



## LAW AND LIBERTY IN A TIME OF CLIMATE CHANGE

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I don't agree with those whose reaction [to a strong response to climate change] is to warn against restricting civil freedoms. Were the forecasts of certain climatologists to come true, our freedoms would be tantamount to those of someone hanging from a 20th-storey parapet.<sup>1</sup>

In Australia, the extensive policy and legal implications of anthropogenic global warming began to be understood only in 2006, after the release of the Stern report<sup>2</sup> and Al Gore's documentary *An Inconvenient Truth*. Until then, the Howard government in collaboration with the fossil fuel industries had downplayed the extent of anthropogenic warming and its likely impacts.<sup>3</sup> The delay in Australia's response has meant that there is still very little Australian legislation which addresses climate change<sup>4</sup> and no legislation which contains effective mitigation measures. Nor has there been a concerted legislative response to the likely impacts of climate change through the imposition of effective and proactive adaptation measures. Other Western nations, with the exception of the United States, have been somewhat quicker than Australia to respond to a global

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<sup>1</sup> Vaclav Havel, 'Our moral footprint', *New York Times* (New York), 27 September 2007 <<http://www.nytimes.com/2007/09/27/opinion/27havel.html>>.

<sup>2</sup> Nicholas Stern, *Stern Review: The Economics of Climate Change* (2007) <[http://www.hm-treasury.gov.uk/stern\\_review\\_report.htm](http://www.hm-treasury.gov.uk/stern_review_report.htm)>.

<sup>3</sup> See Clive Hamilton, *Scorcher. The Dirty Politics of Climate Change* (2007).

<sup>4</sup> See Tim Bonyhady and Peter Christoff, 'Introduction' in Tim Bonyhady and Peter Christoff (eds), *Climate Law and Australia* (2007) 3.

problem which has been documented since 1990 by the Intergovernmental Panel on Climate Change.<sup>5</sup> Thus far, however, there have been no radical cuts in greenhouse gas emissions, even though most scientists consider such cuts absolutely necessary to stave off the more catastrophic consequences of climate change.

My intention here is to adopt a human rights approach to climate change, and consider the implications for human rights and the rule of law in two alternative future scenarios. In the first, Western nations decide to take a proactive, strong and even punitive regulatory stance in a concerted attempt to curtail global greenhouse gas emissions and mitigate the impacts of climate change. I have called such a strategy a ‘war’ on climate change for reasons which I discuss below. In the second of these possible scenarios, the ‘war’ on climate change remains unwaged and there is no real attempt to mitigate the impacts of runaway climate change.

It is arguable that these are not the only two possible scenarios and that, in fact, Western governments will find effective solutions to climate change which jeopardise neither economic growth nor the liberal democratic tradition. The Rudd government would have us believe that voluntary household measures coupled with mandatory small-scale industrial emission cuts will suffice; that we can somehow avoid the worst effects of climate change without resorting to draconian legislative measures. Generally, no Western government is prepared to abandon a ‘business as usual’ approach. However, I have adopted the view, shared by a large number of

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<sup>5</sup> The Intergovernmental Panel on Climate Change, established in 1988, is an intergovernmental body which collates and publishes peer-reviewed findings of climate change scientists worldwide. Its reports can be found at <[http://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.htm#1](http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm#1)>.

scientists, that the failure to adopt radical proactive measures will lead inevitably to runaway climate change and thus to the second scenario.<sup>6</sup>

In exploring the consequences for law and liberty in both scenarios, I am responding to the concerns expressed by climate change sceptics in the political, business and broader communities that strong regulatory action to curb greenhouse gas emissions constitutes a needless assault on human rights and the economy. A strong response to climate change will, indeed, impinge on certain rights. I have adopted the paradigm of war in relation to such strong regulatory action for several reasons: partly because some sacrifice of certain rights is generally accepted during a 'war', partly because those who advocate strong action on climate change commonly employ militaristic terminology and reasoning, and partly because, as we have found in the 'war on terror', a declaration of war on an abstract noun<sup>7</sup> is a common neo-conservative response to fear-inducing phenomena.

The language of war and exceptionalism, if adopted in the context of climate change, can have profound implications for both human rights and the rule of law, as we have found most recently in the war on terror. Of course, the proposed sacrifice of certain human rights in order to safeguard other rights is a suggestion which might well be resisted by human rights advocates and other liberal thinkers, as well as by climate change sceptics. Liberal-minded and well-

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<sup>6</sup> This is the view taken by a majority of scientists, including James Hansen, director of the NASA Goddard Space Studies Center, and James Lovelock (see James Lovelock, *The Revenge of Gaia. Why the Earth is Fighting Back – And How We Can Still Save Humanity* (2007). By 2009, in his most recent publication, Lovelock had adopted an even more pessimistic approach (James Lovelock, *The Vanishing Face of Gaia. A Final Warning* (2009)). In March 2009, 2,500 leading climate scientists warned politicians that unless they adopted drastic measures to reduce carbon emissions, the world would face 'irreversible shifts in climate': see Jonathon Leake, 'Plan B: Scientists Get Radical in Bid to Halt Global Warming "Catastrophe"', *Timesonline* (London), 15 March 2009 <<http://www.timesonline.co.uk/tol/news/uk/article5908377.ece>>.

<sup>7</sup> See Rodney Allan, 'Terrorism and Truth' (2002) 27 *Alternative Law Journal* 157, 157.

meaning human rights supporters might balk at the curtailment of their own rights when the rights which will be safeguarded belong, for the most part, to the ‘Other’: to the residents of developing nations and to future generations. However, by considering the far more catastrophic consequences for human rights in the event that the Western world fails to act, I argue that drastic action on climate change is absolutely necessary. If we fail to make certain sacrifices now, we jeopardise the fundamental human rights of both future and current generations. Indeed, in most depictions of a future world transformed by runaway climate change, law and liberty have become redundant concepts.

## **I - A Matter of Terminology: Waging a ‘War’ on Climate Change**

This article is a departure from conventional legal scholarship in its use of a ‘war’ on climate change paradigm and its reliance on material from a wide variety of non-legal sources. My use of diverse and provocative material and references is deliberate. Caution, precedent and conservatism are not, in my view, appropriate tools to tackle climate change. Instead, we need to jettison many of our traditional practices and beliefs and respond to climate change in truly radical ways. In particular, we will need to make the sorts of sacrifices commonly accepted as necessary when we wage war against a common enemy.

As Tom Lynch and Bert Jenkins have pointed out, the customary neo-conservative response to environmental challenges and other threats tends to involve conflict and warfare. Therefore, they claim, ‘we can expect a “War on Climate Change”, just as we have a “War on Terrorism” and

have had a “War on Drugs”<sup>8</sup>. However, thus far references to the need for a war on climate change, and militaristic comparisons and metaphors, are found not in the speeches of neo-conservative politicians nor in the writings of those who endorse neo-conservative views but rather in the words and writings of progressive advocates for action against climate change. In fact, ironically enough, Australian commentators who have been more than happy to applaud the firm measures adopted in the war on terror have dismissed the campaign of climate change activists as ill-founded and hysterical, and deplore the suggestion that we should sacrifice economic growth for the climate change cause.<sup>9</sup>

In contrast, one of England’s most celebrated scientists, Stephen Hawking, has stated that ‘we should have a war on global warming rather than the war on terror’<sup>10</sup> and the equally renowned scientist James Lovelock, who developed the Gaia hypothesis (viewing the earth as a single organism), is quite prepared to describe oncoming events as a ‘climate war’.<sup>11</sup> Lovelock seeks to draw salutary lessons from Napoleon’s ill-fated advance upon Moscow in 1812, and from the withdrawal of the British army from Dunkirk in 1940,<sup>12</sup> and advocates for ‘restrictions, rationing and the call to service that were familiar in wartime’.<sup>13</sup> The authors of *Climate Code Red*, David Spratt and Philip Sutton, similarly suggest that we need an emergency mobilisation equivalent to

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<sup>8</sup> Tom Lynch and Bert Jenkins, ‘Global Warming, Contemporary Politics and the Principle of Least Disruption’, *Australian Quarterly*, July-August 2007, 30, 34.

