

RETHINKING OCEAN EXCLUSIVITY: THE CASE OF HUMAN RIGHTS

NAAMA OMRI & GERSHON HASIN*

ABSTRACT

The vastness of the oceans and the limited abilities, or interests, of participants to exert powers seaward have allowed perpetrators of various criminal activities to evade authorities while conducting unthinkable human rights violations. Ocean 'exclusivity' confines the lawfulness of interventions by other participants to limited exclusions. But such governance promotes the optimum order only if the relevant state is willing and able to prevent severe deprivations of human rights. As the concept of sovereignty has undergone a process of evolution to impose limits on states' discretion in adversely affecting others, ocean exclusivity must be confined to reduce, or even eliminate, severe deprivations of human rights.

This Article proposes that ocean-based exclusivity of states, whether over vessels or spatial areas, must retreat in face of that state's unwillingness or inability to prevent or cure severe deprivations of human rights, in favor of inclusive powers. Using ocean slavery as an example, this Article demonstrates that in applying both the textual-rules-based and the contextual-policy-based modes of decision-making, a participant's decision to intervene to arrest, prevent, and reverse severe deprivations of human rights over the oceans in lieu of another State's exclusivity is

* Naama Omri is a J.S.D. Candidate at Yale Law School and Dr. Gershon Hasin (J.S.D., Yale) is a Visiting Lecturer in Law at Yale Law School. The authors would like to thank Michael Reisman for his meaningful comments and suggestions, as well as the students of the *Law of the Sea* seminar at Yale (Spring 2019, Spring 2022 and Spring 2023). The authors thank Rossella Gabriele for her research assistance and valuable suggestions. All mistakes are our own. © Naama Omri & Gershon Hasin, 2022.

a lawful international policy. This proposed adjustment of the norms will serve as a starting point for the international legal process to reshape ocean exclusivity and human rights in the twenty-first century to attune the Law of the Sea to changing norms and interactions.

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INTRODUCTION

The sheer spatial extent of the high-seas and the limited ability of States to exert jurisdictional powers seaward¹ have allowed perpetrators to evade regulation and commit unthinkable violations of human rights, including enslavement, human trafficking, and murder.² A key element limiting the ability of interested participants to combat severe deprivations of human rights over the oceans is the concept of “exclusivity.” Exclusive state jurisdiction over vessels or parts of the oceans confines the inclusive powers of other participants to intervene in, reverse, or prevent these atrocities. This Article challenges the balance between exclusivity and human rights under modern ocean governance. It suggests that by reshaping the norms governing interventions and limiting state exclusivity, civil society, international organizations, and state actors will be empowered to generate incentives for meaningful action to ameliorate severe deprivations of human rights on the oceans.

Ocean governance developed over the past centuries to provide a balance between inclusive and exclusive rights and obligations of the various participants involved.³ As part of this balance, it provides states with certain exclusive jurisdictions. These include exclusive jurisdiction over vessels as flags-States, or certain exclusive powers within spatial areas, which primarily include the regimes of the territorial sea and contiguous zone, exclusive economic zone, and continental shelf.⁴ These exclusive state

¹ Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569, 595 (2010) (suggesting that the law of the sea developed in accordance with states' technological capabilities to exercise jurisdiction seaward).

² See, e.g., *Human Rights and the Ocean*, OCEAN FOUND., <https://oceanfdn.org/human-rights-and-the-ocean/> [https://perma.cc/84Y3-YGT3] (last visited June 13, 2023); *What We Do*, HUMAN RTS. AT SEA, <https://www.humanrightsatsea.org/> [https://perma.cc/3Y8N-NU23] (last visited June 13, 2023).

³ On the balance between exclusive and inclusive rights over the oceans, see generally MYRES S. McDOUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962) (examining the international interactions that make up the contextual background of the international law of the sea); Gershon Hasin, *Ocean Governance in the 21st Century: A New 'Package-Deal'*, 48 YALE J. INT'L L. (forthcoming 2023) (discussing the balance between inclusive and exclusive rights under the law of the sea).

⁴ U.N. Convention on the Law of the Sea, pts. II, V, VI, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. There are other unique zones of jurisdiction such as archipelagic waters, bays, semi-enclosed seas, enclosed internal waters, and more.

jurisdictions, either over vessels or spatial areas, confine the lawfulness of interventions by participants other than the relevant State to a limited set of exclusions.⁵ As this Article will explain, with respect to human rights protection, exclusivity is an appropriate foundation for ocean governance in the twenty-first century only as far as it is conditioned on the will and ability of the relevant state to prevent and punish severe deprivations of human rights.⁶ If the will or ability are lacking, inclusive powers for other participants must be recognized and applied.

The Law of the Sea evolved to provide for the optimum utilization of ocean resources while accounting for certain elements of environmental protection and human rights.⁷ Even though states have extended certain jurisdictional powers seaward at least as far as 200 nautical-miles from coasts,⁸ and technology allows for more effective exercise of control,⁹ the oceans still provide harbor for severe deprivations of human rights.¹⁰ The Law of the Sea primarily endows participants with rights, while obligations for the benefit of others remain limited.¹¹ This paradigm of “my right—your problem” is changing with the recent COVID-19 pandemic exposing the paradigm’s inherent flaws in a globalized community.¹²

⁵ See *id.* arts. 33, 56, 73, 86-115, 300-301.

⁶ Severe deprivations of human rights refer to situations which led or will necessarily lead to immense suffering, significant loss of life, or disability, such as the abrogation or failure of the State to protect the population from a grave threat. See Naama Omri, *International Social Economic Rights: From Standards of Achievement to Minimum Standard* (2023) (J.S.D. dissertation, Yale Law School) (on file with authors).

⁷ UNCLOS, *supra* note 4, at pt. XII; see e.g., Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT’L L. 399 (1997) (summarizing the aspects of human rights law that intertwine with the Law of the Sea).

⁸ See Posner & Sykes, *supra* note 1, at 584.

⁹ See, e.g., Joel Coito, *Maritime Autonomous Surface Ships*, 97 INT’L L. STUD. 259 (2021) (suggesting that the introduction of unmanned vessels would increase the abilities of the coast guard to fulfil its mandate).

¹⁰ See, e.g., OCEAN FOUNDATION, *supra* note 2; U.N. Secretary-General, *Oceans and the Law of the Sea*, ¶¶ 28-42, U.N. Doc. A/70/74/Add.1 (Sept. 1, 2015); S.C. Res. 2383 (Nov. 7, 2017) (addressing acts of piracy and armed robbery at sea off the coast of Somalia).

¹¹ See Oxman, *supra* note 7, at 405.

¹² See generally Takuma Kayo, *Global Solidarity Is Necessary to End the COVID-19 Pandemic*, 27 ASIA-PACIFIC REV. 46 (2020) (discussing the importance of global solidarity and cooperation in addressing the spread of infectious diseases); E. Donald Elliott & Daniel C. Esty, *The End of Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law*, 29 N.Y.U. ENV’T L.J. 505 (2021)

As climate change and technological innovation are changing the circumstances in which interactions occur, some have questioned whether the current regime is appropriate or will evolve to provide a new balance.¹³ With respect to the balance between ocean rights and sustainable development, one of us recently suggested that “the law of the sea should evolve to include obligations to avoid exploiting exclusive or inclusive rights in ways that produce environmental externalities.”¹⁴ The concept of sovereignty has evolved to include limits on a state’s discretion in severely depriving human rights, or even, to some extent, adversely affecting foreign stakeholders.¹⁵ State discretion over the oceans must therefore be confined in order to reduce, or even eliminate, the

(suggesting that environmental law ought to switch from an economic approach to one that strives to reduce all externalities).

¹³ See NEW KNOWLEDGE AND CHANGING CIRCUMSTANCES IN THE LAW OF THE SEA (Tomas Heidar ed., 2020) (discussing the developments since the Law of the Sea Convention, and the challenges these developments pose to the legal framework); THE LAW OF THE SEA AND CLIMATE CHANGE: SOLUTIONS AND CONSTRAINTS (Elise Johansen, Signe Veierud Busch & Ingvild Ulrikke Jakobsen eds., 2021) (evaluating climate change developments and the relevant laws through a collection of papers); Hasin, *supra* note 3.

¹⁴ Hasin, *supra* note 3 (manuscript at 63) (citing Elliott & Esty, *supra* note 12). In this sense, it is important to take note of the recently finalized text of the High Seas Treaty, otherwise known as the Biodiversity Beyond National Jurisdiction (“BBNJ”). Should the BBNJ be adopted and become law for those states that accede to it, the Conference of the Parties may prescribe area management tools over the high seas by a majority vote. While an objecting state may excuse itself from the accompanying obligations, the procedural obligations employ shaming as a means to control decisions. See Draft Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction art. 19bis, March 4, 2023 (the numbering of the provisions is subject to editing and may likely change). While this arrangement is not perfect, it indicates a recognition that inclusive rights over the high seas should be confined to limit negative externalities on the rest of the international community.

¹⁵ See generally Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013) (discussing the accountability of states to foreign stakeholders in an increasingly interconnected world); International Law Commission, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, art. 2, ¶ 11, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. INT’L L. COMM’N 15, U.N. Sales No. E.04.V.17 (Part 2) (though non-legally binding, the ILC’s draft articles indicate a recognition of the obligation to conduct an environmental impact assessment where there is a risk of transboundary harm. This obligation has been recognized as customary by the International Court of Justice (ICJ) in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2015 I.C.J. 665, ¶¶ 101-05, 146-62 (Dec. 16).

use of exclusivity as a shield against intervention, especially in cases of severe deprivations of human rights. This point bears emphasis.

Unlike the land territory of the state, the oceans are a common area where the exclusivity awarded to the state is based on the fiat of the international community. Within each “zone” of jurisdictional powers extending seaward from coasts, this exclusivity is further balanced with accompanying obligations and the rights of other users.¹⁶ It would be wrong to ascribe the existing governance regime an enduring nature, or to assume that the regime is unable to evolve with changing realities, norms, and values.¹⁷ The balance between exclusivity and inclusivity must adapt to provide for the common interest if the underlying interests and conceptions of the participants change. In other words, the circumstances in which interactions occur include not only the factual realities, such as geographical changes or technological innovation, but also the perceptions of acceptable or tolerable behavior by states and other participants; when social norms change, the law should follow.¹⁸

Buttressed by legally binding dispute settlement mechanisms, the Law of the Sea is truly a legal enclave where the textual-rules-based approach to international decision-making is appropriate.¹⁹ Yet, as a field of law that is sensitive to changes in technology and norms, a contextual-policy-based approach must be taken to ascertain a *lawful* decision by a participant or to determine a necessary adjustment to conform the regime to the common interest.²⁰ Thus, the concept of exclusivity and the policies which elevate it above the interests of other participants are subject to

¹⁶ See, e.g., UNCLOS, *supra* note 4, arts. 19, 58, 59.

