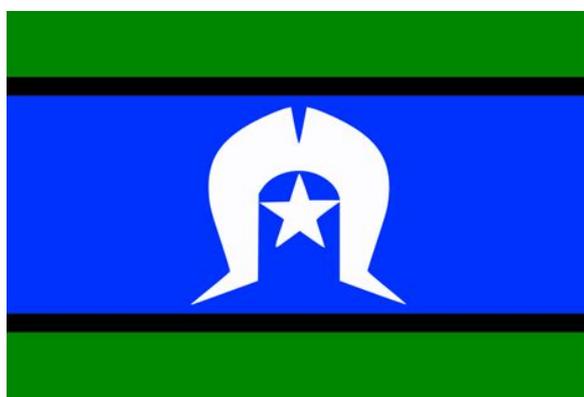




DISPLACEMENT SOLUTIONS

**An Analysis and Recommendations on Applying the
*Peninsula Principles on Climate Displacement Within
States* to Current and Future Climate Displacement in
Australia's Torres Strait Islands**



June 2018

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The Peninsula Principles on Climate Displacement Within States (18 August 2013)

Displacement Solutions (DS) works with climate displaced persons, communities, governments and the UN to find rights-based land solutions to climate displacement. DS also works to empower displaced people and refugees to exercise their right to return and have restored to them their original homes, lands and properties through reliance on the right to restitution. DS works together with and on behalf of people who have been displaced not only by conflict, forced eviction or other human rights abuses, but also natural disaster, climate change or other circumstances beyond their control. DS assists in finding alternative solutions such as compensation or relocation if this is their wish.

DS does not believe in simply blaming governments responsible for human rights abuses. We take human rights work one-step further to solve situations where forcibly displaced people have lost their homes. DS offers practical guidance on how to reduce, eliminate or redress such abuses. This is done through development of institutional and policy frameworks, legal advocacy, training, research and media.

www.displacementsolutions.org

I. Introduction¹

The potential displacement effects of climate change are most commonly associated with small island nations such as Tuvalu or Kiribati, or with the coastal areas of countries such as Bangladesh, Vietnam or Myanmar. While these and other countries are already grappling with increasingly difficult climate-based challenges, and have received extensive attention in our reports and other publications, those concerned have given less attention with climate change to its effects on Australia.

Despite its proximity to climate hot spots in Asia and the Pacific, Australia - both domestically and internationally - has a highly controversial political history in terms of its response to climate change, and has been often criticised for both its lacklustre attempts at reducing domestic CO₂ emissions, for ending a range of forward-looking national institutions and programmes addressing climate change and for the lack of seriousness accorded the climate change impacts facing many of its nearest neighbours including Papua New Guinea, Solomon Islands and all the atoll nations in the Pacific. Moreover, the very real threats of climate displacement within Australia itself have yet to figure prominently on the domestic political agendas of any of the major political parties, despite the very large, and growing, scale of this problem. One leading report on climate impacts on Australia indicates that some 226,000 coastal properties are under threat of permanent inundation, with a collective value of more than AUD 250 billion.²

Some coastal localities have reversed pre-existing planning approvals for fear of future litigation by those who may lose their coastal homes and investments, and a growing number of analysts have noted that climate impacts will not merely be coastal in nature, but will impact all corners of the country.

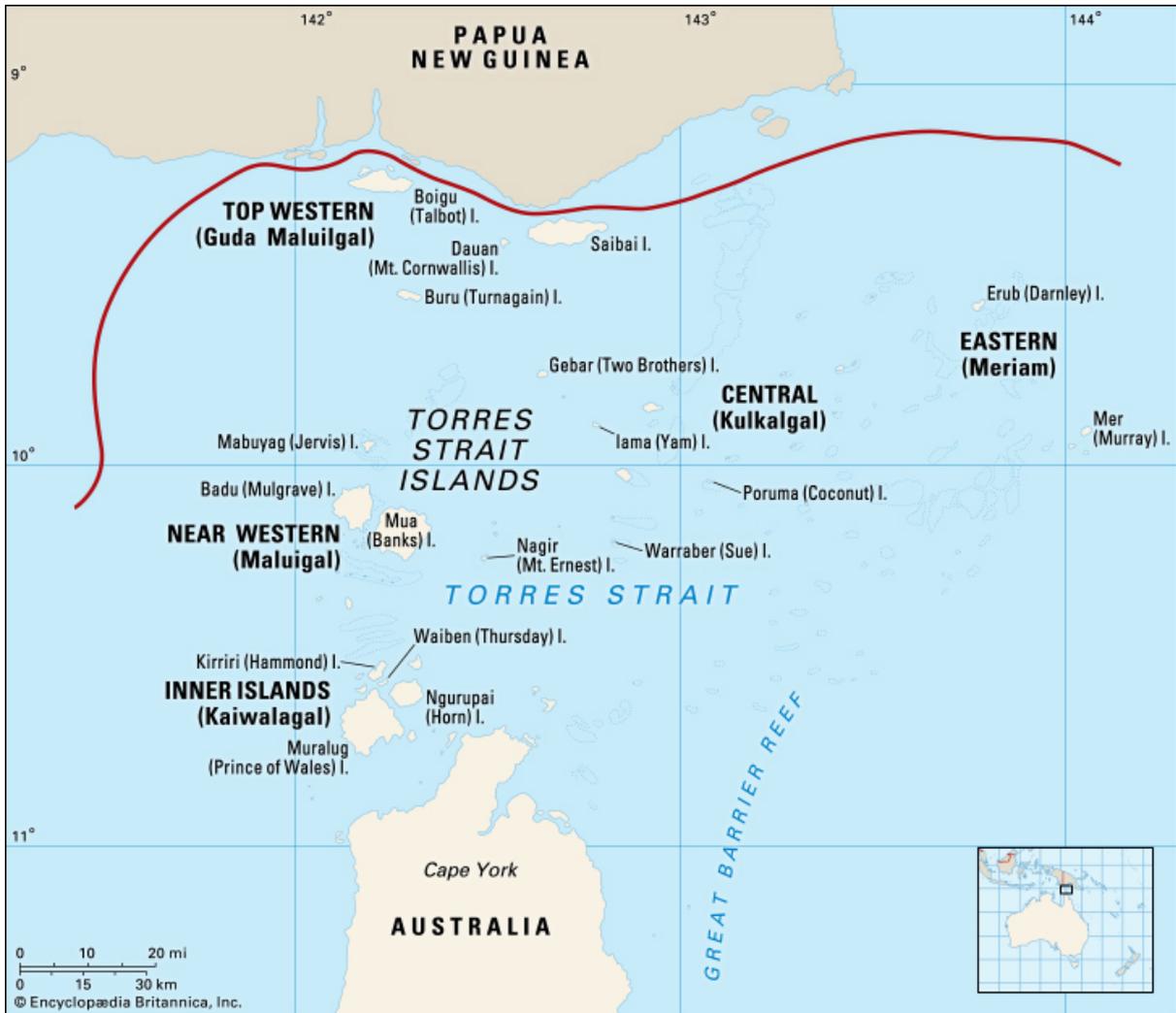
One area of the country that is already facing the very real threat of climate displacement are the communities among the Torres Strait Islands.³ The predicted impacts of climate change on the geographical, ecological, social and cultural aspects of the Torres Strait region make these communities amongst the most vulnerable across Australia; even minor rises in sea level will have severe consequences on the land, lives and livelihoods of the people of the Torres Strait Islands. Climate change is predicted to cause severe damage not only to the islands but also marine and coastal ecosystems in the area, affecting communities' access to resources.⁴ Thus, governments and policy makers – at Commonwealth, State and local levels, must appreciate the risks faced by Torres Strait Island communities and move quickly to implement practicable plans and policies which protect these communities as climate displacement becomes a looming reality in future.

¹ This paper was a collective effort by Scott Leckie, Alyse Rankin, Crystal Nguyen, Lachlan Wittick and Emily Morison.

² Will Steffen, John Hunter and Lesley Hughes, *Counting the Costs: Climate Change and Coastal Flooding*, Climate Council of Australia, 2014, p. 21, et al. See also: John A. Church, Kathleen L. McInnes, Didier Monselesan and Julian O'Grady, *Sea-Level Rise and Allowances for Coastal Councils around Australia – Guidance Material*, 28 June 2016, Report for NCCARF.

³ Torres Strait Regional Authority (2014) *Torres Strait Climate Change Strategy 2014–2018*. Report prepared by the Land and Sea Management Unit, Torres Strait Regional Authority, July 2014, 36p, iii <http://www.tsra.gov.au/data/assets/pdf_file/0003/6393/TSRA-Climate-Change-Strategy-2014-2018-Upload.pdf>.

⁴ Ibid.



II. An Overview of the *Peninsula Principles on Climate Displacement Within States*

The 2013 *Peninsula Principles on Climate Displacement Within States* (Peninsula Principles) are ‘a comprehensive normative framework (...) within which the rights of climate displaced persons can be addressed’ (Principle 1(a)).⁵ They focus on climate displacement within states, which is considered to be the main source of climate-displaced people. The Principles are drawn from three main sources: 1) the principles of international law; 2) human rights obligations; and 3) good practices. They ‘set out protection and assistance principles, consistent with the UN Guiding Principles on Internal Displacement, to be applied to climate displaced persons’ (Principle 1(a)). The Peninsula Principles are the result of a several-year effort, culminating in the work of a group of legal scholars, UN officials and climate change experts that met in Red Hill on the Mornington Peninsula in Victoria, Australia, and adopted them on 18 August 2013. Since their adoption, the Peninsula Principles have been creatively and pragmatically used by numerous communities affected by climate change worldwide, as well as advocates, governments and intergovernmental agencies, all of whom have increasingly incorporated this framework on best to address issue of climate displacement, including the publication of books on the Principles, and their reference at the UN and within official UN documents on many occasions.⁶ The Principles offer an important framework to guide authorities toward taking a human rights-focused approach to climate displacement in the Torres Strait Islands. This paper will discuss the relevance of each substantive principle to the Torres Strait region, and offer points for consideration with respect to how the Principles could be implemented in a way that will best recognise the needs and rights of Torres Strait Island communities.

Basic Definitions and Main Principles

The Principles contain four basic definitions (Principle 2):

Climate change: ‘means the alteration in the composition of the global atmosphere that is in addition to natural variability over comparable time periods’.

Climate displacement: ‘means the movement of people within a State due to the effects of climate change, including sudden and slow-onset environmental events and processes, occurring either alone or in combination with other factors’.

Climate displaced person: ‘means individuals, households or communities who are facing or experiencing climate displacement’.

Relocation: ‘means the voluntary, planned and coordinated movement of climate displaced persons within States to suitable locations, away from risk-prone areas, where they can enjoy the full spectrum of rights including, land and property and livelihood rights and all other livelihood and related rights’.

There are three main principles that guide the Peninsula Principles. The first is the principle of non-discrimination, which states that people cannot be discriminated against based on their real or potential displacement situation and should enjoy the same rights and liberties as the rest of the citizens in the country. The second is the principle of having

⁵ For comprehensive information on the Peninsula Principles, see: <http://displacementsolutions.org/ds-initiatives/the-peninsula-principles/>.

⁶ See, for instance, Scott Leckie & Chris Huggins (eds), *Repairing Domestic Climate Displacement: The Peninsula Principles*, Routledge, 2016.

access to adequate judicial resources and, the third, access to the judicial system if needed. These three overarching elements are key to the successful implementation of the framework in the Torres Strait.

The Rights of Climate Displaced Persons

The Peninsula Principles make an important distinction between people who could be displaced and people who are already suffering displacement for reasons linked to climate change. However, the Principles use the term ‘climate displaced persons’ to define both groups, since both are entitled to rights and protection under international law and under the Principles themselves. This terminology is significant because it asserts that people who *could* be displaced should have rights from the moment they feel that their health, life or environment is threatened as a result of the effects of climate change. To be considered a climate displaced person, an individual does not have to be currently displaced; the *threat* of displacement immediately triggers protection under the Principles. This describes the current situation of many communities in the Torres Strait Islands; Torres Strait Islanders have not yet been displaced, but their islands are being threatened as a result of the rise in sea level and weather-related events that exacerbate their current vulnerability. Therefore, Torres Strait Islanders should be considered “climate displaced persons” and thus should be entitled to the protections offered by the Peninsula Principles and the broader human rights protections they reiterate.

The Peninsula Principles assert two overarching rights of climate displaced persons: 1. *The right to remain in their homes as long as possible*: One of the recitals in the Preamble of the Principles states: “Reaffirming the right of climate-displaced persons to remain in their homes and retain connections to the land on which they live for as long as possible, and the need for States to prioritise appropriate mitigation, adaptation and other preventative measures to give effect to that right”. This right is particularly pertinent to the situation of Torres Strait Islanders, since the threat of rising sea levels is a gradual phenomenon, that threat being exacerbated by weather related events during certain times of the year. 2. *The right to move safely and voluntarily and without coercion relocate over time*: Another of the recitals in the Preamble states: “Reaffirming further the right of those who may be displaced to move safely and to relocate within their national borders over time”. The Principles strongly assert the importance of empowering climate-displaced communities to make their own decisions with respect to how and when they respond to the threat of climate displacement. It is up to each community to decide when to relocate, as long as it is not an imminent risk to their lives and health. It should be stated clearly that climate change displaced people will not lose their rights to be relocated, nor the support from the national government or the international community, as a result of the simple fact that their decision to relocate may take longer than other communities. The Principles set out three phases with respect to approaching climate displacement: (1) the preparation and planning phase; (2) the relocation phase; and (3), where practicable, return to homelands.

