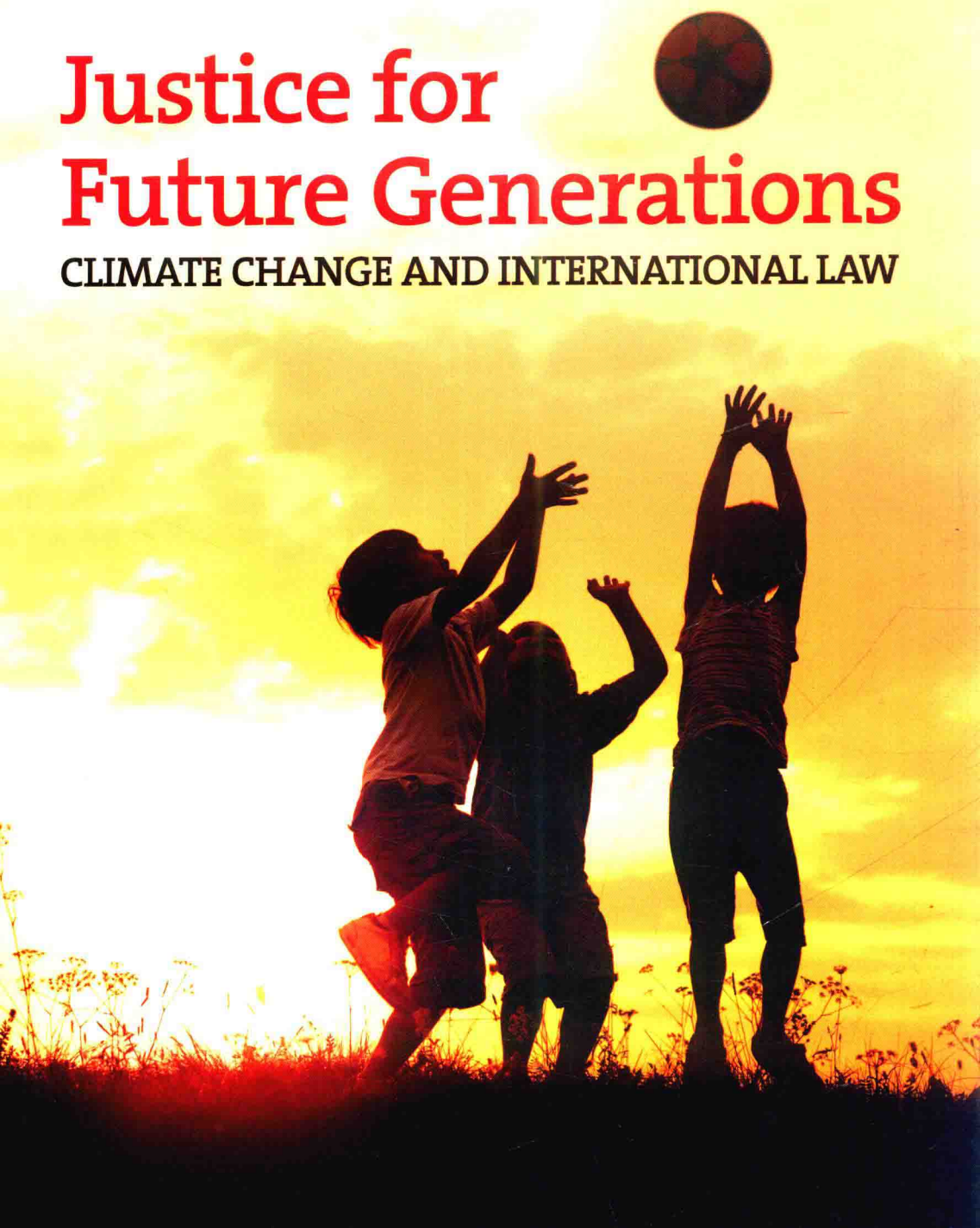


Peter Lawrence



Justice for Future Generations

CLIMATE CHANGE AND INTERNATIONAL LAW

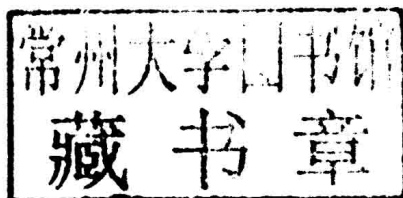


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Climate Change and International Law

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Justice for Future Generations

*For Anja,
Hannah, Sylvia, Emma (2001–2010) and Margaret*

Preface

SUMMARY OF THE ARGUMENT OF THIS BOOK

Climate change raises acute issues of justice between generations. This is because the worst climate change impacts will be experienced by future generations who did not create the problem. These impacts include extreme weather events and droughts and even the disappearance of some small island states, with the poor being particularly affected. Climate change science makes clear that without urgent action being taken now to sharply reduce greenhouse gas (GHG) emissions, there is a strong likelihood of harm to the interests of future generations and indeed a significant risk of catastrophic harm. Moreover, delays by the current generation increase the costs of mitigating and adapting to climate change for our descendants (Chapter 1).