¹⁷ See INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 5 (W. Michael Reisman & Andrew R. Willard, eds., 1988); see also Hasin, *supra* note 3. On the evolution of social norms, see Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in SOCIAL NORMS 35 (Michael Hechter & Karl-Dieter Opp eds., 2001).

¹⁸ See INTERNATIONAL INCIDENTS, *supra* note 17; see also Hasin, *supra* note 3; Ellickson, *supra* note 17.

¹⁹ On the textual-rules-based and the contextual-policy-based modes of decision, see W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT ch. 6 (2d ed. 2023).

²⁰ The common interest includes the preservation of minimum order, which refers to the prevention of conflict and the promotion of the optimum order, defined as the aggregated gain in international values for participants. See MYRES MCDUGAL, HAROLD LASSWELL & IVAN VLASIC, LAW AND PUBLIC ORDER IN SPACE 157, 160 (1963); REISMAN, *supra* note 19, at 363-72.

changes in norms. The changing conception of sovereignty,²¹ the importance of environmental protection,²² and our recognition of an interconnected international community, both factually and morally,²³ serve as changing circumstances for the *de facto*—and perhaps even *de jure*—development of the Law of the Sea. As international and domestic norms change, we must reconsider the concept of exclusivity and the ability of states to employ it in ways which produce negative externalities that adversely affect others or provide a shield against foreign interventions.

This Article suggests that state exclusivity, whether over vessels or spatial areas, must retreat in the face of a participant's unwillingness or inability to prevent or cure severe deprivations of human rights. In such cases, exclusivity must yield to inclusive powers for other participants. Where it comes to ocean governance, various transgressions and omissions may produce situations of severe deprivations of human rights, e.g. human trafficking, slavery, refusal to rescue, illegal, unreported, and unregulated fishing, and severe pollution of the marine environment. While it is important to consider each circumstance and the specific balance to be produced through interactions, this Article will focus primarily on the extreme situation of slavery over the oceans as a case study to demonstrate the concept. As the Article explains, our proposed approach may be used to shape the process of claims and counterclaims through which the international legal process will produce a new balance between ocean exclusivity and human rights.

The Article is divided into three parts: Part I considers the balance between the concept of ocean exclusivity and human rights through the lens of policy-oriented jurisprudence; Part II considers the outcomes of breaches of exclusivity to prevent severe deprivations of human rights; and Part III outlines the path through

²¹ See, e.g., Benvenisti, *supra* note 15 (discussing the impact of increasing interdependence between countries on the concept of sovereignty); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009) (introducing a dynamic process in which sovereignty is replaced by a new normative foundation of international law).

²² See, e.g., Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction*, U.N., <https://www.un.org/bbnj/> [<https://perma.cc/A6QK-QGKN>] (visited June 13, 2023); see also Elliot & Esty, *supra* note 12, at 506 (outlining market-based solutions to environmental problems).

²³ See, e.g., Benvenisti, *supra* note 15, at 296 (referencing the reality of the interconnectedness and shared destinies of contemporary sovereigns).

which to shape a new balance between ocean exclusivity and the protection of human rights to promote the common interest.

I. A POLICY-ORIENTED PERSPECTIVE ON THE BALANCE BETWEEN OCEAN EXCLUSIVITY AND HUMAN RIGHTS

International legal scholarship has considered the interrelation between the Law of the Sea and human rights.²⁴ The United Nations Convention on the Law of the Sea (UNCLOS) is the main instrument of ocean governance.²⁵ Although UNCLOS is not a human rights instrument,²⁶ its distribution of ocean rights and jurisdictions produces significant effects on the ability of states and other members of the international community to promote human rights.²⁷ A tension therefore exists between the concept of ocean exclusivity and the promotion of human rights.

The Law of the Sea provides for various regimes distributing inclusive and exclusive rights and obligations between participants which produce effects on the protection of human rights. Because the territorial sea is under the sovereignty of the coastal state, subject only to certain passage rights, this Article will focus on two sets of distributions: first, the flag-state and non-flag states; and second, the powers of a coastal state within its exclusive economic zone (EEZ) and the rights of other users therein. These two distributions provide participants with certain exclusive powers and jurisdictions which, in turn, limit the ability of other participants to ameliorate the effects of severe deprivations of human rights.

Where it comes to the flag-state, the Law of the Sea provides the state with exclusive jurisdiction over the enforcement of laws on-board the vessel, except where it comes to specific domestic laws of

²⁴ See, e.g., Oxman, *supra* note 7, at 400 (gathering human rights experts' opinions regarding the law of the sea); Tafsir Malick Ndiaye, *Human Rights at Sea and the Law of the Sea*, 10 BEIJING L. REV. 261, 262-63 (2019) (examining whether individuals can exercise their human rights at sea, and whether States have the obligation to protect them); Irini Papanicolopulu, *Human Rights and the Law of the Sea*, in 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW 509, 511 (David Attard, Malgosia Fitzmaurice & Norman Martinez eds., 2014) (considering the law of the sea and human rights rules to determine the extent to which human rights are protected at sea).

²⁵ UNCLOS, *supra* note 4.

²⁶ See Oxman, *supra* note 7, at 404 (clarifying that human rights are generally not enforceable by or against individuals under the Convention).

²⁷ *Id.* at 401.

the coastal state within a spatial area.²⁸ While all other states have certain rights to inspect ships suspected of specific crimes in areas beyond the territorial sea of another state, their ability to enforce norms is significantly limited and, in many cases, turns on the enforcement powers of the flag-state.²⁹ The exclusive economic zone provides the coastal state with certain exclusive enforcement powers within the zone and specifically where it comes to fishing and environmental protection.³⁰ Recently, the International Court of Justice emphasized the supremacy of the coastal state's exclusivity within the EEZ over the interests of other states within the zone.³¹

Under the prevailing interpretation of the applicable international rules, exclusivity means, *inter alia*, that other states, i.e. states which are neither the flag-state nor the EEZ- state, possess limited powers to actively capture ships engaged in severe deprivations of human rights, such as enslavement. Warships may board suspected vessels on the high-seas and perhaps within EEZs, but remedies are subject to the jurisdiction of the flag-state and, in some aspects, the EEZ-state. For example, as elaborated below, foreign warships do not, under a strict textual interpretation, have the authority to free the enslaved victims.³² Thus, while UNCLOS is not a human rights instrument, the concept of exclusivity adversely affects the ability to promote human rights by interested participants.

Terms and concepts in long-term treaties, however, may take on a life of their own through their interpretation and application.³³ Evolutionary interpretation risks precipitating uncertainty, but its application ensures that norms intended to govern the long-term relationships of parties remain attuned to modern interactions and circumstances. In the *San Juan River* case, the International Court of Justice instructed that "generic terms" in treaties of continuing

²⁸ See, e.g., UNCLOS, *supra* note 4, arts. 21, 27, 28, 33, 94, 217.

²⁹ *Id.* arts. 58, 99, 108, 110, 220.

³⁰ *Id.* art. 56, pt. XI.

³¹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, Judgment, 2022 I.C.J. 1, 43 (Apr. 21) (emphasizing the exclusivity of the State's jurisdiction over the protection of the marine environment) [hereinafter *Alleged Violations*].

³² See *infra* text accompanying notes 71-87.

³³ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J. 213, 243 (July 13) [hereinafter *Dispute Regarding Navigational Rights*]; W. Michael Reisman, *Negotiating and Maintaining Investment Treaties: Mechanisms for Anticipating and Controlling Textual Drift*, 6 J. INT'L COMPAR. L. 75, 75-76 (2019).

duration must be interpreted in an evolutionary manner, adapted to modern realities.³⁴ Albeit prone to possible misapplication, this method ensures that the treaty continues to provide for effective governance. In certain circumstances:

The interpretation of the treaty must therefore be attuned to the process of interaction between the participants in the changing context. Adopting narrow and literal interpretations of generic terms, which ignore the realities of ongoing interactions, may fail to reflect and give effect to the policy choices of the parties and defeat the treaty's object and purpose.³⁵

Through its process of negotiations and subsequent adoption over four decades ago, UNCLOS established new rules to govern human activity over the oceans as well as codified existing norms, but it neglected to establish laws which would allow states to squash slavery on the oceans. The Convention introduced a regime of enumerated exclusive economic rights and accompanying jurisdiction in parts of the oceans previously constituting the high-seas governed by the regime of the *mare liberum*, or the freedom of the high-seas.³⁶ With respect to piracy, UNCLOS reinforced the norm that held pirates to be *hostis humani generis* and recognized extensive rights of *all* states to confront and eradicate their menace. With respect to slavery, however, and having committed little thought on the matter, UNCLOS failed to recognize the right of states to combat slavers and free any slaves on board such ships.³⁷ Thus, although UNCLOS prohibits the transportation of slaves,³⁸ it relies on the regulation by the flag-state, thus failing to provide the vessels of non-flag-states with operative powers extending beyond mere inspections.

A key element of international law in general, and the Law of the Sea in particular, is regulating the rights and obligations of states to wield their power. States ought to possess the jurisdiction to prevent or eliminate elements which manifestly undermine the ability of all individuals to exercise their most basic rights and liberties. The

³⁴ *Dispute Regarding Navigational Rights*, *supra* note 33, at 243.

³⁵ Gershon Hasin, *Developing a Global Order for Space Resources: A Regime Evolution Approach*, 52 *GEO. J. INT'L L.* 77, 86 (2020).

³⁶ See DONALD ROTHWELL & TIM STEPHENS, *INTERNATIONAL LAW OF THE SEA* 87 (2d ed. 2016); Posner & Sykes, *supra* note 1, at 595.

