

# Bonavero REPORTS

2/2022 | 29 NOVEMBER 2022

## Amicus Curiae Brief by Professor Martin Scheinin in the Case of 'Daniel Billy et al. (Torres Strait Is- landers) v. Australia' by the UN Human Rights Committee

---

Professor Martin Scheinin, British Academy Global Professor,  
Bonavero Institute of Human Rights

---



Bonavero  
Institute  
of Human  
Rights





## **ABOUT US**

The Bonavero Institute is a research institute within the Faculty of Law at the University of Oxford. It is dedicated to fostering world-class research and scholarship in human rights law, to promoting public engagement in and understanding of human rights issues, and to building valuable conversations and collaborations between human rights scholars and human rights practitioners.

Since opening in October 2017, the Institute has been housed in a new building at Mansfield College. The Institute's home at Mansfield is central to its identity as inclusive and welcoming and is an important factor in the Institute's ability to attract scholars and to host important symposia and conferences. The Bonavero Institute seeks to ensure that the research is of contemporary relevance and value to the promotion and protection of human rights.

As part of its mission, the Institute has nurtured a vibrant community of graduate students, hosted outstanding scholars of law and other disciplines, and collaborated with practitioners engaged in the most pressing contemporary human rights issues around the world. The Bonavero Institute adopts a broad definition of human rights law to include international human rights law and practice, domestic human rights, the rule of law, constitutionalism, and democracy.

The Bonavero Reports Series is the flagship outlet for the scholarship produced at the Institute. It presents cutting-edge research in a straightforward and policy-ready manner, and aims to be a valuable source of information for scholars, practitioners, judges, and policymakers alike on pressing topics of the current human rights agenda. For more information, please visit our website.



## **AUTHOR'S BIOGRAPHICAL NOTES**

Professor Martin Scheinin is a British Academy Global Professor at the Bonavero Institute of Human Rights, where his research project “Addressing the Digital Realm through the Grammar of Human Rights Law” will run from 2020 – 2024. Before joining the Bonavero Institute, Martin was Professor of International and Human Rights at the European University Institute, a position he had held since 2008. Martin has had extensive experience in international human rights law having served as a member of the UN Human Rights Committee from 1997 to 2004, as UN Special Rapporteur on human rights and counter-terrorism from 2005 to 2011 and as a member of the Scientific Committee for the EU Fundamental Rights Agency since 2018.



## EXECUTIVE SUMMARY

This Bonavero Report consists of an *amicus curiae* brief by Martin Scheinin, British Academy Global Professor at the Bonavero Institute, as submitted to the United Nations Human Rights Committee, the treaty body under the International Covenant on Civil and Political Rights, in the case of *Daniel Billy et al. v. Australia* (Communication No. 3624/2019). The case concerns adverse human rights impacts of climate change in the lives of indigenous Torres Strait Islanders.

The *Billy* case is the first successful international human rights case regarding states' treaty obligations regarding climate change. The complaint was declared admissible, and the state party Australia was found to have violated its positive human rights obligations under ICCPR Articles 17 and 27 regarding, respectively, the right to privacy, family and home, and the right of members of a minority – such as an indigenous people – to enjoy their own culture in community with other members of their group. The Committee's reasons for finding the violations overlapped, so that also the Article 17 violation was related "to the traditional indigenous way of life of the authors, who enjoy a special relationship with their territory" (see, paragraph 8.10 of the Committee's Final Views).

The *amicus curiae* brief by Professor Scheinin focused on the Article 27 claim and developed a line of argument according to which the *intergenerational right to transmit* from generation to generation a culture, such as an indigenous way of life with its associated livelihoods, ceremonies, and other traditions, constitutes a core aspect of the right to enjoy one's own culture. This interpretation of Article 27 including an intergenerational aspect was explained as having been implicit in the Committee's own jurisprudence and explicit in case law by the regional human rights courts in Africa and the Americas.

