volume

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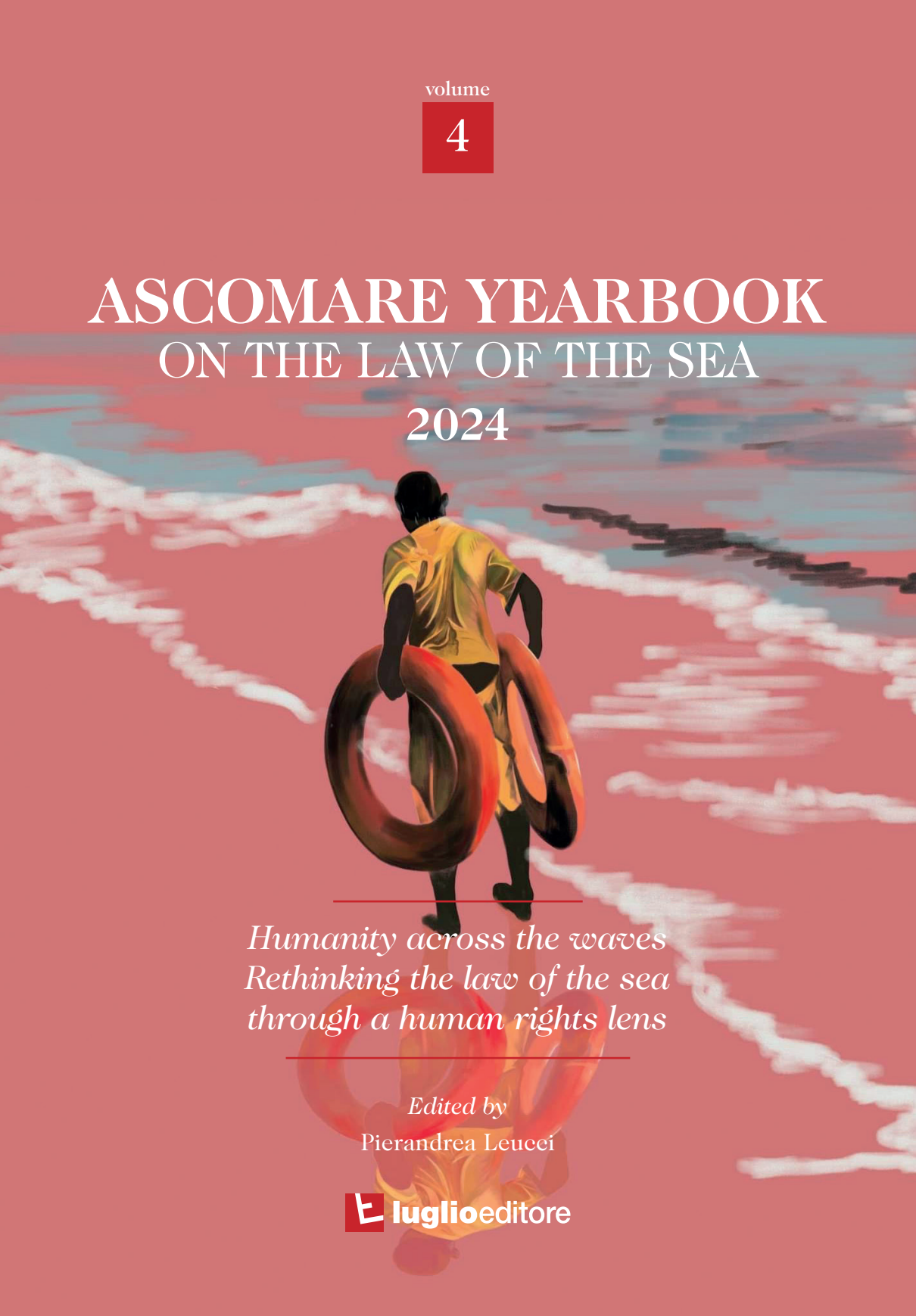
ASCOMARE YEARBOOK
ON THE LAW OF THE SEA
2024



Humanity across the waves
Rethinking the law of the sea
through a human rights lens

Edited by

Pierandrea Leucci

luglioeditore

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ASCOMARE
Consulenza Diritto del Mare

ASCOMARE YEARBOOK ON THE LAW OF THE SEA, 2024
Volume 4: Humanity across the waves – Rethinking the law of the sea through a human rights lens

The *Associazione di Consulenza in Diritto del Mare* (ASCOMARE) is dedicated to promoting the study, uniform interpretation, and application of the international law of the sea, including the United Nations Convention on the Law of the Sea, 1982, and its implementing instruments. The work of ASCOMARE is inspired by human rights considerations and environmental principles. The *ASCOMARE Yearbook on the Law of the Sea* strives to serve as a tool to support the work of international law experts, judicial bodies, policymakers, and legal practitioners in the field of the law of the sea.

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…L'indifferenza è il peso morto della storia. L'indifferenza opera potentemente nella storia. Opera passivamente, ma opera. È la fatalità; è ciò su cui non si può contare; è ciò che sconvolge i programmi, che rovescia i piani meglio costruiti; è la materia bruta che strozza l'intelligenza… Alcuni piagnucolano pietosamente, altri bestemmiano oscenamente, ma nessuno o pochi si domandano: se avessi fatto anch'io il mio dovere, se avessi cercato di far valere la mia volontà, sarebbe successo ciò che è successo?

(A. Gramsci, 'La città futura', 11 febbraio 1917)

Dedicato alle vittime dell'indifferenza.

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Foreword

We are currently experiencing a period of exceptional global instability – arguably the most fragile since the establishment of the post-World War II legal order – particularly for those residing in regions historically shielded from the daily realities of conflict, famine, and systemic collapse. Against this backdrop, the legal significance of the oceans is far from ancillary. Oceans cover over 70% of the Earth's surface, sustain nearly half of the global population – approximately 3.3 billion people – who depend on seafood as a primary source of animal protein, and facilitate roughly 90% of international trade and fuel transportation annually. The human reliance on maritime spaces is not abstract – it is structural.

Despite the profound interdependence between *humanity* and the ocean, the legal regimes governing the law of the sea and international human rights law have historically developed in parallel – doctrinally distinct, discursively detached, and institutionally uncoordinated. This separation has contributed to a fragmented legal landscape in which the human dimensions of maritime activity have often remained peripheral to the mainstream of law of the sea discourse.

In recent years, however, international courts and tribunals – alongside an expanding body of legal scholarship – have begun to challenge this conceptual and normative divide. Through purposive interpretation

of key instruments, most notably the United Nations Convention on the Law of the Sea, efforts have emerged to foster integration between the two regimes. These developments have facilitated the progressive 'humanisation' of the law of the sea, reflected in an increased recognition of the rights, protections, and vulnerabilities of individuals at sea.

The result is the gradual consolidation of a distinct legal field: *human rights at sea*. No longer a peripheral concern, it represents an evolving jurisprudence and scholarly consensus that maritime governance must be attuned to the imperatives of human dignity and accountability under international law. Yet this does not exhaust the ways in which the law of the sea and human rights may – and do – interact in practice.

While much of the existing literature focuses on the conditions of specific individuals such as seafarers, migrants, or civilians at sea, this volume invites a broader and more analytically expansive engagement with the legal and normative intersections between these fields. The contributions adopt a holistic approach, treating the law of the sea as a dynamic legal order that shapes – and is shaped by – broader frameworks of human rights and global governance.

In doing so, this volume prompts us to interrogate how the law of the sea contributes – constructively or otherwise – to the development, application, and potential reconfiguration of collective frameworks for the protection of fundamental rights, including in domains not traditionally situated within the maritime sphere.

In this volume, the law of the sea sometimes steps back from centre stage, yet it remains a vital presence throughout – like a modern-day Samwise Gamgee, the unwavering companion guiding readers through the complex issues at hand. At times, readers may feel disoriented navigating the wide-ranging topics here – wondering what maritime flotillas, search and rescue aircraft, decolonisation, artificial intelligence, intellectual property, genocide, climate change, or child labour in coltan mines have to do with the law of the sea. The short answer? Everything.

For while it is now well established that *human rights apply at sea as they do on land*, the inverse is equally true and perhaps more complex – many rights exercised on land, whether civil, political, social, or economic, are directly or indirectly shaped by how maritime spaces are governed and marine resources exploited. This volume aims to move beyond disciplinary silos and jurisdictional blind spots, offering a sharper lens through which to understand the law of the sea as more than a functional regime of navigation, fisheries, and boundaries. Instead, it is presented here as a powerful vector in the shaping, enabling, and at times constraining, of human rights in a deeply interconnected legal order.

Pierandrea Leucci
President of ASCOMARE
Lecce, December 2024

List of abbreviations

3TG:	Tin, Tungsten, Tantalum and Gold
AI:	Artificial Intelligence
ABMT:	Area-Based Management Tool
ARSIWA:	Articles on the Responsibility of States for Internationally Wrongful Acts
ASCOMARE:	Associazione di Consulenza in Diritto del Mare
ASEAN:	Association of Southeast Asian Nations
ATS:	Air Traffic Services
BBNJ:	Biodiversity Beyond National Jurisdiction
BIOT:	British Indian Ocean Territory
BRI:	Belt and Road Initiative
CAGR:	Compound Annual Growth Rate
CCG:	Chines Coast Guard
CCNUCC:	Convention-cadre des Nations Unies sur les Changements Climatiques
CCTV:	Closed-circuit Television
CEACR:	Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization
ChMPA:	Chagos Marine Protected Area
CIJ:	Cour Internationale de Justice
CNUDM:	Convention des Nations Unies sur le droit de la mer
Conv. Int.:	Convention for the Safeguarding of the Intangible Cultural Heritage, 2003
COSIS:	Commission of Small Island States on Climate Change and International Law
CourIDH:	Cour interaméricaine des droits de l'Homme
CRC:	Committee on the Rights of the Child
DRC:	Democratic Republic of the Congo
DOALOS:	UN Division for Ocean Affairs and the Law of the Sea

ECMPO:	Espaces Côtiers Maritimes des Peuples Originaires
ESCR:	Economic, Social and Cultural Rights
EEZ:	Exclusive Economic Zone
ENAC:	Ente Nazionale per l'Aviazione Civile
EU:	European Union
EASA:	European Union Aviation Safety Agency
ECtHR:	European Court of Human Rights
EMILY:	Emergency Integrated Lifesaving Lanyard
FAO:	Food and Agriculture Organization
FIR:	Flight Information Region
Frontex:	European Border and Coast Guard Agency
GAIRS:	Generally Accepted International Rules and Standards
GDHRS:	Geneva Declaration on Human Rights at Sea
GIEC:	Groupe d'experts intergouvernemental sur l'évolution du climat
GLAN:	Global Legal Action Network
HRC:	Human Rights Committee
IACtHR:	Inter-American Court on human rights
IAMSAR:	International Aeronautical and Maritime Search and Rescue Manual
ICAO:	International Civil Aviation Organization
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICGLR:	International Conference on the Great Lakes Region
ICPPED:	International Convention for the Protection of All Persons from Enforced Disappearances
ICRC:	International Committee of the Red Cross
ICJ:	International Court of Justice
ILA:	International Law Association
ILC:	International Law Commission
ILO:	International Labour Organization

IOM:	International Organization for Migration
ITLOS:	International Tribunal for the Law of the Sea
IMO:	International Maritime Organization
IPCC:	Intergovernmental Panel on Climate Change
ITSCI:	International Tin Supply Chain Initiative
JWG:	Joint Working Group
LCGN:	Libyan Coast Guard and Navy
LLMRCC:	International Aeronautical and Maritime Search and Rescue Manual
M23:	March 23 armed group
MLA:	China's Maritime Law Enforcement
MRCC:	Maritime Rescue Coordination Centre
MASS:	Maritime Autonomous Surface Ship
MoU:	Memorandum of Understanding
NGO:	Non-governmental Organisation
NORI:	Nauru Ocean Resources Inc.
OHCHR:	Office of the United Nations High Commissioner for Human Rights
OECD:	Organization for Economic Co-operation and Development
OECD Guidance:	Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
OIT:	Organisation Internationale du Travail
OMI:	Organisation météorologique internationale
PAFMM:	People's Armed Forces Maritime Militia
PARE:	Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite
PCA:	Permanent Court of Arbitration
PLA:	People's Liberation Army of China
PLAN:	PLA Navy
PRC:	People's Republic of China
RAIT:	Regole dell'Aria Italia

RCC:	Rescue Coordination Centre
RCM:	Regional Certification Mechanism of the International Conference on the Great Lakes Region
SAR:	Search and Rescue
SAR Convention:	International Convention on Maritime Search and Rescue, 1979
SOLAS:	International Convention for the Safety of Life at Sea, 1974
SOMINKI:	Société Minière et Industrielle du Kivu
SRR:	Search and Rescue Region
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNDRIP:	United Nations Declaration on the Rights of Indigenous People
UNESCO:	United Nations Educational, Scientific and Cultural Organization
UNFCCC:	United Nations Framework Convention on Climate Change
UNFSA:	United Nations Fish Stocks Agreement, 1995
UNGA:	United Nations General Assembly
UNGP:	United Nations Guiding Principles on Business and Human Rights
UNHCR:	United Nations High Commissioner for Refugees
UNCLOS:	United Nations Convention on the Law of the Sea, 1982
UNCLOS III:	Third United Nations Conference on the Law of the Sea (1973-1982)
UN Panel:	Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo
UNSC:	United Nations Security Council
VCLT:	Vienna Convention on the Law of Treaties, 1969
WIPO:	World Intellectual Property Organization
XR:	Extended Reality

Ocean space: Timeless relations*

*Mekhala Dave***

For the third United Nations Ocean Conference (UNOC 3) this year, when I arrived on the French Riviera, in the city of Nice – sun-drenched and clinging to the edge where the Alps descend into the Mediterranean – I noticed the glistening sea and, cascading from balconies, climbing the facades of aging buildings, softening the geometries of stone: bou-

* This article, adapted for Volume 4 of the *ASCOMARE Yearbook*, draws from the Prologue of Dr. Mekhala Dave's PhD thesis, *Ocean in Us: Black Embodied Relations in Contemporary Curating*, as well as her recent article "Rights of the Deep," presented at the 2025 One Ocean Science Congress and published on ocean-archive.org. It offers her personal reflections on the entanglement of the law of the sea, evolving ocean ontologies, and the epistemic interventions enabled through the arts and culture.

** Dr. Mekhala Dave is a lawyer and art academic based in Vienna, currently serving as Ocean Law and Policy Analyst/Researcher at TBA21–Academy. In alignment with the Academy's mission to catalyse action and care for the Ocean, she is mapping developments in deep-sea mining through a nuanced, transdisciplinary framework at the intersection of art, law, and science. She holds a doctoral degree in contemporary art history and curatorial practice from the University of Applied Arts Vienna. Through both her legal practice and doctoral research, Dr. Dave advocates for a social turn in artistic practices and explores cross-disciplinary encounters between knowledge systems and communities in the Global South – particularly at the intersection of activism and emergent ocean policy. Informed by her lived experiences across borders, she draws inspiration and spiritual guidance from water as she engages with questions of historicity, identity, and the formation of new relations of belonging.

gainvillea.[1] Their deep purple bracts, paper-thin and crisp to the touch, fluttered in the early summer air. Often mistaken for flowers, these vibrant forms are in fact modified leaves. The true flower lies at the centre of these leaves, called bracts.

As a child growing up in South India, I became familiar with these bracts. I held them between my fingers, tracing their veins, pulled into their saturated hues and hidden centre. Bougainvillea was part of the sensory fabric of world-marking thresholds – covering garden walls, making their way into rituals, and even culinary traditions in the South of India. Their ubiquity made them seem native. But their presence, I later learned, was the result of colonial transplantation.

Indigenous to the coastal regions of Brazil, Argentina, and Peru, bougainvilleas were first brought to Europe in the 18th century during a French expedition led by Admiral Louis Antoine de Bougainville. It is said that it was not the official naturalist, Philibert Commerçon, but his partner – Jeanne Baret, a woman disguised as a man – who first identified the plant in Rio de Janeiro and smuggled it back to France.[2] From there, it was circulated widely across France's and Britain's colonial territories, grafted onto the botanical imaginaries of the Empires. To encounter bougainvillea again in Nice, thriving in the Mediterranean sun, draping over walls in a city temporarily reoriented to host global ocean dialogues, was to feel the sedimented layers of the past: Empires, migration of people, and botany across the ocean. Bougainvillea exemplifies this colonial trace – a testament to the imbrication of nature in histories

1. In early summer 2025, the One Ocean Science Congress and the Third United Nations Ocean Conference (UNOC3) are taking place in Nice. Co-hosted by France and Costa Rica, UNOC3 (9–13 June) is being heralded as a pivotal moment—an inflection point in global ocean governance. Framed by the urgency of the UN's Sustainable Development Goal 14 (Life Below Water), this year's conference aims to "turn the tide" on ocean degradation and to mobilize action ahead of the 2030 horizon.

2. Glynis Ridley, *The Discovery of Jeanne Baret: A Story of Science, the High Seas, and the First Woman to Circumnavigate the Globe* (Crown Publishing 2010).

of conquest and classification that circulated for territorial expansion and encounters across the ocean space.

The history of ocean space has been central to colonial expansion and maritime dominance, which later became a site of transformation as nations of the Global South asserted their independence from colonial rule.[3] A historical perspective, including Hugo Grotius's *Mare Liberum*—which framed the ocean as a space of freedom for navigation and trade during the 17th to 19th centuries – offers crucial insights into how oceanic space has been conceptualised and regulated by sovereign powers over time.[4] Grotius's legal doctrine and colonial maritime histories mark the critical shift in oceanic imaginaries from colonial administration to decolonial perspectives, reflecting a broader interrogation of the ocean's role in freedom of the seas and its governance models. From *Mare Liberum* in the 17th century to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the trajectory of international governance reflects a history of demarcation over nations' sovereignty.[5] Surabhi Ranganathan has in recent years noted that "law-making is really a line-making activity", highlighting the centrality of boundaries and zones in framing the ocean – always a metric for exercising sovereignty by nation-States.

Through these reflections, UNCLOS is often hailed as a foundational international legal framework. Despite its robustness and virtues, if we examine UNCLOS more closely, it is steeped in colonial logics of par-

3. In *Mare Liberum*, Hugo Grotius argues for the freedom of navigation on the high seas, primarily to support Dutch merchants' unrestricted access to Asian trade routes. This principle of navigational freedom forms part of Grotius's broader claim for unimpeded access to global trade and commerce. *See* Peter Borschberg, 'Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)' (2006) International Law and Justice Working Papers (Rev. Aug. 2006) 3.

4. Ibid.

5. Surabhi Ranganathan, 'Decolonization and International Law: Putting the Ocean on the Map' (2020) Journal of the History of International Law / Revue d'histoire Du Droit International 23, no. 1.

titioning and territorialisation – dividing the ocean into volumes and zones, applying the logics of terrestrial enclosures. In contrast, Indigenous cosmologies understand the ocean as one: volumetric and always in motion. Pacific navigators, for thousands of years, have traversed the ocean and carried ancestral legacies embedded in respect and care for Oceania. These take shape through Indigenous genealogies – epistemologies rooted in ancestral custodianship and kinship with the ocean. Migration patterns of birds, animals, and underwater creatures trace the ancient cartographies of the ocean's own memory.

These cyclical movements are not merely instinctual trajectories but embodied responses to the ocean's temperature, salinity, currents, and changing climate. The ocean, in this sense, acts not only as a passage but as a co-navigator – its shifting ecologies choreographing the routes of whales, sea turtles, eels, and pelagic birds across hemispheres. These migrations defy static borders and legal jurisdictions, calling into question the anthropocentric delimitations of UNCLOS and national sovereignty. What law can account for an animal's ancestral return across ocean basins? What policy can trace the fluid inheritance of a turtle that remembers the sand where it first emerged, decades prior, in another ocean altogether? Yet legal instruments like UNCLOS activate zones and lines that seek to fix the ocean's fluid ground.

As Surabhi Ranganathan compellingly argues, the law of the sea is "fostering a 'grab' of the ocean floor via national jurisdiction and international administration" – an act that reifies the ocean's geography and economic potentials as immutable and divisible.[6] I note that UNCLOS, both through its language and in its operational apparatus, enacts a universalising claim over the sovereign space of the ocean that fails to accommodate the epistemologies of Indigenous legal systems, effectively

6. Surabhi Ranganathan, 'Global Commons' (2019) European Journal of International Law 30, no. 2 (2019): 693–717.

excluding relational ontologies and the plural jurisprudences of coastal communities who have long lived in reciprocal relation with the sea.

The patterns of violence today are not dissimilar from those of the past. Whether in the depths of the ocean or on its surface, the sea bears witness to recurring histories of global domination and place-based resistance. We must not forget the counter-narratives of the ocean, which also flows in solidarity: the *Madleen* sailed the Flotilla Coalition of 12 activists across the Mediterranean in international waters—our common heritage of (hu)mankind, carried humanitarian aid to Palestine in May 2025.[7] The vessel is named after Madleen Kulab, a 30-year-old Palestinian fisherwoman – Gaza's fisherwoman – whose life and labour at sea symbolises resilience under siege.

The voyage departed Catania, Sicily, on June 1st, and the mission was expected to reach Gaza soon. Approximately one day from Palestinian shores, the ship was boarded – in violation of international law – by Israeli authorities in international waters.[8] Other voyages are being prepared, such as the Sumud Convoy from Tunisian waters. But what unfolds is a spatial recursion: the ship, the sail, the movement itself becomes a transient, liquid cartography that is etched upon the sea's mutable skin, moving against dominant cartographies of control.

In this moment, we draw breath not only to condemn violence across the seas but to align ourselves with the values we choose to uphold. UNCLOS, the once-hailed constitution for the ocean, yet, as Susan Reid incisively observes, it is a voice *for* the ocean – but notably *without* the

7. Quillen, Stephen, and Usaid Siddiqui, 'Madleen Gaza Flotilla Live Tracker: Greta Thunberg, Crew Taken to Israel' (4 June 2025) *Al Jazeera*, available at <<https://www.aljazeera.com/news/liveblog/2025/6/4/madleen-gaza-flotilla-live-greta-thunberg-activists-to-arrive-on-june-7>>.

8. Amnesty International. "Israel's Interception of Madleen and Detention of Crew Flouts International Law." Amnesty International, June 9, 2025. Accessed on June 10, 2025, available at <<https://www.amnesty.org/en/latest/news/2025/06/israels-interception-of-madleen-and-detention-of-crew-flouts-international-law/>>.

ocean.[9] Drafted through terrestrial logics and juridical abstractions, UNCLOS remains anchored in a static conception of the sea, rendering it a framework that requires continual reinterpretation and radical expansion. Its articles strain under the weight of emerging ecological crises and ontological shifts.

What this Volume 4 – and the powerful cover artwork *Se Sauver* by Ortega Valentine (Alegria Blue) – offers is a support structure through the plethora of perspectives and writings. It urges us to remain contemporaneous: that UNCLOS must evolve not only in scope but also in sensibility, attuned to the ocean's agency and to the epistemologies of those who live with and through its currents.

The crisis lies not only in recognising the many forms of extractivism enacted across waters and lives, but in reckoning with what our values are becoming in response to the infrastructures of violence and the structural injustices sown across geographies inherited from colonial legacies. The ocean, thus, is our common ground. What remains is our responsibility to respond with collective ethics and to cultivate an architecture of resonance – for our ocean and humanity.

9. In-person conversation with Dr. Susan Reid, who refers to UNCLOS as an "ocean constitution" – one, however, without the voice of the ocean. Conducted at the International Seabed Authority in Kingston, Jamaica, July 2025.

ORTEGA VALENTINE (ALEGRIA BLU) *is a Belgian-born artist whose work bridges Western heritage and the vibrant influences of African art. Working across drawing, digital painting, and mixed media, she explores themes of absence, fragmentation, and inner tension, shaped by personal experiences of resilience and survival. Since her debut on the contemporary art scene with exhibitions at the Carrousel du Louvre, Espace Voltaire, and Galerie 139 in Paris, Alegria Blue has steadily expanded her international presence. In 2023, her solo shows at Ouizart Galerie in Cannes and Galerie Amarrage in Saint-Ouen garnered critical acclaim for 'Défragmentation', a series praised for its immersive quality and its ability to give form to the unseen. In February 2025, her participation in a major exhibition at the Grand Palais in Paris marked a significant milestone in her career. Through her ongoing work, Alegria Blue invites viewers into intimate yet universal narratives – spaces where absence and introspection converge, and where layered compositions become portals into the unseen dimensions of human experience.*

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Introductory remarks

*Pierandrea Leucci**

The impetus for this volume emerged from a series of collaborative engagements undertaken between 2022 and 2023 with colleagues from *Law for Palestine*,[1] in which legal analysis intersected with pressing political realities to foreground a frequently overlooked dimension of international law: the structural relationship between the governance of maritime spaces and the realisation of human rights. Initially centred on the legal implications of maritime access in the context of the ongoing occupation of Palestine, these exchanges soon evolved into a broader inquiry – one that interrogates how the legal regulation of ocean spaces and resources not merely reflects, but actively shapes, the conditions under which rights are enabled or denied.

This line of inquiry aims to complement the prevailing discourse on *human rights at sea*, which has primarily centred on the protection of in-

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1. Notably, in the context of the First High-Level Training on the Law of the Sea and Palestine-Israel. The event was co-organized by the Ankara University National Center for the Sea and Maritime Law, Law for Palestine, and ASCOMARE in July–August 2023.

dividuals – particularly seafarers and migrants – through the application of established legal instruments such as the United Nations Convention on the Law of the Sea (UNCLOS).[2]

Although UNCLOS is not a human rights instrument per se, it nonetheless incorporates essential "human rights considerations… in its normative infrastructure."[3] These embedded considerations have been increasingly developed through the jurisprudence of international courts and tribunals – most notably the International Tribunal for the Law of the Sea (ITLOS) – as part of a broader effort to bridge the normative divide between the law of the sea and international human rights law.[4] As early as 2010, former ITLOS Judge Treves described this process of cross-fertilisation as being "just at a beginning phase"[5] – a jurisprudential evolution that continues to unfold and which this volume seeks both to critically examine and further advance.

The fourth volume of the *ASCOMARE Yearbook on the Law of the Sea* – "Humanity across the waves: Rethinking the law of the sea through a human rights lens" – seeks to move beyond traditional paradigms by adopting a holistic and critically engaged approach to the evolving relationship between human rights and the law of the sea. It addresses not only how human rights apply *at* sea, but also how the legal use of maritime spaces and resources may shape, disrupt, or transform human rights frameworks and obligations more broadly, including those with far-reaching implications on land.

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2. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force, 16 November 1994) 1833 UNTS 397.

3. Tafsir Malick Ndiaye, 'Human Rights at Sea and the Law of the Sea' (2019) Beijing Law Review, 10, 261-277, 269.

4. E.g., Anna Petrig and Marta Bo, '12 – The International Tribunal for the Law of the Sea and Human Rights', in Martin Scheinin, *Human Rights Norms in 'Other' International Courts* (CUP 2019).

5. Tullio Treves, 'Human Rights and the Law of the Sea' (2010) Berkeley Journal of International Law, Vol. 28:1, 1-14, 6.

The volume opens with three distinguished contributions by ITLOS Judge Marciniak, ITLOS Judge Lijnzaad, and Professor Papanicolopulu. Together, these contributions bring judicial and academic perspectives into dialogue, offering thoughtful and timely reflections on the evolving integration of human rights considerations into the interpretation and application of the law of the sea.

The main body of the volume is organised into two thematic parts, each addressing critical dimensions of the inquiry (introduced in greater detail below). Part I, *Human rights in a shifting maritime landscape*, engages with normative, jurisprudential, and procedural challenges associated with integrating human rights considerations into the law of the sea. Part II, *Tides of change: Climate impacts, human rights, and maritime legal frameworks*, explores the intricate and evolving interplay between climate change and human rights within the legal regimes governing the use of maritime spaces and resources, drawing particularly on scholarly contributions fostered by the Sea and Climate Change (MCC) Programme, established at Jean Moulin Lyon 3 University. The *Concluding remarks* synthesise the volume's principal insights, offering reflections on emerging trends and ongoing tensions at the intersection of ocean governance and human rights protection.

An Annex complements the main text, by presenting a Legal Opinion prepared by a group of legal experts coordinated by ASCOMARE at the request of the Palestinian BDS (Boycott, Divestment and Sanctions) National Committee. This Opinion contributes to the volume's discourse by critically examining the legal regime of innocent passage and the due diligence obligations of flag States under international law, with particular emphasis on their duty to prevent the transport and transit of arms and related material intended for use in the commission of genocide, apartheid, or other grave human rights violations.

Readers may find themselves navigating unfamiliar terrain – an intentional feature of this volume. It deliberately engages with issues not tradi-

tionally associated with the law of the sea, including settler colonialism, Indigenous rights, genocide, intellectual property, coltan supply chains, and artificial intelligence. The underlying premise is clear: if oceans are vital to human life, the law of the sea must more meaningfully contend with the political, social, and ethical realities that shape that life. We invite readers to embark on this interdisciplinary journey with curiosity, critical reflection, and an openness to rethinking familiar legal boundaries.

High tide for human rights: Some reflections from the perspective of the UN Convention on the law of the sea

*Konrad Jan Marciniak**

1. Introduction

I am pleased to contribute to Volume 4 of the *Yearbook on the Law of the Sea* which is devoted to the theme "Humanity across the waves – Rethinking the law of the sea through a human rights lens."

The question of the interrelation between the law of the sea or, more specifically, the United Nations Convention on the Law of the Sea (hereinafter: the Convention or UNCLOS)[1] and the human rights regime is not a completely new one. It was identified in academic literature relatively early after the Convention entered into force,[2] and was further conceptualised, including in the writings of the Judges of the

* Judge, International Tribunal for the Law of the Sea. All views are strictly personal and do not reflect the official position of the Tribunal. The author wishes to express his sincere appreciation to Mr. Marco Benatar for his comments on the earlier draft of this contribution. However, all mistakes and inaccuracies should be attributed solely to the author.

1. United Nations Treaty Series, vol. 1833, p. 3. The Convention entered into force on 16.11.1994 and has currently 170 Parties.

2. Bernard H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' in Jonathan I Charney, Donald K. Anton and Mary Ellen O'Connell (eds), *Politics, Values and Functions* (Brill | Nijhoff 1998) 377.

International Tribunal for the Law of the Sea (hereinafter: the Tribunal or ITLOS).[3]

On the other hand, bearing in mind that the law of the sea is considered to be one of the oldest branches of international law – traditionally traced back as far as the 15th century (with the papal bull *Inter Caetera* of 1493 and the Treaty of Tordesillas of 1494) and the 17th century (notably Hugo Grotius' *Mare Liberum* of 1609)[4] – the rise of interest in human rights in the maritime context may be perceived as a somewhat belated one. However, to mitigate this perception, one needs to underline that the very notion of human rights, at least as recognised and regulated by international law, is generally linked to the post-Second World War developments, marked particularly by the adoption of the United Nations (UN) Charter in 1945[5] and the Universal Declaration of Human

3. Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law 1; Budislav Vukas, 'Droit de La Mer et Droits de l'homme' in Budislav Vukas, *The law of the sea: selected writings* (Martinus Nijhoff Publishers 2004) 71; Tafsir Malick Ndiaye, 'Human Rights at Sea and the Law of the Sea' (2019) 10 Beijing Law Review 261.

4. Tullio Treves, 'Historical Development of the Law of the Sea' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2016) 1. This is a simplified presentation of the history of the law of the sea. Two main caveats need to be made here. First, this history can also be traced back to antiquity. Secondly, as is also the case with international law generally, it tells a rather European-centric version of the story. For more detailed and nuanced views see, respectively: David J Bederman, 'The Sea' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2014) 359; Ram P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revised* (Brill | Nijhoff 1982).

5. Already the Preamble to the UN Charter reaffirms the "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small', and later makes reference to 'justice' and the promotion of 'social progress". Among the purposes of the UN, listed in Article 1, reference is made, *inter alia*, to the achievement of cooperation in solving problems of humanitarian character and to the promotion and encouragement of respect for human rights. These principles are reflected in the competencies of the General Assembly (Article 13(1)(b)), Economic and Social Council (Article 62(2), 68), and the objectives of the trusteeship system (Article 76(c)), as well as affect other principles, such as in particular the principle of equal rights and self-determination of peoples (Article 55(c)).

Rights (UDHR)[6] in 1948.[7]

Undisputedly, though, the academic attention to the issue under discussion has recently intensified and gained momentum. This interest may be explained, at least partially, as a necessary response to very real and practical challenges, such as those that presented themselves with the rise of piracy off the coast of Somalia[8] or the treatment of migrants and asylum-seekers at sea (and on the coastline).[9] In addition, particularly the latter phenomenon gave rise to regional human rights court cases.[10]

Moreover, this increased attention to the problem of human rights abuses at sea translated into a non-governmental and soft law initiative, namely 'The Geneva Declaration of Human Rights at Sea' (here-

6. UN General Assembly Res no 217 (III) of 10 December 1948.

7. Sarah Joseph and Joanna Kyriakakis, 'The United Nations and Human Rights' in Sarah Joseph and Adam McBeth (eds), *Research handbook on international human rights law* (Edward Elgar Publishing 2010) 1. For a scholarly work that traces the origins of the (idea of) human rights to ancient times see e.g.: Paul Gordon Lauren, 'The Foundations of Justice and Human Rights in Early Legal Texts and Thought' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 163. On the differing understandings of what the concept of 'human rights' means (or could mean) see: Steven Wheatley, *The Idea of International Human Rights Law* (OUP 2019).

8. Stefano Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights' (2011) 22 European Journal of International Law 829; Douglas Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 International and Comparative Law Quarterly 141; Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill 2014).

9. See e.g.: Irini Papanicolopulu, 'International Law and the Protection of People at Sea', *International Law and the Protection of People at Sea* (OUP 2018).

10. See e.g.: Lisa-Marie Komp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights* (Routledge 2022); Efthymios Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (Brill | Nijhoff 2013).

inafter: GDHRS), adopted in 2022.[11] As it eloquently explains its genesis:

> The seas and oceans cover over 70% of the earth's surface. Activity at sea, both lawful and unlawful, is growing year on year. This is leading to an increase in the number of people at sea, currently estimated to be over 30 million men, women and children at any given moment. The vast majority of these people are fishers, numbering approximately 40 million all told, with over 25 million estimated to be physically at sea at any time. Of the total, an estimated 20,000 are children working at sea and in coastal fisheries. Others are in shipping, in offshore oil and gas, and in the tourism industry. There are many more categories, such as passengers, holiday-makers, scientists and state officials on naval and coast guard vessels. Additionally, there are increasing numbers of people using the seas and oceans as a means of migration. Finally, there are people involved in unlawful activities.[12]

It therefore draws on issues that are perhaps less visible on the newspapers' front pages but are nevertheless recurring, daily problems affecting people at sea, including labour malpractices, mistreatment of seafarers (a problem that is perhaps most acute in relation to fishermen), sexually motivated crimes or even violence and threats to life and security.[13]

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11. Available at <<https://www.humanrightsatsea.org/GDHRAS>>. It was initiated in February 2019 by the Founder of the non-governmental organization (NGO) – Human Rights at – David Hammond "as a response to the ongoing systematic abuse of human rights at sea globally (…) in an attempt to bring together 'existing international law into one document". A short commentary is also available online: Steven Haines, David Hammond and Irini Papanicolopulu, 'Geneva Declaration on Human Rights at Sea. Commentary' <<https://www.humanrightsatsea.org/GDHRAS>>. For an early legal appraisal of the Declaration see: Natalie Klein, 'Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law' (2022) 53 Ocean Development & International Law 232. It should be noted here that, as of 7 April 2025, the Human Rights at Sea have taken the decision to close the charity.

12. Haines et al. (n 11) 1 ('Background').

13. Annex A of the GDHRS contains a non-exhaustive list of evidence of human rights abuses at sea.

A year later, in 2023, the International Law Association (ILA) established a Committee on Protection of People at Sea[14] tasked, at least initially, with focusing on the question of jurisdiction of States for the purpose of protecting people in the maritime environment. The proposal for the establishment of the above-mentioned ILA Committee highlights that "[w]hile death, abuse, and excessive use of force have always been common at sea, it is only in the last 15 years that the often systematic violations of fundamental human rights at sea have attracted the attention of stakeholders and the general public".[15]

Finally, this heightened interest also translated into the EU-funded COST (the European Cooperation in Science and Technology) programme devoted to "Life, liberty and health: Ensuring universal protection of human rights at sea (BlueRights)".[16]

Against this background, one can easily state that even if the attention of lawyers, academics and broader civil society has turned to the intersection of human rights and the law of the sea relatively recently, it has become an intense and fertile field of enquiry. This contribution intends to briefly identify some of the main legal (and practical) issues that arise in this context. It does so by applying the following structure. Sections 2 and 3 take a broad perspective and look, respectively, at UNCLOS as the 'Constitution for the oceans' and its capacity to deal with human rights issues, as well as the UNCLOS dispute settlement mechanisms and their jurisdiction as concerns human rights violations. Subsequently, Section

14. Documents available at <<https://www.ila-hq.org/en_GB/committees/protection-of-people-at-sea>>. This ILA Committee is led by Professor Irini Papanicolopulu, with Professors Anna Petrig and Natalie Klein acting as Co-rapporteurs.

15. Proposal to the Executive Council of the International Law Association (ILA) for the establishment of a Committee on "Protection of People at Sea" (May 2023), para 5, available at <<https://www.ila-hq.org/en_GB/documents/ila-proposal-people-at-sea-final>>.

16. See: <<https://www.cost.eu/actions/CA23103/#Description>>. The programme is led by prof. Anna Petrig while Professor Irini Papanicolopulu acts as vice-chair.

4 scrutinises selected areas of intersection between the law of the sea and human rights issues. This contribution closes with some final remarks in Section 5.

In line with the title of this paper, the focus of analysis will rest on the Convention rather than the law of the sea in general. Hence, other law of the sea-related treaties will be referenced in a cursory manner only. Similarly, the work carried out within specialised organizations – such as the International Maritime Organization (IMO) or the Food and Agriculture Organization – will not be elaborated in full (which should not be treated as diminishing their important role in various aspects of applying and furthering human rights at sea). Finally, the concept of human rights is also a dynamic one, as well as subject to differing interpretations across various regional regimes (in addition to some overarching universal norms). For space constraints, this contribution will generally refer only to universal instruments as well as the European Convention of Human Rights (hereinafter: the European Convention)[17] regime, including the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR).

As such, this contribution adopts a 'mixed approach' – it is both about the relevance of human rights within the UNCLOS framework, as well as the relevance of the law of the sea in human rights legal narratives.[18]

17. Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, adopted in Rome on 4.11.1950 and entered into force on 3.09.1953. It currently has 46 Parties. Information available at <<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005>>.

18. See observations by: Treves, 'Human Rights and the Law of the Sea' (n 3) 2.

2. UNCLOS as the 'Constitution for the Oceans' and the question of human rights

2.1 UNCLOS as the constitutional treaty for the oceans

UNCLOS is famously credited with being the 'Constitution for the Oceans'.[19] This phrase, even if overused,[20] can describe well the unique role the Convention plays in governing States' activities in the maritime domain[21] and is generally reflective of UNCLOS universal reach, regulatory breadth and comprehensiveness, as well as the establishment of an institutional (including dispute-settlement) framework.[22] *Philip Allott*, while not using the term 'constitution', does describe UNCLOS as a 'comprehensive' treaty that 'has a rule for everything'. As he explained:

> The rule may be a permissive rule. It may be an obligation. It may confer an explicit freedom or leave a residual liberty by not specifying a right or a duty. But a Flying Dutchman wandering the sea areas of the world, carrying his copy of the Convention, would always be able to answer in legal terms the questions: who am I? who is that over there? where am I?

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19. Tommy TB Koh, 'A Constitution for the Oceans', available at <<https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>>.

20. For a recent critique see: Karen N. Scott, 'The LOSC: "A Constitution for the Oceans" in the Anthropocene?' (2023) 41 The Australian Year Book of International Law 269; Reece Lewis, 'The "Constitution for the Oceans"? The Law of the Sea Convention as a Living Treaty' (2025) 74 International and Comparative Law Quarterly 1.

21. UN General Assembly annually emphasises "…the universal and unified character of the Convention, and (…) that the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out…". Most recently, see: UNGA Res. 79/144 of 12.12.2024, 'Oceans and the law of the sea'.

22. The usage of this phrase, possibly ascribing to it various meanings, has been quite frequent. See e.g.: Robin R. Churchill, Alan V. Lowe and Amy Sander, *The Law of the Sea* (Manchester University Press 2022) 43. For a very thorough analysis see: Shirley V. Scott, 'The LOS Convention as a Constitutional Regime for the Oceans' in Alex G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Brill | Nijhoff 2005).

> what may I do now? what must I do now? The Convention would never fail him.[23]

While this eloquent description may be true for the *Flying Dutchman* as a ship, it is faced with many challenges when viewed from the perspective of the ship's crew – their human rights, and how they would be protected. This is especially the case bearing in mind that this particular ship has allegedly never called at any port.

Notwithstanding the many virtues of UNCLOS, it cannot – as any other international legal instrument – be easily compared with or, even more so, equated to the legal status and role States' constitutions play domestically. Among other differences, the latter – at least currently and in the majority of cases – would normally contain provisions devoted to the protection and rights of citizens or, even more broadly, of all persons within a given State jurisdiction and/or territory. As is apparent from the considerations above, this is not the case of UNCLOS; its regulatory breadth and comprehensiveness, praised above, do not really encompass human rights questions. More precisely, the Convention contains rather scant provisions that deal directly with the protection of people at sea (which will be elaborated on later in this contribution), as well as some more provisions that have indirect bearing on the legal status of humans in the marine environment. But, overall, these regulations certainly fall short of establishing any comprehensive 'system' addressing human rights at sea. As was recently remarked by Professor *Malcolm Evans* "[t]he convention [on the law of the sea] has an awful lot more to say about protecting fish than about protecting people. That is one of its huge flaws."[24]

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23. Philip Allott, 'Power Sharing in the Law of the Sea' (1983) 77 American Journal of International Law 8.

24. Malcolm D. Evans, 'Corrected Oral Evidence: UNCLOS: Fit for Purpose for the 21st Century?' (2021) House of Lords, 5, available at <<https://committees.parliament.uk/oralevidence/2853/pdf/>>.

In this context, one is tempted to go on and say that even when UNCLOS speaks more about fish, it does not necessarily and automatically translate into the better state of the world's fisheries,[25] as was indeed hoped for when the Convention was negotiated and package-deal compromises, particularly with regard to the establishment of the exclusive economic zone (EEZ), were made.[26]

2.2 UNCLOS and (the absence of) human rights provisions

In any case, going back to the main line of argumentation, UNCLOS is neither thought of nor actually designed as a human rights treaty. Although the United Nations General Assembly resolution that formally set out the mandate of the Third UN Conference on the Law of the Sea referred to an all-encompassing phrase that the future convention should "deal with *all matters* relating to the law of the sea" (emphasis added),[27] this was immediately followed up by a number of precisions putting this phrase in the relevant context. The latter makes it clear that UNCLOS

25. For the most current assessment see e.g. the flagship publication of the Food and Agricultural Organization: FAO, *The State of World Fisheries and Aquaculture 2024 – Blue Transformation in Action* (FAO 2024).

26. Jorge Castañeda, 'Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea' in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Brill | Nijhoff 1984) 605–623; Umberto Leanza and Maria Cristina Caracciolo, 'The Exclusive Economic Zone' in David Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *IMLI Manual on International Maritime Law*, vol I (OUP 2014) 182–184; Gemma Andreone, 'The Exclusive Economic Zone' in Donald R. Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 161–162.

27. UNGA resolution no 3067 of 16 November 1973, Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of the Third United Nations Conference on the Law of the Sea, para 3. This desire to settle "all issues relating to the law of the sea" continues to be reflected in the Convention's Preamble (tiret 1).

was supposed to be about maritime zones (particularly seabed beyond national jurisdiction and others) and their resources, as well as some overarching themes – such as the protection of the marine environment and marine scientific research.[28] But not about every conceivable marine-related (legal) issue. An overview of the negotiating history of UNCLOS also reveals that human rights as such were not really argued for.

Indeed, the main focus of the Convention is on the allocation of rights and jurisdiction over maritime zones and resources,[29] thus leading to the 'zonal approach' in governance, whereby coastal States have sovereignty or sovereign rights and/or jurisdiction, depending on the maritime zone in question. To some extent, coastal State (prescriptive and – in specified cases – enforcement) jurisdiction would also extend to ships and their activities in its maritime zones, particularly when it comes to the internal waters and territorial sea. This is complemented by the rising interest and actual usage of port State jurisdiction to enforce certain standards.[30] However, the predominant legal mechanism allowing States to govern

28. Ibid. The UNGA resolution noted above refers back to, *inter alia,* earlier UNGA resolution no 2750 C of 17 December 1970 (under the same title) that lists the main subject-areas of the future convention (*infra*, para 2). There is vast literature on the history of UNCLOS negotiations. See, for example Robert Friedheim, *Negotiating the New Ocean Regime* (University of South Carolina Press 1993); James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 27–61.

29. As one of the crucial paragraphs of the preamble of the Convention specifies, it was considered desirable to establish "a *legal order for the seas and oceans* which will facilitate international *communication*, and will promote the *peaceful uses* of the seas and oceans, the equitable and efficient utilization of their *resources*, the conservation of their living resources, and the study, protection and preservation of the *marine environment*" (emphasis added). The 'principles of justice and equal rights' are also referred to in the preamble, however in a very general manner and rather in the context of the promotion of 'the economic and social advancement of all peoples of the world'. See also: Oxman (n 2) 379.

30. For more on the concepts of coastal and port State jurisdiction see e.g.: Erik Molenaar, 'Port and Coastal States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2016); Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping*, vol 26 (Springer International Publishing 2014). See also: James Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 459-450.

ships, as well as humans onboard, is the flag State jurisdiction.[31] The latter will be particularly relevant in areas beyond national jurisdiction (i.e. the high seas and the Area). Such a jurisdictional scheme of the Convention was commented upon by Professor *Evans* as an additional challenge leading to a situation whereby it is "extremely difficult to apply other areas of law such as human rights law at sea".[32] Concerns in this respect were also expressed by the Special Rapporteur on trafficking in persons, especially women and children, *Siobhán Mullally*, in her 2024 report.[33] Unsurprisingly, therefore, the concept of jurisdiction was referred to by the ILA as a 'key' one because it would allow us to identify "which State or States are under an obligation to respect, protect and fulfil human rights".[34]

Overall, UNCLOS is a more traditional 'State-centred' treaty that focuses on the rights and duties of States rather than those of individual persons. This is despite the fact that when the Convention's negotiations

31. See Article 92(1) UNCLOS that states: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." This principle shall be understood in conjunction with the genuine link requirement as enshrined in Article 91(1) UNCLOS. See also: ITLOS, MV "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, para 83 where the Tribunal underscored, *inter alia*, that "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure mole effective implementation of the duties of the flag State (…)". See generally: Richard Barnes, 'Flag States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2016).

32. Evans (n 24).

33. Siobhán Mullally, 'Trafficking in Persons, Mixed Migration and Protection at Sea' (Human Rights Council 2024) A/HRC/56/60. The report underlines that "[d]isputes regarding jurisdiction and a lack of willingness to accept responsibility contribute to increased risks and failures of prevention and protection at sea. It is critical to recall that States are responsible for the human rights of all persons within their jurisdiction, including within their territory and at borders and where they exercise effective power, control or authority, including at sea and on vessels" (footnotes omitted) (*infra*, para 19).

34. Proposal (n 15), para 15.

were initiated in 1973, it happened after both International Covenants – on Civil and Political Rights (ICCPR),[35] as well as on Economic, Social and Cultural Rights (ICESCR)[36] – had been adopted in 1966, and just three years before they entered into force (which took place during UNCLOS negotiations).[37] However, as already stated above, the setting up of rules in the domain of, broadly speaking, human rights at sea was never *the* aim of the Third UN Conference on the Law of the Sea.

On the other hand, it does not mean that the Convention creates or acknowledges a complete legal vacuum for human rights. For one, it does affirm that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".[38] As commented upon by *Lagoni*, the purpose of this clause is to "avoid lacunae in the law and to complement the legal order for the seas and oceans". However, as he rightly continues, rules of general international law (of customary or treaty character) "may not be sufficient to govern

35. United Nations Treaty Series, vol. 999, p. 171 and vol. 1057, 407. The ICCPR was adopted in New York on 16.12.1966 and entered into force on 23.03.1976 and has currently 174 Parties.

36. United Nations Treaty Series, vol. 993, 3. ICESR was adopted in New York on 16.12.1966 and entered into force on 3.01.1976 and currently has 173 Parties.

37. This point is critically made by Steven Haines, 'Developing Human Rights at Sea' (2021) 35 Ocean Yearbook Online 18, 21–22. He refers, quoting the Law of the Sea Institute publication, to the absence of human rights regulations in UNCLOS as a 'neglected issue'. See also comments in: Anna Petrig, 'Human Rights and Law Enforcement at Sea' in Ruxandra-Laura Boşilcă, Susana Ferreira and Barry J Ryan (eds), *Routledge Handbook of Maritime Security* (Routledge 2022) 155. Petrig refers to this phenomenon as 'human rights blindness' of the Convention.

38. UNCLOS, Preamble. In the context of law enforcement operations, Shearer comments that 'There was an evident reluctance at the Third United Nations Conference on the Law of the Sea (UNCLOS Ill) to formulate in detail prescriptions of the manner of enforcement of the various sovereign rights and jurisdictions accorded to coastal States by the resulting Convention'. Hence, restrictions in that regard should be primarily sought for in specialised treaties or customary rules. See: Ivan Shearer, 'The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime' (1998) 71 International Law Studies 429, 431.

all matters which are not regulated by the Convention".[39] Secondly, as mentioned above, a number of UNCLOS provisions affect, directly or indirectly, the legal status of persons at sea. While in the framework of this contribution extensive discussion about these regulations is neither possible nor necessary,[40] it is worthwhile to at least briefly recall them.

One area of the Convention's substantive provisions that deserves attention in this context is undoubtedly related to the safety of navigation and the protection of human life. The prime example is, of course, Article 98 UNCLOS confirming the duty to render assistance.[41] Another relevant group of the Convention's provisions limits the powers of the *coastal* States in certain law enforcement situations.[42] Thirdly, it is important to pinpoint the broader set of *flag* States' obligations requiring them to effectively exercise their jurisdiction and control in administrative, technical and social matters over ships flying their flag.[43]

Further, *all* States "shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose".[44] Another context in which the Convention refers to individuals is a set of articles prohibiting cer-

39. Rainer Lagoni, 'Preamble' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017) para 40.

40. This exercise has been already carried out by a number of authors. See e.g.: Treves (n 3) 3–6; Oxman (n 2). For a broader outlook, analysing UNCLOS against the background of various other relevant treaties, see in particular: Papanicolopulu (n 9) 61–110; Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) 27 The International Journal of Marine and Coastal Law 867.

41. UNCLOS, Articles 18(2), 39(1)(c) and 146.

42. Ibid., Articles 73 and 230(3).

43. Ibid., Article 94.

44. Ibid., Article 99. Haines reflects in the context of this article in the following manner: "the most obvious provision of the entire Convention having IHRL [international human rights law] significance." Haines (n 37) 22.

tain crimes,[45] in particular piracy.[46] Here, however, the purpose is rather to cater for the States' rights and obligations in the repression of piracy rather than to establish any substantive or procedural guarantees for those suspected of committing this crime.[47] *Petrig* notes in this respect that:

> Symptomatic in this respect are the eight provisions dealing with piracy – seemingly the most densely regulated crime in the entire UNCLOS – none of which confer rights to piracy suspects. It is against this backdrop that UNCLOS' limitations become clear, namely its struggle to conceptualise persons as rights-holders. (footnotes omitted)[48]

Lastly and in addition to the above examples of UNCLOS provisions relating to human rights, it should be recalled that various authors also identify (a) procedural rules, either embedded in the Convention or in proceedings before UNCLOS-established institutions – in particular ITLOS[49] – as well as (b) community rights[50] that the Convention recognises in that regard.

Many of the UNCLOS provisions referred to above will be subject to additional commentary in the subsequent analysis, particularly in Section 4.

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45. See Article 113 UNCLOS dealing with the breaking or injury submarine cable or pipeline. To some extent, Article 73 UNCLOS falls within this category, insofar as it allows for the punishment of persons violating coastal States' fishery-related laws and regulations.

46. UNCLOS, Articles 100-107.

47. Hence, as already mentioned, States' efforts to combat piracy off the coast of Somalia gave rise to a flurry of academic literature concerning, among other issues, human rights aspect of this endeavour. See in particular: Guilfoyle (n 8); Petrig (n 8); Petrig (n 37).

48. Petrig (n 37) 156. See also: Papanicolopulu (n 40) 871.

49. Anna Petrig and Marta Bo, 'The International Tribunal for the Law of the Sea and Human Rights' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (CUP 2019).

50. Oxman (n 2) 381ff.

2.3 UNCLOS as a living treaty: developing the Convention's rules

One of the unique features of UNCLOS as a 'constitution-like' treaty is its adaptability to governing new situations and challenges, potentially not (fully) foreseen at the stage of its adoption. In other words, a question may be posed as to what extent UNCLOS may be perceived as a 'living treaty', particularly in the context of human rights. There are many theoretical and practical frameworks to analyse this issue.[51] Within the confines of this paper, three brief points will be made.

First, there are mechanisms embedded in UNCLOS that allow for its change. They consist of, in particular, the formal mechanisms – such as UNCLOS amendment procedures[52] or decisions by UNCLOS-established bodies.[53] Further, three implementing agreements to UNCLOS

51. For a very thorough and interesting overview of various aspects (though not specifically human rights) of UNCLOS from this perspective see: Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL British Institute of International and Comparative Law 2016); Alex G. Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Brill-Nijhoff 2005). See also Alan Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change' in David Freestone, Richard Barnes and David M. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 40.

52. These differ depending on the subject matter and chosen methodology and may be summarised as referring to either convening of a (traditional) diplomatic conference (Article 312 UNCLOS), simplified tacit acceptance procedure (Article 313 UNCLOS) or amendments pertaining to the provisions the Convention relating exclusively to activities in the Area (Article 314 UNCLOS).

53. Principally, in this context, the meetings of States Parties to the Convention (so called 'SPLOS'), although the role of SPLOS outside purely elections-related, financial or administrative matters is contested. See: Tullio Treves, 'The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention' in Alex G. Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Brill-Nijhoff 2005) 50; Harrison (n 28) 70–84.

were also adopted so far.[54]

Secondly and famously, UNCLOS contains frequent references to externally adopted standards – most often through the usage of the phrase 'generally accepted international rules and standards' (GAIRs; sometimes also referred to as 'rules of reference') or similar.[55] Through this mechanism, UNCLOS-based obligations for the Convention's Parties, change and evolve together with modifications adopted externally in relevant frameworks. More often than not, in practical terms, this reference means rules and standards adopted in the framework of the IMO, particularly in such fields as the construction, design, equipment or manning of ships, rules pertaining to the prevention of collisions at sea (or, more broadly, to the safety at sea), reduction and control of pollution from ships or safety of navigation.[56]

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54. The most recent one – 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 (adopted in New York on 19 June 2023) – is not yet in force and, contrary to the previous two agreements of this kind, does not contain the word 'implementing' in its title. However, it does specify it is 'under' UNCLOS and there are legal consequences of that phrase in the operative provisions of this Agreements itself (see e.g. its Article 5(1)).

55. UNCLOS utilises various similar formulations in this context while also never defining them. For 'GAIRS' *per se* see e.g. UNCLOS Articles 21(2) or 211(2) and (5)-(6), 226(1). Among others, UNCLOS refers also to 'generally accepted international regulations' (UNCLOS Article 21(4), 41(3) and (8), 91(4)-(5)) or 'generally accepted international standards' (UNCLOS Article 60 (3) and (5)-(6)). See also: Catherine Redgwell, 'The Never Ending Story: The Role of GAIRS in UNCLOS Implementation in the Offshore Energy Sector' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL British Institute of International and Comparative Law 2016) 167; Bernard Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 New York University Journal of International Law and Politics 109.

56. As explained by ITLOS: "[t]he term "generally accepted international rules and standards" is not defined in the Convention. Such rules and standards may refer to those contained in international legal instruments that are accepted by a sufficiently large number of States. They must be established through the competent international organization or general diplomatic conference. The term "the competent international organization" in this context is understood to refer to the IMO." *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS) para 280.

Thirdly, UNCLOS provisions may and will be interpreted by, *inter alia*, States and judicial bodies. At the most general level, this process will involve, as stipulated in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), the reliance on "[a]ny relevant rules of international law applicable in the relations between the parties".[57] Moreover, particularly in the context of the 'dynamic' or 'evolutionary' interpretation of UNCLOS, terms used in the Convention will be applied by courts and tribunals (sometimes referred to as a 'judicial interpretation').[58] The discussion concerning the scope and limits (both the 'floor' and, perhaps in particular, the 'ceiling') of such a judicial interpretation is beyond the scope of this paper. Undoubtedly, however, ITLOS – as well as other courts and tribunals that have decided in the UNCLOS context – has applied the Convention's language in the specific factual and legal context of a given case. To take the most recent example, i.e. the ITLOS Advisory Opinion on climate change,[59] the Tribunal noted that:

> Many participants in the present proceedings have emphasized the *open character of the Convention and its constitutional and framework nature*. In the Tribunal's view, coordination and harmonization between the Con-

57. Vienna Convention on the Law of Treaties, done in Vienna, 23 May 1969, UNTS vol. 1155, p. 331.

58. See reflections by Richard Barnes, 'The Continuing Vitality of UNCLOS' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL British Institute of International and Comparative Law 2016) 459; Jill Barrett, 'The UN Convention on the Law of the Sea: A "Living" Treaty?' in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL British Institute of International and Comparative Law 2016).

59. For general commentaries of this case see: David Freestone and others, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case 31' (2024) 39 The International Journal of Marine and Coastal Law 835; Benoit Mayer, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law' (2025) 119 American Journal of International Law 153.

> vention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to *ensure* that the Convention *serves as a living instrument*. (emphasis added)[60]

This Tribunal's statement came precisely in the context of the relationship of UNCLOS and external rules (in this particular instance: the applicable legal regime to climate change).[61] However, the reliance on and ensuring coherence with external rules[62] is not the only legal mechanism the Tribunal used in order to respond to the questions addressed to it in these advisory proceedings and to apply UNCLOS to a phenomenon not *per se* addressed in the Convention.[63] Namely, it broadly applied means of treaty interpretation in order to arrive at the conclusion that anthropogenic greenhouse gas (GHG) emissions into the atmosphere constitute pollution of the marine environment within the meaning of Article 1(1)(4) of the Convention.[64]

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60. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n 56) para 130.

61. To be precise, the Tribunal referred to three main means to properly capture the relationship between the Convention's rule on the protection of marine environment (Part XII of UNCLOS) and external rules: (a) UNCLOS-embedded rules of reference; (b) VCLT rules of interpretation; and (c) Article 237 UNCLOS that clarifies the relationship of Part XII of the Convention with other treaties relating to the protection and preservation of the marine environment. The discussion concerning the latter is omitted for the purposes of this paper.

62. For some critical comments in that regard see: Christina Voigt, 'ITLOS and the Importance of (Getting) External Rules (Right) in Interpreting UNCLOS' (*Verfassungsblog*, 29 May 2024), <<https://verfassungsblog.de/itlos-and-the-importance-of-getting-external-rules-right-in-interpreting-unclos/>>.

63. See also: Jacqueline Peel, 'Unlocking UNCLOS. How the ITLOS Advisory Opinion Delivers a Holistic Vision of Climate-Relevant International Law' (*Verfassungblog*, 24 May 2024), <<https://verfassungsblog.de/unlocking-unclos/>>; Ellen Hey, 'Some Reflections on External Rules in ITLOS' Advisory Opinion on Climate Change' (*NCLOS Blog*, 7 October 2024), <<https://site.uit.no/nclos/wp-content/uploads/sites/179/2024/10/Ellen-Hey-NCLOS-blog-3.pdf>>.

64. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n 56) para 179.

When contemplating the above-mentioned remarks on some selected ways in which UNCLOS may continue to serve as a living treaty in the maritime domain from the perspective of applicable human rights, the following considerations transpire.[65] It would seem that UNCLOS' formal, built-in mechanisms of change are not readily available to address human rights. In particular, no amendment to UNCLOS is currently proposed to that effect; nor – even if it were proposed – do the prospects of it being negotiated and agreed in the near future appear high. Similar considerations would likely apply to the possibility of negotiating another implementing agreement devoted to human rights at sea. Further, UNCLOS rules of reference (also referred to as '*renvoi*'),[66] while overall helpful to keeping UNCLOS 'up-to-speed' with many technical and legal developments, generally do not concern provisions or external fora that would be preoccupied directly with human rights at sea (which does not necessarily mean they would be completely irrelevant or that they would not have indirect positive humanitarian consequences).[67]

65. For a thorough analysis of ITLOS jurisprudence from the human rights standpoint see: Petrig and Bo (n 49) 353.

66. For a recent scholarly analysis of these clause see: Danae F. Georgoula, 'The LOSC Renvois as a Source of Untapped Jurisdiction' (2023) 38 The International Journal of Marine and Coastal Law 228.

67. In addition, one needs to underline that this statement is limited to UNCLOS rules of references clauses and their scope. Thus, it reflects this narrow view. Taking a broader one, there is much that the IMO or International Labour Organization (ILO) do in the area of human rights at sea, including in collaboration. See e.g. publication 'Maritime Human Rights Risks and The Covid-19 Crew Change Crisis: A Tool To Support Human Rights Due Diligence' described as the Human Rights Due Diligence Tool that is a joint initiative of the UN Global Compact (UNGC), the Office of the High Commissioner for Human Rights (UN Human Rights), ILO and IMO. Available at <<https://www.imo.org/en/MediaCentre/PressBriefings/pages/Due-Diligence-Tool.aspx>>. See also: 2024 'Guidelines on fair treatment of seafarers detained in connection with alleged crimes', available here: <<https://www.imo.org/en/MediaCentre/Pages/WhatsNew-2192.aspx>>. These Guidelines were adopted by the IMO Legal Committee in March 2025, <<https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/LEG-112-Press-Briefing.aspx>>.

Therefore, mechanisms of various types of interpretation and development through courts and tribunals will be given additional scrutiny in the subsequent parts of this paper. Before doing so, one needs to caution that in order to address some current legal challenges, including those that arise from human rights violations at sea, it is not necessarily called for to adopt new or modify existing legal commitments. Not infrequently, better implementation, at the global, regional and domestic level, as well as the coordination of various efforts and existing mechanisms, yield better results.[68]

3. UNCLOS, its dispute settlement mechanism and applicability of human rights law

In order to delineate the interpretative room for manoeuvre for courts and tribunals, it is warranted to analyse their jurisdiction.[69] The starting point for such an endeavour is the reminder that any UNCLOS-based court or tribunal "shall have jurisdiction over any dispute concerning the interpretation or application of *this Convention*"[70] (emphasis added). However, when *deciding* the case, such a court or tribunal "shall apply

68. This seems to be also, at least partially, the perspective taken in the GDHRS and its authors. It is, after all, a soft law instrument that, *inter alia*, contains guidelines so that States could use them 'as a means of ensuring compliance with human rights at sea. They provide guidance on conduct that is either necessary, according to existing rules of international law, or put forward as good practice.' GDHRS, Annex C: Guidelines for Promoting Compliance with Human Rights at Sea.

69. See generally e.g.: Natalie Klein and Kate Parlett, *Judging the Law of the Sea* (OUP 2022); Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005); Bernard Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2016).

70. UNCLOS, Article 288(1).

this Convention *and other rules of international law not incompatible with this Convention"*.[71] (emphasis added). Hence, in simple terms, while the subject matter of the disputes that the UNCLOS courts or tribunals[72] may adjudicate is restricted to the Convention,[73] these courts or tribunals may, while doing so, apply rules of international law deriving from outside the Convention[74] – including human rights law.[75]

To provide just one example, the violations and/or applicability of the ICCPR was initially argued by the Netherlands in the *Arctic Sunrise case* against Russia. As the Arbitral Tribunal clearly exposed in that case:

> The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and de-

71. Ibid., Article 293(1).

72. The generic phrase 'UNCLOS court or tribunals' is not the term of art but will be used throughout this contribution to refer generally to all types of judicial bodies capable of settling disputes under Article 287(1) UNCLOS (i.e. ITLOS, ICJ, as well as Annex VII or Annex VIII arbitration).

73. For the purposes of this argument, it was omitted that the jurisdiction of UNCLOS courts or tribunals is actually broader as it also encompasses, in line with Article 288(12) UNCLOS, "any dispute concerning the interpretation or application of *an international agreement related to the purposes of this Convention*, which is submitted to it in accordance with the agreement" (emphasis added). ITLOS website contains a non-exhaustive list of international agreements containing provisions relating to the jurisdiction of ITLOS: <<https://www.itlos.org/en/main/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/>>, however the procedural or substantive requirements to activate dispute settlement mechanisms under these treaties differ.

74. For this general point see e.g.: Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017, para 555 and M/V "Norstar" (Panama v. Italy), Judgment, ITLOS Reports 2018-2019, paras 136-137.

75. There is a fine line between an alleged breach of the Convention that is interpreted (also) from the perspective of human rights and a new claim for human right violations. Such a claim has been sometimes put forward in relation to Article 300 UNCLOS ('Good faith and abuse of rights'). See e.g.: *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v Kingdom of Spain), Judgment* (ITLOS) paras 137-145. See also: *The M/V "Norstar" Case (Panama v Italy), Judgment* (ITLOS) paras 139-146.

> tention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime.[76]

Indeed, the Arbitral Tribunal did refer to the ICCPR in its subsequent analysis regarding the lawful uses of the sea and freedom of navigation (which will be referred to later in this contribution).

Similar considerations were vividly present in the *Duzgit Integrity Arbitration*, where the Annex VII Arbitral Tribunal underlined that it is not competent to determine if fundamental human rights obligations were violated by São Tomé and Príncipe, as argued by Malta.[77] However, it did state that it is competent to assess the State's exercise of enforcement powers derived from the Convention, which, in turn, are governed by rules and principles of general international law (principle of reasonableness that involves the principles of necessity and proportionality).[78]

Lastly, in this context, a precision needs to be made. Namely, the International Court of Justice (ICJ) – which has hitherto heard a number of maritime-related disputes, both before and after the adoption and entry into force of UNCLOS, and has undoubtedly contributed to the development of the law of the sea[79] – does not face the same jurisdictional

76. *Arctic Sunrise Arbitration (Kingdom of the Netherlands v Russian Federation), Merits, Award of 14 August 2015* para 197. In the course of the proceedings, the Netherlands took a more nuanced position as regards the application and role of the ICCPR. See *infra*, para 195.

77. *Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe), Award, PCA Case No 2014-07* (Annex VII Arbitral Tribunal) para 207.

78. Ibid., para 209.

79. See e.g.: Vaughan Lowe and Antonios Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 177.

limitations. In line with its Statute, the 'World Court', as it is sometimes referred to, may apply all sources of international law (famously enumerated in Article 38 of its Statute).

Furthermore, the ICJ's jurisdiction may be activated 'through' its Statute (including relevant compromissory clauses,[80] such as the Pact of Bogota)[81] or UNCLOS Part XV on dispute settlement. Suffice it to say that for the time being the law of the sea-related cases in the ICJ have *not* been settled in the framework whereby it acted as one of UNCLOS courts or tribunals.[82] Also, the hitherto ICJ-decided cases involving maritime issues have not generated human rights considerations,[83] perhaps with the exception of the very first case on its docket – the *Corfu Channel case* – where the Court famously referred to:

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80. ICJ Statute, Article 36.

81. American Treaty on Pacific Settlement (Pact of Bogotá), signed at Bogotá, April 30, 1948; UNTS vol. 49, p. 83. In fact, many of maritime-related cases heard by the ICJ reached the Hague through the operation of this very treaty.

82. This question, as well as the broader issue of the scope of jurisdiction of UNCLOS courts or tribunals in view of Article 282 UNCLOS, is not free from controversy. For example, the relationship between the optional declarations under the ICJ's Statute and Part XV of UNCLOS was recently addressed by the ICJ in the *Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Preliminary Objections, Judgment* (ICJ) paras 115-134. See also Dissenting Opinion of Judge Robinson. For the commentary see e.g.: Marco Benatar and Erik Franckx, 'The ICJ's Preliminary Objections Judgment in Somalia v. Kenya: Causing Ripples in Law of the Sea Dispute Settlement?' (*EJIL: Talk!*, 22 February 2017), available at <<https://www.ejiltalk.org/the-icjs-preliminary-objections-judgment-in-somalia-v-kenya-causing-ripples-in-law-of-the-sea-dispute-settlement/>>; Nigel Bankes, 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention' (2017) 48 Ocean Development & International Law 239.

83. For a general overview ICJ cases involving human rights see: Pavle Kilibarda and Robert Kolb, 'The International Court of Justice, International Humanitarian Law and Human Rights Law' in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2022) 168; Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life?' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 300.

> [T]he elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States (…)[84]

It is also useful to recall in this context that ITLOS referred to the notion of 'considerations of humanity' in its case law, which will be subject to some commentary below.[85]

Summing up, one needs to highlight that while scrutinizing the potential for the development of the Convention, at least through the jurisprudence of UNCLOS courts and tribunals, there are inherent limitations to such an endeavour. This is primarily due to the fact that any dispute concerning the interpretation or application of the Convention will *not* concern human rights violations *per se* – as these rights are not regulated in UNCLOS. It is in connection with such a 'Convention-entrenched' dispute that a court or tribunal applying 'other rules of international law' could engage in human rights-based considerations.

Bearing in mind these remarks, it is now useful to change perspective and scrutinise some selected areas of intersection between UNCLOS and human rights.

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84. The Corfu Channel Case (United Kingdom v Albania), 1949 ICJ Reports 4, Judgment of 4 April 1949, 22.

85. Most famously in the *The M/V 'SAIGA' (No 2) Case (Saint Vincent and the Grenadines v Guinea), Judgment, ITLOS Reports 1999* para 155. See discussion in Section 4.1 below. For an overview see: Francesca Delfino, '"Considerations of Humanity" in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals' in Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer International Publishing 2019) 428.

4. Areas of intersection: Selected substantive questions

As a starting point, it is useful to recall that "[t]he Law of the Sea and the law of human rights are not separate planets rotating in different orbits".[86] They are within each other's gravitational pull; they do meet, intersect and affect each other. While, within the confines of this paper, it is not possible to fully elaborate on all possible areas of intersection of these two areas of international law, it is useful to at least briefly reflect upon some main types thereof. This will be done mainly through the lens of marine-related human rights jurisprudence of the ECtHR.

4.1 Interdiction or enforcement operations at sea and human rights

Firstly, the arguably broadest category of such intersection is when issues of the law of the sea and human rights materialise at the same time, during the same activity or situation. In these situations, human rights considerations may act as a shield *vis-à-vis* external interference with the ship and its crew. The most obvious examples relate to interdiction or

86. Treves (n 3) 12. These remarks may be read against the background of broader considerations pertaining to such concepts as fragmentation of international law or regime interaction. See e.g.: International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Yearbook of the International Law Commission, 2006, vol. II, Part Two; Øystein Jensen and Nele Matz-Lück, 'From Fragmentation to Interaction? A Law of the Sea Perspective on Regime Interaction and Interdisciplinary Interfaces' in Jensen Øystein, Nele Matz-Lück and Elise Johansen, *The Law of the Sea: Normative Context and Interactions with other Legal Regimes* (Routledge 2022).

enforcement[87] operations at sea, such as during the prevention of drug trafficking,[88] combating piracy or in connection with migration at sea. In these instances, traditional notions of the law of the sea – in particular exclusive flag State jurisdiction[89] and possible exceptions thereof, including the right of visit,[90] or piracy-related provisions[91] – come into play.

At the most general level, it is imperative to underscore in this context the famous pronouncement of the ITLOS in the *M/V Saiga* case, made in relation to the forcible arrest of that oil tanker by Guinea, that "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law".[92] Hence, as the Tribunal reasoned, "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances".[93] Similar requirements are enshrined in the 1995 Fish Stocks Agreement in the context of carrying out the boarding and

87. While the terms 'interdiction' and 'enforcement' may be sometimes used as synonyms, the former term is actually a broader one. As Guilfoyle explains, 'interdiction' may be taken to involve two steps: (1) the stopping, boarding and searching the vessels, and, potentially also (2) the seizing of the vessel and arresting the persons onboard. While both sets of activities involve the exercise of extraterritorial enforcement jurisdiction, they may require different legal basis. See: Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 9.

88. This was at the heart of the *Case of Medvedyev and others v France, Application no 3394/03* (ECtHR). See also Article 108 UNCLOS.

89. UNCLOS, Articles 91 and 92.

90. Ibid., Article 110.

91. Ibid., Articles 100-107, 110(1)(a).

92. *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999* (n 85) para 155. This statement was also repeated in the *The M/V 'Virginia G' Case (Panama/Guinea-Bissau), Judgment* (ITLOS) para 359; *The 'Enrica Lexie' Incident (Italy v India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015* para 133.

93. *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999* (n 85) para 155.

inspection procedures.[94] These principles were applied by the Tribunal in the *M/V Virginia G.* case where, however, contrary to the claims of the applicant State (Panama), ITLOS found that excessive force was not used against the *M/V Virginia G* and its crew, and, in particular, that there was no "excessive force leading to physical injuries or endangering human life during the boarding and sailing of the *M/V Virginia G* to the port of Bissau".[95]

Famously, one of the first cases before the ECtHR that involved the considerations pertaining to the applicability of human rights to maritime interdiction operations concerned the Cambodian ship *Winner* that was intercepted by the French frigate on suspicion of drug trafficking.[96] Among the many interesting facets of that case, this contribution will highlight just three of them.[97] Firstly, it deserves to be noted that the ECtHR found that the events in question took place – as required by Article 1 of the European Convention setting out the scope of its application – within the jurisdiction of France. While the Court clearly took into account that the initial interception took place on the high seas, it also affirmed that France (through its warship and the special navy commando that boarded the *Winner*) had "exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its

94. Article 22(1)(f) of the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in New York on 4 August 1995 (United Nations Treaty Series, vol. 2167, 3).

95. *The M/V 'Virginia G' Case (Panama/Guinea-Bissau), Judgment* (n 92) para 362.

96. *Case of Medvedyev and others v. France, Application no 3394/03* (n 88). Previously, the deprivation of liberty under Article 5 of the European Convention had been argued in the *Rigopoulos v Spain, Application no 37388/97* (ECtHR). However, under the facts of the latter case, the European Court dismissed the claims.

97. For more see e.g.: Efthymios Papastavridis, 'European Court of Human Rights Medvedyev et al v France (Grand Chamber, Application No 3394/03) Judgement of 29 March 2010' (2010) 59 International and Comparative Law Quarterly 867.

interception, in a continuous and uninterrupted manner" up until the applicants (i.e. the ship's crew) were tried in France.[98]

The second point to be made relates to the alleged violation of Article 5 ('Right to liberty and security') of the European Convention. The defending Government underscored at this juncture the "specificities of the maritime environment and of navigation at sea", as well as the fact that the freedom of movement of the crew, even before its seizure by the French authorities, had been in any case restricted to the confines of the ship.[99] The Court, however, was not convinced by this argumentation. It recalled in particular that the crew was placed under the control of the French special forces and confined to their cabins during the voyage to Brest, as well as that the "difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance".[100]

Thirdly, the *Medvedyev* case invited considerations regarding possible exceptions to the right to liberty and security, namely: the "lawfulness" of the detention and whether "a procedure prescribed by law" was followed to justify it, as prescribed by Article 5(1) of the European Convention. The ECtHR remarked at the outset, while being cognizant of the "ravages drugs cause" and of the States' conviction to take a firm stance on combating drug trafficking, that nevertheless:

> [T]he special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".[101]

98. *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) paras 62-67.

99. Ibid., paras 49-50.

100. Ibid., paras 73-75.

101. Ibid., para 81.

In the particularities of the case, these general observations translated into the analysis whether the French authorities had a clear and foreseeable legal basis in detaining the ship and the crew of the *Winner*. For the present purposes, it is relevant to note that Article 108 UNCLOS was not directly applicable, as Cambodia is not a State Party to the Convention.[102] In any case, as argued by the ECtHR, Article 108 would not have been applicable, as under this provision it is the *flag State* (i.e. Cambodia in the present case) that may request the co-operation of other States (i.e. France) to suppress illicit traffic in narcotic drugs, not the other way round.[103] Therefore, what turned out to be crucial was the Cambodian consent, given in the form of an exchange of diplomatic notes with the French authorities in 2002 authorising the latter to "intercept, inspect and take legal action against the ship Winner". It was this authorisation that, in the eyes of the ECtHR, failed the test of Article 5(1) of the European Convention on two grounds. First, as it was diplomatic correspondence between States that referred only to the ship (and not its crew), it was not considered to be a situation of deprivation of liberty 'clearly defined by law'. Secondly, bearing in mind the inapplicability in that case of UNCLOS and the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), as well as the lack of any other bilateral treaty between France and Cambodia or even established practice between them, such a diplomatic correspondence

102. It was also not a State Party, at the relevant date, to United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988 (Vienna Convention; United Nations Treaty Series, vol. 1582, 95).

103. Furthermore, Article 108 UNCLOS does not envisage any enforcement rights (such as the boarding of the seizure of the vessel) for non-flag States. Except piracy-related provisions, such a legal basis is granted in Article 110 UNCLOS concerning the right of visit. However, the latter provision does *not* list the illicit traffic in narcotic drugs or psychotropic substances (i.e. subject-matter of Article 108) as one of the permissible grounds to exercise the right of visit.

failed to meet the 'foreseeability' criterion for potential offenders.[104] Thus, overall, the ECtHR found France in violation of Article 5(1) of the European Convention.[105]

Interestingly, seven judges appended a rather powerful partly dissenting opinion arguing that:

> [I]t is scarcely possible to dissociate the crew from the ship itself when a ship is boarded and inspected on the high seas. The actions expressly authorized by Cambodia (interception, inspection, legal action) necessarily concerned the crew members.[106]

Hence, they argued for a less literal interpretation of the diplomatic correspondence between the two States, favouring instead a functional reading whereby the Cambodian consent to intercept, inspect and take legal action against the ship necessarily involved the consent to take action vis-à-vis its crew.

This, in turn, brings to mind the concept of a ship as a unit, that ITLOS has referred to on a number of occasions. In particular, in the *M/V Saiga case*, the Tribunal stated that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State",[107] and that "[t]he nationalities of these persons

104. *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) paras 99-100.

105. The applicants argued that their rights under Article 5(3) of the European Convention were violated as well. The ECtHR, however, did not find such a violation - similarly as in the earlier *Rigopoulos v. Spain, Application no. 37388/97* (n 96).

106. Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou, para 7. For an academic dissent with the Court's reasoning (also on different grounds) see: Papastavridis (n 97) 875–877.

107. The concept of 'every person involved or interested in its operations' was interpreted broadly in the *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation), Merits, Award of 14 August 2015* (n 76) para 171.

are not relevant".[108] It needs to be noted, though, that the meaning of that concept is essentially procedural, as it denotes the standing of the flag State to bring the claim to ITLOS on behalf of a ship, notwithstanding the nationalities of the crew.[109]

Still, when the Tribunal deals with the detention of the vessel and its crew, it is often in the context of prompt release proceedings[110] which have their legal ramifications. In particular, such proceedings do not allow for bringing claims regarding the alleged violations of Article 73(3) and (4) UNCLOS.[111] On the other hand, the Tribunal has remarked that the purpose of these proceedings is to balance the interest of the coastal State in taking appropriate measures to ensure compliance with its laws and regulations with the interest of the flag State "in securing prompt release of its vessels *and their crews* from detention" (emphasis added).[112] In fact, such a release of the master and crew regularly forms part of prompt release judgments, although it is sometimes disputed (and not necessari-

108. *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999* (n 85) para 106; *The M/V 'Virginia G' Case (Panama/Guinea-Bissau), Judgment* (n 92) paras 126-127; *The M/V 'Norstar' Case (Panama v Italy), Preliminary Objections* para 230.

109. As the Tribunal explained "[i]f each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue". *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999* (n 86) para 107.

110. In addition, similar objectives are often pursued in the framework of the provisional measures proceedings.

111. Article 74(3) UNCLOS does not allow for imprisonment or any other form of corporal punishment as part of coastal State's penalties imposed for violations of fisheries laws and regulations specified therein. Article 74(4) requires that the coastal State, upon the arrest or detention of the foreign vessel, shall promptly notify the coastal State. On the inadmissibility of such claims see: *'Camouco' (Panama v France), Prompt Release, Judgment, ITLOS Reports 2000* (ITLOS) para 59; *'Monte Confurco' (Seychelles v France), Prompt Release, Judgment* (ITLOS) para 63.

112. *'Monte Confurco' (Seychelles v. France), Prompt Release, Judgment* (n 111) paras 70-71.

ly decided upon by the Tribunal) whether in the particular situation the master and/or the crew were, indeed, 'detained'.[113]

4.2 Situations taking place after initial seaborn actions

Further, one can identify legal situations that arise subsequent to 'seaborn' actions. They may be related to the treatment of the crew of arrested ships, the treatment, transfer, prosecution and trials of apprehended pirates[114] or the treatment of migrants. In the latter instance, questions involve in particular the application of the principle of non-refoulement[115] and the prohibition of torture in the context of the treatment of migrants at land.[116] While these situations result from maritime-based operations, the applicable legal standards stem predominantly from human rights law.

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113. Ibid., para 90. On the facts of this case, the Master was under 'court's supervision' and his passport was taken away from him. For more on this point see: Petrig and Bo (n 49) 370–374.

114. While UNCLOS allows for the seizing of piratical ship and arresting persons onboard (Article 105), it leaves subsequent actions to "the courts of the State which carried out the seizure". The Convention neither *obliges* to exercise jurisdiction with respect to pirates (Article 105 UNCLOS characterises this as a possibility, by using the word 'may') nor does it specify any criteria, according to which such an arrest, prosecution or trial shall take place. Furthermore, in practice, these post-apprehension processes were often undertaken by States other than the seizing State, on the basis of the so-called transfer agreements. For details and discussion see: Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (n 8) 144–145, 152ff; Petrig (n 8).

115. *Case of Hirsi Jamaa and Others v Italy, Application no 27765/09* (ECtHR) paras 154-158. The Court found Italy to be in breach of this obligation in conjunction with Article 3 ('Prohibition of torture') of the European Convention. See also: Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 Max Planck Yearbook of United Nations Law 205.

116. Case in point is again *Case of Safi and Others v Greece, Application no 5418/15* (ECtHR). The Greek authorities were found to be in breach of Article 3 ('Prohibition of torture') due to fact that the public strip-body searches were unwarranted in the circumstances of that case (paras 197-198) and, hence, constituted inhuman or degrading treatment.

UNCLOS does envisage some regulations and restrictions on coastal States as regards the treatment of vessels and crews; however they are related, in the first place, to the enforcement of fisheries laws and regulations in the EEZ.[117] In judicial practice, these matters arise mainly in the context of prompt release proceedings[118] where the Tribunal has made a more general point, namely that "[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law."[119] Still, this finding – referred to as one reflecting the 'humanization' of the obligation of prompt release[120] – was reached by the Tribunal without reference to external human rights standards.

Outside of prompt release proceedings and in a situation where, ultimately, the Tribunal found it does not have jurisdiction, it is still useful to briefly refer to the *M/V 'Louisa'* case between Saint Vincent and the Grenadines and the Kingdom of Spain. Saint Vincent and the Grenadines claimed that activities of the Spanish authorities – that consisted in

117. See Article 73(3) UNCLOS that states that, absent agreements to the contrary, penalties imposed in such situations "may not include imprisonment (…) or any other form of corporal punishment."

118. See Article 292 in conjunction with Articles 73(2), 220 and 226 UNCLOS. See also: Seline Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' (2017) 48 Ocean Development & International Law 300, 303–304.

119. *The 'Juno Trader' Case (Saint Vincent and the Grenadines v Guinea-Bissau), Prompt Release, Judgment* (ITLOS) para 77. See also Separate Opinion of Judge Treves, as well as Joint Separate Opinion of Judges Mensah and Wolfrum, who underscored the requirements of due process embedded in Article 73 UNCLOS. These Judges also underlined that while the prompt release procedure is not a means to assessing the compatibility of domestic procedures with international law, this does not mean that the procedure applied by the coastal State in taking enforcement measures against a fishing vessel is of no relevance to the Tribunal in a prompt-release procedure.

120. Petrig and Bo (n 49) 367. Judge Treves, referring to another publication, stated that: "[s]een together in light of paragraph 1 [of Article 73], paragraphs 2, 3 and 4 show clear concern for what has been called the human rights consequences of expanding the bases of jurisdiction" (footnote omitted). Separate Opinion of Judge Treves (para 3) to the *The 'Juno Trader' Case (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment* (n 119).

particular of the detention of some members of the vessel's crew and the retention of their passports – go against Article 300 UNCLOS and human rights obligations. In this setting, the Tribunal nevertheless found that "States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances".[121]

Further, in the *Detention of three Ukrainian naval vessels case*, the prolonged deprivation of liberty and freedom of the Ukrainian servicemen raised 'humanitarian concerns' and consequently informed the Tribunal's reasoning as to the existence of the "real and imminent risk of irreparable prejudice" to the rights of Ukraine pending the constitution and functioning of the Annex VII arbitral tribunal.[122] Similar sentiment and reasoning were also expressed by the Tribunal in the *San Padre Pio* case due to the prolonged detention of the master and the crew of that ship, as well as threats to their safety and security.[123] That was one of the considerations that eventually led the Tribunal to the conclusion that there was a real and imminent risk of irreparable prejudice *to the rights of Switzerland* and, hence, it ordered, *inter alia*, the release of the Master and the three officers (upon the posting of a bond or other financial security by Switzerland).

In the *Duzgit Integrity* arbitration, the Annex VII Tribunal stated that even if an archipelagic State, by virtue of its sovereignty, as reflected in Article 49 UNCLOS, may take enforcement measures, it is nevertheless subject to the requirement of reasonableness, which encompasses the general principles of necessity and proportionality. Hence, the Arbitral Tribunal concluded that "the prolonged detention of the Master and the

121. *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment* (n 75) para 155.

122. *Case concerning the detention of three Ukrainian naval vessels (Ukraine v Russian Federation), Request for the prescription of provisional measures* para 112.

123. *The M/T San Padre Pio (Switzerland v Nigeria), Request for the prescription of provisional measures* (ITLOS) para 130.

vessel, the monetary sanctions, and the confiscation of the entire cargo, cannot be regarded as proportional to the original offence".[124]

Lastly, the '*Enrica Lexie' incident* case(s) offer interesting insights into the reasoning of both ITLOS and the Annex VII Arbitral Tribunal. Under the factual circumstances of this case, which were to some extent disputed between the Parties, the Italian vessel protection detachment onboard the 'Enrica Lexie' shot two Indian fishermen onboard the fishing boat 'St. Antony', mistakenly taking it for a pirate skiff. Subsequently, the two Italian Marines were arrested and detained in India, which exercised criminal jurisdiction over them.

ITLOS, recalling that considerations of humanity must apply in the law of the sea, considered both the "grief and suffering of the families of the two Indian fishermen who were killed" and "the consequences that the lengthy restrictions on liberty entail for the two Marines and their families".[125] However, bearing in mind the nature and purpose of these proceedings before the Tribunal,[126] it ordered the suspension of all court proceedings in India and Italy but rejected more far-reaching claims by Italy to, effectively, order India to release the Marines.

After the Annex VII Arbitral Tribunal was constituted, it prescribed its own provisional measures. It also relied on the concept of 'considerations of humanity', as well as the need to preserve the rights of both Parties.[127] Hence, while also bearing in mind that Italy at that stage argued

124. *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), Award, PCA Case No 2014-07* (n 77) para 260.

125. *The 'Enrica Lexie' Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015* 92) paras 133-135.

126. As these were provisional measures proceedings under Article 290(5) UNCLOS, the Tribunal underlined that its order "must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII". Ibid., para 125.

127. *The 'Enrica Lexie' Incident, Order of 29 April 2016, PCA Case No 2015-28* (Annex VII Arbitral Tribunal) para 106.

for the relaxation of the bail conditions – not for the release of the Italian Marine[128] – the Annex VII Tribunal ordered both States to cooperate to "achieve a relaxation of the bail conditions" in order to "give effect to the concept of considerations of humanity" so that the Marine in question "while remaining under the authority of the Supreme Court of India" could return to Italy during the proceedings.[129]

Lastly, to complete the whole picture, one may note that the final award of the Annex VII Arbitral Tribunal also addressed the fact that the crew members of the 'St. Antony' "suffered loss of life, physical harm, material damage to their property (…), and moral harm. *India is* accordingly *entitled* to payment of compensation in respect of such damage" (emphasis added).[130]

As may be observed, therefore, considerations relating to the crew and the well-being of persons onboard feature directly or indirectly in the UNCLOS courts and tribunals' reasoning. They are, however, framed in the State-to-State rationale of the UNCLOS dispute-settlement mechanisms. The well-being of and injuries to persons are, legally speaking, proxy to the (flag) State's rights or its entitlement to be compensated. The link between the flag State, its ship, and the crew is therefore recognisable. This, however, is not always and not necessarily a bad thing. One may recall that one crew member of *Winner* died during the boarding

128. ibid para 75. One of the two Marines – due to poor health condition – was already present in Italy, hence the proceedings really concerned the other one (Sergeant Girone) which was still in India.

129. The Arbitral Tribunal emphatically remarked that "Sergeant Girone's social ties are in Italy. So is his family life. (…) Sergeant Girone's children suffer considerably under the current situation, involving the separation from their father during years of their lives. The distance of thousands of miles between Sergeant Girone's home and his current residence reduces contact with his family to sporadic visits. Such visits, as have occurred on occasion, cannot replace family life." Ibid., para 104.

130. *The 'Enrica Lexie' Incident, Award of 21 May 2020, PCA Case No 2015-28* (Annex VII Arbitral Tribunal) para 1088.

procedure. However, the ECtHR *Medvedyev* case, as it was framed from the perspective of the right to liberty and security (Article 5 of the European Convention), is largely silent on this point.[131]

4.3 Positive obligations of coastal States to save people at sea

First, attention should turn to the Convention's provisions concerning the duty to render assistance at sea, including the establishment, operation and maintenance of an adequate and effective search and rescue service.[132] This general UNCLOS obligation,[133] arguably reflective of customary international law[134] and also elaborated on in more specific treaties,[135] obligates every State to require the master of a ship flying its flag to (a) render assistance to any person found at sea in danger of being lost; (b) proceed with all possible speed to the rescue of persons in distress; and (c) after a collision, to render assistance to the other ship, its crew and its passengers. In addition, as per Article 98(2), every State shall "promote the establishment, operation and maintenance of an adequate

131. See factual part of the judgment: *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) para 13. See also: Papastavridis (n 98) 878–879.

132. See also: Alexander Proelss, 'Law of the Sea and Refugee Law' in Øystein Jensen, Elise Johansen and Nele Matz-Lück, *The Law of the Sea. Normative Context and Interactions with other Legal Regimes* (Routledge 2022); Sofia Galani, 'Human Rights Obligations in Maritime Search and Rescue' (2025) 74 International and Comparative Law Quarterly 33.

133. Article 98 UNCLOS. It is largely based on similar obligation in the International Convention for the Safety of Life at Sea, adopted in London on 1 November 1974 (SOLAS Convention).

134. This was the position taken in particular by the International Law Commission in its 1956 *Articles concerning the Law of the Sea with commentaries*, Yearbook of the International Law Commission, 1956, vol. II, commentary on Article 36. See also: Douglas Guilfoyle, 'Article 98. Duty to Render Assistance' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017).

135. In particular: International Convention on Maritime Search and Rescue, adopted in Hamburg on 27 April 1979 (SAR Convention) and the International Convention on Salvage adopted in London on 28 April 1989 (Salvage Convention).

and effective search and rescue service". This provision was particularly referred to in the context of the so-called 'push-back' operations in the Mediterranean Sea.[136]

There seems to be an emerging understanding of the notion of 'distress' and duty to render assistance under Article 98 UNCLOS that would more directly apply to situations of migrants at seas and the particular challenges such situations pose.[137] As highlighted above, UNCLOS requires that assistance is provided to *any person* found at sea *in danger of being lost*, as well as mandates to proceed with all possible speed to the rescue of *persons in distress*. This obligation is not restricted to any particular maritime zone, and it applies to "any person" which would encompass the ship's crew, seafarers, but also other people onboard.[138]

In addition, the manner in which such assistance is conducted can be and, indeed, was assessed from the standpoint of human rights – particularly the right to life. In the *Safi and Others v. Greece* case,[139] Greece was found in breach of Article 2 of the European Convention ('Right to life') even though, when the migrant's boat was spotted by the Greek

136. See e.g. the *Case of Hirsi Jamaa and Others v. Italy, Application no. 27765/09* (n 115); *Case of Safi and Others v. Greece, Application no. 5418/15* (n 116).

137. See: 'Distress at sea: a call for a humanitarian and precautionary approach'. A joint statement, made in 2024, by the United Nations High Commissioner for Refugees, the International Organization for Migration, the United Nations Office of the High Commissioner for Human Rights, the United Nations Special Rapporteur on trafficking in persons, especially Women and Children, the United Nations Special Rapporteur on the Human Rights of Migrants and the Centre for Humanitarian Action at Sea. available at <<https://www.unhcr.org/sites/default/files/2024-12/joint-statement-on-distress-at-sea.pdf>>. See also: Antarnihita Mishra, 'The Persisting Tragedy in the Mediterranean and What Stands in the Way of the Shipmaster's Duty to Render Assistance' (*Opinio Juris*, 7 November 2022), available at <<https://opiniojuris.org/2022/11/07/the-persisting-tragedy-in-the-mediterranean-and-what-stands-in-the-way-of-the-shipmasters-duty-to-render-assistance/>>.

138. For more on this issue see: Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98 International Review of the Red Cross 491.

139. *Case of Safi and Others v. Greece, Application no. 5418/15* (n 116).

high-speed craft, it was already in a precarious situation. However, in the words of the ECtHR, "Greek authorities did not do all that could reasonably have been expected of them in order to afford the applicants and their family members the level of protection required by Article 2 of the Convention".[140] In other words, the Court interpreted Article 2 through the lens of Greece's positive obligations stemming from that provision, while qualifying Article 98 UNCLOS as part of the "relevant international legal framework".[141]

Lastly, attention should turn to the ongoing discussion as to whether the alleged violations of human rights onboard a ship could, in and of themselves, give rise to actions on the part of third States, such as, for example, by the coastal State utilising its rights relating to the innocent passage regime.[142] In such an instance, the human rights considerations would not be the *result of* – concomitant with – seizing the vessel, searching it, interrogating the crew, leading to a potential arrest of the vessel and crew, but would provide an actual *reason* to undertake action vis-à-vis a vessel (on the assumption that the relevant law of the sea basis exists). While it is recognised that the coastal State has discretion to take measures in relation to ships allegedly in violation of the innocent passage regime,[143] it has been recently argued that some coastal State action may indeed be required and mandatory under international law, particularly in situations where the alleged breaches relate to a norm of peremptory

140. Ibid., paras 165-167.

141. Ibid., para 88.

142. See Article 19 UNCLOS and Anna Petrig, 'Coastal State Jurisdiction in the Territorial Sea and the Protection of People on Board Foreign-Flagged Vessels' (10 December 2024) <<https://www.ejiltalk.org/coastal-state-jurisdiction-in-the-territorial-sea-and-the-protection-of-people-on-board-foreign-flagged-vessels/>>.

143. Article 25(1) UNCLOS states that "[t]he coastal State *may* take the necessary steps in its territorial sea to prevent passage which is not innocent." (emphasis added).

character (*jus cogens*).[144] Notwithstanding the discretionary or mandatory powers that the coastal State may or must take in relation to vessels in innocent passage, the debate in question looks at several other elements of the innocent passage regime in order to ascertain what would be the legal basis and parameters for such an activity. These concern for example the interpretation of the requirements of the passage[145] or understanding which activities would render the passage prejudicial to the peace, good order or security of the coastal State.[146]

4.4 Continuous violations of human rights onboard ships

One can also identify human rights violations of a more permanent character, i.e. the ones that are almost inherent in the very scheme of operation of a given vessel and not resulting from instantaneous external interference with it. The case in point being the labour conditions on vessels, particularly fishing ones, or generally the treatment of seafarers. These matters can be viewed simultaneously from the human rights and the law of the sea perspectives.

As far as UNCLOS is concerned, Article 94 sets out the duties of the flag State that involve the effective exercise of its "jurisdiction and control

144. Anna Petrig refers to prohibition of torture and slavery in this context; Petrig (n 142). ASCOMARE, on the request of the Palestinian Boycott, Divestment and Sanctions (BDS) National Committee, prepared a legal opinion which refers in that context to the prohibition of genocide and apartheid. ASCOMARE, 'Request for a Legal Opinion on the Regime of Innocent Passage and the Due Diligence Obligations of Flag States under the International Law of the Sea' (11 March 2025), available at <<https://ascomare.com/legal-opinions/>> and attached to this book (Annex).

145. In line with Article 19(1) UNCLOS such a passage "shall take place in conformity with this Convention *and with other rules of international law*" (emphasis added).

146. These are enumerated in Article 19(2) UNCLOS and encompass, among others, "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations".

in administrative, technical *and social matters* over ships flying its flag" (emphasis added). In extreme situations, Article 99 that deals with slavery may become relevant as well. The former provision was commented upon by ITLOS in the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* whereby it stated that the list of activities enumerated in Article 94(2) UNCLOS is not exhaustive but in any case includes the obligation of the flag State to "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew", including with respect to the social matters mentioned above.[147] The Tribunal recalled in the context of that Advisory Opinion (and, hence, in the context of fishing activities) that not only every State – that has clear grounds for believing that proper jurisdiction and control are not exercised with respect to a ship – may report this to the flag State, but also that the flag State in question shall investigate the matter and take any action, if necessary, to remedy it, as well as report back on any actions taken.[148] The Tribunal also remarked that, as a whole, Article 94 UNCLOS requires flag States to:

> [A]dopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources.[149]

While this statement is clearly restricted to fishing activities, as this was the scope of inquiry in the 2015 Advisory Opinion, it would seem – even bearing in mind the point of Professor *Evans* that UNCLOS has

147. *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (ITLOS) para 117.

148. Ibid., para 118.

149. Ibid., para 119.

more to say about protecting fish than humans[150] – to be generally applicable to the duties of flag States that should also not undermine their responsibilities in respect of social matters as well.

Perhaps, then, particularly in this context, one can observe the importance of the existence of the 'genuine link' between the State and the ship.[151] This criterion, expressly provided for in Article 91(1) UNCLOS, has been increasingly perceived not only as the right of the flag State[152] but also as the corresponding duty to "secure more effective implementation of the duties of the flag State".[153]

In addition, it is important to highlight in this context the 2006 Maritime Labour Convention[154] that revises and consolidates 37 existing

150. Indeed, the Tribunal, in its reasoning preceding the quoted passage, recognises both general and specific obligations stemming from the Convention as regards the protection and management of marine living resources, such as Articles 192, 193 and 58(3), 62(4), respectively. These provisions do not have their human-rights protection oriented counterparts in the Convention.

151. See generally: Douglas Guilfoyle, 'Article 91. Nationality of Ships' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017). The quoted author points out in particular the lack of definition of the 'genuine link', failed attempts to codify any substantive requirements related to this concept, as well as need to differentiate between the 'genuine link' requirement and actual duties of flag States.

152. Particularly, as Article 91(1) UNCLOS states, the right to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag".

153. *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999* (n 85) para 83. The Tribunal famously stated that this is, indeed, the very purpose of the provision in question while underlining, by contrast, that Article 91 is not designed to "to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States" (*infra*). The Tribunal further clarified that "...once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices". *The M/V 'Virginia G' Case (Panama/Guinea-Bissau), Judgment* (n 92) para 113.

154. Maritime Labour Convention, adopted in Geneva on 23 February 2006 (entered into force: 20 August 2013).

treaties in the International Law Organization (ILO) framework. It applies to 96.6% of the world gross shipping tonnage and establishes minimum working and living standards for all seafarers on ships.[155] It has proved to be an important tool in promoting a more holistic approach to seafarers' rights, although, having said that, it generally does not apply to fishing vessels and some other types of vessels as well.[156]

4.5 Human rights as source of entitlements in the maritime context: Right to a clean and healthy marine environment and right to protest at sea

Lastly, it is warranted to perceive human rights in the maritime context not only as a 'shield' *from* potential abuses but also as a source of positive rights *to* perform certain actions or achieve certain objectives (or require States to undertake certain actions). This was already the case in the situations described in Section 4.3 above; however here the focus is on the rights of individuals (not States) to undertake action in pursuance of some general objectives.

A useful starting point is provided by the broad approach taken by the UN Special Rapporteur on the human right to a clean, healthy and

155. General information available at the ILO webpage: <<https://www.ilo.org/international-labour-standards/maritime-labour-convention-2006>>. The percentage given corresponds to the current 108 ratifications of the Maritime Labour Convention.

156. Article II(4) of the Maritime Labour Convention. This provision excludes "ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. This Convention does not apply to warships or naval auxiliaries". As to fishing, ILO adopted another treaty – the Work in Fishing Convention, adopted in Geneva on 14 June 2007 (entered into force: 16 November 2017) – which, however, has much lower rate of ratifications (at the time of writing: 22 States). Information available at <<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:11300:::::P11300_INSTRUMENT_SORT:3>>.

sustainable environment, *Astrid Puentes Riaño* who, in her report, underscored that

> The ocean's degradation is affecting the enjoyment of human rights, including the rights to a clean, healthy and sustainable environment, life, health, culture and education. (…) A human rights approach, including the right to a healthy environment, can also facilitate the implementation of such relevant treaties as the United Nations Convention on the Law of the Sea (…)[157]

The report highlights, therefore, the interlinkage between humans' dependency on a healthy climate and the Earth's (marine) ecosystem which, in turn, gives rise to and materialises in substantive (e.g. right to a clean, healthy and sustainable environment) and procedural rights (e.g. right to environmental information or right to participation in decision-making) of humans that aim at safeguarding the global, including marine, environment.

The fact of this interdependency had also been earlier recognised by the Tribunal in its 2024 *Advisory Opinion on climate change*. ITLOS took note of the relevant Intergovernmental Panel on Climate Change reports on climate change, the effects of this phenomenon on the state of the marine environment and consequential challenges for people – particularly for human communities in close connection with coastal environments – and stated that "climate change represents an existential threat and

157. 'The Ocean and Human Rights. Report of the Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable Environment, Astrid Puentes Riaño, Doc. A/HRC/58/59' paras 5 and 14.

raises human rights concerns." [158] It also underscored that, while providing answers to the questions posed to the Tribunal, it was "mindful of the fact that climate change is recognized internationally as a common concern of humankind", as well as of the "deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States".[159] Bearing in mind the ITLOS limitations when it comes to its jurisdiction and applicable law, as well as the fact that the requesting entity – the Commission of Small Island States on Climate Change and International Law – did not ask the Tribunal to address human rights issues, the Advisory Opinion delivered did not consider the possible violations of human rights.[160]

Another instance where human rights in the maritime context gave rise to a recognition of positive rights of individuals was in the *Arctic Sunrise* case. It concerned protests, as part of the Greenpeace 'Save the

158. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n 56) para 66. Arguably, other parts of the Advisory Opinion would be of significance also from human rights perspective. This could encompass, for example, conclusions as regards measures to be undertaken by States under Article 194(1) UNCLOS ('obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonise their policies in this connection) which should be approached and implemented in an 'objectivised' manner, i.e. taking into account the best available science and relevant international rules and standards (*infra*, para 243). Human rights concerns in the context of issues at hand in the Advisory Opinion were argued by a number of participants. See e.g. Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd); Client Earth or One Ocean Hub, 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/>>.

159. Ibid., para 122.

160. Some of the Tribunal's Judges would have preferred a more thorough treatment of this issue. See e.g. Declaration of Judge Infante Caffi, Declaration of Judge Kittichaisaree (paras 25-28) or Declaration of Judge Pawlak. This has also been the sentiment expressed in some scholarly commentaries. See e.g.: Hey (n 63).

Arctic' campaign, undertaken by the *Arctic Sunrise* vessel and its crew (that became known as the 'Arctic 30') against oil drilling, and particularly against the Russian offshore oil platform *Prirazlomnaya*. The latter was located in the Russian EEZ. In this maritime zone, by virtue of the application of Articles 58 and 87 of UNCLOS, all States enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom. On this basis, the Annex VII Arbitral Tribunal[161] concluded that

> Protest at sea is an internationally lawful use of the sea related to the freedom of navigation. The right to protest at sea is necessarily exercised in conjunction with the freedom of navigation. The right to protest derives from the freedom of expression and the freedom of assembly, both of which are recognised in several international human rights instruments to which the Netherlands and Russia are parties, including the ICCPR. The right to protest at sea has been recognised by resolutions of international organisations.[162]

While this right is not unlimited, as protest needs to respect other rules of the Convention – such as the reservation of the high seas for peaceful purposes[163] and the necessity to have due regard to the rights and duties

161. The case had been previously referred to, in the provisional measures stage, to ITLOS. In this framework, the Tribunal has decided, inter alia, that '[t]he Russian Federation shall immediately release the vessel Arctic Sunrise and all persons who have been detained'. See: *The 'Arctic Sunrise' case (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013* para 105. While, already at that stage, the Dutch Government (see the *Request for provisional measures submitted by the Netherlands*, para 19 and *Answers to questions posed by the Tribunal*, question 2; available at <<https://www.itlos.org/en/main/cases/list-of-cases/case-no-22/>>) and Greenpeace (acting as *amicus curiae*) have formulated arguments that were based also on human rights, the ITLOS Order makes no direct reference to human rights in its reasoning. This is briefly referred to in the *Joint Separate Opinion of Judge Wolfrum and Judge Kelly*, paras 2 and 14.

162. *Arctic Sunrise Arbitration, Merits* (n 39) para 227 (footnotes omitted).

163. UNCLOS, Article 88 in conjunction with Article 58(2).

of the coastal State[164] – the Arbitral Tribunal, under the factual and legal circumstances of this case, did not find any legal justification for the boarding, seizure, and detention of the *Arctic Sunrise* by the Russian Federation authorities.[165] Although this case brings to the forefront many interesting aspects of the law of the sea and human rights,[166] for the present purposes the mention of just two of them will have to suffice.

The first takes account of the fact that the saga of the *Arctic Sunrise* ship and its crew unfolded not only before the ITLOS (Provisional Measures) and an Annex VII Arbitral Tribunal (Merits) but also before the ECtHR.[167] Namely, in 2014 (i.e. after ITLOS delivered its decision and during the Annex VII Arbitral Tribunal proceedings) the 'Arctic 30' initiated proceedings before this regional human rights body principally on two substantive grounds, i.e.: (a) that their initial arrest and detention had been arbitrary and not in accordance with the law (violation of Article 5 of the European Convention – 'Right to liberty and security') and (b) that their apprehension, detention and prosecution had interfered with their right to freedom of expression (violation of Article 10 of the European Convention – 'Freedom of expression'). The ECtHR found it

164. Ibid., Article 58(3). However, the coastal States is bound by the analogous duty to 'have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention' under UNCLOS Article 56(2).

165. *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation), Merits, Award of 14 August 2015* (n 76) para 333.

166. For more see e.g.: Alex G. Oude Elferink, 'The Russian Federation and the Arctic Sunrise Case: Hot Pursuit and Other Issues under the LOSC' (2016) 92 International Law Studies 381; Richard Caddell, 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea' in Mónika Ambrus and Ramses A Wessel (eds), *Netherlands Yearbook of International Law 2014*, vol 45 (TMC Asser Press 2015); Alex G Oude Elferink, 'The Arctic Sunrise Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 The International Journal of Marine and Coastal Law 244; Douglas Guilfoyle, 'Greenpeace "Pirates" and the MV Arctic Sunrise' (*EJIL: Talk!*, 8 October 2013) <<https://www.ejiltalk.org/greenpeace-pirates-and-the-mv-arctic-sunrise/>>.

167. *Case of Bryan and Others v Russia, Application no 22515/14* (ECtHR).

had jurisdiction to entertain this case despite the fact the factual situation had been previously under the purview of ITLOS and, in particular, the Annex VII Arbitral Tribunal. Importantly, bearing in mind that the latter concerned a dispute *between States* and *their* rights and obligations *under UNCLOS*, the ECtHR considered that the matter cannot be considered *res judicata*. This is particularly due to the fact that the Strasbourg proceedings concerned different complainants (individuals, not States), different alleged breaches of law (violations of the European Convention, not UNCLOS), which were owed to the applicants directly, not States. The Court therefore observed that not only the subject-matter and the objectives of both procedures, but also the complainants before the Court and the UNCLOS arbitral tribunal were substantially different.[168] It further proceeded to the merits and found that, on account of their initial and subsequent arbitrary detention,[169] both their right to liberty (Article 5 of the European Convention)[170] and their right under Article 10 of the European Convention (i.e. right to freedom of expression) were violated. In the latter case, the Court confirmed that this freedom encompasses the right to carry out peaceful protests[171] and that the apprehension of the applicants, their detention and their criminal prosecution constituted interference with their freedom of expression.[172]

168. Ibid., para 40.

169. There were some differences between 2 applicants that attempted to climb the platform and were detained, and the remainder of the applicants that were on board their vessel and detain (in circumstances similar to the *Medvedyev case*).

170. *Case of Bryan and Others v. Russia, Application no. 22515/14* (n 167) paras 64, 73 and 77.

171. The court underlined that "(…) the applicants had notified the authorities in advance of their intention to hold a peaceful protest and the clearly stated goal of the protest was to draw public attention to the environmental effects of oil drilling and exploitation. The Court finds that, notwithstanding its disruptive character, such action should be considered an expression of opinion on a matter of significant social interest." Ibid., para 85.

172. Ibid., para 96.

The second issue still concerns the *Arctic Sunrise*, this time in the context of a protest that started in late November 2022 against deep seabed mining in the Clarion-Clipperton zone in the Pacific Ocean and, specifically, activities of the Danish-flagged *MV Coco* operated by International Seabed Authority (ISA) contractor – Nauru Ocean Resources Inc. (NORI).[173] Also in this instance, the case brings to the forefront multifaceted issues of the law of the sea, such as the relationship between the freedom of navigation (including the right to protest) and activities in the Area[174] or the parameters and scope of the immediate measures of a temporary nature that were issued by the ISA Secretary General.[175] For the purposes of this paper, though, what needs to be stressed is the fact that the incident gave rise to the proceedings in the Netherlands' (as a flag State of *Arctic Sunrise*) Amsterdam district court that were initiated by NORI for an injunction against Greenpeace seeking to, basically, halt Greenpeace activities allegedly disrupting the *MV Coco's* activities in the Area, and to order the activists to disembark from that vessel.[176] Interestingly, the court, referring to the ECtHR's jurisprudence described above and the European Convention's Article 10, confirmed the activists' right

173. For a fuller account of facts and legal analysis see: Klaas Willaert, 'Protest at Sea against Deep Sea Mining Revisited: The MV Coco Case' (2024) 39 The International Journal of Marine and Coastal Law 823.

174. For more see: Arron N Honniball, 'On Whose Authority? Freedom of Navigation and Protests in the 2023 NORI-D Area Incident' (*EJIL: Talk!*, 9 May 2024) <<https://www.ejiltalk.org/on-whose-authority-freedom-of-navigation-and-protests-in-the-2023-nori-d-area-incident/>>.

175. See: Notification of immediate measures of a temporary nature taken in respect of the Contract for Exploration for Polymetallic Nodules between the International Seabed Authority and Nauru Ocean Resources Inc dated 22 July 2011 pursuant to Regulation 33 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area issued on 27 November 2023, available at: <<https://www.isa.org.jm/wp-content/uploads/2023/11/Notification_ISA_SG_Measures_Reg.33.pdf>>.

176. Judgment in summary proceedings of 30 November 2023 available at <<https://linkeddata.overheid.nl/front/portal/document-viewer?ext-id=ECLI:NL:RBAMS:2023:7600>>.

to protest; however, it did not consider that the vessel *MV Coco* constituted 'public space' but rather 'private property' and, hence, it found that the continuing presence of Greenpeace onboard was not justified and ordered the disembarkation.

Overall, one can summarise that it is well established that the freedom of navigation does encompass the right to carry out protests, both from UNCLOS and human rights law perspectives. However, whether the scope of States' and individuals' entitlements in that legal framework is the same remains to be seen and potentially tested.[177] In addition, the *Arctic Sunrise* 'saga' exemplifies that virtually the same factual circumstances can give rise to both inter-State and proceedings before the ECtHR, whereby the latter could be initiated by individuals and the former could not.[178]

5. Conclusions

This contribution set out to investigate the interrelation between the law of the sea, particularly as reflected in UNCLOS, and human rights. Its title refers to 'high tide for human rights' and it seems safe to conclude

177. For example, it has been argued that UNCLOS-based rights do not entail (nor were they explicitly adjudicated on by the Annex VII Arbitral Tribunal) measures such as boarding another vessel (or platform) which, at least to certain extent, seems more likely acceptable in human rights-based proceedings. See e.g. Klaas Willaert, 'Protest at Sea against Deep Sea Mining: Lawfulness, Limits and Remedies' (2021) 36 The International Journal of Marine and Coastal Law 672, 675–676, 682; Honniball (n 174).

178. It is interesting to juxtapose this with prompt release proceedings which can be brought to the Tribunal (or, theoretically, another court or tribunal) "by or *on behalf of* the flag State of the vessel" (emphasis added) (Article 292(2) UNCLOS). Notwithstanding this formulation, it is, formally speaking, still the flag State that remains the party to the proceedings and it is also that State that exercises procedural rights therein. For a discussion see: Petrig and Bo (n 49) 359–360.

that, indeed, when it comes to the discussion concerning the applicability of human rights at sea, much has improved in the recent decade or two. Certainly, the attention and vigilance towards human rights in the maritime domain is much greater. As at least partially demonstrated in this paper, there is quite a wealth of academic discussion (journal articles, books, more institutionalised formats such as the discussion within the ILA) in that regard. This, by and of itself, does not necessarily have an immediate bearing on the actual state of human rights at sea. Nevertheless, it is by no means insignificant. It may also be treated as a move away from 'seablindness' in academic literature.[179]

To be fair, there is also increasingly more attention devoted to humanitarian aspects of the law of the sea in intergovernmental fora, particularly in the framework of global sectoral organisations such as the IMO or ILO, including them working in tandem. On the other hand, the 'Constitution for the Oceans' itself – UNCLOS – is not likely to undergo a formal amendment procedure soon, nor does it contain many provisions dealing directly with human rights. Still, through the application of interpretative processes as well as external rules of reference (*renvoi*), the Convention's specific clauses or general provisions can be interpreted in light of 'considerations of humanity'. However, at the point where a particular matter would be litigated before an UNCLOS court or tribunal, there are inherent limitations to the jurisdiction of such a body (UNCLOS-based dispute; Article 287 UNCLOS) that cannot be wholly mitigated by reference to general international law (including human rights), as part of the 'applicable law' pursuant to Article 293 UNCLOS. On the other hand, certainly with respect to the ECtHR jurisprudence, law of the sea and UNCLOS specifically, is treated as part of the applica-

179. Petrig (n 37) 155–160. Petrig refers in that context to both the 'seablindness' of human rights law but also to 'human rights blindness' of the law of the sea.

ble law in its jurisprudence.[180]

Human rights considerations surface in the maritime context (e.g., on the high seas) in both negative and positive senses. The former may involve 'shielding' individuals – for example, from the excessive use of force during enforcement operations – although this typically occurs through rules regulating State conduct. The latter may relate to positive obligations incumbent on States, such as the duty to save people in distress at sea, as well as to more individualised entitlements, such as the right to protest. Still, the latter is generally related to the freedom all *States* have on the high seas – i.e., freedom of navigation. The same can be said in the context of reparations, whereby even if some form of compensation, including for violating the rights of the crew, is envisaged, this will – in the UNCLOS context – be directed to the flag State and not (directly, at least) to the individuals that suffered prejudice.

This point, as noted on a number of occasions throughout this paper, highlights the inter-State structure of rights and obligations under UNCLOS. Hence, even the more individualised of the Convention's regulations – for instance concerning the duty to render assistance to persons at sea,[181] the prohibition of imprisonment for EEZ fisheries laws and regulations[182] or the prohibition of the transport of slaves[183] – are couched in the language of the obligations of States acting directly or through requiring the master of the vessel flying the flag of that State to act in a certain manner.

Even this cursory overview of intersections between the law of the sea and the human rights regime certainly confirms various types of re-

180. Similar point is made by: Irini Papanicolopulu, 'Human Rights and the Law of the Sea' in David Attard (ed), *The IMLI Manual on International Maritime Law: Volume I* (OUP 2014) 530-531.

181. UNCLOS, Article 98.

182. Ibid., Article 73(3).

183. Ibid., Article 99.

lationships between them. In many, if not most, situations, the two regimes, while interacting with each other, are not in conflict. To some extent, one could claim they are complementary and mutually supportive. However, because of different underlying philosophies (States' rights and obligations vs. individual rights) they perceive even identical factual situations from somewhat different angles and applicable legal standards. This is perhaps best seen in the '*Arctic Sunrise*' saga – that straddled from ITLOS to Annex VII arbitration to ECtHR – described above.

The last section of these concluding remarks is devoted to three topics, namely: territoriality, speciality and unity.

As concerns territoriality, it is interesting to note the special role that land territory plays in both the law of the sea and human rights law. For the law of the sea, the 'land dominates the sea' and it is the land territory that is the source of maritime entitlements. This principle was famously stated by the ICJ in the 1969 *North Sea Continental Shelf* cases[184] and, hence, mostly in the context of delimitation and the 'natural prolongation' concept in understanding the continental shelf regime.[185] As was noted in Section 2.2. above, the main focus of the Convention is on the allocation of rights and jurisdiction over maritime zones and resources, thus leading to the 'zonal approach' in governance. Such an approach, therefore, also brings to the forefront the importance of flag State jurisdiction, particularly in areas beyond national jurisdiction. For human

184. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, ICJ Reports 1969* (ICJ) para 96. For some scholarly reflections, made in the context of more recent jurisprudence, as to the current understanding and implications of the 'land dominates the sea' and 'natural prolongation' concepts see: Irini Papanicolopulu, 'The Land Dominates the Sea (Dominates the Land Dominates the Sea)' (2018) 47 Questions of International Law 39; Hilde Woker and Leonardo Bernard, 'A New Constraint to the Entitlement of a Continental Shelf beyond 200 Nautical Miles? – Implications of the Recent Case Law' (2024) 40 The International Journal of Marine and Coastal Law 31.

185. See, currently, Article 76 UNCLOS.

rights, generally speaking, their source is believed to be, *inter alia*, human dignity[186] and, hence, they are universal in nature. This notwithstanding, for the application of human rights treaties, the delineation of their jurisdictional scope of application matters. Famously, the European Convention applies to everyone within States Parties' jurisdiction,[187] while the ICCPR and the ICESCR cover individuals within States Parties' territory and subject to their jurisdiction.[188] It is in that context that the ECtHR in the *Medvedyev* case recalled its formula:

> In keeping with *the essentially territorial notion of jurisdiction*, the Court has accepted only in *exceptional* cases that acts of the Contracting States performed, or producing effects, *outside their territories can constitute an exercise of jurisdiction* by them for the purposes of Article 1 of the Convention. (emphasis added).

It is beyond the scope of this paper to discuss the extraterritorial application of human rights,[189] however it is worthwhile underlining that in this respect the law of the sea and human rights may be similar in that finding and applying the proper 'jurisdictional link' may be decisive for

186. See e.g. Preamble and Article 1 of the UDHR. It is beyond the scope of this paper to venture into a broader discussion concerning sources of human rights. Suffice it to say at this stage that human dignity is often enumerated in this context, however, it is not necessarily *the* only source. See e.g. Dinah Shelton, 'Introduction' in Dinah Shelton (ed), *The Oxford handbook of international human rights law* (OUP 2015). Shelton quotes Jacques Maritain in this regard: "it is doubtless not easy but it is possible to establish a common formulation of... rights possessed by man' but impossible to find a 'common rational justification of these... rights". See also other contributions in this quoted volume.

187. European Convention, Article 1.

188. Common Article 2(1) of the ICCPR and the ICESR.

189. For a comprehensive analysis see: Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011). This Author also notes the paradox between universality and territoriality: 'Human rights are, after all, supposed to be universal – why should it matter whether a state violates a person's rights through killing, torture, indefinite detention, or unfair trials by acting within its territory or outside it?' (*infra*, p. 2).

the applicability of a given rule.[190] On the other hand, the very understanding and parameters of such a link may differ between these two fields of international law.

In the context of the historical development of the law of the sea, the increasing reach of States' sovereignty and sovereign rights into the maritime domain has not always been perceived as an unequivocally positive one, including for the reason that it came at the cost of 'diminishing' the scope of the High Seas (and the Area).[191] On the other hand, in the human rights context, "State sovereignty (…) continues to play a crucial role in relation to the enforcement of human rights, long regarded as the 'Achilles heel' of the global human rights system".[192]

The second issue that was highlighted above pertains to 'speciality'. In particular, a question that could be asked is whether the maritime domain is 'special' from the human rights perspective. The intuitive answer, particularly bearing in mind the comment above about the universality of human rights, is a quick 'no'. On the other hand, even on the basis of the (limited) case law referred to in this contribution, the issue is not that 'black-and-white'. Still, the ECtHR highlighted – prompted by the arguments of the respondent States to the contrary – that:

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190. Such considerations seem also be present in the recent ECtHR considerations in the *S.S. and Others against Italy, Application no 21660/18* where the Court concluded that it does not have jurisdiction *ratione loci* and *ratione personae*, in the meaning of Article 1 of the European Convention, and, hence, declared the application inadmissible. However, it did underline in its concluding observations that "the situation before the Court is nonetheless governed by other rules of international law, in particular those regarding the rescue of persons at sea, the protection of refugees and State responsibility". These rules, however, fall outside the remit of the Court's jurisdiction.

191. See e.g. Bernard Oxman, 'The Territorial Temptation: A Siren Song At Sea' (2006) 100 American Journal of International Law 830; Barbara Kwiatkowska, 'Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice' (1991) 22 Ocean Development & International Law 153.

192. Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010) 1.

> [T]he special nature of the maritime environment relied upon (…) cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".[193]

On the other hand, the ECtHR did take into account, while interpreting the European Convention, that certain notions require specific considerations in the maritime domain.[194] This has been the case particularly with respect to the notion of 'promptness' in the context of the European Convention's Article 5 violations and the need for swift judicial scrutiny of the status of detained individuals. This is done to "allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty".[195] In this regard, the argument of the 'vastness of the ocean'[196] was accounted for by the Court, as both in the *Rigopoulos* and *Medvedyev* decisions it accepted that the period of, respectively, 16 and 13 days to bring the vessel and the crew to the port so that judicial oversight could be carried out was *not* inconsistent with the requirements of Article 5(3) of the European Convention.[197]

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193. *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) para 81; *Case of Hirsi Jamaa and Others v. Italy, Application no. 27765/09* (n 115) para 178.

194. For more arguments in this regard see: Papanicolopulu (n 180) 527–529.

195. *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) para 121.

196. See the Government of France arguments: ibid., para 59.

197. *Rigopoulos v. Spain, Application no. 37388/97* (n 96) 9; *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) paras 127-134. It was mostly the considerable distance, from the place of interception in the High Seas to the relevant port, that seemed to have convinced the Court that it was 'materially impossible' to bring the applicants in these cases to the relevant authorities on land any more 'promptly'. The Court also noted that it was not for the Court to assess the feasibility of some alternative measures, as argued by the applicants (e.g. that they could have been transferred to another vessel and transported faster; *Case of Medvedyev and others v. France, Application no 3394/03* (n 88) para 131. Other suggestions by the applicants were, in turn, perceived by the Court as 'unrealistic': *Rigopoulos v. Spain, Application no. 37388/97* (n 96) 9.

Lastly, on the notion of 'unity', reference is made to the 'ship as a unit' concept. Somewhat symbolically, it shows – from the law of the sea perspective – the inter-State structure of rights and obligations under the Convention. Hence, it is generally the (flag) State that is the carrier of rights and duties; the Convention does not endow people with individual rights. Similarly, when the Convention refers to 'nationals', it will still be the flag State that is ultimately responsible for the operation of a given fishing boat.[198] Clearly, the approach of human rights instruments is different.

Overall, while the focus of UNCLOS courts and tribunals will vary (State-oriented rights and obligations and alleged violations thereof) from that of the ECtHR (violations of individual rights under the European Convention), it is also in the former case that humanitarian considerations apply and may, to some extent, be argued. There has been an interesting academic discussion on the ITLOS' application of the 'ship as a unit' concept in the '*Arctic Sunrise*' case. It concerned, among other issues, whether ITLOS 'went too far' in ordering that Russia release the vessel and all its crew (as opposed to 'just' non-Russian citizens forming part of the crew) and, additionally, for not preserving the interests of the applicant and respondent States in a balanced manner. While some, both on the Tribunal's bench as well as in academia, seem to think that

198. See e.g. Articles 64, 69-72 or 116 UNCLOS. The latter provision is symptomatic as it starts in the following manner: "All States have the right for their nationals to engage in fishing (…)". See Rosemary Rayfuse, 'Article 116. Right to Fish on the High Seas' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017). This Author comments in particular that: "In the law of the sea context, nationality is conferred upon vessels and the public order of the oceans maintained through the operation of rules on flag State jurisdiction which identify which State has jurisdiction over a vessel on the high seas, which State has responsibility for it under international law (…)". See also: Richard Barnes, *Property Rights and Natural Resources* (Hart Publishing 2009).

way,[199] there have been views expressed that the very approach of ITLOS achieved greater protection, from the human rights perspective, for the crewmembers than what likely could have been achieved in bringing a similar case to the ECtHR.[200]

Drawing this contribution to a close, it shall be once more remarked that the law of the sea and human rights law will and should continue to march in tandem, both being part and parcel of general international law and conducive to achieving a satisfactory "legal order for the seas and oceans".[201] On the other hand, care should be taken to differentiate between different legal mechanisms, philosophies and potentially purposes of these two branches of law and their respective dispute settlement mechanisms.[202]

199. Separate Opinion of Judge Jesus in *The 'Arctic Sunrise' case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013* (n 161) paras 18-20. See also: Douglas Guilfoyle and Cameron A Miles, 'Provisional Measures and the MV *Arctic Sunrise*' (2014) 108 American Journal of International Law 271. See also: Oude Elferink (n 166) 285–286.

200. Michał Balcerzak, 'Preserving the Effectiveness of UNCLOS despite a Party's Non-Appearance? Some Remarks on the "Arctic Sunrise" Arbitration (Netherlands V. Russia) in the Context of Human Rights Protection' (2018) 8 Wroclaw Review of Law, Administration & Economics 172, 180–181.

201. UNCLOS, Preamble.

202. For example Parlett and Klein, referring to Sheldon, remind that "(…) the ICJ and ITLOS as primarily concerned with dispute settlement, whereas the human rights courts have a key function of compliance assessment, and the international criminal courts are primarily concerned with enforcement in finding individuals guilty of violations of international law obligations." Klein and Parlett (n 69) 9–10.

Considerations of humanity and human rights at sea

*Liesbeth Lijnzaad**

It is a pleasure to have been invited to contribute a brief introduction to what promises to be an interesting edition of the ASCOMARE Yearbook, focused on exploring the interlink between the law of the sea and human rights law. This is an important and timely subject. There has been an ongoing debate as to whether and how human rights law is applicable to events, activities and incidents at sea, where academia has contributed to developing the understanding of relevant norms as they apply at sea. The discussion is gradually expanding to a broad range of situations in which questions about human rights law at sea are relevant. The 2022 Geneva Declaration on Human Rights at Sea is a prime example of this type of work: it provides an overview of the types of human rights violations that people may encounter at sea, discusses the relevant human rights norms and provides a useful set of guidelines for States. Case law has played an important role in these developments as well, even if for some it perhaps does not go far enough in specifically addressing human rights.

My observations will focus on the notion of 'considerations of humanity',

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a perspective the International Tribunal for the Law of the Sea (ITLOS, or the Tribunal) took as a starting point when issues related to human rights at sea started appearing in its case law. I intend to sketch how human rights issues have developed in the case law of ITLOS. The mandate of the Tribunal is the interpretation and application of the law of the sea with the 1982 UN Convention on the Law of the Sea (the Convention, or UNCLOS) as its centrepiece.[1] The Tribunal is first and foremost dealing with rights and obligations of States (this also includes the European Union as a 'State Party' to the Convention),[2] as the Convention provides for rules binding on States, in contrast to human rights law and related obligations that are typically formulated as individual rights of persons. The Convention does not provide for individualised rights; however, the flag State may act on behalf of the crew of a ship flying its flag. This procedural mechanism, known as 'the ship as a unit', provides a possibility for the flag State to also address the interests of the crew – such as their living conditions during detention when the ship has been arrested, for example – which might cover matters such as humane treatment, closely connected to their human rights. Under Article 293(1) UNCLOS, the Tribunal may apply other rules of international law not incompatible with the Convention.

In the Tribunal's case law, the notion of 'considerations of humanity' has been the starting point for the reflection on human rights at sea. It is a notion that appears in early case law which gradually opened the door to issues such as the living conditions of the crew.

'Considerations of humanity' at first glance does not necessarily look like a legal norm but rather a moral norm. Anyone can understand that considerations of humanity must play a role in what governments do, in what shipowners do, what port States do etc. The importance of consid-

1. UNCLOS, Annex VI, Article 21.

2. UNCLOS, Article 305(1)(f).

erations of humanity hardly requires clarification. It is a moral imperative from which legal obligations may follow. We recognise considerations of humanity as a universal norm, although we may not specifically know what the norm precisely tells us to do (or not to do) in the abstract. The implications of this norm will be specific to the situation in which the norm applies, and it is clearly a norm relevant to the situation of human beings.

The first time this norm appeared in case law was in the (1949) *Corfu Channel* case (UK v. Albania) before the International Court of Justice (ICJ). This was the first case the ICJ dealt with after the reconstitution of the World Court after World War II. In part, the case is about the responsibility of Albania for explosions caused by the presence of sea mines in the Corfu Channel in the period immediately after World War II. Because of these mines, the United Kingdom embarked on a minesweeping operation, but things went wrong. Two British warships travelled through Corfu Channel, where explosions took place. Consequently, on 22 October 1946, the ships were damaged, 44 crew members died, and 42 were injured. A key issue in this case was the knowledge about the presence of sea mines in Corfu Channel, which was used for international shipping and is located in Albanian waters. The ICJ took the view that the mines could not have been laid in Albanian waters without the knowledge of Albania as a coastal State, even if it did not specifically state that the mines had been laid by Albania itself. In its decision, the Court emphasise that the Albanian authorities had what could be called a 'duty of care', or in today's language a due diligence obligation to notify shipping of the presence of that minefield in Albanian territorial waters and thus to warn the approaching British warships of the imminent danger of the minefield.[3]

3. While it may look as if the laws of naval warfare are applicable here (it was just after World War II, and the ships are navy ships – one could think about the applicability of the 1907 Hague Convention VIII on the laying of automatic submarine contact mines), this is in fact not the case – the minesweeping takes place in peacetime.

In clarifying the obligation to warn about the minefield, the ICJ is very clear: this is based on "certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war". The ICJ identifies the 'elementary principle of considerations of humanity' as an underlying reason for the obligation to warn, as a warning would presumably have protected the ships and would have saved lives. The consequences of *not* warning are what triggers this reference to the principle of elementary considerations of humanity. The ICJ then continues by referring to other rules of law, such as the freedom of maritime communication (a.k.a. freedom of navigation) and every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States.[4]

In the early case law of the Tribunal, the notion of 'considerations of humanity' has been referred to from the start – to begin with the *M/V Saiga (2)* case in 1999. The arrest of the *M/V Saiga* by Guinea had been problematic in the eyes of St Vincent and the Grenadines as its flag State. In particular, the ship had been fired at by Guinean authorities, which the flag State considered excessive and unreasonable given that the ship was an unarmed tanker. Guinea indicated that the use of force against the ship had been a last resort and that this was necessary because the vessel refused to stop when the Guinean ship wanted to arrest the *M/V Saiga*.

