

# Climate justice: the claim of the past

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*This synthetic appraisal of the collection of papers in this issue argues that historical injustice saturates the problem of climate change. Those most vulnerable to climate change today are largely those who already lack resources – who have been on the wrong end of colonial history, or who have been globalization's losers, or who have suffered neglect, exclusion or simple rapacity at the hands of their own governments. They are those who have benefitted little or not at all from a carbon-intensive global economy, but who have long suffered its side effects – resource stripping, food price spikes, impoverishment and now the ravages of climate change. Following the other authors in this issue – and examining human rights law, trade law and the overarching ideal of the rule of law – the paper notes that the particular form taken by law in international and transnational affairs, having largely followed the historical progress of industrialism, colonialism and globalization, is peculiarly ill-suited to the task of addressing this vulnerability.*

**Keywords:** *climate justice, rule of law, trade law, human rights, colonialism, globalization, Walter Benjamin*

Like every generation that preceded us, we have been endowed with a weak Messianic power, a power to which the past has a claim. That claim cannot be settled cheaply. (Walter Benjamin)<sup>1</sup>

Now, as I write (February 2014), I am effectively stranded: the middle English town in which I live is experiencing a wave of debilitating floods. For the second time within a month and the second year in a row, trains are down and two main roads out of the city are closed. The army is building a giant concrete wall down the road. The United Kingdom is suffering a minor crisis: 6,000 homes flooded (and 1.3 million, apparently, 'saved' from flooding), sea-walls smashed or overwhelmed, sinkholes swallowing up trees, huge swathes of agricultural land saturated for the foreseeable future, the heaviest rain in over two hundred years. Not just here, of course. The year brings cyclical crises around the globe. Japan is experiencing a record-breaking winter on the heels of a record-breaking summer. Temperatures in Melbourne Australia have exceeded 50 degrees. The United States is in the midst of a new source of freezing winter misery, its polar vortex – barely a year after its most severe drought since the 1950s (in 2012).

Here, where I live, we hear a lot about 'freak' weather in these, our kindred countries, but relatively less about the world's less wealthy places. But it is not merely a matter of the record-breaking speeds of cyclonic winds in the Philippines. Across 2011–12, East Africa experienced its worst drought in 60 years, killing tens of thousands of people.<sup>2</sup> During the same period, Thailand had its worst floods in five

1. Walter Benjamin, *Illuminations* (Schocken Books, New York 1969).

2. Simon Tisdall, 'East Africa's Drought: The Avoidable Disaster', *The Guardian* (18 January 2012), citing a report by Oxfam and Save the Children entitled 'A Dangerous Delay'.

decades, killing over 800 people and leaving millions displaced.<sup>3</sup> In Russia, 55,000 people died in a heat wave in 2010.<sup>4</sup>

This is where we stand in early 2014, with global average temperatures still less than one degree above pre-industrial levels. Before long, the world will likely be four degrees warmer than it was in 1750.<sup>5</sup> We talk a lot about 2 degrees – the target we are poised to miss – but four degrees is almost certainly a more accurate estimate of where we're headed.<sup>6</sup> And still we habitually qualify these events: 'Of course they cannot be linked unequivocally to climate change'.<sup>7</sup> And still money pours into fossil fuel technologies and extraction. According to the International Energy Agency:

Despite the growth in low carbon sources of energy, fossil fuels remain dominant in the global energy mix, supported by subsidies that amounted to \$523 billion in 2011, up almost 30% on 2010 and six times more than subsidies to renewables. ... Emissions in the [principal] scenario correspond to a long-term average global temperature increase of 3.6°C.<sup>8</sup>

What will this 4-degree warmer world be like? The World Bank, not given to sensationalism, points out that '[r]ecent extreme heat waves such as in Russia in 2010 are likely to become the new normal summer in a 4°C world'. Tropical South America, central Africa, and all tropical islands in the Pacific 'are likely to regularly experience heat waves of unprecedented magnitude and duration'. In the Mediterranean, North Africa and the Middle East 'almost all summer months are likely to be warmer than the most extreme heat waves presently experienced'.<sup>9</sup>

And, notice, the worst effects will be in the tropics, where heat increases will be beyond 'the historical range of temperature and extremes to which human and natural ecosystems have adapted and coped', wreaking devastation, and where sea-level rise will be 15–20 per cent higher than the global average.<sup>10</sup> Life in the tropics will, in fact, cease to be livable. This is a band of the earth where global greenhouse gas emissions remain comparatively tiny. And where, in consequence, nothing meaningful can be done to stop climate change. Where, paradoxically, pressing development needs mandate a significant increase in energy usage – in a world in which fossil fuels

3. Santi Nindang and Teigan Allen, 'Ahead of Flood Season, Thailand's Communities Demand Greater Preparedness' (2012) Asia (journal of The Asia Foundation), 8 August.

4. World Bank, *Turn Down the Heat: Why a 4°C Warmer World Must be Avoided* (World Bank, Washington DC 2012) [study by the Potsdam Institute for Climate Impact Research and Climate Analytics on behalf of the World Bank], xiv.

5. Ibid., xiii: 'Even with the current mitigation commitments and pledges fully implemented, there is roughly a 20 percent likelihood of exceeding 4°C by 2100. If they are not met, a warming of 4°C could occur as early as the 2060s'.

6. Steven C Sherwood, Sandrine Bony and Jean-Louis Dufresne, 'Spread in Model Climate Sensitivity Traced to Atmospheric Convective Mixing' (2014) 505 Nature 37–42. See too Damien Carrington, 'Planet Likely to Warm by 4C by 2100, Scientists Warn' *The Guardian* (31 December 2013).