In this book, I identify a number of criteria – justice principles – essential for ensuring intergenerational justice in relation to the mitigation of climate change. These principles are used to address the overarching question of this book: *what does justice require of current generations in addressing climate change to safeguard the welfare of future generations and how should such obligations be reflected in international law?*

The justice principles developed in this book are applied to GHG emissions conceived as a limited ‘resource’. Climate mitigation involves the question of how to fairly distribute a limited allocation of 1 trillion tonnes of CO₂ between now and 2050 (Shue 2011). This is a daunting task given ever-increasing energy demand. It is also a task which needs to be addressed in a multidisciplinary way, drawing on, for example, insights from international relations theory as to the role of justice in treaty negotiations, and political science, in explaining why the current international climate change regime reflects so poorly the interests of future generations.

Part I of this book (‘Theory’) draws on theories of justice and ethics to address the question of what ethical obligation contemporaries owe to future generations in relation to climate change mitigation and how the mitigation burden should be distributed between contemporaries and

future generations. An ethical obligation towards future generations in this context is presented as resting on a harm avoidance principle and the notion of future generations possessing human rights (Chapter 2). Deep cuts in GHG emissions are required in order to avoid harm to the interests of future generations and to preserve their core human rights. A premise in this approach is that core human rights to life, subsistence and health are entitlements that all persons possess *equally* regardless of when and where they live. Both these core rights and respect for human dignity have received virtually universal recognition in the Universal Declaration on Human Rights (UDHR) and key human rights instruments. Moreover, there is widespread support for these core human rights and the notion of 'human dignity' from diverse belief systems including the major world religions.

An advantage of this approach is that it does not rely upon one single ontological moral basis for human rights. The argument takes as a starting point the widespread support for the values expressed in these core human rights. By using a lean list of rights it is unnecessary to delve into the issue of whether other rights, such as rights to democratic participation or freedom of expression, are shared values or, rather, inevitably linked to Western political liberalism (Caney 2010a).

This book relies on anthropocentric 'social justice' theories rather than deep ecology approaches that ascribe intrinsic value to nature for two reasons. First, anthropocentric approaches are more likely to gain political traction and help form a basis for effective climate change mitigation. Second, deep ecology theories generally point in the same direction as the social justice theories relied upon here (Chapter 2).

One such social justice theory is the 'capabilities approach' of Sen and Nussbaum, which provides a good basis for an obligation towards future generations as a failure to take mitigation action will impair the ability of future generations to fulfil their core capabilities. A 'communitarian' approach points in the same direction on the basis of a transgenerational community extending into the future. At first blush communitarian theories seem to be unable to provide a basis for obligations owed to non-compatriots. But this limitation can be overcome by 'cosmopolitan' theories which provide a basis for obligations across national boundaries, achieved in a global community in relation to core human rights impacted by climate change and the interdependence of all people relating to climate change causes and impacts (Chapter 2).

The notion of core human rights essential for human dignity and a harm avoidance principle provide the basis for an ethical obligation on governments to take strong mitigation action to ensure that the global climate system does not pass beyond a threshold which results in

significant harm to the fundamental interests and core human rights of future generations. But this ethical obligation remains incomplete. Principles of distributive justice are required, as well as clarity, in terms of which states bear the obligation (for example, only developed?), the relevance of historic emissions and knowledge of damage. This book proposes a number of justice principles suitable for determining how the mitigation burden should be fairly distributed between current and future generations, including the rate at which mitigation should occur (Chapter 3). Achieving justice for future generations is dependent on substantially meeting these distributional justice principles. Three key principles are identified: a *core human rights* principle, *avoidance of harm* principle and *capacity to pay* principle. These principles are combined with a *sufficiency* notion of justice which places priority on achieving a basic subsistence level for as many people as possible, and an *equality* notion which seeks to equalise opportunity or outcomes (Page 2006: 79–80).

