THE LAW OF THE SEA AND HUMAN RIGHTS

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Introduction

The law of the sea, including admiralty law, is “as old as humanity’s use of the sea” and yet little attention has devoted to its humanitarian customary practices and codes.¹ Many scholars, who have commented on the origins of modern international law, trace its origins to Grotius’ *Mare Liberum*, which itself defines “the law of the sea as one of the ‘original’ fields of international law”.² Others who have scrupulously traced the origins of human rights law, both international and municipal, in natural law, in the *French Declaration of the Rights of Man* and the *American Bill of Rights* likewise contend that international human rights is younger than the more modern law of the sea. In that respect, as argued by Oxman, the law of the sea, its instruments and institutions have not only a direct contribution to make to human rights law but in some instances are sufficient to protect individual human rights.

Many legal commentators have argued that several provisions of the *UNCLOS* articulate human rights principles which are to date still not used effectively and to its full potential by the human rights community.³ As discussed by Oxam, the primary purpose of the

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² Ibid at 377.
Convention is to uphold the universal rule of law\textsuperscript{4} and provide effective governance at sea.\textsuperscript{5} It allocates authority to govern and imposes qualifications on that authority. It mandates the rights and duties of States in a precise codified form, converting those rules into binding treaty obligations ratified by government pursuant to their constitutional procedures.\textsuperscript{6} Governance is clearly codified with respect to flag States of ships and coastal States. Yet as he so pointedly argued,

[T]he Convention as a whole seeks to advance the interests of humanity by establishing a “legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their resources, and the study, protection and preservation of the marine environment” and by contributing “to the realization of just and equitable international economic order which takes into account the interest and needs of mankind as a whole”.\textsuperscript{7}

He further contends that the Convention not only acknowledges but actively “seeks to advance certain specific community interests” which have been associated with ‘affirmative human rights’.\textsuperscript{8} These rights are in fact complex and quite difficult to identify. They mostly concern the relationship between human rights and the underlying concepts of community rights in general, or common cultural or environmental rights, common heritage of mankind under international law which gives rise to what may be properly called the right of an individual. Their distinction is not easy to make. These rights are not generally enforceable by or against individuals under the Convention, but are in fact articulated as duties to be respected and enforced by States and other parties to the Convention.

One of these affirmative human rights principles - expressed in the Convention as a duty - is to be found in one of its most elaborate provisions: Article 98.

Article 98. Duty to render assistance

\textsuperscript{4} The law of piracy is perhaps the best example of extending the rule of law at sea as it seeks to create universal jurisdiction – in particular in the high seas – to respond to acts of violence and terrorism for example, while respecting freedom of navigation.
\textsuperscript{5} Supra fn. 1 Oxam
\textsuperscript{6} Ibid at 380.
\textsuperscript{7} Ibid at 381-382.
\textsuperscript{8} Ibid at 382.
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1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
   (a) to render assistance to any person found at sea in danger of being lost;
   (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
   (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

Article 98 addresses the obligation of ships to assist vessels in distress or shipwrecked persons. It aims to implement the concept of the safety of life at sea, in other words the protection of life at sea. The duty it refers to is known as the duty to render assistance. This duty purports to provide humanitarian assistance to any person in danger at sea regardless of their legal status, in whatever circumstances, whether in time of war or peace and in whatever parts of the world. It is a well-established legal principle of the law of the sea. Its legal basis has deep roots in customary and humanitarian law principles, in the history of the law of the sea.

Over the last three decades, many of the important human rights issues and in particular humanitarian crisis have been played out at sea; and indeed the sea and international trade are the main conduit for people trafficking and some appalling human tragedies. These have led to calls for increase protection and human rights initiatives, particularly with respect to the 1951 Refugee Convention. Yet, it would be wrong to embark on initiating changes in refugee law without first looking at the protection which instruments of the law of the sea may already offer. Namely to first learn the lesson from the very long experiences of humanitarian practices which the law of the sea affords and which have been very effective in time of humanitarian crisis at sea; and secondly, to ensure that there are no lacuna in these instruments that allow state parties to avoid their

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9 See The M/S Joola, a Senegalese ferry carrying illegal migrants and capsized in 2002 resulting in the loss of 970 of her 1034 passengers; see also the SIEV X where 353 asylum seekers, including 150 children drowned. Of the 400 passengers it carried, only 44 survived and were picked up by two Indonesians fishing boats five days later. The rest are still unaccounted for. In that respect, see Kevin, T. A certain maritime incident: The sinking of SIEV X. Melbourne: Scribe Publications (2004).
10 Convention Relating to the Status of Refugees (1951) 189 UNTS 137.
international and human rights obligations; and thirdly, if such lacunas exist, how does the law of the sea resolve or at least attempt to resolve such lacunas.

