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# Oil, Gas & Energy Law Intelligence

## Climate Change, Law, and Criminology by J.L. Southalan

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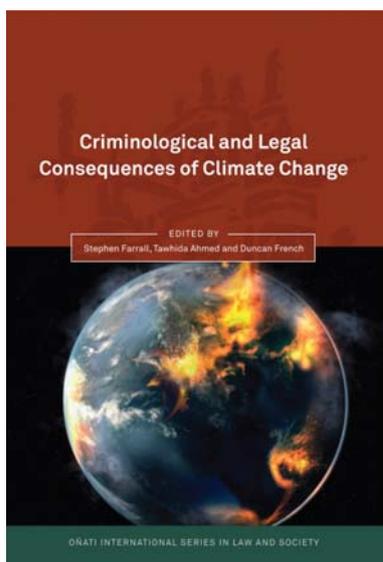
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# Climate change, law, and criminology

John Southalan<sup>1</sup>



*Criminological and Legal Consequences of Climate Change*

Editors: Stephen Farrall, Tawhida Ahmed, Duncan French

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The book *Criminological and legal consequences of climate change*<sup>2</sup> is a collection of papers from a seminar, and so reading this review may be like asking someone about a conference they attended. Their summary will inevitably be patchy, focussing on some areas while ignoring others: commending highlights, condemning lowlights, and contributing no light on some areas. The scope of a conference is often learnt by scanning its program topics; the 'program' presented by this book is these fourteen papers:

- Exploring the Legal and Criminological Consequences of Climate Change: An Introduction<sup>3</sup>
- Where Might We Be Headed? Some of the Possible Consequences of Climate Change for the Criminological Research Agenda<sup>4</sup>
- International Legal Responses to the Challenges of a Lower Carbon Future: Energy Law for the Twenty-first Century<sup>5</sup>
- UK Climate Change Litigation: Between Hard and Soft Framing<sup>6</sup>
- Climate Change and Paradoxical Harm<sup>7</sup>
- Corporate Governance and Climate Change<sup>8</sup>
- Climate Change, Environmental (In)Security, Conflict and Crime<sup>9</sup>
- Analysis of Climate Change from a Human Rights Perspective<sup>10</sup>
- Climate Change and Aid Funding: An Appraisal of Recent Developments<sup>11</sup>
- Climate Change: Effects on Mobility of EU Workers and the Need to Safeguard Supplementary (Occupational) Pension Rights<sup>12</sup>
- Defining Pollution Down: Forestry, Climate Change and the Dark Figure of Carbon Emissions<sup>13</sup>
- Personal Carbon Trading: Towards Sustainable Consumption in an Age of Climate Change and Energy Constraints<sup>14</sup>
- State Responsibility for the Adverse Impacts of Climate Change on Individuals: Assessing the Potential for an Interdisciplinary Approach<sup>15</sup>
- Situating Climate Change in (International) Law: A Triptych of Competing Narratives<sup>16</sup>

The collection is well edited by Professors Stephen Farrall<sup>17</sup> and Duncan French,<sup>18</sup> and Dr Tawhida Ahmed.<sup>19</sup> They explain that the seminar and this book (1) examine climate change's consequences (both legal and criminological), (2) seek to identify areas of concern, and (3) suggest future areas for research.

The collection is usefully book-ended by an introduction from the three editors<sup>20</sup> and a more substantial concluding paper by Ahmed and French.<sup>21</sup> The introduction describes the collection as 'some of the initial forays into this area of research by criminologists and legal scholars'.<sup>22</sup> A metaphor of exploration is apt. Some expeditions are well planned and executed. They produce knowledge and benefits to a wider population. However other explorers acquit themselves poorly – untested assumptions are revealed to be shaky, the way is lost, and little contribution is apparent beyond illuminating what others should not do. It has been observed, in another context, that '...some of the wilder shores of criminology are proving embarrassing in polite scientific company'.<sup>23</sup> I know insufficient about criminology to make any general observations on whether 'climate change criminology' inhabits those 'embarrassing wilder shores', but found papers in this collection to contribute useful analysis and bases for future work and planning.

The book is like most conferences in having a considerable range of material: the practical, the esoteric, the theoretical, the brilliantly incisive, the padded prognostications, and the moments of wishing one had had the benefit of reading some of analysis at an earlier time. The papers are all well referenced, edited and presented, allowing the reader the ability to follow up on any particular issues which could not be covered in detail any particular paper. The concise notes about each author are also useful – informative without tipping into advertising. The book is a professional production, including a fulsome index which will be of considerable use to those wanting to pursue particular issues.

As may be expected from the book's title, *Consequences of climate change*, all papers approach anthropomorphic climate change as a given and instead focus on the need to respond - initially to physical changes but also to longer-term societal changes. Such an approach is obviously required for any meaningful planning and preparation for climate change effects (rather than simply waiting for those effects to occur and leaving it to the government of the day or the political cycle to respond in small, band-aid, ways). This mindset - that climate change is occurring and we should plan for how best to respond - may not be universally shared but the book's opening line ensures no reader is misled as to the subsequent content: 'It is now beyond any reasonable argument that the consequences of climate change are both inevitable and likely to be considerable'.<sup>24</sup> For readers with any doubts about that statement, the forum for that discussion is not in this book.

