



THE UNITED NATIONS, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC), EQUALITY AND NON-DISCRIMINATORY PRACTICES: JUSTIFICATION AND IMPACTS ON THE CLIMATE CHANGE REGIME

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Part One: Introduction

The United Nations Organisation was formed after the Second World War as an international “global village” with the aim of promoting international peace, security and harmonious cooperation of all member nations in matters of social, political and economic affairs. Considering the antecedents before its formation such as the trauma of the 2nd world war, the aftermath of colonialism, the ensued lack of peace, loss of rights and perceived inequality among states, there was the urgent need by the comity of nations, spearheaded by few industrialized nations, still relishing these ugly experiences, to rise above these enclaves for a better harmonious world based on equity and fairness.¹

The body which later became known as the United Nations (UN)² thus enshrined in its charter, the principle of Sovereign rights, Human equality and Non- discriminatory practices for all civilized nations which shall govern the affairs of the original founders of the organisation and those that would join and ratify the charter later.³ It can hardly be disputed that the United Nations Organization through its principles, practices and functions, ushered in today’s globalization, universal human rights, equality, non-discriminatory practices and peaceful resolution of disputes.⁴

However, inherent in certain articles within the UN charter and some practices of some UN agencies, and framework like the United Nations Environmental Program (UNEP), its Intergovernmental Panel on Climate Change (IPCC) and the United Nations framework Convention on Climate Change (UNFCCC) are some entrenched discriminatory clauses, inequality provisions leading to the conclusion by the discerning public that the “grandfather” of nondiscrimination, sovereign equality and human rights seems to negate its primary charter of equality of individuals, states and non-discriminatory practices.⁵ This concern is more visible in the area of Climate Change regimes. Some examples of these unequal and discriminatory practices within the UN system and its agencies include the exclusion of states from the UN Security Council, the interference in the domestic affairs of sovereign nations in the guise of “public interest” and in the case of Climate change regime, by the use of the expression “common but differentiated responsibilities “between developed, developing and small Island states.”⁶

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¹ Charter of the UN is available here <<http://www.un.org/en/documents/charter/chapter5.shtml>> accessed 25/6/2011. There are five permanent members of the UN and ten non permanent members from original six.

² Malcolm N Shaw, *International Law* (5th ed.) Cambridge University Press 2003) 31, says the General Assembly has 105 members in 2006 and aims to be truly universal

³ Art 1 and 2 of the UN charter.

⁴ Art 2 of the UN charter

⁵ See Art 9, 23 and 24 of the UN charter and the Security Council made of 5 permanent members but now 10 elected members totalling 15 members and the right of the Security council to maintain world peace and to expel any member nation from the organisation. See also T. O. Elias, *United Nations Charter and the World Court* (Nigerian Institute of Advance Legal studies 1989) 5

⁶ Art 3 (1) of the UNFCCC



These expressions had been interpreted to mean discriminatory practices in favour of developing states against the industrialized states, hence the reluctance of some world acclaimed emitters of greenhouse gases like the USA to ratify and be serious with the challenges posed by global warming.⁷

This paper shall examine the current UN and its agencies' discriminatory practices and analyse the common but differentiated responsibility clauses under the frame work of the UNFCCC; and more particularly, the impacts of this clause on the climate change architecture. The paper concludes that given the peculiar nature of climate change risks, its causes and global impacts, the cost of adaptation and mitigation, the UN framework Convention on Climate Change and its Kyoto Protocol, being frame work mechanism under the UN for addressing the global climate change risks, were perfectly justified in introducing the discriminatory responsibility practices with respect to emission reduction challenges between developed, developing and small Island states.⁸

The paper will further contend that given the stabilizing and other unique roles of the UN, it is still considered in the eyes of the dominant public opinion, as the champion and grandfather of modern sovereign equality and non-discriminatory practices. However, the paper shall conclude that although based on equity, the impacts of the discriminatory practices of the UNFCCC have contributed in slowing down the mitigation and adaptation process of climate risks and the eventual failure to reach a binding global legal Treaty acceptable to all parts of the global village, developed as well as developing.

This paper is thus organised as follows: Part one shall deal with the UN organizations, its formations and objectives. This part will analyse the historical development of the UN and its major goals which are based on equality and nondiscriminatory practices. Part two will consider the UN agency, the UNFCCC⁹ and climate change. It will emphasise on the aim and objectives of the frame work, the various deployment of the expression "common but differentiated responsibilities." Part three will focus on the justification for these practices by the UN and its agencies. Part four will analyse the impacts of this practice on climate change architecture. Part five will summarise and conclude the paper.

Part Two: Back Ground of the United Nations and Its Objectives

The name "United Nations" was devised by the United States President Franklin D. Roosevelt. It was used for the first time in the 1st January 1942 "Declaration by United Nations" during the Second World War when representatives of 26 nations pledged the support of their governments to continue fighting together against the Axis Powers.¹⁰ It is also an offshoot of the League of Nations formed in 1919 to promote international peace, security and friendly cooperation among members under one global organization.¹¹

⁷ David Freestone and Charlotte Streck (ed.), *Legal Aspects of Implementing the Kyoto protocol and Mechanisms* (OUP 2008) 5,9 and 19, on the special needs of developing countries and the position of the USA; Douglas Bushey, U. C. Berkeley, S. Jinnah, 'Evolving Responsibility; the Principle of Common but Differentiated Responsibility in the UNFCCC' (2010) 6 Berkeley J international Publicist 2-3

⁸ F. Soltau, *Fairness in International Climate Change Law and Policy* (Cambridge University press 2009) 133-160; Intergovernmental Panel on Climate Change (IPCC), First Assessment Report :Preface to the IPCC Over view (IPCC 1990) 58-61

⁹ United Nation Frame work Convention on Climate Change (UNFCCC) New York, 9th May 1992, in force 21 March 1994, 31 International Legal Materials (1992), at pp 849 ff.

¹⁰ Article I of the UN Charter, available at < <http://www.un.org/aboutun/unhistory/>>accessed 25/5/2011. Axis power signify power pact between Germany, Italy and Japan that fought the First World War. it was entered on Sept 27, 1940 in Berlin Germany .

¹¹ See Basic facts about UN, available at < <http://www.un.org/aboutun/history.htm> accessed 25/5/2011



This led to the formation and consequent drawing up of the United Nations Charter by the representatives of 50 countries at the United Nations Conference which was held in San Francisco in 1945.¹² Thus, the United Nations officially came into existence on 24 October 1945, following the ratification of the Charter by the five permanent members namely: China, France, the Soviet Union, the United Kingdom and the United States. About fiftyone industrialized nations were the initial members apart from the founding members.

The United Nations, as “the father” of all civilised nations has its membership drawn from the original founding members and those who later ratified the charter.¹³ There are various arms of the UN. These are the Security Council,¹⁴ the General Assembly,¹⁵ the Trusteeship Council,¹⁶ the Secretariat, the International Court of Justice (World Court).¹⁷ The UN also established such functional bodies like the International Law Commission, the International Labour Organization and the Economic and Social Council (ECOSOC) to address the UN developmental program particular for the development of emerging new states.¹⁸

While the World Bank was in charge of financial matters, the International Court of Justices was in charge of international dispute settlement.¹⁹ There are also different specialized UN agencies dealing with economy, health,²⁰ social, environmental, political and global²¹ issues pursuant to Article 57 of the UN Charter.

The UN also established the Universal Declaration of Human Rights in 1948²² and added three covenants namely: the Covenant on Civil and Political Rights, (CCPR);²³ the International Covenant on Economic, Social and Political Rights (ICESPR)²⁴ and the Covenant on the Elimination of all forms of Racial Discrimination (ICERD).²⁵ Recently, another Covenant on women came into being, which is the International Covenant on the Elimination of all forms of Discrimination against Women (CEDAW)²⁶.

¹² Ibid, UN.

¹³ Article 2 of the UN Charter.

¹⁴ Arts, 12, 23 and 24 of the UN Charter

¹⁵ Chapter 111, Art 7 and Art 13-22 of the UN Charter

¹⁶ UN. chapter X11 Art 75.

¹⁷ UN. Art 92

¹⁸ UN, Art 62 also enjoins the Economic and Social Council to promote and observe human rights and fundamental freedom.

¹⁹ See Article 7 on the establishment of the Economic and Social Council, while Art 92 deals with the International Court of Justice (ICJ).

²⁰ See World Health Organizations WHO and its global Impacts.

²¹ See also World Bank, IMF, World Trade Organization etc, being various agencies in the global paradigm influencing world economy and trade.