This article examines the law of the sea and some of the human rights considerations which it addresses. Specifically, the article explores the protection of life at sea expressed directly or indirectly in various legal instruments of the law of the sea. Part I examines the origins of humanitarian obligations at sea. Part II discusses the legal framework of the law of the sea protecting life at sea provided for by the 1982 United Convention the Law of the Sea, the 1974 International Convention for the Safety of Life at Sea, the 1979 International Convention on Maritime Search and Rescue, the 1989 International Convention on Salvage, and the 1958 Geneva Convention on The High Seas. In this context, I will address the duties of a Master to protect life at sea by providing assistance to persons in distress along with the obligation of flag States and coastal States to equally protect life at sea by providing rescue. I will also briefly explore the long standing maritime tradition of the concept of place of safety or refuge and their implications for the question of innocent passage and disembarkation; and the role of the IMO with concern to the protection of life at sea. The article concludes by examining the international and European jurisprudence with respect to the law of the sea and human rights in general.

1 The origins of humanitarian obligations at sea – out of the mists of time

The obligation of rendering assistance to those in peril or lost at sea is one of the oldest and most deep-rooted maritime traditions. For centuries, seafarers have considered it their duty to assist fellow mariners in peril on the high seas. Today, it has become more than just a moral obligation; it is now codified in international treaty law and is

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12 International Convention for the Safety of Life at Sea (1974) UKTS 46, henceforth SOLAS.
14 International Convention on Salvage (1996) UKTS 93 322, henceforth SALVAGE.
15 Convention on The High Seas (1958) UNTS 6465.
considered to form part of customary law.\textsuperscript{17} In the mid-19th century, one British mariner in five died at sea. Mortality among sailors was higher than in any other occupation and between 1861 and 1870, 5,826 ships were wrecked off the British coast with the loss of 8,105 lives.\textsuperscript{18} It was against this background that the legal obligation of rendering assistance at sea was recognized in 1880 in the \textit{Scaramanga v. Stamp} case:

To all who have to 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 the needed aid.\textsuperscript{19}

This basic precept of British common law was subsequently codified in a number of international Conventions, which well preceded any of the more modern human rights instruments. The first to acknowledge the principle of rendering assistance at sea was the 1910 \textit{Brussels Convention on Salvage}.\textsuperscript{20}

2 The general legal framework of the law of the sea protecting life at sea

2.1 The law of the sea instruments

The principle of humanitarian assistance at sea, aimed at saving life, uses basic human rights principles as its foundation; in particular the protection of the right to life, the right to dignity and humane treatment. Its present normative framework applies to States and the seafaring communities.\textsuperscript{21} It is provided for by the 1982 \textit{UNCLOS}, the 1974 \textit{SOLAS}, the 1979 \textit{S.A.R}, the 1989 \textit{SALVAGE}, and to a certain extent by the 1958 Geneva

\textsuperscript{19} \textit{Scaramanga v. Stamp}, 5 C.P.D. 295, 304 [1880].
\textsuperscript{20} \textit{Brussels Convention on Salvage}, UKTS 4 (1913), Cd 6677; For a history of the \textit{Brussels Convention on Salvage} which later became the 1989 \textit{International Convention on Salvage}, see Supra fn 16 Allen at 148 for a detailed history of the \textit{Brussels Convention}.
\textsuperscript{21} Shipowners, commercial insurers, national and international maritime organisations and maritime unions.
These five Conventions are regarded by most experts in the law of the sea as the expression to the general tradition and practice of all seafarers and of maritime law regarding the rendering of assistance to persons or ships in distress at sea, and the elementary conditions of humanity.

And whilst they anticipate different types of responsibilities for the Master of a ship, flag States and coastal States that must be considered independently and the degrees to which they inter-relate, they in fact use similar language to impose the same duty:

Article 12 of the GCHS and Article 98(1)(a) of the UNCLOS posit a duty to “render assistance to any persons found at sea in danger of being lost” in identical terms. While Article 98(1)(b) imposes a duty to “proceed with all possible speed to the rescue of the persons in distress”;

Chapter V, Regulations 10(a) and (33) of the SOLAS provides for “assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance”;

Article 10 of the SALVAGE requires an obligation to “render assistance to any person in danger of being lost at sea”;

Regulation (2)(1)(10) of the S.A.R Annex further stipulates that “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationalities or status of such a person or the circumstances in which that person is found”.

