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Climate finance as an instrument to implement a man's right to safe climate – a human rights-based approach from the perspective of climate finance

Abstract

Climate change entails emergence of crucial threats, not only for the environment but also for human rights. Paradoxically, these threats may both result from the very changes in climatic conditions and be a consequence of employment of measures intended as protection against these changes. Ensuring adequate funds is becoming a key instrument in mitigating and adaptation to climate change. Climate resources and funds play an essential role in implementing a human rights-based approach to the climate change issue.

Keywords: climate finance, human rights-based approach, climate law, climate

Introduction

The aim of this article is to present the subject matter of climate finance. Climate finance is a name for financial and legal instruments, in particular those operating under international, European and domestic law, intended to support efforts to reduce climate change and to improve adaptability of these parts of climate change that are unavoidable.¹ The authors' main research thesis is to recognize that climate finance, through supporting adaptation and mitigation of climate change, may also be an instrument of promotion of climate justice and of promotion and protection of human rights in threats that these rights are vulnerable to due to the changing climate determinants. Special attention should be given here to the principle of joint, yet varied, responsibility resulting from the climate protection law. Authors analyse legislative acts and legal scholarship and commentary and then, applying the method of economic and sociological analysis of law, on the one hand point to interconnections between climate threats and human rights protection and on the other to synergistic links between norms intended to safeguard financial transfers relating to climate protection and human rights protection instruments in the face of threats to climate.

Climate change in the era of Anthropocene

Human impact on the environment, including climate, has prompted some researchers to create an informal geo-chronological term "Anthropocene".² No single species in the history of the entire Earth has been so influential or dominant for its name to signify the entire geological epoch. Climate change is one of the major environmental challenges that humanity has faced since its very beginning. Its complexity results from many factors that have an adverse impact on Earth's vulnerable climatic balance. The Intergovernmental Panel on Climate Change established in 1988 by the World Meteorological Organization concluded in its second report that scientific evidence clearly points to an express human impact on climate.³

1 Cf. A. Michaelowa, A. Sacherer, *Introduction to the Handbook of International Climate Finance: is Climate Finance a Meteoric Fashion or a Stable Pillar of the Global Response to Anthropogenic Climate Change*, in: A. Michaelowa, A. Sacherer (eds.), *Handbook of International Climate Finance*, Cheltenham 2022, p. 3.

2 E. Bińczyk, *Epoka człowieka. Retoryka i marazm antropocenu*, Warszawa 2018.

3 Intergovernmental Panel on Climate Change, *IPCC Second Assessment. Climate Change 1995*, UNEP, WMO 1995, p. 4.

Climate change occurs as a result of this impact, the consequences of which involve disturbances to Earth's biological systems. This has profound consequences to the existing and future human life and influences socio-economic realities in which we live and in which future generations are to live.

Climate change is a product of various factors that feature strong feedback loops and significant delays between greenhouse gas emissions and effects of their impact on climate change.⁴ It is a result of gathering of greenhouse gases, such as methane, nitrous oxide, tropospheric ozone and carbon dioxide that accumulate in the upper layers of the atmosphere. Human activity is not the only source of these gases. The discovery of the greenhouse effect shows that the industry, agriculture, forestry, the energy sector and many other activities that were once considered growth drives, or even foundations of civilization, are contributors to the destruction of human life support systems.⁵ Responding to climate change entails reduction of greenhouse gas emissions and adaptation to unavoidable effects of climate change which impact the very cornerstone of modern society, changing basic values, life style and consumption.⁶

The sixth edition of the Global Environmental Outlook report drafted by the United Nations Environment Programme shows the scale of the climate crisis.⁷ Global mean temperatures are currently approximately 1.0 ± 0.2 °C higher than those before the industrial era.⁸ Eight out of the warmest years in history happened within the last decade⁹ and 2016 was the hottest year ever.¹⁰ With the current pace of greenhouse gas emissions, the pace of temperature rising worldwide (approximately

4 W. Ripple, C. Wolf, T. Lenton, J. Gregg, S. Natali, P. Duffy, J. Rockström, H. Schellnhuber, *Many Risky Feedback Loops Amplify the Need for Climate Action*, "One Earth 2023", Vol. 6, No. 2, pp. 86–91.

5 T. Cadman, *Introduction: Origins and Evolution of Earth System Law*, in: T. Cadman, M. Hurlbert, A. Simonelli (eds.), *Earth System Law: Standing on the Precipice of the Anthropocene*, Abingdon 2022, p. 27.

6 R. Garnaut, Ross. *The Garnaut Climate Change Review: Final Report*. Cambridge 2008, p. XVIII.

7 UNEP, *Global Environment Outlook. GEO-6 Healthy Planet, Healthy People*, Cambridge 2019.

8 *Ibidem*, p. 57 ff.

