

International Law as a Basis for a Feasible Ability-to-pay Principle

Last pre-publication version: Published in *Principles of Climate Justice and Real-World Climate Politics* (2021) Routledge, ed. Sarah Kenehan and Corey Katz)

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Keywords: International Law, ability-to-pay, distributive justice, cosmopolitanism, statism, realism, international relations,

Many philosophers working on climate change welcome the idea that principles of climate justice they develop will require the bulk of the burden of climate action to be borne by developed countries. However, principles of climate justice that are politically feasible should not merely be acceptable to other fellow travelers, but also be potentially persuasive to those who have reason to oppose the enactment of those principles. Consider two groups of such political opponents. One includes “reactionary citizens” who might take issue with climate justice in ways it is often conceived: as a species of global or intergenerational justice. For instance, they might suspect that most moral commitments are limited by state boundaries, or be skeptical that we have substantive duties to future people, or believe that those countries with current wealth primarily earned it and thus deserve it. The other group includes “constrained policy-makers.” These are policymakers who are sympathetic to progressive action on climate, but face constraints of public opinion from reactionary citizens (if an elected official or political appointee) or imposed by a primary duty to directly serve the medium-term interests of the state that employs them (if a career bureaucrat).

Faced with these political opponents, proponents of climate justice should consider how politically feasible different principles of climate justice are. I focus in this chapter on the political feasibility of an “ability to pay principle” as a proposal for dividing the burdens of past emissions and emissions from the global poor. I argue that a formulation of an ability to pay principle with a voluntarist scope, restricted only to agreed upon collective goals, is significantly more politically feasible than one with a preventative scope, which focuses on preventing a very bad outcome. A voluntarist ability to pay principle can much more clearly be justified to both constrained policy makers and reactionary citizens as a solution to a collective action problem among states that have already bound themselves to collectively solving the problem. A voluntarist principle also has a stronger precedent as a principle of international law. Thus, those philosophers concerned with the political feasibility of an ability-to-pay

principle should carefully consider using a voluntarist rather than a preventative formulation.

The chapter proceeds as follows. First, I outline what I mean by “political feasibility” and distinguish it from other conceptions of feasibility. Second, I explore the different rationales for a preventative ability to pay principle. Third, I introduce my voluntarist formulation of the ability to pay principle. I then reply to objections to that formulation, arguing that the drawbacks of a voluntarist formulation are not as dire as they might appear.

On Political Feasibility

Feasibility, as analyzed by Juha Räikkä (1998), has at least two senses. “Theoretical feasibility” is a (potential) constraint on any political *theory* based on how societies could be organized. These constraints in turn might range from logical impossibility (a constraint on a theory that everyone should earn above the average wage)¹ or physical impossibility (a constraint on a theory that demands that each person receive an unlimited amount of energy or goods). More controversially, such constraints might include the standard motivational equipment humans have (Wiens 2016), the stock of resources needed to bring about a number of specific states of affairs (Wiens 2015), or the actual or perceived moral costs of moving from one overall structure to another (Buchanan 2002; Räikkä 1998). This notion of theoretical feasibility and how it relates to political theory and political philosophy (understood typically in terms of broad theories of governance or distribution) has received a lot of attention (Southwood 2018; Lawford-Smith 2013; Gilabert and Lawford-Smith 2012). What most parties seem to agree on is that the debate about theoretical feasibility typically concerns which real-world constraints should figure in our normative *thinking*. It does not concern something more practical, like the claims one might utter as advice or exhortation, for instance (Southwood 2018; Räikkä 1998).

Theoretical feasibility it is not the only kind of feasibility that those concerned with climate justice might be interested in. Some concerned with climate justice might have reason to aim for feasibility in an even more conservative sense. Alongside theoretical feasibility, there is also what I will call (following Räikkä) “political feasibility.” As Räikkä points out, it is perfectly natural for those interested in the actual “everyday politics” of concrete policies and institutions to take on board different (or stronger) feasibility constraints than those offered by even the most theoretical feasibility-conscious political theorists. For instance, it is common for political actors, such as a constrained policy-maker, to dismiss a proposal as relatively infeasible if it (a)

¹ This example is from Lawford-Smith (2013)

is not able to be brought about relatively quickly or (b) if it runs counter to the current beliefs of numerous and powerful constituencies. These dismissals assume nothing in particular about humans' motivational equipment or the costs of transitions.² In this chapter, I am interested in *political* feasibility, primarily in sense (b), the degree to which it can cohere with numerous and powerful constituencies. Indeed, I will refer to this scalar quality of being able to be consistent with the beliefs of numerous and powerful constituencies as "political feasibility." Political feasibility seems to be an appropriate quality to consider when we are trying to not just think, but prescribe what actors should do now, all things considered.³ And given the urgency of the climate problem and the repeated calls for rapid action, focusing on what specific actors should do now seems highly relevant for the pursuit of climate justice.

Why should a *philosopher* be concerned with political feasibility? Is it not the role of a philosopher to hold actors to a *currently* politically infeasible standard? To continue to speak truth to power, even when it runs counter to widespread or powerful prevailing political attitudes? This is the model of the philosopher as a norm entrepreneur, or less optimistically, a Cassandra.⁴ There is certainly a role for philosophers to put forward proposals that run counter to the political orthodoxy of their time. Indeed, demanding that constrained bureaucrats deliver courageous and just leadership, or that reactionary citizens accept the demands of a progressive, cosmopolitan view of justice, might be a way to spur at least an improvement from current unjust arrangements.

Taking the role of the uncompromising radical, however, can come with risks. A focus on highly politically infeasible ideals might sow division among otherwise powerful pragmatic coalitions. Further, disregarding political feasibility can leave one open to charges of irrelevance or ignorance, and reduce any possible positive impact one might have on constrained policymakers or reactionary citizens.⁵

The model of the philosopher as pragmatist in public life might be less familiar to us than that of the philosopher as visionary. In these times of specialization, it's not likely that many philosophers can be deeply involved in policymaking (and when they

² Although these are sometimes relevant factors for the difficulty of political transformation; see also (Brennan and Sayre-McCord 2016).

