Introducing the Special Issue

Impact of Climate Change on International and European Law

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Climate change affects international law in two ways. First, it leads to the creation of a separate section of international law i.e. climate change law, which is steadily emerging from international environmental law.¹ Secondly, and more importantly, as climate change affects almost all spheres of human life, it has an impact on all fields and branches of international law. Thus, there is a need to examine the intersection of climate change law with other areas of international law, including law on statehood, human rights law, international humanitarian law and law of the sea. Furthermore, climate change influences development of regional law, including law of regional integration organisations. These implications were considered as the most pertinent by the editors when preparing *the Special Issue of International Community Law Review on the impact of climate change on international and European law*. Simultaneously, this Special Issue is inspired by, and reflects some of the issues discussed at, the conference organized by the Cardinal Stefan Wyszyński University and Institute of Environmental Protection – National Research Institute on 29–30 October 2018. The conference took place in the context of

1 Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, *International Climate Change Law* (2017) pp. 10–11; Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofsky, “International Climate Change Law: Mapping The Field” in Cinnamon P. Carlarne, Kevin R. Gray, Richard Tarasofsky (eds.) *The Oxford Handbook of International Climate Change Law* (2016) pp. 4–6.

24th Conference of the Parties to the United Nations Framework Convention on Climate Change which was held in Katowice in December 2018.

This collection begins with *Lukasz Kułaga's* account of the impact of climate change on states. It concentrates on the territorial aspect of state functioning both in the context of maritime as well as land areas. With respect to the latter, the issue of submergence of the entire territory of a state is discussed. The article argues that under current international law states cannot exist in a situation of permanent loss of a territory due to natural phenomena. Simultaneously, *Kułaga* expresses the view that it would be desirable *de lege ferenda* that such entities should be able to maintain some legal personality. Continuing the analysis of consequences of climate change on territory *Vladyslav Lanovoy* and *Sally O'Donnell* set out the key challenges posed by sea level rises to the law of the sea. In their opinion, although provisions of United Nations Convention on the Law of the Sea give some flexibility to accommodate declared baselines and corresponding maritime entitlements, they do not provide a holistic solution to the phenomenon. As a result, the authors recommend the adoption of new legal rules or the amendment of existing ones to respond more comprehensively to the challenges that sea level rises pose to the legal order for the seas and oceans.

Following this overview, the Special Issue explores a number of perspectives specifically on climate change law. *Agnieszka Borek* and *Agata Bator* focus on "Adaptation to Climate Change under Climate Change Treaties". They notice that despite initial marginalisation of the adaptation within the climate change treaty framework, a shift in this respect has been discernible. In particular the provisions of the Paris Agreement shed a new light on this issue, as adaptation becomes one of the main goals of this Agreement. Thus, they underlie that we are witnessing a gradual shift in the perception of adaptation – as an issue which complements mitigation rather than competes with it. This analysis is supplemented by contribution of *Karolina Mordasewicz* and *Marcin Kowalczyk* on "Legal aspects of adaptation finance under the United Nations Framework Convention on Climate Change (UNFCCC) regime with special reference to the Adaptation Fund". They develop their study from a simple but pertinent assumption that finance is one of the most important issues addressed at the international climate negotiations. They examine the history of the climate funds in the climate negotiation process as a background for presenting the special features of the Adaptation Fund. The article explores the difficulty in ensuring that the Adaptation Fund could serve both the Kyoto Protocol and the Paris Agreement. As juxtaposition to the detailed issues of finance *Jason Rudall* ends this part of the Special Issue with the all-encompassing topic "The Obligation to Cooperate in the Fight Against Climate Change". The author

reviews jurisprudence of international courts and tribunals in environmental contexts, ILA Draft Articles on Legal Principles Relating to Climate Change and the Paris Agreement to notice that application of the obligation to cooperate in climate change governance is relatively recent. Furthermore, this study approaches the issue of cooperation in the context of intersection between climate law obligations and human rights as they “go hand in hand”.

The Special Issue proceeds with three contributions assessing the impact of climate change on human rights. *Przemysław Siwior* begins this discussion with the analysis of the potential application of the European Convention of Human Rights (ECHR) in climate change related cases. He evaluates not only the environmental jurisprudence of the Strasbourg Court but also takes into account national litigations based on the ECHR, specifically, the *Urgenda* case. *Siwior* goes on to examine the potential of the first climate change case brought before the European Court of Human Rights – *Duarte Agostinho and Others against Portugal and 33 other States*. Acknowledging the problem of the attribution in this claim he considers that dynamic interpretation of the ECHR can ensure individual protection in climate change related cases.

Piotr Szwedo then turns the discussion to a global picture of “Climate Change and the Human Right to Water”. He notes the emergence of an autonomous human right to water and emphasises its practical importance as expressed in concrete targets in the Sustainable Development Goals. The article argues that climate change regulations and efficient water use require more efforts in education and raising awareness rather than establishing hard legal prescriptions.