9 NOAA 2018. United States National Oceanic and Atmospheric Administration. 2017 was the 3rd warmest year on record for the globe, <http://www.noaa.gov/news/noaa-2017-was-3rd-warmest-year-on-record-for-globe> (access: 29.04.2024).

10 NOAA 2017. United States National Oceanic and Atmospheric Administration. 2016 marks three consecutive years of record warmth for the globe. National Oceanic and Atmospheric Administration, <http://www.noaa.gov/stories/2016-marks-three-consecutive-years-of-record-warmth-for-globe> (access: 29.04.2024).

0.2°C each decade¹¹) will continue; this means that the target of the Paris Agreement of not exceeding temperature increase of 1.5°C compared to pre-industrial levels will be unrealistic.¹²

The assumption of the Paris Agreement – to limit the global warming to below 2°C (1.5°C) – requires drastic steps in reducing emissions and related profound socio-economic changes.¹³

Climate change was considered an element of a broader phenomenon called global ecological crisis and one of the driving forces behind it. This process manifests itself through extinction of plants and animals at a pace that gives rise to new hypotheses of mass extinction, similar if not more drastic than the one that closed Ordovician, Devon, Permian or Triassic.¹⁴ The planetary boundaries theory developed by Rockström's team¹⁵ points out that four out of nine natural resources thresholds that cannot be crossed have already been exceeded, and we are nearing a sudden end of another geological era.¹⁶ 80% of the world population live in areas where water access security is at risk.¹⁷ The water crisis sits third among ten major global threats for world economy.¹⁸ According to the United Nations Environment Programme, exposure to air and water pollution is the cause of a minimum of 9 million deaths a year.¹⁹ Earth's all biological systems are affected by human activity and the right to good quality environment is one of the most violated human rights. These facts clearly show that Earth's generative forces and social structures dependent on them are threatened.

11 K. Haustein, M. Allen, P. Forster, O. Piers, M. Friedrike, *A Realtime Global Warming Index*. Scientific Reports 7(15417), 2017, <https://doi.org/10.1038/s41598-017-14828-5> (access: 29.04.2024).

12 N. Leach, R. Millar, K. Haustein, S. Jenkins, E. Graham, M. Allen, Myles R., *Current Level and Rate of Warming Determine Emissions Budgets under Ambitious Mitigation*, "Nature Geoscience" 2018, Vol. 11, No. 8, pp. 574–579.

13 H. Schellnhuber, S. Rahmstorf, R. Winkelmann, *Why the Right Climate Target was Agreed in Paris*, "Nature Climate Change" 2016, Vol. 6, pp. 649–653.

14 W. Laurence *The Anthropocene*, "Current Biology Magazine" 2019, Vol. 29, p. 954.

15 J. Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, "Ecology and Society" 2009, Vol. 14, No. 2.

16 *Ibidem*, p. 472.

17 C. Vörösmarty, Ch. Erratum, *Global Threats to Human Water Security and River Biodiversity*, "Nature" 2010, No. 467, p. 334.

18 WEF 2019. *Water is a Growing Source of Global Conflict. Here's What We Need to Do*. World Economic Forum, <https://www.weforum.org/agenda/2019/03/water-is-a-growing-source-of-global-conflict-heres-what-we-need-to-do/> (access: 20.04.2024).

19 UNEP, *Global Environment Outlook. Geo-6 Healthy Planet, Healthy People*, Cambridge 2019, p. 5.

Climate as “common concern”

Climate change is considered one of the major problems of collective action in the history of our civilization.²⁰ The concept of problems of collective action stems from Hardin's works. He describes a situation where multiple persons draw benefits from a certain behaviour. However, such an approach is costly, which means that natural persons are quite unlikely to strive to solve the problem. This interaction, or impasse, to put it better, represents a very well-known problem of the “tragedy of the commons”.²¹

Management of the environment's common resources requires creation of certain forms of common identity, while identification and protection of certain categories of common goods requires shared effort. The framework of the International Governance in the Deep Sea (United Nations Convention on the Law of the Sea, 1982), mechanisms for the management of space resources (Outer Space Treaty, 1967), and protection of wild fauna and flora (Convention on Biological Diversity, 1992) and the World Cultural and Natural Heritage (UNESCO Convention, 1972) have served the development of various concepts related to the management of commons exposed to the said tragedy. They all share a philosophical and axiomatic foundation, but differ not only in the subject of the regulation, but also in terms of the regulatory model applied in these systems.

The first mention in an official document of climate as humanity's common problem appeared in 1998. It was based on Malta's proposal when the UN General Assembly adopted Resolution 43/53 “Protection of global climate for present and future generations of mankind”.²² The resolution stipulates the following: “climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth”. The concept of common concern of mankind was adopted in two treaties signed at the Earth Summit in Rio de Janeiro.

