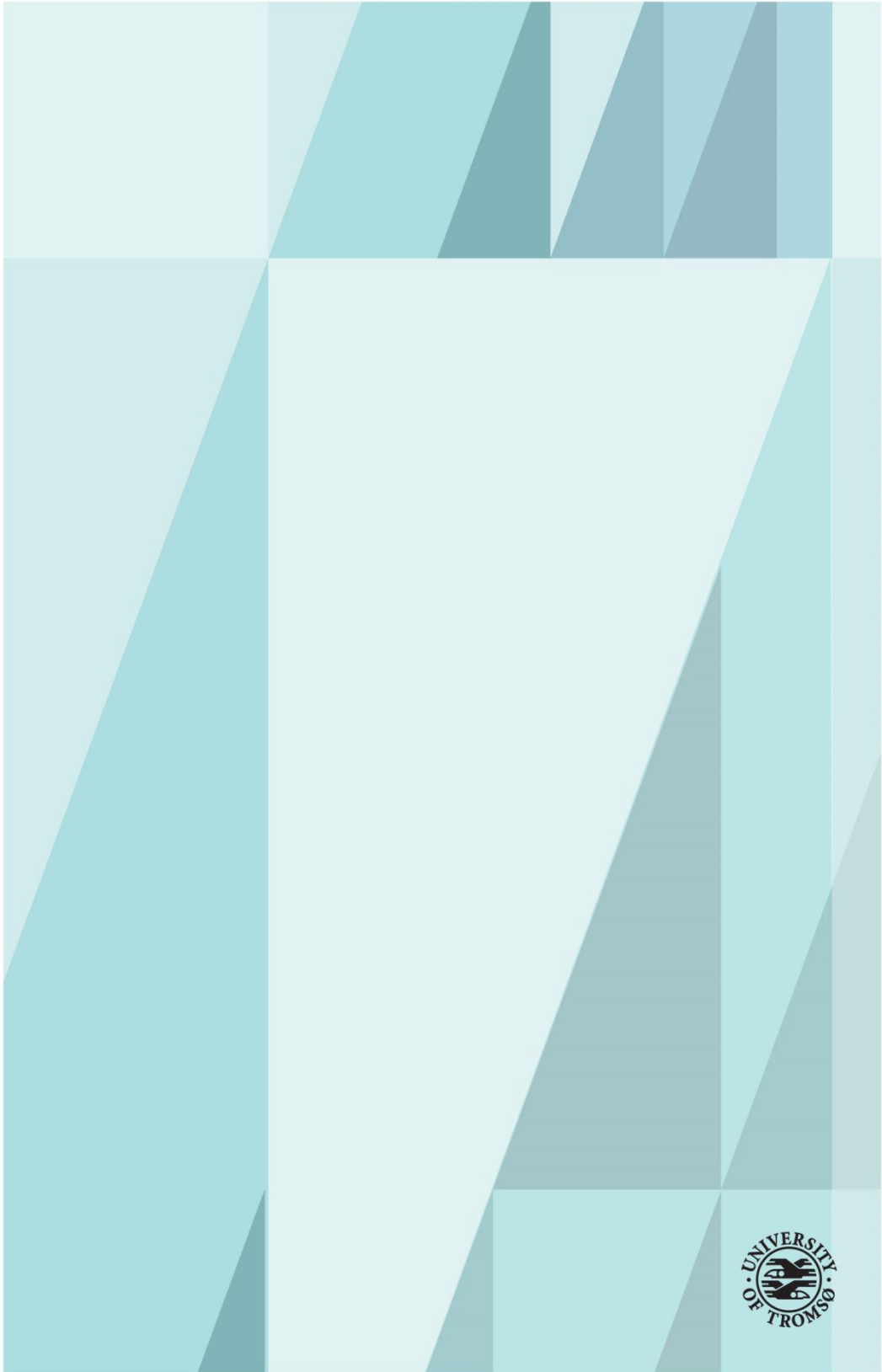


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Title: SAFETY OF HUMAN RIGHTS AT SEA



DEDICATION

I dedicate this research to everyone whose fundamental Human Rights have been trampled upon at sea and especially to the millions of lives that have been lost at sea as a result of Human Rights violations.

ACKNOWLEDGMENT

Firstly, I thank God for the strength he granted me to complete my L.L.M in the Law of the Sea. I thank my family for the love, care and support which they have constantly shown to me. I specially appreciate my supervisor Margherita Paola Poto for her instructive comments and feed backs. It has been a pleasure to benefit from her fountain of knowledge and wealth of experience. I appreciate all of my friends that have constantly checked up on me during the journey of this research. Finally, I will like to express my sincere appreciation to my girlfriend Arinola for her ever present support. She has always been there to encourage, help and was never tired of proof reading my work. I certainly hope I have made you all proud.

ABSTRACTS

The question of whether human rights exist beyond the 24 nautical miles of a State's jurisdiction has become a recent debate in international law. The view of many international lawyers and legal academics is that 1982 United Nations Convention on the Law of the Sea (UNCLOS) is one of the most comprehensive international conventions which addresses almost all necessary issues concerning the use of the Sea. For this reason the convention has often been referred to as the 'Constitution of the Oceans.' UNCLOS made no direct mention of human rights at Sea. This is not far-fetched, as the negotiations of the convention date back to the 1960s and 1970s when the question of human rights at Sea was not as important because of other pending matters. However, a closer look at UNCLOS reveals that some of its provisions may be interpreted as protecting human rights. Same applies to some other maritime conventions such as Safety Of Life At Sea, and Search And Rescue Conventions. Beyond any doubt, the question of the existence of human rights consideration at Sea has found its way into the jurisprudence of international Courts and Tribunals. This research will examine the necessary provisions that cater for the safety of human rights at Sea and will analyze some of the decisions of international Courts and Tribunal relating to human rights and the Law of the Sea.

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
BJIL	Berkeley Journal of International Law
CoE	Council of Europe
CMI	Comité Maritime International
CPD	Common Pleas Division
CTS	Consolidated Treaty Series
DOALOS	Division for Ocean Affairs and the Law of the Sea
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ETS	European Treaty Series
ICCPR	International Covenant on Civil and Political Rights
ICGJ	International Courts of General Jurisdiction
ICJ	International Court of Justice
IHRR	Institute of Hazard, Risk & Resilience
IIED	International Institute for Environment and Development
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
ILRF	International Labour Rights Forum
IMO	International Maritime Organization
ISA	International Sea bed Authority
ITLOS	International Tribunal for Law of the Sea

JEAIL	Journal of East Asia and International Law
LNTS	League of Nations Treaty Series
OUP	Oxford University Press
Res	Resolution
SAR	Search and Rescue
SOLAS	Safety of Life at Sea
SRR	Search and Rescue Regions
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHCR	The UN Refugee Agency
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on Law of Treaties

CHAPTER 1

INTRODUCTION

1.1. Contextual Background

The study of international law is no longer in the age of generalist.¹ The study as well as the practice of international law have been broken down into specialized fields such as the Law of the Sea and International Human Rights Law.² The facts that they have their separate sources, mechanisms, specialized Courts and Tribunal creates the impression that, ‘self-contained’ regimes are separate from general international law.³ The International Law Commission (ILC) studies show that such ‘fragmentation’ of international law can create possibility of conflicting norms and regimes.⁴ This is true because the United Nations Convention on Law of the Sea (UNCLOS)⁵ would encounter problems if some specialized body of rules overlap into its framework.⁶

International lawyers and scholars have mostly not examined the substantive content of Law of the Sea from its potentially humanitarian considerations.⁷ The Law of the Sea may therefore not be susceptible to the development of international human rights.⁸ It is unlikely that UNCLOS or the Law of the Sea regime in general would be accorded an important role in the history of International Human Rights Law, however, it may be deserving of more than just a footnote.⁹ This is because the regime of the Law of the Sea, together with its instruments and institutions have not only made direct contribution to the human rights

¹ Jasmine Coppens, ‘Migrants at Sea: A Legal Analysis of a Maritime Safety and Security Problem’ (Ghent University Faculty of Law 2013) 179.

² *ibid.*

³ M. Koskenniemi and P. Leino, ‘Fragmentation of International Law: Postmodern Anxieties?’ (2002) 15 *Leiden Journal of International Law* 553-579.

⁴ United Nations, ‘Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law’ (Report of the Study Group of the International Law, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006).

⁵ United Nations Convention on the Law of the Sea (UNCLOS), signed 10 December 1982 (entered into force 16 November 1994) 1833 UNTS 397.

⁶ Coppens (n 1) 180.

⁷ Coppens (n 1).

⁸ Richard Barnes, ‘The International Law of the Sea and Migration Control’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 104-106.

⁹ See Bernard H Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 *Columbia Journal of Transnational Law* 399; also, See Jonathan I Charney and others (eds), *International Law in the 21st Century- Essay in Honour of Professor Louis Henkin* (The Hague: Kluwer Law International) 377-404, 404.

regime, but in some instances they have proven to be sufficient to protect individual and collective human rights.¹⁰

1.2. Research Questions

This research seeks to answer the following questions:

- i. Are human rights considerations present in the Law of the Sea regime?
- ii. Are human rights considerations present in other maritime Conventions besides Law of the Sea?
- iii. Does Law of the Sea have sufficient humanitarian provisions to safeguard the rights of migrants in the case of *Hirsi Jamaa and others v Italy* (*Hirsi case*)¹¹?
- iv. How will a lawyer specialized in Law of the Sea interpret the case of *Hirsi Jamaa and Ors v Italy*,¹² in light of relevant provisions of Law of the Sea?

1.3. Aims and Objectives of the Research

This research has five main aims: the first is to prove that human rights considerations exist at sea. The second is to prove that the human rights obligations of a State are not territorially limited and can be applied at sea. The third is to prove that there are provisions in the law of the sea regime that have human rights considerations. The fourth is to identify the human rights considerations in some of the decisions of the international Tribunal for law of the sea. The fifth and final aim is to examine the law of the sea considerations that have been applied in deciding certain human rights cases by the European Court.

To achieve these aims, the first part of the research focuses on evaluating Law of the Sea regime and its provisions that can be inferred to cater for human rights. It aims also to examine the regime of the International Tribunal for Law of the Sea (ITLOS)¹³ and its connections to human rights. In doing this, the research considers the prompt release jurisdiction of ITLOS and some ‘consideration of humanity’ that can be found in some of its judgments. The research is further focused on examining the duty to render assistance at sea

¹⁰ Sophie Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 Sri Lanka J Intl L 1.

¹¹ *Hirsi Jamaa and Others v Italy*, Application No. 27765/09, [2012] ECtHR <<http://www.refworld.org/cases,ECHR,4f4507942.html>> accessed 18 August 2018.

¹² *ibid.*

¹³ Article 21, Annex VI, UNCLOS

as a corollary obligation of right to life. It analyzes the duty under Article 98 UNCLOS, to render assistance to persons lost or in distress at sea, with similar obligation found under International Maritime Organization (IMO) instruments of SOLAS and SAR Conventions¹⁴. Finally, it considers the role of soft law provisions briefly.

The second part focuses on establishing an interaction between human rights and the Law of the Sea. This part specifically addresses the regime of European Court on Human Rights (ECtHR)¹⁵ and the Law of the Sea, in establishing a relationship between human rights and Law of the Sea. In examining the relationship between the regime of the ECtHR and Law of the Sea, the extraterritorial application of human rights obligations under the ECHR are analyzed with the aid of *Hirsi Jamaa and Ors v Italy*¹⁶(case law). The case focused on the extraterritorial application of the ‘non-refoulement’ principle enshrined under Article 33(1) of Refugee Convention¹⁷ and Article 3 ECHR¹⁸. The duty to render assistance at sea is considered alongside the interpretation of *Hirsi* case from the Law of the Sea perspective. The facts of the case raise two practical questions on what the implication of the facts would be in two other circumstances.

To further achieve the aims of the research, the cases of *Medvedyav and Ors v France*¹⁹; *Rigoupoulos v Spain*²⁰; *Women on Waves v Portugal*²¹ and *Mangouras v Spain*²² are examined from the perspective of the protection of human rights within the context of Law of the Sea.

¹⁴ International Convention for the Safety of life at sea (SOLAS Convention), signed 1 November 1974 (entered into force 25 May 1980) 1184 UNTS 278; also the, International Convention on Maritime Search and Rescue (SAR Convention), signed 01 November 1979 (entered into force 22 June 1985) 1405 UNTS 97

¹⁵ Section II, Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights or ECHR), signed 4 November 1950 (entered into force 3 September 1953) 213 UNTS 221

¹⁶ *ibid.*

¹⁷ Article 33(1) of the Convention relating to the Status of Refugees (Refugee Convention), signed 28 July 1951 (entered into force 22 April 1952) 189 UNTS 137.

¹⁸ Article 3 ECHR.

¹⁹ *Medvedyav and Ors v France*, App No. 3394/03, [2010] ECtHR 384; (2010) 51 EHRR 39

²⁰ *Rigoupoulos v Spain*, App No 37388/97, (1999) II ECR 435.

²¹ *Women on Waves v Portugal*, App No 31276/05, [2011] ECtHR 1693.

²² *Mangouras v Spain*, App No 12050/04, [2010] ECtHR 1364.

1.4. Methodology

The research will adopt the ‘Black Letter Law’ methodology to analyse the safety of human rights at sea. The ‘Black Letter Law’ research methodology focuses on case law, statutes and other legal sources.²³ The research methodology will rely mainly on provisions of international conventions such as UNCLOS, SOLAS, SAR, among others and case laws jurisprudence from ITLOS and ECtHR as primary sources. Legal texts, legal journals, academic commentaries, articles, websites and blogs will be adopted as secondary sources to answer the research questions and to achieve the aims and objectives of the research.

1.5. Structure of the Research

Chapter 1: Introduction

This chapter gives an insight into the general introduction on the subject of the research. The chapter would briefly examine the contextual background of the topic followed by the research questions, methodology and structure of the research.

Chapter 2: Human Rights considerations in the Law of the Sea Convention and other maritime conventions

This chapter examines human rights and Law of the Sea by firstly identifying the human rights provisions that can be inferred from UNCLOS. The chapter will go ahead to examine the jurisprudence of the International Tribunal for Law of the Sea (ITLOS). The prompt release jurisdiction of ITLOS and the considerations of humanity in some of its decisions are considered. The duty to render assistance to distressed persons at sea as a corollary obligation of right to life is considered by reviewing the duty under Law of the Sea and International Maritime Organization (IMO) instrument of Safety of Life at Sea (SOLAS)²⁴ and Search and Rescue (SAR)²⁵ Conventions. The role of soft law provisions are also briefly considered at the end of the chapter.

