

“The Unavoidability of Justice – and Order – in International
Climate Politics: from Kyoto to Paris and Beyond”

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Abstract

This article reviews the role that normative claims about climate justice have played in international climate politics and traces how international society’s approach to equity questions has changed between the Kyoto Protocol (1997) and the Paris Agreement (2015). In an anarchic international environment, international society can be expected to prioritize order over justice, and the interest of the most powerful states over those of the most vulnerable states. Interestingly, the UN climate regime managed to establish an unusually strong version of distributive justice as part of its core regulatory instrument, the Kyoto Protocol, but this has been weakened and remodeled in the switch to the bottom-up logic of the Paris Agreement. As a consequence, the global justice debate has seen the weakening of established substantive principles of climate justice and the rise of a new procedural focus on how to subject national climate policy ambition to international scrutiny. Henry Shue’s admonition that the question of the fair sharing of burdens cannot be evaded remains relevant today, but the transition towards the Paris Agreement clearly shows the limitations of any effort to realize strong claims of distributive climate justice in international society.

Keywords

Climate change; international climate negotiations; climate justice; distributive justice; international order; Kyoto Protocol; Paris Agreement;

Introduction

Henry Shue has made a seminal contribution to the international debate about climate justice. By distinguishing between 'subsistence emissions' and 'luxury emissions' (Shue, 1992; 1993), he established the normative principle that emissions from poor countries should be treated differently than those from rich countries. Based on their historical responsibility for climate change and superior economic capacity, industrialised countries are morally obliged to take a lead in reducing greenhouse gas (GHG) emissions and supporting developing countries with their adaptation costs, mainly through financial and technological transfers. In his engagement with global climate change for well over two decades (Shue, 2014), Shue has put forward a carefully developed and powerfully argued theory of climate justice that is of direct relevance to the international politics of climate change. His work is located at the point where normative theory intersects with political reality. Unsurprisingly, given the often dismal state of international climate negotiations, Shue's measured tone of abstract normative reasoning has occasionally given way to more strongly worded expressions of frustration and anger, especially when targeted at 'feckless leaders' that fail to provide leadership, most notably in the United States (Shue, 2011). He is, in the best sense of the word, an engaged normative theorist, an idealist in a world of supposed realists, but fully conscious of the harsh environment that an anarchical international society offers for anyone wishing to translate universal ethical principles into political action.

In this article, I intend to reflect on Shue's argument about the 'unavoidability of justice' (Shue, 1992) from the perspective of International Relations (IR) rather than normative theory. The IR discipline is usually concerned with the 'is' of world politics, not the 'ought', though it should be noted that normative questions about 'how should we act?' are never too far from the surface in the 'practical discourses' that make up IR theorising (Reus-Smith and Snidal, 2008). I am interested in exploring the extent to which normative arguments about climate justice, and especially distributive justice, are reflected in the

main outcomes of international climate negotiations under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC). By tracing the evolution of justice elements in the climate regime from the 1997 Kyoto Protocol to the 2015 Paris Agreement, I hope to illuminate both the power and limitations of justice claims in international climate politics.

International relations is often portrayed as a social realm in which anarchy and the need to maintain order take precedence over morality and the desire to achieve global justice. As Hedley Bull put it in his influential framing of the pluralist nature of international society, 'justice ... is realisable only in a context of order' (1977: 86), but 'international order is preserved by means which systematically affront the most basic and widely agreed principles of international justice' (1977: 91). International order in an anarchic environment is maintained by mechanisms (for example diplomacy, balance of power, war) that privilege the mighty at the expense of the weak, and they usually leave little room for the pursuit of higher normative ambitions. To be sure, Bull's justification for the empirical and moral priority of order over justice is rooted in a distinctly minimalist and deeply skeptical approach to theorising international society, one that is strongly coloured by his Cold War experience (Hurrell, 2003: 26). As such, it may not adequately capture the expansion of human aspiration and solidarity, especially in the post-Cold War era. However, even those that point to the recent growth of solidarist forms of international cooperation usually concede that this process remains weak and incomplete.

