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Maritime Security and People at Sea: Utilising Human Security as a Framework to Bridge the Gaps in Protection

Thesis presented by

Ramat Tobi Abudu, LL. B, B.L, LL.M

ORCID: 0000-0003-4068-7305

for the degree of

Doctor of Philosophy

University College Cork

School of Law

Head of School/Department: Professor Mark Poustie

Supervisors: Dr Dug Cubie and Dr Henrietta Zeffert

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Declaration

This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of University College Cork concerning plagiarism and intellectual property.



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Ramat Tobi Abudu

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Dedication

With great love and mixed emotions, I dedicate this thesis to my late father, Alhaji Mustapha Abudu and my dearest friend late Mrs Lawuna Pinky Gobel-Njoku. Losing them during the early stages of this PhD programme was a breaking point that later fuelled resilience to finish, as they always wanted.

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Abstract

It is known that people at sea are vulnerable to harsh weather conditions and maritime security threats. Nowadays, case law highlights how maritime security operations that are meant to be a source of security for these people also constitute a source of vulnerability – as such operations may be undertaken in a manner that violates their rights. This issue emanates from the friction between maritime security operations and human rights law linked to the dissonance between international human rights law (IHRL) and the international law of the sea (LOS). Scholars suggest a systemic integration between these two fields of law, alongside other relevant fields of international law, to protect people at sea. The problem is that the existing research does not contemplate the gaps within the law as a stumbling block to protecting people at sea.

By utilising the human security framework to guide the doctrinal analysis of IHRL and LOS vis-à-vis maritime security, this thesis finds that people at sea are still rendered vulnerable by gaps in protection resulting from legal uncertainties (including, but not limited to, maritime 'legal black holes'). For example, legal uncertainties cause *de jure* rightlessness affecting the protection of migrants visible in the Mediterranean Sea and *de facto* non-enforcement affecting the protection of civilians within the Gulf of Guinea. These issues are genuine conflicts within international law that a traditional conflict avoidance technique cannot remedy.

This thesis proposes the novel perspective of human security as a framework relevant to maritime security and international law that can strengthen the protection of people at sea. It argues that the tenet of human security allows it to function as a bridge over the maritime legal black holes, as it unifies traditionally set apart laws (IHRL and LOS), policies, governments, organisations, civil society groups, etc. By examining the potential and limits of the human security approach to deal with identified gaps in protection, this thesis concludes that the core benefit of the human security framework to maritime security and international law is that it promotes a coherent people-centric interpretation and application of state-centric concepts, policies, and laws towards the goal of protecting people at sea.

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Abudu, T.R, 'From Passive to Functional: The Legal Protection of People in Distress at Sea' (2021) 6 Wolverhampton Law Journal 5.

Abudu T R, 'A Human Rights View of Maritime Piracy: Exploring the Gulf of Guinea' (2021) 9(1) Groningen Journal of International Law.

Abudu T.R, 'Book Review: Irini Papanicolopulu, International Law and the Protection of People at Sea (Oxford: Oxford University Press) 2018' (2020) 7 The Transnational Human Rights Review 105-115.

Abudu T.R, 'Global Human Security: A Cornerstone in Bridging the Divide between Securitisation and the Human Rights Maritime Security Frameworks' (2020) 4 Edinburgh Student Law Review.

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Abudu T.R, 'An Analysis of the Global Compact for Migration and its Application at Sea' (2019) Society of Legal Studies Conference

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List of Abbreviations

ACJHR	African Court of Justice and Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and People's Rights
AU	African Union
CAT	Convention Against Torture
CERD	Committee on the Elimination of Racial Discrimination
CFREU	Charter of Fundamental Rights of the European Union
CJA	Council Joint Action
CRC	Convention on the Rights of the Child
CtRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
EU	European Union
GoG	Gulf of Guinea
HRC	Human Rights Committee
IACHR	Inter-American Commission for Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce

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ICJ	International Court of Justice
IHRL	International human rights law
ILC	International Law Commission
IMB	International Maritime Bureau
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
KFOR	NATO Kosovo Force
LOS	Law of the Sea
MEND	Movement for the Emancipation of the Niger Delta
MSO	Maritime Security Operations
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
OA	Operation Atalanta
PCA	Permanent Court of Arbitration
SAR	Convention International Convention on Maritime Search and Rescue
SOLAS	Convention International Convention for the Safety of Life at Sea
SPOMO	Suppression of Piracy and Other Maritime Offences
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCLOS	United Nations Convention on Law of the Sea
UNMIK	UN Interim Administration Mission in Kosovo
UNSC	UN Security Council
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

1.1 Background and scope

The continual rise in illegal activities that challenge global maritime security puts pressure on States to increase the effectiveness of law enforcement operations to maintain the stable order of the oceans. Recent reports show that the main threats to maritime security,[1] such as piracy and irregular maritime migration (human trafficking and people smuggling), might only intensify.[2] However, the present friction between international human rights law (IHRL) and the international law of the sea (LOS), arising from the consequences of fragmentation within international law, is hampering effective law enforcement operations at sea.[3] This effect has sparked the question of whether and how maritime law enforcement operations can be improved to be more consistent with human rights obligations.[4]

Scholars point to a series of overlaps and gaps between maritime security operations and human rights norms which creates difficulties for States, adjudicating bodies and maritime enforcement operators. Guilfoyle illustrates how treaty interpretation and the lack of a uniform scope of application of human rights instruments affects the development and evolution of human rights law at sea.[5] Using Somalia as a case study, Osiro argues that though human rights considerations might affect the effectiveness of counter-piracy operations, it is nonetheless

[1] Maritime security is defined further below in sub-section 1.2.2. In this thesis 'maritime security challenges' is used interchangeably with 'maritime insecurities' and 'maritime security threats'.
[2] ICC International Maritime Bureau, ' Piracy and Armed Robbery Against Ships' (January 2021) <2021_Q1_IMB_Piracy_Report.pdf (icc-ccs.org)> accessed 1 November 2021; see also International Centre for Migration Policy Development, 'Seven things to look out for in 2021 Origins, key events and priorities for Europe' (2021) <https://www.icmpd.org/file/download/50542/file/ICMPD_Migration_Outlook_2021_final.pdf> accessed 1 November 2021.
[3] On fragmentation see, Anne Peters, 'The Refinement of International law: From Fragmentation to Regime Interaction and Politicization' (2017) 15(3) International Journal of Constitutional Law 671; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) Modern Law Review 1; Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 New York University Journal of International Law and Politics 697 ; and Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 263.
[4] Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243, 245.
[5] Douglas Guilfoyle., 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters', In Clive R. Symmonds (eds), *Selected Contemporary Issues in The Law of The Sea* (Martinus Nijhoff Publishers, 2011) 85-100.

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necessary.[6] Similarly, Petrig argues that insufficient respect for human rights obligations regarding arrest, detention and transfer of piracy suspects undermines law enforcement at sea.[7] In analysing four maritime security challenges – piracy, drug trafficking, migration at sea and fisheries enforcement issues – Wilson has highlighted the need to harmonise IHRL and maritime law enforcement.[8]

In the last decade, various cases have sparked questions about harmonising human rights law and maritime enforcement operations.[9] Most especially cases emanating from the European Court of Human Rights (ECtHR). In 2012, 2014 and 2016, the ECtHR held that the Italian Government's maritime interception and repatriation of migrants constituted a violation of the European Convention on Human Rights (ECHR).[10] Similarly, on various occasions in recent years, the ECtHR has held that the French Government's maritime law enforcement (counter-piracy and drug trafficking) operations constituted a violation of the suspect's right to liberty under the ECHR.[11] All of these cases and many more have led to the recognition of two important facts.[12]

First, international human rights law applies at sea. This realisation led to the formation of a non-legally binding document titled the "Geneva Declaration on Human Rights at Sea", which aims to raise global awareness of the abuse of human rights at sea and mobilise a concerted international effort to put an end to such violations.[13] Crucially, this document points out that "human rights apply at sea to exactly the same degree and extent that they do on land".[14] Here, the standard of application is to the 'exact same degree' on land. However, from a maritime

[6] Deborah Osiro, 'Somali Pirates have rights too: Judicial Consequences and human rights concerns' (2011) 244 Institute for Security Studies Paper 1,8.
[7] Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff, 2014) 157.
[8] Wilson (n 4) 243.
[9] In this thesis, the phrase 'maritime enforcement operations' is used interchangeably with 'maritime security operations' and sometimes 'law enforcement operations at sea'.
[10] See *Hirsi Jamaa and others v. Italy* App no 27765/09 (ECtHR, 23 February 2012); see also *Sharifi and others v. Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014); see also *Khlaifia and Others v. Italy* App no 16483/12 (ECtHR, 15 December 2016).
[11] Ibid.
[12] In more recent times, see *AS and others v. Italy*, Comm No. 3042/2017, UN Doc CCPR/C/130/DR/3042/2017 (2021) where the Human Rights Committee held that Italy was liable for human rights violations due to their inactions towards distressed migrants on the high seas.
[13] Human Rights at Sea, 'Geneva Declaration on Human Rights at Sea' (2019) Version 1,p.3, <https://www.humanrightsatsea.org/wp-content/uploads/2019/04/HRAS_GENEVA_DECLARATION_ON_HUMAN_RIGHTS_AT_SEA_5_April_2019_Version_1_LOCKED.pdf> accessed 1 November 2021.
[14] Ibid.

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security perspective,[15] the maritime environment (vis-à-vis the law of the sea) forms the basis for a different school of thought that constitutes the second fact: the challenge of consistent interpretation of IHRL at sea in light of LOS obligations.[16] Often, this second fact leads to a different threshold for interpreting IHRL at sea,[17] and highlights that violations of IHRL during maritime security operations (MSOs) may flow from the friction between human rights law and the law of the sea.[18]

The friction between these two fields of international law, according to Papanicolopulu, arises from the "separate treatment of rules deriving from these two branches of international law, which have always been conceived as independent one from the other."[19] As a result of this, Wilson notes that "courts, governments, and deployed naval forces are now confronting the issue of harmonising human rights with the inherent challenges of high seas maritime law enforcement interdictions."[20] Drawing on the issues enunciated by Papanicolopulu and the understanding that the integration of IHRL and LOS will lead to better protection of people,[21] this thesis aims to answer 'how' this integration can happen to ensure the protection of people at sea.

Accordingly, this thesis focuses on the protection of people at sea as the basis for the integration of IHRL and LOS. Papanicolopulu defines the phrase "people at sea" as "any person who is, for a certain period of time, physically at sea".[22] Arguably, this definition is too wide and seems

[15] David Simon Goddard, 'The Application of International Human Rights Law to Maritime Security Operations' (DPhil thesis, University of Exeter 2018).
[16] *A.S and others v. Italy* (n 12) see also in these cases the Human Rights Committee applied relevant provisions of the law of the sea towards the interpretation of human rights obligations.
[17] Marta Bo, 'Hassan and Others v. France; Ali Samatar and Others v. France' (2015) 30 International Journal of Marine & Coastal Law 551,556 notes that the ECtHR allows a loose interpretation of IHRL at sea (in the context of maritime security operations) due to the wholly exceptional circumstances; see also Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018) 162, Papanicolopulu argues that the "protection of people at sea may require States to adopt actions that go beyond those required with respect to land, in order to take into account the special characteristics of the sea."; see also 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, here Moreno-Lax argues that the application of the law of the sea within IHRL should promote a contactless interpretation of jurisdiction which holds States to a higher standard of protecting migrants at sea; similarly see 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, 417–35.
[18] Petrig (n 7); see also Wilson (n 4).
[19] Papanicolopulu (n 17) 8.
[20] Wilson (n 4) 245.
[21] Papanicolopulu (n 17) 13.
[22] Ibid 17.

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to extend to State agents (military personnel, police, immigration/customs officials) at sea,[23] which is not suitable to achieve the aim of this thesis because they are often the source of human rights violations during MSOs. Although I recognise that State employees can also be vulnerable but for the purposes of this thesis, I refer to people at sea as civilians physically present at sea for a specific time frame.[24] Arguably, people contained within this more restrictive definition are the most affected by the legal and operational dissonance between these two fields of law vis-a-vis MSOs. They are also vulnerable because of the unique nature of the maritime environment and the security threats at sea.[25]

The maritime environment is unpredictable; the "weather is more punishing on the open water because it comes from above and below," and severe weather on the high seas is similar to "experiencing an earthquake and a hurricane at the same time."[26] Also, the distance from the coast and the difficulties in patrolling and controlling the oceans results in a space where dangers cannot be entirely controlled, and abuse may take place unchecked.[27] This 'space' in protection also exists within international law. There are legal uncertainties within the law which Mann calls "maritime legal black holes".[28] They amplify the vulnerability of people at sea. States can exploit these legal black holes for ostensibly national security reasons in ways that undermine international human rights obligations.

Thus, people who take to the sea need better protection from the legal uncertainties, maritime security threats and violations of their rights during MSOs. This need forms the basis for this research. This thesis contributes to current scholarship by identifying and addressing the gaps in protection stemming from the unique nature of the maritime environment vis-à-vis the legal uncertainties affecting people at sea. In addition, this thesis further addresses the shortcomings from an operational perspective by examining how MSOs can fully comply with international law to ensure protection from maritime security threats rather than being an instrument for human rights violations.[29]

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[23] Ibid 19, Papanicolopulu notes that the navy and coastguards "are individuals and therefore they can be seen as potential victims, as they may also be affected by all the circumstances that impact on other people at sea. On the other hand, they are also State organs and are therefore the means through which States may protect or violate the rights of other individuals."

[24] A civilian is "A person who is not professionally employed in the armed forces; a non-military person" (see, Oxford English Dictionary (3rd edn, Oxford University Press 2010).

[25] Wilson (n 4); Papanicolopulu (n 17).

[26] Ibid Wilson, 249.

[27] Papanicolopulu (n 17) 16.

[28] Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) The European Journal of International Law 347, 369.

[29]; see Petrig (n 7); see also Goddard (n 15).

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The IHRL framework offers protection of people's rights at sea, while the LOS framework ensures protection for States and people against maritime insecurities, such as maritime piracy, people smuggling and human trafficking. Yet adjudicatory bodies need to take account of both the LOS and IHRL framework concerning maritime security operations.[30] The synergy between IHRL and LOS would positively impact maritime security operations by balancing rights and security interests towards protecting people at sea. Recognising that human rights law applies at sea is one thing but recognising that its rights-based approach is insufficient to tackle maritime insecurities is crucial.[31] On this basis, this thesis argues that the synergy between IHRL and LOS can be better harnessed for improved maritime security and its operations. To do this, I undertake three steps. Firstly, this thesis evaluates various constraints and complexities affecting the relationship between these two fields of law, hindering the harmonisation of MSOs and human rights law. Identifying the structural problems is the first step towards a solution. At the general level, the problem does not arise from only the structural difference of these two fields, but the main issue is the divergent interpretation of foundational concepts by States and the courts.[32] These interpretations further the gaps in the protection of people at sea.

Secondly, I carry out an in-depth analysis of two maritime security challenges: irregular migration and piracy at sea.[33] This is to evaluate the relevance of integrating IHRL and LOS on maritime security and its operations. However, due to the expansive nature of these two maritime insecurities, it is beyond the scope of this thesis to evaluate all the issues emanating from the interaction of IHRL and LOS regarding these two maritime insecurities. Therefore, the evaluation of these two maritime insecurities is limited to specific regional case studies identified as 'hotspots': the Mediterranean Sea for irregular maritime migration, and the Gulf of Guinea for piracy at sea. This analysis finds that there are structural vulnerabilities (i.e. legal uncertainties in the contents and application) of IHRL and LOS, which makes them separately and jointly insufficient to ensure better protection of people at sea except through an integration

[30] For recent developments on this see, Papastavridis (n 17); see also Moreno-Lax (n 17).
[31] See Piet Hein van Kempen 'Four Concepts of Security: A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 23, here Kempen argues that the human rights framework does not give a proper understanding of international security, thus insufficient to deal with security challenges; see also chapters three and four of this thesis which discusses the necessity of both a rights and security approach to dealing with maritime security challenges.
[32] Guilfoyle (n 5) these are the consequences of fragmentation within international law.
[33] Chapters three and four of this thesis defines irregular migration and piracy at sea, respectively.

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by an external 'force'. By force, I mean a concept that can bridge the divide between IHRL and LOS while simultaneously addressing the effects of these structural vulnerabilities.

As such, for the final step, I explore the concept of 'human security' as the external force to ensure both a conceptual and operational integration of IHRL and LOS. Oberleitner and Benedek agree that human security acts as a bridge between fields of international law that have traditionally been kept apart.[34] Similarly, the UN stresses the potential of human security to advance the interconnected pillars of peace and security, development, and human rights.[35] Thus, as a unifying concept, I argue that human security provides a common ground for balancing rights and security-based approaches to maritime security strategies, enhancing maritime security operations.[36] That common ground is protecting people. This forms the *telos* (aim and purpose) to integrate these two fields of law towards enhanced maritime security strategies.[37] This logic is not new, as Papanicolopulu already suggests this approach in her book.[38] However, where this thesis diverges from the existing scholarship is that it applies 'human security' as the theoretical framework for the protection of people at sea. Being an existing approach within the UN, adopted by States/governments, and complementary to both security and rights frameworks, human security fits the purposes of this thesis.[39] In doing so, I do not propose that human security should replace the existing legal frameworks.[40] Instead, I argue that human security is a conceptual and operational approach that can assist the two frameworks in better protecting people at sea.[41]

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[34] Gerd Oberleitner, 'Human Security: A Challenge to International law?' (2005)11 Global Governance 185, 197; see also Wolfgang Benedek, 'Human Security and Human Rights Interaction' (2008) 59(1) International Social Science Journal 7,11.

[35] UNGA, 'Follow-up to General Assembly resolution 66/290 on Human security Report of the Secretary-General' (23 December 2013) UN Doc A/68/685 [hereinafter called 'The 2013 UNGA Report'], Para. 3. stresses the potential of human security to advance the interconnected pillars of peace and security, development, and human rights

[36] For more on the usefulness of human security to both rights and security interests, see Kanti Bajpai, 'Idea of Human Security' (2003) 40(3) International Studies 195, 199; see also Oberleitner (n 34) 191; see also Saul Takahashi, *Human Rights, Human Security, and State Security: The Intersection* (Praeger, 2014).

[37] *Telos* means the object and purpose of a norm, rule, or law.

[38] Papanicolopulu (n 17) 210-245 here Papanicolopulu argues that the international protection of people is an emerging legal regime that finds expression within international law; specifically, law of the sea and international human rights law.

[39] This thesis specifically follows the 2013 UNGA Report (n 35); and UNGA, 'Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome' (25 October 2012) UN Doc A/RES/66/290 [hereinafter called 'The 2012 UN Resolution']. More about this is explored further below in this chapter.

[40] Papanicolopulu (n 17)

[41] The viability of human security is outlined in the 2013 UNGA Report (n 35); see also 2012 UN Resolution (n 39); see also Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Hart Publishing, 2016)124-49; see also Monica den Boer and Jaap de Wilde (eds.), *The viability of Human Security* (Amsterdam University Press, 2008) 182.

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The human security approach puts "individuals at the centre of the analysis and action".[42] People at sea, being the focus of this thesis, are in a peculiar situation because of the nature of the marine environment, the operational consequences of MSOs to human rights and the existing structural legal vulnerabilities. These factors are the rationale for the application of the human security approach based on its conceptual and operational compatibility with MSOs, IHRL, LOS and the usefulness of human security in identifying and addressing the adverse effects of the structural issues. In this thesis, I explore human security as a useful tool that generally engages with the structure of IHRL and LOS and, more specifically, their impact on maritime insecurities. I draw from Newman's insight on the relevance of human security to the critical analysis of security studies.[43] To Newman, human security is valuable when it makes an adequate differentiation between "what it claims the world is like and what it would like the world to be like" after an in-depth analysis into the cause-effect of human insecurities within the existing norms, structures and institutions.[44]

Interestingly, to Martin and Owen, the usefulness of a human security approach requires that it "must be seen as both a goal and a means, both a strategic framework and a tactical doctrine", and that clarity in its application is a pre-requisite.[45] Drawing from Newman, Martin and Owens' proposition, I place human security at the centre of this thesis by using it as an analytical tool in steps one and two (set out above), meaning that each chapter of this thesis identifies the structural vulnerabilities within the law (IHRL and LOS) regarding MSOs through the prism of human security. Later, I address these issues in chapters five and six through a human security lens, illustrating the usefulness of human security as an operational tool. In the methodology section of this chapter, I outline how this is done by defining the applicable tenets of human security within this thesis. This highlights the uniqueness, novelty, and imaginativeness of this thesis.

[42] Shahrbanou Tadjbalkhsh, 'Human Security: Concepts and Implications, with an Application to Post-Intervention Challenges in Afghanistan' (2005) Les Etudes du CERI, 53; UN SG, *We the Peoples: The Role of the United Nations in the 21ST Century* (UN Department of Public Information United Nations 2000) 7 '[n]o shift in the way we think or act can be more critical than this: we must put people at the centre of everything we do' < We_The_Peoples.pdf (un.org) > accessed 1 November 2021.
[43] Edward Newman, 'Critical Human Security Studies' (2010) 36(1) Review of International Studies 77, 93.
[44] Ibid 93-4.
[45] Mary Martin and Taylor Owen, *Routledge Handbook of Human Security* (1st edn, Routledge 2013) 222.

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Only a few scholars have engaged with human security as an analytical tool,[46] and various Governments and the UN use it as a policy tool.[47] Yet never has human security been considered a tool that questions and addresses the disconnect between IHRL and LOS concerning MSOs. This thesis explores a new perspective provided by the human security agenda. The next part of this chapter sets out the general structural vulnerabilities within IHRL and LOS vis-à-vis maritime security affecting people at sea and how human security will be deployed to deal with these vulnerabilities.

1.2 The *status quo*

This section defines key concepts used in this thesis as well as identifies existing difficulties impacting the interaction between IHRL and LOS vis-à-vis maritime security and maritime security operations. In other words, it elucidates the background and scope of the structural problems affecting people at sea.

1.2.1 International law: Law of the sea and human rights law

Human rights are rights inherent to all human beings. IHRL is a field of international law made up of various treaties, instruments and case law that stipulates these human rights and delineates the relevant obligations, derogations, and limitations. This thesis engages with several international human rights instruments and other texts that specify human rights obligations. At the global level, treaties of particular relevance to this thesis are: the Universal Declaration of Human Rights (UDHR),[48] the Convention Relating to the Status of Refugees,[49] the International Covenant on Civil and Political Rights (ICCPR),[50] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[51] the Convention against Torture and Cruel,

[46] Rihards Bambals, 'Human Security: An Analytical Tool for Disaster Perception Research' (2015) 24(2) Disaster Prevention and Management 150,150-65; see also Dmitry Baluev et al, 'Human Security Concept as an Analytical Framework for the Study of Asymmetric Conflict' (2017) <http://www.revistaespacios.com/a17v38n44/a17v38n44p28.pdf> accessed 1 November 2021; see also Albie Sharpe, Husna Razee & Anthony B. Zwi 'Did human security forget the humans? Critically assessing evaluations of interventions with a human security dimension in Sri Lanka' (2020) 20(4) Conflict, Security & Development 467, 467-95.

[47] See, the 2013 UNGA Report (n 35); see also 2012 UN Resolution (n 39).

[48] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA. Res, 217 A(III).

[49] Convention Relating to the Status of Refugees, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, and its 1967 Protocol [hereinafter, together referred to as the 1951 Refugee Convention].

[50] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[51] International Covenant on Economic, Social and Cultural Rights (adopted 16 December1966, entered into force 3 January 1976) 993 UNTS 3.

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Inhuman or Degrading Treatment or Punishment (CAT),[52] and the Convention on the Rights of the Child (CRC).[53] Other relevant instruments at the regional level are the European Convention on Human Rights (ECHR),[54] Charter of Fundamental Rights of the European Union (CFREU),[55] the American Convention on Human Rights (Pact of San Jose),[56] and the African Charter on Human and Peoples' Rights (ACHPR).[57] Among all these instruments, the ECHR has increasingly been interpreted to apply to different maritime security challenges at sea.

On the other hand, the LOS is a field of international law that governs the 'maritime domain'. The maritime domain is predominantly defined as all areas and things of, on, under, adjacent to, or bordering on, the sea, ocean, or other navigable waterways, including maritime-related activities, infrastructure, people, cargo, ships, and other conveyances.[58] This thesis interacts with several international and regional maritime conventions. However, I interpret the UN Convention on the Law of the Sea (UNCLOS) as the constitution of the oceans and the most important source of the international legal framework on the law of the sea.[59] UNCLOS is the *"grundnorm"* for governing the seas as it provides rules that govern most ocean activities and procedures for resolving competing and overlapping uses.[60]

Against this background, it is evident that LOS and IHRL are structurally different and consist of different legal instruments. These instruments vary in nature and application. Inherently, the adjudicatory bodies interpreting human rights treaties are tasked with balancing individual and State interests. By contrast, adjudicatory bodies interpreting the LOS are tasked with balancing "the competing interests of two states rather than the interests of an individual and those of a state."[61] For example, in the *Arctic Sunrise* case, concerning Russia's maritime interception

[52] 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.
[53] Convention on the Rights of the Child (adopted and opened for signature on 20 November 1989, entered into force 2 September 1990) 3 UNTS 1577.
[54] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 231.
[55] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
[56] Organization of American States, American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.
[57] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS. 217.
[58] Christian Buerger, 'From Dusk to Dawn? Maritime Domain Awareness in Southeast Asia' (2015) 37(2) Contemporary Southeast Asia 157,160.
[59] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; see also Robin R Churchill, "*The 1982 United Nations Convention on the Law of the Sea*" In Donald R Rothwell et al, *'Oxford Handbook of the Law of the Sea'* (Oxford University Press, 2015).
[60] Ibid.
[61] *Mangouras v. Spain* App no. 12050/04 (ECtHR, 28 September 2010) para 46.

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operation of the Arctic Sunrise vessel, crew members' subsequent detention constituted a violation of the right to liberty and freedom of expression (Articles 9 and 12 of the ICCPR, respectively).[62] Yet, the International Tribunal on Law of the Sea (ITLOS) did not interact with these human rights provisions because it was outside the scope of its jurisdiction.[63]

Within the bigger picture, the variation between these two fields of international law feeds into the fragmentation within international law and subsequently impacts the concept of maritime security. The evolution of different subfields of international law, proliferation of international organisations, and different sources of international norms influence fragmentation within international law.[64] Fragmentation occurs through law-making at the national, regional, or international level and the application of international law. The former is by creating various "special treaty-regimes", while the latter is the varying interpretation given to international law provisions. There is a divergence of opinion regarding the implications of fragmentation within international law. Some scholars focus on its benefits[65] others focus on its negative effects.[66]

Nonetheless, there have been progressive discussions around the application of the principle of systemic integration, a technique recognised by the International Law Commission (ILC) as a means to deal with fragmentation.[67] Systemic integration seeks to avert apparent conflicts of norms through an interpretation which in turn leads to the harmonisation of rules of international law.[68] Consequently, the interpreter (usually an adjudicatory body) uses systemic integration to identify applicable laws, interpret them, and apply them to the issues.[69] Article 31(3) (c) Vienna Convention on the Law of Treaties (VCLT) formally expresses this principle

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[62] *The Arctic Sunrise Arbitration (The Kingdom of the Netherlands v The Russian Federation*) (Merits) PCA Case No 2014-02 (14 August 2015); for an in-depth analysis see, Alex G. Oude Elferink, 'The Arctic Sunrise Incident: A Multifaceted law of the sea case with a Human Rights Dimension' (2014) 29(2) The International Journal of Marine and Coastal Law 244, 244-89.
[63] Ibid *The Arctic Sunrise* case, para. 198.
[64] Peters (n 3) 673.
[65] Charney (n 3) 700; see also Boyle and Chinkin (n 3) 263; see also Bruno Simma, 'Universality of International Law from the Perspectives of a Practitioner' (2009) 20 European Journal of International Law 265, 265; see also Bruno Simma, 'Fragmentation in a Positive Light' (2003) 25 Michigan Journal of International Law 845, 846; see also Jonathan I Charney "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 *Recuiel des Cours* 101, 161; see also Peters (n 3) 682.
[66] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) Modern Law Review 1, 4-5; Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 24 Michigan Journal of International Law 849, 854-63; Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28(4) Leiden Journal of International Law 863, 863-85.
[67] ILC 'Report of the Study Group of international law on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682.
[68] Campbell Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54(2) The International and Comparative Law Quarterly 279, 318.
[69] Ibid, see also Papanicolopulu (n 17) 75.

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of systemic integration,[70] which is popularly known as the "master key" to regime interaction.[71] Article 31(3)(c) provides that in interpreting a treaty, the body interpreting shall take into account "any relevant rules of international law applicable in the relations between the parties."[72]

The principle of systemic integration allows an interpreter to interact with various relevant laws. Due to the variation of interpretation within IHRL, especially non-context specific application of other treaties, Rachovitsa warns that "systemic integration is neither the ultimate answer to difficulties arising from the fragmentation of international law nor a problem-free interpretive technique".[73] One limitation to the systemic integration technique is that it is not applicable when relevant laws are non-existent.[74] This is the reason why Papanicolopulu using the systemic integration principle, tried to develop a novel framework called the "international protection of people at sea" to facilitate regime interaction and systemic integration of international human rights law, the law of the sea and other relevant maritime law conventions necessary to protect people at sea.[75] However, Harrison criticises the framework's premise and arguments as "unclear and inconclusive".[76] This buttresses Pauwelyn's point that no conflict avoidance technique can solve genuine conflicts.[77] Genuine conflict is when the interpretation or the implementation of a norm constitutes a breach of another norm.[78] Therefore, McLachlan concludes that the principle of systemic integration is "far from being a panacea for fragmentation".[79] Rachovista calls for a more 'creative' tool with "due appreciation of the contextual nuances in different treaties".[80]

On this basis, this thesis highlights these "genuine conflicts" and "non-existent" laws within IHRL and LOS vis-à-vis maritime security operations affecting people at sea, classifiable as

[70] Vienna Convention on the Law of treaties (VCLT) (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331.
[71] ILC Report (n 67) para 420.
[72] It is beyond the scope of this work to analyse this provision but for more details see Campbell Mclachlan (n 68).
[73] Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 International & Comparative Law Quarterly 557, 578.
[74] Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 289
[75] Papanicolopulu (n 17) 71-6.
[76] James Harrison, 'International Law and the Protection of People at Sea, written by Irini Papanicolopulu' (2019) 34(4) The International Journal of Marine and Coastal Law 825, 825-829.
[77] Joost Pauwelyn, *Conflict of Norms in Public International Law* (CUP Cambridge 2003) 272.
[78] Ibid.
[79] McLachlan (n 68) 318; see also Simma, 'Universality of International Law from the Perspectives of a Practitioner' (n 65) 277.
[80] Rachovitsa (n 73) 579.

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"maritime legal black holes".[81] I argue that the existence of these issues shows the insufficiency of a systemic integration between IHRL and LOS to achieve better protection of people at sea. Accordingly, chapter two shows that despite the necessity for synergy, the variation in interpretation of concepts within the subfields of IHRL and LOS creates legal uncertainties that constitute maritime legal black holes that impedes systemic integration. Chapters three and four explore this necessity for integration by identifying specific maritime legal black holes within IHRL and LOS vis-à-vis maritime security challenges that affect the protection of people at sea. Ultimately, the existence of maritime legal black holes means the systemic integration technique will be insufficient in this discourse because there will still be inadequate protection of people at sea. As such, chapter five proposes various clarifications and redefinitions within the perimeters of the fundamental principles of human security. These proposed interpretations do not necessarily resolve genuine conflicts but tackle the adverse effect of structural issues. Below are the definitions of genuine conflicts, also regarded as 'complexities and constraints' or 'structural vulnerabilities' throughout the thesis.

i. *Legal uncertainties*

Feldman and Lifshitz define legal uncertainties as the "inevitable by-product of vague legal standards that may be justified by the prohibitive cost of creating bright-line rules or by the inability of the legislature to account ex ante for the complexity of a particular situation."[82] There are two types of legal uncertainties: one comes from the vagueness of laws, and the other has to do with the relationship between laws.[83] In other words, the source of legal uncertainties are objective and subjective: the objective is when the content of the law results in uncertainty.[84] In contrast, the subjective is when the interpretation or application of the law constitutes a source of uncertainties.[85] In this thesis, both are important to understanding how IHRL and LOS create spaces where individuals at sea are unprotected.

The major legal uncertainties at sea are highlighted in chapter two: these are, the varying interpretation and application of foundational concepts (sovereignty, jurisdiction, obligations,

[81] Mann (n 28) 369.
[82] Yuval Feldman and Shahar Lifshitz, 'Behind the Veil of Legal Uncertainty' (2011) 74(2) Law and Contemporary Problems 133, 133.
[83] Orlin Yalnazov, 'Two Types of Legal Uncertainty' (2018) 10 (2) European Journal of Legal Studies 11, 11-45.
[84] Gerrit Betlem, 'The Doctrine of Consistent Interpretation: Managing Legal Uncertainty' (2002) 22 (3) Oxford Journal of Legal Studies 397, 397-418.
[85] Anthony D'Amato, 'Legal Uncertainty' (1983) 73(1) California Law Review 1,1 recognises that legal uncertainties is both in content and application of rules and principles; see also Davis E Kevin, 'The Concept of Legal Uncertainty: Definition and Measurement' (2011) SSRN Electronic Journal 1, 5-6.

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and applying human rights law to maritime security operations). I argue that this lack of uniformity causes a gap in protecting people at sea. In addition, some of the legal uncertainties discussed in chapters three and four arising from the content of the law constitute maritime legal black holes that affect the protection of people.

ii. Maritime legal black holes

The metaphoric reference to a "black hole" in the legal context became prevalent after the 9/11 attack, specifically regarding the detention of terrorist suspects in Guantánamo Bay.[86] In *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, the English Court of Appeal described Guantánamo Bay as a legal black hole.[87] The Court held that the US had violated Mr Abbasi's fundamental rights when the US government detained him in Guantánamo Bay without a hearing. [88]

The US uses its naval station at Guantánamo Bay, Cuba, as a detention centre for alleged terrorists. Guantánamo Bay is part of Cuba's sovereign territory controlled by the US but does not fall under either State's legal system. Hence, the description that it is a legal black hole. In 1903 the Cuban government leased Guantánamo Bay to the US. While the Cuban government has relinquished its authority over the area, the US government has claimed that it lacks sovereignty and complete jurisdiction over the territory.[89] In *Rasul v. Bush*, the US Supreme Court held that US courts had jurisdiction to hear claims for habeas corpus in relation to prisoners at Guantánamo Bay by the mere fact that the State was holding them.[90]

Similarly, the Inter-American Commission on Human Rights observed that for the purposes of applicability of the American Declaration of the Rights and Duties of Man, individuals held at Guantánamo Bay were under the "authority and control" of the US.[91] Subsequently, in 2008,

[86] Mann (n 28) 349-50. For more about the Guantánamo Bay situation see Johan Steyn, 'Guantánamo Bay: The Legal Black Hole' (2014) 53 The International and Comparative Law Quarterly 1, 1-15.
[87] [2003] UKHRR 76, para 64- 'We do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a legal black hole'.
[88] Ibid.
[89] Michael J. Strauss, 'The Creation and Evolution of the Legal Black Hole at Guantánamo Bay' (Nov 30, 2010) <https://www.ascecuba.org/asce_proceedings/creation-evolution-legal-black-hole-Guantánamo -bay/> accessed 1 November 2021.
[90] 542 U.S. 466 (2004).
[91] Inter-American Commission on Human Rights, Precautionary Measures in Guantánamo Bay, 12 May 2002, ILM, Vol. 41 (2002) 532.

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in *Boumediene v. Bush*, the US Supreme Court stated that the US constitution applies to the territory.[92] Nonetheless, the application of the US constitution is on a case by case basis.[93]

Lord Johan Steyn turned to history to elucidate how States carrying out security-based measures create legal black holes. One of them is Guantánamo Bay, an area where there is a violation of fundamental rights without any avenue for a remedy.[94] Similarly, Koh identifies how Guantánamo Bay influences other States to deviate from the accepted legal procedure to deal with security threats.[95] In his words, States "have given cover to many foreign governments who want to use 'anti-terrorism' to justify their own crackdowns on human rights."[96]

In the maritime context, after the 9/11 attacks and the creation of the Guantánamo Bay detention facilities, the Australian Government passed legislation to give effect to the "Pacific Solution" − an offshore migrant detention policy that excised more than 3,000 islands from the authority of the Australian Government.[97] The Pacific Solution also introduced the transfer of asylum seekers and 'boat people' to detention centres located on islands such as Nauru and Papua New Guinea (the Manus Islands).[98] Additionally, the Australian Government started Operation Sovereign Borders that intercepted migrants' boats and took them to the detention centres.[99] All these measures restricted asylum seekers from seeking an adequate remedy.[100] Nonetheless, there was leeway in 2016, when the Papua New Guinea Supreme Court ordered the closure of the Manus Island Regional Processing Centre on constitutional grounds, ordering:

> The Australian and Papua New Guinea governments shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the

[92] 553 U.S. 723 (2008).
[93] Strauss (n 89).
[94] Steyn (n 86) 1-15.
[95] Harold Hongju Koh, "The United States and Human Rights After September 11th" John Galway Foster Lecture, University College London, October 21, 2003,<http://www.rothschildfostertrust.com/materials/lecture_koh.pdf> accessed 1 November 2021.
[96] Ibid.
[97] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 116; see also Mann (n 28) 352; see also The Australian Migration Amendment 'Excision from Migration Zone' Act 2001.
[98] Mann (n 28) 352.
[99] Operation Sovereign Borders, <https://osb.homeaffairs.gov.au/> accessed 1 November 2021.
[100] Maarten Den Heijer, 'Europe and Extraterritorial Asylum' (DPhil thesis, Leiden University, 2011) 277-294.

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> continued breach of the asylum seekers or transferees Constitutional and human rights.[101]

Mann describes the US approach to Guantánamo Bay as the "counter-terrorism legacy" of a legal black hole that facilitated the second legacy, i.e. the Australian situation, which he called the "migrant-detention legacy".[102] Gammeltoft-Hansen describes this situation as "jurisdiction shopping", where States try to escape their legal obligations.[103] However, a third legacy relevant to this thesis is the 'maritime legal black hole', a term coined by Mann to mean an area at sea outside State jurisdiction where States' legal obligations are non-functional.[104]

The differentiating factor between this legacy and the rest is that maritime legal black hole's stems from the fragmentation within international law.[105] The counter-terrorism and detention legacies are legal gaps in protection knowingly created by States. In contrast, maritime legal black holes are unintended legal gaps in protection flowing from international law itself.[106] The consequences of maritime legal black holes analysed by Mann is *de jure* rightlessness. *De jure* rightlessness is when the structure and nature of international law allow rightlessness, where there is neither specified *de jure* rights nor *de jure* enforcement. In such a case, it goes beyond just a gap in the law which can be rectified by subsequent laws/policies.[107] The *de jure* rightlessness is apparent within the LOS framework applicable to irregular maritime migrants where there are duties without corresponding rights.[108] Besides *de jure* rightlessness, this thesis also shows there is *de facto* non-enforcement: a situation where the legal uncertainties in the law impede counter-operations necessary to ensure the protection of people. *De facto* non-enforcement is apparent within the LOS framework on maritime piracy. The legal uncertainties can arguably be considered a contributor to States' neglect or refusal to effectively deal with piracy.

Maritime legal black holes are also structural vulnerabilities within the law. Within the IHRL framework, the main issue is the concept of jurisdiction, which regulates State obligations. Besson notes that without jurisdiction, "there are no human rights applicable and hence no

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[101] *Namah v. Pato*, [2016] PJSC 13 (Apr. 26, 2016), para. 74(6).
[102] Mann (n 28) 349.
[103] Gammeltoft-Hansen (n 97) 31.
[104] Mann (n 28) 357; this thesis takes on Mann's definition of a maritime legal black hole but explicitly illustrates how it is both a physical and legal space (see chapter 5 section 5.3.2.1). Also, I extend Mann's work by discussing the issue of *de facto* non-enforcement in relation to piracy at sea (see chapter 4).
[105] Ibid 366-7.
[106] Ibid.
[107] Ibid 352.
[108] Chapter four of this thesis explores *de jure* rightlessness in detail.

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duties, and there can be no acts or omissions that would violate those duties that can be attributed to a State and *a fortiori* no potential responsibility of the State for violating those duties later on".[109] Thus, the absence of jurisdiction creates an area where persons are rendered unprotected.[110] In *Medvedyev and others v France*, the ECtHR stated that:

> The special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.[111]

The above *Medvedyev* case suggests that maritime legal black holes do not exist if a State has jurisdiction over a particular incident. But it is the interpretation of jurisdiction itself which causes the problem.[112] Maritime legal black holes are part of the *status quo*, which causes legal gaps in protecting people at sea.

The way forward, according to Mann, is to tackle maritime legal black holes from the perspective of the vulnerable individual,[113] through a 'specific mode of analysis' that examines the international legal framework stymying the protection of people.[114] This thesis uses human security as the tool that identifies and addresses legal gaps affecting the protection of people at sea. These people most affected by the friction between MSOs and IHRL are the focal point of this thesis. Besides legal uncertainties, the next section discusses the overall maritime security framework but observes that the state-centred nature of the maritime security framework also causes friction between MSOs and IHRL.

1.2.2 Maritime security operations

UNCLOS does not provide a clear definition of maritime security but references the notion of 'security'.[115] The term 'maritime security' gained prevalence in the 1990s after the end of the Cold War. However, before that, it was generally used in reference to sea power (i.e. in the

[109] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) Leiden Journal of International Law 857, 867.
[110] Mann (n 28) 368.
[111] *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010) para 81.
[112] Chapter three of this thesis explore *de facto* non-enforcement in detail.
[113] Mann (n 28) 371.
[114] Ibid 369.
[115] Sofia Galani and Malcolm D. Evans, 'The interplay between maritime security and the 1982 United Nations Convention on the Law of the Sea: Help or hindrance?' in Malcom D. Evans & Sofia Galani (eds), *Maritime Security and the Law of the Sea: Help or Hindrance?* (Edward Elgar, Cheltenham, 2020) 8–11; Natalie Klein, *Maritime Security, and the Law of the Sea* (OUP, Oxford, 2011) 2–11.

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naval context).[116] Although existing literature has identified some generic features of maritime security, there is no universal definition of the term.[117] Consequently, Bueger describes maritime security as a 'buzzword' with no definite meaning, which is best understood through an eclectic mix of other relational concepts.[118] Maritime security is a multivocal concept that incorporates different dimensions/concepts that interact with each other. These dimensions are national security (the concept of sea power), the marine environment (the concept of maritime safety), economic development (the concept of the blue economy),[119] and human security (the protection of people).[120]

The national security dimension represents the traditional view of maritime security as sea power (i.e. naval forces) to protect national interests. One of the major actors in maritime security is the naval force which creates the link between maritime security and sea power. In securing the maritime domain, the warships or law enforcement vessels secure a State's own territorial jurisdiction and engage in countering illegal activities in areas outside national jurisdiction. The maritime safety dimension of maritime security addresses issues concerning the safety of persons, ships, maritime installations, and environmental concerns (such as the protection, prevention and response to oil spills, shipwrecks, etc.) The impact of illegal activities at sea on the safety of persons at sea and the marine environment creates the link between maritime safety and maritime security. The blue economy dimension of maritime security stems from the commercial value of fishing and shipping, including the economic potential of offshore resources such as seabed mining and coastal tourism. Indeed, a secured maritime environment is a precondition for sustaining the value and security of the resources

[116] Basil Germond, 'The geopolitical dimension of maritime security' (2015) 54 Marine Policy 137, 138.
[117] Christian Bueger, 'What is maritime security?' (2015) 53 Marine Policy 159, 160.
[118] Ibid 160; see also Germond (n 116) 138.
[119] There are several definitions of blue economy, but Smith-Godfrey gives a succinct definition, see. S. Smith-Godfrey, 'Defining the Blue Economy, Maritime Affairs' (2016) 12(1) Journal of the National Maritime Foundation of India 58, 60 defines blue economy as "the sustainable industrialisation of the oceans to the benefit of all".
[120] Bueger (n 117) 161; see also Christian Bueger and Timothy Edmunds, 'Beyond sea blindness: A new agenda for maritime security studies' (2017) 93 International Affairs 1293, 1293–1311.

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from the ocean.[121] Finally, the human security dimension of maritime security covers the protection of people at sea from all maritime insecurities.[122]

To ensure that all aspects of the maritime environment are secured, State agents conduct maritime security operations. These operations include those conducted against threats such as 'piracy, slavery, people smuggling, illegal immigration, drug smuggling, arms smuggling, terrorism and the proliferation of weapons of mass destruction; as well the protection of the maritime environment, including fisheries.'[123] US doctrine similarly cites, as examples of MSOs, 'missions to counter maritime-related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne immigration.'[124] MSOs also include "assisting mariners in distress, participating in security cooperation operations with allies and partners, sharing situational awareness, and conducting maritime interception and law enforcement operations".[125]

UNCLOS provides States with jurisdiction over these threats, forming the legal basis for MSOs. Chapters three and four discuss the provisions under UNCLOS related to irregular maritime migration and piracy at sea. However, this jurisdiction is subject to the maritime zones where the threat occurs. It is also subject to other rules of international law, including IHRL.[126] Article 53 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) *inter alia* provides that countermeasures shall not affect the

[121] Ibid Bueger 161; see also Michelle Voyer, Clive Schofield, Kamal Azmi, Robin Warner, Alistair McIlgorm & Genevieve Quirk, 'Maritime security and the Blue Economy: intersections and interdependencies in the Indian Ocean' (2018) 14(1) Journal of the Indian Ocean Region 28, 42, shows the intersection between maritime security and blue economy which is summarised into two: maritime security as an enabler of blue economy and sector within the blue economy sector.

[122] UNDP, *Human Development Report 1994: New Dimensions of Human Security* (Oxford University Press 1994) [herein after referred to as '1994 UNDP Report'] 25-33, this report grouped the threats to human security into seven categories: economic, food, health, environmental, community, personal and political security. Economic security refers to an individual's enjoyment of an assured basic income through employment or a public safety net. Food security requires that all individuals have both physical and economic access to basic food. Health security refers to individuals' freedom from various diseases, debilitating illnesses, and access to health care. Environmental security refers to the integrity of land, air, and water, which make human habitation possible. Personal security refers to individuals' freedom from crime and violence, especially women and children, who are more vulnerable. Community security refers to cultural dignity and to inter-community peace within which an individual lives and grows. Finally, political security requires the priority of the human rights of all people.

[123] UK Ministry of Defence, 'British Maritime Doctrine' (JDP 0-10, August 2011) (British Maritime Doctrine) 235

[124] US Joint Chiefs of Staff, 'Command and Control for Joint Maritime Operations' (JP 3-32, 7 August 2013) (JP 3-32) I-4.

[125] Ibid 1-4

[126] UNCLOS (n 59) Articles 2(1), 21(1), 34(2), 58(3), 87(1), 138, 293(1).

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obligations to protect fundamental human rights and obligations of a humanitarian character.[127] The International Court of Justice (ICJ) in the *Gabčíkovo-Nagymaros* case observes that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[128] Moreover, all individuals are guaranteed to enjoy fundamental human rights. The ICJ in the case concerning *Ahmadou Sado Diallo* stated that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.[129]

Furthermore, there have been developments that illustrate the existence of the human rights framework in maritime security. The UN debates concerning the relationship between measures to combat terrorism and respect for fundamental human rights ushered in modifications to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) to include human rights law, refugee law, and international humanitarian law.[130] Also, the UN Security Council, in its binding resolutions on piracy off the coasts of Somalia, have consistently required States' countermeasures to be compliant with IHRL.[131] Accordingly, MSOs ought to align with IHRL.

MSOs entail a combination of both preventive (e.g. port regulation) and responsive measures (e.g. counter-piracy measures) to 'protect the maritime domain against threats and intentional unlawful acts.'[132] The inclusion of 'preventive and responsive measures' aims to cover both

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[127] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts UN Doc A/56/10 Supplement No, GA 56TH Session (2001) [Hereinafter referred to as "Draft Articles"]; Article 53 provides that Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law.

[128] Case concerning *the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ. Rep 7, p. 56, para. 85.

[129] Case concerning *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections [2007] ICJ 582, 599 para 39.

[130] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 U.N.T.S. 221 [Hereinafter referred to as the SUA Convention].

[131] UNSC Res 2500 (4 December 2019) UN S/RES/2500.

[132] Del Pozo et al., 'The Wise Pen Team Final Report to EDA Steering Board' (26 April 2010) Maritime Surveillance in Support of CSDP, <http://www.offnews.info/downloads/wisePenReportApril2010.pdf accessed 5/2/2021> accessed 1 November 2021; see also Lutz Feldt et al., 'Maritime security – Perspectives for a comprehensive approach' (2013) ISPSW Strategy Series: Focus on Defense and International Security <https://www.files.ethz.ch/isn/162756/222_feldt_roell_thiele.pdf > accessed 1 November 2021.

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the law enforcement aspect of maritime security (non-military State agents) and the defence aspect (State military agents).[133] There is no universally accepted definition of the term 'maritime security operation'. However, McLaughlin defines 'maritime law enforcement', which can be considered a synonym of MSO, as actions taken "to enforce all applicable laws regarding the conduct or consequences on, under and over international waters, and in waters subject to the jurisdiction of the state".[134] These operations involve "authorisations for law enforcement agents and authorised vessels to deal with other vessels (and the people and cargoes within) – including, in many situations, foreign vessels and nationals – by taking action at sea (and subsequently, ashore) in order to enforce the relevant laws".[135]

i. Maritime security strategies

This subsection shows that maritime security strategies (MSS) are predominantly state-centred and focused more on State security interests which affect the protection of people's rights at sea. Besides the legal uncertainties (explored in sub-section 1.2.1), this section argues that the friction between MSOs and IHRL affecting people at sea is influenced by the state-centric nature of MSS. On this note, a better understanding of the current MSS highlights the nature and objectives of the MSOs. The current MSS availed by international and State actors can be categorised into three 'generations'. The first two 'generations' are predominantly state-centric and adopt mainly security-based approaches.[136] The more recent third 'generation' strategies adopt a human-centric approach, but there is limited State practice of such strategies.[137] Thus, maritime security and enforcement operations generally tilt towards LOS, a state-centric framework instead of the IHRL framework.[138] So it would appear that State interest remains at the core of maritime security and its operations.[139] These three generations are classified as follows:

[133] Ibid Del Pozo, et al (2010) 45-6.
[134] Rob McLaughlin, 'Authorizations for maritime law enforcement operations' (2016) 98 International Review of the Red Cross, 465, 466.
[135] Ibid.
[136] Isabel Lirola-Delgado, 'Maritime security strategies from a Gender Perspective: Implications for United Nations SDG 5 implementation' (2019) 18 World Maritime University Journal of Maritime Affairs 537, 537-55.
[137] Timothy Walker, 'Reviving the AU's maritime strategy. Institute for security studies' (2017) 96 Policy Brief <https://issafrica.s3.amazonaws.com/site/uploads/policybrief96.pdf > accessed 1 November2021; see also Pieter Brits and Michelle Nel, 'African maritime security and the Lomé Charter: Reality or dream?' (2018) 27 African Security Review 226, 226-44.
[138] Goddard (n 15).
[139] Klein (n 115) 2.

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a. The first-generation MSS adopts a hard security approach focused on using the military for deterrence and defence.[140] This follows the traditional view of maritime security, which is sea power (naval forces) to protect national interests. In 2005, a few years after the 9/11 terrorist attacks, the US Federal government adopted their maritime security strategy to secure their maritime domain. The US maritime security strategy (USMSS) is based on the traditionalist approach that prioritises deterrence. It states that "defending against enemies is the first and most fundamental commitment of the United States Government."[141] To supplement this, in 2015, the US Government released the Asia-Pacific Maritime Security Strategy (APMSS) based on the importance of the Asia-Pacific maritime domain to the security of the US.[142] Like USMSS, the APMSS follows the same traditional view to "ensure continued freedom of the seas, deter conflict and coercion, and promote adherence to international law and standards."[143] The 2015 Indian Maritime Security Strategy (IMSS) also adopts a strong military approach. The IMSS *inter alia* aims to deter conflict and coercion against India through the conduct of maritime military operations.[144]

Prior to this, the North Atlantic Treaty Organisation (NATO) released their Alliance Maritime Strategy (AMS) in 2011, which prioritises deterrence and collective defence, alongside issues such as crisis management and co-operative security, and thus continues to emphasise 'hard' naval power together with more diffuse maritime security tasks.[145] Ultimately, the focus of these first-generation MSS is on power and domination of the sea. Through this lens, maritime security is solely based on a mixture of national security and economic dimensions. The Australian Maritime Security Strategy (AMSS) pushes the frontier of their military presence at sea beyond "sea

[140] Ibid 7.
[141] US National Strategy for Maritime Security [hereinafter referred to as "US Strategy"] at 7 <https://www.hsdl.org/?view&did=456414 > accessed 1 November 2021.
[142] The Asia-Pacific Maritime Security Strategy (2015) <https://dod.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_SecuritY_Strategy-08142015-1300-FINALFORMAT.PDF > accessed 1 November 21.
[143] Ibid 35.
[144] Indian Maritime Security Strategy (2015) at 10 <https://www.indiannavy.nic.in/sites/default/files/Indian_Maritime_Security_Strategy_Document_25Jan16.pdf > accessed 1 November 2021.
[145] NATO Alliance Maritime Strategy (2011) [hereinafter referred to as "NATO strategy"] <https://www.nato.int/cps/en/natohq/official_texts_75615.htm> accessed 1 November 2021.

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power" to "sea denial" and "power projection".[146] Thus, the goal of the AMSS is to control the sea to the extent that the Australian Government controls onshore.

b. The second-generation MSS adopts more of a soft security approach. This approach is described as soft security because it is a mixture of civil-military cooperation and coordination., unlike the first-generation MSS, which is based on the traditional naval power presence at sea. Also, the second-generation MSS references human rights and considers the interests of people. It focuses on protection, restructuring and reconstruction. An example is the 2014 European Union Maritime Security Strategy (EUMSS), which emphasises Europe's maritime interests and is fundamentally linked to people's well-being, prosperity, and security.[147] The EUMSS conceptualises maritime security as "a state of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed, and citizens, infrastructure, transport, the environment and marine resources are protected."[148] Within the EU, France and Spain's national maritime security strategies reference human rights and the protection of human lives, respectively.[149] However, their approach to maritime security is still state-centric, like the EUMSS. As noted by Baird, the EU strategy shows that "the discussion of sovereign rights concerns of member States far outweighs the concerns of human rights or fundamental rights of individuals and groups who will be impacted by the EUMSS".[150]

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[146] Australian Maritime Security Strategy (2004) <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/maritime/report/report.pdf> accessed 1 November 2021.

[147] Brendan Flynn, 'EU Maritime Security Strategy: A Neo-Medieval Perspective on the Limits of Soft Security?' (2016) 75 Croatian international Relations Review 9, 9-37; It is important to note that chapter three below regards the current counter measures deployed by the EU within the Mediterranean Sea against irregular migration as 'hard security' because it is mainly focused on deterrence and defence.

[148] The European Union Maritime Security Strategy (2014) <https://data.consilium.europa.eu/doc/document/ST%2011205%202014%20INIT/EN/pdf> accessed 1 November 2021; Basil Germond, *The Maritime Dimension of European Security: Sea power and the European Union* (Palgrave Macmillan, 2015) 91-125 discusses how the EU maritime security framework tilts more towards the objective of national security.

[149] See French National strategy for the security of maritime areas (2015) at 30 <https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2016/01/strategie_nationale_de_surete_des_espaces_maritimes_en_national_strategy_for_the_security_of_maritime_areas.pdf> accessed 1 November 2021; see also Spain National Maritime Security Strategy (2013) <https://www.dsn.gob.es/gl/file/329/download?token=9Y92D968 > accessed 1November 2021.

[150] Theodore Baird, 'Where is civil society in the EU's new Maritime Security Strategy? The new EU 'Maritime Security Strategy' neglects civil society and raises concerns over fundamental rights' (2014) <https://www.opendemocracy.net/en/can-europe-make-it/where-is-civil-society-in-eus-new-maritime-security-strategy/> accessed 1 November 2021.

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Similarly, part of the objective of the UK national strategy for maritime security (UKMSS) is to protect the UK and the Overseas Territories, their citizens, and economies.[151] Notwithstanding the UKMSS reference to citizens' interest, the strategy is state-centred and economy-focused. The UK National Strategy as a second-generation MSS is a blend of military and law enforcement agents, which means the UK MSS utilises the police, Border Force, the National Crime Agency (NCA), and the Royal Navy to enforce their criminal laws at sea to ensure maritime security.[152]

c. The third generation MSS adopts soft security within a human-centric approach encompassing all maritime security dimensions. This generation aims to address both the maritime insecurities and their grassroots issues. An example is the 2050 African Integrated Maritime Strategy (AIM Strategy) adopted in 2012, which embraces the ideals of "security, in particular, human security".[153] The AIM Strategy "require[s] a concerted application of a collective endeavour to enhance maritime viability frameworks; deploy layered approach through information sharing based on military sea power, law enforcement authorities, and private sector partners' competencies; pursue scientific research and development."[154]

The AIM strategy encourages African Union member States to have the individual at the core of their security strategy. It applies a human-centred approach to "foster increased wealth creation from Africa's oceans and seas by developing a sustainable, thriving blue economy in a secure and environmentally sustainable manner."[155] Therefore, the AIM strategy reifies the human security dimension of maritime security. The human dimension allows the AIM strategy to cover all other dimensions of maritime security and brings it in line with the 2030 UN Agenda on Sustainable Development.[156] Also, the AIM strategy acknowledges the role of more traditional national security, as it refers to 'increased national, regional and continental stability' and 'improving elements of maritime governance'.[157]

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[151] The UK National Strategy for Maritime Security (2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310323/National_Strategy_for_Maritime_Security_2014.pdf> accessed 1 November 2021.
[152] Ibid 11.
[153] African Union, 2050 African Integrated Maritime strategy (2012) <https://cggrps.com/wp-content/uploads/2050-AIM-Strategy_EN.pdf> accessed 1 November 2021.
[154] Ibid 32.
[155] Ibid.
[156] Isabel Lirola-Delgado (n 136).
[157] AIM Strategy (n 153) 11.

