

# International Human Rights Law (2022)

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## Introduction

This contribution discusses the developments that have occurred in the international legal practice of UN Treaty-based and UN Charter-based human rights supervisory bodies in relation to disasters during the year 2022.

In terms of general developments, this year was again plagued by various major disasters, including as exacerbated by climate change. One of the most catastrophic disasters was the massive flooding in Pakistan, inundating about one-third of the country's territory. The prolonged flooding caused thousands of deaths, tens of millions of people to be displaced, and billions of US dollars of damage to properties and the economy. UN Special Rapporteurs responded collectively by calling on UN Member States to act in solidarity and step up their international assistance to victims. States must ensure that 'international recovery efforts are guided by human rights law and standards'.<sup>1</sup> The Special Procedures also issued a communication to Pakistan separately in December 2022, warning the government that climate adaptation and disaster risk reduction activities must occur according to human rights standards too. This communication is discussed further below. The Treaty Bodies did not respond with guidance so far.

In 2022, several new reports about the COVID-19 pandemic were also issued, but these will not be discussed in this contribution.<sup>2</sup> Moreover, various calls for inputs were issued, suggesting further interesting developments in 2023, such as the ongoing drafting of a new General Comment on Article 11 of the

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1 OHCHR, 'Pakistan: UN experts call for more international solidarity with flood victims' (UN Press Release 11 September 2022), at <<https://www.ohchr.org/en/press-releases/2022/09/pakistan-un-experts-call-more-international-solidarity-flood-victims>> last accessed (as any subsequent URL) on 5 September 2023.

2 These reports will not be covered below, but see: HRC, 'Report of the UN Special Rapporteur on the Right to Development: COVID recovery plans and policies and the right to development' (6 July 2022) UN Doc. A/77/174; HRC, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: The coronavirus disease pandemic: lessons learned and moving forward' (20 April 2022) UN Doc. A/HRC/50/40; UNSG, 'Interim report of the Special Rapporteur on the right to food: the coronavirus disease pandemic' (18 July 2022) UN Doc. A/77/177.

Convention on Rights of Persons with Disabilities (CRPD) or the finalization of a new General Comment on Children's Rights and the Environment by the UN Committee on the Rights of the Child (CRC) in July 2023.<sup>3</sup> The latter's draft includes several references to disasters and adaptation as well, and the final version will be discussed in next year's section.<sup>4</sup>

In May 2022, the newly appointed Special Rapporteur on Climate Change and Human Rights, Mr. Ian Fry, began his mandate. His first report chiefly concentrated on the promotion and protection of human rights in the context of climate change mitigation, loss and damage, including due to climate disasters, and participation. The report stresses different types of loss and damages from 'climate-related disasters', including physical, economic and non-economic damage, such as displacement.<sup>5</sup> The report is thus comprehensive that it will not be discussed in full here. In 2023, Mr. Fry shall continue with a focus on 'climate displacement' and 'climate litigation', following many other Special Procedures which discussed displacement due to climate change-related disasters in 2022 (see section 3).

It is anticipated that the mandate of *all* UN monitoring bodies will be bolstered in environmental matters by another milestone development in 2022, notably: the endorsement of the international human right to a clean, healthy and sustainable environment in UN General Assembly Resolution 76/300 of July 2022.

## 1 Adoption of Two New General Comments: CESCR on Land Rights and CEDAW on Indigenous Women and Girls

In 2022, two new general comments were adopted by UN human rights treaty bodies, each with possible relevance to the topic of disasters. However, both

3 E.g., the UN Special Rapporteur on the Right to Food has asked for inputs for a report about the impact of COVID-19 on the right to food, see <<https://www.ohchr.org/en/calls-for-input/2022/call-input-impact-covid-19-right-food>>. The UN Special Rapporteur on Climate Change and Human Rights has asked for inputs for reports on climate displacement and climate legislation and climate litigation, see <<https://www.ohchr.org/en/specialprocedures/sr-climate-change>>.

4 CRC, 'Draft General Comment No. 26 (202x) on Children's Rights and the Environment with a Special Focus on Climate Change' (2022) paras. 33, 37, 48, 50–51, 75, 86, 104–107.

5 His first report: UNGA, 'Report of the UN Special Rapporteur on Climate Change and Human Rights: Promotion and protection of human rights in the context of climate change' (26 July 2022) UN Doc. A/77/226.

general comments discuss disasters only indirectly or to a rather limited extent. In line with a general trend in UN human rights law practice, there is a heavy focus on climate change.

For example, CESCR General Comment No. 26 on Land and Economic Social and Cultural Rights does not include a reference to ‘disasters’ as such, but notes that land degradation due to climate change, environmental degradation and desertification is a major factor affecting the enjoyment of land rights and land-related human rights, such as the right to food or water.<sup>6</sup> In addition, a special section on climate change briefly notes the impacts on access to land of different climate-related events, e.g. sea-level rise, droughts, floods etc.<sup>7</sup> The General Comment affirms that States have legal obligations under human rights law to mitigate climate change in line with the Paris Agreement; to adopt adaptation measures; and to ensure that climate mitigation activities respect land rights (e.g. renewable energy projects). Amongst more novel guidance, is the duty to ‘register’ all those affected and to address impacts according to ‘maximum available resources’.<sup>8</sup>

CEDAW General Recommendation No. 39 on Indigenous Women and Girls more generally endorses the right to a clean, healthy and sustainable environment – which it ties to Articles 12 and 14 CEDAW.<sup>9</sup> It succinctly states on the content of this right that States should:

ensure that laws and policies related to the environment, climate change and disaster risk reduction reflect the specific impacts of climate change and other forms of environmental degradation and harm, including the triple planetary crisis [and that] Indigenous women and girls [should] have equal opportunities to meaningfully and effectively participate in decision-making [in these matters].<sup>10</sup>

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6 CESCR, ‘General Comment No. 26 on Land and Economic, Social and Cultural Rights’ (22 December 2022, UN Doc. E/C.12/GC/26, para. 2(d).

