

Is the Crisis of Climate Change a Crisis for International Law: Is International Law too Democratic, too Capitalist and too Fearful to Cope with the Crisis of Climate Change?

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Abstract

This article goes beyond the international law of climate change to pose some bigger picture questions regarding the relationship of climate change and international law. First, is that as to whether international law has some responsibility for the climate change crisis through its promotion of a capitalist oil-based global economy. Accepting that this is the case, the article then asks whether international law can extricate itself from that past in order to facilitate changes on the scale and in the time-frame required to avoid worst-case scenarios. International law may be constrained in this regard by its methods of law-making and enforcement and by the political context in which it functions. Although international lawyers are currently exploring the possibility of making international law more democratic, the domestic experience of leading democracies would suggest that this may not help international law meet the climate change challenge. The article concludes by asking whether international law is too capitalist, too democratic, and too fearful to cope with the crisis of climate change.

Introduction

Climate change has come to be regarded as one of the key global challenges of our time. In policy terms, it is no longer thought of as an environmental issue only, but as a challenge with potentially far-reaching implications for virtually all areas of planning, from health care, to transport, to taxation. The root cause of the crisis — the burning of fossil fuels for energy — goes to the very heart of contemporary developed economies and while it is projected that some of those worst affected will be in the poorest countries, every society is likely to be affected to some degree. International law, and in particular the *United Nations Framework Convention on Climate Change* (“UNFCCC”)¹ and the *Kyoto Protocol to*

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1 *United Nations Framework Convention on Climate Change*, concluded 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) (“UNFCCC”).

the *United Nations Framework Convention on Climate Change* ('Kyoto Protocol'),² have been central to attempts to address the crisis at a global level. But, just as the policy implications of climate change extend beyond environmental policy, so climate change poses challenges for international law beyond the design and implementation of mitigation measures. This article poses two fundamental questions for international lawyers regarding climate change: does international law carry any responsibility for the crisis and does international law have adequate mechanisms for effecting far-reaching changes in a relatively short time-span? The article concludes by considering whether international law is too democratic, too capitalist, and too fearful to rise to the challenges ahead.

I. The Crisis of Climate Change

The title of this article is premised on the assumption that it is appropriate to use the language of 'crisis' in referring to climate change. Before considering whether the crisis of climate change constitutes a crisis for international law, it is worth reflecting on whether the problems we are facing in respect of a changing climate do in fact warrant use of the term 'crisis'. Some have suggested that the increasingly dramatic language we are encountering in relation to climate change means that the left and the green movement are simply drawing on the same politics of fear drawn on by the right during fear of crime campaigns and the war on terror. According to Frank Furedi, we are witnessing a

[C]onstant inflation of the danger and problems which people face today, coupled with a lack of belief in humanity having the ability to tackle any difficulties we might come up against [W]hat's different today is not the number of problems we face, nor the scale of the dangers confronting us. It is the fatalistic spirit with which they are approached.³

According to Furedi, the culture of fear has led to a culture of limits. 'We are told that there is no alternative but to ... cut down on the consumption of resources to avert climate change, or that there is no alternative but to reorganize our way of life in order to survive the threat of terrorism'.⁴ Mike Hulme has argued that climate has always carried a precarious and ambiguous meaning for humans and that current climate fears — as with those during the early-modern era — will in the end be dissipated, re-configured or transformed.⁵ According to Hulme, 'an emerging discourse of climate catastrophe reveals more about the struggle for ascendancy between the institutions of science, government, business and civil society than it does about a physical reality waiting to strike'.⁶

2 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, concluded 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005) ('Kyoto Protocol').

3 Frank Furedi, *Politics of Fear: Beyond Left and Right* (2005) at 16.

4 *Id.* at 17.

5 Mike Hulme, 'The Conquering of Climate: Discourses of Fear and their Dissolution' (2008) 174 *The Geographical Journal* 5.

6 *Id.* at 13.