³⁷ UNCLOS, *supra* note 4, art. 99.

³⁸ *Id.* art. 99.

doctrine of *jus cogens*, though not uncontroversial, prescribes that there are certain peremptory international norms which no state policy or treaty may undermine and whose perpetrators should be outcasted.³⁹ The prohibition against slavery is one of the norms which have attained the status of *jus cogens*.⁴⁰ Slavers are also considered the enemies of all humankind,⁴¹ and the International Court of Justice has declared the obligation to protect from slavery as *erga omnes*.⁴² Yet the Law of the Sea champions exclusivity in this regard, providing for limited jurisdiction and powers for other participants.

Given the changing dynamics and norms, it is suggested that a contextual-policy-based approach to the lawfulness of interventions to reverse and prevent severe deprivation of human rights over the oceans must be preferred over the textual-rules-based approach. As this Section will explain, a modern interpretation of the applicable international rules leads to the conclusion that *all* states possess a wide array of possible lawful actions and, in fact, a duty to intervene and punish those who partake in the violence against, and exploitation of, the victims of slavery on the seas. That is not only the preferred policy but is in fact the *lawful* policy in these circumstances.

³⁹ See BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 581-83 (James Crawford ed., 9th ed. 2019); International Law Commission, Report on the Seventy-First Session, ch. 5, U.N. Doc. A/74/10, <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> [<https://perma.cc/WU7U-6WUM>]; William E. Conklin, *The Peremptory Norms of the International Community*, 23 EUR. J. INT'L L. 837, 837-38 (2012); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 15 (2000); Report of the International Law Commission to the General Assembly, arts. 40-41, U.N. Doc. A/56/10 (2001), reprinted in [2008] 2 Y.B. Int'l L. Comm'n 112-146 [hereinafter ARSIWA with Commentaries].

⁴⁰ Office of the U.N. High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms*, at 3, U.N. Doc. HR/PUB/02/4 (2002).

⁴¹ Joaquín Alcaide Fernández, *Hostes Humani Generis: Pirates, Slavers, and Other Criminals*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 120-44 (Bardo Fassbender & Anne Peters eds., 2012).

⁴² The Barcelona Traction, Light and Power Co, Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, 32 (Feb. 5).

a. Modern Enslavement on Board Fishing Vessels

Modern forms of slavery still occur around the globe, including on the oceans.⁴³ Yet exclusivity, in terms of surrendering the power of enforcement exclusively to the flag-state or EEZ-state, hinders mitigation. Consider the example of the fishing industry:

Due to an increase in the worldwide demand for seafood and a surge in inexpensive aquaculture techniques, labor demands in the industry have risen, and the pressure to drive the costs down has created a demand for inexpensive workers.⁴⁴ These demands have led to reliance on forced slave labor⁴⁵ and illegal and unsustainable fishing techniques.⁴⁶ According to the International Labour Organization (ILO): “[M]igrant workers in particular are vulnerable to being deceived and coerced by brokers and recruitment agencies and forced to work on board vessels under the threat of force or by means of debt bondage.”⁴⁷ Some of the victims of the slave trade are kidnapped on land and taken aboard a ship,⁴⁸ while others are

⁴³ *Forced Labour, Modern Slavery and Human Trafficking*, INT’L LAB. ORG., <https://www.ilo.org/global/topics/forced-labour/lang-en/index.htm> [<https://perma.cc/24VS-ENQM>] (last visited June 13, 2023) (estimating in 2016 that “40.3 million people are in modern slavery, including 24.9 million in forced labour and 15.4 million in forced marriage”).

⁴⁴ SIROJI SORAJJAKOOL, HUMAN TRAFFICKING IN THAILAND: CURRENT ISSUES, TRENDS, AND THE ROLE OF THE THAI GOVERNMENT 45-46 (2014).

⁴⁵ Ian Urbina, *Lawless Ocean: The Link Between Human Rights Abuses and Overfishing*, YALE ENV’T 360 (Nov. 20, 2019), <https://e360.yale.edu/features/lawless-ocean-the-link-between-human-rights-abuses-and-overfishing> [<https://perma.cc/R6NW-5MH9>]; Emanuel Stoakes & Chris Kelly, *Asian Refugee Crisis: Trafficked Migrants Held off Thailand in Vast ‘Camp Boats’*, GUARDIAN (May 28, 2015), <http://www.theguardian.com/global-development/2015/may/28/asian-refugee-crisis-trafficked-migrants-held-off-thailand-camp-boats> [<https://perma.cc/R6NW-5MH9>].

⁴⁶ See *Forced Labour and Human Trafficking in Fisheries*, INT’L LAB. ORG., <https://www.ilo.org/global/topics/forced-labour/policy-areas/fisheries/lang-en/index.htm> [<https://perma.cc/24VS-ENQM>] (visited June 13, 2023) (“Offences include severe cases of illegal fishing, related offences from document fraud, corruption and tax evasion but also human trafficking in the fisheries sector. Fisheries crime threatens marine ecosystems and has consequences for fish stocks. It has an impact on food security and sustainable fishing by coastal communities around the world. It also deeply affects human lives when it entails forced labour of trafficked fishermen.”).

⁴⁷ *Id.*

⁴⁸ Ian Urbina, ‘Sea Slaves’: The Human Misery That Feeds Pets and Livestock, N.Y. TIMES (July 27, 2015), http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?_r=0 [<https://perma.cc/8J7X-V7YX>]; SORAJJAKOOL, *supra* note 44, at 46-47.

recruited through brokers who make false promises regarding labor and pay, but end up selling the workers against their will to forced labor aboard ships.⁴⁹ Victims may be sold from one boat captain to another at the captain's will or transferred from boat to boat so that boats are able to return to port and avoid the risk of victims escaping. Other ships avoid docking as much as possible,⁵⁰ using the services of what are referred to as "mother ships," which are vessels that carry fuel, extra food and supplies, and even workers to slave ships, and carry the catch back from the slave ships to land. Some fishing captains abandon their enslaved workers on what are termed "prison islands," for weeks at a time so that they are able to take their vessels to port and avoid the danger of slaves escaping or being discovered by authorities.⁵¹ The enslaved victims aboard fishing vessels work inhumane hours, eighteen to twenty and even twenty-two-hour shifts in all weather conditions. With only an hour or two a day to rest, the victims are often drugged so that they have the energy to keep working.⁵² Locked up and cramped in tiny rooms with others in brutal living conditions,⁵³ the victims live under the constant threat of violence, drugging, mental abuse, and even murder. Victims are often beaten for the smallest transgressions, such as complaining, working too slowly, or falling ill.⁵⁴

In 2014, *The Guardian* published a series of articles exposing an intricate system of exploitation on board Thai fishing vessels involved in the production of seafood.⁵⁵ The articles detailed how victims of the fishing industry were forced to work, often for many years and often without remuneration, under inhumane conditions, including the constant threat of extreme violence, torture, and even death.⁵⁶ With one of the world's largest fish and seafood industries,

⁴⁹ See SORAJJAKOOL, *supra* note 44, at 46-47; IAN URBINA, *THE OUTLAW OCEAN: JOURNEYS ACROSS THE LAST UNTAMED FRONTIER* 227 (2019).

⁵⁰ SORAJJAKOOL, *supra* note 44, at 48.

⁵¹ Urbina, *supra* note 48.

⁵² SORAJJAKOOL, *supra* note 44, at 50.

⁵³ *Id.* at 46-49.

⁵⁴ Urbina, *supra* note 48.

⁵⁵ See generally *Modern-Day Slavery in Focus + Thailand*, GUARDIAN, <http://www.theguardian.com/global-development/series/modern-day-slavery-in-focus+world/thailand> [<https://perma.cc/MG2E-PU8V>] (last visited June 13, 2023).

⁵⁶ *Id.*; Kate Hondel, Chris Kelly & Felicity Lawrence, *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, GUARDIAN (June 10, 2014), <http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> [<https://perma.cc/W9AD-CBC3>]; Kate

and with approximately 90% of its production exported, Thailand has become one of the world's leading suppliers of seafood.⁵⁷ The fishing sector in Thailand accounts for approximately 24% of the nation's agricultural GDP.⁵⁸

As a result of *The Guardian's* exposé, newly informed consumers and activists put pressure both on importers and on wholesalers of seafood linked to slave labor to identify the suppliers and sever ties with those who are engaging in the exploitation of slaves.⁵⁹ The U.S. government banned imports of any fish caught through forced labor in Southeast Asia, and in February 2016 the National Oceanic and Atmospheric Administration announced the U.S. Seafood Traceability Program plan to improve the tracking of seafood from catch to market.⁶⁰ Thailand was placed on tier 3 in the U.S. Trafficking in Persons Report,⁶¹ the lowest level possible, indicating the belief that Thailand's government does not "fully comply with the TVPA's minimum standards and [is] not making significant efforts to do so."⁶²

The Thai government was issued a "yellow card" from the European Commission, indicating it had evidence that Thailand was not cooperating in the fight against illegal, unreported, or

Hondel, *Slavery and Trafficking Continue in Thai Fishing Industry, Claim Activists*, GUARDIAN (Feb. 24, 2016), <http://www.theguardian.com/global-development/2016/feb/25/slavery-trafficking-thai-fishing-industry-environmental-justice-foundation> [<https://perma.cc/D5DY-3T97>].

⁵⁷ SORAJJAKOOL, *supra* note 44, at 45.

⁵⁸ *Id.*

⁵⁹ *Modern-Day Slavery in Focus + Thailand*, *supra* note 55; Hondel et al, *supra* note 56; Felicity Lawrence, *Costco and CP Foods Face Lawsuit over Alleged Slavery in Prawn Supply Chain*, GUARDIAN (Aug. 19, 2015), <http://www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain> [<https://perma.cc/5WT4-ZQNJ>].

⁶⁰ Oliver Milman, *Obama to Sign Law Banning US Imports of Fish Caught by Slave Labor*, GUARDIAN (Feb. 16, 2016), <http://www.theguardian.com/us-news/2016/feb/16/obama-ban-fish-imports-slavery> [<https://perma.cc/8Y63-HYYM>]; *Federal Agencies Announce Proposal Creating U.S. Seafood Traceability Program*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 4, 2016), <https://www.fisheries.noaa.gov/media-release/federal-agencies-announce-proposal-creating-us-seafood-traceability-program> [<https://perma.cc/M76K-YC4Z>].