³ (Carens 2013) See (Southwood 2019) for an argument that this framing is misleading.

⁴ See Stephen Gardiner: "...though one purpose of ethics is to guide action, in my view it also plays a role in *bearing witness* to serious wrongs even when there is little chance of change" (Gardiner 2016, 255). See also (Kyle Fruh, n.d.).

⁵ See e.g. Posner and Weisbach (2010) and Weisbach (2016) for rather extreme versions of these views.

try, they often admit to failing spectacularly).⁶ But they can attempt to specifically develop arguments that might be ready out-of-the-box to assist policy-makers, arguments that take widespread or powerful politically conservative opinions about global justice or international fairness as a constraint, not a target or an irrelevancy. Those arguments might help policymakers who are sympathetic to the cause of more radical climate justice to defend themselves against backlash from such constituencies. They might also be persuasive to those constituencies themselves and nudge their opinion in the direction of more radical visions of climate justice.⁷

In what follows I introduce the preventative formulation of the ability to pay principle, and argue it scores low on political feasibility. I then introduce my voluntarist version, which avoids the problems of the preventative formulation and can be justified to the political opponents mentioned above. I then defend this politically feasible voluntarist version, from two objections and a worry, arguing that in its application, it is not as different from the preventative formulation as one might think.

Preventative Ability to Pay Principle

The ability to pay principle (APP), roughly put, dictates that richer states have a duty to do significantly more to help humanity reduce global emissions, adapt to climate changes, and perhaps compensate⁸ unavoidable damages from climate change, than poorer states. Notice, in this formulation, and in my voluntarist formulation that follows, *states* are the primary duty-bearers. There is a practical reason for this. The most plausible pathways to limiting warming to “well below 2°C” involve (i) electrification of manufacturing and transport systems, (ii) decarbonization of electricity generation systems, and possibly (iii) the deployment of large-scale negative emissions technology.⁹ Each of (i) – (iii) are transformations that states are best placed to primarily

⁶See the self-admitted failure of Michael Ignatieff’s Canadian political career (Ignatieff and Warburton 2014).

⁷ In *some* senses, this goal could be exemplified by the first three sections of Chapter 3 of the IPCC’s Fifth Assessment Report by Working Group 3, which translate philosophical positions in a manner and forum to be consumed by policy-makers (Kolstad et al. 2014). However, to the extent that it summarizes work that is not concerned with political feasibility, it does not fit our present purposes well.

⁸ By “compensate” I refer to the process of paying for the “loss and damage” resulting from climate change despite efforts at mitigation and adaptation.

⁹ See the IPCC’s Special Report Global Warming of 1.5°C, especially Section 4.21. “Both the integrated pathway literature and the sectoral studies agree on the need for rapid transitions in the production and use of energy across various sectors, to be consistent with limiting global warming to 1.5°C. The pace of these transitions is *particularly significant for the supply mix and electrification*” (IPCC 2018: 320)

bring about. Plausibly, in most states, (ii)—the decarbonization of the electricity generation system—is something that *requires* strong state action to bring about, given the huge infrastructure and national nature of most electricity systems. Therefore, a principle of burden-sharing that applies directly to states is one that directly applies to the relevant kind of actor to respond to climate change.¹⁰

The main aspect of the ability to pay principle I want to explore is the “scope” of the principle. By scope I mean that distributive task which triggers the application of the principle. So, if the APP is being proposed as a principle of distribution for some task(s) relating to climate change then the scope of the APP determines which particular task(s) it applies to. To ground this discussion, I lay out an ability to pay principle with what I think is the default version of its scope – the version much writing in climate ethics implicitly gestures towards:

Preventative APP: The collective burden of *preventing a very bad outcome* should (where no better principle applies) be borne in relation to a state’s ability to pay.

Notice three things about the principle. First, it refers to “preventing a very bad outcome.” This is left unspecified. The idea is that there is a serious problem that *someone* has to deal with otherwise the outcome would be very bad. Whether that badness should be spelled out in terms of disutility, rights violations, or something else is secondary to the acknowledgment that there is a very bad outcome looming under business-as-usual that should be prevented if at all possible.¹¹ The second point is that the principle has explicit reference to its own low lexical priority. The preventative APP acknowledges that other principles which look to who is contributing to or benefitting from the very bad outcome might be more important. Indeed, several theorists see the APP as a way to determine shares of that part of the burden of climate change mitigation, adaptation (and compensation) that ought not be allocated, or cannot be allocated, via a principle with lexical priority such as a polluter-pays principle. This “climate change remainder” (Caney 2010) is understood to result from greenhouse gases that have been produced (i) under conditions of ignorance about their effects (Kingston 2014), (ii) by people who are now dead (Caney 2010), or (iii) as a result of pursuing basic subsistence (Shue 1993; Caney 2010). The bad outcome of letting the burdens of this remainder fall just where they may calls for a principle of allocation

¹⁰ See (Francis, online ahead of print) for a defense against the objection that treating states as the relevant moral agents creates unfair burdens on individuals.