7 *Ibid.*, paras. 56–58.

8 *Ibid.*, para. 57.

9 CEDAW, ‘General Recommendation No. 39 on the Rights of Indigenous Women and Girls’ (26 October 2022) UN Doc. CEDAW/C/GC/39, paras. 60–61.

10 *Ibid.*, para. 61.

## 2 Views of the Human Rights Committee in *Billy et al. v. Australia* (Torres Strait Islanders Case)

A landmark decision on climate change adaptation was adopted in September 2022 by the Human Rights Committee in response to the *Daniel Billy et al.* case, also known as the *Torres Strait Islanders* case.<sup>11</sup> The case is also discussed by Passarini in this volume of the Yearbook from a perspective of rights and obligations related to Disaster Risk Reduction (DRR).

The case features complaints by Daniel Billy, Ted Billy, Nazareth Faud, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warria, who, on behalf of themselves and six of their children, argue that the Australian government has not been taking sufficient measures to protect them against climate change. The applicants are all part of an indigenous minority group that inhabits four low-lying islands of the Torres Strait Islands in Australia. They assert that due to a lack of mitigation and adaptation measures by the government, floods, sea-level rise, erosion, cyclones and tidal surges are affecting their lives, livelihoods and culture and traditional way of life. This leads to violations of the right to life (with dignity) under Article 6 ICCPR, the right to private life under Article 17 ICCPR, and cultural rights under Article 27 ICCPR, as well as the rights of children and generations to come under Article 24 ICCPR.

Focusing on the adaptation dimension of the complaint here, the islanders argue that Australia has failed to adequately implement an adaptation programme – in line with the Torres Strait Regional Adaptation and Resilience Plan 2016–21 – with the aim of ensuring long-term habitability of the islands and the safety of residents. While some adaptation works had been done, numerous requests for additional assistance and funding were unanswered, and local authorities allegedly are mostly taking a ‘triage’ approach to save endangered homes and infrastructure.<sup>12</sup> Therefore, the applicants claim that the authorities did not use ‘maximum available resources’.

This argument is of interest legally speaking, because the term ‘maximum available resources’ is typically a term used for the implementation of economic, social and cultural rights under the ICESCR, rather than the ICCPR. Australia in fact objected to its use.<sup>13</sup> The Committee did not respond to

11 Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3624/2019, *Daniel Billy et al. v. Australia* (21 July 2022) UN Doc. CCPR/C/135/D/3624/2019.

12 *Ibid.*, para. 2.7.

13 *Ibid.*, paras. 3.4, 6.10.

this argument either, but it more generally noted that the ICCPR's preamble supports attention to economic, social and cultural rights.<sup>14</sup> The Committee thus supports cross-fertilization between different bodies of human rights, i.e. the interpretation of the right to life (with dignity) in light of economic, social and cultural rights.

Amongst some of the relevant statements by the Human Rights Committee, it noted, firstly, that the human rights responsibilities of Australia are engaged (*now*, and not in the future) because all ICCPR States Parties have a

duty to avert devastating and future irreversible impacts on rights protected by the Covenant, including impacts caused by *existing* greenhouse gas emissions. [Therefore] protective measures must be initiated today. Climate change is a slow-onset process. Thus, a State party may violate its obligations before the worst effects occur. The authors' claims are based both on current violations and an imminent threat of violations. They already experience severe impacts from climate change, including disruption to their homes and family life. (...) The authors living on Boigu and Masig face a real prospect of displacement and loss of culture within the next 10 years unless urgent and significant action is taken to enable the islands to withstand expected sea level rise. (...) Such displacement can be prevented with reasonable adaptation and mitigation measures. If the State party's interpretation of imminence were followed, the authors would be forced to wait until their culture and land have been lost in order to submit a claim under the Covenant.<sup>15</sup>

The Committee thus accepted that human rights impacts were already felt now, and that States have individual obligations to act on climate change-related risks now, both through mitigation and adaptation activities.

In addressing the alleged rights violations, the Committee specifically considered the various sudden and slow-onset 'disaster' events experienced by the applicants, and the government's lack of or delay in the construction of adaptive infrastructure, such as seawalls. This lack of action, combined with the lack of justification or explanation thereof, was sufficient for the Committee to conclude that the government failed to 'discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family', thereby violating Article 17 ICCPR.<sup>16</sup> Similarly,

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<sup>14</sup> *Ibid.*, para. 8.4.

<sup>15</sup> *Ibid.*, paras. 5.2–5.3.