All the above provisions expressly articulate an unqualified duty to render assistance to ‘persons’ or ‘any persons’ ‘in distress’ or ‘in danger of being lost at sea’. This duty is clearly unaffected by the nationality, status of the persons, the mode of transports or the numbers involved and the maritime zone in which they are found in distress. But the scope of the assistance itself is not defined in any of the Conventions. It is on that basis

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22 The duty to provide assistance at sea is also required during wartime, see article 18 of The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at sea, 6 U.S.T. 3217 and article 11 of the Brussels Salvage Convention. Other instruments include the 1965 Convention on Facilitation of International Maritime Traffic, as amended (FAL) 591 U.N.T.S. 265 and SALVAGE. In addition, UNCLOS article 18(2) and UNCLOS 39(1)(c) on innocent passage in the territorial seas reflect implicitly the duty to render assistance.


24 In citing article 98, Oxman insists that ‘any persons’ does not exclude any category of persons. Supra fn 14 at 414-415.
that the IMO in 1985 called on all States parties to the Conventions to intensify their efforts in providing assistance to boat people during the Vietnamese refugee crisis.25

One of the crucial points, albeit ambiguous, raised by the above instruments and in particular Article 98 is the extent to which States have an obligation to rescue and provide assistance. This essential consideration is often lost in the meandering and technical debates which have taken place so far on the right to humanitarian assistance at sea, disembarkation and the delivery to a place of safety.26 Indeed, specific rules in the law of the sea can be conveniently blurred and confused with other questions derived from other branches of international law and domestic legislation to facilitate a convenient oversight of basic humanitarian principles.27 These are, as argued by Kaye, probably the most important issues to be considered, since they are, in the first instance, what created for example the diplomatic crisis over the Tampa affair.28 To address this consideration, a distinction must be made between the duty to provide ‘assistance’ which is applicable to Masters and the duty of ‘rescue’ which is imposed on flag and coastal States.29 It is an important distinction because the latter extends to ‘delivery to a place of safety’ where coastal States are concerned. While rescuees can be brought onboard, they must be allowed to disembark for the rescue to be considered fulfilled.

2.2 Legal obligations to provide assistance and rescue

2.2.1 The duties of the Master – the obligation to provide assistance

Masters are legally bound by the provisions of the above Conventions to respond with all possible speed to the assistance and the rescue of persons in distress with due

25 See IMO Circular decision C 54/17(d) (1985); Report of the UNCHR to the General Assembly, UN GAOR, 40th session, Supp. No 12, UN doc. A/40/12 (1985) as cited by Fife, supra fn 11 at 475.
26 Delivery to a place of safety or refuge involves further right such as the rights of innocent passage and access to port.
regards for the safety of their own crew and ship. However, the duty placed on the Master is only a duty to render assistance. Customary law has evolved in a manner that now differentiates between the obligation to assist and the obligation to rescue which falls on States. International maritime law considers that once the Master has provided assistance the rescue is effected.

The scope of the duty to assist is not defined in any of the Conventions. Most scholars argue that the language adopted was deliberately ambiguous to allow Masters to fulfil their obligation with due regards for the safety of their own crew and ship, taking into considerations the various hazards of the high seas when answering a call for distress; mostly because distress is not clearly defined in the law of the sea. Debates on what constitute distress are still ongoing. This constructive ambiguity exists so that Masters are able to exercise moral and operational decisions when assessing the sort of assistance that can be provided. There are a variety of acts that may constitute ‘assistance’ such as towing a boat, unloading crew, providing food and supplies etc.

2.2.2 The duties of flag States – the obligation to rescue

Under UNCLOS Article 98(1) and SOLAS Chapter V, Regulations 7, 10(a) and 33, flag States have an obligation to rescue in so far as they must adopt domestic legislation that establishes penalties for shipmasters who violates the duty to rescue or fail to provide assistance. Yet, whilst this obligation is widely accepted, it is often only partially translated into domestic law, if not absent. As a result, the scope of the duty to assist imposed on Masters is further weakened by the fact that enforcement is problematic, if

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31 Ibid. Allen at 61.
32 In the past it was often feared that fake distress calls could be used by pirates. Today, distress is linked to the concept of place of refuge and innocent passage. See also supra fn 17 Rothwell at 123; fn 4 Pugh at 59.
33 See also S.A.R. ch. 2, para.2.1.10; Harry, M. A. Failure to render aid. Proceedings. US Naval Institute (February 1990) 65-68; Pugh, M. Drowning not waving: Boat people and humanitarianism at sea. 17 Journal of Refugees Studies 1 (2004) at 58; Supra fn 18 Kaye, S. at 68; Norway have given effect to this obligation in the Maritime Code 1994, ss 135 and 164; Penal Code 1902, s 314 as well as the Penal Code s 387, s 12.
34 The Australian provision contained in s317A of the Navigation Act 1912 (Cth) is not an absolute obligation as it is not fully translated into domestic law, see supra fn 30 Davies at 128-133.

