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International Legal Responses for Protecting Fishers' Fundamental Rights Impacted by a Changing Ocean

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Abstract

Climate change directly impacts the marine landscape where fishers operate. Most fishers rely on fishing for food, income and/or employment. A changing ocean can therefore significantly impact fishers' lives and hinder the full exercise of their rights of access to fisheries resources, rights to fish, to food, to work, to culture, and to a healthy, clean and sustainable environment. This article questions whether international law supports the protection of fishers' fundamental rights in the changing ocean context. The authors begin by elucidating what such context means to fishers and their rights, taking special account of small-scale fishers and vulnerable groups. The obligations of

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States Parties to key instruments under the law of the sea and international climate change law, *vis-à-vis* States' obligations under human rights treaties and other relevant international guidance, are explored with a view to furthering the protection of fishers impacted by a changing ocean.

Keywords

fishers – small-scale fishers – climate change – legal protection – fundamental rights – international law

Introduction[1]

Climate change effects on the ocean include warming, acidification, loss of oxygen and loss of sea ice, which have been well documented by successive reports from the Intergovernmental Panel on Climate Change (IPCC).[2] These effects directly impact marine fisheries resources, their habitats, ecosystems and biodiversity,[3] which make up the fishing landscape where fishers operate. The depletion of stocks and shifts in species distribution due to a changing ocean can prevent many fishers from harvesting at sea, with consequences to fishers operating across the entire marine capture fisheries value chain and relying on such harvesting. Most fishers, from small to large-scale, depend on

1 This article draws from research undertaken by Julia Nakamura and Mitchell Lennan under the One Ocean Hub, which is a collaborative research programme for sustainable development funded by United Kingdom Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF) (Grant Ref: NE/S008950/1). Julia Cirne Lima Weston acknowledges as her funder the Portuguese Foundation for Science and Technology (Fundação para a Ciência e a Tecnologia – FCT). The authors wish to thank Professors Elisa Morgera and David Freestone as well as Dr Mara Ntona for their insightful comments on earlier drafts of this article. The authors are responsible for the current text and any remaining errors of fact or interpretation.

2 See in particular, NL Bindoff *et al.*, 'Chapter 5: Changing Ocean, Marine Ecosystems and Dependent Communities' in Intergovernmental Panel on Climate Change (IPCC), *The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change* [H-O Pörtner *et al.* (eds)] (Cambridge University Press, Cambridge, 2022) 447–587.

3 H Lee *et al.*, *Synthesis Report of the IPCC Sixth Assessment Report* (*AR6*) (Cambridge University Press, Cambridge, 2023) 73–74.

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fishing as a source of food, income, culture or employment.[4] A changing ocean, to varying degrees, can therefore significantly impact their lives, as the loss of fish means the loss of nutritious food, the impossibility to fish and, for many, the impossibility to work and continue building their traditions, culture and knowledge. As such, a changing ocean can hinder fishers' full exercise of their fundamental rights, notably, the rights of access to fisheries resources, to fish, to food, to work, to culture, and to a healthy, clean and sustainable environment. Small-scale fishers are particularly vulnerable to these changes, as they generally face historical and persisting marginalisation from governments' financial and institutional support, which tend to subsidise and prioritise large-scale industrial fisheries and other sectors.[5] Consequently, or in addition to this, small-scale fishers tend to face greater challenges of access to fisheries resources and finding alternative livelihoods in the event such resources are no longer available due to climate change impacts.[6]

Against this backdrop, this article questions whether international law supports the protection of fishers' fundamental rights in the changing ocean context. It begins by elucidating what such context means to fishers and their rights, taking special consideration of small-scale fishers and vulnerable groups. While retaining an appreciation of the importance of climate change mitigation, we herein underscore fishers' vulnerability and adaptation capacity, noting small-scale fishers' marginalisation, resilience and perceptions of climate change. In our analysis of international law, we examine key instruments under the law of the sea and international climate change law *vis-à-vis* States' obligations under human rights treaties and other relevant international guidance. Finally, we provide some preliminary conclusions to furthering the protection of fishers impacted by a changing ocean.

4 In 2020, about 58.8 million people were operating in fisheries and aquaculture, 64 per cent of which were in capture fisheries. See Food and Agricultural Organization of the United Nations (FAO), *The State of World Fisheries and Aquaculture 2022: Towards Blue Transformation* (FAO, Rome, 2022) 67.

5 Yet, the environmental and social impacts caused by a large-scale industrial fishing vessel are significantly greater than those caused by a small-scale fishing vessel. This is the reason why States should consider integrated impacts assessments prior to large-scale industrial fishing operations with the potential to cause significant environmental and social impacts. See J Nakamura, D Diz and E Morgera, 'International legal requirements for environmental and socio-cultural assessments for large-scale industrial fisheries' (2022) 31(3) *RECIEL* 336.

6 WK Oestreich *et al.*, 'The impact of environmental change on small-scale fishing communities: Moving beyond adaptive capacity to community response' in AM Cisneros-Montemayor, WWL Cheung and Y Ota (eds), *Predicting Future Oceans: Sustainability of Oceans and Human Systems Amidst Global Environmental Change* (Elsevier, Amsterdam, 2019).

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The Meaning of 'A Changing Ocean' to Fishers

The impacts of climate change on marine capture fisheries is growing in attention,[7] as is the vital role that healthy and sustainably managed fisheries play as part of the ocean-climate nexus through ocean carbon cycling.[8] Considering the nexus between climate change and fisheries, changing oceanic conditions include impacts on the productivity and distribution of fish species, destruction of habitats, depletion of populations and shift in fish populations into deeper waters and towards the Poles.[9] These negatively impact the structure and functioning of marine ecosystems and the services they provide, which are vital to support human rights. Fishers integrate complex socio-ecological systems, where fishers, living marine resources and the ocean interact, are concomitantly affected by climate change, and need to build resilience and adaptability to a changing ocean. The associated impacts on coastal environments as a result of climate change[10] can lead to forced relocation and loss of properties, tools and facilities of fishers.[11]

Many if not all fishers depend on fishing for economic, social and cultural reasons, as fishing is a source of income, or job, and integrates their daily routines, cultural traditions and livelihoods. While the great majority[12] of fishers work in the small-scale fisheries value chain,[13] climate change is a global

7 Bindoff *et al.* (n 2), at p. 447; M Barange *et al.* (eds), *Impacts of Climate Change on Fisheries and Aquaculture: Synthesis of Current Knowledge, Adaptation and Mitigation Options*, FAO Fisheries and Aquaculture Technical Paper No. 627 (FAO, Rome, 2018).

8 D Bianchi *et al.*, 'Estimating global biomass and biogeochemical cycling of marine fish with and without fishing' (2021) 7 *Science Advances* d7554.

9 M Pinsky *et al.*, 'Preparing ocean governance for species on the move' (2018) 306 *Science* 1189.

10 S Cooley *et al.*, 'Oceans and coastal ecosystems and their services' in IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H-O Pörtner e*t al.* (eds)] (Cambridge University Press, Cambridge, 2022) 379–550.

11 V Savo, C Morton and D Lepofsky, 'Impact of climate change for coastal fishers and implications for fisheries' (2017) 18(5) *Fish and Fisheries* 795.

12 Almost 90 per cent of the total number of people employed in fisheries globally work along the small-scale fisheries value chain. See J Virdin *et al.*, 'Small-scale fisheries contributions to economic value and livelihoods' in FAO, Duke University and WorldFish, *Illuminating Hidden Harvests: The Contributions of Small-Scale Fisheries to Sustainable Development* (FAO, Duke University and WorldFish, Rome, 2023) 82.

13 As opposed to large-scale industrial fishing. The differences between these two fisheries sectors greatly vary by country and locality, and there is no globally agreed definition of each of them. For a recent account on the matter of definition of small-scale fisheries, see H Smith and X Basurto, 'Defining small-scale fisheries and examining the role of science

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phenomenon that affects all fisheries, regardless of their size, with impacts on food security worldwide.[14] The next subsections provide some reflections on the fundamental rights of fishers affected by a changing ocean, taking special account of small-scale fishers and other vulnerable groups.

