AMSTERDAM LAW FORUM

Opinion Article

THE *DANIEL BILLY V AUSTRALIA CASE*; ITS SEMANTICS AND THE CHARACTERIZATION OF A CLIMATE THREAT AS A CAUSE FOR MIGRATION

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I. Introduction

The notion of "climate refugee" is not consecrated legally: as no future convention on the matter is emerging while climate change is advancing, it is the role of the jurisprudence to create pathways to deal with it, as many people are and will have to migrate because of the phenomenon.

The Human Rights Committee (HRC) of the United Nations (UN) is a body which could help build a new approach regarding migration caused by the adverse effects of global warming. The Committee's first case in this matter was the *Teitiota* case[2]: Mr. Teitiota, a Kiribati national, claimed that his deportation from New Zealand back to his country violated Article 6 (right to life) of the International Covenant on Civil and Political Rights (ICCPR) due to climate change effects on his island.[3]

The Committee did not find any violation of this right in that case – considering that the measures taken in Kiribati were sufficient to protect people from climate change.[4] It also found that a lack of national and international efforts to mitigate its effects would lead to impair an individual's right to life and right to family life, triggering the *non-refoulement* obligation of the sending state.[5] This requirement is a provision of the Refugee Convention, stating that no refugee should be expelled or returned to the frontier of the territory where their lives or freedom would be threatened because of their race, religion, nationality, membership of a particular social group or political opinion.[6]

The non-refoulement obligation must be understood in the context of refugee law, which faces new challenges due to climate issues. These challenges stimulate the legal understanding: how would the latter requirement work in times of climate change? How could such a threat to life be characterised in refugee law? Would that amount to persecution? Does the violation of climate positive obligations by the state amount to a failure of state protection? If so, would it strengthen a new path to be protected by the Refugee Convention in times of climate change?

The recent case *Daniel Billy v. Australia*[7] from the Human Rights Committee (HRC) of the

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[2] CCPR/C/127/D/2728/2016, Human Rights Committee – Views adopted by the Committee under article 5(4) of the Optional Protocol concerning communication No. 2728/2016, 7th January 2020.
[3] *Id.*, see §3.
[4] *Id.*, see §9.12.
[5] *Id.*, see §9.11.
[6] Article 33 of the Convention relating to the Status of Refugees, adopted on 28 July 1951.
[7] CCPR/C/135/D/3624/2019, Human Rights Committee – Views adopted by the Committee under article 5(4) of the Optional Protocol concerning communication No. 3624/2019, 22 September 2022.

United Nations (UN) could help elaborate on an understanding of forced migration caused by climate change: some indigenous inhabitants of the Torres Islands near Australia[8] complained about the adverse effects of it on their lives, they formulated grievances against the Australian government which – in their opinion – was responsible for their predicament.

The proceedings questioned multiple aspects of climate change: its effects on a population but also broader legal consequences when it comes to states' inaction. The Committee found that Australia was violating Article 17 of the ICCPR regarding the right to family life and Article 27 regarding the cultural rights of these islanders.

This outcome could help define the consequences of climate change in terms of forced migration. The resulting threat to life could be analysed in two ways: narrowly, it could refer to the "persecution" entrenched in Article 1(A)2 of the Refugee Convention (understood as the result of two elements which are a failure of state protection and a harm suffered by the potential refugee[9]). Broadly, it could be in line with the threat evoked in Article 33(1) about the *non-refoulement* obligation: the decision could shape an opportunity towards the activation of it, although no violation of the right to life has been found.

Section 2 explores the case. Section 3 focuses on the legal language of these proceedings and what it means for the characterization of the climate threat to human life discussed in Section 4. Section 5 concludes.

II. The *Daniel Billy v. Australia* Case

The plaintiffs were indigenous from Torres Islands. They particularly denounced that Australia had violated their rights under Article 6 , Article 17 and Article 27 ICCPR.[10]

From their perspective, Australia has failed to take adaptation or mitigation measures to reduce greenhouse gas emissions and has not reduced its promotion of fossil fuel extraction, continuing to affect the authors' lives and breaking down their livelihood.[11]

While the Human Rights Committee found no violation of Article 6, the Committee found Australia violated Articles 17 and 27. Concerning family life (Article 17):

> 'By failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under Article 17'[12]

[8] The Torres Islands are mainly part of the Queensland Government jurisdiction (Australia), these islands have a special status regarding the indigenous population living there, see: https://en.wikipedia.org/wiki/Torres_Strait_Islands
[9] HATHAWAY (James C.) & FOSTER (Michelle), *The Law of Refugee Status*, Cambridge University Press (2014), p.185.
[10] FERIA-TINTA (Monica), "Torres Strait Islanders: United Nations Human Rights Committee delivers ground-breaking decision on climate change impacts on Human Rights", EJIL:Talk! September 27 2022, website: ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on- climate-change-impacts-on-human-rights/.
[11] CCPR/C/135/D/3624/2019, ibid. see §2.1-2.6.
[12] CCPR/C/135/D/3624/2019, *ibid.* see §8.12.