For the first time, the Human Rights Committee's Final Views in the *Billy* case came to include an explicit recognition of the intergenerational aspect of the right to enjoy one's culture, in that Australia was found to have violated "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” (final part of paragraph 8.14). The Human Rights Committee’s Views in the case (CCPR/C/135/D/3624/2019) can be found at the link:

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fD%2f3624%2f2019&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fD%2f3624%2f2019&Lang=en)



## **AMICUS BRIEF IN THE CASE OF *BILLY ET AL. V. AUSTRALIA* (15 September 2020)**

1. The Human Rights Committee, acting through its Special Rapporteurs on new communications and interim measures has on 12 August 2020 granted my request to submit a third-party intervention in the pending Optional Protocol case of *Billy et al. v. Australia* (Communication 3624/2019), concerning alleged violations of the Covenant by the State party Australia, related to the climate crisis and its impact upon the aboriginal communities and their individual members living on several of the Torres Strait Islands. Still on the same day, counsel to the eight authors, some of whom are acting also on behalf of their children, informed me that the authors had consented to sharing the documentation for the sole purpose of writing amicus curiae briefs for the Committee, and on the basis of confidentiality. I hereby commit myself not to disclose information on the Communication without the explicit permission of the Committee.

2. This amicus curiae brief does not seek to address all aspects of the case. Rather, it focuses on one specific issue, namely what will be here referred to as the *intergenerational dimension of the right of members of indigenous peoples to enjoy their culture, in community with the other members of the group*, as protected under article 27 of the Covenant. The position presented and defended in this brief is that it constitutes the correct interpretation of article 27 that this treaty provision includes, as a substantive dimension (or “attribute”) an intergenerational dimension that can be defined as follows:

*The current members of a minority group, typically an indigenous people, have the right individually and in community with each other, to enjoy the culture built and left behind by their predecessors, to develop it, and to transmit it to their successor generations now living and yet to be born.*

3. As the above formulation indicates, we are speaking of a legally binding and applicable human right of currently living individuals, exercised by them in community with other current members of the group and with strong



intergenerational attachment both to the past and to the future. We are not speaking of a potential or hypothetical moral right of future generations but *a legal right of persons living today to transmit their culture to those that come after them*, some of whom are living individuals of today. There is a violation of article 27 today, if members of the present generation are subjected to such hardship for their right to transmit their culture to the next generation that this hardship amounts to a “denial” under article 27. Such denial can take different forms, ranging from direct interference by the State party with the process of transmitting a culture, to its failure to provide adequate protection, including against known threats to the effective enjoyment of the right to transmit their culture to future generations, resulting from action by third parties or from natural hazards or other major changes.

4. It is well established that indigenous peoples fall within the scope of ICCPR article 27 as “minorities” despite often constituting also “peoples” for purposes of article 1. Hence, members of indigenous peoples (or of indigenous groups that would not constitute peoples for purposes of article 1) have the right to enjoy their own culture in community with other members of the group. The Committee’s General Comment No. 23 (1994) made it very clear that article 27 has a central role in protecting the rights of persons belonging to indigenous peoples (CCPR/C/21/Rev.1/Add.5, see, in particular, para. 7).

5. The syntax of article 27 suggests a certain symmetry, so that members of “religious” minorities have the right to profess and practise their religion, members of “linguistic” minorities have the right to use their language and members of “ethnic” minorities have the right to enjoy their culture. The implied link between ethnicity and culture suggests that the notion ethnic minority could very well be replaced by a reference to “cultural minority” in the text of article 27. In the interpretive practice under article 27, indigenous peoples have primarily been addressed as ethnic minorities seeking to enjoy their own culture. That said, there is no obstacle to an indigenous people identifying itself also as a religious or linguistic minority and claiming article 27 protections also on those grounds.



6. This amicus brief will build upon two well-established elements in the interpretation and application of article 27: (a) indigenous peoples fall under its scope of application, and (b) their traditional or otherwise distinctive way of life, including their relationship with lands and resources in a particular geographical area, and their nature-based or otherwise typical means of livelihood there, constitutes a culture for purposes of article 27. There is no need to revisit these themes here.