Fishers' Fundamental Rights Affected by a Changing Ocean

If fishers can no longer fish in an area due to stocks moving to another fishing area, they cannot fully exercise their rights to secure access to fisheries resources and their rights to secure tenure in relation to fishing grounds at sea.[15] As explained and argued elsewhere,[16] for small-scale fishers dependent on fishing for their subsistence and livelihoods, the rights to fish and to secure marine tenure can be seen as a precondition for the realisation of multiple human rights.[17] These include human rights explicitly recognised and affirmed by the Universal Declaration on Human Rights (UDHR),[18] the International Covenant on Civil and Political Rights (ICCPR),[19] and the International

in shaping perceptions of who and what counts: A systematic review' (2019) 6 *Frontiers in Marine Science* 1; Y Rosseau *et al.*, 'Defining global artisanal fisheries' (2019) 108 *Marine Policy* 103634.

14 FAO, *The State of Food and Agriculture: Climate Change, Agriculture and Food Security* (FAO, Rome, 2016).

15 Tenure rights in the context of small-scale fisheries belong to the persons entitled to use fisheries resources and fishing grounds pursuant to prescribed conditions. See FAO, *Implementing Improved Tenure Governance in Fisheries: A Technical Guide to Support the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, Preliminary Version* (FAO, Rome, 2013).

16 See J Nakamura, 'The fundamental rights of small-scale fishers and their communities in the international jurisprudence' in J Nakamura, R Chuenpagdee and S Jentoft (eds), *Implementation of the Small-Scale Fisheries Guidelines: A Legal and Policy Scan* (Springer, Heidelberg, 2023 forthcoming). Such an argument has been used by fishers to claim their rights in judicial fora. See A Song and A Soliman, 'Situating human rights in the context of fishing rights: Contributions and contradictions' (2019) 103 *Marine Policy* 19.

17 FAO, 'Applying coherently the human rights-based approach to small-scale fisheries for achieving multiple Sustainable Development Goals – Policy brief' (FAO, Rome, 2022) available at https://doi.org/10.4060/cc3251en. All websites were accessed on 30 June 2023.

18 United Nations General Assembly (UNGA) Res 217(III)A (10 December 1948), Universal Declaration of Human Rights, UN Doc A/810 [UDHR].

19 International Covenant on Civil and Political Rights (New York, 16 December 1966, in force 23 March 1976) 999 *UNTS* 171 [ICCPR].

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Covenant on Economic, Social and Cultural Rights (ICESCR),[20] namely, the rights to food,[21] to work,[22] and to culture.[23]

The exercise of the right to fish can be deeply rooted in the identity and life of certain fishers, such that fishing means customs, traditions, heritage and life to them.[24] Consequently, being unable to exercise the right to fish due to a changing ocean can hinder the continuity of their daily customary practices, including passing on fishing knowledge and experiences among fishers and members of their communities across the generations. This means that the full exercise of fishers' right to participate in cultural life,[25] is also at risk.

The possibility to fish in different areas or to diversify their catch, for example, depends on fishers' technical and financial capacities, and whether they have the appropriate vessels, gears and tools to adapt to different conditions.[26] Small-scale fishers practicing hand fishing or using small canoes or non-motorised fishing boats, thus with limited fishing capacity, may also not be financially and culturally prepared to look for alternative livelihoods or a different occupation, which increases the challenges they already face.[27] In connection with this, sea level rise and extreme weather events can put at risk the lives of fishers while at sea or on the coast. These environmental instabilities can decrease the ability of fishers to fully exercise their rights to

20 International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, in force 3 January 1976) 993 *UNTS* 3 [ICESCR].

21 *Ibid.*, Article 11(1); UDHR (n 18), Article 25(1).

22 ICESCR (n 20), Article 6(1); UDHR (n 18), Article 23(1).

23 ICCPR (n 19), Articles 27; ICESCR (n 20), Article 15(1); UDHR (n 18), Article 27(1).

24 J Nakamura, B Erinosho and M Strand, '"Fishing" for recognition of customary law: A preliminary reflection in the fisheries context' (2023) 2 *FAO Development Law Magazine* available at https://newsletters.fao.org/q/16vtUl5TxIh/wv; AM Cisneros-Montemayor and Y Ota, 'Coastal Indigenous peoples in global ocean governance' in Cisneros-Montemayor, Cheung and Ota (eds) (n 6).

25 ICCPR (n 19), Articles 27; ICESCR (n 20), Article 15(1); UDHR (n 18), Article 27(1).

26 The majority of fishing vessels have no mechanisation or use small power winches or hauler power off engines. See S Funge-Smith *et al.*, 'The challenge of defining small-scale fisheries: Determining scale of operation by identifying general fisheries characteristics' in FAO, Duke University and WorldFish (n 12), at p. 27.

27 However, it is worth noting that this scenario can greatly vary by country and locality, as small-scale fishers may have low adaptive capacity and livelihood options in certain places, while at the same time being involved in activities other than fishing and already enjoying options for alternative livelihoods at other places. For contrasting examples, see NJ Bennet *et al.*, 'The capacity to adapt? Communities in a changing climate, environment, and economy on the northern Andaman coast of Thailand' (2014) 19(2) *Ecology and Society* 5; MO Silas *et al.*, 'Adaptive capacity and coping strategies of small-scale coastal fisheries to declining fish catches: Insights from Tanzanian communities' (2020) 108 *Environmental Science & Policy* 67.

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life,[28] to the enjoyment of the highest attainable standard of physical and mental health,[29] and to an adequate standard of living.[30]

Fishing in other areas may depend on authorisation, or changes in existing fishing licences, imposing additional burdens on fishers.[31] The urgent search for fisheries resources may consequently lead to more unsustainable fishing practices and put more pressure on the marine environment as competition increases for marine space and fisheries resources among fishers themselves and between fishers and users undertaking other activities in the maritime space.[32] Consequently, different types of conflicts in fisheries and relating to fisheries may arise,[33] alongside irresponsible fishing and a greater subjection to environmental disaster risks.[34] These issues are closely linked and affect fishers' full exercise of their rights to a clean, healthy and sustainable environment,[35] which, in turn, can no longer stably function in a changing ocean context.

While all fishers can be impacted by climate change, scientists have found that small-scale fishers 'may be even more vulnerable to environmental change than their industrial counterparts'.[36] At the same time, dealing with historical

28 ICCPR (n 19), Article 6(1); UDHR (n 18), Article 3.

29 ICESCR (n 20), Article 12(1); UDHR (n 18), Article 25(1).

30 ICESCR (n 20), Article 11(1); UDHR, *ibid.*

31 Researchers have identified the socioeconomic and technical needs of small-scale fishers to adapt to climate change in the Pacific Islands region, for instance. See Q Hannich *et al.*, 'Small-scale fisheries under climate change in the Pacific Islands region' (2018) 88 *Marine Policy* 279; JD Bell *et al.*, 'Adaptations to maintain the contributions of small-scale fisheries to food security in the Pacific Islands' (2018) 88 *Marine Policy* 303.

32 A recent study demonstrates the different factors underpinning the 'illegality trap' in small-scale fisheries from a socio-ecological system and historical perspective. See L Nahuelhual *et al.*, 'A social-ecological trap perspective to explain the emergence and persistence of illegal fishing in small-scale fisheries' (2020) 19 *Maritime Studies* 105.

33 For a comprehensive discussion of the different types of conflicts in fisheries and on how international law addresses them, see K Fawkes, J Nakamura and M Lennan, 'Leveraging international fisheries law for coastal security in the Anthropocene: Addressing conflicts in fisheries' in I Vianello and P Leucci (eds), *Fisheries and Law of the Sea in the Anthropocene Era*, vol 2 (Luglio Editore, Trieste, 2023).

34 L Monnier *et al.*, *Small-Scale Fisheries in a Warming Ocean: Exploring Adaptation to Climate Change* (WWF Germany, Berlin, 2020), 16.

35 Human Rights Council Res 48/13 (8 October 2021), The Human Right to a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/48/13, para 1 [adopted by 43 votes against 0; 4 abstentions – China, India, Japan and Russia]; UNGA Res 76/300 (28 July 2022), The Human Right to a Clean, Healthy and Sustainable Environment, UN Doc RES/76/300 [adopted by 161 votes to 0 against; 8 abstentions (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russian Federation, Syria)].