III. Overview of the Geography of the Torres Strait Islands

The geography of the Torres Strait region manifests the vulnerability of the islands to the impacts of climate change. The region comprises 150 islands over 48,000 square kilometres of sea between Cape York and the southwest coast of Papua New Guinea.⁷ Torres Strait

⁷ David Lawrence and Helen Lawrence, ‘Torres Strait: the region and its people’, in Richard Davis (ed) *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004, Canberra) 15, 15.

Islanders have inhabited this region for more than 50,000 years.⁸ Today, approximately 8,000 Torres Strait Islanders live on 17 of the islands in the region. The 17 islands can be divided into four distinctive groups: The eastern group: ‘high, volcanic islands’⁹ of Mer (Murray Island), Erub (Darnley Island) and Ugar (Stephen or Stephens Island);¹⁰ The central group: ‘low sandy islands’¹¹ of Iama (Yam or Turtle-backed Island), Masig (Yorke Island), Warraber (Sue Island) and Puruma (or Poruma) (Coconut Island);¹² The western group: high rocky islands of Badu (Mulgrave Island), Moa (Banks Island), Mabuia (Jervis Island), Waiben (or Wayben) (Thursday Island), Kiriri (Hammond Island), Nurupai (or Ngurupai) (Horn Island) and Muralag (Prince of Wales Island);¹³ and The northern group: ‘low islands composed of mangrove muds and peats’¹⁴ of Saibai (Saibai Island), Boigu (Talbot Island), Dauan (Mt. Cornwallis Island), Cape York communities, Bamaga and Seisia.¹⁵ Communities in the Torres Strait Region are as diverse as their geography, with numerous languages and dialects amongst the communities. Subsistence strategies also diverge amongst the islands as a result of their diverse geography.¹⁶

IV. Projected Impact of Climate Change on the Torres Strait Region

The impacts of climate change threaten ‘ecosystems, infrastructure, livelihoods, wellbeing, culture and identity’ of Torres Strait Island communities.¹⁷ These impacts will be experienced in all ‘communities, sectors and ecosystems’ in the Torres Strait region.¹⁸ Torres Strait Islanders are exceptionally vulnerable to climate change due to the exposure of the low-lying islands of the Torres Strait to ‘sea level rise and increasingly intense storm surges caused by more extreme weather’¹⁹ which is exacerbated by the Islanders’ ‘limited capacity to respond, and adapt to additional social, financial and ecological stressors.’²⁰ The social and economic disadvantage experienced by Torres Strait Islanders, combined with a

⁸ Human Rights Council, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Situation of indigenous peoples in Australia, 25th sess, Agenda Item 3, UN Doc A/HRC/15/37/Add.4 (1 June 2010) annex 1.

⁹ Claire O’Neill, Donna Green and Willie Lui ‘How to make climate change research relevant for Indigenous communities in Torres Strait, Australia’ (November 2012) 17(1) *Local Environment* 1104.

¹⁰ David Lawrence and Helen Lawrence, ‘Torres Strait: the region and its people’, in Richard Davis (ed) *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004, Canberra) 15, 16.

¹¹ *Ibid.*, 15.

¹² *Ibid.*, 16.

¹³ *Ibid.*, 16.

¹⁴ *Ibid.*, 15.

¹⁵ *Ibid.*, 16.

¹⁶ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> iv. David Lawrence and Helen Lawrence, ‘Torres Strait: the region and its people’, in Richard Davis (ed) *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004, Canberra) 15, 20.

¹⁷ *Ibid.*, i.

¹⁸ *Ibid.*, 10.

¹⁹ Donna Green et al, An assessment of climate change impacts and adaptation for the Torres Strait Islands (October 2010) 102 *Climate Change* 405, 405.

²⁰ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 1.

dearth of infrastructure in the region, further limit the community's capacity to effectively adapt to climate change.²¹

The Torres Strait will experience both direct and indirect consequences of climate change, including 'increasing temperatures, changing rainfall patterns, sea level rise, ocean acidification and more extreme weather events, including tropical cyclones and storms.'²² According to the Torres Strait Regional Authority's 2014-18 plan, modelling predicts that climate change in the Torres Strait region will result in: An increase in mean surface temperatures of between 0.62 and 1.27 °C by 2030; An increase in annual average rainfall of 1.46% by 2030; Sea level rise of between 5 and 15 cm by 2030 relative to 1990 levels; Increases in the maximum wind speed of tropical cyclones of between 2 and 11% by 2100; Decreases in ocean pH (ocean acidification) of between 0.2 and 0.3 units by 2100; and Potential changes in seasonality, wind regimes, waves, ocean currents and salinity.²³

Communities in the Torres Strait are already feeling the impacts of climate change. Every year the Torres Strait experiences high tides that flood the islands, inundating 'houses, infrastructure including roads and sewage systems, community facilities, cultural sites including cemeteries, traditional gardens and coastal ecosystems.'²⁴ These high tides also often results in 'severe coastal erosion and reconfiguration of island shorelines, further threatening community infrastructure.'²⁵ The impact of these events will be exacerbated by sea level rise,²⁶ with levels currently rising at the alarming rate of 6-8 mm per year.²⁷ Rising sea levels have already resulted in significant flooding and erosion in 2005, 2006, 2009 and 2010 and 2014.²⁸ In January 2006 and January 2009, the sea wall in Sabai was breached by king tides, causing extensive inundation.²⁹ Studies show that the Torres Strait Islands of Saibai, Boigu, Masig, Warraber and Iamavii are already 'particularly vulnerable to inundation.'³⁰ Projected sea level rise will increase the frequency of extreme weather events such as storm surges, cyclones and floods³¹ resulting in further flooding and

²¹ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 16.

²² Ibid, 10.

²³ Ibid, 8.

²⁴ Ibid, 1.

²⁵ Ibid.

²⁶ Ibid, i.

²⁷ Torres Strait Regional Authority (2016). *Torres Strait Adaptation and Resilience Plan 2016-2021*. Report prepared by the Environmental Management Program, Torres Strait Regional Authority, June 2016, 108pp, 2.

²⁸ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 10.

²⁹ Green D, S Jackson and J Morrison, Risks from Climate Change to Indigenous Communities in the Tropical North of Australia (2009) Australian Government Department of Climate Change and Energy Efficiency <<http://www.climatechange.gov.au>>.

³⁰ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 14.

³¹ David Lawrence and Helen Lawrence, 'Torres Strait: the region and its people', in Richard Davis (ed) *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004, Canberra) 15, 27-28.

inundation. It is unclear what levels of inundation the islands will be able to withstand before the Islanders are forced to relocate.³²

V. Governance of the Torres Strait

In order to understand how the Peninsula Principles might be applied to the Torres Strait, it is also important to note the various bodies that play a role in governing Torres Strait affairs. The governance and administration of the Torres Strait region is highly complex, encompassing the overlapping jurisdictions of both Australia and Papua New Guinea (PNG), as well as local and state governments and various government agencies.³³ The Torres Strait Regional Authority (TSRA), a Commonwealth statutory authority, administers and coordinates policies and programs in the Torres Strait Region. Established in 1994, the TSRA has both an administrative and elected arm. The elected arm comprises 20 Torres Strait Islanders living in the region. Each island has its own island council. While there are various other Commonwealth, State and local government agencies responsible for the administration of the Torres Strait, the TSRA enables Torres Strait Islanders to exercise a degree of self-determination and independence. Natural Resource Management in the Torres Strait is administered by the TSRA's Environmental Management Program.

The TSRA's Torres Strait Coastal Management Committee (TSCMC) manages coastal and climate change matters. The TSCMC is comprised of representatives of Commonwealth, state and local government, research institutions and members of the Torres Strait Island communities that are the most significantly affected by inundation and coastal erosion in the region, including Boigu, Saibai, Iama, Warraber, Masig and Poruma. The function of the TSCMC is to enable whole of government responses to climate change in the Torres Strait. The Queensland government also exercises jurisdiction over the Torres Strait in respect of services such as 'policing, health care, housing and infrastructure supply and maintenance.'³⁴ Notably, the Queensland Government is responsible for Natural Resource Management and Environmental Protection in the region. In particular, the Queensland Department of Environment and Commonwealth Scientific and Industrial Research Organization (CSIRO), plays a key role in conservation in the Torres Strait.³⁵

³² Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 14.

³³ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf>, 5.

³⁴ *Ibid.*, 4.

³⁵ Kym Seebom and Gerry Morvell, (March 1998) 6(1) *Australian Geographical Studies* 82.

VI. Applying the Peninsula Principles to Address Climate Displacement in the Torres Strait

How, then, might the Peninsula Principles be of assistance in determining how to improve governmental approaches to the question of climate displacement in the Torres Strait Islands?

Principle 5: Prevention and Avoidance

States should, in all circumstances, comply fully with their obligations under international law so as to prevent and avoid conditions that might lead to climate displacement.

The Torres Strait forms part of Australian territory. As such, Australia's multi-faceted obligations under international law with respect to human rights and climate change should guide the federal government to take proactive steps to prevent and avoid conditions that will lead to climate displacement of Torres Strait Islanders. In particular, international law protects Torres Strait Islanders' use of their lands, through asserting the rights of indigenous peoples to access their traditional lands and resources, the right to food and the right to culture.³⁶ Torres Strait Islanders have their customary land rights legally recognised and protected in Australia pursuant to the *Native Title Act 1993* (Cth) (Native Title Act). However, as correctly acknowledged by James Anaya, UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 'the current Native Title Act framework has serious limitations that impair its ability to protect the native title rights of Aboriginal and Torres Strait Islanders.'³⁷ This is apparent when assessing the ability of the Native Title Act to compel action by the Australian government to protect the Torres Strait islands from climate change. While the Native Title Act would arguably require the Commonwealth government to pay compensation to Torres Strait Islanders if the impacts of climate change impair their native title rights, the framework does not require the Australian government to take steps to: protect Torres Strait Islanders' native title land from the damage occurring; or ensure the Torres Strait community, if effectively dispossessed of their land, are granted new land that can meet their cultural requirements.

Torres Strait Islanders' traditional lands are further protected by the right to food, as codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Indigenous lands are an intrinsic component of the right to food, because land is 'an indispensable means through which people can produce food, for their own consumption or as a source of income allowing them, in turn, to purchase food.'³⁸ Traditional means of

³⁶ International human rights law is a pre-existing source of protection for Torres Strait Islanders' traditional lands. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognises the right of indigenous peoples to their traditional 'lands, territories and resources' and requires states to protect these traditional lands, including by prohibiting 'any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources.' See: UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007) Article 8(2)(b).

³⁷ Human Rights Council, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Situation of indigenous peoples in Australia, 25th sess, Agenda Item 3, UN Doc A/HRC/15/37/Add.4 (1 June 2010) annex 1.

³⁸ Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12 *International Community Law Review* 303. 303.

subsistence in the Torres Strait is heavily dependent on ‘traditional and commercial fishing, hunting and gardening.’³⁹ The right to food similarly compels the Australian government to take positive actions protect Torres Strait lands and waters from the impacts of climate change so that traditional subsistence hunting and fishing can continue in the Torres Strait.

Protection of Torres Strait people’s traditional lands and livelihoods is also similarly protected by the right to culture. It is clear that the ‘right of Aboriginal and Torres Strait Islander communities to participate in and strengthen Indigenous cultural life is directly threatened by climate change, given the intrinsic links to land and marine environment in the cultures of these communities.’⁴⁰ Changes to ecosystems resulting from climate change will threaten ‘Torres Strait Island communities, whose culture, subsistence and livelihoods involve traditional and commercial fishing, hunting and gardening.’⁴¹ The Committee on Economic, Social and Cultural Rights (CESCR) asserts that: ‘[t]he strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.’⁴² Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.⁴³ States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.’⁴⁴ The right to culture further imposes a positive obligation on the Australian government to take positive steps to protect Torres Strait Island land and marine environment in order to sustain Torres Strait Islanders’ culture and livelihoods. Therefore, the indigenous right to land, in addition to the right to food and the right to culture as provided for in ICESCR, provide significant legal protections to Torres Strait Islanders’ land and sea environment and require the Australian government to implement adaptation and resilience building measures in the Torres Strait to counter the impacts of climate change and enable Torres Strait Islanders to continue to live in the region for as long as possible.

³⁹ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 14.

⁴⁰ Gustav Lanyi, ‘Climate change and human rights: an unlikely partnership?’ (2012) 37 *Alternative Law Journal* 269, 270.

⁴¹ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 14.

⁴² UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007) Article 26 (a).

⁴³ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, opened for signature 27 June 1989, C169 (entry into force 5 September 1991); UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007).

⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of everyone to take part in cultural life, 43rd sess, E/C.12/GC/21 (21 Dec 2009).

Australia also has obligations to mitigate the effects of climate change due to its commitment to the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC entered into force on 21 March 1994. Australia ratified the UNFCCC on 30 December 1992. In April 2007, the Council of Australian Governments created the National Climate Change Adaptation Framework that coordinates adaptation actions across Australian governments at all levels.⁴⁵ The Framework has also funded research projects including the National Climate Change Adaptation Research Facility (NCCARF) to ‘generate the adaptation information and tools needed by decision makers.’⁴⁶ Further, Australia’s recent ratification of the Paris Agreement signifies to other nations that Australia is committed to pursuing domestic climate change mitigation measures.⁴⁷ This commitment provides a solid basis for the Commonwealth government to implement laws and policies that prevent and avoid climate displacement in the Torres Strait as part of its broader efforts toward combating anthropogenic climate change. As a developed country, Australia should be leading global greenhouse gas emissions reductions efforts by undertaking economy-wide absolute reduction targets, so that global temperatures remain within two degrees of pre-industrial temperatures.⁴⁸ Importantly, as a party to the Agreement, Australia recognises the importance of averting, minimising and addressing loss – including non-economic loss⁴⁹ – and damage associated with the adverse effects of climate change and the role of sustainable development in reducing the risk of loss and damage.⁵⁰ Recognised mechanisms for reducing loss and damage include implementing early warning systems, comprehensive risk assessment tools, and building resilient communities.⁵¹ Also significantly, Australia’s participation in the Paris Agreement entails recognising the importance of the concept of ‘climate justice’ for some communities.⁵² Australia’s commitment to these principles should inform the government’s approach to preventing climate displacement in the Torres Strait.