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Panóptica, Vitória, ano 2, n. 9, jul. – ago. 2007, p. 1-20
not impossible. Ship Masters are known to have deliberately ignored persons in distress simply because of time delays and commercial pressures. This is particularly the case for Masters who sail under flag of convenience.\textsuperscript{35}

\textbf{2.2.3 The duties of coastal States – the obligation to rescue}

Coastal States on the other hand have a positive duty to rescue – that is coordinate SAR operations – under UNCLOS Article 98(2) which “promotes the establishment, operation and maintenance of an adequate and effective search and rescue service”. While some have argued that this provision is limited to the high seas and the EEZ by virtue of Articles 86 and 58(2), it is quite clear that the provisions on innocent passage in the territorial seas reflect implicitly the duty to render assistance.\textsuperscript{36} S.A.R. Chapter V, Regulation 15 also requires States to maintain adequate search and rescue assets and equipment along their coast\textsuperscript{37} while Regulation 2(1)(10) of the Annex expressly mandates assistance to any persons regardless of their status. SOLAS Chapter V, Regulation 7 promotes the concept of cooperation and rescue zones while Regulation 15(a) requires that States “undertake any necessary arrangements […] for the rescue of persons in distress at sea round its coasts and […] afford adequate means of locating and rescuing such persons.” Finally SALVAGE Article 11 “ensures the efficient and successful performance of salvage operations for the purpose of saving life or property in danger.”

\textit{S.A.R.} defines the scope of the duty to rescue as “an operation to retrieve persons in distress, provide for their initial medical and other needs and deliver them to a place of safety.”\textsuperscript{38} However, neither \textit{S.A.R.} nor any other international instruments of the law of the sea clearly define or elaborate the normative criteria of a ‘place of safety’. In effect this means that none of the above Conventions specifically provided for the

\textsuperscript{35} See Coombs, M. Jurisdiction – constitutionality of the U.S. State’s jurisdiction over criminal acts occurring on the high seas – Consistency of such jurisdiction with international law – Effects doctrine. 95 \textit{AJIL} 2 (2001) at 438, 442.
\textsuperscript{36} Supra fn 1 Oxman at 391; Barnes, R. Refugee law at sea. 53 \textit{International and Comparative Law Quarterly} 1 (2004) at 52.
\textsuperscript{37} Para. 2.1.1. In 1998 amendments to S.A.R provided definitions for the terms ‘search’ and ‘rescue’ which in turn clarified the responsibilities of coastal States.
\textsuperscript{38} S.A.R., para 1.3.2. The \textit{International Aeronautical and Maritime Search and Rescue Manual} also requires that “survivors must be delivered to a place of safety as quickly as possible”. See Vol. II, s 2.
disembarkation of the rescuees, which in essence represents the final phase of the rescue process. The 'right to land' at sea relied primarily on coastal States customary practices and domestic jurisprudence. It is also subject to highly complex legal provisions relating to the right of innocence passage as defined in *UNCLOS* and interpreted by domestic jurisprudence. It created a wide margin of appreciation for States when it comes to fulfil their obligation to rescue seaborne refugees.

### 2.3 Rights of innocent passage – access to port – place of safety or refuge

The sources and scope of the right to land, the right to refuge or place of safety, innocent passage and access to ports, are all defined in the *UNCLOS*. They are highly complex legal concepts which have been argued over and over since the 18th Century.

The right to refuge is first and foremost based upon humanitarian considerations, resulting from flag ships in situation of distress seeking or taking refuge in internal or territorial waters of another sovereign State. Vattel recognized that humanitarian considerations were to be extended to ships which entered territorial seas as a result of weather or necessity. See Vattel, E. de *The law of nations* (Chitty, J. trans.). Philadelphia: Johnson & co. (1869), book 2, chapter 7, section 94 at 170. However recent practices, in domestic case law, have

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39 Since the Tampa, the concepts of disembarkation and a place of refuge or safety have been explicitly linked, see supra fn 29 Kenney and Tasikas. The matter had now been clarified by the IMO’s amendments to the S.A.R and SOLAS Conventions, see Chapter 5.


41 The extent of that principle was highlighted by Ortolan in the case of the *Elisabeth*, an English war ship, which made it to Havana as a port of refuge after a hurricane in the Gulf of Mexico in 1746. Ortolan stressed the fact that imminent and irresistible danger forced the ship to seek asylum in an enemy port. See Ortolan, T. *Règles internationales et diplomatie de la mer*, 4d, vol. 2. Paris: Librairie Plon (1864), at 322-323.

42 Article III(e), *International Convention Relating to Intervention on the High Seas in cases of oil Pollution Casualties* (1970) *ILM* 25-44.

imposed important provisos on the right of refuge by making a clear distinction between the humanitarian right to save life and action to save the ship and its cargo. This was particularly highlighted by the High Court of Admiralty in the MV Toledo case which held that the right to refuge, although no longer an absolute right, should be there when human life is at stake.