⁶¹ U.S. DEP'T. OF STATE, TRAFFICKING IN PERSONS REPORT 330 (2015). It should be noted that the situation in Thailand has improved since then, and Thailand has been since moved to Tier 2.

⁶² *Id.* at 47.

unregulated fishing (IUU).⁶³ However, these regulations are designed to combat unregulated fishing and protect fisheries rather than workers, and they are not concerned with the human trafficking aspect of the problem. Therefore, although the yellow card was lifted in January 2019,⁶⁴ there is no indication that there was in fact improvement with regard to slavery practices on board fishing vessels.⁶⁵

Finally, in response to consumer pressure, as well as to sanctions by the United States and the European Union, Thailand legislated new laws regarding the monitoring and regulation of both illegal fishing and labor laws. Unfortunately, reports by the ILO and Human Rights Watch show that this legislation amounted to little more than a spectacle for the appeasement of the international community.⁶⁶ According to these reports, forced labor and human trafficking practices are still prevalent on board Thai fishing vessels, as is illegal fishing. In January 2018, Human Rights Watch published a report stating that although the Thai government had taken some steps to show that it was attempting to combat forced labor practices, the government “has not taken the steps necessary to end forced labor and other serious abuses on fishing boats.”⁶⁷ As emphasized by Human Rights Watch:

Forced labor in the Thai fishing industry has persisted amid a culture of abuse, even as the government has undertaken high-profile initiatives to clean up the sector and portray a better image internationally. Despite some improvements, the situation has not changed substantially since a large-scale survey of 496 fishers in 2012 found that almost one in five

⁶³ European Commission Memo MEMO/19/201, Questions and Answers - Illegal, Unreported and Unregulated (IUU) Fishing in General and in Thailand (Jan. 8, 2019) (“A fishing vessel is notably presumed to be engaged in illegal, unreported and unregulated fishing activities if it is shown to carry out activities in contravention with the conservation and management measures applicable in the area concerned. This includes, inter alia, fishing without a valid licence, in a closed area, beyond a closed depth or during a closed season, or by using prohibited gear, as well as the failure to fulfil reporting obligations, falsifying its identity, or obstructing the work of inspectors.”).

⁶⁴ European Commission Press Release IP/19/61, Commission Lifts “Yellow Card” from Thailand for its Actions Against Illegal Fishing (Jan. 8, 2019).

⁶⁵ European Commission, *supra* note 63.

⁶⁶ *Hidden Chains: Rights Abuses and Forced Labor in Thailand's Fishing Industry*, HUMAN RIGHTS WATCH (Jan. 23, 2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry> [<https://perma.cc/FSX9-5YCM>].

⁶⁷ *Id.*

“reported working against their will with the menace of a penalty preventing them from leaving.”⁶⁸

As can be understood from the Thai example, governments of states who strongly rely on the fishing industry lack incentives to wage war against slavery since, as human rights activists noted regarding Thailand, their “seafood-export industry would probably collapse without slavery.”⁶⁹ Furthermore, even if governments were truly willing to combat these crimes on their flag ships or within their EEZs, most may still be unable to do so. Regulating the activities aboard fishing vessels is costly and likely a low priority considering the physical distance from coasts. Vessels also have the ability to evade authorities not only by employing a mother ship, as described above, but also by changing the vessel’s name or even flag, and the disposal of evidence is made easier by the isolation and magnitude of the oceans.⁷⁰ The suffering of enslaved victims on board fishing vessels is therefore unlikely to end through efforts by the governments of flag-states or in certain EEZs. These countries are unlikely to exercise their jurisdiction as the flag-states or within their maritime zones in a manner which can facilitate the eradication of slavery on the oceans, not to mention the exacerbation of the problem in situations where the flag-state is in fact a flag-of-convenience state.

As the following Section explains, under the current Law of the Sea, the flag or EEZ-state’s respective exclusive jurisdictions would serve as a shield against interventions by other participants, thus blocking possible efforts to cure and prevent these severe deprivations of human rights. This exemplifies the challenge posed by ocean exclusivity to the achievement of a global order based on human dignity in the twenty-first century.

b. Ocean Slavery Under UNCLOS

UNCLOS fails to define the concept of slavery for purposes of the Law of the Sea. The Proelss *Commentary* recently suggested that the meaning of slavery for purposes of UNCLOS can be found in the

⁶⁸ *Id.*

⁶⁹ Hondel et al., *supra* note 56.

⁷⁰ Kyralai Duppel, *The Intersection of Labor Abuses and Environmental Degradation in the Global Fishing Industry: Extent and Potential Solutions* 29 (Jun. 13, 2022) (B.S. honors thesis, University of California, Berkeley).

1926 Slavery Convention,⁷¹ which provides that “[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁷² Since the definition of slavery as ownership is complicated in modern times, in which there can be no legal ownership of persons, a revised understanding of what it means to own a person for the purposes of the definition of slavery is required.⁷³

Leading scholars have suggested that the power attached to ownership, for purposes of the definition of slavery, includes the de facto situation of a person being held under the control of another in a manner which is equivalent to legal ownership.⁷⁴ As such, the main indicator would be the presence of significant control over a person’s body, freedom of movement, the selling and buying of persons against their will, or forced labor, especially under physical coercion or threat of violence. The transgressions on fishing vessels described above, which include the complete restriction of freedom of movement, selling persons from ship to ship, torture, murder, physical punishment, withholding of wages, and debt bondage,⁷⁵ all fit comfortably under this definition of slavery.⁷⁶

UNCLOS stipulates the duty of the flag-state to prevent slave trade and delineates the measures at the disposal of a non-flag state vessel wishing to intervene.⁷⁷ Per UNCLOS Article 99, the primary duty is imposed on the flag-state to prevent the slave trade, requiring the flag-state to take measures to both prevent and punish those who participate in the transgressions: “Every State shall take

⁷¹ ALEXANDER PROELSS, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 732 (2017).

⁷² Convention to Suppress the Slave Trade and Slavery art. 1(1), Sept. 25, 1926, 60 L.N.T.S. 253. Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, repeats this definition verbatim; Article 7(2)(c) of the Rome Statute repeats this definition, and includes human trafficking under this definition.

⁷³ See generally Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239 (2009) (analyzing the imprecise definition of slavery under international law).

⁷⁴ See Jean Allain & Robin Hickey, *Property and the Definition of Slavery*, 61 INT’L & COMPAR. L. Q. 915, 928-29, 936 (2012).

⁷⁵ See generally Douglas Macfarlane, *The Slave Trade and the Right of Visit Under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand*, 7 ASIAN J. INT’L L. 94 (2015) (describing the conditions of fishermen in New Zealand and Thailand as amounting to slavery). Specifically regarding debt bondage, see PROELSS, *supra* note 71, at 732.

⁷⁶ Macfarlane, *supra* note 75, at 113.

⁷⁷ UNCLOS, *supra* note 4, arts. 99, 110.

effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag”⁷⁸ Yet the open-ended language of this provision leaves the specifics of the measures to the discretion of each state and to its domestic law.⁷⁹ Although states are required to prevent their flag ships from participating in slave trade and to punish such transgressions, UNCLOS fails to provide enforcement measures against slavery for foreign vessels. Under certain conditions, warships of non-flag states are limited to inspecting a ship they suspect of participating in the slave trade, and they lack a clear mandate to confiscate the vessels, arrest the perpetrators, or, critically, to free the victims.⁸⁰ Thus, under a strict reading of the Convention, slavery, and all the human rights implications it includes, is subject to the exclusive jurisdiction of the flag-state.

Unfortunately, imposing a duty on the flag-state proves to be, at best, an insufficient tool for two reasons. First, flag-states of slave ships are usually unable or unwilling to fulfill such a duty, as explained above. For instance, in 2015, the Thai government failed to identify even one case of forced labor onboard fishing vessels, though it had reportedly conducted inspections of 474,334 fishery workers. In fact, although UNCLOS requires a genuine link between the ship and its flag-state, the infamous “flags of convenience” are precisely used to avoid regulations. Second, some of these ships are flagless, and so there is no flag-state that has a duty to take measures to prevent and punish the perpetrators.

As mentioned above, UNCLOS provides the warships of non-flag-states a right to visit another ship if it is suspected of various transgressions, including participation in slavery. However, this power is quite limited in its effectiveness. Under the Convention, a warship that encounters a foreign ship is justified in boarding this ship when there is a “reasonable ground for suspecting that . . . the ship is engaged in the slave trade.”⁸¹ In such cases:

[T]he warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further

⁷⁸ *Id.* art. 99.

⁷⁹ PROELSS, *supra* note 71, at 733.

⁸⁰ UNCLOS, *supra* note 4, art. 110.

⁸¹ *Id.* art. 110.

examination on board the ship, which must be carried out with all possible consideration.⁸²

The conditions to be extracted from this Article are: (1) only warships have a mandate to act in any capacity; (2) warships may only act in cases where they have reasonable grounds to suspect that the ship is engaged in slave trade; and (3) if both of these conditions are fulfilled, the warship is limited to: (a) verifying a ship's right to fly its flag; and (b) examination of the ship.

On its face, no further actions in violation of the flag-state's exclusivity may be undertaken, even in cases where it is discovered that a ship is carrying slaves.⁸³ As Jean Allain notes, the authority inspecting the ship

[o]nce on board the . . . ship . . . holds no right beyond the confirmation of the nationality of the ship: no right to search the ship for slaves, no right to ascertain if individuals on board are enslaved; or even, witnessing individuals chained to the afterdeck, to free those individuals . . .⁸⁴

Under such interpretation, persons enslaved and held against their will on board fishing vessels are thus left with little hope of salvation. As for the possibility of intervention by warships of non-flag-states, even if they had the motivation to intervene, the actions they could legally take under this interpretation would offer no relief.

With respect to the EEZ, per UNCLOS Article 58(2), the provisions on slavery continue to apply as part of the rights of other states within the zone. UNCLOS Article 73, however, outlines the powers of the EEZ-state to enforce its exclusivity over the exploitation of living resources:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with

⁸² *Id.* art. 110(2).

⁸³ JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 73 (2013)73.