Even though the idea of common concern of mankind is largely supported in legal writings, its exact meaning and content are not fully understood.²³ For this reason, some supporters of this doctrine question the normative character of this

20 T. Cottier, P. Aerni, B. Karapinar, S. Matteotti, J. de Sèpibuse, A. Shingal, *The Principle of Common Concern and Climate Change*, “Archiv des Volkerrechts” 2014, Vol. 52, No. 3, p. 296.

21 G. Hardin, *The Tragedy of the Commons*, “Science” 1968, Vol. 162, p. 1243.

22 Protection of global climate for present and future generations of mankind, A/RES/43/53.

23 F. Biermann, *Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law*, “Archiv des Volkerrechts” 1996, Vol. 34, pp. 426 ff.

idea, calling it “an aspect” of the “commons” or even “echoes from an empty shell”.²⁴ Putting aside negative attitudes to this concept, since very early stages of its development, it usually assumes common concerns and problems that must be solved based on international cooperation and shared obligations.²⁵ Moreover, naming a specific question as a subject of common concern suggests that the question to which this term refers is international and cannot be solved by individual unilateral action of a single state.²⁶ What is more, the essence of this concept also lies in the fact that solving questions that are common interest bring collective benefits to all countries.

When explaining the term “common concern”, authors refer to factors associated with “commonality” and with the meaning of “concern”. Interestingly, the common character of efforts for environmental protection was aptly captured by Judge Weel-ementry in a separate sentence in the *Gabushkovo Nagymaros* case²⁷, who said that international environmental law is more than balancing the rights and obligations of parties within the closed sphere of individual states’ own interests, unrelated to the global problems of humanity as a whole. Given the specific characteristics of international legal order, one may say that states represent common interests in cases that are subject of common concern of mankind and these state act in the interest of humanity. Multilateral environmental agreements, including the United Nations Framework Convention on Climate Change serve as instruments of coordination of national efforts to address global commons and to support and institutionalize normative communities.²⁸

There are certain common criteria that allow us to identify the problem as major and differentiate it from other approaches to communality management. First of all, the concept of a shared interest is applied equally to areas that are under the jurisdiction of one state and outside it. Secondly, common concerns do not focus on resources of distributive justice regarding these goods, but rather on specific kinds of processes and actions in the area of environmental protection and even on protective measures intended to protect the environment.

24 J. Brunnee, *Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law*, “Zeitschrift für ausländisches öffentliches Recht und Völkerrecht” 1989, Vol. 49, No. 3/4, p. 792.

25 J. Brunnee, *Common Areas, Common Heritage, and Common Concern*, in: D. Bodansky, J. Brunnee, E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, 2007.

26 *Ibidem*, p. 553.

27 S. Stec, *Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment*, “International Community Law Review” 2010, Vol. 12, No. 3, pp. 361 ff.

28 J. Brunnee, *Common Areas...*, p. 555.

Threats to human rights resulting from climate change

Climate change also has an immense impact on human rights and their protection. The Interim Climate Change Committee (IPCC) in its report (IPCC 2014) pointed to a rising number of extraordinary weather phenomena that pose threats to human life and well-being.²⁹ The threats identified in the report included heat waves contributing to human mortality, dry seasons, marine hazards, violent winds and wildfires that cause environmental changes, interfere with food production processes and water accessibility, as well as damage and threats to other ecosystem bases of human existence.³⁰ The report concludes that damage to infrastructure and phenomena causing damage to residential buildings will occur increasingly throughout the world.

There is no doubt that effects of climate change will impact a number of human rights, including the right to food, water and housing, economic rights and even the very right to life.³¹ Climate change was called one of the 21st century's most significant threats to human rights.³²

Paradoxically, threats to human rights may also result even from measures directed towards counteracting climate change or measures associated with adaptation activities relating to such change. It is clearly seen that drastic limitation of emissions has an impact on economic human rights, sometimes threatening directly with energy poverty, possibly resulting in various kinds of discrimination, forced displacement, or strike at cultural rights by forcing changes in the life-style and values of entire communities.³³ Increased awareness of these threats is confirmed in rising interest of legal scholars and commentators in this problem, but also in rising numbers of complaints concerning human rights brought to courts

29 IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)). IPCC, Geneva 2014.

30 D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, Oxford 2017; B. Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, Singapore 2018.

31 Resolution adopted by the UN Human Rights Council on 1 July 2016 - 32/33. Human rights and climate change, A/HRC/RES/32/33.

32 Report of the Special Rapporteur on 1. February 2016 on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, DOC/A/HRC/31/52.