²² For the history of the Universal Declaration of Human rights, see < <http://www.humanrights.com/what-are-human-rights/brief-history/the-united-nations.html> > accessed 25/5/2011. The declaration came into force on 10th Dec 1948

²³ ICCPR was opened for signature, ratification and accession by the General Assembly Resolution. 2200Axx1 of 16th December 1996 entry into force 23/3/76 in accordance with Art 49 of the UN in detail. The covenant is also available at <<http://www2.ohchr.org/english/law/ccpr.htm> > accessed 25/5/2011

²⁴ United Nations Covenant on Economic Social and Cultural Rights can be accessed at <<http://www.hrweb.org/legal/escr.html> > accessed 25/5/2011.

²⁵ UN GA RES.1904(XV111) of 20/1/1963 (Article 1,2).

²⁶ UN Conventional on Elimination of all forms of Discrimination Against Women (CEDAW) was adopted as an International Bill of Rights by the UNGA in New York in 1979 to protect the rights of woman within modern societies, yet no sanction was attached to any breach of its principles by government. See, the UN Policy: Human rights and women rights available at <http://www.dados.org/int/Menschenrechte/Grundkurs_MR3/frauenrechte/was/un-politik.htm#1 > accessed 25/5/2011.



Also, in the area of Environment, the UN Environmental program was established under the United Nations Development program. This body set up the Intergovernmental Panel On Climate Change (IPCC) in 1988. It was on the basis of the IPCC's first Assessment Reports 1990²⁷ that the United Nations Framework Convention (UNFCCC)²⁸ was adopted in the United Nations Conference on Environment and Development held in the Brazilian city of Rio de- Janeiro in 1992.²⁹ These bodies are therefore agencies and mechanisms under the Umbrella of the United Nations.³⁰

The main objectives: of the UN Charter are: to reaffirm faith in the human rights, the dignity and worth of human persons, the equal rights of men, women and nations large or small and to promote social progress and better standard of living in larger freedom wherein, member states 'pledged themselves to unite "their strength" to maintain international peace and security'. This is to be achieved through the Security Council that may or may not consult the General Assembly on peace or security mission in sovereign states, or which may decide to expel any errant state "willy-nilly" out of the global village.³¹

Further, the UN aims at dousing the tension and feeling of racial discrimination arising from apartheid and colonialism of weaker nations by the stronger nations. One of its primary aims is to give some nations "a measure of sovereign rights "within the community of nations, hence the declaration of any unjust occupation or domination of any nation against the other, as contrary to the spirit, intent and character of the UN charter.³²

Today, there are conflicting scenarios emerging from the UN concerning the discharge of the "noblest idea" of equality and sovereignty of states with regard to the non- interference in the domestic affairs of some nations;³³ the equality of states - some very powerful and rich while others weak and poor.³⁴ There are also great dividing walls between develop, developing and small Island sates. ³⁵ Some of these may be attributed to the forces within the new economic order of globalization, ³⁶while others may be located within the context of peculiar local circumstances arising from the socio, economic, political situation in different countries³⁷

²⁷IPCC, First Assessment Report 1990: Overview, available at <http://www.ipcc.ch/ipccreports/1992%20IPCC%20Supplement/IPCC_1990_and_1992_Assessments/English/ipcc_90_92_assessments_far_overview.pdf> accessed 15th march 2012 .

²⁸ United Nation Frame work Convention on Climate Change (UNFCCC) New York, 9th May 1992, in force 21st March, 1994, 31 International Legal Materials (1992), at pp 849ff.

²⁹ S Bell and D McGillivray, *Environmental law* (7th Ed OUP 2008) 520; P. W. Birenien and A. Boyle , *Basic Documents on International law and the Environment* (OUP 1995)9,

³⁰ UN Structure and organisations Available at <<http://www.un.org/en/aboutun/structure>> 15th March 2003

³¹ UN Security Council members 2011 available at <http://www.un.org/sc/members.aspx>> citing A/64/100(annex1V) accessed 25/5/2011, See Also Art 12 of the Un Charter

³² T. O. Elias, *United Nations Charter and the world court* (Nigerian Institute of advance legal studies, Lagos189) pp 22, 32 on the aims of the founding fathers of the UN and Principle of non-discrimination. Elias was a judge and a former President of the international court of justice from Nigeria.

³³ Art 1 (7) of the UN charter on when such interference can be made and restriction as imposed in chapter V11 of the Charter.

³⁴ Malcome N Shaw, *International law* (5th (ed.) Cambridge University Press 2003) 4 on military action on Iraq and the role of force in international law

³⁵ Snigdha Nahar , *Sovereign Equality Principle in International Law* (Global politician of 2008) ,available at <<http://www.globalpolitician.com/24351-international-law>> accessed 25/5/2011 Yugoslavia Vs United states and 44orswhwer Yugoslavian violated the charter by using force against another state, ICJ 14 (2nd June 1999)

³⁶ David Held et al (eds.), *The Governance of climate Change: Science, economics and Politics and ethics* (Polity Press 2011) 49 at 63, where he decried the impacts of globalization on an interdependent world.

³⁷ John Seitz, *Global issues* (2nd Ed Blackwell Publishing 2008) chapter 1, p 4-5, 14and 18 on why some nations are rich while others are poor.

This paper contends that another primary objective of the UN is to maintain International peace and security.³⁸ This is again supposedly based on the United Nations guiding principle of equality of all nations,³⁹ non-discriminatory practices,⁴⁰ civilized behaviour, rule of law,⁴¹ and peaceful resolution of disputes.⁴² The Sovereign equality and non-discriminatory practices are emphasised the more in Article 8 of the Charter dealing with equality between men and women. The UN also enshrined the principle of universality⁴³ and sovereignty where by every state is sovereign and equal within the global village. According to Snigdha,⁴⁴ the principle of sovereign equality was part of customary international law and also found in the League of Nations which was later succeeded by the United Nations. This principle has both positive and negative connotation and includes the obligation to protect the rights of other states.⁴⁵ The universality principle means a global application of customary international principle and practice within each state without discrimination.⁴⁶

The classical meaning of sovereignty by the 19th century implies the non-interference in the domestic affairs of one nation by another nation even when international peace is threatened within the said nation or there exists aggression against its citizens by powerful forces within the states.⁴⁷ However, under the UN charter, states limit their sovereignty by becoming members of the international community and by subscribing to the laid down rules thereon, thus eroding their absolute sovereignty. Jeremy argues:

While the principle of states sovereignty has not been discarded entirely, it has been eroded in recent years; while the classic international legal principle is static, national sovereignty in practice fluctuates with shifting states obligation.⁴⁸

Similarly, the principle of equality is now made conditional upon the capacity and capability of states to protect themselves nationally and to meet with international obligations that have been ratified or domesticated by the states.⁴⁹ The UN also reserve the right to determine through the Security Council on whether any state under the international law, is incapable of protecting its citizens or nationals of

³⁸ UN, Art. 1

³⁹ UN, Art. 2 on sovereign equality

⁴⁰ UN, Art. 3 and 8

⁴¹ UN, Art.92. See also *T. O. Elias, United Nations Charter and the World Court* (Nigerian Institute of Advanced Legal studies, Lagos 1989) at page 7. The achievement of civilized behaviour was also reached by the codification of the customary International law under the internal commission established under the UN based on equality and non-discriminatory practices under the UN.

⁴² Art. 2 and 24 of the Charter.

⁴³ See the Preamble to the UN Charter.

⁴⁴ Snigdha Nahar, "Sovereign Equality principle in International law" (Global politician May-June 24, 2011) He said there are kinds of sovereignty, legal and behavioural sovereignty and that the concept was based on the recognition of equality of states before the law; a concept, which evolved from the theory of natural equality first analyzed by Thomas Hobbes. But according to Oppenheim, also cited by the author, "states are by their nature not equals as regards power, territory and the likes. But as members of the community of nations they are in principle equal whatever difference between them may otherwise exist "

⁴⁵ Malcom N. Shaw, page 412

⁴⁶ UN, Art. 94-95 on dispute resolution

⁴⁷ *M Shaw International Law* (5th ed Cambridge University Press 2003)p1039 citing the Corfu channel case, *ICj Report* ,1949 .pp 4,35 and *Nicaragua case*, *ICJ Report* 1986,pp14; See also Art 1 (7) of the UN charter.

⁴⁸ Jeremy Sarkin , " The role of the United Nations, the African Union and Africa's Sub Regional Organizations Dealing with Africa's Human rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect" (2009)53 (1) *Journal of African Law* 4.

