Geneva Declaration on Human Rights at Sea: An Endeavour to Connect Law of the Sea and International Human Rights Law

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[2022] *UNSWLRS* 21
Forthcoming (2022) 53(2)-(3) *Ocean Development and International Law*

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This paper is a pre-reviewed version of an article that has since been revised and will be published in *Ocean Development and International Law*, vol 53(2)-(3), 2022.

Geneva Declaration on Human Rights at Sea: An Endeavour to Connect Law of the Sea and International Human Rights Law

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Abstract: The Geneva Declaration on Human Rights at Sea was officially launched on 1 March 2022. The document was produced by the non-governmental organization, Human Rights at Sea, and responds to an undoubted need to prevent human rights violations at sea and to provide redress to victims of such abuses. Connecting the international human rights regime with the law of the sea has been one of many challenges to respond to this issue. This article explores the content of the Geneva Declaration and its alignment with existing law of the sea. Beyond the jurisdictional complexities presented, it is important to consider how this informal instrument holds relevance for international lawmaking. While there are obstacles, the Geneva Declaration creates a needed opportunity to bring attention to and clarity around the legal protections of human rights at sea.

Key words: human rights law, law of the sea, human rights at sea, coastal state jurisdiction, extraterritorial jurisdiction, informal law-making

1. Introduction

It is estimated that 30 million people are present in the ocean every day.[1] The range of activities undertaken is varied, as is the allocation of responsibilities for the conduct of those activities. Rather than a vast, blue, limitless expanse, the oceans are divided into a series of zones wherein States have different rights and responsibilities in relation to the people who are present in those zones. Yet the immensity of ocean space has allowed States to neglect the rights owed to certain individuals. People at sea may be victims of sexual assault, indentured in modern forms of slavery, fleeing persecution in unseaworthy vessels and yet face limited opportunities to assert their rights or to seek remedies for violations of those rights.

Part of the reason for the lack of protection of human rights at sea is an apparent disconnect between human rights law and the law of the sea. Human rights law has traditionally focused on land-based activities where there is relative clarity as to which State has responsibility to uphold human rights. Moreover, human rights violations on land have usually been easier to detect and expose, and mechanisms are more likely to exist to seek redress for those violations. At sea, the responsibilities of a coastal State diminish across the maritime space extending away from it, and obligations at sea are possibly shared among more than one State depending on the activity and location of any vessel. These jurisdictional complexities have hindered a ready application and enforcement of human rights law at sea. The law of the sea has rarely gone beyond exhortations that 'considerations of humanity' apply.[2] However,

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[1] Steven Haines, "Developing Human Rights at Sea" (2021) 35 *Ocean Yearbook* 18, 21.

[2] See, eg, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep. 4, 22; *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Reports 10, [155]. See further Francesca Delfino, "'Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals" in Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer, 2019).

increasing awareness of the risk and reality of human rights violations at sea has been prompting greater efforts to read these areas of law together.[3]

The Geneva Declaration on Human Rights at Sea (Geneva Declaration)[4] is the latest endeavour to affirm the applicability of human rights at sea and to provide greater clarity as to when States are responsible for upholding human rights and remedying their violation. It was drafted and launched under the auspices of the non-governmental organisation (NGO) Human Rights at Sea.[5] This informal instrument is thus an NGO-led initiative and potentially aligns with other law-making efforts of civil society actors that have led to the adoption of a treaty.[6] A short overview of the Geneva Declaration is set out in Section 2.

The Geneva Declaration prompts a series of questions as to how it connects international human rights law with the law of the sea. The main lines of enquiry explored in the study below consider, in Section 3, how the Geneva Declaration allocates responsibilities to States to uphold human rights in different maritime zones and the ways it aligns (or not) with existing jurisprudence on human rights responsibilities. Section 4 addresses the interaction of the Geneva Declaration with the existing law of the sea as a possible source of international law, and in the context of international law-making. While the journey ahead is not without challenges, the Geneva Declaration has the potential to bring attention to, and clarity around, the legal protection of human rights at sea.

2. Background to and Overview of Geneva Declaration on Human Rights at Sea

The Geneva Declaration was developed by the United Kingdom-based NGO, Human Rights at Sea, and was drafted by international lawyers with expertise in the field.[7] It is the output of 8 years of advocacy work by the NGO, and three years since the idea of the Geneva Declaration originated.[8] It joins the work of other individuals and organisations who have sought to shine a light on the scale of human rights violations occurring at sea.[9]

The issue was also recently spotlighted in the United Kingdom's House of Lords inquiry on UNCLOS, which urged the adoption of a unified approach to human rights at sea, drawing

[3] See, eg, Anna Petrig and Marta Bo, "The International Tribunal for the Law of the Sea and Human Rights" in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press, 2019); Sofia Galani, "Port Closures and Persons at Sea in International Law" (2021) 70 *International and Comparative Law Quarterly* 605.
[4] Human Rights at Sea, *Geneva Declaration on Human Rights at Sea* (launched 1 March 2022) https://www.humanrightsatsea.org/GDHRAS ('Geneva Declaration').
[5] Ibid.
[6] Discussed in Section 4 below.
[7] The Geneva Declaration was drafted by: Prof. Steven Haines, Prof. Anna Petrig, Prof. Irini Papanicolopulu, Dr. Sofia Galani, Dr. Elizabeth Mavropoulou. It was also reviewed by practitioners in several British law firms: Holman Fenwick Willan LLP, DLA Piper LLP, Norton Rose Fulbright LLP and Reed Smith LLP.
[8] The NGO was founded in 2014, and it is indicated on the website that the idea of the Geneva Declaration emerged in 2019 from the NGO's CEO and founder, David Hammond: Geneva Declaration, https://www.humanrightsatsea.org/GDHRAS.
[9] Haines, note 1, 29-30; Ian Urbina, *The Outlaw Ocean* (Random House, 2020); Seafarers' Rights International, 'Our Purpose', https://seafarersrights.org/our-purpose/ (accessed 15 July 2022). The leading international law treatise on the topic is Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018).

together a suite of human rights laws and seeking mechanisms to enforce those rights.[10] However, the response of the United Kingdom government was lukewarm at best on this issue and referred to a possibility of clarifying where a victim might raise a claim within the United Kingdom.[11] As such, the need for an instrument reflecting a commitment to the recognition and enforcement of human rights at sea remains as pressing as ever.

The Geneva Declaration was formally launched on 1 March 2022 and has been open for consultation for a six-month period.[12] At time of writing, no State has formally endorsed the document but the NGO intends on 'working with individual countries and the UN to promote the adoption of the Declaration'.[13] Section 4 discusses in more detail the different ways that the Geneva Declaration could potentially impact international law.

The Geneva Declaration is comprised of a Foreword, a core Declaration and three annexes. Rather than one instrument comparable to the Universal Declaration of Human Rights with its many aspirations,[14] the Geneva Declaration has a very simple position. It articulates 'four fundamental principles' as follows:

> 1. Human rights are universal; they apply at sea, as they do on land.
>
> 2. All persons at sea, without any distinction, are entitled to their human rights.
>
> 3. There are no maritime specific reasons for denying human rights at sea.
>
> 4. All human rights established under both treaty and customary international law must be respected at sea.[15]

These principles may well seem self-evident in their own right, but State practice and the experiences of individuals indicate that counter-principles have been in operation. The Foreword to the Geneva Declaration suggests that human rights abuses at sea are partly a result of 'sea blindness' because of the nature of the marine environment.[16] The physical distances involved may well facilitate the commission of and impunity for human rights violations, but there are other contributing factors including the economic imperatives of States, shipping companies, the fishing industry and organized criminal groups. Financial interests may thus be preferred over recognition and application of the four fundamental

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[10] UK Parliament, House of Lords, International Relations and Defence Committee, Inquiry: *UNCLOS: fit for purpose in the 21st century?* (2022), available at https://committees.parliament.uk/work/1557/unclos-fit-for-purpose-in-the-21st-century/publications/ ('House of Lords UNCLOS Inquiry'), Chapter 5.