<sup>16</sup> *Ibid.*, para. 8.12.

on Article 27 ICCPR, the Committee noted that despite the completion or construction of several adaptation works on the islands, ‘the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors’ in relation to their cultural rights – who had begun communicating their concerns since the 1990s.<sup>17</sup> According to the Committee:

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 generations their culture and traditions and use of land and sea resources discloses a violation of the State party’s positive obligation to protect the authors’ right to enjoy their minority culture.<sup>18</sup>

Only in relation to the right to life, the situation arguably was not (yet) sufficiently serious to conclude that a violation of Article 6 ICCPR had occurred (so far). This was largely due to two reasons.

First, the negative impacts faced by the applicants so far supposedly did not meet the threshold of violating the right to life with dignity because the applicants did not indicate or manage to prove that they ‘faced or presently face adverse impacts to their own health or a real and 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’.<sup>19</sup> It is well known from the case of *Teitiota v. New Zealand* (the other climate case decided by this Committee in 2019) that the meaning of the ‘right to life with dignity’ has been interpreted rather narrowly by the Committee in its case law, despite the rather progressive phrasing of CCPR General Comment No. 36 (2018). Also in *Billy et al. v. Australia*, several committee members issued critique on this point, stating that the burden of proof is very high.<sup>20</sup>

Secondly, the Committee noted that in terms of *future harm* to the right to life, the timeframe of 10–15 years could still allow for adequate affirmative adaptive measures by the State party, including if necessary, through relocation, to protect applicants. This also follows the reasoning in the *Teitiota* case, that was much critiqued by several committee members and in literature. According to the Committee, Australia had already been taking some adaptive

17 *Ibid.*, para. 8.14.

18 *Ibid.*, para. 8.14, emphasis added.

19 *Ibid.*, para. 8.6.

20 See, especially, the partially dissenting Joint opinion by Committee Members Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin; the partially dissenting Individual opinion by Committee Member Hernán Quezada.

measures to reduce existing vulnerabilities and increase the resilience of inhabitants, and it could not conclude that the measures taken by the State party so far, or still planned ‘would be insufficient so as to represent a direct threat’ to the right to life with dignity of the applicants.<sup>21</sup>

The optimistic lesson is that a lack of adaptation measures can engage the human rights responsibility of the State under the ICCPR, and violate multiple human rights. In short, States have positive obligations to implement adaptative measures to protect life, private life and culture against sudden and slow-onset climate-related disaster events. However, for some rights, the thresholds may be high. The case is unique for its findings on Articles 17 and 27, which were not discussed in the *Teitiota*-case, and as such it is an important jurisprudential development.

### 3 Three Thematic Reports of UN Special Procedures on Rights of Women and Girls, Migration, Displacement, and Trafficking in a Context of Climate Change

Throughout 2022, three overlapping thematic reports submitted to the General Assembly and Human Rights Council by UN Special Procedures addressed the themes of migration and trafficking in a context of climate change – whether due to sudden-onset or slow-onset climate-related disasters or in relation to disaster risk reduction.

For example, the UN Special Rapporteur on violence against women and girls wrote a report on protection against violence in the context of the ‘climate crisis, environmental degradation and related disaster risk mitigation and response’.<sup>22</sup> Amongst other things, the report recommends States to strengthen their multi-sectoral approaches to disaster preparedness and resilience, e.g. by integrating measures for sexual and reproductive health care, access to legal aid, and access to psychosocial support in affected areas. It further highlights that risk mitigation for gender-based violence, with attention to intersectional vulnerabilities, must be integrated into ‘early warning, preparedness and disaster risk reduction strategies’.<sup>23</sup> Existing policies for response and adaptation to climate-related disaster risks must be evaluated and informed by a ‘gender risk

21 *Ibid.*, para. 8.7.

22 HRC, ‘Report of the Special Rapporteur on violence against women and girls, its causes and consequences: Content of the climate crisis, including environmental degradation and related disaster risk mitigation and response’ (11 July 2022) UN Doc. A/77/136.

23 *Ibid.*, paras. 75, 79.

analysis' (e.g. in relation to shelter facilities, access to various forms of health care, family facilities etc.).<sup>24</sup> In turn, the UN Special Rapporteur on trafficking addressed the various 'gender dimensions' of human trafficking in the context of 'climate change, displacement and disaster risk reduction'.<sup>25</sup> She highlights that more attention should be paid to trafficking risks and that States have due diligence obligations to prevent trafficking in a context of climate change. Attention to trafficking should not only occur in the context of high-profile sudden-onset disasters, but also in relation to the slow-onset disasters that lead to 'loss of livelihoods, displacement, migration and increased poverty'.<sup>26</sup> Rapporteur Siobhán Mullally usefully stresses that:

addressing the everyday, less dramatic consequences of climate change and environmental degradation requires structural policy changes and sustained attention to the requirements of a just transition, including respect for fundamental labour rights and principles, expanded social protection, implementation of socioeconomic human rights, and effective protection of international human rights law.<sup>27</sup>

The report ends with several examples of 'promising practices', e.g. in Mozambique, the Philippines, Vanuatu, Bangladesh, Kenya, Nigeria or Peru. The three reports are closely aligned, and indeed, the UN Special Rapporteur on Rights of Migrants similarly issued a report on 'the impact of climate change and the protection of the human rights of migrants'.<sup>28</sup> This report starts by comprehensively charting the current (lack of) international legal frameworks for cross-border climate displacement, and concludes there are still 'insufficient pathways' for safe and legal climate-driven migration in place, as well as a lack of understanding of drivers of migration. This is a conclusion shared by the Rapporteur on Trafficking, who also stresses that States should 'expand access to regular migration routes and pathways to residence and citizenship for victims of trafficking'.<sup>29</sup>

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24 *Ibid.*, paras. 80, 82.

