

# THE SINKING OF THE STRAIT: THE IMPLICATIONS OF CLIMATE CHANGE FOR TORRES STRAIT ISLANDERS' HUMAN RIGHTS PROTECTED BY THE *ICCPR*

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*[The Torres Strait Islands are among the most vulnerable regions to climate change in Australia. This paper examines the implications of climate change for Torres Strait Islanders' human rights protected by the International Covenant on Civil and Political Rights ('ICCPR'). A key purpose is to assess the viability of a complaint being made to the United Nations Human Rights Committee under the ICCPR Optional Protocol, contending that Australia's ongoing failure to adopt sufficient measures to reduce greenhouse gas emissions constitutes a violation of Islanders' Covenant rights. Importantly, it is argued that despite the Rudd Government's ratification of the Kyoto Protocol and announcement of improved domestic emissions abatement measures, Australia must still adopt much tougher measures before it will satisfy its obligations under the ICCPR. The article concludes that whilst a claim by Islanders would have compelling legal merit, the complexity of issues such as causation and standing mean that it is unclear how the Committee would ultimately determine the case.]*

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## I INTRODUCTION

During the Howard Government's term in office, climate change litigation emerged as a response to the threat of global warming largely because of the perceived legislative and policy inaction of the Coalition on this issue.<sup>1</sup> Although Australian greenhouse gas ('GHG') emissions account for only 1.5 per cent of global emission levels, Australia is currently the 16<sup>th</sup> largest and fourth highest per capita emitter worldwide,<sup>2</sup> making it an undeniably large greenhouse polluter by world standards. Following the election of the Rudd Government in November 2007, Australia certainly has a federal government with a stronger commitment to preventing dangerous climate change (potentially eliminating the need for climate litigation). Yet, as will be shown, Australia's GHG emissions mitigation program remains inadequate. Moreover, the truly gargantuan long-term emissions abatement required of industrialised nations like Australia — most likely 80 to 95 per cent of 1990 levels by 2050<sup>3</sup> — suggests that litigation will have a continuing role to play in pressuring government to adopt and enforce appropriate emissions reduction law and policy.

One recent example of climate litigation overseas utilises international human rights law. In December 2005, the Inuit of Alaska and Canada filed a petition

<sup>1</sup> See Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24 *Environmental and Planning Law Journal* 90, 91. The Howard Government was the Australian federal government from March 1996 until November 2007. It was a coalition government, consisting of the Liberal Party of Australia, under the leadership of John W Howard, and the Nationals of Australia ('the Coalition'). In the 2007 federal election, the Coalition was defeated by the Australian Labor Party, led by Kevin Rudd.

<sup>2</sup> Kevin A Baumert, Timothy Herzog and Jonathan Pershing, World Resources Institute, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy* (World Resources Institute Report, 2005) 12 <[http://pdf.wri.org/navigating\\_numbers.pdf](http://pdf.wri.org/navigating_numbers.pdf)> at 23 September 2008.

<sup>3</sup> Sujata Gupta et al, 'Policies, Instruments and Co-operative Arrangements' in Working Group III, Intergovernmental Panel on Climate Change ('IPCC'), *Climate Change 2007: Mitigation of Climate Change* (IPCC Fourth Assessment Report, 2007) 745, 776.

with the Inter-American Commission on Human Rights ('IACHR'), alleging that the failure of the United States to curtail its GHG emissions constitutes a violation of their rights and freedoms protected by regional and international human rights law.<sup>4</sup> Climate change similarly has ramifications for human rights in Australia. A particularly clear example of this is the case presented by the indigenous peoples of the Torres Strait Islands. Recent scientific evidence indicates that if dangerous levels of climate change are not avoided, up to 2000 Torres Strait Islanders will 'likely' be displaced to the Australian mainland later this century.<sup>5</sup>

In light of this potential human tragedy and the absence of legal scholarship addressing this issue, this article's purpose is to explore the implications of global warming for Torres Strait Islanders' human rights protected by the *International Covenant on Civil and Political Rights* ('ICCPR').<sup>6</sup> A key aim will be to assess the viability of a complaint being made to the United Nations Human Rights Committee ('HRC') under the *ICCPR Optional Protocol*,<sup>7</sup> contending that Australia's ongoing failure to adopt sufficient legal and policy measures to reduce GHG emissions constitutes a violation of Islanders' rights and freedoms protected by the Covenant. Importantly, it is argued that despite the Rudd Government ratifying the *Kyoto Protocol*<sup>8</sup> and announcing improved domestic emissions abatement measures, Australia must still adopt much tougher measures both internationally and domestically before it will satisfy its obligations under the *ICCPR*.

This article will consider the most recent evidence on climate change and its likely impacts on the Torres Strait (see Part II). Part III will identify the rationale for adopting a human rights-based approach to the problem of climate change, noting the limitations of other litigation options. In Part IV, the legal precedent for linking civil and political rights norms to environmental harm will be examined, drawing upon key cases of the HRC and other human rights bodies. The *Inuit Petition* to the IACHR, which is yet to be determined by the Commission, will also be outlined. Part V will then identify the primary *ICCPR* rights that are threatened by climate change for Torres Strait Islanders. Finally,

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<sup>4</sup> See Sheila Watt-Cloutier, Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (7 December 2005) <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>> at 23 September 2008 ('*Inuit Petition*').

<sup>5</sup> Kevin Hennessy et al, 'Australia and New Zealand' in Working Group II, IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC Fourth Assessment Report, 2007) 507, 522–3.

<sup>6</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The Human Rights and Equal Opportunity Commission ('HREOC') has recently provided a more general overview of the implications of climate change for human rights in Australia: HREOC, *Background Paper: Human Rights and Climate Change* (HREOC Report, 2008) <[http://www.hreoc.gov.au/pdf/about/media/papers/hrandclimate\\_change.pdf](http://www.hreoc.gov.au/pdf/about/media/papers/hrandclimate_change.pdf)> at 23 September 2008.

<sup>7</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976) ('*ICCPR Optional Protocol*').

<sup>8</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005) ('*Kyoto Protocol*'). Australia's ratification of the *Kyoto Protocol* entered into force on 11 March 2008.

Part VI will consider the major legal hurdles a Torres Strait Islander complaint to the HRC would need to overcome in order to be successful.

## II CLIMATE CHANGE: CONSEQUENCES FOR THE TORRES STRAIT

The Torres Strait, which is part of the State of Queensland, Australia, encompasses roughly 48 000 square kilometres of open seas between the tip of Cape York and the southern coast of Papua New Guinea.<sup>9</sup> Approximately 6958 indigenous Islanders of Melanesian origin live on 17 of the 150 islands in the Torres Strait, representing roughly 15 per cent of Australia's total Torres Strait Islander population.<sup>10</sup> As a low-lying region, the Torres Strait is at similar risk from rising sea levels as Pacific Island nations such as Tuvalu.<sup>11</sup> Donna Green, CSIRO scientist and contributing author to the *IPCC Fourth Assessment Report*, believes that the Torres Strait is among the 'most vulnerable regions' to climate change in Australia.<sup>12</sup> In particular jeopardy are the approximately 1500 people living on the Torres Strait's north-western islands of Boigu and Saibai, and the central islands of Masig, Poruma, Warraber and Yam (or Iama).<sup>13</sup> Some parts of these islands are less than one metre above sea level and communities are often situated only metres from the beach.<sup>14</sup>

### A *The Evidence on Climate Change and Its Causes*

Central to the proposition that Torres Strait Islanders' human rights may be violated by climate change is the strength of scientific evidence on its causes and effects. For many years scepticism on global warming has been rife.<sup>15</sup> But following the release of the *IPCC Fourth Assessment Report* in 2007,<sup>16</sup> there is now overwhelming evidence that climate change is a reality. Indeed, the *IPCC Fourth Assessment Report* states that '[w]arming of the climate system is [now]

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<sup>9</sup> Australia and Papua New Guinea have sovereignty over different islands in the region: see *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area Known as Torres Strait, and Related Matters*, signed 18 December 1978, [1985] ATS 4, art 2 (entered into force 15 February 1985), concerning those islands over which Australia has sovereignty.

<sup>10</sup> Donna Green, *How Might Climate Change Affect Island Culture in the Torres Strait?* (Commonwealth Scientific and Industrial Research Organisation ('CSIRO') Report, November 2006) 3; Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians 2006* (Australian Bureau of Statistics Report No 4705.0, 2007) 8. Aboriginal and non-indigenous people also live in the Strait.

<sup>11</sup> See RoseMary Reed, 'Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress under the Alien Tort Claims Act?' (2002) 11 *Pacific Rim Law and Policy Journal* 399, 400.

<sup>12</sup> Liz Minchin, 'Going Under', *Sydney Morning Herald* (Sydney, Australia) 12 August 2006, 15.

<sup>13</sup> Commonwealth, *Parliamentary Debates*, Senate, 10 October 2006, 142 (Jan McLucas).

<sup>14</sup> *Ibid* 143.

<sup>15</sup> See, eg, Ray Evans, *Nine Lies about Global Warming* (The Lavoisier Group, February 2006) <<http://www.lavoisier.com.au/articles/greenhouse-science/climate-change/lav2006-forWeb.pdf>> at 23 September 2008.

<sup>16</sup> The IPCC reports are widely regarded to represent the best available scientific knowledge on climate change. See also the consistent findings of the CSIRO: CSIRO, *Climate Change in Australia: Technical Report 2007* (CSIRO Report, 2007), available from <<http://www.csiro.au/resources/ps3j6.html>> at 23 September 2008.

unequivocal'.<sup>17</sup> Furthermore, it has 'very high confidence' (at least 90 per cent certainty) that climate change has occurred in the Australian region.<sup>18</sup> This is indicated, for example, by the 0.4 to 0.7°C of warming Australia has experienced since the 1950s.<sup>19</sup>

There is now also substantial evidence that global warming is being caused by human activity, particularly from the release of carbon dioxide ('CO<sub>2</sub>') during the burning of fossil fuels.<sup>20</sup> To this end, the *IPCC Fourth Assessment Report* states that rising global temperatures since the mid-20<sup>th</sup> century are 'very likely' due to increased anthropogenic GHG emissions (a probability of greater than 90 per cent).<sup>21</sup> This assessment represents a significant advance on the *IPCC Third Assessment Report*, which could only conclude that human responsibility for global warming was 'likely' (at least 66 per cent certainty).<sup>22</sup>

Probably the most concerning observation of climate change for Torres Strait Islanders is the estimated 17 centimetre increase in global sea levels during the 20<sup>th</sup> century.<sup>23</sup> Visibly rising sea levels have caused many Torres Strait Islanders to conclude that climate change has arrived.<sup>24</sup> Whilst the precise amount of sea level rise in the Torres Strait has not been recorded,<sup>25</sup> Australian seas generally have risen 7 centimetres since 1950.<sup>26</sup> Residents, including Torres Shire Mayor, Pedro Stephen, now believe that their islands are 'sinking'.<sup>27</sup> Physical evidence supports this view. In August 2007, Helen Mosby showed *The Courier Mail* the dramatic impact of sea level change on Masig Island, where the 'ocean has eaten up the road'.<sup>28</sup> Ms Mosby stated: '[i]t is a big change, and it seems to be getting worse in the past two years or so'.<sup>29</sup> More than 60 metres of land has been consumed on another island, Poruma, since 2000.<sup>30</sup>

Many Islanders believe that recent severe weather events may also be a sign of global warming.<sup>31</sup> In January and February 2006, king tides,<sup>32</sup> strong winds

<sup>17</sup> IPCC, 'Summary for Policymakers' in Working Group I, IPCC, *Climate Change 2007: The Physical Science Basis* (IPCC Fourth Assessment Report, 2007) 1, 5 ('*Physical Science Basis Summary*'). Confirmation of climate change is found in rising average air and ocean temperatures, widespread melting of snow and ice, and rising average sea levels: at 5.

<sup>18</sup> Hennessy et al, above n 5, 509.

<sup>19</sup> Ibid.

<sup>20</sup> See, eg, IPCC, 'Summary for Policymakers' in Working Group III, IPCC, *Climate Change 2007: Mitigation of Climate Change* (IPCC Fourth Assessment Report, 2007) 1, 5 (Figure SPM.2) ('*Mitigation of Climate Change Summary*').