[11] UK Parliament, House of Lords, International Relations and Defence Committee, Inquiry: *UNCLOS: fit for purpose in the 21st century?*, Government Response to 'UNCLOS: the Law of the Sea in the 21st Century' (received 31 May 2022), available at https://committees.parliament.uk/publications/22581/documents/168699/default/. ('House of Lords UNCLOS Inquiry UK Govt Response'), 7-8.

[12] Geneva Declaration, https://www.humanrightsatsea.org/GDHRAS. The Human Rights at Sea website indicates that comments on the Geneva Declaration may be submitted until 1 September 2022, indicating that the text may be further refined in the near-future. The current analysis is based on the Geneva Declaration at the time of its adoption on 1 March 2022.

[13] Ibid.

[14] UNGA Resolution 217A *Universal Declaration of Human Rights* (10 December 1948), GA Res 217A (III), UN GAOR, UN Doc A/810 ('UDHR').

[15] Geneva Declaration, 'Fundamental Principles'.

[16] Ibid 'Foreword'.

principles. Political imperatives that seek to bolster border security have no doubt influenced the current situation as well.

Details are then included in the annexes to the Geneva Declaration, and the Foreword indicates that these annexes will be updated in the future.[17] Annex A details the variety of human rights abuses that have been documented as occurring at sea. The human rights violations traverse many industries, including fishing, merchant shipping, cruise liners and criminal enterprises. The fishing industry, which accounts for the majority of people at sea,[18] is especially problematic with concerns relating to modern slavery, forced labour of children, discrimination and 'disappearances'. Also highlighted is the treatment of seafarers, with account taken of specific hardships endured during the Covid-19 pandemic in relation to employment conditions and movement. Victims of criminal activities, such as sexual assault, human trafficking and migrant smuggling, experience human rights violations because of their vulnerable situation, especially at sea where there is less scrutiny and less accountability.

The recognition of the panoply of human rights obligations implicated by maritime activities is reflected in Annex B of the Geneva Declaration, which lists both multilateral and regional human rights treaties. Most important among these are the International Covenant on Civil and Political Rights (ICCPR),[19] the Convention on the Rights of the Child,[20] and, especially in relation to seafarers, the International Covenant on Economic, Cultural and Social Rights.[21] Beyond human rights treaties, individuals working at sea may also have rights under the Maritime Labour Convention[22] and the Work in Fishing Convention.[23] Migrants may be protected under the Refugee Convention and its Protocol.[24] Even where States are not parties to a treaty, many of the core human rights potentially at stake are considered customary international law.[25] The problem, therefore, is not a lack of human rights and a need to discern new rights but rather establishing responsibility for enforcing existing human rights obligations and remedying human rights violations.

Annex C of the Geneva Declaration sets out 'Guidelines for Promoting Compliance with Human Rights at Sea' (Guidelines). As part of an informal instrument, the Guidelines are not legally binding. Instead, the Guidelines are said to reflect existing law as well as good practice.[26] The terminology used in the Guidelines is intended to eschew formal legal or

[17] Ibid.
[18] Ibid 'Setting the Scene' (noting 25 million fishers at sea at any one time).
[19] International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 ('ICCPR').
[20] Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3 ('UNCRC').
[21] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3 ('ICESCR').
[22] Maritime Labour Convention, adopted 23 February 2006, entered into force 20 August 2013, 2952 UNTS 3.
[23] IMO Work in Fishing Convention (2007) C 188, adopted 14 June 2007, entered into force 17 November 2017 ('Work in Fishing Convention').
[24] Convention relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 150, art IA(2) ('Refugee Convention'); Protocol relating to the Status of Refugees, opened for accession 31 January 1967, entered into force 4 October 1967, 606 UNTS 267, art I(2) ('Refugee Protocol').
[25] For discussion, see William A Schabas, *The Customary International Law of Human Rights* (OUP, 2021).
[26] There is some ambiguity in the phrasing, as the aim of the Guidelines is said to include setting out what is 'necessary' because it is binding law and what is 'put forward' as best practice, which suggests that the latter

technical language with the view to ensuring their accessibility to diverse stakeholders. While this approach is understandable, it may create a risk of obfuscating some of the legal requirements and limitations that exist. The Guidelines have 'core legal obligations', which reflect general international law requirements regarding the implementation of international law into domestic law, and lay down guidance for flag States, port States, coastal States, and 'other States', as well as contemplating the situation of stateless vessels.[27]

The Geneva Declaration thus has a multipronged strategy in setting out the central normative position in its four fundamental principles, informing stakeholders of the need for this statement through the information about human rights violations, indicating the specific human rights at stake under existing international law, and seeking to facilitate implementation of human rights obligations through guidance to coastal States, port States and flag States. It is this final document, Annex C, that is the focus of attention in this article, as it is the detailed Guidelines that intersect most closely with the law of the sea and seek to connect it with human rights law. A key instrument of relevance is the United Nations Convention on the Law of the Sea (UNCLOS), in light of its allocation of maritime space and the rights and duties of States therein.[28] However, this 'constitution of the oceans' has scant recognition of human rights.[29]

3. The Geneva Declaration Within Existing Law of the Sea

The application of human rights at sea starts with the general proposition that human rights obligations are not limited to land territory. Every individual is entitled to respect for their human rights wherever they are. This statement begs the question as to who it is exactly that has to uphold those rights. In the context of irregular migration by sea, the United States Supreme Court determined in 1993 that the obligation of non-refoulement, a critical human rights issue for migrants travelling by sea, did not have extraterritorial force.[30] This decision might be indicative of some current practice occurring at sea, but does not reflect the international legal position.[31]

Instead, the relevant question under international law is whether persons fall within the sovereignty of a State, which includes the territorial sea and ships flying the flag of that State, or whether a State is exercising effective control over persons beyond that State's territory. The effective control standard has been applied in human rights jurisprudence precisely to

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may not be reflected in existing law. However, the legal status of the guidelines is described just as 'reflect[ing] existing international law'.

[27] Geneva Declaration, Guidelines, s 2.

[28] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397 ('UNCLOS').

[29] House of Lords UNCLOS Inquiry, note 10 [190]; The most explicit provisions are those relating to rendering assistance to persons in distress and to slavery. See ibid, Arts 98 and 99. But see generally Bernard Oxman, "Human rights and the law of the sea" (1998) 36 *Columbia Journal of Transnational Law* 399 (arguing that many UNCLOS provisions support human rights).

[30] *Sale v Haitian Centers Council Inc*, 509 US 155, 158-159 (Stevens J for the Court) (1993).

[31] The *Sale* decision could not be considered as reflecting the current position under international law. See, eg, *The Haitian Centre for Human Rights et al. v United States* (Inter-American Commission of Human Rights, Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550, 13 March 1997); UNHCR Executive Committee, *Interception of Asylum Seekers and Refugees: The International framework and Recommendations for a Comprehensive Approach* (9 June 2000) available at <http://www.unhcr.org/4963237411.pdf>, [23]; *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* [2003] EWCA Civ 666, [34]-[35] (Simon Brown LJ).

avoid a situation of a State violating international human rights laws outside its sovereign territory without any accountability. The test of effective control applies in relation to the ICCPR[32] and the Convention against Torture (CAT),[33] and has been applied by the European Court of Human Rights (ECtHR). In each instance before the ECtHR, persons on board a vessel targeted for interdiction on the high seas have been considered as within the jurisdiction of the interdicting State.[34] What amounts to effective control must be determined objectively, and not with regards to the intention of the State undertaking the actions.[35]

While the standard of effective control has its ambiguities,[36] it is important to consider how 'effective control' may be manifested within the allocation of rights and duties under the law of the sea. The Guidelines seek to address this central issue and each maritime zone is considered in turn immediately below.