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> Following the AIM strategy, the Heads of State and Governments of the African Union (AU) adopted the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter). The Lomé Charter follows the AIM strategy model and adopts human security-based principles to maintain security/safety, ensure human protection, and secure the maritime environment and blue economy.[158] The AIM strategy and the Lomé Charter paints the picture that a human security dimension encompasses all other maritime security dimensions. However, the two instruments' success depends on their national implementation, which requires a "new way of thinking."[159] According to Brits and Nel, this new way of thinking requires shifting from the state-centric view to a more holistic approach.[160] This means that even though this third-generation MSS is based on human security, the state-centeredness of the various States party to the AIM strategy and Lomé Charter can frustrate the instruments' actual objective.[161]

Based on the above, maritime security strategies are predominantly state-centric, and thus, MSOs are state-focused and not individual-centred. This state-centeredness affects the protection of people at sea, as evidenced in case law, where the violation of rights occurs because the focus is not on the people but the preservation of State interests.[162] Another reason is that maritime security challenges are securitised – the framework is threat-focused and not individual-centred. This is pointed out in sub-section (ii) below, which reviews the current drawbacks of the state-centric securitisation framework.

ii. Securitisation: Maritime security operations

The securitisation framework gained relevance within security studies after the Cold War.[163] It is also relevant to the current structure of maritime security and operations and how it affects the IHRL framework at sea. As a result of the transboundary effect of maritime security challenges, maritime security is commonly regarded as a 'transnational task' requiring joint State cooperation by the international community.[164] The need for international cooperation became indispensable after the 9/11 attacks when the US and the international community

[158] Brits and Nel (n 137).
[159] Ibid 237.
[160] Ibid.
[161] Ibid.
[162] See above, section 1.1; see also below, chapter two.
[163] Bueger (n 117) 161.
[164] Ibid 163.

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recognised the complexities of maintaining order at sea.[165] As Admiral Michael Mullen, Chief of Naval Operations for the US Navy, noted in 2006:

> It is time to elevate the discussion of sea power. For far too long and in far too many ways, it has been about big-ship battles and high-tech weapons systems. Life is just not that simple anymore [...] we face entirely new challenges.[166]

Hayes described this development as a "co-operative global maritime security network that coordinates the activities of volunteer nations."[167] This co-operative framework proposed by the US was criticised mainly due to other States' suspicion of the US agenda.[168]

Nevertheless, this political debate grew and arguably moved "the maritime environment" into the securitisation framework.[169] Securitisation in security studies is a concept originally proposed by Buzan, Weaver and Wilde.[170] According to them, securitisation allows the securitising actor to break free of procedures or rules they are obligated to follow on the basis that securitised issues are perceived to be of such immediate importance above the conventional norms of the political debate.[171] The State acquires special rights to adopt extraordinary measures to protect itself.[172]

An issue becomes securitised when there is the acceptance that it is an existential threat to a referent object.[173] The referent object is a term used in security studies which means the object that is being threatened and needs to be protected. In security studies, this is often "the state, incorporating government, territory and society."[174] Even though security studies literature makes no reference to maritime security as a dimension of security,[175] answering the question of whether maritime security challenges qualify as an accepted existential threat gives a conclusive argument on the existence of a securitisation framework within maritime security. Therefore, what are these existential threats?

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[165] Bueger and Edmunds (n 120) 1298.
[166] Peter D. Haynes, *Toward a new Maritime Strategy: American Naval thinking in the Post-Cold War Era* (Annapolis, MD: Naval Institute Press, 2015) 201.
[167] Ibid 197.
[168] Bueger and Edmunds (n 120) at 1298.
[169] Ibid.
[170] Barry Buzan, Ole Wæver, Jaap de Wilde, *Security: A new framework for analysis'* (Lynne Rienner Publishers; 1998) 25.
[171] Ibid.
[172] Ibid 27; see also Klien (n 115) 5.
[173] Ibid.
[174] Buzan et al., (n 170) 21.
[175] Christian Beuger (n 116) 161.

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In 2019, due to the ongoing maritime security challenges, the UN Secretary-General report on oceans and the law of the sea noted that '… addressing criminal activities, including in the context of the broader category of transnational organised crimes at sea, remained a priority for the international community.'[176] These illegal activities, according to the 2019 UN Secretary General's report, are (1) piracy and armed robbery; (2) terrorist acts; (3) the illicit trafficking in arms and weapons of mass destruction; (4) the illegal trafficking of narcotics ; (5) smuggling and trafficking of persons by sea; (6) illegal, unreported and unregulated fishing; and (7) intentional and unlawful damage to the marine environment.[177]

Article 39 of the UN Charter places the duty to decide what constitutes an existential threat to the UN Security Council and defines such as threats as "any threat to the peace, breach of the peace, or act of aggression."[178] On 5 February 2019, the UN Security Council held a ministerial debate on the theme "Transnational organised crime at sea as a threat to international peace and security".[179] Consequently, the UN Security Council reiterated that it recognises transnational organised crimes at sea as a threat to international peace and security.[180]

Furthermore, other international actors and States have also identified these threats. For instance, the EUMSS extends the UN list to include *inter alia* cybersecurity, territorial maritime disputes, acts of aggression, armed conflict between States, potential impacts of disasters, extreme events, and climate change on the maritime transport system.[181] The USMSS broadly categorises the UN's list into five main maritime threats: nation-State threats, terrorist threats, transnational criminal and piracy threats, environmental destruction, and illegal seaborne immigration. Also, all MSS itemise the threats to maritime security and strategy to deal with them.

Consequently, it is widely accepted that illegal activities at sea can constitute an existential threat. Article 2(1) of the Vienna Convention on the Law of Treaties (VCLT) provides that "acceptance" of an act is a situation whereby "a state establishes on the international plane its

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[176] United Nations General Assembly, 'Oceans and the law of the sea Report of the Secretary-General' (11 September 2019) A/74/350, para 37.
[177] Ibid; see also United Nations. Oceans and the law of the sea. Report of the Secretary General, (10 March 2008) UN Doc A/63/63.
[178] Charter of the United Nations (UN Charter) (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[179] A documented record of the debate <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8457.pdf> accessed 1 November 2021.
[180] Yury Fedotov, 'Remarks at the Security Council debate on Transnational Organized Crime at Sea as a Threat to International Peace and Security' (5 Feb 2019), <https://www.unodc.org/unodc/en/speeches/2019/unsc-tocsea-050219.html > accessed 1 November 2021.
[181] European Union Maritime Security Strategy (n 148) 3-4.

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consent to be bound by a treaty."[182] Therefore, "consent to be bound" signifies acceptance of an issue: the acceptance of a treaty is the acceptance of the issues contained in the treaty, except where otherwise stated. The UN's list of threats is incorporated into several international treaties, such as UNCLOS (with 168 parties), which refers to piracy as a universal threat and promotes the protection and preservation of the maritime environment.[183] Others include the UN Convention against Transnational Organised Crimes (with 190 parties), which deals with people smuggling, human trafficking and illicit manufacturing and trafficking in firearms.[184]

Against this backdrop, it appears a vast majority of States have accepted the illegal activities at sea mentioned in the UN Secretary-General's reports as existential threats. This acceptance strongly indicates that securitisation of the maritime environment has taken place. Buerger has argued that securitisation is a "welcome development" in the maritime environment because it places maritime security as a priority in the international community.[185] However, one cannot ignore the adverse effects of securitisation as it promotes "extreme measures" and does not always lead to an "optimal and sustainable solution."[186] For example, reports show that the extreme measures of strengthening border control and criminalising humanitarian assistance at sea to address illegal migration have led to increased criminal activities and migrant deaths.[187] Also, EU States have violated the ECHR provisions during the detention at sea and subsequent transfer of criminal suspects.[188]

Ultimately, the securitised nature of MSS, regardless of the 'soft' security nature of the second generation of MSS, highlights a deficiency of IHRL in MSOs. The solution is not to do away with securitisation. According to Newman, the response to the detrimental consequences of securitisation should entail a demand for legitimate, accountable, and proportionate

[182] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series vol 1155 [hereinafter referred to as "VCLT"].
[183] UNCLOS (n 59) Article 105 gives universal jurisdiction to all States in respect to piracy.
[184] Convention against Transnational Organised Crimes (adopted 12 December 2000, entered into force 29 September 2003) 40 ILM 335. See also Convention against Illicit Traffic in Narcotics Drug and Psychotropic Substances (adopted 19 December 1988 entered into force 11 November 1990) 1582 UNTS 95 (190 parties) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (166 parties) and its 2005 protocol.
[185] Bueger (n 117) 161.
[186] Ibid 162.
[187] Sergio Carrera et al., "Fit for purpose? The Facilitation Directive and the Criminalisation of humanitarian assistance to irregular migrants: 2018 update" (2018) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels.
[188] Petrig (n 7) 126-8; see also Wilson (n 4) 269-70.

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securitisation, prioritising the 'human good of security' as a public good.[189] Thus, the goal of this thesis is not to preclude State security or securitisation under the LOS framework, but to align it with IHRL requirements. To demonstrate this, chapters three and four analyse two maritime security challenges: irregular migration at sea and maritime piracy. These two case studies show that maritime security is not a "fully articulated framework in its own right"; it should also incorporate relevant provisions from human rights law.[190] The proper balance between the security focus of MSS and the rights-based focus of the IHRL ensures better protection of people at sea.

1.3 Thesis structure and central argument

The *status quo* centres around two issues causing friction between MSOs and IHRL that negatively affect people at sea. First, maritime legal black holes and legal uncertainties within IHRL and LOS constitute a 'genuine conflict' arising from the fragmentation of international law and are therefore irresolvable by the current systemic integration technique set out in Article 31(3)(c) of the Vienna Convention. Second, maritime security strategies are predominantly state-centric, which affects the protection of people at sea. To deal with these issues, this thesis proposes human security as a conceptual and operational tool that can better investigate and address them. This section lays out 'how' human security can do this by discussing the aims and objectives and the methodology of this thesis, as well as the applicable tenets of human security in this thesis.

1.3.1 Aim, objectives, and structure of this study

This thesis aims to contribute a new perspective to the discourse on the integration of IHRL and LOS towards the better protection of people at sea. This thesis builds on the framework of the third generation of maritime security strategies, which situates the 'individual' as the referent object of maritime security. As earlier stated, maritime security, unlike 'State security',

[189] Edward Newman, 'Human Security: Reconciling Critical Aspirations with Political 'Realities' (2016) 56 British Journal of Criminology 1165, 1179; see also Ian Loader and Neil Walker, 'Necessary Virtues: The Legitimate Place of the State in the Production of Security', in Jennifer Wood and Benoit Dupont (eds), *Democracy, Society and the Governance of Security* (Cambridge University Press, 2006) 165-95.

[190] Barry Buzan, 'Peace, Power, and Security: Contending Concepts in the Study of International Relations' (1984) 21(2) Journal of Peace Research 109, 124, Buzan says "A proper security-based approach would require a conscious rejection of the current polarisation between peace and power, and the assertion of security as a fully-articulated framework in its own right'; see also Richard H Ullman, 'Redefining Security' (1983) 8(1) International Security 129, Ullman also argues that the. 'Human rights and state security are thus intimately related'.

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is a multivocal concept with various dimensions, including human security.[191] Third-generation strategies that recognise the individual as the referent object may be less popular with States, but arguably they provide a better maritime security strategy for people at sea,[192] since they fix human security as the core of the maritime security framework.[193] The rationale behind this approach is that existing legal uncertainties, some of which are maritime legal black holes (as highlighted in the *status quo*), create a space where people at sea are left vulnerable. Human security is proposed as the approach to deal with the negative effects of these legal uncertainties – specifically *de jure* rightlessness and *de facto* non-enforcement – and simultaneously unify IHRL and LOS for a maritime security framework that ensures better protection of people at sea.

The threshold for ascertaining the relevance of human security in this discourse flows from its application as an analytical tool to identify and address the problems affecting the protection of people at sea. The UN and other scholars agree that the functionality of the human security approach rests on its ability to investigate and respond to structural challenges affecting people.[194] This is how I apply human security in this thesis, as a means of challenging the critique of human security as being a "normatively attractive but analytically weak concept".[195]

This thesis questions how the human security approach is relevant to integrating IHRL and LOS towards enhanced maritime security and enforcement operations at sea. Bearing in mind that the goal of this inquiry is to ensure better protection of people at sea despite the structural vulnerabilities within the two legal frameworks, this thesis investigates two questions:

1. What are the complexities (i.e. legal uncertainties and maritime legal black holes) affecting the protection of people at sea arising from the interaction of IHRL and LOS?

[191] Buerger (n 116) 161 here Buerger mentions that the human security has several maritime dimensions. This differs from the proposed redefinition. Here, this thesis argues that maritime security should find its basis in human security.
[192] Bueger and Edmunds (n 120) 1300; see also Sofia Galani, Assessing Maritime Security and Human Rights: The Role of the EU and its Member States in the Protection of Human Rights in the Maritime Domain' (2020) 35 The International Journal of Marine and Coastal Law 325, 325-47.
[193] See, James Malcolm 'Sustainability as Maritime Security: A Small Island Developing State Perspective?' (2017) 8(2) Global Policy 237, 237-44 points out that human security and maritime security are inextricably related.
[194] See, the 2013 UNGA Report (n 36); see also 2012 UN Resolution (n 40); see also Dorothy Estrada-Tanck (n 41) 136; Edward Newman, 'Human security and constructivism' (2001) 2(3) International Studies Perspectives 239, 239-51
[195] Edward Newman, 'Normatively Attractive but Analytically Weak Concept' (2004) 35(3) Security Dialogue 358, 358-9.

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2. To what extent does the human security framework respond to these complexities? And how does this impact the protection of persons during maritime security operations?

The five remaining chapters of this thesis examines these questions. Chapters two, three and four engage with the first question. These chapters highlight the relevance of integrating IHRL and LOS towards protecting people at sea and point out the legal complexities impacting this integration, which still allows spaces where people at sea are not protected. They highlight the insufficiency of either IHRL or LOS regarding maritime security to better protect persons at sea. In so doing, chapter two examines the general legal uncertainties and constraints which flow from the state-centric interpretation of foundational concepts within international law, such as sovereignty and jurisdiction. Chapter two offers an in-depth analysis of IHRL and LOS vis-à-vis maritime security operations and concludes that state-centeredness is a hindrance to the protection of people at sea.

Chapters three and four evaluate the specific constraints and complexities from a maritime security operational perspective. These chapters illustrate the need to balance rights and security-based approaches to dealing with maritime security challenges, particularly irregular migration, and piracy at sea. In these chapters, I show that there are maritime legal black holes within the structure of the laws regulating these maritime insecurities. I argue that the interaction between IHRL and LOS is relevant to making maritime security operations more aligned with human rights obligations. However, the success of such integration depends on a uniform shift from state-centric objectives to people-centredness. Neither IHRL nor LOS can guarantee this uniform shift because of the existing legal uncertainties that stem from the interpretational disparities highlighted in chapter two.

Against this background, chapter five proposes human security as an approach to facilitate the required paradigm shift both conceptually and operationally. As a conceptual tool, human security discourse clarifies foundational concepts that constitute the responses to the main issues identified in chapter two. Also, as an operational tool, it proffers contextual solutions to the resultant effects of the maritime legal black holes identified in chapters three and four. However, because these maritime legal black holes result from the structure of international law and provisions under the law, it is difficult to circumvent the problem as subsequent laws, policies, and rules still reflect the ‘holes’ emanating from the foundational laws (as seen in chapters three and four). Therefore, the human security approach cannot vanquish these

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maritime legal black holes in the sense of creating new laws but can ensure better protection of people through its applicable tenets, which are described in the methodology section below.

In sum, chapter five deals with the second research question above by utilising human security as a framework to bridge the gaps in protection. Chapter six closes this thesis by providing human-security-based recommendations (combining rights and security-based approaches) to enhance the protection of people at sea during maritime security operations.

1.3.2 Methodology

This thesis adopts a doctrinal methodology with human security as a theoretical and operational framework. By analysing cases, statutes, policies, and other legal sources, this thesis sets out patterns of normative understanding to give a holistic view of the relevance of human security to the relationship between IHRL and LOS vis-à-vis maritime security and operations.[196] This includes doctrinal analysis of the various branches of international law, specifically: IHRL, LOS and relevant technical regimes.[197] Rather than focus on individual legal regimes/rules, this method helps achieve the main objective of this research by considering all legal frameworks that substantially contribute to the rights and security framework.[198] This research also involves a close analysis of decisions by adjudicating bodies (e.g., courts and quasi-administrative bodies) and relevant domestic legislation.[199]

The novelty of this research is that human security is placed at the centre of international legal analysis. Human security is used to identify and address the complexities between IHRL, LOS, and maritime security operations. Thus, it illuminates the overall significance of this approach to integrating IHRL and LOS vis-à-vis maritime security and enforcement operations at sea.

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[196] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632, 634 points out that the task for doctrinal analysis is often to "attempt to draw out the patterns of normative understanding that enable us to see the wood and the trees together as constituting a working whole."

[197] A similar step was followed by Papanicolopulu who explains it like this: "identifying the core characteristics of each and the elements that may contribute towards its integration with the others. It then singles out the devices that are currently available in order to integrate legal rules and instruments deriving from the discrete regimes of international law", see Papanicolopulu (n 17) 12.

[198] Ibid 80 here Papanicolopulu discusses that this process is relevant to ensuring better protection of people at sea because it allows one to understand the scope, compatibility, and limitations within the current framework; similarly, Wilson discusses other relevant rules from the security and rights framework to create a road map to future integration between maritime law enforcement and human rights law, see Brian Wilson (n 4) 243-319.

[199] See, Papanicolopulu (n 17) 72, this process involves systemic thinking which Papanicolopulu describes as "a two- step process of identifying the applicable law, which requires us first to 'enter' into each legal regime that provides rules relevant for the issue under consideration, and then 'leave' these regimes and return to the system, so as to reconstruct a picture of regulation which is as complete as possible" ; similarly Pauwelyn adopted the same process to establish a systemic framework vis-à-vis relevant rules of WTO law, see Pauwelyn (n 77) 3. In this thesis, this systemic thinking is achievable through the human security framework as an operational tool for analysis.

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The historical scope of human security is complex, and the development of the concept is broad because it includes anything that affects individuals and their collective existence.[200] Therefore, the interpretation of human security in this thesis is limited to provisions in the United Nations (UN) reports/resolutions and the mainstream debates.[201] Drawing from existing scholarly insights on human security, I will now set out the applicable tenets of human security, which form the relevant framework in this thesis.

i. Applicable tenets of human security

The first notable document that popularised the concept of human security is the 1994 United Nations Development Programme (UNDP) report entitled "New Dimensions of Human Security". This report identified four essential characteristics of human security, namely that it is: 1) of universal concern; 2) people-centred; 3) interdependent, and 4) entails early prevention. It also categorised human security into seven key components: economic, food, health, environmental, personal, community, and political security.[202] As defined by the UNDP, human security includes two main aspects: 1) safety from chronic threats such as hunger, disease and repression; and 2) protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs or communities.[203] These two aspects constitute two pillars of human security: freedom from fear and freedom from want.[204] This report pledged a revolutionary stance by positioning human security as an opposing concept to State security and broadened the array of security concerns.

Subsequently, the 2003 Commission on Human Security report relaxed the radical stance of the 1994 UNDP report. This report developed the threshold limits of human security to protect the vital core of human lives from critical (severe) and pervasive (widespread) threats and situations.[205] It also recognises 'freedom to live in dignity' as the third pillar of human security,

[200] Emma Rothschild, 'What is security?' (1995) 124(3) Daedalus 53, 53-98; see also Dorothy Estrada-Tanck,(n 42) 48; see also Sudha Venu Menon, 'Human security: Concept and practice' (2007) 2 Munich Personal RePEc Achive, <https://mpra.ub.uni-muenchen.de/2478/1/MPRA_paper_2478.pdf> accessed 1 November 2021; see also Kanti Bajpai, 'Human Security : Concept and Measurement', (2000) 19 Kroc Institute Occasional papers 1,1;see also Taylor Owen, Challenges and Opportunities for Defining and Measuring Human Security (2004) 3 Disarmament Forum 15, 16; see also Ullman (n 190) 129-53.

[201] The core documents relevant to this thesis are the 1994 UNDP Report (n 122), The Commission on Human Security, *Human Security Now* (New York, 2003) 4 [hereinafter referred to as 'the 2003 CHS Report'] <https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf > accessed 1 November 2021; the 2013 UNGA Report (n 35); see also 2012 UN Resolution (n 39).

[202] Ibid 1994 UNDP Report, 25-33.

[203] Ibid 23.

[204] Ibid 23.

[205] The 2003 CHS Report (n 201).

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which makes it compatible with human rights.[206] Unlike the 1994 report, the 2003 report stresses that human security complements security by tackling issues not addressed under State security. Also, it extends the range of actors involved in managing security issues from just the State to include regional and international organisations, nongovernmental organisations (NGOs) and civil society.[207]

After decades of discourse and implementation, the current understanding of human security set out by the UN is more watered-down than the previous reports.[208] This present understanding recognises human security as merely an approach to assist States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of people.[209] Among other things, it recognises governments as the primary providers of human security, which must be applied with due respect to State sovereignty, territorial integrity and non-interference in matters that are essentially within the domestic jurisdiction of States.[210] Accordingly, Newman observes that this contemporary formulation institutionalises human security within the conventional, state-centric parameters of international society.[211] Even though this diluted version mainstreams human security,[212] to Turner, Cooper and Pugh, it renders the concept beneficial only to governments.[213] Yet Oberleitner has noted that the compatibility of human security to the militarised security discourse and human-oriented discourse renders it valuable to international law.[214] The strength of human security is dependent on its ability to critically interrogate and problematise existing values and institutions as they relate to "human welfare and more thoroughly question the interests that are served by these institutions".[215]

There are criticisms that human security, either in its radical or watered-down form, is too broad, vague, and therefore unusable in both policy making and security studies.[216] Some

[206] UNSG, Report of the United Nations Secretary-General, Security and Human Rights for all, (21 March 2005) A/59/2005, 34-38.
[207] The 2003 CHS Report (n 201) 6.
[208] The 2013 UNGA Report (n 35); see also 2012 UN Resolution (n 39).
[209] Ibid the 2012 UN Resolution, para 3.
[210] Ibid.
[211] Newman (n 195) 1174.
[212] David Chandler, 'Human Security: The Dog That Didn't Bark', (2008) 39(4) Security Dialogue 427, 427-38.
[213] Mandy Turner, Neil Cooper, and Michael Pugh, 'Institutionalised and Co-opted. Why Human Security Has Lost Its Way', in David Chandler and Nik Nynek (eds) *Critical Perspectives on HS* (Routledge, 2011) 83.
[214] Oberleitner (n 35) 191- 98.
[215] Newman (n 195)1170.
[216] Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26(2) International Security 87, 88 Paris observes that human security is like 'sustainable development' because "everyone is for it, but few people have a clear idea of what it means"; see also Keith Krause, 'Is Human Security "More than Just a Good Idea?"', in M.

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scholars observe that human security is valuable only if narrowed down,[217] and others commend its broadness.[218] Some scholars highlight the potential of human security as an operational tool.[219] Consequently, this thesis focuses on the conceptual and operational utility of the human security approach. On 23 December 2013, the UNGA released a report that stresses the potential of human security to advance the interconnected pillars of peace and security, development, and human rights.[220] In this report, the UNGA pinpoints the increasing recognition several governments give to the added value of human security at both the national and local levels and by regional organisations and civil society groups. This report draws input from human security experiences at the national, regional, and international levels to show the importance of applying human security and the principles that underpin it (i.e. protection and empowerment strategies that are people-centred, comprehensive, context-specific, and prevention-oriented). Significantly, this report reinforces the centrality of human security to the activities of the United Nations system and underlines its importance for achieving inclusive social and economic development, environmental sustainability and peace and security in the twenty-first century.[221] The version of human security adopted in this thesis fits with many States' political agendas, as they have been articulated and applied nationally and at intergovernmental levels – showing a level of States political willingness to apply this concept.[222] As such, it is relevant to address the state-centred issues revealed in the *status quo*.

UN human security discourse on the operationalisation of human security does not deepen the understanding of the structural "root" causes of insecurities. Instead, they address only the manifestations of insecurities. As a result, this thesis operationalises human security to

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Brzoska and P. J. Croll (eds), Promoting Security: But How and For Whom? (2004) Contributions to BICC's Ten-year Anniversary Conference BICC brief 30, 44, to Krause, the broad definition of human security where insecurities range from environmental degradation, pollution, homelessness, and unemployment is a loose synonym for "bad things that can happen"; see also MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Indiana University Press, 2006) 237, 247; see also Barry Buzan, 'A Reductionist, Idealistic Notion that Adds Little Analytical Value' (2004) 35(3) Security Dialogue 369, 369-70.; see also Sorpong Peou**,** *Human Security in East Asia: Challenges for Collaborative Action* (Routledge, 2009) 82.

[217] Gary King and Christopher Murray, 'Rethinking Human Security' (2001) 4 Political Science Quarterly 116, 585-610, King and Murray base the measurable description of human security on the "number of years of future life spent outside a state of generalised poverty"; see also David Roberts, 'Human Security or Human Insecurity? Moving the Debate Forward' (2006) 37 (2) Security Dialogue 249, 249-61; see also Rhoda E. Howard-Hassman, 'Human Security: Undermining Human Rights?' (2012) 34(1) Human Rights Quarterly 88, 88-112.

[218] Shahrbanou Tadjbakhsh and Anuradha Chenoy, *Human Security Concepts and Implications* (Routledge, 2008) 20-30; see also Astri Suhrke, Human Security and the Interests of States (1999) 30 Security Dialogue 265, 272.

[219] See Kamrul Hossain et al 'Constructing Arctic security: an inter-disciplinary approach to understanding security in the Barents region' (2017) 53 Polar Record 52, 52–66; see also Bambals, (n 46); see also Sharpe et al (n 46); Boer and Wilde (n 41).

[220] The 2012 UN Resolution (n 39) para. 3.

[221] Ibid para. 59.

[222] The 2013 UNGA report (n 35).

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investigate the structural issues deepening the insecurity of people at sea and addresses their negative effect on the protection of people at sea. I discuss how this is done below.

ii. Conceptual tool: Protection of people

Beyond the definitional, theoretical, or practical criticisms of human security, it remains a potentially valuable tool.[223] Chandler points out that "the conceptual power of human security discourses and their capacity to reshape policy frameworks has often been underestimated".[224] He suggests that there is an inherent transformative potential within the concept of human security.[225] Oberleitner mentions that human security is seemingly a "natural step" to move international law towards the protection of individuals as the ultimate beneficiaries of the law.[226] Likewise, this thesis engages with perceived weakness in the human security framework but argues that human security can better ensure the "protection of people".[227]

The concept of human security at sea means the protection of people at sea.[228] Like human rights, the concept of human security also implies a distinction between people: the victims, offenders, and protectors of human security.[229] As earlier stated, this thesis interprets people at sea as civilians who are either victims, suspects, or offenders, not State agents who are the primary protectors but may also be human rights violators (as seen in section 1.1). Astri Sukhre suggests that the individuals to be protected should be the most vulnerable people because the core of human insecurity relates to extreme vulnerability.[230] The 2013 UNGA Report highlights that human security addresses all people's challenges, including the most vulnerable people.[231] People at sea are vulnerable because they are on the move through the unpredictable maritime environment and are prone to threats posed by maritime insecurities like piracy.[232]

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[223] Taylor Owen, 'Human Security – Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition' (2004) 35(3) Security Dialogue 373, 374-85; see also Alexander Gilde, 'International law and human security in a kaleidoscopic world' (2021) 59(1-4) Indian Journal of International Law 111, 136.
[224] David Chandler, 'Resilience and Human Security: The post-interventionist paradigm' (2012) 43(3) Security Dialogue 213, 214.
[225] Ibid.
[226] Oberleitner (n 35) 198.
[227] Cecilia Jacob, 'Practising civilian protection: Human Security in Myanmar and Cambodia' (2014) 45(4) Security Dialogue 391, 391-408.
[228] Ibid; see also Sofia Galani, 2020 (n 192) 325-47.
[229] Jaap de Wilde, 'Speaking or Doing Human Security?' In Monica den Boer & Jaap de Wilde (eds.) *Viability of Human Security* (Amsterdam University Press, 2008) 226.
[230] Suhrke (n 218) 272.
[231] The 2012 UN Resolution (n 40) para 3 (a); see also the 2013 UNGA Report (n 36).
[232] Gerd Oberlietner (n 35) 198 arguing that human security is an approach relevant to vulnerable people on the move.

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There are various human rights centred conventions with the word 'protection' in their title, which generally refers to the protection of rights. The ECHR does not define protection, but it can be implied that protection is the primary responsibility of the State to secure the rights and freedoms guaranteed in the Convention.[233] According to the Convention on the Protection and Promotion of Diversity of Cultural Expressions, 'protection' means the "adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions".[234] Protection from a rights-based approach is the deployment of the IHRL framework, its codification in national legal systems, and human rights principles as a basis for securing the rights of persons.[235] From a security perspective (including maritime security), protection is the provision of physical safety which involves the deployment of law enforcement operators to secure State interests.

This thesis adopts a human security-based conceptualisation of protection, combining a human-centred and security-oriented agenda.[236] In particular, Thakur and Newman's definition of human security, as follows:

> Human security is concerned with the protection of people from critical and life-threatening dangers, regardless of whether the threats are rooted in anthropogenic activities or natural events, whether they lie within or outside states, and whether they are direct or structural. It is 'human-centered' in that its principal focus is on people both as individuals and as communal groups. It is 'security oriented' in that the focus is on freedom from fear, danger, and threat.[237]

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[233] ECHR (n 54) preamble, recital 6.

[234] Convention on the Protection and Promotion of Diversity of Cultural Expressions (adopted 20 October 2005; entered into force 18 March 2007) <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf> accessed 1 November 2021, Article 4(7).

[235] See, Allison H E. et al., 'Rights-based fisheries governance: from fishing rights to human rights' (2012) 13 Fish and Fisheries 14, 19; see also Shirley G. Gatenio, *A Rights-Based Approach to Social Policy Analysis* (Springer International Publishing AG, 2016) 6- 11; see also Morten Broberg and Hans-Otto Sano, 'Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences (2018) 22 The International Journal of Human Rights 664, 666-7, the human rights principles include universality and inalienability; indivisibility; inter-dependence and inter-relatedness; accountability and the rule of law; participation and inclusion; and equality and non-discrimination.

[236] A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe's Security Capabilities' (15 September 2004) <http://eprints.lse.ac.uk/40209/1/A_human_security_doctrine_for_Europe%28author%29.pdf> accessed 1 November 2021.

[237] Ramesh Thakur and Edward Newman, 'Introduction: Non-traditional security in Asia, in Ramesh Thakur and Edward Newman (eds), *Broadening Asia's Security Discourse and Agenda: Political, Social, and Environmental Perspectives* (Tokyo, UN University Press, 2004) 4.

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Furthermore, this thesis adds to the understanding of protection from a human security perspective. It shows that protection of people also means deploying human security principles to secure people from the maritime legal black holes within the law. Human security is portrayed as a bridge built by its fundamental principles connecting all relevant laws, fostering co-operation among governments, institutions, and civil societies to secure people from falling into the legal black holes created by uncertainties within the law. Human security cannot remove these legal black holes, but as a bridge, it can safely transport persons from one point to the other.

iii. The principles of human security: An operational tool

Human security is also presented in this thesis as an operational tool for analysis to engage with the IHRL and LOS regarding maritime security. As an operational tool, human security offers analysis, implementation, and impact by "assessing existing institutional arrangements and policies".[238] In other words, human security as an operational tool is used to identify and respond to challenges. The key to doing this is embedded in the 2012 UN Resolution and 2013 Report of the Secretary-General on human security in paragraphs 3(c) and 4(b), which provides: "Human security calls for people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities."[239] These are the criterion for the operationalisation of human security. The UN Trust Fund for Human Security (UNTFHS) Handbook classifies them as the human security principles and operational tools for analysis.[240] Sharpe et al. rightly note that these principles are key in evaluating the usefulness of human security in any discourse, particularly one with the individual at the centre of its analysis. [241] Other academics have also applied all or some of these principles in their analysis of people-centred issues.[242] Accordingly, in this thesis, I use the principles as an operational framework to identify and respond to the structural vulnerabilities affecting the protection of people at sea. These are people-centric,

[238] United Nations Trust Fund for Human Security, 'Human Security Handbook: An Integrated Approach for the Realization of The Sustainable Development Goals and The Priority Areas of The International Community and The United Nations System' (United Nations, Human Security Unit 2016) 8-10 [hereinafter referred to as 'UNTFHS Handbook']. For more on this see UNTFHS, 'Human Security in Theory and Practice: Application of Human Security Concept and the United Nations Trust Fund for Human Security' (United Nations,) <https://www.unocha.org/sites/dms/HSU/Publications%20and%20Products/Human%20Security%20Tools/Human%20Security%20in%20Theory%20and%20Practice%20English.pdf> accessed 1 November 2021.
[239] The 2012 UN Resolution (n 39); see also the 2013 UNGA Report (n 35).
[240] The UNTFHS Handbook (n 239) 8.
[241] Sharpe et al (n 46) 484.
[242] Bambals (n 46) 152-55; Estrada-Tanck (n 41) 275-98; see also Sara de Simone 'Beyond normativity and benchmarking: applying a human security approach to refugee-hosting areas in Africa' (2020) 41 (1) Third World Quarterly 168, 168-83.

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comprehensive, context-specific, prevention-oriented principles with protection and empowerment of people as the goal.[243]

These principles form the theoretical framework that guides the analysis in each chapter. In chapter two, it guides the examination of IHRL and LOS regarding enforcement operations at sea to reveal the general constraints and complexities that affect the protection of people at sea. Similarly, chapters three and four on maritime security framework and operations (irregular migration and maritime piracy, respectively) reveal maritime legal black holes affecting people at sea. In these chapters, the doctrinal analysis is people-centric, comprehensive, context-specific, and prevention-oriented. In contrast, chapter five uses these principles to respond to results from the analysis in chapters two, three and four. Notably, it provides recommendations for a maritime security framework in dealing with irregular migration and piracy at sea with the protection of people at sea as a goal. Chapter six draws on all the previous analyses to point out the viability of the human security approach.

Based on the UNTFHS Handbook and UN human security-related documents on these principles, I explain their functions below:

a) **People-centric**: Human security considers the broad range of conditions that confront people and their aspirations to be free from want, fear and indignity and their communities, particularly those most vulnerable. Howard-Hassmann points out that this people-centric nature of human security could unintentionally undermine the human rights framework because it appears to privilege people, i.e. collectives or groups, over individuals, unlike human rights.[244] On the contrary, Estrada-Tanck emphasises that the human security–human rights synergy directs us to prioritise persons, and among them the most vulnerable.[245] The most vulnerable in this discourse are people at sea.[246] Thus, Papanicolopulu shows how the qualification "people at sea" creates regime interaction towards protecting all persons at sea.[247] The term "people-centred" implies that individuals are at the core of any human security approach.

[243] Ibid 8.
[244] Howard-Hassman (n 218) 104-105.
[245] Estrada-Tanck (n 41) 136.
[246] Karim Hussein, Donata Gnisci and Julia Wanjiru, 'Security and Human Security: An Overview of Concepts and Initiatives What Implications for West Africa?' (2004) 16 points out that vulnerable people are classified into three categories: people living in areas affected by violent conflict, people on the move, and people living in areas emerging from conflict <https://www.oecd.org/swac/publications/38826090.pdf > accessed 1 November 2021. People at sea fit all three categories because they are on the move in a threatening maritime environment, prone to maritime security challenges.
[247] Papanicolopulu (n 17) 210-234.

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As a people-centric tool, the human security approach can uncover gaps in the protection of the people within any framework. Estrada-Tanck uses this tool in analysing the IHRL framework to show the vulnerabilities within the existing judicial interpretation affecting people.[248] As highlighted by the 2013 UNGA resolution, various countries have adopted a people-centric focus. In Kenya, Mongolia, Nepal, and Paraguay, utilising a human security approach uncovered multiple exclusion factors that impeded women, minority ethnic groups, and economically marginalised populations from accessing essential public services. Subsequently, services were tailored to meet the excluded populations' specific needs regarding language, gender, and culture. As a result, national and local priorities were established to advance an inclusive development process where all could access peace and development dividends.[249] Similarly, in the Andean region of Peru, using a people-centred assessment of the affected communities in 2006, a deeper analysis of the needs and vulnerabilities of the local population, along with greater recognition of the existing capacities of community-based organisations and local institutions, emerged to fill critical gaps in the existing disaster risk management framework.[250]

b) **Context-specific**: The 2003 Common Human Security report highlights that "the vital core" of human protection is dynamic.[251] Therefore, to protect people, a context-specific approach is needed. [252] This context-specific principle allows the consideration of the unique nature of the maritime environment as a relevant factor in ensuring the protection of people at sea. The manifestation of insecurity that affects humans varies considerably at sea as well as in various regions. Human security provides the flexibility to tailor national strategies and international responses to local contexts. [253] By so doing, human security advances solutions that are contextually relevant and responsive to the situations they seek to address. Subsequently, policies and programmes have been developed that consider the root causes of insecurity, identify the complex interaction

[248] Estrada-Tanck (n 41) 238-290.
[249] The 2013 UNGA Report (n 35) para 45.
[250] Ibid para 47.
[251] The 2003 CHS Report (n 202) 4.
[252] Ibid.
[253] The 2013 UNGA Report (n 35) para 49.

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of internal and external threats in a specific situation, and reveal possible mismatches among domestic, regional, and international policies and responses. [254]

As a context-specific tool, the human security approach identifies and addresses structural challenges based on their peculiarities. In this thesis, it is used to streamline the analysis to a particular legal framework (chapter two: IHRL and LOS regarding maritime security operations) and regional focus (chapters three and four: the Mediterranean Sea and the Gulf of Guinea, respectively).

c) **Comprehensive**: Human security draws together all the actors (governments, civil society, regional and international organisations) necessary to respond to a challenge. The application of human security ensures coherence, eliminates duplication and advances integrated solutions that result in more effective and tangible improvements in the day-to-day life of people and their communities. As a people-centred and context-specific framework, the human security approach facilitates comprehensive, multidimensional strategies and a broader analysis of a given situation.[255]

As a comprehensive tool, the human security approach is used in two ways. First, it allows regime and institutional interaction to combat the ills of fragmentation within international law to protect people at sea. In chapters two, three and four, this aspect of the comprehensive tool is used to engage with laws and foundational concepts relevant to the aim and objectives set out in these chapters. Second, the comprehensive tool offers a human security-related solution by interacting with various paradigm shifts through a doctrinal analysis of laws, cases, and relevant policies to better protect people. Gasper points out that human security offers the change in perspective needed to strengthen accountability at the national and global scale with this comprehensive outlook.[256] In chapter five, we see the perspective shift aspect of human security. The issues identified in the previous chapters are addressed by engaging with various emerging interpretations that align with the human security goal.

This tool represents a 'topographical approach', a term coined by Tan and Gammeltoft-Hansen. It conveys a method in which "the site of a violation is perceived from a bird's-eye view and accountability pursued through diverse legal regimes and via a broadened

[254] Ibid.
[255] Ibid paras 54 and 57.
[256] Des Gasper, 'Human Security Analysis as a Framework for Social Accountability' (2013) In Accountable Governance for Development - Setting an Agenda Beyond, 393-420.

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geographic lens."[257] Therefore, the human security comprehensive tool is helpful to identify widespread challenges and address them through cross-cutting methods.

d) **Prevention-oriented**: The UNGA resolutions and reports show that human security promotes the development of early warning mechanisms that help to mitigate the impact of insecurities, where possible, and prevent the occurrence of future challenges.[258] In other words, human security is not reactive but proactive in identifying and preventing future challenges.

   Similarly, as a prevention-oriented tool, human security identifies and addresses both existing and future legal uncertainties stemming from the interpretation of the law and concepts. This element is used in chapters two, three and four to highlight potential legal uncertainties that arise from interpreting the current legal frameworks. In contrast, chapter five applies prevention as a policy principle necessary to deal with irregular migration and maritime piracy.

e) **Protection (top-down norms) and empowerment (bottom-up focus) goal**: These are two mutually reinforcing principles. The protection of people is the first key to human security, which involves States, international agencies, NGOs, and private institutions to uphold rights and freedoms. Empowerment is the second key of human security, ensuring the stability of people to act independently and on behalf of others. Fostering that ability differentiates human security from State security, humanitarian work and even from much development work. To do so requires concerted efforts through a bottom-up participatory process to develop national and international norms, processes, and institutions, which must address insecurities in ways that are "systematic, not makeshift, comprehensive not compartmentalised, preventive not reactive".[259] Thus, protection and empowerment are the end goals of applying the previous principles. As a tool, human security "helps identify gaps in the infrastructure of protection as well as ways to strengthen or improve it".[260]

iv. The overall framework

[257] Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 German Law Journal 335, 337.
[258] UNTFHS Handbook (n 239) 8.
[259] The 2003 CHS Report (n 202) 10-11.
[260] Ibid.

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The central aim of this thesis is to strengthen the protection of people at sea by dealing with the gaps in protection. In doing so, this thesis conducts a doctrinal analysis on international law (specifically, IHRL and LOS) vis-à-vis maritime security and operations. The principles of human security form the theoretical framework that guides the doctrinal analysis of international law and maritime security. This forms the crux of chapters two, three and four. It reveals that the source of the gaps in protection are the interpretation of the law and concepts forming the structure of international law. To address these issues, chapter five portrays human security principles as the bricks used to construct a bridge that enhances the protection of people at sea through clarifications of the law and improvement of maritime security strategies. Finally, chapter six concludes the thesis by exploring human security as the point at which maritime security operations are reconciled with human rights obligations.

The next chapter evaluates IHRL and, LOS vis-à-vis maritime security operations. It argues that integrating IHRL and LOS is necessary to prevent further human rights violations at sea. However, the state-centric interpretation of foundational concepts and variations within IHRL treaties still present gaps in protection. Thus, it lays the foundation for arguments on the relevance of human security.

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2 General Legal Uncertainties: International Human Rights Law and Law of the Sea

2.1 Introduction

Several discussions on the interaction between the law of the sea (LOS) and international human rights law (IHRL) have emphasised their bidirectional influence.[1] This interaction shows that these two fields of international law are interconnected, albeit some legal uncertainties and complexities emanate from this relationship which can cause friction between maritime security operations (MSOs) and human rights law. These legal uncertainties lead to a gap in protection for people at sea. Some of these legal uncertainties are pointed out in this chapter to support the argument that further integrating IHRL, and LOS is necessary to protect people at sea. However, there is a need for a coherent approach that ensures the better protection of people by addressing the existing legal uncertainties. Thus, this chapter lays the foundation for the argument on the viability of adopting a human security approach to improve the interaction of IHRL and LOS vis-à-vis maritime security for the benefit of people at sea.

Section 2.2 below discusses the general issues that can constrain the integration of IHRL and LOS towards the protection of people at sea. These issues are classified into three sub-headings: jurisdiction, positive and negative obligations, and sovereignty. Each sub-heading gives an overview of each concept before highlighting their structural problems and how it impacts the protection of people at sea. Section 2.3 discusses specific human rights provisions relevant to MSOs, which shows the gaps in protection and emphasises the need to integrate IHRL and LOS. In sum, sections 2.2 and 2.3 highlight the complexities that can constrain the integration of IHRL and LOS towards the protection of people at sea. Section 2.4 concludes this chapter by revisiting the key legal uncertainties and how they affect people at sea. This section restates the main argument of this chapter: the existence of these legal uncertainties calls for a unifying approach to achieve the goal of protecting people at sea.

2.2 The legal uncertainties and constraints affecting the protection of people

2.2.1 The notion of jurisdiction

[1] For these discussions see- Bernard H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Columbia Journal of Transnational Law 399, 399-404; see also Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law 1.

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Oppenheim has defined jurisdiction as "the extent of each state's right to regulate/conduct the consequence of events" and "the legal competence of a state … to make, apply, and enforce rules of conduct upon persons."[2] International law distinguishes among prescriptive jurisdiction (the authority to apply the law to particular conduct or individuals regardless of their location); enforcement jurisdiction (the power to enforce compliance with the law); and adjudicative jurisdiction (the authority to subject an individual to a State's judicial system). For clarity, this thesis reads adjudicative jurisdiction with enforcement jurisdiction. Therefore, enforcement jurisdiction is the authority to enforce the prescribed laws either through executive or judiciary authorities.[3] The equal rights and sovereignty of other States limit the power given to States under international law.[4]

The concept of jurisdiction under the LOS is quite different from that under international human rights law. The discussion below highlights the complexities arising from the concept of jurisdiction under international human rights law, which causes a gap in protection at sea. Also, a general complexity arises because human rights treaties do not specifically deal with individuals at sea or provide specific regulations for situations occurring at sea.[5] Similarly, the international legal framework governing the sea is state-oriented rather than individual-focused because it was traditionally concerned with balancing the competing claims to the freedom of the seas and sovereign rights of States.[6]

i. Jurisdiction under the law of the sea

UNCLOS has a framework that focuses on State jurisdiction, i.e., port State jurisdiction, coastal State jurisdiction, and flag State jurisdiction. The concept of State jurisdiction under UNCLOS closely interlinks with the various maritime zones. The maritime zones are the internal waters which are the body of waters landward of the sea baseline. The territorial sea is water 12 nautical miles (nm) outward of the baseline. The contiguous zone refers to the water within 12-24 nm outward the sea baseline. The Exclusive Economic Zone (EEZ) is a body of water not

[2] Robert Y Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed, Longman 1996) 456.
[3] D.W. Bowett, Jurisdiction: Changing Patterns of Authority Over Activities and Resources (1982) 53 British Yearbook of International Law 1, p 1; see also Michael Akehurst, Jurisdiction in international law (1972-3) 46 British Yearbook of International Law 145, 151.
[4] Malcolm N Shaw, *International Law* (7th edn, Cambridge Press, 2014) 469; see also UN Vienna Convention on the Law of Treaties, 23 May1969, United Nations Treaty Series vol 1155 [Herein after referred to as "VCLT"] 6th Recital points out that the principle of equal rights amongst others was respected while the provisions where drafted.
[5] See, Irini Papanicolopulu, Human Rights and Law of the Sea in David J Attard et al (eds*), 'IMLI Manual on International Maritime Law: The Law of the Sea'* Volume 1 (Oxford University Press, 2014).
[6] Tullio Treves, 'Historical Development of the Law of the Sea' in Donald Rothwell et al (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 1-2.

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exceeding 200nm outward from the sea baseline. The Continental Shelf is the seabed or subsoil below the EEZ and consists of an outer limit that shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. Finally, the 'high seas' is the water column beyond the EEZ.[7] At sea, for a State to validly exercise their enforcement jurisdiction under UNCLOS, it should have prescribed relevant UNCLOS provisions within its national system,[8] but prescriptive jurisdiction does not always guarantee enforcement power.[9] As Mann has pointed out: "No State may exercise enforcement jurisdiction outside its own territory in the absence of its own legislature authorising it to do so, that is to say, in the absence of legislative jurisdiction."[10]

Port State jurisdiction is "the State's power to regulate activities and standards in the port, the maritime zones of another coastal State including the zones in which their port is located and areas beyond the national jurisdiction," i.e., high seas and the "Area" (the seabed of the high seas).[11] Coastal State Jurisdiction is jurisdiction over the maritime zones, i.e., the internal waters, territorial sea, archipelagic waters, EEZ, contiguous zone and continental shelf. These maritime zones are areas within national jurisdiction, i.e., areas in which the State exerts territorial sovereignty (internal waters and territorial seas) and sovereign rights (EEZ and contiguous zone).[12]

Flag State jurisdiction is a State's jurisdiction over vessels flying its flag. This jurisdiction applies wherever a ship sails, and on the high seas, the flag State generally exercises exclusive jurisdiction.[13] The high sea is a maritime zone beyond national jurisdiction, i.e. it is not owned by any State.[14] Yet, it is subject to the flag State jurisdiction, which means the ship, everything on it, and every person involved or interested in its operation is an entity linked to the flag

[7] UNCLOS, part II.
[8] Frederick A Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', (1984-III) 186 Recueil des cours 9, 34; see also ILC, 'Report of International Law Commission on the work of its 58th Session (1 May-9 June and 3 July- 11August 2006) UN DOC A/6/10, 518.
[9] Ivan Shearer, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35 The International and Comparative Law Quarterly 320- Here the author examines the distinction between prescriptive and enforcement jurisdiction.
[10] Mann (n 8).
[11] Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 281; see also Article 1(1) UNCLOS defines the 'Area' as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.'
[12] Robin R Churchill and Alan V Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, 1999); see also Donald R Rothwell and Tims Stephens, *International law of the Sea* (2nd edn Hart Publishing 2016).
[13] UNCLOS, Article 92 (1).
[14] UNCLOS Article 92(1).

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State.[15] Nevertheless, flag State jurisdiction exclusivity on the high seas is subject to some exceptions: the effect doctrine, the nationality principle and the passive personality principle; the universality principle; the right to visit;[16] the right to hot pursuit;[17] and constructive presence.[18]

At all times, a ship is subject to the flag State jurisdiction. It can also be within the coastal State's territorial jurisdiction while transiting through maritime zones and ports, thereby subject to its laws.[19] Notably, general international law recognises the concurrent operation of multiple jurisdictions. There are still safeguards to ensure a balance between the various State jurisdictions over issues such as marine environmental protection, national security, and navigational rights, and freedoms.[20]

National jurisdiction exercised by a State is territorial jurisdiction that applies within a State's territory and onboard its flag ships.[21] However, UNCLOS also provides another jurisdiction called 'extra-territorial jurisdiction', which allows States to exercise jurisdiction in areas beyond national jurisdiction, i.e. on the high seas and the 'area' to ensure complete protection of the marine environment from vessel source pollution.[22] Customary international law permits States to exercise extra-territorial prescriptive jurisdiction based on any of the jurisdictional principles.[23] They are:

- Effect Doctrine: This allows States to assert jurisdiction over matters that affect the State even outside the State's territory.[24]

- Protective Principle: This allows States to assert jurisdiction over persons, property, and events that constitute a threat to a State's national interest, such as the State's security or the integrity of government functions.[25]

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[15] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Judgment of 1 July 1999) ITLOS Reports 106.
[16] UNCLOS, Article 110.
[17] UNCLOS, Article 111.
[18] UNCLOS, Article 111(4).
[19] UNCLOS, Article 21.
[20] See, UNCLOS PART I- XII.
[21] *The Lotus case [France v Turkey)* [1927] PCIJ Rep Ser A no 10, para 62- Dissenting Opinion of Judge Nyholm.
[22] Erik Jaap Molenaar, 'Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage' (2007) 38 Ocean Development and international law 225, 236 which points out the restrictive nature of the extra-territorial port State jurisdiction; see also UNCLOS, Arts 218, 228, 230, 224, 225, 226, 227 and 232.
[23] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) Human Rights Law Review 411, 421.
[24] *The Lotus case* (n 21).
[25] Allyson Bennet, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act' (2012) 37 The Yale Journal of International Law 433, 437.

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- Nationality Principle: This allows States to assert jurisdiction over matters involving their nationals.[26]

- Passive Personality Principle: This allows States to assert jurisdiction over an event or behaviour abroad that is harmful to their nationals (although not all States recognise this principle).[27]

- Universality principle: This allows all States to assert jurisdiction over specific crimes that are serious and generally recognised by law to be subject to any State's authority, such as piracy, genocide, and war crimes.

Extra-territorial jurisdiction is defined and limited by the sovereign territorial rights of the other relevant States. This means that a State cannot exercise jurisdiction on the territory of another without the latter's consent, invitation, or acquiescence.[28] In asserting extra-territorial jurisdiction, the fundamental principles of sovereign equality of States, territorial integrity, and non-intervention binds all States.[29]

In sum, the maritime zones within national jurisdiction are the internal waters, territorial seas, contiguous zone, continental shelf and EEZ. In contrast, the maritime zones outside national jurisdiction are the "high seas" and "the Area". Therefore, any jurisdiction applied in areas outside national jurisdiction apart from the flag State's jurisdiction and as permitted under international law is extra-territorial.

ii. Jurisdiction under international human rights law

Jurisdiction under IHRL extends to the maritime environment. Courts have defined the scope of application of IHRL into territorial jurisdiction and extra-territorial jurisdiction. Territorial jurisdiction means that the State exercises jurisdiction (prescriptive and enforcement jurisdiction) regarding its human rights obligation within the State's territory.[30] Here, the notion of territory does not include all the maritime zones earlier classified within national jurisdiction. The territorial sea and contiguous zone (which together are 24 nm seaward from

[26] Christopher L. Blakesley and Dan E. Stigall, 'The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century' (2007) 39 Georgia Washington International Law Review 1, 13.
[27] Bennet (n 25) 436.
[28] *Banković and others v Belgium and 16 other States* App No 52207/99 (ECtHR, 12 December 2001) paras 59-61.
[29] VCLT (n 4).
[30] For example, see the cases *Soering v. the United Kingdom*, 7 July 1989, para 86, Series A no. 161, and *Banković* case (n 28) para 66 where the ECtHR points out that Article 1 of the ECHR sets a limit notably territorial on the reach of the convention.

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the baseline[31]) are zones where a coastal State can exercise both prescriptive and enforcement jurisdictions, except in certain situations.[32] In the EEZ, the coastal State has a more limited power that is not as extensive as the full territorial jurisdiction exercised within the territorial sea and contiguous zone.[33] Therefore, the EEZ cannot be included as forming the territory of the State for the territorial application of human rights law.[34] Jurisdiction under UNCLOS is 'functional'.[35] Functional jurisdiction requires all States (i.e. port, flag and coastal States) to fulfil their obligations (including human rights obligations) towards other States and persons within their port, maritime zones, vessels, installations, and platforms.[36] On the contrary, jurisdiction under IHRL, particularly extra-territorial jurisdiction under the ECtHR, can be considered as 'passive' because of the restrictive interpretation of extra-territorial obligations.[37]

The extra-territorial application of human rights principles covers areas beyond national jurisdiction: the EEZ and high seas. This extra-territorial application extends to a State's national human rights obligations to acts carried out by a State agent outside its territory.[38] The basis of such application rests on the concepts of effective control or power/authority as defined by the UN Human Rights Committee (HRC) and the Inter-American Commission on Human Rights.[39] Similarly, the ECtHR concept of *de facto* jurisdiction, which is effective control over persons and control over territory and *de jure* jurisdiction, represents the power given by a legal rule to a State.[40] These terminologies are used below to highlight the issues with jurisdiction in the maritime context.

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[31] UNCLOS, Article 33.

[32] For the exception see UNCLOS, Articles 27 (criminal jurisdiction on board a foreign ship) and 28 (civil jurisdiction in relation to foreign ships.

[33] Churchill and Lowe, (n 12) 165- 7; see also Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007) 62-9.

[34] Ian Brownlie, *Principles of Public International Law* (Sixth edn. Oxford University Press 2003) 115.

[35] Gavouneli (n 33) 62-9.

[36] UNCLOS, Article 300 provides that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".

[37] See, Ramat Tobi Abudu, 'From Passive to Functional: The Legal Protection of People in Distress at Sea' (2021) 6 Wolverhampton Law Journal 5.

[38] See, *Al-Skeini and others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) paras.136- 50; see also *Al-Sadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 30 July 2009) para 86-89; see also *United States v. Flores*, 289 U.S. 137 (1933); see also *Lauritzen v Larsen*, 345 U.S. 571, 585 (1953).

[39] Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add 13, adopted on 29 March 2004 (2.187th meeting) para 10; see also *Coard v United States*, Report No 109/9 (IACtHR, September 1999) (DC 215-6) para 37.

[40] Anna Petrig, 'Human Rights in Counter-piracy Operations: No Legal Vacuum but Legal Uncertainty' In Maximo Q Mejia Jr et al, *Piracy at Sea* WMU studies in Maritime Affairs (Springer, 2013) 39-42; see also *(United Kingdom), R (on the Application of Mazin Jumaa Gatteh Al-Skeini and others) v Secretary of State for Defence* (EWHC, 2004) para 48- In this case Lord Brooke distinguishes between *de jure* and *de facto* jurisdiction as the two grounds that the ECHR can be applied extra-territorially.

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iii. De facto jurisdiction

De facto jurisdiction involves control over a territory (including the installations/platforms or the vessel) or the person itself.[41] This is effective overall control which does not mean control over every act or part of the territory. It is a control that is only temporary and over a portion of the territory.[42] Petrig points out that the concept of effective overall control arises at sea, but it is different from the application over a fixed location.[43] At sea, this takes the form of enforcement action by one State against a vessel flying a foreign flag in its maritime zones or on the high seas.[44] Law enforcement vessels are capable of exercising temporal control within the operational radius.

De facto jurisdiction is relatively developed in the area of land-based enforcement operations, but it is still developing in the maritime context.[45] On that basis, there is a plethora of case law dealing with land-based enforcement operations and limited case law dealing with law enforcement at sea. Therefore, it will be necessary to look at this land-based case law to highlight the problem with its application to the maritime environment.

Over the years, the ECtHR has determined that a State has jurisdiction over the extra-territorial acts of State agents as long as there is 'effective control of an area outside the national territory'.[46] This interpretation can also be considered consistent with the Inter-American Commission of Human Rights interpretation as seen in its report in *Coard et al. v. the United States,*[47] where citizens of Grenada alleged that the US forces illegally detained and mistreated them. The Commission held that US forces were exercising extra-territorial jurisdiction for the purposes of the American Declaration of the Rights and Duties of Man read alongside Article 1 of the American Convention on Human Rights, which contains positive obligations on the part of States parties to all persons subject to their jurisdiction.[48]

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[41] Ibid.
[42] *Cyprus v Turkey* App no. 25781/94 (ECtHR, 10 May 2001) para 77; see also Ibid Petrig (n 40) 40.
[43] Ibid Petrig (n 40) 40.
[44] Ibid Papanicolopulu (n 5) 13.
[45] Ibid Petrig (n 40) 39-41.
[46] See the case of *Loizidou v. Turkey* App no 15318/89 (ECtHR, 18 December 1996) para 52; see also *Issa v. Turkey* App no 31821/96 (ECtHR, 16 November 2004) para. 71; see *Öcalan v Turkey* (ECtHR, 12 May 2005); see also *Ilascu v. Moldova and the Russian Federation* App no 48787/99 (ECtHR, 8 July 2004); see also *Banković* case (n 28) para 54-81.
[47] *Coard et Al. v. United States* (n 39).
[48] Ibid.

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In the *Haitian Interdiction Case*,[49] a complaint was made against the US Government's Migrant Interdiction Program, which allowed US vessels to interdict Haitian migrants on the high seas and repatriate them to Haiti against their will.[50] The Inter-American Commission on Human Rights held that the US had breached their obligation under Article XXVII of the American Declaration on the Rights and Duties of Man (which provides for the right to asylum) as interdicting asylum seekers on the high seas denied them the possibility to seek asylum in other countries.[51] This case highlights the extra-territorial application of human rights principles on acts carried out in areas outside national jurisdiction.[52]

Similarly, in *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[53] the ICJ held that the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its territory.[54] The Human Rights Committee has also reached consistent conclusions regarding Article 2(1) of the ICCPR and Article 1 of its Optional Protocol.[55] One such case is *Sergio Euben Lopez Burgos v. Uruguay*, in which the Committee held:

> The reference in that article is not to the place where the violation occurred but *rather to the relationship between the individual and the State in relation to a violation of any of the rights outlined in the Covenant,* where they occurred. Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', *but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether within*

[49] *Case 10.675 v. the United States (Haitian Interdiction* Case*)* Report No. 51/96 (The Inter-American Commission on Human Rights, 13 March 1997).
[50] For further reading see- Harold Koh, 'Reflections on Refoulement and Haitian Centers Council' (1994) 35(1) Harvard International Law Journal 1.
[51] *Haitian Interdiction* Case (n 49).
[52] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 120-9.
[53] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (ICJ, 9 July 2004) 136.
[54] Ibid see paras 107- 113, particularly paras 111 & 113.
[55] General Comment No. 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, CCPR/C/21 Rev.1/Add.1. 13 adopted on 29 March 2004 (2,187th meeting), para, 10. This is the position announced in *Sergio Euben Lopez Burgos v Uruguay*, Communication No R 12/52, UN Doc. Supp. No. 40 (A/36/40) (1981) para 12.3; see also *Lilian Celeberti de Casariego v Uruguay* Comm no 56/1979, UN Doc CCPR/C/13/D/56/1979 (1981) para 10.3.