In discussing the execution of the boarding, the Tribunal mentions that no express provisions on the use of force in the arrest of ships exist in the Convention; however, such use of force must be avoided if at all possible. When force is unavoidable, this must not go beyond what is reasonable and necessary in the circumstance. It states that "[c]onsider-

4. *Corfu Channel* (merits), ICJ reports 1949, p. 22. Otherwise, the ICJ determined that the British navy ships had exercised the right of innocent passage through the strait, even if the minesweeping itself had violated Albania's sovereignty as Albania had not agreed to this activity in its waters. *Corfu Channel* (merits), ICJ reports 1949, p.28.

ations of humanity must apply in the law of the sea, as they do in other areas of international law", which is followed by a paragraph identifying relevant earlier international case law.[5] It then discusses the facts of the case and concludes that the use of excessive force by Guinea violated the rights of St Vincent and the Grenadines. 'Considerations of humanity' as an applicable principle of the rule of law thus opens a window to limit law enforcement activity at sea to what is reasonable and necessary.

Some five years later, the (2004) *Juno Trader* case is before the Tribunal, a prompt release case between St Vincent and the Grenadines and Guinea-Bissau related to fisheries. In discussing the scope and aim of Article 73 dealing with prompt release, the Tribunal clarifies that this provision "includes *elementary* considerations of humanity and due process of law". The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision" (emphasis added).[6]

This statement brings us somewhat closer to understanding the notion of considerations of humanity: it is an expression of a concern for fairness and reasonableness. It is, however, not completely clear at that point in time whether fairness points to the position of the shipowner (who needs to pay the bond or financial security to get the ship released) or also the crew.

Referring to the quotation from the *Corfu Channel* case mentioned above, one will note that the ICJ speaks about '*elementary*' considerations of humanity. I have been wondering about this word '*elementary*', what it means and what exactly it does in that part of the decision. Presumably there is a distinction between something like 'general' or 'all' considerations of humanity and a more limited category of *elementary* considerations in the sense that the scope of application of the principle

5. *M/V Saiga (2)*, ITLOS reports 1999, paras 155-156.

6. *Juno Trader*, ITLOS reports 2004, para 77.

was supposedly not extremely wide or all-embracing (in 1946, that is). This reference to *elementary* considerations of humanity by the ICJ is perhaps not very generous, and it had not been copied by the Tribunal in *M/V Saiga (2)*.[7]

Looking at the Tribunal's case law, we note that the word *elementary* does not appear in most of the cases where reference is made to considerations of humanity. However, the odd one out here is the *Juno Trader* case where we see the notion of *elementary* considerations reappear in the text. That was perhaps unnecessarily restrictive, or was it maybe a slip of the pen? At any rate, it raises the question as to what this qualifying word means, a matter that has so far not been addressed, also because this language has not been repeated after the *Juno Trader* case.

Quite some time later, in 2013, the *M/V Louisa* case between St Vincent and the Grenadines and Spain[8] is before the Tribunal. This involves a ship arrested while in a Spanish port under suspicion of crimes related to the possession of weapons of war, as well as damage to protected Spanish historical patrimony and archaeological objects. It is asserted that the way in which the boarding and search of the ship had been carried out and the detention of people involved with the ship had violated their human rights, in particular due process rights.

In spite of considering that the Tribunal did not have jurisdiction in an earlier paragraph, it continues to refer to the view that "States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances." This view may be specific to this case in which the treatment of crew members and a visitor while in detention is

7. This may also be related to the fact that the ICJ is responding to Britain's argument about the obligation to warn based on the law of naval warfare (1907 Hague Convention VIII on the laying of automatic submarine contact mines, in particular Articles 3 and 5) which in general is less protective than the law of peace.

8. *M/V Louisa*, ITLOS reports 2013, para 155–156.

at stake. But, although this is an *obiter dictum*, the language has moved on from considerations of humanity to an explicit reference to human rights themselves.

In the (2014) *M/V Virginia G* case between Panama and Guinea-Bissau, the issue was amongst others the use of excessive force during boarding presumably leading to physical injuries or endangering life of the crew. The Tribunal quotes verbatim from the *M/V Saiga (2)* case and the paragraphs discussing 'considerations of humanity' and calls this the 'standards' of the Tribunal.[9] The Tribunal then concludes from the facts of the case that the boarding had not caused physical injuries nor endangered human life. One gets the impression that endangering human life has now become the standard, or at any rate has taken the place of the earlier reference to 'considerations of humanity'.

The 2015 *Enrica Lexie* case is an Article 290(5) provisional measures case between Italy and India about actions of the Italian navy on board an Indian ship in Indian waters, in which two Indian fishermen were killed and two Italian naval personnel were arrested by India. The Tribunal confirms that "considerations of humanity must apply in the law of the sea as they do in other areas of international law", again verbally quoting from the *M/V Saiga (2)* case in the final section of the Order.[10] This reference to 'considerations of humanity' is followed by the Tribunal expressing its commiserations with the grief of the relatives of the two Indian fishermen who lost their lives, followed by a paragraph referring to the consequences of the long detention of the two Italian marines, including for their families. The drafting is somewhat removed from considerations of humanity as a legal norm: the text reads like an expression of empathy.

In the arbitration that followed, Italy requested provisional measures with respect to the return of an Italian sergeant to Italy whilst he re-

9. *M/V Virginia G*, ITLOS reports 2014, para 359–362.

10. *Enrica Lexie*, ITLOS reports 2015, para 133.

mained under the jurisdiction of India during the continuation of the arbitration. In discussing this issue, the arbitral tribunal referred to "the concept of considerations of humanity" while granting this request, based on weighing the personal situation of the sergeant and his family.[11]

In more recent case law, the position of crews of ships that have been arrested and are detained is discussed. For this type of situation, the Tribunal has started to refer to the notion of 'humanitarian concerns', first in the case of the *Three Ukrainian Naval Vessels*, an Article 290(5) provisional measures case. The Tribunal considers that "… the continued deprivation of liberty and freedom of Ukraine's servicemen raises humanitarian concerns."[12]

Also in 2019, another request for provisional measures based on Article 290(5) UNCLOS brought Switzerland and Nigeria before the Tribunal. In the *M/T San Padre Pio* case, the master and three officers were detained on the ship, which had been arrested and brought to port. The Tribunal states that "[t]he restrictions on their liberty and freedom for a lengthy period raise humanitarian concerns."[13] By then a typical human right such as the freedom of movement (of the crew) had come to be labelled as a humanitarian concern, however with the omission of human rights language. Yet, in the *Advisory Opinion on sea level rise*, the Tribunal in a byline also considers that climate change "represents an existential threat and raises human rights concerns".[14]

Since the *Corfu Channel* case, considerations of humanity have become incorporated into treaty law, such as the 1979 Convention on

11. *Enrica Lexie*, Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea, Order, Request for Provisional Measures 29 April 2016, para 104-108 and dispositif at para 132.

12. *Three Ukrainian Naval Vessels*, Reports 2018 -2019, para 112.

13. *M/T San Padre Pio*, ITLOS Reports 2018 -2019, para 130 at 405.

14. *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Reports 2024, para 66 at 35.

Maritime Search and Rescue, the 1974 Convention for the Safety of Life at Sea, and other International Maritime Organization (IMO) instruments. To put things into perspective, considerations of humanity as a norm aimed at the protection of human life at sea have, to a certain extent, also been codified in UNCLOS itself: Articles 18(2), 24(2), 44, 98 or 146 are examples of such concerns in relation to force majeure and distress in situations endangering life at sea. Article 146 specifically calls for necessary measures to be taken to ensure effective protection of human life with respect to activities in the Area. Article 98 speaks about the duty to render assistance to persons found at sea in danger of being lost. This provision is (perhaps surprisingly) an obligation for States to legislate in order to require ships under its flag to render assistance. It is not a direct instruction from the Convention to the master of the ship, but rather an obligation for the flag State to legislate in this respect.

Of course, the Tribunal can only respond to such cases as are presented to it. Considerations of humanity have been at the heart of case law in a wide range of situations of distress threatening human life at sea and in different types of procedures. So far, in ITLOS case law this has been specifically related to the situation of the crew on board the ship and when the crew was detained in port.

Cases before the Tribunal seem to have moved away from one typical human rights issue, such as control over the execution of law enforcement and the way in which States use force, including at sea when arresting a ship or its crew, to another typical human rights issue, which is the conditions and duration of detention – in particular the consequences for the detained crews of their detention related to the arrest of a ship. Also to be noted is the fact that while the debate about considerations of humanity started in a contentious case, it quickly moved on to prompt release cases and several provisional measures cases. Meanwhile, the notion of 'considerations of humanity', or even '*elementary* considerations of humanity', has in more recent case law morphed into the

language of 'humanitarian concerns'. Since the *M/T San Padre Pio* and *Three Ukrainian Naval Vessels* cases this seems to have become the Tribunal's preferred language. Although the Tribunal is not explicitly speaking about human rights concerns, the language of humanitarian concerns goes a long way in that direction.

The reference to 'considerations of humanity' is a difficult one in situations that suggest that human rights are not properly implemented or where crews cannot rely on the protection offered by human rights law. The reference to 'considerations of humanity' may be language that is unnecessarily concealing, when, in fact, there is no general obstacle to referring to relevant human rights law, depending, of course, on its applicability. Article 293(1) UNCLOS does not seem to stand in the way of such a reference, saying "[a] court or tribunal having jurisdiction … shall apply this Convention (UNCLOS) and other rules of international law not incompatible with this Convention." There is no *a priori* obstacle to consider human rights law as generally compatible with the Convention, even if its application will depend on the facts of each individual dispute. Parties in the various types of cases before the Tribunal have not hesitated to refer to various human rights instruments, but whether these will be applicable will depend on the facts and the law in a particular case.

Considerations of humanity, whether elementary or not, whether referred to as principles or not, or the more recent version of humanitarian concerns imply a moral imperative relevant to the behaviour (of States, shipowners, crews and others) at sea. Although related to human rights, it is perhaps a notion that is easier to employ than a reference to human rights law, which may require the specific identification of which human right would be applicable and why. But I am hopeful that the general formula of 'considerations of humanity' or even the notion of humanitarian concerns over time will become much more specific with references to human rights law. This may be helpful in further developing concrete rules with respect to the protection of human life at sea.

Human rights and the law of the sea: From concept to action

*Irini Papanicolopulu**

The last hundred years have seen a profound transformation of the international community, which has been based upon the *humanisation* of international law. And while, in light of current events, some may doubt that this objective has been truly achieved, there is no doubt that for millions of people around the world, human rights hold a promise of freedom, dignity, and agency which they had never before imagined.

The adoption of the Universal Declaration of Human Rights in 1948,[1] followed by the regional human rights conventions, the two global covenants, and other global and regional treaties, has created a framework of substantive rules and procedural mechanisms that aim to both recognise the individual as a rights holder and allow them to have access to effective remedies against violations of those rights.

This fundamental development, however, for quite some decades seemed to focus only on dry land and to forget that there are also people at sea. Not that there were no instances which showed that people at sea face risks that endanger their very basic human rights, such as the right to life, the right to liberty, and the right to health. From the sinking of

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1. UN General Assembly Res. no 217 (III) of 10 December 1948.

the RMS Titanic in 1912, to the pushback of the MS St Louis in 1939, to the plight of the boat people in 1978-1979, the history of the last century offers many instances of breaches of the human rights of persons at sea. In some cases, these triggered a response in the form of new international instruments, with the most prominent being the 1914 SOLAS Convention[2] and the 1979 SAR Convention.[3] These instruments, however, while admittedly having a humanitarian objective, did not speak the language of human rights. Similarly, while a handful of scholars occasionally addressed the relationship between human rights and the law of the sea,[4] there was no systematic treatment of the topic by scholars.

The picture changed with the turn of the century. Irregular migration by sea and piracy off the coasts of Somalia, with all the practical problems that they posed for states and other actors, triggered much scholarly writing on how the law of the sea and human rights interact in these two scenarios.[5] From there, the relationship between the law of the sea and human rights (law) started being addressed by scholars in a more comprehensive way,[6] up to the conceptualisation of how international

2. International Convention for the Safety of Life at Sea, adopted in London on 1 November 1974 (SOLAS Convention).

3. International Convention on Maritime Search and Rescue, adopted in Hamburg on 27 April 1979 (SAR Convention).

4. Louis B. Sohn, 'International Law of the Sea and Human Rights Issues' in Thomas A. Clingan Jr (ed), *The Law of the Sea: What Lies Ahead?* (The Law of the Sea Institute 1988) 51; Bernard Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1998) 36 Colum. J. Transnat'l L. 399; Budislav Vukas, 'Droit de la Mer et Droits de l'Homme' in Giuseppe Cataldi (ed), *La Méditerranée et le droit de la mer à l'aube du 21e siècle* (Bruylant 2002) 85; Paul Tavernier, 'La Cour Européenne des Droits de l'Homme et la Mer' in *La Mer et son Droit: Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Pedone 2003) 575.

5. See, among many others: Richard Barnes, 'Refugee Law at Sea' (2004) The International and Comparative Law Quarterly, Vol. 53, 47-77; Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014).

6. Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law 1.

law protects people at sea through the interaction of the law of the sea, human rights law, and other fields of law.[7]

We have therefore reached a stage where the protection of people at sea, through the interaction of the law of the sea, human rights law, maritime law, labour law, and other fields of international law has been established as a field of study and research. This development has been prompted by, and has contributed to, action by states and other international actors. The adoption of the Maritime Labour Convention in 2006[8] and the Work in Fishing Convention in 2007[9] brought attention to the rights and need for protection of workers at sea. Seminal decisions of the European Court of Human Rights, notably in the *Medvedyev* and *Hirsi Jamaa* cases,[10] as well as the findings of the Human Rights Committee in the *A.S.* cases[11] have allowed to test the reach of human rights and identifying the scope and content of states' obligations in the cases of law enforcement by sea and push-back operations.

The last few years, in particular, have seen the significant increase in the adoption of soft law and, eventually, hard law. Suffice it to mention the 2004 International Maritime Organization (IMO) Maritime Safety Committee *Guidelines on the Treatment of Persons Rescued at Sea*;[12] the 2006 document on *Rescue at Sea* jointly prepared by IMO, the UN

7. Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018).

8. Maritime Labour Convention, adopted in Geneva on 23 February 2006 (entered into force: 20 August 2013).

9. Work in Fishing Convention (C-188), adopted in Geneva on 14 June 2007 (entered into force: 16 November 2017).

10. European Court of Human Rights*, Case of Medvedyev and others v France, Application no 3394/03* and *Case of Hirsi Jamaa and Others v Italy, Application no 27765/09*.

11. Human Rights Committee, *A.S. and Others v. Italy, 27 January 2021* (UN Doc CCPR/C/130/D/3042/2017) and *A.S. and Others v. Malta, 27 January 2021* (UN Doc CCPR/C/128/D/30423/2017).

12. IMO Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea*, adopted on 20 May 2004 (Resolution MSC.167(78)).

High Commissioner for Refugees and the International Chamber of Shipping;[13] the 2022 *Geneva Declaration on Human Rights at Sea*,[14] the most comprehensive and ambitious document adopted so far; the 2023 Association of Southeast Asian Nations (ASEAN) *Declaration on the Placement and Protection of Migrant Fishers*;[15] the 2024 Human Rights Council *Resolution on Promoting and Protecting the Enjoyment of Human Rights by Seafarers*.[16] Finally, in 2024, the Western and Central Pacific Fisheries Commission has been the first Regional Fisheries Management Organization to adopt a binding decision on *Crew Labour Standards*.[17] More initiatives are underway, at both the state level, in particular within regional organisations, and the level of academia and civil society.[18]

We have therefore reached a stage where the protection of the human rights of people at sea has started to take centre stage for states. This is combined with the growing awareness that a successful blue economy cannot be achieved if the social component of sustainable development,

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13. IMO, United Nations High Commissioner for Refugees and International Chamber of Shipping, Rescue at Sea. *A Guide to Principles and Practice as Applied to Migrants and Refugees* (UNCHR 2006).

14. Geneva Declaration on Human Rights at Sea (launched 1 March 2022), available at <<https://www.humanrightsatsea.org/GDHRAS>>.

15. Association of Southeast Asian Nations (ASEAN), *Declaration on the Placement and Protection of Migrant Fishers* (Labuan Bajo, 10 May 2023), available at <<https://asean.org/wp-content/uploads/2023/05/10-ASEAN-Declaration-on-Protection-and-Promotion-of-the-Rights-of-Migrant-Fishers_adopted-1.pdf>>.

16. Human Rights Council, *Promoting and Protecting the Enjoyment of Human Rights by Seafarers*, adopted on 11 July 2024. Available at <<https://docs.un.org/en/A/HRC/RES/56/18>>.

17. Western and Central Pacific Fisheries Commission (WCPFC), CMM 2024-04 - Conservation and Management Measure for Crew Labour Standards (24 December 2024), available at <<https://cmm.wcpfc.int/measure/cmm-2024-04>>.

18. To mention but a couple of examples, in 2023 the International Law Association created a Committee on Protection of People at Sea, while COST Action BlueRights, which started in 2024, is bringing together academics and stakeholders to discuss how to better protect the core right of life, liberty, and health.

and of SDG 14,[19] is not given the same attention as the environmental and economic ones. The maritime sector, with its multiple activities, is key to ensuring sustainable development on both sea and land. This sector comprises a wide variety of activities, with a marked international and transnational dimension, including transportation of goods and persons, fishing, oil and gas extraction, cruising and other recreational activities, as well as more innovative activities targeting deep seabed minerals and genetic resources of the oceans. The seas and oceans, where these activities take place, cover more than 70% of our planet. They play a crucial role in many processes necessary for life on earth, including oxygen production and carbon storage, and provide enormous benefits for humanity in the form of ecosystem services and benefits.

To ensure that society reaps the many benefits deriving from maritime activities while ensuring that seas and oceans are protected and that all humans involved and affected are duly protected, the international community has adopted an articulated, multi-level, multi-stakeholder, and increasingly cross-sectorial regulatory framework. This dynamic framework is, however, often put under stress by political and economic challenges, as well as by a generalised myopia of portions of society towards the interlinkages between land and sea.

The challenge is therefore to ensure the resilience and adaptability of maritime governance, creating a normative framework that, while taking into account the peculiarities of the maritime environment, in both practical and legal terms, ensures that protection of people at sea is at least as good as that of people on land. It is furthermore necessary to ensure the development of a *Sustainable Blue Economy* that remains committed to the core values of the international community and fully integrates all three dimensions of sustainable development. The regulation of

19. UN, *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015), Sustainable Development Goal (SDG) 14 – Life below water.

maritime activities needs to be founded on the basic principle of respect for the human rights of all persons, at sea as well as on land, and needs to follow a comprehensive and principled approach. To do so, we need to fully understand the practical issues at stake, to master the existing normative framework and how it can be interpreted and applied to address these, and to clearly identify gaps and dare propose solutions that both capitalise on existing rules, instruments, institutions, and processes and dare suggest changes, whenever these are needed. Research has a great role to play in this respect, and I am particularly pleased to welcome this volume of the Yearbook dedicated to the relationship between human rights and the law of the sea. My invitation goes to all readers: read these well-researched and thought-provoking articles, think about what they say, and try to identify how you can also contribute to ensure better protection for human rights at sea.

Isabella Leucci, *Paranza I.*

I

Human rights in a shifting maritime landscape

*Matteo Bedendi**

When the United Nations Convention on the Law of the Sea (UNCLOS) entered into force in 1994, then-Secretary-General Boutros Boutros-Ghali hailed it as "possibly the most significant legal instrument" of the twentieth century.[1] Four decades later, UNCLOS remains a foundational pillar of the international legal order governing maritime spaces. Yet, its current relevance is increasingly tested by complex and evolving challenges – chief among them, its capacity to engage meaningfully with the protection and promotion of human rights.

Part I of Volume 4 of the ASCOMARE Yearbook on the Law of the Sea explores this tension through an evolutionary lens, critically examining the interplay between the law of the sea and international human rights law. Although UNCLOS does not explicitly reference human rights – a limitation acknowledged across multiple contributions – its interpretation and application have been shaped by normative developments, including international jurisprudence that introduces 'con-

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1. UN Division for Ocean Affairs and the Law of the Sea, 'The United Nations Convention on the Law of the Sea (A historical perspective)' (originally prepared for the International Year of the Ocean, 1998), available at <<https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm>>.

siderations of humanity' as guiding principles within the maritime domain.[2]

The contributions in this Part address key doctrinal and practical developments at this intersection. Qafisheh and Patel examine the maritime past and prospective future of the State of Palestine, exploring how UNCLOS may generate legal and human rights implications at both domestic and regional levels. Loefflad and Kapogianni investigate China's maritime militias in the South China Sea, highlighting the tension between security imperatives and human rights concerns, particularly where Chinese practice departs from Western legal norms. Canella discusses the Chagossian Committee's *amicus curiae* submission, underscoring the marginalisation of Indigenous rights and the potential for international adjudicative bodies to accommodate such claims. Cerboni analyses the dual implications of artificial intelligence in the maritime sphere: its potential to enhance safety and its capacity to generate new human rights risks. Porchia examines the emerging trend among States to restrict non-governmental search and rescue operations in the Mediterranean, particularly in light of recent Italian aviation legislation, while Papachristodoulou highlights legal voids that hinder accountability for States complicit in migrant disappearances. Leucci focuses on maritime trade in conflict minerals, notably coltan from the Democratic Republic of the Congo, and its impact on the rights of those involved in its extraction.

Together, these contributions converge on a central critique: the existing legal architecture is ill-equipped to address the human rights dimensions of maritime governance. Scovazzi's discussion of underwater intangible cultural heritage, contextualised within ongoing negotiations at the International Seabed Authority, further illustrates the tension between

2. See Liesbeth Lijnzaad, 'Considerations of humanity and human rights at sea', *in this volume*.

sovereign rights and the protection of cultural and social dimensions of the law of the sea.

Yet, the section does more than diagnose shortcomings. Contributions by Scovazzi and Canella highlight the potential of an evolving legal framework to support rights-based claims, particularly those of Indigenous Peoples and local communities. The adoption of the UNCLOS implementing agreement on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ Agreement)[3] marks a significant development in this regard, signalling a shift toward inclusive governance in areas beyond national jurisdiction and reinforcing a broader 'humanisation' of the law of the sea – an approach increasingly recognised in judicial practice. Such efforts should be welcomed, especially as they seek to correct historical injustices, many rooted in colonial legacies. In this context, the analysis by Qafisheh and Patel on the maritime past and present of the Palestinian people offers a future-oriented reminder that such colonial mindsets must be categorically rejected.

Several implicit reflections also emerge. First, the importance of multilateralism in promoting human rights at sea. As seen in the chapters by Porchia and Papachristodoulou, unilateral State practices exercised under broad discretion pose substantial risks to fundamental rights. Similar concerns arise in Loefflad and Kapogianni's analysis of Chinese maritime militias, whose operations threaten regional stability and carry serious human rights implications.

Second, UNCLOS itself requires critical reassessment. Its limited engagement with human rights norms makes it essential to consider the role of complementary legal instruments that extend its functional reach.

3. 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 (New York, 19 June 2023, not yet in force).

These include the BBNJ Agreement and the International Convention on Maritime Search and Rescue,[4] both integral to the protection of human dignity at sea.

Leucci's chapter underscores the imperative of strengthening the nexus between States' due diligence obligations – particularly those of flag States – and the protection of human rights. Framed within the context of maritime trade in conflict minerals such as coltan, this observation accords with the conclusions articulated in the ASCOMARE Legal Opinion annexed to this Yearbook. It further prompts a broader examination of the extent to which the effective implementation of human rights obligations at sea may produce concrete legal and practical effects on land (and *vice versa*).

Boutros Boutros-Ghali's optimism in 1994 reflected the achievements of a different era. The question now is whether UNCLOS can retain its status as a *Constitution for the oceans* in a world where human rights and maritime governance are ever more entwined. The contributions in Part I suggest a cautiously optimistic answer: with political will, normative innovation, and a commitment to justice at sea, a more human-centred law of the sea is within reach.

4. International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979, in force 22 June 1985) 1405 UNTS 119.

The nexus between the law of the sea and human rights law in the context of maritime occupation: The case of Palestine

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Abstract

The law of the sea, when it comes to Palestine, is, at its core, a *human right*. The maritime rights of the Palestinian people have been overshadowed and pushed to the margins due to a tremendous humanitarian crisis that risked the existence of the Palestinians as a people. Palestinians have been denied access to their rights in the sea for over a century. Palestine was colonised at a time when Britain was the global maritime hegemon, which used Palestine's sea to serve its colonial interests. With its declaration in 1948, Israel controlled over 80% of Palestine's coast. Only a small fraction of the coast on the Mediterranean Sea, about 40 kilometres long, was left to the Palestinians offshore Gaza. Even in this limited portion, the Palestinians have been deprived of using the sea. With the 2014 accession of Palestine, as a State, to the UN Convention on the Law of the Sea, possibilities for Palestine to declare its prerogatives under the Convention are legally available. However, the ability to exercise actual control over Palestine's maritime zones offshore Gaza con-

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tinues to face enforcement challenges due to the Israeli naval blockade, military occupation and, now, genocide. This article addresses the law of the sea from the lens of human rights and humanitarian law in relation to the Palestinian people, with a focus on three aspects: Palestine's maritime legal history, maritime boundary delimitation and claims, and settlements of disputes.

Keywords: Maritime occupation, Palestine, self-determination, marine resources, Gaza, maritime claims, maritime boundary.

1. Introduction

The 2023-2025 Israeli genocidal war on Gaza has led to calls for the recognition of the State of Palestine in the West Bank, including East Jerusalem, and the Gaza Strip.[1] After the UN General Assembly's resolution of May 2024, which affirmed that Palestine qualifies for full membership in the UN,[2] an increasing number of States are recognising the State of Palestine, the most recent of which are Ireland, Norway, and Spain.[3] Such recognitions have implications not only for the status of Palestine's land territory, but also for the sea offshore Gaza in the Mediterranean. That brings to the fore the status of the Gaza Sea under the 1982 UN

1. United Nations, 'Secretary-General Underscores Two-State Solution Only Way to End Israeli-Palestinian Conflict, One-State Formula Inconceivable, in Day-Long Debate', Security Council Meeting No. 9534, UN Doc SC/15569 (23 January 2024); Margaret Besheer, 'Nations Reaffirm Urgency of Two-State Solution for Israel and Palestine', *Voice of America* (23 January 2024); Anna Gordon, 'U.K. Will Consider Recognizing Palestinian State, Foreign Secretary David Cameron Says', *Time* (30 January 2024).

2. UN Doc A/ES-10/L.30/Rev.1, 9 May 2024.

3. Rory Carroll and Sam Jones, 'Ireland, Spain and Norway to recognise Palestinian state', *The Guardian* (22 May 2024).

Convention on the Law of the Sea (the Convention or the UNCLOS),[4] to which Palestine acceded on 2 January 2015.

On 19 July 2024, the International Court of Justice (ICJ), in its advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, concluded that the Israeli occupation of the Palestinian territory is unlawful.[5] Following this Advisory Opinion, the UN General Assembly on 18 September 2024 instructed Israel to bring "an end without delay to its unlawful presence in the Occupied Palestinian Territory, which constitutes a wrongful act of a continuing character entailing its international responsibility, and do so no later than 12 months from the adoption of the present resolution".[6] This adds another layer of legal rights for Palestine pertaining to, amongst other things, its maritime engagements.[7]

The UNCLOS creates a set of rights for State Parties regarding maritime activity. As a party to the Convention, Palestine can delimit its offshore maritime zones, namely the Gaza Strip ('Gaza'), which extends for 40 kilometres along the Mediterranean Sea.[8] As "the land dominates the sea", according to the ICJ,[9] in the sense that maritime zones are a natural extension of land, it is imperative to look at the status of the Gaza land

4. United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

5. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, 19 July 2024, Advisory Opinion, ICJ Rep (2024), para 261.

6. UN Doc A/RES/ES-10/24, 18 September 2024, para 2.

7. Mutaz M. Qafisheh, Jinan Bastaki, and Victor Kattan, 'Gaza Marine: The Facts and the Law' (2025) Leiden Journal of International Law (forthcoming).

8. UNCLOS entered into force with regard to Palestine on 2 January 2015, in accordance with article 308(2).

9. *North Sea Continental Shelf (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands)*, ICJ Rep (1969) para 96.

boundary, especially its terminus on the coast.[10]

The territorial extent of Gaza is defined by two land borders drawn up in the first half of the past century, one with Egypt and the other with Israel.[11] Based on the UNCLOS specifications, the Palestinian territorial sea would reach approximately 888 square kilometres and enlarge the size of Gaza's 365 square kilometres of territory by 241 per cent. The extension of the exclusive economic zone (EEZ) and continental shelf would more than double the entire size of Palestine's territory, up to 14,800 square kilometres.

With the discovery of gas reserves in the Eastern Mediterranean,[12] the region has recently become a canter for global attention, particularly in light of world gas supply shortages in the wake of the Russian war on Ukraine.[13] By exercising its sovereign rights over its maritime zones, Palestine could become one of the major global gas and petroleum States. The U.S. Energy Information Administration indicates that the Gaza Marine field holds an estimated 1.6 trillion cubic feet (about 500 billion cubic meters) in recoverable natural gas resources.[14] In addition to framing claims to underwater gas reserves, the UNCLOS sets out Palestine's ability to establish ports and harbours, to register ships that fly its flag,

10. The International Criminal Court (ICC) decided that 'the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem'. *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, ICC-01/18-143, Pre-Trial Chamber I (5 February 2021) 51.

11. Abu Lafi, *Legal Consequences of Succession on Maritime Zones and Delimitations under the United Nations Convention on the Law of the Sea* (International Maritime Law Institute 2021) 7-9.

12. James Stocker, 'No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean' (2012) 66 Middle East Journal 579.

13. Jokull Johannesson and D Clowes, 'Energy Resources and Markets – Perspectives on the Russia–Ukraine War' (2022) 30 European Review 4.

14. U.S. Energy Information Administration (EIA), *Palestinian Territories* (March 2014), available at <<https://www.eia.gov/international/analysis/country/PSE>>.

to export and import freely, to fish in Palestine's maritime zones and the high seas, as well as to control the entry, departure, navigation, security and flights over its waters.

Notwithstanding Israel's prolonged occupation and its ongoing blockade of Gaza, Palestine retains the right to exercise legislative jurisdiction over its coastline and maritime zones in accordance with the UNCLOS, irrespective of its current capacity to enforce such laws.[15] While Israel is not a party to the UNCLOS, neighbouring States with overlapping maritime claims – namely Egypt and Cyprus – are.[16] The key issue thus concerns Palestine's ability to operationalise its maritime entitlements under international law in light of the Israeli blockade, compounded by Israel's continued denial of Palestinian statehood.[17]

This article examines the legal avenues available to Palestine to assert its maritime rights in the eastern Mediterranean under the UNCLOS, with a view to advancing the rights and welfare of the Palestinian people. In this context, the law of the sea, as it pertains to Palestine, must also be understood through the lens of human rights – particularly the principle of self-determination.

To identify how Palestine can navigate this process and where the primary legal and political challenges lie, the analysis proceeds in three parts. Section 2 provides an overview of the evolution of Palestine's maritime legislation, starting from the Ottoman times, through British and Egyptian as well as Israeli rules, to the current state that was shaped by

15. Susan Power, 'War, Invasion, Occupation - A Problem of Status on the Gaza Strip' (2009) 12 Trinity College Law Review 25; Sari Bashi, 'Controlling Perimeters, Controlling Lives: Israel and Gaza' (2013) 7 Law & Ethics of Human Rights 243; Roi Bachmutsky, 'Otherwise Occupied: The Legal Status of the Gaza Strip 50 Years after the Six-Day War' (2018) 57 Virginia Journal of International Law 413.

16. Nicholas A. Ioannides, *Maritime Claims and Boundary Delimitation: Tensions and Trends in the Eastern Mediterranean Sea* (Routledge 2020) 10-12.

17. Safaa Sadi Jaber and Ilias Bantekas, 'The Status of Gaza as Occupied Territory under International Law' (2023) 72 International & Comparative Law Quarterly 1069.

the Oslo Accords and the Palestinian Authority and Hamas rules. Section 3 explores the maritime claims that Palestine made with regard to its maritime boundary delimitation with neighbouring States: Israel, Egypt, and Cyprus. Lastly, Section 4 addresses the various mechanisms available to Palestine for the dispute settlement in the eastern Mediterranean with regards to its maritime delimitation.

2. Maritime legal framework in Palestine

This Section explores the emergence and evolution of Palestine's maritime legislation at the domestic level and its external implications. It does so by first addressing the pre-Israeli occupation legislation (under the Ottomans, British, and Egyptians) regulating the maritime affairs and its impact on the Israeli maritime approach to the Gaza Sea. It then elaborates on the Israeli-Palestinian interim peace treaties, signed in Oslo, and their approach to the Gaza offshore, while reflecting on the consistency of the maritime arrangements of the Oslo Accords with the UNCLOS and the international humanitarian law applicable to the occupied territory. Finally, the Section ends with outlining how the accession of Palestine to the UNCLOS may offer a tool to develop a legislative framework based on the Convention and considers future reform actions while scrutinising what Palestine may do legislatively as part of its commitments under the law of the sea.

2.1 Development of maritime legislation in Palestine

Gaza's boundary with Egypt, like the rest of the pre-1948 Palestine-Egypt frontier, dates back to the late nineteenth century. This border was initially drawn up on a *de facto* basis as the Ottoman Empire acknowledged

Egypt's autonomy under Britain's protection.[18] Two border agreements between the Ottomans and Egypt were reached in 1906. The first came in the form of an 'Exchange of Notes between Britain [which occupied Egypt from 1882] and Turkey relative to the Maintenance of the Status Quo in the Sinai Peninsula' (Istanbul, 14 May 1906).[19] The second was the 'Agreement between Egypt and Turkey for the fixing of an Administrative Line between the Vilayet of Hejaz and the Governorate of Jerusalem and the Sinai Peninsula' (Rafah, 1 October 1906).[20] The 1906 treaties continue to govern the borders between Egypt, on one side, and both Israel and Gaza, on the other.[21] Accordingly, Egyptian borders with the pre-1948 Palestine, including the region that was later named the 'Gaza Strip', were definitively fixed.

A separate process led to the demarcation of the Gaza frontier with Israel. Gaza, like the rest of Palestine, was occupied by Britain in December 1917 and remained under the League of Nations Mandate until 14 May 1948.[22] During its 1948-9 war with Israel, Egypt controlled Gaza, which emerged within its current boundary after the armistice agreement signed between Egypt and Israel (Rhodes, 24 February 1949),[23] followed by a 'Modus vivendi to the Egyptian-Is-

18. Aimee M. Genell, *Empire by Law: Ottoman Sovereignty and the British Occupation of Egypt, 1882-1923* (Columbia University 2013).

19. Clive Parry (ed.), *The Consolidated Treaty Series, Volume 23* (Oceana 1969) 190.

20. Ibid., 19.

21. UN, 'Case concerning the Location of Boundary Markers in Taba between Egypt and Israel' (2006) XX Reports of the International Arbitral Awards 18.

22. William Basil Worsfold, *Palestine of the Mandate* (Fisher Unwin 1925); Jacob Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (Longmans 1928); Bernard Wasserstein, *The British in Palestine: The Mandatory Government and the Arab-Jewish Conflict, 1917-1929* (Royal Historical Society 1978).

23. *Israel and Egypt General Armistice Agreement*, entered into force 24 February 1949, 42 UNTS 252.

raeli General Armistice Agreement' (El Auja, 22 February 1950).[24] The latter agreement reduced the Gaza territory to the current 365 km^2, including the loss of about two km from the northern Gaza coast. Egypt administered Gaza without annexing it.[25] A constitutional instrument that Egypt proclaimed in 1962 provided that "the Gaza Strip forms an integral part of Palestine".[26] Since then, the lines separating Gaza and Israel as erected in 1949 have been duly reaffirmed as *de jure* borders.[27]

No power that governed Palestine over the last century had attempted to delimit the territorial waters or other maritime zones. Under the Ottoman Empire (1516-1917), the Palestinian sea had no separate status, as Palestine formed part of the Eastern Mediterranean coast that stretched from Anatolia in the north to the Sinai Peninsula in the south.[28] With the dismantling of the Ottoman Empire during World War I, Britain ruled Palestine from 1917 to 1948, a time when the British were the world's greatest military and naval power.[29] It seems that Britain, like its Ottoman predecessor, left maritime boundaries to the customary law

24. UN Doc S/1471, 17 March 1950.

25. Ilana Feldman, *Governing Gaza: Bureaucracy, Authority, and the Work of Rule, 1917–1967* (Duke University Press 2008).

26. 'Proclamation of the Constitutional System of the Gaza Strip' (5 March 1962), Palestine Gazette, Extraordinary Issue, 29 March 1962, 664, article 1.

27. Mutaz M. Qafisheh, 'What is Palestine? The *de jure* Demarcation of Boundaries for the ICC's *ratione loci* Jurisdiction and Beyond' (2020) 20 International Criminal Law Review 908, 119 ff.

28. Vital Cuinet, *Syrie, Liban et Palestine, géographie administrative: statistique, descriptive et raisonnée* (Leroux 1896); Ellsworth Huntington, *Palestine and its Transformation* (Mifflin 1911); Alexander Scholch, *Palestine in Transformation 1856-1882: Studies in Social, Economic and Political Development* (Institute for Palestine Studies 1993).

29. Norman Bentwich, *Palestine* (Benn 1934) 31-72; Herbert Sidebotham, *Great Britain and Palestine* (Macmillan 1937); Nevill Barbour, *Nisi Dominus: A Survey of the Palestine Controversy* (Harrap 1946) 42-87.

of the sea of the time.[30] The Egyptian administration of Gaza (1948-67) and its subsequent occupation by Israel from 1967 until the onset of the Oslo Accords in 1994 led to a range of restrictions on the use of Gaza's coast and territorial waters. However, for over a century, the various powers that controlled Palestine adopted a range of legislative enactments related to the use of the sea, many of which are still applicable in Gaza at present. Thus, the regulation of the maritime affairs of Gaza today, as with the rest of the Palestinian legal system, reflects an aggregation of international and State law.[31]

On 6 August 1863, the Ottoman Empire adopted a detailed Code of Maritime Commerce, which applied to Palestine and the rest of the Turkish domains.[32] This code, inspired by the maritime law of France, Sardinia, and Sicily,[33] remains in force today, as it has never been repealed by any power that ruled Palestine. The code set up rules for, *inter alia*, ships' registration system, ownership of ships, labour law at sea, civil and criminal liability of ships' crew, marine insurance, sea transport of persons, shipment of goods and vessel collision. The Ottomans updated this code through the Law of Promotion and Development of Maritime Commerce of 21 November 1885, which comprised provisions pertinent to customs, taxes, and port systems.[34] Another Ottoman law, passed on 8 January 1882, regulated the "fishing in land and sea" without ad-

30. Tommy B. Koh, 'The Origins of the 1982 Convention on the Law of the Sea' in D Rothwell, ed, *Law of the Sea* (Elgar 2013) 48-64.

31. Mutaz M. Qafisheh, 'Legislative Drafting in Transitional States: The Case of Palestine' (2014) 2 International Journal of Legislative Drafting and Law Reform (2014) 7.

32. Aref Ramadan (ed.), *Completion of Laws: Ottoman Laws Enforced in Arab States Detached from the Ottoman Empire* (Science Press 1928) vol 2, 161.

33. Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East: Origin and Development of Islamic Law* (Middle East Institute 1955) 289.

34. Ramadan (n 32) vol 2, 233.

dressing any aspect relating to maritime zones where fishers navigate.[35]

The British authorities in Palestine elevated the codification of maritime affairs beyond that of their predecessor, likely because Palestine under the League of Nations Mandate acquired its distinctive territorial status and because the British Empire stood alone as the world's maritime hegemon.[36] While retaining the aforementioned Ottoman legislation, British High Commissioner for Palestine enacted provisions for Palestinian ports under the Ports Ordinance No. 114 of 1 April 1926.[37] Based on the latter, a British Order inaugurated the Gaza Port on 4 October 1945.[38] Britain simultaneously adopted legislation relative to the carriage of goods by sea on the first day of 1926,[39] and established a maritime court in February 1937.[40] Fisheries Ordinance No. 6 of 18 February 1937 equated the territorial waters of Palestine as the zone reserved for fishing and fixed the breadth of the zone at three nautical miles offshore measured from the lowest point of the tide.[41] Less than one month later, on 2 March 1937, the rules adopted by the British-run government defined the 'internal merchant journey' as "any trip that a ship makes from a port in Palestine to a port or location outside Palestine situated in the Mediterranean east of longitude degree No. 28 eastward of Green-

35. Ibid., vol 3, 237.

36. Gabriela A. Frei, *Great Britain, International Law, and the Evolution of Maritime Strategic Thought, 1856–1914* (OUP 2020).

37. Robert H. Drayton (ed.), *The Laws of Palestine in Force on the 31st Day of December 1933* (Waterlow 1934) 1340.

38. Gaza Port (Water Limit) Order, Palestine Gazette (Supplement 2), No. 1445, 11 October 1945, 1444.

39. Carriage of Goods by Sea Ordinance No. 43 of 1 January 1926, Drayton (n 37) 113.

40. Palestine Admiralty Jurisdiction Order of 2 February 1937, Palestine Gazette, Supplement 2, No. 673, 269.

41. Palestine Gazette, Supplement 1, No. 667, 18 February 1937, 210, article 2.

wich".[42] As the west coast of Palestine lies at approximately longitude degree 34, and as each degree equals about sixty nautical miles, the limits of Palestine's internal waters were extended to about 360 nautical miles.

When Egypt administered Gaza after the British withdrawal in May 1948 until the Israeli occupation in June 1967, the Gaza Sea had not been a priority because Egypt possessed enough and approximate ports that left Gaza's port unnecessary, especially given its presumed high security considerations. Indeed, almost immediately, the Egyptian governor of Gaza shut down the city's port for merchant ships arriving or departing.[43] However, as early as June 1948, the Egyptians permitted fishing boats to sail up to three nautical miles measured from Gaza offshore seaward, but only in designated areas and during daylight, subject to "firing at those who fail to comply".[44] Shortly after that, the Egyptian governor allowed fishing boats to sail at night with their boat lights continuously illuminated.[45] In 1951, Egypt eased the closure somewhat but continued to criminalise the entry of merchant ships into, or departure from, Gaza port without a permit "from competent authorities".[46] These restrictions, motivated by security concerns as Egypt remained in a state of war with Israel, barred the development of the Gaza maritime zones for two decades.

From the outset of its occupation in 1967 until the withdrawal of its forces from parts of Gaza after the establishment of the Palestinian

42. Ports (Seagoing Vessels) (Amendment) Rules of 2 March 1937, Palestine Gazette, Supplement 2, No. 672, 11 March 1937, 211, article 2.

43. Order No. 41 Relating to the Prohibition of Mooring of Merchant Ships at the Ports under the Egyptian Forces Control in Palestine of 12 September 1948, Palestine Gazette No. 2, 31 March 1950, 61.

44. Order No. 9 of 3 June 1948, Palestine Gazette No. 1, 31 December 1949, 12.

45. Order No. 14 of 12 June 1948, Palestine Gazette No. 2, 31 March 1950, 27.

46. Order Relating to Prohibition of the Transport of any Persons by Sea Save under Special Permit No. 194 of 24 November 1951, Palestine Gazette No. 8, Supplement 3, 15 October 1951, 298.

Authority in 1994, Israel imposed a blockade on the Gaza coast with a complete ban on entry or departure of ships from Gaza territorial waters.[47] While leaving the previous law technically in place, Israel enacted a series of military orders to codify the issue of fishing, focusing on a permission regime for the fishers.[48] Without abolishing the three-mile limit designated for fishing that existed for decades before its occupation, Israel restricted the fisheries and prohibited fishing boats from entering specific locations.[49] It banned fishers from exiting the zone beyond the three-mile seaward, and it halted fishers from using boats with specific engines, focusing on slow boats with maximum speeds of 20 horsepower.[50] Several Israeli military orders were dedicated to the 'regulation' of swimming on beaches, prohibiting the entry of swimmers to more than 300 metres seaward even in the designated swimming blocks.[51] Obviously, these measures were introduced chiefly for security purposes, namely to prevent the use of the sea by resistance groups to enter Israel or attack Israeli targets. With its establishment per the framework of the 1993 Oslo Accords, signed by Israel and the Palestine Liberation Organisation (PLO), the Palestinian Authority attempted to develop certain aspects of maritime legislation.

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47. Bob Labes, 'The Law of Belligerent Occupation and the Legal Status of the Gaza Strip' (1988) 9 Michigan Yearbook of International Legal Studies 383.

48. Order Concerning Fishing Instructions (Gaza Strip and North Sinai) No. 69 of 27 August 1967, Israeli Army, *Proclamations, Orders and Appointments*, No. 3, 31 December 1967, 211.

49. General Permit for Fishermen Exit from the Area (Gaza Strip Area) No. 144 of 18 April 1985, Israeli Army, *Proclamations, Orders and Appointments*, No. 75, 16 November 1986, 8045, Article 1.

50. Ibid.

51. Regulations for the Implementation of the Order concerning the Regulation of Bathing Areas in the Sea (Gaza Strip and North Sinai) No. 66 of 31 August 1967, Israeli Army, *Proclamations, Orders and Appointments*, No. 3, 31 December 1967, Article 13.

2.2 The Oslo Accords and the law of the sea

Article IV of the Declaration of Principles on Interim Self-Government Arrangements, signed at Washington, DC, between Israel and the PLO on 13 September 1993, known as 'Oslo I', reserved the issue of borders for further negotiation.[52] Article IV did not indicate what would follow if the negotiation did not resume or if the negotiation brought no agreement on boundaries. The latter scenario now persists with the negotiation deadlocked, making it possible to argue that the status of borders remains as it existed under international law before the signing of the Oslo Accords. Three explanations drawn from international law and the Oslo Accords themselves support this assertion. The first stems from the aforementioned Article IV, by which the "two sides view[ed] the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved". The second draws from Oslo I, which is based on UN Security Council resolutions 242 (1967) and 338 (1973), and states that "the negotiations on the permanent status [between Israel and Palestine] will lead to the implementation of [these] Security Council resolutions"; namely the withdrawal of Israel from the territories that it occupied in June 1967.[53] Third, much of State practice, backed, among other bases, by judgements of the ICJ,[54] the International Criminal Court (ICC),[55] as well as ample UN Security Council and General Assembly resolutions, recognises the "State of Palestine on the Palestinian territory occupied

52. 32 ILM 1525 (1993).

53. Article 1 of Oslo I.

54. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Advisory Opinion, ICJ Rep (2004) 167.

55. ICC, *Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States*, ICC-01/18-131, 30 April 2020.

since 1967".[56] Because the sea forms an extension of the landscape,[57] Palestinian maritime areas encompass the Gaza internal waters and territorial sea, as well as the powers of control in the contiguous zone and sovereign rights in the EEZ and the continental shelf.

The issue of boundaries that defines the territory of Palestine was debated before the ICC for the purpose of the Court's territorial jurisdiction in the State of Palestine as a Member State in the Rome Statue in 2021. It was argued before the ICC that the lack of an agreed-upon solution to the territorial scope of the State of Palestine would lead to the preservation of the *status quo* relating to Palestine's land under international law until after a change of the territorial limits would be reached by an agreement between the State of Israel and the State of Palestine. Indeed:

> The fact that Palestinians and Israelis are undergoing a negotiation process to set the final boundaries between the State of Palestine and the State of Israel does not change Palestinian territorial title over the West Bank, including East Jerusalem, and Gaza Strip. Naturally, negotiation might yield an agreed-upon solution that may modify Palestine-Israel borders, for example, by land swap or special arrangement of joint control in certain religious sites. Until that solution materializes, the status quo regarding Palestine's borders remains intact.[58]

The ICC Prosecutor, and subsequently the Court itself, endorsed this argument in its entirety.[59]

Despite the fact that the occupying power is disregarding the ICC-recognition of Palestinian territorial title, this Section examines the current

56. UN Doc A/RES/67/19, 29 November 2012.

57. *North Sea Continental Shelf* (Federal Republic of Germany *v* Denmark and Federal Republic of Germany *v* Netherlands), Judgement of 5 February 1969, ICJ Rep (1969), para 96.

58. Mutaz M. Qafisheh, *Borders of the State of Palestine under International Law for the Purpose of ICC Territorial Jurisdiction*, *Amicus Curiea* (ICC 2020) ICC-01/18-72, para 46.

59. *Prosecution Response to the Observations of Amici Curiae* (n 55) 48 (fn 278).

state of affairs of the maritime regime of the Gaza Sea as enshrined in the Oslo Accords, agreed to by the State of Israel and the PLO. Article VII, paragraph 4, of Oslo I provided the basis for the Palestinian Authority to establish 'a Gaza Sea Port Authority'. In Annex III, titled 'Protocol on Israeli-Palestinian Cooperation in Economic and Development Programmes', the parties agreed to establish an Israeli-Palestinian Continuing Committee for Economic Cooperation, which empowered the Palestinians to establish 'a Gaza Sea Port Area'.[60] Indeed, on 8 December 1999, late Palestinian President Yasser Arafat founded the 'Sea Port Authority' and named its chairperson.[61] Shortly thereafter, Arafat reinstated the 'Port of Gaza' through Decree No. 1 of 30 April 2000.[62] Article 2 of the latter decree provided that the Port Authority shall enact "bylaws and instructions to give effect to the decree". In practice, such "bylaws and instructions" have never been adopted. Despite enacting these instruments, the Sea Port Authority or the Port of Gaza did not materialise for two reasons. First, Arafat's enactments coincided with the outbreak of the second uprising (*intifada*) from 2000 to 2005 that led to the deterioration of relations between Palestine and Israel, during which time the latter imposed a fresh set of restrictions on the Gaza coast. Second, the Sea Port Authority has been accorded a limited mandate under the Oslo Accords offshore Gaza.

Regardless of the Oslo stipulations, the Port of Gaza has existed for decades. Its creation and dimensions had been fixed by the British-enacted Gaza Port Order of 1945, under the Ports Ordinance of 1926, both mentioned above. The purpose of establishing the Sea Port Authority and the new Gaza Port served to enlarge and modernise the port and enable Palestinian and foreign ships to navigate Gaza shores. This pro-

60. Annex III.

61. Palestine Gazette, No. 34, 30 September 2000, 38.

62. Palestine Gazette, No. 33, 30 June 2000, 30.

jected function proved impracticable due to strict Israeli control over the sea following the Oslo Accords. Thus, the Palestinian government decided to merge the Ports Authority on 23 May 2006 with the Ministry of Transport.[63]

Significantly, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995, known as 'Oslo II', elaborated details regarding the 'Sea of Gaza'.[64] Article XIV, titled 'Security along the Coastline to the Sea of Gaza', recognises a fishing limit of 20 nautical miles from the Gaza shore seaward. However, in the north of Gaza, a maritime zone marked as 'K', with 1.5 nautical miles breadth, was designated as a buffer space along the Israeli side of the sea. In the south, a zone called 'M', one nautical mile wide, was allocated as a buffer area along the Egyptian waters. Both zones were assigned as "closed areas, in which navigation was to be restricted to activity of the Israel Navy". The offshore area between these two zones was designated as 'Zone L', open for Palestinian fishing, recreation, and economic activities.

Article XIV added further restrictions on Palestinian activities in 'Zone L'. Fishing boats, for instance, "will not exit Zone L into the open sea and may have engines of up to a limit of 25 HP [horsepower] for outboard motors and up to a maximum speed of 18 knots for inboard motors".[65] In addition, recreational boats and yachts were limited to sailing within a distance of six nautical miles. Finally, motorbikes and water jets were altogether forbidden from Zone L.[66]

As for incoming ships to Gaza from various destinations, Oslo II provided that "[f]oreign vessels entering Zone L will not approach

63. Council of Ministers Decision No. 46 Concerning the Merger of the Civil Aviation Authority and the Ports Authority with the Ministry of Transportation, Palestine Gazette No. 68, 7 March 2007, 92.

64. 36 ILM 551 (1997).

65. Oslo II, Article XIV/1/a(2)(b)(i).

66. Ibid., Article XIV/1/a(2)(b)(ii).

closer than 12 nautical miles from the coast".[67] An exception had been made for such ships to enter the Gaza Port after its establishment,[68] but, as noted above, the new Port has never been established. Despite the Palestinian Naval Police being formed to address maritime concerns and criminal activity, Oslo II permitted the "Israel Navy vessels [to] sail throughout these [three] zones, as necessary and without limitations, and may take any measures.... [with the proviso that] The Palestinian Police will be notified of such actions".[69] The Palestinian Police were allowed to operate only ten boats, with limited speed and weapons, up to six nautical miles. In extraordinary cases and, with special Israeli permission, the range could extend to 12 nautical miles.[70] Pending the construction of the Gaza Port, "arrangements for entry and exit of vessels, passengers and goods by sea, as well as licenses for vessels and crews sailing on international voyages in transit to the West Bank and the Gaza Strip, shall be through Israeli ports under the relevant rules and regulations applicable in Israel", a situation that maintained Israel's commercial security monopoly.[71] See *Figure 1* for the Gaza fishing limits under Oslo II.

In less than a decade since the signing of Oslo I and Oslo II, at the end of April 2002, Israel foisted tighter limits on Palestinian fishing. In August 2002, UN Secretary-General Humanitarian envoy Catherine Bertini reported that she obtained a commitment from Israel to permit a 12-mile fishing zone offshore Gaza.[72] Despite Israel's so-called 'Disengagement Plan' in September 2005, Israel has retained its siege on

67. Ibid., Article XIV/1/a(2)(b)(iv).

68. Ibid., Article XIV/4(c).

69. Ibid., Article XIV/1/b(4).

70. Ibid., Article XIV/2/a and b.

71. Ibid., Article XIV/4(c).

72. Catherine Bertini, Mission Report (UN, 11-19 August 2002) para 8.

Gaza,[73] while claiming that it ended its occupation.[74] In the *Al-Bassiouni* case,[75] which the Israeli Supreme Court confirmed the narrative alleging an end to Israel's occupation, stating that Israel no longer had effective control over Gaza. Against all the odds of international law, Israel's High Court of Justice ruled that "the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order... according to the laws of belligerent occupation".[76] In April 2006, the Israeli navy began enforcing a ten-mile limit on Gaza fishers, and in October of that year, it reduced the limit to six miles.[77]

According to Article 42 of the Hague Convention IV, Respecting the Laws and Customs of War on Land, and its regulations of 18 October 1907,[78] a "territory is considered occupied when it is placed under the authority of the hostile army". The end of occupation occurs when the occupier's military ceases holding any *de facto* control.[79] Thus, Gaza remains an occupied territory according to international law.[80] As recently

73. Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15 Journal of Conflict and Security Law 14.

74. Iain Scobbie, 'An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination' (2005) 11 Yearbook of Islamic and Middle Eastern Law 3; Benjamin Rubin, 'Disengagement from the Gaza Strip and Post-Occupation Duties' (2009) 42 Israel Law Review 528; Elisabeth Samson, 'Is Gaza Occupied: Redefining the Status of Gaza under International Law' (2010) 25 American University International Law Review 915.

75. Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel' (2009) Israel Law Review 101.

76. Israeli High Court of Justice, *Jaber Al-Bassiouni Ahmed and others v Prime Minister and Minister of Defense*, Case No. 9132/07, 27 January 2008, para 12.

77. Sharat G. Lin, 'Gaza's Shrinking Borders: 16 Years of the Oslo Process', 27 December 2009, available at <<https://www.countercurrents.org/lin271209A.htm>>.

78. 2 American Journal of International Law (Supplement) (1908) 90.

79. John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN Doc A/HRC/4/17, 29 January 2007.

80. Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 276–279.

as in its July 2024 advisory opinion, the ICJ rendered the Israeli occupation unlawful and reiterated the contiguous nature of the Palestinian territory, including the West Bank, East Jerusalem, and Gaza.[81]

Israel maintained its military dominance over Gaza's territorial waters, along with its airspace, while also restricting the entry of persons and the supply of products and services.[82] It upheld the ban on foreign ships that attempted to enter the Gaza Port, attacking such ships or dragging them into Israeli ports.[83] A notable instance of this policy occurred with the Turkish Mavi Marmara and accompanying flotilla on 31 May 2010, during which the Israeli navy raided the ship and killed nine international peace activists aboard.[84] This incident triggered considerable global attention, including UN probes that addressed the legality of the blockade,[85] and involved ICC proceedings.[86] The incident led to considerable diplomatic tensions but no prosecutions.

The above discussion reveals that the issue of the Gaza Sea appeared in the Oslo Accords as a matter of security and, at best, as a potential for economic development, particularly fishing. It largely maintained the

81. ICJ Advisory Opinion 2024 (n 5) para 78.

82. Nicholas Stephanopoulos, 'Israel's Legal Obligations to Gaza after the Pullout' (2006) 31 Yale Journal of International Law 524 (2006); Solon Solomon, 'Occupied or Not: The Question of Gaza's Legal Status after the Israeli Disengagement' (2011) 19 Cardozo Journal of International and Comparative Law 59.

83. Daniel Benoliel, 'Israel, Turkey and the Gaza Blockade' (2011) 33 University of Pennsylvania Journal of International Law 615.

84. Andrew Sanger, 'The Contemporary Law of Blockade and the Gaza Freedom Flotilla' (2013) 13 Yearbook of International Humanitarian Law 397; Douglas Guilfoyle, 'The *Mavi Marmara* Incident and Blockade in Armed Conflict' (2011) 81 *British Yearbook of International Law* 171; George Bisharat, Carey James and Rose Mishaan, 'Freedom Thwarted: Israel's Illegal Attack on the Gaza Flotilla' (2011) 4 Berkeley Journal of Middle Eastern and Islamic Law 79.

85. UN Doc A/HRC/15/21, 27 September 2010.

86. *Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, ICC-01/13-34, 16 July 2015.

status quo created by Israel during the years of occupation beginning in 1967. For example, the maximum that the Oslo Accords gave to the Palestinians concerning fishing (20 nautical miles) equals ten per cent of the 200 miles of the EEZ under the UNCLOS. The Oslo-allocated zone has been shrunk, in reality, to much less than 20 nautical miles.

The Oslo Accords, contrary to international law prescriptions, do not contemplate any sovereign rights for the Palestinian people along the Gaza coast. Although its entry into force at the global level coincided with the adoption of the Accords, the UNCLOS was entirely off the negotiation agenda. Nevertheless, are the maritime arrangements of the Oslo Accords, as a bilateral treaty between two international law entities, consistent with the Convention?

Israel contends that Palestine has no maritime powers except those stipulated in the "Israeli-Palestinian agreements which clearly define the scope of rights and obligations in the relevant maritime area",[87] unequivocally asserting that the 'Palestinian entity' cannot claim any maritime rights based on the UNCLOS.[88] Indeed, under the law of the sea, a range of issues can be regulated by regional, sub-regional or bilateral treaties in lieu of the Convention arrangements.[89] But can the Oslo Accords stipulations relating to the maritime arrangements as detailed above be considered a *lex specialis* that overturns the application of the UNCLOS concerning Palestine?

87. Israel, *Note verbale dated 14 January 2020 from the Permanent Mission of Israel to the United Nations addressed to the Office of the Secretary-General*, Law of the Sea Bulletin No. 102 (2020) 25.

88. Ibid.

89. For example, Article 51 (existing agreements, traditional fishing rights and existing submarine cables), Article 237 (obligations under other conventions on the protection and preservation of the marine environment), Article 270 (ways and means of international co-operation) and Article 282 (obligations under general, regional or bilateral agreements). This principle of special agreements was also embedded in the ILC work on the codification of law of the sea. ILC, 'Articles concerning the Law of the Sea' (1959) II Yearbook of the International Law Commission 256, Article 14.

An analysis of the Oslo Accords themselves indicates a negative answer to that question, based on two grounds. First, the Oslo Accords stipulated a period limited to five years for implementation, ending in May 1999 and leading to a permanent settlement. The Accords by no means intended to create a perpetual or permanent status. On the contrary, as indicated above, the issue of borders (including maritime zones) was reserved for further negotiation, indicating that the *status quo* remained intact. Hence, the Oslo arrangements merely constituted security and economic aspects that the sides were projected to coordinate as a preparation for an elevated stage leading to Palestinian independence, which implied sovereignty over, among other areas, maritime zones. Secondly, and more importantly, various provisions of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War of 12 August 1949[90] stipulate, for example, that "[n]o special agreement shall adversely affect the situation of protected persons..., nor restrict the rights which it confers upon them".[91] As the territorial sea and other maritime zones constitute part of the territory of a State and the resources on which the Palestinian people have the right to self-determination,[92] which, in turn, forms a peremptory rule of international law (or *jus cogens*),[93] then any special agreement, or a provision thereof, that restricts this right must be void.[94] In this connection, it was aptly concluded that "the conventional rules [of the Oslo Accords] on the governance

90. 75 UNTS 287, entry into force 21 October 1950.

91. Article 7. See also Article 8 (non-renunciation of rights) and Article 47 (inviolability of rights).

92. Irini Papanicolopulu, 'Human Rights and the Law of the Sea' in David Attard, Malgosia Fitzmaurice and Norman Gutiérrez (eds.), *The IMLI Manual on International Maritime Law: The Law of the Sea* (OUP 2014) 509-32.

93. *Wall* (n 54) 199.

94. Ki-Gab Park, 'The Right to Self-Determination and Peremptory Norms' in Dire Tladi, ed, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021) 689-712.

of the territorial sea off the Gaza Strip cannot derogate from the law of occupation".[95]

As part of the Accords, Palestine acquired powers to perform a set of State-like functions. The lack of control over certain issues does not imply Palestinian concordance with the ongoing situation but merely reflects an occupier's forceful domination.[96]

Indeed, "[n]o territorial acquisition resulting from the... threat or use of force shall be recognized as legal".[97] Occupation thus does not legally diminish statehood entitlement or alter the sovereignty of the occupied State.[98]

Since the temporal lapse of the Oslo Accords over two decades ago, circumstances have substantially changed.[99] Palestine has behaved as a State and performed most of the State's functions. Externally, it became a member of a dozen international organisations and acceded to over a hundred treaties.[100] It established or enhanced its diplomatic missions

95. Marco Longobardo, 'The Occupation of Maritime Territory under International Humanitarian Law' (2019) 95 International Law Studies 322, 354.

96. John Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' (2009) 35 Rutgers Law Record 1, 6-7.

97. General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625(XXV), 24 October 1970.

98. Conor McCarthy, 'Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' (2005) 10 Journal of Conflict and Security Law 43; Salvatore F. Nicolosi, 'The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty' (2011) 31 Polish Yearbook of International Law 165.

99. Oliver Lissitzyn, 'Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances' (1967) 61 American Society of International Law Proceedings 186.

100. Basheer Al-Zoughbi, 'The *de jure* State of Palestine under Belligerent Occupation: Application for Admission to the United Nations' in Mutaz M. Qafisheh (ed.), *Palestine Membership in the United Nations: Legal and Practical Implications* (CSP 2013) 162.

worldwide. It hosts numerous embassies.[101] It may, equally, delimit its maritime zones under the UNCLOS and codify its maritime affairs thereof as in the case of any other State.[102]

Lastly, the accession of Palestine to the UNCLOS in 2015 can form a new obligation towards other States of the Convention that prevails over the Oslo Accords as an old treaty. Articles 309-311 are clear in this respect. Palestine has made no reservation or exception to modify or alter the application of the UNCLOS upon its accession to the Convention. More significantly, Article 311(2) clearly stated that the "Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention". Thus, the Oslo maritime provisions that deny or restrict the enjoyment of Palestine's rights under the UNCLOS cannot bind Palestine under the Convention itself, as that would lead to the inability of Palestine to perform its duties towards other States parties. On the contrary, Palestine carries a burden of reforming its domestic law in order to perform the obligations set forth in the Convention *vis-à-vis* other States parties, as will be explained next.

101. Qafisheh, 'What is Palestine?' (n 27) 931-2.

102. Clive Symmons, 'Article 15: Delimitation of the Territorial sea between States with Opposite or Adjacent Coasts' in Alexander Proelss, ed, *United Nations Convention on the Law of the Sea: A Commentary* (Beck 2017) 165.

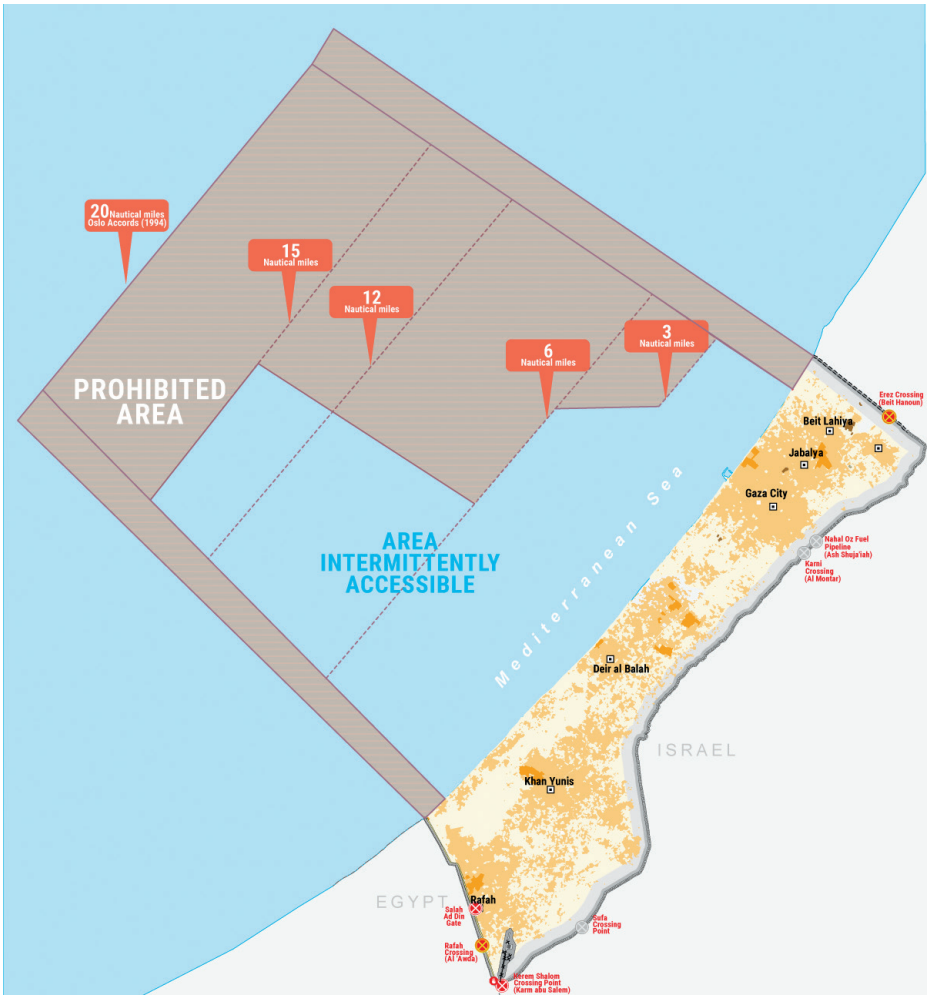

Figure 1: Gaza Fishing Limits according to Oslo Accords II (1995)[103]

103. OCHA, *The Monthly Humanitarian Bulletin*, 19 November 2019, available at <<https://www.ochaopt.org/content/gaza-s-fisheries-record-expansion-fishing-limit-and-relative-increase-fish-catch-shooting accessed>>.

2.3 UNCLOS-based legal reform in Palestine

Under the UNCLOS, a riparian State party reserves a power to take a range of measures through its domestic law to enforce the Convention. Besides unilateral maritime boundary delimitation,[104] examples of these measures relate to ports (Article 11), the right to innocent passage of foreign ships in the territorial sea (Articles 17-26), including the passage of nuclear ships (Article 23) and submarines (Article 20), jurisdiction on criminal law and civil law aboard ships (Articles 27-28), rights in the contiguous zone (Article 33), law on the use of EEZ (Articles 58-59), obligations of foreign citizens regarding fishing in EEZ (Article 62), laws to protect EEZ (Article 73), rights in relation to the continental shelf (Article 76), nationality and registration of ships (Article 91), jurisdiction in high seas: penal jurisdiction, marine assistance and salvage, collision, combating slavery, piracy, trafficking, trade in drugs, unauthorised broadcasting and rights of visit and hot pursuit (Articles 97-111), punishing the breaking or injury of submarine cables or pipelines (Article 113), preservation of marine environment (Articles 192-195) and the prevention of pollution from land-based sources (Articles 207, 210 and 213). Few of these issues have been regulated in Palestine due to its colonial heritage,[105] as observed above.

Palestine's accession to the UNCLOS offers an opportunity to craft comprehensive Palestinian legislation that may give rise to the domestication of the international law of the sea, a harmonisation called for annually by the UN General Assembly.[106] The reform process is imperative despite the inability of Palestine to enforce these stipulations at the

104. See Proelss (n 102).

105. Rashid Khalidi, *The Hundred Years' War on Palestine: A History of Settler Colonialism and Resistance, 1917–2017* (Metropolitan 2020).

106. J. Ashley Roach, *Excessive Maritime Claims* (Brill Nijhoff 2020) 7-8.

present time due to the restrictions of the Israeli occupation forces. Some of these prospective laws might accord Palestine the means of claiming certain maritime rights towards other State parties to the UNCLOS, relevant international organisations or law of the sea tribunals, or even companies operating ships, submarines, oil rigs and so on.[107] Domestication gives a positive image of the State at the global stage, increasing the State's credibility and contributing to its independence.

Due to the fact that the maritime legislative pieces were enacted several decades before the adoption of the UNCLOS by States that controlled Palestine, most legislation does not cohere with the Convention. Some provisions of previous legislation reflect circumstances no longer relevant to the current time. For example, the maritime commerce laws enacted towards the end of the nineteenth century, highlighted in Section 2.1 above, have become outdated. No provision in Palestine's Labour Law No. 7 of 30 April 2000 addresses the rights of workers on board of ships.[108] British mandate-era Penal Code Ordinance No. 74 of 14 December 1936,[109] applicable in Gaza, still defines the territorial sea as three nautical miles from the baseline (Article 6). By contrast, Jordan-era Penal Code No. 16 of 10 April 1960 of the West Bank fixes the territorial sea at five nautical miles.[110] In the *Majalle*, the Ottoman Civil Code of 15 September 1876,[111] also applicable to Palestine today, is silent when it comes to civil jurisdiction in maritime areas or on ships.

Reference to EEZ has been made in two separate Palestinian laws enacted at the close of the past century. The first is Natural Resources

107. Dana Weiss and Ronen Shamir, 'Corporate Accountability to Human Rights: The Case of the Gaza Strip' (2011) 24 Harvard Human Rights Journal 155.

108. Palestine Gazette No. 39, 25 November 2001, 7.

109. Palestine Gazette, Supplement 1, No. 652, 14 December 1936, 399.

110. Jordan Official Gazette No. 1487, 1 May 1960, 374, Article 7(3).

111. Ramadan (n 32) vol 6, 1.

Law No. 1 of 24 January 1999.[112] However, while listing EEZ (without defining it), among other 'definitions' in Article 1 of this law, it includes no particular provision related to other maritime zones or natural resources thereof. Environment Law No. 7 of 28 December 1999[113] provided detailed rules pertinent to the preservation of the marine environment in various maritime zones (Articles 31-39). The latter law mentions other maritime zones without defining them: the territorial sea, continental shelf and seabed.[114] Regarding the preservation of the marine environment, with the exception of the precise prohibition of oil pollution of the sea (Article 38),[115] the law sets out general principles that were presumed to be materialised through the enactment of detailed regulations, bylaws, instructions and standards envisaged to be drafted by the Ministry of Environmental Affairs.[116] Such instruments have never been passed.

The foregoing shows the long path ahead for Palestine to harmonise its laws in line with the law of the sea. Such domestication can be crystalised on two fronts. The first, which may consist of a single law named 'Maritime Zones Law', can relate to the delimitation of maritime zones offshore Gaza based on the UNCLOS and the sovereign rights of Palestine and obligations. The second, more comprehensively, can transfer other technical (*vis-à-vis* sovereign) aspects of the Convention into national legislation through a set of laws as detailed in the series of treaties that have been adopted by the International Maritime Organization (IMO) since the middle of the twentieth century.

112. Palestine Gazette No. 28, 13 March 1999, 10.

113. Palestine Gazette No. 32, 29 February 2000, 38.

114. Article 1 (definition of EEZ), and Articles 35 and 37.

115. This Article stated: "It shall be prohibited for all parties including ships, irrespective of their nationality, to dispose or throw oil, oil mix or any other pollutants in the territorial waters or the exclusive economic zone of Palestine".

116. Articles 31-33, 35-37.

With regard to the 'Maritime Zones Law', Palestine started to regulate and reclaim sovereignty over its maritime areas through declarations upon its accession to the UNCLOS. On 31 August 2015, Palestinian President Mahmoud Abbas communicated a declaration to the then-UN Secretary-General Ban Ki-moon defining Palestine's maritime zones.[117] The declaration extended Palestine's sovereignty up to 12 nautical miles into Gaza's shore measured from the baseline that was set as a 'low-water line along the coast'.[118] Palestine claimed a 24-mile contiguous zone and 200 miles for both EEZ and the continental shelf combined.[119]

On 24 September 2019, the Palestinian Minister of Foreign Affairs and Expatriates, Riad Maliki, deposited a more precise declaration with the UN Secretariat.[120] The declaration marked the baseline offshore Gaza and the breadth of seaward maritime zones with specific geographical points of coordinates based on the World Geodetic System 1984,[121] which links national to global datum systems.[122] The declaration was professionally illustrated by a chart drawn by a cartographic consulting

117. State of Palestine, *Declaration of the State of Palestine regarding the Maritime Boundaries of the State of Palestine in accordance with the United Nations Convention of the Law of the Sea* (Ramallah, 31 August 2015), Law of the Sea Bulletin No. 89 (2017) 18, hereinafter 'Abbas Declaration'.

118. Ibid.

119. Kriangsak Kittichaisaree, *The International Tribunal for the Law of the Sea* (OUP 2021) 195.

120. Palestinian Ministry of Foreign Affairs and Expatriates, *Declaration of the State of Palestine regarding the Maritime Boundaries of the State of Palestine in accordance with the United Nations Convention of the Law of the Sea* (Ramallah, 24 September 2019), Law of the Sea Bulletin No. 101 (2020) 46, hereinafter 'Ministry of Foreign Affairs Declaration' or 'Declaration'.

121. Ibid., 47.

122. Jonathan Myres, 'Survey Tasks Arising from the United Nations Convention on the Law of the Sea' (1986) 63 International Hydrographic Review 65, 69; Muneendra Kumar, 'World Geodetic System 1984: A Modern and Accurate Global Reference' (1988) 12 Marine Geodesy 117; Ahmed El-Rabbany, 'Geomatics Aspects of the UN Convention on Law of the Sea – A Case Study' (2002) 55 Journal of Navigation 443, 445.

firm,[123] 'International Mapping'.[124] The declaration encompasses six tables that listed geographical coordinates, defining Palestine's baseline and other zones offshore Gaza. It marked the 'Southern Limits of Maritime Areas of the State of Palestine', i.e. the seaside line boundary of Gaza with Egypt. It likewise demarcated the 'Northern Limits of Maritime Areas of the State of Palestine', that is, the seaside-line of Gaza along the coastal frontier with Israel. On 27 April 2022, Palestine filed a communication at the UN Secretariat with respect to the potential use of Gaza's maritime zones by third parties (States, companies or individuals) without Palestinian consent.[125]

The Division for Ocean Affairs and the Law of the Sea (DOALOS) of the UN Secretariat published these declarations under the heading 'National Legislation' in the *Law of the Sea Bulletin* and on the DOALOS's website.[126] Nevertheless, the declarations have not been published in the Palestine Official Gazette as in the case of other national legislation. The declarations do not contain detailed provisions, rights and obligations for the activities carried out by various actors in each Palestinian maritime zone. No penalties that sanction those who breach Palestinian law in the designated areas can be found. Although a step towards the right direction in the sense that claiming and demarcating maritime zones protects such zones from conflicting claims by other States,[127] such declarations need to be converted into binding law, incorporating specific

123. Interview with Ambassador Omar Awadallah, Assistant Minister for United Nations and International Organizations, Ministry of Foreign Affairs and Expatriates (Ramallah, 14 June 2022).

124. The homepage of this company is <<https://internationalmapping.com>>.

125. State of Palestine, *Note verbale dated 27 April 2022 from the Permanent Observer Mission of the State of Palestine to the United Nations addressed to the Secretary-General*, Law of the Sea Bulletin No. 108 (2022) 19.

126. See <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/PSE.htm>>.

127. Roach (n 106) 6.

provisions based on the UNCLOS, sanctioning those who violate the law, and, finally, be published in the official gazette.

The proposed maritime legislation would largely translate the UNCLOS stipulations on maritime areas, as reflected in the above declarations, into a domestic law.[128] The law could define the internal waters, baseline, territorial sea, contiguous zone, EEZ and continental shelf.[129] It may specify the outer limits of each zone with specific geographical coordinates and the boundaries of Palestine with adjacent States (Israel and Egypt) as well as opposite neighbouring States, particularly Cyprus and, possibly, Turkey. The law must indicate that the unilateral delimitation of maritime zones might be modified based on agreements with other States or pursuant to decisions of competent international courts or tribunals.[130] The law can define the prerogatives of Palestine in each zone, along with the high seas and seabed. The rights and duties in Palestinian maritime zones of national or foreign entities operating boats, ships, vessels, warships, artificial islands, underwater vehicles, submarine cables and pipelines, aircraft, oil rigs, fisheries, or conducting marine scientific research may be equally specified in the Palestinian domestic law. These entities may include governments, companies, research institutions or individuals in each of the maritime areas. The Palestinian law needs to incorporate concrete provisions pertinent to each maritime zone in detail. Proportionate penalties and civil liability pronouncements for those who breach Palestinian law can be similarly introduced. The law needs to name the governmental bodies that would regulate maritime affairs in relation to foreign entities, for example, the Ministry of Foreign Affairs

128. Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2019) 236-78.

129. Satya N. Nandan et al., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nijhoff 1993) vol II, 148.

130. *Fisheries* (United Kingdom *v* Norway), Judgement of 18 December I95I, ICJ Rep (1951) 116, 132.

in connection to boundary delimitation, the Council of Ministers in relation to the adoption of regulations towards law enforcement and the Energy and Natural Resources Authority concerning gas and oil exploration and exploitation. In this law, Palestine may revoke provisions of previous legislation that contradict the new law or the UNCLOS or are no longer relevant. In developing this law, Palestine's legislators may learn from and be guided by the national maritime zone legislation of other States.[131] Finally, the Palestine Gazette must publish the UNCLOS in its entirety, following the ruling of the Palestinian Constitutional Court No. 4 of 19 November 2017 that requires gazetting international treaties and converting them into domestic law as a pre-requisite for the enforcement of such instruments at the national level.[132]

Besides the first proposed law that centres on the sovereignty, sovereign rights and jurisdiction of Palestine over its maritime zones, another proposed set of laws may cover technical aspects. As a framework instrument, many of the UNCLOS "provisions can be implemented only through specific operative regulations in other pertinent international agreements".[133] The IMO as a UN agency has developed over 50 conventions relating to the use of the sea since the adoption of the UNCLOS.[134] Many of these conventions are considered complementary law

131. Mutaz M. Qafisheh, 'From Constantinople to Oslo to Gaza: Developments of Palestine's Maritime Legislation under Colonization' (2024) 160 *Marine Policy: The International Journal of Ocean Affairs*, DOI: 10.1016/j.marpol.2023.105954.

132. Palestine Gazette No. 138, 29 November 2017, 84.

133. Gaetano Librando, 'The International Maritime Organization and the Law of the Sea' in David Attard et al. (n 92) 577-605, 580.

134. IMO, 'List of Conventions, Other Multilateral Instruments and Amendments in respect of which the Organization Performs Depository and Other Functions' (London, February 2022), available at <<https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/List%20of%20the%20Conventions%20and%20their%20amendments.pdf>>.

for the UNCLOS.[135] The IMO conventions fall into four categories: (1) maritime safety, (2) preservation of the marine environment, (3) liability and compensation over damages, and (4) other issues, namely shipping facilitation, tonnage measurement, unlawful acts against shipping and salvage.

As in the case of over a hundred other treaties and organisations that it has acceded to in the past decade,[136] Palestine can become the 176th member of the IMO and, thereafter, join the instruments and standards that were adopted under its auspices. Articles 4-9 of the IMO Convention, signed at Geneva on 6 March 1948,[137] set out procedures for a State to become an IMO member. Palestine meets the requirements of Article 7, which reads:

> Any State... may apply through the Secretary-General of the [International Maritime] Organization to become a Member and shall be admitted as a Member upon its becoming a party to the Convention... provided that, upon the recommendation of the Council, its application has been approved by two thirds of the Members.

Palestine is currently contemplating applying for the IMO membership.[138] Through UNCLOS, as complemented by the IMO, its conventions and standards that can be transferred to domestic law, Palestine would be legally empowered to act as a coastal, port and flag State across the globe.[139]

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135. Ilker Basaran, 'The Evolution of the International Maritime Organization's Role in Shipping' (2016) 47 Journal of Maritime Law and Commerce 101.

136. Shadi Sakran and Mika Hayashi, 'Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences' (2017) 25 Journal of International Cooperation Studies 81.

137. 298 UNTS 3, entry into force 17 March 1958.

138. Second interview with Ambassador Omar Awadallah, Assistant Minister for United Nations and International Organizations, Ministry of Foreign Affairs and Expatriates (Ramallah, 2 July 2022).

139. Librando (n 133) 598-605.

3. Palestine maritime boundary delimitation

As outlined in the introduction, the post-October 7, 2023, Israeli assault on Gaza, the discovery of gas reserves in the Eastern Mediterranean, the ICJ Advisory Opinion rendering the Israeli occupation unlawful, and the UN General Assembly resolution calling for the end of occupation, it is critical for Palestine to define its maritime zone. Thus, this Section argues that Palestine's accession to the UNCLOS and its claims to maritime zones will change the Eastern Mediterranean Sea *status quo*.[140] We will explore the potential delimitation process for Palestine's overlapping boundaries with neighbouring States: Israel, Egypt and Cyprus. The discussion will then proceed to the implications of Palestine's unilateral claims to maritime zones under the Convention.

3.1 Unilateral delimitation of Palestinian maritime zones

A State possesses the competence to define its maritime zones in accordance with the UNCLOS parameters.[141] Palestine can, first and foremost, draw its baseline from the low-water line of the Gaza coast, from which all maritime zones are measured. In this respect, Article 5 of the UNCLOS provides that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State". Palestine may subsequently locate the zones where it is entitled to assert full sovereignty, namely over the internal waters and territorial sea, in addition to a contiguous zone and then the areas reserved for exercising sovereign

140. Ioannin N. Grigoriadis, 'The European Union in the Eastern Mediterranean in 2020: Whither Strategic Autonomy' (2021) Journal of Common Market Studies 1.

141. Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 32.

rights: EEZ and continental shelf.[142]

Six months after the entry into force of UNCLOS with regard to Palestine, on 31 August 2015, Palestinian President Mahmoud Abbas communicated a Declaration to the then UN Secretary-General Ban Ki-moon regarding Palestine maritime zones based on the Convention's modalities.[143] In the Declaration, Abbas proclaimed that Palestinian sovereignty extends 12 nautical miles offshore, measured from the baseline set as a "low-water line along the coast"[144] and that Palestine exercises sovereignty over the territorial sea, its bed and subsoil as well as the airspace above it. He similarly claimed a 24 nautical mile contiguous zone and a 200 nautical-mile combined EEZ and continental shelf. The Declaration indicated that when Gaza's maritime boundaries overlap with those of other States, delimitation "should be resolved on the basis of equity and the principles of international law".[145] Probably owing to its generic character that replicates UNCLOS, this Declaration received no reaction from neighbouring States.

As mentioned above, in September 2019, the Palestinian Minister of Foreign Affairs and Expatriates, Riad Maliki, took the significant step of depositing a second Declaration with the DOALOS.[146] This Declaration set out the baseline for the Gaza offshore maritime zones and the breadth of the seaward maritime zones using specific geographical points of coordinates based on the World Geodetic System 1984 (WGS 84), as a datum system. The WGS 84 incorporates all national datum systems into a global system.[147] Indeed, "[w]ith the introduction of the Navstar Global

142. Tanaka (n 128) 145.

143. Abbas Declaration (n 117).

144. Ibid.

145. Ibid.

146. Ministry of Foreign Affairs Declaration (n 120).

147. Kumar (n 122) 117.

Positioning Systems (GPS), any surveyor navigation undertaken using GPS receivers will give positions related to WGS 84".[148] The coordinates and maritime zones set out in the Declaration were technically designed by using the professional service of Maryland-based cartographic consulting firm,[149] 'International Mapping'.[150] The chart attached to the 2019 declaration is reproduced in *Figure 2* below.

The said Declaration encompasses six tables that list points of geographical coordinates along the globe's latitude and longitude.[151] It defined Palestine's baseline (Table 1), territorial sea (Table 2) and contiguous zone (Table 3). Table 4 merged the breadth of both the EEZ and continental shelf. While Table 5 drew the 'Southern Limits of Maritime Areas of the State of Palestine', namely the sea lateral boundary of Gaza with Egypt, Table 6 fixed the 'Northern Limits of Maritime Areas of the State of Palestine', that is, the lateral line of Gaza along the coastal frontier with Israel. Following this Declaration, Israel and Egypt took little time in lodging protests.

148. Neil R. Guy, 'The Relevance of Non-Legal Technical and Scientific Concepts in the Interpretation and Application of the Law of the Sea: An Analysis of the United Nations Convention on the Law of the Sea' (University of Cape Town 2000) 48-9.

149. Awadallah (n 123).

150. The homepage of this company is <<https://internationalmapping.com>>.

151. These tables, originally annexed to the declaration, did not appear in the Law of the Sea Bulletin No. 101 (n 120) in which the declaration was published. The tables are available on the website of DOALOS at <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PSE_Deposit_09-2019.pdf>>. However, the Ministry of Foreign Affairs Declaration (n 120) 46 stated that such tables 'constitute an integral part of this Declaration'.

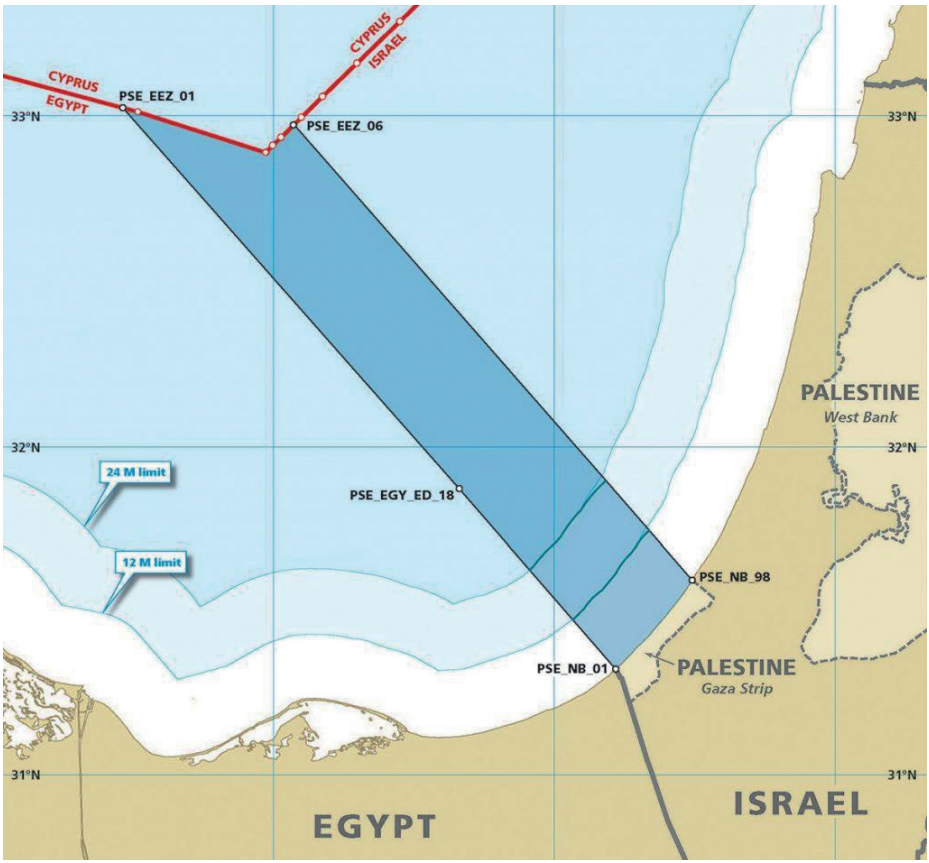

Figure 2: Chart on Palestine's Maritime Zones submitted by the Palestinian Ministry of Foreign Affairs to the United Nations Secretariat on 24 September 2019.

3.2 Palestinian boundaries with Israel

In reaction to Palestine's 2019 Declaration, on 14 January 2020, the Mission of Israel to the UN communicated to the office of the UN Secretary-General, through a note verbal, a memorandum to reject the Palestinian Declaration "on its purported maritime

boundaries".[152] Israel objected to the Declaration in its entirety without indicating particular concerns around any zone or point of geographical coordinates. Israel based its view on two grounds. One is that the Declaration contradicts the Oslo Accords' maritime stipulations that give the Palestinian Authority limited access to the sea, largely for fishing in an area up to 20 nautical miles offshore. Secondly, that Palestine lacks statehood as a prerequisite for maritime claims. The Israeli communication reads:

> It is a well-established and basic principle, both under customary international law of the law of the sea [sic] and relevant treaty law, that only sovereign states have the right to maritime zones, including territorial seas and exclusive economic zones, as well as the right to declare maritime boundaries. The Palestinian entity does not satisfy the established criteria for statehood under general international law and therefore lacks the legal entitlement to such maritime zones.[153]

This Israeli claim is ill-founded. Despite being a non-UN member State and its UN observer status, Palestine has been treated as a *de jure* State for the purposes of dozens of treaties and the UNCLOS is no exception.[154] If Palestine is not a State, how have all these treaties and their mechanisms dealt with it as such?[155] Why would the UNCLOS be different from other treaties? The logical answer is that the UNCLOS is just like any other treaty when it comes to Palestine's status as a contracting State. This has become more tangible with Palestine's participation in the

152. *Communication dated 14 January 2020 from the Permanent Mission of Israel to the United Nations addressed to the office of the Secretary-General of the United Nations*, *Law of the Sea Bulletin* No. 102 (2020) 25, hereinafter 'Israel Communication'.

153. Ibid.

154. Al-Zoughbi (n 100) 162.

155. Alice M. Panepinto, 'Jurisdiction as Sovereignty over Occupied Palestine: The Case of Khan-al-Ahmar' (2017) 26 Social & Legal Studies 311.

annual meetings of the Convention's State parties in New York since the twenty-fifth meeting (June 2015), in accordance with Article 319/2(e) of the Convention,[156] through the last meeting that took place in June 2024.[157]

As one can sense from the tone of its communication, Israel objects to any plans to explore resources within Palestinian maritime zones. Its communiqué firmly expressed the view that Israel "will not allow any non-consensual or unauthorised activities, including by third actors, in its maritime areas".[158] Using the phrase 'its maritime areas',[159] while responding to the Palestinian maritime proclamation, indicates that 'it' (Israel) either considers Palestinian zones as its own or, at best, that Israeli zones overlap with those of Palestine. However, it appears that Israel has no intention to discuss the "invalid and devoid […] alleged delimitation lines submitted in the Palestine declaration".[160] Nonetheless, Israel retains "its readiness to engage in good faith with relevant third parties".[161] It seems that the reference to 'third parties' pre-empts the leaked reports on Palestine's periodic negotiations with Turkey in regard to a bilateral pact on the EEZ.[162]

In practice, Israel deals with other States concerning maritime delimitation as if it has no boundary with Palestine. On 17 December 2010, for instance, Israel and Cyprus signed an agreement concerning the de-

156. UN Doc SPLOS/INF/29, 15 July 2015, 33.

157. UN Doc SPLOS/34/INF/1, 10 October 2024, 37.

158. Israel Communication (n 152).

159. Ibid.

160. Ibid.

161. Ibid.

162. S. Sadri Alibabalu and T. Sarkhanov, 'Geopolitics and Geoeconomics of the Eastern Mediterranean Gas Conflict: Analysis of Turkey's Policy' (2023) 18 Geopolitics Quarterly 94, 106.

limitation of their respective EEZs.[163] Article 1(e) of the Agreement referred to the possibility of reaching a complimentary agreement with Egypt. It provided that:

> [T]he geographical coordinates of points 1 or 12 [agreed upon by Cyprus and Israel] could be reviewed and/or modified as necessary in light of a future agreement regarding the delimitation of the Exclusive Economic Zone to be reached by the three States concerned.

This reference to 'three States concerned', meaning Cyprus and Egypt as well as Israel that share the same points of coordinates 1 to 12, was made as if Palestine does not exist. We will discuss certain means available for Palestine to challenge this Israeli position in Section 4 below.

3.3 Palestinian-Egyptian maritime boundaries

Unlike Israel, Egypt's objection to the September 2019 Palestinian Ministry of Foreign Affairs Declaration, through a communication deposited with the UN Secretariat on 31 December 2019, focused on specific points of geographical coordinates.[164] It seems that this opposition came after the unsuccessful attempts to reach an amicable understanding on the maritime delimitation, apparently through Palestine's coordination with the League of Arab States.[165] Thus, Egypt rejects Palestine's unilateral delimitation because the Palestinian "boundary overlaps with the east-

163. *Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the delimitation of the exclusive economic zone* (Nicosia, adopted 17 December 2010, entered into force 25 February 2011, 2740 UNTS 55.

164. *Communication from the Permanent Mission of Egypt to the United Nations transmitted to the Secretary-General on 31 December 2019*, Law of the Sea Bulletin No. 102 (2020) 22, hereinafter 'Egypt Communication'.

165. 'Palestine Officials Take Steps to Demarcate Maritime Borders', Middle East Monitor (8 October 2019).

ern maritime boundary of the Arab Republic of Egypt in the Mediterranean".[166] From the language of its reaction, one can adduce that Egypt recognises the Palestinian maritime zones as a matter of principle, but it objects to the boundary specified in the Declaration. This approach was expected, as Egypt, unlike Israel, is a State party to the UNCLOS, according to which parties are bound to solve maritime disagreements through peaceful dispute settlement. Currently, Palestine, for the sake of retaining close relations with Egypt on multiple fronts,[167] is reportedly not contemplating legal action against its neighbouring Arab State, preferring to negotiate overlapping zones.[168]

On 16 February 2017, in an apparent response to Palestine's accession to the UNCLOS and less than two years after President Abbas's Declaration regarding Palestine's maritime zones of August 2015 discussed above, Egypt issued a Declaration under Article 298 of the UNCLOS[169] stating that:

> The Government of the Arab Republic of Egypt declares that, pursuant to article 298 paragraph 1 of the United Nations Convention on the Law of the Sea signed on 10 December 1982, it does not accept any of the procedures provided for in section 2 of part XV of the Convention with respect to all the categories of disputes specified in article 298, paragraph 1 (a), (b) and (c) of the Convention.

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166. Egypt Communication (n 164).

167. Jeremy Sharp, 'The Egypt-Gaza Border and its Effect on Israeli-Egyptian Relations' (CRS Report for Congress, Order Code RL34346, 1 February 2008); Anais Antreasyan, 'Gas Finds in the Eastern Mediterranean: Gaza, Israel, and Other Conflicts' (2013) 42 Journal of Palestine Studies 29.

168. Mutaz M. Qafisheh, 'Law of the Sea Dispute Settlement in Eastern Mediterranean with Particular Reference to Palestine: Negotiation, Conciliation, Arbitration or Adjudication?' (2024) 6 Diplomatica: A Journal of Diplomacy and Society 201.

169. Egypt's Article 298 Declaration is available at <<https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/>>.

This demonstrates that Egypt will not accept adjudication or arbitration relating to its maritime boundary delimitation disputes with neighbouring States, including Palestine. The Egyptian declaration seems to be a pre-emptive measure in response to Palestine's 2019 Declaration concerning the Gaza Sea claims. Egypt's position will make it difficult for Palestine to launch proceedings to obtain a binding decision regarding maritime boundary delimitation with Egypt other than conciliation, should negotiations fail, as we will explain in Section 4 below.

3.4 Palestinian boundary delimitation with Cyprus

Cyprus, whose EEZ and continental shelf overlap with Palestine,[170] has not reacted to the 2019 Ministry of Foreign Affairs Declaration. However, in its communication objecting to the Declaration, Egypt referred to its EEZ agreement with Cyprus that potentially overlaps with Gaza:

> Part [of] the northern boundary of that [exclusive economic] zone, bordering Cyprus, was defined in the agreement on the delimitation of the exclusive economic zone concluded between Egypt and Cyprus on 17 February 2003, which entered into force on 7 March 2004.[171]

Be that as it may, Palestine's overlapping EEZ and continental shelf with Cyprus are not expected to generate major disagreement, as both are State parties to the UNCLOS. But Palestine may resort to arbitration with Egypt indirectly through its objections to the aforesaid 2003 Cyprus-Egypt delimitation agreement to the extent that it affects Gaza's maritime zones.[172] Cyprus' EEZ as delimited by this agreement, as ev-

170. Kittichaisaree (n 119) 36, 196.

171. Egypt Communication (n 164).

172. *Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone* (Cairo, 17 February 2003, entered into force 7 March 2004), *Law of the Sea Bulletin* No. 52 (2003) 45.

ident from the chart annexed thereto,[173] overlaps with Gaza's maritime claims. Article 1(e) of the Agreement recognised this fact by stipulating that:

> [G]eographical coordinates of points 1 and 8 [of the chart annexed to the agreement] could be reviewed and/or extended as necessary in the light of future delimitation of the exclusive economic zone with other concerned neighbouring States and in accordance with an agreement to be reached in this matter by the neighbouring States concerned.

As neither Cyprus nor Palestine have deposited declarations under Article 298 of the UNCLOS, arbitration will be the residual mechanism for resolving any dispute between the two States, as we will discuss in some detail in Section 4 below.

3.5 Fixing maritime zones of Palestine

The 2019 Ministry of Foreign Affairs Declaration started by defining the State of Palestine's offshore baseline.[174] Baselines constitute the basic limit from which the breadth of other maritime zones is measured.[175] Table 1 of the Declaration specified the Gaza baseline by listing 98 points of geographical coordinates along the globe's latitude and longitude. The adoption of the 'normal baseline', which is shown in an illustrative chart annexed to the Declaration, is a direct application of Article 5 UNCLOS. In the *South China Sea Arbitration*, the tribunal held that the "Convention gives important weight to published nautical charts... [in] a situation in which a State is presenting information concerning its

173. Ministry of Foreign Affairs Declaration (n 120) 47.

174. Ibid., 46.

175. Coalter Lathrop, 'Baselines' in Donald Rothwell et al. (eds) *The Oxford Handbook of the Law of the Sea* (OUP 2015) 69.

own coastlines".[176] Hence, as a coastal State, Palestine has exercised its normal right under UNCLOS. Egypt did not object to the geographical coordinates of the Palestinian baseline as set out in the Declaration, indicating consent.

The Palestinian Ministry of Foreign Affairs Declaration extended the Gaza territorial sea from 68 geographical points to 12 nautical miles seaward as measured from the baseline, claiming full sovereignty therein.[177] Palestine has acted unilaterally in delimiting its territorial sea, as there are no agreements in place with neighbouring States, which is a normal state of affairs that States often revert to. In this respect, it has been pointed out that "[i]n the absence of any delimitation treaty, some States have acted to unilaterally delimit the boundary of their territorial seas".[178]

The process of Palestinian designation accords with Article 16(1) UNCLOS, which stipulates that "baselines for measuring the breadth of the territorial sea... shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical coordinates of points, specifying the geodetic datum, may be substituted."

Indeed, any "coastal State may create and publish its own charts".[179] Article 16(2) adds that the "coastal State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations".[180] To this effect, Palestine transmitted the Declaration on maritime bound-

176. PCA Case No. 2013-19, *The South China Sea Arbitration* (Philippines *v* China), Award of 12 July 2016, 142.

177. Ministry of Foreign Affairs Declaration (n 120) 46.

178. Symmons (n 102) 165.

179. Nandan et al. (n 129) 148.

180. Clive Symmons and Michael Reed, 'Baseline Publicity and Charting Requirements: An Overlooked Issue in the UN Convention on the Law of the Sea' (2010) 41 Ocean Development & International Law 77.

ary delimitation, its annexed tables of geographical coordinates and an illustrative chart to the UN Secretariat, which subsequently posted the document on its website,[181] and published the text of the Declaration in the *Law of the Sea Bulletin*.[182] The purpose of such publicity is "to ensure that the international community is adequately informed of the boundaries of the territorial sea of a coastal State, including the baselines, the outer limit lines and lines of delimitation".[183] Palestine specified the 'datum'[184] upon which the chart annexed to the declaration and the list of points of coordinates were drawn, namely the WGS84. On this point, it has been observed:

> Whereas charts give a visual representation of the limits of the territorial sea, a list of geographical coordinators provides greater precision [emphasis added]... While article 16 [of UNCLOS] provides that either way of giving the limits is acceptable, in fact it may be most beneficial to use both a chart for illustrative purposes and a list of coordinates for definitive positions.[185]

By releasing both lists of coordinates and a chart annexed to its Declaration, Palestine has provided 'greater precision' with regard to its maritime zones.

The UNCLOS rule regarding delimitation of the territorial sea is also accepted under customary international law. With regard to the issue of delimitation between Palestine and Israel and Palestine and Egypt, the content of Article 15 governs all States, including non-State parties

181. DOALOS (n 152).

182. Law of the Sea Bulletin No. 89 (n 117).

183. Nandan et al. (n 129) 145.

184. Ibid., 148.

185. Clive Symmons, 'Article 16: Charts and Lists of Geographical Coordinates' in Proelss (n 102) 167.

owing to its status as part of customary international law.[186] Article 15 provides:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line, every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured…

There is no State opposite Palestine that may claim an overlapping territorial sea. Article 15 thus pertains only to the territorial sea boundaries with adjacent States;[187] namely between Palestine, on one side, and both Israel and Egypt, on the other sides.

Notwithstanding its recognition of the Palestinian territorial sea as a matter of principle, Egypt filed reservations partially targeting nine of the 68 basepoints in respect of the claimed Gaza territorial sea.[188] By implication, it may be inferred that Egypt consents to the other coordinates determined by the Ministry of Foreign Affairs Declaration, namely basepoints 10 to 68. That may in principle satisfy the meaning of 'agreement' under Article 15 UNCLOS.[189] The divergent positions on the nine remaining basepoints can be resolved by, for example, a formal delimitation agreement. The Palestinian unilateral delimitation of its territorial sea is intended to "protect the sovereignty of the coastal State".[190] This act is not, however, without limitations. As the ICJ has remarked:

186. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar *v* Bahrain), Merits, Judgment of 16 March 2001, ICJ Rep (2001) 40, 93-4.

187. Symmons (n 102) 151 and 157.

188. Egypt Communication (n 164).

189. *Cf Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangladesh *v* Myanmar), Judgment of 14 March 2012, ITLOS Reports (2012) 4, 24.

190. Nandan et al (n 129) 74, 145.

> The delimitation of sea areas... cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of delimitation with regard to other States depends upon international law.[191]

Evidently, Palestine was aware of this aspect when it formulated its declaration. In this connection, the declaration announced that:

> [I]n cases where the maritime zones of the State of Palestine overlap with those of other States, maritime delimitation shall take place on the basis of equity and the principles of international law... If an agreement cannot be reached, then recourse may be had to a competent international court or body for a final decision.[192]

This approach reflects a policy embraced by most States that have issued unilateral claims.[193]

The Declaration – in its Table 3 – defined the Gaza contiguous zone as 24 nautical miles measured from the baseline through 50 geographical points of coordinates.[194] It follows that Palestine "has the right to establish appropriate mechanisms to prevent and penalize violations of international law and national Palestinian law and regulations within this zone".[195] This clause echoes the wording of Article 33(1)(a) UNCLOS that vests the coastal State with a power to undertake control to "prevent infringement of its customs, fiscal, immigration or sanitary laws and reg-

191. *Fisheries (United Kingdom v Norway)*, ICJ Rep (1951) 116, 132.

192. Ministry of Foreign Affairs Declaration (n 120) 47.

193. *Continental Shelf* (Tunisia *v* Libyan Arab Jamahiriya), ICJ Rep (1982) 18, 66-7; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v* United States of America), ICJ Rep (1984) 246, 292, 299; *Bay of Bengal* (n 191) 106, 165.

194. Ministry of Foreign Affairs Declaration (n 120) 46.

195. Ibid.

ulations within its territory or territorial sea".[196] While Egypt rejected points 1-10 listed in the Declaration with respect to the territorial sea,[197] as explained above, it may be inferred that Egypt consents to a substantial area claimed by Palestine as the Gaza contiguous zone.

The Declaration extended the EEZ through six geographical points of coordinates listed in its Table 4, "beyond and adjacent to the territorial sea, up to 200 nautical miles measured from the baseline".[198] These phrases reflect the substance of Articles 55 and 57 UNCLOS. In the EEZ, Palestine asserts that it exercises

> [S]overeign rights in relevance to exploring and exploiting natural resources... of the waters superjacent to the seabed and of the seabed and its subsoil, as well as with regard other activities for the purpose of the economic exploration and exploitation of the zone.[199]

This quotation reflects the text of Article 56(1)(a) UNCLOS. However, it is evident that Palestine, in common approach with the majority of coastal States, expects to have to delimit its EEZ to address overlapping areas with its neighbouring States.

For this reason, the Declaration adds that "Palestine shall have due regard to the rights and duties of other states... and shall act in accordance with the provisions of the United Nations Convention on the Law of the Sea".[200] This sentence slightly reframes Article 56(2) UNCLOS. By mentioning 'other states', the declaration hints at Israel, Egypt and Cyprus. In its communication in response to the Palestinian Declaration, Egypt

196. *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines *v* Guinea), Judgment of 1 July 1999, ITLOS Rep (1999) I0, 57-61.

197. Egypt Communication (n 164).

198. Ministry of Foreign Affairs Declaration (n 120) 46.

199. Ibid.

200. Ibid.

refused to recognise basepoints 1-3 (out of six) of the claimed EEZ listed in Table 4 of the Declaration.[201] In anticipation of overlapping claims among neighbouring States, Article 74(1) UNCLOS requires that the "delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law… to achieve an equitable solution". Article 74, which is reflected in customary international law,[202] asserts that in the absence of agreement, the "parties concerned shall resort to the procedures provided for in Part XV" of the Convention.

Table 4 of the Declaration merges both the EEZ and the continental shelf, listing six identical points of geographical coordinates for both areas. As both the continental shelf and the EEZ are part of customary international law,[203] their provisions apply to all States, even non-UNCLOS parties such as Israel. In its Declaration, Palestine asserted that its continental shelf "includes the seabed and subsoil of the submarine areas up to 200 nautical miles measured from the baseline".[204]

It is likely that Palestine has no intention to claim an extended continental shelf beyond 200 nautical miles, as provided for in Article 76(4-7) UNCLOS. That is due to the fact that "in the Mediterranean... there is no point in which two coasts are more than 400 nautical miles... apart".[205] In this respect, Palestine is no different from other Mediterranean States. Indeed:

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201. Egypt Communication (n 164).

202. *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark *v* Norway), ICJ Reports (1993) 38, 59.

203. *Territorial and Maritime Dispute* (Nicaragua *v* Colombia), ICJ Rep (2012) 624, 666; *Continental Shelf* (Libya *v* Malta), ICJ Rep (1985) 3, 33.

204. Ministry of Foreign Affairs Declaration (n 120) 47.

205. Umberto Leanza, 'The Delimitation of the Continental Shelf of the Mediterranean Sea' (1993) 8 International Journal of Marine and Coastal Law 373, 375.

> Almost all legislation passed by the Mediterranean coastal states on the exploration and exploitation of mineral resources... in the continental shelf contains a declaration of intent to reach a consensual delimitation of the continental shelf with interested neighbouring states.[206]

In relation to the continental shelf, the Palestinian Declaration satisfies the requirements of Article 76(9) UNCLOS which stipulates that "[t]he coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf". Unlike for the EEZ, the text of the Declaration does not refer to disputes with other States that have overlapping continental shelf boundaries with Palestine. This is apparently due to the identical method applied to both areas.

Mixing points of geographical coordinates of the continental shelf with those of EEZ in an annexed table of the Declaration indicates a likely significant overlap between the two zones. Such overlap is not without precedent, as "there is a clear trend that States draw a single maritime boundary for the continental shelf and the EEZ".[207] It has been observed that "the relationship between the EEZ and the continental shelf has presented international lawyers with the knotty problem of how these zones of maritime jurisdiction are to be reconciled with each other."[208]

Egypt has refused to recognise points 1-3 (again, out of six) of the geographical coordinates of the claimed Palestinian continental shelf in the same paragraph in which it objected to the purported EEZ listed in Table 4.[209] Consequently, Article 83(1) UNCLOS requires that the "delimitation of the continental shelf between States with opposite or

206. Ibid.

207. Tanaka (n 128) 238.

208. Stuart Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice' (1998) 19 Australian Yearbook of International Law 49, 49.

209. Egypt Communication (n 164).

adjacent coasts shall be effected by agreement… to achieve an equitable solution".

As to the northern maritime borderlines of Gaza with Israel and the southern boundary with Egypt, the Declaration lists points of geographical coordinates that fix boundaries in Table 5 with Egypt and Table 6 with Israel. These boundaries reflect the content of Article 15 UNCLOS on the delimitation of territorial sea, Article 33 on the contiguous zone, Article 74 on the EEZ, and Article 83 on the continental shelf.[210] As discussed above, these provisions represent customary international law that binds State parties and non-parties to UNCLOS alike.[211]

Table 5 in the Declaration draws a straight line that begins at the land border point separating Israel from northern Gaza based on the 1951 armistice agreement through 109 nautical miles towards the sea until it reaches the EEZ of Cyprus. Table 6, similarly, produces a parallel line that commences at the land point separating Egypt from Rafah city in the southern Gaza based on the 1906 agreements between Egypt/Britain and the Ottomans, explained above, and continues 136 nautical miles unto the sea until the border with Cyprus.[212] Both lines are illustrated by a chart annexed to the Declaration (*Figure 1* above).[213] Egypt has rejected three out of five points indicated on its seaside-line with Gaza listed in the Declaration,[214] while Israel rejected the Declaration *in toto*; that rejection includes the Gaza sea line adjacent to all southern Israeli maritime zones.

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210. Shunji Yanai, 'International Law Concerning Maritime Boundary Delimitations' in Attard et al. (n 92), vol I, 304, 313-16.

211. Tanaka (n 128) 238.

212. The measurement of the two parallel polygon lines between Gaza on one side and both Israel and Egypt were made by using Google Maps GPS coordinates.

213. Ministry of Foreign Affairs Declaration (n 120) 48.

214. Egypt Communication (n 164).

4. Law of the sea dispute settlement with Palestine's neighbouring States

As outlined in the previous Sections, it is promising and challenging for Palestine to delimit its maritime boundaries, access its rights and discharge its obligation as per the applicable international law frameworks, including UNCLOS. Thus, it is crucial to test the UNCLOS dispute settlement mechanisms in relation to East Mediterranean overlapping maritime zones. This Section focuses on this aspect of dispute settlement with a particular reference to the delimitation of Palestine's maritime boundaries and the possible methods of dispute settlement, including negotiation, conciliation, arbitration and adjudication. The Section discusses the available dispute settlement channels between Palestine and neighbouring States: Egypt, Israel and Cyprus.

4.1 UNCLOS dispute settlement modalities: Application to Palestine

UNCLOS sets out a comprehensive scheme for dispute settlement among States regarding the interpretation or application of the Convention.[215]

215. Marianne P. Gaertner, 'The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea' (1982) 19 San Diego Law Review 577; Andronico O. Adede, *The System of Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Brill 1987); Adam Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problem of Fragmentation and Jurisdiction' (1997) 46 International and Comparative Law Quarterly 37; Thomas Mensah, 'The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea' (1998) 2 Max Planck Yearbook United Nations Law 307; Rosemary Rayfuse, 'The Future of Compulsory Dispute Settlement under the Law of the Sea Convention' (2005) 36 Victoria University Wellington Law Review 683; Natalie Klein, *The Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005); Igor V. Kataman, *Dispute Resolution in the Law of the Sea* (Nijhoff 2012); Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48 Ocean Development & International Law 216.

UNCLOS directs parties to solve conflicts by any peaceful means of their own choice.[216] The Convention offers a roster of peaceful channels listed in Article 33 of the UN Charter:[217] "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".[218] Anticipating this framework may not succeed in relation to the law of the sea disputes, and in an attempt to adopt binding mechanisms and reduce protracted standoffs, the UNCLOS advanced a range of specific compulsory settlement processes. It starts from the 'obligation to exchange views',[219] into two types of conciliation (voluntarily and compulsory),[220] through instituting proceedings before courts or tribunals:[221] ITLOS,[222] ICJ, general arbitration,[223] or special arbitration for certain types of technical themes enumerated in the Convention.[224]

Since its accession to the UNCLOS in 2015, Palestine currently holds contractual relations with 169 States regarding the law of the sea.[225] UNCLOS dispute settlement mechanisms may vary depending on the means each State has opted for explicitly or by implication. In order to pick a preferred mechanism for solving inter-State conflicts, a party should deposit a written declaration with the UN Secretary-General.[226]

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216. Articles 280 and 281.

217. San Francesco, 26 June 1944, entry into force 24 October 1945.

218. UNCLOS, Article 279.

219. Ibid., Article 283.

220. Ibid., Articles 284 and 298(1) and Annex V.

221. Ibid., Article 287.

222. Ibid., annex VI.

223. Ibid., annex VII.

224. Ibid., annex VIII.

225. As of April 2025, there are 170 States Parties to UNCLOS, according to the UN Treaty Collection.

226. UNCLOS, Article 287(8).

Thus far, according to DOALOS, Palestine did not deposit any declaration regarding the choice of procedure for settling disputes upon its accession to UNCLOS. Palestine is thus "deemed to have accepted arbitration" by default concerning disputes with all State parties.[227] Palestine, like any other State Party, can still deposit a declaration to activate other procedures available under UNCLOS, as the declaration can be communicated upon acceding to the Convention "or at any time thereafter".[228] Consequently, the only available process for compulsory dispute settlement for Palestine at this time is arbitration *vis-à-vis* all State parties with regard to all types of disputes.

However, Palestine's neighbouring States have different approaches. While Egypt declared that it does not accept arbitration regarding boundary delimitation with other State parties, Israel is not a party to UNCLOS and thus does not recognise any of its dispute settlement mechanisms. Against this backdrop, how can disputes be resolved? Would conciliation work? What are other available pacific mechanisms? This Section attempts to answer these questions.

4.2 Palestinian-Israeli maritime dispute settlement

As indicated above, on 14 January 2020, the Permanent Mission of Israel to the UN communicated to the Secretary-General a memorandum to reject the 4th of September 2019 Palestinian Declaration on 'purported maritime boundaries'.[229] Israel objected Declaration in its entirety without indicating particular contention pertinent to any zone or point of geographical coordinate. Israel attributed its position to the assertion

227. Ibid., Article 287(3).

228. Ibid., Article 287(1).

229. Israel Communication (n 152) 25.

that the Declaration contradicts the Oslo Accords and the claim that Palestine lacks sovereignty over Gaza.[230]

As outlined in the previous Section, this claim is manifestly ill-founded. Despite being a non-UN Member State and its observer status, Palestine has been recognised and treated as a *de jure* State concerning dozens of treaties, and UNCLOS is no exception. As one can sense from the tone of its objection and what was discussed above in Section 3.2, Israel took an offensive position towards any plans to explore Palestinian maritime zones.

The foregoing shows that the conflict resolution between Palestine, as a UNCLOS State Party, with Israel, as a non-State Party,[231] will be more complex than that with other neighbouring States. The Israeli-Palestinian relations on the Gaza Sea have reached a deadlock over three decades. Even minor agreements relating to the use of the sea, such as operating a port, fishing, sailing of ships, receiving foreign vessels and marine imports or exports, were heavily restricted if at all permitted. These limitations carry serious human rights implications for the Palestinian population. One can predict that it would be even more difficult for Palestine to exercise sovereign powers over the sea, particularly the delimitation of maritime boundaries with Israel.

Yet the law pertinent to the Gaza Sea is clear-cut. Gaza, its land and sea, forms a part of Palestine. Under UNCLOS, Palestine possesses all sovereign prerogatives, including title over, and exploration of, Gaza gas fields, on the same footing as any other State party. Palestine can claim and delimit the maritime zones off Gaza, and it did so pursuant to its accession to UNCLOS as we discussed above. Palestine can, in law, grant

230. Elai Rettig, Shani Friedman and Benny Spanier, 'Postwar development of offshore energy resources: Legal and political models for developing the Gaza Marine gas field' (2024) Leiden Journal of International Law 1-16, DOI: 10.1017/S0922156524000359.

231. Yael Teff-Seker, Ehud Eiran and Aviad Rubin, 'Israel Turns to the Sea' (2018) 72 Middle East Journal 610.

contracts to any State or company to explore Gaza gas fields. Preventing Palestine from exercising its sovereign maritime rights and exploiting its resources is due to the State of Israel's unlawful acts that violate international law, seemingly with impunity. This wrongfulness, in turn, triggers State responsibility of Israel towards Palestine as an injured State, with its attendant legal consequences. Accordingly, the State of Israel must cease its wrongful acts by lifting the Gaza blockade, removing the unlawful restrictions on Palestine's usage of its maritime zones and its access and use of its natural resources, and compensating Palestine for the losses sustained from denying the exploration of its natural gas.[232]

Consequently, it is crucial to explore instruments within the law of the sea that may open avenues for Palestine to claim and exercise maritime rights indirectly through, for example, the conflict relation mechanisms with Egypt and Cyprus, as we will explore next.

4.3 Palestinian-Egyptian maritime dispute settlement

As discussed above, three months after the September 2019 unilateral declaration of Palestine's maritime zones, Egypt communicated with the UN Secretariat an opposition to a number of geographical coordinates fixed in the Ministry of Foreign Affairs Declaration.[233] It appears that the Egyptian stance came after the unsuccessful attempts to reach an amicable understanding on the maritime delimitation with Palestine. Egypt refused the Palestinian unilateral delimitation.[234]

As State parties to UNCLOS, Palestine and Egypt may resort to the Convention's dispute settlement mechanisms entailing binding decisions after exhausting diplomatic and bilateral arrangements. For a State to re-

232. Qafisheh et al. (n 7).

233. Egypt Communication (n 164).

234. Ibid.

vert to one of the UNCLOS dispute settlement platforms (ITLOS, ICJ, arbitration or special arbitration), the two disputing parties should have chosen an identical procedure under Article 287(1) UNCLOS. In case of a different procedure chosen by parties or if one party does not identify a preferred mechanism, arbitration remains the residual choice based on Article 287(4) and (5). While Egypt opted for arbitration, Palestine did not indicate a preference. Hence, arbitration between the two sides ends up being the default channel to settle disputes.

Nonetheless, concerning disputes involving boundary delimitation (and a few other disputes), Article 298 UNCLOS empowers States to cast a declaration to oppose the Convention's compulsory dispute resolution avenues. To this effect, as discussed above, in February 2017, in a presumable response to Palestine's accession to UNCLOS and less than two years after the 2015 Palestinian President declared maritime zones, Egypt filed an objection to adjudication in resolving, among other disputes, maritime delimitation disputes under UNCLOS.[235] This indicates that Egypt does not accept adjudication or arbitration relating to its maritime boundary delimitation with its neighbouring States, including Palestine. The Egyptian objection seems to be a pre-emptive move to Palestine's 2019 Declaration. Such a position would make it difficult for Palestine to launch judicial proceedings entailing a binding decision with regard to maritime boundary delimitation with Egypt other than conciliation. But what if conciliation fails? Are we facing a deadlock that keeps the boundary unfixed indefinably? Is there an exit channel in such a hypothesis? Can Palestine still approach an arbitral tribunal? To answer these questions, we start with conciliation before heading towards the debate on potential arbitration.

In its aforementioned declaration of February 2017, Egypt announced that "it does not accept any of the procedures provided for in

235. According to the UN Treaty Collection website (under Egypt), <<https://treaties.un.org>>.

Section 2 of part XV of the Convention with respect to all the categories of disputes specified in Article 298, paragraph 1 (a), (b) and (c) of the Convention".[236] This means that Egypt does not accept arbitration over boundary delimitation with Gaza. Egypt rejected Palestine's unilateral declaration of September 2019 regarding its geographical points of coordinates pertinent to the lines defining contiguous zone, EEZ and continental shelf. Thus, the residual dispute settlement mechanism would be the 'compulsory' conciliation.[237]

As a general rule, should a conflict arise between Palestine and Egypt in connection to boundary delimitation, the two States need to undergo four stages within the conciliation process. These stages can be identified for such a particular and unique scenario,[238] by reviewing the various provisions of UNCLOS along with relevant aspects of its drafting history and examination of a number of the Convention's commentaries. These stages can be enumerated as follows: (1) exchange of views, (2) voluntary conciliation, (3) delimitation conciliation in lieu of arbitration, and (4) negotiation to reach an agreement on boundary delimitation. The two neighbours have the potential to settle disputes through, or after, each stage. We here take the case to the end, presuming that the two parties fail to reach a mutual consent upon the conclusion of each of the four stages.

To start with, if a dispute concerning boundary delimitation arises, Article 283 UNCLOS comes into play. Here the "parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".[239] This exchange of views, or 'con-

236. Ibid.

237. Roberto Lavalle, 'Conciliation under the United Nations Convention on the Law of the Sea: A Critical Overview' (1997) 2 Austrian Review of International & European Law 25; Sienho Yee, 'Conciliation and the 1982 UN Convention on the Law of the Sea' (2013) 44 Ocean Development & International Law 315.

238. Philippe Gautier, 'The Settlement of Disputes' in Attard et al. (n 92) 533-76, 552.

239. UNCLOS, Article 283(1).

sultation',[240] is "mandatory [and] is not restricted to negotiations but also includes... some other means, such as good offices, mediation, fact finding...".[241] Indeed, 'the compulsory procedures', in this case the compulsory conciliation regarding boundary delimitation as an alternative to adjudication/arbitration, "would be invoked only where the exchange of views disclosed that no other course could appropriately settle the dispute".[242]

The exchange of views,[243] as a prerequisite act preceding conciliation, can be considered fulfilled if Palestine, as an applicant State in this scenario, concludes that there is no point in prolonged negotiation, taking into account the dispute history and the various diplomatic attempts to solve it.[244] This is also the case when Palestine finds that "this exchange could not yield a positive result".[245] It would always be useful for an applicant State for compulsory conciliation to make the 'exchange of views' as explicit as possible to avoid the invocation of such a procedure and therefore declare the lack of jurisdiction by the conciliation commission or a court or tribunal.[246]

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240. Andrew Serdy, 'Article 283: Obligation to Exchange Views' in Proelss (n 102) 1830-8, 1832.

241. Myron H. Nordquist, Shabtai Rosenne and Louis Sohn, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nijhoff 1989) vol V, 29.

242. Serdy, 'Article 283' (n 240) 1832.

243. Mariano J. Aznar, 'The Obligation to Exchange Views before the International Tribunal for the Law of the Sea: A Critical Appraisal' (2014) 47 Belgium Review of International Law 237; Deyi Ma, 'Obligation to Exchange Views under Article 283 of the United Nations Convention on the Law of the Sea: An Empirical Approach for Improvement' (2019) 12 Journal of East Asia & International Law 305.

244. *Southern Bluefin Tuna Cases* (New Zealand *v* Japan; Australia *v* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Rep (1999) 280, 295.

245. *Land Reclamation in and around the Straits of Johor* (Malaysia *v* Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Rep (2003) 10, 20.

246. *The M/V 'Louisa' Case* (Saint Vincent and the Grenadines *v* Kingdom of Spain), Provisional Measures, Order of 23 October 2010, Dissenting Opinion of Judge Wolfrum, ITLOS Rep (2010) 77, 85; *The M/V 'Louisa' Case* (Saint Vincent and the Grenadines *v* Kingdom of Spain), Judgment of 28 May 2013, Separate Opinion of Judge Ndiaye, ITLOS Rep (2013) 57, 62.

After the exchange of views procedure comes to an end, Palestine may resort to 'voluntary conciliation'[247] regulated in Article 284 and Section 1 of Annex V UNCLOS. Although general conciliation may occur anytime, "[t]he placement of this article [284] immediately after Art. 283 which requires a preliminary exchange of views may... suggest that this exchange is the most likely juncture for one of the parties to issue the invitation [for voluntary consultation]".[248] This mechanism aims to submit the dispute to a conciliation commission that may contribute to the delimitation of boundaries by mutual consent between the parties. Such conciliation "implies the use of a more institutionalized procedure than the political or diplomatic processes of good offices or mediation".[249] If one State invites the other for this type of conciliation proceedings, "by written notification addressed to the other party",[250] the latter may accept or refuse to conciliate.[251] If it accepts, both parties may concur on the conciliation procedures.[252]

Annex V UNCLOS sets out the steps for the constitution of a five-member conciliation commission. After getting the parties' views and examining their claims and objections, the commission proposes an amicable settlement to the parties.[253] The commission would submit its non-binding findings, i.e. recommendations, on resolving the dispute through a report that it communicates to the parties through the UN Secretary-General.[254] If, however, one of the parties turns down the invi-

247. Nordquist et al. (n 241) 33.

248. Andrew Serdy, 'Article 284: Conciliation' in Proelss (n 102) 1838-1841, 1839.

249. Nordquist et al. (n 241) 310.

250. UNCLOS, annex V, Article 1.

251. Ibid., Article 282, paras 2 and 3.

252. Ibid., annex V, Article 4.

253. Ibid., annex V, Article 6.

254. Ibid., annex V, Article 7(2).

tation to voluntary conciliation, no commission would be constituted.[255] Even after the release of the commission's report, either party can accept or reject the report's findings.[256] The commission's report, if accepted by the parties, may end the dispute.[257] The report may incorporate "recommendations as the commission may deem appropriate for an amicable settlement",[258] which "could be acceptable to all parties".[259] Although the parties have the choice to reject the findings of the conciliation commission, such rejection "may incur a political cost".[260]

Compulsory conciliation involves the intervention of a conciliation commission, despite the objection of the other State. The latter cannot challenge the conciliation's formation, although it has a choice to refuse the implementation of the commission findings. However, is it possible to recourse to the two types of conciliation? In this connection, it was observed that nothing precludes such a course, "particularly if the preliminary conciliation has failed to settle the dispute and there is the possibility that a second similar procedure could be successful".[261]

The scenario of compulsory conciliation between Palestine and Egypt stems from Article 298(1)(a)(i) UNCLOS, which permits States to deposit declarations providing exceptions from the jurisdiction of courts or tribunals entailing binding decisions. Hence, State parties to "disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations..., at the request of any party to the dispute, [shall] accept submission of the matter to conciliation". Pal-

255. Ibid., Article 284(3).

256. Annex V, Article 8.

257. Nordquist et al. (n 241) 310.

258. UNCLOS, annex V, Article 7(1).

259. Nordquist et al. (n 241) 310.

260. Serdy, 'Article 284' (n 248) 1841.

261. Nordquist et al. (n 241) 313.

estine may, therefore, institute conciliation proceedings "by written notification",[262] addressed to Egypt. Egypt "shall be obliged to submit to such proceedings".[263] Accordingly, a five-member conciliation commission would be formed.[264]

Palestine, as the party instituting proceedings, can appoint two conciliators, one of whom may be a Palestinian citizen,[265] to be chosen preferably from the list "maintained by the Secretary-General of the United Nations".[266] Egypt can similarly appoint two conciliators within 21 days of receipt of the Palestinian notification. If the appointments are not made within that period, Palestine may, within one week following the period of expiration, "request the Secretary-General of the United Nations to make the appointments".[267] Within 30 days after all four conciliators have been appointed, they shall appoint a fifth conciliator who shall be chairman. If the appointment is not made within that timeframe, "either party may, within one week of the expiration of that period, request the Secretary-General of the United Nations to make the appointment".[268] After hearing the parties, the commission makes "proposals to the parties with a view to reaching an amicable settlement".[269] Henceforth, the "Commission shall report within 12 months of its constitution".[270]

When the conciliation commission presents its report and one of the parties rejects its findings, the situation shifts to stage 4, viz., negotiation to reach an agreement. At this stage, summed up in Article 298(1)(a)(ii),

262. UNCLOS, annex V, Article 11(1).

263. Ibid., annex V, Article 11(2).

264. Ibid., annex V, Article 3(a).

265. Ibid., annex V, Article 3(b).

266. Ibid., annex V, Article 2 and Article 3(b).

267. Ibid., annex V, Article 3(c).

268. Ibid., annex V, Article 3(d).

269. Ibid., annex V, Article 6.

270. Ibid., annex V, Article 7(1).

Palestine and Egypt "shall negotiate an agreement on the basis of that report". If negotiation does not lead to an agreement, "the parties shall, by mutual consent", submit the question to a court or tribunal whose findings entail a binding decision.[271] However, what if the parties fail to reach 'mutual consent'? In this respect, it was correctly observed: "[T]he provision in subparagraph (a)(ii) [of Article 298] is not perfectly clear since it obliges States to submit the dispute to a compulsory procedure entailing binding decisions while at the same time providing that this should take place 'by mutual consent'."[272]

This ambiguous provision has triggered scholars to express diverse interpretations on the next step following the rejection of compulsory conciliation. In this hypothesis between Palestine and Egypt, the case may move to a fifth stage which would involve the composition of an arbitral tribunal. We will explore this scenario in accordance with the available doctrinal views.

Some early scholarly writings, such as the 1989 UNCLOS commentary by Nordquist, Rosenne and Sohn, were of the view that after the conclusion of compulsory conciliation and the refusal to implement the findings of the conciliation commission, the case would face a standstill, leaving the maritime boundary dispute to last indefinably. Here "the only obligation that remains is... to proceed expeditiously to an exchange of views regarding the settlement of the dispute by further negotiations".[273] Writing in 1982, Adede also cast some doubt that "the system established under the above paragraph [(1)(a) of Article 298] non-compulsory".[274] Lastly, Klein, in her monograph on the law of the sea dispute settlement

271. Ibid., Article 298(1)(a)(ii).

272. Gautier (n 238) 134.

273. Nordquist et al. (n 241) 134.

274. Andronico O. Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention' (1982) 11 Ocean Development & International Law 125, 139.

system and after reviewing a range of scholarly views,[275] captured the classical position on this debate and concluded that the "end result is that if States cannot reach agreement and one State has opted to exclude compulsory jurisdiction, there is no mandatory mechanism for decision and the dispute can be left unresolved".[276]

A more careful analysis, however, leads in a different direction. Gautier, in his chapter edited in 2014 by Attard, Fitzmaurice and Gutierrez, pointed out:

> If there is no consent between the parties, for example because one of the parties is reluctant to submit the dispute to a judicial body, it could be argued that this would constitute a new dispute, not relating to the delimitation of maritime boundaries, which could then be subject to the compulsory mechanism contained in section 2 of Part XV.

In the 2017 commentary on the UNCLOS edited by Proelss, Serdy elegantly underscored:

> [T]here would seem to remain scope for an argument, based on the warnings sounded by some States in the negotiations of the dangers of letting maritime boundary disputes persist indefinitely, that the effect of a declaration under Art. 298 (1)(a) is merely to interpose a compulsory conciliation before the more normal course of events under section 2 of Part XV can proceed.[277]

Five reasons can be advanced to reinforce the position that there should be adjudication or arbitration entailing a binding decision following the conclusion of compulsory conciliation.

