



**Human Rights and Equal
Opportunity Commission**
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Background Paper

HUMAN RIGHTS AND CLIMATE CHANGE

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Table of Contents

Introduction.....	1
I. The Human Rights Dimensions of Climate Change.....	3
A Right to an Environment of a Particular Quality.....	3
The Right to Life	4
The Right to Adequate Food	4
The Right to Water	5
The Right to Health	6
The Rights of Indigenous Peoples.....	6
Human Security.....	8
II. Australia's Human Rights Obligations.....	9
International Law	9
Domestic Law.....	10
III. Upholding Australia's Human Rights Obligations in Climate Change Responses .	12
A Human Rights Response to Adaptation	12
A Human Rights Response to Aid for Overseas Adaptation Measures	16
A Human Rights Response to Disaster Management	18
A Human Rights Response to 'Climate Change Refugees'	21
Conclusion	24
Bibliography.....	25

Introduction

Climate change will have significant impacts in both Australia and across the globe. Australia is one of the most arid continents in the world. It is vulnerable to risks such as disruptions to water supply; increases in the severity of storms, floods and droughts, coastal erosion due to sea level rise; and to negative human health impacts, for example through an increase in the range and spread of disease.¹ The impacts of climate change are also a particular concern in the Asia Pacific region. According to the fifth report from the Working Group on Climate Change and Development, *Up in Smoke? Asia and the Pacific*, which was released in November 2007, ‘the human drama of climate change will largely be played out in Asia, where over 60 per cent of the world’s population, around 4 billion people, live’.²

In responding to climate change, governments have traditionally approached it as an ecological problem or more recently, as an economic one. To date the social and human rights implications of climate change have received little attention.³ Yet the human costs of climate change directly threaten fundamental human rights; rights to life, to food, to a place to live and work, rights that governments have an obligation to protect. As Kyung-wha Kang, the UN Deputy High Commissioner for Human Rights has stated:

*Global warming and extreme weather conditions may have calamitous consequences for the human rights of millions of people...ultimately climate change may affect the very right to life of various individuals...[countries] have an obligation to prevent and address some of the direst consequences that climate change may reap on human rights.*⁴

Equity issues also arise in the climate change context because of its disproportionate impact on already vulnerable people and communities. As articulated by the UK Secretary of State for the Environment, ‘socially, climate change raises profound questions of justice and equity: between generations, between the developing and developed worlds; between rich and poor within each country. The challenge is to find an equitable distribution of responsibilities and rights.’⁵

* Paper prepared by the Hon John von Doussa QC, Allison Corkery and Renée Chartres.

¹ Rory Sullivan, *Australia Country Study* (Background Paper for the UNDP Human Development Report 2007/08, 2008) at p. 1. Available at: http://hdr.undp.org/en/reports/global/hdr2007-2008/papers/sullivan_rory_australia.pdf

² Working Group on Climate Change, *Up in Smoke – Asia and the Pacific* (November 2007) at p. 3. Available at: <http://www.iied.org/pubs/pdfs/10020IIED.pdf>

³ See Sara Aminzadeh, ‘A Moral Imperative: the human rights implications of climate change’ (2007) 30 *Hastings International and Comparative Law Journal* 231, at p. 231.

⁴ Laura MacInnis ‘Climate change threatens human rights of millions: UN’ *Reuters* 19 February 2008.

⁵ The Rt Hon David Miliband MP, ‘Building an Environmental Union’ (Speech delivered in Berlin, 19 October 2006). Available at: <http://www.defra.gov.uk/corporate/ministers/speeches/david-miliband/dm061019.htm>

What then, if anything, does the modern human rights discourse offer or require from governments when developing appropriate responses to the impacts of climate change? The answer, it appears, is ‘a lot’. As noted by the Deputy High Commissioner, states have a positive obligation to protect individuals against the threat posed to human rights by climate change, regardless of the causes. The most effective means of facilitating this is to adopt a ‘human rights-based approach’ to policy and legislative responses to climate change; an approach that is *normatively* based on international human rights standards and that is *practically* directed to promoting and protecting human rights.

Part I of this paper considers the human rights dimensions of climate change. Specifically, it looks at how the rights contained in the key international instruments are threatened by the impacts of climate change. Part II then goes on to consider what obligations are imposed on Australia, in both international and domestic law, to respond to these threats. Part III outlines how Australia may fulfil its human rights obligations, in the context of climate change responses; arguing that a human rights-based approach is the most effective way to respond to climate change.

I. The Human Rights Dimensions of Climate Change

The modern human rights system is founded in international law. It traces back to, and is based upon the *Universal Declaration of Human Rights* (UDHR) which was adopted by the General Assembly of the United Nations on 10 December 1948.⁶ The human rights enshrined in the UDHR have been further articulated in subsequent human rights treaties. Most relevantly, the *International Covenant on Civil and Political Rights*⁷ (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*⁸ (ICESCR). Australia is a party to both of these instruments.⁹ However, as the major human rights treaties were developed before climate change was understood to be a looming threat to human security, the environmental dimension of these rights has not been extensively articulated and the precise connection between climate change and the international human rights law system is as yet undeveloped.¹⁰

Some commentators have criticised attempts to delineate the connection between climate change and human rights. Others argue that using rights language to describe broader social issues confuses and devalues the existing human rights framework.¹¹ Yet while it is important to maintain the integrity and credibility of traditional standards, these standards must also be understood in a manner that can respond to the emergence of new threats to human dignity and well-being.¹² How then, does climate change impact on human rights, as understood in the key international human rights instruments?

A Right to an Environment of a Particular Quality

In Australia, and elsewhere, there have been discussions about the existence of an internationally recognised human right to an environment of a particular quality.¹³ The Advisory Council of Jurists of the Asia-Pacific Forum on National Human Rights Institutions recently endorsed the idea that the protection of the environment is ‘a vital part of contemporary human rights doctrine and a *sine qua non* for numerous human

⁶ *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 at 71 (1948).

⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁹ Australia ratified the ICESCR on 10 December 1975 and the ICCPR on 13 August 1980.

¹⁰ See, for example, Advisory Council of Jurists of the Asia Pacific Forum, *Observations and Recommendations – Reference on the Right to Environment* (2007). Available at: http://www.asiapacificforum.net/acj/references/right-to-environment/downloads/observations_recommendations.doc

¹¹ See, for example, Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 *American Journal of International Law* 607, at p. 607.

¹² *Ibid.*, at p. 609.

¹³ See, for example, Matthew Zagor and James Prest, *The Case for Environment Related Human Rights* (Submission to the ACT Attorney-General for consideration in s43. Review of Operation of the Human Rights Act 2004 (ACT), June 2005).

rights, such as the right to health and the right to life'.¹⁴ However, the ACJ found that current legal instruments and trends in relation to environment law are insufficient to support the existence of a clear and specific right to an environment of a particular quality in international law.¹⁵

Even without the articulation of a specific right to the environment, there are many broad rights recognised in the UDHR, ICCPR and ICESCR, as well as in the *Convention against Torture* (CAT),¹⁶ and the *Convention on the Rights of the Child* (CRC),¹⁷ which are relevant to the situation of people whose way of life comes under threat from climate change. States have a responsibility under these instruments to take action to remedy the direct and indirect threats to these rights posed by climate change.

The Right to Life

The right to life is protected in both the UDHR and the ICCPR. Article 3 of the UDHR provides 'everyone has the right to life, liberty and security of person'. Article 6(1) of the ICCPR provides 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The right to life of children also receives specific protection in article 6 of the CRC.¹⁸ In its General Comment on the right to life, the UN Human Rights Committee warned against interpreting the right to life in a narrow or restrictive manner. It stated that protection of this right requires the State to take positive measures and that 'it would be desirable for state parties to take all possible measures to reduce infant mortality and to increase life expectancy...'¹⁹

As articulated by the Deputy High Commissioner for Human Rights, climate change can have both a direct and indirect impact on human life. The effect may be immediate, as in the aftermath of climate-change induced extreme weather, or may appear gradually, as deterioration in health, diminishing access to safe drinking water and susceptibility to disease increases.

