

HUMAN RIGHTS LAW REVIEW: ARTICLE 4 OF THE UNFCCC 1992

The following essay is a discussion on **Article 4** of the **United Nations Convention on Climate Change**¹ 1992 [hereinafter **UNFCCC**], through a human rights based approach.

First of all, it needs to be made clear, that climate change “has implications for the full enjoyment of human rights.” The United Nations on 2008, by the Human Rights Council **Resolution 7/23** on human rights and climate change², for the first time in a U.N. resolution, has openly recognized their actual inter-connected and mutually reinforcing relationship.

Article 4, points out the commitments that the signatory States are taking upon them. In the present essay, I attempt to unravel the main problematic issues that Article 4 of the UNFCCC engenders, in relation to human rights. Throughout my argumentation, I mention the human rights principle of ‘progressive realization’ as I find it relevant also to climate change; and in the last paragraphs of this paper, I comment on Dangerous Anthropogenic Interference (DAI).

The article in question, includes commitments to: cooperate, support and assist in adaptation formulation; to demonstrate effort to diminish the adverse effects of climate change policies on human health and the economy; to sponsor supportive exchange of scientific, socio-economic and technological knowledge; and to collaborate in educational and training efforts. [UNFCCC, at Art. 4(1)(e), (f), (h)]. Additionally, **Article 4**, acknowledges the duty of industrialized member States to aid unindustrialized country Parties that are particularly exposed to climate change in their adaptation plans, and to handover technological know-how to developing States to assist with the realization of the Convention. [UNFCCC, at art. 4(4),(5)].

The law requests better mitigation methods and attention to the “economic and social consequences of response measures” through amplified government deeds on adaptation, with particular consideration to the special needs of unindustrialized nations “particularly vulnerable to the adverse effects of climate change.” This reintroduced guidance within the UNFCCC, is pointing out that the social and economic impacts of climate change response measures must be considered; this also signifies an important move forward for the whole legal regime.

Article 4, is the longest article within the treaty. This is not insignificant, since it is a common practice of the law-makers in international law, to use broad language, in order to achieve consensus and ‘signatures’ by States; while the most common side-effect of this broad language, is that the law becomes unclear as to what it actually commands. This permits for what lawyers call little windows for the interpretation of the law, and allowing a “leeway” for the duty-bearers to escape responsibility.

Noteworthy is also the ‘shall’ language used in the Convention³. As a word as such, implies something that will take place or exist in the future. One interpretation could be that the choice of, ‘shall’ is less commanding than ‘should’, and more suggesting than demanding. In the sense that a soft law is characterized as a consensual mutual political agreement with less legal enforceability, lacking sanctions or penalties in failure of its implementation by States. Moreover, one could argue, that the choice of words indicates the future progressive realization of the envisioned legal climate justice’s framework, excluding the strong ‘should’ in present tense language, that usually law is formed by. However it is not so uncommon in UN legislation

¹ http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf
(Accessed 29/10/2013)

² In the preamble of the U.N. Human Rights Council [UNHRC] Res. 7/23, U.N. Doc. A/HRC/7/78 (Mar. 28, 2008).

³ UNFCCC Article 4, 1.

the usage of that language⁴, especially in ‘soft law’ constructions, where the immediate enforceability of the duties imposed on governments by the treaties, are not so legally pressing since are mostly political agreements.

So, it does not come as a surprise when signatory States claim that, they do not fully grasp what Art. 4 means; while the unwillingness of the **Intergovernmental Panel on Climate Change** [hereinafter **IPCC**] to clearly define the blurred areas of the law, do not add into the solution of this problematic claims by duty-bearing States.

On the other hand, it would be reasonable to argue that the States in question, have great resources and big pools of legal consultants, which means that they could mobilize them in order to improve the wording and function of the law in question. Hence, a claim of ignorance of law it is unacceptable and they cannot argue such a thing, without receiving criticism. While it is notable that the signatory parties to the convention, have signed and agreed according to **Article 4, 2(d)**,⁵ that they undertake a responsibility to review the law, and contribute into its amendments. Such an active role for the improvement of the convention is implied in the whole treaty. It is a law into-making, it is not a final legal product. It is not as simple as a law forbidding a harmful act, like to say “you are forbidden to do physical harm to humans”. The harm entailed in Climate change, does not enjoy a universal acceptance, since it is an open debate in the legal, political as well in certain scientific circles, as to whether climate change can be attributed into fault-bearers. While, the man-made effects of climate change, although an actual reality, have not been described, listed, or categorized in order to achieve a better legal status – for instance by identifying a threshold of harm – able to solve the legal problematic of allocating responsibility, as we do in criminal law, or identifying duties on the State as we do in human rights law or humanitarian law.

