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Kiadó: Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola

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Felelős Kiadó: TÓTH J. ZOLTÁN

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HOW CLIMATE CHANGE AFFECTS PUBLIC INTERNATIONAL LAW

MUHANAD ALAMRO¹

ABSZTRAKT ■ Ez a tanulmány a klímaváltozás és a nemzetközi jog metszetét vizsgálja, különös tekintettel az emberi jogokra és a tengerjogi szabályozásra. Az emberi jogok összefüggésében megvizsgálja a klímaváltozás hatásait az élethez és az önrendelkezéshez való jogokra, valamint a tiszta környezethez való hozzáférésre vonatkozóan, kiemelve az egyre változó jogi környezetet és a nemzetközi emberi jogi mechanizmusokban történt legutóbbi fejleményeket. Ezen túlmenően mélyebben foglalkozik a klímaváltozás tengerjogi szempontjainak következményeivel, elemezve az UNCLOS kötelezettségeket, a nemzetközi törvényszékek szerepét, valamint a jogi keretrendszerek alkalmazhatóságát a klímaváltozással kapcsolatos kihívások kezelésében a tengeri kormányzás területén. Átfogó szakirodalmi áttekintés és esettanulmányok elemzése révén ez a tanulmány rávilágít a klímaváltozás komplexitásaira a nemzetközi jog területén, és hangsúlyozza a kollektív cselekvés fontosságát annak káros hatásainak enyhítése érdekében.

ABSTRACT ■ This study examines the intersection of climate change and international law, with a focus on human rights and the Law of the Sea. In the context of human rights, it explores the impacts of climate change on the rights to life, self-determination, and access to a clean environment, highlighting the evolving legal landscape and recent advancements in international human rights mechanisms. Furthermore, it delves into the implications of climate change for the Law of the Sea, analyzing UNCLOS obligations, the role of international tribunals, and the applicability of legal frameworks in addressing climate-related challenges in maritime governance. Through a comprehensive review of relevant literature and case studies, this study sheds light on the complexities of climate change within the realm of international law and underscores the importance of collective action to mitigate its adverse effects.

KULCSSZAVAK: klímaváltozás, emberi jogok, nemzetközi jog, nemzetközi környezetjog, tengeri nemzetközi jog, nemzetközi törvényszékek

¹ PhD student, Doctoral School of Law and Political Sciences, Károli Gáspár University of the Reformed Church in Hungary.

1. INTRODUCTION

Climate change and international law are intricately linked, as the detrimental consequences of climate change threaten the enjoyment of various human rights globally. International law plays a crucial role in addressing climate change through treaties, agreements, and conventions aimed at mitigating greenhouse gas emissions, adapting to climate impacts, and promoting sustainable development.

The escalating adverse effects of climate change have prompted a scholarly inquiry into the capacity of international human rights mechanisms to afford adequate protection to those rights imperiled by climate change. Thus, international tribunals have highlighted on a strong connection between the obligations of States under international environmental law and the rights potentially affected by climate change².

As climate change continues to affect the planet, it has significant implications for the oceans and the legal frameworks governing them. Rising sea levels, ocean acidification, and changes in marine biodiversity are just some of the consequences of climate change impacting the seas. Therefore, as climate change increasingly affects the marine environment, the international law of the sea becomes ever more relevant in promoting sustainable ocean governance and addressing the challenges posed by climate change.

2. CLIMATE CHANGE AND INTERNATIONAL HUMAN RIGHTS LAW

The United Nations Framework Convention on Climate Change (UNFCCC) defines “climate change” to mean a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.³

² See, European Court of Human Rights (ECtHR) Judgment in the (Cordella case), it held that Italy had failed to fulfil its obligations under Directive 2008/1 EC of the European Parliament and of the Council concerning integrated pollution prevention and control. In the context of an infringement procedure against Italy, opened on 16 October 2014, the European Commission issued a reasoned opinion asking the Italian authorities to remedy the serious pollution problems observed. It noted that Italy had failed to fulfil its obligations to guarantee that the steelworks complied with the Industrial Emissions Directive ECtHR, *Cordella and Others v Italy*, App no 54514/13 and 54264/15 (ECtHR, 24 January 2019).