<sup>9</sup> See, for example, the columns of Miranda Devine in *The Sydney Morning Herald*, and Clive Hamilton’s commentary on the stance on climate change taken by *The Australian* newspaper: Hamilton, above n 3, 163. In fact, as a further example of inconsistency, Hamilton has pointed out that although *The Australian* has campaigned against postmodernism, the newspaper has adopted a postmodernist approach to climate change, questioning established science and querying the motives of scientists.

<sup>10</sup> Quoted in Mike Hulme, ‘The Conquering of Climate: Discourses of Fear and their Dissolution’ (2008) 174 *Geographical Journal* 5, 11.

<sup>11</sup> Lovelock, *The Revenge of Gaia*, above n 6, 17.

<sup>12</sup> *Ibid* 191.

<sup>13</sup> *Ibid* 196.

that which took place during World War II.<sup>14</sup> Furthermore Al Gore, in the well-known documentary *An Inconvenient Truth*, compares our current refusal to take decisive action with the inertia which gripped Western Europe in the 1930s, as the German government of Nazi fascists seized power, appropriated land and increasingly demonstrated a callous disregard for human rights; thus, the ‘horrible unprecedented gathering storm in continental Europe’ in the 1930s is equivalent to the looming crisis of climate change and must also end with a declaration of war.<sup>15</sup>

Militaristic metaphors abound in the climate change context because war necessitates a strong, united response to a significant external threat. At the outset, however, I have to concede that the war paradigm is problematic. Firstly, conceptualising a concerted global campaign against climate change as a war means that we must identify an enemy, but who or what is the enemy in such a war? If the war on terror has shown us nothing else, it has certainly shown us that the Western world is quite capable of waging war on an abstract noun.<sup>16</sup> Yet in a war on climate change, it is unlikely that the enemy will remain disembodied. Antonia Quadara has pointed out that terrorism itself may be ‘absolutised, faceless, virtual’ but it is always in need of ‘particular bodies to make visible the threat’.<sup>17</sup> In the war on terror, the ‘particular bodies’ tend to belong to the young Muslim man of Middle-Eastern appearance. Which group will provide us with the scapegoats in a war on climate change?

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<sup>14</sup> David Spratt and Philip Sutton, *Climate Code Red. The Case for Emergency Action* (2008) 158.

<sup>15</sup> James Lovelock draws the same analogy: Lovelock, *The Vanishing Face of Gaia*, above n 6, 20.

<sup>16</sup> Allen, above n 7, 157.

<sup>17</sup> Antonia Quadara, ‘David Hicks In/As the Event of Terror’ (2006) 24 *Australian Feminist Law Journal* 141, 146.

Lynch and Jenkins anticipate that in such a war, the ‘vulnerable and (relatively) powerless’ will be the victims.<sup>18</sup> This would not be the first time that vulnerable individuals have been punished for a changing climate; it is probable that certain women were held responsible for the early Little Ice Age and burned as witches in sixteenth century Europe.<sup>19</sup> Yet it is not the vulnerable and powerless who are responsible for climate change, even though they will be the main victims. As Robert Aisi, who represents Papua New Guinea in the United Nations, stated to the United Nations General Assembly on behalf of the Pacific island countries: ‘We are likely to become the victims of a phenomenon to which we have contributed very little and of which we can do very little to halt’.<sup>20</sup>

In fact, to borrow from the title of another article, ‘we have met the enemy and he is us’.<sup>21</sup> There is no question that the main contributors to global warming are the Western nations and Australia’s greenhouse gas emissions per capita are embarrassingly high. Our undeniable complicity in the phenomenon of global warming, although we may be complicit ‘without passion or intent’,<sup>22</sup> is, according to Kochi and Ordan, comparable to the banal acts of evil committed by bureaucrats in the Nazi regime.<sup>23</sup> Yet it is unlikely that we will wage war on ourselves.

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<sup>18</sup> Lynch and Jenkins, above n 8, 34.

<sup>19</sup> Hulme, above n 10, 7.

<sup>20</sup> Robert Aisi, ‘Facing Extinction. Climate Change and the Threat to Pacific Island Countries’ (2007) 90 *Reform* 65.

<sup>21</sup> Mark Sagoff, ‘We Have Met the Enemy and He is Us or Conflict and Contradiction in Environmental Law’ (1981-2) 12 *Environmental Law* 283; Sagoff is himself quoting another author.

<sup>22</sup> George Monbiot, *Heat: how to stop the planet burning* (2007) 22.

<sup>23</sup> Tarik Kochi and Noam Ordan, ‘An Argument for the Global Suicide of Humanity’ (2008) 7 *borderland e-journal* 1, 13. The phrase ‘the banality of evil’ was used to describe Nazi bureaucrats by Hannah Arendt: Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (1965).

The other reason why a war on climate change is a problematic concept is that it forms part of the language and mindset of conquest which has created the predicament of climate change in the first place. Robyn Eckersley has observed that the liberal belief that humankind can use instrumental reason and complex technologies to master the natural world and thus expand human autonomy ‘has served to imperil rather than expand autonomy for large numbers of people and non-human species’.<sup>24</sup> Despite the many examples of the failure of reason and technology to master nature in a way which benefits humankind as a whole, the prospect of geo-engineering our way out of the climate change predicament still captivates us in our quest for a relatively painless solution to an intractable dilemma. Such solutions include pumping sulphate into the atmosphere and capturing and storing carbon. Stephen Hawking’s suggestion that we colonise other planets is the most ambitious of such geo-engineering solutions.<sup>25</sup> It is also, possibly, the most foolhardy, as Jeanette Winterson’s tale in *The Stone Gods* suggests.<sup>26</sup> Winterson describes a futuristic world in which a group of people and a robot set off on a spaceship to colonise a lush new planet – only to discover that their geo-engineered intervention, designed to destroy the larger life forms and thereby make the planet more suitable for human habitation, triggers a lethal mini Ice Age. As Mike Hulme points out, geo-engineering solutions to climate change bear ‘the language of control and mastery over climate’, as indeed do political and social engineering solutions<sup>27</sup> and indeed, as does the idea of a war on climate change. Yet Rachel Carson, a leading ecologist, stated in 1962: ‘We still talk in terms of conquest . . . I think

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<sup>24</sup> Robyn Eckersley, *The green state. Rethinking democracy and sovereignty* (2004) 107.

<sup>25</sup> See Kochi and Ordan, above n 23, 1-2.

<sup>26</sup> Jeanette Winterson, *The Stone Gods* (2007).

<sup>27</sup> Hulme, above n 10, 12.



we're challenged, as mankind has never been challenged before, to prove our maturity and our mastery, not of nature but of ourselves'.<sup>28</sup>

Thus, the use of a militaristic metaphor to inspire Western nations to abandon their apathetic 'business as usual' approach and adopt a more offensive stance on carbon emissions has obvious drawbacks. However, by exploring the dimensions of a 'war' on climate change, I shall to seek to demonstrate that any infringements to human rights which might take place as a consequence of such a war are relatively minor compared to the impact on human rights of runaway climate change.

## II - Climate Change and Human Rights

There is virtually unanimous agreement in the global scientific community about the existence of human-caused climate change.<sup>29</sup> Related phenomena include sea level rise, eventual inundation of low-lying islands and coastal areas, and increases in the frequency and severity of droughts, floods, violent storms and heat waves.<sup>30</sup> As stated above, the Intergovernmental Panel on Climate Change has measured the progress of climate change and predicted its impacts in a series of increasingly disquieting reports.<sup>31</sup> Some scientists have expressed concerns that even these reports have understated the magnitude and severity of the problem.<sup>32</sup> The international

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<sup>28</sup> Quoted in Philip Cafaro, 'Thoreau, Leopold and Carson: Toward an Environmental Virtue Ethics' in Robert J Goldstein (ed), *Environmental Ethics and Law* (2004) 32.

<sup>29</sup> See Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (2007) <[http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf)> at 39.

