

DEATH, DESIRE, MODERNITY AND REDEMPTION: CLIMATE CHANGE AND PUBLIC INTERNATIONAL ENVIRONMENTAL LAW

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Death and desire exist in a critical tension, contributing to climate change as a crisis of modern civilisation. Public international environmental law, in particular the United Nations Framework Convention on Climate Change, is a point of potential redemption for the deaths and loss that are predicted to occur with global warming. Arguably, climate change is a cumulative outcome of a 'shift' in governance from state control and concern about 'death' to a regulation of 'desire' or life. In the modern governance of life and desire by 'Northern' states, there has been a successive deflection of the ecological limits of 'civilisation' into the colonial and postcolonial space of the peoples and places of the developing world. In the first instance, these deflections were achieved through the instruments of law as sovereignty in colonial periods. In a postcolonial era, such deflections are implemented as 'regulation' adopting the techniques of a governance of desire to realise the processes of climate change mitigation, credit and trade, notwithstanding the language of co-benefits for local communities that is emerging at international law. Tensions about this history of deflection and appropriation at an international level surface in the climate change context around the principle of a 'common but differentiated responsibility'. Whether such tensions can be resolved, at least partially, will be important to whether any post-Copenhagen agreement is achieved and whether civilisation is able to avert crisis.

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* Professor of Law, Melbourne Law School, The University of Melbourne. The support of Australian Research Council Project DP0987850 is gratefully acknowledged. The research assistance provided by Anne Kallies, Michael Power and the Melbourne Law School Research Service is also gratefully acknowledged. My long-time colleague Shaun McVeigh offered a valuable sounding board for many ideas, providing an account of law against which to test the direction of my thought. I would like to thank the Editorial Committee of the *Melbourne Journal of International Law* for their patience and assistance in the completion of this work. The article also benefitted from the insightful comments of referees on an earlier version. Finally, the article adopts a style that is meant to challenge the view that there is a sovereign, authoritative meaning to text (and law) that is readily discernible!

What is that sound high in the air
 Murmur of maternal lamentation
 Who are those hooded hordes swarming
 Over endless plains, stumbling in cracked earth
 Ringed by the flat horizon only
 What is the city over the mountains
 Cracks and reforms and bursts in the violet air
 Falling towers
 Jerusalem Athens Alexandria
 Vienna London
 Unreal²

I INTRODUCTION: DEATH AND CHAOS

Amidst allusions to immense death and apocalyptic sacrifice for Empire and Civilisation in this extract from *The Waste Land*, Eliot is concerned with the descent into Chaos that attended World War I. Those wandering in *The Waste Land* of desolate mountains without water were left to mourn the death, endure the sacrifice and inhabit a lesser world as civilisation, exemplified by the city over the mountains, burst and reformed. Eliot regarded the war as a cataclysmic crisis that cleaved the world, defined modernity,³ and redefined civilisation. Conversely, it also ushered in the banalities of suburban existence based on material prosperity for the Western world that Eliot so insidiously describes in other poems.⁴ *The Waste Land* serves as an augury for a breakdown of known order, the loss of *nomos* or law as an animating virtue, and it highlights the death and sacrifices that are demanded of many to avert chaos.⁵ International public law was important to that redefinition of civilisation and to the restoration of world order that occurred post World War I. That redefinition of a global modern order included setting in place a process that resulted in decolonisation and the break up of European empires that had been instituted during earlier periods of colonialism and imperialism. However, the poem is relevant also for its portent of a global crisis another century on, perhaps this time of modernity's own making: that of climate change.

The looming apocalypse of global warming echoes earlier portents of the limits that nature appeared to pose for civilisation.⁶ Ironically, climate change

² In my edition of *The Norton Anthology of Poetry*, the following is the note made by Eliot about the last few lines:

Eliot's note to lines 366–376 quotes a passage from Hermann Hesse's *Blick ins Chaos (A Glimpse into Chaos)* which may be translated as follows: 'Already half Europe, already at least half of Eastern Europe is on the road to Chaos, drives drunken in holy madness ... and sings the while, sings drunk and hymn-like ... The bourgeois laughs, offended, at these songs, the saint and the prophet hear them with tears.'

Arthur M Eastman et al (eds), *The Norton Anthology of Poetry* (1970) 1010.

³ Anthony Giddens, *The Consequences of Modernity* (1990) 8–10.

⁴ See, eg, T S Eliot, *The Love Song of J Alfred Prufrock* (1917), as reproduced in Arthur M Eastman et al (eds), *The Norton Anthology of Poetry* (1970) 996.

⁵ Paul Fussell, *The Great War and Modern Memory* (1975) 8.

⁶ Catherine Keller, *Apocalypse Now and Then: A Feminist Guide to the End of the World* (1996) 2.

has its origins in the very historical trajectories of industrialisation that earlier 'limits' to civilisation discourses sought to overcome, whereby emerging European nation-states colonised the natural environment and peoples of the non-Western world from the 17th century onwards.⁷ Imperialism effected a displacement of the costs of European industrialisation through the appropriation of resources and lands, and the forced relocation and the death of many peoples and species. Climate change governance at an international level potentially involves another 'redistribution' of costs to the extent that it allows a trade-off where the developed 'Annex I' countries can pay for emission reduction cuts to be made in the developing world.⁸ Thus, in the 21st century we have a new crisis for global civilisation, which requires us to change direction from a trajectory of modern history that now signals descent into dangerous climate change. That historical trajectory is predicated upon the 'entry of life into history' and the fulfilment of the promise of modernity through a governance of desire that promotes the wellbeing of populations and individual fulfilment.

The Waste Land therefore encapsulates many resonances of death, desire, modernity and redemption that are discussed in this article. In particular, it raises questions regarding whether in western civilisations, death and sacrifice have been overcome by a 'modern' focus on life, desire and prosperity or whether death and sacrifice has simply been displaced onto 'others'. How international law is constituted and the vision that we have of the role of the state in responding to those affected by climate change will be important for how we structure responsibility for those other peoples, species and life-worlds affected by climate change. To fully acknowledge such responsibilities requires us to engage with what it might mean to assume an in situ and present responsibility⁹ for the history of colonialism and imperialism that is not endlessly deflected as a transcendental promise of redemption gained through sacrifice,¹⁰ trade or 'offset'.

The central contention here is that climate change is a cumulative outcome of a 'shift' in governance from state control and concern about 'Death' to a regulation of 'desire' or Life. In the modern governance of life and desire by 'Northern' states, there is yet another successive deflection of the ecological limits of 'civilisation' into the colonial and post-colonial space of other peoples and places of the developing world. In the first instance, these deflections were

⁷ The period of colonisation and imperialism is clearly open to various interpretations regarding the relevant time periods. Richard Grove identifies the period from around the beginnings of the 17th century where there was systematic and sustained incursion of European colonists into many parts of the New World, Asia and the Pacific: see Richard Grove, *Ecology, Climate and Empire: Colonialism and Global Environmental History, 1400–1940* (1997).

⁸ See generally Anil Agarwal and Sunita Narain, *Global Warming in an Unequal World: A Case of Environmental Colonialism* (1991).

⁹ The distinction here is to recognise the need for a sense of responsibility that is immediate and grounded in history as one related to specific peoples, places and times. The philosophical tradition of 'immanence' might have been preferred had such a term not acquired an unflattering association with the 'mechanics' of power.

¹⁰ On the question of law as initially embodying constructs of Christian bond and sacrifice, see Jennifer Beard, *The Political Economy of Desire* (2005) 16–19.

achieved through the instruments of law as sovereignty in colonial periods. In a post-colonial era, such deflections are implemented as ‘regulation’, adopting the techniques of governance to realise the processes of climate change mitigation, credit and trade, notwithstanding the language of co-benefits for local communities that is emerging at international law. Tensions about this history of deflection and appropriation at an international level surface in the climate change context around the principle of a common but differentiated responsibility. Whether such tensions can be resolved, at least partially, will be important to whether any post-Copenhagen agreement is achieved and whether civilisation is able to avert crisis without widespread death and loss.

Thus, any responsibility for history to be articulated in international environmental law will need to consider the accountability of western nations for historic emissions in a manner that will shift away from entrenched patterns of progress and growth rather than entrenching them further.¹¹ This raises a central problem that climate change poses for public international environmental law. In part, this difficulty arises from the past manner of the implementation of international law in its insistence on nation and sovereignty. However, the present modes of understanding international law as caught between ‘technique and politics’¹² also raise the dilemma of exactly how to configure a common but differentiated responsibility in response to climate change. ‘Technique’ or ‘governmentality’ references those modes of governance that relate to the patterns of exchange and consumption that public international law once initiated and still institutionalise through a pervasive insistence on the facilitation of life.¹³ On the other hand, politics looks to questions about the relations of power and a determination about those entities, human and non-human, that will bear most heavily the impacts of climate change.¹⁴ To resolve such a dilemma will require

¹¹ The Intergovernmental Panel on Climate Change (‘IPCC’), a group of eminent climate scientists, identifies Northern (or Western) nations as having contributed the greater percentage of greenhouse gas emissions since the industrial revolution and thus to have been responsible for the majority of anthropogenic global warming. Core Writing Team, Rajendra K Pachauri and Andy Reisinger (eds), *Climate Change 2007: Synthesis Report* (IPCC Fourth Assessment Report, 2007) 2. See also Martin Khor, ‘Historical Responsibility as a Guide to Future Action in Climate Change’ (Speech delivered at the Sixth Meeting of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (‘AWG-LCA’), Bonn, 4 June 2009).

¹² See Martti Koskenniemi, ‘The Fate of International Law: Between Technique and Politics’ (2007) 70 *Modern Law Review* 1.

¹³ The reference to life here is multifaceted and discussed further below. Suffice here to indicate that life can be rendered as the life that is redeemed but not perfected through Christian sacrifice (see Beard, above n 10, 18). Cf Hannah Arendt, *The Human Condition* (1958), who sees life in more secular terms as related to labour and the fulfilment of human potential in the individual; and that “‘life on earth has been given to man.’” The human condition of labor is life itself (Dana Villa, *The Cambridge Companion to Hannah Arendt* (2000) 96). See also the work of Foucault, who posits that ‘normalizing society is the historical outcome of a technology of power centred on life’: Michel Foucault, *The History of Sexuality* (Robert Hurley trans, 1978 ed) vol 1, 144 [trans of: *Histoire de la Sexualité*]. See also Alain Pottage, ‘The Inscription of Life in Law: Genes, Patents and Bio-Politics’ (1998) 61 *Modern Law Review* 740.

¹⁴ Diana Liverman, ‘Conventions of Climate Change: Constructions of Danger and the Dispossession of the Atmosphere’ (2009) 35 *Journal of Historical Geography* 279. For the predicted loss of biodiversity all over the world, see IPCC, ‘Summary for Policymakers’ in Working Group II, IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC Fourth Assessment Report, 2007) 7, 13–14.

examination of how law might be ‘a place holder for the languages of goodness and justice, solidarity and responsibility’.¹⁵ In this way, law as *nomos* and the instigator of a life animated by a collective vision of the good, might again restore order to civilisation without the violence of unnecessary sacrifice or the resort to a state of exception.¹⁶ In this way too, law might reinstitute itself not as ‘absolute power’ but as an open-grained order of meaning in the world.¹⁷ Any open-grained meaning will need to be inclusive in order to constitute an effective collective response. Koskenniemi, for example, acknowledges a need for international law to embrace a translation of cultural vocabularies not in a functional sense ‘but — in true translation — about, to put it perhaps contentiously, the meaning of life’.¹⁸

Further, even if international law might then be interpreted as ‘a kind of secular faith’,¹⁹ embracing values of collective concern, such faith must not be purely abstract and insensitive to its practical distributive justice implications. Any law which binds developing nations to developed nations,²⁰ and which potentially ignores the immensity of the likely death of non-human species, must require close investigation as to exactly how any sense of universal community might be implemented under an expansive conception of law and state. Nonetheless, a re-imagined community of international law based on a reassertion of a project of critical reason and with an appeal to overarching values of responsibility for others may be important as a means to resist law simply ‘being reduced to a technique of governance’.²¹ Such governance is strongly implicated as the ‘method’ of biopower that facilitates life and which manifests as an expert managerialism and specialisation in the maintenance of life’s conditions.²² The advent of desire as a concern of the state marks a change from the earlier sovereign model of the state premised upon a power over death.²³ Indeed, just how to curb desire with its implications for progress and growth — where supposedly there is no longer an ultimate sanction of death, just an all consuming life — is a pervasive crisis of modernity.