³ UN General Assembly, United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.

This study aims to systematically examine the specific human rights most significantly affected by climate change, including but not limited to the right to life, the right to self-determination, and the right to access a clean, healthy, and sustainable environment.

2.1. Right to life

The right to life is considered as the most importantly basic right which has been affirmed by nearly all major human rights instruments. According to the article 3 of Universal Declaration of Human Rights “*everyone has the right to life, liberty and security of person*”, and also article 6 of the International Covenant on Civil and Political Rights states that: “*every human being has the inherent right to life*”.⁴

Although all States are committed to fulfil the right to life, Climate change clearly poses a threat to human life.⁵ A recent report by the World Bank affirms this risk, finding that “*further health impacts of climate change could include injuries and deaths due to extreme weather events*”.⁶

The UN Human Rights Council (UNHRC) in 2008 expressed its concern that climate change is a direct and long-term threat to individuals and communities, with consequences for the full enjoyment of human rights.⁷

It is unequivocal that extreme weather events may be the most visible and most threat to the enjoyment of the right to life but they are by no means the only one. Climate change kills through drought, increased heat, expanding disease vectors and a myriad of other ways.

Notably, the International Court of Justice (ICJ) has revealed in *Gabčíkovo Nagymaros* case, that “*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*”.⁸

⁴ The United Nations Human Rights Committee describes the protection of life as a prerequisite for the enjoyment of all other human rights. See: Human Rights Committee :General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc CCPR/C/GC/36 (30 October 2018) (General Comment No. 36) para 3.

⁵ 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, 27 November 2015.

⁶ The World Bank:International Bank for Reconstruction and Development, turn down the heat: why a 4°C warmer world must be avoided, a report for the World Bank by the Potsdam Institute for Climate Impact Research and Climate Analytics, November 2012.

⁷ UNHRC Res (28 March 2008) UN Doc A/HRC/7/23.

⁸ Reports of judgments, advisory opinions and orders case concerning the *Gabčíkovo Nagymaros* project (Hungary Slovakia) judgment of 25 September 1997.

The European Court of Human Rights, through its interpretation of Article 2 on the right to life and Article 8 on private and family life, have recognized that States should hold positive obligations to prevent environmental risks that may endanger the right to life⁹. It affirmed in the *Budayeva and Others v Russia* case that in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention (right to life) largely overlaps with those under Article 8 (right to private, family life). Consequently, the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.¹⁰

The inter-American Court of Human Rights in its advisory opinion on the environment and human rights stated that the American Convention on Human Rights demands from parties to comply with the obligations to respect and ensure the rights to life and personal integrity, in the context of environmental protection, therefore the court will examine the procedural obligations relating to environmental protection in order to establish and determine the State obligations to respect and to ensure the rights to life established in the American Convention.¹¹

Significantly, numerous national courts become more encouraged to protect the right to life in context to detrimental consequences of climate change, for example: on 20 December 2019 the Dutch highest court upheld the previous decisions in the 'Urgenda Climate Case,' a lawsuit originally brought by a Dutch environmental group Urgenda, on behalf of 886 citizens, against the Government. The court affirmed the lower courts' order requiring the Dutch Government to reduce greenhouse gas (GHG) emissions by a minimum of 25% by 2020 compared to 1990 levels, a target more ambitious than the one the Dutch State has under EU law (a 20% reduction by 2020 compared to 1990 levels). The court based its judgment on the UNFCCC and on the Dutch State's legal duties to protect the life and well-being of citizens in the Netherlands, in line with the European Convention on Human Rights (ECHR).¹²

⁹ See, *Öneryıldız v Turkey*, App no. 48939/99 (ECtHR, 30 November 2004); *Powell & Rayner v UK*, App no 9310/81 (ECtHR, 21 February 1990); *Hatton and Others v UK*, App no 36022/97 (ECtHR, 8 July 2003); *López Ostra v Spain*, App no 16798/90 (ECtHR, 9 December 1994).

