

Teresa M. Thorp

CLIMATE JUSTICE

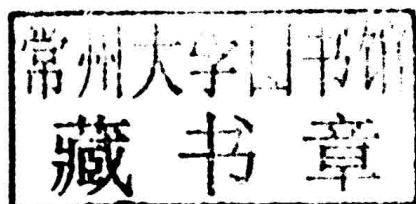
A Voice for the Future



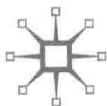
Climate Justice

A Voice for the Future

Teresa M. Thorp



palgrave
macmillan



© Teresa M. Thorp 2014

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission.

No portion of this publication may be reproduced, copied or transmitted save with written permission or in accordance with the provisions of the Copyright, Designs and Patents Act 1988, or under the terms of any licence permitting limited copying issued by the Copyright Licensing Agency, Saffron House, 6–10 Kirby Street, London EC1N 8TS.

Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

The author has asserted her right to be identified as the author of this work in accordance with the Copyright, Designs and Patents Act 1988.

First published 2014 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN 978–1–137–39463–7

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

From Seattle to Copenhagen, from Funafuti to Rio, tens of thousands of people from every corner of the world are marching in the streets. Being swept along in the crowds, I realised that everyone around me was rallying around the same cause, justice. What struck me the most though was that not a single government knew how to respond, nor did the people around me have a rule of law that was capable of doing so.

Teresa Thorp, 2008

Tables

6.1 The constitution of international climate law	330
---	-----

Preface

The idea to search for solutions to injustice was implanted in my convictions over 30 years ago. Fifteen years thereafter, my early teachers of international law ignited a spark of inspiration that sent me on a path of discovery, carried me through the process and still shapes my thinking today. Professor Edmond Jouve, former Director of the Observatory of International Relations of Development and of l'Observatoire des Relations Internationales du Développement et de la Francophonie (ORIDEF), provided my first insights into the *droit des gens*, the law of peoples in general, and a "discourse on the method" in particular. Professor Boutros Boutros-Ghali's course on *la Francophonie* introduced me to theories of justice and teleological thinking from a civil law perspective.

Since this work on climate justice started, much has happened in international law. New situations have arisen in international climate law. The IPCC's predictions of more intense weather events have been reinforced around the world. From the USA to Bangladesh, a mass of civil society organisations are advocating for different strands of so-called "climate justice". Rio + 20 and the first Kyoto commitment period have passed.

Science may be questionable but one thing remains constant: while there is a humanitarian need to respond to disasters and build resilience, the debate about reaching consensus on international legal norms rages on. Governing the existing and potential adverse effects of climate change is a universal human rights issue that requires a legitimate and effective legal approach to human development, not just a moral one.

This book situates the adverse effects of climate change as a concern for all humanity. It develops a unified and universal approach to the constitutionalism of international climate law. It uses methods similar to those developed by Pictet to unify humanitarian law (the Geneva Conventions, Protocols I and II and consequential norms) and by UNCITRAL to harmonise international commercial transactions.

Humanitarian law and private international law widely recognise a theory of justice founded on legal justice. Current threads of climate policy and law often differ. Numerous publications advocate for relative empiricism, "thick law", "thin law" or "non-law" instead. For many, *climate injustice* is a problem caused by others. Empirical, ethical and scientific work continues, but time is running away from us.

There is an urgent need for a universal and unified normative response grounded in common *elements*. The book makes the first steps in this direction. It offers an approach to break the deadlock in international climate negotiations. It provides a user guide on how to do it.

The book frames *legal justice* as the engine of *climate justice*. It develops a legitimate normative basis to unify a universal approach to climate law. A common voice paves the way to the future. It speaks for all if all can use it, and if all can use it, it is *applicable to all*.

In the remembrances of time, I hope that human dignity, human security and human rights will regain their footing in local communities and in the global community within which they reside. "*We think, therefore I am.*"

Acknowledgement

I have Insight International and HSBC to thank for funding this entire work, my family and friends for their constant support and Sarratt for providing an ideal venue.