36 Among the reasons for such vulnerability are their disproportionate vulnerability to sea level rise, especially small-scale fishers living on small islands, at low elevations and at

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multiple challenges and unforeseen threats have built fishing communities' capacity to respond and adapt to changing environmental conditions.[37] Such capacity is seen as a 'fundamental part of the culture and ethos that has enabled their long-term persistence', but may not be sufficient to 'keep pace with increasing exposure to biophysical stressors'.[38]

Rights of Other Vulnerable Groups in Fisheries Affected by a Changing Ocean

Vulnerability in a changing ocean context depends on a combination of factors varying in different contexts and geographical locations.[39] Vulnerability to the effects of climate change is linked with adaptive capacity.[40] This capacity varies considerably among systems and regions, and varies over time depending on climate impacts.[41] The cumulative effects of climate change and overexploitation on marine ecosystems may be beyond the adaptive capacity of many fisheries systems, exploited species or the entire ecosystem, limiting their ability to adapt to change.[42] Enhancing adaptive capacity through sustainable development is necessary to reduce vulnerability, especially for systems most at risk to climate change.[43] Vulnerability has been described as 'the degree to

ice-edge systems, and their marginalisation from climate adaptation strategies. See Oestreich *et al.* (n 6), at p. 272.

37 *Ibid.*, at p. 275.

38 *Ibid.*

39 Working Group II, which contributed to the IPCC Sixth Assessment Report, defines vulnerability as 'the propensity or predisposition to be adversely affected' and comprising 'a variety of concepts and elements, including sensitivity or susceptibility to harm and less capacity to cope and adapt'. See A Begum *et al.*, 'Point of departure and key concepts' in IPCC, *Climate Change 2022* (n 10), at p. 133.

40 Defined by the IPCC as '[t]he ability of a system to adjust to climate change (including climate variability and extremes) to moderate potential damages, to take advantage of opportunities, or to cope with the consequences'. See ML Parry *et al.* (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, 2007) 896.

41 For context, systems or groups with high exposure to climate extremes may have limited adaptive capacity.

42 For example, 'systems with low adaptive or transformative capacity, like the Newfoundland cod fishing communities of the 1980s and 1990s, collapse in the face of change'. A Garmestani *et al.*, 'Can law foster social-ecological resilience' (2013) 18 *Ecology and Society* 19899 available at https://www.jstor.org/stable/26269288.

43 IPCC, 'Adaptation to climate change in the context of sustainable development and equity' in IPCC, *Climate Change 2001: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel*

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which a system is susceptible to injury, damage or harm'.[44] Ensuring climate change and associated risks are included in the design and implementation of management decisions in socio-ecological systems, such as fisheries, can reduce the vulnerability of the fisheries system and enhance sustainability.[45]

In many parts of the world, Indigenous peoples exercise fishing as part of their daily subsistence activities, customs, and traditional, spiritual and cultural practices.[46] Fishing can be the differentiating factor that distinguishes between an Indigenous fisher belonging or not belonging to an Indigenous community.[47] Specific international instruments, which affirm the fundamental rights of Indigenous peoples, include the Convention No. 169 concerning Indigenous and Tribal Peoples in independent countries (C-169),[48] adopted under the auspices of the International Labour Organization (ILO), and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[49] For Indigenous fishers, a changing ocean may thus hinder the full exercise of multiple fundamental rights, such as the rights to practice and revitalise their cultural traditions and customs,[50] to maintain and strengthen their distinctive spiritual relationship with their traditionally used coastal seas,[51] and to maintain, control, protect and develop their cultural heritage and

on Climate Change [JJ McCarthy *et al.* (eds)] (Cambridge University Press, Cambridge, 2001) 879.

44 *Ibid.*, at p. 894; B Smit *et al.*, 'The science of adaptation: A framework for assessment' (1999) 4 *Mitigation and Adaptation Strategies for Global Change* 199.

45 IPCC, *Climate Change 2001* (n 43), at p. 888.

46 A detailed and focused account of Indigenous peoples in the context of their fishing rights can be found in EL Enyew, 'International human rights law and the rights of Indigenous peoples in relation to marine spaces' in S Allen, N Bankes and Ø Ravna (eds), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing, Oxford, 2019); JM Cantzler, *Environmental Justice as Decolonization: Political Contention, Innovation and Resistance over Indigenous Fishing Rights in Australia, New Zealand, and the United States* (Routledge, Abingdon, 2021).

47 Cisneros-Montemayor and Ota (n 24), at pp. 317–324, 318.

48 Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989, in force 5 September 1991) 1650 *UNTS* 383.

49 UNGA Res 61/295 (13 September 2007), United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/Res/61/295 [UNDRIP].

50 *Ibid.*, Article 11(1). See also the right to life, physical integrity and security of person (Article 7(1)), the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies (Article 12(1)), the right to revitalise, use, develop and transmit to future generations their histories, oral traditions and philosophies (Article 13(1)), and the right to the conservation and protection of the environment and the productive capacity of their resources (Article 29(1)).

51 *Ibid.*, Article 26(1).

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traditional knowledge.[52] The Inter-American Court of Human Rights (IACtHR) has consistently recognised 'fishing' as integrating the essential components of the culture of Indigenous communities, which is related to Indigenous fishers' right to culture.[53] The IACtHR has also recognised 'fishing grounds' as part of their ancestral traditional lands, territories and resources (including lands adjacent to rivers), which is related to Indigenous fishers' right to property.[54]

Regarding women, who represent about 18 per cent of fishers globally,[55] it is important to note that most do not directly engage in marine capture fisheries, but rather participate in fishing preparatory work, or work in the post-harvesting processing sector.[56] The rights of women affected by a changing ocean thus relate to the impossibility or struggle to continue their activities or work in support of fishing. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[57] protects women's rights generally and specifically requires States Parties to ensure women's participation in the formulation of climate change policies.[58] Contributing to this treaty's evolutive interpretation, the Committee on the Elimination of Discrimination Against Women, which functions as CEDAW's monitoring body, has affirmed women and girls' rights to lead, participate and engage in decision-making in activities

52 *Ibid.*, Article 31(1).

53 IACtHR (2005) *Case of the Yakye Axa Indigenous Community* v. *Paraguay*, Merits, reparations and costs, Judgment of 17 June 2005, para 140; IACtHR (2010) *Case of the Xákmok Kásek Indigenous Community* v. *Paraguay*, Merits, reparations and costs, Judgment of 24 August 2010, paras 89, 113; IACtHR (2020) *Case of the Indigenous Communities of the Lhaka Honhat* (*Our Land*) *Association* v. *Argentina*, Merits, reparations and costs, Judgment of 6 February 2020, para 247.

54 IACtHR (2001) *Case of the Mayagna* (*Sumo*) *Awas Tingni Community* v. *Nicaragua*, Merits, reparation and costs, Judgment of 31 August 2001, para 151; IACtHR (2005) (n 53), paras 137, 140; IACtHR (2010) (n 53), paras 87–88; IACtHR (2012) *Case of the Kichwa Indigenous People of Sarayaku* v. *Ecuador*, Merits and reparations, Judgment of 27 June 2012, paras 145–146; IACtHR (2014) *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members* v. *Panama*, Merits, reparations and costs, Judgment of 14 October 2014, para 117; IACtHR (2015) *Case of the Kaliña and Lokono Peoples* v. *Suriname*, Merits, reparations and costs, Judgement of 25 November 2015, para 152; IACtHR (2018) *Case of the Xucuru Indigenous Peoples and its Members* v. *Brazil*, Preliminary objections, merits, reparations and costs, Judgement of 5 February 2018, paras 117–120; IACtHR (2020) (n 53), para 95.

55 FAO (n 4), at pp. 71–73.

56 *Ibid.*

57 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979, in force 3 September 1981) 1249 *UNTS* 13 [CEDAW].

58 *Ibid.*, Articles 7(b), 14(1)(2)(a).

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relating to climate change,[59] and Indigenous women and girls' rights to a clean, healthy and sustainable environment, equal access to fisheries, and protection against discrimination and dispossession.[60]

Similarly, children fishing at sea or dependent on marine fisheries for their livelihoods can suffer the impacts of a changing ocean, hindering the full exercise of their fundamental rights.[61] Having fewer children fishing at sea due to a changing ocean can promote greater engagement of child fishers with formal education at schools, and enhance education that can help them build their capacity to do other types of work and thus be less dependent on fishing.[62] This is important in building the future generation of fishers, as fishers with higher education levels are able to cope and adapt to climate change impacts better.[63] Children's involvement in fisheries may also mean a realisation of their rights to education and association with their own cultural identity and respect for the natural environment, thereby contributing to the transmission of intergenerational knowledge as a supplement to their mainstream education.[64] Children's rights are provided in the Convention on the Rights of

59 See the full set of detailed recommendations in Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change (13 March 2018), UN Doc CEDAW/C/GC/37.