- **Human Rights**

While **human rights law**, has a crucial role to play in the further evolvement of climate justice, it is notable, that even human rights law do not have a complete universal enforceability. The sovereignty of the States, the multi-cultural element, and many other factors add to the seemingly impossible task of an actual and real global enforcement of human rights.

While this is an obstacle that is a matter of time for international law to overcome; it is however a reality and it would be hypocritical to present human rights law as the ideal piece of international law – from theory to practice. Law from theory to practice has a long journey and many obstacles to overcome.

⁴ See: Charter of the United Nations, Chapter I, Art. 2. (www.un.org/en/documents/charter/chapter1.shtml); or The Universal Declaration on Human Rights, Art 4,5, 9, 11(2), 12, 15(2), 16, 17, 26, 29(2).

(<http://www.un.org/en/documents/udhr/>); Amongst many other UN conventions where the ‘shall’ language is used.

⁵ **UNFCCC, Art. 4, 2(d)**: The Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above. The CoP, at its first session, shall also take decisions regarding criteria for joint implementation as indicated in subparagraph (a) above. A second review of subparagraphs (a) and (b) shall take place not later than 31 December 1998, and thereafter at regular intervals determined by the Conference of the Parties, until the objective of the Convention is met;

One way to view a rights-based approach, would be to say that, it offers a direct claim for receiving technological know-how, from the possessors of knowledge. Such a claim could be founded on an express right to access technology as an essential element for the gratification of further rights. However, if today the owners of technology is mainly private corporations, then the demanding of handing over of this knowledge, is a different matter all together. It is one thing to ask a State to provide for the well-being of the citizens, and another to demand corporate responsibility in a world where the legal status of corporations enjoys great safeguards and protections, while the economic interests and power are of colossal dimensions.

A human rights based approach, would demand, that the exercise of climate policies, the choice of strategies, allocation of resources, assessments, as well as further amendments of the climate change's legal framework – would have as a starting point the human rights – the chief and principal standards for acquiring an official international 'green light' to realize these climate justice's policies, and to act lawfully and not *ultra vires*⁶, would be the human rights regime's canons, principles and rules. So the human rights ideally should be the protagonist.

In this line of reasoning it would be illuminating to highlight the UNFCCC **Article 4.1(f)** which demands from signatory States to: "Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions..."

Customarily, in international law, human rights duties are valid *a priori* for every government of the world, in the entirety of their activities. Also, emphasis should be given to the fact that human rights are fundamental, sources of primary law, and cannot be dismissed. Keep in mind that I am talking in terms of customary law, because in practice the reality is very different, like in the case of national security, or situations of national emergency, where, in practice the human rights regime is 'put on ice'. Yet, specific human rights are accepted as *jus cogens*⁷ so they have the advantage to trump over other international rules and legal canons. It should be noted that the power of human rights norms over other pieces of international law, derives also from the fact that they provide the ethical basis for the existence and mandate of the international community.

As far as the debates on the links of human rights and the UNFCCC, or the relevance of the one legal regime over the other is concerned, allow me to point out that, the human rights agencies have steadily raised the customary rule, that human rights are fundamental obligations of Countries, and cannot be questioned or subjected to evaluation checks. The climate change legal framework and the human rights legal regime, can be mutually reinforcing and equally interconnected, but simply to the point that stay compatible with human rights law.

Article 4, is undeniably a long and unclear Article. It is listing the obligations of the governments, however it is titled as "Commitments". The words we use in law, makes all the difference, since, it is one thing to title an article of an international treaty as "commitments" and another as "obligations". Although, Art. 4 is listing the obligations on signatory States, the law-makers are using softer language, by titling it commitments. The commitments are more like promises – a promise that implies that you could break it if the circumstances allow—while the obligations are duties to act, duties that one would be called to be accountable for, if fail to

⁶ Ultra vires: Latin for, beyond the powers. Describing an act that goes beyond the limits of the powers conferred on it. Ultra vires acts or laws are invalid. See: Martin, Elizabeth A., 'A Dictionary of Law', Fifth Edition, Oxford University Press, 2003, p. 513.

⁷ Jus Cogens: That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. (<http://legal-dictionary.thefreedictionary.com/Jus+Cogens>) (Accessed 2/11/2013).

perform, duties carry legal weight and they are complemented by penalties. It is a given that the UNFCCC does not enjoy a universal legal enforceable weight, which makes any arguing line for the legal ideal status as being in vain. Yet, although it is considered a piece of “soft law”, it is also a piece of international universal law into making, since this is its real mandate. The problematic lingering in this area of law, although form a wall of obstacles into the legal interpretation of the language used, however, these obstacles are a normality in any legal analysis, and natural evolution of law as a living organism, until it fulfills its journey and become an international law with universal applicability in the model of the human rights legal regime.

- **The progressive realization concept**

The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** 1966, obligates its signatory members to work toward the granting of economic, social, and cultural rights (ESCR). Part 2, Articles 2 – 5 founds the principle of "progressive realization".