The Right to Adequate Food

The right to adequate food is recognised in several international instruments; most comprehensively in the ICESCR. Pursuant to article 11(1), state parties recognise 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions', while pursuant to article 11(2) they recognise that more immediate

¹⁴ Per C G Weeramantry J, in his separate opinion in the International Court of Justice's decision in *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97 at 110; 37 ILM 162 at 206 (1998).

¹⁵ Advisory Council of Jurists, *Observations and Recommendations*, note 10, at p. 3.

¹⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 12 October 1984, 1465 UNTS 85 (entered into force 16 June 1987). Australia ratified the CAT on 8 August 1989.

¹⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified the CRC on 17 December 1990.

¹⁸ Article 6 states '(1) state parties recognise that every child has the inherent right to life. (2) state parties shall ensure to the maximum extent possible the survival and development of the child.'

¹⁹ UN Human Rights Committee, *General comment No. 6 - the Right to Life* (1982) UN Doc HRI/Gen/1/Rev.7 at 128, at paras. 1 and 5.

and urgent steps may be needed to ensure ‘the fundamental right to freedom from hunger and malnutrition’. The UN Special Rapporteur on the Right to Food has defined the right as follows:

*The right to adequate food is a human right, inherent in all people, to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear.*²⁰

There is little doubt that climate change will detrimentally affect the right to food in a significant way. Regional food production is likely to decline because of increased temperatures accelerating grain sterility; shift in rainfall patterns rendering previously productive land infertile, accelerating erosion, desertification and reducing crop and livestock yields; rising sea levels making coastal land unusable and causing fish species to migrate; and an increase in the frequency of extreme weather events disrupting agriculture.²¹ For example, in Australia, up to 20% more droughts are expected by 2030 and up to 80% more droughts by 2070 in south-Western Australia.²²

The Right to Water

Although not expressly articulated in the ICESCR, the right to water is intricately related to the preservation of a number of rights; underpinning the right to health in article 12 and the right to food in article 11. The right to water is also specifically articulated in the article 24 of the CRC and article 14(2)(h) of the *Convention on the Elimination of Discrimination against Women* (CEDAW).²³ In 2002 the UN Committee on Economic, Social and Cultural Rights recognised that water itself was an independent right.²⁴ Drawing on a range of international treaties and declarations it stated, ‘the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival’.²⁵

As the earth gets warmer, heat waves and water shortages will make it difficult to access safe drinking water and sanitation. There will be lower and more erratic rainfall in the tropical and sub-tropical areas of the Asia and the Pacific. This will be

²⁰ Jean Ziegler, *The Right to Food* (Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session, 2001) UN Doc E/CN.4/2001/53 at p. 2. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G01/110/35/PDF/G0111035.pdf?OpenElement>

²¹ Alan Dupont and Graeme Pearman, *Heating up the Planet: climate change and security* (Lowy Institute Paper 12, 2006) at pp. 30-31. Available at: <http://www.lowyinstitute.org/Publication.asp?pid=391>

²² IPCC, ‘Chapter 11 – Australia and New Zealand’, in *Climate Change 2007: Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at p. 515. Available at: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter11.pdf>

²³ *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981). Australia ratified the CEDAW on 28 July 1983.

²⁴ UN Committee on Economic, Social and Cultural Rights, *General comment No. 15 - the Right to Water* (2002) UN Doc E/C.12/2002/11.

²⁵ *Ibid.*, at para. 3.

exacerbated by the recession of the Himalayan glaciers, which flow in into the Ganges, Indus, Brahmaputra, Salween, Mekong, Yangtse and Yellow Rivers.²⁶ Violent conflicts over water are likely to become more severe and widespread.²⁷ In Australia declining precipitation in water catchments is already creating competition between stakeholders over the appropriate use and sharing of remaining water.²⁸

The Right to Health

Article 25 of the UDHR states that ‘everyone has the right to a standard adequate for the health and well-being of himself and his family’. Article 12(a) of the ICESCR recognises the right of everyone to ‘the enjoyment of the highest standard of physical and mental health’. The right to health is also referred to in a number of articles in the CRC. Article 24 stipulates that state parties must ensure that every child enjoys the ‘highest attainable standard of health’. It stipulates that every child has the right to facilities for the treatment of illness and rehabilitation of health. Article 12 of the CEDAW contains similar provisions.²⁹

Climate change poses significant risks to the right to health. A 2003 joint study by the World Health Organisation and the London School of Hygiene and Tropical Medicine states that global warming may already be responsible for more than 160,000 deaths a year from malaria and malnutrition; a number that could double by 2020.³⁰ Climate change will have many impacts on human health. It will affect the intensity of a wide range of diseases – vector-borne, water-borne and respiratory.³¹ In the Pacific, changes in temperature and rainfall will make it harder to control dengue fever.³² In Australia, there is a risk that the range and spread of tropical diseases and pests will increase.³³ For example, a warmer climate will provide a more hospitable environment for disease carrying mosquitoes.³⁴

The Rights of Indigenous Peoples

Under the 2007 Declaration on the Rights of Indigenous People and other international human rights instruments, indigenous people have the right to practice

²⁶ Dupont and Pearman, *Heating up the Planet*, note 21, at p. 34.

²⁷ United Nations Development Programme (UNDP), ‘Chapter Four - Adapting to the Inevitable: National Action and International Cooperation’, in *Human Development Report 2007/2008 – Fighting climate change: Human solidarity in a divided world* (November 2007) at p. 186. Available at: <http://hdr.undp.org/en/reports/global/hdr2007-2008/chapters/>

²⁸ Dupont and Pearman, *Heating up the Planet*, note 21, at p. 35.

²⁹ Article 12 of the CEDAW states ‘(1) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.’

³⁰ Shaoni Bhattacharya, ‘Global warming kills 160,000 a year’, *New Scientist*, 1 October 2003.

³¹ Working Group on Climate Change, *Up in Smoke – Asia and the Pacific*, note 2, at p. 6.

³² ‘Expert says climate change will spread global disease’, *Agence France-Presse*, 11 September 2007.

³³ Sullivan, *Australia Country Study*, note 1, at p. 1.

³⁴ Dupont and Pearman, *Heating up the Planet*, note 21, at p. 37.

and revitalise their cultural practices, customs and institutions.³⁵ There is an intrinsic link between indigenous culture and land. According to one expert,

*Indigenous people don't see the land as distinct from themselves in the same way as maybe society in the south-east (of Australia) would. If they feel that the ecosystem has changed it's a mental anxiety to them. They feel like they've lost control of their "country" — they're responsible for looking after it.*³⁶

For this reason, the right to participate in and to strengthen indigenous cultural life is directly threatened by the impacts of climate change.³⁷

More generally, indigenous populations are disproportionately affected by climate change because it poses a danger to the very survival of their communities.³⁸ In September 2007 the Interagency Support Group on Indigenous Issues pointed out that 'the most advanced scientific research has concluded that changes in climate will gravely harm the health of indigenous peoples traditional lands and waters and that many of plants and animals upon which they depend for survival will be threatened by the immediate impacts of climate change'.³⁹ For example, the Inuit people of the Arctic brought a petition in 2005 against the United States in the Inter-American Commission on Human Rights, asserting that changes in the availability of traditional food sources and the increased risks associated with travelling in changing ice and weather conditions have violated their rights to life, family and privacy under the American Convention on Human Rights.⁴⁰

Closer to home, a recent report by Friends of the Earth International predicts that as a result of climate change more than 100,000 people in northern Aboriginal communities will face serious health risks from malaria, dengue fever and heat stress, as well as loss of food sources from floods, drought and more intense bushfires.⁴¹ It is also anticipated that in the Torres Strait Islands, at least 8000 people could lose their

³⁵ See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007) at article 5, 9 and 11.