7. So, e.g., Sir Brian Hoskins of the Grantham Research Institute, speaking on Radio 4's *Today* programme about the UK floods on February 13, 2014: 'There's no simple link – we can't say yes or no this is climate change'. To which, Nigel Lawson: 'He's right ... no one knows'. Transcript available at the Global Warming Policy Foundation website: <[www.thegwpf.org/bbc-radio-4-lawson-hoskins-flooding-climate-change](http://www.thegwpf.org/bbc-radio-4-lawson-hoskins-flooding-climate-change)>.

8. International Energy Association, *World Energy Outlook 2012*, OECD/IEA (2012), 1.

9. World Bank (n 4), xv. 'For example, the warmest July in the Mediterranean region could be 9°C warmer than today's warmest July'.

10. World Bank (n 4), xiii.

still remain cheaper and more efficient than renewable alternatives, and where, ironically, increased exposure to the ravages of climate change is matched by a dearth of the resources needed to adapt.

This, in a nutshell, is the problem of climate justice: those most vulnerable to climate change are least responsible and have the fewest resources to adapt.<sup>11</sup> But it breaks down into myriad other justice problems: 'human rights' that are unenforced, unsubstantiated, even unarticulated; path-dependence on an ever-expanding global economy that has already outgrown its resource base even as it polarizes wealth; a complicated international legal architecture that apparently sustains and rewards the status quo; political inertia; legal conservatism; plutocratic obfuscation.

These are the topics discussed in the six foregoing lucid and provocative papers. They approach their subject in thoroughly distinctive and diverse registers, but remain complementary, each one rising above the received wisdom on climate change and opening up a space for potentially game-changing reappraisal. So, in what follows I will thread together some points of principle and of practice that leap out from this collection, taken together. I put them under the following headings: (1) It is past time; (2) To do the right thing; (3) Beginning with the law.

## 1 IT IS PAST TIME

It is past time. That is the key message I take from each of the foregoing papers. It is past time, as Mary Robinson puts it, 'to question the status quo' on climate change, 'to challenge the political Zeitgeist'. 'Challenging the Zeitgeist' is a provocative idea: it calls upon us to take on the *spirit of time* itself. As Jonathan Schell wrote in *The Fate of the Earth*, 'Formerly, the future was simply given to us; now it must be achieved'.<sup>12</sup>

And yet, instead, we seem stuck in an endless present, one in which the machines we've built continue to rev up and pelt headlong towards full destructive capability, while we gawk and wonder and continue to feed them. We seem addicted to a present that we're unable to conceive of as our past, while the future seems to recede further and further out of reach. We appear stuck in a nightmare of collective inaction, only barely alleviated by the dreamed pleasure of an excess that we know must end, but cannot move to halt. But of course, even if it is everyone's endless present, it is not everyone's addiction. And even if it is everyone's nightmare, it is not everyone's dreamed pleasure. Some of us are considerably more invested in this faltering machine than others. 'The current system lurches forward, as the devastating consequences of our actions and inactions increase day by day'.<sup>13</sup>

This selection of papers breaks with the addictive present, the 'political Zeitgeist'. They tell us it is past time.

It is past time for a change of mind: past time to rethink the problem of climate change; past time to 'move beyond its construct as a scientific or environmental problem' – in Mary Robinson's words – and to recognize its extraordinary violation of ordinary justice.<sup>14</sup> It is past time to query, with Connie Hedegaard, why 'politics today [are] dominated by short-term interests while many of the challenges we face

11. Mary Robinson, in this issue, 15–17.

12. Jonathan Schell, *The Fate of the Earth* (Stanford University Press, Stanford 2000), 174. My thanks to Henry Shue for drawing my attention to this text and quotation.

13. Hedahl in this issue, 35–49.

14. Mary Robinson in this issue, 15–17.

require long-term answers'.<sup>15</sup> Or, indeed, why economics are dominated by short-term shareholder profits rather than long-term public interests, as Anna Grear points out.<sup>16</sup> And past time, as Olivier De Schutter writes, to query 'development pathways ... [which perpetuate a] post-colonial pattern of resource exploitation in which Southern countries provide natural resources and Northern countries produce higher added-value and knowledge-intensive products'.<sup>17</sup>

It is, moreover, past time to construct systems capable of matching our obligations, as Marcus Hedahl argues.<sup>18</sup> It is time therefore to rethink the law. It is past time for 'international and national legal processes and systems ... to evolve';<sup>19</sup> time to 're-engineer' the 'structural design of the corporation' and question the 'juridical privileging of the corporate';<sup>20</sup> time to recognize the absurdity of a trade regime that may impose penalties on countries that, in the face of international immobility, act unilaterally to reduce or eliminate the import of carbon-intensive goods into their economies.<sup>21</sup>

Henry Shue provides a compelling account of encroaching urgency, detailing the IPCC's initial pronouncements for their forthcoming fifth assessment report. This report details the world's cumulative carbon budget – which, if we are to have a 50/50 chance of keeping average global temperature rises below 2 degrees on pre-industrial levels, will expire by 2040 at current rates.<sup>22</sup> Shue's conclusion:

The empirical reality that we need to face is: there are not enough carbon dioxide emissions left in the cumulative carbon budget for very much economic activity. To fight mostly over how to divide up those emissions is largely to miss the point. The goal is not to get a larger slice of the pie of carbon emissions; it is to create a non-carbon-based pie.<sup>23</sup>

It is past time, in Shue's account, that we gave up on carbon, past time that we invested heavily in the renewables that constitute the only possible ticket to a future that might still meet the needs of the world's disadvantaged populations without destroying them in the process.