Principle 6: Adaptation Assistance, Protection and Other Measures

Under Principle 6(a), States should provide adaptation assistance, protection and other measures to ensure that individuals, households and communities can remain in their lands or places of habitual residence for as long as possible in a manner fully consistent with their rights.

Australian authorities have strategies in place for dealing with the effects of climate change. At a federal level, the Government’s current approach to climate change adaptation is contained within its National Climate Resilience and Adaptation Strategy 2015. Its vision is to build the resilience of communities, the economy and the environment to climate change.⁵³ The guiding principles underlying the Strategy are: shared responsibility among governments, businesses, individuals and communities; considering climate change in all decision-making; regularly reviewing decisions and their outcomes; taking an evidence-based, risk management approach; assisting those who are vulnerable to the impacts of

⁴⁵ Ibid., p 17.

⁴⁶ Ibid., p 17.

⁴⁷ Art 4(2).

⁴⁸ Art 4(4). Australia’s current target – to reduce emissions to 26-28% on 2005 levels by 2030 – is inadequate. Targets are reviewed every five years, beginning in 2023, which will provide important incentive for Australia to achieve its emission reduction targets.

⁴⁹ Art 8(4)(g).

⁵⁰ Art 8(1).

⁵¹ Art 8(4).

⁵² Preamble

⁵³ National Climate Resilience and Adaptation Strategy 2015, 77.

climate change; and respecting the knowledge and experience of those affected by climate change, and involving them in decision-making.⁵⁴ The Strategy addresses key sectors including:

Coasts: Australian coastal regions are vulnerable to ‘sea-level fluctuations, coastal inundation and flooding from short-term weather cycles and episodes of extreme events.’⁵⁵ Rising sea levels and storm surges perpetuated by climate change therefore pose a risk to ‘households and settlements, businesses, infrastructure and essential services (water and energy), and industry (such as fishing, oil and gas and tourism)’⁵⁶ in coastal regions.

Cities and the built environment: Climate change impacts such as rises in sea level and temperature and more frequent extreme weather events have the potential to impact assets and infrastructure such as ‘residential buildings, energy, water and communications utilities, and transport systems’.⁵⁷ Additionally, such changes pose a greater risk to human health and threaten ‘damage to biodiversity and ecosystems that support social wellbeing, provide services that are fundamental to our health like clean air and fresh water, and offer protection from natural disasters.’⁵⁸ The Government has focused on building Australia’s agricultural industry’s capacity to adapt to climate change by committing significant funds to research, including for instance, research projects that examine ‘livestock tolerance to heat stress during extreme weather events while increasing productivity and improving animal welfare.’⁵⁹ The government has also committed to developing policies to strengthen the agricultural industry’s capacity to adapt to climate change, for example, by ‘strengthen[ing] their drought preparedness and risk management.’⁶⁰

Water resources: Australian water resources are managed pursuant to the 1994 Council of Australian Governments Water Reform Framework, and the 2004 Intergovernmental Agreement on the National Water Initiative (NWI). Australian Commonwealth and State governments manage water pursuant to the NWI ‘in a way that optimises economic, social and environmental outcomes through a range of regulatory and planning reforms.’⁶¹ The NWI helps to manage risks posed to water security from climate change.⁶²

Natural ecosystems: Australia’s biodiversity and ecosystems are vulnerable to climate change and have limited capacity to adapt.⁶³ Australia is acting to limit the impacts on climate change on Australian biodiversity through the Biodiversity Conservation Strategy 2010–2030. The Australian Government is also investing over ‘\$2 billion to help communities take practical action towards rebuilding and protecting our precious natural resources and build ecosystem resilience to climate change.’⁶⁴ Finally, the Australian Government is investing in the National Environmental Science Programme (NESP) in

⁵⁴ National Climate Resilience and Adaptation Strategy 2015, 77.

⁵⁵ *Ibid.*, 27.

⁵⁶ *Ibid.*, 27.

⁵⁷ *Ibid.*, 34.

⁵⁸ *Ibid.*, 34.

⁵⁹ *Ibid.*, 42.

⁶⁰ *Ibid.*, 43.

⁶¹ *Ibid.*, 48.

⁶² *Ibid.*, 48.

⁶³ *Ibid.*, 51.

⁶⁴ *Ibid.*, 53.

order to assist ‘decision-makers to understand, manage and conserve Australia’s environment by funding world-class biodiversity and climate science.’⁶⁵

Health and well-being: ‘climate change poses challenges to the health of Australians through stresses such as heatwaves, droughts and an increased risk of food and water borne diseases.’⁶⁶ The Australian government already has a robust system in place for responding to ‘environmental threats to human health including heat waves, bushfires, flooding, disease outbreaks and declines in air and water quality.’⁶⁷ There are no specific national programmes to address the impacts of climate change on health in Australia. However, health impacts are addressed in other national programs, including publicly funded research by the Australian Institute of Health and Welfare and the National Health and Medical Research Council.⁶⁸ Disaster risk management: Climate change is projected to increase instances of extreme weather and therefore ‘increase Australia’s exposure to natural disasters.’⁶⁹ The Australian Council of Australian Governments has endorsed the National Strategy for Disaster Resilience to build a national approach to disaster risk management.⁷⁰

Resilient and Secure Region:⁷¹ With respect to the impacts of climate change on coastal regions, the Strategy recognises that Torres Strait Island communities are ‘at the frontline of climate change impacts’ as a result of their remoteness, low topography and limited capacity to respond to social, financial and ecological challenges presented by climate change.⁷² However, the Strategy’s discussion of how these communities should be supported is limited to early planning, building coastal defences, undertaking risk assessments and improving scientific understanding of the impacts of climate change on coastal regions. No mention is made of the need to prepare for the planned relocation of coastal communities.⁷³ Further, whilst the Strategy recognises the potential for climate change to ‘worsen the impacts of disaster-induced population displacement’, it goes no further than stating that Australia supports the Nansen Initiative (an international initiative focused on cross-border displacement),⁷⁴ rather than displacement within a state. Incorporating the Peninsula Principles into this Strategy would be an ideal way for the federal government to remedy its current lack of consideration of within-state displacement and relocation.

Torres Strait Regional Adaptation and Resilience Plan 2016 – 2021

Particularly relevant to climate displacement in the TS is the TSRA’s *Torres Strait Regional Adaptation and Resilience Plan 2016 – 2021* (‘the Plan’), released in December 2016. The Plan outlines several actions which, if implemented, will go a significant distance toward achieving Principle 6. The philosophy underpinning the Plan is as follows:

⁶⁵ Ibid., 54.

⁶⁶ Ibid., 58.

⁶⁷ Ibid., 58.

⁶⁸ Ibid., 61.

⁶⁹ Ibid., 63.

⁷⁰ Ibid., 66.

⁷¹ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014–2018: Fact Sheet* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0016/7414/TSRA-Climate-Change-2014-2018-Factsheet.pdf> 2.

⁷² National Climate Resilience and Adaptation Strategy 2015, 32.

⁷³ National Climate Resilience and Adaptation Strategy 2015, 32.

⁷⁴ National Climate Resilience and Adaptation Strategy 2015, 75.

*Torres Strait is the ancestral homeland of our people and is inseparable from our culture. Therefore we strive to remain here, to retain the achievements of the present and regain the good ways of the past for a future that is resilient to change, in particular to the effects of climate change. The ability to be responsive and adaptable is important in attaining the goals of individual and community happiness and wellbeing.*⁷⁵

The Plan recognises that relocation must be a last resort.⁷⁶ Thorough, community-led planning and strategy will thus be integral to ensuring that Torres Strait Islanders can remain on their traditional lands for as long as possible.⁷⁷ Whilst the Plan details a number of adaptation assistance and protection measures, it does not use Torres Strait Islanders' human rights as a basis for these measures. Like many other indigenous communities, Torres Strait Islander culture is intrinsically tied to the land that they inhabit. Given the close connection between the Torres Strait Islanders and their lands, it is likely that Islanders will be 'extremely reluctant to leave their "home islands", and would only do so when they have little or no choice.'⁷⁸ The relationship between indigenous peoples and their lands forms the 'very basis of their economic, social and cultural systems, their ecological knowledge and their identities as distinct peoples.'⁷⁹ Lewis notes that Torres Strait Islanders have a 'cultural connection with their natural environment, to the extent that cultural integrity and the mental and physical wellbeing of the Islanders themselves depends upon the health of land and sea country.'⁸⁰ While climate change adaptation strategies in other parts of Australia may involve planned relocation initiatives, relocation is considered a last resort in the Torres Strait because of the fundamental relationship between indigenous peoples and their lands. In light of these considerations, protection measures — namely, assessment and defences — are of particular importance for communities in the Torres Strait.

Assessment - A coastal vulnerability assessment model has been developed to assess the costs and benefits and timing of defend or retreat strategies.⁸¹ 'Defend' strategies will be significantly more costly than planned retreat,⁸² but are essential for ensuring that communities can remain in their places of residence for as long as possible.

Defences - Building defences is consistent with the right of climate displaced persons to remain in their homes and retain connections to the land on which they live for as long as possible. This is one of the foundations of the Peninsula Principles. Raising buildings and erecting coastal defences will delay displacement in the short to medium term. Sea wall construction is important for both delaying coastal erosion and protecting communities from immediate impacts of tidal and storm surges.⁸³ In 2014, the Commonwealth and

⁷⁵ Plan 2.

⁷⁶ Plan 26.

⁷⁷ Plan 42.

⁷⁸ Green D, S Jackson and J Morrison, Risks from Climate Change to Indigenous Communities in the Tropical North of Australia (2009) Australian Government Department of Climate Change and Energy Efficiency <<http://www.climatechange.gov.au>>.

⁷⁹ Permanent Forum on Indigenous Issues, *Climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges* Implementation of the recommendations on the six mandated areas of the Permanent Forum and on the Millennium Development Goals Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Land, 7th sess, Agenda Items 3 & 4 (21 April-2 May 2008)

⁸⁰ Bridget M. Lewis, 'Indigenous Human Rights and Climate Change' (2008) 7.8 *Indigenous Law Bulletin* 2, 6

⁸¹ Harper 2014, Plan 41.

⁸² Ibid.

⁸³ Torres Strait Sea Wall Project Q&A.

Queensland governments committed to contributing \$26.2 million for installation of further coastal defences in six Torres Strait communities across Saibai, Boigu, Iama, Poruma, Masig and Warraber islands, as part of the Torres Strait Sea Wall Project. The Commonwealth's 2015-16 budget allocated almost \$3 million to the project. That Project was scheduled for completion by June 2017, but whether it has in fact been completed is unknown. The Plan provides for construction of artificial barriers and also reinforcing natural barriers by protecting and rehabilitating coastal habitats.⁸⁴ Such defence strategies will become increasingly expensive and require increasing levels of maintenance as sea levels rise: Defences are likely to fail and forced retreat will be likely if sea levels rise beyond 45 cm above the island benchmark.⁸⁵

Adaptation assistance measures - Avoiding relocation of Torres Strait Islanders, at least in the short term, will require significant government investment in climate change adaptation measures on the island, notably the "climate proofing" [of] significant public service infrastructure and buildings, increasing communication infrastructure and transport infrastructure on the islands⁸⁶ and increasing the 'social and economic resilience of the communities themselves.'⁸⁷

Dealing with Extreme Weather Events - One of the effects of climate change in the Torres Strait will be to increase the frequency of extreme weather events. Investigating current housing and building capacity to withstand cyclones, ensuring that emergency food supplies will be available for extreme weather events,⁸⁸ and implementing Disaster Management Plans outlining what actions communities should take in an extreme weather event, with disaster drills practiced regularly in communities, will all contribute to enabling Torres Strait Islanders to adapt to their changing living conditions. The relevant human right with respect to such measures is the right to adequate living standards, including adequate food, clothing and housing, and to the continuous improvement of their living conditions.⁸⁹

Health and Well-being - Given the connection between land and the Islanders livelihoods, culture and social and psychological well-being, Torres Strait Islanders are particularly vulnerable to the effects of climate change. These effects are likely to have a negative impact on health, 'including increases in heat related illness, and mosquito borne and waterborne diseases.'⁹⁰ Further, climate change is likely to 'exacerbate other existing health problems, many of which are already disproportionately present in Indigenous communities.'⁹¹ Under Article 12 of the ICESCR, Torres Strait Islanders have the right to enjoy the highest attainable standards of physical and mental health. As party to the ICESCR, Australia recognises the need to take steps to prevent diseases and to ensure that adequate medical

⁸⁴ Torres Strait Regional Authority (2016). *Torres Strait Adaptation and Resilience Plan 2016-2021*. Report prepared by the Environmental Management Program, Torres Strait Regional Authority, June 2016, 108pp, 57.

⁸⁵ Ibid 59.

⁸⁶ Donna Green et al, An assessment of climate change impacts and adaptation for the Torres Strait Islands (October 2010) 102 *Climate Change* 405, 429.

⁸⁷ Ibid.

⁸⁸ Torres Strait Regional Authority (2016). *Torres Strait Adaptation and Resilience Plan 2016-2021*. Report prepared by the Environmental Management Program, Torres Strait Regional Authority, June 2016, 108pp, 61.

⁸⁹ ICESCR Art 11(1).

⁹⁰ Bridget M. Lewis, 'Indigenous Human Rights and Climate Change' (2008) 7.8 *Indigenous Law Bulletin* 2, 5.