Having recently been chastised for focusing too heavily on ‘crises’ at the expense of developing an international law of the ‘everyday’,⁷ international lawyers sensitive to criticism might reasonably be expected to shy away from alarmism. And it is true that certain sections of the scientific community and pro-fossil fuel lobby groups continue to suggest that the problem is being exaggerated. But in a recent study, James Risbey concluded that use of the term ‘crisis’ is broadly consistent with the science and not unduly alarmist. He demonstrated that the alarming terms and phrases being used in relation to climate change — ‘catastrophic’, ‘rapid’, ‘urgent’, ‘irreversible’, and ‘worse than we thought’ — all seem reasonable descriptors of the phenomenon of climate change and some of its key impacts.⁸

2. Questions for International Law

The science of climate change has become much more certain over the years and the challenge of climate change is now in large measure a challenge of governance: how to bring about needed changes in the time available. Given that the object of concern is the atmosphere, climate change is quintessentially a global issue. It is the thesis of this article that if it is accepted that climate change is of the nature of a crisis for global governance, including legal governance, the crisis is one not only for international environmental law but for the international legal system more generally. To explore the validity of this proposition, this article considers three questions linking international law and climate change. It may not at this stage be possible to provide comprehensive answers to any of them, but it is important that the questions are raised, and it is hoped that doing so might encourage debate by others.

A. Does International Law Have a Measure of Responsibility for the Climate Crisis?

The roots of modern international law lie in Europe. As time passes and history is reviewed, often in a critical light, international lawyers agonise over causes — colonialism, patriarchy, or globalization, for example — that international law appears to have served. Is climate change yet another phenomenon for which international lawyers should feel some degree of collective responsibility? At first glance the answer is a clear ‘no’. International law certainly has no *direct* responsibility for climate change. On the contrary, the international legal instruments that address climate change — the *UNFCCC* and *Kyoto Protocol* — are part of the body of international environmental law that has evolved in an effort to protect the environment from the damage done by humankind. In the case of greenhouse gas emissions, the anthropogenic causes have been clearly established. According to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (‘IPCC’), greenhouse gas forcing has ‘very likely’ caused most of the observed warming over the last 50 years.⁹ Fossil fuel

7 Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65 *Modern Law Review* 377.

8 James S Risbey, ‘The New Climate Discourse: Alarmist or Alarming?’ (2008) 18 *Global Environmental Change* 26 at 26.

9 Working Group I of the IPCC, *Climate Change 2007: The Physical Science Basis* (2007) at 665 <www.ipcc.ch/ipccreports/ar4-wg1.htm> accessed 18 August 2008.

combustion (plus a smaller contribution from cement manufacture) is responsible for more than 75 per cent of human-caused carbon dioxide emissions, with land use change responsible for the remainder.¹⁰ The IPCC describes recent atmospheric change as ‘dramatic and unprecedented’.¹¹ Degradation of the atmosphere has come about through the burning of fossil fuels in the operation of an oil-based economy. The greatest historical responsibility for greenhouse gas emissions lies with those countries that industrialized first, although with China experiencing rapid industrialization, urbanization and economic growth, China’s level of emissions has now overtaken that of the United States.¹²

If international law has not *caused* climate change, could it be said to have *facilitated*, or to be currently *facilitating*, human behaviours that have been, or are currently, exacerbating anthropogenic climate change? Asked in this way, the answer would seem to be in the affirmative. To take one example, the aviation industry has been one of the fastest growing sources of carbon dioxide emissions. Although there is some disagreement over modelling and difficulties in assessing the future impact of new technologies, one study has forecast an increase in carbon dioxide emissions by the aviation industry from 572 million tonnes in 2000 to 1229 million by 2025.¹³ There is, similarly, increasing concern at the contribution of the shipping industry to the climate problem. While it was previously believed that shipping was a relatively environmentally-friendly mode of transport, a recent report has suggested that shipping emits up to six per cent of world greenhouse gases, double that of aviation. Indeed, only six countries in the world are emitting at higher levels.¹⁴ This sizeable contribution is attributable in large measure to the considerable growth that has been experienced by the industry in recent years.

The success of the international transport industries is obviously not attributable solely to international law, but international law has arguably enabled their growth. One of the core principles of the international law of the sea, found in both customary and treaty law, is that of the freedom of the high seas, including freedom of navigation.¹⁵ The modern law of the sea has given coastal States increased rights of regulation, but the fundamental role of the law of the sea in facilitating transport and trade between countries has been preserved. Shipping has such an enormous carbon footprint because it carries about 90 per cent of world trade and trade continues to increase, promoted by free trade agreements and the work of the World Trade Organization (‘WTO’). International shipping has thus not only had a direct impact on the climate crisis, but an indirect effect, fuelling international trade and consumption. It is true that the International Maritime Organization (‘IMO’) aims to adopt a regime to control

10 Id at 512. Other greenhouse gases include methane, nitrous oxide and halogen-containing gases such as chlorofluorocarbons.

11 Ibid.

12 Netherlands Environmental Assessment Agency, ‘China Contributing Two Thirds to Increase in CO₂ Emissions’ (Press Release, 13 June 2008) <www.mnp.nl/en/service/pressreleases/2008/index.html> accessed 21 July 2008.