Article 2 of the Covenant imposes a duty on all parties to: *...take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...*

This is known as the principle of "**progressive realization**". It acknowledges that some rights, like the right to health for instance, is hard to be warranted, since it is impossible to be guaranteed and offered for enjoyment to the citizens of a State in an immediate manner; given that there is a net of factors that needs to be established first, like hospitals, doctors, good healthy environment, and many other, but nevertheless, the law commands the States to perform within their means and resources, and at least work towards the progressive realization of these rights.

Almost analogously to the “**equal but differentiated responsibilities**” principle established in UNFCCC. While in Human rights law, it is not worded as such, since is implied that all States have the same responsibilities. Like for example in the **International Covenant on Civil and Political Rights (ICCPR)**, which places a duty on all States, to "respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights in that Convention.⁸

Nonetheless, it should be stressed that this flexibility allowed on the Countries governments, does not make the laws obsolete and worthless. The obligation to “take steps” insists and places an ongoing duty to work for fulfilling the relevant rights.⁹

It additionally excludes calculatingly backsliding methods, which may block that objective. The Committee on Economic, Social and Cultural Rights also translates the norm as placing minimum basic duties to provide, minimum vital points of the concerned rights.¹⁰ Similarly to the UNFCCC, if resources are limited, the focus should fall on the establishment of special plans meant for the vulnerable.¹¹

It is essential to acknowledge that the UN climate change regime do not represent a separate sphere of international law that should be secluded from human rights law.

The responsibilities of all nations associated to the safeguard of human rights are also applicable to the resolutions that they embrace at the climate change negotiations and to the activities that

⁸ See: International Covenant on Civil and Political Rights. United Nations, 16 December 1966, Article 2.1.

⁹ See: United Nations Office of the High Commissioner for Human Rights, CESCR General Comment 3, Paragraph 9, 14/12/1990.

(<http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/CESCR+General+comment+3.En?OpenDocument>).

¹⁰ Idem: CESCR General Comment 3, paragraph 10.

¹¹ Idem: CESCR General Comment 3, paragraph 12. (Accessed on 4/11/ 2013).

they realize as a consequence. It is therefore vital that the frames founded under the framework convention stay responsible for the repercussions of their assessments on local populations, while current Human Rights organizations could hold States liable for their failure to fulfill climate strategies.

It is obvious that, incorporating human rights through the climate change regime could empower States into advancing in the negotiations, on the foundation of duties and philosophies recognized by everyone. It seems to me that such an approach, may additionally block and avoid conflicts between the rulings agreed in the convention and the rights of local populations, and save the international justice system of many to come legal claims and cases, actually, both in domestic and international courts.

- **Dangerous anthropogenic interference**

According to the **UNFCCC, Article 2**: *The ultimate objective of this Convention ... is to achieve, ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.*

The convention points out that the world nations, must jointly act, to prevent raising atmospheric greenhouse gas concentrations to the level of “dangerous anthropogenic interference” [hereinafter DAI] - with our climate. What constitutes dangerous anthropogenic interference is a matter of a debate to-date.

A good working definition could be: “Among the many plausible choices, dangerous interference with the climate system may be interpreted as anthropogenic radiative forcing causing distinct and widespread climate change impacts such as a widespread demise of coral reefs or a disintegration of the West Antarctic ice sheet.”¹² It is not possible to define DAI, through one scientific methodology, or tools. In order to better describe what it is meant by the law-makers when they talk about DAI, a reader must use a multi-disciplinary methodological process which could include: scientific, environmental, political, legal, even philosophical reasoning and tools; as the Intergovernmental Panel on Climate Change (IPCC) publicly asserts in its official website.¹³ The IPCC does not explain adequately what is needed in order to avoid DAI. So they do not offer a clear definition of DAI, or of the ways to escape it.

However, in human rights terms, to talk about dangerous anthropogenic interference with the climate system, would mean to talk of: any human-made act that could be linked with the adverse effects of climate change and consequents into being a factor for the infringement of human rights of current and future generations.

Now, the questions that rise from such a conceptualization, can be solved – not just by a definitive and complete legal text, through for instance: a categorization of all acts that could fall within its reach, while something like that would help, it is rather an impossible task given the resources and scientific knowledge required – but also through a case-by-case legal dealing with the harmful acts. More or less, just as any Court of law is administrating justice around the world.

¹² Keller K, Hall M, Kim S-R, Bradford DF, Oppenheimer M., (2005) Avoiding dangerous anthropogenic interference with the climate system. *Clim Change* 73:227–238.

¹³ “Defining what is dangerous interference with the climate system is a complex task that can only be partially supported by science, as it inherently involves normative judgements.”
http://www.ipcc.ch/publications_and_data/ar4/wg3/en/ch1s1-2-2.html (Accessed 2/11/ 2013).

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