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275. Klein (n 215) 227-315.

276. Ibid., 263.

277. Andrew Serdy, 'Article 298: Optional Exceptions to Applicability of Section 2' in Proelss (n 102) 1930.

One emanates from the obligation of the parties to a dispute to reach an agreement by mutual consent and will miss its binding value if the dispute cannot be referred to a mandatory adjudication.[278] Secondly, the purpose of UNCLOS is to settle maritime disputes through a peaceful means to end inter-State conflicts.[279] Leaving delimitation issues unresolved indefinably would run counter to that purpose and render the Convention largely superfluous, as there are "more judgments and awards on maritime boundary disputes than on any other subject of international law".[280] Thirdly, States in the negotiation process of UNCLOS that advocated binding third-party adjudication accepted the resort to compulsory conciliation as a preliminary step that precedes referral to a court or tribunal entailing binding decisions.[281] It is unrealistic to go back to the first square of negotiation and the 'exchange of views' after the failure of compulsory conciliation. Fourthly, earlier drafts of Article 298(1)(a) provided that, in the event of unsuccessful compulsory conciliation, the parties had to specify regional or third-party mechanisms entailing a binding decision.[282] The acceptance of the clause on compulsory conciliation was contingent on the availability of such regional mechanisms, provided that State parties have been presumed to accept adjudication after exhausting the chance of compulsory conciliation. In other words, compulsory conciliation was not made as an alternative to adjudication or arbitration altogether. Finally, the essence of UNCLOS "dispute settlement regime is the right of disputants to settle any dispute,

278. *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark *v* Norway), Judgment of 14 June 1993, ICJ Rep (1993) 38, 78.

279. Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell et al. (n 175) 24-45, 27.

280. Jonathan Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88 American Journal of International Law 227, 227.

281. Nordquist et al. (n 241) 109-113.

282. Ibid.

at any time, by any mutually acceptable legal mode".[283] Making the compulsory conciliation non-binding would, arguendo, "seem to contribute absolutely nothing",[284] as States can anyway resort to conciliation anytime without a need for such a pronunciation.

It is to be noted that the foregoing arguments might be opposed by some standard views in this regard, but this analysis is based on the current writers' findings and represents an opinion to which some writers might disagree. Others, however, might perceive such arguments as a new way of approaching conciliation alternatives in order to avoid a deadlock in settling disputes.

Indeed, Article 298(1)(a) has been characterised as "one of the most bizarre passages in the entire Convention".[285] The inability to reach a unified scholarly position on the interpretation of the provision is attributable to the fact that no cases have yet to involve compulsory conciliation that resulted in disagreement on the conciliation outcome.[286] Although, in the Timor Sea dispute, where Timor-Leste submitted a request for compulsory conciliation against Australia concerning a boundary delimitation that was rejected by the latter,[287] both parties reached an agreement based on the findings of the conciliation commission's report on 6 March 2018.[288] This case is "the first instance of conciliation, whether

283. John K. Gamble, 'The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?' (1991) 9 Boston University International Law Journal 39, 51.

284. Ibid.

285. Ibid.

286. Bernard Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Rothwell et al. (n 175), 394-415, 406.

287. Donald K. Anton, 'Negotiating the Settlement of the Timor Sea Boundary Dispute between Australia and Timor Leste' (2017) 2 Asia-Pacific Journal of Ocean Law & Policy 187.

288. Permanent Court of Arbitration (PCA) Case No. 2016-10, *Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea* (9 May 2018), Annex 28.

voluntary or compulsory, under UNCLOS".[289]

Thus, it would be left for the determination of a court or tribunal to which a dispute might be referred subsequent to a failed compulsory conciliation to settle this question, based on the principle *compétence de la compétence* that UNCLOS itself embraced.[290] In *Arctic Sunrise* (The Netherlands *v* Russia), as a case in point, an issue was raised of whether the dispute submitted to arbitration would fall within the category of disputes exempted from compulsory procedures under Article 298(1)(b) UNCLOS concerning Russia's law enforcement activities against the Netherlands Arctic Sunrise vessel in the Russian EEZ.[291] Interestingly, the arbitral tribunal upheld its competence to deal with the dispute, notwithstanding the Russian declaration to exclude such a dispute from adjudication or arbitration.[292] The tribunal found that the "Declaration of Russia upon ratification of the Convention does not have the effect of excluding the present dispute from the procedures… and, therefore, does not exclude the dispute from the jurisdiction of the Tribunal".[293]

In sum, after exhausting negotiation with Egypt at the diplomatic level, formally exchanging views, inviting Egypt for voluntary conciliation and then to compulsory conciliation, Palestine can still explore the arbitration option for a binding decision on boundary delimitation. It would be up to the tribunal to decide whether it has jurisdiction to resolve the dispute and, simultaneously, settle the dust off the debate relating to the nature of compulsory conciliation.

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289. Dai Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement' (2020) 31 European Journal of International Law 321.

290. UNCLOS, Article 288(4): 'In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal'.

291. PCA Case No. 2014-02, *Arctic Sunrise Arbitration*, Award on Jurisdiction, 26 November 2014, 12, 15-16.

292. Tanaka (n 128) 507-10.

293. *Arctic Sunrise* (n 291) 16.

Arbitration with Egypt can also be indirectly foreseen through reservations that Palestine may cast towards the Cyprus-Egypt delimitation agreement of 17 February 2003 as far as this instrument affects Palestine's title in the common EEZ and continental shelf.[294] The EEZ (and, by extension, continental shelf) fixed by this agreement, as one can notice from the chart annexed thereto,[295] considerably overlaps with the Egypt-Cyprus-Palestine zone as it cuts across the Palestinian EEZ.

As both Cyprus and Palestine have not deposited any declaration under UNCLOS, including in relation to Article 298, arbitration will be the residual mechanism for settling any dispute between the two parties. It is likely that the arbitration tribunal that would be formed under Annex VII UNCLOS would simultaneously decide upon the Egyptian-Palestinian zones, as such areas form an integral and natural part of the Palestinian-Cypriot zone.

Article 4(b) of the Cyprus-Egypt agreement has opted for arbitration to resolve the potential conflict between the two States. This particular consent regarding arbitration would still function despite the 2017 Egyptian declaration under Article 298 UNCLOS, as such declaration does not apply to "any sea boundary dispute finally settled by an arrangement between the parties or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties".[296] In this case, Palestine may call for the formation of an arbitral tribunal that would involve both Cyprus (under general UNCLOS rules regarding settlement of disputes for the Palestine-Cyprus relations) and Egypt after exhausting the compulsory conciliation procedure under Article 298(1)(a) UNCLOS as detailed above.

294. Agreement between Cyprus and Egypt (n 172) 45.

295. Ibid., 47.

296. UNCLOS, Article 298(1)(a)(iii).

In case arbitration covers the three States in this scenario,[297] the tribunal would consist of five arbitrators if both Egypt and Cyprus opt to join forces against Palestine as parties of the same interest. Both States can appoint one arbitrator, and Palestine would appoint its arbitrator. The parties would then agree on the three other arbitrators.[298] Similar arbitration occurred in the *Southern Bluefin Tuna* case, where Australia and New Zealand appointed a joint arbitrator as parties in the same interest *vis-à-vis* Japan.[299] The tribunal may, however, be composed of seven arbitrators if each of the three parties believes it holds a divergent interest.[300] This composition would set an unprecedented model in the history of maritime arbitration.[301]

4.4 Palestine's settlement of disputes with Cyprus

As it is clear from its response to the 2019 Ministry of Foreign Affairs Declaration, Israel does not recognise 'the legal entitlement'[302] of Palestinian maritime zones. Even though it is not a party to the Convention, Israel claims rights and privileges from UNCLOS indirectly by recognising certain customary aspects of the Convention. Israel, for example, defined its territorial sea at 12 nautical miles based on UNCLOS as early as 5 February 1990, before even the Convention entered into force.[303] On 12 July 2011, Israel communicated a unilateral list of geographical

297. Nordquist et al. (n 241) 428.

298. UNCLOS, annex VII, Article 3(a) to (e).

299. Charlotte Burke, 'Arbitration' in Proelss (n 102) 2465-90, 2473.

300. UNCLOS, annex VII, Article 3(g) to (h).

301. Nigel Bankes, 'The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention With Respect to Other Treaties' (2021) 52 Ocean Development and International Law 346.

302. Israel Communication (n 152) 25.

303. Israel, *Territorial Waters (Amendment) Law, 5750-1990* (5 February 1990).

coordinates for the delimitation of the northern limit of the territorial sea and EEZ based on UNCLOS modalities to the UN Secretariat.[304] In most of its maritime zone actions, Israel refers to 'international law' or 'international customary law of the sea', not UNCLOS.[305] However, Israel (as the case with some other States) uses definitions, terms, concepts and administrative forums established under the Convention, notably the UN Secretariat as a depository of the Convention,[306] and other communications that normally UNCLOS State parties undertake.[307]

Interestingly, on 17 December 2010, Israel and Cyprus signed a maritime delimitation agreement, whose preamble directly referred to the EEZ as regulated in UNCLOS.[308] It seems that Israel is ready to apply the Convention as a matter of principle, particularly when UNCLOS serves Israeli interests. However, it is widely believed that Israel did not become party to the Convention owing to its boundary dispute settlement processes, which "would allow other states to determine its [i.e. Israel] borders".[309] Nevertheless, Israel has reached boundary delimitation agreements with Cyprus (2010), as indicated above, and with Jordan (1996).[310] In October 2022, Israel and Lebanon signed a maritime de-

304. Israel, *List of Geographical Coordinates for the Delimitation of the Northern Limit of the Territorial Sea and Exclusive Economic Zone of the State of Israel* (UN, 12 July 2011).

305. Israel Communication (n 152) 25.

306. David Attard, Malgosia Fitzmaurice and Norman Gutiérrez, 'The United Nations Division for Ocean Affairs and the Law of the Sea' in Attard et al. (n 92) 606-17.

307. See series of Israeli legislation, agreements, declarations, letters, notes verbale and other communications posted at the website of DOALOS <<www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/ISR.htm>>.

308. Agreement between Israel and Cyprus (n 163).

309. Teff-Seker et al. (n 231) 613.

310. *Maritime Boundary Agreement between the Government of the State of Israel and the Government of the Hashemite Kingdom of Jordan* (Aqaba, 18 January 1996), entry into force 17 February 1996, Law of the Sea Bulletin No. 32 (1996) 97.

limitation agreement based on the UNCLOS parameters.[311] Hence, the remaining border is the joint Israel-Palestine-Egypt boundary that drove Israel's hesitation to access UNCLOS.

Palestine cannot directly use any of the UNCLOS dispute settlement mechanisms explained above in relation to Israel as a non-State party to the Convention. There is no room to resort to the ITLOS, the ICJ, arbitration or special arbitration or even to compulsory or voluntary conciliation without Israeli consent. However, Palestine may challenge the Israeli control of the Gaza Sea through certain procedures pertinent to Cyprus, Egypt or others. In general, it is crucial for Palestine to keep opposing other States' claims affecting its maritime zones because "[u]nless these excessive claims are actively opposed, the challenged rights will be effectively lost".[312]

As the EEZ of Palestine overlaps with Cyprus and Egypt as well as Israel, Palestine could assert its maritime boundary with Israel by instituting an arbitration procedure against the 17th of December 2010 agreement that Israel signed with Cyprus (above) concerning the delimitation of the EEZ between the two States. The arbitration tribunal that may be set up to decide on the dispute between Palestine and Cyprus would also inevitably rule on the Israeli-Palestinian boundary. In this case, Cyprus might invoke Article 4(b) of its agreement with Israel that permits both States to revert to arbitration to settle their disputes. A scenario of mixed arbitration might arise here, as we explained concerning the possibility of arbitration between Palestine and Egypt.

There are three differences relating to this scenario. One is that the arbitration between Cyprus and Israel will not be conducted under the

311. Hamza Haşil, 'Lebanon – Israel Maritime Border Agreement: From the Line of Tension to the Regional Stability' (2022) Policy Brief, No. 226 (Ankara: Center for Middle Eastern Studies).

312. Roach (n 106) 6.

UNCLOS formula, as Israel would not be a party to that process. Secondly, Article 4(b) of the Israeli-Cypriot agreement made arbitration contingent on prior consent between the two sides: "The terms of reference and the procedure of the arbitration shall be determined by the Parties, by mutual agreement, prior to the commencement of the arbitration". That might render the possibility of arbitration impracticable. Thirdly, even if Cyprus and Israel agree on arbitration in relation to each other, Palestine cannot initiate mixed arbitration towards them, as that arbitration will be confined to both contractual States. In this case, we might reach a scenario of two parallel arbitral tribunals: one based on UNCLOS between Palestine and Cyprus; and another grounded on the 2010 agreement between Israel and Cyprus.

However, both tribunals might find it unavoidable to determine the status of the overlapping EEZ and continental shelf among all States sharing the same maritime areas (Cyprus, Egypt, Israel and Palestine). Article 3 of the Cyprus-Israel 2010 agreement hinted at that possibility by stating that "if either of the two Parties is engaged in negotiations aimed at the delimitation of its [EEZ] with another State, that Party, before reaching a final agreement with the other State, shall notify and consult the other Party". This means that Cyprus and Israel are prepared for the scenario of a common EEZ with other States, including Egypt and Palestine. For long, the ICJ has been of the position that "the validity of delimitation with regard to other States depends upon international law",[313] namely not based on an agreement that affected the rights of other States.

If Palestine manages to initiate arbitration proceedings with Egypt, as detailed above, that would affect Palestine's boundary with Israel and Cyprus. Although it is unprecedented to activate three arbitral tribunals

313. *Fisheries* (United Kingdom *v* Norway), Judgement of 18 December I95I, ICJ Rep (1951) 116, 132.

simultaneously concerning a single maritime zone, that scenario is hypothetically conceivable. The triple tribunals could be: (1) tribunal between Palestine and Egypt as discussed above, (2) tribunal between Palestine and Cyprus based on UNCLOS, and (3) tribunal between Israel and Cyprus based on the 2010 agreement. The four States may elect a more rational path and agree to alternatively establish one arbitral tribunal.

If a single UNCLOS-based arbitration is instituted upon agreement, the tribunal would likely be composed of at least nine members.[314] One arbitrator would be appointed by each of the four States (Cyprus, Egypt, Israel, Palestine). The other five would be agreed upon jointly between the parties or through the President of ITLOS following the technicalities of Article 3 of Annex VII of the UNCLOS. In this connection, Article 1(e) of the 2010 agreement between Israel and Cyprus, while being ignorant to the Palestinian EEZ, hinted at the possibility of agreement with Egypt. It provided that

> [T]he geographical coordinates of points 1 or 12 [agreed upon by Cyprus and Israel] could be reviewed and/or modified as necessary in light of a future agreement regarding the delimitation of the Exclusive Economic Zone to be reached by the three States concerned with respect to each of the said points.

Reference to 'three States', namely Cyprus and Egypt as well as Israel that share the coordinates of points 1 to 12, was made as if Palestine does not exist. Such an attitude might leave no choice for Palestine but to turn on the UNCLOS binding dispute settlement mechanisms, at least in relation to Cyprus and, by implication, to Israel.

314. Nordquist et al. (n 241) 428.

5. Conclusion

The law of the sea, when it comes to Palestine, is, at its core, a *human right*. The maritime rights of the Palestinian people have been overshadowed and pushed to the margins due to a tremendous humanitarian crisis that risked the existence of the Palestinians as a people. Palestinians have been denied access to their rights in the sea for over a century. Palestine was colonised at a time when Britain was the global maritime hegemon, which used Palestine's sea to serve its colonial interests. With its declaration in 1948, Israel controlled over 80% of Palestine's coast. Only a small fraction of the coast on the Mediterranean Sea, about 40 kilometres long, was left to the Palestinians offshore Gaza. Even in this limited portion, the Palestinians have been deprived of using the sea. With the 2014 accession of Palestine, as a State, to UNCLOS, possibilities for Palestine to declare its prerogatives under the Convention are legally available. However, the ability to exercise actual control over Palestine's maritime zones offshore Gaza continues to face enforcement challenges due to the Israeli naval blockade, military occupation and, now, genocide.

Significant changes in the Middle East have marked the last few years. From the accession of Palestine to UNCLOS in 2015 to the ICJ advisory opinion on the illegality of Israeli occupation in 2024, and from the discovery of gas reserves in the eastern Mediterranean to the escalation of the Israeli genocidal assault on the Gaza Strip after 7 October 2023, the *de jure* and *de facto* status of the occupied Palestinian territory has altered. The UNGA resolutions affirming the qualification of Palestine for full membership in the UN and the resolution calling for the withdrawal of Israel from the occupied Palestinian territory by 18 September 2025, the paradigmatic shift in the approach of member States of the UN towards Palestine is substantial.

The colonial history of Palestine, extending over more than a century, precluded the development of national legislation relating to the law

of the sea. Palestine inherited an outdated body of maritime law from the Ottoman and British empires. The Israeli occupation and blockade of Gaza made, and continue to make, it impossible for Palestine to modernise its harbour, port, fishing, navigation and trade. Palestine remains unable to explore and exploit its natural maritime resources. The Oslo Accords maintained the status quo, with little jurisdiction given to the Palestinians offshore Gaza. This limitation has impeded the systematic development of maritime legislation, thereby affecting the full realisation of human rights linked to the use of maritime spaces and resources.

The accession of Palestine to UNCLOS offers an opportunity to craft a comprehensive legal system. This system could comprise two dimensions. One relates to Palestinian sovereignty over its internal waters and territorial seas, along with its airspace, submarine activity, and subsoil usage, as well as its sovereign rights in the contiguous zone, EEZ and continental shelf. These areas and the rights and obligations of Palestine as well as other States and entities thereof need to be clearly codified, defined and sanctioned with proper penalties by domestic law. The second dimension pertains to more technical aspects of the use of the sea beyond maritime zones, including *inter alia* harbour and port affairs, ship registration and nationality, criminal, civil and labour law aboard ships, navigation, shipping, commerce, customs, marine environment and scientific research, security, fighting piracy, terrorism, trafficking, ship collision and hot pursuit.

While Palestine can assert its sovereignty over its maritime zones through its accession to UNCLOS, the ability to accede to the IMO would raise the potential to become a party to a series of conventions that may reinforce sovereign rights through the technical materialisation of various aspects relating to the use of the sea. These aspects may not only have domestic value via legislation but may also create inter-State relations between Palestine and other States worldwide,

which, in turn, may effectively contribute to Palestine's independence.

The Israel-Palestinian negotiations, including the relations regarding the Gaza coast, have encountered an impasse over the past three decades. Even small-scale agreements on the use of the sea, such as operating a port, fishing, sailing of ships, receiving external vessels and marine imports or exports, have been heavily restricted, if permitted at all. It has been and continues to be challenging to exercise Palestinian sovereignty or sovereign rights in the maritime zones off Gaza in the absence of delimited maritime zones. With the Israeli genocidal war on Palestine that began after the 7 October 2023 attack and the ICJ advisory opinion of July 2024, along with the UN General Assembly resolution of September 2024 instructing an end to Israeli presence in Palestine, the boundary delimitation with Israel does not seem to be a priority at the current time. Simultaneously, the boundary delimitation with Egypt and Cyprus cannot be taken for granted, either.

However, Palestine's accession to UNCLOS has opened avenues for potential maritime arrangements, including boundary delimitation, not only in relation to the Gaza neighbouring States, but also for the Eastern Mediterranean region at large. In some ways, the boundary of the overlapping in the Gaza coast is less complex than in other regions of the world; there are no islands, archipelagos, straits, mouths of rivers, bays or landlocked States to contend with. But the protracted pending territorial disagreement necessarily overshadows the maritime front. The accession of Palestine to UNCLOS, after the discovery of gas reserves that promise to benefit the entire region, may offer an opportunity to restart negotiations that may contribute to the development of innovative cooperative options.

At the same time, it is crucial for Palestine to explore routes within the law of the sea, specifically the UNCLOS, that may crystallise the exercise of maritime rights. The Convention establishes a comprehen-

sive mechanism for settling disputes among States, including those related to maritime zones. As the Gaza Sea is still occupied, it might also be relevant to refer to international humanitarian law rules relating to maritime belligerent occupation.[315] The ICJ advisory opinion of July 2024 that rendered the Israeli occupation of Palestinian territory unlawful also reiterated the Palestinian people's right to self-determination as a peremptory norm of international law.[316] The Court identified "the right to exercise permanent sovereignty over natural resources, which is a principle of customary international law",[317] a key element of the right to self-determination. Human rights law,[318] with a focus on the right to self-determination that implies independence and control over marine resources, is therefore critically relevant here as well.[319] Other fields of international law may also be activated, such as the law of State responsibility for breaches of maritime law, international criminal law, IMO conventions, and air law over the territorial sea.

The East Mediterranean region after Palestine's accession to UNCLOS is not as before. The Convention creates a series of rights for Palestine in various maritime zones which overlap with the zones of neighbouring States: Egypt, Israel and Cyprus.[320] At a certain point, conflicting interests would come to the fore, and the need for dispute settlement would

315. James Kraska, 'Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea? (2010) 13 Yearbook of International Humanitarian Law 367.

316. ICJ Advisory Opinion 2024 (n 5) para 233.

317. Ibid., para 240.

318. Papanicolopulu (n 92) 509.

319. Pal Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' (2019) 52 Israel Law Review 3.

320. Irini Papanicolopulu, 'The Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean' (2007) 38 Ocean Development & International Law 381.

arise. At this point, political realities in the region overshadow the law, and UNCLOS remains largely unenforced.[321] However, the discoveries of gas resources in the eastern Mediterranean might accelerate the process for finding solutions to pending maritime conflicts in parallel to the gas exploration. That renders the Convention dispute settlement scheme more relevant than ever.[322]

The UNCLOS dispute settlement mechanisms apply to other States parties that share no border lines with Palestine. Disputes with other States are perceived with regard to potential actions by such States in zones whereby Palestine qualifies to exercise sovereignty or sovereign rights. Such disputes can be resolved through arbitration, as it is currently the residual means that Palestine has implicitly opted for. Examples of such disputes include infringement of innocent passage and overflight and navigation in the Palestinian territorial sea, security and illegal immigration and trafficking in drugs in the contiguous zone, fishing, and navigation as well as artificial islands in the EEZ, gas and oil exploration and exploitation in Palestinian-claimed continental shelf, and collision and boarding of ships as well as the misuse of flags in the high seas. Such operations might include works carried out by commercial ships, military vessels, submarines, aircraft, and oil rigs owned or operated by UNCLOS State parties either directly or through concessions given to companies or individuals belonging to, or contracted or authorised by, these States.[323]

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321. Walid Khadduri, 'East Mediterranean Gas: Opportunities and Challenges' (2012) 17 Mediterranean Politics 111.

322. Kimberlyn Hughes, 'Solving the Unsolvable? How a Joint Development Zone Could Extinguish the Natural Gas Conflict in the Eastern Mediterranean' (2021) 54 Vanderbilt Journal of Transnational Law 1041.

323. James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (OUP 2011); H Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (Ashgate 2001).

Palestine seems to be aware of third-party actions in its offshore Gaza maritime zones. To this effect, it has issued warnings to such parties. In April 2022, for instance, Palestine, through a communication to the UN Secretariat, alerted all States and other entities against unauthorised and non-consensual maritime activities in the Palestinian maritime zones.[324]

324. Mission of Palestine to the UN, *Communication dated 12 April 2022 from the Ministry of Foreign Affairs and Expatriates of the State of Palestine addressed to the Secretary-General* (New York, 27 April 2022), available at <<https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/20220427PseNvUn.pdf>>.

China's maritime militias, human rights, and the law of the sea: Contested norms in a shifting international legal order

Eric Loefflad and Vicky Kapogianni***

Abstract

While many have studied the international legal dimensions of South China Sea disputes, few have explored the intersection of human rights and the law of the sea. Yet, this perspective is crucial – especially given China's claims that its maritime militia fishermen, who controversially advance its maritime strategy, have suffered human rights abuses. Using this issue to theorise the broader relationship between human rights and the law of the sea, we examine Chinese maritime militias through a comparative international law framework. On the one hand, existing legal doctrine – including the United Nations Convention on the Law of the Sea and its implementing agreement on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction – provides strong grounds to critique China's maritime militia strategy.

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On the other hand, these militias can be framed as agents of China's 'ecological civilisation' agenda, confronting climate change and advancing human rights under the law of the sea. Ultimately, the Chinese maritime militia question offers deep insights into intersecting legal regimes amid global norm contestations.

Keywords: Law of the sea, human rights, South China Sea, maritime militias, BBNJ agreement, comparative international law.

1. Introduction

On 12 July 2016, an arbitral tribunal convened under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)[1] ruled in favour of the Philippines in its action against the People's Republic of China (PRC) regarding the latter's controversial claims over the South China Sea.[2] With this action, the long-standing array of territorial disputes between the PRC and several neighbouring States (Brunei, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam) centred on the South China Sea took on a new degree of international legal significance.

Despite China's non-participation in the arbitration, Chinese opinion was made clear through an extensive rebuttal of the award crafted by scholars from the Chinese Society of International Law.[3] Amongst the

1. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force, 16 November 1994) 1833 UNTS 397.

2. *South China Sea Arbitration, Philippines v China, Award*, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration.

3. Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17 *Chinese Journal of International Law* 207 (hereinafter: CSIL, 'Critical Study').

multitude of points raised, the rebuttal contains the curious assertion that:

> By firing upon Chinese fishing boats and fishermen, illegally seizing and detaining Chinese fishermen, giving them inhumane treatment and robbing them of their property, the Philippines has gravely infringed upon the personal and property safety and the dignity of Chinese fishermen and blatantly trampled on their basic human rights.[4]

While a seemingly minor point in the grand scheme of this text's 542 pages,[5] this inclusion, nevertheless, contains within it a grand amalgam of controversies with far-reaching implications that demand serious scholarly scrutiny. This is especially true for any who seek to delineate the relationship between human rights and the law of the sea in a highly contested world.

Given this curious configuration present in China's rebuttal, we argue that an analysis of China's maritime militias and their contested legal status provides ample opportunity to gain insights into intersecting branches of international law at a time when existing norms are being subject to a vast array of challenges. This is particularly true as it concerns the maritime militias operating in contested waters as would-be subjects of human rights. What is the legal status of said militias? What theory of human rights would centre the activities of said militias? These issues become all the more pressing when considering how originally the maritime militias were agents of guerrilla warfare in the context of the Chinese Revolution – a period in time when the PRC viewed international law writ large as an unredeemable tool of capitalist imperialism.[6] What then

4. Ibid., 705

5. This human rights issues only appears two other times in the rebuttal. Ibid., 596, 707.

6. Hungdah Chiu, 'Communist China's Attitude Toward International Law' (1966) 60 American Journal of International Law, 245.

might it mean to consider the ongoing deployment of Cold War-reminiscent maritime militias in a moment when China has not only come to view international law favourably, but is increasingly positioning itself as a norm entrepreneur – including in the domain of international human rights?[7] How do the particularities of the South China Sea disputes shape the operation of the law in this area? It is these questions that we seek to disentangle in reference to existing international legal doctrine (and its limits) when considering how maritime militias in the South China Sea provide a unique opportunity to explore the relationship between human rights and the law of the sea.

Section 2 provides a high-altitude overview of contestations over human rights and the law of the sea in Western and Chinese discourse, framing maritime militias as situated at the intersection of two already contested areas. From here, we argue that a broad approach to comparative international law enables deeper insights into the relationship between human rights and the law of the sea in light of Sino-Western contestation. Section 3 then provides a detailed doctrinal unpacking of the international legal status of China's maritime militias as they operate to advance Chinese claims in the South China Sea, in light of recent legal developments – most notably the UNCLOS implementing agreement on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ Agreement).[8]

While the law as it exists provides a strong foundation for being critical of Chinese actions, in Section 4 we show how recent developments

7. Malin Oud, 'Powers of Persuasion? China's Struggle for Human Rights Discourse Power at the UN' (2024) 15 *Global Policy* 85; Ryan Martínez Mitchell, 'How China Came to Embrace International Institutions' in Raluca Grosescu and Ned Richardson-Little (eds), *Socialism and International Law: The Cold War and Its Legacies* (OUP 2025) 115.

8. 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 (New York, 19 June 2023).

regarding 'considerations of humanity' in the law of the sea jurisprudence might enable the PRC's strategy of linking its conceptions of human rights and the law of the sea. This is especially pertinent if the International Tribunal of the Law of the Sea's (ITLOS) recent climate change mitigation strategies are read in conjunction with China's 'ecological civilisation' strategy for climate action. Such considerations provide the grounding for a very different interpretation of Chinese maritime militia fishermen and their relevance to international human rights. In concluding, we offer observations on further directions in which the above analysis may go.

2. Human rights and the law of the sea in Western versus Chinese perspective: Towards a comparative international law

To speak of the international legal status and human rights of Chinese maritime militias in the South China Sea is to raise an array of (geo) politically loaded international legal questions. After all, the effect of China's rise on the international legal order – with the South China Sea as a key battleground – is one of the most important questions in the current discourse on both international law and international politics.[9] Connecting past, present, and future, to speak of China in the broader scheme of international law is to speak of an ancient civilisation whose

9. Barry Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?' (2010) 3 Chinse Journal of International Politics, 5; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (CUP 2019); Jessica Chen Weiss and Jeremy Wallace, 'Domestic Politics, China's Rise, and the Future of the Liberal International Order' (2021) 75 International Organisation, 635; Tingyang Zhao, *All Under Heaven: The Tianxia System for a Possible World Order* (University of California Press 2021).

status as 'Middle Kingdom' between heaven and earth was brutally dispatched by international law-justified imperialism. This same civilisation later developed a globally captivating anti-imperial identity that is now embracing its newfound role as a norm-shaping agent within the very domains of international law and institutionalism it once condemned as the source of its marginalisation.[10] Representing a grand-scale challenge to five centuries of Eurocentric global legal presumptions, to critically imagine China is to reimagine the very structure and purpose of international law.[11]

In few domains is the controversy spawned by China's world-historical trajectory more apparent than in the domains of international human rights law and the law of the sea. Here, even the most seemingly technical and doctrinal of legal issues can generate an avalanche of political commentary. Here, the prospect of seemingly irreconcilable interpretation turns attention to the irreconcilably differing worldviews that underlie this failed reconciliation and undermine any effort to construe (international) law as a seamless web of meaning.[12] Never far from this rupturing disjuncture is the ghost of the Third Reich jurist Carl Schmitt who infamously prophesied that the 'spaceless universalism' of Anglo-American liberalism would inevitably collapse into a multiplicity of normatively irreconcilable 'greater spaces', each dominated by unquestionable regional

10. Li Chen, 'Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter' (2011) 13 Journal of the History of International Law, 75; Teemu Ruskola, 'China in the Age of the World Picture' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 138; Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (OUP 2018); Maria Adele Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (CUP 2019); Ryan Martínez Mitchell, *Recentering the World: China and the Transformation of International Law* (CUP 2022).

11. See Alberto Toscano, 'Carl Schmitt in Beijing: Partisanship, Geopolitics and the Demolition of the Eurocentric World' (2008) 11 Postcolonial Studies, 417.

12. Kevin Jon Heller, 'The "Great Powers" and The Formation of International Law' (2024) 23 Chinese Journal of International Law, 637.

hegemons.[13] The fact that Schmitt's theories of public law, international law, political theology, and geopolitics enjoy no small degree of influence in present-day China (and Russia) certainly complicates the task of anyone seeking to rebuff Schmitt's prophecy.[14] While either human rights or the law of the sea alone can serve as a catalyst for meta-speculation on the global law-politics-normative continuum, the risk of a heightened controversy becomes even more pronounced when these issues are combined. This combination is precisely at issue in China's claims that its maritime militia members are human rights abuse victims in the context of the South China Sea disputes.

Regarding human rights, China has long been viewed as a grave challenge by those who conflate human rights with theories of liberal democracy, proclaiming that individual autonomy forms an axiomatic limit on State power.[15] From this perspective, China acts against the purpose of human rights by subordinating the individual to the collective through an all-powerful State.[16] However, for many Chinese scholars approaching the question of human rights, this line of critique is questionable at the levels of both accuracy and authority.

As a matter of accuracy, those critical of the 'individual subordinated to the state' narrative is a mischaracterisation of the Chinese attempt

13. Carl Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* (Telos Press 2003).

14. Zhang Shuangli, 'Why Should One be Interested in the Theological Dimension within the Project of Modern Politics? On the Chinese Acceptance of Carl Schmitt's Political Theology' (2014) 2 Critical Research on Religion, 9; Ryan Martinez Mitchell, 'Chinese Receptions of Carl Schmitt since 1929' (2020) 8 Penn State Journal of Law and International Affairs, 181; Xie Libin and Haig Patapan, 'Schmitt Fever: The Use and Abuse of Carl Schmitt in Contemporary China' (2020) 18 International Journal of Constitutional Law, 130.

15. See Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (OUP 2001).

16. Xinyuan Dai and Lucie Lu, 'Beyond Liberal Narratives: China and the International Human Rights Order' (2025) 101 International Affairs, 459.

to empower individuals through a State empowered to pursue paths of collective uplift – a duality lost on those who see power distribution between individuals and States in zero-sum terms.[17]

As a matter of authority, proponents of Chinese conceptions of human rights will often turn attention to how individual-centred theories of rights were profoundly complicit in histories of imperial domination and race hierarchy, as well as the preservation of their legacies.[18] From these Chinese critiques comes an alternative view of human rights that stresses economic development and subsistence as providing the essential foundation for realising human rights in a world of so many embedded inequalities.[19] While this elevation of interests over ideals has certainly gained influence beyond the PRC (especially in a Global South weary of Western efforts to generate 'development'),[20] for those critical of China, such invocations of human rights are a cynical tool for furthering Chinese influence and expansion by shifting attention away from the PRC's accountability for its many human rights

17. Ruijun Dai, 'China and International Human Rights Law' in Ignacio de la Rasilla and Congyan Cai (eds.), *The Cambridge Handbook of China and International Law* (CUP 2024) 261.

18. Elliott Young, 'Chinese Coolies, Universal Rights and the Limits of Liberalism in an Age of Empire' (2015) 227 Past and Present, 121; Roland Boer, 'Sovereignty and Human Rights: A Comparison Between Western Liberal and Chinese Marxist Traditions' (2022) 23 Political Theology, 13.

19. Ryan Martinez Mitchell, 'Domestic Governance as Critique of International Law: Beijing's 'SDG' Authoritarianism and the Contested Future of Human Rights' in Helmut Aust, Heike Krieger, and Felix Lange (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar 2024) 351; Esther Song and Joanne Yang, 'China's Adherence to International Human Rights Treaties: An Empirical Assessment' (2023) 26 International Area Studies Review, 252.

20. Rana Mitter, 'China in the Indian Ocean: The Search for a New Hegemon?' in Harry Verhoeven and Anatol Lieven (eds), *Beyond Liberal Order: States, Societies and Markets in the Global Indian Ocean* (Hurst 2022) 209, 219-26; Matthew Erie, 'Chinese Law and Development' (2021) 62 Harvard International Law Journal, 51; Matthew Erie, 'The Soft Power of Chinese Law' (2023) 61 Columbia Journal of Transnational Law, 1.

abuses.[21] It would not be difficult for such a critic to see the characterisation of human rights in the Chinese Society of International Law's South China Sea arbitration rebuttal as consistent with this behaviour – especially as it concerns the lack of attention to the human rights of those victimised by PRC actions in the South China Sea.

The extent to which China's invocation of human rights in this context constitutes a genuine affirmation of its 'Cute, Cuddly Panda' image or a strategic manipulation in line with its 'Fire-Breathing Dragon' persona largely depends on its adherence – or lack thereof – to the law of the sea as it applies to its maritime presence in the South China Sea.[22] After all, if Chinese fishermen are operating within a zone of their State's entitlement, then forcible actions against them are rightly condemned for their human rights implications. Conversely, if these same fishermen are acting on behalf of the PRC to interfere with the maritime entitlements of neighbouring States, then human rights claims in this context warrant closer scrutiny. As with many issues related to human rights, a clear juridical consensus remains elusive.

From the perspective shared by Western States and China's South China Sea rivals, China's arguments are in fundamental conflict with the UNCLOS framework. On this basis, as per the conclusion reached by Kardon, regarding governance of the world's oceans, China is a disruptor of global standards whose efforts are less an attempt to build a coherent alternative but rather the construction of a regional order yielding to the fact of Chinese sovereignty.[23] This prospect is all the more serious if en-

21. See Margaret Lewis, 'Why China Should Unsign the International Covenant on Civil and Political Rights' (2020) 53 Vanderbilt Journal of Transnational Law, 131.

22. Randall Peerenboom, 'The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability' (2006) 7 Chicago Journal of International Law, 17.

23. Isaac Kardon, *China's Law of the Sea: The New Rules of Maritime Order* (Yale University Press 2023).

hanced Chinese efforts to become a maritime power are taken seriously.[24] Unsurprisingly, Chinese scholars see the situation differently and base their claims to historic rights over the South China Sea and key island chains within it (namely the Spratlys and Paracels)[25] that predate European legal impositions-cum-imperialism in the region.[26] The limits of the UNCLOS framework in addressing the deeper histories and legacies of colonialism and imperialism, and to produce a resolution in light of these issues, plays a key role in sustaining ongoing contention over the South China Sea.[27]

Given this Western versus Chinese contention regarding the law of the sea and human rights – two meta-issues fundamentally entangled through the PRC's maritime military strategy – what analytical tools are available to the observer seeking to navigate the politically treacherous waters that accompany this topic? One such tool is comparative international law where, rather than emphasising international law's innate unity, the task of the analyst is awareness of how international legal interpretations differ among those with different histories, cultures, and polit-

24. Howard Wang, 'Toward a Sea-Power Strategy – Chinese Communist Party Debates and Consensus Building under Jiang Zemin, Hu Jintao, and Xi Jinping' (2024) 77 Naval War College Review, 41.

25. Anthony Carty, 'Archives on Historical Titles to South China Sea Islands: The Spratlys' (2019) 4 Jus Gentium: A Journal of International Legal History 7; Anthony Carty, 'British and French Archives Relating to Ownership of the Parcel Islands 1900-1975' (2019) 4 Jus Gentium: A Journal of International Legal History, 301.

26. See Jianming Shen, 'China's Sovereignty over the South China Sea Islands: A Historical Perspective' (2002) 1 Chinese Journal of International Law, 94; Sienho Yee, 'The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns' (2016) 15 Chinese Journal of International Law, 219; Xinmin Ma, 'Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal' (2018) 8 Asian Journal of International Law, 12.

27. Ryan Martinez Mitchell, 'An International Commission of Inquiry for the South China Sea: Defining the Law of Sovereignty to Determine the Chance for Peace' (2016) 49 Vanderbilt Journal of Transnational Law, 749.

ical objectives.[28] While seemingly Schmittian in its acknowledgement of embedded barriers to rules-based integration, comparative international law need not fall into Schmitt's trap of irreducible enmity that excludes other relevant considerations of why differing legal interpretations might exist on a planetary scale.[29] To quote Stephen, this approach to comparative international law:

> [G]ives us the tools to unpack both the external context and internal logic of particular international legal claims. It focuses not on the audience−asking whether all or most other states accept a claim as an accurate statement of international law – but on the claimant – asking what explains why the particular actor chose the argument made.[30]

While certainly more attuned to politics than other international legal engagements,[31] contra Schmittian emphasis on fundamental difference, through a comparative international law approach, we can see how mapping legal argument in a diverse world contains numerous possibilities of hybridity and dialogical engagement.[32] In other words, even the most seemingly fundamental difference cannot be separated from a greater

28. See Boris Mamlyuk and Ugo Mattei, 'Comparative International Law' (2011) 36 Brooklyn Journal of International Law, 385; Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds), *Comparative International Law* (OUP 2018); Miriam Bak-McKenna, 'Remaking the Law of Encounter: Comparative International Law as Transformative Translation' in Zeynep Gulsah Capan, Filipe dos Reis, and Maj Grasten (eds), *The Politics of Translation in International Relations* (Palgrave Macmillan 2021) 67.

29. Benno Teschke, 'Fatal Attraction: A Critique of Carl Schmitt's International Political and Legal Theory' (2011) 3 International Theory, 179 and 184.

30. Paul B Stephan, 'Wars of Conquest in the Twenty-First Century and the Lessons of History − Crimea, Panama, and John Bassett Moore' (2021) 62 Virginia Journal of International Law, 63 and 70.

31. Daniel Abebe, 'Why Comparative International Law Needs International Relations Theory' in Roberts et al. (n 28) 71.

32. See Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019) 50-53.

web of interaction where constant merger and synthesis provides great insights into international law's possible evolutionary trajectory. As such, contentions between Chinese and Western approaches as they concern human rights, the law of the sea, and their varied overlaps might be planting the seeds for something entirely new that might contain elements of forces that were once fundamentally opposed. While the issue of Chinese maritime militias can certainly be analysed through this interactive lens, the challenge of this Chinese strategy to current international legal understandings must first be explicated in detail. This is especially pressing given the high degree of novelty and legal regime intersection entailed by the question of Chinese maritime militias.

2.1 Rewriting the seascape: China's maritime militias, international law, and global power dynamics

The rise of maritime militias as quasi-governmental forces, notably in the context of China's assertive practices in contested waters, has posed significant challenges to default understandings of international law. These maritime militias, state-supported civilian vessels, often referred to as China's 'third sea force' alongside its navy and coast guard,[33] reflect the PRC's ambition to become an enhanced sea power and a "country that leads the world in terms of composite national strength and international influence" by its centennial year in 2049.[34] Bolstered by three major organisations within its Armed Forces, each possessing a maritime

33. Andrew Erickson, 'China's Maritime Militia: The "Gray Zone" Force in the South China Sea' (23 December 2023), available at <<https://www.andrewerickson.com/2023/12/chinas-maritime-militia-the-gray-zone-force-in-the-south-china-sea/>>.

34. Yi Changliang, 'Predicting the Future: China's Composite National Strength in 2049' (*The Centre for Strategic Translation',* 1 May 2020), available at <<https://www.strategictranslation.org/articles/predicting-the-future-chinas-composite-national-strength-in-2049>>.

subcomponent,[35] the PRC has intensified its efforts to assert its authority over the South China Sea, one of the most disputed territories in the world, based on its understanding of its historic rights/title claims.[36] Through its controversial nine-dash line,[37] which marks China's expansive territorial claims on the map of Southeast Asia,[38] the PRC claims control over much of the region – well beyond what is recognised under international law[39] – while aiming to edge out other claimants. This has escalated tensions, as countries such as Vietnam and the Philippines strive to uphold their own rights, while others, like the United States

35. The People's Liberation Army (PLA) includes the PLA Navy (PLAN), a key element in projecting naval power; the People's Armed Police, which increasingly oversees China's Maritime Law Enforcement (MLE) forces such as the China Coast Guard, plays a crucial role in asserting maritime claims; and the Militia, that includes the People's Armed Forces Maritime Militia (PAFMM), a growing force of sea-based units that operate in tandem with other branches. See, Andrew Erickson, 'Understanding China's Third Sea Force: The Maritime Militia' (*Harvard Fairbank Center Blog Post,* 8 September 2017), available at <<https://fairbank.fas.harvard.edu/research/blog/understanding-chinas-third-sea-force-the-maritime-militia/>>.

36. 'Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea' (2016) 15 Chinese Journal of International Law, 903.

37. Hannah Beech, 'Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?' (*Time,* 19 July 2016), available at <<https://time.com/4412191/nine-dash-line-9-south-china-sea/>>.

38. China recently declared new baselines around Scarborough Reef in the South China Sea to assert territorial claims. These baselines signal China's intent to strengthen its maritime control and enforce sovereignty in the region. This development aligns with China's broader strategy of using straight baselines to maximise maritime zones despite conflicts with international law under UNCLOS. See Yucong Wang, Clive Schofield, and Warwick Gullett, 'Drawing Lines in the South China Sea: What Beijing's New Claims Over a Disputed Coral Reef Mean' (*The Conversation,* 29 November 2024), available at <<https://theconversation.com/drawing-lines-in-the-south-china-sea-what-beijings-new-claims-over-a-disputed-coral-reef-mean-244197>>.

39. Conor Steeds, 'Why Have the People's Republic of China and the Socialist Republic of Vietnam been able to Create and Sustain Maritime Militias' (2022) 4 Contemporary Voices, Stages in Security, 199.

(U.S.), United Kingdom, Japan, and Australia seek to underwrite freedom of navigation in these strategic waters.[40]

For the last 30 years, the PRC leadership has consistently emphasised the nation's 'maritime rights and interests' in nearby seas, with much of its maritime power expansion aimed at both safeguarding and coercively advancing these claims.[41] In response, Vietnam and the Philippines have sought to assert their respective territorial rights. While maritime militias remain rare, Vietnam stands as the only other country with a comparable force specifically created to contend with China's assertive maritime strategy. Hanoi formally established its maritime militia in 2009 under Law No. 43/2009/QH12, primarily to compete directly with China's People's Armed Forces Maritime Militia (PAFMM) in what can be described as an ongoing 'people's war at sea'.[42] Unlike China, Vietnam does not possess a long-standing maritime militias tradition, but its military strategy draws from the broader 'people's war' doctrine, shaped by its revolutionary history and the Chinese Communist Party's military theory.[43] In contrast, the Philippines, lacking a similar history, despite expressing interest in creating its own maritime militia through legislation in 2016, has not yet succeeded in establishing such a force.[44]

China's armed fishing militia – PAFMM – plays an instrumental role in blurring the lines between private civilian activity and state-driven efforts to advance sovereign claims. Operating under the direct command and control of the People's Liberation Army (PLA), the PAFMM has existed for decades, supporting Chinese Coast Guard (CCG) and PLA

40. Emma Salisbury, 'China's PLAN: Maritime Dominion Beyond the South China Sea', Council on Geostrategy, Policy Paper, Geopolitics Programme, No GPPP05, May 2024.

41. Ibid., 10.

42. Steeds (n 39) 215.

43. Ibid.

44. Ibid., 206.

Navy (PLAN) operations in the region.[45] It does so by establishing a *de facto* Chinese presence in disputed areas, thereby challenging the ability of counterclaimants to assert control over disputed features. These grey-zone operations, which use nontraditional forces and methods to pursue security objectives without triggering armed conflict,[46] are designed to "win without fighting" by overwhelming adversaries with swarms of fishing vessels – often supported by CCG and, depending on the contingency, potentially PLAN ships.[47] Within this spectrum, maritime militias serve as a pivotal instrument for asserting control over contested waters by obstructing and harassing ships of opposing parties and conducting intelligence gathering and surveillance.[48] In doing so, they maintain a routine military presence that enforces controlled tension without resolving disputes or escalating to full-scale conflict. Furthermore, because maritime militiamen are civilians, China gains a strategic advantage by operating in a legal grey area, allowing for both legal ambiguity and diplomatic manoeuvring.[49] It is this civilian status that underpins the Chinese Society of International Law's claims of human rights abuses in its rebuttal to the 2016 Arbitral Tribunal's decision.

45. Derek Grossman and Logan Ma, 'A Short History of China's Fishing Militia and What it May Tell Us' (*Rand,* 6 April 2020), available at <<https://www.rand.org/pubs/commentary/2020/04/a-short-history-of-chinas-fishing-militia-and-what.html>>.

46. Shuxian Luo and Jonathan Panther, 'China's Maritime Militia and Fishing Fleets: A Primer for Operational Staffs and Tactical Leaders' (2021) Military Review, 7.

47. Derek Grossman and Logan Ma, 'A Short History of China's Fishing Militia and What it May Tell Us'(*Rand,* 6 April 2020), available at <<https://www.rand.org/pubs/commentary/2020/04/a-short-history-of-chinas-fishing-militia-and-what.html>>.

48. Kentaro Furuya, 'Law Enforcement Measures Against Chinese Maritime Militia' (2023) 100 International Law Studies, 672, 673; see also Conor Kennedy, 'Gray Forces in Blue Territory: The Grammar of Chinese Maritime Militia Gray Zone Operations,' in Andrew Erickson and Ryan Martinson (eds), *China's Maritime Gray Zone Operations* (Naval Institute Press 2019) 168.

49. James Kraska and Michael Monti, 'The Law of Naval Warfare and China's Maritime Militia' (2015) 91 International Law Studies, 450.

Before parsing China's state responsibility for its, still civilian, self-styled agents of guerilla warfare dedicated to entrenching its maritime presence, it is worth examining China's stance during the UNCLOS negotiations and, more recently, its engagement in the latest development of the BBNJ Agreement. These engagements demonstrate how China has sought to recalibrate maritime governance to advance its visions of equitable access while resisting what it condemns as Western hegemony. Understanding these dynamics is critical to contextualising China's deployment of maritime militias as tools of maritime control and its broader efforts to reshape the normative order of the seas.

2.2 Tides of power: China's shaping of ocean governance through UNCLOS and the BBNJ Agreement

In August 2022, states convened at the United Nations Headquarters to negotiate a new legally binding instrument – the BBNJ Agreement – on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, namely the high seas and the Area.[50] This agreement was adopted in June 2023 as the third implementing agreement under UNCLOS. Central to these negotiations was the debate over whether the *common heritage of humankind*[51] constitutes a binding principle of international law or "remains a mere conceptual ideal".[52] China, while supportive of applying the ad hoc principle, expressed discontent with what it perceives as the "West's lack of political will to equitably

50. UNCLOS, Article 1(1)(1): '"Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

51. See, Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 43, 312-337.

52. Nengye Liu and Shirley Scott, 'China in the UNCLOS and BBNJ Negotiations, Yesterday Once More?' (2024) Leiden Journal of International Law 1, 1.

share the benefits stemming from exploiting marine genetic resources in the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction."[53] This disquiet has not only shaped China's negotiating posture but also informed its broader maritime strategy.

As a key actor in both UNCLOS and the BBNJ Agreement negotiations, China has consistently sought to align the evolving legal framework with its strategic and geopolitical ambitions. Its active engagement in shaping these legal instruments showcases an ambition to redefine the normative structure governing the high seas. These attempts have been reflected in China's advocacy that such resources should be used for peaceful purposes, "jointly by the peoples of all countries"[54] and managed through "an effective international regime" to prevent "any form of super-Power manipulation or monopoly and the exclusive control or arbitrary exploitation of international deep-sea resources by one or two super-Powers on the strength of their advanced technology".[55] These positions, and their clear homage to China's revolutionary and anti-imperialist traditions, signal China's broader attempt to place itself as a counterweight to Western dominance in maritime governance and to assert itself as a leading global actor.

Historically, China's stance has undergone significant transformations, particularly in its relations with the U.S. and Soviet Union since the 1970s. During the UNCLOS III negotiations (1973-1982), China aligned closely with the Global South, prioritising sovereignty and equitable access to maritime resources.[56] By positioning itself as an ally of

53. Ibid., 2.

54. UNCLOS III, Second Session, 25th Plenary Meeting, UN Doc. A/CONF.62/SR.25 (2 July 1974), para 18.

55. Ibid.

56. Liu and Scott (n 52) 2.

developing nations (and an alternative to the U.S. and Soviet Union),[57] China sought to oppose hegemonies, a stance consistent with the anti-imperialist rhetoric of that era. Nevertheless, over time, these dynamics evolved considerably, particularly under President Xi Jinping's leadership commencing in 2012. Xi's launch of the Belt and Road Initiative (BRI) in 2013 marked a shift toward constructing a new global era, under the concept of a "Community of Shared Future for Mankind."[58] This ambition, nonetheless, has coincided with intensified strategic rivalry with the U.S., as evidenced by the South China Sea arbitration (2013-2016),[59] President Donald Trump's 'Trade War' in 2018,[60] and the overall deterioration of this bilateral relation.[61]

Conversely, China's relations with (post-Soviet) Russia have grown increasingly robust with Presidents of both states meeting in person 42 times from 2013 to 2023,[62] culminating in the formal upgrade of their bilateral ties to a "comprehensive strategic partnership" in 2019.[63]

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57. See Jeremy Friedman, *Shadow Cold War: The Sino-Soviet Competition for the Third World* (University of North Carolina Press 2015); Gregg Brazinsky, *Winning the Third World: Sino-American Rivalry during the Cold War* (University of North Carolina Press 2017).

58. James McBride, Noah Berman, and Andrew Chatzky, 'China's Massive Belt and Road Initiative' (*Council on Foreign Relations,* 2 February 2023), available at <<https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative>>.

59. China contends that the unilateral initiation of UNCLOS Annex VII Arbitration by the Philippines was orchestrated under the influence of the US government, see Wang Xiaohui, 'South China Sea Arbitration: A US-Led Conspiracy behind the Farce' (*People's Daily Online*, 12 July 2016), available at <<http://en.people.cn/n3/2016/0712/c90000-9085051.htm>l>>.

60. Tao Liu and Wing Thye Woo, 'Understanding the US-China Trade War' (2018) 11 China Economic Journal, 319.

61. Liu and Scott (n 52) 14.

62. Huiyun Feng and Kai He, 'Why China and Russia not Form an Alliance? The Balance of Beliefs in Peacetime' (2024) 100 International Affairs, 2089.

63. 'China, Russia Agree to Upgrade Relations for New Era', (*State Council of the People's Republic of China*, 6 June 2019), available at <<https://english.www.gov.cn/news/top_news/2019/06/06/content_281476701425684.htm>>.

Of particular note, the China-Russia Foreign Ministerial Joint Declaration on Issues of Global Governance adopted on 23 March 2021,[64] reaffirmed China's vision of the global order by challenging the U.S.-anchored "rules-based international order" and emphasising the primacy of "international law underpinned by the United Nations."[65] While China has officially abstained from supporting Russia's war in Ukraine, Russia's complete isolation from the West has undeniably cemented its alignment with China, driven by shared security and economic interests.[66] President Xi's state visit to Russia in March 2023, shortly after securing his third term, resulted in a new joint statement reaffirming the strength of Sino-Russian ties, describing them as being in their "best period in history" and "fast growing towards the future".[67]

Against this backdrop of shifting power dynamics and strengthening ties, China has leveraged UNCLOS and the BBNJ Agreement's negotiations on a two-pronged front. First, China vigorously sought to exclude disputed sea areas, such as the South China Sea, from the scope of the BBNJ Agreement.[68] For instance, during negotiations on issues like Area-based management tools (ABMTs), decision-making process, and dispute settlement, China proposed that such measures "shall not

64. Andrea Kendall-Taylor and David Shullman, 'China and Russia's Dangerous Convergence' (*Foreign Affairs,* 3 May 2021)m available at <<https://www.foreignaffairs.com/articles/china/2021-05-03/china-and-russias-dangerous-convergence>>.

65. Liu and Scott (n 52) 14.

66. Pascal Abb and Mikhail Polianskii, 'Xi and Putin's Strategic Tango: Unpacking the Complexities of Russia-China Relations After the 2023 Moscow Summit (*Prif Blog,* 20 April 2023), available at <<https://blog.prif.org/2023/04/20/xi-and-putins-strategic-tango-unpacking-the-complexities-of-russia-china-relations-after-the-2023-moscow-summit/>>.

67. China Ministry of Foreign Affairs, 'Joint Statement of the People's Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership of Coordination for the New Era', (22 March 2023), available at <<https://www.fmprc.gov.cn/zyxw/202303/t20230322_11046188.shtml>>.

68. Liu and Scott (n 52) 19.

be involved in any kind of land or maritime disputes".[69] Furthermore, it asserted that in cases where disputes arise over whether an area lies beyond national jurisdiction, such areas should not be designated as ABMT.[70] Thus, China's position reflects its broader strategy to prevent international regulatory frameworks from impacting its territorial claims and interests in contested regions. Second, China exhibited considerable scepticism regarding the application of the UNCLOS dispute settlement mechanism, *mutatis mutandis* to the BBNJ Agreement,[71] reflecting its strong criticism of the South China Sea Arbitration conducted under Annex VII UNCLOS – a case that emphasised China's longstanding concerns over the implications of compulsory dispute settlement for issues of sovereignty.[72] Consistent with its stance during the UNCLOS III negotiations, China has demonstrated resistance, holding that sovereignty-related disputes should not be subject to compulsory adjudication. Instead, it has advocated for the establishment of a distinct dispute settlement mechanism for the BBNJ Agreement, one that would prioritise state consent as its foundational principle.[73] Nevertheless, while China failed to garner adequate support for creating such a mechanism, it did succeed in securing Article 60(9),[74] which explicitly precludes the BBNJ Agreement from exercising jurisdiction over any sovereignty disputes.

China's participation in the UNCLOS and BBNJ Agreement negotia-

69. Ibid. China, Article 17 Proposals, IGC 5th (18 August 2022), available at <<https://www.un.org/bbnj/igc-5th-proposals>>.

70. China, Article 17bis Identification of Areas, IGC 5 Proposals (18 August 2022), available at <<https://www.un.org/bbnj/igc-5th-proposals>>.

71. Yubing Shi, 'Settlement of Disputes in a BBNJ Agreement: Options and Analysis' (2020) 122 Marine Policy, 104 and 156

72. CSIL, 'Critical Study' (n 3) 246-397.

73. Liu and Scott (n 52) 19.

74. 2023 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 ('BBNJ') Agreement, Article 60(9).

tions demonstrates a strategic approach aimed at reshaping the law of the sea in a manner that aligns with its national interests and geopolitical ambitions. This strategy is further bolstered by the deployment of maritime militias, which operate as *de facto* enforcers of Chinese territorial claims in contested waters. By leveraging international law to legitimise its maritime interests while relying on non-traditional actors to reinforce its claims, China positions itself as a counter-hegemonic actor in global maritime governance while also asserting its regional designs. This dual approach raises critical questions about state responsibility: to what extent does China's legal and operational strategy, executed through hybrid actors operating under the covert direction of the state, reshape the legal consciousness of the seascape and global order?

2.3 The thin line of accountability: China's hybrid maritime actors and State responsibility

The obscure and clandestine nature of Chinese maritime militias poses significant international legal challenges. As a guardian of China's expansive maritime claim to over 90 percent of the South China Sea,[75] this covert maritime force has become a key lever for power projection during peacetime.[76] As tensions escalate over China's overlapping maritime claims with Vietnam and the Philippines, *inter alia,* Beijing's maritime militia serves as a potent non-forcible method of coercion.[77] By dom-

75. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, 'People's Republic of China: Maritime Claims in the South China Sea' (*Limits in the Seas, No. 150*, January 2022) <<https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf >>.

76. Kraska and Monti (n 49) 454.

77. Ibid. For a rejection of this 'nonforcible' characterisation, see Aurel Sari, 'Maritime Incidents in the South China Sea: Measures of Law Enforcement or Use of Force?' (2024) 103 International Law Studies, 463.

inating the seascape without the risk of open conflict, China furthers its geopolitical aims while blurring the lines between civilians, fishing vessels and state actions, thereby complicating the attribution of state responsibility. Nevertheless, the International Court of Justice (ICJ), in its 1949 advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, marked a landmark moment by recognising that "the progressive increase in the collective activities of states has given rise to instances of action […] by certain entities which are not states"[78] and thus entities other than states are indispensably qualified as subjects of international law.[79]

While the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provide a robust legal framework – particularly in terms of (1) the attribution of conduct to the state under international law and (2) the breach of an international obligation of the state (Article 2) – their application in the context of China's maritime militias is fraught with complexities.[80] The militias, operating under the covert direction of the state, consist of vessels and personnel affiliated with state-owned fishery companies. However, as these entities do not qualify as state organs under Article 4,[81] nor as parastatal entities exercising governmental authority under Article 5 of ARSIWA,[82] which makes the attribution of responsibility to the Chinese state under these provi-

78. ICJ, *Reparations for Injuries Suffered in the Service of United Nations,* Advisory Opinion of 11 April 1949, 178.

79. James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility,' in Malcolm Evans (ed), *International Law* (OUP 2003) 446.

80. Su Jin Yoo and Min Gyo Koo, 'Is China Responsible for Its Maritime Militia's Internationally Wrongful Acts? The Attribution of the Conduct of a Parastatal Entity to the State' (2022) 24 Business and Politics, 277, 280.

81. ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' YILC 2001, vol II, Article 4 (hereinafter: ILC, 'Draft Articles on State Responsibility').

82. Ibid., Article 5.

sions problematic. This structural ambiguity creates notable challenges in establishing China's responsibility for the militia's actions, particularly with regard to acts of harassment, bullying, and obstruction of the navigational rights and freedoms of foreign vessels.[83] Such actions not only contravene some of the obligations set forth in UNCLOS[84] – that was ratified by China in 1996 – but also raise questions about the attribution of responsibility to states for unlawful conduct carried out by hybrid, non-state actors operating under its auspices.[85] In addition, these activities have significant human rights implications for vulnerable coastal communities and foreign seafarers subjected to intimidation, violence, or economic coercion. These maritime militia actions may, in certain cases, amount to violations of fundamental human rights protections under international law, including the right to security[86] and protection from inhumane treatment.[87] Nevertheless, the actions of the militias, which operate under China's internal directives and are tasked with carrying out its mission at sea, remain attributable to the Chinese government.[88] This is because, under Article 4 of the ARSIWA, the militia can be considered a state organ, making China responsible for its conduct, even when that conduct is carried out by entities not formally recognised as

83. Jaymes MacKinnon, 'Fishery Depletion and the South China Sea' (2019) 9 Flux: International Relations Review 47; Ryan Martinson, "No Ordinary Boats: Cracking the Code on China's Spratly Maritime Militias." (*CIMSEC Capability Analysis*, 17 May 2021), available at <<https://cimsec.org/no-ordinary-boats-cracking-the-code-on-chinas-spratly-maritime-militias/>>.

84. E.g., Articles 58, 94, 192, 194, 279, 296, and 300, as recognised by the Arbitral Tribunal in its 2016 South China Sea award on the merits.

85. Jonathan Odom, 'Guerrillas in the Sea Mist: China's Maritime Militia and International Law' (2018) 3 Asia-Pacific Journal of Ocean Law and Policy, 31.

86. International Covenant on Civil and Political Rights (ICCPR), Article 6.

87. ICCPR, Article 7.

88. Koki Sato, 'China's Maritime Militia: A Legal Point of View' (*Maritime Issues*, 12 March 2020), available at <<https://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html>>.

state organs under international law.[89]

But even if these vessels in effect belong to state-owned fishery companies, since they are empowered by China's internal directives "to defend the frontier and maintain public order"[90] in disputed waters, such activities would constitute a "typical or essential state function" regardless of the identity or character of a maritime militia as a parastatal or private entity.[91] Thus, pursuant to Article 4 of the ARSIWA commentary, "a state is responsible for the conduct of its own organs" and must assume responsibility for their conducts, even if it denies their formal status as state organs.[92] This principle was affirmed by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* where it stated in categorical terms that, "according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule […] is of a customary character."[93] A similar application of the "typical or essential state function" test was articulated in the 1985 *Hyatt v. Iran* case.[94] The tribunal in this case determined that it was necessary to

89. ILC, 'Draft Articles on State Responsibility' (n 81) vol II, Article 4.

90. Massaki Yatsuzuka, 'China's Advance into the Sea and the Maritime Militia' (*NIDS Commentary 53*, 2016) 1–5, available at <<https://www.nids.mod.go.jp/english/publication/commentary/pdf/commentary053e.pdf>>; James Kraska, 'China's Maritime Militia Vessels May Be Military Objectives during Armed Conflict', (*The Diplomat*, 7 July 2020), available at <<https://thediplomat.com/2020/07/chinas-maritime-militia-vessels-may-be-military-objectives-during-armed-conflict/>>.

91. Oliver Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 Connecticut Journal of International Law 239, 265-267.

92. ILC, 'Draft Articles on State Responsibility' (n 81) vol II, Article 4 (1-4); Chester Brown, 'Article 4 of the ARSIWA: Conduct of Organs of a State' in Andreas Kulick and Michael Waibel (eds), *General International Law in International Investment Law, A Commentary,* (OUP 2024) 249.

93. *Difference relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para 62, 87.

94. Yoo and Koo (n 80) 282.

consider whether the function performed by the entity is "typically or essentially" a state function. It therefore concluded that the foundations in question were not private but public entities, empowered by Iranian internal law, whose mandate to locate and confiscate foreign properties could be characterised as actions serving public purposes on behalf of the government.[95]

The application of the 'typical or essential state function' test is not limited to traditional state organs but extends to entities whose activities are deemed to serve state interests, even when these entities operate outside the formal structures of government. In *Nicaragua v. United States* (1986), for instance, the ICJ ruled that responsibility for the conduct of the Contra rebels fell on the U.S., despite the fact that they were not formal organs of the U.S. government.[96] In this regard, the Court concluded that the group's actions, directed by the U.S. to further its foreign policy, could be attributed to the State, since they performed essential functions related to state interests.

Considering China's maritime militia, the key issue here is whether the activities conducted by these vessels – often in contested waters – serve to protect China's sovereignty or territorial integrity both of which are central to state functions. Similar reasoning was applied in *Nicaragua v. United States* (1986), where the Court held that actions carried out by paramilitary forces, whether state-controlled or not, could be attributable to the state when they were directed towards achieving the state's objectives.[97] Thus, the conduct of China's maritime militia – empowered by state directives to defend disputed maritime areas – would, under the customary rules of state responsibility, be attributable to the state itself.

95. Ibid. Iran-United States Claims Tribunal, *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, IUSCT Case No.134, Interlocutory Award, 17 September 1985.

96. *Nicaragua v. United States* (1986), ICJ Reports 1986, paras 110 and 115.

97. Ibid.

With all the above in mind, China's strategic manoeuvres appear to reflect a calculated effort to reinterpret and reshape the international legal framework in a way that aligns with its geopolitical ambitions, while limiting accountability. By leveraging legal ambiguities and deploying its maritime militias, China challenges the global maritime order. In doing so, it seeks to assert its regional influence, acting as both a rule-maker and, at times, a rule-breaker in the South China Sea. For Kardon, China's actions – in their highly selective approach to existing international law coupled with no presentation of a coherent alternative – is potentially creating a new maritime order in East Asia premised on a sovereign supremacy at odds with creating and adhering to universally applicable standards.[98] Thus, "rather than changing the rules, China is changing the international environment in which those rules take effect."[99] Speculating upon the future consequences of such a shift, in Kardon's words, "international acceptance of a special set of Chinese claims and rules underpinning them would create a precedent for other states to develop non-uniform practices and idiosyncratic rules of their own. It would become more difficult for courts and arbitral panels to deny the validity of plural interpretations of rules as applied in different regions of the world."[100] The great emphasis on sovereignty, openness to bilateral dialogue, and lack of faith in international adjudication measures amongst other East Asian states (especially after the enforceability limits of the Philippines's arbitration action became plainly apparent) only compounds this process of fragmentation.[101]

98. Kardon (n 23).

99. Ibid., 263.

100. Ibid., 267.

101. Ibid., 267-68; Nguyen Huong Thach Thao, 'The Philippines and Vietnam's Responses to the Permanent Court of Arbitration's Final Award on the Arbitration Case Initiated by the Philippines Against China over the South China Sea (July 2016)' (2019) 11 Vienna Journal of East Asian Studies, 155.

3. What possible rejoinder: 'Considerations of Humanity' with Chinese characteristics?

If there are ample grounds for criticising China's particular approach to the human rights/law of the sea nexus in relation to its maritime militia strategy, what exactly might a Chinese rejoinder look like? Adopting a lens of comparative international law makes it possible to speculate on such matters and consider that factors that might inform any alternative interpretation. That said, when assessing this prospect, a place to look is for gaps in existing doctrine through which China's might lodge its own approach to worldmaking – and thus reconcile its longstanding critiques of international law with its ambition to provide world leadership through international law.[102] On such gap relevant to both human rights and the law of the sea is the recognition of 'considerations of humanity' within the jurisprudence of the law of the sea as interpreted and applied by ITLOS.[103] While there is extensive debate on whether 'considerations of humanity' should exist as a narrow gap-filler or a broad norm-creating means of humanising the oceans,[104] the latter interpretation gained a major boost through ITLOS's 2024 Advisory Opinion articulating States' duties to mitigate climate change.[105] As

102. Ignacio de la Rasilla and Hao Yayezi, 'The Community of Shared Future for Mankind and China's Legalist Turn in International Relations' (2021) 20 Chinese Journal of International Law, 341.

103. Francesca Delfino, "Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals' in Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 421.

104. Anna Petrig and Marta Bo, 'The International Tribunal of the Law of the Sea and Human Rights' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (CUP 2019) 353, 402-405.

105. Request for an Advisory Opinion by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion – International Tribunal for the Law of the Sea (21 May 2024), at 66 ('the Tribunal notes that climate change represents an existential threat and raises human rights concerns').

Benoit Mayer has observed "[t]he Opinion is a significant step in international law because it confirms that states have obligations on climate change mitigation arising from sources other than climate treaties and that climate treaties do not preclude the application of such obligations."[106] In other words, the prospects for connecting wide-ranging interpretations of 'humanity' to the law of sea are open as they never were before.

Considering this development and its vast potential in expanding relevant 'considerations of humanity' in relation to the law of the sea, there is no shortage of paths for Chinese utilisation in light of its own international legal understandings and ambitions. This is especially true as climate change – and the calls for decisive worldwide action that it entails – forms a key medium for connecting human rights to the law of the sea in light of recent jurisprudence. On this point, a fundamentally relevant Chinese concept is its meta-project of 'ecological civilisation'.[107] Devised in response to the large-scale environmental impact of China's rapid industrialisation in the early twenty-first century, ecological civilisation as a modality of environmental protection stresses the related importance of top-down action by a powerful State and the need to transcend Western modes of reasoning when implementing meaningful climate action.[108]

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106. Benoit Mayer, 'Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law' (2025) 119 American Journal of International Law, 153, 154.

107. Mette Halskov Hansen, Hongtao Li, and Rune Svarverud, 'Ecological Civilization: Interpreting the Chinese Past, Projecting the Global Future' (2018) 53 Global Environmental Change, 195.

108. Xin Zhou, 'Ecological Civilization in China: Challenges and Strategies' (2021) 32 Capitalism Nature Socialism, 84; Bing Xue, Bin Han, Hongqing Li, Xiaohua Gou, Hong Yang, Heiko Thomas, and Stefan Stückrad, 'Understanding Ecological Civilization in China: From Political Context to Science' (2023) 53 Ambio, 1895.

While not without its critics,[109] as a meta-policy for framing the operation of international law it is not difficult to see how 'ecological civilisation' can easily fit within China's strategy of appealing to the States of the Global South. By prioritising concrete interests over abstract ideals – an approach central to China's human rights strategy – ecological civilisation directly addresses the immediate and visceral impacts of climate change in the Global South, circumventing the displacing rhetoric of 'future generations' that has often framed and constrained climate action.[110] On an additional (related) level, by challenging Western hegemony in climate governance, China's concept of ecological civilisation turns attention to how Western States fail to acknowledge their greater historical responsibility for climate change, thereby constraining their climate action proposals.[111] As mechanism of meta-legality, ecological civilisation can thus offer an effective inversion of the infamous 'standard of civilisation' whereby the applicability of international law to a given polity was preceded by the question of whether the polity was a 'civilised' or 'uncivilised' nation.[112] If China's 'ecological civilisation' is to shape the future discourse on human rights, the law of the sea, and their varied intersections, how might this standpoint reframe the question of maritime militias?

If 'ecological civilisation' and the actions it calls for can be framed as a 'considerations of humanity' lodged as an interpretive template regard-

109. See Paul Barresi, 'The Role of Law and the Rule of Law in China's Quest to Build an Ecological Civilization' (2017) 1 Chinese Journal of Environmental Law, 9; Evelyn Li Wang, 'A Beacon of Hope for a troubled Earth? A Critical Analysis of China's Authoritarian Approach to Constructing 'Ecological Civilization'' (2023) 26 Asia Pacific Journal of Environmental Law, 108.

110. Stephen Humphreys, 'Against Future Generations' (2022) 33 European Journal of International Law, 1061.

111. Julia Dehm, 'Carbon Colonialism or Climate Justice: Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 Windsor Yearbook of Access to Justice, 126.

112. Gerrit Gong, *The Standard of 'Civilization' in International Society* (OUP 1984).

ing the law of the sea (especially as it concerns climate change mitigation), this holds tremendous implications as to how China might frame its actions in the South China Sea and their international legality. After all, the more China seeks to integrate its economic growth agenda with its environmental protection designs, the more closely it will need to acknowledge the many links between land and sea as central to ecological sustainability. In other words, in actualising environmental policies in light the inescapable land-sea nexus, the further China turns to a 'green economy', the more it will need to recognise the relevance of a 'blue economy.'[113] When it comes to actualising its efforts, the further the reach of its maritime jurisdiction, the more directly China will be able to manage its 'blue economy' in a manner tied to the central presumption of ecological civilisation that climate action requires a State highly empowered to act in a top-down capacity. Given the South China Sea's significance as a key site for renewable and non-renewable resource extraction, there is little reason to doubt that it will remain central to this unfolding agenda. If China further develops its arguments linking the blue economy to its ecological civilisation strategy within a broader international legal framework, it can frame its claims over the South China Sea beyond narrow historical entitlements, instead appealing to 'considerations of humanity' on a larger scale. Such invocations would speak directly to Chinese discourse surrounding the "human community of fate".[114]

Against this possible reframing, China's maritime militias – and China's advocacy on behalf of their human rights – can take on a new form

113. Michael Fabinyi, Annie Wu, Sallie Lau, Tabitha Mallory, Kate Barclay, Kathleen Walsh, and Wolfram Dressler, 'China's Blue Economy: A State Project of Modernisation' (2021) 30 Journal of Environment and Development, 127; Sufian Ahammed, Md Masud Rana, Helal Uddin, Shapan Chandra Majumder, and Saju Shaha, 'Impact of Blue Economy Factors on the Sustainable Economic Growth of China' (2024) Environment, Development, and Sustainability, 1.

114. See Ryan Martinez Mitchell, 'The Human Community of Fate: A Conceptual History of China's Ordoglobal Idea' (2022) 13 Humanity, 175.

of meaning that could generate new international legal arguments. If the greater extent of China's maritime jurisdiction is correlated with an enhanced ability of China to combat climate change (and enhance human rights in the process), then the maritime militia fishermen operating to bolster these claims are hardly the disruptive rogues that certain interpretations of international law would deem them to be. Rather, true to their heritage as guerrilla fighters working to uplift the human condition via world revolution, the maritime militias are on the forefront of struggle on behalf of all mankind. On this basis, if placed within the Chinese frame in which transformed material conditions to achieve emancipation are the great end of human rights, then the protection of the human rights of maritime militia fishermen, must be paramount. From this perspective, any interpretation of the law of the sea (or of international law more broadly) that can easily justify force against Chinese maritime militias in the South China Sea does not take due account of the 'considerations of humanity.'

4. Conclusion – on the Vietnam conundrum

Any Chinese rejoinder along these lines would certainly invite a broad array of critical counterclaims, and – as shown through Section 3 – there is no shortage of potential legal constructs for a would-be critic to draw upon. However, for all the questions this might raise (especially when anticipating subsequent Chinese rejoinders), the terms of discourse in this vein must always be critically assessed if the insights of any deployment of comparative international law are to be global in character. While a pitting of Western international legal interpretations against Chinese ones is unavoidable in an era of rising powers and faltering liberal hegemony, focus here must not ignore the peoples and nations

caught between them. As Anne Orford notes of the newfound relevance of an increased regionalisation of international order, amongst the most profound insights can be found through turning attention to the border regions and those who inhabit them.[115] In the context of the South China Sea debates, this would include the other Asian parties to this dispute in the form of Brunei, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. As Douglas Guilfoyle has observed, China has "potentially underestimated the extent to which its policy impinges on other states' national interests in the maritime domain – interests they conceptualize in legal terms."[116] The perceptions of these states carry tremendous bearing on China's ability to provide leadership of the non-Western world. After all, when it comes to offering an alternative to Eurocentric dominion, how might China prove that its rise in the twenty-first century will be marked differently from the rise of Imperial Japan in the twentieth century?[117] China's own victimisation in this context can only explain so much.[118]

While an admittedly colossal question, if maritime militias are a key nexus for China's distinct interplay of human rights and the law of the sea in a potential new regional order in East Asia, one nation of profound international is the People's Republic of Vietnam. Alongside China, Vietnam is the only other nation that maintains a maritime militia force to stake out claims in the South China Sea that is rooted in furthering the

115. Anne Orford, 'Regional Orders, Geopolitics, and the Future of International Law' (2021) 74 Current Legal Problems, 128, 191-193.

116. Douglas Guilfoyle, 'The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea' (2019) 95 International Affairs, 999, 1000.

117. See Zhiguang Yin, 'Is China Just Another Japan in the World: Towards a Non-Hegemonic Understanding of Global Order' (2021) 14 Tsinghua China Law Review, 75.

118. Patrick Sze-Lok Keung and Bijun Xu, 'The Sino-Japanese War and the Collapse of the Qing and Confucian World Order in the Face of Japanese Imperialism and European Acquiescence' in Carty and Nijman (n 10) 413.

world revolution through the tactic of guerilla warfare.[119] Interestingly, despite this ostensibly unified cause, for Chinese legal scholars addressing Vietnam's maritime militias, their criticisms are remarkably similar to Western legal scholars addressing China's maritime militias.[120] In both cases, maritime militias are a menace operating according to illegitimate purposes.[121] This appears to be a striking disjuncture between two nations that still claim legitimacy on the basis of building a unified socialist revolutionary front. While inquiry into why this is the case might reveal a great deal about the operation of international law and politics after Western hegemony, this broader inquiry will have to wait for another occasion. However, the mere fact that such an inquiry is possible at all is a testament to the power of the often narrowly considered maritime militia question to vastly complicate assumed wisdom regarding the relationship between human rights and the law of the sea.

119. Hoaran Cui and Yubing Shi, 'A Comparative Analysis of the Legislation on Maritime Militia Between China and Vietnam' (2022) 53 Ocean Development and International Law, 147.

120. Hoaran Cui, 'Evolution of Vietnam's Maritime Milita and Its Impact on the Situation in the South China Sea' (2022) 18 China Oceans Law Review, 140.

121. Ibid., 154-157; Raul Pedrozo, 'China's IUU Fishing Fleet: Pariah of the World's Oceans' (2022) 99 International Law Studies, 318.

Claiming Indigenous rights: The unacknowledged *amicus curiae* submission by the Chagossian Committee (Seychelles)

*Cristina Canella**

Abstract

Over the past fifty years, international human rights law has made significant advancements in recognising Indigenous People's rights to self-determination. However, the recognition of Indigenous sovereignty over their land and natural resources – especially sea rights – remains limited. A recent instance involves the amicus curiae submission by the Chagossian Committee (Seychelles) to the Special Chamber of the International Tribunal for the Law of the Sea concerning the *Delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*. The Special Chamber declined to incorporate the submission into the litigation, representing a missed opportunity to acknowledge Indigenous claims to sovereignty over the marine areas and their resources. Employing a qualitative research methodology, this contribution assesses whether acceptance of the *amicus curiae* submission would have aligned with recent developments in international law, in-

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cluding the law of the sea, and whether such recognition could stimulate future discourse on Indigenous interests and historical maritime water usage.

Keywords: Maritime boundary, UNCLOS, Indian Ocean, Chagossians, Indigenous Peoples, environmental justice.

1. Introduction

On 23 November 2021, the Chagossian Committee (Seychelles) submitted an *amicus curiae*[1] statement to the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in connection with the dispute concerning the *Delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*.[2]

The Chagossian Committee (Seychelles) represents a group of Chagossians residing in the Republic of Seychelles. While none of them are citizens of Mauritius, several of them were born in the Chagos Archipelago and forcibly deported by the United Kingdom (UK) prior to Mauritian independence, achieved on 12 March 1968.

With the *amicus curiae* submission, the Chagossian Committee (Seychelles) claimed legal standing in the delimitation dispute between

1. The *amicus curiae* submission was not accepted and, consequently, was not included in the official case files. The advisors for the *amicus curiae* were Sebastian Schnitzenbaumer, Jamie Trinidad, Stephen Allen, and Thomas Burri. A revised version of the submission was subsequently published in the following work: Stephen Allen, Thomas Burri, and Jamie Trinidad, 'Stakeholders or bystanders? – An attempt by Seychelles Chagossians to intervene in the International Tribunal for the Law of the Sea' in Laura Jeffrey, Chris Monaghan, and Mairi O'Gorman (eds), *Challenges and Prospects for the Chagos Archipelago* (Routledge 2024).

2. Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Judgement [2023] 28 ITLOS.

Mauritius and the Maldives. As the Indigenous People of the Chagos Archipelago, they claimed their right to self-determination and permanent sovereignty over natural resources, including their interests in the use of marine spaces around the Chagos Archipelago, which are debated in the *Mauritius/Maldives* dispute. The Parties involved in the legal case did not object to the inclusion of the *amicus curiae* submission. They deferred to the discretion of the Special Chamber of the ITLOS regarding whether to incorporate the submission into the litigation. After reviewing the *amicus curiae* submission and the comments thereon made by the Parties, the Special Chamber of the ITLOS determined that the request should not be accepted, so it has not been included in the case file.

Admitting the submission could have provided an opportunity to amplify the voice of Indigenous Peoples, shedding light on their right to self-determination, economic interests, and historical maritime water usage. It might have prompted further questions on the concept of 'sovereignty' as interpreted by contemporary international law, which hinders the full realisation of the rights and interests of Indigenous Peoples.[3]

Sovereignty is a political concept that refers to an authority possessing supreme and independent powers within a defined territory delineated by political borders.[4] It is essential to emphasise the 'political' nature of sovereignty. The term 'politics' finds its origin in the ancient Greek word *polis*, meaning city-state, reflecting the community structure of Ancient Greece. In this light, politics and political expressions pertain to the

3. Heather N. Nicol, 'Reframing Sovereignty: Indigenous Peoples and Arctic States' (2010) 29(2) Political Geography, 78; and Williamson BC Chang, 'Indigenous Values and the Law of the Sea', in Jon M. van Dyke, *Governing Ocean Resources* (Brill | Nijhoff 2013) 427.

4. Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42(1) Texas International Law Journal, 157.

affairs of the *polis*. The modern interpretation of this definition is associated exclusively with the role of the State; accordingly, the political authority is confined to the formal governance of the State. In contemporary international law, the State is the unique entity meeting the necessary conditions for sovereignty.[5]

The Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention)[6] has been a foundational document in international law for determining rights and responsibilities of States. Article 1 of the Montevideo Convention outlines the criteria for statehood, providing key qualifications: a permanent population, a defined territory, a government, and the capacity to enter into relations with the other States.[7] While these criteria are widely accepted as foundational guidelines for determining statehood, the recognition of a State is ultimately shaped by political realities and diplomatic considerations. Some entities that meet the Montevideo criteria may not be widely recognised as States, while others that do not fully satisfy the criteria are nonetheless treated as States due to broad international recognition.

In recent decades, challenges such as climate change and related sea level rise have added complexity to the concept of statehood. For example, countries facing the risk of disappearing due to environmental changes may push international law toward more flexible interpretations

5. Ibid.

6. Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934).

7. Article 1, Montevideo Convention: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States".

of statehood.[8]

The United Nations Convention on the Law of the Sea (UNCLOS)[9] defines the coastal State as the only entity which has sovereign powers over the natural resources within its maritime spaces. The coastal State has territorial sovereignty within its land territory to an adjacent belt of sea extending up to 12 nautical miles from the baselines, including the seabed and subsoil, defined as territorial sea.[10] Ships of all States have the right of innocent passage through the territorial sea subject to UNCLOS and international law.[11]

In accordance with customary international law, UNCLOS affirms that sovereignty is a power held by coastal States over their territorial sea. Flag States exercise jurisdiction rather than sovereignty over their vessels,[12] while port States, as coastal States, operate within a framework

8. A particularly illustrative case is that of the Maldives, where the highest natural elevation is less than two meters above sea level. This geographic vulnerability places the Maldives among the States most severely threatened by sea level rise, and consequent coastal inundation, with significant implications for its territorial integrity and legal status (Tariq Masood Ali Khan, Dewan Abdul Quadir, T. S. Murty, Anwarul Kabir, Fahmida Aktar, and Majajul Alam Sarker, 'Relative Sea Level Changes in Maldives and Vulnerability of Land Due to Abnormal Coastal Inundation'(2002) 25(1-2) Marine Geodesy, 133). This is crucial to ensure that such countries are not rendered stateless, allowing them to continue to be recognised in the international community despite the loss of their traditional territory. The International Law Commission reported a general acceptance among States of the principle of continuity of statehood, regardless of the impact of sea-level rise on land territory, and emphasised the importance of international cooperation in addressing the consequences of this phenomenon (Nilüfer Oral, Bogdan Aurescu, Patricia Galvão Teles and Juan José Ruda Santolaria 'Rising Hopes Amid Rising Seas: Developments in International Law Addressing the Treat of Sea-Level Rise' 31 January 2024 UN Chronicle). See also International Law Association 'Final Report: International Law and Sea Level Rise' (2024).

9. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994).

10. Ibid., Article 2.

11. Ibid., Article 17.

12. Ibid., Article 94.

of specific functional powers.[13] An inclusive approach should encompass all stakeholders involved in the conservation and exploitation of natural resources in the oceans and seas. For instance, Indigenous Peoples represent a significant group of active participants whose rights and interests are not explicitly addressed in UNCLOS.

However, international human rights law instruments and jurisprudence regulate the exercise of State sovereignty in relation to natural resources, including marine resources, framing it not only as a set of rights but also as a source of corresponding obligations. These obligations include the duty to ensure equitable access to natural resources for individuals or specific groups, such as Indigenous Peoples and marginalised communities, as well as for the general population's right to subsistence.[14] While international law upholds the principle of State sovereignty over natural resources, this sovereignty is not 'absolute'. It is subject to limitations when it conflicts with fundamental human rights, such as the right to food,[15] and water,[16] and cultural rights.[17] This contribution advocates for greater attention from the international community toward the claim of the Chagossians to the islands of the Chagos Archipelago and related maritime spaces.

Situated in the Indian Ocean, the Chagos Archipelago comprises nu-

13. Ibid., Article 218.

14. *Saramaka People v. Suriname* (Judgment) Inter-American Court of Human Rights Series C No 172 (28 November 2007) and Human Rights Committee, 'General Comment No 12: Article 1 (Right to Self-determination)' (13 March 1984) UN Doc HRI/GEN/1/Rev.1.

15. Universal Declaration of Human Rights, Article 25. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), Article 11.

16. UNGA, 'The Human Right to Water and Sanitation' (Resolution 64/292, 28 July 2010) A/RES/64/292.

17. UN Human Rights Council, 'Cultural rights and the protection of cultural heritage' (Resolution 33/20, 30 September 2016) A/HRC/RES/33/20. See also, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007), Article 3.

merous islands and atolls, with its largest island, Diego Garcia, covering an area of 27 square kilometres – half of the territory of the Chagos. The archipelago, located 2,200 kilometres northeast of the main island of Mauritius, has a long, complex history. When the Treaty of Paris was signed in 1814, Mauritius was ceded to the British Empire along with some other French colonies. During colonisation, Mauritius held control over the Chagos Archipelago. However, in 1965, the UK detached the Chagos Archipelago from Mauritius and other islands from Seychelles, establishing the British Indian Ocean Territory (BIOT).[18]

On 16 April 1971, the BIOT Commissioner enacted Immigration Ordinance 1 of 1971, rendering it unlawful for any individual to enter or remain in the territory without a permit. Between 1967 and 1973, Chagossians were forcibly removed from the Chagos and transported to Mauritius and Seychelles under inhumane conditions.[19]

Over the years, the UK's sovereignty claims over the Chagos Archipelago have been subject to numerous court cases. Legal disputes have been brought before various British courts, including the Divisional Court in 2000,[20]

18. Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 95.

19. Mr. Olivier Bancoult, President of the Chagos Refugees Group and principal litigant in the legal actions initiated by Chagossians, detailed the inhuman conditions endured during their deportation, which led in illnesses, deaths, and suicides. Furthermore, he highlighted the lack of assistance from the UK and the difficulties Chagossians faced in integrating into a developed society, as defined by Western standards, due to the absence of essential work skills needed to secure employment in Mauritius. Olivier Bancoult, 'The Historic Legal Battle of the Chagossians to Return to Their Homeland, the Chagos Islands, and to Be Compensated for Their Deportation: A Narrative' (2004) 39 South African Yearbook of International Law, 23.

20. *R (Bancoult) v. Secretary of State for the Foreign and Commonwealth Affairs* [2000] EWHC 1 413 (Admin). See also, Chris Monaghan, 'Challenging the United Kingdom's Decision not to Support the Resettlement of the Chagos Islands: *R (on the application of Hoareau and Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*' (2020) EWCA Civ 1010 (2021) 26(1) Judicial Review, 62.

the High Court of Justice in 2006,[21] and the House of Lords in 2008.[22] The issue was also brought to the European Court of Human Rights in 2012,[23] an Arbitral Tribunal constituted under Annex VII of UNCLOS in 2015,[24] the International Court of Justice (ICJ) in 2018,[25] and the United Nations General Assembly (UNGA) in 2019.[26]

This paper consists of three sections. Firstly, it addresses the central challenge of integrating Indigenous Peoples into the concept of sovereignty as defined by international law. By giving Indigenous Peoples political powers in the form of sovereign institutions, they can achieve their right to self-determination and realise their interests (Section 2).[27]

Secondly, it examines the current status of recognition of the rights and interests of Indigenous Peoples in the context of the law of the sea and ocean affairs by the international community (Section 3).

Lastly, the focus narrows down to the Chagos Archipelago and the Chagossians as Indigenous Peoples of this land (Section 4). This Section delves into the history of the Chagossians and discusses why the rejection of the *amicus curiae* submission in the *Mauritius/Maldives* case represents

21. *R (Bancoult) v. Secretary of State for the Foreign and Commonwealth Affairs* (Rev 1) [2006] EWHC 1038 (Admin).

22. House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause *R (Bancoult) v. Secretary of State for the Foreign and Commonwealth Affairs* [2008] UKHL 61.

23. *Chagos Islanders v. the United Kingdom* Application [2012] ECHR 5622/04.

24. Chagos Marine Protected Area Arbitration (The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland) (Award) [2018] Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea 2011-03.

25. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Order of 17 January 2018 ICJ Rep [2018] 7.

26. UNGA, Resolution adopted by the General Assembly on 22 May 2019 (2019) UN Doc A/RES/73/295.

27. Chang (n 3).

a missed opportunity to acknowledge the Chagossians' right to self-determination as Indigenous Peoples, their historical usage of marine resources and their economic interests.

2. Advancing Indigenous self-determination in International Human Rights Law

The right to self-determination of all peoples in the world was primarily enshrined in Article 1(2) of the United Nations Charter,[28] in conjunction with Article 55, which emphasises the establishment of conditions of stability and well-being necessary for peaceful relations between States.

On 10 December 1948, the UNGA adopted the Universal Declaration of Human Rights (UDHR).[29] While the UDHR is not legally binding *stricto sensu*, its principles and rights have been incorporated into subsequent international human rights instruments and are widely recognised as reflecting customary international law and *jus cogens* norms.[30] The UDHR stands as a foundational text in the development of the international human rights regime. Among its key provisions, the principles of equal rights, self-determination, and non-discrimination are particularly salient. It affirms that every individual is entitled to the right to freedom of movement, including the right to leave any country and to

28. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).

29. UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948.

30. Judge Tanaka's Dissenting Opinion in the *South West Africa* case (*Ethiopia v. South Africa; Liberia v. South Africa).* Second Phase. Judgement [1966] Rep 298.

return to their own.[31]

A step forward has been taken in the safeguarding of fundamental human rights through the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[32] by UNGA resolution 2200A (XXI) of 16 December 1966. The ICESCR particularly emphasises the right of peoples to self-determination, including the right to determine their political status and economic, social, and cultural development, as well as the right to freely dispose of their natural resources and wealth.

On the same note, the International Covenant on Civil and Political Rights (ICCPR)[33] was adopted by the UNGA in the same 1966 resolution. The ICCPR safeguards fundamental human rights such as the right to life and human dignity, equality before the law, freedom of speech, assembly and association, religious freedom and privacy, and minority rights. Article 12(4) of the ICCPR reiterates the principle that no one may be arbitrarily denied entry to their own country, as already established in the UDHR. Additionally, Article 27 of the ICCPR addresses the issue of minority discrimination, ensuring that any minority group in a State may practise its own culture, profess its own religion, and speak its own language. To follow, Article 28 lays down the establishment of a Human Rights Committee. State parties are required to submit a report detailing their approach to implementing the rights described in the ICCPR, as well as their progress in ensuring the enjoyment of civil and political rights.

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31. Ibid., Article 13. Note also after the Universal Declaration of Human Rights, the UN General Assembly Resolution 2625 (XXV) of 20 October 1970, 123-124, along with subsequent resolutions, recognised the duty of States to promote the realization of the right of peoples to self-determination, in accordance with the UN Charter.

32. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976).

33. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976).

Combined, the UDHR, the ICESCR, and the ICCPR constitute the International Bill of Human Rights.

One of the first international instruments recognising Indigenous rights is the International Labour Organisation (ILO) Convention No. 107 concerning the *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*.[34] Article 11 of the Convention affirms that Indigenous and Tribal populations are entitled to own the lands they have traditionally occupied and obliges States to formally recognise such ownership. However, Article 12(1) qualifies this entitlement by permitting States to remove these populations from their ancestral territories without their free, prior, and informed consent in circumstances involving considerations of national security, public health, or – more controversially – economic development. In doing so, the Convention simultaneously affirms a right to land while authorising States to derogate from this right, including for reasons as ambiguous and potentially expansive as economic interests.

In response to the assimilationist orientation of ILO Convention No. 107, the ILO adopted Convention No. 169 in 1989, titled *Convention concerning Indigenous and Tribal Peoples in Independent Countries*.[35] Article 14 of Convention No. 169 reaffirms the right of ownership and possession of Indigenous and Tribal Peoples over the lands they have traditionally occupied. Crucially, unlike its predecessor, Article 16(1) and (2) provide that Indigenous and Tribal Peoples shall not be removed from their ancestral lands, except in cases of exceptional necessity. In such circumstances, their free, prior, and informed consent must be sought. Where consent cannot be obtained, relocation must be carried out in

34. ILO, Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247.

35. ILO, Convention (No.169) concerning indigenous tribal peoples in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS.

accordance with national legal procedures, including mechanisms such as public inquiries that ensure the effective participation of the affected communities. Of particular significance is Article 16(3), which provides that when the reasons justifying relocation cease to exist, Indigenous and Tribal Peoples shall have the right to return to their traditional lands.

ILO Convention No. 169 represents the first major effort by the international community to articulate a working definition of 'Indigenous Peoples'. According to the Convention, Indigenous Peoples are defined as,

> [P]eoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region, to which the country belongs, at the time of conquest or colonisation of the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[36]

With this definition, the ILO Convention No. 169 emphasises the concept of historical continuity' between Indigenous communities and their ancestral lands, as well as their distinct social, economic, cultural, and political characteristics. This definition is rooted in the work of the United Nations Special Rapporteur Martínez Cobo, who, in his 1987 study, defined Indigenous Peoples as:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that

36. ILO Convention No. 169, Article 1. It is fair to note that in the same paragraph "tribal peoples" are defined as those "in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs of traditions or by special laws or regulations". However, with the exception of the ILO, the international community has generally addressed Indigenous People' issues without making a clear distinction between Indigenous and Tribal Peoples.

> developed on their territories, considering themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[37]

The attempt of the international community to define Indigenous Peoples is intended to establish a basis for their recognition and protection under international law. However, the challenge behind creating a legal definition of Indigenous Peoples is that it should not result from an 'external categorization' based on Western (mis)conceptions. As Rapporteur Martínez Cobo highlighted, Indigenous identity should be determined by Indigenous Peoples themselves:

> The fundamental assertion must be that indigenous populations must be recognised according to their own perception and conception of themselves in relation to other groups; there must be no attempt to define them according to the perception of others through the values of foreign societies or of the dominant sections in such societies.[38]

Thus, any international definition should serve to support Indigenous rights rather than as a tool for external classification, control, or restrictions.

Over the last half-century, developments in international human rights law have led to greater recognition of the rights of Indigenous Peoples around the world. This shift has stemmed from a reassessment of assumptions regarding Indigenous communities, many of which were

37. Martínez Cobo, José R, Special Rapporteur on the Problem of Discrimination against Indigenous Populations 'Study of the problem of discrimination against indigenous populations. Volume V' (1987) E/CN.4/Sub.2/1986/7/Add.4. UN Subcommission on Prevention of Discrimination and Protection of Minorities

38. Ibid., para 368.

rooted in Western philosophies, and has prompted corresponding adjustment in international standards.

On 25 June 1993, the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action.[39] The document contains the proclamation of an international decade for Indigenous Peoples, starting January 1994, and most importantly, the mandate to draft a Declaration of Indigenous Peoples' rights.

The UNGA resolution 61/295 was adopted on 13 September 2007, establishing the United Nations Declaration on the Rights of Indigenous People (UNDRIP).[40]

While the UNDRIP avoids providing a general definition of Indigenous Peoples, it promotes the right of self-identification as Indigenous, acknowledging that Indigenous Peoples are *equal* to all other peoples, while at the same time recognising their right to be *different* and to consider themselves different.[41] In particular, Indigenous Peoples are unique in their circumstances due to the suffering and historical injustices resulting from their colonisation and dispossession of lands, territories, and resources, among other factors.[42] As a consequence, it is highlighted that Indigenous Peoples' rights stem not only from their political, economic, and social structures, but also from their cultures, spiritual traditions, histories, and philosophical systems, particularly their rights to lands, territories, and resources.[43] As well, the UNDRIP emphasises that the respect for Indigenous knowledge, cultures, and traditional practises

39. The World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23, UN General Assembly, 12 July 1993.

40. UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 2 October 2007.

41. Ibid., Annex.

42. Ibid.

43. Ibid.

contributes to sustainable and equitable development and proper environmental management.[44]

The differences that exist within the macro group of Indigenous Peoples, which includes communities from various parts of the world, from the Arctic to New Zealand, with significantly different historical and cultural backgrounds, must also be taken into account. However, along the years the institution of associations of Indigenous Peoples offered the potential to improve Indigenous Peoples' standing before the international community and facilitated the development of their human rights, such as the right to self-determination.

As stated in Article 3 of the UNDRIP, Indigenous Peoples have the right to self-determination, as a result of which they may "freely determine their political status and freely pursue their economic, social and cultural development". Subsequently, Article 4 of the UNDRIP declares that they should have complete autonomy in their internal and local affairs as well as means for financing their autonomous functions. The right to self-determination is further emphasised in Article 5 of the UNDRIP where it is specified that Indigenous Peoples are responsible for maintaining "distinct political, legal, economic, social, and cultural institutions". As a result of the interpretation of these three articles, Indigenous Peoples may exercise a form of self-governance and authority over their communities and resources. In this regard, it is important to note that although only States possess sovereignty under international law, such sovereignty over natural resources is not absolute and must be exercised in accordance with international obligations, including those pertaining to human rights and the rights of Indigenous Peoples.

The right to self-determination and access to natural resources have been consistently reinforced through various legal sources, emphasising the fundamental connection between the right to self-determination and

44. Ibid.

the ability to control and manage natural resources. The Inter-American Court of Human Rights ruling in *Saramaka People v. Suriname,* has affirmed that States must respect Indigenous land and resource rights, requiring States to recognise, respect, and in some cases, grant Indigenous communities' ownership, access, and consent-based rights over their traditional lands and resources.[45]

The UNGA resolution 2625 (XXV), adopted on 24 October 1970, affirms the duty of States to promote the realisation of the right of peoples to self-determination in accordance with the purposes and principles of the United Nations Charter.[46] In a similar vein, the Human Rights Committee has recognised the inherent connection between the right to self-determination and the effective protection of individual human rights. In its General Comment No. 12 on Article 1 of the ICCPR, the Committee underscores the entitlement of all peoples to freely dispose of their natural resources and outlines corresponding obligations incumbent upon States and the international community.[47]

The Committee further highlights the role of self-determination in fostering friendly relations and cooperation among States, thereby contributing to the maintenance of international peace and security.[48] Along this line, in 1995 the ICJ affirmed that the right to self-determination constitutes a fundamental principle of international law, possessing both *erga omnes* and *jus cogens* status. This recognition underscores the peremptory nature of the right to self-determination, obligating all States to respect and uphold it.[49] Recently, the ICJ reaffirmed the link between

45. *Saramaka People v. Suriname* (Judgment) Inter-American Court of Human Rights Series C No 172 (28 November 2007).

46. UNGA Res 2625 (XXV) (24 October 1970).

47. Human Rights Committee, 'General Comment No 12: Article 1 (Right to Self-determination)' (13 March 1984) UN Doc HRI/GEN/1/Rev.1, para 5.

48. Ibid., para 8.

49. *East Timor* (Portugal v. Australia) (Judgment) [1995] ICJ Rep 90, paras 16 and 29.

self-determination and access to natural resources in its 2024 *Advisory Opinion on the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, affirming that the principle of self-determination inherently encompasses access to and control over natural resources.[50]

Continuing the analysis of the UNDRIP, Article 5 asserts that "if they so choose" Indigenous Peoples should have the right to fully participate in the political, economic, social, and cultural life of the State. This means that Indigenous Peoples can choose to be part of a State; it is not a requirement. While they are also entitled to obtain citizenship under Article 6 of the UNDRIP, it is not a mandatory procedure.

States are required to implement effective mechanisms to ensure that the rights set forth in the UNDRIP are protected. Particularly, States are expected to prevent "any action which has the aim or effect of dispossessing them of their lands, territories and resources" and any form of forced population transfer undermining their rights. Article 10 of the UNDRIP is of critical importance to the Chagossian discussion:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

In Article 10, the keynotes are "free, prior and informed consent" and "agreement on just and fair compensation". Hence, Indigenous Peoples may be relocated from their land only if they have agreed to the relocation, and in such cases, they are entitled to just and fair compensation. As already recalled in the preamble of the UNDRIP, Article 30 states that

50. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) [2024] ICJ Rep 66, para 234.

military activities are prohibited in Indigenous Peoples territories unless they have been negotiated effectively with representative institutions and agreed to by the Indigenous Peoples themselves. Since Diego Garcia is a U.S. military base, it is crucial to point out that the UNDRIP explicitly encourages the demilitarisation of Indigenous Peoples' lands and territories for the sake of peace, economic development, and social progress.

As outlined in Article 32 of the UNDRIP, the State is required to consult and cooperate in good faith with Indigenous Peoples, as well as obtain their free and informed consent prior to carrying out any project affecting their territory or involving mineral or natural resource exploitation. Additionally, any such activity should be undertaken "to mitigate adverse environmental, economic, social, cultural or spiritual impact".

A fundamental right of Indigenous Peoples is expressly stated in Article 40 of the UNDRIP, which affirms that they have access to prompt decision-making through just and fair procedures when resolving conflicts or disputes with a State or another party as well as effective remedies when their individual and collective rights have been violated.

Under Article 41 of the UNDRIP, the United Nations system and other intergovernmental organisations are obligated to contribute to the full implementation of the concerned rights and duties.

The International Bill of Human Rights and the UNDRIP provide the basis for Indigenous Peoples' self-determination, their rights regarding political, social, and economic status, and their right to own their ancestral lands exploiting the natural resources. The UNDRIP outlines Indigenous Peoples as active participants in the governance of a community within their ancestral territories, as well as key stakeholders at the international level in the process of decision-making.

Commonly, Indigenous communities are represented by a self-governing population that has its own set of rules. A typical Indigenous Population is located in a geographical area which is not demarcated by 'physical borders', but rather by people belonging to the same community.

In 1975, the ICJ issued an Advisory Opinion on *Western Sahara*, addressing its legal status prior to Spanish colonisation.[51] The ICJ acknowledged the historical ties between the indigenous Sahrawi people and the occupied areas. Particularly, the ICJ found that the nomadism of the vast majority of the Indigenous Peoples of Western Sahara gave rise to "certain ties of legal character" between the tribes of the territory and those of neighbouring lands. All throughout the region, the tribes had grazing pastures, cultivated lands, and wells and water holes. The ICJ recognised that the use of land and natural resources is based on the nomads' way of life and subject to tribal rights, which are generally regulated by customs. In light of this, the ICJ has held that even though the nomadic peoples are not legal entities, they possess rights related to their land. A major point of emphasis in the Advisory Opinion is the importance of self-determination, which affirms tribes in the Western Sahara have the right to determine their status and their legal relationships with the territory. In this way, the ICJ has given greater significance to the concept of territoriality, not restricting it only to a geographical concept.

Although the Advisory Opinion did not dictate Western Sahara's sovereignty, it nevertheless emphasised the importance of respecting and empowering Indigenous Peoples in deciding the future of their territory.[52]

While the international community has made significant strides in recognising Indigenous Peoples' right to self-determination, the establishment of Indigenous Peoples as fully sovereign entities remains a distant goal. Despite efforts to acknowledge and uphold Indigenous rights, achieving territorial sovereignty for Indigenous communities has proven challenging. Within the framework of international law, this gap underscores the complexities of balancing Indigenous self-determination with State sovereignty.

51. *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12.
52. Lenzerini (n 4) 163.

As described by Lenzerini, nowadays the concept of 'indigenous sovereignty' is generally recognised as a form of self-government – often equated to 'internal' self-determination – which varies in extent depending on the State, but in any case, could not override the supreme sovereign powers of the national government. As a result, any sovereign powers recognised by the State will always be subject to its control and may be limited or conditioned in accordance with relevant constitutional or legislative framework.[53]

3. Indigenous rights in the contexts of the law of the sea and ocean affairs

Many Indigenous Peoples maintain deep cultural and spiritual connections to the sea, which is revered as a nurturing 'mother' who provides for their communities. Indigenous worldviews also emphasise the responsibility to care for the sea and to respect its resources, serving as custodians of this life-sustaining entity.[54]

Beyond shaping spiritual and cultural identities, the marine environment also underpins the food security, economic growth, and social stability of Indigenous communities. A 2016 study estimated that coastal Indigenous populations consume approximately 2.1 million metric tonnes of seafood each year (ranging between 1.5 million and 2.8 million tonnes) – equivalent to nearly 2% of the global commercial fisheries catch. Per capita consumption in these communities is

53. Ibid.

54. Rodney Dillon, 'Seeing the Sea: Science, Change and Indigenous Sea Rights' (2002) 123 Maritime Studies, 12. For more details on the relationship between the Indigenous Peoples and the oceans. See also UN Economic and Social Council, 'Study on the relationship between indigenous peoples and the Pacific Ocean', 19 February 2016, E/C.19/2016/3.

estimated to be around 15 times higher than in non-Indigenous populations.[55]

Despite this profound dependence on marine ecosystems, international human rights law does not expressly protect the rights of Indigenous Peoples to access and use marine areas.[56] However, certain interpretations of international instruments suggest potential protections. Article 25 of the UNDRIP affirms that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Similarly, Article 23 of the ILO Convention No. 169 recognises that fisheries operations, as traditional subsistence activities, are integral to the socio-cultural and economic development of Indigenous Peoples. It requires States to ensure the continuation of such activities and the sustainable use of the associated marine resources.[57]

What role does UNCLOS play? With 170 contracting parties, UNCLOS serves as the principal legal framework governing the use of maritime spaces and activities. It establishes a comprehensive legal order for

55. Andrés M Cisneros-Montemayor, Daniel Pauly, Lauren V Weatherdon, Yoshitaka Ota, 'A Global Estimate of Seafood Consumption by Coastal Indigenous Peoples' (2016) 11(12) PLoS ONE, 7.

56. It is an open discussion on that specific human rights norms relating to traditional 'lands' and 'resources' could be applied to the recognition of rights of Indigenous Peoples to marine areas and its living resources. E. Endalew Lijalem, 'International Human Rights Law and the Rights of Indigenous Peoples in Relation to Marine Space and Resources' (2019), in Stephen Allen, Nigel Bankes and Øyvind Ravna (eds.), *The Rights of Indigenous Peoples in Marine Areas* (Hart Publishing 2019) 45–68.

57. For more details on fishing rights of Indigenous Peoples: UN Economic and Social Council, Report on Indigenous fishing rights in the seas with case studies from Australia and Norway, 8 January 2010, E/C.19/2010/2

the seas and oceans affirming coastal States' sovereignty within their territorial seas and archipelagic waters,[58] and delineating rights and responsibilities concerning the equitable use of marine resources,[59] environmental protection,[60] and the promotion of marine scientific research.[61] Despite its extensive scope, UNCLOS remains insufficiently inclusive of non-state stakeholders. Notably, it contains no explicit reference to the rights and responsibilities of Indigenous Peoples in any of its articles or annexes. Nonetheless, Articles 61 and 62 highlight the "needs of coastal fishing communities" and the rights of "nationals who have habitually fished" in the exclusive economic zone. These provisions impose obligations on coastal States to conserve, manage, and equitably access marine living resources. When interpreted in light of evolving international norms, they may be applied to encompass the specific interests of Indigenous and other communities, particularly where traditional fishing practices and subsistence rights are central.

Additionally, Resolution III of the Final Acts of UNCLOS further implies the need of considering the rights and interests of local populations in the application of UNCLOS – especially in cases where full decolonisation has not been achieved. The Resolution stresses that, in sovereignty disputes where the United Nations has outlined specific avenues for resolution, meaningful consultations must be conducted, with the interests of the affected population placed at the forefront.[62] This principle is especially pertinent in relation to the *amicus curiae* submission made by the Chagossian Committee (Seychelles), as discussed in the following Section.

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58. UNCLOS., Articles 2 and 49.

59. E.g., in UNCLOS Part V.

60. E.g., in UNCLOS Part XII.

61. E.g., in UNCLOS Part XIII.

62. UNGA, Final Act of the Third United Nations Conference on the Law of the Sea, A/CONF.62/121 (27 October 1982) 139, 148.

To date, UNCLOS has been supplemented by three implementing agreements,[63] two of which may contribute to ongoing regulatory discourse concerning the rights of Indigenous Peoples and their relationship with maritime spaces and resources.

The first is the *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* (UN Fish Stocks Agreement), which promotes the sustainable management of fish stocks that traverse both national jurisdictions and the high seas. Article 24 of this Agreement recognises the particular needs of developing States and underscores the necessity of avoiding adverse impacts on small-scale, subsistence, and artisanal fishers – including Indigenous Peoples.

The second is the *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* (BBNJ Agreement), which – though not yet in force – seeks to address existing governance gaps concerning marine biodiversity in areas beyond national jurisdiction. Significantly, the BBNJ Agreement reflects progressive developments in international law by explicitly referencing the UNDRIP in its preamble and affirming that its provisions shall not undermine existing Indigenous rights.[64]

63. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3; and 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 (adopted on 19 June 2023).

64. It is important to note that the BBNJ Agreement has been adopted before the final judgment of *Mauritius/Maldives*. By the way, as a significant step forward for the law of the sea and the rights of Indigenous Peoples, it is crucial to report it.

The BBNJ Agreement further incorporates Indigenous perspectives through key provisions. Article 7 identifies Indigenous traditional knowledge as a guiding principle and calls for its meaningful inclusion. Articles 47 and 48 ensure Indigenous participation as observers in the Conference of the Parties, while Article 49 encourages their input into the Scientific and Technical Body – reinforcing their role in shaping marine biodiversity governance.

Beyond UNCLOS and its implementing agreements, the UNGA plays a significant role in shaping marine governance through the adoption of two annual thematic resolutions: one on the law of the sea and ocean affairs,[65] and another on sustainable fisheries.[66]

UNGA Resolution 77/248 of 30 December 2022 advances legal and institutional developments in ocean governance, with particular emphasis on partnerships with Indigenous Peoples. Similarly, UNGA Resolution 77/118 of 9 December 2022 on sustainable fisheries recognises the contributions of women and the vulnerability of Indigenous, local, and minority communities involved in small-scale fisheries. It reaffirms the

65. For the purpose of this article, the UNGA resolutions on the law of the sea and ocean affairs, and on sustainable fisheries which will be taken into consideration, will refer to the year 2022. Hence, this study aims to present an overview of developments in the law of the sea in the period when the judges of the *Mauritius/Maldives* decided not to include the Chagossian *amicus curiae* submission in the arbitration. The most recent UNGA resolutions – Resolution 78/69 on the law of the sea and ocean affairs (5 December 2023) and Resolution 79/144 (12 December 2024), as well as Resolution 78/68 (5 December 2023) and 79/145 (12 December 2024) on sustainable fisheries – are not addressed in this article, as they were adopted after the tribunal issued its final judgement. It is worth noting, however, that these later resolutions introduced limited additions: the law of the sea and ocean affairs resolutions included provisions recognizing the relevance of traditional knowledge of Indigenous Peoples and local communities in the conservation and sustainable use of the ocean and its resources; the sustainable fisheries resolutions highlighted the lack of social protection and unequal employment opportunities faced by vulnerable groups, including Indigenous Peoples.

66. The annual resolution on sustainable fisheries, concerned the latest developments and implementation of the regulations provided in the UN Fish Stocks Agreement.

commitments made in *The Future We Want*,[67] underscoring the importance of access to fisheries and market participation for subsistence and artisanal fishers, including Indigenous Peoples – especially in developing countries and Small Island Developing States[68].

4. Indigenous Chagossian People: the rejection of the *amicus curiae* submission

As part of the maritime delimitation proceedings between Mauritius and the Maldives, the Chagossian Committee (Seychelles) submitted an *amicus curiae* brief to the Special Chamber of the ITLOS on 23 November 2021. This submission sought to assert the legal rights of the Indigenous Peoples of the Chagos Archipelago in relation to the use of maritime spaces surrounding their ancestral lands, including any economic and other benefits derived from such use.

Geographically, the Chagos Archipelago, located in the Indian Ocean, comprises five atolls, including the Great Chagos Bank – the largest atoll in the world. Encircled by coral reefs, the archipelago hosts a rich array of biodiversity and serves as a critical refuge for many threatened species. However, this biodiversity has been subject to significant decline, primarily due to coral bleaching linked to global warming.[69]

Historically, the archipelago remained uninhabited until the late 18th century, when it was colonised by the French, who established a slave-based

67. A/RES/66/288 (UNGA), 27 July 2012.

68. This emphasis on Indigenous People has been reiterated in the UN General Assembly resolutions after the *Maldives/Mauritius* of 2022.

69. Nicholas AJ Graham, Morgan S. Pratchett, Tim R. McClanahan, Shaun K. Wilson, 'The Status of Coral Reef Assemblages in the Chagos Archipelago, with Implications for Protected Area Management and Climate Change' (2013) Coral Reefs of the World, 253.

coconut plantation economy between 1721 and 1814. Sovereignty over the archipelago was transferred to the British Empire under the Treaty of Paris (1814).[70] During the decolonisation process in the 1960s, Mauritius negotiated its independence from the UK, achieved on 12 March 1968. However, prior to independence, the UK unilaterally detached the Chagos Archipelago from Mauritius, along with some islands from Seychelles, to form the BIOT on 8 November 1965. This detachment occurred with the consent of the Mauritian Prime Minister, though no formal consultation process was conducted with the Indigenous Chagossian population.[71]

In 1971, the largest island, Diego Garcia, was leased to the U.S. for the establishment of a strategic military base during the Cold War, resulting in the forced displacement of the Chagossian population between 1968 and 1971.[72] This displacement has since been the subject of ongoing legal and human rights disputes, particularly concerning the right of return.[73]

In 2010, the UK government established the Chagos Marine Protected Area (ChMPA) – then one of the world's largest marine reserves – to preserve the ecological integrity of the archipelago by prohibiting commercial fishing and other extractive activities.[74] However, leaked diplomatic cables later revealed that the ChMPA may have also served

70. Ayşe Y. Demir, 'The Process of Decolonization of Mauritius and the Right to External Self-Determination of Colonial Peoples' (2021) Public and Private International Law Bulletin, 885.

71. Richard Gifford, 'Submission from Richard Gifford, Legal Representative, Chagos Refugees Group' UK Parliament Foreign Affairs Written Evidence, 31 January 2008, available at <<https://publications.parliament.uk/pa/cm200708/cmselect/cmfaff/147/147we94.htm>>.

72. Ibid.

73. Bancoult (n 19) 21.

74. Richard Norton-Taylor and Rob Evans 'WikiLeaks cables: Mauritius sues UK for control of Chagos island' *The Guardian* (London, 21 December 2010), available at <<https://www.theguardian.com/world/2010/dec/21/mauritius-uk-chagos-islands>>.

a political function by preventing the resettlement claims of displaced Chagossians.

Mauritius initiated arbitral proceedings under Annex VII of UNCLOS on 20 December 2010, challenging the establishment of the ChMPA. The Arbitral Tribunal, in its 2015 award, took no position on the substantive environmental merits of the ChMPA but found that the manner of its establishment was procedurally flawed, as it lacked prior consultation and negotiation with Mauritius. This outcome prompted renewed calls for cooperative arrangements under a "sovereignty umbrella" to protect the marine environment.[75]

In a landmark advisory opinion delivered in 2019, the ICJ held that the UK had acted unlawfully in detaching the Chagos Archipelago from Mauritius in 1965.[76] The ICJ concluded that the separation was not based on "the free and genuine expression of the will of the people concerned" and that the UK had failed to respect Mauritius's territorial integrity during decolonisation. The Court highlighted that the Chagos Archipelago remained part of Mauritius, and that the UK was under an obligation to end its administration of the territory "as rapidly as possible".[77] In response, the UNGA adopted resolution 73/295 on 22 May 2019, calling for the UK's withdrawal and the facilitation of the resettlement of Mauritian nationals, including those of Chagossian origin.

Specifically, the UNGA reiterated that the Chagos Archipelago forms

75. Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, *Reports of International Arbitral Awards* Volume XXXI 359 (18 March 2015).

76. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion [2019] ICJ Rep 95.

77. Ibid., para 178.

an integral part of the territory of Mauritius.[78] In light of this, it called upon the UK to withdraw its administration from the archipelago within six months of the resolution's adoption.[79] Additionally, it urged the facilitation of "the resettlement of Mauritian nationals, including those of Chagossian origin, in the Chagos Archipelago". The reference to "Chagossian origin" in the resolution is significant, as not all Chagossians hold Mauritian citizenship. The Chagossians are Indigenous to the Chagos Archipelago, and their rights to the land and surrounding maritime zones arise from this deep-rooted connection, independent of any formal nationality

This distinction is useful to understand why a committee of Chagossians from the Seychelles wanted to submit an *amicus curiae* brief, claiming their right to self-determination and permanent sovereignty over the natural resources of the Chagos Archipelago, which they assert were breached in 1965.[80] They strongly claimed their legal interest in the *Mauritius/Maldives* case, arguing that their legal rights could not be adequately represented by Mauritius alone. The conclusion of the litigation establishes the extent of the maritime entitlements generated by the Chagos Archipelago. The marine areas and the resources therein should be entitled exclusively to Indigenous Chagossians, "not merely as a subset of the population of Mauritius".[81]

In this respect, the Chagossian Committee (Seychelles) recalled the UNDRIP and the ILO Convention No. 169 as the legal basis for the

78. UN General Assembly, Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, A/RES/73/295, para. 2(b). Noteworthy, the UN General Assembly voted 1116 to 6 (Australia, Hungary, Israel, Maldives, United Kingdom, United States against; 56 abstained) for the adoption.

79. Ibid., para 3.

80. Chagossian Committee (Seychelles) *amicus curiae* Submission in Allen (n 3) para 13.

81. Ibid., para 23.

recognition of the rights of Indigenous Peoples, including Chagossians' right to self-determination, though not to independent statehood.

ILO Convention No. 169, Article 15(1) safeguards Indigenous rights to natural resources on their lands, including participation in their use, management and conservation. The broad concept of 'lands' includes "the total environment of the areas which the peoples concerned occupy or otherwise use", as per Article 13(2), consequently the surrounding marine areas are included. Article 25 of the UNDRIP encompasses terrestrial and marine spaces and resources. While Article 26 asserts that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." States are required to legally recognise and protect these lands, respecting the Indigenous traditions involved.

The Chagossian Committee (Seychelles) noted that the "Final report of the study on indigenous peoples and the right to participate in decision-making" of the UN Human Rights Council emphasises the importance of Indigenous Peoples' participation in decision-making progress, and the respect of their rights in multilateral environmental processes.[82] The final report outlines the significance of obtaining free, prior and informed consent from Indigenous Peoples in decisions about, among other things, the exploration and exploitation of natural resources of Indigenous lands and marine territories.

Finally, the *amicus curiae* submission recalled Article 28(1) of the UNDRIP, which affirms Indigenous Peoples' right to redress, including restitution for lands and resources taken without their free, prior and informed consent.

Despite the strong legal foundation presented by the Chagossian Committee (Seychelles), particularly concerning the importance of In-

82. UN Human Rights Council 'Final report of the study on indigenous peoples and the right to participate in decision-making' (2011) A/HRC/18/42.

digenous Peoples' participation in decision-making processes and considering the recognition of their interests in disputes between States, as enshrined in Resolution III of the Final Acts of UNCLOS, there are significant complexities in this case.

Specifically, the Chagossians are not solely Mauritian citizens; a portion of the Chagossian population remains without Mauritian citizenship. This distinction undermines the assumption that Mauritius, as a State, can adequately represent the interests of all Chagossians in the maritime delimitation dispute between Mauritius and the Maldives. Since not all Chagossians are citizens of Mauritius, it follows that the State may not be able to fully account for the interests of this distinct group.

In light of this unique circumstance, it would have been appropriate for ITLOS to consider the peculiarity of the Chagossian situation when evaluating the inclusion of the *amicus curiae* submission. However, the Special Chamber of ITLOS ultimately decided not to include the *amicus curiae* submission in the maritime delimitation case between Mauritius and Maldives. This decision raises important questions regarding ITLOS' approach to ensuring that the interests of non-state actors, such as Indigenous Peoples with historical ties to the disputed territory, are adequately considered in the resolution of international disputes.

ITLOS did not provide an explanation for its decision to exclude the *amicus curiae* submission. However, as noted by Churchill, the refusal may have stemmed from the absence of any provisions for *amici curiae* in the ITLOS Statute and Rules of Procedure. Moreover, in a prior contentious case a request from Greenpeace, a non-governmental organisation, to participate as an *amicus curiae* was likewise denied without detailed justification.[83]

83. The 'Arctic Sunrise' Case (Kingdom of the Netherlands v. Russian Federation) [2013] ITLOS 22.

Despite ongoing progress by the international community in recognising the rights of Indigenous Peoples within human rights and the law of the sea, Indigenous voices continue to be marginalised. The outcome of maritime delimitations between Mauritius and the Maldives may or may not have been different had Indigenous perspectives been fully considered. Noteworthy, legal history has shown that international law can lead to significant changes through pivotal judgments.

The *Fisheries Case (UK v. Norway)*, adjudicated by the ICJ on 18 December 1951, is a landmark case concerning maritime boundaries and historical claims.[84] This case arose from a dispute between the UK and Norway over the extent of Norwegian territorial waters and the method used to determine them, impacting national and local fishing rights. The UK challenges the method of Norway in delineating its territorial waters, which involved drawing straight baselines along its indented coast. Norway justified its approach by citing historical usage and geographic considerations for its coastal configuration. The ICJ ruled in favour of Norway, recognising the legitimacy of historical claims and the specific geographical context. In particular, the ICJ concluded: "such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line".[85]

The *Fisheries Case (UK v. Norway)* influenced the drafting of UNCLOS, in which Article 7(5) states:

> Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

84. Fisheries Case (United Kingdom v. Norway), Judgement [1951] ICJ Rep 116.
85. Ibid., 142.

As discussed by Enyew and Bankes, Article 7(5) of UNCLOS could potentially allow a coastal State to rely on Indigenous traditional usage to support a more extensive claim of internal waters.[86] According to Article 7(5), when geographical conditions allow the coastal State to establish straight baselines, it may take into account the economic interests specific to the region in question, provided that these interests are clearly demonstrated through long-standing usage and are of significant importance.[87] Based on this, Mauritius might have extended its internal waters around the Chagos Archipelago by designating baselines that account for the historical access and use of marine resources by the Chagossians prior to their deportation. This consideration could have influenced the maritime delimitation between Mauritius and the Maldives, given that the Chagos Archipelago is the closest Mauritian territory to the Maldives.

In addition, the ICJ's ruling in the *Jan Mayen* case *(Norway v. Denmark)* provides a pertinent precedent for incorporating socio-economic interests and traditional rights into maritime delimitation. The Court recognised that maritime boundaries could not be drawn in a vacuum but must account for historical and traditional fishing rights, particularly where vulnerable communities are concerned.[88]

In the *Jan Mayen* case, the Court considered the economic interests of the parties, particularly regarding the exploitation of the capelin stock, which was the principal fishery resource in the disputed area. The Court considered the importance of fishing activities for the economies of both parties and the traditional nature of fishing practises carried out by the population concerned. This set a meaningful precedent.

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86. Endalew Lijalem Enyew and Nigel Bankes, 'Interaction between the Law of the Sea and the Rights of Indigenous Peoples' (2022) in *Routledge Handbook of the Law of the Sea* (Routledge 2022) 151-174.

87. Ibid.

88. *Jan Mayen* (Norway v Denmark) [1993] ICJ Rep 38, paras 72 et seq.

> It appears however to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards.[89]

If economic interests may weigh in delimitation decisions between sovereign States, a broader interpretation of such interests could, or should, encompass Indigenous interests that are directly linked to subsistence, cultural practises, and environmental conservation and use of marine resources.

Finally, as Rocha observed in the context of climate change disputes, legal decisions often have significant impacts on individuals and communities who are not formal parties to the proceedings.[90] A similar dynamic is evident in cases involving Indigenous Peoples, whose rights, culture, and territories may be directly affected by international legal rulings despite the missed opportunity of procedural standing. The State-centric framework of international adjudication is set against the broader consequences of legal proceedings, calling for a reconsideration of the rules to allow the inclusion of *amicus curiae* submissions.

This would also represent a step forward in alignment with the well-known Principle 10 of the Rio Declaration, which, among other things, establishes access to justice as a key pillar of sound environmental governance.[91]

89. Ibid., para 76.

90. Armando Rocha, '*Amicus Curiae* before the International Tribunal for the Law of the Sea: The Prospect of an Advisory Opinion on Climate Change and the Law of the Sea' (2022) 6(1) Católica Law Review, 87.

91. Rio Declaration on Environment and Development A/CONF.151/26 (1992).

5. Conclusions

The rights of Indigenous Peoples, including those related to access to maritime spaces and resources, remain a critically important yet quite underexplored area within international law. Although there has been growing recognition of these rights under human rights law, as well as within the frameworks governing the law of the sea, Indigenous perspectives continue to be marginalised in global legal processes. For instance, in its 2024 Advisory Opinion, the ICJ reaffirmed that the right to self-determination inherently includes access to and control over natural resources.[92]

This marginalisation is further illustrated by the rejection of the *amicus curiae* submission filed by the Chagossian Committee (Seychelles) before ITLOS in the maritime boundary dispute between Mauritius and the Maldives concerning the area north of the Chagos Archipelago.

The Chagossians' legal struggle, rooted in their displacement from the Chagos Archipelago and their ongoing fight for self-determination and access to their ancestral natural resources, illuminates the legal and procedural gaps that continue to impede their rights. Despite the legal foundation presented by the Chagossian Committee (Seychelles), which referenced key international instruments within the human rights and law of the sea frameworks, ITLOS decision not to include their *amicus curiae* submission left their interests unaddressed in the *Mauritius/Maldives* maritime delimitation case.

This rejection raises a fundamental question: Could the inclusion of Indigenous perspectives have altered the outcome of the case? Drawing from the argumentation in the *Jan Mayen* case, the economic and so-

92. Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion) [2024] ICJ Rep 66, para 234.

cio-cultural interests of local communities, especially those historically dependent on marine resources, should be taken into consideration in maritime delimitation decisions. The ICJ in the *Jan Mayen* acknowledged the importance of considering these interests when determining equitable maritime boundaries. It recognised that communities reliant on fishing and other marine resources must have their specific needs and historical rights considered to achieve a fair judgement.

By extension, if the Chagossian community had been allowed to formally participate in the proceedings, their claim to the marine resources of the Chagos Archipelago, the closest Mauritian territory to the Maldives, might have impacted the delimitation of maritime boundaries between the two island States. Furthermore, considering that not all Chagossians are nationals of Mauritius, their interests cannot be represented by Mauritius alone. The exclusion of their *amicus curiae* submission potentially disregarded – once again – Chagossians' longstanding ties to the region, as well as their right to participate in decisions affecting their territory, as enshrined in international law. This omission echoes the broader issue that while economic interests are increasingly considered in maritime delimitations, the traditional and historical rights of Indigenous peoples are not sufficiently incorporated into such processes.

The case also highlights how the procedural rules of international courts, in this relevant case of ITLOS, can inadvertently exclude those most affected by the legal outcomes, in this case the Indigenous People whose lives, and cultural heritage are directly tied to the disputed territories. This exclusion is compounded by the absence of provisions for *amici curiae* in the ITLOS Statute and Rules of Procedure, which further limits the ability of affected parties to participate in the legal process. The reluctance to include non-state actors in decision-making processes can undermine the fairness of the proceedings. This is evident in the *Maldives/Mauritius* case, where the exclusion of the Chagossian *amicus curiae* submission denied the tribunal crucial insights into the

socio-cultural and ecological significance of the Archipelago for its Indigenous inhabitants.

The evolving nature of international law and maritime governance suggests a path forward where the voices of Indigenous Peoples are not only recognised but actively integrated into legal decisions. The recent adoption of the BBNJ Agreement and increased acknowledgment of Indigenous traditional knowledge in environmental governance signal a positive shift. However, these advancements remain insufficient without a more consistent approach that ensures meaningful participation for Indigenous Peoples in disputes over resources they have historically occupied.

In conclusion, the decision to exclude the Chagossian *amicus curiae* submission potentially deprived the court of critical perspectives that could have influenced the outcome of the *Mauritius/Maldives* case. As seen in the *Jan Mayen* case, the consideration of historical and socio-economic interests is essential in ensuring equitable solutions. To promote justice, sustainability, and the fair recognition of Indigenous rights, future international legal proceedings must adopt more inclusive practises, integrating non-state actors' contributions into decisions that directly affect their territories. This inclusive approach not only ensures a more comprehensive and fair legal process but also strengthens the legitimacy and sustainability of international legal rulings in matters of environmental and human rights governance.

Artificial intelligence and human rights at sea: Legal challenges and opportunities in maritime governance

*Filippo Cerboni**

Abstract

The interconnection between the law of the sea and human rights law is increasingly shaping the legal order envisioned by the UN Convention on the Law of the Sea. With the rise of Artificial Intelligence (AI) and rapid technological advances in the shipping industry, the urgency of protecting human rights at sea has intensified. Nevertheless, significant challenges remain in monitoring, preventing, and prosecuting rights violations in maritime spaces. This article explores whether emerging technologies in maritime navigation bolster or undermine human rights protection at sea. It assesses how innovation may enhance safeguards, while also identifying its persistent shortcomings. The analysis begins by examining the relationship between the law of the sea and human rights law and reviewing relevant regulatory developments related to AI in navigation, including reference to practical examples such as varying

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levels of automation in shipping. The discussion then turns to AI's dual role at sea – its regulatory potential in preventing and detecting violations, and its risks, including algorithmic bias, opaque decision-making ("black box" effects), and vulnerabilities in the maritime supply chain. The article concludes that vilifying AI is misguided; like any tool, its impact will depend on how and where it is deployed.

Keywords: Law of the sea, human rights law, artificial intelligence, European Union, IMO, shipping.

1. Introduction

The interrelation between the law of the sea and human rights law has become increasingly crucial in shaping the legal order of the seas and the oceans, as envisioned by the UN Convention on the Law of the Sea (UNCLOS).[1] In this context, the advent of Artificial Intelligence (AI) and the broader technological revolution transforming the shipping industry are creating unprecedented opportunities, while simultaneously heightening the urgency of safeguarding human rights at sea. Despite the considerable promise of emerging technologies in enhancing maritime navigation and surveillance, significant challenges persist in the detection, prevention, and prosecution of fundamental rights violations in maritime contexts.