In justifying these principles I draw on various theories of justice and ethics. These theories are not justified – a task beyond the scope of this book – but are taken as starting points. A number of the principles, however, already have widespread support in the international system. Thus, the *sufficiency* notion of justice is recognised by the international community as a widely shared value in, for example, the UN Millennium Goals. *Equal* entitlement to core human rights is also recognised by the international community in, for example, the Universal Declaration of Human Rights. *Sufficiency* and *equality* notions of justice are argued as requiring the apportionment of the global emissions ‘budget’ between now and 2050 on the basis of (1) an equal per capita emissions basis, modified to take into account national circumstances (3.5.9), and (2) the notion that the poor should be required to reduce emissions last owing to their sufficiency requirements (3.5.10). These later two principles are amongst five ‘Implementation Principles’ (IPs) which flow from the key principles and overarching core principles of *equality* and *subsistence*.

Assuring a reasonable balance between the needs of the contemporary poor and future generations is a particularly challenging issue given the reality that rapid movement to a low-carbon economy in developing countries will involve considerable economic and social dislocation. To address this concern a ‘structural reform principle’ is proposed which places an onus on policy-makers to not delay structural reforms necessary to ensure the protection of the long-term interests of future generations while avoiding harm to the core rights of current generations (3.5.3).

To ensure intergenerational justice, the justice principles must operate under an *effectiveness imperative* based on Article 2 of the United

Nations Framework Convention on Climate Change (UNFCCC) and involving the prevention of dangerous anthropocentric interference with the climate system (3.4.1). This effectiveness imperative must be met in order to avoid harm to future generations. The *effectiveness imperative* depends upon duties of precaution and cooperation. While the latter already find embodiment in the UNFCCC, the ethical basis of these principles remains important in order to demonstrate their deeper legitimacy in justice and ethics. This deeper legitimacy is integral to the approach of this book in elaborating a justice-based normative framework used to evaluate international law rules.

Thus Part II of this book ('International Law and Politics') evaluates current international law rules on climate change in order to assess, firstly, the extent to which the justice principles, implementation principles and *effectiveness imperative* are met, and, secondly, to explain the poor embodiment of justice principles in current international law rules. The methodology adopted in Chapter 4, which addresses the first issue, rests on an approach to sources of international law according to which state consent is central, while acknowledging that so-called 'soft-law' norms may have considerable impact on national law and in shaping expectations. In order to meet the *effectiveness imperative*, scientists are calling for a virtual decarbonisation of the global economy by 2050 with 10–40 per cent GHG emission reductions by 2020 (Chapter 1). Such emission reductions need to be anchored in a global treaty which includes binding mitigation targets, a funding mechanism to facilitate technology transfer and assist developing countries in reducing GHG emissions and an effective compliance mechanism (Chapter 4). The current global climate treaty regime falls well short of these requirements. The Kyoto Protocol has been further extended to cover 2013–20 but only imposes GHG emission reduction targets on the EU and a few other industrialised countries.

Under the Durban platform agreed at COP17 in 2011, there is a mandate to negotiate a global agreement by 2015 to enter into force by 2020. This timetable fails to meet the *effectiveness imperative* as climate scientists are calling for GHG emissions to peak between 2015 and 2020 and rapidly decline thereafter (Allison et al. 2009: 7). Moreover, the delay in making emissions entailed in this time frame would mean that emissions would have to be reduced more sharply than otherwise, which may not be feasible (Macintosh 2010). Furthermore, there is ambiguity under the Durban platform as to whether the instrument to be negotiated must be a treaty status agreement (Chapter 4). Absent binding mitigation

targets, covering all industrialised countries and major developing country emitters, the existing compliance mechanism and funding mechanisms remain inadequate, like the walls of a house without foundations.

The principle of 'intergenerational equity' is examined in general international law in order to see if this sheds light on how this principle should be interpreted in its embodiment in Article 3 of the UNFCCC. This analysis also aims to establish whether this principle – alone or as an element of sustainable development – can be relied upon to establish obligations which meet the justice principles of Chapter 3, independently of the UNFCCC. 'Intergenerational equity' is shown to lack a consistent formation in global environmental treaties sufficient for it to be a binding norm of customary international law. Moreover, this concept is argued to be indeterminate and incapable in itself of addressing the substantive justice requirement of prescribing what weight should be given to future generations' interests vis-à-vis current generations.

A survey of jurisprudence of the International Court of Justice (ICJ) shows that intergenerational equity as an element of sustainable development has played a role in combination with other international law rules. However, again the inherent indeterminacy of 'sustainable development' means that it is incapable of assisting in allocating climate change mitigation burdens which can only be effectively achieved by application of justice principles in rules embedded in a global treaty. This is not to deny the importance of sustainable development which is argued to be essential in implementing obligations owed to future generations in relation to climate change.