¹⁵ Martti Koskenniemi, ‘Miserable Comforters: International Relations as the New Natural Law’ (2009) 15 *European Journal of International Relations* 395, 415. See also Martti Koskenniemi, ‘The Politics of International Law — 20 Years Later’ (2009) 20 *European Journal of International Law* 7, 17.

¹⁶ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, 1998 ed) 122 [trans of: *Homo Sacer: Il Potere Sovrano e la Nuda Vita*].

¹⁷ This idea draws on Robert Cover’s work as indicative of the hermeneutic tradition in law. See, eg, Robert M Cover, ‘Foreword: *Nomos* and Narrative’ (1983) 97 *Harvard Law Review* 4. Cover identifies law as *nomos*, which finds its fullest expression in the ‘civil community’ as well as a second ideal-typical pattern that is ‘world maintaining’ and ‘imperial’.

¹⁸ Koskenniemi, ‘Miserable Comforters’, above n 15, 416.

¹⁹ Koskenniemi, ‘Between Technique and Politics’, above n 12, 30.

²⁰ See Beard, above n 10, 16.

²¹ The concept of technique is associated with the idea of a pervasive regulatory regime of specialists and expertise exercising power on a number of levels. See, eg, Koskenniemi, ‘Between Technique and Politics’, above n 12, 30.

²² Foucault, *The History of Sexuality*, above n 13, 92–102.

²³ Death and desire reference those movements in the prevailing model of law and statehood that are proposed by theorists such as Foucault (ibid) and associated with the rise of governmentality, of law as ‘technique’: Koskenniemi, ‘Between Technique and Politics’, above n 12.

A *Modernity*

Modernity was once regarded as the apogee of the history of progress initiated by the Enlightenment.²⁴ It assumed great robustness before the world's descent into the wasteland of war at the turn of the 20th century. Further, it was just such a crisis of modernity where reason itself is subverted, that concerned Adorno and Horkheimer. They described the emerging fraught vision of a post-World War I world as the projected outcome of the dialectic initially invoked by European Enlightenment thought.²⁵ Ultimately, these processes resulted in the contemporary, 'self-destruction of the Enlightenment'.²⁶

On one hand, the growth of economic productivity furnishes the conditions for a world of greater justice; on the other hand it allows the technical apparatus and the social groups which administrate a disproportionate superiority to the rest of the population. The individual is wholly devalued in relation to the economic powers, which at the same time press the control of society over nature to hitherto unsuspected heights.²⁷

If we accept this perspective, then climate change is the quintessential modern problem. It is the problem of how law and civilisation might restrain the very conditions for human flourishing that modernity has instituted, so as to avoid the lapse into the mountains of *The Waste Land*, the state of nature where no law runs,²⁸ and where 'death' might ultimately render us all less than fully human — or perhaps too fully human.²⁹ Indeed, the spectre of Death is raised again as a major threat to society if always an inevitability for the individual. Thus, '[h]e who was living is now dead [and] We who were living are now dying, With a little patience'.³⁰ This looming Death (faster perhaps if we reach over 4°C of global warming) is a very different vision of the world to that which was being predicted toward the end of the 20th century.

The 'End of History'³¹ that was prophesied — as a lack of regional division; a united international community enjoying the benefits of individual fulfilment and human rights under a benign global democracy — is revealed as something

²⁴ On the perceived need in modern thought to perfect the vision of the humanist conception of the world, see Zygmunt Bauman, *Modernity and Ambivalence* (1991) 6.

²⁵ Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment* (1979) 1–34.

²⁶ *Ibid.* xiii.

²⁷ *Ibid.* xiv.

²⁸ Agamben, above n 16.

²⁹ See Arendt, *The Human Condition*, above n 13, but note the influence of Nietzsche in developing this concept: Friedrich Nietzsche, *Human All Too Human: A Book for Free Spirits* (Reginald Hollingdale trans, 1996 ed) [trans of: *Menschliches, Allzumenschliches*].

³⁰ For arguments regarding intergenerational equity and intra-generational equity, see Laura Horn, 'Intra-Generational Equity: A Key Concept in the United Nations Framework Convention on Climate Change' (Paper presented at the Australian Law Teachers Association Conference, 'Law and Public Policy: Taming the Unruly Horse?', Perth, Australia, 23–26 September 2009) (on file with author).

³¹ See Francis Fukuyama, *The End of History and the Last Man* (1992).

of a false evolutionary end-point.³² Also revealed is the falsity of an ideal of globalised economic prosperity. Rather, we are left in the 21st century with a new problem of history, its beginnings and its current ends, that demands new forms of responsibility,³³ and new legal modes to restore order and to ward against ‘dangerous climate change’.³⁴ Such a situation requires us to be alert to ‘what the thunder said’ as we wander in the mountains of rock, sometimes losing our way and where the demands of differentiated responsibility reveal not a universal community, but one potentially fractured by competing visions in the attempt to fully recognise a diversity of cultures and claims.³⁵ It is a vision of ‘civilisation’ and ‘modernity’ in which once more we might foresee that

the city over the mountains
Cracks and reforms and bursts in the violet air
Falling towers
Jerusalem Athens Alexandria
Vienna London [New York]
Unreal.

This potential to undo the existing stability and ‘towers’ of civilisation, borne from the legacies of colonialism and imperialism,³⁶ is one that public international law has picked at like a half-healed scar since the World War I era.

The internationalization of colonialism under the mandates and trusteeship systems was part of the civilizing mission in the precise sense that it reinstated Europe’s role as the gatekeeper for the benefits of public diplomacy for the colonial world. It restated the logic of exclusion–inclusion that played upon a Eurocentric view about the degrees of civilization and legal status. Decolonization effectively universalized the European State as the only form of government that would provide equal status in the organized international community.³⁷

³² This point of course has been made by many commentators, perhaps most recently in the proposition of a new form of imperial regime in Michael Hardt and Antonio Negri, *Empire* (2000). Hardt and Negri argue that the late 20th century global order based on virtuality, communication and networking does not replicate the past imperial forms. By contrast, postcolonial scholars such as Sundhya Pahuja emphasise the difficulties in re-founding international law and moving away from its colonial origins: see, eg, Sundhya Pahuja, ‘This Is the World: Have Faith’ (2004) 15 *European Journal of International Law* 381.

³³ Sébastien Jodoin, ‘International Law and Alterity: The State and the Other’ (2008) 21 *Leiden Journal of International Law* 1, 20–1.

³⁴ The IPCC posits a scenario whereby a rise in global mean temperature of more than 2°C above 1990–2000 levels would have serious effects on global climatic systems: IPCC, ‘Summary for Policymakers’, 780–810. Other commentators suggest this is a conservative estimate and that ‘tipping points’ will be reached more quickly. However, note Liverman’s discussion of such constructed metanarratives, above n 14, 284–6.

³⁵ See David Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’ [1997] *Utah Law Review* 545, 575: ‘If we take the public international law discipline in broad strokes, then, we find a general effort to step back from issues of culture — to cabin them locally or generalize them to a global civilization’.

³⁶ There are a number of treatises examining the role of international law in the era of colonialism: see, eg, Koskenniemi, ‘Miserable Comforters’, above n 15. For an examination of the antecedents of international law as a not-so-gentle civiliser, see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004). From an indigenous perspective, see S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004).

³⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002) 174–5.

Whether states, other than those of the North, have achieved equal status on a substantive rather than formal level over the course of the 20th century is strongly contested. Public international law, and increasingly the private ordering of the economic regimes of the World Trade Organization, have been integral to shaping the respective continuities and discontinuities of colonialism and imperialism during this period. More widely, ‘as a mechanism of power, law has been crucial to colonial and postcolonial relations’,³⁸ including those operative in the environmental sphere.

B *North–South Tensions*

In the initial years of the 21st century, the underlying tensions between North and South, less developed nations (‘LDNs’) and large developing nations, the alliance of small island states as well as shifting coalitions of Northern nations constitute the ‘realpolitik’ of climate change governance in international law. Previous historical trajectories borne of earlier patterns of colonialism are brought to the fore again in all their situated immediacy. International law has already articulated strong principles of responsibility, justice and equity that might govern a climate change world. Legal principles contained in the *United Nations Framework Convention on Climate Change* espouse the ‘common but differentiated responsibilities’ of nation-states in dealing with greenhouse gas emissions.³⁹ Intra-generational equity and intergenerational equity have particular pertinence for addressing the equity concerns raised by the differential impacts of climate change in an immediate and long-term sense. Yet these principles risk being redundant as they are tied to a liberal model of the state that no longer seems to prevail. How then to transform the legal instruments of reason and enlightenment, justice and rights that foster individual life, and economic ‘progress’ while still seeking to contain the potential for the violence of displacement, dispossession and death on which such material existence might be founded?

If international law is unsuccessful, it might once again precipitate for many in the world, an analogous descent into a land where there is ‘no water only rock’.⁴⁰ For Western nations, the progress up the ‘white road’ over the 21st century to a civilisation adapted to a climate change world will be accompanied by ‘another one walking beside you’ — that other, who shadows life through

³⁸ Richardson discusses the penetration into developing countries of regulatory biopower in a Foucauldian sense under the guise of environmental law: Benjamin Richardson, ‘Environmental Law in Postcolonial Societies: Straddling the Local–Global Institutional Spectrum’ (2000) 11 *Colorado Journal of International Environmental Law and Policy* 1, 4.

³⁹ Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 3(1) (‘UNFCCC’).

⁴⁰ See generally Sir Nicholas Stern’s work, which predicts ‘major disruption to economic and social activity ... on a scale similar to those associated with the great wars and the economic depression of the first half of the 20th century’: Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2007) ii. For a discussion of the uneven impacts of climate change, see Pepe Clarke and Ilona Millar, ‘Climate Change and the Law in the Pacific Islands’ in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2008) 73.

sacrifice, offset or death.⁴¹ Climate change, with its accompanying demand by ‘developing countries’⁴² that Western nations take on a ‘common but differentiated responsibility’ for past excesses of industrialism and ‘development’⁴³ threatens to reopen the half-healed wound that international law thought it might have closed over.⁴⁴ Such closing over remains partial as the residual question of alterity in international law is such that ‘international law today appears haunted by the memory of colonialism’.⁴⁵

The following Parts seek to articulate the question of responsibility more discretely in the context of climate change law, given the ghosts and suppressed histories that pervade such laws. First, this article considers how we might understand the configuration of the ‘common but differentiated responsibility’ concept embedded in the *UNFCCC*, by reference to earlier imperial and colonial histories.⁴⁶ Second, it seeks to deconstruct the core movement in law from a control over Death to a facilitation of Life by the state through identifying the methods of governance that mark this pattern as a key characteristic of the modern era. Building on this analysis, the article turns to probe the underlying fissures of postcolonial realpolitik to consider prospects for law in mediating the

⁴¹ In the Eliot poem, the mantled figure is generally seen as a reference to Christ and redemption through sacrifice. Here, the intention is to signify other ghosts that might haunt international law and Western history with a relevance for contemporary debates about offsets and carbon credit exchanges under the *UNFCCC* regime: see, eg, Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (1994).

