

HUMAN RIGHTS AND CLIMATE CHANGE: A TRAGEDY IN THE MAKING

THE HON JOHN VON DOUSSA QC*

I INTRODUCTION

I would like to begin by acknowledging the Gadigal People of the Eora Nation, the traditional owners of the land on which we meet.

Good afternoon Ladies and Gentlemen.

I am very pleased to be here talking about Human Rights and Climate Change in the first of Human Rights and Equal Opportunity Commission's ('HREOC's') seminar series celebrating the 60th Anniversary of the *Universal Declaration of Human Rights* ('Declaration').¹

The *Declaration*, adopted by the United Nations ('UN') General Assembly in 1948, consists of a preamble and 30 articles setting out a broad range of fundamental human rights and freedoms to which all men and women, everywhere in the world, are entitled, without any distinction. The *Declaration* and its core values, inherent human dignity, non-discrimination, equality, fairness and universality, apply to everyone, everywhere and always.²

Many things can be said about the *Declaration*. It is the foundation of international human rights law, the first universal statement on the basic principles of inalienable human rights, and a common standard for all peoples and all nations.³ As the *Declaration* approaches its 60th birthday, it is HREOC's intention to emphasise the document's enduring relevance, its universality, and its application to all of us in a series of seminars open to the general public.

The present seminar marks the first of this series. It is appropriately entitled 'Human Rights and Climate Change: A Tragedy in the Making' because although climate change will clearly have direct and indirect human rights impacts, the focus of governments seems to have been largely on the economic, trade and security impacts of climate change, with the social and human rights

* President of the Human Rights and Equal Opportunity Commission. Text of an address delivered at the HREOC Seminar Series for the 60th Anniversary of the Universal Declaration of Human Rights 20 August 2008.

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

2 Office of the High Commissioner of Human Rights, *The Universal Declaration: a Living Document* (2008) <<http://www.un.org/events/humanrights/udhr60/declaration.shtml>> at 27 August 2008.

3 *Ibid.*

implications receiving little consideration in policy debates. While the interim report of the Garnaut Climate Change Review⁴ made progress in distancing itself from the 'business as usual' approach to climate change, still no specific mention is made of the impact of climate change on human rights in Australia.

I therefore welcome this opportunity to look at climate change through a human rights lens. I will begin by discussing the direct and indirect impacts climate change will have on human rights and substantive equality. I will then canvass what Australia international human rights obligations require us to do when responding to climate change. Finally I will highlight some possible areas where, in responding to climate change, human rights principles might aid policymaking. I hope to demonstrate in this speech today that the values of non-discrimination, equality and fairness – the very foundations of the *Declaration*, offer some very useful guiding principles for our response to climate change.

II THE DIRECT AND INDIRECT IMPACT OF CLIMATE CHANGE ON HUMAN RIGHTS

When climate change is viewed through a human rights lens, the picture looks very different from the scientific statistics and economic forecasts we generally hear. The human rights lens shows populations becoming increasingly vulnerable to poverty and social deprivation as large tracts of previously fertile land become useless. We can anticipate conflicts over limited water supplies becoming more severe and frequent. We see problems in controlling infectious diseases, which are also spreading wider. We see rising sea levels submerging low-lying atoll countries and delta regions, or making them uninhabitable by inundating their fresh water tables.

These are scenarios which directly threaten fundamental human rights; rights to life, to food, to a place to live and work as well as rights to shelter and property, rights associated with livelihood and culture and migration and resettlement. As Madame 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 ...⁵

What's more, the human rights lens brings into focus the reality that the world's poor and marginalised, all too often women and children, will be disproportionately affected by climate change – exacerbating existing social inequity at both the local and international level. The International Council on Human Rights Policy observed in its seminal report on climate change and human rights this year that the worst effects of climate change are likely to be felt

4 Garnaut Climate Change Review, *Draft Report: June 2008* (2008) <[http://www.garnautreview.org.au/CA25734E0016A131/WebObj/GarnautClimateChangeReview-FULLDraftReport,4July2008/\\$File/Garnaut%20Climate%20Change%20Review%20-%20FULL%20Draft%20Report,%204%20July%202008..pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/GarnautClimateChangeReview-FULLDraftReport,4July2008/$File/Garnaut%20Climate%20Change%20Review%20-%20FULL%20Draft%20Report,%204%20July%202008..pdf)> at 27 August 2008.