While the book's acceptance of the certainty of climate change is understandable, even appropriate,<sup>25</sup> the implications that some authors drew from this left me nonplussed. Credible points and analysis were undercut by attempts to bolster arguments with tenuous claims. The perennial issue of 'weather' and 'climate' is a case in point. Professor Mark Halsey's paper explains the 'critically important distinction between "climate variability" (measured in years) as against "climate change" (measured across centuries). Climate change... [i]s a longer term trend superimposed on natural decade to decade variability'.<sup>26</sup> This is an important distinction, but one that some other authors seemed to blur in their eagerness to support their arguments. For instance Farrall writes:

Although it would be a gross over-simplification to attribute the war in the Darfur region of Sudan to climate change alone (since other factors were at operation too), the droughts of the 1980-1984 seasons certainly played their part in this tragedy.<sup>27</sup>

Harsh climatic conditions can contribute to civil tension; but haven't humans also been able to adapt social and physical institutions to live harmoniously in areas with extreme climate eg. Scandinavia, Dubai, Siberia, Peru's southern coast, Iceland, Addis Ababa, Antarctic bases? This suggests to me that economic development and distribution, and politics, are more significant than

climate in determining contemporary societal harmony. Climate change is having serious impacts including loss of life,<sup>28</sup> and many of these are outlined in the book, but linking climate change to genocide<sup>29</sup> is overstating the case. Farrall is not alone in his assessment,<sup>30</sup> but I suspect that societal and institutional engagement with climate change (and the need to address it) will come from stronger and clearer examples rather than suggesting that issues with a complex calculus of causes are due to climate change.

Many papers contain useful facts and research across a wide range of areas, including the following examples. Halsey reports that the decrease in forest biomass from 2005 to 2010 is a loss of the ability to sequester 4% of annual carbon emissions.<sup>31</sup> Farrall collates and summarises some of the recent analysis of likely physical impacts of climate change.<sup>32</sup> Professor Chris Hilson's paper has detailed notes on many British court proceedings in relation to climate change issues (e.g. contesting airport expansions, fuel policy, incinerators, government investment).<sup>33</sup> Dr La Chimia flags the stark difference between rhetoric and action in this area, noting 'The world's richest countries have together pledged nearly \$18 bn in the last seven years however despite these commitments less than \$0.9 billion has been dispersed'.<sup>34</sup>

The role of human rights is emphasised in various papers.<sup>35</sup> The argument is perhaps best summarised by Ahmed & French:

[H]uman rights ... [w]ill provide the necessary structure to ensure that climate change is tackled not by means of expediency but also in accordance with certain fundamental precepts of international law and community. The very foundation of human rights is the claim that rights protection is a duty first and foremost on national governments.<sup>36</sup>

Human rights does have a role to play, and Dr Tom Obokata's paper<sup>37</sup> explains this well (more on that below), but at times I think some of these authors expect too much of 'human rights'. Human rights provide important standards and tools which can help in improving people's lives. However human rights should not be 'white knights' ascribed an unrealistic or starry-eyed expectation. To do so can divert attention from other significant dynamics which need to be addressed and cannot be improved by human rights alone. Useful guidance on human rights was expounded in 2006 by Professor Marie-Bénédicte Dembour<sup>38</sup> who explained there are significantly different concepts of what is meant by 'human rights'. She characterised three approaches or 'schools'.<sup>39</sup>

- the 'Natural school', which is the most prevalent, understands human rights 'as minimal entitlements originating from Nature, God, Reason, Humanity';<sup>40</sup>
- the 'Deliberative school' approaches human rights 'as procedural...political or legal principles which have been agreed upon';<sup>41</sup> and
- the 'Protest school' sees human rights as 'a language of protest'<sup>42</sup> - never fulfilled and part of a never-ending struggle to improve people's situation.<sup>43</sup>

Dembour explained that identifying how we conceive and use 'human rights' helps in explicitly recognising that we are not always discussing the same thing. I lean to the 'Deliberative' school, that 'human rights' provides no more, nor less, than the laws and mechanisms agreed by nation states. Perhaps that can be best summarised by the phrase 'human rights law'. This does not reject other understandings of human rights – but it illuminates that some other approaches may be using the phrase 'human rights' interchangeably with 'justice', 'fairness' or 'humanity'. These other concepts are important to examine in relation to climate change, but that discussion is best furthered with more than just law – with philosophy, political science, history, anthropology, economics, international relations, sociology and other disciplines. The problem arises if this latter

approach to 'human rights' (read 'fairness') is expected to be delivered by human rights law alone. And, if discussion is actually about issues of 'fairness' then that requires far more 'unpacking' because the end results of 'fairness' in addressing climate change can be extremely different depending on the starting assumptions and framework. This was well demonstrated in the following table developed in 2002 by Lasse Ringius and others<sup>44</sup>

**Selected fairness principles and related burden sharing rules  
invoked in international climate negotiations.**

<i>Fairness principle</i>	<i>Interpretation</i>	<i>Example of implied burden sharing rule</i>
Egalitarian	Every individual has an equal right to pollute or to be protected from pollution	Allow or reduce emissions in proportion to population
Sovereignty	All nations have an equal right to pollute or to be protected from pollution; current level of emissions constitutes a status quo right	Allow or reduce emissions proportionally across all countries to maintain relative emission levels between them
Horizontal	Countries with similar economic circumstances have similar emission rights and burden sharing responsibilities	Equalize net welfare change across countries (net cost of abatement as a proportion of GDP is equal for each country)
Vertical	The greater the ability to pay, the greater the economic burden	Net cost of abatement is directly correlated with per capita GDP
Polluter pays	The economic burden is proportional to emissions (eventually including historical emissions)	Share abatement costs across countries in proportion to emission levels

Regardless of how one understands or uses human rights, Obokata's paper *Analysis of Climate Change from a Human Rights Perspective* is an excellent article.<sup>45</sup> For me this is the standout piece in this collection, with its succinct explanations of the relevant human rights principles and jurisprudence. Obokata describes the *UN Framework Convention on Climate Change* as not engaging with sustainable development and, as a result, not addressing the social aspects of climate change. This is where Obokata sees international human rights law as having an important role to 'ameliorate... [t]his shortfall... [a]s it recognises these and other wider issues relating to climate change... International human rights law can usefully supplement International environmental Law to address climate change'.<sup>46</sup> Obokata's paper usefully summarises the relevant rights, explaining the relevant standards and jurisprudence in relation to each (including rights to health, standard of living, privacy, family life, participation in public affairs, life, property, culture). He also examines the human rights issues in relation to coal, waste management, and public authority decision-making. Obokata's article covers considerable regional human rights jurisprudence – from the Americas, Europe and Africa – which is often overlooked by commentary focussing only on the global human rights standards. The width of Obokata's analysis is complemented by his practical and nuanced summaries of what broader principles may exist. For example, in relation to environmental rights, Obokata advises:

Sufficient jurisprudence has not been developed to make a firm conclusion on the position of this right [to environment] in international human rights law<sup>47</sup>...[but] some important points have emerged in the [African Commission on Human and Peoples' Rights decision in the] *Ogoniland* case...[including]:

- a link between a clean and safe environment and the quality of life and safety of individuals...;
- States must take reasonable measures to prevent pollution and ecological degradation ...[and] to secure ecologically sustainable development and use of natural resources...;

- States are under [an] obligation to permit independent scientific monitoring of threatened environments and publicise environmental and social impact studies prior to any major industrial development.<sup>48</sup>

Obokata does not, however, restrict himself to just black-letter reporting on the law. His paper engages with some of the vexing and developing issues in human rights and climate change, such as: extraterritoriality,<sup>49</sup> 'causation' links between any specific event and longer-term change, the precautionary principle, and the existence of obligations on richer nations to help others in need.

Various papers make astute observations about the complex and difficult political factors that exist, both domestically and internationally, if there is to be any movement on how humanity responds to climate change. Some may consider these factors as political 'realities' to be resignedly accepted—the authors in this collection perceived them more as barriers or obstacles. I am inclined to agree. Professor Catherine Redgwell's paper provides a useful summary of current law on climate change and energy, observing:

What is distinctly absent from [the] international landscape is a global organisation of general scope with open membership exclusively concerned with energy activities; there is no "world energy organisation" nor is there the political appetite amongst states to create an energy entity and analogous to, say, the WTO.<sup>50</sup>

Redgwell looks at the law and politics and astutely notes 'the clear reluctance of states to place responses within a wider framework of commitment to a particular energy mix and to constrain national energy choice... [W]hat International energy law lacks in the 21st century is not the necessary legal tools but in fact a grand narrative'.<sup>51</sup>

The significant domestic political implications are also apparent from various papers. Halsey describes 'Carbon sinks – and particularly forests –... as one major way to mitigate the effects of climate change'.<sup>52</sup> If that is correct, and we also accept Halsey's explanation that climate change is a centuries-long process, then presumably carbon sinks need to be planned and protected for centuries. That suggests nations will need to find cross-party political support and community acceptance of the longevity required. It is difficult to envisage the type of legal structures which might contribute these kinds of long-term arrangements. There are few existing examples to call on: many national constitutions, with their inbuilt but important ability to be amended, are not necessarily the answer. Perhaps ideas of legislative entrenchment, which has been used for things like national parks and massive infrastructure projects,<sup>53</sup> may have some useful structures to consider. I would have appreciated more engagement with these issues in the book – but also understand that maybe we need a stepped approach, of first reaching general acceptance of the kinds of things needed before searching for the legal framework which may assist with that.

Immediately apparent, in considering any longer term 'entrenchments' or legal structures is how they would relate to the notion of democracy and the polity of the day deciding its own priorities and governance (as opposed to having these fixed by another generation's decisions). For climate change, and other long-term issues, public education and awareness is critical. Democracy can engage with issues beyond the next election, provided the electorate sees the relevance of doing so. So the question then arises of how to engage the individual voter in issues of climate change. Dr Peter Doran's paper<sup>54</sup> engages with this, and broader dilemmas of democracy. Doran observes that 'consumption and individual freedom are written into the fabric of democratic experience' and the potential disjuncture between this and international climate change agreements 'with their far-reaching implications for the design of our economies and the basis upon which access to

environmental and atmospheric resources are shared<sup>55</sup> both *inter-generationally* and *intra-generationally*. Doran examines regulatory forms which would enable the ramifications of consumption to be brought more directly to the individual.<sup>56</sup> This approach fits with other literature which acknowledges that implementing and fulfilling principles of climate change and human rights obviously involves nations but should not absolve individuals from responsibility. Focussing on nations' positions and obligations is 'acceptable *only if it is supplemented* with much more talk of the obligations of affluent individuals, and critiques of their consumption choices'.<sup>57</sup> Individual obligations can be mediated through states' regulation, taxes and infrastructure,<sup>58</sup> and Doran's paper on Personal Carbon Trading is a useful outline of potential developments in that regard.

I found some of the analysis in the collection too speculative to see how it might contribute to planning for climate change, or even guide future research. The following are examples of what struck me as unusual for an academic paper.

[A]s food becomes scarce so there may first be price hikes (leading perhaps to localised riots about food prices...and then larger scale shortages. Such episodes may lead people to turn to illegal markets or basic foodstuffs... [A]ll this remains in the realms of speculation of course<sup>59</sup>

As climatic shifts alter local temperatures, so human behaviour will change, with people spending (perhaps) longer away from their home (increased risk of burglary?) Or (perhaps) more time at home (increased risk of domestic violence?). Field found that "good weather" (ie a lack of rain and the presence of sunshine) was associated with increases in sexual offences, but decreases in non-residential burglary and shop theft.<sup>60</sup>

This kind of analysis made me ponder the role of criminology as a tool for future prediction. Criminology is an important discipline with its assistance to those involved in the justice system, and also broader society, to understand crime and society's responses to it.<sup>61</sup> But perhaps criminology is a discipline more able to look backwards and at the present, rather than as a tool for engaging with future issues. Can a discipline which examines the relation between the individual and her/his society in understanding crime and behaviour be directly applied in predicting and planning the future? Nothing in this book explained how criminological concepts are appropriately used in such an exercise. There are obvious difficulties in applying contemporary moral frameworks and approaches to future populations. Entitlements and obligations within any group or community are usually founded on mutual social or 'contractual' arrangements. That framework has difficulty with future communities because there can be no reciprocation of benefits.<sup>62</sup>