⁴⁹ *ibid*, at page 5 where under the African Union, if states cannot protect its citizens, it calls for the intervention of the AU even in the domestic affairs of the state. See also Malcolm N. Shaw, *International Law* (5th ed. Cambridge University press 2003) 183-187 on the determination of statehood and its extinction.



other nations within their territories.⁵⁰ The UN can adopt the use of limited or extended force where necessary to intervene in the domestic affairs of sovereign nations.⁵¹

The International Court of Justice established under the United Nation is seen to apply the court rules equally on all persons among all sovereign states without discrimination under a rule of law which guarantees impartiality and equality. This is carried out in order to fulfil its principle of equality of all persons before the law.⁵² This paper further notes that globalization, as a weapon of international cooperation, which affects modern societies, stemmed from the primary function and practices of the United Nations.⁵³ The idea behind globalisation is not different from equity, equality and fairness, and non-discriminatory practices.⁵⁴ However, if one lifts the veils of the UN Charter, the conventions and covenants aforementioned and goes beyond their façade, there are underlying restrictions on every “right” provision for which a “duty” lies showing some limitations on the enjoyment of these rights. This means that there is no absolute right anywhere.⁵⁵

Again, a cursory examination of the UN Charter, its conventions and covenants would reveal some entrenched discriminatory practices that have become “customary” in international parlance. These can be seen in the creation of separate body known as the Security Council, consist in of 5 permanent members with only one developing country China, as a member. The main duty of the security is to protect global peace and security of the world.⁵⁶ Apart from China, no other developing nation is a member of the Security Council. The Security Council, on “justifiable” ground of maintaining international peace, security and aggression against states could vote within themselves, to recommend to the General Assembly, to expel a nation out of the membership of the UN or to interfere in the domestic affairs of sovereign nations⁵⁷.

There have been discordant tunes within the members of the General Assembly in the past, over the composition of the Security Council and its operations. Some cite its undemocratic nature as example, while others cite the lopsided nature of its composition.⁵⁸ There were cases of questionable interference in the domestic affairs of some nations by the UN and its agencies, thus challenging and undermining the UN’s position on equality, on discriminatory practices and application of the rule of law.⁵⁹ There have been instances of bigger and developed nations interfering in the domestic affairs of smaller or

⁵⁰ UN Arts 2(4), 39 See Malcolm N Shaw page 1018-1021

⁵¹ UN Art.41,42, see also to Elias page 65 on Corfu channel ‘s case .

⁵² Art 94- 96 on when intervention is necessary

⁵³ UN Art 1(2),(3)

⁵⁴ See The United State Diplomatic and consular staff in Tehran(USA Vs Iran) ICJ Reports 1980,p3.International court of justice applied the principle of Human rights and Humanitarian law to declare Iran liable .Similarly the Nicaragua Vs USA) Merits ,ICJ report 1986,p14, where the Nicaragua accused USA of exploitation and occupation of her territory ,the Intentional court declared the action of US contrary to the provision of Art 2(4) the charter

⁵⁵ UN Art. 1(4) places a limitation on the rights of a member nation by virtue of their memberships of the UN.

⁵⁶ Article 23, where a platform has been created for sanction against any state that has ratified the convention.

⁵⁷ See Article 24 to 27. While Art 2 (4) UN Charter prevents the use of force by any nation against the other. The UN can in special cases, especially on grounds of humanitarian intervention(HI),the responsibility to protect particularly the need to prevent genocide interfere in the domestic affairs of nations.; See , Elias p 67

⁵⁸ T O Elias, *The United Nations charter and the world court* (Nigerian Institute of the advanced legal studies, Lagos 1989) Page 5 . The new states of Africa, Latin America Asia and Soviet group of states have longed sought for the enlargement of the Security Council, just as the Trusteeship Council which includes some of these third world countries.

⁵⁹ Art 2 (4) UN Elias P65-67 ;Charter Chris Spence, “Who decides? The Role of the United Nations and Security Council in addressing Climate and Energy Insecurity “in Felix Dodd, *Climate Change and Energy Insecurity: The challenge for Peace, Security and Development* (Earth scan, UK 2009) pp169 at 172,173 where the G77 argued about the meddlesomeness of the UN Security Council in Climate Change Matters in 2007.

developing countries before the very eyes of the UN.⁶⁰ There were also other cases of political, economic and social inequity between the rich north and the poor south practiced, through their agencies such as the Security Council, World Bank, IMF and WTO.⁶¹

However, the UN has endeavoured always to justify some of these measures, basing some on the question of overriding public good, doctrine of necessity and saving of lives and property by preventing genocide or aggression of one state against the other.⁶² However, every attempt by the UN and its agencies to be as equitable as possible in dealing with member nations in these matters sometimes exposed them to the challenges of discriminatory practices.⁶³ This paper is not intended to pass judgment on the UN actions or that of her agencies but to find justification in some measures taken by the UN since some of these measures, in the past, sometimes favoured the rich north and other times the poor south.⁶⁴ The recent UN intervention in Libya case and the delay in making similar intervention in Syrian killings are good examples of some perceived double standards.⁶⁵

This paper is further concerned with the UN involvement in the protection of the global atmosphere considered as “global commons.”⁶⁶ The UN agencies adopted severally, the principle of “Common but differentiated responsibility in dealing with global environmental problems caused by climate change⁶⁷ which few countries considered as undemocratic and discriminatory against some developed nations.⁶⁸ This paper argues that UNEP and WMO were perfectly right in establishing, the Intergovernmental Panel on Climate Change and the subsequent adoption of the United Nations framework Convention on climate change 1992.

The paper further argues that the UN and her agencies were in my humble view, justified under the “equitable ground” to have introduced the principle of common but differentiated responsibility, to deal with burden sharing between the rich north aggregated as Annex 1 countries, the developing countries (non- annex 1 countries) and least developed small island states (LDC)⁶⁹.

⁶⁰ US- led invasion of Iraq which was later pronounced as breach of the UN charter on non interference and compare with the US diplomatic and Consular staff in Tehran against Iran; and US military and paramilitary activities in Nicaragua; Tanzanian intervention in Ugandan affairs that led to the removal of Idi Amin ; See also Jeremy Sarkin , th role of the United nations above n-at page 6

⁶¹ John Seitz, *Global Issue: An Introduction* (3rd Ed. Black well USA, 2008) P 29. It has been argued that most terms and conditions imposed by the UN bodies like IMF and world bank on developing countries as condition precedent before securing any loan or grants that are unconscionable and amount to interference in the domestic affairs of these countries .

⁶² Malcom 1039 ; UN gives green light to NATO for LYBIA killing June 11,2011 available at< <http://www.presstv.ir/detail/184233.html>> accessed 23/5/2011.th reason cited was to prevent genocide and killing of civilians

⁶³ Philippe Pernstich: “New Directions: Rebuilding the Climate change Negotiation” (1999) 33 *Atmospheric Environment* 2297-2298 where the author questioned the basis of common but differentiated responsibility on grounds of equity at the same time supporting the US stand. He rather suggested “Contraction and Convergence” approach as long term emission reduction measure and Emission Trading.

⁶⁴ Kofi Annan, Iraq war was illegal and a breach of the UN Charter <http://www.guardian.co.uk/world/2004/sep/16/iraq>. Iraq.

⁶⁵ UN gives green light to NATO for Libya killing June 11, 2011 available at< <http://www.presstv.ir/detail/184233.html>> accessed 23/5/2011.th reason cited was to prevent genocide and killing of civilians

⁶⁶ John I Seitz, *Global Issues: An Introduction*(3rd ed.) Black Well Publishing USA) 208. Global common was defined as those pat of the planet that are used by many or all nations and these include the ocean, international rivers, the seabed the atmosphere and outer space

⁶⁷ Ellen Wiegandt , ‘Climate Change ,Equity and International Negotiations’ in Urs Luterbacher and Detlef Spring, *International relation and Global climate Change* (MIT Press, Cambridge 2001) p127, at 136

⁶⁸ Douglas Bushey, U. C. Berkeley, S. Jinnah, ‘Evolving Responsibility; the Principle of Common but differentiated Responsibility in the UNFCCC’ (2010) 6 *Berkeley J international Publicist* 2-3.

⁶⁹ Kyoto Protocol to the UNFCCC, Kyoto 10th December 1997, in force 16th February 2005, 37 ILM (1998)



The next part of this paper shall deal with the background of the UNFCCC and the reasons for adopting this burden sharing approach over a matter considered as a global concern- Climate change risks.⁷⁰

Part Three: UNFCCC and the Climate Change Regime.