<sup>21</sup> IPCC, *Physical Science Basis Summary*, above n 17, 10. The IPCC now has 'very high confidence' that the net effect of human activity since pre-industrial times (from the year 1750) has been one of warming. The level of atmospheric CO<sub>2</sub> reached 379 parts per million in 2005, up from pre-industrial levels of 280 parts per million: at 2-3.

<sup>22</sup> IPCC, *Climate Change 2001: Synthesis Report* (IPCC Third Assessment Report, 2001) 5-6.

<sup>23</sup> Ibid 7. Sea level rise has been caused by warming oceans and melting mountain glaciers and snow cover: at 5.

<sup>24</sup> Peter Michael, 'Torres Strait Islands at Risk from Global Warming', *Courier Mail* (Brisbane, Australia) 2 August 2007 <<http://www.news.com.au/story/0,23599,22175611-2,00.html>> at 23 September 2008.

<sup>25</sup> Tidal gauges have not been situated in this area.

<sup>26</sup> Hennessy et al, above n 5, 509.

<sup>27</sup> See, eg, Michael, above n 24.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid. Poruma is also known colloquially as Coconut Island.

<sup>31</sup> Minchin, 'Going Under', above n 12, 15.

and heavy rain caused severe damage to the north-western and central islands as high tides destroyed sea walls and flooded houses, roads and airstrips for several hours.<sup>33</sup> On Yam Island, six families, including about 20 children, were evacuated.<sup>34</sup> This event followed the king tides of mid-2005 which flooded several houses on Mer Island.<sup>35</sup> These two events were unusual; previously, such levels of flooding had occurred only once in living memory.<sup>36</sup> Green supports the view that these weather events may be indications of global warming stating that it 'is likely that climate change is playing a part in these recent inundations'.<sup>37</sup>

### B *The Likely Future Effects of Climate Change*

The IPCC has significantly improved its ability to project future climate change since its *Third Assessment Report*, but climate projections remain highly variable. Depending on the extent to which nations reduce worldwide GHG emissions, the IPCC's 'best estimate' for temperature increases is 1.8–4°C by the end of the 21<sup>st</sup> century.<sup>38</sup> Due to historic emissions, at least 0.4°C of warming can be expected over the next two decades.<sup>39</sup> In Australia, an average warming of 0.1–1.0°C is likely by 2020, 0.3–2.7°C by 2050, and 0.4–5.4°C by 2080.<sup>40</sup> Of particular concern for the Torres Strait is that global sea levels are projected to rise from between 18–38 centimetres to 26–59 centimetres by 2100; however, this could be as much as 79 centimetres.<sup>41</sup> In a worst-case scenario, the Greenland ice sheet could melt, resulting in a staggering seven metre rise in sea levels.<sup>42</sup>

According to Green, identifying the likely climate impacts in the Torres Strait is difficult because of the lack of available data.<sup>43</sup> Climate projections for the nearby Cape York, however, suggest likely temperature increases of 1.3–1.4°C for the region by 2050.<sup>44</sup> Of most concern for Islanders will be the impact of sea level rise in conjunction with a likely increase in extreme weather events, causing flooding and erosion.<sup>45</sup>

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<sup>32</sup> A king tide is a high tide well above average height.

<sup>33</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 8.

<sup>34</sup> McLucas, above n 13, 143.

<sup>35</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 9.

<sup>36</sup> In 1948, king tides inundated Boigu and Saibai, resulting in some of the population relocating to mainland Australia: *ibid* 8, 10.

<sup>37</sup> Minchin, 'Going Under', above n 12, 15, quoting CSIRO scientist Donna Green.

<sup>38</sup> This increase is calculated relative to the 1980–99 period: IPCC, *Physical Science Basis Summary*, above n 17, 13. The IPCC's projections are based on six emissions scenarios. A worst-case scenario could see 6.4°C of warming: at 13.

<sup>39</sup> *Ibid* 12.

<sup>40</sup> Relative to 1990 and in areas within 400 kilometres inland of the coast: Hennessy et al, above n 5, 515.

<sup>41</sup> IPCC, *Physical Science Basis Summary*, above n 17, 13–14.

<sup>42</sup> *Ibid* 17.

<sup>43</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 6.

<sup>44</sup> *Ibid*. Green also notes that rainfall increases or decreases of up to 2 per cent are also expected.

<sup>45</sup> *Ibid* 6–7.

The *IPCC Fourth Assessment Report* makes it quite clear that the physical consequences of climate change could have devastating impacts globally on human society and the natural environment.<sup>46</sup> For Torres Strait Islanders, Green identifies the areas of culture, health, biodiversity, water resources, buildings and infrastructure as being at greatest risk.<sup>47</sup> Most worryingly, the IPCC predicts that climate change will ‘likely’ cause the displacement of up to 2000 Torres Strait Islanders later this century.<sup>48</sup>

### III THE RATIONALE FOR ADOPTING A HUMAN RIGHTS APPROACH TO CLIMATE CHANGE

#### A *The Federal Government’s Response to Climate Change*

During the Howard government’s time in power, the concept of Torres Strait Islanders taking a complaint to the HRC appeared to have obvious merit, given the Coalition’s inadequate efforts to mitigate Australia’s rising GHG emissions.<sup>49</sup> Although the Howard Government spent approximately AU\$3.4 billion<sup>50</sup> on a range of mainly voluntary programs to contain emissions growth,<sup>51</sup> only mounting public pressure and the looming federal election in 2007 finally forced it to acknowledge that much stronger measures were needed.<sup>52</sup> Significantly, however, the Coalition continued to hold out on ratifying the 1997 *Kyoto Protocol*,<sup>53</sup> under which developed nations committed to reduce their combined GHG emissions by 5.2 per cent below 1990 levels by 2008–12.<sup>54</sup> Moreover, despite nonetheless claiming to be committed to achieving Australia’s

<sup>46</sup> See generally IPCC, ‘Summary for Policymakers’ in Working Group II, IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC Fourth Assessment Report, 2007) 7. See also the *Stern Review* which warns of ‘major disruption to economic and social activity ... on a scale similar to those associated with the great wars and the economic depression of the first half of the 20<sup>th</sup> century’ if dangerous climate change is not prevented: HM Treasury, *Stern Review: The Economics of Climate Change* (HM Treasury Report, UK, 30 October 2006) xv, available from <[http://www.hm-treasury.gov.uk/stern\\_review\\_climate\\_change.htm](http://www.hm-treasury.gov.uk/stern_review_climate_change.htm)> 23 September 2008 (‘*Stern Review*’).

<sup>47</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 7–8.

<sup>48</sup> Hennessy et al, above n 5, 522–3.

<sup>49</sup> For an analysis of this issue prior to the Rudd Government coming to power, see Owen Cordes-Holland, *The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR* (Honours Thesis, ANU, 2007), available from <<http://www.ssrn.com>> at 23 September 2008.

<sup>50</sup> Alexander Downer, ‘Australia Turns up the Heat on Climate Change’, *The Age* (Melbourne, Australia) 21 August 2007, 9.

<sup>51</sup> See Commonwealth, *Report of the Task Group on Emissions Trading* (Prime Ministerial Task Group on Emissions Trading Report, 2007) 37–43.

<sup>52</sup> In particular, the Coalition promised to introduce an aspirational long-term emissions reduction target, a national emissions trading scheme, and a 15 per cent Clean Energy Target for 2020: Commonwealth, *Australia’s Climate Change Policy: Our Economy, Our Environment, Our Future* (2007) 6; Matthew Franklin and Matthew Warren, ‘John Howard Sets Target for Clean Energy’, *The Australian* (Sydney, Australia) 24 September 2007 <<http://www.news.com.au/story/0,23599,22470362-421,00.html>> at 23 September 2008.

<sup>53</sup> The Howard Government argued that without US support and developing countries also adopting binding emissions caps, ratifying the Protocol would damage the Australian economy: see Rosemary Lyster and Adrian Bradbrook, *Energy Law and the Environment* (2006) 81–2.

<sup>54</sup> *Kyoto Protocol*, above n 8, art 3(1).

individual target of 108 per cent of 1990 levels by 2008–12 (which it agreed to as a *Kyoto Protocol* signatory),<sup>55</sup> a 2006 report by the Australian Greenhouse Office estimated that Australia's emissions would in fact reach 109 per cent of 1990 levels during the *Kyoto* commitment period.<sup>56</sup> Worse still, emissions would escalate to 127 per cent of 1990 levels by 2020.<sup>57</sup>

With the coming to power of the Rudd Government, a stronger federal approach to climate change mitigation has arrived, as evidenced by Labor's immediate ratification of the *Kyoto Protocol*. In addition, Labor has set a target of reducing Australia's GHG emissions by 60 per cent of 2000 levels by 2050.<sup>58</sup> Significant measures have been promised to enable Australia to meet this target, most notably a national emissions trading scheme — the Carbon Pollution Reduction Scheme, to be operational by 2010<sup>59</sup> — and a mandatory 20 per cent Renewable Energy Target ('RET') for 2020.<sup>60</sup> This obviously raises the question of whether litigation to encourage a responsible federal emissions reduction program remains necessary. It is submitted, however, that for several reasons, it is too early to draw such a conclusion.

First, Labor's 60 per cent emissions reduction target for 2050 is inadequate: according to the IPCC, a cut of 80 to 95 per cent on 1990 levels is more likely required.<sup>61</sup> Yet the Rudd Government has stated that it will not increase its target.<sup>62</sup> Second, Labor will not set its 2020 target until later in 2008 and this may also be set at an insufficient level. Third, the Rudd Government has only adopted an aspirational target for 2050 (and will likely do the same for 2020), when clearly mandatory targets are needed. These issues are properly explored in Part VI. Lastly, governments have a proven tendency to introduce much weaker policies than are actually necessary to meet their emission reduction targets, as demonstrated by the expected failure of many industrialised states to achieve their modest goals under the *Kyoto Protocol*.<sup>63</sup>

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<sup>55</sup> Commonwealth, *Australia's Climate Change Policy*, above n 52, 6.

<sup>56</sup> Australian Greenhouse Office, Department of the Environment and Heritage, Commonwealth, *Tracking to the Kyoto Target 2006: Australia's Greenhouse Emissions Trends: 1990 to 2008–2012 and 2020* (2006) 1.

<sup>57</sup> *Ibid.*

<sup>58</sup> See Department of Climate Change, Commonwealth, *Australian Government Action on Climate Change* (Fact Sheet, 2008) <<http://www.climatechange.gov.au/about/publications/pubs/fs-overview.pdf>> at 23 September 2008.

<sup>59</sup> See Department of Climate Change, Commonwealth, *Carbon Pollution Reduction Scheme* (Green Paper, July 2008) <<http://www.climatechange.gov.au/greenpaper/report/pubs/greenpaper.pdf>> at 23 September 2008, 3, 9–10.

<sup>60</sup> See Department of Climate Change, *The Australian Government's Renewable Energy Target* (Fact Sheet, July 2008) <<http://www.climatechange.gov.au/renewabletarget/publications/pubs/fs-ret.pdf>> at 23 September 2008.

<sup>61</sup> Gupta et al, above n 3, 776.

<sup>62</sup> Australian Associated Press, 'Government Won't Budge on 2050 Climate Target', *Sydney Morning Herald* (Sydney, Australia) 22 February 2008 <<http://news.smh.com.au/govt-wont-budge-on-2050-climate-target/20080222-1trj.html>> at 23 September 2008.

<sup>63</sup> See, eg, Bruno Waterfield, 'Europe Falling Behind in Kyoto Carbon Targets', *The Age* (Melbourne, Australia) 16 June 2007, 18; Organisation for Economic Co-operation and Development, *Economic Survey of Canada, 2008* (Policy Brief, June 2008) 8–9 <<http://www.oecd.org/dataoecd/20/27/40811541.pdf>> at 23 September 2008.