Such violations have historically thrived on a combination of factors. Chief among them is the vastness and remoteness of maritime spaces, which has rendered abuses more difficult to detect than their terrestrial

1. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force, 16 November 1994) 1833 UNTS 397. Preamble (4).

counterparts, thereby contributing to their neglect by States.[2] The persistence of such violations – and their widespread impunity – has been further facilitated by the prioritisation of border control measures, as well as by the vested interests of commercial shipping entities, the fishing industry, and transnational criminal networks.[3] As a result, individuals at sea remain vulnerable to a range of human rights abuses, including slavery, forced labour, sexual harassment, discrimination, human trafficking, and migrant smuggling, often without access to effective mechanisms of protection or redress.[4]

These factors have all contributed to what scholars refer to as the 'sea blindness' of human rights.[5] Given that more than thirty million people are estimated to be on the world's oceans every day, the urgency of addressing this issue cannot be overstated.[6]

Concurrently, the use of AI in the maritime industry is expanding at a rapid pace, exerting a transformative influence on global shipping. Notably, the maritime AI technology market nearly tripled between 2023 and 2024.[7] Further, research conducted in 2024 estimates the value of the global AI market at USD 4.13 billion, with a projected compound annu-

2. Natalie Klein, 'Geneva Declaration on Human Rights at Sea: An Endeavour to Connect Law of the Sea and International Human Rights Law' (2022) 53(2)-(3) Ocean Development and International Law, 1.

3. Ibid., 3-4.

4. Ibid.

5. E.g., Elizabeth Mavropoulou, 'UK UNCLOS Inquiry: Is UNCLOS Fit for Protecting Human Rights at Sea? A Comment' (*EJIL: Talk! Blog of the European Journal of International Law*, 27 December 2021), available at <<https://www.ejiltalk.org/uk-unclos-inquiry-is-unclos-fit-for-protecting-human-rights-at-sea-a-comment/>>; Anna Petrig, 'Human Rights and Law Enforcement at Sea' in Ruxandra-Laura Bosilca, Susana Ferreira, Barry J. Ryan (eds.), *Routledge Handbook of Maritime Security* (Routledge 2022) 153-164, 155.

6. Steven Haines, 'Developing Human Rights at Sea' (2021) 35 Ocean Yearbook, 21.

7. Fiona Macdonald and Dave Martin, 'Beyond the Horizon: Opportunities and Obstacles in the Maritime AI Boom' (Thetius 2024) 8, available at <<https://thetius.com/free-report-beyond-the-horizon-opportunities-and-obstacles-in-the-maritime-ai-boom/>>.

al growth rate (CAGR) of 23% over the next five years.[8] This technological revolution serves as a catalyst for both opportunities and challenges in the realm of human rights – issues that industry stakeholders and the international community are increasingly called to confront. While certain AI applications have the potential to strengthen the protection of human rights at sea, others may give rise to significant risks and unintended consequences.

Against this backdrop, researchers and practitioners are increasingly prompted to assess the extent to which AI ultimately supports or undermines the protection of human rights at sea. To begin exploring this issue, the present article provides a preliminary overview of the current relationship between the law of the sea and human rights law. This includes reference to the Geneva Declaration on Human Rights at Sea (GDHRS) – a soft-law instrument launched in 2022 by the non-governmental organization *Human Rights at Sea*, with academic backing, aimed at addressing the legal and practical gap between international human rights law and the law of the sea.[9]

The analysis then turns to two recent initiatives aimed at regulating AI: Regulation (EU) 2024/1689 (the AI Act),[10] adopted by the European Union on 13 June 2024, and the ongoing regulatory efforts of the International Maritime Organization (IMO) concerning autonomous vessels. Finally, the article examines several ways in which AI is currently being employed in maritime navigation, comparing their respective benefits and drawbacks in relation to the protection of fundamental rights at sea.

8. Ibid.

9. Geneva Declaration on Human Rights at Sea (launched 1 March 2022).

10. OJ L, 2024/1689, 12.7.2024.

2. The relationship between the Law of the Sea and Human Rights Law

From a legal perspective, the shortcomings in the protection of human rights in maritime spaces highlight the need for a stronger interconnection between the law of the sea and human rights law.[11] Historically, however, these fields have not automatically or reciprocally permeated one another. By its nature, the law of the sea tends to be particularly 'state-centric' and has traditionally been drafted to address the 'human' elements of maritime activities only marginally.[12] In contrast, human rights law has primarily focused on land-based contexts, where territorial boundaries are clearer, thereby making it easier to establish jurisdiction over the protection of rights.[13] The GDHRS marks a significant step toward bridging this gap, as will be discussed below. Moreover, implicit intersections between the use of maritime spaces and human rights law can be identified in both international legal instruments and judicial decisions. The following sections offer illustrative examples of such convergence.

2.1 References to Human Rights Law in the Law of the Sea

Such references are particularly evident in several provisions of UNCLOS. While the Convention does not directly address human rights,

11. Felipe Gonzalez Morales, UN Special Rapporteur on the Human Rights of Migrants, Means to address the human rights impact of pushbacks of migrants on land and at sea, UN Doc A/HRC/47/30 (12 May 2021), para 107; and Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018) 73;

12. Seline Trevisanut, 'The Future of the Oceans: The Role of Human Rights Law and International Environmental Law in Shaping the Law of the Sea' in Nico Krisch and Ezgi Yildiz (ed.) *The Many Paths of Change of International Law* (OUP 2024) 201-226, 201.

13. Klein (n 2) 1.

certain provisions nonetheless pertain to the treatment of individuals and reflect underlying human rights considerations.[14] For example, Article 18 provides an exception to the prohibition on stopping or anchoring during innocent passage,[15] allowing such actions "for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress".[16] This provision is further reinforced by Article 98, which imposes a general duty to assist vessels and individuals in distress on the high seas.[17] Under Article 58(2) of the Convention, this obligation is also applicable within the Exclusive Economic Zone (EEZ).[18] In addition, Article 73(3) explicitly prohibits coastal States from imposing penalties of "imprisonment" or "any form of corporal punishment" on individuals violating fisheries laws within their EEZs without the consent of the States concerned.[19]

Furthermore, the International Tribunal for the Law of the Sea (ITLOS) has made significant contributions toward bridging the gap between the law of the sea and human rights law. Over the years, ITLOS has explicitly affirmed that principles derived from human rights law are applicable in the interpretation and application of UNCLOS, even when they are not expressly stated in its provisions.[20] This approach was most clearly articulated in the *M/V Saiga (No. 2)* case, where the Tribunal held:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force

14. Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law, 3.

15. UNCLOS (n 1), Article 17: "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea".

16. Ibid., Article 18(2).

17. Ibid., Article 98(1).

18. Ibid., Article 58(2).

19. Ibid., Article 73(3).

20. Treves (n 14) 5.

> must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply to the Law of the Sea as they do in other areas of international law.[21]

The reference to 'considerations of humanity' echoes the International Court of Justice (ICJ)'s reasoning in the *Corfu Channel* case, in which the ICJ acknowledged *elementary* considerations of humanity as "general and well-recognized principles" of international law.[22] Besides the already mentioned *M/V Saiga (No. 2)* case, ITLOS reprised the reference to 'considerations of humanity' in subsequent cases, notably *M/V Virginia G* and *Enrica Lexie*.[23] While this formula was not specifically defined in any of these judgements, some authors have praised its flexibility as the "starting point of a greater process of humanisation of the law of the sea", deeming it a decisive reference to human rights law and a symbolic bridge between the latter and UNCLOS.[24]

ITLOS further developed this human rights-oriented approach in cases such as *Juno Trader* and *Hoshinmaru*.[25] Although the respective applications concerned the prompt release of vessels, ITLOS took the opportunity to also address the treatment of the individuals involved, demanding that the masters and crews be allowed to leave the territories of

21. *M/V Saiga (No. 2)* (St. Vincent and the Grenadines v. Guinea), ITLOS Reports 1999, 10, 120, I.L.R. 143 (International Tribunal for the Law of the Sea, 1999) ¶ 155.

22. *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), 1949 ICJ Rep 4 (International Court of Justice, 1949) (Merits); Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2015) 15-16.

23. *M/V Virginia G* (Panama v. Guinea-Bissau) (Judgement), ITLOS Reports 2014, 5, 53 ILM 1187 (International Tribunal for the Law of the Sea, 2014) ¶ 359; *Enrica Lexie* (Italy v. India), Provisional Measures, ITLOS Reports 2015, 24, ¶ 133.

24. Anna Petrig and Marta Bo, 'The International Tribunal for the Law of the Sea and Human Rights' in Martin Scheinin (ed.) *Human Rights Norms in 'Other' International Courts* (CUP 2019) 353-411, 404-405; and Treves (n 14) 5-6.

25. Treves (n 14) 4-5.

the detaining States "without any condition".[26] In the *Juno Trader* judgement, ITLOS particularly emphasised that "the obligation to grant the prompt release of vessels and crews includes elementary considerations of humanity and due process of law."[27] These examples highlight the Tribunal's awareness of humanitarian concerns, while also demonstrating that human rights principles may significantly influence the application and interpretation of the law of the sea.

2.2 References to the Law of Sea in ECtHR judgements

The law of the sea may, in turn, inspire human rights practice, as demonstrated by several relevant judgements of the European Court of Human Rights (ECtHR).[28] For instance, the ECtHR considered maritime legal principles in the *Women on Waves* case, stemming from a complaint by three NGOs against the Portuguese government.[29] The complaint concerned the Portuguese government's prevention of the entry of their chartered vessel, *Borndiep* – which hosted activities advocating the legalization of abortion, a practice illegal in Portugal at the time – into Portuguese waters.[30] While the Court confirmed that the vessel's inno-

26. *Juno Trader* (Saint Vincent and the Grenadines v. Guinea Bissau), ITLOS Reports 2004, 17, 128 I.L.R. 267 ¶ 77, Order of 19 November 2004; *Hoshimaru* (Japan v. Russian Federation), ITLOS Reports 2005-2007, 18, ¶ 12, Order of 9 July 2007.

27. *Juno Trader* (n 26) ¶ 77.

28. The ECtHR adjudicates on alleged violations of the rights set out in the European Convention on Human Rights on behalf of the member States of the Council of Europe, on the grounds of applications filed by those States or by individuals: see Convention for the Protection of Human Rights and Fundamental Freedoms (ECtHR) (Rome, 4 November 1950, in force, 3 September 1953) ETS No. 5, Articles 33 and 34.

29. Namely *Women on Waves*, *Clube Safo* and *Não Te Prives*: see *Women on Waves and Others v. Portugal*, Application n. 31276/05, European Court of Human Rights (Judgement of 3 February 2009).

30. Ibid.

cent passage had been obstructed in accordance with UNCLOS, thereby recognising the relevance of the Convention in the application of human rights law, it also ruled that the plaintiffs' rights to freedom of expression, peaceful assembly, and association had been violated. Indeed, the Court found that Portugal could have adopted more proportionate measures in this case.[31]

The ECtHR's willingness to balance maritime legal principles with human rights considerations is further evidenced by its judgements in *Medvedyev et al. v. France* and *Rigopoulos v. Spain*.[32] Both cases stemmed from the seizure of vessels – flying the Cambodian and Panamanian flags, respectively – on suspicion of drug trafficking.[33] In each instance, the crew members were detained aboard naval ships and subjected to legal proceedings in the arresting States (France and Spain, respectively), where they argued that their rights under Article 5(3) of the European Convention on Human Rights were violated. This provision stipulates that persons arrested or detained "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power".[34] While the Court acknowledged that the respective time between arrest and hearing (sixteen days in *Rigopoulos* and thirteen days in *Medvedyev*) should normally constitute a breach of the 'promptness' required by Article 5(3), it nevertheless found that the exceptional circumstances in both cases warranted derogations from the norm.[35] The ECtHR justified its

31. Treves (n 14) 11.

32. Douglas Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters' in Clive Ralph Symmons (ed.) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers 2011) 83-104, 87; and Treves (n 14) 12.

33. *Medvedyev and Others v. France*, Application n. 3394/03, European Court of Human Rights (Judgement of 29 March 2010); *Rigopoulos v. Spain*, Application n. 37388/97, European Court of Human Rights (Judgement of 12 January 1999).

34. ECtHR (n 28), Article 5(3).

35. *Medvedyev and Others v. France* (n 32); and *Rigopoulos v. Spain* (n 32)

reasoning by emphasising the great distance from the mainland at which the arrests were effected, as well as the urgency of combating drug trafficking at sea.[36] This case law underscores the importance of considering the unique characteristics of maritime contexts when evaluating potential human rights violations.[37]

2.3 The GDHRS

While the aforementioned examples demonstrate that the law of the sea and human rights law can influence one another to a meaningful degree, persistent reports of rights violations indicate that their current integration remains insufficient to guarantee effective protection.[38] The absence of a specific, universal legal framework governing the intersection of these two domains arguably undermines legal clarity and exacerbates the jurisdictional ambiguities that have historically hindered the enforcement of human rights at sea.[39] This legal vacuum inspired the GDHRS, which was drafted with the support of renowned publicists under the auspices of *Human Rights at Sea*.[40] The essence of this document is best captured in its four 'fundamental principles':

1. Human rights are universal; they apply at sea, as they do on land.
2. All persons at sea, without any distinction, are entitled to their human rights.
3. There are no maritime specific reasons for denying human rights at sea.

36. Treves (n 14) 8.

37. Ibid.

38. Klein (n 2) 1-2.

39. Ibid.

40. Including Dr. Sofia Galani, Dr. Elizabeth Mavropoulou, Prof. Steven Haines, Mr. David Hammond, Prof. Irini Papanicolopulu, Prof. Anna Petrig: see Human Rights at Sea, 'The Geneva Declaration on Human Rights at Sea' (*Human Rights at Sea*) available at <<https://www.humanrightsatsea.org/GDHRAS>>.

4. All human rights established under both treaty and customary international law must be respected at sea.[41]

The GDHRS does not seek to create new categories of human rights or impose novel obligations on States; rather, it aims to consolidate and reaffirm rights and duties already established under existing international law.[42] For example, Annex B lists the principal multilateral and regional human rights instruments that inform the Declaration – such as the International Covenant on Civil and Political Rights[43] – alongside specific rights that are particularly relevant in maritime contexts, including the right to life, the principle of non-refoulement, and the right to freedom of expression.[44] The remainder of the GDHRS consists of non-binding 'Guidelines' intended to assist States in upholding human rights obligations in maritime spaces.[45] As a document drafted and adopted by a private group of experts – without formal endorsement by States or intergovernmental organizations – the GDHRS currently holds the status of a soft-law instrument and lacks direct legal effect on State conduct.[46]

Nonetheless, the GDHRS may still exert normative influence on the evolution of human rights protections at sea. As Papanicolopulu observes, "the practice of non-state actors may be quite relevant in the shaping of international custom, and in its recognition, since it may drive unwilling States to act, or to voice their beliefs, in connection with the existence or non-existence of an international customary rule."[47]

41. GDHRS (n 9) Fundamental Principles.

42. Klein (n 2) 23.

43. International Covenant on Civil and Political Rights (New York City, 16 December 1966, in force 23 March 1976) 999 UNTS 171.

44. GDHRS (n 9) Annex B.

45. Ibid., Annex C.

46. Klein (n 2) 18.

47. Irini Papanicolopulu, "Informal Lawmaking in Maritime Migration" in Natalie Klein (ed.), *Unconventional Lawmaking in the Law of the Sea* (OUP 2022) 62-75, 73.

Given that customary international law constitutes a recognised source of law under Article 38(1)(b) of the ICJ Statute, the GDHRS may contribute to the gradual emergence and consolidation of new customary norms, particularly in relation to the protection of human rights in maritime contexts.[48]

The presence of the GDHRS within the international legal landscape may also influence the future interpretation of treaties in a manner conducive to the advancement of human rights at sea. While it may be contended that, in the absence of formal public endorsement, the GDHRS does not constitute one of the conventional interpretive tools under the Vienna Convention on the Law of Treaties (VCLT),[49] its normative orientation nonetheless holds interpretive value. Specifically, it may inform the application of Article 31(3)(c) VCLT, which refers to "relevant rules of international law applicable in the relations between the parties", thereby allowing the GDHRS to serve as a supplementary reference in the interpretation of treaty obligations in light of evolving human rights norms.[50]

Consequently, the GDHRS may further contribute to encouraging States to acknowledge the need for an official international legal framework that substantively integrates the law of the sea with human rights law. Historical precedents demonstrate that non-State actors have, at times, played a pivotal role in influencing State positions and promoting the development of international treaties. A notable example is the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines, the adoption of which was largely driven by civil society initiatives and supported by a coalition of more than 1,200 non-governmental organi-

48. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 933, Article 38(1).

49. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

50. Ibid., Article 31(3)(c).

zations across numerous countries.[51]

Owing to its flexible legal format, the GDHRS may also provide a valuable foundation for the development of emerging customary practices concerning the application of AI in the protection of human rights at sea. Notably, it may serve as a normative reference for States and international organisations in crafting future regulatory frameworks for emerging technologies that align with established human rights standards. In any event, its normative influence will ultimately hinge on the degree to which States engage with its principles and translate them into concrete legal and operational practice.

3. AI and its impact on the safeguard of human rights at sea

The extent to which AI may contribute to the protection of human rights at sea similarly depends on the willingness of States and other relevant actors to engage with and regulate its use. In fact, while the deployment of AI technologies in maritime contexts is expanding globally, a comprehensive international legal framework specifically governing this development is yet to be created. As a result, many technological innovations currently operate within a legal grey zone, affording both States and private entities considerable discretion. Nonetheless, significant regulatory efforts are emerging. Notably, in 2024 the European Union adopted the AI Act, representing a pioneering supranational attempt to comprehen-

51. Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction (adopted 3 December 1977, entered into force 1 March 1999) 2056 UNTSS 211; and Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society' (2000) 11 (1) European Journal of International Law, 105.

sively address AI regulation. Simultaneously, the IMO is undertaking work on a regulatory code for autonomous maritime navigation. In the interim, as the shipping industry increasingly benefits from AI technologies, their impact on human rights at sea may be either beneficial or detrimental, depending on how these technologies are implemented and governed in practice.

3.1 The European Union's AI Act

The European Union's AI Act marks a legal milestone as the world's first comprehensive regulatory framework on AI. Its expansive scope is also expected to influence the role of AI in the maritime sector, including its implications for human rights at sea. While the AI Act warrants a more detailed analysis than can be offered here, several of its provisions are particularly relevant to the present discussion. Article 3 of the AI Act defines an AI system as

> [A] machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments.[52]

Based on this definition, the AI Act seeks to ensure a safe and ethical deployment of AI technologies by categorising systems according to their potential risk: namely, systems of unacceptable, high, limited, and minimal risk.[53]

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52. OJ L 2024/1689 (n 10), Article 3.

53. European Commission, 'Shaping Europe's Digital Future: AI Act', (*European Commission*) available at <<https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai>>.

AI systems classified as posing an *unacceptable risk* are prohibited within the European Union, as they employ manipulative techniques such as "social scoring", defined as the evaluation or classification of individuals or groups based on social behaviour or personal characteristics.[54] *Limited-risk* systems, by contrast, are permitted provided they comply with specific transparency obligations. *Minimal-risk* systems – such as AI-enabled video games or spam filters – may be used without restriction.[55]

The primary focus of the AI Act's regulatory obligations, however, is on *high-risk* systems.[56] These are AI systems intended for use in sensitive contexts, including critical infrastructures, safety components of products, or applications capable of automated profiling and analysis of individuals' personal data to assess sensitive dimensions of their lives.[57] In general, high-risk AI encompasses systems whose improper use could seriously endanger the life, health, or fundamental rights of individuals.

The provisions of the Act are primarily directed at the *providers* and *deployers* of AI systems. For the purposes of the AI Act, a *provider* is defined as any natural or legal person, public authority, agency, or other entity that develops an AI system or places it on the market under its own name or trademark.[58] A *deployer*, by contrast, refers to an entity that uses an AI system under its authority, excluding uses for personal or non-professional purposes.[59] Notably, the AI Act is drafted with a reach extending beyond the borders of the Union, as it applies to *providers* and *deployers* irrespective of their geographic location, insofar as their AI

54. Future of Life Institute, 'High Level Summary of the AI Act' (30 May 2024 Update) (*EU Artificial Intelligence Act,* 27 February 2024, Updated on 30 May 2024), available at <<https://artificialintelligenceact.eu/high-level-summary/>>.

55. European Commission (n 53).

56. Future of Life Institute (n 54).

57. OJ L, 2024/1689 (n 10), Article 6; and European Commission (n 53).

58. OJ L, 2024/1689 (n 10), Article 3.

59. Ibid.

systems – or the outcomes thereof – are used within the Union, as such including Union waters.[60]

In particular, *providers* and *deployers* of *high-risk* AI systems are subject to a range of obligations, including the establishment of robust risk management frameworks, the implementation of sound data governance measures (ensuring that datasets are relevant, representative, and, where possible, error-free), and the maintenance of adequate cybersecurity standards. These safeguards must also be complemented by mechanisms allowing effective human oversight.[61]

While the AI Act does not explicitly refer to the protection of human rights at sea, it nonetheless holds significant potential to shape the role of AI in this context. Indeed, the Act demonstrates a significant awareness of both fundamental rights and the legal implications of AI deployment in maritime domains. A contextual and systematic reading of several key provisions suggests that the European Union seeks to regulate AI applications – including those at sea – in a manner that complements and reinforces the protection of individuals' rights.

First, it is worth noting that the AI Act explicitly references human rights, including the "right to dignity and non-discrimination", to assert that any AI system violating such values should be classified as unacceptable, and therefore prohibited.[62] Moreover, Article 5(1)(d) of the Act prohibits the use of systems designed to assess the likelihood that certain individuals might commit a crime "based solely on their profiling or the evaluation of their personality traits and characteristics";[63] such practices would violate privacy rights and the principle of non-discrimination. However, this prohibition does not extend to AI systems used

60. Ibid., Article 2.

61. Ibid., Articles 8-15.

62. Ibid., para (31).

63. Ibid., Article 5(1)(d).

to "support human assessment of an individual's involvement in criminal activity", provided that the assessment is based on "objective and verifiable facts".[64] In a similar vein, Article 5(1)(h) prohibits the use of real-time remote biometric identification systems in publicly accessible spaces for law enforcement purposes, except when necessary for criminal investigations or for the identification, location, or prosecution of criminal suspects in relation to offenses listed in Annex II.[65] Several of these offenses – such as "trafficking in human beings", "sexual exploitation of children and child pornography", "murder, grievous bodily injury", and "rape" – are crimes intrinsically linked to human rights, highlighting the EU's commitment to protecting individuals through an ethical use of AI.[66] Article 77 further reinforces this interpretation by granting authorities tasked with safeguarding fundamental rights the power to access all documentation created or maintained under the AI Act.[67]

On a separate note, the transport sector has been explicitly identified by the European Commission as a critical infrastructure for the purpose of determining the operational contexts of high-risk AI systems.[68] Consequently, it is reasonable to infer that the *providers* and *deployers* of AI systems intended for the shipping industry will be required to comply with the AI Act when their activities affect the European Union territory, ensuring that their practices align with human rights standards. The AI Act's influence on maritime law is further evidenced by the explicit inclusion of the "unlawful seizure of aircraft or ships" among the criminal offenses that justify the use of AI for law enforcement purposes.[69] Addi-

64. Ibid.

65. Ibid., Article 5(1)(h).

66. Ibid, Annex II.

67. Ibid., Article 77 (1).

68. European Commission (n 53).

69. OJ L, 2024/1689 (n 10), Annex II.

tionally, the Act refers to Directive 2014/90/EU on marine equipment as a relevant source of European Union law when assessing high-risk AI systems that serve as safety components of products or systems.[70] On these grounds, it may be inferred that several provisions of the AI Act are inspired by human rights considerations, while also targeting key actors and activities within the maritime industry.

The AI Act will become fully effective in August 2026.[71] However, the EU's concern regarding the "unacceptable risks associated with the use of AI in certain ways" has led to the anticipation of the Act's prohibitions and general provisions, which – as specified by the Regulation – apply as of February 2025.[72] Meanwhile, the shipping industry is already employing AI across various activities. Most notably, AI is driving the growth of autonomous navigation, which has, in turn, prompted regulatory efforts by the IMO.

3.2 Autonomous navigation and the ongoing development of a "MASS" Code

Most existing maritime legislation rests on the assumption that every vessel must be operated by a human crew. However, the emergence of AI is disrupting this paradigm by enabling the development of autonomous ships, which are poised to reshape the global shipping and shipbuilding industries by delegating tasks traditionally performed by humans to technological systems.[73] The maritime sector's increasing shift toward autonomous navigation is reflected in the growth of the associated mar-

70. Ibid., Annex II, para (49).

71. Ibid., para (179) and Article 113.

72. Ibid.

73. Mohammad Riyadh, 'Transforming the Shipping Inustry with Autonomous Ships and Artificial Intelligence' (2024) 3(2) Maritime Park: Journal of Maritime Technology and Society, 81-82.

ket, which recorded a revenue share exceeding USD 89 million in 2021 and is projected to grow at a compound annual growth rate (CAGR) of 6.81% through 2031.[74]

In light of this, the IMO has acknowledged the pressing need to develop a regulatory framework for the application of AI in the decision-making processes underpinning autonomous navigation.[75] With the aim of enforcing a mandatory Maritime Autonomous Surface Ships (MASS) Code by 2032 (preceded by a non-mandatory code currently scheduled to come into effect in 2026), the IMO established a MASS Joint Working Group (JWG) and is conducting legal studies with the support of its member States.[76] In particular, in 2021 the IMO completed a regulatory scoping exercise to assess the applicability of existing IMO legal instruments to autonomous navigation. This exercise resulted in the identification of vessels corresponding to four possible degrees of autonomy, which may be outlined as follows:

1. Ships with automated processes and decision-support systems, but with crew on board capable of taking control if necessary;
2. Remotely controlled ships operated from another location, with seafarers on board who can assume control if required;
3. Remotely controlled ships without crew on board, operated entirely from a remote location; and

74. Thor Maalouf and Julia Norsetter, "Big waves: global autonomous ship market on the rise" (*ReedSmith Ship Law Log,* 8 March 2024), available at <<https://www.shiplawlog.com/2024/03/08/big-waves-global-autonomous-ships-market-on-the-rise/>>.

75. IMO, 'Autonomous ships: regulatory scoping exercise completed' (25 May 2021), available at <<https://www.imo.org/en/MediaCentre/PressBriefings/pages/MASSRSE2021.aspx#:~:text=The%20Maritime%20Safety%20Committee%20(MSC,(MASS)%20could%20be%20regulated>>.

76. IMO, 'Autonomous shipping', available at <<https://www.imo.org/en/MediaCentre/HotTopics/Pages/Autonomous-shipping.aspx >>; and Barbara Stepien, 'Navigating New Waters: IMO'S Efforts to Regulate Autonomous Shipping' (2024) 23(3) Chinese Journal of International Law, 610-612.

4. Fully autonomous ships, equipped with operating systems capable of making decisions and selecting courses of action independently, without any crew on board.[77]

While this classification is likely to serve as a foundational element of the forthcoming MASS Code, its practical implications raise complex legal considerations. The interplay between AI and the existing regulatory frameworks and maritime safety standards – which were developed for traditional, crew-operated vessels – is a delicate one, as the current laws will have to undergo changes in order to accommodate autonomous ships.[78]

Moreover, while autonomous shipping has significantly advanced, technologies such as sensors and decision-making algorithms are not infallible, making it difficult for stakeholders to place a total and unwavering trust in these tools, especially with regards to maritime safety.[79] In this regard, the implementation of higher degrees of autonomy also prompts concerns over the attribution of legal liability in cases of malfunction or accidents. The current international legal framework lacks specific norms addressing the distribution of responsibility among the actors involved, such as AI system manufacturers, ship operators and shipowners when decision-making functions are delegated to AI tools.[80] In such scenarios, the traditional rules governing liability become increasingly difficult to apply, especially where human involvement is limited or entirely absent.[81]

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77. IMO, MSC 1/ Circ. 1638, Outcome of the Regulatory Scoping Exercise for the use of Maritime Autonomous Surface Ships (MASS) (Adopted 3 June 2021).

78. Riyadh (n 73) 83-84.

79. Ibid.

80. Linlin Chen,'Maritime rights, obligations, and liabilities of intelligent ships from the perspective of risk distribution' (2023) 7(4) Taylor & Francis Group, Journal of International Maritime Safety, Environmental Affairs and Shipping, 9-10.

81. Ibid.

AI's impact on maritime labour should also not be underestimated, as the evolving role of seafarers underscores the necessity for adapted training and preparedness to engage with and operate alongside new technologies. Some scholars have begun to advocate the formal integration of AI modules in maritime education programmes as an essential step to project maritime professions into the future and equip seafarers with the necessary skills to face an increasingly automated maritime domain.[82]

Against this backdrop, the JWG observed that there should always be a "human master" responsible for all modes of navigation.[83] Accordingly, the master of an autonomous vessel – whether located on board or operating remotely – should always retain the ability to intervene directly when necessary, regardless of the vessel's level of autonomy.[84] In practice, this is likely to result in the implementation of flexible and dynamic degrees of autonomy, calibrated in response to contextual factors such as geographic location, maritime traffic density, navigational hazards, and the requirements of coastal or port States.[85] In other words, at least in the foreseeable future, the degree of navigational autonomy will likely vary based on operational parameters and applicable legal standards. Furthermore, Secretary-General Kitack Lim has emphasised that technological innovations must be matched by evolving IMO standards to "ensure the

82. Sergey Karianskyi, "Artificial Intelligence in Maritime Transport" (Institute of Marine Engineering, Science and Technology, 30 April 2025), available at <<https://www.imarest.org/resource/mp-artificial-intelligence-in-maritime-transport.html>>; Elham Karimi, Jennifer Smith, Randy Billard and Brian Veitch, 'AI-based adaptive instructional systems for maritime safety training: a systematic literature review' (2024) 4 Discover Artificial Intelligence 51, available at <<https://doi.org/10.1007/s44163-024-00153-0>>.

83. IMO Repository, Joint MSC-LEG-FAL Working Group on MASS, 2nd session, Report of the Joint Working Group, MASS-JWG 2/WP.1, 21 April 2023, Point 13, 4.

84. Ibid.

85. Murat Sumer, 'Applicability of the right of innocent passage to maritime autonomous surface ships: Exploring the potential role of advisory opinions', in Pierandrea Leucci and Ilaria Vianello (eds.) *ASCOMARE Yearbook on the Law of the Sea. Volume 3 – Maritime Security, New Technology and Ethics* (Luglio Editore 2023) 158-159.

safe, secure and environmentally sound operation of remotely operated and autonomous vessels".[86] Therefore, the forthcoming MASS Code faces the complex task of balancing diverse operational, legal, and safety-related considerations.

Meanwhile, the deployment of AI in the shipping sector is progressing at a significantly faster pace than the corresponding regulatory developments. In March 2023, the M/V *Yara Birkeland* – the world's first fully electric, autonomous, and zero-emission container vessel – completed its inaugural voyage within Norwegian waters.[87] Other automated vessels are following suit, undergoing operational trials across various jurisdictions, facilitated in part by the IMO's issuance of Interim Guidelines for MASS trials.[88] Concurrently, the maritime industry is increasingly integrating AI-based technologies into conventional vessels, generating substantial improvements in navigational efficiency – developments that are also likely to affect the protection and promotion of human rights at sea.

86. IMO, "Symposium on Making headway on the IMO MASS Code" (*International Maritime Organization)*, available at <<https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/Symposium-on-"Making-headway-on-the-IMO-MASS-Code"-.aspx>>.

87. Yara International ASA, 'Yara Birkeland, two years on' (*Yara International Asa*, 28 April 2024), available at <<https://www.google.com/search?client=safari&rls=en&q=yara+birklenad+two+years+on&ie=UTF-8&oe=UTF-8&sei=c0CaZ-rRIp6fi-gPocauwQk>>.

88. IMO, MSC 1/Circ. 1604, Interim Guidelines for MASS Trials (adopted 14 June 2019); by way of illustration: Austal, "Austal Australia Completes Sea Trials for Royal Australian's Navy's Patrol Boat Autonomy Trial" (*Austal,* 23 April 2024), available at: https://www.austal.com/news/austal-australia-completes-sea-trials-royal-australian-navys-patrol-boat-autonomy-trial; Manuela Perrone, 'Navi senza equipaggio, al porto di Livorno si sperimentano le manovre digitali', *Il Sole 24 Ore* (22 March 2024) available at <<https://www.ilsole24ore.com/art/navi-senza-equipaggio-porto-livorno-si-sperimentano-manovre-digitali-AFA5PX9C>>; The Nippon Foundation, 'The Nippon Foundation MEGURI2040 Fully Autonomous Ship Program Introduced at Meeting of IMO's Maritime Safety Committee' (*The Nippon Foundation*, 12 December 2024), available at <<https://en.nippon-foundation.or.jp/news/articles/2024/20241215-107557.html>>.

3.3 Opportunities for the safeguard of human rights at sea through AI

The increasing employment of AI technologies into the maritime sector responds to a range of long-standing challenges, including the need for improved operational efficiency, enhanced safety, and greater environmental sustainability.[89] In addressing these concerns, AI has already demonstrated its potential to produce significant positive outcomes, as evidenced by several of its current applications. These developments, in turn, present promising opportunities for the protection and promotion of fundamental human rights at sea.

One of the primary drivers behind the growing demand for automation in maritime transport is AI's capacity to optimise voyages. For instance, AI-powered sensors facilitate real-time access to performance data, while decision-support platforms that integrate proprietary information from shipping companies with publicly available data can generate rapid, legally accurate responses to queries from crew members or shore-based teams; this enables more efficient and informed decision-making.[90] In addition, AI can forecast the logistical and financial consequences of various scenarios – such as route deviations, adverse weather conditions, or unscheduled port calls – thus promoting safer and more efficient navigation.[91]

Given that the principal causes of maritime accidents continue to include human error, equipment failure, adverse weather, and outdated or incomplete navigational information (such as uncharted obstacles), the enhanced accuracy offered by AI-based systems holds considerable

89. MacDonald and Martin (n 7) 3.

90. Ibid., 12 and 15.

91. Ibid., 17.

promise for improving maritime safety.[92] This, in turn, strengthens the protection of the health and lives of seafarers, passengers, and others involved. In this regard, the maritime technology company OrcaAI reported a 33% reduction in close-quarters incidents across 267 vessels, based on data collected over 15 million nautical miles through its AI-powered situational awareness platform.[93]

AI-driven voyage optimisation can further significantly enhance energy efficiency in maritime operations.[94] Advanced algorithms are capable of monitoring a vessel's energy consumption in real time and recommending strategies for its reduction, such as route recalibration or operational adjustments.[95] This application is particularly salient in light of recent legislative developments at the European Union level – most notably, Regulation (EU) 2023/1805 (the "FuelEU Maritime" Regulation)[96] – which place increasing obligations on States and industry actors to reduce greenhouse gas emissions.[97] In this context, AI has the potential to contribute meaningfully to the reduction of marine pollution and the advancement of the right to a clean, healthy, and sustainable environment, formally acknowledged as a human right by the United Nations

92. Yong Bai and Jeom Kee Paik, *Risk Assessment and Management for Ships and Offshore Structures* (Elsevier 2024) 285.

93. The Digital Ship, 'ORCA'S navigation situation awareness platform leads to 33% reduction in close encounters' (*The Digital Ship*, 22 February 2024), available at <<https://thedigitalship.com/news/electronics-navigation/orca-s-navigation-situation-awareness-platform-leads-to-33-reduction-in-close-encounters/>>.

94. Macdonald and Martin (n 7) 15.

95. Ibid.

96. OJ L 234, 22.9.2023, p. 48–100.

97. Lloyd's Register, The Monohakobi Technology Insitute, NYK Line, "The benefits and opportunities of data-driven condition-based maintenance" (*Lloyd's Register*, 2024), 13, available at <<https://www.lr.org/en/knowledge/research-reports/2024/data-driven-condition-based-maintenance/>>.

General Assembly in 2022.[98]

Another key area in which the shipping industry is benefiting from AI is data-driven, condition-based maintenance and remote diagnostics.[99] AI algorithms can analyse data from on-board sensors to predict equipment failures before they occur, thereby enabling pre-emptive maintenance operations.[100] This proactive approach not only extends the lifespan of equipment but also enhances safety standards – particularly in instances where preventing mechanical breakdowns mitigates the risk of accidents and casualties.

In addition, AI has the potential to become a critical asset in search and rescue (SAR) operations. AI-powered sensors and data analysis tools can detect distress signals and accurately determine the location of vessels or individuals at sea with greater speed and precision than traditional methods.[101]Furthermore, by processing large volumes of environmental data, AI can help predict and mitigate potential risks associated with SAR missions, thereby improving their overall effectiveness.[102] This application is particularly relevant in light of the ongoing phenomenon of mass migration across maritime routes. A notable example is the Emergency Integrated Lifesaving Lanyard (EMILY), an AI-enabled, remotely operated rescue device resembling a buoy, which was successfully deployed by the Greek Coast Guard to assist migrants in the Aegean Sea.[103] More recently, in Valencia, Spain, an AI-based drone played a pivotal

98. UNGA Res A/76/L/75 (26 July 2022).

99. Lloyd's Register, The Monohakobi Technology Insitute, NYK Line (n 97) 13.

100. Ibid.

101. Young-Gyu Lee, Chang-Hee Lee, Young-Hun Jeon and Jae-Hwan Bae, 'Transformative Impact of the EU AI Act on Maritime Autonomous Surface Ships' (2024), 13(5) Laws, 68.

102. Ibid.

103. Warren Duffie, 'From Whales to Silver Foxes to Refugees: Emily Robot is a Lifesaver' (*Office of Naval Research*, 5 May 2016), available at <<https://www.onr.navy.mil/media-center/news-releases/whales-silver-foxes-refugees-emily-robot-lifesaver>>.

role in rescuing a boy at risk of drowning, detecting and reaching him faster than lifeguards and delivering an inflatable life vest that kept him afloat until help arrived.[104]

Similar considerations apply to law enforcement at sea. AI-based tools such as sensors, drones, and automated watchkeepers can facilitate the detection and monitoring of vessels suspected of involvement in activities such as forced labour, illegal fishing, piracy, and human trafficking.[105] Crucially, AI's capacity to accurately track vessel positions may help address longstanding challenges related to the identification of jurisdictional boundaries at sea, which have often constituted an obstacle to the prosecution of offenders. Crime prevention efforts may also be bolstered through the use of AI-powered onboard surveillance technologies, which can deter unlawful conduct and support the collection of reliable evidentiary material. As previously discussed, the AI Act expressly permits the use of real-time remote biometric identification in combating crimes linked to human rights violations, potentially including those occurring at sea, thereby setting a precedent that could influence future legislation on maritime AI applications.

In this context, a practical illustration can be found in Regulation (EU) 2023/2842, which amends the existing legal framework governing the Common Fisheries Policy of the European Union.[106] This regulation introduces new rules targeting fishing practices involving forced labour and explicitly recognises the role of technology in addressing such viola-

104. Charlie Devereux, 'Drone rescues boy caught in riptide off beach in Spain' (*The Times*, 25 July 2022), available at <<https://www.thetimes.com/world/europe/article/drone-rescues-boy-caught-in-riptide-off-beach-in-spain-lfbsbh3nb>>.

105. Mark Floyd, 'Researchers to use Artificial Intelligence "big data", to locate and predict crime at sea' (*Oregon State University Newsroom*, 19 December 2018), available at <<https://news.oregonstate.edu/news/researchers-use-artificial-intelligence-"big-data"-locate-and-predict-crime-sea>>.

106. OJ L, 2023/2842, 20.12.2023.

tions.[107] Fishing vessels are now required to install systems such as vessel monitoring systems, automatic identification systems, and remote electronic monitoring with closed-circuit television, and to regularly transmit data regarding their operations to flag States.[108] While these technologies are not new, many are now available in AI-enhanced versions that operate through machine learning or can be augmented with AI to improve their accuracy and operational effectiveness.

Meanwhile, in the announcement letter for a new study presented by the FAO during the fifth session of the Joint FAO/ILO/IMO Working Group on Illegal, Unreported, and Unregulated Fishing and Related Matters (held in Geneva in 2024), the Secretariat noted that "advancements in data technology, particularly through the analysis of fishing vessels" patterns using various sources of information, may significantly enhance the detection of labour exploitation.[109] This statement further corroborates AI's potential to support the safeguarding of human rights at sea.

3.4 Current and future challenges related to the use of AI

At the same time, increasing concerns have emerged regarding the human, ethical, and economic costs associated with the advantages offered by AI. While this technology presents significant opportunities, it also introduces substantial challenges. Among the most pressing issues are

107. Pierandrea Leucci, 'Fishing activities conducted with the use of forced labour under the revised EU fisheries control system: Improving maritime security through control, inspection and technology', in Pierandrea Leucci and Ilaria Vianello (eds.) *ASCOMARE Yearbook on the Law of the Sea. Volume 3–Maritime Security, New Technology and Ethics* (Luglio Editore 2023) 278.

108. Ibid., 294.

109. FAO Secretariat, 'Safety and Working Conditions on the Fishery Sector', FAO/ILO/IMO Joint Working Group on IUU Fishing and related matters, 5th session, 8-12 January 2024, Geneva.

those related to the nature and governance of data, a lack of transparency in algorithmic decision-making, the potential for social and economic discrimination, and the absence of a harmonised international legal framework.

Data serves as the foundational element of most AI-based systems, including algorithms.[110] However, ensuring access to high-quality, reliable data remains a central obstacle to the effective deployment of AI. When AI systems are fed with suboptimal or obsolete data, their performance may be compromised, potentially resulting in serious errors or user-related difficulties.[111] This is especially evident in the case of autonomous navigation: inadequate data collection or irregular updates of the onboard AI systems may cause equipment malfunctions or even lead to maritime accidents.

The issue is further compounded by the "black box" effect, a concept frequently discussed in AI literature.[112] This term refers to the inherent unpredictability of machine learning, which is AI's capacity to observe its environment and process the information it receives.[113] The outcomes of these processes are not predetermined, making them difficult to foresee. Consequently, the functioning of AI systems remains largely opaque, even to their creators and programmers. Indeed, current AI systems often fail to articulate the reasoning behind their conclusions in a manner that is fully understandable to humans. As a result, placing absolute trust in AI can be problematic, particularly when sensitive data or the protection of fundamental rights is involved.

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110. Macdonald and Martin (n 7) 18.

111. Ibid.

112. Vasiliki Papadouli, 'Artificial Intelligence's Black Box: Posing New Ethical and Legal Challenges on Modern Societies' in Angelos Kornilakis, Georgios Nouskalis, Themistoklis Tzimas, Vassilis Pergantis (eds.), *Artificial Intelligence and Normative Challenges International and Comparative Legal Perspectives* (Springer International Publishing 2023) 39-64, 41.

113. Ibid.

Against this backdrop, the inherent characteristics of the maritime domain – where data availability is generally more limited than in terrestrial environments – underscore the risks posed by AI in terms of opacity and its potential detachment from human rights realities on multiple levels.[114] To date, the development of AI technologies has been predominantly led by experts and institutions based in the Global North, whereas much of the empirical focus of human rights research remains centred on the Global South.[115] This geographic and epistemic divide is particularly significant in data-driven investigations, which are frequently conducted remotely, often relying on data gathered through technological systems or provided by third parties closer to the events in question.[116] Such detachment increases the risk of analytical bias and misinterpretation. For instance, scholars have criticised remote sensing and observation technologies for failing to correctly identify or distinguish between different onboard activities such as fishing, maintenance, or medical operations, demonstrating the necessity of local cooperation and context-specific insight to ensure an accurate interpretation of events.[117]

Furthermore, the high cost and technological complexity associated with the most advanced AI tools underscore their uneven accessibility. These tools are largely concentrated in the hands of economically

114. Jamie Hancock, Ruoyun Hui, Jatinder Singh, Anjali Mazumder, 'Trouble at sea: Data technology and challenges for maritime human rights concerns' (2024) The 2024 ACM Conference on Fairness, Accountability Transparency - FAccT '24, June 3-6, Rio de Janeiro, Brazil, ACM Digital Library, 992, available at <<https://dl.acm.org/doi/pdf/10.1145/3630106.3658950>>.

115. Eman El-Sherbiny, 'Symposium on Fairness, Equality and Diversity in Open Source Investigations: Why Tapping Into Open Source Intelligence Still Comes at a Cost for Researchers in the Global South' (*Opinio Juris*, 6 February 2023), available at <<http://opiniojuris.org/2023/02/06/symposium-on-fairness-equality-and-diversity-in-open-source-investigations-an-introduction/>>.

116. Hancock et al. (n 114) 992.

117. Ibid., 995.

powerful actors, thereby exacerbating existing global disparities.[118] This inequality is particularly concerning in view of the fact that marginalised or underdeveloped communities – often the most vulnerable to human rights abuses – stand to benefit most from AI's protective potential. The unequal distribution of AI-related capabilities creates an asymmetry in both protection and agency, reinforcing structural imbalances. A further issue in this respect is the fact that much of the training data used in contemporary AI systems originates from developed countries, and may embed culturally specific assumptions or biases.[119] When such data is employed without sufficient contextual calibration, it can lead to discriminatory or inappropriate outcomes in diverse maritime settings.

These issues are particularly pertinent to SAR missions and the management of migration at sea. Several actors involved in these domains – including the European Border and Coast Guard Agency (Frontex) – have begun to integrate advanced technologies such as Extended Reality (XR) systems, often supported by AI.[120] While such tools may enhance operational efficiency, they also raise substantial human rights concerns that must not be underestimated. Given the complex nature and provenance of data processed by AI systems, the risk of algorithmic bias – and its potential to perpetuate or amplify discriminatory outcomes – has been extensively acknowledged in academic literature.[121] Scholars have documented how algorithmic decision-making may entrench existing

118. Philip Schellekens and David Skilling, 'Three Reasons Why AI May Widen Global Inequality' (*Center For Global Development*, 17 October 2024), available at <<https://www.cgdev.org/blog/three-reasons-why-ai-may-widen-global-inequality>>.

119. Hancock et al. (n 114) 994-995.

120. Francesca Romana Partipilo, 'Getting rescued by RoboCop? Legal and ethical challenges of the use of extended reality in Frontex's search and rescue operations at sea', in Pierandrea Leucci and Ilaria Vianello (eds.) *ASCOMARE Yearbook on the Law of the Sea. Volume 3–Maritime Security, New Technology and Ethics* (Luglio Editore 2023) 213, 214.

121. Ibid., 234.

patterns of exclusion based on race, ethnicity, language, nationality, or religion.[122] In this regard, the outputs of AI systems could shape the conduct and responses of SAR personnel, giving rise to significant ethical dilemmas. Moreover, technological fallibility presents further risks: for instance, testing conducted by the NGO Space-Eye using satellite-based AI tools revealed a troubling number of "false negatives", wherein small migrant vessels went undetected.[123] Clearly, such oversights could have life-threatening consequences.

The lack of a universal, comprehensive legal framework for the governance of AI intensifies these challenges. While many governments and international organisations remain in the early stages of regulatory development, the rapid pace of AI innovation continues to outstrip existing oversight mechanisms. As a result, the dual-use nature of AI – its capacity to be harnessed for both protective and harmful purposes – has become increasingly evident. Improper deployment of AI surveillance tools, for example, could lead to violations of privacy and exacerbate risks for vulnerable individuals.[124] In this regard, allegations of AI-enabled facial recognition technologies being used by Chinese authorities to monitor, track, and prosecute Uyghurs – a predominantly Muslim minority in Xinjiang – illustrate the profound dangers of such practices.[125] In the maritime domain, NGOs have expressed concern about Frontex's use of drones in the Mediterranean, alleging that surveillance

122. Matthias Leese (et al.), 'Data matters: The politics and practices of digital border and migration management (2022) 27 Geopolitics 5.

123. Elli Wittmann, 'Creating a dataset to spot refugee boats in the Mediterranean' (*Medium,* 22 June 2021), available at <<https://medium.com/data-science/creating-a-dataset-to-spot-refugee-boats-in-the-mediteranean-449e86e2d4b2>>.

124. Hancock et al. (n 114) 991.

125. Paul Mozur, 'One Month, 500,000 face scans: How China is using AI to Profile a Minority', *The New York Times*, 14 April 2019, available at <<https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html>>.

data has facilitated interceptions by Libyan authorities, resulting in the forced return of migrants in contravention of the principle of non-refoulement.[126]

Similar apprehensions apply to the growing threat of AI-facilitated supply chain attacks in the cybersecurity realm.[127] Machine learning algorithms have been shown to bypass traditional security measures, deploying sophisticated malware or exploiting vulnerabilities to extract sensitive personal data.[128] Such breaches could expose victims to multiple risks, including identity theft, surveillance, or coercion. Furthermore, the opacity of AI systems may enable the concealment of ongoing abuses within global supply chains – such as forced labour, human trafficking, or systemic discrimination – by obscuring patterns that would otherwise be detectable through human oversight.

4. Conclusion

This article offered a preliminary overview of the relationship between human rights law and the law of the sea, suggesting that – despite their reciprocal, implicit references in treaty and case law – the international legal framework would benefit from their clearer statutory connection. While the GDHRS represents a remarkable effort in this regard, it would be desirable for it to receive a formal endorsement, or for States to fol-

126. Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya: Aerial Surveillance is Enabling Interceptions, Return of Migrants to Harm' (*Human Rights Watch*, 12 December 2022), avaialble at <<https://www.hrw.org/news/2022/12/12/eu-frontex-complicit-abuse-libya>>.

127. Oladoyin Akinsuli, 'AI-Powered Supply Chain Attacks: A Growing Cybersecurity Threat' (2024) 8 Issue 3 IRE Journals, 696.

128. Ibid.

low its example and integrate the law of the sea with human rights law through global legal efforts.

This is particularly true in view of the staggering growth of AI, even in maritime contexts. Certainly, the AI Act constitutes a legal milestone as the first comprehensive regulatory framework on AI, and includes references to human rights and to the maritime legal domain that are bound to shape the employment of new technologies at sea. Moreover, while any AI regulation depends on a careful balance of multiple interests, the IMO's ongoing work on a Code specifically addressing autonomous ships is as promising as it is necessary, given the growth of the respective market.

Nonetheless, the issues surrounding AI's impact on the safeguard of human rights at sea are of increasing urgency. Indeed, the use of AI at sea appears to present a maritime landscape both illuminated by opportunities and shadowed by potential risks. Each positive impact that AI might have on the protection of human rights at sea seems to be counterbalanced by a corresponding danger, depending on how the relevant technologies are applied. The contribution highlighted this tension through practical examples of advantages (such as those related to voyage optimisation and enhanced accuracy in SAR operations) and shortcomings (including a general lack of transparency and the possible hazards for the cybersecurity of individuals) stemming from AI applications at sea. In any case, AI has firmly established its place in a world increasingly required to adapt to its rapid growth. Furthermore, the benefits that could arise from its appropriate use are too significant to justify its blanket demonization.

While the evidence indicates that the protection of fundamental rights at sea would benefit from a binding international legal framework that regulates the intersection of the law of the sea and human rights law, it is difficult to envision such an effort without addressing AI's role. Overall, an instrument as powerful as AI urgently requires more global

regulatory initiatives that both harness its potential and mitigate its risks, even with regards to the safeguard of human rights. Until such frameworks are developed, the impact of AI at sea rests in the hands of States and stakeholders with access to the relevant innovations, who must, it is hoped, navigate these technological waters with human rights as their guiding compass.

The Italian Civil Aviation Authority's ban on human rights monitoring over the Mediterranean and Law Decree 145/2024: State interference in private rescue operations

*Marilù Porchia**

Abstract

The tension between national border control and the duty to rescue at sea is increasingly evident in Mediterranean States, particularly in Italy. Recent ordinances and legislation have targeted non-governmental organisations (NGOs) conducting search and rescue (SAR) operations, including shipmasters and aircraft pilots monitoring for vessels in distress. This article examines Italy's regulatory framework, focusing on measures issued by the Italian Civil Aviation Authority (ENAC) and their incompatibility with international maritime and aviation law, especially regarding the duty to assist persons at sea. Special attention is given to Article 11 of Law Decree 145/2024, which governs private aircraft operations and mandates compliance with national Maritime Rescue Coordination Centre instructions – including those from Libyan authorities – raising serious human rights and legal concerns. These developments are situated within a broader pattern of State interference in humanitarian SAR efforts. The article argues that restricting NGO aerial surveillance undermines rescue effectiveness, increases the risk of preventable deaths,

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and challenges Italy's compliance with international legal obligations. Evidence shows NGO aircraft play a vital role in detecting distress situations. Rather than impeding their operations, Italy should adopt a regulatory approach that enables cooperation and affirms the fundamental legal and moral duty to save lives at sea.

Keywords: Search and rescue, Italy, ENAC, Libya, place of safety, UNCLOS, private aircraft.

1. Introduction

The conflict between the legal framework established to safeguard national borders and the duty to rescue at sea is becoming increasingly acute in Mediterranean coastal States. In Italy, this tension is reflected in the adoption of ordinances and legislation targeting non-governmental organisations (NGOs) involved in search and rescue (SAR) operations – specifically, the shipmasters of rescue ships and the pilots of aircraft monitoring the Mediterranean Sea to report vessels in distress.

The SAR system plays a crucial role in ensuring that assistance is available to persons in distress, whether at sea or in the air. States that are Parties to the Safety of Life at Sea (SOLAS) Convention,[1] the International Convention on Maritime Search and Rescue (Hamburg Convention),[2] and the Convention on International Civil Aviation (Chicago Convention)[3]

1. Safety of Life at Sea Convention (adopted on 17 June 1960, entered into force on 26 May 1965) 1184, 1185 UNTS 2 (SOLAS).

2. International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS (Hamburg Convention).

3. Convention on International Civil Aviation (adopted 7 December 1944, entered into force 7 April 1947) 15 UNTS 295 (Chicago Convention).

have accepted the obligation to provide aeronautical and maritime SAR coordination and services for their territories, territorial seas, and, where appropriate, the high seas.[4]

The International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO) coordinate global efforts among States to provide effective SAR services. Their objective is to establish a worldwide system that guarantees the availability of rescue operations wherever they are needed.[5] To achieve this, the world is divided into Search and Rescue Regions (SRRs), each with a specific Rescue Coordination Centre (RCC) responsible for overseeing SAR operations within its designated area of responsibility. In the maritime domain, this role is carried out by the Maritime Rescue Coordination Centre (MRCC). In Italy, the MRCC is operated by the Italian Coast Guard.

Against this backdrop, the Italian Civil Aviation Authority (ENAC)[6] – the national authority responsible for the regulation and oversight of civil aviation in Italy – has issued specific regulations affecting SAR operations, including prohibitions on the operational activities of NGO aircraft and vessels engaged in humanitarian monitoring and rescue missions in the Central Mediterranean.

This paper begins by providing background information on the existing regulatory framework in place in Italy (Section 2), before analysing the measures issued by ENAC and highlighting their incompatibility with both the law of the sea and international aviation law, particularly when assessed through the duty to render assistance at sea (Section 3). It

4. E.g., International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, Volume II, par. 1.1.3. For more details on the SAR system, see Seline Trevisanut, *Practice of Shared Responsibility in International Law*, (CUP 2017) 426; Rick Button, 'International law and search and rescue. Operational law in international straits and current maritime security challenges' (2018) 70 Naval War College Review 101.

5. IAMSAR Manual, Volume II, para 1.1.1.

6. *Ente Nazionale per l'Aviazione Civile* (ENAC).

then offers a concise examination of Article 11 of Law Decree 145/2024, which governs the activities of private aircraft (Section 4). These regulatory developments are discussed within the broader framework of State interference in private SAR operations at sea.

Finally, the article assesses whether domestic legal frameworks that directly or indirectly condition compliance with instructions from MRCCs – including the Libyan MRCC – on the imposition of coercive measures, such as significant administrative penalties or criminal sanctions, are consistent with international legal obligations. It also examines whether the practice of the Italian MRCC in instructing private aircraft operators and shipmasters to follow orders issued by the Libyan Coast Guard – despite credible knowledge that rescued persons will be returned to Libya – complies with applicable norms of international law (Section 5).

2. National legal framework

Italy's aviation legislation is primarily governed by the Italian Navigation Code.[7] Part II ("Air Navigation") of the Navigation Code constitutes the foundational legal framework for civil aviation in Italy, covering areas such as aircraft registration, airworthiness, pilot licensing, airport management, and air traffic rights. The Code has undergone several amendments to ensure alignment with international obligations and European Union (EU) standards, particularly following Italy's accession to the Chicago Convention and its integration into the EU Single European Sky

7. *Codice della Navigazione*, R.D. 327/1942.

initiative.[8]

Italian legislation addresses aviation security through the National Civil Aviation Security Programme,[9] developed pursuant to Regulation (EC) No. 300/2008.[10] The central regulatory authority for civil aviation in Italy is ENAC, established by Legislative Decree No. 250/1997.[11] ENAC is tasked with ensuring compliance with both domestic and international aviation standards and is vested with broad administrative, technical, and supervisory powers over air carriers, airports, and aeronautical personnel.[12]

8. Established under Regulation (EU) 2024/2803. OJ L, 2024/2803. The EU Single European Sky (SES) initiative is a regulatory framework launched by the European Commission in 2004 with the aim of reforming the fragmented architecture of European air traffic management (ATM). Its main objective is to improve the efficiency, capacity, and safety of European airspace by moving beyond the limitations imposed by national borders. This is pursued through the centralisation and harmonisation of air traffic control systems across EU member states, fostering cross-border cooperation and introducing common performance targets. The initiative was significantly reinforced by Regulation (EU) 2024/2803, which consolidates and updates previous SES legislation. The regulation aims to optimise the use of airspace, reduce delays, enhance safety standards, and contribute to the environmental sustainability of the aviation sector, aligning with broader EU goals such as the Green Deal and the Paris Agreement. It also emphasises a performance-based approach to air navigation services, greater integration through functional airspace blocks, and modernised air traffic management supported by the SESAR (Single European Sky ATM Research) programme.

9. The *Programma Nazionale per la Sicurezza dell'Aviazione Civile* (National Civil Aviation Security Programme) is the Italian regulatory framework that establishes policies, procedures, and measures to protect civil aviation from acts of unlawful interference. Managed by the Italian Civil Aviation Authority (ENAC), the programme complies with Regulation (EC) No 300/2008 and Commission Implementing Regulation (EU) 2015/1998, ensuring a harmonised level of security across all Italian airports. Its purpose is to safeguard passengers, personnel, aircraft, and facilities through a structured and risk-based approach to aviation security.

10. OJ L 97, 9.4.2008.

11. OJ L 177, 31.07.1997.

12. OJ L 177, 31.07.1997, Article 2; Article 687 of the Italian Navigation Code; ENAC Technical Regulation, Title I, Part II (ENAC Activities), Chapter B (Technical Regulatory Activities) and Chapter D (Supervisory Activities).

ENAC exercises wide-ranging regulatory functions, including the licensing and certification of air operators, airport oversight, and the monitoring of airworthiness,[13] in accordance with Regulation (EU) 2018/1139[14] and relevant European Union Aviation Safety Agency (EASA) regulations.[15] Additionally, ENAC contributes to the liberalisation of air transport and the economic regulation of airport services, particularly under the framework of Regulation (EC) No. 261/2004[16] on air passenger

13. OJ L 177, 31.07.1997, Article 2; Article 687 of the Italian Navigation Code; ENAC Technical Regulation, Title I, Part II (ENAC Activities), Chapter E (Certification Activities) and Chapter F (Airworthiness Requirements).

14. OJ L 212, 22.8.2018.

15. ENAC implements a wide range of EASA regulations that cover various domains of civil aviation safety. ENAC applies Regulation (EU) 2018/1139 as the legal basis for its oversight activities, including certification, licensing, and safety monitoring. Another key regulation is Commission Regulation (EU) No 965/2012 on Air Operations (Air OPS), which sets out rules for commercial and non-commercial air operations. ENAC is responsible for ensuring compliance by Italian air operators, including monitoring flight time limitations, crew qualifications, and operational procedures. For pilot licensing, ENAC implements Commission Regulation (EU) No 1178/2011 (Part-FCL), which governs training, testing, and licensing of flight crew. It certifies Approved Training Organizations (ATOs), issues licenses, and ensures adherence to EASA training standards. In the field of aerodromes, ENAC enforces Commission Regulation (EU) No 139/2014, which lays down requirements for the certification and operation of airports serving commercial air traffic. ENAC certifies Italian airports and verifies compliance with safety infrastructure and operational procedures. Regarding aircraft maintenance and continuing airworthiness, ENAC applies Commission Regulation (EU) No 1321/2014. ENAC approves maintenance organizations, supervises Continuing Airworthiness Management Organizations, and ensures that aircraft registered in Italy remain airworthy. ENAC also enforces Commission Regulation (EU) No 376/2014 on occurrence reporting, which establishes rules for mandatory and voluntary safety incident reporting. In the area of air traffic services, ENAC implements Commission Regulation (EU) No 2015/340, which governs the licensing and training of air traffic controllers (Part-ATCO). It is responsible for issuing licenses, approving training programs, and supervising compliance of air navigation service providers. These EASA regulations are transposed into ENAC's own technical regulatory framework, including its "*Regolamento Tecnico*", "*Circolari Operative*", and specific national guidance documents, ensuring that European standards are effectively applied within the Italian civil aviation system.

16. OJ L 046, 17/02/2004.

compensation and assistance.[17]

ENAC also regulates airport tariffs and air service agreements, in coordination with the Italian Competition Authority[18] and the Transport Regulation Authority.[19] In response to the rapid development of emerging technologies, Legislative Decree No. 96/2005[20] and subsequent amendments have expanded ENAC's mandate to include the regulation of unmanned aircraft systems and urban air mobility, in line with EASA's U-space framework.[21] More recently, Law No. 77/2020 has reinforced

17. ENAC has been designated as the National Enforcement Body (NEB) for the implementation of Regulation (EC) No. 261/2004, which establishes common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellation, or long delay. Legislative Decree No. 69 of 27 January 2006 sets out the penalty provisions for infringements of the regulation and identifies ENAC as the competent authority for detecting violations and imposing the prescribed penalties. ENAC is also the designated body responsible for enforcing Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. Legislative Decree No. 24 of 24 February 2009 governs the penalties for breaches of the provisions of the regulation and assigns ENAC the responsibility for detecting violations and imposing the corresponding sanctions.

18. The *Autorità Garante della Concorrenza e del Mercato* is an independent Italian administrative authority established under Law No. 287 of 1990, tasked with monitoring and promoting fair competition.

19. The *Autorità di regolazione dei trasporti* is an independent administrative authority operating in the regulation of public utilities, established pursuant to Law No. 481 of 1995.

20. Legislative Decree 96/2005.

21. See Commission Implementing Regulation (EU) 2021/664 (OJ L 139, 23.4.2021). The EASA's U-space framework is a regulatory and operational initiative designed to enable the safe, efficient, and secure integration of unmanned aircraft systems (UAS), or drones, into the airspace, particularly in low-level airspace (typically below 120 meters). It establishes a set of digital and automated services – known as U-space services – to support the large-scale use of drones, while minimizing risks to manned aviation and people on the ground. The U-space framework defines the roles and responsibilities of national authorities, air navigation service providers (ANSPs), and newly introduced entities called U-space service providers (USSPs). These USSPs are responsible for delivering core services such as network identification, geo-awareness, flight authorisation, and traffic information to UAS operators. The framework is part of EASA's broader effort to develop a harmonised European drone ecosystem, complementing the EU drone regulation package (such as Regulation (EU) 2019/947 and Regulation (EU) 2019/945).

national sustainability objectives by promoting the decarbonisation of air transport and supporting investment in advanced air mobility solutions.[22]

While ENAC operates under the administrative supervision of the Ministry of Infrastructure and Transport, it enjoys operational independence and collaborates closely with EASA to ensure that Italy's civil aviation governance is harmonised with international and EU standards. As the national civil aviation authority, ENAC also holds regulatory and supervisory authority over Italy's Flight Information Regions (FIRs), which are designated portions of airspace in which the State is responsible for providing air traffic control, flight information services, and alerting services,[23] as defined under the ICAO framework.[24]

It is important to note that the geographic boundaries of Italy's FIRs do not coincide precisely with those of its SRRs. Although some overlap may exist, the two are established for different purposes and according to distinct criteria. As such, ENAC does not appear to hold specific regulatory authority over SAR activities within SRRs.

The regulatory framework governing aircraft operations in Italy, as set out in the national Regulations for Aircraft Operations in Italy (RAIT),[25] provides that standard aviation rules may be waived for certain special operations, including SAR missions. In particular, RAIT.3112 stipulates that SAR activities must be conducted in accordance with the provisions of the competent State authority. The establishment of a SAR area may lead to the imposition of airspace restrictions, such as no-fly zones or other limitations communicated through notices to airmen. Additional

22. Law No. 77/2020.

23. David W. Wragg, *A Dictionary of Aviation* (Osprey 1973) 133.

24. Pablo Mendes de Leon, *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development* (Brill 2021) 223–246.

25. See Regolamento "Regole dell'Aria Italia" (ENAC Regulation on rules for the Italian airspace) 4 edn rev.2 of December 20, 2024.

operational information may be provided via advisories broadcast by Air Traffic Services (ATS) units over standard air-to-ground frequencies.[26] When a SAR area is activated, aircraft involved in rescue operations must coordinate with ATS units and maintain continuous radio contact with the Italian Coast Guard.[27]

3. Analysis of the ENAC ordinances

3.1 Scope and content

Between 3 and 6 May 2024, ENAC issued seven ordinances – identical in content – addressed to seven different Sicilian airports. Each was titled "*Phenomenon of irregular migration by sea from the North African coasts. Prohibition of the operational activity of NGO aircraft and vessels in the Central Mediterranean Sea scenario*."[28]

In line with national law, the ordinances stipulate that the institutional body authorised to intervene in and coordinate SAR activities – through the RCC or designated Rescue Sub-Centres[29] – is the General

26. RAIT.3112(1), 11.

27. RAIT.3112(2), 11.

28. The ordinances are addressed to the airports of *Catania Fontanarossa* (Direzione Territoriale ENAC Sicilia Orientale, ordinanza n. 02/2024, 03.05.2024); *Comiso* (Direzione Territoriale ENAC Sicilia Orientale, ordinanza n. 03/2024 03.05.2024); *Pantelleria* (Direzione Territoriale ENAC Sicilia Occidentale, ordinanza n. 01/2024, 03.05.2024); *Lampedusa* (Direzione Territoriale ENAC Sicilia Occidentale, ordinanza n. 02/2024, 03.05.2024); *Palermo Punta Raisi* (Direzione Territoriale ENAC Sicilia Occidentale, ordinanza n. 01/2024, 06.05.2024); *Palermo Bocca di Falco* (Direzione Territoriale ENAC Sicilia Occidentale, ordinanza n. 01/2024, 06.05.2024); and *Trapani Birgi* (Direzione Territoriale ENAC Sicilia Occidentale, ordinanza n. 01/2024, 06.05.2024). All the ordinances are available here at <<https://www.enac.gov.it/la-normativa/normativa-enac/ordinanze/>>.

29. Secondary coordination facilities established under the SAR framework. They function under the authority of the RCC.

Command of the Port Authorities (*Capitaneria di Porto*) of the Italian Coast Guard, which must be recognised as the sole national maritime authority competent in SAR matters.[30] Accordingly, ENAC holds that NGO involved in SAR operations bear responsibility for "improper sea intervention situations",[31] defined as "the rescue – from makeshift boats – of migrants coming from North African routes".[32]

In particular, the ordinances frame the presence and activities of NGO-operated aircraft as exacerbating the institutional burden borne by the Italian Coast Guard in maritime intervention efforts,[33] while also alleging that such operations may endanger the safety of migrants when conducted outside the parameters of protocols formally sanctioned by the competent maritime authority.[34]

On grounds of national security,[35] Article 1 of the ENAC ordinances determines that "anyone conducting [SAR] activities not in line with the provisions of the current regulatory framework" is subject to sanctions under the Navigation Code, including the potential administrative detention of aircraft as a punitive measure.[36] It may be contended that the use of the term "anyone" in Article 1 of the ordinances could be construed as extending their scope – including the imposition of sanctions for non-compliance – to encompass NGO-operated vessels conducting SAR operations without prior authorisation. Such an interpretation may shed light on the somewhat incongruous invocation of the United Nations Convention on the Law of the Sea

30. ENAC ordinances, Preambular para 8.
31. Ibid., Preambular para 11.
32. Ibid., Preambular para 9.
33. Ibid., Preambular para 10.
34. Ibid., Preambular para 12.
35. Ibid., Preambular para 13.
36. Ibid., Article 1.

(UNCLOS)[37] in the preambular section of the ordinances.[38]

Yet, the ENAC ordinances must be interpreted against the backdrop of Article 792 of the Navigation Code, which defines ENAC's mandate as limited to functions of policing and surveillance of "air navigation", including air safety, air transport, and the management of airspace.[39] The phrase "anyone conducting [SAR] activities not in line with the provisions of the current regulatory framework", therefore, should be interpreted as applying to NGO-operated aircraft, but not to rescue vessels. Besides, the "improper actions of interventions" prohibited and subject to penalties under the ordinances remain ambiguous.

Given the role played by NGO aircraft in the Mediterranean – primarily involving the monitoring of maritime areas and the reporting of distress situations – it can be inferred that the "improper actions of intervention" targeted by these measures are likely to include *monitoring* flights over national and international airspace, as well as the act of *reporting distress* cases.

Using this inference as a starting point, it becomes necessary to assess whether restrictions imposed on NGO aircraft engaged in monitoring and reporting activities are compatible with international legal frameworks governing maritime rescue, airspace regulation, and Italy's obligations to ensure effective SAR operations within its assigned SRRs.

37. United Nations Convention on the Law of the Sea (adopted on 10 December 1982 and entered into force on 16 November 1994), 31363 UNTS.

38. ENAC ordinances, Preambular para 4.

39. See also the ENAC Statute, approved with interministerial Decree (DI) No. 13 of 19 January 2015.

3.2 Compatibility of restrictions on NGO aircraft engaged in *monitoring* activities with international and domestic law

The first issue to be addressed is whether the prohibition imposed on NGO aircraft from conducting *monitoring* activities – effectively restricting their access to national and international airspace – is compatible with international law. This requires a twofold analysis: first, whether overflight of a State's territory by NGO aircraft complies with international legal norms; and second, whether such overflight through international airspace is similarly permissible.

3.2.1 Overflight of State territory by NGO aircraft

It is a well-established principle of international law that a State's sovereignty extends not only over its land territory but also over its territorial sea and the airspace above it.[40] This principle is codified in Article 2(1)

40. Malcom N. Shaw, *International Law* (CUP 2021) 476; Myron Nordquist (ed), *United Nations Convention on the Law of the Sea 1982* (Brill Nijhoff 2011) 145; DP O'Connell, *The International Law of the Sea* (Oxford Law Pro 1982) 124; Renate Platzöder (ed), *Third United Nation Conference* (Oceana Publications 1987) 132; Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (Manchester Unversity press 2022) 57; Donald R. Rothwell et al., *The Oxford Handbook of the Law of the Sea* (OUP 2015) 62; Lilian del Castillo, *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (Brill Nijhoff 2015) 48; Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2019) 94; James Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 241; Jean A. Martial, 'State Control of the Air Space over the Territorial Sea and the Contiguous Zone'(1952) 30 Canadian Bar Review 245; L.J. Bouchez, 'The Concept of Effectiveness as applied to Territorial Sovereignty over Sea-Areas, Air Space and Outer Space' (1962) 9 Netherlands International Law Review 151; Kay Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea' (1983), 77 American Journal of International Law 490; See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 14 and *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4.

UNCLOS, which also reflects customary international law.[41]

UNCLOS remains the foundational legal framework governing maritime zones and related activities. While predominantly focused on the legal regime of the seas and oceans, several of its provisions address the status of the airspace above maritime zones and the rights and obligations of aircraft operating therein.[42]

This regime is complemented by the Chicago Convention, which affirms in Article 1 that each contracting State has complete and exclusive sovereignty over the airspace above its territory. Article 2 further defines "territory" to include land areas and adjacent waters under sovereignty, suzerainty, protection, or mandate.

Under Article 5 of the Chicago Convention, non-scheduled civil aircraft of contracting States enjoy the right to transit the airspace of other contracting States without prior authorisation and to make non-traffic stops.[43] However, this freedom is not absolute: overflown States retain regulatory authority for safety and security purposes and may require landings.[44] Article 15 reinforces the principle of non-discrimination, requiring that "[e]very airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions

41. Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I, (Martinus Nijhoff Publishers 2002) 125; Brian D. Lepard, *Customary International Law. A New Theory with Practical Applications* (CUP 2010) Chapter 10.

42. E.g., Articles 34, 49, 78, 87, 110, 111, 135, 212, 222, 224.

43. Chicago Convention, Article 5, first sub-paragraph: "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights..."

44. Ibid.

of Article 68, be open under uniform conditions to the aircraft of all the other contracting States."[45]

The Convention also provides specific exceptions to the principle of free overflight. Article 5 allows States to impose routing requirements or special permissions for flights over regions lacking adequate navigational infrastructure.[46] Article 9 authorises restrictions or prohibitions on overflights for reasons of military necessity or public safety, provided such measures are geographically defined, uniformly applied, and duly notified to other States and to the ICAO.[47]

Italian domestic law adheres closely to this international framework. Article 3 of the Italian Navigation Code adopts the definitions established by the Chicago Convention and affirms national sovereignty over the airspace above both land territory and territorial sea. Consistently, the RAIT defines "national airspace" as encompassing the airspace over the national territory and territorial sea of the Republic.[48]

Domestic provisions on airspace control are elaborated in Article 793 of the Navigation Code ("Prohibition of Overflight"), which states that:

> [ENAC] may prohibit overflight of certain areas of the national territory for security reasons. When there are military or security or public order reasons, ENAC, upon request of the competent administration, shall prohibit overflight of certain areas of the national territory. The Ministry

45. Ibid., Article 15, first sub-paragraph. Also note that, Article 68 of the Chicago Convention, as referenced in the first sub-paragraph of Article 15, empowers each State to designate the routes to be followed by international air services within its territory, as well as the specific airports such services may utilise.

46. Ibid., Article 15, second sub-paragraph.

47. Notably, Article 9(a) specifies that such prohibitions must be uniform, geographically reasonable, and promptly notified to other States and the ICAO; and Article 9(b) allows temporary, exceptional restrictions in emergencies or for public safety, provided they apply equally to aircraft of all nationalities.

48. RAIT, Article 2(12). Italy's compliance with its international obligations, in any case, finds a general legal justification in Article 10(1) of the Italian Constitution.

of Infrastructure and Transport may also prohibit air navigation over the entire national territory for exceptional reasons of public interest.

ENAC Circular ATM-05B (13 May 2021)[49] details the procedures for establishing "reserved airspace" – temporarily designated areas for the exclusive or restricted use of specific users. These may include airspace restrictions for public events (e.g., firework displays), military exercises, or operations linked to public figures, demonstrations, explosive ordnance disposal, or natural disasters.

Article 793, however, refers only to "security" without clarifying whether this includes "national security", a distinct concept from public security. While public security relates to the protection of individuals and public order, national security is oriented toward the protection of the State from internal and external threats.[50] The Navigation Code's sparse reference to national security may reflect legislative caution, given its ambiguous conceptual contours and unclear position within the broader legal categories of public order and State defence.[51] This indeterminacy raises rule-of-law concerns, particularly where judicial oversight is required.[52]

In the absence of an explicit domestic legal basis authorising flight restrictions on grounds of national security, the legality of ENAC ordinances directed at civil – especially NGO-operated – aircraft in international airspace remains open to challenge.

49. ATM-05B Circular of 13/05/2021 "Update and general revision"; ENAC also updates the guidelines provided for the first time in 2010 regarding "Temporary airspace restrictions".

50. See David A. Baldwin, 'The concept of security' (1997), 23 Review of International Studies 5 and Denis Iroshnikov, 'Theoretical Issues of "Security" Concept' (2019), 12 Journal of Politics and Law 34.

51. See Victoriia Zagurska-Antoniuk, 'National security and public administration in modern political systems' (2020) 66 Galician economic journal 187.

52. Ibid. See also Denis Iroshnikov, 'A Systematic Approach to the Understanding of National Security in the Legal Dimension' (2018), 11 Journal of Politics and Law 11.

3.2.2 Overflight in international airspace

Beyond the territorial sea, States no longer exercise full sovereignty but instead possess limited functional jurisdiction,[53] particularly within the exclusive economic zone (EEZ)[54] and over the high seas. The airspace above these maritime zones is classified as international and governed by the freedoms codified in UNCLOS and customary international law, including, notably, the freedom of overflight.[55]

The principle of freedom of overflight was first formally articulated during the Paris Peace Conference of 1919–1920, wherein the Aeronautical Commission's report affirming such a freedom received near-unanimous endorsement from the participating States.[56] Although the 1944 International Civil Aviation Conference, which culminated in the adoption of the Chicago Convention, did not expressly reiterate this principle in the treaty text, the preparatory works and deliberations of the Conference nonetheless reflected a broad consensus among States that international

53. Shaw (n 40) 495; Nordquist (n 40) 145; O'Connell (n 40) 124; Platzöder (n 40) 154; Churchill (n 40) 82; Tanaka (n 40) 186; Crawford (n 40) 250.

54. See Part V UNCLOS.

55. Tanaka (n 40) 554; Pete Pedrozo, 'Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas' (2020) *Indonesian Journal of International Law*, Vol. 17, No. 4, 477. See Articles 58(2) and 87(1)(b) UNCLOS.

56. John Cobb Cooper, 'The International Air Navigation Conference, Paris 1910' (1952) 19 Journal of Air Law and Commerce Journal of Air Law and Commerce, 127. The Commission – composed of technical and diplomatic delegates from the victorious Allied and Associated Powers – had been created by the Conference to draft the aviation clauses of the post-war peace treaties and to prepare a separate multilateral air-law instrument. Its report, adopted almost unanimously by the plenary Conference in May 1919, became the blueprint for Articles 313-320 of the Versailles Treaty and for the separate Convention Relating to the Regulation of Aerial Navigation signed in Paris on 13 October 1919, both of which affirmed – though later narrowed – the freedom of overflight. Aeronautical Commission, Report on Aerial Navigation, Paris Peace Conference Doc. No. 164 (7 May 1919) in Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, vol XIII, ch. XX, 'Aerial Navigation', 641–647.

airspace lies beyond the scope of any single State's sovereign jurisdiction.[57]

Italian aviation law, as codified in the RAIT, defines "national airspace" as comprising the airspace within the limits of the territorial sea. This definition excludes the airspace over the EEZ, which is therefore subject to the legal regime applicable to the high seas.[58] Notably, the RAIT contains no substantive provisions concerning the high seas – a likely indication that, in such zones, only the standards prescribed in the ICAO Annexes or regionally coordinated ICAO procedures apply.

The absence of sovereignty over airspace above the high seas entails a corresponding absence of territorial jurisdiction *stricto sensu*. The legal fiction that ships and aircraft constitute extensions of a State's territory – a concept often metaphorically described as "floating islands"[59] – has been consistently rejected in contemporary international law.[60] Both

57. Article 12 of the Chicago Convention stipulates that air navigation over the high seas must be regulated without exception by uniform rules established by ICAO, and that compliance with these rules must be ensured by the States to which the aircraft belong. The binding provisions of Article 12 are not limited to routes and the conduct of flights but also extend to air traffic control and the safety of air navigation. These rules define the legal status of such airspace and implicitly exclude any alternative claims by individual States regarding activities conducted within it. See Antonio De Rosa, Vincenzo Simonetti, *Lezioni di diritto aeronautico militare*, (Stato Maggiore dell'Aeronautica – Ufficio Generale Consulenza e Affari Giuridici 2017) 219.

58. Italy "authorised" the establishment of an EEZ through Law No. 14 of 14 June 2021, pending the issuance of an executive decree. For more details, see Tullio Scovazzi, 'The Italian Exclusive Economic Zone', in Pierandrea Leucci and Ilaria Vianello (eds.), *ASCOMARE Yearbook on the Law of the Sea. Volume 2: Fisheries and the Law of the Sea in the Anthropocene Era* (Luglio Editore 2023). See also Kay Hailbronner, 'The legal regime of the airspace above the exclusive economic zone' (1983) 8 Air and Space Law, 30; Shaw (40) 499.

59. Rolando Quadri, *Le navi private nel diritto internazionale* (Giuffrè 1939) 37; Herman Meyers, *The Nationality of Ships* (Martinus Njhoff 1967) 32; Amina Maneggia, *La giurisdizione negli spazi marini non sottoposti a sovranità territoriale* (Wolters Kluwer 2022) 108.

60. Nagendra Singh, *Maritime Flag and International Law* (Sijthoff 1978) 14; Lorenzo Schiano di Pepe, 'La questione della nazionalità delle navi dinanzi al Tribunale internazionale per il diritto del mare' (2002) Rivista di Diritto Internazionale, 329. Shaw (n 40) 525; Tanaka (n 40) 186; Crawford (n 40) 285; Francesco Salerno, Diritto Internazionale (Wolters Kluwer 2021) 371; Benedetto Conforti and Massimo Iovane, *Diritto internazionale* (Editoriale Scientifica 2023) 329.

UNCLOS and international case-law oppose this notion, favouring instead the principle of *extraterritoriality*, under which jurisdiction over vessels and aircraft beyond national territory is exercised through the concept of nationality.[61] This is reflected in Article 17 of the Chicago Convention, which provides that "aircraft have the nationality of the State in which they are registered." Nationality thereby serves as the basis for both prescriptive and enforcement jurisdiction in international airspace, mirroring the legal treatment of ships on the high seas.[62]

This principle is echoed in Italian domestic law. Article 7 of the Navigation Code affirms that "[t]he liability of the shipowner and the operator of the aircraft for acts or facts attributable to the crew is governed by the national law of the ship or the aircraft." Similarly, Article 8 provides that "[t]he powers, duties, and responsibilities of the shipmaster or captain of the aircraft are governed by the national law of the ship or aircraft."

Nevertheless, despite the international repudiation of onboard territoriality, Italian legislation continues to reflect this concept. Article 4 of the Navigation Code stipulates that "Italian ships on the high seas and Italian aircraft in areas or spaces not subject to the sovereignty of any State shall be considered as Italian territory." This provision, however, constitutes a purely domestic legal fiction and does not confer sovereignty under international law.

A coherent reading of the principles of onboard jurisdiction and the freedom of overflight leads to the conclusion that no State other than the State of Registry may lawfully interfere with the activities of civil aircraft in international airspace. While limited exceptions to this rule do exist –

61. E.g., Article 92(1) UNCLOS affirms that ships on the high seas are subject to the exclusive jurisdiction of their flag State, except in exceptional circumstances expressly provided for by international treaties or conventions. See also *Corfu Channel* case (n 40) and *Enrica Lexie* Case (Italy v. India) (Merits) [2020] PCA, 2015-28.

62. See Articles 91 and 94 UNCLOS.

particularly in relation to aviation security, crime prevention, or specific forms of international cooperation[63] – such exceptions are narrowly construed within the aviation domain, reflecting its distinctive operational and legal characteristics.

Although certain States have sought to extend regulatory control beyond their sovereign airspace – a tendency often labelled as *aerial contiguity*[64] – the exercise of public authority beyond national borders is permissible only under narrowly circumscribed conditions in international and domestic law. Notably, SAR operations are not among the permissible bases for extraterritorial regulatory action. This is confirmed in Article 13 of the Italian Navigation Code, which expressly provides that "[t]he obligations arising from assistance, rescue, and recovery operations carried out on the high seas are governed by the national law of the ship or aircraft that rendered the assistance or performed the recovery." Accordingly, ENAC lacks the jurisdiction to impose legal consequences on foreign-flagged civil aircraft, including those operated by NGOs, for activities conducted in international airspace.

This interpretation was recently affirmed by the Administrative Court of the Lazio Region (*TAR Lazio*), which annulled ENAC's order of 17 November 2023, titled *"Coast Guard Reconstruction of the Activities of the NGO Aircraft Colibrì 2 – Report on the Events of 11 November 2023"*.[65] The order alleged that the Austrian-registered aircraft operated by the NGO Pilotes Volontaires had engaged in unlawful conduct in interna-

63. For example, universal jurisdiction may justify the intervention of states other than the flag State. Two recent major aviation incidents – the downing of Malaysia Airlines Flight MH17 and the crash of Ukrainian International Airlines Flight PS752 in Tehran on 8 January 2020 – illustrate the application of universal jurisdiction in the context of air criminal law. E.g., see Sarah Williams, 'Mh17 and the International Criminal Court: a Suitable Venue?' (2016) MelbJlIntLaw 9, 17(1) Melbourne Journal of International Law 210.

64. See De Rosa, Simonetti (n 57) 220-221.

65. Regional Administrative Court (TAR) of Lazio, 19 June 2024, RG. No. 00567/2024, judgment No. 12644/2024, made public on 21 June 2024.

tional airspace and directed the organisation to cease such activities, under threat of sanctions.[66]

The annulled provision closely resembled other ENAC orders under current judicial review. The NGO was accused of having "improperly operated outside national and supranational rules, endangering the safety of migrants, who were not assisted according to the prevailing and approved protocols of the Maritime Authority",[67] and was instructed to refrain from further activities in the SAR domain, with a warning that continued operations could result in "sanctions such as the administrative detention of the aircraft."[68] However, the facts established that the flight occurred outside Italian sovereign airspace and involved an Austrian-registered aircraft. The court therefore held that ENAC had exceeded its prescriptive competence, as it purported to exercise regulatory authority over a foreign-registered aircraft operating in international airspace. The ruling explicitly found that "it is clear that ENAC, in issuing the contested provision, exceeded its territorial competence, improperly exercising a power (the power of oversight and air police)."[69]

In conclusion, a State – and by extension, its civil aviation authority (ENAC in the case of Italy) – may not lawfully impose restrictions on the freedom of overflight enjoyed by foreign-flagged civil aircraft operating in international airspace. Such restrictions may only be imposed within national airspace and under exceptional conditions expressly recognised in law, such as those relating to flight safety, military necessity, or public emergencies. In the absence of a clearly established legal basis in either international or domestic law, any restriction on foreign aircraft grounded in national security considerations remains of dubious legal validi-

66. Ibid., para 8, 5.

67. Ibid., para 8, 4.

68. Ibid.

69. TAR Lazio (n 65), para 10.1.3.

ty. Moreover, the ENAC-imposed restrictions examined herein are not territorial (*ratione loci*)[70] but functional in character, as they selectively target aircraft engaged in SAR operations, as further addressed below.

3.3 Compatibility of restrictions on NGO aircraft *reporting distress* situations with international and domestic law

The second issue under consideration concerns the compatibility of restricting NGO-operated aircraft from *reporting distress* situations with international law. These activities have been characterised by the ENAC ordinances as "improper intervention activities" and a "substantial evasion of the regulatory framework for [SAR]".

As a preliminary matter, it is essential to underscore that the international SAR regime is predicated on the prompt and effective communication of distress situations. This obligation is firmly embedded in a range of international legal instruments.

The Hamburg Convention[71] obliges States to act expeditiously when informed of persons in distress at sea within their designated SAR regions. Specifically, it requires competent national authorities to coordinate without delay and to ensure that appropriate assistance is rendered.[72] RCCs must also maintain up-to-date operational information[73] and implement procedures to obtain the data necessary for effective SAR interventions.[74] Critically, the Convention neither centralises the authority to report maritime distress in a single institutional actor nor prohibits

70. The ordinances do not establish a 'no-fly zone' in the airspace over the State's territory.

71. It is worth noting that reference to the Hamburg Convention is contained both in the ENAC ordinances and in Italy's Law No. 147/1989, whereby it is incorporated into the national framework.

72. Hamburg Convention, Chapter 2, para 2.1.9.

73. Ibid., Chapter 4, para 4.1.1.

74. Ibid., Chapter 4, para 4.2.3.

pilots, vessels, or other third parties from notifying SAR authorities of emergencies

In this context, ENAC ordinances cite Presidential Decree No. 662/1994, which implements Law No. 147/1989 and thereby transposes the Hamburg Convention into Italian law. The decree designates the General Command of the Port Authorities (*Capitaneria di Porto*) of the Italian Coast Guard as the national MRCC,[75] responsible for organising and managing SAR operations within Italy's maritime area of responsibility.[76] However, this designation pertains strictly to coordination and does not confer an exclusive competence to receive or validate distress reports. This reading aligns with broader international legal obligations under UNCLOS,[77] SOLAS,[78] and established principles of customary international law,[79] all of which affirm the duty of shipmasters and relevant actors to render assistance to persons in distress at sea.

The International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual), jointly issued by the IMO and the ICAO, reinforces this decentralised and inclusive approach to distress reporting. It affirms that any capable asset – whether vessel or aircraft – has a positive obligation to assist, and that distress alerts may and should be transmitted through a variety of channels to ensure a timely response.[80] Italian domestic law similarly reflects and reinforces these internation-

75. Presidential Decree No. 662/1994, Article 3(1)(a).

76. Ibid., Article 4(2).

77. UNCLOS, Article 98.

78. Article 10 of the International Convention on Salvage (adopted on 28 April 1989, entered into force on 14 July 1996), 1953 UNTS.

79. See Irini Papanicolopulu, 'The duty to render assistance, in peacetime and in war: A general overview' (2016) International Review of the Red Cross, 98(2), 491-514, 494; and Felicity Attard, 'Limitations on the duty to render assistance at sea under international law', in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 1 – Law of the Sea, Interpretation and Definitions* (Luglio Editore 2022), 49-50.

80. IAMSAR Manual Volume II, para 1.3.4.

al norms. Article 69 of the Navigation Code ("Assistance to Vessels in Danger and Shipwrecked Persons") mandates that maritime authorities initiate immediate rescue efforts upon learning of an incident at sea. Where direct intervention is unfeasible, they must alert other competent bodies.[81] Furthermore, in the absence of a timely maritime response, the duty to act transfers to the local municipal authority.[82] These provisions make clear that the duty to intervene does not depend on the source of the distress information.

Additional articles in the Navigation Code substantiate this legal framework: Article 489 ("Duty of Assistance"), Article 490 ("Duty of Rescue"), and Article 1158 ("Omission of Assistance to Vessels or Persons in Danger") collectively impose a general obligation to provide aid, regardless of how or by whom the distress report is initiated.

Section 310 of the National SAR Plan[83] ("Emergency Reporting and Evaluation of Information") provides further clarity. It expressly stipulates that any public or private entity that becomes aware of a maritime distress situation must immediately notify the competent Maritime SAR Organisation. Acceptable reporting pathways include emergency services, law enforcement, military command centres, foreign SAR entities, and NGOs. The IAMSAR Manual echoes this broad reporting framework, affirming that all distress situations should be communicated by any means necessary to ensure the prompt mobilisation of rescue efforts.

Collectively, this legal and operational architecture – international and domestic – is designed to serve a singular, overriding objective: the preservation of human life at sea. Given that NGO-operated aircraft and vessels may, in many cases, be the first to detect persons in distress and

81. Navigation Code, Article 69(1).

82. Ibid., Article 69(2).

83. National SAR Plan, 2020 edition, adopted by decree of the Ministry of Infrastructure and Sustainable Mobility on 4/2/2021, No. 45. The National SAR Plan implements what is prescribed by Rule 4.5 of the Annex to the Convention.

may be better positioned to initiate or coordinate a rapid response, the prompt transmission of such information is not merely permissible but indispensable. The IAMSAR Manual underscores the urgency of early intervention, observing that survival rates for injured individuals can decline by up to 80% within the first 24 hours, while the chances of survival for uninjured persons decrease significantly after 72 hours.[84] Within this framework, reports from NGOs and other non-State actors constitute not unlawful interference, but critical components of an effective and lawful SAR system.[85]

3.4 Enforcing ENAC Ordinances

ENAC has initiated enforcement of its 2024 ordinances through administrative sanctions targeting NGO-operated aircraft in at least two recent cases. The first involves *Seabird*, a German-registered aircraft operated by Sea-Watch, which was fined €2,064 on 21 May 2024.[86] According to ENAC's enforcement notice,[87] on 14 May the aircraft "overflew the Libyan SAR area, instructing a ship of the same NGO to carry out a rescue operation in Libyan waters"[88] – a rescue operation which the Libyan authorities allegedly "did not authorise for this specific case."[89] Sea-Watch has rejected this account, stating that the distress alert was transmitted to

84. IAMSAR Manual Volume II, para 1.3.4.

85. Therefore, the master of a vessel retains discretion over how to conduct rescue operations in compliance with applicable legal frameworks. See IAMSAR Manual, Volume II, para 3.1.2.

86. Sea Watch Italy, available at <<https://x.com/SeaWatchItaly/status/1792962961419673910>>; See also Human Rights Watch, Italy Threatens to Ground Rescue Planes in the Mediterranean, 22 May 2024, available at <<https://www.hrw.org/news/2024/05/22/italy-threatens-ground-rescue-planes-mediterranean>>.

87. ENAC, Direzione Territoriale Sicilia Occidentale, ordinanza-ingiunzione 5/2024.

88. Ibid., 1.

89. Ibid.

all relevant maritime authorities, including Italy, the EU, and Libya, in accordance with standard emergency protocols. The organisation further contends that the rescue took place in international waters, albeit within the Libyan-designated SAR zone – not within Libya's territorial sea.[90]

The second case concerns a Swiss-registered aircraft operated by the Humanitarian Pilots Initiative,[91] which was likewise fined €2,064 for an alleged incident on the same date.[92] The sanctioning decision mirrors that issued against Sea-Watch, alleging unauthorised overflight of the Libyan SAR region and direction of a rescue operation absent express clearance from the Libyan Coast Guard.[93]

In both cases, the sanctions appear to rely on communications received from Libyan authorities indicating that the respective rescue operations lacked authorisation. Italian authorities accepted this representation as a sufficient legal basis for imposing penalties under national law.[94]

This enforcement approach raises serious legal concerns. As established under the Hamburg Convention, SAR zones are created not to confer sovereign rights or exclusive control, but to assign responsibility for coordinating rescue efforts in service of a single overriding objective: the protection of human life at sea. The functional mandate granted to coastal States within their SAR regions does not entail a right to prohibit

90. Extracts of the court documents reviewed by the author but not publicly available.

91. ENAC, Direzione Territoriale Sicilia Occidentale, ordinanza-ingiunzione 6/2024.

92. Ibid.

93. Information obtained by court documents reviewed by the author but not publicly available.

94. See Luca Pons, 'Sea Watch multata per aver soccorso migranti, la Ong: "Governo ci sanziona su indicazione della Libia"' (22 May 2024) FanPage, available at <<https://www.fanpage.it/politica/sea-watch-multata-per-aver-soccorso-migranti-la-ong-governo-ci-sanziona-su-indicazione-della-libia/>>; and Alessia Candito, 'Multe per tenere a terra gli aerei ong, l'Enac sanziona Seabird. "Ce lo hanno detto i libici"' (21 May 2024) La Repubblica, available at <<https://palermo.repubblica.it/cronaca/2024/05/21/news/migranti_ong_enac_multa_seabird_libia-423061749/>>.

or penalise rescue activities by other actors, particularly where such activities are undertaken in response to clear distress and in compliance with customary international law obligations.[95]

More broadly, international law – reflected in instruments such as UNCLOS, SOLAS, and the Hamburg Convention, and entrenched in customary practice – imposes an unequivocal duty on all capable actors to render assistance to persons in distress at sea. This obligation is not contingent upon the prior approval of the responsible coastal State, particularly where such approval is delayed, withheld, or inconsistently granted. Accordingly, the absence of express authorisation from Libyan authorities cannot, in and of itself, constitute a lawful basis for penalising NGO aircraft or vessels engaged in *bona fide* rescue operations in international waters.

ENAC's sanctions risk blurring the line between the SAR authorities' coordination role and an effective regulatory monopoly over maritime rescue operations. Such an approach distorts the legal architecture underpinning the international SAR regime by recharacterizing essential, life-preserving interventions as administrative violations. This interpretation is at odds with the core legal principle that the duty to render assistance to persons in distress at sea constitutes a peremptory obligation, one that supersedes procedural formalities and cannot be subordinated to discretionary State authorisation.[96]

95. Trevisanut (n 4) 439; Steven Haines, 'Developing Human Rights at Sea' (2021) 35 OceanYB 18; Irini Papanicolopulu, *International Law and the Protection of People at Sea* (OUP 2018) 132; Natalie Klein, 'Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law' (2022) 53 OceanDev&IntlL, 232.

96. See (n. 95).

4. Analysis of Law Decree 145/2024

Following the adoption of the seven ordinances by ENAC, as analysed above, the Italian Government issued a new Law Decree (No. 145/2024) on 11 October 2024. Article 11 (paragraphs 2 octies to 2 sexiesdecies)[97] of this Decree is specifically dedicated to regulating the activities of private aircraft in SAR operations. The new legislation stipulates that pilots of private aircraft departing from or landing in Italian territory, and engaging in non-occasional search activities related to rescue operations, are required to notify the competent authorities in the area "immediately and with priority" and to follow their instructions. The article also specifies that the pilot "must comply with the operational instructions of the responsible [MRCC]."

Violations of these provisions may result in fines of up to €10,000, and the aircraft may be detained for a period of up to 20 days.[98] In the case of repeated violations committed with the same aircraft, an additional administrative sanction of two months' detention will apply; in the event of further repeated violations, the aircraft will be subject to confiscation.[99] ENAC personnel, the Coast Guard, and police forces have the authority to bring charges for violations, with ENAC being the sole body responsible for imposing sanctions.

The emphasis on the duty to report to the competent authorities "immediately and with priority" is somewhat peculiar, given that communication with coastal States' rescue coordination centres is already standard practice for NGOs. There is no evidence to suggest that NGO aircraft have failed to report distress situations at sea immediately and with pri-

97. Law Decree 145/2024 (converted in Law 187/2024).

98. Law Decree 145/2024, Article 11(d), which amends Law Decree 130/2020, Art. 1, adding par. 2-*terdecies*.

99. Ibid., adding para 2-*sexiesdecies*.

ority to all relevant authorities. This is corroborated by data provided by the Deputy General Commander of the Italian Coast Guard during his hearing on the approval of the Law Decree.[100] The data in *Table 1* show how reports from NGO aircraft have consistently prompted rapid interventions by the nearest available vessels, irrespective of their affiliation, including those of national authorities and the European Border and Coast Guard Agency (Frontex).

Table 1 - NGO aerial sightings and the corresponding vessels intervening in 2024[101]

ANNO 2024				ASSETTO INTERVENUTO				
Assetto aereo	ONG	Sede	N avvistamenti	ONG	GDF	Cp	Frontex	Unità governative estere
Sea Bird 1	SEAWATCH	Lampedusa	17	7	4	3	2	1
Sea Bird 2	Humanitarian Pilots initiative	Lampedusa	73	21	10	17	2	23
Colibri	Pilotes Volontaires	Lampedusa	26	9	5	11	0	1
TOTALE			**116**	**37**	**19**	**31**	**4**	**25**

It is noteworthy that in the aforementioned proceedings for violations of ENAC ordinances – the *Seabird* and *Humanitarian Pilots Initiative* cases – the issue was not the failure of the aircraft to communicate distress situations to the relevant authorities, but rather the coordination by the Libyan authorities. In both cases, the rescue appears to have occurred without the authorisation of the Libyan authorities, i.e., without following the operational instructions of the Libyan Joint Rescue Coordination Centre.

100. Hearing of Admiral Inspector Sergio LIARDO, Deputy Commanding General of the Harbour Master Corps-Coast Guard, available at <<https://documenti.camera.it/leg19/documentiAcquisiti/COM01/Audizioni/leg19.com01.Audizioni.Memoria.PUBBLICO.ideGes.48612.23-10-2024-15-35-08.339.pdf>>.

101. Ibid, Annex 2. Unofficial translation of the table's items: *Anno 2024* (Year 2024); *Assetto Intervenuto* (Intervening vessels); *Assetto aereo* (aircraft); *ONG* (NGO); *Sede* (location); *N Avvistamenti* (Number of sightings); *GdF* (Italian Financial Police); *Cp* (Italian Port Captaincy); and *Unità Governative Estere* (Foreign Governmental Units).

5. Balancing State sovereignty and human rights in SAR operations: The role of Italy and Libya in migrant rescue

5.1 Libya's SAR zone

After acceding to the Hamburg Convention on 2 June 2005, Libya unilaterally declared the establishment of its own SAR area in July 2017, a declaration later withdrawn.[102]

On 14 December 2017, Libyan authorities issued a communication to IMO informing it that the Libyan Government of National Accord had declared the Tripoli flight information region, which had been communicated to and approved by the International Civil Aviation Organization, to be the "Libyan Search and Rescue Region". [103] Moreover, the Region was publicised by IMO on the Global Integrated Shipping Information System website in June 2018.[104]

Although the IMO's published information includes reference to a Libyan MRCC,[105] a 2018 UN report indicates that the centre was not expected to become fully operational before 2020, with support and

102. 'Libya Drops Claim to Search-and-Rescue Zone, IMO Confirms', News Deeply, 14 December 2017, available at <<https://deeply.thenewhumanitarian.org/refugees/executive-summaries/2017/12/14>>. *Cfr.* "The IMO Secretariat has just received on 10 December 2017, an official communication from the Government representative of Libya, to withdraw their previous official notification, dated on 10 July 2017, to the IMO Secretary-General on their Government's designation of Libyan SRR."

103. UN Security Council, Report of the Secretary-General: Implementation of Resolution 2380 (2017), 31 August 2018, UN doc. S/2018/807, para 12.

104. Ibid.

105. IMO, Global SAR Plan, Rescue Co-ordination Centre / Libya (website), available at <<https://gisis.imo.org/Public/COMSAR/RCC.aspx?CID=LBY&Action=View&ID=2032>>.

assistance provided by the Italian Coast Guard.[106] The same report states that Italian coastguard was leading, within the framework of the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, a European Union project – "Libyan Maritime Rescue Coordination Centre (LMRCC) Project" – to assist the Libyan authorities in establishing a fully operational MRCC in order to efficiently coordinate search and rescue operations within the Libyan SRR.[107] Italy notified the IMO about this project. [108]

Moreover, Italy signed a Memorandum of Understanding (MoU) in February 2017,[109] which played a crucial role in facilitating the establishment of Libya's SAR zone.[110] The MoU provided substantial financial and technical assistance, including "making recourse to funds made available by Italy and the European Union",[111] enhancing the operational capacity of the Libyan Coast Guard.

Despite widespread criticism, the agreement was automatically renewed on 2 November 2022 for an additional three-year period – as provided by the automatic renewal clause in the absence of termination

106. UN Security Council (n 103) para 12.

107. Ibid.

108. IMO, Sub-Committee on Navigation, Communications and Search and Rescue, 5th session, NCSR 5/INF.17, 15 December 2017.

109. Signed in Rome on 2 February 2017, available at <<https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>>.

110. Martino Reviglio, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2019) Global Jurist 20; Diego Zambiasi, Emanuele Albarosa, 'Externalizing rescue operations at sea: The migration deal between Italy and Libya' (2024) Journal of Economic Geography 18; Michela Ceccorulli, 'Triangular migration diplomacy: the case of EU–Italian cooperation with Libya' (2022) 53(3) Italian Political Science Review 328.

111. MoU, Article 2(2).

by either party[112] – reflecting Italy's continued commitment to migration control. The EU has devoted around EUR 700 million to Libya during 2014-20, including EUR 59 million to increase the operational capacity of the Libyan Coast Guard and the General Administration for Coastal Security. [113] Both Italy and the EU contributed vessels and training to improve the operational effectiveness of Libyan officers.[114]

5.2 Italy's coordination with Libya in SAR operations

The analysis of the ENAC ordinances, the *Seabird* and *Humanitarian Pilots Initiative*'s proceedings, and Law Decree 145/2024 highlights significant concerns regarding how pilots can fulfil their obligations under international law while adhering to Italian law. The tension between State sovereignty and human rights protection at sea is evident in Italy's efforts to regulate SAR operations through its cooperation with the Libyan Coast Guard. Since 2018, Italy's MRCC has functioned as the regional hub, while the Libyan Joint Rescue Coordination Centre has operated as a sub-regional

112. Ibid., Article 8.

113. Answer given by Ms Johansson on behalf of the European Commission to the written question from Ms. Susanna Ceccardi, European Commissioner. Subject: Training the Libyan coastguard saves lives: increase in EU funding for maritime policing projects. Date: 21 April 2022. Available at <<https://politique.pappers.fr/question/training-the-libyan-coastguard-saves-lives-increase-in-funding-for-maritime-policing-projects-QECR924939>>.

114. Andrea Beck, 'Italian and EU Funding of the Libyan Coast Guard: How Italian External Border Immigration Policies Have Created Crimes Against Humanity, Public Ignorance, and Legal Accountability Issues' (2024) 5(1) Immigration and Human Rights Law Review 1.

entity.[115] On 24 September 2024, the EU Delegation, acknowledging its role as Libya's primary partner in migration management, celebrated the completion of EU-funded training programs aimed at improving Libya's SAR capabilities.[116] It was announced that by 28 October 2024, Libya's EU-funded SAR centre would become fully operational, marking a significant milestone after years of delays.[117] However, concerns persist regarding Libya's ability to uphold the essential legal and operational standards necessary to maintain an effective SAR zone.

The actions of the Libyan Coast Guard have repeatedly raised alarms over violations of international law of the sea and human rights law.[118] The

115. See Melanie Fink, 'In search of a safe harbour for the Aquarius: the troubled waters of international and EU law' (2018) EU Immigration and Asylum Law and Policy, available at <<https://eumigrationlawblog.eu/in-search-of-a-safe-harbour-for-the-aquarius-the-troubled waters-of-international-and-eu-law/>>. The Libyan authorities have confirmed that their Coast Guard maintains continuous communication with MRCC Rome and receives critical information on SAR distress cases (transcript of interview with Brigadier Masoud Abdel Samad (Nov. 10, 2017) cited by Violeta Moreno Lax, 'Meta-Borders and the Rule of Law: From Externalisation to 'Responsibilisation' in Systems of Contactless Control' (2024) 21 Netherlands International Law Review, 54. This collaboration was further substantiated by judicial proceedings in the Open Arms case of March 2018, where it was established that MRCC Rome regularly transmitted distress alerts to the Libyan Joint Rescue Coordination Centre, thereby enabling subsequent rescue operations. See *Open Arms*, 27 March 2028, Preliminary Investigating Judge of the Catania Court, available at <<https://www.statewatch.org/media/documents/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf>>. The Libyan Coast Guard has therefore continuously been involved in rescue and interception operations, even without the Libyan Joint Rescue Coordination Centre being fully operational – see Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) European Journal of International Law, 353.

116. See EU Neighbours South, Training for Change: EU-Funded Initiatives Boost Libya's Rescue Operations, 27 September 2024, available at <<https://south.euneighbours.eu/news/training-for-change-eu-funded-initiatives-boost-libyas-rescue-operations/>>.

117. EU Observer: 'After years of delays, Libya's EU-funded rescue centre set to become operational', 28 October 2024, available at <<https://euobserver.com/migration/ar7e0b8ee6>>.

118. Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal, 459; Aphrodite Papachristodoulou, 'The Exercise of State Power over Migrants at Sea Through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction' (2024) 73 International & Comparative Law Quarterly, 931; Zambiasi, Albarosa (n 110) 41; Patrick Müller and Peter Slominski, 'Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean' (2021) 28 Journal of European Public Policy, 801.

UN High Commissioner for Refugees indicated frequent failures to respond to distress calls, deploy SAR patrols in a timely manner, and ensure the safe recovery of all individuals in peril at sea.[119] Moreover, the Libyan Coast Guard has employed aggressive and hazardous tactics that endanger migrant lives, often resorting to force to prevent resistance from those facing return to Libya,[120] where they risk abuse in detention centres.[121]

119. UN High Commissioner for Refugees (UNHCR), *Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea* (September 2020), available at <<https://www.ecoi.net/en/file/local/2037541/5f1edee24.pdf>>.

120. See Lizzie Dearden, 'Libyan Coastguard 'Opens Fire' During Refugee Rescue as Deaths in Mediterranean Sea Pass Record 1,500', *The Independent* (24 May 2017), available at <<https://www.independent.co.uk/news/world/europe/refugee-crisis-deaths-mediterranean-libya-coastguard opens-fire-drowned-gunshots-ngos-rescue-boat-a7754176.html>>; Reuters in Rome, 'Libyan Coastguard' Speedboat Attacked Migrant Dinghy, Says NGO', *The Guardian* (21 October 2016), available at <<https://www.theguardian.com/world/2016/oct/21/men-on-libyan-coastguard-boat-reportedly-attack-dinghy-of-refugees-and-migrants>>; Médecins Sans Frontières (MSF), MSF Accuses Libyan Coastguard of Endangering People's Lives During Mediterranean Rescue (24 May 2017), available at <<https://www.msf.org/msf-accuses-libyan-coastguard-endangering-people%E2%80%99s-lives-during-mediterranean-rescue>>; Al Jazeera, 'Caught on camera: Libyan coastguard shoots at migrant boat', *Al Jazeera* (1 July 2021) available at <<https://www.aljazeera.com/news/2021/7/1/caught-on-camera-libyan-coast-guard-shoots-at-migrant-boat>>; Sea Watch, *Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea* (May 2023), available at <<https://documenti.camera.it/leg19/documentiAcquisiti/COM03/Audizioni/leg19.com03.Audizioni.Memoria.PUBBLICO.ideGes.9852.25-07-2023-10-53-26.786.pdf>>; Eleonora Vasques, 'Exclusive: Libyans fired at rescuers while performing a rescue at sea' (July 2023) Euractiv, available at <<https://www.euractiv.com/section/migration/news/exclusive-libyans-fired-at-rescuers-while-performing-a-rescue-at-sea/>>.

121. Nadia Al-Dayel, Aaron Anfinson and Graeme Anfinson, 'Captivity, Migration, and Power in Libya' (2021) 9 Journal of Human Trafficking 280. See also UN Office of the High Commissioner for Human Rights (OHCHR) and UN Support Mission in Libya (UNSMIL), 'Detained and Dehumanised': Report on Human Rights Abuses Against Migrants in Libya (December 2016), available at <<https://www.ohchr.org/sites/default/files/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>>; OHCHR in cooperation with the UNSMIL, 'Abuse Behind Bars: Arbitrary and unlawful detention in Libya' (April 2018), available at <<https://www.ohchr.org/sites/default/files/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf>; UNHCR, Annual results report 2022 Libya (2022), available at <<https://reporting.unhcr.org/sites/default/files/2023-06/MENA%20-%20Libya.pdf>>; International Criminal Court (ICC), Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya (2022) available at <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint>>; OHCHR, Report of the independent fact-finding mission on Libya, A/HRC/52/83) (2023), available at <<https://view.officeapps.live.com/op/view.aspx>>.

These actions raise doubts about the safety of disembarkation in Libya, as required under international law.[122] The determination of a 'place of safety' under the law of the sea requires a case-by-case assessment,[123] considering whether rescued individuals would face persecution, torture, arbitrary detention, or inhuman treatment upon disembarkation. Since 2013, Italian case law has repeatedly affirmed that Libya cannot be considered a place of safety due to systematic human rights violations, as evidenced in

122. IMO, Resolution MSC.167(78), *Guidelines on the Treatment of Persons Rescued at Sea*, 20 May 2004, para 6.12. AR Convention, Annex, para 1.3.2; Seline Trevisanut, *Search and Rescue Operations at Sea,* in André Nollkaemper and Ilias Plakokefalos, *The Practice of Shared Responsibility in International Law* (CUP 2017) 431. According to Papastavridis, disembarkation at a place of safety may be regarded as an 'obligation of result'. See Efthymios Papastavridis, *The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans* (Bloomsbury Publishing 2014) 298. While the SAR regime does not establish any explicit obligation for States to disembark persons rescued within a SAR region in their own territory, scholars have argued that such a residual obligation exists if no other safe place of disembarkation can be found. See Thomas Gammeltoft-Hansen, *The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration*, in Violeta Moreno-Lax and Efthymios Papastavridis, *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016) 69. The Council of Europe Commissioner for Human Rights, in a recommendation from June 2019, emphasised the need for the choice of a disembarkation location to be based on further 'human rights-based considerations', including 'the extent to which disembarked persons could be subjected to arbitrary deprivation of liberty, or whether they would be vulnerable to trafficking or exploitation'. Council of Europe Commissioner for Human Rights, Lives Saved. Rights Protected. Bridging the Protection Gap for Refugees and Migrants in the Mediterranean (2019) 27. IMO, FAL.3/Circ.194, 22 January 2009, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea, para 2.5; Parliamentary Assembly of the Council of Europe Resolution 1821 (2011) on the interception and rescue at sea of asylum-seekers, refugees and irregular migrants, para 5.2.

123. IMO, Resolution MSC.167(78) (n 122) para 6.15 and 6.17; IMO and UNHCR, *Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants*, 2015. See also Irini Papanicolopulu and Giulia Baj, 'Controllo delle frontiere statali e respingimenti nel diritto internazionale e nel diritto del mare' (2020) 1 Diritto, Immigrazione e Cittadinanza, 24. Any assessments regarding the status of survivors or other issues not directly related to rescue operations may only be addressed once the individuals have disembarked; IMO, Resolution MSC.167(78) (n 122) paras 6.19 and 6.20.

the *Zawiya camp* case (2017),[124] *Vos Thalassa* case (2021),[125] and various rulings involving migrant pushbacks.[126]

Despite this, Italy has introduced legal measures to ensure that SAR activities comply with State policies, often requiring coordination with the Libyan Coast Guard. Therefore, the issue arises: can pilots of private aircraft disregard instructions from the responsible MRCC to coordinate the disembarkation of rescued persons in an unsafe location, based on

124. Court of Assizes of Milan, 10 October 2017, Judgment n. 10/2017, available at <<https://www.questionegiustizia.it/data/doc/1601/sentenza_corte_assise_milano_10_ott_1_dic_2017.pdf>>. The Court of Assizes of Milan convicted the prison guards of the Zawiya detention camp in Libya for having committed abuse, rape, torture, and murder in that camp, providing evidence of systematic violations of fundamental rights in Libya that prevent it from qualifying as a place of safety for disembarkation.

125. Court of Cassation, 16 December 2021, Judgment n. 1498/2021, available at <<https://www.centrostudilivatino.it/wp-content/uploads/2022/05/Corte-di-Cassazione-sentenza-Vos-Thalassa.pdf>>. Migrants rescued at sea who resisted return to Libya were acquitted of violence charges on self-defence grounds. The Court of Cassation upheld the Court of Trapani's ruling that they had the right to resist to protect themselves from being sent to an unsafe place, in accordance with the principle of non-refoulement under international, EU, and national law.

126. In the *Asso 28* case (June 2024), the Italian-flagged ship's captain was convicted of abandoning minors and vulnerable persons after transferring about 100 rescued migrants to a Libyan patrol boat, as Libya is not a place of safety. The Italian Court of Cassation affirmed the flag State's jurisdiction over the migrants' human rights, upholding the non-refoulement principle. See Court of Cassation, 1 February 2024, Judgment n. 4557/2024, available at <<https://www.altalex.com/documents/news/2024/02/15/sbarco-abbandono-migranti-si-dolo-eventuale>>. In the *Asso 29* case (July 2024), the Court of Rome ruled that by transporting rescued migrants to Libya, the Italian-flagged merchant ship exposed them to torture, unlawful detention, violence, and death. On 2 July 2018, under the coordination of the Italian military ship "Duilio" the "Asso 29" assisted a malfunctioning Libyan patrol boat that had intercepted around 150 people. The Italian Navy Base in Tripoli instructed the "Asso 29" to follow Libyan orders, transfer the migrants on board, and return them to Libya. The Court found that, despite Libyan coordination and the presence of the Libyan authorities, Italy remained responsible under international law. It held that Italy exercised or should have exercised effective control over the migrants and was obligated to bring them to safety in Italy rather than returning them to Libya. Court of Rome, 26 June 2024, RG n. 4782/2021, available at <<https://www.asgi.it/allontamento-espulsione/caso-asso-29-arriva-a-sentenza-la-libia-non-e-un-luogo-sicuro-dove-condurre-i-migranti/>>.

their own SAR obligations under the law of the sea or human rights law? Moreover, can a pilot refuse to follow instructions from the Libyan Coast Guard if doing so would result in the disembarkation of rescued individuals in Libya?

Although the questions raised pertain to aeronautical activity and the duties of pilots, the answer must be sought within the law of the sea, which governs the coordination of SAR operations and the relationship with MRCCs. Under SOLAS Regulation V/33 and Article 10 of the Salvage Convention, shipmasters are obligated to rescue persons in distress,[127] but international conventions do not explicitly require them to follow MRCC instructions.[128] SOLAS Regulation V/34.1 affirms shipmasters' discretion during rescue operations,[129] while the 2004 IMO/MSC (Maritime Safety Committee) Guidelines mandate that survivors must not be disembarked in places where their safety is at risk.[130] Consequently, shipmasters can lawfully refuse to follow instructions that would result in disembarkation in Libya. This interpretation has been confirmed by recent case law regarding the violation of Law Decree 1/2023,[131] which requires rescue vessels to comply with directives issued by the national authorities responsible for the SAR zone where

127. The duty to render assistance persists until the master of a ship is apprised of the fact that other ships have been requisitioned by the master of the ship in distress or the Search and Rescue service concerned and are complying with the requisition, or until he or she is informed that assistance is no longer necessary.

128. Article 98(2) UNCLOS requires costal states to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service".

129. SOLAS Regulation V/34.1, "The owner, the charterer, the company operating the ship […], or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgment, is necessary for safety of life at sea […]".

130. IMO, Resolution MSC.167(78) (n 122) para 5.6.

131. Law Decree. 1/2023, *Disposizioni urgenti per la gestione dei flussi migratori*. Converted into Law 15/2023.

the rescue operations take place. The *SEA-EYE 4*[132] and *Humanity 1*[133] cases further emphasised that Libyan instructions lack legal validity, as the Libyan Coast Guard has been documented engaging in violent and

132. In the *SEA-EYE 4* case (June 2024), the Court of Reggio Calabria annulled a 60-day administrative detention imposed for alleged violation of Law Decree 1/2023. The detention was based on claims that the vessel disregarded the Libyan authorities' instructions, thus creating a dangerous situation. The court found no evidence of such instructions and noted that the Libyan Coast Guard's approach during the rescue of migrants from an unseaworthy inflatable boat heightened agitation. As a result, the detention order was deemed unlawful and annulled. Court of Reggio Calabria, 5 June 2024, Judgment n. 811/2024, available at <<https://www.asgi.it/allontamento-espulsione/caso-asso-29-arriva-a-sentenza-la-libia-non-e-un-luogo-sicuro-dove-condurre-i-migranti>>. In the *SEA-EYE 4* case (December 2024), the Court of Vibo Valentia annulled the vessel's 20-day detention from October 2023 for allegedly violating Law Decree 1/2023. The detention followed the crew's refusal to comply with Libyan Coast Guard orders. The Court found no evidence that the SEA-EYE 4's rescue operation was dangerous and dismissed the accusation that the NGO endangered shipwrecked individuals. It ruled that Libyan authorities' orders lacked legitimacy under national and international law, as they did not coordinate the rescue but merely instructed the NGO to leave. The Court reaffirmed that Libya is not a place of safety, noting that no safe port was designated for disembarkation. The Court further added that 'under international law, the Libyan authority's removal order cannot be justified, as it contradicts the absolute nature of the duty to rescue, which applies to all shipmasters. This duty is limited only by the condition that the rescue is feasible without endangering the ship, crew, or passengers, and that such an initiative can be reasonably expected'. In conclusion, the Court asserted that the *SEA-EYE 4* and its shipmaster did not create any danger but instead saved dozens of lives. Court of Vibo Valentia, 6 December 2024, Judgment n. 660/2024, available at <<https://www.asgi.it/asilo-e-protezione-internazionale/tribunale-di-vibo-valentia-le-sanzioni-alle-navi-della-flotta-civile-sono-illegittime/>>.

133. In the *Humanity 1* case (June 2024), the Court of Crotone annulled the detention of *Humanity 1* after it rescued 77 migrants. The Italian authorities alleged that the NGO obstructed the Libyan Coast Guard in the Libyan SAR zone, thereby creating danger and violating Law Decree 1/2023. The Court ruled that the Libyan Coast Guard is not a credible SAR actor, citing armed personnel firing shots, which disqualified their actions as rescue measures. It reaffirmed that Libya is not a safe port due to documented human rights violations against migrants. The Court also clarified that the Italy-Libya migration agreement does not override international obligations. It concluded that detaining *Humanity 1*, the only actor capable of conducting SAR at the time, was unlawful. Court of Crotone, 26 June 2024, Judgment n. 748/2024, available at <<https://www.asgi.it/allontamento-espulsione/tribunale-di-crotone-illegittimo-il-fermo-della-humanity1/#:~:text=Il%20tribunale%20civile%20di%20Crotone,4%20marzo%202024%2C%20%C3%A8%20illegittimo>>.

coercive tactics rather than genuine SAR operations. These cases have established that Libya is not a place of safety for rescued migrants. The courts have consistently affirmed that the duty to rescue is absolute, and that MRCC instructions cannot override international legal principles.[134] Therefore, the constitutionality of Law Decree 1/2023 is subject to legal scrutiny.[135]

On analogous grounds, pilots engaged in coordination with NGOs in SAR operations are likewise bound by a duty to ensure that their conduct does not contribute – directly or indirectly – to unlawful refoulement, particularly where such coordination entails prioritising instructions from the Libyan authorities over independent SAR initiatives. The obligation to comply with instructions issued by MRCCs must be interpreted not as an unqualified imperative, but within the broader normative framework prioritising the preservation of human life at sea. Such

134. The opposite opinion seems to be held by Stefan Talmon, 'Private Seenotrettung und das Völkerrecht' (2019) 74 Juristen Zeitung 802 803.

135. Judgment of the Court of Brindisi, 10 October 2024, available at <<https://www.asgi.it/wp-content/uploads/2024/10/sentenza_Tribunale-di-Brindisi_ottobre_2024.pdf>>, by which the Court raises a question of constitutional legitimacy concerning Decree-Law No. 1/2023. The case arose from the Libyan Coast Guard's claim that the Ocean Viking's captain disregarded its instructions, thus obstructing operations and creating danger. The Court of Brindisi found that requiring compliance with Libyan orders conflicted with international obligations prohibiting refoulement and collective expulsions, binding under Articles 10 and 117 of the Italian Constitution. It cited multiple legal instruments, including the Geneva Convention, SOLAS Convention, the EU Charter of Fundamental Rights, and the ECHR. The Court of Brindisi rejected the assumption that Libya is a safe port, already contradicted by case law. It also ruled that reliance on informal communications, such as an email from the Libyan Coast Guard, violated the legality principle under Article 25(2) of the Constitution. Based on these arguments, the Court referred the matter to the Constitutional Court. At the time of writing, the case is pending before the Court. The first public hearing took place on 21 May 2025. Information on the proceedings is available at <<https://www.cortecostituzionale.it/schedaOrdinanze.do?anno=2024&numero=205&numero_parte=>>. The Court of Brindisi's reasoning against Law Decree 1/2023 similarly applies to Law Decree 145/2024 and ENAC ordinances. In the *Seabird* and *HPI* cases, Libya's removal orders lacked formal coordination and contradicted the absolute duty to rescue, which applies to both ship captains and pilots.

an interpretive approach affirms that adherence to MRCC directives should reinforce, rather than undermine, the integrity and effectiveness of the SAR regime.

This interpretative approach is grounded in the principle of 'considerations of humanity', a normative standard consistently affirmed by international courts and tribunals, including the International Tribunal for the Law of the Sea (ITLOS),[136] since its early articulation in the *Corfu Channel* case (1947).[137] Notably, in the *MV Saiga (No 2)* case – and following decisions – ITLOS reaffirmed that "considerations of humanity must apply in the law of the sea, as they do in other areas of international law."[138]

This principle carries particular weight when assessing the balance between State sovereignty and the protection of fundamental human rights. In such contexts, international legal obligations must take precedence, especially where the core duty to render assistance at sea is concerned. The conduct of SAR operations must not only secure the survival of those in distress but must also be carried out in a manner that upholds their inherent dignity and safety.

136. See Pierandrea Leucci, 'Enforcing fishery legislation in the exclusive economic zone of non-parties to UNCLOS: A commentary to Article 73', in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 1 – Law of the Sea, Interpretation and Definitions* (Luglio Editore 2021) 343-344.

137. *Corfu Channel* case (n 40).

138. See, in particular, *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1st July 1999, ITLOS, para 359, 102; *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, ICGJ 452, ITLOS Case No. 19, 14th April 2014, ITLOS, para 359, 102; *Enrica Lexie* case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24st August 2015, ITLOS, para 133, 24; and the *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6st July 2019, ITLOS, paras 83-4, 21, and para 130, 32.

6. Conclusion

The analysis of the ENAC ordinances and Law Decree 145/2024 highlights significant legal and operational concerns regarding the restrictions imposed on NGO aircraft engaged in SAR activities. While States retain sovereign authority over their airspace and aviation regulation, this power must be exercised in compliance with international legal obligations, particularly those enshrined in the Chicago Convention, UNCLOS, and the Hamburg Convention. The measures adopted by ENAC, which effectively prohibit NGO aircraft from conducting aerial surveillance over the Central Mediterranean, risk undermining Italy's ability to fulfil its SAR obligations under international law.

A central justification for these restrictions is national security. However, this rationale appears both legally tenuous and factually unsupported. There is no substantial evidence indicating that NGO aircraft interfere with State-led SAR operations or pose any credible security threat. The conflation of SAR responsibilities with migration control challenges the functional and human rights framework established under the SAR regime. It is essential to maintain a clear distinction between the two; failure to do so may lead to tragic outcomes. One such example is the Italian authorities' classification of a SAR event as a law enforcement matter, which contributed to the Cutro shipwreck.[139] Alarmingly, this appears to reflect a broader institutional stance. In a parliamentary hearing on Law Decree 145/2024, the Deputy General Commander of the Port Authorities (*Capitaneria di Porto*) of the Italian Coast Guard referred to reports from private pilots and shipmasters primarily as tools for addressing "emerging threats", rather than for ensuring timely res-

139. Francesca de Vittor, 'Controllo dell'immigrazione irregolare o soccorso a naufraghi? Sulla compatibilità con gli obblighi in materia di soccorso della classificazione di eventi SAR come operazioni polizia' (2023) ADiM Blog <<https://www.adimblog.com/wp-content/uploads/2023/04/DE-VITTOR.pdf>>.

cue.[140] He concluded by emphasising the importance of border control over humanitarian rescue, stating: "The path taken at the national level of constant border control is important, and it is necessary to strengthen the capacity to support search and rescue operations." [141]

Such reasoning reflects a misunderstanding of the legal nature of SAR zones. Contrary to Italy's apparent interpretation, a SAR zone is not a maritime area where the coastal State exercises sovereignty or jurisdiction; rather, its designation entails obligations and responsibilities, not sovereign rights.

Restricting aerial surveillance may unintentionally hinder maritime rescue efforts, increasing the risk of avoidable loss of life. Available data indicate that NGO aircraft have played a critical role in detecting vessels in distress and enabling timely intervention by Italian authorities and Frontex assets. These restrictions also raise serious human rights concerns. The *de facto* criminalisation of NGO aerial surveillance undermines independent humanitarian action and erodes transparency and accountability in SAR operations. By limiting access to real-time information on maritime distress, these measures also obstruct documentation efforts that are essential for monitoring State compliance with international legal obligations, including the right to life and the prohibition of refoulement.

Furthermore, Law Decree 145/2024 requires pilots to comply with operational instructions issued by the relevant national MRCC. In practice, this mandates cooperation with Libyan authorities, which presents grave challenges. Effective SAR cooperation must be consistent with human rights obligations.[142] Accordingly, any domestic legislation compel-

140. Hearing of Admiral Inspector Sergio Liardo (n 100) 11.

141. Ibid.

142. ECHR parties cannot "enter into an agreement with another State which conflicts with [their] obligations under the Convention". See ECtHR, *Al-Saadoon v UK*, Appl. 61498/08, 2 March 2010, para 138.

ling compliance with MRCC instructions that result in disembarkation in an unsafe location, conflicts with international law.

For over a decade, European and Italian funding has supported the Libyan Coast Guard to prevent irregular migration and reduce arrivals to EU territory. Today, the Central Mediterranean remains both the most heavily used and the most dangerous migration route. Instead of penalising humanitarian actors, Italy should adopt a more constructive approach – one that enhances cooperation between State and non-State actors and recognises the complementary role of NGOs in SAR efforts. A regulatory framework that facilitates rather than hinders aerial monitoring would be more consistent with Italy's international legal obligations and better uphold the fundamental humanitarian imperative to save lives at sea.

The duty to assist persons and vessels in distress at sea is among the most deeply entrenched and fundamental obligations under international law.[143] The fulfilment of this duty, as one scholar has aptly noted, "determines whether or not migrant people will live or die; will have access to protection within a safe territory or will be denied this right."[144]

143. Thomas Gammeltoft-Hansen (n 122).

144. Luna Vives, Arnaud Banos, Camille Martel, Elizabeth Rose Hessek, and Kira Williams, 'Maritime Sar Systems in the EU: Convergence and Co-optation into the Anti-Immigration Border' (2024) Journal of Borderlands Studies, 1.

Out of sight, out of mind? Migrant deaths and disappearances at sea and the interplay between the law of the sea and human rights obligations

*Aphrodite Papachristodoulou**

Abstract

The increasing number of migrant deaths and disappearances in the Mediterranean Sea exposes profound failures and inconsistencies in international law to ensure accountability and uphold fundamental human rights. Despite well-established obligations under the law of the sea and human rights, the lack of a coordinated framework for searching for missing migrants at sea, recovering bodies and investigating these tragedies remains a grey area. Jurisdictional ambiguities and inconsistencies in the interpretation of States' obligations further undermine search and rescue activities, particularly in cases where migrants remain unaccounted for. This contribution focuses on the relatively neglected topic of human rights at sea by examining the interplay between the existing legal instruments and highlighting the jurisdictional and legal challenges that hinder effective protection. The article underscores the urgent need for

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legal clarity, enhanced accountability, and stronger enforcement mechanisms to address the humanitarian crisis of migrant deaths and enforced disappearances at sea.

Keywords: Missing migrants, enforced disappearances, right to life, law of the sea, procedural obligations, search and rescue.

1. Introduction

The International Organization for Migration (IOM) estimates that since 2014, more than 31,287 migrants – many believed to be victims of human trafficking – have died or gone missing in the Mediterranean trying to reach their destinations. These figures account only for deaths for which there is some record.[1] One of the most pressing concerns regarding migrants who go missing at sea is their invisibility, coupled with a systemic lack of accurate documentation and the absence of accountability. The information regarding shipwrecks in the Mediterranean is arguably scarce and inconsistent, as there is no official system for systematically collecting and publishing accurate data on human tragedies at sea.[2] Consequently, migrant disappearances have been insufficiently investigated compared to other populations,[3] raising serious human rights concerns

1. Tara Brian and Frank Laczko (eds), *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants* (IOM 2016).

2. This poses an acute challenge that has also been acknowledged under Objective 8 of the Global Compact for Safe, Orderly and Regular Migration, also reflected in the UN's General Assembly Resolution on the protection of migrants, December 2019.

3. Laczko, Frank, Ann Singleton and Julia Black (eds), *Fatal Journeys Volume 3: Part I: Improving Data on Missing Migrants* (IOM 2017).

and questions about States' obligations to protect migrants' rights.[4]

The international law of the sea and human rights law establish clear obligations for States to protect persons found in distress at sea along with obligations emanating from the application of the right to life. However, these obligations, along with established international standards on missing persons, are not adequately upheld in the context of irregular migration by sea, particularly concerning responsibility for deaths and disappearances along Europe's external borders.[5]

Despite growing international attention to the fate of migrants[6] who die or go missing while attempting to cross sea borders in search of safety, gaps in legal frameworks and enforcement mechanisms remain. Situated within the broader discussions of *Humanity across the waves: Rethinking the law of the sea through a human rights lens*, this contribution will critically examine the challenges in the application of established norms, the jurisdictional ambiguities that hinder accountability, and the systemic shortcomings that have resulted in an increasing number of preventable migrant deaths and unresolved disappearances.