⁹¹ Ibid., 5.

services are provided to those who are ill.⁹² Heat stress as a consequence of more hotter days and increased transmission of mosquito-borne diseases are factors which will challenge the health system in the Torres Strait. Further, the prospect of having to relocate because of climate displacement in future may compromise the mental health of many Islanders. The Plan implements a number of measures that will monitor and build community awareness of health risks, and programs that will assist mental and physical wellbeing. Arguably, targeted counselling services will also be necessary as relocation becomes a looming reality for Islanders, and psychologists will need to be trained to effectively deal with the fears, concerns and sense of hopelessness which may accompany the prospect of climate displacement.

According to Peninsula Principle 6(b), States should, in particular, ensure protection against climate displacement and demonstrate sensitivity to those individuals, households and communities within their territory who are particularly dependent on and/or attached to their land, including indigenous peoples and those reliant on customary rules relating to the use and allocation of land.

Climate change will likely have negative impacts on indigenous health and pose challenges to health care in the Torres Strait region. Torres Strait Islanders already face significant health challenges as a result of 'poor nutrition, overcrowded housing, lack of good water and sewerage infrastructure, poor hygiene, lack of rewarding employment opportunities, as well as psycho-social health problems related to a history of dispossession, loss of capacity to care for ancestral lands, and life histories complicated by domestic violence and substance abuse.'⁹³ Due to the region's remoteness, there are also significant challenges associated with access to health related infrastructure in the Torres Strait.

The impact of climate change is likely to have a disproportionate effect on indigenous Australians because of their current disadvantage. The impacts of climate change are likely to exacerbate existing health problems as well as create new health challenges in the Torres Strait. Changes in temperature are likely to result in greater instances of health concerns such as heat stroke, heat exhaustion, heart attacks and death. Changes in heat and water availability may also lead to increased spread of infectious diseases such as dengue fever.⁹⁴ If the impacts of climate change necessitates the dispossession of Torres Strait Islanders from their traditional lands, the resulting 'loss of identity'⁹⁵ is likely to have significant 'adverse physical and mental health outcomes.'⁹⁶ As noted, the right to health requires that the Australian government take measures to ensure Torres Strait Islanders enjoy 'the highest attainable standard of physical and mental health.'⁹⁷ This includes the obligation to take positive measures against climate change impacts that will affect the health of the Islanders. The right to health requires that the government ensures to Torres Strait communities access to appropriate healthcare facilities, goods and services, as well as 'adequate food and

⁹² CESCR Art 12(2)(c), (d).

⁹³ Green D, S Jackson and J Morrison, Risks from Climate Change to Indigenous Communities in the Tropical North of Australia (2009) Australian Government Department of Climate Change and Energy Efficiency <<http://www.climatechange.gov.au>>.

⁹⁴ David Lawrence and Helen Lawrence, 'Torres Strait: the region and its people', in Richard Davis (ed) *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004, Canberra) 15, 29.

⁹⁵ Rhys Jones, Hayley Bennett, Gay Keating and Alison Blaiklock, 'Climate Change and the Right to Health for Maori in Aotearoa/New Zealand' (2014) 16.1 *Health and Human Rights Journal* 54, 56.

⁹⁶ Ibid.

⁹⁷ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, UNTS vol. 993 (entry into force 3 January 1976) Article 12(1).

nutrition, housing, safe drinking water and adequate sanitation, and a healthy environment⁹⁸ to enable a healthy life. Given the significant risk posed by climate change to the health of the Torres Strait Islanders, the Australian government should seek improve health care in the region and ensure that addressing health risks are pivotal to any climate change adaptation and mitigation measures.

A key part of fulfilling the right to health is ensuring access to adequate food and water. The right to adequate food and water is protected under the umbrella of the right to an adequate standard of living in the ICESCR. The impacts of climate change in the Torres Strait will make this increasingly challenging. Notably, 'food production is likely to decline due to increased temperatures accelerating grain sterility; shifts in rainfall patterns producing land infertility, elevating erosion, desertification and diminishing crop and livestock yields; rising sea levels making coastal lands unusable and causing fish species to migrate; and increasingly frequent extreme weather events disrupting agriculture.'⁹⁹ Traditional sources of food may become unviable in the Torres Strait as a result of climate change. The right to food requires that the Australian government ensure sufficient availability of food to satisfy individual's dietary requirements.¹⁰⁰ This includes protecting access to food from private actors, and enacting appropriate environmental policies to protect food security from climate change.¹⁰¹ The right to food offers Torres Strait Islanders additional protection from climate change, requiring that the Australian government take positive measures to protect their land and means of food production.

Ensuring sustainable access to water in the Torres Strait will also be a key challenge in the face of climate change. Climate change is likely to 'exacerbate existing burdens on limited global water resources'¹⁰² and 'compound the problem of access to safe drinking water.'¹⁰³ Lack of safe drinking water will impact sanitation and the right to health, as well as food production and the right to food.¹⁰⁴ Access to drinking water and safe sanitation is at risk of being compromised as the effects of climate change in the Torres Strait escalate. The islands have a limited water supply, depending upon covered catchments, domestic rain tanks and desalination plants, which will be threatened by shorter wet seasons.¹⁰⁵ Most wells are already unusable as a result of rising sea levels causing contamination of ground water by

⁹⁸ United Nations High Commissioner for Human Rights, 'The relationship between climate change and human rights', chapter 16 in Scott Leckie, Ezekiel Simperingham and Jordan Bakker (eds), *Climate change and displacement reader* (Earthscan, 2012) 219.

⁹⁹ Gustav Lanyi, 'Climate change and human rights: an unlikely partnership?' (2012) 37 *Alternative Law Journal* 269, 269.

¹⁰⁰ John H. Knox, 'Climate Change and Human Rights Law' (2009) 50.1 *Virginia Journal of International Law* 163, 179.

¹⁰¹ Stand Up for Your Rights, 'The Human Side of Climate Change: Human Rights Violations and Climate Refugees', chapter 20 in Scott Leckie, Ezekiel Simperingham and Jordan Bakker (eds), *Climate change and displacement reader* (Earthscan, 2012) 264.

¹⁰² Alyssa Johl & Sebastian Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15.3 *Ethics, Policy and Environment* 298, 298.

¹⁰³ United Nations High Commissioner for Human Rights, 'The relationship between climate change and human rights', chapter 16 in Scott Leckie, Ezekiel Simperingham and Jordan Bakker (eds), *Climate change and displacement reader* (Earthscan, 2012) 218.

¹⁰⁴ Gustav Lanyi, 'Climate change and human rights: an unlikely partnership?' (2012) 37 *Alternative Law Journal* 269, 269.

¹⁰⁵ Torres Strait Regional Authority (2016). *Torres Strait Adaptation and Resilience Plan 2016-2021*. Report prepared by the Environmental Management Program, Torres Strait Regional Authority, June 2016, 108pp, 44.

saline water and also by septic tank leakage.¹⁰⁶ Waste management is already a significant issue, because there is limited space for storing waste, and capacity to recycle is limited. Further, freight costs make disposal of particular wastes including whitegoods expensive. Increasing wind severity is causing wastes to be blown into the ocean. Landfill sites and wastewater treatment plants are vulnerable to damage by seawater inundation in future. Therefore, water and sanitation must be prioritised in order for Torres Strait Islanders to continue to live in a manner consistent with their human rights. Such measures are integral to upholding the human rights to adequate, safe and affordable drinking water and sanitation.¹⁰⁷

The European Court of Human Rights (ECHR) in the 2008 case of *Budayeva*¹⁰⁸ confirms that the obligation extends to putting adequate administrative and legislative systems in place and taking all feasible measures to prevent or mitigate foreseeable threats to life from natural disasters, climate change and environmental disruption.¹⁰⁹ The right requires that the Australian government ensure 'at a minimum...sufficient supply of safe drinking water exists to sustain life [and] ... those quantities needed for basic sanitation and agricultural needs.'¹¹⁰ The CESCR has stressed that States have an additional burden in protecting the right to water in respect of indigenous people, noting that States must ensure 'that Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution.'¹¹¹

Land and sea in the Torres Strait region are integral to Ailan Kastom and the spiritual and cultural identity of Torres Strait Islanders. The culture, subsistence and livelihoods of Torres Strait Islanders are heavily dependent on 'traditional and commercial fishing, hunting and gardening.'¹¹² Changes to 'ocean salinity and temperature are already having an impact on fish stocks, affecting subsistence hunting and commercial fishery activities.'¹¹³ These changes to marine and coastal ecosystems will have significant consequences on the way of life in the Torres Strait.¹¹⁴

¹⁰⁶ Ibid.

¹⁰⁷ In November 2002, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 on the right to water. Paragraph 1.1 states that "The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights". Comment No. 15 also defined the right to water as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses. On 28 July 2010, through Resolution 64/292, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.

¹⁰⁸ *Budayeva al v. Russia (Judgment)* [2008] ICJ Rep 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

¹⁰⁹ Stand Up for Your Rights, 'The Human Side of Climate Change: Human Rights Violations and Climate Refugees', chapter 20 in Scott Leckie, Ezekiel Simperingham and Jordan Bakker (eds), *Climate change and displacement reader* (Earthscan, 2012) 266 citing *Budayeva al v. Russia (Judgment)* [2008] ICJ Rep 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

¹¹⁰ Randall S. Abate, 'Climate Change, The United States, and The Impacts Of Arctic Melting: A Case Study In The Need For Enforceable International Environmental Human Rights' (2007) 26A/43A.3 *Symposium: Climate Change Risk* 4, 23-24.

¹¹¹ Ibid.

¹¹² Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 14.

¹¹³ Bridget M. Lewis, 'Indigenous Human Rights and Climate Change' (2008) 7.8 *Indigenous Law Bulletin* 2, 5

¹¹⁴ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority

Principle 7: National Implementation Measures

Under Principle 7(a), States should incorporate climate displacement prevention, assistance and protection provisions as set out in these Peninsula Principles into domestic law and policies, prioritising the prevention of displacement.

Australian legislation currently lacks any specific provisions relating to climate displacement. Thus, there appears to be a need for Commonwealth and Queensland legislation to be augmented to include specific provisions relating to preventing and adapting to climate displacement in the Torres Strait Islands. Among other options, the Peninsula Principles could be fully incorporated into the *Aboriginal and Torres Strait Islander Act 2005* (Cth), and Queensland's *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) should allude specifically to its recognition of the Principles in the Commonwealth Act. The predecessor of this Act established the TSRA, and the Act sets out the TSRA's functions, which including to recognise the unique Ailan Kastom of the Islanders and to formulate and implement programs for Islanders. The Act also confers upon the TSRA the power to do all things necessary to carry out those functions.¹¹⁵ The role of the TSRA 'to formulate and implement measures that prevent climate displacement as far as possible and assist Islanders to adapt to climate displacement' should be added to its list of functions in s 142A(1).

Under Peninsula Principle 7(b), institutions and mechanisms at all levels of government (local, regional and national) should implement these Peninsula Principles and give effect to their provisions through specially earmarked budgetary allocations and other resources to facilitate that implementation.

Budget estimates for 2015–16 indicate that the government provided an estimated \$42,853 to the TSRA, and the TSRA received \$11,432 from other sources. Funding will need to be increased over future years as climate displacement planning measures become more resource-intensive.

Further, Peninsula Principle 7(c) calls for States to ensure that durable solutions to climate displacement are adequately addressed by legislation and other administrative measures.

As noted, no such legislation exists at present.

Under Peninsula Principle 7(d), States should ensure the right of all individuals, households and communities to adequate, timely and effective participation in all stages of policy development and implementation of these Peninsula Principles, ensuring in particular such participation by indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalised groups and people.

Churches are important gathering places for Torres Strait Islanders, thus, must be safeguarded for as long as possible to ensure participation by as many in the community as possible. Relocation of important cultural sites, as suggested by the Plan, should prioritise sites which are places for community gathering to discuss important issues.

<http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf>iii.

¹¹⁵ *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 142C(1).

Under Peninsula Principle 7(e), all relevant legislation must be fully consistent with human rights laws and must in particular explicitly protect the rights of indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalised groups and people.

The *Racial Discrimination Act 1975* (Cth) is one mechanism through which Australia has incorporated human rights into domestic law, and should be interpreted in a way that prohibits the government from making decisions which could lead to climate displacement of Torres Strait Islanders. The Act disallows Commonwealth or State laws which cause Torres Strait Islanders not to enjoy (or to enjoy to a lesser extent) a right that is enjoyed by non-Torres Strait Islanders.¹¹⁶ Other anti-discrimination legislation also go some way toward ensuring that the rights of minority or marginalised groups in the Torres Strait will be protected throughout the process of climate change adaptation and relocation. The *Age Discrimination Act 2004* (Cth) protects younger and older people from discrimination with respect to access to goods, services, facilities and accommodation. With respect to goods, services and facilities, the law currently provides that it is unlawful for a person who provides those things to discriminate against another person on the basis of their age by refusing to make those things available to that person; in the terms or conditions on which they provide them; or by the manner in which they provide them.¹¹⁷ With respect to accommodation, it is unlawful to discriminate against another on the basis of that person's age by refusing their application for accommodation, in the conditions on which the accommodation is offered to the person or by according the person a lower order of precedence in any list of applicants for that accommodation.¹¹⁸ Discrimination is also explicitly prohibited with respect to the administration of Commonwealth laws and programs.¹¹⁹ Similar laws prevent discrimination on the basis of disability,¹²⁰ sex or gender identity.¹²¹ Whilst such legislation is consistent with Principle 7(e), the importance of protecting human rights throughout the process of climate displacement mitigation and relocation requires that Australia's anti-discrimination laws be modified so as to explicitly state that the rights of Torres Strait Island communities will be protected.