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> *the acquiescence of the Government of that State or in opposition to it* (emphasis added).[56]

The above shows that jurisdiction has been equated to attribution of State responsibility. Article 2 of the ILC Draft Articles on State Responsibility differentiates the two elements of State responsibility: whether the act or omission is attributable to the State and whether it constitutes a breach of an international obligation.[57] These two elements of State responsibility show that the concept of jurisdiction given by the ECtHR and the other courts is embedded in State responsibility as it contains the 'test of attribution' and 'the scope of States obligation'. The ICJ, the Inter-American Court of Human Rights (IACtHR), HRC and the African Commission on Human and People's Rights all support the element of attribution as sufficient to invoke jurisdiction.[58] These adjudicatory bodies interpret jurisdiction as dependent on the extent to which an individual has been affected by the direct act or omission of a State.[59] This is a cause-and-effect notion of jurisdiction. However, IACtHR takes this a step further by admitting a causal link as a standalone criterion for jurisdiction. In an advisory opinion, the IACtHR noted that "a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory".[60]

The ECtHR does not equate jurisdiction to attribution. Instead, for the ECtHR, jurisdiction is based on the scope of the State's obligation.[61] Therefore, no jurisdiction means no obligation, which creates a gap in human rights protection.[62] The effect of such interpretation was first highlighted in *Banković & Others v. Belgium and 16 others*.[63] In this case, the defendants

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[56] Ibid, *Sergio Euben Lopez Burgos v Uruguay* para 12.2 para 12.3.
[57] Marko Milanovic (n 23) 441-42; see also Olivier De Schutter, *International Human Rights Law: Cases Materials, Commentary* (2nd edn, Cambridge University press 2014)148- 80.
[58] Olivier De Schutter, *International Human Rights Law: Cases Materials, Commentary* (2nd edn, Cambridge University Press 2014) 168; see also Marko Milanovic (n 23) 441-2; see also African Commission on Human and Peoples' Right**,** General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (PULP, 2015) 10.
[59] The African Commission on Human and People Rights interprets a cause-and-effect notion of jurisdiction as part of the criteria to establish a jurisdictional link, see the General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (PULP, 2015) 10; similarly, the International Court of Justice basis jurisdiction on cause and effect see, *Sergio Euben Lopez Burgos v Uruguay* (n 55) para 12.2 and para 12.3.
[60] *Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights*, Inter-American Court of Human Rights (IACtHR 15 November 2017)
para 104(h).
[61] Schutter (n 58) 168.
[62] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 867.
[63] *Banković* case (n 28).

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(NATO European States) launched a missile destroying the Radio Television of Serbia (RTS) facilities in Belgrade, which killed sixteen people, and others were seriously injured. The applicants representing their deceased family petitioned the ECtHR after failed attempts before the ICJ and International Criminal Tribunal for the former Yugoslavia (ICTY). They claimed the bombing constituted a violation of Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy) of the ECHR. The governments argued that ECHR Article 1 does not permit a cause-effect notion of extra-territorial jurisdiction. In their defence, they argued that such a notion seriously distorts the purpose of the ECHR and international military collective action.[64] The ECtHR observed that the exercise of extra-territorial jurisdiction in another territory is subject to the relevant States' sovereign territorial rights.[65] Relying on this "ordinary and essentially territorial notion of jurisdiction",[66] the Court concluded that the impugned action of the respondent States did not engage their Convention responsibility.[67]

Louicades rightly observes that the issue with *Banković* is that the Court's interpretation of jurisdiction is based on state-centric international law without considering the object and purpose of the Convention.[68] An otherwise teleological interpretation of the ECHR upholds the object and purpose of the Convention, which is "securing the universal and effective recognition and observance of the Rights therein."[69] In *Issa and others v. Turkey*,[70] the ECtHR implicitly overruled aspects of the *Banković* case[71] by recognising that the ECHR disallows a State party to perpetrate violations on the territory of another State, which it could not commit on its territory.[72] From this, other case law involving military intervention held exceptions to the *Banković* case based on effective overall control (total and exclusive control by the relevant

[64] Ibid para 43.
[65] Ibid para 59.
[66] Ibid para 61.
[67] Ibid para 84.
[68] Loukis G Loucaides 'Determining the extra-territorial effect of the European Convention: Facts Jurisprudence and the *Banković* Case' in Loukis G Loucaides (ed) *The European Convention on Human Rights: Collected Essays* (Brill, 2007) 76.
[69] ECHR, preamble, recital 2.
[70] *Issa and others v Turkey* (n 46).
[71] Schutter (n 58) 176 points out that the *Issa and other v Turkey* case indirectly overrules the *Banković* case insofar as this "latter decision seemed to imply that a State party to the Convention could not be held responsible for the consequences of acts going beyond the jurisdiction it might legitimately exercise under public international law, unless it occupies foreign territory where it exercises de facto governmental powers").
[72] *Issa and others v Turkey* (n 46) 629.

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State).[73] However, in 2021, the ECtHR applied the *Banković* approach even more restrictively in *Georgia v Russia*[74] and *Hanan* v *Germany*.[75]

The first case was about the atrocities committed by Russia during the 2008 conflict between Russia and Georgia. Georgia petitioned the ECtHR claiming Russia violated Articles 2,3,5,8, and 13 of the ECHR.[76] The ECtHR excluded events that occurred during the active phase of the hostilities (international armed conflict) from the evaluation of jurisdiction.[77] However, the events after the armed conflict fell within Russia's jurisdiction.[78] Judge Albuquerque's partly dissenting opinion expresses this author's view that this case is a "pernicious progeny"[79] of *Banković*, which is "promoting fragmentation in international law and pushing the Court to an extremely isolated position worldwide and thus discrediting its role as a human rights guarantor in Europe."[80]

In *Hanan*,[81] Colonel K, who was in charge of a German contingent of the International Security Assistance Force (ISAF) commanded by NATO, ordered an airstrike in Kunduz, Afghanistan. The Colonel ordered the airstrike because of two fuel tankers thought to have been hijacked and surrounded by insurgents, but which were in fact surrounded by civilians. The airstrike killed 91 civilians, including the applicant's two sons, and injured 11 civilians. Citing the procedural limb of Article 2 of the Convention, the applicant complained that the investigation into the airstrike conducted by German authorities that killed his two sons had not been effective. The Grand Chamber found that Article 1 had been triggered, but that Germany had duly fulfilled its obligation to investigate under Article 2. To the Court, the jurisdictional link was created by obligations under international humanitarian law, a bilateral agreement between Germany and Afghanistan and Germany's domestic legislation, not the Colonel's actions.[82] Here, in trying to escape a cause-and-effect interpretation of jurisdiction, the ECtHR implicitly recognises an even broader scope: a relevant law can provide a jurisdictional link (in this case, international humanitarian law). However, in its pursuit of restricting the interpretation of

[73] See *Al-Skeini and others v UK* (n 38*)*; see *Al-Jedda v UK* Application no 27021/08 (ECtHR, 7 July 2011); see *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014)*; Jaloud v The Netherlands*, App no 47708/08 (ECtHR, 20 November 2014).
[74] *Georgia v Russia* (II), Application no 38263/08 (ECtHR, 21 January 2021).
[75] *Hanan v Germany*, Application no 4871/16 (ECtHR, 16 February 2021).
[76] Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy).
[77] *Georgia v Russia* (n 74) para 140.
[78] Ibid para 175.
[79] Ibid partly dissenting opinion of Judge Pinto De Albuquerque, pp. 201-202.
[80] Ibid.
[81] *Hanan v Germany* (n 75).
[82] Ibid paras 137-39.

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jurisdiction, the ECtHR emphasised that the mere establishment of a jurisdictional link to the procedural obligation under Article 2 does not mean that the substantive act fell within Germany's jurisdiction or responsibility.[83]

This recent jurisprudence reiterates the *Banković* position that a State agent's extra-territorial actions and effect do not necessitate jurisdiction. In *Hanan*, the Government argued that although the airstrike did not constitute a jurisdictional link, it did not lead to an accountability gap.[84] Yet, it surely led to a protection gap for the individuals concerned. In *Georgia*,[85] the Court further restricted IHRL obligations to applying only in times of peace, thus revealing the passive interpretation of jurisdiction as a limitation to people's protection. Indeed, as Roxstorm *et al.* observe, this *Banković* approach "has resulted in the divide between enforcement and protection."[86]

There is also varying interpretation between the ICJ and the ICTY on the degree of control to impute State responsibility for acts or omissions of non-State officials. In the *Nicaragua* case,[87] the ICJ formulated the test on whether the State exercised "effective control" over third parties. Contrastingly, the ICTY in the *Tadić* case[88] held that the relevant test was that of "overall control". Subsequently, in the 2007 *Bosnia Genocide* case,[89] the ICJ upheld the effective control test in *Nicaragua* and criticised the *Tadić* test as "unpersuasive" and for "broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility."[90] Yet the International Criminal Court in *Prosecutor v. Thomas Lubanga Dyilo*[91] without any recourse to the *Nicaragua* case held that the "overall control" test as set out in *Tadić* was applicable in determining the nature of conflict under the ICC statute. The ICTY subsequently upheld the *Tadić* test in the *Celebici* case,[92] as did the ECtHR

[83] Ibid para 143.
[84] Ibid para 107.
[85] *Georgia v Russia* (n 74).
[86] Erik Roxstrom, Mark Gibney, and Terje Einarsen, 'The Nato Bombing Case (*Banković Et Al. V. Belgium Et Al.*) and the Limits of Western Human Rights Protection' (2005) 23 Boston University International Law Journal 55, 139.
[87] Case Concerning Military and Paramilitary Activities in and Against Nicaragua *(Nicaragua v. United States of America); Merits*, (ICJ, 27 June 1986).
[88] *Prosecutor v. Tadic*, Appeals Chamber IT 94-1-A (ICTY, 15 July 1999).
[89] *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (ICJ, 26 February 2007).
[90] Ibid para 406.
[91] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber 1, ICC 01/04-01/06 (ICC, 29 Jan 2007) para 210-211.
[92] *Prosecutor v. Zenjil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (Celebici Case)* Case No IT-96-21-A. Ch (ICTY, 20 February 2001).

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in *Behrami and Behrami v. France* and *Saramati v. France, Germany, and Norway.*[93] Notwithstanding the ECtHR's application of the *Tadić* case, the Court does not admit a cause-and-effect notion of jurisdiction like the ICJ.

Against this background, the application of IHRL in the maritime context is unsettled. The different interpretation of jurisdiction still creates blurred lines on the nuances between State responsibility and jurisdiction in the marine environment.[94] However, at sea, it is clear that *de facto* jurisdiction involves effective control over persons and territory. The Grand Chamber of the ECtHR pointed this out in *Medvedyev v France* where it stated that France had exercised:

> full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention.[95]

There remains a grey area concerning the specific interpretation of *de facto* jurisdiction in the maritime context. The uncertainty is due to the lack of case law on the relationship between law enforcement at sea and human rights, including variation in the interpretation of jurisdiction between different human rights adjudicatory bodies.[96] However, the ECtHR's passive interpretation of jurisdiction clearly creates a gap in human rights protection even during MSOs.

In regards to law enforcement at sea, some scholars point out that human rights apply extra-territorially from the moment of interception of a vessel, i.e. before boarding a ship.[97] Others point out that this matter is contentious because it is difficult to prove whether mere communication suffices as effective control or actual physical contact.[98] In the *Women on Waves v. Portugal* case, the ECtHR held that the ECHR was applicable because the Portuguese

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[93] App nos 71412/01 and 78166/01 (joined cases) (ECtHR, 2 May 2007) [hereinafter referred to as *Behrami and Behrami* case].
[94] See for example, Stefano Piedimonte Bodini, "Fighting Maritime Piracy under the European Convention on Human Rights" (2011) 22 European Journal of International Law 829, where the author discussed the concepts as intertwined when dealing with maritime piracy.
[95] App no 3394/03 (ECtHR, 29 March 2010) [hereinafter referred to as the '*Medvedyev* case'] para 67.
[96] Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at sea in the European Context' (2017) 30 Leiden Journal of International Law 49, 51 -60 points out that there are different models in the interpretation of the notion of jurisdiction by the ECHR and other courts and the recent case laws by the ECHR actually further blur the lines.
[97] Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff, 2014) 141; Bodini (n 94) 844.
[98] Efthymios D. Papstavridis, "Is there a right to be rescued at Sea? A skeptical view" (2014) 4 Questions of International Law 17.

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military ship intercepted the Dutch vessel *Borndiep* on the high seas off Portugal's coast (apparently without boarding it) to enforce a prohibition on entering Portugal's territorial waters.[99] This case implies that effective control can be established through communication, not necessarily physical contact. However, in the *MV Aquarius* situation, Italian officials, without any physical contact, instructed the *MV Aquarius* (which was carrying rescued migrants and requested entry to dock at the Italian port) to standby.[100] Arguably, such communication was a mere instruction and could not constitute effective control to establish jurisdiction.[101] Whether or not oral communication constitutes effective control is still contentious and can best be dealt with on a case-by-case basis.

iv. De jure jurisdiction

De jure jurisdiction rests on the existence of rules of international law that attribute jurisdiction to a State. In the maritime context, *de jure* jurisdiction is conferred on States by UNCLOS, treaty-based provisions and customary international law.[102] Article 94 UNCLOS summarises the extent of flag State jurisdiction, which comprises the obligation to effectively exercise jurisdiction in conformity with generally accepted international regulations, procedures, and practices and take steps necessary to secure their observance. Regarding human rights obligations, this means ensuring that activities onboard a vessel conforms with IHRL.[103] Consequently, this involves fulfilling human rights obligations to persons on board a ship flying its flag[104] but not to the extent that renders the ship as an extension of the flag State's

[99] App no 31276/05 (ECtHR 3 February 2009) (Second Section).
[100] Melanie Fink and Kristof Gombeer, 'The Aquarius Incident: navigating the turbulent waters of international law' (2018) EJIL: Talk blog <www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/#more-16269> accessed 1 November 2021.
[101] Ibid.
[102] *Banković* case (n 28) para 73, the court pointed out that the other "recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on-board craft and vessels registered in, or flying the flag of, that State, in these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State".
[103] UNCLOS, Art 91(1); see also *Banković* (n 28) para 73; See also *Al-Sadoon and Mufdhi v. United Kingdom* (n 38) para 85 the ECtHR held that: "There are, additionally, other recognised instances of the extra-territorial exercise of jurisdiction by a State such as cases involving the activities of its diplomatic or consular agents abroad and on-board craft and vessels registered in, or flying the flag of, that State"
[104] Irini Papanicolopulu, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea' In Moon-Sang Kwon, Clive Schofield, and Seokwoo Lee (eds), *The Limits of Maritime Jurisdiction* (Brill Nijhoff, 2014) 387-404.

territory for asylum-seeking procedures.[105] International practice recognises the flag State principle as an extra-territorial ground for applying human rights principles at sea.[106]

Among the above-mentioned jurisdictional basis for applying human rights principles in the maritime environment, the flag State principle appears to be a more settled and straightforward concept. However, it does not seem clear once it involves enforcement operations carried out by multiple States under the same agency or agreement. Presently, MSOs are conducted through joint patrols by the North Atlantic Treaty Organization (NATO), EU Naval Force (EUNAVFOR), and the Proliferation Security Initiative[107] via a ship-riders agreement.[108] UNCLOS points out that the flag State's identity covers the nationality of the ship.[109] Therefore, a law enforcement vessel flying the flag of any specialised agency is under that agency's umbrella.[110] From an IHRL perspective, the situation is distinctive.

In the European context, non-EU countries directly or indirectly involved in operations carried out under the EU's umbrella are free from liability under the ECHR. In *Behrami and Behrami*, the ECtHR held that the applicants' complaints about alleged violations of the Convention resulting from the involvement of French, German and Norwegian personnel belonging to KFOR (NATO Kosovo Force) and UNMIK (UN Interim Administration Mission in Kosovo) operating in Kosovo was not attributable to their respective countries. On the basis that KFOR and UNMIK were under "the retained ultimate authority and control" of the UN Security Council (UNSC).[111] The Court declared that the application was inadmissible since the UN was not a contracting party to the ECHR, and the Court lacked jurisdiction to command compliance with the judgment.

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[105] Seunghwan Kim, "Non- Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context" (2017) 30 Leiden Journal of International Law 49, 62.

[106] *Banković case* (n 28) para 59; See also *Markovic and Others v. Italy* (ECtHR, 14 December 2006) para 49; See also *Assanidze v. Georgia* App no. 71503/03 (ECtHR, 4 August 2004) para 137.

[107] The Proliferation Security Initiative (PSI) is a voluntary, multilateral effort initiated by U.S. and 10 other countries to strengthen the non-proliferation architecture. Specifically, PSI seeks to enhance interdiction capabilities and increase coordination between States to disrupt trade in weapons of mass destruction (WMD), delivery systems, and related materials (see, Timothy Perry, 'The PSI as a Shared Good: How the Proliferation Security Initiative Both Challenges and Reinforces a Prevailingly Mare Liberum Regime' (2018) 49(4) Ocean Development and International Law 335, 335-67).

[108] A ship rider means a law enforcement agent of one party authorised to embark on the law enforcement vessel of another party. The Ship rider agreements authorises the ship rider to do so, as they are designed to remove policing barriers in international maritime boundaries, and to stop smugglers and other criminals from taking advantage of shared territorial waters for illegal activities.

[109] UNCLOS, Art 91.

[110] UNCLOS, Art 93.

[111] *Behrami and Behrami* cases (n 93).

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The *Behrami and Behrami* case also implicitly shows that the test to apply in lifting a veil in a joint operation is "retained ultimate authority and control'.[112] Accordingly, if it is proved that a State agent acted ultra-vires, i.e., outside the authority and control of the umbrella organisation/ agreement or under the command of their State, such a State can be held independently liable for a breach of human rights obligations. In *Jaloud v. Netherlands* the Netherlands was held accountable for human rights violations in Iraq, even though the UK and US also had effective control over the area.[113] Some judges and academics have expressed their views regarding the independent liability of State parties and non-State parties.[114] In *T.I v. United Kingdom*, the Court held that it would be incompatible with the purpose and object of the ECHR to absolve some contracting States under the auspices of an international organisation from their obligations.[115]

By contrast, and from the perspective of State responsibility, the flag State jurisdiction does not preclude other States' obligations. Article 47 of the Draft Articles points out that in a situation where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked concerning that act.[116] Article 16 of the Draft Articles provide that a State which aids or assists another State in committing an internationally wrongful act is internationally responsible for doing so, if: (a) that State does so with knowledge of the circumstances of the internationally unlawful act; and (b) the action would be internationally wrongful if committed by that State. These provisions support the unveiling of flag State cover to pinpoint wrongdoers. Accordingly, Spijkerboer and Giuffre argue that a contrary practice is synonymous with seeking absolution from human rights responsibility via international cooperation, which should not be permitted.[117] However, this is neither a conclusive nor generally accepted view on this issue because the concept of 'jurisdiction' and 'State responsibility' are highly differentiated.

[112] Ibid para 56-67.
[113] *Jaloud v. The Netherlands* (n 73) The Grand Chamber held that Netherlands had failed to adequately investigate the death of an Iraqi citizen allegedly killed by a Dutch lieutenant at a vehicle control point in Iraq in 2004.
[114] See, Thomas Spijkerboer, 'Moving Migrants, States and Rights Human Rights and Border Deaths' (2013) 7 LEHR 213, 238; see also Mariagiulia Giuffre, 'State Responsibility beyond Borders: What Legal basis for Italy's Push-backs to Libya' (2012) 24 International Journal of Refugee Law 692, 693-7.
[115] App no. 43844/98 (ECtHR, 7 March 2000); see also *Waite and Kennedy v. Germany* App no 26083/94 (ECtHR, 18 February1999) 67.
[116] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts UN Doc A/56/10 Supplement No, GA 56TH Session (2001) [Hereinafter referred to as "ILC ARISWA"].
[117] Spijkerboer (n 114); see also Giuffre (n 114) 693-7.

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In sum, this discussion on jurisdiction illustrates how the disparity in interpretation is a problem that affects the concept of jurisdiction in the maritime context. State jurisdiction is functional under the LOS framework because it covers all the maritime zones. Yet, the IHRL framework is full of differences in interpretation, and some Courts, like the ECtHR, adopt a restrictive interpretation of jurisdiction, which can leave a gap in protection.[118] Moreover, other contributory factors are the legal uncertainties in interpreting effective control in MSOs[119] and the subtle blurred lines between State responsibility and jurisdiction.

The discussion in the next section juxtaposes the notion of jurisdiction with the concept of obligations. Specifically, it addresses whether the establishment of jurisdiction is crucial to establishing State obligations under human rights law. The analysis will indicate the extent to which States are bound to their human rights obligations in areas outside national jurisdiction.

2.2.2 Positive and negative obligations

Generally, rights and obligations exist together. The existence of rights-holders requires a commensurate duty-bearer. These obligations are binding on the State and its organs/agents, which consists of the obligation to respect, protect, and fulfil. The obligation to respect requires States and their agents not to commit violations. In contrast, the obligation to protect requires States to protect right-holders against third party interference and to hold perpetrators to account. Finally, the obligation to fulfil calls for 'specific positive measures to give full realisation and full effect to the right'.[120]

There are positive and negative obligations under the ECHR, similar to the generic nature of State obligations.[121] The negative obligation requires refraining from interference with rights, which is similar to the obligation to respect. In contrast, the positive obligation requires a positive intervention by the State/agent to secure and protect the rights of the rightsholders, which is similar to the obligation to protect and fulfil.[122] Therefore, a breach of positive

[118] Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights' (1999) 42 German Yearbook of International Law 11, 14 (where Bernhardt suggests that a restrictive interpretation is done to support state sovereignty which is wrong as "every effective protection of individual freedoms restrict state sovereignty"); see also Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) European Journal of International Law 681, 682 (Crema defines 'Restrictive interpretation' as "the interpretative choice which restricts the meaning of a text. In an original sense, it is restrictive in favour of the real intentions of the parties, as opposed to what is expressed in a text.").
[119] See, Petrig (n 40).
[120] Jean-François Akandji-Kombe, "Positive obligations under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights" (2007) 7 Human Rights Handbooks, Council of Europe, 5.
[121] Ibid.
[122] Ibid.

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obligation will result from a State's inactions to safeguard rights. A violation of negative obligation results from a State's actions that prevent or limit rights.[123]

The negative obligation is less comprehensive than a positive obligation. The obligation to protect and fulfil means States must take positive action to protect individuals and groups against the violation of their human rights by others and facilitate the enjoyment of fundamental human rights.[124] In interpreting the African Charter on Human and People's Rights, the positive obligation includes promoting the enjoyment of all human rights.[125] Similarly, the ECtHR further emphasised the positive obligation of States in *X and Y v. the Netherlands.*[126] Here, the ECtHR held that there is an obligation on authorities to take steps to ensure the enjoyment of the rights is not interfered with by any other private person. Also, in *Velàsquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights held that a State violates its obligation to protect if such a State allows private persons or groups to act freely and with impunity to the detriment of other rightsholders.[127]

The concept of positive obligations and negative obligations is apparent in both IHRL and LOS. However, the scope of the extra-territorial application of these obligations, especially positive obligations, is not settled under IHRL, which is reflected in maritime security operations.

i. Law of the sea and international human rights law

The law of the sea contains several duties that also fall under the categories of either positive or negative obligations. An example of a positive obligation is the flag State's duty to require the master of a ship flying its flag to assist any person found at sea in danger of being lost or in distress.[128] Also, UNCLOS requires coastal States to promote the establishment, operation, and maintenance of an adequate and effective search and rescue service regarding safety on

[123] Ibid 11.
[124] UN Office of the High Commissioner for Human Rights, 'International Human Rights Law' <http://www.ohchr.org/EdN/Issues/Pages/WhatareHumanRights.aspx> accessed 1 November 2021 points out that the obligation to protect requires States to protect individual and groups against human rights abuses.
[125] For example, see 155/96 : Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria para 44 and para 46 <http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf> accessed 1 November 2021 (Ogoni land case) it was held that "Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights…'
[126] App no. 8978/80 (ECtHR, 26 March1985) 32.
[127] See, *Velàsquez Rodríguez* case, (IACtHR, 19 July 1988), Series C, No. 4.
[128] UNCLOS, Article 98.

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and over the sea.[129] There are several negative obligations, such as Article 24 UNCLOS, which states that a coastal State shall refrain from hampering foreign-flagged vessels' innocent passage through the territorial sea, except as allowed by the Convention. There are several rights and duties in UNCLOS and other international maritime conventions that States must respect. Accordingly, these provisions provide a medium to assess compliance by a State with its positive obligations to protect specific human rights and the negative obligation to respect and refrain from infringing such rights.

Generally, all international human rights instruments have been interpreted by courts and monitoring bodies to contain State obligations that are both positive and negative.[130] The scope of the negative and positive obligations are determined on the legal basis of such rights as contained in the human rights instruments.[131] However, what is somewhat contentious is whether the obligations apply extra-territorially without a jurisdictional link (i.e., *de facto* and *de jure*). This contention is particularly significant in discussing the application of human rights principles at sea, especially on the high sea, during law enforcement operations.

Under maritime law, obligations and jurisdiction are intertwined, meaning the flag State, port State and coastal State have various obligations to fulfil based on their jurisdiction. Under IHRL, it is uncertain if jurisdiction determines the scope of obligations because the jurisdictional clauses in each human rights instrument vary in words and interpretation. Thus, it is more challenging to obtain a general view of the scope of obligations within IHRL.[132] For instance, the wording of the ICCPR dealing with similar civil and political rights as the ECHR appears to give a more holistic understanding of extra-territorial obligation. Article 2(1) of the ICCPR provides that States undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant." Based on this provision, the ICCPR's jurisdictional threshold applies to the positive obligation to ensure or secure and the negative obligation to respect. Accordingly, the ICJ has interpreted Article 2(1) of the ICCPR as applicable to acts done by a State in exercising its extra-territorial jurisdiction.[133] Conversely, Article 1 of the ECHR explicitly refers to the obligation to "secure

[129] Ibid.
[130] Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *'The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 562-3.
[131] Akandji-Kombe (n 120).
[132] See Ibrahim Kanalan, 'Extra-Territorial State Obligation Beyond the Concept of Jurisdiction' (2018) 19 German Law Journal 44, 44- 62; see also Spijkerboer (n 114) 227-235.
[133] *The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories* (ICJ. 9 July 2004) para 111; See also Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic,

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to everyone within their jurisdiction the rights and freedoms". Some writers argue that Article 1 ECHR refers only to the positive obligations to secure through this wording.[134] However, such a view is erroneous as the ECHR innately contains and applies its jurisdictional threshold to negative obligations.[135]

In contrast, the applicability of the International Covenant on Economic Social and Cultural Rights (ICESCR)[136] is not limited to the exercise of jurisdiction.[137] The wording in ICESCR, Article 2 (1) provides that:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

Here, there is no mention of jurisdiction, unlike in the previous human rights instruments. For that reason, one can say that the ICESCR includes extra-territorial obligations of States beyond the notion of jurisdiction.[138] However, Kanalan points out that the justification for the scope of the extra-territorial obligation is vaguer than the extra-territorial applicability of the Covenant.[139] Arguably, the rationale for the Covenant's extra-territorial applicability is the provisions on international assistance and cooperation in the ICESCR.[140] Nevertheless, the Committee on Economic, Social and Cultural Rights (CESCR) does not refer to a specific justification in discussing the extra-territorial applicability of the Covenant.[141]

In more recent times, the view is shifting towards the extra-territorial application of human rights obligations regardless of the notion of jurisdiction (characterised as effective control or authority over persons or territory). The Maastricht Principles on the Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights extends the scope of

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Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 Human Rights Law Review. 1.

[134] Kanalan (n 132) 51.

[135] Akandji-Kombe (n 120) 1.

[136] Ibid.

[137] Fons Coomans, "Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisation" (2007) 11 Max Planck Yearbook of United Nations Law 360, 362.

[138] See, e.g., Sigrun I. Skogly & Mark Gibney, "Transnational Human Rights Obligations" (2002) 24 Human Rights Quarterly 781, 786.

[139] Kanalan (n 132) 47-8.

[140] Ibid 48.

[141] Ibid 49.

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obligation beyond jurisdiction. [142] Similarly, UN bodies such as the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CtRC) also hold the same view.[143] The jurisprudence of the Inter-American human rights system follows a similar approach to the extra-territorial application of human rights treaties. The Inter-American Commission on Human Rights has reaffirmed that the Inter-American Convention applies to situations where States exercise authority or control over acts with an extra-territorial locus.[144] The ICJ, as previously discussed, tilts towards this new model of interpreting obligation.[145] The ECtHR's position on this is unclear. Apparently, as set out in the previous section, the existence of an extra-territorially violated ECHR obligation does not always create a jurisdictional link.[146]

Regarding MSOs, the gap in protection created by the diverse interpretation of obligations is apparent in joint operations carried out by various member States within an organisation. The mandate for joint maritime operations mainly refers to "applicable international law" as the legal basis for their operations without spelling out all such laws.[147] Therefore, this current jurisprudence from regional and global courts, which supports an expansive interpretation of States' obligations for the ICESR and partially the ICCPR, can create legal uncertainties (in terms of application) when the mandate for an MSO does not identify a specific instrument.[148]

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[142] Eto Consortium, Maastricht Principles on Extraterritorial Obligations of States, In The Area of Economic, Social and Cultural Right (2013) <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 1 November 2021 [Hereinafter referred to as "Maastricht principles"] paras 8, 9, 11 and 19.

[143] See Oona Hathaway et al., 'Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?' (2011) 43 Arizona State Law Journal 389, 414; see also Commission on the Rights of the Child, General Comment 16: On State Obligations Regarding the Impact of the Bus. Sector on Children's Rights para 38, UN Document CRC/C/GC/16 (Apr. 17, 2013).

[144] *Coard et Al. v. United States* (n 39) para 37; see also *Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights* (n 60).

[145] See, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 53).

[146] *Banković* case (n 28); see also *Hanan v Germany* (n 75); see also *Germany v Russia* (n 74).

[147] See, for example, the mandates for EU NAVFOR (MED) - Operation Sophia - which refers to UNSC resolutions and international law as its legal basis <https://www.operationsophia.eu/wp-content/uploads/2018/03/Council-Decision-CFSP-2015778-of-18-May-2015.pdf> accessed 1 November 2021; see also the mandate of EU NAVFOR Somalia- Operation Atlanta <https://eunavfor.eu/mission/> accessed 1 November 2021.

[148] Differential interpretation can become a source of uncertainty for the States and state agents (enforcement operators) leading to more violations; see Council of Europe, 'Report of the Steering Committee for Human Rights (CDDH): The Place of The European Convention on Human Rights in The European and International Legal Order' adopted at its 92nd meeting (Strasbourg, 26–29 November 2019) 179 observes that "Europe's architecture of human rights protection has been described as a 'crowded house'. The existence of parallel protection mechanisms may normally be a source of enrichment and enhancement of the universal protection of human rights. *However, where the interpretation of the provisions in the different human rights instruments is perceived either as unclear or as inconsistent, these mechanisms also have the potential of becoming a source of uncertainty* for States Parties on how to best fulfil their human rights commitments and for individuals as regards the exact scope of their rights" (emphasis added).

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Thus, some States can escape liability for violating their obligations in courts practising the restrictive interpretation of obligation and jurisdiction

Again, due to a lack of coherence in the scope of interpreting obligations, specificity might be required to help State agents proactively apply the relevant IHRL requirements.[149] Thus, in turn, ensuring better protection of people at sea. For example, we can look to *AS and others v. Malta* and *AS and others v. Italy*, concerning the liability of Italy and Malta arising from their inactions which caused the death of migrants on a ship-wrecked vessel on the high sea.[150] In these cases, the HRC, in interpreting jurisdiction under the ICCPR, looked for causal links between Italy and Malta to the situation and showed that the existence of a breached obligation links the wrongdoer to the offence.[151] If the same case was brought before the ECtHR, the reverse might be the outcome.[152]

Moving from the complexity in interpreting IHRL obligations, another problem is the interpretation and application of State sovereignty. States have varying interpretations of sovereignty, which affects those States ratification and application of IHRL. This concept of State sovereignty is analysed below.

2.2.3 Sovereignty

The term 'sovereignty' signifies a "State's independent status as a politico-legal entity in the world and its absolute authority to make law."[153] Sovereign States enjoy the right to non-interference, which means States (including the UN) cannot intervene in State's internal

[149] Petrig (n 40); see also Marko Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 Harvard International Law Journal 81, 111–19; see also Oona Hathaway et al (n 143); see also *Al-Skeini and others v. UK* (n 38) para. 133; *Banković* case (n 28) 67.

[150] *AS and others v. Malta*, Comm No. 3043/2017, UN Doc. CCPR/C/128/D/3043/2017 (2021); see also *AS and others v. Italy*, Comm No. 3042/2017, UN Doc CCPR/C/130/DR/3042/2017 (2021).

[151] Ibid *AS and others v. Malta* paras 6.7 and 6.8, The HRC held that Malta had effective control over the rescue operation because of the existence of the shipwrecked vessel in their search and rescue (SAR) region and their response to the distress call; see also *AS and others v. Italy*, para 7.8 the HRC held that the incident fell within Italy's jurisdiction because Italian authorities were aware of the distress call and closer to the distressed vessel but did nothing to respond.

[152] This is because the ECtHR does not admit a cause-and-effect notion of jurisdiction, see *Banković* case (n 28) para 75.

[153] Martine Loughlin 'Why Sovereignty' in Richard Rawlings, Peter Leyland, and Alison Young (ed) *Sovereignty and the Law: Domestic European and International Perspectives* (Oxford University Press 2013) 34; see also Stephen D. Krasner, *Power, the State, and Sovereignty : Essays on International Relations* (Taylor and Francis, 2009) Krasner writes at 184: "In practice, sovereignty has been commonly used in at least four different ways "domestic sovereignty, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control transborder movements; international legal sovereignty, referring to the mutual recognition of states or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations."

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affairs.[154] However, sovereignty is not absolute, as States sign and ratify treaties that restrict some of their governmental powers and sovereign rights.[155] Thus, sovereignty is also a responsibility that involves State duties towards persons within their territories and control and the international community.[156] IHRL is an embodiment of various State duties towards individual rights. On the other hand, LOS does not contain individual rights but establishes States sovereign rights and duties.[157] Integrating these two fields of law towards protecting people at sea vis-à-vis MSOs depends on the interpretation and applicability of sovereignty as a right and a responsibility.[158]

Sovereign States are the primary subjects of binding international law norms.[159] Based on popular sovereignty, States "are peoples within states, and no longer states only".[160] With the rise of the international rule of law and democracy, the people decide the affairs within and outside the territory of the State.[161] However, the challenge of ensuring the better protection of people through the application of human rights at sea arises from different understandings of sovereignty and human rights.[162] Some States adopt a Westphalian perspective where the rights of the sovereign are above the rights of people.[163] Other States adopt a view that prioritises the

[154] See, *France v Turkey (Lotus Case*) [1927] PCIJ Rep Ser A no 10, p.18, the Permanent Court of International Justice (PCIJ) noted that 'the first and foremost restriction imposed by international law upon a State is that […] failing the existence of a permissive rule to the contrary […] it may not exercise its power in any form in the territory of another State'; see also *United Kingdom of Great Britain and Northern Ireland v Albania (Corfu Channel)* [1949] ICJ Rep 4, p. 35. In the *Corfu Channel* case, the successor of the PCIJ, the International Court of Justice (ICJ), noted that "between independent States, respect for territorial sovereignty is an essential foundation of international relations."; see also *Nicaragua v. United States of America* (n 87) para 202, the ICJ in the 1986 *Military and Paramilitary Activities* case held that "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference".

[155] Loughlin (n 153) 44; see also Jorge Emilio Nunez, 'About the Impossibility of Absolute State Sovereignty: The Early Years' (2014) 27 International Journal Semiotics of Law 645, 645–64; see also Krasner (n 153).

[156] James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2014) 52; see also James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm D. Evans (eds), *International Law* (2nd edn., Oxford University Press, 2006) 451. These authors point out that "responsibility is the necessary corollary of obligations".

[157] See UNCLOS; see also Maria Gavouneli (n 33).

[158] Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of The International Legal Order* (Brill Nijhoff, 2019) 89, international law rests on the concept of sovereignty and the state.

[159] Samantha Beeson, 'Sovereignty, International Law and Democracy' (2011) 22(2) European Journal of International Law 373, 376.

[160] Ibid 383; for more on this see Bernard Yack 'Popular Sovereignty and Nationalism' (2001) 29(4) Political Theory 517, 517-36.

[161] Ibid Samantha Beeson, 383.

[162] See, Jing Men, 'Between Human Rights and Sovereignty—An Examination of EU–China Political Relations' (2011) 17(4) European Law Journal 534, 534-50.

[163] Harald Bauder and Rebecca Mueller, 'Westphalian Vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance' (2021) Geopolitics 1, 1-14 here the authors argue that the Westphalian Sovereignty is the same as the Eurocentric concept of Sovereignty.

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rights of persons in their territory over other people.[164] Either one or the other is the predominant approach reflective in most maritime security strategies.[165]

Also, the difference between the content of international law and its application across the globe creates uncertainty that can affect the protection of people at sea. The coherence between the content and interpretation of the law is essential to achieve a jurisprudential change by integrating IHRL and LOS. Koskenniemi observes that the content of the law is verifiable by reference to actual State behaviour, will or interest.[166] Similarly, at sea, Aalberts and Gammeltoft-Hansen point out that the content of the law informs States' conduct, and thus States inactions towards their responsibilities can also be linked to the law.[167] These maritime legal black holes lead to *de jure* rightlessness and *de facto* non-enforcement, as highlighted in chapter one and further explored in chapters three and four.

Moreover, practice shows that States violate human rights using sovereignty as a shield.[168] States are often both the protectors and violators of human rights obligations. Consequently, the conceptual expectation is that State sovereignty does not constrain human rights,[169] but the reality seems to be the reverse.[170] For ostensibly national security concerns, States use their sovereign powers to counter their international obligations at sea even if they threaten human life.[171] For instance, various cases from different regions of the world show the above practice:

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[164] State practice shows that most European States adopt this view, see Ramona Coman & Cécile Leconte 'Contesting EU authority in the name of European identity: the new clothes of the sovereignty discourse in Central Europe' (2019) 41(7) Journal of European Integration 855, 855-70.

[165] Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge University Press, 2020) 129; see also Susan Marks, 'State-Centrism, International Law and the Anxieties of Influence' (2006) 19 Leiden Journal of International Law 339, 339-47.

[166] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 17.

[167] Tanja E. Aalberts and Thomas Gammeltoft-Hansen, 'Sovereignty at sea: the law and politics of saving lives in mare liberum' (2014) 17 Journal of International Relations and Development 439. 446, and at 461.

[168] Abdullah Kadir and Zana Tofiq Kaka Amin, 'Can Human rights be reconciled with State Sovereignty' (2017) 4 International Journal of Social Sciences & Educational Studies 29, 29-36; see also Daria Jartczewska, 'To What Extent Do Universal Human Rights Encoded within International Law Challenge State Sovereignty?' <http://www.e-ir.info/2013/03/15/do-human-rights-challenge-state-sovereignty/> accessed 1 November 2021.

[169] Cristina Lafont, 'Human Rights, Sovereignty and the Responsibility to Protect' (2015) 22 (1) Constellations 68, 75, Lafont argues that sovereignty and human rights are mutually reinforcing political values as long as the State is the primary protector of human rights; see also John Charvet, 'The Idea of State Sovereignty and the Right of Humanitarian Intervention' (1997) 18(1) International Political Science Review 39, 39-48.

[170] See Eric A. Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014); see also Sovereignty Rules! Human Rights Regimes and State Sovereignty <https://www.cghr.polis.cam.ac.uk/upload/Sovereignty%20Rules> accessed 1 November 2021 ;see also Ruth Jamieson and Kieran McEvoy, 'State Crime by Proxy and Judicial Othering' (2005) 45(4) British Journal of Criminology 504, 504-27.

[171] Petrig (n 97); see also Douglas Guilfoyle., 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters', In Clive R. Symmonds (eds), 'Selected Contemporary Issues in The Law of The Sea' (Martinus Nijhoff Publishers, 2011) 85-100; see also Irini Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: A general overview' (2016) 98(2) International Review of the Red Cross 49.

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the *Tampa*, Haitian interdiction cases, Cap Anamur, Tunisian Fishermen, and the *Pinar affair*.[172]

In the *Tampa case*[173], on 26 August 2001, a boat carrying about 450 asylum seekers began to sink. It was found by the *MV Tampa*, whose Captain, Arne Rinnan, fulfilled his duty as a mariner and picked them up. He planned to take them back to Indonesia, but they protested. The captain saw that many of the asylum seekers were sick and considered it too risky to return to Indonesia since Christmas Island was nearer.[174] He headed for Christmas Island but was denied entry clearance by the Australian Government and instructed to remain in the contiguous zone outside the Australian territorial limit. On 28 August, Rinnan put out a distress signal, and the following day proceeded into Australian territorial waters. Australian SAS commandos boarded the vessel 4 miles off Christmas Island and detained all the rescuees on board the *MV Tampa*. On 31 August, the Victorian Council for Civil Liberties sought orders on behalf of the detainees from the Federal Court by way of mandamus, habeas corpus, and injunctive relief. On 3 September, the detainees were transferred to the Australian naval supply vessel *HMAS Manoora* which set sail for Papua New Guinea.[175] On 11 September, the Federal Court ruled that the detention of the rescuee's onboard the Tampa was unlawful and ordered their return to Australia for processing. On 21 September, the Federal Court of Australia's full bench reversed the Federal Court decision on the ground that the detainees had no right to enter Australia. Subsequently, the Australian Government transferred those rescued by the *Tampa* to processing centres in Nauru (a small island state in the Pacific) and New Zealand.[176]

In this case, the Australian Government's defence was that it had executive power to repel people from its borders as a necessary facet of national sovereignty.[177] Subsequently, the Australian Government made laws with a retrospective effect to protect the Government from any cost arising from the Tampa case and stop any such future occurrences.[178] Similarly, in the *Haitian Interdiction* case, the US government argued that they had the right to expel migrants found at sea from US territory. However, the Inter-American Commission on Human Rights

[172] See Pierluigi Umbriano, 'Is it a crime to help people to survive (Cap Anamur and other cases)' <http://www.eldh.eu/fileadmin/user_upload/ejdm/publications/2013/Pierluigi_Umbriano_-_Speech.pdf> accessed 1 November 2021.
[173] Julian Burnside, 'Refugees: The Tampa Case' <http://www.futureleaders.com.au/pdf/Julian_Burnside.pdf> accessed 1 November 2021; see also *Ruddock v Vadarlis* (FCA, 18 September 2001) 1329.
[174] Ibid *Ruddock v Vadarlis*.
[175] Ibid.
[176] Ibid.
[177] Juliana Burnside (n 173).
[178] Ibid.

held that the US was wrong for interdicting vessels on the high seas for repatriation. By so doing, the US prevented the migrants from seeking asylum in other countries.[179] Similarly, in the *Cap Anamur, Tunisian Fishermen*, and the *Pinar affair* cases, the respective States used their sovereign powers to discourage migrants from being rescued at sea.[180]

These cases and more recent cases are explored in more detail in chapters three and four concerning irregular migration and piracy at sea to illustrate the need to clarify sovereignty as a right and responsibility in the maritime environment.[181] A proper balance between the two classifications of sovereignty is needed to combat the ill effects of legal uncertainties faced by people at sea. The next section addresses the friction between MSOs and IHRL obligations due to the varied understanding of sovereignty as a right and responsibility.

2.3 Specific human rights provisions in maritime security operations

During MSOs, States have regularly violated the rights to liberty and security, freedom of expression and assembly, and the *non-refoulement* obligation. This section discusses the first two obligations, while chapters three and four address States' *non-refoulement* obligations regarding irregular migration and piracy at sea. Currently, only the ECtHR has progressively interpreted the application of human rights law at sea concerning MSOs. This section largely relies on the ECtHR's case law to hypothesise the potential interpretation by other IHRL courts. The presumption that this interpretation will be tenable in other courts is based on the similarity between the human rights provisions in the ECHR and other IHRL instruments such as the ICCPR and the ACHPR.[182]

2.3.1 The right to liberty and security

In conducting an MSO such as counter-piracy or anti-drug trafficking operations, UNCLOS and other international instruments authorise State agents to arrest, detain, and transfer

[179] *Haitian Interdiction* Case (n 49) at 550.
[180] *Cap Anamur*, Case N. 3267/04 R.G.N.R (07 October 2009); for the details on the cases see Pierluigi Umbriano (n 176); see also Tugba Basaran, 'The saved and the drowned: Governing indifference in the name of security' (2015) 46(3) Security Dialogue 205, 205-20; Tugba Basaran, 'Saving Lives at Sea: Security, Law and Adverse Effects' (2014) 16(3) European Journal of Migration and Law 365, 365-87.
[181] Scholars have pointed out that these practices undermine human rights and suggest that human rights should gain priority. See Michael W Reisman, 'Sovereignty and Human Rights- Contemporary International Law' (1990) 84 The American Journal of International Law 866, 866-76; see also Jack Donnelly, 'Human rights' In John Baylis, Steve Smith, Patricia Owens, (eds.) *Globalisation of World Politics: introduction to International Relations* (Oxford University Press, 2011) 496-508.
[182] David Simon Goddard, 'The Application of International Human Rights Law to Maritime Security Operations' (DPhil thesis, University of Exeter 2018).

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suspects.[183] However, this is subject to the right to liberty.[184] In interpreting this right, there is friction between a State's law enforcement powers and the right to liberty.[185] It is unclear the point at which the control exerted by a State agent over a suspect amount to a deprivation of liberty.

For an MSO to constitute a deprivation of the right to liberty, time, spatial, and coercion elements need to have been violated. The spatial and coercion element is violated when a suspect is detained on board a law enforcement vessel and has no free will to leave the ship.[186] The time element is violated when the detained suspect is not brought promptly before a judge.[187] All these elements are demonstrated in case law, such as *Rigopoulos v. Spain* and *Medvedyev v. France*.[188] In these cases, ships flying the Panamanian and the Cambodian flags, respectively, were intercepted on the high seas. In the *Rigopoulos* case, the Spanish navy intercepted the Panamanian ship, while in the *Medvedyev* case, the Cambodian flagship was intercepted by the French navy for suspicion of drug trafficking. In both cases, vast quantities of drugs were found onboard, and some were thrown overboard by the crew members. The crew members were taken into custody on the navy ship, brought to a port of the arresting State, and later submitted to criminal proceedings. The travel time between boarding and arraignment before a judge was sixteen days in the *Rigopoulos* case and thirteen days in the *Medvedyev* case. In both cases, the crew members claimed that the State detaining them had violated Article 5(1) and Article 5(3) of the ECHR.[189]

In the *Medvedyev* case, the Court held that there was a violation of Article 5(1) ECHR, in particular highlighting the violation of the coercion and spatial element. The Court stated that:

> While it is true that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, so that there was a *de facto*

[183] Petrig (n 40); see also Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (n 97) 157-65.
[184] The right to liberty and security is a fundamental right enshrined in various human rights instruments, and domestic legislation.
[185] Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243,246.
[186] Petrig (n 97) 157-65.
[187] The right to liberty entails the procedural right to be brought promptly before a judge. For example, ECHR, Article 5(3) provides that: 'everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to a release pending trial.' See also Anna Petrig (n 99) 160-66.
[188] *Medvedyev* case (n 95); see also *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999).
[189] Article 5(1) ECHR provides 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'.

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> restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. *The crew members were placed under the control of the French special forces and confined to their cabins during the voyage.* True, the Government maintained that during the voyage, the restrictions were relaxed. In the Court's view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces (emphasis added).[190]

However, in the above cases, the Court also held that there was no violation of the time element because it recognised in *Rigopoulos* and *Medvedyev* that only "exceptional circumstances" could justify such prolonged detention.[191] Therefore, the Court noted in the *Medvedyev* judgment that 'there was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the *Winner*, which made it impossible for it to travel any faster'.[192] In *Rigopoulos,* the Court considered that the delay could not be attributed to the Spanish authorities because it was materially impossible to bring the applicant physically before such authority any sooner.[193] Thus, a wholly exception circumstance is a situation beyond the control and authority of any of the parties, including the unique features of the maritime environment.

Accordingly, on a case by case basis, the procedural requirement to be brought "prompt[ly] before a judge" can be interpreted to apply when the suspect is brought onshore. The ECtHR considered the distance at which MSOs may be conducted from the interdicting State's territory allowing a substantial delay before individuals are brought before judicial authorities. In *Vassis and others v. France*, the issue was whether the French Government violated Article 5(3) ECHR based on the 18-day transit to the port and the next 48 hours upon arrival at the port.[194] The French Government submitted it was "materially impossible to physically bring the applicants before the judicial authority any more promptly", and upon arrival at the port, the delay was due to the "number of persons concerned and the need for interpreters for the different acts and steps in the proceedings."[195] The ECtHR held that the 18-day transit was not

[190] *Medvedyev* case (n 95) paras 74 and 75.
[191] Ibid see also *Rigopoulos v Spain* (n 188).
[192] *Medvedyev* case (n 95) para 131.
[193] Ibid para 130.
[194] *Vassis and Others v. France* App no 62736/09 (ECtHR, 27 June 2013).
[195] Ibid.

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more than necessary. However, the 48 hours delay upon arrival was not justifiable.[196] Based on this judgment, Wilson points out that the *Vassis* case creates a balance between human rights and maritime law enforcement because the Court took cognisance of the nature of the maritime environment.[197]

Nonetheless, it is unclear how MSOs can fulfil the spatial and coercion elements of the right to liberty. The restriction of suspects onboard a ship seems to constitute a violation. Some suggest using video calls for Court hearings at sea or the supplemental use of a UN flagged vessel hosting trials at sea.[198] Weather conditions on the high seas are unpredictable, which would affect any possible video hearing at sea. The cost and practicalities of hosting a trial at sea should also be factored in. Indeed, there is no definitive solution because there is no one-size-fits-all solution, as interpretation is based on the facts of each case.

2.3.2 Freedom of expression and assembly

MSOs include maritime interception operations where State agents intercept vessels violating their national laws. In some of these operations, States have violated the rights to freedom of expression and assembly when intercepting NGOs protesting at sea.[199] This subsection uses this right to illustrate the friction between MSOs and IHRL as an issue that requires separate consideration to the relationship between LOS and IHRL.

IHRL instruments guarantee the freedom of expression and freedom of assembly of everyone.[200] Freedom of expression is the right to hold, receive and disseminate opinions,[201] while freedom of assembly is the right to peaceful assembly and association with others.[202] These two freedoms are usually exercised during protests and campaigns, albeit subject to restrictions stipulated under national law.

In the *Kudrevičius and others* case, the ECtHR observed that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is

[196] Ibid para 60-62.
[197] Wilson (n 185) 267.
[198] Barry Hart Dubner and Brian Otero, 'The Human Rights of Sea Pirates: Will the European Court of Human Rights Decisions Get More Killed?' (2016) 15(2) Washington University Global Studies Law Review 215, 246.
[199] *Women on Waves and Others v Portugal* App No 31276/05 (ECtHR, 3 February 2009); see also *Drieman and Others v Norway* (Admissibility) App no 33678/96 (ECtHR, 4 May 2000); see also, *The Arctic Sunrise Arbitration (The Kingdom of the Netherlands v The Russian Federation)* (Merits) PCA Case No 2014-02 (14 August 2015).
[200] For a general understanding of the freedom of expression and the freedom of assembly, see Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), International Human Rights Law (2nd edn, OUP 2014) 225–31 and 234–5.
[201] See Article 10 ECHR; Article 19 ICCPR, Article 19 UDHR and Article 9 ACHPR.
[202] See Article 11 ECHR; Articles 21 and 22 ICCPR, Article 20 UDHR and Articles 10 and 11 ACHPR.

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one of the foundations of such a society, it should not be interpreted restrictively."[203] Therefore, MSOs should respect the right to freedom of expression and assembly even though it involves unauthorised entry. In *Women on Waves and others v. Portugal*, three associations sent the ship *Borndiep* to Portugal to stage activities promoting the decriminalisation of abortion, including distributing drugs that can induce abortion.[204] Aware of the project, the Portuguese Government prevented the vessel from entering its territorial sea. The three plaintiffs sued Portugal in national courts, which refused the claim. Subsequently, the case was brought before the ECtHR arguing violation of Article 10 (freedom of expression). The Court held that the Portuguese Government violated Article10 by refusing entry to the *Borndiep*.[205]

The LOS recognises that coastal States exercise sovereignty over their territorial sea and internal waters and therefore has jurisdiction to enact and enforce laws.[206] This sovereign right is exercisable with due regard to the navigational rights of foreign vessels, which must be "continuous and expeditious".[207] The navigational rights must not be prejudicial to the peace, good order and security of the coastal State.[208] Such prejudicial activity includes *inter alia* "any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State".[209] The protests carried out in the exercise of the freedom of expression can be argued (on a case by case basis) to come under the UNCLOS description of the prejudicial activity. However, UNCLOS does not prevent freedom of expression while exercising the right to innocent passage and freedom of navigation at sea. It does provide that coastal States can prevent prejudicial passage through their territorial sea, and foreign-flagged vessels must exercise due regard to the coastal State's right, including their use of their installations.[210] Accordingly, UNCLOS implicitly gives the coastal State the power to prevent certain protesting activities, which conversely may constitute a breach of IHRL.

Therefore, there needs to be a balance between the sovereign rights to prevent prejudicial entry under UNCLOS and individual rights under IHRL. So far, courts have interpreted the LOS provisions on prejudicial entry within the perimeters of IHRL or vice-versa.[211] The closest a

[203] *Kudrevičius and others v Lithuania* App no 37553/05 (ECtHR, 15 October 2015) para 91.
[204] *Women on waves and others v Portugal* (n 199).
[205] Ibid.
[206] UNCLOS, Article 2.
[207] UNCLOS, Article 18.
[208] UNCLOS, Article 19.
[209] UNCLOS, Article 19, specifically Article 19(2) (k).
[210] UNCLOS, Article 25 and Article 87.
[211] The ECtHR had earlier considered freedom of expression in a maritime context in *Drieman and others v Norway*, (n 199) but not substantially only concerning admissibility.

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court has come to undertaking this analysis arose in the *Arctic Sunrise* case.[212] In this case, the Russian Government detained a Dutch-flagged vessel, *Arctic Sunrise* and its crew members without the flag State's consent (The Netherlands) for carrying out a protest on the *Prirazlomnaya* offshore oil production platform operated by the Russian Government located within Russia's EEZ. [213] The Netherlands requested provisional measures from ITLOS, and the Arbitral Tribunal decided the merits. The Arbitral Tribunal and ITLOS acknowledged the Netherlands' submissions, which was for the tribunal to consider applying the ICCPR based on Article 293 UNCLOS.[214]

However, the Arbitral Tribunal noted that it was beyond its jurisdiction to directly apply Articles 9 and 12(2) of the ICCPR or determine breaches of such provisions.[215] The tribunal further added that human rights law alone (in this case, the ICCPR) could not be the source of jurisdiction for any UNCLOS dispute settlement body.[216] With no reference to human rights law provisions, ITLOS ruled that Russia breached its international obligations under UNCLOS as they failed to obtain the prior consent of the Netherlands before intercepting, boarding, and charging the *Arctic Sunrise*.[217] If ITLOS or the Arbitral Tribunal had analysed IHRL, they would have generated a jurisprudence on interpreting the right to freedom of expression and assembly at sea through the UNCLOS lens.[218]

In sum, the above analysis of the rights to freedom of expression and assembly at sea shows that the integration of LOS and IHRL is necessary to prevent further human rights violations during MSOs. ITLOS acknowledges that States should uphold their IHRL obligations in all circumstances[219] and respect 'the consideration of humanity'.[220] Yet by not directly applying

[212] The *Arctic Sunrise* case (n 199).
[213] Ibid.
[214] Ibid paras 193-198. Para 198 points out that the "Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention"; see also *the "Arctic Sunrise" Case (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures* (ITLOS, 25 October 2013) [Hereafter referred to as 'ITLOS Arctic Sunrise Report'] para 87.
[215] The *Arctic Sunrise* case (n 199) para 198.
[216] Ibid para 192 points out that "Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention".
[217] The *Arctic Sunrise* case (n 199); see also ITLOS Arctic Sunrise Report (n 214).
[218] Oude Elferink, 'The Arctic Sunrise Incident: A Mulit-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 International Journal of Marine and Coastal Law, 259-260.
[219] The M/V 'Louisa' Case (Saint Vincent and the Grenadines v Kingdom of Spain) (Judgment of 28 May 2013) ITLOS Reports 2013, para 155; see also "Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004, p. 17, at pp. 38-39, para. 77; "Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007, p. 74, at p. 96, para. 76.
[220] The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v Guinea) (Judgment of 1 July 1999) ITLOS Reports 1999, para 155.

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the human rights regime in interpreting LOS obligations, to date, ITLOS has not produced jurisprudence examining the application of human rights law at sea, thereby reinforcing the legal uncertainties regarding the protection of people at sea.

2.4 Conclusion

This chapter has evaluated some of the legal uncertainties affecting the integration of IHRL and LOS towards protecting people at sea. These are predominantly problems of interpretation by States and the ECtHR arising from state-centrism (the goal of protecting the State's interest over all else). This state-centric agenda results in the restrictive interpretation of jurisdiction, limits on extra-territorial obligations and state-centred sovereignty. First, jurisdiction is a concept subject to multiple courts' interpretations for various purposes.[221] The interpretation of jurisdiction differs in LOS and IHRL. However, the legal uncertainties mainly emanate from IHRL courts.[222] A key one is that some IHRL adjudicatory bodies admit a cause-and-effect notion of jurisdiction, while the ECtHR explicitly rejects this. By not adopting this notion of jurisdiction, the ECtHR cases demonstrate gaps in the protection of people at sea. The ECtHR's restrictive interpretation of jurisdiction, in particular, affects the protection of migrants at sea, which I explore in the next chapter on irregular migration in the Mediterranean Sea. Also, under IHRL and LOS, obligations predominantly function within the concept of jurisdiction such that when there is no jurisdiction, there is no violation of State obligation.[223] Though not entirely a problem within the LOS framework concerning sovereign rights, this becomes an issue for the fulfilment of IHRL obligations on the high seas. As such, it qualifies as a maritime legal 'black hole' when an extra-territorial jurisdictional link is severed, and wrongdoers (States) cannot be held accountable for their human rights violations.[224]

State practice shows that the predominant interpretation of sovereignty tilts towards protecting sovereign rights over fulfilling State responsibility towards people at sea (specifically on the high seas). States are the primary protectors of human rights and security. Therefore, it is necessary that their enforcement operations at sea reflect the balance between their responsibilities under IHRL and sovereign rights under LOS. Otherwise, the goal of ensuring better protection of people through the integration of IHRL and LOS would not be achieved.