3.1 Ports and Internal Waters

Coastal States exercise complete sovereignty over their ports and internal waters.[37] The coastal (or port) State may determine the conditions of access to its ports and may even close ports on a discriminatory basis.[38] Rights to access ports may be governed by trade or fisheries agreements.[39] Unlike the territorial sea, there is typically no right of innocent passage for foreign-flagged vessels to traverse a coastal State's internal waters.[40] An exception to this sovereignty is when a vessel is in distress;[41] it is incumbent on the vessel to demonstrate the

[32] UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), [10].
[33] UN Committee Against Torture, *Concluding Observations: United States of America*, UN Doc. CAT/C/USA/C/2 (2006), [20]. See also *JHA v Spain* where Spain was found in violation of its *non-refoulement* obligation as a consequence of its interception program as well as the extraterritorial examination of asylum claims: *JHA v Spain*, CAT/C/41/D/323/2007 (10 November 2008, adopted 21 November 2008), UNCAT Communication No 323/2007. See further Mariagiulia Guiffre, "Watered-down Rights on the High Seas: Hirsi Jamaa and others v Italy (2012)" (2012) 61 *International and Comparative Law Quarterly* 728, 735-736.
[34] See eg *Hirsi Jamaa v Italy* (2012) II Eur Court HR 97 (App No 27765/09, 23 February 2012) ('*Hirsi*'); *Medyedyev v France* (2010) III Eur Court HR 61 (App No 3394/03, 29 March 2010); *Women on Waves v Portugal* (European Court of Human Rights, Second Section, Application No 31276/05, 13 January 2009); *Xhavara v Italy and Albania* (European Court of Human Rights, Fourth Section, Application No 39473/98, 11 January 2001).
[35] *Hirsi*, note 34, [81]. See also Irini Papanicolopulu, "Hirsi Jamaa v Italy" (2013) 107 *American Journal of International Law* 417, 420.
[36] See, eg, Violeta Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model'" (2020) 21 *German Law Journal* 385; Efthymios Papastavridis, "The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm" (2020) 21 *German Law Journal* 417.
[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep. 14, [212]–[213]. Internal waters are "waters on the landward side of the baseline of the territorial sea": UNCLOS, Art 8(1).
[38] Louise de la Fayette, "Access to Ports in International Law" (1996) 11 *International Journal of Marine and Coastal Law* 1
[39] See, eg, Judith Swan, "Ocean and Fisheries Law: Port State Measures to Combat IUU Fishing: International and Regional Developments" (2006) 7 *Sustainable Development Law and Policy* 38.
[40] Passage through the territorial sea may, however, include passage to and from internal waters. UNCLOS, art 18(1)(b). Innocent passage is allowed through internal waters where straight baselines have been drawn, further to Article 8(2) of UNCLOS.
[41] Anthony P Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (Martinus Nijhoff Publishers, 2012) 75.

situation of distress.[42] When a vessel enters in distress, it is usually immune from the application of local laws.[43] This exemption from local laws for entry in distress may be beneficial in situations where a vessel has entered after rescuing irregular migrants and the vessel and crew should not be subject to migrant smuggling laws. However, it may remain problematic for a coastal State seeking to apply and enforce human rights standards in relation to such vessels.

The Guidelines state: 'Vessels visiting ports automatically submit to the jurisdiction of the state in which the port is located'.[44] However, the legal position is slightly more nuanced. When a foreign-flagged vessel enters the internal waters or port of a State, that vessel is subject to the jurisdiction of the coastal State except in relation to matters that are considered internal to the vessel.[45] The flag State is typically considered to be responsible for the internal affairs (or 'internal economy') of a ship, which has the policy advantage of allowing for the application of international standards as to construction, crew and equipment, as well as preventing the labour laws of each country a ship visits to be considered applicable.[46] However, where something occurs on a ship that is prejudicial to the peace, good order or security of the coastal State then the coastal State has a basis of jurisdiction to investigate and potentially enforce its domestic (usually criminal) laws.[47] Human rights violations, especially egregious violations, should thus fall within the scope of port State authority.

Yet, as the Guidelines note, the flag State still has responsibility as well when its vessel is in port.[48] When there is concurrent jurisdiction, then which State may act? International law does not provide a ready answer to this question. Most typically, the State with territorial jurisdiction, and preferably the alleged offender(s) physically present within its territory, is presumed to have a primary position in exercising jurisdiction.[49] Yet part of the difficulties with human rights violations at sea has been that some States will not act, on the basis that it is for other States, presumably the flag State, to act. The Guidelines admonish flag States not to 'abdicate [their] own responsibility to respond, as appropriate, to any human rights violation' on its vessels.[50] Equally, a port State should not abdicate its responsibility to respond to any human rights violation occurring within its jurisdiction in light of the shared authority with the flag State.

The position in the Guidelines is that port States are obliged to exercise jurisdiction either when a violation 'has occurred' or 'is being committed'. That position is tenable when a port State has jurisdiction over acts occurring within its jurisdiction and could address detention or forced labour of crew on vessels in port. Yet what is the situation when the violation occurred

[42] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 81.
[43] Ibid.
[44] Geneva Declaration, Guidelines, s 4.
[45] Erik Molenaar, "Port State Jurisdiction: Towards Mandatory and Comprehensive Use" in David Freestone, Richard Barnes and David M Ong (eds) *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 192, 195.
[46] Churchill and Lowe, *The Law of the Sea* (3rd ed, Manchester University Press, 1999) 66.
[47] Ibid 66-67. This position was set out in the 19th century: *Wildenhus' Case*, 120 US 1 (1887).
[48] The Guidelines read: 'port states' jurisdiction and its human rights obligations partly overlap with those of the flag state of any foreign vessel': Geneva Declaration, Guidelines, s 4.
[49] Bernard H Oxman, 'State Jurisdiction', *Max Planck Encyclopedia of International Law*, para. 51; Malcolm Shaw, *International Law* (6th ed, Cambridge University Press, 2008) 654.
[50] Geneva Declaration, note 3 Guidelines, s 3.

outside the territorial jurisdiction of the port State? The answer to this question may depend on domestic legislation and whether a State has criminalised acts that occur outside its territory where the alleged offender is within a State's territory.[51] The latter may be considered as 'obligatory territorial jurisdiction over persons'.[52] Such obligations may arise as a result of treaty commitments, where there is a requirement to prosecute or extradite.[53] However, it is not generally the case that States are obliged under the international human rights treaties or, for example, under the Human Trafficking Protocol to exercise jurisdiction over alleged offenders located in their territory when the crimes were committed elsewhere.[54]

A distinction may be needed as to whether a State has the *right* to exercise jurisdiction or whether it has an *obligation* to exercise jurisdiction. Establishing a right of the port State to exercise jurisdiction in relation to offences that have been committed outside its territory is possible.[55] Where a human rights violation gives rise to universal jurisdiction (such as the prohibition against torture), the port State will have the right to exercise jurisdiction over alleged offenders. There are increasing instances where port States are authorised to act in response to harmful acts that occur on the high seas, especially in relation to environmental harm[56] or illegal, unreported or unregulated fishing.[57] Some commentators have gone so far as to suggest that there is a general jurisdiction vested in port States to assert jurisdiction over persons within their territory even when the acts have occurred beyond that territory.[58] While no doubt desirable that port States 'must exercise jurisdiction',[59] it is more properly the case that port States 'may' exercise jurisdiction.

3.2 Territorial Sea

Within the territorial sea, which extends up to 12 NM from the coast of a State, the coastal State has sovereignty,[60] which is subject to the right of other States to enjoy innocent passage.[61] Innocent passage necessitates continuous and expeditious passage through the territorial sea, but may include anchoring and stopping where incidental to ordinary navigation or to render assistance.[62] Passage is deemed not to be innocent if the coastal State considers that passage to be prejudicial to its peace, good order or security.[63] The

[51] Australia takes this approach in relation to child sex offences: see *Criminal Code* (Cth) div 272. This question was at issue in *Ex parte Pinochet (No. 3)* [2000] 1 AC 147.
[52] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Joint Sep. Op. Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep. 3, 74-75.
[53] Eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85, art 7 ('UNCAT').
[54] States may be obligated to criminalize certain acts in their domestic legislation. It is the domestic legislation that may then create a requirement on State authorities to investigate and prosecute human rights violations.
[55] See, eg, Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018) 142-143.
[56] Eg UNCLOS, Art 218.
[57] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, entered into force 5 June 2016) [2016] ATS 21.
[58] Papanicolopulu, *International Law and the Protection of People at Sea*, note 55, 143; Erik Jaap Molenaar, "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage" (2007) 38 *Ocean Development and International Law* 225.
[59] Geneva Declaration, Guidelines, s 4.
[60] UNCLOS, art 2(1).
[61] Ibid art 17.
[62] Ibid art 18(2).
[63] Ibid art 19(1).

determination as to whether the passage is innocent or not rests with the coastal State and may be a subjective assessment as a result.[64] It would rest with the flag State to challenge any coastal State actions to prevent allegedly non-innocent passage either directly at the time of the passage, through subsequent diplomatic discourse or potentially in formal dispute settlement proceedings.