<sup>30</sup> See the contribution of Working Group I to the Fourth Assessment Report of Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (2007) <[http://www.ipcc.ch/publications\\_and\\_data/publications\\_ipcc\\_fourth\\_assessment\\_report\\_wg1\\_report\\_the\\_physical\\_science\\_basis.htm](http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm)>.

<sup>31</sup> See <[http://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.htm#1](http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm#1)>.

<sup>32</sup> See, eg, Spratt and Sutton, above n 14, 66-68; Lovelock, *The Vanishing of Gaia*, above n 6, 32.

community has accepted the need for mitigation measures to curb the production of greenhouse gas emissions and thus slow down the rate of climate change.<sup>33</sup> There is, however, a range of views on the nature of such measures and the extent to which they should be permitted to affect the global economy, corporate activity and individual freedoms.

Climate change sceptics and their supporters maintain that the greatest threat to human rights and liberty is posed by unnecessary and unduly restrictive mitigation measures. Clive Hamilton provides many colourful examples of rhetoric from climate change sceptics and deniers, who describe themselves as defenders of human rights and portray even half-hearted governmental and international attempts to curb carbon emissions as authoritarian infringements on such rights. For instance, a Washington-based think-tank which denies the seriousness of climate change claims that it is 'dedicated to advancing the principles of free enterprise and limited government'.<sup>34</sup> According to one observer, Hugh Morgan, who was a key figure in the campaign to prevent the Howard government from acting on climate change, referred to government discussion papers on emissions trading as 'Mein Kampf declarations'.<sup>35</sup> Continuing with the Nazi Germany metaphors, President Putin's economic adviser wrote in *The Moscow Times* that Kyoto was killing the world economy like an 'International Auschwitz'.<sup>36</sup> And Ian Campbell, while Australian Environment Minister, stated in January 2006 that the reason for his government's failure to limit Australia's greenhouse gas emissions was that 'we are not trying to

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<sup>33</sup> See the *United Nations Framework Convention on Climate Change* <[http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php)>, which was adopted on 9 May 1992 and came into force on 21 March 1994. See also its *Kyoto Protocol* <[http://unfccc.int/essential\\_background/kyoto\\_protocol/items/1678.php](http://unfccc.int/essential_background/kyoto_protocol/items/1678.php)>, which was adopted on 11 December 1997 and entered into force on 16 February 2005.

<sup>34</sup> Hamilton, above n 3, 131.

<sup>35</sup> Ibid 140-1.

<sup>36</sup> Ibid 156.

run some kind of police state'.<sup>37</sup> In the first Part of this article, I consider the impact of more stringent or radical mitigation measures on individual freedoms and the rule of law in Western nations.

Climate change is, overwhelmingly, a global environmental problem and solving environmental problems by reference to human needs and rights has proved problematic in the past. There have been many critiques of the anthropocentric (or human-focused) thrust of existing environmental law by scholars and environmental ethicists, who have suggested that this area of law will remain ineffective as a tool for environmental protection unless it adopts a holistic, species-centred approach.<sup>38</sup> Nevertheless, a number of commentators have adopted a human rights focus in addressing the problem of climate change. John von Doussa, former President of the Australian Human Rights Commission, maintained that 'a human rights-based approach is the most effective way to respond to climate change'<sup>39</sup> and even environmental lawyers have acknowledged the advantages of such an approach, with Kirsty Ruddock, principal solicitor of the NSW Environment Defender's Office, describing it as 'the most equitable way to solve the complex issues that arise'.<sup>40</sup>

Commentators such as von Doussa and Ruddock are acknowledging that runaway climate change will have extraordinary and cataclysmic implications for both the global environment *and* the fundamental human rights of millions of people. I consider the implications of climate

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<sup>37</sup> Ibid 172.

<sup>38</sup> See, eg, the critique of the homocentric perspective of law in Laurence H Tribe, 'Ways Not to Think about Plastic Trees: New Foundations for Environmental Law' (1974) 83 *Yale Law Journal* 1315.

<sup>39</sup> John von Doussa, Allison Corkey and Renee Chartres, 'Human Rights and Climate Change' (2007) 14 *Australian International Law Journal* 161, 162. See also Sara C Aminzadeh, 'A Moral Imperative: The Human Rights Implications of Climate Change' (2006-7) 30 *Hastings International and Comparative Law Review* 231, 234.

<sup>40</sup> Kirsty Ruddock, 'Protection of Human Rights and Environmental Rights in Australia' (Environment Defender's Office Discussion Paper) 21 May 2009 <<http://www.edo.org.au/edonsw/site/pdf/subs09/090521hreraust.pdf>>.

change for human rights in the second Part of this article. It is increasingly apparent that, if left unchecked, climate change will have a catastrophic impact upon human rights. Thus, the requirement for urgent action on climate change arises as much from a human rights perspective as from a more holistic environmental perspective.

### **III - The Vulnerability of Human Rights and the Rule of Law in a War on Climate change**

A cursory look at Western states in time of war, and most recently during the war on terror, reveals the vulnerability of fundamental human rights in times of national crisis or emergency. During the war on terror, as Hilary Charlesworth has pointed out, fundamental human rights have been treated as ‘some kind of fancy optional extra’ by Western governments keen to instigate tough anti-terrorism measures.<sup>41</sup> The ‘key assumption’ in Australia’s counter-terrorism measures, according to Jenny Hocking, is that ‘civil and political liberties must “bend” in order to respond to terrorism’.<sup>42</sup> Other commentators have also expressed alarm at the willingness on the part of Western states to sacrifice fundamental democratic freedoms in an ostensible attempt to save democracy.<sup>43</sup> According to Michael Head, Australia during the war on terror began to resemble the dystopia in George Orwell’s *Nineteen Eighty-Four*.<sup>44</sup>

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<sup>41</sup> Hilary Charlesworth, ‘Human Rights in the Wake of Terrorism’ (2004) 41 *Law Society Journal* 62, 62.

<sup>42</sup> Jenny Hocking, ‘National Security and Democratic Rights: Australian Terror Laws’, *The Sydney Papers*, Summer 2004, 92, 92.

<sup>43</sup> See, eg, Michal Head, “‘Counter-Terrorism’ Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights’ (2002) 26 *Melbourne University Law Review* 666 and Sarah Joseph, ‘Australian Counter-Terrorism Legislation and the International Human Rights Framework’ (2004) 27 *University of New South Wales Law Journal* 428. In fact, the title of my article is an adaptation of the title of a symposium held at the University of New South Wales in 2007, one of many conferences in which such concerns have been articulated. The title of the symposium, ‘Law and Liberty in the War on Terror’, subsequently became the title of a collection of essays from speakers at the symposium; see Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (2007).

<sup>44</sup> Michael Head, ‘Orwell’s Nineteen Eighty-Four Twenty Years On. “The War on Terrorism”, “Doublethink” and “Big Brother”’ (2005) 30 *Alternative Law Journal* 208.

In this Part, I shall address the extent to which human rights, the rule of law and indeed democracy itself may be imperiled if we *do* wage war on climate change.

## **A - Rights to Produce and Consume, Freedom of Speech and Freedom of Movement**

Rationing was certainly a feature of wartime Europe in the mid-twentieth century and most advocates of strong concerted action to curb carbon emissions accept that carbon rationing is inevitable.<sup>45</sup> For instance, the principle of ‘contraction and convergence’, which has been popularised through the UK-based independent Global Commons Institute, requires an overall reduction in global greenhouse gas emissions and an equitable distribution of emission quotas amongst the world’s nations.<sup>46</sup> This necessarily means that the capacities of Western citizens to produce and consume non-essential commodities will be curtailed in order to reduce our excessive per capita emissions. Indeed, journalist and climate change activist George Monbiot describes the campaign against climate change as a campaign ‘for austerity’.<sup>47</sup>

The right to own property and the right to compensation if arbitrarily deprived of property are recognised human rights.<sup>48</sup> The basic rights to food and water are also recognised human rights<sup>49</sup> which will, as will become apparent in Part IV, be jeopardised in a future world suffering from

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<sup>45</sup> See, eg, Monbiot, above n 22, 43-8.

<sup>46</sup> Gwynne Dyer, *Climate Wars* (2008) 174-6.