²³ ASC LLM Support- UWE, ‘Research Methods: Doctrinal Methodology’ (2017) <<https://uweasccllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/>> accessed 23 August 2018.

²⁴ SOLAS Convention (n 14)

²⁵ .SAR Convention (n 14)

Chapter 3: Case Law: The Interaction between Human Rights and Law of the Sea

This chapter will examine the interaction between human rights and Law of the Sea. The jurisprudence of European Court of Human Rights (ECtHR)²⁶ and its Law of the Sea cases will be examined in this chapter.

Chapter 4: Conclusions

This final chapter will draw a conclusion on the aims that has been achieved by the research. The summary and findings from chapter 1 to 4 will be discussed. The research will be concluded by opinion and recommendation of the researcher.

²⁶ Section II, Article 19 ECHR.

CHAPTER 2

HUMAN RIGHTS CONSIDERATIONS IN THE LAW OF THE SEA CONVENTION AND OTHER MARITIME CONVENTIONS

2.1. Human Rights Considerations in the Law of the Sea

The ocean space is governed by laws provided for under UNCLOS; hence, the Convention has been referred to as the “Constitution for the Oceans”.¹ UNCLOS is one of the most successful treaties under international law.² Its comprehensive nature and the number of its parties have made it one of the most popular conventions under the auspices of the United Nations. The Convention has been ratified by 168 parties including the European Union.³

The ultimate aim of UNCLOS is to contribute ‘to the maintenance of peace, justice and progress for all the people of the world’.⁴ In achieving this aim its first task was to establish a rule of law in the seas and oceans.⁵ It granted States power to rule and at the same time to pursue certain interests it provided for.⁶ These interests include maritime safety, security of persons at sea, rights to freedom of navigation, scientific research, exploitation of living and non-living resources of the sea. The rights provided by UNCLOS are designed for States and not for individuals, even though individuals are the beneficiaries of them in the long run.⁷

There are recent events that have occurred at sea which have put safety of human lives at risk. These occurrences have emphasized the need for more humanitarian consideration at sea.

¹ DOALOS, ‘United Nations Convention on the Law of the Sea: A historical perspective’ (United Nations, 2012) <http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm> accessed 30 July 2018.

² UNCLOS, ‘Meeting of State Parties’ (*Report of the Twenty-fourth Meeting of States Parties to the United Nations Convention on the Law of the Sea (SPLOS/277)*, New York, 9 June 2014) 4 <file:///C:/Users/aring/Downloads/Documents/SPLOS_277-EN.pdf> accessed 02 August 2018.

³ United Nations Convention on the Law of the Sea (UNCLOS), signed 10 December 1982 (entered into force 16 November 1994) 1833 UNTS 397 <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 04 August 2018.

⁴ *ibid.*

⁵ David J Attard, Malgosia Fitzmaurice, Norman AM Gutiérrez, ‘The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea’ in Irini Papanicolopulu, *Human Rights and the Law of the Sea* (OUP 2014) 1-2.

⁶ Bernard H Oxman, ‘The Rule of Law and the United Nations Convention on the Law of the Sea’ (1996) 7 EJIL 353.

⁷ Irini Papanicolopulu, *Human Rights and the Law of the Sea* (OUP 2014) 1-2.

Some of the occurrences include, increased number migrant death at sea,⁸ the sinking of *Costa Concordia* off the island of Giglio in Italy;⁹ the death of crew members in the process of arresting *Saiga* off the coast of Guinea;¹⁰ the inhuman living and working conditions of on board some fishing vessels;¹¹ piracy; human trafficking among others. These occurrences demonstrate the need for human rights to be protected at sea as much as on the land.

This chapter will examine some of the rights humans have at sea. In achieving this it will consider a combination of Law of the Sea rules, human rights rules and other rules governing the sea such as SOLAS and SAR Conventions. The regime of the International Tribunal for Law of the Sea (ITLOS) is part of the scopes that would be examined in this chapter.

2.1.1. Protection of Individual Rights under Law of the Sea.

The rights under Law of the Sea cannot be enforced by individuals but rather by States. Some of the individual rights under UNCLOS would be further examined under this chapter. The rights that would be examined include:

- a. Prohibition of the transport of slaves under Article 99 of UNCLOS;
- b. Prohibition of imprisonment or any form of corporal punishment under Article 73(3) UNCLOS;
- c. The duty to render assistance to distressed or lost people at sea under Article 98 UNCLOS.

⁸ Saeed Kamali Dehghan, 'Migrant Sea Route to Italy is World's Most Lethal' *The Guardian* (International edn, 11 September 2017) <<https://www.theguardian.com/world/2017/sep/11/migrant-death-toll-rises-after-clampdown-on-east-european-borders>> accessed 30 July 2018.

⁹ BBC News Europe, 'Costa Concordia: What happened', *BBC News* (Europe, 10 February 2015) <<https://www.bbc.com/news/world-europe-16563562>> accessed 10 July 2018.

¹⁰ *M/V 'Saiga' (No 2) Case (Saint Vincent and the Grenadines v Guinea)*, (Provisional Measures), (1998) 117 ILR 111; (Admissibility and Merits), (1999) 120 ILR 143 (hereinafter '*Siaga*' case).

¹¹ Christina Stringer, Glenn Simmons and Daren Coulston, 'Not in New Zealand's waters, surely? Labour and Human Rights Aboard Foreign Fishing Vessels' (2011) New Zealand Asia Institute working Paper Series No.11-01, 13, 17.

2.1.1.1. Prohibition of the transport of slaves

Slavery includes all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him/her to slavery.¹² The term ‘Modern-day Slavery’ can be used to mean human trafficking, smuggling or forced labour at sea.¹³ The provision prohibiting the transportation of slaves can be interpreted as part of the humanitarian considerations under Law of the Sea. The first provision prohibiting the transport of slaves under Law of the Sea came under Article 13 of the 1958 Geneva Convention on the High Seas.¹⁴ The article provides that every State shall adopt effective measures to prevent and punish the transport of slaves in its flag ships, and to prevent the unlawful use of its flag for that purpose.¹⁵ It further provides that any slave that is taking refuge on board any ship, whatever its flag shall *ipso facto* be free.¹⁶ Article 22 of the Geneva Convention further grants warships right to visit vessels suspected to be in slave trade.¹⁷ Moving on to the UNCLOS, prohibition of the transport of slaves is provided for under Article 99 and it has the exact wordings of Article 13 of the Geneva Convention. Article 99 addresses slave trade and grants freedom to all slaves found on the High Sea.¹⁸

The Article makes no distinction between persons being trafficked and persons being smuggled, hence slavery can be defined to connote both activities. The scope of modern slavery has been extended to the fishery industry.¹⁹ The issues of forced labour, poor working conditions, loss of lives due to fishing practices have been reported in the fishery industry of some States.²⁰ In order to curtail these human rights violations at sea the UNCLOS, just like the Geneva Convention has granted warships the right of visit to vessel suspected of engaging

¹² Article 7(c) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, UNGA Res 608(XXI), signed 7 September 1956 (entered into force 30 April 1957) 266 UNTS 3.

¹³ Zezen Z Mutaqin ‘Modern-day Slavery at Sea: Human Trafficking in Thai Fishing Industry’ (2018) 11 JEAIL 75-6.

¹⁴ Article 13 of the Convention on the High Seas, signed 29 April 1958 (entered into force 30 September 1962) 450 UNTS 11.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Article 22(1)(b) Convention on the High Seas.

¹⁸ Article 99 UNCLOS.

¹⁹ Mutaqin (n 13).

²⁰ Kate Hodal, ‘Slavery and trafficking continue in Thai fishing industry, claim activists: Environmental Justice Foundation says abuses in Thai seafood sector persist despite government insistence that new legal measures are working’ *The Guardian* (international edn, 25 February 2016) <<https://www.theguardian.com/global-development/2016/feb/25/slavery-trafficking-thai-fishing-industry-environmental-justice-foundation>> accessed 22 July 2018.

in these slavery activities on the High Sea.²¹ The right of visit is an exception to the freedom of navigation on the High Seas. The right can only be exercised by warships or vessels in service of the Government of a State. However, it is important to note that the UNCLOS does not prescribe any form of punishment to vessels found engaging in slavery activities. It can be concluded that the jurisdiction to punish vessels involved in these activities rest upon the flag State in line with Article 99 of UNCLOS.

2.1.1.2. Prohibition of imprisonment or corporal punishment for violation of fisheries law

Article 73 of UNCLOS provides for the powers of a coastal State to impose punishments for the violation of fisheries laws and regulation to guilty persons.²² This article prohibits any form of imprisonment or corporal punishment except such has been agreed with the State concerned.²³ The discretion granted to coastal States to prescribe punishments for fisheries violation means that they can adopt methods such as confiscation fishing equipment, seizure of fisheries caught in excess among others.²⁴ However, it must be noted that the confiscation of a fishing vessel must not be used in such a manner that will upset the balance of interests of both flag State and coastal State as established under UNCLOS.²⁵ Article 73(4) of UNCLOS went on to provide that in cases of arrest or detention of a foreign vessel the coastal State shall promptly notify the flag State in question. The whole essence of Article 73(3) of UNCLOS is to guarantee the individual rights to freedom of liberty and to prevent any form of imprisonment or corporal punishment for the violation of fisheries law of a coastal State.²⁶

2.1.1.3. Duty to render Assistance under Law of the Sea

The duty to render assistance under Law of the Sea first appeared in Article 12(1) of the Convention on High Seas. The duty under this article is the same as the one provided under Article 11 of the 1910 Convention on Salvage. Similar duty has been echoed by Article 98 of

²¹ Article 110(1)(b) UNCLOS.

²² Article 73(3) UNCLOS.

²³ *ibid.*

²⁴ *The 'Tomimaru' Case (Japan v Russian Federation)*, (Judgment), [2007] ICGJ 419 para 72; (2007) 46 ILM 1185 (hereinafter '*Tomimaru*' case).

²⁵ *ibid* para 75.

²⁶ Article 73(3) UNCLOS.

UNCLOS. The article provides that every State shall require the master of its flag vessels to render assistance to any person found to be in danger of being lost or in distress at Sea, as long as it would not be detrimental to its own vessel.²⁷ It further went ahead to provide that collision assistance should be rendered to the other vessel, its crew and its passengers and where possible, to inform the other vessel of the name of his own vessel, port of registry and nearest port.²⁸ The second paragraph of the article went on to give every coastal State the responsibility to cooperate in establishing and maintaining an adequate and effective search and rescue service regarding safety at Sea.²⁹ The provisions of Article 98 contain two obligations. The first gives flag States the obligation to rescue persons who are lost or distressed at Sea.³⁰ The other gives coastal States the duty to establish and maintain search and rescue services.³¹

The duty to render assistance is one of the oldest rules of Law of the Sea and has been classified by the scholars as forming part of customary international law.³² The fact that such duty has been incorporated into many international and national laws signifies its status as one of the general principles of law mentioned under Article 38(1)(c) of the Statute of ICJ.³³

The duty under Article 98 does not have territorial restrictions; it is applicable to all maritime zones.³⁴ Even though, Article 98 is found under part VII of UNCLOS, which is the High Seas section, it will still be applicable to the EEZ because of the cross-reference in Article 58(2) of UNCLOS. Under the regime of the Territorial Sea, the duty to save life can be inferred from the reference made to the rendering assistance in case of distress under Article 18(2) of UNCLOS.³⁵ The duty to render assistance will apply where there is collision between two vessels, as well as, in situations where a vessel receives information about one or more persons in danger of being lost at Sea either as a result of their vessel being in danger or

²⁷ Article 98(1)(a)&(b) UNCLOS.

²⁸ Article 98(1)(c) UNCLOS.

²⁹ Article 98(2) UNCLOS.

³⁰ Article 98(1) UNCLOS.

³¹ Article 98(2) UNCLOS.

³² Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 134; Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press 1996) 278.

³³ Tullio Scovazzi, 'Human Rights and Immigration at Sea' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014) 255.

³⁴ Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98(2) *International Review of the Red Cross* 495.

³⁵ Donald R. Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 104.

shipwrecked.³⁶ The duty to render assistance under Article 98 applies to all distressed person at Sea without any distinction. The nationality of the vessels as well as the persons, or their legal status is irrelevant.³⁷ The activities such persons engaged in are also irrelevant, even if such activity is illegal. The fact that the persons in distress are refugees or migrants should never be a factor when it comes to fulfilling the mandate of Article 98 of UNCLOS.³⁸ It is quite unfortunate that at times vessels fail to come to the aid of drowning refugees and migrants.³⁹

The duty to render assistance at Sea under Article 98 of UNCLOS applies equally to military vessels, State owned vessels and private owned vessels. It is worthy of note that this duty, under the 1910 Salvage Convention and the 1989 International Convention on Salvage expressly exclude military vessels from rendering assistance at Sea.⁴⁰ Such exclusion may be counterproductive in situations where military vessels at sea stand a better chance at rescuing distressed persons due to their closer proximity. Unlike the Salvage Conventions however, the negotiators and drafters of UNCLOS did not have any intention of making such exclusion.⁴¹ If such exclusion was intended, the Convention would have been expressly stated so, just as the provisions of Article 236 of UNCLOS excludes warships from the provisions relating to the protection of the marine environment.⁴²

However, the only exception that UNCLOS provides for under the duty to render assistance is for the rescuing vessel not to endanger itself, its crew and passengers in the process of discharging such duty.⁴³ The wordings of Article 98(2) suggest that coastal States shall promote and not just provide a certain level of search and rescue services.⁴⁴ The search and rescue services must be adequate and effective, even though the Convention does not define the meaning of ‘adequate and effective’. It appears that what is meant by ‘adequate and

³⁶ Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War:’ (n 114) 496.

³⁷ Scovazzi (n 33) 134.

³⁸ Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War:’ (n 114) 496.

³⁹ The Associated Press, ‘Rescue ship told not to respond to distress call as 100 migrants feared drowned’ *The CBC News* (World, 29 June 2018) <<https://www.cbc.ca/news/world/libya-migrants-missing-rescue-mediterranean-sea-tripoli-1.4727841>> accessed 24 July 2018.

⁴⁰ Articles 4, 14 of the International Convention on Salvage (Salvage Convention), signed 28 April 1989 (entered into force 14 July 1996) 1953 UNTS 165.

⁴¹ Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War:’ (n 114) 496.

⁴² *ibid.*

⁴³ Article 98(1) UNCLOS.

⁴⁴ Jasmine Coppens, ‘The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment of the European Court of Human Rights’ in Y Haeck and E Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (2014) 30 *Ius Gentium: Comparative Perspectives on Law and Justice* 179-202.

effective' is for instance, a vessel engaging in search and rescue in the arctic must be well equipped with all the necessary apparatus such as ice breakers, warm clothings, among others in consideration of the nature of arctic waters.⁴⁵ This is to prevent a situation where the search and rescue services will also need to be rescued.