But, with the 'disadvantaged' of the world still in view, let me invoke a different inflection of this expression 'past time'. The philosopher Walter Benjamin, in an enduring challenge to his own political *Zeitgeist*, that of Germany in the 1930s and 40s, famously introduced the idea of the *time of now*, the *jetztzeit*.<sup>24</sup> In Benjamin's writing, the *jetztzeit* describes a time 'that is ripe with revolutionary possibility, time that has been detached from the continuum of history. It is time at a standstill,

15. Connie Hedegaard interview, in this issue, 8–14.

16. Grear in this issue, 103–33.

17. De Schutter in this issue, 65–102.

18. Hedahl in this issue, 35–49.

19. Robinson in this issue, 15–17.

20. Grear in this issue, 103–33.

21. De Schutter. See also Joost Pauwelyn, 'Carbon Leakage Measures and Border Tax Adjustments Under WTO Law' in D Prevost and G Van Calster (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar, Cheltenham 2012); Andrew Green, 'Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules' (2005) 8 *Journal of International Economic Law* 143.

22. See the calculator provided on <<http://www.trillionthtonne.org/>> (referenced in Shue in this issue, 50–64).

23. Shue in this issue, 50–64.

24. Walter Benjamin, 'Theses on the Philosophy of History' in Benjamin, *Illuminations* (Harry Zohn (trans.)) (Schocken Books, New York 1969), 261–4.

poised [and] filled with energy'.<sup>25</sup> It is a time infused, most importantly, with an appreciation of the past, of the countless missed opportunities and defeats that have made the present what it is.<sup>26</sup> For Benjamin, the defeats and injustices of the past remain to be redeemed today – in this way the *jetztzeit*, the 'time of now', is 'shot through with flecks of Messianic time'.<sup>27</sup> To seize the occasion for justice in the present would be to redeem the past and liberate the present as a space within which the future may be born.<sup>28</sup> 'As flowers turn toward the sun, so too does the past, by dint of a secret heliotropism, strive to turn toward that sun which is rising in the sky of history'.<sup>29</sup> Indeed, it is an exuberant 'secret heliotropism' that marks our current historical moment.

The collection of papers in this special volume are suffused with 'flecks' of the past, the historical injustices that have brought us to the sorry ledge upon which we now teeter, the mounting legacy of injustice that places the living today in bad faith with regard to those who will come after us – after having been placed there ourselves by those who came before. Climate change raises new 'justice' questions, but in practice these are few. For the most part it intensifies and exacerbates existing patterns of injustice. It is true that the impacts of a changing climate are felt unevenly around the world,<sup>30</sup> but the most vulnerable to climate change are most vulnerable for a reason. They are those who already lack resources – who have been on the wrong end of colonialism, or who have been globalization's losers, or who have suffered neglect, exclusion or simple rapacity at the hands of their own governments. They are those who have benefitted little or not at all from a carbon-intensive global economy, but who have long suffered its side effects – food price spikes, corruption, resource stripping, and now the ravages of climate change.

In these articles, past time, the injustice of the past, appears in the particular prejudices of legal and international legal structures (Anna Grear), in historically unequal patterns of resource overuse resulting in the encroachment of excess (Henry Shue), in the coercive origins of the contemporary international trade regime (the WTO's 'single undertaking') and the distributional skew of a liberalized global economy (Olivier de Schutter), and in dramatically uneven access to basic enforceable human rights (Marcus Hedahl, Mary Robinson and John Knox).

## 2 TO DO THE RIGHT THING

It is past time, to do the right thing. According to this present collection of articles, we have to do right by a number of groups of people.

25. Ian Buchanan, *Oxford Dictionary of Critical Theory* (Oxford University Press, Oxford 2010), online edition (2012): <<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100020224>>.

26. Benjamin's enduring image is the 'angel of history' (n 24), 257.

27. Benjamin (n 24), 263 (translation slightly amended by the author).

28. In fact, Benjamin has little to say about the 'future'. He speaks instead of the historian taking 'a tiger's leap into the past' (n 24), 261. Indeed, the 'future' per se is a notion that he aims to explode, at least in its standard signification; his historian 'cannot do without the notion of a present which is not a transition, but in which time stands still and has come to a stop'. In an important sense, the past is all around us, evidenced everywhere; the present is the space in which events may take place; the future – if it is the point at which the present stops – has no material existence at all.

29. Benjamin (n 24), 255 (translation slightly amended by the author).

30. Robinson in this issue, 15–17.

We have to do right, first, as Henry Shue reminds us, by future humans, the future generations upon whom we are, as things stand, bestowing this invidious problem. The present generation has, in effect, as Shue memorably puts it elsewhere, ‘seized control of the climate’.<sup>31</sup> ‘Our successors will doubtless struggle to end up in a better place, but we impose – indeed, we cannot avoid imposing – their starting place. We can make their task far easier or nearly impossible’.<sup>32</sup> And again:

If we leave those in our wake with no alternatives to energy sources that emit long-lasting carbon pollution, we will not have left them alone – we will have left them exposed to a socially destructive international energy regime that enriches a comparative few owners of fossil fuel reserves and endangers billions of ordinary people. We will knowingly have left them in an unsustainable position.<sup>33</sup>

One might argue with the grammatical subject of this assertion (is there really such a ‘we’? Does the ‘present generation’ not already comprise climate victims as much as perpetrators? Are ‘we’ not rather deeply divided over what to do?) – but one surely cannot argue with the thrust.