Guidance as to what constitutes actions that are prejudicial to the peace, good order or security of the coastal State may be found in Article 19 of UNCLOS. The list is non-exclusive and primarily targets actions that would be contrary to the security interests of the State: weapons exercises, surveillance, fishing, irregular migration, and collecting information prejudicial to the security or defence of the coastal State.[65] Article 19(2)(l) further anticipates that any other activity not directly connected to passage may be considered as a violation of the right of innocent passage.

Committing human rights violations would not typically constitute actions that are directly connected to passage. At most, it may be argued that passage was not innocent if the violations concerned inhumane treatment of seafarers engaged in the vessel's operation. The possible difference that arises as between human rights violations and the actions listed as inconsistent with the right of innocent passage is that the former do not directly implicate the security of the coastal State. The Guidelines instead provide that human rights violations 'may compromise the good order of the coastal state and may render passage non-innocent'.[66] The ultimate decision rests with the coastal State and if it does determine that human rights violations aboard a foreign-flagged vessel are morally repugnant to its society then it 'may take the necessary steps to prevent' the non-innocent passage.[67]

What action may be taken to prevent non-innocent passage is considered a graduated response and may not necessarily involve the detention of a vessel and those onboard.[68] The response most typically seeks for the conduct in question to stop (that is, no more surveillance, or fishing, or weapons exercises) and for the vessel to leave the territorial sea.[69] In this scenario, the coastal State may limit itself to moving the problem on to another State to address, possibly leaving the issue as one for the flag State to address (or not). Yet an advantage for deeming human rights abuses as a violation of the right of innocent passage is that a coastal State does have an international law basis to 'take necessary steps to prevent' that passage and the coastal State may indeed lawfully interfere with the vessel, potentially removing victims from the vessel. Such action on behalf of the coastal State is consistent with its human rights obligations, which are owed to all individuals within its sovereign territory, which includes the territorial sea.

In addition, a coastal State may be able to exercise criminal jurisdiction over a vessel and those on board in instances where 'the consequences of the crime extend to the coastal State' or if the crime is one that 'disturb[s] the peace of the country or the good order of the

[64] Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 76-77.
[65] UNCLOS, art 19(2).
[66] Geneva Declaration, Guidelines, s 5.
[67] UNCLOS, Art 25.
[68] Richard Barnes, "Article 2" in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 27, [7].
[69] Ibid.

territorial sea'.[70] This language potentially allows for a broad interpretation and may include 'acts which have social, moral or other disturbing consequences for the coastal State'.[71] It is thus up to each coastal State to determine what falls within the scope of its criminal jurisdiction. To respond to serious human rights crimes within its territorial sea, it must be anticipated that the coastal State has domestic legislation that criminalises the human rights violations in question throughout its territory (including its territorial sea).[72]

The Guidelines refer to possible actions to uphold human rights and to remedy violations in 'territorial waters', although more formally UNCLOS refers to the territorial sea as a maritime area over which a coastal State exercises sovereignty.[73] It may be the case that 'territorial waters' is intended as a more inclusive and comprehensible term to cover archipelagic waters,[74] as well as maritime areas within international straits that are subject to the regime of transit passage.[75] There may be instances, however, where the distinction is worth considering. When foreign-flagged vessels are exercising the right of archipelagic sealanes passage through archipelagic waters or the right of transit passage through an international strait subject to that regime, the grounds for interfering with the vessel are more limited than when a vessel is traversing the territorial sea in violation of the right of innocent passage.[76] The steps anticipated for 'territorial waters' may not be apposite as a result.

A foreign-flagged vessel traversing an international strait or archipelagic waters has a right of navigation for continuous and expeditious passage in its normal mode.[77] In straits subject to the regime of transit passage, the main limitation on this right of navigation is that the ship refrain from any threat or use of force and proceed without delay.[78] That a human rights violation is occurring aboard the vessel would not constitute a threat or use of force against the coastal State. During transit passage or archipelagic sea lane passage, it is incumbent on the strait State or archipelagic State, respectively, not to hamper the passage of the foreign-flagged vessel.[79] During transit passage (and archipelagic sea lane passage[80]), ships must comply with 'generally accepted international regulations, procedures and practices for safety at sea'.[81] To prevent human rights abuses aboard a foreign-flagged vessel during this passage, a strait or archipelagic State would need to rely on a broad understanding of what constitutes 'safety at sea' to encompass human safety and not just the safety of the vessel (which also implicitly protects the humans on board in any event).

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[70] UNCLOS, Art 27(1)(a) and (b).
[71] Richard Barnes, "Article 27" in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017) 229, 235 [14].
[72] A point made in the Guidelines. Geneva Declaration, Guidelines, s 5.
[73] UNCLOS, Art 2(1).
[74] UNCLOS defines an 'archipelago' as 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such': UNCLOS, Art 46.
[75] UNCLOS, Part III.
[76] Ibid Art 44.
[77] Ibid Arts 39(1)(c) and 53(3).
[78] Ibid Art 39(1)(a) and (b).
[79] Ibid Art 44 and Art 54. Article 53(3) also refers to passage through archipelagic sea lanes being 'unobstructed'. This provision arguably underlines the importance of coastal States not interfering with the passage of foreign-flagged vessels through these waters.
[80] By virtue of Article 54, which extends Article 39 to archipelagic sea lane passage: UNCLOS, Art 54.
[81] UNCLOS, Art 39(2)(a).

Beyond the transit and archipelagic sea lane passage regimes, in each instance, the State with sovereignty over these waters has authority to adopt laws and regulations on a variety of topics, some of which could potentially be extended to protect and uphold human rights. For example, laws may be adopted in relation to immigration, with respect to fishing vessels and for the safety of navigation.[82] Although human rights are not explicitly mentioned, the fact that the littoral States have sovereignty over these waters may allow for these obligations to be read within these issue areas.[83] Yet in doing so, those laws must not 'discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing' the passage of those ships.[84] Stopping a foreign-flagged vessel to investigate suspected human rights violations may well have this effect.

Given this situation, if a coastal State suspects that human rights violations are occurring on a foreign-flagged vessel that is transiting its strait or utilising its archipelagic sealanes, it should be primarily incumbent on the coastal State to advise the flag State so it investigates and takes necessary steps. Alternatively, the coastal State may wait until the vessel enters another maritime zone in which the coastal State does have authority in order to take action in response to the alleged human rights violations.

3.3 Contiguous zone

The Guidelines do not specifically address actions by coastal or flag States in the contiguous zone. This zone extends up to 24 NM from the coast and the coastal State has policing powers in relation to fiscal, immigration, sanitary and customs laws.[85] Where a coastal State has claimed a contiguous zone, it may exercise control to prevent infringement of these laws within its territory or territorial sea as well as punish infringement of those laws when committed within its territory or territorial sea.[86] Domestic legislation could extend to cover human rights violations associated with migration (such as human trafficking) or customs offences (associated with the illicit trade in drugs and weapons).