¹⁰ *Budayeva and Others v Russia*, App no. 15339/02, 11673/02, 15343/02, 20058/02 and 21166/02 (ECtHR, 20 March 2008).

¹¹ Inter-American Court of Human Rights advisory opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*.

¹² For more see: BENOIT MAYER: *The Contribution of Urgenda to the Mitigation of Climate Change*. *Journal of Environmental Law*, 2/2023, 167–184.

2.2. Right to self-determination

In contrast to most human rights which are framed in individualistic terms, such as the right to life, self-determination is a collective right that enables groups to determine their political destiny and freely pursue their cultural, social, and economic development. The right to self-determination is well-defined in article 1 of the International Covenant on Civil and Political Rights (ICCPR)¹³.

Climate change undeniably is posing an immediate and continued threat for low-lying Oceanic states. Without adaptation, the most vulnerable islands are anticipated to be uninhabitable by mid-century.¹⁴

According to a recent report by a group of United Nations Special Rapporteurs, climate change impedes the ability of peoples in small island states to live their traditional territory continuously, and threatens their right to self-determination¹⁵. Therefore, there is an argument to consider the capacity of the right of self-determination to levy a duty on large emitting States to reduce their greenhouse gas emissions, thereby reducing the risks of climate-change-induced displacement for vulnerable peoples.¹⁶

The prospect of total flooding of a small island State also threatens the right to self-determination. In the case of the land being flooded, there is a significant risk of a new form ‘climate statelessness’¹⁷. Thus, those peoples might suffer deprivation of nationality without replacement by another nationality, they could have serious consequences in terms of preserving civil, political and

¹³ The article 1 of ICCPR states:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

¹⁴ See, CURT D. STORLAZZI et al.: Most Atolls Will Be Uninhabitable by the Mid21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding. *Science Advances*, 4/2018.

¹⁵ DEVANDAS AGUILAR et al.: The effects of climate change on the full enjoyment of human rights (OHCHR, 2015), 16.

¹⁶ AMY MAGUIRE – JEFFREY MCGEE: A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change. *Review of European Community and International Environmental Law*, 1/2017, 61.

¹⁷ See, ETIENNE PIGUET: Climatic Statelessness: Risk Assessment and Policy Options. *Population and Development Review*, 4/2019, 865–883.

socio-economic rights such as, for example, the right of entry, residence, return and diplomatic protection.¹⁸

In May 2019 a communication was submitted to the United Nations Human Rights Committee by Torres Strait Islanders against Australia. The Islanders claimed that as Australia failed to adapt to climate change by, inter alia, upgrading seawalls on the islands and reducing greenhouse gas emissions, they have experienced direct harmful consequences on their livelihood, their culture and traditional way of life¹⁹. The U.N. Human Rights Committee found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home²⁰.

The Committee also has asserted in the *Ioane Teitiota v. New Zealand* case that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the International Covenant on Civil and Political Rights. Hence, the risk of an entire country becoming submerged under water is such an extreme risk that the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.²¹

2.3. Right of access to a clean, healthy, and sustainable environment

In July 2022 the UN General Assembly declared that everyone has a right to a healthy environment is a significant development in the protection of environmental rights. It called on states to step up efforts to ensure their people have access to a clean, healthy and sustainable environment²². Where as in October 2021, the United Nations (UN) Human Rights Council adopted a resolution

¹⁸ See, LAURA VAN WAAS: The Intersection of International Refugee Law and International Statelessness Law. In: CATHRYN COSTELLO – MICHELLE FOSTER – JANE McADAM (eds.): *The Oxford Handbook of International Refugee Law*, OUP, 2021. 152-170.