25 HRC, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children: Gender Dimensions of Trafficking in Persons in the Context of Climate Change, Displacement and Disaster Risk Reduction' (22 July 2022) UN Doc. A/77/170.

26 *Ibid.*, paras. 2–3.

27 *Ibid.*, para. 3.

28 HRC, 'Report of the Special Rapporteur on the human rights of migrants: the complex relationship between climate change, human rights and migration' (19 July 2022) UN Doc. A/77/189.

29 HRC, A/77/170 (n 25) paras. 11, 57.



The Rapporteur on Rights of Migrants further similarly stated that while sudden-set climate disaster may ‘displace large numbers of people for a relatively short period of time’, slow-onset climate disaster may fuel displacement permanently and in less ‘headline-grabbing ways’.<sup>30</sup> Although migration may be an important adaptation strategy, it can also lead to pressure on human rights enjoyment without safe and accessible migration options. The report ends with several observations on ‘prevention, protection and assistance’ in the context of cross-border (climate) displacement, and a call to expand and diversify the options for safe and orderly migration. The report is rather comprehensive and, similar to the others, worth a close reading. It includes a summary of remarkable recent climate-displacement-related litigation, legislation and other facilities, e.g. in Italy, Vanuatu, Switzerland, Mexico, Germany, Ecuador, Brazil, Fiji and New Zealand. This report’s recommendations are to a large extent echoed by the other two rapporteurs as well.

As aforementioned, the new UN Special Rapporteur on Human Rights and Climate Change intends to place a major focus on the theme of climate-related displacement too, both internally and cross-border, in the first year(s) of this mandate: several further reports by Mr Ian Fry on this topic are anticipated in 2023.<sup>31</sup> It may be hoped and anticipated that his reports will build on the existing work of other rapporteurs and propose further solutions, thereby acting as a catalyst for additional legal development.

#### **4 Thematic Report of the UN Special Rapporteur on Contemporary Forms of Racism on Environmental Degradation, including Climate Change**

In October 2022, the UN Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, highlighted the racially discriminatory and unjust roots and consequences of environmental degradation, including climate change, in a new report.<sup>32</sup> The report stresses the need to acknowledge systemic racism in rights-based action in order to protect

<sup>30</sup> HRC, A/77/189 (n 28) para. 37.

<sup>31</sup> See e.g. UNGA, ‘UN Special Rapporteur on Human Rights and Climate Change: Providing legal options to protect the human rights of persons displaced across international borders due to climate change’ (18 April 2023) UN Doc. A/HRC/53/34; another one is anticipated, with a call for inputs open at the time of writing.

<sup>32</sup> HRC, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Ecological Crisis, Climate Justice and Racial Justice’ (25 October 2022) UN Doc. A/77/549.

people better against environmental degradation and various types of disasters. This latest report chimes in with the report on environmental racism adopted by the Working Group on People of African Descent, covered in last year's section of the Yearbook.

The new report notes that certain populations have been rendered exceptionally vulnerable to climate disasters and other disasters due to structural exploitation and marginalization by more powerful actors. Those affected include indigenous peoples, people living in Small Island Developing States and people living in Central America and the Caribbean, i.e. where populations have suffered from deadly histories of 'intervention, neoliberal coercion and unequal relationships between Latin America and military superpowers'.<sup>33</sup> The report also notes that certain marginalized groups, including Roma people in Europe, tend to live near heavily polluted or hazardous waste sites, or in areas that are highly prone to (climate) disasters. The rapporteur notes that environmental racism and climate injustice, paradoxically, can manifest both in the inability to flee contamination hotspots or areas of escalated natural disaster risk as well as in 'forced displacement', i.e. when people feel compelled to move out of danger zones against their will and there are no other options available.

Amongst more fundamental critiques and recommendations made by this rapporteur, is that Eurocentric views of 'nature' still dominate international legal thinking, leaning to more anthropocentric, commercial and technocratic perspectives on humans' relationship with their environment. According to the rapporteur, large parts of international law 'continue to exclude the worldviews of other peoples'. This, in itself, is a form of 'epistemic imperialism' that raises serious 'racial justice' issues within the fundamentals of international legal order.<sup>34</sup> Yet, according to the report solutions to tackle ecological crises and disasters should not be found in 'localist' approaches solely: 'global approaches to adaptation, mitigation and loss and damage' are certainly needed too. However, these 'must be shaped by and responsive to grass-roots organizations and networks of racially, ethnically and nationally marginalized groups which are on the front lines of the global ecological crisis'.<sup>35</sup>

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33 *Ibid.*, para. 30.

34 *Ibid.*, para. 74.

35 *Ibid.*, para. 75.