¹¹ For a general example, see (Miller 2001). For an application to climate change, that is not discussed below, see (Miller 2008), where the scope is the violation of human rights from unmitigated climate change.

beyond the polluter-pays principle (Mittiga 2019; Caney 2010).¹² Third, as with the exact scope, the preventative APP is also unspecific about the *metric* of a state's ability to pay. There are numerous suggestions for measuring ability to pay in the climate case.¹³ Some can be progressive. For instance, they can exclude incomes of individuals below a "subsistence" threshold and heavily weight incomes above a "luxury" level.¹⁴ Alternatively, a measurement of state ability can be regressive, by correlating it directly to Gross National Income (Höhne, Den Elzen, and Escalante 2014). Moreover, a quick glance at the websites of the different public "fairness comparisons" of states' NDCs show that the choice of measurement metric makes a big difference to how burdens are ultimately divided.¹⁵ (For more on fairness in relation to NDCs, please see Bourban in this volume.) This is true even under division schemes that incorporate both an APP and a polluter-pays principle (Kingston 2020). I do not go into this problem here, because it arises at a second stage in the discussion once an interlocutor has accepted that ability-to-pay is a relevant factor in the division of climate burdens. (For a treatment of the complex political feasibility issues at play in choosing an ability to pay metric, see Kingston 2020).

The preventative APP is an assertion, rather than an argument. If someone was unconvinced that ability-to-pay should play a role in dividing the burdens of climate change, specifically the remainder, the preventative APP gives them no further reason to accept it. Climate ethicists have, however, provided arguments for APP that seem tailor-made to justify the preventative APP. One way to assess these arguments is to try to determine whether they are successful or sound in relation to the intuitions of moral theorists. But, another way to assess them, one that is highly relevant for political feasibility, is to see if they could be justified to those citizens that might be skeptical of those intuitions (Moellendorf 2016; Rawls 1999). Or, justified to policymakers constrained by either the beliefs of such citizens, or institutional frameworks that enshrine a more conservative outlook on world affairs, such as a duty to serve the material self-interest of one's state. Thus, we can ask: to what extent could the extant

¹² Some even support an APP that does not cede lexical priority in this way (Moellendorf 2014: ch 6). For such an account, the political feasibility of the APP is even more important.

¹³ See (Höhne, Den Elzen, and Escalante 2014) for a review.

¹⁴ As in (Baer et al. 2008) and operationalized by the Civil Society Review (2015). See also the argument in (Shue 2015). Edward Page suggests a role for the ability to pay principle as a means of separating out those states that lack any burdens at all from those that bear burdens (Page 2008).

¹⁵ NDCs are "Nationally Determined Contributions – states' official mitigation pledges under the Paris Agreement. The websites in question include www.parisequitycheck.org, www.climateactiontracker.org, and www.civilsocietyreview.org.

arguments for the preventative APP influence political opponents such as reactionary citizens or constrained policymakers?

Domestic Comparison

One kind of argument for the preventative APP proceeds by making an analogy to principles that might regulate intra-state relations between compatriots. For instance, Simon Caney seems to support something like the preventative APP. He defends it with a comparison to a scenario involving individual people:

There are familiar cases where we think that a person is obligated to assist others even when they played no part in the other's poverty or sickness. In such cases we think that a positive duty falls on those able to help. For example, if someone sitting next to you at a table suddenly becomes seriously ill and you're well placed to help, then we tend to think that you should do so (Caney 2010, 216).

The scope here – the very bad outcome – is “someone's poverty or sickness.” One might here already question the analogy to climate change, in that “helping” an ailing diner might take little effort, whereas the decarbonization of a state appears to be significantly costly. But assisting a stranger or acquaintance to prevent a very bad outcome often does come with significant risks or costs. If, for instance you are helping the ailing person in a somewhat remote forest, and emergency services instruct you by phone to wait several hours with the ailing person, we tend to think you should, even if it means you return to the city too late for a crucial job interview. Even if it might turn out to be costly, I agree with Caney's intuition here that I should help remedy my table-mate's illness and I imagine that intuition is widespread, even among the reactionary citizens we are imagining.¹⁶ Presumably, it would be morally unacceptable for the collective at the table to let the diner suffer alone. Those able to assist should assist. It would, after all be a very bad outcome to let the unfortunate person suffer.

Other authors provide another example of a domestic analogy when they compare the demands of an international climate regime based on ability-to-pay to that of a domestic scheme of taxation (Moellendorf 2014, 176, Harris 2019, 2). A supporter of the preventative APP might build this comparison into an argument. To prevent very bad outcomes, a wide range of public goods in our societies – infrastructure, defense, judicial systems, and so on – should be funded via progressive tax systems, which levy the highest costs (and even the highest *rates* of costs) on those most financially able to pay them. The cost of preventing the very bad outcomes of undersupplied public goods, the argument goes, should be divided by ability to pay, and similarly, the

¹⁶ There is disagreement of course, about whether the law should punish those that do not assist in relatively easy rescues, even if they are able to. But that is a different matter (Feinberg 1984).

burden of preventing very bad outcomes with regard to climate change should be shared according to the same pattern. If we support progressive taxation for projects to protect public goods within a domestic society, the argument goes, it would be inconsistent to deny the underlying principle behind progressive taxation—ability to pay—in the case of protecting the global public good of a safe climate.¹⁷

Assume, if only for the sake of argument, that the examples of the ailing diner and progressive taxation do support a broad idea that *individual persons* in a *society* should bear the burdens of preventing a very bad outcome in proportion to their ability. This does not yet result in an argument for the preventative APP between states. The move from our intuitions about individuals to a principle that is meant to govern states could progress in two quite different ways, but both of which are controversial.

Analogy Between Persons and States

The most obvious reading of the arguments above suggests that they are direct analogies. Persons have a duty to prevent very bad outcomes in proportion to their ability to do so. States have duties that mirror those of persons, just at a larger scale. Rich states facing climate costs then are like the tablemates close to the ailing diner or like a wealthy individual considering why she has a duty to pay a higher tax rate.

The political feasibility problem with this direct analogy approach is that reactionary citizens and constrained policymakers will likely be skeptical of the extent to which the moral requirements on states are as stringent of those on persons. Given how different states and persons are (for instance, states do not experience moral emotions), many think it would be strange if the same moral norms applied to both. Even if states and persons were similar enough, it is unclear how much of a community (as opposed to a competition) the collection of states really is (Norman 2020). By contrast, a dinner table or domestic collaboration on a state infrastructure project is not a competitive arena.