¹⁹ Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee, CCPR/C/135/D/3624/2019, 22 September 2022.

²⁰ CCPR/C/135/D/3624/2019, para 8.

²¹ *Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, available at: <https://www.refworld.org/cases,HRC,5e26f7134>.

²² A/RES/76/300, information A/76/251 74b Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms. Human Rights Advancement, [New York]: UN, 26 July 2022.

recognizing ‘the right to a clean, healthy and sustainable environment’ as a ‘human right that is important for the enjoyment of human rights’.²³

This resolution could be a first step towards filling a significant gap in international law. Furthermore, although it is not legally binding, the resolution has the potential to prompt states to adopt similar measures at the national and regional levels²⁴. Additionally,, the right to a healthy environment contributes to improved implementation and enforcement of climate litigation, protects against gaps in climate laws, and creates opportunities for better access to climate justice.²⁵

The 1972 Stockholm Declaration on the human environment was the first international document to recognize the link between human rights and the environment²⁶.while the Paris Climate Agreement acknowledges in its preamble that states should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights.

Remarkably, the inter-American human rights system expressly mentioned the right to a healthy environment in article 11 of the Protocol of San Salvador, which says that everyone shall have the right to live in a healthy environment and to have access to basic public services. Besides, the States shall promote the protection, preservation, and improvement of the environment.²⁷

The Inter-American Court of Human Rights has demonstrated that according to the close connection between environmental protection, sustainable development and human rights, currently numerous human rights protection systems recognize the right to a healthy environment as a right in itself. It also reiterates that the human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. On the other hand, the right also has an individual dimension insofar as its breach may have a direct and an indirect

²³ Human Rights Council Resolution 48/13, UN Doc A/HRC/RES/48/13 (2021) at 1.

²⁴ ENGIN FIRAT: Rights-based litigation in tackling climate change. Can the ECtHR be effective in protecting human rights in the context of climate change? *Law & Justice Review*, 26/2023, 89–139. 112.

²⁵ PAU DE VILCHEZ ANNALISA SAVARESI: The Right to a Healthy Environment and Climate Litigation. A Game Changer. *Yearbook of International Environmental Law*, 1/2021, 3–19. 4.

²⁶ The principle 1 of declaration states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated”.

²⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), entered into force November 16, 1999.

impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity and life.²⁸

In the case *Earthlife Africa v Minister of Environmental Affairs*, a South African non-governmental organization (NGO) filed a judicial review request challenging the government's decision to issue a license to build a coal power station. The applicants raised concerns about the power station that would significantly contribute to climate change and affect the enjoyment of human rights. The High Court of South Africa upheld the applicants' request. The court justified its decision, among other reasons, by referring to the right to a healthy environment²⁹.

It seems that the recognition of the human right to a healthy environment is a step in the right direction to enhance the success of human rights-based climate litigation.

In conclusion, the recognition of the fundamental human rights implicated by climate change, including the rights to life, self-determination, and access to a clean environment, highlights the urgent need for collective action and legal frameworks to address this global challenge. Recent advancements, such as the acknowledgment of the right to a healthy environment by international bodies, underscore the growing consensus on the interdependence of human rights and environmental protection. Moving forward, it is imperative for governments and stakeholders to uphold their obligations under international law, implement effective measures to mitigate climate impacts and prioritize the well-being of vulnerable communities.

3. CLIMATE CHANGE AND THE LAW OF THE SEA

Climate change undeniably creates new challenges for the Law of the Sea, which then must adapt to tackle its impacts. COP 26 in Glasgow referred to the integration between the law of the sea and climate change. The formal outcome of COP 26 contains several references to the oceans. As a result, it becomes imperative to understand how legal frameworks, particularly the United Nations Convention on the Law of the Sea (UNCLOS), address and adapt to these challenges.