In light of these challenges, the Parliamentary Assembly of the Council of Europe, through its Resolution, "Missing migrants, refugees, and asylum seekers: a call to clarify their fate" (2024), urged the Committee of Ministers to affirm the Council's commitment to addressing this issue

4. States have repeatedly affirmed their collective responsibility to preserve the lives of all migrants and take action to prevent loss of migrant lives e.g. see, Global Compact for Safe, Orderly and Refuge Migration (para 24). See, also, Progress Declaration of International Migration Review Forum (para 14).

5. The words 'disappearances' and 'missing' are used interchangeably herein.

6. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), a migrant is "any person who is outside a State of which she or he is a citizen or a national, or, in the case of a stateless person, his or her State of birth or habitual residence". Migrants thus may be persons on the move, or persons of foreign origin established regularly or irregularly in a country, OHCHR, 'Recommended Principles and Guidelines on Human Rights at International Borders' (2014).

by working alongside international partners.[7] In line with the Council of Europe's values and standards, the Assembly calls for continued support to member States in strengthening and expanding the efforts initiated in recent years to address the issue of missing migrants, refugees, and asylum seekers, as there is no effective search mechanism established. This Resolution underscores a fundamental challenge in resolving migrant disappearances at sea: the difficulty of ensuring accountability and upholding human rights obligations beyond sovereign territory. This is particularly pronounced when considering the legal constraints of human rights jurisdiction at sea, where traditional applications of human rights treaties are often limited by territorial boundaries, including their territorial sea and on vessels where they exercise jurisdiction.

Clear instances where human rights obligations will arise in this context include, *inter alia,* cases where a person dies or goes missing in a State's territorial waters, their body is recovered by the State, or a family member of the deceased or missing is within the State's jurisdiction. However, the territorial scope of application of human rights treaties leaves out of the ambit migrants disappearing or dying at sea, as most, if not all maritime incidents occur in areas beyond the jurisdiction of any sovereign State, that is, the high seas.[8] For this reason, the allocation of authority over activities (or perhaps non-activities) carried out on the

7. Parliamentary Assembly, 'Missing migrants, refugees and asylum seekers – A call to clarify their fate' (Doc. 16037, 13 September 2024), available at <<https://rm.coe.int/as-mig-2024-11-draft-report-missing-migrants-refugees-and-asylum-seeke/1680b090c3>>.

8. It is vital to stress that distress incidents, border controls and maritime interceptions occur not only on the high seas, which is the area beyond the 200 nautical miles from a State's coastal baseline but from just outside the 12 nautical miles territorial sea; this is known as the Exclusive Economic Zone (EEZ). Briefly, in the EEZ, States have sovereign jurisdiction over the exploration and exploitation of marine resources and certain economic activities, but for the purposes of SAR, this area is treated as if it is the high seas. Article 58(2) UNCLOS is important in this respect as it sets out the continuance of high seas freedoms in the EEZ, insofar as they are not incompatible with the EEZ regime.

high seas centres around the principle of flag State jurisdiction and violations of international responsibilities can easily go unnoticed.[9] Arguably, this is one of the most complex areas of the United Nations Convention on the Law of the Sea (UNCLOS),[10] as the legality of the high seas character is rather controversial, where the ambiguity of jurisdiction exacerbates challenges in ensuring accountability and where duties and rights are susceptible to mismanagement.

Who, then, bears the obligation to prevent, search and investigate migrant deaths and disappearances on the high seas, given the jurisdictional challenges that exist beyond sovereign territory? The absence of human rights jurisdiction *ipso facto* means that individuals cannot claim protection against a State to secure their human rights, as the extraterritorial application of human rights treaties is premised on the exercise of jurisdiction by the State.[11] For this reason, jurisdiction presents the *Achilles' heel* of human rights applicability beyond sovereign territory.

Against this background, the core principle of saving the lives of persons in distress at sea under international law of the sea is of critical importance in upholding the obligation to protect life. Historically speaking, providing assistance to persons in distress at sea was a traditional hallmark of maritime law, arising out of a moral obligation, for the purposes of maintaining safety of life at sea given the inherent dangers of the oceans. This humanitarian norm is incorporated as a legal duty of the search and rescue (SAR) system under Article 98 UNCLOS.[12] Im-

9. Douglas Guilfoyle, 'The High Seas' in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 208.

10. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

11. See, *inter alia,* Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 45.

12. UNCLOS, Article 98.

portantly, the duty imposed upon flag States to ensure that the master of a ship flying its flag renders assistance to those in distress at sea,[13] serves to safeguard the right to life, which includes both positive and negative obligations. Negative obligations require the State not to abstain from taking human life, while positive obligations include substantial and procedural obligations, such as conducting independent and transparent investigations into deaths,[14] identifying the deceased, and providing information to their families. Moreover, coastal States are also required to provide for SAR services and to cooperate with States nearby for the purpose of maritime safety. Notwithstanding these obligations, there remain numerous gaps and inconsistencies with regard to questions of State jurisdiction and State responsibility to search for those unaccounted for when a SAR incident occurs.

The incident of the *Pylos* shipwreck on 14 June 2023 exemplifies not only the severity of the situation and the reluctance of States to take responsibility for the protection of migrants, but also the unwillingness of authorities to bring those responsible to account. Of the migrants aboard, only 104 individuals survived, while 82 bodies were recovered, of which merely 58 have been identified, leaving over 500 persons unaccounted for.[15]

13. It is clear that the duty applies to *all* other maritime zones, notwithstanding the absence of explicit wording to this effect. In particular, Article 58(2) UNCLOS, which sets out the rights and duties of other States in the Exclusive Economic Zone (EEZ) (the EEZ extends up to 200 nautical miles from the baseline), confirms that the duty to render assistance falls within the rules of international law that apply also to the EEZ. See Efthymios Papastavridis, 'European Convention of Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?' in Maglosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and application of the European Convention of Human Rights: Legal and Practical Implications* (Queen Mary Studies of International law 2013).

14. *Cyprus v. Turkey*, Application No. 25781/94, (ECtHR, 10 May 2001); *McCann and Others v. The United* Kingdom, Application No. 18984/91 (ECtHR, 27 September 1995), *Mahmut Kaya v. Turkey*, Application No. 22535/93 (ECtHR, 28 March 2000).

15. Alice Autin, 'In Their Words: Pylos Survivors Speak up for Justice' (HRW, 13 December 23), available at <<https://www.hrw.org/news/2023/12/13/their-words-pylos-survivors-speak-justice>>.

Serious allegations implicate the Hellenic Coast Guard in actions that may have precipitated the vessel's capsizing, exacerbating the humanitarian catastrophe, as they have explicitly refused to conduct an internal disciplinary investigation.[16]

Evidently, the normalisation of 'dying in anonymity' in the Mediterranean region highlights the persisting lack of accountability and transparency. Still, under the international law of the sea, searching for and recovering bodies is not normally considered to be part of SAR operations, but solely that "handling of human remains may at times be necessary".[17] Subsequently, some missing migrants could be victims of disappearance and, in certain circumstances, be legally characterised as enforced disappearance in accordance with the definition set out in the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED).[18] This was highlighted by the Committee on Enforced Disappearances, which posited that "the principal distinctive element between a migrant going missing and a migrant becoming a victim of disappearance is the commission of a crime against a migrant."[19] This has

16. Nektaria Stamouli, 'Greece – the country that lets people escape justice' (Politico, 26 August 2024), available at <<https://www.politico.eu/article/greece-justice-democracy-corruption-scandals-tempe-train-crash-migrant-shipwreck-predator-spyware/>>.

17. 'IAMSAR Manual: International Aeronautical and Maritime Search and Rescue Manual 2016 Edition' (Vol. III, 2016) at 2-41.

18. Article 2 of the ICPPED reads: "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

19. Committee on Enforced Disappearances, 'CED/C/GC/1: General comment No. 1 (2023) on enforced disappearance in the context of migration' (26 October 2023), available at <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/cedc-gc1-general-comment-no-1-2023-enforced>>.

brought to the fore the absence of a clear international normative framework which governs migrant deaths and missing at sea, as well as broader structural deficiencies in State responses, which are largely determined by national legislation and practice, though in principle should align with international standards.

The article examines this neglected human rights at sea issue by, first, sketching the legal challenges in addressing migrant deaths and missing at sea, and, second, identifying the international legal obligations that flow from the international law of the sea and the ways in which European State outsource SAR responsibilities. Following an analysis of the human rights implications of these practices on the ground, the next section delves into the international legal obligations stemming from an application of the right to life. It critically evaluates the obligations endowed on States as well as their capability of being secured on the high seas, addressing the gaps in enforcement that contribute to impunity and ongoing violations of the right to life while emphasising the need for clarity.

2. Legal challenges in addressing migrant deaths and missing at sea

The requirement of treating the dead with respect and dignity has been a core human value long before efforts were made to define and codify international law. This principle is especially relevant in the context of missing persons, where the legal and moral obligation to account for individuals remains central. International humanitarian law, unlike international human rights law, provides a substantial body of rules and legal principles related to missing persons during

wartime.[20] However, persons can also go missing outside the context of armed conflict, including, *inter alia*, situations of violence, organised crime, or migration.

The situation of missing migrants was only highlighted for the first time by the UN General Assembly in 2014, which, reporting to the UN Secretary General, pointed to similarities between missing persons in situations of conflict, disaster and migration, and urged States to recognise migrants as particularly *vulnerable*.[21] Building upon this recognition, the death and disappearance of migrants at sea presents a distinct human rights challenge that occurs in peacetime, thereby involving different international frameworks, including international human rights law – safeguarding the right to life; the law of the sea – mandating SAR obligations; refugee law – providing *non-refoulement* obligations; and criminal law, which can hold individuals or State agents accountable for actions such as human trafficking, pushbacks, or failure to prevent enforced disappearances.

In the context of maritime cross-border migration, smugglers and traffickers play an integral role in facilitating the transit of migrants,[22] often via 'flagless' or 'stateless' vessels, thereby rendering the whole experience even more treacherous. The facilitation of movement and irregular border crossings provided by smugglers, some of which may involve exploitative

20. For relevant rules in customary IHL, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Vol I: Rules* (International Committee of the Red Cross (ICRC) and CUP 2005, rev'd 2009) (ICRC Study), rule 98 ('Enforced disappearance is prohibited') rule 117 ('Accounting for Missing Persons' International Committee of the Red Cross).

21. United Nations General Assembly, 'Missing Persons: Report of the Secretary-General' (UN Doc. A/69/293, 11 August 2014) available at <<https://documents.un.org/doc/undoc/gen/n14/501/44/pdf/n1450144.pdf>>.

22. Report of the Special Rapporteur on the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/72/335: Unlawful death of refugees and migrants - Note by the Secretary-General - Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions (15 August 2017) at [43], available <<https://www.ohchr.org/en/documents/thematic-reports/a72335-unlawful-death-refugees-and-migrants-note-secretary-general>>.

practices that constitute human trafficking,[23] serves to meet this demand.[24] International legal instruments explicitly address State obligations in this domain. The 2000 *Protocol Against the Smuggling of Migrants by Land, Sea and Air* makes clear in Article 16(1) that States are required to take:

> [A]ll appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol [smuggling] as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[25]

Within this framework, it is assumed that the majority of irregular migrants use the services of smuggling networks at some point in their journey.[26] The Mediterranean Sea is today the deadliest route for migrants seeking refuge in Europe,[27] as the risk of death is especially high due to

23. An individual may fall victim to human trafficking even if they cross international borders through regular means. In contrast, human smuggling inherently involves the irregular crossing of borders. See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 32.

24. Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 German Law Journal 437.

25. Resolution adopted by UN General Assembly on 15 November 2020, by resolution 55/25, United Nations Convention against Transnational Organized Crime, <<https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf>>.

26. UNDOC, 'Issue Paper: Smuggling of Migrants by Sea' (2011) 11, <<https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf>>.

27. In this article, the term 'migrants' is used as employed in the International Organization for Migration (IOM) definition as there is no universally accepted definition at the international level. The IOM provides that the term migrant is "[a]n umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.' IOM, 'International Migration Law No 34, Glossary on Migration" (2019), available at <<https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf>>.

drowning, malnourishment, suffocation, dehydration, starvation, unsanitary conditions and violence,[28] all of which are intensified by rigid migration policies. Arguably, over the past decade, attention has shifted from preventing deaths at sea to prioritising border protection, particularly through policies increasingly focused on external border management and remote surveillance aimed at controlling migration flows at *all* costs.[29]

The conditions for migrants attempting to cross the sea continuously deteriorated, amidst a drastic reduction of SAR capacity by the European States, delayed responses and growing barriers to humanitarian rescue initiatives, preventing NGOs from conducting proactive SAR, leaving many to drift, drown, or disappear.[30] Adding to this, a worrisome increased reliance on aerial assets, such as surveillance drones, in order to enhance country-of-origin authorities' capacity to prevent exit and intercept migrant boats (pull-back practice) at EU external borders. In particular, direct and/or indirect pushbacks intensify the risk of migrant disappearances[31] and have been identified as aggravating factors contrib-

28. OHCHR, "'Lethal disregard': Search and rescue and the protection of migrants in the central Mediterranean Sea' (26 May 2021), <<https://reliefweb.int/report/libya/lethal-disregard-search-and-rescue-and-protection-migrants-central-mediterranean-sea>>; and Noemi Magugliani and Jean-Pierre Gauci, 'Migrant Crossings in the Channel: Non-Assistance, Securitisation, and Accountability Under International Law' (21 December 2021) Opinio Juris, <<http://opiniojuris.org/2021/12/21/migrant-crossings-in-the-channel-non-assistance-securitisation-and-accountability-under-international-law/>>.

29. Thomas Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7(2) Law and Ethics of Human Rights 213.

30. UNHCR, 'Distress at sea: a call for a humanitarian and precautionary approach' (2024), available at <<https://www.unhcr.org/sites/default/files/2024-12/joint-statement-on-distress-at-sea.pdf>>.

31. Migrants may also be victims of enforced disappearance which mean that they are victims of a crime perpetrated by States or non-state actors as defined in Articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearances. In 2017, the Working group on Enforced or Involuntary Disappearances outlined "the direct link between migration and enforced disappearance, either because individuals leave their country as a consequence of a threat or a risk of being subject to enforced disappearances there, or because they disappear during their journey or in the country of destination" - UN Working Group on Enforced or Involuntary Disappearances, "2017 Report" (A/HRC/36/39 and addendum A/HRC/36/39/Add.2), 1 August 2017. See also analysis by Delphine Rodrik, arguing that pushbacks constitute an enforced disappearance, <<https://eumigrationlawblog.eu/rightlessness-in-melilla-pushbacks-as-violations-of-the-right-to-recognition-before-the-law/>>.

uting to cases of missing migrants.[32] In this regard, when drones are deployed to monitor movement across the sea, the information collected from drones plays a crucial role in enabling States to carry out enforced disappearances. The Border Violence Monitoring Network has provided that "data collected by EU surveillance drones at sea is sometimes not shared with SAR teams closest to the migrants in distress, thus hindering rescue operations and potentially endangering life".[33] Such practice is a blatant contravention of SAR obligations and challenges efforts to prevent future deaths and disappearances, leaving vulnerable individuals in peril and perpetuating a cycle of unaccountability.[34]

Apart from cases of enforced disappearance, it should be noted that human rights treaties do not contain specific provisions addressing missing persons. Nonetheless, various treaty provisions have been interpreted by UN treaty bodies and regional courts as imposing State obligations relevant to missing persons, particularly in clarifying their fate and whereabouts. Such developments in legal interpretation highlight the responsibility of States to uphold the right to life and ensure accountability in cases of disappearances. Notably, the UN Human Rights Committee (HRC) – an independent expert body established to monitor the implementation of the 1966 International Covenant on Civil and Political Rights (ICCPR) – stated in its *General Comment No. 36* on the right to

32. Parliamentary Assembly, Doc. 16037 (n 7) at 9.

33. Border Violence Monitoring Network, EU Member States' use of new technologies in enforced disappearances (02 February 2023) at 2, available at <<https://borderviolence.eu/app/uploads/Input-for-the-thematic-study-on-new-technologies-and-enforced-disappearances_version-2.pdf>>; Nikolaj Nielsen, 'NGO rescue boats do not receive Frontex alerts' (03 February 2020), available at <<https://euobserver.com/migration/147331>>.

34. On SAR obligations in particular, see, para 2.1.1. of the SAR Convention. On November 29, the European Center for Constitutional and Human Rights (ECCHR) filed a complaint before the International Criminal Court (ICC) arguing European responsibility for crimes against humanity committed against migrants and refugees in Libya. Available at <<https://www.ecchr.eu/en/case/interceptions-of-migrants-and-refugees-at-sea/>>.

life that enforced disappearance:

> [C]onstitutes a unique and integrated series of acts and omissions representing a grave threat to life.[35] The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.[36] It thus results in a violation of the right to life as well as other rights recognized in the [ICCPR], in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law).[37]

In this context, a related legal development can be traced in the UN Committee on Enforced Disappearances' Guiding Principles for the search of disappeared persons, which are grounded in the ICPPED. According to Principle 1, "[t]he search for a disappeared person should be conducted under the *presumption* that he or she is alive".[38] Additionally, Article 24 of the Convention acknowledges families as indirect victims of enforced disappearances, thereby placing an obligation on State authorities to provide effective support and reparations mechanisms.

However, as of 2024, only a limited number of States have ratified the ICPPED, thus limiting its legal reach and effectiveness in addressing disappearances.[39] Notwithstanding this limitation, the Convention further mandates that States must adopt all necessary measures to search for, locate, and release disappeared persons, as well as investigate cases of en-

35. *Bousroual v. Algeria*, Communication No. 992/2001 (CCPR/C/86/D/992/2001) para 9.2.

36. *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013) para 7.5.

37. OHCHR, 'Guiding principles for the search for disappeared person' (28 August 2019) CED/C/7, at para 58.

38. Ibid.

39. 77 of the 193 UN Member States have ratified the Convention.

forced disappearance and hold those responsible accountable. This framework aligns with, and is reinforced by, the established practice of human rights bodies, including the European Court of Human Rights (ECtHR) under the European Convention on Human Rights (ECHR),[40] which requires States to protect life, investigate violations, and ensure accountability for preventing and addressing disappearance or death.[41] However, the consequences of disappearance or death during maritime migration for the families of migrants have not been systematically explored, and the right to know the truth about the circumstances of a migrant's death at sea is ostensibly also hindered for family members and relatives.

3. The duty to render assistance at sea under the law of the sea framework

As already touched upon in section 1 , the specific obligations to preserve the safety of life against the risks of sea travel are addressed through the general framework set out in Article 98 UNCLOS, and are further detailed in the International Convention for the Safety of Life at Sea (SOLAS)[42] and the International Convention on Maritime Search and

40. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.

41. E.g., *McCann and Others v. the United Kingdom*, Application No. 18984/91 (ECtHR, 27 September 1995); *Osman v. the United Kingdom,* Application No. 87/1997/871/1083 (ECtHR, 28 October 1998) Reports of Judgments and Decisions 1998-VIII. On the search for missing persons, see particularly: *Cyprus v. Turkey*, Application No. 25781/94 (ECtHR, 10 May 2001, ECHR 2001-IV); *Varnava and Others v. Turkey*, Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), *Aslakhanova and Others v. Russia,* Application Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10 (ECtHR, 18 December 2012).

42. International Convention for the Safety of Life at Sea, 1974, as amended, 1184 UNTS 278 (adopted 1 November 1974, entered into force 25 May 1980).

Rescue (SAR Convention).[43] These instruments establish a robust framework for rendering assistance to persons in distress at sea, which is central in upholding the obligation to protect human life and addressing the issue of migrant deaths and disappearances. Notwithstanding the existence of this legal framework under the law of the sea and its standing as a customary law obligation, human rights abuses at sea are often not reported, enforced, or remedied due to the challenging nature of the maritime environment.[44] They can easily go unnoticed on the high seas, which has been described, quite starkly, as a "place where anyone can do anything because no one is watching... a dystopian place, home to dark inhumanities".[45] Despite this, the vast and largely unregulated expanse of the sea, occupying over seventy per cent of the terrestrial surface, should not serve as a space for impunity.

Against this backdrop, the delineation of the world's oceans into 13 national SAR regions by the International Maritime Organization (IMO) provides a mechanism for identifying which State is primarily *responsible* for ensuring that distress at sea calls are received and responded to within their respective Search and Rescue Regions (SRRs).[46] For instance, if a boat in distress finds itself within a State's SRR (e.g., Italy),

43. International Convention on Maritime Search and Rescue, 1979, with annexes, 1405 UNTS 97 (adopted 27 April 1979, entered into force 22 June 1985).

44. Natalie Klein, 'Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law' (2022) 53(2)-(3) Ocean Development and International Law.

45. Ian Urbina, 'Stowaways and Crimes Aboard a Scofflaw Ship' *New York Times* (New York, 17 July 2015), <<https://www.nytimes.com/2015/07/19/world/stowaway-crime-scofflaw-ship.html>>; Richard Collins, '"Outlaw Oceans" and "Lawless Sea"? Revisiting the High Seas as a Regulatory Space Under (and After) UNCLOS 1982' in Kristina Siig, Birgit Feldtmann and Fanella MW Billing (eds), *The United Nations Convention on the Law of the Sea: A System of Regulation* (Routledge 2023) 26.

46. Tanja E. Aalberts and Thomas Gammeltoft-Hansen, 'Sovereignty at Sea: the Law and Politics of Saving Lives in Mare Liberum' (2014) 17 Journal of International Relations and Development 445.

it is the *responsibility* of that coastal State (Italy) to coordinate the search operation and ensure that assistance is rendered. Notably, the IMO has stressed that the boundaries of SAR areas should not be perceived by coastal States as barriers to rendering assistance to persons in distress.[47] Ergo, the SAR Convention becomes a critical instrument in supporting the operational fulfilment of the duty to rescue at sea, as it provides the international system underpinning SAR operations.[48] However, the SAR regime has arguably contributed to a form of 'territorialisation' of the high seas, where the principle of *mare liberum* is increasingly intertwined with State responsibility.[49]

By delineating SAR regions and assigning primary responsibility for SAR coordination, the SAR framework serves as a mechanism to govern the high seas while ensuring that humanitarian obligations remain at the *forefront* of maritime operations. Nonetheless, the overlapping SAR areas between Italy, Malta, and Libya have often caused delays or inadequate responses in handling distress information.[50] In particular, the island of Lampedusa is part of both the Italian and Maltese SAR areas. Truly, questions of shared responsibility are genuinely difficult, as there is a lack of clarity in the wider responsibility framework of international law and obligations are insufficiently developed. As Gammeltoft-Hansen convincingly contends, this might lead to "jurisdiction shopping",[51] as

47. Felicity Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Brill Nijhoff 2020) 57.

48. International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979, in force 22 June 1985) 1405 UNTS 119.

49. Aalberts and Gammeltoft-Hansen (n 46) 458.

50. Silvia Dimitrova, 'Rethinking "Jurisdiction" in International Human Rights Law in Rescue Operations at Sea in the Light of *AS and Others v. Italy* and *AS and Others v. Malta*: A New Right to be Rescued at Sea?' (2023) 56 Israel Law Review 127.

51. Thomas Gammeltoft-Hansen, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 142f.

it arguably creates a legal basis for destination States to shift both procedural and substantive asylum and refugee protection obligations to the neighbouring coastal State.

Consequently, the delineation of SAR regions has inevitably created overlapping responsibilities between coastal States, flag States and the State of nationality of individuals that find themselves in distress at sea, leading to inconsistent implementation of the duty to render assistance to those in danger at sea. Certainly, when the duty was formulated, the drafters of the UNCLOS did not have in mind the massive migration movements we are witnessing today. Instead, this duty was predominantly thought to safeguard the safety of life at sea against the inherent dangers of the sea *in those instances* where something has gone 'wrong'. Nonetheless, in such situations, all ships are required to have plans and procedures in place to recover casualties from the sea.[52]

Moreover, the SOLAS Convention imposes obligations on contracting governments by requiring States to establish SAR facilities to effectively render assistance to those in distress and around their coasts.[53] The provision provides that upon the communication of distress information, governments should ensure that the necessary arrangements are made to locate the persons in distress and assist them, either by State-owned vessels (e.g., coastguards) or by other vessels (e.g., merchant vessels) that navigate in the area.[54] In line with Article 98(2) UNCLOS, coastal States have authority over their respective SAR zone and hold an obligation of due diligence to provide adequate and effective SAR

52. International Chamber of Shipping, 'Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons' (2nd ed, 2015) 4.

53. Attard (n 47) 57; SOLAS, Annex Ch V, Reg 7.

54. SOLAS, Ch V, Reg 7.1; See also further discussion in Irini Papanicolopulu, *International Law and The Protection of People at Sea* (OUP 2018) 499.

services in their SAR zone.[55] In fact, this is a critical duty, which can give rise to the accountability and responsibility of a State, if proven that they failed or delayed in offering or cooperating in the provision of such assistance.

While the SAR regime does not require that coastal States conduct SAR for every vessel in distress in the respective SAR zone, States are under a due diligence obligation to ensure the adequacy and effectiveness of the SAR services, particularly when they know or ought to have known in the circumstances that persons were in distress. Moreover, under the SAR Convention, a national Rescue Coordination Centre (RCC) is a unit responsible for promoting the efficient organisation of SAR activities within its SRR and must be capable of objectively assessing a situation and acting on the basis of relevant information. Crucially, RCCs are the cornerstones of the operability of the SAR system, as they provide *instructions* to shipmasters upon the receipt of distress communication.[56] In addition to this, RCCs are required to take immediate action to assist and to inform the responsible RCC if they receive *information* about an emergency that is beyond its SAR zone. If the latter refuses to intervene, then that primary State would remain responsible for the coordination and management of the SAR services.[57] It is imperative to note that individuals within a SAR zone do not *ipso facto* fall within the jurisdiction of the respective coastal State, as there must be some additional factual element that will link the persons and the coastal State

55. Seline Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (Questions of International Law, Zoom-In, 23 June 2014) <<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>>.

56. Attard (n 47) 68.

57. Article 4.3 of the Annex SAR Convention; See also Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Violeta Moreno-Lax and Efthymios Papastavridis, (eds), *'Boat refugees' and Migrants at Sea: A Comprehensive Approach, Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016) 229-30.

concerned, such as receiving information about people in danger at sea.[58]

The HRC decision in the *A.S. and Others v. Italy*[59] is particularly relevant in this context. The case involved the deaths of 63 migrants whose boat capsized in international waters while attempting to cross the Mediterranean. Despite numerous distress calls alerting both the Italian and Maltese authorities to the perilous situation, no timely SAR action was undertaken, which could have prevented the loss of life. Truly, the ambiguities that can arise from diplomatic (and legal) quarrels between State governments can have fatal consequences for migrants. *In casu,* both the Italian and the Maltese authorities failed to properly cooperate as to who would undertake the rescue operation. As a result, assistance arrived approximately seven hours after the initial distress call. Manifestly, the principal reason for the human tragedy was the reluctance of *both* States to reach a timely agreement and to coordinate the rescue with due diligence; an omission that could have significantly reduced the risk to the lives involved. This incident illustrates the difficulties in implementing rescue obligations, particularly when incidents occur near the boundaries of overlapping SRRs or in areas where jurisdiction remains contested. These legal and operational gaps within the SAR framework continue to result in preventable deaths and leave families without answers or closure.

It is further pivotal to comprehend that duty to rescue under the law of the sea is not contingent upon a State's *de jure* or *de facto* control over the individual. Jurisdiction, in this context, is not a prerequisite,

58. Patricia Vella de Fremeaux (Mallia) and Felicity G. Attard, 'Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I' (3 March 2021) OpinioJuris, <<http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-committee-part-i/>>.

59. *A.S. and Others v. Italy*, 27 January 2021, UN Doc CCPR/C/130/D/3042/2017.

unlike the duties that flow from the right to life under human rights law. Reconciling these legal frameworks is therefore crucial, as it may inform and shape the interpretation and application of human rights obligations, including the duty to prevent foreseeable deaths and disappearances, to search for missing persons, to recover bodies, and to conduct effective investigations into such incidents.

3.1 Outsourcing SAR responsibilities and human rights implications

Beyond legal and jurisdictional complexities, SAR operations also pose a significant security and safety challenges for the crew and shipmaster, particularly when merchant vessels are called upon to assist migrants in distress. For instance, in the case of *The M/V King Jacob*, a container ship was called to respond to a distress call from a migrant vessel carrying over 800 people.[60] During the rescue attempt, however, the two vessels collided, resulting in the deaths of several hundred people. The inherent risks of SAR operations are further exacerbated when rescued migrants face the prospect of forced return to the country from which they fled. A stark example is *The Lady Sham* incident, whereby a cargo ship, upon rescuing 140 migrants in the Mediterranean, was instructed by Italian authorities to disembark them at the port of Misrata, Libya, where they were then taken to a detention centre.[61] Upon their rescue, the crew (misleadingly) told the migrants that they would be disembarked in Germany. This is believed to have been done because of fears of protests by migrants should they have realised they were being taken back to

60. Julian Miglierini, 'Migrant tragedy: Anatomy of a shipwreck' (24 May 2016) BBC, available at <<https://www.bbc.com/news/world-europe-36278529>>.

61. Marion MacGregor, 'Migrants Rescued by "Lady Sham" Detained in Libya' (23 January 2019) InfoMigrants, available at <<https://www.infomigrants.net/en/post/14678/migrants-rescued-by-lady-sham-detained-in-libya>>.

Libya.[62] Notably, the actors involved in SAR operations bear high risks when conducting a large-scale rescue, as they are exacerbated by the political standoffs regarding the identification of a disembarkation port.[63] The incident illustrates the critical complexities of the legal framework surrounding the duty to rescue at sea, highlighting concerns about States that are increasingly outsourcing SAR responsibilities to avoid accountability for migrant deaths and disappearances as well as any subsequent investigation obligations.

Another illustration of the increased risks migrants face when crossing the sea is when European States opt for pushbacks by a proxy third actor instead of conducting SAR operations. This is arguably the case when a State endeavours to avoid any associated responsibility for migrant deaths and disappearances and diverts SAR activity to third-country authorities in an apparent effort to avoid any direct physical contact that would place the individuals under a State's jurisdiction. The case of *S.S. and Others v. Italy* (communicated)[64] is a paradigmatic example of this practice. It concerned an interception of a migrants' vessel carrying around 150 migrants on the high seas by the Libyan Coast Guard and

62. In particular, domestic courts have found that actions by rescued persons amidst fear of being return back to their countries (e.g. Libya) e.g. pressuring shipmasters, were justified under the principles of self–defense. For more, see Jean-Pierre Gauci, 'When Private Vessels Rescue Migrants and Refugees: A mapping of Legal Considerations' (British Institute of International and Comparative Law, 24 November 2020) at 13, available at <<https://www.biicl.org/documents/124_private_vessels_research.pdf>>. Moreover, for similar incidents, see, Aphrodite Papachristodoulou, 'The Principle of Saving Lives at Sea: Just a Fool's Hope' (International Law Blog, 27 June 2019), available at <<https://internationallaw.blog/2019/06/27/the-principle-of-saving-lives-at-sea-just-a-fools-hope/>>; Aphrodite Papachristodoulou, *Protection of Human Life at Sea in International Law: Rescuing Maritime Migrants* (Routledge 2025) 72-81.

63. For instance, see Guglielmo Mangiapane, 'Italian Political Standoff Keeps Rescued Migrants Stranded at Sea' (Reuters, 19 December 2019), available at <<https://www.euronews.com/2019/08/16/italian-political-standoff-keeps-rescued-migrants-stranded-at-sea>>.

64. App no 21660/18 (ECtHR, communicated on 26 June 2019).

Navy (LCGN); the migrants' vessel had begun to capsize soon after its embarkment from Tripoli.[65] The first distress call was received by the Italian Maritime Rescue Coordination Centre (MRCC), which thereafter communicated to all ships "transiting in the area" to assist the vessel.[66] Various actors were in close proximity to the vessel (Operation *Sophia*, Operation *Mare Sicuro*, a French warship, and an Italian navy helicopter) at the time of the distress call, and an hour later, the NGO Sea Watch 3 (SW3) and the LCGN arrived at the scene.[67] The NGO assumed on-scene coordination after the LCGN objected (and did not have the necessary equipment to carry out the rescue). The applicants maintained that before the NGO had arrived at the scene, the LCGN authorities physically abused them, threw objects at them, and tried to prevent the SW3 from reaching the scene.[68] Without going into extensive detail of the contested orders, it appears to be the case that a communication was made by the Italian authorities to the LCGN to take charge of the rescue, which the LCGN later accepted. In the end, some of the individuals managed to get rescued by the SW3; some, including a child, drowned amidst the unravelling of this chaotic situation, and some were taken by the LCGN back to a camp in Libya where they were reportedly abused for a month.[69]

The case was brought before the ECtHR in 2018 by an application made by the Global Legal Action Network (GLAN) against Italy alleging violations of Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 4 of Protocol 4 (pro-

65. Ibid., 388.

66. Papastavridis (n 13) 417.

67. Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21(3) *German Law Journal* 389.

68. Ibid.

69. Ibid., 390.

hibition of collective expulsions) of the ECHR. Importantly, by taking into account human rights law, the law of the sea, and refugee law, the counsels argued that Italy, by way of exercising its jurisdiction – operating through the MRCC – has the obligation *not* to transfer coordination of the rescue to the authority of another State "unless they are satisfied that the other State will ensure rescue, treatment and disembarkation in full respect of the obligation not to expose a person to a risk of serious violation of human rights".[70] This case clearly manifests an example of State practice that contributes to migrant deaths and enforced disappearances and prevents accountability mechanisms from addressing these violations. However, as this is a pending case, it is difficult to predict with confidence how the ECtHR will address some of the most complex challenges before it, which are novel in many ways and have never been challenged before.

4. The right to life under international human rights law

The ECHR and other international human rights treaties impose both substantive and procedural obligations on States to ensure the protection of the right to life for everyone under their jurisdiction through exercising best efforts. On the one hand, international institutions have sought to interpret positive obligations arising under the right to life in a manner that broadens the scope of application of the right. On the other hand, States appear to adopt a differential treatment in securing the right to life according to the *group* of people they are called upon to save. For instance, Thomas Spijkerboer has rightly observed that "states

70. Ibid., 8.

have assumed far-reaching positive obligations to protect the right to life for regular travellers, but recognize only limited obligations vis-à-vis irregularized travellers".[71]

4.1 Duty to conduct effective investigations

The obligation to conduct an effective investigation upon reasonable allegations that harm has materialised or into suspicious deaths, also referred to as the procedural limb of Article 2, has been emphasised by the ECtHR in the seminal case of *Varnava and Others v. Turkey* with reference to the failure of the authorities to investigate the disappearance of nine men in Cyprus in 1974. *In casu,* the ECtHR established that enforced disappearances represent a continuing violation of human rights, persisting until the fate of the disappeared person is determined.[72] Although the *Varnava* case occurred during armed conflict, this arguably applies to disappearances at sea, where States fail to conduct effective investigations into maritime tragedies or conceal the fate of victims. Specifically, the Court *in casu* made the following declaration:

> A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred [...] This situation is very often drawn out over time, prolonging the torment of the victim's relatives [...] the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite

71. Thomas Spijkerboer, 'Wasted Lives: Borders and the Right to Life of People Crossing Them' (2017) 20 Nordic Journal of International Law.

72. *Varnava* case at para 194.

> investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed.[73]

This statement gave a necessary clarification previously missing from the ECtHR jurisprudence. While enforced disappearances on land have been recognised as ongoing violations, disappearances at sea remain legally ambiguous due to national laws on search operations that might be inconsistent with international standards or apply incompletely at sea. For instance, the *modus operandi* of the Hellenic Coastguard when searching for missing and deceased persons at sea is defined by internal orders, which are classified as confidential and not publicly accessible, thereby limiting external scrutiny of their actions.[74] More specifically, a three-day period is designated for the search for missing persons at sea following a shipwreck, in accordance with standard operational procedures. However, this timeframe has proven problematic, as numerous bodies have been discovered well beyond this limited window. Such an arbitrary cut-off risks undermining the effectiveness of search efforts and perpetuates a situation where those lost at sea are never found or identified, disregarding the right of families to know the fate of missing migrants. On the contrary, the SAR Convention assigns responsibility to the rescue coordination centre or sub-centre responsible to decide as to when to discontinue SAR operations.[75] Therefore, while a fixed duration for search efforts (e.g., the three-day period in Greece) is not explicitly stated in the maritime SAR Convention, the general principle is that search efforts should continue as long as there is a reasonable chance of

73. Ibid., para 148.

74. Vassilis Kerasiotis and Maria Spiliotakara, 'Missing and Dead Migrants at Sea: The Legal framework in Greece' (September 2016), Missing Migrants Project, IOM, 5, available at <<https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/Mediterranean-Missing-Greek-legal-memo.pdf>>.

75. SAR Convention, 4.8.2.

finding survivors.[76]

The connection between the lack of effective investigation and a violation of the right to life is consistent with the legal prohibition on arbitrary killing, as the latter will be rendered vain if there is no procedure for reviewing the lawfulness of the use of force by the State and its agents.[77] Moreover, another significant development emphasising the scope of the obligation to undertake an effective investigation is the *Xhavara and Others v. Italy and Albania* case,[78] brought in the context of migrant interceptions at sea. *In casu*, fifty-eight migrants drowned due to their vessel being struck by an Italian navy vessel. The ECtHR held that the Italian authorities were under an obligation pursuant to Article 2 of the ECHR to instigate an effective investigation into the deaths of the victims, underlining the procedural duty to investigate deaths resulting from State actions. The established ECtHR's case law consistently confirms that a State has an obligation to investigate its own omissions. The procedural obligation arises when harm occurs – whether due to a natural disaster, an accident, or harm inflicted by a non-state actor, either intentionally or unintentionally – if the State's failure to act could have arguably prevented the harm.[79] This principle was applied in *Ribcheva and Others v. Bulgaria,*[80] where a police officer was killed during

76. See also IMO Guidelines for the Development of Plans and Procedures for the Recovery of Persons from the Water (MSC.1/Circ.1447).

77. Fionnuala Ní Aoláin, 'The Evolving Jurisprudence of the European Convention Concerning the Right to Life' (2001) 19(1) Netherlands Quarterly Human Rights 33; The HRC confirmed this as well in *Amirov v. Russian Federation*, Communication No 1447/2006, 2 April 2009, UN Doc CCPR/C/95/D/1447/2006.

78. *Xhavara and Others v. Italy and Albania,* Application No. 39473/ 98 (ECtHR, 11 January 2001).

79. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (OUP 2023) 134.

80. *Ribcheva and Others v. Bulgaria,* Application Nos. 37801/16, 39549/16, 40658/16 (ECtHR, 30 June 2021).

an operation against a dangerous individual. The ECtHR ruled that the procedural limb of Article 2 is engaged when lives are lost in circumstances that may implicate State responsibility due to alleged negligence in fulfilling its positive obligations.[81] In such cases, the State is arguably required to investigate its own omissions if they have "directly contributed" to causing the death.

Analogously, the Greek Ombudsman's recent report on the *Pylos* shipwreck exemplifies the critical need for effective investigations behind negligent actions. The report identified significant omissions in the Hellenic Coast Guard's SAR operations, suggesting that eight senior officers may have neglected their duties, thereby endangering the lives of migrants aboard the vessel.[82] The findings highlight the procedural duty of States to investigate unlawful or suspicious deaths within their jurisdiction, including those occurring at sea. In particular, the Ombudsman's investigation was initiated after the Hellenic Coastguard declined to conduct an internal inquiry, underscoring the necessity for independent oversight in such cases. It follows, then, that there is a duty to investigate migrant deaths both in the course of coastguard operations and in the course of smuggling operations.[83]

The above argument aligns with the ECtHR's stance in *Cyprus v. Turkey,*[84] which established that States have a positive obligation to investigate suspicious deaths, particularly when authorities "had known or

81. Ibid., para 129.

82. The Greek Ombudsman, The Ombudsman's Report on the Pylos Shipwreck, available at <<https://www.synigoros.gr/en/category/default/post/press-release-or-the-ombudsman's-report-on-the-pylos-shipwreck>>.

83. Stefanie Grant, 'Dead and Missing Migrants: The Obligations of European States under International Human Rights Law' (2016), Missing Migrants Project, IOM, available at <<https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/Mediterranean-Missing-Legal-Memo-290816.pdf>>.

84. *Cyprus v. Turkey,* App no 25781/94 (ECtHR, 10 May 2001).

ought to have known" of a threat to life.[85] This judgement provides an important precedent for cases of migrant fatalities at sea, reinforcing that States must not only fulfil their duty to render assistance to those in distress at sea, but also investigate when deaths or disappearances result from *knowledge* of a reasonably foreseeable outcome that the authorities could have prevented. Thus, the failure of States to provide timely assistance or instigate an investigation on migrant deaths at sea might constitute a violation of both their obligations under the law of the sea and the right to life under international human rights law.[86]

The obligation to conduct an effective investigation pursuant to Article 2 is further reinforced by the specific obligations set forth in a number of international and regional instruments, including, in particular, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, insofar as States Parties are concerned.[87] In this regard, the ECtHR has accepted that not every investigation will necessarily be *successful*, "however, it should in principle be capable of leading to the establishment of the facts of the case".[88]

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85. The positive obligation was later also confirmed in *Eshenov v. Uzbekistan*, CCPR, Comm. No. 1225/2003 (2010).

86. HRC, *CCPR General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant,* adopted 29 March 2004, CCPR/C/21/Rev.1/Add.13, para 80.

87. Article 4 of both the Smuggling and Trafficking Protocols require States to prevent, investigate and prosecute the offence of smuggling and trafficking respectively, supra fn. 9. In addition, Article 7 of the Smuggling Protocol requires States Parties to cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea. Article 3 of the Trafficking Protocol as well as the Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008, CETS No. 197) include the offence of recruitment. Accordingly, States Parties must undertake a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation in circumstances where there is evidence to indicate that those who died were victims of smuggling or trafficking.

88. *Aslakhanova and Others v. Russia*, Application Nos. 2944/06 and 8300/07, 50184/07, 332/08. 42509/10 (ECtHR 29 April 2013) para 144.

4.2 Duty to provide arrangements to secure legal accountability

Procedural obligations are central to ensuring that States meet their duty to protect the right to life, especially in cases where State agents may be involved. The ECtHR has established in its case law that there is a duty to provide arrangements to secure legal accountability for those responsible for a violation of the right to life. This was exemplified in *Kaya v. Turkey*,[89] where the Court found a violation of Article 2 on the basis of an ineffective investigation into the death of the applicant's brother following the exercise of lethal force. In holding so, it highlighted the positive nature of the obligations arising under the provision by prescribing that States need to ensure accountability for deaths occurring under the responsibility of a State's agents for acts they did or did not do. Simplified, a lack of accountability for the circumstances of the death will arguably constitute a violation of Article 2 under the ECHR.[90]

In addition to this, both *Cyprus v. Turkey* and *Varnava* cases represent continuing procedural violations of Article 2 due to Turkey's subsequent failure to account for the whereabouts and fate of the missing persons, giving rise to a continuing situation. Certainly, non-compliance with this duty undermines both human rights and the rule of law in Europe. Arguably, the procedural obligation will persist as long as the fate of the missing persons remains unaccounted for, even where death is presumed. This aligns with the ECtHR's view that the failure to clarify the fate of missing persons constitutes an ongoing violation of the right to life under Article 2. This is highly relevant in the context of migrant deaths and missing

89. *Kaya v. Turkey,* Application No. 22729/93 (ECtHR, 19 February 1998).

90. See, also, Christof Heyns and Thomas Probert, 'Securing the Right to Life: A cornerstone of the human rights system' (11 May 2016) *EJIL:Talk!*, available at <<https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/>>.

at sea, as the failure to investigate or respond to distress information can prolong the violation of the right to life, leaving families in uncertainty.

In the *Varnava* case, the ECtHR emphasised that the duty incumbent on States includes "... determining the facts surrounding the deaths of the missing persons who have been identified or in collecting or assessing evidence with a view to holding any perpetrators of unlawful violence to account in a criminal prosecution".[91] In terms of accountability, the ECtHR has clarified that the primary purpose of an investigation is to ensure responsibility for any ill-treatment occurring under the State authorities' control. This entails that the investigation must not only establish the relevant facts but also identify and prosecute those responsible.[92] Consequently, only an official criminal investigation is regarded as fulfilling the procedural obligation in cases of harm caused by State agents.[93]

To contextualise the discussion, it is essential to look again at the *A.S.* case. In particular, the individual Opinion of the HRC Member Gentian Zyberi highlighted that, in cases of failed SAR operations that result in lives lost, the State has a procedural obligation under Article 6 of the ICCPR to start *ex officio* a prompt and effective investigation into allegations to find out what happened and, where necessary, hold those responsible to account. *Ergo,* a State's obligation to conduct an effective investigation, including the recovery of bodies, identification of the deceased, and determination of the cause of death, does not end at its borders. States must take all necessary and available steps as soon as they become aware of such incidents, and this duty is not contingent upon a formal complaint by the victims' relatives. As a result, States should secure relevant evidence, including from other States, an obligation that is particularly relevant in the context of migrant deaths, the vast ma-

91. *Varnava* case, para 192.

92. *Labita v. Italy*, Application No. 26772/95 (ECtHR, 6 April 2000) para 131.

93. Stoyanova (n 79) 131.

jority of which have transboundary implications.[94] It should be noted that although the primary responsibility for investigating a death lies with the State where the victim has died or the body has been found, all States Parties to the *European Convention on Mutual Assistance in Criminal Matters* are under a corollary obligation to render assistance to the investigating State where a legal request has been sought by that State, not least when evidence is located within its jurisdiction.[95] Given the transnational nature of migrant sea journeys, this cooperative framework ensures that States fulfil their procedural obligations to investigate deaths, uncover the circumstances surrounding them, and hold those responsible accountable, even when evidence spans multiple jurisdictions.

4.3 Duty to prevent a violation of the right to life

Continuing, the HRC in *A.S.* reaffirmed that the right to life imposes positive obligations on States to protect life from *all reasonably foreseeable* threats; such due diligence requirement involves taking "reasonable, positive measures that do not impose disproportionate burdens on State parties in response to reasonably foreseeable threats to life".[96] The same rationale can be traced in the ECtHR's jurisprudence, providing that the right to life prescribes a duty to prevent a violation from occurring, encompassing a due diligence standard in international human rights law, in circumstances where it is foreseeable or known that life is exposed to danger.[97] Stoyanova in this regard posits that the more foreseeable the risk to life, the more reasonable it is to anticipate the State to take

94. *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (ECtHR, 10 May 2010) at 241.

95. Ibid., 245.

96. *A.S.* case (against Italy) (n 59) 8.3.

97. For example, see *Opuz v. Turkey,* App no 33401/02 (ECtHR, 9 June 2009) para 144. For further discussion see Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (CUP 2021).

measures to prevent the loss of life.[98] Certainly, as foreseen, the European Union and its Member States have adopted policies which, to a certain *foreseeable* extent, negatively affect the lives of individuals who are trying to cross borders. It is in this context that positive obligations to protect the right to life might be triggered, encompassing not only substantive obligations, but also procedural obligations, including the duty to search for missing persons and to investigate deaths.

Consequently, the HRC, *in casu*, reasoned that "the individuals on the vessel in distress were *directly affected* by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable".[99] This was even though Malta had formally assumed primary responsibility for coordinating the rescue operation, as the vessel was in its SAR zone. The existence of multiple duty-bearers does not preclude a finding that more than one State exercised concurrent jurisdiction (shared responsibility) over the same individuals and the same situation,[100] if their acts or omissions impact the lives of individuals in a direct and reasonably foreseeable manner.

Emphatically it can be concluded that where migrant deaths and missing are closely linked to harm resulting from negligent omissions by the State, this will also trigger the procedural obligation under the right to life. The above reasoning is echoed in the recent ECtHR seminal decision of *Safi and Others v. Greece,*[101] also known as the *Farmakonisi*

98. Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21(3) German Law Journal 448.

99. *A.S.* case (against Italy) (n 59) 8.5; *A.S. and Others v. Malta*, 27 January 2021, UN Doc CCPR/C/128/D/30423/2017 (*A.S.* case (against Malta) 6.7. Emphasis added.

100. This follows the ECtHR's jurisprudence in the context of asylum e.g. in the *M.S.S. v. Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011), where both respondent States were found internationally responsible for the treatment of the applicant, an asylum-seeker returned from Belgium to Greece.

101. Application No. 5418/15 (ECtHR, 7 July 2022).

shipwreck case. The Court in this case tackled for the first time the right to life in SAR operations in the Aegean Sea and unanimously found a violation of both the procedural and the substantive limbs of Article 2 of the ECHR by virtue of the Hellenic Coastguard's actions. The former limb was violated by the failure of the Greek authorities to carry out an exhaustive and effective investigation into the sinking of the vessel, namely the initiation of criminal proceedings against coastguard personnel, whilst the latter was violated on account of the failure of Greece to take all reasonably expected measures to adequately respond to the risk to the applicants' lives.[102]

The sinking in question occurred as a result of two high-speed towing attempts (to push back the migrants' boat), which led to water entering the vessel, causing it to capsize and resulting in the deaths of 11 out of the 27 migrants on board. Several upshots of the case are important to fathom from the judgement. The ECtHR stressed the absence of meaningful accountability and the lack of transparency in judicial enquiries that highlighted systemic deficiencies in addressing violations of the right to life by Greece. It noted that the authorities "did not take, within the framework of their powers, the measures that could be considered, reasonably, capable of preventing the danger".[103] Apart from this case, the lack of case law at the European level dealing specifically with death and disappearances during migration proves to be an obstacle for families who wish to take cases to the ECtHR, as they must identify the State responsible for the violation as well as surmount

102. For analysis, see also Mariana Gkliati, Danai Angeli, Elizabeth Mabropoulou and Niovi Vavoula, 'Greece Boat Disaster: Questions of International Law' (5 August 2023) OpinioJuris, <<http://opiniojuris.org/2023/08/05/greece-boat-disaster-questions-of-international-law/>>.

103. Ekathimerini, 'Ombudsman finds "reprehensible omissions" in coast guard's handling of Pylos shipwreck' (03 February 2025), available at <<https://www.ekathimerini.com/news/1260535/ombudsman-finds-reprehensible-omissions-in-coast-guards-handling-of-pylos-shipwreck/>>.

practical and legal obstacles which include distance, cost and often their own irregular status.

Lastly, in *Safi,* the ECtHR reinforced the principle that time is of the essence in cases where drowning is reasonably foreseeable, and placed importance on the considerable delays of rescue efforts, in particular, over an hour after the boat had completely sunk, a practice that has become the norm in the Mediterranean.[104] More recently, the EU Fundamental Rights Agency has reported systematic delays and non-assistance practices in the Central Mediterranean. For example, Malta has been accused of postponing rescue efforts for over 38 hours in one instance, demonstrating the persistent failures in the implementation of SAR obligations and associated human rights responsibilities.[105]

Furthermore, the case of *Öneryıldız v. Turkey* establishes that a State's failure to prevent and investigate deaths, despite being aware of life-threatening risks, constitutes a violation of Article 2 of the ECHR. A clear parallel can be drawn between this precedent and deaths or disappearances occurring during perilous sea crossings, where a documented history of shipwrecks demonstrates that States are aware of the risks in migration routes in the Mediterranean Sea yet often fail to take adequate preventative action or investigate loss of life. The Italian Mare Nostrum mission was one example of preventive action by the State, which had as its core mandate the rescue of migrants travelling on vessels in distress in the Central Mediterranean between Italy and North Africa. The humanitarian operation lasted only one year, even though it was estimated to have saved at least 130,000 people during its operation. Indeed, the

104. Hannah Katz and Itamar Mann, 'From Farmakonisi to Pylos at the ECtHR' (12 July 2023) *EJIL:Talk!*, available at <<https://www.ejiltalk.org/from-farmakonisi-to-pylos-at-the-ecthr/>>.

105. European Union Agency for Fundamental Rights, 'Fundamental Rights Report–2024', available at <<https://fra.europa.eu/sites/default/files/fra_uploads/fra-2024-fundamental-rights-report-2024_en.pdf>>.

mission has been applauded from many quarters, including the IOM,[106] but at the European level, it remained controversial and, for this reason, short-lived.

Substantiating the above line of argumentation, scholars like Spijkerboer have rightly posited that border controls are among the contributing factors that cause fatalities at sea, but other factors might play a leading role, such as adverse weather conditions, as was seen in the Crotone incident in 2023.[107] In particular, *in casu*, bad weather and sea conditions caused large quantities of water to flood the overcrowded migrants' boat that became in distress and in need of assistance.[108] Despite clear indications of peril from surveillance technology, Italian authorities failed to launch a timely SAR operation, exacerbating the disaster that led to the death of 79 lives, including 33 minors, with approximately 20 migrants still missing. Given the history of casualties taking place across the semi-enclosed area of the Mediterranean Sea, coupled with pre-existing knowledge of the Mediterranean migration routes, States are reasonably expected to apprehend that such information manifested a certain *risk* to the life of migrants that was foreseeable. Respectively, the obligation to protect the right to life in international human rights law encompasses a duty to *prevent* loss of life according to a due diligence standard. Relatedly, the ECtHR in the *Osman* case identified a "reason-

106. International Organization for Migration, 'IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"' (IOM 2014), available at <<https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor>>.

107. I have analysed this incident earlier in a blogpost, see, Aphrodite Papachristodoulou, 'The Crotone Migrant Shipwreck: A Cat-and-Mouse Blame Game and the Role of Technologies at External Borders' (12 April 2023) *EJIL:Talk!*, available at <<https://www.ejiltalk.org/the-crotone-migrant-shipwreck-a-cat-and-mouse-blame-game-and-the-role-of-technologies-at-external-borders/>>.

108. Aphrodite Papachristodoulou, 'Shipwreck after Shipwreck: Frontex Emergency Signals and the Integration of AI systems' (11 March 2024) Verfassungsblog, available at <<https://verfassungsblog.de/shipwreck-after-shipwreck/>>.

able knowledge" condition which provided that the preventive positive obligation arises if the State's authorities knew or should have known of a *real* and *immediate risk* to the life of an identified individual(s).[109]

To be clear, the duty to prevent loss of life is not an absolute one, as there are boundaries in delimiting the preventive measures a State would need to take, even though these are not clear-cut in the ECtHR's jurisprudence. In the *A.S.* case, the HRC highlighted that failing to respond in a due diligent manner to distress situations will amount to an exercise of human rights jurisdiction by the State. *In casu,* the issue was not whether the shipwreck occurred within the State party's territory; it *clearly* did not. The subject matter to decide was whether the alleged violations of the right to life could be considered to have been *within the power* or *effective control* of the State, even though it took place outside its territory.[110] In this regard, the HRC grasped the opportunity to adopt its views enshrined in its latest *General Comment No. 36* on the right to life, where it observed that a State has an obligation to protect and ensure the right to life for all persons over whom it exercises power or effective control and "[t]his includes persons *located outside any territory* effectively controlled by the State, whose right to life is nonetheless *impacted by its military or other activities* in a *direct* and *reasonably foreseeable manner*".[111] Fundamentally, the ECtHR, in *Güzelyurtlu and Others v. Cyprus and Turkey,* affirmed that the obligation to investigate has "evolved into a separate and autonomous obligation" and "[i] n this sense it can be

109. *Osman* (n 41) paras 116–117.

110. *A.S.* case (against Italy) (n 59) 7.7.

111. HRC, *CCPR General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, adopted 30 October 2018, CCPR/C/GC/36, para 63 (emphasis added); See also Paolo Busco, 'Not all that Glitters Is Gold: the Human Rights Committee's Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations' (2 March 2021) OpinioJuris, <<https://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations/>>.

considered to be a detachable obligation arising out of Article 2 [of the ECHR] and capable of binding the State even when the death occurred outside its jurisdiction".[112]

A crucial final remark is in order. A striking paradox can further be observed in the phenomenon of migration by sea and its 'inherent' invisibility. While, as underscored in the introduction of this paper, migrants who go missing in the Mediterranean often remain invisible, this anonymity (presence) is, in fact, highly visible to the authorities. European States and agencies, including Frontex, have long used advanced surveillance technologies to monitor and control mobility from the moment an individual attempts to leave their country to 'prevent' irregular arrivals.[113] However, rather than being utilised primarily as a means of preventing perilous journeys and mitigating loss of life, these technological advancements are largely deployed to reinforce the border securitisation paradigm.[114] This contradiction underscores a fundamental failure in the implementation of international legal obligations: while States possess real-time spatial knowledge of migration routes, they routinely neglect their duty to prevent foreseeable harm and ensure prompt rescue operations. As such, migrants at sea are deliberately subjected to enforced disappearance through various mechanisms employed by the EU and its member States to endanger them and prevent their arrival.

112. *Güzelyurtlu and Others v. Cyprus and Turkey,* Application No. 36925/07, (ECtHR, 29 January 2019) at para 189.

113. Aphrodite Papachristodoulou, 'The Exercise of State Power Over Migrants at Sea Through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction' (2024) 73(4) International & Comparative Law Quarterly 945-947.

114. See Francesca Romano Partipilo, 'Getting rescued by RoboCop? Legal and ethical challenges of the use of extended reality in Frontex's search and rescue operations at sea', and Giorgia Bevilacqua, 'Managing migration in the Mediterranean Sea: From mythology to remote surveillance, the compatibility of the Italian strategy with international law of the sea', in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 3–Maritime Security, New Technology and Ethics* (Luglio Editore 2024).

The centrality of surveillance technologies to contemporary border governance cannot be overstated. By generating spatial knowledge, these systems afford States significant power to control remotely the passage and entry of irregular migrants, effectively transforming maritime spaces into sites of selective intervention. This is important to comprehend, as the increased visibility of migration routes and the timely knowledge of potential distress situations afford States the power to strategically affect an outcome or course of events.[115] The exercise of such power, together with the foreseeability of the risk to life, is capable of triggering both substantive obligations to safeguard the right to life and procedural obligations to search for missing migrants, recover bodies, and instigate an investigation into deaths. Arguably, such a human-rights-based approach is justified by the need to redress the situation of migrants' vulnerability at sea.[116]

5. Conclusion

There are myriad situations in which a State is factually perfectly capable of violating the rights of individuals without directly controlling the actual area or persons, as traditionally interpreted by the ECtHR. The challenges posed by jurisdictional limitations on the high seas, alongside the absence of effective enforcement mechanisms and clear legal interpretations, exacerbate the plight of those lost or stranded. Apart from the case of *Safi*, the absence of case law at the European level specifi-

115. Ibid., 937.

116. On 14 March 2023, the UHCHR published its training guide No. 26 'Towards a Human Rights-Based Approach to Migration' available at <<https://www.ohchr.org/sites/default/files/documents/publications/Towards-Human-Rights-Based-Approach-Migration-Training-Guide.pdf>>.

cally addressing death and disappearances during migration highlights a significant gap in the protection of fundamental rights. International obligations to prevent, search for, and investigate migrant deaths and missing persons in the Mediterranean, along with providing information about their whereabouts to their families, remain one of the most current and complex topics. The case of the *Pylos* shipwreck serves as a stark reminder of the failures in ensuring timely assistance and accountability and underscores the need for a more robust, comprehensive international framework to safeguard the rights of migrants at sea. Undoubtedly, strengthening the integration of human rights obligations within the SAR framework is essential for minimising the loss of life and ensuring greater accountability for migrant fatalities at sea.

The limits of certification mechanisms and the role of flag States in the maritime trade of coltan from the Democratic Republic of the Congo

*Pierandrea Leucci**

Abstract

Coltan, a critical mineral essential to technologies such as 5G infrastructure and electric vehicles, is primarily extracted from the Democratic Republic of the Congo, where its production is closely linked to armed conflict, systematic human rights abuses, and entrenched illicit trade networks. Despite existing regulatory frameworks and the formal designation of coltan as a conflict mineral, significant volumes – often associated with grave human rights violations and illicit extraction – continue to enter global markets. These flows are frequently facilitated by external actors, including officials from neighbouring Rwanda, and are routed through key maritime corridors. This paper critically assesses whether prevailing due diligence mechanisms serve as effective barriers to the trade in conflict-sourced coltan, or whether they function primarily as a *façade* of compliance, enabling the continued circulation of high-risk

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materials. In response to these shortcomings, the analysis advances the case for strengthening the role and accountability of flag States under the UN Convention on the Law of the Sea, particularly in fulfilling their obligations under relevant International Labour Organization conventions and UN Security Council resolutions.

Keywords: Flag State, DRC, conflict minerals, UNCLOS, human rights, ILO, coltan, due diligence.

1. Introduction

Columbite-tantalite (coltan) is a critical mineral integral to the high-tech industry, playing a pivotal role in the production of 5G technology, electric vehicle batteries, and various other advanced technologies. The Democratic Republic of the Congo (DRC) is one of the world's largest primary producers of coltan.[1]

Despite its economic potential, the DRC's coltan sector is marred by serious challenges. Conflict, human rights abuses, and extensive illicit trade networks dominate the industry, creating significant barriers to

1. Market data on tantalum primary production remain inconsistent. U.S. and EU sources from 2023 identify the DRC as the leading producer, followed by either Rwanda or Brazil – though even this ranking varies across datasets. In contrast, the Ecofin Agency reports that Rwanda exported 2,070 tons of coltan in 2023, surpassing the DRC's 1,918 tons and positioning Rwanda as the world's top primary producer, with the DRC in second place. See, U.S. Geological Survey (USGS), *Mineral commodity summaries 2024* (USGS, 2024) 177; EU Trade Module, Raw Materials Information System (Tantalum), available at <<https://rmis.jrc.ec.europa.eu/rmp/Tantalum>>; and 'Coltan: Rwanda ranks top global exporter for the fifth time in 10 years' (8 April 2024), available at <<https://www.ecofinagency.com/mining/0804-45364-coltan-rwanda-ranks-top-global-exporter-for-the-fifth-time-in-10-years?>>.

establishing responsible sourcing practices and ethical supply chains. These challenges are further exacerbated by the involvement of external actors who have actively contributed to and capitalised on the region's instability for financial and strategic gain.

United Nations (UN) reports and independent investigations have consistently exposed Rwanda's central role in the illegal extraction and laundering of DRC-sourced coltan, facilitated through its support of the March 23 (M23) armed group. Once smuggled into Rwanda, this coltan is rebranded under Rwanda's export designation, effectively concealing its true origin and allowing it to enter international supply chains as a legally sourced mineral.

These revelations have fuelled growing global calls for coltan from both the DRC and Rwanda to be officially and consistently classified as a 'conflict mineral'. Such a designation subjects it to stricter trade regulations, enhanced transparency measures, and international monitoring systems aimed at curbing the influx of conflict minerals into the global market. Despite these regulatory efforts, the trade of conflict-sourced coltan persists, with substantial quantities still flowing to key processing and importing hubs across Asia, the U.S., and Europe. Maritime shipping routes likely constitute a significant channel for the continued movement of conflict-sourced coltan, with available documentation indicating export flows through strategic ports such as Mombasa (Kenya), Dar es Salaam (Tanzania), Durban (South Africa), and Luanda (Angola).

This paper addresses the effectiveness of existing due diligence mechanisms in preventing coltan illegally sourced in the DRC from entering global supply chains by sea. It assesses whether these mechanisms serve as genuine safeguards or merely create a *façade* of compliance, allowing high-risk products to circulate unchecked. In light of potential deficiencies in these frameworks, the analysis advocates for a more prominent role for flag States under the UN Convention on the Law of the Sea

(UNCLOS)[2] in preventing the illegal trade of coltan. This approach emphasises these States' legal responsibilities in ensuring compliance with their obligations under relevant International Labour Organization (ILO) Conventions and United Nations Security Council (UNSC) resolutions.

It is recognised that much of the information presented in this paper extends beyond the immediate maritime scope and may appear somewhat removed from the core subject matter of this Yearbook. However, this broader contextual foundation is essential for a comprehensive understanding of the issue's underlying nature, as well as its legal and factual ramifications, before engaging with its specific maritime dimensions.

This paper does not purport to offer definitive answers. On the contrary, it is likely to raise further questions and open new lines of inquiry. Its primary objective is to stimulate critical debate and encourage further academic research into these questions – both in relation to the specific context discussed here and, more broadly, concerning the responsibilities of States in regulating the maritime transport of goods obtained through illegal or exploitative practices – from cocoa harvested through child labour to garments produced in sweatshops.

2. Why coltan?

Understanding the importance of coltan – and the global urgency surrounding its ethical sourcing – is critical to grasping its broader role in international legal and policy debates. While other mineral and natural resources, including cobalt, diamonds, and wildlife, are equally central

2. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

to discussions on state responsibility for illicit exploitation, trafficking, and their links to ongoing conflict in the DRC and neighbouring countries, they are not the focus of this paper.

This decision is informed by two primary considerations. First, a comprehensive examination of each of these resources would require extensive, context-specific legal and empirical analysis that exceeds the scope of a single academic article and would be more appropriately addressed in a monographic study.[3] Second, the due diligence and traceability frameworks currently in place for so-called 'conflict minerals' – namely tin, tungsten, tantalum, and gold (3TG) – are comparatively more developed and legally structured. Among these, coltan, as the principal ore of tantalum, occupies an important position due to its strategic relevance and persistent linkages to human rights violations and transboundary criminal networks, particularly in the eastern DRC. Accordingly, while many of the challenges and conclusions addressed in this paper apply more broadly to 3TG metals, the analysis will primarily centre on coltan and its derivative, tantalum.

Tantalum is a rare and critical metal with distinct properties that make it indispensable in the manufacture of advanced technologies. It is particularly critical in the production of tantalum capacitors, which regulate and store electrical energy in almost every modern electronic device.[4] What makes tantalum capacitors so valuable is their combination of effi-

3. This is the case, for instance, of cobalt, diamonds, lithium, ivory and giant pangolins, which are characterised by different challenges, geographical distribution, legal instruments and historical considerations.

4. Raimund Bleischwitz et al., 'Coltan from Central Africa, International Trade and Implications for Any Certification' (2012) Resources Policy 37, no. 1 (March 2012) 3-4; and Oluwole Ojewale, *Mining and Illicit Trading of Coltan in the Democratic Republic of the Congo* (ENACT, 2022) 2. See also, European Commission, *Critical Raw Materials for Strategic Technologies and Sectors in the EU. A Foresight Study* (EU, 2020) 57; and The Hague Centre for Strategic Studies (HCSS), *Coltan, Congo & Conflict. Polinares Case Study* (2013) Rapport No. 210513, 15-16.

ciency, heat resistance, and stability. These features allow manufacturers to produce incredibly small components, driving the miniaturisation of devices like smartphones, tablets, and laptops. Their reliability and durability also make them indispensable for 5G phone infrastructure, where high-frequency telecommunications equipment depends on stable and high-performing electronic components. The global rollout of 5G networks simply wouldn't be possible without advanced materials like tantalum, which ensures both performance and longevity in these systems.[5]

Beyond consumer electronics, tantalum's strategic significance extends to the aerospace, defence, and emerging technologies sectors. It is widely used in the production of advanced military hardware, satellite systems, aircraft components, AI processors, and green technologies such as electric vehicle batteries and renewable energy storage solutions. These applications demand materials capable of withstanding extreme environmental conditions, rendering tantalum a critical input for high-risk, high-performance systems.[6]

From the laptop used to write this very article to the smartphones buzzing in our pockets, the electric vehicles that take us home, and the satellites enabling global communication and security – coltan is deeply embedded in nearly every aspect of our modern lives.

Given its strategic importance, global coltan production is projected to grow significantly in the coming years. According to market analyses, the tantalum market (which coltan feeds into) is expected to expand at a compound annual growth rate of approximately 6% between 2023 and

5. Xue Wei et al., 'A review of tantalum resources and its production' (2023) Transactions of Nonferrous Metals Society of China, Vol. 33, Issue 10, 3132-3156; Tomas Zednicek, 'Tantalum Capacitors in 5G Infrastructure. What are critical metals?' (2023) Tantalum-Niobium International Study Centre, 35; and Philemon Lindagato et al., 'An advanced overview of recent developments in tantalum, tin, and tungsten production in Rwanda' (2023) International Journal of Mining and Mineral Engineering 14(1):1-26, 15-16.

6. Nabeel A. Mancheri et al., 'Resilience in the Tantalum Supply Chain' (2018) Resources, Conservation and Recycling, vol. 129, 56-69.

2028, driven by heightened demand for semiconductors, 5G infrastructure, and electric battery components.[7] Major industrialised nations – most notably China and the U.S. – along with leading tech giants such as Huawei, Apple and Tesla, are locked in a competitive race to secure a stable and reliable supply of coltan.[8]

The DRC holds vast reserves of strategic minerals, including some of the largest known deposits of coltan.[9] By 2019, the country accounted for approximately 40% of global coltan production, highlighting its central role in the global supply chain and its attractiveness to transnational mining firms.[10]

3. Coltan, conflict, and human rights

The 1961 assassination of Patrice Lumumba, the DRC's first democratically elected Prime Minister and a prominent figure in African anti-colonialism, marked a pivotal turning point in the country's post-colonial trajectory. Orchestrated with the complicity of Belgian and American intelligence

7. Research and Markets, *Global Strategic Business Report – Tantalum (2023 – 2030)*. See also, Wei et al. (n 5) 3132-3156; and Ojewale (n 4) 2.

8. See Bleischwitz et al. (n 4) 12; and Ojewale (n 4) 2. Coltan is also included in the list of "critical raw materials" under Annex II of Regulation (EU) 2024/1252, as well as in the "critical minerals list" featured in Table 4 of the U.S. *Mineral Commodities Summary 2024*.

9. Max Chaffetz, 'Disentangling Conflict and Minerals: How NGOs and Lawmakers Ought to Rebrand Their Flawed Narrative of Eastern Congo' (2021) Virginia Journal of International Law Vol. 62.1, 203-234, 207; Artur Usanov et al., *Coltan, Congo & Conflict* (Hague Centre for Strategic Studies, 2013) 43-44; and Dena Montague, 'Stolen Goods: Coltan and Conflict in the Democratic Republic of Congo' (2002) SAIS Review vol. XXII, no. 1, 103-118, 105.

10. U.S. data from 2023 identify the DRC, Rwanda, and Brazil as the top three producers of mined tantalum, together accounting for the majority of global output. See U.S. Geological Survey, *Mineral commodity summaries 2024* (USGS, 2024) 177. See also, Ojewale (n 4) 2.

services, Lumumba's execution facilitated the consolidation of authoritarian rule under Mobutu Sese Seko, ushering in nearly three decades of kleptocracy and political instability.[11] This instability laid the groundwork for the protracted civil conflict that continues to afflict the region.

During the 1970s, the Belgian-owned *Société Minière et Industrielle du Kivu* (SOMINKI) began extracting tantalum as a by-product of gold mining operations.[12] Holding significant concessions across what was then Zaire, SOMINKI's operations remained modest in scale until the 1990s, when global demand for coltan began to surge.[13]

Following the First Congo War (1996–1997),[14] the dynamics of coltan mining in the DRC shifted dramatically. The conflict weakened State control over mining operations, creating a power vacuum that facilitated the rapid growth of artisanal mining.[15] This boom was further fuelled by a sharp increase in global tantalum prices during the Second Congo War (1998–2003),[16] driven by soaring demand from the high-tech industry for electronic devices.[17]

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11. Ludo De Witte, *The Assassination of Lumumba* (Verso 2001). See also, Andrew L. Gulley, 'One hundred years of cobalt production in the Democratic Republic of the Congo' (2022), Resources Policy 79, 103007, 1-10, 2.

12. See Usanov et al. (n 9) 108.

13. Ibid. See also, Kazuyo Hanai, 'Conflict minerals regulation and mechanism changes in the DR Congo' (2021) Resources Policy 74 (2021) 102394, 1-9, 5.

14. The First Congo War was a conflict in the DRC that led to the overthrow of longtime dictator Mobutu Sese Seko. It was primarily driven by regional tensions following the Rwandan Genocide, with Rwanda and Uganda backing rebel forces led by Laurent-Désiré Kabila. See Gulley (n 11) 2.

15. Hanai (n 13) 5; and Aloys Tegera, Sofia Mikolo and Dominic Johnson, 'The Coltan Phenomenon: How a rare mineral has changed the life of the population of war-torn North Kivu province in the East of the Democratic Republic of Congo' (Pole Institute, 2002) 5-6.

16. See Gulley (n 11) 2.

17. See S/2003/1027 of 23 October 2003, 5-6; Steven Jackson, 'HPG Background Paper. Fortunes of War: The Coltan Trade in the Kivus' (2003) Overseas Development Institute, Background Research for HPG Report 13, 1-21, 7.

The Kivu provinces, rich in coltan deposits, rapidly became the epicentre of a frenzied mining rush. Thousands of artisanal miners, including a significant number of children, were drawn into the industry, often working under harsh and exploitative conditions. This chaotic, unregulated environment not only intensified human rights abuses, but also provided fertile ground for armed groups and foreign countries to seize control of mining operations and exploit the illegal coltan trade to finance ongoing conflicts.

The following sections offer an overview of key issues surrounding coltan mining in the DRC, including relevant UNSC Resolutions, international and national transparency initiatives for certifying conflict-free minerals, human rights considerations, and the involvement of external actors in the illegal trafficking of mineral resources. Together, these factors expose a deeply flawed system that undermines the ethical sourcing of coltan in global supply chains, with far-reaching implications for compliance with international law.

Due to space constraints, this paper will not distinguish between industrial and artisanal mining in its discussion, though certain concerns may be more pronounced in one or the other depending on the specific context. However, this does not impact the analysis's conclusions and results, as they are based, in practice, on a hybrid system that integrates both artisanal and industrial mining at various stages of the process.

3.1 UNSC Resolutions

UNSC Resolution 1291 (2000) was the first Security Council resolution to formally underscore the link between the illegal exploitation of natural resources in the DRC and the continuation of hostilities during the Second Congo War.[18] This resolution led to the establishment of

18. S/RES/1291 of 24 February 2000, 5. See also following UNSC Resolutions 1304(2000) and 1341(2001).

the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC (the "UN Panel"), which was tasked, among other things, with investigating the illegal sourcing and trade of natural resources, including minerals, in the DRC, and reporting on the situation.[19]

The findings of the first UN Panel's report (2002) already raised significant alarm regarding the scale of illegal resource exploitation in the DRC, particularly highlighting the involvement of external actors, including Rwanda and Uganda, in these illicit activities.[20] The UN Panel's mandate was later incorporated into the work of the UN Group of Experts on the DRC, established under UNSC Resolution 1533 (2004).[21] While the primary objective of the UN Group of Experts is to monitor the arms embargo imposed by the same resolution, its mandate also includes investigating the illegal trade of mineral resources that finance the military conflict in the DRC. Accordingly, the Group's reports have systematically addressed illegal mineral exploitation and trade, including cross-border smuggling of coltan to neighbouring countries.[22]

Building on the UN Group of Experts work and findings,[23] in 2010, the Security Council adopted UNSC Resolution 1952 (2010),[24] which, among other things, called upon "all States" to take appropriate action:

> [T]o urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence by applying [due diligence]

19. UN, *Repertoire of the Practice of the Security Council*, Chapter V: Subsidiary Organs of the Security Council, 178-180. Available at <<https://main.un.org/securitycouncil/sites/default/files/en/sc/repertoire/2000-2003/00-03_5.pdf#page=16>>.

20. S/2002/1146 of 16 October 2002, 5 and 14-17.

21. S/RES/1533/2004 of 12 March 2004, para 10.

22. See particularly, S/2020/482, 20-24; S/2023/431, 23-24; and S/2024/432, 29-31.

23. S/2010/596, 95-96.

24. S/RES/1952 (2010) of 29 November 2010.

> guidelines, or equivalent guidelines, containing the following steps as described in the final report (S/2010/596): strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings.

The responsibility of companies to implement robust traceability mechanisms and enhance transparency within mineral supply chains has been consistently reinforced by successive UNSC resolutions, including 2053 (2012),[25] 2198 (2015),[26] 2293 (2016),[27] 2457 (2019),[28] and 2765 (2024).[29] However, as the following sections will illustrate, these efforts have yielded only limited success.

In response to the escalating crisis in the DRC, marked by the occupation of key cities in the eastern provinces – such as Masisi, Sake, Goma, and Bukavu – by the M23 armed group in early 2025,[30] the Security Council adopted UNSC Resolution 2773 (2025).[31] This resolution reaffirms the fundamental principles of sovereign equality and non-intervention enshrined in the UN Charter and unequivocally condemns violations of the DRC's territorial integrity.[32] While acknowledging M23's

25. S/RES/2052 (2012), 27 June 2012.

26. S/RES/2198 (2015), 29 January 2015.

27. S/RES/2293 (2016), 23 June 2016.

28. S/RES/2457 (2019), 27 February 2019.

29. S/RES/2765 (2024), 20 December 2024.

30. See Jennifer Giblin, 'The complexities of the Congo: What do the battles with M23 mean for the DRC and UN Peacekeeping?' (13 March 2025) EJIL:Talk. Available at <<https://www.ejiltalk.org/the-complexities-of-the-congo-what-do-the-battles-with-m23-mean-for-the-drc-and-un-peacekeeping/>>.

31. S/RES/2773 (2025), 21 February 2025.

32. Ibid., Preamble (2): "*Reaffirming* its strong commitment to the sovereignty, independence, unity and territorial integrity of the DRC and emphasizing the need to respect fully the principles of non-interference, good-neighbourliness and regional cooperation, and condemning any violation of the territorial integrity of the DRC."

primary role in the conflict, the resolution also formally recognises the "direct support and participation of the Rwanda Defence Forces" in the attacks.[33]

The resolution also strengthens due diligence and traceability obligations within the mineral sector by calling for enhanced measures to combat fraudulent labelling and improve supply chain transparency. It urges all actors involved in the mineral trade – including importers, processors, traders, and consumers – to comply with the due diligence framework established under UNSC Resolution 1952 (2010),[34] particularly through the implementation of the Regional Certification Mechanism (RCM) of the International Conference on the Great Lakes region (ICGLR),[35] to prevent the illegal sourcing and trafficking of 'conflict minerals' from the DRC.

3.2 Conflict minerals and transparency initiatives for ethical sourcing

The term 'conflict mineral' generally refers to 3TG metals whose extraction, processing, or trade is believed to finance armed groups or contribute to human rights abuses in conflict-affected regions.[36] When

33. Ibid., Preamble (6) and paras 1 and 4.

34. Ibid., para 16.

35. The International Conference on the Great Lakes Region (ICGLR) is an intergovernmental organisation established in 2006 under the Pact on Security, Stability and Development in the Great Lakes Region. It comprises twelve Member States: Angola, Burundi, the Central African Republic, the Republic of the Congo, the DRC, Kenya, Uganda, Rwanda, South Sudan, Sudan, Tanzania, and Zambia.

36. Hanai (n 13) 1; and Emily Mankowsky, 'Conflict Minerals and Crimes Against Humanity in the DRC: How to Hold Individual Corporate Officers Criminally Liable' (2019) Notre Dame Law Review, Vol. 94, Issue 3, Article 9, 1453-1478, 1455. See also, list of "conflict minerals" in Annex I of Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

classified as a conflict mineral**,** these metals become subject to strict due diligence requirements, which may result in trade restrictions. These requirements support the implementation of the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance), adopted in 2011 by the Organization for Economic Co-operation and Development (OECD) to promote transparency, ethical sourcing, and accountability in mineral supply chains.[37]

To prevent conflict minerals from entering global supply chains and ensure compliance with corporate due diligence obligations, transparency initiatives have been developed to certify the conflict-free origin of minerals sourced from conflict-affected and high-risk areas like the DRC.[38] While these instruments do not explicitly ban the trade of conflict minerals, they impose risk management obligations on importers to minimise and address such risks. The two leading initiatives designed to ensure the ethical sourcing of 3TG metals in the region through monitoring, reporting, and certification mechanisms are the RCM and the International Tin Supply Chain Initiative (ITSCI).

These systems, while complementary, are distinct in nature: the RCM provides government-backed, conflict-free certification essential for mineral exports, based on a due diligence process; meanwhile, ITSCI is a private sector initiative that supports companies in meeting the due diligence standards required for RCM certification.

37. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition* (OECD Publishing, 2016).

38. Hanai (n 13) 1-9. See also the initiatives undertaken by the U.S, the EU, and China, either through dedicated legislation – such as Section 1502 of the U.S. Dodd-Frank Act and Regulation (EU) 2017/821 – or through due diligence frameworks, including China's 2015 Guidelines for Responsible Mineral Supply Chains.

3.2.1 The RCM system

The RCM was established by ICGLR Member States, including the DRC and Rwanda, to give effect to the 2010 Lusaka Declaration, which endorsed the OECD Guidance as principal framework to fight against the illegal exploitation of natural resources in the Great Lakes region.[39]

The mechanism was first formalised with the adoption of the RCM Manual in 2011, which was later revised in 2019 to enhance its effectiveness and alignment with evolving international standards.[40] The Preamble of the RCM Manual expressly acknowledges that "an ICGLR RCM for minerals will only be credible if all Member States have established procedures for credible Mine Site Inspection and validation systems designed to confirm that mine sites meet ICGLR Requirements".[41] Chapter I of the Manual clarifies that these Requirements "are intended to prevent non-state armed groups and public or private security forces from interfering illegally at any point along the supply chain or committing serious human rights abuses related to the supply chains of minerals".[42]

The scope of the RCM specifically covers coltan in the list of 'designated minerals', namely minerals originating from the territories of the ICGLR Member States.[43] The RCM operates through a multi-stage process, including mine site validation,[44] chain of custody

39. Lusaka Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes, Lusaka (Zambia), 15 December 2010, para12.

40. Manual of the Regional Certification Mechanism (RCM) of the International Conference on the Great Lakes Region (ICGLR), second edition (2019), 4.

41. Ibid., 9.

42. Ibid., 17.

43. Ibid., 18.

44. Ibid., 19. See a more detailed description of the process below.

tracking,[45] third-party audits,[46] and ICGLR export certification.[47] The mine site validation stage is particularly important, as it determines a mine site's status, directly affecting its ability to export designated minerals. This process employs a colour-coded classification system and relies on annual mine site inspections[48] to assess compliance with the criteria outlined in the Annexes of the RCM Manual, including adherence to ILO Conventions and human rights standards.[49]

A 'green' tag indicates that a site is free from irregularities, as verified by government officials and independent auditors.[50] 'Yellow' and 'red' tags indicate sites with minor and major irregularities, respectively, with the latter including the presence of armed groups or serious human rights violations such as child labour.[51] Mining is strictly prohibited at red-tagged sites, while it is permitted under certain conditions at yellow-tagged sites and always allowed at green-tagged sites.[52] A 'blue' tag signifies that a

45. The Chain of Custody (CoC) system is a documented record of licensed operators and other authorised actors involved in the designated mineral supply chain, along with a traceable record of mineral lots and their upstream movement through the supply chain. RCM Manual , 26-30.

46. Third party audits provide "independent verification that Exporters' mineral chains from mine site to export are in conformance with RCM requirements". These audits should cover all mining stages, from sourcing to transportation and export. RCM Manual, 31-40.

47. Export certification can only be issued to products sourced in 'green', 'yellow' and 'blue' tagged mines, subject to CoC requirements. RCM Manual 41-43.

48. Inspections should be planned every six months for certain 'yellow' or 'blue' tagged mines.

49. Appendix A2 of the RCM Manual explicitly requires classifying mine sites as "red" if designated minerals have been sourced using child labour, forced labour, torture, or inhuman and degrading treatment. It also mandates this classification in cases involving gross human rights violations, including sexual violence, war crimes, violations of humanitarian law, genocide, other crimes against humanity, or involvement of non-State armed groups.

50. RCM Manual, 20-22 and 33-34.

51. Ibid.

52. Ibid.

site's validation status is pending or under review.[53] Mineral exploitation and export from blue-tagged sites are permitted, provided inspections are conducted within three years. If no inspection takes place within that period, the site is automatically reclassified as 'red'.[54]

ITSCI data and inspectors may contribute to the validation process and follow-up inspections, providing key information on traceability, compliance, and associated risks, which informs the site's validation status. To implement the RCM, the DRC enacted the necessary domestic legislation.[55]

3.2.2 The ITSCI system

ITSCI is a third-party initiative that implements a physical traceability mechanism known as the 'Bag and Tag' system, designed to monitor and document the origin of 3TG minerals at the mining site.[56]

After extraction, minerals are placed in sealed bags tagged with a unique label/barcode. Information on the mine of origin, transportation routes, processing facilities, and export records is collected at every stage of the supply chain to ensure traceability and accountabil-

53. Ibid. This designation is based on risk assessments conducted by mineral stakeholders, regardless of the site's prior classification. For instance, a mine previously classified as red may be reclassified as blue following a reassessment if stakeholders' evaluations fail to confirm the reported irregularities.

54. RCM Manual, 20.

55. In particular, Note Circulaire No. 002/CAB.MIN/MINES/01/2011 of 6 September 2011, and Arrêté Ministériel No. 0057/CAB.MIN/MINES/01/2012 of 29 February 2012, as amended by the Interministerial Order No. 009/VPM/CAB.MIN/ECO.NAT/2023, No. 00137/CAB/MIN/MINES/01/2023, and No. 010/CAB.MIN/COM.EXT/2023 of 4 August 2023.

56. Global Witness, *The ITSCI Laundromat. How a Due Diligence Scheme Appears to Launder Conflict Minerals* (Global Witness, 2022) 11-12.

ity.[57] This system is supported by a process of monitoring, risk assessment, and third-party certification. On-the-ground staff and independent third parties conduct inspections of mining sites, transport routes, and trading depots to verify compliance with human rights, labour, and environmental standards.[58]

Routine audits and field reports are expected to identify risks such as child labour, corruption, or the involvement of armed groups in mining operations. The ITSCI risk assessment process aligns with the OECD Guidance and includes corrective action plans when violations are detected.[59] Companies can then integrate ITSCI data into their due diligence processes, ensuring that RCM certified conflict-free minerals meet international legal standards.

This is how ITSCI and similar implementing tools[60] are intended to function at their best. However, evidence from NGOs and UN investigations has exposed systemic corruption, negligence, and fraudulent practices that undermine the credibility of ITSCI mechanisms. Among these issues are the systematic smuggling of minerals from the DRC to Rwanda and Uganda, where they are laundered into the legitimate

57. OECD, *Report on The Implementation of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* [C/Min(2011)12/Final], 28 April 2016, 48. See also, ITSCI, *Annual Report 2023 and Second Independent Alignment Assessment* (ITSCI, 2023), available at <<https://www.itsci.org/wp-content/uploads/2024/07/ITSCI-2023-Annual-Review_EN.pdf>>.

58. Ibid.

59. OECD, *Alignment Assessment of Industry Programmes with the OECD Minerals Guidance* (OECD, 2018), 14.

60. E.g., the Better Mining Programme from the RCS Global Group. Over the years, the DRC government has showed preference in using the ITSCI mechanism. See also, Jose A. Diemel and Jeroen Cuvelier, 'Explaining the uneven distribution of conflict-mineral policy implementation in the Democratic Republic of the Congo: The role of the Katanga policy network (2009–2011)' (2015) Resources Policy 46, 151-160, 157.

supply chain,[61] as well as the tagging of minerals originating from militia-controlled areas or sites linked to severe human rights abuses, including child labour.[62] These minerals are falsely attributed to non-operational yet officially validated mines,[63] with the silence or complicity of ITSCI agents and government officials aiding the cover-up.[64]

As the UN Group of Experts warned in 2017:

> [T]he Group found that the implementation of the [ITSCI] traceability system in use in the Democratic Republic of the Congo had several shortcomings, which could lead to the smuggling of minerals from outside the chain of custody into the legal trading circuit. […] errors or deliberate acts committed by agents responsible for tagging, such as tagging mineral consignments from non-validated sites, could disrupt the integrity of the whole chain.[65]

In 2022, Global Witness investigations revealed that more than 80%, and in some cases up to 97%, of green-tagged minerals from certain validated sites were fraudulently funnelled into the supply chain under

61. The 2024 midterm report of the UN Group of Experts revealed that M23 rebels in the DRC illicitly exported at least 150 tons of coltan to Rwanda. Armed groups transport the minerals across the border, where they are laundered into the legitimate supply chain. Once in Rwanda, these conflict minerals are mixed with locally sourced materials, undermining international efforts to curb the trade of conflict minerals. In particular, see S/2024/969 of 27 December 2024, 114, and previous UN Group of Experts reports (e.g., S/2020/482, S/2023/431, S/2023/990, and S/2024/432). See also, Global Witness (n 56) 46-65.

62. E.g., See S/2020/482, 20-24; S/2023/990, 14-16 and 120; and Global Witness (n 56) 17-32. See also, Diemel and Cuvelier (n 60) 155.

63. Ibid.

64. As Bleischwitz et al. observed as early as 2012, "The number of actors involved […] and the fact that official representatives and armed groups often cooperate make up for an intransparent situation. Even like-minded actors have difficulties to get evidence on whether any permission or certificate is legally correct and complies with basic laws." See Bleischwitz et al. (n 4) 8. See also, Hanai (n 13) 6-7; Ojewale (n 4) 6; and Global Witness (n 56) 40-44.

65. S/2017/672/Rev.1, 18.

the RCM/ITSCI system.[66] Under DRC law, production and export from these mines should have been strictly prohibited.

3.3 External actors

External actors have long been involved in the illegal exploitation and smuggling of the DRC's natural resources, particularly coltan. As early as 2002, the UN Panel highlighted their role in these illicit activities, identifying the illegal trade in natural resources as a key driver of Rwanda's occupation of the DRC's eastern provinces. The UN Panel notably stated:

> Rwanda's leaders have succeeded in persuading the international community that their military presence in the eastern Democratic Republic of the Congo protects the country against hostile groups in the Democratic Republic of the Congo, who, they claim, are actively mounting an invasion against them. The Panel has extensive evidence to the contrary […] On the basis of its analysis of considerable documentation and oral testimony, the Panel holds the view that the rationale for Rwanda's presence is to increase the numbers of Rwandans in the eastern Democratic Republic of the Congo and to encourage those settled there to act in unison to support its exercise of economic control.[67]

The UN Panel's findings were deemed "to be probative" by the ICJ,[68] which, in its rulings on the *Armed Activities on the Territory of the Congo*

66. Global Witness (n 56) 16-32. According to Global Witness, these cases "illustrate a general pattern across North and South Kivu Provinces, pointing to deep-seated problems with the ITSCI scheme." This assessment is reinforced by the decision of the Responsible Minerals Initiative (RMI) – a leading industry platform established to advance best practices in responsible mineral sourcing – to suspend ITSCI "as a recognized upstream system in the DRC until at least January 2026" (S/2024/969, para 110).

67. S/2002/1146, 14.

68. *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v Uganda) (Judgement) [2005] ICJ reports 2005, para 237.

cases (Democratic Republic of the Congo v. Uganda and Democratic Republic of the Congo v. Rwanda),[69] confirmed the involvement of foreign military forces – specifically Ugandan and Rwandan troops – in the unlawful extraction and smuggling of minerals and other natural resources.[70] The ICJ's findings underscored that the exploitation of DRC's resources by foreign military forces played a significant role in perpetuating the region's conflict, violating international law.[71]

Rwanda's direct involvement in the illegal mining and smuggling of coltan became increasingly evident following the emergence of the M23 rebel group in 2012, which was largely composed of former Tutsi refugees who had fled Rwanda during the 1994 genocide. The M23 operates primarily in the Kivu provinces of eastern DRC, where it has been responsible for widespread war crimes and human rights violations, including civilian massacres, torture, sexual violence, human trafficking, and the recruitment of child soldiers.[72] These atrocities have fuelled the ongoing conflict in the region, which has already claimed more than five million lives.[73]

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69. *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v Uganda) (Judgement), ICJ reports 2005; and *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Judgment), ICJ reports 2006.

70. *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Judgment), ICJ reports 2006, para 243. See also, Dena Montague (n 9) 107-113.

71. *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v Uganda) (Judgement), ICJ reports 2005, para 262.

72. As systematically highlighted by the UN Group of Experts in all recent reports, e.g. S/2023/431; S/2023/990; and S/2024/969, and S/2024/432. See also, Giblin (n 30).

73. Benjamin Coghlan et al., *Mortality in the Democratic Republic of the Congo. An Ongoing Crisis* (2007) International Rescue Committee, 16; Mankowsky (n 36) 1456; and Van Butsic et al., 'Conservation and conflict in the Democratic Republic of the Congo: The impacts of warfare, mining, and protected areas on deforestation' (2015) Biological Conservation 191, 266-273, 267.

Since its inception, M23 has received substantial military support from the Rwandan government, despite denials from Kigali and President Paul Kagame.[74] Numerous UN reports and investigations have documented the direct involvement of Rwandan military forces alongside M23 rebels, including the 2024 UN Group of Experts' report, which highlighted the ties between M23 and Rwandan state actors,[75] condemning Rwanda's violations of the DRC's sovereignty and urging it to withdraw its forces.[76] According to UN experts, between 3,000 and 4,000 Rwandan troops were deployed in eastern DRC, operating alongside M23 rebels during major offensives.[77]

This was echoed by several political leaders,[78] including Kaja Kallas, the High Representative of the European Union (EU) for Foreign Affairs and Security Policy, who expressed deep concern for the "renewed offensive of the M23 supported by the Rwandan Armed Forces" and strongly condemned "Rwanda's military presence in the DRC as a clear violation of international law, the UN Charter, and the territorial integrity of the DRC."[79]

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74. Rwanda Statement on Situation in Eastern DRC, Kigali, 26 January 2025, available at <<https://www.minaffet.gov.rw/updates/news-details/statement-on-situation-in-eastern-drc>>.

75. S/2024/432, 10-13. See also, S/2023/431, 15-20; S/2023/990, 9-10; and S/2024/969, 10-15.

76. S/2024/432, 44.

77. Ibid., 12-13.

78. E.g., Statement by Canadian Ministers Joly, Hussen and Ng on Rwanda's involvement in eastern Democratic Republic of Congo conflict, Ottawa, 3 March 2025; and G7 Foreign Ministers' Statement on the Escalation of Violence in the Eastern Democratic Republic of the Congo, 3 February 2025.

79. Democratic Republic of the Congo: Statement by the High Representative on behalf of the EU on the latest escalation in eastern DRC (25 January 2025), available at <<https://www.consilium.europa.eu/en/press/press-releases/2025/01/25/democratic-republic-of-the-congo-statement-by-the-high-representative-on-behalf-of-the-eu-on-the-latest-escalation-in-eastern-drc/>>.

M23 plays a key role in the shadowy trade of coltan, driving illegal mining and cross-border smuggling into Rwanda. Despite its status as one of the world's top coltan exporters, much of Rwanda's so-called "domestic production" is unaccounted for.[80] Mounting evidence reveals that a significant share of the coltan and other 3TG minerals exported from Rwanda are actually looted from conflict zones in the DRC – smuggled, rebranded, and sold as 'conflict-free' Rwandan resources.[81] The close links between M23 and the Rwandan government, as corroborated by multiple UN reports, reinforce the ongoing role of foreign actors in fuelling the illegal mining operations that continue to destabilise the DRC.[82]

80. "[…] Global Witness has spoken to an industry expert, who has worked in Rwanda and visited most concessions, who estimates Rwanda's total coltan production from mines on the concessions to be around 5–7 tonnes per month, with a smaller amount coming from mines that are not part of formal concessions. Even if experts have different opinions as to how much coltan is produced in Rwanda, it seems unlikely that the total comes anywhere close to the 1,000–2,400 tonnes of coltan that Rwanda has exported every year since 2012 […] and that made Rwanda the world's largest coltan exporter in 2014." Global Witness (n 56) 48.

81. E.g., S/2010/596, 78-79; S/2015/19, 36-38; S/2015/797, 14-16; S/2017/672/Rev.1, 18-19; S/2023/990, 14-16; S/2023/431, 23-24; S/2024/969, 114; and S/2024/432, 29-30. See also, Global Witness (n 56) 46-65.

82. On 21 August 2023, the DRC instituted proceedings against Rwanda before the African Court on Human and Peoples' Rights (AfCHPR), alleging violations of the African Charter and other applicable human rights instruments. Among other remedies, the DRC requested the withdrawal of Rwandan troops from its territory [see *DRC v. Rwanda* (Application No. 007/2023), AfCHPR, 7 March 2024]. On 26 June 2025, the AfCHPR issued its judgment on the preliminary objections to jurisdiction raised by Rwanda. The Court dismissed the objections, holding that, "...having regard to the documents in the case file, in particular reports of United Nations experts, the Court considered, first, that there is indeed an armed conflict between the M23 and the FARDC and, secondly, that the Respondent State [Rwanda], through its armed forces (RDF), was involved in the conflict" (*Judgment Summary*, p. 6, available at: <<https://www.african-court.org/cpmt/storage/app/uploads/public/685/e60/b61/685e60b618ca8752129237.pdf>>).

3.4 Human rights abuses and instruments

The exploitation of natural resources, including mining, in the DRC has long been associated with grave human rights violations, such as child labour, forced labour, sexual violence, and appalling working conditions. Modern coltan mining is no exception to this tragic legacy.

Reports found that armed groups – including groups linked with M23 – control numerous mining sites in the DRC[83] exploiting both adult and child workers under brutal conditions.[84] NGOs have documented cases of children as young as seven working in slavery-like conditions in hazardous mines, where they are subjected to torture, chronic injuries, and exposure to toxic substances such as thorium, uranium, and other radioactive elements commonly found alongside coltan.[85]

These concerns were reiterated by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), which in 2022 called upon the Government of the DRC to "take immediate and effective measures, as a matter of urgency, to eliminate forced child labour and hazardous work for children under 18 years of age in mines".[86]

The DRC has established a legal framework to combat these human

83. E.g., in the Kalimbi, Chigubi, Kamatale, Biholo, and Rubaya sectors. See S/2023/431, 23-24; and S/2024/432, 29-30.

84. Global Witness (n 56) 28; Chaffetz (n 9) 211; Dylan O'Driscoll, *Overview of Child Labour in the Artisanal and Small-Scale Mining Sector in Asia and Africa* (K4D Helpdesk Report, 2017) 6.

85. Amnesty International, "*This is What we Die For" – Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Coltan* (Amnesty International, 2016); and Ida Sawyer (Human Rights Watch), 'Child Labour and Human Rights Violations in the Mining Industry of the Democratic Republic of the Congo' (2022) Tom Lantos Human Rights Commission, 14 July 2022, 1-6. See also, Ojewale (n 4) 12-13.

86. CEACR Observations, adopted 2021, published 110th ILC session (2022). Available at <<https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4124190,102981>>.

rights violations, including those occurring in the context of mining activities.[87] Article 42 of the DRC Constitution requires public authorities to protect young persons from threats to their health, education, and development.[88] This constitutional mandate is supported by Law No. 015/2002 (Labour Code), which explicitly prohibits both forced labour and the employment of children in mines.[89] Complementing these provisions, Law No. 09/001 on Child Protection reinforces the legal prohibition of child labour and establishes broader protections for minors involved in hazardous work.[90]

DRC national legislation gives effect to multiple international legal instruments, including the ILO Convention on Forced Labour (No. 29) and the ILO Convention on the Worst Forms of Child Labour (No. 182).

ILO Convention (No. 29) and its 2014 Protocol impose an obligation – consistent with customary international law – to eliminate forced labour in all its forms.[91] This obligation requires States to adopt all "necessary measures" to identify, prevent, and eradicate its use[92] and to "cooperate" actively in achieving that aim.[93]

Under Article 2(1) of ILO Convention (No. 29), forced labour is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered

87. See also, S/2024/432, Annex 69, 218.

88. Constitution of the Democratic Republic of the Congo (2005), Article 42: "The public powers have the obligation to protect youth against any infringement of their health, of their education or of their integral development."

89. Labour Code, Articles 2 and 3.

90. Child Protection Law, Article 50. It is worth noting that the term 'children' is defined in Article 2(1) of the same Law as any person under the age of 18.

91. Article 1, ILO Convention (No. 29); and Article 1, 2014 Protocol.

92. 2014 Protocol, Article 4.

93. Ibid., Article 5.

himself voluntarily."[94] This definition applies to all persons, including children. Yet, recognizing the heightened severity of forced labour involving children, ILO member States have developed specific instruments addressing this issue.

Particularly, ILO Convention (No. 182), requires all States Parties to adopt "immediate and effective measures" to prohibit and eliminate the worst forms of child labour.[95] This includes enacting and enforcing implementing legislation,[96] as well as "taking appropriate steps to assist one another" in giving effect to the provisions of the Convention."[97]

The Convention is complemented by the ILO Worst Forms of Child Labour Recommendation, 1999 (No. 190), which identifies a number of activities as particularly hazardous for children. Notably, Paragraph 3(a) of the Recommendation includes any work that "exposes children to physical, psychological or sexual abuse", while Paragraph 3(d) highlights work performed "underground, under water, at dangerous heights or in confined spaces" – all of which are characteristic of mining operations in the DRC.

State obligations under the relevant ILO instruments must be construed broadly to encompass not only the prohibition of forced and child labour within national jurisdictions, but also the affirmative duty to prevent and eliminate its effects. This includes ensuring that goods produced through exploitative labour do not enter domestic or inter-

94. For an evolutionary meaning of the definition, see Pierandrea Leucci, 'Fishing activities conducted with the use of forced labour: New control tools and technology under the revised EU fisheries control system', in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea – Volume 3, Maritime Security, New Technology and Ethics* (Luglio Editore, 2024), 279-280.

95. Article 3(d) of the Convention explicitly includes in the list of "worst forms of child labour" any work that, by its nature or the conditions under which it is performed, is likely to endanger the health, safety, or morals of children.

96. ILO Convention (No. 182), Articles 1, 6 and 7

97. Ibid., Article 8.

national markets, irrespective of whether they are transported by land or sea.[98]

4. From mining ore to shore: The maritime dimension of coltan

Coltan may be exported in either its raw or processed form, depending on the availability and capacity of local processing facilities in the country of origin.[99] Like other mineral exports, coltan is transported from the DRC to importing States – whether for processing or final use – via three main modes of transport: land (road and rail), air, and sea.

While data on the volume of coltan transported by sea remains limited and fragmented,[100] existing evidence indicates that maritime shipping constitutes the primary mode of export for coltan and other mineral resources from Central Africa, owing to the bulk nature of these commodities.[101] Shipments from the DRC are typically routed through key ports

98. E.g., recital (19) of Regulation (EU) 2024/3015 on the prohibition of products made with forced labour, which highlights the market dimension of the prohibition by emphasizing its contribution to broader international efforts aimed at eradicating forced labour. See also, Mankowsky (n 36) 1454, including ft 6.

99. In Central Africa, where coltan reserves are heavily concentrated, limited refining infrastructure – mainly due to energy shortages – means coltan is typically exported in raw or semi-processed form after basic ore concentration. See Tegera et al. (n 15) 5-6; and Bleischwitz et al. (n 4) 10.

100. It should be noted that the coltan supply chain presents considerable challenges due to the lack of detailed trade data and transport records, which are often inaccessible to the public. Furthermore, global mineral trade statistics are typically aggregated, failing to distinguish coltan from other tantalum-bearing minerals, thereby complicating precise assessments of its maritime transport volumes. See also, Bleischwitz et al. (n 4) 8.

101. In 2023, total maritime trade volumes reached approximately 12.3 billion tons, reflecting a 2.4% increase from the previous year, with projections indicating further growth of 2% in 2024 and an average annual expansion of 2.4% through 2029. UNCTAD, *Review of maritime transport 2024 Navigating maritime chokepoints* (UN Publications, 2024).

such as Dar es Salaam (Tanzania),[102] Mombasa (Kenya),[103] and Durban (South Africa),[104] with China serving as the primary hub for processing and re-export.[105] From there, refined tantalum reaches major electronics manufacturing industries in the U.S. and Europe.[106] Recent U.S. data also highlight the development of a new DRC-Zambia-Angola trade corridor, facilitating the export of tantalum through Angola's Lobito port via the Atlantic Ocean.[107]

102. According to the Tanzania Ports Authority, about 68% of cargo products, including minerals, from the DRC are handled by the port in Dar es Salaam. Gadiosa Lamtey, 'New Facility at Dam Port to Verify Minerals from DR Congo' (26 March 2024) The Citizen, available at <<https://www.thecitizen.co.tz/tanzania/business/new-facility-at-dar-port-to-verify-minerals-from-dr-congo-4568640>>. See also, Amsterdam & Partners LLP, *Blood Minerals. The Laundering of DRC's 3T Minerals by Rwanda and Private Entities* (Washington, 2024) 19.

103. Julian Luk, 'African copper, cobalt logistics chain under pressure as truckers avoid DRC' (19 April 2022) Fastmarkets, available at <<https://www.fastmarkets.com/insights/african-copper-cobalt-logistics-chain-under-pressure-as-truckers-avoid-drc/>>; Eric Olander, 'DRC Cobalt Shipments to China Resume Via the Port of Durban' (18 May 2022) China Global South Project, available at <<https://chinaglobalsouth.com/2022/05/18/drc-cobalt-shipments-to-china-resume-via-the-port-of-durban/>>.

104. Anna Bulzomi et al., *Supply Chains and Transport Corridors in East Africa* (IPIS Research, 2014) 46; and Trade Mark Africa, 'DRC now third largest mover of cargo at Mombasa port' (7 September 2022), available at <<https://www.trademarkafrica.com/news/drc-now-third-largest-mover-of-cargo-at-mombasa-port/>>.

105. Dalton M. McCaffrey et al., 'Embedded critical material flow: The case of niobium, the United States, and China' (2023) Resources, Conservation & Recycling 188 (2023) 106698, 1-14; and Bleischwitz et al. (n 4) 11-12.

106. This strengthens China's position as the world's leading trading hub for tantalum, with the U.S. and Germany following. Data from the World Bank's World Integrated Trade Solution platform, available at <<https://wits.worldbank.org/trade/comtrade/en/country/ALL/year/2021/tradeflow/Exports/partner/WLD/product/810390>>.

107. U.S. Geological Survey, *Mineral commodity summaries 2024* (USGS, 2024) 177. According to official U.S. data for 2022–2023, the DRC was the leading exporter of coltan in Central Africa, with 400 metric tons shipped to the U.S., followed by Rwanda with 280 metric tons. The data also underscore the significant role of the U.S. as a re-export hub – primarily for overseas destinations – which complicates traceability efforts and further emphasises the importance of maritime transport in the global coltan supply chain. See USGS, Minerals Yearbook 2022, v. I, Metals and Minerals – 2022 Annual Tables, available at <<https://www.usgs.gov/centers/national-minerals-information-center/niobium-and-tantalum-statistics-and-information>>. See also, USIP Senior Study Group, *Critical Minerals in Africa. Strengthening Security, Supporting Development, and Reducing Conflict amid Geopolitical Competition* (USIP, 2024) 42.

This underscores the critical role of maritime shipping – and, by extension, the law of the sea – in the broader conversation. The relevance of this legal framework must be evaluated against the backdrop of earlier sections, which expose the systemic shortcomings of current traceability mechanisms in curbing the flow of conflict minerals. At the same time, it brings to the forefront a fundamental yet often overlooked consideration – one that is equally vital to the maritime dimension of this discourse:

If the legal entry of coltan and other conflict minerals into the global supply chain is contingent upon compliance with a credible traceability system based on corporate due diligence and effective oversight, then how can such mechanisms be deemed sufficient when substantial evidence – including official UN data – demonstrates that the majority of so-called certified 'conflict-free' minerals exported from the DRC and Rwanda are, in reality, illegally sourced and linked to grave human rights violations, war crimes, and unlawful external interventions?

This question highlights the urgent need to re-consider the adequacy of existing due diligence, control, and certification frameworks in regulating the trade of coltan from the DRC and Rwanda, while also exploring alternative avenues and mechanisms to leverage compliance with international legal obligations binding upon States, including those established under relevant ILO conventions and UNSC resolutions.

Given these challenges, the author contends that the law of the sea can play an important role in strengthening compliance with international law and preventing the entry of illegally sourced coltan into the global supply chain.

The law of the sea is the body of rules of public international law that regulates maritime spaces and activities. The primary legal framework governing the law of the sea is UNCLOS, adopted in 1982 and entering into force in 1994. To date, UNCLOS has been ratified by 170 states,

including the DRC and Rwanda.[108]

UNCLOS adopts a zonal architecture, granting States specific rights and obligations depending on the legal status of the maritime zone in which activities take place. A core pillar of the Convention, as articulated in its preamble, is international communication, including shipping.[109] UNCLOS operationalises this principle through a legal framework regulating navigational rights and freedoms across all maritime zones, both within and beyond national jurisdiction.[110]

While UNCLOS does not explicitly regulate the maritime transport of minerals, its legal framework underpins global commodity shipping, including the export of coltan and other bulk resources. Several maritime considerations are relevant in this context: the ports of departure and destination, transit states, the legal regime governing the waters through which the vessel transits, compliance with International Maritime Organization (IMO) standards for transported cargo,[111] and the ship's flag State, which holds responsibility for the vessel, its cargo, and all persons onboard.[112]

108. List of ratification available at <<https://treaties.un.org>>.

109. UNCLOS, Preamble (4): "Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment".

110. See, in particular, UNCLOS Articles 17, 38, 45, 52, 53, 58, 78, and 87.

111. E.g., regarding the potential classification of coltan as a Class 7 hazardous material under the International Maritime Dangerous Goods (IMDG) Code. In fact, while coltan itself is not inherently radioactive, as noted above, it may contain trace amounts of thorium and uranium within its crystal structure. The presence of these naturally occurring radioactive materials (NORM) may, in certain cases, elevate radiation levels beyond regulatory thresholds, thereby triggering strict classification and transport controls. If coltan shipments exceed the permissible limits for NORM under international regulations, they would be subject to Class 7 classification, imposing a range of stringent shipping requirements.

112. E.g., *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 120.

Depending on these factors, States acting as port, coastal, or flag States may have the authority – or even the obligation under international law – to act. This may include adopting and enforcing legislation to prevent the entry of minerals illegally sourced from the DRC into their territory/ports or waters, or their transportation aboard vessels flying their flag.

Due to space constraints, this chapter focuses solely on the role of flag States, although the author encourages further discussion and research, particularly on the role of port States, as part of a more comprehensive approach to addressing this issue. The analysis draws on the findings of the expert group that contributed to the *Request for a Legal Opinion by the BDS National Committee on the Regime of Innocent Passage and the Due Diligence Obligations of Flag States under the International Law of the Sea* (the ASCOMARE Legal Opinion).[113] The author was a member of this expert group. The full text of the ASCOMARE Legal Opinion is included as annex to this volume.

4.1 Flag State due diligence: A new compliance paradigm?

The term 'flag State' commonly refers to the country under whose laws a vessel is registered and operates.[114] Under UNCLOS and interna-

113. ASCOMARE, *Request for a Legal Opinion by the BDS National Committee on the Regime of Innocent Passage and the Due Diligence Obligations of Flag States under the International Law of the Sea* (11 March 2025). The Legal Opinion was prepared in response to a request from the BDS National Committee to ASCOMARE in November 2025. Its findings reflect the collective work of international law experts, including scholars and practitioners specializing in the law of the sea, under ASCOMARE's coordination. The final opinion letter was published on 11 March 2025 and is available at <<https://ascomare.com/wp-content/uploads/2025/03/ascomare-legal-opinion-_-innocent-passage-and-due-diligence.pdf>>.

114. It is unrelated to the nationality of the vessel's owner (whether a natural or legal person), operator, charterer, or crew. Instead, it is primarily determined by the act of registration.

tional law at large,[115] vessels registered in a State's territory are entitled to fly its flag and exercise the rights and freedoms granted under the Convention and broader international law, including navigational ones.[116]

Article 91(1) UNCLOS mandates that States Parties establish, through domestic law, the conditions for conferring nationality on ships, registering them within their jurisdiction, and granting them the right to fly their flag.[117] A genuine link must exist between a State and a vessel to formalise the vessel's nationality and enable the flag State to exercise jurisdiction over it.[118] As the International Tribunal for the Law of the Sea (ITLOS) observed in *M/V Saiga (No. 2)*, "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State."[119]

These duties are set out, more generally, in Article 94(1) UNCLOS, which requires States to "effectively exercise jurisdiction and control in

115. See Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 137-152; Roach JA, 'Today's Customary International Law' (2014) Ocean Development and International Law, 45:239-259, 248-249; and John King Gamble Jr., Maria Frankowska, 'The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning' (1984) San Diego Law Review, Vol. 21: 491, 1984, 499. See also, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015, Sep. Op. Judge Paik, para 12.

116. E.g., Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea. Fourth Edition* (Manchester University Press, 2022) 141 et ss; and Pierandrea Leucci, 'Innocent passage in the territorial sea within the framework of the law of the sea Convention' (2018) KMI International Journal of Maritime Affairs and Fisheries, Volume 10, Issue 1, 1-9.

117. ASCOMARE Legal Opinion (2025), para 106.

118. UNCLOS, Article 91(1).

119. *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 112.

administrative, technical, and social matters" over vessels flying their flag. The ASCOMARE Legal Opinion noted that the phrase "administrative, technical, and social matters" in Article 94(1) should be interpreted broadly, encompassing all aspects requiring administrative oversight or jurisdiction over a vessel, except where explicitly restricted by international law.[120] The Opinion also identified a specific due diligence obligation resulting from a joint reading of Articles 91(1) and 94(1) of UNCLOS.[121] This obligation imposes a heightened standard of compliance with international legal commitments on flag States, including those stemming from the UN Charter, human rights conventions, and peremptory norms of international law.[122]

More in details, according to ITLOS case law and UNCLOS commentaries, vessel registration – defining a ship's nationality – serves as the legal basis for the flag State's jurisdiction.[123] The requirement of a "genuine link" under Article 91(1) implies that flag States must actively exercise jurisdiction and control over their vessels to guarantee compliance with international obligations. If a flag State fails to fulfil this responsibility, the legitimacy of the genuine link may be called into question.[124]

As a result, an inherent duty of due diligence emerges: while a vessel's breach of international law does not automatically sever its legal link to the flag State, that State remains bound to "deploy adequate means, to exercise best possible efforts, to do the utmost" to secure complian-

120. ASCOMARE Legal Opinion (2025), para 112.

121. Ibid., paras 125-131.

122. Ibid., para 143.

123. Ibid., para 129.

124. *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 51.

ce.[125] This includes enacting robust legislation, ensuring its effective implementation, enforcing maritime regulations, and taking prompt action in response to violations.[126] Crucially, this obligation extends beyond domestic enforcement – it also requires States to prevent activities under their jurisdiction or control that could cause harm to other States, their nationals, or the international community at large.[127] These duties must be interpreted in light of the broader 'considerations of humanity' which, as affirmed by ITLOS and other international judicial bodies, should inform the application of the law of the sea, just as they do across other areas of international law.[128]

125. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Case No 17, [2011] ITLOS Rep 10, ICGJ 449 (ITLOS 2011), 1 February 2011; Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015; South China Sea arbitration (Philippines v. China), Final Award, PCA Case No 2013 – 19, ICGJ 495 (PCA 2016), 12 July 2016; and Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024.

126. *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Merits) [2010] ICJ Rep., para 197.

127. ASCOMARE Legal Opinion (2025), para 131.

128. E.g., *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 155, 61-62; Guyana v. Suriname, Final Award, ICGJ 370 (PCA 2007), 17 September 2007, Permanent Court of Arbitration, para 405, 112-113; *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 359, 102; *Enrica Lexie* case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24 August 2015, ITLOS, para 133, 24; and the *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, paras 83-4, 21, and para 130, 32. See also, Francesca Delfino, 'Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals', in Angela Del Vecchio, Roberto Virzo (eds.), Interpretations of the United Nations Convention on the Law of the Sea by international courts and tribunals (Springer International Publishing, 2019) 421-443; and Pierandrea Leucci, 'Enforcing Fishery Legislation in the Exclusive Economic Zone of Non-Parties to UNCLOS: A Commentary to Article 73', in Pierandrea Leucci and Ilaria Vianello, ASCOMARE Yearbook on the Law of the Sea. Volume 1: Law of the Sea, Interpretation and Definitions (Luglio Editore, 2022) 344-345.

In practical terms, a State acting as a flag State cannot plead ignorance of the actions of its flagged vessels – including the nature of their cargo or their operations far from national waters – as a justification for failing to uphold its international obligations. These obligations extend to core principles enshrined in the UN Charter, such as the respect for territorial integrity and the right of peoples to self-determination – principles that form part of the peremptory norms of international law.[129] As such, every State bears a duty to ensure that vessels under its jurisdiction or control do not engage in activities that could undermine the realisation of these fundamental norms. This aligns with Article 301 UNCLOS, which obliges States Parties to exercise their rights and fulfil their duties under the Convention in a manner consistent with the "principles of international law embodied in the Charter of the United Nations" – including the good faith fulfilment of obligations undertaken under the Charter, as well as those arising from relevant resolutions adopted by the UNSC pursuant to it.[130]

Flag States are equally bound by international instruments with extraterritorial reach – most notably, ILO Conventions No. 29 (and its 2014 Protocol) and No. 182 – which require them to take proactive steps to prevent goods tainted by forced or child labour from entering global supply chains. While these obligations may not be explicitly articulated in the text of the relevant conventions – or in others not directly addressed in this analysis – they nonetheless derive from the duty to adopt all "necessary" and "effective" measures to combat forced and child labour,[131] as

129. ASCOMARE Legal Opinion (2025), para 143.

130. See the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, annexed to UN General Assembly Resolution 2625 (XXV) of 1970, as well as the considerations outlined in paragraph 48 of the ASCOMARE Legal Opinion (2025).

131. See Article 7 of Convention No. 182 and Article 1(1) of the 2014 Protocol to Convention No. 29.

well as from the overarching obligation to "cooperate" in the suppression of such crimes.[132]

In this regard, it is worth recalling the International Law Commission (ILC) observations on the duty to cooperate in the suppression of piracy, as articulated in its 1956 Draft Articles on the Law of the Sea with commentaries.[133] The ILC noted that: "Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."[134] This understanding of the duty to cooperate may likewise inform the interpretation of cooperation obligations under ILO instruments addressing the eradication of child and forced labour, particularly in relation to the due diligence responsibilities incumbent upon flag States.

As emphasised in the ASCOMARE Legal Opinion, the scope of a flag State's duty to monitor and enforce compliance with international obligations is contingent upon both legal and factual considerations. Legally, the duty to act with due diligence is framed by international law. As such, while a flag State is responsible for the conduct of its vessels, its due diligence obligations may be limited when those vessels are subject to the regulatory authority of a coastal State.[135]

Factually, the extent of this duty is shaped by specific contextual elements. A flag State's obligation to act diligently arises when it has "knowledge" of activities onboard or by its vessels that may breach international obligations.[136] Furthermore, the State's capacity to intervene in a given situation significantly impacts the breadth of its duty. While internation-

132. See Article 8 of Convention No. 182 and Article 5 of the 2014 Protocol to Convention No. 29.

133. International Law Commission (1956) Articles concerning the Law of the Sea with commentaries, Yearbook of the International Law Commission, 1956, Volume II.

134. Ibid., draft Article 38.

135. ASCOMARE Legal Opinion (2025), para 140.

136. Ibid., para 141.

al law generally presupposes that States possess authority and capacity over vessels flying their flag, the effectiveness of enforcement measures will inevitably depend on the circumstances at hand. In some cases, an increased duty of diligence may arise from UNSC resolutions or judicial and advisory decisions from international courts and tribunals.[137] This becomes especially relevant when assessing a flag State's "knowledge" of risks posed by its vessels' activities.

In addressing corporate knowledge and responsibility, Mankowsky observed that "knowledge of the conflict mineral trade and the human rights abuses committed as a result of companies not cleaning up their supply chains is arguably common knowledge, such that a corporation claiming ignorance of how its actions impact the DRC conflict could amount to willful blindness."[138] In light of the extensive documentation produced by the UN, independent experts, and NGOs, similar conclusions may arguably be extended to States, which can no longer plausibly disclaim awareness of the consequences of their engagement in or regulation of global supply chains linked to ongoing conflict in the DRC and Rwanda's involvement therein.

The above should be read against the backdrop of the principles governing the international responsibility of States, particularly Article 41 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[139] which reflects customary international law.[140] Article 41 requires all States to cooperate and take appropriate

137. Ibid., para 142. See also See Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Preliminary objections, ITLOS Case No 28, ICGJ 560 (ITLOS 2021), 28 January 2021, paras 203-205.

138. Mankowsky (n 36) 1473.

139. International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, UN GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10 (2001).

140. ASCOMARE Legal Opinion (2025), para 57.

measures to bring an end to serious breaches of peremptory norms of international law when they are aware of the risk of such violations.[141] Notably, the non-exhaustive list of peremptory norms recognised by the ILC in Conclusion 23 of its 2019 Report[142] explicitly includes the prohibition of crimes against humanity, slavery, and violations of self-determination[143] – offenses directly linked to the illicit sourcing of coltan and other conflict minerals in the DRC, as reflected in the findings of the UN Group of Experts and other relevant sources discussed above. Failure to comply with Article 41 of ARSIWA and customary international law, including a flag State's inaction in preventing its vessels from directly or indirectly contributing to an internationally wrongful act, may give rise to that State's international responsibility.

With all that in mind, the connection between the law of the sea – particularly the role of flag States – and the illegal sourcing and trade of conflict minerals becomes clearer. Consider a scenario in which a vessel flying the flag of State A transports coltan illegally sourced from the DRC to either a final destination (State B) or intermediary processing States (States C and D). Such transport may constitute a violation of multiple international legal frameworks, including relevant ILO Conventions, UNSC resolutions, and the UN Charter.

Without prejudice to any responsibility that may be borne by States B, C, and D in their capacities as port or coastal States, a distinct layer

141. ARSIWA, Article 41: "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40; 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law."

142. ILC, *Peremptory Norms of International Law. Text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading* (29 May 2019) UNGA, A/CN.4/L.936.

143. Ibid., 6.

of accountability may arise for State A in its role as the flag State. If State A has knowledge of the risk posed by this unlawful transport and fails to "deploy adequate means", "exercise the best possible efforts", or "do its utmost" to prevent the illicit shipment by its flagged vessel, it may incur international responsibility.

The flag State's inaction could not only amount to a violation of Articles 91 and 94 of UNCLOS – potentially undermining the "genuine link" requirement between the vessel and its flag State – but also breach Article 41 ARSIWA, thereby engaging the flag State's liability for internationally wrongful acts. Consequently, where operators transport products linked to forced or child labour or sourced in a manner inconsistent with the principles of the UN Charter or binding UNSC resolutions, the flag State may incur international responsibility if it has failed to take appropriate preventive or corrective action.

International case law underscores that due diligence obligations must be proportionate to the level of risk of non-compliance.[144] Accordingly, heightened risks demand more stringent and precisely tailored measures to ensure effective compliance.[145] But what if the risk level is so high that existing regulatory mechanisms cannot reasonably guarantee compliance? In such cases, States should adopt a precautionary approach, which may even warrant a full prohibition of high-risk activities – much

144. E.g., *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024, paras 233, 239, and 405. See also, Alice Ollino, 'Reflections on the Advisory Opinion on Human Rights and the Environment and the Notion of Extraterritorial Jurisdiction' (2020) Die Friedens-Warte Vol. 93 | 2020 | Issue 1–2, 56-69, 65-66; and Irini Papanicolopulu, 'Due diligence in the law of the sea', in Heike Krieger et al., *Due Diligence in the International Legal Order* (OUP 2020), 147-162.

145. E.g., the use analytical fingerprinting (AFP) to determine the specific mining site of exported/imported minerals. See Bleischwitz et al. (n 4) 2; and Justine Perry T. Domingo et al., 'Geochemical fingerprinting to determine sediment source contribution and improve contamination assessment in mining-impacted floodplains in the Philippines' (2023) Applied Geochemistry, vol. 159, Dec. 2023, 105808, 1-14.

like the measures applied in fisheries management and environmental protection.[146]

This approach is particularly relevant given the inherent flaws and unreliability of corporate due diligence and certification mechanisms, such as those under the RCM/ITSCI framework. These shortcomings necessitate a fundamental shift in how compliance with international standards is assessed for coltan exports from the DRC and Rwanda. Without such a shift, it is unclear how States – including importing States – can effectively meet their obligations under relevant ILO conventions, UNSC resolutions, and the UN Charter. The substantial risk that most coltan entering the global supply chain from these countries is sourced in violation of international law – fuelling serious human rights abuses and ongoing conflict, as extensively documented by UN data and NGO reports – demands urgent and decisive action.

In light of the "knowledge" of these risks, flag States bear a duty to prevent the transportation of illegally sourced coltan from the DRC – including material re-branded and exported by Rwanda – by vessels flying their flag. This responsibility remains unless more robust compliance standards, either at the corporate or State level, are established to guarantee the ethical sourcing and verifiable origin of such commodities.

The UN Guiding Principles on Business and Human Rights (UNGPs), although primarily conceived as a framework to guide corporate due diligence, may also serve as a normative compass to orient and

146. Referring to the application of due diligence under international environmental law, the International Law Association (ILA) noted that "[…]technological capabilities can also increase the degree of care required over time. The extent of risk or advances in scientific knowledge that allow us to perceive more accurately the extent of risk (either higher or lower) will also influence the degree of diligence required. This can also be seen in the relationship between the principles of precaution and prevention. *States should take a precautionary approach to 'threats of serious or irreversible damage*'." (emphasis added). ILA Study Group on Due Diligence in International Law, Second Report (July 2016) 21. Available at <<https://www.ila-hq.org/en/documents/draft-study-group-report-johannesburg-2016>>.

evaluate flag States' due diligence obligations. Particularly salient in this respect are Principles 17, 18, and 19, which set out the core elements of human rights due diligence for business enterprises, including the need to identify, prevent, mitigate, and account for actual or potential adverse human rights impacts connected to their activities or business relationships.[147]

Under these Principles, enterprises are expected to conduct periodic and context-sensitive assessments of risks and impacts, adapting to evolving circumstances.[148] This includes proactively addressing situations that could give rise to *complicity* in human rights abuses. As clarified in the Commentary to Principle 17:

> Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a nonlegal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party...

Once risks are identified, enterprises are expected to "integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action". As noted in the Commentary to Principle 19:

> The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond. If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it.

147. UNGP, Principle 18.

148. Ibid., Principle 17.

These principles and considerations may be logically extended to flag States, particularly in the context of their obligations under UNCLOS and general international law. Specifically, they offer a valuable framework for structuring flag State due diligence in relation to the maritime transport of coltan and other conflict minerals by vessels flying their flag.

4.2 Strategic considerations going forward

Drawing on the foregoing analysis, three policy-oriented measures may be proposed to enhance the effectiveness of maritime regulatory mechanisms in addressing the issue at hand.

First, one potential avenue lies in enhancing transparency along the global mineral supply chain. Under the OECD Guidance, downstream companies should ascertain the origin of the minerals they produce, process, or import, with the aim of determining whether such minerals qualify as conflict minerals. This process includes carrying out internal due diligence and corporate self-reporting.[149] Typically, this is conducted through the dissemination of a standardised survey to suppliers. The responses received are then reviewed and, where appropriate, subject to follow-up actions.

The outcomes of this process fall into three categories: (i) the minerals are confirmed to be conflict-free; (ii) the minerals are not conflict-free; or (iii) the conflict-free status remains indeterminate. For instance, U.S. company disclosures for the year 2022 reveal that only approximately 3% of reporting entities could affirmatively state "that their conflict

149. See particularly, Step 5 of the OECD Guidance. OECD, *Monitoring and Evaluation Framework: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Publishing, 2021). Example of corporate self-reporting covering 3TG from the DRC: ZTE Corporation, *Conflict minerals report 2022* (March 2023), available at <<https://www.zte.com.cn/content/dam/zte-site/res-www-zte-com-cn/mediares/zte/files/pdf/white_book/202304111532_en.pdf?la=en>>.

minerals did not finance or benefit armed groups."[150] While this figure does not imply that the remaining 97% are necessarily conflict-linked, it exposes the persistent opacity of mineral supply chains.

At this juncture, flag States may be well positioned to assume a more proactive role. They could mandate a verification of the conflict-free status of tantalum and other 3TG minerals at the point of transport or importation. Where such verification yields negative or inconclusive results, flag States should apply the precautionary approach, prohibiting the carriage of those minerals aboard vessels flying their flag. Instituting such measures would introduce a meaningful compliance layer and could serve as a deterrent against the trade and transport of potentially conflict-linked minerals, thereby reinforcing the integrity of maritime-linked supply chains.

Second, the integration of flag States' obligations within a structured due diligence framework appears both plausible and necessary in light of contemporary developments in international law. UNCLOS and customary law already impose a duty on flag States to exercise effective jurisdiction and control over vessels flying their flag, ensuring compliance with international legal commitments, including those pertaining to human rights. Drawing from the logic underpinning corporate human rights due diligence, particularly as articulated in the UNGPs, it is arguable that flag States should be required to proactively identify, assess, and address the risks associated with activities conducted by their vessels. This would be particularly pertinent where such activities, such as the maritime transport of conflict minerals, risk contributing to breaches of peremptory norms. Embedding flag State responsibilities into a due diligence framework would not create new obligations *ex*

150. U.S. Government Accountability Office (GAO), *Conflict Minerals. 2022 Company Reports on Minerals Sources Were Similar to Those Filed in Prior Years* (2023) GAO-23-106295, 16-17.

nihilo, but rather operationalise existing duties, providing a systematic means to enhance compliance, prevent complicity, and strengthen the enforcement of fundamental principles of international law. This could be done, for instance, under EU law in the context of the recently adopted Regulation (EU) 2024/3015.[151] Article 3 of the Regulation requires economic operators not to "place or make available on the Union market products that are made with forced labour, nor shall they export such products".[152] To determine the likelihood of a violation of Article 3, the competent authorities of the Member States and the European Commission "shall follow a risk-based approach",[153] which shall be informed by "*all relevant*, factual, and verifiable information available to the Commission and competent authorities, including […] *any issues* arising from meaningful consultations with relevant stakeholders, such as civil society organisations and trade unions" (emphasis added).[154] Building on the results of this risk-assessment, a decision shall be taken as to whether products were made with the use of forced labour, and, if so, the placing, making available on the EU market, or exporting of those products *shall be prohibited*[155] – including "where it was not pos-

151. Regulation (EU) 2024/3015 of the European Parliament and the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937. *OJ L, 2024/3015, 12.12.2024*.

152. Article 2(4), (5), (6) and (9) of the Regulation defines 'economic operator' as "any natural or legal person or association of persons placing or making available products on the Union market or exporting products"; 'placing on the market' as "the first making available of a product on the Union market"; 'making available on the market' as "any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge"; and 'products made with forced labour' as "any item that can be valued in money and is capable, as such, of being the subject of commercial transactions, whether it is extracted, harvested, produced or manufactured".

153. Regulation (EU) 2024/3015, Article 14(1).

154. Ibid., Article 14(3).

155. Ibid., Article 20(1) and (4).

sible to gather information and evidence", or where the information and evidence provided was false or incomplete.[156] Against this backdrop, the data, evidence, and risk factors presented in this paper – including the 2022 observations of the CEACR[157] – are directly relevant to any informed assessment of a potential breach of Article 3 of Regulation (EU) 2024/3015. This also extends to the due diligence obligations incumbent upon EU Member States acting as flag States, particularly with respect to the maritime transport and subsequent placement on the market of coltan linked to forced labour.

Finally, no paradigm shift will be possible without concerted political action by key States that import and process tantalum and other 3TG minerals. While legal frameworks provide clear obligations, their effectiveness is ultimately contingent upon the political will of major industrialised economies, particularly where considerations of mineral security are perceived as strategic imperatives. For instance, although political leaders have repeatedly expressed serious concerns regarding Rwanda's role in perpetuating the conflict in the DRC – and notwithstanding the imposition of targeted sanctions against certain Rwandan officials – [158] commercial mineral relations with Rwanda have remained largely uninterrupted. This starkly illustrates the enduring gap between political rhetoric and economic practice, underscoring the urgent need for co-

156. Ibid., Article 20(3).

157. See (n 86).

158. E.g., see Council of the EU press release of 17 March 2025: "…the EU listed Francis Kamanzi a.k.a Erasto, chief executive officer of the Rwanda Mines, Petroleum and Gas Board (RMB) who, due to his leading position in the RMB, is responsible for exploiting the armed conflict through the illicit exploitation and trade of natural resources - in this case conflict minerals. The EU also listed Gasabo Gold Refinery, based in Kigali and responsible for illegally importing gold from M23-controlled regions in the DRC, thus also exploiting the armed conflict, instability or insecurity in the DRC." Available at <<https://www.consilium.europa.eu/en/press/press-releases/2025/03/17/democratic-republic-of-the-congo-eu-lists-further-nine-individuals-and-one-entity/>>.

herence between human rights commitments and trade policies in the regulation of mineral supply chains.