³⁶ Friends of the Earth International, *Climate Change: voices from communities affected by climate change* (November 2007) at p. 6. Available at: <http://www.foei.org/en/publications/pdfs/climate-testimonies>.

³⁷ See, for example, Donna Green, *How Might Climate Change Affect Island Culture in the Torres Strait?* (CSIRO Marine and Atmospheric Research Paper 011, November 2007). Available at: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf.

³⁸ Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Climate Change: An Overview* (November 2007) at p. 4. Available at: http://www.un.org/esa/socdev/unpfii/documents/Climate_change_overview.doc

³⁹ United Nations Permanent Forum on Indigenous Issues, *Interagency Support Group on Indigenous Peoples Issues* (Collated Paper on Indigenous People and Climate Change, February 2008) UN Doc E/C.19/2008/CRP.2 at p. 1. Available at: http://www.un.org/esa/socdev/unpfii/documents/E_C19_2008_CRP.2.doc

⁴⁰ In November 2006, the Commission declined to process the Inuit petition. The Inuit responded by asking the Commission for a hearing on the linkages between climate change and human rights. The Commission granted this request and a hearing took place on March 1, 2007. The Commission is currently deliberating based on this hearing: Sheila Watt-Cloutier, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (submitted 7 December, 2005). Available at: http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf.

⁴¹ Friends of the Earth International, *Climate Change*, note 36, at p. 5.

homes if sea levels rise by one metre.⁴² Another CSIRO report, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia*, predicts that the economic and health status of remote indigenous communities is likely to worsen owing to climate change.⁴³

Human Security

Climate change also has the potential to exacerbate *existing* threats to human rights in the region and around the globe. Rising global temperatures will jeopardise many people's livelihoods, increasing their vulnerability to poverty and social deprivation. This is particularly problematic in weak states with poorly performing institutions and systems of government that are unable to manage competition over diminishing resources. In these conditions climate change is likely to overwhelm local capacities to adapt, which will reinforce the trend towards general instability in these countries.⁴⁴

International Alert, a UK-based, non-government organisation, has identified 46 countries – home to 2.7 billion people – where the impacts of climate change, interacting with economic, social and political problems, will create a high risk of violent conflict and a further 56 countries where institutions of government will have great difficulty taking the strain of climate change on top of their other current challenges. A number of these are in the Asia Pacific region.⁴⁵

⁴² Green, *How Might Climate Change Affect Island Culture*, note 37, at pp. 5-6.

⁴³ See Donna Green, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia* (CSIRO Marine and Atmospheric Research Paper 012, November 2006)

⁴⁴ German Advisory Council on Global Change, *World in Transition: Climate Change as a Security Risk – Summary for Policy Makers* (May 2007) at p. 1. Available at: http://www.wbgu.de/wbgu_jg2007_kurz_engl.pdf

⁴⁵ International Alert, *A Climate of Conflict: the links between climate change, peace and war* (November 2007) at p. 3. Available at: <http://www.international-alert.org/publications/getdata.php?doctype=Pdf&id=322&docs=980>

II. Australia's Human Rights Obligations

As a signatory to the international human rights instruments discussed above, Australia has an obligation in both international and domestic law to ensure that human rights are protected when responding to climate change.

International Law

In international law, when a state ratifies an international human rights instrument it undertakes to ensure that the standards contained therein are upheld vis-à-vis those within its territory or subject to its jurisdiction.⁴⁶ All organs of the state are responsible for the implementation of international human rights instruments – the executive, the government, the legislature and the judiciary. As Australia has ratified all the major human rights instruments, it is subject to the monitoring and enforcement mechanisms that form part of the international human rights system. The failure to meet its obligations in the climate change context could, for instance, lead to complaints being lodged against Australia with the UN treaty monitoring bodies.⁴⁷

Human rights instruments impose broad obligations upon signatory states. By ratifying an international human rights instrument, Australia has agreed to *respect, protect and fulfil* the rights contained within it.⁴⁸ The obligation to respect means Australia must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires Australia to protect individuals and groups against human rights abuses – whether by private or government actors. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.⁴⁹ Thus irrespective of the *cause* of a threat to human rights Australia still has positive obligations to use all the means within its disposal to uphold the human rights affected.⁵⁰ The positive nature of state obligation, in the

⁴⁶ See UN Human Rights Committee, *General comment No. 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant* (2004) UN Doc CCPR/C/21/Rev.1/Add.13, at para 10.

⁴⁷ For example, the gradual inundation of parts of the Torres Strait Islands could lead to complaints under Article 14 of the 1969 *International Convention on the Elimination of Racial Discrimination* or under Article 1 of the 1966 First Optional Protocol of the ICCPR: Marc Byrne and Marta Iljadica *There goes the neighbourhood* (Uniya Occasional Paper 12, May 2007). Available at: http://www.uniya.org.au/talks/byrne_may07-op1.html

⁴⁸ UN Office of the High Commissioner for Human Rights, *What are Human Rights?* (2008). At: <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

⁴⁹ See UN Committee on the Rights of the Child, *General comment No 5 – General Measures of Implementation of the Convention on the Rights of the Child* (2003) UN Doc CRC/GC/2003/5; UN Committee on Economic, Social and Cultural Rights, *General comment No 9 – the Domestic Application of the Covenant* (1998) UN Doc E/C.12/1998/24; UN Human Rights Committee, *General comment 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant* (2004) UN Doc CCPR/C/21/Rev.1/Add.13.

⁵⁰ UN Committee on Economic, Social and Cultural Rights, *General comment No. 3 - On the Nature of State Parties' Obligations* (1990) UN Doc, E/1991/23, annex III.

context of environmental harm, has been considered in a number of cases in the European Court of Human Rights.⁵¹ For example:

- *Lopez Ostra v Spain* (1994):⁵² in this case, the complainant lived near a waste water treatment plant, which caused serious health problems and nuisance to residents in the town. The Court held that severe environmental pollution may affect and individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life (article 8). The state had a positive duty to protect that right (e.g. regulating the plant) and had failed to do so.
- *Oneryildiz v Turkey* (2004):⁵³ in this case, 39 people who were living in a slum below a rubbish tip in Istanbul died when a methane gas explosion occurred. The tip had been poorly managed by the Istanbul City Council, who had failed to respond to an expert report warning of the dangers of an explosion. The Court held that there had been a violation of the right to life (article 2), because even though the state is not obliged to take action in relation to every presumed threat to life, where a state knows or ought to have known of a real and immediate risk to life they have a positive obligation to act. The state had failed to communicate essential information to residents about the risks of where they lived.
- *Budayeva v Russia* (2007):⁵⁴ in this case, the homes of many residents in the town of Tyrnauz were destroyed by a mudslide. The complainant argues that the Russian government knew about the risk of the mudslide and failed to take preventative action by reinforcing a dam wall and failed to warn the residents of the imminent risk. The Court has recently accepted the complaint as admissible.

The above cases demonstrate that where a state is aware of a threat to human rights, regardless of the cause, it has a positive obligation to act because state inaction would exacerbate the situation. This is particularly significant in the climate change context where it is often difficult to establish the causal connection between the activities (or omissions) of the state or of private actors who have emitted greenhouse gas and the human rights impact.

Domestic Law

The obligations discussed above exist in international law. However, international law has no binding force in Australian law until the parliament enacts the provisions of an international instrument into domestic legislation. While Australia has enacted a number of international human rights norms,⁵⁵ the broad range of rights most likely to be under threat from the impact of climate change, including those rights set out in the ICESCR, have not been directly incorporated into Australian law.