<sup>47</sup> *Ibid* 215.

<sup>48</sup> See, eg, Article 17 of the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948.

<sup>49</sup> See, for instance, Article 25 of the *Universal Declaration of Human Rights*, which encompasses not only the right to adequate food but also the right to adequate clothing and housing, and Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966 and entered into force 3 January 1976. In relation to a basic right to water, see Article 14(2)(h) of the *Convention on the Elimination of Discrimination against Women*, opened for signature on 18 December 1979 and entered into force 3 August 1981.

the drastic impacts of runaway climate change. By contrast, the 'rights' to produce and consume non-essential commodities are not expressly set out in international covenants or declarations on human rights, or in national constitutions.<sup>50</sup> Nevertheless, these habits of consumption are associated with liberal rights in capitalist societies, and are particularly prized in what Hamilton has termed an 'age of affluenza'.<sup>51</sup>

Some commentators, including climate change activists Mark Lynas and George Monbiot, have compared climate change denial to Holocaust denial<sup>52</sup> and suggested that it may well be necessary to restrict freedom of speech by criminalising the promulgation of the arguments of climate change deniers or sceptics. For instance, Australian journalist Margo Kingston has written: 'Perhaps there is a case for making climate change denial an offence. It is a crime against humanity, after all'.<sup>53</sup> Public policy makers are, of course, very susceptible to the arguments of climate change sceptics, who offer the seductive promise that we *can* continue to adopt a 'business as usual' approach without endangering the planet. The astonishing popularity of the most recent Australian contribution to this genre, Ian Plimer's *Heaven and Earth*,<sup>54</sup> which

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<sup>50</sup> We do, however, find the right to develop and the right to exploit resources set out in a number of international covenants and declarations which relate to the environment; see, eg, Articles 2 and 3 of the 1992 *Rio Declaration on Environment and Development*.

<sup>51</sup> Clive Hamilton, *Affluenza: when too much is never enough* (2005).

<sup>52</sup> See Simon Castles, 'The Garden of Good and Evil', *The Age* (Melbourne), 17 June 2007 <<http://www.theage.com.au/news/opinion/the-garden-of-good-and-evil/2007/06/16/1181414606757.html>>. Mark Lynas has written that: 'I put this [climate change denial] in a similar moral category to Holocaust denial – except that this time the Holocaust is yet to come, and we still have time to avoid it': <<http://www.marklynas.org/2006/5/19/climate-denial-ads-to-air-on-us-national-television>> and quoted in Castles. Castles also quotes George Monbiot, who has written: 'Almost everywhere, climate change denial now looks as stupid and unacceptable as Holocaust denial.'

<sup>53</sup> Castles, above n 52..

<sup>54</sup> Ian Plimer, *Heaven and Earth. Global Warming: The Missing Science* (2009). In this book, Plimer dismisses the views of the vast majority of scientists who have concluded that human-caused global warming is occurring at an alarming rate, and maintains that human-caused carbon dioxide emissions, and human activities generally, have no effect on the earth's climate.

found its way on to the *Sydney Morning Herald*'s list of the top ten independent bestsellers,<sup>55</sup> is testament to that. Yet it has been alleged that the works of climate change sceptics, including Plimer, contain erroneous and misleading statements and are frequently based on non-existent or false evidence.<sup>56</sup> Climate change sceptics certainly disregard the vast amount of scientific evidence about the reality of human-caused global warming and its impacts. Furthermore, Monbiot and Hamilton have documented the somewhat sinister links between the fossil fuel industry and climate denialists.<sup>57</sup>

The dangers in the promulgation of the arguments of climate change sceptics are obvious. In the Howard years, climate change scepticism dominated government policy and was used to justify prolonged apathy and inaction.<sup>58</sup> The ideas of climate change sceptics remain publicly persuasive even with the advent of a new government which labeled Howard a climate change denier in its 2007 election campaign.<sup>59</sup> Family First Senator Steven Fielding, whose vote is critical for the passage of the Rudd government's carbon pollution reduction scheme, adopted the views of climate change sceptics after journeying to the United States to attend a conference of the Heartland Institute, an organisation funded by the fossil fuel industry.<sup>60</sup> He remains stubbornly convinced that the science on global warming is flawed, despite attempts by such prominent

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<sup>55</sup> List of the Top 10 Independents in 'Spectrum', *The Sydney Morning Herald* (Sydney), 9-10 May 2009, 32.

<sup>56</sup> See, eg, Monbiot, above n 22, 25-7. For a critical review of Plimer's book by a Professor of Astrophysics, see Michael Ashley, 'No Science in Plimer's Primer', *The Australian* (Sydney), 9 May 2009 <<http://www.theaustralian.news.com.au/story/0,,25433059-5003900,00.html>>.

<sup>57</sup> Monbiot, above n 22, 27-8 and Hamilton, above n 3, 128-44.

<sup>58</sup> Hamilton, above n 3.

<sup>59</sup> Castles, above n 52.

<sup>60</sup> Stephanie Peatling, 'Senator Blows Hot and Cold on Science', *The Sydney Morning Herald* (Sydney), 11 June 2009 <<http://www.smh.com.au/environment/senator-blows-hot-and-cold-on-science-20090610-c3ox.html>>.

figures as Minister for Climate Change Penny Wong and Australia's Chief Scientist Penny Sackett to convince him otherwise.<sup>61</sup>

Furthermore, the beliefs of climate change sceptics have also influenced the outcome of some climate change litigation, with the contentious arguments of Bob Carter and Ian Byatt cited in the *Xstrata* case.<sup>62</sup> The *Xstrata* case involved a challenge by the Queensland Conservation Council and Mackay Conservation Group to an application by three companies to expand their open cut coal mining operations. The objectors sought conditions which would reduce the greenhouse gas emissions from the companies' mining operations. In that case, the presiding member of the Queensland Land and Resources Tribunal referred to Carter and Byatt's view that the Stern Review<sup>63</sup> was scientifically inaccurate and that the Intergovernmental Panel on Climate Change's *Summary for Policymakers* failed to provide accurate supporting evidence for its contention that human-created greenhouse gas emissions are causing global warming. He stated that 'having become aware of ... pages [authored by Carter and Byatt] and regarding them as relevant, it would have been inappropriate for me to have just ignored them'.<sup>64</sup>

Given the considerable impact of the flawed arguments of climate change sceptics, should freedom of speech therefore be curtailed to ensure that such arguments are no longer disseminated? While freedom of speech is indeed widely recognised as a basic human right,<sup>65</sup> its

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<sup>61</sup> Tom Arup, 'Warming Science: Fielding Unmoved', *The Sydney Morning Herald* (Sydney), 25 June 2009 <<http://www.smh.com.au/environment/global-warming/warming-science-fielding-unmoved-20090624-cwvu.html>>.

<sup>62</sup> *Re Xstrata Coal Queensland Pty Ltd v Ors* [2007] QLRT 22 ('*Xstrata*').

<sup>63</sup> Stern, above n 2.

<sup>64</sup> *Xstrata* [2007] QLRT 22 [16-18].

<sup>65</sup> See Article 19 of the *Universal Declaration of Human Rights* and Article 19 of the *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966 and entered into force on 23 March 1976.



curtailment is accepted in democratic societies where this is demonstrably in the public interest.<sup>66</sup> For instance, in Australia, the Commonwealth Racial Discrimination Act makes it unlawful to insult, humiliate, offend or intimidate another person or group in public on the basis of their race<sup>67</sup> and our constitutional freedom of political communication can be curtailed where appropriate and adapted to a constitutionally legitimate public interest.<sup>68</sup>

Freedom of movement could also be at risk in a war on climate change. George Monbiot manages to find ways by which Britain could cut its emissions by 90% without sacrificing its standard of living, with one notable exception: long-distance travel. He writes: 'It has become plain to me that long-distance travel, high speed and the curtailment of climate change are not compatible. If you fly, you destroy other people's lives.'<sup>69</sup> The aviation industry is one of the fastest growing sources of carbon dioxide emissions.<sup>70</sup> It is also increasingly clear that we cannot continue driving and riding in petrol-guzzling and carbon emission-producing cars. The right of freedom of movement is again one which is protected in international treaties and conventions<sup>71</sup> but restrictions on the freedom of movement which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others are permissible under the *International Covenant on Civil and Political Rights*. Monbiot also points out that although restrictions on long distance travel would be keenly felt by the travel-addicted Western consumer, such travelers constitute only a tiny percentage of the world's population.