Some coastal States have relied on powers in the contiguous zone for boat pushback (or towback) operations to prevent the arrival of irregular migrants.[87] Australia, for example, has stopped vessels seeking to enter its waters and towed the vessel back to slightly outside Indonesia's territorial sea, or, where a vessel was unseaworthy, moved migrants on to a lifeboat with sufficient food, water and medical supplies to voyage back through Indonesia's

[82] Ibid Art 42(1).
[83] Allowing States to comply with other international obligations pursuant to a treaty interpretation involving systemic integration. See Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, Art 31(3)(c) ('VCLT').
[84] UNCLOS, Art 42(2)
[85] Ibid Art 33.
[86] Ibid Art 33(1).
[87] Australia began this policy in the wake of the *Tampa* incident: Penelope Mathew, "Legal Issues Concerning Interception" (2003) 17 *Georgetown Immigration Law Journal* 221, 223, 227. The United Kingdom has recently endorsed the legality of this treatment of irregular migrants: House of Lords UNCLOS Inquiry UK Govt Response, note 11.

territorial sea.[88] In taking this action, Australia is exercising effective control over the vessels and individuals on board and hence owes human rights obligations in this situation.[89]

As the coastal State's exercise of authority in the contiguous zone involves law enforcement action, it is worth noting that the Guidelines stipulate, 'Any states deploying vessels for enforcement operations at sea (including any interception or boarding operations), have human rights obligations in relation to any persons involved'.[90] This view encapsulates the customary international law requirement as to any use of force involved in such operations being necessary and proportionate.[91] Further, it anticipates that those arrested will be entitled to relevant due process rights,[92] rights against arbitrary detention,[93] and, potentially, consular rights.[94]

The policing powers of the coastal State in the contiguous zone co-exist with the rights enjoyed by the coastal State in its exclusive economic zone (EEZ). The considerations as to protecting human rights in the EEZ may thus also be relevant for the contiguous zone and are next addressed.

3.4 Exclusive Economic Zone

Within the EEZ, the coastal State has sovereign rights over the natural resources found therein and exclusive jurisdiction in relation to marine scientific research, the protection and preservation of the marine environment and over artificial islands, installations and structures.[95] The EEZ may extend up to 200 NM from the coast.[96] The coastal State is to exercise these rights with due regard to the rights of other States that continue to apply within the EEZ.[97] These other rights include the freedom of navigation, overflight and 'other internationally lawful uses of the sea related to these freedoms'.[98] As with the other maritime zones, the interpretation of the allocation of authority between States—and whether human rights protections are implicit in that allocation—will likely be critical.

As human rights are not explicitly mentioned, it may be worth noting that where rights or duties are not allocated to a specific State, 'any conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'.[99] The application of this provision is yet to be fully realised in State practice or

[88] Andreas Schloenhardt and Colin Craig, "Turning Back the Boats": Australia's Interdiction of Irregular Migrants at Sea" (2015) 27 *International Journal of Refugee Law* 536.
[89] Natalie Klein, "Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants" (2014) 15(2) *Melbourne Journal of International Law* 414, nn 124-138.
[90] Geneva Declaration, Guidelines, s 6.
[91] *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Admissibility and Merits) (1999) 38 ILM 1323, [155].
[92] ICCPR, Art 14.
[93] Ibid Art 9.
[94] Vienna Convention on Consular Relations, adopted 22 April 1963, entered into force 19 March 1967, 596 UNTS 261, Art 36(1)(b).
[95] UNCLOS, Art 56(1).
[96] Ibid Art 57.
[97] Ibid Art 56(3).
[98] Ibid Art 58(1).
[99] Ibid Art 59.

judicially tested in any judgment issued in UNCLOS dispute settlement proceedings. There may be an opportunity to operationalise Article 59 for the better protection of human rights, but this approach is not explicitly followed in the Geneva Declaration Guidelines.

In relation to the EEZ, the Guidelines provide: 'The coastal state should extend its legislation, administrative procedures of control and the competence of its courts to human rights violations that occur onboard any vessels engaged in the exploration or exploitation of economic resources within the EEZ and on artificial islands, installations and structures, and onboard any vessel engaged in marine scientific research'.[100] The implication from this statement is that the coastal State's sovereign rights extend not only to what a vessel does within its EEZ but what happens on board the vessel, as well. The human rights protections are thus directly tied to the activities that are explicitly allocated to the coastal State.

The extent of coastal State jurisdiction in relation to fisheries has received some focus in judicial and arbitral decisions. In a 1986 arbitration between Canada and France, *Filleting within the Gulf of St Lawrence*,[101] a majority of the tribunal concluded that Canada was not permitted to regulate processing, but only harvesting and allocation of fish.[102] This decision was criticised for being too narrow in assessing the scope of Canada's regulatory authority in the EEZ.[103] More recent decisions in UNCLOS dispute settlement have considered coastal State authority to extend to 'fishing-related' activities, which includes bunkering of fishing vessels.[104] What may be critical is an assessment as to whether there is a direct connection to fishing to enable the coastal State to regulate, and enforce, the activities.[105] The labour involved in fishing should surely be considered as a 'direct connection' to the conservation and management of marine living resources.

In the context of human rights violations, the rights of the coastal State in relation to the conservation and management of marine living resources are especially relevant because of the significant number of fishers operating at sea at any one time.[106] Under UNCLOS, the coastal State may license fishing vessels to operate within its EEZ.[107] The licensing system enables the coastal State to fulfill its obligations of conservation and management of the fish resources.[108] The Geneva Declaration anticipates that licensing may be a vehicle for coastal States to exert greater influence over adherence to human rights obligations aboard fishing vessels. The Guidelines provide that it is:

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[100] Geneva Declaration, Guidelines, s 6.
[101] *Dispute Concerning Filleting within the Gulf of St Lawrence between Canada and France* (Decision of 17 July 1986) (1990) 82 ILR 591 ('*Filleting Award*').
[102] The arbitral tribunal in the *Filleting Award* simply denied regulation "of a different nature than those described" in Article 62 of UNCLOS: ibid [52]. See further Ted L McDorman, "French Fishing Rights in Canadian Waters: The 1986 La Bretagne Arbitration" (1989) 4 *International Journal of Estuarine and Coastal Law* 52, 58–59 (criticising the decision as "at odds with state practice, the intent of the negotiators of the LOS Convention and the interpretation placed on the LOS Convention provisions by knowledgeable commentators").
[103] See, eg, William T Burke, "Coastal State Fishery Regulation Under International Law: A Comment on the La Bretagne Award of July 17, 1986" (1988) 25 *San Diego Law Review* 495, 520.
[104] *M/V Virginia G (Panama/Guinea-Bissau)* (Judgment) [2014] ITLOS Reports 4, [216].
[105] Ibid [215].
[106] See n 18 and accompanying text.
[107] UNCLOS, Art 62(4)(a).
[108] Ibid Art 61(2).

> emerging practice that such licences be issued on condition that the licensees, in relation to all types of vessels used to carry out the licensed activity, comply with human rights. The coastal state should conduct routine inspections of any vessels operating under a licence regime within its EEZ, including to ensure compliance with human rights.[109]

Arguably, sovereign rights for 'conserving and managing the natural resources… of the waters' does not immediately encompass the protection of the human resources involved in harvesting the fish resources. Part V of UNCLOS, which is focused on the EEZ regime, primarily regulates how fish are to be exploited, and was not directed at the possible exploitation of humans in the process. However, there is some consideration accorded to the individuals involved in the fishing industry, as regard must be had to economic needs of coastal fishing communities in decisions about maximum sustainable yield,[110] to nationals who habitually fish or research stocks when harvest allocations are made,[111] and in limiting the penalties that may be imposed against individuals when the coastal State enforces its fishing laws and regulation.[112] These provisions may indicate that the individuals who fish are not entirely invisible in coastal State regulations concerning fishing in the EEZ.

An alternative view may be that UNCLOS simply does not address labour conditions on fishing vessels and it is a matter for each coastal State to determine what 'other terms and conditions' may be included in agreements or arrangements allowing foreign-flagged vessels to fish in its EEZ.[113] ITLOS has observed that flag State obligations are usually elaborated on in the context of fisheries access agreements between flag States and coastal States.[114] The coastal State thus has ample discretion to require human rights protections and enforce those obligations along with any other license terms and conditions.