33 F. Birol, *Energy Economics: A Place for Energy Poverty in the Agenda?*, "The Energy Journal" 2007, Vol. 28, pp. 1–6; D. Hernández, *Understanding 'energy insecurity' and why it matters to health*, "Social Science & Medicine" 2016, Vol. 167, pp. 1–10; S. Bouzarovski, S. Petrova, *A Global Perspective on Domestic Energy Deprivation: Overcoming the Energy Poverty–Fuel Poverty Binary*, "Energy Research & Social Science" 2015, Vol. 10, pp. 31–40.

on the basis of a premise of adverse effects of climate change.³⁴ These challenges were moreover subject of interest of the Office of the United Nations High Commissioner for Human Rights and also Human Rights Committee (OHCHR 2015).³⁵ Human rights-based approach to climate change as a significance advantage over others based on universal natural law. And while international climate law focuses on specifying mutual obligations of states towards themselves, human rights specify obligations of states towards individuals and may be effectively claimed before domestic courts.³⁶

Climate finance

Problems of climate change have essential links with the sphere of finance. First of all, the principle of shared though diverse responsibility determines the scope of involvement in activities directed to counteract climate change and towards states' economic and social potential. Highly-developed countries are expected to display greater involvement, in particular by assuming most of economic burdens of the fight against climate change. Development of states of the poor south may be possible through their engagement in combating climate change and will increase capacity to cover the major part of costs of this effort. On the other hand, ensuring resources to adapt to climate change may also lower social costs of unavoidable change and also contribute to lowering pressure on human rights resulting, as has already been mentioned, both from the effects of climate change itself and measures to counteract these effects.³⁷

The United Nations Framework Convention on Climate Change mentions in its Article 4(5) the obligation of developed countries to take all practical steps to promote, facilitate and finance the transfer of or access to environmentally sound technologies and know-how. At the same time, it specifies the source and, relatively broadly, the aim of obtaining climate finance. The Kyoto Protocol repeats this

34 D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, Oxford 2017, p. 283.

35 Office of the High Commissioner for Human Rights (OHCHR) 2015. Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 November 2015, <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf> (access: 30.04.2024).

36 D. Bodansky, J. Brunnée, L. Rajamani, *International...*, p. 298.

37 M. Nyka, *Climate Change as a Challenge to Constitutional Values. Toward Climate Change Constitutionalism*, in: J. Cremades, C. Hermida (eds.), *Encyclopedia of Contemporary Constitutionalism*, Cham 2021, p. 4, https://doi.org/10.1007/978-3-319-31739-7_143-1 (access: 28.09.2024).

obligation in Article 10(c), expanding the aim by adding the financing of practices and processes limiting climate change. Only the Paris Agreement noticed the full potential of financial matters in climate law, pointing in Article 2(1) to making financial transfers coherent with reduction of emissions and climate change resilience one of the three basic tools for responding to climate threats.

The very concept of climate finance has not yet been given a legal definition. The Convention's website defines climate finance as local, national or transnational financing – drawn from public, private and alternative sources of financing – that seeks to support mitigation and adaptation actions that will address climate change.³⁸ Buchner presents a similarly broad definition that involves both public and private funds in the concept of climate finance.³⁹

The discussion on having to engage finance in mitigation and adaptation to climate change has in fact accompanied climate law since the very beginning, thus since the negotiation of the United Nations Framework Convention on Climate Change.⁴⁰ They started to be seen as an urgent concern after the 2006 publication of the Stern Review,⁴¹ which was the first attempt to calculate the costs of global warming in relation to global GDP. The Review points out that effects of uncontrolled climate changes in relation to the very extraordinary atmospheric phenomena may cost at least 5% of the gross domestic product (GDP) a year in an optimistic angle, and even exceed 20% GDP in a pessimistic variant.⁴² At the same time, the Review points to economic reasoning behind increasing the costs of counteracting climate change and prevention to reduce all negative effects of these impacts, pointing out that they are many times lower.

In 2009, during the Conference of the Parties in Copenhagen, the UK Prime Minister Gordon Brown pointed out the goal in his speech, i.e. to make available USD 100 billion a year until 2020 as part of various instruments of climate finance; this goal was then taken up by the remaining states participating in the Conference. This goal was achieved with a slight delay, that is only in 2023. Funds and measures stipulated in the framework of climate finance include the Global Environment Facility (GEF), the Adaptation Fund (AF), the Special Climate Change Fund

38 <https://unfccc.int/topics/introduction-to-climate-finance> (access: 29.04.2024).

39 B. Buchner, B. Naran, R. Padmanabhi, S. Stout, C. Strinati, D. Wignarajah, G. Miao, J. Connolly, N. Marini, *Global Landscape of Climate Finance 2023*, "Climate Policy Initiative" 2023, p. 1.

40 A. Michaelowa, A. Sacherer, *Introduction*, in: A. Michaelowa, A. K. Sacherer (eds.), *Handbook of International Climate Finance*, Cheltenham 2022, p. 3.

41 N. Stern, *The Economics of Climate Change: The Stern Review*, Cambridge 2006.

42 *Ibidem*, p. 10.