Principle 9: Climate Displacement Risk Management

Principle 9 sets out the obligations of States regarding climate displacement risk management, monitoring, and modelling.

Risk Management Strategies

The 2014-2018 TSRA was the primary authority of the risk management plan for the Torres Strait Region. Risk management strategies are already underway. Indeed, as noted, \$26 million has been set aside to build seawalls on the low lying island of Saibai. Further, funds have been allocated to risk reduction, however, as it relates to the transferral/sharing of risk there seems to be a significant lack of this as well as a lack of clear/consistent mechanism relating to a organised response. Despite these limited measures, however, the

¹¹⁶ *Racial Discrimination Act 1975* (Cth) s 10(1).

¹¹⁷ *Age Discrimination Act 2004* (Cth) s 28.

¹¹⁸ *Age Discrimination Act 2004* (Cth) s 29(1).

¹¹⁹ *Age Discrimination Act 2004* (Cth) s 31.

¹²⁰ *Disability Discrimination Act 1992* (Cth) ss 24 (goods, services and facilities), 25 (accommodation), 29 (administration of Commonwealth laws and programs).

¹²¹ *Sex Discrimination Act 1984* (Cth) ss 22 (goods, services and facilities), 23 (accommodation), 26 (administration of Commonwealth laws and programs).

Commonwealth and Queensland governments can be generally seem to be lacking in their response to formulating risk management plans.

Collection and Monitoring of Data

In 2006 the Federal Government granted \$300,000 towards a major study of the six islands at greatest risk from surging king tides: the sandy coral cays of Poruma, Iama, Masig, and Warraber in the central Strait, and the swampy north-western islands of Saibai and Boigu. According to the TSRA Climate Change Strategy 2014/2018 there has been a significant lack of collection and monitoring of the data in the Torres Strait, specifically unsatisfactory according to what is required to help the region.

Climate Displacement Modelling Scenarios

Various predictive modelling has been undertaken, thus this aspect of Principle 9 can be seen to be well underway in respect of the Torres Strait. The TSRA primarily relies on the modelling of the Intergovernmental Panel on Climate Change for general predictions on the impact of CO₂ emissions on the sea level. Specifically as it relates to the Torres Strait, there has been collaboration between the TSRA and CSIRO and Bureau of Meteorology and bases their action plan off the results off these models. The importance of continuing to model predicted impacts of climate change on the Torres Strait in future cannot be understated.

Principle 10: Participation and Consent

A clear definition of informed consent essential to ensure that relocation from the Torres Strait region occurs only to individuals, households and communities that request (principle 10(a)) relocation or provide full and informed consent for such relocation (Principle 10(b)).

Sea level rise, more frequent extreme weather events, coastal erosion, inundation and changes in natural ecosystems threaten to necessitate the relocation of Torres Strait Islanders from their lands.¹²² Central to this necessity is the informed consent from Torres Strait Islanders to be relocated.

Defining Informed Consent

Four primary factors underpin the framework for determining if residents of the Torres Strait Islands have provided fully informed consent to be relocated. These factors relate to each resident's knowledge of the laws that govern their relocation, the ability for residents to negotiate with Commonwealth and State Governments on an equal playing field, adequate time for residents to consider their options and articulating consent in a manner which is culturally sensitive and legally appropriate.¹²³ It must be noted that this framework defining consent is underpinned by the caveat that relocation of some individuals, households and communities may be necessary to preserve life and protect public health and safety (Principle 10(c)).

¹²² Donna Green and Kirsty Ruddock, 'Could Litigation Help Torres Strait Islanders Deal with Climate Impacts?' (2008) 9.2 *Sustainable Development Law & Policy* 23, 23.

¹²³ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) Reg 8A.12.

1. *Education* - It is essential to ensure that Torres Strait Island residents have adequate knowledge of the laws and surrounding factors underpinning relocation procedures.¹²⁴ Ensuring the residents of the Torres Strait Islands are educated about the governing legal factors and practical aspects of the relocation process will ensure that they have a solid basis of understanding under which they have adequate time to consider their options and negotiate on equal footing with the parties seeking to carry out the relocation process.

2. *Negotiation* - Fully informing Torres Strait Islanders in relation to the relocation process will place them in a strong position to advocate and negotiate for their needs. Having adequate time to negotiate is essential to ensuring that parties do not feel pressured throughout the lead up to the relocation process.¹²⁵ This will empower Torres Strait Island residents to simultaneously advocate for their needs and articulate items for consideration that may not have already been considered by State and Commonwealth Governments. It should be noted that negotiations should be undertaken via both Governmental and indigenous representative institutions.

3. *Provision of Informed Consent* - Provision of informed consent to be relocated should be considered as the final stage once the *education* and *negotiation* phases have been completed. It is essential that Commonwealth and State Governments simultaneously consult and cooperate with residents of the Torres Strait Islands via both Governmental and indigenous representative institutions.¹²⁶ It should also be made clear to residents of the Torres Strait Islands that consent can be revoked at any time with the condition that it is done so clearly and in a manner and in a language that all parties can unequivocally understand. Combining the framework for consent within factors including education, negotiation and provision of informed consent in both a legally and culturally sensitive manner will ensure the following six considerations are adhered to: Priority consideration is given to request for relocation (Principle 10(a)); No relocation shall take place unless individuals, households and communities provide full and informed consent for such relocation (Principle 10(b)); Relocation without consent is only permitted to take place in exceptional circumstances Principle 10(c)); Measures are adopted to promote livelihoods, acquisition of new skills, and economic prosperity for displaced communities (Principle 10(d)); (i) affected displaced communities are fully informed and can actively participate in relevant decisions and the implementation of those decisions; (ii) basic services, adequate and affordable housing, education and access to livelihoods will be available for climate displaced persons; (iii) adequate mechanisms, safeguards and remedies are in place to prevent and resolve conflict over land and resources; (iv) the rights of individuals, households and communities are protected at all the stages of the relocation process (Principle 10(e)); Prior to any relocation, prepare a master relocation plan that addresses critical matters including: (i) land acquisition; (ii) community preferences; (iii) transitional shelter and permanent housing; (iv) the preservation of existing social and cultural institutions and places of climate displaced persons; (v) access to public services; (vi) support needed during the transitional period; (vii) family and community cohesion; (viii) concerns of the host community; (ix) monitoring mechanisms; and (x) grievance procedures and effective remedies (Principle 10(f)).

4. *Exceptions* - The ICESCR asserts that the following procedural protections are required for any forced eviction to be considered consistent with the terms of international human rights law. These protections would apply if any coercive relocation of the Torres Strait Islanders becomes a necessity, even if such relocation is intended to protect those relocated

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

from worse fates. In any forced relocation of people, therefore, the government must ensure: an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; especially where groups of people are involved, government officials or their representatives to be present during an eviction; all persons carrying out the eviction to be properly identified; evictions not to take place in particularly bad weather or at night unless the affected persons consent; provision of legal remedies; and provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.¹²⁷

Additional protections regarding relocation also exist in ILO Convention No. 169, although Australia is not currently a party to this Convention. However, if Australia was to ratify this convention, it would be required to ensure that Torres Strait Islanders: Not to 'be removed from the lands which they occupy'¹²⁸ unless 'relocation of these peoples is considered necessary as an exceptional measure';¹²⁹ Provide free and informed consent to any relocation;¹³⁰ Be provided with 'lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development';¹³¹ and Be 'fully compensated for any resulting loss or injury.'¹³²

Consent and Self-Determination

Climate change poses challenges to Torres Strait Islanders' self-determination. Sea level rise, more frequent extreme weather events, coastal erosion, inundation and changes in natural ecosystems threaten to dispossess Torres Strait Islanders from their 'traditional territories and sources of livelihood.'¹³³ Pursuant to the right to self-determination, 'States have a duty to take positive action, individually and jointly, to address and avert'¹³⁴ the threat posed by climate change to traditional lands and livelihoods. The right to self-determination not only requires states to take positive action to implement adaptation and resilience building measures in the Torres Strait, but also requires states to ensure the active participation of Torres Strait Islanders in the development of those strategies. In accordance with ILO Convention No. 169, the Australian Government would need to obtain the informed consent of the Torres Strait Islanders to any mitigation or adaptation strategy to be implemented in the region. Ensuring the participation of Torres Strait Islanders in decision making is also likely to result in successful outcomes in climate adaptation and mitigation policies. Indigenous peoples hold important knowledge that is 'a valuable asset

¹²⁷ Ibid.

¹²⁸ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, opened for signature 27 June 1989, C169 (entry into force 5 September 1991) Article 16(1).

¹²⁹ Ibid., Article 16(2).

¹³⁰ Ibid., Article 16(2).

¹³¹ Ibid., Article 16(4).

¹³² Ibid., Article 16(5).

¹³³ United Nations High Commissioner for Human Rights, 'The relationship between climate change and human rights', chapter 16 in Scott Leckie, Ezekiel Simperingham and Jordan Bakker (eds), *Climate change and displacement reader* (Earthscan, 2012) 214, 220.

¹³⁴ UN Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights', 10th sess, Agenda Item 3, UN Doc. A/HRC/10/61 (15 January 2009) cited in Stand Up for Your Rights, 'The Human Side of Climate Change: Human Rights Violations and Climate Refugees', chapter 20 in Scott Leckie, Ezekiel Simperingham and Jordan Bakker (eds), *Climate change and displacement reader* (Earthscan, 2012) 266, 269.

in observing and managing environmental change, and importantly, is an unheralded source of adaptive capacity.¹³⁵ This is because ‘[f]or millennia, local capacity, practices, knowledge and traditions have helped indigenous peoples, who have developed a close relationship with their natural environment, to cope with hazards and thrive in highly at risk areas.’¹³⁶ Torres Strait Islanders have a wealth of local knowledge regarding their land that can assist in the regions adaptation efforts. This includes ‘[t]raditional knowledge of seasonal variations, climatic events and natural cycles, built upon over many generations.’¹³⁷ Torres Strait Islanders have already commenced actively using their local knowledge to implement climate change adaptation strategies. This includes building ‘rock walls and wind breaks, using native species to re-vegetate sand cays and the coastal foreshore, applying self-sufficient practices such as fish traps and gardening, reading and respecting country, and transferring this knowledge to the younger generation.’¹³⁸ The TSRA 2014-2018 climate change strategy acknowledges the importance of traditional ecological knowledge in tackling climate change. As part of the strategy, the TSRA has established the Traditional Ecological Knowledge (TEK) project, to record traditional ecological knowledge about ‘climate change in the Torres Strait, including seasonal variations, weather patterns and changes in resource distribution and abundance.’¹³⁹

Principle 11: Land Identification, Habitability and Use

Principle 11 sets out the obligations of States regarding land identification, habitability and use when relocation becomes a reality.

Principle 11(a)(i) - Finding suitable land for relocation will be a particular challenge for Torres Strait Islander communities, whose lives are so closely entwined with the geography and physical and marine environments of the islands on which they currently reside. Given the current role of Queensland-based authorities - including the state government and the TSRA - in governance of the Torres Strait, it seems most appropriate that sufficient, suitable, habitable and appropriate public land be sourced from somewhere on the Queensland mainland, so as to maximise continuity of service provision and access, and to provide similar climatic conditions.

A 2011 report on projected population changes between 2006 and 2031 suggested that population growth would be greatest in regions around Cairns, and along the Eastern

¹³⁵ Karen Elizabeth McNamara and Ross Westoby, ‘Local knowledge and climate adaptation on Erub Island, Torres Strait (October 2011) 16(9) *Local Environment* 887, 887.

¹³⁶ Permanent Forum on Indigenous Issues, *Follow-up on the recommendations of the Permanent Forum Study on engaging indigenous peoples more inclusively in the disaster risk reduction process*, 12th sess, Agenda Item 3 (20-31 May 2013).

¹³⁷ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 20.

¹³⁸ Karen Elizabeth McNamara and Ross Westoby, ‘Local knowledge and climate adaptation on Erub Island, Torres Strait (October 2011) 16(9) *Local Environment* 887, 891.

¹³⁹ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 20.

coastline of Queensland, including areas such as Mackay, Rockhampton and Gladstone.¹⁴⁰ These predictions indicate that the Queensland government will face pressure in future to increase land access, infrastructure and services so as to cater for a fast-growing population, particularly along the Eastern coastline. If conditions deteriorated enough and relocation proved the only viable means for protecting the population of the Islands, the relocation of Torres Strait Island communities will present a relatively minor increase in demand for land, services and infrastructure, given that the population of the Torres Strait Islands was only 4,248 in 2011.¹⁴¹ The main challenge will lie in finding appropriate land.

Principle 11(a)(i) asks States to create National Climate Land Banks. This is not something that Australia has undertaken, and should be made a national priority. Australia has large segments of vacant Crown land that has not been allocated for any particular purpose across inland Western Australia and the Northern Territory, but these remote regions would be inappropriate for relocation, not only because there is a dearth of services in these regions and relocation to such areas would involve moving outside of Queensland government authority, but because the natural environment in those regions would differ drastically from the island environment to which Torres Strait Islanders are accustomed. In Queensland, there are significant areas of land designated as nature conservation reserves and forestry reserves, particularly around the regions of Tin Can Bay, Fraser Island and Coffs Harbour. If necessary, repurposing one of these areas for future relocation of Torres Strait Island communities is a possibility.¹⁴²

In the 1960's, the possibility arose of the entire population of Nauru relocating to Australia after decades of environmentally devastating phosphate mining on Nauru had rendered large parts of the island uninhabitable.¹⁴³ Fraser Island was canvassed as a possible relocation site, but was deemed unsuitable. One of the factors influencing that decision was the difficulty of undertaking agriculture on the sandy soils.¹⁴⁴ Given that Fraser Island's population was only 194 in 2011,¹⁴⁵ it is unlikely that introducing the entire population of the Torres Strait Islands to that area in future is a sustainable solution. Further, the island has recently been the subject of a successful native title claim by the Butchulla People,¹⁴⁶ who have called the Island home for over 5,000 years. The island also holds important environmental protection value.