60 CEDAW, General Recommendation No. 34 (2016) on the rights of rural women (7 March 2016), UN Doc CEDAW/C/GC/34, para 56; CEDAW, 'General Recommendation No. 39 (2022) on the rights of Indigenous women and girls (31 October 2022), UN Doc CEDAW/C/GC/39, para 23(e).

61 See S Shields *et al.*, 'Children's human right to be heard at the ocean-climate nexus' (2023) 38(3) *International Journal of Marine and Coastal Law* (*IJMCL*), this issue. In effect, the involvement of children in fisheries is a challenging issue on its own, particularly in respect of illegal child labour, which, *inter alia*, subjects children to dangerous and inappropriate environments for their age. See FAO, *Eliminating Child Labour in Fisheries and Aquaculture: Promoting Decent Work and Sustainable Fish Value Chains* (FAO, Rome, 2018) 2.

62 The extent to which such child fishers would be able to fully enjoy their right to education would largely depend on the education system provided by the government or on the financial capacity of their families to ensure access to private education.

63 See Bennet *et al.* (n 27); AA Samal *et al.*, 'Factors affecting small-scale fishermen's adaptation toward the impacts of climate change: Reflections from Malaysian fishers' (2019) 9(3) *SAGE OPEN*, https://doi.org/10.1177/2158244019864204; MM Limuwa *et al.*, 'Evaluation of small-scale fishers' perceptions on climate change and their coping strategies: Insights from Lake Malawi' (2018) 34(6) *Climate* 1.

64 See G Trommsdorff, 'Intergenearational relations and cultural transmission' in U Shönpflug (ed), *Cultural Transmission Psychological, Developmental, Social and Methodological Aspects* (Cambridge University Press, Cambridge, 2008) 126–160.

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the Child (CRC).[65] This treaty's monitoring body, the Committee on the Rights of the Child, recently adopted a new general comment on children's rights and the environment with a special focus on climate change, which clarifies the applicable principles and protection of human rights of children particularly relevant to the changing ocean context.[66]

Another vulnerable group in fisheries are impacted by a changing ocean is migrant fishworkers, including those migrating within a single country or to different countries,[67] and fishworkers migrating from their State of nationality to work on board a fishing vessel flying the flag of another State. Industrial large-scale fisheries largely rely on foreign migrant fishworkers,[68] whose nationalities differ from that of the flagged fishing vessels on board of which they work. These fishworkers migrate from their homes and may spend weeks working and living on such fishing vessels. Studies have showcased their vulnerability to severe human rights abuses, such as trafficking and forced labour.[69] A changing ocean, particularly impacts from extreme weather events, thus adds an additional stressor to the unsafe and poor working conditions of these migrant fishworkers, aggravating the conditions that put their lives at risk, and hindering their ability to fully exercise the foreseen fundamental rights. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)[70] is relevant to foreign fishworkers as it applies to a migrant worker, who is defined as 'a

65 Convention on the Rights of the Child (New York, 20 November 1989, in force 2 September 1990) 1577 *UNTS* 3, Article 29(1)(c – d) [CRC].

66 Adopted in May 2023 at this Committee's 93rd session, but not yet published. See Office of the High Commissioner for Human Rights, 'General comment No. 26 on children's rights and the environment with a special focus on climate change' available at https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-26-childrens-rights-and.

67 See, for example, A Uwazuruike, 'Migration and the right to survival: An empirical study of three fishing communities in Senegal' (2023) 99 *Journal of Rural Studies* 71.

68 This is notable in certain countries in Asia, such as Thailand and Vietnam. See AN Le, 'The homeland and the high seas: Cross-border connections between Vietnamese migrant fish workers' home villages and industrial fisheries' (2022) 21 *Maritime Studies* 379.

69 *Ibid.* See also International Labour Organization (ILO), *Caught at Sea: Forced Labour and Trafficking in Fisheries* (ILO, Geneva, 2013) available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf; AJG Lozano *et al.*, 'Decent work in fisheries: Current trends and key considerations for future research and policy' (2022) 136 *Marine Policy* 104922.

70 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990, in force 1 July 2003) 2220 *UNTS* 3.

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person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national'.[71]

Finally, peasants engaged in small-scale fishing and related activities, though primarily associated with rural areas, also operate in marine spaces.[72] As advanced elsewhere,[73] when applying a broad interpretation of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP),[74] which explicitly applies to small-scale fishers,[75] one can find the rights of small-scale fishers affirmed therein as applicable to marine small-scale fishers. Differing from the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines),[76] which is not a human rights instrument but rather follows a human rights-based approach,[77] the UNDROP explicitly affirms the fundamental rights of peasants and small-scale fishers, detailing their rights recognised in human rights treaties. In the changing ocean context, the UNDROP affirms the rights of peasants and small-scale fishers to 'contribute to the design and implementation of national and local climate change adaptation and mitigation policies, including through the use of practices and traditional knowledge' and have access to 'adequate [climate change and weather-related events] training suited to the specific agroecological, sociocultural and economic environments in which they find themselves'.[78]

71 *Ibid.*, Articles 1, 2(2).

72 I Ertör, '"We are the oceans, we are the people!": Fisher people's struggles for blue justice' (2021) 50(3) *Journal of Peasant Studies* 1157–1186; M Barbesgaard, 'Blue growth: Savior or ocean grabbing' (2017) 45(1) *Journal of Peasant Studies* 130–149.

73 E Morgera and J Nakamura, 'Shedding a light on the human rights of small-scale fishers: Complementarities and contrasts between the UNDROP and the Small-Scale Fisheries Guidelines' in M Alabrese *et al.* (eds), *The United Nations' Declaration on Peasants Rights* (1st edn, Routledge, Abingdon, 2022) 66.

74 UNGA Human Rights Council 39/12 (28 September 2018), United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc A/HRC/RES/39/12 [adopted by 33 votes to 3 against (Australia, Hungary and the United Kingdom); 11 abstentions] [UNDROP].

75 *Ibid.*, Article 1(2).

76 FAO, Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (adopted at the 31st Session of the Committee on Fisheries, Rome, 9–13 June 2014) [SSF Guidelines].

77 This means that the 'SSF Guidelines identify good practices in the use and management of natural resources, emphasising the role of small-scale fishers as agents in environmental conservation and management and as benefit holders of the social development, security, and safety, which is the State's responsibility to deliver'. See Morgera and Nakamura (n 73), at p. 68 (citation omitted).

78 UNDROP (n 74), Articles 18(3), 25(1).

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Based on this analysis of vulnerable groups in fisheries, the importance of using and interpreting international instruments that specifically apply to these vulnerable groups and affirm their fundamental rights is clear. These groups have faced several historical challenges, including poverty, dispossession, marginalisation from decision-making affecting them and lack of financial support. Therefore, the recognition of their traditional knowledge and practices, as well as the due consideration for inclusion of such knowledge systems into decision-making processes relating to climate change, are crucial to ensure that these groups contribute to preventing or avoiding greater impacts of a changing ocean. Scientists have recommended the adoption of principles of distributive justice and procedural justice so as to enable the participation of local communities and Indigenous peoples in the climate change regime's work,[79] recognise their knowledge and perceptions of climate risk, and carry out climate action that addresses historical injustices against marginalised groups.[80]

States' Obligations and International Guidance for Protecting Fishers' Rights in the Changing Ocean Context

The protection of fishers' rights in a changing ocean relates to different international legal regimes, but here the focus is on the interactions of certain treaties and instruments under the law of the sea, international climate change law and international human rights law. There may be other relevant treaties and instruments, notably under international biodiversity law.[81] Both the law of the sea and international climate change law are known to be traditionally not 'human rights-friendly' in the sense that these regimes are not particularly concerned with the protection of people,[82] let alone their rights. The linkages

79 Begum *et al.* (n 39), at p. 160.

80 *Ibid.*, at pp. 147–156.

81 In effect, States Parties to the Convention on Biological Diversity (CBD) have adopted important decisions through the CBD Conference of the Parties that address the climate-ocean nexus. See, for example, CBD COP9, Decision IX/16, Biodiversity and climate change, UN Doc UNEP/CBD/COP/DEC/IX/16 (9 October 2008); CBD COP10, Decision 10/29, Marine and coastal biodiversity, UN Doc UNEP/CBD/COP/DEC/X/29 (29 October 2010); CBD COP15, Decision 15/4, Kunming-Montreal Global Biodiversity Framework, UN Doc CBD/COP/DEC/15/4 (19 December 2022). See also E Morgera, 'Far away, so close: A legal analysis of the increasing interactions between the Convention on Biological Diversity and climate change law' (2011) 2(1) *Climate Law* 85–115.