To counter that view, it would have to be argued that a coastal State's adherence to its human rights obligations was inconsistent with UNCLOS.[115] Yet UNCLOS is not to 'alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention'.[116] A flag State opposing the imposition and enforcement of licensing terms and conditions that insist on adherence to international human rights, especially to counter modern slavery, would have the unpalatable argument of demanding it could maintain abusive labour standards existing on its vessels without any coastal State oversight. At most, the flag State may rightly insist it also has responsibility for this issue and should therefore be able to exercise jurisdiction instead of the coastal State. So long as the human rights involved are recognised and enforced then it should not matter which State is ensuring that this outcome is achieved.

If a coastal State does have licensing conditions that require adherence to international human rights standards, it may take steps 'necessary to ensure compliance' with those

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[109] Geneva Declaration, Guidelines, s 5.
[110] UNCLOS, Art 61(3).
[111] Ibid Art 62(3).
[112] Ibid Art 73(3).
[113] Ibid Art 62(4).
[114] *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) [2015] ITLOS Reports 4, [112].
[115] See UNCLOS, Art 62(3).
[116] Ibid Art 311(2).

requirements.[117] Inspections of fishing vessels are frequently authorised as a means to ensure compliance with conservation and management measures. Inspections are anticipated as a possible compliance measure under UNCLOS,[118] the 1995 Fish Stocks Agreement,[119] and within regional fisheries management organisations (RFMOs).[120] The inspections are generally intended to ensure compliance with conservation and management measures, which are, again, ostensibly focused on the treatment of fish and not humans.

The 1995 Fish Stocks Agreement refers to the flag States taking measures in relation to their 'vessels, their fishing operations and related activities', and so would necessarily allow flag States to police human rights violations.[121] However, in terms of another State conducting inspections and taking measures, these actions appear limited under the Fish Stocks Agreement to allowing inspection of 'the vessel, its licence, gear, equipment, records, facilities, fish and fish products and any relevant documents necessary to verify compliance with the relevant conservation and management measures'.[122] Port State inspection powers are similarly limited to 'inspect[ing] documents, fishing gear and catch on board fishing vessels', but this list is non-exclusive[123] and thus may not necessarily negate the authority to act as discussed above.[124] Inspection regimes adopted within RFMOs may further open up opportunities to ensure human rights compliance in fishing operations, if the members so agree.[125]

The Work in Fishing Convention is intended to set out minimum requirements for work on fishing vessels, including in relation to conditions of service, accommodation and food, occupational health and safety protection, medical care and social security.[126] A State party owes obligations under this treaty 'with respect to fishers and fishing vessels under its jurisdiction' and must implement and enforce laws to fulfill its treaty obligations.[127] On the basis of this provision, there is a possibility of States other than the flag State being able to set human rights standards for fishers and take measures to enforce those standards. Yet Article 40 draws the emphasis back to the flag State, providing:

> Each Member shall effectively exercise its jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention including, as appropriate, inspections, reporting, monitoring,

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[117] Ibid Art 73(1).
[118] Ibid Art 73(1).
[119] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted 4 August 1995, entered into force 11 December 2001, 2167 UNTS 3, Arts 18(3)(g)(i), 21 and 22 ('FSA').
[120] See Douglas Guilfoyle, *Shipping Interdictions in the Law of the Sea* (Cambridge University Press, 2009) 118-119, 125-128, 137, 143-144.
[121] FSA, Art 18(3)(g).
[122] Ibid Art 22(2).
[123] Ibid Art 23(2).
[124] See note 117.
[125] Ridings has observed some of the difficulties for RFMOs in taking action to address labour issues on fishing vessels: Penelope J Ridings, "Labour Standards on Fishing Vessels: A Problem in Search of a Home?" (2021) 22(2) *Melbourne Journal of International Law* 308, nn50-54.
[126] Work in Fishing Convention, Preamble. See also International Labour Organization, Recommendation concerning Work in the Fishing Sector, 96th sess, Agenda Item 4, 14 June 2007.
[127] Work in Fishing Convention, Art 6(1).

> complaint procedures, appropriate penalties and corrective measures, in accordance with national laws or regulations.

Nonetheless, the port State 'may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health' and must report to the flag State and to the ILO.[128] Those measures may be taken on the basis of a complaint or evidence suggesting that standards are inconsistent with the Work in Fishing Convention, even when the evidence comes from sources other than the victims of the human rights violations.[129] While the Work in Fishing Convention may be an important agreement for upholding the rights of millions of fishers, concerns have been raised about its implementation,[130] and only 20 States are currently parties to the treaty.[131] What may be important for present purposes is that the Work in Fishing Convention demonstrates that the port State is to play a role in enforcing human rights obligations in relation to fishing vessels even when not flagged to that port State and with no requirement that the violations have occurred within the sovereign jurisdiction of the port State but potentially in the EEZ (or on the high seas).

Where a coastal State does set terms and conditions relevant to the protection of human rights in granting licenses to foreign-flagged fishing vessels for its EEZ, the Geneva Declaration Guidelines anticipate the flag State's compliance with those conditions and its cooperation with any inspection regime that ensues.[132] The flag State does not cede responsibility for upholding human rights obligations in this situation but rather concurrent jurisdiction exists, as when vessels are in the territorial sea or ports of other States. The flag State still owes human rights towards individuals onboard its vessels and may seek cooperation from other States to uphold its human rights obligations even when operating in another State's EEZ.[133]

Beyond the fishing context, coastal States also have duties in their EEZs to uphold human rights where individuals are located on artificial islands, installations or structures.[134] Coastal States have exclusive jurisdiction over these locations, which includes, but is not limited to, jurisdiction in relation to 'health, safety and immigration laws and regulations'.[135] Individuals employed in oil and gas industries may thus depend on the coastal State to uphold their human rights when operating on platforms or like structures.

Further, protestors who undertake demonstrations opposing oil operations on platforms should have their freedom of speech protected by the coastal State in its EEZ. In the *Arctic Sunrise* arbitration, the tribunal considered that a coastal State should tolerate 'some level of nuisance through civilian protest as long as it does not amount to an "interference with the exercise of its sovereign rights."'[136] Any measures taken by a coastal State against protestors on these artificial structures or installations must be reasonable, proportionate and

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[128] Ibid Art 43(1) and (2).
[129] Ibid Art 43(4).
[130] See Ridings, note 125, nn30-31.
[131] International Labour Organization, 'Ratifications of C188 - Work in Fishing Convention, 2007 (No. 188)', available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333:NO.
[132] Geneva Declaration, Guidelines, s. 3.
[133] Ibid.
[134] Ibid s 5.
[135] UNCLOS, Art 60(2).
[136] *Arctic Sunrise (Netherlands v Russia)* (Award on the Merits) PCA Case 2014-02, [328].

necessary.[137] The relevant standards of conduct applicable in law enforcement measures provide a further measure of protection of human rights at sea and should be anticipated at any time the coastal State is enforcing laws and regulations in its EEZ.

3.5 High seas

As an initial matter, flag States have exclusive jurisdiction over vessels that are flagged or registered to it on the high seas. This exclusive jurisdiction is subject to a range of limited exceptions, which are primarily concerned with policing specific crimes.[138] The starting point in relation to human rights on the high seas is thus that the flag State has responsibility to protect the human rights of those on board its vessels when that vessel is operating on the high seas.[139] The problem is that flag States are failing to meet those obligations in relation to their vessels. The question then becomes whether, and on what grounds, other States may be able to take action to prevent human rights violations that occur on foreign-flagged vessels on the high seas.