If there are any areas of international life that are particularly open to the influence of normative reasoning, then global environmental politics ought to be one of them. After all, environmental stewardship became a fundamental international norm mainly because of norm entrepreneurship by environmental campaigners, scientists and progressive state leaders (Falkner and Buzan, 2017). Originating in diverse normative initiatives in the 19th century and gradually morphing into a global movement in the 20th century, environmentalism gave rise to an enlarged agenda of global governance along solidarist lines. But to become politically salient and universally

accepted, international environmental politics has followed primarily a 'common fate' logic that emphasises common interests rather than a justice-based conception of common duties. It is in this sense that environmentalism as practiced by international society has not progressed much beyond a pluralist logic of international coexistence. Powerful vested interests continue to hold back environmental protection efforts, whether at the national or international level. The same can also be said of the international politics of climate change, which saw a strong push for solidarist solutions in its Kyoto Protocol phase but has reverted to a more pluralist and de-centralised approach in the Paris Agreement (Falkner, 2017).

The rise and fall of the Kyoto Protocol's equity approach

Demands for fairness in sharing the burden of climate change mitigation have been a central feature of the international climate negotiations right from their start in the late 1980s (for a history of the negotiations, see Gupta 2014). Developing countries and civil society groups, in particular, have routinely referred to historical responsibilities and the unequal distribution of climate impacts as the basis for determining the distribution of international commitments. Such appeals to global justice are not uncommon when the weak confront the strong. What is remarkable, however, is the unusual degree to which distributive justice principles were incorporated into the UNFCCC regime, especially against the background of the Third World's unsuccessful campaign for a *New International Economic Order* (Hurrell and Sengupta, 2012: 467-8). By adopting 'common but differentiated responsibilities and respective capabilities' (CBDR), the UNFCCC established differentiation as the core principle for defining how countries ought to reduce emissions and contribute to international climate finance and technology transfer. The first-ever climate treaty thus incorporated elements of industrialised countries' historical responsibility and ability to pay into its burden sharing arrangement, though it did not operationalise how *common* and *differentiated* responsibilities would be balanced.

The 1997 Kyoto Protocol to the UNFCCC went one step further and established a strict divide between industrialised (Annex I) and developing (non-Annex I) countries, with only the former committing to legally binding and quantified emission reduction targets. In less than ten years of international negotiations, developing countries had thus scored one of their biggest diplomatic victories. They had pushed the mitigation burden entirely onto developed economies while exempting themselves from any emission cuts, at least until the end of the treaty's first commitment period (2008-12). In this sense, at least, the Kyoto treaty fulfilled Shue's normative principle that poor countries should not be restricted in their ability to increase 'subsistence' emissions as part of their developmental effort.

Other elements of the treaty were more problematic, however. By prioritising climate change mitigation over adaptation, Kyoto did not do enough to prevent significant losses for the most vulnerable countries (Gardiner, 2011); its provisions on capacity building and technology transfer remained underdeveloped (Okereke and Coventry, 2016: 838); and the Clean Development Mechanism (CDM), a flexibility instrument that allows developed countries to fund emission reduction projects in developing countries and in exchange claim credits towards their own commitments, lowered rich countries' mitigation costs but risked delaying the transition to alternative forms of energy (Shue, 2014: 217-23). Still, despite its many flaws, the Kyoto Protocol remains an outstanding success of solidarist ambition in international climate politics, especially when measured against the conservative standards of international diplomacy (Falkner, 2017).

As soon as the Kyoto Protocol entered into force in 2005, its fragile compromise on climate justice began to fall apart. Three recent shifts in the international politics of climate change have contributed to this unraveling of Kyoto-style equity.