5 Laura MacInnis, 'Climate Change Threatens Human Rights of Millions: UN', *Reuters*, 19 February 2008.

by those individuals and groups whose rights are already precarious.⁶ This is because populations whose rights are poorly protected are likely to be less well-equipped to understand or prepare for climate change effects; and more likely to lack the resources needed to adapt to expected alterations of their environmental and economic circumstances.⁷

We can therefore anticipate conflicts over limited resources becoming more frequent and severe, and at times violent, as a result of climate change. International Alert, a United Kingdom based, non-government organisation, has already 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.⁸ A number of these are in the Asia Pacific region. Critically, food production in Asia is said to decrease by as much as 20 per cent as a result of climate change, affecting more than one billion people by 2050.⁹

It is in this context that the Garnaut Climate Change Review Draft Report released in July 2008 warns that Australia is set to experience the ripple effects of climate-induced political disturbances and even violent conflict in the region.¹⁰ Since 1999, Australian Defence Force regional interventions have cost the federal budget on average over half a billion dollars every year, a figure that could rise significantly in the longer term with the destabilising impact of climate change on the region.¹¹

With climate change becoming a key topic in national and global politics, the first response has been to pursue measures to mitigate its rate of acceleration, for example by curbing greenhouse gas emissions through the introduction of an emissions trading scheme, scheduled to commence in 2010. We are presently in the midst of further discussions on an agreement to replace the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('*Kyoto Protocol*') once it expires in 2012. The Bali Mandate named after the conference held in Bali in December 2007 set a course for 'long term cooperative action' and witnessed Australia's signature to the *Kyoto Protocol* and the announcement by the Prime Minister of Australia that, by 2050 Australia would reduce emissions by 60 per cent over 2000 levels.¹² The Bali Mandate, for the first time, also has developing countries committing to preparation of mitigation actions, supported

6 International Council on Human Rights Policy, *Climate Change and Human Rights: a Rough Guide* (2008) 3 <http://www.ichrp.org/files/reports/36/136_report.pdf> at 27 August 2008.

7 Ibid.

8 Dan Smith and Janani Vivekananda, *A Climate of Conflict: The Links Between Climate Change, Peace and War* (2007) International Alert, 3 <http://www.international-alert.org/pdf/A_Climate_Of_Conflict.pdf> at 27 August 2008.

9 Garnaut Climate Change Review, above n 4, 188.

10 Ibid 192.

11 Ibid 190.

12 Ibid 273.

by technology and financing, in a measurable, reportable and verifiable manner.¹³

Recognising that climate change will nevertheless continue, albeit hopefully at a reduced rate, there have been attempts to adapt to its effects. Australia and other developed nations have already accepted financial obligations under the *United Nations Framework Convention on Climate Change* ('UNFCCC') to assist developing nations implement regional adaptation programs.¹⁴ However, to date delivery through these programs has been limited. The total international contribution has amounted to around US\$26 million. For the purposes of comparison; this is equivalent to one week's worth of spending under the United Kingdom flood defence program.¹⁵

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.¹⁶

Importantly, there are promising signs that this approach is changing. Australia's most recent budget committed \$150 million over three years to assist countries in our region assess and adapt to the likely impacts of climate change on their coastal communities and infrastructure, their agricultural sectors and their health systems. The new Rudd Government should be congratulated for this very valuable step towards reducing the impact of climate change in the immediate region.¹⁷

Yet the differential impact of climate change is not limited to developing and developed countries. Within Australia, it has been predicted that northern Aboriginal communities will bear the brunt of climate change, with more than 100 000 people facing serious health risks from malaria, dengue fever and heat stress, as well as loss of food sources from floods, drought and more intense

13 *United Nations Framework Convention on Climate Change* Secretariat, 'Bali Action Plan' adopted at the United Nations Climate Change Conference in Bali, Indonesia, December 3–15 2007 (Decision CP/13) (2007) <http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf> 27 August 2008.

14 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107, arts 4(1)(b), 4(1)(e), 4(4) (entered into force 21 March 1994). 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 per cent 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 Secretariat, 'UN Breakthrough on Climate Change Reached in Bali' (2007) <http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20071215_bali_final_press_release.pdf> 27 August 2008.