2.1.2. Protection of Community Rights under UNCLOS

UNCLOS contains several provisions that ensure the protection of community rights. Only the most important of them would be discussed in this chapter. They include:

- a. The declaration that the international seabed area and its resources are the 'common heritage of mankind' under Article 136 UNCLOS.
- b. The protection of archaeological and historical objects found at sea under Article 149 UNCLOS.

2.1.2.1. The declaration that the international seabed area and its resources as the 'common heritage of mankind'.

Article 136 of UNCLOS provides that the Area and its resources are the common heritage of mankind. The 'Area' is defined under Article 1(1) UNCLOS as seabed, ocean floor and sub soil beyond the limits of national jurisdiction. The notion of restricting the freedom to the 'Area' was first proposed by Arvid Pardo of Malta at the 1967 UN General Assembly.⁴⁶ The notion was later formalized and included under UNCLOS.

The 'Area' is a vast part of the Sea that is very rich in natural resources. The resources of the 'Area' mean all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed including polymetallic nodules.⁴⁷ Other resources of the 'Area' include Manganese, Nickel, copper, Cobalt, aluminium and iron.⁴⁸ To control and regulate the

⁴⁵ The Arctic makes a good example of the meaning 'adequate and effective' due to the peculiarities of the Sea environment such as weather, ice, to mention but a few.

⁴⁶ Examination of the Question of the 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 the Use of their Resources in the Interests of Mankind, UNGA Res 2340 (XXII) (adopted 18 December 1967) UN Doc A/RES/25/2749 <<http://www.un.org/documents/ga/res/22/ares22.htm>> accessed 28 July 2018.

⁴⁷ Article 133 UNCLOS.

⁴⁸ Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Bloomsbury Publishing 2016) 130.

regime of the 'Area' on behalf of humanity UNCLOS established the International Seabed Authority (ISA).⁴⁹ The ISA has the responsibility to ensure equitable sharing of financial and other economic benefits derived from activities in the 'Area' through appropriate mechanism and on a non-discriminatory basis.⁵⁰

The whole essence of restricting the High Seas freedom only to the adjacent waters above the 'Area' is to ensure equality between developing and developed States in the enjoyment of its resources. This is because technological developed States are likely to monopolize the resources.⁵¹ It was anticipated that there would be scramble for the resources in the 'Area' to the detriment of developing States if the resources are granted the freedom of the High Seas.⁵² In order to ensure equity between developing and developed States, the Convention further provided for the transfer of mining technologies from developed States to developing States.⁵³ The ISA has a trusteeship obligation to control activities in the 'Area' by administering its resources.⁵⁴ The administration of such resources must be based on sovereign equality among States.⁵⁵ The mandate granted to the ISA is to ensure sustainable use of the resources of the 'Area.' The sustainable use of the resources in the 'Area' will therefore be for the benefit of humanity in general and for the protection and preservation of the interest and rights of future generation.⁵⁶

2.1.2.2. The protection of archaeological and historical objects found at sea

The protection of archaeological and historical objects found at sea is also a method that the Law of the Sea has used to ensure the protection of the collective rights of humanity to the objects which represent the history of humanity. Article 149 UNCLOS provides that all object of archaeological and historical nature found on the sea bed and ocean floor beyond the limits of national jurisdiction shall be preserved and disposed of for the benefit of mankind as a whole; particular regards must be paid to the preferential rights of the State of

⁴⁹ Article 137(2) UNCLOS.

⁵⁰ Article 140(2) UNCLOS.

⁵¹ Rothwell and Stephens (n 48) 134.

⁵² *ibid.*

⁵³ Article 141 UNCLOS.

⁵⁴ Article 157 UNCLOS.

⁵⁵ Article 157(3) UNCLOS.

⁵⁶ Marie Bourrel, Torsten Thiele, Duncan Currie, *The Common Heritage of Mankind as a means of Assess and Advance Equity in Deep Sea Mining* (Marine Policy 2016) 3.

origin or State of cultural origin, or the State of historical and archaeological origin.⁵⁷ Similarly, Article 303(1) UNCLOS provides that States have the duty to protect objects of archaeological and historic nature found at Sea. The article also grants States the duty to cooperate for this purpose.⁵⁸

Archaeological and historic objects found at sea are part of the culture and heritage of human kind. The protection of such objects represents the protection of collective cultural rights.⁵⁹ Cultural rights form part of economic and social rights that is protected under Article 22 of the Universal Declaration of Human Rights. The Article provides that ‘Everyone (...) is entitled to realization, through (...) international co-operation (...), of the economic, social and cultural rights (...).’⁶⁰ Further reference was made to cultural right under Article 27 of the Universal Declaration of Human Rights. The article provides that everyone has a free right to participate in the cultural life of the community, to enjoy the arts, to share in scientific advancement and its benefits.⁶¹ Archaeological and historic objects found at Sea represent cultural heritage, history and identity. The protection that Law of the Sea has extended to these cultural objects on behalf of mankind as a whole is in line with the right to culture as provided for by the Universal Declaration of Human Rights.⁶²

2.1.3. The International Tribunal for the Law of the Sea (ITLOS) and human rights

The establishment of dispute settlement procedure for disputes that result from the interpretation and application of the Convention is part of the reasons why UNCLOS has been referred to as a ‘Package deal’⁶³. The negotiators and drafters of UNCLOS sought to address part of the shortcomings from the previous Law of the Sea Conventions (LOSC I and II) by establishing an International Tribunal for the Law of the Sea (ITLOS).⁶⁴ The sole jurisdiction of ITLOS is Law of the Sea matters. This chapter is examining the regime of ITLOS for two reasons. Firstly, because of its prompt release jurisprudence which prevents

⁵⁷ Article 149 UNCLOS.

⁵⁸ Article 303(1) UNCLOS.

⁵⁹ Hilary Charlesworth, ‘Human Rights and the UNESCO memory of the World programme’ in M. Langfield, W. Logan and M.N. Craith (eds), *Cultural Diversity, Heritage and Human Rights; Intersections in Theory and Practice* (Routledge 2009) 22.

⁶⁰ Article 22 of the Universal Declaration of Human Rights (UDHR), UNGA Res 217 A (III) (adopted 10 December 1948) <<http://www.un.org/en/universal-declaration-human-rights/>> accessed 20 July 2018.

⁶¹ Article 27 UDHR.

⁶² *ibid.*

⁶³ Tommy TB Koh, ‘A Constitution for the Oceans’ (Remarks by President of the Third United Nations Conference on the Law of the Sea, Montego Bay, 10 December 1983).

⁶⁴ Article 21, Annex VI, UNCLOS.

the further detention of arrested persons and vessels who have violated the legislation of a coastal State, after posting of reasonable bond or other financial security.⁶⁵ The provision of prompt release is to guarantee the protection of freedom of liberty of detained persons. The second reason why we are considering the regime of ITLOS is because of the humanitarian considerations found in some of its judgments. These humanitarian considerations can be interpreted as considerations of human rights.

Part XV of UNCLOS deals entirely with settlement of dispute concerning the interpretation and application of the Convention. Article 279 UNCLOS gives States the obligation to settle differences by peaceful means.⁶⁶ UNCLOS under Article 287 grants States the liberty to choose freely by way of written declaration any one or more dispute settlement means provided. The choice can either be made after signing, ratifying or acceding to the Convention or at any time after.⁶⁷ The article went on to provide for ITLOS; the International Court of Justice (ICJ), an Arbitral Tribunal and a Special Arbitral Tribunal to settle disputes.⁶⁸ In situations where parties to a dispute have chosen the same procedure for dispute settlement, such dispute may only be submitted to that procedure, unless it is otherwise agreed by the parties.⁶⁹ In the situation where parties have chosen different procedures for dispute settlement, such dispute may only be submitted to Arbitration.⁷⁰

The third-party dispute settlement mechanisms provided by the Convention are also open to other entities that are not State parties to the Convention an example of such entity is the International Seabed Authority (ISA).⁷¹ Other entities that are parties to the Convention such as international organizations are also open to these mechanisms.⁷² UNCLOS also grants natural or juridical persons access to ITLOS under two circumstances. The first being under Article 292(2) which provides that application for prompt release may be made by and on behalf the flag State⁷³; while the second circumstance can occur where a natural or juridical person brings a Part XI claim before ITLOS seabed dispute chamber or where such claim is

⁶⁵ Article 292 UNCLOS.

⁶⁶ Article 279 UNCLOS.

⁶⁷ Article 387(1) UNCLOS.

⁶⁸ Article 287(1) UNCLOS.

⁶⁹ Article 287(4) UNCLOS.

⁷⁰ Article 287(5) UNCLOS.

⁷¹ Article 7, Annex IX UNCLOS.

⁷² Article 305 UNCLOS.

⁷³ Article 292(2) UNCLOS.

brought against the natural or juridical person.⁷⁴ UNCLOS granted ITLOS a residual compulsory jurisdiction with regards to matters of prompt release⁷⁵ and prescription of provisional measures.⁷⁶ Majority of the disputes instituted at ITLOS have been within these two categories.

2.1.3.1. Prompt Release of Detained Foreign vessels and Crews

Articles, 73, 220 and 226 of UNCLOS grants coastal States the power to arrest and detain vessels that have violated their legislation. However, Article 73(2) provides that arrested vessels and their crew shall be promptly released after posting a reasonable bond or other security.⁷⁷

Article 292 UNCLOS provides that where the authorities of a State have detained a foreign vessel and the detaining State have not complied with the prompt release provision of the Convention, the question of release from detention may be submitted to any Court or Tribunal agreed upon by parties, failing such agreement within ten days of the detention the flag State may unilaterally bring such action before any of the Courts or Tribunals under Article 287 of UNCLOS or alternatively before ITLOS.⁷⁸ An action for prompt release will arise when a coastal State continues to detain a foreign vessel and crew who have complied with the provision of the Convention for the prompt release by posting a reasonable bond or other financial security for violation of the coastal State legislation.⁷⁹

The concern of UNCLOS for the freedom and liberty of detained individuals and their vessel is well shown under Article 292 UNCLOS. First, it sets a ten day limit for parties to agree on a dispute settlement mechanism to institute the action for prompt release, failing flag State can unilaterally institute an action by itself or its behalf.⁸⁰ UNCLOS has granted special jurisdiction to ITLOS concerning the prompt release of vessels and crew because of the timeous nature of the case and the delay that may occur in instituting such action before other

⁷⁴ Article 190(2) UNCLOS.

⁷⁵ Article 292(1) UNCLOS

⁷⁶ Article 290(5) UNCLOS.

⁷⁷ Article 73(2) UNCLOS.

⁷⁸ Article 292(1) UNCLOS.

⁷⁹ *ibid.*

⁸⁰ Article 292(2) UNCLOS.

Courts and Arbitral Tribunals.⁸¹ Hence, its jurisdiction in prompt release actions has been referred to as ‘residual compulsory jurisdiction.’⁸²

Just as the name implies, ‘Prompt release proceedings’ is an extremely fast dispute settlement procedure that ensures the freedom of liberty of vessel and crew detained for a violation of coastal State legislation. The Court will only decide the issue of prompt release of detained vessel and crew, it will not touch on the merits of the case. ITLOS in its prompt release judgments have continue to show the underlining intention of UNCLOS to protect individual rights. In the *Camouco* case,⁸³ ITLOS stated that Article 292 of UNCLOS is designed to free a vessel and its crew from prolonged detention on account of the imposition of unreasonable bonds by the municipal jurisdictions, or the failure of the local law to provide for release after posting of a reasonable bond.⁸⁴ It further stated that its aim is to avoid loss to the owner of the vessel or other persons affected by the detention and equally to safeguard the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security determined by a domestic Court or Tribunal, without prejudice to the merit of the case.⁸⁵ Similarly in the *Monte Confurco* case,⁸⁶ ITLOS observed that a situation where the captain of the detained vessel had surrendered his passport, and was subject to daily verification of presence by the authority amounted to detention.⁸⁷ In the same judgment, the ITLOS observed that the aim of Article 73 of UNCLOS is to balance the interest of a coastal State on one hand, with the interest of the flag State on the other hand by providing for the release of the vessel and its crew upon posting of reasonable bond or other security.⁸⁸

2.1.3.2. Consideration of Humanity

The first time this term was used by an international Court was the ICJ in the *Corfu Chanel* case.⁸⁹ ITLOS has been shy to mention human rights in its judgments, probably because

⁸¹ Article 112(1) of the International Tribunal for the Law of the Sea Rules (Rules of the Tribunal) adopted 28 October 1997 (amended on 15 March and 21 September 2001 and on 17 March 2009).

⁸² Seline Trevisanut, ‘Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends’ (2017) 48 *Ocean Development & International Law* 300-12.

⁸³ *The Camouco Case (Panama v France)*, (Prompt Release), (2000) 125 ILR 151 (hereinafter ‘*Camouco*’ case).

⁸⁴ *ibid* para 57.

⁸⁵ *ibid*.

⁸⁶ *The ‘Monte Confurco’ Case (Seychelles v France)*, (Prompt Release), (2000) 125 ILR 203 (hereinafter ‘*Monte Confurco*’ case).

⁸⁷ *ibid* para 90.

⁸⁸ *ibid* para 70.

⁸⁹ *The Corfu Channel (United Kingdom v Albania)*, (Merits), [1949] ICJ Rep 4 (hereinafter ‘*Corfu Channel*’ case) para 22.

human rights are not within its scope of jurisdiction, but instead it has referred to ‘considerations of humanity’.⁹⁰ The content of such judgments, if not the wordings, clearly points to the necessity of taking human rights into account while operating at Sea.⁹¹ In the *Saiga* case,⁹² ITLOS examined the ‘consideration for humanity’ in the use of force during law enforcement activities at sea. ITLOS in that case stated that:

In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. 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 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 in the Law of the Sea, as they do in other areas of international law.⁹³

The position in the *Saiga*’s case was again reaffirmed by ITLOS in its provisional measures judgment of the *Enrica Lexie* case.⁹⁴ It went on to state that the Tribunal reaffirms its views in the *Saiga*’s case that, consideration of humanity must apply in the Law of the Sea, as they do in other areas of international law.⁹⁵

The ITLOS further highlighted the humanitarian intent of UNCLOS in *Juno Trader* case.⁹⁶ While observing the essence of prompt release in that case, it noted that the obligation of prompt release of vessels and crew includes elementary considerations of humanity and due process of law. It stated that the requirement that a bond or other financial security must be reasonable indicates that ‘fairness’ is part of the purpose for that provision.⁹⁷

⁹⁰ *The ‘Juno Trader’ Case (Saint Vincent and the Grenadines v Guinea-Bissau)*, (Prompt Release), (2004) 44 ILM 498 (hereinafter ‘*Juno Trader*’ case); *M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Kingdom of Spain)*, (Merits Judgment), (2012) 148 ILR 459 (hereinafter ‘*Louisa*’ case); *M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Kingdom of Spain)*, (Merits Judgment), (2012) 148 ILR 459 (hereinafter ‘*Louisa*’ case).