7. In the following, focus will be on a central but often more implied than explicitly articulated dimension of article 27, namely the intergenerational nature of culture. For instance, in the Committee's General Comment No. 23 there is no explicit reference to the right of current members of ethnic minorities to transmit their culture to new generations. That said, the General Comment and the Committee's case law under the Optional Protocol suggest that the intergenerational dimension of article 27 rights is *inherent* to the provision. Such a reading is justified, inter alia, of the opening phrase of paragraph 6.2 of the General Comment which affirms protection for "the ability of the minority group to *maintain* its culture..." (emphasis added). Further, final paragraph 9 of the same General Comment is clear in that the protection of article 27 rights "imposes specific obligations on States parties ... towards *ensuring the survival and continued development* of the cultural, religious and social identity of the minorities concerned" (emphasis added), a formulation that clearly recognizes the intergenerational dimension of the right, even if not employing notions such as "to transmit" or "future generations".

8. The likely reason why the intergenerational dimension of article 27 often is assumed and implied, rather than expressly articulated, is that the notion of "culture" itself is by definition intergenerational. Dictionary definitions of culture demonstrate this. For instance, the Merriam-Webster dictionary offers multiple definitions for culture, starting from "the customary beliefs, social forms, and material traits of a racial, religious, or social group" and then presenting others, including one that is explicit about the intergenerational dimension: "the integrated





pattern of human knowledge, belief, and behaviour that depends upon the capacity for learning and transmitting knowledge to succeeding generations.” Culture, for indigenous peoples, is about how, over generations, they have interacted with nature, cultivated the land and its resources and passed them on to subsequent generations, together with their continuously accumulating and evolving knowledge, customs and beliefs. This process of transmittal is at the core of culture, even conceptually.

9. While the intergenerational dimension of culture is by definition central in every ethnic community or culture, in a human rights context it is particularly important for indigenous peoples and their survival. Also in the age of modernity where most dominant populations have adopted cultural patterns that are less directly related to lands and their natural resources or to social practices related to them, indigenous peoples have retained and keep transmitting to new generations their own distinctive culture that continues to be nature-based and manifested in the continued collective practice of their traditional livelihoods, possibly in new partly modernized forms but nevertheless retaining their constitutive significance in preserving a way of life, a culture, also to future generations. Without such transfer of the livelihoods and associated cultural patterns to new generations, there no longer would be a culture that would distinguish an indigenous people from other, dominant, segments of society.

10. In the best known and widely accepted *José Martínez Cobo definition* of the notion of indigenous peoples, prepared in the 1980s in an extensive study for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the intergenerational dimension of culture not only is an essential core element of the right to enjoy one’s culture in community with other members of the group. It also is a conceptual element in the definition of the very notion of indigenous peoples:

Indigenous communities, peoples and nations are those which, having a *historical continuity* with pre-invasion and pre-colonial societies that



developed on their territories, consider themselves *distinct* from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and *transmit to future generations* their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

(E/CN.4/Sub.2/1986/7/Add.4, para. 379; emphasis added)

11. Here, indigenous peoples are defined by an intergenerational continuity of their culture from past, even ancient, generations (“historical continuity”) through a distinctive present-day culture to the transmission of this culture to future generations. These elements of the intergenerational dimension of indigenous people’s rights are also reflected in ILO Indigenous and Tribal Peoples Convention No. 169, article 1 (1)(b) (“who are regarded as indigenous on account of their descent... and who ... retain...”) and in article 29 (“imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully...”).