13 Aviation Environment Federation, ‘Unpublished Report Forecasts Huge Increase in Aviation’s Global Environmental Impacts’ (24 April 2008) <www.aef.org.uk/?p=245> accessed 16 July 2008.

14 CNN, ‘Shipping’s Impact on the Air’ (20 January 2008) <<http://edition.cnn.com/2008/WORLD/asiapcf/01/20/eco.about.ships/>> accessed 16 July 2008.

15 *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 87.

greenhouse gas emissions from ships by mid 2009,¹⁶ but as a general principle, there is no sense within the bodies of law governing use of the oceans or airspace that the expansion of the world shipping and aviation should be curtailed.

From these few examples, it would seem that international law has indeed acquiesced in human activities that are contributing significantly to climate change, simply through its facilitation of an oil-based, capitalist, global economy. Modern capitalism emerged in Western Europe and its overseas offshoots in the early 19th century.¹⁷ On economic grounds these societies were characterized by the fact that economic activities were for the first time organized predominantly via market exchange, based on private property relations in labour, capital, land, and ideas. On political grounds, one dominant characteristic was the rule of law; sovereign power was no longer to be exercised without juridical constraint.¹⁸ Economic growth in these economies from the end of the 18th century meant that there was an enormous gap in material well-being, industrial power, and military force between these countries and the rest of the world. Much of 19th and 20th century history can be read 'as the playing out of this profound imbalance in economic and military power, a confrontation between a dynamic capitalist western Europe (and its American and Oceanic offshoots) and a much less dynamic non-European world'.¹⁹

It is perhaps no coincidence that, although modern international law had originated during the 16th century, it was consolidated during the last part of the 19th and the early 20th century.²⁰ International law was integral to the confrontation between Western Europe (and the United States) and the rest of the world at that time. Unequal treaties were imposed on Japan, China and other Asian States as a way of effectively forcing trade and opening ports. But the global capitalist system that had emerged by the end of the 19th century did not last, and it was not until after the Great Depression and two world wars that the second global capitalist system, this time of sovereign States, emerged towards the end of the 20th century.²¹ Integral to the development of this second global economy has been a body of international economic law to permit trade, commerce and investment, of which the WTO is the most developed branch.²² Free trade agreements have 'by and large served to further pry open regions and sectors around the world to global capitalism'.²³

16 International Maritime Organisation, 'Oslo Meeting Prepares Ground on GHG Reduction Mechanisms' (1 July 2008) <www.imo.org/Safety/mainframe.asp?topic_id=1709&doc_id=9753 - 15k/> accessed 31 August 2008.

17 Jeffrey D Sachs, 'Twentieth-Century Political Economy: A Brief History of Global Capitalism' (1999) 15 *Oxford Review of Economic Policy* 90 at 90.

18 *Id* at 92.

19 *Ibid*.

20 R P Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law' (1966) 15 *International and Comparative Law Quarterly* 55 at 57.

21 Sachs, above n17 at 99.

22 Asif H Qureshi & Andreas R Ziegler, *International Economic Law* (2nd ed, 2007) at 267.

23 William I Robinson, 'Global Capitalism: The New Transnationalism and the Folly of Conventional Thinking' (2005) 69 *Science and Society* 316 at 324.

B. If International Law has been Complicit in Creating the Crisis of Climate Change, does this Matter Today?

Beyond ensuring an accurate historical record, does it matter if international law has been complicit in creating the climate change crisis? We have seen that at least in the few areas considered, international law has facilitated the growth of a global capitalist economy and, in the process, left space for environmental degradation. It is not that alternative economic systems are necessarily respectful of the environment, but rather that the harm that has been done to the atmosphere has occurred largely within the context of capitalist national economies, and more recently within a capitalist global economy. The globalised world that the international law of trade, shipping, and aviation are helping to create stands in contrast to the world that we may face in the not too far distant future. Many believe that, whether action is taken to reduce dependency on oil for reasons of climate change, or whether for reason of declining availability of oil combined with increasing prices boosted by demand from China and India, the world is set to change. Analysts differ as to whether we have already reached, or will shortly reach, the year in which world oil production peaks.²⁴ The International Energy Agency ('IEA') forecasts that if governments around the world stick with current policies, the world's energy needs will be 50 per cent higher in 2030 than today.²⁵ Although it judges that world oil resources will be sufficient to meet demand up to 2030, the IEA nevertheless urges that all governments take 'vigorous, immediate and collective policy action ... to move the world on to a more sustainable energy path'.²⁶ In one sense it is unnecessary to identify the exact year of peak production; the 'bottom line' of research into the phenomenon of peak oil is simply that oil is a finite resource, and once it is gone it is gone.