William Faulkner famously remarked that the past is ‘never dead. It’s not even past’.<sup>34</sup> Is the future, by contrast, unborn, unknowable, irredeemably future tense? Hardly. If the future is an act of imagination informed by historical sensibility, its people are already arriving into our ken. The span forged by the newest lives here in our midst – stretching to the end of the century, 2100 – also spans the likely limit of our imaginative capacity to foresee the coming world and its concerns for justice. That future is already present. And it is presumably in institutions, as Shue remarks, that we can effectively project our present forward, just as it is by means of institutions – states, universities, constitutions – that the past retains most presence in our lives today.<sup>35</sup> But, as he also notes, we now know that much of the carbon in the sky is there not just for generations, but will continue to affect future human beings ‘after tens and hundreds of thousands of years’.<sup>36</sup> Precisely because some of the destruction we are wreaking right now is ‘irreversible’, we are not well equipped to imagine what form ‘justice’ might take in that distant time. The best we can do, then, might be to build institutions capable of dealing justice. But do we have such institutions today? And if not, are we capable of building them?

What we know is that, today, the future is built (instituted) into our accounting in almost the reverse sense: it is expected future returns on investments that has driven the extraordinary progress in fossil fuel extractive technologies in recent years. Given the imperative to keep at least 66 per cent of known oil reserves in

31. Shue, draft presentation for the Dahrendorf Symposium, Changing the European Debate: Focus on Climate Change, Akademie der Künste, Berlin, November 14, 2013.

32. Shue in this issue, 50–64.

33. Shue in this issue, 50–64.

34. William Faulkner, *Requiem for a Nun*, Act 1, scene 3.

35. Shue in this issue, 50–64.

36. Shue in this issue, 50–64: ‘no one can plausibly claim that our emissions will not affect very distant future generations – forget great grandchildren, we are talking hundreds of thousands of years – because significant percentages of our 2014 carbon emissions will still be in the atmosphere after that period, still holding in heat, and the higher our emissions are absolutely, the higher the percentage of them that will remain after tens and hundreds of thousands of years. One can argue about how to define ‘irreversible’, but these are, from the perspective of humanity, irreversible changes’.

the ground,<sup>37</sup> these investments ought to be money wasted – it is sobering to realize that the investors and shareholders in question clearly do not believe so and nor do current regulations so expect.<sup>38</sup> Rather, the institution of law still provides an environment of stability for investors who bet on a carbon-rich future – a promise that the rules won't suddenly change, that excessive carbon extraction (for example) won't be retroactively criminalized, and that the proceeds from carbon-intensive activity won't be seized.<sup>39</sup>

We must do right, secondly, by those who are already wronged today, who are born into poverty and apparently maintained there by a global economic order 'under which millions *avoidably* die each year', as Thomas Pogge once put it.<sup>40</sup> And by a global *legal* order that, in Anna Grear's words, 'naturalizes' gross inequality – that sequesters trillions into tax havens and re-presents the ODA crumbs from our table as some sort of international largesse.<sup>41</sup> After all, we live in a wealthy world. Even during the recent financial crisis, the world economy continued to grow robustly. Gross World Product stood at USD78 trillion in 2012 – that is more than USD11,000 per capita.<sup>42</sup> This is not bad given that it was only USD 45 trillion as recently as 2000. And yet, most people do not enjoy a yearly income of anything like USD 11,000. Well over a billion survive on less than USD2 a day. By contrast, a mere 100,000 'ultra high net worth individuals' – that is, less than 0.01 per cent of the world's population – control almost USD15 trillion, a fifth of the world's total wealth.<sup>43</sup> Unsurprisingly, the spread between the very wealthy and the very poor tends to follow familiar post-colonial lines.

And the world's putative aid recipients are, to extrapolate from Anna Grear's powerful argument, climate change's *predictable victims*. This is because there appear to be structural causes of poverty – of impoverishment – and these causes appear to be intimately related to the structural causes of climate change itself. Grear's analysis, 'points beyond seeing climate injustice as a symptom of climate change (as if simply "caused by" it) – and ... beyond the need simply to identify and hold accountable "those" "who" are "responsible" for climate change'. Rather, 'the historical dimensions of climate injustice ... point to the importance

37. International Energy Association, *World Energy Outlook 2012*, OECD/IEA (2012), 3.

38. Carbon Tracker & The Grantham Research Institute, *Unburnable Carbon 2013: Wasted Capital and Stranded Assets* (2013).

39. Each of these principles is, of course, rooted in turn in the notion of the rule of law – see text at note 80 below.

40. Thomas Pogge, *World Poverty and Human Rights* (Polity Press, Cambridge 2008), 115, emphasis added.

41. Anna Grear in this issue, 103–33. ODA = Official Development Aid. Estimates of the amount of unpaid tax sequestered in tax havens globally range from USD21 to USD32 trillion. See 'The missing \$20 trillion', *The Economist* (16 February 2013). In 2012, according to the OECD, 'net ODA was USD 127 billion, representing 0.29% of ... donors' combined gross national income'. This figure, down USD6 billion on 2011 (which was itself down 3% on 2010), amounts to about 0.6% of USD21 trillion. See OECD Aid Statistics: <<http://www.oecd.org/dac/stats/>>.

42. CIA Factbook, <<https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html>>.

43. Capgemini and Merrill Lynch Wealth Management, *World Wealth Report 2011* (2012). In 2011, these 'ultra-high-net-worth-individuals' comprised about 0.9% of the group of 10 million 'high-net worth-individuals' (HNWI) and owned about 36.1% of the latter group's total wealth of \$42.7 trillion. The net worth of the Ultra-HNWIs grew by 11.5% in 2010.

of climate justice advocacy directly addressing “relations between imperial and subordinate states”<sup>44</sup>. To gain a sense for climate justice, Grear reminds us, we must try and understand the scale and extent of ‘climate injustice’, whose victims are already marked out as such by processes that predate, and coincidentally presume, the depredations of climate change: these are the processes that have made the world a (relatively) safe place for global capitalism, by externalizing its ‘toxic social and environmental costs’ onto others poorly placed to resist.<sup>45</sup>

And yet, as Mary Robinson prods us to recall – it is in developing countries that we will find the ‘visionary leaders to drive the societal change required to make the leap from “business as usual” powered by fossil fuels, to a new model of low-carbon, climate-resilient development with people at the centre’.<sup>46</sup> As we in the cockpit mismanage the controls, we can expect someone else to step into the pilot’s seat.