Unmitigated climate change threatens the human rights to life, health and subsistence enshrined in UN human rights instruments (Chapter 5). However, litigation based on violations of international human rights rules relating to climate-change-related harms faces obstacles in terms of establishing standing, causation and responsibility for extraterritorial harms – namely, harms that occur outside the state that is responsible for breaching the particular obligation. These challenges are even more acute in relation to future generations, where harm has not yet occurred. Human rights litigation is explored in both the EU and US, where courts have been reluctant to interfere in climate policy-making, considered to be within the political domain.

Human rights has been proposed as an appropriate basis for benchmarks from which mitigation targets may be derived. An advantage of using human rights in identifying benchmarks in relation to climate change mitigation rests in wide acceptance of core human rights. However, a limitation of human rights is that it cannot address the

distributional justice issues involved in intergenerational justice including, for example, how rapidly GHG emissions should be reduced.

This book breaks new ground by using ‘discourse theory’ to explain why the international climate regime so weakly embodies intergenerational justice (Chapter 6). ‘Discourses’, following Dryzek (1997) and Hajer (1995), comprise shared understandings. Dominant discourses include ‘industrialism’, which seeks to maximise goods and services, ‘ecological modernisation’, which requires environmental harm to be internalised in the costs of goods and services, and ‘climate marketisation’, which dictates the use of market mechanisms such as emissions trading schemes. This book builds on the work of Dryzek and Stevenson (2011) in analysing recent climate change negotiations. These dominant discourses have been underpinned by powerful economic interests of fossil fuel and related high GHG-dependent industries and lobbying networks. While the discourse of *ecological modernisation* incorporates notions of intergenerational justice, the rhetoric has not been matched with action, with industrialised countries generally failing to adequately reduce GHG emissions. Importantly, developing country statements in the UN climate negotiations have attributed to industrialised countries a *global responsibility* for ensuring protection of future generations from climate change. A shift in these discourses and the economic interests that underpin them is essential for progress in climate change mitigation.

Part III of this book explores how justice principles *should* be incorporated in international law rules relating to climate change. I argue that a notion of global responsibility needs to be fostered in order to reflect the notion of proportionate responsibility rather than industrialised countries being seen as having sole responsibility for future generations (Chapter 7). This will, however, only occur with political leadership in the North. Industrialised countries should foster trust by addressing the development concerns of developing countries in other forums such as the World Trade Organization (WTO) (Roberts and Parks 2007). Moreover, industrialised countries need to sharply reduce emissions to build trust inside the UNFCCC regime.

International law, particularly in the form of treaty rules, remains crucial in ensuring intergenerational justice in relation to climate change. An agreement binding under international law is more likely to give the stability of commitments required to meet long-term objectives when compared with other non-binding options such as the Copenhagen pledge and review model (Chapter 7). A treaty-level instrument is also essential to address trade competitiveness concerns. The prevailing consensus approach to treaty-making in the UN hinders rapid development of an effective climate treaty. However, with political leadership, and a shift in

the dominant discourses, discussed below, these processes can potentially deliver an effective climate regime (Chapter 7).

While not central to this book, some mechanisms are canvassed aimed at promoting procedural climate justice, including the idea of an international commissioner for future generations and reform of UNFCCC procedural rules to allow youth climate NGOs greater opportunities to participate in the negotiation process on the basis that they are more likely to represent the interests of future generations (7.6.1). It remains unclear whether such procedural mechanisms would be successful in delivering substantive justice and further research in this area is required.

National proposals for a future global climate agreement are evaluated against the justice principles and *effectiveness imperative* set out in Chapter 3. This evaluation also uses 'political feasibility' criteria (following Bosetti and Frankel 2011), which require a regime to include all major emitters and not cost any individual party more than a certain threshold. Following Pickering et al. (2012), an 'institutional continuity' criteria is used whereby proposals must build on the existing architecture and principles of the UNFCCC. This book does not include a full analysis of political feasibility; the more modest aim is to examine the feasibility of substantially meeting the requirements of the justice principles and *effectiveness imperative* (Chapter 3) in a global climate treaty.