On 27 June 2025, the DRC and Rwanda signed a controversial (preliminary) Peace Agreement, brokered with the backing of the U.S.[159] Strikingly, the agreement makes no reference to the role of the M23 rebel group – or to Rwanda's support for it – in the ongoing conflict, nor does it address reparations in that regard. This omission is particularly conspicuous, given both the centrality of M23 and Rwanda's involvement in the hostilities, and the judgment issued just one day earlier by the African Court on Human and Peoples' Rights, which rejected Rwanda's preliminary objections in a case brought by the DRC in 2023 and explicitly acknowledged the participation of the Rwanda Defence Forces in the conflict alongside M23.[160]

The agreement underscores economic cooperation in areas directly relevant to the concerns addressed in this paper – particularly the "derisking" of mineral supply chains (point 6.i). It further calls for the establishment of "independent economic audit and anti-corruption mechanisms" (point 6.ii) and envisions the development of "transparent, formalised end-to-end mineral value chains (from mine to processed metal)" (point 6.i), all to be implemented in collaboration – "as appropriate" – with the U.S. government and U.S. investors.

President Trump hailed the deal by declaring, "[w]e're getting, for the United States, a lot of the mineral rights from the Congo as part of [this agreement]",[161] thereby highlighting its distinctly transactional nature.

159. Peace Agreement Between the Democratic Republic of the Congo and the Republic of Rwanda (June 27, 2025). Available at <<https://www.state.gov/peace-agreement-between-the-democratic-republic-of-the-congo-and-the-republic-of-rwanda/>>.

160. See (n 82).

161. Carlos Mureithi, 'Trump eyes mineral wealth as Rwanda and DRC sign controversial peace deal in US' (27 June 2025) The Guardian, available at <<https://www.theguardian.com/world/2025/jun/27/rwanda-drc-peace-deal-us-trump-m23>>.

Strong doubts persist as to whether the agreement can genuinely bring an end to the conflict between the DRC and Rwanda, along with its attendant implications concerning the illegal exploitation and trade of minerals.

5. Concluding remarks

Writing this paper proved a complex and often challenging undertaking. The author grappled repeatedly with the risk of straying from the core subject, while recognising the necessity of addressing the broader dimensions underlying the issues at stake. The process required extensive revision and structural rethinking. At times, the validity of the research itself came under scrutiny, given that flag States might initially appear peripheral within the broader geopolitical and regulatory landscape. However, it became increasingly evident that while flag States may not be principal actors in the commission of offences, they occupy a strategic regulatory position within a system that enables more powerful interests. By holding flag States to their legal responsibilities, it becomes possible – at least in part – to influence and reshape the broader system.

A major challenge identified in this study is the marked scarcity of data concerning the maritime transport of coltan. Given the predominance of maritime shipping in global trade, it is scarcely conceivable that coltan – typically exported in raw or semi-processed form – would be transported from Central Africa to principal processing centres such as China or the United States by air or overland routes, considering the associated logistical and economic constraints. As with other bulk commodities, it is evident that tantalum is predominantly transported by sea. Nonetheless, both available data and the existing body of scholarly literature largely overlook the maritime dimension of this trade, result-

ing in a significant informational gap. Industry disclosures offer only fragmented insights, insufficient to construct a comprehensive picture of coltan's maritime flows.

This gap critically impedes the effectiveness of traceability initiatives and undermines broader efforts to prevent the infiltration of illicitly sourced minerals into legitimate international markets – setting aside, for present purposes, the additional implications for compliance with IMO regulations on the transport of hazardous materials, which, while important, falls outside the scope of this paper's focus on conflict minerals.

Accordingly, this study underscores the urgent need to enhance transparency in the maritime transport of coltan and other minerals, and calls for a critical reassessment of the adequacy of the regulatory frameworks currently governing their trade and transportation, particularly in light of the persistent deficiencies in traceability and due diligence mechanisms.

Bleischwitz et al. highlighted as early as 2012 that any certification scheme should consider the risk for actors in the supply chain "to mix legal mining products with others along the first stages of the supply chain."[162] This concern remains as relevant today as it was then.

The widespread smuggling, rebranding, and illegal trade of conflict minerals from the DRC highlight the persistent gaps in enforcement, allowing illicitly sourced coltan to enter the global supply chain. In this context, the law of the sea provides a potentially powerful tool for addressing these challenges.

UNCLOS establishes a framework of rights and obligations for flag States, which are required to exercise effective jurisdiction and control over vessels flying their flag. This responsibility extends beyond administrative oversight to encompass compliance with broader international

162. Bleischwitz et al. (n 4) 14.

legal commitments, including human rights protections and UNSC resolutions.

The paper highlights that the due diligence obligations of flag States must be interpreted in light of their knowledge of the risks associated with the illegal trade of conflict minerals. If a flag State knows that its vessels are transporting coltan illicitly sourced from the DRC – thereby directly or indirectly contributing to human rights violations and breaches of international law – it has a legal duty to act. The same applies when the risk of illegal sourcing is so high that States must adopt precautionary measures. This approach is reflected in the RMC Preamble, which asserts that the certification process can only be deemed "credible" if States have effective procedures in place for mine validation and inspection. Failure to act not only undermines the "genuine link" requirement between the vessel and its flag State but may also engage the flag State's international responsibility under Article 41 ARSIWA.

The analysis suggests that a fundamental shift is needed in how compliance with international law is assessed in the context of conflict minerals. The inherent flaws in corporate due diligence and certification schemes – such as the RCM/ITSCI framework – demonstrate that reliance on self-regulation by industry actors is insufficient. Instead, more robust enforcement mechanisms at the State level, including through flag State responsibility, are essential to preventing illicit coltan shipments from infiltrating global markets.

Without a structural overhaul of enforcement strategies and compliance mechanisms, international obligations under ILO conventions, UNSC resolutions, and the UN Charter will remain largely ineffective in addressing the devastating consequences of the conflict mineral trade. Flag States, as critical regulatory actors under UNCLOS, must fulfil their due diligence obligations to prevent their vessels from facilitating the transport of illegally sourced coltan. This requires the establishment of robust, verifiable, and transparent mechanisms to ensure ethical sourcing

and trade practices. Strengthening these regulatory frameworks is not only a legal necessity but also a crucial step in addressing the human toll of coltan exploitation in the DRC. Inaction not only perpetuates injustice and exploitation but also sustains a global economic system that thrives on impunity, where the hidden costs of technological progress are too often borne by those who suffer the most.

Cracking down on the coltan trade will not end the bloodshed in the DRC overnight. It will not undo decades of foreign interference, or reverse the chaos unleashed since the assassination of Lumumba in 1961. Some might even argue it could make things worse – cutting off one of the few lifelines for artisanal miners, including women and children, who toil for a few dollars a day in war-ravaged, lawless regions. But that is not the point.

The point is that corporations and States cannot be allowed to continue profiting from a trade steeped in violence and exploitation – not with full knowledge of its human cost, and not under the hollow watch of international commitments to human rights and dignity.

Let's be clear – what is happening is not a failure of awareness. It is a failure of will. And when governments and companies choose inaction, knowing well the suffering at the heart of their supply chains, that is no longer negligence. That is complicity. And this holds true on land and at sea.

The marine manifestations of intangible cultural heritage

*Tullio Scovazzi**

Abstract

A number of elements of the intangible cultural heritage inscribed on the lists of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage are linked to activities relating to seas and oceans, such as navigation, fishing or disaster prevention. The 2023 Agreement on the Conservation and Use of Marine Biological Diversity of Areas beyond National Jurisdiction and the 2024 Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge protect traditional knowledge of indigenous peoples or local communities associated with genetic resources. As regards the exploitation of the mineral resources beyond the limits of national jurisdiction, a potential conflict can be envisaged between the principle of protection of intangible cultural heritage, on the one hand, and the principle of common heritage of mankind, on the other.

Keywords: Intangible cultural heritage, UNESCO, marine activities, law of the sea, human rights.

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1. The intangible cultural heritage and human rights

In 2003, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted in Paris the Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter, 'Conv. Int.').[1] This treaty, which binds today the notable number of 183 States, recalls in the preamble "existing international human rights instruments", namely the Universal Declaration of Human Rights (1948),[2] the International Covenant on Economic, Social and Cultural Rights (New York, 1966),[3] and the International Covenant on Civil and Political Rights (New York, 1966).[4]

The intangible cultural heritage is a sign of cultural diversity, which "can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions,

1. See Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (Institute of Art and Law 2006); Toshiyuki Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Intersentia 2009); Lucas Lixinski, *Intangible Cultural Heritage in International Law* (OUP 2013); Pier Luigi Petrillo (ed.), *The Legal Protection of the Intangible Cultural Heritage – A Comparative Perspective* (Springer 2019); Lucas Lixinski and Janet Blake (eds.), *The 2003 UNESCO Intangible Heritage Convention - A Commentary* (OUP 2020); Benedetta Ubertazzi, *Intangible Cultural Heritage, Sustainable Development and Intellectual Property* (Springer 2022).

2. Particularly relevant is Article 27(1): "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits".

3. Particularly relevant is Article 15(1): "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (…)".

4. Particularly relevant is Article 27(1): "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

are guaranteed".[5] This implies the recognition of equal dignity of, and respect for, all cultures, including the cultures of persons belonging to minorities or indigenous peoples.[6]

The intangible cultural heritage presents a strong social character. A practice cannot be dissociated from a community of practitioners, as it is reflected in the definition itself of intangible cultural heritage, which means "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage…".[7]

An important consequence of its strong social character is that the "intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity…".[8]

Among the 'manifestations' of intangible cultural heritage, the Conv. Int. includes:

5. See Article 2(1) of the Convention on the Protection and Promotion of the Diversity of Cultural Expression (Paris, 2005). According to Article 4 of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005), "the Parties recognise that: a) everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment; b) everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe; c) exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others".

6. See Article 2(3) of the Convention on the Protection and Promotion of the Diversity of Cultural Expression.

7. Conv. Int., Article 2(1). See Tullio Scovazzi, 'Intangible Cultural Heritage as Defined in the 2003 UNESCO Convention', in Gaetano Golinelli (ed.), *Cultural Heritage and Value Creation – Towards New Pathways* (Springer 2014) 105.

8. Conv. Int., Article 2(1).

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(b) performing arts;
(c) social practices, rituals and festive events;
(d) knowledge and practices concerning nature and the universe;
(e) traditional craftsmanship.[9]

Not surprisingly, the Conv. Int. also provides that "[f]or the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."[10]

Traditional practices that entail the depletion of a given species (for example, whaling) or cruelty towards animals (for example, sealing) could be considered as incompatible with the principle of sustainable development or with international human rights instruments and, consequently, as not covered by the Conv. Int.

As stated in the preamble of the Conv. Int., the present processes of globalisation and social transformation, as well as recurring phenomena of intolerance, can give rise to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for the safeguarding of it. The Conv. Int. aims, among other things, at ensuring respect for the intangible cultural heritage of the communities, groups and individuals concerned, raising awareness at the local, national and international levels of the importance of such heritage and ensuring mutual appreciation thereof.[11]
Like the Convention concerning the Protection of the World Cultural

9. Ibid., Article 2(2).

10. Ibid., Article 2(1).

11. Ibid., Article 1(b) and (c).

and Natural Heritage (Paris, 1972),[12] the Conv. Int. provides for the establishment of two lists, namely the Representative List of the Intangible Cultural Heritage of Humanity (hereinafter, the 'Representative List'), and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (hereinafter, the 'Safeguarding List'), drawn up by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (hereinafter, the 'Committee').[13] In fact, the lists become three if account is taken also of the Register of Good Safeguarding Practices (hereinafter, the 'Good Practices Register'), intended to include the national, subregional and regional programmes, projects and activities that best reflect the principles and objectives of the Conv. Int.[14]

The social character of intangible heritage explains why the elements on the lists established under the Conv. Int. are not selected because of their "outstanding universal value", as instead required for inscription on the lists drawn up under the abovementioned 1972 World Heritage Convention.[15] In the case of the intangible cultural heritage, it is sufficient that the elements are "representative of the intangible cultural heritage of humanity". Here the lists are inclusive rather than exclusive. They are drawn "to ensure better visibility of the intangible cultural heritage and awareness of its significance",[16] without establishing any hierarchy between different communities. Such a hierarchy would be contrary to the objectives of encouraging "dialogue which respects cultural diversity"[17] and of "bringing human beings closer together and ensuring ex-

12. On this Convention see Francesco Francioni and Federico Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary* (OUP 2023).

13. It is composed of 24 States parties elected for a term of four years.

14. See Article 18 of the Conv. Int.

15. Namely, the World Heritage List and the List of World Heritage in Danger.

16. Conv. Int., Article 16(1).

17. Ibid.

change and understanding among them".[18]

So far, the elements inscribed in the lists are 730, of which 611 are in the Representative List, 82 are in the Safeguarding List and 37 are in the Good Practices Register. It could be interesting to see which elements so far inscribed on the Conv. Int. lists present a marine connotation and to which kind of activities they are related.

2. Instances of marine activities listed under the Conv. Int.

2.1 Navigation and wayfinding

Navigation, in the form of ship or boat building, is the marine activity most represented in the Conv. Int. lists. In certain cases, it is combined with wayfinding capacities.

In 2017, the Committee decided to inscribe the element "Pinisi, art of boatbuilding in South Sulawesi" (Indonesia)[19] on the Representative List based on the following considerations:

> Pinisi, or the Art of Boatbuilding in South Sulawesi, refers to the rig and sail of the famed 'Sulawesi schooner'. The construction and deployment of such vessels stand in the millennia-long tradition of Austronesian boatbuilding and navigation that has brought forth a broad variety of sophisticated watercrafts. For both the Indonesian and the international public, Pinisi has become the epitome of the Archipelago's indigenous sailing craft. Today, the centres of boatbuilding are located at Tana Beru, Bira and Batu Licin, where about 70 per cent of the population make a living through work related to boatbuilding and navigation. Shipbuild-

18. Ibid., Preamble.

19. Indonesia is the biggest archipelagic State in the world.

> ing and sailing are not only the communities' economic mainstay, however, but also the central focus of daily life and identity. The reciprocal cooperation between the communities of shipwrights and their relations with their customers strengthen mutual understanding between the parties involved. Knowledge and skills related to the element are passed down from generation to generation within the family circle, as well as to individuals outside of the family through the division of labour. The communities, groups and individuals concerned are actively involved in safeguarding efforts, for example through marketing initiatives and the publication of books on the subject.[20]

In 2021, the pluri-national element "Nordic clinker boat traditions" (Denmark, Finland, Iceland, Norway and Sweden) was inscribed on the Representative List based on the following considerations:

> Nordic clinker boats are small, open, wooden boats between five and ten metres long. For almost two millennia, the people of the Nordic region (including the indigenous Sami peoples in Finland, Norway and Sweden and minority groups such as the Kvens in Norway, the Tornedalians in Sweden and the Swedish-speaking population in Finland) have been building clinker boats using the same basic techniques: thin planks are fastened to a backbone of the keel and stems, and the overlapping planks are fastened together with metal rivets, treenails or rope. The shell of the boat is strengthened with frames. Clinker boat builders emphasize the long time it takes to acquire the knowledge and skills for building traditional boats. In the past, it was common to start training with a master from a young age, and it would take up to ten years to learn the trade. A symbol of common Nordic coastal heritage, clinker boats were traditionally used for fishing and to transport materials and people. Today, they are primarily used in traditional festivities, regattas and sporting events, even though about a thousand persons make a full or partial living through the production, maintenance or use of clinker boats. Clinker boat traditions include social practices. For instance, once finished, boats may be ceremo-

20. Decision 12.COM 11.b.13.

> nially carried to the water where they are then given a name and wished good fortune; traditional songs may be sung during sailing and rowing.[21]

In certain cases, the elements need safeguarding measures.[22] In 2010, the Committee decided to inscribe the element "Watertight-bulkhead technology of Chinese junks" (China) on the Safeguarding List:

> Developed in South China's Fujian Province, the watertight-bulkhead technology of Chinese junks permits the construction of ocean-going vessels with watertight compartments. If one or two cabins are accidentally damaged in the course of navigation, seawater will not flood the other cabins and the vessel will remain afloat. The junks are made mainly of camphor, pine and fir timber, and assembled through use of traditional carpenters' tools. They are built by applying the key technologies of rabbet-jointing planks together and caulking the seams between the planks with ramie, lime and tung oil. The construction is directed by a master craftsman who oversees a large number of craftsmen, working in close coordination. Local communities participate by holding solemn ceremonies to pray for peace and safety during construction and before the launch of the completed vessel. The experience and working methods of watertight-bulkhead technology are transmitted orally from master to apprentices. However, the need for Chinese junks has decreased sharply as wooden vessels are replaced by steel-hulled ships, and today only three masters can claim full command of this technology. Associated building costs have also increased owing to a shortage in raw materials. As a result, transmission of this heritage is decreasing and transmitters are forced to seek alternative employment.[23]

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21. Decision 16.COM 8.b.10.

22. "'Safeguarding' means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage" (Conv. Int., Article 2(3)).

23. Decision 5.COM 5.2. Moreover, "despite the historical importance of this shipbuilding technology, its continuity and viability are today at great risk because wooden ships are replaced by steel-hulled vessels, while the timber for their construction is in increasingly short supply; apprentices are reluctant to devote the time necessary to master the trade and craftspeople have not managed to find supplementary uses for their carpentry skills".

In 2011, the Committee decided to inscribe the element "Traditional skills of building and sailing Iranian Lenj boats in the Persian Gulf" (Iran) on the Safeguarding List. The relevant considerations show how manifestations of intangible cultural heritage are in danger today of being replaced by the products of new technologies and how traditional maritime navigation was often associated with wayfinding skills:

> Iranian Lenj vessels are traditionally hand-built and are used by inhabitants of the northern coast of the Persian Gulf for sea journeys, trading, fishing and pearl diving. The traditional knowledge surrounding Lenjes includes oral literature, performing arts and festivals, in addition to the sailing and navigation techniques and terminology and weather forecasting that are closely associated with sailing, and the skills of wooden boat-building itself. The navigational knowledge used to sail Lenjes was traditionally passed on from father to son. Iranian navigators could locate the ship according to the positions of the sun, moon and stars; they used special formulae to calculate latitudes and longitudes, as well as water depth. Each wind was given a name, which along with the colour of water or the height of waves was used to help forecast the weather. Specific music and rhythms also constituted inseparable parts of sailing in the Persian Gulf, with sailors singing particular songs while working. Nowadays, the community of practitioners is small and mainly comprises older people. Wooden Lenjes are being replaced by cheaper fibreglass substitutes, and wooden Lenj construction workshops are being transformed into repair shops for older Lenjes. The philosophy, ritualistic background, culture and traditional knowledge of sailing in the Persian Gulf are gradually fading, although some of the associated ceremonies continue to be practised in a few places.[24]

24. Decision 6.COM 8.10. Moreover, "the diminishing number of practitioners, economic changes, adoption of cheaper manufacturing technologies, and introduction of modern navigation methods combine to threaten the viability of the element; knowledge of it is compartmentalized among different groups, who are not aware of the philosophy, ritual background and complete form of the tradition".

Boatbuilding is strictly connected to long-distance orientation also in the case of the element "Carolinian wayfinding and canoe making" (Micronesia) that in 2021 was inscribed on the Safeguarding List:

> Carolinian wayfinding and canoe making refers to the centuries-old tradition of building and navigating long-distance canoes. Communities in Micronesia, and particularly in the outer islands of Yap State, continue the traditions of building the ocean-voyaging sailing canoes from local materials and of navigating, or wayfinding, without maps or instruments. The entire community participates in the construction of the canoe, which begins with the selection and felling of a tree and involves a detailed measurement system based on an indigenous mathematical tradition that is both accurate and verifiable. The carving is done almost exclusively with the indigenous adze. The asymmetrical design supports high-speed sailing and allows access to shallow water. Traditional wayfinders use environmental cues, including atmospheric phenomena, to navigate. Although they have been lost in most Pacific nations, these wayfinding and canoe-making traditions and technologies enabled the settlement of thousands of islands in the Pacific Ocean. The practice is passed on through traditional apprenticeships led by master canoe carvers and navigators. Today, only a limited number of navigators and canoe carvers remain, with few opportunities to pass on the knowledge and skills due to the reduced size of nuclear families and migration to high islands. The element is also threatened by faster transportation alternatives and environmental degradation.[25]

25. Decision 16.COM 8.a.4. Moreover, "faster transportation, environmental degradation, pressure on subsistence living and the limited availability of the wood needed to make the canoes are some of the threats to the continued viability of the element".

Initiatives to preserve traditional types of boats have taken place. In 2016, the Committee selected "Oselvar boat – Reframing a traditional learning process of building and use to a modern context" (Norway) for inclusion in the Good Practices Register:

> Previously western Norway's main mode of transportation, also used for recreation, the wooden oselvar boat almost became obsolete with the introduction of modern boats in the 1940s, as well as government price restrictions forcing builders to find alternative work, and greater road transport in the 1960s. To help safeguard the traditional practice, the Os Båtbyggjarlag boat-builders guild, Os Municipality and Hordaland County, supported by the Arts Council Norway, founded the non-profit boatyard and workshop foundation Oselvarverkstaden. Operating since 1997, it recruits apprentice boat builders, facilitates the transmission of expert know-how on building techniques (normally passed down from father to son), attracts active builders providing them with infrastructure and supports the oselvar manufacturing market. So far, more than 85 boats have been built and 40 repaired. Five of its six apprentices remain active and four builders participate. They have access to a workshop where skills sharing is encouraged, as well as materials and tools. Constructing the 5m to 10m boats made for racing, freighting or fishing is a 500 to 600 hour process, from negotiating with material suppliers to rigging and testing the final product. The builders also conduct field studies, demonstrations and participate in seminars and exhibitions, locally and internationally.[26]

Another similar instance is "The Martinique yole, from construction to sailing practices, a model for heritage safeguarding" (France), which in 2020 was selected for the Good Practices Register:

26. Decision 11.COM 10.c.7.

> Created several centuries ago, the Martinique yole reflects the importance of traditional boats in the history of the region. A yole is a light, fast, shallow-draught boat with a tapered shape, which can sail with one or two sails. Crew members must perch off the hull on long movable poles to balance the boat, requiring great agility, physical engagement and perfect coordination. Yoles are built in different shapes depending on their uses and the geographical areas concerned; the Martinique yole used by fishers is ideal for the specific conditions along the island's coasts. During the 1950s and 1960s, other types of boats made of composites and equipped with motors gradually supplanted the traditional yole. Faced with the threat of disappearance of these boats, which reflected the history and society of the island, a spontaneous movement to safeguard them developed. The safeguarding initiatives originated with races organized by the fishers themselves. Over the years, the safeguarding programme has gradually expanded, and is now supported by a broad range of longstanding associations and partnerships. This has resulted in a number of good practices. The main objectives of the safeguarding programme are to: preserve the know-how of local boat builders; transmit know-how on sailing; strengthen the ties between yole practitioners and the local community; and create a federation capable of organizing major events.[27]

2.2 Fishing

Three traditional fishing techniques have been selected by the Committee for the Representative List.

In 2016, the Committee decided to inscribe the element "Culture of Jeju Haenyeo (women divers)" (Republic of Korea):

> In Jeju Island, there is a community of women, some aged in their 80s, which goes diving 10m under the sea to gather shellfish, such as abalone or sea urchins for a living without the help of oxygen masks. With

27. Decision 15.COM 8.c.2.

> knowledge of the sea and marine life, the Jeju haenyeo (female divers) harvest for up to seven hours a day, 90 days of the year holding their breath for just one minute for every dive and making a unique verbal sound when resurfacing. Divers are categorised into three groups according to level of experience: hagun, junggun and sanggun with the sanggun offering guidance to the others. Before a dive, prayers are said to the Jamsugut, goddess of the sea, to ask for safety and an abundant catch. Knowledge is passed down to younger generations in families, schools, local fishery cooperatives which have the area's fishing rights, haenyeo associations, The Haenyeo School and Haenyeo Museum. Designated by the provincial government as representating the island's character and people's spirit, the culture of Jeju haenyeo has also contributed to the advancement of women's status in the community and promoted environmental sustainability with its eco-friendly methods and community involvement in management of fishing practices.[28]

The element "Charfia fishing in the Kerkennah Islands" (Tunisia), which in 2020 was inscribed on the Representative List, can be considered a sustainable way of fishing:

> Charfia fishing in the Kerkennah Islands is a traditional, passive fishing technique that capitalises on the hydrographic conditions, seabed contours and natural resources both at sea and on land. The 'charfia' is a fixed fishery system consisting of palm fronds embedded in the seabed to create a triangular barrier, blocking the path of the fish pulled in by the ebb tide and channelling them into capture chambers and finally into a net or trap. Unlike bottom trawling systems that scrape the seabed, the traps keep the fish alive and fasting until raised. It is customary to install and operate the charfia only between the autumn equinox and June to ensure the marine wildlife have a biological rest period. The charfias are rebuilt each year, accompanied by social practices such as sharing a meal or rogatory prayers. The practice of charfia fishing requires extensive knowledge of underwater topography and marine currents. Many

28. Decision 11.COM 10.b.24.

> of the inhabitants of Kerkennah learn to fish from an early age and it is also common for a râïs to leave his fishery to his eldest son to perpetuate ownership. Vocational training centres also provide indirect training. Charfia fishing is the main fishing technique used in the Kerkennah Islands. The entire local community participates in the different phases of the process in varying degrees, from installing the charfia and the accompanying rituals to raising the traps, making this a unifying element for all Kerkennians.[29]

Even if they cannot be considered as marine mammals, horses can be useful for fishing, as shown by the element "Shrimp fishing on horseback in Oostduinkerke" (Belgium), inscribed in 2020:

> Twelve households in Oostduinkerke are actively engaged in shrimp fishing: each has its own speciality, such as weaving nets or an extensive knowledge of Brabant draft horses. Twice a week, except in winter months, the strong Brabant horses walk breast-deep in the surf in Oostduinkerke, parallel to the coastline, pulling funnel-shaped nets held open by two wooden boards. A chain dragged over the sand creates vibrations, causing the shrimp to jump into the net. Shrimpers place the catch (which is later cooked and eaten) in baskets hanging at the horses' sides. A good knowledge of the sea and the sand strip, coupled with a high level of trust and respect for one's horse, are the shrimpers' essential attributes. The tradition gives the community a strong sense of collective identity and plays a central role in social and cultural events, including the two-day Shrimp Festival for which the local community spends months building floats, preparing street theatre and making costumes. The shrimp parade, and a contest involving hundreds of children being initiated into shrimp catching, attract over 10,000 visitors every year. The shrimp fishers function on principles of shared cultural values and mutual dependence. Experienced shrimpers demonstrate techniques and share their knowledge of nets, tides and currents with beginners.[30]

29. Decision 15.COM 8.b.9.

30. Decision 8.COM 8.5.

2.3 Disaster prevention

The worshipping of deities to prevent casualties at sea is a practice that can also qualify for the Conv. Int. In 2020, the Committee decided to inscribe on the Representative List the element "Ong Chun / Wangchuan / Wangkang ceremony, rituals and related practices for maintaining the sustainable connection between man and the ocean" (China and Malaysia):

> The Ong Chun ceremony and related practices are rooted in folk customs of worshipping Ong Yah, a deity believed to protect people and their lands from disasters. Developed in China's Minnan region between the fifteenth and seventeenth centuries, the element is now centered in the coastal areas of Xiamen Bay and Quanzhou Bay, as well as in the Chinese communities in Melaka, Malaysia. Those who died at sea are considered as 'good brothers' who become lonely, wandering souls. The ceremony begins by people gathering at the seaside to welcome Ong Yah to temples or clan halls, while lamp poles are erected to summon 'good brothers' and deliver them from torment. In this way, the element has been celebrated as 'doing good deeds'. Performances head the procession and clear a path for Ong Yah's barge (wooden or paper-made models). These performances include gaojia and gezai opera, different dances, comprising dragon and lion dances, and puppet shows, among many others. The element evokes the historical memory of ancestors' ocean-going, reshapes social connections when confronted with emergencies such as shipwrecks, and honours the harmony between man and the ocean. It also bears witness to the intercultural dialogue among communities.[31]

31. Decision 15.COM 8.b.22.

3. Intangible cultural heritage on the high seas

While most of the manifestations of intangible cultural heritage take place in coastal waters,[32] it is not excluded that some elements may occur also on the high seas, that is beyond the 200-mile limit of the exclusive economic zone. This assumption is confirmed by some of the elements already included in the Conv. Int. lists, such as those relating to wayfinding capacities.[33]

No provision in the United Nations Convention on the Law of the Sea (Montego Bay, 1982) does directly refer to the traditional knowledge of certain communities.[34] However, the recently adopted 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 (New York, 2023) includes a provision devoted to "traditional knowledge of Indigenous Peoples and local communities associated with marine genetic resources in areas beyond national jurisdiction":

> Parties shall take legislative, administrative or policy measures, where relevant and as appropriate, with the aim of ensuring that traditional knowledge associated with marine genetic resources in areas beyond national jurisdiction that is held by Indigenous Peoples and local communities shall only be accessed with the free, prior and informed consent or approval and involvement of these Indigenous Peoples and local communities. Access to such traditional knowledge may be facilitated by

32. For the simple reason that human permanent settlements take place on land or, in some rare cases, close to land.

33. *Supra*, 2.1.

34. However, an indirect reference to, *inter alia*, traditional practices may be found in Article 7(5): "Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage".

> the Clearing-House Mechanism. Access to and use of such traditional knowledge shall be on mutually agreed terms.[35]

As stated by the Pacific Small Island Developing States, the recognition of traditional knowledge of Indigenous Peoples and local communities and their rights thereto moves the needle towards equity and towards a healthy, productive and resilient ocean to which the international community has long committed:

> The Pacific have long advocated for traditional knowledge of Indigenous Peoples and local communities to be recognized as a source of knowledge which, with proper safeguards, could inform the decision-making processes under this Agreement.
> Indigenous Peoples have a wealth of knowledge based on millennia of observing and interacting with the natural earth and we are pleased to see the recognition of this traditional knowledge clearly indicated alongside the best available science and scientific information.[36]

The delegate of Micronesia confirmed that:

> We have broken ground on a number of important issues, with far-reaching legal implications, such as for: […] the relevance of the traditional knowledge of Indigenous Peoples and local communities as sources of information for the Agreement on par with science, and the rights of such Indigenous Peoples and local communities including their free, prior, and informed consent.[37]

35. Article 13. In the preamble of the Agreement, the parties affirm that nothing in it "shall be construed as diminishing or extinguishing the existing rights of Indigenous Peoples, including as set out in the United Nations Declaration on the Rights of Indigenous Peoples, or of, as appropriate, local communities".

36. United Nations doc. A/CONF.232/2023/INF.5 of 3 August 2023, 17.

37. Ibid., 69.

Within the World Intellectual Property Organization (WIPO), after long-lasting negotiations, the Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge was adopted in Geneva on 24 May 2024. It emphasises the need "to prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources".[38] The treaty, which applies both on land and at sea, binds parties to require applicants to disclose in a patent application based on genetic resources the country or origin or the source of such resources,[39] as well as the indigenous peoples or local community who provided the traditional knowledge associated with genetic resources.[40] Where there has been fraudulent intent in regard to the disclosure requirements, parties are bound to provide for post-grant sanctions or remedies.[41] However, the treaty does not cover the whole range of inventions related to intangible cultural heritage, but only those inventions that depend on the specific properties of genetic resources or the traditional knowledge associated with genetic resources.

Within the International Seabed Authority and during the ongoing work for the drafting of the Regulations on Exploitation of Mineral Resources in the Area,[42] it was proposed to understand the concept of "underwater cultural heritage" as including both the "tangible underwater cultural heritage" and the "intangible underwater cultural heritage". The

38. Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, Preamble and Article 1(b).

39. Ibid., Article 3(1).

40. Ibid., Article 3(2).

41. Ibid., Article 5(4).

42. The Area is defined in the United Nations Convention on the Law of the Sea as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (Article 1, para 1), that is beyond the limits of the 200-mile exclusive economic zones established by coastal States.

latter was defined in the schedule (use of terms) of the draft as referring to:

> [P]ractices, representations, expressions, knowledge, skills, and traditions that are transmitted from generation to generation – as expressed in instruments, objects, artefacts, flora, fauna and cultural spaces associated therewith – that communities, groups, or, in some cases, individuals recognize as part of their cultural heritage; and relate to the underwater environment and to its interaction with human cultures. This may include, but is not limited to, traditional navigation knowledge, oral histories associated with maritime landscapes, spiritual and ritual practices linked to water bodies, and artisanal fishing techniques.[43]

The regulations are still in the drafting process and little can be said about their final content.[44] However, they are likely to include a provision according to which exploitation activities in the Area are to be conducted in a way that does not affect underwater cultural heritage and, perhaps, a provision prescribing the termination of activities within a clearly defined area surrounding a discovered underwater cultural heritage.[45]

Given the very broad range of certain manifestations of intangible cultural heritage that take place in the oceans, it will be interesting to see how the forthcoming Regulations are able to balance two potentially conflicting general principles in present international law: the principle of protection of the cultural heritage,[46] on the one hand, and the prin-

43. Doc. ISBA/29/C/CRP. 1 of 16 February 2024.

44. See Matteo Bedendi and Lorenzo Schiano di Pepe, 'A New Chapter of Ocean Governance and the European Union: Codification Efforts and Prospects of a Moratorium at the International Seabed Authority' (2025) International Journal of Marine and Coastal Law, 1-20, 1.

45. See draft Regulation 35alt.

46. See Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in Abdulqawi A. Yusuf (ed.), *Standard-setting in UNESCO, volume I: normative action in education, science and culture; essays in commemoration of the Sixtieth Anniversary of UNESCO* (UNESCO 2007) 221.

ciple of common heritage of mankind, on the other.[47] In fact, the latter goes in the direction of promoting as much as possible the exploitation of mineral resources of the Area for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States, as provided for in Article 140 of the United Nations Convention on the Law of the Sea.

4. Conclusions

In present international law, the intangible cultural has emerged as a component of the broader concept of cultural heritage. It is duly protected by the 2003 specific convention concluded within the framework of UNESCO to which the great majority of States are parties today.

Besides this convention, two recent treaties take into consideration the intangible cultural heritage. The 2024 WIPO treaty on intellectual property and genetic resources aims at protecting indigenous peoples or local communities that have provided traditional knowledge associated with genetic resources, and the 2023 Agreement on biodiversity of areas beyond national jurisdiction aims at ensuring that traditional knowledge associated with marine genetic resources held by indigenous peoples or local communities is accessed only with their free, prior and informed consent. Moreover, during the negotiations for the drafting of the regulations on the exploitation of mineral resources in the Area, a potential conflict is emerging between the principle of protection of the cultural heritage and the principle of common heritage of mankind.

47. See Tullio Scovazzi, 'The Principle of Common Heritage of Mankind in International Law of the Sea: Problems and Prospects', in Siew Moi Phang et al. (eds.), *Innovations and Technologies in Oceanography for Sustainable Development* (University of Malay – Maritime Research Centre 2005) 327.

The unavoidable, even if not fully satisfactory, conclusion is that the intangible cultural heritage is becoming an interesting subject matter even from the point of view of international law, irrespective of whether it is located on land or in the seas and oceans.

Isabella Leucci, *Paranza II.*

II

Tides of change: Climate impacts, human rights, and maritime legal frameworks

Kiara Neri and Pascale Ricard***

Part II of this volume engages with the complex interplay between climate change and human rights within the normative framework of the law of the sea, which governs the use of maritime spaces and resources. It draws on the scholarly contributions and interdisciplinary dialogues fostered by the *Sea and Climate Change* (MCC) Programme.[1]

The MCC Programme is built around the scientific consensus regarding the harmful effects of climate change on the ocean. Beyond rising sea levels, ocean acidification promotes coral bleaching and threatens entire associated ecosystems. Organisms that use calcium carbonate to build their shells or exoskeletons face increasing difficulty and may ultimately disappear. Many species will likely need to migrate to marine regions with more suitable temperatures, which will require adaptable legal frameworks and may increase the risk of encountering invasive species. In the face of this urgency, identifying the legal obligations of States under international law is essential. However, the law of the sea and cli-

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1. Original name (in French): *Programme Mer et changement climatique*. This research program is financed by the University Jean Moulin Lyon 3 for the 2024-2027 period. Led by Kiara Neri (Lyon 3 University) and Pascale Ricard (Aix-Marseille University).

mate law have developed in parallel, in silos, without providing a specific regime to address the impacts of climate change on the ocean.

Indeed, the law of the sea is one of the oldest branches of international law, based on customary principles established as early as the 17th century, such as the freedom of navigation. In contrast, international climate law only truly emerged in the 1990s with the adoption of the United Nations Framework Convention on Climate Change (UNFCCC, Rio, 1992), as part of the broader development of international environmental law. Although the UNFCCC notes in its preamble the "possible adverse effects of sea-level rise on islands and coastal areas" and devotes Article 4 to "the conservation and, as appropriate, the enhancement of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems", the two branches of law interact very little. Some relatively recent international legal instruments also acknowledge the connection between sea and climate (e.g., the Paris Agreement, preamble and Article 5(1); the Agreement on Biodiversity Beyond National Jurisdiction, preamble and Articles 1, 7, 17, and Annex 1), but these elements do not allow for a truly integrated interpretation of the two branches. This lack of specific norms applicable to the consequences of climate change on the ocean, as well as the preservation of the ocean's role in combating climate change, represents a significant scientific and legal gap that must now be overcome.

The issue of the interplay between these two branches of international law is currently at the forefront, as reflected in the requests for advisory opinions submitted to the International Tribunal for the Law of the Sea (ITLOS) on December 12, 2022, and to the International Court of Justice (ICJ) on March 29, 2023. In its advisory opinion issued on May 21, 2024, ITLOS helpfully clarified and detailed how States' obligations to protect and preserve the marine environment should be interpreted in light of the effects of climate change. Furthermore, it affirmed that

climate change, as it constitutes "an existential threat", raises "human rights concerns",[2] although it did not further elaborate on this aspect. This dimension is expected to be at the heart of the opinion to be issued by the ICJ in 2025 and raises numerous questions.

The inaugural conference of the MCC Programme, held at Jean Moulin Lyon 3 University on October 18, 2024, was specifically dedicated to human rights and cultural rights issues at the intersection of the law of the sea and climate law. Central to these discussions were topics such as fishing and the right to food (*Olivier Afogo*), Indigenous peoples (*Victoria Chiu*), population displacement (*Elena Ardito*), protection of cultural and natural heritage (*Anna Padrajas*), and national and international litigation based on human rights (*Kiara Neri*). The proceedings of this conference are gathered in Part II.

The presentations highlight an approach to climate issues affecting oceans and coastal communities based on fundamental and/or cultural rights, emphasising the need for inclusive climate justice that is forward-looking and centred on future generations. They explore the impact of climate change on the effective enjoyment of human rights by coastal communities and Indigenous peoples, whose connection to the sea is particularly deep. They also consider the possible use of refugee law and international human rights law in the context of climate-induced migration linked to sea-level rise. Finally, they question the role played by national and international courts, which have become key venues for ensuring effective protection of individual and collective rights in the face of climate degradation.

2. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024, para 66.

The justiciability of the 'right to consume seafood' in the context of climate change*

*Nouwagnon Olivier Afogo***

Abstract

This article examines whether a right to consume seafood can be legally asserted in the context of climate change. Although not explicitly enshrined in international or domestic law, the author argues that such a right can emerge through systemic and evolutive interpretations of human rights, the law of the sea, and climate law. It is closely linked to the right to food and a healthy environment. The article analyses international case law, advisory opinions, and treaty interpretation practices to show how legal frameworks can indirectly protect coastal communities facing food insecurity due to marine degradation. Ultimately, the right to consume seafood can be invoked through related rights, contributing to climate and food justice. The work advocates for a living, adaptive view of legal texts in light of ecological crises.

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Keywords: Right to food, seafood, climate change, evolutive interpretation, food justice.

1. Introduction

Climate change affects harmfully the availability, quality and quantity of marine resources, thereby affecting the social, economic and cultural rights and intergenerational equity of coastal communities. To grasp what is at stake, this article examines some theoretical considerations of the definition of the 'right to consume seafood' and a selective case law in which plaintiffs have claimed the protection of this right.

This intention stems from a factual contrast. On the one hand, the consumption of seafood is vital for human health and well-being, as it is rich in iron, zinc, calcium, iodine, omega-3 fatty acids and vitamins A, B12 and D.[1] On the other hand, global warming, the salinisation and acidification of the oceans, the melting of glaciers, and the degradation and loss of fauna and flora in the marine ecosystem are seriously altering the integrity of the marine environment, leading to a profound disruption in the dietary habits of coastal communities dependent on marine resources.[2] The disputes

1. Apparent consumption of aquatic foods of animal origin grew by 127% between 1961 and 2022. And if current levels of per capita consumption are maintained, regional growth of between 12% and 74% is required by 2050, except in Europe, where consumption is expected to decrease by 5%. See Food and Agriculture Organization of the United Nations, 'The State of World Fisheries and Aquaculture 2024: Blue Transformation in Action' (Rome, 2024).

2. Julia Nakamura (et al.), 'International Legal Responses for Protecting Fishers' Fundamental Rights Impacted by a Changing Ocean' (2023) 38 The International Journal of Marine and Coastal Law 516-544, 518; Nilüfer Oral and Elver Hilal, 'Chapter 7: Food Security, Fisheries and Ocean Acidification: A Human Rights Based Approach' in David L. VanderZwaag, Nilüfer Oral and Tim Stephens (eds), *Research handbook on ocean acidification law and policy* (Edward Elgar Publishing 2021) 74–92; Anaëlle J. Lemasson (et al.), 'Changes in the Biochemical and Nutrient Composition of Seafood Due to Ocean Acidification and Warming' (2019) 143 Marine Environmental Research 82-92.

that arise from this contrast are not the easiest to settle, given that they involve the concomitant articulation of international human rights law, the law of the sea and climate law; and even then, the right in question requires formal, legally principled or customary protection. That raises the question of whether it is possible to assert a right to consume seafood before a judge and, if so, to what extent the harmful effects of climate change on the marine environment are likely to be the cause. The answer to this question requires legal positivism[3] in its objectivist approach,[4] in combination with the rules of hermeneutics[5] developed by international case law and codified in the Vienna Convention on the Law of Treaties (VCLT).[6] It is well known that the invocation of any right before a judge must be founded on an identifiable provision, a customary rule or a well-established principle of law. Thus, given that the right to consume seafood is enshrined *expressi*

3. Hans Kelsen, 'Théorie du droit international public', in *Recueil des cours de l'Académie de La Haye* (Brill | Nijhoff 1953) 101.

4. Martti Koskenniemi, 'Objectivity in International Law: Conventional Dilemmas', in Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

5. Zimmermann Jens, 'Hermeneutics and law', in Zimmermann Jens, *Hermeneutics: A Very Short Introduction* (OUP 2015) 98; Hernández Gleider I, 'Interpretation', in Jörg Kammerhofer and Jean D'Aspremont (ed.), *International Legal Positivism in a Post-Modern World* (CUP 2014) 317–348.

6. Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, Articles 31 – 33; Sotirios-Ioannis Lekkas, Panos Merkouris, 'Interpretation of International Law: Rules, Content, and Evolution' (2022) 69 Netherlands International Law Review, 183–189; Odile Ammann, 'Chapter 6 The Interpretative Methods of International Law: What Are They, and Why Use Them?', in Odile Ammann, *Domestic Courts and the Interpretation of International Law*, (Brill | Nijhoff 2020) 192; Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 29; Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation', in Duncan B Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2020) 459–488; Steven R. Ratner, 'International Law Rules on Treaty Interpretation', in Christopher McCrudden (ed.), *The Law and Practice of the Northern Ireland Protocol* (CUP 2022) 82; Roberto Ago, 'Droit des traités à la lumière de la Convention de Vienne. Introduction', in *The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye* (Brill | Nijhoff 1971).

verbi neither in domestic law nor in international law, invoking this right implies an interpretative manoeuvre.

The motivation for this topic derives from the fact that the right to consume seafood in the context of climate change is not directly guaranteed in any treaty, be it a human rights treaty, a law of the sea treaty, or a climate change treaty. Thus, the first section will examine how the general rule of treaty interpretation can be used to identify this right (Section 2). Another possibility for identifying the right to consume seafood is the evolutive interpretation. Basically, "an evolutive interpretation is an interpretation where a term is given a meaning that changes over time".[7] Admittedly, the evolutive interpretation of treaties is not expressly codified by the VCLT.[8] However, it obeys at least in part the same principle as the general rule of treaty interpretation, since it is based primarily, though not exclusively, on subsequent State practice. Considering the debate on the similarities or distinctions between the general rule of treaty interpretation and the evolutive interpretation,[9] it would be appropriate to examine this question in a separate section. In this respect, it should be recognised that climate change has brought a significant transformation in the way we think about the effectiveness of human rights, the right to food especially (Section 3). The final section discusses how the practice of courts and tribunals shows that, currently, this right can be protected indirectly through other enshrined rights (Section 4). This is followed by concluding remarks (Section 5).

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7. Sondre Torp Helmersen, 'Evolutive treaty interpretation: legality, semantics and distinctions', European journal of legal studies, 2013, Vol. 6, No. 1, 161-188, 162.

8. Francisco Pascual-Vives, 'Chapter 4 Evolutive Interpretation as a Method of Interpretation in Public International Law', in *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill | Nijhoff 2019) 73.

9. According to the Inter-American Court, the "evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention". See Inter-American Court of Human Rights, Advisory Opinion OC-16/99 requested by the United Mexican States on the Right to information on consular assistance in the framework of the guarantees of the due process of law, October 1, 1999, para 114.

2. How can the general rule of interpretation contribute to the definition of the right to consume seafood in the context of climate change?

Any treaty can be interpreted to the satisfaction of the judge in accordance with paragraphs a) and b) of Article 31 of the VCLT, without having to consider subsequent agreement and practice or any other rule of international law external to the text which is interpreted. Consequently, we can rely on the good faith of courts and tribunals[10] to deduce the right to consume seafood products in the context of climate change from the "ordinary meaning of the terms"[11] (literal interpretation), the "context" (systematic interpretation), and the "object and purpose" (teleological interpretation) of the international human rights law, the law of the sea and climate law (Section 2.1).

That said, the general rule of interpretation prescribes a unique operation.[12] Pursuant to paragraph c) of Article 31, courts and tribunals shall consider "together with the context" any subsequent agreement, practice and relevant rules of international law applicable. This article will demonstrate how the international human rights law, the law of the sea and climate law are relevant to each other in identifying the right to consume seafood in the context of climate change, based on the systemic integration method (Section 2.2).

10. Ulf Linderfalk (n 6) 46.

11. Slocum Brian G. and Wong Jarrod, 'The Vienna Convention and Ordinary Meaning in International Law' (2021) 46(2) Yale Journal of International Law 191.

12. Kenneth J. Vandevelde, 'Treaty Interpretation from a Negotiator's Perspective' (2021) 21(2) Vanderbilt Law Review 281-311.

2.1 The autonomous interpretation of international human rights law, the law of the sea and climate Law

As a starting point, the right to consume seafood in the context of climate change should be understood as a variant of the right to food, which is protected by various human rights instruments. At the regional level, it appears in Article 12 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 14 of the African Charter on the Rights and Welfare of the Child, Articles 16 and 22 of the African Charter on Human and Peoples' Rights, and Article 15 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. At the universal level, the right to food is protected by Article 25 of the Universal Declaration of Human Rights, Article 1 of the Universal Declaration on the Eradication of Hunger and Malnutrition, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 24 and 26 of the Declaration on the Rights of Indigenous Peoples, and the Rome Declaration on World Food Security. The interpretation of these provisions should make it possible to recognise the right to consume seafood, even if these instruments and none of their provisions explicitly mention climate change.

For example, the Committee on Economic, Social and Cultural Rights (ESCR Committee), in its General Comment No. 12 on the right to adequate food (Article 11 of the ICESCR), recognised that "the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights", specifying that its realisation depends *inter alia* on environmental policies.[13] The

13. Committee on Economic, Social and Cultural Rights, 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No 12: The right to adequate food (art.11)' (12 May 1999) UN Doc E/C.12/1999/5, para 4.

ESCR Committee attributes certain importance to the environmental dimension of the right to food by requiring States to adopt all necessary measures to ensure its effectiveness, including when faced with severe climatic conditions.[14] In this respect, when defining the right to food, the Special Rapporteur on the right to food, Mr Jean Ziegler, specified that the food in question should correspond to "the cultural traditions of the people to which the consumer belongs",[15] so that the traditional criteria of accessibility and availability must be supplemented by an environmental factor to define the right to food. Thus, knowing that climate change is altering the marine ecosystem, coastal communities should be able to claim either the right to food or the right to a healthy, clean and sustainable environment for nutritional purposes. This environmental dimension of the right to food applies *ipso jure* to the marine environment.

Related to the law of the sea, following the logic of the delimitation of maritime zones, the United Nations Convention on the Law of the Sea (UNCLOS) and subsequent agreements confer to States Parties the power to manage and conserve marine resources in areas under their sovereignty,[16] those on either side of their maritime borders,[17] and those beyond their national jurisdiction. These measures may be taken with the aim of preserving the food needs of the populations of States Parties. For example, Articles 61 and 62 UNCLOS empower the coastal State to adopt measures for the conservation and management of living resources in the exclusive economic zone (EEZ): "the coastal State shall

14. Ibid., para 28.

15. Commission on Human Rights, 'Report by the Special Rapporteur on the right to food, Mr Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10' (7 February 2001) UN Doc E/CN.4/2001/53, para 14.

16. United Nations Convention on the Law of the Sea (UNCLOS) adopted 10 December 1982, entered into force 16 November 1994, Articles 2, 3, 55, 56 and 57.

17. UNCLOS, Articles 63, 64 and 118.

determine the allowable catch of the living resources in its [EEZ]".[18] In return, Articles 69 and 70 UNCLOS require coastal States, landlocked States and geographically disadvantaged States[19] to take account of the "nutritional needs of [their] populations" in bilateral, subregional and regional agreements concerning the exploitation of the above resources. Although disputes relating to the exercise of the coastal State's discretionary power in the context of the conservation and preservation of the marine resources in its EEZ may not be subject to the settlement procedure leading to binding decisions (Part XV, Section 2 UNCLOS), in accordance with Article 297 UNCLOS,[20] they may be subject to the conciliation, pursuant to Section 1 of Part XV and Annex V of the Convention. If so, the conciliation commission, if required, should recognise the possibility for States Parties, notably those that are landlocked or geographically disadvantaged, to claim the protection of the "nutritional needs of [their] populations"[21] either under UNCLOS or within agreements on the conservation and management of marine resources in the EEZ of the coastal States.

Although the right to consume seafood was not really the subject of the

18. UNCLOS, Article 61 (1).

19. UNCLOS, Article 170(2): "'geographically disadvantaged States' means coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own".

20. Ibid.

21. UNCLOS, Article 297(3.a.), for example: "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, *except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise*, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations" [Italics added].

International Tribunal for the Law of the Sea (ITLOS) Advisory Opinion on climate change, some participants addressed that issue, considering that climate change is adversely affecting the dietary habits of coastal communities. For example, according to the Commission of Small Island States on Climate Change and International Law (COSIS), "the introduction of excess carbon dioxide into the marine environment has resulted in or is likely to result in the following deleterious effects, among others […] food insecurity and malnutrition arising out of the decline in seafood as an essential source of animal protein, resulting in hazards to human health".[22] The Pacific Community argued that "shifting to coastal fisheries, the decline in warm-water coral reefs is projected to significantly increase risks on seafood security and pose threats to nutritional health on the communities that rely on them as food sources".[23] The Republic of Sierra Leone pointed out that "central, west and east Africa are projected to be at the greatest nutritional risk from sea temperature rise, leading to reduced catch in coastal waters".[24] It can be deduced that the right to consume seafood may be threatened by the harmful effects of climate change on the marine environment.

From the same perspective, Article 17 of the Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement) specifies that the objective of this agreement, consisting of protecting, preserving, restoring and maintaining biodiversity and ecosystems from climate change, ocean acidification and marine pollution, contributes to

22. Commission of Small Island States on Climate Change and International Law, *Statement of Ms Wewerinke-Singh*, ITLOS/PV.23/C31/2/Rev.1 (11 September 2023) 59.

23. Pacific Community, *Statement of Ms Robinson*, ITLOS/PV.23/C31/15/Rev.1 (20 September 2023) 364.

24. 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), *Written Statement of the Republic of Sierra Leone* (16 June 2023) para 39.

food security.[25] In fact, the BBNJ Agreement is based *inter alia* on "an approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification".[26] To this end, Article 7 of the BBNJ Agreement requires "the use of relevant traditional knowledge of Indigenous Peoples and local communities, where available".[27] This principle is relevant because, as the Special Rapporteur on the right to food has rightly pointed out in its report on fisheries and the right to food in the context of climate change, "[I]ndigenous Peoples connection with seas and rivers reflects the deep intertwining of their livelihoods, food security and culture".[28] Therefore, the law of the sea courts and tribunals[29] will have to interpret certain provisions of the BBNJ Agreement, principally Articles 7 and 17 mentioned above, which raise issues relating to the right to consume sea products in the context of climate change. This will be the case when ITLOS is asked to give an advisory opinion on any legal question relating to the BBNJ Agreement.[30]

Lastly, the right to seafood in the context of climate change is not absent from the climate law. The preamble and Article 2 of the United Nations

25. 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 (BBNJ Agreement) adopted 19 June 2023, Art. 17 (c), (d). In accordance with Article 68(1), the BBNJ Agreement "shall enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession".

26. Ibid., Article 7(h).

27. Ibid., Article 7(j).

28. Human Rights Council, 'Fisheries and the right to food in the context of climate change – Report of the Special Rapporteur on the right to food, Michael Fakhri' (09 January 2024) UN Doc A/HRC/55/49, para 21.

29. BBNJ Agreement, Article 60(5). Regarding the settlement of disputes related to the interpretation and the application of the BBNJ Agreement, States party, including those not party to UNCLOS, can choose between the International Tribunal for the Law of the Sea, the International Court of Justice, an Annex VII arbitral tribunal or a special arbitral tribunal in accordance with Annex VIII of UNCLOS.

30. Ibid., Article 47(7).

Framework Convention on Climate Change (UNFCCC) reveal the commitment of States Parties to preserve all ecosystems, including the oceans, with the objective of not harming food production. Similarly, States have committed themselves in the Paris Agreement to taking account of their obligations under international human rights law when adopting measures to combat the harmful effects of climate change. More specifically, the preamble to the Paris Agreement emphasises the importance of protecting food production systems from the adverse effects of climate change. Accordingly, Article 2(1.b) states that the objective of the agreement is to protect food production systems from the harmful effects of climate change by reducing greenhouse gas emissions and enhancing adaptive capacity. As a result, the International Court of Justice, an arbitration body or a conciliation commission could eventually deduce from the interpretation of the climate law, the right to consume seafood in accordance with Article 14 UNFCCC and Article 24 of the Paris Agreement.

2.2 The systemic integration approach

The legal basis for the systemic integration method stems from the general rule of interpretation which states that when interpreting a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose […] *there shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties*". Basically, this *formula* in Article 31(3)(c) of the VCLT assumes that no treaty is concluded or intended to be applied in isolation. It forms a part of the international legal order and is linked to the other rules that make it up[31] and should be "interpreted and applied within

31. Oliver Dörr, Kirsten Schmalenbach (ed.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer-Verlag GmbH Germany 2018) 582.

the framework of the entire legal system prevailing at the time of the interpretation".[32]

More specifically, Monica Feria-Tinta wrote an interesting article on the function of the systemic integration approach in recent jurisprudential developments before courts and tribunals in relation to climate change. Considering the fact that climate law alone is not sufficient to address climate change issues recently submitted to the international courts and tribunals, she argues that there is, by presumption, a certain coherence in general international law (including, of course, the law of the sea and the international human rights law) that makes it possible to address the current concerns of climate change.[33] This interplay can contribute to the definition of the right to consume seafood in the context of climate change, human rights bodies are conscious that international human rights instruments must be interpreted and applied in light of other instruments of international law.

It is well established that human rights instruments in the inter-American system, including the American Declaration, were adopted with due regard to other instruments of international law and must therefore be interpreted and applied in light of these other instruments and of the progressive development of international human rights law.[34] Some petitioners have invoked this approach in the *Case concerning the protection of the rights of Inuit minorities before the Inter-American Commission* (the *Inuit case*), arguing in particular that "the rights of the American

32. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971,* p. 16, para 53; See also, International Law Commission, 'Report of the International Law Commission on the Work of its 57th Session' (2 May–3 June and 11 July–5 August 2005) UN Doc A/60/10 para 467.

33. Monica Feria-Tinta, 'The master key to international law: systemic integration in climate change cases' (2024) 13(1) Cambridge International Law Journal 20-40, 26.

34. *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev.1 at 727 (2004), para 86.

Declaration should be applied with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged".[35] The Commission has not been able to examine the substance of this argument for reasons that will be developed below.

The European Court of Human Rights (ECtHR), for its part, has clearly admitted this, emphasising that "the Convention should be interpreted, as far as possible, in harmony with other rules of international law".[36] This question of the interpretation of human rights treaties in light of other treaties arose before the Human Rights (HR) Committee in the *Torres Strait Islanders case (Daniel Billy and others v. Australia)*. In this case, Australia argues that the communication is inadmissible because "the alleged violations of international climate change treaties such as the Paris Agreement and other international treaties such as ICESCR are inadmissible *ratione materiae* because they are outside the scope of the [International Covenant on Civil and Political Rights]".[37] The HR Committee observed that:

> To the extent that the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant, the Committee considers that the appropriateness of such interpretations relates to the merits of the authors' claims under the Covenant.[38]

35. *Petition to the IACHR Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 2005, Testimony of Martin Wagner before the Inter-Am. CHR, March 1, 2007, 3.

36. European Court of Human Rights, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, Application 53600/20, Judgment of April 9, 2024, para 455.

37. Human Rights Committee, 'Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 3624/2019' (21 July 2022) UN Doc CCPR/C/135/D/3624/2019, para 4.1.

38. Ibid., para 7.5.

This basically means that the Committee was perfectly willing, if necessary, to interpret the International Covenant on Civil and Political Rights (ICCPR) in light of the UNFCCC and the Paris Agreement. By analogy, the ESCR Committee and any other interpreters should be expected to interpret the right to food as enshrined in the various instruments mentioned above in light of other rules they deem relevant.

In the law of the sea, ITLOS has recently noted that "coordination and harmonisation between the Convention [UNCLOS] and external rules are important to clarify and to inform the meaning of the provisions of the Convention and to ensure that the Convention serves as a living instrument".[39] Accordingly, in its advisory opinion on climate change, the Tribunal interpreted the provisions of UNCLOS in light of the UNFCCC and the Paris Agreement, taking Article 237 and Part XII UNCLOS as the reference framework.[40] It is therefore possible that ITLOS will have to interpret Articles 61, 62, 69 and 70 UNCLOS or Articles 7 and 17 of the BBNJ Agreement, which deal directly or indirectly with the right to food in light of climate law and international human rights law. Independently of Article 31 of the VCLT, Article 293 UNCLOS authorises courts and tribunals to refer to external rules, including obviously the international law of human rights and the climate law, to interpret and apply UNCLOS.

The systemic integration method is also used before domestic courts and regional human rights bodies. For example, in the *Green Connection NPC and Natural Justice v. Department of Minerals and Energy case,* the High Court of South Africa was asked to interpret the right to a healthy environment for present and future generations, enshrined in section 24 of the Constitution of South Africa, in light of the other relevant rules

39. *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, ITLOS, para 30.

40. Ibid., para 132.

of international law, notably Article 206 UNCLOS, Article 13 of the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West and Central Africa Region (Abidjan Convention), and Articles 1, 2, 3, and 4(2.b) of the Benguela Current Convention between Angola, Namibia and South Africa. The Applicants also maintain that South Africa is a Party to the Paris Agreement on climate change, which "recognizes the fundamental priority of safeguarding food security and ending hunger and the particular vulnerabilities of food production systems to the adverse impacts of climate change".[41] Similarly, the India Supreme Court was requested in the *S. Jagannath Vs. Union of India and Ors* to interpret the Indian Environment (Protection) Act in light of the United Nations Conference on the Human Environment held at Stockholm "in which India participated".[42]

Before the Inter-American Commission, in the *Inuit case*, the petitioners requested interpretation of the American Declaration of Human Rights in light of Article 194 UNCLOS and the UN Fish Stocks Agreement, Articles 4(1.b) and 4(2.b) UNFCCC, the Kyoto Protocol and the right to means of subsistence as a general principle of international law.[43] In any case, if the systemic integration method fails to establish the right to consume seafood in a context of climate change, the interpreter can refer to the evolutive interpretation of treaties.

41. *Green Connection NPC and Natural Justice v. Department of Minerals and Energy,* High Court of South Africa, 2024, para 69(2).

42. India Supreme Court, *S. Jagannath Vs. Union of India and Ors*, (1996) INSC 1592, 11 Dec 1996, para 924.

43. *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. CHR, Doc. 5 rev.1 at 860 (2002), para 129. In this case, "the Commission considers that the basic principles reflected in many of the provisions of the Declaration [the draft], including aspects of Article XVIII [right to a means of subsistence], reflect general international legal principles developing out of and applicable inside and outside of the inter-American system".

3. The evolutive interpretation of treaties as a method of defining the right to consume seafood in the context of climate change

It is well established that courts and tribunals may not be "oblivious either to later facts that bear on the effective application of the treaty, nor indeed to all later legal developments".[44] They must consider as far as possible the "development of international relations".[45] Accordingly, the evolutive interpretation can apply to any treaty, as "the treaty is not static, and is open to adapt to emerging norms of international law".[46] As a result, the ordinary meaning of the terms of a treaty is not static and may change over time.[47] This principle applies automatically to any attempt to define the right to consume seafood in the context of climate change.

In the Law of the Sea, ITLOS has recognised that certain obligations that cannot be defined in precise terms "may change over time […] in light, for instance, of new scientific or technological knowledge".[48] Considering that scientific and technological knowledge plays a major role in climate change, they can justify the evolutive interpretation method when it will be necessary to interpret, for example, Articles 61, 62, 69, and 70 UNCLOS which, as mentioned above, concern the integration

44. *Arbitration Regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 24 May 2005, para 79.

45. *Nationality Decrees Issued in Tunis and Morocco*, PCIJ Series B, Advisory Opinion No. 4 (1923), 24.

46. *Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997,* p. 7, para 112; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, 31.

47. For further details, see Helmersen Sondre Torp 'Evolutive treaty interpretation: legality, semantics and distinctions' European journal of legal studies (2013) 6(1), 161-188, 167.

48. *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, 10, para 117.

of the food needs of populations into bilateral or multilateral agreements on the conservation and management of marine resources. The same approach should apply to the application and interpretation of Articles 7 and 17 of the BBNJ Agreement regarding the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

Moreover, States Parties to the UNFCCC are aware that the ultimate objective of the Convention "should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change to ensure that food production is not threatened".[49] This commitment enshrined in Article 2(1.b) UNFCCC must be interpreted in an evolutionary manner, in conjunction with the preamble to the Paris Agreement, which states that:

> Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.[50]

More specifically, human rights protection bodies are conscious of the fact that "such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions".[51] Due to their composition, human rights treaties form a *sui generis* legal corpus. As the Inter-American Court of Human Rights noted in its Advisory Opinion OC-16/99 in 1999, "the

49. United Nations Framework Convention on Climate Change, 1992, article 2.

50. Paris Agreement, 2015, Preamble.

51. Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), para 146.

corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects".[52] These include treaties, conventions, resolutions and declarations, which often require an evolving interpretation to ensure consistency. In the advisory opinion OC-16/99, the Inter-American Court "consider[s] [the questions submitted to it] in the context of the evolution of the fundamental rights of the human person in contemporary international law".[53] In fact, the evolutive interpretation follows a "consistent practice" of the States Parties to the treaty concerned, a practice from which the European Court has deduced in most cases a willingness on the part of the Parties to give a completely new meaning to the text.[54] This is what Geraldo Vidigal named "State-driven evolution",[55] by contrast with what the third Special Rapporteur on the topic of the law of treaties developed as the "principle of contemporaneity".[56]

It would be certainly excessive to consider that the practice of States regarding their obligations under international human rights law in relation to climate change is sufficient to constitute an element on which a court or tribunal could proceed with an evolutive interpretation. Within the framework of the universalist conception of human rights, the Office of

52. Inter-American Court of Human Rights, Advisory Opinion OC-16/99 requested by the United Mexican States on the Right to information on consular assistance in the framework of the guarantees of the due process of law, October 1, 1999, para 115.

53. Ibid.

54. *Hassan v United Kingdom* [GC] App no 29,750/09 (ECtHR, 1 6 September 2014), para 101; In this case, the Court considered that "a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention", referring to its consistent jurisprudence in *Soering v. the United Kingdom*, Series A no. 161, ECtHR 7 July 1989, para 102-103, and *Al-Saadoon and Mufdhi v. the United Kingdom*, App no. 61498/08, ECtHR 2010, para 120.

55. Geraldo Vidigal, 'Evolutionary Interpretation and International Law', *Journal of International Economic Law*, Volume 24, Issue 1, March 2021, 203–219, 210.

56. Pascual-Vives (n 8) 74.

the United Nations High Commissioner for Human Rights is still working on clarifying the obligations of States parties to international human rights law on climate change. Its relevant studies are fairly recent: climate change and the right to health (since 2016), climate change and the rights of the child (since 2017), human rights, climate change and migration (since 2018), gender-responsive climate action (since 2019), climate change and the rights of persons with disabilities (since 2020), climate change and the rights of older persons (since 2021), climate change and people in vulnerable situations (since 2022), climate change and the right to food (since 2023), loss and damage from the adverse effects of climate change (since 2024), and just transition and human rights (since 2025).[57]

Fortunately, a court or tribunal may be able to take guidance from the major transformations that have occurred since the text was adopted. The HR Committee adopted this approach in the *Case concerning Roger Judge v. Canada*, considering that "if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised, [international human rights law] should be interpreted as a living instrument and the rights protected under it should be applied in context and in light of present-day conditions".[58] Recently, the ECtHR is of the opinion that "the interpretation and application of the rights provided for under the [European] Convention [on Human Rights] can and must be influenced […] by factual issues and developments affecting the enjoyment of the rights in question".[59] As mentioned above, there are reasons to consider that climate change represents a major transformation in the way treaties in general, and human rights treaties in particular,

57. Office of the United Nations High Commissioner for Human Rights, *OHCHR and climate change*, available at <<https://www.ohchr.org/en/climate-change>>.

58. Human Rights Committee, *Roger Judge v. Canada, Communication No. 829/1998*, UN Doc CCPR/C/78/D/829/1998, 5 August 2003, para 10.3.

59. European Court of Human Rights, *Verein Klimaseniorinnen Schweiz and others v. Switzerland* (n 36) para 455.

may be interpreted. In its *Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS expressly noted in an *obiter dictum* that "climate change represents an existential threat and raises human rights concerns".[60]

Related to the rights to consume seafood in the context of climate change, a recent report of the United Nations High Commissioner for Human Rights on the measures for minimising the adverse impact of climate change on the full realisation of the right to food recognised that "climate change is one of the leading causes of the unprecedented rise in global hunger".[61] Likewise, the Special Rapporteur on the right to food took note of the conclusions of the Intergovernmental Panel on Climate Change, admitting that "climate change in polar regions will affect the informal, subsistence-based economy of indigenous peoples, with changing sea ice conditions likely to reduce their ability to hunt the marine mammals that are a significant source of both food and livelihood".[62] Such arguments were central to the *Inuit case* mentioned above.[63] More recently, the report of the Special Rapporteur on the right to development, Surya Deva, on climate justice: loss and damage, noted that "fishing communities in low-lying island countries might need to relocate and might lose their livelihoods due to the rise of sea levels",[64] which has a harmful effect on the right to development of these communities.[65]

60. *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (n 39) para 66.

61. Human Rights Council, *Measures for minimizing the adverse impact of climate change on the full realization of the right to food* (1 February 2024) UN Doc A/HRC/55/37, para 2.

62. General Assembly, *Interim report of the Special Rapporteur on the right to food* (5 August 2015) UN Doc A/70/287, para 40.

63. *Petition to the IACHR Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 2005, (n 35) 3

64. General Assembly, *Report of the Special Rapporteur on the right to development, Surya Deva, Climate justice: loss and damage* (17 Jully 2024) UN Doc A/79/168, para 33(e).

65. Ibid., para 41.

There is no doubt that climate change affects the availability, accessibility and adequacy of food supplies.[66] Therefore, these factors may justify an evolutive interpretation of provisions protecting the right to food to adapt the resulting obligations to the context of climate change. This hypothesis is best illustrated by the *Advisory Opinion of the Inter-American Court of Human Rights OC-23/17* in which Colombia asked the Court the following question (specific question II):

> Are the measures and the actions taken by one of the States parties the effects of which, by act and/or omission, may cause serious damage to the marine environment–which constitutes the way of life and an essential resource for the subsistence of the inhabitants of the coast and/or the islands of another State party–compatible with the obligations set out in Articles 4(1) and 5(1), read in relation to Article 1(1), of the Pact of San José? Or of any other permanent provision?[67]

This question requires the Court to adapt States' obligations under Articles 4(1) and 5(1), read in relation to Article 1(1), of the Pact of San José to the context of climate change (act and/or omission may cause serious damage to the marine environment), with a view to preserving the right to subsistence of coastal communities, especially since these obligations must be assessed in light of the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (the Cartagena Convention). Articles 1(1), 4(1) and 5(1) of the American Convention do not impose any specific environmental obligations on States Parties. However, given that their acts and/or omissions are potentially affecting the marine ecosystems of States Parties to the Cart-

66. General Assembly, *Interim report of the Special Rapporteur on the right to food* (5 August 2015) UN Doc A/70/287, para 40.

67. *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the Am. C.H.R.,* Case OC-23/17, Nov. 15, 2017, para 3.

agena Convention, i.e. well beyond the spatial coverage of the American Convention, it was appropriate to clarify the obligations of States in this respect. Thus, despite the difference between the legal regime of the American Convention and the Cartagena Convention,[68] the Court pointed out that "States must refrain from […] unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a dignified life for the individual; for example, by dumping waste from State-owned facilities in ways that affect access to or the quality of […] sources of food".[69] The precaution adopted by the Court was to consider that "The State's positive obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities".[70] The cautious approach of the Inter-American Court makes it possible to consider the challenge of invoking the right to consume seafood before courts and tribunals. In the following section, we will discuss how this "right" can be claimed indirectly before both domestic and international courts and tribunals.

4. Exploring the protection of the 'right to consume seafood in the context of climate change' before domestic and international courts and tribunals

Without pretending to be exhaustive, the cases mentioned here reveal that it is possible to claim the right to consume seafood products before any court in an indirect manner through the right to a healthy environment,

68. Ibid., para 92, 104 (d).

69. Ibid., para 117.

70. Ibid., para 120.

the right to life, the right to physical integrity, the right to means of subsistence, intergenerational equity, and others. As a result, it is not an autonomous right and must therefore be invoked through other enshrined rights.

As a starting point, the right to a healthy environment is the primary norm used by parties before domestic courts to assert a right to consume seafood in the context of climate change. Several cases illustrate this point. First, in the *case S. Jagannath Vs. Union of India and Ors* before the India Supreme Court. It is particularly important to mention that Article 32 of the Indian Constitution establishes *actio popularis*, giving every citizen the duty "to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures",[71] in accordance with its Article 51-A. In the *case S. Jagannath Vs. Union of India and Ors*, the traditional system of aqua rotative rice/shrimp culture used by Indian fishermen has been gradually replaced by intensive shrimp production methods. As a result, the court was requested to impose restrictions on industrial shrimp farming in fragile coastal areas, in accordance with the 1986 Environmental Protection Act. In its judgement, the Court ordered the demolition of aquaculture, and shrimp farming industries located in the fragile coastal areas: "no aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 meter of Chilka lake and Pulicat lake".[72] In fact, this measure preserves the right of coastal communities to exploit the areas in traditional ways and to continue to enjoy their livelihoods from them. It was attested that "much of the coastal land recently converted into shrimp farms was previously used for food crops and traditional fishing".[73] Therefore, the Court was of the opinion

71. India Supreme Court, S. Jagannath Vs. Union of India and Ors, (1996) INSC 1592, 11 Dec 1996, para 924.

72. Ibid., para 935.

73. Ibid., para 920.

that "the farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production productivity and return with prior approval on the 'authority' constituted".[74] The court also established the polluter-pays principle for the coastal regulation zone and created a control authority headed by a High Court Judge.[75]

The second case that deserves to be mentioned is that concerning *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* before the High Court of South Africa (*Shell Case*). The applicants, nine environmental, socio-economic and cultural rights NGOs,[76] argued that:

> Communities collect mussels, limpets, oysters and crayfish. They also fish for a range of species, including king fish as well as garrick, kob and shad. Sea food, to this community, forms a vital part of their diet and

74. Ibid., para 935.

75. Ibid., para 934. A similar case before the United States courts did not conclude with a decision on the merits. See *Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp*., Docket n°CGC-18-571285, Cal. Super. Ct. (removed, 12/12/2018); *Pacific Coast Federation of Fishermen's Associations v. Chevron Corp*., Docket n° 3:18-cv-07477, N.D. Cal. (dismissed, 12/14/2023), paras.9, 182. In this case, fossil fuel companies were prosecuted by a trade group from the commercial fishing industry for their contributions to the adverse effects of climate change on the ocean off the coasts of California and Oregon. In fact, industrial activities have forced fishing communities to foreclose their Dungeness crab fisheries. Applicants argued that "rising ocean temperatures and the resultant Pseudo-nitzschia blooms allow domoic acid to enter the marine food web and accumulate in crab flesh, rendering it at times dangerous and unfit for human consumption and that the condition created by Defendants affected, and will continue to affect, Plaintiff, because the economic impacts of fishery closures cascaded to impact entire fishery-dependent communities and businesses, and because the public was deprived of safe, local, and sustainable seafood". Ultimately, the complainants withdrew their application.

76. Sustaining the Wild Coast NPC (1st Applicant), Mashona Wetu Dlamini (2nd Applicant) Dwesa-Cwebe Communal Property (3rd Applicant), Association Ntsindiso Nongcavu (4th Applicant), Sazise Maxwell Pekayo (5th Applicant), Cameron Thorpe (6th Applicant), All Rise Attorneys for Climate And (7th Applicant), The Environment NPC Natural Justice (8th Applicant), And Greenpeace Environmental Organization (9th Applicant).

> contributes to the fact that their community has some of the lowest rates of hunger in South Africa […] They are concerned that the proposed seismic survey will have an impact on their ability to sustain themselves from the sea.[77]

Consequently, they were seeking to enjoin the defendants[78] from continuing the seismic survey off the east coast of South Africa between 2021 and 2022,[79] a seismic survey conducted by Shell and Impact Africa following an exploration right granted on April 29, 2014.[80] The purpose of the study was to provide subsurface imaging to determine whether there might be energy reserves beneath the seafloor.[81] The applicants maintain that "research in 2017 has shown significant mortality in zooplankton up to 1.2 km from the seismic survey array [and that] depletion of zooplankton could thus have an impact on food for their predators, such as fish, as well as impact fish eggs and larvae, with potential local impacts on species important in fisheries".[82] Considering that "zooplankton forms the base of many important food webs in the

77. *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others*, Case No. 3491/2021, High Court of South Africa (1 September 2022) para 116.

78. Minister of Mineral Resources and Energy (1st Respondent), Minister of Environment, Forestry and Fisheries (2nd Respondent), Shell Exploration and Production South Africa BV (3rd Respondent), Impact Africa Limited (4th Respondent) BG International Limited (5th Respondent).

79. *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Agency and Others (3491/2021) ZAECGHC 100*, High Court of South Africa (28 December 2021) para 6.

80. Ibid., para 5.

81. For a brief Summary, see Rankin Claire, 'Defending the Rights of Local Communities against Box-Ticking Exercises: An Analysis of Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy' (2023) *Business and Human Rights Journal* 8.3, 441–447, 442-443.

82. *Sustaining Wild Coast NPC and Others v Minister of Mineral Resources and Agency and Others* (n 79), para 56.

marine environment",[83] they requested "an interim interdict"[84] and argued that the project fails to integrate the ancestral needs and practices of coastal communities who rely on fishing and other marine resources to supplement their livelihoods,[85] in accordance *inter alia* with sections 24 (the right to a healthy environment), 30 and 31 of the Constitution of South Africa (cultural, religious and linguistic communities). The respondents replied that "Climate change considerations and the right to access food and livelihood are irrelevant when considering an application for an exploration right".[86] The Judge of the High Court has suspended the seismic surveys.[87]

A further case pending before the High Court of South Africa concerns the *Green Connection NPC and Natural Justice v. Department of Minerals and Energy*. The applicants contested an administrative authorisation to carry out exploratory drilling off the south-west coast of South Africa. They argued that the environmental impact report failed to consider the economic and social consequences (the food security in particular), the effects of climate change linked to a potential oil spill, and contamination of Namibian and international waters. There is a high probability that the Court decides in the same way as it did in the *Shell case*, by ruling in favour of the applicant.

The right to consume seafood in the context of climate change is indirectly protected before regional human rights courts from a totally different standpoint. The first case concerns the *Petition to the Inter-American Commission of Human Right Seeking Relief from Violations Resulting from*

83. Ibid.

84. Ibid., para 1.

85. Ibid., para 32.

86. *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* (n 77) para 122.

87. *Sustaining Wild Coast NPC and Others v Minister of Mineral Resources and Agency and Others* (n 79) para 82(1).

Global Warming Caused by Acts and Omissions of the United States. The Inuit are indigenous peoples of the Arctic, mainly established in Canada but also in Greenland, who use ice shelves to hunt, gather food and communicate. Claiming their rights to traditionally occupied land, to life, to physical integrity and security, to culture, to property, to health and to their own means of subsistence, they filed a complaint with the Commission (the claim was initiated by Sheila Watt-Cloutier, an Inuit political representative), seeking recognition of the violation of their rights by the United States of America due to the impact of its carbon emissions on their livelihood. Given that the American Declaration, which constituted the basis of their complaint, does not directly protect the right to food, they decided to use indirect protection through the right to culture (Article XIII); the right to health through the right to food (Article XI), the right to life, physical integrity and security (Article I). In addition, they invoke the right to their own means of subsistence as an inherent right. Unfortunately, the Commission was not able to examine the complaint for the following reason:

> Having completed the study set forth in Article 26 of the Commission's Rules of Procedure, I wish to inform you the Commission, in plenary, has determined that it will not be possible to process your petition at the present because the information it contains does not satisfy the requirements set forth in those Rules and the other applicable instruments. Specially, the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.[88]

The alternative solution was to authorise them to present their views to the Commission to extend the scope of protection to Article 4(1) of the

88. Inter-American Commission on Human Rights, *Letter from the Assistant Executive Secretary*, November 16, 2006.

American Convention and Article 12 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (right to food).

A further case in the same vein concerns the protection of the rights of the *Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*. In this case, the petitioners denounce Canada's failure to implement measures to reduce carbon emissions. They mainly invoke their cultural, property and health rights, and, as in the *Inuit case*, their right to their own means of subsistence. According to the applicants, "the decline and loss of traditional subsistence foods (meats, fish, berries, and medicinal plants) due to climate change has a significant effect on Arctic Athabaskan peoples' health".[89] They added that "by threatening Arctic Athabaskan peoples' subsistence way of life, including their traditional hunting and fishing activities, Canada is abridging Arctic Athabaskan peoples' right to their own means of subsistence".[90] Consequently, and given that Canada is not a party to the American Convention on Human Rights, the petitioners invoke the right to culture (Article XIII of the American Declaration), the right to health (Article XI of the American Declaration), and the right to a means of subsistence, considered as an inherent right. The Commission, unlike the Inuit petition, might be expected to examine the substance of this petition.

Let us conclude this sequence of case illustrations with the *Teitiota case* (*Daniel Billy and others v. Australia*) before the HR Committee. According to the facts, it was documented, including by the Torres Strait Regional Authority, a government body, that "the effects of climate change

89. *Petition to the IACHR Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, 2013, 45.

90. Ibid., 78.

threaten the islands themselves as well as marine and coastal ecosystems and resources, and therefore the life, livelihoods and unique culture of Torres Strait Islanders".[91] When examining the applicants' claims, the HR Committee noted that "while crayfish is a fundamental source of food and income for the authors, they no longer find crayfish in areas where coral bleaching has occurred".[92] Therefore, it was considered that "the State party has not provided alternative explanations concerning the reduction of marine resources used for food".[93] The Committee Member Duncan Laki Muhumuza also pointed out that "the coral bleaching that occurred has led to the disappearance of crayfish which is a fundamental source of food and income for the authors".[94] Even if the HR Committee is not competent *ratione materiae* to address the violation of the right to food, concluding the violation of Article 27 of the ICCPR is no less a particular protection of the rights of the authors to means of subsistence. It follows that crayfish consumption constitutes their right of ethnic minorities to enjoy, in community with the other members of their group, their own cultural life. Moreover, because of the differences that characterise the cultures of coastal communities, the nutritional needs change depending on the region, traditional practices and dietary habits

91. Human Rights Committee, 'Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning communication No. 3624/2019' (21 July 2022) UN Doc CCPR/C/135/D/3624/2019, para 2.2, 2.6; Katrien Steenmans, Aaron Cooper, 'Ioane Teitiota v New Zealand: A landmark ruling for climate refugees?' (2020) 25(2) Coventry Law Journal 23-32; Lisa Mardikian, Sofia Galani, 'Protecting the Arctic indigenous peoples' livelihoods in the face of climate change: the potential of regional Human rights Law and the Law of the Sea' (2023) 23(3) Human Rights Law Review 1–24.

92. Ibid., para 2.5.

93. Ibid., para 8.12. See Maria Gavouneli, 'Views Adopted by the Committee under Art. 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019 (U.N.H.R. Committee)' (2023) 62.5 International Legal Materials, 841–867.

94. Human Rights Committee (n 91) Individual opinion by Committee Member Duncan Laki Muhumuza, para 12.

of the community from which the consumer originates.[95] Ultimately, the suitability of food for coastal communities is determined not only by social and economic conditions but also by environmental dimension, including cultural, climatic and ecological factors.

5. Concluding remarks

The effectiveness of human rights is increasingly challenged by the harmful effects of climate change on the marine environment, affecting *inter alia* the availability, accessibility and consumption of seafood products. It is perfectly reasonable to conceive of the existence of a right to consume seafood in the context of climate change, even if this right is not expressly enshrined. As demonstrated above, international human rights law, the law of the sea and climate law are the three major sets of rules that can contribute to the definition of this right, either autonomously or articulated harmoniously together. Domestic courts and international courts and tribunals may have to identify the right to consume seafood in the context of climate change, but this implies going beyond the voluntarist paradigm of legal positivism.

95. Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation' (26 July 2022) UN Doc A/77/226, para 49. Human Rights Council, 'Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change' (8 October 2021) UN Doc A/HRC/RES/48/14, para 6; Human Rights Council, 'Human rights and climate change' (7 July 2022) UN Doc A/HRC/RES/50/9, 3.

Sinking States' open questions: Continuity of statehood and human rights protection of forcibly displaced people. The case of Tuvalu in light of the *Falepili Union Treaty*[*]

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Abstract

This article explores the legal issues facing sinking island States due to sea-level rise, through the lens of the *Falepili Union Treaty* between Tuvalu and Australia. It first examines whether land loss entails the end of statehood and argues for the possibility of continued sovereignty. Secondly, it discusses the 'human face' of the sea-level rise, i.e. the legal protection granted to people affected by this phenomenon. The treaty affirms Tuvalu's ongoing statehood and provides a human mobility pathway to Australia, ensuring the right to remain as well. It offers significant guarantees for Tuvaluans, including permanent residency and access to healthcare, while preserving their cultural identity. The article also addresses criticism of a clause giving Australia influence over Tuvalu's foreign policy in security matters, mitigated by a clarifying memorandum. The treaty is presented as a landmark model for future climate displacement responses, combining state continuity, rights protection, and regional cooperation.

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1. Introduction

Tuvalu is an island country in the South Pacific Ocean with a total area of only 26 square kilometres and around 11 thousand citizens, with half the population living on the atoll of Funafuti. It is one of the smallest States in the world and consists of nine inhabited islands and a series of atolls, many of which are barely two metres above sea level.

Tuvalu has recently gained attention among scholars of international law because it fits perfectly into the definition of 'sinking States', being deeply threatened by climate change and, in particular, by sea-level rise. According to the UN Development Programme, by 2050 half the capital, Fogafale, will be flooded by tidal waters, and it is predicted that 95 per cent of Tuvalu's territory will be submerged by routine high tides by 2100 if no action is taken,[1] becoming a real lost paradise. On the other hand, under all future scenarios and without further protection, a sharp increase in the frequency and severity of episodic flooding is estimated for Tuvalu in the 21st century, reaching a threshold of more than 100 days of flooding per year.[2]

For these obvious and urgent reasons, the Tuvaluan government began to undertake a series of initiatives, both operational and diplomatic, in order to preserve its existence.

1. UN Development Programme, Arthur Web et al., *Notes from Tuvalu: Leading the way in adapting to sea-level rise*, 19 July 2023, available at <<https://www.undp.org/blog/notes-tuvalu-leading-way-adapting-sea-level-rise>>.

2. NASA Sea Level Change Team, *Assessment of Sea Level Rise and Associated Impacts for Tuvalu,* Technical Report, N-SLCT-2023-01, June 2023.

In this spirit, firstly, the *Tuvalu Coastal Adaptation Project* was launched in 2017, which involved the implementation of several measures aimed at reducing exposure to coastal hazards on three target islands among those inhabited to date, including beach nourishment, concrete and rock revetments, and seawalls. The overall objective of the project is to develop a long-term coastal adaptation strategy, adopting an ecosystem approach, strengthening the capacity of national and local authorities to manage the phenomenon and investing in young people as future stewards of the country.[3]

Moreover, Tuvalu is a member of the United Nations and several other international organizations.[4] In response to its precarious situation, the country has been particularly proactive in building bilateral and multilateral networks, especially with other Pacific developing countries, in order to unite their efforts and strengthen their position in international fora, with particular attention to the challenges posed by climate change.[5]

3. The first phase of the Project (2017-2024), co-financed by the Green Climate Fund and the Government of Tuvalu and implemented by the UN Development Programme in partnership with Tuvalu, was concluded in May 2024, achieving good results in comparison with its initial objectives. The second phase of the Project was launched in September 2024, with financial contributions provided also by Australia and New Zealand. For further details see <<https://tcap.tv/>> (project website); UN Development Programme, *Australia and New Zealand back a second phase of the Tuvalu Coastal Adaptation Project to beat sea level rise,* 18 September 2024, available at <<https://www.undp.org/pacific/press-releases/australia-and-new-zealand-back-second-phase-tuvalu-coastal-adaptation-project-beat-sea-level-rise>>.

4. Tuvalu belongs to several international organisations, including the United Nations, the International Monetary Fund, the World Bank, the Pacific Community, and the Secretariat of the Regional Environmental Programme.

5. Tuvalu is a member of the Pacific Island Forum <<https://forumsec.org/pacific-islands-forum>> and is a co-founder, along with Antigua and Barbuda, of the Commission of Small Island States on Climate Change and International Law <<https://www.cosis-ccil.org/>>. Furthermore, Tuvalu is a member of the Alliance of Small Island States <<https://www.aosis.org/>> and regularly participates in the International Conference on Small Island Developing States <<https://sdgs.un.org/conferences/sids2024>>.

For example, in 2020, Tuvalu joined Vanuatu and other countries to establish an international campaign calling for a *Fossil Fuel Non-Proliferation Treaty*, identified as the leading cause of the climate crisis.[6]

In 2021, in collaboration with the Marshall Islands, Tuvalu established the *Rising Nation Initiative*, which aims to protect the statehood and sovereignty of Pacific atoll countries and safeguard the rights and heritage of affected populations.[7]

It is worth mentioning that it was the *Small Island States Commission on Climate Change and International Law*, co-founded by Tuvalu and Antigua and Barbuda, that made a formal request in December 2022 for an advisory opinion to the International Tribunal for the Law of the Sea on the content and scope of the obligations of States Parties to the United Nations Convention on the Law of the Sea (UNCLOS, 1982) to prevent, reduce and control marine pollution and to protect and preserve the marine environment, in both cases in relation to climate change.[8]

It is in this context that the *Falepili Union Treaty* – a historic agreement signed by Tuvalu and Australia on 9 November 2023 – can be framed, and it will be analysed in the present paper.

In particular, the treaty will be examined in relation to two specific aspects, which reflect the two main questions that the case of sinking States raises under international law and are the object of the current work of the International Law Commission (ILC) in relation to the topic 'sea-level rise'. They concern, on the one hand, the debate on the continuity or loss of statehood and, on the other hand, the need to protect

6. Adam Morton, *Pacific nations push for global backing of fossil fuel non-proliferation treaty* (March 2023) The Guardian, available at <<https://www.theguardian.com/world/2023/mar/17/pacific-nations-push-for-global-backing-of-fossil-fuel-non-proliferation-treaty>>.

7. For more details see <<https://sdgs.un.org/partnerships/rising-nations-initiative>>.

8. *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024.

human rights and preserve the cultural heritage of local communities forced to migrate.

Before going deeper into the analysis of the agreement, a general and preliminary overview of these two issues will be briefly offered in the following paragraphs.

2. Does the disappearance of land imply the loss of statehood?

Although there is no generally recognised legal definition of 'State' in international law, the territory has been traditionally considered a constitutive element of statehood, along with two other elements, namely 'permanent population' and 'government'.

The question has therefore legitimately been raised as to whether the physical disappearance of territory – an unprecedented circumstance, now become realistic due to climate change – could lead to the extinction of a State.[9]

Two different and opposite theses have been elaborated in literature to try to resolve this dilemma, which currently has no clear answer but is the subject of a lively and ongoing debate, both in the academic and institutional fields.

9. 'State extinction' has so far been considered and admitted with reference to the loss of government effectiveness and/or independence, leading to situations that can be qualified as dissolution, merger or absorption of one State into another. Never in relation to the loss of land. This circumstance is relatively new in the international law framework, but the doctrine has begun to take an interest in the subject given the potential effects of climate change. See James Ker-Lindsay, 'Climate Change and State Death' (2016) Survival, n. 58 (4), 73-94; Ori Sharon, 'State Extinction through Climate Change', in Alexander Zaher and Benoit Mayer (eds.), *Debating Climate Law* (CUP 2021) 349-364; Andrea Caligiuri, 'Sinking States: The statehood dilemma in the face of sea-level rise' (2022) Questions of International Law, n. 91, 23-37.

The first one, referred to by Green and Guilfoyle as 'the austere view',[10] is based on a restrictive and literal interpretation of the criteria of statehood established by the 1933 *Montevideo Convention on the Rights and Duties of States.* According to this view, if a State loses one of them (land in the present case), it necessarily ceases to exist as a State.[11]

However, this perspective has been criticised in several respects by other scholars, according to whom the statehood of sinking States is not in question despite their partial or total loss of territory due to sea-level rise.

First of all, it has been argued that the Montevideo criteria refer to the first acquisition of statehood and not to the maintenance of it.[12] In other words, although it is necessary and desirable to avoid the proliferation and premature recognition of States (to begin to exist as subjects of international law, they must satisfy the Montevideo requirements),

10. Douglas Guilfoyle and Alex Green, 'The Australia-Tuvalu Falepili Union Treaty: Security in the Face of Climate Change…and China?' (28 November 2023) EJIL:TALK!, 2023, available at <<https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/>>.

11. James R. Crawford, *The creation of States in International Law* (OUP 2007) 671; Lilian Yamamoto and Miguel Esteban, 'Vanishing Island States and Sovereignty' (2010) Ocean and Coastal Management, Vol. 53, Issue 1, 1-9; Sarah Lok, 'Sinking States, Sunken Statehood? The Recognition of Submerged States under International Law' (2023) Cambridge Law Review, Vol. 8, Issue 2, 31-55, 41; Ori Sharon, 'To Be or not to Be: State Extinction through Climate Change' (2021) Environmental Law, Vol. 51(4), 1041-1065; UN. Doc. A/CN.4/774, International Law Commission, Seventy-fifth session, Geneva, 29 April–31 May and 1 July–2 August 2024, *Sea-level rise in relation to international law***,** United Kingdom of Great Britain and Northern Ireland Submission, according to which: "With regard to recognition of statehood, the United Kingdom's general practice has been to consider whether a State has, and seems likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in its external relations".

12. Abhimanyu G. Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-induced loss of Territory' (2014) Stanford Journal of International Law, Vol. 50(1), 1-52; Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024) 225–229.

once States exist, they benefit from a general presumption of continuity,[13] even if one or more of their constitutive elements diminish or completely disappear in the most critical circumstances.

Secondly, this thesis (a more 'flexible view') seems to be supported by positive precedents in State practice, which demonstrate that Montevideo requirements can be interpreted in a nuanced manner: the reference is to the cases of 'deterritorialised States'[14] and of 'governments in exile'[15].

However, irrespective of the legitimacy or validity of this thesis under international law, there are other reasons why the continuity of statehood of sinking States seemed to be considered the most equitable and sustainable option.

On one side, it undoubtedly preserves the stability of international legal order and international relations.[16]

It is also an issue strictly connected to citizenship. Although the question is controversial, the presumption of continuity of statehood has practical rather than theoretical implications, as it avoids the concrete risk of statelessness of citizens of the State concerned.[17] In this sense, it

13. Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?' (2021) Melbourne Journal of International Law, Vol. 22(2), 357-382; Derek Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) Melbourne Journal of International Law, Vol. 14(2), 362-364.

14. As well known, the form of "deterritorialized States" has been already recognised in the case of the Holy See and the Order of St John.

15. UN Doc. A/CN.4/752, International Law Commission, Seventy-third session, Geneva, 18 April–3 June and 4 July–5 August 2022, *Sea-level rise in relation to international law. Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law*, paras 138-154.

16. Sue Farran, 'Seeking a pragmatic and creative solution to the challenge of sea-level rise: The case of Tuvalu' (2022) Questions of International Law, n. 91, 99-111, 104.

17. The principle of prevention of statelessness in international law is indeed a corollary to the right to a nationality, protected by the 1961 *Convention on the Reduction of Statelessness*. See Alejandra Torres Camprubí, *Statehood Under Water: Challenges of Sea-level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 203.

would allow such citizens to maintain their relationship, their ancestral link with their country of origin as the State of nationality, with direct and important consequences on identity and in a perspective also in line with the principle of self-determination of people.

Finally, the loss of statehood due to sea-level rise would represent a manifestly unfair outcome: the consequences of a global phenomenon (climate change) would be reflected on those international actors (sinking States, which in most cases are small island developing countries) that have contributed the least to the causation of the phenomenon itself.

In any case, the idea that a State can continue to operate as such and exercise its functions despite the absence of territory definitively requires the identification of practical solutions to this end. In this context, some innovative hypotheses have already been put forward, such as those relating to the transition to a 'virtual State',[18] while other more traditional possibilities are currently under discussion within the work of the ILC.[19]

18. Farran (n 16). On this issue it seems interesting to report the declaration of Tuvalu Foreign Minister Simon Kofe during released at COP27, according to which: "Tuvalu could be the first country in the world to exist solely in – but if global warming continues unchecked, it won't be the last" (see Nick Kelly and Marcus Foth, 'An entire Pacific country will upload itself to the metaverse. It's a desperate plan – with a hidden message' (16 November 2022) The Conversation, available at <<https://theconversation.com/an-entire-pacific-country-will-upload-itself-to-the-metaverseits-a-desperate-plan-with-a-hidden-message-194728>>. The reference is to *Future Now Project*, a Tuvalu's initiative with the aim to build up a 'digital nation', to be implemented through a digital platform which will offer a series of services to citizens.

19. UN Doc. (n 15), paras 198-226.

3. The protection of people affected by sea-level rise

The other big theme underlying the case of sinking States is the so-called 'human face'[20] of sea-level rise, concerning the legal protection granted to people affected by this phenomenon.

The starting point should be the recognition of a lacuna in this regard: to date, there is no international law-binding instrument or separate legal status specifically relating to this category of people, who can be included in the still precarious definition of 'climate migrants'. Consequently, as a temporary solution to fill the gap, it seemed necessary and appropriate to explore legal frameworks potentially applicable to persons affected by sea-level rise although not specifically dedicated to them.

In this sense, international human rights law is certainly relevant and pertinent and can offer a first form of protection through an evolutionary interpretation of the single provisions taken into consideration, even in the absence of a specific mention to climate change or sea-level rise.

As the Human Rights Council has recognised on several occasions,[21] it is a matter of fact that climate change in general, including sea-level rise, can have an adverse and significant impact on the enjoyment of the most basic human rights, such as the right to life, adequate housing, food, potable water, cultural identity, self-determination, and nationality (as a prevention of statelessness).

For what concerns the identification of the State responsible for granting the full enjoyment of these rights, with specific reference to people affected by sea-level rise, the general rule should be that States are obliged

20. Patricia Galvao Teles, 'The "Human Face" of Sea-Level Rise: Protection of persons Affected' (2023) American University Law Review, Vol. 38(3), 693-700.

21. HRC, Resolution 7/23, *Human rights and climate change*, 28 March 2008; HRC, Resolution 10/4, *Human rights and climate change*, 25 March 2009; HRC, *Human rights and climate change*, Resolution A/HRC/RES/26/27, 15 July 2014.

to provide protection and assistance to people residing in their territories and/or under their jurisdiction.[22]

It is evident that in the context of calamities due to climate change, people tend to migrate from one country to another (generally the nearest safe place), and thus different orders of responsibility may emerge on behalf of different States. When people remain in the territory of the State affected by sea-level rise, the responsibility of that State can include a duty to mitigate, adapt, and prevent natural disasters.

This duty involves the implementation of various measures, such as, to name but a few, the reduction of greenhouse gas emissions or water desalination plans, all aimed at making the territory of the State habitable for as long as possible, thus respecting the citizens' "right to remain".[23]

Another aspect that may involve the responsibility of the State directly threatened by climate change refers to the duty to act promptly and adequately to save people's lives when natural disasters occur or are about to occur. This could imply evacuation or relocation plans to avoid storms, floods, or other extreme natural events.[24] However, this duty must be considered subsidiary to the first mentioned and should only be activated in the most urgent cases.[25]

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22. 2018 *Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise,* Principle 1.

23. This duty is also recalled by Article 7 of the 2015 *Paris Agreement*s.

24. ECtHR, *Budayeva and Others v. Russia,* App. No. 15339/02, 11673/02, 15343/02, 20058/02, 21166/02, Judgement of 20 March 2008, para 152.

25. On 23 September 2022, the UN Human Rights Committee ruled in favour of a group of eight Torres Strait Islanders, concluding that Australia's decision to forcibly relocate them to another region as a consequence of insufficient or too late adoption of mitigation measures to combat climate change violated their rights to enjoy their culture (Article 27 of the International Covenant on Civil and Political Rights) and their right to private and family life (Article 17 of the International Covenant on Civil and Political Rights). See Human Rights Committee, *Billy and Others v. Australia*, Communication No. 3624/2019, Decision of 22 September 2022. According to this precedent, only if the primary duty to mitigate, adapt and prevent natural disasters has been adequately and efficiently implemented, can the subsidiary duty to save people's lives through emergency measures (such as evacuation plans) be legitimately activated.

On the other hand, still in the framework of international human rights obligations, when people affected by sea-level rise decide to move to another country – voluntarily or not but due to climate change – also the responsibility of the State of destination may arise.

In particular, the principle of *non-refoulement* could be triggered in this respect: the State concerned has the duty not to return a person when the push-back to the country of origin implies a risk of irreparable harm. In this specific context, irreparable harm could be identified with the deprivation of a series of basic social, economic, and cultural rights as a consequence of climate change, leading to a general impossibility to conduct a 'decent life'.[26]

Turning to another regime, with regard to the protection potentially available under international refugee law, it should be clarified, as a preliminary point, that the definition of 'refugee' established by the Geneva Convention is not applicable in general terms to climate migrants and

26. HRC, *Ioane Teitiota v. New Zealand,* Communication No. 2728/2016, Decision of 7 January 2020. For more details, see Amina Maneggia, 'Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee' (2020) Diritti umani e diritto internazionale, 2/2020, 635-643; Jane McAdam, 'Climate Refugees Cannot Be Forced Back Home' (20 January 2020) The Sydney Morning Herald, available at <<https://www.smh.com.au/environment/climate-change/climate-refugees-cannot-be-forced-back-home-20200119-p53sp4.html>>; Kate Shuetze, 'A Groundbreaking Ruling on Climate Refugees Puts the World on Notice' (23 January 2020) The Spinoff, available at <<https://thespinoff.co.nz/society/23-01-2020/a-groundbreaking-ruling-on-climate-refugees-puts-the-world-on-notice/>>; Marie Courtoy, 'Une décision historique pour les "réfugiés climatiques"? Mise en perspective' (2020) Cahiers de l'EDEM, available at <<https://www.uclouvain.be/fr/instituts-recherche/juri/cedie/news/comite-des-droits-de-l-homme-des-nations-unies-constatations-relatives-a-la-communication-n-2728>>; Vernon Rive, 'Is an Enhanced Non-refoulement Regime under the ICCPR the Answer to Climate Change-related Human Mobility Challenges in the Pacific? Reflections on Teitiota v New Zealand in the Human Rights Committee' (2020) Questions of International Law, n. 75, 7-24; Emanuele Sommario, 'When climate change and human rights meet: A brief comment on the UN Human Rights Committee's Teitiota decision, in Questions of International Law' (2021) n. 77, 51-65.

thus to persons affected by rising sea levels.[27]

However, in some exceptional cases, the combination of climate change-induced effects and other related political, social and economic factors may lead to the fulfilment of the requirements for refugee status and thus enable the person concerned to apply for and be granted international protection.[28]

Therefore, although the landscape offered by international law is still uncertain and constantly evolving, other possibilities of protection for people affected by rising sea levels can be found in the practice of States.

For example, several States have decided to set up visas and humanitarian permits specifically dedicated to people forced to leave their country due to climate change and/or natural disasters.[29]

However, the implementation of these measures differs widely between countries in terms of timing and modality of release of the permit, the requirements to be met, and the content and duration of the protection offered.[30]

Lastly, with regard to inter-state relations in this field, several regional instruments and programmes have been adopted over the past

27. Jane McAdam, 'Moving beyond Refugee Law: Putting Principles on Climate Mobility into Practice' (2022) International Journal of Refugee Law, Vol. 34 (3-4), 440–448.

28. See UNHCR, *Legal Considerations regarding Claims for International Protection Made in the context of the Adverse Effects of Climate Change and Disasters,* 1 October 2020, para 2, according to which: "The adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socio-economic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection".

29. UN Doc. (n 15), para. 344.

30. Ibid., paras 345-347.

decade,[31] and specific 'human mobility pathways' have been established between two or more States through bilateral agreements (which is exactly the model followed by the *Falepili Union Treaty*).

4. The *Falepili Union Treaty*

4.1 Background

On 9 November 2023, the Prime Minister of Australia, Anthony Albanese, and the Prime Minister of Tuvalu, Kausea Natano, signed the *Falepili Union Treaty,* which has been mentioned as a "historic climate refugee and security pact"[32] and "the world's first climate resettlement treaty".[33]

The treaty is (or should be) inspired by the traditional Tuvaluan concept of *falepili*, which, according to the preamble, means "good neighbourliness, duty of care and mutual respect".[34] In Tuvaluan culture, *falepili* means caring for one's neighbours as if they were family and symbolises the act of giving without expecting anything in return. Among some Tuvaluans, however, there is a perception that Australia has not en-

31. These regional instruments and programmes on protection of people affected by climate change and/or sea-level rise include, for example: *The Nansen Initiative* (Geneva, 12–13 October 2015); *Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin* (South American Conference on Migration, 2018); *Kampala Ministerial Declaration on Migration, Environment and Climate Change* (Intergovernmental Authority on Development, the East African Community, and States of the East and Horn of Africa, 29 July 2022); *Pacific Regional Framework on Climate Mobility* (Rarotonga, Cook Islands, 10 November 2023).

32. Ben Wescott, 'Australia Signs Historic Climate Refuge and Security Pact With Tuvalu' (10 November 2023) TIME USA, available at <<https://time.com/6333731/australia-climate-refuge-pact-tuvalu/>>.

33. Guilfoyle and Green (n 10).

34. *Australia-Tuvalu Falepili Union*, Preamble.

gaged in the true spirit of the *falepili* concept because, as is obvious and as will be explained below, it has made certain demands and obtained related concessions from Tuvalu for the conclusion of the treaty itself.[35]

The main purposes of the agreement are to strengthen the bilateral relationship between Tuvalu and Australia into one that is more advanced, integrated, and comprehensive, provide Tuvalu's citizens with a human mobility pathway to be implemented with dignity, and protect and promote the collective security and sovereignty of each Party.[36]

As already noted, the agreement was first signed in November 2023, but after the Tuvaluan national general elections, held in January 2024, the new Prime Minister Feleti Teo formally reaffirmed his support for the principles and objectives of the treaty but acknowledged "the absence of transparency and consultations in socialising and informing the public in Tuvalu of such an important and groundbreaking initiative".[37] The newly formed government therefore pledged to work on this shortcoming and remedy it before the treaty ratification.[38]

In May 2024, the two governments signed a Joint Statement[39] on commitment to the *Falepili Union Treaty*, and, more significantly, an Explanatory Memorandum[40] was adopted. This document represents

35. Taukiei Kitara and Carol Farbotko, 'Tuvalu, Australia, and the Falepili Union' (24 November 2023) Australian Institute of International Affairs, available at <<https://www.internationalaffairs.org.au/australianoutlook/tuvalu-australia-and-the-falepili-union/>>.

36. *Australia-Tuvalu Falepili Union*, Article 1.

37. Statement of Priorities for the New Government of Tuvalu after the National General Elections on 26 January 2024. Released on Wednesday 28th February 2024, available at <<https://psc.gov.tv/?page_id=1136>>.

38. Ibid.

39. *Joint Statement on commitment to the Falepili Union,* available at <<https://www.dfat.gov.au/sites/default/files/joint-statement-commitment-falepili-union.pdf>>.

40. *Explanatory Memorandum – Falepili Union Between Tuvalu And Australia,* available at <<https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf>>.

an important interpretation tool and clarifies many of the treaty's most critical and discussed points. The treaty finally entered into force on 28 August 2024.

4.2 The human mobility pathway

What has certainly made the *Falepili Union Treaty* innovative, and the reason for its considerable media coverage, is the protection offered by Australia to the citizens of Tuvalu, who face the existential threat of sea-level rise. It is indeed the first bilateral treaty to provide a response to climate mobility.[41]

First of all, it seems important to underline the express recognition in the text of the agreement of "the desire of Tuvalu's people to continue to live in their territory where possible and Tuvalu's deep, ancestral connections to land and sea".[42]

The perspective adopted by the treaty is therefore to support the State of Tuvalu in its resilience process in the first instance (so that it can continue to exist as a safe and liveable space for its citizens) while offering Tuvaluans the option of relocating to Australia only if they so wish and/or if living conditions in Tuvalu become objectively untenable.

Moreover, the special mobility pathway established by the treaty, emphasised for its dignified nature, provides for Tuvaluan citizens to enter Australia to live, study, or work there while also accessing Australian education, health, and key income and family support on arrival.[43]

The treaty does not provide more specific information on this aspect. The provision in question (Article 3) contains vague and general state-

41. Clare Francis, 'Kaldor Centre calls for support for Tuvaluans settled under treaty' (9 July 2024), UNSW, available at <<https://www.unsw.edu.au/news/2024/07/Kaldor-Centre-calls-for-support-for-Tuvaluans-settled-under-treaty>>.

42. *Australia-Tuvalu Falepili Union*, Article 2.2(a).

43. Ibid., Article 3.

ments, with no reference to other elements such as the quotas of Tuvaluan nationals admitted each year, the timing and management of arrival, and the specific content and duration of the protection offered.

However, the Explanatory Memorandum therefore specified most of these points. In particular, it establishes an initial annual allocation of a maximum of 280 visas (a mutually adjustable number each programme year) allocated through a random ballot, administered by Australia.

Another clarification is that Falepili visa holders would be eligible to apply for Australian citizenship on the same basis as other permanent residents, and, eventually, Australian citizenship will not affect Tuvaluan citizenship. This confirms a particular sensitivity to the importance of Tuvaluans maintaining their close ties with their country of origin even in terms of nationality.

It has also been specified that Falepili visas provide for permanent residence for an indefinite period, with unlimited freedom to travel from Australia to Tuvalu and vice versa. This is a remarkable passage, as all other permanent residency visas issued by Australia include a 'use it or lose it' clause.[44]

According to the Memorandum, Tuvaluan citizens could apply for the special pathway from anywhere in the world and would be free to secure work of their choice. Moreover, the pathway would be open to all Tuvaluan citizens and not only to people with a specific job or skill. This means there is no risk of brain drain, which is particularly relevant for a country as small and sparsely populated as Tuvalu.[45]

Finally, the pathway would be open to Tuvaluan citizens with disabil-

44. This kind of clause means that one person can stay in Australia for as long as he/she wants as a permanent resident, but if he/she leaves the country for too long he/she cannot re-enter, at least not after five years of being granted the visa. See Stephen Howes and Finn Clarke, 'Falepili Union treaty: Tuvalu's amazing migration deal' (5 July 2024) DevPolicy Blog, available at <<https://devpolicy.org/tuvalu-amazing-deal-20240705/>>.

45. Francis (n 41).

ities, special needs and chronic health conditions who could join the Australian National Disability Insurance Scheme. This is another crucial recognition, because any other type of visa issued by Australia, except the one that allows New Zealanders to move to Australia, implies forms of discrimination towards people with disabilities.[46]

In sum, the protection offered by Australia to Tuvaluan citizens seems to be very broad and complete, also in comparison to other bilateral agreements concluded by Australia with other countries on the same issues and, more generally, to its attitude on the matter.

4.3 Tuvalu's continuation of statehood and political cooperation

Regarding the question of the continuation or loss of statehood by Tuvalu due to its *sinking* nature, the viewpoint embraced by the treaty is extremely clear.

Article 2(2) of the agreement provides that "[t]he Parties recognize (…) the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise".[47]

This statement binds Australia for the present and the future and seems extremely significant for the overall development of the international relationship between the two States. On the other hand, from Tuvalu's perspective, it "confirms the ongoing lack of appetite on the part of States affected by sea-level rise for 'solutions' that envision merger with larger political communities",[48] such as, for example, Australia.

46. Howes and Clarke (n 44).

47. *Australia-Tuvalu Falepili Union*, Article 2(2)(b).

48. Alex Green and Douglas Guilfoyle, 'The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change' (2024) American Journal of International Law, Vol. 118, Issue 4, 684-703, 695.

Another section of the same provision also mentions the importance of the latest technological developments in providing additional adaptation opportunities to sea-level rise.[49] The reference is undoubtedly to the *Tuvalu Coastal Adaptation Project* – mentioned in the introduction and partially funded by the Australian government – but also to the realisation of other future initiatives, should further advances in the field make them feasible.

Again, the perspective adopted by the treaty is to support Tuvalu's existence for as long as possible, including through the use of financial resources for this purpose.

This provision is also linked to another one relating to political cooperation between the Parties, according to which Australia, at Tuvalu's request, will provide assistance in the event of natural disasters, health emergencies of international concern, or in the event of military aggression against Tuvalu.[50]

This represents certainly a further positive outcome of the agreement, as it opens up the possibility that Australia's financial support to Tuvalu will not only be limited to the prevention and/or management of the consequences of climate change (as is already the case) but also to other circumstances, not necessarily related to this aspect.

4.4 *Falepili* or no *Falepili*? The price of Australian commitment

The most controversial section of the treaty is certainly Article 4(4), which explicitly states:

> Tuvalu shall mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-re-

49. *Australia-Tuvalu Falepili Union*, Article 2(2)(c).

50. Ibid., Article 4(1).

> lated matters. Such matters include but are not limited to defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure.[51]

This provision has been interpreted as a substantial threat to Tuvalu's independence,[52] as it would confer upon Australia a 'potential veto power' on a series of issues related to Tuvaluan foreign policy.[53] Precisely because of this clause, some commentators have gone so far as to define the overall agreement as a 'neo-colonial security pact', primarily driven by Australia's objective of countering China's influence in the Pacific.[54]

It is important to note that similar concerns were initially raised by the Tuvaluan opposition leader, Enele Sopoaga, at the time of the first agreement's conclusion,[55] and subsequently reiterated by the newly elected Tuvaluan Prime Minister, Feleti Teo, who assumed office in January 2024. In particular, he emphasised the necessity of obtaining guarantees from Canberra that the landmark treaty with Australia would not compromise Tuvaluan sovereignty in any way.[56]

In response to this request, the Explanatory Memorandum adopted in May 2024 also addressed this aspect, specifying that:

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51. Ibid., Article 4(4).

52. Kitara and Farbotko (n 35).

53. Guilfoyle and Green (n 33).

54. John Braddock, 'Australia strikes neo-colonial "security" pact with Tuvalu to counter China in Pacific' (13 November 2023), WSWS, available at <<https://www.wsws.org/en/articles/2023/11/13/vouf-n13.html>>.

55. Enele Sopoaga, 'Australia-Tuvalu Falepili Union 'shameful' – Former Tuvalu PM' (27 November 2023) Radio New Zealand, available at <<https://www.rnz.co.nz/international/pacific-news/503354/australia-tuvalu-falepili-union-shameful-former-tuvalu-pm>>.

56. Prianka Srinivasan, 'Tuvalu prime minister calls on Australia for sovereignty 'guarantees' over treaty' (16 March 2024) The Guardian, available at <<https://www.theguardian.com/world/2024/mar/17/tuvalu-prime-minister-calls-on-australia-for-sovereignty-guarantees-over-treaty>>.

> Tuvalu does not need permission from Australia before it starts to talk with other partners. Article 4(4) does not diminish Tuvalu's standing in global fora. It will not preclude other partners supporting Tuvalu's economic and development interests such as education, health, waste, climate adaptation, gender, disability, trade or granting fishing licences.[57]

It is therefore evident that a de facto Australian veto power exists; however, this power has been clarified and circumscribed by the Explanatory Memorandum.

Primarily, it has been reiterated that this power pertains exclusively to security and defence-related matters. Consequently, Tuvalu is at liberty to engage in discussions and conclude agreements with other Parties on any other field.

Secondly, in relation to matters covered by the veto, Tuvalu retains the ability to initiate negotiations with any country without having to seek and obtain authorisation from Australia, but will, in fact, have to agree with Australia on the conclusion of any eventual agreement.

According to Tuvalu's Prime Minister, Feleti Teo, this Australian 'intrusion' into Tuvaluan foreign policy has a reasonable explanation, which was discussed at length during the negotiation process.[58] Indeed, he recalled that under the terms of the treaty, Australia is obliged to provide security to Tuvalu,[59] so it is in Australia's interest to be aware of the potential implications of any agreement between Tuvalu and third Parties in this area. This is due to the fact that any such agreements could hinder Australia's capacity to fulfil its obligations under the treaty.

Furthermore, it should be considered that the agreement provides for certain safety valves for both Parties, which could be activated if, for ex-

57. Explanatory Memorandum (n 40).

58. Joint press conference – Pacific Islands Forum – Transcript, Wednesday 28 August 2024, available at <<https://www.pm.gov.au/media/joint-press-conference-pacific-islands-forum>>.

59. *Australia-Tuvalu Falepili Union,* Article 4(1).

ample, this veto power is used in a manner incompatible with the overall objectives of the treaty.

Indeed, if one Party feels that the other is not living up to the spirit of the treaty, it can open negotiations through the Joint Committee and at the same time suspend the fulfilment of one or more of its obligations under the treaty.[60]

On the other hand, if this process does not lead to any positive result, the Parties also have the possibility to terminate the agreement at any time by written notification.[61]

Finally, it has been correctly observed that, from this perspective, the *Falepili Union Treaty* appears less intrusive when compared to certain similar provisions included in the so-called 'Free Association Treaties'.[62] Consequently, despite the presence of Article 4(4), there is no doubt as to Tuvalu's maintenance of independence and international legal status.

5. Final remarks

The *Falepili Union Treaty* represents a relevant State practice for the future of sinking States. With regard to the protection of people affected by sea-level rise and forced to migrate, the guarantees offered by Australia to Tuvaluans appear broad, do not involve inequalities and provide for full respect of their right to remain in their country of origin (for as long as possible) and to maintain their cultural identity.

Indeed, although the text of the agreement does not include specific in-

60. Ibid., Article 6(3).

61. Ibid., Article 8(4).

62. Green and Guilfoyle, (n 48), 698-702.

formation about the details of its mobility scheme,[63] this gap has been filled by the Explanatory Memorandum. This document clarified that the protection offered is considerable in terms of content, duration and quotas of visas admitted each year.

Even if this protection is offered by Australia only to Tuvaluans and does not apply to migrants of different nationalities who might be in the same situation – an aspect related to the bilateral nature of the agreement – it can certainly represent a good practice to follow. In this sense, given the current uncertainty of climate migrant protection standards within the framework of international law, which is reflected in a fragmentation of domestic legal systems on the subject, the treaty can be a positive model for the development of other bilateral or multilateral mobility pathways related to climate change.

In addressing the matter of statehood, the treaty follows a definitive direction and contains unambiguous statements. Indeed, Australia expressly pledges, for the present and the future, to recognise Tuvalu as a sovereign and independent State, notwithstanding the potentially devastating effects of sea-level rise and, consequently, irrespective of its potential partial or total loss of territory.

However, the agreement does not provide any practical solution to this end in the sense that it does not speculate or envisage what the concrete ways might be for Tuvalu to continue to exercise its functions in the absence of physical land, at least in the context of relations between the two States.

Conversely, the agreement actually provides for the much-criticised and discussed veto power. However, firstly, this power seems to be supported by a justification deemed legitimate by the Tuvaluan government itself. Moreover, the scope of this power has been specified and reduced

63. Szymon Kucharski, 'Limited Success. Reflections on the Falepili Union Treaty' (21 November 2023) Verfassungsblog, available at <<https://verfassungsblog.de/limited-success/>>.

through the Explanatory Memorandum. Taking into account the aforementioned clarification, as well as the various security clauses present in the agreement, it seems difficult to identify a compromise of Tuvalu's sovereignty or independence.

On the other hand, even considering the political implications of the agreement and abstractly admitting that Australia's motivations for signing it lie in its desire to improve its reputation in the Pacific, the objective benefits it implies for Tuvalu and its people cannot be denied.[64] In this regard, the opportunity offered to Tuvaluan citizens to relocate to Australia, accessing a broad series of services, the financial support pledged and subsequently delivered by Australia for adaptation initiatives already in place (such as the Tuvalu National Adaptation Plan) and for future ones, and the economic support and assistance measures provided in relation to emergency situations, not necessarily resulting from climate change, should be regarded in a favourable light.

In conclusion, it is evident that the effective positive aspects of the treaty can only be ascertained or disproved at the time of its actual and future implementation.

64. Clive Schofield and Frances Anggadi, 'The Australia-Tuvalu Falepili Union Treaty: Opportunities and Controversies' (2024) Asia-Pacific Journal of Ocean Law and Policy, Vol. 9, 85-115, 94.

La justice climatique et les peuples autochtones côtiers en Amérique du Sud*

*Victoria Chiu***

Résumé

Le présent article met en lumière la vulnérabilité des peuples autochtones côtiers d'Amérique du Sud face aux changements climatiques et aux atteintes à leurs territoires maritimes. Il explore les mécanismes juridiques internationaux et interaméricains en faveur de leurs droits collectifs. Il souligne le rôle pionnier de la Cour interaméricaine des droits de l'homme et de la Cour constitutionnelle colombienne dans la reconnaissance d'une relation spirituelle et culturelle aux territoires, y compris marins. L'article examine les lacunes persistantes dans la reconnaissance des territorialités marines autochtones. Il présente également les avancées chiliennes en matière de concessions d'Espaces Côtiers Maritimes des Peuples Originaires. Enfin, il évoque la reconnaissance des droits de la nature et les effets du droit constitutionnel équatorien. L'article défend

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une lecture écocentrée et interculturelle des droits fondamentaux dans un contexte de justice climatique. Il appelle à une réforme structurelle du droit maritime et à une co-gestion durable des espaces côtiers par les communautés autochtones.

Mots-clés: Droits des peuples autochtones, territoire maritime autochtone, justice climatique, droits de la nature, Cour interaméricaine.

1. Introduction

À l'ère de l'Anthropocène,[1] les espaces naturels gérés par les peuples autochtones subissent une pression accrue de la part des États et des industriels, mettant en péril leurs moyens de subsistance, leur identité culturelle, leur santé, leur bien-être et leur vie.

Si les peuples autochtones représentent seulement environ 5% de la population mondiale, 80% de la biodiversité mondiale se situe dans leurs terres et territoires.[2] Leurs savoirs ancestraux et leur cosmogonie les placent en fer de lance d'une protection transgénérationnelle de la biodiversité.

Le droit international reconnaît la place centrale des peuples et des communautés autochtones dans la lutte contre le changement climatique et pour défendre la nature. Par exemple, l'accord de Paris signé le 12 décembre 2015 et entré en vigueur le 4 novembre 2016 reconnaît

1. Le terme "anthropocène" a été proposé en 2000 par le biologiste américain Eugene F. Stoermer et le Prix Nobel de chimie néerlandais Paul Josef Crutzen. Ce terme qualifie l'époque géologique contemporaine caractérisée par les effets massifs des activités humaines sur la Terre et son atmosphère tels que le réchauffement climatique, la fonte des glaciers et de la banquise, l'élévation du niveau des mers et des océans, les pollutions, l'érosion de la biodiversité, des sols etc.

2. Rapport de la Rapporteuse spéciale sur les droits des peuples autochtones, Victoria Tauli-Corpuz, ONU, A/71/229, § 14.

l'importance des connaissances et savoirs traditionnels autochtones, et que ces derniers doivent être pris en compte dans les politiques nationales d'adaptation au changement climatique.[3]

Afin d'identifier la catégorie juridique de "peuple autochtone", il convient de s'appuyer sur la Convention n°169 de l'Organisation Internationale du Travail (OIT) de 1989. Elle précise qu'elle s'applique aux peuples considérés comme autochtones

> [D]u fait qu'ils descendent des populations qui habitaient le pays, ou une région géographique à laquelle appartient le pays, à l'époque de la conquête ou de la colonisation ou de l'établissement des frontières actuelles de l'Etat, et qui, quel que soit leur statut juridique, conservent leurs institutions sociales, économiques, culturelles et politiques propres ou certaines d'entre elles.[4]

Cette définition doit être complétée avec celle donnée par le rapport Cobo qui pose le critère de l'auto-identification en indiquant que:

> [D]u point de vue de l'individu, l'autochtone est la personne qui appartient à une population autochtone par auto-identification (conscience de groupe) et qui est reconnue et acceptée par cette population en tant que l'un de ses membres (acceptation par le groupe). Cela laisse aux communautés autochtones le droit et le pouvoir souverain de décider quels sont leurs membres, sans ingérence extérieure.[5]

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3. Article 7, 5 de l'Accord de Paris prévoit que les États parties "reconnaissent que l'action pour l'adaptation devrait suivre une démarche impulsée par les pays, sensible à l'égalité des sexes, participative et totalement transparente, prenant en considération les groupes, les communautés et les écosystèmes vulnérables, et devrait tenir compte et s'inspirer des meilleures données scientifiques disponibles et, selon qu'il convient, des connaissances traditionnelles, du savoir des peuples autochtones et des systèmes de connaissances locaux, en vue d'intégrer l'adaptation dans les politiques et les mesures socioéconomiques et environnementales pertinentes, s'il y a lieu".

4. Article 1.1, b) de la Convention 169 de l'OIT du 27 juin 1989.

5. J. Martinez Cobo, *Etude du problème de la discrimination à l'encontre des populations autochtones*, 1986, 5 vol., E/CN.4/Sub. 2/1986/7/Add. 4, 32, § 391-392.

Les peuples autochtones ont développé une relation étroite avec leurs terres, territoires et ressources naturelles traditionnels, y compris les zones marines et les ressources marines vivantes. Les mers et les océans constituent non seulement une source vitale de nourriture et de sécurité économique pour les peuples autochtones vivant le long des côtes, mais ils façonnent également leur identité culturelle et leurs valeurs spirituelles.

Bordé à l'ouest par l'océan Pacifique et au nord et à l'est par l'océan Atlantique et comprenant de très nombreuses îles, le continent latino-américain dispose d'une biodiversité terrestre et marine très riche et unique,[6] mais il reste en même temps un des plus exposés aux impacts liés aux changements climatiques, comme le précisent le Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC)[7] et l'Organisation météorologique internationale (OMI).[8] Plusieurs Etats de la région ont d'ailleurs adopté des législations spécifiques en matière de changement climatique, à l'image de l'Argentine,[9] de la Bolivie,[10] du Chili,[11] de la Colombie,[12] du Guatemala,[13] du Honduras,[14] du Mexique,[15] du

6. La région abrite, par exemple, le deuxième plus grand récif corallien du monde, voir M. Tambutti, J. J. Gómez (coord.), *Panorama de los océanos, los mares y los recursos marinos en América Latina y el Caribe. Conservación, desarrollo sostenible y mitigación del cambio climático*, Documentos de Proyectos (LC/TS 2020/167/REV.1), Santiago, CEPAL, 2022, 9.

7. GIEC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability* (CUP 2022).

8. World Meteorological Organization (WMO), *State of the Climate in Latin America and the Caribbean 2021* (WMO-No. 1295), WMO. Ginebra, 2022.

9. Ley 3871 – Ley de Adaptación y Mitigación al Cambio Climático del 31 de octubre de 2011.

10. Ley 835 – Ley de 17 de septiembre de 2016.

11. Ley 21455 – Ley Marco de Cambio Climático del 13 de junio 2022.

12. Ley 1931 – Ley por la cual se establecen las directrices para la gestión de cambio climático del 27 de julio de 2018.

13. Decreto 7-2013 – Ley Marco para Regular la Reducción de la Vulnerabilidad, la Adaptación obligatoria ante los efectos del Cambio Climático y la Mitigación de Gases Efecto Invernadero del 05 de septiembre de 2013.

14. Decreto 297-2013 – Ley de Cambio Climático del 10 de Noviembre de 2014.

15. Ley General de Cambio Climático del 06 de Junio de 2012.

Paraguay[16] ou encore du Pérou.[17]

A côté de la diversité biologique remarquable que caractérise ce continent, plus de 500 peuples et communautés autochtones différents y habitent, représentant plus de 8,5% de l'ensemble de la population et environ 30% des personnes vivant dans l'extrême pauvreté.[18]

Les peuples autochtones sont les plus vulnérables aux effets causés par le changement climatique. Cette vulnérabilité est aussi exacerbée par la pollution et l'accaparement des océans et des côtes, la dépossession, le déplacement, la destruction et la non-reconnaissance de leurs territoires ancestraux. Par voie de conséquence, leur sécurité alimentaire, leurs modes de vie traditionnels, leurs cultures et leurs conditions d'existence sont ainsi menacés. Confrontés à la marchandisation et à la surexploitation des ressources marines, la reconnaissance et le respect du droit collectif à l'autodétermination sont primordiaux pour que ces peuples puissent exercer un contrôle sur leurs espaces de vie côtiers et les administrer selon leurs propres régimes fonciers.

Si les peuples autochtones sont restés longtemps persécutés et marginalisés par les États, la prise en compte par le droit du statut particulier des peuples autochtones s'est d'abord développée dans le cadre du droit international des droits de l'homme qui a pu, par la suite, influencer le droit de certains États.[19]

Qu'il s'agisse des textes internationaux se référant aux droits de l'homme,[20]

16. Ley 5875 – Ley Nacional de Cambio Climático 15 de septiembre de 2017.

17. Ley 30754 – Ley Marco sobre Cambio Climático 02 de abril de 2018.

18. Servicio de Género, Igualdad y Diversidad & OITSIDA Departamento de Condiciones de Trabajo e Igualdad Organización Internacional del Trabajo *Aplicación del Convenio sobre pueblos indígenas y tribales núm. 169 de la OIT: Hacia un futuro inclusivo, sostenible y justo*, 2019, 156.

19. Alexis Le Quinio, 'Droit constitutionnel, environnement et peuples autochtones en Amérique latine' (2020) RFDC, n°122, 299-320.

20. Le Pacte international des droits civils et politiques et notamment l'art. 27 qui reconnaît aux peuples autochtones le droit à la culture.

aux droits des peuples autochtones ou des textes se référant à la protection de l'environnement, le droit international public n'a eu de cesse de reconnaître le rôle primordial de ces peuples dans la préservation de l'environnement du fait de leurs connaissances spécifiques relatives à la gestion durable des ressources naturelles.[21] Parmi ces textes, deux portent directement sur les droits des peuples autochtones: La Convention n° 169 de l'OIT de 1989 relative aux peuples indigènes et tribaux[22] et la Déclaration des Nations Unies sur les droits des peuples autochtones de 2007.[23] Les deux textes sont fondamentaux car ils leur garantissent des

21. Lors de la 16ème Conférence des Parties (COP 16) à la Convention sur la diversité biologique qui s'est tenue à Cali, en Colombie, du 21 octobre au 2 novembre 2024, le rôle des peuples autochtones et des communautés locales dans les COP biodiversité a été renforcé. Leur participation directe aux décisions prises dans le cadre de la Convention sur la diversité biologique est désormais reconnue au sein d'un organe subsidiaire permanent qui a été créé lors de la COP 16. Cette COP intervient deux ans après la signature de l'accord-cadre de Kunming Montréal (COP 15) de 2022 qui comprend 23 objectifs à réaliser d'ici 2030 et plus spécifiquement la protection de 30% des terres et des mers de la planète à échéance 2030. S'agissant du rôle des peuples et des communautés autochtones dans la préservation de la nature voir également la Déclaration de Rio sur l'environnement et le développement de 1992 (principe 22), la Convention sur la diversité biologique de 1992 (article 8(j)), la Déclaration de Johannesburg sur le développement durable de 2002 (§25) et la Déclaration finale du sommet "Rio + 20" de 2012 (§ 197), la Convention n°169 de l'OIT concernant les peuples indigènes et tribaux dans les pays indépendants de 1989 (articles 4 et 7).

22. La convention est entrée en vigueur le 5 septembre 1991. Elle a été ratifiée par 24 États. Parmi les États européens il y a l'Allemagne (en 2021), Danemark (en 1996), Espagne (en 2007), Luxembourg (en 2018), Norvège (en 1990), Pays-Bas (en 1998). Il convient de souligner que si la convention a été ratifiée par plusieurs États d'Amérique latine, des États tels que le Canada, les États-Unis, la Russie, la Suède, la Finlande, l'Australie, la Nouvelle-Zélande, la France refusent pour l'heure de s'y engager.