The violation of Article 27 (cultural rights) the Committee found, relies on the same argument:

> 'The State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generation their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the author's right to enjoy their minority culture'[13]

The right to life is not found to be violated: the Committee's reasoning is similar to the one made in *Teitiota*, where it also rejected this possibility:

> 'The State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms'[14]

The *Daniel Billy* case reveals the same justification:

> 'The information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate-change-related harms in the Islands'15

A look at the case's words and their meaning from a refugee law perspective could also offer a useful glimpse: could the vocabulary used by the Committee be an indication of what could be a global approach towards the displacement caused by the threat of climate change on human life?

III. The Case's Semantics

The case's words can be divided into two categories. Both concern the refugee status determination in a new way: one is about the situation of the applicants, and the second concerns the determination of the duty bearer.

III.1 The Condition of the Applicants

The condition of the applicants is discussed through the views adopted by the Committee. It seems that every aspect of their predicament is evoked: flooding and loss of their traditional lands due to erosion are among the consequences climate change has apparently induced for them. Another result of climate change: distress and anxiety are touching their community.[16]

The Committee's final analysis of the situation towards climate change effects often relied on the vulnerability they experience while facing this slow-motion disaster:

> 'The Committee recalls that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change'[17]

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[13] CCPR/C/135/D/3624/2019, *ibid.* see §8.14.
[14] CCPR/C/127/D/2728/2016, *ibid.* see §9.12.
[15] CCPR/C/135/D/3624/2019, *ibid.* see §8.7.
[16] CCPR/C/135/D/3624/2019, *ibid.* see §5.2.
[17] *Id.* see §8.6.

As the Committee also puts it: the islanders are "extremely vulnerable"[18] persons. They could be seen as the first human beings facing the harshest reality of a warmer climate.

This vulnerability is demonstrated in different ways: through the living conditions endangered by the changing environment, and the mental states of these indigenous people who are seeing their home features slowly disappearing.

This characteristic is to be balanced with the determination of the duty bearer the Committee is evaluating, regarding the applicants' situation.

III.2 Determining the Duty Bearer

The evaluation of the Committee is based on the claims of the applicants and Australia's environmental obligations as the country is a signatory of binding climate agreements (especially the Paris Agreement). The analysis is connected to these environmental treaties, as they can help interpret the human rights duties a State has to ensure.[19]

The main point here is about the consideration of Australia's greenhouse gas emissions:

'The State Party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced'[20]

The assessment made by the Committee leads to the conclusion that these islanders are facing the adverse outcomes of a polluting state on a worldwide scale.

It is recalled that they have been alerting about this issue for thirty years (since the 1990s), and that nothing has been done to at least mitigate the outcomes during that time – by Australia.[21]

What do these assessments tell us? We can assume that the language used in the case refers to a novel approach to the management of natural disaster, which departs from the classic view according to which it is strictly natural. The case's language is then grasping a more critical understanding addressing both the existence of a natural predicament and the reality of socio-economic dynamics that favour such disasters.

III.3 Assessing the Natural Predicament by the Social Paradigm

The person fleeing a natural disaster would often see themselves denied the status of a refugee. This is anchored into the argument considering that the disaster and the displacement it caused cannot be linked to discriminatory conducts.[22]

This analysis, also called the "hazard" paradigm[23], assumes that human agents are mostly absent from the causation process of the disaster and is still applied in many domestic Civil and

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[18] *Id.* see §7.10.
[19] *Id.* see §5.6 – 7.5.
[20] CCPR/C/135/D/3624/2019, *ibid.* see §7.8.
[21] *Id.,* see §8.14.
[22] SCOTT (Matthew), "Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change", *Refugee Survey Quarterly* 2016, 35, p.27.
[23] SCOTT (Matthew), *ibid.*, p.32.