In light of these concerns, mainland Queensland is likely a more plausible option for resettlement than Fraser Island. Both the Commonwealth and Queensland governments should take a future-focused approach, and secure a large space of public coastal land that can be used for conservation for the present, but earmarked for the gradual resettlement of Torres Strait Island communities in future decades. When surveying possible land options,

¹⁴⁰ See Office of Economic and Statistical Research (Queensland Treasury), Queensland Government population projections to 2013: Local government areas (2011 edition) Page 10, Figure 3.10:

<http://www.qgso.qld.gov.au/products/reports/qld-govt-pop-proj-lga/qld-govt-pop-proj-lga-2011-edn.pdf>.

¹⁴¹ According to the 2011 Australian census.

¹⁴² See a detailed map of Australian Crown land here: <https://d28rz98at9flks.cloudfront.net/68463/68463.pdf>.

¹⁴³ The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration (2011) 3(46) *Journal of Pacific History* 337, 338. See here for access:

https://www.researchgate.net/publication/228204282_The_Resettlement_of_Nauruans_in_Australia_An_Early_Case_of_Failed_Environmental_Migration.

¹⁴⁴ The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration (2011) 3(46) *Journal of Pacific History* 337, 346.

¹⁴⁵ See 2011 Australian Census.

¹⁴⁶ *De Satge on behalf of the Butchulla People #2 v State of Queensland* [2014] FCA 1132.

Principle 11(a)(iii) emphasises that the areas be sheltered from the effects of climate change or other natural or human hazards and, that planners consider the safety and environmental integrity of the new site(s), and ensure that the rights of both those relocated and the communities that host them are upheld.

Principle 11(a)(ii) - Principle 11(a)(ii) asks States to develop 'fair and just land acquisition and compensation processes and appropriate land allocation programmes, with priority given to those most in need'. The Grantham Land Offer Program initiated by the Lockyer Valley Regional Council in South East Queensland in response to devastating floods in the area was arguably the first implemented housing relocation policy in Australia, and demonstrates that a Queensland local government has already had experience in dealing with relocation initiatives which would translate usefully to future relocation for Torres Strait Islanders. It also provides a practical example of how Principle 11(a)(ii) can be implemented through policy. The Grantham Program was not initiated directly in response to climate displacement, but in response to the severe property damage and loss of life which occurred when floods inundated the Lockyer Valley region in January 2011. 120 homes were destroyed.¹⁴⁷ The risk that such severe flooding would reoccur prompted the Lockyer Valley Regional Council to purchase just under 1,000 ha of land above the January 2011 flood level in nearby Grantham. The decision-making principles which governed the project align well with Principle 11(a)(ii): The Council undertook to ensure that the Program was delivered 'in a fair and equitable manner', and land was offered at no cost on the basis that the landholder would transfer ownership of their existing land to the Council without encumbrances. Different lot sizes were offered to eligible owners depending on the size of their existing land: for example, those who currently owned blocks between 500 and 1500 sq/m were offered blocks of approximately 1000 sq/m; whilst those who currently owned land between 1501 and 3000 sq/m were offered blocks of around 2000 sq/m (no compensation was to be paid to those who, by participating in the project, would end up with smaller blocks of land than their initial blocks). Each new block would have quality services including sewers, footpaths and water, with some parts of the sewer systems to be installed at the owners' own cost. To ensure priority for those in most need, eligible persons for the program were defined as those whose homes were located on a particular map, or whose homes had suffered damage in the floods to the extent that the houses were unsalable as dwellings fit for habitation. Owners of multiple blocks would be considered on a case-by-case basis. Also, the project was undertaken in two stages: first, a sufficient number of lots of land were provided to accommodate eligible people who had initially expressed interest, and second, additional lots were provided for eligible people who became interested at a later time. Further, the project's approach to relocation fit well within the definition of 'relocation' under Principle 2, because the policy set out that relocation was to be 'entirely voluntary' and enabled participants to move sufficiently away from flood-prone areas where the full spectrum of rights were available to them. Obviously, a relocation plan for the Torres Strait would be significantly more challenging than the Grantham Program. Implementation of the Grantham Program was facilitated by the fact that Grantham had a small population, the disaster-impacted region was limited, and the Council had sufficient economic reserve to commence the Program and purchase new land. With respect to the Torres Strait, the scale will be much greater, thus more costly, and will require the government to set aside a much greater pocket of land than 1000 ha. Further, as is discussed elsewhere in this paper, relocation poses complex cultural challenges: should a pocket of land in Queensland be found to be suitable for relocation, any area on the mainland will be immeasurably different - both in geography and lifestyle - from the islands that Torres Strait Islander peoples have based their lives around for centuries. The Grantham Program

¹⁴⁷ <https://www.nccarf.edu.au/content/grantham-planned-relocation>.

provides useful guidance for future relocation of Torres Strait communities, however, because it demonstrates that local Queensland government has capacity to respond to relocation challenges in a positive manner. The Project was commenced in an incredibly short time frame - within six months of the flood event - and a review of the Program undertaken in 2013 concluded that 'positive achievements in most aspects proposed for a successful resettlement' had occurred.¹⁴⁸ Early consultations with community facilitated general consensus among community members; despite the emotional hardship that many were experiencing at the time.¹⁴⁹ The Commonwealth and Queensland governments can use the Grantham experience as a useful reference point for future, larger scale, work toward facilitating the planned relocation of Torres Strait Island communities should no other option be available.

Principles 11(c) and 11(d)(ii) - The following applications of principles 11(c) and 11(d)(ii) are intended to fulfil the following three objectives in relation to providing '*...easily accessible information to individuals, households and communities...*'; Provide a staged approach to educating residents of the Torres Strait about their substantive rights; Provide comprehensive information to the residents of the Torres Strait about the procedures for relocation; and Ensure that once relocation has been achieved, the ongoing rights of residents are maintained. Providing residents of the Torres Strait with easily accessible information should be completed in three distinct stages. Stage 1, the substantive phase. Stage 2, the procedural phase. Stage 3, the maintenance phase. It should be noted that any communications material produced should be translated into local language, and be produced to ensure inclusivity across online platforms. Information should be communicated to residents without internet access on printed materials produced in an environmentally fashion. Stage 1. Substantive phase: Stage 1 primarily concerns community education regarding the nature and extent of the actual and potential changes to the habitability of resident homes (11(c)(i)) to ensure that leading up to their relocation citizens are educated and informed about the fundamental reasons for why they are being relocated. Community education will include the provision of evidence (11(c)(ii)) that all viable alternatives to relocation have been duly considered. Stage 2. Procedural phase (11(d)(ii): Stage 2 primarily consists of educating residents about planned efforts for the Australian Government to assist in relocation (11(c)(iii)). Distribution of online and printed materials is to commence specifically educating residents with internet access about the key steps, dates and milestones that will involve relocation. All communications materials should advise residents being relocated that their rights to housing, land, property and livelihood are ongoing and will not cease upon relocation. Stage 3. Maintenance phase: Stage 3 commences when all consenting residents have been relocated. Primary messaging for stage three materials will concern ongoing education regarding the relocated resident's rights in relation to compensation (11(c)(iv)) and their rights in relation to their property, housing, land and livelihood post-relocation.

Principle 11(d)(i)(iii) - Relevant departments within the Australian Government should categorise compensation for climate change displaced persons within the following two categories: Compensation for the consequential losses sustained via loss of property due to rising sea levels; and Compensation for the pure economic losses sustained via future earnings lost due to rising sea levels. This would particularly apply to business operators in the Torres Strait forced to close upon relocation. However, it must be noted that

¹⁴⁸ http://ac.els-cdn.com/S2212420914000028/1-s2.0-S2212420914000028-main.pdf?_tid=c5991cbc-9d2d-11e7-b1e8-0000aab0f27&acdnat=1505820738_f0ccfb586f61369a4786895569c75f7d - page 30.

¹⁴⁹ http://ac.els-cdn.com/S2212420914000028/1-s2.0-S2212420914000028-main.pdf?_tid=c5991cbc-9d2d-11e7-b1e8-0000aab0f27&acdnat=1505820738_f0ccfb586f61369a4786895569c75f7d - page 28.

compensation should not solely be viewed within a financial framework. Many aspects of the cultural and traditional way of life in the Torres Strait are irreplaceable and may be gradually lost due to rising sea levels. Though highly complex, one possible form of compensation could be by providing individuals displaced by climate change in the Torres Strait with land that similarly replicates (11(d)(iii) their current living environment on mainland Australia, for example, on the Cape York Peninsula. While not acting as compensation which is purely financial, this may prove a lateral way to provide a living environment enabling people of the Torres Strait to simultaneously be relocated and preserve their cultural practices on an ongoing basis. Protected areas within Australia like Kakadu can be looked at as a reference point with the view to replicate similar designated areas of land designed specifically for the use of indigenous people.

Principle 12: Loss and Damage

States should develop appropriate laws and policies for loss suffered and damage incurred in the context of climate displacement.

The Queensland government, Torres Strait government, and federal government (under s 51 (xxvi) Australian Constitution (indigenous matters) or s51(xxiiiA) Australian Constitution (social services)). As it is primarily the state's responsibility to care for its citizens, failure to do so induces a moral obligation to compensate victims for loss suffered and damaged incurred from climate displacement. Compensable Harms: The compensable class could be permanent residents of the Torres Strait Islands. Loss incurred may include: economic loss, which is defined as including, among other things, loss of land, loss of earnings, and "loss of business or employment opportunities" and reimbursement for costs incurred in moving and relocating. It should also cover non-economic loss such as physical and emotional pain and distress. Any compensation scheme will most likely be informed by tortious compensation, and the state's tortious liability. The default measure of damages ought to be restoration cost. In the US, a victim compensation fund was created for 9/11 victims, providing standardized damage measures in the interests of efficient dispute resolution and fairness among victims, and as an alternative to the tortious litigation.¹⁵⁰ It is argued that should Torres Strait Islanders be climate displaced, it is an inevitability that states must compensate the victims. Compensable harms cannot be so broad so as to create overwhelming financial burden, but not so finite as it is incapable and inflexible to exclude valid victims from claiming compensation. It should also minimise burdens of proof and proximate cause so that victims are not burdened with onerous standards of proof and drawn-out administrative processes. Since a compensation scheme is a reactive mitigative strategy, it is imperative it is implemented conjunction as a part of the holistic process, such as climate change mitigation and risk management. The scheme, as far as applicable, will be more acceptable if based off existing compensation mechanisms, such as tortious compensation, or other environmental compensation schemes. Restoration, adaption and precaution should be the basis of the damages.

Principle 13: Institutional Frameworks to Support and Facilitate the Provision of Assistance and Protection

Under Principle 13(a), States should strengthen national capacities and capabilities to identify and address the protection and assistance needs of climate displaced persons through the establishment of

¹⁵⁰ Farber, DA. *Basic Compensation for Victims of Climate Change*, Berkeley Law Scholarship Repository, (1 January 2006).

effective institutional frameworks and the inclusion of climate displacement in National Adaptation Programmes of Action as appropriate.

The Australian government signed the UN Declaration on the Rights of Indigenous People. This can be viewed as extremely important to climate change in the Torres Strait region because the signing of this declaration is a commitment to protecting the rights of the indigenous people living in this area as it relates to rights of life/food/water/health. Therefore, because of the threat that climate change and rising sea levels poses to these aforementioned rights it is a step forward in developing institutional mechanisms to protect the Torres straight from climate change. The Torres Strait Climate Change Strategy (TSCCS) can be seen as an important step forward in this respect, as it outlines possible impacts of climate change in the region, details an action plan and possible pre-emptive courses of action as a result of co-operation between the Australian government, Queensland government and the TSRA. The action plan details how to implement some of the urgent adaption measures, how to enable community adaption, building resilience and local action as well as promoting the use of risk science to inform planning.

Principle 13(b) states that States should take all appropriate administrative, legislative and judicial measures, including the creation of adequately funded Ministries, departments, offices and/or agencies at the local (in particular), regional and national levels empowered to develop, establish and implement an institutional framework.

The aforementioned action plan delineates the need for there to be co-operation and partnership at all regional, national and state levels. The TSRA has sought to work the federal and state governments and CSIRO. They have further created partnerships with Emergency Management Queensland (EMQ) and both the Torres Shire Council (TSC) and the Torres Strait Island Regional Council (TSIRC).

Principle 13(b)(i) calls for states to enable government technical assistance and funding to prevent, prepare for and respond to climate displacement.

There has been great criticism levied at both Federal and state government relating to a perceived lack of funding towards the issue of climate change in the Torres Strait. All the planning and work done to try and create an institutional framework is ultimately left redundant if the requisite funding is not provided to implement the required measures.

Principle 13(b)(iii) asks states to exchange information and cooperate with indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalized groups.

The TSRA and federal/state governments have sought cooperation with the indigenous population who are threatened by climate change. There has been a concerted effort to seek to help and engage with all aspects of the Torres strait community, through consulting with the TSC and the TSIRC to ensure that both this community at large and the marginalised persons within in this group are best able to be protected from the threat of climate change.

Further, under Principle 13(d), States should ensure the provision of adequate resources (including points of contact and assistance) at all levels of government that directly address the concerns of climate displaced persons.

As is demonstrated by issues surrounding a lack of funding, there are arguably not enough resources being provided to this issue which therefore means there is a lack of points of contact and assistance at various positions in government.