⁸⁴ *Id.*

the laws and regulations adopted by it in conformity with this Convention.⁸⁵

Slavery on fishing vessels would fall under these exclusive jurisdictions of the coastal state. The interrelation of this power with the inclusive powers to combat slavery within the EEZ is unclear. In light of the International Court of Justice's recent decision in *Alleged Violations*, however, one may assume that the coastal state's power in this regard is in fact exclusive.⁸⁶ Thus, ostensibly the EEZ-state's exclusive enforcement power would preclude the implementation of inclusive powers by other participants to combat ocean slavery.

Therefore, de jure, UNCLOS limits the inclusive enforcement powers of naval states in favor of the exclusivity of the flag-state and the EEZ-state. It is clear that such balance between inclusive and exclusive rights, which denies foreign warships the right to free the slaves, is at odds with basic moral norms and human rights. Such a rule hardly predicates the achievement of a global order of human dignity which is defined as "one which approximates the optimum access by all human beings to all things they cherish."⁸⁷ Given that slavery is prohibited as a violation of *jus cogens*, considered a crime against humanity, and its validity is rejected under UNCLOS, adhering to this outdated balance between exclusive and inclusive rights is unjustifiable. As is further explained below, taken as a whole, an evolutionary interpretation of the Law of the Sea would shift the balance towards increased inclusive powers to confront these severe deprivations of human rights.

c. Slavers at Sea: A Purposeful Evolutionary Interpretation

Michael Reisman explains the two modes of international decision-making: textual-rules-based and contextual-policy-based.⁸⁸ The first "requires the persons applying it to approach the issues before them through the prism of rules."⁸⁹ In this mode, a valid decision "is 'legal' to the extent that it identifies and correctly applies the relevant rules and is consistent with prior decisions that applied

⁸⁵ UNCLOS, *supra* note 4, art. 73(1).

⁸⁶ See *Alleged Violations*, *supra* note 31, and accompanying text.

⁸⁷ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 576 (2007).

⁸⁸ REISMAN, *supra* note 19, at 169.

⁸⁹ *Id.*

those rules.”⁹⁰ Such an approach is more appropriate when operating within what Reisman calls “legal enclaves,” in which a third-party decisionmaker may in fact decide the legality of a decision through the application of rules, as would a court.⁹¹ UNCLOS may in fact constitute such an enclave. But one must not disregard the second mode of decision-making, especially when norms are changing and the prospects of a state claiming before a tribunal that another state has breached its rights by ameliorating severe deprivations of human rights are in fact slim.⁹² As for the contextual-policy-based mode of decision, Reisman explains that:

The contextual-policy-based mode of decision, by contrast, requires decision-makers to approach the issues before them through the prism of policy and the contexts in which the values of that policy are produced and distributed. Rather than the question as to which rules apply, the questions underlying the contextual-policy-based decision-making are [(1)] what ought to be the goal values of the community with respect to the values concerned; [(2)] which practicable arrangements will most efficiently optimize the production and distribution of those goal values in short-term and longer-term projected contexts; and [(3)] how can those arrangements be installed.⁹³

It is accepted that, as a treaty providing for extensive, though not all-encompassing, dispute settlement mechanisms, there is merit in considering the rules specified under UNCLOS from a textual

⁹⁰ *Id.* at 170-71.

⁹¹ *Id.* at 30-33.

⁹² *See infra* Part II.

⁹³ REISMAN, *supra* note 19, at 171. Reisman adds that:

The tasks involved in answering these questions include, at a minimum, (1) the clarification and specification of community policy; (2) the examination of the extent to which that policy is currently being achieved in ways compatible with other relevant policies; (3) the identification of the factors that account for achieving or failing to achieve the policies; (4) the extent to which existing arrangements are likely to realize the policies in various imagined futures; and, if the prognosis is that the policies are unlikely to be secured, (5) the invention of alternative arrangements which are more likely to realize the policies. Instead of compliance with rules, the decision-maker operating in this mode is concerned with assessing the production and distribution of values in preferred ways.

Id. at 127.

perspective. The examination of the text and its interpretation must, however, be approached while accounting for the common interest:

The examination of rules and authoritative texts are not excluded from the scope of the contextual-policy-based mode of decision. Rules in extant legal arrangements will be examined, but rather than the grammatical and syntactical examination of the textual-rule-based mode, the rules are now considered in terms of the extent to which the social and economic consequences of their application will approximate the value goals of the relevant community.⁹⁴

Applying an evolutionary and context-based interpretation to UNCLOS demonstrates that recourse is available to those inclined to confront slavery over the oceans. UNCLOS provides two sets of powers which may be interpreted to apply to the case of slavery: the duty to render assistance, and the obligation to combat piracy. While the former is more intuitive, the latter attunes outdated distinctions to modern situations.

i. The Duty to Render Assistance Provides Powers to Reverse Severe Deprivations of Human Rights

This Section explains that, even assuming that the duty to render assistance was originally conceived as a duty which would apply to maritime accidents, its interpretation within a modern context should extend its application to severe deprivations of human rights. Specifically, it is submitted that the concept of “persons in distress,” along with the rights and obligations such a definition entails, must be subject to evolutionary interpretation and applied to persons suffering severe deprivations of human rights. Taken together with the right to visit, this interpretation would, for instance, provide an interested state’s warship with the power to fulfil a moral obligation to intervene and free slaves irrespective of any exclusive rights of another state.

UNCLOS Article 98(1), titled “Duty to render assistance,” mandates that each state require the master of any ship, including a warship, 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

⁹⁴ *Id.* at 172.

action may reasonably be expected of him.”⁹⁵ One may dispute whether the term “distress” was intended to apply to persons held against their will on board a ship in the maritime context. But what constitutes distress at sea is subject to evolutionary interpretation attuned not only to modern realities, but also normative aspects such as moral convictions. Such interpretation would be consistent with the Vienna Convention on the Laws of Treaties (VCLT), which provides that an interpretation must take into account “any relevant rules of international law applicable in the relations between the parties,” including the *jus cogens* prohibition on slavery.⁹⁶

The Maritime Search and Rescue Convention defines “distress phase” as a “situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.”⁹⁷ The concept of distress at sea has been argued to extend to migrants at sea, including conditions on board the vessels carrying them.⁹⁸ As early as 2002, the United Nations High Commissioner for Refugees (UNHCR) explained that “[t]his obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved,”⁹⁹ explaining that the obligations must extend beyond mere rescue to “delivery to a place of safety,” and even to preventive measures.¹⁰⁰ As the UNHCR report explained:

⁹⁵ UNCLOS, *supra* note 4, art. 98(1).

⁹⁶ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁹⁷ International Convention on Maritime Search and Rescue, chs. 1, 1.3., 1.1, Apr. 27, 1979, 1405 U.N.T.S. 119.

⁹⁸ See, e.g., *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea*, U.N. HIGH COMM’R FOR REFUGEES (Mar. 18, 2002), <https://www.unhcr.org/3e5f35e94.pdf> [https://perma.cc/AF2F-CEPH] [hereinafter UNHCR, *Background Note*]; *Med: A Distress Call for Human Rights as More People Die at Sea*, EUR. COUNCIL ON REFUGEES & EXILES, (Mar. 19, 2021), <https://ecre.org/med-a-distress-call-for-human-rights-as-more-people-die-at-sea/> [https://perma.cc/J3WC-UTD8]; Seline Trevisanut, *Is There a Right to Be Rescued at Sea? A Constructive View*, 4 QIL 3, 11-12 (2014); Patricia Vella De Fremeaux & Felicity G. Attard, *Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Part II Committee?*, OPINIOJURIS (Mar. 3, 2021), <http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-part-ii-committee/> [https://perma.cc/Z7VB-Q4US]; Marion MacGregor, *Sea Rescue - What the Law Says*, INFOMIGRANTS (Dec. 4, 2019), <https://www.infomigrants.net/en/post/21314/sea-rescue--what-the-law-says> [https://perma.cc/E2CU-L5MF].

⁹⁹ See UNHCR, *Background Note*, *supra* note 98, ¶ 5.

¹⁰⁰ *Id.* ¶ 12.

The international community as a whole has a responsibility in terms of developing appropriate responsibility-sharing mechanisms involving States and other actors in order to ensure appropriate responses to the array of scenarios involving migrants, asylum-seekers, refugees and others facing difficulties at sea. Responsibilities assumed by the international community extend not only to response measures but also include preventative actions.¹⁰¹

While the report focused on “migrants, asylum-seekers, [and] refugees,” it recognized that it applies to “others facing difficulties at sea.”¹⁰² The High Commissioner then added that:

From UNHCR’s perspective, the pressing humanitarian challenge in any rescue situation is *to ensure an immediate life-saving solution for the plight of severely traumatised persons, without an over-emphasis on legal and practical barriers*. It is crucial that ship masters are actively facilitated in their efforts to save lives, confident that safe and timely disembarkation will be guaranteed.¹⁰³

From a human rights perspective, it is important to both expand the concept of “persons in distress” at sea to cover “severely traumatised persons,” and ensure the ability to remedy the situation “without an over-emphasis on legal and practical barriers.”¹⁰⁴ It is only natural to apply this reasoning to persons enslaved on the oceans and to reconsider the degree to which exclusivity under the Law of the Sea imposes any legal or practical barrier upon effective measures to alleviate the situation.

A warship wishing to provide assistance in the situation of slavery can find justification for doing so in Article 98(1). Furthermore, Article 110 confers on warships a “right to visit,” i.e. to board and inspect, ships suspected of some international wrongdoings, including participation in the slave trade. So long as the crew of the warship has “reasonable ground for suspicion” that the ship to be inspected is involved in the slave trade, it would be justified in boarding. Once on board the suspected ship, and having discovered persons in “grave and imminent danger [that] require[]

¹⁰¹ *Id.* ¶ 10.

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 15 (emphasis added).

¹⁰⁴ *Id.*

immediate assistance,"¹⁰⁵ the inspecting crew would have a duty to intervene. A more careful phrasing is that the inspecting crew's flag-state is responsible to obligate the crew to provide assistance, but the message is the same.