Stefania Negri addresses the potential role of the right to health in international climate litigation. She observes an asymmetry between the climate protection regime and international human rights law as the former only recently acknowledged the interaction between climate change and the right to health. *Negri* reviews positions of human rights bodies to conclude that they have established a strong normative and political basis for integrating human rights, including the right to health, in climate action. The article argues that failure to take measures to protect the most vulnerable from the negative health impacts of climate change breaches State human rights obligations. As a result, in her opinion, invoking the right to health can add remarkable strength to the legal complaints advanced by current and projected victims of climate change and allows them to have access to appropriate remedies.

The Special Issue then highlights a number of relevant challenges that climate change pose for other areas international law. *Malgosia Fitzmaurice* analyses the relationship between biodiversity and climate change. She demonstrates the synergies between multilateral environmental agreements and decisions of the Conference of the Parties (COPs) addressing this problem. The

article zooms into the Arctic region as an instructive example of the interaction between climate change and biodiversity. *Fitzmaurice* argues that the nexus of intersecting initiatives involving all stakeholders should be protected with the leading and crucial role played by the Convention on Biological Diversity.

Dorota Pyć evaluates ship energy efficiency measures in the context of climate protection. She focuses on the current and expected impact of the Energy Efficiency Design Index and the Ship Energy Efficiency Management Plan, which became mandatory after the adoption of amendments to Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL). The article notes new mandatory regulations to cut the carbon intensity of existing ships approved in November 2020. It concludes that the effective implementation of the adopted measures requires increasing awareness of the need to protect the climate and provide the necessary trainings to personnel both on ship and ashore.

Bartłomiej Krzan thereafter approaches climate change from the perspective of the law of armed conflict. His study relies on the normative framework dealing with the protection of environment, with a view to distill rules capable of being applied to climate change. Although his analysis leads to a rather cautious assumption as to the possibility of use international humanitarian law (IHL) norms in this context, he agrees that the environmental consequences of armed conflict could also contribute to climate change. Finally, *Krzan* argues that the regime of IHL is flexible enough to meet the likely challenges associated with climate change.

The last four contributions in this Special Issue illustrate impact of climate change on international law from regional perspectives. The first three are dedicated to European Union and the following one to Pacific region.

Analysis of European Union law interaction with climate change starts with the article of *Joanna Bukowska*, *Piotr Świat* and *Anna Sosnowska*, who address the issue of “participation of the Council of the European Union and the European Commission in the process of concluding international agreements on climate protection”. The article expands upon internal EU law issues that is the specific role and interaction of two leading institutions in the process of negotiating climate change treaties, taking into account division of competences between EU and Member States. The authors point out that EU constitutional provisions on concluding treaties, in particular article 218 of the Treaty on the Functioning of the European Union (TFEU), do not fully reflect the specificity of so-called mixed agreements, including on climate change, concluded by both the EU and its Member States.

Marek Jaśkowski next addresses the “External aspects of the EU emissions trading system (ETS) in aviation in light of CORSIA”. His article examines

the consequences of the successful adoption of the Carbon Offsetting and Reduction Scheme for International Aviation mechanism (CORSIA) within the International Civil Aviation Organization (ICAO) for the Emissions Trading System of the EU. The article examines the complexities of the legal status of CORSIA under the Chicago Convention which influences the difficulty in establishing a comprehensive EU position in this respect. He concludes that EU member states are not free to ignore the CORSIA, not only due to political reasons but also for legal ones. However, this does not have to lead to abandoning the existing EU ETS as whole. *Jaśkowski* proposes the possibility of accommodating both.

The last article on EU law by *Monika Adamczak-Retecka* and *Olga Śniadach* explores the food security concept. At the outset, the articles discusses how the understanding of food security has changed under the influence of climate change. *Adamczak-Retecka* and *Śniadach* argue that the European Union is a forerunner in this process by addressing comprehensively the challenges of sustainable food systems. European Commission strategy sets goals such as further development of organic farming, reducing the sale of antimicrobials for farms and reducing usage of fertilizers and pesticides.

Sarah Mead and *Margaretha Wewerinke-Singh* examine “Recent Developments in International Climate Change Law: Pacific Island Countries’ Contributions”. They evaluate expectations of the Pacific Island Countries as to the Paris Agreement negotiations and the subsequent developments in particular with respect to the loss and damage concept. In this context *Mead* and *Wewerinke-Singh* conclude that the climate treaty regime is failing to deliver reductions in global Greenhouse Gas (GHG) emission and the support needed to help vulnerable states to deal with resulting loss and damage.

In summary, *the Special Issue of the International Community Law Review on impact of climate change on international and European law* captures key threads and features of diverse perspectives from experts in appropriate fields. The processes of intersections and mutual influences between climate change law and different areas of international law will certainly deepen as the effects of climate change become more visible.