⁹¹ Papanicolopulu, *Human Rights and the Law of the Sea* (n 7) 22.

⁹² *Juno Trader* case (n 90).

⁹³ *ibid* para 155.

⁹⁴ *The ‘Enrica Lexie’ Incident (Italy v India)*, (Order, Provisional Measures), ITLOS Case No 24, [2015] ICGJ 499 (hereinafter ‘*Enrica Lexie*’ case).

⁹⁵ *ibid* para 133.

⁹⁶ *Juno Trader* case (n 90).

⁹⁷ *ibid* para 77.

ITLOS did not expressly state what it meant by considerations of humanity but the consequences that flow from the statement seem to point out that it was referring to human rights consideration. However, in the more recent case of *Louisa*,⁹⁸ ITLOS stated that, ‘States are required to fulfill their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances,’⁹⁹ even though, it eventually ruled that it lacked the required jurisdiction to decide the merit of the case. The ITLOS by nature is not a human rights Tribunal, but it has always shown great concern for human rights, hence it has never hesitated to remind States of their obligations outside UNCLOS whenever the need arises.

2.2. Human Rights Considerations under other Maritime Conventions

The obligation to render assistance to distressed people at sea is one of the oldest and most deeply rooted maritime traditions.¹⁰⁰ Early maritime law placed more emphasis on the preservation of maritime properties and slaves, rather than the protection of seafarers.¹⁰¹ By the mid-nineteenth century, one in every five British mariners died or got missing at sea.¹⁰² The mortality rate in the maritime profession became significantly higher than other professions.¹⁰³ Between 1861 and 1870, it was recorded that 5,826 vessels were wrecked off the coast of Britain and an estimated 8,105 lives was lost at sea.¹⁰⁴

The legal obligation to render assistance to distressed people at Sea was first recognized in the 1880 case of *Scaramanga v Stamp*.¹⁰⁵ In that case *Cockburn* CJ noted that ‘...to all who have trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations which may result to a ship or cargo from the rendering of needed aid.’¹⁰⁶

⁹⁸ ‘*Louisa*’ case (n 90).

⁹⁹ *ibid* para 154.

¹⁰⁰ Coppens, ‘The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment’ (n 44)

¹⁰¹ Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law: Essentials of Canadian Law* (Irwin Law 2003) 193-195.

¹⁰² *ibid*.

¹⁰³ *ibid*.

¹⁰⁴ Nicolette Jones, *The Plimsoll Sensation: The Great Campaign to save Lives at Sea* (Hachette Digital 2006).

¹⁰⁵ *Scaramanga v Stamp*, (1880) 5 CPD 295, 304.

¹⁰⁶ *ibid* para 304.

The first formal international convention to address the rendering of assistance at Sea was the 1885 Brussels Salvage Convention.¹⁰⁷ The Comité Maritime International (CMI) in 1897 organized its first international conference in Brussels, to discuss issues relating to collisions, salvage and the render of assistance at Sea.

The discussions resulted into the approval of the 1910 Brussels Convention on Salvage.¹⁰⁸ The Convention was later replaced in 1989 by International Convention on Salvage.¹⁰⁹ This Convention contains express provisions to render assistance to persons or to any person in distress or in danger of being lost at Sea.¹¹⁰ In line with the aforementioned Maritime Conventions, Law of the Sea similarly contains provisions about the duty to render assistance at Sea that has been previously discussed under this chapter.¹¹¹ Other maritime conventions that contain the duty to render assistance at sea are SOLAS and SAR Conventions

2.2.1. Duty to render assistance under the SOLAS Convention.

The Safety of Life At Sea Convention (SOLAS)¹¹² is one of the most important Conventions under the auspices of the International Maritime Organization (IMO). The IMO have three main objectives, which are Maritime Safety, Maritime Security and protection of the Marine environment.¹¹³ SOLAS falls under the category of maritime safety. It provides for measures to ensure the safety of vessels at Sea. The first of its kind was adopted in 1914 as a response to the *Titanic* disaster.¹¹⁴ From then up until now it has undergone series of changes and the most recent is the 1974 SOLAS Convention (as amended). The main objective of SOLAS is to prevent the loss of life at Sea and to deals with distress situations at Sea.

¹⁰⁷ Coppens, ‘The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment’ (n 44).

¹⁰⁸ Brussels Convention on Assistance and Salvage at Sea (adopted 23 September 1910) [1913] UKTS 4.

¹⁰⁹ Salvage Convention (n 40).

¹¹⁰ Sophie Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 Sri Lanka J Intl L 85.

¹¹¹ Chapter 2, para 2.1.1.3.

¹¹² International Convention for the Safety of life at sea (SOLAS Convention), signed 01 November 1974 (entered into force 25 May 1980) 1184 UNTS 278.

¹¹³ IMO, ‘Introduction: Adopting a convention, Entry into force, Accession, Amendment, Enforcement, Tacit acceptance procedure’ (2018) <<http://www.imo.org/en/About/Conventions/Pages/Home.aspx>> accessed 08 August 2018.

¹¹⁴ IMO, ‘International Convention for the Safety of Life at Sea (SOLAS) 1974’ (2018) <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)> accessed 25 July 2018.

The duty to rescue under SOLAS applies to vessels in all maritime zones.¹¹⁵ Regulation 33.1 of SOLAS Convention provides that the master of a vessel who is in a position to render assistance, upon receiving a signal from any source that persons are in distress at Sea, is bound to proceed with all speed to their assistance and if possible inform them or the search and rescue service that the ship is doing so.¹¹⁶ The SOLAS Convention however, provides exceptions for the rescue of vessels in distress. Regulation 33.1 provides that, where the vessel receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to render assistance, the master must register in the log-book the reasons for failing to render assistance to the persons in distress and take into account the recommendation of the organization, to inform the appropriate search and rescue authorities.¹¹⁷

From the above mentioned provision, three exceptions can be observed from the duty to rescue. The words that the Convention adopts for these exceptions are ‘unable’, ‘unreasonable’ and ‘unnecessary.’ The first concerns the situation where a vessel is unable to perform the rescue mission either due to bad weather conditions or because of the condition of the vessel. The second concerns the situation where it is unreasonable to expect the vessel to proceed on the rescue mission. The major difference between the first and second exceptions resides in the degree to which the external or internal impediment affects compliance with the duty.¹¹⁸ In the case of ‘unable’ the impossibility of the vessel should be objective while it should be total, in case of ‘unreasonableness’ it might be objectively possible to go on the rescue operation but in light of the actual circumstances of the vessels involved and the weather conditions, it would be unreasonable to expect the master of such vessel to proceed with the rescue mission.¹¹⁹ This exception comes close to that which was provided for under UNCLOS, that a threat to the rescuing vessel, its crew and its passengers would render unreasonable the duty to rescue. The final exception concerns situations where it is unnecessary for a vessel to proceed with the rescue operation either because another vessel is closer to the distressed vessel and has already taken up the

¹¹⁵ SOLAS Convention, Chapter 5, Regulation 1.1.

¹¹⁶ SOLAS Convention, Regulation 33.1.

¹¹⁷ SOLAS Convention, Regulations 33.1.

¹¹⁸ Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War.’ (n 34) 497.

¹¹⁹ *ibid.*

duty to rescue or the distance between the rescuing vessel and the distressed vessel is such that the former will not make it in time to conduct the rescue operation.¹²⁰

2.2.2. Duty to render assistance under the SAR Convention.

The International Convention on Maritime Search and Rescue (SAR) was adopted by the IMO in April 1979.¹²¹ As the name implies, the Convention was designed to improve the existing arrangements and provide a framework for search and rescue operations following maritime casualties. This happens irrespective of whether States already have established plans for these casualties or not. This was the first international procedure that was adopted in the line of search and rescue.¹²² Consequently, in some areas there was well regulated organization able to provide assistance promptly and efficiently, but in other areas there was nothing at all.¹²³

The aim of the SAR Convention was to develop an international search and rescue plan. Therefore, whenever there is a maritime casualty, the rescue of persons in distress will be organized and if necessary with the cooperation of neighbouring search and rescue organizations.¹²⁴ The world ocean is divided into thirteen search and rescue areas, from which coastal States that are involved have various areas which falls within their responsibility.¹²⁵ States must ensure that efficient and sufficient Search and Rescue Regions (SRR) are well established and managed in each of the ocean areas.

The SAR Convention defines distress as a situation where there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and in a situation that requires immediate assistance.¹²⁶ The need for immediate assistance varies depending on the State that is managing the situation. To some States, the distressed vessel

¹²⁰ *ibid.*

¹²¹ International Convention on Maritime Search And Rescue (SAR Convention), signed 01 November 1979 (entered into force 22 June 1985) 1405 UNTS 97.

¹²² Coppens, ‘The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment’ (n 44).

¹²³ *ibid.*

¹²⁴ IMO, ‘Search and Rescue’ (2018) <<http://www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/Default.aspx>> accessed 28 July 2018.

¹²⁵ *ibid.*

¹²⁶ SAR Convention, Annex Chapter 1 para. 1.3.13.

must be on the verge of sinking before it can be termed an emergency.¹²⁷ The definition of distress is vague; therefore the assessment of whether a person is truly in distress can only be decided on a case-by-case basis.¹²⁸ The vagueness of the definition of distress has allowed ship masters and States to take all the relevant elements into account. They have discretionary power to determine whether a person is in distress or not.¹²⁹ However, an important element is that the existence of an emergency should not be exclusively dependent on or determined by an actual request for assistance.¹³⁰ The SAR Convention defines Rescue as an operation to retrieve persons in distress, provide for first aid or other needs and deliver them to a place of safety.¹³¹ The SAR Convention did not however, define a place of safety.

2.2.3. A Place of Safety

Disembarkation of rescued persons at a place of safety is the final duty under the obligation to rescue distressed persons at Sea. Cooperation among States has particularly been strained with regards to this final duty.¹³² On board a rescuing vessel may be considered a place of safety; however, the rescued persons must eventually be disembarked at a particular territory. There are a number of options available to a rescuing vessel when it comes to the place of safety to disembark the rescued persons.¹³³ First, the place of safety can be at the next port of call for the rescuing vessel; it could be on the dry land nearest to the area where the rescue operation was conducted; it could be at the destination indicated by the rescued persons or other places where the rescued persons can receive assistance. In practice, it may

¹²⁷ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance, the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the management of Operational Cooperation at the External Borders, COM (2009) 658 final, Explanatory Memorandum para 2.

¹²⁸ Coppens, 'The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment' (n 44).

¹²⁹ *ibid.*

¹³⁰ European Commission Proposal for a Council Decision of 27 November 2007 supplementing the Schengen Borders Code as regards the surveillance the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the management of Operational Cooperation at the External Borders, OJL 111/20 of 4 May 2010, Annex part II para.1.4.

¹³¹ SAR Convention, Annex Chapter 1 para. 1.3.2.

¹³² Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War:' (n 34) 499.

¹³³ *ibid* 500.

be difficult to find a State that will allow rescuing vessels to disembark irregular migrants and asylum seekers on its territory.¹³⁴

There are two principles that regulate disembarkation of rescued persons at a place of safety. The first one is derived from the sovereignty of a States over its territory. This means that a rescuing vessel must seek the permission of the port State before it can disembark rescued persons at such port.¹³⁵ The other principle, which is an important limitation to the disembarkation options of a rescuing vessel, is the *non-refoulement* principle. The principle prohibits the return of persons to a territory where their life or freedom will be threatened or where they may be subject to torture or other inhuman treatments¹³⁶. The *non-refoulement* principle is examined in detail in the next chapter.¹³⁷

The duty to rescue distressed persons at sea is not complete without disembarking them at a place of safety. In practice, this has often resulted in dispute between the rescuing State and port States especially in situations where the rescued persons are irregular migrants and asylum-seekers. Port States have often adopted a measure of shutting their ports against rescued migrant. Examples of this measure can be found in the *Tampa*¹³⁸ case where Australia decided to shut its port against Afghan refugees who were rescued at Sea by a Norwegian flag vessel. Similar examples can also be found in recent cases where Italy and Malta have decided against allowing rescued migrants to be disembarked at their ports.¹³⁹

As a response to the *Tampa* incident the 2004 amendment of the SAR Convention, made attempts to clarify the duties of States. It provided that parties should co-ordinate and cooperate to ensure that vessels that have rendered assistance at sea are released from their obligations with minimum further deviation from the vessel's intended voyage.¹⁴⁰ This is provided that it does not result in further endangering the safety of life at Sea.¹⁴¹ The States

¹³⁴ *ibid.*

¹³⁵ Barnes (n 32) 118.

¹³⁶ Article 33 of the Convention relating to the Status of Refugees (Refugee Convention), signed 28 July 1951 (entered into force 22 April 1952) 189 UNTS 137.

¹³⁷ Chapter 3, para 3.2.1.1.

¹³⁸ Penelope Mathew 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96(3) *American Journal of International Law* 661-76

¹³⁹ Lucia Benavides, 'Italy, Malta Close Ports To Migrant Rescue Ship; Spain Takes It In', *npr News* (Europe, 12 June 2018) <<https://www.npr.org/2018/06/12/619109893/italy-closes-port-to-migrant-rescue-ship-spain-takes-it-in>> accessed 28 July 2018.

¹⁴⁰ SAR Convention, Chapter 3.1.9.

¹⁴¹ *ibid*

responsible for search and rescue operation in the region in which such assistance was rendered shall have the primary responsibility for ensuring such co-ordination and cooperation occurs, so that the rescued persons are disembarked from the assisting vessel and delivered to a place of safety, while taking into consideration the particular circumstances of the case and the guidelines developed by the (Inter-Governmental Maritime Consultative) Organization.¹⁴² In such circumstances, the relevant States shall arrange for such disembarkation to be effective as soon as reasonably possible.¹⁴³ The humanitarian provisions under the 2004 SAR Amendments have imposed more obligations upon States with regards to place of safety for rescued person. Consequently, States like Finland and Malta have refused to ratify the 2004 SAR Amendments.