## 5 Thematic Report of the UN Special Rapporteur on the Right to Adequate Housing on Just Transformations: Adequate Housing and the Climate Crisis

In December 2022, the UN Special Rapporteur on the Right to Adequate Housing adopted a thematic report that set out various different facets of ensuring the right to adequate housing in a context of ‘climate crisis’.<sup>36</sup> It refers to the concept of ‘resilience’ several times and more generally acknowledges that climate-induced disasters affect the right to housing deeply. The rapporteur ambitiously notes that improving resilience to climate disasters will require better

systemic and integrated urban and rural planning at the national and local levels that fully integrates climate change, disaster risk reduction, location of services and infrastructure, planning for transit, green space, vegetation, the mitigation of heat islands, water and waste management, net-zero building codes and resilience.<sup>37</sup>

This applies ‘especially in relation to the informal city’. In addition to this comprehensive statement, urban planning must be based on (rights-based) ‘risk assessment, mapping and resilience planning, to ensure buildings can withstand changing weather conditions and to minimize the need for rebuilding and repair in the aftermath of climate-induced extreme weather events’.<sup>38</sup>

The report further acknowledges that victims of climate-induced disasters may face considerable delays in the reconstruction of housing. As a result, they are forced to live in temporary shelters for extended periods of time. Moreover, rehabilitation may slow down as climate-induced disasters become more frequent, leading to a vicious cycle. The report also notes that housing-related losses in the aftermath of disasters are often not met adequately or timely, even in developed countries. This may be due to delays in obtaining disaster relief funding; vast inequalities in the resources that different countries and regions can mobilize after extreme weather; or poor levels of insurance for

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36 HRC, ‘Report of Report of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context: Towards a just transition: the climate crisis and the right to adequate housing’ (23 December 2022) UN Doc. A/HRC/52/28.

37 *Ibid.*, para. 48.

38 *Ibid.*

disaster events. Indeed, the rapporteur points out that insurance coverage in most developing and emerging economies is even well below 10 per cent, and that climate change is rapidly becoming an ‘insurability crisis’.<sup>39</sup> This will lead to major insecurities amongst affected populations and large burdens on the State to protect its population.

The report further reiterates that post-disaster reconstruction may favour elites and promote privatization of housing or land grabs: planning decisions are frequently ‘driven by the financial interests of developers’.<sup>40</sup> A rights-based approach would require and intends to ensure that community participation occurs, especially of marginalized communities, and would recognise the collective agency of residents in shaping the future of their cities. In addition, ensuring increased security of tenure of residents, both in rural and urban informal settlements, including as based on ‘customary land tenure rights’, is expected to equip affected societies better to withstand the impact of climate-induced events.<sup>41</sup>

## 6 Communication of UN Special Procedures on the Human Rights Impact of Oil Spills on the Callao Maritime Coastline

On 3 March 2022, the UN Special Procedures on human rights and transnational corporations, healthy environment, toxic wastes and the right to food jointly issued communications to the governments of Spain, Peru and the Netherlands and to companies Repsol S.A, Repsol Peru B.V and the Refinery La Pampilla S.A.A.<sup>42</sup> It concerned the human rights impact of oil spills on the Callao maritime coastline, occurring at the facilities of the La Pampilla S.A.A. Refinery (Relapasa), a subsidiary of Repsol Peru B.V., forming part of the Spanish Repsol group, and domiciled in the Netherlands.

The communications addressed the oil spill of over 11,900 barrels of crude oil from a tanker during the unloading of the oil. According to the Peruvian government, the spill would affect at least 180 hectares of beach and coastline and 713 hectares in the sea; contaminate land, surface groundwater and sediments; and ultimately affect an estimated 1,000 local fishermen directly and leave local farmers and communities without local food. The long-term effects

39 *Ibid.*, para. 20.

40 *Ibid.*, paras. 48, 72(e)

41 *Ibid.*, paras. 25, 48.

42 OHCHR, ‘Joint Communication of UN Special Procedures of the Human Rights Council on human rights and business, the environment, food and toxic wastes’ (3 March 2022) UN Docs JAL PER 3/2022; NLD 3/2022; ESP 2/2022; OTH 13/2022; OTH 14/2022; OTH 15/2022.

of heavy metals on the wider ecosystem were also cited because the contamination would make the consumption of fish and other marine resources dangerous for many years, with impacts on the wider marine food chain. Similarly, concerns were raised about the formal and informal livelihoods of many local workers depending on tourism for income.

The situation led the Ministry of Health to declare an environmental emergency in the coastal marine area for 90 days. It approved an immediate and Short-Term Action Plan to organise clean-ups. Yet, the communication also points out that 'despite the clean-up measures carried out at the local level', national supervisory bodies allegedly focused too much on taking supervisory and punitive measures against the company, rather than on the implementation of actual measures to contain the spread of the spill, or any remedial actions and identification of the social, economic, cultural and humanitarian impacts.<sup>43</sup>

The communication is of interest because it shows the great difficulty of pinpointing and distributing (rights-based) responsibilities amongst different private and public actors in a context of 'industrial' disaster risk management. The Special Procedures note in some detail how parties involved have been pointing to each other in terms of not taking up sufficient responsibility for risk management and disaster response, whether in relation to different parts of the oil shipment process or the immediate response phase. The communication also details how incorrect or untransparent communication about the situation, by different parties, hampered the response to the spill. The Special Procedures did not respond in great detail to these complexities but highlighted the different responsibilities of public and private entities under different treaties and the UN Guiding Principles on Business and Human Rights. Moreover, they drew attention to the right to life with dignity, which 'depends, *inter alia*, on the measures taken by States parties to preserve the environment and protect it from damage, pollution and climate change caused by public and private actors'.<sup>44</sup>

In addition, the Special Procedures cite a document that has not often been discussed in a disaster law context yet, i.e. the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.<sup>45</sup> This document was adopted by the UN General Assembly in 2018 and recognizes that

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43 *Ibid.*, p. 4 of all communications.