This study explores the intersection of climate change and the Law of the Sea, delving into UNCLOS obligations, implications for maritime boundaries, the role of international tribunals, and the application of the precautionary

²⁸ Inter-American Court of Human Rights advisory opinion OC-23/17, para 54.

²⁹ *Earthlife Africa v Minister of Environmental Affairs et al*, High Court of South Africa Gauteng Division, Pretoria, Judgment (6 March 2017), Case number: 65662/16, para 81.

principle. Through an examination of these key areas, with aim to shed light on the evolving legal landscape surrounding climate change and its impact on marine environments.

3.1 Obligations Under the United Nations Convention on the Law of the Sea (UNCLOS)

The United Nations Convention on the Law of the Sea (UNCLOS) provides that states have the obligation to protect and preserve the marine environment, and this general obligation is affected by climate change³⁰. Consequently, the violation of the obligation of protecting and preserving the marine environment could be invoked in terms of climate change under the dispute settlement mechanism provided for in Part XV of the UNCLOS³¹.

The maritime boundaries delimitation remains a primary focus of the international Law of the Sea and the UNCLOS, thus shifting baselines resulting from sea-level rise due to climate change will cause a modification of the marine spaces of some coastal and archipelagic States. That will undoubtedly introduce tension between States concerning the delimitation of national maritime boundaries, access to natural resources and navigation³².

The preamble of the Paris Agreement stated expressly the importance of ensuring the integrity of all ecosystems, including oceans and the protection of biodiversity. Although the primary does not bear binding value, it is important when it comes to interpreting the agreement positions besides the broader constellation of international legal frameworks and its relationship with other legal instruments.

Despite the fact that the UN Convention on the Law of the Sea UNCLOS is a comprehensive international legal instrument established to govern the oceans, it makes no explicit reference to climate change. Its preamble provides that its purpose is to create a legal order for the seas and oceans, which will facilitate international communication and will promote the peaceful uses of the seas and

³⁰ The article 192 of UNCLOS states: “States have the obligation to protect and preserve the marine Environment.”, also article 194/1 provides: “States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection”.

³¹ See, articles 279-299 of UNCLOS.

³² RANDALL S. ABATE: *Climate Change Impacts on Ocean and Coastal Law. U.S. and International Perspectives*. Oxford University Press, 2015. 256.

oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment.³³

However, article 192 of the convention forms a general obligation to protect and preserve the marine environment³⁴, and the International Tribunal for the Law of the Sea (ITLOS) has elaborated on the term of ‘marine environment’ in its Fisheries Advisory Opinion, where it found that this includes living resources and marine life. The statement further asserts the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment³⁵. Although Article 192 phrased in general terms, it has been considered well established that Article 192 does impose a duty on States Parties³⁶.

3.2. The role of International Tribunals

International tribunals, such as the International Tribunal for the Law of the Sea, interpret UNCLOS obligations, emphasizing due diligence in protecting the marine environment and preventing future damage.

In the South China Sea Arbitration, the Permanent Court of Arbitration discussed article 192 at length affirming that the general obligation enshrined therein is one of due diligence, which extends both to protection of the marine environment from future damage and preservation in the sense of maintaining or improving its present condition³⁷.

³³ UNCLOS, Preamble.

³⁴ Article 192 stated: “States have the obligation to protect and preserve the marine environment”.

³⁵ The Advisory Opinion of the International Tribunal for the Law of the Sea on the Request submitted to the Tribunal by the Sub-Regional Fisheries Commission on 2 April 2015. It is available on the Tribunal’s websites (<http://www.itlos.org> and <http://www.tidm.org>).

³⁶ Saint Vincent and the Grenadines v. Kingdom of Spain, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010. 58.

³⁷ Permanent Court of Arbitration (PCA) Case No. 2013-19, in the matter of the South China Sea arbitration, – before – an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea – between - the Republic of the Philippines – and – the People’s Republic of China, 12 July 2016.