It is too early in the Durban platform negotiation process for fully-fledged proposals to emerge. However, skeletal proposals made by some countries, and proposals made under the Bali mandate, which may well influence future proposals, are explored (Chapter 7). Proposals by China, India and Brazil reflect strongly the principles of *responsibility for harm* and *capacity to pay* by placing mitigation targets exclusively on industrialised countries. However, these proposals are problematic in terms of addressing the *effectiveness imperative* and *political feasibility* criteria, both of which require legally binding commitments on major developing countries. A proposal by the EU is stronger in terms of the *effectiveness* and the *responsibility for harm* principle. The EU is committed to a 20 per cent reduction in GHGs by 2020 and will raise this to 30 per cent but only if other major emitters make comparable emission reductions.

Absent from the national proposals are some essential elements required for a global climate treaty to achieve intergenerational justice. While the UNFCCC contains a reference to sustainable development, this falls short of the required commitment to strong sustainability. The latter means that elements of the global ecosystem which are not substitutable – including the ongoing stability of the global climate – are not traded off against other elements. Also vital is a commitment to a *structural reform implementation principle* which places an onus on policy-makers not to

delay the structural reforms necessary to ensure the protection of the long-term interests of future generations while minimising harm to the core rights of current generations.

While these principles do not necessarily need to be embedded in a new climate treaty, a shared understanding of them is a prerequisite for progress. Indeed, international relations literature suggests that no single notion of fairness needs to be accepted by all as a prerequisite for agreement (Albin 2001). A compromise involving different competing justice elements may be possible. While the exact elements of such a treaty would need to be negotiated, the broad contours of an instrument which would meet both the requirements of intergenerational justice and political feasibility are identified (7.5.1). A treaty of this nature would need to include both short- and long-term national emission reduction targets quantified within an overall budget requiring zero emissions by 2050. Such a treaty could meet the requirements of political feasibility by placing a cost cap on emission reductions to be taken each year by each country. In the short term it would reflect a grandfathering approach combined with capacity to pay, while – over the long term – moving towards equal per capita emissions (Bosetti and Frankel 2011). Larger developing countries would take on emissions gradually over time, reflecting the principle of *proportionate responsibility for harm*. This would depend on developed countries making sharp emission reductions and substantially funding developing country emission reductions. Historic emissions would be reflected in the treaty's funding mechanism rather than in the framing of mitigation targets given difficulties with measuring historic emissions (Pickering et al. 2012) (7.5.1). While human rights provide a strong ethical basis for mitigation action to protect future generations, an injection of human rights discourse into the climate change negotiations could exacerbate existing North–South tensions. Thematic rapporteurs within the UN human rights system (for example on the right to food) have ensured increased and welcome attention to climate change impacts on the enjoyment of particular human rights. However, the creation of a special rapporteur on climate change is argued to be of limited value (Chapter 7).

The upshot of this analysis is that it is difficult but possible to implement justice principles to safeguard the welfare of future generations in a workable global treaty. But this will only occur with a shift in the dominant discourses and economic interests which underpin them. As a minimum, there needs to be urgent internalisation of climate change harms through effective regulation. In addition, ethics and justice-based discourses need to become more prominent in climate policy-making. High discount rates applied by some economists are problematic as they

imply that future persons do not have equal value with contemporaries (1.8). While economic modelling is important in ensuring that governments make informed policy choices in terms of climate change mitigation, justice- and ethics-based assumptions need to be transparent and based on shared values. Crafting strong international law rules to address climate change remains a vital task for humanity and the global ecology. Justice for future generations depends upon it. Building agreement on what justice means in this context is an essential part of this task.

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The law is current as of 1 September 2013.

Abbreviations

| | |
|---------------|--|
| AOSIS | Association of Small Island States |
| AWG-LCA | Ad Hoc Working Group on Long-Term Cooperative Action |
| BAU emissions | business-as-usual emissions |
| CBDR | common but differentiated responsibilities |
| CDM | Clean Development Mechanism |
| COP | conference of parties |
| EASD | equitable access to sustainable development |
| ECHR | European Convention on Human Rights |
| EIG | Environment Integrity Group |
| EU | European Union |
| FAO | Food and Agriculture Organization |
| GDP | gross domestic product |
| GHG emissions | greenhouse gas emissions |
| G77 | Group of 77 |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ILA | International Law Association |
| IPCC | Intergovernmental Panel on Climate Change |
| LDCs | least developed countries |
| NGOs | non-government organisations |
| PPP | polluter pays principle |
| SRES | Special Report on Emissions Scenarios |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environment Programme |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNFCCC | United Nations Framework Convention on Climate Change |
| USEPA | United States Environmental Protection Agency |
| WMO | World Meteorological Organization |
| WTO | World Trade Organization |