First, as emerging economies gained in economic strength throughout the 2000s, they saw their GHG emissions rise steadily in both absolute terms and as a share of global emissions. China's emissions doubled between 1990 and

2005, and soon after the country overtook the United States to become the world's largest GHG emitter. As industrialised countries' emissions began to peak and even decline in the 2010s, it was emerging economies such as China and India that increasingly came to determine the future trajectory in global emissions. This transformation in the global emissions profile had profound consequences for how international climate responsibility would be defined in the climate regime. The binary logic of Kyoto's burden-sharing arrangement seemed increasingly out of touch with global economic reality, and populous and economically dynamic developing countries could no longer seek cover behind their status as non-Annex I countries. Over time, they came to accept the need for some form of differentiation between themselves and poorer developing countries, a process that eventually led to the emergence of the BASIC group (Brazil, South Africa, India, China) as a third major block in the post-Kyoto climate negotiations (Hochstetler and Milkoreit, 2014).

Second, and closely connected with the shift in global emissions, the United States and other industrialised countries stepped up their efforts to contest the strong equity dimensions of the Kyoto Protocol. The US, in particular, was adamantly opposed to the Kyoto Protocol's binary logic that exempted all developing countries from tackling their rising emissions. As the negotiations on a successor agreement got underway in 2007, American negotiators consistently emphasised the need to base the global mitigation effort on the widest possible cooperation of *all* countries. By the time of the Copenhagen conference (COP-15) in 2009, which failed to adopt a post-Kyoto treaty, the US had succeeded in agreeing with the BASIC group the contours of a new international approach that replaced strict differentiation with a more balanced approach of mitigation contributions by all major emitters. It was on the basis of this new framework that COP-17 in Durban established the new negotiation mandate for the Paris Agreement. In fact, the 'Durban Platform for Enhanced Action' failed to make any explicit reference to the UNFCCC norms of 'equity' or 'common but differentiated responsibilities'. The combination of US power and intransigence had finally succeeded in shifting the international consensus away from Kyoto-style equity solutions. As Todd Stern, US Special

Envoy on Climate Change, had made clear during the Durban conference, ‘if equity’s in, then we’re out’ (Pickering, et al., 2012).

And *third*, as the international community began to prepare the ground for the new architecture of the Paris Agreement, non-state actors assumed a more important role as contributors to the mitigation effort and providers of transnational climate governance outside the UNFCCC climate regime. The growing involvement of a wide variety of non-state actors has been noted at least since the early 2000s, with municipalities, cities, private actors and civil society organisations taking on voluntary emission reduction targets and providing governance functions for both mitigation and adaptation (Bulkeley, Andonova, et al., 2014). The contributions that non-state actors can make have also been increasingly recognised within the inter-governmental regime, and the UN and other international organisations have embarked on sustained orchestration efforts to mobilise nonstate climate actions (Hale and Roger 2014).

The resulting de-centralisation of global climate action raises important question about how climate justice can be debated and negotiated in a climate governance context that is characterised by a proliferation of actors and governance levels. The research literature has begun to develop new accounts of emerging transnational conceptions of climate justice, for example in the context of urban climate governance (Bulkeley, Edwards, et al., 2014). These emerging approaches try to take into account structural inequalities and injustices that exist not just between nation-states but also within societies, and they also move beyond international distributional conflict towards questions of participation and recognition. They raise questions about how to apply the principle of differentiation to non-state actors, such as the fossil fuel industry, and how to account for the different responsibilities and contributions of the growing variety of actors involved in climate governance (Frumhoff and Heede, 2015).

Redefining global climate justice: The new logic of the Paris Agreement

The three trends identified above have led to a partial unraveling of the substantive justice foundations on which the international climate regime has been built. Climate justice has not been written out of the regime, but the connections between the UNFCCC governance architecture and demands for climate justice, such as those made by Shue, have been weakened. By moving away from emission reduction targets and timetables that are internationally negotiated and legally binding, and by diluting the differentiation principle as it existed in Kyoto, international society has created greater uncertainty about whether and how rich countries are meeting their climate obligations towards poorer ones. At the same time, however, the move towards an expanded global governance framework for climate change, in terms of the diffusion of climate responsibilities to emerging economies as well as to non-state actors, marks a strengthening of international society's and world society's commitment to tackling both the global mitigation and adaptation challenge. How well does the Paris Agreement deal with this changing framework for addressing climate justice concerns?