At the outset, the Tribunal notes that the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. (same case law at g. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015, para. 120) Accordingly, questions of sovereignty are irrelevant to the application of Part XII of the Convention.

Remarkably, the court also reiterated that the content of the general obligation in Article 192 requires that States ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control³⁸.

The content of the general obligation in Article 192 is further explained in the subsequent provisions of Part XII, including Article 194, which concerns pollution of the marine environment, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention³⁹.

The International Tribunal for the Law of the Sea sheds light on the obligation of a flag State to ensure its fishing vessels not be involved in activities, which will undermine a flag State's responsibilities under the Convention in respect of the conservation of living resources and the obligation to protect and preserve the marine environment⁴⁰. Therefore, this case law can serve as a springboard to assert that the previous articles of the convention provide a foundation for establishing an obligation to combat climate change and its causes, which likely pose a serious threat to the marine environment.

On another occasion, the court illustrated that the expression 'to ensure' is often used in international legal instruments to refer to obligations. In regard to paragraph 2 of Article 194, it adds: "*States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment...*", in which this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".⁴¹

³⁸ See, the same principle in the international court of justice law case: Legality of the Threat of Use of nuclear weapons, Advisory Opinion, ICJ Reports 1996, 226,240-242, para. 29.

³⁹ Article 237, entitled *Obligations under other conventions on the protection and preservation of the marine environment, states: 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously, which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.*

2. Specific obligations assumed by States under special conventions with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention."

⁴⁰ See, Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280, at 295, para. 70; Pulp Mills on the River Uruguay (Argentina v. Uruguay), the International Court of Justice Judgment, ICJ Reports 2010, 14, at 79, para. 197.

⁴¹ Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011, ITLOS Reports 2011.

The Permanent Court of Arbitration rejected the argument that Part XII of the Convention (relating to the protection and preservation of the marine environment) are limited to measures aimed at controlling marine pollution. In the Tribunal's view, Article 194 is accordingly not restricted to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems⁴².

Moreover, in the South China Sea Arbitration, it is affirmed that paragraph 5 of Article 194 covers all measures under Part XII of the Convention (whether taken by States or those acting under their jurisdiction and control) that are necessary to protect and preserve "rare or fragile ecosystems" as well as the habitats of endangered species.

3.3. UNCLOS and Climate Change Mitigation

Although the provisions of Part XII, which are concerned with pollution to the marine environment, were not drafted with climate change in mind, it is well accepted that they are broad enough to encompass pollution by greenhouse gases⁴³. Thus, these provisions can be applicable to climate change, since they can be interpreted so as to cover all contemporary threats to the marine environment.

The climate crisis caused by greenhouse gases meets the definition of "pollution of the marine environment" in UNCLOS Article e 1(4). The Intergovernmental Panel on Climate Change (IPCC) has reported extensively on the adverse impacts of climate change on the marine environment⁴⁴. The world's oceans have absorbed more than 90% of the additional energy trapped by the greenhouse effect and approximately 30% of anthropogenic carbon dioxide from the atmosphere⁴⁵. This absorption has heated, deoxygenated, and acidified the marine environment.⁴⁶

⁴² The Permanent Court of Arbitration, Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, paras. 320, 538.

⁴³ KAREN N. SCOTT: Ocean Acidification. In: ELISE JOHANSEN – SIGNE VEIERUD BUSCH – INGILD ULRIKKE JAKOBSEN (eds.): *The Law of the Sea and Climate Change. Solutions and Constraints*. Cambridge University Press, 2021. 113.

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⁴⁴ IPCC, AR6 Synthesis Report of the IPCC Sixth Assessment Report: Climate Change 2023, paras B.1.4, B.2.1.

⁴⁵ IPCC, Report of Working Group I (Physical Science Basis), AR6: Summary for Policymakers, A.4.2; IPCC Working Group II, AR5, 1658.

⁴⁶ Ocean temperatures were 0.88°C [0.68°C-1.01°C] higher in 2011-2022 than in 1850-1900. IPCC (2023) AR6, Summary for Policymakers, pg. 4.