Climate Change, for the first time came to lime light within the UN through the General Assembly by Malta, when it sought that climate change be declared a” common heritage of mankind .⁷¹ However, this was met by opposition from developing countries on the ground that it will erode their sovereignty.⁷² To strike a balance between the North and the South, the UN General Assembly resolved to refer it as “a common concern of mankind.”⁷³ However, in the World Climate Conference on 1990, the United Nations Environmental Programme and World Metrological Organization established the Intergovernmental negotiating committee for a framework convention on climate change.⁷⁴ Accordingly, the United Nations framework Convention was adopted in Rio de Janeiro Brazil in 1992. This Convention became a Treaty on Climate Change mitigation and challenges.⁷⁵ This negotiating continued under the UNFCCC up till the Cancun (COP 16)⁷⁶ Conference of the parties serving as the meeting of the parties to the UNFCCC in 2010, and in Dunbar South Africa in 2011.⁷⁷ This, however, brought out the differences between the USA and the rest of the world on one hand, and developed countries and developing countries on the other with respect to the cause of climate change, its impacts and allocation of burden of mitigation and adaptation.⁷⁸

The Intergovernmental Panel on Climate Change, in its fourth Assessment Report defined Climate change as:

“a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and or the variability of its properties and that persists for an extended period, typically decades or longer. It refers to any change in the climate overtime whether due to natural variability or as result of human activity”⁷⁹

The IPCC has shown that this change which occurred over an extended period of time (residency time of GHGs in the atmosphere) could be linked to natural factors, such as earthquakes, cyclone, radiation forcing and or man-made actions. Such deployment of fossil fuels (anthropogenic greenhouse gas concentration) since the mid-20th century has contributed to the emission of greenhouse gases of carbon dioxide, methane, nitrous oxide, hexa fluorocarbon, perfluro carbon and sulphur hexafluro carbon into

⁷⁰ UNFCCC (1992)

⁷¹ P. Birnie and A Boyle , *Basic Documents on International Law and the Environment* (Oxford University Press, New York 1995) 9

⁷² P Birnie and A Boyle , *Basic Documents* ,9.

⁷³ Mathew Paterson, *Global warming and global Politics* (Routledge ,London 1996) p11

⁷⁴ UN General Assembly Resolution 1990,Resolution 45/212)

⁷⁵ P .W Birnie and Alan Boyle, above n at page 9 on the declaration of the UN Conference on Environment and Development Rio de Janeiro 3-14 June 1992

⁷⁶ COP 16 <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2> where far reaching accord was reached particularly on a shared vision of long term cooperation ,anew enhanced action on adaptation and mitigation strategies

⁷⁷ Durbar Climate Change Conference held in Dumber South Africa between Nov- Dec 2011< http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php> accessed 12thmarch 2012

⁷⁸ ibid 73 on COP16

⁷⁹ Intergovernmental Panel on climate change 2007: Synthesis Report: An assessment of the Intergovernmental panel on Climate change ,Contribution of the working group 1,11and 111 to the fourth Assessment Report of the Intergovernmental Panel on Climate change (IPCC Cambridge University press, Cambridge, 2007)



the atmosphere. This then conduces into global warming, leaving several impacts and consequences, among which are the ultimate climate changes that the world is contending with today.⁸⁰

Under the United Nations Conference on Environment and Development held in Rio in 1992,⁸¹ otherwise called the earth summit, the developing nations raised the concern that their developmental priorities and differentiated responsibilities be recognized in amore anthropocentric documents like a Treaty.⁸² The compromised reached between the developed and developing countries during the negotiations of the Treaty lead to the flexible approach contained in the UNFCCC⁸³.

Accordingly, principles 6 and 7 of the Rio Earth Summit captured the common but differentiated responsibilities for both the developed and developing nations. Thus, the idea of discriminatory practices subsequently seeped into the climate change regime.

For our purpose, Principle 7 of the Rio Declaration is very apposite and it says:

“...In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and the technologies and financial resources they command...”⁸⁴

Climate change is seen as one of the greatest challenges facing mankind and threatening societies, damaging properties and harming lives in entire globe.⁸⁵ Addressing climate change requires both precautionary actions not only because of the uncertainties of climate science but due to magnitude of the risks. Therefore, in the light of the Rio declaration, developed countries must take the lead while all other countries must participate because of its global nature.⁸⁶

According to the IPCC:⁸⁷

Warming of the climate system is unequivocal, as is seen now evident from observations of increases in global average air and ocean temperatures, wide spread melting of the snow, and ice and rising average seal level”⁸⁸.

This observed changes and impacts, according to the IPCC will continue for many centuries due to time scale associated with climate feedbacks, even if GHGs were to stabilize. The report emphasised the

⁸⁰ IPCC 2007, Impacts and consequences.

⁸¹ United Nations Conference on Environment and Development, June 3-14 1992, Rio Declaration on Environment and development , Principle 7 Un Doc .A /CONF.151/26(August 12 1992)

⁸² P Birnie and A.Boyle ,*Basic documents*. 9

⁸³ Kyoto protocol Art 3(6)

⁸⁴ UN General Assembly resolution 44/228 (1989) and UN Report on Environment and Development UN Doc. A CONF.151/26/Rev.1. VOLS 1-111 19920. See also, Patricia Birnie and Alan Boyle , *Basic Documents* PP 9-14 on the Treaty

⁸⁵ Ian Goldin, “Global shocks, Global solutions: meeting 21st century Challenges “ in David Held et al , *The Governance of Climate change ,Science ,economic ,Politics and Ethics* (Polity press Uk,2011)p 49 at 65

⁸⁶ World Bank world Development Report, Conceptual note : Development in a changing Climate (World Bank, Washington D.C 2010)P.1

⁸⁷ Intergovernmental panel on climate change is a group of scientific body set up by the World metrological society, and United Nation Environmental Agency in 1988 to study, evaluate and report about the science and implication of climate change to humanity. It has issued five assessment reports of the climate change in 1990, 1995, 2001,2005 and 2007. The 2007 fourth Assessment report synthesises all the previous IPCC findings on climate change

⁸⁸ IPCC (Inter government Panel on climate change 2007), *Climate change 2007: Synthesis Report: An Assessment of the Intergovernmental panel on climate change* (IPCC 2007) Para 1.1

impacts of climate change on ecosystems, food security, coastal environment, industry, settlements and society, health systems and water resources. The impact is monumental cross –cutting, many national regional boundaries.⁸⁹

As energy use and deployment were seen as mainly responsible for the previous concentration of greenhouse gases, this was exacerbated by the developed country's style of development.⁹⁰ The main issues confronting the global community were thus: how to mitigate the impacts of climate change and adapt to its threatening consequences and how to allocate the "cause and effect" of climate change by distributing the burden and costs of mitigating equitably.⁹¹ This paper is mainly concerned with the later which is the allocation and distribution of cause and burden. Some developed nations have happily acknowledged much of the impacts of their development on the ecosystem and are willing to take the lead to mitigate its impact on the rest of the continent, while some are still adamant and making moves to stall every global effort to secure lasting commitment to set target for the reduction of climate change and its global impacts.⁹²

Part Four: The Objective of the UNFCCC.

The main objective of the United Nations Framework Convention is "to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate systems."⁹³ In order to achieve this objective of the Convention, Article 3(1) and 4 and the Kyoto Protocol under Article 10, reinforced the Rio principle of "common but differentiated responsibilities" and respective capabilities of parties as basis to protecting the earth climate system for the present and future generation. What this means is that developed countries should take the lead in combating climate change and that developing countries, should be given full cooperation and assistance by developed countries to live a carbon free life.⁹⁴ While the UNFCCC did not extract binding commitments from the developed countries, Article 4(2) required them to adopt national policies and take corresponding measures by limiting greenhouse gases. However, its Kyoto protocol created⁹⁵ a binding commitment under Art 3 requiring the developed annex A countries to reduce their qualified emission limitation and reduction commitment set out in annex B by at least 5% below their 1990 levels between 2008 -2012 being the first commitment period. This must be verified by the expert review of the subsidiary body for scientific and technological advice.⁹⁶

Similarly, Article 12 (a) (b) and (c) of the UNFCCC required them to submit national inventory of greenhouse gasses by source and removal by sink. Even at that, the discharge of any obligation under the convention by developing countries shall be fully borne by the developed countries pursuant to

⁸⁹ IPCC 2007

⁹⁰ Ian Goldin, 'Global shocks, Global solutions: meeting 21st century Challenges' in David Held et al, *The Governance of Climate change*, Science, economic, Politics and Ethics (Polity press UK, 2011) pp 66 and 67

⁹¹ M. Schalkwijk, 'The challenge of Climate Change in Developing country' in Felix Dodd et al page 8;

Mark Jaccard, John Nyeboer, Bryn Sadowinik (eds.), *The Cost of Climate change* (UBC Press –Vancouver –Toronto 2002) pp 25 and 199.