15 United Nations Development Programme, *Human Development Report 2007/2008 - Fighting Climate Change: Human Solidarity in a Divided World*, 14 (2007) <http://hdr.undp.org/en/media/HDR_20072008_EN_Overview.pdf> at 27 August 2008.

16 Ibid 13.

17 Department of Foreign Affairs and Trade, *About Australia: International Aid* (2008) <http://www.dfat.gov.au/facts/international_aid.html> at 27 August 2008.

bushfires.¹⁸ In the Torres Strait Islands, at least 8000 people will lose their homes if sea levels rise by one metre.¹⁹

In some areas the effects of climate change are already being experienced by Indigenous peoples in Australia, particularly on island communities, in the Torres Strait and other islands and communities along the coastline of Australia, and also those Indigenous groups whose lives, and maintenance of culture, depends on the Murray–Darling River.²⁰

At the recent United Nations Permanent Forum in New York, Indigenous peoples from around the world voiced their concerns that due to their cultural and spiritual relationship with the land, climate change posed particular risks to their very survival of their communities.²¹ In brief, the problems that Indigenous people will face in the future include forced relocation to the mainland urban centres, resulting in dispossession, environmental degradation and negligence, cultural genocide through loss of access to lands, ancestral, spiritual and totemic impacts, and impacts to overall health and wellbeing, in violation of the distinct rights and interests that Indigenous peoples have under the *Declaration on the Rights of Indigenous people* to their lands and territories, waters, culture, and natural resources.²²

III AUSTRALIA'S HUMAN RIGHTS OBLIGATIONS

Given that climate change is already affecting a broad range of internationally protected human rights, the question may be asked; what if anything, does the modern human rights regime require from governments when developing appropriate responses to climate change? The answer, it seems, is 'a lot', despite the fact that mainstream climate change literature and debate has, until very recently, given little or no attention to human rights concerns.

But, as the precise connection between human rights and climate change is still developing, I need to say a little by way of background about the notion of human rights, and why it is justifiable to assert that human rights principles establish normative benchmarks that governments should comply with.

The modern notion of human rights is one founded in international law. It traces back to, and is based upon the *Universal Declaration of Human Rights* which was adopted by the General Assembly of the United Nations on 10

18 Friends of the Earth International, *Climate Change: Voices from Communities Affected by Climate Change*, 5–6 (2007) <<http://www.foei.org/en/publications/pdfs/climate-testimonies>> at 27 August 2008.

19 Ibid.

20 Donna Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (CSIRO Marine and Atmospheric Research Paper 001, November 2006) 5–6 <http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf> at 27 September 2008.

21 Tom Calma, 'Land and Culture,' (Speech delivered at the Department of Environment, Water, Heritage and the Arts for NAIDOC Week Celebrations, Parkes, 7 July 2008) <http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20080707_essentials_land_and_culture.html> at 27 August 2008.

22 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/61/L.67 (2007).

December 1948. The *Declaration* builds from the premise in the first Article that '[a]ll human beings are born free and equal in dignity and rights'.

The major human rights treaties were developed before climate change was understood to be a looming threat to human security. However, there are many broad rights recognised in the *International Covenant on Civil and Political Rights*²³ and in the *International Covenant on Economic, Social and Cultural Rights*²⁴ as well as in the *Convention against Torture*,²⁵ and the *Convention on the Rights of the Child*²⁶ which are relevant to the situation of people whose way of life comes under threat from climate change. These broad rights establish international norms 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. Further, the fundamental concept that all are equal before the law and are entitled without discrimination to equal protection under the law, which underpins these human rights treaties, is particularly relevant in developing responses to the impacts of climate change.

As a signatory to the above human rights instruments, Australia has agreed to 'respect, protect and fulfil' the rights contained within them.²⁷ 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.²⁸ 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.²⁹ This is particularly relevant in the climate change context where responsibility for carbon emissions may be difficult to ascertain.

However, the legal force of the rights protected in international treaties in Australia is not clear cut. On the one hand, by signing up to international treaties

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

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

25 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

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

27 UN Office of the High Commissioner for Human Rights, *What are Human Rights?* (2008) <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> at 27 August 2008.

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

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

Australia has made an undertaking to the international community to ensure people within its jurisdiction enjoy the recognised human rights.