82 T Treves, 'Human rights and the law of the sea' (2010) 28 *Berkeley Journal of International Law* 1; I Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford

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between these regimes and human rights were created and developed through time. Nevertheless, interactions between human rights law and those two other regimes have occurred and continue to strengthen. This is largely in response to societal needs and the international community's growing awareness about the interconnections and interdependency between human rights and the environment, which culminated with the landmark recognition through the resolutions adopted by the Human Rights Council in 2021[83] and the UN General Assembly (UNGA) in 2022.[84]

Yet, this awareness took time, and the lack of reference to human rights and the protection of fishers' rights in the main law of the sea and climate change treaties is no surprise. As a consequence of the need for more interaction between these regimes and human rights, international legal scholarship has evolved towards addressing these regimes' interactions,[85] often discussing their interplay with the biodiversity regime.[86] This work is fundamental to clarifying the applicability of States' general human rights obligations in the fisheries context, with a view to protecting fishers' rights. In the next subsections the entry points in the law of the sea and climate change regimes, where the obligations of States thereunder can contribute to the protection of fishers' rights affirmed in the human rights treaties and elaborated in specific terms in non-binding instruments, are explored.

University Press, Oxford, 2018); R Barnes, 'Environmental rights in marine spaces' in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and Beyond: Swedish Studies in European Law* (Hart Publishing, Oxford, 2018) 65–70; A Boyle, 'Climate change, the Paris Agreement and human rights' (2018) 67(4) *International and Comparative Law Quarterly* 759.

83 Human Rights Council Res 48/13 (n 35), para 1.

84 UNGA Res 76/300 (n 35).

85 M Young, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge, 2012); A Boyle, 'Law of the sea perspectives on climate change' (2012) 27(4) *IJMCL* 831–838; TM Ndiaye, 'Human rights at sea and the law of the sea' (2019) 10 *Beijing Law Review* 261; I Papanicolopulu and A Rocha, 'Oceans, climate change and non-State actors' in J McDonald, J McGee and R Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing, Cheltenham, 2020).

86 Morgera (n 81); E Morgera, 'Dawn of a new day? The evolving relationship between the Convention on Biological Diversity and international human rights law' (2018) 53 *Wake Forest Law Review* 691.

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Linking Law of the Sea Obligations with the Protection of Fishers' Rights

The United Nations Convention on the Law of the Sea (LOSC)[87] contains few provisions relevant to the protection of fishers' rights, as explained elsewhere.[88] In the changing ocean context, the pertinence of the LOSC in protecting fishers' rights is twofold: ensuring activities in marine waters and land-based activities affecting marine waters are carried out sustainably, and preventing or tackling climate change impacts on the ocean in the first place. While the LOSC does not sufficiently address the sustainable development and environmental concerns that emerged after its negotiation,[89] the treaty prescribes certain obligations that limit State Parties' discretion in the manner they can use and exploit ocean resources. Noteworthy examples are the provisions on total allowable catch and use of best scientific evidence for conservation and management of living resources in the exclusive economic zone,[90] and on inter-State cooperation for the conservation and management of living resources of the high seas.[91] Additionally, Part XII of the LOSC contains State Parties' general obligations to protect and preserve the marine environment, including their competence and power to enforce the necessary measures in their respective territorial sea and internal waters,[92] and to prevent, reduce and control marine pollution.[93] International legal scholarship supports the assertion that States' obligations under Part XII of the LOSC include the duty to prevent the effects of climate

87 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 396 [LOSC].

88 The relevant provisions are those which are also relevant to small-scale fisheries, including Articles 61(3), 69(2)(a) and (4), 70(3)(a) and (5) of the LOSC (n 87). See J Nakamura, 'Legal reflections on the Small-Scale Fisheries Guidelines: Building a global safety net for small-scale fisheries' (2022) 37(1) *IJMCL* 31–72, 36–40.

89 See, for example, R Churchill, 'The LOSC regime for protection of the marine environment: Fit for the twenty-first century?' in R Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, Cheltenham, 2015); KM Gjerde, 'Challenges to protecting the marine environment beyond national jurisdiction' (2012) 27(4) *IJMCL* 839–847.

90 LOSC (n 87), Article 61.

91 *Ibid.*, Articles 117–118.

92 *Ibid.*, Article 192; D Czybulka, 'Art. 192' in A Proelss, *The United Nations Convention on the Law of the Sea: A Commentary* (Nomos, Baden-Baden, 2017) 1280. See E Morgera *et al.*, 'Ocean-based climate action and human rights implications under the international climate change regime' (2023) 38(3) *IJMCL*, this issue.

93 LOSC (n 87), Article 194; Y Tanaka, *The International Law of the Sea* (Cambridge University Press, Cambridge, 2016) 275–276.

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change in the ocean.[94] This is a matter that the International Tribunal for the Law of the Sea (ITLOS) is expected to elucidate in a forthcoming advisory opinion.[95] In the exercise of such duties, States Parties to the LOSC can take the necessary measures to protect the marine environment through, for instance, establishment of marine protected areas and penalties for marine pollution, including plastic pollution.[96] In doing so, States protect everyone's rights to a clean, healthy and sustainable environment, as well as the full realisation of the other fundamental rights to fishers outlined above.

The law of the sea regime has evolved through time[97] with the adoption of so-called implementing instruments, which include the UN Fish Stocks Agreement (UNFSA)[98] and the recently adopted Agreement for the Conservation and Sustainable Use of Marine Biological Diversity of Areas

94 As scholars explain, the broad definition of 'pollution of the marine environment' under Article 1 of the LOSC includes introduction of substances or energy, which can be associated with greenhouse gas emissions and their effects on the ocean. Consequently, the obligations under Part XII of the LOSC can be considered those relating to climate change obligations. See D Freestone and M McCreath, 'Climate change, the Anthropocene and ocean law: Mapping the issues' in McDonald, McGee and Barnes (eds) (n 85), at pp. 59–60; A Boyle, 'Protecting the marine environment from climate change: The LOSC Part XII regime' in E Johansen, SV Busch and IU Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press, Cambridge, 2020).

95 In the request for an advisory opinion, the Commission of Small Island States on Climate Change and International Law asked for clarifications on States' obligations under the LOSC, including Part XII, to preserve and protect the marine environment, and to prevent, reduce and control marine pollution, which are all associated with climate change impacts on the ocean. See ITLOS, 'Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)' (ITLOS, 2023) available at https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/; see also LP Baars, 'The salience of salt water: An ITLOS advisory opinion at the ocean-climate nexus' (2023) 38(3) *IJMCL*, this issue.

96 See N O'Meara, 'Human rights and the global plastics treaty to protect health, ocean ecosystems and our climate' (2023) 38(3) *IJMCL*, this issue.

97 For an historical analysis of the law of the sea regime with a focus on international fisheries law since the entry into force of the LOSC, see J Nakamura, 'International fisheries law: Past to future' in S Partelow, M Hadjimichael and A-K Hornidge (eds), *Ocean Governance: Knowledge Systems, Policy Foundations and Thematic Analyses* (Springer, Heidelberg, 2023).

98 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 December 1995, in force 11 December 2001) 2167 *UNTS* 3 [UNFSA].

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beyond National Jurisdiction (BBNJ Agreement).[99] Additionally, the LOSC contains provisions referring to generally recommended international minimum standards, which can serve as the basis for other international guidance that can aid the interpretation and application of the Convention, arguably elaborating on obligations of States Parties to manage and conserve their domestic fish stocks.[100] While the BBNJ Agreement is not yet in force, it is worth examining both agreements' contents to clarify the provisions which Parties to the UNFSA and future States Parties to the BBNJ Agreement are, and will be, bound to, and which can contribute to the protection of fishers' rights in a changing ocean context.

Starting with the UNFSA, its relevance for the protection of fishers' rights is indirect and reflected in qualified language, in that it requires Parties to 'take into account the interests of artisanal and subsistence fishers' as a principle for the conservation and management of straddling and highly migratory fish stocks.[101] The 'need to avoid adverse impact on, and ensure access to fisheries' by those fishers, as well as women fishworkers and Indigenous peoples, is also required for States Parties when giving effect to their duty to cooperate in the conservation and management of the stocks concerned.[102] These provisions are as far as the UNFSA goes in drawing States Parties' attention to protect fishers, notably in respect of vulnerable groups.[103] Additionally, the UNFSA can be considered relevant due to its precautionary approach, which is explicitly and widely adopted to protect living marine resources and preserve the marine environment,[104] and the contributions that conservation and management of stocks can bring to strengthening the resilience of the environment, its habitats and ecosystems against the impacts of a changing ocean.[105]

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99 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 Jurisdiction, UN Doc A/CONF.232/2023/4 (19 June 2023, not yet in force) [BBNJ Agreement]. See E Morgera *et al.*, 'Addressing the ocean-climate nexus in the BBNJ Agreement: Strategic environmental assessments, human rights and equity in ocean science' (2023) 38(3) *IJMCL*, this issue.