⁹² The EU has pledged to reduce emissions by 20% of their 1990 levels and by 30% by 2020, if other developed nations show seriousness. For the EU's giant strides, see EU, *Combating Climate Change: the EU leads the way* (European Commission 2007) 5, 10. While the general target for Annex one countries was 5.2% under Kyoto protocol first commitment Period, the EU sets a target of 8% GHGs reduction by 2012. Also available at < ec.europa.eu/publications > 12th march 2012

⁹³ UNFCCC art 2

⁹⁴ UNFCCC art 3(2)

⁹⁵ Kyoto Protocol to the United Nations Framework Convention on Climate change, Kyoto, 10th December 1997, in force 16th February 2005, 37 International legal materials (1998), at pp 22 ff

⁹⁶ Art 8 of the Kyoto Protocol.



Article 4(3).⁹⁷ This incorporates capability principle upon which the common but differentiated responsibility approach was based. The level of cooperation includes the provisions of adequate finances, transfer of technology and appropriate information to meet the agreed incremental costs of implementing measures under Art 1 of the convention and subsequent agreement between the developing countries and the international organizations.

While the UNFCCC was largely seen as voluntary measure by the parties, the Kyoto protocol was rather seen as introducing some stiffer commitments on the part of the developed countries. There was no similar commitment for developing or small Island states under the protocol hence states like USA argued that it was unfair and undemocratic to exclude chief emitters of GHGs like China and India, with growing GHGs trajectory from the Kyoto commitment even though they are part of developing nations.⁹⁸

The Kyoto Protocol was also noted to have introduced three flexible mechanisms to enable the developed countries achieve their targets under the protocol. These are: the Joint Implementation Program between and among annex A countries⁹⁹, the Emission Trading Scheme which established¹⁰⁰ the cap and trade scheme between Annex A countries; and the Clean Development Mechanism between Annex A countries and developing countries.¹⁰¹ This paper also argues that the Joint implementation program and Emission Trading schemes have the same design in line with the common but differentiated responsibility principle because they encourage countries with low certified emission scenarios to purchase credit from countries with higher emissions and trading between and among low carbon countries and higher carbon countries within Annex A under the Protocol.¹⁰² This is because nations with low emissions or higher savings of GHGs could assist other developed nations among and between annex A countries, with higher emissions in reducing their aggregate emissions under the Protocol.

The UNFCCC also introduced different categories of countries in Art 4 (7) such as Small Island countries, land locked and transition countries, in addition to existing demarcation of developed, developing, least developed economies.¹⁰³ This categorization also appears discriminatory as all states are equal by virtue of their attaining statehood status under the UN.¹⁰⁴ Before the UNFCCC and its Kyoto Protocol,¹⁰⁵ the United Nation agencies had adopted discriminatory practices, particularly with respect

⁹⁷ Art 10 of the Kyoto Protocol does not give any new commitment to parties not included in annex one but reaffirms existing commitment under in Art 4 Para. 1 of the UNFCCC.

⁹⁸ D Bushey, U. C. Berkeley, S. Jinnah, 'Evolving Responsibility; the Principle of Common but differentiated Responsibility in the UNFCCC' (2010) 6 Berkeley J International Publicist 2-3.

⁹⁹ Kyoto Protocol Art 6.

¹⁰⁰ Id, at Art 17.

¹⁰¹ Id Art 12.

¹⁰² Art 6 and Art 17 of the Protocol.

¹⁰³ Id Art .3(6) Douglas Bushey and U. C. Berkely, S. Jinnah, 'Evolving Responsibility? The Principle of Common but differentiated responsibility in the UNFCCC' (2010) 6 Berkeley J International Publicist 2, Odile Blanchard James Perkaus, 'Does the Bush Administration's Climate Policy Mean Climate Protection? (2004)32 Energy Policy 1994.

¹⁰⁴ UN Art. 3, 4, 5, 6.

¹⁰⁵ See Article 4 of the Kyoto protocol <<http://unfccc.int/resource/docs/convkp/kpen.pdf>> accessed 2/2/2100

to trans boundary air pollution control,¹⁰⁶ reduction on substance that depletes Ozone layer,¹⁰⁷ and prevention of dumping of hazardous waste.¹⁰⁸

Therefore, in justifying the deployment of discriminatory practices by the UNFCCC the paper shall deal with two issues: the issue of acknowledgment of responsibility of causal factors of GHG emission by the developed countries and imposition of responsibility by the UNFCCC and Kyoto Protocol on developed countries. The paper argues that having accepted responsibility voluntarily, there is no need to accuse the United Nation Agency of discriminatory practices in the manner the burden sharing was allocated for the mitigation of climate change to annex 1 countries, as alleged by the USA, in failing to endorse the Kyoto protocol.¹⁰⁹

The rule *is volenti non fit in iuria* meaning, he who has volunteered to suffer damage should not complain of harm. In this case, he who has justifiably accepted past mistakes should not be heard to complain about taking steps or risk of embarking on remedy to ameliorate his past mistakes.¹¹⁰ Thanks to European Union and some developed countries that are championing the resolution of the many climate change risks and impacts both within their developed regions and beyond.¹¹¹ Having said this, the next issue for consideration is whether the UN and its agency -UNFCC is justified in retaining the principle of common but differentiated responsibility in the UNFCC and its Kyoto protocol? The following consideration as manifest from tone of the treaty was the major consideration in arriving at burden sharing approach?

Part Five: Justification and Bases for the adoption of the Common but Differentiated Responsibility Principle by the UNFCC.

The word “common” supposedly implied the common problem affecting mankind developed or developing - that is, climate change risks. Nevertheless, the fact that some nations were responsible for the historical per capita emission of carbon in the atmosphere for the past 200years, lend itself to the justification for a burden sharing approach to mitigate the common global problem.¹¹² The United Nations Framework Convention on Climate Change therefore considered, under article 3 (1), the following grounds in the climate change architecture and under Art 4 (2) it stressed the industrialized world to take the lead having regard to their means and the fact that polluter must pay for polluting the

¹⁰⁶ Convention on long range Tran boundary Air Pollution , 1979 and the 1994 protocol Art 2 (5) entered into force on the 16th march 1983 ratified 1 January 1995 see also 75 A J IL (1981) 975

¹⁰⁷ Convention for the protection of the Ozone layer , Vienna,22march1985,an the protocol on substance that depletes Ozone layer 1987, 26 ILM(1987)1529, Article, 2,(` means at their disposal)` , Article 4(needs of developing countries.)

¹⁰⁸ Convention On the control of Tran boundary Movement of Hazardous waste and their Disposal 1989 entered into force 5th may 1992 , see 28 ILM 1989)657,19EPL (1989)68

¹⁰⁹ David Freestone and Charlotte streck, Legal Aspects of Implementing the Kyoto protocol mechanism: Making Kyoto Work (OUP 2008)9,19,163 about the mistrust between annex one and non annex one countries and USA position

¹¹⁰ Ian H Rowland's “ Classical Theories of International Relations” in Urs Luterbacher and DetLef F sprinz , International Relations and global climate change, at page 76 where he captured the Us interest and policy of climate change being determined by its position as the world largest producers of coal oil, gas yet and yet importer of, these greenhouse emitting resources.

¹¹¹ 2002/358/EC Council Decision of 25 April2002 concerning the approval ,on behalf of European Community, of the Kyoto Protocol to the united Nations Frame work convention on climate change and the joint fulfilment of commitment there under official journal L 130,15/o5/2002 P.1 001-0003; 2005/166/EC Commission Decision of 10 February 2005 laying down rules implementing Decision No 280/2004/EC of the European parliament and the council concerning mechanisms for monitoring community green house gas emission and for implementing the Kyoto protocol official Journal L 055,01/03/2005P.0057-0091,official journal L319,29/1/11/2008 P..0152-0186

¹¹² Mathew Paterson ,Global warming and global Politics (Routledge ,London 1996)p11

environment as well¹¹³ Similarly the Kyoto protocol also set different targets for annex 1 and annex 2 countries without any for developing and transition countries¹¹⁴

These are (1) equity¹¹⁵ (2) historical ground (3) financial capability, need and technological advancement¹¹⁶ (4) sustainable development oriented consideration¹¹⁷ (5) The need for the prevention of common problem of global concern and for Joint cooperation.¹¹⁸ There is also consideration of egalitarian principle which implies common right to space and absorptive capacity of the environment to all nations on equal basis.¹¹⁹ These factors featured prominently in what some authors regard as politics behind the negotiation conflict, which basically polarised between USA and the rest of the world on one hand and the rich north and the poor south on the other hand.¹²⁰ How did these consideration play out?