The Paris Agreement¹ has advanced global climate policy in a number of ways. By setting a global temperature target of 'well below 2⁰C', with the aspiration to 'limit the temperature increase to 1.5⁰C', the international community has set a clear goal that allows us to calculate the world's remaining carbon budget (even though we have now nearly exhausted this budget, as Shue argues in his 'Breakthrough' article (2018: x)). The agreement also includes a long-term goal of reaching global peaking of GHG emissions 'as soon as possible' and achieving net zero emissions in the second half of the 21st century, which sends a stronger signal to global markets about the required direction and pace of decarbonisation.

The treaty's main innovation can be found in the move away from internationally negotiated emission targets towards a bottom-up structure of nationally determined contributions (NDCs) (Falkner, 2016). This shift has allowed the international community to sidestep the thorny distributional

¹ Paris Agreement, available at:
https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

conflict that had bedeviled the UNFCCC process for over two decades. The equity norm of ‘common but differentiated responsibilities’ had only established the vague principle that some form of differentiation was needed in dividing the global mitigation burden, but countries never managed to agree on a precise formula for translating this principle into quantified emission reduction targets for each and every country. In a world of shifting emissions profiles and contested notions of historical responsibility, the creators of the Paris Agreement opted for a more inclusive but voluntary approach that spreads mitigation responsibility widely while allowing each country to set its own emission targets. To balance this de-centralised approach with a certain degree of international accountability, the Paris Agreement also established an international framework for reviewing and revising national pledges on a five-yearly basis, with countries having to report on the implementation of their NDCs and increase the level of national ambition over time.

Given the profound shift in its underlying regulatory approach, the Paris Agreement was bound to raise a number of difficult questions for the climate justice agenda. Early concern focused on the omission of references to equity and differentiation in the Durban Platform for Enhanced Action, which framed the negotiations on the Paris accord. At the insistence of developing countries, however, the CBDR norm was reinserted into the working draft for the treaty. Unsurprisingly, questions of equity loomed large over the entire negotiation process as developing countries tried to reintroduce a stronger justice dimension, fearful of the consequences for equity if Northern proposals for a more flexible and bottom-up model would be adopted. In the end, the preamble of the agreement included a reference to the ‘concept of climate justice’, although the added qualifier that it is important only ‘for some’ clearly signals its contested nature.

There can be little doubt that the treaty marks a profound shift in the way climate justice is approached in international climate politics. Whereas in the past the debate revolved around how to balance historical responsibilities with different economic circumstances in defining mitigation targets, the new bottom up structure avoids any attempt to resolve this core distributional

conflict. Differentiation is still present as a guiding principle: the Paris Agreement accepts that emissions peaking will take longer for developing countries to achieve; acknowledges the special situation that the poorest countries find themselves in; and makes frequent reference to sustainable development and eradicating poverty as the context for defining the global response (Okereke and Coventry, 2016: 840). But this does not alter Rajamani's (2012) assessment that differentiation has been 'on the wane' ever since it reached its zenith in the Kyoto Protocol.

The international climate regime has moved away from an internationally agreed formula for allocating fair and equitable mitigation burdens and instead leaves it to the Parties to define for themselves how they intend to meet their own interpretation of climate justice. It is now through a regular international review process that the international community seeks to subject national claims to equitable mitigation efforts to a transparent form of international scrutiny and contestation (Chan, 2016: 298), potentially relying also on civil society groups to perform so-called 'equity reviews' as part of the Agreement's new deliberative process (Shue, 2018: x).² Paris thus represents a weakening of the climate regime's *substantive* justice dimensions and a greater *procedural* focus on how to review and ratchet up nationally determined mitigation pledges.