Thus, in the modern context, an evolving interpretation of UNCLOS Articles 98 and 110 provides warships with a right as well as a duty to use necessary means, including the use of force, to board, inspect, and free slaves held on board ships. As such, the exclusivity of the flag-state, and where applicable a coastal state, must give way to the inclusive obligation to confront these severe deprivations of human rights. While the flag-states may have certain interests protected by exclusivity, there can no legitimate interest to perpetuate a situation in breach of *jus cogens* norms. Thus, the flag-state's "interest" with respect to its inclusivity must retreat in face of the interest of the international community to eradicate situations of severe deprivations of human rights. As further elaborated below, a reliance upon exclusivity in this regard will, in fact, constitute an abuse of rights.¹⁰⁶

To be sure, the exclusivity of the coastal state within its EEZ should also give way to the interest of the international community to confront severe deprivations of human rights. As explained above, UNCLOS Article 73 provides the EEZ-state with exclusive enforcement powers over the exploitation of living resources in the EEZ. Yet a claim that this exclusive enforcement power precludes the ability of other participants to free victims may be deemed an abuse of rights.¹⁰⁷ Where it comes to the exclusivity of the EEZ-state, it is important to remember that UNCLOS recognizes that the regime of the EEZ is that of enumerated rights, providing for a balance between the coastal state and other states where the convention does not specifically attribute rights and jurisdictions:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the

¹⁰⁵ International Convention on Maritime Search and Rescue, *supra* note 97.

¹⁰⁶ UNCLOS, *supra* note 4, art. 300 ("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.").

¹⁰⁷ *Id.* art. 300.

light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.¹⁰⁸

UNCLOS Article 59 thus inserts the interests of the international community as a whole into the equation between the coastal state and other states.¹⁰⁹ As slavery is not specifically included in Article 73, it may be argued that a purposeful interpretation would subject the power to free slaves to Article 59's balancing, thus ostensibly granting it to other states rather than subjecting it to the exclusivity of the EEZ-state. In any event, it is difficult to accept a public order in which exclusive economic rights are utilized to preclude internationally beneficial policies which eradicate severe deprivations of human rights.

ii. Slavery on Board Fishing Vessels as Piracy Under UNCLOS

An evolutionary interpretation of UNCLOS extends the inclusive powers to combat pirates to acts of slavery, thus not only providing the foreign warship with rights, but also imposing a duty to board the vessel and free those enslaved. Recall, contextual-policy-based decision-making is appropriate when considering the lawfulness of interventions to ameliorate and cure severe deprivations of human rights over the oceans, and specifically slavery. When it comes to modern acts of slavery, as explained below, there is merit in extending the rules applicable to piracy to govern such situations. Yet, given that UNCLOS is what can be called a legal enclave within international law, after explaining the application of evolutionary interpretation to the provision governing piracy, this Section considers a potential textual-rules-based limitation to the lawfulness of interventions in the form of the purported two-ship requirement under UNCLOS.

Long before UNCLOS, pirates were a major focus of international regulation, regarded as enemies of humankind. States were recognized as having the inherent right to arrest and punish pirates. Before the notions of war crimes and crimes against

¹⁰⁸ *Id.* art. 59.

¹⁰⁹ Some argue that this provision provides for a rebuttable presumption in favor of the coastal state for economic interests, and others suggest a rebuttable presumption in favor of other states. PROELSS, *supra* note 71, at 463.

humanity were ever envisioned in the minds of international policymakers and scholars, pirates were the subject of universal jurisdiction by states.¹¹⁰ On the high seas, nations have long combatted pirates, including through the exercise of force. UNCLOS subsequently provided all states with a broad mandate to repress piracy, including through seizure. Under the Law of the Sea, the eradication of piracy, incumbent on all states, is an inclusive power, or even obligation, which transcends exclusivity. In other words, the balance provided under the Law of the Sea is that the exclusivity provided by the flag or EEZ regime may not exclude the application of inclusive powers to combat piracy by an interested state.

The concept of piracy and the subsequent scope of these powers must be attuned to the changing realities, social norms, and the interactions between participants. In *San Juan River*, the ICJ instructed that where it comes to generic terms in long-term treaties, an evolutionary, rather than a static, interpretation of international law is appropriate.¹¹¹ Thus, in addition to applying the rules of interpretation under the VCLT, the interpreter must account for the changing context when interpreting the scope of piracy in a long-term treaty such as UNCLOS. This context includes the complexity of the international community. As Michael Reisman pointed out:

[N]o matter how skillfully the rhetoric of legal grandeur is deployed, both the content and procedures of legal arrangements in complex societies (and bear in mind that the world community is *the* complex society) are inherently volatile, even when they seek to express and implement an interest common to all participants.¹¹²

Therefore, “the *content* of both constitutive and specific arrangements is constantly under political stress to change, and that change in the context of the arrangements will be registered in

¹¹⁰ The Constitution of the United States, for example, provides that Congress shall have the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” an exercise of extraterritorial jurisdiction against crimes committed by pirates. U.S. CONST. art. I, § 8.

¹¹¹ *Dispute Regarding Navigational Rights*, *supra* note 33, ¶ 66 (“[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”).

¹¹² REISMAN, *supra* note 19, at 87.

adjustments in the content and procedures of those arrangements.”¹¹³ As mentioned above, the interpreter must consider other rules of international law applicable between the parties,¹¹⁴ which must include the customary *jus cogens* prohibitions on slavery. All this, while considering that as a long-term treaty, the provision of UNCLOS must be presumed to have an evolving meaning.

While piracy has a common meaning, influenced, in part, by its memorialization in popular culture, it may in fact be treated as a generic term, which has undergone a constant evolution in light of changing realities.¹¹⁵ The transgressions described above of modern slavery on fishing vessels can arguably fit better under the umbrella of piracy than of the slave trade. Those endeavoring to enslave the victims on fishing vessels are not seeking to merely use their ships to transport the victims to sovereign land where they will be traded and enslaved. Rather, the acts are conducted as the—for lack of better term—“regular course of business” for the slavers for financial gains. They benefit from the forced labor of the victims, rather than the trade.

It is no surprise, therefore, that in applying these rules of interpretation, in order to achieve the object and purpose of UNCLOS’s prohibition on slavery and a public order based on human dignity, UNCLOS Article 101 reads applicable to instances of enslavement on the oceans. This provision provides a general and workable interpretation of piracy, as far as international law is concerned, which has been accepted as a statement of customary international law:

Piracy consists of any of the following acts:

- (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:

¹¹³ W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 33, 38 (Tomer Broude & Shany Yuval eds., 2008).

¹¹⁴ See generally VCLT, *supra* note 96 (outlining the international legal rules on treaty interpretation).

¹¹⁵ LASSA OPPENHEIM, 1 *INTERNATIONAL LAW* 608-09 (Hersch Lauterpacht ed., 8th ed. 1955).

- (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[.]¹¹⁶

This definition of piracy is not only applicable to state actions over the high seas, but also within the EEZs of other states. The definition of piracy refrains from limiting its applicability to “this article” or “part,” indicating it is a definition of general application,¹¹⁷ and is thus applicable for all states within EEZs through the operation of Article 58(2). The provision delineates the scope of the term “piracy,” clarifying which actions trigger the application of the rights and duties of states and their vessels to respond, as stipulated in the relevant subsequent Articles 100 through 110.¹¹⁸ In other words, it provides for situations in which these inclusive powers supersede any otherwise applicable exclusive rights.

This Article suggests that the transgressions committed by slavers, and perhaps even perpetrators of other severe deprivations of human rights, fit neatly within the confines of Article 101. To recall, under the VCLT, a provision in a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹⁹ It does not have to be the original meaning. The legislative history is only a secondary, supplemental means of interpretation, which becomes relevant if the ordinary meaning “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”¹²⁰ Thus, even if originally the provision was not intended to combat slavers, the ordinary meaning of Article 101, taken within the modern context and the object and purpose of these powers, lends itself to this interpretation. Slavers commit illegal acts, which include both violence and detention of the victims, and they are committed on the

¹¹⁶ UNCLOS, *supra* note 4, art. 101.

¹¹⁷ PROELSS, *supra* note 71, at 738-39.

¹¹⁸ *Id.*

¹¹⁹ VCLT, *supra* note 96, art. 31, ¶ 1.

¹²⁰ *Id.* arts. 31-32.

high seas or EEZ,¹²¹ either against persons on board another ship¹²² or on against persons on the same ship, and are committed for private ends (i.e. securing a profit). The alternative in Article 101(a)(ii) is especially pertinent as it includes under the definition of piracy such acts of violence “against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.” Although the flag ship is under the “exclusive jurisdiction” of the flag-state,¹²³ attaching such jurisdiction, which is detailed in Article 94 (e.g. administrative, technical, social, safety, etc.), with the exclusion of inclusive powers to combat severe deprivations of human rights, would ascribe it a character inappropriate to the modern conception of sovereignty. Furthermore, a proper interpretation must consider, at least, the provision as a whole. Treating the exclusion in Article 101(a)(ii)—“a place outside the jurisdiction of any State”—as referring to a physical vessel produces an absurd result: “against a ship, aircraft, persons or property [on a ship.]”¹²⁴ As acts of violence against a ship or aircraft on a ship is senseless, such an interpretation produces an absurd result. As further elaborated below, considering the context of the provision provides additional support to the interpretation that the exclusion, “a place outside the jurisdiction of any State” refers to a spatial location rather than the ship itself. To recall, while the territorial sea is under the sovereignty of the coastal state, the EEZ is merely a set of enumerated sovereign rights and thus, strictly speaking, not a spatial area under the jurisdiction of the state.

The prevailing interpretation of Article 101, however, reads into it a two-ship requirement.¹²⁵ Scholars exclude from the definition of piracy “acts of violence or detention, or any act of depredation, committed for private ends,” which would otherwise be considered piracy, if they are directed at the crew or passengers of the same ship as those committing the illegal acts of violence, detention, or depredation. As explained below, such an interpretation is unconvincing and the purported two-ship requirement is an

¹²¹ Art. 58(2) applies the Article to activities conducted the exclusive economic zone (EEZ). Acts committed in the territorial waters of Thailand or other states are not included in this article. This will be further elaborated below. See URBINA, *supra* note 49, at 227-69.

¹²² *Id.*

¹²³ UNCLOS, *supra* note 4, art. 92(1).

¹²⁴ *Id.* art. 101.