12. Since its adoption in 2007 by the General Assembly, the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) has informed the Committee’s understanding of indigenous peoples’ rights under article 27. The Committee implicitly referred to UNDRIP in the case of *Ángela Poma Poma v. Peru* (Communication 14457/2006), and has subsequently made such references explicit as evidenced by the cases of *Tiina Sanila-Aikio v. Finland* (Communication 2668/2015) and *Klemetti Näkkäljärvi et al. v. Finland* (Communication 2950/2017). UNDRIP is very clear about the intergenerational dimension of indigenous peoples’ rights, including their right to enjoy their own culture. The Preamble of UNDRIP refers to indigenous civilizations and cultures as constituting the common heritage of humankind and recognizes the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child. UNDRIP article 11 (1) proclaims



indigenous peoples' right to practise and revitalize their cultural traditions and customs, including "the right to maintain, protect and develop the past, present and future manifestations of their cultures". Further, UNDRIP article 13 (1) is explicit in recognizing the right of indigenous peoples "to revitalize, use, develop and *transmit to future generations*" their cultural expressions (emphasis added). Most importantly in the current context, UNDRIP article 25 reads:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to *future generations* in this regard. (emphasis added)

13. After the adoption of UNDRIP by the General Assembly and the Committee's adoption of Final Views in the three above-mentioned cases it is pertinent and justified that relevant UNDRIP provisions are explicitly referred to by the Committee also in the interpretation of the intergenerational dimension of article 27 rights. Hence, it would be pertinent for the Committee to refer to UNDRIP article 25 in the interpretation of the Covenant when resolving the case of *Billy et al. v. Australia*.

14. In substance, the intergenerational dimension of the right to enjoy one's own culture in community with other members of the group has always been present in article 27. It is inherent in the notion of culture and it is of particular significance in the application of article 27 in respect of indigenous peoples. In my own academic writing, I have used the typology of the right to the past, the right to the present and the right to the future to analyse indigenous peoples' rights. Here, the right to the future can be based on indigenous peoples' right of self-determination as peoples, on account of article 1 of the Covenant. But their "right to the future" also flows from their right to the present: "much of the securing of the sustainability of a distinctive culture is in its successful transmission to future generations" (as quoted from p. 162 of my own chapter in Francesco Francioni and Martin Scheinin, eds., *Cultural Human Rights*, Martinus Nijhoff 2008). The intergenerational dimension of



ICCPR article 27 rights has been affirmed also by other academic authors, including William Schabas, who in the 3rd revised edition of *Manfred Nowak's CCPR Commentary* (N.P.Engel 2019) closes the article 27 discussion on the right to enjoy one's culture with the conclusion that "an important aspect of enjoyment of a culture by a minority is *the ability to pass on this culture*" (page 828, emphasis added). James S. Anaya, in his book *Indigenous Peoples in International Law* (2<sup>nd</sup> edition, Oxford University Press 2004), gives special attention to the rights of indigenous children as informing *the norm of cultural integrity*, a central underlying theme in his discussion on indigenous peoples' rights (see, pp. 66-67 and 131-141).

15. Many of the Committee's earlier Optional Protocol cases under article 27 have involved an intergenerational dimension, even if not always articulated in explicit terms by the Committee. Several examples will be provided in the following paragraphs. In the already mentioned case of *Ángela Poma Poma v. Peru* the Committee was clear about the significance of the intergenerational dimension of article 27 rights when establishing a violation of that provision:

7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. In the present case, it is undisputed that the author is a member of an ethnic minority and that *raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child...* (emphasis added)

16. The intergenerational dimension of indigenous peoples' rights was central also in the Committee's finding of a violation in *Francis Hopu and Tepoaitu Bessert v. France* (Communication 549/1993), even if, due to the State party's declaration/reservation under article 27, the finding was made, not in relation to the complainants' status as members of a minority, but in respect of their



universally applicable human rights under articles 17 and 23. Reference is made to paragraph 10.3 of the Final Views.

17. The classic case of *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada* (Communication 167/1984) established a violation of article 27 due to the gradual destruction of the preconditions for the group's enjoyment of their distinctive culture based on hunting, fishing and other nature-based activities. The facts of the case are rich with evidence of the intergenerational dimension of indigenous peoples' rights, even if the Committee's finding of a violation of article 27 was formulated in generic terms. The importance of the intergenerational dimension in the case is, however, evidenced by the individual opinion of Committee member Nisuke Ando:

I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which *might cause irreparable damage to the environment of the earth that must be preserved for future generations* (emphasis added).