[221] Milanovic (n 23) 446-7.
[222] Guilfoyle (n 171) Guilfoyle illustrates how treaty interpretation and the lack of a uniform scope of application of human rights instruments affects the development and evolution of human rights law at sea.
[223] Beeson (n 62).
[224] Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) The European Journal of International Law 347

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Instead, States will further exploit maritime legal black holes within the law to preserve their sovereign rights at the expense of their responsibility towards people at sea,[225] as is further explored in the case studies presented in chapters three and four.

In addition, the interpretation of human rights law towards MSOs shows that the ECtHR allows a loose interpretation of the time element concerning the right to liberty. However, the uncertainty regarding the scope of the coercion and spatial elements of the right to liberty might restrict the effective planning and implementation of MSOs.[226] Because of the nature and procedure in such operations, a strict interpretation of these elements can result in almost all maritime security counter-operations violating the right to liberty. As much as the maritime environment should not be an area where human rights are violated, it should also not be an area where wrong-doers thrive.[227] Thus, there is a need to balance rights and security-based measures in dealing with maritime security challenges. Such strict interpretation can also feed the *de facto* non-enforcement issue discussed in chapter four: where State's unwillingness to conduct much-needed counter-piracy operations is exacerbated by the risk of sanction for human rights violations.[228]

The application of IHRL and LOS simultaneously is necessary to protect people at sea. However, the incoherence in understanding these foundational concepts points to a need for a conceptual and operational integration through a 'unifying concept'. Later on, in chapter five, human security is explored as a conceptual tool that can address these legal uncertainties and thus ensure better protection of people. Before then, the next two chapters proceed to explore in more detail legal uncertainties within IHRL and LOS concerning irregular maritime migration and piracy at sea. These chapters argue that while the integration between these two fields of law is necessary, integration by itself is insufficient to ensure the protection of people at sea due to the existence of maritime legal black holes. These chapters further lay the foundation for the discourse on the viability of human security as an operational tool for maritime security in chapter five.

[225] Ibid, see also Tanja E. Aalberts and Thomas Gammeltoft-Hansen (n 171); see also Jessica Greenberg (n 150)
[226] Brian Wilson (n 188) argues that to prevent this, Courts should recognise the maritime environment as a key influencer on the interpretation of human rights at sea.
[227] The ECtHR noted the same thing in *Medvedyev* case (n 95) para 81.
[228] See, chapter four below.

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3 Irregular Maritime Migration: Legal Uncertainties and *De jure* Rightlessness

3.1 Introduction

Migration is a complex international phenomenon that impacts the social, economic, and security aspects of States' welfare.[1] The IOM glossary defines international migration as "the movement of persons away from their place of usual residence and across an international border to a country of which they are not nationals".[2] Regular and irregular migration are the two broad forms of international migration. Regular migration occurs in compliance with the laws of the country of origin, transit and destination.[3] There is no universally accepted definition of irregular migration. Still, the IOM defines it as the 'movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination.'[4] To Duvell, irregular migration is a social, political and legal construct, and its existence is determined by policies that define which "types and levels of migration are permitted, and which are not."[5] Some of these policies draw their validity from international law, and this chapter will show that these laws (particularly IHRL and LOS) contain legal uncertainties that affect the protection of migrants at sea.

At sea, irregular migration is not new.[6] Irregular maritime migrants are often victims of people smugglers and traffickers.[7] As a result, irregular migration is a growing maritime security

[1] International Organization for Migration (IOM), "World Migration Report 2018", at 1 <https://www.iom.int/sites/default/files/country/docs/china/r5_world_migration_report_2018_en.pdf> accessed 1 November 2021.
[2] IOM UN Migration, 'International Migration Law: Glossary on Migration' (IOM, 2019) 113 <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf> accessed 1 November 2021.
[3] Ibid 175.
[4] Ibid 116. The author uses the phrase 'irregular migration' without making any value judgment on persons who migrate in an irregular manner.
[5] Franck Düvell, 'Framing and Reframing Irregular Migration' in Bridget Anderson and Michael Keith (eds) *Migration: A COMPAS Anthology* (Oxford: COMPAS, 2014) 1.
[6] Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30(1) Fordham International Law Journal 75, 75.
[7] Joan Van der Leun and Maria llies, '*Undocumented Migration: An Explanatory Framework'* In Marco Martiniello, and Jan Rath (eds), *An introduction to international migration studies: European perspectives* (Amsterdam University Press, 2015) 305; see also Demetrios G. Papademetriou, 'The Global Struggle with Illegal Migration: No End in Sight' (Washington Migration Policy Institute, September 2005) 2 ; Steffen Angenendt 'Irregular Migration as an international Problem: Risks and Options' SWP Research Paper <https://www.swp-berlin.org/fileadmin/contents/products/research_papers/2008_RP04_adt_ks.pdf> accessed 1 November 2021; see also Clare Cummings et al "Why people move: understanding the drivers and trends of migration to Europe" (working paper 430, December 2015) <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10157.pdf> accessed 1 November 2021.

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challenge intertwined in a complex web of duties and rights at sea. Although there was a continued significant decrease in the arrivals of irregular migrants into the EU in 2018 and 2019, recent trends show the need for sustained action and responsiveness to changing circumstances.[8] In 2020, due to strict measures during the COVID-19 pandemic, there was a 10% decrease in the number of irregular border crossings to the EU─ to the lowest level in the last six years.[9] Yet, compared to 2019, there was a substantial increase in irregular maritime migration via the Central Mediterranean Sea route.[10]

The diverse classification of irregular migrants under general international law leads to differing duties on States. Irregular migrants at sea often qualify as persons in distress, triggering the obligation to rescue under UNCLOS and other maritime conventions such as the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR).[11] IHRL protects all persons irrespective of their migration status. Legal obligations such as assisting persons in distress, and respect for the right to life, and the prohibition of torture, inhuman and degrading treatment, present a ray of hope to migrants to an extent, arguably constituting a pull factor for these migrants.[12] Conversely, the criminal jurisdiction given to States to combat human trafficking in persons and migrant smuggling provides the State with the power to strengthen its borders.[13] States that classify irregular migration as a security challenge respond with measures like the interception and detention of irregular migrants, which aim to push back migratory flows.[14] In other words,

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[8] Communication from the Commission to the European Parliament, the European Council and the Council, 'Progress report on the Implementation of the European Agenda on Migration' (Brussels, 2019) 2-4 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_com-2019-126-report_en.pdf> accessed 1 November 2021.

[9] European Commission, Migration statistics update: the impact of COVID-19 <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_232> accessed 1 November 2021.

[10] Ibid.

[11] International Convention for the Safety of Life at Sea (SOLAS) (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 3; International Convention on Maritime Search and Rescue (SAR) (adopted 27 April 1979, entered into force 22 June 1985) 1403 UNTS; International Convention on Salvage (Salvage Convention) (adopted 28 April 1989 entered into force 14 July 1996) 1953 UNTS 165.

[12] See Ramat Tobi Abudu, 'How the Law Itself is Killing Migrants at Sea' (2019) RTE Brainstorm <https://www.rte.ie/brainstorm/2019/1211/1098424-how-the-law-itself-is-killing-migrants-at-sea/> accessed 22/07/2021; In this thesis, pull factors include the provisions of the international law (within IHRL and LOS) that arguably contribute to irregular migration, while the push-back are the provisions of the law that strengthens States to stop irregular migratory flows. See, Council of Europe 'Pushback policies and practice in Council of Europe member States' (2019) Committee on Migration, Refugees and Displaced Persons, para 2 notes: 'pushbacks can be considered as part of national policies rather than incidental actions <https://reliefweb.int/sites/reliefweb.int/files/resources/20190531-PushbackPolicies-EN.pdf> accessed 1 November 2021.

[13] See below, section 3.3 for an in-depth discussion of the differences between trafficking in persons and smuggling of migrants.

[14] Angenendt (n 7); see also Cummings et al (n 7).

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the sovereign rights given to States to control their borders and combat the challenges that come with irregular migration act as a means of pushing back migrants from arriving in their planned country of destination.[15] EU States adopt such push-back measures for strengthening their external borders in a manner that often violates the rights of migrants at the Mediterranean Sea.[16] Yet, arguably, the power to do so is authorised in certain circumstances by international law.[17]

States apply security measures to protect persons within their territory and fight against the ills of irregular migration. At the same time, the rights-based framework, and the duty to rescue persons in distress is needed to protect the irregular migrants at sea. One of the most challenging conundrums all relevant actors face is striking a balance between security and rights-based approaches to irregular migration. Support for this premise is inferable from the negative reaction of States to the UN Global Compact on Safe, Orderly and Regular Migration (GCM), a non-legally binding international document with a people-centred approach to dealing with international migration adopted by a majority of UN members in 2019.[18] The main concern raised by the few States that rejected the GCM was that the rights-based aspects of the GCM seemed to encourage irregular migration, which they perceived as a threat to their sovereignty and national security.[19]

Accordingly, this chapter points out the need to balance security and rights-based approaches by integrating IHRL and LOS. It argues that this will lead to the better protection of people at sea, but the existence of legal uncertainties and maritime legal black holes still leaves a space where migrants on the high seas are unprotected.[20] As such, this chapter builds on the conclusion in the previous chapter that a systemic integration between these two fields by itself is insufficient to ensure better protection of people at sea.

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[15] Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 The European Journal of International law 347,354.
[16] Marie Martin and Euro Mediterranean Human Rights Network, 'Prioritising border control over Human Lives: Violations of the rights of migrants and refugees at sea (2014) Policy Brief, Euro-Mediterranean Human Rights Network, Copenhagen 1, 8-9.
[17] See below, section 3.5.
[18] Joanna Apap, 'A Global Compact on Migration Placing Human Rights at the Heart of Migration Management' (European Parliament Research Service, January 2019) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614638/EPRS_BRI(2017)614638_EN.pdf> accessed 1 November 2021; see also Global Compact for Safe, Orderly and Regular Migration (11 July 2018) [hereinafter referred to as 'The GCM'] <https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf> accessed 1 November 2021.
[19] Ibid.
[20] Mann (n 15).

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This chapter is structured as follows. Section 3.2 sets out the operations carried out in the Mediterranean Sea in recent years, showing that the current approach is a hardened security approach (i.e. based solely on a State securitisation framework) which is arguably the cause of the increased death rate of migrants in the Mediterranean Sea. Subsequently, the relevant laws forming the legal basis for the security measures are analysed in section 3.3 to argue that the legal uncertainties within these laws allow the hardened approach adopted by the EU towards migrants at sea. Thus, it paints the picture that the law itself could be the problem.[21] The next two sections evaluate the laws within the LOS and IHRL frameworks guaranteeing the protection of migrants at sea but highlights the weaknesses in these laws.

Accordingly, section 3.4 evaluates the relationship between the LOS framework and migration to highlight how the framework offers protection to persons at sea and yet contains interpretational issues which negatively affect such protection. Section 3.5 evaluates the relevant provisions of international human rights law vis-à-vis the law of the sea provisions concerning maritime migration, revealing the strengths and weaknesses of the current level of integration. Section 3.6 concludes that the integration between IHRL and LOS is necessary, but the legal uncertainties emanating from these two fields of law makes such integration insufficient to better protect people at sea. Thus, this chapter lays the foundation for the argument on the viability of adopting a human security approach to improve the interaction of IHRL and LOS vis-à-vis maritime security for the better protection of people at sea.

3.2 The nature of maritime security operations in the Mediterranean Sea

Maritime security operations (MSOs) in the Mediterranean Sea have border security as their primary objective.[22] States' maritime border security responsibilities within the EU are based on the specific provisions of EU law and are supplemented by international obligations set out in the UN Convention Against Transnational Organized Crime and UNCLOS. [23] However, States are also mandated to undertake search and rescue operations because of their obligations under UNCLOS and other maritime conventions.[24] IHRL places a responsibility to protect and respect the human rights of migrants at sea irrespective of their legal status. Thus, border security operations should still involve fulfilling search and rescue obligations within the ambit

[21] See, Abudu (n 12).
[22] Daniel Ghezelbash et al, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in The Mediterranean and Offshore Australia' (2018) 67 International Comparative Law Quarterly 315, 315–51.
[23] United Nations Convention Against Transnational Organized Crime and the supplementing Protocols (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 [hereinafter referred to as 'UN Convention Against Transnational Organized Crime'].
[24] UNCLOS, Article 98.

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of IHRL. Consequently, maritime operations that are security-driven should also be rights-focused. The friction between MSOs and IHRL occurs when there is no such balance, which is influenced by the legal uncertainties in the law and its application.[25] To further understand the consequence of this situation for people at sea, we need to evaluate the current nature of EU States' maritime security operations in the Mediterranean Sea.

Since 2015, EU States have adopted a 'hardened' security approach with no search and rescue missions at the Mediterranean Sea, which has arguably caused an increased rate of migrant deaths at sea.[26] Mediterranean search and rescue missions notably started in 2013, after the sinking of two large boats near the island of Lampedusa, resulting in the deaths of over 600 migrants, when the Italian Navy launched Operation Mare Nostrum. [27] This operation cost €11 million per month and involved 34 naval warships and approximately 900 sailors per working day.[28] However, this operation ended in 2014 due to the lack of burden-sharing within the EU and criticism from non-EU States that the mission was a pull factor. After this, the EU border agency Frontex launched Operation Triton, primarily a border control mission.[29] In April 2015, the EU tripled the budget of Operation Triton, and its operational area expanded from 30 miles to 138 miles off the Italian coast.[30] Unlike Operation Mare Nostrum, Operation Triton's primary mandate was "to control irregular migration flows towards the territory of the European Union and to tackle border crime."[31]

In the same year, the EU launched an operation under the framework of the Common Security and Defence Policy (CSDP) entitled EUNAVFOR Med 'Sophia'. Operation Sophia is an EU military-led mission to rescue migrants in the southern Mediterranean Sea and disrupt the activities of traffickers. However, Mann has argued that Operation Sophia was seemingly not

[25] It is also worth noting that the imbalance between rights and security-based measures at sea is often influenced by States' political interest. See Vera Wriedt and Darius Reinhardt (European Center for Constitutional and Human Rights, ECCHR), 'Analysis Opaque and unaccountable: Frontex Operation Hera Vera' (February] 2017) Operation Hera in the western Mediterranean Sea, which has been very successful in border security surveillance but has received criticism for its violation of human rights.

[26] Isabella Lloyd-Damnjanovic, 'Criminalization of Search-and-Rescue Operations in the Mediterranean Has Been Accompanied by Rising Migrant Death Rate' October 9, 2020 <https://www.migrationpolicy.org/article/criminalization-rescue-operations-mediterranean-rising-deaths> accessed 1 November 2021.

[27] Martina Tazzioli, 'Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton' (2016) 4 Migration Studies 1, 1–19.

[28] Eugenio Cusumano and James Pattison, 'The Non-governmental Provision of Search and Rescue in the Mediterranean and the Abdication of State Responsibility' (2018) 31 Cambridge Review of International Affairs 53, 55-6.

[29] Lloyd-Damnjanovic (n 26).

[30] Mann (n 15) 353-354.

[31] Ibid 354.

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designed for rescue operations but for border management because of the increase in the death of migrants at sea.[32] After the end of Operation Mare Nostrum, migrant deaths at sea increased as there was no longer a search and rescued based operation. In 2015, 3,777 migrants died in the Mediterranean, out of more than 1 million arrivals (0.3 per cent); in 2016, 5,143 migrants died out of 363,504 arrivals (1.4 per cent).[33] In 2017, 3,116 migrants died out of 171,635 arrivals (1.8 per cent); and in 2018, 2,054 migrants died out of 103,347 arrivals (1.9 per cent).[34] In 2019, 1,283 migrants died out of 110,699 arrivals (1.8 per cent).[35] Consequently, although the number of migrant arrivals reduced dramatically from 2015 until 2019, the percentage of deaths per arrival increased ─ except in 2020, when there was an all-time decrease in arrivals primarily as a result of unprecedented global travel restrictions arising from the COVID-19 pandemic.[36] Therefore, there was an increase in migrant drownings at sea despite the reduction of the overall migration flow.

In February 2018, the EU's Operation Themis replaced Operation Triton with an enhanced law enforcement focus but also included search and rescue as a crucial component. Its operational area spans the Central Mediterranean Sea and covers migration from Algeria, Tunisia, Libya, Egypt, Turkey, and Albania. Officers deployed by the agency also support the Italian authorities in registering the arriving migrants.[37] Meanwhile, Operation Poseidon is the main operation in the Eastern Mediterranean route, covering the Greek sea borders with Turkey and the Greek Islands. The main maritime operations conducted by the EU in the Western Mediterranean route are operations Hera, Indalo, and Minerva, aiming to combat maritime security challenges.

In addition, the NATO Operation Sea Guardian (OSG), in conjunction with Frontex maritime operations and EU naval operations, deals with maritime security challenges in the Mediterranean Sea.[38] The OSG mandate does not include humanitarian rescue operations;

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[32] Ibid.
[33] IOM Report, (05 January 2018) <https://www.iom.int/news/mediterranean-migrant-arrivals-reached-171635-2017-deaths-reach-3116> accessed 1 November 2021.
[34] IOM Report, (16 November 2018) <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-103347-2018-deaths-reach-2054> accessed 1 November 2021.
[35] IOM Report, (03 January 2020) <https://www.iom.int/news/iom-mediterranean-arrivals-reach-110699-2019-deaths-reach-1283-world-deaths-fall>accessed 22/07/2021.
[36] See, The European Commission, 'Migration statistics update: the impact of COVID-19' (n 10).
[37] EU Frontex, <https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/> accessed 1 November 2021.
[38] Nato: Operation Sea Guardian (OSG) <https://shape.nato.int/ongoingoperations/operation-sea-guardian-osg-> accessed 1 November 2021.

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however, they promote maritime situational awareness and conduct interdiction tasks.[39] NGO's have been effectively performing the humanitarian rescue operation from the inception of the 'Migrant Offshore Aid Station' (MOAS) in August 2014. Others include Médecins sans Frontières (MSF), SOS Méditerranée, Sea Watch, Sea-Eye, and Pro-Activa.[40] However, these NGOs suffer the risk of prosecution for illegal entry and migrant smuggling, mainly due to States' unwillingness to authorise disembarkation within their territory.[41]

This unwillingness is evident in the 2019 agreement on the EU's Operation Sophia after Italy said it would no longer receive those rescued at sea.[42] The EU agreed that Operation Sophia would no longer involve a maritime presence, meaning that in fulfilment of the operation, ships would not be deployed to the Mediterranean. Instead, reliance would be on air patrols and closer coordination with Libya.[43] This new arrangement received criticism because it was argued that its effect would occasion more deaths at sea and underscored States' unwillingness to carry out their legal obligations to rescue persons at sea.[44] Although Operation Sophia is an operation against human smuggling and a SAR operation, the decision to end the maritime presence is an implicit termination of the SAR aspect,[45] which has always been secondary to the anti-smuggling operations.[46]

In 2020, the EU Operation Sophia ended, and the EU launched Operation Irini, which will run until 31 March 2023.[47] This operation has no search and rescue mandate; its core task is to implement the UN arms embargo on Libya using aerial, satellite and maritime assets.[48] Therefore, the EU currently has no operation with a search and rescue mandate.[49] Yet, legal

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[39] Ibid.
[40] Eugenio Cusumano, 'Emptying the sea with a Spoon? Non-governmental providers of migrants search and rescue in the Mediterranean' (2017) Marine Policy 91, 92-4, here the author discusses these NGO's carrying search and rescue operations.
[41] Ibid.
[42] Euractiv, 'EU to end ship patrols in scaled down Operation Sophia' (27 March 2019) <https://www.euractiv.com/section/justice-home-affairs/news/eu-to-end-ship-patrols-in-scaled-down-operation-sophia/> accessed 1 November 2021.
[43] Ibid.
[44] European Council on Refugee and Exiles 'Last Breath of Operation Sophia Should Push Coalition of the Willing' (29 March 2019) <https://www.ecre.org/last-breath-of-operation-sophia-should-push-coalition-of-the-willing/> accessed 1 November 2021.
[45] Cusumano and Pattison (n 40) 71- points out that the Triton and Operation Sophia were not primarily focused on SAR.
[46] Jovana Arsenijevic et al., 'Are Dedicated And Proactive Search And Rescue Operations At Sea A "Pull Factor" For Migration And Do They Deteriorate Maritime Safety In The Central Mediterranean', <http://searchandrescue.msf.org/assets/uploads/files/170831-%20Report_Analysis_SAR_Final.pdf> accessed 1 November 2021.
[47] EU Navfor Med Irini <https://www.operationirini.eu/about-us/> accessed 1 November 2021.
[48] Ibid.
[49] As of the time this thesis was concluded in December 2021.

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uncertainties within international law give room for different interpretations of State obligations, allowing this hardened security approach.[50] This is the reason countries like Italy, Greece, Australia, and the US can criminalise the entry of rescuing vessels into their ports which discourages NGOs and other civil actors from carrying out search and rescue operations at sea.[51]

The following section evaluates the content of the security framework relevant to irregular migration to illustrate how it is a source of the hardened security measures applied by EU States in the Mediterranean Sea.[52] As defined in chapter one, the content of the law being the source of uncertainty qualifies the problem as a maritime legal black hole (i.e. a genuine conflict).[53]

3.3 Border control: Maritime legal black holes in the security-based approach

Under international law, States have the right to control their borders. This right includes the power to intercept irregular migrants at sea. Article 33 UNCLOS gives States the ability to exercise the control necessary to prevent the infringement of their immigration laws within their territorial sea.[54] Stephens argues that such authority exists in the territorial sea based on Article 19(g) UNCLOS, which qualifies loading/unloading of persons as contrary to State immigration law and falls within non-innocent passage under Article 25, which allows States to take preventative measures.[55] The two maritime security challenges that fit into the Article 19(g) UNCLOS description are people smuggling and trafficking in human persons, both forms of irregular migration.

In addition, Article 27 UNCLOS gives States the right to exercise criminal jurisdiction over a crime conducted on board a foreign vessel when the consequences of the crime extend to the coastal State, such as the effects of human smuggling and trafficking offences. However, there has to be both criminal prescriptive jurisdiction and enforcement jurisdiction to establish a link

[50] See chapter two, section 2.2.
[51] Valsamis Mitsilegas 'The Normative Foundations of The Criminalization of Human Smuggling: Exploring the Fault Lines Between European and International Law' (2019) 10(1) New Journal of European Criminal Law 68, 68-85; see also Eugenio Cusumano and Flora Bell 'Guilt by association? The criminalisation of sea rescue NGOs in Italian media' (2021) Journal of Ethnic and Migration Studies 1, 1—23.
[52] See below, section 3.3.
[53] Chapter one, section 1.2.
[54] UNCLOS, Article 33.
[55] Dale Stephens, 'Comparative Approaches to Security and Maritime Border Control' (2006) 81 International Law Studies 19, 23.

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between the illegal activities and the coastal State's domestic law.[56] In exercising such criminal jurisdiction over their maritime borders, States are to respect Article 18(2) UNCLOS, which gives an exception to persons in distress to stop and anchor at a port and Article 98 UNCLOS, which imposes the duty to assist persons in distress. Hence, border control measures to combat trafficking and people smuggling should include an obligation to conduct search and rescue operations.

The international legal framework combating the trafficking and smuggling of humans is the UN Convention Against Transnational Organized Crime and its supplementing protocols.[57] Out of the three supplementing protocols, only two are relevant to this discussion: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Anti-Trafficking Protocol),[58] and the Protocol against the Smuggling of Migrants by Land, Sea, and Air (Anti-Smuggling Protocol).[59] For combating these crimes, Article 5 of the Anti-Trafficking Protocol criminalises those who attempt, participate or organise activities for trafficking in persons. The trafficked persons are seen as victims and offered protection, compensation and residency if need be.[60] Article 6 of the Anti-Smuggling Protocol criminalises the procurement of irregular entry or residence of migrants to obtain, directly or indirectly, financial or other material benefits. Unlike the Anti-Trafficking Protocol, the Anti-Smuggling Protocol allows States to take measures against a person, including the smuggled migrants themselves if their conduct constitutes an offence under the State's domestic law.[61] As such, the smuggled migrants are relieved from criminal liability for being the object of smuggling but may face other offences such as illegal entry.[62] In combatting migrant smuggling, States have the power to intercept vessels flying their flag, as well as other foreign ships following the authorisation of their flag State.[63] Additionally, States can criminalise those who facilitate unlawful entry.

[56] IOM, 'Protection of migrants at sea' (IOM, 2018) 47 <https://publications.iom.int/system/files/pdf/protection_of_migrants_at_sea.pdf> accessed 1 November 2021.
[57] UN Convention Against Transnational Organized Crime (n 23).
[58] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000) [hereinafter called the Anti-Trafficking Protocol].
[59] 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) [hereinafter called the Anti-Smuggling Protocol].
[60] Anti-Trafficking Protocol (n 58) Articles 6, 7, 8.
[61] Anti-Smuggling Protocol (n 59) Article 4.
[62] Ibid Article 5 relieves them from criminal liability and Article 6(4) exposes them to other liability under domestic law.
[63] Ibid Article 8.

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However, State practice reveals how the interpretation of this international law and other similar regional/domestic laws affects maritime search and rescue.

Looking at the situation in the Mediterranean Sea, the EU framework implicitly facilitates the criminalisation of those who have offered humanitarian assistance (usually NGOs) to those in distress at sea described as irregular migrants. The EU framework that deals with irregular migration is the "EU Facilitators Packages", it draws from the Anti-Smuggling Protocol and it is made up of two instruments. They are the EU Facilitation Directive defining the facilitation of unauthorised entry, transit and residence [64] and the Facilitation Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.[65] The EU framework contains the implicit authority to criminalise every illegal entry.

Unlike the Anti-Smuggling Protocol, which defines criminalisation of smuggling only for financial gain,[66] Article 1(1) (a) of the Facilitation Directive gives EU member States a broader authority to criminalise those who assist an illegal entry in general. Article 1(2) provides that States "may" exclude an illegal entry facilitated to provide humanitarian assistance. Nonetheless, the use of the word "may" as against the word "shall" contained in Article 1(1) is too passive and means States can still criminalise those who offer humanitarian assistance. There is no provision or recital in the facilitation packages to define or clarify what humanitarian aid entails, leaving it to the interpretation of the EU States. Hence, out of all the 27 EU member States that criminalise illegal entry, only eight of them restrict it to exclude those who provide humanitarian assistance.[67]

A study done by the European Parliament Committee in 2016, and updated in 2018, shows that the criminalisation of civil society actors' moral and legal obligations in rendering humanitarian assistance to people in distress at sea only increases the growth of criminal

[64] Council Directive (EC) 2002/90 defining the facilitation of unauthorised entry, transit, and residence, [2002] OJ L 328.
[65] Council Framework Decision, 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence [2002] OJ L 328.
[66] Anti-Smuggling Protocol (n 59) Article 3 defines smuggling of migrant as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, or the illegal entry of a person into a State party of which the person is not a national or a permanent residence."
[67] European Union Agency for Fundamental Rights FRA, 'Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations' (2018) <https://fra.europa.eu/en/publication/2018/ngos-sar-activities> accessed 1 November 2021.

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groups.[68] Therefore, reports have criticised such practice as infringing on civil society's freedom and the rights of EU citizens, which challenges the EU fundamental values of democracy, the rule of law and fundamental rights.[69] They have argued that the criminalisation practice equally violates the fundamental rights of private actors offering humanitarian assistance because such criminalisation impacts their willingness to fulfil their moral/legal obligations to conduct such rescue operations. All this leads to an increase in criminal activities and more deaths at sea. [70]

Besides the criminalisation of illegal entry, another measure to combat these maritime security challenges is strengthening borders. Article 11(1) of both the Anti-Trafficking and Anti-Smuggling Protocols requires States to strengthen their borders to the extent possible, such as may be necessary to prevent and detect trafficking in persons and smuggling of migrants, respectively. The phrase "to the extent possible" is quite vague and encourages a more security-based approach towards these offences. Hathaway posits that these instruments have allowed States to intensify their efforts to limit the entrance or arrival of irregular migrants.[71] Thomas argues that international instruments such as the Anti-Trafficking and Anti-Smuggling Protocols enhance 'sovereign territorial prerogative' rather than impede it.[72] Indeed such provisions implicitly stymie States' obligation under the law of the sea and international human rights law. However, Article 19 of the Anti-Smuggling Protocol provides that nothing under the protocol shall affect a State's obligations and rights under international law, specifically the 1951 UN Refugee Convention. Consequently, Article 19 of the Anti-Smuggling Protocol is a saving clause that requires that States exercise anti-smuggling operations within the ambit of international law, including international human rights law and the Refugee Convention. Nevertheless, the omission of a similar provision in the Anti-Trafficking Protocol implies that the saving clause may not apply to anti-trafficking operations.

The EU has been criticised for strengthening its external borders to the extent that it acts as a push back to migrants in the Mediterranean Sea, thereby blurring the lines between search and

[68] Sergio Carrera et al., 'Fit for purpose? The Facilitation Directive and the Criminalisation of humanitarian assistance to irregular migrants: 2018 update' (2018) Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels.
[69] Ibid.
[70] Ibid.
[71] James. C. Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 Virginia Journal of International Laws 1, 6.
[72] Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty? (2013) 14(2) Melbourne Journal of International Law 392, 435.

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rescue obligations and border control.[73] For example, in the *Hirsi Jamaa* case, the Italian government intercepted a boat containing irregular migrants based on a border control (push back) bilateral agreement with Libya but claimed it was a search and rescue operation.[74] Tondini has argued that the reason for claiming this was to escape questions of illegality under the international human rights framework.[75] Consequently, Tondini proposes the notion of the 'prevalence criterion' as the yardstick to determine the legality of any interception operation. This criterion consists of policies that strike a balance between search and rescue and the goals of combatting irregular migration.[76]

The operational security-based approach towards border control focuses on 'catching the bad guys', which leads to a situation where the root causes of migration are not tackled, leading to an unending cycle of irregular migratory flows.[77] However, the Anti-Smuggling and Anti-Trafficking Protocols are transposed even more strictly in regional and domestic law.[78] Though it is within the sovereign responsibility of States to uphold human rights and ensure territorial security,[79] to protect irregular migrants, States need to balance their security duties and human rights obligations in dealing with irregular maritime migration. A solely security-based approach, as is the current EU approach, leads to increased deaths of migrants at sea. By contrast, a solely rights-based framework might lead to more irregular migratory flows.[80] A fusion of the two could provide a balance, yet they are both insufficient in dealing with the root causes of irregular migration.[81]

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[73] Marie Martin, 'Prioritising border control over Human Lives: Violations of the rights of migrants and refugees at sea' (2014) Policy Brief, Euro-Mediterranean Human Rights Network, Copenhagen 1, 8-9.
[74] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012) paras 9-14.
[75] Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the Hirsi case' (2012) 18 Journal of International Maritime Law 59, 73-74.
[76] Ibid 74.
[77] Polly Pallister-Wilkins, 'The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros' (2015) 9 International Political Sociology 53, 66.
[78] Ghezelbash et al (n 21).
[79] Pallister-Wilkins (n 77) 66.
[80] For the cons of the human rights-based approach see Morten Broberg and Hans-Otto Sano 'Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences' (2018) 22(5) International Journal of Human Rights 644, 674.
[81] Although it is beyond the scope of this thesis to deal with the root causes of migration, the human security approach brings the dimension necessary to address these social, economic, and cultural issues (for more see, Bloomer J, 'The only honest thief: critiquing the role of human smugglers' in John Morrissey (ed) *Haven: The Mediterranean Crisis and Human Security* (Edward Elgar Publishing, 2020) 130-48).

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3.4 Legal uncertainties and maritime legal black holes: The law of the sea and irregular maritime migration

Section 3.2 above shows that there are currently no MSOs within the EU with a search and rescue mandate which has caused an increase in the migrant death rate. The legal uncertainties in the content of the law (the UN Convention Against Transnational Organized Crime and its supplementing protocols and the EU Facilitators packages) as seen in Section 3.3 on the security legal framework, allow the hardened security approach which directly affects people at sea. This section identifies more legal uncertainties and gaps, such as the definitions of persons and ships in distress at sea and some of the limitations on the duty to render assistance at sea.

3.4.1 The concept of 'persons in distress' and 'ships in distress'

This sub-section lays out the concept of persons and ships in distress relating to irregular migrants at sea and the ships they are on, and the legal uncertainties surrounding these definitions. The maritime legal black hole here is the non-existence of the right to be rescued, which causes *de jure* rightlessness. The other is the uncertainty arising from the variation between the content of the law and the implementation of the right to call at a port. In what follows, it is necessary to lay out the arguments that connect irregular migrants to the concept of persons and ships in distress.

i. Is a migrant boat a ship in distress or a 'ship in need of assistance'?

Tanaka extrapolated from Lord Stowell's famous statement in the *Eleanor* case of 1809[82], the four criteria qualifying a ship in distress.[83] They are: "The distress must be urgent and something of grave necessity, there must be at least a moral necessity, such as a danger to the lives of the persons on board, it must not be man-made, the claimant must prove it in a clear and satisfactory manner."[84] However, the essential criterion seems to be the element of urgency and grave necessity as stressed in the *Rebecca* case,[85] and the Supreme Courts of the United

[82] [1809] 165 ER 1068 Lord Stowell said "It must be an urgent distress; it must be something of grave necessity, such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man… Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner."

[83] Yoshifumi Tanaka, 'Key Elements in International Law Governing Places of Refuge for Ships: Protection Of Human Life, State Interests, And Marine Environment' (2014) 45(2) Journal of Maritime Law and Commerce 157,160.

[84] Ibid.

[85] Kate A. Hoff, Administration of the Estate of Samuel B. Allison, Deceased (U.S.A.) v. United Mexican States (1929) RIAA Vol IV, 447.

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States and Canada in the *New York*, [86]and *May v. The King*,[87] cases, respectively. Article 24 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts points out that the scope of distress is applicable when human life is at stake.[88] Similarly, in the *M/V Toledo*, the Irish High Court of Admiralty made a clear distinction between a situation that occasions a grave and imminent danger to the lives of persons on board and a situation that leads to purely economic risk to the vessel and cargo.[89] According to the Court, if the safety of life is not a factor, the coastal State may refuse to offer a place of refuge for ships, but if the safety of life is a factor, the coastal State cannot refuse to grant such refuge. The former instance qualifies as a "ship in need of assistance" while the latter qualifies as a "ship in distress". Additionally, a ship in distress enjoys immunity from the local laws of the port State, but if there is no proving of distress, then the port State laws apply.[90]

Against this backdrop, one can argue that a migrant boat may equally qualify as a ship in distress and a ship in need of assistance at different times. A ship in need of assistance means "a ship in a situation, apart from one requiring the rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard." [91] A migrant boat on the high seas at risk of capsizing with persons onboard can qualify to be in distress. However, when persons on board a migrant boat are rescued and brought on board a rescuing ship that is well able to accommodate these persons, the rescuing ships can arguably be classified as a ship in need of assistance because there is no immediate risk to loss of life. Unlike the latter situation, the former still retains the "element of urgency and grave necessity", which is why one could argue that it is a distress situation. This argument can be supported by classifying the different "emergency phases" for a search and rescue operation under the SAR Convention. The SAR Convention differentiates between the "uncertainty phase", the "alert phase", and the "distress phase."[92] Though actions are to be taken by States at each phase, immediate assistance is

[86] 16 US 59 (1818).
[87] (1931) SCR 381-382; hereinafter referred to as the "SS May case."
[88] Tanaka (n 83) 161; see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002)176.
[89] *ACT Shipping (PTE Ltd) v The Minister for the Marine, Ireland, and the Attorney General* (1995)3 ILR 406.
[90] *Merk and Djakimah v the Queen* [1991] Supreme Court of St Helena SC 12; see also in *Rex v Flahaut* [1935] 2 DLR 685; see also Anthony P Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (Martinus Nijhoff publishers 2012)117; see also Eric Van Hooydonk, *Places of Refuge- International law and the CMI Draft Convention* (Lloyds List, 2010) 24.
[91] International Maritime Organization (IMO), Guidelines on Places of Refuge for ships in need of assistance Resolution A.949(23) (adopted on 5 December 2003) A 23/Res.949, 5 March 2004.
[92] SAR Convention, Chapter 1 – Para 1.1 (9-11)- The uncertainty phase is a situation wherein uncertainty exists as to the safety of a vessel and the persons on board. The alert phase is a situation wherein apprehension exists as to the safety of a vessel and of the persons on board. The distress phase is a situation wherein there is reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.

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required at a distress phase, i.e., when there is a "grave and imminent danger". Usually, people traffickers and smugglers leave these migrants onboard an overcrowded rubber dinghy (a weak rubber boat) on the high seas, which creates an immediate risk of loss of life and triggers the obligation to assist persons in distress.

The proposition that a rescuing ship with migrants on board is to be qualified as a ship in need of assistance and not in distress is not conclusive. The reason is that there still exists a risk of loss of life. The general rule of interpretation contained in Article 31 of the VCLT supports that submission. Article 31 requires that interpretation should be made in good faith following their ordinary contextual meaning of the words considering subsequent agreement, practice, rules of international law and its object and purpose. The SOLAS, SAR, IMO guidelines, international human rights law, and customary international law all require the protection of persons in distress. The presence of migrants at sea creates distress, meaning even if the migrants are on board a rescuing vessel or are found on a capsizing boat at the Mediterranean Sea, their right to life still must be protected. Therefore, the duty to assist persons at sea requires the flag and coastal States to relieve the shipmasters of the persons recovered at sea.[93]

Consequently, it is possible to say that irregular migrants qualify as persons in distress and whatever boat or ship they are on qualifies as a ship in distress. Persons in distress have no right under UNCLOS, but a ship in distress has a right to call at any port. IMO posits that the right of the ship in distress to enter a port is not absolute as it involves balancing the nature and immediacy of the threat to the ship's safety against the risks such entry may pose.[94] Accordingly, coastal States might refuse access to their ports where the vessel poses a severe and unacceptable safety, environmental, health or security threat to that coastal State after the safety of persons on board is assured. [95] This seemingly means even if a ship in distress is not allowed into a port, States still retain the obligation to protect persons in distress. I discuss this further below.

ii. The duty to render assistance under maritime law

[93] See the IMO Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC. 167(78) (adopted on 20 May 2004) <http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf> accessed 1 November 2021; see also SOLAS and SAR Convention Amendments (n 11) Reg 3.1.
[94] Ibid IMO Guidelines, at 11.
[95] Ibid.

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The duty to assist persons/ships in distress at sea is a fundamental obligation under the law of the sea,[96] and is part of customary international law.[97] The duty is contained in several maritime law conventions, including UNCLOS, the SAR Convention, the SOLAS Convention and the International Convention on Salvage. Since irregular migrants qualify as persons in distress, they are also owed the duty to be rescued at sea. Article 98 of UNCLOS provides that:

> 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 cooperate with neighbouring States for this purpose.

This provision creates an obligation on the flag and coastal States.[98] The flag State has to oblige the masters of vessels flying their flag to rescue persons in distress, while the responsibility of the coastal State is to promote an effective search and rescue service.[99] Papastavridis points out that the obligation on the flag State and coastal State is an "obligation of conduct," i.e., it guarantees the prescription of such duty in the flag State's law rather than an "obligation of result" to ensure the protection of persons in distress.[100] This is because the existence of this duty without a right frustrates its enforcement, as there are no rights holders.[101]

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[96] Emer de Vattel, *The Law of Nations* (Joseph Chitty, translation, London 1834) 170 - In the eighteenth century de Vattel recognised the special humanitarian consideration owing to vessels in distress.

[97] Richard Barnes, 'Refugee Law at Sea' (2004) 53 International and Comparative Law 44, 49; see also Richard Barnes, 'The international Law of the Sea and Migration Control', in Bernard Ryan and Valsamins Mitsilegas (eds), *Extra-territorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010) 134; see also Bernard H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Columbia Journal of Transnational Law 399, 415.

[98] The SOLAS Convention (n 11) Chapter V Reg 7(1) obliges coastal States to rescue persons in distress around its coast; see also the SAR Convention (n 11) Annex Ch 2, para 2.1.1 obliges States to rescue persons in distress at sea which also includes the high seas in a situation where they come into knowledge of such emergency.

[99] Ibid.

[100] Efthymios D. Papastavridis, 'Is there a right to be rescued at Sea? A skeptical view' (2014) 4 Questions of International Law 17,21-2.

[101] See chapter two, subsection 2.2.2.

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The duty to render assistance to persons in distress applies to all maritime zones, i.e., areas within and outside the coastal State's jurisdiction. The phrase "render assistance to any person found at sea" implies that there is no geographical limitation to the duty to render assistance. If the objective of Article 98(1) were otherwise, then UNCLOS would have explicitly mentioned "high seas", as mentioned throughout Part VII. The provisions on the EEZ and territorial sea support this view. Article 58(2) provides that the provisions applicable on the high seas are also applicable to the EEZ, including Article 98 (1) UNCLOS. Also, Article 18(2) in defining "passage" provides that passage includes stopping and anchoring for "rendering assistance to persons." Article 18(2) read with Article 19 on innocent passage clearly shows that UNCLOS upholds such a duty in the territorial sea. The SOLAS Convention and the SAR Convention explicitly impose the obligation to render assistance within the territorial sea.[102] Likewise, the Salvage Convention presupposes the existence of such a duty within the territorial sea.[103] The duty to render assistance can be understood to apply in all the maritime zones, including the territorial seas where the coastal State exacts sovereign jurisdiction.

According to the SAR Convention, States shall make the necessary arrangements to provide adequate search and rescue services for persons in distress at sea around their coasts.[104] States are to provide the most appropriate assistance available regardless of the nationality, status or circumstances of the person.[105] Similarly, the SOLAS Convention places an obligation on the masters of ships to proceed with all speed to assist "any persons" in distress at sea.[106] The phrase "regardless of the nationality and status of such a person" and "any person" used under the SAR Convention, SOLAS, UNCLOS, and the Salvage Convention, respectively,[107] explicitly shows that no form of discrimination is allowed under the law when it comes to rescuing persons in distress. Regrettably, the reality is different, as States are more willing to protect persons who do not seek asylum than they are eager to rescue migrants and refugees.[108]

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[102] SOLAS Convention (n 11) Annex Chapter V reg 1(1) provides, that "unless expressly provided otherwise, this chapter shall apply to all ships on all voyages except [government ships]; and ships solely navigating the Great Lakes of North America" ; see also SAR Convention, Annex para 2.1 does not refer to any geographical limitation when it provides that "on receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided".

[103] Salvage Convention, Article 10 provides, without any geographical limitation: 'Every master is bound, so far as he can do so without danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea'.

[104] SAR Convention (n 11) Annex Ch 2 Article 2.1.1.

[105] Ibid Articles 2.1.9 and 2.1.10.

[106] SOLAS Convention (n 11) Annex Ch V reg 33(1).

[107] Salvage Convention (n 11) Article 10.

[108] Irini Papanicolopulu, 'The Duty to Rescue at Sea, In Peacetime and In War: A General Overview' (2016) 98(2) International Review of the Red Cross 491, 495; see also Barnes, Refuge at sea (n 97) 49.

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The duty to render assistance applies to all ships, i.e., military/ other State-owned vessels and private vessels, since UNCLOS Article 98 does not distinguish between the types of ships obligated to render such assistance. On the contrary, the Salvage Convention in Article 4 explicitly excludes the application of the Convention to warships, thereby excluding warships from the duty to assist persons in distress. However, State practice shows otherwise, and UNCLOS is silent on the issue.[109] As a result, Papanicolopulu posits that "it would be absurd, not to say counterproductive to demand that States put in place search and rescue services having the aim of going to the rescue of ships in distress, and at the same time not to oblige their warships, who may be near the vessel in distress to offer assistance."[110]

iii. Scope of the duty to render assistance

In fulfilling the duty to render assistance, the coastal State has to "promote the establishment, operation, and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea."[111] The keywords are "search and rescue", but what do they mean? According to the SAR Convention, "search" is an "operation, normally coordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress",[112] while "rescue" is "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."[113]

Regulation 7(1) of the SOLAS Convention on search and rescue services provides that:

> Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation, and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.[114]

The main aim of any search and rescue service is to identify and rescue persons in distress. From the definition of rescue, it is evident that the final constituent of a rescue operation is to deliver the protected persons to a place of safety. Later below, section 3.4.2 shows that the non-

[109] Ibid Papanicolopulu 496.
[110] Ibid.
[111] UNCLOS, Article 98(2).
[112] SAR Convention (n 11) Regulation 1.3.1.
[113] Ibid Regulation 1.3.2.
[114] SOLAS Convention (n 11) Ch V Reg 7.1.

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existence of the duty to allow disembarkation frustrates this duty to rescue persons in distress which exacerbates *de jure* rightlessness.

iv. Exceptions to the duty to render assistance

The duty to render assistance is not absolute. Article 98(1) UNCLOS provides that the only occasion the master of a ship can refuse to assist persons in distress is when such assistance will create danger for the rescuing ship, its crew or its passengers. Similarly, Article 10(1) of the Salvage Convention contains that same exception. However, Regulation 33.1 of the SOLAS Convention has other grounds for an exception which provides that:

> If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress.[115]

Here, it highlights three other criteria for failing to render assistance which is that it is "unable," "unreasonable", and "unnecessary" to do.[116] Papanicolopulu points out that "unable" has to do with the weather condition or the condition of the vessel, and "unreasonable" has to do with it being unreasonable to expect the master to proceed to render assistance due to similar impediments such as the weather.[117] Lastly, "unnecessary" means it is unnecessary to proceed to rescue either because of the distance or another closer vessel has started the rescue operation.[118] Accordingly, States cannot relinquish their duty to render assistance to persons in distress for their border management objectives.[119] Yet as we have seen in section 3.2 above, EU State practice shows otherwise.

v. The right to call at a port

It is established that persons in distress have no right to be rescued, but ships in distress have a right to call at a port under Article 18. This article provides that:

> 1. Passage means navigation through the territorial sea for the purpose of:
>
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or

[115] SOLAS Convention (n 11) Regulation 33.1.
[116] Papanicolopulu (n 108) 497.
[117] Ibid.
[118] Ibid.
[119] Ibid.

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(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

The application of this right is very contentious, as some argue that the coastal State has the discretion to grant access to a ship in distress.[120] In contrast, others say a ship in distress has the right to enter a port independent of the coastal State's discretion.[121] Thus, the uncertainty in applying Article 18 UNCLOS is whether it applies to boats or ships with rescued migrants on board. According to Article 18, innocent passage is continuous but includes stopping and anchoring when rendered necessary by force majeure or distress to help persons, ships or aircraft in danger or distress. Based on the content of Article 18, the right to call at a port should apply to those carrying irregular migrants in distress, but interpretation and state practice show otherwise.[122] In the *Military and Paramilitary Activities in Nicaragua* case, the ICJ noted that "The basic legal concept of State sovereignty in customary international law ...extends to the territorial waters and territorial sea of every state ... It is also by virtue of its sovereignty that the coastal state may regulate access to its ports."[123] Ports are situated in a State's internal waters, which form part of its territory and therefore are subject to the State's territorial sovereignty.[124]

Under customary international law, there may be a universal, albeit not absolute, right for a ship in distress to enter a port or harbour when there exists a specific threat to the safety of persons aboard the ship.[125] Hooydonk points out that the right for a distressed ship to call at a State port depends on four theories: the absolute right of access, the absolute right of refusal,

[120] Christopher Murray, 'Any Port in a Storm? The right of Entry for reasons of Force Majeure or Distress in the Wake of the Erika and the Castor' (2002) 63 Ohio State Journal 1465, 1476 this points out that a ship in distress has the right to enter the territorial sea; see also Morrison, (n 90) 102-104.

[121] Jacqueline Joyce F. Espenilla, 'Injustice ignored: a case study of the irregular sea migration of the Rohingyan boat people' (2010) 8 Asia Europe Journal 45, 49–50 points out that the definition of innocent passage under UNCLOS suggests that the "entry of boats carrying undocumented or unauthorized individuals for the purpose of unloading them in the territory of the prospective destination State is not an exercise of the right to innocent passage".

[122] See chapter two, subsection 2.2.3.

[123] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States),* Merits, (ICJ, 27 June 1986) paras. 212-213.

[124] See Louise de la Fayette, 'Access to ports in international law' (1996) 11 The International Journal of Marine and Coastal Law 1.

[125] Robin Churchill and A Vaughan Lowe, *The law of the Sea* (3rd Manchester University Press, 1999) 63; see also Tanaka (n 83) 165; see also Morrison (n 90) 146-9.

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balancing interests and proper management based on the right of access. The absolute right of entry has its legal basis in customary international law, and it is recognised by various international, European and national legal rulings as well as by the texts of multiple conventions.[126] The absolute right of refusal is a concept established from arguments supporting state-centric sovereignty and lacks an internationally recognised legal basis, unlike the absolute right of access theory.[127] The balancing of interest theory requires an evaluation of the risk, which helps balance the interests of all relevant parties.[128] The view on proper management based on the right to access is a theory enunciated by Hooydonk, which supports a presumption of the right to access until proven otherwise due to the evaluation of risk, which is fair and based on good decision making.[129] The balancing interest theory is primarily supported by State practice,[130] but the proper management theory is presumably more legally ideal especially considering a State's duty towards migrants at sea. An example of such duty under the LOS is the duty to render assistance to persons in distress. Thus, this goes back to the disparity between the content and application of the law highlighted in chapter two, where States interpret their duties under the law based on their perception of sovereignty.[131]

3.4.2 The notion of a place of safety

This subsection points out the non-existence of the duty to allow disembarkation and the lack of a uniform understanding of the notion of a place of safety as legal uncertainties that impedes the protection of persons at sea. Due to these uncertainties, there is usually a 'stand-offish' State practice towards those rescued at sea.[132] Some States use the SAR framework as a shield when disregarding their obligation to provide a place of safety.[133] For example, in 2007, the *Budafel* tug case where a Maltese fishing vessel had some migrants clinging onto its tuna pen for three days until the Italian government intervened. The Maltese government refused the disembarkation of the migrants and, in defending their action, pointed out that the SAR framework places the obligation to provide a place of safety on the State in charge of the SAR region.[134] In 2018, Italy refused the entrance of the migrant rescue ship MV Aquarius into its

[126] Eric Van Hooydonk, 'To a Ship in Distress A Plea for Granting a Salvage Reward to Ports and an International Convention on Ports of Refuge' (CMI Yearbook 2003) 409-10.
[127] Ibid 415-28.
[128] Ibid 428-32, this is a theory recognized by the IMO, EU and ICM initiatives which is categorized as soft law.
[129] Ibid 432-35.
[130] See chapter two, subsection 2.2.3
[131] Ibid.
[132] Cusumano and Pattison (n 40).
[133] Tanja E. Aalberts and Thomas Gammeltoft-Hansen, 'Sovereignty at Sea: The Law and Politics of Saving lives in the Mare Liberum' (2014) 17 Journal of international Relations and Development 439, 439-68.
[134] Ibid.

territorial waters and requested the vessel to disembark in Malta.[135] Spain subsequently accepted MV Aquarius after Malta refused to accept the ship claiming that the country had nothing to do with the SAR operation.[136] In 2019, Italy's refusal to continue to allow disembarkation of rescued migrants on the Italian territory led to the reduction of the maritime patrol aspect of Operation Sophia. These examples and many more, which occurred over the years, are proof that the concept of a place of safety is subject to different interpretations.[137] This problem of interpretation is because UNCLOS mandates all States to carry out the duty to render assistance but omits the duty to provide a place of safety. However, as mentioned earlier, other maritime conventions and instruments recognise the responsibility to provide a place of safety, albeit it is not mandatory. The source of these non-mandatory provisions is further discussed below to buttress this point.

i. SOLAS and SAR Convention

Disembarkation at a place of safety for persons rescued in a search and rescue operation is the last stage of the rescue operation. However, neither the SOLAS Convention nor the SAR Convention nor any other treaty defines what a place of safety entails. In 2002 following the Tampa Incident,[138] the Assembly of IMO and other inter-agency organisations held several meetings to investigate the issue of persons rescued at sea.[139] These meetings formed the basis for the amendment of the SOLAS and SAR Conventions in 2004. They helped clarify the existing procedures to guarantee that persons rescued at sea will be provided with a place of safety regardless of their nationality, status or circumstances.[140] The 2004 Amendments to the SAR Convention were adopted together with amendments to the SOLAS Convention.[141] The intent of the paragraphs inserted (i.e., paragraph 3. 1..9 of the SAR Convention and paragraph 1-1 of the SOLAS Convention as amended) is to ensure that in every case, a place of safety is

[135] Ibid.
[136] Ibid.
[137] Martin Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at sea? '(2015) 33 Australian Yearbook of International Law 81, 81-129.
[138] See chapter two, sub-section 2.2.3.
[139] Draft progress report to the Assembly pursuant to operative paragraph 5 of resolution A.920(22) on Review of safety measures and procedures for the treatment of persons rescued at sea, Maritime Safety Committee 77th Session, Agenda item 10, <https://www.transportstyrelsen.se/contentassets/87acf213bfef4ecab11950fcb725e787/77-10-3.pdf> accessed 1 November 2021.
[140] SOLAS Convention and SAR Convention (n 11) recital.
[141] Adoption of Amendments to the International Convention on Safety of Lives at Sea, 1974, as amended, MSC Res.153(78), 78th session, Agenda Item 26, IMO Doc MSC 78/26/Add.1 annex 3 (4 June 2004, adopted 20 May 2004) ('2004 Amendments to the SOLAS Convention').

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provided within a reasonable time. Also, the State responsible for the SAR region where the rescue operation was conducted is accountable to provide or ensure a place of safety.[142]

SAR Convention, paragraph 3 .1.9, provides that:

> The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.[143]

Furthermore, the SOLAS Convention Regulation 33 (as amended), paragraph 1-1 reads the same as above. As stated above, a search and rescue region are simply areas of defined dimensions within which search and rescue services are provided.[144] Presently, the IMO Maritime Safety Committee has divided the world's oceans into thirteen search and rescue regions, in each of which the countries concerned have delimited search and rescue regions for which they are responsible.[145] The State responsible for each such region is to ensure that the rescued persons are disembarked from the rescuing ship and delivered to a place of safety. Here, it is evident that the relevant coastal State has the primary responsibility of bringing the rescued persons to a place of safety. However, there is no concomitant obligation on either the coastal States or the flag State to accept those rescued at sea.[146] Consequently, the law seems to create a gap in achieving the underlying objective of the duty to render assistance to protect lives at sea.

ii. IMO Guidelines

The 2004 IMO guidelines on the treatment of persons rescued at sea emerged due to the need for further clarification on the scope of State obligations regarding a place of safety. A place of safety is "a location where rescue operations are considered to terminate, including a place where the survivors' safety of life is no longer threatened and where their basic human needs

[142] Ibid the recital.
[143] SAR Convention (n 11).
[144] Ibid para 1.3.4
[145] Erick Franckx, 'Search and Rescue as an Enabler to Stimulate Cooperation in Areas of Tension' in Seokwoo Lee and Hee Eun Lee, *Asian Yearbook of International Law* (Brill Nijhoff, 2018) 255-271
[146] Papastavridis, (n 100) 19.

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(such as food, shelter and medical needs) can be met."[147] Furthermore, it is a place where transportation arrangements are made for the survivors' next or final destination.[148]

A place of safety may be on land or aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.[149] An assisting ship should not be considered as a place of safety even though it serves as a temporary place of safety, and alternative arrangements can be made to relieve it of its responsibility.[150] Each rescue case should be treated as unique when selecting a place of safety.[151] During disembarkation of refugees and asylum seekers, there is a need to avoid territories where there is a well-founded fear of persecution, i.e. a place which threaten the lives and freedom of the rescued.[152]

The IMO guidelines addressed the issue of an obligation to accept those rescued at sea, with paragraph 2.5 of the IMO Guidelines providing that "the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered." Accordingly, the IMO Facilitation Committee (FAL) points out that all parties should cooperate in carrying out disembarkation swiftly, and the coastal State responsible for the SAR coordinates such cooperation.[153] However, if disembarkation elsewhere seems impossible, then the coastal State should accept the disembarkation of the persons rescued in accordance with its immigration laws and regulations into a place of safety under its control.[154]

The above implies that the coastal State bears the primary burden of bringing the search and rescue operation to a safe end. Trevisanut suggests that the coastal State conducting the SAR operation has a residual obligation to bring it to an end even if it requires disembarkation on its territory.[155] Although the use of the word "should" by the IMO FAL suggests that this "residual

[147] IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea (20 May 2004) para 6.12.
[148] Ibid.
[149] Ibid para 6.14.
[150] Ibid para 6.13.
[151] Ibid para 6.15.
[152] Ibid para 6.17.
[153] The IMO Facilitation Committee (FAL),'Principles relating to administrative procedures for disembarking persons rescued at sea', (22 January 2009) FAL.3/Circ.194, principle 3 points out that "If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support.
[154] Ibid.
[155] Seline Trevisanut 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict' (2010) 25 The International Journal of Marine and Coastal Law 523, 530.

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obligation" is not mandatory, the international agreements on this issue are not uniform, as demonstrated in State practice.[156] Also, solely placing the burden on the coastal State responsible for the SAR region appears to shift the obligation from the flag State, which is not the intention of Art 98 UNCLOS.

Together with the 2004 amendments, the IMO guidelines appear to territorialise the high seas, in this case, the Mediterranean Sea. This action contradicts Article 89 UNCLOS, which states that "no State may validly purport to subject any part of the high seas to its sovereignty". However, the use of the word "may" rather than "shall" presupposes that it is not outrightly impermissible. By territorialising the Mediterranean Sea, the SAR framework ensures the rescuing of more persons in distress around that region.[157] Nonetheless, placing the sovereign responsibility to ensure disembarkation solely on the coastal State in charge of the SAR region undermines the universality of the duty to assist persons in distress at sea.

3.5 International human rights law: Rights-based framework

This section discusses the relevant rules of IHRL as the rights-based aspect of dealing with irregular migration. It shows that IHRL does not recognise the right to be rescued but integrating IHRL and LOS offers protection to people at sea. However, the lack of uniform interpretation of jurisdiction across the subfields of IHRL discussed in chapter two still affects the protection of persons in distress in the Mediterranean Sea.

3.5.1 Rights-based framework

Migrants are people first and foremost, even if some States consider them a potential threat to maritime security, sovereignty, and State interests. Like all people, they are entitled that all their human rights are respected without discrimination, and these are rights inherent to all human beings by virtue of being human. International human rights law lays down the obligations of States to respect, protect and fulfil these human rights. Therefore, one can argue that the emergence of international human rights law has widened the notion of State responsibility to the extent that it makes human rights law a primary source of protection for

[156] Aalberts and Gammeltoft-Hansen (n 133) 439-468.

[157] See the ruling of the UN Human Rights Committee in *AS and others v Malta*, Comm No. 3043/2017 UN Doc. CCPR/C/128/D/3043/2017 (2021) the HRC noted that the SAR region created a jurisdictional link between Malta and a ship in distress.