On the other hand, while international human rights law establishes these broad rights, in Australia international law has no binding force as a law of this land until the Parliament enacts the provisions of a treaty into domestic law. And while Australia has enacted a number of international human rights norms,³⁰ the broad range of rights most likely to be under threat from the impact of climate change, including those rights set out in the *International Covenant on Economic, Social and Cultural Rights* have not been incorporated into Australian law.

Nevertheless, the fact that these rights have been acknowledged by Australia to the international community is still significant. In the now famous case of *Teoh*,³¹ 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 Australian law.³²

It seems reasonable therefore to argue, and hopefully *expect*, that in developing policy and legislative responses to climate change Australia will respect its international human rights obligations.

IV UPHOLDING AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IN RESPONDING TO CLIMATE CHANGE

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 in their homeland; or to funding for adaptation measure overseas, a human rights-based approach to policy development could and I would urge *should* be developed as a benchmark against which policy and resource allocation is evaluated.

In one sense, with adaptation measures at the centre stage of national policy development, we are already focused on protecting human rights, even if they are rarely articulated in such terms. For example:

- ensuring that homes are resistant to extreme weather conditions protects the right to life;

30 See for example, the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and parts of the *Workplace Relations Act 1996* (Cth) and the *Evidence Act 1995* (Cth).

31 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*').

32 Although various governments have attempted to overturn the effect of *Teoh*, in more recent times the Liberal 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. There is no indication the new Labor Government will adopt any different approach.

- 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.

However, Australia's peak environment and welfare groups have also recognised that low income and disadvantaged people will not only be at the forefront of climate change impacts, but also may be disproportionately affected by the adaptation measures pursued for the purposes of minimising the risks associated with climate change. For instance 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.³³ The most disadvantaged will struggle to live with increased costs.

Furthermore, there is strong evidence that low income earners will spend a greater proportion of total weekly household budget on energy and water than wealthier households. Given that these low income households will be left with little option but to pay the extra for these essential services, there is a general agreement that price increases have a far greater impact on total household spending in low income households.³⁴

Applying a human rights-based approach would address these inequities that arise in the context of responding to climate change. First, it would encourage *transparent and participatory* processes for decision-making, implementation, monitoring and evaluation. By focusing on individuals as *rights-holders* the responsibility is placed on government to allow for participation and input from affected members of society. Applied, this would mean, for example, that Indigenous people are considered as a major stakeholder in an emissions trading scheme, and that their custodial role over traditional lands, flow on impacts for environmental protection and caring for country, are fully taken into account when developing strategies for mitigation and adaptation.

Beyond these procedural issues, a human rights-based approach would also guide policy makers on the *substantive* elements of adaptation measures. The important questions about impact scenarios would be *who* precisely is to suffer *what* and *why* from climate change responses.³⁵ Human rights standards thereby provide thresholds of minimum acceptability and ensure that the impact of adaptation and mitigation measures on individuals – either positive or negative – remains central to the policy debate.

33 Justin Sherrard and Alan Tate, *Equity in Response to Climate Change Roundtable: an Australian Snapshot* (2007) <http://www.bsl.org.au/pdfs/Cambiar_climate_justice_Australian_snapshot_mar07.pdf> at 27 August 2008.

34 The Australian Conservation Foundation, CHOICE and the Australian Council of Social Service, *Energy and Equity: Preparing Households for Climate Change: Efficiency, Equity, Immediacy* (2008) 3 <<http://www.choice.com.au/files/f132489.pdf>> at 27 August 2008.

35 International Council on Human Rights Policy, above n 6, 6–7.

A human rights-based approach would apply the principle of *non-discrimination* and *substantive equality*. So, when a climate change policy is put forward, decision-makers would need to identify the impact it would have on the most disadvantaged or vulnerable, as far as possible using data disaggregated according to the prohibited grounds of discrimination, for example, race, colour, sex, national or geographic origin. If the result of an adaptation measure is, for instance, that Indigenous people are going to be disproportionately impacted, the measure would require adjustment.