⁵¹ The European Court of Human Rights implements the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, which was adopted under the Council of Europe in 1950.

⁵² *Case of Lopez Ostra v Spain*, Application no. 16798/90 [1994] ECHR 46 (9 December 1994).

⁵³ *Case of Oneryildiz v Turkey*, Application no. 48939/99 [2004] ECHR 657 (30 November 2004).

⁵⁴ *Decision as to the Admissibility of Application by Budayeva against Russia*, Application no. 15339/02 (5 April 2007).

⁵⁵ See, for example, the *Racial Discrimination Act 1975* (Cth); the *Sex Discrimination Act 1984* (Cth); the *Human Rights and Equal Opportunity Commission Act 1986* (Cth); the *Disability Discrimination Act 1992* (Cth); parts of the *Workplace Relations Act 1996* (Cth); and the *Evidence Act 1995* (Cth).

Nevertheless, the fact that these rights have been acknowledged by Australia to the international community is still significant in domestic law. In the now renowned case of *Minister for Immigration and Ethnic Affairs v Teoh*⁵⁶ the High Court of Australia in 1995 held that in decisions made under domestic laws by the executive arm of government, people in Australia had a 'legitimate expectation' that bureaucrats would act in accordance with Australia's international treaty obligations, even when the treaty had not been enacted into domestic law.⁵⁷ It therefore seems reasonable to expect that in implementing climate change policy, decision makers will uphold Australia's international human rights obligations. Incorporating human rights obligations into climate change policy could also avoid potential compensation claims brought against decision makers, in either negligence or nuisance, for failing to respond to the impacts of climate change.⁵⁸

⁵⁶ (1995) 183 CLR 273.

⁵⁷ Although various governments have attempted to overturn the effect of *Teoh*, in more recent times the Coalition Government made formal statements to the effect that Australia sees it as its obligation to meet its human rights treaty obligations and encouraged other States to do likewise: John von Doussa, 'How universal are international human rights principles?' (Speech delivered at the Administrative Appeals Tribunal National Conference, 21 - 24 October 2007). Available at: http://www.humanrights.gov.au/about/media/speeches/speeches_president/2007/20071219_aat.html

⁵⁸ The potential for actions in negligence and nuisance arises particularly in the context of property damage caused by climate change: see Jan McDonald 'A risky climate for decision-making: the liability of development authorities for climate change impacts' (2007) 24 *Environmental Planning Law Journal* 405, at pp. 412-415.

III. Upholding Australia's Human Rights Obligations in Climate Change Responses

What can be seen from the above discussion is that in order to uphold its international human rights obligations, the government must respond to the impacts of climate change. It must use all means available to it to prevent and address the threats to human rights that result from climate change and to provide access to remedies when these rights are violated.⁵⁹ The most effective means of facilitating this is to adopt a 'human rights-based approach' when responding to the impact of climate change.

The concept of a human rights-based approach has evolved most extensively in the literature relating to development.⁶⁰ Essentially, a human rights-based approach provides a conceptual framework for climate change policies; a framework which is *normatively* based on international human rights standards and which is *practically* directed to promoting and protecting human rights. The practical value of a human rights-based approach lies in the following:

1. gives a 'human face' to the issue;⁶¹
2. focuses on the inclusion of excluded and marginalised populations – even if resource constraints imply prioritisation;
3. encourages accountability and transparency in policy decisions;
4. encourages participatory and democratic processes; and
5. provides sustainable outcomes – by building on the capacity of key stakeholders, strengthening social cohesion.

This section discusses how a human rights-based approach would apply in relation to current responses to climate change in Australia; namely domestic adaptation measures, aid for overseas adaptation and disaster management. It also examines what a human rights approach to 'climate change refugees' would look like.

A Human Rights Response to Adaptation

Recognising that climate change is likely to continue even with successful mitigation measures, governments have been providing financial and other forms of support to affected communities so that they can adapt to the impact of changing conditions. Adaptation measures, taken in advance, can reduce the risks and limit the damage

⁵⁹ UN Human Rights Committee, *General comment No. 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, at para 15.

⁶⁰ See, for example, Office of the High Commissioner for Human Rights, *Frequently Asked Questions about a human rights-based approach to development cooperation* (2006). Available at: http://www.crin.org/docs/ohchr_rights_based.pdf

⁶¹ In the words of the Maldives President Maumoon Abdul Gayoom "It is time to put people back at the heart of climate change diplomacy": Jeremy Laurence, 'Climate change threatens human rights -small island states', *Reuters*, 13 November 2007.

caused by climate change.⁶² The United Nations Framework Convention on Climate Change (UNFCCC)⁶³ provides that all Parties must formulate and implement national or regional programmes, which contain measures to facilitate adequate adaptation to climate change.⁶⁴

Adaptation measures have increasingly become part of mainstream policy development in Australia, with one of Australia's four National Research Priorities being 'an environmentally sustainable Australia' which includes 'responding to climate change and variability'.⁶⁵ The National Climate Change Adaptation Programme, for which the previous government put forward \$14.2 million dollars in 2006, is part of this effort.⁶⁶ Current adaptation proposals include:

- installing more efficient irrigation measures;
- creating wildlife corridors;
- building more resilient housing;
- guidance notes for urban planners;
- improved disaster planning; and
- amending local planning laws.⁶⁷

In addition, in February 2006 the Council of Australian Governments developed the *National Climate Change Adaptation Framework* which seeks to reduce the vulnerability of water resources, biodiversity, coastal regions, agriculture, fisheries, forestry, health, tourism and settlements to the impacts of climate change.⁶⁸ It suggests that action in these areas could involve: sourcing additional water supply; increasing the resilience of farming systems and regions to climate-change; and sharing knowledge in regards to planning and development. It also seeks to establish an Australian Centre for Climate Change Adaptation to provide decision-makers with relevant information on climate change impacts, vulnerability and adaptation options.⁶⁹

⁶² UNDP, *Human Development Report 2007/2008*, note 27, at p. 167.

⁶³ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force on 21 March 1994). The UNFCCC enjoys almost universal ratification, with 192 states parties. The ultimate objective of the UNFCCC is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. However, it does not set binding obligations on developed states to stabilise emissions. For further background information on the UNFCCC see: www.unfccc.int

⁶⁴ Ibid, at art.4(1)(b).

⁶⁵ Department of Education, Employment and Workplace Relations, *The National Research Priorities and their Associated Priority Goals* (2003) at p. 1. Available at:

<http://www.dest.gov.au/NR/rdonlyres/AF4621AA-9F10-4752-A26F-580EDFC644F2/2846/goals.pdf>

⁶⁶ Department of the Environment and Heritage, *Climate Change Impacts and Risk Management: A Guide for Government and Business* (2006) at p. 2. Available at:

<http://www.greenhouse.gov.au/impacts/publications/pubs/risk-management.pdf>

⁶⁷ Ibid, at p. 49.

⁶⁸ Council of Australian Governments (COAG), *National Climate Change Adaptation Framework* (2007) at p. 3. Available at:

http://www.coag.gov.au/meetings/130407/docs/national_climate_change_adaption_framework.pdf

⁶⁹ Ibid, at pp. 6-7.

In responding to climate change through adaptation measures Australia is already, in fact, avoiding many of the resulting threats to human rights. For example:

- ensuring that homes are resistant to extreme weather conditions protects the right to life;
- offering alternative water access when climate change has limited supply protects the right to water;
- offering health-related information and education and providing proper sanitation protects the right to health.

Nevertheless, to date the ascendance of adaptation measures to the centre-stage of national policy has largely been driven by recognition of the high economic costs that accompany climate change.⁷⁰ Driven by this economic rationale, consideration of the impact such measures will have on the human rights of individuals – either positive or negative – remains peripheral; when it should be central.