⁴² The contested nature of the term ‘developing country’ is readily acknowledged. See Beard, above n 10, 16, who suggests that ‘[d]espite the fact that many “non-western” peoples are members of what one would consider the “developed” world, the concept of development remains closely associated with western identity and its claims to capitalist prosperity and liberal democracy’. Here, the term ‘developing’ comprises countries not included in Annex B of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) (*Kyoto Protocol*). See generally Deane Curtin, *Chinnagounnder’s Challenge: The Question of Ecological Citizenship* (1999) 32, who draws on Ashis Nandy, *Traditions, Tyranny and Utopias: Essays in the Politics of Awareness* (1987) 21, in reference to the First and Third Worlds: ‘The concept of the Third World is not a cultural category; it is a political and economic category born of poverty, exploitation, indignity and self contempt’. Other commentators prefer to use the Third World to signify the postcolonial ‘order’. Here, the ‘developed/developing’ terminology relates primarily to legal spheres while Third World/First World relates to the postcolonial economic and political order.

⁴³ The Preamble of the *UNFCCC* notes

that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita global emissions in developing countries are still relatively low and that the share of global emissions in developing countries will grow to meet their social and development needs.

⁴⁴ For an analysis of the continuities between earlier colonial forms and postcolonialism, see Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (1999).

⁴⁵ Jodoin, above n 33, 28.

⁴⁶ The Preamble of the *UNFCCC*:

Acknowldg[es] that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.

divisive problems of climate change mitigation through the controversial Clean Development Mechanism ('CDM').⁴⁷ The article, in this context, briefly considers the potential trade in bio-sequestration 'offsets' under the Reducing Emissions from Deforestation and Forest Degradation ('REDD') scheme. The REDD scheme is situated at the juncture of environmental law and development debates,⁴⁸ and will likely be the subject of much intense negotiation at Copenhagen. Finally, the article examines whether law as *nomos*, an instigator of Order, can meet the challenge of fashioning constraints upon desire and life to recognise a responsibility to others under an expanded sense of imagined communities.

II CONSTRUCTING AGREEMENT ON CLIMATE CHANGE

Extreme anxieties surrounding whether there will be 'agreement' post-*Kyoto*,⁴⁹ and the exact parameters of any 'deal' negotiated under the UNFCCC at the Conference of the Parties ('COP') at the end of 2009 in Copenhagen indicate the extent of the discursive disruption to modernity that is threatened by climate change.⁵⁰ Climate change seems to endanger the very possibility of progress and order, which was refocused after the chaos of the World Wars into an emphasis on technology and science for the production and maintenance of 'life'.⁵¹ In large measure, societal wellbeing still remains predicated upon 'progressing' society beyond the state of nature.⁵² The staged transition from nature to civilisation by means of science and technology as one manifestation of biopower was an important element of the evolutionary model of history that was associated with European colonial expansion. Under this model, European colonisation was deemed to introduce civilisation, and to begin the move to progress and development for the lands that were colonised.

A *The History and Development of the World*

Indeed, the imperial 'Age of Discovery' is replete with implications that this period was the start of History for lands of the New World. Discovery was an important legal construct in international law by which the Western European

⁴⁷ *Kyoto Protocol*, above n 42. The *Bali Action Plan* of 2007 expressly contemplated that REDD schemes should be considered as part of the common but differentiated responsibilities formula for reducing emissions. See Conference of the Parties ('COP'), UNFCCC, *Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007, Addendum — Part Two: Action Taken by the Conference of the Parties at Its Thirteenth Session*, UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008) 3 (*Decision 1/CP.13 — Bali Action Plan*) art 1(b)(iii) ('*Bali Action Plan*').

⁴⁸ There is a growing literature on climate change and development: see, eg, Chukwumerrije Okereke and Heike Schroeder, 'How Can Justice, Development and Climate Change Mitigation Be Reconciled for Developing Countries in a Post-Kyoto Settlement?' (2009) 1 *Climate and Development* 10. For an early discussion by a long-time commentator on the topic, see Henry Shue, 'Global Environment and International Inequality' (1999) 75 *International Affairs* 531.

⁴⁹ David Leary, 'From Bali to Poznan: An Assessment of Australia's Response to Climate Change in 2008' (2009) 26 *Environmental and Planning Law Journal* 190, 203–6.

⁵⁰ See generally Anthony Giddens, *The Politics of Climate Change* (2009).

⁵¹ See Foucault, *The History of Sexuality*, above n 13.

⁵² Bauman argues that one of these forms has been the eugenics projects that involved attempts by the state and science to perfect human nature: Bauman, above n 24, 30–46.

nations justified their sovereignty and possession of the lands of other peoples, particularly indigenous communities.⁵³ Central to the doctrines was a categorisation scheme of non-European peoples that associated them with nature, savagery and a lack of civilisation. By contrast, the ‘civilised’ people of European nations, self-identified as those who changed ‘Nature’, concurrently establishing law and a natural right to property — and the territory of other lands. The imperative that civilisation and law must exist ‘beyond nature’ was important in setting in place those patterns of growth and development that, over several centuries, have had cumulative impacts resulting in global warming.

Ironically, the current calls to protect the environment from the ravages of climate change, and to prevent forest degradation in the name of a universal human good, typically are to be implemented over regions plundered for their natural resources by the Northern states under a very different ‘world order’.⁵⁴ Peoples of the South that now agitate for the ‘right’ to develop notwithstanding climate change impacts were at that time largely invisible, being constructed as dependencies of the North. Conflicts engendered between the European states through this ‘scramble’ for colonies reached a climax in the late 19th century, contributing to the events that precipitated World War I. Once, the history of the world seemed only able to be written by European civilisations as the narratives within international law, served to subsume other histories, laws and communities.⁵⁵ Further, the denial of effective economic trajectories for the peoples of the South was hidden by the geographic and historical bifurcations that constructed the European and the Other.⁵⁶ The intersections of Western science and law in appropriating resources under imperial regimes and in perpetuating colonised peoples as the recipients of modern development and economic imperatives has been articulated in a range of scholarship.⁵⁷

B *Sustainable Development in Public International Law*

In the 20th century, the North–South bifurcation gained prominence in discourses about development and progress. While the decolonisation movement of post-World War II engendered optimism among ‘Third World’ countries that they would achieve durable economic stability and ‘development’, the experiences of many during the second half of the 20th century defied this optimism. Few Third World (developing) nations gained either economic or social independence from global institutions.⁵⁸ Thus, while these peoples gained

⁵³ Peter Fitzpatrick, *The Mythology of Modern Law* (1992) 44–87.

⁵⁴ See, eg, Anaya, above n 36, 15–48.

⁵⁵ Doreen Massey, *For Space* (2005) 4.

⁵⁶ Civilisation and order are held to be maintained by the construction of oppositions or binaries: Anghie, above n 36, 6. See also Spivak, who argues that the colonised subaltern is denied voice since communication must be made in terms constituted by the coloniser: Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Patrick Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (1994) 66.

⁵⁷ See, eg, Rhada D’Souza, *Interstate Disputes over Krishna Waters: Law, Science and Imperialism* (2006).

⁵⁸ See generally Nathalie Karagiannis, *Avoiding Responsibility: The Politics and Discourse of European Development Policy* (2004).

some measure of political freedom, '[t]he result is that decolonization has tended to perpetuate imperialism through the sanctification of traditional state sovereignty concepts that elide cultural variety'.⁵⁹ Development constructs also remain tied to progress ideologies.⁶⁰

Nonetheless, points of strong resistance did emerge in many postcolonial societies, particularly as a growing globalisation threatened the coherence of local communities and cultures. Many 'development' tensions were evident in early international environmental law instruments, such as the *Stockholm Declaration*.⁶¹ Principle 21 of the Declaration, regarded as a basic norm of customary international law, states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁶²

The tentative steps to widening the concept of common responsibilities were developed further in the *Brundtland Report on Sustainable Development*, known as *Our Common Future*.⁶³ This report articulates that sustainable development comprises 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁶⁴ In this way, sustainable development in international law (and where replicated in domestic law) fundamentally links environmental protection and human development, and to this extent, integrally links trajectories of growth in a dialectic with environmental protection. Therefore, the conception of environmental protection cannot escape the imperatives of human 'life' and 'desire' and their implementing techniques.

Thus, the concept from the *Brundtland Report* is replete with the compromise reached where 'Northern' nations bargained for environmental protection while 'Southern' nations negotiated the right to embark on the similar trajectories of development to those adopted by European countries in earlier centuries. Such divergent emphases on 'sustainable development' were given more precise formulation in the *Rio Declaration*. Subsidiary principles of sustainable

⁵⁹ Richardson, above n 38, 3.

⁶⁰ Beard, above n 10, 15.

⁶¹ *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1 January 1973) ch I (*Declaration of the United Nations Conference on the Human Environment*) ('*Stockholm Declaration*'). See Principles 8 to 25 of the *Stockholm Declaration* that deal with implementation and, in particular, Principle 9 that deals with technology and knowledge transfer and assistance to poorer countries. Principles 10 to 12 deal with what is commonly known as 'fair trade'.

⁶² *Ibid* principle 21. Having achieved the status of customary international law, Principle 21 of the *Stockholm Declaration* is binding on all states regardless of whether they are party to a treaty containing the same obligation.

⁶³ World Commission on Environment and Development, *Our Common Future* (1990) 87.

⁶⁴ *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol I) (12 August 1992) annex 1 (*Rio Declaration on Environment and Development*) principle 2 ('*Rio Declaration*').

development, such as intergenerational equity and the precautionary principle, have been subsequently adopted in many international environmental treaties,⁶⁵ and suggest a growing acceptance of changing value-sets at international law. At another level though, these principles of public international environmental law have provided the legal architecture for instituting complex, multilayered organisational structures across the world, such as the United Nations Environment Programme that are much more diffuse in their operational objectives. Moreover, since the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (the 'Earth Summit'), multilateral environmental treaties have gained an impressive administrative machinery, that has expanded them into specialist and functionally-focused 'regimes'. Such regimes — denoted as 'sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'⁶⁶ — reveal the increasing penetration of regulation and governance techniques into environmental law. Sustainability now represents a key goal of environmental legislation and governance in most nations across the world. Its innate flexibility has seen it coopted by many organisations as a pervasive means to achieve self-regulation and reflexive forms of regulation under a deregulatory policy agenda,⁶⁷ which is key to more recent, neoliberal forms of the governance of desire.

Critiques of sustainability at a cross-cultural level also argue that despite the rhetoric of socially-responsible and environmentally-sustainable development, pertinent matters such as consumption, population growth and equity are avoided or manipulated in international policy and law. These latter issues critically affect how the South fares under any purported sustainability regime.⁶⁸ Similarly, the continuing environmental degradation in many Third World countries 'provokes serious questions about the role and efficacy of law as an instrument for environmental management in postcolonial societies'.⁶⁹ Other commentators see equity, particularly intra-generational equity and intergenerational equity, as an effective legal standard supporting the implementation of a robust and effective model of sustainable development. To that extent, general principles of international environmental law provide a valuable means of articulating the nature of common responsibilities to current

⁶⁵ This body of principles at international law typically relies on liberal constructs related to 'reason' and justice. Often they are held to form an overarching ethics or moral value system — that is, a form of natural law as that jurisprudential term is generally understood.

⁶⁶ Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organizations* 186, 186.

⁶⁷ This phenomenon is sometimes called 'greenwash'. For a discussion of the rise of economic regulatory paradigms and governance mechanisms, see Leigh Hancher and Michael Moran, 'Organizing Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture, and Economic Regulation* (1989) 271, as cited in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (2007) 59.