¹²⁵ See, e.g., KEYUAN ZOU, THE INTERNATIONAL LAW OF THE SEA IN THE 21ST CENTURY: STATE PRACTICE IN EAST ASIA 136-40 (2022).

outdated and mistaken misconception and should not limit the application of the provision. An evolutionary interpretation of the provision in the modern context would extend these inclusive powers to cover severe deprivations of human rights.

*1. Extending the Inclusive Powers to Combat Piracy to
Ameliorating Severe Deprivations of Human Rights*

Approaching the legality of interventions from a contextual-policy-based mode of decision-making leads to evaluating the applicable rules in terms of “the extent to which the social and economic consequences of their application . . . will approximate the value goals of the relevant community,”¹²⁶ which include, at their core, the amelioration of severe deprivations of human rights.¹²⁷ As this Section demonstrates, severe deprivations of human rights, and specifically, slavery, fulfil the conditions of UNCLOS Article 101, thus permitting interested participants to exercise inclusive powers to prevent and reverse such instances. Given the evolution of other international rules and the impermissibility of such behavior as enslavement, there is no justification to interpret the modern Law of the Sea as excluding powers to combat these instances. If anything, the historical context supports the proposition that slavery, and perhaps other instances of severe deprivations of human rights, may be included under the definition of piracy under UNCLOS, legitimizing inclusive powers irrespective of exclusivity.

In 1811, Sir William Scott of the British High Court of Admiralty considered the case of the seizure of *le Louis*, a French vessel, which the British Admiralty Court of Sierra Leone found had been fitted for the transferring of slaves. *Le Louis* resisted capture and “piratically killed” eight of the crew members of a British cruiser in the process of resisting capture. Scott found, *inter alia*, that slave trade was not the same as piracy. One of the reasons given by Scott for this holding was that it was not the law of nations that slave trade was a form of piracy.¹²⁸ It is important to recall that slavery was not

¹²⁶ REISMAN, *supra* note 19, at 172.

¹²⁷ The prevention and reversal of severe deprivations of human rights fit neatly into what the New Haven School would define as the minimum order of the world community. Omri, *supra* note 6, ch. 2.

¹²⁸ JOHN DODSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ADMIRALTY COMMENCING WITH THE JUDGMENTS OF THE RIGHT HON. SIR WILLIAM SCOTT, TRINITY TERM 1811, 201-64 (London, A. Strahan 1815).

outlawed by all nations at the time of *le Louis*, and therefore Scott found that the prohibition on slavery was not the law of nations.¹²⁹ Yet as much as Scott was justified in his holding, the law of nations has since developed, and slave trade and the slave related activities have been labelled *jus cogens* violations, thus obviating Scott's reasoning.

The proposition of extending the powers to combat piracy to include other transgressions is not entirely new. In 1925, the British government proposed to the League of Nations, in a suggested convention, a provision that

[t]he act of conveying slaves on the high sea shall be deemed to be an act of piracy, and the public ships of the signatory powers shall have the same rights in relation to the vessels and persons engaged in such act as over vessels and persons engaged in piracy.¹³⁰

This was met with strong opposition and did not come to fruition. Although also heavily opposed and unsuccessful, the British Government presented a draft convention in 1954 suggesting supplementing the 1926 Convention by declaring slave trading on the high seas to be a "crime similar to piracy in international law," subject to the same enforcement powers. This is an interesting statement. The inclusive powers to combat and eradicate piracy were recognized due to the specific characterization of the crime of piracy and the classification of the perpetrators as *hostis humani generis*. As such, at least for the British government, "similar" crimes by arguably "similar" perpetrators may legitimize similar inclusive enforcement powers. Such an approach is sensible, reaching back to the rationale of these inclusive powers, extending them to cover other violations which affect our morality and undermine the interests of the international community.

Support for the fact that enslavement fits neatly into the definition of piracy can also be found in the Harvard Research in International Law and the Comment to the Draft (Harvard Comment). This document was heavily relied upon by J.P.A. Francois, the special rapporteur for the International Law

¹²⁹ *Id.*

¹³⁰ Louis B. Sohn, *Peace Time Use of Force on the High Seas*, in 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 38, 50 (Horace B. Robertson Jr. ed., 1991).

Commission, in preparing the articles on piracy.¹³¹ Article 3 of the Harvard Comment states that:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state: 1. Any act of violence or of depredation committed with the intent to rob, rape, wound, *enslave*, imprison or kill a person with the intent to steal or destroy property, for private ends without *bona fide* purpose of asserting a claim of right, provided that act is connected with an attack on or from the sea or in or from the air.¹³²

This statement indicates that what one might think of as the traditional concept of piracy is, in fact, inaccurate, as it included several additional scenarios and actions. In fact, it may indicate that the inclusive powers to combat piracy were originally conceived as powers to combat what may be treated today as severe deprivations of human rights.

There is room to interpret the definition of piracy under UNCLOS more broadly¹³³ so as to include the transgressions of slavers, producing a broadening of the concept simply by changing our conceptions of slavers. The fact that the concept of piracy has changed is a natural consequence of the passage of time.¹³⁴ The geopolitical map has changed, with many small and often failing states added, which are not always able to police their flagged ships or their maritime zones. Technologies have advanced and so have the capabilities of pirates and of the seafarers, arguably contributing to the proliferation of maritime crime.¹³⁵ The common

¹³¹ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 277 (1988).

¹³² Penny Campbell, *A Modern History of the International Legal Definition of Piracy*, in *PIRACY AND MARITIME CRIME: HISTORICAL AND MODERN CASE STUDIES* 19, 24 (Bruce A. Ellerman, Andrew Forbes & David Rosenberg eds., 2010) (emphasis added) (referring to the Harvard Research in International Law and the Comment to the Draft) (emphasis added).

¹³³ It is beyond the scope of this Article to examine alternative definitions of piracy, such as those that may be found in domestic laws of states.

¹³⁴ For an account of the ways piracy practices have changed, see generally Simon Barker, *International Maritime Piracy: An Old Profession That Is Capable of New Tricks, but Change Is Possible*, 46 CASE W. RESRV. J. INT'L L. 387 (2014) (describing the ways piracy practices have developed over the years and the legal instruments available to address them).

¹³⁵ See, e.g., Somalia: Security Council Adopts Resolution to Keep Pirates at Bay, U.N. NEWS (Dec. 3, 2021), <https://news.un.org/en/story/2021/12/1107192> [<https://perma.cc/T6NL-6W8P>].

understanding of the rules and regulations governing the slave trade in UNCLOS is outdated, and the transgressions committed by slavers, including widespread violence, torture, and murder should be understood as piratical acts under the UNCLOS definition.

Thus far, slavers have not been treated as pirates under UNCLOS, perhaps due to the fact that the common conception of “classic” piracy includes robbery. But in recent years it has become clear that piratical actions can take different forms. For example, there is a proliferation of scholarship debating the justifications and the practicality of defining terrorist acts at sea as piracy.¹³⁶ With respect to terrorist activities, Guilfoyle explained that:

Historically, there has been some difficulty in defining the terms ‘pirate’ and ‘terrorist.’ They are both quintessentially words that stigmatise someone as other: a violent, outlaw actor who seeks to impinge upon states’ legitimate monopoly over violence. As a matter of legal usage, the controversial relationship between piracy and terrorism springs from three words in the modern definition of piracy, which requires that piracy on the high seas must involve an act ‘for private ends’ . . . This immediately suggests a distinction between piratical acts and some other class of public or political acts.¹³⁷

It appears that such a broadening is more contentious than expanding the scope of the state’s inclusive powers to include the eradication of slavery and the liberation of those enslaved. Yet as Sir Hersch Lauterpacht’s edition of *Oppenheim* explained: “[t]here is substance in the view that, by continuous usage, the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed.”¹³⁸ These words, written as early as 1955, are extremely relevant to piracy today, and specifically to the situation of enslavement and violence on board fishing vessels.

If we accept that the characterization of perpetrators as *hostis humani generis* justifies the extension of inclusive enforcement powers, then the only remaining question concerns the spatial extent

¹³⁶ See, e.g., Halberstam, *supra* note 131, at 276.

¹³⁷ Douglas Guilfoyle, *Piracy and Terrorism*, in *THE LAW AND PRACTICE OF PIRACY AT SEA: EUROPEAN AND INTERNATIONAL PERSPECTIVES* 33, 33 (Panos Koutrakos & Achilles Skordas eds., 2014).

¹³⁸ OPPENHEIM, *supra* note 115, at 562-63.

of such powers – that is, where they may be exercised. The Harvard Comment suggests that it was originally limited to “a place not within the territorial jurisdiction of any state,” or “a place outside the jurisdiction of any State” per UNCLOS. As explained above, treating this exclusion as applicable to a vessel produces an absurd result. In addition, considering the context of the provision as a reference to territorial jurisdiction in the Harvard Comment supports the interpretation that the exclusion, “a place outside the jurisdiction of any State,” refers to a spatial location rather than the ship itself. Recall, while the territorial sea is under state sovereignty, and thus reasonably excluded, the exclusive economic zone is merely a set of enumerated sovereign rights primarily concerned with natural resources; it is a place where the provisions on piracy extend to all other users through the operation of UNCLOS Article 58. For the purpose of piracy, a flagged ship and the EEZ may arguably be “a place outside the jurisdiction of any State.”

It is hardly justified to allow exclusivity to shield severe deprivations of human rights from inclusive powers by those interested in protecting them. Subjecting acts of slavery, for instance, to the balance of powers underlying piracy would provide the international community with important tools to eradicate these severe deprivations of human rights. Such an interpretation is consistent with a key principle behind the provisions regarding piracy which is the safety of persons on the high seas.¹³⁹ Where there is no possibility of protection by the flag-state, implementing these provisions in order to mitigate severe deprivations of human rights on the high seas and within EEZs is a requisite expansion of the concept of piracy in the twenty-first century. Thus, applying the rules on piracy to the transgressions of slavers would grant states the legitimacy necessary to fight these horrors on the oceans. It would provide any state with the jurisdiction to not only board ships suspected of slavery, but also allow the freeing of the victims and punishment of the perpetrators. Treating acts of slavery as those constituting piracy and thus engaging the same obligations and powers is textually sound and would facilitate the achievement of a global order of human dignity.

¹³⁹ See PROELSS, *supra* note 71, at 734-35.