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<sup>66</sup> For instance, Holocaust denial is an offence in some European countries, including Austria, where historian David Irving was convicted of this crime.

<sup>67</sup> *Racial Discrimination Act 1975* (Cth) s 18C.

<sup>68</sup> See, eg, *Levy v Victoria* (1997) 189 CLR 579.

<sup>69</sup> Monbiot, above n 22, 188.

<sup>70</sup> Shirley V Scott, 'Is the Crisis of Climate Change a Crisis for International Law: Is International Law Too Democratic, Too Capitalist and Too Fearful to Cope with the Crisis of Climate Change?' (2007) 14 *Australian International Law Journal* 31, 34.

<sup>71</sup> See, eg, Article 13 of the *Universal Declaration of Human Rights* and Article 12 of the *International Covenant on Civil and Political Rights*.

These sorts of curtailments are indeed confronting but would leave intact the basic social and political institutions prized in the Western world. In fact, given that the freedom to produce and consume non-essential commodities is not expressly mentioned in international human rights declarations and conventions, and that it is generally accepted that the freedoms of speech and movement can be curtailed in the public interest, a regulatory regime which curtailed individual carbon emissions through quotas and rationing, prevented the dissemination of the arguments of climate change sceptics, and prohibited long-distance travel in all but the most extraordinary of circumstances may actually comply with international human rights law. Even so, once the rhetoric of war is deployed, other valued freedoms and rights including those associated with democracy and even the rule of law may be endangered.

## **B - The Right to Democratic Freedoms<sup>72</sup> and the Adequacy of Democratic Solutions in a War on Climate Change**

Some commentators argue that the war on terror has created a Schmittian ‘state of exception’<sup>73</sup> in Western nations and have drawn upon the work of political theorist Giorgio Agamben in support of this argument.<sup>74</sup> Agamben contends that Western democracies function as such states

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<sup>72</sup> The rights and freedoms associated with democracy commonly include the right to vote (Article 25 of the *International Covenant on Civil and Political Rights* and Article 21 of the *Universal Declaration of Human Rights*), the right to freedom of association (Article 22 of the *International Covenant on Civil and Political Rights* and Article 20 of the *Universal Declaration of Human Rights*), the right to peaceful assembly (Article 21 of the *International Covenant on Civil and Political Rights* and Article 20 of the *Universal Declaration of Human Rights*), and the right to political communication, which is encompassed within the freedom of speech.

<sup>73</sup> Carl Schmitt was a German theorist (and later Nazi sympathiser). He wrote about the nature of the exception or emergency situation, in which the rule of law was excluded, in *Political Theology. Four Chapters on the Concept of Sovereignty* (George Schwab transl, 1985) 7.

<sup>74</sup> See Jude McCulloch and Bree Carlton, ‘Preempting Justice: Suppression of Financing of Terrorism and the War on Terror’ (2006) 17 *Current Issues in Criminal Justice* 397, 400-10; Lee Godden, ‘Terrorism: Reinvoking the Barbarian to Secure the Space of Civilisation’ (2006) 24 *Australian Feminist Law Journal* 69; Matthew Sharpe, ‘Thinking of the Extreme Situation ...’ On the New Anti-Terrorism Laws or Against a Recent (Theoretical and Legal) Return to Carl Schmitt’ (2006) 24 *Australian Feminist Law Journal* 95; Quadara, above n 17. Giorgio

of exception; he maintains that the state of exception prevails as ‘the dominant paradigm of government in contemporary politics’<sup>75</sup> and in fact has ‘reached its maximum worldwide deployment’.<sup>76</sup> Nations at war display many of the characteristics of the state of exception: the language of exceptionalism,<sup>77</sup> enhanced executive power, the erosion of human rights and the setting aside of the rule of law. In fact, the modern state of exception is a ‘space devoid of law’,<sup>78</sup> populated by *homo sacer* or bare life. *Homo sacer* can be killed with impunity; he is not protected by human or divine law.<sup>79</sup> Agamben asserts that Western citizens are *homo sacer*,<sup>80</sup> controlled and disciplined by biopolitical mechanisms. This is contentious but it is clear that *homo sacer* will feature prominently in any future state of exception which may form part of a war on climate change.

Few of us would willingly assume the characteristics of *homo sacer*, who is exemplified in the much-surveyed and almost completely disempowered figure of the concentration camp prisoner.<sup>81</sup> Can we, however, halt climate change within the framework of traditional liberal democracies? It may be that the necessary action requires the executive to act unilaterally, fettering individuals’ democratic freedoms and subjecting them to the intense surveillance which we associate with much more authoritarian regimes. Indeed, if Agamben’s hypothesis that Western democracies have already segued into states of exception is correct, then perhaps the costs associated with more authoritarian measures are already being borne.

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Agamben in his books *Homo Sacer. Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, 1998) and *State of Exception* (Kevin Attrell trans, 2005) argues that increasingly Western democracies resemble states of exception.

<sup>75</sup> Agamben, *State of Exception*, above n 74, 2.

<sup>76</sup> Ibid 87.

<sup>77</sup> See examples of this during the war on terror in Nicole Rogers, ‘Terrorist v Sovereign: Legal Performances in a State of Exception’ (2008) 12 *Law Text Culture* 159, 178-80.

<sup>78</sup> Agamben, *State of Exception*, above n 74, 51.

<sup>79</sup> Agamben, *Homo Sacer*, above n 74, 82.

<sup>80</sup> Ibid 115.

<sup>81</sup> Agamben has described concentration camps as ‘the pure, absolute and impassable biopolitical space’: ibid 123.

Nevertheless, the question of whether an agenda of environmental protection can be adopted and implemented by the liberal democratic states is one which has vexed green political theorists for many years. For the purposes of this article, I will do no more than gesture toward the magnitude of work on this subject.<sup>82</sup> Some writers have argued that the ecological crisis can only be solved by authoritarian governments.<sup>83</sup> Others take an eco-anarchist approach, rejecting the state in preference for other social and political structures.<sup>84</sup> Those who would prefer to retain the structure of the democratic state nevertheless advocate reform. For instance, Robyn Eckersley argues for a re-invented or 'ecologically renovated' democratic state,<sup>85</sup> and Andrew Dobson for an 'active eco-state'.<sup>86</sup>

Within the specific context of climate change, doubts have been raised about the adequacy of democratically-imposed solutions. At present, probably the two most authoritative texts in climate change discourse are the 2007 Intergovernmental Panel on Climate Change Assessment Report<sup>87</sup> and the 2006 Stern report, commissioned by the British government on the economics of climate change.<sup>88</sup> Whether one accepts their predictions about the rate of climate change and its resulting impacts or the more catastrophic perspective recently articulated by James

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<sup>82</sup> See, eg, Freya Matthews (ed), *Ecology and Democracy* (1996).

<sup>83</sup> See, eg, William Ophuls, *Ecology and the Politics of Scarcity* (1977) and Robert L Heilbroner, *An Enquiry into the Human Prospect* (1974).

<sup>84</sup> See a discussion of ecoanarchism in Stewart Davidson, 'Ecoanarchism: A Critical Defence' (2009) 14 *Journal of Political Ideologies* 47.

<sup>85</sup> Eckersley, above n 24, 242.

<sup>86</sup> Andrew Dobson, 'A Climate of Crisis: Towards the Eco-State', 19 September 2007 <[http://www.opendemocracy.net/article/globalisation/politics\\_climate\\_change/state](http://www.opendemocracy.net/article/globalisation/politics_climate_change/state)>.

<sup>87</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (2007) <<http://www.ipcc.ch/ipccreports/assessments-reports.htm>>.

<sup>88</sup> Stern, above n 2.