⁶⁸ See, eg, Alexander Gillespie, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (2001). Other commentators have sought to revitalise the principle of sustainability: see, eg, Klaus Bosselman, *The Principle of Sustainability: Transforming Law and Governance* (2008).

⁶⁹ Richardson, above n 38, 1.

and future generations for the protection of the climate system,⁷⁰ although a requirement for non-species equity would be an important addition. In essence, this view of common responsibilities reflects an appeal to ‘secular faith’ in international law.⁷¹

Whether such faith can prevail against the penetration of environmental law by governance regimes as a mechanism of power designed to perpetuate ‘desire’ is examined further below.⁷² Any tension between competing models of law and governance must also sit across a background of historic asymmetries of development between nations as well as the growing transnational operation of law and institutions such as development and aid agencies. Thus, there is a widening dichotomy between the objectives of climate change instruments within international law, that are couched predominately in terms of liberal principles of justice and equity, while the mechanisms that are deployed to implement them are increasingly those of neoliberal market environmentalism. Even so, debates surface continually as to whether climate change can be adequately addressed without attention to sustainable development more widely.⁷³

C *The Law of Climate Change*

The momentum to deal with climate change in international law lies with a rising level of scientific concern about global warming over many years. The environmental movement has depended for much of its social authority on scientific claims about the threats produced by the trajectories of Western modernisation and industrialisation.⁷⁴ Early studies of anthropogenically-induced climate change were based around the Mauna Loa group of climatic measurements, which revealed increasing concentrations of carbon dioxide in the earth’s atmosphere.⁷⁵ From the early 1980s, these concerns were progressively institutionalised in transnational organisations, such as the IPCC.⁷⁶ Science thus served, and continues to serve, a double function. First, it is a source for technology and instrumental applications that foster life and development consistent with the rise of biopower; and second, as a key knowledge basis for concern about those very patterns of industrialisation and consumption that will propel the world towards dangerous climate change.⁷⁷

⁷⁰ Horn, above n 30.

⁷¹ Koskenniemi, ‘Between Technique and Politics’, above n 12, 30.

⁷² See Cover, above n 17, 11–13. While Cover was addressing his analysis to law in a generic sense, it is clear that this model has acute relevance for the resurgent neoliberal forms of globalised power. ‘In this model, norms are universal and enforced by institutions’: at 13 (emphasis omitted).

⁷³ Martin Parry, ‘Climate Change Is a Development Issue, and Only Sustainable Development Can Confront the Challenge’ (2009) 1 *Climate and Development* 5, 5.

⁷⁴ See generally Jürgen Habermas, *The Philosophical Discourse of Modernity* (1991).

⁷⁵ Liverman, above n 14, 282.

⁷⁶ *Ibid* 283.

⁷⁷ Bronislaw Szerszynski, ‘On Knowing What to Do: Environmentalism and the Modern Problematic’ in Scott Lash, Bronislaw Szerszynski and Brian Wynne (eds), *Risk, Environment and Modernity: Towards a New Ecology* (1996) 104.

Scientific concerns were given particular impetus with the 1988 Toronto Conference on the Changing Atmosphere, which recommended an international framework for redressing the complex problems of climate change, atmospheric pollution and ozone depletion to be prepared for the 1992 Earth Summit.⁷⁸ Subsequent negotiations ensued toward a climate change convention but developing countries — grouping together as the Group of 77 ('G77') bloc — only agreed to participate on the grounds that these countries would not be required to commit to any greenhouse gas emissions reductions.

The G77 bloc emphasised that, as a matter of history, the responsibility for anthropogenic global warming rested with the developed world.⁷⁹ Despite contested national positions that resulted in a generic 'common but differentiated responsibility' principle, ultimately the *UNFCCC* was signed by 154 states and the European Union at the Earth Summit. The Convention established a composite institutional machinery, including an administrative secretariat; subsidiary bodies providing specialist advice to the treaty parties; and bodies responsible for financial assistance and technology transfer.⁸⁰ These administrative and specialist functions exemplify the trends whereby '[t]he law defers to the politics of expertise'⁸¹ and where the extension of the 'techniques' of governance is clearly evident.⁸²

D Global Climate Change Law: The UNFCCC

The *UNFCCC* is a legal framework for addressing global warming, rather than a prescriptive legal instrument, as it does not contain explicit commitments for countries to reduce greenhouse gas emissions.⁸³ Principally, it was the resistance by leading developed countries, such as the United States, which vetoed the inclusion of any firm targets or timetables for the reduction of greenhouse gas emissions.

Yet, the stated norms in the Convention refer to a wider imagined community in that '[p]arties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity'.⁸⁴ Under this general

⁷⁸ For the formal authorisation, see *United Nations Conference on Environment and Development*, GA Res 44/228, UN GAOR, 44th sess, 85th plen mtg, A/RES/44/228 (22 December 1989) [3].

⁷⁹ Historic emissions are significant due to the long lag-time between release of greenhouse gas emissions and the time when these cease to be held in the atmosphere contributing to global warming. Hence, the effects of greenhouse gas emissions from many years ago will still contribute to current global warming.

⁸⁰ Jacqueline Peel, 'Environmental Law and the Challenge of Internationalisation' in Lee Godden and Jacqueline Peel (eds), *Environmental Law: Scientific, Policy and Regulatory Dimensions* (2009) 331, 341.

⁸¹ Koskeniemi, 'Between Technique and Politics', above n 12, 10. For a defence of political systems as not captured by special interests, see Daniel Farber, 'Politics and Procedure in Environmental Law' (1992) 8 *Journal of Law, Economics and Organization* 59.

⁸² Foucault, *The History of Sexuality*, above n 13, 141–5. See also Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596.

⁸³ The UNFCCC acknowledges that a trend to move to 'earlier levels' of greenhouse gas emissions would be consistent with the objective of the *UNFCCC*, above n 39, art 4(2)(a).

⁸⁴ *Ibid* art 3(1). See generally Horn, above n 30.

rubric, the *UNFCCC* sets out the main principles for international climate change regulation and establishes institutions for managing the climate change regime.⁸⁵ The central principle is that the parties to the *UNFCCC* should protect the climate ‘in accordance with their common but differentiated responsibilities and respective capabilities’.⁸⁶ The *UNFCCC* also contains a mechanism for providing funding and technology transfer, principally to developing countries.⁸⁷ Developed countries (listed in Annex I) are to ‘take the lead in combating climate change and the adverse effects thereof’.⁸⁸ However, the distribution of responsibility for emissions reduction remains one of the most controversial aspects of international climate law.⁸⁹

The ‘common but differentiated responsibility’ principle effectively crystallised a long-running debate as to the respective responsibilities of developed and less-developed nations.⁹⁰ The conflict has been ‘cast in north–south terms, with the argument made that the north should take action (first) because of its responsibility for the vast majority of emissions to date, its high levels of per capita emissions and its capacity to take action’.⁹¹ While the *UNFCCC* recognises, in principle, the historic responsibility of the nations of the North, it has not quelled claims by nations of the South that ‘the politics of climate change represents a form of “environmental colonialism”’.⁹² Ongoing conflicts have ensued over how to frame historic responsibility in the *UNFCCC*, centred on divergent perceptions of equity⁹³ and methods of calculation⁹⁴ that have continued to resonate through to the Copenhagen Conference.

Other relevant principles embodied in the *UNFCCC* include provisions requiring consideration of the special circumstances of the countries most vulnerable to the impacts of climate change.⁹⁵ Significantly, there is a prescience of the governance modes to come, with an exhortation ‘to promote a supportive and open international economic system that [will] lead to sustainable economic growth and development in all Parties, particularly developing country Parties’.⁹⁶

⁸⁵ The *UNFCCC* instituted the COP and its advisory bodies: *UNFCCC*, above n 39, arts 7, 9, 10.

⁸⁶ *Ibid* art 3(1).

⁸⁷ *Ibid* art 11.

⁸⁸ *Ibid* art 3(1).

⁸⁹ The ‘common but differentiated responsibility’ principle has attracted much legal analysis as well as commentary from many other disciplines: see, eg, Paul Harris, ‘The European Union and Environmental Change: Sharing the Burdens of Global Warming’ (2006) 17 *Colorado Journal of International Environmental Law and Policy* 309. See generally Mathias Friman and Björn-ola Linnér, ‘Technology Obscuring Equity: Historical Responsibility in UNFCCC Negotiations’ (2008) 8 *Climate Policy* 339.

⁹⁰ See generally Harriet Bulkeley, ‘Governing Climate Change: The Politics of Risk Society?’ (2001) 26 *Transactions of the Institute of British Geographers* 430.

⁹¹ *Ibid* 435.

⁹² For an early discussion, see Agarwal and Narain, above n 8.

⁹³ Friman and Linnér, above n 89, 340.

⁹⁴ Kevin Baumert, Timothy Herzog and Jonathan Pershing, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy* (World Resources Institute Report, 2005) 12, 22.

⁹⁵ *UNFCCC*, above n 39, art 3(2).

⁹⁶ *Ibid* art 3(5).

E *Market-Based Instruments and Flexibility Mechanisms:
The Kyoto Protocol*

The return of the ghosts of progress is apparent in the idea of sustainable economic growth, which works a subtle transformation of the sustainable development concept.⁹⁷ However, the contested notion of responsibility still remained at the core of negotiations between the instigation of the *UNFCCC* in 1992 and the adoption of *Kyoto Protocol* in 1997.

In the negotiations leading to the *Kyoto Protocol*, the Brazilian Government submitted a proposal to the Ad Hoc Group on the Berlin Mandate,⁹⁸ which argued that Annex I country obligations should be related to relative levels of past emissions and the current effect on the climate.⁹⁹ The ultimate fate of the Brazil proposal represents a microcosm of the means by which equity principles were weakened within the Protocol. Methodologies for calculating emissions reductions ultimately did not reflect the past trajectories of the industrialisation of Northern nations. Baselines benchmarked at 1990 levels were chosen instead for the ‘common but differentiated responsibility’ principle within the *Kyoto Protocol*.¹⁰⁰ While it is acknowledged that no targets for reductions were assigned to developing nations, ‘a 1990 baseline favoured several powerful interests including the UK, Germany and Russia’.¹⁰¹

Some observers such as Friman and Linnér attribute the exclusion of robust historical responsibilities for Northern nations to the technical paradigm within which emissions were considered, which diluted moral and ethical concerns. Other commentators emphasise the last minute political compromise engineered by the Chair of Negotiations, Raul Estrada, that eschewed logical or uniform cuts across the industrialised world in favour of existing country commitments to ensure that a wide acceptance of the *Kyoto Protocol* was achieved.¹⁰² While these trends might suggest that politics, rather than technique, were the prevalent influence on international climate law at this point, the instruments that emerged to implement the Protocol exemplify the growing presence of governance techniques.¹⁰³ Given the complexity of the *Kyoto Protocol*, the discussion is directed to targets and flexibility mechanisms as the two main areas relevant for an examination of how more prescriptive concepts of discrete responsibility have been overtaken by the introduction of governance modes that refocus on desire and consumption.

⁹⁷ David Driesen, ‘Sustainable Development and Market Liberalism’s Shotgun Wedding: Emissions Trading under the Kyoto Protocol’ (2008) 83 *Indiana Law Journal* 21, 25.

⁹⁸ COP, *Report of the Conference of the Parties on Its First Session, Held at Berlin from 28 March to 7 April 1995, Addendum — Part Two: Action Taken by the Conference of the Parties at its First Session*, UN Doc FCCC/CP/1995/7/Add.1 (6 June 1995) 4–6 (Decisions 1/CP.2–3/CP.2) (‘Berlin Mandate’).

⁹⁹ Friman and Linnér, above n 89, 341.

¹⁰⁰ *Ibid* 342.

¹⁰¹ Liverman, above n 14, 290.

¹⁰² *Ibid* 291.