The law concerning the right of entry by a ship in distress is also anchored in treaty law and again widely recognised by most legal scholars. While the right of coastal States to regulate access to its ports, harbours and internal waters, is not questionable, when a ship is in distress, customary law again clearly allows entry to port. The right to innocent passage is made out of two elements: the physical act of passage and the innocent mode of the act. Article 18 of the 1958 Convention on the Territorial Sea and Contiguous Zone defines the means of passage while the meaning of innocent has been gradually defined by the IJC. To date article 19 of UNCLOS provide the most comprehensive definition.

2.4 The IMO

The ambiguities with respect to the obligation to provide assistance and the obligation to rescue came to the forefront of the international stage during the “Tampa Incident”, when Australia refused entry into its territorial waters, denied the right to innocent

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47 Supra fn 42 O’Connell at 857.


49 Supra fn 38 Rothwell at 124.


51 See Corfu Channel Case (United Kingdom v Albania), ICJ Reports 4 [1949] (Merits).

52 Art. 18.2 UNCLOS. Cavaré made the following commentary on the corresponding article 14.3 of the Geneva Convention on the Territorial Sea: “C'est un incident technique qui le motive (réparation à une machine), ou bien c'est une raison d'humanité qui le rend licite”, see Cavaré, L. Le droit international public positif, II. Paris: Pedone (1969) at 757.
passage and access to port for the purpose of disembarkation, to a Norwegian commercial ship following the rescue of 433 asylum seekers requested by the Australian Search and Rescue Services. This ‘crisis’ raised concerns in many coastal nations, shipping companies and the commercial shipping world at large and prompted the IMO to become involved with the case within day of its occurrence with a view to facilitating a solution.

The *notes verbales* exchanged between Norway and Australia, during the diplomatic negotiations, clearly distinguished between the obligation of assistance rendered by the Tampa and the obligation of rescue.\(^{53}\) One of the disputed facts was that Australia saw the rescue as completed once the rescued boarded the Tampa notwithstanding the fact that the Master had twice signalled to the authorities that his ship was in distress due to overloading and lack of supplies.\(^{54}\) Norway argued that Australia had created “a most unwelcome obstacle to prevent seafarers from being rescued when they are in distress or shipwrecked”.\(^{55}\) The *notes* confirmed the varied interpretation of the word “rescue” which indicated an unwillingness to cooperate, preventing a speedy resolution of the case. It is this impasse which decided the Secretary-General of the IMO to advise the UN High Commissioner for Human Rights and other UN agencies\(^{56}\) that he would now intervene and order a review of the relevant IMO instruments as the consequences of this rather significant incident could have serious repercussions for the integrity of the S.A.R. system and assist those found in distress at sea.\(^{57}\) The IMO was now set to push the issue of seaborne refugees to the forefront of the international stage and portray it

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53 The IMO received copies of the notes verbales and circulated them to all IMO members.
54 IMO Circular letter No 2345 (October, 15, 2001) at 2 containing the Notes verbales between the Embassy of Australia, Copenhagen, Denmark and the Royal Ministry of Foreign Affairs of the kingdom of Norway, Oslo.
55 IMO Circular letter No 2363 (February 1, 2002) at 2, containing the Notes verbales dated September 1, 2001 and January 29, 2002 from the Royal Ministry of Foreign Affairs of the kingdom of Norway to the Embassy of Australia, Oslo, Norway.
56 The UN Division for Ocean Affairs and the law of the Sea has since included the issue of the rescue of persons at sea in the schedules of its annual report. See for example, *Report of the Secretary-General, oceans and the law of the sea*. A/56/58 (9 March 2001) paras 43-45; The UNHCR High Commissioner also participated in discussions at the seventy-fifth and seventy-sixth MSC sessions which focused on the meaning of the phrase “delivery to a place of safety”. See *Report of the Secretary General oceans and law of the sea*. A/58/65 (3 March 2003) para. 94.
57 Opening address to the Twenty-Second regular session of the Assembly *Speech given by Mr. W.A. O’Neil, Secretary-General of IMO Headquarters, London* (19 November 2001).
as a multifaceted challenge for all policy makers.\textsuperscript{58} It needed to clarify and elaborate on the interpretation of the terms ‘place of safety’, ‘disembarkation’ within the meaning of the SOLAS and S.A.R. Conventions.