While Australia is now projected to meet its *Kyoto* target because of new Labor initiatives,<sup>64</sup> it must be remembered that Australia has a very weak target compared to other developed nations in two respects. First, Australia's target allows for an eight per cent increase in emissions whereas most nations are required to make emissions cuts;<sup>65</sup> and second, most of Australia's emissions abatement is the result of reduced land clearing and deforestation — a source of emissions abatement uniquely granted to Australia during *Kyoto* negotiations.<sup>66</sup> Deep post-*Kyoto* emission cuts in Australia will be far more difficult to achieve, particularly as energy sector emissions, which constitute 72 per cent of total emissions, are likely to rise 50 per cent on 1990 levels during 2008–12.<sup>67</sup>

It is yet to be seen whether the Rudd Government and future federal governments will possess the political will to implement laws and policies robust enough to enable Australia to meet more stringent future emissions reduction obligations. It is certainly too early to know whether Labor's planned Carbon Pollution Reduction Scheme will have the impact desired. As such, the answer to the question of whether litigation is necessary to pressure the Federal Government to achieve adequate emissions reductions, remains fluid.

### B *Litigation Options for Torres Strait Islanders*

A number of legal avenues are potentially available to exert legal, political and moral pressure on governments to introduce or enforce responsible GHG emissions reduction policies. The new body of climate litigation in Australia has to date focused on judicial and merits review under administrative law.<sup>68</sup> In the *Anvil Hill*,<sup>69</sup> *Hazelwood*<sup>70</sup> and *Bowen Basin*<sup>71</sup> cases, for example, litigants challenged the failure of decision-makers to consider the global warming impacts

<sup>64</sup> Department of Climate Change, Commonwealth, *Tracking to the Kyoto Target 2007: Australia's Greenhouse Emissions Trends: 1990 to 2008–2012 and 2020* (2008) 1.

<sup>65</sup> Only Australia, Norway and Iceland are permitted to make emissions increases: *Kyoto Protocol*, opened for signature 16 March 1998, 37 ILM 22 (1998), annex B (entered into force 16 February 2005).

<sup>66</sup> Australia is estimated to be able to achieve cuts in emissions of 92 million tonnes of carbon dioxide equivalent ('CO<sub>2</sub>-e') from reduced land clearing and deforestation by 2008–12: Department of Climate Change, *Tracking to the Kyoto Target 2007*, above n 64, 4. Australia insisted on including GHG emissions from land clearing in its 1990 total, the only industrialised nation to do so. The 'Australia clause' effectively added 136 million tonnes of CO<sub>2</sub>-e to Australia's 2012 emissions target. For a discussion of the 'Australia clause', see, eg, Clive Hamilton and Lins Vellen, 'Land-Use Change in Australia and the Kyoto Protocol' (1999) 2 *Environmental Science and Policy* 145; Matthew Coghlan, 'Prospects and Pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' (2002) 3 *Melbourne Journal of International Law* 165, 175.

<sup>67</sup> Department of Climate Change, *Tracking to the Kyoto Target 2007*, above n 64, 4. Energy sector emissions include stationary, transport and fugitive sources. Note that the impact of the national emissions trading scheme on future emissions levels — beginning in 2010 — is yet to be calculated.

<sup>68</sup> See Tim Bonyhady, 'The New Australian Climate Law' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 8.

<sup>69</sup> *Gray v Minister for Planning* (2006) 152 LGERA 258 ('*Anvil Hill*').

<sup>70</sup> *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 ('*Hazelwood*').

<sup>71</sup> *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510 ('*Bowen Basin*').

of proposed new coal mines under environmental impact assessment processes (provided for by various state and federal environmental legislation).<sup>72</sup>

Judicial or merits review is unsuitable, however, where the goal of litigation is not to challenge a specific ‘administrative decision’ of government which has climate change implications (for instance, the approval of a coal mine under environmental legislation), but rather the government’s general policy failures on climate change (for example, the Federal Government’s reluctance thus far to introduce mandatory emissions reduction targets for 2020 and 2050 (see Part VI)). The decision of government whether or not to introduce particular greenhouse policies or laws involves political, rather than administrative decisions, the former of which are not open to judicial or merits review by the courts.<sup>73</sup>

In addition to utilising administrative review avenues,<sup>74</sup> litigants in the US have pursued corporations and statutory authorities under tort law, albeit with little success.<sup>75</sup> The torts of negligence and nuisance are most obviously applicable to Torres Strait Islanders’ factual situation. It could, for example, be argued that the Commonwealth’s failure to adequately regulate GHG emissions has negligently contributed to global warming, causing both present and future harm to Torres Strait Islanders. The impacts of climate change could alternatively be regarded as a public or private nuisance.<sup>76</sup> Proving that either tort had been committed would be fraught with complex legal issues such as causation (see Part VI). Moreover, it is doubtful whether complaints based in tort against the government would actually be justiciable. Smith and Shearman suggest that,

[d]ue to the separation of powers, governments generally are not open to prosecution [in tort], particularly in relation to negligence, on the grounds that their policies (which are often dictated by political, economic and social factors) encourage or enable high levels of greenhouse gas emissions.<sup>77</sup>

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<sup>72</sup> See generally Peel, above n 1, 97–101. For commentary on *Anvil Hill*, *Hazelwood* and *Bowen Basin*, see Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 189–213, 161–72, 173–88 respectively Charles Berger, ‘Hazelwood: A New Lease on Life for a Greenhouse Dinosaur’ in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 161; Kirsty Ruddock, ‘The Bowen Basin Coal Mines Case: Climate Law in the Federal Court’ in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 173; David Farrier, ‘The Limits of Judicial Review: Anvil Hill in the Land and Environment Court’ in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 189.

<sup>73</sup> Note also that administrative review has severe limitations as a form of climate litigation. In *Bowen Basin*, for example, the greenhouse emissions of two proposed new coal mines in Queensland were not considered ‘significant’ enough to warrant needing federal environmental impact assessment, which the applicant claimed was required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): see Ruddock, above n 72.

<sup>74</sup> See, eg, *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007) (‘*Massachusetts*’).

<sup>75</sup> See Joseph Smith and David Shearman, *Climate Change Litigation* (2006) 79–97.

<sup>76</sup> For a discussion of US climate change litigation brought primarily on public and private nuisance grounds, see, eg, David Hunter and James Salzman, ‘Nuisance in the Air: The Duty of Care in Climate Change Litigation’ (2007) 155 *University of Pennsylvania Law Review* 1741, 1788–94.

<sup>77</sup> Smith and Shearman, above n 75, 18.

This view appears warranted in light of cases such as *Graham Barclay Oysters Pty Ltd v Ryan*,<sup>78</sup> which demonstrate, in the torts context, the reluctance of Australian courts to pass judgement upon the appropriateness of complex policy choices made by government. In this case, the plaintiff had consumed contaminated oysters grown in Wallis Lake, causing him to contract Hepatitis A. Ryan claimed, *inter alia*, that the Council and New South Wales Government had negligently failed to introduce more stringent policies and practices to prevent pollution of the lake.<sup>79</sup> One of the grounds on which Ryan's case was dismissed was that it involved a non-justiciable political question.<sup>80</sup> Gleeson CJ stated that decisions about the reasonableness of 'the extent of government regulation of private and commercial behaviour' were 'essentially political' and that

[w]hen courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process. Especially is this so when criticism is addressed to legislative action or inaction. Many citizens may believe that, in various matters, there should be more extensive government regulation. Others may be of a different view, for any one of a number of reasons, perhaps including cost. Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature.<sup>81</sup>

These public policy considerations would likely inhibit a global warming torts suit against the Commonwealth.<sup>82</sup>

Principles of international environmental law have also been mooted as having relevance in the climate change context. The principle that states have a duty to prevent trans-boundary harm to the environment of other states or to the 'global commons' — a norm of customary international law — seems particularly applicable to the problem of climate change.<sup>83</sup> It could undoubtedly be argued that Australia has, and continues to, breach this principle. A failure by Australia to adequately cut its emissions could also be regarded as a breach of its commitments under the *United Nations Framework Convention on Climate Change* ('UNFCCC'); namely to reduce emissions to a sufficient extent to help

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<sup>78</sup> (2002) 211 CLR 540.

<sup>79</sup> *Ibid* 554 (Gleeson CJ).

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* 553–4.

<sup>82</sup> See also *Commonwealth of Australia v Eland* (1992) 27 ALD 516, in which Studdert J dismissed a complaint by several Aboriginals that the Commonwealth had failed to protect them from the dangers of alcoholism: '[i]t is not for the courts to determine whether the policies of the Commonwealth are appropriate and to reflect disapproval of the Commonwealth's failure to act in an area of policy by extending liability in tort into such an area': at 523. See also the US cases of *State of Connecticut v American Electric Power Corporation*, 406 F Supp 2d 265 (2004) and *People of the State of California v General Motors Corporation*, No C06-05755 MJJ (ND Cal, 2007) involving claims in public nuisance against major energy providers and automobile manufacturers respectively. Both claims were dismissed on the basis that they presented political, rather than legal, questions.

<sup>83</sup> For discussion of state obligations with respect to trans-boundary environmental issues, see, eg, Smith and Shearman, above n 75, 44–55. For a general analysis of this principle, see Philippe Sands, *Principles of International Environmental Law* (2<sup>nd</sup> ed, 2003) 241–6.

prevent dangerous anthropogenic climate change.<sup>84</sup> Australia must also meet its obligations under the *Kyoto Protocol* and any future international accords.

Under international law, however, Torres Strait Islanders would not enjoy standing to litigate alleged breaches of the above obligations before an appropriate international forum, namely the contentious jurisdiction of the International Court of Justice (which is restricted to states).<sup>85</sup> Nor could purported violations of the above obligations be litigated before a domestic court. Australian courts are not empowered to compel governments to comply with Australia's international obligations arising from treaties or customary international law unless those obligations have been incorporated into domestic law via enabling legislation.<sup>86</sup> The aforementioned obligations have not been domestically enacted.

Reed, meanwhile, has questioned whether the US's contribution to climate change amounts to genocide against the inhabitants of Pacific Island nations, who, like Torres Strait Islanders, are being threatened by rising sea levels.<sup>87</sup> Whilst Australia has incorporated the international crime of genocide into federal criminal law via the *Criminal Code Act 1995* (Cth),<sup>88</sup> it would be far-fetched to assert that Australia's emission policies have been or are *intended* to destroy, in whole or in part, the Torres Strait Islander race or culture, as required by the *mens rea* of this offence.<sup>89</sup>

### C The Human Rights Option

Given the dearth of alternative litigation avenues available to Torres Strait Islanders, the potential utility of the *ICCPR Optional Protocol* complaints procedure becomes more obvious. A similar conclusion was reached by the Inuit in the Arctic region of Alaska and Canada, who are experiencing some of the most rapid and severe climate change on earth.<sup>90</sup> In 2005, the Inuit filed a petition with the IACHR, seeking 'relief from human rights violations resulting from the impacts of global warming ... caused by acts and omissions of the United States'.<sup>91</sup> Although the IACHR is not a judicial body, and hence lacks the power to enforce its decisions, lawyers involved in the *Inuit Petition* believe that a favourable decision by the Commission could have significant political and legal influence in the US, notwithstanding its non-binding nature.<sup>92</sup>

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<sup>84</sup> *UNFCCC*, opened for signature 4 June 1992, 1771 UNTS 107, arts 2, 4(2) (entered into force 21 March 1994).

<sup>85</sup> *Statute of the International Court of Justice* art 34(1).

<sup>86</sup> See, eg, *Chow Hung Ching v The King* (1948) 77 CLR 449, 478; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J); *Nulyarimma v Thompson* (1999) 96 FCR 153, 163. Note that this principle is yet to be confirmed by a majority of the High Court in relation to customary international law.

<sup>87</sup> Reed, above n 11, 399.

<sup>88</sup> Sch, ss 268.3–268.7.

<sup>89</sup> See *Nulyarimma v Thompson* (1999) 96 FCR 153, 208, which demonstrates the difficulty of establishing the *dolus specialis* of genocide.

<sup>90</sup> See generally Watt-Cloutier, above n 4.

<sup>91</sup> *Ibid* 1.

<sup>92</sup> See Donald M Goldberg and Martin Wagner, Center for International Environmental Law, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System* (2002) 15 <[http://ciel.org/Publications/Petitioning\\_GlobalWarming\\_IAHR.pdf](http://ciel.org/Publications/Petitioning_GlobalWarming_IAHR.pdf)> at 23 September 2008.