Applying a human rights-based approach, decision-makers should be guided by the core minimum human rights standards when weighing competing demands on limited resources. The content of some of the key human rights affected by climate change are articulated in the General Comments of the UN human rights treaty bodies, which provide one basis for developing the standards and measures to apply when evaluating whether a particular policy meets its human rights requirements. To take but one example, in accordance with General Comment 15 of the Committee on Economic, Social and Cultural Rights, the relocation of a community would have to ensure that the minimum requirements of fresh water (currently calculated by the World Health Organisation at 7.5 litres per day) would be available to every adult and child. That water must be physically and financially accessible to all, without discrimination on the grounds of sex, age, or economic or social standing, and without threatening personal security when the water is obtained.⁷¹ Similar core obligations resting on governments have been specified in other General Comments in relation to the rights to food, health and adequate housing.⁷²

In addition, decision-makers must avoid the presumption that *all* efforts to address the impact of climate change will be utilitarian and thus result in an evenly distributed net benefit to the Australian community. The reality is that climate change responses are likely to exacerbate already existing social inequity. Australia's peak environment and welfare groups have recognised that low-income and disadvantaged people will not only be at the forefront of climate change impacts, but also may be disproportionately

⁷⁰ This economic emphasis is reflected in the *National Climate Change Adaptation Framework*, which emphasises the needs of government and business in responding to climate change and, with the exception of human health and disaster management, lists areas of vulnerability as those that will be economically or ecologically worse-off as a result of climate change.

⁷¹ UN Committee on Economic Social and Cultural Rights, *General comment No. 15 – the Right to Water* (2002) UN Doc E/C.12/2002/11, at para. 37.

⁷² See, for example, UN Committee on Economic Social and Cultural Rights, *General comment No. 12 – the Right to Adequate Food* (1999) UN Doc E/C.12/1999/5; UN Committee on Economic Social and Cultural Rights, *General comment No. 4 – the Right to Adequate Housing* (1991) UN Doc E/1992/23; UN Committee on Economic Social and Cultural Rights, *General comment No. 14 – the Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4.

affected by the adaptation measures pursued for the purposes of minimising the risks associated with climate change.⁷³ For example:

- The focus on shifting energy sources to low carbon alternatives is likely to mean the more widespread introduction of minimum energy performance standards, for electrical appliances, cars and buildings, all of which have the potential to increase costs for users. Pricing carbon into energy means unit costs will rise.⁷⁴
- As the magnitude and frequency of natural disasters goes up, the cost of insuring houses, buildings and infrastructure against extreme events will also increase. In some areas the cost of insurance cover may become inhibitive or may even be withdrawn, leaving housing assets stranded and some areas abandoned.

A human rights-based approach addresses these equity issues. By focusing on individuals as *rights-holders* responsibility is placed on government to allow for participation and input from affected members of society into the development of adaptation policies. At a procedural level, this approach requires *transparent and participatory* decision-making, implementation, monitoring and evaluation. This means making specific channels available for the participation of the poorest and most marginalised groups in the community, with sensitivity to social and cultural context. For example, one policy for dealing with urban areas that are under constant threat of erosion is ‘systematic abandonment via planned retreat’.⁷⁵ A human rights-based approach to the implementation of such a policy would require that decision-makers engage in a thorough and proper consultation with those affected to minimise the disproportionate impact on vulnerable groups.

A human rights-based approach also applies the principles of *non-discrimination* and *substantive equality* recognised in article 2 of the ICCPR and the ICESCR. Thus, when a climate change policy is proposed, decision-makers would identify its likely impact on the most disadvantaged or vulnerable, with data disaggregated as far as possible according to the prohibited grounds of discrimination, e.g., race, colour, sex or national origin. This could be achieved by requiring that all new legislative-based policies concerning climate-change adaptation be accompanied by a human rights compliance statement. Where either the policy or enabling legislation does not meet recognised human right norms, for example by disproportionately impacting indigenous people, the statement must identify and explain the reasons for the shortcoming and the policy should be reconsidered.⁷⁶

⁷³ See *Equity in Response to Climate Change Roundtable 2007* (Report of the Equity in Response to Climate Change Roundtable, Melbourne, 26 March 2007). The Equity in Response to Climate Change Roundtable consisted of the Brotherhood of St Laurence, the National Welfare Rights Network, the Australian Conservation Foundation and the Climate Institute. Available at: http://www.bsl.org.au/pdfs/Equity_in_Response_to_Climate_Change_Roundtable_report_2007.pdf

⁷⁴ Justin Sherrard and Alan Tate, *Equity in Response to Climate Change: an Australian snapshot* (paper for the Equity in Response to Climate Change Roundtable, Melbourne, 26 March 2007) at p. 25. Available at: <http://www.bsl.org.au/main.asp?PageId=4732>

⁷⁵ See, for example, the South West Queensland Coastal Management Plan, as discussed in McDonald, note 58, at p. 408.

⁷⁶ This type of policy formulation process is analogous to the procedures enacted in the Human Rights Charters now in place in the United Kingdom, New Zealand, the Australian Capital Territory and Victoria.

A Human Rights Response to Aid for Overseas Adaptation Measures

Furthermore the principles that underpin the development of adaptation measures in Australia are equally applicable when providing assistance for adaptation overseas. Research commonly concludes that developing countries remain disproportionately affected by climate change. This is for two main reasons:

- Higher impacts: developing countries are generally more exposed to disasters, drought and desertification. Furthermore, exposure to the risk of climate disasters in developing countries can be expected to rise with urbanisation, the expansion of unplanned human settlements in slum areas, environmental degradation and the marginalisation of rural populations.
- Higher vulnerability: developing countries also tend to have a much lower capacity to cope with these adverse impacts. When these vulnerable communities are hit by droughts, floods or landslides, the immediate humanitarian impact can quickly be transformed into long-term development setbacks.⁷⁷

Recognising this, the UNFCCC places international obligations on state parties to help developing nations meet the costs of climate change adaptation and develop regional mitigation and adaptation programs.⁷⁸ As a signatory to the UNFCCC, Australia currently contributes \$7.5 million to limit the impact of climate change on some of the poorest and most vulnerable countries.⁷⁹ However, overall, the delivery of financing under the UNFCCC has been limited. Total financing from state parties to date has amounted to around US\$26 million.⁸⁰ For the purposes of comparison, this is equivalent to one week's worth of spending under the United Kingdom flood defence program.⁸¹ Archbishop Desmond Tutu has argued that we are drifting into a world of 'adaptation apartheid' with the world's poor left to sink or swim through a problem that is not of their making, while citizens of the rich world are protected from harm.⁸²

There is a strong case for Australia to play a greater role in overcoming this adaptation apartheid. Climate change has the potential to create humanitarian

⁷⁷ UNDP, *Human Development Report 2007/2008*, note 27, at p. 191.

⁷⁸ UNFCCC, note 63, at arts.4(1)(b); 4(1)(e); 4(4). Several dedicated multilateral financing mechanisms have also been created under the UNFCCC, including the Least Developed Country Fund and the Special Climate Change Fund. At the Bali Conference in December 2007 the State parties further agreed to the establishment of a special Board to supervise and manage the Adaptation Fund to ensure that the fund becomes operational to provide funding for adaptation projects in developing countries, which signifies a promising development. The Adaptation Fund was established in 2002 and is filled by means of a 2% levy on projects from the Kyoto Protocol's clean development mechanism (CDM) and other sources. Currently the fund is worth about 37 million Euros: UNFCCC, 'UN Breakthrough on climate change reached in Bali' (Press Release, 15 December 2007). Available at: http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20071215_bali_final_press_release.pdf

⁷⁹ Australia's contribution is made through the Least-Developed Countries Fund: Alexander Downer, Minister for Foreign Affairs, 'Australia Funds Climate Change Adaptation in Most Vulnerable Countries' (Press Release, 5 June 2007). Available at: http://www.aisaid.gov.au/media/release.cfm?BC=Media&ID=2290_3126_5249_45_8382%20

⁸⁰ UNDP, *Human Development Report 2007/2008*, note 27, at p. 189.