It is difficult for most of us to imagine a world with a dramatically declining supply of oil and, as with climate change, it is comforting to think that writers on peak oil are being unduly pessimistic. But just as Risbey concluded that the alarming language being used to depict climate change and its impacts is a fair representation of the science, so many cool-headed analysts believe that the pessimistic accounts of looming world oil shortages are fair representations of the evidence. According to the findings of a study on the future availability of oil:

- (a) Any oil, if indeed there is any, that forms over the next 10,000 years would be but a drop compared with the past available supply.
- (b) New technology will not recover sufficient oil to meet the growing demand.
- (c) Beyond a certain depth there *is no* oil to be recovered because the high temperature within the Earth's mantle has decomposed organic matter into methane, the simplest hydrocarbon.
- (d) With a couple of exceptions, there is virtually no place on Earth that has not yet been explored for oil.²⁷

24 John Hallock et al predict that global production of conventional oil will almost certainly begin an irreversible decline somewhere between 2004 and 2037. John Hallock et al, 'Forecasting the Limits to the Availability and Diversity of Global Conventional Oil Supply' (2004) 29 *Energy* 1673.

25 International Energy Agency, *World Energy Outlook 2007*, Executive Summary at 3 <www.worldenergyoutlook.org/2007.asp> accessed 20 July 2008.

26 Id at 3, 5.

Our civilization is dependent on oil, not only to fuel ships, cars and airplanes, but more generally. Plastics are made from oil and there could be no computer society without plastic. Contemporary agricultural food production depends on oils in fertilizers and pesticides and a globally connected information economy depends on a secure supply of electricity. Even if a substitute for oil could be found, there would need to be a replacement for the oil infrastructure.²⁸ It is feared that significant increases in oil prices followed by a lack of supply may well cause major turmoil in coming decades, both at the domestic and international level. Oil depletion is already widely believed to have been a major factor in international conflicts.²⁹ Given the dependence of modern developed economies on oil, a world of diminishing and vastly more expensive supplies of oil may, in the absence of adequate alternatives, force new geographies of economic and social relationships in a process that is virtually the opposite of the deterritorialising force of trade-based, capitalist, globalisation.³⁰ It is quite possible that proximity to markets will become far more important in determining competitive advantage.³¹ It is not inconceivable that, on what is a rather sobering though not necessarily far-fetched reading of the future, much of the deterritorialising international law of the era of globalisation may become counter-productive or even redundant.

Doubts about the value of never-ending growth have long been expressed, albeit not generally by policymakers.³² Early voices included those of Malthus (1766-1834) and William Stanley Jevons (1835-82).³³ Concern about the effects of industrial development on the environment grew sharply in the 1960s, and in 1972 the Club of Rome published *Limits to Growth*.³⁴ The related themes — that economic growth is not ecologically sustainable and that less focus should be placed on continued growth — have been repeated on many occasions.³⁵ In relation to the particular environmental crisis represented by climate change, Brett Clark and Richard York have recently drawn on Marx's notion of metabolic rift to demonstrate the ultimate incompatibility of capitalism and sustainability.³⁶ According to Clark and York, capitalism is a system in which

27 Mark P Silverman, review of Kenneth S Deffeyes, *Hubbert's Peak: The Impending World Oil Shortage* (2001) in (2004) 72 *American Journal of Physics* 126 at 127.

28 David Shearman & Joseph Wayne Smith, *The Climate Change Challenge and the Failure of Democracy* (2007) at 122.

29 See, *inter alia*, Richard Heinberg, *The Party's Over: Oil, War and the Fate of Industrial Societies* (2nd ed, 2005); Michael T Klare, *Blood and Oil: The Dangers and Consequences of America's Growing Dependency on Imported Petroleum* (2004); Doug Stokes, 'Blood for Oil? Global Capital, Counter-Insurgency and the Dual Logic of American Energy Security' (2007) 33 *Review of International Studies* 245; and Shearman & Smith, above n28 at 123.

30 'Capitalism, specifically, reshapes political units, the nature of international society, and its dominant process through the twin processes of democratisation and globalisation'. Hannes Lacher, 'International Transformation and the Persistence of Territoriality: Toward a New Political Geography of Capitalism' (2005) 12 *Review of International Political Economy* 26 at 27.