(SCCF), the Least Developed Countries Fund (LDCF), the Climate Investment Funds (CIF), as well as other smaller, financial initiatives, often under private law.⁴³

Engagement of USD 100 billion a year is certainly a valuable initiative that may impress. On the other hand, it is worth pondering whether such amounts may satisfy investment needs of developing states in the context of mitigation and adaptation to climate change. This reflection seems justified in the light of information that the European Union estimated that Europe in this decade will need additional investment of EUR 350 billion a year to meet the goal of reduction of emissions till 2030 in energy systems alone and, moreover, it will need a further EUR 130 billion to meet other environmental targets.⁴⁴

Human rights-based approach as a leading idea of international cooperation

Human rights are an essential pillar on which contemporary international relations are based – a pillar constructed under the United Nations upon adoption on 26 June 1945 of the Charter of the United Nations.⁴⁵ Legal scholars and commentators emphasize that today's international relations are a new normative era in the sphere of protection of rights of the individual in which the international community, inspired by the Universal Declaration of Human Rights of 10 December 1948,⁴⁶ has created a broad catalogue of international standards that ensure respect for the most important human value, that is personal dignity. Personal dignity as a principle of law adopted in current human rights protection systems provides normative anchoring for all rights and freedoms of individuals; for this reason, human rights are a form of dignity, thus they are universal, indivisible and inalienable.⁴⁷

⁴³ A. Michaelova, A. Sacherer *Introduction...*, p. 4.

⁴⁴ See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, SWD/2020/176 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Stepping up Europe's 2030 climate ambition. Investing in a climate-neutral future for the benefit of our people, 17.9.2020, COM/2020/562 final.

⁴⁵ Charter of the United Nations, Statute of the International Court of Justice and the Agreement Establishing the Preparatory Commission of the United Nations, 24 October 1945, 1 UNTS XVI.

⁴⁶ Universal Declaration of Human Rights of 10 December 1948, 217 A (III).

⁴⁷ For more see: J. Habermas, *Przyszłość natury ludzkiej. Czy zmierzamy do eugeniki liberalnej?*, transl. M. Łukasiewicz, Warszawa 2003, pp. 217 ff.; W. Chudy, *Prawda człowieka i prawda o człowieku*, in: K. Popielski (ed.), *Człowiek, wartości, sens. Studia z psychologii egzystencji*, Lublin 1996.

Founding human rights protection on the principle of respect for personal dignity allowed adoption of the so-called human rights-based approach (hereinafter as HRBA) in international relations. Pursuant to the position of the UN High Commissioner for Human rights, the human rights-based approach provides a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.⁴⁸ This approach is intended to analyse and combat inequalities underlying developmental problems and to combat discriminatory practices and unfair distribution of power that hamper developmental progress and often result in violation of rights of individuals and social groups. It is assumed under the HRBA that development plans, policies and processes against national and international relations are normatively anchored in all planes in the international legal system of human rights (that includes civic, cultural, economic, political and social rights, the right to development, etc.) and corresponding obligations set therein. Thus, HRBA requires that human rights principles (universality, indivisibility, equality, non-discrimination, participation and accountability) provide fundamental legal values for development and be applied at the place of developing capacities – of both entities that are duty-bearers – thus obliged to respect human rights, and “rights-holders” – entities competent for effectiveness of their enforcement.

It needs to be emphasized that treaty standards as well as soft law have not constructed a universal definition of HRBA based on which it would be possible to indicate unequivocally the catalogue of elements that make up this concept. Nevertheless, relying on broad analyses in legal commentary and positions of international bodies, certain essential features that determine the specific characteristics of the HRBA may be identified (relying on the proposals of UN agencies). It is worth emphasizing that the UN Secretary General, in the UN Programme for reform launched in 1997, called upon all actors under the United Nations system to include human rights in actions and programmes in their activity. As a result, an

48 Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, United Nations, New York and Geneva, 2006, p. 15; For more see: L. VeneKlasen, V. Miller, C. Clark, M. Reilly, *Rights-based Approaches and Beyond: Challenges of Linking Rights and Participation*, IDS Working Paper 235, Institute of Development Studies: Brighton, 2004, pp. 2–29; A. Hughes, J. Wheeler, R. Eyben, *Rights and Power: The Challenge for International Development Agencies, in Developing Rights*, Institute of Development Bulletin 2005, Vol. 36, No. 1, pp. 63 ff.; C. Nyamu-Musembi, A. Cornwall, *What is the “Rights-based Approach” all About? Perspectives from International Development Agencies*, IDS Working Paper 234, Institute of Development Studies, Brighton 2004, pp. 47 ff.; P. Gready, J. Ensor (eds.), *Reinventing Development: Translating Rights-based Approaches from Theory into Practice*, London – New York 2005.

inter-agency UN session was held on 3–5 May 2003, following which the *Common Understanding on HRBA to Development Cooperation* was adopted.⁴⁹ This document's main pillars lay down that all programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.⁵⁰ It emphasizes, that development cooperation contributes to the development of the capacities of “duty-bearers” to meet their obligations and/or of “rights-holders” to claim their rights.⁵¹ The aim of all activities in the human rights-based approach to programming and cooperation is to contribute directly to the implementation of human rights, as per need. These processes should be guided by so-called basic human rights principles, that is participation, accountability, non-discrimination, empowerment and linking to the human rights framework (PANEL).⁵² Therefore, we may point to a fundamental question here, that is a value that the human rights-based approach brings to the development of today's societies. There are two main co-related lines of reasoning here: first, internal reasoning according to which the human rights-based approach is appropriate from the moral and legal point of view since it is anchored in human personal dignity as inherent and inviolable; the second, instrumental reasoning, that assumes that the human rights-based approach leads to better and more sustainable results of social development.