Even if the same norms applied in theory, a critic would note that the two actors do not follow moral norms to the same extent. Even putting aside hard-nosed realism, in which to talk of states' moral duties is a kind of category mistake (Feaver et al. 2000), few international relations theorists hold that the moral requirements that states might perceive and act upon are simple corollaries of the moral requirements on individuals (Legro and Moravcsik 1999). Rather, a more common position among international relations theorists and political decisionmakers is that states act on more minimal norms

¹⁷ While this domestic analogy is suggested by Moellendorf, he has a different, and in my view, more politically feasible argument for a more voluntarist ability-to-pay principle, on the basis of there being a right to sustainable development in the UNFCCC. I disagree that such a right was actually agreed upon in any hard law instrument (see Biniaz 2016), but the form of his argument is promising (Moellendorf 2014, 2016).

that align more closely with the “harder” aspects of international law: to keep good faith agreements, obey *jus cogens* norms such as the prohibition of slavery and piracy, to respect the basic human rights of the people in their territory, and respect the right to self-determination of other states. Given that states and persons behave differently, the political opponent might claim, shouldn’t the practical moral requirements on states also be more lenient? It would be little wonder, then, if large proportions of the public in some of the wealthy states to which the preventative APP would attach duties should object that states owe each other less than individuals in the same society do. The direct analogy between the domestic cases and state duties threatens to be unconvincing to key political opponents, and thus quite politically infeasible.

State Duties Constructed from Individual Duties

There is another way to try to understand the arguments above that begin with intuitions about domestic situations and make conclusions about international affairs. Rather than directly comparing states to moral agents such as persons, one might see them as emphasizing the duties that individuals have to each other (regardless of state membership) then implying that the moral principles that govern states are a function of those duties. But this strategy for justifying the preventative APP to a reactionary citizen or a constrained policymaker faces a challenge. It requires us to move from interpersonal relationships between compatriots or those immediately around one to relationships that cross state borders. While a broadly cosmopolitan outlook acknowledges no morally relevant difference between the diner one sits next to and the similarly needy individual in another state, a non-cosmopolitan outlook treats state boundaries as morally relevant. If state duties are a function of individual duties, and the duties on individuals across state borders are highly disputed, the state duties we can supposedly construct from the duties of individuals across state borders are going to inherit that controversy. And there is a widespread belief that one can choose to favor one’s compatriots in terms of aid which I will explore further below. This controversy means that arguments based on constructing duties between states from those that exist between individuals will not help the feasibility of the preventative APP.

Furthermore, even if we accept that individuals have strong duties of charity to needy individuals in other states, this does not get the preventative APP off the ground. The idea that the moral principles that govern states can be constructed from the duties of its members raises further difficulties. It will typically be unclear, at least to the reactionary citizen, or even the constrained policy-maker, how such a construction occurs. By what function does the state inherit the duties of its members? What happens to the duties of the individuals when the state assumes them? At the very least, the political opponent could ask for a clear account of the construction of state duties from individual duties. This is likely to look different depending on whether we are methodological individualists who see a state as an institution made up of a collection

of individual agents (albeit interacting in special roles) and those who see it as an agent itself, with very different duties to individuals or other states (List et al. 2011).

Public Attitudes Towards Development Aid

Regardless of the way the argument from individual duties is meant to proceed (whether by analogy or construction) the kinds of duties of assistance to poorer countries that large parts of the general public in wealthy countries accept seems to belie easy comparison to the duty of assistance between compatriots. Some countries are ailing, just like the sick diner, but assistance from those able to help remains very low. The exact support for development aid among the public is notoriously hard to test, because people are typically confused about the facts and try to please interviewers by professing at least a “normal” amount of support for development assistance (Hudson and Van Heerde 2012). However, one US study about financing the Sustainable Development Goals found that 41% of respondents (and 64% of Republicans) rated “very convincing” an argument that stated “Spending tens of billions to help other countries when we are facing our own severe problems is irresponsible. Each country should focus on solving their own problems and encourage others to do the same” (Program for Public Consultation 2020). This was compared to 25% (7% of Republicans) who rated the contrary argument in favor of development assistance “very convincing” (Program for Public Consultation 2020). In several European countries, Alain Noel and Jean-Phillipe Therein (2016) analyzed Eurobarometer data to assess the relationship between public concern for domestic inequality and support for development aid. Perhaps surprisingly, they found that the more citizens felt there were serious distributional concerns at home, the less support they gave for development assistance. The likely explanation is a public perception of priority. To the extent that inequality is a significant problem among compatriots, even urgent demands of those elsewhere are treated as less significant (Noel and Therein 2016). Furthermore, the relative lack of prominence of international assistance in national policy debates is evidence for the view that many people place only small weight on any duty to avoid very bad outcomes (if the bad outcomes are felt elsewhere). So understood, the analogy from domestic situations between individuals doesn’t seem to make the preventative APP particularly political feasible.

Concern for the Future Poor

Another possible defense of the preventative APP does not try to begin with a principle operative between individuals, but instead looks at the details of the climate change case in particular. For instance, Caney first asks us to consider, in roughest terms, the options for bearing the climate change remainder. Either the current poor bear the burden, the current rich bear the burden, or neither do and the remaining burdens of climate change fall where they may, which is to say, mainly on the future

poor. Caney notes that the future poor seem particularly undeserving of extra burdens, and since the rich can bear the burden “without sacrificing any reasonable interests” they are thus the ones who should (Caney 2010, 214).