Abbreviations

AB	Appellate Body
ACHPR	African Commission on Human and Peoples' Rights
ACP	African, Caribbean and Pacific Group of States
ACTSC	Australian Capital Territory Supreme Court
ADP	Ad Hoc Working Group on the Durban Platform for Enhanced Action
AHRLR	African Human Rights Law Reports
AMCEN	African Ministerial Conference on the Environment
AOSIS	Alliance of Small Island States
APEC	Asia-Pacific Economic Cooperation
AR	Assessment Report
ASEAN	Association of Southeast Asian Nations
AU	African Union
AWG-LCA	Ad Hoc Working Group on Long-Term Cooperative Action
BwHC	High Court, Botswana
CAADP	Comprehensive Africa Agriculture Development Programme
CAN	Climate Action Network
CBA	cost-benefit analysis
CBD	Convention on Biological Diversity
CBDR	common but differentiated responsibilities
CBDRRC	common but differentiated responsibilities and respective capabilities
CDM	Clean Development Mechanism
CE	Council of Europe
CE	European Council conformity marking to be used in technical harmonisation directives
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CER	Certified Emissions Reduction
CETS	Council of Europe Treaty Series
CFI	European Court of First Instance
CIS	Commonwealth of Independent States
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMP	Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol
COMESA	Common Market for Eastern and Southern Africa

COP	Conference of the Parties
COST	European Cooperation in Science and Technology
CSR	corporate social responsibility
CTC	Certified Treaty Collection
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
EAC	East African Community
EC	European Commission
EC	European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice (Court of Justice for the European Communities)
ECommHR	European Commission of Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EEZ	exclusive economic zone
EHRR	European Human Rights Reports
EIA	Environmental Impact Assessment
ELD	Environmental Liability Directive
EPA	economic partnership agreement
EPA	Environmental Protection Agency (USA)
ESC	economic, social and cultural
ETS	European Treaty Series
EU	European Union
FCCC	United Nations Framework Convention on Climate Change
FET	fair and equitable treatment
FTA	free trade agreement
FVA	Framework for Various Approaches
GAOR	General Assembly Official Records (United Nations)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCCA	Global Climate Change Alliance
GDP	gross domestic product
GHG	greenhouse gas
HRC	United Nations Human Rights Committee
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IFRC	International Federation of Red Cross and Red Crescent Societies
IIA	International Investment Agreement
ILA	International Law Association
ILAC-LPCC	ILA's Committee on Legal Principles Relating to Climate Change
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
INC-FCCC	Intergovernmental Negotiating Committee for a Framework Convention on Climate Change
IPCC	Intergovernmental Panel on Climate Change
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature and Natural Resources
JI	Joint Implementation
KeHC	High Court, Kenya
LTRAP	Convention on Long-Range Transboundary Air Pollution
MDG	Millennium Development Goal
MDG + 2015	Millennium Development Goals after 2015
MEA	multilateral environmental agreement
MFN	most favoured nation
MOP	Meeting of the Parties
MRV	Measurement, Reporting and Verification
NAMA	Nationally Appropriate Mitigation Action
NAPA	National Adaptation Programmes of Action
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisation
OAS	Organization of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OED	<i>Oxford English Dictionary</i>
OJ	official journal
PCIJ	Permanent Court of International Justice
REDD	Reducing Emissions from Deforestation and Degradation
REDD+	Reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks

Res.	resolution
Rio + 20	UN Conference on Sustainable Development (UNCSD) held in Rio de Janeiro, Brazil, from 20 to 23 June 2012, 20 years after the landmark 1992 Earth Summit in Rio
SADC	Southern African Development Community
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SC	Security Council
TBT	Technical Barriers to Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNC	transnational corporation
TRIPS	WTO Agreement on Trade-Related Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS	United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNIDROIT	International Institute for the Unification of Private Law
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
US EPA	United States Environmental Protection Agency
VCLT	Vienna Convention on the Law of Treaties 1969
WHO	World Health Organization
WTO	World Trade Organization

Contents

<i>List of Tables</i>	xv
<i>Preface</i>	xvi
<i>List of Abbreviations</i>	xviii

Introduction	1
I.1 The rationale for advancing action on climate change	1
I.2 The United Nations Framework Convention on Climate Change	3
I.3 Towards a legal outcome applicable to all	5
I.4 Human dignity, human security and universal human rights	7
I.5 Towards constitutional governance of the global commons	8
I.6 Normative legitimacy and fulfilment	9
I.7 Systematic governance failure	11
I.8 Governing complex systems	13
I.9 Normative consensus beyond the State	14
I.10 Kaleidoscopic normativity	16
I.11 Towards a new process/approach/theory/doctrine of global justice	19
I.12 Ring-fencing the perimeters	21