⁸¹ Ibid, at p. 189.

⁸² Ibid, at p. 166.

disasters, ecological collapse and knock-on socio-economic effects – none of which will respect national borders.⁸³ The United Nations Development Programme's *Human Development Report 2007/2008* argues that mass environmental displacement, the loss of livelihoods, rising hunger, and water shortages have the potential to unleash national, regional and global security threats. Furthermore, if the countries that carry primary responsibility for the problem are perceived to turn a blind-eye to the consequences, the resentment and anger that will follow could foster conditions for political extremism.⁸⁴ Parts of the Asia Pacific region, in particular India, Pakistan, Bangladesh and China, have been identified as a 'hot-spot' for security risks associated with climate change.⁸⁵ Therefore, even though from a strict legal standpoint it is difficult to invoke international human rights law as a reason for providing assistance overseas,⁸⁶ it is in Australia's security interests to be responding to climate change impacts overseas.

However, financing levels themselves will not be the only determinant of the success of a response – it is important that the *right kinds* of responses are being funded. The United Nations Development Programme's (UNDP) *Human Development Report 2007-08* states that current international efforts suffer not just from chronic under-financing, but also a lack of coordination and coherence.⁸⁷ Current responses have also been criticised for focusing on short term relief, following natural disasters, at the expense of longer-term recovery and development efforts.⁸⁸

While there is no blueprint for an effective response, when considering how Australia can improve its international adaptation efforts, a human rights-based approach is instructive. Through a human rights-based approach aid should focus on poverty-reduction, strengthening communities from the bottom up, building on their own coping strategies to live with climate change and empowering them to participate in the development of climate change policies.⁸⁹ It needs to be locally grounded and culturally appropriate.⁹⁰ To this end, adaptation assistance should be part of mainstream poverty reduction strategies and budget planning in developing countries, rather than one-off 'special initiatives'.⁹¹ Modelling international aid delivery on the human rights-based approach discussed earlier allows for this, as it emphasises the importance of local knowledge and seeks the active participation and consultation of local communities in working out how best to adapt to climate change.⁹² This could mean, for example, incorporating the traditional cultural practices of indigenous communities into climate change responses.

⁸³ International Alert, *A Climate of Conflict*, note 45, at p. 23.

⁸⁴ UNDP, *Human Development Report 2007/2008*, note 27, at p. 186.

⁸⁵ German Advisory Council on Global Change, *World in Transition*, note 44, at p. 3.

⁸⁶ Under international human rights law, States generally only have direct human rights obligations to people within their territory or jurisdiction, rather than to the international community generally: see Jane McAdam, 'Climate Change 'Refugees' and International Law: on or off the world map?' (Speech delivered at the Australian Human Rights Centre 21st Anniversary Symposium, University of New South Wales, 2 May 2007) at pp. 6-7.

⁸⁷ UNDP, 'Chapter One – the 21st Century Climate Challenge' in *Human Development Report 2007/2008 – Fighting climate change: Human solidarity in a divided world* (November 2007) at p. 27.

⁸⁸ UNDP, *Human Development Report 2007/2008*, note 27, at pp. 192-193.

⁸⁹ Working Group on Climate Change, *Up in Smoke – Asia and the Pacific*, note 2, at p. 10.

⁹⁰ International Alert, *A Climate of Conflict*, note 45, at p. 32.

⁹¹ UNDP, *Human Development Report 2007/2008*, note 27, at p. 192.

⁹² International Alert, *A Climate of Conflict*, note 45, at p. 29.

A Human Rights Response to Disaster Management

Even with effective adaptation, the scale and frequency of natural disasters, both in Australia and across the world, will increase as a result of climate change. This increase is already evident. In 2007, of the 14 global missions undertaken by the UN Office for the Coordination of Humanitarian Affairs (OCHA), 70% were in response to hurricanes and floods. The OCHA called this ‘a glimpse of the shape of things to come, given the reality of climate change’.⁹³

The Inter-Governmental Panel on Climate Change (IPCC) argues that Australia’s vulnerability to natural disasters has increased significantly as a result of global warming. In particular they project that by 2050 ongoing coastal development and population growth will exacerbate risks from sea level rise and increase the severity and frequency of storms and coastal flooding,⁹⁴ exposing large quantities of people, wealth and infrastructure to extreme weather events as a result of climate change. Australia has already begun to implement policies to respond to these risks and has relatively advanced disaster warning and response capabilities. Nonetheless, Hurricane Katrina, which struck the Gulf Coast of the United States in August 2005, was a powerful reminder that even well-resourced countries can struggle dramatically to deal with the effects of a natural disaster.

For developing countries, the impact of climate change-induced natural disasters is likely to be much more severe and long-term. These countries are generally more geographically vulnerable and lack adequate financial resources for effective adaptation and response mechanisms. This vulnerability is reflected by the fact that of the 24,500 people killed by natural disasters in 2002 just 6% lived in countries of high human development.⁹⁵ Asia, in particular, faces projected increases in the intensity and frequency of extreme weather events, heatwaves, tropical cyclones, severe erosion and dust storms.⁹⁶ In response, the involvement of Australian defence personnel in emergency relief operations overseas is likely to grow, transforming them into multi-skilled institutions in which disaster relief will become a core task. For example, the Australian Defence Force and its Japanese and New Zealand counterparts were crucial to the success of early efforts to provide humanitarian relief and the restoration of essential services in Indonesia’s province of Aceh, the area worst hit by the December 2005 Tsunami.⁹⁷

Persons affected by natural disasters face multiple human rights challenges. They may encounter problems such as: unequal access to assistance; discrimination in aid provision; enforced relocation; sexual and gender-based violence; loss of

⁹³ Jo Tuckman, ‘Global Warming Brings Busy Year for UN Disaster Teams’ *The Guardian*, 27 December 2007.

⁹⁴ Currently over 80% of Australia’s population live in coastal areas and these areas are also experiencing rapid population growth. The IPCC also argues that the frequency of severe tropical cyclones on the east Australian coast will increase by 22% between 2000 and 2050: IPCC, ‘Australia and New Zealand’, note 22, at pp. 509-520.

⁹⁵ Global Education, *Natural Disaster Management* (January 2007). At: <http://www.globaleducation.edna.edu.au/globaled/go/cache/offonce/pid/308#Responses>

⁹⁶ Working Group on Climate Change, *Up in Smoke – Asia and the Pacific*, note 2, at p. 10.