Another reasonable point argues that climate crisis-related pollution of the marine environment threatens the right to life. Therefore, in the case of *Billy v. Australia*, the UN Human Rights Committee examined whether Australia's alleged failure to protect complainants from the effects of climate change amounted to a violation of Australia's obligations under Article 6 of the International Covenant on Civil and Political Rights⁴⁷.

The Committee revealed that under those circumstances, the pollution of the marine environment resulting from greenhouse gas emissions threatens the right to life. Thus, States have an obligation to take effective measures to mitigate climate change, strengthen the adaptive capacity of vulnerable populations and prevent foreseeable loss of life⁴⁸.

Not only does the climate crisis-related pollution of the marine environment threaten the human right to a clean, healthy and sustainable environment, but it also compromises access to food. The UN Special Rapporteur on the Environment has observed that Pollution of the marine environment affects fisheries and consequently threatens the right to food⁴⁹.

According to article 212 of UNCLOS, States focus on the duty of states to cooperate in the prevention of global atmospheric pollution. This obligation complements with the general obligation stated in articles 193 and 194(1) to "protect and preserve the marine environment" and to "prevent, reduce and control pollution of the marine environment from any source". These provisions collectively reflect the commitment of states to reduce their greenhouse gas emissions under UNCLOS.

The precautionary principle is a key concept in international environmental law⁵⁰. As a result, the Second Chamber of ITLOS has mentioned expressly the Seabed Disputes in its advisory opinion that there is a trend to put this principle besides customary international law and its enforcement may be required in

⁴⁷ See *Billy v. Australia*, CCPR/C/135/D/3624/2019.

⁴⁸ Human Rights Committee, General Comment No. 36, CCPR/C/GC/36, 3 Sept. 2009, para. 62.

⁴⁹ In the oceans, temperature changes, bleaching of coral reefs and ocean acidification are affecting fisheries. Climate change also exacerbates drivers of food insecurity and malnutrition, such as conflict and poverty.

See, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, United Nations High Commissioner for Human Rights, A/74/161, 15 July 2019. Available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Annualreports.aspx.

⁵⁰ It involves that where they are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. See: Rio Declaration on Environment and Development 1992, Principle 15.

light of article 31, paragraph 3(c) of Vienna Convention on the Law of Treaties.⁵¹ Therefore, states must adopt a precautionary approach to activities that may pollute the marine environment through the emission of greenhouse gases.

Although climate change is not expressly referred to in UNCLOS, its adverse effects on the ocean are to be considered as ‘pollution’ under the terms of Article 1(1)(4), regardless of the source. Therefore, the provisions of Article 194 to prevent, reduce and control those effects apply along with the following obligations established by Part XII.

In contrast to UNCLOS, which makes no explicit reference to climate change, the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction⁵² has recognized the need to address biological diversity loss and the degradation of the ecosystems of the ocean in a coherent and cooperative manner, in particular, to climate change impacts on marine ecosystems, such as warming and ocean deoxygenation, as well as ocean acidification, pollution, including plastic pollution, and unsustainable use. Remarkably, when the agreement identified the term of cumulative impacts, it elaborated that it means the combined and incremental impacts resulting from different activities, including the consequences of climate change⁵³. Thus, climate change impacts are considered in the conduct of environmental impact assessments (EIAs), as States are under an obligation to take cumulative impacts into account, when conducting EIAs.⁵⁴

It is important to emphasize the fundamental principle of international law regarding the duty to cooperate, a principle that lies at the core of the United

⁵¹ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 ITLOS, para 135.

Article 31, paragraph 3(c) of Vienna Convention states that the interpretation of a treaty should take into account not only the context but “any relevant rules of international law applicable in the relations between the parties”.

⁵² The Agreement was adopted in New York on 19 June 2023 during the further resumed fifth session of the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The Agreement shall be open for signature in New York on 20 September 2023 and shall remain open for signature until 20 September 2025.