Caney’s argument from intuitions about the climate case relies on somewhat more specific, but no less contested grounds than treating interstate morality as interpersonal morality, or constructing state duties from individual duties. Caney suggests that there is strong reason not to allow both rich and poor countries to ignore climate change caused by the remainder and leave future people to foot the bill. In fact, he sees that kind of intergenerational buck-passing as exactly the kind of bad outcome that triggers the ability to pay principle. But this just leads straight to the debate about whether the principle is triggered at all – whether the outcome is bad enough. Philosophical orthodoxy suggests that the interests of future people matter a great deal, if not equally to those alive today.¹⁸ But how to weigh harm to future people is yet another deeply contested topic in the political realm. One could note the policy debates about pure time discounting,¹⁹ or the scarcity of robust institutions to protect future people, or a relative lack of interest in existential risks (Ord 2020) as a sign of public lack of concern about the welfare of future people. And even if there was widespread public agreement that harm to future people from climate change counts as a very bad outcome, some popular arguments suggest that continually rising economic growth means that future people as a group will have resources to adapt to future climate damages. Of course, numerous philosophers have argued for the necessity of taking climate action to prevent harm to future people: to avoid a tragic tyranny (Gardiner 2011), human rights violations in the future (Caney 2009), or because of the irrelevance of continually rising global GDP (Jamieson 2014). But the point here is not to find a principle that will convince other philosophers, but to propose a principle that is likely to be marginally persuasive to reactionary citizens and constrained policymakers.

My overall assessment of the preventative APP is that it is not very politically feasible. It places costs on people who are at least tempted by non-cosmopolitan and realist views, but it very hard to justify without relying on cosmopolitan assumptions or assuming a human-like morality of states. We next turn to a formulation of the APP that is specifically designed to be more politically feasible – the voluntarist APP.

Voluntarist APP

¹⁸ (Sikora and Barry 1978). For an example of a philosopher (with an economist) bucking the orthodoxy, see Beckerman and Pasek (2001)

¹⁹ See the vast literature on discounting. A good introduction is in (Broome 2012).

The preventative APP has a rather permissive scope: it deals with the distribution of the burdens of preventing some very bad outcome. If we narrow the scope of the APP, can we ameliorate some of the feasibility worries? Consider a voluntarist APP.

Ability to Pay Principle (Voluntarist): The collective burden of meeting *an agreed-upon collective goal* should (where no better principle applies) be borne in relation to a state's ability to pay.²⁰

The voluntarist APP mirrors the preventative APP by ceding lexical priority to unspecified "better principles." I simply assume here that a polluter pays principle can be formulated in a way that has lexical priority and is equally politically feasible (likely by basing it on the more robust notion of non-aggression between states). At least it will apply specifically to the remainder. But unlike the preventative APP, the voluntarist APP has a restrictive scope. It only applies to the burdens of meeting an agreed-upon collective goal.

One politically feasible justification for the voluntarist APP is this. States owe each other little under normal circumstances. But where they share an agreed-upon collective goal, and particularly where the shared goal has been formalized in an international treaty, this creates a tighter community of agents (with regard to that issue), and the domain becomes more cooperative. Thus, considerations of fair burden sharing become prominent. And where no other obvious division of burdens to meet this shared goal seem relevant, ability to pay is an apt principle by which to divide the burden.

Why should a shared goal create stronger connections between states? One way to consider it is from the game-theoretic perspective. It is in all states' interest to keep global temperatures relatively low. But individual states all have a reason (some more than others) to free-ride and rely on other states to be the suckers that pay to reach the goal. In the absence of a global leviathan, *some* conception of fair burden-sharing is necessary to prevent universal defection in this case, by disgruntled leaders or populaces not wanting to be a sucker. Furthermore, all countries have some reason to

²⁰ Shue's version of an APP (about environmental problems in general, not climate change in particular) could be seen to be a voluntarist APP: "Among a number of parties, all of whom are bound to contribute to some common endeavor, the parties who have the most resources normally should contribute the most to the endeavor" (Shue 1999, 537). The formulation is deliberately vague about what it means to be bound. Shue provides one justification from broad sufficientarian intuitions, but considers that "the general principle itself is sufficiently fundamental that it is not necessary, and perhaps not possible, to justify it by deriving it from considerations that are more fundamental still" (Shue 1999, 537).

prefer an orderly, rules-based international regime, and respecting fair sharing to meet collective goals is a part of that rules-based package. Still, given its low lexical priority, it is not the main or only potential principle for dividing the burdens. I argue, however, that it is a good default principle of division where no better principle applies.²¹ Why does it make a good default? Perhaps this is where explanation comes to an end (Shue 1999). However, as we see in the paragraph below, the choice of a voluntarist APP in the past is one reason to continue using it to avoid a collective action problem persisting in the case of climate change. It also avoids the controversial assumptions required by the preventative APP. Unlike the various arguments for the preventative APP, it does not treat states as subject to the same moral constraints as persons, nor does it assume that state duties can be constructed out of individual cosmopolitan duties to aid. Its normative basis: treating states as permitted to pursue their own self-interest, mainly constrained by their own agreements and perhaps requirements of rationality, is much more palatable to many political opponents. Thus the voluntarist version beckons as a more politically feasible formulation of the APP.

There is a complementary argument for the voluntarist APP. Many political opponents of a conservative bent place importance on the existence of clear precedents in the international domain. And the voluntarist APP does seem to have such precedents. One example is the contributions to the general budget of the UN. The commitment to form a cooperative body for peace, security, and prosperity post-war predated the exact sharing of the operating budget. Once general cooperative goals were agreed upon, something like the voluntarist APP was enacted. The operating budget of the UN (around 12 billion USD annually) and dues are linked to states GNI except with a ceiling of .01% of the budget for the Least Developed States and an overall ceiling of 22 percent of the budget, which effectively only applies to the United States.²² Likewise, when the Pearson commission convened during the late 1960s to discuss how developed countries should divide the burden of the shared goal of promoting global development, a proportion of countries' GNP (eventually 0.7%) was chosen as the relevant sharing rule. The UN General Assembly adopted this rule by consensus as part of the International Development Strategy in 1970. Since then, the 0.7% of GNP rule

²¹ Compare Schelling's idea of a focal point – an otherwise arbitrary point chosen for coordination purposes to avoid a social dilemma (Schelling 1980).