100 J Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press, Oxford, 2017) 171, 180.

101 UNFSA (n 98), Article 5(i).

102 *Ibid.,* Article 24(2)(b).

103 Nakamura (n 88), at pp. 41–42.

104 UNFSA (n 98), Article 6.

105 In this respect, in UNFSA's preamble, States Parties affirmed 'the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimise the risk of long-term or irreversible effects of fishing operations'. The UNFSA also aims at ensuring 'the long-term conservation and sustainable

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For its part, the BBNJ Agreement contains certain provisions relevant to the protection of fishers' rights concerning their knowledge and culture, while also providing important considerations for climate change impacts on marine ecosystems. For instance, in its preamble, the BBNJ Agreement affirms the 'existing rights of Indigenous Peoples' pursuant to the UNDRIP, and of local communities, as well as the need to coherently and collaboratively address marine biodiversity loss and ecosystems degradation due to climate change impacts on marine ecosystems.[106] The BBNJ Agreement's principles and approaches include the precautionary and ecosystem approaches, as well as an approach that builds ecosystem resilience, including to adverse effects of climate change, and the 'use of relevant traditional knowledge of Indigenous Peoples and local communities'.[107] Also important are the provisions for the establishment of area-based management tools, including marine protected areas, environmental impact assessment and strategic environmental assessment,[108] because they contribute to strengthening the ocean's resilience to climate change and its capacity to absorb greenhouse gas emissions.

Whilst these are not in themselves human rights obligations, they do have direct consequences for the enjoyment of human rights, which has implications on States' obligations to protect said rights from interference. Although the specific human rights issues would not be addressed within the LOSC's realm of compulsory jurisdiction, the protection of human rights affected by a changing ocean could be sought from international human rights monitoring mechanisms, as explained further below, which individuals could have direct or indirect access to (for instance, through the UN Special Rapporteurs).

use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention' (Article 2).

106 It also exemplifies the climate change impacts, such as warming and ocean deoxygenation, as well as ocean acidification, pollution, including plastic pollution, and unsustainable use. See BBNJ Agreement (n 99), preamble.

107 *Ibid.,* Article 7(e)–(f), (h), (j).

108 *Ibid.,* Part IV.

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Linking Climate Change Law Obligations with the Protection of Fishers' Rights

The UN Framework Convention on Climate Change (UNFCCC)[109] contains no explicit mention of human rights,[110] neither does the Kyoto Protocol.[111] It took some years until the climate change regime began to interact with human rights and related issues. This interaction was largely promoted through the efforts of the Human Rights Council. Since 2008, it has raised awareness about the threats climate change poses to people and communities, and the need to connect climate change and human rights.[112] Notably, the Conference of the Parties (COP) to the UNFCCC, at its 16th meeting, in 2010, agreed that 'Parties should, in all climate change related actions, fully respect human rights'.[113] However, human rights were not mentioned in subsequent COP resolutions,[114] until COP21,[115] and the Paris Agreement's preamble, which refers to the human rights to health, the rights of Indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, the right to development, as well as gender equality, empowerment of women and intergenerational equity.[116] Human rights references dissipated again from

109 United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994) 1771 *UNTS* 107 [UNFCCC].

110 'Human rights under the UNFCCC regime' (*Legal Response*, 25 June 2019) available at https://legalresponse.org/legaladvice/human-rights-under-the-unfccc-regime/.

111 Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005) 2303 *UNTS* 162.

112 Human Rights Council Res 7/23 (28 March 2008), Human Rights and Climate Change [adopted without a vote].

113 UNFCCC, *Report of the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), para 8.

114 Human rights are only mentioned in the draft Paris Agreement's preamble. See UNFCCC, *Report of the Conference of the Parties on its Twentieth Session, held in Lima from 1 to 14 December 2014*, UN Doc FCCC/CP/2014/10/Add.1 (2 February 2015); see also UNFCCC, *Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its Seventh Session, held in Durban from 28 November to 11 December 2011*, UN Doc FCCC/KP/CMP/2011/10/Add.1 (15 March 2012); UNFCCC, *Report of the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012*, UN Doc FCCC/CP/2012/8/Add.1 (28 February 2013); UNFCCC, *Report of the Conference of the Parties on its Nineteenth Session, held in Warsaw from 11 to 23 November 2013*, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014).

115 UNFCCC, *Report of the Conference of the Parties on its Twenty-first Session, held in Paris from 30 November to 13 December 2015*, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016).

116 Paris Agreement on Climate Change (Paris, 12 December 2015, in force 4 November 2016) 3156 *UNTS*, preamble.

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climate change debates in subsequent COPs,[117] with references in specific contexts.[118] Notably, in COP23, in 2017, reference to human rights is found in a decision to adopt a gender action plan, to promote and consider obligations on human rights in a broader context, as well as gender equality.[119] COP24, in 2018, mentioned human rights concerning the elaboration by Parties of laws and measures concerning displacement due to climate change.[120] The latest implementation plan adopted at COP27, in 2022, reproduces text from previous decisions at COP25 and COP26,[121] and notably recommends that States Parties promote and consider their respective human rights obligations, explicitly including the right to a clean, healthy and sustainable environment.[122]

There is a vast body of scholarship on human rights and climate change.[123] While one could take insights from this literature in their account of Indigenous peoples and local communities affected by climate change, the particularities faced by fishers in a changing ocean context merits special attention, as explored in this article. The references to human rights in the preamble of the Paris Agreement and in foreseen COP decisions should be read in conjunction with the references to ocean, biodiversity and ecosystems in the instruments and obligations under the law of the sea regime outlined above. The explicit mention of those terms is a recognition of the goods and services that marine ecosystems and their biodiversity provide, including fisheries, and the human rights of fishers, and it can be argued that the obligations that the

117 UNFCCC, *Report of the Conference of the Parties on its Twenty-second Session, held in Marrakech from 7 to 18 November 2016*, UN Doc FCCC/CP/2016/10/Add.1 (31 January 2017).

118 *Ibid.*

119 UNFCCC, *Report of the Conference of the Parties on its Twenty-third Session, held in Bonn from 6 to 18 November 2017*, UN Doc FCCC/CP/2017/11/Add.1 (8 February 2018).

120 UNFCCC, *Report of the Conference of the Parties on its Twenty-fourth Session, held in Katowice from 2 to 15 December 2018*, UN Doc FCCC/CP/2018/10/Add.1 (19 March 2019).

121 UNFCCC, *Report of the Conference of the Parties on its Twenty-sixth Session, held in Glasgow from 31 October to 13 November 2021*, UN Doc FCCC/CP/2021/12/Add.1 (8 March 2022); UNFCCC, *Report of the Conference of the Parties on its Twenty-fifth Session, held in Madrid from 2 to 15 December 2019*, UN Doc FCCC/CP/2019/13/Add.1 (16 March 2020).

122 UNFCCC, *Report of the Conference of the Parties on its Twenty-seventh Session, held in Sharm el-Sheikh from 6 to 20 November 2022*, UN Doc FCCC/CP/2022/10/Add.1 (17 March 2023).

123 See, for instance, M Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing, Oxford, 2018); Boyle (n 82); A Savaresi and J Auz, 'Climate change litigation and human rights: Pushing the boundaries' (2019) 9(3) *Climate Law* 244; G Giacomini, *Indigenous Peoples and Climate Justice: A Critical Analysis of International Human Rights Law and Governance* (Springer, Heidelberg, 2022); O Quirico and M Boumghar, *Climate Change and Human Rights: An International and Comparative Law Perspective* (Taylor & Francis Group, Abingdon, 2015); S Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, Cambridge, 2010).