Common Law jurisdictions.[24] Starting from the Lisbon earthquake of 1755, the natural disaster is not seen anymore as an act of God but simply as a natural hazard which could be studied and mitigated.[25]

As such, the refugee status cannot be granted to a victim of a "natural" disaster who needs assistance. It is understood as different from what the Convention Relating to the Status of Refugees of 1951 offers.

The social paradigm would refer to a position according to which the disaster is seen as produced by society itself, generated by its weaknesses. Disaster would then constitute a social phenomenon.

The notion of vulnerability would play an important role: this vulnerability - if caused by poor socio-economic conditions induced by systematic state policies – could lead to the radical consequences a natural disaster can provoke.[26] Disaster shall then be seen as an interaction between hazards and social phenomena. That would mean that states should have to consider a wide range of information, both social and climate science related – to determine the roots of it.

Analysing a situation with different types of information would lead to a better understanding of what type of predicament the victim goes through. It would permit us to go beyond some beliefs. For example: the person fleeing their low-lying island submerged by waters could be entitled to refugee protection. In the present case: their predicament occurs because of climate failures of the state situated near their land.

This predicament is caused by a climate threat to human life maintained and accelerated by harmful state policies.

IV. Characterization of a Climate Threat to Human Life

The climate threat to human life could be analysed in two ways: in a narrow sense, it could refer to the "persecution" entrenched in Article 1(A)2 of the Refugee Convention. It could also be in line with the broader threat evoked in Article 33(1) related to the *non-refoulement* obligation.

IV.1 Determining the Possible Persecution

The reading of Article 1A(2) of the Refugee Convention informs about the persecution criterion, one of the conditions to fulfil in order to be considered a refugee.

Persecution is the result of two elements: a serious harm inflicted on a potential refugee and a failure of state protection.[27] The same authors support a positivist approach towards the serious harm factor: every time a generally accepted right codified in international law is violated, the

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[24] See for example: *A and Another v Minister for Immigration and Ethnics Affaires & Anor*, 1997, Australian High Court, Dawson J's *obiter dictum.*

[25] CEDERVALL-LAUTA (Kristian), *Disaster Law*, London, Routledge, 2015, ch. 2.

[26] O'KEEFE (P.), WESTGATE (K.), & WISNER (B.), "Taking the Naturalness out of Natural Disasters",
Nature, 260, Apr. 1976, 567.

[27] HATHAWAY (James C.) & FOSTER (Michelle), *ibid.*, p.185.

finding of a serious harm can be facilitated.[28] This serious harm could be characterised if there is a violation of socio-economic rights[29], and also if autonomy and self-realisation rights are endangered by a state's failure to protect.[30]

What would be essential there is whether there is an intentionality regarding the government's inaction towards climate change.[31] The possibility to grant an indigenous group the refugee status, because of the inaction of a state could be analysed as a substantive claim. The relationship between an indigenous group and their land is part of their identity. The destruction caused by climate change, fueled by adverse policies taken by a state – without considering the indigenous' environmental claims – affects their territory. It could be seen as amounting to being harmed.[32]

The second element of the persecution is the failure of state protection[33]: where the nature of the risk combined with the nature of state response provides a measure of the applicant's predicament.[34] The attitude of the state is then scrutinised.

One could advocate that the analysis made about the present case could lead to recognition of climatic persecution linked to the failure of a state to act on their positive obligation, and to a serious harm fueled by natural and socio-economic disasters.

This failure to successfully act on positive obligations is explained throughout the case:

> 'The State's party's failure to adopt timely adequate measures (...) discloses a violation of the State party's positive obligation'[35]

It is recalled that:

> 'The State party has not explained the delay in seawall construction with respect to the islands where the author lives'[36]

The failure to respect a positive obligation could unveil a failure of state protection. What could be the content of this positive obligation? The concurring opinion made by the Committee Member Gentian Zyberi is a useful source to understand its meaning:

> 'This is an individual responsibility of the State, relative to the risk at stake and its capacity to address it. A higher standard of due diligence applies in respect of those states with significant total emissions or very high per capita emissions (...), given the greater burden that their emissions place on the global climate system, as well as to states with higher capacities to take high ambitious mitigation action. The higher standard applies to the

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[28] *Id.*, p.210.
[29] *Id.*, p.228.
[30] *Id.*, p.260.
[31] KEYES (Elizabeth), "Environmental Refugees: Rethinking What's in a Name", *North Carolina Journal of International Law* 44, n°3 (2019), p.468.
[32] KOZOLL (Christopher M.), "Poisoning the Well: Persecution, the Environment, and Refugee Status", *Colorado Journal of International Environmental Law and Policy* 15, n°2 (Spring 2004), p.278.
[33] HATHAWAY (James C.) & FOSTER (Michelle), *ibid.*, p.185.
[34] *Id.*, p.288.
[35] CCPR/C/135/D/3624/2019, *ibid.* see §8.14.
[36] *Id.*, see §8.12.

state party in this case'[37]

The climatic weight of each state should be scrutinised, as well as their climate engagement: the delay in seawall construction plus the high number of toxic emissions Australia is authorising hint towards the characterization of the Australian failure to respect its positive obligations.