### 3 BEGINNING WITH THE LAW

I sense, within this collection of interventions, some ambivalence about the role law, and international law, could play were we to emerge from an unjust past into the modest future that is the best we can bequeath. The law – human rights law, trade law – is not ready-made to deliver climate justice: it must evolve. A question that arises is whether it can. Another is whether the ‘specific excellence of the law’ (in Joseph Raz’s words)<sup>47</sup> – the quality of *rule of law* – facilitates or retards that evolution.

Let’s start with *human rights*. There seems little doubt that climate change’s predictable victims, temporally or geographically, have (or will have) human rights. But Marcus Hedahl is concerned with a prior question: does anyone have obligations co-extensive with these rights specifically as they arise in a context of climate change? For if not, it may be incorrect to refer to their injustices as ‘rights violations’ at all.<sup>48</sup> This is a real question, he points out, as it is unclear what, if any, obligation exists under law, national or international, between climate change’s perpetrators and its victims.

This legal conundrum has by now been well rehearsed in international law scholarship.<sup>49</sup> John Knox’s contribution to the present issue outlines the principal lines of thought: legal human rights may be understood as too vague (i.e., unable to provide remedy for the specific injuries caused by climate change), too inflexible (i.e., poorly equipped for the complexities of climate change), or too state-centric (i.e., unable to address harms where a border separates perpetrator from victim) to be useful in addressing the injustices of climate change.<sup>50</sup> Knox can point to the early conclusions of his own work as UN Independent Expert on Human Rights and the Environment to

44. Anna Grear in this issue, 103–33.

45. Anna Grear in this issue, 103–33: ‘In the neoliberal world order, the poorest peoples and nations of the earth are forced disproportionately to bear the deepening social costs of capitalism – including the toxic social and environmental fallouts now manifesting as climate crisis’.

46. Mary Robinson in this issue, 15–17.

47. Joseph Raz, ‘The Rule of Law and Its Virtue’ in David Dyzenhaus and Arthur Ripstein (eds), *Law and Morality* (University of Toronto Press, Toronto 2001 [1979]), 303.

48. Hedahl in this issue, 35–49.

49. For my own contribution, see Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, Cambridge 2009).

50. Knox in this issue, 22–34.



counter, in part, the first two objections – at a minimum, human rights law includes some procedural and substantive duties with regard to environmental protection.

As to the third ('most serious') objection, Knox writes that general principles of good faith and a duty to cooperate under international law may be of help here. These obligations are arguably fulfilled in the ongoing UNFCCC COP (Conference of the Parties) caravan, gathering the world's international set in the world's top holiday resorts year after year to (fail to) hash out an agreement on climate change. Important as each of these observations are, they hardly conclusively address Hedahl's worry – as Knox recognizes.

For Hedahl, this problem of apparently clear 'moral' rights that lack clear legal counterparts is an instance of a long-recognized dilemma in rights discourse – which he refers to as the 'strict correlativity requirement'.<sup>51</sup> Much as it is undeniably the case that not all 'self-evident' rights do in fact entail obligations, as a matter of law, Hedahl suggests that this truth does not entail that no such rights exist. 'If the world is aligned such that some moral claim rights do not possess corresponding directed obligations, at times at least, we should regard that as a normative failure of the world, rather than as a descriptive indication that a right fails to obtain'.<sup>52</sup> In consequence, Hedahl argues that the human rights of climate change's predictable victims "'call out" to be fulfilled, even when they are not, in fact fulfilled'.<sup>53</sup> Even where there is no legal ('directed') obligation to meet the human rights of climate victims, Hedahl argues, there is nevertheless a *secondary* obligation: institutions must be created and/or empowered to ensure that there exist, in practice, concrete obligations correlative to these rights.<sup>54</sup> (Though, of course, even the secondary obligation must be called forth; it doesn't exist, as such, in law.)

Both John Knox and Marcus Hedahl acknowledge the gap between the existence of human rights in principle in a climate-changed world and their poor availability in practice – and both suggest normative bases for bridging that gap. Moreover, the solutions seem modest. The problem with the law, it seems on these accounts, is that it doesn't quite do what it says on the tin. Human rights are promised, but, for a variety of reasons – historical accident or political disagreement – they are not fulfilled. Fix the broken bit and all will be right. Human rights, says Knox, 'will have to evolve' if they are to remain relevant in a climate-changing world.<sup>55</sup>

And yet both authors also indicate that the problem may lie somewhere deeper than these easily remedied contingencies. 'We remain', writes Hedahl, 'in a morally fractured world, without reform, collective agreement, or climate justice'.<sup>56</sup> Not only are we, here in the rich world, 'complicit' in climate injustice – standing by when we could intervene – but we are in fact 'participating in injustice', since our everyday behaviour actively contributes to the climate change that harms others elsewhere.<sup>57</sup> Knox too notes the systemic nature of the shortcomings in the law. There are available entry points for human rights at the micro-level, he points out, but 'the effectiveness of human rights law at addressing climate change will depend in large part on how it

51. Hedahl in this issue, 35–49.

52. Hedahl in this issue, 35–49.

53. Hedahl in this issue, 35–49.

54. Hedahl in this issue, 35–49.

55. Knox in this issue, 22–34.

56. Hedahl in this issue, 35–49.

57. Hedahl in this issue, 35–49.

deals with climate change at the macro level, as a global threat to the enjoyment of human rights everywhere'.<sup>58</sup> This assessment is fundamentally shared by Marcus Hedahl, Henry Shue and Mary Robinson in the present issue.