18. Further, even if the case of *Sandra Lovelace v. Canada* (Communication 24/1977) was presented and decided as pertaining to the rights of one individual to belong to her indigenous community, it revealed a wider issue with a strong intergenerational dimension, namely a woman's right to pass on to her children and thereby onto all future generations the membership of the group. There was no claim and hence no finding by the Committee of the latter issue but the Committee did in fact address the matter subsequently in the reporting procedure, under article 27 and confirming the centrality of the intergenerational dimension of the provision. When considering the fourth periodic report by Canada in 1999, the Committee stated in its Concluding Observations:

19. The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee's Views in the Lovelace case in July 1981, amendments were introduced to the



Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, *not subsequent generations, which may still be denied membership in the community*. The Committee recommends that these issues be addressed by the State party. (CCPR/C/79/Add.105, emphasis added)

19. Even if the recent case of *Ioane Teitiota v. New Zealand* (Communication 2728/2016) was not about article 27 rights, it should be mentioned here because the Committee's discussion under article 6 makes a very clear link between environmental degradation resulting from climate change and the relevance of the fate of future generations in assessing the human rights claims of today:

9.4 .... Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development *constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life*. (emphasis added, footnote omitted)

20. As this brief account of the Committee's earlier case law shows, the intergenerational dimension of the right of indigenous persons to enjoy their culture in community with other members of the group has been present in several of the cases and has had a decisive role in the finding of a violation in some of them. What is new in the pending case of *Billy et al. v. Australia* is that the intergenerational dimension of the alleged violation of article 27 is at the very heart of the case, to a degree that its assessment may be decisive not only for the merits of the case but also for the admissibility of the communication.

21. The Communication by *Billy et al. v. Australia* presents several claims of alleged violations of the Covenant, including the right to life (article 6) as the ongoing effects of climate change have affected, continue to affect and pose a threat of forced displacement of some of the world's most climate-vulnerable peoples, the



indigenous communities living on several islands in the Torres Strait. This amicus curiae brief focuses on issues raised by the Communication in respect of article 27 and in particular its intergenerational dimension. Clearly, this case is the most important one ever dealt with by the Committee in that respect.

22. The intergenerational dimension of article 27 is clearly addressed as part of the authors' main claim under article 27, presented at the outset of the section in paragraph 31 of the Communication. Here, the Communication quotes the witness statement of author Ted Billy: "If we have to move from this island... We won't be able to pass down to the younger generations our stories and history, about their culture." As the further substantiation of the claim then demonstrates, the authors' article 27 claim is not only about a foreseen and, if not prevented, unavoidable future violation of the Covenant but is also based on how environmental degradation resulting from the climate change has already by now affected the lives of Torres Strait Islanders: the graves of their ancestors have been destroyed and cannot be visited, culturally significant land has been lost to the sea, food gardens and buildings have been destroyed, culturally significant marine species have been depleted etc. All of these hardships already experienced have a strong intergenerational dimension, as the transmittal of the way of life of the indigenous peoples in question to future generations has greatly suffered. Displacement of the Torres Strait Islanders from their ancient home islands would of course put an end to their remaining capability of transmitting their culture to new generations. But, as the Communication and the witness statements appended to it demonstrate, the effects of climate change have already caused significant harm to the transmittal of the indigenous cultures in question to the next generation. As many of the witness statements demonstrate, these hardships have been going on already for at least ten years which entails that they have been affecting at least three generations and the transmittal of culture between them. As relevant background information, one should not ignore the fact that according to the State party's official statistics intentional self-harm (suicide) was already the second leading cause of death among Aboriginal and Torres Strait Islander males in 2018 (Australian Bureau of Statistics, 3303.0 - Causes of Death:



<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2018~Main%20Features~Intentional%20self-harm%20in%20Aboriginal%20and%20Torres%20Strait%20Islander%20people~4>.

The male suicide rate was alarmingly high already in the age bracket of 15-24 years-old males and peaked at 25-34 years, while for indigenous females it peaked at 45-54 years.