Part I Unifying the Parameters of Climate Justice

1 Scope of the Work	25
1.1 Main purpose	25
1.1.1 Governing legal complexity	25
1.1.2 Framing climate change as a constitutional issue	26
1.2 A fiduciary theory of governing the global commons	27
1.2.1 On the proper motives of beneficiaries	27
1.2.2 An entrusted duty to protect humanity in the global commons	29
1.3 Constitutionalism of international climate law	30
1.3.1 Constitutionalism: Meaning and rationale	30
1.3.2 Design aims	35
1.4 Background to the inquiry	38
1.4.1 Foundational studies	38

1.4.2	Analytical philosophy and constitutionalism of legal principles	40
1.5	Points at issue	40
1.5.1	Limits of the inquiry	40
1.5.2	Course of action	41
2	Optimising Dynamic Normative Systems	42
2.1	Introduction	42
2.2	Secondary research – Literature and legal doctrine	43
2.2.1	From relativism to congruity	43
2.2.2	Gaps in normative analysis	44
2.2.3	Towards a congruent “first principles” approach	46
2.3	Traits and characteristics of “ <i>jus gentium</i> ” principles	49
2.3.1	On the universal nature of principles	49
2.3.2	The distinction between social justice and legal justice	52
2.3.3	On conscience and mobilisation of the transcendent will	53
2.4	Fundamental principles of general international law	60
2.4.1	Position and function of general principles of international law	60
2.4.2	Legal principles relating to climate change	65
2.4.3	Towards a law of the global commons	72
2.5	Universal environmental principles	74
2.5.1	From Stockholm to Rio	75
2.5.2	“Rio + 20”	79
2.5.3	A survey of cross-cutting issues	80
2.6	Regional environmental principles	86
2.6.1	Europe	87
2.6.2	Africa	90
2.6.3	From regionalism to congruous collaborative pluralism	101
2.7	Principles engaging non-State actors	102
2.7.1	Society’s elites and the establishment	102
2.7.2	Corporate incentives	103
2.7.3	Corporate citizenship	104
2.8	The normative system of international climate law	107
2.8.1	Contemporary perspectives: Legal systems	107
2.8.2	The appropriateness of UNFCCC principles	110
2.8.3	Optimising networked principles, rules and standards	112
2.9	Conclusion	114

3	What's Gone Wrong?	116
3.1	Introduction	116
3.2	Systemic or systematic failure?	117
3.2.1	The difference between normative systemic and systematic failure	117
3.2.2	Limitations of systemic risk management	118
3.2.3	Indications of systematic failure	120
3.3	Indecision and absence of robust theory	121
3.3.1	Individual transitive and invertible relations	121
3.3.2	Collective welfare and consent	122
3.3.3	From the individual preference to the legal "ought"	124
3.4	No architecture to launch a process for 2015	125
3.4.1	From inventorying norms to normative contextualisation	125
3.4.2	Open systems interconnection protocol suite	127
3.4.3	Avoiding harmful layering and harmful optimisation	129
3.5	Research instruments	130
3.5.1	Comparative research methods	130
3.5.2	Case law method for empirical inquiry	131
3.5.3	Case study method for normative inquiry	131
3.6	Constitutional theory	132
3.6.1	Legal hermeneutics replaces relativism	132
3.6.2	Legal science and constitutional unification	133
3.6.3	An emerging philosophy of legal science	140
3.7	Systematics, universal laws and the law of special regimes	143
3.7.1	Systematics of third-generation rights and obligations	143
3.7.2	How does the science of special regimes observe, contextualise and verify the right object?	145
3.7.3	Alignment and orientation	146
3.8	Prognosis	148
3.8.1	Delimiting the scope of systematic review	149
3.8.2	Establishment and effect	149
3.8.3	Derivative legal products	150
3.9	Conclusion	150

Part II Launching a Process *Applicable to All*

4	The Elements	155
4.1	Introduction	155
4.2	Preliminaries: An overview of the elements	155
4.3	Legal science and analytical construction	156