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Agreement lays out apply to the management and conservation of marine living resources. The Agreement contains a mix of country-based voluntary and binding provisions relating to Parties' contributions to achieving global goals set out in the Agreement on climate mitigation, adaptation and finance. Article 7 contains multiple provisions with the objective of realising the aim of increasing the ability of States Parties to adapt to climate change and fostering climate resilience in Article 2(1)(b).[124] It is worth noting Article 7(5), which reiterates that 'adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach' considering vulnerable groups, communities and ecosystems, and that such adaptation action 'should be based on and guided by the best available science', including traditional, Indigenous and local knowledge systems. This is a key provision in support of fishers' participatory rights in the changing ocean context. In addition, specialised organisations of the United Nations, such as the Food and Agriculture Organization (FAO), are encouraged to support States Parties to implement the above actions, taking into account Article 7(5). In support of this endeavour, the FAO has made major contributions by including chapter 9 dedicated to climate change and disaster risk in the SSF Guidelines, as well as various other technical guidance documents which discuss climate change and fisheries in an adaptation context.[125] It remains to be seen whether voluntary guidelines on climate change and fisheries will be developed by the FAO.

As seen above, human rights of fishers are affected by climate change, with its effects felt especially by coastal and Indigenous communities, with drastic effects on rights to life, health and property, for instance.[126] In this sense, scholars have drawn attention to the IPCC findings that climate change will have impacts on human life, especially those located in coastal communities and

124 Article 2(1)(b) aims to '[i]ncreas[e] the ability to adapt to the adverse impacts of climate change and foster climate resilience and low [GHG] emissions development, in a manner that does not threaten food production'.

125 For example, Barange *et al.* (n 7); T Bahri *et al.* (eds), *Adaptive Management of Fisheries in Response to Climate Change*, FAO Fisheries and Aquaculture Technical Paper No. 667 (FAO, Rome, 2021); K Cook, K Rosenbaum and F Poulain, *Building Resilience to Climate Change and Disaster Risks for Small-Scale Fishing Communities. A Human Rights-based Approach to the Implementation of Chapter 9 of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (FAO, Rome, 2021); NL Gutierrez *et al.*, 'Production and environmental interactions of small-scale fisheries' in FAO, Duke University and WorldFish (n 12) 30–79.

126 G Giacomini, *Indigenous Peoples and Climate Justice: A Critical Analysis of International Human Rights Law and Governance* (Springer, Heidelberg, 2022) 101.

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vulnerable communities.[127] In a way, the insufficient developments on human rights in the climate change regime have been counterbalanced by the special procedures of the Human Rights Council, which have advanced in making the linkages and incorporating climate change to the human rights realm. Ian Fry, appointed in 2022 as the first Special Rapporteur on climate change issued his inaugural report on the promotion and protection of human rights in the context of climate change[128] and a subsequent report on legal options to protect the human rights of persons displaced across international borders due to climate change.[129] These are important developments for interpreting within a system or in a mutually supportive way climate change obligations with human rights obligations.

Clarifying States' Obligations for the Protection of Fishers' Rights

The law of the sea regime has relatively little to offer for the protection of fishers, as noted previously.[130] To fill this gap and understand States' obligations to protect fishers' fundamental rights in a changing ocean, one needs to rely on the core human rights treaties noted above, as well as the UNDRIP and UNDROP, which affirm the fundamental rights of fishers and provide obligations and recommendations for States to comply and observe in protection of such rights. State Parties to those treaties are bound by its obligations, and States which voted in favour of the adoption of UNDRIP and UNDROP are expected to take measures to protect fishers' rights affected by a changing ocean. Although considered non-binding, both Declarations, as well as the SSF Guidelines, are based on binding obligations. As such, these formally non-binding instruments can arguably generate law-making effects.[131] Interpreting the provisions of relevant binding instruments should consider complementary international guidance that specifically addresses fishers and

127 S Caney, 'Human rights, climate change and discounting' (2008) 17(4) *Environmental Politics* 536.

128 UNGA, Promotion and Protection of Human Rights in the Context of Climate Change, UN Doc A/77/226 (26 July 2022).

129 UNGA Human Rights Council, Providing Legal Options to Protect the Human Rights of Persons Displaced Across International Borders Due to Climate Change, UN Doc A/HRC/53/34 (18 April 2023).

130 Nakamura (n 88), at pp. 36–42.

131 The legal status and normative authority of these instruments have been supported by literature. See, for example, A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007); S Barnabas, 'The legal status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in contemporary international human rights law' (2017) 6(2) *International Human Rights Law Review* 242–261; Nakamura 2022 (n 88).

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details the actions or measures that States should take to protect fishers' rights. This is known as systemic integration, pursuant to the Vienna Convention on the Law of Treaties,[132] in the sense that treaty obligations should be read and implemented together, even if they belong to different treaties.[133] This is key to painting the full picture of fishers' rights protection.

Let us look into some examples of specific obligations under those treaties which are particularly relevant to the changing ocean context. Under both the ICCPR and ICESCR, States Parties have the duty to undertake steps towards achieving the full realisation of the rights recognised under the Covenants, including by adoption of laws that give effect to such rights.[134] ICCPR Parties also have the duty to ensure that individuals whose rights and freedoms are violated have an effective remedy and that such remedy is enforced.[135] The Committee on Economic, Social and Cultural Rights, which functions as the ICESCR's monitoring body, has highlighted that, when exercising appropriate measures to comply with the ICESCR, judicial remedies in respect of these rights may be one of the measures.[136] The Committee has also stated that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.[137] This minimum level is unclear and might change due to States' resource constraints.[138]

The Human Rights Committee, which functions as the ICCPR's monitoring body, has adopted views on a few cases regarding the protection of fishers' rights.[139] A landmark case for the protection of fisher's rights in a changing ocean is worth highlighting: the Human Rights Committee's views adopted in the case *Daniel Billy et al.* v. *Australia*, which discussed the protection of an Indigenous community in the Torres Islands against climate change impacts

132 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) 1155 *UNTS* 331.

133 *Ibid.*, Article 31(3); see also B Mayer, 'Climate change mitigation as an obligation under human rights treaties?' (2021) 115(3) *American Journal of International Law* 438.

134 ICCPR (n 19), Article 2; ICESCR (n 20), Article 2.

135 ICCPR, *ibid.*

136 Committee on Economic, Social and Cultural Rights (CESCR), 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (CESCR, 14 December 1990) available at https://www.refworld.org/pdfid/4538838e10.pdf.

137 CESCR, 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (CESCR, 14 December 1990) available at https://www.refworld.org/pdfid/4538838e10.pdf.

138 N Rodley, 'International human rights law' in M Evans (ed.), *International Law* (Oxford University Press, Oxford, 2018) 783.

139 Nakamura (n 16).

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(i.e., sea level rise, flooding, coral bleaching, ocean acidification) and the violation of the Islanders' rights to culture and interferences with private life, family and homes.[140] The Committee found that such impacts 'could have been reasonably foreseen' by the State Party, given that Torres Islanders' claims date back to the 1990s.[141] While Australia began to take adaptation measures (i.e., upgrading seawalls), the Committee considered the delay in taking such measures 'an inadequate response'.[142] The Committee concluded that there was a violation of Article 27 of the ICCPR given

> the State's party failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture.[143]

The Human Rights Committee further noted the obligation of Australia to provide effective remedy, namely, full reparation to the individuals whose rights under the ICCPR were violated, provide adequate compensation, engage in meaningful consultation with the affected communities and conduct needs assessments, and take steps to prevent similar violations in the future.[144] This is a ground-breaking decision and the first to link the failure of a developed State like Australia to take mitigation and adaptation measures to the rights of a small island State's nationals, taking into account their particular vulnerability as an Indigenous group.[145]

In addition to the ICCPR and the ICESCR and their respective committees, the Committee on the Elimination of Discrimination Against Women has issued specific recommendations for States Parties to provide women and girls equal opportunities to lead, participate and engage in decision-making in

140 Human Rights Committee, Communication No. 3624/2019, *Daniel Billy et al.* v. *Australia*, UN Doc CCPR/C/135/D/3624/2019, adoption of Views 21 July 2022.

141 *Ibid.*, para 8.14.

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*, para 11.

145 M Feria-Tinta, 'Torres Strait Islanders: United Nations Human Rights Committee delivers ground-breaking decision on climate change impacts on human rights' (*EJIL:Talk!*, 27 September 2022) available at https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/.