Another body of law that will have to evolve to meet the challenge of climate change, according to Olivier De Schutter, is *trade law*. Here the problem does not appear to be too little law, but too much. (Of course neither one is, in fact, 'the problem'.) De Schutter joins a growing line of scholars concerned that international trade law may penalize states who respond to the failure of international negotiations on climate change by acting unilaterally to restrict the greenhouse gas (GHG) content of products bought and sold within their territories.<sup>59</sup>

On its face, this worry seems absurd. Surely international law, for all its flaws, could not pose an *obstacle* to any state brave and conscientious enough to act where the international community has been failing so visibly and egregiously? De Schutter, like others before him, concludes that it need not be impossible to design carbon-light trade policies that are also WTO-compatible.<sup>60</sup> But nor is it easy. The design will need to be cautious and meticulous, avoiding anything radical, and ensuring that all trade partners have been adequately consulted along the way. And even then, the chances of success in the face of a challenge at the WTO's Dispute Settlement Mechanism (DSM) are at best unpredictable.

The centrality of this question to climate change policy is hard to overstate. In a globalized economy, we – you and I – participate (to embellish Marcus Hedahl's charge) in the emission of greenhouse gases in every object we consume. If I buy grapes in Tesco produced in South Africa, there are, of course, carbon emissions involved in transporting them to the UK ('food miles'), but there are also the emissions involved in producing, cultivating, harvesting and processing those grapes in South Africa. As with any agricultural process, this may be done in a more or less carbon neutral fashion. What sources of energy have been used? What agricultural techniques? Land use patterns? And so on. But of course, whereas the United Kingdom, as an EU member, has carbon reduction targets, albeit contested, South Africa does not. Extrapolate the problem to textiles produced (for argument's sake) in Bangladesh, electronics from China. Factor in the lengthy supply chains that attach to many such products. Everything we eat, buy and consume has a potentially lengthy carbon tail. And the fact that so much of our produce is made in developing countries (which, as a matter of equity, have no carbon reduction obligations under the UNFCCC), mean that all this carbon is not accounted for at all. Not here, where the objects are consumed; not in South Africa/Bangladesh/China, where they are produced. This, in a nutshell, is the problem of *carbon leakage*.<sup>61</sup>

Carbon leakage may ultimately be addressed through international agreement of course – were all (or at least a preponderant majority) of the world's states to agree to GHG reductions, thereby eliminating regulatory competition. But assuming this is unlikely for the moment, the best other option would appear to be that conscientious states apply a *carbon-neutral trade policy*, simply refusing to import carbon-intensive products. However, were they to do so, they might then be open to challenge from exporting countries under WTO law. The challenge would essentially seek to show that

58. Knox in this issue, 22–34.

59. Others include Joost Pauwelyn and Andrew Green. See note 21 above.

60. De Schutter in this issue, 65–102.

61. De Schutter in this issue, 65–102.

any such refusal amounts to a form of protectionism, prohibited under WTO law. So, for example, bans on imported products are entirely disallowed under GATT, Art. XI, as are taxes targeting imports. Any measure will have to show that it is applied equally to 'like' domestic products (under GATT, Art. III) and to 'like' products from any other country (under GATT, Art. I). The WTO jurisprudence on 'like' products is somewhat arcane – helpfully clarified in De Schutter's illuminating text. Other issues may arise under the WTO's 'Technical Barriers to Trade' (TBT) agreement, which aims to monitor whether regulations on 'production and processing methods' (i.e., for present purposes, gauging how much carbon has been used in producing a given product) are applied in a non-discriminating fashion to all countries just as they are at home. This is far from straightforward, given that different countries have different regulations, and different technical capacities aiming to do similar things.<sup>62</sup>

In most such cases, should a measure fall foul of WTO law, as seems likely, it may yet be allowed under the 'general exceptions' provisions of GATT Art. XX, which provides exceptions for measures 'relating to the exhaustion of natural resources' (such as, in our case, the atmosphere), and/or 'necessary to protect human, animal or plant life or health'.<sup>63</sup> Even if a measure is found to comprise an 'exception', it must still pass through GATT Art. XX's notoriously tricky *chapeau* – that is, it must be shown not to 'constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. Again, the jurisprudence of the DSM in this domain is arcane, but De Schutter and others agree that the hurdles, if daunting, need not be insurmountable.

In practice, of course, whether a policy is ultimately viable or not, such a situation may lead to 'regulatory chill'.<sup>64</sup> The possibility of falling foul of the DSM – not to mention the costs, both economic and diplomatic, associated with litigation and (in particular) potential failures – may discourage states from taking steps towards a carbon-neutral trade policy. The trade regime is a cornerstone of the international system; the climate regime is not. Meanwhile, within the WTO itself – including its Dispute Settlement Body – there is little sense that climate change requires any rethinking of WTO rules.<sup>65</sup> Yet, like the UN Charter, the WTO was presumably not intended as a suicide pact. Here too is a body of law that, it seems, must 'evolve' if we are to achieve climate justice.