31 Richard Heinberg, *The Oil Depletion Protocol: A Plan to Avert Oil Wars, Terrorism and Economic Collapse* (2006) at 40.

32 See, for example, E J Mishan, *The Costs of Economic Growth* (1967).

33 Angus Maddison, *Contours of the World Economy, 1-2030.AD: Essays in Macro-Economic History* (2007) at 352-3.

34 Donella H Meadows, Dennis L Meadows, Jorgen Randers & William W Behrens III, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (1972).

35 See, *inter alia*, Clive Hamilton, *Growth Fetish* (2003); Joel Jay Kassiola, *The Death of Industrial Civilization: The Limits to Economic Growth and the Repoliticization of Advanced Industrial Society* (1990); and Martin O'Connor (ed), *Is Capitalism Sustainable? Political Economy and the Politics of Ecology* (1994).

36 Brett Clark & Richard York, 'Carbon Metabolism: Global Capitalism, Climate Change, and the Biospheric Rift' (2005) 34 *Theory and Society* 391.

economic surplus must occur on an ever-larger scale. Surplus accumulated at one stage becomes the investment fund for the next, so that the scale of capitalist operation is driven by ceaseless economic growth. 'To sustain this process, capital requires constant access to, and an increasingly large supply of, natural materials, appropriating them in the pursuit of profit, and leaving wastes behind'.³⁷ Because there are no institutional mechanisms to price non-renewable resources at globally optimal price levels, economic decision-makers place too high a value on labour, so that technologies are geared to saving worker time and to producing goods and services to save consumer time, rather than technologies and products to conserve non-renewable resources.³⁸ Climate change is simply one more rift in a natural cycle, this time the carbon cycle, caused by industrial capitalism. Clark and York deny that the answer can be found in newer, more efficient technologies because history shows that better technology simply means more production; while carbon efficiency may improve, per capita emissions increase monotonically with economic development.³⁹ The bottom line, according to Clark and York, is that '[t]here is no natural containment of capitalist operations, short of human extinction.'⁴⁰

If, then, modern international law is entwined with expansionary capitalism, and there are physical limits to the future of expansionary capitalism, can international law extricate itself to serve as the engine of a genuinely sustainable economy? A question such as this echoes that posed by critical theorists regarding the role of international law in colonialism. Tony Anghie has asked, for example, whether the post-colonial world can deploy for its own purposes the law that had enabled its suppression in the first place.⁴¹ And yet, to ask whether international law can serve a master other than expansionary capitalism is perhaps to move ahead of where current discussion can make any useful contribution. There is plenty to be done to move forward from where we are now rather than to focus on the end point. The concept of sustainable development plays a useful role in helping moderate the environmental extremes of capitalism. And in relation to climate change and peak oil, the considerable effort being directed towards using international law as a mechanism by which to reduce greenhouse gas emissions could usefully be balanced by a treaty promoting renewable energy and energy efficiency technologies.⁴² Proposals for a treaty to manage the distribution of oil as global production decreases warrant greater attention from international lawyers.⁴³ And all this is without even considering the range of international legal measures that will be needed to adapt to the reality of a changing climate.

37 Id at 407.

38 Christine Greenhalgh, 'Why Does Market Capitalism Fail to Deliver a Sustainable Environment and Greater Equality of Incomes?' (2005) 29 *Cambridge Journal of Economics* 1091 at 1106.

39 Clark & York, n36 at 411.

40 Id at 418.

41 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) at 8.

42 See Adrian J Bradbrook, 'The Development of a Protocol on Energy Efficiency and Renewable Energy to the United Nations Framework Convention on Climate Change' (2001) 5 *New Zealand Journal of Environmental Law* 55. See also Adrian J Bradbrook, 'The Development of Renewable Energy Technologies and Energy Efficiency Measures through Public International Law' in Donald N Zillman, Catherine Redgwell, Yinka O Omorogbe & Lila K Barrera-Hernández (eds), *Beyond the Carbon Economy: Energy Law in Transition* (2008) at 109.