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migrants.[158] The ICJ acknowledged this growth of international human rights law in the case concerning *Ahmadou Sado Diallo*, where the court stated that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[159]

The LOS framework protects migrants through the duty to rescue persons in distress at sea. However, there is a need to address the presence of maritime legal black holes: specifically, the lack of a corresponding right (rightlessness) and universal interpretation of the notion of a place of safety. In considering the idea of a place of safety, the Council of Europe points out it extends beyond mere protection from physical danger and considers the fundamental rights dimension of the proposed place of safety.[160] Consequently, the realisation of migrants' fundamental rights will demand disembarkation in a place where their rights are equally protected. The Office of the UN High Commissioner for Human Rights highlights the core international instruments which refer to the rights to which migrants are entitled irrespective of their status.[161] These are:

(i) the right to life, liberty and security, freedom from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;

(ii) the right to non-discrimination;

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[158] Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28 Georgetown Immigration Law Journal 225, 231-242; see also Thomas E. Carbonnneau, 'The convergence of the law of State responsibility for injury to Aliens and international human rights norms in the Revisited Restatement' (1985) 25 Virginia Journal of International Law 99, 100-140; see also Myres S McDougal, Harold D Lasswell, and Lung-chu Chen, 'Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 American Journal of International Law 432, 443-61.

[159] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Preliminary Objections (ICJ, 24 May 2007) p. 599 para 39.

[160] Council of Europe, 'Parliamentary Assembly, Resolution 1821 (2011) on the interception and rescue at sea of asylum seekers, refugees and irregular migrants' (adopted 21 June 2011) paras 5.2 and 9.5.

[161] United Nations Human Rights, Office of the High Commissioner, 'Migration and Human Rights: Improving Human rights-based governance of international migration' at 15 <https://www.ohchr.org/Documen 3ts/Issues/Migration/MigrationHR_improvingHR_Report.pdf> accessed 1 November 2021.

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(iii) the prohibition of torture, cruel, inhuman, or degrading treatment or punishment, the right to be protected from abuse and exploitation, the right to be free from slavery and involuntary servitude;

(iv) the right to a fair trial and legal redress; and;

(v) the right to protection of economic, social, and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work.[162]

Amongst all the rights mentioned above, the protection of the right to life is fundamental to the enjoyment of all other human rights, which informs other human rights.[163] Nonetheless, international law does not recognise the right to life as a corresponding right to the duty to render assistance at sea. Trevisanut argues that the right to be rescued at sea is the corresponding right derived from the operation of the positive obligation on States to protect life.[164] Yet, there is no right to be rescued contained on paper. From a sceptical point, Papastavridis agrees with Trevisanut's view only to the extent that it applies within the normative framework of human rights law and cannot be transposed into the law of the sea (as a matter of *lex lata*). Accordingly, the right to be rescued at sea cannot find its basis in the law of the sea framework− not even the SAR framework. This view is supported by the fact that these frameworks are mainly focused only on the duty of the State rather than the right of persons in distress. Also, the protection of such rights requires an individual and state-oriented redress system like the human rights courts and other monitoring and enforcement mechanisms, unlike the solely state-oriented redress mechanism under the LOS. Lastly, the notion of jurisdiction under the LOS creates a system in which the duty to provide a place of safety lies upon the coastal States, which limits liability to only coastal States. However, under the human rights framework, the obligation to protect persons at sea rests on all States exercising jurisdiction. Below, through case law, I point out the benefit of integrating IHRL and LOS

[162] François Crépeau and Bethany Hastie, 'The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights' (2015) 17 European Journal of Migration 157, 161; see also United Nations Human Rights, Office of the High Commissioner, 'Migration and Human Rights: Improving Human rights-based governance of international migration'; see also the International Justice Resource Centre (IJRC), 'Immigration and migrants' rights'- for a more detailed analysis of these rights, <https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/> accessed 1 November 2021.
[163] General comment no. 36, Article 6 (Right to Life) (HRC, 3 September 2019) CCPR/C/GC/35.
[164] Seline Trevisanut, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 Questions of International Law 3,12-4.

towards protecting persons at sea. However, in section 3.5.3, I reiterate the arguments in chapter two that the variation in interpreting jurisdiction and obligation within the IHRL courts still leaves a gap where persons are not protected.

3.5.2 The non-existing duty to allow disembarkation and human rights: The *Sea Watch 3* case

Following the fact that States have no duty to allow disembarkation, it can be argued that the "stand-offish" practice by States complies with LOS. Examples that have already been discussed in chapter two are the *MV Aquarius* saga, the *Tampa* and *Haitian interdiction* cases, the *Cap Anamur*, the *Tunisian Fishermen*, and the *Pinar affair*.[165] More recently, the issue arose in *Rackete and others v. Italy*,[166] showing that the ECtHR cannot force a State to authorise disembarkation. On June 12, 2019, the *Sea Watch* 3, a Dutch ship, had rescued 53 people from a rubber dinghy off the coast of Libya. The ship was stranded for 14 days outside Italian territorial waters off Lampedusa after the Italian authorities refused entry and requested her to disembark in Tripoli, Libya.[167] Out of the 53 rescued, only 13 migrants had been evacuated and brought to Lampedusa on medical or humanitarian grounds.[168] In three separate operations, the remaining migrants were denied entry.[169] Subsequently, on June 21, 2019, the applicants (the master of the ship and crew members) applied to the ECtHR for interim measures under Rule 39 of its Rules of Court, requesting to be permitted to disembark from *Sea Watch* 3.

Relying on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the Convention, the applicants' asked to be permitted to disembark to be able to apply for international protection or, at the least, for a place of safety. The ECtHR submitted questions to the parties concerning the vulnerability and condition of the persons on board the ship. Based on the parties' replies, the court decided not to indicate to the Italian Government under Rule 39 the interim measure requested by the applicants, namely authorisation to disembark in Italy from the *Sea Watch 3*. However, the ECtHR held that it was relying on the Italian authorities to continue to provide all necessary assistance to those vulnerable persons on board the *Sea Watch* 3. The ECtHR decision shows the court upheld the existing positive obligation of the Italian government flowing from Article 2 and 3 of the ECHR towards the migrants on board, even though there was no duty to allow disembarkation.

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[165] See Pierluigi Umbriano, 'Is it a crime to help people to survive (Cap Anamur and other cases) <http://www.eldh.eu/fileadmin/user_upload/ejdm/publications/2013/Pierluigi_Umbriano_-_Speech.pdf> accessed 1 November/2021.
[166] App no 32969/19 (ECtHR, 25 June 2019).
[167] Ibid.
[168] Ibid.
[169] Ibid.

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3.5.3 Jurisdictional link: The right to life and the duty to render assistance

Generally, under international human rights law, the scope of a State's extra-territorial obligations are linked to the State's jurisdiction.[170] Hence, a State may commit human rights violations when that State establishes jurisdiction over the migrants or the situation. In *Hirsi Jamaa and others v. Italy,* the Italian Revenue Police and Coastguard ships at 35 nm South of Lampedusa, the Maltese SAR's area, intercepted a ship carrying migrants from Somalia and Eritrea who had fled from Libya. Because of their bilateral agreements, the intercepted persons were brought on board the Italian naval ship and later handed over to the Libyan authorities. The applicants complained about a violation of Article 3 of the ECHR (prohibition of torture and inhuman treatment) and Article 4 of the Fourth Protocol (prohibition of collective expulsion). The Italian government submitted that its action was an execution of a relevant agreement with Libya and that there was no jurisdictional link.[171] The ECtHR held that there was a jurisdictional link between Italy and the rescued migrants. Accordingly, Italy violated Article 3 ECHR and Article 4 of the Protocol to the ECHR for collectively expelling all the migrants to Libya without any individual assessment.

The *Hirsi Jamaa* case is the first case to deal with the human rights protection of irregular migrants. Mann argues that this case creates a maritime legal black hole because it encourages the creation of rightlessness in a place that ignores violence or violation outside the scope of jurisdiction, and States become *legibus solutus*.[172] This was already highlighted in chapter two when discussing the gap in protection created by the ECHR's restrictive interpretation of the scope of obligation. As such, there is a space where there is a violation of obligation under the ECHR, but the wrong-doing State cannot be held liable because jurisdiction could not be proved. Concerning search and rescue operations, the lack of legal certainty further preserves this maritime legal black hole. The legal uncertainty results from the varying State interpretation of a place of safety, the use of SAR regions as a means to escape the general duty to rescue, the criminalisation of illegal entry to the extent that discourages humanitarian assistance and the flag revocation of humanitarian rescue ships.

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[170] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 876.

[171] *Hirsi Jamaa and others v Italy* (n 74) para 65. The Italian authorities pointed out that the "rescue" operation lasted no more than ten hours, within which applicants were provided with the necessary humanitarian and medical assistance, and that since the State's military personnel "had in no circumstances used violence; (...) had not boarded the boats and had. not used weapons" (as they did in *Medvedyev),* the State did not exercise full and exclusive] control over the applicants and, subsequently, the applicants did not fall under the Italian jurisdiction.

[172] Mann (n 15).

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Article 98 UNCLOS provides that the flag State shall require a master of a ship flying its flag to "proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance." Here, the keyword is "informed", which denotes that the duty to render assistance applies immediately upon receiving information of a distress situation[173]– i.e., information disseminated through distress calls from a migrant boat or a rescuing ship to a State.[174] Therefore, to establish jurisdiction under UNCLOS, a request for assistance is arguably sufficient.[175] However, if one accepts the argument that there is a link between the right to life under international human rights law and the search and rescue obligation at sea, how does one establish jurisdiction under the normative human rights framework in combination with the duty set out under the law of the sea? In more simplified terms: is a distress call enough to establish *de facto* jurisdiction?

To evaluate this question, it is pertinent to recognise the lack of uniformity in the interpretation of jurisdiction across the various human rights sub-fields. The ECtHR is often the relevant court dealing with human rights violations of migrants in the Mediterranean Sea.[176] To the ECtHR, jurisdiction involves State control which has to be effective, overall and normative.[177] Besson points out that State control cannot merely be claimed but must be effective and established.[178] Relating this to the above discussion on whether or not a distress call can establish a jurisdictional link, an established jurisdiction is dependent on the States response to it. Two questions are necessary here.

First, does the response to a distress call constitute an interception? The International Organization for Migration (IOM) simply notes that interception is a means of enforcing domestic laws extraterritorially.[179] Meanwhile, noting that there is no general definition of interception, UNHCR has defined it as encompassing "all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way

[173] See SAR Convention, chapter 4.3 points out that "any search and rescue unit receiving information of a distress incident shall initially take immediate action if in the position to assist and shall, in any case without delay, notify the rescue co-ordination centre or rescue subcentre in whose area the incident has occurred".
[174] UNCLOS, Article 98 (1) (a) and (b) the key words are "found and informed" as can be deduced from the phrases- "to render assistance to any person found at sea" and "to proceed with all possible speed to rescue of persons in distress, if informed of their need of assistance".
[175] See, *AS and others v Italy*, Comm No. 3042/2017, UN Doc CCPR/C/130/DR/3042/2017 (2021) para 7.8.
[176] 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, 417–35.
[177] Samantha Besson (n 170) 872.
[178] Ibid.
[179] IOM, 'Protection of migrants at sea' (n 56) 47.

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to the country of prospective destination."[180] Therefore, if the response to the distress call is an external measure to prevent, interrupt or stop the movement of persons, it can be said to be an interception. However, a distress call is inconclusive as a standalone requirement to hold a State liable for violating the duty to render assistance.[181]

Second, does the measure have to be physical to establish jurisdiction? Physical contact through boarding a vessel is the norm and has been prevalently acknowledged by the courts as sufficient in establishing jurisdiction. For instance, in the *Hirsi Jamaa*, *Rigopoulous*, and *Medvedyev* cases, the ECtHR acknowledged interception involving boarding to constitute effective overall control.[182] However, a view from the normative dimension of jurisdiction shows that direct physical contact through boarding is not quintessential to interception operations.[183] In the *Women on Waves* case, the ECtHR acknowledged the presence of the Portuguese naval ship blocking the entrance of the *Borndiep* ship carrying the Women on Waves members (even without boarding, and only providing a mere request to stay away) as a breach of Article 10 of the ECHR.[184] This developing case law prompted Gammeltoft-Hansen to conclude that:

> A strong presumption prevails that any interdiction measure, even if not amounting to effective control over individuals or a geographical area, through the act itself would entail jurisdiction and thus an obligation on behalf of the acting State to respect basic rights under international refugee and human rights law.[185]

Furthermore, in January 2019, the chamber of the ECtHR decided, by a majority, to grant an interim measure concerning the vessel *Sea Watch 3*, which by that point had 47 migrants on board and was refused disembarkation by the Italian government. [186] The applicants filed a

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[180] UNHCR, Executive Committee of The High Commissioner's Programme 'Interception of Asylum-Seekers And Refugees: The International Framework And Recommendations For A Comprehensive Approach' (9 June 2000) EC/50/SC/CRP.17 Para 10 <https://www.unhcr.org/excom/standcom/3ae68d144/interception-asylum-seekers-refugees-international-framework-recommendations.html> accessed 1 November 2021.

[181] See, in *AS and others v Italy* (n 175) para 7.8 The UN HRC ruled that among other factual elements, including the violation of the duty to respond to a distress call made Italy liable for the death of some migrants at sea; for more on this see Ramat Tobi Abudu, 'From Passive to Functional: The Protection of Persons in Distress' (2021) 6 Wolverhampton Law Journal 5.

[182] *Hirsi Jamaa and others v Italy* (n 74); see also *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999); see also *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010).

[183] Samantha Beeson (n 170) 865.

[184] *Women on Waves and Others v Portugal* App No 31276/05 (ECtHR, 3 February 2009).

[185] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 125.

[186] Press Release issued by the Registrar of the Court, 'ECHR grants an interim measure in case concerning the *Sea Watch 3* vessel' (2019) <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-6315038-

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complaint that the rescued migrants were detained onboard without a legal basis, suffering inhuman and degrading treatment, with the risk of being returned to Libya. In its decision, the court did not grant the applicants' requests on disembarkation but requested the Italian government to provide necessary assistance to the rescued migrants. At the same time, they anchored outside their territory. Here, without dealing with the substantial issue, the court implicitly acknowledged Italy's refusal to allow entry as a sufficient jurisdiction link to demand the performance of an obligation towards those in distress on board the vessel. Nevertheless, it is not conclusive to say a distress call is sufficient to establish a jurisdictional link considering that jurisdiction must be established based on the circumstances of each case.[187]

Nonetheless, the UN Human Rights Committee (HRC) interpretation of jurisdiction is a welcomed development to protecting migrants at sea. In *AS v Italy* and *AS v Malta*,[188] the HRC applying the LOS framework noted that Italy and Malta had concurrent jurisdiction over the drowning of over 400 migrants on the high seas in 2013. The HRC held that Malta had effective control over the rescue operation because of the existence of the shipwrecked vessel in their search and rescue (SAR) region and their response to the distress call.[189] The HRC's reasoning implies that the LOS framework on SAR creates a jurisdictional link, *ipso facto* triggering obligations under IHRL (in this case, ICCPR). The HRC held that the incident fell within Italy's jurisdiction because Italian authorities were aware of the distress call and closer to the distressed vessel but did nothing to respond.[190] The HRC found that Italy violated the right to life of those involved under Article 6 of the ICCPR because Italy failed to discharge its positive obligation to protect the lives of persons in distress at sea.[191]

However, the lack of uniformity in interpreting jurisdiction and the scope of positive obligation within IHRL courts, as highlighted in chapter two, are legal uncertainties that create a gap in the protection of people. At sea, the ECtHR's passive interpretation of jurisdiction and positive obligation can arguably affect the protection of persons in distress in the Mediterranean Sea.[192] This is a problem because the ECHR is often the "legal instrument that the "boat refugees" or "boat migrants" and their respective lawyers would turn to seek redress in cases of loss of life

8248463&filename=ECHR%20grants%20an%20interim%20measure%20in%20case%20concerning%20SeaWatch%203%20vessel.pdf> accessed 1 November 2021.

[187] Samantha Beeson (n 170) 877.

[188] *AS and others v. Malta* (n 157); see also *AS and others v. Italy* (n 176).

[189] Ibid *AS and others v Malta*, para 6.7 and 6.8.

[190] *AS and others v Italy* (n 175) para 7.8.

[191] Ibid para 8.7.

[192] Samantha Beeson (n 170) 884.

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or *refoulement* practices arising from interception or rescue operations at sea."[193] Due to this lack of uniformity, it is safe to reiterate that "human rights are not the cure to all ills."[194]

3.5.4 The principle of *non-refoulement*

The principle of *non-refoulement* forms the core of international refugee law and is enshrined in IHRL.[195] Article 33 of the Refugee Convention provides:

> No contracting State shall expel or return (*"refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion. [196]

States owe the above duty to refugees.[197] Refugees are persons who flee because of a threat of persecution, and they lack the protection of their own country.[198] Another category of persons that enjoys international protection are those eligible for subsidiary protection. Under EU law, such a person is a third-country national or stateless person who does not qualify as a refugee. Still, substantial grounds exist to show that the person concerned, if returned to their country of origin or in the case of stateless persons, to their country of former habitual residence would face a real risk of suffering serious harm.[199] On the other hand, migrants are persons who leave their country for many reasons not related to persecution but still enjoy the protection of their own government even when abroad.[200]

The Refugee Convention does not restrict State parties' *non-refoulement* obligations and other consequential obligations under international human rights law.[201] The IHRL framework offers

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[193] Papastavridis (n 176) 418.
[194] Samantha Beeson (n 170) 877.
[195] See, UDHR, Article 14 (1); see also, ECHR, Articles 2 and 3 and ICCPR, Articles 6 and 7 precludes removal when there is fear of ill treatment; CAT, Article 3 and ECHR, Article 4 of protocol no 4 prohibits collective expulsion of aliens; see also Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016) 171-230 where the author draws the differences between the protection offered under international human rights law (ECHR and EU law) compared to the Refugee Convention.
[196] Convention on the Status of Refugees 1951 and its 1967 protocol (adopted 28 July 1951 entered into force 22 April 1954) 189 UNTS 137 [Herein referred to as the 'Refugee Convention'].
[197] Ibid Article 1(A)(2); see also Art 1 F -This does not include anyone whom there are serious reasons to believe they have committed acts which exclude them from refugee protections, such as war crimes. Crimes against humanity or serious ordinary crimes
[198] Gammeltoft-Hansen, (n 185) 12.
[199] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted 30 October 2004 L304/12
[200] IOM, 'Protection of migrants at sea' (n 56).
[201] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' at 3-4 <https://www.unhcr.org/4d9486929.pdf> accessed 1 November 2021.

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broader protection to migrants and refugees, which is not limited to the fear of persecution but covers more grounds of protection. Based on this, Chetail argues that human rights law should be the sole protector of refugees' rights.[202] Goodwin-Gill and McAdam speaking from a more general perspective, point out that the relationship between human rights law and refugee law is complementary as the latter fills in the gaps under the former concerning the protection of refugees.[203] On the other hand, Costello acknowledges Noll's prediction on the prevalent access to the ECHR as a means to seek protection.[204] Costello also highlights that the wider scope of the ECHR protection causes more complexities because it opens up issues already taken care of in the Refugee Convention.[205] Similarly, Edwards argues that due to the shortcomings of the international human rights framework and the distinct nature of the Refugee Convention, the former cannot offer better protection.[206] Nonetheless, the international community is more tolerant to the protection of refugees following its specialised legal framework (the Refugee Convention) rather than the protection of other irregular migrants.[207]

The broader scope of the international human rights framework offers protection to migrants at sea irrespective of their status. The principle of *non-refoulement* applies to every person, whatever his or her past activities or the danger he or she is perceived to pose to the State in the custody of which he or she is held.[208] Similarly, the recently adopted GCM emphasises protection regardless of the status of the migrant.[209] However, States, through their domestic law, can still create *de jure* rightlessness where rights holders, both refugees and migrants, are rendered rightless − because their domestic laws are security-driven and usually involve the criminalisation of illegal entry and facilitation of entry.[210] Such actions have received criticism because they complicate access to human rights protection[211] and affects migrants who are in

[202] Vincent Chetail, 'Are Refugees Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law'', in Rubio-Marin (ed), *Migration and Human Rights* (Oxford University Press, 2014).
[203] Goodwin-Gill and McAdam, *The Refugee in International Law* (Oxford University Press, 2007)1.
[204] Costello (n 196) 171-230; see also G Noll, '*Negotiating Asylum'* (Martinus Nijhoff Publishers 2000) 454.
[205] Ibid Costello.
[206] Alice Edwards, 'International Refugee Law' In Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn Oxford University Press, 2018) 544.
[207] Chetail (n 202).
[208] *Chahal v. United Kingdom*, App no 22414/93 (ECtHR, 15 November 1996) para 80 points out that 'the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'; see also *Ahmed v. Austria*, App no 25964/94 (ECtHR, 17 December 1996) para. 41.
[209] The GCM, Object 21 includes a definition like that of *non-refoulement* provision
[210] Mitsilegas (n 51) 68-85.
[211] Ibid.

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need of international protection, as seen in the *CPCF* case[212] involving the detention of 157 asylum seekers by the Australian Navy. Here, the Australian High Court held that the Australian authorities had the right to detain the asylum seekers intercepted in the Australian contiguous zone as permitted under Australian law and Art 33 of UNCLOS. In this case, the High Court did not give any detailed analysis of the *non-refoulement* principle even though the plaintiff, a Sri Lankan national of Tamil ethnicity, claimed to have a well-founded fear of persecution in Sri Lanka, qualifying him as a refugee under the 1951 Refugee Convention. However, Justice Keane observed that:

> The Australian courts are bound to apply Australian statute law 'even if that law should violate a rule of international law'. International law does not form part of Australian law until it has been enacted in legislation.[213]

The High Court's observation is in line with the fact that Australia has no self-executing treaty implementation mechanism.[214] Even countries with a self-executing treaty mechanism can use their domestic law to limit the full performance of their international obligation. For example, the US has a self-executing treaty mechanism and has ratified the Refugee Convention. Still, they watered down their *non-refoulement* duty in the *Sale v. Haitian Centers Council* case.[215] The US Supreme Court, in an 8-1 majority decision, held that the interdiction of Haitian asylum seekers on the high seas, being an area outside the US jurisdiction, did not attract the *non-refoulement* obligation.[216] Also, in *A and others v. Secretary of State for the Home Department*,[217] the UK Court of Appeal supported the measures adopted by the UK Government under Section 23 of the UK Anti-Terrorism, Crime and Security Act even though it derogated from international human rights guarantees because it was a security necessity.[218] However, the House of Lords held that the section of the Act which allowed detention of only foreign nationals for security purposes was incompatible with the European Convention on Human Rights.[219] Lord Hoffmann observed that "The real threat to the life of the nation, in

[212] *CPCF v Minister for Immigration and Border Protection* (High Court of Australia, 28 January 2015).
[213] Ibid Keane J., para 462.
[214] Stephens (n 55) 24.
[215] *Sale v. Haitian Centers Council, Inc*., 509 U.S. 155 (1993).
[216] Ibid.
[217] *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56.
[218] Ibid.
[219] Ibid.

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the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these".[220]

Nevertheless, the interception of migrants on the high sea does not violate the principle of *non-refoulement* until the State expels those migrants intercepted.[221] The *non-refoulement* obligation is comparable to the duty to render assistance at sea, as they both do not imply an obligation to admit a person to the country where she or he seeks entry.[222] Accordingly, the *non-refoulement* and search and rescue obligations are distinguishable from the right to asylum under international law.[223] The former is a peremptory rule of international law (law of the sea and refugee law), while the latter falls within the sovereign powers of the State.[224] Also, neither the duty to render assistance nor the *non-refoulement* obligation includes migrants' right to choose a port of destination.[225] To include such a claim would affect the sovereign rights of States to manage their borders which encompasses State criminal jurisdiction against activities that may threaten border security. Thus, as much as protecting the rights of irregular migrants at sea is essential, it needs to be reconciled with States sovereign rights to border security to protect persons living within their territory.

3.6 Conclusion

By using the case study of irregular maritime migration in the Mediterranean Sea, this chapter shows the need for both the security and rights-based approaches to ensuring better protection of people in the context of maritime security. The security approach is authorised by border management laws (including the LOS) and the rights-based approach authorised by IHRL. The integration between these two fields of law should balance both approaches reflected in MSOs towards protecting people at sea. Yet, the general complexities acknowledged in chapter two and this chapter still presents gaps in protection. Chapter two gave emphasis to the incoherence in the interpretation of concepts as the core source of gaps in protection, while this chapter examined the content of the relevant legal frameworks as an issue. The content of the security

[220] Ibid para 97, Lord Hoffmann.
[221] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law (*Oxford University Press New York 2007) 277.
[222] UN Ad Hoc Committee on Statelessness and Related Problems `Comments of the committee on the draft Convention' article 28 (10 February 1950) UN Doc E/AC.32/L.32/Add 1.
[223] Goodwin-Gill and McAdam (n 221) 196.
[224] Jean Allain, 'The jus cogens nature of non-refoulement' (2001) 13(4) International Journal of Refugee Law 533, 533-58; see also Eggli Ann Vibeke, *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff Publishers, 2002) 155.
[225] Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the Hirsi case' (2012) 18 Journal of International Maritime Law 59, 64.

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legal framework evaluated in this chapter seems to allow the hardened security approach to irregular migration which is substantiated by the current push-back practice by EU States affecting the protection of migrants rights at sea. The rights-based framework, to an extent, helps secure these rights, but is limited by the lack of uniformity in interpretation identified in chapter two.

The LOS makes no explicit reference to maritime migration, but it contains provisions applicable to the issue. The UNCLOS, SOLAS and SAR conventions implicitly classify migrants at sea as persons in distress, which creates an obligation to rescue. Also, UNCLOS recognises a ship in distress with the right to stop and anchor during passage through a port States territorial sea. Case law has interpreted distress to mean a situation where there is a risk to life which aligns with the migrants' situation at sea.[226] Thus, migrants at sea qualify as 'persons in distress' and the vessel they sail on becomes a 'ship in distress,' i.e. the migrants' boat or the rescuing ship. UNCLOS, SOLAS, SAR do not provide the right to be rescued nor the right to a place of disembarkation, nor any duty on States to authorise entry or disembarkation. Instead, Article 19(g) UNCLOS qualifies the loading or unloading of any person contrary to a State's domestic immigration laws as prejudicial to the peace, good and security of the coastal State.

Consequently, coastal States have the right to adopt rules and regulations to prevent the violation of their immigration laws. Besides national laws, an example of such laws at the international level are the Anti-Smuggling and Anti-Trafficking Protocols, transposed into EU law as the EU Facilitators Packages.[227] These laws give States the criminal jurisdiction to combat the challenges that come with irregular migration, such as trafficking in persons and migrants smuggling, which includes the power to strengthen its borders. Such authority includes measures such as the interception and detention of irregular migrants, which in turn may push back the migratory flow.

IHRL guarantees fundamental rights to all persons, including migrants at sea. However, these *de jure* rights operate within the concept of jurisdiction and where there is no jurisdiction, there cannot be *de jure* enforcement. Arguably, the ECtHR's passive interpretation of jurisdiction vis-à-vis the hardened EU security approach in the Mediterranean Sea adversely affects the protection of people at sea. Although there is a more comprehensive protection when IHRL

[226] Tanaka (n 83) 160.
[227] See above, section 3.3.

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and LOS are systemically integrated, there is still a gap in protection from the lack of uniformity in interpretation across IHRL subfields, including those made by the LOS adjudicatory bodies. There is a need for an approach that can deal with the gap in protection created by these legal uncertainties, creating *de jure* rightlessness.

The next chapter expands and strengthens the arguments in this chapter regarding the need for a unified approach to address the ill-effects of legal uncertainties on people at sea. Chapter four investigates the relevant piracy laws, drawing on a case study of the Gulf of Guinea, to reveal the complexities within the content and application of both the security and rights-based legal frameworks to deal with piracy. It shows that the protection of all people at sea requires integrating both the LOS and IHRL frameworks through an approach that can deal with the effect of these legal uncertainties, i.e. *de facto* non-enforcement.

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4 Maritime Piracy: Legal Uncertainties and *De facto* non-enforcement

4.1 Introduction

In the Middle Ages, maritime piracy was dominated by Vikings raiding and looting ships at sea using swords and other weapons. Modern pirates have changed their techniques and weapons. However, piracy is still ongoing, specifically because today, 90 per cent of world trade is by shipping, making the sea an attractive hub for pirates. In the Lotus case, a *locus classicus*, piracy was referred to as "an offence against the law of nations". Pirates were considered "the enemy of mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish".[1] Piracy is also the "only true case of universal jurisdiction" under customary international law.[2] Acts of piracy cause maritime and human insecurity by endangering the welfare of seafarers and the security of navigation and commerce. These criminal acts may result in the loss of life, physical harm or hostage-taking of seafarers, significant disruptions to commerce and navigation, financial losses to ship-owners, increased insurance premiums and security costs, and increased costs to both consumers and producers, including damage to the marine environment.[3]

Therefore, the international community considers piracy a serious threat requiring security measures at the international, regional, and national levels. With the expansion of human rights law, the need to consider the human rights consequences of anti-piracy operations has also become more prevalent. This chapter illustrates how the international framework to combat maritime piracy is inherently a securitised framework with little or no human rights law dimension. It argues that the relationship between piracy laws (international, regional, and domestic) and human rights law is fragmented to the extent that anti-piracy operations seem to inherently violate international human rights law. An example is the evaluation of the right to liberty and security in the arrest, delivery, and transfer of piracy suspects, which illustrates the dichotomy between international piracy laws and IHRL.[4]

[1] The Lotus Case (France v Turkey) (1927). PCIJ Series. A No.10: 70 Judge Moore.
[2] *The Arrest Warrant Case (Democratic Republic of the Congo v Belgium)* (ICJ, 14 April,2002).
[3] UN, 'Piracy' <https://www.un.org/ruleoflaw/thematic-areas/transnational-threats/piracy/> accessed 1 November 2021.
[4] See above, chapter two, section 2.3.1.

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This chapter furthers the central argument of this thesis. Namely, it highlights the need to balance security and rights-based approaches by integrating IHRL and LOS to ensure better protection of people at sea. Yet, the existence of legal uncertainties within these two frameworks still leaves spaces where civilians at sea are unprotected.[5] These legal uncertainties constitute maritime legal black holes that exacerbates *de facto* non-enforcement, which impacts counter-piracy operations and affects the protection of all people at sea.[6]

In this chapter, the Gulf of Guinea (GoG) is evaluated as one of the maritime areas where *de facto* non-enforcement (unwillingness of States to enforce counter-piracy measures) is most visible. Section 4.2 discusses the nature of piracy in the GoG, highlighting the issues driving the increase in piracy activities within the region. This section argues that the law causes *de facto*-non enforcement. This argument is furthered in section 4.3, which points out the legal uncertainties (including maritime legal black holes) within the definition and scope of piracy under the law of the sea vis-à-vis other international, regional, and national instruments. Section 4.4 examines the specific legal uncertainties arising from the securitised counter-piracy framework, mainly the permissive enforcement jurisdiction, the dualistic nature of piracy, and the duty to co-operate, which facilitates variation in piracy laws. In turn, these variations cause *de facto* non-enforcement through which pirates and States can escape liability and responsibility.

Section 4.5 discusses the possible positive impact of the rights-based framework on *de facto* non-enforcement by evaluating the IHRL implications on piracy at sea. This section discusses piracy and human rights law from the perspectives of people at sea (both suspects and victims), with a general evaluation of the global context and a specific focus on the GoG. Section 4.6 concludes by drawing on the analysis from all the preceding sections. It deduces that the existence of *de facto* non-enforcement supports the integration of both rights and security-based approaches to piracy but also highlights the need for a more comprehensive, coherent, and context-specific approach to dealing with piracy.

4.2 Piracy in the Gulf of Guinea

[5] See, Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) The European Journal of International Law 347.
[6] See above, chapter one, sub-section 1.2.1 (II) notes that *De facto* non-enforcement is apparent within the LOS framework on maritime piracy, where there are gaps within the law that allows State's failure or refusal to deal with piracy.

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According to Hopkins, the security framework that contributed to the decline of piracy in the early 21st century includes self-defensive measures by the shipping industry, the employment of armed guards, the international naval surveillance, patrol and guarding programme, and the prosecution of piracy suspects.[7] However, all these measures are either lacking or insufficient in the Gulf of Guinea (GoG) due to *de facto* non-enforcement. This is both an accountability and prevention shortcoming of the counter-piracy framework. As such, there is no enforcement mechanism to hold States accountable for their failure to enforce counter-piracy measures. The prevention shortcoming emanates from the securitised nature of the framework, and thus, there are insufficient attempts to deal with the root causes.[8]

The initial epicentre for piracy was the Horn of Africa, the Gulf of Aden, which was infiltrated by the Somali-based pirates, but currently, that area records no piracy cases. The present epicentre is the Gulf of Guinea (GoG) which Nigerian pirates have always infiltrated, but the cases in the GoG have substantially increased in the last five years.[9] In 2020, the International Maritime Bureau's Piracy Reporting Centre (IMB PRC) recorded a total of 195 incidents of piracy and armed robbery against ships, compared to 162 incidents in 2019.[10] This global rise is attributed to increased piracy, and armed robbery in the GoG, which accounts for 95% of the crew members kidnapped globally.[11] The *modus operandi* of piracy in the GoG differs from that which occurred in the Gulf of Aden. Therefore, there is a need to investigate the region's specificity in addressing the crime of piracy.

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[7] Donna Hopkins, 'U.S. State Department Coordinator on Counter Piracy and Maritime Security' (2013, June 26). Piracy Daily <http://www.piracydaily.com/ donna-hopkins-u-s-state-department-coordinator-on-counter-piracy-and-maritime-security/> accessed 1 November 21.

[8] Some authors categorise the legal framework as the source of the problem, see Anna Petrig, 'Human Rights in Counter-piracy operations: No Legal Vacuum but Legal Uncertainty' In Maximo Q Mejia Jr et al, *Piracy at Sea* WMU studies in Maritime Affairs (Springer, 2013) 39-42; see also Mazyar Ahmad, 'Maritime Piracy Operations: Some Legal Issues' (2020) 4(3) Journal of International Maritime Safety, Environmental Affairs and Shipping 62, 62-9; Bueger notes that the more the maritime environment is securitised the higher the likelihood of piracy, see Christian Bueger, 'Learning from piracy: future challenges of maritime security governance' (2015) 1 Global Affairs 33, 35.

[9] Maisie Pigeon and Kelly Moss, 'Why Piracy Is a Growing Threat in West Africa's Gulf of Guinea' (2020) World Politics Review <https://www.worldpoliticsreview.com/articles/28824/in-west-africa-s-gulf-of-guinea-piracy-is-a-growing-threat#:~:text=Evolving%20Criminal%20Tactics&text=The%20potential%20for%20high%20profits,for%20pirates%20and%20other%20criminals.> accessed 1 November 2021.

[10] ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships' (January 2021) <https://www.icc-ccs.org/reports/2020_Annual_Piracy_Report.pdf > accessed 1 November 2021.

[11] Ibid.

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The GoG is part of the Atlantic Ocean off the western African coast and is considered the geographic centre of the earth.[12] The GoG includes both oil-producing and potential oil-producing States along the coast of West Africa, Central Africa, and Southern Africa. Therefore, piracy in the GoG poses a threat to global energy security. The region encompasses over a dozen countries, namely Angola, Benin, Cameroon, Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo (DRC), Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Nigeria, Republic of the Congo (Congo-Brazzaville), São Tomé and Príncipe, Senegal, Sierra Leone, and Togo.

GoG piracy is not the same paradigm of piracy as Somalia-based piracy, it is a hybrid of conventional and insurgent piracy. Although Somali pirates were aided by sophisticated criminal networking, their *modus operandi* still fits into the paradigm of traditional piracy.[13] In this context, a ship is hijacked, and the payment of a ransom is negotiated for the release of the ship. The piracy crisis in East Africa has ceased due to a combination of international, national, and privately contracted security personnel, including reforms to the regional judicial system.[14] The GoG presents a different scenario, with its hybrid of traditional and insurgent piracy. Unlike Somalia, pirates in West Africa frequently disable a ship's equipment and take control of the ship. This model requires combating piracy and other consequentially related crimes such as kidnappings, arms smuggling, money laundering, and cyber-crimes.[15] Conversely, Somali pirates concentrated on kidnapping for ransom, capturing vessels, and controlling their cargo and crew to extort money from a shipowner.

Pirates in the GoG launch attacks primarily from Nigeria to steal cargo, equipment or valuables from a vessel and its crew. [16] The kidnapping of crew members does occur, albeit with lesser frequency than in the Indian Ocean. Yet, the levels of violence are high because the GoG pirates are less concerned with maintaining the well-being of hostages.[17] The causal factors contributing to piracy in the GoG are: "legal and jurisdictional weakness, favourable geography, conflict and disorder, underfunded law enforcement, inadequate security,

[12] Kennedy K. Mbekeani and Mthuli Ncube, 'Economic Impact of Maritime Piracy', African Development Bank (2011) 5 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Maritime%20Piracy_Maritime%20Piracy.pdf> accessed 1 November 2021.
[13] Kamal-Deen Ali, 'Anti-Piracy Responses in the Gulf of Guinea: Addressing the Legal Deficit' In Carlos Esposito, James Kraska, Harry N. Scheiber and Moon-Sang Kwon (eds) '*Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime'* (Brill/Nijhoff, 2016) 211.
[14] Ibid.
[15] Ibid.
[16] Ibid 213.
[17] Ibid 211.

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permissive political environments, cultural acceptability, and promise of reward".[18] The key drivers of piracy are poverty, unemployment, lack of economic opportunities, environmental conditions and political corruption. Other drivers are the domestic conflicts and border disputes between GoG countries, which fuel piratical activities in the GoG. For instance, some Nigerian pirates were connected with the separatist Movement for the Emancipation of the Niger Delta (MEND). Before the amnesty given to the MEND group in 2009, they rebelled for politically motivated reasons that did not qualify as piracy – although the violence against foreign-flagged vessels mimicked piracy attacks. Likewise, the ongoing border dispute on the Bakassi Peninsula between Cameroon and Nigeria has led to large areas of their maritime borders being under-governed, allowing a safe haven to develop for pirate groups.

At the regional level, the current legal regime in maintaining security in the GoG ranges from hard law to soft law. The only binding African Union regime is the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter).[19] The other is a soft law document titled "Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa",[20] specifically covering the GoG. Then, there are several international operational initiatives to combat piracy in the GoG.[21] Despite these laws, there is the fear that the current legal and operational framework is insufficient to combat the predicted increase in piratical activities.[22] Currently, several GoG States are adjusting their national budget. It has been argued that if Nigeria's budget constraints curtail the "government's ability to sustain its demobilisation and reintegration programs for former combatants in the Delta, history suggests that piracy and armed robbery may rise".[23] Alongside the national impacts of the COVID-19 pandemic, the regional and international

[18] Maj. Eero Tepp, 'The Gulf of Guinea: Military and Non-Military Ways of Combatting Piracy Baltic Security and Defence' (2012) 14 Baltic Security and Defence 181, 182.
[19] African Union regime is the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) (adopted October 15, 2016).
[20] Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa (adopted March 13, 2013) (Hereinafter referred to as "The Yaoundé Code of Conduct").
[21] In 2013, the international community established the G7++ Friends of the Gulf of Guinea (G7++ FOGG), members to this initiative are the G7 States together with Belgium, Denmark, the Netherlands, Norway, Portugal, Spain, Switzerland (and Brazil as an observer), and international bodies (the EU, and the UN Office on Drugs and Crime and Interpol). The G7++FOGG initiated cooperation with the oil and shipping industry, as well as with ECCAS and ECOWAS, to support the implementation of the Yaoundé Code of Conduct. Another initiative is the reporting mechanism operated by the French and UK navies called the Maritime Domain Awareness for Trade in the GoG (MDAT-GoG). This mechanism allows shipmasters to report their presence in the GoG and report any occurring incident to signal a warning to other ships. In 2016, the EU launched the GoG Inter-Regional Network (GoGIN) covering 19 GoG States, which aims to improve maritime security in the GoG mainly by supporting the establishment of an effective and technically efficient regional information-sharing network.
[22] Pigeon and Moss (n 9).
[23] Ibid.

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cooperation in the GoG over the past 18 months has been largely affected. For example, in March 2020, a French naval mission deployed to the GoG to support regional counter-piracy operations was recalled to France, although the Italian Navy replaced the French ship.[24] This volunteer action by the Italian navy is commendable. In the short to medium term, such naval missions might not be sustainable for all States, considering the global economic impact of the coronavirus pandemic.[25]

Piracy in GoG is a "symptom of a deeper malaise" but also a disease.[26] Contrary to the opinion that supports either eradicating the symptoms or the disease itself: both the root causes and the security concern posed by piracy have to be dealt with simultaneously to ensure a sustainable solution building upon peace, justice, and strong institutions.[27] The reality is that these root causes, which are prevalent in developing countries, turn people towards piracy, which, when combined with weak law enforcement and corruption, has allowed piracy to flourish in the GoG. Therefore, there must be a balanced solution to piracy – even in the GoG, which involves all hands-on deck. Although there are presently various bilateral, regional, national, and extra-regional regimes to combat piracy and armed robbery at sea in the GoG, they are only securitised. The only country in the GoG with an anti-piracy law is Nigeria,[28] although the other countries have some form of security-focused laws embedded in their criminal codes. This gap in legislation affects the effective prosecution of the offence of piracy within the GoG and, in turn, negatively impacts the effectiveness of counter-piracy operations.

Academics point at the limited maritime capacity, lack of unity and weak military power of GoG States as a reason for the increase of piracy activities in the GoG.[29] This chapter argues that the legal uncertainties in piracy laws at the international, national, and regional level cause *de facto* non-enforcement, arguably the crucial source of the increase in piracy activities. The

[24] Martin Manaranche, 'Italian Navy Deploys Frigate to The Gulf of Guinea While French Navy Suspends Patrol Mission' (29 April 2020) <https://www.navalnews.com/naval-news/2020/04/italian-navy-deploys-frigate-to-the-gulf-of-guinea-while-french-navy-suspends-patrol-mission/> accessed 1 November 2021.
[25] Ibid.
[26] Freedom C Onuoha 'Piracy and Maritime Security in the Gulf of Guinea: Trends, Concerns, and Propositions' (2013) 4(3) The Journal of the Middle East and Africa 267, 270-74; see also Paul Williams and Lowry Pressly, 'Maritime Piracy: A Sustainable Global Solution' (2013) 46 Case Western Reserve Journal of International Law 177,184.
[27] Daud Hassan and Sayed Hasan, 'Effectiveness of the Current Regimes to Combat Piracy in the Gulf of Guinea: An Evaluation' (2017) 10 African Journal of Legal Studies 35, 36-7.
[28] It is titled Nigeria's Suppression of Piracy and Other Maritime Offences Act 2019 (SPOMO Act), aiming to "prevent and suppress piracy, armed robbery, and any other unlawful act against a ship, aircraft, and other maritime craft, including fixed and floating platforms."
[29] Hassan and Hasan (n 27); see also Onuoha (n 26).

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next section lays the foundation for this argument by examining the legal uncertainties and weaknesses within the scope of piracy laws in the region.

4.3 Definition and scope of piracy: Legal uncertainties and weaknesses

4.3.1 Definition of piracy

UNCLOS codifies the customary international law on maritime piracy, which contain gaps reflective in subsequent laws[30] such as the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),[31] and the International Maritime Organization (IMO)'s code.

Article 101 UNCLOS reiterates Article 15 of the Convention on the High Seas 1958. Under these provisions, piracy is defined to consist of any of the following:

> a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> ii) Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State;
>
> b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)

From the above definition, the essential characteristics of piracy under the UNCLOS definition are: (a) it occurs on the high seas; (b) inter-ship attacks; and (c) motive requirements. In contrast, these requirements are not reflected in the SUA Convention. The offence of piracy is embedded in Article 3 of the SUA Convention, which provides various elements of unlawful acts at sea. It is important to note that the SUA Convention does not explicitly criminalise piracy but spells out acts that fall under the rubric of piracy. Article 3 provides that:

[30] Mazyar Ahmad 'Maritime piracy operations: Some legal issues' (2020) 4 Journal of International Maritime Safety, Environmental Affairs, And Shipping 62, 62-9.

[31] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 U.N.T.S. 221 [Hereinafter referred to as the SUA Convention].

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> any person commits an offence if that person unlawfully or intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship.[32]

There is a differentiation between piracy (which occurs on the high seas and similar maritime zones) and armed robbery against ships (which can occur within the internal waters and territorial sea). IMO defines 'Armed Robbery against Ships' as any of the following acts:

> 1)any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
>
> 2)any act of inciting or of intentionally facilitating an act described above.[33]

IMO's definition retains the piracy definition under UNCLOS, where all States have jurisdiction but restrict jurisdiction to the coastal State only in the case of an armed robbery at sea. Like UNCLOS, the IMO definition does not criminalise attempted attacks. In the GoG, the Nigeria's Suppression of Piracy and Other Maritime Offences Act 2019 (SPOMO Act), and the Yaoundé Code of Conduct reiterate the definition of piracy set out in Article 101 UNCLOS.

4.3.2 Geographical limitation

The first maritime legal black hole within UNCLOS is the geographical limitation of piracy as an illegal activity that can only be carried out on the high seas (Article 101) or in a State's exclusive economic zone (Article 58(2)). But, in areas subject to a State's territorial sovereignty, such as the internal waters, territorial seas, and archipelagic waters, the provisions on piracy do not apply.[34]

One contentious aspect is whether the laws on piracy apply to the contiguous zone.[35] No provision in UNCLOS explicitly extends the laws of piracy to the contiguous zone. However,

[32] Ibid Articles 3 (1) and (2).
[33] IMO, 'Code of Practice for the Investigation or crimes of Piracy and Armed Robbery Against Ships' 26th Session (18 January 2010) A 26/Res.1025.
[34] For more on jurisdiction in different maritime zones, see Section 2.2.1 of chapter two.
[35] UNCLOS, Article 33(2), the contiguous zone is the maritime zone that extends within the 24 nautical miles limit from the baselines from which the breadth of the territorial sea is measured.

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it is implied since the contiguous zone forms part of the EEZ and the high seas.[36] Unlike the internal waters and territorial sea, which is within a State's territorial sovereignty and jurisdiction, the contiguous zone is an area where the State enjoys sovereign rights and jurisdiction over certain matters. Article 33 UNCLOS provides that the coastal State may exercise the control necessary to prevent and punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea". This provision does not preclude the extension of piracy provisions to the contiguous zone. Still, it reiterates the rights of the coastal State to exercise 'a form of' jurisdiction over such offences prescribed in its national laws.[37] Accordingly, the contiguous zone forms an area outside State jurisdiction and so falls within the scope of the law on piracy.

The SUA Convention extends the geographical jurisdiction available to State parties against unlawful acts, but the question is whether such an extension applies to piracy offences. Article 4 of the SUA Convention provides that the Convention applies "if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States."[38] Article 4 defines the application of the Convention very broadly − therefore, it has been criticised for not being 'carefully drafted and not expressing the intent of the drafters'.[39] Yet, the phrase "ship is navigating or scheduled to navigate into" means the Convention applies to ships on international voyages both in motion and scheduled to operate seaward of a State's territorial sea. On the contrary, the definition and scope of piracy under UNCLOS only refers to piratical acts on the high seas − while similar acts in the territorial sea are classified as armed robbery at sea. Also, the phrase "outer limit or lateral limits of the territorial sea" (under Article 4 SUA Convention) covers unlawful acts in the territorial sea, which does not apply to piracy. The SUA Convention does not uphold the elements of the crime of piracy, like motive and high seas requirements, which are customary international law. Therefore, States in drafting anti-piracy laws must apply the SUA Convention vis-à-vis UNCLOS to retain customary international law standards. Accordingly, the SUA Convention does not explicitly deal with all

[36] Phillip Eschenhagen and Max Jurgens, 'Protective jurisdiction in the contiguous zone and the right of hot pursuit: Rethinking coastal States' jurisdictional rights' (2018) 19(2) Melbourne Journal of International Law, 521, 528; see also United Nations Office on Drugs and Crime, 'Maritime Crime: A Manual for Criminal Justice Practitioners' (United Nations, 2017) 40- the contiguous zone qualifies as international waters.

[37] Ibid Phillip Eschenhagen and Max Jurgens, at 521, the authors provide a detailed analysis of the difference between control and jurisdiction and conclude that control is a form of administrative measure rather than jurisdiction.

[38] SUA Convention (n 31) Article 4.

[39] Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy* (Oxford University Press, 2011) 155.

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the gaps in piracy law at the international level. Instead, at a general level, it prevents the perpetuation of unlawful acts at sea.

The International Maritime Bureau (IMB) of the International Chamber of Commerce previously defined piracy as an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the evident intent or capability to use force in the furtherance of that act.[40] The definition of piracy given by the IMB was broad and arguably dealt with the deficiency of the restrictive definition under UNCLOS. According to the IMB, the above definition was adopted because most attacks against ships occur within the jurisdiction of States, and piracy, as defined under UNCLOS, does not address this aspect.[41] For the same reasons, some authors argue that the definition of piracy under UNCLOS is impractical in the fight against contemporary piracy, armed robbery and maritime terrorism, and hence its revision is necessary.[42] Such arguments might seem plausible based on their relevance to developing responsive maritime security strategies – as the level of violence by pirates on the high seas is the same as that in the territorial and internal waters. Therefore, it seems to offer an operational perspective to combat armed robbery at sea and piracy attacks without legal limitations. Yet, the UNCLOS definition of piracy gives legal clarity, which is essential for the purpose of prosecuting and evidence gathering for piracy cases.

4.3.3 Attempted attacks and inter-ship limitation

Article 101 UNCLOS shows that piracy involves only inter-ship attacks, i.e., involves more than one vessel. The International Law Commission (ILC) commentary confirms that "acts committed on board a ship by the crew or passengers and directed against the ship itself or persons or property on the ship, cannot be regarded as acts of piracy."[43] For example, the hijacking incidents by persons who embarked as passengers of the Portuguese ship *Santa Maria*

[40] Herbert I. Anyiam, 'When Piracy is Just Armed Robbery' (19 July 2014) <https://www.maritime-executive.com/article/When-Piracy-is-Just-Armed-Robbery-2014-07-19#:~:text=Until%202009%20the%20IMB%20defined,in%20furtherance%20of%20that%20act.> accessed 1 November 2021.

[41] Ibid.

[42] Keyuan Zou, 'New Developments in the International Law of Piracy' (2009) 8(2) Chinese Journal of International Law 323, 323-45; see also Rytis Satkauskas, 'Piracy at Sea and the Limits of International Law' (2011) 1(2) Aegean Review of the Law of the Sea and Maritime Law 217, 217-35; see also Mark Sloan, Marine Piracy: A Continuing Challenge in International Ocean Institute (eds) *The Future of Ocean Governance and Capacity Development*: *Essays in Honor of Elisabeth Mann Borgese (1918-2002)* (Brill Nijhoff, 2018) 422- Sloan argues that the restrictive definition under UNCLOS hampers the development of responsive maritime security strategies.

[43] Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 A/3159 (1956) II Yearbook of International Law Commission 253, 282.

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in 1961 and the Italian cruise ship *Achille Lauro* in 1985 were not classified as piracy.[44] Nonetheless, these cases led to the adoption of the SUA Convention.[45]

The Article 101 UNCLOS reference to "acts of piracy" does not cover attempted offences. In contrast, the SUA Convention criminalises attempts to commit or abets the commission of unlawful offences at sea.[46] This does not *mutatis mutandis* apply to piracy at sea, as UNCLOS is the customary international law. Presumably, this is why "acts of piracy", albeit referred to as an international crime, are not subject to international criminal law.[47] However, the dualist nature of piracy allows piracy to be dealt with as a crime within national law. Although Article 105 UNCLOS, the anti-piracy enforcement provision, enforcement provision, permits States to apply universal jurisdiction for acts of piracy, but does not include mandatory prescriptive criminal jurisdiction. Consequently, not all States have laws that punish piracy as a crime. Even for States that enact anti-piracy laws, UNCLOS does not provide a model law for States to adopt such legislation. Therefore, the standards of anti-piracy laws vary from country to country, which affects the efficacy of dealing with piracy at an international level.[48]

A legal uncertainty within the definition of piracy under Article 101 UNCLOS arises due to the reference to "acts of piracy" and not "crime of piracy". Even Article 102 UNCLOS refers to the offence as the "acts of piracy". A crime includes both acts and omissions but referring to piracy as only "acts" means it might be challenging to punish an organised piracy group with no proof of their participation in a particular act of piracy. For instance, a piracy financing organisation cannot be prosecuted in the same manner as pirates caught at sea, neither is such an offence subject to universal jurisdiction like the actual act of piracy; although Article 101(b) UNCLOS does create an offence that focuses on presence and participation in running a pirate ship or aircraft.[49] This provision could be extended to cover the actions of organisations that

[44] Malvina Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety '(1988) 82(2) The American Journal of International Law 269, 269-310.
[45] Ibid.
[46] SUA Convention (n 31) Article 3(2).
[47] It should be noted that piracy was excluded from the 1966 Draft Code of Crimes Against the Peace and Security of Mankind drafted by the ILC and the subsequent Rome Statute of the International Criminal Court.
[48] Jing Jin and Erika Techera, 'Strengthening Universal Jurisdiction for Maritime Piracy Trials to Enhance a Sustainable Anti-Piracy Legal System for Community Interests' (2021) MDPI 1, 11-5; see also Eugene Kontorovich and Steven Art, An Empirical Examination of Universal Jurisdiction for Piracy (2010) 104(3) American Journal of International Law 436, 436-53; see also Waseem Ahmad Qureshi, 'The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws are virtually incapacitated by the Law Itself' (2017-2018) 19 San Diego International Law Journal 95, 124-5.
[49] Douglas Guilfoyle and Rob McLaughlin, 'The Crime of Piracy' In Charles C. Jalloh, Kamari M. Clarke, Vincent O. Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in Context development and challenges* (Cambridge University Press, 2019) 398-99.

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finance piracy but not necessarily the actions of the organisations that benefit from pirates' returns (i.e., the private ends).

4.3.4 Private ends

It is a legal uncertainty whether piracy is only limited to crimes for "private ends" because the phrase "private ends" is not defined under UNCLOS. However, according to the ILC's Commentary, "acts of piracy may be prompted by feelings of hatred or revenge and not merely by the desire for gain".[50] Yet, not all private politically motivated acts would qualify as terrorism or fall within the definition of piracy.[51] This element is essential because persons convicted of Somali based theft have repeatedly stated that the reason and motivation behind hijacking ships is the need to protect Somalia's waters and resources from illegal fishing and waste dumping by foreign vessels.[52] However, the *modus operandi* of the Somali pirates reveals otherwise. Unlike the UNCLOS definition of piracy, the SUA Convention omits 'motive' as a criterion – i.e., "private ends" − meaning motive is not relevant in such offences under Article 3 of the SUA Convention. Therefore, politically motivated attacks such as the *Achille Lauro* could be prosecuted by States.

4.3.5 Digital piracy

Another issue is digital piracy. Piracy today has progressed from guns and cutlasses to digital piracy, where the pirates carry out cyber-attacks against ships on the high seas. These cyber-attacks include ghosting GPS systems, taking over command-and-control systems, disruption attacks, ransomware, and even cyber commercial intelligence gathering.[53] Through these activities, pirates can get a hold of a cargo ship by rerouting it or requesting a ransom to stop a denial-of-service attack on a ship− these are the primary methods for obtaining financial gains for digital pirates. An example of a digital pirate group is the Gold Galleon group, likely based in Nigeria, targeting maritime shipping organisations.[54] Based on the definition of piracy under

[50] Report of the International Law Commission (n 43) 282.
[51] See *Castle John and Nederlandse Stichting Sirius v. NV. Mabeco and NV Parfin,* Belgium Court of Cassation (1986) 77 ILR 537, 540; see also Arron N Honniball, 'Private Political Activists and The International Law Definition of Piracy: Acting For 'Private Ends' (2015) 36 Adelaide Law Review 279, 279-328.
[52] Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill, 2014) 17-19
[53] Nicholas Newman, 'Cyber Pirates Terrorising the High Seas' (18 April 2019) <https://eandt.theiet.org/content/articles/2019/04/cyber-pirates-terrorising-the-high-seas/> accessed 1 November 2021.
[54] Counter Threat Unit Research Team 'GOLD GALLEON: How a Nigerian Cyber Crew Plunders the Shipping Industry' (18 April, 2018) <https://www.secureworks.com/research/gold-galleon-how-a-nigerian-cyber-crew-plunders-the-shipping-industry > accessed 1 November 2021.

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UNCLOS, there must be two ships involved to fulfil the offence of piracy which impedes the application of UNCLOS to digital piracy. Also, the keyword to define the scope of cyber-attacks against ships is "interference" with the ships operating systems. Article 101 UNCLOS lacks the word "interference"; rather, it addresses piracy in its traditional physical nature. Although paragraph (b) points out that piracy includes participation in the operation of a ship with knowledge of facts, making it a pirate ship – this does not sufficiently cover cyber-attacks. Instead, it only refers to acts of aiding and abetting the commission of piracy.

A foreseeable uncertainty from digital piracy will be determining the point at which the offence qualifies as piracy. For example, a group of cyber attackers take control of a ship while just leaving the territorial sea and bringing the ship through the international waters down to a selected port. Arguably, such a situation qualifies as an armed robbery at sea rather than piracy because the offence is commenced within the territorial sea – or not, since there are no weapons involved. In such an instance, it might be better directed as a maritime cybercrime than cyber-piracy because of the limited scope of the word "piracy".

Such forms of digital piracy were not contemplated during the 1970s and 1980s during the development of UNCLOS and the formation of the definition/scope of piracy. However, Article 3 of the SUA Convention covers digital piracy. It includes all harmful activities that endanger or are likely to endanger the safety of navigation of ships or destroys a ship, or seriously interfere with their operation. Other non-legally binding documents cover such issues, such as the IMO's Maritime Safety Committee's Resolution MSC.428 (98) on Maritime Cyber Risk Management in Safety Management Systems,[55] and the IMO Guidelines on Maritime Cyber Risk Management, both of which were adopted in 2017.[56]

The above analysis illustrates how the limited scope of piracy laws is the cause of the legal uncertainties that negatively impact the efficacy of counter-piracy operations. The next section examines more specific maritime legal black holes vis-à-vis the above legal uncertainties within the counter-piracy legal framework, which affect the protection of people at sea.

[55] IMO 'Resolution Msc.428(98): Maritime Cyber Risk Management in Safety Management Systems' (16 June 2017) MSC 98/23/Add.1 Annex 10, the resolution encourages administrations to ensure that cyber risks are appropriately addressed in existing safety management systems no later than the first annual verification of the company's Document of Compliance after 1 January 2021.

[56] IMO 'Guidelines on Maritime Cyber Risk Management' (5 July 2017) MSC-FAL.1/Circ.3, the guidelines provide high-level recommendations on maritime cyber risk management to safeguard shipping from current and emerging cyber threats and vulnerabilities and include functional elements that support effective cyber risk management.