Of the international human rights treaties to which Australia is a party — and which contain rights relevantly implicated by climate change<sup>93</sup> — only the *ICCPR* affords Australians the right to make an individual ‘communication’ to a UN human rights body; in this case the HRC.<sup>94</sup> This complaints procedure is granted by art 1 of the *ICCPR Optional Protocol*, to which Australia has acceded.<sup>95</sup> As with the IACHR, the HRC cannot enforce its ‘views’; thus the value of a positive determination by the HRC is more in its political rather than legal effect.

One advantage of Torres Strait Islanders making an individual claim to the HRC would be that human rights can bring a great moral force to political debate. Linking climate change to human rights and establishing a ‘human face’ of climate change in Australia would establish a powerful argument that could be used to exert pressure on government to adopt and enforce responsible GHG emission policies. Indeed, the strong concern the Australian public now has for climate change<sup>96</sup> suggests that drawing the link between global warming and human rights in Australia could have significant political utility in this country.

#### IV LINKING CLIMATE CHANGE TO HUMAN RIGHTS

##### A *Connecting Civil and Political Rights to Environmental Harm*

Demonstrating that the *ICCPR* can extend to an environmental problem such as global warming is not a straightforward task. As with most international or regional human rights treaties, the *ICCPR* does not provide for an explicit right to a ‘healthy environment’.<sup>97</sup> The Covenant’s civil and political rights were originally conceived to safeguard individual rights from arbitrary governmental

<sup>93</sup> The *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*) and the *Convention on the Rights of the Child*, opened for signature 26 January 1990, 1577 UNTS 3 (entered into force 2 September 1990) also arguably contain rights implicated by climate change. Claims could also possibly be made under the *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). The 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/Res/61/295 (13 September 2007) (which Australia voted against in the UN General Assembly) also contains relevant rights but the Declaration is non-binding.

<sup>94</sup> Australia ratified the *ICCPR* on 13 August 1980.

<sup>95</sup> Australia acceded to the *ICCPR Optional Protocol* on 25 September 1991.

<sup>96</sup> See, eg, *The Lowy Institute Poll 2007*, which found that climate change is a ‘central’ issue for Australians, who see it as the ‘most important external threat [they] face’: Allan Gyngell, Lowy Institute for Foreign Policy, *The Lowy Institute Poll 2007: Australia and the World — Public Opinion and Foreign Policy* (2007) <<http://www.lowyinstitute.org/Publication.asp?pid=660>> at 23 September 2008. According to the poll, Australians deem tackling climate change more important than ensuring economic growth or combating international terrorism: at 3, 15.

<sup>97</sup> Two exceptions are: *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217, art 24 (entered into force 21 October 1986); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, OAS 69, art 11(1) (entered into force 16 November 1999) (*Protocol of San Salvador*).

interference and to guarantee participatory rights in civil society.<sup>98</sup> *ICCPR* rights would be plainly breached, for example, in a situation where a political activist is arbitrarily killed or has his or her personal security violated by police. As noted by Atapattu, the human rights debate emerged in the aftermath of World War II when environmental concerns were ‘not a priority’.<sup>99</sup> Hence, the 1948 *Universal Declaration of Human Rights*<sup>100</sup> and subsequent covenants on the subject — the *ICCPR* and *ICESCR* — make no mention of environmental protection.<sup>101</sup> Thus, the rights contained in the *ICCPR* must be reinterpreted to encompass a situation such as climate change.<sup>102</sup>

Fortunately, most major human rights bodies, including the HRC, have now established a link between human rights and the environment.<sup>103</sup> Human rights bodies have been particularly willing to protect indigenous peoples’ rights adversely affected by environmentally harmful activities, because of the strong interdependence between indigenous welfare and the health of their environment. Both civil and political rights, and economic, social and cultural rights, have been implicated by environmental concerns. These have included rights to: life; freedom of residence and movement; the enjoyment of culture; the protection of privacy, family and the home; property; and health.<sup>104</sup> However, the discussion below is restricted to key cases in which civil and political rights relevant to a potential Torres Strait Islander complaint to the HRC (see Part V) have been implicated.

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<sup>98</sup> Alan E Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’ in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 43, 46.

<sup>99</sup> Sumudu Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment under International Law’ (2002) 16 *Tulane Environmental Law Journal* 65, 67.

<sup>100</sup> GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948).

<sup>101</sup> Atapattu, above n 99, 67–8. Environmental rights have since emerged in many international law documents including the *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972*, UN Doc A/CONF.48/14/Rev.1 (1 January 1973) ch I (*Declaration of the United Nations Conference on the Human Environment*) (‘*Stockholm Declaration*’); *World Charter for Nature*, GA Res 37/7, UN GAOR, 37<sup>th</sup> sess, 48<sup>th</sup> plen mtg, UN Doc A/RES/37/7 (28 October 1982) and the *United Nations Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1 (1992) (‘*Rio Declaration*’). A 1994 UN report also concluded that the right to a ‘healthy and decent environment’ is now a binding norm of international law: Fatma Zohra Ksentini, *Report of the Special Rapporteur on Human Rights and the Environment*, UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994) 11. However, this view is regarded as premature by most scholars: see, eg, Atapattu, above n 99, 82.

<sup>102</sup> See Michael Burger, ‘Bi-Polar and Polycentric Approaches to Human Rights and the Environment’ (2003) 28 *Columbia Journal of Environmental Law* 371, 375.

<sup>103</sup> Marguerite E Middaugh, ‘Linking Global Warming to Inuit Human Rights’ (2006) 8 *San Diego International Law Journal* 179, 181.

<sup>104</sup> Ibid 199–206. See generally Dinah Shelton, ‘Human Rights and the Environment: Jurisprudence of Human Rights Bodies, Background Paper No 2’ (Paper presented at Joint UNEP–OHCHR Expert Seminar on Human Rights and the Environment, Geneva, 14 January 2002).

1 *The Right to Life and the Right to Freedom of Residence and Movement — ICCPR Arts 6, 12*

The relationship between environmental harm and human rights has been most explicitly acknowledged by the IACHR. In 1990, a petition filed with the Commission on behalf of the indigenous Huaorani people of Ecuador alleged that oil exploration activities on their traditional lands threatened the Huaorani's physical and cultural survival.<sup>105</sup> The activities concerned contaminated the region's water, soil and air, thereby jeopardising the health and lives of the Huaorani.<sup>106</sup> In its *Report on Ecuador*, the Commission stated that the 'realization of the *right to life*, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment'.<sup>107</sup> The foregoing rights were implicated where 'environmental contamination and degradation pose a persistent threat to human life and health'.<sup>108</sup>

In the earlier case of *Yanomami v Brazil*, the Commission also found that a breach of the right to life had occurred as well as the right to freedom of residence and movement.<sup>109</sup> The violation of Yanomami rights arose as a result of the Brazilian government authorising a new highway and mining activities in Yanomami territory, forcing the tribe to abandon their habitat and seek refuge elsewhere.<sup>110</sup> The Yanomami also suffered considerable harm from the introduction of foreign diseases, conflicts with the miners, and environmental pollution.<sup>111</sup>

Cases connecting the right to life with environmental harm have not reached the merits stage of assessment before the HRC. In one case, *EHP v Canada*, a group of Canadian citizens complained that the right to life of present and future generations was threatened by the storage of radioactive waste near their homes, due to the health hazards associated with excessive exposure to radiation.<sup>112</sup> The HRC accepted that the communication raised 'serious issues' with regard to the right to life, but the communication was inadmissible due to the applicants' failure to exhaust domestic remedies as required by arts 2 and 5(2)(b) of the *ICCPR Optional Protocol*.<sup>113</sup>

<sup>105</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*, OAS Doc OEA/Ser.L/V/II.96, Doc 10, rev 1 (24 April 1997) ('*Report on Ecuador*').

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* ch VIII, 6 (emphasis added). The right to life is protected in the Inter-American system by: Organization of American States, *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948) ('*American Declaration*'); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

<sup>108</sup> IACHR, *Report on Ecuador*, above n 105, ch VIII.

<sup>109</sup> IACHR, Res No 12/85, Case No 7615 (5 March 1985).

<sup>110</sup> *Ibid* (Background).

<sup>111</sup> *Ibid.*

<sup>112</sup> HRC, Communication No 67/1980, UN Doc CCPR/C/17/D/67/1980 (27 October 1982).

<sup>113</sup> *Ibid* [8]. See also *Bordes and Temeharo v France*, HRC, Communication No 645/1995, UN Doc CCPR/C/57/D/645/1995 (30 July 1996) ('*Bordes*'), concerning France's nuclear testing in the South Pacific. The complaint was dismissed because the likelihood of harm was too remote.

## 2 The Right to Culture — ICCPR Art 27

In *Ominayak, Chief of the Lubicon Lake Band v Canada*,<sup>114</sup> the HRC considered the connection between environmental harm and the right of minorities to enjoy their culture. The Band is an indigenous tribe from northern Alberta that continues to maintain its traditional culture, religion, political structure and subsistence economy.<sup>115</sup> The Band alleged that the Canadian Government's authorisation of oil and gas exploration on the Band's territory threatened their right to self-determination and means of subsistence under art 1 of the *ICCPR*.<sup>116</sup> It was contended that these activities would destroy the environment, the Band's traditional economy and way of life, and its spiritual and cultural ties to the land.<sup>117</sup> Whilst the HRC declared that the right to self-determination was not justiciable under the *ICCPR Optional Protocol*, it did hold that a violation of art 27 had occurred.<sup>118</sup>

The deep connection between indigenous peoples' culture and their environment has been most explicitly articulated by the IACHR. In its *Report on Ecuador*, for example, the Commission stated that 'certain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein — respect for which is essential to their physical and cultural survival'.<sup>119</sup> It also concluded that 'displacement [from indigenous] lands or damage to these lands "invariably leads to serious loss of life and health and damage to the cultural integrity of indigenous peoples"'.<sup>120</sup>

## 3 The Right to Privacy, Family and Home — ICCPR Art 17

Cases linking environmental harm and the right to be protected from unlawful interference with one's privacy, family or home, have mostly arisen in the European Court of Human Rights, under art 8 of the *European Convention on Human Rights*.<sup>121</sup> In *Lopez-Ostra v Spain*, strong fumes, noise and smells from a tannery waste treatment plant made the applicant and her family's living conditions unbearable and caused them serious health problems.<sup>122</sup> In holding that there had been a violation of art 8, the Court accepted that 'severe environmental pollution may affect individuals' well-being and prevent them

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<sup>114</sup> HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (10 May 1990) ('*Ominayak*').

<sup>115</sup> *Ibid* [2.2].

<sup>116</sup> *Ibid* [2.3].

<sup>117</sup> *Ibid* [11.2].

<sup>118</sup> *Ibid* [32.1]–[32.2]. See also *Länsman v Finland*, HRC, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) ('*Länsman*') which held that stone-quarrying permitted by Finland on traditional Sami lands did not breach art 27, but could do so in future if expanded in scale.

<sup>119</sup> IACHR, *Report on Ecuador*, above n 105, ch IX.

<sup>120</sup> *Ibid*, quoting Ksentini, above n 101. See also *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-Am Ct HR (ser C) No 9.

<sup>121</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

<sup>122</sup> *Lopez-Ostra v Spain*, Application No 16798/90 (Unreported, European Court of Human Rights, Court Chamber, 9 December 1994) [7]–[15].



from enjoying their homes in such a way as to affect their private and family life adversely'.<sup>123</sup>

### B *The Case of the Inuit — Linking Human Rights to Climate Change*

This discussion clearly indicates that a healthy environment can be a necessary condition for the fulfilment of the above civil and political rights.<sup>124</sup> As such, it is reasonable to expect that the HRC could be receptive to a complaint by Torres Strait Islanders regarding the impact of climate change on the aforementioned rights. Needless to say, it remains to be seen whether human rights bodies will accept that governments can be held responsible for their contributions to climate change (a much more legally complex form of environmental harm than existent in the cases above). The *Inuit Petition* to the IACHR is therefore of great significance and may provide a litmus test of whether a complaint by Torres Strait Islanders would likely succeed.