So a further question arises: to what extent might we look forward to the evolution of international law (human rights law, trade law, environmental law)? In this regard, the foregoing papers raise a third question, it seems to me, this one about the *rule of law*. Mary Robinson argues that, absent rule of law, successful global action on climate change is near inconceivable.<sup>66</sup> If targets are agreed, if they can then be entrenched in law, if that law can then be made enforceable – only then can climate change be addressed. Law – a 'legally binding agreement' – is an indispensable attribute of any solution to climate change, which must further embed principles of equity, transparency and accountability, principles associated with the rule of law.<sup>67</sup>

62. De Schutter in this issue, 65–102.

63. De Schutter in this issue, 65–102.

64. Green (n 21), 187.

65. See the WTO website's climate change page: <[http://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm)>.

66. Robinson in this issue, 15–17.

67. Robinson in this issue, 15–17: 'Without a legally binding international agreement, there is no obligation to act. The rule of law – applied at the international level and translated into

This seems inarguable. And yet Anna Grear is also surely right to warn that ‘we cannot afford to be naïve about the promise of a “strong rule of law” approach’.<sup>68</sup>

Grear explains why in her fiery account of the ‘structural complicity’ of law in climate change. Citing Stephen Turner, she points out that ‘the very design of the law itself is fundamentally predisposed to environmental degradation and forms part of a dysfunctional global legal architecture which cannot achieve environmental sustainability’.<sup>69</sup> How so? Because the law, on Grear’s account, systematically privileges corporate private actors above the public interest – and this attribute of the law, she says, is inherent in its structure: the ideal type of human agent empowered and expected in law, as both a historical and economic matter, is (it turns out) a private corporation.<sup>70</sup> And the legal attributes that anticipate and reinforce this ideal agent systematically facilitate the externalization of social and environmental costs associated with profit-seeking behaviour:

separate legal personality, limited liability, the separation between ownership and control of corporations, and the legal duty placed upon company directors to pursue the company’s best interests as a profit-making entity [ – all these] are key *structural juridical reasons* why environmental legal responses fail with respect to meeting important accountability targets for modes of environmental degradation.<sup>71</sup>

Whether or not we accept the stronger implication of this account – that the law is inherently unsuited to perform on behalf of non-corporate entities – it is surely difficult to contest the weaker implication: that existing legal structures do not merely permit, but facilitate and even promote environmentally destructive behaviour. After all, if the environment (‘nature’) is that which is to be transformed in an economy premised on ceaseless innovation and production,<sup>72</sup> a primary objective of a modern legal system is presumably to support and encourage this transformation. The peripheral, soft and fundamentally ambiguous constraints of ‘environmental law’ (‘sustainable development’, the ‘precautionary principle’) merely underline the point – designed not primarily to prevent, but to secure, nature’s continued (sustainable) despoliation in the service of the economy.<sup>73</sup>

To be sure, private entities cannot escape liability for *all* environmental harms – there are some exceptions at the limits. At bottom, however, the transformation of nature into capital *must* systematically produce toxic, ugly and depleted by-products and waste.<sup>74</sup> A certain quotient of environmental harm is so fundamental to the

national policies and actions – is a key tool in delivering justice. It ensures commitment and accountability, and provides a framework for ensuring transparency and equitable action. A legally binding agreement would include measures for holding the international community and individual states to account for their actions. Nothing short of a new international treaty can provide this level of commitment and certainty’.

68. Grear in this issue, 103–33.

69. Grear in this issue, 103–33.

70. Grear in this issue, 103–33, citing Janet McLean, ‘The Transnational Corporation in History: Lessons for Today?’ (2004) 79 *Indiana Law Journal* 363–77.

71. Grear in this issue, 103–33, emphasis in the original.

72. See in this regard, Jean Baudrillard, *The Mirror of Production* (Telos Press, St Louis 1975).

73. See Stephen Humphreys and Yoriko Otomo, ‘Theorising International Environmental Law’, LSE Law, Society and Economy Working Papers 9/2014.

74. Raymond Williams, ‘Ideas of Nature’ in *Problems in Materialism and Culture* (Verso, London and New York 1980), 83–4.

economy that it is not visible as ‘harm’ at all: it is to be contained and directed rather than avoided. Climate change challenges this legal-economic system at its core, because the ‘by-product’ is so ubiquitous, so indispensable to contemporary economic processes, and yet so inimical to the system that produces it. It cannot be managed within the system, and so threatens to overturn it.

Viewed in this light, Anna Grear’s caution about the rule of law makes sense for two reasons. First, the rule of law is generally understood as a procedural ideal – it tells us how the law should be done, not what the law should do.<sup>75</sup> For this reason, there has long been disagreement as to whether the existence of human rights, for example, are a necessary element of a rule of law framework. In Joseph Raz’s stark formulation, they are not: the rule of law is to law what ‘sharpness is to a knife’; it is the capacity of law to be law, the ‘specific excellence’ of law.<sup>76</sup> On other, more expansive, accounts, the rule of law involves certain basic attributes of a liberal legal system to ensure its claim to generality and equal application – guarantees of non-discrimination and a fair trial – attributes that also enjoy articulation as human rights principles.<sup>77</sup> But nowhere do articulations of the rule of law extend to the full panoply of human rights found in contemporary treaties – civil, political, social, economic, cultural and environmental.<sup>78</sup> Even Tom (Lord) Bingham’s forthright defence of a human-rights-based rule of law stops short at a very limited range of contemporary human rights.<sup>79</sup>