23. For instance, the witness statement by author Nazareth Faid includes a detailed account on how the natural resources and traditional forms of livelihood are the basis for cultural ceremonies, clothing and other artefacts, the preparation of food and dance all include and engage children, and are thereby important in transmitting a culture to them (see para. 15 of the witness statement). She states:

“We pass this culture down to our young ones. I speak from my perspective as a woman. I love my diving, hunting and gathering. I show the younger ones where to go and look for food, to go fishing and diving. I teach them gardening as well. This is becoming harder with changes in the weather and not enough rain.” (para. 18 of the witness statement)

24. To provide another example, the witness statement by Yessie Mosby provides a highly detailed description (in its paras. 42-59) of the cultural and ceremonial significance of two specific marine species, *mullet* and *dugong*, in the context of transmitting the culture to the new generation through significant rituals related to the child coming to a certain age. The same witness statement also demonstrates how central in the identity and way of life of the current adult generation is the significance of transmitting the culture to the future generations. A known threat of relocation in the future affects the enjoyment of the culture today (see, para. 89 of witness statement). As is explained in the Communication, many marine species have disappeared at one or the other of the islands in question (paras. 70-73 of the Communication), including dugong the cultural significance of which is depicted in the witness statement of Yessie Mosby.





25. The intergenerational nature of the alleged violations, even if partly presented in the context of article 24 of the Covenant, is very clear from the Communication and its annexes. The information presented by the authors demonstrates that climate change and various forms of environmental degradation caused by it, have already had significant adverse effect on the livelihoods, way of life and transmittal of culture to future generations, of the Torres Strait Islanders. The material as presented provides in my view a clear basis for assessing that the authors, acting on their own behalf and some of them on behalf also of their children, have demonstrated, for purposes of admissibility, their victim status and have substantiated, again for purposes of admissibility, that the hardship already experienced currently affects their enjoyment of their article 27 rights, including the intergenerational dimension of the right to enjoy one's culture related but not limited to the present-day right actively to transmit a culture to the members of the following generation. Therefore, my conclusion is that the Communication should be allowed to proceed to the examination of its merits, so that the Committee would assess the substantive arguments and responses by the parties.

26. Proceeding to addressing the merits of the Communication would be in line with regional human rights jurisprudence. Similar to the Committee, the African and Inter-American regional human rights courts have included the intergenerational nature of indigenous peoples' rights in their case law but have not yet decided cases where the claims by the applicants would focus on the intergenerational dimension. Their pronouncements in the matter have nevertheless been very clear.

27. In already a number of cases, the Inter-American Court of Human Rights has found violations of the American Convention of Human Rights, typically including the right to property (article 21) and the right to judicial protection (article 25), when there has been severe harm to the way of life and typical livelihoods or important natural resources of indigenous peoples. In the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay* (Judgment of 29 March 2006) the Court stated (emphasis added):



222. Similarly, the Court finds that the special meaning that these lands have for indigenous peoples, in general, and for the members of the Sawhoyamaxa Community, in particular (supra para. 133), implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations.

28. In the earlier *Case of the Yakye Axa Indigenous Community v. Paraguay* (Judgment of 17 June 2005) the Court held (emphasis added; footnotes omitted):

124. In its analysis of the content and scope of Article 21 of the Convention in the instant case, the Court will take into account, in light of the general rules of interpretation set forth in Article 29 of that same Convention, as it has done previously, the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its *transmission to future generations*, as well as the steps that the State has taken to make this right fully effective (supra para. 51).

131. Applying said criteria, this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and *preservation and transmission to future generations*.

203. Likewise, the Court notes that the special significance of the land for indigenous peoples in general, and for the Yakye Axa Community in particular (supra para. 137 and 154), entails that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at



risk of losing or suffering irreparable damage to their cultural identity and life and to the *cultural heritage to be passed on to future generations*.

29. Finally, in the already classic Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment of 31 August 2001) the Court established the interpretation that since then has been followed when it stated (emphasis added):

149... For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and *transmit it to future generations*.