Subsequently, at its November 2001 session, the IMO Assembly adopted resolution A.920 (22) involving a Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea. Its mandate was to instruct the IMO Maritime Safety Committee, the Legal Committee, and the Facilitation Committee to review all IMO instruments to “identify any existing gaps, inconsistencies, duplications or overlaps in that legislation”.\textsuperscript{59} As pointed out by Fife, the purpose of the IMO review was to ensure that three basic humanitarian principles expressed by the law of the sea would be met, namely:

- Persons in distress at sea will be provided assistance regardless of nationality, status or the circumstances in which they are found;
- Vessels which recover persons in distress at sea, will be allowed to deliver the rescuees to a place of safety; and
- Rescuees, regardless of their nationality, status or the circumstances in which they are found, including undocumented migrants, asylum-seekers, refugees and stowaways will be treated on board, in the manner prescribed by the relevant IMO instruments and in accordance with international law and human rights law as well as long-standing humanitarian maritime traditions.\textsuperscript{60}

As a result of Resolution A.920 (22), in 2003 the IMO Maritime and Safety Committee during its 77\textsuperscript{th} session approved draft amendments to Chapter V of the SOLAS and the S.A.R. Conventions. The purpose of these amendments was to clarify how State parties and seafarers would cooperate to assist any persons rescued at sea regardless of their status. The amendments were then formally adopted one year later with a view to enter into force on 1 July 2006. In the meantime, to ensure that persons in distress at sea are assisted and to safeguard the integrity of the S.A.R. Convention, the MSC Committee

\begin{footnotesize}
\textsuperscript{58} At its meeting on December 12, 2002, the General Assembly passed Resolution A57/141 Oceans and Law of the Sea which acknowledged the IMO initiatives with regards to the treatment of persons rescued at sea, see A/RES/57/141 (21 February 2003) para. 34.
\textsuperscript{59} Review of safety measures and procedures for the treatment of persons rescued at sea, 22\textsuperscript{nd} session, Agenda Item 8, IMO Assembly resolution A.920(22) (November 2001).
\textsuperscript{60} Supra fn 25 Fife at 477.
\end{footnotesize}
adopted *Guidelines on the Treatment of Persons Rescued at Sea*\(^{61}\) which aimed to assist State parties and Masters of ships in fulfilling their legal and humanitarian obligations towards persons rescued at sea under the relevant international law instruments. The Guidelines confirm that the obligation of a Master to render assistance should be complemented by the corresponding obligation of States parties to rescue. In other words to coordinate and cooperate in assisting the Master towards the prompt delivery of persons rescued at sea to a place of safety and relieving the Master of the responsibility to provide ongoing assistance to those rescuees.

In its latest report on oceans and law of the sea, the Secretary-General reported that the General Assembly urged

States to take all necessary measures to ensure the effective implementation of the amendments to the International Convention on Maritime Search and Rescue (*S.A.R.*) and to the International Convention for the Safety of Life at Sea relating to the delivery of persons rescued at sea to a place of safety (*SOLAS*) upon their entry into force, as well as of the associated Guidelines on the Treatment of Persons Rescued at Sea.\(^{62}\)

On 1 July 2006, the amendments to the *SOLAS* and *S.A.R.* Conventions concerning the treatment of persons rescued at sea entered into force. The amendments to Chapter V – Safety of Navigation – of *SOLAS* provide a definition of search and rescue services. They further clarify the existing longstanding obligation to provide assistance, adding a wording similar to that of Rule 2(1)(10) of the Annex to the *S.A.R.* Convention: “This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found.” They also set down co-ordination and co-operation requirements between States to assist Masters in delivering persons rescued at sea to a place of safety. This is the first time that such an obligation is placed on States. The amendments also add a new regulation emphasising a Master’s discretion when assessing the safety of life at sea:

> the owner, the charterer, the company operating the ship […], or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master’s professional judgement, is necessary for safety of life at sea.

\(^{61}\) *IMO Related guidelines on the treatment of persons rescued at sea*, also adopted in May 2004.

Amendments to the Annex of the S.A.R. Convention are even more explicit. They add one new paragraph in Chapter 2 - Organization and coordination, clarifying the definition of persons in distress; several new paragraphs in Chapter 3 - Cooperation between States, relating to assistance to the master in delivering persons rescued at sea to a place of safety; and one new paragraph in Chapter 4 - Operating procedures, concerning rescue co-ordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

Overall, the new and amended provisions make it clear that any international conflicts arising arise out of a SAR mission are to be resolved by States parties and are not the responsibility of the Master and crew. Governments are responsible for coordinating their actions and cooperating so that rescuees are disembarked from the assisting ship and delivered to a place of safety. In today's commercial environment where ships' captains are relentlessly requested to improve efficiency and cut costs, it is critical that they continue to assist those in distress at sea without regard to their nationality or status. Their sole duty is to render assistance to persons in danger at sea. Their primary responsibility remains the protection and safety of life at sea. The entry into force of these amendments constitutes a significant milestone in the application of basic humanitarian standards at sea.