43 See the draft of an oil depletion protocol by Colin J Campbell in Heinberg, above n31.

It already seems clear that the legal governance of climate change and the transition to a low-carbon economy will not all be top-down. Some of the most promising responses to climate change are taking place at a sub-national level. According to Barry Rabe, debate regarding climate policy has for two decades focused on international diplomacy seeking the one best system by which to reduce emissions; meanwhile, much of value has been taking place at the State level, where formal engagement in the international realm of policy is not a good indicator of policy development or of emissions reductions.⁴⁴ Local governments have not just responded to policy goals set at the national or international level but are taking initiatives in their own right.⁴⁵ Environmentalists are advocating comparable measures. According to Michael McGonigle, sovereignty must be reformulated in the ecological age to protect those communities below and across the State that have in the past been undermined by claims of sovereignty. International law has so far been silent on how to turn around this process.⁴⁶

C. Does International Law Offer Adequate Mechanisms for Effecting Far-Reaching Change in the Timeframe Required?

The world has known about the dangers of climate change for several decades. The perceived urgency of the issue encouraged the relatively rapid negotiation of the core treaty dealing with climate change. The *UNFCCC* entered into force almost 15 years ago. Virtually all countries have agreed to the objective expressed in article 2 of the Convention: to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The *UNFCCC* was followed by the *Kyoto Protocol* in 1997 and negotiations are in train for a post-2012 agreement. And yet despite all this activity, few governments have made fundamental changes to their economy of the order needed to really make a difference, and national and global emissions of greenhouse gases continue to increase. This would seem to beg the question whether international law contains adequate mechanisms by which to bring about far-reaching changes, at least within a restricted timeframe.

There are well-known deficiencies of the multilateral treaty negotiating process, one of the most striking of which is the ‘lowest common denominator’ effect, whereby the resulting treaty bows to the demands of the least willing. Negotiators for each State cannot afford to be seen to be giving more than anyone else. The anarchic nature of the international system engenders an element of fear and mistrust in others.⁴⁷ Richard

44 Barry G Rabe, ‘Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems’ (2007) 20 *Governance: An International Journal of Policy, Administration, and Institutions* 423.

45 See, *inter alia*, Michele M Betsill & Harriet Bulkeley, ‘Cities and the Multilateral Governance of Global Climate Change’ (2006) 12 *Global Governance* 141; Harriet Bulkeley, Anna Davies, Bob Evans, David Gibbs, Kristine Kern & Kate Theobald, ‘Environmental Governance and Transnational Municipal Networks in Europe’ (2003) 5 *Journal of Environmental Policy and Planning* 235; and Paul Wapner, ‘Horizontal Politics: Transnational Environmental Activism and Global Cultural Change’ (2002) 2 *Global Environmental Politics* 37.

46 Michael McGonigle, ‘New Theoretical Perspectives on International Law: Ecological Political Economy’ in Canadian Council on International Law (eds), *Looking Ahead: International Law in the 21st Century* (2002) 41 at 48.

47 See Ken Booth & Nicholas J Wheeler, *The Security Dilemma: Fear, Cooperation and Trust in World Politics* (2008) .

Black, an environment correspondent for BBC News, captured the nature of multilateral treaty negotiations when he likened national representatives negotiating a multilateral agreement on the environment to sibling dogs who, while usually getting on well, engage in a stand-off as soon as they are both given a bone. Instead of enjoying the bone, each would seemingly focus on the relative size of the bone, who would begin eating first, and so on. According to Black, negotiators on such issues as endangered species, fishing and climate change behave similarly.

“Are his emissions bigger than mine?” “I’m not signing for 11% unless he signs for 12%.” “If I keep him awake for 56 hours straight maybe I can lure him into something stupid.” “No way he’s getting more cod than I am.” And so on, summit after summit, with tails standing defiant.

As they check each other out, carbon emissions soar, species loss runs at an unprecedented rate, freshwater systems dry up and fish stocks disappear ...

I think the problem may not be, as it is often painted, that the politicians we have are failing; but that the very system of trying to solve global environmental problems through national governments is flawed, and likely to continue failing.⁴⁸

Ken Booth and Nicholas Wheeler point to the fact that the anarchical system of world politics in which each State looks after its security is one in which fear is pervasive, despite the fact that national leaders and international relations theorists have only rarely acknowledged this fear.⁴⁹ A fear of not protecting one’s own best interests translates into a competitive environment of fundamental mistrust, and this is the context in which multilateral negotiations are embedded. Little wonder that the resulting treaty tends to incorporate weaker obligations than those that would be most effective in terms of achieving the stated objectives. At Kyoto, the tendency for a much-needed treaty to get weighed down by the least willing contributed to the finalisation of a treaty in which the emissions reduction target itself is inadequate.⁵⁰

In recent years there has been growing angst regarding the authoritative basis and democratic credentials of international law, in terms both of whether international law can demand that participating States be democratic, and whether its own rules and the institutions it establishes are, or should be, democratic.⁵¹ There is broad agreement that the functioning of international institutions does not meet democratic standards.⁵² It is true that international law is not, and never has been, democratic. In classical

48 Richard Black, ‘Bypassing the blockage of nations’ *BBC News* (15 January 2008), <<http://news.bbc.co.uk/2/hi/science/nature/7187985.stm>> accessed 18 August 2008.