At present, another State does not have the right to interfere with a foreign-flagged vessel on the high seas simply because there is a reasonable suspicion of human rights abuses. Instead, it is more likely the commission of specific criminal offences that may warrant the exercise of the right of visit by a State's warship or other government vessel operated on non-commercial service. Under UNCLOS, a foreign-flagged vessel may be boarded where there is a reasonable suspicion that the ship is engaged in piracy or the slave trade.[140] If a ship is engaged in slavery, under UNCLOS the responsibility falls to the flag State to take 'effective measures to prevent and punish' those responsible.[141] The Human Trafficking Protocol[142] does not provide a basis to board ships at sea, comparable to Article 8 of the Migrant Smuggling Protocol,[143] even though both instruments were adopted under the auspices of the Transnational Crime Convention.[144]

The Geneva Declaration Guidelines do anticipate that there will be different occasions that State officials interact with individuals on vessels, even when on the high seas. It thus sets out a core legal obligation whereby 'States are to safeguard human rights on vessels even where the purpose of monitoring or enforcement is not related to the protection of human rights specifically'.[145] On this basis, even if a State is visiting a foreign-flagged vessel for a purpose other than monitoring and enforcement of human rights, an expectation exists that human rights should still be 'safeguarded'. What action is anticipating in 'safeguarding' human rights is not specified in the Guidelines but given, for example, that UNCLOS provides that

[137] Ibid [326].
[138] Encapsulated within the right of visit: see UNCLOS, Art 110.
[139] Geneva Declaration, Guidelines, s 3.
[140] UNCLOS, Art 110(1)(a) and (b).
[141] Ibid Art 99.
[142] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, adopted 15 November 2000, entered into force 25 December 2003, 2237 UNTS 319 ('Human Trafficking Protocol').
[143] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted 12 December 2000, entered into force 29 September 2003, (2001) 40 ILM 384, Art 8 ('Migrant Smuggling Protocol').
[144] United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, entered into force 29 September 2003, 2225 UNTS 209.
[145] Geneva Declaration, Guidelines, s 2.

slaves on vessels are *ipso facto* free, it could involve removing individuals who are held in like conditions on the delinquent vessel and taking them to safety. During the conduct of law enforcement activities, it may well be anticipated that the State officials are exercising effective control over the vessel concerned. As such, it would necessarily be the case that human rights obligations are owed to those on board during law enforcement operations.[146]

4. Potential Contribution to International Law

Beyond contemplating the allocation of rights and responsibilities for human rights within the law of the sea, consideration should also be afforded to the status of the Geneva Declaration as a possible source of law. As noted above, the Geneva Declaration claims that it is based on existing international law; the Guidelines articulate an understanding of how the law of the sea and international human rights law may operate in a complementary way. Yet where does the Geneva Declaration fit within the lexicon of international law?

The formal sources of international law are limited to treaties, customary international law and general principles of law, as set out in Article 38 of the ICJ's Statute.[147] The ICJ Statute also acknowledges that judicial decisions and the views of eminent publicists may be subsidiary sources of international law.[148] Agreements adopted by private groups that purport to set out laws for States are not legally binding and, in the absence of any public engagement or endorsement, may be unlikely to be considered *lex ferenda* and/or have the status of 'soft law'.[149] Nonetheless, there are ways that the Geneva Declaration may still have a positive impact on recognising and enforcing human rights at sea. As such, the Geneva Declaration may yet achieve a normative effect.[150]

4.1 As a Prompt for State Action

First, there are situations where informal agreements may be the catalyst for State action and it is that State action that contributes to the development or affirmation of international law. For example, Papanicolopulu has argued that the actions of NGOs in rescuing migrants on the Mediterranean and refusing to take them to Libya but entering Italian ports due to distress, prompted responses from State actors within Italy to confirm rules relating to rescue at sea and the obligation of non-refoulement.[151] She further notes that 'the practice of non-state actors may be quite relevant in the shaping of international custom, and in its

[146] The Geneva Declaration Guidelines do not refer explicitly to the relevance of the effective control test in this situation, although it is implicit in its exhortation that "Any states deploying vessels for enforcement operations at sea (including any interception or boarding operations), have human rights obligations in relation to any persons involved": Geneva Declaration, Guidelines, s 6.
[147] ICJ Statute, Art 39(1)(a), (b) and (c).
[148] ICJ Statute, Art 38(1)(d)
[149] The definition and characteristics of 'soft law' or 'informal agreements' may vary. Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law" (1989) 38(4) *International & Comparative Law Quarterly* 850, 850. Pauwelyn anticipates that public authorities will be involved in any informal law-making: Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions" in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 22.
[150] Natalie Klein, "Meaning, Scope and Significance of Informal Lawmaking in the Law of the Sea" in Natalie Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (Oxford University Press, 2022) 3, 12-13.
[151] Irini Papanicolopulu, "Informal Lawmaking in Maritime Migration" in Natalie Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (Oxford University Press, 2022) 62, 72-73.

recognition, since it may drive unwilling states to act, or to voice their beliefs, in connection with the existence or non-existence of an international customary rule'.[152]

Another situation where informal agreements may prompt State action has occurred in relation to the laws of armed conflict. In the maritime context, the development of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea is notable as it reflected the work of private individuals assembled under the auspices of the San Remo Institute for International Humanitarian Law and the International Committee of the Red Cross.[153] The San Remo Manual sought to reflect and update existing treaty obligations relating to the law of naval warfare, as well as taking into account the varied maritime zones set out in UNCLOS and existing State practice.[154] The San Remo Manual has become generally accepted as authoritative and influenced national manuals on the laws of armed conflict, even if it is not formally binding.[155] Lijnzaad has remarked on the relevance of this type of informal agreement as follows:

> Informality has its benefits for states. Rules formulated by a group of experts will, on the face of it, be no more than rules drafted by a private group with no governmental authority. Governments can ignore, support, or criticise these rules without claiming any ownership. It will be possible to downplay the role of the group of experts for lack of formal authority, when the results of their work are not acceptable. Or, alternatively, states may praise the result as a proper reflection of the law when the text is to one's liking, and the work carries the authority of the best experts working in the field. … Informality creates flexibility for governments with respect to the outcome. It would seem that informal normative projects provide a possibility of giving norms a kind of 'trial run': the newly formulated norms will become accessible, and will provide clarity for practitioners.[156]

The Geneva Declaration could potentially serve a comparable purpose in seeking to reflect existing international law and State practice, as well as providing an opportunity for States to engage with these rules given the clarity provided as to the application of human rights at sea.

4.2 Treaty Interpretation

There may be situations where informal agreements can be utilised as a tool for interpreting existing treaty obligations. The Vienna Convention on the Law of Treaties sets out the accepted rules for treaty interpretation, providing that treaties are to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[157] Where this approach may be relevant is where there is a treaty obligation that admits of two interpretations where one favours the

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[152] Ibid, 73.
[153] Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea" (1995) 89 *American Journal of International Law* 192, 193.
[154] Louise Doswald-Beck, 'Introduction to the Explanation' in Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995), 61 – 69. Lijnzaad describes it as "reformulat[ing] existing rules from a contemporary perspective". Liesbeth Lijnzaad, "The San Remo Manual on the Law of Naval Warfare - from Restatement to Development?" in Natalie Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (Oxford University Press, 2022) 22.
[155] Lijnzaad, note 154, 31.
[156] Ibid 34.
[157] VCLT, Art 31(1).

implementation of human rights whereas another interpretation may favour another policy objective. The current context could be considered to support an approach that protects human rights, especially in light of consistent statements by international courts and tribunals as to the need to apply 'considerations of humanity' at sea, as well as on land.[158]

An example of this situation may be drawn from incidents occurring during irregular migration by sea. Under the Search and Rescue Convention, persons rescued at sea are to be delivered to 'a place of safety'.[159] The Search and Rescue Convention does not define what location may constitute a place of safety, but further guidance is provided in a set of Guidelines adopted under the auspices of the International Maritime Organisation.[160] The 'place of safety' could be understood as a location where human rights are respected and upheld.[161] Such an approach can be drawn from the current context given the extent that international human rights law has developed, especially in recognising the right to life that must be upheld by States involved in search and rescue operations.[162]

Beyond reliance on the context of a treaty for modern interpretations, treaty interpretation may also take into account:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.[163]

The Geneva Declaration does not presently fit within any of these frames because of its current status as an agreement adopted by a private organization rather than an agreement of the 'parties' (that is, States). If the Geneva Declaration is ultimately endorsed by States or adopted as an informal agreement within an intergovernmental organization then there may be scope to consider in what circumstances that the Geneva Declaration could be used in interpreting existing obligations.[164] It is nonetheless the case that international human rights law may be utilised in its own right to inform treaty interpretation as part of a 'systemic integration' drawing from the 'relevant rules of international law applicable in the relations