1) Equity: The UNFCCC considered the need for fairness to developing countries, as it would be unfair to allow developing countries to share any much burden than was necessary considering their little or no contribution to the past emissions of greenhouse gases, largely believed to be caused by the developed countries' style of development. However, the equity considered here goes beyond equity between rich north and the south but equity between the present generation and future generation.¹²¹

This fairness goes with the allocation of responsibility of mitigation to annex I countries (developed countries) under the Kyoto protocol. Consequently, countries like the USA did not see any reason to exclude China and India, other growing emitters of greenhouse gases from this burden sharing¹²². It was alleged during the Copenhagen Conference of the parties (COP 15), that the emission of greenhouse gases in developing countries are equally growing hence the developing countries should be given targets and commitments like the developed annex 1 countries under the Kyoto protocol to reduce greenhouse gases. Thus the reliance on the UNFCCC equitable ground was challenged.¹²³

However, this paper contends that considering that the past emission from developed countries led to the accumulation of GHGs that affected the global warming of today, there is nothing wrong in being fair to the developing countries in the manner they were excused from the initial target given to developed countries to reduce emission to their 1990 levels at 5.2% between 2008-2012.¹²⁴

¹¹³ UNFCCC art 4(2)

¹¹⁴ Art 2(4) 3 and 4 of the Kyoto Protocol

¹¹⁵ UNFCCC, Principal text and preamble.

¹¹⁶ UNFCCC Art 4(g) 4(3)(7)

¹¹⁷ Kyoto protocol Art 2, and 10, principle 1, 4, of UNFCCC

¹¹⁸ Id. Art 3(14)

¹¹⁹ F Soltau, *Fairness in International Climate change Law and Policy* (Cambridge University Press 2009) chapter 4 at 153

¹²⁰ Matthew Paterson, *Global warming and Global Politics* (Routledge London 1996) P 72 at 77 where the hostile position of USA was shown through the statement credited to George Bush the then president of the USA when he said "we cannot permit the extreme in the environmental movement to shut down the United States. We cannot shut down the lives of many American by going extreme on environment" as published in the (Guardian 1 June 1992)

¹²¹ UNFCCC Art 3 (1)

¹²² Douglas Bushey and U C Berkely, S Jinnah, *Evolving Responsibility? The Principle of Common but differentiated responsibility in the UNFCCC* (2010) 6 Berkeley J International Publicist 5

¹²³ Kelly McManus, 'The Principle of Common but differentiated responsibility and the UNFCCC' (Climate special feature 2009) chapter four. < available at www.climatecoanalysis.org> accessed 25/5/2011

¹²⁴ F Soltau Chapter 4 pp 156 -157. This is considered both on moral grounds and ethics



2) Historical responsibility: The UNFCCC also considered from its preamble the fact that though climate change is a global issue that requires global solution, ethically, states have different responsibility for dealing with it based on their historical contribution and special capability to address the problem. It was on account of the historical responsibility and equity that the discriminatory burden sharing measures were incorporated into the UNFCCC framework and the protocol. This got the overwhelming support of the developing countries during the negotiations of the framework.¹²⁵ The position of the oil Producing Exporting Countries (OPEC) captures the reality of the case of the developing countries. OPEC members have demanded for reparation and compensation for participating in the Kyoto Protocol's emission reduction scheme on grounds of losses its members would suffer arising from GHGs emission concentration largely caused by consumer of their OPEC's Oils from the developed countries.¹²⁶ This paper thus contends that there was nothing wrong for the UNFCCC to rely on historical principles in arriving at cost allocation and in the subsequent design of the climate change targets.

3) Financial Capability: The magnitude of capital, technology and knowledge required to address certain global environmental issues such as climate change mitigation cost can only be amassed by the UN and its Agencies through the developed countries. For instance, World Bank and IMF are example of multilateral banks at the disposal of the UN to address the financial and technical implication of certain global environmental problems.¹²⁷ The developed countries have more access to these multilateral banks than the developing countries. Most regional and national banks may lack transparency, objectivity in advancing finances to address global environmental problems. The need therefore to incorporate the south who felt indifferent about climate change risks, its mitigation and who are equally more concerned with their domestic poverty issues, led to the inclusion of financial capability consideration by the UNFCCC in the design of the climate change regime. This includes clauses relating to the raising of Climate fund¹²⁸ such Special Climate Change fund, strategic climate change fund, least Developed Countries Funds and those operated under General Environmental facility (GEF) together with technology transfer from the north to help the developing countries in addressing the global problem which the south perceived as purely a developed country's concern. These funds would help the developing countries in preparing national adaptation plans and in mitigating the impacts of climate change. Its main target is to get the developing and transition countries to be engaged in further negotiations regarding the resolution of climate change problem.

In fact the Alliance for small Island states (AOSIS) and many from the south Sahara Africa, during the negotiations, called for a climate change convention that addresses the cost, impacts and mitigation ways as they specially affect them.¹²⁹ Some members of this group stood the risk of extinction due to sea level rise, flooding and ocean surge, if nothing drastic was done to ameliorate the impacts of global

¹²⁵ Id at page 75, where he argues that the original submission by the south was watered down by superior argument of the rich north.; see also art 3(1)UNFCCC

¹²⁶ J Barnett S. Dessai, M Webber, 'Will OPEC Lose from the Kyoto Protocol?' (2004) 32 Energy Policy 2077 at 2079

¹²⁷ Nicholas Stern, "Changing Economics" In Felix Dodd et al (eds.) *Climate change and Energy Insecurity :the challenge of peace ., security and Development* (Eartscan, Uk 2009) P80 at 82 where he stated that the cost of inaction to mitigate climate change will cost globally 20% of the annual GDP consumption but if actions are taken it will only cost the global community only 1-2% of the annul global consumption per GDP

¹²⁸ F. Soltau chapter 5 at pages 214-215

¹²⁹ Id at page 85



warming on these countries that lack financial and technological resilience.¹³⁰ Therefore, there is justification requiring the developed countries to assist these developing countries in finance, technology, education; research and development for them to be able to similarly respond to climate change risks.¹³¹

4) On Sustainable Development: This is a point of convergence between the south and the north which the UNFCCC incorporated. It was recognised that the present way of development was unsustainable and that there was the need for economic growth to balance with environmental growth and development both in the interest of the present and future generation.¹³² A safe and sustainable energy system was thus suggested and shift from high carbon intensity sources to cleaner technologies like renewable were tinkered as possible less carbon pathways.¹³³

However, the ability of the poor south to engage meaning fully in this transition without the cooperation of the rich north in terms of technology transfer and aid is suspect, hence the inclusion of Green Climate fund of \$30 billion for mitigation and adaption by 2010-2012 and \$100 a year by 2020 for developing countries as part of the Cancun accord.¹³⁴ Again, in the interest of developing countries, it was stressed that climate change mitigation should not stifle economic growth effort in developing countries nor should any of the mitigating measures constitute a trade restriction or any measure aimed at attaining sustainable development goals in any other country partially, in these developing countries.¹³⁵ Therefore, the need for sustainable development for both developed and developing countries is one faire justification for the adoption of common but differentiated responsibilities under the UNFCCC¹³⁶

5) Joint Cooperation for a Common Problem.

It has been acknowledging that most environmental risks are global and beyond the carrying capacity of one nation or region.¹³⁷ Natural disasters are more prone in certain regions than others. It is contended that tsunami, earthquake, landslide cyclone impacts are sometimes beyond the capability of certain nations to handle because of their magnitude, repeated occurrence and financial cost¹³⁸.

These issues are exacerbated by climate change. Issues such as refugee, immigration and disaster responses flowing from natural disasters are better monitored efficiently under the auspices of the UN Climate change frame work. Issues Global issues like ozone depletion, Trans boundary air pollution and even biodiversity depletions are issues of common concern that can spin of global security problems¹³⁹. It was on account of this that in 2007, under the auspices of its Security Council,¹⁴⁰ climate

¹³⁰ IPCC (Intergovernmental panel on climate change climate change 2007) climate change 2007: Fourth Assessment Report of the intergovernmental panel on climate change (Cambridge University Press, Cambridge UK 2007)

¹³¹ World Bank world Development Report. 2010

¹³² ED Mill band, The politics of climate change in David Held Et a (eds) page 199

¹³³ World Commission on Environment and Development : Our Common Future (OUP 1987)pp8,14

¹³⁴ Fund

¹³⁵ Art 3 (4) and(5)UNFCCC.