Human rights-based approach in the policy for financing climate-related actions

HRBA is one of the six pillars of the United Nations Sustainable Development Cooperation Framework for the implementation of the 2030 Agenda.⁵³ The UNGA Resolution 72/279 elevates the position of the United Nations Development Assistance Framework (now re-named to the United Nations Sustainable Development Cooperation Framework) as “the most important instrument for the planning

⁴⁹ United Nations Development Group, *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*, <https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un> (access: 20.03.2024).

⁵⁰ *Ibidem*, p. 1.

⁵¹ *Ibidem*.

⁵² *Ibidem*, p. 2.

⁵³ Resolution 70/1. *Transforming our world: the 2030 Agenda for Sustainable Development*, adopted by the General Assembly on 25 September 2015, A/RES/70/1.

and implementation of United Nations development activities in each country, in support of the implementation of the 2030 Agenda for Sustainable Development (2030 Agenda)”⁵⁴

Adopting the human rights perspective under sustainable development means that it is also included in all actions, be it legal or financial, that pertain to climate protection. It is essential especially in developing countries, where more and more instruments and actions associated with the Climate and Disaster Risk Financing (hereinafter as CDRF), intended to protect the poorest persons and often most exposed to such phenomena. These financial instruments, if well-planned, developed and effectively implemented, may help improve resilience to climate change, strengthen the position of individuals and entities entitled to human rights protection, and may even be a certain “incentive” to take up preventive actions that will limit the risk of emergence of negative phenomena as a result of climate change.⁵⁵ On the other hand, badly planned and badly implemented CDRF may intensify pre-existing inequalities and create new inter-dependencies or new forms of discrimination, producing marginalised parts of society that are most vulnerable to human rights violations. To make sure that it is truly the poorest and most in need that are able to benefit from CDRF programmes, it is proposed under the international cooperation that climate financing take into account the human rights-based approach in its programming constructions and implementation.⁵⁶ It is crucial since

54 Section I(1) reads as follows “A new generation of United Nations country teams [w]elcomes a revitalized, strategic, flexible and results- and action-oriented United Nations Development Assistance Framework as the most important instrument for the planning and implementation of United Nations development activities in each country, in support of the implementation of the 2030 Agenda for Sustainable Development,1 to be prepared and finalized in full consultation and agreement with national Governments”, Resolution72/279 adopted by the General Assembly on 31 May 2018, Repositioning of the United Nations development system in the context of the quadrennial comprehensive policy review of operational activities for development of the United Nations system, A/RES/72/279.

55 K. da Costa, P. Pospieszna, *Finding the Missing Thread: The Inclusion of a Human Rights-based Approach in Tackling Climate Change Mitigation, Adaptation and Disaster Risk Reduction*, Input Paper Prepared for the Global Assessment Report on Disaster Risk Reduction 2015, <https://www.undrr.org/publication/finding-missing-thread-inclusion-human-rights-based-approach-tackling-climate-change>, (access: 28.03.2024).

56 L. Schäfer, E. Waters, S. Kreft, M. Zissener, *Making Climate Risk Insurance Work for the Most Vulnerable: Seven Guiding Principles*, Munich Climate Insurance Initiative/UNU_EHS Publication Series. Policy Report 2016 No. 1, pp. 9 ff.; M. L. Hutflil, *A Human Rights-Based Approach to Climate Risk Insurance: Making Insurance-related Instruments for Climate Risk Management Beneficial to the Poor and Vulnerable*, in: D. d Eckstein, V. Künzel, L. Schäfer, M. Wings (eds.), *GLOBAL CLIMATE RISK INDEX 2020. Who Suffers Most from Extreme Weather Events? Weather-Related Loss Events in 2018 and 1999 to 2018*, Berlin 2018, pp. 5–21.