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activities relating to climate change,[146] and to fully ensure Indigenous women and girls' rights to a clean, healthy and sustainable environment, equal access to fisheries, and protection against discrimination and dispossession.[147] The Committee on the Rights of the Child has recently adopted general comments on children's rights and the environment with a special focus on climate change, and the Special Rapporteur procedures before the Human Rights Council also contribute to elucidate the protection of fishers' rights in a changing ocean context. The reports of the former Special Rapporteur on Human Rights and the Environment John Knox have clarified the relationship between human rights and the environment, including climate change's adverse effects on the enjoyment of human rights.[148] While the connections made are generic, they are inherently related to the specific case of fishers, especially small-scale fishers and vulnerable groups. The former Special Rapporteur on the Right to Food Olivier De Schutter has also contributed to bridging human rights approaches to fisheries as essential for the recognition of fishers' fundamental rights.[149] By taking into account climate change effects, the Rapporteur concludes that States should 'generally strengthen measures to limit climate change' in view of fishers' right to food.[150] This is a further example of how the UN system of human rights protection helps shed light on how human rights obligations and climate change effects interact.

The SSF Guidelines also provide recommendations for enhancing the recognition and sustainable development of and equitable treatment given by States and non-State actors to small-scale fishers.[151] Based on the human rights-based approach, the SSF Guidelines link obligations that States Parties are bound under the nearly universally ratified core human rights treaties, and clarify recommendations that States and non-State actors should do to protect small-scale fishers.[152] The SSF Guidelines establish the urgency in combating

146 See the full set of detailed recommendations in CEDAW General Recommendation No. 37 (2018) (n 59).

147 CEDAW General Recommendation No. 34 (2016) (n 60), para 56; CEDAW General Recommendation No. 39 (2022) (n 60), para 23(e).

148 JH Knox, 'Human rights principles and climate change' in P Cinnamon *et al.* (eds), *The Oxford Handbook on International Climate Change Law* (Oxford University Press, Oxford, 2016).

149 UNGA, *Report of the Special Rapporteur on the Right to Food*, UN Doc A/HRC/40/56 (25 January 2019).

150 *Ibid.*, para 83(t).

151 Morgera and Nakamura (n 73), at p. 68.

152 'Unpacking a human rights-based approach to small-scale fisheries: How the integrated protection of substantive and procedural human rights can contribute to achieving multiple Sustainable Development Goals' (One Ocean Hub Policy Brief, 31 May 2022)

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climate change in small-scale fisheries. States should take applicable measures for adaptation and mitigation of climate change through consultation with small-scale fishers, with special support available to vulnerable coastal communities.[153] The SSF Guidelines call for integrated approaches to address climate change impacts on small-scale fisheries, such as disasters that can compromise livelihoods, and the impacts of climate change on harvest and post-harvest.[154] Similar guidance can be found in the UNDROP, which also calls for the participation of peasants and small-scale fishers in the design and implementation of adaptation and mitigation measures, taking into account their traditional knowledge.[155] UNDRIP, albeit not containing any specific provisions on climate change, affirms Indigenous peoples' right to participate in decision-making of matters which affect them, and calls on States to establish mechanisms to prevent and redress actions which cause displacement of Indigenous peoples.[156]

Therefore, the protection of the fundamental rights of fishers in a changing ocean cannot be secured on the basis of a single legal regime, but rather the interpretation and use of different regimes, including (but not limited to) the law of the sea, climate law and human rights regimes in a mutually supportive manner. Such an approach can be used as a way of advancing the protection of fishers' rights adversely affected by a changing ocean.

Conclusion

Fragmentation in international law requires interpreting and using treaties, principles, approaches and non-binding instruments from different legal regimes in a systemic, integrated and mutually supportive manner. In examining the support of the human rights, law of the sea and climate change regimes to the protection of fishers in the changing ocean context, special account has been taken of small-scale fishers and other vulnerable groups. Current and future developments are and will show whether duty-bearers will take the necessary actions and measures to further such protection. Many possibilities exist to advance this protection, including, but not limited to, providing capacity development and awareness-raising by governments, international

available at https://oneoceanhub.org/wp-content/uploads/2022/06/Policy-brief_HUMAN RIGHTS_Smallscalefisheries_OOH.pdf; accessed 3 March 2023.

153 SSF Guidelines (n 76), ss 9.1–9.2.

154 *Ibid.,* s 9.3.

155 UNDROP (n 74), Article 2.

156 UNDRIP (n 49), Article 18.

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organisations and non-governmental organisations in close collaboration with fishers, particularly for the development of adaptation plans and tools. Special rapporteurs can play a key role by elucidating, in their country visits,[157] the challenges and identifying solutions to strengthening the protection of fishers' rights in the changing ocean context. Notably, thematic reports can focus on this particular topic to deepen the analysis of the matter, and involve and draw the attention of multi-stakeholders to address this issue.[158]

Fishers directly or through their representatives could also take the initiative in seeking the full realisation of their rights or claim reparations or compensation for past and current rights' violations. Remedies through the justiciability of certain rights may change according to the rights themselves being justiciable within States' own national systems, affecting primarily social, economic and cultural rights.[159] Litigating on human rights in order to address climate change impacts is not a new tactic and has been increasingly used by civil society to achieve the clarification of certain human rights obligations in the light of climate change impacts.[160] Fishers' communities may initiate cases under human rights treaty monitoring bodies, as well as other international or regional human rights courts and tribunals, after having exhausted domestic options and following the applicable procedures. Ensuring fishers participation in the design, implementation and monitoring of climate change prevention, adaptation and mitigation measures, policies and programmes is fundamental, and enables the contribution of fishers' traditional knowledge and perceptions of climate change. This participatory approach to climate change decision-making in fisheries can be realised by the undertaking of socio-cultural environmental strategic and impact assessments prior to the development of plans, policies, programmes and undertakings with potential

157 See the database of country visits by thematic and country special procedures mandate-holders available at https://spinternet.ohchr.org/Home.aspx?lang=en; accessed 2 July 2023.

158 In addition to the reports of the Special Rapporteur on Climate Change, which relate to the protection of human rights, a forthcoming thematic report is being prepared by Michael Fakhri, the Special Rapporteur on the Right to Food that is dedicated to the right to food in the context of small-scale fisheries. See S Febrica and E Webster, 'How can national human rights institutions and international human rights mechanisms support the protection of small-scale fishers' human rights?' (One Ocean Hub, 28 February 2023) available at https://oneoceanhub.org/how-can-national-human-rights-institutions-and-international-human-rights-mechanisms-support-the-protection-of-small-scale-fishers-human-rights/.

159 Rodley (n 138), at pp. 783–784.

160 S Jodoin, A Savaresi and M Wewerinke-Singh, 'Rights-based approaches to climate decision-making' (2021) 52 *Current Opinion in Environmental Sustainability* 45–53.

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to cause significant environmental impacts.[161] Specifically, the participation of small-scale fishers in decision-making processes requires consideration of their representation, cultural aspects and integration of their views and traditional knowledge, as well as access to information in a way that is easily understood by small-scale fishers.[162]

It is crucial to read, interpret and apply the forementioned treaties, international guidance and technical documents in conjunction with each other so as to strengthen the protection of the fundamental rights of all fishers in the face of climate change. Comprehensive guidance from UN agencies could help in consolidating the recommendations from the applicable regimes in a coherent and mutually supportive manner, furthering the protection of fishers' fundamental rights in a changing ocean context. Additionally, as certain treaty monitoring bodies have already advanced the climate change discussion in their forums by issuing general recommendations (in the case of CEDAW) and general comments (CRC), which elaborate on States' obligations under those treaties in the climate change context, it remains to be seen whether other treaty monitoring bodies, including the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, will do the same. Furthermore, regional human rights instruments also include monitoring mechanisms that are specific to each region's peculiarities.[163] Notably, this is illustrated by the IACtHR jurisprudence on Indigenous peoples' human rights[164] and its ground-breaking advisory opinion which clarified the correlation between human rights and the environment.[165] These can also be pathways through which State obligations can be clarified.[166] Many possibilities indeed exist, and it is hoped this article has contributed to clarifying some options for furthering the protection of fishers in the changing ocean context.

161 Nakamura, Diz and Morgera (n 5).

162 One Ocean Hub Policy Brief 31 May 2022 (n 152).

163 B Cali, 'Regional protection' in D Moeckli, S Shah and S Sivakumaran, *International Human Rights Law* (Oxford University Press, 2018).

164 See (nn 53–54).

165 IACtHR, 'Advisory Opinion OC-23/17 of 15 November2017 requested by the Republic of Colombia' (*IACtHR*, 15 November 2017) available at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

166 A notable example is the case submitted by Chile and Colombia concerning their obligations within climate change prevention and mitigation. See J Auz and T Viveros-Uehara, 'Another advisory opinion on the climate emergency? The added value of the inter-American Court of Human Rights' (*EJIL:Talk!*, 2 March 2023) available at https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/.

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