Equally perplexing for me was the application of criminology to international issues, where the notion of 'society' (if it exists at all<sup>63</sup>) is far more diverse. Notions of state crime or global developments receive comparatively little attention in criminology<sup>64</sup> – largely because much of criminology understands 'crime' as whatever the state identifies it as.<sup>65</sup> These issues were nagging at me when reading Dr Matthew Hall's discussion of agency and society and implications of these notions at an international level.<sup>66</sup> Concepts of justice and equity used in considering resource use and distribution *within* a state are not necessarily accepted when considering these issues *between* states.<sup>67</sup> Again, I would have been assisted by some preliminary discussion or reference to literature on how issues like the social contract, agency, victimology and others can be meaningfully applied at the international level.

Perhaps both these concerns (criminology for 'future' prediction, and for international society) are easily assuaged and are dealt with elsewhere. My concerns about the application of criminology

here may be a matter of 'jumping at shadows'. But if that is the case, the relevant literature could have been included in the various papers where these issues arose. It is easy to find warnings in other criminological writings of the dangers of applying observations and data from one society/nation to a different one<sup>68</sup> but I have been less able to find material about how to apply criminological analysis and findings from a domestic (ie. sub-national) level to the international level.<sup>69</sup> Had some of these preliminary notions been addressed, it may have allowed the audience to remain focused on the author's point rather than being distracted about the fundamental validity of the exercise.

Some of my difficulty in comprehending the criminology is likely due to the cross-disciplinary nature of various papers. Interdisciplinary work is hard, forcing the practitioner to generalise in explaining and applying principles from different fields, thereby leaving the resultant analysis open to specialists in the separate fields to pick at the generalisations and cast doubt on the findings. Of course there is a 'downside in disciplines'<sup>70</sup> – disciplines which assist in segmenting and imparting knowledge, can also contribute to oversights or omissions where a phenomenon crosses disciplinary boundaries. And climate change is a quintessential 'boundary crosser'. Ahmed and French note the dilemma arising from climate change, and other contemporary international issues, blurring the distinction between "international" and "domestic" – 'which for the international lawyer is not necessarily either the normal or the most comfortable point from which to premise an analysis'.<sup>71</sup> So perhaps it is hard enough for lawyers to process climate change in their own discipline, let alone determine how to interact with other disciplines in this area. All the more reason for writers to reinforce their basic building blocks and assumptions.

Ahmed & French note the propensity in this field to merge analysis and ideals, with the editors noting that 'legal analysis of climate change often strays beyond a doctrinal assessment of the current legal framework to engage with broader questions of idealised purpose and design'.<sup>72</sup> There is no harm in being aspirational. Indeed it is probably incumbent on any analysis which identifies problems to also explain how things could be improved. In effect, to 'aspire' to those improvements. The danger lies in being aspirational without acknowledging that one is. Some of my work is in areas where the law has shortcomings and needs improvement, and so I am well aware of the limitations of an overly legalistic approach. But informing or assisting any moves for reform requires a soberly accurate understanding of the current law, to identify where the reforms are needed and how they can arise. Law reforms will not be found by simply focussing on a desired endpoint and advocating that it somehow already exists as an 'arguable' legal case. The difficulty is that sometimes lawyers do not realise they have strayed from their legal framework and start insisting on things as if they are legally obligatory.<sup>73</sup>

An additional problem of over-stating a case is that the necessary support for a position cannot be demonstrated (in law) or engendered (if political acceptance is required). Determining whether a position is 'over-stated' is always easier in hindsight, but the UN's processes in relation to human rights and companies provide an apposite example. The UN's Sub-Commission on Human Rights adopted the *Norms on Responsibilities of Corporations with Regard to Human Rights* in 2003<sup>74</sup> after a five year drafting process, but these were rejected by the UN Commission on Human Rights.<sup>75</sup> From 2005 the UN then mandated a different approach, which resulted in a more nuanced framework being adopted by the UN Commission<sup>76</sup> and gaining broad governmental and business support.<sup>77</sup> There is particular relevance for all this in relation to Hall's reliance on the draft principles on transboundary harm prepared by the International Law Commission, and the provisions in these about compensating individuals for climate change impacts.<sup>78</sup> Whether those draft principles will found the legal basis for the kinds of rights and approaches Hall advocates

remains to be seen. Hall acknowledges that the principles are only draft, but his approach may overly focus on seeking state responsibility.<sup>79</sup> The business-human rights example suggests that more attention could usefully be directed at developing shared responsibilities between state, business, and individual. This is even more pertinent with climate change, where further complexity arises because so much is consumer driven. It is easy to criticise large oil/coal companies and the national laws which support these, decrying the climate change impacts from their produce; just as it is easy to overlook that few consumers are actually changing their consumption practices which use those products.<sup>80</sup> For me, this suggests that more immediate legal attention should be given to finding ways to bring ramifications to the individual, rather than focusing only on legal responsibilities of states.<sup>81</sup>

The concerns about, and response to, climate change have produced considerable writing and philosophy about how we might approach inequalities in resource ownership and use.<sup>82</sup> Some of this thinking can be useful *before* diving into the detail of identifying problems and solutions. The paper by Dr Konstantina Kalogeropoulou<sup>83</sup> is a case in point. Kalogeropoulou's article criticises the lack of protection of workers' pension entitlements when the workers move from one country in the European Union to another:

EU workers may have to move... In order to take up new employment, either because of loss of previous employment or due to better and more appealing job prospects... In this context, the protection of social security rights of migrant workers is necessary to enable them to move between Member States, without diminishing their level of social protection.<sup>84</sup>