The *Inuit Petition* was submitted by Sheila Watt-Cloutier on 7 December 2005 on behalf of herself, 62 named individuals and all other affected Inuit in the Arctic regions of the US and Canada.<sup>125</sup> Scholars, including Middaugh, have argued that the *Inuit Petition* is well-founded in international law,<sup>126</sup> but it was initially rejected by the IACHR in November 2006 on the basis that it had insufficient information to determine the issue.<sup>127</sup> However, in February 2007, the Commission invited Watt-Cloutier to provide testimony on the impact of climate change on Inuit and other vulnerable communities at a hearing held on 5 March 2007.<sup>128</sup> As of September 2008, the Commission was, disappointingly, still to release its findings.

#### 1 *Rights Allegedly Infringed*

The Inuit base their claim on the US's obligations under the *American Declaration*,<sup>129</sup> which is interpreted in light of other international human rights instruments.<sup>130</sup> The *Inuit Petition* asserts that a number of Inuit rights have been infringed. First, the Inuit's right to enjoy their culture, particularly their subsistence way of life, is violated by the widespread environmental change that

<sup>123</sup> Ibid [51]. See also *Guerra v Italy* (1998) I Eur Ct HR 210, concerning chemical pollution from a factory.

<sup>124</sup> Note that several national courts have also accepted that environmental health is implicitly guaranteed by many basic human rights: see Atapattu, above n 99, 103–8.

<sup>125</sup> Watt-Cloutier, above n 4, 1. Note that Canadian Inuits are included in the *Inuit Petition* as the IACHR has previously indicated that a state's responsibility under the *American Declaration*, on which the claim is based, may extend beyond its territory: see Middaugh, above n 103, 197–8.

<sup>126</sup> Middaugh, above n 103, 181.

<sup>127</sup> Jane George, 'ICC Climate Change Petition Rejected', *Nunatsiaq News* (Iqaluit, Canada) 15 December 2006 <[http://www.nunatsiaq.com/archives/61215/news/nunavut/61215\\_02.html](http://www.nunatsiaq.com/archives/61215/news/nunavut/61215_02.html)> at 23 September 2008.

<sup>128</sup> Center for International Environmental Law, *Global Warming and Human Rights Gets Hearing on the World Stage* (2007) <[http://www.ciel.org/Climate/IACHR\\_Inuit\\_5Mar07.html](http://www.ciel.org/Climate/IACHR_Inuit_5Mar07.html)> at 23 September 2008.

<sup>129</sup> Above n 107.

<sup>130</sup> These international instruments include the *ICCPR*, above n 6, and the *ICESCR*, above n 93. See Watt-Cloutier, above n 4, 5.

is occurring.<sup>131</sup> Meanwhile, the right to use and enjoy traditional Inuit lands is allegedly violated because large tracts of Inuit lands are fundamentally changing, in some areas becoming inaccessible.<sup>132</sup> A particular problem is the disappearance of sea ice, which is used by the Inuit to travel and hunt, and is now often thin and unsafe.<sup>133</sup>

The Inuit's right to enjoy their property is allegedly infringed because climate change has reduced the value of both the Inuit's personal property — including hides, snowmobiles, and dog sleds — as well as their 'cultural intellectual property', namely their traditional knowledge, which is now often 'unreliable or inaccurate as a result of climate change'.<sup>134</sup> In addition, Inuit rights to health and life are being impacted by new pressures on the Inuit to maintain their traditional diet, as well as increasing numbers of life-threatening accidents caused by changes to ice, snow and land.<sup>135</sup> Rights of the Inuit to residence and movement, and to inviolability of the home, are also allegedly infringed because of threats to the physical integrity of their homes.<sup>136</sup> Storm surges, permafrost melt and erosion are destroying coastal homes and communities, whilst in inland areas, slumping and landslides are threatening homes and infrastructure.<sup>137</sup>

## 2 *Holding the US Responsible*

The *Inuit Petition* attempts to hold the US responsible for the impacts of climate change on their human rights on several grounds, including that:

- the US is the world's largest GHG emitter (being responsible for more than 20 per cent of current global emissions);
- the US government has failed to appropriately regulate and reduce the country's emissions;
- it is 'beyond dispute' that global warming is attributable to human actions; and;
- despite ratifying the *UNFCCC*, the US has rejected international agreements to curtail GHG emissions, including the *Kyoto Protocol*, with full knowledge that this course of action is causing harm to the Inuit.<sup>138</sup>

The Inuit request that the IACHR declare that the US is responsible for violations of their rights under the *American Declaration* and other instruments of international law.<sup>139</sup> Several forms of relief are requested, namely that the US:

- adopt mandatory measures to limit its GHG emissions;

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<sup>131</sup> Watt-Cloutier, above n 4, 5.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.* 6. The *Inuit Petition* uses the example of Inuit traditional knowledge about the safety of sea ice. It describes this knowledge as now becoming unreliable in some regions due to the impacts of climate change, resulting in some hunters and other travellers falling through the ice: at 2.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* 6–7.

<sup>139</sup> *Ibid.* 7.

- cooperate in international efforts to reduce global emissions;
- consider the impacts of US emissions on the Inuit before approving major government actions; and
- implement plans to protect and mitigate harm to Inuit culture and resources and to assist the Inuit adapt to climate change's unavoidable impacts.<sup>140</sup>

## V THE IMPACT OF CLIMATE CHANGE ON TORRES STRAIT ISLANDERS' RIGHTS AND FREEDOMS PROTECTED BY THE *ICCPR*

This section will now examine the impact of climate change on several of the Torres Strait Islanders' *ICCPR* rights and freedoms. The legal hurdles involved in establishing that Australia has in fact infringed these rights (such as causation) are then discussed in Part VI. It is submitted that the following articles of the Covenant are most evidently impaired by climate change for Torres Strait Islanders.

### A *The Right of Minorities to Enjoy Their Culture*

The provision of the *ICCPR* most clearly implicated by climate change for Torres Strait Islanders is art 27. It provides that persons belonging to 'ethnic, religious or linguistic minorities ... shall not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.<sup>141</sup> According to the HRC, art 27 is 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned'.<sup>142</sup> Numbering approximately 46 390 people (including those who live on the mainland), Islanders constitute a mere 0.23 per cent of Australia's population.<sup>143</sup> Of this figure, 6958 Islanders actually reside in the Strait.<sup>144</sup> Many Islanders still use their native languages of Meriam Mer, Kala Lagaw Ya or Kala Kawa Ya.<sup>145</sup> The unique Torres Strait Kriol is also spoken throughout the Islands.<sup>146</sup> As such, Islanders should qualify for protection under art 27 either as an 'ethnic' or 'linguistic' minority.

The element of art 27 most evidently engaged by climate change concerns Islanders' right to enjoy their culture. Island culture — or *Ailan Kastom* (Island Custom), as it is referred to locally — has origins dating back some 2500 years.<sup>147</sup> Its unique nature is legally recognised in Queensland legislation such as

<sup>140</sup> Ibid 7–8.

<sup>141</sup> *ICCPR*, above n 6, art 27.

<sup>142</sup> HRC, *General Comment No 23: The Rights of Minorities (Art 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [9].

<sup>143</sup> This figure is derived from statistics within a 2006 Australian Bureau of Statistics report: Australian Bureau of Statistics, above n 10, 8.

<sup>144</sup> Ibid.

<sup>145</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 4.

<sup>146</sup> Ibid.

<sup>147</sup> John Burton, Torres Strait Regional Authority, *History of Torres Strait to 1879 — A Regional View* (2007) <<http://www.tsra.gov.au/the-torres-strait/general-history.aspx>> at 23 September 2008.

the *Torres Strait Islander Land Act 1991* (Qld).<sup>148</sup> A starting point for understanding Island culture is that it comprises

a body of customs, traditions, observances and beliefs ... [which] has survived European contact and continues to develop. *Ailan Kastom* combines strong elements of Christianity ... with traditional values associated with the authority of elders and sea and market garden based economies.<sup>149</sup>

Islanders enjoy a 'holistic relationship' with their natural environment,<sup>150</sup> which leaves Island culture particularly vulnerable to climate change because of the significant environmental change that is likely to occur in the Strait.

Islanders' right to enjoy their culture is manifestly prejudiced by climate change in the following ways. First, climate change is likely to threaten the biodiversity of the Islands, including populations of marine turtle and dugong which are integral components of Island culture.<sup>151</sup> Turtle and dugong are important for *Ailan Kastom* as totems, as objects of traditional hunting (and related customs involving the preparation and sharing of their meat) and for the subsistence way of life Islanders still maintain to varying degrees.<sup>152</sup> The long-term survival of these species is presently under threat due to their unsustainable commercial, traditional and illegal harvesting, and other human activities.<sup>153</sup> According to Green, climate change may exacerbate this situation by causing the loss of key habitat and consequently a reduction in their populations.<sup>154</sup>

Second, climate change is likely to impair Islanders' traditional gardening practices. Historically, gardening has been crucial for many Islanders' subsistence way of life, as well as for trading between Island communities and with villages in Papua New Guinea.<sup>155</sup> Although this important cultural practice has reduced since colonisation, community gardens on the western and eastern Islands continue to produce various crops and Islanders are attempting to revive its use.<sup>156</sup> Green states that several expected impacts of climate change, including more frequent droughts and floods, are likely to hamper these efforts.<sup>157</sup>

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<sup>148</sup> Section 8 defines 'Island custom' as 'the body of customs, traditions, observances and beliefs of Torres Strait Islanders'.

<sup>149</sup> Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, Parliament of Australia, *Torres Strait Islanders: A New Deal* (1997) 9.

<sup>150</sup> Torres Strait Natural Resource Management Reference Group, *Land and Sea Management Strategy for Torres Strait* (Torres Strait Regional Authority Report, 2005) 11, 16, available from <<http://www.tsra.gov.au/the-tsra/land-and-sea-management.aspx>> at 23 September 2008.

<sup>151</sup> See Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 4–5, 7.

<sup>152</sup> *Ibid* 4–5.

<sup>153</sup> See, eg, North Australian and Indigenous Land and Sea Management Alliance, *Dugong and Marine Turtle Knowledge Handbook* (2006) 53, 56–8 <<http://www.nailsma.org.au/nailsma/downloads/Dugong%20and%20marine%20turtle%20handbook.pdf>> at 23 September 2008.

<sup>154</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 5.

<sup>155</sup> Jeremy Beckett, *Torres Strait Islanders: Custom and Colonialism* (1987) 28–9.

<sup>156</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 6–7.

<sup>157</sup> *Ibid* 7.

Third, a rise in sea level and extreme weather events could potentially destroy much of Islanders' cultural heritage. A number of important heritage areas — including graveyards, monuments and sacred sites — are highly vulnerable to storm surges.<sup>158</sup> Climate change already appears to be having consequences in this area. Graveyards on Warraber and Saibai were washed out during the king tides of 2006 and many cultural sites are now regularly inundated.<sup>159</sup>

The fourth and most damaging effect climate change could have on Island culture relates to the IPCC's recent prediction that many Islanders will 'likely' be displaced from their traditional lands if severe climate change is not avoided.<sup>160</sup> Islanders' traditional ownership of Torres Strait land was first recognised in the landmark *Mabo* decision of 1992, in which the High Court awarded the Meriam people native title over the Mer (or Murray) Islands.<sup>161</sup> Since then, traditional owners have had their native title recognised on most of the Islands.<sup>162</sup> Islanders have also initiated a claim in the Federal Court over 42 000 square kilometres of sea territory.<sup>163</sup> The displacement of Islanders to the Australian mainland would indubitably damage Islanders' ability to enjoy their culture as the Islands are central to Islander identity. This is evident from anthropologist Nonie Sharp's description of the significance of Meriam land and sea for the Meriam people:

Location is primary for the Meriam; every person ... must have a *ged* or homeland ... a relationship to *place* creates a *simultaneous* relationship or ownership of portions of foreshore, reefs, cays and outer seas, including fishing grounds, the wind which blows in that particular quarter, particular stars in their rising or waning phases. Given Meriam clanship and kinship structures, relationship to place is integral to social relationships with other groups.<sup>164</sup>

Although it is true that the overwhelming majority of Islanders now reside on the mainland, those who remain on the Islands do not see relocation as a viable option. The Chairperson of the Torres Strait Regional Authority, for example, states that: 'you cannot move these people because they are connected by blood and bone to their traditional homes'.<sup>165</sup> Echoing this concern, the Chairperson of Saibai Council says, 'we will lose our identity as Saibai people if we scatter. If we separate, there will be no more Saibai'.<sup>166</sup>

Islanders are socio-economically disadvantaged by Australian standards and thus have a low adaptive capacity to climate change.<sup>167</sup> Nonetheless, some

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<sup>158</sup> Ibid 5.