4.4	Legal hermeneutics and the science of the interpretative schema	157
4.4.1	Treaty interpretation	157
4.4.1.1	Cognitive interpretation differs from authentic interpretation	157
4.4.1.2	Vienna Convention on the Law of Treaties	159
4.4.1.3	Preparatory work is valuable but not necessarily an authentic interpretation	163
4.4.1.4	Treaty interpretation and dispute resolution	163
4.4.1.5	Teleological reasoning	164
4.4.2	Entailment and constitutional unification	164
4.4.2.1	The meaning of entailment	164
4.4.2.2	The difference between ex post and ex ante interpretation	165
4.4.2.3	Interpretation as a constant means of discovery and problem solving	166
4.4.2.4	Interpretative differences between civil and common law	167
4.4.2.5	<i>Lex specialis</i> norms depend on a relationship with international law but are also co-dependent	167
4.4.2.6	On modelling dependent and independent variables	168
4.4.2.7	On the differences between chance, interpretative correctness and validity	169
4.4.2.8	Deduction of second- and nth-order legal norms	169
4.4.2.9	On why notation helps to describe the complex norm	169
4.4.2.10	Set logic, Venn diagrams and legal norms	170
4.5	Linguistic interpretation, nomenclature and terminology	171
4.5.1	Values and ethics	171
4.5.2	Legal system	171
4.5.3	The nature of constitutional frameworks	172
4.5.4	Authentication and the Competent Authority	172
4.5.5	Transposition of values into legal norms	173
4.5.6	Norms	173
4.5.7	On the specificity of legal norms	173
4.5.7.1	On the constitution of norms	173
4.5.7.2	Specificity materiate – Objective and subjective tests	174

4.5.7.3	Hortatory “should” and obligatory “shall”	176
4.5.7.4	Modality and the omission of an ought	176
4.5.7.5	Modal specificity and range specificity	177
4.5.7.6	“Ought to be” or “ought not to be”	177
4.5.7.7	Specificity of a legal norm’s sphere of validity	178
4.5.7.8	Spatial specificity	178
4.5.7.9	Temporal specificity	178
4.5.7.10	Spatio-temporal specificity	178
4.5.7.11	Specificity personae and the “norm addressee”	179
4.5.7.12	Substantive versus procedural and objective versus subjective norms	179
4.5.8	A “binding” legal norm: Definition and application	181
4.5.8.1	On the binding nature of things	181
4.5.8.2	To what does a legal norm bind?	185
4.5.8.3	On whom does a legal norm bind?	185
4.5.8.4	How does a legal norm bind?	185
4.5.8.5	Why does a UN Declaration not bind all the time?	197
4.5.9	Testing legal principles and the error reduction checklist	199
4.5.9.1	Root element	199
4.5.9.2	Schema	199
4.5.9.3	Normative “regression analysis” and the equation	199
4.5.9.4	Nesting	200
4.5.9.5	Parsing	200
4.5.9.6	Specification statement	200
4.5.9.7	Prologue	201
4.5.10	The policy question doctrine	201
4.5.10.1	Differences between climate law and climate policy	201
4.5.10.2	Constitutional reserves	201
4.5.10.3	The political question doctrine in national law	202
4.5.10.4	The policy question doctrine in international climate law	203
4.5.10.5	Constitutional limits	205
4.5.11	The legal principle is a legal norm	207
4.5.11.1	Legal principles of general international law	207

4.5.11.2	Legal principles of special regimes	208
4.5.12	Interactions between different legal norms	209
4.5.12.1	Legal principles, legal rules and legal standards	209
4.5.12.2	Legal principles and legal rules	209
4.5.12.3	Legal principles and legal standards	210
4.5.12.4	Derivative legal products	211
4.5.12.5	Auxiliary legal principles	212
4.6	Controversies and special topics	212
4.6.1	How much do we owe future generations?	212
4.6.2	How do we factor in intersecting special regimes?	215
4.6.3	Why conflate legal philosophies?	215
4.6.4	Why has justice not yet been found in positivism, judge-made law or natural law?	216
4.6.5	Why does heterarchical dialectic not negate validity?	228
4.7	Conclusion	232
5	First Principles	233
5.1	Introduction	233
5.2	The analytical proceeding to discover first-order principles	233
5.3	Elements applicable to international climate law	234
5.3.1	The UNFCCC serves as the root element	239
5.3.2	The science of the interpretative climate schema	241
5.3.3	Epistemic communities and the interpretation of legal principles	246
5.4	"First" principles of international climate law	246
5.4.1	Equity	246
5.4.1.1	Article 3(1) UNFCCC – Textual, contextual and teleological interpretation	246
5.4.1.2	Supplementary means of interpretation	249
5.4.2	Solidarity	253
5.4.2.1	Article 3(2) UNFCCC – Textual, contextual and teleological interpretation	253
5.4.2.2	Supplementary means of interpretation	254
5.4.3	Precaution	255
5.4.3.1	Article 3(3) UNFCCC – Textual, contextual and teleological interpretation	255