Similar provision was also inserted into Regulation 4.1.1 of SOLAS Convention amendments. However, the conventions have failed to address the important question of what State should the rescued persons be disembarked.¹⁴⁴ The provision was under the assumption that relevant States should coordinate and, while the State responsible for the SAR zone has the primary responsibility, this responsibility relates only to ‘ensuring such co-ordination and cooperation occurs.’ The provision was also silent on what criteria should be applied in the case where no agreement can be reached. The provision clearly avoided stating that, in the absence of an agreement, rescued persons should be disembarked in the State responsible for the SAR Zone.¹⁴⁵

2.2.4. The Role of Soft Law Provisions

In efforts to meet the practical obstacles of implementation and in order to assist States to meet existing commitments, a wide range of soft law instruments that concerns migrants at Sea has been developed.¹⁴⁶ They contain elements that may be difficult to find their way into Conventions because of opposition from certain States. An example is the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea.¹⁴⁷ The instrument was especially

¹⁴² Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework* (Martinus Nijhoff 2010) 100-101.

¹⁴³ SAR Convention, Chapter 3.1.9; Mallia (n 144).

¹⁴⁴ Papanicolopulu, ‘The Duty to Rescue at Sea, in Peacetime and in War.’ (n 34) 501.

¹⁴⁵ *ibid.*

¹⁴⁶ Coppens, ‘The Law of the Sea and Human Rights in the Hirsi Jamaa and Others v Italy Judgment’ (n 44).

¹⁴⁷ IMO, ‘Resolution MSC 167(78), Guidelines on the Treatment of Persons Rescued At Sea’ (2004) <<http://www.refworld.org/docid/432acb464.html>> accessed 17 August 2018.

developed to provide guidance to Governments and masters of vessels with regards to humanitarian obligations under relevant international law relating to the treatment of persons rescued at Sea. The instrument is related to the 2004 SAR and SOLAS Amendments because they were adopted at the same time. The term ‘Government’ was used in these guidelines to signify Contracting States to the 1974 SOLAS Convention (as amended) or member States to 1979 SANS Convention (as amended) in 2004.¹⁴⁸ The requirements provided for under the instrument are applicable to all maritime zones.

Although the provisions are not binding, as soft law instrument they can contain an agreed interpretation of a treaty provision in accordance with the Vienna Convention on Law of Treaties (VCLT).¹⁴⁹ Gradual evolutionary changes in existing Conventions may occur through the process of interpretation of soft law.¹⁵⁰ Therefore, it is not always necessary to turn a soft law instrument into a ‘rule’ of international customary law or to enshrine it into a binding treaty.¹⁵¹

Therefore, States that have adopted the 2004 SAR and SOLAS Amendments have also agreed upon the associated 2004 IMO Guidelines as a tool of interpretation.¹⁵² Malta, had objections to the provisions of the 2004 Amendments. Consequently, it refused to sign the 2004 Guidelines because it was of the opinion that there is a difference between a safe place in terms of search and rescue and in terms of humanitarian law.¹⁵³ However, the 2004 Guidelines also did not mention that a place of safety has to fulfil certain humanitarian requirements.¹⁵⁴

2.3 Conclusion

This chapter has examined the human rights consideration in the Law of the Sea. It first considered UNCLOS provisions that have human rights implications. Under this sub-

¹⁴⁸ *ibid* para 1.1.

¹⁴⁹ Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), signed 23 May 1969 (entered into force 27 January 1980) 1155 UNTS 331 .

¹⁵⁰ Alan Boyle, ‘Further Development of the 1982 Convention on the Law of the Sea’ in D Freestone, R Barnes and D Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006) 51-52.

¹⁵¹ *ibid*.

¹⁵² Coppens, ‘The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment’ (n 44).

¹⁵³ Silja Klepp, ‘A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A legal Anthropological Perspective on the Humanitarian Law of the Sea’ (2011) 23(3) *IJRL* 549.

¹⁵⁴ Coppens, ‘The Law of the Sea and Human Rights in the *Hirsi Jamaa and Others v Italy* Judgment’ (n 44).

paragraph the UNCLOS provisions was divided into two categories: First is the provisions that can be interpreted as protecting individual rights, while the second is provisions that can be interpreted as protecting collective rights. The chapter examined the regime of the ITLOS and its prompt release jurisdiction which guarantees the freedom of liberty of arrested vessels and their crew, and the humanitarian consideration in the jurisprudence of the ITLOS. The duty to render assistance at Sea was considered at length, with particular focus on the obligation under Article 98 of UNCLOS and the IMO instruments of 1974 SOLAS and 1979 SAR Conventions, and their further amendments. The disembarkation of rescued persons at a place of safety was considered. The chapter concluded with examining the role of soft law provisions in relation to the duty to render assistance to distressed persons at Sea.

With the duty to render assistance at Sea, being the main focus of this chapter, the provisions of UNCLOS on the subject, and the principle of safety of life at Sea under the IMO instruments of SOLAS and SAR Conventions were carefully examined to show the similarities between both Conventions. These conventions summarily ensure that safety of life at Sea is prioritized where there are conflicting interests.¹⁵⁵ The safety of life at sea can be seen as protecting the ‘right to life’ under international law. Notable amongst the international human rights conventions that also guarantees the ‘right to life’ are the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁶ the European Convention on Human Rights (ECHR),¹⁵⁷ the African Charter on Human and Peoples’ Rights (Banjul Charter)¹⁵⁸ and the American Convention on Human Rights (ACHR).¹⁵⁹ These Conventions ensure the protection of individual rights within the jurisdiction of State parties.

¹⁵⁵ Mark Pallis, ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes’ (2002) 14 IJRL 329, 335.

¹⁵⁶ International Covenant on Civil and Political Rights (ICCPR), UNGA Res 2200A (XXI), signed 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171.

¹⁵⁷ Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights or ECHR) signed 4 November 1950 (entered into force 3 September 1953) 213 UNTS 221.

¹⁵⁸ African Charter on Human and Peoples Rights (Banjul Charter), signed 27 June 1981 (entered into force 21 October 1986), (1982) 21 ILM 58.

¹⁵⁹ American Convention on Human Rights (ACHR) ‘Pact of San Jose, Costa Rica’, signed 22 November 1969 (entered into force 18 July 1978) 1144 UNTS 123.

CHAPTER 3

CASE LAW: THE INTERACTION BETWEEN HUMAN RIGHTS AND LAW OF THE SEA

This chapter will focus on the interaction between human rights and law of the Sea. In doing so, it will particularly examine some case laws from the European Court of Human Rights (ECtHR),¹ and their relationship with Law of the Sea.

3.1. Relationship between Human Rights and Law of the Sea

Based on the existing legal instruments, the case law jurisprudence of international Tribunals, and scholarly writings have all agreed to the findings that human rights apply at Sea in the same way they do on land.² First, taking a look at human rights instruments, there is nothing in human rights treaties that precludes them from being applicable at Sea. On the contrary, the use of the notion of jurisdiction to determine the scope of human rights will naturally lead to the concept of extraterritorial application of jurisdiction. The extraterritorial application of jurisdiction has been decided by the ECtHR in some case laws that would be examined further under this chapter.

Conversely, United Nations Convention on Law of the Sea III (UNCLOS) did not mention human rights at all in any of its provisions. However, this does not mean human rights cannot be applicable to it. This is because none of its provisions precludes the application of human rights treaties to it.³ Article 311(2) of UNCLOS provides that the Convention shall not alter the rights and obligations of States parties which arise from other agreements as long as they are compatible with the Convention and do not affect the enjoyment by other States parties of their rights or the performance of their obligations under UNCLOS.⁴ This article must always be read along with other relevant provisions.⁵ The first of the relevant provisions is the Article 1 of Charter of the United Nations which provides that the purpose of the UN includes

¹ Section II, Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights or ECHR) adopted 4 November 1950 (entered into force 3 September 1953) 213 UNTS 221.

² See Bernard H Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Columbia Journal of Transnational law 399; also, Jonathan I Charney and others (eds), *International Law in the 21st Century- Essay in Honour of Professor Louis Henkin* (The Hague: Kluwer Law International); Tullio Treves, 'Human Rights and Law of the Sea' (2010) 28(1) BJIL 1; finally, see Irini Papanicolopulu, *Human Rights and the Law of the Sea* (OUP 2014)

³ Papanicolopulu (n 2) 22.

⁴ Article 311(2) UNCLOS.

⁵ Papanicolopulu (n 2) 22.

achieving ‘international cooperation [...] in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.’⁶ Similarly, Article 55 and 56 of UN Charter gives States the obligation to take joint and separate actions to cooperate with the UN to achieve universal respect and observance of human rights and fundamental freedoms.⁷ Finally, Article 103 of the UN Charter provides that the UN Charter shall prevail against all other treaty obligations.⁸

Therefore, any interpretation of UNCLOS or other Conventions that would curtail the human rights obligations of States or preclude them from being carried out should be set aside by the obligations under Article 56 of the UN Charter.⁹ However, there is hardly a need to go to this extreme measure because it is very difficult to find a provision under UNCLOS that does not allow for compliance with human rights.¹⁰

This conclusion has been continuously confirmed by the case law jurisprudence of ECtHR.¹¹ The ECtHR has often times referred to law of the Sea concepts and rules in deciding alleged violations of human rights. In these cases it considered the rules of UNCLOS as ‘applicable law.’¹² In deciding law of the Sea cases some Tribunals have often referred to the ‘consideration of humanity’ rather than ‘human rights.’ Nevertheless, the content of their decisions, if not the wording, clearly indicates that they have taken into consideration human rights instruments.¹³

3.2. The European Court on human rights and law of the Sea

The European Convention on Human Rights (ECHR) which was formerly known as the Convention for the protection of human rights and fundamental freedom is an international Convention drafted within the Council of Europe (CoE) in 1949. It opened for signature in

⁶ Article 1 of the Charter of the United Nations (UN Charter), signed 26 June 1945 (entered into force 24 October 1945) 1 UNTS XVI.

⁷ Articles 55, 56 UN Charter.

⁸ Article 103 UN Charter.

⁹ Papanicolopulu (n 2) 22.

¹⁰ Bruno Simma and others, *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012), Article 103 UNCLOS.

¹¹ Good examples of this will be illustrated with the case law that would be examined under this chapter.

¹² A good example is the case of *Hirsi Jamaa and Others v Italy*, Application No. 27765/09 [2012] ECtHR <<http://www.refworld.org/cases,ECHR,4f4507942.html>> accessed 15 August 2018

¹³ *M/V ‘Saiga’ (No 2) Case (Saint Vincent and the Grenadines v Guinea)*, (Provisional Measures), (1998) 117 ILR 111; (Admissibility and Merits), (1999) 120 ILR 143 (hereinafter ‘*Siaga*’ case) para 155. Also, see the case of *Guyana v Suriname*, Award, [2007] ICGJ 370 para 405.

1950, and entered into force in 1953.¹⁴ The Convention provides for a catalogue of rights and freedoms which includes, among others: Right to life¹⁵; Prohibition of torture¹⁶; Prohibition of slavery and force labour¹⁷; Right to liberty and security¹⁸. The Convention established the European Court of Human Rights (ECtHR),¹⁹ with the aim of enforcing the rights and freedoms under the Convention. The Convention has been amended over the years through additional protocols.²⁰ The ECtHR jurisprudence would be examined from two major perspectives.

- I. The extraterritorial application of human rights at Sea;
- II. The protection of human rights within the context of law of the Sea.

3.2.1. Extraterritorial Application of Human Rights at Sea

The ECHR did not mention in its provisions that the rights and freedoms it guarantees, can be applied at Sea or extraterritorially. However, the ECtHR has decided several cases concerning extraterritorial application of human rights at Sea. Most of these cases relate to State jurisdiction in maritime zones and how the ECHR can be applied to the regime of maritime zones.²¹ The major question in these cases has been the application of Article 1 of ECHR, which provides that ‘the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.’²²

¹⁴ Maša Marochini, ‘The Interpretation of the European Convention on Human Rights’ (2014) 51(1) Zbornik radova Pravnog fakulteta u Splitu 63.

¹⁵ Article 2 ECHR.

¹⁶ Article 3 ECHR.

¹⁷ Article 4 ECHR,

¹⁸ Article 5 ECHR.

¹⁹ Section II, Article 19 ECHR.

²⁰ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 9), signed 20 March 1952 (entered into force 18 May 1954) 213 UNTS 262; Protocol No. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 46), signed 16 September 1963 (entered into force 02 May 1968) 1469 UNTS 46; Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 114), signed 28 April 1983 (entered into force 01 March 1985); Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 117), signed 22 November 1984 (entered into force 01 November 1988); Protocol No. 12 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), signed 04 November 2000 (entered into force 01 April 2005), (2002) 8 IHRR 884; Protocol No. 13 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 187), signed 03 May 2002 (entered into force 07 January 2003), (2002) 9 IHRR 884.

²¹ Jasmine Coppens, ‘Migrants at Sea: A Legal Analysis of a Maritime Safety and Security Problem’ (Ghent University Faculty of Law 2013)

²² Article 1 ECHR.

Territoriality is an important form of jurisdiction under international law.²³ This means that the sovereign powers of a state is exclusive within its territory. Nevertheless, there have been some circumstances where the human rights obligations of States have been held to be applicable extraterritorially, i.e. in areas outside the States' territory.²⁴ A precondition for a State's extraterritorial jurisdiction is having 'effective control' over an area outside its territory. The ECtHR in the case of *Mansur PAD and Ors v Turkey*²⁵ noted that Turkey had 'effective control' over the region of Iran where its military agents were operating. Similarly, in the case of *Hirsi Jamaa and Ors v Italy*,²⁶ it noted that Italy had 'effective control' over the persons it rescued on the high Sea. In the case of *Medvedyev and ors v France*,²⁷ the ECtHR noted that for the purpose of Article 1 of ECHR, *Winner* a Cambodian flag vessel that was arrested by the French navy along with its crew was under the control and jurisdiction of France despite the fact that the vessel was arrested on the high Sea outside the territory of France. In situations where a State has 'effective control' over an area, be it on land or at Sea, it will be held responsible for human rights violations that occur in that area.²⁸

From the Law of the Sea perspective, a State has exclusive jurisdiction and control over the administrative, technical and social activities of vessels that fly its flag.²⁹ This means that the jurisdiction of a State extends extraterritorially on board its flag vessels. Hence Byles J. in the 1868 case of *R v Anderson* referred to a vessel as 'floating Islands' and Lord Blackburn J. in the same case stated that '...a ship on the high Seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory.'³⁰

The extraterritorial application of human rights provisions at Sea has been upheld by the ECtHR in some notable case laws that will be further examined under this chapter.

²³ *Banković and Ors v Belgium and Ors*, App No 52207/99, [2001] ECtHR 890 para 73; (2001) 123 ILR 94.

²⁴ Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 International Journal of Refugee Law 174.