¹⁰³ See Farhana Yamin, ‘The Kyoto Protocol: Origins, Assessment and Future Challenges’ (1998) 7 *Review of European Community and International Environmental Law* 113.

1 *Targets*

A controversial aspect of the *Kyoto Protocol* is the greenhouse gas emissions reductions targets for the Annex I group of developed countries. The Protocol embraces an overall goal of reducing the greenhouse gas emissions of developed country parties,¹⁰⁴ 'by at least 5 per cent below 1990 levels in the first commitment period 2008 to 2012'.¹⁰⁵ Within the Annex I group, there are differentiated targets for reductions.¹⁰⁶ Some groups, such as the members of the European Union, agreed to eight per cent reductions by 2012 relative to 1990 levels,¹⁰⁷ whereas Australia, for example, was able to negotiate less onerous targets.¹⁰⁸ Targets under the *Kyoto Protocol* have been criticised as not reflecting an adequate response to the climate change risks that science has identified.¹⁰⁹ Yet, it was widely acknowledged that the Protocol measures were a first step to raise awareness among nations and industry of the need for substantial change to established patterns of development. Therefore, the Protocol was to accomplish interim objectives and to begin the process of implementing the complex governance machinery associated with the international climate law measures, including trading regimes. Yet, the path dependency entailed in instituting these forms at international law may mean that the world is unable to retreat substantially from the legal, political and economic structures that have been precipitated by the Protocol.¹¹⁰ However, there are no targets laid down in the *Kyoto Protocol* for any commitment periods beyond 2012 as these are the subject of further international negotiations.¹¹¹ North–South tensions are thus escalating in the light of forthcoming negotiations in Copenhagen.¹¹²

The efficacy of the *Kyoto Protocol* remained tenuous given that the US, at that time the largest greenhouse gas emitter, did not ratify the Protocol.¹¹³ Australia in December 2007 at Bali only ratified because of a change of federal government. At the Bali COP, few firm numbers or timelines were agreed upon for possible post-2012 targets.¹¹⁴ Suggestions were raised though about targets

¹⁰⁴ The *Kyoto Protocol* covers six greenhouse gases, namely carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, per-fluorocarbons and sulphur hexafluoride: *Kyoto Protocol*, above n 47, annex A. Some bodies lobbied for a smaller number of relevant gases, such as the EU which argued for only those gases included in their own emissions trading scheme: European Parliament and Council, *Directive 2003/87/EC* [2003] OJ L 275/12, annexes I–II.

¹⁰⁵ *Kyoto Protocol*, above n 47, art 3(1).

¹⁰⁶ See *ibid* annex B.

¹⁰⁷ *Ibid*.

¹⁰⁸ Australia benefits from art 3(7) of the *Kyoto Protocol*, which allows countries with net emissions from land clearing in 1990 to include those emissions in calculating their 1990 starting baseline. This baseline means that the reductions Australia must make to meet the eight per cent target are substantially reduced: Matthew Coghlan, 'Prospects and Pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' (2002) 3 *Melbourne Journal of International Law* 165, 175.

¹⁰⁹ Khor, above n 11.

¹¹⁰ Liverman, above n 14, 292.

¹¹¹ See *Kyoto Protocol*, above n 47, art 3(1). See also Leary, above n 49.

¹¹² See Khor, above n 11.

¹¹³ Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24 *Environmental and Planning Law Journal* 90, 92.

¹¹⁴ See *Bali Action Plan*, above n 47, 3–6.

for larger developing countries.¹¹⁵ To date, commitment has been limited to working toward a new agreement by the end of 2009.¹¹⁶ However, some Annex I countries have introduced specific legislation for emissions trading schemes and other regulatory tools designed to meet projected commitments, given the existence of flexibility mechanisms under the *Kyoto Protocol*.¹¹⁷ Increasingly though, debates over appropriate targets and responsibilities have been displaced by the attention directed toward the intricate, technical detail of emissions trading.

2 Flexibility Mechanisms

The market mechanisms that the international community has adopted to respond to the crisis engendered by climate change,¹¹⁸ on one view, allow for a deferral of immediate responsibility in favour of flexibility.¹¹⁹ Initially, groups such as the EU had favoured the introduction of taxation-related measures as the substantive measure under the *Kyoto Protocol*. Yet, 'consistent with broader ideologies of market environmentalism and ecological modernisation',¹²⁰ the US successfully argued for the greater effectiveness of cap and trade policies that underpin carbon markets.¹²¹ The 'flexibility mechanisms' comprise of international emissions trading schemes, and two other forms: Joint Implementation ('JI') and the CDM.¹²² These instruments that permit trade in emissions credits between states were included under the *Kyoto Protocol* to allow developed states parties to meet a portion of their emissions reduction targets by relying on greenhouse gas mitigation activities undertaken in other countries.¹²³ The underpinning 'social cost' theory suggests that greater efficiencies will be achieved in this manner.¹²⁴ The theory contends that once a cap is set on greenhouse gas emissions — that is, in relation to reductions

¹¹⁵ Ibid art 1(b)(i)–(ii).

¹¹⁶ Ibid arts 1–2.

¹¹⁷ See, eg, Carbon Pollution Reduction Scheme Bill 2009 (Cth); *Climate Change Response Act 2002* (NZ); *Climate Change Response (Emissions Trading) Amendment Act 2008* (NZ); *Climate Change Act 2008* (UK); American Clean Energy and Security Act of 2009, HR Res 2452, 111th Congress (2009).

¹¹⁸ Robyn Eckersley, 'The Ethics of Carbon Trading' (Speech delivered at the Ethics and Climate Change Lecture Series, Princeton Environmental Institute, New Jersey, US, 21 February 2009) <<http://www.princeton.edu/sites/pei/ECC/eckersley.htm>>

¹¹⁹ Liverman, above n 14, 292–3. See also James Prest, 'A Dangerous Obsession with Least Cost? Climate Change, Renewable Energy Law and Emissions Trading' in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) 179.

¹²⁰ Liverman, above n 14, 293.

¹²¹ David Toke, 'Trading Schemes, Risks, and Costs: The Cases of the European Union Emissions Trading Scheme and the Renewables Obligation' (2008) 26 *Environment and Planning C: Government and Policy* 938, 942; Peter Christoff, 'Can the Invisible Hand Adjust the Thermostat? Carbon Emissions Trading and Australia' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 82, 90; Suzanne Dickey, 'Emissions Trading: What Works?' in Wayne Gumley and Trevor Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) 63, 64.

¹²² *Kyoto Protocol*, above n 47, arts 6, 12.

¹²³ Ibid art 7.

¹²⁴ See Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

targets — then polluters will either innovate to reduce pollution levels to meet targets or, where that is not feasible, buy or trade ‘credits’ from another entity that has been able to reduce pollution and which has spare credits. Like many environmental-credit or ecosystem offset models, the flexibility mechanisms raise the possibility of an almost ‘business as usual’ approach for some sectors of society but more radical adjustments for others, especially where policymakers are persuaded that other reforms (such as direct regulation) are too costly to implement.¹²⁵

There are three mechanisms for trade in emissions credits. JI allows an Annex I party to enter into an agreement with another Annex I party so that the first party can gain emissions credits earned through funding a mitigation project on the territory of the second party.¹²⁶ There was strong resistance by countries of the South to the inclusion of these measures. The use of JI has been more confined than the euphemistically named, the ‘Clean Development Mechanisms’.¹²⁷ The CDM was instigated, *inter alia*, as a means of ‘compensating’ the developing countries under the climate regime.¹²⁸ Beneficial social and economic outcomes for developing nations were predicted.¹²⁹ The CDM permits Annex I parties to earn emissions credits from projects undertaken in non-Annex I parties, namely developing countries or entities registered from within those nations.¹³⁰ All CDM credits must be certified by an executive board.¹³¹ Again, the reliance on governance through reflexive forms of compliance are evident here, but already problems have emerged with the certification and monitoring processes associated with some CDM projects.¹³²

Importantly, for both the CDM and JI, credits earned must reflect emissions reductions that are ‘additional to’ those which would have occurred without the project.¹³³ This ‘additionality’ requirement seems reasonable in that it requires verification that an actual reduction in emissions has occurred. In some instances though, it has militated against projects in the less developed regions such as in Africa where it cannot be clearly indicated that the project would not have proceeded anyway.¹³⁴ This requirement to demonstrate additional activities also presents a possible barrier for many ‘avoided’ deforestation or degradation projects, if these REDD-type activities are to be brought under the CDM umbrella post-Copenhagen.

¹²⁵ Driesen, above n 97, 33.

¹²⁶ *Kyoto Protocol*, above n 47, art 6(1).

¹²⁷ *Ibid* art 12.

¹²⁸ Liverman, above n 14, 293.

¹²⁹ Friman and Linnér, above n 89, 340.

¹³⁰ *Kyoto Protocol*, above n 47, art 12(3).

¹³¹ For the role of the Conference of the Parties serving as the Meeting of the Parties (‘COP/MOP’) and the constituted bodies established under its authority, see Jutta Brunnée, ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements’ (2002) 15 *Leiden Journal of International Law* 1.

¹³² Jolene Lin and Charlotte Streck, ‘Mobilising Finance for Climate Change Mitigation: Private Sector Involvement in International Carbon Finance Mechanisms’ (2009) 10 *Melbourne Journal of International Law* 70, 87–9.

¹³³ *Kyoto Protocol*, above n 47, arts 6(1)(b), 12(5)(c).

¹³⁴ Paul Desancker, ‘The Kyoto Protocol and the CDM in Africa: A Good Idea But ...’ (2005) 56 *Unasylva* 24, 24–5.

Nonetheless, the CDM has enabled Northern states to gain credits for greenhouse gas emissions reduction projects in the South in areas such as industrial gas capture, renewable technologies, energy efficiency and forest plantations in return for credits and a small fund toward adaptation measures. Patterns of support, though, have been very geographically skewed, with countries, such as China, being recipients of much support, while LDNs are notable in their absence.¹³⁵ Mounting evidence suggests that most CDM support is flowing to countries that are already well along the path to industrial development. Further, the CDM was not designed to supplant foreign aid and other forms of assistance, such as technology and knowledge transfer, to vulnerable developing countries. While the intention may not have been to displace development aid, nonetheless, the CDM is receiving significant attention as the 'latest development discourse', as investors and environmental groups scramble to involve local communities within developing countries in these schemes. Speculation and unscrupulous scamming is rife in some circumstances.¹³⁶ The CDM, like previous forms of global trade, contains the promise of economic opportunities for the South but also the potential to re-entrench and extend existing disparities of wealth between nations and within nations that are a legacy of colonialism and past patterns of promoting growth and progress.

Questions about the manner in which the commodification of 'avoided' emissions will operate, as well as the structural and economic impacts on local communities, are likely to be reiterated with the proposed introduction of the REDD scheme under the CDM at the Copenhagen Conference.¹³⁷ Basically, the REDD plus schemes seek to capture the potential of standing tropical forests to sequester carbon and to formulate this capacity as a credit under the CDM flexibility mechanisms. The REDD schemes exemplify most acutely the potential of market mechanisms to offer a means to redress environmental degradation in many developing countries as well as offering the incentive for climate change emissions reduction. By placing a normative value upon activities and policies designed to avoid deforestation, these mechanisms demonstrate the capacity for significant environmental benefits as well as social 'co-benefits'.¹³⁸ Alternatively, the adoption of these market mechanisms will

¹³⁵ United Nations Development Programme, *The Clean Development Mechanism: An Assessment of Progress* (2006).

¹³⁶ The recent scandal in Papua New Guinea is one example. A government minister, at the behest of an Australian 'investor', issued many thousands of credits in relation to avoided timber felling even though no such CDM scheme existed in the country, and much to the detriment of local communities who held the land under customary title: Marian Wilkinson and Ben Cubby, 'How a \$100m Carbon Trading Scandal in PNG Has Cast Doubt on Australia's Plans to Cool the Planet', *The Age* (Melbourne, Australia) 4 September 2009, 1.