I struggled to follow the argument as I was stuck at an initial point on the relationship between the pension standards that Kalogeropoulou requires protected and climate change. Focussing solely on your own nation's or region's activities and obligations can ignore the impact of these on populations in other countries or in the future.<sup>85</sup> Kalogeropoulou, and some other papers in the collection, refer to sustainable development as supporting their analysis. Sustainable development is best known by the Brundtland Report catchphrase: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>86</sup> However the Brundtland Report contains far more fundamental demands:

Many present efforts to guard and maintain human progress, to meet human needs, and to realize human ambitions are simply unsustainable - in both the rich and poor nations. ...They may show profits on the balance sheets of our generation, but our children will inherit the losses. ...We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.<sup>87</sup>

A preliminary issue which Kalogeropoulou could have usefully addressed is whether and how the resources needed for accrued pension rights are realisable consistent with climate change. Discussion of limits and rights can potentially lead to a more unequal world if people in advantage refuse to change or consider any measure which will prejudice their privileged position.<sup>88</sup> Obviously every nation or region has domestic obligations, but these ought not be determined separately from global considerations in two important respects. First, it seems difficult (if not impossible) to determine national duties without reference to international context.<sup>89</sup> Second, we should ensure that any measures introduced to address inequality within a region do not leave those outside that region (either geographically or temporally) worse off.<sup>90</sup>

The book finishes with a paper by Ahmed and French,<sup>91</sup> providing the metaphorical 'step back' to get a broader perspective on the field and where international law and climate change may be going. But their paper is not a step back in its analysis, and it engages with some useful issues

including the extent to which we are seeing norms or aspirations, and the degree to which climate change law is influencing international law more broadly. Ahmed and French draw some encouragement from what they see, but also have reservations.

This exploration of ideas should, of course, be positively encouraged, and certainly contributes to our understanding of the issue beyond the paradigms of the multilateral climate change regime *stricto sensu*. ... But more critically, one might begin to wonder whether this capacity to seemingly accommodate each and every approach – or to use climate change as a conceptual peg for virtually any argument that one might want to construct – is actually problematic, being indicative not only of the scale and complexity of climate change but perhaps, more worryingly, the continued absence of the meaning for consensus as to how best to respond and adapt thereto. ... [S]uch an approach also tells us something about the fundamental conceptual ambivalence at the heart of the climate change debate? And on climate change, is that something we can afford?<sup>92</sup>

*Criminological and Legal Consequences of Climate Change* is a useful book, with its various papers bound to guide future research and analysis for some time to come.

## ENDNOTES

- 1 In House Counsel (Yamatji Marlpa Aboriginal Corporation), Global Faculty (Centre for Energy, Petroleum and Mineral Law and Policy), Committee Member (Australian Lawyers for Human Rights), Board Member (Centre for Native Title Anthropology), Honorary Fellow (University of Western Australia). This article does not represent the views of any organisations for which the author works or is associated.
- 2 S Farrall, T Ahmed, D French (eds.) *Criminological and Legal Consequences of Climate Change* (2012, Hart Publishing). For the remainder of these references, where no other bibliographic detail is given, it is a paper or page from this book.
- 3 Stephen Farrall, Tawhida Ahmed & Duncan French, 1-5.
- 4 Stephen Farrall, 7-26.
- 5 Catherine Redgwell, 27-46.
- 6 Chris Hilson, 47-62.
- 7 Rob White, 63-78.
- 8 Sally Wheeler, 79-98.
- 9 Nigel South, 97-112.
- 10 Tom Obokata, 113-132.
- 11 Anna La Chimia, 133-150.
- 12 Konstantina Kalogeropoulou, 151-168.
- 13 Mark Halsey, 169-192.
- 14 Peter Doran, 193-214.
- 15 Matthew Hall, 215-240.
- 16 Tawhida Ahmed & Duncan French, 241-264.
- 17 Professor of Criminology, University of Sheffield.
- 18 Professor of International Law, University of Lincoln.
- 19 Lecturer in Law, University of Reading.
- 20 Farrall, Ahmed & French, *Exploring the Legal and Criminological Consequences of Climate Change: An Introduction*, 1-5.
- 21 Ahmed & French, *Situating Climate Change in (International) Law: A Triptych of Competing Narratives*, 241-263.
- 22 Farrall, Ahmed & French, n20 above, 5.
- 23 K Pease, 'Crime science' (2010) in S Shoham, P Knepper & M Kett (eds.) *International Handbook of Criminology* (CRC Press), 3, 8. Professor Pease's concern was in relation to 'critical criminology' (see pp8-9) and he advocates a re-assessment of what criminology should properly involve, as the full quote indicates: 'Any attempt to reorient the study of crime by shifting discipline boundaries is not to be undertaken lightly. It smacks of arrogance. Its justification here has two elements. Some of those well placed to know have begun to express doubts about the usefulness of criminology, and some of the wilder shores of criminology are proving embarrassing in polite scientific company': Pease, 8
- 24 Farrall, Ahmed & French, n20 above, 1.