²⁵ *Mansur Pad and Others v Turkey*, Application No 60167/00, Admissibility Decision, 28 July 2007 (unreported).

²⁶ *Hirsi Jamaa and Ors v Italy* (n 12).

²⁷ *Medvedyev and ors v France*, App No. 3394/03, [2010] ECtHR 384; (2010) 51 EHRR 39.

²⁸ Coppens (n 18) 263.

²⁹ Article 94 UNCLOS.

³⁰ *R v Anderson*, (1868) 2 Cox Criminal Case 198.

3.2.1.1. Hirsi Jamaa and Others v Italy 2012 (Hirsi Case)

Non-refoulement Principle:

Before we proceed with the fact of the case, we firstly need to examine the principle of ‘non-refoulement’ as provided under Article 33(1) of Refugee Convention.³¹ It states that: ‘No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ The principle is not limited to refugees alone, it also includes asylum seekers.³²

The principle was not mentioned in the provisions of the ECHR however, the ECtHR has interpreted the Article 3 of ECHR to include prohibition of refoulement.³³ The article provides for individual right against torture, inhuman, degrading treatment or punishment.³⁴ The ECtHR has often used the interpretation from that article to extend the international protection to asylum seekers.³⁵ This is because the principle extends to inhuman and degrading treatment. In the case of *Alexjis Lisikov v Sweden*, the Court noted that the ECHR does not guarantee a right to asylum or refugee status but it only prohibit the expulsion of persons where they may be subject to the treatments contrary to Article 3 ECHR non-refoulement.³⁶ The non-refoulement principle as well as the prohibition of collective expulsion has attained the status of customary international law.³⁷ The question before the Court in the Hirsi case was whether the non-refoulement principle under Article 3 of ECHR could be applied extraterritorially to at Sea situations.

3.2.1.1.2 Facts

The applicants were eleven Somali and thirteen Eritrean nationals who were part of a group of two hundred individuals traveling on three vessels from Libya with the aim of reaching the coast of Italy. They were intercepted by the Italian revenue police on the high Sea, who

³¹ Article 33(1) of the Convention relating to the Status of Refugees (Refugee Convention), signed 28 July 1951 (entered into force 22 April 1952) 189 UNTS 137.

³² Coppins (n 21) 208.

³³ *Alexjis Lisikov v Sweden* [1997] ECtHR No 38821/97.

³⁴ Article 3 ECHR.

³⁵ *Alexjis Lisikov v Sweden* (n 33).

³⁶ *ibid.*

³⁷ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement obligations under the 1951 Convention relating to the status of Refugees and its 1967 Protocol’ para 15 <<http://www.unhcr.org/4d9486929.pdf>> accessed 20 July 2018.

transferred them into Italian military ship and returned them to Tripoli, without making an inquiry about their identity or need for international protection. Their return was based on a 'push back policy' signed in a bilateral agreement between Italy and Libya on 4 February 2009. The major objective of the agreement was to combat terrorism, drug smuggling and irregular migration. The agreement involves at Sea interdiction and subsequent return of migrants to Libya.³⁸

The Applicants argued that the principle of non-refoulement under Article 3 ECHR should have extraterritorial application. They further argued that the decision of the Italian authority to send them back to Libya exposed them to ill-treatment, as they became in danger of being returned from Libya to their various States of origin, where they would have faced risk of great danger. Italy in its defence noted that none of the migrants requested for international protection.

The Court unanimously decided that Italy was in violation of the human rights of the migrants under Article 3 and Article 4 of Protocol 4 of ECHR.³⁹ While considering the arguments of both parties, the Court noted that the applicants alleged no information was given to them by Italian military personnel, who made them believe they were being taken to Italy and did not inform them of the procedure to be followed to avoid being returned to Libya. In so far that circumstance was disputed by Italy, the Court attached more weight to the applicants version because it was corroborated by a very large number of witness statements gathered by UNHCR, the CPT and Human Rights Watch.⁴⁰ The Court found, inter alia, that the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and of being arbitrarily repatriated to Somalia and Eritrea. Having regard to all the circumstances of the case, the Court considered that the Italian Government should have taken all possible steps to obtain assurance from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention.⁴¹

The Court further noted that the purpose of Article 4 of Protocol 4 ECHR is to prevent States from expelling aliens without examining their personal circumstances and without giving them the opportunity to put up arguments against measures taken by relevant authorities.⁴² The prohibition of collective expulsion under international law is aimed at ensuring the duty

³⁸ *Hirsi Jamaa and Ors v Italy* (n 12) para 19.

³⁹ *ibid* para 201.

⁴⁰ *ibid* para 203.

⁴¹ *Hirsi Jamaa and Ors v Italy* (n 12) para 211.

⁴² *ibid* para 177.

of due process in examining the individual situation of each applicant. Therefore, the Court held that the principle of non-refoulement was applicable extraterritorially in that case.⁴³

3.2.1.1.3. Law of the Sea Perspective of *Hirsi Jamaa and Ors v Italy* Case

This sub-paragraph considers some issues arising in the case from the law of the Sea perspective. Italy in its argument noted that its interaction with the migrant vessels was not in the capacity of maritime policing but it was rather based on rescue operation at Sea, in line with Article 98 UNCLOS and similar obligations under international law.⁴⁴ Article 98 gives flag States the duty to render assistance to persons lost or in distress at Sea.⁴⁵ As we have observed in the previous chapter, the duty to rescue distressed or lost people at Sea is not complete if such people are not taken to a place of safety after rescue.⁴⁶

Italy is a party to UNCLOS, SAR and SOLAS Amendments⁴⁷. Therefore, these Conventions have given it a duty to carry out Search and rescue operations. Rescued people are to be taken to place of safety, not a place where they may face persecution or fear of ill treatment. As it has been seen in the previous chapter, State parties to UNCLOS, SAR and SOLAS amendments have a duty to render assistance to persons in danger at Sea.⁴⁸

3.2.1.1.4. Comments:

The decision in *Hirsi Jamaa and Ors v Italy* has raised some serious questions in the mind of an international lawyer specialized in Law of the Sea, with regards to the interpretation and application of the ECHR to interdiction at Sea. In reality it is not every migrant at Sea that is in need of international protection. Irregular migration into Europe has become a major problem for the Continent in the last decade.⁴⁹ Coastal States affected by this problem have in the past made efforts to divert migrant vessels at Sea so as to prevent their entry into territorial sea.⁵⁰

⁴³ *ibid* para 186.

⁴⁴ *ibid* para 65.

⁴⁵ Article 98 UNCLOS.

⁴⁶ Chapter 2, para 2.2.3.

⁴⁷ Chapter 2, para 2.5.

⁴⁸ Chapter 2, para 2.1.1.3., para 2.2.

⁴⁹ European Parliament, 'EU migrant crisis: facts and figures', *European Parliament News* (Society, 30 June 2017) <<http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures>> accessed 31 July 2018.

⁵⁰ Bill Frelick, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (Human Rights Watch 2009).

The EU in its bid to strengthen European borders and curtail irregular migration by Sea, in 2004 established Frontex, an agency that carries out control and surveillance of the external borders of member States.⁵¹ The agency consists mainly of EU member States. Frontex is a specialized and independent body with the responsibility of monitoring the borders of Europe. In the past, Frontex has also been involved in the diversion of migrant vessels, in its *operation Hera*, it successfully diverted thousands of migrants to the coasts of Senegal and Mauritania in West Africa.⁵² Consequently, these diversions can result in the violation of the non-refoulement principle where the individual situation of the migrants is not reviewed.

The *Hirsi Jamaa and Ors v Italy* case has established the importance of reviewing the individual situation of at Sea migrants in the same way as on land migrants.⁵³ Considering this factor, the following questions can be raised:

1. Can a State be interpreted as having ‘full and effective control’ in a situation where it diverts a migrant vessel on the High Sea?⁵⁴
2. What would be the implication if the interception operation was conducted by Frontex?⁵⁵

To answer the first question of whether ‘full and effective control’ is deemed, where a State diverts migrant vessel on the high Sea. A State may divert migrant vessels on the high Sea in exercise of its right of visit. The right of visit is provided for under Article 110 of UNCLOS as one of the exceptions to the principle of exclusive sovereignty of flag State on the high Sea as provided for under Article 92 of UNCLOS. The right grants every warship the power to stop and Search vessels on the high Sea that have been suspected of engaging in piracy, slave trade, unauthorized broadcasting, vessels without nationality, vessels refusing to show flag, vessels of foreign nationality or the same nationality as the warship.⁵⁶

The diversion of a vessel on the High Sea can be interpreted as a physical interference, which must fulfil the conditions of right of visit before it can be regarded as lawful.⁵⁷ The absence

⁵¹ Council Regulation (EC) No. 2007/2004 of Oct 2004 establishing a European Agency for the Management of Operational Cooperation at the External Border of Member States of the European Union, OJL 349/1 of 25 Nov 2004, Preamble, para 4.

⁵² Dominic Bailey, ‘Stemming the immigration wave: Europe has taken its fight to control the boatloads of African immigrants setting off for the Canary Islands to the coasts of western Africa’, *BBC News* (Europe, 10 September 2006) <<http://news.bbc.co.uk/2/hi/europe/5331896.stm>> accessed 20 July 2018.

⁵³ *Hirsi Jamaa and Ors v Italy* (n 12) para 177.

⁵⁴ Coppins (n 21) 270.

⁵⁵ *ibid* 273.

⁵⁶ Article 110 UNCLOS.

⁵⁷ Efthymios Papastavridis, ‘Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law’ (2009) 36 *Syracuse Journal of International Law and Commerce* 145, 155. Also see E

of nationality is the usual excuse States use in interdicting most migrant vessels at Sea.⁵⁸ UNCLOS is silent on whether the principle of non-refoulement can be applied by a warship after exercising the right of visit. Therefore, any diversion that would risk refoulement will amount to violation of the principle of the non-refoulement.⁵⁹ Where the diversion occurs on the Mediterranean Sea, it is easy to foresee the next destination of the migrant vessel because it is almost an enclosed Sea.⁶⁰ At the point where the diversion is taking place is where the diverting authorities can be interpreted as having ‘full and effective control.’ At this point, the human rights considerations under ECHR will be applicable to all the individuals in question. This is why it can be said that the freedoms and rights under the ECHR can be ‘divided and tailored’.⁶¹ The ECtHR observed in the case of *Mansur PAD and Ors v Turkey*, where seven Iranians were murdered in North-West of Iran by Turkish Soldiers, that a State may be held accountable for ECHR violations of people who are in territories of other States which is not part of its territory, if such State is found to have authority and control through its agents operating lawfully or unlawfully in those other States.⁶²

Secondly, what would be the implication if the interception operation was conducted by Frontex? In situations where human rights violation occurs from a joint operation of States such as Frontex, the independent role played by each State must be assessed to determine who would be held responsible.⁶³ In the case of *Xhavara and Ors v Italy and Albania*⁶⁴, Italy and Albania had entered into a bilateral agreement for a joint operation to interdict Albania migrant vessels and prevent them from entering Italy. In one of the operations Italian warship *Sibilla* engaged in a collision with a migrant vessel on the high Sea, which resulted in ship wreck and consequently the death of 58 migrants. The ECtHR noted that Albania could not be held responsible for the shipwreck merely because it had entered into a bilateral agreement with Italy and permitting such actions. The Court further held that the interdiction program generally and the actions of *Sibilla* in particular was a violation of human rights. Italy was held responsible because its vessel caused the actual damage in that operation.

Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart Publishing 2013)

⁵⁸ Article 110(1)(d) UNCLOS.

⁵⁹ Coppens (n 21) 272.

⁶⁰ *ibid.*

⁶¹ *Al-Skeini and Ors, Bar Human Rights Committee (intervening) and Ors (intervening) v United Kingdom*, App No 55721/07, [2011] ECtHR 1093 (hereinafter *Al-Skeini and Ors v UK*) para 137.

⁶² *Mansur PAD and Ors v Turkey* (n 25).

⁶³ Moreno-Lax (n 24) 174-220.

⁶⁴ *Xhavara and Ors v Italy and Albania*, App No 39473/98, Admissibility Decision, 11 January 2001 (unreported case).

However, the set-up of Frontex is a bit complex and not transparent because several States are involved in each operation. Therefore, it may be difficult to know who is in control and what role each Member State played in each operation. For instance in 2011, during Frontex's *Operation Hermes* that took place in central Mediterranean, EU States of Italy (host), Belgium, Austria, Germany, France, Poland, Netherlands, Greece, Hungary, Poland, Portugal, Romania, Switzerland and Spain all participated actively.⁶⁵ However, the Regulation 1168/2011 provides for each operation to be based on a well-defined operational plan, including an evaluation and obligation to report incidents, agreed before the start of the joint operations or pilot projects between Frontex, and Member States.⁶⁶ The operational plan gives details about the mode of operation before the start of the operation. It contains all the necessary information needed for the joint operation such as description of task, special instruction, composition of teams, deployments of staffs, command and control. The operational plan can also contain specific information about application of relevant jurisdiction and legislation in the geographical area where the joint operation is to take place, references to international and EU laws regarding interception, rescue at Sea and disembarkation.⁶⁷ Therefore, in an event of human rights violation during its operation the operational plan can be consulted to help identify the State that had effective control of the operation in question.⁶⁸

3.2.2. Protection of Human Rights within the context of Law of the Sea.

The other major perspective from which the ECtHR jurisprudence would be examined is the protection of human rights from the viewpoint of law of the Sea.⁶⁹ Human rights law can be relevant in the application and interpretation of law of the Sea the same way law of the Sea can be relevant in the application and interpretation of human rights law.⁷⁰ Nonetheless, the specific viewpoint of a human rights Court is to interpret and apply human rights instruments.⁷¹ This will be seen in the way ECtHR interpreted human rights from law of the

⁶⁵ Frontex, 'General Report 2011' (2011) 41 <<http://www.europarl.europa.eu/document/activities/cont/201207/20120725ATT49372/20120725ATT49372EN.pdf>> accessed 18 August 2018.

⁶⁶ Article 3(a) of Regulation (EU) No. 1168/2011 of the European Parliament and the council of 25 October 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union, OJL 304/1 of 22 November 2011.

⁶⁷ *ibid.*

⁶⁸ Coppens (n 21) 274.

⁶⁹ *ibid* 264.

⁷⁰ Treves (n 2) 7.

⁷¹ *ibid.*

Sea perspective in the cases of *Medvedyev and Ors v France*⁷²; *Rigoupoulos v Spain*⁷³; *Women on Waves v Portugal*⁷⁴ and *Mangouras v Spain*.⁷⁵ These cases will be examined further in this chapter.