Principle 16: Remedies and Compensation

According to Principle 16, Torres Strait Islanders who experience displacement whose rights have been violated, but who have not yet been relocated, must be given fair, equitable access to appropriate remedies and compensation.

The Native Title Act provides various situations in which holders of native title may be eligible for compensation for acts which have impinged upon their native title rights.¹⁵¹ Arguably, the Commonwealth and Queensland governments are liable to pay compensation under this Act by virtue of the fact that they have contributed (and are contributing) to the extinguishment of Torres Strait Islanders' native title rights through failing to take adequate steps to mitigate the effects of climate change on the Islands.¹⁵² Whether this avenue will be an effective way for Torres Strait communities is yet to be seen, but as yet, our researches have not uncovered any successful climate change compensation claims made under the Act. Another source of the Commonwealth government's responsibility to provide compensation and remedies for climate change affected Torres Strait Islander communities can be found in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Provision of remedies and compensation to climate displaced persons is consistent with the federal government's duties under this Act, which states that the Federal Executive has a statutory obligation to promote a 'cooperative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples'. This need to provide protection should be interpreted to extend to the need to provide ongoing support to the people of the Torres Strait; that support becoming particularly important from the time that they become 'climate displaced persons'. International conventions can provide a framework for instituting remedies and compensation for climate affected Torres Strait Island communities. The most relevant international convention could be considered to be the Warsaw International Mechanism for Loss and Damage ('the Warsaw Mechanism'), which was created at the 19th Conference of the Parties to the UNFCCC (2013) to address loss and damage stemming from the impacts of climate change in under-resourced countries. It provides guidance on identifying options and designing and implementing country-driven risk management strategies and approaches, including risk reduction, and risk transfer and risk-sharing mechanisms. The Executive Committee established by the Warsaw Mechanism articulates two categories of losses communities can suffer due to climate change: economic and non-economic. Economic losses comprise physical assets and income, whilst the non-economic category covers a range of losses including individual (loss of life or health), societal (such as the loss of cultural assets) and environmental losses (such as biodiversity loss). These forms of losses are then categorised as being caused by either slow onset climate change or extreme weather events.

¹⁵¹ Tom Calma, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008 - Case Study 1: Climate Change and the Human Rights of Torres Strait Islanders* (18 February 2009) <https://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport08/pdf/casestudy1.pdf> 258 n 125.

¹⁵² Ibid 258.

The Committee provides tools which could be used for the Torres Strait.¹⁵³ Two financial mechanisms have the potential to be implemented by the Commonwealth or Queensland Governments: *Establish an index insurance scheme*: The Commonwealth or Queensland Governments would work with a private insurer to establish an agreed index relating to the effects of climate change on the Torres Strait. When results fell above or below the anticipated index, for example, due to increased rainfall or tidal degradation payouts would be triggered to individuals experiencing the causal effects of the particular weather patterns falling outside the established index. *Establish a climate change/green bond*: The Commonwealth or Queensland Governments could establish a climate change/green bond scheme in which a designated amount of money is loaned to a mixture of large corporations, banks and individuals. The interest which would be repaid by the borrowers during the period of the loan would then be used to finance specific climate related projects in the Torres Strait. If the Commonwealth government were to implement such compensation mechanisms, doing so would give effect to its commitment under s 1(e) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) 'to assist in the co-operative implementation of Australia's international environmental responsibilities' through furthering the purpose of the Warsaw International Mechanism for Loss and Damage. At a state level, Queensland's *Torres Strait Islander Cultural Heritage Act 2003* (Qld) provides a foundation for providing compensation to climate displaced people in the Torres Strait. One of the objects of the Act is to make rules about the ownership, custodianship and possession of Torres Strait Islander cultural heritage,¹⁵⁴ with the intent underlying those rules being 'that Torres Strait Islander cultural heritage should be protected',¹⁵⁵ and that as far as practicable, Torres Strait Islander human remains and secret or sacred objects should be owned and protected by Torres Strait islanders who have traditional or familial links with those pieces of cultural heritage:¹⁵⁶ where items of cultural heritage are in the custody of the State, the government should protect them until they can be transferred to Torres Strait Islander communities.¹⁵⁷ These provisions suggest that the Queensland government is bound to preserve Torres Strait Islander culture, and with this, comes a responsibility to mitigate cultural loss arising from the effects of climate change.

Principle 17: Framework for Return

When return to a displacement affected region is possible, the Peninsula Principles are designed to addressing the following four areas relating to a former resident's return: The obligation of states to establish a framework for return in case displacement is temporary and return is possible and agreed to by the people affected (Principle 17(a)). The obligation of states to allow climate displaced persons to return voluntarily. States should facilitate return in conditions of security and dignity, in places where original homes are in habitable condition and return does not represent a risk to their lives and means of subsistence (Principle 17(b)). The obligation to allow climate displaced persons to decide about the convenience to return to their traditional location and provide all the necessary information to allow their right to circulate freely and select their residency (Principle 17(c)). The obligation to provide transitory aid during the process of return until the means of subsistence and access to services are re-established (Principle 17(d)).

¹⁵³ *Loss and Damage Online Guide*, (2013) United Nations Framework Convention on Climate Change , http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/online_guide_on_loss_and_damage-dec_2017.pdf>.

¹⁵⁴ *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 14(1).

¹⁵⁵ *Ibid* s 14(2).

¹⁵⁶ *Ibid* s 14(3).

¹⁵⁷ *Ibid* s 14(4).

It must be noted in relation to the region of the Torres Strait that the permanent return of former residents will most likely not be possible once sea levels have inundated the islands in the region beyond sustainable levels. This must be contrasted with other larger affected nations which are in the position to relocate affected populations and central points of economic output to other regions in response to the effect of climate change.¹⁵⁸ The vulnerability of regions of the Torres Strait to complete and permanent relocation of its residents places an even greater emphasis on stringently protecting the region when developing displacement agreements with the Queensland and Commonwealth Government's.¹⁵⁹ It must be ensured that Torres Strait Islanders continue to maintain control over their own self-determination throughout the relocation process to ensure their personal freedoms and indigenous practices are preserved.¹⁶⁰

VII. Conclusions

Climate change threatens to dispossess approximately 8,000 Torres Strait Islanders of the land they have inhabited for more than 50,000 years. The Torres Strait will experience both the direct and indirect consequences of climate change, including 'increasing temperatures, changing rainfall patterns, sea level rise, ocean acidification and more extreme weather events, including tropical cyclones and storms.'¹⁶¹ The social and economic disadvantage of Torres Strait Islanders and the lack of infrastructure in the region will limit the community's capacity to adapt to climate change.¹⁶² The Peninsula Principles are 'a comprehensive normative framework (...) within which the rights of climate displaced persons can be addressed.'¹⁶³ It is imperative that the Australian government utilize this framework to address the threat of climate displacement in the Torres Strait. While Torres Strait Islanders are yet to be displaced by climate change, the threat posed by climate change to the Torres Strait entitles the Islanders to the rights and protections for climate displaced persons within the Peninsula Principles and international law. Our research thus far indicates that many of the Peninsula Principles are highly applicable to the current situation in the Torres Strait Islands, where climate displacement is an inevitable part of the future of Torres Strait Island communities. The TSRA's current plan is highly instructive, but lacks the human rights-focus and overarching principled approach that is required to ensure a sustainable, long-term process of adaptation to a changing environment in the Torres Strait and the reality of needing to relocate to the Australian mainland.

VIII. Recommendations for the Australian Government

As climate change is yet to displace the Torres Strait Islanders, Australian government action should focus on satisfying the requirements in the Preparation and Planning Stage. Further, pursuant to the protections within the Peninsula Principles, Torres Strait Islanders have the right to remain in their homes for as long as possible. The Australian government must prioritise appropriate mitigation, adaptation and other preventative

¹⁵⁸ David Hodgkinson, *A Convention for Persons Displaced by Climate Change* (31 March 2011) Shaping Tomorrow's World <http://shapingtomorrowsworld.org/hodgkinson_convention_displaced_persons.html>.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Australian Government and Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience* (Undated) Torres Strait Regional Authority <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf> 10.

¹⁶² Ibid., 16.

¹⁶³ Peninsula Principles on Climate Displacement within States, Principle 1(a).

measures to give effect to this right. Adaptation and mitigation measures should also seek to address the challenges climate change will pose to the enjoyment of human rights in the Torres Strait, particularly in relation to the rights to land, culture, food, water, health and self-determination. Importantly, in accordance with the right to self-determination, the Australian government should work closely with and respect the views of knowledge of the Torres Strait islander community in formulating mitigation and adaptation measures. In particular, the following steps are recommended:

1. Comply with the obligations set out in the 2013 Peninsula Principles on Climate Displacement to recognise and respect the rights of climate displaced persons;
2. Ratify ILO Convention 169 (1989) on Indigenous and Tribal Peoples and comply with the 2007 UN Declaration on the Rights of Indigenous Peoples to further advance recognition of and respect for the rights of the Torres Strait Islanders;
3. Recognise that Torres Strait Islanders are climate displaced persons pursuant to the Peninsula Principles on Climate Displacement, and use the Principles as a guiding framework to establish institutional frameworks, procedures and mechanisms to address the problem;
4. Undertake immediate mitigation, adaptation and other preventative measures to give effect to the right of Torres Strait Islanders to remain in their homes and retain connections to the land on which they live for as long as possible;
5. Invest in health care management and infrastructure and conduct research on how to minimise the impacts of climate change on islander health and wellbeing;
6. Work with the TSRA to ensure local participation in adaptation and mitigation planning measures;
7. Initiate a process to identify land for relocation in the event that relocation becomes necessary. Land should be identified in collaboration with Torres Strait Islanders and consider the unique cultural needs of the community;
8. Ensure that at the time of relocation, the acquired land provides sufficient access to basic services, adequate and affordable housing, education and access to livelihoods for relocated Islanders;
9. Provide opportunities for the acquisition of new skills to ensure new sources of livelihood and economic prosperity at the time of relocation; and
10. Develop land acquisition and compensation processes and appropriate land allocation programs. Ensure that at the time of relocation Torres Strait Islanders receive fair levels of compensation for loss of their native title rights.

The Peninsula Principles on Climate Displacement Within States (18 August 2013)

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Preamble

CONCERNED that events and processes caused or exacerbated by climate change have and will continue to contribute to displacement of populations resulting in the erosion of the rights of those affected, in particular vulnerable and marginalized groups, the loss of assets, housing, land, property and livelihoods, and the further loss of cultural, customary and/or spiritual identity;

GUIDED by the Charter of the United Nations, and REAFFIRMING the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Program of Action;

NOTING that these Peninsula Principles build on and contextualize the United Nations Guiding Principles on Internal Displacement to climate displacement within States;

UNDERSTANDING that when an activity raises threats of harm to human health, life or the environment, precautionary measures should be taken;

COGNISANT that the vast majority of climate displaced persons are not responsible for the processes driving climate change;

NOTING that while climate displacement can involve both internal and cross-border displacement, most climate displacement will likely occur within State borders;

REAFFIRMING the right of climate displaced persons to remain in their homes and retain connections to the land on which they live for as long as possible, and the need for States to prioritise appropriate mitigation, adaptation and other preventative measures to give effect to that right;

REAFFIRMING further the right of those who may be displaced to move safely and to relocate within their national borders over time;

RECOGNISING that voluntary and involuntary relocation often result in the violation of human rights, impoverishment, social fragmentation and other negative consequences, and recognizing the imperative to avoid such outcomes;

NOTING further that climate displacement if not properly planned for and managed may give rise to tensions and instability within States;

ACKNOWLEDGING that States bear the primary responsibility for their citizens and others living within their jurisdiction, but recognising that, for many States, addressing the issue of and responding to climate displacement presents financial, logistical, political, resource and other difficulties;

CONVINCED, however, that as climate change is a global problem, States should, on request by affected States, provide adequate and appropriate support for mitigation, adaptation, relocation and protection measures, and to provide assistance to climate displaced persons;

REALISING that the international community has humanitarian, social, cultural, financial and security interests in addressing the problem of climate displacement in a timely, coordinated and targeted manner;

REALISING further that there has been no significant coordinated response by States to address climate displacement, whether temporary or permanent in nature;

RECOGNISING that the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol neither contemplate nor address the issue of climate displacement, and that conferences and meetings of the parties to these instruments have not substantively addressed climate displacement other than in the most general of terms;

NOTING, however, that paragraph 14(f) of the UNFCCC 16th session of the Convention of the Parties (COP16) Cancun Adaptation Framework refers to enhanced action on adaptation, including ‘[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation ...’;

NOTING further that UNFCCC COP18 in Doha decided to establish, at UNFCCC COP19, institutional arrangements to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change as part of the Cancun Adaptation Framework;

RECOGNISING the work being undertaken by the United Nations and other inter-governmental and non-governmental agencies to address climate displacement and related factors;

REALISING the need for a globally applicable normative framework to provide a coherent and principled approach for the collaborative provision of pre-emptive assistance to those who may be displaced by the effects of climate change, as well as effective remedial assistance to those who have been so displaced, and legal protections for both;

ACKNOWLEDGING the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, the Hyogo Framework for Action, the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons and others, the incorporation of a number of their principles within these Peninsula Principles, and their application to climate displaced persons;

ACKNOWLEDGING also regional initiatives addressing internal displacement such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa;

NOTING the work of the Nansen Initiative on disaster-induced cross-border displacement;

NOTING that these Peninsula Principles, addressing climate displacement within States, necessarily complement other efforts to address cross-border displacement; and

RECOGNISING judicial decisions and the writings of eminent jurists and experts as a source of international law, and acknowledging their importance and contribution to formulating the present Peninsula Principles,

these Peninsula Principles on Climate Displacement ('Peninsula Principles') provide as follows:

I. Introduction

Principle 1: Scope and purpose

These Peninsula Principles:

- (a) provide a comprehensive normative framework, based on principles of international law, human rights obligations and good practice, within which the rights of climate displaced persons can be addressed;
- (b) address climate displacement within a State and not cross-border climate displacement; and
- (c) set out protection and assistance principles, consistent with the UN Guiding Principles on Internal Displacement, to be applied to climate displaced persons.