Lovelock,<sup>89</sup> it is clear that climate change will, in the not too distant future, provide Western democracies with a formidable challenge. Lovelock asserts that ‘orderly survival ... may require, as in war, the suspension of democratic government for the duration of the survival emergency’.<sup>90</sup> David Shearman and Joseph Wayne Smith believe that the climate change crisis can still be averted but not by democratic states;<sup>91</sup> they should therefore be replaced by authoritarian governments of ‘ecowarrior/philosophers’,<sup>92</sup> the ‘new priesthood of the new dark age’,<sup>93</sup> who will strictly enforce ecological requirements and control all human activity affecting the environment.<sup>94</sup> In fact, according to the authors, the collapse of liberal democratic structures is inevitable at a time of ‘civilization-threatening changes’ such as those brought about through climate change.<sup>95</sup> Shirley Scott, in a critique of the response of international law to climate change, similarly concludes that both democracy, ‘fuelled by short-term objectives’, and capitalism, ‘driven by the quest for short-term profits’, are ill-equipped to provide effective solutions.<sup>96</sup> Certainly, the difficulties experienced by the Rudd government in its attempts to pass its carbon pollution reduction scheme in 2009 are symptomatic of the failings of democracy in the context of climate change regulation. Political wrangling is hardly an appropriate response to a global crisis.

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<sup>89</sup> Lovelock, *The Vanishing Face of Gaia*, above n 6. Unlike most commentators, Lovelock’s view is now unremittingly bleak; he maintains that we have passed the point where we could turn back climate change and our planet will be transformed no matter what steps we now take.

<sup>90</sup> Ibid 61.

<sup>91</sup> David Shearman and Joseph Wayne Smith, *The Climate Change Challenge and the Failure of Democracy* (2007) 2.

<sup>92</sup> Ibid 133.

<sup>93</sup> Ibid 152.

<sup>94</sup> Ibid 3.

<sup>95</sup> Ibid 124.

<sup>96</sup> Scott, above n 70, 43.

In addition, it seems unlikely that effective solutions to climate change cannot be found within the policy frameworks of neo-liberalism and/or neo-conservatism which most contemporary Western democracies have embraced. The deficiencies of the neo-liberal approach to climate change regulation are apparent in the flawed suggestion that we can resolve the crisis of climate change through the strategic trading of carbon credits on the open market. This approach relies on individual choice and market supremacy, integral components of both neo-liberal and neo-conservative philosophies.<sup>97</sup> If the global economy cannot be entrusted to the vagaries of the free market for the duration of the current economic crisis and must instead be rescued by regulatory intervention, surely it is somewhat foolish to believe that the climate change crisis can be safely consigned to ‘the invisible hand of the market’.<sup>98</sup> This strategy seems particularly ill-advised given that economist Sir Nicholas Stern, although the most well-known advocate of market-based solutions, has described climate change as ‘the greatest and widest ranging market failure ever seen.’<sup>99</sup> One added concern about transforming climate change into a market issue is that, as Lisa Pryor has pointed out, ‘negotiations over trading and credits and prices per tonne and projections’ are ‘complex and boring’ and therefore hold little interest for the average attention-deficit affected Western consumer. Pryor claims that were she ‘working on a public relations strategy on behalf of climate change denialists or the fossil fuels industry, [she] would be concentrating on making the issue so complicated and dry that it loses traction in the wider community.’<sup>100</sup>

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<sup>97</sup> See Lynch and Jenkins, above n 8, 33-4.

<sup>98</sup> Lynch and Jenkins describe ‘such faith in the omniscient beneficence of the “Invisible Hand” in the face of manifest market-failures’ as ‘touching but little more’: *ibid* 31.

<sup>99</sup> Stern, above n 2, Executive summary, 1.

<sup>100</sup> Lisa Pryor, ‘Maybe We’re All Just Too Bored to Bother Saving the Planet’ *The Sydney Morning Herald* (Sydney), 13-14 June 2009, News Review 7.

Thus far, Western democracies have failed to respond effectively and proactively to the catastrophic risks<sup>101</sup> associated with climate change. In the above discussion, I have discussed some of the ramifications for human rights, the rule of law and democracy if Western governments adopt a strong, proactive and effective regulatory response to climate change. I have argued that the curtailment of certain human rights can be justified. It is more confronting to speculate on the wider consequences of a ‘war’ on climate change for the rule of law and for democratic rights and traditions. Nevertheless, it is sobering to compare such consequences with the human rights challenges of runaway climate change. In the next part, I shall consider the likely human rights violations which will occur as a consequence of climate change apathy.

#### **IV - The Vulnerability of Human Rights and the Rule of Law in a Time of Runaway Climate Change**

I have already referred to Michael Head’s argument that the Australian legislative response to the war on terror gestured towards an Orwellian dystopia. Lawyers tend to look to the past rather than imagine the future, but some have been less hesitant to conjure up images of the dystopia which awaits us should we fail to halt climate change – should we lose, or not even wage, the war. In the remainder of this article, I shall contemplate the futuristic visions in the writings of novelists Steve Amsterdam and Julie Bertagna, journalists and writers Mark Lynas and Gwynne Dyer, cultural studies scholar Nick Mansfield and scientist James Lovelock, and discuss some of the implications of runaway climate change for human rights and the rule of law.

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<sup>101</sup> The Intergovernmental Panel on Climate Change 2007 Assessment Report and the Stern Report clearly set out such risks. See also, Spratt and Sutton, above n 14; Gwynne Dyer, above n 46; James Lovelock, *The Revenge of Gaia*, above n 6; Lovelock, *The Vanishing Face of Gaia*, above n 6; Mark Lynas, *Six Degrees. Our Future on a Hotter Planet* (2007).

Steve Amsterdam sets his collection of short stories<sup>102</sup> in future worlds afflicted by, alternately, endless rain and drought and consequent food and water shortages, and inhabited by a bewildered shifting group of people far more accustomed to hardship, deprivation and loss than we are in the western world today. However, at least there is still land, of sorts, in his imaginings. Julie Bertagna, writing for young adults, conjures up a world almost completely covered in water and images of global refugees in boats and rafts, crammed together in miserable conditions outside the large sea walls which protect the new sky cities. She writes:

There is no land or harbour, only a blurred mass that heaves and bobs around the city. A huge, dull-coloured live thing. The vile, rotting stench of an open drain hits as the clustering thing sharpens into focus. Mara gasps as she sees it's a heaving mass of humanity. A chaos of refugee boats crams the sea around the city and clings like a fungus to the huge wall that seems to bar all entry to refugees.<sup>103</sup>

It is not only novelists who are exploring the dimensions of a climate-changed future. English journalist Mark Lynas begins his account of a gradually warming world by reflecting on the savagery and lawlessness which followed the destruction of New Orleans by Hurricane Katrina. Viewing the televised coverage of the disaster and its aftermath was like 'peering through a portal into the future'.<sup>104</sup> In his account, the prospect of social collapse and conflict intensifies as the world warms by degrees<sup>105</sup> and hundreds of millions of people are displaced from their homes.<sup>106</sup> The hypothetical future scenarios in Gwynne Dyer's *Climate Wars*<sup>107</sup> similarly

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<sup>102</sup> Steve Amsterdam, *Things We Didn't See Coming* (2009).

<sup>103</sup> Julie Bertagna, *Exodus* (2002) 66.

<sup>104</sup> Lynas, above n 101, xiv.

<sup>105</sup> *Ibid* 227-30.

<sup>106</sup> *Ibid* 171-2.



encompass conflict including nuclear war, mass displacement of populations, widespread famine and water shortages, fortress nations with sealed borders, and even eco-terrorism.