44 *Ibid.*, p. 11 of all communications; this also refers back to HRC General Comment No. 36 (2018) on the Right to Life.

45 UNGA, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (adopted by the Human 17 December 2018) UN Doc. A/RES/73/165.

peasants 'suffer from the burdens caused by environmental degradation and climate change'. According to Articles 14 and 18 of the Declaration 'peasants and other people in rural areas have the right not to use or to be exposed to hazardous substances or toxic chemicals', as well as 'the right to the conservation and protection of the environment and the productive capacity of their lands, and of the resources that they use and manage'. States 'shall take appropriate measures' to ensure that 'a safe, clean and healthy environment' is enjoyed. Article 16 further states that 'States shall take appropriate measures to strengthen the resilience of peasants and other people working in rural areas against natural disasters (...)' and guard against arbitrary or unlawful deprivation of land in times of disasters.

Although this declaration is non-binding, it is formulated in strong treaty language ('shall'). As such it constitutes a comprehensive and authoritative new legal instrument for the protection of the human rights of peasants, subsistence farmers, as well as more generally, people working in rural areas. The declaration was also cited in the communication discussed in the next section.

## 7 **Communication on the Human Rights Impacts from Four Spills of Toxic Substances from the Veladero Mine from 2015 to 2022 in the San Juan Province in Argentina**

This communication was issued in September to Argentina, Canada and China and three companies related to the operation of the Veladero mine in Argentina, a polymetallic deposit containing high levels of mercury and using cyanide for the extraction process of gold and silver.<sup>46</sup> It raises a range of issues in relation to the occurrence of four separate spills from the mine that affected about 24,000 people living in the Rodeo and San José de Jáchal communities downstream from the mine. Some of the spills reportedly were described as the 'worst environmental mining disaster in Argentina's history', leading to fines of up to US\$10 million. After the latest spill, measurements suggested that levels of arsenic, lead, mercury, aluminium and manganese were extremely high, i.e. tenfold or even hundredfold above World Health Organization (WHO) and Argentinian drinking water standards. The spills allegedly also raised issues about compliance with the Minamata Convention on Mercury, including its

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46 OHCHR, 'Communication of the UN Special Procedures on human rights and toxic wastes, human rights and business enterprise, and human rights and environment' (16 September 2022) JAL ARG 2/2022; CAN 4/2022; CHN 7/2022; OTH 86/2022; OTH 87/2022; OTH 88/2022.

obligations to identify and protect populations at risk of negative health effects. This shows again how the UN Special Procedures ‘systemically’ consider the relevance of other applicable international agreements, such as multilateral environmental agreements.

This communication is of interest because at face value it makes an effort to emphasize both the impacts on the *community* and the *environment*, or *ecosystems*. It is noted that the mine is actually located in a protected nature reserve created under the ‘Man and Nature’ program of the United Nations Educational, Scientific and Cultural Organization (UNESCO). In this area, ‘only low-impact human activities or activities with controlled impacts in time and space are allowed’. This is evidently not the case in case of the mine, and the communication notes that the spills affected ‘the preservation and conservation of the San Guillermo Biosphere Reserve’ and altered ‘the balance of the ecosystems in the reserve’.<sup>47</sup>

Yet, a closer reading reveals that the impacts on the *environment* are largely explained by reference to their impacts on the *human beings* living in the community, e.g. through food chain contamination or problems with crop irrigation. This communication was not seized to develop a more *eco-centric perspective* on harms caused to sensitive environmental/ecological areas, that could have been advanced or pioneered as well, e.g. keeping in mind possible interpretations of the right to a healthy, clean and sustainable environment. Indeed, the communication notes more generally that the spill

severely affect[s] the right to life, the right to the highest attainable standard of health, the right to food, the right of access to information, the right to environmental justice, the right to safe drinking water, the right to work and safe working conditions, and the right to a clean, healthy and sustainable environment free of toxic substances.<sup>48</sup>

The communication did ask for more information about authorities’ plans to ‘prevent the recurrence of an ecological disaster’ at the hands of companies, and otherwise stressed, somewhat vaguely, that ‘hazardous substance spills require human rights-based responses with a differential approach’. This includes ‘comprehensive accountability and reparation mechanisms on the part of the State and the company, as well as prevention measures and guarantees of non-repetition’.<sup>49</sup> In addition, the rapporteurs noted that

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47 *Ibid.*, p. 2 of all communications.

48 *Ibid.*, p. 5–6 of all communications.

49 *Ibid.*, p. 5 of all communications.

the spill undermines international cooperation 'for the conservation of sites of particular natural and cultural significance' by the international community, through UNESCO.<sup>50</sup> See for critiques of a human or anthropocentric, rather than more eco-centric views of nature in international (human rights) law, section 4.