3.2.2.1. Medvedyev and Ors v France; and Rigoupoulos v Spain

The 2008 and 1999 cases of *Medvedyev and Ors v France*, and *Rigoupoulos v Spain* present very similar facts. A Cambodian and Panamanian flagged vessel suspected of illicit drug trafficking was intercepted on the high Sea by the French and Spanish navies respectively. Permission to intercept and visit *Winner* the Cambodian vessel was obtained from the Cambodian ministry of foreign affairs in a diplomatic note of 7 June 2002. Similar authorization was also obtained by Spain from Panama. Both vessels were arrested and taken to the ports of the arresting States, while their crew was detained on board the vessels.

The arrested vessel in the *Medvedyev and Ors v France* case arrived French port of Brest on 26 of June 2002, 13 days after the vessel was arrested, while the Panamanian vessel arrived Spain 16 days after arrest. On their arrival, they were promptly charged before the competent Courts by the arresting States.

The crew members in both cases instituted actions for human rights violation before the ECtHR. In both cases they claimed that the States detaining them had violated their human rights under Article 5(3) ECHR. Article 5(3) provides that an arrested or detained person must be brought promptly before a judge or other officers authorized by law to exercise judicial power. They claimed that the detention and delay of 13 days in *Medvedyev and Ors v France* case and 16 days in *Rigoupoulos v Spain* case, did not comply with the requirement of promptitude provided for under the ECHR. The Court observed in both cases that the fact presented ‘wholly exceptional circumstance,’ due to the fact that it was impossible to charge them before a competent Court sooner than they were charged. The reason for this decision was because their arrest was made on the high Sea at a distance of thousands of kilometres from the arresting States.⁷⁶ It consequently held that there was no violation of Article 5(3) ECHR in both cases.

⁷² *Medvedyev and Ors v France* (n 27)

⁷³ *Rigoupoulos v Spain*, App No 37388/97, (1999) II ECR 435.

⁷⁴ *Women on Waves v Portugal*, App No 31276/05, [2011] ECtHR 1693.

⁷⁵ *Mangouras v Spain*, App No 12050/04, [2010] ECtHR 1364.

⁷⁶ *Medvedyev and Ors v France* (n 27) para 105.

The decisions of the Court in both cases, demonstrate the relevance of maritime situations in the interpretation and application of human rights provisions.⁷⁷ In *Rigoupoulos v Spain*, there was no claim that Spain's arrest and detention of the Panamanian vessel and its crew was incompatible with the provisions of ECHR. However in *Medvedyev and Ors v France*, the applicants also pleaded violation of Article 5(1) of ECHR. The Article provides that, no one shall be deprived of his liberty except in accordance with a procedure prescribed by law.⁷⁸ The applicants claimed that their arrest and detention did not fulfil the procedural requirements of both French domestic and international law. The applicants argued that there was no basis for their arrest under Law of the Sea because Article 108(2) of UNCLOS provides that any State that has reasonable grounds to suspect that its flag vessel is involved in drug trafficking, may request the cooperation of other States to suppress it. This is the only article that mentioned drug trafficking under the Law of the Sea regime. The Convention did not provide for a situation where a State can request for cooperation from the flag State of a suspected vessel.⁷⁹ They further argued that Cambodia's acceptance of France's request cannot be interpreted as a request for cooperation by Cambodia to France in light of Article 108(2) of UNCLOS. Similarly, Article 17(3) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention)⁸⁰ which France relied upon could not be applied because Cambodia was not a party to the Convention.

The Court while noting that Article 5(1) of ECHR can be applicable under domestic legislation underlined that a Court must consider all rules that can be applicable to all interested parties including those that have their source under international law.⁸¹ The Court in arriving at a decision took into consideration the freedom of navigation and the supremacy of flag State jurisdiction on high seas.⁸² It also considered that the right of visit under Article 110 UNCLOS only authorizes interception of vessels involved in piracy; slave trade; unauthorized broadcasting; sailing without nationality and refusing to show its flag or 'where specific treaties provide so'.⁸³ The Court opined that the 1988 Vienna Convention⁸⁴ will be the appropriate treaty to be considered. Article 17(4) of the Vienna Convention provides that

⁷⁷ Treves (n 2) 8.

⁷⁸ *Medvedyev and Ors v France* (n 27) para 62.

⁷⁹ Louis B Sohn, 'International Law of the Sea and Human Rights Issues' in Thomas A Clingan (ed), *The Law of the Sea: What Lies Ahead?* (Law of the Sea Institute Honolulu 1988) 60.

⁸⁰ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed 20 December 1988 (entered into force 11 November 1990) 1582 UNTS 95 (hereinafter '1988 Vienna Convention').

⁸¹ *Medvedyev and Ors v France* (n 27) para 79.

⁸² *ibid* para 50.

⁸³ *ibid* para 85.

⁸⁴ 1988 Vienna Convention (n 80).

if evidence of involvement in drug trafficking is found after Searching a ship, appropriate action may be taken against the ship and its crew.⁸⁵ The Court classified this provision as a ‘derogation’ of the law of flag State principle.⁸⁶ However, the provision in the Vienna Convention could not be applied to the case, because Cambodia was not a party to the Vienna treaty.

At this stage, the Court needed to examine the diplomatic exchange between Cambodia and France to check whether it can be interpreted as an invitation to cooperate in suppressing drug trafficking at Sea in line with Article 108(1) UNCLOS. The Court concluded that France’s agreement with Cambodia based on Article 108(1) UNCLOS was a sufficient legal basis for the interception and taking into custody of the vessel. However, this was not the same for all the consequences that resulted from the arrest. The agreement could not be interpreted as giving rights to detain the crew for thirteen days. Consequently, the Court applied ECHR to conclude that France had violated the human rights of the applicants under Article 5(1) of ECHR.⁸⁷

3.2.2.1.1. Comments

The steps taken by the Court to arrive at this decision raises doubts from the viewpoint of an international lawyer specialized in the law of the Sea.⁸⁸ The approach the Court took on UNCLOS and the 1988 Vienna Convention did not adopt as starting point the idea that a flag State is free to grant other States some or all its powers and jurisdiction over its vessels and all States are free to request jurisdiction from a flag State prior to taking any action on the high Sea.⁸⁹ The approach seems like there must be a legal basis before this type of request can be made or granted: either under Article 108(2) UNCLOS or under Article 17 of the 1988 Vienna Convention.⁹⁰

If the Court decided that France had rightly arrested and detained the Cambodian vessel and its crew, it would have done so by directly examining the authorization given by Cambodia to see whether the action of France was covered by it or not. The Court would have seen that the essence of Article 108 UNCLOS is to facilitate cooperation among States in the fight against

⁸⁵ Article 17(4) 1988 Vienna Convention.

⁸⁶ *Medvedyev and Ors v France* (n 27) para 22.

⁸⁷ *ibid* para 103.

⁸⁸ Treves (n 2) 10.

⁸⁹ Coppens (n 21) 264.

⁹⁰ Treves (n 2) 10.

drug trafficking. It would have also noticed that the aim of Article 17 of the 1988 Vienna Convention is to facilitate and render more efficient the cooperation based on request and grant of an authorization by stressing that the flag State may make the authorization conditional, shall respond expeditiously to requests, and shall designate an authority competent for receiving such request.⁹¹ It is important to note that the obligations under Article 17 of the 1988 Vienna Convention are conditional, based on the fact that States have the freedom to request for authorization and States are free to either accept or reject such authorization.

Finally, the ECtHR is not a specialized Court authorized to determine the legality of the arrest of vessels at Sea except such arrest concerns specific rights of individuals. As the Court rightly stated in the case, part of its task is to consider the ‘quality’ of the legal rules applicable to the interested parties: such quality entails that rules authorizing the restriction of freedom of liberty must be sufficiently accessible and precise in order to avoid any danger to arbitrariness.⁹²

3.2.2.2. Women on Waves v Portugal

This case was about the NGO *women on waves*, invited to Portugal by two Portuguese Associations to organize seminars and workshops on legalizing abortion, that was illegal in Portugal at the time. The NGO was on its way to Portugal via *Borndiep*, a rented vessel when it was accosted and prevented entry into the territorial Sea by a Portuguese warship on the authority of the government of Portugal. The NGO along with the two Portuguese Associations instituted this action against the Government of Portugal at the ECtHR. They claimed violation of the freedom of expression and peaceful assembly under Articles 10 and 11 of ECHR. Portugal in its defence argued that it has the right to prevent innocent passage under Articles 19 and 25 of UNCLOS, especially when such passage is against the law in Portugal. It further argued that the measures taken were prescribed by law in a democratic society so as to protect the morality and health of its citizens in conformity with Articles 10(2) and 11(2) of ECHR. Although the Court admitted that Articles 19(2)(g) and 25 of UNCLOS can justify the interference. However, such interference was unnecessary in a democratic society. Article 19(2)(g) provides that a passage can be considered prejudicial to the peace, good order or security of a coastal State if it involves loading or unloading of any commodity,

⁹¹ Treves (n 2) 10.

⁹² *Medvedyev and Ors v France* (n 27) para 80.

currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulation of the coastal State.⁹³ While Article 25 UNCLOS provides that the coastal State can take necessary steps to prevent a passage that is not innocent.⁹⁴ The Court observed that other mechanisms could have been adopted to protect the morality and health of Portuguese other than outright prevention of innocent passage using a warship against a merchant vessel.⁹⁵ The Court held Portugal in violation of the freedom of expression of the applicants under Article 10 of the ECHR.

3.2.2.2.1. Comments

It must be noted that there would have been a serious doubt in Portugal's defence for hindering the right of innocent passage if the case was instituted before a Court or Tribunal that is specialized in the interpretation and application of the provisions of UNCLOS.⁹⁶ The right of innocent passage through the territorial Sea is one of the most important rights and freedoms provided by the law of the Sea for the interest of navigation.⁹⁷ It is important that such passage must be continuous and expeditious.⁹⁸ According to UNCLOS such a passage will be deemed innocent if it does not prejudice the peace, good order or security of the coastal State and such passage must be in conformity with UNCLOS and other international laws.⁹⁹ States under UNCLOS have the right to take necessary steps to prevent any passage that is deemed not innocent.¹⁰⁰ If a vessel engages in activities listed under Article 19(2)(a-l) UNCLOS, then its passage will be deemed not innocent.¹⁰¹

In the case of *Lusitania Expresso*¹⁰² where a group of Portuguese human rights activists sailed in 1992 from Darwin Australia to Dill, East Timor to protest human rights violations happening in that region. Their vessel was subsequently turned back by the Indonesian government. The government maintained that such passage was not innocent based on Article 19(2)(d) of UNCLOS which provides that any passage that promotes an act of propaganda

⁹³ Article 19(2)(g) UNCLOS.

⁹⁴ Article 25 UNCLOS.

⁹⁵ *Women on Waves v Portugal* (n 74).

⁹⁶ Treves (n 2) 11.

⁹⁷ Article 18 UNCLOS.

⁹⁸ Article 18(2) UNCLOS.

⁹⁹ Article 19 UNCLOS.

¹⁰⁰ Article 25 UNCLOS.

¹⁰¹ Article 19 (2)(a)-(l) UNCLOS.

¹⁰² Donald R Rothwell, 'Coastal State Sovereignty and innocent passage: The Voyage of the Lusitania Expresso' (1992) 16(6) Marine Policy 427

aimed at affecting the defence or security of the coastal State is not innocent.¹⁰³ This case is a classic example of a State's willingness to take pre-emptive measures to prevent a passage it deems not innocent.¹⁰⁴

3.2.2.3. Mangouras v Spain

This is the final case that will be examined in this chapter. The decision of ECtHR in this case was influenced by the principles of law of the Sea. The case involved Captain Mangouras who was in control of the vessel during the *Prestige* accident. He instituted this action against Spain to determine whether the bail condition of three million Euros levied against him and his vessel by the Spanish Court was a violation of Article 5(3) of ECHR. The article provides for an accused to be released on bail pending trial on reasonable conditions. The Court held that although the bail condition was high, it did not constitute a violation of Article 5(3) ECHR. The Court's reasoning was like this because of the growing and legitimate concerns for the protection and preservation of the marine from pollution, inter alia expressed under part XII of UNCLOS. Thus the values that originate from law of the Sea are assessed by the ECtHR, to determine whether they can be balanced with the values set out under ECHR.¹⁰⁵

3.3. Conclusion

In conclusion, this chapter has attempted to build an interaction between human rights and the law of the Sea by first examining the relationship between both regimes in order to draw a connection. It further went on to consider the case law jurisprudence of the ECtHR from two broad perspectives: the extraterritorial application of human rights at Sea and the protection of human rights within the context of law of the Sea.

The first part of the chapter dealt with the extraterritorial application of human rights at Sea. Under this sub-paragraph, cases dealing with the extraterritorial application of Article 1 of ECHR were considered. Article 1 of the ECHR provides that, States shall secure the rights and freedom of all persons within their jurisdiction. The ECtHR decided that the term 'jurisdiction' can be applicable extraterritorially in situations where States have 'effective

¹⁰³ *ibid.*

¹⁰⁴ Coppens (n 18) 267.

¹⁰⁵ Coppens (n 18) 267.

control' of other territories example of this was found in *Mansur PAD and Ors v Turkey*¹⁰⁶ or in situations where States have 'effective control' over group of persons example of this was found in *Hirsi Jamaa and Ors v Italy*.¹⁰⁷ The ECtHR decided in the *Hirsi Jamaa and Ors v Italy* that the non-refoulement principle under Article 3 of ECHR could be applied extraterritorially to at Sea circumstances. The case was further considered from the Law of the Sea perspective concerning the obligation under Article 98 UNCLOS. The general comment on the case generated two important questions of whether 'effective control' could be interpreted in cases at Sea diversion of migrants' vessels and what the implication would be if the diversion was conducted by Frontex.

The second part of the chapter examined the protection of human rights within the context of law of the Sea. Under this section, the cases of *Medvedyev and Ors v France*¹⁰⁸ and *Rigoupoulos v Spain*¹⁰⁹ were examined in relation to right of visit under Article 110 UNCLOS and duty to cooperate in the fight against drug trafficking under Article 108 UNCLOS. The *Women on Waves v Portugal* case was also examined in relation to right of innocent passage under Article 19 and 25 of UNCLOS. The last case that was examined in this chapter was *Mangouras v Spain*,¹¹⁰ in which the provisions of part XII of UNCLOS influenced the decision of the Court.

Finally, from the case law jurisprudence that has been examined, it can be observed that there are circumstances where human rights concerns are intertwined with law of the Sea concerns.¹¹¹ These two fields are not separate planets rotating in different orbits, but rather from time to time they meet.¹¹² Any time there is fusion between both regimes, the considerations of human rights must always triumph in line with the provisions of the UN Charter.¹¹³

¹⁰⁶ *Mansur PAD and Ors v Turkey* (n 25).