Nick Mansfield's view of the future is also bleak. In reflecting on the cultural politics of climate change, he maintains that this 'will be a politics of differences, but of de facto autocracies as well, of wars and the annihilation of all rights, and it will fall differentially on human groups, but cataclysmically, perhaps taking capitalism and all its subversive shadows with it'.<sup>108</sup> According to Mansfield, a climate-changed future is a time 'when wars and the undermining of civil rights will occur and recur'.<sup>109</sup> Finally, James Lovelock voices similar fears that 'we may be unable to prevent a global decline into a chaotic world ruled by brutal warlords on a devastated Earth'.<sup>110</sup> He envisages the few stranded 'lifeboats' of humanity<sup>111</sup> turning away climate change refugees, and speculates that human civilisation itself is endangered by climate change.<sup>112</sup>

Such accounts can perhaps be dismissed as part of a tradition of apocalyptic predictions in environmental discourse, beginning as far back as the 1960s with Rachel Carson's *Silent Spring*.<sup>113</sup> Many of these predictions subsequently proved to be inaccurate. Indeed, Hulme conceptualises the current climate change 'discourse of fear' as culturally situated and therefore

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<sup>107</sup> Dyer, above n 46.

<sup>108</sup> Nick Mansfield, "'There is a Spectre Haunting ...': Ghosts, Their Bodies, Some Philosophers, a Novel and the Cultural Politics of Climate Change' (2008) 7:1 *borderlands e-journal* <[http://www.borderlands.net.au/vol7no1\\_2008/mansfield\\_climate.htm](http://www.borderlands.net.au/vol7no1_2008/mansfield_climate.htm)> [25].

<sup>109</sup> Ibid [27].

<sup>110</sup> Lovelock, *The Revenge of Gaia*, above n 6, 198.

<sup>111</sup> Lovelock, *The Vanishing Face of Gaia*, above n 6, 56.

<sup>112</sup> Lovelock, *The Revenge of Gaia*, above n 6, 77.

<sup>113</sup> See Jimmie Killingsworth and Jacqueline S Palmer, 'Millennial Ecology. The Apocalyptic Narrative from *Silent Spring* to Global Warming' in Carl G Herndl and Stuart C Brown (eds), *Green Culture. Environmental Rhetoric in Contemporary America* (1996).

‘unstable’ and transient.<sup>114</sup> He optimistically predicts that the fear of climate catastrophe will change or dissipate as a consequence of cultural changes.<sup>115</sup>

Although we can perhaps dismiss the above writings as part of a culturally-conditioned ‘discourse of fear’, what are we to make of the predictions of military experts that climate change will result in wars, chaos and displacement of populations of a magnitude we can hardly imagine? Reports of military experts such as the October 2003 report commissioned by the United States Department of Defense,<sup>116</sup> the United States independent think-tank CNA’s study of April 2007<sup>117</sup> which presented the views of twelve retired generals and admirals, and the November 2007 report<sup>118</sup> co-authored by high profile political and intelligence figures, the Center for Strategic and International Studies and the Center for a New American Security, all highlight the dire challenges which climate change poses for global stability. The Australian Defence Force also concluded in 2007 that environmental stress caused by climate change will raise significant security concerns.<sup>119</sup> In fact, the ramifications of climate change for international security have been acknowledged in a 2007 debate in the United Nations Security Council.<sup>120</sup>

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<sup>114</sup> Hulme, above n 10, 13.

<sup>115</sup> Ibid 13.

<sup>116</sup> Peter Schwartz and Doug Randall, ‘An Abrupt Climate Change Scenario and Its Implications for United States National Security’, October 2003 <<http://www.greenpeace.org/raw/content/international/press/reports/an-abrupt-climate-change-scena.pdf>>.

<sup>117</sup> The CNA Corporation, ‘National Security and the Threat of Climate Change’ (2007) <<http://securityandclimate.cna.org/report/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf>>.

<sup>118</sup> Kurt M Campbell et al, ‘The Age of Consequences: The Foreign Policy and National Security Implications of Global Climate Change’, November 2007 <[http://www.cnas.org/files/documents/publications/CSIS-CNAS\\_AgeofConsequences\\_November07.pdf](http://www.cnas.org/files/documents/publications/CSIS-CNAS_AgeofConsequences_November07.pdf)>.

<sup>119</sup> This was discussed in a paper entitled *Climate Change, The Environment, Resources and Conflict*, which was completed in November 2007; see Jonathon Pearlman and Ben Cubby, ‘Defence Warns of Climate Conflict’, *The Sydney Morning Herald* (Sydney), 7 January 2009, 1.

<sup>120</sup> Scott, above n 70, 505.

In the midst of these predictions, increasingly, and belatedly, the impact of climate change on human rights is being considered by scholars, activists and domestic and international organisations in the human rights field. It is now generally agreed that climate change poses a threat to a large number of human rights protected in key international instruments, such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.<sup>121</sup> Human rights affected by climate change include the right to life,<sup>122</sup> the right to adequate food,<sup>123</sup> the right to water,<sup>124</sup> the right to health,<sup>125</sup> the right to privacy and family life,<sup>126</sup> the right to property,<sup>127</sup> and the rights of indigenous people to participate in traditional cultural practices and live on their traditional lands.<sup>128</sup>

The United Nations Human Rights Council passed two Resolutions in 2008 and 2009<sup>129</sup> recognising the implications of climate change for human rights, and held a panel discussion on the relationship between climate change and human rights in June 2009. In addition, the Office of the United Nations High Commissioner for Human Rights has undertaken a study on this

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<sup>121</sup> Von Doussa, Corkery and Chartres, above n 39, 162-3. See also Aminzadeh, above n 39 and Ilona Millar, 'There's No Place Like Home: Human Displacement and Climate Change' (2007) 14 *Australian International Law Journal* 71, 92.

<sup>122</sup> Protected in Article 3 of the *Universal Declaration of Human Rights* and Article 6(1) of the *International Covenant on Civil and Political Rights*.

<sup>123</sup> Article 25 of the *Universal Declaration of Human Rights* and Article 11 of the *International Covenant on Economic, Social and Cultural Rights*.

<sup>124</sup> Article 14(2)(h) of the *Convention on the Elimination of Discrimination against Women*.

<sup>125</sup> Article 25 of the *Universal Declaration of Human Rights* and Article 12(a) of the *International Covenant on Economic, Social and Cultural Rights*.

<sup>126</sup> Article 12 of the *Universal Declaration of Human Rights* and Article 17 of the *International Covenant on Civil and Political Rights*.

<sup>127</sup> Article 17 of the *Universal Declaration of Human Rights*.

<sup>128</sup> Articles 5, 8, 9 and 11 of the *United Nations Declaration on the Rights of Indigenous People*, adopted by the General Assembly on 13 September 2007. For a discussion of the impact of climate change on Australian indigenous people, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2008) <[http://www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport08/index.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport08/index.html)>, Chapter 5.

<sup>129</sup> Resolution 7/23, adopted by the United Nations Human Rights Council on 28 March 2008, and Resolution 10/4, adopted by the United Nations Human Rights Council on 25 March 2009.

relationship. In its report, it concluded that climate change-related impacts ‘have a range of implications for the effective enjoyment of human rights’<sup>130</sup> and that the effects of climate change are already being felt by individuals and communities around the world.<sup>131</sup>

Some of the victims and potential victims of climate change managed to focus the world’s attention on their plight when the Inuit people lodged a petition with the Inter-American Commission on Human Rights in December 2005 and the Small Island Developing States adopted the Male’ Declaration<sup>132</sup> in 2007.

## **A - The Inuit petition and the Male’ Declaration**

We are currently witnessing the first attempts at climate change litigation based on the violation of international human rights. In the Inuit petition,<sup>133</sup> the Inuit people of the Arctic argued that the effects of global warming violated their human rights as set out in the American Declaration of the Rights and Duties of Man and other international law instruments.<sup>134</sup> The Inuit people are experiencing the accelerated impacts of climate change as annual arctic temperatures are increasing more than twice as fast as temperatures in the rest of the world. The disappearance of sea ice, the melting of the permafrost and unpredictable changes in weather patterns are affecting

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<sup>130</sup> See Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, A/HRC/10/61, 15 January 2009 <<http://www.indiaenvironmentportal.org.in/files/G0910344.pdf>>, 29.

<sup>131</sup> Ibid 30.

<sup>132</sup> *Male’ Declaration on the Human Dimension of Climate Change*, 14 November 2007 <[http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf)>.

<sup>133</sup> See <[http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf)>.