the subject matter of climate change is indispensably linked with the human rights realm. Pursuant to the UN Framework Convention on Climate Change⁵⁷ (hereinafter as UNFCCC), UN international bodies and states agree that climate change is not only an environmental question; it is most of all the subject matter of effective human rights protection. Climate change is a phenomenon that, through its human rights perspective, applies to millions of people and communities throughout the world. The experience of the rising sea and ocean levels, floods and storms, glacier melting, groundwater pollution affecting health, forced relocation and resettlement, and other adverse effects of climate change affect an increasing number of people worldwide every year, contributing to violations of human rights and freedoms. This perspective therefore allows stakeholders to put forward a clear thesis, which has found expression in the practice of international bodies, namely, that the responses of the international community to combat climate change have direct and indirect implications for the full and effective enjoyment of human rights.⁵⁸ As the international community takes an increasingly responsible approach to the issue of climate change, more focus is being given to the financial resources needed, especially by developing countries, to take action to mitigate and adapt to climate change. It is important that climate financing in the form of managing climate finances and their distribution should have a direct impact on the realization of human rights, including, for example, the right to life, health, food, water, housing or culture. For instance, the large-scale construction of hydroelectric dams has raised serious human rights concerns regarding forced displacement and relocation of local communities or loss of land or other means of livelihood.⁵⁹ The contemporary model of climate change financing in the above-mentioned perspective should, therefore, take into account the essential human rights principles that constitute the basis of the HRBA within the framework of the catalogue of principles of the so-called PANEL. These rules should be a certain signpost for the activity of domestic and international institutions that manage the operation and implementation of financial policies for climate. Taking them into account at every stage, i.e. planning, formulation, implementation, monitoring and evaluation of financing policy, is a necessary platform for real and not illusory – and therefore – effective and

57 United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84.

58 OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights. Document No: A/HRC/10/61, 15 January 2009, pp. 6–7, 19–20.

59 S. Jodoin, *Rights-Based Framework for Climate Finance*, International Development Law Organization and the Centre for International Sustainable Development Law, Legal Working Paper Series, CISDL IDLO 2010, p. 5.

efficient protection of human rights. There is no doubt that this aspect is important today in the face of such serious climate challenges, and HRBA as a concept anchored in the normative foundations of human rights protection plays a pivotal role. This thesis is confirmed by international practice, where, as an example, we can point to the position of states on the interpretation of the goals pursued by the UNFCCC, according to which respect for human rights should feature in all activities related to climate change.⁶⁰

In a climate finance policy that takes into account the human rights-based approach, protecting the right to a safe climate is of particular importance. It is worth emphasizing here that the term “the right to a safe climate” appears in the international legal space both in the language of the law and in the legal language; yet, it has not been uniformly defined. Pointing out the importance of the discourse devoted to the right to a safe climate is not without significance from the perspective of the principles of financing climate actions in the international arena. Taking into account the ongoing disputes in the legal scholarship regarding the concept of the right to a safe climate and its legal construction, it should be stated that this right is essentially normatively anchored in the international legal *acquis* (both in the dimension of regional human rights protection systems and in the universal system). Existing references to this law are general, most often in the context of issues related to environmental protection. Nevertheless, bearing the above in mind, it should be emphasised that the right to a safe climate has a specific normative anchoring in human dignity and in the principles of equality and non-discrimination. Hence, contemporary international standards constitute appropriate legal and axiological foundations justifying the basing of this law on these fundamental human rights values. An analysis of the definitional components of the right to a safe climate, carried out on the elements constituting the normative structure of human rights and presented in the entitled entity–the obliged entity–the object relationship, provides a basis for qualifying the right to a safe climate as a subjective right. Based on the achievements of legal scholarship and commentary on subjective rights, the right to a safe climate can therefore be considered as a set of complex legal situations, designated to entities by applicable norms, due to the

⁶⁰ Section 8 emphasizes that Parties should, in all climate change related actions, fully respect human rights, Framework Convention on Climate Change. Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010. Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP.16. FCCC/CP/2010/7/Add.1, 15 March 2011, ust. 8.

socially justified interests of these entities recognized by the legislator.⁶¹ The aim of the right to a safe climate understood like this as a subjective right is to indicate – with reference to claims put forward by Wronkowska and Ziemiński – that this right implements the postulate of existence of a set of functionally related rights, competences and a generally beneficial situation for stakeholders.⁶² The right to a safe climate as a subjective right is, therefore, a springboard to a claim that this right is a human right, not only a legal instrument to enforce these rights. This, in turn, allows us to put forward a thesis that the right to a safe climate has the status of a second-degree right, a “meta-right”,⁶³ which means that it becomes an operational condition necessary for the realization and effectiveness of other human rights.⁶⁴ The consequence of adopting this understanding is that without a stable climate, all human rights are at risk. Therefore, the for the human right to a safe climate constitutes a prerequisite and at the same time a necessary condition for the realization of other human rights, from substantive rights to life, health and a healthy environment, etc., to procedural rights to information and participation in climate and environmental policies, etc. *De lege lata*, it is therefore justified to frame the right in question within the framework of a normative concept, while at the same time excluding the possibility of treating it exclusively in terms of a certain legal idea which, due to its nature, might never be implemented. Understood in this way, the normative nature of the right to a safe climate directly includes the issue of the principles of financing climate actions in the scope of its implementation. This specific interdependence in the sphere of protection of this right, including the use of financial instruments, should not raise any doubts, as it results from the need to ensure the integrity of the basic needs of a human being.