This has led to a greater danger for Torres Islands' communities which have seen a degradation of their environment. They are consequently suffering a gradual destruction which eventually will result in the total disappearance of their islands.

It would also be possible with this case to recognize a possibility to enforce the view leading to the application of the *non-refoulement* obligation. As it has already been underlined in *Teitiota*, this notion will certainly be used in the future[38], along with the increase of climate change phenomena. We argue that the *Daniel Billy* case reaches a new threshold in that direction.

IV.2 Triggering the *Non-Refoulement* Obligation

Article 33 of the Refugee Convention is about the *non-refoulement* obligation a state party must respect. It is linked to a broader approach to persecution: a refugee cannot be sent back or expelled to the frontiers of territories where his or her life would be in danger (in relation to specific grounds). The notion of persecution induced there means a threat to life which must be avoided by respecting the principle.

As the Committee recalls it in *Teitiota*:

'The Committee is of the view that without national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 and 7 of the Covenant, thereby triggering the non- refoulement obligations of sending states'[39] In the present case, the Committee does not find a violation of Article 6 (right to life) but concludes that Australia has violated both Article 17 (right to family life) and Article 27 (cultural rights of minority groups). It is interesting to look at the justification the Committee gives, regarding the violation of Article 27:

> 'The Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect *the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generation their culture and traditions and use of land and sea resources* discloses a violation of the State party's positive obligation to protect the author's right to enjoy their minority culture'[40]

This violation is not a violation of the right to *life* itself as Article 6 explicates it. It refers to a particular way of life, as the people who see their collective rights violated are indigenous. This way of life is characterised by strong cultural aspects. Would it be possible to equalise the right to life of Article 6 with the cultural rights of Article 27? Would it be possible to also establish a violation of Article 6 when Article 27 is violated?

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[37] *Id.*, see p.20.
[38] CCPR/C/127/D/2728/2016, *ibid.* see §9.11.
[39] *Id.*
[40] CCPR/C/135/D/3624/2019, *ibid.* see §8.14 – the underlining is done by the author.

According to the majority opinion in the decision:

> 'The Committee further notes that the author's claims under Article 6 of the Covenant mainly relates to their ability to maintain their culture, which falls under the scope of article 27'[41]

Precisely: it is because the victims in the present case are indigenous that their right to life must be seen as tied to their cultural rights. One cannot be experienced without the other. This understanding could more easily trigger the *non-refoulement* obligation if this population would have to leave its territory because of climate issues. Their existence deeply linked to cultural aspects is endangered by this phenomenon. This underlines the threat these people experience. It will finally give them the possibility to be protected by this obligation if they decide to leave.

V. Conclusion

The present outcome of the case gives the possibility to hope for a better legal understanding of climate change effects on the first human lives concerned by it. The discussed case is indeed a starting point for trying to understand the plight of these indigenous groups. The precise factual context is of paramount importance: the slow destruction of their land affects their lives in a more profound way than it would in any other place. It is also striking how the applicants and their claims are linked to their community throughout the proceedings. The *Daniel Billy* case offers important paths in refugee law to acknowledge the threat of climate change. This could be achieved by considering more information when it comes to analysing an environmental disaster. But also, by pointing a duty bearer for determining possible persecution through the refugee status determination. The characterisation of such persecution could be made by examining the implementation of positive obligations arising from environmental treaties that a state has signed. Violations of these obligations by the state party and the resulting hardship for indigenous groups would be strong indications leading to the assertion of persecution.

This could also be done by equalising in specific contexts a violation of cultural rights and a violation of the right to life to trigger the *non-refoulement* obligation. Indeed: this option could further be helpful to other groups of people affected by the climate threat and who appear to have a particular identity (namely, linguistic, religious or ethnic minorities[42]).

The future is going to unveil how these opportunities are to be considered.

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[41] CCPR/C/135/D/3624/2019, *ibid.* see 8.6 – the underlining is done by the author.
[42] Article 27, ICCPR.

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