Principle 2: Definitions

For the purposes of these Peninsula Principles:

- (a) 'Climate change' means the alteration in the composition of the global atmosphere that is in addition to natural variability over comparable time periods (as defined by the IPCC).
- (b) 'Climate displacement' means the movement of people within a State due to the effects of climate change, including sudden and slow-onset environmental events and processes, occurring either alone or in combination with other factors.
- (c) 'Climate displaced persons' means individuals, households or communities who are facing or experiencing climate displacement.

- (d) 'Relocation' means the voluntary, planned and coordinated movement of climate displaced persons within States to suitable locations, away from risk-prone areas, where they can enjoy the full spectrum of rights including housing, land and property rights and all other livelihood and related rights.

Principle 3: Non-discrimination, rights and freedoms

- (a) States shall not discriminate against climate displaced persons on the basis of their potential or actual displacement, and should take steps to repeal unjust or arbitrary laws and laws that otherwise discriminate against, or have a discriminatory effect on, climate displaced persons.
- (b) Climate displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country, in particular housing, land and property rights.
- (c) States should ensure that climate displaced persons are entitled to and supported in claiming and exercising their rights and are provided with effective remedies as well as unimpeded access to the justice system.

Principle 4: Interpretation

- (a) These Peninsula Principles shall not be interpreted as limiting, altering or otherwise prejudicing rights recognized in international law, including human rights, humanitarian law and related standards, or rights consistent with those laws and standards as recognized under domestic law.
- (b) States should interpret these Peninsula Principles broadly, be guided by their humanitarian purpose, and display fairness, reasonableness, generosity and flexibility in their interpretation.

II. General Obligations

Principle 5: Prevention and avoidance

States should, in all circumstances, comply in full with their obligations under international law so as to prevent and avoid conditions that might lead to climate displacement.

Principle 6: Provision of adaptation assistance, protection and other measures

- (a) States should provide adaptation assistance, protection and other measures to ensure that individuals, households and communities can remain in their homes or places of habitual residence for as long as possible in a manner fully consistent with their rights.

- (b) States should, in particular, ensure protection against climate displacement and demonstrate sensitivity to those individuals, households and communities within their territory who are particularly dependent on and/or attached to their land, including indigenous people and those reliant on customary rules relating to the use and allocation of land.

Principle 7: National implementation measures

- (a) States should incorporate climate displacement prevention, assistance and protection provisions as set out in these Peninsula Principles into domestic law and policies, prioritising the prevention of displacement.
- (b) States should immediately establish and provide adequate resources for equitable, timely, independent and transparent procedures, institutions and mechanisms – at all levels of government (local, state and national) – to implement these Peninsula Principles and give effect to their provisions through specially earmarked budgetary allocations and other resources to facilitate that implementation.
- (c) States should ensure that durable solutions to climate displacement are adequately addressed by legislation and other administrative measures.
- (d) States should ensure the right of all individuals, households and communities to adequate, timely and effective participation in all stages of policy development and implementation of these Peninsula Principles, ensuring in particular such participation by indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalized groups and people.
- (e) All relevant legislation must be fully consistent with human rights laws and must in particular explicitly protect the rights of indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalized groups and people.

Principle 8: International cooperation and assistance

- (a) Climate displacement is a matter of global responsibility, and States should cooperate in the provision of adaptation assistance (to the maximum of their available resources) and protection for climate displaced persons.
- (b) In fulfilling their obligations to prevent and respond to climate displacement within their territory, States have the right to seek cooperation and assistance from other States and relevant international agencies.
- (c) States and relevant international agencies, either separately or together, should provide such cooperation and assistance to requesting States, in particular where the requesting State is unable to adequately prevent and respond to climate displacement.

- (d) States that are otherwise unable to adequately prevent and respond to climate displacement should accept appropriate assistance and support from other States and relevant international agencies, whether made individually or collectively.

III. Climate Displacement Preparation and Planning

Principle 9: Climate displacement risk management

States, in terms of climate displacement risk management, monitoring and modeling, using a rights-based approach, should:

- (a) identify, design and implement risk management strategies, including risk reduction, risk transfer and risk sharing mechanisms, in relation to climate displacement;
- (b) undertake systematic observation and monitoring of, and disaggregated data collection at the household, local, regional and national levels on, current and anticipated climate displacement;
- (c) enhance sharing, access to and the use of such data at the household, local, regional and national levels, mindful of the need for data protection and predetermined use of data, facilitate the assessment and management of climate displacement;
- (d) model likely climate displacement scenarios (including timeframes and financial implications), locations threatened by climate change, and possible relocation sites for climate displaced persons;
- (e) integrate relocation rights, procedures and mechanisms, as defined in these Peninsula Principles, within national laws and policies; and
- (f) develop institutional frameworks, procedures and mechanisms with the participation of individuals, households and communities that:
 - (i) identify indicators that will, with as much precision as possible, classify where, at what point in time, and relevant to whom, relocation will be required as a means of providing durable solutions to those affected;
 - (ii) require and facilitate governmental technical assistance and funding; and
 - (iii) outline steps individuals, households and communities can take prior to climate displacement in order to receive such technical assistance and financial support.

Principle 10: Participation and consent

To enable successful preparation and planning for climate displacement, States should:

- (a) ensure that priority consideration is given to requests from individuals, households and communities for relocation;
- (b) ensure that no relocation shall take place unless individuals, households and communities (both displaced and host) provide full and informed consent for such relocation;
- (c) only require relocation to take place without such consent in exceptional circumstances when necessary to protect public health and safety or when individuals, households and communities face imminent loss of life or limb;
- (d) adopt measures that promote livelihoods, acquisition of new skills, and economic prosperity for both displaced and host communities;
- (e) make certain that:
 - (i) affected individuals, households and communities (both displaced and host) are fully informed and can actively participate in relevant decisions and the implementation of those decisions, including the planning and implementation of laws, policies and programs designed to ensure respect for and protection of housing, land and property rights;
 - (ii) basic services, adequate and affordable housing, education and access to livelihoods (without discrimination) will be available for climate displaced persons in the host community at a standard ensuring equity between the host and relocating communities, and consistent with the basic human rights of each;
 - (iii) adequate mechanisms, safeguards and remedies are in place to prevent and resolve conflicts over land and resources; and
 - (iv) the rights of individuals, households and communities are protected at all stages of the relocation process;
- (f) prior to any relocation, prepare a master relocation plan that addresses critical matters including:
 - (i) land acquisition;
 - (ii) community preferences;
 - (iii) transitional shelter and permanent housing;

- (iv) the preservation of existing social and cultural institutions and places of climate displaced persons;
- (v) access to public services;
- (vi) support needed during the transitional period;
- (vii) family and community cohesion;
- (viii) concerns of the host community;
- (ix) monitoring mechanisms; and
- (x) grievance procedures and effective remedies.

Principle 11: Land identification, habitability and use

- (a) Recognising the importance of land in the resolution of climate displacement, States should:
 - (i) identify, acquire and reserve sufficient, suitable, habitable and appropriate public and other land to provide viable and affordable land-based solutions to climate displacement, including through a National Climate Land Bank;
 - (ii) develop fair and just land acquisition and compensation processes and appropriate land allocation programmes, with priority given to those most in need; and
 - (iii) plan for and develop relocation sites including new human settlements on land not at risk from the effects of climate change or other natural or human hazards and, in so planning, consider the safety and environmental integrity of the new site(s), and ensure that the rights of both those relocated and the communities that host them are upheld.
- (b) In order to determine the habitability and feasibility of any relocation site, and to ensure that climate displaced persons being relocated and the relevant jurisdictional authority are in agreement as to the habitability of any such site, States should create and make publicly available specific, geographically appropriate, standard criteria including:
 - (i) current and future land use;
 - (ii) restrictions (including those of a customary nature or not otherwise formally codified) associated with the land and its use;

- (iii) habitability of the land, including issues such as accessibility, availability of water, vulnerability to climate or other natural or human hazards, and use; and
 - (iv) feasibility of subsistence/agricultural use, together with mechanisms for climate displaced persons to decide to where they wish to voluntarily relocate.
- (c) States should provide easily accessible information to individuals, households and communities concerning:
- (i) the nature and extent of the actual and potential changes to the habitability of their homes, lands and places of habitual residence on which they dwell or subsist, resulting from climate change, including the evidence on which such assessments are made;
 - (ii) evidence that all viable alternatives to relocation have been considered, including mitigation and adaptation measures that could be taken to enable people to remain in their homes and places of habitual residence;
 - (iii) planned efforts to assist climate displaced persons in relocation;
 - (iv) available compensation and alternative relocation options if the relocation site offered is unacceptable to climate displaced persons; and
 - (v) rights under international and domestic law, in particular housing, land and property rights.
- (d) States should include in relocation planning:
- (i) measures to compensate climate displaced persons for lost housing, land and property;
 - (ii) assurances that housing, land, property and livelihood rights will be met for all climate displaced persons, including those who have informal land rights, customary land rights, occupancy rights or rights of customary usage, and assurances that such rights are ongoing; and
 - (iii) assurances that rights to access traditional lands and waters (for example, for hunting, grazing, fishing and religious purposes) are maintained or similarly replicated.

Principle 12: Loss and damage

States should develop appropriate laws and policies for loss suffered and damage incurred in the context of climate displacement.

Principle 13: Institutional frameworks to support and facilitate the provision of assistance and protection

- (a) States should strengthen national capacities and capabilities to identify and address the protection and assistance needs of climate displaced persons through the establishment of effective institutional frameworks and the inclusion of climate displacement in National Adaptation Programmes of Action as appropriate.
- (b) States should take all appropriate administrative, legislative and judicial measures, including the creation of adequately funded Ministries, departments, offices and/or agencies at the local (in particular), regional and national levels empowered to develop, establish and implement an institutional framework to:
 - (i) enable government technical assistance and funding to prevent, prepare for and respond to climate displacement;
 - (ii) support and facilitate the provision of assistance and protection to climate displaced persons;
 - (iii) exchange information and cooperate with indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalized groups.
 - (iv) represent the needs of climate displaced persons.
- (c) Responsibility for establishing Ministries, departments, offices and/or agencies should lie with national governments, and such governments should consult and collaborate with regional and local authorities, and integrate such Ministries, departments, offices and/or agencies in relevant institutional frameworks.
- (d) States should ensure the provision of adequate resources (including points of contact and assistance) at all levels of government that directly address the concerns of climate displaced persons.

IV. Displacement

Principle 14: State assistance to those climate displaced persons experiencing displacement but who have not been relocated

- (a) States have the primary obligation to provide all necessary legal, economic, social and other forms of protection and assistance to those climate displaced persons experiencing displacement but who have not been relocated.

- (b) Protection and assistance activities undertaken by States should be carried out in a manner that respects both the cultural sensitivities prevailing in the affected area and the principles of maintaining family and community cohesion.
- (c) States should provide climate displaced persons experiencing displacement but who have not been relocated with a practicable level of age and gender-sensitive humanitarian assistance including, without limitation, as the context requires:
 - (i) emergency humanitarian services;
 - (ii) evacuation and temporary and effective permanent relocation;
 - (iii) medical assistance and other health services;
 - (iv) shelter;
 - (v) food;
 - (vi) potable water;
 - (vii) sanitation;
 - (viii) measures necessary for social and economic inclusion including, without limitation, anti-poverty measures, free and compulsory education, training and skills development, and work and livelihood options, and issuance and replacement of lost personal documentation; and
 - (ix) facilitation of family reunion.

Principle 15: Housing and livelihood

- (a) States should respect, protect and fulfil the right to adequate housing of climate displaced persons experiencing displacement but who have not been relocated, which includes accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and non-discriminatory access to basic services (for example, health and education).
- (b) Where climate displacement results in the inability of climate displaced persons to return to previous sources of livelihood, appropriate measures should be taken to ensure such livelihoods can be continued in a sustainable manner and will not result in further displacement, and opportunities created by such measures should be available without discrimination of any kind.

Principle 16: Remedies and compensation

Climate displaced persons experiencing displacement but who have not been relocated and whose rights have been violated shall have fair and equitable access to appropriate remedies and compensation.

V. Post-Displacement and Return

Principle 17: Framework for return

- (a) States should develop a framework for the process of return in the event that displacement is temporary and return to homes, lands or places of habitual residence is possible and agreed to by those affected.
- (b) States should allow climate displaced persons experiencing displacement to voluntarily return to their former homes, lands or places of habitual residence, and should facilitate their effective return in safety and with dignity, in circumstances where such homes, lands or places of habitual residence are habitable and where return does not pose significant risk to life or livelihood.
- (c) States should enable climate displaced persons to decide on whether to return to their homes, lands or places of habitual residence, and provide such persons with complete, objective, up-to-date and accurate information (including on physical, material and legal safety issues) necessary to exercise their right to freedom of movement and to choose their residence.
- (d) States should provide transitional assistance to individuals, households and communities during the process of return until livelihoods and access to services are restored.

VI Implementation

Principle 18: Implementation and dissemination

States, who have the primary obligation to ensure the full enjoyment of the rights of all climate displaced persons within their territory, should implement and disseminate these Peninsula Principles without delay and cooperate closely with inter-governmental organisations, non-government organisations, practitioners, civil society, and community-based groups toward this end.

Adopted by a group of eminent jurists, text writers, legal scholars and climate change experts in Red Hill on the Mornington Peninsula, Victoria, Australia on 18 August 2013.