61 M. Stoczkiewicz, *Prawo ochrony klimatu w kontekście praw człowieka*, Warszawa 2021, pp. 382 ff.; Z. Ziemiński, *Funkcje prawa*, in: S. Wronkowska, Z. Ziemiński (eds.), *Zarys teorii prawa*, Poznań 2001, pp. 233 ff.

62 S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 2001, p. 109.

63 For more on first- and second-degree norms see T. Gadkowski, *Odpowiedzialność międzynarodowa państwa za szkodę jądrową*, Poznań 1990, pp. 46 ff.

64 The concept of the so-called meta-right appears in legal commentary also in relation to other categories of rights, e.g. the right to citizenship as a meta-right in relation to: civil and political rights – J. Polatyńska, *Prawo do obywatelstwa jako prawo człowieka*, “Acta Universitatis Lodziensis. Folia Iuridica” 2009, Vol. 69, p. 74; right to association – M. Dąbrowski, *Konstytucyjny aspekt zrzeszania się cudzoziemców w partiach politycznych w Polsce*, “Przegląd Sejmowy” 2011, No. 103, pp. 121–122; the right to justice – M. Dąbrowski, *Prawo do sądu administracyjnego w świetle standardów wynikających z treści art. 45 Konstytucji Rzeczypospolitej Polskiej. Konstytucyjne prawo do sądu w teorii i praktyce*, M. Kłopotcka-Jasińska (ed.), “Przegląd Prawa Konstytucyjnego” 2016, Vol. 3, No. 31, pp. 108–109.

This justifies the adoption of the position that the principles of financing climate actions by entities that have the duty to protect human rights should be established and verified in terms of social needs and expectations, taking into account negative phenomena and obstacles, including stereotypes and prejudices, that exist or could appear at the stage of design, implementation or enforcement. From the perspective of the scholarship of international law, the normative construction of the right to a safe climate also includes the functions that this right should perform; in a broader context, these are the functions of law, and in a narrower context, socio-cultural functions. The examination of the functions of the law implemented by the right to a safe climate through the prism of financing climate actions is, in principle, based on a general, universal catalogue, in accordance with the established views of legal scholars and commentators. It includes a protective function (with the following sub-functions: compensatory, caring and promotional), a stabilizing function, a dynamizing function, an organizational function, a repressive function and an educational function.⁶⁵ The perspective of the socio-cultural functions of the right to a safe climate in the context of financing climate actions includes axiological and sociological conditions relating to the economic, social, cultural or political situation between individual groups in a given society or between societies of different countries caused by climate change. In this sense, the right to a safe climate also has a socio-cultural character, as its implementation should be based on culturally and socially expected criteria, interpretations and assessments. A human rights-based approach broadly referring to all aspects of state action in terms of the right to a safe climate is therefore an important area for the conceptual and methodological framework of climate finance processes.

Conclusions

The assessment of the principles of designing, implementing and using financial instruments in the area of climate action based on the HRBA concept allows us to answer the question about the appropriate basis for their creation and impact on the protection of human rights from the perspective of normative standards. It is therefore important that, in the scope of the right to a safe climate – taking into account its specific nature as a subjective right and meta-right, states and international organisations undertake appropriate activities both in the sphere of law and in the sphere of practical actions resulting in the appropriate impact of financial instruments on the effectiveness of human rights protection. However, it is worth

⁶⁵ Z. Ziemiński, *Funkcje prawa*, in: *Zarys teorii prawa...*, pp. 233 ff.

emphasising – as a *de lege ferenda* conclusion – that there is currently no uniform model to which states building or redefining climate financing systems could refer based on a human rights-based approach from the perspective of climate challenges and which would have significant legal and practical significance for states' actions in this area. HRBA is certainly necessary to address the challenges of climate change and the associated threats of human rights violations.

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Finanse klimatyczne jako instrument realizacji prawa człowieka do bezpiecznego klimatu – podejście oparte na prawach człowieka z perspektywy finansów klimatycznych

Streszczenie

Zmiany klimatu wiążą się z powstawaniem istotnych zagrożeń nie tylko dla środowiska, lecz także dla praw człowieka. Paradoksalnie zagrożenia te mogą wynikać z samych zmian warunków klimatycznych, mogą też być konsekwencją stosowania środków mających na celu ochronę przed tymi zmianami. Zapewnienie odpowiednich środków finansowych staje się kluczowym instrumentem mitygacji i adaptacji do zmian klimatu. Środki i fundusze klimatyczne odgrywają istotną rolę w realizacji podejścia opartego na prawach człowieka do problematyki zmian klimatu.

Słowa kluczowe: finanse klimatyczne, podejście oparte na prawach człowieka, HRBA, klimat, prawo klimatyczne

CYTOWANIE

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