¹³⁷ *Bali Action Plan*, above n 47, art 1(b)(iii). The REDD negotiating text was developed by the AWG-LCA in the Climate Talks in Bonn, June 2009. The document has since been further revised in the meetings of the AWG-LCA in Bangkok September 2009 and Barcelona, November 2009. The current negotiating text can be found at <<http://unfccc.int/resource/docs/2009/awglca7/eng/inf02.pdf>>.

¹³⁸ The language of 'co-benefits' is emerging as one denoting a 'win-win' situation in which projects have positive environmental outcomes as well as social and economic benefits: see Leo Peskett et al, *Making REDD Work for the Poor* (2008) 5.

substantially alter the value of forests and pose lucrative opportunities that may well lead to an intensification of the existing inequities experienced by the local communities dependent on forests for a livelihood.¹³⁹ The commodification and 'proprertisation' of any entity increases its exchange value and thus it will initiate risks of unscrupulous exploitation.

But in climate change debates, these issues of creating tradeable commodities from avoiding what otherwise might be regarded as illegal or immoral behaviour, such as polluting the atmosphere or clearing forests, has attracted censure. Indeed, one of the remarkable aspects about the institution of governance by market mechanisms has been the extent to which the legal status of particular activities moves from being the subject of sanction to that of incentive. Some commentators still prefer the analogy of a religious or moral indulgence as the descriptor for these 'avoided' activities that now attract market values.¹⁴⁰ In this view, the 'sinners' in developed countries pay an indulgence — or in modern parlance, a carbon credit — to continue with their own past behaviour, little altering their industrialised and highly consumptive lifestyles. 'Others' must then make up the deficit as an offset or sacrifice.¹⁴¹ Depending on whether 'avoided' pollution or degradation under the CDM is regarded as efficient governance tool or a moral indulgence for developed countries will bear directly upon whether international climate law might be said to have discharged its obligations in effecting a common but differentiated responsibility to 'protect the climate system for the benefit of present and future generations of humankind, on the basis of equity'.¹⁴²

The CDM functions alongside the well-established voluntary offsets markets in carbon trade that operate at the international and domestic levels,¹⁴³ as well as the growing number of national emissions trading schemes that also include various forms of offset. All such schemes are reliant on the penetration of international modes of governance into the country or region that is providing the reduction activity. In turn, this penetration of governance relies on highly technical forms of scientific determination of value for the credit, together with complex monitoring and compliance regimes that mirror many of the reflexive techniques of the governance of desire that have been adopted in Western nations.

(a) *Emissions Trading Schemes*

These trends to expand the scope and penetration of techniques for the governance of CDM mechanisms reflect the fact that the central instruments under the *Kyoto Protocol* for mitigating the effects of climate change are global

¹³⁹ Marcus Orellana, *REDD Legal Issues: Indigenous Peoples and Local Communities* (Center for International Environmental Law Draft Report, 30 March 2009) 19.

¹⁴⁰ The practice of buying and selling indulgences was regarded as a remission of the temporal punishment by the Church in return for payment: Beard, above n 10, 33.

¹⁴¹ Khor, above n 11.

¹⁴² *UNFCCC*, above n 39, art 3(1).

¹⁴³ Anthony Collins and Sally Palmer, 'The Role of Financial Markets in Emissions Trading' (2008) 27 *Australian Resources and Energy Law Journal* 41.

emissions trading schemes. Credits in this trade may be derived from JI or CDM projects, from emissions savings made in a national domestic context or from 'sink' activities. Sink activities, otherwise known as bio-sequestration, relate to the absorption of carbon from the atmosphere (currently from afforestation and reforestation,¹⁴⁴ and potentially as noted above from avoiding deforestation and the degradation of forests). Buyers of credits — whether generated through sink activities or greenhouse gas emissions reductions — will be countries that find it less expensive to buy credits to meet their emissions targets than to undertake more extensive reductions within their own country. Nevertheless, a country is not permitted to meet its emissions target solely by buying emissions credits on the international market. Rather, international emissions trading must be 'supplemental' to domestic activities.¹⁴⁵

Critical to the effective operation of all flexibility mechanisms are suitable provisions to ensure compliance. Compliance in international environmental law is problematic, and an increasing array of administrative measures has been developed to deal with perceived limitations of compliance and accountability.¹⁴⁶ Compliance issues are critical as much of the success of the flexibility schemes will hinge upon the price of credits on the market. In turn, this price is dependent upon sufficient verification protocols and their effective implementation to ensure that the value of credits purchased does accurately reflect the actual emissions reductions that have occurred.¹⁴⁷ Accordingly, the *Kyoto Protocol* contains a complex compliance mechanism.¹⁴⁸ The adoption of such a complex and pervasive compliance regime points to the fact that the credit or trade scheme is not a stand-alone 'free market' approach. Rather, the market mechanisms function as a co-regulatory regime employing methods of governance drawn from both private and public law.¹⁴⁹ All are highly dependent on specialist expertise and reflexive regulatory techniques in order to achieve the economic and structural goals. The language is that of least cost avoidance, rather than obligation and responsibility.

¹⁴⁴ For definitions of these terms, see COP, UNFCCC, *Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001, Addendum — Part Two: Action Taken by the Conference of the Parties*, UN Doc FCCC/CP/2001/13/Add.1 (21 January 2002) 58 (*Decision 17/CP.7 — Land Use, Land-Use Change and Forestry*).

¹⁴⁵ *Kyoto Protocol*, above n 47, art 17; COP, UNFCCC, *Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001, Addendum — Part Two: Action Taken by the Conference of the Parties*, UN Doc FCCC/CP/2001/13/Add.3 (21 January 2002) 2 (*Decision 15/CP.7 — Principles, Nature and Scope of the Mechanisms Pursuant to Articles 6, 12 and 17 of the Kyoto Protocol*).

¹⁴⁶ Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale Law Journal* 1490.

¹⁴⁷ Lin and Streck, above n 132, 87–9.

¹⁴⁸ See COP, UNFCCC, *Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001, Addendum — Part Two: Action Taken by the Conference of the Parties*, UN Doc FCCC/CP/2001/13/Add.3 (21 January 2002) 64–77 (*Decision 24/CP.7 — Procedures and Mechanisms relating to Compliance under the Kyoto Protocol*).

¹⁴⁹ Morgan and Yeung contend that the *Kyoto Protocol* emissions trading regime operates as a mixed market system, strongly influenced by politics of the nation-state: Morgan and Yeung, above n 67, 314–16.

Thus, neoliberal market mechanisms have emerged at the international and national levels as the preferred mode of governing climate change.¹⁵⁰ Other regulatory instruments such as carbon or ‘eco’ taxes have been adopted by some countries and publicly debated in others. The adoption of the *Bali Action Plan* and *Road Map* for negotiations to 2009 provided strong indications that any international agreement on climate change post-2012 will rely heavily for its implementation on emissions trading.¹⁵¹ While Lin and Streck note early resistance to the inclusion of market mechanisms in the *Kyoto Protocol*, they conclude that:

the reliance on market instruments has been unquestioned ... Negotiators may have been surprised by the success of the flexible mechanisms, the CDM in particular, and they may not understand the dynamics of the carbon market, but they have embraced the power of the market to mobilise finance and the possibility of harnessing this power for environmental goals.¹⁵²

Other commentators have not been as sanguine about the success of flexibility mechanisms. Trading schemes have been widely promoted as ‘more flexible than carbon taxes or prescriptive regulation because they promote least-cost solutions for any desired level of emissions reductions’.¹⁵³ However, emissions trading schemes need to be assessed not only as cost-benefit exercises but also from the standpoint of environmental justice and ethical responsibility:

The instruments enable the maintenance of carbon polluting practices, high consumption life-styles, and the postponement of deep structural changes in developed countries while increasing the costs of transition to a low carbon economy by developing countries.¹⁵⁴

More widely, Driesen identifies tensions between ‘market liberalism’s goal of maximizing short-term cost effectiveness and sustainable development’s goal of catalyzing technological change for the benefit of future generations’.¹⁵⁵ Many perceptive accounts are also emerging of the distributive justice imbalances for the economies of the South that are implicit to the deployment of market mechanisms under the *Kyoto Protocol*. Khor, a strong advocate for the South, puts it simply that ‘there is a danger in “Offsets” or Too Many Offsets’.¹⁵⁶ Further, any calculation about the current value of carbon credits with its deference to discount rates will seriously underestimate the scale and nature of the offset or sacrifice that will be asked of developing nations; local communities within those nations, including many indigenous peoples,¹⁵⁷ as well as the

¹⁵⁰ Robert Baldwin, ‘Regulation Lite: The Rise of Emissions Trading’ (2008) 2 *Regulation and Governance* 193, 193; Prest, above n 119, 179.

¹⁵¹ *Bali Action Plan*, above n 47.

¹⁵² Lin and Streck, above n 132, 93–4.

¹⁵³ Eckersley, above n 118.

¹⁵⁴ *Ibid.*

¹⁵⁵ Driesen, above n 97, 21.

¹⁵⁶ Khor, above n 11.

¹⁵⁷ See, eg, Owen Cordes-Holland, ‘The Sinking of the Strait: Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the *ICCPR*’ (2008) 9 *Melbourne Journal of International Law* 405.

non-human world and future generations. Moreover, an understanding of the loss of the intangibles of cultural landscapes, lifestyles and relationships with the natural world that will be coopted into the new carbon age is occluded by their representation only as commodified value within the market exchange systems. In this manner, the flexibility mechanisms distort many of the distributive justice and equity principles that are held to animate the overall operation of the climate law framework.

(b) *Flexibility, Trade and the Responsibility of International Law*

What might we make of these trends in international environmental law by reference to earlier themes? Flexibility mechanisms under the *Kyoto Protocol* in their pervasive operation across the climate change regime suggest that imperialism — manifesting once again as an ‘openness to trade’ — is an important component of international law.¹⁵⁸ The universalising principles of an openness to trade were the precursors to the expansion of Western nations into the life space of other peoples that international law rationalised for many centuries. Potentially, flexibility mechanisms can effect a similar appropriation of the lands and resources of the Third World to the economic imperatives of the First World without direct territorial acquisition. While these large questions attendant upon law are partially obscured by the current attention directed towards securing a post-*Kyoto* agreement on targets to mitigate greenhouse gas emissions, and by the intricacies of the mechanisms of emissions trading, this section refocuses attention upon them.

Fractured negotiations over the role of international law in addressing climate change have continued to provoke significant conflicts over the accountability of Northern nations. International climate law agreements and institutions reflect new governance discourses and practices in attempts to legitimate and mitigate climate risk.¹⁵⁹ These conflicts, on one level, pose novel challenges for the ‘relations of definition’ within modernity.¹⁶⁰ Those relations of definition must work across both formal appeals to equity and common but differentiated responsibility but also the deferral of responsibility under the flexible trade mechanisms that are deployed. In this latter response, the methods employed to recognise responsibility to the ‘Other’ resonate with many ghosts of the past that still walk beside international law and are a reminder of the past sacrifices made to ensure the continuity of civilisation. In this manner, ‘postcolonialism does not imply that imperialism is a matter for historians, but rather it seeks to disclose and analyse the various ways colonialism is reproduced today’.¹⁶¹

How might colonialism be reproduced in the vocabulary of today? Has the impulse to categorise and assign a nomenclature that masks other peoples’ histories and identities in favour of a Northern ‘ideal’ subsided? It is still

¹⁵⁸ Sundhya Pahuja, ‘Review’ (2006) 65 *Modern Law Review* 486.