49 Booth & Wheeler, above n47.

50 Working Group III of the IPCC, *Climate Change 2007: Mitigation of Climate Change* (2007) at 32 <www.ipcc.ch/ipccreports/ar4-wg3.htm> accessed 18 August 2008.

51 See, *inter alia*, Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001); James Crawford, ‘Democracy and International Law’ in James Crawford (ed), *International Law as an Open System: Selected Essays* (2002) 39; GH Fox & Brad Roth (eds), *Democratic Governance and International Law* (2000); and Thomas Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46.

52 See, *inter alia*, James Bohman, ‘International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions’ (1999) 75 *International Affairs* 499 and Michael Zurn, ‘Global Governance and Legitimacy Problems’ (2004) 39 *Government and Opposition* 260 at 260.

international law, the only requirement for the government of a State participating in international law was that it be in effective control over the apparatus of the State.⁵³ International law is not founded on democracy but on the legitimating principle of the sovereign equality of States. But although international law does not pretend to be democratic, the principle of sovereign equality could be said to have a 'pseudo-democratic aspect' in so far as it allows choice.⁵⁴ The lowest common denominator effect is caused in part by the fact that adoption of a treaty at an international conference takes place by a vote of two-thirds of the States present and voting, unless by the same majority it is decided to apply a different rule.⁵⁵ This may mean that relatively small groupings of States and, in the case of 'key' States, even a single State, may have considerable influence over the final text of a treaty. International environmental law is not a coherent body of law to which all States are equally obligated; the precise rules applicable to any State will depend on customary international law and just which treaties it is party to and the acts of international organisations binding on it.⁵⁶

While one dynamic evident at international negotiations may be that no negotiator wants to give away more than anyone else, another is generally that most negotiating States nevertheless choose to become associated with what may be considered an important cause with which to be seen to be aligned. It is not always evident that any State is fully committed to the often lofty goals expressed in a treaty, certainly not as a priority. A State may ascribe to the goal of minimising climate change but this does not mean that it may not place higher a goal of economic growth, nor that it necessarily has the financial resources available to enable it to make the necessary economic shifts to contribute to realising that goal. In the case of climate change, non-climate policy priorities such as the decision in Brazil to clear forests for agriculture or in the US to promote coal power to enhance energy security, can overwhelm climate mitigation efforts.⁵⁷ It is all too easy for environmentalism to become no more than a marketing strategy for capitalist endeavours⁵⁸ rather than a fundamental concern to which all other interests are subsumed. It may be the goals not expressed in multilateral treaties that are impacting most significantly on our global future; those expressed in multilateral treaties may perhaps best be understood as serving as checks on pursuit of the common underlying goals.⁵⁹

53 Crawford, above n51 at 43.

54 See Craig Forcese, 'Hegemonic Federalism: The Democratic Implications of the UN Security Council's "Legislative" Phase' (2007) 38 *Victoria University of Wellington Law Review* 175 at 176.

55 *Vienna Convention on the Law of Treaties*, concluded 23 May 1969, 8 ILM 679 (1969) (entered into force 27 January 1980), art 9(2).

56 Philippe Sands, *Principles of International Environmental Law: Volume 1. Frameworks, Standards and Implementation* (1995) at 104.

57 Working Group III of the IPCC, above n50 at 749.

58 See Ajay Menon & Anil Menon, "'Enviropreneurial Marketing Strategy": The Emergence of Corporate Environmentalism as Market Strategy' (1997) 61 *Journal of Marketing* 51.

59 Shirley V Scott 'The Political Interpretation of Multilateral Treaties: The Case of CEDAW' (2007) 5 *New Zealand Journal of Public and International Law* 103.

It cannot be said that the results of the 'pseudo-democracy' found in current multilateral processes encourage faith in the benefits of any increased degree of choice in international law-making processes. Nor does the domestic experience of climate change and democracy encourage much optimism. In *The Climate Change Challenge and the Failure of Democracy*,⁶⁰ David Shearman and Joseph Smith set out a number of reasons for what they consider to have been the failure of democracy to tackle the challenges of climate change, including the fact that the interests of the politicians are at odds with what we need of them; politicians in democracies are short-term caretakers and career seekers who cannot afford to take the hard decisions needed to make dramatic drops in emissions and significant progress towards a low-carbon economy. Some analysts believe that in the case of climate change, the only hope is for less than democratic processes to bring about change in a fast and effective manner.⁶¹