## 8 Communication on Recovery of Displaced Populations from Hurricanes Eta and Iota in Colombia

This joint communication concerns the humanitarian and environmental crisis suffered by the Raizal people of the islands of Vieja Providencia and Santa Catalina, an Afro-descendant people, after subsequent category 4 and 5 hurricanes Eta and Iota struck these islands in November 2020.<sup>51</sup> Nearly two years later, about 5,000 people reportedly still urgently need help with affected basic needs, including accommodation, health care, water, sanitation and food. Almost 95% of Providencia's infrastructure, houses and its only health center were destroyed.

This communication notes that the Colombian government had known about the hurricane risk a week in advance, but failed to alert the population and prepare an immediate evacuation strategy to help the most vulnerable residents. It was also known that the area lacked sufficient emergency shelters, and did not apply adequate building codes. Moreover, the rapporteurs noted that the government's reconstruction efforts have not taken into account the aspirations and recommendations of the Raizal people and their authorities, i.e. ignoring their way of life and their customs, as well as the climate of the islands. This led to the construction of inadequate housing and the Raizal taking the rebuilding of homes into their own hands. An example is the construction of model homes with inadequate water collection systems, exposing the water supply to future disaster events and misaligning with the Raizal's tradition and spirit of self-sufficient living in harmony with nature. The communication also notes that increasingly severe weather events due to climate change have been long anticipated and widely known.

Due to the poor adaptation of the new houses to the climatic conditions of the islands, the situation allegedly remains critical and carries the risk that

50 *Ibid.*, p. 5–6 of all communications.

51 OHCHR, 'Joint Communication of UN Special Procedures of the Human Rights Council on Housing, Health, Internally Displaced Persons, Food, Cultural Rights, Climate Change and African Descent to Colombia' (15 November 2022) UN Doc. JAL COL 11/2022.



the people concerned will move again and become homeless when the next hurricane hits. The communication details concerns about the right to water, the right to food and livelihoods, the right to self-determination and the right to participate. It specifically stresses the right to health, including due to the 'mental health crisis in the Raizal community' as a result of the 'precarious housing, food and water situation, and the lack of psycho-social assistance'.<sup>52</sup> The communication additionally refers to the right to life and the right to a healthy environment, but the relevance of these rights is not explained in detail.

In September 2022, the Colombian Constitutional Court allegedly also ruled that similar rights were violated in its judgment T-333 of 2022, which ordered government agencies to implement certain rehabilitative measures over a period of 15 days to 4 months.<sup>53</sup> The United Nations communication was issued in November 2022, thus, supposedly before the expiry of all these dates. The communication is not clear on the fact whether the government has been too late in implementing certain measures, or whether additional enforcement remedies may be available at the national level if the government fails to implement the judgement. Because the communications of UN Special Procedures do not require the exhaustion of local remedies, it is possible that the Rapporteurs address the government separately and thereby offer international legal guidance as national procedures are ongoing.

Lastly, another aspect that this communication specifically stresses, is the failure to rebuild the health facilities on the islands, especially during times of COVID-19, and leading to the inability to provide mental health care. It states that reconstruction of the hospital after these disasters must be a 'priority', recognizing the link between access to health care services and disaster events. The occurrence of a second wave of 'health disaster' after major disruptive events played also a major role in concerns about the Pakistan floods, which is addressed in the next section.

## 9 Communication on Climate Adaptation Measures in Karachi, in Light of the Major Climate-Related Floodings in Pakistan in 2022

In December 2022, the UN Special Procedures on the right to housing, health, extreme poverty, IDPs, women and girls warned that forced evictions and home demolitions along Karachi's watercourses in Pakistan in the name of climate

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<sup>52</sup> *Ibid.*, p. 7.

<sup>53</sup> *Ibid.*, p. 9.

adaptation must be stopped. They have been carried out without consultation of affected persons and without any 'rehabilitation plan' or adequate, targeted compensation. Above all, they are carried out at a time when the wider population is severely affected by the effects of the catastrophic monsoon floodings, e.g. through homelessness, extreme poverty and lack of access to basic services, including health services.<sup>54</sup>

This communication follows a set of earlier warnings to the Pakistan Government about ongoing forced evictions and demolitions along two of Karachi's Gujjar and Orangi watercourses, reportedly 'carried out in an untransparent manner without any consultations with the affected populations, with little to no notice to the affected residents, with no regard for different degrees of tenure they may hold, and with disparate provisions for redress and compensation'. It also raised concerns about the risk of extreme poverty and homelessness that the people affected by those forced evictions and demolitions faced. The contested forced evictions and demolitions were allegedly carried out to implement an order of the Pakistan Supreme Court issued on 12 August 2020. Among other things, it instructed the National Disaster Management Authority to ensure that all encroachments in and around the watercourses would be removed as an act of risk reduction. These activities started taking place in January 2021, after the devastating flooding of the city during the monsoon season of 2020.

The current communication specifically responds to the uncharacteristically heavy monsoon rains occurring from mid-June to September 2022, leading to floods across the country that reportedly resulted in over 1,600 deaths, over 12,850 injuries, 7.9 million displaced and over 2 million houses damaged or destroyed. The living situations of those affected are severely dire and unsanitary, with many health facilities affected, underlying determinants of health impaired, and cases of vector-borne and water-borne diseases breaking out, as well as people and children suffering from diarrhoea and malnutrition, and women being unable to access reproductive health services. The situation thus effectively led to a 'health disaster' as well, described by the WHO and media as the 'second (wave of) disaster'.<sup>55</sup>

The communication further describes the 'multiplier effects' of climate change, by noting that the precarious living situation of those informally inhabiting the watercourses in part stems from urban migration as a coping

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54 OHCHR, 'Joint Communication of UN Special Procedures of the Human Rights Council on housing, health, internally displaced persons, poverty and women and girls to Pakistan' (22 December 2022) UN Doc. JAL PAK 7/2022.