⁹⁷ Dupont and Pearman, *Heating up the Planet*, note 21, at p.45.

documentation; unsafe or involuntary return or resettlement; and issues of property restitution. Affected populations are most often forced to leave their homes or places of residence because of the destruction of houses.⁹⁸

Natural disasters also have a disproportionate impact on already marginalised groups, as was clearly highlighted by Hurricane Katrina. The statistics speak for themselves:

- More than 90,000 people in the affected areas had incomes of less than \$10,000 per year.
- More than 40% of children affected lived in households with incomes below the federal poverty line.
- Roughly 30% of people hit hardest were African-American; by contrast, African-Americans make up 12% of the overall population.
- More than 35% of African-American households and nearly 59% of poor African-American households in New Orleans lacked a vehicle, resulting in greater difficulty in leaving the city in face of the impending disaster.⁹⁹

Response efforts that fail to recognise the disproportionate impact of natural disasters on marginalised groups exacerbates their vulnerability. This issue was illustrated by the relief effort following the Indian Ocean Tsunami in December 2004, where government policies and practices reinforced rather than challenged social divisions.¹⁰⁰ For example, in Sri Lanka the post-tsunami relief program was criticised for not addressing the pre-Tsunami land tenure laws that discriminated against women. This meant that many female widows were left without any right to restitution or compensation in the post-disaster redistribution process.¹⁰¹

In its response to climate change-induced disasters, in Australia or overseas, the government has an obligation to address these inequities. Adopting a human rights-based approach achieves this, by linking natural disaster policy to international human rights law. This link emphasises the duty of states to facilitate, and the right of individuals to access, disaster relief on a non-discriminatory basis.¹⁰² The *Operational Guidelines on Human Rights and Natural Disasters*, adopted by the Inter-Agency

⁹⁸ Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters* (IASC Operational Guidelines on Human Rights and Natural Disasters, 2007) at p. 8. Available at: http://www.humanitarianinfo.org/iasc/content/documents/working/OtherDocs/2006_IASC_NaturalDisasterGuidelines.pdf

⁹⁹ *McWaters v. Federal Emergency Management Committee* No. 05-5488 (December 12, 2005) at pp. 3-4. Available at: http://www.femaanswers.org/images/3/38/McWaters_v_FEMA_Court.Decision.12.12.05.pdf

¹⁰⁰ Action Aid International, *Tsunami Response: A Human Rights Assessment* (February 2006) at p. 10. Available at: http://www.actionaid.org/docs/tsunami_human_rights.pdf

¹⁰¹ See, for example, Daniel Fitzpatrick, *Restoring and Confirming Rights to Land in Tsunami-Affected Aceh* (Oxfam/UNDP Report, July 2005). Available at: http://www.humanitarianinfo.org/sumatra/reference/reports/docs/ingo/oxfam/UNDP-OXFAM_LandRightsReport0705.pdf

¹⁰² David Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: what role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458, at p. 469. Available at: [http://www.mjil.law.unimelb.edu.au/issues/archive/2005\(2\)/08Fidler.pdf](http://www.mjil.law.unimelb.edu.au/issues/archive/2005(2)/08Fidler.pdf)

Standing Committee in June 2007, explains how a human rights-based approach operates in the disaster relief context. Under these guidelines:

- If a natural disaster creates a serious risk for the life, physical integrity or health of affected individuals and communities, all appropriate measures to protect those in danger, in particular vulnerable groups, should be taken to the maximum extent possible (e.g. emergency shelter arrangements).
- Protection is not limited to securing the survival and physical security of those affected by natural disasters. It encompasses all relevant guarantees—civil and political as well as economic, social and cultural rights.
- During and after the emergency phase, law enforcement personnel and local authorities should be encouraged to take effective measures to ensure the security of populations affected by the natural disaster. In particular, law enforcement personnel should be deployed to areas at risk of sexual and gender-based violence, robberies, or looting.
- Measures should be taken to ensure that persons affected by natural disasters, in particular those displaced, have unimpeded and non-discriminatory access to goods and services necessary to address their basic needs.¹⁰³

In addition, longer-term efforts to rebuild and reconstruct after a disaster must not merely focus on the redevelopment of infrastructure. Again, Hurricane Katrina highlights the problems of such an approach. The UN Special Rapporteur on Adequate Housing and the UN Independent Expert on Minority Issues have recently expressed concern about the ongoing housing difficulties faced by residents who had been displaced by the hurricane, with the demolition of public housing in New Orleans. They state:

*The authorities claim that the demolition of public housing is not intentionally discriminatory. Notwithstanding the validity of these claims, the lack of consultation with those affected and the disproportionate impact on poorer and predominately African-American residents and former residents would result in the denial of internationally recognised rights.*¹⁰⁴

Post-disaster reconstruction must adopt a human rights-based approach to ensure that such reconstruction efforts do not discriminate on gender, racial or ethnic grounds; that the rights of children are adequately addressed; and that property rights of the poor and vulnerable are respected.¹⁰⁵ By recognising the right of individuals and communities to participate in the decision-making process, such an approach would address the human rights issues that arise following a natural disaster, particularly those relating to property claims and resettlement. This reduces the possibility of

¹⁰³ IASC, *Protecting Persons Affected by Natural Disasters*, note 98, at pp. 13-22.

¹⁰⁴ Office of the High Commissioner for Human Rights, 'UN Experts call on U.S. Government to halt ongoing evictions and to take immediate steps to protect the human rights of African-Americans affected by Hurricane Katrina and the demolition of public housing in New Orleans, Louisiana' (Press Release, 28 February 2008). Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/907604B6DAF5E2F1C12573FD007AD7DC?opendocument>

¹⁰⁵ Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami', note 102, at p. 469.

conflict between groups and ensures that post-disaster reconstruction is not only just but also sustainable.

A Human Rights Response to 'Climate Change Refugees'

When mitigation and adaptation strategies are ineffective, the displacement of communities will be the inevitable consequence. One of the most significant impacts of climate change, therefore, will be the migration of people, not only within the boundaries of their countries, but across borders and across oceans. Oxford academic Norman Myers has predicted that by 2050 up to 150 million people may be forced to migrate because of the impacts of global warming.¹⁰⁶ The predictions of the Stern Review on the Economics of Climate Change echo this concern, estimating that the scale of migration will reach 200 million by 2050.¹⁰⁷

Much of the anticipated displacement will be in Asia.¹⁰⁸ Australia's geographic location within the region makes climate-induced displacement a particularly significant issue, although there are differing opinions on the extent of the impact of population movements in Asia on Australia. For example, Australian Federal Police Commissioner Mick Keelty has predicted that climate-induced migration will turn border security into Australia's biggest policing issue this century.¹⁰⁹ On the other hand, the Lowy Institute, a leading Australian think tank, does not anticipate a surge of 'environmental boat people' seeking to enter Australia. Instead, they anticipate that most of those in the region will relocate within their own country and that those that do cross an international border are likely to seek refuge in states where they have strong cultural or ethnic ties. However, the Lowy Institute does acknowledge that Australia will not be completely immune from climate-induced migration and must expect increased migratory pressure from the region.¹¹⁰

The likely causes of climate-induced migration are:

- Displacement following natural disasters: for example, due to the increase in the strength of tropical hurricanes and the frequency of heavy rains and flooding, or the growth in the number of droughts causing food shortages.¹¹¹
- Long-term environmental deterioration: particularly the rise in sea levels. The potential of sea level rise to cause migration is considerable, as the phenomenon is virtually irreversible and manifests itself over a long period of time.¹¹²

¹⁰⁶ Norman Myers, 'Environmental Refugees in a globally warmed world', (1993) 43(11) *BioScience* 752

¹⁰⁷ Nicholas Stern et al, *The Economics of Climate Change* (2006). Available at: http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cf

¹⁰⁸ Dupont and Pearman, *Heating up the Planet*, note 21, at p. 56.

¹⁰⁹ He states that 'in their millions, people could begin to look for new land and they will cross oceans and borders to do it': Mick Keelty, '2007 Inaugural Ray Whitrod Oration' (Speech delivered at the Adelaide Convention Centre, 24 September 2007). Available at: http://www.afp.gov.au/media/national_media/national_speeches/2007/inaugural_ray_whitrod_oration

¹¹⁰ Dupont and Pearman, *Heating up the Planet*, note 21, at pp. 58-59.