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4.4 Security-based framework: *De facto* non-enforcement

The security-based framework is relevant to countering piracy at sea, though it contains complexities that raises human rights concerns.[57] This section examines the existing legal uncertainties within the security framework and shows the insufficiency of the framework towards the protection of people at sea. It argues that these legal uncertainties at the international, regional, and national levels can create areas (such as the GoG) where States can ignore their counter-piracy obligations. This is called *de facto* non-enforcement and results from the securitisation framework, permissive enforcement jurisdiction, nature of piracy, and failure to comply with the duty to co-operate.

4.4.1 Securitisation framework

Article 100 UNCLOS establishes the obligation for all States to cooperate to "the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." The focus is on "repression" rather than "prevention", promoting a more securitised approach. Similarly, the SUA Convention and its Protocol titled "suppression of unlawful acts" also focus on the repression of acts that could be classified as piracy; although Article 13 provides that States should cooperate in the "prevention" of unlawful acts covered by the Convention, which could include piracy. Yet, the measure to do so is securitised, as it mainly focuses on dealing with the manifestations of piracy.[58] The problem here is that the securitised approach does not deal with the grassroots problems, which give rise to the conditions that promote piracy. Also, the securitised framework can lead to human rights violations, as shown in chapter two on the relationship between MSOs and the right to liberty and security of the pirates.[59]

The Lomé charter and the Yaoundé Code of Conduct are inspired by UNCLOS and the SUA Convention. Thus, these instruments reflect the securitised framework. The Yaoundé Code of Conduct has a repressive approach towards piracy in the GoG, which has led to securitisation measures by State signatories,[60] such as securitisation measures are "cross border and regional naval acquisitions, international naval training and assistance programmes, increased naval

[57] Petrig (n 8) 39-42.
[58] SUA Convention (n 31) Article 13 (1) and (2).
[59] See above, chapter two, section 2.3.
[60] Pieter Brits and Michelle Nel, 'African maritime security and the Lomé Charter: Reality or dream?' (2018) 27 African Security Review 226, 230 emphasises that the Yaoundé Code of Conduct is similar to the Jeddah Amendment which more focussed on nation security concerning the repression of piracy than human security and development.

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interventions in pirate attacks, heightened naval patrols and vessel security measures, employment of local armed security, use of extra-watch duty, reinforcement of ships self-defence and use of citadel safe rooms."[61] However, the securitised approach is not optimal and, therefore, incapable of addressing the problems on a sustainable basis because such measures are often carried out without equal consideration of the socio-economic development of the coastal communities.[62] Hence, the reason this "repressive approach has been implicated in the rising spate of these illegal maritime activities" in the GoG.[63]

In contrast, the Lomé Charter recognises the importance of socio-economic measures drawing from human security instruments like the African Union's AIM 2050 strategy.[64] It mandates States to adopt socio-economic measures to prevent crimes at sea, such as creating productive jobs, reducing poverty, eliminating extreme poverty, etc.[65] Also, the Lomé Charter refers to the protection of human rights as a fundamental principle.[66] Yet there is no enforcement mechanism for the Lomé Charter, which thus translates to *de facto* non-enforcement on the part of GoG States.

4.4.2 Permissive enforcement jurisdiction

UNCLOS provides for universal jurisdiction against piratical activities at sea as contained in Article 105 UNCLOS, which states:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft, or property, subject to the rights of third parties acting in good faith.

Article 105 UNCLOS uses the word "may" to refer to a State's duty to exercise enforcement jurisdiction over piracy at sea. Thus, it suggests that the exercise of such jurisdiction is optional. Enforcement jurisdiction involves the arrest of the pirates, the seizure of their pirate ship and

[61] Ken Ifesinachi and Chikodiri Nwangwu, "Implementation of the Yaoundé Code of Conduct and Maritime Insecurity in the Gulf of Guinea" (2015) 5 Research on Humanities and Social Sciences 54, 57 63.
[62] Ibid.
[63] Ibid.
[64] The AIM 2050 Strategy falls within the confines of the third generation of maritime security strategy (see chapter one, subsection 1.2.2.
[65] Lomé Charter (n 19) Article 5.
[66] Ibid Article 2.

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adjudication. As highlighted in chapter two, this thesis reads enforcement as involving adjudicatory jurisdiction.[67] However, prescriptive jurisdiction is mandatory to exercise adjudicatory jurisdiction. The silence of Article 105 on the exercise of prescriptive jurisdiction and the use of the permissive word "may" allows *de facto* non-enforcement.

In contrast, Article 6 of the SUA Convention uses "shall" but only requires the flag States and States of the offenders to establish jurisdiction over the offence of piracy. The maritime legal black hole here is that there is no mandatory requirement for coastal States to establish jurisdiction over the crime of piracy. Article 6 of the SUA Convention provides that coastal States shall establish jurisdiction over the offences under Article 3 of the SUA Convention within their territory, including its territorial sea. The phrase "within their territory" means this provision only applies to armed robbery at sea because the international waters where piracy occurs are not the coastal State's territory.

In practice, this fosters a gap in protection because States become reluctant to take counter-piracy measures, as exemplified in the GoG, where Nigeria is the only country with a standalone piracy law. At the regional level, the Lomé Charter mandates States to prescribe national legal frameworks to coordinate their respective legal interventions at sea.[68] Yet there is neither an explicit reference to counter-piracy laws nor is there an enforcement mechanism for the Charter. Also, the Yaoundé Code of Conduct does not reference the prescription of such laws. Thus, without prescription of counter-piracy national laws, there is no guaranteed effective counter-piracy enforcement.[69]

Article 105 UNCLOS points out that every State may seize a pirate ship and arrest the persons involved in piracy, but adjudication of the penalties for such offence is left for "the courts of the State which carried out the seizure." The uncertain language "may" can arguably create an overlapping of jurisdictions because Article 105 further subjects such adjudicatory jurisdiction to the "rights of third parties acting in good faith." These third parties are mostly the State of the nationality of the piracy suspects, victims, cargoes, and ships. Accordingly, there are competing jurisdictional interests in piracy offences with various laws and regulations coming into play. A realistic hypothetical example of the complexity of overlapping jurisdiction is piracy incidents in the GoG; for example, a group of Nigerian pirates enter Benin and Togo's territorial sea to hijack ships, and in Nigeria's EEZ, they kidnap Turkish crew members on a

[67] See above, chapter two, section 2.2.1.
[68] Lomé Charter (n 19) Article 39.
[69] See below, subsection 4.4.3 for the discussion on the dualistic nature of piracy laws.

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Turkish flagged vessel. [70] Finally, the pirates are intercepted in the Nigerian territorial waters by the Nigerian Navy. [71] In this situation, the Nigerian Government would view the issue as within their enforcement (including adjudicatory) jurisdiction since they carried out the arrest /seizure.[72] Here, the interested third party is the Turkish Government which owes a duty of protection to their kidnapped nationals.

However, under Article 105 UNCLOS, it is not clear cut if Turkey can also prosecute. That provision does not explicitly authorise prosecution by third-party States, but equally does not expressly prohibit the practice. Reading Article 105 UNCLOS with Article 94 (1) UNCLOS requires the flag State to exercise jurisdiction over matters involving ships flying its flag. Article 94(7) UNCLOS mandates the flag State to conduct an inquiry or co-operate with any State concerning any incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships. This provision signifies that Turkey (flag State) has *de jure* jurisdiction in this scenario.

The chain of events brings up two distinct offences: armed robbery at sea and piracy – notwithstanding the similarity in the nature of these crimes. For the event in the EEZ, the suspected offenders will be tried for piracy, but for offences in the territorial sea, they could be tried for armed robbery at sea by both Togo and Benin. This deduction is based on the scope and definition of piracy as distinct from the offence of armed robbery at sea or against ships – it is plausible to argue that the suspects can be tried for both offences, with four States potentially claiming adjudicatory jurisdiction. Moreover, the notable distinction between the two crimes arguably dismisses any argument on the defence of *non bis in idem* (double jeopardy). However, this creates a complexity concerning the procedural requirements under criminal law and human rights law.

The issues under human rights law emanate from the transfer and detention of the suspected pirates/armed robbers at sea, discussed further below. On the other hand, the procedural issues under criminal law mainly concerns evidence gathering and sharing. Evidence sharing involves moving evidence from one location to the other. In the GoG context, apart from the political distrust between the contending States and the possibility of losing vital evidence,[73] there are various laws of evidence in play in that scenario – leading to questions on the procedural

[70] Ali (n 13)211-3.
[71] Ibid.
[72] Yaoundé Code of Conduct (n 20) Article 6.
[73] Ali (n 13) 212.

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standard. For example, the Nigerian Evidence Act points out that improperly obtained evidence can be admissible in court based on its relevance to the case and the court's discretion.[74] However, this is not the general standard elsewhere.[75] Due to these variations, pirates can operate in identified gap areas generated by national laws to escape liability.[76] Similar to the discussion in chapter two, the lack of coherence creates a gap in the protection of people at sea, in this case for both the victims of the kidnapping and the suspected pirates.

4.4.3 The nature of piracy laws

UNCLOS highlights the dualistic nature of piracy which represents piracy as an international crime, but which domestic laws and courts then prosecute. The dualism of piracy laws is a maritime legal black hole that leads to *de facto* non-enforcement. As mentioned above, the subsequent regional laws within the GoG include the permissive enforcement status reflected in UNCLOS and State practice; however, only Nigeria has a standalone national piracy law. Thus, international law arguably encourages a weak legal framework within the region.[77] Also, the dualism allows variation in the prosecution of piracy offences. Similar to the issue highlighted in chapter two, the lack of uniformity means there can be areas where human rights are not adequately protected/respected.

Before the 1982 UNCLOS and the 1958 Convention on the High Seas, international law highlighted the dualistic nature of piracy. As early as 1932, this dualistic nature was noted in the conclusion of a Harvard Research in International Law report, which observed that "piracy under the law of nations and piracy under domestic law are entirely different subject matters and ... there is no necessary coincidence of fact-categories covered by the term in any two systems of law."[78] In the 2006 English case of *R. v. Margaret Jones,* Lord Justice Cornhill noted that: "a distinction must be drawn between piracy under any municipal act of a particular

[74] The Nigerian Evidence Act (2011) (as amended), Section 14.
[75] See, Joachim Meese, 'Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union' (2017) 18 ERA Forum 297, 297-309; see also Christopher Yaw Nyinevi &Maame Efua Addadzi-Koom, 'To admit or not to admit: a comparative constitutional perspective on illegally obtained evidence in Ghana' (2016) 42 Commonwealth Law Bulletin 538, 538-63.
[76] Francois Morizur 'Countering Gulf of Guinea Piracy Towards 2025' (3 May. 2020) <https://www.maritime-executive.com/blog/countering-gulf-of-guinea-piracy-towards-2025> accessed I November 2021.
[77] The legislative and adjudicatory frameworks are very important in the countering piracy at sea. See, Curtis Bell et al, 'Report: Pirates of the Gulf of Guinea: A Cost Analysis for Coastal States' (November 2021) Stable Seas 1, 27 available at <https://www.stableseas.org/post/pirates-of-the-gulf-of-guinea-a-cost-analysis-for-coastal-states> accessed 1 November 2021, this report points out that "without convictions and non-were reported before 2021, piracy will remain low risk, high reward venture for pirate".
[78] Harvard Research in International Law: Original Materials (1932) 26 American Journal of International Law Spec. Supp. 281, 749.

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country and piracy *jure gentium*."[79] Also, in the *United States v. Hasan,* the US District Court for the Eastern District of Virginia observed piracy as an offence with a unique dual characterisation against municipal and international law.[80] Asides from being dualistic, piracy laws are multi-faceted. For example, the meaning of piracy differs from the perspective of the insurance industry, the shipping industry, international law, criminal, and even common law.[81] The multi-dimensional nature of piracy owes to the fact that a single act of piracy triggers various fields of law such as human rights law, criminal law, the law of evidence, maritime law, shipping, insurance law, etc. These fields of law at a national level vary from country to country and cannot all be analysed in this chapter.

Domestic laws and courts determine the prosecution of piracy across the globe. However, the variation between the punishment and criminal procedure is an issue because the domestic courts are more likely to prioritise vertical equity (within the national criminal system) than horizontal (international) equity.[82] The lack of any provision on the length of piracy penalties and the broad drafting of Article 105 UNCLOS has led to extremely heterogeneous penalties across jurisdictions. However, this fact did not seem to concern those initially drafting UNCLOS in the 1950s. They considered that it was not necessary to agree upon the penalties for maritime piracy: "The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts".[83]

Earlier in the 18th and 19th centuries, international law even allowed for the extrajudicial killing of pirates when encountered on the high seas. But, by the 20th century, extrajudicial killing became "inconsistent with the spirit of modern jurisprudence."[84] Presently, 142 countries have abolished the death penalty for any crime in law, which also extends to the crime of piracy.[85] An additional eight countries have abolished the death penalty for only ordinary crimes, 28 countries have abolished the death penalty only in practice (not from their laws), and 56

[79] *R. v. Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136 (appeal taken from England) (Comhill, J., drawing a distinction between piracy under national law and piracy under international law).
[80] Case No 2:10cr56, ILDC 1586 (US 2010) 36.
[81] Michael H. Passman, 'Interpreting Sea Piracy Clauses in Marine Insurance Contracts' (2009) 40 Journal of Maritime Law and Commerce 59, 61-2.
[82] Eugene Kontorovich, 'The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime' (2012) Faculty Working Papers, Paper 211,19.
[83] International Law Commission, 'Articles concerning the Law of the Sea with Commentaries' (1956) II Yearbook of International Law Commission 253, 283.
[84] Joseph Bingham, et al, 'Harvard Research in International Law, Draft Convention on Piracy' (1932) 26 American Journal of International Law 825, 873.
[85] Amnesty International, 'Abolitionist and Retentionist Countries as Of July 2018' <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> accessed 1 November 2021.

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countries retain the death penalty.[86] Some of the retentionist countries that impose the death penalty for the crime of piracy are Cuba, Iran, Japan, Kuwait, Lebanon, Philippines, Qatar, Singapore, South Korea, Thailand, and the United Arab Emirates. While some countries, such as South Africa and Nigeria, have a discretionary death penalty sentence. Before the surge of Somali- based piracy and subsequent international response, there were few international law prosecutions of piracy.[87] China exemplified the harsh approach to punishment−it imposed the death penalty in some cases.[88] These cases appear to be the only use of the death penalty for piracy against non-nationals under international law in recent decades.

In addition to the death penalty, piracy is generally punishable with life imprisonment or a long-term prison sentence. Some common law countries such as Australia, Canada, the US, Ireland, India, and Jamaica have a mandatory life imprisonment penalty. In New Zealand, Germany, Austria, Belgium, Djibouti, Cuba, Slovakia, France, Malta and Sweden, life imprisonment applies for aggravated piracy, namely when the piracy attack resulted in loss or risk to life.[89] Life imprisonment is also a mandatory minimum sentence for piracy in Nigeria, Cyprus, the United Arab Emirates, Kuwait, Singapore, and Tanzania. In Chile, Denmark, South Korea, Slovakia and Japan, life imprisonment is the maximum punishment for piracy.[90] Countries like Singapore impose corporal punishment, while Togo and Lebanon impose forced labour as punishment for maritime piracy.[91]

The US criminal justice system is known for relatively strict punishment. Still, life sentences are quite uncommon in the US federal system − for aggravated murder, the mandatory minimum is a life sentence for first-time convicts.[92] European countries tend to have significantly lower maximum penalties for piracy.[93] By contrast, Seychellean and Kenyan maximum sentences are 30 years and life, respectively.

4.4.4 Duty to co-operate

[86] Ibid
[87] Kontorovich and Art (n 48) 436-53.
[88] Zou (n 42); see also Zhu Lijiang, 'The Chinese Universal Jurisdiction Clause: How Far Can It Go?' (2005) 52 Netherlands International Law Review 85.
[89] Beatriz López Lorca, 'Harmonisation of National Criminal Laws on Maritime Piracy: A Regulatory Proposal for the Crime of Piracy and its Penalties' (2017) 23(2) European Journal on Criminal Policy and Research 115, 123.
[90] Ibid.
[91] Ibid.
[92] Kontorovich and Art (n 47) 436.
[93] Ibid.

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The duty to co-operate furthers the variation in enforcing counter-piracy measures at the national level. Article 100 UNCLOS establishes the obligation for all States to cooperate to "the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." Churchill argues that Article 100 supplements the deficiency of Article 105 UNCLOS as it encompasses the requirement to enact laws to suppress piracy within the existing legal framework.[94] Accordingly, Geiss and Petrig have argued that Article 100 includes an obligation to prosecute suspected pirates.[95] Although an unpopular opinion, the blanket phrase "the fullest possible extent" implies variation according to each State's capabilities and does not explicitly mandate States to enact anti-piracy laws. The wording of Article 100 UNCLOS suggests that the duty to cooperate is flexible and limited to the fullest possible extent, giving room for different performance levels in practice. The ILCs commentary on Article 100 UNCLOS observes that States neglecting to take appropriate measures will not be fulfilling their international legal obligation.[96] Yet States must be allowed a certain latitude as to the steps they should take to this end in any individual case.[97] There is still room for variation in anti-piracy laws and measures adopted, including the extent of co-operation rendered. The Yaoundé Code of Conduct reiterates the same provision applicable within the GoG.[98]

Consequently, the variation arguably encourages the lack of unity among the GoG States to conduct counter-piracy operations on the hidden basis of weak naval strength.[99] This lack of unity is visible in the Nigerian national piracy law (the SPOMO Act). This Act does not reference the Yaoundé Code of Conduct, which is the only viable document, albeit non legally binding – that enables co-operation to deal with piracy in the GoG. The inclusion of the Yaoundé Code in the SPOMO Act would have strengthened the effectiveness of the document and transition it from the soft law category into hard law. Also, the omission of the Yaoundé Code of Conduct which supports regional co-operation, signifies to an extent the stance of Nigeria in counter-piracy co-operation in the GoG.

Article 100 UNCLOS only allows States to cooperate on the high seas and areas outside national jurisdiction, not territorial waters. Consequently, in dealing with Somali based piracy,

[94] Robin Churchill, 'The Piracy Provisions of the UN convention on the Law of the Sea – Fit for Purpose?' in Panos Koutrakos & Achilles Skordas (eds) *The Law &Practice of Piracy at Sea: European &International Perspectives* (Hart Publishing, 2014) 24.
[95] Geiss and Petrig (n 39)152.
[96] Report of the International Law Commission (n 43) 272.
[97] Ibid.
[98] Article 6.
[99] Daud Hassan and Sayed Hassan (n 27) 37.

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the UN Security Council adopted several resolutions to deal with the problem of piracy and armed robbery in Somali territorial waters. The Security Council resolutions adapted the provisions of UNCLOS to Somali piracy by extending the scope of policing and law enforcement rights to the territorial sea of Somalia and authorising States to use land-based operations.[100] This geographical limitation of Article 100 UNCLOS applies to other given rights to deal with piracy – such as Article 105 (enforcement jurisdiction) and Article 110 (the right to visit).[101] These rights can only be exercised to fight piracy and not maritime terrorism or armed robbery at sea. Considering that the perpetrators of acts of piracy are often the same perpetrators of armed robbery at sea – the global fight against piracy cannot be separated from that of armed robbery at sea. However, the SUA Convention does not include any geographical limitation on the duty to cooperate in dealing with both piracy and armed robbery offences.[102] Yet the core State universal rights to visit and enforce are limited to piracy on the high seas.

4.4.5 Right to extradite, deliver and transfer

Extradition "is a formal process by which a person is surrendered for prosecution by one State to another based on an international treaty, domestic legislation, reciprocity or comity".[103] This formal proceeding of extradition of pirates is not popular during counter-piracy operations, and a more commonly used mechanism is the transfer of pirates.[104] The word "transfer" differs from "delivery" of pirates in Article 8 SUA Convention, which provides that the master of a ship may deliver any person to the authorities of another State when there are reasonable grounds to believe they have committed an unlawful offence under the convention. The difference between the two terms is that delivery is limited to the master of a private ship, but the transfer mechanism applies to law enforcement vessels.[105]

The retention of the power to deliver with the master of the ship aligns with the International Convention for the Safety of Life at Sea (SOLAS). SOLAS provides that the master of the ship has the absolute discretion to make decisions in the interests of the safety of life at sea and the

[100] UNSC, 'Security Council Adopts Resolution 2442 (2018): Authorizing 12-Month Extension for International Naval Forces Fighting Piracy off Somali Coast' (6 November 2018) SC/13566.
[101] The right to visit, is the right of a warship to send a boat to verify the suspected ship's right to fly its flag. After the documents have been checked, if suspicions persist, the law enforcement agents may proceed to a further examination on board the ship, which must be carried out with all possible consideration. However, if the suspicion is unfounded, and the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained (see UNCLOS, Article 110).
[102] SUA Convention (n 31) Article 12.
[103] Ibid 41.
[104] Ibid 47.
[105] Ibid 47.

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protection of the marine environment.[106] Also, the master of the ship shall not be constrained from taking or executing any decision necessary to maintain the safety and security of the ship.[107] In other words, the SUA Convention places the power of delivery of suspected pirates in the hands of shipmasters and not law enforcement agents as UNCLOS had initially envisaged.[108] Therefore, the fact that the master of the ship is a civilian raises concerns regarding human rights protection since they may be unaware of their obligations, and their role as a duty bearer in IHRL is unclear.

At the GoG regional level, the Yaoundé Code of Conduct follows UNCLOS and provides that counter-piracy operations should be carried out by law enforcement or other authorised warships or military aircraft.[109] Therefore, the Code of Conduct applies to warships, unlike the SUA Convention. The main provisions dealing with piracy and armed robbery at sea are Articles 6 and 7. Article 6 requires full co-operation between the member States in carrying out enforcement and adjudicatory functions such as arresting, seizure of pirate ships, investigating and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy. However, a profound requirement omitted in the SUA Convention but included in the Yaoundé Code of Conduct is that State members are to cooperate to rescue ships, persons, and property subject to piracy.[110] This provision recognises that pirate attacks induce distress and gives rise to the duty to assist persons or ships in distress (Article 98, UNCLOS).[111]

International law does not prohibit the practice of transferring piracy suspects from one competent jurisdiction to another.[112] Consent of the receiving State may be granted by 'an exchange of diplomatic notes or other ad hoc agreement'.[113] Under the SUA Convention, the right to deliver on the part of the flag State is accompanied by the duty to receive on the receiving State. However, can this practice of delivery give way to the exploitation of other countries criminal justice systems? In 2009 Kenya signed memorandums of understanding

[106] SOLAS, Reg 34-1.
[107] SOLAS, Reg 8, Chapter XI-2.
[108] UNCLOS, Article 107 provides that counter-piracy enforcement operations can only be conducted by the military vessels or vessels clearly marked and identifiable as being on government service and authorised to that effect
[109] The Yaoundé Code of Conduct (n 20) Article 3(1).
[110] Ibid Article 6(1) (c).
[111] See above, chapter three sub-section 3.4.1 for more discussion on the duty to render assistance at sea.
[112] Douglas Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters', In Clive R. Symmonds (eds), *Selected Contemporary Issues in The Law of The Sea* (Martinus Nijhoff Publishers, 2011) 152.
[113] Ibid.

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(MOUs) with the US, UK, the EU, Denmark, Canada, and China. These MOUs allowed the foreign States to deliver apprehended piracy suspects to Kenya for trials according to Kenyan laws, and in return, the foreign countries would provide the necessary assistance. Accordingly, the US transfers pirates apprehended for attacking foreign-flagged ships to Kenya but tries pirates caught attacking US ships or ships laden with US cargo in the Gulf of Aden or the Red Sea.[114] However, within a year, Kenya backed out of the MOUs *inter alia* because of the fear of becoming a "second Guantanamo" for wealthy nations to dump pirates.[115]

Also, the duty to prosecute pirates is entrenched in some State laws such as Kenya and Nigeria, including prosecuting pirates seized by foreign nationals. Yet not all States have such provisions in their laws. For example, in Denmark, the law stipulates that the State can only prosecute pirate attacks when there have been attacks on their nationals or national interests.[116] The disparity in national law over such issues of prosecution creates a strain on some States criminal justice systems.[117] It also gives room for States to escape fulfilling their duty to deal with piracy, especially to avoid the human rights liability that comes with it. Thus, chapter two observed that a strict interpretation of human rights law towards maritime security operations can worsen *de facto* non-enforcement because it might discourage States from conducting such operations to prevent being liable for human rights violations.[118]

Nonetheless, the SUA Convention, compared to UNCLOS, explicitly recognises and upholds the human rights of persons involved in unlawful acts.[119] The 2005 protocol amended the SUA 1988 text to include Article 2*bis,* which provides that the SUA Convention shall not "affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law." Thus, IHRL applies to enforcement operations.

4.5 International human rights law: A rights-based framework to maritime piracy

[114] Williams and Pressly (n 26) 200.
[115] Ibid.
[116] Scott McKenzie and Karl T Muth, 'Maritime Piracy Does Controlling Piracy and Other Criminal Activities Require Systematic State Intervention?' in Peter M. Haas and John A. Hird (eds), *Controversies in Globalization: Contending Approaches to International Relations* (2nd edn, Sage Publications Ltd, 2013) 226.
[117] Clive Schofield and Kamal Deen-Ali, 'Combating and Armed Robbery at Sea' in Robin Warner and Stuart Kaye (eds) *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge, 2016) 280.
[118] See above, chapter two section 2.4.
[119] SUA Convention (n 31) The preamble, 2nd Recital.

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The previous section classifies the security framework as relevant but weak because of legal uncertainties that cause *de facto* non-enforcement, which can be detrimental to people at sea (as shown in the GoG). This section discusses the relevance of IHRL to ensuring the protection of people at sea affected by piracy, i.e. both suspects and victims. However, it reiterates that the lack of uniformity of national laws relating to human rights is a legal uncertainty within IHRL itself that renders it insufficient, as highlighted in chapters two and three. Sub-sections 4.5.1 and 4.5.2 evaluate the relevance of IHRL to improving counter-piracy operations within the GoG. In contrast, sub-sections 4.5.2 and 4.5.3 argue that the variation in interpretations within the IHRL subfields act as a legal uncertainty affecting the protection of rights at sea.

4.5.1 The Malabo Protocol: A right-based solution

On 27 June 2014, the Assembly of Heads of State and Government of the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol'). The Malabo Protocol seeks to provide a tripartite jurisdiction over human rights, criminal law, and general matters within the remit of the proposed African Court of Justice and Human Rights (ACJHR). The Malabo Protocol requires 15 States to ratify the treaty to enter into force – at the time of writing this, no States have ratified it, and only 15 out of 55 African Union (AU) member States have signed it.

The Malabo Protocol includes the crime of piracy within the jurisdiction of the ACJHR.[120] Article 28F of the Protocol reiterates the definition of piracy under Article 101 UNCLOS − except for the inclusion of the word 'boat'− this inclusion might be referencing the boats used by pirates sent out by the mothership for piracy attacks. Consequently, the same limitations and criticism applicable to Article 101 UNCLOS extend to Article 28F of the Protocol. Like the SUA Convention, the Protocol punishes those who aid, abet, or are an accessory before or after the fact, or persons attempting to commit piracy at sea.[121] Also, the Protocol punishes anyone who 'incites, instigates, organises, directs, facilitates, finances, counsels or participates' in the crime of piracy.[122]

A possible uncertainty arising from the relationship between the proposed ACJHR and Article 105 UNCLOS is whether the adjudicatory jurisdiction belongs only to the State which carried

[120]Amnesty International, *Malabo Protocol: Legal and Institutional Implications of The Merged and Expanded African Court*, 22 January 2016, AFR 01/3063/2016 [Hereinafter referred to as the 'Malabo Protocol'] Article 28A (5).
[121] Ibid Article 28N.
[122] Ibid.

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out the seizure of the pirate vessel. Although Article 105 UNCLOS stipulates that the court of such a State "may" prosecute the offence of piracy, the inclusion of the word "may" show that the adjudicatory jurisdiction is not limited to the enforcing State. This stance is proven in State practice of transferring suspects to other States.[123] Accordingly, Guilfoyle and McLaughlin conclude that the drafters of UNCLOS did not plan to exclude or replace the universal jurisdiction of every State.[124]

In sum, the Malabo Protocol presents a great opportunity to solve the disparity issues concerning the prosecution of piracy in the GoG. It could prevent States and pirates from exploiting the gaps in the anti-piracy laws and can also create uniform piracy law at both the regional and subsequently international level. Also, it could deal with the gap in the legislation that affects the effective prosecution of piracy within the GoG and, in turn, affects the effectiveness of counter-piracy operations. The Protocol is an essential first step towards bridging the legislation gap in Africa. Yet to date, none of the GoG States have ratified it. This could be due to the lack of clarity regarding the overlapping jurisdiction between the ACJHR's jurisdiction and the International Criminal Court (ICC) – including, the increased financial burden on States to both courts.[125] Arguably, these issues consequentially affect *de facto* non-enforcement as States are dissuaded from dealing with piracy in the region through the Malabo Protocol.

4.5.2 Seafarers, crew members and master of a ship: The right to life and duty to assist

Integration of the right to life within the IHRL framework and the duty to assist persons in distress within LOS can arguably create safety for seafarers, crew members and ship masters. The right to life creates an obligation on States to protect, respect and fulfil the right to life of persons within their jurisdiction. Article 98 UNCLOS recognises a State's duty to render assistance to persons in distress at sea. A coastal State must "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

[123] Guilfoyle and McLaughlin (n 49) 404.
[124] Ibid.
[125] For more on this see, Pauline Martini, 'The International Criminal Court versus the African Criminal Court: A Remodelling of the Principle of Complementarity as a Solution to Potential Conflicts of Jurisdiction between the Courts' (2020) 18(5) Journal of International Criminal Justice 1185; see also Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) 17 Journal of International Criminal Justice, 1005; see also Jessie Chella, 'A Review of the Malabo Protocol on the Statute of the African Court of Justice and Human Rights – Part I: Jurisdiction over International Crimes' on ILA Reporter (4 January 2021) <https://ilareporter.org.au/2021/01/a-review-of-the-malabo-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights-part-i-jurisdiction-over-international-crimes-jessie-chella/> accessed 1 November 2021.

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arrangements cooperate with neighbouring States for this purpose".[126] The phrase "search and rescue services regarding safety on and over the sea" can be construed to apply to deal with piracy activities – that is, States coordinating operations to rescue sea fearers and crew members of an attacked ship. Although this is an unexamined deduction, it is plausible because of the implicit link between Article 98 UNCLOS and the right to life, considering the articles' main object and purpose is to prevent the loss of life at sea. Such view is supported by the Yaoundé Code of Conduct which provides that State members are to cooperate to rescue ships, persons, and property subject to piracy.[127] This provision recognises that pirate attacks induce distress and gives rise to the duty to assist persons or ships in distress (Article 98, UNCLOS).

Chapter two points out that States have obligations arising from IHRL. The right to life places on States the obligation to protect. Article 4 ACHPR provides that "every human being shall be entitled to respect for his life and the integrity of his person". This right creates a positive obligation of State members to "deter the commission of offences against persons"[128] and update laws and practices to conform with international standards.[129] Consequently, the African Union member States are required to protect persons within their jurisdiction from the crime of piracy according to international standards. Article 6 (1) ICCPR provides that "every human being has the inherent right to life" - this right shall be protected by law - and no one shall be arbitrarily deprived of their life. The right to life requires States parties to "exercise due diligence to protect the lives of individuals against deprivation caused by persons or entities, whose conduct is not attributable to the State".[130] This means States are required to take measures that protect the lives of people within their jurisdiction from all "reasonably foreseeable threats".[131]

Similarly, Article 2(1) ECHR provides that "everyone's right to life shall be protected by law". In *Osman v. United Kingdom*, the ECtHR observed that:

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[126] UNCLOS, Article 98(2).
[127] Yaoundé Code of Conduct (n 20) Article 6(1) (c).
[128] African Commission on Human and People's Right, Communications 279/03-296/05, *Sudan Human Rights Organisations and Centre for Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009, para 147.
[129] African Commission on Human and People's Right, General Comment No.3 on the African Charter on Human Peoples' Rights: The Right to Life (Article 4) adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, the Gambia.
[130] UN HRC, General Comment No 36(2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life CCPR/C/GC/36 (30 October 2018) para 7; see also UN HRC, General Comment No. 31 (80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para 8.
[131] Ibid para 18.

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> It must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[132]

From the interpretation of the right to life, a State's positive obligation is to take appropriate measures to protect people against reasonably expected risks. Piracy being a "reasonably expected risk" in the GoG, the proposition is that the right to life should create an obligation on States to protect sea fearers, crew members and the master of a ship. The geographical limitation is the legal uncertainty with expanding the right to life towards securing pro-active counter-piracy operations. The high seas are beyond national jurisdiction, and only the flag State enjoys exclusive jurisdiction over their flagship. Therefore, a State's extra-territorial IHRL obligation based on the *de jure* principle is limited to the flag State,[133] and *de facto* is limited to the ability to prove spatial and personal effective control.[134] But considering piracy is based on universal jurisdiction, the question is whether this extends to IHRL obligations. Based on the analysis in chapter two, there must be a jurisdictional link within the IHRL framework for the courts to hold a State accountable for violating an obligation. Arguably, universal jurisdiction is not sufficient to hold all States to an obligation of protecting people at sea. Moreover, chapter two points out that the standard of interpreting the IHRL scope of positive obligation varies; thus, it does not offer much protection for all people.

Piracy is an outward to inward crime – see, for instance, piracy in the GoG.[135] Individuals classified as pirates on the high seas are referred to as armed robbers when they act in the territorial seas. The nature of the crime is the same, but the location differs. So, looking at Article 98 and 105 UNCLOS, it is arguable that the universal jurisdiction over the offence of piracy raises some form of obligation in protecting the lives of persons/ships at sea against pirates and armed robbers − irrespective of where they are operating. Accordingly, protective measures need to be carried out throughout the navigation of such a vessel. One such suggested measure is the use of private maritime security contractors to protect unarmed civilians on board from the whims and caprices of pirates.[136] The UN Firearms Protocol, a legally binding

[132] App no 23452/94 (ECtHR, 28 October,1998) para 116.
[133] UNCLOS, Article 91.
[134] See above, chapter two, sub-section 2.2.1 on *de facto* jurisdiction.
[135] Ali (n 13) 211.
[136] Williams and Pressly (n 26).

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agreement that entered into force in 2005, contains clauses that allow States to authorise firearms through their domestic legislation.[137] Through the UN Firearms Protocol, States can transit privately armed security providers or Military Vessel Protection Detachments (VPDs) to protect commercial vessels.

Private maritime security onboard foreign vessels largely contributed to reducing piracy attacks in the Gulf of Aden (including in Somali territorial waters).[138] Unfortunately, most West African States prohibit the use of private security within their territorial waters. Nigeria has taken a particularly aggressive stance against any use of private security, going so far as to apprehend ships making use of private security within their EEZ.[139] The only legal options available to shipping companies seeking to bolster their defences are security companies sanctioned by the State or national forces such as the navy or marine police.[140] Such limitation makes the transiting of external privately armed security personnel through the GoG almost impossible, which increases the risk of pirate attacks.

Also, the role of private armed security appears to be limited to only the defence of persons/cargo on board and does not extend to the seizure of pirates. Article 107 UNCLOS provides that "seizure on account of piracy may be carried out only by warships or military craft or vessels clearly marked and identifiable as being on government service and authorised to that effect". Accordingly, under Articles 101 and 107, private security guards could themselves be classified as suspected pirates if they took on the role of arresting pirates.[141] Yet it is unclear if this limitation extends to military personnel contracted as private security officials.

There is no international treaty on the immunity of VPDs from prosecution by a third State, albeit the Arbitral Tribunal in the *Enrica Lexie* case has set a precedent on the immunity of

[137] Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005) 2362 UNTS 208 art 3(e).
[138] Gregory DeAngelo and Taylor Leland Smith 'Private security, maritime piracy and the provision of international public safety' (2020) 60 Journal of Risk and Uncertainty 77, 77-97.
[139] See, Nigerian Armed Forces Act 1993, Section 1(4) <https://www.ecoi.net/en/file/local/1041285/4765_1465378595_armed-forces-act.pdf> accessed 1 November 2021.
[140] International Human Rights Internships 'The Development of Piracy Law in West Africa & the Institutions Underpinning Counter-Piracy Efforts' (2015) 3(10) Working Paper Series1, 7.
[141] Patrick Cullen, and Claude Berube, *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (Taylor & Francis Group, 2012).

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military VPDs at sea.[142] Therefore, they are not subject to any other States criminal or civil law − but private armed guards are not immune from criminal or civil liability. The immunity of VPDs might influence their acceptance as security guards of vessels transiting high-risk areas that constitute States' territorial/ EEZ seas. Consequently, Marin et al. have argued that the use of private maritime security contractors is a "possible insecurity factor, leading to an increased level of violence and increased insecurity of people and goods at sea."[143]

Resting on the notion (as discussed in chapter one) that the *telos* or common interest of maritime security and human rights law at sea is the protection of people, it becomes apparent that the concerns of allowing the use of force by private actors is valid. The 2007 Nisour Square massacre incident provides a perspective for consideration. In this incident, a private military company (then known as Blackwater Security Consulting) contracted by the US government to protect US diplomats in Iraq, while escorting a US embassy convoy, shot at Iraqi civilians, killing 17 and injuring 20 in Nisour Square, Baghdad.[144] The four security guards involved in the firefight were later convicted, one of first-degree murder and the other three for manslaughter.[145] In sum, the Nisour Square situation shows the risk private security personnel pose to life, especially if not adequately regulated. Borrowing from Zedner's words, "this is not to say that private security provision can never conduce to the public good but alerts us to the ways in which private security activity alters, distorts, or transforms that public good".[146] Therefore, the international law regulating private security personnel, both at sea and on land, needs to be further developed to clarify their roles, responsibility, and limitations.

Suppose the above suggestion for an international law regulating private security personnel is implemented. In that case, the expectation is for States to allow and facilitate the services of onboard security personnel − based on Article 100 UNCLOS − which calls on all States to

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[142] The *Enrica Lexie* case *(The Italian Republic v the Republic of India)* Case no 2015-28 (Permanent Court of Arbitration Award, 15 February 2012) where two Italian marines providing government authorised Vessel Protection Detail (VPD) onboard the Italian tanker Enrica Lexie shot and killed two Indian fishermen. The two marines were subsequently arrested and detained by the Indian authorities. The Arbitral Tribunal decided that "Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines."

[143] Jasenko Marin et al., 'Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain', In Gemma Andreone (ed) *The Future of the Law of the Sea Bridging Gaps Between National, Individual and Common Interests* (Springer 2017) 192.

[144] Dara Lind 'Why four Blackwater contractors were just now convicted of killing 17 Iraqi civilians in 2007' <https://www.vox.com/2014/10/23/7047519/blackwater-trial-nisour-square-massacre-2007-guilty-convicted> accessed 1 November 2021

[145] The Guardian, 'US jury convicts Blackwater guards in 2007 killing of Iraqi civilians' <https://www.theguardian.com/us-news/2014/oct/22/us-jury-convicts-blackwater-security-guards-iraq> accessed on 1 November 2021.

[146] Lucia Zedner, 'Too Much Security?' (2003) 31 International Journal of the Sociology of Law 155, 180.

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cooperate in the repression of piracy at sea. This seems plausible looking at Article 100, in conjunction with the right to life, but it is not conclusive − the *Enrica Lexie* case creates doubts to such argument. In that case, the Italian government submitted that the actions of the Indian authorities against the two Italian marines, whose duty was to authorise VPD onboard the Italian tanker *Enrica Lexie*, constituted a violation of their duty to cooperate in the repression of piracy under Article 100 UNCLOS.[147] But, the Arbitral Tribunal unanimously held that there was no such violation.[148]

According to this decision, it is clear that UNCLOS provisions alone are insufficient to act as a legal base to promote the protection of the right to life. Also, both parties before the ITLOS put forward arguments on the consideration of humanity in favour of their actions.[149] Yet there was no discussion about international human rights law, which would have elaborated on the issue from a human rights perspective.[150] Presumably, the outcome would have been different if ITLOS engaged with the right to life under IHRL. Yet neither ITLOS nor the Permanent Court of Arbitration deals with human rights law, as highlighted in chapter two. The other way to ensure the legality of onboard armed security is using the flag State principle – the flag State must ensure the protection of the right to life of every person on board a vessel flying its flag. A limitation is the practice of flag of convenience, making it difficult for a State to guarantee protection to all ships flying its flag.[151]

The following sub-section examines the right to liberty vis-à-vis the counter-piracy framework to show that the framework is a source of legal uncertainty affecting the protection of rights. Thus, this section argues that there is a need for an interaction between the two fields of law to ensure the preservation of IHRL through counter-piracy operations.

4.5.3 Arrest, detention, and transfer of piracy suspect: A case for the right to liberty

Most of the arrest, detention and transfer of piracy suspects are carried out by the warships (Navy) or law enforcement vessels marked to affect such operations. Since piracy is a crime, criminal procedural laws are presumably applicable except otherwise provided in the individual nation-States. States in the GoG, such as Nigeria, have an administration of criminal justice laws (criminal procedural laws) that apply to the military. However, in some countries like

[147] The *Enrica Lexie* (n 142) paras 662, and 708-10.
[148] Ibid at 4.
[149] Ibid.
[150] *Enrica Lexie (Italy v India)* ITLOS provisional measures (Order of 25th August 2015).
[151] Flag of convenience is a practice where ships fly the flags of other States which the ship owners register under to avoid financial charges or restrictive regulations.

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Denmark and Germany, their criminal procedural law does not apply to the military.[152] Accordingly, such States participating in counter-piracy operations are not bound by their domestic criminal procedural laws. Noting that criminal procedural law dictates the ambit of lawful deprivation of liberty such as arrest and detention, therefore, what is the lawfulness of the arrest/detention by Naval warships under international law?

Article 105 UNCLOS gives all States the power to seize a pirate ship and arrest piracy suspects. Therefore, Article 105 UNCLOS provides a universal arrest warrant, but it is not clear if it guarantees the lawful detention of piracy suspects in all counter-piracy operations. Article 107 UNCLOS gives naval warships the power to conduct seizures on account of piracy, including the ability to board a reasonably suspected piracy vessel.[153] Although reading all these provisions outlines the substantive lawfulness of the arrest, there is still a need for procedural lawfulness as contained under human rights law. This was the contention in *Medvedyev and others v. France* where the ECtHR Grand Chamber pointed out that none of the legal provisions relied on by the French Government afforded sufficient protection against arbitrary violations of the right to liberty. The reason relied upon by the Court was that "none of those provisions referred specifically to depriving the crew of the intercepted ship of their liberty or regulated the conditions of deprivation of liberty on board the ship."[154] This case relates to illegal drug trafficking, of which there is no universal jurisdiction compared to piracy at sea – thus, it arguably does not apply. Even though Article 105 UNCLOS and various UN Security Council resolutions provide the legal authority to detain suspected pirates,[155] the lawfulness criteria relate to the "quality of the law" from an ECHR perspective.[156]

According to the ECtHR, this includes "the existence of clear legal provisions for ordering detention, for extending detention, and for setting time limits for detention; and the existence of an effective remedy by which the applicant can contest the lawfulness and length of his continuing detention".[157] As a framework, UNCLOS does not state all these, but national laws or the counter-piracy operation's mandate should meet the criteria. Also, national laws authorising deprivation of liberty must be sufficiently accessible, precise, and foreseeable in

[152] Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (n 52) 220-21.
[153] UNCLOS, Article 110.
[154] *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010) para 41.
[155] Geneva Academy of International Humanitarian Law and Human Right, 'Counterpiracy under International Law' (2012) Academy Briefing 1, 34.
[156] *J.N. v. The United Kingdom* App no 37289/12 (ECtHR, 19 May 2016) para 77.
[157] Ibid.

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its application; otherwise, it is arbitrary.[158] Generally, the components of the right to liberty under human rights law instruments are the right to be informed at the time of arrest of the reasons for arrest; the right of detainees to be brought promptly before a judge or other judicial officers; and the right to be tried within a reasonable time.[159]

Apart from aligning national piracy laws with human rights law, the counter-piracy operation's mandate must also align with IHRL. An example is the notable EU NAVFOR framework – Operation Atalanta (OA), the current military operation at sea conducted by the European Union off the Horn of Africa and the Western Indian Ocean. The EU NAVFOR operation plan and the Council Joint Action (CJA) Operation Atalanta contains the arrest and detention mandate of the OA; however, it is a non-public document.[160] Therefore, Petrig concluded, based on expert interviews, that the CJA OA did not meet the lawfulness standard of Article 5(1) of the ECHR and Article 9(1) of the ICCPR.[161] Following the definition of transfer under Article 12 CJA OA, which discusses detention and transfer of piracy suspects, it provides that persons "arrested and detained with a view of prosecution shall be transferred".[162] The wording "shall be transferred" implies that the suspects can be detained with a transfer in view but does not outline the procedural requirement for such detention.[163] Therefore, the legal basis for the lawfulness of a piracy detention pending transfer cannot be the CJA OA.

As discussed above, transfers differ from extradition.[164] The exception under Article 5(1) (f) of the ECHR and other laws on extradition cannot be substantial grounds to deprive a suspected pirate of their liberty pending a transfer.[165] Transfer requests come from the State or international organisation to a third State (i.e. the receiving State) – while extradition requests come from the receiving State to the State holding the suspect.[166] Also, a transfer request, unlike extradition, does not go through a formal proceeding where the request can be granted or

[158] Ibid; see also see *Nasrulloyev v. Russia* App no 656/06 (ECtHR, 11 October 2007) para 71; *Khudoyorov v. Russia* App no 6847/02 (ECtHR, 22 February 2005) para 125
[159] David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, 'Article 5: The right to liberty and security of the person' in D J Harris, M O'Boyle, and C M Buckley (eds.), *Law of the European Convention on Human Rights* (4th edn, Oxford University Press, 2018) 291-371.
[160] Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (n 52) 230.
[161] Ibid at 233.
[162] Ibid.
[163] Ibid.
[164] See above, sub-section 4.4.5.
[165] Geiss and Petrig (n 39) 193; see also Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (n 52) 234.
[166] Ibid.

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refused subject to protective remedies.[167] On the other hand, Article 7 of the SUA Convention seems to act as a legal basis for extradition because it contains the elements of lawful deprivation of liberty. These elements are that the States shall immediately make a preliminary inquiry into the facts, and promptly report its finding to the adjudicating State.[168] The suspect has the right to a legal representative and other rights exercised in conformity with the law.[169] However, it arguably cannot provide the legal basis because Article 7 of the SUA Convention requires States to function "in accordance with its law", which means the legal basis cannot be the SUA Convention but the detaining State's domestic laws.

Even the Yaoundé Code of Conduct and the SPOMO Act addressing piracy in the GoG does not include provisions on the deprivation of liberty of piracy suspects. Nonetheless, the Nigerian government designed a Harmonised Standard Operating Procedures on arrest, detention, and prosecution of vessels and persons in Nigeria's maritime environment (HSOP) to guide the operations of maritime law enforcement agencies and adequately address the overlapping responsibilities of the various agencies. The HSOP, which co-ordinates maritime law enforcement in the Nigerian maritime domain and the GoG, has a human rights policy coordinating the arrest and detention of suspects. Paragraph 3 of the HSOP references the procedural guarantees for investigation and prosecution. These are "the right to be heard, the right to be informed of available remedies, the right of review by a competent authority, the right to representation by a legal practitioner of their choice, right to bail, and the right to appeal to a higher authority."[170] This provision appears to be a sufficient procedural basis in the context of "detention pending prosecution" looking at the deprivation of liberty in line with Article 9 ICCPR or Article 6 of the African Charter on Human and People's Right (ACHPR). However, there is no mention of detention pending transfer of the suspect to a third country (the receiving State) – neither is there any mention of transfer proceedings.

The above analysis indicates that, ultimately, the legal basis for the deprivation of liberty under UNCLOS and the SUA Convention does not meet the procedural requirements of a lawful deprivation of liberty under the ICCPR, ECHR, and ACHPR. However, due to the dualistic nature of piracy, the international piracy law is mainly the structure, and the national laws are

[167] Ibid.
[168] SUA Convention (n 31) Article 7.
[169] Ibid.
[170] Harmonized Standard Operating Procedures (HSOP) on Arrest, Detention and Prosecution of Vessels and Persons in Nigeria's Maritime Environment 2016, para 3 <https://christusliberat.org/journal/wp-content/uploads/2017/11/Harmonized-SOP-on-Arrest-Detention-Prosecution-of-Vessels-Persons-in-Nigerias-Maritime-Environment-2016-1.pdfcitation> accessed 1 November 2021.

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the substantive/procedural legal basis for such arrest, detention, and transfer. But some domestic legislation like the SPOMO Act does not provide for the detention pending transfer of piracy suspects to third States. Thus, operational mandates should contain specific IHRL requirements to ensure the protection of the rights of suspected pirates during MSOs.

Nonetheless, the following sub-section observes that the variation in interpretation creates legal uncertainty within IHRL that causes violations of the rights of piracy suspects. It argues that these variations threaten the sufficiency of IHRL to secure rights at sea.

4.5.4 The principle of *non-refoulement*: Exception to transfer, delivery or extradition of piracy suspects

In counter-piracy operations, the *non-refoulement* provisions apply extraterritorially based on the flag State principle (*de jure* jurisdiction) and when a suspect is on board a vessel in view of a decision to transfer or deliver to a third State (*de facto* jurisdiction).[171] *Hirsi Jamaa v. Italy*, illustrates the scope of the *non-refoulement* obligation under the ECHR.[172] In that case, the court held that the Italian Government's interception of migrants and immediately transferring them to Libya following an MOU between both countries without accessing individual cases was a violation of the convention.[173] This case shows that individual assessment of each case is necessary before any form of transfer. Relating this to piracy cases, the validity of an immediate transfer decision is questionable, even if there is an existing MOU between those countries.

The principle of *non-refoulement* prohibits the removal of a person to a State or territory where there are risks of them facing persecution, serious harm or torture, inhuman and degrading treatment.[174] Whether or not the reasonably expected risk of human rights violation occurs is irrelevant to this obligation on States.[175] Under IHRL, neither the ICCPR, ACHPR or ECHR explicitly articulates this principle of *non-refoulement*. But the right to life and the prohibition of torture and other ill-treatment is often expanded to cover the *non-refoulement* obligation.[176]

[171] Ibid at 326; *Hirsi Jamaa and others v. Italy* App no 27765/09 (ECtHR, 23 February 2012).
[172] Ibid *Hirsi Jamaa*, paras 110-38.
[173] Ibid paras 110-38.
[174] Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009) 25.
[175] Ibid.
[176] ICCPR, Article 6 and 7; see also ECHR Article 2 and 3; see also ACHPR, Article 4 and 5 See, for example, the jurisprudence of the ECHR, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's decisions in *Soering v. United Kingdom* App no 14038/88, (ECtHR, 7 July 1989) and subsequent cases, including *Cruz Varas v. Sweden*, App no 15567/89 (ECtHR, 20 March 1991); With

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The scope and content of the *non-refoulement* obligation in the human rights context may be expressed as follows:

> No person shall be rejected, returned, or expelled in any manner whatever, where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman, or degrading treatment or punishment. This principle allows of no limitation or exception.[177]

In addition, Article 3 of the UN Convention Against Torture (CAT) provides that no State Party shall "expel, return, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". This *non-refoulement* obligation applies irrespective of the offence a person has committed, i.e., even for piracy suspects – and no derogation is permitted.[178]

However, the extent of the application of the above instruments varies. On the one hand, the CAT does not apply to "surrender for prosecution" cases,[179] while the ICCPR and the ECHR do. Even if the transfer is for prosecution, the transferring State must conduct a risk assessment of the detention centre/ prison following the prosecution.[180] Also, following the ECtHR case law[181] and recommendation from the UN Human Rights Council,[182] the transfer of piracy suspects by a State party to the ECHR to a country that punishes piracy with a death penalty or the risk of torture, ill-treatment, etc. may be problematic and therefore questionable.

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regard to the scope of the obligations under Article 7 of the ICCPR, see Human Rights Committee in its General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"); See also for the ACHPR, *John K. Modise v. Botswana*, African Commission on Human and Peoples' Rights, Comm. No. 97/93 (2000) here the African Commission on Human and Peoples' Rights found that the deportation of Modise constituted cruel, inhuman, or degrading treatment because of the sufferings he was exposed to (see para 91).

[177] Sir Elihu Lauterpacht and Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* (Cambridge University Press, 2003)163.

[178] Petrig *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (n 52) 321-9.

[179] Ibid at 338.

[180] Ibid 338-48.

[181] See, *Soering v. United Kingdom* (n 162); see also *Al-Saadoon and Mufdhi v The United Kingdom* App no 61498/08 (ECtHR, 2 March 2010).

[182] *Roger Judge v. Canada*, Comm No. 829/1998 UN Doc. CCPR/C/78/D/829/1998 (2003) para 10; see also, HRC, 'General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant' in Note by the Secretariat, Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies: (2008) UN Doc HRI/GEN/1/Rev.9 (Vol.1) para 12.

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States parties to the ECHR, ICCPR and ACHPR, are to guarantee the rights of piracy suspects under their effective control during the time of arrest, detention and even transfer/delivery. Yet the scope of jurisdiction varies from one human rights treaty to another. As highlighted in chapters two and three, the lack of uniformity in interpretation within IHRL systems creates a space where individual's rights are violated. In *Munaf v. Romania*, the HRC observes that all that is "necessary to prove jurisdiction is that the conduct which led to the violation was a 'link in the causal chain'".[183] Therefore, the ICCPR focuses on the conduct of the State and the effect thereof – meaning a decision to transfer will make the State transferring suspected pirates liable for any human rights violations, even "post-removal" of the suspects.[184] This scope is similar to the ECHR.[185] Yet the ECHR does not admit a cause and effect notion of jurisdiction like the ICCPR.[186]

4.6 Conclusion

This chapter shows that the impact of the legal uncertainties in maritime piracy differs from those in irregular maritime migration. Some of the legal uncertainties are maritime legal black holes affecting the protection of people at sea, visible in subsequent laws. For chapter three, the ill-effect of these maritime legal black holes is *de jure* rightlessness, contained in international law, EU laws and evident in the hardened security operations in the Mediterranean Sea. In this chapter, it is *de facto* non-enforcement, reflected in piracy laws and as evident in the actions of GoG States. The manifestations of these legal uncertainties affect the protection of people at sea, especially on the high seas. The high sea is often the area where people are affected most by these legal uncertainties because jurisdictional links are easily severable within this maritime zone.[187]

The uncertainty in the counter-piracy legal framework leads to *de facto* non-enforcement. This situation permits States to escape their obligations in dealing with piracy and, in turn, their obligation to protect the right to life of innocent civilians at sea. *De facto* non-enforcement arises from the uncertainties in piracy law, specifically, the permissiveness of the universal jurisdiction given to States against piracy, which causes laxity in counter-piracy endeavours as exemplified in the GoG. Even though Article 100 UNCLOS makes it mandatory for States to

[183] *Mohammad Munaf v. Romania*, Comm No. 1539/2006 UN Doc. CCPR/C/96/D/1539/2006 (2009) paras 14.1-14.6.
[184] Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (n 52) 143.
[185] Ibid.
[186] *Banković and others v. Belgium and 16 other States* App No 52207/99 (ECtHR, 12 December 2001).
[187] Mann (n 5) 369.

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co-operate in the repression of piracy, this does not seem to apply to the exercise of universal jurisdiction against piracy. Thus, in the GoG, only Nigeria has a standalone anti-piracy legislation and is proactive in counter-piracy operations. Moreover, the multi-dimensional nature of piracy law creates a disparity in national laws on piracy which in turn gives room for pirates to escape getting caught.

In the GoG, *de facto* non-enforcement is both an accountability and prevention shortcoming of the counter-piracy framework. As such, there is no enforcement mechanism to hold States accountable for their failure to enforce counter-piracy measures. The prevention shortcoming emanates from the securitised nature of the framework, and thus, there is an insufficient mechanism to deal with the root causes that lead to people taking up piracy in the first place. This chapter argues that the integration between IHRL and LOS might ensure the better protection of people at sea, if the failure to conduct counter-piracy operations can be linked to a violation of the right to life of persons at sea. However, as highlighted in chapters two and three, the lack of uniformity in interpretation within IHRL systems is a legal uncertainty that creates a space where individuals rights may be violated.

Overall, this chapter uses a case study of piracy in the GoG to show the insufficiency of either the security or rights-based approaches to ensuring better protection of people at sea. LOS (including other regional and national laws) reflects the security approach. Although only focussed on the repression of piracy and not the root causes, it still is insufficient to ensure the protection of individuals at sea. IHRL, on the other hand, neither engages with the repression of piracy nor deals with its root causes. Still, it is relevant to securing the rights of individuals at sea (including suspected pirates). The integration between these two fields of law arguably provides better protection for people at sea, yet the identified legal uncertainties impede this goal.[188]

The next chapter proposes a human security approach as a response to the underlining issues identified in chapters two, three and four. The extent to which human security can respond to these issues determines how viable it is to act as a bridge between IHRL and LOS to better protect people at sea.

[188] See above, chapter two section 2.4.

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5 Towards Conceptual and Operational Integration: Exploring Human Security as a Bridge

5.1 Introduction

The previous chapters have shown that the main problem causing the gap in the protection of people is rooted in state-centric mindsets[1] regarding the interpretation and application of international law towards maritime security. A state-centric focus might not necessarily be considered a 'bad thing' looking at the global decrease in illicit activities at sea, but an 'ugly situation' considering the human rights violations resulting from these State security-focused operations. Equally, the previous chapters show that the integration between security and rights-based interests represented in IHRL, and LOS can better protect people, albeit with several gaps due to legal uncertainties and maritime legal black holes within the two fields of law. Accordingly, neither IHRL nor LOS is sufficient to ensure the protection of people. Moreover, without dealing with these legal uncertainties, the systemic integration of IHRL and LOS still leaves some people at sea vulnerable. Human security is explored as an approach that can unify these two fields of law and respond to the complexities and constraints highlighted in the previous chapters. Thus, this chapter reviews how human security can conceptually and operationally integrate LOS and IHRL towards better protection of people at sea.

Benedek and Oberlietner both agree that human security has the potential to unify different fields of international law.[2] Oberleitner notes that "a human security approach to international law *can* reinforce and strengthen attempts to bring international law better into line with the requirements of today's world."[3] For people at sea, the requirement today is the reinforcement of existing State obligations. Human security as an approach "does not entail additional legal obligations on the part of States."[4] Thus, it does not seek to replace or add to the existing legal framework but seeks to complement them, including State security.[5] As such, the human

[1] For more see, Monica den Boer and Jaap de Wilde, '*The Viability of Human Security*' (Amsterdam University Press, 2008) 9.
[2] Wolfgang Benedek, 'Human Security and Human Rights Interaction' (2008) 59(1) International Social Science Journal 7,11 describes human security as a "unifying concept bridging the conceptual divides and providing solutions to different fields of international law"; see also Gerd Oberleitner, 'Human Security: A Challenge to International law?'(2005)11 Global Governance 185,197 points out that "Human security has the potential to bring together fields of international law that have traditionally been kept apart".
[3] Ibid Oberleitner, 186 emphasis added.
[4] UNGA, 'Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome' (25 October 2012) UN Doc A/RES/66/290 [hereinafter called 'The 2012 UN Resolution'] para 3(h).
[5] Ibid para 3(e) "Human security does not replace State security".