At an international level we have had some experience of a style of international law-making that is more authoritarian than that of multilateral treaty making. This is the recent 'legislative' or quasi-legislative activity of the Security Council on terrorism and weapons of mass destruction.⁶² On 17 April 2007 the Council held its first debate on climate change, but since then there has been a shying away from Council involvement.⁶³ China, the G77 and the non-aligned movement interpreted any implication that the Security Council might have a future role in addressing climate change as indicative of weakening support on the part of developed countries for the principle of common but differentiated responsibilities.⁶⁴ It is at this stage difficult to anticipate the United States ('US') taking the initiative on climate change in the Council as it has on other matters and, even if the US were to do so, a decision by the Council to act on climate change would require the US and China to bridge what are at present irreconcilable perspectives on how to tackle the issue. This is not to say that such a development is out of the question. One of the most optimistic signals at this stage of a possible dramatic change in attitude on the part of the US is the fact that the Pentagon is beginning to weaken its hard-line opposition to the concept of environmental security and to see the benefits of reducing the dependency of the US military, and the US itself, on oil. If the Pentagon were to fully embrace alternative energy we may well see radical change on a global scale akin to that experienced with the introduction of the internet.⁶⁵

60 David Shearman & Joseph Wayne Smith, *The Climate Change Challenge and the Failure of Democracy* (2007).

61 Michael Redclift, *Sustainable Development: Exploring the Contradictions* (1987) at 199.

62 See, *inter alia*, Paul C Szasz, 'The Security Council Starts Legislating' (2002) 96 *American Journal of International Law* 901 and Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175.

63 Shirley V Scott, 'Securitizing Climate Change: International Legal Implications and Obstacles' (2008) 21 *Cambridge Review of International Affairs* forthcoming.

64 United Nations Security Council, 'Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers', 17 April 2007 <www.un.org/News/Press/doc/2007/sc9000.doc.htm> accessed 18 August 2008.

65 Eva Sohlman, 'Flight of the Green Hawks: Why the Pentagon is on a Green Mission', *Washington Life Magazine*, April 2008, <http://washingtonlife.com/issues/april-2008/special_report/index.php> accessed 17 July 2008.

3. Conclusion: Is International Law too Democratic, too Capitalist and too Fearful to Cope with the Crisis of Climate Change?

This article has considered the question whether international law has any responsibility for the climate change crisis with which we are confronted. In acknowledging that international law has facilitated the growth of a global oil-based economy, the article has recognized that international law is indelibly linked with the problem. What does this mean so far as the solution is concerned? If experience to date is a guide, the news is not all good. International lawyers, naturally enough, tend to have faith in the mechanisms of international law and to attribute any failings to States and a lack of political will. Writing on the challenges of a lower-carbon future, Catherine Redgwell commented that international law does have the tools to respond; 'it is up to States, and other international actors, to use them'.⁶⁶

This may be a fair enough comment, and yet climate change and peak oil constitute such a critical challenge that a failure to take effective action, even with someone to blame, is inconceivable. The fact that climate change and peak oil have implications for the very foundations of the global economy and local societies means that we are forced to reconsider fundamentals. Neither international lawyers nor scholars of international relations have paid great attention to the impact of capitalism on their subjects of enquiry. With but a brief glance at the interlinking of international law with capitalism and an increasing tendency to try to link international law with democracy, we have seen that both climate change and a sustainable relationship with the natural environment necessitate a long-term perspective for which capitalism and democracy are ill-equipped. Just as capitalism is driven by the quest for short-term profits, so democracy tends to be fuelled by short-term objectives. International law can be viewed as embedded in an anarchic, self-help international system in which fear is endemic.

The catalogue of systemic problems in the global response to the threat of climate change could be read as a call to arms for economic and political philosophers, but this does not let international lawyers 'off the hook'. There is plenty for international lawyers to contribute, in the more immediate term, to the legal governance of climate change mitigation and adaptation, to supply and distribution of diminishing supplies of oil and to supporting the development of alternative energy sources. This article has sought to foster discussion about the relationship of such work to the broader political and economic processes with which the legal response to climate change is entwined.

⁶⁶ Catherine Redgwell, 'International Legal Responses to the Challenges of a Lower-Carbon Future: Climate Change, Carbon Capture and Storage, and Biofuels' in Donald N Zillman, Catherine Redgwell, Yinka O Omorogbe & Lila K Barrera-Hernández (eds), *Beyond the Carbon Economy: Energy Law in Transition* (2008) 85 at 87.