- 25 Given the preponderance of material which indicates that, eg. N Stern, *The Economics of Climate Change* (2006) Cabinet Office (UK Government), available <[www.hm-treasury.gov.uk/stern\\_review\\_report.htm](http://www.hm-treasury.gov.uk/stern_review_report.htm)> 13 Oct 2009; R Garnaut, *The Garnaut Review 2011* (2010) Australian Government (Cambridge University Press), available <[www.garnautreview.org.au/update-2011/garnaut-review-2011/garnaut-review-2011.pdf](http://www.garnautreview.org.au/update-2011/garnaut-review-2011/garnaut-review-2011.pdf)> 30 Dec 2012; M Staudinger & o'rs, *Impacts of Climate Change on Biodiversity, Ecosystems, and Ecosystem Services: Technical Input to the 2013 National Climate Assessment* (2012) US Department of the Interior (US Geological Survey, National Wildlife Federation, Arizona State University), available <<http://downloads.usgcrp.gov/NCA/Activities/Biodiversity-Ecosystems-and-Ecosystem-Services-Technical-Input.pdf>> 30 Dec 2012; CAN Gov, *Canada's Fourth National Report on Climate Change* (2006) Environment Canada (Government of Canada), available <[www.ec.gc.ca/Publications/26CA8150-B183-441F-95EB-B60F36A487A0%5Ccanadasforthclimatechange.pdf](http://www.ec.gc.ca/Publications/26CA8150-B183-441F-95EB-B60F36A487A0%5Ccanadasforthclimatechange.pdf)> 30 Dec 2012; IPCC, *Climate Change 2007: Synthesis Report* (2007) Intergovernmental Panel on Climate Change, available <[www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf)> 30 Dec 2012.
- 26 Halsey, *Defining Pollution Down: Forestry, Climate Change and the Dark Figure of Carbon Emissions*, 169-192, 172.
- 27 Farrall, *Where Might We Be Headed? Some of the Possible Consequences of Climate Change for the Criminological Research Agenda*, 7-26 at 18.
- 28 eg. see A McMichael & o'rs, 'Global climate change' (2004) in M Ezzati, A Lopez, A Rodgers & C Murray (eds.) *Comparative Quantification of Health Risks: Global and Regional Burden of Diseases Attributable to Selected Major Risk Factors* (World Health Organization), 1543, available <[www.who.int/publications/cra/chapters/volume2/1543-1650.pdf](http://www.who.int/publications/cra/chapters/volume2/1543-1650.pdf)> 17 Oct 2009.
- 29 The Prosecutor of the International Criminal Court has identified the conflict in Darfur as including genocide: ICC, *ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur* (2008) Office of the Prosecutor (International Criminal Court), available <[www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/Pages/a.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/Pages/a.aspx)> 30 Dec 2012.
- 30 eg. J Borger, *Darfur conflict heralds era of wars triggered by climate change, UN report warns* (2007), available <[www.guardian.co.uk/environment/2007/jun/23/sudan.climatechange](http://www.guardian.co.uk/environment/2007/jun/23/sudan.climatechange)> 30 Dec 2012
- 31 Halsey, n26 above, 173.
- 32 Farrall, n27 above, 9-10.
- 33 Hilson, *UK Climate Change Litigation: Between Hard and Soft Framing*, 47-61, at 51-60.
- 34 La Chimia, *Climate Change and Aid Funding: An Appraisal of Recent Developments*, 133-150 at 136.
- 35 eg. Obokata, *Analysis of Climate Change from a Human Rights Perspective*, 113-132 at 117; White, *Corporate Governance and Climate Change*, 79-98 at 74; South, *Climate Change, Environmental (In)Security, Conflict and Crime*, 97-112 at 100; Hall, *State Responsibility for the Adverse Impacts of Climate Change on Individuals: Assessing the Potential for an Interdisciplinary Approach*, 215-240 at 232-233; Ahmed & French, n21 above, 262.
- 36 Ahmed & French, n21 above, 262.
- 37 Obokata n35 above, 113-132.
- 38 M-B Dembour, *Who believes in human rights?: reflections on the European Convention* (2006, Cambridge University Press)
- 39 Dembour actually identifies four schools (see Dembour 2006, 254-255) but the three identified in the text above are sufficient for discussion here.
- 40 Dembour 2006, 11.
- 41 Dembour 2006, 11.
- 42 Dembour 2006, 11
- 43 Dembour 2006, 232.
- 44 Table from L Ringius & o'rs, 'Burden Sharing and Fairness Principles in International Climate Policy' (2002) 22(1) *J International Environmental Agreements: Politics, Law and Economics* 1, available <<http://folk.uio.no/stvau1/Journal%20articles/Burdensharing.pdf>> 22 Aug 2011, p5.
- 45 And this is in a field (human rights and climate change) where there is already much written, eg: M Wewerinke & o'rs, 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' (2011) 10(1) *Chinese J International Law* 141, available <<http://chinesejil.oxfordjournals.org/content/10/1/141.short?rss=1>> 2 Aug 2011; UN, *Report on the relationship between climate change and human rights* (2009) Office of UN High Commissioner for Human Rights (United Nations), available <<http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>> 22 Oct 2009; L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 *J Environmental L* 391; ICHRP, *Climate Change and Human Rights: A Rough Guide* (2008) International Council on Human Rights Policy, available <[www.ichrp.org/files/reports/45/136\\_report.pdf](http://www.ichrp.org/files/reports/45/136_report.pdf)> 15 Jun 2009; S Humphreys & o'rs, *The Human Rights Dimension of Climate Change* (2009) (UN Development Program), available <<http://hrba.vrl3.com/insight/?p=143>> 5 Aug 2009; ACJ, *Human Rights and the Environment* (2007) Advisory Council of Jurists (Asia Pacific Forum of National Human Rights Institutions), available <[www.asiapacificforum.net/acj/references/right-to-environment/downloads/environment/final\\_report\\_recommendations.doc](http://www.asiapacificforum.net/acj/references/right-to-environment/downloads/environment/final_report_recommendations.doc)> 31 Dec 2012.
- 46 Obokata, n35 above, 117.
- 47 He explains the right to environment is not explicitly provided for in international instruments but it is better supported in regional human rights instruments in Europe, Africa and the Americas (the details the relevant law for this): Obokata, n35 above, 125.
- 48 Obokata, n35 above, 125.
- 49 Since Obokata's paper there have been further indications of human rights having extra-territorial obligations on a state. Questions were asked of the German state's response to the actions of a German company in Uganda, with the