23. Résolution des Nations Unies n°61/295 adoptée par l'Assemblée générale le 13 septembre 2007.

droits collectifs de nature environnementale[24] et plus généralement le droit d'accès à la justice.[25]

À l'échelle du continent latino-américain, c'est le droit interaméricain des droits de l'homme qui a joué un rôle crucial de relai du droit international public pour faire pression sur les États afin de mieux prendre en compte les droits des peuples autochtones.[26] D'ailleurs, la majorité des recours intentés par des peuples autochtones se trouvant sur ce continent l'ont été sur le fondement du non-respect des obligations liées à la ratification de la convention n° 169 de l'OIT,[27] cette dernière ayant d'ailleurs une valeur constitutionnelle dans la majorité des États latino-américains.[28]

La Cour interaméricaine des droits de l'homme a accompagné ce processus de reconnaissance des droits des peuples autochtones, à l'image de sa décision de 2005, *Comunidad Yakye Axa vs. Paraguay,* dans laquelle elle a affirmé que lorsqu'elle analyse la portée de l'article 21 relatif au droit à la propriété privée de la Convention américaine relative aux droits de l'Homme, "la Cour juge utile et approprié d'utiliser d'autres traités

24. L'article 26 de la Déclaration des Nations-Unies sur les droits des peuples autochtones de 2007 dispose que: "1. Les peuples autochtones ont le droit aux terres, territoires et ressources qu'ils possèdent et occupent traditionnellement ou qu'ils ont utilisés ou acquis. 2. Les peuples autochtones ont le droit de posséder, d'utiliser, de mettre en valeur et de contrôler les terres, territoires et ressources qu'ils possèdent parce qu'ils leur appartiennent ou qu'ils les occupent ou les utilisent traditionnellement, ainsi que ceux qu'ils ont acquis. 3. Les États accordent reconnaissance et protection juridiques à ces terres, territoires et ressources. Cette reconnaissance se fait en respectant dûment les coutumes, traditions et régimes fonciers des peuples autochtones concernés".

25. Article 40 de la Déclaration des Nations Unies sur les droits des peuples autochtones, Résolution n°61/295 adoptée par l'Assemblée générale le 13 septembre 2007; article 6 de la Convention n° 169.

26. Olivier Courtemanche, 'Conséquences juridiques et sociales des revendications foncières autochtones: regards sur le droit interaméricain' (2014) Droit et société, 88(3), 667-688.

27. Quinze Etats latino-américains ont ratifié cette Convention.

28. Le Quinio (n 19).

internationaux que la Convention américaine, comme la Convention n° 169 de l'OIT, pour interpréter ses dispositions conformément à l'évolution du système interaméricain, en tenant compte du développement du droit international des droits de l'homme dans ce domaine".[29] Ainsi, l'interprétation de l'article 21 donnée par la Cour a permis d'élargir son champ d'application aux systèmes coutumiers autochtones de tenure foncière collective étant donné le lien particulier qui unie les autochtones et leurs territoires ancestraux.

Ces évolutions internationales ont été confirmées par l'adoption, le 13 septembre 2007, de la Déclaration des Nations Unies sur les Droits des Peuples Autochtones[30] qui mentionne notamment le droit à l'auto-détermination, le droit à l'intégrité culturelle, le droit à l'égalité et à la non-discrimination, le droit à la terre, aux territoires et aux ressources naturelles et le droit à la consultation préalable, libre et informée. Ces deux derniers droits revêtent une importance particulière dans la perspective de la justice environnementale et de la justice climatique.[31]

Les préoccupations environnementales associées aux revendications des peuples autochtones s'articulent essentiellement autour du droit à la terre, aux territoires et aux ressources et du droit à la consultation préalable, libre et informée en cas de projets susceptibles d'affecter l'environnement. Ces deux droits sont profondément imbriqués, le second

29. Cour IDH, Caso *Comunidad* indígena *Yakye Axa Vs. Paraguay,* Sen. n° 125 (2005), Série C, 17 juin 2005, *§ 127*.

30. Déclaration des Nations Unies sur les droits des peuples autochtones, Résolution 61/295 du 13 septembre 2007. Voir Claire Charters et Rodolfo Stavenhagen, (dir.), *La déclaration des droits des peuples autochtones. Génèse, enjeux et perspectives de mise en œuvre* (IWGIA 2013) 393.

31. Dans les Etats ayant ratifié la Convention n°169 et ayant signé la Déclaration de 2007, le droit des peuples autochtones doit, *a minima*, assurer une protection qui s'articule autour de cinq dimensions: le droit à la non-discrimination; le droit au développement et au bien-être social; le droit à l'intégrité culturelle; le droit de propriété, d'accès, d'utilisation et de contrôle des terres, territoires et ressources naturelles; et le droit à la participation politique et au consentement libre, préalable et éclairé.

participant de manière éminente à la protection du premier.[32] La reconnaissance et la protection des droits de communautés autochtones ne peuvent être garanties que dans l'hypothèse où l'accès à la justice l'est également. Il convient de souligner, d'ailleurs, que l'un des premiers pays de la région à avoir consacré dans sa constitution tant la protection de l'environnement que la protection des peuples autochtones avait consacré un article au droit à un recours juridictionnel effectif pour ces communautés, en affirmant que "les Indiens, leurs collectivités et organisations sont parties légitimes pour agir en justice en défense de leurs droits et intérêts".[33]

Les conflits environnementaux y compris les conflits climatiques sont associés au concept de justice environnementale. Selon Sophie Thériault,[34] le concept de justice environnementale inclut la possibilité pour les "groupes marginalisés", dont font partie les peuples autochtones, de participer aux processus décisionnels se rapportant aux projets pouvant affecter l'environnement et leur relation à celui-ci.

Plus globalement, la justice environnementale repose sur la reformulation des problèmes environnementaux et climatiques en enjeux de justice, à savoir la justice distributive, la justice de la reconnaissance (sociale, collective et individuelle) et la justice procédurale. La justice distributive traite des injustices socio-économique et propose des solutions concernant la restructuration économique, tels que la redistribution des revenus.[35] En contexte autochtone, il s'agit de garantir que les politiques en-

32. Magdalen Gómez, 'Derecho Indigéna al territorio y a la consulta : el caso yaqui en México' (2017) e-cadernos CES, vol. 28, 141-164.

33. Article 232, Constitution du Brésil [1988].

34. Sophie Thériault, 'Justice environnementale et peuples autochtones: les possibilités et les limites de la jurisprudence de la cour interaméricaine des droits de l'homme' (2020) Révue Québécoise Droit Int, 129148.

35. Nancy Fraser, 'Justice sociale, redistribution et reconnaissance' (2004) *Revue du MAUSS*, 2004/1, n° 23, 152-164, 155.

vironnementales sont adoptées en répondant aux intérêts et aux besoins des peuples autochtones.

La justice de la reconnaissance se concentre sur les injustices liées à des "modèles sociaux de représentation, d'interprétation et de communication: la domination culturelle, le déni de reconnaissance et le mépris".[36] C'est, par exemple, le cas lorsqu'il y a un manque de reconnaissance des pratiques autochtones de pêche et de chasse. Pour remédier à une telle injustice, il convient d'opérer des changements culturels et symboliques pouvant mener à des transformations institutionnelles.[37] La reconnaissance est garantie lorsque les systèmes de savoirs, les traditions juridiques et les ontologies autochtones qui les fondent sont valorisées et respectées. En ce qui concerne la justice procédurale, il s'agit d'assurer une participation effective des peuples autochtones à toutes les étapes du processus décisionnel et de leur garantir une participation sur un même pied d'égalité que les autres acteurs publics et privés. Ils doivent avoir accès à toutes les informations concernant les enjeux et les risques environnementaux qui les touchent. Par ailleurs, la justice procédurale garantit également qu'il existe des instances juridiques pertinentes pour protéger les droits des peuples autochtones grâce à un processus judiciaire indépendant et rapide, qui tend à la réparation des dommages environnementaux. En pratique, les mouvements sociaux portant sur la justice environnementale revendiquent généralement ensemble la justice distributive, la justice de la reconnaissance et la justice procédurale, les trois piliers étant en étroite corrélation.

La justice environnementale et plus particulièrement la justice climatique ne peuvent pas être étudiées dans un contexte autochtone sans tenir compte de la relation particulière qu'entretiennent les peuples au-

36. Ibid.

37. Ibid.; David Schlosberg, *Defining Environmental Justice. Theories, Movements, and Nature* (OUP 2007) 16.

tochtones avec la Terre. L'identité des peuples autochtones côtiers et la survie de leurs cultures et savoirs traditionnels est fondée sur l'existence d'un lien spécifique à la terre et à la mer, l'espace marin étant appréhendé comme faisant partie intégrante de la terre. Sur ce dernier point, la jurisprudence de la Cour interaméricaine des droits de l'homme a permis de dégager une interprétation des droits fondamentaux favorisant la justice environnementale au profit des peuples autochtones côtiers (Section 2). Cependant, à l'échelle nationale, une telle interprétation n'est pas tout à fait acquise, à l'exception de la Cour constitutionnelle colombienne ayant une position très audacieuse en la matière (Section 3). Enfin, s'agissant tant de la reconnaissance juridique des territoires autochtones dans l'espace maritime national (Section 4) que da la participation des Autochtones côtiers à la gestion des espaces maritimes protégés (Section 5), les avancées juridiques demeurent assez timides et incomplètes. Dans un tel contexte, la justice environnementale et la justice climatique ne peuvent pas être garanties.

2. Une interprétation interculturelle des droits de l'homme dégagée par la Cour interaméricaine des droits de l'homme afin de favoriser la justice environnementale

La Cour interaméricaine des droits de l'Homme (ci-après CourIDH) a jugé dans sa décision *Awas Tingni c. Nicaragua* rendue le 31 août 2001 que les peuples autochtones "du fait de leur seule existence, ont le droit de vivre librement sur leurs territoires" au vu notamment de l'étroite relation qu'ils maintiennent avec la Terre. Ainsi, la Cour relevait que pour les Autochtones, "la relation avec la terre n'est pas une simple et unique question de possession et de production, mais un élément matériel et

spirituel dont ils doivent jouir pleinement, y compris afin de préserver leur héritage culturel et le transmettre aux générations futures".[38] Pour retenir une telle interprétation novatrice, la Cour a intégré une approche ethnologique à son raisonnement juridique.[39] Le sens de cette décision va alors fonder par la suite une jurisprudence de la Cour reconnaissant l'interconnexion entre le droit à la vie et le droit au territoire incluant également les espaces côtiers.

Cette position a été également adoptée par certaines cours constitutionnelles à l'image de la Cour constitutionnelle de Colombie. Elle a considéré que les peuples autochtones ont "une conception du territoire et de la nature qui s'avère étrangère aux canons juridiques de la culture occidentale".[40] Le droit de propriété collective revêt une importance particulière pour ces peuples en ce qu'il relèverait de leurs cultures et valeurs spirituelles en s'inscrivant dans une *cosmovision* globale. Dans cette optique, le territoire ne peut être perçu comme appartenant à un individu "comme cela s'entend dans la conception classique du droit privé occidental mais à tout le groupe humain qui l'habite, de telle manière qu'il acquiert un caractère éminemment collectif".[41] Une telle appréhension de la propriété collective renvoie aux nombreux travaux sur la notion de 'commun'.[42]

Dans le prolongement de ce raisonnement, les parties de l'océan qui sont traditionnellement occupées ou dont les ressources sont traditionnellement utilisées par les peuples autochtones font partie de leur territoire,

38. CourIDH, *Awas Tingni c. Nicaragua*, décision du 31 août 2001, Serie C N° 79, §149.

39. Delphine Couveinhes-Matsumoto, 'Les peuples autochtones et le droit de propriété devant la Cour interaméricaine des droits de l'Homme' (2018) *RJE*, n° spécial *Le bon usage de la terre. Penser le droit dans une planète finie*, 58.

40. Cour constitutionnelle de Colombie, Sen. T-622/16, *Centro de Estudios para la Justicia Sociale "Tierra Digna"*, 10 nov. 2016, point 6.3.

41. Ibid.

42. Judith Rochfeld, Marie Cornu, Gilles J. Martin (dir.), *L'Échelle de communalité, Propositions de réforme pour intégrer les biens communs en droit* (Mission de recherche Droit et Justice 2021).

même si aucun titre officiel ne protège cette utilisation ou cette occupation.

En fait, c'est précisément cette absence de reconnaissance formelle d'une relation territoriale entre les peuples autochtones et des zones spécifiques de l'océan qui les empêche de protéger cette territorialité. Le droit international de la mer ignore les territorialités autochtones qui existent dans les espaces maritimes. À leur tour, les droits nationaux, en incorporant la mer territoriale dans le domaine public maritime de l'État, ignorent l'existence de ces territoires autochtones.

Les effets négatifs des changements globaux sur la biodiversité et les écosystèmes marins prennent la forme d'un réchauffement des eaux, d'une acidification des océans et d'une élévation du niveau des mers. Cela menace la survie de nombreuses communautés autochtones côtières et l'existence même de certains États insulaires.

Pour la CourIDH, il existe un lien étroit entre la protection des terres et territoires autochtones, la protection de l'environnement et le respect des droits individuels et collectifs des peuples autochtones.[43]

L'approche écocentrée du droit à un environnement sain développée par la CourIDH a eu une influence importante sur l'interprétation de ce droit par les tribunaux nationaux dans les litiges écologiques et climatiques. Ainsi, grâce au dialogue entre les tribunaux, l'interprétation écocentrée des droits de l'homme a été promue en Amérique latine.
Dès l'avis consultatif n° 23/2017[44] portant sur les liens étroits entre le droit de l'environnement et les droits de l'Homme et ensuite avec l'arrêt

43. Camila Perruso, 'Le droit à un environnement sain, propre et durable saisi par le droit international' (2024) Titre VII, n°13, 2024, disponible en ligne à l'adresse suivante <<https://www.conseil-constitutionnel.fr/publications/titre-vii/le-droit-a-un-environnement-sain-propre-et-durable-saisi-par-le-droit-international>>.

44. CourIDH, 15 novembre 2017, avis consultatif demandé par la Colombie, *Environnement et droits de l'homme*, OC-23/17, §§ 108-243, Pascale Ricard, 'La clarification du lien entre droits de l'homme et protection de l'environnement et de ses conséquences par la Cour interaméricaine des droits de l'homme dans son avis consultatif du 15 novembre 2017' (2018) Le Journal du Centre de droit international, n°17, 15-18.

de 2020,[45] la CourIDH s'est engagée à intégrer les droits culturels dans sa jurisprudence. D'une part, la CourIDH, dans l'avis de 2017, considère que le droit à un environnement sain est à la fois un droit individuel et collectif dont l'objet comprend les "bois, les rivières, les mers et autres" éléments naturels. La Cour considère également qu'en matière environnementale et climatique, les obligations liées au respect des droits de l'homme ont un effet extraterritorial. D'autre part, la CourIDH, dans son arrêt de 2020, tient compte de l'interdépendance entre le droit à un environnement sain, le droit à une alimentation adéquate, le droit à l'eau potable et le droit à l'identité culturelle des peuples autochtones, pour constater, en l'espèce, pour la première fois, la responsabilité internationale d'un État pour la violation du droit à un environnement sain. Selon l'interprétation retenue par la CourIDH, plusieurs droits fondamentaux exigent, comme condition préalable à leur jouissance, une qualité environnementale minimale et sont profondément affectés par la dégradation des ressources naturelles.[46]

3. L'interprétation interculturelle des droits fondamentaux favorisée par la Cour constitutionnelle colombienne

Quant au rôle du juge constitutionnel en matière d'interprétation interculturelle des droits fondamentaux dans un contexte de changement

45. CourIDH, 6 février 2020, *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) c. Argentina*, Exceptions préliminaires, fond, réparations et coûts, Série C, n° 400. Voir aussi CourIDH, 27 novembre 2023, Habitants de la Oroya c. Pérou, Série C n°511. Kathia Martin-Chenut et al., 'La protection de l'environnement saisie par la Cour interaméricaine des droits de l'homme' (2024) RSC, n°2, 441-452.

46. CourIDH, avis consultatif n°23/2017, précité. Voir aussi, Cour IDH, 17 juin 2005, *Comunidad indígena Yakye Axa c. Paraguay,* Serie C Nº 125.

climatique, il convient de mentionner l'activisme de la Cour constitutionnelle colombienne.

Dans les arrêts T-333 de 2022,[47] T-246 de 2023[48] et T-123 de 2024,[49] la Cour constitutionnelle colombienne avait accepté d'examiner le concept de déplacements forcés pour cause environnementale, pourtant absent dans le droit interne. Les juges, en se fondant sur le droit international des droits de l'homme et le droit international de l'environnement, ont néanmoins dégagé une obligation pour l'État d'adopter des mesures législatives de prévention, d'atténuation et d'adaptation au changement climatique et une obligation d'adopter une législation spécifique pour reconnaître et protéger juridiquement les déplacés de force à l'intérieur de l'État colombien en cas de catastrophes naturelles, avec la mise en place d'un régime différencié pour les peuples et communauté autochtones. Les juges constitutionnels ont reconnu que les effets de ce phénomène génèrent un impact différencié et plus intense sur les populations les plus vulnérables et celles qui ont des liens forts avec la terre et la nature. La Cour constitutionnelle interprète le droit constitutionnel à l'environnement sain à la lumière de ces mesures obligatoires de prévention, d'atténuation et d'adaptation au changement climatique.

L'arrêt de 2022 concerne davantage la situation des peuples autochtones côtiers, en l'occurrence le peuple Raizal. En l'espèce, la Cour constitutionnelle avait constaté le non-respect par l'État des droits individuels et collectifs du peuple Raizal, déplacé pour cause de destruction des îles de Providencia et Santa Catalina suite au passage de l'ouragan Iota en novembre 2020. Plus précisément, c'est dans le cadre du processus de reconstruction de ces îles que la Cour constitutionnelle colombienne s'est prononcée sur la protection des droits du peuple Raizal. Pour les juges,

47. Arrêt de la Cour constitutionnelle T-333 du 26 septembre 2022.

48. Arrêt Cour constitutionnelle T-246 du 7 juillet 2023.

49. Arrêt de la Cour constitutionnelle T-123 du 16 avril 2024.

l'État n'avait pas respecté le droit à une consultation libre, préalable et informé des Raizal lors de l'élaboration du plan de reconstruction des îles détruites. Selon une interprétation désormais constante, les juges constitutionnels confirment l'interdépendance entre le droit à une consultation préalable et d'autres droits fondamentaux tels que le droit à un environnement sain, le droit à un logement décent, le droit à la santé, le droit à l'eau potable et à l'assainissement. Pour la Cour, afin de garantir une protection constitutionnelle aux peuples autochtones victimes d'une catastrophe naturelle causée par le changement climatique, les droits fondamentaux doivent être interprétés dans une approche interculturelle, en tenant compte de la cosmovision autochtone. En constatant les violations de ces droits, la Cour a ordonné à la Présidence de la République, au Ministère de l'Intérieur, à l'Unité Nationale de Gestion des Risques de Catastrophe, au Ministère du Logement et aux autorités locales des îles de Providencia et de Santa Catalina de réparer les dégâts subis par le peuple Raizal et de reprendre la reconstruction des îles en les consultant de manière effective et en tenant compte de leurs besoins et de leurs savoirs et connaissances traditionnels pour s'adapter aux effets du changement climatique.

Plus généralement, l'intégration du paradigme du pluralisme juridique au sein des constitutions latino-américaines a permis de reconnaître formellement l'existence des normativités autochtones, donnant ainsi un fondement solide aux juges pour opérer une interprétation des droits dans une approche interculturelle. Dans cette perspective, la Cour constitutionnelle colombienne s'inscrit dans un activisme judiciaire très prononcé, mais tel n'est pas le cas, par exemple, des juridictions constitutionnelles péruvienne ou encore chilienne.[50]

50. Par exemple, le Tribunal constitutionnel péruvien dans un arrêt du 20 janvier 2022 refuse de reconnaître le droit à la consultation des peuples autochtones comme un droit fondamental, en l'absence de dispositions constitutionnelles explicites en ce sens, voir l'arrêt n° 03066-2019-PA/TC. Sur ce point voir plus largement Victoria Chiu, *Le droit d'accès à la justice environnementale des peuples et communautés autochtones* (IERDJ 2025) 113 et ss.

Si l'interprétation des droits fondamentaux garantis par la Constitution à la lumière du droit international des peuples autochtones n'est pas totalement acquise au sein de l'ensemble des États d'Amérique latine, la reconnaissance des territorialités autochtones dans les espaces maritimes nationaux demeure timide. Certaines revendications territoriales autochtones ont permis néanmoins la mise en place d'une co-gestion des espaces maritimes protégés.

4. Une reconnaissance timide et incomplète des territoires autochtones dans l'espace maritime

Une des difficultés en matière de reconnaissance des territoires autochtones dans l'espace maritime réside dans le fait que les modes de vie traditionnels des peuples côtiers et les frontières maritimes délimitées par le droit international de la mer sont difficilement conciliables.

En effet, le mode de vie traditionnel des peuples autochtones côtiers ignore les délimitations imposées par le droit international de la mer telles que la mer territoriale, la zone économique exclusive etc. À titre d'illustration, la pêche traditionnelle, qui reste le principal mode de subsistance de ces peuples, peut être exercée au-delà de la mer territoriale. Ce mode de vie traditionnel peut être une source de violation du droit international de la mer. Sur ce point, il convient de mentionner l'arrêt de la Cour Internationale de Justice (CIJ) du 21 avril 2022, *Nicaragua c. Colombie*,[51] dans lequel s'est justement posé la question de la légalité

51. CIJ, arrêt du 21 avril 2022, *Nicaragua c. Colombie* (violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraibes), Recueil des arrêts, avis consultatifs et ordonnances, 2022, 266; CIJ, 19 novembre 2012, *Nicaragua c. Colombie*, Différend territorial et maritime, Fady Ortiz Roca, 'Los derechos del pueblo raizal del archipiélago más allá del fallo de la Corte Internacional de Justicia de la Haya' (2013) *Revista Cuadernos del Caribe*, Vol. 16, n°1, 27-35.

de l'exercice de la pêche artisanale par le peuple côtier Raizal de Colombie au sein de la zone économique exclusive de Nicaragua. Au-delà du différend interétatique sur la délimitation des espaces maritimes dans la mer des Caraïbes, une des questions posées par la Colombie à la CIJ était de savoir si et dans quelles conditions les droits de pêche traditionnels d'une communauté donnée peuvent survivre à la création de la zone économique exclusive d'un autre État. Les juges de la CIJ se sont abstenus d'y répondre en l'absence de preuves suffisantes permettant d'établir que les Raizal de l'archipel de San Andrés jouissent de droits de pêche artisanale dans les eaux situées dans la zone économique exclusive nicaraguayenne.[52] La CIJ estime que la méthode la plus appropriée pour remédier aux préoccupations exprimées par la Colombie et ses nationaux au sujet de l'accès aux pêcheries situées dans la zone économique exclusive du Nicaragua serait la négociation d'un accord bilatéral entre les Parties.[53] En revanche, la CIJ souligne également que, conformément au droit international coutumier applicable à la zone économique exclusive, tel que reflété à l'article 58 de la Convention des Nations Unies sur le droit de la mer (CNUDM, 1982), les Etats tiers jouissent de la liberté de navigation dans cette zone.[54] Il s'ensuit que les habitants de l'archipel, notamment les Raizals, peuvent naviguer librement dans la zone économique exclusive du Nicaragua, y compris au cours de leurs déplacements entre les îles habitées et les zones de pêche situées du côté colombien de la frontière maritime.[55]

Si le droit international de la mer s'adapte difficilement à la situation particulière des peuples autochtones, *a priori* tel n'est pas le cas du droit national. Les États côtiers exercent leur entière souveraineté dans leur

52. *Nicaragua c. Colombie* § 231.
53. Ibid., § 232.
54. Ibid., § 233.
55. Ibid.

mer territoriale, pouvant s'étendre jusqu'à une distance de 12 milles marins. Dans cet espace, les États peuvent reconnaître l'existence des espaces maritimes autochtones.

C'est le cas, par exemple, du Chili,[56] car depuis 2008, le législateur chilien a ouvert la possibilité pour les peuples et communautés autochtones côtiers de présenter des demandes de reconnaissance d'Espaces Côtiers Maritimes des Peuples Originaires (ECMPO) afin d'obtenir une concession.[57] Ce mécanisme législatif a permis aux peuples autochtones côtiers de mettre en place une stratégie largement mobilisée pour exercer une gouvernance environnementale sur leurs territoires et éviter des injustices environnementales causées par l'exploitation des mers et des espaces maritimes par des tiers. Il s'agit de la loi du 31 janvier 2008, dite *lafkenche* sur "l'espace côtier maritime des peuples originaires", d'initiative *mapuche lafkenche*.[58] Elle a permis de dépasser les concepts de terres et territoires autochtones en l'étendant à celui d'ECMPO. La loi permet

56. Au Chili, il existe plusieurs peuples autochtones qui habitent les zones côtières, les îles, les archipels et les canaux. Il s'agit notamment des peuples Chango, Rapa Nui, Mapuche (lafkenche et williche), Kawésqar, Selknam et Yagán. Pour ces peuples, leurs territoires, leur culture, leur vision du monde et leur spiritualité sont étroitement liés à la mer. C'est de la mer qu'ils obtiennent leurs principaux moyens de subsistance et leur principal moyen de connectivité. C'est le lien culturel et spirituel qu'ils entretiennent avec la mer qui leur donne la force et la légitimité de défendre ces espaces. Cependant, malgré leur préexistence dans ces espaces, ce lien avec la mer et leurs droits sur leurs territoires et espaces côtiers ne leur sont pas reconnus. Dans de nombreux cas, ils ont été dépouillés et déplacés, ce qui a conduit à rompre leur relation avec la mer. De même, l'activité extractive qui pollue leurs territoires, le changement climatique et l'urbanisation galopante du littoral rendent leurs espaces de vie encore plus fragiles. Voir sur ce point, Lorena Arce et al. (coord.), *Mujeres del mar: aproximaciones sobre los espacios costeros marinos de pueblos originarios* (Observatorio Ciudadano 2023) 159.

57. Les concessions sont octroyées pour une durée indéterminée mais peuvent s'éteindre dans quatre circonstances: 1/ si les bénéficiaires ne respectent pas le plan d'administration; 2/ dans l'hypothèse où des ressources hydro-biologiques seraient gravement affectées; 3/ en cas de dissolution de l'association de communautés ou de la communauté bénéficiaire; 4/ ou encore en cas d'infraction commise par le bénéficiaire de la concession (article 15 de la loi).

58. Ley n° 20.249 que crea el espacio costero marino de los pueblos originarios, adoptée le 31 janvier 2008 et publiée le 16 février 2008.

à des communautés autochtones ou associations de communautés de demander à l'administration publique (le sous-secrétariat de la pêche) l'octroi d'une concession sur un espace côtier, libre de toute autre concession, pour assurer sa conservation et sa gestion, sous réserve d'attester des usages coutumiers.[59]

Cette loi ne reconnait pas un droit autochtone au territoire ancestral mais un droit d'accès et d'usage d'un espace sous réserve qu'il soit libre de concession au moment de la demande.[60] Si la loi fixe un délai de douze mois pour traiter les demandes de reconnaissance d'ECMPO, dans la pratique, le délai de traitement reste assez long, en moyenne de quatre ans et demi.[61] Étant donnée la longueur de la procédure, en septembre 2024, seulement 24 ECMPO ont été accordées par les services de l'État, principalement dans la région de Los Lagos, et 82 demandes étaient en cours d'examen.[62]

Le mécanisme de l'ECMPO est mobilisé de manière stratégique par les peuples et les communautés autochtones côtiers pour protéger leur espace de vie, appelé parfois en espagnol *maritorio.* Le premier projet de Constitution chilienne de 2022,[63] très avant-gardiste en matière de pro-

59. L'usage coutumier des requérants autochtones peut correspondre à la pratique coutumière de la médecine, de cérémonies, d'activités récréatives ou encore de pêche. C'est l'organisme étatique, appelé la Corporation Nationale de Développement Indigène (CONADI), qui est chargé de produire une expertise anthropologique afin d'évaluer la réalité de l'usage coutumier ainsi que la superficie auquel il s'applique.

60. Dans l'hypothèse où des concessions sollicitées par des tiers non autochtones sont encore en attente d'octroi au moment du dépôt d'une demande par des communautés autochtones, ces dernières bénéficient d'un droit préférentiel.

61. Isnel Martínez Montenegro, 'Valoración critica del régimen jurídico-administrativo de la desalinización en Chile' (2023) Universidad y Sociedad, vol. 15, n°3, 701-709, 706.

62. Selon les données officielles publiées par le Sénat chilien sur son site internet à l'adresse suivante <<https://www.senado.cl/comunicaciones/noticias/en-comision-de-intereses-maritimos-avanza-proyecto-que-perfecciona-la>>.

63. Le premier projet de Constitution chilienne de 2022 avait été rejeté par le peuple chilien le 4 septembre 2022. Environ 62% des votants se sont exprimés contre le projet.

tection des droits des peuples autochtones, reconnaît l'existence d'une nouvelle catégorie juridique, le *maritorio*,[64] qui, comme le territoire, doit avoir une réglementation normative spécifique qui incorpore ses propres caractéristiques dans des domaines social, culturel, environnemental et économique.

En Argentine, la Constitution, depuis sa révision en 1994, reconnaît un ensemble de droits aux peuples autochtones et crée le recours de protection collective (*amparo colectivo*) ce qui facilite leur protection, car il permet à une collectivité de présenter un recours en justice en protection d'un droit collectif.[65] Toutefois, cette reconnaissance demeure limitée dans sa portée, car les questions autochtones relèvent d'une compétence partagée entre l'État fédéral et les provinces. En pratique, la délimitation des territoires autochtones demeure très insuffisante. Il a fallu attendre l'adoption d'une loi fédérale en 2006 afin d'enjoindre aux provinces de débuter la procédure de délimitation de la propriété foncière et territoriale des peuples autochtones et d'éviter ainsi l'expulsion des collectivités concernées.[66] Sa mise en œuvre par les provinces fait cependant encore défaut, par manque de respect général du droit des peuples autochtones mais aussi en raison de la richesse en ressources naturelles des sols et sous-sols des territoires sollicités.[67] Ain-

64. Article 139, al. 1 qui mentionnait que Chile "es un país oceánico que reconoce la existencia del maritorio como una categoría jurídica que, al igual que el territorio, debe contar con regulación normativa específica, que incorpore sus características propias en los ámbitos social, cultural, medioambiental y económico".

65. Article 75 § 17 de la Constitution de l'Argentine

66. Loi n°26.160 dite d' "urgence sur la possession et la propriété des terres et territoires autochtones" adoptée le 1 novembre 2006 (Ley 26.160 que declárase la emergencia en materia de posesión y propiedad de las tierras que tradicionalmente ocupan las comunidades indígenas originarias del país, cuya personería jurídica haya sido inscripta en el Registro Nacional de Comunidades Indígenas u organismo provincial competente o aquéllas preexistentes).

67. Irene Bellier, Leslie Cloud et Laurent Lacroix (dir.), *Les droits des peuples autochtones. Des Nations Unies aux sociétés locales* (L'Harmattant 2017) 159.

si, la reconnaissance des espaces maritimes autochtones est loin d'être acquise en Argentine.

Certaines avancées en matière de reconnaissance et de protection des territoires autochtones peuvent être le résultat d'une interprétation écocentrée des dispositions constitutionnelles conduisant à l'octroi des droits spécifiques à certains éléments dits 'naturels'. En favorisant une telle interprétation, le juge constitutionnel tient compte de l'interdépendance entre les droits fondamentaux individuels, les droits collectifs des peuples autochtones, les droits environnementaux et les droits de la nature.[68] Une telle interprétation permet également de protéger les territorialités autochtones.

Si, pour l'heure, l'octroi de droits aux écosystèmes marins n'est pas aussi répandu que pour les écosystèmes d'eau douce,[69] des efforts ont été déployés, à l'image de l'Équateur, pour protéger les mangroves, ces forêts entre terre et mer qui bordent les littoraux tropicaux, longtemps perçues comme un milieu hostile ou inutile.

Alors même que la région de l'Amérique latine et des Caraïbes possède la plus grande étendue de mangroves, entre 1997 et 2016, les pertes de mangroves les plus importantes ont été observées dans cette même région.[70] En effet, l'expansion de l'aquaculture dans cette région du monde a été possible, en partie, grâce à la déforestation des mangroves, autorisée par certains États côtiers.

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68. Fernanda De Salles Cavedon-Capdeville et al., 'Les droits de la nature dans le contentieux climatique. Développements de l'argumentaire écocentrique en Amérique latine', in Christel Cournil (dir.), *Expertises et argumentaires juridiques. Contribution à l'étude des procès climatiques* (DICE Édition 2024) 393-409.

69. Rhomir S. Yanquiling, Gabriela Cuadrado-Quesada et Susanne Schmeier, 'Exploring the rights of nature in freshwater and marine ecosystems' (2024) Earth System Governance, Vol. 22, 1-12, 3

70. Lisa Beers et Siobhan Fennessy, *Desktop study of blue carbon ecosystems in Ramsar Sites* (2020) Ramsar Briefing Note 12, 1-15, 3.

Et pourtant le rôle des mangroves dans la lutte contre le changement climatique est primordial, car elles stockent jusqu'à quatre fois plus de carbone par hectare que les autres forêts tropicales humides.[71] Leur protection est également essentielle pour la survie de certains peuples autochtones, dont la culture et l'identité sont attachées aux mangroves.

La Constitution équatorienne de 2008, qualifiée par certains auteurs de "plus avancée au Monde"[72] en matière de reconnaissance des droits des peuples autochtones et en matière des droits environnementaux, reconnaît la nature comme étant titulaire des droits spécifiques.[73] Ainsi, en se fondant sur principe constitutionnel selon lequel les écosystèmes sont détenteurs de droits, la Cour constitutionnelle équatorienne a reconnu dans l'arrêt de 2021,[74] que les mangroves sont des écosystèmes fragiles ayant des droits spécifiques. Parmi les droits reconnus aux mangroves, il y a le droit au plein respect de son existence, au maintien et à la régénération de ses cycles de vie, de sa structure, de ses fonctions et de ses processus évolutifs. En outre, s'agissant de l'Argentine, il convient de souligner l'activisme des associations de protection de l'environnement et des collectifs représentants les générations futures qui a conduit la Cour suprême de Justice, sans reconnaître explicitement des droits à la Nature, à mentionner des concepts assez similaires, largement inspirés de la cosmovision autochtone pour protéger le delta de la rivière Panará. En effet, dans un arrêt de 2020, la Haute juridiction fait droit à la requête d'une mesure provisoire demandant que des actions soient prises pour arrêter

71. Andre S. Rovai et al., 'Brazilian Mangroves: Blue Carbon Hotspots of National and Global Relevance to Natural Climate Solutions' (2022) Front. For. Glob. Change, Vol. 4, 1-11.

72. Luigi Ferrajoli, 'Garantismo y Derecho' (2011) Podium UEES, n° 20, 31-46, "Ecuador tiene seguramente la Constitución más avanzada del mundo".

73. Constitution de l'Équateur, article 71.

74. Cour constitutionnelle équatorienne arrêt n° 22-18-IN du 8 septembre 2021; Pablo Arturo Piedra Vivar, 'Los derechos de la Naturaleza: casos "Manglares" y "Bosque Protector Los Cedros"' (2024) Foro: Revista de Derecho, n° 41, 30-49.

les incendies dans les îles du delta.[75] Les juges ont enjoint aux autorités publiques la création d'un Comité d'urgence environnementale pour le delta Panará afin qu'il prenne les mesures nécessaires pour prévenir les incendies que les défendeurs doivent respecter. Pour motiver leur décision, les juges font référence à la nécessité d'adopter le paradigme écocentré ou systémique pour protéger les biens collectifs environnementaux. La Cour Suprême précise, qu'étant donné l'importance de l'écosystème du delta pour la régulation du système climatique, mais aussi son importance pour les populations locales qui tirent leurs moyens de subsistance de cet écosystème, sa protection doit être considérée comme prioritaire tant pour les générations présentes que pour les générations futures.

À côté de la reconnaissance directe ou implicite des territorialités autochtones dans l'espace maritime national, les peuples autochtones côtiers peuvent être associés à la gestion des espaces maritimes protégés leur permettant ainsi de lutter plus efficacement contre les injustices environnementales et climatiques et donc de mieux contrôler leurs espaces de vie.

5. La participation des peuples autochtones côtiers dans la gestion des espaces maritimes protégés

Comme le souligne l'ancienne rapporteuse spéciale sur les droits des peuples autochtones des Nations Unies, Victoria Tauli-Corpuz, "le respect du droit à la participation ainsi qu'au consentement libre, préalable et éclairé sont des conditions *sine qua non* pour promouvoir efficacement

75. Cour Suprême de Justice de la Nation, arrêt n°468/2020, 11 août 2020, *Equística Defensa del Medio Ambiente Aso. Civ. c/ Santa Fe, Provincia de y otros s/ amparo ambiental.*

les droits des peuples autochtones dans la pratique".[76]

La participation publique des peuples autochtones au processus de prise de décision en matière d'exploitation des terres traditionnelles, des territoires autochtones et des ressources est associée au respect de l'obligation internationale de les consulter. La majorité des États latino-américains[77] reconnaissent, sous l'influence de la Convention n°169 de l'OIT majoritairement ratifiée pas ces derniers et de la jurisprudence de la Cour interaméricaine des droits de l'Homme, le droit au profit des autochtones d'être consultés avant tout projet ou décision susceptible de porter atteinte à leurs droits collectifs, à leurs terres, territoires et ressources.

Malgré les progrès manifestes de la protection des droits des peuples autochtones dans les États d'Amérique latine, l'étude de ces derniers laisse une impression contrastée. Si des efforts notables ont été produits, l'effectivité réelle de ces droits est plus relative. Alors même que ces États reconnaissent l'existence des peuples autochtones et consacrent le principe du pluralisme juridique, leur droit de participation à la gestion des écosystèmes marins est plus difficilement mis en œuvre. Cette mise en œuvre est souvent laborieuse et souffre de nombreux obstacles juridiques et politiques.

En effet, le développement des aires marines protégées dans le monde a été particulièrement important ces dernières années. Leur délimitation est encouragée tant par le droit international que par le droit national pour protéger la biodiversité marine. S'agissant des aires

76. Rapport de la Rapporteuse spéciale sur les droits des peuples autochtones, Victoria Tauli-Corpuz, A/71/229, 29 juillet 2016, 10. Voir aussi Comité des droits de l'homme, *Ángela Poma Poma c. Peru*, communication n° 1457/2006; recommandation générale n° 23 du Comité pour l'élimination de la discrimination raciale; recommandation du Comité des Ministres aux États membres sur les droits de l'homme et la protection de l'environnement, du 11 juillet 2022, CDDH (2022)R96 Addendum 4.

77. Zérah Bremond, 'Les garanties juridiques des droits environnementaux en Amérique latine. Source d'inspiration pour le droit français de l'environnement?' (2023) Cahiers de l'Amazonie, n°1, 29-62.

marines protégées sous juridiction nationale qui couvrent à l'échelle mondiale environ 17% des eaux nationales,[78] elles peuvent avoir des appellations multiples: parcs nationaux, parcs naturels marins, réserves naturelles etc. Dans le cadre d'un projet de création d'une telle zone, l'État doit, en vertu du principe de participation, consulter préalablement les peuples et les communautés autochtones côtiers concernés.[79] En outre, selon le droit international des peuples autochtones, la gestion des aires marines protégées telle que mise en place par l'État doit permettre à ces peuples de pouvoir exercer librement leurs modes de vie traditionnels.

Quelques exemples peuvent être mentionnés pour illustrer une telle participation et prise en compte des modes de vie traditionnels dans le cadre de la gestion d'une aire marine protégée.

Par exemple, le parc naturel national Tayrona, créé en Colombie en 1964[80] d'une superficie terrestre de 15.000 hectares et d'une superficie maritime de 4.500 hectares, englobe dans son périmètre le territoire traditionnel et ancestral des quatre peuples autochtones de la Sierra

78. Selon les données de l'Union Internationale pour la Conservation de la Nature disponibles à l'adresse suivante: <<https://uicn.fr/aires-protegees/aires-marines-protegees/>>.

79. En s'inspirant de la Convention d'Aarhus de 1998, le 4 mars 2018, les États de l'Amérique latine et des Caraïbes ont signé à Escazu, au Costa Rica, l'Accord régional sur l'accès à l'information, la participation publique et l'accès à la justice à propos des questions environnementales, entré en vigueur le 22 avril 2021. Contrairement à la convention d'Aarhus, l'accord d'Escazu laisse une place importante aux peuples autochtones. Parmi les droits reconnus au profit des peuples autochtones, il y a le droit à la participation aux décisions qui les concernent. Ce droit permet aux peuples et communautés autochtones d'exprimer leurs valeurs culturelles et les intérêts qui les différencient de la culture majoritaire prédominante, afin qu'elles puissent être prises en compte lors de la prise de décisions les concernant, et protéger leur intégrité culturelle. Actuellement, il y a 24 États signataires et 16 États ayant ratifié l'accord.

80. Voir sur le site officiel <<https://www.parquesnacionales.gov.co/nuestros-parques/pnn-tayrona/>>.

Nevada de Santa Marta, territoire appelé la Ligne Noire (*Linea Negra*), qui dans leur vision du monde considèrent la zone comme un tissu de sites et d'espaces sacrés interconnectés physiquement et spirituellement. Ce territoire ancestral a été reconnu officiellement par l'État colombien en 1973,[81] qui a accordé aux peuples concernés le droit d'accéder librement aux sites sacrés se situant sur ce territoire. En 1995,[82] l'État a délimité, avec la participation des autochtones, le périmètre exact du territoire traditionnel appelé la Ligne Noire, en réalisant un inventaire de l'ensemble des sites sacrés. Les deux réformes opérées par l'État ont eu comme effet de reconnaître la relation spéciale et spirituelle que les quatre peuples autochtones de la Sierra Nevada de Santa Marta entretiennent avec leur territoire traditionnel et ancestral.

Plus récemment, afin de protéger davantage les droits des peuples autochtones du territoire précité, l'État a adopté la résolution n°5 du 4 janvier 2024,[83] actant des fermetures saisonnières permanentes pour accéder au Parc naturel national Tayrona. La décision de fermer l'accès au parc trois fois par an[84] a été justifiée par la nécessité de laisser les peuples autochtones vivant sur le territoire du parc de pouvoir réaliser pleinement et sans obstacles des activités environnementales, culturelles et spirituelles.

Au Chili, l'exemple le plus abouti qui permet d'illustrer la mise en place d'une co-gestion des espaces marins protégés est celui de l'aire marine côtière protégée à usages multiples Rapa Nui créé par le gouver-

81. Resolucion 002 du 4 janvier 1973.

82. Resolucion n° 837 du 28 août 1995.

83. Publiée le 18 février 2024, Diario oficial.

84. Ainsi, toutes les activités touristiques sont suspendues au sein du parc tous les ans pour les trois périodes suivantes: du 1er février au 15 février, du 1er juin au 15 juin et du 19 octobre au 2 novembre.

nement en 2018.[85] D'une superficie d'environ 72 millions d'hectares il s'agit de l'une des plus grandes aire marine protégée du monde. Cette zone a été créée après consultation des peuples autochtones concernés et elle est gérée par un conseil composé de six représentants du peuple Rapa Nui et de cinq représentants de l'État. Au sein de cette zone protégée, la pêche artisanale autochtone est la seule autorisée et les activités qui ont ou peuvent avoir un effet négatif sur les traditions et les coutumes autochtones sont interdites.

Le peuple autochtone côtier Kawésqar, qui habite dans la région de la Patagonie chilienne, a vu également son territoire menacé par la pêche industrielle intensive et l'expansion de l'aquaculture, notamment pour l'élevage du saumon. Leurs revendications territoriales ont abouti à la création du parc national et de la réserve nationale de Kawésqar,[86] qui concernent respectivement la zone terrestre et la zone marine du territoire ancestral du peuple Kawésqar.[87] L'État chilien, en dissociant les espaces terrestres et maritime, ne tient pas vraiment compte des liens étroits qu'entretiennent les peuples autochtones côtiers entre la mer et la terre. Néanmoins, afin d'assurer une certaine participation des au-

85. Décret du ministère chargé de l'environnement n°10 du 28 février 2018, publié le 8 juin 2018 (*Decreto n°10 del Ministerio del Medio Ambiente que crea área marina costera protegida de múltiples usos Rapa Nui*). L'île de Rapa Nui aussi connue sous le nom de l'île de Pâques. Il s'agit de l'une des îles les plus isolées au monde. Elle se trouve dans l'océan Pacifique, à 3.700 km à l'ouest de l'Amérique du Sud et plus de 1 900 km à l'est de l'île polynésienne habitée la plus proche.

86. Decreto n°6 del Ministerio de Bienes Nacionales que *Desafecta Reserva Forestal 'Alacalufes' y Créa el Parque Nacional 'Kawésqar' y la Reserva Nacional 'Kawésqar', en la Región De Magallanes y de la Antártica Chilena, 26 janvier* 2019, publié le 30 janvier 2019.

87. A l'extrême sud du Chili, se trouve le territoire du Peuple Kawesqar, peuple nomade marin des canaux australx. Leur territoire ancestral appelé Kawésqar Wæs, s'étend du golfe de Penas au nord, dans la région d'Aysén, jusqu'à la péninsule de Brecknock, dans les canaux les plus méridionaux du détroit de Magellan. Il comprend aujourd'hui toute la zone maritime et côtière composée d'îles, d'îlots, de canaux, de glaciers, de montagnes, de rivières, de lacs et de fjords de la région subantarctique, à l›ouest de la zone géographique connue sous le nom de Patagonie.

tochtones dans le cadre de la gestion du parc national et de la réserve nationale, l'État avait organisé une consultation lors de l'élaboration du plan de gestion pour chacune des deux zones protégées. Le fait de classer l'espace maritime du territoire Kawésqar en réserve nationale n'est pas sans conséquence, puisque selon la législation chilienne, la réserve est bien moins protégée que le parc national. À titre d'illustration, si les activités industrielles telles que la pêche industrielle et l'aquacultures sont interdites dans le périmètre d'un parc national, tel n'est pas le cas des réserves nationales.[88] En outre, si la gestion du parc national est assurée en co-gestion (entre l'État et les peuples autochtones), tel n'est pas le cas des réserves nationales. Ainsi, la réserve nationale de Kawésqar est actuellement l'une des zones protégées soumises à la plus grande pression de l'activité aquacole.[89] Bien que la création de la réserve nationale constitue un engagement de l'État à garantir les revendications et la reconnaissance du territoire ancestral du peuple Kawésqar, en juin 2020, dans le périmètre de la réserve, 69 concessions aquacoles ont été accordées pour des installations d'élevage de saumon![90] Afin de défendre leurs territoires, des représentants du peuple Kawésqar soutenus par des associations de protection de l'environnement ont contesté devant la justice les autorisations accordées par l'État pour les installations d'aquaculture. Certaines décisions de justice, favorables aux autochtones, ont permis des avancées jurisprudentielles significatives. À titre d'illustration, il convient de mentionner la décision du Tribunal environnemental qui a annulé les autorisations octroyées pour cinq installations d'élevage de saumon dans la réserve nationale de Kawésqar, en demandant à l'État qu'elles soient

88. Lorna Püschel Hoeneisen, 'Regulación de Actividades En Áreas Protegidas' (2019) Revista de Derecho Ambiental, n°11, 88-109, 98.

89. Sebastian Luengo Troncoso, 'From a Top-Down Perspective to Collaborative Management: The Kawésqar People's Role In Their National Park and Reserve' (2022) McGill Journal of Sustainable Development Law, Vol. 18, n°1, 96-127.

90. Ibid., 118.

évaluées conjointement et en synergie.[91] Par ailleurs, en 2022,[92] la Cour suprême de justice a jugé illégale la décision de l'État d'autoriser plusieurs installations en mer pour l'élevage du saumon dans le périmètre de la réserve nationale et du parc national Kawésqar pour avoir omis d'organiser une procédure de participation. Pour les juges, même si les projets en question sont éloignés des habitations les plus proches (se situant à une distance d'environ 100 km des villes les plus proches), ils sont susceptibles de produire des effets négatifs du fait même de leur présence en mer. En outre, même si ces installations font l'objet d'un contrôle étroit, l'utilisation des antibiotiques, le risque de fuite des saumons d'élevage et plus généralement les pollutions causées par ce type d'installations pourraient affecter négativement des zones très vastes y compris les espaces de vie du peuple Kawésqar. La Cour Suprême rappelle à l'État que dans le cadre de l'application des instruments de gestion environnementale il doit favoriser la conservation adéquate, le développement et le renforcement de l'identité, des langues, des institutions et traditions sociales et culturelles des peuples, communautés et individus autochtones, conformément au droit national et aux conventions internationales ratifiées. Les juges concluent que le fait que l'État n'avait pas organisé une procédure de consultation avant l'octroi des autorisations litigieuses permet de déclarer recevable le recours de protection des droits fondamentaux introduit par les représentants du peuple autochtone Kawésqar. En somme, les juges ont annulé pour cause d'illégalité les autorisations octroyées aux installations d'aquaculture et ont enjoint à l'État d'organiser la participation publique prévue par la législation environnementale.

In fine, les tribunaux se sont transformés en un terrain privilégié pour garantir une protection effective des droits des peuples autochtones. En

91. Tercer Tribunal Ambiental, Roles n° R-17-2021 (acumulada en la R-16-2021); R-7-2022 (acumulada en la R-6-2022); R-25-2022 (acumulada en la R-24-2022) y R-40-2022.

92. Arrêt de la Cour Suprême de Justice, n° 60.548-2021, 31 janvier 2022.

Amérique latine, les peuples autochtones, épaulés par des ONG et associations de protection de l'environnement, ont développé une véritable stratégie de judiciarisation des conflits environnementaux, climatiques et territoriaux en raison d'une multiplicité des recours judiciaires disponibles. A côté de stratégies juridictionnelles, ces peuples ont développé des stratégies de gouvernance territoriale en vue d'une justice environnementale autodéterminée notamment à travers l'administration ou la co-administration d'aires marines protégées. Rendre visibles toutes les territorialités autochtones dans les espaces maritimes reste toutefois un défi pour le droit.

Le droit international au secours du patrimoine culturel marin et côtier face aux changements climatiques*

*Anna Pedrajas***

Résumé

Cet article examine le rôle que peut jouer le droit international dans la protection du patrimoine culturel marin et côtier face aux bouleversements climatiques croissants. Alors que la montée du niveau de la mer et les dérèglements environnementaux globaux menacent non seulement les écosystèmes mais aussi les identités culturelles ancestrales des populations des zones côtières, l'étude attire l'attention sur la valeur souvent négligée du patrimoine culturel dans les politiques climatiques. L'auteure retrace l'évolution des réponses juridiques internationales aux menaces climatiques, en mettant en lumière les avancées, mais aussi les lacunes des actions multilatérales. Une attention particulière est accordée à l'articulation entre droit de l'environnement et protection du patrimoine culturel, à travers des instruments tels que les conventions de l'UNESCO et le cadre de la Convention-cadre des Nations Unies sur les Changements Climatiques. L'article plaide pour une approche intégrée et culturelle-

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ment adéquate, soulignant l'importance de reconnaître les patrimoines immatériels et communautaires comme des leviers essentiels de résilience climatique.

L'innovation juridique et la coopération internationale apparaissent comme des conditions indispensables pour préserver la mémoire culturelle autant que les écosystèmes naturels à l'ère du changement climatique.

Mots-clés: Patrimoine culturel marin, élévation du niveau de la mer, changement climatique, gouvernance côtière, droit du changement climatique, contentieux climatique.

1. Introduction

À l'heure de l'accélération des changements globaux, la diversité des cultures humaines constitue un vivier inépuisable de sagesse sur laquelle la communauté internationale pourrait s'appuyer pour organiser la gouvernance. Un proverbe samoan, "A logo tai ua logo uta", signifiant que ce qui est ressenti dans l'océan l'est aussi sur la terre ferme,[1] rappelle que la survie de l'être humain dépend de la nature et qu'il partage avec elle les périls qui la menacent. Dans le contexte des changements climatiques et de la montée du niveau de la mer, cette formule rappelle l'importance d'une prise de conscience de l'échelle de leurs conséquences.

1. Charleboys Harley, 'Samoan Language: Proverbs for Family and Community' (28 avril 2023) Polynesian Cultural Center, en ligne, consulté le 7 août 2024, <<https://blog.polynesia.com/samoan-language>>. En anglais, le proverbe se traduit par "What is felt in the ocean is felt in the land". Le présent article a été présenté lors de la première conférence du projet MCC (Mer et Changements climatiques) à Lyon le 18 octobre 2024.

Entre la crise de la biodiversité,[2] la modification du cycle de l'eau,[3] ou encore la prolifération de la pollution plastique,[4] il ne saurait être nié que l'humanité est aujourd'hui confrontée aux conséquences de 'l'anthropocène' qu'elle a instauré sur Terre, terme non-officiel désignant une ère géologique marquée par l'altération durable des conditions de vie sur la planète en raison des activités humaines.[5] Face à ces multiples menaces, les États ont raisonnablement emprunté la voie de la coopération, adoptant des accords internationaux et créant des institutions pour organiser une réponse collective. Plus particulièrement, la prise de conscience de la communauté internationale au sujet des changements climatiques dans les années 1970 et 1980 a conduit à la création du Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC) en 1988, suivie de l'élaboration d'un cadre de gouvernance conventionnel.[6] Néanmoins, cette réaction coordonnée accuse d'un manque d'efficacité notoire régulièrement déploré par la doctrine, la communauté scientifique, la société civile et les décideurs politiques. Dans son sixième rapport de synthèse de mars 2023, le GIEC, après avoir souligné un *ambition gap* dans la formulation des objectifs na-

2. Voy. par ex. David Storch et al., 'Biodiversity dynamics in the Anthropocene: how human activities change equilibria of species richness' (2022) Ecography 2022(4), 1-19. Cette crise de la biodiversité est évaluée de manière exhaustive dans le premier rapport global de l'IPBES: Eduardo S. Brondizio et al. (eds.), *IPBES (2019): Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES 2019) 206-209.

3. Tom Gleeson et al., 'Illuminating water cycle modifications and Earth system resilience in the Anthropocene' (2020) Water Resources Research, Vol. 56, no. 4, 1-24.

4. Voy. par ex. Estelle Praet, 'Plastic pollution: archaeological perspective on an Anthropocene climate emergency' (2024) World Archaeology, 1-19.

5. Frances Anggadi, 'Geography, International Law and the Anthropocene' (2024) ANU College of Law, 24 avril 2024, <<https://law.anu.edu.au/geography-international-law-and-anthropocene>>.

6. Lurs Luterbacher et Detlef F. Sprinz, *International Relations and Global Climate Change* (MIT Press 2001) 23-40.

tionaux d'atténuation des gaz à effet de serre et un *implementation gap* dans leur réalisation, a alerté sur le fait qu'il était probable que le plafond de limitation du réchauffement climatique à une hausse de 1,5°C des températures globales par rapport aux valeurs pré-industrielles soit dépassé au cours du XXIe siècle.[7] Il a ainsi pu être avancé qu'une des 'limites planétaires' serait dangereusement menace.[8]

Les conséquences de cette crise d'envergure planétaire, tout autant globales dans leur étendue et présentant une particulière gravité, sont aujourd'hui bien connues grâce aux nombreux travaux dédiés à la question.[9] Il est en effet admis que les changements climatiques perturbent l'environnement global, dérèglent les systèmes planétaires et menacent l'ensemble de la vie sur Terre, qu'elle soit humaine ou non-humaine. Différents impacts ont pu être imputés à ce phénomène, à l'image, entre autres, d'événements climatiques et météorologiques extrêmes tels que des sécheresses, des cyclones et des précipitations intenses, de la détérioration des écosystèmes, de l'aggravation de la mortalité de certaines espèces ou encore, dans une certaine mesure, d'un péril aggravé sur la vie humaine, la sécurité alimentaire, l'accès à l'eau, la santé mentale et

7. Intergovernmental Panel on Climate Change, Climate Change 2023: *Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva, IPCC, 2023, 10-11.

8. Sandrine Maljean-Dubois, 'La quête d'effectivité du droit international de l'environnement', in Delphine Misonne (dir.), *Actes du colloque en l'honneur de François Ost. À quoi sert le droit de l'environnement?* (Bruylant 2018) 2. Ces neuf 'planetary boundaries' ont été identifiées en 2009 par un groupe de scientifiques dirigé par Johan Rockström. La notion théorise un cadre pour penser le développement humain dans le respect des capacités de l'environnement global et du système terrestre. Voy. par exemple Johan Rockstrom et al., 'A safe operating space for humanity' (2009) *Ecology and Society,* Vol. 14, no. 2, art. 32, <<https://www.ecologyandsociety.org/vol14/iss2/art32/>>.

9. Voy. notamment le plus récent rapport, très exhaustif, du GIEC à ce sujet: 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* (CUP 2022) 3056.

les modes de vie.[10] Cette cartographie est d'autant plus alarmante qu'elle gagne en précision à mesure que les conséquences des changements climatiques sont concrètement ressenties par les populations, en témoignent par exemple les conclusions du GIEC sur les dommages au patrimoine culturel,[11] notamment celui des communautés indigènes et locales et des habitants des pays insulaires.[12]

Au surplus, la pression du réchauffement des températures mondiales s'est en particulier manifestée à travers un ensemble de bouleversements du milieu vulnérable que constituent les océans, en témoignent notamment des changements dans leur composition chimique, l'observation d›un phénomène d'acidification, le blanchissement des coraux, l'érosion côtière ou la hausse du niveau de la mer qui menace les zones côtières[13] – voire condamne des îles à la disparition.[14] Du fait de l'interconnexion des espaces et de la dépendance de l'Homme envers son environnement, ces conséquences menacent conséquemment les signifiants culturels, tant matériels qu'immatériels, liés à ces milieux côtiers et marins. Les exemples foisonnants à ce sujet sont régulièrement rappelés aux esprits, à

10. Ibid., 9-11.

11. Ibid., 69.

12. Ibid., 65.

13. Ibid.; Voy. par. ex. également Cinnamon P. Carlarne, 'Climate Change, Cultural Heritage & the Oceans: Rethinking Regulatory Approaches to Climate Change' (2009) *Southeastern Environmental Law Journal*, Vol. 17, no. 2, 278; Elena Perez-Alvaro, 'Climate change and underwater cultural heritage: Impacts and challenges' (2016) Journal of Cultural Heritage, 21, 842–843; Charlotte Beaucillon, 'Culture overboard! The climate shift of international cultural heritage law in the face of rising sea levels' (2022) Questions of International Law. Zoom out, 91, 68-69; James Harrison, 'Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime', in Ivano Alogna et al. (eds.), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021) 415; IPCC (n 9) 62; Eva U. Wagner (ed.), *Intangible Cultural Heritage within the Laws and Policies of South Pacific Small Island States in the Climate Crisis: Towards a More Resilient and Inclusive Approach* (Konrad Adenauer Stiftung 2023) 12-13.

14. Lyn Mettler, '13 Islands that Will Disappear in the Next 80 Years' (14 juin 2022) Readers Digest, <<https://www.rd.com/list/islands-will-disappear-80-years/>>.

l'image de la mise en péril de la Grande Barrière de corail face au réchauffement de la mer,[15] de Venise face à la montée des eaux,[16] des potentielles conséquences culturelles de la disparition des Maldives,[17] ou encore des pratiques d'agriculture et de pêche traditionnelles propres aux habitants des îles menacées d'être englouties.[18] À la confirmation de l'accélération de ce phénomène par les travaux des scientifiques, répondent les appels à une mobilisation urgente de la communauté internationale: le 27 août 2024, à l'occasion d'un sommet régional, le Secrétaire-général des Nations Unies Antonio Guterres a émis un 'SOS mondial' au sujet de la montée des eaux dans le Pacifique.[19] Il est aujourd'hui ainsi clairement établi que le milieu marin et les zones côtières font face à un péril imminent.

La menace climatique pesant sur les éléments culturels représente un enjeu préoccupant en ce qu'ils irriguent pleinement les sociétés humaines et en constituent un caractère essentiel. S'il s'avère indéniablement complexe de définir ces notions multidimensionnelles, la culture, qui englobe "[...] toutes les manifestations de l'existence

15. Harrison (n 13) 416; Miriam Pfeiffer, 'The Great Barrier Reef is warmer than ever' (2024) *Nature*, Vol. 632, 265-266.

16. Claudio Furlan, 'New study by Italian scientists predicts Venice will be underwater by 2150' (19 juin 2024) Euronews, <<https://www.euronews.com/green/2024/06/19/new-study-by-italian-scientists-predicts-venice-will-be-underwater-by-2150#:~:text=The%20scientists%20predict%20parts%20of,times%20between%202019%20and%202023>>.

17. Assemblée générale des Nations Unies, 10 octobre 2020, A/75/298 Annex, *International legal frameworks related to climate change, culture and cultural rights, and examples from submissions received*, 3.

18. Voy, par exemple, Rodrigo Camara-Leret et al., 'Climate change threatens New Guinea's biocultural heritage' (2019) Science Advances, Vol. 5, no. 11, 1-8.

19. Source AFP, 'Le chef de l'ONU lance un 'SOS mondial' sur la montée des eaux dans le Pacifique' (27 août 2024) Courrier international, <<https://www.courrierinternational.com/depeche/le-chef-de-l-onu-lance-un-sos-mondial-sur-la-montee-des-eaux-dans-le-pacifique.afp.com.20240827.doc.36eu9ze.xml>>.

humaine",[20] saurait se résumer à sa qualité de "[...] somme des produits spirituels et matériels d'une société", tandis que le patrimoine culturel, en tant que notion davantage juridique, se référerait plus précisément à "[...] un héritage matériel et immatériel, des éléments hérités du passé et considérés comme dignes d'être protégés et transmis aux générations suivantes".[21] Selon une approche non-restrictive, il désignerait largement le patrimoine naturel, culturel et immatériel et les considérerait de manière interconnectée.[22] Pour Fatima Bennoune, rapporteuse spéciale dans le domaine des droits culturels, il recouvrirait ainsi "[...] l'ensemble des ressources qui rendent possibles les processus d'identification et de développement culturels des personnes et des groupes et que ces derniers, de façon implicite ou explicite, veulent transmettre aux générations suivantes".[23] Les patrimoines culturels humains ne brillent pas seulement par leur richesse: ils pourraient également contribuer de manière déterminante à la gouvernance des changements climatiques, notamment en

20. Comité des droits économiques, sociaux et culturels, E/C.12/GC/21, 21 décembre 2009, *Observation générale no. 21. Droit de chacun de participer à la vie culturelle (art. 15, par. 1 a), du Pacte international relatif aux droits économiques, sociaux et culturels)*, §§11-13, 3-4. Pour le Comité, "[...] la culture comprend notamment le mode de vie, la langue, la littérature orale et écrite, la musique et la chanson, la communication non verbale, la religion ou les croyances, les rites et cérémonies, les sports et les jeux, les méthodes de production ou la technologie, l'environnement naturel et humain, l'alimentation, l'habillement et l'habitation, ainsi que les arts, les coutumes et les traditions, par lesquels des individus, des groupes d'individus et des communautés expriment leur humanité et le sens qu'ils donnent à leur existence, et construisent leur vision du monde représentant leurs rapports avec les forces extérieures qui influent sur leur vie".

21. Karolina Sikora, 'The Right to Cultural Heritage in International Law, with Special Reference to Indigenous Peoples' Rights' (2021) Santander Art and Culture Law Review, Vol. 7, no. 2, 151. L'auteure se réfère en langue originale à "[...] the sum of the spiritual and material outputs of a society" et à "[...] the legacy of tangible and intangible, pieces that were inherited from the past and are considered to be worth protecting and passing on to the next generations".

22. Noelle Higgings, 'Changing Climate; Changing Life – Climate Change and Indigenous Intangible Cultural Heritage' (2022) Laws, Vol. 11, no. 3, 3.

23. Assemblée Générale des Nations Unies, A/71/317, 9 août 2016, *Droits culturels*, §6, 4.

tant que vivier de bonnes pratiques et de solutions fondées sur la nature.[24] En ce sens, la menace climatique, en engendrant des pertes de patrimoine, risquerait non seulement d'appauvrir la diversité culturelle, mais également de priver l'humanité d'atouts non-négligeables.[25] Ainsi, l'appréhension des signifiants culturels par le droit international dans le contexte de cet enjeu global implique de considérer leur double nature passive et active, faisant de la culture un objet de protection et un outil actif de lutte climatique.[26]

Au-delà de ces constatations factuelles et des préoccupations qu'elles engendrent sur le plan de l'affect, la menace pesant sur le patrimoine côtier et marin s'érige comme un enjeu digne d'intérêt en raison de ses implications juridiques. Ces conséquences singulières des changements climatiques suscitent plusieurs questions de droit, à l'image de l'appréhension d'objets de protection dont la valeur ne saurait simplement être évaluée pécuniairement. Par ailleurs, alors que le modèle de l'État souverain et que le découpage du monde en territoires nationaux restent des paradigmes aujourd'hui, s'interroger sur la possibilité d'une gouvernance collective d'un enjeu global qui dépasse les frontières s'avère particulièrement d'actualité. Au-delà de ses implications matérielles, la menace

24. Voy. par exemple Wagner (n 13) 14. À ce sujet, il faut également se référer aux initiatives récentes que sont le Kashi Culture Pathway d'août 2023 du G20 et à la réunion, à l'occasion de la COP28, du premier dialogue organisé au sujet de l'action climatique fondée sur la culture, ayant abouti à une "Emirates Declaration on Cultural-based Climate Action".

25. Emirates Declaration on Cultural-based Climate Action, 8 décembre 2023, 3; Adam Markham, 'COP28 Took Steps Toward Safeguarding Cultural Heritage from Climate Change' (3 janvier 2024) The Equation, <<https://blog.ucsusa.org/adam-markham/cop28-took-steps-toward-safeguarding-cultural-heritage-from-climate-change/>>.

26. L'essence duale de la culture dans le contexte de la crise climatique a été réaffirmée à l'occasion de la cinquième réunion des parties à l'Accord de Paris, ayant abouti à l'adoption d'un cadre général sur l'adaptation identifiant la protection du patrimoine culturel parmi les objectifs clés en la matière. Voy. Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, FCCC/PA/CMA/2023/L.18, *Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation referred to in decision 7/CMA.3*, 13 décembre 2023, 3.

climatique est aussi une véritable crise de justice. En effet, ceux qui en subiront principalement les effets sont aussi ceux qui y ont le moins contribué, et qui manquent de capacités et de moyens pour y faire face. En ce sens, toute étude sur les conséquences endurées par le patrimoine culturel dans un tel contexte est aussi une réflexion sur la justice climatique.[27] Le souci de la protection de ces signifiants culturels chers aux communautés humaines conduit ainsi à explorer les voies potentielles pour que, dans un système juridique internationalisé qui tend par principe à le mettre à l'écart, le justiciable directement lésé recherche la justice face aux écueils de réalisation du droit.

La pratique récente des relations internationales révèle la volonté des États d'appréhender par le droit les enjeux globaux les plus pressants, en témoignent le succès célébré du cadre international de protection de la couche d'ozone ou les négociations en cours au sujet de la pollution plastique. Cependant, force est de constater que ni les implications de la montée du niveau de la mer et de l'acidification,[28] ni la menace climatique pesant sur les signifiants culturels n'ont bénéficié d'un tel traitement. En effet, si la communauté internationale a pris conscience de la menace que

27. La justice climatique est une notion vaste qui ne fait l'objet, à ce jour, d'aucune définition d'autorité par une institution internationale. Elle peut être définie comme un processus. Le Conseil international des monuments et des sites (ICOMOS) y voit une action "[…] centrée sur l'humain, qui préserve les droits des plus vulnérables, tienne compte des besoins des personnes les plus à risque, en particulier les plus pauvres et les plus vulnérables et répartisse les efforts et les avantages relatifs au changement climatique et à sa résolution de manière équitable et juste". Voy. à ce sujet Sheridan Burke et al. (dir.), *L'avenir de notre passé: Engager le patrimoine culturel dans l'action pour le climat* (ICOMOS 2019) 20. Elle peut aussi être définie à l'aune de sa finalité: "[…] guider nos principaux arrangements sociaux, économiques et politiques face à la gestion des risques environnementaux causés par les changements climatiques". Voy. à ce sujet Marta Torre-Schaub, 'Justice et justiciabilité climatique: état de lieux et apports de l'Accord de Paris', in Marta Torre-Schaub et Mireille Delmas-Marty (dir.), *Bilan et perspectives de l'Accord de Paris (COP 21). Regards croisés* (IRJS Editions 2017) 107.

28. Tim Stephens, 'Climate change adaptation in marine and coastal areas and international law', in Jonathan Verschuuren (ed.), *Research Handbook on Climate Change Adaptation Law* (Edward Elgar 2022) 265-266 et 274.

représentent les changements climatiques pour le patrimoine côtier et marin, il ne saurait être ignoré que ces questions ne font toutefois l'objet d'aucun instrument international dédié à ce jour. Cette observation ne saurait toutefois condamner au défaitisme. En effet, l'histoire contemporaine regorge d'exemples démontrant la capacité des États, dans l'attente de développements normatifs spécifiques, à adresser spontanément les nouveaux enjeux globaux en s'appuyant sur le droit existant – à l'image, par exemple, de l'appréhension possible de la géoingénierie solaire,[29] ou encore de la migration climatique.[30] En ce sens, l'absence de norme dédiée face à un enjeu pour la communauté internationale ne signalerait aucunement un vide juridique et ne saurait être un aveu d'impuissance. Ainsi, l'analyse du cadre juridique applicable aux éléments culturels dans le contexte de la crise climatique constitue une perspective digne d'intérêt en ce qu'elle contribuerait à penser une gouvernance plus pertinente de la question et à déployer davantage de volonté pour y faire face. Par ailleurs, l'étude pourrait nourrir la réflexion théorique générale sur l'ordre juridique international, ses failles révélées, notamment, par la difficulté d'obtenir le consensus des États pour organiser la coopération internationale, et sa capacité à dépasser ces écueils. Elle conduirait potentiellement, enfin, à considérer des perspectives d'évolution de l'ordre juridique international pour le rendre plus adéquat face aux urgences de notre temps, ainsi que des hypothèses de développement normatif pour étendre la justice climatique aux signifiants culturels. En ce sens, s'attarder sur cet enjeu précis serait potentiellement porteur pour penser le droit international et la manière dont il saisit les problématiques

29. Voy. notamment Jesse L. Reynolds, *The Governance of Solar Geoengineering: Managing Climate Change in the Anthropocene* (CUP 2019) 250. Tel est aussi le cas de l'enjeu de la migration climatique, une question saisie par la *lex lata*.

30. Voy. notamment Caitlan M. Sussman, 'A Global Migration Framework Under Water: How Can the International Community Protect Climate Refugees?' (2023) Chicago Journal of International Law, Vol. 2, no. 1, 41-68.

d'envergure planétaire. L'étude de ce cadre normatif présent et potentiel présente ainsi un certain intérêt.

Manifestement, l'analyse du cadre juridique pertinent conduit à un constat nuancé. Si un vaste patchwork de normes internationales et domestiques s'applique au patrimoine culturel côtier et marin dans le contexte des changements climatiques (Section 2), sa mobilisation ne saurait suffire pour assurer une justice climatique à l'égard des signifiants culturels, et des développements normatifs additionnels s'avèrent nécessaires (Section 3).

2. L'identification possible d'un cadre normatif applicable à la protection du patrimoine côtier et marin face aux changements climatiques

Une vision d'ensemble des normes applicables au cas des signifiants culturels côtiers et marins menacés par les conséquences de la crise climatique conduit à constater que le droit international est assurément outillé pour garantir leur protection. En effet, non seulement il présente un patchwork de sources d'obligations pour exiger une certaine conduite diligente des États (Section 2.1), mais il fournit un ensemble de fondements juridiques solides pour tenir les émetteurs responsables de leurs actions dommageables et rechercher des réparations pour les préjudices subis par le patrimoine culturel côtier et marin (Section 2.2).

2.1 Le droit international au service de la protection de la culture côtière et marine face à la crise climatique

Du fait de la diversité de celui-ci et de ses liens indissociables avec l'humain et son environnement, la protection du patrimoine culturel côtier

et marin face aux changements climatiques peut reposer sur un panel de normes internationales particulièrement large et hétéroclite, applicables au patrimoine culturel, que Clémentine Bories a qualifié de "puzzle d'obligations".[31] Cette vision maximaliste du droit applicable émane d'une certaine lecture du droit international qui tendrait à préconiser l'application conjointe et harmonieuse des diverses sources pertinentes.[32] S'il serait trop ambitieux de prétendre, dans le cadre de la présente étude, appréhender ce patchwork de manière exhaustive, une simple vision d'ensemble de ces perspectives conduit à plusieurs constats.

L'analyse des normes applicables à toute question intéressant le patrimoine culturel implique de considérer celles qui abordent spécifiquement ces questions. En raison de leurs champs d'application spatiaux et matériels disparates, elles semblent toutefois n'offrir qu'une protection inégale et incomplète des signifiants culturels, faute de convention globale les abordant sans distinction. À titre d'exemple, la Convention concernant la protection du patrimoine mondial, culturel et naturel prévoit, à travers l'inscription sur la liste du Patrimoine mondial, l'octroi potentiel d'un statut particulier exigeant une protection renforcée et offrant l'accès à certaines procédures d'assistance technique et financière.[33] La désigna-

31. Clémentine Bories, *Le patrimoine culturel en droit international* (Pedone 2011) 251-252.

32. Cette position se réfère à la notion d'intégration systémique, une question clé en matière de droit du changement climatique qui saurait s'étendre à la présente étude. Voy. à ce sujet Monica Feria-Tinta, 'The master key to international law: systemic integration in climate change cases' (2024) Cambridge International Law Journal, Vol. 13, no. 1, 2024, 20-40. L'idée de l'applicabilité intégrée d'un ensemble de sources applicables, au-delà du seul droit climatique, a été au coeur des débats organisés dans le cadre de la procédure d'avis consultatif devant la Cour internationale de justice. Voy. par ex. la position de la Colombie: Republic of Colombia, *Written Comments of the Republic of Colombia*, 14 août 2024, §3.66, 37. L'avis sur les obligations internationales des États en matière de changements climatiques doit être rendu dans le courant de l'année 2025.

33. Convention concernant la protection du patrimoine mondial, culturel et naturel, adoptée le 16 novembre 1972, entrée en vigueur le 17 décembre 1975. Voy. notamment les articles 11, 13, 19, 20, 22. Pour une analyse approfondie du contenu de ladite Convention, voy. Francesco Francioni et Federico Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary* (OUP 2023) 480.

tion comme sites du patrimoine mondial des zones et éléments côtiers et marins menacés par la crise climatique serait de ce fait un levier pertinent pour renforcer la protection de ces signifiants culturels chers à l'humanité et particulièrement menaces.[34] En outre, le fait que l'UNESCO explore l'inscription potentielle sur la Liste du Patrimoine mondial de sites situés en haute mer constitue une perspective prometteuse.[35]

Si les États parties à cette Convention ont oeuvré pour intégrer la question climatique dans ce regime,[36] celui-ci accuse néanmoins de profondes lacunes et ne saurait appréhender la menace pesant sur le patrimoine culturel de manière satisfaisante. Le pragmatisme et le manque de moyens de protection imposent de restreindre le nombre de sites protégés. Or, ladite liste révèle une sur-représentation du patrimoine occidental et une vision universaliste occultant le patrimoine local et indigene,[37] ce qui exclut de ce régime protecteur un ensemble de biens ne correspondant pas à la vision autorisée et nuit à la protection effective de toutes les formes d'expression Culturelle.[38] En outre, parce que le Comité du Patrimoine mondial reste un organe intergouvernemental dominé par

34. Lucy Wiggings, 'Existing Legal mechanism to Address Oceanic Impacts from Climate Change' (2007) Sustainable Development Law & Policy, Vol. 7, Issue 2, 24.

35. Francesco Francioni, 'World Cultural Heritage', in Francesco Francioni et Ana Filipa Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law* (OUP 2020) 253; UNESCO, *Brochure de synthèse. Le patrimoine mondial en haute mer: Une idée qui fait son chemin* (UNESCO 2021) 12.

36. Voy. notamment Comité du Patrimoine mondial, HC/23/24.GA/INF.8, *Updated Policy Document on Climate Action for World Heritage*, 3 novembre 2023, 35. Un World Heritage Programme for Small Islands Developing States a également été établi en 2005: Comité du Patrimoine mondial, WHC-05/29.COM/22, *Decisions of the 29th Session of the World Heritage Committee (Durban, 2005),* 10-17 juillet 2005, 220.

37. Sikora (n 21) 152.

38. Costanza Rizzetto, 'Which Protection Against the Destruction of the Cultural Heritage of 'Non Outstanding Universal Value ? A Critical Analysis of the World Heritage Convention Framework in the Light of the Recent Iconoclastic Propaganda', in Ana Gemma Lopez Martin et al. (eds.), *Forever Young: Celebrating 50 Years of the World Heritage Convention* (Mucchi 2023) 210-211.

les représentants nationaux, les tentatives de discussions sur la question climatique, notamment l'inscription d'un site sur la Liste du Patrimoine en danger, sont neutralisées ou repoussées par le biais de tractations politiques,[39] entravant ainsi toute perspective de protection des sites côtiers et marins à valeur universelle exceptionnelle.

Les limites du champ *ratione materiae* de cet instrument majeur du droit international du patrimoine ont été appréhendés par l'adoption de la Convention pour la sauvegarde du patrimoine culturel immatériel, qui pose les bases d'un cadre juridique destiné à soutenir la préservation des éléments culturels vivants et présentant une valeur significative pour des communautés locales.[40] Cependant, non seulement les limites structurelles et procédurales des mécanismes établis et le manque de moyens d'assistance technique et financière amenuisent grandement l'efficacité de cette protection,[41] mais le régime n'a, de surcroît, connu que de timides développements face à l'enjeu climatique, les travaux en la matière n'ayant pas produit d'outils opérationnels dont les parties pourraient se saisir.[42] Tel est également le cas de la Convention sur la protection et la promotion de la diversité des expressions culturelles, dont les lacunes substantielles et le manque de caractère contraignant ont été déplorées.[43] Par ailleurs, si la Convention sur la protection du patrimoine culturel

39. Ellen Hawkins et Anna Huggings, 'Climate change litigation before the World Heritage Committee: subject to negotiation?', in Francesco Sindico et al. (eds.), *Research Handbook on Climate Change Litigation* (Edward Elgar 2024) 305-306.

40. Sikora (n 21) 152.

41. Voy. par exemple Ahmed Skounti, 'The Intangible Cultural Heritage System: Many Challenges, Few Proposals' (2017) Santander Art and Culture Law Review, Vol. 3, no. 2, 74.

42. UNESCO Expert meeting on safeguarding intangible cultural heritage and climate change, 14 juin 2024, *Policy frameworks on living heritage in the climate emergency* (LHE/24/EXP THEMA-CLIMA/4e) 7.

43. Mira Burri, 'The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force' (2013) International Journal of Cultural Property, Vol. 20, no. 4, 358.

subaquatique pourrait offrir des perspectives de protection pour le patrimoine culturel condamné à la submersion en raison de la montée du niveau de la mer,[44] cet instrument reste faiblement ratifié et présente un champ d'application restreint, limité aux objets archéologiques et historiques subaquatiques.[45] Aucun de ces instruments conventionnels n'appréhende, à ce jour, la question spécifique de la protection du patrimoine culturel face aux conséquences des changements climatiques qui menacent son environnement. Enfin, un consensus doctrinal semble bien établi au sujet de l'absence d'obligation coutumière de protection générale du patrimoine en temps de paix.[46]

Le paysage normatif de la protection des expressions culturelles en droit international révèle ainsi une fragmentation sur le plan formel et des limites substantielles. Il ressort en effet de cette vision panoramique non-exhaustive que ces normes indiqueraient davantage de devoirs en matière d'identification du patrimoine que d'exigences précises de protection concrète de celui-ci. Pour Clémentine Bories, il serait possible de distinguer entre les composantes d'un "volet préventif détaillé et relativement complet" et les éléments relevant davantage du domaine 'défensif', qui forment quant à eux un ensemble éclectique, peu contraignant,

44. Elena Perez-Alvaro, 'Climate change and underwater cultural heritage: Impacts and challenges' (2016) Journal of Cultural Heritage, 21, 845.

45. Antoine Maniatis, 'La Convention sur la protection du patrimoine culturel subaquatique' (2023) Neptunus, Vol. 29, no. 1, 1-9.

46. Le débat reste ouvert au sujet de l'existence d'une potentielle norme coutumière interdisant la destruction intentionnelle du patrimoine culturel en temps de paix. Pour certains auteurs, une obligation embryonnaire serait en train d'émerger. Voy. notamment: Ana Filipa Vrdoljak, 'Intentional Destruction of Cultural Heritage and International Law', in Kalliopi Koufa (ed.), *Multiculturalism and International Law. XXXV Thesaurus Acroasium* (Sakkoulas Publications 2007) 377-396; Francesco Francioni, 'Au-delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel' (2008) *EUI Working Papers*, LAW 2008/05, 19. *Contra:* voy. notamment Niccolò Lanzoni, 'The World Heritage Convention, Customary International Law and the Scope of Protection of Cultural Heritage in Peacetime', in Ana Gemma Lopez Martin et al. (n 38) 281-320.

relevant principalement du droit souple, n'instituant pas de règles en matière de responsabilité et laissant une grande souplesse aux États dans leur action territoriale.[47] Le cadre de protection des éléments culturels face aux menaces pesant sur eux et leur promotion comme atout pour le développement humain resteraient ainsi en cours de construction.[48]

La spécificité de l'enjeu global que représente la crise climatique appelle à considérer l'applicabilité du droit international de l'environnement. En effet, parce que le patrimoine culturel humain est fondamentalement inscrit dans son environnement naturel et nécessite la préservation des espèces vivantes et des espaces associés,[49] il bénéficie par ricochet de tout cadre de protection en la matière. En toute logique, les obligations de diligence opposables aux États dans le cadre du régime climatique et exigeant entre autres, qu'ils veillent à atténuer leurs émissions de gaz à effet de serre et à s'adapter face aux conséquences de ce phénomène,[50] voire à rendre compte d'un certain degré d'ambition et d'une forme de progression dans ces poursuites,[51] contribueraient à la préservation de la culture humaine en ce qu'elles constituent autant de mesures environnementales à portée globale. S'il est crucial de protéger le milieu marin et les zones côtières face à la crise climatique s'intensifiant, cet enjeu reste toutefois largement inexploré par cette branche spécifique du droit international.[52]

47. Bories (n 31) 197-198; Patrizia Vigni, 'Cultural Heritage and State Responsibility', in Francioni et Vrdoljak (n 35) 605-611.

48. Bories (n 31) 197-198.

49. Wagner (n 13) 78.

50. Voy. notamment CCNUCC, article 4; Accord de Paris, article 4 et article 7.

51. Christina Voigt, 'State responsibility for damages associated with climate change', in Meinhard Doelle et Sara L. Seck (eds.), *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar 2021) 172-176.

52. Il s'agit de l'une des lacunes de la CCNUCC. Force est de constater que cette conclusion vaut encore aujourd'hui à l'ère de l'Accord de Paris, dont la seule mention des océans et du milieu marin figure en préambule. Le régime s'étend très peu sur la question de l'adaptation et de la montée du niveau de la mer. Voy. Carlarne (n 13) 278; Stephens (n 28) 255.

Des travaux précurseurs ont avancé que les dispositions de la partie XII de la Convention des Nations Unies sur le droit de la mer (CNUDM), servant l'objectif de la protection du milieu marin et de la prévention de sa pollution, pouvaient être interprétées comme des devoirs de limitation des émissions de gaz à effet de serre, et qu'ils ouvraient de surcroît le champ à une invocation de l'article 235 sur la responsabilité internationale des signataires en cas de manquement.[53] La préoccupation à l'égard du patrimoine côtier et marin pourrait également émaner d'accords régionaux dédiés au littoral et aux aires marines ainsi que, plus généralement, du principe coutumier exigeant des États de faire preuve de diligence pour prévenir tout potentiel dommage transfrontière.[54] En somme, le droit international de l'environnement actuel, qui n'offre aucun instrument ni aucune règle coutumière apte à exiger une protection générale et holistique de l'environnement saisi dans son entièreté et se caractérise par sa compartimentalisation, offre un patchwork complexe de normes aptes à soutenir l'appréhension du patrimoine culturel côtier et marin dans le contexte des changements climatiques.

Par ailleurs, le droit international des droits de l'homme s'impose comme une base normative incontournable pour renforcer la protection de la culture humaine face à la crise climatique. Comme le souligne Janet Blake, il constitue le seul domaine de droit international où les États ont accepté une limitation de souveraineté et des obligations contraignantes pour permettre une régulation internationale s'interposant entre les États

53. Carlarne (n 13) 285-287; Harrison (n 13) 417-418, 426-427 et 431.

54. Les travaux ayant avancé cette position sont nombreux. Voy. par exemple Jacqueline Peel, 'The Practice of Shared Responsibility in relation to Climate Change' (2015) SHARES Research Paper Series, no. 71, 18-19; Joie Chowdhury et al., *International Court of Justice. Obligations of States in Respect of Climate Change (Request for Advisory Opinion). Written Statement Submitted by the Center for International Environmental Law (CIEL), Center for International Environmental Law. Memorandum on the Legal Consequences for States of Internationally Wrongful Acts Causing Harm to the Climate System* (CIEL 2024) 16, 24 et 32; Benoit Mayer, 'Climate Reparations' (2024) Nevada Law Journal, Vol. 24, no. 3, 995-996.

et les citoyens.[55] Ces instruments auraient un rôle déterminant à jouer en ce qu'ils imposent des standards de protection aptes à soutenir une action climatique ambitieuse.[56] En dépit du fait qu'ils ne le mentionnent pas explicitement, le patrimoine culturel bénéficierait de leur protection.[57] Ainsi, la garantie de la liberté de participation à la vie culturelle, exigée par l'article 15 du Pacte international relatif aux droits économiques, sociaux et culturels,[58] est un atout déterminant pour la protection du patrimoine côtier et marin. En effet, elle implique des obligations négatives comme positives aptes à exiger des signataires qu'ils ne nuisent pas aux signifiants culturels de leur territoire national et prennent des mesures actives pour les préserver.[59] Pour Clémentine Bories, cette norme précise créerait ainsi une base juridique additionnelle de protection du patrimoine, qui bénéficierait à tous les signifiants culturels sans distinction,[60] et constituerait en ce sens un véritable "droit de l'homme syncrétique" au service d'une protection globale de la culture.[61] Au surplus, cette protection des signifiants culturels a pu être renforcée au niveau régional par la consécration

55. Janet Blake, 'Taking a Human Rights Approach to Cultural Heritage Protection' (2011) Heritage and Society, Vol. 4, no. 2, 231.

56. Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (Hart 2019) 97-98.

57. Francesco Francioni et Lucas Lixinski, 'Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage', in Andrea Durbach et Lucas Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart 2017) 18. Pour une vision d'ensemble exhaustive des dispositions de droit international des droits de l'homme en matière de droits culturels, voy. Wewerinke-Singh (n 56) 113.

58. Pacte international relatif aux droits économiques, sociaux et culturels, adopté le 16 décembre 1966, entré en vigueur le 3 janvier 1976, article 15.

59. Comité des droits économiques, sociaux et culturels, E/C.12/GC/21, *Observation générale no. 21. Droit de chacun de participer à la vie culturelle (art. 15, par. 1 a), du Pacte international relatif aux droits économiques, sociaux et culturels*, 21 décembre 2009, §50, p. 14; Yvonne Donders, 'Cultural Heritage and Human Rights', in Francioni et Vrdoljak (n 35) 393-394.

60. Bories (n 31) 236.

61. Ibid., 217.

de droits culturels dans le cadre du système interaméricain et du système africain de protection des droits de l'homme.[62] Quant à la reconnaissance générale d'un droit spécifique au patrimoine culturel, elle reste embryonnaire et non opérationnelle. Ni l'adoption de la Convention de Faro – proclamant un droit au patrimoine culturel dont ne peuvent toutefois se saisir les justiciables,[63] ni les rapports des rapporteuses spéciales des Nations Unies dans le domaine des droits culturels – se limitant à constater que la protection des droits culturels implique celle du patrimoine culturel et que ce droit hypothétique se traduirait juridiquement à travers d'autres,[64] ne sauraient suffire à assoir une telle norme.[65]

Par ailleurs, certains signifiants culturels bénéficient, à travers le truchement d'instruments dédiés de droit international des droits de l'homme, d'une protection renforcée face aux conséquences du changement climatique. Le droit international des droits de l'homme comprend en effet une prise en compte spécifique des droits des individus et groupes particulièrement vulnérables. Tel est le cas des minorités, dont l'accès à leur culture propre est pris en compte par l'article 27 du Pacte international relatif aux droits civils et politiques,[66] interprété par le Co-

62. Convention interaméricaine relative aux droits de l'homme, adoptée le 22 novembre 1969, entrée en vigueur le 18 juillet 1978, article 26; Protocole additionnel de la Convention américaine des droits humains, adopté le 17 novembre 1988, entré en vigueur le 16 novembre 1999, article 14 ; Charte africaine des droits de l'homme et des peuples, adoptée le 27 juin 1981, entrée en vigueur le 21 octobre 1986, article 17.

63. Yvonne Donders, 'Protection and promotion of cultural heritage and human rights through international treaties: two worlds of difference?', in Charlotte Waelde et al. (eds.), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Edward Elgar 2018) 54-77.

64. Conseil des droits de l'homme, A/HRC/17/38, *Rapport de l'Experte indépendante dans le domaine des droits culturels, Mme Farida Shaheed*, 21 mars 2011, §21, 8; Assemblée Générale des Nations Unies, A/71/317, *Droits culturels*, 9 août 2016, §14, 7.

65. Sikora (n 21)159.

66. Pacte international relatif aux droits civils et politiques, adopté le 16 décembre 1966, entré en vigueur le 23 mars 1976, article 27.

mité des droits de l'homme comme posant, à l'égard des minorités et, par conséquent, des autochtones, une obligation négative de ne pas interférer de manière injustifiée avec leur culture et une obligation positive d'adopter des mesures pour garantir sa protection.[67] La culture d'une minorité particulière, les peuples autochtones, jouit par ailleurs, à travers l'article 31 de la Déclaration des Nations unies sur les droits des peuples autochtones, d'une protection renforcée de par la reconnaissance de leurs droits propres et implique des obligations additionnelles pour les États.[68] Tel est aussi le cas des enfants, dont les intérêts sont particulièrement protégés par la Convention internationale des droits de l'enfant dont l'article 3 exige à titre général des signataires qu'ils prennent en compte "l'intérêt supérieur de l'enfant" comme "considération primordiale" dans l'appréhension de toute question les concernant, et l'article 31 qu'ils protègent leur droit de participer à la vie culturelle.[69]

En outre, au-delà de sa protection *per se*, la culture humaine bénéficie de la couverture juridique d'autres droits fondamentaux. Parce qu'elle est fondamentalement inscrite dans la nature, elle serait protégée à travers le droit des justiciables à un environnement sain, qui s'érige comme un fondement pour revendiquer la garantie de la préservation d'un environnement où les populations humaines peuvent jouir de leurs droits

67. Bories (n 31) 242-243; Donders (n 59) 396; Sikora (n 21) 166.

68. Bories (n 31) 244-245; Donders (n 59) 396. Voy. Assemblée générale des Nations Unies, 61/295, *Déclaration des Nations unies sur les droits des peuples autochtones*, 13 septembre 2007, 9.

69. Voy. Convention internationale des droits de l'enfant, adoptée le 20 novembre 1989, entrée en vigueur le 2 septembre 1990, articles 3 et 31. L'article 3 a été interprété comme affirmant un standard à considérer dans la prise de décision et fondant une obligation procédurale: Francesca Ippolito, 'The best interests of the child: Another string to the environmental and climate protection bow?' (2022) Questions of International Law, Vol. 89, 9-10. Il a également été considéré comme base de protection juridique face aux menaces environnementales et climatiques: voy. Comité des droits de l'enfant, CRC/C/GC/26, 22 août 2023, *Observation générale no. 26 (2023) sur les droits de l'enfant et l'environnement, en mettant l'accent sur le changement climatique*, §§16-19, 3.

culturels.[70] Ce droit subjectif est assis juridiquement au niveau régional interaméricain et africain, mais sa diffusion dans les ordres européens et universels reste en construction.[71] Les champs d'application vastes d'autres droits fondamentaux, tels que le droit à la vie privée, le droit à l'autodétermination ou encore le droit à la liberté d'expression, en font également des sources additionnelles pertinentes pour exiger des États un comportement protecteur à l'égard des signifiants culturels côtiers et marins.[72]

La protection du patrimoine culturel côtier et marin par cette branche du droit international dans le contexte de la crise climatique n'est pas qu'une perspective théorique. En effet, les récente avancées en matière de contentieux climatique à travers le monde témoignent de la propension des organes juridictionnels et quasi-juridictionnels, internes comme internationaux, à identifier des manquements aux obligations de droit international des droits de l'homme protégeant la culture humaine. Tant la position du Comité des droits de l'homme dans l'affaire des Iles Torres que la récente acceptation, par les juridictions néerlandaises, de la requête des insulaires de Bonaire augurent de futurs développements positifs.[73]

70. Wagner (n 13) 19.

71. Au niveau universel, le droit à un environnement sain n'a été affirmé que par deux résolutions du système onusien qui, en tant qu'instruments recommandataires et de droit souple, ne sauraient engendrer d'obligations contraignantes pour les États. Voy. Conseil des droits de l'homme, A/HRC/RES/48/13, *Droit à un environnement propre, sain et durable*, 8 octobre 2021, 4; Assemblée générale des Nations Unies, A/77/226, *Promotion et protection des droits humains dans le contexte des changements climatiques*, 26 juillet 2022, 27.

72. Francioni et Lixinski (n 57) 18; Donders (n 59) 397-398.

73. Comité des droits de l'homme, CCPR/C/135/D/3624/2019, *Daniel Billy et al. v. Australia,* 23 septembre 2022; Cour de district de La Haye, *Greenpeace Netherlands and 8 citizens of Bonaire v. The Netherlands*, 25 septembre 2024. Pour des éléments de commentaire à ce sujet, voy. par ex. Riccardo Luporini, 'Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case)' (2023) The Italian Review of International and Comparative Law, Vol. 3, no. 2, 238-259; Greenpeace Netherlands, 'Climate case of bonaire residents and Greenpeace against the Dutch State moves on' (25 septembre 2024).

Enfin, parce que la mise en œuvre du droit international environnemental et de sa branche climatique en particulier reposent principalement sur les initiatives normatives de l'État, le rôle déterminant des sources de droit national ne saurait être occulté. Les lois et règlements adoptés pour soutenir une politique environnementale et climatique et encadrer l'action des personnes privées constituent autant de fondements de protection pertinents – une vaste palette de normes domestiques que la présente étude ne saurait avoir la prétention d'aborder avec exhaustivité.

Il ressort de cette analyse d'ensemble que l'ordre juridique international présente un patchwork de normes habilitées à contribuer à la protection de la culture humaine dans le contexte de la crise climatique. Comme l'a résumé Clémentine Bories, l'ensemble du droit international applicable à la préservation du patrimoine, à travers les obligations pesant sur les États à l'égard des signifiants culturels sis sur leurs territoires nationaux respectifs, établit ainsi un cadre étendu de manière à saisir un vaste ensemble d'objets de protection.[74] La multiplicité des fondements invocables ne saurait toutefois masquer les écueils substantiels du droit international applicable à la question du patrimoine culturel côtier et marin.

Manifestement, un cadre de protection – aussi critiquable soit-il – existe et lie les États par des obligations de lutte contre le changement climatique et de protection des signifiants culturels. Néanmoins, l'ambition n'est pas au rendez-vous, et il est évident que les pertes culturelles seront inévitables. Ainsi se pose la question de l'existence de potentiels outils juridiques à mobiliser pour attribuer les responsabilités à l'égard des dommages issus de ces échecs.

74. Bories (n 31) 255.

2.2 La mobilisation envisageable du droit international pour la réparation des pertes et préjudices climatiques de culture côtière et marine

Les dynamiques de développement normatif propres à l'ordre juridique international, reposant sur la volonté des États souverains de s'engager dans des accords contraignants, ouvrent un vaste champ de possibilités pour qu'ils organisent leurs relations interétatiques et la gouvernance des enjeux globaux. Il est ainsi tout à fait envisageable que ceux-ci établissent des cadres spécifiques pour traiter de la distribution des responsabilités et des charges en matière de réparation. Le droit international de l'environnement, face à la complexité de la réparation de certains préjudices environnementaux spécifiques, comme ceux issus des activités nucléaires ou du transport des hydrocarbures, a été le cadre du développement de tels régimes de responsabilité.[75] En exigeant des signataires qu'ils établissent dans leur ordre national un cadre pour organiser la responsabilité des opérateurs, ces régimes spécifiques ont permis de réparer de manière pragmatique et simplificatrice les dommages subis du fait des conséquences de certaines activités humaines dangereuses à l'égard de l'environnement, notamment en fixant des plafonds d'indemnisation, en instaurant une garantie étatique pour pallier l'insolvabilité potentielle de l'exploitant et en établissant des fonds de compensation.[76]

75. Voy. notamment: Convention de Paris sur la responsabilité civile dans le domaine de l'énergie nucléaire, adoptée le 29 juillet 1960; Convention de Vienne relative à la responsabilité civile en matière de dommages nucléaires, adoptée le 21 mai 1963, entrée en vigueur le 12 novembre 1977; Convention internationale sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures, adoptée le 29 novembre 1969, entrée en vigueur le 19 juin 1975; Convention internationale sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures, adoptée le 27 novembre 1992, entrée en vigueur le 30 mai 1996; Convention portant création du Fonds, adoptée le 27 novembre 1992, entrée en vigueur le 30 mai 1996.

76. Birsha Ohdedar, 'Loss and damage from the impacts of climate change: A framework for implementation' (2016) Nordic Journal of International Law, Vol. 85, no. 1, 32-34; Jason Rudall, *Compensation for Environmental Damage Under International Law* (Routledge 2020) 51-57.

La considération de telles perspectives s'impose naturellement face à la complexité de l'appréhension des conséquences de la crise climatique, notamment celles liées à la montée du niveau de la mer. Pourtant, malgré ces enseignements tirés de la pratique et du paysage juridique international en général, signalant qu'un tel modèle serait pertinent pour saisir les conséquences de la crise climatique,[77] il n'existe aucun instrument posant la responsabilité des opérateurs ou celle des États.[78] De manière plus générale, les pertes et préjudices climatiques et, plus particulièrement, les conséquences de la montée des eaux, ne font l'objet d'aucune règle de *lex specialis* à ce jour pour organiser la responsabilité et la réparation.[79] Si l'Accord de Paris a introduit la question à son article 8, cette disposition ne fonde aucune obligation contraignante pour les parties d'appréhender les pertes et préjudices climatiques et ne revient ainsi pas sur l'approche réservée de l'article 4.4 de la Convention-cadre des Nations Unies sur les changements climatiques (CCNUCC).[80] Elle affirme seulement, par des formules peu exigeantes sur le plan de la contrainte, que les signataires "devraient améliorer la compréhension, l'action et l'appui" au sujet des pertes et préjudices, et propose, en lieu et place de voies juridictionnelles, un mécanisme de coopération multilatérale – le Mécanisme international de Varsovie.[81] Par ailleurs, l'introduction de ce

77. Ibid., 31-32.

78. Sandrine Maljean-Dubois, 'Climate Change Litigation' (2018) *Max Planck Encyclopedia of Procedural Law*, §§9-10.

79. Peel (n 54) 23. L'auteure insiste particulièrement sur la pauvreté du régime climatique en matière de responsabilité. Wewerinke-Singh (n 56) 67-68.

80. Ce constat a été largement souligné par les travaux des auteurs. Voy. notamment Maljean-Dubois (n 78); Florentina Simlinger et Benoit Mayer, 'Legal Responses to Climate Change Induced Loss and Damage', in Reinhard Mechler et al. (eds.), *Loss and damage from climate change: Concepts, methods and policy options* (Springer 2019) 196.

81. Accord de Paris sur le climat, adopté le 12 décembre 2015, entré en vigueur le 4 novembre 2016, article 8.

nouveau pilier d'action climatique a été accompagnée par la formulation, dans la décision de COP adoptant l'Accord de Paris, d'une sorte de 'réserve' générale pour les signataires, précisant que l'article 8 "ne peut donner lieu ni servir de fondement à aucune responsabilité ni indemnisation".[82] En ce sens, l'appréhension des pertes et préjudices par le droit international climatique se rapprocherait davantage d'un cadre de partage de bonnes pratiques et de supervision souple des actions nationales pour prendre en compte les conséquences des changements climatiques que d'un régime apte à appréhender les responsabilités et les réparations revendiquées.[83]

Nonobstant la réserve exprimée par l'Accord de Paris au sujet de la responsabilité climatique, une certaine interprétation de l'article 8 et de la décision d'adoption de l'Accord, tendant à les mettre en lien avec le traité dans son ensemble et le contexte plus vaste de l'ensemble du paysage normatif international, conduit à envisager l'hypothèse de l'application d'autres régimes et principes de droit international pour organiser l'allocation des responsabilités. Tant les travaux de la doctrine internationaliste que les déclarations des États formulées à l'occasion de la ratification des accords climatiques – entendant préserver leur possibilité de recourir à d'autres sources de droit pour réclamer des réparations – confirment qu'une telle interprétation, tendant à rechercher une lecture harmonieuse des normes internationales, est tout à fait défendable face à l'ambiguïté du régime conventionnel climati-

82. Convention-cadre sur les changements climatiques. Conférence des parties, FCCC/CP/2015/10/Add.1, 29 janvier 2016, *Rapport de la Conférence des Parties sur sa vingt et unième session, tenue à Paris du 30 novembre au 13 décembre 2015. Additif. Deuxième partie: Mesures prises par la Conférence des Parties à sa vingt et unième session*, §51, 9.

83. Simlinger et Mayer (n 80) 196.

que.[84] Cette branche du droit international ne constituerait aucunement une *lex specialis* apte à écarter l'application d'autres sources.[85] Il ressort de ces considérations que la déférence du droit international climatique à l'égard des États en matière de pertes et préjudices ne saurait signifier que les dommages subis par le patrimoine côtier et marin face aux catastrophes brutales et à la montée du niveau de la mer doivent rester ignorés. L'applicabilité de sources parallèles offre des perspectives non-négligeables pour rechercher des réparations.

À ce jour, il n'existe aucune affirmation coutumière générale d'un droit à la réparation pour les individus victimes de violations des droits humains. Les principes sur la réparation des violations des droits humains et du droit humanitaire proposés par une résolution de l'Assemblée générale des Nations Unies affirment clairement leur caractère recommandataire et n'entendent pas créer de nouvelles obligations contraignantes

84. Les travaux de la doctrine se sont employés à explorer les implications de cette piste. Voy. notamment: Peter-Tobias Stoll, 'The Climate as a Global Common', in Michael Faure et al. (eds.), *Elgar Encyclopedia of Environmental Law. Volume I: Climate Change Law* (Edward Elgar 2016) 131–142; Maljean-Dubois (n 78); Wewerinke-Singh (n 56) 67-69; Simlinger et Mayer (n 80) 196; Meinhard Doelle et Sara Seck, 'Loss & damage from climate change: from concept to remedy?' (2020) Climate Policy, Taylor & Francis Journals, vol. 20(6), 669–680; Alastair Marke et al., 'The Development of a Quasi-Loss and Damage Compensatory System for Developing Countries through Climate Litigation' (2020) Carbon & Climate Law Review, Vol. 14, no. 1, 57; Morten Broberg, 'Interpreting the UNFCCC's provisions on 'mitigation' and 'adaptation' in light of the Paris Agreement's provision on 'loss and damage'', in Morten Broberg et Beatriz Martinez Romera (eds.), *The Third Pillar of International Climate Change Policy: On 'Loss and Damage' after the Paris Agreement* (Routledge 2021) 86; Al Venn, 'Rendering International Human Rights Law Fit for Purpose on Climate Change' (2023) Human Rights Law Review, Vol. 23, no. 1, 7-8; Chowdhury et al. (n 54) 10-11 et 53-55; Linnea Nordlander, *Human Rights and Climate Change. The Law on Loss and Damage* (Routledge 2024) 10; Pour les déclarations de ratification détaillées des signataires, voy.: United Nations Treaty Collection, 'Chapter XXVII Environment. 7. United Nations Framework Convention on Climate Change', *treaties.un.org*.

85. Wewerinke-Singh (n 56) 68-69; Chowdhury et al. (n 54) 12-13; Venn (n 84) 7-8.

pour les États en la matière.[86] Celles-ci trouvent plutôt leurs sources dans la diversité d'instruments de droit international des droits de l'homme, dont la ratification engendre des obligations de pleine réparation pour les individus lésés qui s'étendent aux préjudices matériels comme moraux.[87] Cela implique que ces devoirs et la jurisprudence des organes supranationaux s'appliquerait dans l'hypothèse d'une affaire ayant trait aux menaces subies par le patrimoine marin et côtier. Ainsi, le foisonnement de développements en la matière, notamment la préconisation, par la Cour interaméricaine des droits de l'homme, de mesures non-pécuniaires telles que l'établissement de fonds de compensation et de modalités symboliques de réparation telles que des excuses publiques,[88] les recommandations de la Commission africaine des droits de l'homme et des peuples en faveur de modifications dans les législations nationa-

86. Assemblée générale des Nations Unies, A/RES/60/147, 16 décembre 2005, *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international relatif aux droits de l'homme et de violations graves du droit international humanitaire*, préambule, 3; Voy. Pierre D'Argent, 'Le droit de la responsabilité internationale complété? Examen des Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire' (2005) Annuaire français de droit international, Vol. 51, 34; Clara Sandoval, 'The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation' (2018) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 78, 565-566.

87. Chowdhury et al. (n 54) 13-14.

88. Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2015) 390-391 et 396-397; Juan Auz, 'Climate Crisis and the Testing of International Human Rights Remedies: Forecasting the Inter-American Court of Human Rights', in Sandrine Maljean-Dubois et Jacqueline Peel (eds.), *Climate Change and the Testing of International Law* (Brill Nijhoff 2023) 370. Pour la jurisprudence, voy. notamment Cour interaméricaine des droits de l'homme, arrêt sur les réparations du 21 juillet 1989, *Velásquez-Rodríguez v. Honduras*, §58; Cour interaméricaine des droits de l'homme, arrêt sur les réparations du 27 novembre 1998, *Loayza-Tamayo v. Peru*, §§165-171, 39-40; Cour interaméricaine des droits de l'homme, arrêt sur les réparations du 3 décembre 2001, *Durand and Ugarte v. Peru*, §39.

les[89] et celles du Comité des droits de l'homme formulées de manière à aiguiller les États vers la conformité et à donner satisfaction aux victimes,[90] atteste de l'existence de bases solides pour offrir des réparations équitables à de potentiels requérants. À titre d'exemple, si le Comité des droits de l'homme était saisi d'une question sur la montée des eaux et ses conséquences quant à la jouissance des droits culturels et identifiait un manquement, il pourrait recommander que les mesures de réparation impliquent, entre autres, des garanties de non-répétition, une indemnisation adéquate, des consultations et une coopération avec les parties lésées et un suivi dans la mise en œuvre – à l'image de ses conclusions sur l'inaction climatique de l'Australie à l'occasion de l'affaire dite des Iles Torres.[91]

Au-delà des garanties de droit international des droits de l'homme offertes aux individus, les principes encadrant la responsabilité internationale des États constituent une source centrale du cadre normatif international applicable à la protection du patrimoine côtier et marin face aux changements climatiques. Il est aujourd'hui pleinement établi que le manquement à une obligation internationale et l'établissement de la responsabilité d'un État impliquent la réparation des dommages en découlant.[92] Le Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite (PARE) proposé par la Commission du droit

89. Shelton (n 88) 388-389; Voy. par exemple l'affaire *Gunme et al. v Cameroon*, où la Commission a recommandé la modification de la législation nationale pour mettre fin aux pratiques discriminatoires contestées: Commission africaine des droits de l'homme et des peuples, 266/03, *Kevin Mgwanga Gunme et al. v Cameroon*, 27 mai 2009, §215.

90. Voy. notamment Comité des droits de l'homme, CCPR/C/135/D/3624/2019, 21 juillet 2022, *Daniel Billy v Australia*, §§11-12.

91. Ibid.; Auz (n 88) 376-377.

92. D'Argent (n 86) 41; Cour permanente de justice internationale, *Usine de Chorzów (Fond),* arrêt sur le fond du 13 septembre 1928, Recueil des arrêts, Série A, n° 17, 29; Assemblée générale des Nations Unies, A/RES/56/83, *Responsabilité de l'État pour fait internationalement illicite*, 12 décembre 2001, 2.

international en 2001 constitue la source incontournable en la matière en ce qu'elle codifie les grands principes de la réparation des dommages argués par les États victimes – à savoir, entre autres, la cessation du manquement et la garantie de sa non-répétition, puis la restitution, l'indemnisation ou la satisfaction équitable.[93] Le recours à ces grands principes en matière de réparation représente ainsi, à ce jour, la perspective la plus prometteuse car elle offre un outil pour mettre en cause tout État qui serait responsable d'un manquement à une obligation internationale primaire applicable à la question de la protection du patrimoine culturel côtier et marin face à la crise climatique. Comme l'ont avancé d'aucuns,[94] la *lex generalis* serait ainsi apte à combler les lacunes du droit international applicable en matière d'allocation des responsabilités et des réparations et, partant, d'adresser dans une perspective juridique les pertes et préjudices liées à ces signifiants culturels particulièrement menacés par les conséquences délétères de ce phénomène global. À cet égard, la pratique de la Commission des réclamations Erythrée/Ethiopie, ayant retenu la responsabilité internationale de l'Ethiopie pour la destruction de la Stèle de Matara, s'avère particulièrement éclairante pour aborder les pertes culturelles.[95] Le PARE représenterait ainsi un outil déterminant pour responsabiliser les États à l'égard des normes primaires les liant, en fonction des conventions auxquelles ils sont parties,[96] d'autant plus que l'application des principes spécifiques du droit international des droits humains ne saurait neutraliser le droit international général.[97]

93. Assemblée générale des Nations Unies, A/RES/56/83, *Responsabilité de l'État pour fait internationalement illicite*, 12 décembre 2001, 7-9, articles 28 à 39. Voy. également Wewerinke-Singh (n 56) 145. L'auteure résume la manière dont les principes posés par le PARE devraient s'appliquer dans le contexte climatique.

94. Voy. par exemple Peel (n 54) 25; Vigni (n 47) 606.

95. Vigni (n 47) 619.

96. Ibid., 606-607.

97. Wewerinke-Singh (n 56) 65-66; Chowdhury et al. (n 54) 13-14.

Enfin, la piste du droit interne ne saurait également être occultée. Les diverses législations nationales invocables pour demander la réparation des dommages environnementaux et contester le comportement dommageable dans le domaine climatique offrent en effet des perspectives non-négligeables pour réparer les préjudices.

Il est avéré que le droit international propose un cadre apte à appréhender la menace climatique sur le patrimoine côtier et marin et ses conséquences, tant à travers l'opposition d'obligations primaires de protection que par l'invocation de normes secondaires pour engager la responsabilité des États et exiger des réparations. Ces diverses constatations fonderaient autant d'appels à négocier pour combler les lacunes normatives et à porter des actions contentieuses. Ainsi, face à l'inadéquation du droit international actuel pour protéger effectivement le patrimoine culturel côtier et marin de la menace climatique rampante et l'absence de système apte à appréhender efficacement les pertes et préjudices subis, il est impératif que la communauté internationale continue de construire activement la justice climatique.

3. La perspective de la réalisation d'une justice climatique pour la culture côtière et marine, une alternative en cours de construction

L'étude du cadre juridique applicable, dans le contexte des changements climatiques, à la protection du patrimoine culturel côtier et marin et à l'appréhension des dommages qu'il subirait révèle que ces questions sont indissociables des intérêts humains. Les impacts déjà observés de ce phénomène global sur ces éléments particulièrement vulnérables et les atteintes aux droits culturels des populations victimes conduisent en effet à constater le besoin évident de renforcer la justice climati-

que.[98] Si la voie du prétoire apparaît comme une solution salutaire pour combler les failles d'effectivité de la gouvernance climatique et de la protection du patrimoine culturel côtier et marin, elle ne représente toutefois aucunement la panacée et servirait davantage, au final, à impulser des développements normatifs futurs (Section 3.1). La progression de la justice climatique impliquera en effet inévitablement de recourir à des négociations dans les enceintes des fora internationaux compétents pour appréhender ces questions (Section 3.2).

3.1 Le contentieux comme levier de justice climatique pour la culture, une stratégie prometteuse mais insuffisante

Face aux carences dans la mise en application du droit international applicable à l'enjeu climatique et à l'accélération de cette crise environnementale globale, tant les auteurs de doctrine que les justiciables ont considéré le rôle potentiel des juridictions et quasi-juridictions pour mettre en cause les émetteurs et aborder les questions de réparation des dommages climatiques. Dès 2018, Sandrine Maljean-Dubois signalait la voie du contentieux comme une évolution certaine de la gouvernance climatique.[99] La diversité des mécanismes juridictionnels envisageables dans les ordres internes et internationaux laisse en effet la liberté pour les requérants, qu'il s'agisse d'États ou de personnes individuelles ou morales, de donner cours à des stratégies contentieuses fondées sur la

98. Selon certaines définitions, la notion de justice climatique serait étroitement liée aux droits de l'homme. Voy. par exemple la définition proposée par un rapport de l'ICOMOS en 2019 et se revendiquant de la définition utilisée par la Fondation Mary Robinson pour la justice climatique: Burke et al. (n 27) 104. Le rapport propose la définition suivante: "Justice reliant le développement et les droits de l'homme de sorte que le changement climatique soit abordé dans une optique humaine qui préserve les droits des plus vulnérables et répartisse avec équité et impartialité les efforts et les avantages, ainsi que les impacts de l'évolution du climat."

99. Maljean-Dubois (n 78).

mise en cause pour manquement à des obligations internationales ou sur l'invocation des droits humains – une distinction proposée par Maiko Meguro.[100] Il serait dès lors déterminant, de considérer cette voie pour concrétiser la justice climatique et adresser la pression des conséquences des changements climatiques sur les signifiants culturels,[101] et ainsi, parmi eux, sur le patrimoine côtier et marin en particulier. En raison des menaces préoccupantes que représentent la montée du niveau de la mer et l'aggravation des catastrophes météorologiques, il n'apparaît pas déraisonnable de pressentir que de tels recours s'imposeront naturellement comme de prochaines perspectives naturelles d'évolution du contentieux climatique.

L'applicabilité d'une vaste palette de normes internationales et l'outil déterminant que constitue la *lex generalis* en matière de réparation des dommages issus de manquements à ces obligations primaires ouvrent la voie à des perspectives très diverses d'affaires contentieuses interétatiques pour appréhender la menace climatique sur le patrimoine culturel côtier et marin et les dommages qui en résultent aujourd'hui et en résulteront à l'avenir. Il serait possible, par ces stratégies contentieuses fondées sur les obligations internationales des États et les grands principes de réparation des préjudices,[102] d'aborder de manière alternative la question de la protection du patrimoine culturel côtier et marin et de traiter de la réparation des pertes et préjudices en la matière. Il conviendrait alors de s'appuyer sur des manquements aux accords climatiques, au principe coutumier de prévention, aux conventions liées au patrimoine culturel ou aux

100. Maiko Meguro, 'Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy' (2020) Leiden Journal of International Law, vol. 33, no. 4, 933–951

101. Assemblée générale des Nations Unies, A/75/298 Annex, 10 octobre 2020, *International legal frameworks related to climate change, culture and cultural rights, and examples from submissions received*, §29, 8.

102. Peel (n 54) 33-34 ; Voigt (n 51) 182.

obligations des États en matière de droits humains. Par exemple, grâce à l'interprétation audacieuse du Tribunal international du droit de la mer dans son avis récent, établissant l'obligation des États, afin de prévenir la pollution du milieu marin, de prendre des mesures d'atténuation dans la lignée de la due diligence et de veiller à protéger et préserver le milieu marin,[103] une requête contentieuse contre un État peu vertueux en la matière serait une perspective envisageable, d'autant plus que la CNUDM est assortie de mécanismes de résolution des différends effectifs.[104]

Les victimes d'atteintes à leurs droits subjectifs pourraient également, après épuisement des voies de recours internes, saisir les mécanismes supranationaux afin de poursuivre leur recherche de justice climatique par mise en cause de l'État défaillant. Les travaux de Rosa Celorio ont souligné les avancées déterminantes des organes protecteurs des droits de l'homme dans la protection des intérêts des populations les plus vulnérables face aux changements climatiques – à savoir, les positions du Comité des droits de l'enfant au sujet des affaires *Chiara Sacchi* et des Iles Torres.[105] L'auteur, saluant ces développements jurisprudentiels, a suggéré que de nouvelles initiatives contentieuses additionnelles qui s'appuieraient sur ces avancées seraient particulièrement pertinentes à ce jour dans la mesure où le contentieux s'est affirmé comme une voie se-

103. Voy. notamment Tribunal international du droit de la mer, avis no. 31, 21 mai 2024, *Demande d'avis consultatif soumise par la commission des petits états insulaires sur le changement climatique et le droit international*, §223, 87; Ibid., §258, 100-101; Ibid., §400, 244.

104. Avant même l'adoption de l'avis consultatif précité, cette hypothèse a été suggérée et largement traitée par la doctrine tout au long des dernières décennies. Voy. par exemple William C.G. Burns, 'Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea' (2006) McGill International Journal of Sustainable Development Law and Policy, Vol. 2, no. 1, 38; Meinhard Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention' (2006) Ocean Development & International Law, Vol. 37, nos. 3-4, 319–337; Peel (n 54) 33-34; Harrison (n 13) 417-418.

105. Rosa Celorio, 'The Kaleidoscope of Climate Change and Human Rights: The Promise of International Litigation for Women, Indigenous Peoples, and Children' (2023) Arizona Journal of Environmental Law & Policy, Vol. 13, no. 2, 203-204.

condaire de protection des intérêts des populations vulnérables, a permis des réparations dans des affaires sensibles, et a ainsi assuré des voies de participation et de justice.[106]

Pour autant, le recours potentiel au juge international pour soutenir la culture côtière et marine face aux changements climatiques rencontrerait assurément des limites du fait de la structure même de l'ordre juridique international. Non seulement cette perspective de recherche de la justice climatique dépend directement de l'acceptation volontaire des clauses de règlement des différends et de la compétence du juge international,[107] mais ses conséquences devraient être relativisées en raison des écueils de ces mécanismes juridictionnels et quasi-juridictionnels dans la mise en œuvre des décisions prononcées.[108] L'absence, à ce jour, d'affaires contentieuses interétatiques sur la question des obligations climatiques serait dès lors loin d'être anodine.[109] Par ailleurs, la *lex generalis* n'offre qu'un cadre limité, fondé sur une approche bilatérale, pour appréhender les questions de responsabilité et de réparations se rattachant à l'intérêt commun de l'humanité que représente la protection du patrimoine culturel,[110] et impliquant une pluralité d'auteurs et de victimes. Pour ces raisons, si l'ordre juridique international peut amplement être le théâtre d'affaires contentieuses liées au climat et aux droits culturels, l'analyse générale

106. Ibid.

107. Maljean-Dubois (n 78).

108. À titre d'exemple, le bilan de la mise en oeuvre des arrêts de la Cour interaméricaine des droits de l'homme s'avère particulièrement illustratif des limites de la justice internationale. Voy. par exemple Auz (n 88) 381-383.

109. Sumudu Atapattu, 'Climate Change under Regional Human Rights Systems', in Sebastien Duyck et al. (eds.), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 128; Benoit Mayer, 'International Advisory Proceedings on Climate Change' (2023) Michigan Journal of International Law, Vol. 44, no. 1, 43; Al Venn, 'Rendering International Human Rights Law Fit for Purpose on Climate Change' (2023) Human Rights Law Review, Vol. 23, no. 1, 8-12.

110. Vigni (n 47) 641.

du contentieux climatique atteste que le contrôle judiciaire sur l'action climatique des États et des personnes privées a pu s'exprimer davantage devant les juridictions nationales.[111] En effet, le rôle actif que le juge s'est attribué dans l'appréciation de la mise en œuvre des engagements internationaux et de la législation interne a assurément permis de renforcer le contrôle sur la gouvernance de cet enjeu. Les requérants, par leurs stratégies contentieuses ingénieuses, ont pu obtenir satisfaction sur une grande diversité de revendications, en témoignent la reconnaissance de la carence étatique dans l'action d'atténuation,[112] dans la politique d'adaptation nationale,[113] ou encore à l'égard des droits de l'homme.[114] De ce fait, il est probable que les futures affaires contentieuses ayant trait à la protection du patrimoine culturel côtier et marin face aux conséquences des changements climatiques et à la réparation de son endommagement ou de sa disparition se développent en grande majorité – voire quasi-exclusivement – dans les ordres juridiques nationaux. De telles requêtes pourraient alors tirer profit de la pratique foisonnante du contentieux climatique et de la jurisprudence établie, offrant ainsi des perspectives encourageantes pour dépasser les lacunes de la mise en œuvre des engagements internationaux et l'ambiguïté du cadre climatique au sujet des pertes et préjudices. Le contentieux climatique interne permettrait *in fine* de faire fonctionner un "quasi-loss and damage compensatory response".[115]

111. Voy. notamment Maljean-Dubois (n 78); Patrick Toussaint, 'Loss and damage and climate litigation: The case for greater interlinkage' (2021) Review of European, Comparative & International Environmental Law, Vol. 30, no. 1, 20-21.

112. Tribunal administratif de Paris, 3 février 2021, *Notre Affaire à Tous et al.*

113. Haute cour de Lahore, No.25501/2015, 4 et 15 septembre 2015, *Ashgar Leghari v. Federation of Pakistan*.

114. Cour suprême du Panama, 27 novembre 2023, *Callejas v. Law No 406 (unconstitutionality of mining concession).*

115. Marke et al. (n 84) 68.

Néanmoins, le recours au juge national ne saurait demeurer la perspective ultime et idéale de la concrétisation de la justice climatique et fait face à de nombreux écueils. D'abord, l'idée de s'appuyer sur les juridictions internes pour assurer l'effectivité du droit international et la réparation des dommages culturels pose des problèmes d'équité en ce qu'elle conduirait incidemment à faire peser la charge de l'appréhension des griefs des justiciables sur les gouvernements des régions du monde particulièrement exposées au péril climatique, et dont les habitants manquent de ressources pour soutenir des actions contentieuses.[116] En outre, la potentielle inadéquation des mesures non-pécuniaires offertes en réparation de dommages non évaluables pécuniairement, tels que les pertes culturelles, constitue une question épineuse.[117] En effet, la recherche contentieuse de responsabilités climatiques conduit inévitablement à devoir envisager des questions complexes d'attribution des dommages climatiques, d'évaluation des contributions respectives des émetteurs et de causalité – des considérations épineuses au regard de la globalité du phénomène climatique et de la multiplicité des émet-

116. Sebastien Jodoin et al., 'Rights-based approaches to climate decision-making' (2021) Current Opinion in Environmental Sustainability, Vol. 52, 48; Ivo Wallimann-Helmer, 'Resilience and Nonideal Justice in Climate Loss and Damage Governance' (2023) Global Environmental Politics, Vol. 23, no. 3, 55-56; Amy Rose et al., 'The crucial role of strategic climate litigation', in Francesco Sindico et al. (eds.), *Research Handbook on Climate Change Litigation* (Edward Elgar 2024) 31-32.

117. Les dommages climatiques en matière de culture humaine ont été qualifiés comme relevant du champ des "pertes et préjudices non-économiques" (*non-economic loss and damage*), une notion développée par le cadre CCNUCC. Voy. à ce sujet CCNUCC, FCCC/TP/2013/2, *Non-economic losses in the context of the work programme on loss and damage. Technical paper*, 9 octobre 2013, §§3-5. La notion a fait l'objet de travaux de doctrine. À titre d'exemple, voy. Olivia Serdeczny, 'Non-economic Loss and Damage and the Warsaw International Mechanism', in Mechler et al. (n 80) 205-220; Anastasia Telesetsky, 'Climate-Change Related "Non-economic Loss and Damage" and the Limits of Law' (2020) San Diego Journal of Climate and Energy Law, Vol. 11, 97-113.

teurs.[118] Par ailleurs, il est malaisé de tenter d'estimer des valeurs qui ne sauraient être saisies par le marché,[119] et cette difficulté s'impose d'autant plus en ce qui concerne la culture humaine. Peut-on attribuer un prix à la connexion symbolique et sentimentale qu'une communauté ressent à l'égard de son héritage culturel? À quelle hauteur s'évaluerait la perte des barrières de corail du Patrimoine mondial,[120] ou de la submersion de territoires associés à des pratiques culturelles de populations insulaires?[121] La question se pose également de délimiter le champ des victimes de ces pertes et préjudices culturels. À cet égard, certaines tribunaux internes ont d'ores et déjà affirmé que fournir une réponse à de telles requêtes ne relevait pas de la fonction judiciaire.[122] Les difficultés rencontrées conduisent ainsi à s'interroger sur la capacité des

118. Cet écueil est régulièrement abordé par les auteurs. Voy. par exemple: Daniel Bodansky, 'The role of international court of justice in addressing climate change: some preliminary reflections' (2017) Arizona State law Journal, Vol. 49, 704; Veera Pekkarinen et al., 'Loss and Damage after Paris: Moving Beyond Rhetoric' (2019) Carbon & Climate Law Review, Vol. 13, no. 1, 40; Margareth Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) Climate Law, Vol. 9, no. 3, 228-229; Annalisa Savaresi, 'Human rights and the impacts of climate change: Revisiting the assumptions' (2021) Oñati Socio-Legal Series, Vol. 11, no. 1, 234; Jacob Wise, 'Climate Change Loss and Damage Litigation: Infeasible or Useful Shadow?' (2021) Wisconsin International Law Journal, Vol. 38, no. 3, 697

119. La question a été explorée en profondeur par Anastasia Telesetsky dans son article à ce sujet. Anastasia Telesetsky, 'Climate-Change Related "Non-economic Loss and Damage" and the Limits of Law' (2020) San Diego Journal of Climate and Energy Law, Vol. 11, 97-113.

120. Scott F. Heron, *Impacts of climate change on World Heritage coral reefs: update to the first global scientific assessment* (UNESCO 2018) 5.

121. Communauté du Pacifique, 'Loss and Damage: Preserving traditions in the Pacific region', *www.spc.int*, en ligne, consulté le 12 février 2025, <<https://www.spc.int/updates/blog/dynamic-story/2025/02/loss-and-damage-preserving-traditions-in-the-pacific-region>>.

122. Voy. par ex. *Lho'imggin et al v. Her Majesty the Queen* au Canada. Sabin Center for Climate Change Law, -'Lho'imggin et al. v. Her Majesty the Queen', *Climate Change Litigation Database*, <<https://climatecasechart.com/non-us-case/gagnon-et-al-v-her-majesty-the-queen/>>; Maria Antonia Tigre, 'Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation' (2022) *e-Publica*, Vol. 9, no. 3, 245.

juridictions à assurer une pleine satisfaction aux victimes,[123] et à penser qu'elles ne seraient pas les instances les plus légitimes et adéquates pour traiter efficacement de la réparation du problème global que constituent les changements climatiques.[124] En outre, le caractère sensible de la question climatique implique que les juges, soucieux de ne pas outrepasser leur fonction judiciaire et de ne pas nuire aux processus normatifs internes et internationaux, tendent à faire preuve de réserve dans la teneur de leurs décisions.[125] Enfin, quand bien même l'attribution et l'évaluation des dommages seraient possibles, la multiplication des plaintes pour entorses à des droits subjectifs pourrait conduire, *in fine*, à une individualisation, voire une "[…] dépolitisation de la lutte climatique provoquée par la judiciarisation".[126] Au regard de l'ampleur des conséquences de cette crise globale et de l'évaluation économique qui est avancée, il n'est pas déraisonné de penser que la démultiplication des requêtes de réparation finirait par engendrer inévitablement l'insolvabilité des responsables identifies.[127] Il ressort de ces écueils que la véritable force du contentieux climatique résiderait de ce fait, plutôt que dans la recherche concrète de réparations, davantage dans la perspec-

123. Une doctrine émergente se constitue à ce sujet. Voy. notamment Telesetsky (n 119) 97-113.

124. Mayer (n 54) 1022-1023.

125. Diverses affaires attestent d'une telle réserve. Voy. par exemple Comité des droits de l'homme, CCPR/C/135/D/3624/2019, 23 septembre 2022, *Daniel Billy et al. v. Australia,* §11; Cour européenne des droits de l'homme, requête no. 53600/20, 9 avril 2024, *Verein KlimaSeniorinnen Schweiz et autres c. Suisse,* §536 et §§653-657. Les juges ont entendu préserver une large part de discrétion aux États en cause dans le choix des mesures à prendre pour renforcer leur climatique.

126. Matthias Petel, *Droits humains et contentieux climatique: une alliance prometteuse contre l'inertie politique*. *CRIDHO Working Paper 2021/5* (Université catholique de Louvain 2021) 26.

127. L'évaluation monétaire des dommages climatiques serait de l'ordre du trilliard en 2025, et pourrait atteindre 70 trilliards par an en 2075. Carl Friedrich Schleussner et al., *Carbon Majors' trillion dollar damages* (Climate Analytics 2023) 3.

tive de montrer la voie au législateur – national ou international – pour développer le droit applicable en la matière. De nombreux auteurs ont ainsi pu insister sur le rôle déterminant des procédures contentieuses et des demandes d'avis consultatifs pour impulser et compléter – et non remplacer – les négociations climatiques internationales.[128]

Il appert que la sollicitation des organes juridictionnels et quasi-juridictionnels serait une piste pertinente pour faire avancer la justice climatique en matière de pertes et préjudices climatiques. En effet, qu'il s'agisse de saisines d'instances nationales ou supranationales, qu'elles soient portées par des États ou par des justiciables et qu'elles s'appuient sur des dénonciations de manquement à des obligations de prévention ou de protection ou sur de simples principes de droit interne en matière de responsabilité, les possibles actions en justice poursuivant la finalité d'obtenir des réparations pour des conséquences dommageables des changements climatiques sur des éléments culturels marins et côtiers offriraient le double bénéfice d'une satisfaction des intérêts lésés et d'une impulsion pour négocier des développements normatifs en la matière et "[…] briser l'inertie politique des États".[129] Elles s'érigent comme autant d'hypothèses à explorer pour renforcer l'appréhension par le droit de ces éléments particulièrement menacés du patrimoine culturel et, *in fine*, nourrir le développement de la gouvernance internationale de cet

128. Sur le rôle des procédures contentieuses voy. par exemple Bodansky (n 118) 712; Pekkarinen et al. (n 118) 31-49; Morten Broberg et Beatriz Martinez Romera (eds.), 'Loss and damage after Paris: more bark than bite?' (2020) Climate Policy, Vol. 20, no. 6, 661-668; Christina Voigt, 'The power of the Paris Agreement in international climate litigation' (2023) Review of European, Comparative & International Environmental Law, Vol. 32, no. 2, 237; Mayer (n 54) 1025-1026. Sur le rôle des avis consultatifs, voy. par exemple Mayer (n 109) 43-44; Maria Antonia Tigre, 'It Is (Finally) Time for and Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives' (2023) Charleston Law Review, Vol. 17, 723; Margareth Wewerinke-Singh et al., 'The advisory proceedings on climate change before the International Court of Justice' (2023) Questions of International Law, Vol. 102, 41-42.

129. Petel (n 126) 27.

enjeu global. En ce sens, l'urgence du besoin de faire progresser la justice climatique conduira nécessairement à aborder les lacunes du droit applicable "au-delà du prétoire",[130] dans le cadre des *fora* de négociation internationale.

3.2 La nécessité de développements normatifs futurs pour une concrétisation de l'appréhension équitable de la culture face à la crise climatique

En raison du caractère global des enjeux climatiques et des limites de l'approche par le contentieux, la réalisation de la justice climatique dépendra inévitablement d'un approfondissement du droit qui, du fait de la structure de l'ordre juridique international qui reste encore à ce jour fondé sur la primauté des États, impliqueront des négociations multilatérales pour faire progresser la gouvernance climatique.[131] La diversité de sources applicables à la question de la protection du patrimoine culturel côtier et marin face à la crise climatique font que les possibilités de développements normatifs pour combler ses écueils et la renforcer dépendent essentiellement de la volonté des États et des directions qu'ils entendent donner au droit international.