¹⁰⁷ *Hirsi Jamaa and Ors v Italy* (n 12).

¹⁰⁸ *Medvedyev and Ors v France* (n 27).

¹⁰⁹ *Rigoupoulos v Spain* (n 73).

¹¹⁰ *Mangouras v Spain* (n 75).

¹¹¹ Coppens (n 21) 274.

¹¹² *ibid.*

¹¹³ Article 55, 56 and 103 UN Charter.

CHAPTER 4

CONCLUSION

4.1. Summary and Findings

The first chapter introduced the scope of the research, its subject matter. The chapter examined briefly the contextual background of the topic, along with its research questions, methodology and structure of the research. It is in subsequent chapters that the body of the research was examined.

The second chapter identified the human rights consideration in the Law of the Sea. In so doing it first considered the provisions of UNCLOS that have human rights implications. In the chapter, UNCLOS provisions were divided into two categories. First, the provisions that can be interpreted as protecting individual rights; while the second contained provisions that can be interpreted as protecting collective rights. The chapter went ahead to examine the regime of the ITLOS with focus on the ‘prompt release’ jurisdiction of ITLOS. ‘Prompt release’ guarantees the freedom of liberty of vessels and crew detained for violating a coastal State legislation. It can only be applied after the detained vessel has posted a reasonable bond. The humanitarian consideration in the jurisprudence of the ITLOS was further considered under its regime.

The duty to render assistance at Sea as a corollary obligation of right to life was also examined under the chapter. Particular emphasis was laid on the obligation under Article 98 of UNCLOS and the IMO instruments of SOLAS and SAR Conventions. The disembarkation of rescued persons at a place of safety was considered. The chapter concluded by examining the role of soft law provisions in relation to the duty to render assistance to distressed persons at Sea.

The chapter achieved the aim of proving that human rights considerations exist in the Law of the Sea regime and consequently, that human rights considerations exist at Sea. The analysis of the regime of ITLOS in both its ‘prompt release jurisprudence’ and ‘consideration of humanity’ judgments was to achieve the aim of identifying human rights considerations in some Law of the Sea cases.

The third chapter commenced by first building an interaction between the human rights and the Law of the Sea regime by examining the relationship between both regimes in order to draw a connection. It went ahead to consider the case law jurisprudence of the ECtHR from two broad perspectives; One, being the extraterritorial application of human rights at Sea. While the other, the protection of human rights within the context of Law of the Sea.

The first part of the chapter examined ECtHR case laws that dealt with the extraterritorial application of Article 1 of ECHR. Article 1 of ECHR provides that States shall secure the rights and freedom of all persons within their jurisdiction.¹ The ECtHR decided that the term ‘jurisdiction’ can be made applicable extraterritorially in situations where States have ‘effective control’ in other territories. An example of this was seen in the case of *Mansur PAD and Ors v Turkey*.² The Court also held that States have ‘effective control’ in situations where they are in charge of a group of people. An example of this was seen in the case of *Hirsi Jamaa and Ors v Italy*.³ The ECtHR in the latter case decided that the *non-refoulement* principle enshrined under Article 3 of ECHR could be applied extraterritorially to at Sea circumstance. The research further examined the case from the Law of the Sea perspective and the obligation under Article 98 of UNCLOS. The general comment on the case generated two important questions of whether ‘effective control’ could be interpreted in a situation of at Sea diversion of migrants vessels and what would the implication be if the division was conducted by Frontex (EU agency for external European boarder control).

The second part of the chapter examined the protection of human rights within the context of Law of the Sea. Under this section, the cases of *Medvedyav and Ors v France*⁴ and *Rigoupoulos v Spain*⁵ were examined in relation to right of visit under Article 110 of UNCLOS and duty to cooperate in the fight against drug trafficking under Article 108 of UNCLOS. The *Women on Waves v Portugal*⁶ case was also examined in relation to right of innocent passage under Article 19 and 25 of UNCLOS. The last case that was examined in

¹ Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedom (European Convention on Human Rights or ECHR) adopted 4 November 1950 (entered into force 3 September 1953) 213 UNTS 221.

² *Mansur PAD and Ors v Turkey*, App No 60167/00, Admissibility Decision, 28 July 2007 (unreported).

³ *Hirsi Jamaa and Ors v Italy*, App No. 27765/09, [2012] ECtHR <<http://www.refworld.org/cases,ECHR,4f4507942.html>> accessed 15 August 2018

⁴ *Medvedyev and Ors v France*, App No. 3394/03, [2010] ECtHR 384; (2010) 51 EHRR 39.

⁵ *Rigoupoulos v Spain*, App No 37388/97, (1999) II ECR 435.

⁶ *Women on Waves v Portugal*, App No 31276/05, [2011] ECtHR 1693.

this chapter was *Mangouras v Spain*.⁷ In that case, the provisions of part XII of UNCLOS influenced the decision of the Court.⁸

The aim of examining the cases of *Mansur PAD and Ors v Turkey*⁹ and *Hirsi Jamaa and Ors v Italy*¹⁰ was to prove that the human rights obligations of a State is not territorially limited. The analysis of case laws of *Hirsi Jamaa and Ors v Italy*;¹¹ *Mangouras v Spain*;¹² *Medvedyav and Ors v France*;¹³ *Rigoupoulos v Spain*¹⁴ and the *Women on Waves v Portugal*¹⁵ was also to achieve the aim of identifying the Law of the Sea considerations that exists in some human rights cases before the ECtHR. The final aim of analyzing the case laws under this chapter was to prove that human rights considerations exist at Sea and they should be protected.

4.2. Research Methodology

The research methodology that was adopted for the purpose this research is the ‘Black Letter Law’ methodology. The research methodology relied mainly on provisions of international conventions such as UNCLOS, SOLAS, SAR, among others and the case laws jurisprudence of the ITLOS and the ECtHR for its primary sources. Legal texts, legal journals, academic commentaries, articles, websites and blogs were adopted as secondary sources to answer the research questions and to achieve the aims and objectives of the research.

4.3. Main Conclusion

This research has been able to establish that human rights consideration exists at Sea and that there are certain provision of UNCLOS, SOLAS and SAR Convention that can be interpreted to protect human rights. However it is submitted that these provisions are not enough in every case to ensure adequate protection of human rights at Sea. This is in view of certain elements that would be further considered under this chapter.

⁷ *Mangouras v Spain*, App No 12050/04, [2010] ECHR 1364

⁸ *ibid.*

⁹ *Mansur PAD and Ors v Turkey* (n 2).

¹⁰ *Hirsi Jamaa and Ors v Italy* (n 3).

¹¹ *ibid.*

¹² *Mangouras v Spain* (n 7).

¹³ *Medvedyev and Ors v France* (n 4).

¹⁴ *Rigoupoulos v Spain* (n 5).

¹⁵ *Women on Waves v Portugal* (n 6).

The High Seas is an area that covers two third of the ocean.¹⁶ The High Seas covers nearly half of Earth's planet surface area.¹⁷ The fact that the vast majority of the Earth has been left unsecured by an international human rights convention have ensured that there is a legal vacuum in the human rights regime at Sea. This vacuum has allowed for several human rights violations to thrive at Sea. Some of the violations include, violation of 'non-refoulement' principle during migration at Sea¹⁸, piracy¹⁹, slavery at Sea.²⁰ Some of these issues will be discussed further.

4.3.1. Piracy

This activity is defined under the UNCLOS as one which takes place on the High Sea.²¹ In view of the resurgence of piracy in the last decade, States have taken up responsibilities to conduct maritime operations to combat this activity. These operations may lead to violation of human rights when States are not bound by any human rights convention at Sea. The ECtHR held in the case of *Hassan and Ors v France*,²² that France had violated the rights to 'liberty and security' of detained pirates under Article 5(1) and 5(3) of ECHR.²³ In that case France had delayed the arraignment of detained pirates by 48 hours.²⁴

The legal uncertainty concerning the regime of human rights at Sea resulted in States who are afraid of violating human rights to release arrested pirates without trial.²⁵ The implication of this is that pirates that are set free can continue their criminal activity.

4.3.2. Migration at Sea

The terms 'Migrants' and 'refugees' have often been used interchangeably, but these terms have different meanings.²⁶

¹⁶ Essam Yassin Mohammed, 'Governing the ungoverned 50% of the planet' (IIED, 2016) <<https://www.iied.org/governing-ungoverned-50-planet>> accessed 15 August 2018.

¹⁷ *ibid.*

¹⁸ *Hirsi Jamaa and Ors v Italy* (n 3).

¹⁹ *Hassan and Ors v France*, App No 46695/10 and 54588/10, [2014] ECtHR 4.

²⁰ ILO, 'Forced Labour and Human Trafficking in Fisheries' <<http://www.ilo.org/global/topics/forced-labour/policy-areas/fisheries/lang-en/index.htm>> accessed 15 August 2018.

²¹ Article 101 UNCLOS.

²² *Hassan and Ors v France* (n 19).

²³ *ibid.*

²⁴ *ibid.*

²⁵ Oliver Hawkins, 'What to do with a captured pirate' (2009) <<http://news.bbc.co.uk/2/hi/7932205.stm>> accessed 17 August 2018.

²⁶ United Nations, 'Refugees and Migrants: Definition' <<https://refugeesmigrants.un.org/definitions>> accessed 15 August 2018.

The term ‘refugee’ is defined under the Refugee Convention as a person who owing a well-founded fear of being prosecuted for reasons such as race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality, and he is unable to return to his country owing to such fears.²⁷ Refugees can seek for international protection under international law.²⁸ As earlier examined the ‘non-refoulement’ principle has been used to protect the rights of refugees from returning them to a place where they will face the fear or risk of ill-treatment.²⁹

The term ‘Migrant’ has been defined as a person who changes his country of usual residence irrespective of the reason for migration or legal status.³⁰ States can choose to deport migrants who have arrive its border irregularly if they do not fall within the category of persons referred to by the 1951 Refugee convention.

The problem of migration at Sea is not new, it dates back to World War II when European Jews attempted to flee Nazi regime, with several of their boats pushed back by UK and USA, which lead to drowning of most of the migrants.³¹ The term ‘Boat People’ was often used for refugees who were trying to flee Vietnam, Cambodia and Laos, following the Vietnam War between 1978 and 1979.³² Close to 200, 000 deaths were recorded due to drowning, as many others were sold into slavery.³³ Similar situation occurred in 1972 with refugees fleeing war ravaged Haiti on boats to USA.³⁴ The war in Afghanistan has also forced refugees to flee on boats; an example of this was seen in the ‘Tampa case.’³⁵ The migration crises in the Mediterranean Sea have only placed more attention on an existing problem.

Coastal States has employed the policy of patrols, push-back policy, interdiction to prevent migrants access to territorial Sea.³⁶ As the ECtHR have determined in the case of *Hirsi*

²⁷ Article 1(A)(2) Convention relating to the Status of Refugees (Refugee Convention), signed 28 July 1951 (entered into force 22 April 1952) 189 UNTS 137.

²⁸ Article 1(C)(3) Refugee Convention.

²⁹ Chapter 3, para 3.2.1.1.

³⁰ United Nations, ‘Refugees and Migrants: Definition’ (n 26).

³¹ Sofia Galani, ‘The “New” Human Rights at Sea Debate’ (2018) <<https://www.maritime-executive.com/editorials/the-new-human-rights-at-sea-debate#gs.JKi5eWA>> accessed 17 August 2018.

³² *ibid.*

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

Jamaa and Ors v Italy,³⁷ this can have human rights implications on genuine refugees seeking international protection in line with international law.³⁸

4.3.3. Slavery at Sea

Slavery at Sea can be in form of forced labour, child labour, human trafficking among others. Illegal, unreported and unregulated (IUU) fishing has been a breeding ground for modern slavery and other human right violations at Sea.³⁹ The high demand for seafood all around the world has led to increased activity of IUU fishing. This has consequently led to the issues of slavery, human trafficking, bonded labour, deplorable working conditions within the fisheries industry of some States.⁴⁰ Examples of States where these acts have been uncovered include Thailand,⁴¹ New Zealand,⁴² Cambodia⁴³, Indonesia⁴⁴ among others. The Asia-Pacific region accounts for the highest rate of forced labour in the world with an estimated figure of 11.7 million victims, which is 56 percent of global total.⁴⁵ Africa is next with an estimate of 3.7 million victims, which is 18 percent of global total.⁴⁶ Latin America has an estimate of 1.8 million victims, at 9 percent of global total.⁴⁷ It is estimated that more than 21 million people are victims of forced labour all around the world, which occurs mostly in fisheries industries.⁴⁸

In view of the human rights violations discussed and many more violations that go unnoticed such as, murders,⁴⁹ tortures⁵⁰ among others, it is recommended that more effective measures should be taken by the international community to protect human rights at sea. Examples of

³⁷ *Hirsi Jamaa and Ors v Italy* (n 3).

³⁸ *ibid.*

³⁹ Daniel Shepard, 'SLAVERY AT SEA: An Overview of the UK Fishing Industry and a Model Approach for Identifying Human Rights Abuses in the Supply Chain' <<https://front-group.co.uk/2018/01/19/slavery-Sea-overview-uk-fishing-industry/>> accessed 17 August 2018.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Tim McKinnel, Slavery on an industrial scale in fishing industry' *Radio New Zealand* (New Zealand, 27 May 2018) <<https://www.radionz.co.nz/news/national/358307/slavery-on-an-industrial-scale-in-fishing-industry>> accessed 17 August 2018.

⁴³ ILRF, 'Stop Trafficking by Sea' (2016) <<https://laborrights.org/releases/stop-trafficking-Sea>> accessed 17 August 2018.

⁴⁴ *ibid.*

⁴⁵ 'Human Trafficking in South East Asia: Statistics' <<https://brewer2336.weebly.com/statistics.html>> accessed 17 August 2018.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ Fish-i Africa, 'Investigation No. 15: Murder at Sea?' (2017) <<https://fish-i-africa.org/wp-content/uploads/2017/03/15-Murder-at-Sea.pdf>> accessed 17 August 2018.

⁵⁰ The Irish Times, 'Chile navy admits to torture on boat' *The Irish Times News* (Dublin 01 December 2004) <<https://www.irishtimes.com/news/chile-navy-admits-to-torture-on-boat-1.996094>> accessed 17 August 2018.

measures that can be taken include negotiating a global convention that will specifically regulate and guarantee the safety of human rights at sea; regional cooperation to combat human rights violations at sea, among others. These measures will ensure that there is safety of human rights at sea.

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