- Human Rights Committee indicating that the *International Covenant on Civil and Political Rights* may require more than simply following the 'voluntary' procedures in the OECD's *Guidelines for Multinational Enterprises*. The Committee's decision is UN, *Concluding observations on the sixth periodic report of Germany* (2012b) Human Rights Committee (United Nations), available <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/476/12/PDF/G1247612.pdf?OpenElement>> 3 Jan 2013, para [16]. This was in response to the German State's submissions available at UN, *Replies of Germany to the list of issues* (2012a) Human Rights Committee (United Nations), available <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/465/15/PDF/G1246515.pdf?OpenElement>> 3 Jan 2013, para's [83]-[85].
- 50 Redgwell, *International Legal Responses to the Challenges of a Lower Carbon Future: Energy Law for the Twenty-first Century*, 27-46 at 36. Redgwell notes the relevant laws 'provide... Flexible mechanisms for implementation which stop far short of dictating sovereign energy choices as between, say, call and renewables, or nuclear', 35
- 51 Redgwell, 46.
- 52 Halsey, n26 above, 172.
- 53 eg. see J Southalan, *Mining law and policy: international perspectives* (2012, Federation Press), ch 7 Government Agreements; N Miranda, 'Concession agreements: from private contract to public policy' (2007) 117(3) *Yale LJ* 510, available <<http://yalelawjournal.org/images/pdfs/622.pdf>> 4 Aug 2009.
- 54 Doran, *Personal Carbon Trading: Towards Sustainable Consumption in an Age of Climate Change and Energy Constraints*, 193-214.
- 55 Doran, n54 above, 194.
- 56 'Democracies turn on the question of individual freedom, and never more so than when the sustainable development agenda gets personal, around the challenge of sustainable consumption.... The demands of the sustainable consumption and the implicit critique of consumerism has begun to reopen questions about the State, and the relationship between the State and individual. ... The question of the relationship between consumerism, the role of the consumer – citizen, freedom and the legitimacy of the liberal state will emerge as one of the more critical questions around the States response to climate change and other environmental challenges': Doran, n54 above, 213-214.
- 57 P Harris, 'Climate Change and Global Citizenship' (2008) 30(4) *Law & Policy* 481483; see also P Baer, 'Equity in climate-economy scenarios: the importance of subnational income distribution' (2009) 4(1) *Environmental Research Letters* 18. The existing system of international governance is premised upon not placing obligations on people within state boundaries, but this preoccupation is seen as diverting the attention needed for simultaneous action on states and individuals: P Harris (2008) at 485.
- 58 P Harris (2008) n57 above, 493; F Haines & o'rs, 'The Problem That Is Global Warming: Introduction' (2008) 30(4) *Law & Policy* 385388-389. Dr Ton Bührs has examined various ideas, some of which likely have limited political feasibility, eg. a tax on countries that exceed their environmental space; a tax levied on embodied pollution (ie. products exported and consumed elsewhere, which should have the pollution involved in their production attached to that consumption); and maximum personal income or spending; T Bührs, 'Environmental Space as a Basis for Enhancing the Legitimacy of Global Governance' (2007), paper presented to 'Pathways to Legitimacy? The Future of Global and Regional Governance' (CSGR / GARNET), University of Warwick, available <<http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/conference2007/papers/Buhrs.pdf>> 21 Apr 2009, 17-19.
- 59 Farrall, n27 above, 17-18.
- 60 Farrall, n27 above, 23 – 24. Not only is this speculative, it conflates 'weather' with 'climate'. A study which shows differences in crime in one area across different seasons does not necessarily mean that, in completely different areas and societies, a long-term change in climate will result in the same changes in crime.
- 61 J Treadwell, *Criminology* (2006, Sage Publications Ltd), 5.
- 62 M Golding, 'Limited Obligations to Future Generations' (2005) in L Pojman (ed.) *Environmental ethics: readings in theory and application* (4th ed) (Thomson/Wadsworth), 330, 333.
- 63 There are certainly obligations and relationships which exist beyond a national level (eg. R Jackson, *The global covenant: human conduct in a world of states* (2003, Oxford University Press)) but notions of a 'social contract' between an individual and her/his society surely relate to a society at which that 'contract' will have tangible effect – eg. a nation at most, and quite often something smaller than a nation.
- 64 J Hardie-Bick & o'rs, 'Transnational and Comparative Criminology in a Global Perspective' (2005) in J Sheptycki & A Wardak (eds.) *Transnational and Comparative Criminology* (London), 1, 1.
- 65 R Watts & o'rs, *International criminology: a critical introduction* (2008, Routledge), 208 & 209.
- 66 Hall, n35 above, 221-223.
- 67 eg. S Caney, 'Cosmopolitan Justice, Rights and Global Climate Change Global Ethics' (2006) 19(2) *Canadian J L & Jurisprudence* 255, 257; R Devetak & o'rs, 'Justice unbound? Globalization, states and the transformation of the social bond' (1999) 75(3) *International Affairs* 483, 484. This is broadly a division between *cosmopolitan* approaches ('the idea that the scope of justice is universal and that each individual person shares an equal moral status with each of the others throughout the world') and *statist* approaches ('the view that state sovereignty and shared citizenship are directly relevant to determining [any]...duties of distributive justice'): C Jones, 'Global Ethics Introduction' (2006) 19(2) *Canadian J L & Jurisprudence* 213, 213-214. Those advocating statist approaches essentially argue that: (1) measures to address inequality should only arise where there is a social or institutional relationship between the group across which equality is being sought *and* a lawful coercive authority to address this; and (2) as these relationships and coercive force exist at international level, there is no justifiable reason for international attention to inequality. See, for examples of these arguments: K-C Tan, 'Boundary of Justice and the Justice of Boundaries: Defending Global Egalitarianism' (2006) 19(2) *Canadian J L & Jurisprudence* 319, 321-341; T Nagel, 'The Problem of Global Justice' (2005) 33(2) *Philosophy & Public Affairs* 113, available <<http://philosophy.fas.nyu.edu/docs/IO/1172/globaljustice.pdf>> 19 Oct 2009, 114-117.