55 UN News, 'Pakistan: To avert 'second wave of death', UN raises funding appeal to \$816 million' (4 October 2022) <<https://news.un.org/en/story/2022/10/1129177>>.

mechanism for climate change that is affecting livelihoods in rural areas. As such, climate change is compounding Karachi's housing crisis in multiple ways.<sup>56</sup>

Although the Special Procedures recognize the 'enormity' of the challenges facing Pakistan, and that this country is only minimally responsible for climate change, it also recalls its previous guidance on rights-based adaptation, in that:

when communities are particularly vulnerable to the effects of climate change and climate change-related disasters, such as those living on or near waterways and shorelines, priority should be given to adaptation measures to preserve existing communities and States must consult with residents to identify the measures needed for their protection. (...) Resettlement and relocation should only be considered when strictly necessitated by the unsustainability of maintaining human settlements in at-risk zones.<sup>57</sup>

Amongst the requests for further information about the situation, the communication asks Pakistan to share information about any 'human-rights impact assessments' that may have been carried out in relation to the contested climate change adaptation measures, and the manner in which adaptation measures are integrated with other policy domains, such as housing or poverty reduction. This suggests that climate adaptation measures must be accompanied by human rights impact assessments and be integrated with other policy domains, as suggested by the UN Special Rapporteur on Housing as well (see section 3). Pakistan has not (yet) responded to the communication.

## 10      **Communication by UN Special Procedures on Prolonged Effects of the Collapse of a Dam in Attapeu Province in Laos**

Finally, this communication, by the UN Special Procedures on human rights and extreme poverty, human rights and business, environment, right to housing, human rights defenders, internally displaced persons, and water and sanitation, follows up on a situation that already received scrutiny to a communication issued to several countries and companies in 2020. This time, the communication was issued to Laos, Japan, South Korea, Thailand, Singapore and the United States of America, as well as over 20 different companies and

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<sup>56</sup> OHCHR, JAL PAK 7/2022 (n 54) 5.

<sup>57</sup> *Ibid.*

financial institutions (banks) domiciled in these countries, or otherwise working in Laos or affiliated with aforementioned countries.<sup>58</sup>

The communications of 2022, largely similar in language, drew attention to the prolonged impacts of the collapse about four years later. Many survivors who became internally displaced still have no access to satisfactory, long-term housing and there is little transparent and consistent involvement of the affected communities during the recovery stage. According to the rapporteurs, 'the lengthy delays in providing survivors with long-term accommodation, leaving them stranded in unsuitable and unsanitary temporary shelters' violate people's rights to housing and health. There is also limited support and compensation, and 'no effective complaint mechanisms', as well as a lack of an inquiry procedure. In addition, 'irregularities in providing allowances, compensation money and rice, along with the reported suspension [of payment of living allowances] negatively affect the rights to food and an adequate standard of living. According to the information received, '[c]ommunities also seem reluctant to voice their concerns for fear of retaliation, in the form of losing their compensation or even being arrested for criticizing the government'. One human rights defender working on justice for victims of the collapse reportedly was given a prison sentence of five years, for critically speaking out on social media.<sup>59</sup>

The importance of insurance and liability coverage for disaster scenarios was already mentioned in section 3. This communication also makes some relevant observations on survivors' access to relevant support schemes. It states that most affected people allegedly are unaware that relevant 'insurance coverage exists and have received no information as to whether they have a right to make any claims' for insurance that might arise from a liability scheme arranged by AON Thailand (the dam project's insurance advisor) or from liability coverage provided for the project and related activities by different insurance groups.<sup>60</sup> The various parties involved, including the Lao government, are asked to provide more information about how 'the right to adequate housing of all affected persons that have lost housing, irrespective of their pre-disaster tenure status and without discrimination of any kind' will be ensured, including by implementing the 'right to compensation and to equal access to adequate housing, i.e. housing that fulfils the requirements of

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58 OHCHR, 'Joint Communication of UN Special Procedures of the Human Rights Council' (15 July 2022) UN Doc. JAL LAO 1/2022; KOR 3/2022; SGP 6/2022; THA 1/2022; USA 12/2022, etc.

59 *Ibid.*, p. 3 in all communications.

60 *Ibid.*, p. 4 in all communications.

accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, access to essential services and safety’<sup>61</sup>

Specifically, information was asked about whether there is ‘an established insurance claims process through which affected people can receive compensation payments’ and how people can obtain a remedy via that process. In case there is no insurance claims process, parties are asked to explain why not. Additional information is also requested on the availability of relevant grievance mechanisms and the steps taken to ‘monitor and ensure that donations, supplies, and compensation payments reach their intended recipients; that payments are paid on a consistent schedule; that estimates of the damage incurred and actual compensation received by affected communities are consistent; and the application of certain processing fees are legitimate’.<sup>62</sup>

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61 *Ibid.*, p. 6 in all communications.

62 *Ibid.*