²² These figures are market exchange rates, not purchasing power. Admittedly, the application of the burden sharing scheme for the UN does not have full compliance. A large (and growing) proportion of the costs of the UN, are funded by voluntary contributions, which has been flagged as a cause for concern (Yussuf, Larrabure, and Terzi 2007). Notably, besides receiving special consideration in reducing its proportion of the costs (via the 22% ceiling), the US has at times fallen significantly in arrears in its payments.

among developed countries has been affirmed many times.²³ While neither the general budget contributions rule nor the Pearson Commission 0.7% goal is being complied with completely, these examples provide evidence that a voluntarist ability to pay principle is already part of the state-based international system. This increases the political feasibility of the principle to constrained actors. Such actors can suggest to those who constrain them that while the scale of the challenge of climate change is new, the principle of division is not. Reactionary citizens might still dismiss these examples as more cases of problematic globalism. However, others might accept these precedents, especially if they see international law as a slow accretion of techniques to solve collective action problems amongst self-interested actors.

Applying the Voluntarist APP

We have justified the voluntarist APP and suggested it is more politically feasible than the preventative APP. Does the voluntarist APP apply to the problem of climate change? Yes, it does. First, the scope is triggered. The clearest aspects of international climate law are perhaps now the shared goals. “The ultimate objective” of the collection of the 197 states that have ratified the UNFCCC is “to achieve... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” (UNFCCC 1992, art. 2). The Paris Agreement gets more specific, affirming that Parties collectively “aim to strengthen the global response to the threat of climate change... by... holding the increase in the global average temperature... to well below 2°C... increasing the ability to adapt to the adverse impacts of climate change... and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development (UNFCCC 2015a, 2.1).²⁴ It seems fair to say that states have a set of shared climate goals, which creates a community for this issue that should be governed by fair sharing rules.

Second, although the voluntarist APP, like the preventative APP, has low lexical priority, no better principle applies to the remainder as a practical principle for fair division. A polluter pays principle is a non-starter, since we are discussing the distribution of the remainder, which by definition cannot be distributed via a polluter

²³ See (OECD 2002). In the DAC Aid Review of 1971 the US stated that it rejected “specific targets.” However, the spirit of the principle was still respected by affirming that states “should make their best efforts” to increase development assistance” (OECD, 2002).

²⁴ This strengthened a specific temperature goal first agreed-upon in a UNFCCC Decision at Cancun in 2010 (UNFCCC 2010, I.4).

pays principle. What about a beneficiary pays principle, by which those who have benefitted from past emissions should bear the costs associated with them? This has several problems. Part of the remainder is the emissions from those too poor to be asked to bear burdens, but it is primarily the poorer countries that benefit most from the emitting activity of the global poor. Thus, under a beneficiary pays principle, that part of the remainder would either have to be borne by the poorer countries (not particularly politically feasible either) or not borne at all. The other part is the burden from historical emissions. This burden could be passed on to wealthy countries under a beneficiary pays principle. But that move is not politically feasible. The idea that the beneficiaries of decisions made generations ago should pay for the consequences of those decisions is likely to be seen by political opponents in rich countries as a *reductio ad absurdum* of a historical beneficiary pays principle, that reaches too far into the past and blames the innocents for what they could not have known was harmful. Finally, even if the beneficiary pays principle were to be a good candidate in theory, it would be particularly difficult to apply in practice.

What about a principle that is more lenient on wealthy countries? Why not propose the hyper-realist version of the beneficiary pays principle: that those who benefit most from the global *effort to solve climate change* should bear the greatest burden (Posner and Weisbach 2010)? The US would be more willing to move on climate if it received side payments from Bangladesh: everyone wins! Such an arrangement would be stable too, if the most vulnerable states can put aside their pride. But, even if it would be accepted by the most vulnerable, as Stephen Gardiner (2016) points out, this would be essentially for the wealthy countries to run an extortion racket. Treating fair sharing of an agreed-upon goal as an extortion racket treats the project to respond to climate change as a competitive arena rather than a cooperative zone.²⁵ This in turn would mean that those who entered the Framework Convention and the Paris Agreement acted in bad faith.

No other politically feasible principle applies well to the remainder. Thus, unless we can uncover a better principle, ability-to-pay wins by default as a focal point for distribution of an agreed-upon burden.

The Voluntarist APP in International Climate Law

At least under a popular interpretation, international climate law also affirms the APP is one of the principles in play. The 1992 Convention states, broadly, that “parties should protect the climate system... in accordance with their common but differentiated responsibilities and *respective capabilities*” (CBDR-RC), where capabilities were widely understood to be the stark divide in wealth and income between two worlds – the

²⁵ Indeed, it is no longer clear why solving climate change is a shared goal at all, for the side payments to rich countries could be made as a series of discrete transactions.

developed and developing (UNFCCC 1992, art. 3.1).²⁶ The Paris Agreement is, in the words of the Durban Platform “under the Convention.” It is guided to a large extent by its principles, and refers to the Convention 48 times (UNFCCC 2011, 2015a). The Paris Agreement also makes specific reference to, and updates, the language of CBDR-RC. Paris Agreement Article 2.2. states: “This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”²⁷ Furthermore, the Paris Agreement consistently references an expectation that developed states “should continue taking the lead” on mitigation by undertaking economy-wide absolute emission reduction targets” while “developing state Parties... should continue enhancing their mitigation efforts” (ibid. art 4.4)²⁸ Arguably, both the principles of equity in the UNFCCC and Paris Agreement, and their overall structure follow the voluntarist APP: a collective goal is named, and both contribution (perhaps with lexical priority), and ability to bear burdens to address the problem are noted as relevant for meeting the goal. But the argument for the voluntarist APP in this context is not simply that a reference to ability to pay happened to be negotiated into place in international climate law and that states should keep their agreements.²⁹ Rather, even under conservative views of international duties, once the prospect of a cooperative, shared goal is in play, a reference to ability to pay is an *appropriate* default principle to guide division of that goal it that is mirrored in international climate law.