¹¹¹ See Etienne Piguet, *Climate Change and Forced Migration*, (UNHCR, New Issues in Refugee Research, Research Paper No.153, January 2008) at p. 5. Available at: <http://www.unhcr.org/research/RESEARCH/47a316182.pdf>

- Political instability, military conflict, ecological stress and socio-economic change: as a result of increasing vulnerability to poverty and social deprivation, coupled with weak state institutions that are inadequate in managing competition over diminishing resources.¹¹³ The conflict in Darfur, for example, has been recognised as stemming from an ecological crisis in the region, which, at least in part, was caused by climate change.¹¹⁴

To date there has been no coordinated response from the international community to address the situation of populations displaced due to the impacts of climate change, which leaves it to the goodwill of an individual state to accept them. Although the term ‘climate change refugees’ has often been used to describe these populations, this does not accurately reflect the status of these populations in international law.¹¹⁵ Under the *Convention relating to the Status of Refugees*, states have obligations not to return a refugee to any country where he or she is likely to face persecution, other ill-treatment, or torture.¹¹⁶ The immediate obstacle for victims of the impacts of climate change would be categorising such impacts as *persecution*. Further, under article 1A(2) persecution must be ‘by reason of an individual’s race, religion, nationality, political opinion or membership of a particular social group’; a requirement that is counterintuitive to the indiscriminate nature of climate change disasters.¹¹⁷

Climate change refugees may be covered by the broader protection obligations imposed on states that stem from article 7 of the ICCPR, which prohibits torture and ‘cruel, inhuman, or degrading treatment or punishment’.¹¹⁸ The UN Human Rights Committee has interpreted article 7 as preventing States from exposing individuals to the risk of such treatment ‘upon return to another country by way of their extradition, expulsion or *refoulement*’.¹¹⁹ As the definition of ‘degrading treatment’ is evolving,¹²⁰

¹¹² Ibid, at p. 7. Sea-level rise will have dire consequences for low-lying atoll countries in the Pacific such as Kiribati, the Marshall Islands, Tokelau and Tuvalu. Ultimately, the sea will either submerge the coral atolls or salt water intrusion will contaminate ground water so much that agricultural activities will cease, making habitation impossible. Here mitigation and adaptation strategies are unlikely to be of assistance and displacement of communities has already started. Rising sea levels are also problematic for the broader region, as most of Asia’s densest populations live on or near the coast, including the cities of Shanghai, Tianjin, Guangzhou, Hong Kong, Tokyo, Jakarta, Manila, Bangkok, Singapore, Mumbai and Dhaka. These cities are becoming increasingly susceptible to flooding due to extensive urbanisation, exacerbated by extensive land clearance: Dupont and Pearman, *Heating up the Planet*, note 21, at pp. 46-48.

¹¹³ German Advisory Council on Global Change, *World in Transition*, note 44, at p. 1.

¹¹⁴ International Alert, *A Climate of Conflict*, note 45, at p. 12.

¹¹⁵ McAdam, ‘Climate Change ‘Refugees’ and International Law’, note 86, at p. 4.

¹¹⁶ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954). Australia ratified the Refugee Convention on 22 January 1954.

¹¹⁷ Although, there may be some limited situations where individuals will fit the Convention definition, for example if good land for farming or grazing becomes scarce and one group attacks another to drive it away and the State is unable to prevent this.

¹¹⁸ There are a limited number of rights in international instruments and customary law, which supplement the 1951 Refugees Convention, by imposing a protection obligation on states. These broader obligations, which may be either explicit or implied, are described as ‘complementary protection’: Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Edition, 2007) at p. 285.

¹¹⁹ UN Human Rights Committee, *General comment No.20 - Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (1992) at para 9. This position has been affirmed by the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439.

there is potential for degrading treatment to include situations where individuals are left destitute, without basic levels of subsistence, in an environment that is uninhabitable due to the impacts of climate change. But at present it is questionable whether such a situation would be encompassed by existing jurisprudence.

It is clear that international law is not yet equipped to respond adequately to the diverse causes of climate-induced migration. Yet given the numbers, the question of the rights of displaced populations to a form of protection from receiving countries will become unavoidable. To encompass the novel issues arising in the climate change context, a new international agreement is needed; one that equitably shares the emerging burden of climate-induced migration flows across the world and upholds the human rights of the individuals affected.¹²¹

The development of solutions at the international level will inevitably take time, and in the interim it will be necessary to formulate domestic laws to respond to the issue of climate-induced migration. This need has been recognised by the government, who in 2006, when in opposition, developed a policy discussion paper on climate change in the Pacific. Among a number of recommendations, the paper proposes that Australia establish an 'international coalition' of Pacific Rim countries willing to accept 'climate change refugees' and that Australia itself accept 'climate change refugees' as part of its humanitarian program.¹²² The proposal to resettle populations displaced by climate change in Australia is to be commended. However, the implementation of such a policy should be driven by the human rights needs of the affected populations, and not by their capacity to fit within the general migration program. New Zealand, for example, has established a settlement visa called the Pacific Access category. While climate change was the impetus behind the programme, eligibility is based on age and language criteria.¹²³ This limits the effectiveness of that programme to address the human rights needs of those impacted by climate change in the region.

¹²⁰ See, for example, *N v Secretary of State for the Home Department* [2005] UKHL 31; *Rodriguez-Torres, R (on the application of) v Home Secretary* [2005] EWCA Civ 1328. These cases consider Article 3 of the European Convention on Human Rights (which is equivalent to article 7 of ICCPR).

¹²¹ This has been recognised by the current government, who in 2006 developed a policy discussion paper on climate change in the Pacific, which among a number of recommendations, proposes that Australia work at the UN to ensure appropriate recognition of climate change refugees in existing conventions, or through the establishment of a new convention on climate change refugees: Australian Labor Party, *Our Drowning Neighbours*, (Labor's policy discussion paper on climate change in the Pacific, January 2006) at p. 10. Available at: <http://www.anthonyalbanese.com.au/documents/060105%20-%20Our%20Drowning%20Neighbours.pdf>

¹²² Ibid.

¹²³ Eligibility is restricted to applicants between the ages of 18 and 45 who have a minimum level of English. Selection is by ballot and permits an annual quota of 75 citizens each from Tuvalu and Kiribati and 250 each from Tonga and Fiji, plus their partners and dependent children: McAdam, 'Refugees' and International Law: on or off the world map?', note 86, at p. 8.

Conclusion

The values that inspired the drafters of the UDHR provide a powerful point of reference in the climate change context. That document was an international response to the human tragedy of extreme nationalism, fascism and world war. It established a set of entitlements and rights - civil, political, cultural, social and economic for 'all members of the human family' to prevent the 'disregard and contempt for human rights that have resulted in barbarous acts which have outraged the conscience of mankind'. While the drafters of the UDHR were looking back at a human tragedy that had already happened, we are now looking at a human rights tragedy *in the making*. Allowing that tragedy to evolve would represent 'a systematic violation of the human rights of the poor and of future generations'.¹²⁴

This paper has shown that many of broadly recognised rights contained in the UDHR and other international instruments will be significantly threatened by the impacts of climate change. As a signatory to these instruments Australia has agreed to *respect, protect and fulfil* the rights contained within them and therefore has a positive obligation to respond to the impacts of climate change. As such, Australia's response to climate change must be human rights compliant.

What is also clear is that the international standards and norms that these rights establish - for the protection of the right to life, to personal security, and to the basic necessities for life - clean water, food, shelter, minimum health care and so on - themselves provide guidance to decision makers on the substantive elements of legislative and policy responses to climate change. Further, the fundamental concept underpinning these international instruments, that all are entitled to equal protection under the law without discrimination, will be of particular importance in developing responses to the impacts of climate change.

Accordingly, whether particular climate change responses relate to local communities in Australia, to immigration policies for people seeking to come to Australia to escape environmental catastrophes, or to funding for adaptation measure overseas, a human rights-based approach to policy development could, and should, be adopted to provide a standard against which policy and resource allocation is evaluated.

¹²⁴ UNDP, 'Overview – Fighting climate change: human solidarity in a divided world' in *Human Development Report 2007/2008 – Fighting climate change: Human solidarity in a divided world* (November 2007) at p. 4.

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