30. From these judgments it is clear that the Inter-American Court has not addressed hypothetical or potential violations of members of future generations but has, instead, established an actual violation of currently living indigenous individuals and communities, with explicit reference to the intergenerational nature of indigenous peoples' rights. What has been established as already violated is the human right of members of the *current* generation to transmit their culture to *future* generations. This is exactly the claim that now is presented to the Human Rights Committee through the case *Billy et al. v. Australia*.

31. Also, one of the very first cases decided by the African Court of Human and Peoples' Rights, the case of the *Ogiek Community (Commission v. Kenya)* (Case No. 6/2012, Judgment of 26 May 2017) addressed the intergenerational dimension of the right to culture. In finding violations of, inter alia, articles 2, 8, 14, 17, 21 and 22 of the African Charter of Human and Peoples' Rights the Court made multiple references to the intergenerational dimension of indigenous peoples (see, paras. 103, 106, 155, 165 and 179 of the judgment).

32. The explicit recognition of the intergenerational dimension of the right to enjoy one's culture as part of the essential core of article 27 rights would not be an unforeseen change in the interpretation of the provision. The intergenerational



dimension is and has always been inherent in the very notion of “culture” and has widely been recognized, since the *Martínez Cobo* definition, as absolutely central for indigenous peoples’ rights. The fact that the Committee has not addressed the intergenerational dimension head-on in its earlier article 27 cases is simply a consequence of how the complainants have presented the facts and their claims. As any body of human rights adjudication, the Committee needs to be responsive in relation to the actual human rights claims made under the Optional Protocol by the complainants. What has now been presented to the Committee in the case of *Billy et al. v. Australia* requires that the Committee will explicitly address the authors’ claims that are of an intergenerational nature. This is particularly pertinent as they affect determinations of both the admissibility and the merits of the case.

33. Still in respect of the possible counter-argument that giving due attention to the intergenerational dimension of the case would come as an unforeseen surprise to the State party, it should be made clear that Australia is, since 1980, a State party to the Covenant, after having been an active participant in its drafting, and it has extensively engaged with the Committee over several decades. In the drafting phase of the Covenant, Australia did not object to the inclusion of the right to enjoy one’s culture in article 27, or to the very notion of culture entailing a strong intergenerational dimension. Where Australia, however, had an issue at that time was whether all of its indigenous peoples had a culture. In 1953 the Australian delegate at the Commission on Human Rights stated that:

There were, of course, the aborigenes but they had no separate competing culture of their own, for as a group they had only reached the level of food-gatherers (E/CN.44/SR.369 page 11).

34. Positions of this sort were not unique in the 1950s when the Covenant was being drafted. Today, such views are universally understood as incompatible with the Covenant. The fact that a State party may have held such views decades ago does not excuse it from today fully complying with article 27, the intergenerational dimension of which is inherent in the very notion of culture. Article 27 is binding



upon Australia, even if its diplomatic representatives 70 years ago assumed that it might not apply to the benefit of Australia's own indigenous peoples.

35. This amicus curiae brief has offered a proposition how what has been articulated above as the intergenerational dimension of the right of members of indigenous peoples to enjoy their own culture in community with other members of their group should be understood in the application of article 27 of the Covenant. As explained, this dimension of article 27 rights should be seen as an essential core element of the provision, as it is inherent in the very notions of culture and indigenous peoples. Having studied the Communication by *Billy et al. v. Australia* in the form of the documents submitted to the Committee, I take the view that this case represents the clearest opportunity so far presented to the Committee to address the intergenerational dimension of article 27. The claims presented in the Communication demonstrate that the authors do qualify as victims of alleged violations of the Covenant. They have substantiated an arguable claim of actual and ongoing violations of article 27, through detailed witness statements that evidence the hardship already suffered by the authors in respect of their Covenant rights. My conclusion is that the Committee's consideration of the Communication should proceed to hearing and assessing the arguments and responses of the parties on the merits.