To sum up, restricting the scope of the APP to situations where actors have antecedently committed to contribute to a shared goal makes it considerably more feasible. States have already agreed to a shared collective goal: preventing dangerous interference in the climate system and keeping the global temperature rise “well below” 2°C. After more obvious principles like a polluter pays principle have been applied,

²⁶ As evidenced by the division of states into Annexes: Annex 1 states were given mitigation commitments, the subset Annex 2 states (excluding “economies in transition”) were given both financial and mitigation commitments, while non-Annex states had no substantive mitigation or financial commitments.

²⁷ The addition of “in the light of different national circumstances” reflects a compromise between developed states and emerging economies. It balances the importance of the 1992 division of states into Annex/non-Annex parties on the one hand, and the rising emissions and wealth associated with emerging economies on the other (Rajamani 2016).

²⁹ As Darrel Moellendorf argues (in work that has significantly inspired this chapter), taking these norms of the UNFCCC seriously can provide arguments for climate justice that have more bite in the international realm. This is because they rest not on any particular view of global justice, but on the “promissory obligations” that states voluntarily took on by signing or ratifying these treaties (Moellendorf 2016). Indeed, that promissory obligation rests in the oldest principle of international law, *pacta sunt servanda* (agreements must be kept) (Shaw 2008).

using a voluntarist APP to distribute the remainder of that burden can be argued for more persuasively to those likely to be starting from more conservative, statist intuitions. Where a preventative APP draws on broadly cosmopolitan intuitions about how states' duties to bear the climate burden might mirror or reduce to individuals' duties, a voluntarist APP can be defended to political opponents as a way to solve tough collective action problems among a group at least nominally committed to the cooperative goal. Furthermore, this division of an agreed upon collective goal of affirmed in the UNFCCC and has echoes in other shared projects. The voluntarist APP holds significant promise as a politically feasible burden-sharing principle in the case of climate change. In the next section I turn to objections to the voluntarist APP.

Objections

Objection from Ephemerality

Here I raise an objection about the voluntarist APP: It is too ephemeral as a basis for climate justice. If the only trigger for the duty to bear the climate change remainder were these voluntary agreements made by states, this entails that any wealthy state that wanted to shirk their moral requirement to bear the climate change remainder could choose to lessen their burden by simply withdrawing from the relevant agreement, and thus the collective goal. The critic fears that the voluntarist APP thus sets out not a principle of climate justice, but a contingent agreement that can be undermined at the whim of powerful states.

As a practical matter, the objection from ephemerality does not seem particularly salient. While the US stated its withdrawal from the Paris Agreement on June 1, 2017, no other state has followed suit, and the US is likely to have rejoined by the time this book is published. After a 23-year struggle to achieve a new comprehensive global treaty on climate change, ratified by an astonishing 187 states, it is not surprising that many other states will be eager to try to renegotiate the key principles of the Paris Agreement. This is compounded by the highly conservative nature of the UNFCCC's decision-making process, which relies on consensus, not voting, to make any change. As Moellendorf points out, citing Robert Keohane, international agreements are much harder to come by than to maintain, and it is hard to imagine states giving up the hard-fought compromises of Paris to start from scratch or go it alone (Moellendorf 2016). It is also interesting that despite President Trump's dismissive attitude towards the Paris Agreement, there has been no signal that the US considered pulling out of the 1992 UNFCCC.³⁰ It is the UNFCCC that provides the overarching (and demanding) goals of

³⁰ It might be argued that the Trump administration was simply unaware of the commitments in the UNFCCC Framework Convention, and fundamentally disagreed with the idea of

preventing “dangerous anthropocentric interference” in the climate system, and reiterates the principle of meeting that goal in light of states’ “common but differentiated responsibilities and respective capacities.” The ephemerality of international agreements should not be overstated.

Objection from Irrelevance

There is a second kind of objection to the voluntarist APP as the salient principle for political feasibility. The objection is that it is not politically feasible after all, for key constituencies (reactionary citizens and constrained policy-makers from rich countries) simply do not accept that international law is “real law” and thus is not of any particular moral relevance. States can sign agreements, the argument goes, but still act roughly as they wish, since such treaties contain minimal, if any, enforcement. In fact, the objection goes, they decide very often to bend or violate treaties they have ratified. Consequently, their citizens and bureaucrats feel no great compulsion to respect the force of agreed-upon collective goals in climate treaties.

This objection underestimates the power of international law. While international law has never been, and arguably should never be, enforced like the law of a sovereign state is, this does not mean it is toothless and irrelevant. In fact, much work in international studies has tried to explain why states obey international law so often *despite* the lack of direct enforcement. In an oft quoted line Louis Henkin, former president of the American Society of International law notes that “almost all nations observe almost all principles of international Law and almost all of their [legal] obligations almost all of the time” (Henkin 1979). As one of the major international law textbooks puts it, we are hostage somewhat to availability bias: violations of international law are newsworthy, while most states following most of the thousands of international legal instruments is not (Shaw 2008).³¹ Most scholars are particularly familiar with the conduct of the US, a country with a difficult relationship with international law, to put it mildly. But even the US rarely violates international law. Rather, it refuses to sign, refuses to ratify, or argues for special “exceptions and reservations” written into law before signing and ratifying. A final consideration is the spectrum of international law, from hard law (treaties, jus cogens laws against piracy and slavery) to soft law (political declarations and UN General Assembly resolutions). For instance, it is more common for countries to act contrary to General Assembly

anthropocentric interference on the climate or the desirability to take steps to limit it. But even Donald Trump’s own record on climate denial is patchy and opportunistic (Friedman 2020). His withdrawal speech focused on the supposed unfairness of the distribution principles, not climate denial or an attitude that climate change would not be bad.