- 68 eg. J Vagg, 'Context and Linkage - Reflections on Comparative Research and Internationalism in Criminology' (1993) 33 *British J Criminology* 541, 544-545 & 561; Hardie-Bick & o'rs (2005), n64 above.
- 69 That may be because I don't know where to look, or it may be because criminology is not normally (nor properly) used in such a way without substantial caveats.
- 70 Pease (2010) n23 above, 3-7.
- 71 Ahmed & French, n21 above, 261.
- 72 Ahmed & French, n21 above, 247-248.
- 73 See discussion in J Southalan, 'Authorisation of native title claims - problems with a "Claim Group Representative Body"' (2010) 29(1) *Australian Resources & Energy LJ* 49, available <[www.dundee.ac.uk/cepmlp/staff/jlsouthalan\\_publications.arelj.draft\\_Mar2010.pdf](http://www.dundee.ac.uk/cepmlp/staff/jlsouthalan_publications.arelj.draft_Mar2010.pdf)> 2 Aug 2011 at 59.
- 74 The full names are the UN Sub-Commission on the Promotion and Protection of Human Rights and the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. The text of the Norms is available at UN, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (2003a) Sub-Commission on the Promotion and Protection of Human Rights (United Nations), available <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/Sub.2/2003/12/Rev.2&Lang=E>> 3 Jan 2013. The Sub-Commission's decision approving the Norms is UN, *Responsibilities of transnational corporations and other business enterprises with regard to human rights* (2003b) Sub-Commission on the Promotion and Protection of Human Rights (United Nations), available <[http://ap.ohchr.org/Documents/E/SUBCOM/resolutions/E-CN\\_4-SUB\\_2-RES-2003-16.doc](http://ap.ohchr.org/Documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2003-16.doc)> 3 Jan 2013.
- 75 A useful précis of these developments is provided in S Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9(2) *European Company Law* 101.
- 76 UN, *Human rights and transnational corporations and other business enterprises* (2011) Human Rights Council (United Nations), available <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>> 20 Oct 2011.
- 77 See, eg. J Bonnitca, 'The UN Guiding Principles on Business and Human Rights: The Implications for Enterprises and their Lawyers' (2012) 1 *Business & Human Rights Review* 14, 15-16.
- 78 Hall, n35 above, 220-221 & 237.
- 79 The Principles from the International Law Commission are 'presently only in draft form and are centred on receiving compensation from operators below the state level. There is as yet no established international mechanism for victims of environmental harm to receive compensation from the polluting state.': Hall, n35 above, 221.
- 80 What people demand in relation to sustainable development is frequently different to how they actually act in practice: WBCSD, *Sustainable Consumption Facts and Trends* (2008) World Business Council for Sustainable Development, available <[www.wbcsd.org/DocRoot/19Xwhv7X5V8cDIHbHC3G/WBCSD\\_Sustainable\\_Consumption\\_web.pdf](http://www.wbcsd.org/DocRoot/19Xwhv7X5V8cDIHbHC3G/WBCSD_Sustainable_Consumption_web.pdf)> 30 Jan 2010, 17-18.
- 81 Obviously both levels are needed, as discussed in relation to Doran's paper, see n54-58 above and the related text.
- 82 See generally E van de Haar, 'Classical Liberalism and International Relations' (2009) 25(1) *Policy* 35, available <[www.cis.org.au/Policy/autumn09/vandehaar\\_autumn09.html](http://www.cis.org.au/Policy/autumn09/vandehaar_autumn09.html)> ; L Westra, 'Environmental Risks, Rights, and the Failure of Liberal Democracy: Some Possible Remedies' (1996) in L Pojman (ed.) *Environmental ethics: readings in theory and application* (4th ed) (Thomson/Wadsworth), 624; F Haines & o'rs, 'The Problem That Is Global Warming: Introduction' (2008) 30(4) *Law & Policy* 385; T Mulgan, *Moral Philosophy and The Future* (2008), available <[www.st-andrews.ac.uk/philosophy/events/?eventid=81](http://www.st-andrews.ac.uk/philosophy/events/?eventid=81)> 14 Oct 2009; T Nagel, 'The Problem of Global Justice' (2005) 33(2) *Philosophy & Public Affairs* 113, available <<http://philosophy.fas.nyu.edu/docs/IO/1172/globaljustice.pdf>> 19 Oct 2009; L Pojman, *Environmental ethics: readings in theory and application* (2005, Thomson/Wadsworth); C Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 *American J International L* 276; H Shue, 'Global environment and international inequality' (1999) 75(3) *International Affairs* 531
- 83 K Kalogeropoulou, *Climate Change: Effects on Mobility of EU Workers and the Need to Safeguard Supplementary (Occupational) Pension Rights*, 151-168.
- 84 Kalogeropoulou, 158.
- 85 eg. Harris (2008) n57 above, 491; Caney (2006) n67 above, 257.
- 86 WCED, *Our Common Future* (1987) World Commission on Environment and Development (United Nations), available <[www.un-documents.net/wced-ocf.htm](http://www.un-documents.net/wced-ocf.htm)> 19 Apr 2009, Chapter 2: Towards Sustainable Development, [1].
- 87 WCED (1987), n86 above, Overview [25].
- 88 Bührs (2007) n58 above, 2.
- 89 'Before we can know what it is that citizens owe to each other by virtue of their status as compatriots, we need first to know what it is that they may distribute among themselves, and this cannot be determined independently of what it is that they rightly own, which in turn cannot be determined without reference to what it is that they owe as a matter of justice to non-citizens': Tan (2006) n67 above, 341.
- 90 eg. Tan (2006) n67 above, 324-325.
- 91 Ahmed & French, n21 above.
- 92 Ahmed & French, n21 above, 262 – 263.