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[158] *Corfu Channel (Albania v United Kingdom)* (Merits) [1949] ICJ Rep. 4; *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Admissibility and Merits) (1999) 38 ILM 1323, [155].
[159] International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985, 1405 UNTS 119, Annex [1.3.2].
[160] Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued At Sea* ('IMO Guidelines'), MSC Res 167(78), IMO Doc. MSC 78/26/Add.2.
[161] Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, "Border Controls at Sea: Requirements under International Human Rights and Refugee Law" (2009) 21 *International Journal of Refugee Law* 256, 290; Violeta Moreno-Lax, Daniel Ghezelbash, and Natalie Klein, "Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia" (2019) 32 *Leiden Journal of International Law* 715, 736-7.
[162] See *Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3043/2017; AS, DI, OI and GD v Malta*, CCPR/C/128/D/3043/2017 (28 April 2021, adopted 13 March 2020), HRC, Comm No 3043/2017; *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3042/2017; AS, DI, OI and GD v Italy*, CCPR/C/130/D/3042/2017 (28 April 2021, adopted 4 November 2020), HRC, Comm No 3042/2017
[163] VCLT, Art 31(3).
[164] International Law Commission, "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties" (2018) II *Yearbook of the International Law Commission* 2, 10 [3].

between the parties'.[165] This position is especially apposite in relation to the Migrant Smuggling Protocol, which explicitly preserves the operation of international human rights law in creating a law enforcement regime to counter migrant smuggling.[166]

4.3 Future Treaty

The Geneva Declaration may also potentially catalyse consideration of whether a specific treaty on this topic should be debated and adopted. There are several examples of where non-State actors have galvanised public opinion on a specific issue, leading to one or more States endorsing the initiative and championing the adoption of a treaty. For example, the 1997 Ottawa Convention,[167] which has sought to ban the use of anti-personnel landmines, was spearheaded by civil society actors and eventually involved 1,200 NGOs across 60 countries.[168] More recently, the 2017 Treaty on the Prohibition of Nuclear Weapons was initiated through an international campaign to abolish nuclear weapons.[169] It began with an organisation in Australia and evolved into a coalition of NGOs across one hundred countries.[170]

The adoption of these treaties through this lawmaking route has not been without challenges. Some key States will refuse to join the regime, even where there is significant support among the majority of States.[171] Determining the normative stance so that it appeals to both States and civil society actors may involve compromise or a shift in perspective to reach agreement.[172] Commentators have also raised questions as to a democracy deficit in civil society organisations where there is a small membership base, involving the intellectual elite of society in primarily global north countries, and funding from wealthy benefactors.[173] Establishing the necessary support at the international level may be a lengthy and expensive undertaking. However, similar to the Nuclear Ban Treaty, the Ottawa Convention and the Cluster Munitions Convention,[174] the Geneva Declaration has a simple and understandable premise: that human rights apply at sea as they do on land.[175] As with any other treaty, it is of course the details that must then be determined and may be much less simple.

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[165] As noted in VCLT, Art 31(3)(c). On systemic integration, see Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279

[166] Migrant Smuggling Protocol, Art 19.

[167] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, adopted 3 December 1997, entered into force 1 March 1999, 2056 UNTS 211 ('Ottawa Convention').

[168] Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society" (2000) 11(1) *European Journal of International Law* 91, 105.

[169] Treaty on the Prohibition of Nuclear Weapons, adopted 20 September 2017, entered into force 22 January 2021, available at https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf ('Nuclear Weapons Ban Treaty').

[170] Dimity Hawkins, Dave Sweeney and Tilman Ruff, 'ICAN's origins' October 2019, *ICAN* at https://www.icanw.org/ican_origins; see also *ICAN* at https://www.icanw.org/the_campaign.

[171] As was the case with the Nuclear Weapon Ban Treaty.

[172] This shift was necessitated in relation to the weapons ban treaties where there was a need to move away from a narrative around peace but to focus on humanitarian concerns.

[173] Anderson, note 168, 117-18.

[174] Convention on Cluster Munitions, adopted 3 December 2008, entered into force 1 August 2010, 2688 UNTS 39.

[175] Geneva Declaration, 'Fundamental Principles'.

While a distinct treaty may be appropriate as a way to bridge any gap between the law of the sea and international human rights law, the possibility of an 'implementing agreement' for UNCLOS could also be considered. There have been two implementing agreements negotiated to date, with a third currently being negotiated. The 1994 Agreement substantially revised Part XI of UNCLOS,[176] adjusting the deep seabed mining regime so as to render the legal obligations arising in relation to the deep seabed more acceptable for a greater number of States.[177] The 1995 Fish Stocks Agreement provided more detail about how fish stocks that are shared on the high seas should be managed between interested parties.[178] The current treaty under negotiation concerns the protection of biodiversity beyond national jurisdiction and is focused on marine protected areas, environmental impact assessments, marine genetic resources, as well as capacity building and the transfer of technology. The latter two treaties are notable for setting out more detailed requirements within the existing broad legal frame provided in UNCLOS. The 1994 Agreement was perhaps exceptional in its revision of the terms of UNCLOS, which is not otherwise easily achieved through the formal amendment process under Articles 312 and 313 of the Convention.

Any implementing agreement addressing human rights at sea could ostensibly build on frames within UNCLOS. Notably, sovereignty within the territorial sea is 'exercised subject to… other rules of international law'.[179] What falls within 'other rules of international law' has been debated within tribunals constituted under UNCLOS and has been said to include general principles of international law[180] and vested fishing rights,[181] though not necessarily separate treaty obligations.[182] The latter position could be clarified, or changed, in an implementing agreement. Coastal State rights in the EEZ are also subject to 'other pertinent rules of international law' provided they are not incompatible with the rights set out in UNCLOS.[183] Finally, on the high seas, the freedom of the high seas is to be exercised under conditions laid down by UNCLOS and 'by other rules of international law'.[184] There is thus scope to flesh out obligations relating to human rights obligations within these maritime zones.

Otherwise, or additionally, an implementing agreement could elaborate on what falls within flag State duties under Article 94. The provisions of UNCLOS requires a flag State to 'effectively exercise its jurisdiction and control in administrative, technical and social matters' over its ships.[185] There are a range of inclusive examples provided in Article 94 as to what may constitute such matters, with a focus on ensuring safety at sea. Arguably, 'social' matters could include human rights. In any implementing agreement of Article 94 to protect human rights, further details could be provided as to the scope of the flag State's jurisdiction

[176] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted 28 July 1994, entered into force 28 July 1996, 1836 UNTS 3.
[177] Michael W Lodge, "The Deep Seabed" in Donald R Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP, 2015) 226, 226-27.
[178] FSA, note 119.
[179] UNCLOS, Art 2(3).
[180] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award) PCA Case 2011-03, [516] (Chagos MPA).
[181] *South China Sea Arbitration (Philippines v China)* (Award) PCA Case No 2013-19, [808].
[182] *Chagos MPA*, note 180, [516].
[183] UNCLOS, Art 58(2).
[184] Ibid Art 87(1).
[185] Ibid Art 94(1).

over human rights in each of the maritime zones, especially in situations of concurrent jurisdiction.

5. Conclusion

It is important to appreciate that the Geneva Declaration is not setting out new law, but rather reflects what the law is. As described in its Foreword, it is 'a concise refocusing of existing international law'. Human rights apply at sea and the Guidelines explain *how* this operates. Connecting international human rights law with the law of the sea can be done, even if it is not as straight forward as it may appear at first blush. As with so much of international law, and particularly international human rights law, much comes down to the willingness of States to align conduct with existing international standards. A good starting point is the recognition of the fundamental principles of the Geneva Declaration. From there, any interpretation of States' rights and duties when operating at sea should then account for the application of human rights and seek to find means to uphold the rights of the 30 million individuals plying the seas.