⁵³ See, article 1 para 6.

⁵⁴ Article 27 of the agreement affirmed that the provisions of the Convention on environmental impact assessment for areas beyond national jurisdiction needed to implement by establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties.

Nations Charter (Articles 1.3 and 56), reflected in numerous international instruments (Rio Declaration and Tokyo Protocol as well as ICESCR arts 2, 11, 15, 22 and 23). In the case of environmental disasters, States must strengthen international cooperation among themselves and assist, prevent, avoid and respond to all types of risks with relevant international organizations and agencies.

4. CONCLUSION

As a summary, the intertwining of climate change with international law, particularly in the realms of human rights and the Law of the Sea, highlights the urgent need for global cooperation and action. The recognition of basic human rights, such as the right to life and a healthy environment, underscores the interconnectedness of climate change and the protection of vulnerable communities. Recent developments, including the acknowledgment of the right to a healthy environment by international bodies, signify progress in addressing the harmful effects of climate change on human well-being.

Within the framework of the Law of the Sea, the United Nations Convention on the Law of the Sea (UNCLOS) serves as a crucial tool for regulating ocean activities and addressing emerging challenges, including those posed by climate change. Despite UNCLOS's silence on climate change, its provisions on marine environmental protection provide a foundation for mitigating climate-related impacts on marine ecosystems.

International tribunals, such as the International Tribunal for the Law of the Sea, play a vital role in interpreting UNCLOS obligations and ensuring compliance with international law. Through their rulings and advisory opinions, these tribunals contribute to shaping legal frameworks that support sustainable ocean governance and climate change mitigation.

Moving forward, it is essential for governments, stakeholders and the global community to fulfill their responsibilities under international law, implement effective measures to address climate impacts and prioritize the welfare of vulnerable populations. By fostering collaboration, strengthening legal frameworks, and promoting sustainable practices, we can collectively confront the multifaceted challenges posed by climate change and protect the rights and resources of current and future generations.

BIBLIOGRAPHY

- AMY MAGUIRE – JEFFREY MCGEE: A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change. *Review of European Community and International Environmental Law*, 1/2017.
- BENOIT MAYER: The Contribution of Urgenda to the Mitigation of Climate Change. *Journal of Environmental Law*, 2/2023, 167–184.
- CURT D. STORLAZZI et al.: Most Atolls Will Be Uninhabitable by the Mid21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding. *Science Advances*, 4/2018.
- ETIENNE PIGUET: Climatic Statelessness: Risk Assessment and Policy Options. *Population and Development Review*, 4/2019, 865–883.
- LAURA VAN WAAS: The Intersection of International Refugee Law and International Statelessness Law. In: CATHRYN COSTELLO – MICHELLE FOSTER – JANE MCADAM (eds.): *The Oxford Handbook of International Refugee Law*, OUP, 2021. 152-170.
- ENGIN FIRAT: Rights-based litigation in tackling climate change. Can the ECtHR be effective in protecting human rights in the context of climate change? *Law & Justice Review*, 26/2023, 89–139.
- PAU DE VILCHEZ ANNALISA SAVARESI: The Right to a Healthy Environment and Climate Litigation. A Game Changer. *Yearbook of International Environmental Law*, 1/2021, 3–19.
- RANDALL S. ABATE: *Climate Change Impacts on Ocean and Coastal Law. U.S. and International Perspectives*. Oxford University Press, 2015.
- KAREN N. SCOTT: Ocean Acidification. In: ELISE JOHANSEN – SIGNE VEIERUD BUSCH – INGVILD ULRIKKE JAKOBSEN (eds.): *The Law of the Sea and Climate Change. Solutions and Constraints*. Cambridge University Press, 2021.
- ALAN BOYLE: Litigating Climate Change under Part XII of the LOSC. *-The International Journal of Marine and Coastal Law*, 3/2019, 458–481.