Under a human rights-based approach, the substantive elements of any new measure would need to ensure that the fundamental rights of everyone affected by the measure were taken into account, and balanced on non-discriminatory grounds. Those rights should of necessity incorporate minimum standards of political and civil rights, including personal security, and economic social and cultural rights. Water, food, and housing would be the most basic and important rights to ensure that the right to life was meaningful. Human rights standards would guide policymakers and legislators when weighing competing demands on limited resources; helping to ensure, for example, that budget allocations prioritise the most marginalised and disadvantaged. This could mean, for instance, that the government take steps to provide financial and other assistance to low income households to implement measures that improve water and energy efficiency. It could also encourage governments to establish safety net provisions to ensure that low income families are not burdened with price increases for essential services such as electricity and water, resulting from the introduction of an emissions trading scheme.³⁶

Initiatives such as the Bushlight Project, which aims to increase access to sustainable energy services within remote Indigenous communities across Australia is one such example of the possible benefit of a human rights based approach to climate change mitigation measures.³⁷ By July 2007 this program had installed 97 renewable energy systems in remote communities in Australia. This is particularly important in remote communities where often the only source of power for refrigeration, heating and other basic essentials, that we in the cities take for granted, is through diesel generators.³⁸

The authoritative General Comments of the Human Rights Treaty Bodies are a useful articulation of the *content* of some of the key human rights affected by climate change and provide a 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, the relocation of a community would have to ensure that the minimum requirements of fresh water (currently

36 The Australian Conservation Foundation, CHOICE and the Australian Council of Social Service, above n 34, 4.

37 See The Centre for Appropriate Technology, *Bushlight* <www.bushlight.org.au> at 27 August 2008.

38 See HREOC, *International Day of the World's Indigenous People* <http://www.hreoc.gov.au/about/media/media_releases/2008/84_08.html> at 29 August 2008.

calculated by the World Health Organisation at 7.5 litres per day)³⁹ would be physically and financially available to every adult and child, and that it would be accessible to all without discrimination on the grounds of sex, age, or economic or social standing, and that personal security is not threatened when having to physically access to water.⁴⁰ Similar core obligations resting on governments have been specified in other General Comments in relation to the rights to food, health and adequate housing.⁴¹

A human rights-based approach could be applied through a process that required the introduction of new legislative based policies to be accompanied by a human rights compliance statement. Where either the policy or enabling legislation does not meet recognised human right norms, the statement would have to identify and explain the reasons for the shortcoming. This type of policy formulation process would be analogous to the processes enacted into the Human Rights Charters now in place in the United Kingdom, New Zealand, the Australian Capital Territory and Victoria.

The human rights issues for Australia that will arise where displaced populations cross their national boundaries raise additional issues. As others have observed, desperate, hungry and homeless people are likely to cross borders, even oceans as a result of the impacts of climate change.⁴²

In the past two decades Australia has experienced movement across the seas of people seeking refuge from persecution. Australia's legislative response to these so called 'unlawful non-citizens' has included indefinite detention for failed asylum seekers and, until mid December 2007, the 'Pacific solution'. These measures are generally acknowledged to fall short of well-established international human rights norms. In this context, we welcome Senator Evans'

39 This figure is for total consumption (that is, drinking water plus water for foodstuffs preparation): Guy Howard and Jamie Bartram, *Domestic Water Quantity, Service Level and Health* (2003) World Health Organisation, 9 <http://www.who.int/water_sanitation_health/diseases/en/WSH0302.pdf> 27 August 2008.

40 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15 – The right to water* (2002) [37] <<http://cesr.org/generalcomment15>> at 27 August 2008.

41 See for example, CESCR, *General Comment No.12 – The Right to Adequate Food* (1999); CESCR, *General Comment No.4 – The Right to Adequate Housing* (1991); and CESCR, *General Comment No.14 – The Right to the Highest Attainable Standard of Health* (2000); <<http://cesr.org/generalcomments>> at 27 August 2008.