3 An overview of International and European jurisprudence

The International Tribunal for the Law of the Sea, as part of the international institutional framework, first considered the protection of human rights in the SAIGA (no 2) judgment, when ruling that "considerations of humanity must apply in the law of the sea, as they do in other areas of international law." A previous judgment had already reflected the

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64 The M/V ‘SAIGA’ (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) [1999] para. 155 henceforth the M/V Saiga; See also supra fn 3 Tavernier at 575-583; Chrestia, P. Chronique de jurisprudence internationale. 104 RGDIP 2 (2000) 514-522.
relevance of elementary conditions and considerations of humanity as a general principle of international law and therefore as a source of law in its own rights.  

The European Convention of Human Rights makes no direct references to the law of the sea or maritime law. Yet the European Court of Human Rights, and previously the Commission, has on several occasions considered cases concerning both the law of the sea and maritime law. Two types of cases have been heard by the ECHR. The first type involves cases relating to state jurisdiction in maritime zones with respect to the European Convention of Human Rights and more specifically the interpretation of article 1 of the Convention; in other words, how the Convention can be applied in a maritime context. The second type concerns the more classical protection of the applicant’s human rights within the context of the law of the sea.

State jurisdiction is an essential concept of the law of the sea. It is generally used to define the competences, duties and rights of a State in the various maritime zones surrounding its shores. The UNCLOS differentiates between the jurisdiction of sovereign rights and sovereignty, since jurisdiction is sometimes qualified as exclusive. Yet, the ECHR has never taken into account such subtleties which is quite ironic since this particular difference is explicitly stipulated in article 173 of the UNCLOS, which concerns “the legal status of the Area and its resources”; the ‘Area’ defined in the previous article as the “Common Heritage of Mankind”. The Court has, on the contrary, following the Loizidou case and subsequently the Bankovic case, largely interpreted the notion of territoriality and extra-territoriality contained in article 1; more precisely...
States’ jurisdiction with respect to the specificity and traditional principles of human rights in maritime zones. This has allowed the Court to consider all sorts of circumstances where the law of the sea provides a State party with territorial competences in maritime zones which may be at times quite far in distance terms from the actual territorial landmass of the State. In this respect the Court’s position is aligned with the many decisions rendered by the Human Rights Committee when it affirmed that human rights obligations cannot be avoided by extraterritorial exercises of jurisdiction.  

The jurisprudence, here, specifically relates to the jurisdictional competence of State parties in ports or its territorial sea; or alternatively, involves situations where a State’s liability is engaged under article 1.

The second types of cases concern a procedural or a substantial violation of human rights within a law of the sea context. When it comes to rule on an applicant’s claiming a specific violation of their human rights, the Court has been exceedingly cautious. Relying on the rules of international law and the law of the sea in particular, it is inclined to simply adopt solutions conform to the customary or codified rules of the law of the sea and in some cases of the 1958 Conventions in so far as they are applicable. To date, there are no contradictions between the protections of human rights as defined in the Convention and norms of the law of the sea. In fact, the Court appears to be quite reluctant to depart from international law rules and the law of the sea.

academics, see for example Cohen-Jonathan, G. La territorialisation de la juridiction de la Cour européenne des droits de l’homme, observation sous la décision Bankovic et autres. 52 RTDH October (2002) at 1069-1082.

73 See Nowak, M. UN Covenant on civil and political rights: CCPR Commentary of jurisdiction Kelh am Rheim: Engel (1993) 41-43. It is worth noting here, that the ECHR also follows previous decisions it has rendered with respect to States’ responsibility for the treatment of persons within their jurisdiction, as an example see Soering v United Kingdom. 98 ILR 270, para. 88.

74 Consorts D. v. France, 31 August 1994, ECHR; Antonsen v. Norway, 15 January 1997, ECHR. As such these cases do not cause difficulty of interpretation since they concern zones where States already exercise sovereignty and all the Court has to do was to combine the rules of the Convention with those of the law of the sea.

75 Gunnar and Annika Bendréus v. Sweden, 8 September 1997, ECHR; Leray and Others v. France, application n° 44617/98 (2001) ECHR 880 (20 December 2001); Angelos Rigopoulos v. Spain, application n° 37388/97, ECHR16 (April 1998 and 12 January 1999); L.H.T.C. and G.C. v. France, application n° 15454/89, ECHR (29 March 1993). This type of cases often concern shipwrecks close to the high seas, boarding of ships in the high seas to arrest members of the crew, jurisdictional competences of a State in the EEZ or the continental shelf.

76 Concerns a violation of article 6 (Leray and Others), article 5 (Rigopoulos) and article 2 (Xhavara and Others v. Italy and Albania, Application n° 39473/98, ECHR (11 January 2001).