³¹ There are roughly 3700 international *environmental* agreements in the IEA database alone (<https://iea.uoregon.edu/>).

resolutions, but the majoritarian nature of most of those decrees gives them much less gravitas than treaties and agreements such as the Framework Convention and the Paris Agreement, negotiated as they were through painstaking consensus processes.

As far as political feasibility goes, the widespread actual compliance with international law is enough to save the voluntarist APP as a justification to constrained policymakers for rich countries bearing the climate remainder. But what about reactionary citizens? Would they care whether or not their state has joined a cooperative venture to prevent dangerous interference with the earth's climate system? Again, the falling fortunes of the international order in recent years might threaten the idea that reactionary citizens, especially, put any stock in something like the ability of international law to create cooperative communities on an issue. This is a concern, although it is too early to say what effect the global pandemic or the rise of China as a superpower will have on public respect for the international order. Still, we have some recent social science evidence that individual citizens, including conservatives, still pay some heed to international law. A survey experiment of several thousand subjects in India, Australia, and the US described a refugee policy supported by the country's leader, then informed some subjects of the international illegality of the policy, while informing others of the leader's support for the policy. They found that the international law information reduced subjects' support for the policy by a "small but significant" amount (Strezhnev, Simmons, and Kim Forthcoming). Even reactionary citizens might take the commitment to collective climate goals seriously enough to make the voluntarist APP feasible.

Worry: Loss and Damage

I will consider here a worry. The voluntarist APP supported by a persuasive legal argument has too narrow a scope. The voluntarist APP applies to agreed-upon goals, which we saw above were the collective burdens of mitigation and adaptation, and providing climate finance to assist these goals. But one kind of burden that would not necessarily trigger a voluntarist APP is the burden of compensating for "loss and damage." Loss and damage, in international negotiations, refers to the harms of climate change that will inevitably occur despite efforts at adaptation or mitigation. Compensation for loss and damage does not easily fall under the category of "agreed-upon collective goal." After all, the Framework Convention refers to "preventing" not "repairing" dangerous interference. Article 8 of the Paris Agreement only contains the mild language that states "recognise the importance of averting, minimizing and addressing loss and damage" (UNFCCC 2015a, art. 8.1), without any acknowledgement that this is a shared goal or specific duty. The accompanying Paris Decision, furthermore, (in)famously states that parties agree "that article 8 does not involve or provide a basis for any liability or compensation" (UNFCCC 2015b: para. 51).

At this point, a supporter of the voluntarist APP should probably bite the bullet. Under current conceptions of the shared goal of responding to climate change, the voluntarist APP does not require wealthy states to pay compensation for damage that occurs despite mitigation and adaptation efforts. If we presume that there is a clear moral case for wealthy states paying loss and damage, the voluntarist APP might be seen to trade off climate justice for feasibility. But it is important not to overstate this result. After all, the voluntarist APP does not rule out arguments that highly polluting states should compensate for loss and damage *caused by their pollution*. The usual caveats about emissions produced under ignorance and making the polluter-pays principle poverty-sensitive might apply, which could presumably limit the proportion of loss and damage that would require compensation. This means that the voluntarist APP in combination with a polluter-pays-principle leaves open the possibility for a principled compromise on loss and damage. That part of loss and damage that was caused by the remainder falls where it may, and that part captured by an appropriately bounded polluter-pays principle falls to the polluter. Loss and damage caused by the remainder might be a very bad outcome, but it does not fall under the agreed-upon collective goal (yet), and requiring it to be borne in relation to ability-to-pay is not currently politically feasible. (For more on distributing the burden for loss and damage, please see Hossain et al. in this volume.)

Conclusion

I have laid out an argument for bearing the climate change remainder with a specific, voluntarist ability to pay principle. It is a formulation of the ability to pay principle that is more easily justified to political opponents than typical formulations. Because it is more easily justifiable to such opponents, it makes the world it describes more politically feasible, more likely to come to pass in an environment marked at times by bitter division and parochial worldviews. Of course, I have said nothing about how to measure ability to pay, and it is likely to be in an operational stage that more bitter disputes arise, particularly between industrialized states and rapidly emerging economies.³² But my main point is there is no need to saddle the ability to pay principle at the outset with a scope that is so contentious that it could not be justified to constrained policymakers or reactionary citizens.

³² Indeed, the plenary in the negotiations at Paris largely concerned whether the world had “changed” significantly from 1992 in terms of countries ability to pay or not, with the chief negotiator for the EU and the negotiator for the “like-minded-developing-countries” bloc trading statistics about economic development among middle income countries (author’s notes).

Some might fear that the justification for my voluntarist APP rests on a flimsy foundation of vague treaties only held together by the consent of states. I have tried to allay those fears. However, I admit that my specific APP will not apply to the burden of loss and damage. This might be enough to lead those committed to progressive goals or ideal theory to reject a voluntarist formulation of an APP. To those I ask only for an account of what philosophizing about climate justice is for. If one thinks it is only to witness our moral failure, utopian theories might suffice. But what if a legitimate purpose of climate philosophy is to prepare policymakers to justify going beyond a state's narrow self-interest or encourage them to engage with reactionary citizens? Or to attempt to persuade reactionary citizens directly? In that case, I suspect this minor weakening of the ability to pay principle will be repaid many times over by its greatly increased feasibility. (For more on the role of philosophers in climate change policymaking, please see McBee, J. in this volume.)

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