42 Nicholas Stern et al, *The Economics of Climate Change* (2006) HM Treasury <http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm> at 1 September 2008; Norman Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43(11) *BioScience* 752; Alan Dupont and Graeme Pearman, *Heating up the Planet: Climate Change and Security* (2006) Lowy Institute for International Policy, 56 <<http://www.lowyinstitute.org/Publication.asp?pid=391>> 1 September 2008; Etienne Piguet, *Climate Change and Forced Migration* (2008) Policy Development and Evaluation Service United Nations High Commissioner for Refugees, 5 <<http://www.unhcr.org/research/RESEARCH/47a316182.pdf>>

commitment this July to reform the current detention regime and prove a more humane treatment of those seeking our protection.⁴³

The flow of this human traffic in the past may turn out to be a trickle of what may occur in the future. The International Federation of Red Cross announced this year that climate change disasters are currently a bigger cause of population displacement than war and persecution.⁴⁴ According to a report published by the United Nations University, there are now about 19.2 million people officially recognised as ‘persons of concern’ – that is, people likely to be displaced because of environmental disasters.⁴⁵ Current estimates range between 25 million and one billion people by 2050 that are going to be resettled by 2050.⁴⁶

One of the international treaties that followed the Declaration was the *Convention Relating to the Status of Refugees* made in 1951 (*Refugee Convention*).⁴⁷ We hear a lot today about a class of climate or environmental refugees, but the *Refugee Convention* in fact offers no protection to these new classes of asylum seekers. The *Refugee Convention* was developed to protect people fleeing from persecution, and applies only to people who ‘owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ are outside the country of their nationality, and are unable or unwilling to return.

Climate refugees, generally speaking, will not fit within the definitions of the *Refugee Convention*. But people cannot be returned to their island state if the island no longer exists. Currently, the nation of Kiribati faces the prospect of becoming uninhabitable, and many low-lying islands in the Pacific, including Tuvalu, and some in Papua New Guinea, and the Marshall Islands, face the prospect of disappearing completely.

Furthermore, international law is clear that a non-citizen must not be returned to a border of another country where the safety of that person is at risk of torture, cruel or inhumane treatment. Plainly, to return people to a country that still exists, but is so ravaged by the elements that food, water and housing cannot be provided by its government would be to expose them to cruel and inhumane treatment. However, it can be anticipated that there will be endless arguments

43 Chris Evans, Minister for Immigration and Citizenship, ‘New Directions in Detention, Restoring Integrity to Australia’s Immigration System’ (Seminar given at the Centre for International and Public Law, Australian National University, 29 July 2008)

<http://law.anu.edu.au/Cipl/Lectures&Seminars/2008/Evans_paper.pdf> at 27 August 2008.

44 United Nations Environment Programme, ‘Disasters Contribute to Rise in Population Displacement’ (Press Release, 20 June 2008)

<<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=538&ArticleID=5842&l=en>> 27 August 2008.

45 United Nations University, ‘As Ranks of “Environmental Refugees” Swell Worldwide, Calls Grow for Better Definition, Recognition, Support’ (Press Release, 12 October, 2005)

<<http://www.ehs.unu.edu/article:130>> 27 August 2008.

46 Oli Brown, *Migration and Climate Change* (2008) IOM Migration Research Series, 11–2,

<http://www.iisd.org/pdf/2008/migration_climate.pdf> at 27 August 2008.

47 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

whether those fleeing particular countries could be resettled somewhere in their country of nationality – either immediately, or in the foreseeable future.

How Australia will treat unauthorised arrivals that really are in desperate need of protection from starvation and death is a pressing question. At this point in time international law offers no precise answer. Solutions will require inventive and creative thinking, and much goodwill on the part of developed nations. Plainly a new international treaty is needed to deal with the obligation of the States to people in need of either temporary protection from drought, storm or salt water devastation, or a new permanent home because their nation state has disappeared or can no longer support them. Hopefully, Australia will take a leadership role in UN fora to hammer out a solution which equitably shares the emerging burden of climate change-induced catastrophes in particular countries across the world.

V CONCLUSION

Ladies and Gentleman, the values that inspired the drafters of the *Declaration* 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’.⁴⁸ While the drafters of the *Declaration* were looking back at a human tragedy that had already happened, we are now looking at a human rights tragedy *in the making*.

The Garnaut Climate Change Review describes climate change as a ‘diabolical policy problem ... harder than any other issue of high importance that has come before our polity in living memory’.⁴⁹ Given the complexity of the issue, I would suggest that human rights principles may at least help to return the focus to the human suffering that climate change is causing and will continue to cause, helping us to remain attentive to the human rights needs of the people whose lives climate change will impact upon most.

48 As enumerated in its Preamble.

49 Garnaut Climate Change Review, *Draft Report*, above n 4, 2.