<sup>159</sup> Ibid.

<sup>160</sup> Hennessy et al, above n 5, 522.

<sup>161</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>162</sup> Nicolette Kormendy, National Native Title Tribunal, 'Torres Strait Islanders, Fishermen and Government Agree on Native Title over Eight Islands' (Press Release, 15 August 2005), available from <<http://www.nntt.gov.au/News-and-Communications/Pages/default.aspx>> at 23 September 2008.

<sup>163</sup> Torres Strait Regional Authority, *Native Title* <<http://www.tsra.gov.au/the-tsra/native-title.aspx>> at 23 September 2008. In 2001, the High Court held that limited native title rights can extend over the sea: *Commonwealth v Yarmirr* (2001) 208 CLR 1.

<sup>164</sup> Nonie Sharp, *No Ordinary Judgment* (1996) 84 (emphasis in original).

<sup>165</sup> Minchin, 'Going Under', above n 12, 15.

<sup>166</sup> Liz Minchin, 'Sea Wall No Match for Tide's Fury', *Sydney Morning Herald* (Sydney, Australia) 12 August 2006, 15.

<sup>167</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 10.

Islanders are now adopting measures to help resist the impacts of climate change, such as building on higher ground and raising their houses on stilts.<sup>168</sup> Local authorities have also requested government funding to repair crumbling sea walls and to protect vital infrastructure.<sup>169</sup> However, given the IPCC's warning that displacement of many Islanders is likely in the long-term, whether such measures can ultimately be effective must be doubtful.

### B *The Right to Self-Determination*

The right of all 'peoples' to self-determination expressed in art 1 of the *ICCPR* is not independently justiciable under the *Optional Protocol*;<sup>170</sup> however, it can be relevant to the interpretation of other Covenant rights, particularly art 27.<sup>171</sup> One aspect of this right pertinent to the present context is the guarantee of art 1(1) that all peoples have the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.<sup>172</sup> Islanders presently enjoy a good deal of political autonomy in the management of their economic, social and cultural affairs. Major Island governance bodies include Island Councils, the Island Coordinating Council and the TSRA, the latter of which has the goal of empowering Islanders to 'determine their own affairs based on ... *Ailan Kastom*'.<sup>173</sup> Islanders living on the mainland do not similarly enjoy this level of political representation; indeed, they struggle to have their unique identity and needs distinguished from the much larger Aboriginal population.<sup>174</sup> The reduction of political autonomy Islanders would likely experience if displaced from their lands would clearly diminish their ability to maintain their unique culture.

### C *The Right to Life*

Article 6(1) of the *ICCPR* guarantees every human being the 'inherent right to life'. Global warming arguably presents a direct threat to Islanders' lives. During the king tides that affected Mer in 2005, for example, several houses were flooded, in one case threatening a child's life.<sup>175</sup> As severe storms and inundation are likely to increase because of climate change, it is reasonable to assert that this puts Islanders' lives at greater risk from severe weather than would otherwise be the case. In addition, mosquito-borne diseases are likely to increase in the region.<sup>176</sup> This presents a very real threat to Islanders' lives,

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<sup>168</sup> Ibid 8.

<sup>169</sup> Minchin, 'Going Under', above n 12, 15.

<sup>170</sup> *Ominayak*, HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (10 May 1990) [13.3].

<sup>171</sup> *Apirana Mahuika v New Zealand*, HRC, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (15 November 2000) [9.2].

<sup>172</sup> Article 1(2) also protects all peoples' 'natural wealth and resources' and 'means of subsistence'.

<sup>173</sup> Torres Strait Regional Authority, *Welcome to TSRA* (2007) <<http://www.tsra.gov.au>> at 23 September 2008. The Torres Strait Regional Authority operates within the provisions of the *Aboriginal and Torres Strait Islander Act 2005* (Cth).

<sup>174</sup> See Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 149, 89.

<sup>175</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 9.

<sup>176</sup> Ibid 7.

indicated by the fact that malaria has caused several deaths in the Torres Strait since 1990.<sup>177</sup>

Article 6 of the *ICCPR* also requires states to take positive measures to increase individuals' 'life expectancy'.<sup>178</sup> Climate change may decrease Islanders' life expectancy as it presents serious risks to Islanders' health (who already experience lower health indicators than the average Australian) because of a likely increase in heat-related illness, a higher risk of mosquito-borne disease, an increase in extreme weather events and an increased risk of water and food-borne illness.<sup>179</sup>

#### D *The Right to Protection of Privacy, Family and the Home*

Article 17(1) of the *ICCPR* states that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence'. Islanders' homes and family life were arguably 'interfered' with by the king tides of 2005–06, which caused serious damage to homes on several of the Islands. This interference was not provided for by law and thus could be regarded as 'unlawful' or 'arbitrary'.<sup>180</sup> Furthermore, future interferences of this type are more likely to occur in the future because of increased sea levels and severe weather events.

#### E *The Right to Freedom of Residence and Movement*

Article 12(1) of the *ICCPR* provides that every person lawfully within the territory of a state has 'the right to liberty of movement and freedom to choose his residence' within that state. States must protect against 'all forms of forced internal displacement'.<sup>181</sup> Arguably, if Islanders are forcibly displaced from their homelands because of climate change, Islanders' right to choose their place of residence will be effectively denied.

### VI HOLDING AUSTRALIA RESPONSIBLE FOR A VIOLATION OF THE *ICCPR*

The above discussion indicates that climate change undoubtedly has ramifications for Torres Strait Islanders' enjoyment of several *ICCPR* rights. It is much more equivocal, however, whether Australia could actually be held responsible for causing a breach of these rights. As previously noted, Australia has ratified the *ICCPR* and accompanying *ICCPR Optional Protocol*, which means that Torres Strait Islanders are entitled to submit a written communication

<sup>177</sup> Donna Green, CSIRO, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia* (CSIRO Marine and Atmospheric Research Paper, November 2006) 6 <[http://www.cmar.csiro.au/e-print/open/greendl\\_2006.pdf](http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf)> at 23 September 2008.

<sup>178</sup> HRC, *General Comment No 6: Article 6 (Right to Life) (1982)*, as contained in *Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) [5].

<sup>179</sup> Green, *How Might Climate Change Affect Island Culture in the Torres Strait?*, above n 10, 7, 10.

<sup>180</sup> See HRC, *General Comment No 16: Article 17 (Right to Privacy) (1988)* [3]–[4], as contained in *Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006).

<sup>181</sup> HRC, *Addendum: General Comment No 27 (67): Freedom of Movement (Art 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [7].

to the HRC concerning alleged violations of the Covenant. A complaint could be submitted by a single Islander or a group of Islanders claiming to be ‘similarly affected’.<sup>182</sup> This section does not attempt to examine all issues relevant to a potential Torres Strait Islander communication, but several key issues are highlighted.<sup>183</sup>

#### A *Is Australia Meeting Its Obligations under the ICCPR?*

The general legal obligation undertaken by states parties to the *ICCPR*, expressed by art 2(1), is to ‘respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant’. In addition, art 2(2) requires that states ‘adopt such laws or other measures as may be necessary to give effect to the rights recognized’. The legal obligation imposed by art 2 is both negative and positive in nature. This means that a state must first refrain from directly breaching Covenant rights through the acts or omissions of its own agents.<sup>184</sup> Second, a state must adopt positive measures to give effect to individuals’ Covenant rights<sup>185</sup> (and in the case of art 27, to protect the identity of the *group*).<sup>186</sup> A state’s positive obligations to ensure Covenant rights to individuals are only discharged if individuals are protected against violations committed by the state’s agents, as well as ‘acts committed by private persons or entities that would impair the enjoyment of Covenant rights’.<sup>187</sup> A state is strictly liable for violations committed by its own agents.<sup>188</sup> Where the wrongful act is committed by private persons or entities, a state may be held responsible for ‘permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm’ caused.<sup>189</sup> In light of the above, Islanders would have a strong case that the Covenant imposes positive obligations upon Australia to adopt appropriate measures to help prevent climate change, notwithstanding the fact that anthropogenic GHGs are primarily emitted by individuals and corporations, rather than the state.

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<sup>182</sup> See, eg, *Ominayak*, HRC, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (10 May 1990).

<sup>183</sup> Issues not addressed here include that of deference and the extent to which economic development considerations would be balanced by the Committee against cultural rights protected by art 27. Regarding deference, the HRC appears to have rejected the ‘margin of appreciation’ doctrine — a degree of discretion granted to states by the European Court of Human Rights in the implementation of the *European Convention on Human Rights* — in cases such as *Länsman*, above n 118, [9.4]. The Committee does, however, tend to balance economic development considerations against art 27 rights, although only to an extent that does not effectively deny those rights: see, eg *Länsman*, above n 118, [9.4]. Note also that although states have a limited right to derogate from, or restrict, *ICCPR* arts 27, 12 and 17, this right is very unlikely to apply in the present circumstances: see *ICCPR*, above n 6, arts 4(1), 12(3).

<sup>184</sup> HRC, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].

<sup>185</sup> *Ibid* [8].

<sup>186</sup> HRC, *General Comment No 23*, above n 142, [6.2].

<sup>187</sup> HRC, *General Comment No 31*, above n 184, [8]. The Committee has specifically made this point in relation to arts 27, 17 and 12: *General Comment No 23*, above n 142, [6.1]; *General Comment No 16*, above n 180, [1]; *Addendum: General Comment No 27*, above n 181, [6].

<sup>188</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2<sup>nd</sup> ed, 2004) 36.

<sup>189</sup> *General Comment No 31*, above n 184, [8].



The question is, then, what measures must the Commonwealth adopt to satisfy its obligations under the Covenant? This necessarily involves both international and domestic aspects.

## B *International Measures*

### 1 *The Kyoto Protocol*

At an international level, Australia clearly must at least comply with its emissions obligations under the *Kyoto Protocol*. As noted, recent projections indicate that Australia is now likely to do so. This could provide the Commonwealth with a strong argument that it is taking appropriate measures to help prevent dangerous climate change, given that Australia's emissions target — although generous — was accepted by states parties to the Protocol in the context of a global agreement to tackle climate change.

The importance of the *Kyoto Protocol*, however, should not be overstated. First, its modest overall emissions reduction target of 5.2 per cent will do little to avert dangerous climate change.<sup>190</sup> Second, Australia's individual target allows for an eight per cent increase in emissions between 2008–12. Thus, during the *Kyoto* commitment period Australia will actually be adding to the risk of dangerous climate change occurring, rather than helping to prevent it. Australia's longer-term legal and policy response is therefore likely to be of much greater significance than its expected compliance with the *Kyoto Protocol*.

### 2 *Post-Kyoto Negotiations*

It could also be argued that Australia must engage proactively with the international community in its efforts to develop a post-*Kyoto* agreement, as without a strong global pact to reduce longer-term emissions there is little chance of avoiding dangerous climate change.<sup>191</sup> The duty to cooperate to protect the environment is a well-accepted principle of international law.<sup>192</sup> Whilst the Howard Government was often criticised for obstructing post-*Kyoto* negotiations,<sup>193</sup> Labor's ratification of the *Kyoto Protocol*, and its helpful negotiating role at the UN Climate Change Conference in Bali,<sup>194</sup> indicates that for the present, the Rudd Government appears to be fulfilling this obligation.

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<sup>190</sup> Indeed, because the US and developing nations have not committed to emissions reductions under the *Kyoto Protocol*, it is projected that by 2012 emissions will rise 41 per cent over 1990 levels: Downer, above n 50.

<sup>191</sup> See generally Ross Garnaut, *Garnaut Climate Change Review: Final Report* (2008), available from <<http://www.garnautreview.org.au>> at 23 September 2008.

<sup>192</sup> See, eg, Sands, above n 83, 231–3, 249–51; *Rio Declaration*, above n 101 (see especially principle 27).