Procedurally, the rule of law is said to invest law with the quality of predictability (among others).<sup>80</sup> Predictability is a claim of the past upon the future. The law, in a rule-of-law setting, is a vehicle to ensure that past decisions, past claims, past reasoning, past justification have effect into the future. How far into the future? As far as they are not specifically and deliberately overturned, which can only happen, in a rule-of-law state, through a procedural apparatus intended to subject any such overturning to close scrutiny, to keep it in line with existing principles, to ensure it has the agreement of the priesthood of legal professionals, and to eliminate discretion in the pursuit of policy ends. The rule of law, from this perspective, is – and is intended to be – a bulwark against hasty change, a guarantor of the status quo, an inherently conservative principle: it is opposition to revolution and resistance to evolution. This ‘claim of the past on the future’ is, then, the opposite – better, the opponent – of that

75. See, e.g., Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467.

76. Raz (n 47), 303.

77. TRS Allan, *Constitutional Justice* (Oxford University Press, Oxford 2003).

78. The one counter-example is the 1959 Delhi Declaration of the International Commission of Jurists, which asserted that the rule of law requires ‘not only the recognition of [each individual’s] civil and political rights’ but also ‘the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality’. But this document, where it has not been forgotten outright, has been repudiated (by Joseph Ratz *inter alia*). ICJ, ‘Declaration of Delhi’ (1959), reprinted in ICJ, *The Rule of Law and Human Rights: Principles and Definitions* (ICJ 1967).

79. Tom Bingham, ‘The Rule of Law’ (2007) 66 Cambridge Law Journal 67, 77.

80. This claim is made passionately in Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press, Chicago 1994 [1944]). It is this quality of the rule of law that underlies its claim to underpin and facilitate investment (see text above at note 39). See Ibrahim Shihata, ‘Promotion of Foreign Direct Investment – A General Account with Particular Reference to the Role of the World Bank Group’ in Shihata, *The World Bank in a Changing World: Selected Essays* (Franziska Tschöfen and Antonio Parra (eds)) (Martinus Nijhoff, the Hague, 1991).

revolutionary claim invoked by Walter Benjamin above. The rule of law protects acquired rights and property and slows legal innovation. Whatever its qualities (and they are many), it is hardly conducive to the kind of seismic changes in law necessary to seriously retard the advance of climate change.

Second, despite its supposed substantive reticence, most characterizations of the rule of law do in fact presuppose an immense amount of detail about the appropriate shape of the economy and society that underpin the good life.<sup>81</sup> These are, of course, ‘liberal’ ideas about the ideal society – but at some level they are proto-liberal: core assumptions about the background conditions which make possible a certain configuration of the public–private relation, the role of courts, the appropriate constraints upon the state, the autonomy of the individual, the power of civil society, the importance of public opinion. The expression ‘rule of law’ operates as a shorthand for this set of background assumptions. Principal among them is the public–private distinction: public and private exist in tension; the boundary must be policed; the public must be constrained in order that the private shall be free. On most accounts, what distinguishes rule of law from ‘rule by law’ (mere obedience to the law) is precisely this notion that the law protects the private person from the whim or discretion of the public ‘servant’. The point, of course, is that the public interest is not the interest of the ‘public sector’ or ‘public functionary’: the public interest is essentially an aggregate of *private* interests, the interests of a public comprised of ‘private’ people.<sup>82</sup> This is, of course, a complex and often delusory notion in practice, but it nevertheless carries powerful and intuitive ideological weight.

It is in this sense that the contemporary cult of the rule of law bears out, to a compelling degree, Anna Grear’s intuitions about the private privileging of modern law. Whether we agree or not that the corporate form is the prototypical legal subject, it seems right to notice that, for the rule of law, the ‘private’ – as an attribute of both legal and natural persons – is legally defensible a priori, for those with the wherewithal to mobilize it. What the rule of law cannot tell us is how to mobilize law in the interests of those lacking such wherewithal. These are the stakes of climate justice. This does not mean that, as we turn to consider how to address climate injustice, we can simply dispense with law or the rule of law. But it does mean we cannot expect the necessary ‘evolution’ of law simply to take place because it is ‘right’ or ‘reasonable’.

#### 4 TO CONCLUDE

Climate change dramatizes Walter Benjamin’s thesis: our present predicament materializes the occasion of *jetztzeit*. For climate change is not merely an accident of history or a piece of bad luck. It is the inescapable, if initially unforeseen, outcome of a concerted effort to intensify and accelerate a global economy and society, an effort that has, for all its achievements, left in its wake a swathe of losers and victims of war, imperialism and environmental despoliation. Climate change cannot be addressed in a piecemeal fashion: it can only be treated systemically, root and branch, for a carbon footprint haunts every step of the history of industrial and colonial expansion of the last centuries.

Yet to say climate change must be addressed systemically is tantamount to asserting that it cannot be addressed at all. After all, our carbon-producing ‘system’ is energized

81. On this, see further: Stephen Humphreys, *Theatre of the Rule of Law* (Cambridge University Press, Cambridge 2010).

82. The point is intuitive, but well expressed in Jürgen Habermas, *Structural Transformation of the Public Sphere*, Polity Press (1994) [1962], 27 Humphreys (2010), 47.

with the latest fossil fuel extraction technologies, replete with the momentum of decades of turbo-capitalism, supra-political in its transcontinental fluidity – carbon production moves around the world to wherever is cheapest and most efficient. Because it is premised upon (as well as embedded within) a global economy, it slips between our poorly aligned controls: our market democracies, our command-and-control economies, our weak or failed states lacking in rule of law and enforcement, and, of course, our agnostic, laissez-faire international regime.

The conundrum with which climate justice faces the law is a problem of degree. For how long shall we continue to inch forward, seeking the ‘evolution’ of our protected investments in the name of a justice they have never recognized, even after they have already exhausted the breathing space of the world? At what point do we instead ‘empower’ the forgotten claims of the past – and how do we do so?