77 Supra fn 3 Tavernier at 583.
consistently interpreted the European Convention on Human Rights in harmony with and taking into account the existing law of the sea. As noted by Tavernier, the reason being, because the Convention cannot operate in a vacuum and must be interpreted harmoniously with other existing bodies of international law.\textsuperscript{78}

With regards to the examination of the duty to assist and the duty to rescue, the duties defined in article 98 of the UNCLOS have never been directly raised by applicants. One decision only briefly and quite indirectly refers to the normative content of article 98 when citing a violation of article 2 of the ECHR. In \textit{Viron Xhavara and 15 others v. Italy and Albania}\textsuperscript{79}, the Court rejected an application by the defendants that a naval blockade imposed by Italy and Albania in the Albanian territorial waters and the international waters to prevent illegal immigration was in violation of article 2, thus endangering the right to life and physical integrity of the illegal immigrants. The case hit the headlines in March 1998, following an Italian naval corvette colliding and sinking an Albanian boat transporting illegal immigrants while attempting to stop it 35 nautical miles off the Italian coast, in international waters. 86 people drowned. In rejecting the application, the Court ruled that the applicants were under the Italian territorial jurisdiction as stipulated by article 1 of the Convention\textsuperscript{80} and whilst it felt that the applicants were unable to prove that the sinking was intentional, it reminded the parties the extensive application it provides to Article 2: States have a negative obligation to abstain from provoking the voluntary death of a person but have equally a positive duty to take all necessary and precautionary measures to protect the life of a person under its jurisdiction. A point which is reminiscent of the content of Article 98.

\textbf{Conclusion}

Although many believe that the law of the sea and human rights law have developed in isolation from one another, it is clear that in some instances, they not only interact but

\textsuperscript{78}Ibid.
\textsuperscript{79}Xhavara and Others.
\textsuperscript{80}Ibid., para. 1.
have also produced interesting dynamics forced by events, reactive to different political policies and legal needs.\textsuperscript{81}

This article has highlighted the relative success of the normative framework of the law of the sea and maritime law in establishing a comprehensive regime protecting the life and the rights of those travelling the seas, notwithstanding ambiguities introduced by the interpretation and practices of coastal States with respect to disembarkation, the rights of innocent passage and access to ports. If these ambiguities are to be resolved, it requires a change in attitude by coastal States to reflect a more genuine balance between security interests and the need to assist ships Masters who have gone out of their way to fulfil the humanitarian obligation to assist and rescue persons in distress at sea.

The IMO framework is probably today by far the best implementation of the duty to render assistance with respect to the humane treatment of persons in distress at sea and the respect of their human rights.\textsuperscript{82} Its action driven by the IMO following the Tampa crisis has shown that a prompt and comprehensive multi-agencies approach provides a pragmatic example of how existing international instruments can be used to address the challenges of human rights with respect to persons rescued at sea. In particular, it highlighted the need for a more proactive multidimensional approach underpinned by a human rights framework and the important role which sanctions for breach of regulation play. Success appears to come from embracing the long standing underlying humanity principles and the formulation of frameworks which embrace principles of humanity rather than narrow legal prescriptions. It has brought to the forefront the importance of maintaining the basic humanitarian principles provided for in the law of the seas instruments while respecting the rights and dignity of the persons rescued at sea regardless of their status.

\textsuperscript{82} Hinrichs, X. Measures against smuggling of migrants at sea: a law of the sea perspective. 36 Revue Belge de Droit International 2 (2003) at 448.
As suggested by Oxman, like universal jurisdiction, a universal duty to rescue is a practical response to protecting the right to life. As it stands, it is duly confirmed in many law of the sea instruments which all, without exception, stress that it applies to “any person” found at sea in danger of being lost. Thus, if one were to take a Hohfeldian approach, one might conclude that international law thus establishes or at least implies a right to be rescued at sea. In terms of human rights principles, this means that human rights law has an essential role to play in the law of the sea to sustain the applicability of the duty to assistance and reinforce the duty to rescue by stressing that the protection of life be respected regardless of the status of the rescuees. This also means that the duty to assist person in danger to which shipmasters and States are bound to under the law of the sea should be viewed as the ultimate, universal criteria, of the protection of another’s person’s right to life at sea. It should not be impeded by any other duties or rights arising out of other international instruments and its scope should be broadened as suggested by the IMO to include the right to disembark to the nearest port or place of refuge as this would allow for a better application of the human rights of those found in distress at sea.

Hence, when it comes to the law of the sea to protect or at least recognise human rights, we need to focus on the humanitarian elements customary law already provides and assess whether or not they meet the requirements of basic principles of human rights law; and how can we ensure that these humanitarian elements continue to be upheld and further strengthen within a human rights framework. In this context, there is no doubt that the law of the sea, and in particular the duty to assist and to rescue, provide an added-value to the protection of human rights for those at sea; as last but not least we must remember that central to the concept of the duty to rescue is an ideal of maritime ethics based on the respect for human life and its dignity.