Reflections on the Suitability of a Human Rights Approach in the Context of the Climate Change Regime¹

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1. – The different scenarios that the successive reports of the International Panel on the Climate Change have drawn up reveal –with an ever increasing degree of scientific certainty– that human-induced climate change and global warming is one of the most urgent problems that the global society has to address². Over the past few years, as most governments realize that the climate change is not just a potential threat in the future, but rather an already ongoing reality that requires response through collective action of all states, it has also become evident that global warming does have a clear impact on the enjoyment of some of the most basic internationally recognized human rights. However, similar as in other international regimes stemming from universal or quasi-universal treaties for the protection of the environment, so far states and international institutions have paid little attention to the potential interaction between international obligations to protect human rights, on the one hand, and the obligations undertaken in the context of the climate change regime, on the other hand. Only in 2008, the UN Human Rights Council commissioned a ‘detailed analytical study on the relationship between climate change and human rights’³, which was submitted by the Office of the UN High

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³A/HRC/RES/7/23 (28 March 2008), para. 1.
Commissioner for Human Rights in January 2009. More recently, a thorough study on the international legal dimensions of the relation between human rights and climate change has also been released under the aegis of the World Bank. This rather modest trend towards linking human rights and climate change has also permeated the ongoing climate negotiations, where the efforts to integrate a human rights approach has eventually led the Conference of the Parties to the UN Framework Convention on the Climate Change in its 16th meeting of December 2010 to emphasise “that Parties should, in all climate change related actions, fully respect human rights”.

This paper addresses the question whether—and if so, to what extent—human rights as recognized under widely ratified treaties, such as the 1966 International Covenants on Civil and Political Rights (hereinafter ICCPR), and on Economic, Social and Cultural Rights (ICESCR), may offer a suitable complementary legal basis for international cooperation in the context of mitigation and adaptation measures under the climate change regime. While it is generally recognized that human rights would have the potential of providing a sound moral and philosophical basis for mitigation and adaptation measures that would increase their social acceptance, a major obstacle for too prominent a human rights approach under the climate change regime seems to lie in a divergent telos in both branches of international law. One of the most significant differences between both types of regimes lies in the deeply dissimilar design of what might be considered to be their primary rules, namely, the international obligations undertaken by states in the field of the protection of human rights—either on the basis of treaties, or of customary law—and in those other obligations undertaken through the UN Framework Convention on the Climate Change (hereinafter FCCC), and its Kyoto Protocol. Primary rules in the field of international human rights law deal essentially with the preservation of a sphere of human dignity of individuals vis-à-vis specific state acts. They imply the assumption of international obligations by the state not to interfere through its acts with the enjoyment of specific human rights by individuals within its territorial boundaries or elsewhere under its jurisdiction or control.

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Ideally then, the enforcement of human rights standards takes place in the internal order before national judiciaries. Still, complementary thereto, judicial or quasi-judicial enforcement mechanisms have been set up in regional and global human rights treaties, providing for some sort of standing to individuals. Moreover, states may exert diplomatic protection of their nationals in cases of human rights violations. And even if highly controversial, the well-known *obiter dictum* of the International Court of Justice in the *Barcelona Traction* case, declaring that obligations undertaken by states in the field of the protection of the human rights are of an *erga omnes* character, would also seem to open up the possibility for the invocation of state responsibility for human rights violations by states other than that of the nationality of victims.

In contrast thereto, primary rules in the climate change regime deal with the mitigation of and adaptation to the consequences of global warming, with the objective of achieving the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. This objective has to be achieved through collective action, based amongst other on the principles of ‘precaution’ and of ‘common but differentiated responsibilities’. The climate change regime sets up global standards, such as the quantified limitation or reduction commitments of anthropogenic emissions of greenhouse gases, the implementation of which is incentivised through the so-called ‘flexible mechanisms’ under the Kyoto Protocol.

The core of the treaty obligations in this regime is certainly of a collective nature. As the problems addressed therein affect the global commons and are considered to be a ‘common concern of humankind’, the states parties have agreed to establish global standards that are binding for all, despite the differential treatment accorded to them in view of their diverging degree of economic development. Parties to these regimes actually undertake obligations *erga omnes partes*, as all states parties have an expressed or necessarily implied common legal interest in the maintenance and implementation of the

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11 Art. 4 FCCC.

12 Art. 2 FCCC.

13 Art. 3 FCCC.

14 Art. 3 Kyoto Protocol.

15 Arts. 6, 12, and 17 Kyoto Protocol.

16 FCCC, Preamble.
international regime\textsuperscript{17}. Its enforcement is provided for through an endogenous, non-adversarial compliance mechanism, rather than through adjudicative dispute settlement\textsuperscript{18}. However, despite being highly innovative in many regards, the climate change regime is fairly traditional, at least to the extent that it has been designed as a classical inter-state regime.