<sup>134</sup> These rights include the right to the benefits of culture, the right to use and enjoy lands traditionally used and occupied, the right to use and enjoy personal and intellectual property, the right to preservation of health, the right to life, physical protection and security, the right to own the means of subsistence and the rights to residence, movement and the inviolability of home, found in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

their enjoyment of their traditional lands, their cultural practices, their homes and their diet. They alleged that the United States, as the world's largest contributor to greenhouse gas emissions, was responsible for these human rights violations.

Although the Inter-American Commission on Human Rights refused to review the petition, testimony on the impact of climate change on the human rights of Inuit people was presented at the 2007 February and March session of the Commission.<sup>135</sup> One commentator has argued that the petition will undoubtedly lead to future human rights-based legal action on climate change.<sup>136</sup> In fact, the residents of one Inuit village, Kivalina, which will soon have to be abandoned due to erosion caused by the melting of Arctic ice, have mounted an action in public nuisance in a United States court against oil, power and coal companies.<sup>137</sup> The plaintiffs have also alleged civil conspiracy, arguing that some of the defendants conspired to create a false debate in order to allay public concerns about global warming.<sup>138</sup> The outcome of this litigation will be hugely influential in determining whether other vulnerable communities and even nations decide to launch climate change lawsuits based on violations of international human rights.

The Male' Declaration highlights the catastrophic impact of climate change and associated rising sea levels for Small Island Developing States. In the Declaration, member States called for urgent action on climate change and further assessment of its impact on human rights by the Office of the United Nations High Commissioner for Human Rights and the United Nations

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<sup>135</sup> The testimony can be found at <[http://www.ciel.org/Climate/IACHR\\_Inuit\\_5Mar07.html](http://www.ciel.org/Climate/IACHR_Inuit_5Mar07.html)>.

<sup>136</sup> Aminzadeh, above n 39, 239.

<sup>137</sup> *Kivalina v ExxonMobil* 08-CV-1138 (NDCal, filed 26 February 2008) discussed in Brian J Preston, 'Climate Change Litigation' (2009) 26 *Environmental and Planning Law Journal* 169, 171. A copy of the complaint can be found at <<http://www.globalclimatelaw.com/uploads/file/Kivalina%20Complaint.pdf>>.

<sup>138</sup> *Ibid* 175.

Human Rights Council. Prior to the Declaration, Tuvalu had threatened in 2002 to mount an action in the International Court of Justice against countries such as the United States and Australia based on their refusal to ratify the Kyoto Protocol. Although direct causal links between emitters and the damaging impacts of climate change are difficult to establish, the then government of Tuvalu maintained that the significant contributions to global warming by Australia and the United States were instrumental in the rapid destruction of Tuvalu. The action, however, was never mounted.<sup>139</sup>

## **B - Climate change refugees**

From an Australian perspective, the plight of prospective climate change refugees from the Pacific island states and Torres Strait Islands requires urgent attention. Robert Aisi has described climate change as ‘undermining the very basis for the existence of 12 independent Pacific Island countries, as well as seven Pacific Island Territories’.<sup>140</sup> For Torres Strait Islanders, the rising tides of a climate-changed world may achieve what the ‘tide of history’<sup>141</sup> failed to do to their native title rights. Pacific and Torres Strait Islanders will be among the first groups of climate change refugees and the deficiencies of international refugee law in its application to this group and other groups of climate change refugees are increasingly highlighted,<sup>142</sup> although mostly by non-legal scholars.<sup>143</sup> There is no provision for climate change refugees in the 1951 United Nations *Convention Relating to the Status of Refugees*. Legal scholars are beginning to look at

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<sup>139</sup> Ibid 186.

<sup>140</sup> Aisi, above n 20, 66.

<sup>141</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 59-60 (Brennan J).

<sup>142</sup> See, eg, Jane McAdam, ‘Climate Change “Refugees” and International Law’, *Bar News*, Winter 2008, 27 and Millar, above n 121.

<sup>143</sup> Millar makes this point in above n 121, 84.

other possible avenues of redress in international and domestic law for the Torres Strait Islanders;<sup>144</sup> one such possibility may be a remedy under the *Native Title Act 1993* (Cth).<sup>145</sup>

Australia's receptivity to an influx of climate change refugees has also been discussed. Our lack of hospitality in relation to asylum seekers is arguably deplorable;<sup>146</sup> will we be any more amenable to the idea of accommodating climate change refugees? Certainly an Australian Labor Party Discussion paper,<sup>147</sup> which was subsequently adopted as policy by the Australian Labor Party national conference in April 2007,<sup>148</sup> recommended that Australia adopt a proactive and strategic approach to climate change in the Pacific for security as well as environmental and altruistic reasons; the authors suggested that Australia offer assistance to and accept refugees from Pacific countries. However, a Bill put forward by the Greens in 2007 to amend the *Migration Act 1958* to create a 'climate change refugee visa' failed to gain the Senate's support.<sup>149</sup> Even New Zealand, historically far more generous than Australia in accepting asylum seekers, has imposed criteria for a selection process for Pacific Islanders under its Pacific Access Category.<sup>150</sup>

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<sup>144</sup> Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the *ICCPR*' (2008) 9 *Melbourne Journal of International Law* 405; Donna Green and Kirsty Ruddock, 'Could Litigation Help Torres Strait Islanders Deal with Climate Impacts?' *Sustainable Development Law and Policy*, Winter 2009, 23. The situation of the Torres Strait Islanders has also been acknowledged in the Intergovernmental Panel on Climate Change's Fourth Assessment Report, and in a case study in the 2008 *Native Title Report* by the Australian Human Rights Commission, <[http://www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport08/index.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport08/index.html)>.

<sup>145</sup> Green and Ruddock, above n 144, 26.

<sup>146</sup> See Greta Bird, 'An Unlawful Non-Citizen is Being Detained or (White) Citizens are Saving the Nation From (Non-White) Non-Citizens' (2005) 9 *University of Western Sydney Law Review* 87.

<sup>147</sup> Bob Sercombe and Anthony Albanese, *Our Drowning Neighbours. Labor's Policy Discussion Paper on Climate Change in the Pacific* (2006) <<http://www.anthonyalbanese.com.au/news/940/documents/060105%20%20Our%20Drowning%20Neighbours.pdf>>.

<sup>148</sup> Emma Brindal, 'Asia Pacific: Justice for Climate Refugees' (2007) 32 *Alternative Law Journal* 240, 241.

<sup>149</sup> Migration (Climate Refugees) Amendment Bill 2007 (Cth), discussed in Millar, above n 121, 99.

<sup>150</sup> Brindal, above n 148, 241.

Understandably, the present debate on human rights and climate change is focused upon the immediate plight of the inhabitants of islands which are rapidly becoming uninhabitable, and upon the circumstances of the Inuit people, whose homes are also being destroyed. The wider implications for human rights in the ravaged future world of runaway climate change have received less attention, but those who have considered such a future offer little hope for the long-term resilience of a human rights-based legal framework. The relocation of hundreds of thousands Pacific State Islanders, Carteret Islanders and Torres Strait Islanders may be problematic, but relocating hundreds of millions of climate change refugees is an altogether different prospect.<sup>151</sup>

## V - Conclusion

I have argued that taking effective action on climate change will impinge upon fundamental freedoms and possibly threaten the rule of law. It may alter the shape and functioning of our democratic institutions. It may require strong, even authoritarian, leadership, rationing and considerable sacrifice. There is, however, no easy way to avoid this. We have been warned by a large number of the world's most eminent scientists that failing to act, or negotiating only tokenistic emission cuts, will inevitably lead to runaway climate change. A war on climate change may be unpalatable and unacceptable for climate change sceptics, industry, and liberal thinkers but the alternative is much, much worse.

It seems highly probable that unless we conduct an effective war on climate change, we will end up at war with each other on an increasingly uninhabitable planet, protecting our borders from a

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<sup>151</sup> Norman Myers has estimated that there will be 150 million climate change refugees by the middle of the twenty first century: Norman Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *Bioscience* 11.



constant influx of desperate refugees while grappling with drought, famine, fires and floods. And in such a world, in the worst of possible futures, rhetoric about human rights and the rule of law will have little relevance.