¹⁵⁹ See Bulkeley, above n 90, 442.

¹⁶⁰ *Ibid* 432.

¹⁶¹ Richardson, above n 38, 7.

with some surprise to find a new ordering — not explicitly of progress and civilisation — but of labour and its specialisation:

Simple dichotomies, such as First World–Third World, developed–developing countries, and north–south, are no longer adequate for understanding the complex economic geography of the world. Even the division into core, semi-periphery, and periphery groups diverse economies into an excessively limited number of categories. It is time to develop a new scheme that better classifies the countries of the world into coherent groups.¹⁶²

What might be that new scheme that better classifies the climate change world? Is it the market and an associated governance of life? Does law have a separate and independent role in constituting an order of life? The following section explores the role of law and regulation in instituting desire and facilitating life, before the final section briefly considers whether law as *nomos* might offer an alternative meaning for constituting responsibility. A *nomos*, a world of law, encompasses

the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision. Our visions hold our reality up to us as unredeemed.¹⁶³

III DESIRE AND LIFE

As the humanist project of the Enlightenment progressed beyond a concern with overcoming Death, it reached the point of placing human Life and Desire at the centre of history.¹⁶⁴ Yet not all humanity was so positioned. Only those persons who had attained the rights of selfhood and civilisation were so centrally positioned as a reflection of the universal ideal. The self, to attain such status, needed to be disciplined as an all-consuming life of self-revealing penitence marked the limits of desire. Arguably, the Enlightenment ultimately succeeded in achieving a transgression of those limits, in part due to the rise of a secular state that had an overarching objective in the facilitation of life and desire by a concentration on the body, consumption and continual growth. Such was the outcome of the dialectic that resulted in the ‘self destruction of the Enlightenment’ post World War I that was averted to by Adorno and Horkheimer. Moreover, the links between civilisation’s need to transcend ecological or ‘natural’ limits, the improvement and disciplining of the individual

¹⁶² Wolfgang Hoeschele, ‘The Wealth of Nations at the Turn of the Millennium: A Classification System Based on the International Division of Labor’ (2002) 78 *Economic Geography* 221, 221. This new classification is to be based on a division of labour that replicates a class system at an international level.

¹⁶³ Cover, above n 17, 9.

¹⁶⁴ Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Robert Hurley, Mark Seem and Helen Lane trans, first published 1972, 1983 ed) [trans of: *L’Anti-Oedipe*].

integral to the Enlightenment project; and the civilisation and development of peoples is made explicit by Beard:

Within development discourse, the subject exists in so far as the word has wrought him or her from nothingness ... This is the process of development. Development is transcendence: the place that everyone is trying to get to, to complete themselves. Development is desire — the desire to become that which language promises but never achieves. Development is Western Imperialism: a never ending lack, and it is what holds together the global economy.¹⁶⁵

Under the climate change regime, international law, together with the more explicitly economic regimes under the World Trade Organization,¹⁶⁶ will play its role in binding together the global economy. Instrumental uses of law and governance will operate within an emergent ‘low-carbon’ development discourse that will be a fundamental part of the new green global economy. Increasingly, the regime of climate change seems to be converging with an older, imperial understanding of development while still employing the vocabulary of public international law. Once anchored in a discourse of sustainable development, the *UNFCCC* now seems more closely associated in its modus operandi with development as the governance of ‘desire’. The adoption of market-based instruments of trade and the technicalities of flexibility mechanisms suggest an insidious, technical and all-pervasive governmentality of life that has origins in the patterns of trade and economic growth set in place under colonialism and imperialism but which now must constitute a low-carbon means of controlling ‘the reproductive wastes’ of modern consumer life so as not to endanger the wellbeing of populations. The *UNFCCC* framework establishes the nexus between Life, Desire and Law by bringing together in a legal framework the dialectical means for the nation-state to sustain life by reducing emissions while at the same time still operating within the paradigms of growth and consumption. To draw on Foucault, ‘[u]nderlying ... the idea that law constitutes desire, one encounters the same putative mechanics of power’.¹⁶⁷ Climate law also uncannily constitutes a [market] mechanics of power directed to securing life as the welfare of populations¹⁶⁸ — or at least some populations — in post-carbon modernity.

Foucault initially analysed law as ‘a power whose model is essentially juridical, centred on nothing more than the statement of law’.¹⁶⁹ This modality of the exercise of power, formulated in the vocabulary and method of law, has been

¹⁶⁵ Beard, above n 10, 15.

¹⁶⁶ See a recent report considering border tax adjustments that espouses the essential coalition of interest between the public international law *UNFCCC* regime and WTO trade rules: Ludvine Tamiotti et al, *Trade and Climate Change* (United Nations Environment Programme and World Trade Organization Report, 2009) 98–105.

¹⁶⁷ Foucault, *The History of Sexuality*, above n 13. Foucault saw sex as the point of entry of the state into control over the human body, whereby desire is increasingly regulated through the power of the state.

¹⁶⁸ *Ibid* 25.

¹⁶⁹ *Ibid* 85.

the defining characteristic of western societies since the Middle Ages.¹⁷⁰ Why might power be formulated as law?

Let me offer a general and tactical reason that seems self-evident: power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its mechanisms. Would power be accepted if it were entirely cynical? ... Power as a pure limit set on freedom is, at least in our society, the general form of its acceptability.¹⁷¹

Power's efforts to obscure its mechanisms became more entrenched with 'the entry of life into history',¹⁷² and the rise of a pervasive state regulatory regime designed around utilitarian goals of progress and growth as the end-point for civilisation. The 'state' in Western European countries from the 17th century onward instituted a shift from the sovereign model of power over the subject through the sanction of death, to the facilitation of life through governance.¹⁷³ Generally, this movement coincided with the early periods of European colonialism. The rise of a normative paradigm of biopower can be characterised in that '[i]f the question of man was raised — insofar as he was a specific being, and specifically related to other beings — the reason for this is to be sought in the new mode of relation between history and life: in the dual position of life that placed it at the same time outside history, in its biological environment, and inside human historicity'.¹⁷⁴ Life became susceptible to specialist techniques as it was 'outside', located in a material realm and thus beyond the previous sovereign sphere — that is, outside God and sanction. Yet, life also became central to achieving the ends or outcomes of human historicity, the appeal to a vision of history, civilisation and dialectic order, such as that entailed in an evolutionary model of development.

The consequence of the shift from death to life was the subsequent infiltration of power as a regulation of populations and the disciplining of the body is known now by the shorthand form of 'biopower'. The key shift is from law to regulation,¹⁷⁵ and it is held to exist in tandem with a rising concern over the health and wellbeing of populations¹⁷⁶ as the end(s) of history. 'Broadly speaking, at the juncture of the "body" and the "population," sex became a crucial target of a power organised around the management of life rather than the menace of death'.¹⁷⁷

¹⁷⁰ Ibid 86.

¹⁷¹ Ibid.

¹⁷² Ibid 141. This point references back to the earlier discussion of *The Waste Land* as one 'end-point' of history.

¹⁷³ Arendt identifies a similar shift, although she sees the provenance of governments as increasingly concerned with the private realm of 'housekeeping', that is, the economy: Hannah Arendt, *The Origins of Totalitarianism* (2nd ed, 1958). See generally Beard, above n 10.

¹⁷⁴ Foucault, *The History of Sexuality*, above n 13, 143.

¹⁷⁵ The sovereign-juridico model of law and power and the shift to governmentality is articulated also in Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, first published 1975, 1988 ed) [trans of: *Surveiller et Punir: Naissance de la Prison*].

¹⁷⁶ For a discussion, see generally Alan Hunt and Gary Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance* (1994) 25–7.

¹⁷⁷ Foucault, *The History of Sexuality*, above n 13, 147.

Power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself; it was the taking charge of life, more than the threat of death, that gave power its access even to the body.¹⁷⁸

The reference to death here is in the generic sense of cataclysmic events, such as plagues and wars that threaten not just individual bodies but the stability of civilisation. Death as sacrifice or as apocalyptic calamity has long been seen as the scourge of civilisation and these ideas are replayed through *The Waste Land*, although the spectre of death and sacrifice is now raised very prominently in many climate change predictions.

Moreover, the control over populations resonates not just in the direct medical control over the health of individual humans that overcomes death, but it encapsulates their reproductive energies, consumption patterns and desires as well as the conditions that constitute the flourishing of populations. These conditions extend to trade, markets, and indeed to development. Such conditions for flourishing might, in the 21st century, begin to employ a terminology borrowed from ecology and be couched in terms of the need for deep structural change in the face of dwindling resource bases and trajectories toward dangerous climate change. Yet the spectre of Death that the rise of biopower had supposedly precluded, has re-surfaced, not as a sign of scarcity and plague, as earlier prophets would have suggested, but more as a consequence of the 'over-facilitation' of life and the fulfilment of desire and its excesses. Ultimately, chosen populations are to be secured by trade or offset against the chaos of a descent into dangerous climate change in order to prevent another cataclysmic cleaving of civilisation.

While law as reasoned principle and justice seems immobilised by the moral dilemmas that such responsibilities and choice entail, already the refashioned modes of governance proclaim a new 'global deal'¹⁷⁹ for modernity. The welfare of populations can be achieved through green jobs, green economies, and an extension of climate change governance into the dependent economies of the globalised South through CDM and REDD projects. Public international environmental law will be integral, in that 'contemporary international environmental regimes ... are equally concerned with states' internal management of their environment and natural resources as with global commons problems'.¹⁸⁰

The instruments of cap and trade, exchange and offset, instituted through emissions trading schemes, CDM and JI, will continue to attenuate or defer notions of 'responsibility' by reference to the perceived need to facilitate growth and life. These modes of governance produce a tension between the public and private forms of law and ordering that operate in the interstices of the 'space' of multilateral conventions. Increasingly, the formalised public law of nation-state

¹⁷⁸ Ibid 142–3.

¹⁷⁹ Nicholas Stern, *The New Global Deal: Climate Change and the Creation of a New Era of Progress and Prosperity* (2009).

¹⁸⁰ Peel, above n 80.

sovereign ordering now must iterate against the rising prominence of the World Trade Organization, robust in its insistence on the openness of countries to the regime of the free market. This situation highlights the dilemma for law in seeking to use market mechanisms against the backdrop of an economic system still firmly entrenched in growth.¹⁸¹ Market governance is pervasive though. Taking on the language of economics,¹⁸² the nations of the South are now arguing for a ‘fair carbon budget’ and that Northern nations owe a ‘carbon debt’:

As well as causing adaptation impacts, excessive emissions by the rich industrialized world are denying developing countries access to a common atmospheric space that should be shared fairly among all peoples.¹⁸³

The prevalence of an authoritative vocabulary of the economic that has arisen in concert with the rise of biopower and technical specialisation, as much as the power plays of the words of politics,¹⁸⁴ illustrates the enhanced importance of an overarching legal model for configuring responsibility and its correlative obligations in law. Yet how to constrain desire and consumption if the overarching governance mode is the facilitation of life? How might law assign new or adjusted responsibility for past desires or ask for new sacrifices?

IV DEATH: RESPONSIBILITY AND REDEMPTION

—But who is that on the other side of you?

What is that sound high in the air
Murmur of maternal lamentation
Who are those hooded hordes swarming
Over endless plains, stumbling in cracked earth
Ringed by the flat horizon only
What is the city over the mountains
Cracks and reforms and bursts in the violet air

‘While Power remains, responsibility disappears’.¹⁸⁵ Given the pervasive infiltration of biopower and the recent emphasis on economic modes of governance, serious questions arise about whether international environmental law can reinstitute responsibility for history, provide robust principles for deciding current common but differentiated responsibilities for emissions reductions and initiate a shift from existing patterns of industrialisation and

¹⁸¹ Arendt, in her discussion of the growth of nation-states and colonialism in the 19th and 20th centuries, also identifies the ‘entry of life into history’: Arendt, *The Origins of Totalitarianism*, above n 173.