Therefore, one may agree with Stephen Humphreys in that both types of regimes remain fundamentally dissimilar. In the conclusions to his recently edited book, he compares the climate change regime to the human rights regimes, to state that

\begin{quote}
[\ldots] one is a regime of flexibility, compromise, soft principles and differential treatment; the other of judiciaries, policing, formal equality and universal truths. Faced with injustice, one regime tends to negotiation, the other to prosecution. But neither on its own seems quite up to the challenge presented by climate change. [...]
\end{quote}

It may be that the justice claims generated by climate change are simply too large and unsettling to be effectively treated by either regime alone. Or perhaps there is scope for learning to combine the strengths of each \ldots with a view to forging an increased capacity for justice in an interdependent world\textsuperscript{19}.

2. – How may then these two branches of international law be brought together? One possible way would be to seize states not engaging in or not complying with obligations under the climate change regime before international human rights courts or treaty bodies, for the allegedly deleterious effects of their conduct on the enjoyment of human rights by individuals. Think for instance of the petition filed by the Inuit against the US before the Inter-American Commission of Human Rights\textsuperscript{20}. However, these judicial avenues may prove little helpful in order to obtain some sort of redress for victims. In particular, the determination of jurisdiction, standing, direct or indirect affectation, and above all, the causal link between state act and injury may be extremely difficult, if not impossible altogether\textsuperscript{21}. On the other hand, national


\textsuperscript{18} Art. 18 Kyoto Protocol.


courts do have a significant role to play in holding authorities to account and enforcing the states' international obligations stemming from human rights treaties and/or the climate change regime. Admittedly, also here the argument of the limited effectiveness of the judicial avenue in order to obtain redress by individual victims may be forwarded. Accordingly, authors like Eric Posner consider human rights litigation in the context of climate change only as second best to international cooperation in this field. Nonetheless, human rights-based climate litigation should not be completely dismissed either. As Lavanya Rajamani has recently pointed out, whatever the outcome of national or international climate litigation might be, cases like *Massachusetts v. EPA* before the US Supreme Court, or the Inuit petition before the Inter-American Commission of Human Rights—just to highlight the two most prominent cases—clearly demonstrate that the resort to national or international courts does raise public awareness and builds indirect pressure for policy and legislative action.

However, as Rajamani also suggests, a much more promising and ambitious approach seems to lie in addressing more broadly the impacts of climate change from a human rights optic. In this way, internationally recognized human rights, such as the right to life, liberty and security, the right to an adequate standard of living, including adequate food and housing, or the right to health, impose obligations for states that are parties to the 1966 International Covenants and the climate change treaties “to approach the climate change problem not just as a global environmental problem, but also as a human rights concern”, particularly when they adopt and implement their national climate change policies.

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25 For a comprehensive review of cases of climate litigation brought before national and international courts, see the contribution by Susana Borrás Pentinat to this volume.


27 Art. 6 International Covenant on Civil and Political Rights (hereinafter ICCPR).

28 Art. 9 ICCPR.

29 Art. 11 International Covenant on Economic, Social and Cultural Rights (ICESCR).

30 Art. 12 ICESCR.

Yet, the standards and benchmarks that derive from the aforementioned human rights give rise to an international obligation to integrate human rights concerns into policy planning not only at the internal—i.e. national—level, but arguably also at the international level. At least with respect to the rights recognized under the ICESCR, states parties undertake “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized”\(^{32}\). The Committee of Economic, Social and Cultural Rights interpreted this provision in the sense that

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\text{in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all states. It is particularly incumbent upon those states which are in a position to assist others in this regard.}^{33}\]

Hence, the scope of the obligation to take steps towards the progressive realization of the rights recognized in the ICESCR is not limited to the internal jurisdiction of each state party, but extends beyond state boundaries, imposing a responsibility upon developed states to assist developing states in their efforts to meet the Covenant’s objective. Therefore, the point can be made that article 2.1 ICESCR, read in combination with other relevant provisions recognizing substantive rights (such as articles 11 and 12 ICESCR), seem to provide a suitable legal basis for such a human rights approach in the climate change regime, if taken as a “relevant rule of international law applicable in the relations between the parties”\(^{34}\) necessary for consistent interpretation of the relevant provisions of the FCCC and its Kyoto Protocol. In this way, internationally recognized human rights standards might very well be used as hermeneutical tools able to qualify in a significant way the content of the obligations that developed and developing states have undertaken in the framework of the climate change regime.