To be sure, the international debate on climate justice has made some minor advances in other areas. Given that a certain degree of global warming is now inevitable and will result in rising sea levels and extreme weather patterns whatever mitigation efforts will be undertaken, developing countries have long demanded that climate change-related loss and damage should be recognised formally as part of the climate regime. They and their allies in global civil society scored a first success with the creation of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts at COP-19 in 2013 (Vanhala and Hestbaek, 2016: 112). But as so often in the protracted climate negotiations, success for the Global

² For an example of existing 'equity reviews' by NGOs, see www.civilsocietyreview.org.

South came at the cost of legal ambiguity and weak commitments. While developing countries saw loss and damage as leading to liability and compensation, developed countries framed the issue as a more straightforward matter of adaptation, rejecting explicit promises to make compensation payments. It was the latter perspective that gained the upper hand in the Paris Agreement, which explicitly excludes liability and compensation in the context of loss and damage (paragraph 51 of the decision commenting on article 8 of the Agreement that mentions the Warsaw Mechanism for Loss and Damage; Pottier et al., 2017: 39). The Warsaw Mechanism is thus likely to emphasise a more conventional agenda of promoting resilience, risk management and scientific cooperation rather than financial payments to address historical responsibilities.

Conclusions: Justice and Order in International Climate Politics

As this brief review of the justice dimension in the evolving climate regime shows, normative claims regarding the distribution of the climate change mitigation and adaptation burden have played a central role throughout the history of the international negotiations. Both developing countries and civil society groups have fought hard to inject principles of distributive justice into the climate regime. The Kyoto Protocol came closest to realising some of the key elements of Shue's theory of climate justice, mainly by exempting developing countries from the need to reduce GHG emissions. Other provisions, on adaptation finance and technology transfers, fell short of Shue's distributive justice demands, but the Kyoto Protocol stands out as a remarkably strong instrument for turning normative claims into specific, if inadequate, regulatory provisions. In this sense, justice has indeed proved to be an 'unavoidable' part of the international politics of climate change (Shue, 1992).

But far from providing the basis for strengthening and going beyond the initially agreed equity formula, the precarious international compromise underpinning the Kyoto Protocol has gradually unraveled in more recent years. In response to the dramatic shift in global emissions profiles, which

saw emerging economies from the Global South shoulder ever greater responsibility for current and future emissions, the Kyoto Protocol's 'firewall' between industrialised and developing countries has been replaced by a new, more balanced, but ultimately voluntary approach of bottom-up national pledges. In the Paris Agreement, major emitters from both sides of this divide have strengthened their commitment to preventing runaway global warming, but without trying to negotiate in advance how to divide up the mitigation burden. In doing so, they have weakened not only the differentiation principle at the heart of the UNFCCC regime but also the role that distributive justice can play in determining future climate action. In as much as there is a trade off between justice and order in international climate politics, powerful states within international society have successfully shifted the balance towards the latter. Normative contestation continues in international climate politics, but the highpoint of basing climate action on firm principles of distributive justice appears to have passed.

To be sure, the notion of an eternal struggle between international order and global justice is far too simplistic to capture the complex reality of how normative claims have infused and shaped international climate politics. What we have witnessed in the negotiations leading to the Paris Agreement is not just a revision, and partial rejection, of established approaches to distributive justice, but also a reframing of the normative debate. This is in part about a move from negotiating global towards local justice solutions (Pottier, 2017). It also signals the rise of a new procedural approach to embedding justice concerns in global climate governance, which engages a wider range of actors – states in first instance, but also firms and civil society groups – in ongoing struggles to review and revise national policy ambition.

By creating what could prove to be a politically more acceptable and robust regime, international society has also increased the chances of the remaining elements of climate justice to be implemented and expanded. And as the global transition towards a low-carbon economic future picks up speed and green energy sources become more readily available, some of the early distributional disputes, such as over subsistence emissions, may lose their

urgency. But this presumes that the low-carbon transition is proceeding at a sufficient pace and on a global scale, and that other distributional conflicts do not hold back the collective effort. Shue is therefore right to stand by his core claim that 'the politically crucial question of the fair sharing of burdens cannot be evaded and will not be forgotten' (Shue, 2018: xx).

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