¹³⁶ World Commission on Environment and Development(WCED) Our common future (OUP 1987)8-9

¹³⁷ Urs Luterbacherand Detlef F Sprinz , problem of global environmental Cooperation in Urs Luterbacher and Detlef F sprinz , International Relations and global climate change (MIT Press Cambridge, London2001) page 9 where they stressed the need for international cooperation in overcoming climate change risks

¹³⁸ WCED, chapter 10 pages 261-286

¹³⁹ WCED, chapter 12 on proposal for common action .pages 308-312

¹⁴⁰Chris Spence, Who Decides? .The role of the United nations and Security Council in addressing Climate change in Felix Dodd Climate change And Energy Insecurity : the challenge for peace , security and Development (earth scan London 2009) P170

change risks were considered among other security risks which made the Security Council to intervene under the leadership of the then British Secretary of States ,Margaret Becky ¹⁴¹

Although, the Security Council was criticised for taken this role regarded by G77 countries as undemocratic there was the clear understanding and signal that climate change posses both environmental and security risks.¹⁴² In order to address the common problem of climate change risks, the need for both the developed and developing countries to act together and to act now despite the uncertainty surrounding the climate change science thus became paramount within the UNFCC framework.¹⁴³ In fact, such uncertainty should not be aground for any inaction or failure to act or to cooperate.¹⁴⁴ Where such uncertainty exists, the absence of credible evidence is not an excuse for inaction.¹⁴⁵ In most developing countries where the science of climate change is unclear and not yet developed and the technology to address the risks is absence, the need for the developed countries to corporate in this regard becomes very pivotal for inclusion in the framework. ¹⁴⁶ In order therefore to have a trade off between the need to meaningfully engage the poor south in mitigating a “so called global problem” not caused by them gave impetus to the inclusion of issues as climate fund, technology transfer, research and development from developed countries to developing countries including access to information clean development mechanisms (CDM) into the convention and its subsequent protocol.

The Kyoto Protocol was more explicit in introducing Joint Implementation between the developed countries and CDM between developed countries and developing countries.¹⁴⁷ It was also noted that the challenge posed by climate change risk requires colossal costs which cannot be provided by one country or region alone; hence the need for a collaborative efforts.¹⁴⁸

The whole issues therefore surrounding climate change is also sauced with uncertainty and complexity, although now somewhat clear by the IPCC Fourth Assessment Report 2007. The need to convince the poor nations to join the climate change mitigation boat for the benefit of the present and future generation in place of poverty eradication measures in theses sates becomes very apposite.¹⁴⁹ The poor south, though would be more vulnerable, given their incapacity to mitigate or adapt to the climate risk, the distribution of responsibilities was thus appropriate by the UNFCC and its subsequent protocol¹⁵⁰ This paper contends that more than these considerations were the need for a consensus building among the global community in the resolution of global climate change risks.¹⁵¹

¹⁴¹ Andrew Higman , Creating a Climate of Security : The Latest Science and Acceptable risk in Felix Dodd Et al (eds.) page 61 at page64 regarded as extreme climate events by the author.

¹⁴² Chris Spence: who decides ,

¹⁴³ UNFCC preamble/text; WCED 46 on equity and common interest

¹⁴⁴ Art

¹⁴⁵ UNFCC Art 4, Art 10 of the Kyoto Protocol

¹⁴⁶ David Held Et al at page 7 why climate change is such difficult problem to resolve?

¹⁴⁷ F Soltau, 133-162, WCED page 308-309

¹⁴⁸ Nicholas Stern; Changing Economics in Felix Dodd Climate Change and Energy Insecurity: the challenge for peace Security and development (Earth scan London 2009) P81. where the Author stressed about strong leadership by the developing countries in the tackling of climate change issues. Perhaps this may be a show of strong leadership.

¹⁴⁹ Poverty and the parties in Kyoto

¹⁵⁰ Art 2 and 11 of the Kyoto protocol

¹⁵¹ F. soltau ,page 162-1



6) Common Approach for Multifaceted Problem of Common Concern

International Environmental law, rights duties and general obligations as emerging novel area are better drafted by the UN and its agencies that are more knowledgeable and have qualified personnel and experience in climate change legal mechanism and architecture. The various multilateral, bilateral treaties, conventions, protocols, agreement, reports and guidance notes are better handled from the apex UN bodies to command compliance and general acceptance. They must be of general application by majority of nations and adopted by ratifying states within before they become a Treaty or customary International laws. Some have the force of law while others are mere directives. Soft laws are mere declaratory and are not binding on states. Generally therefore compliance is made possible by an unbiased UN organization or agency like the UNFCCC.¹⁵²

In order to appear fair to all concern, discriminatory clauses for developed and developing countries within their special respective capacities were built into the system. This paper contends that there is nothing wrong for the UN and its Agencies in adopting this approach in the case of climate change frame work.

7) Legal Novelty and Originality Consideration. Certain technologies and market-based instruments and mechanisms for addressing international environmental issues like climate change, Low carbon technology and alternative energy are better handled at the level of the UN and its agencies. Mechanisms' such as the emissions reduction targets, Joint Implementation, Clean Development Mechanisms, emission trading are novel mechanisms for addressing common greenhouse abatement problems that need both advanced developed and developing countries to cooperate under the UNFCCC framework.

The developed countries are more equipped to handle this than the developing countries hence the need for international cooperation.¹⁵³ The UN sets the necessary targets and benchmark for regions, governments and other bodies to follow. Without the UN bench mark, it would be difficult for Nations to assess their performance under the various multilateral, bilateral conventions and protocols.¹⁵⁴ It was on account of this that the Bali road maps¹⁵⁵ was reached and Cancun accord.¹⁵⁶ These aim at implementing some of the decisions reached under the Kyoto Protocol particularly, the issues of climate fund, development aids, and technology transfer, adaptation and mitigation funds, reduction on emission from forest degradation and deforestation, other land use and land use change and forestry measures. This paper contends that these measures are all aimed at engaging the developing countries

¹⁵² P. Birnie and A Boyle, Basic Documents on International law and the Environment (OUP 1995) 9

¹⁵³ Ellen Wiegandt, "Climate change, Equity and international Negotiations "in Urs Luterbacher and Detlef Sprinz, *International relation and Global climate Change* (MIT Press ,Cambridge 2001) p127,at 137

¹⁵⁴ World Bank world Development Report Development in a changing Climate (world Bank Washington Dc 2010). Where global deal ,fiscal policies issues of low carbon technologies, energy efficiency , renewable energy , carbon capture and sequestration technologies are highlighted ,pointing out the need for action both from the developed and developing countries

¹⁵⁵ UNFCC 2007 Bali Action Plan (Decision 1/C/P13, document FCCC/CP/2007/61 add.1, <www.unfccc.int/resource/docs/2007/cop13/eng/o6a01.pdf> accessed 23/4/2011 where a more comprehensive agreement was reached for the implementation of the goal of the Kyoto Protocol. Unfortunately, most of the decisions reached such as technology and fund transfer sharing of best practices are yet to be implemented by developed nations.



in a special way within the design of the climate change architecture considering that these land use changes are more prevalent emission pathways in developing countries.¹⁵⁷

8) The Need for Effective Compliance and Enforcement of Agreements Reached.

The need for compliance and enforcement of any agreement reached by the conference of the parties under the UNFCCC is one of the justifications for the flexibility adopted by the UNFCCC in the climate change architecture. The ability of developing countries to comply with various agreements reached under the UNFCCC Framework could not be guaranteed given their primary consideration to poverty and the instability in most developing countries. Therefore Measuring, Reporting and Verification (MRV) of Nationally Appropriate Mitigation Actions (NAMAs) and standards of domestic actions taken by developing countries in mitigating climate change and verification of technological assistance of the developed countries to developing countries are made possible through an unbiased organ like the UN and her agencies in such a flexible manner, tailored to suit these developing countries.¹⁵⁸ On the part of the UN, there was the need to verify reports and ensure that standards and targets were met hence the flexibility approach adopted with respect to differentiated and burden sharing measures based on the respective capacities of parties to comply.¹⁵⁹

Part 6 Impacts of the UN, UNFCCC Discriminatory Practices on Climate Change Architecture.

The impacts on the climate change design have been both positive and negative. On the positive side, the fact of climate change risks being considered a global concern is no longer in doubt. The fact that all must participate whether developed developing or transition states has also been achieved under the current design of the regime based on flexibility. Climate change mitigation is now both seen as an opportunity and as challenge by the global community whether developed or developing¹⁶⁰. As Freestone and Streck put it, it has brought in originality and innovation in carbon trading and taught the world how to manage global climate risks, learning by doing even while the climate risks and legal mechanisms are yet uncertain.¹⁶¹ However compliance and enforcement of the targets have not been achieved under the current architecture.

This is due to the difficulties arising from target setting among and between countries members of the UNFCCC.¹⁶² Apart from some few EU countries, most rich nations are still foot dragging.¹⁶³ This is based on the fact that some developed countries believe that at the time of their development, they did not perceive their nature of development as wrongful.¹⁶⁴ The consequence of this development is that

¹⁵⁷ UNFCC REDD http://unfccc.int/methods_science/redd/items/4531.php

¹⁵⁸ Douglas Bushey et al (eds.) *Evolving Responsibility? The Principle of Common but differentiated Responsibility in the UNFCC* (2010)6 Berkeley J. International Publicist P. 1 at 7. The authors pointed out the contention on the level of MRV and application of Nationally Appropriate Mitigation Action between developed and developing countries. The developing countries felt that an international supervision of NAMA was another erosion of their sovereignty under the UNFCCC, hence the Copenhagen Accord struck compromise to request that only national mitigation actions that are funded by foreign finance should require international consultation by international monitoring, reporting and verification.

