7.5