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security approach is designed to be compatible with both LOS and IHRL.[6] The need to integrate LOS and IHRL is not out of any formal incompatibility but the separate treatment of the rules within each field of international law.[7] In other words, both fields are compatible.[8] Despite being compatible, chapter two highlights that the disparity in interpretation between the subfields creates legal uncertainties that can still leave a space where individuals at sea are not protected. Concerning maritime security operations, chapters three and four showed that the integration between these two fields of law is needed to create a balanced approach to maritime security. This current chapter now explores human security as an operational tool that can respond to these protection gaps. Moreover, human security provides a new lens with which to view maritime security and operations, as explored in this chapter and chapter six.

Various critics challenge the usefulness of the concept of human security for fulfilling its objectives. The main objection is that the concept lacks a precise definition, and it is too vague and expansive.[9] Paris observes that human security is similar to 'sustainable development' because "everyone is for it, but few people have a clear idea of what it means".[10] However, as mentioned in chapter one, this thesis applies the definition of human security adopted in the 2012 UNGA Resolution. This defines human security as "an approach to assist member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people."[11] In the previous chapters, the human security principles (i.e. people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people and all communities) guided the analysis of the structural vulnerabilities that constitute legal uncertainties, gaps and manifestations of maritime legal black holes within IHRL and LOS impacting maritime security operations that affect the protection of people at sea. This chapter examines the extent to which human security as a conceptual and operational tool can address them.

This chapter is divided into two main sections. Section 5.2 lays out the interaction between human security, IHRL and LOS. Here I argue that human security is compatible with these two

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[6] UNCLOS, Article 311 (2) and (3) highlights the compatibility between LOS and other frameworks that does not affect or alter the rights and obligations it embodies; see also Alex Oude Elferink, *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005).
[7] Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018) 6.
[8] Tafsir Malick Ndiaye 'Human Rights at Sea and Law of the Sea' (2019) 10 Beijing Law Review 261, 261-77; see also Bernard H. Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Columbia Journal of Transnational Law 399, 399-404; see also Tullio Treves, 'Human Rights and the Law of the Sea' (2010) 28 Berkeley Journal of International Law 1.
[9] Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26(2) International Security 87, 88.
[10] Ibid.
[11] The 2012 UN Resolution (n 4) preamble, recital 3.

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fields of law because it fits into their purpose and objectives. In section 5.3, human security is applied as a tool that can respond to the complexities of the previous chapters. This section examines human security as a conceptual tool that shifts the general understanding of foundational concepts from state-centric objectives to people-centred objectives. I then move to evaluate human security as an operational tool that addresses the manifestations of the structural complexities within IHRL and LOS concerning irregular migration and maritime piracy. This section of the chapter makes human security recommendations towards protecting people at sea. Reflecting on the analysis in the previous sections, section 5.4 provides a concise evaluation of the relevance and limitations of human security. The final section discusses the overall value of human security as a bridge between IHRL and LOS in the context of maritime security operations.

5.2 Law of the sea, human security, and international human rights law

The concept of human security rests on the notion that the "protection of people" is a matter of common concern and common responsibility.[12] Human security has to do with a common concern for humanity.[13] The term 'common concern' is also known as 'community interest', 'common interest', 'common good',[14] and refers to a "consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter s*e but is recognised and sanctioned by international law as a matter of concern to all States".[15] In a present-day sense, this involves a partnership between all States ─ under-developed, developing, and developed – through international law to seek sustainable development and peace.[16] The common concern for humanity brings IHRL, human security and LOS together.

First, it is important to note that the IHRL and LOS frameworks recognise they are not self-sufficient and are open to interacting with other laws, agreements, or principles compatible

[12] Barbara Von Tigerstrom, *Human Security, and international law: Prospects and Problems* (Hart Publishing 2007) 72.
[13] Ulrich Albrecht et al., 'A Human Security Doctrine for Europe The Barcelona Report of the Study Group on Europe's Security Capabilities' (2004) [hereinafter referred to as 'The Barcelona Report'] <http://eprints.lse.ac.uk/40209/1/A_human_security_doctrine_for_Europe%28author%29.pdf> accessed 1 November 2021.
[14] Yoshifumi Tanaka, 'Protection of community interest in International law: The case of the Law of the Sea' (2011) 15 Max Planck Yearbook of UN Law 329,331-2; see also Sophia Kopela, 'Port State Jurisdiction, Extraterritoriality and the protection of Global Common' (2016) 47 Ocean Development and International Law 89, 89-130; see also Thomas Cottier et al., 'The principle of common concern and climate change' (2014) 52 Archiv des Völkerrechts 293, 293-324.
[15] Ibid Tanaka, 332.
[16] Mike Bourne, *Understanding Security* (Palgrave Macmillan, 2014) 183- 4.

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with their object and purpose. Article 311(2) and (3) UNCLOS highlights the compatibility between LOS and other frameworks that do not affect or alter the rights and obligations it embodies. Accordingly, Gavouneli concludes that UNCLOS is "a living instrument, capable both of change in order to accommodate new challenges and of construing novel associations of existing provisions, both in the text itself and in other international conventions, to support the evolving needs of the international community."[17] Similarly, some human rights provisions show that human rights treaties are open to other customs, regulations, and conventions involving individual rights.[18] A notable example is Articles 60 and 61 of the ACHPR, which mandate the African Commission to:

a) Draw inspiration from international law on human and peoples' rights from various UN instruments.

b) Take into consideration, in a subsidiary manner, "other general or special international conventions", "customs generally accepted as law, general principles of law", and lastly, "legal precedents and doctrine".

At the UN level, there is no report analysing the relationship between LOS and human security. Still, the 2003 Common Human Security Report evaluates the relationship between human rights and human security.[19] Nevertheless, human security fits into the purpose and objective of the law of the sea. UNCLOS indicates that the purpose of the law of the sea revolves around "strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world."[20] Following this, the purpose of the law of the sea framework is 'state-centric' as it involves peace, security, cooperation, justice, and equal rights among States. However, its objective is also focused on people, as the "peoples of the world" are the ultimate beneficiaries.

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[17] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007) 146.
[18] ICCPR, Article 5(2) provides "There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent" ; see also ICESCR, Article 5(2); see also ECHR, Article 53 safeguards "any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."; see also ACtHPR, Article 29(b).
[19] The Commission on Human Security, *Human Security Now* (New York, 2003) 4 [hereinafter referred to as the 2003 CHS Report] <https://reliefweb.int/sites/reliefweb.int/files/resources/91BAEEDBA50C6907C1256D19006A9353-chs-security-may03.pdf > accessed 1 November 2021.
[20] UNCLOS, preamble, recital 1 and 7.

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In addition, UNCLOS stipulates that its objective and purpose should be carried out "with due regard for the sovereignty of all States"[21] and "in accordance with the Purposes and Principles of the United Nations as set forth in the Charter."[22] Accordingly, the law of the sea is compatible with other frameworks that share its purpose, objectives, and scope. The human security approach is therefore compatible with the LOS framework because it recognises the 'government' as the subject of protection and 'all people' as the beneficiary of protection.[23] Also, the human security approach is implemented in accordance with the purposes and principles of the UN Charter with "full respect for the sovereignty of States, territorial integrity and non-interference in matters that are essentially within the domestic jurisdiction of States."[24]

From a human rights perspective, the protection of individual rights is the object and purpose of IHRL treaties.[25] Personal security is a dimension of human security which covers individual rights.[26] According to the 2003 Common Human Security report, the human security approach seeks to advance human rights by "identifying the importance of freedom from basic insecurities — new and old" to human rights.[27] These freedoms are grouped into the freedom from fear, want and indignity. Freedom from fear means freedom from pervasive threats to people's rights, safety, or lives. To achieve this, the focus is on increasing public safety from transnational crime (terrorism), protecting civilians (specifically war-affected populations), conflict prevention, governance, accountability, and peace support operations.[28]

Freedom from want ensures that individuals and communities' economic, social, and cultural demands are met through economic, food, health, and environmental security. This is a broader definition of the human security approach where insecurities range from environmental degradation, pollution, homelessness, and unemployment. It is even more expansive with the inclusion of the third pillar (freedom to live in dignity) beyond personal security but interlinks

[21] Ibid Preamble, recital 4.
[22] Ibid Preamble, recital 7.
[23] The 2012 UN Resolution (n 4) para 3(a) and (g).
[24] Ibid para 3(h)
[25] OC-2/82, The Effect of Reservation on the Entry into force of the American Convention (Arts 74 and 75), IACtHR Series A No 2 (24 September 1982) paras 29-30. "Modern human rights treaties in general […] are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality [...] the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individual within their jurisdiction".
[26] UNDP, *Human Development Report 1994: New Dimensions of Human Security* (Oxford University Press 1994) 23.
[27] The 2003 CHS Report (n 19) 9.
[28] Canada's Foreign Policy on Human Security, *Freedom from Fear* (Canada, Department of Foreign Affairs, and International Trade, 2002).

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with environmental, political, health, community, and economic security. To Krause, this broad definition is a loose synonym for "bad things that can happen".[29] In contrast, Tadjbakhsh and Chenoy argue that human security has to embrace a wide range of threats because threats are intrinsically linked.[30]

Human security, specifically the freedom from fear aspect, highlights the importance of the traditional security dimension to human lives.[31] The essence of this is revealed in chapters three and four on irregular migration and maritime piracy, as they contextualise the relevance of security and rights-based approaches to securing human lives at sea. Of note, in December 2013, the UNGA released a report that builds on the notion of 'common understanding' and stresses the potential of human security to advance the interconnected pillars of peace and security, development, and human rights.[32] Kempen argues that human rights law on its own fails to provide a comprehensive, balanced view of what security means from a human rights perspective.[33] As a result, he concludes that "human rights law offers less substance and direction to the security discourse than it potentially should be able to, while moreover this unnecessarily weakens the ability of human rights to protect the individual."[34] Thus, human security brings into perspective within IHRL the security needs of persons at sea by placing security challenges as a threat to the enjoyment of individual rights.[35] For instance, the discourse on piracy in chapter four, evaluates the interaction of various laws and institutions, (reflecting the human security principle of comprehensive analysis), which shows the relevance of the security dimension to the protection of rights at sea and vice versa.

Human security seeks to advance all aspects of human rights, which are civil, political, economic, social and cultural rights.[36] Some scholars point out that human security

[29] Keith Krause, 'Is Human Security "More than Just a Good Idea?", in M. Brzoska and P. J. Croll (eds), Promoting Security: But How and For Whom? (2004) Contributions to BICC's Ten-year Anniversary Conference BICC brief 30, 44.
[30] Shahrbanou Tadjbakhsh and Anuradha Chenoy, *Human Security Concepts and Implications* (Routledge, 2008) 20-30.
[31] Ibid.
[32] UNGA, Follow-up to General Assembly resolution 66/290 on Human Security Report of the Secretary-General (23 December 2013) UNGA A/68/685, Para. 3 [hereinafter referred to as 'the 2013 UNGA Report'].
[33] Piet Hein van Kempen 'Four Concepts of Security: A Human Rights Perspective' (2013) 13 Human Rights Law Review 1, 23
[34] Ibid.
[35] Jiyoung Song, 'Redefining Human Security for Vulnerable Migrants in East Asia' (2015) 11 Journal of Human Security 45–56.
[36] The 2012 UN Resolution (n 4) para 3(c).

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complements human rights law because it seeks to further human rights objectives.[37] Howard-Hassmann agrees the two are complementary but says the "overly broad view of human security ignores the human rights regime" because it deals with issues already covered by human rights law.[38] However, a contrary opinion is that the human security approach does not seek to undermine human rights because the three pillars of human security (the freedom from fear, want, and indignity) are intertwined but distinct from pre-existing human rights law. It is intertwined because IHRL frameworks such as the UDHR highlight "the freedom from fear, want and inherent dignity" as fundamental to preserving human rights.[39]

Yet human security is distinct from human rights because the freedom from fear, want, and indignity allows an approach ─ i.e. human security approach ─ that focuses on the root causes of insecurities that challenges the preservation of the rights of people. Succinctly put, human security provides an environment for the realisation of human rights.[40] Human security provides the "social and international order" recognised by Article 28 of the UDHR to promote the enjoyment of human rights.[41] Article 29 of the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights emphasises the need for an enabling environment to ensure the realisation of these rights.[42] These instruments point out that IHRL needs an environment where the State as the primary actor can fulfil, protect, and respect all individuals' civil, political, economic, social and cultural rights. Estrada-Tanck proposes that the human security–human rights synergy creates this much-needed environment that directs States to prioritise persons and the most vulnerable.[43] To Ramcharan, this synergy is necessary for the protection of human rights.[44] The relevance of human security to human rights law is that this approach helps identify the rights at stake in a particular situation, especially in security-related situations.[45] Alkire observes that "human security does entail the explicit, open-ended prioritisation of freedoms and rights that

[37] Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Hart Publishing, 2016) 53; see also Bertrand Ramcharan, 'Human Rights and Human Security' (2004) 1 Disarmament Forum 39, 39-47.
[38] Rhoda E. Howard-Hassman, 'Human Security: Undermining Human Rights?' (2012) 34(1) Human Rights Quarterly 88, 88-112.
[39] UDHR, Preamble.
[40] Estrada-Tanck (n 37) 124-49.
[41] Ibid 124-27.
[42] Eto Consortium, Maastricht Principles on Extraterritorial Obligations of States, In The Area of Economic, Social and Cultural Right (2013) <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 1 November 2021.
[43] Estrada-Tanck (n 37) 124-25, 136.
[44] Ramcharan (n 37) 39-47.
[45] The 2003 CHS Report (n 19) 10.

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current human rights theories studiously avoid."[46] In this sense, it supplements human rights, and since it is an approach rather than a legal regime, it does not threaten the IHRL framework.

In general, the human security approach is compatible with both the IHRL and LOS frameworks because it places people as the ultimate beneficiary of security and the State as the subject. The protection of people at sea is thus the point of conceptual and operational integration between these two fields of international law and maritime security. However, the previous chapters have highlighted the challenges inherent in conducting security operations in the marine environment. Therefore, the significance of human security depends on its viability to ensure better protection of people at sea despite these legal uncertainties, gaps, and maritime legal black holes. The following sections evaluate how human security deals with these challenges.

5.3 Human security clarifications: Reviewing the legal uncertainties and black holes

Human security as a conceptual tool can be applied to clarify the key legal uncertainties affecting the integration of IHRL and LOS towards protecting people at sea. Indeed, "one of the major challenges that humanity faces is that of mindset".[47] Oberleitner observes that applying a human security approach can alter our thinking about "the relation between the resources devoted to the protection of national security vis-à-vis the protection of the human security of the people."[48] The section below offers clarification from a human security perspective on the issues identified in the previous chapters.

These clarifications propose to deal with the root source of the general legal uncertainties revealed in chapter two and the specific ill-effects of the maritime legal black holes illustrated in chapters three and four. It should be noted that chapter one highlights that no technique solves genuine conflicts like maritime legal black holes (specifically, the issue of non-existent laws). However, the resultant effect of the maritime legal black holes, the gap in the protection of people (from *de jure* rightlessness and *de facto* non-enforcement) drawn from chapters three and four, respectively, can still be prevented. Section 5.3.1 offers human security clarifications on sovereignty, jurisdiction and interpretation of human rights law at sea, which aims to deal

[46] Sabina Alkire, 'Conceptual Framework for the Commission on Human Security', (2003) Centre for Research on Inequality, Human Security and Ethnicity (CRISE) 2 Working Paper 1, 39.
[47] Ramcharan (n 37) 46.
[48] Gerd Oberleitner, 'Human Security and Human Rights' (2002) 8 ETC Human Rights and Democracy, Occasional Paper Series 1, 11.

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with this gap in protection. Similarly, section 5.3.2 offers a blueprint to enhancing maritime security through the lenses of the human security principles, which guarantees both rights and security enforcement towards protecting people at sea.

5.3.1 General legal uncertainties

Chapter two highlights the legal uncertainties affecting the protection of people at sea despite the integration of IHRL and LOS, arising from the state-centric and diverse application of jurisdiction, sovereignty, and the interpretation of human rights law at sea. This sub-section offers human security-based clarifications to create coherence in the interpretation of these concepts.

5.3.1.1 Clarifying sovereignty: Rights and responsibilities under international law

> "State sovereignty, in its most basic sense, is being redefined — not least by forces of globalisation and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa."[49]

The concept of sovereignty is complex, mainly due to its manifold usage over the years.[50] From the outset, sovereignty is juxtaposed with the State, which created the traditionalist statist orientation of sovereignty.[51] This means that 'the State' and the concept of 'sovereignty' are intertwined to form a peculiar liaison. The State bears sovereignty, and sovereignty becomes an essential attribute of the State.[52] Conversely, with the emergence of international human rights law, this statist orientation has evolved over the years to what Peters has called a "humanised sovereignty".[53]

Nonetheless, to clarify sovereignty following human security principles, there is a need to recognise all the prominent conceptions of sovereignty. The constructivist view, which is generally less popular amongst State actors, holds that the specific content of sovereignty and

[49] UN Press Release, 'Secretary-General Presents his Annual Report to General Assembly' (September 20, 1999) SG/SM/7136 <https://www.un.org/press/en/1999/19990920.sgsm7136.html> accessed 1 November 2021.
[50] For more on this, see, Felix Lange, 'Challenging the Paris Peace Treaties, State Sovereignty, and Western-Dominated International Law – The Multifaceted Genesis of the Jus Cogens Doctrine' (2018) 31 Leiden Journal of International Law (2018) 821, 821–39.
[51] See the *Island of Palmas Case (or Miangas), United States v Netherlands*, Award, (1928) II RIAA 829, at 838 where the Arbitrary Tribunal explained that Statehood signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State'; See also Julian H. Franklin, *Bodin: On Sovereignty Four Chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992) 1, Jean Bodin defines sovereignty as "the absolute and perpetual power of a commonwealth".
[52] Jüri Lipping, Sovereignty beyond the State in Hent Kalmo and Quentin Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press, 2010) 187.
[53] Anne Peters, 'Humanity is the A and Ω of sovereignty' (2009) 20(3) The European Journal of International Law 513, 513-54.

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its political implications vary with time and context.[54] Within this view comes the notion that sovereignty cannot simply be defined because of its manifold historical usage.[55] Conversely, two notable perceptions of sovereignty have persisted throughout history, even until now.

The first is the absolutist Westphalian sovereignty, which Krasner defines as the "fundamental rule".[56] This notion holds that States have the sovereign power to govern themselves, and States should refrain from intervening in other States' internal affairs.[57] In other words, the non-intervention principle is a right of sovereign States ─ a right enshrined in the UN Charter.[58] This right/immunity impacts both the internal and external dimensions of State sovereignty.[59] Internal sovereignty is the State's territorial power through its institutions over its internal affairs with its subjects, while external sovereignty refers to the State as an independent and autonomous power within the international community.[60] Jackson, in upholding an absolutist view of sovereignty, describes this external right to non-intervention as a "formal legal condition", which implies "negative sovereignty", and internal sovereignty as "positive sovereignty".[61] According to Jackson, through positive sovereignty, States can take advantage of their negative sovereignty (freedom from external influence) to provide fundamental political goods such as security and welfare to their own citizens.[62] Unfortunately, history shows that this ideal is far from reality.

Jackson's view suggests that the legitimacy of the right to internal sovereignty is linked to the sovereign's duty to the people. Interestingly, such a view ties nicely with the second interpretation of sovereignty. This second view rejects the absolute nature of the non-intervention principle and proposes an acceptable justification for intervention. In other words, the legitimacy of sovereignty is based on its justification ─ both internal and external

[54] Christian Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 Review of International Studies 519, 538.
[55] Rob B.J Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge University Press, 1993)10; see also Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press, 1995)13; see also Nico Schrijver, 'The Changing Nature of State Sovereignty' (2000) 70 British Yearbook of International Law 65, 70.
[56] Stephen D. Krasner, 'Rethinking the Sovereign State Model' (2001) 27 Review of International Studies 17, 17.
[57] Ibid.
[58] See UN Charter, Articles 1(2), 2(4) and 2(7).
[59] Ersun N Kurtulus, *State Sovereignty: Concept, Phenomenon and Ramifications* (Palgrave Macmillan, 2005) 81.
[60] Samantha Besson, 'Sovereignty', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP, 2011) paras. 69–73; see also N. Van Kleffens, 'Sovereignty in International Law' (1953) 82 Recueil des cours 1, 9; see also Hent Kamo and Quentin Skinner, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press, 2011) 64, 66–9.
[61] Robert H Jackson *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge University Press 1990) 26-9.
[62] Ibid 29.

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sovereignty must be justified.[63] This view supports sovereignty as a responsibility to protect, which stems from the claim that humanity is the normative source and goal of sovereignty.[64] This view was enshrined in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS). This report notes that "State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the State itself."[65] The 2005 World Summit Outcome Document appraised this concept and emphasised that the State is responsible for protecting its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[66] Therefore, this principle is meant to be construed as "limited to extreme, conscience-shocking cases of mass atrocities" as opposed to the broader concept of human security.[67]

The human security clarification accepts all the above-mentioned views to the extent that sovereignty is a right and responsibility. To this end, Oberleitner reiterates the arguments of Correll that human security and State sovereignty are compatible.[68] But Oberleitner takes it a step further by holding that human security means that "the international order can no longer rest on State sovereignty as the overriding concept of international law, but that the individual has to be in the centre." [69] Oberleitner's radical view is based on the 1994 UNDP Reports' aspirations which have since been diluted by the UNGA's common understanding of 2012/2013.[70] Based on this more recent stance, it cannot be said that human security replaces the concept of sovereignty, but rather it reinforces a State's obligation to protect persons.[71] Thus, the human security view is that State sovereignty is both a right and a responsibility.

Various concepts such as colonialism, self-determination, decolonisation, and human rights illustrate how sovereigns exact both the right to non-intervention and the responsibility to

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[63] Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford University Press, 1999) 226, also at 220; See also Peters (n 53) 513-54.
[64] See Stanley Hoffman, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse University Press, 1981) 65-97; see also Cynthia Weber, *Simulating Sovereignty: Intervention, the State and Symbolic Exchange* (Cambridge University Press, 1995); see also Helle Malmvig, *State Sovereignty and Intervention: A Discourse Analysis of Interventionary and Non-Interventionary Practices in Kosovo and Algeria*. (Routledge 2006); see also Peters (n 53) 518.
[65] ICISS, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (International Development Research Centre, 2001) XI [hereinafter referred to as 2001 ICISS Report].
[66] UNGA, 'Resolution adopted by the General Assembly on 16 September 2005: 2005 World Summit Outcome' (25 October 2005) A/RES/60/1 paras 138 and 139.
[67] Peters (n 53) 513.
[68] Oberleitner (n 48) 12.
[69] Ibid 29.
[70] The 2012 UN Resolution (n 4); see also the 2013 UNGA Report.
[71] Estrada-Tanck (n 37) 136.

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protect people. Glanville concludes that these examples imply that sovereigns see themselves as wielding the power and responsibility to protect persons who could not protect themselves.[72] Accordingly, the notion of sovereignty is one already laid out in history that demands that "the practices of sovereigns be reconciled to the justifications for sovereignty; that the rights of sovereigns be limited by the responsibilities that underpin the legitimation of their authority."[73]

The justification and legitimation of sovereign authority are tied to the explicit willingness of States to fulfil their international obligations.[74] As highlighted in chapter two, solely referring to the absolute concept of sovereignty gives room for States to violate human rights law, as exemplified in the migrant situation at sea (see chapter three). Arguably, States can say their attitude towards irregular migrants is an expression of their responsibility to protect their own citizens. Ideally, sovereignty should encompass the legitimisation of internal and external sovereignty so that States are responsible for protecting all people within their territory and under their jurisdiction. Tigerstrom argues that the idea of human security suggests that States may bear some responsibility for the security of individuals regardless of whether those individuals are within their jurisdiction.[75] This idea of 'responsibility for the security of individuals' is the foundation of the concept of functional jurisdiction discussed further below. Also, even in securitised issues like piracy at sea, chapter four argues that States owe the duty to carry out counter-piracy operations that align with their obligations under IHRL.

Consequently, this clarified notion of sovereignty is vital to ensuring that maritime security operations fulfil their IHRL obligations since sovereignty is "the basic constitutional doctrine of the law of nations."[76] Sovereignty as a right and responsibility means States can conduct maritime security operations within the boundaries of their international obligations (both IHRL and LOS). Through this, the goal of maritime security operations becomes human security (the protection of all people). Oberleitner observes that the input of human security to the international law-making process reflects in the balance between State sovereignty and concern for the individual.[77] The Global Compact on Migration (GCM), a UN non legally

[72] Luke Glanville, 'The antecedents of 'sovereignty as responsibility' (2010) 17(2) European Journal of International Relations 233, 234-49.
[73] Ibid 250.
[74] Ibid, see also Peters (n 53).
[75] Tigerstrom (n 12) 72-3.
[76] Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press, 1998) 289.
[77] Oberleitner, 'Human Security and Human Rights' (n 48) 26.

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binding instrument, provides a good example of how this balance could look through a human security lens.[78]

The reason most States give for their refusal to adopt the GCM is that it threatens their State sovereignty and their right to control national borders.[79] Conversely, Capone applying the 'sovereignty test' proves that the GCM aligns with sovereignty as it upholds State sovereignty as a right and responsibility.[80] The 'sovereignty test' was initiated by Schrijver to determine the extent to which new developments in international law challenge and ultimately diminish the concept of State sovereignty.[81] At the time, the 'new developments' Schrijver analysed were in four fields of international law: arms control and disarmament; management of the environment, foreign investment, and peace and security.[82] Schrijver also covered a number of issues vital to understanding sovereignty, which are the actors involved in the law-making process, the definition of sovereignty, the scope of sovereignty, the influence of universal values, the duties of States, the role of international institutions, and the procedures for the settlement of disputes.[83] Schrijver concludes that in "modern international law, sovereignty functions, therefore, not merely as the basis of rights but also as the source of responsibility, accountability and liability and as the basis of international co-operation."[84] This conclusion reifies sovereignty as a right and responsibility. The responsibility aspect stems from the plethora of international norms and principles, also belonging to human rights law that States have willingly decided to uphold.[85] Thus, a human security approach assists States to maintain their rights and responsibilities while ensuring the systemic integration between IHRL and LOS towards legitimate and effective enforcement operation. Of course, this is done within the parameters of the fundamental human security principles.

5.3.1.2 Redefining the concept of jurisdiction: From passive to functional

[78] Global Compact for Safe, Orderly and Regular Migration (11 July 2018) [hereinafter referred to as 'The GCM'] <https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf> accessed 1 November 2021.
[79] Mauro Gatti, 'EU States' Exit from the Global Compact on Migration: A Breach of Loyalty' (2018) <https://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty/> accessed 1 November 2021.
[80] Francesca Capone, The alleged tension between the Global Compact for Safe, Orderly and Regular Migration and state sovereignty: 'Much Ado about Nothing'? (2020) 33 Leiden Journal of International Law 713, 721-29; see also Schrijver (n 55) 81-95.
[81] Ibid Schrijver, 81-95.
[82] Ibid.
[83] Ibid.
[84] Ibid 98.
[85] Capone (n 80) 730.

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Chapter two shows that the existing interpretation of jurisdiction is split into passive (or restrictive) and functional (or proactive). The passive interpretation extends from the absolute conception of national sovereignty and emphasises the restrictive nature of extra-territorial jurisdiction towards State obligations. Most relevant is the ECtHR's restrictive interpretation of jurisdiction. Restrictive interpretation is a choice by an adjudicatory body to limit the application of a treaty to favour State interest over the object and purpose of the treaty.[86] This form of interpretation can particularly affect migrants at sea because it allows States to become passive towards fulfilling their extra-territorial obligations. This was seen in chapter three, which exemplifies how inactive the EU operations are towards fulfilling their extra-territorial search and rescue obligations.

On the other hand, the functional approach proceeds from the basic tenet that 'power entails responsibility' and thus stresses the functional or causal relationship between the individual and the State regarding a specific action or omission.[87] The LOS framework embodies this functional approach to jurisdiction where the flag, coastal, and port States have designated rights and obligations within the various maritime zones.[88] However, chapters three and four highlight that the high seas still remain a place where the security of the individual is not fully guaranteed, mainly because of the unwillingness of States to proactively enforce their obligations.

Sovereignty is the legal basis for all aspects of jurisdiction.[89] The previous section on sovereignty shows that a human security interpretation of sovereignty is considered as both a right and a responsibility. As such, States enjoy their sovereign rights and fulfil their responsibilities to all people. The notion of 'all people'[90] presupposes that human security understands jurisdiction as a power that entails a responsibility to all people with a causal link

[86] See *Wemhoff v Germany Application no 2122/64* (ECtHR, 27 June 1968) para 8, here the ECtHR implicitly describes restrictive interpretation as an interpretation which "restricts to the greatest possible degree the obligations to be undertaken by the parties" rather than align with the object and purpose of a treaty; see also Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights' (1999) 42 German Yearbook of International Law 11, 14 where Bernhardt suggests that a restrictive interpretation is done to support state sovereignty which is wrong as "every effective protection of individual freedoms restrict state sovereignty"; see also Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) European Journal of International Law 681, 682, Creama defines 'Restrictive interpretation' as "the interpretative choice which restricts the meaning of a text. In an original sense, it is restrictive in favour of the real intentions of the parties, as opposed to what is expressed in a text."

[87] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 101.

[88] Gavouneli (n 17) 62-9.

[89] Ibid 6, Gavouneli notes that State sovereignty is the legal basis for all aspects of jurisdiction and that Jurisdiction remains an external manifestation of the power of the State.

[90] The 2013 UNGA Report (n 32) para 4(a).

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to a State. Thus, a functional interpretation of jurisdiction. There are various understandings of the functional approach. Judge Bonello in *Al-Skeini and others v. UK* enunciated the idea of functional jurisdiction in these words:

> Jurisdiction […] ought to be functional − in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.[91]

Accordingly, Judge Bonello views functional jurisdiction as holding States liable for breaches within their authority and control. To Hugh and Lawson, this includes a factual relation promoting a cause-and-effect notion of jurisdiction, where States are responsible for the consequences of their conduct wherever performed.[92] Before the *Banković* approach,[93] the ECtHR admitted the factual idea of jurisdiction in *Drozd and Janousek v. France and Spain*. Here, the ECtHR recognised that:

> The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory. [94]

In the same light, Shany argues that functionalism should serve as the basis for the extra-territorial application of IHRL– this requires States to protect human rights when they can do so.[95] Consequently, Shany proposes a more proactive positive obligation. State practice shows that States accept factual relations in interpreting the extra-territorial application of human rights.[96] However, such perception tends to be limited to only negative obligation, *i.e*., States should refrain from actions that affect the enjoyment of human rights. Conversely, States reject

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[91] *Al-Skeini and others v. The United Kingdom* App no. 55721/07 (ECtHR, 7 July 2011) Separate Opinions of Lord Bonnello para 12-14.
[92] Rick Lawson, 'Life after *Banković:* On the Extraterritorial Application of the European Convention on Human Rights', in Fons Coomans & Menno T. Kamminga eds, *Extraterritorial Application of Human Rights Treaties* (2004) 83; see also Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 Human Rights Law Review 521, 521.
[93] The *Banković* approach is a restrictive interpretation of extra-territorial ECHR obligation to prevent jurisdictional links on the basis of the effect of State's extra-territorial actions, see chapter two, subsection 2.2.1 (iii).
[94] *Drozd and Janousek v. France and Spain* App no 12747/87 (ECtHR, 26 June 1992) para 91.
[95] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extra-territoriality in International Human Rights Law' (2013) 7(1) Law and Ethics of Human Rights 47.
[96] Monika Heupel 'How do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review' (2018) 40(3) Human Rights Quarterly 521, 521-46.

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the idea that extra-territorial positive obligations extend within factual relations between the State (through its agents) and individuals in other territories.[97] Thus, Shany's view is an unpopular opinion in State practice.

Nevertheless, more recently, the HRC has made progress in cementing Shany's functional approach in IHRL discourse. In 2018, the HRC adopted General Comment No 36 concerning the right to life under Article 6 of the International Covenant on Civil and Political Rights Covenant (ICCPR).[98] According to para 63, persons are subject to the jurisdiction of a State when that State "exercises power or effective control"[99] over their "enjoyment of the right to life".[100] To the Committee, this brings under the State's jurisdiction persons located outside any territory effectively controlled by the State, whose right to life is impacted by its military or other activities in a direct and reasonably foreseeable manner. Hence, General Comment No. 36 is an articulation of the 'functional approach' to jurisdiction. Every time a State has the power to exercise functions that impacts the human rights of individuals in a direct and reasonably foreseeable manner, those individuals are within the jurisdiction of the State. To simplify, States must protect human rights in situations where they can do so.

Roxstrom, Gibney and Einarson, highlight the problem with Shany's approach. They recognise that an obligation on States to ensure/protect human rights obligations in a territory where they lack the competence violates the norm of non-intervention. [101] Then again, the *de facto* principle applies in a situation where the defaulting State exercises effective control over persons and territories outside its territory. Thus, a truly functional extra-territorial jurisdiction includes factual relations complementary to the traditional (*de facto* and *de jure*) concept.

At sea, the obligation to assist persons in distress (Article 98 UNCLOS) creates a State competence to protect anywhere at sea, even in areas beyond a State's legal jurisdiction. With this in mind, functional jurisdiction to Moreno-Lax involves more than cause and effect.[102] Moreno-Lax draws from Gavouneli's illustration of functional jurisdiction under the LOS

[97] Ibid.
[98] UN Human Rights Committee, General comment no. 36, Article 6 (Right to Life) UN Doc. CCPR/C/GC/35 (3 September 2019).
[99] Ibid.
[100] Ibid.
[101] Erik Roxstrom, Mark Gibney, and Terje Einarsen, 'The Nato Bombing Case (*Banković Et Al. V. Belgium Et Al.*) and the Limits of Western Human Rights Protection' (2005) 23 Boston University International Law Journal 55,88.
[102] 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.

framework and argues that the human rights framework should recognise the same. She holds that:

> […] under the functional approach, the elimination of direct physical contact with the individuals concerned no longer amounts to the severance of a possible jurisdictional link that may trigger human rights obligations. On the contrary, the functional understanding maintains that operational power projected and actioned abroad, like other methods of territorial and/or personal control, amounts to an exercise of jurisdiction.[103]

Therefore, Moreno-Lax supports Hugh and Lawson's factual relation concept but takes it a step further by holding that such relations can be contactless because jurisdiction is established when there is an externalisation of power.[104] The inclusion of LOS provisions to the conceptualisation of extra-territorial jurisdiction towards not just irregular migrants but 'people at sea' facilitates a 'contactless' factual relation towards protecting persons in distress. This is exemplified in the case of *AS and others v. Malta* and *AS and others v. Italy.*[105] These cases concern the failure of Malta and Italy to rescue a group of more than 200 migrants whose shipwrecked vessel sank in the Mediterranean in 2013. The Committee found that Italy violated the right to life of those involved under Article 6 of the ICCPR because Italy failed to discharge its positive obligation to protect the lives of persons in distress at sea. The HRC found the incident within Malta's jurisdiction, but the communication against Malta was found to be inadmissible, as the applicants did not exhaust local remedies. [106]

Notably, in these cases, the HRC interpreted the ICCPR as applying extra-territorially based on the casual link created by the direct and reasonably foreseeable causal relationship between the State parties' acts and omissions.[107] In the Maltese case, the HRC held that Malta had effective control over the rescue operation because of the existence of the vessel in their search and rescue (SAR) region and their response to the distress call.[108] The HRC's reasoning implies that the LOS framework on SAR creates a jurisdictional link, *ipso facto* triggering obligations under IHRL (in this case, ICCPR).

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[103] Ibid 388.
[104] Maria Gavouneli (n 17) 6.
[105] *AS and others v Malta*, Comm No. 3043/2017, UN Doc. CCPR/C/128/D/3043/2017 (2021); see also *AS and others v Italy*, Comm No. 3042/2017, UN Doc CCPR/C/130/DR/3042/2017 (2021).
[106] Ibid *AS and others v Malta*, para 6.9 and 7.
[107] Ibid para 6.6 and 6.7; *AS and others v Italy*, (n 105) para 7.8.
[108] Ibid *AS and others v Malta*, para 6.7.

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Zimmermann, in the only individual dissenting opinion, raises a number of interesting points.[109] Zimmerman does not dispute the existence of a positive obligation to protect persons in distress under the law of the sea, but that such obligation cannot be triggered by a decision not to protect them.[110] On the contrary, Zyberi, Bulkan and Muhumuza hold that such a positive obligation involves 'due diligence', which requires taking reasonable, positive measures that do not impose disproportionate burdens on State parties in response to reasonably foreseeable threats to life.[111] This view aligns with Morena-Lax's postulation on functional jurisdiction.[112] To her, the trigger is not "random, one-off haphazard encounters between a state and its potential subjects".[113] Instead, the complex mechanism of governance of such operations, *i.e.*, the planning, roll-out, and post-implementation phases, counts as well.[114] Rightly so, considering the detrimental effect of the current externalisation of border control policies within the EU can serve as a predetermined basis for the unwillingness to fulfil the obligation to rescue.[115]

Nonetheless, the mere potential of a violation should not *ipso facto* constitute one.[116] Rather, as contemplated by UNCLOS, a decisive factor for jurisdiction should be knowledge of the distress situation and the control over the persons concerned.[117] Zimmermann believes that an obligation under the ICCPR should not arise due to a violation of a duty under a different legal framework – *i.e.* UNCLOS.[118] Following Zimmermann's reasoning, the solution to prevent this expansive interpretation of jurisdiction is the separate application of IHRL and LOS. That is,

[109] Ibid individual opinion of Andreas Zimmermann (dissenting) 10-12.
[110] Ibid.
[111] Ibid individual opinion of Committee members Gentian Zyberi, Arif Bulkan and Duncan Muhumuza (dissenting), Annex 2, para 4, p.12.
[112] Moreno-Lax (n 102) 387 – functional approach requires that the Court considers 'the role of knowledge and the extent of due diligence owed to avoid prospective harm … in view of conduct occurred "during the course of, or contiguous to, security operations" performed under state direction'.
[113] Ibid.
[114] Ibid.
[115] Ramat Tobi Abudu, 'How the law itself is killing migrants at Sea' (RTE Brainstorm,11 December 2019) <https://www.rte.ie/brainstorm/2019/1211/1098424-how-the-law-itself-is-killing-migrants-at-sea/> accessed 1 November 2021.
[116] Paolo Busco, 'Not All that Glitters Is Gold: The Human Rights Committee's Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations' <https://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations/> accessed 1 November 2021.
[117] 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, 435.
[118] *AS and others v Malta* (n 105), individual Opinion of Andreas Zimmermann (dissenting) para 5, p.11.

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to respect and accept the current fragmentation within international law,[119] which Papanicolopulu observes as detrimental to the protection of people at sea.[120] Perhaps, this is a price to pay to keep sovereignty as a right and responsibility – even though most States might be reluctant to take on any further obligation under LOS with the fear of getting caught under the ICCPR.[121]

In the Italian case, the HRC held that the incident fell within Italy's jurisdiction because Italian authorities were aware of the distress call and closer to the distressed vessel but did nothing to respond.[122] This approach goes beyond the existing scope of functional jurisdiction on land, as expressed in the dissenting opinion of Shany, Heyns and Pazartzis. They argue that actual control (actions) places persons within a State's jurisdiction, not potential control (omissions), which the decision showcases.[123] Also, in their view, since Malta had both *de jure* and *de facto* jurisdiction, then Italy should not.[124] In contrast, Zyberi rightly observes that the jurisdictional link results from the relevant legal framework at sea. He follows that "the concepts of "power and control" commonly used regarding extra-territorial jurisdiction have to be construed and interpreted in light of the specific circumstances at sea."[125] Even the restrictive ECtHR interpretation recognises the wholly exceptional circumstances at sea in interpreting the ECHR.[126] Shany's opposition is understandable, considering his functional jurisdiction view revolves solely around the factual relations between the State and individual, not the location.[127]

The understanding from *AS and others v. Malta* is that the search and rescue legal framework creates an extra-territorial jurisdictional link between coastal States and persons in distress in their search and rescue region.[128] Such jurisdictional link is 'contactless' as suggested by Morena-Lax,[129] which means the coastal State has effective control over the area, in this case, 'the high seas', even without any physical contact. This is similar to the concept of *de jure*

[119] See Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) Modern Law Review 1, 4-5.
[120] Irini Papanicolopulu (n 7).
[121] *AS and others v Malta* (n 105), individual Opinion of Andreas Zimmermann (dissenting) para 9.
[122] *A.S and others v Italy* (n 105) para 8.5.
[123] Ibid individual opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting) Annex 1 paras 1-7 p. 16-17.
[124] Ibid para 5.
[125] Ibid individual opinion of Gentian Zyberi (concurring) Annex 4 Para 3 p.19-20.
[126] See, Marta Bo, 'Hassan and Others v. France; Ali Samatar and Others v. France' (2015) 30 International Journal of Marine & Coastal Law 551, 556.
[127] Yuval Shany (n 94) 71.
[128] *AS and others v Malta* (n 105).
[129] Violeta Morena-Lax (n 102).

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jurisdiction at sea, where the law creates a jurisdictional link between a flag State and its flagship.[130] The ECtHR can apply the HRC's interpretation within the scope of *de jure* jurisdiction, as they already accept such a notion of jurisdiction.[131] The recent case *Hanan v. Germany* also shows the ECtHR accepts that the law can constitute a jurisdictional link.[132] Indeed, the acceptance of such interpretation by ECtHR will be more beneficial to the protection of migrants on the Mediterranean Sea because of the Court's ability to ensure just satisfaction to the injured party.[133]

However, the HRC's decision in *AS and others v. Italy* interprets the jurisdictional link not based solely on the law (*de jure*) rather on factual elements (distress call and proximity), which resulted in a special relationship of dependency between the individuals on the vessel in distress and Italy.[134] This goes beyond the popular definition of functional jurisdiction based on factual elements which links a cause (an action of a State) to an effect (a breach of their responsibility). Instead, this functional interpretation links the inactions of a State to a beach of responsibility in an area outside their territorial jurisdiction. This shows that the human rights system integrated with the LOS (the search and rescue framework) allows better protection of migrants at sea. States can no longer escape their responsibility; this might reduce the rate of migrants' death at sea. [135] Thus, Tigroudja concludes that the HRC's decision serves as a proactive step in addressing some maritime legal black holes.[136]

The application of this functional approach at sea is dependent on a perspective shift towards the common goal of protecting people, instead of State interest. Gammeltoft-Hansen notes that the "fundamental barrier" in choosing between national sovereignty or the functional conception results from the "conceptual history that makes it cognitively difficult".[137] This view seems convincing looking at the Westphalian history of sovereignty. Still, it is not conclusive as there have been changes to the conceptual history of sovereignty as discussed above in sub-section 5.3.1(c). Yet human security as a bridge between IHRL and LOS could be the perspective shift needed to break that fundamental barrier where both national and

[130] See, UNCLOS, Article 91(1).
[131] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012); see also *Sharifi and others v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014); *see also Medvedyev and Others v. France* App no 3394/03 (ECtHR, 29 March 2010).
[132] *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021) para 137-39.
[133] ECHR, Article 41.
[134] *AS and others v Italy* (n 105) para 7.8.
[135] See Papastavridis (n 117) 417-35.
[136] *AS and other v Italy* (n 105), Individual Opinion of Hélène Tigroudja, Annex 7 p.22-3.
[137] Gammeltoft-Hansen (n 87) 157.

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international judiciaries accept sovereignty as a right and responsibility for the sake of protecting people at sea. This understanding, in turn, could shift jurisdiction from the passive conception to a functional approach.

5.3.1.3 Redefining the concept of human rights law at sea: From equality to equity and uniformity

The current notion relating to the interpretation of human rights law at sea is one of equality ─ holding that human rights law should apply at sea the same way that it applies on land. The 2019 Geneva Declaration on Human Rights at Sea,[138] developed by the NGO Human Rights at Sea, identifies four fundamental principles for applying human rights at sea.

a) Human rights apply at sea to exactly the same degree and extent that they do on land;

b) All persons at sea, without any distinction, enjoy human rights at sea;

c) There are no maritime specific rules allowing derogation from human rights standards;

d) All human rights established under treaty and customary international law must be respected at sea.[139]

All the above principles seem legally justified under IHRL. Still, a gap in protection may be created when there is no contextual consideration of specific challenges posed by the maritime environment in fulfilling the first fundamental principle.[140] This is the notion that needs clarification. The emerging interpretation of IHRL at sea holds a more equitable view, allowing a court to consider the nature of maritime security operations as a relevant factor. In so doing, the standard of applying procedural requirements on land differs at sea. Yet, there are variations in interpreting IHRL at sea among the IHRL adjudicatory bodies.[141]

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[138] Human Rights at Sea, The Geneva Declaration on Human Rights at Sea, Version 1 (5 April 2019) <https://www.humanrightsatsea.org/wp-content/uploads/2019/04/HRAS_GENEVA_DECLARATION_ON_HUMAN_RIGHTS_AT_SEA_5_April_2019_Version_1_LOCKED.pdf> accessed on 1 November 2021.
[139] Ibid 3.
[140] Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243, 245; see also Papanicolopulu (n 7) 238.
[141] Chapter 2, sub-section 2.2.1.

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On the one hand, the ECtHR allows a loose interpretation of ECHR at sea vis-à-vis maritime enforcement operations (MSOs).[142] This interpretation balances the security-based requirement and the substantive human rights law but adapts the procedural requirement, as done in the *Rigopoulos*, *Medvedyev* and *Vassis* cases.[143] In these cases, the ECtHR interpreted the right to be brought promptly before a judge (a procedural requirement of the right to liberty) with due consideration of the maritime operations.[144] The ECtHR accepted that the prompt requirement counts from when the suspects arrived onshore, not the time spent at sea. This interpretation signals a balance in applying human rights law vis-à-vis maritime security operations.

On the other hand, the UN Human Rights Committee applies the LOS framework in interpreting IHRL at sea, promoting a higher threshold of positive obligations at sea. This is illustrated in the *AS and others v. Italy* and *AS and others v. Malta* cases discussed earlier, where the HRC read the State obligations under the LOS framework as necessary to interpret the duty to protect lives under the ICCPR. Significantly, these cases show that the application of the LOS framework reinforces IHRL obligations toward the protection of people at sea. However, it is unclear if the ECtHR can adopt such an interpretation because of its overall restrictive approach.

The human security approach encapsulates these two interpretations as they align with its principles and thus bring coherence in interpreting IHRL at sea. It involves interpretation that considers the security necessity of MSOs and the relevance of the security-based legal framework in interpreting human rights at sea. The people-centric principle espoused in the common understanding of human security places the individual at the centre of the interpretation. This leads to an interpretation of the law that protects the rights of civilians at sea but at the same time prevents State actors from violating the rights of others. Chapters three and four show that the sea is an environment for offenders like human traffickers, smugglers, and pirates, requiring a mixture of security and rights-based approaches. The ECtHR contextualises this perfectly in *Medveyev v. France*:

> [T]he special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees

[142] Bo (n 126) 556
[143] *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999); see also *Medvedyev v France* (n 132); see also *Vassis and others v France* App no 62736/09 (ECtHR, 27 June 2013). See chapter two, section 2.4 for in-depth analysis of these cases.
[144] Ibid.

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> protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".[145]

Accordingly, a people-centric interpretation holistically considers the impacts upon both victims and suspects.[146] Human security, a 'comprehensive' and 'context-specific' approach, allows an interpreter (e.g. adjudicatory bodies) to interact with diverse legal regimes, which helps to ensure coherence and coordination within international law bringing about a unity of purpose between all relevant legal regimes to ensure the protection of people at sea.[147] Yet adjudicatory bodies should be context-specific in interpreting relevant international treaties at sea. Interpreting in context requires reference to the text, preamble, annexes, and any agreement/instrument relating to the treaty made between all the parties connected with the conclusion of the treaty.[148] These comprehensive and context-specific principles are synonymous with the systemic[149] and teleological[150] approaches under Article 31 of the Vienna Convention on the Law of Treaties (VCLT) because they permit the application of diverse relevant regimes, while taking into account the specific context.[151]

The final principle particularly relevant to promoting the protection of people at sea is human security's prevention-oriented approach, which can deal with the negative effects of maritime legal black holes. This tool allows a more in-depth analysis to determine the root causes of any legal gap or uncertainty impacting the protection of people. Using this tool, interpretation of the law is responsive to the current issues within the law arising from the present cases but predicts future problems and gives 'early warning' towards such future occurrences.[152] We can

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[145] *Medvedyev v France* (n 131) para 81.
[146] See also *Mangouras v. Spain* App no. 12050/04 (ECtHR, 28 September 2010) para 46.
[147] Papanicolopulu (n 7) 6-10.
[148] VCLT, Article 31(2).
[149] Chapter one discusses the principle of systemic integration embedded in Article 31(3)(c).
[150] A teleological approach looks at the "*telos,*" which is the object and purpose of a norm, rule, or law. There is always a *telos* that defines the content and function of a norm, which plays a crucial role in interpreting any law. The teleological approach finds expression in VCLT, Article 31(1) which provides that "a treaty shall be interpreted in good faith following the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"; see also *North Sea Continental Shelf* cases, (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (ICJ, 20 February 1969) Dissenting Opinion of Judge Tanaka, at 182, in this case Judge Tanaka's dissenting opinion illustrates the method of teleological interpretation as appropriate in the context of both written and customary law. He says, "the method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law".
[151] Article 31(2) VCLT provides that "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes." Therefore, an adjudicatory body applies various legal regimes within the contextual meaning of the regime.
[152] United Nations Trust Fund for Human Security, 'Human Security Handbook: An Integrated Approach for the Realization of The Sustainable Development Goals and The Priority Areas of The International Community and The United Nations System' (United Nations, human security Unit 2016) 8 [hereinafter referred to as 'UNTFHS Handbook'].

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see this play out in *AS and others v. Italy*. In this case, the HRC responded to *de jure* rightlessness by applying the LOS framework to the positive obligations under the ICCPR. By so doing, the HRC operationalised the duty to rescue persons at sea, which previously had been merely a duty of conduct.[153] Yet, with human rights law in the mix, it is now an obligation of result where States also have an obligation to prevent human rights violation flowing from their non-performance of their obligation to rescue persons in distress.[154] As a result, future occurrences of migrant deaths at sea arising from *de jure* rightlessness can be minimised. However, this is only a practice adopted by the HRC at the time of writing this thesis, and thus for more impact, it needs to be mainstreamed to the other sub-fields of IHRL and by States in their maritime security strategies. This is where the relevance of the human security approach becomes apparent – it can create coherence in interpretation across all IHRL subfields vis-à-vis issues pertaining to maritime security.

Chapter one points out that the systemic interpretation technique cannot solve genuine conflicts like maritime legal black holes. This is because no integration technique can create a non-existing law. However, these human security clarifications can create a bridge between the rights and obligations set out in IHRL and LOS, thereby offering a means of addressing the negative impact of the maritime legal black holes.

5.3.2 Specific complexities: Maritime security and human security recommendations

One of the most challenging conundrums all relevant actors face is striking a balance between security and rights-based approaches to dealing with maritime security challenges such as irregular migration and piracy at sea. It almost appears that international law itself impedes the balance between these two methods, which creates certain complications as States can disregard their obligations and use the law as a shield. The fear is no longer the existence of these complexities but that the 'maritime legal black hole' may never be closed.[155]

The resultant effect of the maritime legal black holes identified in chapters three and four are *de jure* rightlessness and *de facto* non-enforcement. Because these maritime legal black holes

[153] The rights-based framework shifts the obligation to rescue persons in distress at sea from being merely an obligation of conduct, *i.e.*, it guarantees the prescription of such duty, into an "obligation of result" to ensure the protection of persons in distress. Thus, a positive step towards reducing the deaths of migrants at sea; see Efthymios Papastavridis, 'Is there a right to be rescued at Sea? A Skeptical view' (2014) 4 Questions of International Law 17, 21-2.

[154] *AS and others v Italy* (n 105) para 10 the HRC noted that "The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future".

[155] See Gammeltoft-Hansen (n 87) 155-7; see also Tom De Boer 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection' (2015) 28 Journal of Refugee Studies 118, 119-32.

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flow from the structure of international law and provisions under the law, it is difficult to circumvent the problem. Chapters three and four show that subsequent laws, policies and rules still reflect the 'holes' emanating from the foundational laws. Thus, the human security approach cannot vanquish these maritime legal black holes. Yet through its core principles, human security can act as a bridge over the holes to protect people at sea despite these complexities. It is beyond the scope of this thesis to give a comprehensive range of solutions but below offers overall human-security recommendations as a bridge over the issue of maritime legal black holes. Accordingly, the sub-sections below explore human security as a policy tool to protect people at sea despite the challenges of *de jure* rightlessness and *de facto* non-enforcement.

5.3.2.1 Irregular migration at sea: *De jure* rightlessness

De jure rightlessness takes two forms. First, it is a physical space of rightlessness. Chapters two and three illustrate that the lack of uniformity within the IHRL adjudicatory bodies promotes '*de jure* rightlessness' as a physical space on the high seas (e.g. the Mediterranean Sea) where there is an apparent gap in human rights protection. Thus, *de jure* rightlessness is a physical space where human rights violations cannot be entirely controlled, and abuse may take place unchecked. To deal with this, sub-section 5.3.1 above proposes human security interpretations of foundational concepts relevant to both IHRL and LOS to enhance State obligations at sea. This section takes this argument a step further by exploring how human security works as a policy framework to deal with this physical gap.

Second, *de jure* rightlessness is a 'space' in protection existing within international law. Particularly, a maritime legal black hole is caused by the non-existence of a right to be rescued. The duty to assist persons in distress is without a corresponding right to be rescued. There is no duty to allow disembarkation, which altogether frustrates the purposes of Article 98 UNCLOS to bring persons in distress to safety. Maritime Conventions like SOLAS and SAR try to deal with the UNCLOS shortcomings but further worsen the situation by territorialising the duty to render assistance and still do not include a duty to allow disembarkation. The lack of a duty to allow disembarkation aligns with the criminal jurisdiction of States to manage their borders through strengthened border control measures. These are key legal uncertainties affecting the overall protection of people (migrants) at sea.

Nonetheless, in contrast to the LOS persons in distress framework, the human rights framework offers protection of the rights for all people at sea. Specifically looking at persons in distress

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(migrants at sea), although the human rights framework does not create the right to be rescued or duty to allow disembarkation, overall, it recognises the human rights of all persons, which can still push States to offer protection to migrants at sea. Yet the rights-based framework must be integrated with the LOS framework in such a way that balances the rights of all people and States' sovereign rights over their borders, to tackle the ills of irregular migration (people smuggling and human trafficking). From this perspective, the next section analyses policies to paint the picture of a human security approach at sea relevant to irregular maritime migration.

I. Human security and irregular migration at sea

The securitisation of irregular maritime migration within the EU led to the externalisation policies which aim at "policing at a distance" and, more importantly, "policing in the name of freedom."[156] The increasing number of deaths strongly suggests that EU securitisation practices are ineffective and non-people centric. This security model focuses on preventing irregular maritime migration, categorising it as a threat. In contrast, the human security model sees the human insecurities that lead to irregular migration as the main threat. Thus, it seeks to identify and alleviate threats that lead to forced and irregular migration.[157] The difference between these two views is that the classification of irregular migrants as 'security threats' leads to marginalisation within the society, which opens the door to other threats.[158] The human security approach goes beyond merely preventive measures since it is contextual and more comprehensive with a people-centric focus. [159]

It is also crucial to address the threats that migrants face during transit.[160] In this thesis, the *de jure* rightlessness is apparent during the transit through the Mediterranean Sea. From a human security perspective, it is essential to put in place legal protections for people on the move and establish institutions and structures that can effectively enforce those protections.[161] Putting

[156] Apostolos Papadopoulos, 'Migration and Human Security in the Balkans' (2007) 4(2) Migration Letters 95, 99.
[157] Ibid 24.
[158] See, Daniel Ghezelbash et al, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in The Mediterranean and Offshore Australia' (2018) 67 International and Comparative Law Quarterly 315, 315-51.
[159] Francesca Vietti and Todd Scribner, 'Human Insecurity: Understanding International Migration from a Human Security Perspective' (2013) 1(1) Journal on Migration and Human Security 17, 20-31; see also UNGA, 'Strengthening of the United Nations: An Agenda for Further Change, Report of the Secretary-General' 57th session (9 September 2002) A/57/387, para. 39, a comprehensive step looks at "the various dimensions of the migration issue, which now involves hundreds of millions of people and affects countries of origin, transit and destination. We need to understand better the causes of international flows of people and their complex interrelationship with development".
[160] Anwar Hassen Tsega, 'The Nexus between Migration and Human Security: The Case of Ethiopian Female Migration to Sudan' (2016) 10 (7) International Journal of Humanities and Social Sciences 2531, 2531-7.
[161] Vietti and Scribner (n 159) 26.

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such legal protection in an area beyond national jurisdiction (i.e. on the high seas) can be daunting without State willingness. However, such protection may be achievable with human security as the bridge fostering the coherent interaction of various legal frameworks, institutions, and civil societies. Also, it is useful that human security can help investigate the current existing structures to improve the protection of people. In discussing the synergy between human rights and human security vis-à-vis migration, Estrada-Tanck says that:

> At the same time, a human security approach contributes to cover protection gaps in human rights law, weave together existing obligations under the common values of both, uphold the normative spirit underlying the recognition of universal rights of all persons, challenge existing legal boundaries and articulate emerging duties derived from contemporary dilemmas.[162]

Some threats are origin and transit based, such as sexual and physical violence interlinked with human trafficking and human smuggling. Irregular migrants may indeed experience both categories during their transit, starting out as a migrant who approaches a smuggler or develops contacts and knowledge of irregular migration routes and then suddenly becomes trafficked for a different purpose.[163] Thus, the security dimension is also necessary to prevent the exploitation of migrants by people smugglers and human traffickers on arrival at the destination country.

Human security being comprehensive and people-centric (not merely people-oriented)[164] requires that irregular migrants enjoy the freedom from fear, want and freedom to live in dignity.[165] This requires a balance between rights and security measures. Although it is beyond the scope of this thesis to set out comprehensive practical solutions, the GCM and proposed EU Pact on Migration and Asylum could form the basis for States to proactively adopt a more balanced approach to rights and security-based recommendations.

i. The Global Compact for Migration and the proposed EU Pact on Migration and Asylum

[162] Dorothy Estrada-Tanck, 'Human security and international human rights law in the Mediterranean crisis' in John Morrissey (ed) *Haven: The Mediterranean Crisis and Human Security* (Edward Elgar Publishing, 2020) 286.
[163] Julian Bloomer 'The only honest thief: critiquing the role of human smugglers' in John Morrissey (ed) *Haven: The Mediterranean Crisis and Human Security* (Edward Elgar Publishing, 2020) 135.
[164] Lorraine Elliott, 'Critical human security: reclaiming a cosmopolitan ethics of dignity and recognition' in John Morrissey (ed) *Haven: The Mediterranean Crisis and Human Security* (Edward Elgar Publishing, 2020) 33.
[165] Des Gasper and Giulia Sinatti, 'Investigating Migration within a Human Security Framework' (2016) 14(27) Migration and Development Journal 1, 8.