Comme l'avait souligné Cinnamon Carlarne, le renforcement de la protection et de la gestion des sites naturels et culturels passera par l'avènement d'une bonne gouvernance climatique,[132] une conclusion conduisant à appeler à un développement du droit applicable spécifiquement à cet enjeu. À cet égard, les dynamiques visibles dans la diffusion du contentieux climatique sauraient inspirer la direction de ces développe-

130. Ibid., 28.

131. Bodansky (n 118) 695-699; Pekkarinen et al. (n 118) 31-49; Wewerinke-Singh (n 56) 168.

132. Carlarne (n 13) 272-273.

ments futurs de l'architecture instituée à Rio. Avant tout, la mise en péril évidente du patrimoine côtier et marin face aux catastrophes météorologiques et à la montée du niveau de la mer illustre un besoin crucial d'inclure le patrimoine culturel dans le régime climatique et d'ancrer davantage ce dernier dans une perspective prenant en compte les enjeux locaux, humains et culturels de la crise climatique.[133] Plutôt que d'imposer des obligations contraignantes et rigoureusement précises et détaillées, l'inclusion du patrimoine culturel dans le cadre climatique onusien – par un protocole ou une décision – impliquerait, dans la continuité de l'approche *bottom-up* prônée par ce régime, de formuler un devoir des parties d'appréhender ces questions culturelles et de droits humains dans leur ordre juridique national et à travers leurs initiatives de coopération, une approche qui laisserait une large discrétion aux États dans la concrétisation de cette intégration dans le droit. Ils auraient ainsi la faculté de conceptualiser, par exemple, des cadres de participation des parties prenantes pour que leurs perspectives soient prises en compte. Il pourrait aussi être exigé qu'ils rendent compte, par le *reporting*, de leurs initiatives d'inclusion de ces questions culturelles et humaines dans leurs contributions nationales déterminées, à la condition de poser des indicateurs pour assurer une évaluation homogène et objective.

De manière générale, le droit international positif – tant lié à la protection du patrimoine qu'à la lutte climatique en général – appréhende davantage le patrimoine culturel dans son aspect passif, comme victime des changements climatiques, que dans son rôle d'atout pour la lutte climatique, les rares développements en la matière relevant de l'ordre des re-

133. À cet égard, les développements récents du régime climatique témoignent d'un souci croissant 'd'humanisation'. Des plateformes ont été établies pour assurer la participation des parties prenantes non-étatiques – à l'image, par exemple, des peuples autochtones ou des femmes. Voy. à ce sujet Jodoin et al. (n 116) 46; Freedom-Kai Phillips, *Participation of Non-party Stakeholders under the UNFCCC. Options for Future Engagement* (Centre for International Governance Innovation 2018) 6.

commandations.[134] Développer cet aspect s'avère ainsi déterminant pour la gouvernance mondiale et constitue une piste à explorer. À titre d'exemple, un récent rapport dédié à la question a soutenu que, dans le contexte de la crise climatique, le patrimoine immatériel et les formes d'expressions culturelles vivantes devaient être appréhendées juridiquement tant dans leur rôle actif que passif, et a ainsi appelé à développer le droit climatique, tant international que national, de manière à les promouvoir davantage comme ressources pouvant contribuer à l'adaptation et à la résilience.[135] De manière similaire, un rapport du Conseil international des monuments et des sites (ICOMOS) avait déjà, en 2019, suggéré une promotion des sites du Patrimoine mondial comme des outils pertinents dans l'action climatique.[136] À cet égard, l'appel formulé à la COP28 à la CCNUCC en faveur d'une action climatique fondée sur la culture est un signal encourageant.[137]

Cette approche ascendante, reconnectée avec le territoire, participerait à une appréhension plus qualitative du patrimoine, à la fois en tant qu'objet de protection qu'outil participant à l'action climatique globale. En ce qui concerne les milieux marins et côtiers, cette perspective suggère par exemple que les mesures actives prises par les États pour s'affranchir

134. À titre d'exemple, l'article 7 de l'Accord de Paris se limite à prendre note que les États "reconnaissent" l'importance des connaissances traditionnelles dans l'action en matière d'adaptation climatique. Quant aux développements de droit souple sur la question, à l'image de la Déclaration de Hangzhou de 2013 et des Outcomes de Hangzhou de 2015, ils ne sauraient opposer de devoirs contraignants aux États et appellent seulement à intégrer les savoirs et pratiques traditionnelles dans le droit applicable à la question des changements climatiques et des catastrophes. À ce sujet, voy. notamment Wagner (n 13) 23. Les approches les plus récentes en la matière dans le cadre des COP climat, à l'image du Dialogue ministériel de haut niveau pour une action climatique fondée sur la culture lors de la COP28, restent quant à elles tout autant embryonnaires à ce jour, n'ayant produit qu'une déclaration non contraignante. Voy. Emirates Declaration on Cultural-based Climate Action, 8 décembre 2023, 3.

135. Wagner (n 13) 5.

136. Burke et al. (n 27) 11.

137. Voy. aussi les initiatives des pays du G20 mentionnés en introduction: Wagner (n 13) 14.

de leur devoir, telles que la préservation d'édifices côtiers menacés par la montée des eaux ou la valorisation des connaissances traditionnelles culturelles – à l'image de la prévision des tempêtes dans le Pacifique[138] – contribueraient à la sauvegarde des signifiants culturels et à la lutte contre le changement climatique en général. En outre, ce raffermissement de la protection du patrimoine par la formalisation d'obligations dans le droit international climatique servirait potentiellement de fondement additionnel pour exiger une action collective de la communauté internationale pour l'atténuation des gaz à effet de serre. Afin d'assurer la pérennité de certains éléments du patrimoine face à des conséquences globales des changements climatiques nécessitant des efforts concertés – à l'image de la montée des eaux, l'impossibilité pour les États de combattre ces menaces par leurs engagements individuels et le caractère vain des mesures locales d'adaptation déployées seraient en effet un appel à la négociation et à la coopération d'échelle globale.[139] Somme toute, de tels développements normatifs s'avèrent déterminants pour renforcer la protection des signifiants culturels liés aux milieux côtiers et marins face aux changements climatiques et faire progresser la justice climatique pour les communautés qui y sont attachées.

Au surplus, la nécessité d'appréhender la question des pertes et préjudices porte naturellement à considérer un approfondissement de ce pilier d'action au sein du régime climatique. De futures négociations pourraient ainsi aboutir au renforcement du cadre institutionnel clima-

138. Ibid., 117.

139. Tel est par exemple le cas de la Grande barrière de corail, site naturel du Patrimoine mondial de l'UNESCO célébré pour sa "beauté naturelle exceptionnelle", l'exemplarité de son processus d'évolution géologique et la richesse de sa biodiversité. À l'instar de tout récif corallien, sa pérennité est menacée, entre autres, par l'acidification causée par le changement climatique – une conséquence globale qui ne peut être adressée que par une réaction universelle. Sa préservation dépendrait ainsi davantage de la coopération internationale et des efforts de l'ensemble de la communauté internationale en matière d'atténuation des gaz à effet de serre que de mesures locales d'adaptation.

tique par l'instauration d'une autorité centralisant l'action climatique et apte à sanctionner les États en cas de manquement,[140] au développement de fonds d'indemnisation financés par les États les plus responsables des changements climatiques,[141] ou encore, dans un souci de dépassement de la notion de la responsabilité et d'obtention d'un consensus, de mettre en place un financement fondé sur la contribution volontaire des États. Les développements récents obtenus à l'issue de la COP28, ayant tranché en faveur de cette seconde option,[142] sont particulièrement encourageants à cet égard et suggèrent des voies de réparation des dommages subis par le patrimoine culturel marin et côtier. Face aux difficultés d'appréhension de la responsabilité partagée des émetteurs de gaz à effet de serre, il serait ainsi souhaitable d'envisager le développement de mécanismes de financement pour soutenir la lutte face aux conséquences des catastrophes brutales et des phénomènes à évolution lente.[143]

Plutôt que d'introduire une forme de sanction dans le régime climatique, il serait davantage concluant et non-dissuasif, pour inciter les États à renforcer leur action, de conserver le modèle de contrôle de conformi-

140. Joel Wainwright et Geoff Mann, *Climate Leviathan: A Political Theory of Our Planetary Future* (Verso 2020) 224; Raka Sen, 'Book Review: Climate Leviathan: A political theory of our planetary future' (2019) Communication and the Public, Vol. 4, no. 1, 85; John Foran, 'What Is Climate X? An Essay on Joel Wainwright and Geoff Mann's *Climate Leviathan: A Political Theory of Our Planetary Future*' (2020) Rethinking Marxism, Vol. 32, no. 4, 419-420. Voy. également d'autres propositions en ce sens: Catherine Le Bris, 'Les limites des droits de l'homme face aux défis climatiques' (2022) Revue internationale de droit comparé (Dossier spécial 'Climat et droits de l'homme: regards croisés' (sous la dir. de C. Le Bris et M. Torre-Schaub), no. 1, 87-96; Eric Muraille et al., 'Les politiques climatiques: entre techno-optimisme et déni de réalité' (24 janvier 2024) *The Conversation,* <<https://theconversation.com/les-politiques-climatiques-entre-techno-optimisme-et-deni-de-realite-221234>>.

141. Mayer (n 54) 1026-1027.

142. Conférence des parties à la Convention-cadre des Nations Unies sur les changements climatiques, 1/CP.28, 6 décembre 2023, *Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4*, 17.

143. Peel (n 54) 32-33.

té non-conflictuel et facilitateur établi par l'Accord de Paris – qui entend guider les États à travers des recommandations plutôt que de les contraindre par la menace.[144] Il s'agirait dès lors d'étendre le champ de cette supervision à d'autres éléments de la mise en œuvre des instruments climatiques, notamment, par exemple, l'appréhension des pertes et préjudices, la considération des droits humains ou l'assistance offerte à d'autres parties.[145] L'ensemble de ces perspectives forme un tout indiquant quelle serait la direction la plus adéquate pour faire progresser la justice climatique au service du patrimoine culturel côtier et marin particulièrement vulnérable. À titre général, il apparaît que les enjeux complexes posés par les pertes et préjudices climatiques appellent par pragmatisme à considérer une approche de la justice climatique davantage tournée vers l'avenir et la solidarité que vers la sanction et l'attribution de responsabilités présentes et historiques.[146]

144. Meinhard Doelle, 'In Defence of the Paris Agreement's Compliance System: The Case for Facilitative Compliance', in Benoit Mayer et Alexander Zahar (eds.), *Debating Climate* Law (CUP 2021) 89-90 et 97-98; Rosemary Lyster, 'Adaptation, loss and damage and climate justice', in Verschuuren (n 28) 39.

145. Ibid., 88-89. Bien que le mandat du comité établi par l'Accord de Paris vise des points procéduraux, sa reconnaissance discrétionnaire d'une capacité à interroger la mise en oeuvre d'éléments substantiels est encourageante en ce sens.

146. Les revendications en faveur d'une approche solidaire de la gouvernance climatique sont nombreuses. Voy. notamment le lien fait avec le principe des responsabilités communes mais différenciées par Agnès Michelot: Agnès Michelot, 'À la recherche de la justice climatique – Perspectives à partir du principe de responsabilités communes mais différenciées', in Christel Cournil et Catherine Colard-Fabregoule (dir.), *Changements climatiques et défis du droit. Actes de la journée d'études du 24 mars 2009* (Bruylant 2010) 208. D'autres ont appelé à développer la justice climatique en prenant en considération les intérêts des générations futures. Voy. notamment François Ost, 'Au-delà de l'objet et du sujet, un projet pour le milieu', in François Ost et Serge Gutwirth (dir.), *Quel avenir pour le droit de l'environnement?* (Publications des Facultés Universitaires Saint-Louis 1996) 14; Jessica Makowiak, 'À quels temps se conjugue le droit de l'environnement?', in Domenico Amirante et al. (dir.), *Pour un droit commun de l'environnement. Mélanges en l'honneur de Michel Prieur* (Dalloz 2007) 286; Emilie Gaillard, 'L'équité transgénérationnelle: Perspectives de justice pour les générations futures?', in Agnès Michelot (dir.), *Équité et environnement. Quel(s) modèle(s) de justice environnementale?* (Larcier 2012) 51-69; Torre-Schaub (n 27) 123; Rudall (n 76) 61-62.

Enfin, à titre plus général, l'essoufflement du multilatéralisme fait du renforcement de l'ordre juridique international dans son ensemble une nécessité indéniable. À l'heure où l'humanité fait face à de multiples enjeux globaux, il devient en effet impératif de mobiliser de nouveaux leviers pour inciter à l'action collective. À cet égard, les perspectives de développement de principes généraux sont inépuisables. Entre autres, il serait loisible de considérer la négociation d'un instrument pour assurer une protection de la culture et du patrimoine dans sa globalité,[147] à titre général ou pour saisir leurs besoins face à la menace climatique. Un accord universel visant une appréhension globale et holistique de l'environnement en attribuant aux États un devoir contraignant de protection générale – des pistes explorées ces dernières années[148] – saurait par ailleurs contribuer tant à la lutte climatique que, indirectement, à la préservation du patrimoine. À cet égard, les initiatives régionales des pays du Pacifique, s'attachant à aborder de manière intégrée l'appréhension des catastrophes naturelles, l'action climatique et le développement durable et à promouvoir la résilience, s'avèrent particulièrement inspirantes.[149] L'étendue du champ de protection des droits de l'homme par la reconnaissance d'un droit à un environnement sain contribuerait à élargir l'arsenal utilisé par les justiciables dans leur quête de justice cli-

147. Voy. Maria Kenig-Witkowska, 'The European Union Perspective on Cultural Heritage and Climate Change Issues' (2019) Journal of Comparative Urban Law and Policy, 3, no. 1, 69-70. Soulignant l'interdépendance entre l'environnement et le patrimoine culturel, l'auteure suggère l'introduction d'une régulation apte à protéger l'environnement humain en général (...*a proper regulation protecting the human environment considered*).

148. Environment Committee of The Club des Juristes, Report: Increasing the Effectiveness of International Environmental Law–Duties of States, rights of individuals, Le Club des Juristes, 2015, 103-104; AGNU, 10 mai 2018, A/72/L.51, 'Vers un Pacte mondial pour l'environnement', 2; Samantha Franks, 'The Trees Speak for Themselves: Nature's Rights Under International Law' (2021) Michigan Journal of International Law, 42, 3, 635.

149. Voy. par exemple les lignes directrices du Forum des Îles du Pacifique, adoptées en 2016 sous le nom de Cadre en faveur d'un développement résilient dans le Pacifique.

matique,[150] ainsi qu'à poser les bases d'une nouvelle gouvernance. Non seulement les régimes conventionnels pour la protection des droits humains et leurs mécanismes ne recueillent pas l'assentiment de tous les États et laissent des populations hors de tout cadre de protection, mais ils établissent des dynamiques verticales circonscrites aux rapports entre un État de nationalité et leurs ressortissants. Ils pourraient s'avérer inadaptés pour aborder les enjeux extraterritoriaux de cette menace globale, il s'avère impératif de développer des cadres normatifs pour organiser la responsabilité climatique à l'échelle planétaire.[151] Enfin, la formalisation plus affirmée de l'équité intergénérationnelle et de droits pour les générations futures permettrait à la communauté internationale de se doter d'un outil juridique déterminant pour impulser un mouvement dynamique de gouvernance raisonnée et durable.[152] De tels développements auraient le mérite de donner un sens plus clair au patchwork de normes applicables et de nouveaux fondements juridiques à la coopération multilatérale. Somme toute, cette réflexion d'ampleur conduirait à un changement de paradigme et ouvrirait la voie à une gouvernance plus adaptée aux défis de notre époque. Ainsi, ces multiples réformes potentielles de l'ordre juridique international permettraient, par ruissellement, de nourrir tant les processus de protection du patrimoine marin et côtier que la gouvernance de l'enjeu climatique.

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150. À ce sujet, le Comité directeur pour les droits humains du Conseil de l'Europe a exploré la perspective d'un instrument sur les droits humains et l'environnement dès septembre 2022. Voy. Conseil de l'Europe, 'Environnement et droits humains (CDDH-ENV)', *www.coe.int*, en ligne, consulté le 18 juillet 2024, <<https://www.coe.int/fr/web/human-rights-intergovernmental-cooperation/environment-and-human-rights>>.

151. Atapattu (n 109) 139-140.

152. À en juger l'actualité internationale, cette perspective est dans l'air du temps. Les discussions récentes dans les enceintes onusiennes, à l'occasion de la session ordinaire de l'Assemblée générale des Nations Unies, augurent d'un renforcement de l'équité intergénérationnelle en droit international et de l'avènement potentiel d'un nouveau paradigme de gouvernance.

Comme l'avaient constaté William H. Rodgers et Anna T. Mortiz dans les années ayant précédé l'adoption de l'Accord de Paris, le paysage juridique actuel est irrigué de dynamisme, d'optimisme et d'appel au changement.[153] Le champ des possibles est ainsi ouvert pour penser une justice climatique solidaire, tournée vers l'avenir et les générations futures plutôt que vers la recherche des responsabilités, et favorisant l'action présente. La pérennité du patrimoine culturel côtier et marin, dans l'idéal, et la justice pour les communautés affectées par sa disparition, dans le pire des scénarios envisageables, en dépendent.

153. William H. Rodgers et Anna T. Mortiz, 'The Worst Case and the Worst Example: An Agenda for Any Young Lawyer Who Wants to Save the World From Climate Chaos' (2009) Southeastern Environmental Law Journal, Vol. 17, no. 2, 335. ("*Despite all talk of futility, impossibility, and resignation, the entire legal scene is a frenzy of hope, effort, creative initiative, and change*").

The first climate cases of the European Court: What implications for the sea?*

*Kiara Neri***

Abstract

This article reviews the first climate-related rulings of the European Court of Human Rights and their potential implications for the sea. Through the *KlimaSeniorinnen, Duarte Agostinho*, and *Carême* cases, the Court defined strict thresholds for jurisdiction and victim status, contrasting with more flexible interpretations by UN and Inter-American bodies. While none of the cases directly addressed marine issues, they raise important questions about the legal protection of rights threatened by sea-level rise. The Swiss case established a positive obligation to prevent serious climate harms. The article highlights the structural challenges of accessing climate justice in Europe and suggests that these rulings might influence future maritime climate litigation.

Keywords: ECtHR, climate justice, sea-level rise, positive obligations, climate victim status.

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1. Introduction

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR) issued its first decisions on climate issues, in the context of three cases: *Duarte Agostinho and al. v. Portugal and 32 other States*,[1] *Carême v. France*,[2] and *Verein KlimaSeniorinnen Schweiz and al v. Switzerland*.[3]

The *Duarte Agostinho* case concerned the greenhouse gas emissions from 33 Member States which, in the view of the applicants – Portuguese nationals aged between 10 and 23 – contribute to global warming, resulting in, among other effects, heatwaves that adversely affected the applicants' living conditions and health.

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1. ECtHR, [GC] *Durarte Agostinho v. Portugal and 32 other States (the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Swiss Confederation, the Republic of Cyprus, the Czech Republic, the Federal Republic of Germany, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Estonia, the Republic of Finland, the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Hellenic Republic , the Republic of Croatia, Hungary, Ireland, the Italian Republic, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Latvia, the Republic of Malta, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Sweden, the Republic of Türkiye and Ukraine)*, 9 April 2024, Application no. 39371/20.

2. ECtHR, [GC] *Carême v. France*, 9 April 2024, Application no. 7189/21.

3. ECtHR, [GC] *Verein KlimaSeniorinnen Schweiz and al v. Switzerland*, 9 April 2024, Application no. 53600/20. For a commentary, see Andre Den Exter, 'Bringing Climate Change to Strasbourg. The Convention and Healthy Environment Claims' (2024) European Journal of Health Law, Vol. 31, Issue 2, 153-170; Angela Hefti et al., 'A Health-Centric Intersectional Approach to Climate Litigation at the European Court of Human Rights' (2024) Harvard Human Rights Journal, vol. 37, no. Special Edition, 351-378; Jacques Hartmann, 'Protecting Rights through Climate Change Litigation before European Courts' (2022) Journal of Human Rights and the Environment, Vol. 13, Issue 1, 90-113; Verena Kahl, 'A Human Right to Climate Protection - Necessary Protection or Human Rights Proliferation?' (2022) Netherlands Quarterly of Human Rights, Vol. 40, Issue 2 158-179; Ane Sydnes Egeland, 'The Convention, the Court and the Climate: The Future in the Balance' (24 September 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/the-convention-the-court-and-the-climate-the-future-in-the-balance/>>; Başak Çali and Chhaya Bhardwaj, 'Watch this

The applicants relied on the positive obligations under Articles 2 (right to life) and 8 (right to respect for private and family life) of the Convention, read in light of the States' commitments under the 2015 Paris Agreement on climate change (COP 21). They also alleged a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 2 and/or Article 8 of the Convention, arguing that global warming affects their generation particularly and that, given their age, the interference with their rights is greater than in the case of older generations. The

space: Executing Article 8 Compliant Climate Mitigation Legislation in Verein KlimaSeniorinnen v. Switzerland' (15 July 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/watch-this-space-executing-article-8-compliant-climate-mitigation-legislation-in-verein-klimaseniorinnen-v-switzerland/>>; Chris Hilson and Oliver Geden, 'Climate or carbon neutrality? Which one must states aim for under Article 8 ECHR?' (29 April 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/climate-or-carbon-neutrality-which-one-must-states-aim-for-under-article-8-echr/>>; Aoife Nolan, 'Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' Klimaseniorinnen Decision' (15 April 2024) EJIL Talks!, available <<https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>>; Stephen Humphreys, 'A Swiss human rights budget?' (12 April 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/a-swiss-human-rights-budget/>>; Ole W. Pedersen, 'Climate Change and the ECHR: The Results Are In' (11 April 2024) EJIL Talks!, available <<https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/>>; Marko Milanovic, 'A Quick Take on the European Court's Climate Change Judgments' (9 April 2024) EJIL Talks!, available at <<https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/>>; Joël Andriantsimbazovina, 'L'obligation positive des États adhérents à la Convention européenne des droits de l'Homme de lutter contre les effets néfastes graves du changement climatique' (2024) La Gazette du Palais, 05-11-2024, n°36; Marta Torre-Schaub, 'La Cour européenne des droits de l'Homme: une jurisprudence originale sur le changement climatique' (2024) Revue internationale de droit comparé, n°4, 80-95; Monica Feria-Tinta, 'Le droit international est-il en train de changer? Observations après Duarte Agostinho, Klimaseniorinnen et l'avis consultatif du TIDM sur le changement climatique' (2024) Revue internationale de droit comparé, n°4, 157-178; Marta Torre-Schaub, 'La CEDH et le changement climatique, une "approche sur mesure"' (2024) Actualité Juridique Droit Administratif (AJDA), n°31, 1720-1724; Marta Torre-Schaub, 'Le changement climatique dans la jurisprudence de la Cour européenne des droits de l'homme: entre continuité et innovation' (2024) La Semaine juridique - Administrations et collectivités territoriales (JCPA), n°23, 36-40; Sara Brimo, 'Le changement climatique entre dans le prétoire de la Cour européenne des droits de l'Homme' (2024) La Gazette du Palais, n°19, 16-19.

Grand Chamber unanimously declared the application inadmissible for two reasons. First, the Court refused to establish the extraterritorial jurisdiction of the respondent States other than Portugal. Indeed, the Court found that there were no grounds in the Convention for the extension, by way of judicial interpretation, of their extraterritorial jurisdiction in the manner requested by the applicants. It followed that territorial jurisdiction was established in respect of Portugal, whereas no jurisdiction could be established as regards the other respondent States. Second, since the applicants had not pursued any legal remedy in Portugal, the applicants' complaint against Portugal was also inadmissible for non-exhaustion of domestic remedies.

The *Carême v. France* case concerned a complaint by a resident and former mayor of the city of Grande-Synthe, who submitted that France has taken insufficient steps to prevent climate change and that this failure entails a violation of the right to life and the right to respect for private and family life. The Grand Chamber unanimously declared the application inadmissible because of the lack of victim status: the applicant had no relevant links with Grande-Synthe anymore since at the time of his application he did not live in Grande-Synthe anymore, nor in France but in Brussels.

The *Verein KlimaSeniorinnen* case was brought to the Court by four women and a Swiss association (Verein KlimaSeniorinnen Schweiz) whose members are all older women concerned about the consequences of global warming on their living conditions and health.

They considered that the Swiss authorities were not taking sufficient action to mitigate the effects of climate change. They argued that the respondent State had failed to fulfil its positive obligations to protect life effectively and to ensure respect for their private and family life, including their home. They further complained that they had not had access to a court and argued that no effective domestic remedy had been available to them for the purpose of submitting their complaints relating to the right

to life and to the right to respect for private and family life. The Grand Chamber held that there had been a violation of Article 8 (right to respect for private and family life) and 6 § 1 (right to a fair trial / access to court) of the Convention in what concerns the association. Therefore, the Court found that Switzerland had failed to comply with its duties ("positive obligations") under the Convention concerning climate change. The Swiss authorities had not acted in time and in an appropriate way to devise, develop and implement relevant legislation and measures in this case. In particular, the Court found that Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life. However, it held that the four individual applicants did not fulfil the victim-status criteria under Article 34 (individual applications) of the Convention and declared their complaints inadmissible.

These three cases are not *maritime cases.* The only one indirectly linked to sea issues is the *Carême v. France* case, in which the applicant complained about the erosion of the coastline, the risk of flooding and the sea-level rise. He submitted that his residence in Grande-Synthe was at a future risk of flooding and that according to some predictions the part of the city where he lived would be underwater by 2040 due to the effects of climate change. According to the applicant, this situation prevented him from envisaging himself serenely in his home.[4] Neither the applicant nor the Court mobilise the law of the sea in the *Carême* case. The only mention is a reference to the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice advisory proceedings on obligations of States in the context of climate change in the part "relevant international materials" common to all three cases. They were both still pending at the time the decisions of the European Court were taken.[5]

4. ECtHR, [GC] Carême v. France, 9 April 2024, Application no. 7189/21, §67, 77 and 82.
5. ECtHR, *Verein KlimaSeniorinnen,* prec., §§187 and 188.

However, these judgments raise issues that could be useful to address situations where the effect of climate change on the ocean have consequences on the enjoyment of human rights due to sea-level rise and inhabitability of coastal areas. In particular, these cases provide information on the justiciability of the human rights threatened by the maritime effects of climate change and on the conditions for accessing human rights bodies to defend them (Section 2). In addition, the Swiss case also provides information on the content of human rights in the face of climate change, which could be applicable in a maritime or coastal context (Section 3).

2. Access to an International Human rights body to address the maritime effects of climate change

The access to the ECtHR, as well as other human rights bodies is delicate in climate matters because of the global nature of the issue. First, it is extremely difficult (if not impossible) to identify the individual State responsible for the pollution since all States contribute at different levels to climate change. Second, it is also very difficult to identify who can be granted the victim status since everyone is affected by climate change.

These issues were addressed by Human rights Bodies before the European Court, especially the UN Committees (mainly the Human Rights Committee – HRC, and the Committee on the Rights of the Child – CRC) and the Inter-American Court on Human Rights (IACtHR). The HRC addressed these issues in the *Teitiota*[6] and *Torres Strait*

6. HRC, *Teitiota v. New Zealand*, Communication No. 2728/2016, 23 September 2019. No violation of the right to life (article 6).

Islander[7] cases, the CRC in the *Chiara Sacchi*[8] case, and the Inter-American Court in its 2017 *Advisory Opinion on the Environment*.[9] This *corpus* of cases factually very similar to the ECtHR cases is mostly coherent and adopts a concurring and flexible position on issues of jurisdiction and victim status. In all these cases, the human rights bodies considered the two conditions to be met.

The ECtHR adopts a diametrically opposed position since it refused to adapt the notion of jurisdiction to the climate context (Section 2.1) and creates new and specific criteria for climate cases in relations to the victim status requesting an *especially high threshold* (Section 2.2).

2.1 The notion of Jurisdiction

The IACtHR in its 2017 Advisory opinion and the CRC in the *Chiara Sacchi* case used the same test for the establishment of the jurisdiction when a transboundary harm occurred. The *Chiara Sacchi* case was brought to the Committee by a group of fifteen children who alleged that the climate inaction of France, Germany, Brazil, Turkey and Argentina caused the violation of their rights even though they did not live in the territory of the defendant States.[10] According to this test, the individuals are under the jurisdiction of the State on whose territory the emissions originated if three conditions are met: (i) if there is a causal link between

7. HRC, *Daniel Billy et al. v. Australia* (Torres Strait Islanders case), Communication No. 3624/2019, 21 July 2022. No violation of the right to life (article 6) but violation to the right to private and family life (article 17) and the minority rights (article 27).

8. CRC, *Sacchi and Others v. Argentina* (CRC/C/88/D/104/2019, 22 September 2021). Inadmissible (non-exhaustion of domestic remedies).

9. IACtHR, Advisory Opinion OC-23/17 *on the Environment and Human Rights*, 15 November 2017.

10. They alleged the violation of articles 3 (best interests of the child); 6 (right to life); 24 (right to health) and 30 (minority rights) of the Convention on the Right of the Child.

the acts or omissions of the State in question and the negative impact on the rights of individuals located outside its territory; (ii) if the State of origin exercises effective control over the sources of the emissions in question; and (iii) if the alleged harm suffered by the victims was reasonably foreseeable to the State.[11] Therefore, the CRC considered that the children were under the jurisdiction of the defendant States, opening the access to human rights bodies to the all the victims of the adverse effects of climate change even the ones that are not located in the territory of the defendant State.

The ECtHR refused to use this test in the *Duarte Agostinho* case which was very similar to the *Chiara Sacchi* case. The Court did acknowledge that States have ultimate control over public and private activities based on their territories that produce greenhouse gas (GHG) emissions that there is a certain causal relationship between public and private activities based on a State's territories that produce GHG emissions and the adverse impact on the rights and well-being of people residing outside its borders; and that the issue of climate change is of a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations. However, according to the Court, "these considerations cannot in themselves serve as a basis for creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction or as justification for expanding on the existing ones."[12]

The judges considered that there was no ground for jurisdiction in the existing case law that the Court could use since the defendant States exercised no control over the territory or the individuals. Besides, there was no "special features" which may lead the Court to extend its case law. Therefore, the Portuguese children were under the jurisdiction of Portugal only, and could not be considered to be under the jurisdiction

11. See IACtHR, OC-23/17, préc., §§101-104 and CRC, *Chiara Sacchi*, préc., §10.7.
12. ECtHR, *Verein KlimaSeniorinnen,* préc., §195.

of the other 32 States. In doing so, the ECtHR limited the access in the framework of climate issues and refused to adapt its competence and admissibility criteria to the specificities of the climate litigation. This position stems primarily from a structural concern: the European system is already burdened by a very high volume of applications, which threatens to overwhelm the Court. The ECtHR would not be able to absorb the flow of applications that could arrive if it opened its jurisdiction to all climate victims. The risk does not exist for the UN Committees and the IACtHR.

2.2 The Victim Status

The UN Committees have adapted their interpretation of victim status to address the specificities of climate change. In particular, the Committees have applied two criteria: (i) the risk of impairment of the rights being "more than a theoretical possibility"[13] and (ii) the vulnerability of the applicant.

First, the HRC reiterates its jurisprudence according to which a person may claim victim status if they are actually affected, either by an act or omission of the State party that has already impaired the exercise of a right, or if such impairment has not yet occurred but the risk of being affected is *more than a theoretical possibility*. Both in the *Torres Strait Islander* case and in the *Teitiota* case, the HRC considered that the risk of impairment of the author's rights was "more than a theoretical possibility", considering the serious adverse impacts that have already occurred, are ongoing and reasonably foreseeable.

Second, the specific vulnerability of certain groups to the adverse effects of climate change was put forward by the HRC and the CRC to grant victim status to the authors of the communications. In the *Chiara*

13. HRC, *Torres Strait's Islander*, préc., §7.10; HRC, *Teitiota v. New Zealand*, préc., §8.4.

Sacchi case, the authors are children. The Committee recognised that, "as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken."[14] In the *Torres Strait Islander* case, the HRC considered that the authors are "among those who are extremely vulnerable to intensely experiencing severely disruptive climate change impacts."[15]

The ECtHR did recognise the particular vulnerability of children in the *Duarte Agostinho* case and of older people in the *Verein Seniorinnen* case, but did not use this vulnerability to lower the threshold of the victim-status criteria.[16] On the contrary, the European Court adapted its criteria to the context of climate change to adopt an *especially high threshold*.[17] According to the Court, the victim status in relation to future risk is only exceptionally admitted in order not to slip into *actio popularis*. Besides, anyone could be concerned by the actual and future risks posed by climate change and could be affected:

> Given the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite. […] The need, in this context, for a special approach to victim status, and its delimitation, therefore arises from the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to

14. *Chiara Sacchi*, préc., §10.13.

15. HRC, *Torres Strait's Islander*, préc., §7.10.

16. ECtHR, *Verein KlimaSeniorinnen*: "The Court notes that there is cogent scientific evidence demonstrating that climate change has already contributed to an increase in morbidity and mortality, especially among certain more vulnerable groups, that it actually creates such effects and that, in the absence of resolute action by States, it risks progressing to the point of being irreversible and disastrous", préc., §478.

17. Ibid., §488.

> certain identifiable individuals or groups but affect the population more widely.[18]

Therefore, the Court requires the existence of a real risk of a "direct impact" on the applicant's rights.[19] Besides, the risk must be of a particular level and severity. If the applicant invokes the rights to life, he/she has to demonstrate that the risk is "real and imminent";[20] if the allegations concern the enjoyment of the right to privacy or family life, the Court requires the proof of an "actual interference" with the applicant's rights.[21]

As a result, the four individual applicants in the *Verein KlimaSeniorinnen* case did not meet the *especially high threshold.* Once again, UN Committees are not facing the same risks as the European Court is in terms of clogging under the number of applications. However, the Court did grant the victim status to the Swiss association. This is the only issue where the Court will allow some flexibility in the interpretation of the admissibility criteria. According to the Court, the "the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing" justify the recognition of the standing of associations before the Court in climate-change cases:[22]

> The Court therefore considers it appropriate in this specific context to acknowledge the importance of making allowance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change, instead of exclusively relying on proceedings brought by each individual on his or her own behalf.[23]

18. Ibid., §479.

19. Ibid., §483.

20. Ibid., §§511 et s.

21. Ibid., §§514 et s.

22. Ibid., §499.

23. Ibid.

Thus, the conditions for an association to be granted the victim status are the following: the association must be (i) lawfully established in the State party; (ii) pursuing (in accordance with its statute) the defence of the human rights of its members (within the jurisdiction concerned) against the threats arising from climate change; and (ii) qualified and representative to act on behalf of its members or other affected individuals.[24]

3. Content of the obligations regarding the maritime effects of climate change

The most interesting part of the ECtHR judgments is, of course, the recognition of a positive obligation "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change"[25] (Section 3.1). However, the Court also recognised the existence of a wide margin of appreciation in the implementation of the positive obligation (Section 3.2).

3.1 The Recognition of Positive Obligations

In the *Torres Strait Islander* case, Australia argued that the positive obligation under Article 17 of the Covenant (private and family life) does not "create an obligation to protect generally against the future effects of climate change, which, as a matter of international law, extend well beyond the scope of a single State party's jurisdiction and control".[26] The defendant State further argued that the allocation of State's resources to

24. Ibid., §502.

25. Ibid., §545.

26. HRC, *Torres Strait Islander*, préc., §6.8.

the fight against climate change is a democratic matter including difficult policy decisions from democratically elected national institutions. A similar position has been taken by the Swiss authorities in the *KlimaSeniorinnen* case.[27]

However, both the HRC and the ECtHR applied the positive obligations under the right to private and family life to climate change measures. The HRC recalls that States parties must "prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious,"[28] including when the threat comes from environmental damage.[29] Likewise, the ECtHR concluded that the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the European Convention on Human Rights.

The ECtHR also recognised procedural positive obligations as regards the State's decision-making process in the context of climate change. First, the obligation to inform the public, in particular the persons who may be affected by the regulations and measures decided by the public authorities or the absence thereof, allowing them to assess the risk to which they are exposed. Second, the obligation to allow public participation in the decision-making process, in particular the interests of those affected or at risk.[30]

27. ECtHR, *Verein KlimaSeniorinnen*, préc., §337.

28. HRC, *Torres Strait Islander*, préc., § 8.9. See also General comment No. 16 (1988), paras 1 and 9.

29. Ibid., préc., §8.9.

30. ECtHR, *Verein KlimaSeniorinnen*, préc., §554.

3.2 The margin of appreciation

If human rights bodies affirm the existence of a positive obligation under the right to privacy and family life to adopt measures capable of mitigating the existing and potentially irreversible future effects of climate change, they also let to the State parties a certain margin of appreciation.

The ECtRH explained, in the *KlimaSeniorinnen* case, that States Parties have a reduced margin of appreciation on their commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect. However, on the choice of means designed to achieve those objectives, State parties can benefit from a wide margin of appreciation. Of course, the ECtHR will control that the competent domestic authorities have not exceeded their margin of appreciation. To do so, the Court verifies that they

(i) adopted general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(ii) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(iii) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction target […];
(iv) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(v) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[31]

31. ECtHR, *Verein KlimaSeniorinnen*, §550.

The existence of a wide margin of appreciation could disappoint on the robustness of the obligations, especially in comparison to other international courts or tribunals who adopted a more ambitious interpretation of States' obligations in the context of climate change.[32] However, the ECtHR judges made a clear reference to the due diligence obligation[33] contained both in international environmental law and in the law of the sea.[34] Therefore, the ECtHR opened the door for a dynamic interpretation of the Convention in light of the law of the sea obligations, especially in light of ITLOS's interpretation of the due diligence obligation in the context of climate change. As a matter of fact, ITLOS considers that the standard of due diligence that States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be *stringent*.[35]

In conclusion, the ECtHR adopted a rather restrictive view of its competence and of the admissibility of the application preventing non-European coastal communities from accessing the Court, for instance on sea-level rise issues. However, it did recognise the existence of a positive obligation under Article 8 of the European Convention on Human Rights to mitigate existing and potential effects of climate change and extend the *locus standi* of associations in climate matters, opening the door to potential maritime or coastal cases.

32. See for instance: ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, N°31.

33. See ECtHR, *Verein KlimaSeniorinnen*, §§538 and 550.

34. The due diligence principle is stemming from the prevention principle (which requires States to act diligently to prevent environmental harm). In the climate change context, the principle is contained in Article 4§3 Of the Paris agreement, 2015.

35. ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, N°31, §241.

Isabella Leucci, *Paranza III.*

Concluding Remarks

Pierandrea Leucci, Chiara Pavesi,** and Pierre Clément Mingozzi****

This volume brings to a close an intellectual voyage through the dynamic interface of international human rights law and the law of the sea. Along the way, we have traced the enduring imprint of occupation and systematic rights violations along the Palestinian borders; followed flotillas navigating the disputed waters of the Spratly Archipelago; and traversed the lived realities of Indigenous communities across Latin America, the Seychelles, and the Pacific. We have examined extractive practices in the conflict-affected Kivu provinces and observed search and rescue operations over the Mediterranean, where the journeys of migrants often culminate in fatal neglect.

This volume has also interrogated the intersecting pressures of climate change on oceanic governance and human rights, explored the deploy-

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ment of machine learning and emerging technologies at sea, and reflected on the ethical and legal frameworks necessary to regulate these transformations. Through these contributions, a unifying thread emerges: maritime spaces are not legal voids but arenas of normative contestation and accountability. Human rights obligations extend beyond terrestrial borders and must inform – and be informed by – the ways in which States regulate maritime spaces and resources.

The conceptual foundation of this volume rests on the recognition that the rights of individuals and communities are not only applicable *at sea* as they are on land, but that their content and implementation are inextricably linked to the legal regimes through which States exercise jurisdiction, control, and regulatory authority over maritime spaces and resources. The absence of an integrated legal approach – one that bridges the artificial compartmentalisation between distinct regimes of international law – risks rendering international human rights law and the law of the sea normatively proximate yet functionally disjointed.

Judicial and scholarly efforts have played an instrumental role in addressing this fragmentation. The jurisprudence of international courts and tribunals, as well as academic-led initiatives such as the Geneva Declaration on Human Rights at Sea and the *BlueRights* COST Action, constitute emerging avenues for clarifying and operationalising human rights standards in maritime contexts. The foundational contributions to this volume by Judge Lijnzaad, Judge Marciniak, and Professor Papanicolopulu reflect the increasing recognition of the imperative to foster normative coherence between these bodies of law, particularly in a legal landscape that is progressively centring 'considerations of humanity' within the regulatory governance of maritime spaces and activities.

Building on these insights, this volume adopts a holistic and integrative perspective, treating the law of the sea not as an autonomous or self-referential regime, but as a dynamic and permeable body of international law – one that both shapes and is normatively shaped by

adjacent legal frameworks, including international human rights law. It is conceived not merely as a functional regime concerned with maritime navigation, fisheries management, and the delimitation of maritime zones, but as a structural legal order that operates as a determinant in the realisation and protection of human rights across diverse legal and geographic contexts.

This, in turn, raises the critical question of how such a normative shift may be operationalised within legal practice.

First, as explored throughout this volume, normative lacunae within the UN Convention on the Law of the Sea (UNCLOS) and the broader corpus of international law governing maritime affairs engender uncertainty regarding States' jurisdictional competence, rights, obligations, and accountability. The contributions to this volume converge almost unanimously in acknowledging the functional and evolutionary significance of 'considerations of humanity', as consistently invoked by international courts and tribunals – most notably the International Tribunal for the Law of the Sea (ITLOS) – as a pivotal interpretative medium for bridging the normative gap between human rights law and the law of the sea within the framework of UNCLOS. The precise content of 'humanity' for the purposes of interpreting and applying specific rights and obligations under the law of the sea remains open to debate; however, what is clear is that UNCLOS provisions – and the law of the sea more broadly – cannot be construed or applied in a manner that infringes upon the basic human rights and fundamental principles protecting individuals and communities, whether on land or at sea.

Second, the risks associated with the use of maritime spaces and resources in ways that are incompatible with the protection and full realisation of human rights are further exacerbated when the safeguarding of such rights is subordinated to, or distorted by, State political agendas, often shaped by enduring post-colonial legacies. Prevailing geopolitical dynamics and economic rivalries among super-powers materially influ-

ence the interpretation and application of the law of the sea and human rights norms, including by non-Parties to UNCLOS. In this regard, any constructive academic discourse on the subject must be grounded in a structural understanding of the geopolitical context within which maritime rights and obligations are embedded. Such an approach underscores that, in the absence of genuine political will, normative frameworks alone are insufficient to ensure the consistent protection of human rights at sea.

Third, equally significant is the internalisation of international human rights obligations – particularly those deriving from UNCLOS – through domestic legislative and regulatory frameworks. States, in their various capacities as flag, coastal, or port States, are thereby enjoined to adopt measures enabling them to discharge their responsibilities under international law. This process transcends mere technical compliance; it reflects a deeper alignment between the normative commitments of the international legal order and the practical mechanisms through which individual and collective rights – especially those of vulnerable or maritime-dependent communities – are recognised and safeguarded within national systems.

Fourth, there is a pressing need to reimagine legal frameworks in light of emerging and evolving challenges in ocean governance. The inadequacy of traditional legal silos – whether within human rights law, cultural heritage protection, climate law, or the law of the sea – is increasingly apparent. Instead, interdisciplinarity and normative flexibility are required: a vision of the ocean not merely as a resource but as a juridical space for the realisation of socio-environmental rights, particularly through the recognition of community-led and Indigenous claims. Contributions in this volume underscore the role of marine cultural heritage in reinforcing memory, identity, and resilience for communities whose ways of life are threatened by sea-level rise and ecological degradation. In this context, law is interrogated not only for its deficiencies but also

reimagined as a generative force – a vehicle for solidarity, resistance, and transformation.

Fifth, a salient domain is the delimitation of maritime boundaries, which carries significant implications for the effective enjoyment of human rights, both on land and at sea. Beyond ensuring legal certainty regarding the scope of coastal States' jurisdiction – which necessarily conditions the distribution and exercise of rights and obligations by adjacent communities – there is an emerging imperative to integrate human rights considerations into the delimitation process itself. In particular, the rights of Indigenous peoples and other vulnerable groups ought not to be treated as peripheral concerns but recognised as relevant, and potentially determinative, circumstances within the normative framework governing maritime delimitation. This approach requires a reorientation of traditional methodologies, incorporating socio-legal and human rights dimensions alongside geographic and geomorphological considerations.

Sixth, another key avenue of inquiry concerns the incorporation of human rights considerations into the due diligence obligations incumbent upon States, particularly in their capacity as flag States with respect to the conduct of vessels entitled to fly their flag. Pursuant to Article 94 UNCLOS and customary international law, the flag State bears primary responsibility for exercising effective jurisdiction and control over its vessels. When viewed through the prism of international human rights law, this obligation entails not only the establishment of adequate legislative and administrative frameworks but also the implementation of monitoring mechanisms and the adoption of corrective measures in the event of violations – proportionate to the degree of risk and the State's actual or constructive knowledge thereof. Such duties may be conceptualised as constitutive of the 'genuine link' requirement, situating flag State responsibility within the broader matrix of fundamental rights protection at sea. A normative intersection further elaborated in the Legal Opinion

commissioned by the BDS National Committee and prepared by an expert group coordinated by ASCOMARE, annexed to this volume.

Seventh, and finally, we would like to conclude with a forward-looking observation: the time may be approaching for the international community to contemplate the development of a fourth implementing agreement to UNCLOS, specifically addressing human rights issues arising in the management and use of maritime spaces and resources. Such an instrument could clarify and operationalise the human rights obligations of States and non-State actors in maritime contexts, particularly where legal ambiguities or jurisdictional gaps persist. It would also provide a formal mechanism for integrating evolving standards of environmental justice, cultural rights, and the protection of vulnerable categories into the legal fabric of ocean governance. Drawing inspiration from existing implementing agreements under UNCLOS, a dedicated agreement on human rights at sea would reinforce normative coherence between the law of the sea and international human rights law.

By grounding such an initiative in both doctrinal development and lived realities, the international legal order could take a meaningful step toward dismantling the long-standing conceptual and institutional silos that continue to obscure the indivisibility of rights, irrespective of whether they are exercised on land or at sea.

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ANNEX

11 March 2025

Legal opinion

Request for a Legal Opinion on the Regime of Innocent Passage and the Due Diligence Obligations of Flag States under the International Law of the Sea

I. Introduction

1. This expert legal opinion aims to elucidate the rights and obligations of States regarding activities conducted by vessels flying their flag or operating within their waters, particularly in cases involving serious violations of human rights or breaches of peremptory norms of international law. To this end, the opinion addresses the following questions concerning the regime of innocent passage and the due diligence obligations of flag States under the international law of the sea:

Question 1 – Innocent passage regime

a. Under the UN Convention on the Law of the Sea (UNCLOS or the Convention)[1] or other applicable rules of international law, do coastal States have the right or the obligation to interrupt or suspend the passage of foreign ships through their

1. Convention on the Law of the Sea, opened for signature on 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

territorial sea:

i. In response to non-compliance with international human rights obligations binding upon those States, including obligations arising under the UN Arms Trade Treaty and other relevant treaties?
ii. To avoid providing aid or assistance to another State in maintaining a situation that constitutes a breach of peremptory norms of international law?

b. If such a right or duty exists:
   i. Under what circumstances and conditions may or should it be exercised?
   ii. What enforcement measures can a coastal State lawfully implement against foreign ships engaged in non-innocent passage?
   iii. Does it reflect customary international law?

Question 2 – Due diligence obligations of flag States

a. Does UNCLOS require flag States to effectively exercise control and jurisdiction over vessels flying their flag, including when those vessels operate within the waters of another State?
b. If such a general duty exists:
   i. Does it include a due diligence obligation for flag States to monitor the compliance of vessels flying their flag with the State's binding human rights obligations, including those arising under the UN Arms Trade Treaty and other relevant treaties, and to take appropriate action in cases of non-compliance?
   ii. Does it reflect customary international law?

2. The international law of the sea is the body of rules of public international law governing the use and management of maritime spac-

es and resources, both in peacetime and, to the extent consistent with the law of armed conflict, during wartime.[2]

3. The sources of international law, as outlined in Article 38(1) of the Statute of the International Court of Justice (ICJ),[3] including international conventions and customs, apply to the law of the sea, as they do in other areas of international law. These sources may also underpin the establishment of peremptory norms of general international law (*ius cogens*), as defined by Article 53 of the Vienna Convention on the Law of Treaties (VCLT).[4]

4. The cornerstone of the international law of the sea is the UNCLOS, adopted in 1982 and in force since 16 November 1994. The Convention draws on the foundational work of the International Law Commission (ILC)[5] for the 1958 Geneva Conventions on the Law of the Sea,[6] as well as on subsequent multilateral developments,

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2. *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9 April 1949, ICJ, 22.

3. ICJ Statute, Article 38(1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

4. VCLT, Article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, *a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*" Emphasis added.

5. International Law Commission, *Articles concerning the Law of the Sea with commentaries*, Yearbook of the International Law Commission, 1956, Volume II.

6. Convention on the Territorial Sea and the Contiguous Zone, came into force on September 10, 1964, Convention on the High Seas, came into force on September 30, 1962, Convention on Fishing and Conservation of the Living Resources of the High Seas, came into force on March 20, 1966, Convention on the Continental Shelf, came into force on June 10, 1964.

negotiations, relevant State practice, and decisions by competent international bodies, including international courts and tribunals.

5. As of January 2025, UNCLOS has been ratified or acceded to by 170 parties, including one international organization (the European Union) and a non-UN member State with Permanent Observer status (the State of Palestine).

6. Due to the widespread ratification of UNCLOS, the enduring nature of many of its provisions – confirmed by the Convention's history and the jurisprudence of international courts and tribunals – and the prohibition of reservations and exceptions within its framework,[7] numerous UNCLOS provisions are widely recognized as reflective of customary international law, even by States that have not ratified the Convention.

7. The provisions of UNCLOS pertinent to the analysis in this legal opinion are primarily found in Part II (Territorial Sea and Contiguous Zone), Section 3 (Innocent Passage in the Territorial Sea), Part VII (High Seas), Section 1 (General Provisions), and Part XVI (General Provisions) of the Convention. These rules should be considered in the context of the preparatory work of UNCLOS, academic literature, and relevant international case law, including decisions of the International Tribunal for the Law of the Sea (ITLOS), which contribute to their interpretation.

8. Finally, other international legal instruments, including the UN Arms Trade Treaty (ATT)[8] the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),[9]

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7. UNCLOS, Article 309.

8. Arms Trade Treaty, opened for signature on 3 June 2013, UNTS No 52373 (entered into force 24 December 2014).

9. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, UNTS 2000 (entered into force 12 January 1951).

and the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)[10] are integral to the analysis presented in this legal opinion.

9. This legal opinion was commissioned by the Palestinian Boycott, Divestment and Sanctions (BDS) National Committee (hereinafter "the claimant") to the Associazione di Consulenza in Diritto del Mare (ASCOMARE), and was prepared in a personal capacity by the following experts, listed alphabetically: Ademuni Odeke,[11] Alice Ollino,[12] Andrea Caligiuri,[13] Andrea Pappalardo,[14] Daud Hassan,[15] Irini Papanicolopulu,[16] Pierandrea Leucci[17] and Tullio Scovazzi.[18] Research support was provided by Pierre Clément Mingozzi,[19] Andrea Valentina Salamino[20] and Matteo Bedendi.[21]

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10. International convention on the suppression and punishment of the crime of apartheid, adopted by the General Assembly of the United Nations on 30 November 1973, UNTS 1563 (entered into force 18 July 1976).

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II. Legal analysis

QUESTION 1, SUB-QUESTION (a)

10. The first issue addressed pertains to the regime governing the innocent passage of vessels through a coastal State's territorial sea, which encompasses several sub-questions, as outlined in point 1 of this legal opinion.

11. Initially, the inquiry seeks to determine whether coastal States, under UNCLOS or other international law rules, have a right or an obligation to interrupt or suspend the passage of a foreign vessel through their territorial sea:

i. *In response to non-compliance with international human rights obligations binding upon those States, including obligations arising under the UN Arms Trade Treaty and other relevant treaties?*

ii. *To avoid providing aid or assistance to another State in maintaining a situation that constitutes a breach of peremptory norms of international law?*

12. With respect to the reference in sub-question (a)(i) to the human rights obligations arising under the ATT and other relevant treaties, the claimant queried whether non-compliance with such obligations by vessels transiting through a coastal State's territorial sea could justify the suspension or interruption of the innocent passage regime for a specific vessel. While the ATT does not, strictly speaking, create standalone "human rights obligations" applicable in this context, it underscores the need for States to respect and uphold existing human rights commitments under other legal frameworks. Therefore, this legal opinion will examine the relevant provisions of the ATT in the broader context of international human rights obligations and assess their potential implications.

13. The term "human rights obligations" should be understood as encompassing obligations to respect, protect, and fulfil the rights of individuals or groups, including those who may be directly or indirectly impacted by the activities of vessels transiting through a coastal State's territorial sea. However, this legal opinion does not specifically address the implications of non-compliance with human rights obligations as they relate to individuals on board the vessel, such as seafarers, although many of the conclusions and considerations discussed herein could extend to those circumstances.

14. As for "other relevant treaties," this term should be understood within the context and objectives of the ATT. Entered into force on 24 December 2014 and being today in force for 116 States, the ATT was conceived, negotiated, and adopted within the framework of existing international legal and policy instruments. Its primary aim is to prevent the misuse of deadly weapons to undermine peace and security or to perpetrate acts such as genocide, crimes against humanity, war crimes, and other human rights violations.[22] The treaty recognizes the interdependence and mutual reinforcement of peace, security, and human rights – the foundational pillars of the UN system.[23]

15. In light of the foregoing, while the term "other relevant treaties" could be interpreted broadly, the authors of this legal opinion propose that it should, at a minimum, include the Genocide Convention and the Apartheid Convention. Accordingly, the analysis presented in this legal opinion will, to the extent possible, also consider these legal instruments.

16. The **ATT** establishes provisions regulating the transfer of conven-

22. ATT, Preambular Paragraph 4.

23. Ibid., Preambular Paragraph 7.

tional arms outlined in Article 2(1)[24] and additional items covered by Articles 3[25] and 4.[26]

17. Article 6 explicitly prohibits States Parties from authorizing the "transfer", including transit,[27] of conventional arms and related items if they have knowledge that such arms or items will be used to commit genocide, crimes against humanity, or other serious human rights violations.[28] The Voluntary Guide on implementing Article 6 clarifies that the phrase "shall not authorize any transport" should be interpreted broadly, obliging States Parties to prohibit and prevent any export, import, transit, trans-shipment, or brokering of arms and other items covered by Articles 2(1), 3, and 4 of the ATT under their jurisdiction.[29]

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24. ATT, Article 2(1): "This Treaty shall apply to all conventional arms within the following categories: (a) Battle tanks; (b) Armoured combat vehicles; (c) Large-calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons."

25. Ibid., Article 3: "Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions."

26. Ibid., Article 4: "Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components."

27. Ibid., Article 2(2): "For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as 'transfer'."

28. Ibid., Article 6(3): "A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

29. Working Group on Effective Treaty Implementation, *Voluntary Guide to Implementing Articles 6 and 7 of the Arms Trade Treaty* (19 July 2024) 20, para 45.

18. The obligations under Article 6 are reinforced by Articles 5(5)[30] and 14[31] which require States Parties to adopt necessary measures, including enforcement action to implement treaty provisions.[32]

19. The text of the treaty does not imply a strict territorial limitation on its obligations and provisions. References to "territory" in certain provisions of the ATT (e.g., Articles 9 and 12) should be understood to encompass, at a minimum, waters under the coastal State's territorial sovereignty – specifically, internal waters, territorial seas, and archipelagic waters – which are recognized under international law as integral and inseparable components of a coastal State's territory.[33]

20. Turning to the **Genocide Convention**, the prevention and punishment of genocide – a crime under international law – is a fundamental duty under Article I[34] and constitutes a peremptory norm

30. ATT, Article 5(5): "Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2 (1) and of items covered under Article 3 and Article 4."

31. Ibid., Article 14: "Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty."

32. Although Article 9 of the Treaty explicitly refers to "transit" and could arguably have been mentioned here, it is reasonable to conclude that this provision does not apply in the context of Article 6, which is more exceptional in nature. For further analysis, see Expert Group on ATT Implementation, Prevention, Transit, and Innocent Passage under the Arms Trade Treaty (Briefing No. 3, August 2015), p. 8.

33. The *Grisbådarna* case (Norway v. Sweden), Award, (1909) XI RIAA 155, (1910) XVII RGDIP 177, ICGJ 404 (PCA 1909), 23rd October 1909, Permanent Court of Arbitration, 4; and Article 2(1) UNCLOS.

34. Genocide Convention, Article I: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

of international law applicable to all States.[35]

21. The Convention defines "genocide" in Article II[36] as any of the acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", whether in times of peace or war.[37] Article III further obliges States to punish conspiracy, direct and public incitement, attempt and complicity in committing genocide, alongside the crime itself.[38] The International Criminal Tribunal for Rwanda has clarified that complicity in genocide encompasses "all acts of assistance or encouragement that have substantially contributed to, or had a significant effect on, the commission of the crime of genocide."[39]

22. The Convention imposes obligations on its State Parties, which are characterized as obligations *erga omnes partes*, meaning that each

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35. E.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, para 161; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, para 87. See also the non-exhaustive list of norms with peremptory character published in 2022 by the ILC in its 'Fifth Report on Peremptory Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur', available at <<https://documents.un.org/doc/undoc/gen/n21/284/83/pdf/n2128483.pdf>>.

36. Genocide Convention, Article II: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

37. Ibid., Article I.

38. Ibid., Article III: "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

39. Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), International Criminal Tribunal for Rwanda, May 15, 2003, paras 393 and 395.

State Party has a vested interest in ensuring compliance in any given case.[40]

23. States Parties to the Genocide Convention are legally obliged to prevent and punish genocide from the moment they "[learn] of, or should normally have learned of, the existence of a serious risk that genocide will be committed."[41] At that point, if the State possesses means reasonably capable of deterring individuals suspected of preparing to commit genocide or harbouring the requisite specific intent (*dolus specialis*), it must employ such means to the fullest extent permitted by the circumstances.[42]

24. For the duty to prevent to be triggered, two conditions must be met: (i) the situation must constitute a "grave risk", and (ii) the State must have known, or should have known, of the risk. The "grave risk" criterion is closely linked to the "plausibility" standard, as highlighted by the ICJ in its indication of interim measures in *South Africa v. Israel*.[43] The ICJ's finding of "plausible rights" and "imminent risk" serves as the threshold for knowledge of the risk of genocide, which activates the legal obligations of third States under the Convention.

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40. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Provisional Measures, Order, 26 January 2024, ICJ, para 33. See also, Barcelona Traction, Light and Power Company Limited (New Application, 1962), (Belgium v. Spain), Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970), 5 February 1970, ICJ, paras 33-34; and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19 December 2005, ICJ, para 64.

41. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 431.

42. Id.

43. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Provisional Measures, Order, 26 January 2024, ICJ, para 54.

25. In *Bosnia v. Serbia*, the ICJ clarified that the duty to prevent requires States "to employ all means reasonably available to them" to prevent genocide.[44] This obligation is one of *conduct*, not of *result*, meaning the focus is on whether the State has taken all reasonable measures, made its best efforts, and acted to the fullest extent possible to achieve the prevention of genocide, regardless of the outcome.

26. The obligation to prevent requires States to act with due diligence by taking all necessary measures to avert genocide. This obligation applies extraterritorially.[45] A State's responsibility for an international wrongful act arises if it "manifestly failed to take all measures within its power to prevent genocide."[46]

27. Finally, regarding the **Apartheid Convention**, apartheid is recognized as a "crime against humanity", constituting a grave threat to international peace and security and violating fundamental principles of international law, including those enshrined in the UN Charter.[47]

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44. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 430.

45. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Preliminary Objections, I.C.J. Reports 1996 (II), para 31; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 183.

46. Ibid., para 431. See also, *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, Sep. Op. Judge ad hoc Petrig, 15-16.

47. Apartheid Convention, Article I: "1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security. 2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid."

28. The crime of apartheid encompasses a range of "inhuman acts" outlined in Article II of the Convention, committed "for the purpose of establishing and maintaining domination by one racial group over any other racial group and systematically oppressing them."[48]

29. Similar to the Genocide Convention, Article III of the Apartheid Convention affirms the extraterritorial application of its provisions and extends legal consequences to acts of participation in, direct incitement, abetment (complicity), conspiracy, encouragement,

48. Apartheid Convention, Article II: "For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour; (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."

and cooperation in the commission of apartheid.[49] The prohibition of apartheid is recognized as a peremptory norm (*jus cogens*) under customary international law, giving rise to *erga omnes* obligations owed to the international community as a whole.[50]

30. All States Parties are obliged to prevent and punish the crime of apartheid, including through the adoption of necessary measures to suppress, prevent, and prosecute its commission.[51]

Innocent passage regime under the UNCLOS

31. Before addressing Question 1, sub-question (a), it is important to outline the legal regime governing innocent passage, as established in Part II, Section 3 of the UNCLOS.

32. Under Article 17 of the UNCLOS, the right of innocent passage is granted to the ships[52] of all States through the territorial sea

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49. Ibid., Article III: "International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention; (b) Directly abet, encourage or co-operate in the commission of the crime of apartheid."

50. See the non-exhaustive list of norms with peremptory character published in 2022 by the ILC in its 'Fifth Report on Peremptory Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur', available at <<https://documents.un.org/doc/undoc/gen/n21/284/83/pdf/n2128483.pdf>>.

51. Ibid., Article IV: "The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts."

52. Including underwater vehicles (Article 20). For a definition of "ships" in the context of the innocent passage regime under the UNCLOS see Murat Sumer, 'Applicability of the right of innocent passage to maritime autonomous surface ships: Exploring the potential role of advisory opinions', in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 3: Maritime Security, New Technology and Ethics* (Luglio Editore 2024) 149-178.

of a coastal State[53] and, with certain exceptions, extends to other maritime zones.[54] Innocent passage consists of two key elements: "passage" and "innocence". To lawfully exercise this right, vessels must satisfy the criteria for both. Additionally, ships engaged in innocent passage are required to adhere not only to the provisions of the UNCLOS but also to other applicable rules of international law.[55]

33. Passage may occur laterally through the territorial sea or vertically when entering or exiting the territorial sea to or from internal waters,[56] the exclusive economic zone (EEZ), or the high seas. Such passage must be continuous and expeditious, without stopping or anchoring, except in cases of force majeure, distress, or to provide assistance to persons or vessels in distress at sea.[57] Passage is "innocent" so long as it is not prejudicial to the peace, good order or security of the coastal State.[58] Article 19(2) of the UNCLOS provides a list of activities which render passage not innocent.

34. Coastal States exercise sovereignty over their territorial sea,[59] which includes the power to enact laws and regulations governing specific activities of vessels engaged in innocent passage.[60] These laws and regulations must be public, non-discriminatory, and

53. UNCLOS, Article 17: "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

54. Internal waters (UNCLOS, Article 8(2)), straits used for international navigation (UNCLOS, Article 45), and archipelagic waters (UNCLOS, Article 52).

55. See Articles 18 and 19 of the UNCLOS, as they will be examined below in this legal opinion.

56. UNCLOS, Article 18(1).

57. Ibid., Article 18(2).

58. Ibid., Article 19(1).

59. Ibid., Article 2(1).

60. Ibid., Article 21(1).

must not hamper passage, including by imposing requirements on foreign ships that effectively deny or impair the right of innocent passage.[61]

35. Warships[62] and other government vessels operating for non-commercial purposes are also required to comply with the laws and regulations of the coastal State while exercising the right of innocent passage through its territorial sea. In cases of non-compliance, the coastal State may demand that such vessels immediately leave its territorial sea.[63] Although these vessels enjoy immunity from the coastal State's enforcement jurisdiction,[64] the flag State remains liable for any loss or damage caused by acts of non-compliance by its vessels.[65]

36. Coastal States have the authority to take measures against passages that does not qualify as "innocent" and to prevent violations of the conditions governing entry into their internal waters or ports.[66] They may also temporarily suspend innocent passage in specified areas of their territorial sea, provided such suspension is duly published, non-discriminatory, and essential for safeguarding their security, including during weapons exercises.[67]

37. The coastal State's sovereignty over its territorial sea includes the right to exercise full jurisdiction vis-à-vis vessels that are not engaged in innocent passage. Additionally, a coastal State may assert criminal or civil enforcement jurisdiction over individuals on for-

61. Ibid., Article 24.

62. As defined in Article 29 of the UNCLOS.

63. UNCLOS, Article 30.

64. Ibid., Article 32.

65. Ibid., Article 31.

66. Ibid., Article 25(1) and (2).

67. Ibid., Article 25(3).

eign vessels exercising the right of innocent passage in the territorial sea, in accordance with the UNCLOS.[68] This includes cases where the consequences of the crime extend to the coastal State, where the offense occurred within the coastal State's land territory or internal waters, or where such action is requested by the vessel's master or flag State.

38. Based on the foregoing, and without prejudice to the special status of warships and other government vessels used for non-commercial purposes, the UNCLOS would allow coastal States to interrupt or suspend the passage of foreign vessels through their territorial sea in at least four scenarios: **first,** when a vessel engages in passage that is not "innocent"; **second**, when a vessel is bound for internal waters or ports in violation of the conditions governing its admission to those areas; **third**, when such suspension is deemed essential for the protection of the coastal State's security, subject to the conditions outlined in the UNCLOS; and **fourth**, when suspension is necessary for criminal or civil enforcement related to offenses committed by individuals on board the vessel, within the limits prescribed by the UNCLOS. An analysis of these four scenarios is needed to reply to Question 1(a).

First scenario – vessels engaging in non-innocent passage

39. Article 25(1) of the UNCLOS[69] grants coastal States the authority ("*may*") to take the necessary steps within their territorial sea to prevent passages that does not qualify as "innocent", which may

68. Ibid., Articles 27 and 28.

69. UNCLOS, Article 25(1): "The coastal State *may* take the necessary steps in its territorial sea to prevent passage which is not innocent." Emphasis added.

include stopping the vessel for enforcement purposes.[70]

40. The "meaning of innocent passage" is provided for by Article 19 of the UNCLOS:

> *1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.*
>
> *2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:*
>
> *(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;*
>
> *(b) any exercise or practice with weapons of any kind;*
>
> *(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;*
>
> *(d) any act of propaganda aimed at affecting the defence or security of the coastal State;*
>
> *(e) the launching, landing or taking on board of any aircraft;*
>
> *(f) the launching, landing or taking on board of any military device;*
>
> *(g) the loading or unloading of any commodity, currency or per-*

70. As noted by Petrig: "Jurisdiction under the law of the sea is permissive in nature, not prescriptive. This means that the coastal state is authorised, but not obliged, to exercise it. This is confirmed by Article 25(1) UNCLOS, stating that "The coastal State *may* take the necessary steps in its territorial sea to prevent passage which is not innocent' (emphasis added). The word 'may' indicates that the coastal state has the option to not take any action at all against a non-innocent ship." See Anna Petrig, 'Coastal State Jurisdiction in the Territorial Sea and the Protection of People on board foreign-flagged vessels' (2024), available at <<https://www.ejiltalk.org/coastal-state-jurisdiction-in-the-territorial-sea-and-the-protection-of-people-on-board-foreign-flagged-vessels/>>.

son contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

41. Article 19 outlines three key elements in defining the concept of innocent passage. First, there is the requirement that the passage must not prejudice the "peace, good order, or security of the coastal State" (paragraph 1, first sentence). Second, the passage must be consistent with other provisions of the UNCLOS and broader international law (paragraph 1, second sentence). Finally, paragraph 2 provides a detailed list of activities qualifying the types of "prejudice" that render a passage non-innocent.

42. It is reasonable to view the first and third elements outlined in point 41 of this legal opinion as closely interdependent. The "prejudice" described in paragraph 1 of Article 19 is legally substantiated by one or more of the activities enumerated in paragraph 2. As such, although the wording of paragraph 2(l) may allow for some interpretive flexibility, the list should be regarded as relatively strict.

43. This interpretation is further supported by the preparatory work of the Convention.[71] Article 19 of the UNCLOS draws upon Article 14(4) of the 1958 Territorial Sea and Contiguous Zone (TSC)

71. For a summary of which see Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne. *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume 2* (Brill | Nijhoff 1993) 164-174.

Convention,[72] which, while nearly identical to Article 19(1) of the UNCLOS, did not include a list of activities explicitly qualifying a passage as non-innocent. The inclusion of such a list, now found in Article 19(2), arose during the UNCLOS negotiations to limit the discretionary power of coastal States in determining the non-innocence of a vessel's passage through their territorial sea.[73]

44. Regarding the second element outlined in point 41 of this legal opinion – namely, the requirement that passage be exercised in a manner consistent with other provisions of the UNCLOS and broader rules of international law – it should be stressed that, irrespective of any prejudice caused by the activities of the transiting vessel, passage cannot qualify as innocent if it contravenes other provisions of the UNCLOS or other rules of international law. This conclusion, among other things, is supported by the underlying separation between the first and second sentences of Article 19(1), the hierarchical relationship between the UNCLOS and other sources of international law (in particular, *jus cogens*), and a contextual reading of Article 17,[74] which explicitly conditions the right of innocent passage on compliance with the Convention as a whole.[75]

45. Neither Article 19(1) nor 19(2) explicitly address the two scenarios outlined in point 11 of this legal opinion – namely, vessels acting in

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72. Convention on the Territorial Sea and the Contiguous Zone, opened to signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964). According to Article 14(4) "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law".

73. See Richard Barnes, 'Article 19', in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 189.

74. UNCLOS, Article 17: "*Subject to this Convention*, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." Empasis added.

75. Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne. *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume 2* (Brill | Nijhoff 1993) 174.

violation of international human rights law or peremptory norms of international law – unless such violations fall within the scope of the activities enumerated in Article 19(2).[76] However, the specific content of Article 19(2)(a), as well as the conditional nature of the innocent passage regime in Article 19(1), which requires conformity with other provisions of the UNCLOS and international law more broadly, may hold significant relevance in this context.

46. Specifically, Article 19(2)(a) identifies two distinct sets of actions, either of which can independently render a passage non-innocent: threatening or using force against the sovereignty, territorial integrity, or political independence of the coastal State; and threatening or using force "*in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations*". The authors of this legal opinion hold the view that, under certain circumstances, the second action may provide a legal basis for interrupting or suspending the passage of vessels that violate international human rights law or peremptory norms of international law.

47. This is particularly relevant in cases of **complicity in the threat of force**, such as when a vessel transports weapons or equipment through the territorial sea with the intention of facilitating actions that breach human rights obligations or violate peremptory norms of international law. Such actions could constitute an indirect threat of force inconsistent with the principles enshrined in the UN Charter. Yet, for these actions to qualify as non-innocent passage under Article 19(2)(a) of the UNCLOS two key conditions must be met. First, there must be a **real and credible risk of future use of force** substantiated by a declaration of intent or conduct

76. E.g., a vessel violating international human rights law binding upon the coastal State by unlawfully disembarking migrants at sea, thereby falling within the scope of Article 19(2)(g) of the UNCLOS.

that reasonably conveys the likelihood of force being used. Second, the vessel must **engage in activities that support or facilitate the threat of force**, such as complicity, which is a legally recognizable act under international law.[77]

48. The phrase in the final sentence of Article 19(2)(a) of the UNCLOS echoes the language of Article 301,[78] particularly in its reference to "*the principles of international law embodied in the Charter of the United Nations*." According to the UNCLOS commentaries, these principles encompass not only those outlined in Chapter I of the Charter[79] but also "all the principles of international law

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77. In *Nicaragua v. United States*, the ICJ interpreted the threat of force to encompass covert activities such as funding or arming rebels with the intent to destabilize another State, even in the absence of an explicit threat. This interpretation broadens the concept of the threat of force to include actions with indirect coercive effects—activities that, while not overtly aggressive, can reasonably be perceived as preparations for aggression or intimidation. Examples include the unexplained massing of troops at a border or the transport of military arms and equipment intended for use in conflict. This notion of an indirect threat of force aligns with the ICJ's reasoning in its *Israeli Wall Advisory Opinion*, where the Court held that actions contributing to an illegal situation, even if they do not involve direct force, could still breach international obligations. This principle could extend to cases where a State's assistance or support in certain activities effectively constitutes an indirect threat of force, thereby violating international law. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27 June 1986, ICJ, para 228; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 159. See also, Christine D. Gray, *International Law and the Use of Force* (4th Edition, Oxford University Press 2018) 29-31.

78. UNCLOS, Article 301: "In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations." Article 301 reproduces almost verbatim the text of Article 2(4) of the UN Charter.

79. Principles provided for by Chapter 1 of the Charter are included in Article 2, for which reference is made to Andreus Palaus, 'Article 1', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf (eds.), *The Charter of the United Nations: A Commentary* (Volume I, Oxford Academic, 3rd ed., 2012) 122-132.

contained in the Charter."[80] This includes the principles articulated in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (Friendly Relations Declaration), annexed to UN General Assembly Resolution 2625 (XXV) of 1970,[81] which "continue to serve as an interpretative aid for the basic principles of the Charter as these are to be incorporated into the law of the sea...".[82]

49. Due to space constraints, a comprehensive enumeration of the "principles of international law" relevant to this discussion is not feasible. However, three principles stand out as particularly pertinent in the context of Article 19(2)(a) of the UNCLOS: cooperation in the maintenance of international peace and security,[83] sovereign equality,[84] and the principle of equal rights and self-determination of peoples.[85]

50. According to the *Friendly Relations Declaration*, these principles require States, among other things, to promote and uphold human rights and fundamental freedoms, including those reflecting peremptory norms of international law.[86] This obligation extends not only to activities within a State's territory but

80. Alexander Proelß (Ed.), United Nations Convention on the Law of the Sea: A Commentary, C. H. Beck/Hart/ Nomos 2017) 1947. See also Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 154.

81. United Nations General Assembly Resolution 2626(XXV) of 24 October 1970 (A/RES/2625(XXV)).

82. Killian O'Brien, 'Article 301', in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 1946.

83. UN Charter, Articles 1(1), 11(1) and 26; and Friendly Relations Declaration, para 1.

84. Ibid. Article 2(1); and Friendly Relations Declaration, para 1.

85. Ibid., Article 55; and Friendly Relations Declaration, para 1.

86. Friendly Relations Declaration, para 1.

also to those occurring in its territorial sea and aboard vessels flying its flag, in line with the case law of international courts and tribunals, which emphasizes the need to interpret and apply UNCLOS provisions consistently with the "considerations of humanity" that apply to the law of the sea, as they do in other areas of international law.[87]

51. Consequently, acts of passage by vessels through the territorial sea of a coastal State that contravene these principles or otherwise undermine their purpose could be deemed prejudicial to the peace, good order, or security of the coastal State. This includes acts such as complicity in apartheid, which Article I(1) of the Apartheid Convention expressly identifies as "*violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security*".

52. The above interpretation is further reinforced by the wording of Article 19(2)(a), which suggests that passage cannot be considered innocent if the vessel or its cargo poses a threat to fundamental principles of international law, even when such a threat is not directed specifically against the coastal State but impacts the international community as a whole. Notably, the placement of a comma

87. E.g., *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 155, 61-62; Guyana v. Suriname, Final Award, ICGJ 370 (PCA 2007), 17 September 2007, Permanent Court of Arbitration, para 405, 112-113; *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 359, 102; Enrica Lexie case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24 August 2015, ITLOS, para 133, 24; and the *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, paras 83-4, 21, and para 130, 32. See also, Francesca Delfino, "Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals', in Angela Del Vecchio, Roberto Virzo (eds.), Interpretations of the United Nations Convention on the Law of the Sea by international courts and tribunals (Springer International Publishing, 2019) 421-443.

between "coastal State" and "or" highlights that the provision is not confined to threats solely targeting the coastal State.

53. Turning now to the other consideration referenced in points 44 and 45 – namely, the conditional nature of the innocent passage regime under Article 19(1) of the UNCLOS – it has already been noted that the requirement for passage to be consistent with other provisions of the UNCLOS and broader international law, as set out in the second sentence of Article 19(1), possesses a quasi-independent character. This requirement functions as a legality test for determining the *innocence* of passage. In other words, no passage through a coastal State's territorial sea can benefit from the "innocent passage" regime if it contravenes other provisions of the UNCLOS or applicable rules of international law.

54. While applying this legality test may pose practical challenges – requiring a preliminary assessment of the passage's compatibility with the UNCLOS and international law – some cases are more straightforward. For example, where a vessel's activities while transiting the territorial sea clearly violate human rights obligations reflecting peremptory norms of international law, the test is more easily satisfied. In this context, "the *jus cogens* nature of the obligation could provide a benchmark" for determining the applicability of the innocent passage regime.[88] Nonetheless, the same level of certainty is harder to achieve when the vessel's passage appears to conflict with human rights obligations stemming from treaty or customary international law that do not rise to the level of peremptory norms. In those cases the relationship between those obligations and the UNCLOS provisions should be assessed in practice.

88. Anna Petrig, 'Coastal State Jurisdiction in the Territorial Sea and the Protection of People on board foreign-flagged vessels' (2024), available at <<https://www.ejiltalk.org/coastal-state-jurisdiction-in-the-territorial-sea-and-the-protection-of-people-on-board-foreign-flagged-vessels/>>.

55. Lastly, Article 19(1) of the Convention should be considered within the broader context of State responsibility for internationally wrongful acts, as codified in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[89]

56. Specifically, Article 41 of the ARSIWA outlines several legal consequences for third States in relation to serious breaches of peremptory norms of general international law, as referenced in Article 40 of ARSIWA.[90] These elements were reaffirmed in 2022 in Draft Conclusion 19 of the ILC's *Draft Conclusions on Identification and Consequences of Peremptory Norms of General International Law*.[91]

57. First, under Article 41(1) of ARSIWA, States have an obligation to cooperate to bring an end to serious breaches of peremptory norms of general international law through lawful means. This obligation, recognised as customary international law, emphasizes a coordinat-

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89. ILC, *Responsibility of States for Internationally Wrongful Acts*, 2001. Despite their non-binding nature, they are "widely regarded as a codification of customary international law" (Arbitral Award rendered on 12 October 2005 in the case *Noble Venture Inc. and Romania* (ICSID Case No. ARB/01/11)).

90. Article 40 of the ARSIWA sets out the definition of "serious breach by a State of an obligation arising under a peremptory norm of general international law," which is integral to the application of Article 41. The provision states as follows: "1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. *A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation*." Emphasis added.

91. Draft Conclusion 19: "1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens). 2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens), nor render aid or assistance in maintaining that situation. 3. A breach of an obligation arising under a peremptory norm of general international law (jus cogens) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation. 4. This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens) may entail under international law."

ed international response to counteract the effects of such breaches.[92]

58. The obligation to cooperate does not specify the measures States must take to address serious breaches of peremptory norms but requires that such measures be lawful and context-dependent. As highlighted by the ILC, this entails "a joint and coordinated effort by all States to counteract the effects of these breaches", irrespective of whether individual States are directly affected.[93]

59. Second, under Article 41(2) of ARSIWA, States are prohibited from recognizing as lawful situations created by serious breaches of peremptory norms and from rendering aid or assistance that would maintain such situations. These obligations, also recognized as customary international law, are distinct yet interconnected; the prohibition of aid or assistance logically follows from the prohibition of recognition.[94]

60. Importantly, the prohibition of aid or assistance under Article 41(2) differs from the one in Article 16 of ARSIWA, which addresses aiding or assisting in the commission of an internationally wrongful act. By contrast, Article 41(2) applies to conduct "after the fact", which supports the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[95]

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92. Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 2. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 155; and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* in 1965 [2004] ICJ Rep 2019, para 182.

93. Yearbook of the International Law Commission (2001, Volume II, Part Two – Report of the Commission to the General Assembly on the work of its fifty-third session), 114.

94. Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 12.

95. ARSIWA, commentary article 41 para 11.

61. Compliance with Article 41(2) requires States to have "knowledge of the circumstances of the internationally wrongful act" and a causal link between their conduct and the maintenance of the unlawful situation. ILC commentary,[96] international practice and scholarship suggest that a "significant contribution" to the maintenance of the violation suffices for the prohibition to apply. [97]

62. The commentaries to Article 41(1) and Draft Conclusion 19 emphasize that the preferred framework for cooperative action is the institutional system of the UN.[98] However, the ILC has clarified that cooperation may also occur through non-institutionalized or unilateral measures,[99] provided they are consistent with international law.[100]

63. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ indicated that individual States have an obligation to take steps to bring situations created by breaches of peremptory norms to an end.[101]

64. More recently, the ICJ reaffirmed these obligations in its advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East*

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96. The ARSIWA commentary pertinent to this analysis is that of Article 16, which, while distinct in scope from Article 41(2), employs the same terminology ("aid or assistance") and is therefore relevant to the discussion.

97. ARSIWA commentary article 16 para 5. See also Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart Publishing 2016), and Alexander Orakhelashvili, *Causation in International Law* (Edward Elgar 2022) 84 ff.

98. Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 7.

99. ARSIWA, commentary article 41 para 2

100. Draft conclusions on identification and legal consequences of peremptory norms, Conclusion 19, commentary para 7.

101. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 159.

Jerusalem.[102] In this case, the ICJ identified obligations *erga omnes* that were violated, including the right of the Palestinian people to self-determination, the prohibition of the use of force to acquire territory, and certain obligations under international humanitarian and human rights law.[103]

65. The Court emphasized that these breaches triggered obligations on third States, not only within the UN framework but also as a matter of general international law.[104] These obligations included non-recognition, non-assistance, and cooperation to bring an end to the breaches.

66. Based on the above, **coastal States may, under certain circumstances, hold not only the right, but also the obligation to take appropriate action, which may involve interrupting or suspending the passage of foreign vessels through their territorial seas, particularly when they are aware that such passage would contribute to maintaining a situation arising from breaches of peremptory norms**. For instance, coastal States aware that granting passage to foreign ships would facilitate the transfer—including the transit—or use of weapons in serious breaches of peremptory norms must refrain from actions contributing to maintaining such unlawful situations. In such cases, their duty of non-assistance may require the suspension of passage**. Additionally, the suspension of passage may also be justified by the coastal States' obligation to cooperate in ending breaches of peremptory norms**. As this duty may be fulfilled through unilateral actions under general international law, coastal States may suspend the right of passage to

102. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, Including East Jerusalem, ICJ Advisory Opinion of 19 July 2024.

103. Ibid., para 274.

104. Ibid., paras 278-279.

meet their secondary obligations. In both scenarios, the right and duty to suspend passage may be grounded in the legality test under Article 19(1) of UNCLOS and broader principles of international law.

Second scenario – violation of the conditions governing admission to internal waters or ports

67. Article 25(2) of the UNCLOS provides that:
In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

68. Based on the language of Article 25(2), coastal States have the authority to interrupt the passage of foreign vessels in the territorial sea, if they are proceeding to certain port facilities or internal waters.[105] Article 25(2) extensively draws on the text of Article 16(2) of the 1958 TSC Convention.[106]

69. While, in principle, this scenario permits a coastal State to interrupt ("prevent any breach") the passage of foreign vessels that fail to comply with human rights obligations or peremptory norms of international law – particularly when access to internal waters or port facilities is contingent upon such compliance – its practical application to the cases referenced in point 11 of this legal opinion is limited. As such, it will not be addressed further. This limitation arises because any interruption under Article 25(2) would likely necessitate clear evidence of an intent to breach the conditions

105. As such, the provision would not apply to internal waters covered by innocent passage under Article 8(2) of the UNCLOS.

106. TSC, Article 16(2): "In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject."

governing access to internal waters or ports, or other compelling indications of a significant risk of non-compliance (e.g., navigation speed relative to the vessel's proximity to those areas).

70. **The foregoing is without prejudice to the right – and, in some instances, the duty[107] – of coastal States to adopt national regulations prohibiting or restricting the entry of foreign vessels into their ports and internal waters for non-compliance with specific human rights obligations binding upon those States, including those established under the ATT and other relevant treaties**. This aligns with the practice of States forming "The Hague Group", which includes Belize, Bolivia, Colombia, Cuba, Honduras, Malaysia, Namibia, Senegal, and South Africa. In their inaugural joint statement, the Group emphasized their commitment to "*Prevent the docking of vessels at any port, if applicable, within our territorial jurisdiction, in all cases where there is a clear risk of the vessel being used to carry military fuel and weaponry to Israel, which might be used to commit or facilitate violations of humanitarian law, of international human rights law, and of the prohibition on genocide in Palestine, in keeping with states' peremptory legal obligation to cooperate towards preventing genocide and other violations of peremptory norms by all legal measures at their disposal."*[108]

Third scenario – suspension for the protection of the coastal State's security

71. Article 25(3) of the UNCLOS sets forth a specific circumstance under which the passage of foreign vessels through the territorial

107. For instance, when coastal States are required to take necessary measures to fulfil a specific obligation or achieve a particular outcome, as stipulated under Articles 5(5) and 14 of the ATT.

108. The Hague Group, *Inaugural Joint Statement*, 31 January 2025, The Hague (Netherlands), para 3, available at <<https://thehaguegroup.org/>>.

sea may be suspended:

The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

72. There are five cumulative conditions for the suspension outlined in the provision: the suspension shall be non-discriminatory, temporary, geographically circumscribed, duly published, and essential for the protection of the security of the coastal State. This provision extensively draws on Article 16(3) of the 1958 TSC Convention.[109]

73. It could be argued that serious human rights violations or breaches of certain peremptory norms of international law might present significant security concerns for the coastal State, potentially justifying the suspension of passage through its territorial sea. However, the purpose of Article 25(3) is different. It allows suspension only in specific areas of the territorial sea, not for passage as a whole. Moreover, such suspension cannot target individual vessels based on their conduct but shall be imposed pre-emptively, addressing inherent security risks, and only after prior publication. Consequently, while Article 25(3) provides a legal basis for suspension, its applicability to the present discussion remains marginal and as such will not be discussed further.

109. TSC, Article 16(3): "Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."

Forth scenario – criminal and civil enforcement jurisdiction

74. Articles 27 and 28 of the UNCLOS establish rules governing the exercise of criminal and civil jurisdiction, respectively, over foreign ships engaged in innocent passage through the territorial sea. These provisions extensively draw on Articles 19[110] and 20[111] of the 1958 TSC Convention.

75. The rules on civil jurisdiction over foreign ships engaged in innocent passage, as outlined in Article 28 of the UNCLOS, will not be addressed here due to their limited scope and the specific focus of this legal opinion.

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110. TSC, Article 19: "1.The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (a) If the consequences of the crime extend to the coastal State; or (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or (d) If it is necessary for the suppression of illicit traffic in narcotic drugs. 2.The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters. 3.In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken. 4.In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation. 5.The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters."

111 TSC, Article 20: "1.The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship. 2.The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State. 3.The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters."

76. As for Article 27 of the UNCLOS, the provision establishes that:

1. *The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:*
   - *(a) if the consequences of the crime extend to the coastal State;*
   - *(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;*
   - *(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or*
   - *(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.*
2. *The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.*
3. *In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.*
4. *In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.*
5. *Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation*

in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

77. Without prejudice to the powers conferred upon coastal States under Article 25 of the UNCLOS, as previously discussed in this legal opinion, Article 27 grants coastal States the authority to stop a vessel engaged in innocent passage through their territorial sea in order to exercise criminal jurisdiction over individuals onboard.

78. The circumstances under which passage may be interrupted under Article 27 are outlined in its first paragraph. Furthermore, paragraphs 2 and 5 of the same Article authorize the coastal State to stop a vessel in its territorial sea to exercise criminal enforcement jurisdiction when the vessel entered the territorial sea from the State's internal waters, or in connection with specific environmental crimes (under Part XII of the UNCLOS) or criminal offences related to laws and regulations adopted by the coastal State in its EEZ (under Part V of the UNCLOS).

79. Articles 27(2) and 27(5) are of limited relevance to this discussion due to their narrow scope and as such will not be discussed further. By contrast, two cases outlined in Article 27(1) merit closer consideration in the context of this legal opinion. Specifically, subpoints (a) and (b) of Article 27(1) permit the exercise of criminal enforcement jurisdiction over offences committed onboard a vessel during its passage through the territorial sea in the following instances: (a) "if the consequences of the crime extend to the coastal State," and (b) "if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea".

80. A comprehensive analysis of the circumstances in which these two conditions might apply is not feasible here. However, it is worth highlighting that criminal offences related to human rights, in-

cluding those reflecting peremptory norms of international law, may fall within the scope of Article 27(1)(a) or (b), particularly where the failure to take enforcement action might result in the coastal State's international responsibility – as observed in points 56 to 66 – or where the offence could disturb the peace of the coastal State or strain peaceful relations between the coastal State and other States (e.g., in the context of a dispute or regional conflict).

81. As clarified by the ILC in 1956, the above should not be interpreted as granting the coastal State: "*authority to stop a foreign ship passing through the territorial sea without entering internal waters merely because some person happens to be on board who is wanted by the judicial authorities of that State in connection with some punishable act committed elsewhere than on board the ship*".[112] This does not, however, preclude the coastal State from stopping vessels in innocent passage to enforce criminal offences that fall within the categories of Article 27(1)(a) and (b), or in other cases as required under international law, provided those offences, although initiated elsewhere, continue within the territorial sea.

Conclusions

82. Question 1, sub-question (a) seeks to determine whether the coastal State, under UNCLOS or broader international law, has a right or an obligation to interrupt or suspend the passage of a foreign vessel through its territorial sea:

i. *In response to non-compliance with international human rights obligations binding upon those States, including obligations arising under the UN Arms Trade Treaty and other relevant treaties?*

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112. ILC, *Articles concerning the Law of the Sea with commentaries*, Yearbook of the International Law Commission, 1956, Volume II, 275.

ii. *To avoid providing aid or assistance to another State in maintaining a situation that constitutes a breach of peremptory norms of international law?*

83. To address these sub-questions, points 31 to 81 of this legal opinion analysed the regime of innocent passage and other relevant provisions under the UNCLOS. Broader aspects of international law were not discussed in that context, as the customary status of those provisions will be examined in response to Question 1, sub-question (b) of this legal opinion.

84. Based on the foregoing analysis**, it is reasonable to conclude that the UNCLOS grants coastal States both the right and, in certain circumstances, the obligation to interrupt or suspend the passage of vessels in the territorial sea** that violate peremptory norms of international law, including those of international human rights law.

85. The **right to stop a vessel and interrupt or suspend its passage arises when the vessel engages in activities during passage that are prejudicial to the peace, good order, or security of the coastal State**. **This may include conduct that aids or facilitates actions contravening human rights obligations or peremptory norms of international law, as reflected in the principles of international law embodied in the UN Charter (Article 19(2)(a)). It also encompasses violations of other UNCLOS provisions or the broader international legal obligations of the coastal State, depending on the relationship between those obligations and the Convention (Article 19(1)).** Additionally, coastal States may exercise criminal enforcement jurisdiction by stopping a vessel in innocent passage, particularly where failure to take action could result in the State's international responsibility or where the offence disrupts the peace of the coastal State or strains its peaceful relations with other States (Article 27(1)(a) and (b)).

86. A combined reading of Articles 19 and 301 of the UNCLOS, interpreted in light of the UN Charter, the *Friendly Relations Declaration*, ARSIWA, and relevant international case law, may also impose **a duty on the coastal State to prevent further violations of international law resulting from the vessel's conduct**, including by stopping the vessel during its passage. **This duty arises, for instance, when the vessel engages in activities that contravene peremptory norms of international law, or when it aids or assists States in the commission of such crimes, especially if the coastal State's inaction would result in its own responsibility or liability under international law**.[113]

87. Given the above considerations, a general aspect is worth noting regarding specific obligations contained in the ATT provisions and other relevant rules examined in points 16 to 30 of this legal opinion: assessing the compatibility of the innocent passage regime with other international obligations binding upon States is inherently challenging, particularly when such obligations fall outside the regulatory framework of the law of the sea, as is the case with the ATT, the Genocide Convention and the Apartheid Convention.

88. If the rules contained in such treaties rise to the level of *jus cogens* norms or give effect to one or more of the principles outlined in points 48 to 50, it is reasonable to conclude that a coastal State may have the authority, and potentially the duty, to suspend or redirect the passage of foreign vessels through its territorial sea to avoid violating its binding international law obligations. **This applies, for instance, to the prohibitions against complicity in genocide**

113. It should be noted, in this respect, that Article 304 of the UNCLOS recognises that: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

and apartheid, as enshrined in the Genocide Convention and the Apartheid Convention and reflecting peremptory norms of international law.

89. In the remaining cases, the right of innocent passage must be weighed against the coastal State's specific international legal obligations. These obligations may warrant the interruption or suspension of a vessel's passage through the territorial sea, especially when the coastal State's inaction would constitute a breach of its legal duties. **For example, this could occur in relation to the obligation to prohibit the transfer of weapons or other items, in accordance with Article 6 of the ATT.** Notably, Article 2(2) of the ATT explicitly includes the "transit" of arms within the scope of activities classified as "transfer." Under Article 6(3), a State Party is prohibited from authorizing such transfers if it has knowledge that the arms would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks intentionally directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which the State is a party.

90. Either way, the considerations and conclusions outlined in this legal opinion extend only in part to foreign warships or government vessels used for non-commercial purposes. Under Articles 29 to 32 of the UNCLOS and customary international law,[114] such vessels benefit from a special regime of sovereign immunity. In peacetime, this immunity generally limits coastal States to requesting these vessels to leave the territorial sea immediately, without taking enforcement

114. Natalino Ronzitti, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law* (Éditions A. Pedone, 2011) 140. See also, "ARA Libertad" case (*Argentina v. Ghana*), Order, provisional measures, ITLOS Case No 20, [2012] ITLOS Rep 21, ICGJ 454 (ITLOS 2012), 15 December 2012, ITLOS, Sep. Op. Wolfrum and Cot, paras 43 and 46.

action to prevent their passage through the territorial sea – even if their passage is deemed non-innocent. **This, however, does not absolve the flag State of its responsibilities under international law**, as affirmed in Article 31 of the UNCLOS and relevant international case law.[115] The flag State remains obligated to investigate the matter and take appropriate action against vessels flying its flag and persons on board that are suspected or confirmed to have acted inconsistently with the Convention or other rules of international law.[116]

QUESTION 1, SUB-QUESTION (b)

91. Having established that the UNCLOS provides coastal States with both the right and, in certain circumstances, the duty to interrupt or suspend the passage of vessels in the territorial sea that violate international human rights law or peremptory norms of international law, sub-question (b) of the claimant's first question seeks to clarify:

i. *Under what circumstances and conditions may or should [this right/duty] be exercised?*

ii. *What enforcement measures can a coastal State lawfully implement against foreign ships engaged in non-innocent passage?*

iii. *Does [this right/duty] reflect customary international law?*

92. The response to **numeral (i) of sub-question (b)** has already been thoroughly addressed in points 31 to 81 of this legal opinion. Ac-

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115. In *Germany v. Italy*, the ICJ emphasized that the rules on sovereign immunity, as reflective of customary international law, are relevant for determining whether jurisdiction can be exercised in a specific case by a State or a court. However, these rules do not impact the substantive provisions that may have been violated, including *jus cogens* norms, nor do they alter the legal consequences arising from such violations. In essence, sovereign immunity governs jurisdictional matters without negating responsibility under international law. Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, 3 February 2012, I.C.J. Report 2012, paras 91-95.

116. UNCLOS, Article 94(6).

cordingly, no further elaboration on the circumstances and conditions governing the exercise of the right or duty to interrupt or suspend passage is required here.

93. Regarding **numeral (ii) of sub-question (b)**, the UNCLOS does not provide an exhaustive list of enforcement measures that a coastal State may lawfully implement against foreign ships engaged in non-innocent passage. Article 25 of the UNCLOS merely refers to the "necessary steps" a coastal State may take to prevent such passage. The determination of what constitutes "necessary steps" depends on the specific circumstances of each case and must be guided by the general principles of proportionality and necessity that govern enforcement actions under the UNCLOS.[117] Such measures may include, among other actions, stopping and boarding the vessel for investigations or, where appropriate, arresting individuals onboard.[118] Additional steps could involve diverting the vessel's passage, rerouting it to a designated port, ordering it to leave the territorial sea, or, where proportionate and necessary, employing force.

94. It should be noted that, despite the UNCLOS's silence on the use of force in enforcement operations, international courts and tribunals have consistently acknowledged that a certain degree of force may be permissible, provided it is unavoidable and applied in a reasonable and necessary manner under the circumstan-

117. See Pierandrea Leucci, 'Enforcing Fishery Legislation in the Exclusive Economic Zone of Non-Parties to UNCLOS: A Commentary to Article 73', in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 1: Law of the Sea, Interpretation and Definitions* (Luglio Editore 2022), 335-337.

118. E.g., under Article 27 of the UNCLOS.

ces.[119] As Judge Paik observed in the *M/V Virginia G* case, the principle of "necessity" seeks to balance two competing interests: the freedom of a State to achieve its objectives using appropriate means and the obligation of that State to avoid employing measures that would unduly infringe on the rights or interests of another State.[120]

95. As discussed in points 35, 38 and 90 of this legal opinion, under the UNCLOS, the sole measure permitted regarding warships and government vessels used for non-commercial purposes is to request their immediate departure from the territorial sea while urging the flag State to take appropriate action.

96. Finally, regarding **numeral (iii) of sub-question (b)**, which concerns the legal status of the innocent passage regime under international law, it suffices to note that the preparatory works of the Convention,[121] authoritative academic literatu-

119. E.g., *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 155, 61-62; Guyana v. Suriname, Final Award, ICGJ 370 (PCA 2007), 17 September 2007, Permanent Court of Arbitration, para 405, 112-113; *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 359, 102; Enrica Lexie case (Italy v. India), Order, Provisional Measures, ITLOS Case No 24, ICGJ 499 (ITLOS 2015), 24st August 2015, ITLOS, para 133, 24; and the *M/T "San Padre Pio"* case (Switzerland v. Nigeria), Order, Provisional Measures, 6 July 2019, ITLOS, paras 83-4, 21, and para 130, 32.

120. *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, Sep. Op. Paik, para 9.

121. ILC, *Articles concerning the Law of the Sea with commentaries*, 1956, 272. The right of innocent passage was originally included in Art. 15 of the ILC's Articles and, according to the ILC, it reiterated "a principle recognized by international law and confirmed by the 1930 Codification Conference".

re,[122] and international case law[123] collectively support the customary nature of the innocent passage provisions in the UNCLOS. This conclusion is further substantiated by State practice and by the very high number of ratifications and accessions to the UNCLOS – currently 170.

97. Furthermore, the customary status of its provisions is bolstered by the ratifications and accessions to the 1958 TSC Convention, one of the predecessors to the UNCLOS, which, as observed in points 43, 68, 72, and 74 of this legal opinion, provides the foundation for many of the contemporary innocent passage rules. Notably, States such as the United States, Israel, and Venezuela, which have not yet acceded to the UNCLOS, are parties to the 1958 TSC Convention. This Convention remains in force under Article 311[124]

122. E.g., Hitoshi Nasu, 'The regime of innocent passage in disputed waters' (2018) 94 int'l L. Stud. 241, 242; Pierandrea Leucci, 'Innocent passage in the territorial sea within the framework of the law of the sea Convention' (2018) KMI International Journal of Maritime Affairs and Fisheries, Volume 10, Issue 1, 1-9, 14; O.G. de Vries Reilingh, 'Warships in territorial waters, their right of innocent passage' (1971) Netherlands Yearbook of International Law, Volume 2, December 1971, 30; and Kari Hakapää, 'Innocent Passage', in Rüdiger Wolfrum, Max Planck Encyclopaedia of Public International Law (Oxford Public International Law, 2023) para 4. See also the Statement delivered by the former President of the ITLOS, Rüdiger Wolfrum, entitled 'Freedom of Navigation: New Challenges', 8.

123. *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9 April 1949, ICJ, 28; and *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27 June 1986, ICJ, para 214. See also, See *Compañia de Navegación Nacional (Panama) v. U.S*, Arbitral Award rendered on 29 June 1933. While at the time no international convention was in force yet, the Commission found that "[t]here is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters".

124. UNCLOS, Article 311(1) and (2): "1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958. 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention…"

of the UNCLOS and reinforces the broad acceptance and customary nature of the innocent passage regime.

Conclusions

98. The UNCLOS grants coastal States both the right and, in certain circumstances, the obligation to interrupt or suspend the passage of vessels in the territorial sea that violate international human rights law or peremptory norms of international law, as outlined in points 31 to 81 of this legal opinion.

99. Without prejudice to the specific regime governing warships and government vessels used for non-commercial purposes, **this right and duty encompass the implementation of "necessary" enforcement measures to prevent non-innocent passage through the territorial sea.** Such measures may include stopping or boarding the vessel, redirecting its passage, ordering it to leave the territorial sea, or employing a proportionate degree of force, subject to UNCLOS and broader international law.

100. The relevant UNCLOS provisions on the innocent passage regime, as discussed in this legal opinion, **arguably reflect customary international law and are therefore binding on States that are non-parties to UNCLOS**.

QUESTION 2, SUB-QUESTION (a)

101. The second issue raised by the claimant concerns the jurisdiction and due diligence obligations of flag States under the law of the sea. As noted in point 1, and similar to the first issue, this matter comprises several sub-questions.

102. The initial inquiry focuses on whether flag States, under the UNCLOS, are obligated to *effectively exercise control and jurisdiction over vessels flying their flag, including when those vessels operate within the waters of another State*.

103. To address this question, an analysis of the role and responsibilities of the flag State under the UNCLOS is required, starting with its Articles 91, 92 and 94. These provisions draw on Articles 5, 6 and 10 of the High Seas (HS) Convention, adopted in Geneva in 1958, and largely based on the work of the ILC.[125]

104. Article 91 establishes rules governing the "nationality" of ships:

1. *Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*
2. *Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.*

105. Only paragraph 1 of Article 91 is relevant for this discussion and will therefore be examined further. The latter comprises three interconnected elements, each with significant implications.

106. First, the *nationality* of a vessel is primarily determined by the conditions set forth in the national legislation of its flag State. These conditions generally consist of eligibility criteria required for the vessel's registration in the national register of the flag State, achieved through administrative acts or procedures.[126] As former ITLOS Vice-President Wolfrum aptly noted in his separate opinion in the *M/V Saiga (No. 2)* case: "*Registration of ships has to be seen in close connection with jurisdictional powers flag States have over ships flying their flag and their obligation concerning*

125. Convention on the High Seas, opened to signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

126. Simon W. Tache, 'The national of ships: the definitional controversy and enforcement of genuine link' (1982) The international lawyer, Vol. 16, No 2, 301-312, 302.

the implementation of rules of international law in respect to these ships."[127]

107. Second, Article 91(1) establishes the entitlement of vessels holding a State's nationality to fly its flag. While not definitive on its own, this act formalizes the *jurisdictional* relationship between the vessel and its flag State – a relationship explicitly recognized in Article 92(1) of UNCLOS and under broader international law.[128] The flag State's jurisdiction encompasses both legislative and enforcement jurisdiction, extending to all persons and activities on board the vessel, regardless of its destination or the duration of their presence. Legislative jurisdiction is general in nature and may be exercised at any time, including when a vessel is located within the territorial sea or ports of another State. By contrast, enforcement jurisdiction is spatially constrained, applying primarily within the flag State's maritime zones and on the high seas, and to a limited extent within the EEZ of other States pursuant to Article 58(2). Enforcement jurisdiction may only be exercised in the territorial sea of another State in exceptional circumstances provided for under international law.

108. Third, a *genuine link* must exist between the vessel and its flag State. As ITLOS has observed, "*the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag*

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127. *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, Sep. Op. Wolfrum, para 17.

128. Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edition, Manchester University Press 2022) 381-382; and Douglas Guilfoyle, 'Article 92', in in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 701.

State".[129] The genuine link is not an independent criterion for assessing vessel's nationality, which is conferred through registration. Rather, it functions as a conceptual bridge, linking the vessel's nationality to the rights and obligations the flag State assumes under international law.[130]

109. ITLOS has explicitly tied the genuine link requirement in Article 91(1) of the UNCLOS to the duties of the flag state set forth in its Article 94.[131] The latter reads as follows:

> *1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*
>
> *2. In particular every State shall:*
>
> *(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and*

129. *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, para 112.

130. *M/V "SAIGA" (No.2)* case, (Saint Vincent and the Grenadines v. Guinea), Judgment, Merits, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, ITLOS, paras 83 and 94. See also, Simon W. Tache, 'The national of ships: the definitional controversy and enforcement of genuine link' (1982) The international lawyer, Vol. 16, No 2, 301-312, 304-306; Robin R Churchill, 'The meaning of the "genuine link" requirement in relation to the nationality of ships' (2000), A study prepared for the International Transport Workers' Federation, 35-37; available at <<https://orca.cardiff.ac.uk/id/eprint/45062/1/itf-oct2000.pdf>>; Léna Kim, 'The place of economic actors as "Nationals" under the UN Convention on the Law of the Sea', in Pierandrea Leucci, Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 1: Law of the Sea, Interpretation and Definitions* (Luglio Editore, 2022) 143; and Douglas Guilfoyle, 'Article 92', in in Alexander Proelß, *United Nations Convention on the Law of the Sea: a Commentary* (Baden-Baden: Nomos Verlagsgesellschaft, 2017) 697-699.

131. E.g., *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, paras 81 and 113; and *Tomimaru* case (Japan v. Russian Federation), Judgment, Prompt Release, ITLOS Case No 15, ICGJ 419 (ITLOS 2007), 6 August 2007, ITLOS, para 70.

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regula-

tions, procedures and practices and to take any steps which may be necessary to secure their observance.

6. *A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.*
7. *Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.*

110. Article 94(1) explicitly imposes an overarching obligation on the flag State to "*effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag*". This general duty is further detailed through a non-exhaustive list of specific obligations outlined in paragraphs 2 to 7 of the same Article.

111. Although positioned in Part VII of the UNCLOS, the duties of the flag State in Article 94 are not confined to the high seas but extend across all maritime zones,[132] including waters under the

132. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 152. See also Haijiang Yang, *Jurisdiction of the coastal state over foreign merchant ships in internal waters and the territorial sea* (Springer, 2006) 27; Sondre Torp Helmersen, 'The sui generis nature of flag State jurisdiction', in *Japanese Yearbook on the Law of the Sea*, 2015, 320; and Richard Barnes, 'Flag State duties', in Donald R. Rothwell (et al.), *The Oxford Handbook on the Law of the Sea* (Oxford University Press 2015) 314.

sovereignty of another State, subject to any jurisdictional limitations imposed on the flag State under the UNCLOS or broader international law.[133]

112. **The phrase "administrative, technical, and social matters" in Article 94(1) should be construed broadly, encompassing virtually all aspects requiring administrative control or jurisdiction over a vessel, unless explicitly limited by international law**. This expansive interpretation is supported by the wide scope of the flag State's jurisdiction, as well as by authoritative academic literature[134] and relevant international case law.[135]

113. Finally, as the duty outlined in Article 94(1) is intrinsically tied to a vessel's nationality and to the genuine link between that vessel and its flag State, the same duty shall be deemed to apply uniformly to all vessels, including warships and government vessels used for non-commercial purposes.

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133. Id.

134. As Barnes noted, "States are required to exercise effective jurisdiction and control over the somewhat ambiguously phrased 'administrative, technical and social matters'. Since flag State jurisdiction is exclusive, *this phrase must be constructed broadly to include any matters affecting vessel operations in order to avoid regulatory lacunae*" (emphasis added). See Richard Barnes, 'Flag State duties', in Donald R. Rothwell (et al.), *The Oxford Handbook on the Law of the Sea* (Oxford University Press 2015) 314.

135. In its 2015 advisory opinion on IUU fishing, the ITLOS observed that "the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters [under Article 94 of UNCLOS], must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources." This suggests, among other things, that the term "administrative…matters" in Article 94(1) and (2) should be interpreted broadly, encompassing "administrative control" over all activities conducted on and by the vessel at sea. See *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015, para 119.

Conclusion

114. Based on the above analysis, it can be concluded that **UNCLOS imposes a duty on flag States to effectively exercise control and jurisdiction over vessels flying their flag, even when those vessels operate within the waters of another State**.

115. This obligation is rooted not only in the language of Article 94(1), which is quite explicit in its formulation, but also in the interconnected concepts of nationality, genuine link, and flag State jurisdiction, as outlined in Articles 91(1) and 92(1). These provisions must be interpreted in light of ITLOS jurisprudence and other relevant legal sources.

QUESTION 2, SUB-QUESTION (b)

116. Having established that the UNCLOS provides flag States with a duty to effectively exercise control and jurisdiction over vessels flying their flag, sub-question (b) of the claimant's second question seeks to clarify:

i. *Does [this duty] include a due diligence obligation for flag States to monitor the compliance of vessels flying their flag with the State's binding human rights obligations, including those arising under the UN Arms Trade Treaty and other relevant treaties, and to take appropriate action in cases of non-compliance?*

ii. *Does [this duty] reflect customary international law?*

117. To address this sub-question, it is first necessary to clarify several aspects of due diligence obligations under international law.

118. Generally, due diligence represents the standard of conduct expected from a responsible State to effectively fulfil its obligations.[136]

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136. Pierre Dupuy, 'Due diligence in the International Law of Liability' in *Legal Aspects of Transfrontier Pollution*, OECD, 1977, Paris, France, para 3; Patricia Birnie and Alan Boyle, *International Law and The Environment* (2nd ed., Oxford University Press 2002) 112.

119. In recent years, international courts and tribunals, including ITLOS, have extensively examined and defined the content and scope of due diligence obligations. These discussions often draw on the ICJ landmark 2010 judgment in the *Pulp Mills on the River Uruguay* case,[137] which sought to establish a general framework for understanding such obligations, among other things, by stressing that:

> *"…an obligation to act in due diligence… is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party…"*[138]

120. The ICJ's definition has since been employed by ITLOS and arbitral tribunals in significant decisions pertaining to the law of the sea,[139] which recognised the due diligence implications of several UNCLOS provisions.[140] Key principles emerging from these decisions, relevant to this discussion, are outlined below.

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137. *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13 July 2006.

138. Ibid., para 197.

139. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, ITLOS Case No 17, [2011] ITLOS Rep 10, ICGJ 449 (ITLOS 2011), 1 February 2011; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015; *South China Sea* arbitration (Philippines v. China), Final Award, PCA Case No 2013—19, ICGJ 495 (PCA 2016), 12 July 2016; and *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024.

140. E.g., those concerning seabed activities, fisheries, marine pollution and climate change.

121. First, due diligence obligations under international law are obligations of *conduct*, not *result*.[141] They do not require States to achieve a specific outcome but rather "to deploy adequate means, to exercise best possible efforts, to do the utmost" to obtain the intended result.[142]

122. Second, due diligence is a "variable concept" that may change over time.[143] Measures deemed adequately diligent at one point may later be considered insufficient, particularly in light of advancements in scientific or technological knowledge. Additionally, the required level of diligence may vary depending on the risks associated with the activity in question.[144]

123. Third, responsibility or liability for breaching due diligence obligations arises only if a State fails to take all appropriate and necessary measures to fulfil its duties. This includes neglecting to investigate reported instances of suspected non-compliance and, where warranted, failing to undertake the necessary enforcement actions.[145]

124. Forth, due diligence obligations can have an extraterritorial dimension, and a breach may occur in relation to activities conducted by vessels operating within the maritime waters of a State other than their flag State.[146]

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141. (More recently) *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024, para 233.

142. Ibid., para 405.

143. Ibid., para 239.

144. Id.

145. *South China Sea* arbitration (Philippines v. China), Final Award, PCA Case No 2013 – 19, ICGJ 495 (PCA 2016), 12 July 2016, para 944.

146. *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015 para 85 ff.; Samantha Besson, 'Due diligence and extraterritorial human rights obligations' (2020) ESIL Reflections, Volume 9, Issue 1, 5.

Due diligence of the flag State and human rights under the UNCLOS

125. International courts and tribunals have recognized that several provisions of UNCLOS impose due diligence obligations on States Parties to the Convention, particularly in areas such as fisheries management, environmental protection, and climate change.[147] Certain obligations specifically address flag States, notably those outlined in Article 94(3). This provision requires flag States to adopt measures "necessary to ensure safety at sea", including the implementation and enforcement of safety, labour, and environmental standards, as elaborated in paragraphs 4 and 5 of the same provision.

126. These standards may be closely tied to specific human rights obligations, for which Article 94(3) explicitly imposes a due diligence requirement. However, it remains contentious whether this provision alone can establish a broader due diligence obligation for flag States to monitor the compliance of vessels flying their flag with *all* binding human rights obligations, particularly considering that, as observed above, Article 94(3) strictly focuses on measures "necessary to ensure safety at sea". This ambiguity is especially relevant to obligations arising under the ATT and other legal instruments referenced in this legal opinion, as they do not appear to set forth rules and standards that can be incorporated by reference through Article 94(3) of the UNCLOS.

127. That said, the authors of this letter take the view that a broader due diligence obligation may still be inferred from the UNCLOS through a combined reading of Articles 91 and 94, as examined above in this legal opinion. This position draws on the following considerations grounded in the history and preparatory works of the Convention, as well as in the work of the ILC and relevant

147. See (n 139).

international case law.

128. The UNCLOS commentaries and ITLOS case law establish that a vessel's registration, which determines its nationality, provides the legal foundation for the flag State to exercise jurisdiction over the vessel, including the exercise of effective jurisdiction and control to ensure the vessel's compliance with international rules and standards binding on the flag State.[148] As ITLOS has observed, "[t]*he juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations, as indicated in article 94 of the Convention*."[149]

129. This network of rights and obligations has a direct bearing on compliance with the genuine link requirement established in Article 91(1).[150] Consequently, the concluding sentence of Article 91(1) – "*There must exist a genuine link between the State and the ship*" – should be interpreted as requiring the flag State to establish and maintain the genuine link through the effective exercise of jurisdiction and control over its flagged vessels.[151] **Without this functional interpretation of Article 94(1) in conjunction with Article 91(1), the purpose of the jurisdictional link established under the latter provision would be effectively undermined, as**

148. E.g., *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 112. See also, Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume III (Brill/Nijhoff, 1995), 104-7 and 144.

149. *Tomimaru* case (Japan v. Russian Federation), Judgment, Prompt Release, ITLOS Case No 15, ICGJ 419 (ITLOS 2007), 6 August 2007, ITLOS, para 70.

150. Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 104.

151. *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 112.

the flag State would lack the necessary control over the vessel to sustain the genuine link required under Article 91(1) following registration.[152] This observation is supported by the ITLOS, which recognizes that the genuine link between a State and its vessel may be called into question if the flag State fails to exercise proper jurisdiction and control.[153]

130. An obligation of due diligence can be inferred from the above.[154] Simply put, non-compliance by vessels with human rights obligations binding on their flag States does not, on its own, sever the genuine link between the vessels and their flag States. This holds true provided the flag State has enacted appropriate legislation, exercised vigilant enforcement, and taken decisive action in response to non-compliance. **In other words, the genuine link is preserved as long as the flag State "effectively exercises its jurisdiction and control" over the vessel**.

131. This implies, as a corollary, a duty to act in relation to activities or events occurring within a State's jurisdiction or under its control that may cause harm to third States, their nationals, their property,

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152. See also *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, Diss. Op. Judge Jesus, para 46: "The Convention, in its article 94, outlines the duties to be observed by the flag State so as to ensure that it 'effectively exercise[s] its jurisdiction and control in administrative, technical and social matters over ships flying its flags.' In other words, *it is through the performance by the flag State of the duties referred to in article 94 in relation to a given ship that the test of whether there is a genuine link between the State and the ship is to be applied*". Emphasis added.

153. *M/V "Virginia G"* case (Panama v. Guinea-Bissau), Merits, Judgment, ICGJ 452, ITLOS Case No. 19, 14 April 2014, ITLOS, para 51.

154. See also, Irini Papanicolopulu, 'Due Diligence in the Law of the Sea', in Heike Krieger, Anne Peters, Leonhard Kreuzer, *Due Diligence in the International Legal Order* (Oxford University Press 2020) 150-151 and 158-159; and Donald Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens, *The Oxford Handbook of The Law of the Sea* (Oxford University Press 2015) 323-324.

or, more broadly, to interests of the international community as a whole.[155] In this context, flag States are obligated to respect international human rights, including the ones of persons and crew onboard their vessels and to ensure that these rights are upheld by those actors. This conclusion finds support in international practice and scholarship.[156] How does this specifically apply to the ATT, the Genocide Convention, and the Apartheid Convention?

132. Article 6(3) of the ATT stipulates that a State Party shall not authorize the transfer of conventional arms covered under Article 2(1), or items covered under Articles 3 and 4 of the Treaty, "*if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party*".

133. The application of this obligation is not limited to the territory of the State. The prohibition on authorizing transfers of conventional arms under the Treaty applies within the State's territory and in any other area under its jurisdiction, including ships flying its flag, provided the State has knowledge that the arms would be used to commit the crimes outlined in Article 6(3).

134. States are therefore required to adopt all necessary measures to ensure compliance with Article 6(3) of the ATT. For flag States, this

155. See *Island of Palmas* case (Netherlands v. United States of America), reprinted in UNRIAA, vol. 2, 829, at 839; and *S.S. 'Lotus'* case (France v. Turkey), 1927 PCIJ Series A, No. 10, at 88. See also, Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press 2022) 22, 144.

156. See Markovic and Others v. Italy App no 1398/ 03 (Decision [GC] of 14 December 2006) para 49; Assanidze v. Georgia App no 71503/ 01 (Decision [GC] of 8 April 2004) para 137; and Medvedyev and Others v. France App no 3394/ 03 (Judgment (GC) of 29 March 2010) para 65; See also, Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018) 150 ff.

obligation extends to ensuring that vessels flying their flag are not used to transfer arms in violation of this provision.

135. The obligation of flag States to ensure that vessels flying their flag do not engage in prohibited arms transfers under Article 6 is one of due diligence. As the ICJ stated in the *Pulp Mills* case, the obligation to act with due diligence "*entails not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators*".[157]

136. Similarly, in its Advisory Opinion on Climate Change and International Law, the ITLOS established that "*the obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures, and enforcement mechanisms necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective*."[158]

137. Thus, fulfilling an obligation of due diligence requires more than enacting appropriate legislation and administrative measures. It also necessitates exercising adequate vigilance to ensure that relevant actors comply with those laws and regulations, with the aim of achieving the objective of the obligation.

138. In the context of Article 6 of the ATT, the flag State's due diligence obligation to ensure that vessels flying its flag are not involved in prohibited arms transfers entails not only enacting appropriate legislation but also actively overseeing compliance with the relevant

157. *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Merits) [2010] ICJ Rep., para 197.

158. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS report 2024, para 235.

rules onboard its vessels.

139. The extent of a flag State's duty to oversee and enforce compliance with rules prohibiting the transfer of arms will depend on both legal and factual circumstances.[159]

140. Legally, the duty to act with due diligence is bounded by international law, as "every State may only act within the limits permitted by international law."[160] Consequently, while a flag State is responsible for the conduct of its vessels, its due diligence obligations may be constrained when those vessels are subject to the regulatory authority of a coastal State.

141. Factually, the scope of the duty depends on specific parameters. A flag State's obligation to act diligently arises when it has knowledge that an illegal arms transfer is occurring onboard its vessels.[161] Additionally, the State's capacity to act in the specific circumstances of the case will influence the extent of its obligation.[162] While international law generally presumes that States have authority and capacity to act over vessels flying their flag, the degree of such power and the effectiveness of intervention will vary depending on the circumstances.

142. In that respect, as the International Law Association (ILA) noted in its work on due diligence and international law: "[a]n enhanced degree of diligence can also result from a Court order (as in the case of the two Provisional Orders in the Bosnian Genocide

159. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia Herzegovina v. Serbia and Montenegro), Judgment, Merits, I.C.J. Reports 2007, para 430.

160. Ibid.

161. Ibid., para 431. See also, *Corfu Channel* case (United Kingdom v. Albania), Judgment, Merits, I.C.J. Reports 1949, 9 April 1949, ICJ, 16-17 and 22.

162. *South China Sea* arbitration (Philippines v. China), Final Award, PCA Case No 2013 – 19, ICGJ 495 (PCA 2016), 12 July 2016, paras 754 – 5.

case proceedings) or a Chapter VII Security Council resolution directed at a particular State."[163] This observation is particularly significant in evaluating the flag State's **"knowledge" of risks** and should reasonably extend to **advisory opinions** issued by international courts and tribunals. As recently recognized by ITLOS in the *Mauritius v. Maldives* case, such opinions may create legal expectations ("determinations") applicable to all States.[164]

143. The considerations outlined above regarding the scope and implications of due diligence obligations under Article 6 of the ATT equally extend to the relevant peremptory provisions of the **Genocide Convention** and the **Apartheid Convention**, particularly the duties to prevent and punish the crimes of genocide and apartheid, including acts of **complicity in their commission**,[165] as well as to other peremptory norms and fundamental principles of international law, such as the **right to self-determination of peoples and the prohibition on the acquisition of territory by force**.[166] This gives rise to an enhanced responsibility for States to ensure that they do not, directly or indirectly, contribute to serious violations

163. ILA, *Study group on due diligence in international law*, second report, July 2016, Tim Stephens and Duncan French, 17.

164. See *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (Mauritius v. Maldives), Preliminary objections, ITLOS Case No 28, ICGJ 560 (ITLOS 2021), 28 January 2021, paras 203-205.

165. Genocide Convention, Articles I and III(e); and Apartheid Convention, Articles III and IV.

166. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, paras 87-88; and *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, Including East Jerusalem, ICJ Advisory Opinion of 19 July 2024, para 233. See also ILC's *Draft Conclusions on Identification and Consequences of Peremptory Norms of General International Law (2022), Draft conclusion 23; Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Judgment, Merits, J.27.6.1986, ICJ reports 1986, 27 June 1986, ICJ, para 190; and Human Rights Council resolution 49/28 of 11 April 2022.

of these peremptory norms, whether through the actions of private actors under their jurisdiction or vessels flying their flag. **Compliance requires not only the adoption of appropriate legislation and the establishment of administrative frameworks, but also continuous oversight, effective enforcement mechanisms, and prompt corrective action** when the "knowledge" of risks arises – particularly in contexts of prolonged occupation, illegal annexation, or systematic persecution, which often involve grave and widespread human rights violations, as the ICJ has emphasised, notably concerning the Occupied Palestinian Territory.[167] **A failure to discharge these due diligence obligations may render flag States internationally responsible and liable for violations of international law, including human rights obligations, committed by their flagged vessels** (see points 56 to 66).

144. Consequently, a flag State's failure to respond to potential or confirmed non-compliance by vessels flying its flag with peremptory norms of international law, including international human rights law – especially when the State has knowledge of the risk or has been informed of the violation – **would likely constitute a breach of its due diligence obligations under UNCLOS. This includes cases where vessels engage in the transfer of weapons or other prohibited equipment under Article 6 of the ATT, or facilitate acts of genocide or apartheid, with the flag State's awareness and failure to take measures to prevent or punish the offense**.

145. In this regard, it is important to highlight that the prohibition under Article 6 of the ATT is not restricted to direct, country-to-country transfers – such as those from the flag State to the territory where

167. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, paras 87-128; and *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, Including East Jerusalem, ICJ Advisory Opinion of 19 July 2024, paras 154-155, 173, 179, 229, 243.

human rights crimes are committed. Rather, it broadly applies to any transfer of arms or related items that "would be used in the commission" of such crimes, irrespective of where the crimes take place, provided that the State authorizing the transfer has "knowledge at the time of the authorization" of their intended use.[168]

Effective jurisdiction and control under customary international law

146. Finally, with regard to the assessment of the legal status of the flag State's duty to effectively exercise jurisdiction and control on vessels flying its flag, as outlined under **numeral (ii) of sub-question (b),** it suffices to note that the preparatory works of the Convention and authoritative academic literature collectively support the customary nature of Articles 91 and 94 of the UNCLOS.[169] This conclusion is further substantiated by State practice and by the very high number of ratifications and accessions to the UNCLOS – currently 170.

147. Furthermore, the customary status of its provisions is bolstered by the ratifications and accessions to the 1958 HS Convention, one of the predecessors to the UNCLOS, which, as observed in point 103 of this legal opinion, provides the foundation for some of the rules on vessel's nationality and flag State's duties discussed so far. Notably, States such as the United States, Israel, and Venezuela, which

168. ATT, Article 6.

169. See Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea of 1982: A Commentary, Volume 3* (Brill/Nijhoff 1995) 137-152; Roach JA, 'Today's Customary International Law' (2014) Ocean Development and International Law, 45:239-259, 248-249; and John King Gamble Jr., Maria Frankowska, 'The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning' (1984) San Diego Law Review, Vol. 21: 491, 1984, 499. See also, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, ICGJ 493 (ITLOS 2015), 2 April 2015, Sep. Op. Judge Paik, para 12.

have not yet acceded to the UNCLOS, are parties to the 1958 HS Convention. This Convention remains in force under Article 311[170] of the UNCLOS and reinforces the broad acceptance and customary nature of the relevant provisions discussed under Question 2.

Conclusions

148. The sub-questions under Question 2 aim to determine the legal status of the duty imposed on flag States by UNCLOS to exercise effective jurisdiction and control over vessels flying their flag, as analysed above in this legal opinion. They further explore whether this duty includes a due diligence obligation to ensure that such vessels comply with the flag State's binding human rights obligations, particularly those reflected in the ATT and other relevant instruments.

149. The analysis in this legal opinion confirms that, **under UNCLOS and customary international law, flag States are obligated to exercise effective jurisdiction and control over vessels flying their flag. This obligation encompasses adopting and enforcing measures to ensure compliance with binding international obligations. A combined reading of Articles 91 and 94 of the UNCLOS provides the foundation for this duty, establishing a comprehensive framework that defines the scope and content of a general due diligence obligation incumbent upon flag States.**

150. This **due diligence obligation applies to all activities conducted by vessels flying their flag, including those involving potential violations of the flag State's binding human rights obligations under the ATT, the Genocide Convention, and the Apartheid Convention.** To fulfil these obligations, flag States must adopt ap-

170. See (n 124).

propriate legislation, establish oversight mechanisms, and actively enforce compliance in order to prevent arms transfers that could lead to grave breaches of international law, including genocide, crimes against humanity, or apartheid. **Failure by a flag State to fulfil its due diligence obligations – by neglecting to monitor, investigate, or act in cases of non-compliance – can give rise to international responsibility, including for the violation of the relevant UNCLOS provisions**.

151. In light of the foregoing, **obligations under the ATT, the Genocide Convention, and the Apartheid Convention must therefore be interpreted in conjunction with the legal principles outlined in Articles 91 and 94 of the UNCLOS**. These provisions elucidate and reinforce the flag State's responsibility to "effectively exercise jurisdiction and control" over vessels flying its flag. Consequently, a flag State's failure – whether due to incapacity or unwillingness – to fulfil its due diligence obligations under these instruments, including preventing vessels flying its flag from aiding or abetting the commission of offences under these conventions, undermines its compliance with the corresponding obligations under the UNCLOS. Such failure also jeopardizes the genuine link between the vessels implicated in these offences and their flag State.

III. Conclusions

152. This legal opinion was prepared to clarify the rights and obligations of States concerning activities conducted by vessels flying their flag or operating within their waters, particularly in cases involving serious violations of human rights or breaches of peremptory norms of international law. The analysis focuses on the **regime of innocent passage** and the **due diligence obligations of flag States** un-

der international law.

153. Regarding the **innocent passage regime (Question 1)**, this legal opinion examines the circumstances under which coastal States may lawfully suspend or interrupt the passage of foreign vessels through their territorial sea under UNCLOS. It identifies various scenarios where such suspension or interruption is legally permissible.

154. Based on the analysis, the letter concludes that UNCLOS grants coastal States both the **right and, in specific circumstances, the obligation to interrupt or suspend the passage of vessels through their territorial sea** when such vessels violate international human rights law or peremptory norms of international law.

155. This **right** is triggered when a vessel engages in activities prejudicial to the peace, good order, or security of the coastal State. Such activities may include aiding or facilitating violations of human rights obligations or peremptory norms, **as reflected in the principles of international law embodied in the UN Charter and outlined in Article 19(2)(a) of UNCLOS.** Additionally, breaches of other UNCLOS provisions or broader international obligations under **Article 19(1) may also warrant intervention**. Lastly, coastal states may exercise **criminal enforcement jurisdiction over vessels engaging in innocent passage**, especially when failure to act could result in their international responsibility or disrupt their peace or diplomatic relations with other States **(Article 27(1)(a) and (b))**.

156. A combined reading of Articles 19 and 301 of UNCLOS, along with principles derived from the UN Charter, ARSIWA, and relevant case law, may impose a **duty** on coastal States to prevent further violations of international law by a vessel. This duty arises particularly when a vessel violates peremptory norms or aids other States in committing such violations, **especially if the coastal State's inaction would render it responsible under international**

law.

157. In particular, where treaty obligations reflect ***jus cogens*** **norms** or align with fundamental international principles, coastal States may have **the obligation to suspend or redirect a vessel's passage** to prevent violations of binding international law. **This includes prohibitions on complicity in genocide or apartheid, as enshrined in the Genocide and Apartheid Conventions**.

158. In other cases, the coastal State's right to suspend passage must be balanced against its broader legal obligations. For instance, **a coastal State may need to act to prevent arms transfers, including transit, that would violate Article 6 of the ATT, especially if inaction would amount to a breach of its duties**.

159. Foreign warships and government vessels used for non-commercial purposes, however, enjoy **sovereign immunity** under Articles 29–32 of UNCLOS and customary international law. This precludes coastal States from taking certain enforcement actions against such vessels during peacetime, even in cases of non-innocent passage. Nevertheless, the **flag State remains responsible** under Article 31 of UNCLOS to investigate and take appropriate measures against vessels or individuals acting in contravention of international law.

160. Excluding the specific regime applicable to warships and government vessels used for non-commercial purposes, **the right and duty to suspend or interrupt the passage include implementing "necessary" enforcement measures to prevent non-innocent passage through the territorial sea**. These measures may involve stopping or boarding the vessel, redirecting its passage, ordering it to leave the territorial sea, or using proportionate force, subject to the constraints of UNCLOS and broader international law.

161. The relevant provisions of UNCLOS governing the innocent passage regime, as discussed in this legal opinion, are widely considered to **reflect customary international law and are thus binding**

on States that are not parties to UNCLOS.

162. The claimant's second issue concerns the **jurisdiction and due diligence obligations of flag States under the law of the sea (Question 2)**.

163. The analysis conducted in this legal opinion confirms that **UNCLOS and customary international law impose an obligation on flag States to exercise effective jurisdiction and control over vessels flying their flag**. This obligation includes adopting and enforcing measures to ensure compliance with binding international obligations. **Articles 91 and 94 of UNCLOS form the foundation for this duty, providing a comprehensive framework that establishes the scope and content of the flag State's general due diligence obligation**.

164. This due diligence obligation extends to all activities conducted by vessels flying a State's flag, including those involving potential violations of the flag State's binding human rights obligations reflected in the ATT, the Genocide Convention, and the Apartheid Convention.

165. To meet these obligations, flag States must enact appropriate legislation, establish oversight mechanisms, and actively enforce compliance to prevent arms transfers that could result in grave breaches of international law, including genocide, crimes against humanity, or apartheid. **Failure to fulfil these obligations** – such as neglecting to monitor, investigate, or act in cases of non-compliance – **can result in international responsibility, including for violations of relevant UNCLOS provisions**.

166. Accordingly, **obligations under the ATT, the Genocide Convention, and the Apartheid Convention must be interpreted in conjunction with the principles outlined in Articles 91 and 94 of UNCLOS**. These provisions clarify and reinforce the flag State's responsibility to exercise effective jurisdiction and control over ves-

sels flying its flag. A flag State's failure – whether due to incapacity or unwillingness – to fulfil its due diligence obligations, including preventing vessels flying its flag from aiding or abetting offences under these conventions, constitutes a violation of its obligations under UNCLOS. Such failure also undermines the genuine link between the vessels involved and their flag State.

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