<sup>193</sup> See, eg, Friends of the Earth Australia, 'Australia Isolates Itself at Climate Change Negotiations' (Press Release, 14 November 2006) <[www.foe.org.au/media-releases/2006-media-releases/mr\\_14\\_11\\_06.htm](http://www.foe.org.au/media-releases/2006-media-releases/mr_14_11_06.htm)> at 23 September 2008.

<sup>194</sup> Australian Conservation Foundation, 'Bali Roadmap Adopts Strong Guidance on Targets' (Press Release, 15 December 2007) <[http://www.acfonline.org.au/articles/news.asp?news\\_id=1583](http://www.acfonline.org.au/articles/news.asp?news_id=1583)> at 23 September 2008.

## C Domestic Measures

On the domestic front, two things are broadly necessary if the Commonwealth is to be regarded as taking appropriate measures to help prevent dangerous climate change: first, the setting of appropriate emission reduction targets; and second, laws and policies capable of putting Australia on track to meet those targets (keeping in mind that the Rudd Government may not be in power long enough to see medium-term, and certainly long-term, targets met).

## 1 Target Setting

With respect to setting medium and long-term targets, most international concern presently revolves around the years 2020 and 2050, although it is clear that a wider range of interim targets will also be needed. The Rudd Government has adopted a long-term goal of reducing GHG emissions by 60 per cent by 2050 (on 2000 levels). This figure is widely regarded to be insufficient.<sup>195</sup> This target was based on the recommendations of the 2006 *Stern Review*,<sup>196</sup> which relied upon now-dated scientific assumptions. The later *IPCC Fourth Assessment Report* found that a 50 to 85 per cent reduction of CO<sub>2</sub> emissions (on 2000 levels) is actually needed by 2050 to avert the most damaging and irreversible impacts of climate change: the goal being to contain atmospheric emission levels at 450 parts per million CO<sub>2</sub>-e and global temperature rises to 2°C.<sup>197</sup> This will require industrialised nations — who, because of equity and mitigation capacity considerations, must reduce emissions by a larger extent than developing countries — to reduce their GHG emissions by 80 to 95 per cent of 1990 levels.<sup>198</sup>

Professor Ross Garnaut's 2008 *Climate Change Review*<sup>199</sup> — commissioned by the state and federal Labor governments — also recently confirmed that Labor's 60 per cent emissions reduction target is hopelessly inadequate. According to Garnaut, Australia will need to reduce its emissions by 90 per cent by 2050 (on 2000 levels) to play its 'proportionate part' in a post-*Kyoto* agreement capping future atmospheric emissions at 450 parts per million CO<sub>2</sub>-e<sup>200</sup> — the goal recommended by the *IPCC Fourth Assessment Report*. Even if a post-*Kyoto* agreement adopts a more politically feasible, but scientifically riskier, target of 550 parts per million CO<sub>2</sub>-e, Australia will still need to reduce its emissions by 80 per cent.<sup>201</sup> To date, however, the Rudd

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<sup>195</sup> See, eg, Kerrie Sinclair, 'Cuts 'Not Enough' To Slow Warming', *The Courier Mail* (Brisbane, Australia) 3 July 2008, 7; Australian Conservation Foundation, *Carbon Reduction Targets* (2008) <[http://www.acfonline.org.au/default.asp?section\\_id=198](http://www.acfonline.org.au/default.asp?section_id=198)> at 23 September 2008.

<sup>196</sup> *Stern Review*, above n 46, xxiii.

<sup>197</sup> *IPCC, Mitigation of Climate Change Summary*, above n 20, 23.

<sup>198</sup> Gupta et al, above n 3, 776.

<sup>199</sup> Garnaut, above n 191.

<sup>200</sup> *Ibid* 277. Garnaut's advice is premised on the view that the adoption of Australian targets must be 'linked to [a] comprehensive global agreement on emissions reductions': at 277. Parties to the *UNFCCC* are expected to adopt a new global pact to replace the *Kyoto Protocol* (which expires in 2012) at Copenhagen, Denmark, in 2009.

<sup>201</sup> *Ibid* 277–9.

Government has strongly opposed increasing its 60 per cent target for 2050, simply because it is an ‘election commitment’.<sup>202</sup>

Meanwhile, the Federal Government will not set its 2020 target until it has considered Garnaut’s report, economic modelling from Treasury, as well as other analysis.<sup>203</sup> The *IPCC Fourth Assessment Report* indicates that industrialised nations will need to reduce 2020 emissions by 25 to 40 per cent on 1990 levels to avoid dangerous climate change.<sup>204</sup> Garnaut’s report suggests that a 25 per cent emissions reduction (on 2000 levels) would be appropriate for Australia in a 450 parts per million CO<sub>2</sub>-e emissions scenario (10 per cent in a 550 parts per million CO<sub>2</sub>-e scenario).<sup>205</sup> Labor’s support for the 2007 UN Climate Change Conference *Bali Roadmap*<sup>206</sup> — which footnoted the IPCC’s recommended 25 to 40 per cent target — may indicate that it is prepared to adopt a goal matching Garnaut’s recommendation, or higher, but its present refusal to embrace a sufficient target for 2050 calls this into question.

## 2 *Mandatory Targets*

In addition to setting scientifically appropriate targets, these surely must be mandatory to be of any value. At present, Australia’s *Kyoto* target is binding under international law; however, its domestic goal for 2050 is merely aspirational. Given the imperative of preventing dangerous climate change, there is a strong case for setting legally binding targets. The UK Government has taken this approach, recently introducing the *Climate Change Bill 2007* into the House of Lords which contains mandatory CO<sub>2</sub> emission reduction targets of 26–32 per cent by 2020 and 60 per cent by 2050 (on 1990 levels).<sup>207</sup> The Bill makes it the ‘duty’ of the Secretary of State to ‘ensure’ that the 2050 target is met<sup>208</sup> as well as to set and to ensure compliance with five-yearly ‘carbon budgets’.<sup>209</sup> An amendment to the Bill will also be made to impose a statutory duty on government to annually review the 60 per cent target, to assess whether its level remains scientifically appropriate.<sup>210</sup> It should be noted that it is doubtful whether the Bill’s ‘duty’ on government to meet specific targets is actually enforceable by the courts in its current form. It is important, therefore, that any

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<sup>202</sup> Australian Associated Press, above n 62.

<sup>203</sup> Department of Climate Change, *Australian Government Action on Climate Change*, above n 58.

<sup>204</sup> Gupta et al, above n 3, 776.

<sup>205</sup> Garnaut, above n 191, 277.

<sup>206</sup> See *Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007*, UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008).

<sup>207</sup> *Climate Change Bill 2007–08* (UK) ss 1(1), 5(1)(a).

<sup>208</sup> *Climate Change Bill 2007–08* (UK) s 1(1).

<sup>209</sup> *Climate Change Bill 2007–08* (UK) ss 4(1)(a), 4(1)(b).

<sup>210</sup> Department for Environment Food and Rural Affairs, UK Government, ‘Benn Announces Statutory Review of 2050 Climate Targets’ (Press Release, 18 February 2008).

equivalent emissions reduction target legislation in Australia contains an appropriate compliance mechanism.<sup>211</sup>

It is not clear to what extent Australia's obligations under the *ICCPR* are impacted by its involvement in international negotiations to develop a post-*Kyoto* agreement, which would, if adopted, bind Australia to future emissions reduction targets under international law. Obviously, Australia cannot act alone to prevent dangerous climate change, and making substantial emission cuts without other states doing likewise could have large economic ramifications.<sup>212</sup> As such, the Federal Government could mount a reasonable argument that the appropriate forum for establishing Australia's emissions reduction responsibilities is the *UNFCCC* (Kyoto) Conference of Parties, not the HRC. However, Australia's obligations under the *ICCPR* clearly operate immediately and cannot be suspended on the hypothetical situation that it may adopt mandatory international targets at some point in future. Therefore, until Australia adopts appropriate mandatory medium and long-term targets, either under domestic or international law, it is arguable that Australia's *ICCPR* obligations are not being discharged.

### 3 Domestic Policy for Achieving Targets

Patently, domestic policy must be implemented that is capable of setting Australia on a path to meet its emissions reduction targets. In this regard, the Rudd Government seems likely to deliver a superior emissions abatement program to that witnessed under the Howard Government, and one which is broadly consistent with the recommendations of the *Stern Review*.<sup>213</sup> Already, Australia's 2020 emissions are projected to drop from 127 per cent of 1990 levels (the estimated consequence of Howard Government policy) to 120 per cent, because of new Labor measures such as the 20 per cent RET.<sup>214</sup> This figure should drop much further once the likely impact of the Carbon Pollution Reduction Scheme — the centrepiece of Labor's emissions reduction strategy — is calculated. However, this emissions trading scheme is still in its design phase.<sup>215</sup> Further policy detail must be seen before it can be properly gauged whether this and other policies will be designed and implemented robustly enough to be capable of achieving Australia's targets.

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<sup>211</sup> The Joint Committee on the Draft UK Climate Change Bill recommended that a detailed compliance mechanism be included to strengthen the Bill. The Committee's suggestion, based on the *Kyoto Protocol* Compliance Procedure, was that failure by the Government to meet its five-yearly carbon budget, or an annual emissions milestone, should trigger a duty to prepare a report explaining the reasons for the non-compliance and an action plan to remedy the situation (including identifying policy changes, legislative proposals and the resources needed to implement it). Furthermore, if a carbon budget were exceeded, the excess emissions would be deducted from the carbon budget for the subsequent period: Joint Committee on the Draft Climate Change Bill, Parliament of the UK, *Draft Climate Change Bill* (2007) [104]–[117].

<sup>212</sup> Garnaut, above n 191, 278.

<sup>213</sup> See *Stern Review*, above n 46, xviii–xxii.

<sup>214</sup> Department of Climate Change, *Tracking to the Kyoto Target 2007*, above n 64, 1.

<sup>215</sup> See Department of Climate Change, *Carbon Pollution Reduction Scheme*, above n 59.

#### 4 *What Would Be an Appropriate Remedy?*

Article 2(3) of the *ICCPR* obliges States Parties to provide individuals whose rights have been infringed with an ‘effective’ remedy. In the circumstances, these would at minimum include that Australia:

- immediately adopt mandatory, scientifically-based, medium and long-term emissions reduction targets;
- implement appropriate legislative and policy measures capable of achieving these targets;
- co-operate with other nations to negotiate and implement a strong post-*Kyoto* agreement; and
- adopt and implement a plan to help protect Islanders’ rights threatened by climate change and to assist Islander communities adapt to its unavoidable impacts.

#### D *Exhaustion of Domestic Remedies, Causation and Standing*

##### 1 *Exhaustion of Domestic Remedies*

Many complaints to the HRC fail on procedural grounds because the applicant has not exhausted ‘all available domestic remedies’ under arts 2 and 5(2)(b) of the *ICCPR Optional Protocol*. Applicants need only pursue domestic remedies which offer a ‘reasonable prospect of redress’.<sup>216</sup> As previously indicated, effective domestic remedies do not appear readily available to Torres Strait Islanders.

##### 2 *Causation*

The issue of causation would possibly present the most difficult legal hurdle for a Torres Strait Islander communication to overcome. It is not clear how the HRC would approach the issue as it has not outlined a test of causation for use in communications under the *ICCPR Optional Protocol*. This is not surprising as generally human rights cases do not present difficult causation issues. The HRC may therefore wish to draw upon other areas of jurisprudence, particularly ‘toxic torts’ litigation, in which complex causation scenarios are often resolved.<sup>217</sup>

There are three major causal relationships a Torres Strait Islander communication would need to address. First, anthropogenic GHG emissions must be shown to be responsible for global warming. Given that the *IPCC Fourth Assessment Report* states that this is ‘very likely’ — a probability of more than 90 per cent<sup>218</sup> — this element should not present difficulties. A second, more complicated aspect is attributing the specific impacts of climate change alleged to violate Islanders’ *ICCPR* rights to anthropogenic GHGs. For instance, whilst Green has stated in the media that it is ‘likely’ that climate change played

<sup>216</sup> *Patiño v Panama*, HRC, Communication No 437/1990, UN Doc CCPR/C/52/D/437/1990 (21 October 1994) [5.2].