¹⁵⁹ UNFCCC Decisions adopted by COP 17 and CM7 in south Africa available at < http://unfccc.int/meetings/durban_now_2011/meeting/6245/php/view/decision.php> accessed 12/3/2012. The non implementation of Bali action plan up till COP 17, stresses the need for a UN monitoring reporting and evaluation of responsibilities under the frame work.

¹⁶⁰ James Cameron Climate change in Business in D Freestone and C Streck (ed) *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (OUP 2008) p25-32

¹⁶¹ D Freestone, C Streck, Summary and Outlook in legal Aspects of Implementing the Kyoto protocol Mechanisms: Making Kytoto work (OUP 2008) 538-542

¹⁶² See F Soltau, chapter 6 pages 229-231

¹⁶³ USA and Australia are example

¹⁶⁴ F. Soltau page 239



since 1990 First Assessment Report of the IPCC till its fourth Assessment Report in 2007, the threshold of global temperature has continue to rise with intense impacts.¹⁶⁵ In addition, up till 2012, there has not been agreed any legally binding framework or treaty based on fresh targets after the first commitment period ends by 2012.¹⁶⁶ Most developed countries have not complied with the Copenhagen accord 2009,¹⁶⁷ the Cancun agreements up till 2012,¹⁶⁸ yet this delay is not slowing down the impacts of climate change in most countries whether developed or developing.¹⁶⁹

The demands of most developed countries like the USA is that China and India must be brought within the scope of any commitment to be agreed upon before a binding Treaty could be reached. This paper contends that every country must be given commitment under the new climate change architecture whether developed on developing. This away no nation would feel cheated, neglected or indifference of the need to take steps both nationally and internationally.

The transition from a carbon constrained form of development by the industrialized economies to a low carbon and sustainable development is also challenging.¹⁷⁰ Similarly, grasping the new legal mechanisms by all the parties towards an efficient carbon trading is a huge task for emerging developing and transition economies

This would douse any concern of some developed countries concerning the growing emissions of GHGs in China and other developing countries wanting to meet up with economic growth. The benefit of this general but differentiated target would help to caution the developing countries to develop sustainably and help to warn the developed countries not to go back to their previous style of development.¹⁷¹ This would thus be a win- win for both developed and developing countries and catalyse easy transition to a legally binding Treaty, perhaps before the end of this decade. Climate change mitigations are both an opportunity and a challenge. If mitigation and adaptive measures are well implemented, they present greater opportunities for both businesses industries and nations in diverse ways but if ignored then the risk spreads to all whether the country is indifferent or not.¹⁷²

Part 7: Summary and Conclusion

This paper has been able to highlight the origin, goals and functions of the United Nations organization. The paper has also shown the fact that sovereign equality is the foundation of modern civil society, rule of law which were enshrined in the UN charter and covenants. However, the operations of these noblest ideas have some limitations as there is no absolute right anywhere. We have also see, in the case of climate change, evidence of its causal factors and its consequences that only an international cooperation anchored on the basis of mutual understanding, equity and trust among all nations, developed, developing, least developed and small Island states, would reduce the global consequences

¹⁶⁵ IPCC, Climate change 2007 Synthesis Report: An Assessment of the Intergovernmental Panel report on Climate change IPCC 2007) 30-32

¹⁶⁶ SPICe , the Information centre, SPICe Briefing CanCum:UN Climate Negotiations 10/87 (2010) , The Scottish Parliament available < www.scotish.parliament.uk>accessed 12/3/2012

¹⁶⁷ SPICe page 7

¹⁶⁸ *ibid*4-6

¹⁶⁹ IPCC 2007

¹⁷⁰ D freestone and C Streck, Summary and overview 538-539



of climate change by keeping the earth from warming above 2 degree Celsius.¹⁷³ Although, in various attempts to address global problems, anchored on these time honoured idea of sovereign equality and non discriminatory practices, the UN and its agencies had been accused of selective treatment even within its own family (General Assembly Vs security council) as in the case of UN security council's interference with the climate change issue in 2007 under the UK's presidency.¹⁷⁴ There are other instances pointed out in this paper on the UN interference in the domestic affairs of other nations in breach of its own principle of equality and sovereignty¹⁷⁵.

The case of climate change regime and the adoption of common but differentiated responsibility principle were also analysed. The criticism raised by USA against non inclusion of China and India in the target setting by the UNFCCC was also considered. This paper concludes that notwithstanding this criticisms, the UN and its agencies still remain the bastion of hope for the oppressed modern day societies in many ways: such as the maintenance of international peace and security, international friendly cooperation and stabilization of world economic order; and in addressing of common global problems and seeking for common solution.

This paper further concludes that in the case of climate change, the UNFCCC is justified by adopting discriminatory practices in addressing environmental concern given that most developing countries, least developed countries, small island states are preoccupied by issues of poverty, economic growth and political instability to pay any greater attention to climate change mitigation judging the costs of mitigations.

Again, some nations are obviously stronger, wealthier, more economically and technologically empowered than others that without allocating responsibilities in a differential manner, would obviously impact on the ability of less developed nations that feel indifferent about climate change problems, to join hands with developed countries to tackle its risk frontally. The criticism against the UNFCCC on its flexible approach is defeated relying on historical and equitable grounds of the cause of the present climate variability and warming which the developed countries were the main culprits and for which some have acknowledged responsibility by taken steps.¹⁷⁶

Again, global problems like climate change require global solution and if an equitable and fair approach in the nature "common but differentiated responsibility principle" were not adopted by the UN Agency, the ability of the developing and small island nations to comply with their supposed respective commitments under the protocol was suspect. The net result would be that the global risks would be shared only by developed countries parties to the UNFCCC if the developing countries are left out¹⁷⁷.

¹⁷³ IPCC(Intergovernmental Panel on climate change)Climate change 2007, Fourth Assessment Report of the Intergovernmental panel on climate change(Cambridge University Press, Cambridge UK)p173 -210

¹⁷⁴ Chris Spence, Who Decides? The role of the United nations and the security Council in Addressing Climate and energy insecurity In Felix Dodd et al (eds.)(at page 170at page 171 where he said that "the British wanted to address the security implication of a changing climate ,including through its impact on potential drivers of conflict such as access to energy ,water, food and other scarce resources, population movement and border disputes "

¹⁷⁶ EU 2020 20

¹⁷⁷ IPCC, First Assessment Report: Over View: preface to the IPCC overview (Scientific Assessment of Climate change (IPCC 1990) p57-59.



Further, this will compound the global collaborative effort to address such impacts as desertification, sea level rise and flooding, emission from forest changes and land use practices mainly from developing countries if developing countries are left out of negotiations. Finally, climate change problems are multifaceted and have multiplier effect on human settlement, agriculture, housing, industries, businesses etc and might lead to refugee and immigration problems which one side of the globe would not be able to contend with unless with the cooperation of both the developed and developing countries.¹⁷⁸ This paper argues that under the banner of the UN and its agencies, stronger Nations can pull the weaker nations along from both economic brink and waters by helping them to mitigate and develop adaptive mechanisms against the impacts of climate change. This can be by bilateral agreement for transfer of technology and by research and aids assistance as in the nature of bailouts or multilateral aids as enshrined already under the UNFCCC collaborative framework.

The paper in concludes that given the strategic role of the UN agencies and the global nature of climate risks, together with respective capabilities of nations under the global community, the UN agencies acted well to have adopted an equitable burden sharing formula called the common but differentiated responsibilities in addressing global climate problem. In doing so, the UN and its agencies should not be seen as practising what they do not preach that is, equality and non-discriminatory practices.

This position is fortified the more, given the slow pace of developmental aids, technology transfer flowing from developed countries to developing countries which were promised under the Bali action plan that would have enabled the developing countries to fulfil similar commitments under the protocol. This paper argues that an unbiased appraisal of the critical role of the UN and its Agencies¹⁷⁹ had justified the current practice on common but differentiated responsibilities principle. This paper supports this common but differentiated responsibilities but will add that both developed and developing countries be given targets under the new climate change architecture hopefully to be reached after 2012.

¹⁷⁹ Stuart Bell Et al (Eds.)Environmental law (7th Ed. OUP, ,New York 2008) P516 on the critical role of international law in sharpening air pollution