3. – What might then be the relevance and implications of such a human rights approach to the climate change regime? Perhaps the most obvious one is that the presently dominating inter-state perspective of the climate change regime would have to be reconciled with the normative focus on the individual that comes necessarily with human rights\(^{35}\). From the perspective of moral and political philosophy, Simon Caney considers that such an approach would offer an indeed much needed theoretical counter-balance to cost-benefit and

\(^{32}\) Art. 2.1 ICESCR. Emphasis added.


\(^{34}\) Art. 31.3, c) Vienna Convention on the Law of the Treaties (VCLT).

\(^{35}\) RAJAMANI, “The Increasing Currency…”, cit., p. 414-416.
security-based analyses that presently underlie to mitigation and adaptation policies. In this sense, integrating a human rights approach into the climate change regime would require to fundamentally reassess and reconceive the costs involved in mitigation and adaptation, by admitting in the very first place that some costs are incommensurable. In particular, it would imply to recognize that climate change itself, as well as the mitigation and adaptation measures adopted in response, do have consequences on the enjoyment of human rights that should not and will not be accepted if below a given level.

Translating these theoretical reflections into the legal domain, the integration of human rights into the climate change regime would not only broaden the basis for the states' mitigation and adaptation duties. It would also provide one for duties of compensation, if they fail to take all necessary measures. Hence, it would imply that human rights considerations guide not only the evaluation of the impacts of climate change, but also the distribution of the duties to uphold the human rights threatened by climate change, thereby substantially broadening the moral and legal basis for claims of distributive, procedural and corrective justice to be addressed within the climate change regime.

From this perspective, taken seriously into consideration as thresholds, the aforementioned human rights would provide valuable hermeneutical tools to re-interpret some of the key principles, upon which the climate change regime is based, namely, the principles of common but differentiated responsibilities (CBDPRP) and the precautionary principle, as set out in article 3 FCCC.

In the first place, human rights considerations are prone to reshape the interpretation of the CBDPRP, a principle that already channels claims of fairness and equity in international climate change law. For instance, it might require to take seriously into consideration Henry Shue’s distinction between subsistence and luxury emissions or, as Rajamani puts it, between trivial and non-trivial climate endangering activities, in the negotiation of future burden sharing agreements between the states. Moreover, as Philippe Cullet has suggested, it might also require to give a central role to the criterion of

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37 Ibid., pp. 86-90.


39 Art. 3, paras. 1 and 2 FCCC.


vulnerability – foremost of peoples and communities – in the operation of the CBDRP, in order to complement the hitherto dominant environmental and economic considerations, and properly integrate human rights aspects into the formulation and implementation of the mitigation and adaptation measures, including the flexible mechanism.

With respect to the precautionary principle, human rights – especially the rights to adequate food and to the highest attainable standard of physical and mental health – may provide quite useful operational criteria for its application. On the one hand, the actual or foreseeable situation of the enjoyment of these rights may very well contribute to appreciate the existence of “threats of serious or irreversible damage” to vulnerable peoples and communities that would require precautionary action by the states under the climate change regime. On the other hand, more broadly conceived, human rights would also have to be considered as part of the “different socio-economic contexts” that states parties and the climate change regime’s treaty bodies have to take into account in the design and implementation of precautionary measures.

4. To wrap up the previous comments, I will end these admittedly very general reflections by concluding that despite an extremely narrow basis, the consistent interpretation of the climate change treaties with human rights treaties offers the legal ground for a human rights approach within the climate change regime. Even though no such approach has been articulated in that regime to the date, there seems to be a modest, but increasing trend towards the integration of rights-based perspectives in the international negotiations for a post-2012 agreement. So far, these efforts have merely led to the recognition

43 Art. 3.2 FCCC requires that “[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration”.


45 According to article 3.3 FCCC, “[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties”.


47 Ibid.
by the Conference of the Parties to the FCCC “that Parties should, in all climate change related actions, fully respect human rights”\textsuperscript{48}.

Be that as it may, even acknowledging the disparity of approaches underlying to these two branches of international law, this paper takes the view that there is room for at least some cross-fertilization between both types of regimes. More specifically, conceived of as thresholds, internationally recognized human rights may very well be used as hermeneutical tools that have the potential to qualify in a significant way the content of the obligations that developed and developing states have undertaken in the framework of the climate change regime. More specifically, the paper addresses how human rights standards may influence the operation of the principles enshrined in article 3 FCCC –namely and foremost, the principles of common but differentiated responsibilities and of precaution– as a way to foster an equitable intra- and intergenerational burden-sharing in the design and implementation of mitigation and adaptation measures. It concludes that, despite playing a modest role in the context of the climate change regime, internationally recognized human rights standards may very well contribute to narrow the discretion of States and international institutions in the normative development and implementation processes of the climate change regime, hence fostering distributive and procedural justice in this particular field of international law.