<sup>217</sup> For a general analysis of the causation issue in climate change suits see Smith and Shearman, above n 75, 107–43.

<sup>218</sup> IPCC, *Physical Science Basis Summary*, above n 17, 10.

a part in the severe storm events of 2005–06 in the Strait,<sup>219</sup> it could alternatively be suggested that these were merely natural events. The HRC would also need to be persuaded by the evidence that rising GHG emissions are likely to cause the physical impacts in the Torres Strait outlined in this article — such as increased sea levels and severe storms — and as a result, the violations of the Covenant alleged. In both cases, it would be helpful if more scientific studies on the present and likely future impacts of climate change in the Strait were conducted.

The third, and most difficult, causal relationship concerns whether harm to Islanders' ICCPR rights can be attributed to the acts or omissions of the Australian Government. If Australia is to be held responsible for a violation of the Covenant, the HRC would need to accept that a state need not be the sole or even primary cause of global warming. Whilst Australia is currently the 16<sup>th</sup> largest and fourth highest per capita contributor to global GHG emissions, overall Australia only accounts for 1.5 per cent of global emissions.<sup>220</sup> Historically, it is estimated that Australia is the 15<sup>th</sup> highest contributor to global CO<sub>2</sub> emissions (emitting 1.1 per cent);<sup>221</sup> although it could only be deemed to have knowledge of the likely consequences of its actions since the late 1980s at the earliest.<sup>222</sup> Clearly, Australia's actions have, and will make, only a relatively small contribution to global warming. This also begs the question of whether the HRC could offer an effective remedy. By contrast, the US, the subject of the *Inuit Petition*, is historically the largest contributor to global CO<sub>2</sub> emissions (29.3 per cent),<sup>223</sup> and is presently responsible for 20.6 per cent of global GHG emissions levels; meaning that its domestic actions can greatly influence global emission levels.<sup>224</sup>

This aspect of causation is not insurmountable however. In *Massachusetts*,<sup>225</sup> the US Supreme Court was required to determine whether or not the federal Environmental Protection Agency ('EPA') possessed the statutory authority to regulate GHG emissions from new motor vehicles under the federal *Clean Air Act of 2004*.<sup>226</sup> The State of Massachusetts complained that rising sea levels associated with global warming had harmed the State of Massachusetts and would continue to do so.<sup>227</sup> The minority of the Court found that:

In light of the *bit-part* domestic new motor vehicle greenhouse gas emissions have played in [global warming] ... and the *myriad additional factors* bearing on

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<sup>219</sup> Minchin, 'Going Under', above n 12, 15.

<sup>220</sup> Baumert, Herzog and Pershing, above n 2, 12, 22.

<sup>221</sup> Between 1850 and 2002. Total GHG emission estimates are not available: *ibid* 32.

<sup>222</sup> Global warming first emerged as a policy concern in Australia in the late 1980s. Australia first set targets to reduce Australian emissions in 1990 when the Hawke Government committed both to stabilise 1988-level CO<sub>2</sub> emissions by 2000 and to reduce 1988-level CO<sub>2</sub> emissions by 20 per cent by 2005: see Tim Bonyhady and Peter Christoff, 'Introduction' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 1, 1–2.

<sup>223</sup> Baumert, Herzog and Pershing, above n 2, 32.

<sup>224</sup> *Ibid* 12.

<sup>225</sup> 549 US 497 (2007).

<sup>226</sup> 42 USC §§ 7401–671 (2006).

<sup>227</sup> *Ibid* 519 (Justice Stephens).

the petitioners' alleged injury ... the connection is far too speculative to establish causation.<sup>228</sup>

The majority, however, accepted that US motor vehicle emissions (which account for six per cent of global CO<sub>2</sub> emissions) made a 'meaningful contribution' to global warming and further noted that whilst the EPA could not reverse global warming by prescribing new vehicle emission standards, '[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere'.<sup>229</sup> This points to the type of argument that a Torres Strait Islander communication would need to adopt; namely, that a sufficient causal link exists between Australia's (not insubstantial) emissions and harm to Islanders' *ICCPR* rights, because each tonne of Australian GHG emissions contributes to climate change, notwithstanding the contributions of other states.

### 3 *The Precautionary Principle*

If the HRC is not convinced of the science regarding climate change, arguably the precautionary principle, which finds expression in many international environmental law instruments,<sup>230</sup> should inform its approach. Article 3.3 of the *UNFCCC*, for example, states that:

The Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.<sup>231</sup>

Whilst the HRC has not explicitly relied upon this principle, Kamminga notes that in 'international human rights complaints procedures, the precautionary approach tends to be followed when there is a situation of uncertainty in the face of the threat of serious, irreparable harm'.<sup>232</sup> Dangerous climate change clearly presents a risk of serious or irreversible damage; thus it would be appropriate for the HRC to find that Australia is obliged under the *ICCPR* to take the fullest measures possible to prevent its occurrence, regardless of the uncertainty concerning what its precise impacts might ultimately be.

### 4 *Standing*

To have standing under art 1 of the *ICCPR Optional Protocol* an applicant must be considered a 'victim' of a violation by a state party to the *ICCPR*. This usually requires that the applicant has been directly and concretely affected by the alleged violation.<sup>233</sup> In this regard, an Islander or Islanders affected by the severe storm events of 2005–06 could argue that their Covenant rights have been

<sup>228</sup> Ibid 507 (Chief Justice Roberts) (emphasis added).

<sup>229</sup> Ibid 517–19 (Justice Stephens).

<sup>230</sup> See generally Sands, above n 83, 266–79.

<sup>231</sup> *UNFCCC*, above n 84.

<sup>232</sup> Menno T Kamminga, 'The Precautionary Approach in International Human Rights Law: How It Can Benefit the Environment' in David Freestone and Ellen Hey (eds), *The Precautionary Principle and International Law* (1996) 171, 184.

<sup>233</sup> *Aumeeruddy-Cziffra v Mauritius*, HRC, Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978 (9 April 1984) [9.2] ('*Aumeeruddy-Cziffra*').

directly affected. The HRC will also consider potential violations of the Covenant so long as the threat of harm is not too remote. Essentially, a potential breach of a victim's rights must constitute 'more than a theoretical possibility';<sup>234</sup> it must be a 'real risk',<sup>235</sup> or a 'foreseeable' consequence of the state's actions.<sup>236</sup> The evidence on the risk climate change presents to Islanders' rights appears sufficient to satisfy either of these tests. Of course, in relation to either present or future violations alleged, the HRC would need to accept that the applicant was causally a 'victim' of Australia's acts or omissions.

Where potential violations of the Covenant are alleged, the HRC further requires that the threatened breach is 'imminent'.<sup>237</sup> In *ARS v Canada*,<sup>238</sup> the HRC dismissed the communication because the threatened violation of the applicant's rights would not occur for 10 to 11 months, and a number of variables meant that whether or not the alleged violation would transpire was highly uncertain.<sup>239</sup> The requirement of imminence also clearly presents a major hurdle for a Torres Strait Islander communication. Many speculated harms to Islanders' rights may not occur for decades — even until later this century. However, according to the IPCC, unless drastic GHG emission reductions begin immediately — with emissions levels peaking in 2015 — dangerous climate change may become unavoidable.<sup>240</sup> Therefore, because of the strong risk of serious and irreparable damage occurring to Islanders' rights, a compelling argument exists that the requirement of imminence could be waived in this instance.

#### E Comparison with the Inuit Petition

The IACHR's pending determination on the *Inuit Petition* may shed some light on the likely viability of a future Torres Strait Islander communication. One would be less confident about a Torres Strait Islander complaint prevailing if the *Inuit Petition* is rejected as, for several reasons, the Inuit case appears to have the stronger claim: the *Inuit Petition* cites considerable evidence of present harm (whereas Islanders would largely rely upon speculative evidence concerning the potential impacts of climate change); the HRC has a less developed body of jurisprudence linking human rights to environmental harm than the IACHR; fewer human rights implicated by climate change are contained in the *ICCPR* than in the *American Declaration*; and the subject of the *Inuit Petition* — the US — is a far greater cause of climate change than Australia and currently has less progressive policies on climate change (as evidenced, for example, by its continued refusal to ratify the *Kyoto Protocol*).

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<sup>234</sup> *Ibid.*

<sup>235</sup> *Kindler v Canada*, HRC, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991 (18 November 1993) [10.2].

<sup>236</sup> *Ibid* [6.2].

<sup>237</sup> *Bordes*, above n 113, [5.5].

<sup>238</sup> Communication No 91/1981, UN Doc CCPR/C/14/D/91/1981 (28 October 1981).

<sup>239</sup> *Ibid* [5.2].

<sup>240</sup> IPCC, *Mitigation of Climate Change Summary*, above n 20, 23.



## VII CONCLUSION

As the 16<sup>th</sup> largest and fourth highest per capita GHG emitter, Australia has as much moral responsibility as any other nation to reduce its emissions as part of the global effort to avert dangerous climate change. Until the federal government fully accepts this responsibility, litigation may be needed to exert pressure on it to do so. Whilst the Rudd Government appears more strongly committed to cutting Australian GHG emissions than its predecessor, its present mitigation program is undoubtedly inadequate. Until the Federal Government adopts legally binding and scientifically appropriate 2020 and 2050 emissions reduction targets, as well as programs demonstrably capable of achieving those targets, arguably its obligations to Torres Strait Islanders under the *ICCPR* are not being met. Of course Labor deserves more time to develop an effective emissions reduction program, given its limited time in office, but the option of human rights litigation may be worth pursuing if it fails to deliver.

Whilst the submission of a complaint by Torres Strait Islanders to the HRC would certainly involve the testing of new legal waters, this article has demonstrated that the concept has strong legal merit. If the Rudd Government fails to act responsibly on climate change, a human rights complaint could provide the legal, political and moral pressure needed to ensure that it does so. It is submitted, therefore, that Islanders may wish to consider undertaking this type of action. Having said this, the limitations of a human rights action must of course be acknowledged.

First, it is uncertain how the HRC would likely determine the case, particularly because of the complex issues of causation and standing involved. Second, the views of the HRC are unenforceable and thus it is unknown to what extent its decision would ultimately influence Australian Government policy. As noted by Charlesworth et al, the previous federal government regularly ignored the adverse findings of the HRC and other international human rights bodies during its term in office; a fact which did not appear to distress the general Australian public.<sup>241</sup> Arguably, however, the strong concern the Australian community now has about climate change suggests that the views of the HRC could not be readily dismissed in this instance (at least without some political cost). Indeed, regardless of whether a complaint to the HRC would actually succeed, it could generate substantial political value for those wishing to leverage pressure on government to adopt and enforce appropriate GHG emissions law and policy.

A third limitation of a human rights complaint concerns the nature of the climate change problem. Only an ambitious, sustained and cooperative effort from the entire international community can avert dangerous climate change. Faced with such an immense task, it may be questioned whether a human rights complaint against only the Australian Government has much to contribute. Whilst this is a valid concern, it must be remembered that Australia and other industrialised nations — who are primarily responsible for historic GHG emissions — have the leading role to play in climate change mitigation. Unless this occurs, developing nations such as China and India, who are now major

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<sup>241</sup> Hilary Charlesworth et al, *No Country Is an Island* (2006) 59–60, 83–5.

GHG emitters, are unlikely to also contain their emissions growth,<sup>242</sup> in which case dangerous climate change could not be avoided. Given the catastrophic consequences that would likely ensue for Torres Strait Islanders and humanity generally every strategy capable of pressuring Australia to be one of the much-needed global leaders on climate change deserves proper consideration.

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<sup>242</sup> Note that China is now estimated to be the largest emitter of CO<sub>2</sub>, whilst India is the fifth: Netherlands Environmental Assessment Agency ('NEAA'), *China Now No 1 in CO<sub>2</sub> Emissions; USA in Second Position* (NEAA Dossiers, 19 June 2007) <<http://www.mnp.nl/en/dossiers/Climatechange/moreinfo/Chinanowno1inCO2emissionsUSAinsecondposition.html>> at 23 September 2008; Anita Chang, 'China Says Developed Countries Should Take Lead in Fighting Climate Change', *International Herald Tribune* (Paris, France) 12 March 2008, 19.