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To facilitate the much-needed sustainable approach to migration, the majority of the UN member States adopted the Global Compact for Safe, Orderly and Regular Migration (GCM) at an Intergovernmental Conference in Marrakesh, Morocco, on 10 December 2018. The GCM is a non-legally binding instrument with a strong human dimension as it places individuals at its core.[166] Therefore, the GCM sees human protection as the essential aspect of its existence. This concept of human protection goes beyond just human rights law by incorporating a human security dimension.[167] Supporters of the agreement say it will foster cooperation and improve the handling of millions of migrants, but critics fear it will encourage more irregular migration.[168]

Similarly, in September 2020, the European Commission introduced a new EU Pact on Migration and Asylum, which follows a "human and humane" approach.[169] President von der Leyen points out that saving lives at sea is mandatory. This new proposed European Pact aims to reduce "unsafe and irregular routes and promote sustainable and safe legal pathways for those in need of protection".[170] This new proposed Pact offers a "maximal view" of dealing with migration, leading to increased efficiency in conducting search and rescue operations, particularly a "more predictable solidarity mechanism for disembarkation".[171] Such a maximal view is similar to a human security perspective as it seemingly offers a comprehensive and people-centred approach to migration at sea. Yet, Amnesty International's EU Advocacy Director, Eve Geddie, had this to say about the pact:

> Pitched as a fresh start, this pact is, in reality, designed to heighten walls and strengthen fences. Rather than offering any new approach to facilitate bringing people to safety, this appears to be an attempt to rebrand a system which has been failing for years, with dire consequences.[172]

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[166] The GCM (n 78) para 15.
[167] See, the 2012 UN Resolution (n 4) and the 2013 UNGA Report (n 32).
[168] Joanna Apap, 'A Global Compact on Migration Placing Human Rights at the Heart of Migration Management' (European Parliament Research Service, 2019) 3 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614638/EPRS_BRI(2017)614638_EN.pdf> accessed 1 November 21; see also BBC News, 'What's the UN global Compact on Migration', <https://www.bbc.com/news/world-46607015> accessed 1 November 2021.
[169] European Commission, 'Communication from The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions On A New Pact On Migration And Asylum' Brussels, 23.9.2020 COM (2020) [hereinafter referred to as 'the proposed EU Pact'] <https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v7_1.pdf> accessed 1 November 2021.
[170] Ibid 2.
[171] Ibid.
[172] Amnesty International, 'EU: Migration Pact is not a fresh start but a false start' (23 September 2020) <https://www.amnesty.org/en/latest/news/2020/09/eu/> accessed 1 November 2021.

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Application of the human security test to the GCM and the EU Pact shows whether they can be considered as human security policy documents. The human security test is whether a policy is people-centric, context-specific, comprehensive, prevention-oriented, and ultimately ensures the protection and empowerment of people. In this case, the GCM explicitly provides that it is people-centric because it has people at its core.[173] It is context-specific as it deals with migrants, both regular and irregular. The GCM is the first global instrument addressing migrants, which differs from the Global Compact on Refugees (GCR),[174] which addresses only refugees. This distinction is vital because the existing gap in protection is often towards irregular migrants. The GCM also comprehensively addresses the migration cycle from the country of origin, transit, and arrival. Its comprehensive approach advances multisectoral/multi-stakeholder and integrated responses to migration.[175] It also interacts with various international legal regimes and their obligations. The GCM is prevention-oriented, as it aims to "prevent and counter smuggling of migrants with the aim to end impunity for smugglers and prevent irregular migration."[176] Finally, the GCM upholds the rights of migrants to ensure the overall protection and empowerment of migrants[177] ─ all within the ambits of international law and respect for national sovereignty.[178] Thus, the GCM recognises sovereignty as a right and responsibility.

On the other hand, the proposed EU Pact is not people-centred but merely people-oriented as the interest of people is not at the core of the instrument. It is context-specific as it relates to migrants but not comprehensive as the GCM because it focuses mainly on arrivals of migrants. It is prevention-oriented, but protection and empowerment are not the ultimate goals. Unlike the GCM, the proposed EU Pact tilts towards the prevention and security interests of the EU member States, placing more weight on the "security" components of a human security approach. The proposed EU Pact is relevant to this thesis because it has principles like the GCM relevant to the human security framework. Also, it is specific to the EU waters, which is the "hotspot" area treated in chapter three.

[173] The GCM (n 78) 4.
[174] UN 'Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees' (UN, 2018) available at <https://www.unhcr.org/gcr/GCR_English.pdf> accessed 1 November 2021.
[175] Ibid 3.
[176] Ibid 17.
[177] The GCM (n 78) all the objectives and commitments of the GCM.
[178] Ibid 2, 4, and 18.

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The GCM and the proposed EU Pact on Migration and Asylum appear to be the closest the international community has come towards dealing with irregular migration. Nonetheless, they both present different views, highlighted further below.

ii. The nature of the GCM and the Proposed EU Pact

The GCM marks the enhanced cooperation on international migration in all its dimensions and reiterates the human rights of all migrants.[179] The GCM builds on ten guiding principles with 23 objectives for safe, orderly, and regular migration, each of which includes commitments and suggested follow up actions for States. The guiding principles rest on the vision that the challenges and opportunities of international migration unite rather than divide States. These guiding principles are people-centeredness, international co-operation, national sovereignty, the rule of law and due process, sustainable development, human rights, gender-responsiveness, child sensitivity, whole-of-government approach, and whole-of-society approach. All of which demonstrates the principles of the human security approach.

The GCM's vision is set out as "common understanding, shared responsibility and unity of purpose", which aims to deal with the challenges and opportunities of migration as a united force. Similarly, the proposed EU Pact adopts a solidary mechanism based on later decided principles. According to Article 80 of the Treaty on the Functioning of the European Union (TFEU), the EU area of immigration and asylum and its implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. However, history has shown that the enforcement of this principle proves difficult because some EU Member States shun the idea of solidarity in dealing with irregular migration.[180] Yet, as mentioned in the GCM, common understanding, shared responsibilities, and unity of purpose is essential in dealing with global migration.

The GCM is an instrument that has a strong human dimension as it places individuals at its core.[181] Meaning, the GCM sees human protection as an essential aspect of the GCM's existence which arguably appears to embrace the concept of human security.[182] The GCM highlighted people centeredness as its first guiding principle and applied it throughout the compact.[183] Nonetheless, the GCM retains a balance between human rights and State

[179] The GCM (n 78).
[180] See, *Slovak Republic and Hungary v Council of the European Union* Joined Cases C 643/15 and C 647/15 (Court of Justice of the European Union, 6 September 2017).
[181] The GCM (n 78) para 15.
[182] The 2012 UN Resolution (n 4).
[183] The GCM (n 78).

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sovereignty as it recognises human rights obligations vis-à-vis promoting the "security and prosperity" of the State's citizens.[184] More than half of the proposed EU Pact focuses on dealing with irregular migration as a security threat rather than creating legal pathways. The Pact offers to deal with the root causes and drivers of irregular migration such as safety factors (increased insecurity and violence), economic factors (low income, lack of job security and unemployment), environmental factors (drought, environmental degradation), political and social factors (poor governance and social inequalities) to discourage migrants at sea, specifically through migrant smuggling.

iii. Impact and shortfalls of the GCM and the proposed EU Pact on migration at sea

The GCM promotes humanitarian actions in the Mediterranean Sea. Objective 8 aims to "save lives and establish coordinated international efforts on missing migrants" in recognition of the right to life of migrants. Objective 8 facilitates States to carry out search and rescue operations both collectively and individually. Also, Objective 8 of the GCM enables the non-criminalisation of private vessels or entities that assist in an exclusively humanitarian nature for migrants — thereby fostering the duty to render assistance at sea.[185] Similarly, the proposed EU Pact aims at guiding the EU States on the practical implementation of "EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence" ─ i.e. the EU Facilitators' Package,[186] ─ to prevent the criminalisation of humanitarian actors.[187] The problem of interpretation stems from the UN Anti-Smuggling Protocol itself, which implicitly gives States the right to criminalise smuggled migrants for any domestic offence, including illegal entry.[188] This provision in itself is not problematic, but the issue is that a state-centric securitised approach against the smuggled migrants causes States to act to the detriment of migrants in general, such as the criminalisation of humanitarian rescue operations. The proposed EU Pact further mentions the efficiency of the present anti-smuggling rules and the need to strengthen actions against smuggling. Therefore, one can question the sufficiency of a "guidance" to deal with the criminalisation of humanitarian action, which is facilitated by an appraised law.

[184] Ibid para 11.
[185] Ibid objective 8 para 24(a) provides that States should ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful.
[186] See, chapter three section 3.3
[187] The proposed EU Pact (n 170) 14-16.
[188] See chapter three, section 3.3.

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Also, while the GCM gives power to States to manage their borders by preventing irregular migration, it encourages border management policies to align with State obligations under international law and respect the human rights of all migrants regardless of their migration status.[189] In doing this, the action plan includes developing technical cooperation agreements that enable States to request and offer assets, equipment and other technical assistance to strengthen border management, particularly in the area of search and rescue as well as different emergencies.[190] The reference to search and rescue as part of enhancing border management shows that the GCM embraces the duty to render assistance, as seen in Article 98 UNCLOS. Similarly, the proposed EU Pact emphasises the duty to render assistance at sea, building on the solidarity mechanism to ensure all EU States cooperate in carrying out search and rescue services and allow the EU to cooperate with third countries.

Nevertheless, unlike the proposed EU Pact, the GCM does not discuss the disembarkation process, which is the final stage of any search and rescue operation at sea.[191] Disembarkation involves the delivery of migrants rescued at sea to a place of safety. The proposed EU Pact aims to apply the solidarity mechanism to the disembarkation of migrants. The issue of disembarkation might not be easily tackled because there is neither a duty on States to receive rescued migrants under the law of the sea nor a specific duty under international human rights law. The GCM reflects the gap under international law on disembarkation, which ultimately frustrates the obligation to render assistance at sea.[192]

The GCM also does not refer to the commitment of strengthening border control measures as a method of preventing trafficking in human beings.[193] This compares with the often-criticised Article 11(1) of the Anti-Trafficking Protocol, which does.[194] The GCM applies the "prevalence criterion" for border control as it strikes a balance between the search and rescue

[189] The GCM (n 78) objective 11 para 27.
[190] Ibid, objective 11 para 27(d).
[191] SAR Convention, Regulation 1.3.2 defines "rescue" as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety."
[192] See the case of *Rackete and others v Italy (Sea Watch 3)* App no 32969/19 (ECtHR, 25 June 2019) where the European Court of Human Rights decided not to indicate to the Italian Government the interim measure requested by the applicants (captain of the Sea-Watch 3 vessel) which would have required that they be allowed to disembark in Italy from the ship Sea-Watch 3. The vessel was refused entry by the Italian government, but the captain due to frustration sailed the ship into the Italian territory to disembark the rescued migrants and was subsequently arrested for such violation.
[193] Hathaway C. James, 'The Human Rights Quagmire of 'Human Trafficking' (2008) 49 Virginia Journal of International L.aw 1,1-59.
[194] Ibid; see also Elspeth Guild and Tugba Basaran, 'The UN's Global Compact for Safe, Orderly and Regular Migration Analysis of the final draft, Objective by Objective' <https://www.cjhm.org/wp-content/uploads/2019/03/The-UN%E2%80%99s-Global-Compact-for-Safe-Orderly-and-Regular-Migration-Analysis-of-the-final-draft-Objective-by-Objective.pdf> accessed 1 November 2021.

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obligations and the anti-irregular migration goals.[195] According to Tondini, an intervention meets the prevalence criterion when the search and rescue character prevails over the objective of preventing irregular migration.[196] The GCM applies the prevalence criterion regarding international migration because it qualifies migration as a source of prosperity, innovation and sustainable development rather than a threat to security; hence, it is rooted in the 2030 Agenda for Sustainable Development.[197] This development depicts a response to Spijkerboers' call for a reformed migration policy that moves from "tunnel vision to evidence-based policy-making" as evidence shows that strengthening border management policies increases illicit activities, leading to more deaths at sea.[198]

The proposed EU Pact does not explicitly refer to strengthening border control. Still, it refers to improving external border control measures to deal with migrant smuggling through three steps ─ the pre-entry screening, asylum procedure and swift return. The first step is the pre-entry screening phase applicable to all third-country nationals who cross the external border without authorisation, including identification, health and security checks, fingerprinting, and registration in the Eurodac database. The second step is the asylum procedure, when asylum applications are processed through accelerated grounds such as the concepts of safe countries of origin or safe third countries. The problem with the concept of safe countries is that it does not fit with the human rights concept, which is individualistic. For example, the non-refoulement obligation requires individual processing of protection claims even if the applicant's country seems safe ─ it is the individual that risks persecution. Therefore, such an approach can lead to violations of human rights provisions. The final step is the swift return, where an EU return border procedure would apply immediately for rejected asylum border claims. All EU States that do not contribute to the asylum procedure step would be required to sponsor the return of the rejected applicants.

The GCM provides a more harmonious and equal attempt to balance the twin requirements of human rights and State security; while the EU Pact is an example of a text which finds it harder

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[195] Matteo Tondini, 'The legality of intercepting boat people under search and rescue and border control operations with reference to the recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the Hirsi case' (2012) 18 Journal on International Maritime Law 59,74.
[196] Ibid.
[197] The GCM (n 78) para 8.
[198] Thomas Spijkerboer, 'Policy Conclusions' <http://www.borderdeaths.org/wp-content/uploads/Policy-Conclusions.pdf> accessed 1 November 2021 points out that strengthening border management has given rise to more human smuggling activities which in turn leads to more deaths at sea; see also Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: Externalisation of migration policy before the EU Court of Justice' (2018) 31 Journal of Refugee Studies 216, 216-39.

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to reconcile these two elements, and ultimately falls down stronger on the security side, rather than the human side (although it does include a focus on root causes which fits well into the human security approach). Combining the positive part of the two approaches can give a balanced consideration of security concerns and the human rights of irregular migrants at sea, necessary to circumvent *de jure* rightlessness.

5.3.2.2 Piracy at sea: *De facto* non-enforcement

The definitional gaps and uncertainties arising from international, regional, and national piracy laws can create *de facto* non-enforcement: a State's refusal to enforce counter-piracy measures. This *de facto* non-enforcement affects the protection of people at sea because a State's inactions in carrying out counter-piracy measures can mean that the sea is a safe haven for pirates to abuse the rights of civilians at sea. Chapter four shows that the permissive wording of UNCLOS towards enforcement/adjudicatory jurisdiction against piracy is reflected in the lack of interest from States in the Gulf of Guinea (GoG) in creating standalone piracy legislation, with the notable exception of Nigeria. Moreover, from an IHRL perspective, persons suspected of being pirates also enjoy certain rights such as due process and a fair trial. An enhanced maritime security framework on piracy should take on board the rights and security interests of all people involved.

i. Human Security and Maritime Piracy

The human security framework is built around freedom from fear, want and indignity. Relating this to maritime piracy; freedom from fear means protecting civilians at sea from the armed violence of pirates; freedom from want requires that States, civil society, and the international community deals with the root causes of piracy; freedom from indignity calls for the respect and protection of the rights of all people, victims, and suspects. Based on these pillars, an improved approach to piracy focuses on protecting individuals at sea through rights and security-based frameworks.

Unlike the case study of irregular maritime migration, which exemplifies the GCM as a human security framework, piracy has no global pact. Yet, the fundamental elements of the human security approach which exist in the GCM are also relevant to piracy at sea. The first one is people-centredness. This principle promotes the right of all persons under the law, i.e., the suspects and victims. Article 6 UDHR and Article 16 ICCPR provide that everyone has the right to be recognised as a person under the law. Looking at Article 16 ICCPR, the Human Rights Committee has found that "intentionally removing a person from the protection of the

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law for a prolonged period of time may constitute a refusal to recognise that person before the law."[199] Not respecting this right of every person, including piracy suspects, leads to more violation of human rights requirements. Therefore, Petrig argues that "the failure to perceive piracy suspects as subjects of the disposition procedure most notably in matters involving deprivation of liberty and their potential transfer for prosecution ─ amounts to a violation of various international individual rights with the procedural component."[200]

The comprehensive principle embedded in a human security approach allows the interplay of various relevant legal regimes that balance sovereignty, national security, and human rights law.[201] This need was emphasised at the international conference on piracy in 2011 in relation to Somalia piracy which is still very relevant today.[202] A comprehensive approach includes the whole society and whole government perspective (i.e., top-down norms with bottom-up focus), which promotes the participation of civil society, governments, victims and suspects in the policy-making process.[203] Besides being comprehensive, a sustainable approach must also be context-specific. As noted earlier, piracy is a dynamic crime, requiring a context-specific solution and recognition that piracy varies considerably within and across countries and regions, and at different points in time.[204]

Another context-specific suggestion is the need for an innovative international tool – such as an international court with a legal mandate on piracy – to deal with the constraints of national boundaries and jurisdiction.[205] Although this might be time-consuming and costly, it would create coherence in the prosecution of piracy offences. Prosecution of piracy offences is currently only at the national level, meaning joint counter-piracy operations carried out by organisations such as NATO still require transfers/delivery to prosecuting States. Hence the

[199] *Kimouche v Algeria* Comm no 1328/2004, UN Doc. CCPR/C/90/D/1328/2004 (2007) para 7.8 and *Grioua v Algeria* Comm no 1327/2004, UN Doc. CCPR/C/90/D/1327/2004 (2007) para 7.8. see also *Aouabdia v Algeria* Comm no 1780/2008 UN Doc. CCPR/C/101/D/1780/2008 (2011) Para 7.9.
[200] Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff, 2014) 4.
[201] UN Security Council, 'Report of the Secretary-General: The situation with respect to piracy and armed robbery at sea off the coast of Somalia' (10 October 2018) S/2018/903,para 33, The Secretary General points out that "the array of threats in the region makes clear the need for a comprehensive maritime security approach, and a key priority for the international community is to secure Somalia's maritime sovereignty and suppress piracy and other threats emanating from Somalia".
[202] Maximo Q. Mejia, Jr., Chie Kojima., and Mark Sawyers, 'The Malmo Declaration: Calling for a Multi-Sectoral Response to Piracy' in Maximo Q. Mejia, Jr., Chie Kojima., and Mark Sawyers (eds) *Piracy at Sea* (Springer, 2013) 12.
[203] Michael G. Smith and Jacqueline Whelan 'Advancing Human Security: New Strategic Thinking for Australia' (2008) 4(2) Security Challenges,1, 18.
[204] UNTFHS Handbook (n 152) 8.
[205] Mejia et al (n 202) 12.

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reason the operational framework of the NATO mission is criticised for following a deter and disrupt strategy while operating a catch and release scheme.[206] The lack of piracy laws means States will mostly rely on transfers of pirates to other States, during which States could easily violate human rights provisions, making the courts question the legality of the whole maritime enforcement operation.[207] Accordingly, another recommendation from the conference still relevant is the call for all States to fulfil their responsibility to successfully prosecute and punish the universal crime of piracy, regardless of where it is committed, with due regard to international human rights law.

The prevention-oriented approach of human security requires that piracy policies be evidence-based to ascertain the real causes of piracy in each region. Building on this, any solution must be sustainable and resilient. For example, piracy in the GoG is a symptom of deeper socio-economic challenges in the region.[208] Accordingly, there is a need to jointly treat the root causes and security concerns to ensure a sustainable solution building upon peace, justice, and strong institutions. The causes of piracy are not to be found on the sea – they are land-based. As such, any genuine solution will require a land-based approach, focusing on improving human security, economic opportunities and governance in the areas in which pirates are based.[209] Buerger condenses these root causes or "triggers" of piracy into five: geography, weak law enforcement; maritime insecurity; economic dislocation; and cultural acceptability.[210] The reality is that these root causes, which are prevalent in developing countries, turn people towards piracy, while weak law enforcement and corruption allow piracy to flourish in the GoG. Therefore, there must be a balanced solution to piracy – even in the GoG, which involves all hands-on deck. Although there are presently various bilateral, regional, national, and extra-regional regimes to combat piracy and armed robbery at sea in the GoG, they are only repressive. Such repressive methods focus mainly on securitisation, which is necessary because it recognises the problem, but is not a sustainable solution to maritime insecurities by itself. So

[206] Petrig (n 200) 54; Frederick Lorenz and Laura Eshbach, 'Transfer of Suspected and Convicted Pirates' in Michael P. Scharf, Michael A. Newton, Milena Sterio (eds) *Prosecuting Maritime Piracy: Domestic Solutions to international Crimes* (Cambridge University Press, 2015) 154.
[207] See, *Ali Samatar and Others v. France* App no. 17110/10 and 17301/10 (ECtHR, 4 December 2014); see also *Hassan and Others v. France* App no 46695/10 and 54588/10 (ECtHR, 4 December 2014).
[208] Freedom C Onuoha 'Piracy and Maritime Security in the Gulf of Guinea: Trends, Concerns, and Propositions' (2013) The Journal of the Middle East and Africa 267, 270-74; see also Paul R. Williams and Lowry Pressly: Maritime Piracy a Sustainable Global Solution (2013) 46 Case Western Reserve Journal of International Law 177, 184.
[209] Alan McRae, 'A Human Security Approach to Addressing Piracy Off the Coast of Africa' (2014) 3 <https://www.e-ir.info/pdf/47968> accessed 1 November 2021.
[210] Christian Bueger, 'Learning from piracy: future challenges of maritime security governance' (2014) 1 Global Affairs 33, 34.

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far as the root causes that trigger maritime insecurities continue to grow, the reoccurrence of such a security threat is inevitable.

Human security can help promote the development of early warning mechanisms that may mitigate the impact of piracy and, where possible, prevent the occurrence of future challenges. From the operational perspective, it is necessary to continually enhance cooperation between law enforcement and military services regionally and internationally. For example, in the GoG, a comprehensive approach is needed where there is better integration of independent and regional forces and efforts — including the use of maritime patrol aircraft. However, to successfully prevent the root causes and manifestations of piracy, States need to see maritime security operations as an 'obligation and not a choice' to protect all people at sea. Most States in the GoG seemingly view counter-piracy as a choice and not an obligation (leading to *de facto* non-enforcement) that flows from political unwillingness, arguably strengthened by legal uncertainties within the law.

Another solution to better protect people at sea despite *de facto* non-enforcement is the use of private maritime security, including vessel protection detachments (VPDs).[211] Chapter four highlights that flag States use military VPDs to protect vulnerable vessels against pirates at sea. However, there is no clear framework to regulate the use of force by VPDs.[212] Thus, challenges remain in clarifying the roles and limitations of VPDs operating aboard vessels, including whether the master of a ship remains in control when the VPDs are onboard. For this reason, coastal States may interpret the presence of armed military personnel on privately owned and operated vessels as prejudicial to the merchant vessels' status under the regime of innocent passage. Therefore, there is a need for an international framework on the embarkation and activities of VPDs, including their relationship with the master of a commercial vessel.

The ultimate goal of the human security approach is protection and empowerment. As expanded in chapter four, the duty to rescue persons in distress under Article 98 UNCLOS weighs on all States and calls for a positive human rights obligation to protect persons at sea. Article 101 UNCLOS limits piracy to an offence on the high seas, and Article 92 (1) UNCLOS reserves exclusive jurisdiction on the high seas to the flag State. In conjunction with the duty

[211] Conor Seyle and Jens Vestergaard Madsen, 'Non-State Actors in Maritime Security' in Ioannis Chapsos and Cassie Kitchen (eds) *Strengthening Maritime Security Through Cooperation* (IOS Press, 2015) 23-33 argues that private security actors are relevant to dealing with maritime piracy especially considering the unwillingness of States in conducting counter-piracy operations.
[212] For more on Military VPDs, see, Kiara Neri, 'The Use of Force by Military Vessel Protection Detachment' (2012) 51 Military Law and Law of War Review 73.

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to cooperate to repress piracy under Articles 98 and 100 UNCLOS shows that all States and institutions must curb piracy at sea. Accordingly, flag and coastal States need to fully cooperate with other industries to provide services like long-range identification and tracking details to law enforcement and promote/supervise the use of private maritime security contractors. Finally, in dealing with the symptoms and disease of piracy, counter-piracy policies must empower people and their communities to articulate and respond to their needs and those of others.

The above section sets out a potential blueprint for building an enhanced maritime security framework through human security to protect people at sea.[213] Based on the analysis in this chapter, the below section examines the relevance and limitations of the human security approach.

5.4 Human security: Relevance and limitation

Human security offers the much-needed coherent approach to protecting people at sea.[214] However, there remains a grey area concerning implementation, particularly how to move the written words into action. The UN has set out many reports and resolutions discussing the concept of human security, yet there is not much on how to operationalise the human security approach. Instead, these reports and resolutions show how compatible human security is with other fields like human rights and State security and includes the different ways human security is currently implemented at national, regional, and international levels. Yet, there are no in-depth practical solutions from the general human security discourse concerning the above discourse on maritime security. This is because the practical problems and solutions should be context-specific, involving an in-depth empirical analysis.[215]

Being a doctrinal study, providing in-depth practical solutions is beyond the scope of the thesis. Nevertheless, the evaluation of the scholarly works on human security in this thesis gives an insight into the road map for building practical solutions. There are three main steps to build

[213] For more, see Mary Kaldor 'Human Security in Complex Operations' 3 <https://cco.ndu.edu/Portals/96/Documents/prism/prism_2-2/Prism_3-14_Kaldor.pdf > accessed 1 November 2021, the strength of human security is that it "can facilitate both the way we understand complex operations and how we design the toolkit for addressing these risks and dangers. It offers a narrative that is quite different from the war on terror, and it implies a set of principles for using both military and civil capabilities combined."

[214] See Violeta Moreno-Lax, and Efthymios Papastavridis (eds) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill, 2016) 5, 57-9,

[215] UNTFHS Handbook (n 152) 9; see also Violeta Moreno-Lax, and Efthymios Papastavridis, 'Tracing the Bases of an integrated paradigm' in Violeta Moreno-Lax, and Efthymios Papastavridis (eds) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill, 2016) 7.

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on the current conceptual and operational application of human security. The first step is situational analysis through evidence gathering to deepen the understanding of the complexities regarding any particular security challenge. A key component for this is the deployment of the human security principles as tools to guide empirical analysis which ensures individuals are at the centre of the analysis and action. Thus, these principles define the purpose and parameter of such research.[216] The comprehensive results from the evidence-based research are important to the next phase of policy-making which involves developing and implementing targeted yet comprehensive solutions through partnerships between States, civil societies, organisations and relevant bodies. The final step requires the participatory members to measure and monitor the implementation of the comprehensive solutions.

Human security is not a legal regime but an approach with fundamental principles accepted within the UN system. Yet this concept is relatively new and is still evolving. As a result of the flexibility of the human security approach, this chapter was able to build its principles as a conceptual and operational tool by combining various human security discourses. However, being a flexible approach, human security can arguably be distorted. Critics highlight that the human security approach can be exploited and distorted to suit States' interests,[217] specifically, the version of human security, which this thesis applies that places the government as the primary protector of people.

On the one hand, it shows how human security complements the structure of international law (IHRL and LOS) and maritime security because the State is the predominant subject of international law and security. Being complementary to maritime security, it is suitable to deal with the state-centric problems within the framework. For example, the majority of States accept the GCM, a human security instrument addressing the underlying state-centric issues affecting migrants at sea. On the other hand, it seems that human security does not recognise that the State can also be the source of human insecurities at sea ─ a recognition that is vital to

[216] Rihards Bambals, 'Human Security: An Analytical Tool for Disaster Perception Research' (2015) 24(2) Disaster Prevention and Management 150,150-65; see also Dmitry Baluev et al, 'Human Security Concept as an Analytical Framework for the Study of Asymmetric Conflict' (2017) <http://www.revistaespacios.com/a17v38n44/a17v38n44p28.pdf> accessed 1 November 2021; see also Albie Sharpe, Husna Razee & Anthony B. Zwi 'Did human security forget the humans? Critically assessing evaluations of interventions with a human security dimension in Sri Lanka' (2020) 20(4) Conflict, Security & Development 467, 484; see also Edward Newman, 'Covid-19: A Human Security Analysis' (2021) Global Society 1, 1-17.

[217] For more on this see, Christie Ryerson, 'Critical voices and Human Security: To endure, to engage or to critique?' (2010) 41(2) Security Dialogue 169, 169–90; see also Yuen Foong Khong, 'Human Security: A Shotgun Approach to Alleviating Human Misery?' (2001) 7 Global Governance 231, 231.

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protecting people. This seemingly gives room for States to distort the human security agenda at sea under the pretence of protecting people.[218]

However, following the human security principles as the backbone for the maritime security and its operational framework can prevent such distortion. An operational framework for maritime security ought to be people-centric, comprehensive, context-specific, prevention-oriented, with protection and empowerment as the goal. These principles were encapsulated in Jolly and Ray's tripartite human security distortion test.[219] The first one is protection and empowerment, which requires human security policies or initiatives to strengthen people's capacities and abilities to make choices. The second is that it should be context-specific; thus, the securitisation of threats must apply to the target population. Finally, the universality of human security requires that a measure that claims to protect people in one area but raises security concerns in another cannot be within the human security agenda.[220]

By applying this test, human security strengthens existing legal frameworks as it can be used to identify and address their weakness, which saves the international community from the time and cost of the law-making/amendment process. Also, human security having a normatively flexible but defined structure makes it relevant to the future of customary international law because it brings uniformity to State practice for the protection of people at sea. The flexibility of human security is due to the dynamism of security concerns of all people, and thus human security is translated into various national legal systems based on the specificity of the security concerns for the people of each nation.[221] However, the defined structure comprises the underlying principles of human security, which constitutes the common values that eventually shape State practice.

With the application of human security to international law and maritime security, the scope of protecting people at sea has expanded to cover areas of security not traditionally considered as security concerns. Already, the Human Rights Committee (HRC) implicitly reaffirmed the extensive scope of individual rights.[222] In *Teitiota v. New Zealand,* the HRC held that the effects of climate change *per se* might expose individuals to a violation of the right to life and

[218] Hawre Hasan Hama, 'State Security, Societal Security, and Human Security' (2017) 21(1) Jadavpur Journal of International Relations 1,16.
[219] Richard Jolly and Deepayan Basu Ray, 'The Human Security Framework and National Human Development Reports: A Review of Experiences and Current Debates' (UNDP, 2006) Human Development Report Office, National Human Development Report Series (NHDR) Occasional Paper 5, 11.
[220] Ibid.
[221] The 2013 UNGA Report (n 32).
[222] HRC, *General Comment no. 36* (n 98) paras 9.3 and 62.

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provoke the principle of *non-refoulement*.[223] This implies that environmental security is relevant to personal security. Thus, States are to be more proactive in ensuring environmental security because of its severe and adverse effect on the right to life. However, human security at sea brings in other dimensions such as health, food, political, and community security added to the existing maritime security dimensions (i.e., environment, personal, economic, and national security). Although this broadness can be criticised,[224] Klein recognises that other security dimensions are important to pursuing a comprehensive framework to enhance maritime security.[225] The comprehensive nature of human security is the main reason it can act as an effective bridge between legal frameworks, approaches, and institutions. In the words of Daft, human security can do well as a "synthesised overarching framework" that provides a principled future for how international law tackles threats.[226]

Moreover, human security can be a valuable tool specifically for international law. Gilder argues that the conceptual framework re-orientates international law onto the human-centric notion of security.[227] In the same way, this thesis demonstrates how this is true regarding maritime security. Human security places the individual at the centre of maritime security, which can help integrate obligations among relevant stakeholders to align maritime security strategies with human rights requirements.[228] Human security reinforces and integrates existing State obligations at sea by acting as a bridge between human rights, the law of the sea, and other legal frameworks. It universalises the concept of functional jurisdiction at sea, which improves the application of obligations within the two legal frameworks by changing them from mere obligations of conduct to obligations of actual results. Such a shift can strengthen the protection of people at sea from the gaps of *de jure* rightlessness and *de facto* non-

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[223] *Ioane Teitiota v. New Zealand (advance unedited version),* Comm No. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016 (2020) para 9.11 provides 'without robust national and international efforts, the effects of climate change in receiving states [of rejected asylum-seekers] may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states'.
[224] Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26(2) International Security 87; see more discussion in chapter one, sub-section 1.3.2 (i).
[225] Natalie Klein, 'Maritime Security Framework' in Violeta Moreno-Lax, and Efthymios Papastavridis (eds) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill, 2016) 58-9.
[226] Shireen Daft, *The Relationship Between Human Security Discourse and International Law: A Principled Approach* (Routledge, 2017) 33.
[227] Alexander Gilder, 'International law and human security in a kaleidoscopic world' (2021) 59(1-4) Indian Journal of International Law 111, 136, Gilder argues that human security is a valuable tool that can help re-orientate international law to the human-centric notion of security
[228] Violeta Moreno-Lax, and Efthymios Papastavridis, 'Tracing the Bases of an integrated paradigm' in Violeta Moreno-Lax, and Efthymios Papastavridis (eds) *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill, 2016) 5.

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enforcement, which are promoted by the lack of result-oriented interpretation and a coherent application of human rights obligations.

Human security is relevant to various stakeholders within the international and national communities. To lawyers, it can be a useful tool for analysis of any field of law, policy frameworks and contemporary issues affecting people. To adjudicatory bodies, it presents a practical guide for the interpretation and application of the rules, laws, and policies. States, as political actors can benefit from human security because it can be instrumental to their understanding of their people-centred obligations under international law and how to align such commitments with their national interests. Moreover, human security as a policy tool fosters the relationship between States, civil societies, regional organisations, the private sector, and relevant technical entities in promoting and regulating policies through the top-down and bottom-up approaches. Currently, the UN Human Security Unit established in 2004 together with the UNTFHS is instrumental in fostering such relationships and mainstreaming human security principles to create coherence in policies among these stakeholders while addressing the multi-dimensional structural root causes of insecurities.

5.5 Conclusion

Being a concept similar to the IHRL framework, the human security approach might be easily construed as irrelevant. In the same view, this chapter could be said to prove the limited utility of human security, considering that most of the cases referenced in this chapter are within the IHRL field. However, the previous chapters emphasise the relevance of human security as a tool for analysis, highlighting the structural weaknesses of IHRL and other legal frameworks. In particular, the absence of coherence in interpretation and application gives room for legal uncertainties that create the space where persons are unprotected. According to Peters, the lack of uniformity implies "the loss of international law's quality as a legal order (or system)".[229] In this case, the quality of the law to safeguard people at sea.

Regardless of the positive paradigm shifts in applying concepts like jurisdiction and the interpretation of human rights law at sea, uniformity is needed to strengthen the protection of people at sea. Similarly, the LOS framework needs a more direct application of IHRL to protect the human element at sea. To this end, integrating IHRL and LOS ensures better protection of people only to the extent that there is coherence across the national and international judiciaries.

[229] Anne Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15(3) International Journal of Constitutional Law 671, 679.

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Human security helps to ensure "coherence and coordination across traditionally separate fields and doctrines and enables comprehensive and integrated solutions from the fields of development, security, humanitarian action and human rights in an integrated manner".[230]

The positive value of coherence within international law lies in "the connection it has with predictability and legal security".[231] Arguably, the clarified notions offered through the human security discourse supports the positive paradigm shifts already noted within international law. These clarifications follow the principles of human security and by being the threshold requirements for interpretation, integration, and policymaking, they can help with fostering coherence across the international law system. In other words, the principles of human security can be applied as a baseline requirement across all courts concerning people at sea.

Regarding the manifestations of the structural vulnerabilities, *de jure* rightlessness and *de facto* non-enforcement, the human security approach cannot address them by creating new rights or obligations. The human security principles offer the first step to responding to these complexities. States being the primary protectors and offenders of human security, will have to respect and follow sovereignty as both a right and a responsibility to all people. The interpretation of jurisdiction should be functional towards enforcing State obligations, and IHRL and LOS need to be applied by adjudicatory bodies in both fields. Also, as an analytical tool, this chapter shows that human security can assist in developing comprehensive policies that balance both the rights and security interests with the protection of people as the ultimate goal. In other words, it presents a blueprint for a human-centric approach to maritime security.

This chapter has laid out the strengths of human security to the discourse of integrating IHRL and LOS vis-à-vis maritime security. The final chapter concludes this discourse by exploring the key areas of interest, including the overarching argument of this thesis and the significance of applying human security at sea.

[230] UNTFHS Handbook (n 152) 9.
[231] Martti Koskenniemi, 'Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) para 491.

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6 Conclusion

The research impetus for this thesis is the friction between maritime security operations and human rights law as a growing concern that leads to the violations of individual rights at sea. This issue begs the general question: how can maritime security be reconciled with human rights law? To solve this dilemma, scholars suggest reconciling the law of the sea, human rights law, and other relevant legal frameworks to protect people at sea.[1] However, there is no clear understanding of how this integration should occur. In this thesis, I have argued that applying a human security approach can act as a bridge between these fields of law, thereby strengthening the protection of people at sea. Human security offers protection of people beyond merely securing their individual rights but also allowing security-based protection and protection from legal uncertainties within the law that causes gaps in protection at sea. To utilise human security as a tool to harness the advantages of reconciling maritime security operations and human rights law, the focus of international legal analysis should be on strengthening the protection of people at sea. Through this, the general dilemma is broken down into two issues: what are the complexities affecting the protection of people at sea, and how does human security respond to these complexities?

Despite the criticisms against the human security approach,[2] this thesis marks a new beginning for future research on the strengths of human security as a theoretical framework relevant to legal analysis. The originality of this research rests on its operationalisation of the human security approach within international law (specifically, IHRL and LOS), and maritime security operations. Human security is an evolving concept that has been critiqued mostly by scholars within security studies.[3] In contrast, this study indicates the strengths of human security as a recognised dimension of the maritime security framework and a complementary concept for international law.[4] This chapter draws on analysis in the previous chapters to evaluate the

[1] Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243; see also Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, 2018)162.
[2] See chapter one sub-section 1.3.2: see chapter five section 5.4.
[3] Keith Krause, 'Is Human Security "More than Just a Good Idea?"', in M. Brzoska and P. J. Croll (eds), Promoting Security: But how and For Whom? (2004) Contributions to BICC's Ten-year Anniversary Conference BICC brief 30, 44, to Krause, the broad definition of human security where insecurities range from environmental degradation, pollution, homelessness, and unemployment is a loose synonym for "bad things that can happen"; see also MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Indiana University Press, 2006) 237. 47; for more on this see chapter one sub-section 1.3.2.
[4] See, chapter five section 5.2.

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viability of human security acting as a bridge between IHRL and LOS to enhance maritime security operations. In doing so, section 6.1 discusses the common concern for humanity as the basis for integrating IHRL and LOS vis-à-vis maritime security. Section 6.2 analyses the protection of people as the common ground to intersect the rights and security framework through the human security analysis offered in chapter five. Section 6.3 evaluates the relevance of human security to maritime security operations. Section 6.4 contains concluding remarks on the future of human security in international legal analysis.

6.1. A common concern for humanity: Towards human security at sea

The concept of human security rests on the notion that the "protection of people" is a matter of common concern and common responsibility.[5] This common concern for the protection of people promotes cooperation within the international community.[6] With maritime security threats, some States have specific needs or interests that coexist with the interests of other States.[7] However, geographical factors influence States' interests as some States are closer to the threats than others and require stricter security measures in dealing with the same (for example, irregular migration affects Italy and Spain more in Europe because of their proximity to the Mediterranean hotspots).[8] Nonetheless, the cooperative framework creates a mechanism to regulate and limit individual State actions.[9]

The common interest in tackling maritime security challenges places it at the centre of its interrelated dimensions, i.e. national security, marine environment, blue economy, and human security.[10] The positioning of maritime security at the centre continues a state-centred focus as the State remains the referent object, partly due to the state-centrism of international law. Nonetheless, this position is changing as international law's structure expands to fit the common concern for humanity. Justice Weeramantry, in his separate opinion in *Gabcikovo/Nagymaros*, opines that:

[5] Ibid.
[6] Ibid.
[7] Natalie Klein, *Maritime Security and the Law of the Sea'* (Oxford: Oxford University Press, 2012), 18.
[8] Basil Germond, 'The geopolitical dimension of maritime security' (2015) 54 Marine Policy 137, 138.
[9] Sophia Kopela '*Port State Jurisdiction, Extraterritoriality and the protection of Global Common'* (2016) 47 Ocean Development and International Law 89, 108-11; see also Jutta Brunnée, 'Common areas, common heritage, and common concern' In Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds) *Oxford handbook of International environmental law* (Oxford University press, 2007) 566 points out that common concern "signals that State's freedom of action may be subject to limits…".
[10] Christian Bueger, 'What is maritime security?' (2015) 53 Marine Policy 159, 160.

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> we have entered an era of international law in which international law subserves not only the interests of individual States but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.[11]

As a relatively new concept, maritime security was omitted from the text of UNCLOS. However, UNCLOS is conscious of the importance of peace and security at sea. Its preamble points out that the Convention is essential to the "maintenance of peace, justice and progress for all peoples of the world".[12] In other words, UNCLOS, a state-oriented legal instrument, recognises that an essential objective of security is security for all people[13] and includes the protection of human life and sustainable human habitation.[14] The expansion of activities and human presence at sea has led to concern about protecting the "human element".[15] For instance, part of the EU maritime security strategy's guiding principles is the respect for rules and principles under international law, including international human rights law.[16]

Similarly, the AU's AIM 2050 strategy refers to human rights, albeit only for the fight against maritime terrorism, human trafficking and human smuggling.[17] However, unlike the EU Strategy, the AIM strategy explicitly embraces the idea of human security, which places people at the core of its mission and vision.[18] More recently, in reaction to irregular migration, the vast majority of UN member States adopted the Global Compact for Migration (GCM - a non-legally binding document) rooted in the 2030 sustainable development agenda.[19] The GCM is a document that has a strong human dimension as it places individuals at its core.[20] The fact that 152 States out of the 193 UN Member States adopted the GCM shows the paradigm shift from a State securitised approach to a people-centred approach.

Human security is a people-centric approach that does not replace State security but complements both the right and security-based approaches to maritime security. From a legal and operational perspective, both approaches are needed to deal with maritime security challenges. Otherwise, the maritime environment could become a 'safe haven' for offenders

[11] Case concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) [1997] I.C.J. Rep 7, para 118.
[12] UNCLOS first recital of the preamble.
[13] UNCLOS, Preamble, Recital 7; see also UNCLOS Article 121 and Article 146.
[14] UNCLOS, Article 121 and Article 146.
[15] Efthymios Papastavridis, 'Is there a right to be rescued at Sea? A Skeptical view' (2014) 4 QIL 17, 20; see also Seline Trevisanut, 'Is there a right to be rescued at sea? A Constructive View' (2014) 4 QIL 3, 7.
[16] See, chapter one sub-section 1.2.2.
[17] See chapter one, 2050 AIM Strategy para 74.
[18] Ibid para 7.
[19] The GCM was discussed in chapter three (section 3.1 and subsection 3.5.4) and chapter five (subsection 5.3.1 and 5.3.2).
[20] The GCM, para 15.

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and a space where the rights of individuals are not protected.[21] Moreover, legal uncertainties and maritime legal black holes within IHRL and LOS leave some people at sea (particularly on the high sea) vulnerable. In other words, these legal uncertainties deepen the vulnerability of people at sea. Thus, the human security approach can reinforce State obligations under IHRL, and the LOS framework as needed to protect people at sea.[22]

The notion of human security at sea is gradually gaining momentum as an approach that can deal with the root causes of maritime security challenges.[23] In particular, the causes of maritime insecurities such as piracy and irregular migration are both land and sea-based, such as economic, political, environmental, and personal insecurities.[24] These root causes can be addressed when human security is used to plan and implement laws and policies at the national, regional, and global levels. This promotes top-down protection measures with bottom-up empowerment activities to bolster institutional capacities and advance a people-centred, comprehensive, and inclusive approach to maritime security.[25]

6.2 Protection of people: The point of integration

The usefulness of the human security approach starts with a shift in mindset. It creates a common goal of protecting people, which is the basis for integrating IHRL and LOS concerning maritime security operations. The protection of people is central to the human security agenda, which involves freedom from want, fear and indignity, thereby placing individuals at the core of any enforcement operation.[26] Human security also places the individual at the centre of analysis, thus, bringing to light various structural vulnerabilities that threaten the protection of people at sea.[27]

Protection of people at sea is the point of integration between the rights and security-based frameworks. However, protection of people means and looks different in both frameworks. For

[21] *Medvedyev and Others v. France* App no 3394/03 (ECtHR, 29 March 2010) para 81.
[22] See chapter five; for more see Dorothy Estrada-Tanck, *Human Security and Human Rights under International Law: The Protections Offered to Persons Confronting Structural Vulnerability* (Hart Publishing, 2016) 136.
[23] For more see, Kriangsak Kittichaisaree, 'A code of conduct for human and regional security around the South China Sea' (2010) 32(2) Ocean Development & International Law 131,133. See, Andy Thorpe et al., 'Fisheries and failing States: The case of Sierra Leone' (2009) 33(2) Marine Policy 393, 393-400; see also Jason Abbott and Neil Renwick, 'Pirates? Maritime piracy and societal security in Southeast Asia' (1999) 11(1) Pacifica Review: Peace, Security & Global Change 4, 4-24.
[24] Christian Bueger, 'Learning from piracy: future challenges of maritime security governance' (2014) 1 Global Affairs 33, 34.
[25] UNGA, Follow-up to General Assembly resolution 66/290 on Human Security Report of the Secretary-General (23 December 2013) UNGA A/68/685, Para. 3 [hereinafter referred to as 'the 2013 UNGA Report'] 4-11.
[26] Mary Kaldor, *Human Security* (Polity, 2007) 186.
[27] Estrada-Tanck (n 22).

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example, the EU maritime security structure categorises border control management as necessary to protect their citizens, including those within their territory, which might be perceived as beneficial for those within their territory, but this securitisation method creates a danger to irregular migrants beyond the borders (on the high seas). Whilst a rights-based interpretation of protection from an IHRL viewpoint is the protection of all people's rights, which arguably does not contextualise what security from threats looks like for the preservation of rights.[28] Also, the IHRL system lacks the uniformity to bridge the gap in the protection of individual rights. On the other hand, the study on maritime piracy shows that the law of the sea promotes a threat-focused security objective; while this may be necessary to secure the rights of the civilians at sea, it can result in the violation of the rights of the pirates involved. This interpretational issue forms the basis for the friction between maritime enforcement operations and human rights law (as highlighted in chapter two).

At this point, the relevance of human security becomes apparent. As a conceptual and operational tool, human security promotes a uniform understanding of the protection of people, by painting a picture of what the situation is and what the situation should be for the protection of people. This means, regarding the protection of people, human security shows the strengths and weaknesses of both the rights and security frameworks and suggests how to tackle these weaknesses. Thus, beyond embracing the need for both the rights and security-based conception of protection,[29] this thesis illustrates a new aspect of protection: the protection of people from gaps within the law. As an operational tool, human security places the 'protection of people' at the centre of analysis through the fundamental principles: people-centredness, context-specific, comprehensive, and prevention-oriented. These principles help identify the gaps within the law and can also respond to these gaps.

The people-centric principle points out the gaps in the protection of people at sea through a comprehensive and context-specific lens, an examination of various relevant laws vis-à-vis maritime security and operations. The prevention-oriented principle highlights the future challenges affecting people at sea within the relevant legal structures, alongside a focus on addressing the root causes. In chapters one to four, these principles direct the analysis of IHRL, LOS and other relevant laws and policies vis-à-vis maritime security affecting the protection

[28] This is implicit in chapters three and four on irregular migration and piracy at sea respectively, from the IHRL framework, makes no direct reference to security measures.
[29] Ramesh Thakur and Edward Newman, 'Introduction: Non-traditional security in Asia, in Ramesh Thakur and Edward Newman (eds), *Broadening Asia's Security Discourse and Agenda: Political, Social, and Environmental Perspectives* (Tokyo, UN University Press, 2004) 4.

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of people at sea. The policy framework (maritime security strategies) is predominantly state-centric, which causes friction between maritime security operations and IHRL. This friction is furthered by a state-centric interpretation of foundational concepts within international law and the various legal uncertainties affecting the protection of people at sea. A closer view of the legal uncertainties within IHRL and LOS vis-à-vis maritime security and operations leads to the conclusion that the content of the law is arguably the problem – due to the existing maritime legal black holes – causing *de jure* rightlessness and *de facto* non-enforcement. *De jure* rightlessness is a rights-based deficit, while *de facto* non-enforcement is a security-based deficit – both affecting people at sea. Thus, these situations reiterate the hypothesis laid out at the beginning of this thesis that there is a need to integrate both approaches.

Nonetheless, this does not vanquish the maritime legal black holes, and people at sea are still vulnerable to the weaknesses within the law. This thesis has established that the human security approach can neither cover nor vanquish these maritime legal black holes, as they are issues classified as "genuine conflicts"[30] and "non-existent law"[31] that no conflict resolution technique can resolve. An example of genuine conflict is how the interpretation of the obligation to repress piracy under Article 100 UNCLOS and the legal framework for counter-piracy operations seems to be a breach of human rights obligations. Also, the border control management obligations are interpreted to promote mainly a securitised approach to migration which also usually constitutes a breach of human rights obligations. On the other hand, the examples of non-existent rules include the absence of relevant laws to protect people at sea, such as the right to be rescued, the duty to allow disembarkation at sea and the right to disembarkation.

Human security is neither a legal regime nor a recognised conflict resolution technique within international law. Therefore, it cannot produce non-existent rules and resolve genuine conflicts in the traditional forms offered by any conflict resolution techniques. This thesis has argued that these issues mainly affect the protection of people at sea if the *telos* of interpretation by adjudicatory bodies, governments or maritime security operators is state-centric. Therefore, to strengthen the protection of people at sea, the principle of human security offers a people-

[30] Genuine conflict is when the interpretation of a norm constitutes a breach of another norm see, Joost Pauwelyn, *Conflict of Norms in Public International Law* (CUP Cambridge 2003) 272

[31] This is when a relevant law is non-existent such as the right to be rescued, see Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 289

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centric guide to the application of laws and policies, beneficial to States, adjudicatory bodies, maritime security agents, organisations, academics, etc.

In the next section, I give more general human-security based recommendations on maritime security operations.

6.3 Human security approach to maritime security

Maritime security is a multi-dimensional concept, and the referent object is dependent on which aspect of maritime security is adopted in a policy framework. The source of the dissonance between maritime security operations and human rights law arises from the state-centredness of maritime security strategies, with the referent object being either the State or community. State-centredness negatively affects the protection of people at sea, as can be seen from State practice. As such, the impact of human security on maritime security is to influence these foundational state-centric practices by placing the individual as the referent object.

Accordingly, maritime security operations should be conceived and planned from a people-centric perspective. Human security complements and combines security and rights-based approaches to improving maritime security operations. This is revealed through the two main maritime security challenges addressed in this thesis: irregular maritime migration and piracy at sea. These challenges represent the security and rights-based approaches within the maritime security framework. In irregular maritime migration, legal uncertainties mainly constitute maritime legal black holes that cause the *de jure* rightlessness of irregular migrants. Thus, this represents the need for a rights-based approach to protect people at sea. However, the legal uncertainties affecting counter-piracy at sea exemplifies maritime legal black holes as a problem causing *de facto* non-enforcement. This situation requires proactive security measures to protect the lives of civilians at sea. The following section discusses the impact of human security on both the security and rights frameworks.

6.3.1 Security framework: Securitisation to de-securitisation

Securitised issues are challenges perceived as of immediate importance above the conventional political debate.[32] Therefore, securitisation allows the international recognition of the impact of these maritime security threats on economies, livelihoods, and national and international security interests.[33] This international recognition is necessary to combat these security threats.

[32] See chapter one subsection 1.2.2 (ii).
[33] Ibid.

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However, the current securitisation approach is mainly threat-focused which allows States to adopt extra-ordinary measures that cause the violation of human rights obligations at sea.

The securitisation framework is subject to a state-centred agenda, thus can be detrimental to people at sea. This happens when people are the focus of securitisation rather than the threats. For example, irregular maritime migrants are securitised rather than the act of human trafficking or people smuggling. Similarly, for piracy at sea, the pirates are securitised rather than the act of piracy. Thus, the violation of the rights of these individuals is inescapable. These practices result from the interpretation of the laws governing these maritime security challenges. To deal with this, chapter five suggested a restructuring of mindset through people-centric interpretations. The rights of those involved in the security challenges are safeguarded, and the security interest of those not involved are protected through pro-active enforcement operations.[34]

Accordingly, this thesis did not preclude State security or securitisation under the LOS framework but aligned it with IHRL requirements through a human security approach. The placement of human security at the core of maritime security operations allows "de-securitisation" – meaning the aspect of securitisation that pushes States to adopt extra-ordinary measures is put in check by IHRL.[35] Human security causes de-securitisation through the change in mindset from the state-centric securitisation agenda to the original intent of securitisation as a process for engagement, debate, and analysis.[36]

From the operational perspective, Kaldor refers to this process of de-securitisation as "stabilisation", which protects people through stabilisation rather than via military "victory".[37] In other words, the role of the military in a human security operation is to stabilise the situation so that space can be created for a political process.[38] Thus, it is de-securitisation because the conflict is back to the political debate stage. This debate stage allows protection and empowerment, where top-down norms can be adopted through a bottom-up approach to ensure the participation of civil societies, institutions, and affected communities.[39] As such, human

[34] See chapter five subsection 5.3.2.
[35] See chapter one subsection 1.2.2 and chapter two section 2.4.
[36] Ibid.
[37] Mary Kaldor, 'From Just War to Just Peace' in Monica den Boer and Jaap de Wilde (eds.), *The viability of Human Security* (Amsterdam University Press, 2008) 38.
[38] Ibid.
[39] See chapter five subsection 5.3.2.

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security principles promote legitimate, accountable, and proportionate securitisation that prioritises the protection of people at sea.[40]

6.3.2 Rights framework

Beyond the securitisation framework, IHRL is also applicable to maritime security and operations. This thesis challenged the popular opinion that the rights-based framework is the most important since the security framework impedes the protection of people at sea. It observes that the rights-based framework itself contains complexities that impede the achievement of people-centred maritime security operations necessary for protecting people at sea.[41] Thus, the two frameworks are equally relevant. There are two core weaknesses of the IHRL framework vis-à-vis maritime security operations. First, the incoherence in the application of IHRL among its various sub-fields causes gaps in the protection of people at sea. As a result of the lack of uniformity in interpreting the scope of IHRL instruments, there is also vagueness (in terms of application) caused when a maritime security operational mandate does not specify the applicable human rights treaties governing any operational activity.[42] Due to the incoherence, the lack of specificity renders the application of human rights law in maritime security operations ineffective in ensuring the protection of the rights of people at sea. Thus, the friction between maritime security operations and IHRL.

Second, the IHRL framework contains requirements that do not align with the nature and legal framework coordinating maritime security operations.[43] Specifically, it appears that the conduct of maritime security operations can result in a violation of the substantive right to liberty because the security framework does not fulfil the procedural requirements of a lawful deprivation of liberty.[44] A strict interpretation of IHRL at sea could affect the much-needed security framework because it increases *de facto* non-enforcement.[45] As a result, the ECtHR, to an extent, promotes a loose interpretation of IHRL to maritime security operations.[46] Yet, the lack of uniformity in the application and interpretation of IHRL means there is no universally applicable standard for interpreting IHRL at sea. Also, the LOS framework and

[40] Ibid
[41] See chapter two.
[42] Ibid.
[43] See chapter two section 2.3 and chapter four section 4.5.
[44] See chapter two section 2.3.1 and four, section 4.5.3.
[45] Ibid
[46] Ibid see also chapter five section 5.3.1 (c).

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tribunals do not make explicit reference to IHRL – this would have given better insights into the synergy of maritime security operations and IHRL.

One of the key strengths of the human security approach is that it complements international legal frameworks, including IHRL.[47] It supports the relevance of the rights-based framework to maritime security and deals with the insufficiency of the legal framework towards strengthening the protection of people at sea. Human security ensures the protection of people despite the above-mentioned issues by offering clarifications and redefinitions of foundational concepts that promote coherence across the various fields of law (IHRL and LOS). First, it clarifies sovereignty as a right and responsibility – balancing the sovereign rights of the States with their IHRL obligations. Through this clarification, human security redefines the interpretation of jurisdiction from passive to functional towards protecting people at sea. Finally, it redefines the application of IHRL from equality to equity and unity of purpose, which aligns maritime security operations with IHRL and vice-versa.

6.4 Concluding remarks

This thesis deploys a doctrinal methodology with human security as its conceptual framework. It illustrates the relevance of human security to legal analysis despite the criticisms of the approach.[48] The fundamental principles of human security − people-centric, comprehensive, context-specific, and prevention-oriented − were deployed for analysis towards protecting people at sea. Through this, I used human security as a unique conceptual and operational tool to conduct analysis within international legal studies.

The strength of the human security approach is that it is suitable to both a rights and security agenda, and its principles can be operationalised to align policies (maritime security strategies) and maritime security operations with IHRL. As opposed to the general state-centric *status quo* of the maritime security framework, a human security approach is people-focused. Human security brings this into play through its principles, and the end goal is to strengthen the protection of people at sea. The argument made in this thesis is that the introduction of the human security approach at the centre of IHRL, LOS, maritime security strategies and maritime security operations can strengthen the protection of people at sea. This is achievable through a

[47] See, Albrecht et al., 'A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe's Security Capabilities' (15 September 2004) <http://eprints.lse.ac.uk/40209/1/A_human_security_doctrine_for_Europe%28author%29.pdf> accessed 1 November 2021.
[48] See, chapter one sub-section 1.3.2.

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human security analysis on the core sources of the legal uncertainties. The resultant clarifications offer a people-centric understanding of sovereignty, jurisdiction, understanding of human rights obligations and their application at sea. Through this, there is a likelihood of coherence towards protecting people at sea, which is currently lacking.

The methodology deployed in this thesis addresses the central research question by identifying and responding to the structural vulnerabilities necessary to ensure the protection of people at sea through the integration of IHRL and LOS. It also offers recommendations for building an enhanced maritime security framework by combining rights and security-based measures. Although this thesis only focuses on piracy at sea and irregular maritime migration, these recommendations are useful to the maritime security framework as a whole — the human security impact on securitisation and the rights framework forms the backbone for maritime security operations.[49] However, because this thesis does not use empirical methodology, it does not provide in-depth practical solutions to building maritime security strategies for each threat. In other words, it does not detail how to put the words into action for each maritime security challenge. Yet, the human security recommendations provided in this thesis are proposed changes to the foundation of the maritime security framework.

This thesis has successfully laid the foundation for future research (including empirical analysis) that showcases the relevance of human security to other maritime challenges. It presents the possibility for more research to further investigate the 'hidden treasures' embedded in the human security approach both as a conceptual and operational tool.

[49] For example, in the context of illegal fishing, environmental pollution or serious breaches of labour or health and safety rules at sea.

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