¹⁸² See generally Spivak, *A Critique of Postcolonial Reason*, above n 44. See also Third World Network, *Developing Countries Call for Historical Responsibility as Basis for Copenhagen Outcome* (TWN Bonn Update No 9, 5 June 2009).

¹⁸³ Third World Network, *Developing Countries Call for Historical Responsibility*, above n 182, 5.

¹⁸⁴ Koskenniemi, ‘Miserable Comforters’, above n 15, 401–5, discussing the constructs of vocabulary and the language employed in successive phases of international law.

¹⁸⁵ Koskenniemi, ‘Miserable Comforters’, above n 15, 414.

development to instigate a new global order for civilisation. Alternatively, will the ‘new vocabulary’¹⁸⁶ preclude such institutional re-order? The climate change regime as a body of norms, practices and expectations associated with technical idioms of global penetrating power is, at one level, testimony to the fragmentation of international law into specialist regimes that seem to have little anchoring in the more general calls to have regard to equity, justice and responsibility. These liberal principles were fashioned around a model of a strong sovereign state having duties and responsibilities in the exercise of sovereign power. At another level, the ‘flexible’ governance mechanisms of the international climate change regime appear increasingly sophisticated in their capacity to include a diversity of actors and to integrate social and economic goals across a spectrum of culturally diverse spheres.¹⁸⁷

In the negotiations leading up to the Copenhagen Climate Change Conference, two central issues attenuate the North–South divide. The first is the growing insistence by countries of the South, although not unanimous in approach, for a fair share of the earth’s atmosphere. These calls have reignited debates about the responsibility of Northern nations for historic greenhouse gas emissions and the appropriate calculation for current responsibility. Second, countries with severe rates of deforestation, such as Indonesia and Papua New Guinea, are likely to push strongly for the inclusion of extended CDM flexibility mechanisms such as REDD within the *UNFCCC* umbrella. Indeed, REDD ‘has become the latest frontier in the international community’s efforts to curb escalating [greenhouse gas] emissions’.¹⁸⁸ Significantly, the strongest barrier to the introduction of such trading schemes is seen as the need to ensure good governance.¹⁸⁹ Nonetheless, there is a gathering political will to institute the scheme.¹⁹⁰

In the emerging ‘realpolitik’ of the power bloc negotiations that will occur at Copenhagen, law as a formal state institution involved in setting obligations and in incurring responsibilities by reference to a diffuse model of governance rather than government. The instruments of ‘cap and trade’, ‘exchange and offset’, instituted through emissions trading schemes, CDM and JI, work to attenuate notions of ‘responsibility’ by reference to the perceived need to facilitate growth and life. These modes of governance produce a tension between the public and private forms of law and ordering that operate in the interstices of the power

¹⁸⁶ Ibid 401. For an analysis of how the new vocabulary of pragmatism was inaugurated ‘in six steps’, see at 406–11.

¹⁸⁷ Jed S Ela, ‘Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions’ (2009) 27 *UCLA Journal of Environmental Law and Policy* 93.

¹⁸⁸ Rosemary Lyster, ‘The New Frontier of Climate Law: Reducing Emissions from Deforestation (and Degradation)’ (2009) 26 *Environmental and Planning Law Journal* 417, 441.

¹⁸⁹ Ibid.

¹⁹⁰ For example, Papua New Guinea and Costa Rica submitted a proposal at the 11th COP in Montreal in 2005: COP, UNFCCC, *Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action*, UN Doc FCCC/CP/2005/Misc.1 (11 November 2005) (*Submissions from Parties*). In 2005, the parties to the *UNFCCC* agreed to consider proposals from a number of developing countries about the viability of reducing greenhouse gas emissions through avoided deforestation.

'spaces' of multilateral conventions and in national laws enacted in response to those Conventions. Accordingly, law as justice, reason and equity, the principles of modern liberal humanism, when formulated in the cities that have regrouped over the twentieth century in an increasingly carbonised, thunderous air, seems unlikely to have a strong reach into the diversity of the plains (or forests) below which will be the particular location of climate change impacts. Even the search for a revitalised sense of international community that can use 'the language of international law to articulate the politics of critical universalism'¹⁹¹ may not be sufficient to avert Chaos and prevent the many deaths of those, 'swarming Over endless plains, stumbling in cracked earth, Ringed by the flat horizon only'.¹⁹²

What scope is there then for international law to truly acknowledge the fate of these Others on the trajectory to Chaos and dangerous climate change?¹⁹³ These are the poor and displaced of the world, whose dependency on the natural environment, the bare life of their existence, is glimpsed only distantly from the towers and traditions of Northern civilisation. For one critical constituency of the global community most heavily impacted by climate change, law as reason and right cannot glimpse a responsibility for their loss at all. Nature supposedly remains 'beyond law' as it can never approach the pre-eminent paradigm of being the subject of law:

one would not speak of injustice or violence toward an animal, even less toward a vegetable or a stone. An animal can be made to suffer, but we could never say, in a sense considered proper, that it is a wronged subject ... What we confusedly call 'animal,' the living thing as living and nothing else, is not a subject of the law or of law (*droit*). The opposition between just and unjust has no meaning in this case.¹⁹⁴

Can there be justice under modern law if it denies an ethical responsibility for the thousands of Other species that will be the overwhelming victims of global warming? If modern civilisation is now to be governed principally by the mechanics of the desire of life, should we not recognise the fragility of the foundation of that life in its ecological substrate? At its minimal level, this argument should recognise that without a collective responsibility for the climate system it will consign to death many elements of the ecosystem on which human life depends. Therefore, what trade can we offer for life itself? Does responsibility therefore not lie in recognising a shared biological imperative where the techniques of biopower intersect the politics of expediency by being aware that 'modern man is an animal whose politics places his existence as a living being in question'.¹⁹⁵

Yet the choice between law and governance in addressing the dilemmas of climate change and in restraining desire does not seem clear cut. Thus, while we cannot help but to bequeath a diminished world to future generations given that

¹⁹¹ Koskenniemi, 'Between Technique and Politics', above n 12, 1.

¹⁹² Eliot, *The Waste Land*, above n 1.

¹⁹³ Jodoin, above n 33, 22–6.

¹⁹⁴ Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1989) 11 *Cardozo Law Review* 919, 951.

¹⁹⁵ Foucault, *The History of Sexuality*, above n 13, 143.

we are already committed to some degree of global warming, the principles of public international environmental law, together with general concepts such as common heritage, could offer a point of mediation for conceiving a more robust collective responsibility for dealing with climate change that can work in conjunction with a range of other measures, such as cap and trade mechanisms. The principles of ecologically sustainable development and their constituent legal frameworks have been painstakingly built up in international law and domestic laws as an alternative value to untrammelled resource exploitation, absolute nation-state sovereignty and development over many years by an appeal to values of common responsibility, equity and restraint. These principles function as an overriding value or reason in international environmental law. Lawyers will be familiar with this jurisprudential construct as a model of natural law. Public international environmental law in many aspects rests on such an appeal to an animating virtue over and above the current order. In discussing the prospects for international law, admittedly almost two decades ago, David Kennedy remarked that 'there is a problem of order above states and a problem of understanding between cultures'¹⁹⁶ (and one might add, species!). Yet if law is to have renewed relevance in formulating new modes of responsibility, then we must treat with circumspection any approach even when grounded in an appeal to virtue and reason which eliminates 'Otherness' by denying 'the irreducible specificity of situations and the difference among moral subjects'.¹⁹⁷ Law might perform an instituting violence by discounting the specificity of the history behind its most recent institution of order under the *UNFCCC*.¹⁹⁸ The problem of where to locate justice in the metaphorical space between the universal need for order and the particular circumstances of those affected by the decision or choice to be made, and on which that order depends, has long plagued the West in its search for meaning¹⁹⁹ in law. As an international community, at the very least, the responsibility should not be to leave the choices about the sacrifices to be made, the deaths to be mourned or the lives to be endured in the mountains of rock to the ad hoc decision-making of market mechanisms with all their implicit but entrenched power differentials.

On the other hand, should the search for a meaning beyond an instrumental calculation of death, sacrifice, trade and credit persist if the world is consigned to circumstances where power is masked as a normative order that governs the conditions of life? Is it feasible to locate ethical and moral values in a construct of common but differentiated responsibility related to prescriptive targets for emissions reductions in light of a previous history of civilisation and by reference to a narrative about the shifts from death to governance of life and

¹⁹⁶ Kennedy, above n 35, 557.

¹⁹⁷ Iris Young, 'Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory' (1985) 5 *Praxis International* 381, 385.

¹⁹⁸ Cf Schmitt, who asserts that '[European] jurisprudence is protected against the danger of falling back into a mere historical enterprise': Carl Schmitt, 'The Plight of European Jurisprudence' (1990) 83 *Telos: A Quarterly Journal of Critical Thought* 35, 70.

¹⁹⁹ Pahuja, above n 158, 488.

desire? In this regard, it is pertinent that we might at least ask of law that it acknowledge that:

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.²⁰⁰

The trajectories that will be plotted on the material realities of many people, environments and lifeworlds will be embodied in the legal texts issuing from any agreements arising from the Copenhagen Climate Change Conference. Law cannot escape its origins in an earlier model of law as a sovereign power over the subject exercised by a control over death that was based on the earlier Christian religious archetype of God.²⁰¹ But its ends may now lie in an acknowledgment by the state of a responsibility to others, their histories and the current material circumstances of their existence under an expanded and revitalised model of law that ameliorates a pervasive governance of life. Such an appeal to imagined communities of law has been invoked before,²⁰² but is enlivened here again as part of the redemptive gesture of hope in international law.²⁰³ Just who and what law will imagine to be part of the communities of the climate change world will be as critical as the calculations over historic emissions, the debates about the monitoring and compliance mechanisms of CDM and REDD activities and the realpolitik of power negotiations.

It is sobering though to recall, in return to the theme of death, desire and redemption, that modernity, and perhaps all civilisation has been sustained on violence and death, deemed as necessary sacrifices to life and desire rather than Chaos. In these circumstances though, if law is to be ‘a place-holder for the languages of goodness and justice, solidarity and responsibility’,²⁰⁴ then the important meanings that international law must probe for a post-Copenhagen world is a judgment about who will take responsibility, and who and what will fall within the sacrificial and what will be the offset exacted. Further, as Arendt noted in respect of action and responsibility in the political (that is, the public law sense), ‘one cannot reverse what has been done, one always has a past to bear’.²⁰⁵ Moreover, we might also adopt Arendt’s sense of ‘viva active’ that it is part of the human condition only to achieve ‘full life’ by participation in the collective public realm that constitutes a *nomos*. Accepting that responsibility, it might be possible for law to institute an alternative vision of life and civilisation

²⁰⁰ Cover, above n 17, 5 (citations omitted).

²⁰¹ Ibid 16. Cover’s basic contention is that the very inscription and prescription of law works violence.

²⁰² Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (1995).

²⁰³ Koskenniemi, ‘Between Technique and Politics’, above n 12, 30.

²⁰⁴ Koskenniemi, ‘Miserable Comforters’, above n 15, 415.

²⁰⁵ A recurring theme throughout Arendt’s work is the idea that where a common humanity is denied and people are seen as less than fully human, it provides a basis for those in power to exploit and persecute them: see Arendt, *The Human Condition*, above n 13, 294.

and to animate more fully that public realm with an equitably-grounded responsibility for the many vulnerable others that will be affected by climate change. Law may yet offer modern civilisation a small window into redemption for past sacrifices and for some of those still to come:

A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute. The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine [or Conventions and Protocols] to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it.²⁰⁶

²⁰⁶ Cover, above n 17, 6.