2. *The Outdated Two-Ship Requirement*

As explained above, from a contextual-policy-based perspective, treating the acts of slavers as those of pirates would be justified, in part because it would be consistent with the goals of the international community. Yet, as UNCLOS provides for a comprehensive regime of global governance with legally binding dispute settlement, it is important to consider whether, from a textual-rules-based perspective, UNCLOS excludes the lawfulness of interventions in severe deprivations of human rights through the powers to combat piracy. We, however, recognize that given modern interactions, it is highly unlikely that a state would lay a claim for a breach of its rights when another power frees those enslaved. Nevertheless, it is important to show that, even from a textual-rules-based mode of decision, there is no exclusion preventing interventions.

As noted above, many scholars read a two-ship requirement into UNCLOS Article 101. If accepted, such a condition could seemingly frustrate any attempt to include cases of enslavement on fishing vessels as falling under the inclusive powers to combat piracy if they do not involve two ships. But the two-ship requirement is unsupported by the definition of piracy under the convention, thus contradicting the rules of treaty interpretation. It is both inconsistent with the ordinary meaning of the terms in their context and the object and purpose of the articles dealing with piracy. Even if the provision was deemed ambiguous, an exploration of the *travaux préparatoires* reveals that the two-ship requirement is an unjustified limitation on otherwise purpose oriented inclusive powers.

The two-ship requirement is deduced by scholars from subparagraph (i) of Article 101(a), identical to Article 15 of the 1958 Convention on the High Seas,¹⁴⁰ which defines piracy, *inter alia*, as an act which is committed “[o]n the high seas, against another ship . . . or against persons or property on board such ship”¹⁴¹ To be clear, pirates should be considered pirates even if they are only in preparation of committing piratical acts. Thus, in certain instances of ocean enslavement, detailed above, the two-ship requirement would be fulfilled. For instance, it is met through the fact that in order to avoid docking, a fishing ship remains on the high-seas,

¹⁴⁰ United Nations Convention on the High Seas art. 15, Apr. 29, 1958, 450 U.N.T.S. 11.

¹⁴¹ *Id.*

while a mothership carries fuel, supplies, and workers. At such a time, the victims can be seen as the passengers of the mothership,¹⁴² and once transferred to the fishing vessel, acts of violence and detention are committed against them, fulfilling this condition.¹⁴³ The same logic can be applied to cases where victims are sold and transferred by the captains from one boat to another, even if the acts of violence would be committed later.¹⁴⁴

Not all cases, however, involve such transfers. Some fishing boat owners elect to abandon their victims on islands while venturing to port and picking them up afterwards. Some victims remain on board the ship for years, never being transferred to another vessel, while others die aboard the ship from disease, accidents, or murder. Although such cases are excluded from the application of Article 101(a)(i), the two-ship requirement does not appear in the alternative subparagraph (ii) which prescribes that piracy includes acts which are committed "against a ship, aircraft, persons or property in a place outside the jurisdiction of any State." Unfortunately, this is not the interpretation commonly given to this condition.

Scholarship has been consistent in subjecting the rules governing piracy to the two-ship requirement.¹⁴⁵ Most such assertions are unaccompanied by reference to Article 101(a)(ii), thus disregarding a clear alternative situation in which the inclusive powers apply. Yoshafumi Tanaka states, without providing further explanation or reference, that "piracy involves two ships or aircraft."¹⁴⁶ Similarly, Malvina Halberstam declares, without justification, that UNCLOS defines piracy "as an act committed 'for private ends' by 'one ship against another.'"¹⁴⁷ Others have recognized the implications of the

¹⁴² See Urbina, *supra* note 48.

¹⁴³ See Barker, *supra* note 134 (arguing that "armed robbers operating on small boats in coastal waters are not pirates in the strict legal sense of the term. However, when these same attackers are backed by larger 'mother ships' that can extend operations out into the high seas, the crews on the smaller boats can be legitimately regarded as pirates").

¹⁴⁴ Urbina, *supra* note 48.

¹⁴⁵ See, e.g., Barker, *supra* note 134, at 392 ("Under this Article, the High Seas Convention contains a requirement that at least two vessels be involved to qualify as an act of piracy: a pirate ship and a victim ship. Hijacking a ship that you are on board is not an act of international piracy, nor is any act of violence by a mutinous crew against its own vessel.").

¹⁴⁶ YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 381 (2d ed. 2015).

¹⁴⁷ See Halberstam, *supra* note 131, at 290.

alternative in Article 101(a)(ii) but excluded it for various, unconvincing reasons.

Samuel Menefee acknowledges that there can be room for the argument that “Article 101(a)(ii) states merely that the crime be against ‘a ship, aircraft, persons or property’ (no mention of ‘another’) if the location is ‘outside the jurisdiction of any State,’” and since the high seas is a place outside the jurisdiction of any state, “the presence of two vessels for a piracy to occur is unnecessary.”¹⁴⁸ However, Menefee writes the argument off as a result of “poor drafting,” arguing that “one clause emphasi[zes] the location, and the other the target of attack.”¹⁴⁹ Lawrence Azubuike excluded this rule because the ship is “always under the jurisdiction of the flag State” and “any act or offense committed on board a ship is subject to the domestic laws of the flag State.”¹⁵⁰ As mentioned above, however, treating the exclusion as referring to a vessel as physical location leads to absurdity.¹⁵¹ José Luis Jesus, although believing that the two-ship requirement is undesirable, dismissed the possibility of including acts of piracy involving only one vessel arguing that the Article concerns acts which occur in places “considered as terra nullius,” which is an obsolete term.¹⁵² Jesus explains the wording of the Article:

This wording, which was inspired by Article 3 of the Harvard Research Draft Convention on Piracy, refers, as explained by the comments thereto, to acts committed in a place which is not owned by any country It is impossible today to find a piece of land on earth that is not claimed by a nation.¹⁵³

Therefore, Jesus concluded that “this provision serves no useful purpose today. It is fair to say, especially having in mind the *travaux préparatoires*, that the piracy definition does not and was not supposed to contemplate the one-ship situation.”¹⁵⁴ Such analysis,

¹⁴⁸ Samuel Pyeatt Menefee, *Foreign Naval Intervention in Cases of Piracy: Problems and Strategies*, 14 INT'L J. MARINE & COASTAL L. 353, 358 (1999).

¹⁴⁹ *Id.*

¹⁵⁰ Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMPAR. L. 43, 53 (2009).

¹⁵¹ See discussion *supra* Section I.c.ii.

¹⁵² José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 377 (2003).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

however, treats the legislative history as a primary rather than a supplementary means of interpretation. Furthermore, such proposition mistakenly treats the EEZ as a place *owned* by the state.

The prevailing, though not singular,¹⁵⁵ interpretation seems to be that there is a two-ship requirement for piracy to apply.¹⁵⁶ However, since most proponents of the two-ship requirement seem to disregard the existence of Article 101(a)(ii) in their analysis, it is difficult to see how their interpretation takes into account the context or the treaty as a whole. Moreover, disregarding a treaty provision, or voiding it of meaning, is *prima facie* not in accordance with the ordinary meaning of the terms of the treaty and undermines the principle of *effet utile*. Even assuming, *arguendo*, that the original intention of the drafters was to impose a two-ship condition, or if the drafters did not intend the provision to apply to instances of slavery, the intention of the drafters is only a secondary means of interpretation when the ordinary meaning is obscure or leads to a result which is manifestly absurd.¹⁵⁷ The provision is neither obscure nor does extending the provision to cover severe deprivations of human rights on one vessel leads to an absurd result.

When it comes to the Law of the Sea and UNCLOS, ambiguity, wrongfully perceived as poor drafting, is a technique employed to delineate substantive rules that require development through practice. Manafee's contention that the two-ship requirement ought to be imported into the provision because it was poorly drafted contradicts the ordinary meaning; it plainly rejects it and thus has no legal force. In fact, "poor drafting" may indicate an intentional obscurity allowing for disputes in the application of a rule and its adjustment to changing circumstances.¹⁵⁸ For instance, besides piracy, the ambiguous regime of islands found in Article 121(3) has

¹⁵⁵ See, e.g., Jesus, *supra* note 152, at 376; Gerald P. McGinley, *The Achille Lauro Affair - Implications for International Law*, 52 TENN. L. REV. 691, 697 (1985); Janin Viviane Ahnefeld, *The International Fight Against Modern-Day Piracy - Are the Legal Regulations Enough?* 21-22 (2011) (Small master's thesis, University of Tromsø), <https://munin.uit.no/bitstream/handle/10037/3891/thesis.pdf>.

¹⁵⁶ 141Diana Chang, *Piracy Laws and the Effective Prosecution of Pirates*, 33 B.C. INT'L & COMPAR. L. REV. 273, 275 (2010).

¹⁵⁷ VCLT, *supra* note 96, art. 32.

¹⁵⁸ On disputes as application of the law, see Monika Hakimi, *Constructing an International Community*, 111 AM. J. INT'L L. 317, 317 (2017) ("[C]onflict, especially conflict that manifests in law, is not necessarily corrosive to an international community. To the contrary, it often is a unifying force that helps constitute and fortify the community and support the governance project.").

been labelled a result of poor drafting,¹⁵⁹ but it should be viewed as a tactic to allow state practice to develop the rule's application through claims and counterclaims.

The authoritative *Virginia Commentary* acknowledges that the International Law Commission (ILC) "did not view internal seizures of a ship as piracy." However, the *Commentary*, in reading Article 101(a)(ii), concludes that

under Article 101, subparagraph (a)(ii), attacks against 'a' ship or aircraft in a place outside the jurisdiction of any state fall within the definition of piracy. Thus, challenges by a ship's crew against its own master - acts that can be considered mutiny under municipal law - may fall within the Convention's definition of piracy.¹⁶⁰

The Proelss *Commentary* states that "[g]iven the failure to refer to 'another ship' (as in Art. 101(a)(i)), it is conceivable that this provision could bring within the definition of piracy a mutiny of the crew against the master of a vessel in such a place."¹⁶¹ Although Proelss suggests that the provision is most probably intended to include acts in which the offenders descend upon a *terra nullius* island, referred to in the article as "outside the jurisdiction of any State," the *Commentary* leaves open the possibility of considering attacks committed with the involvement of only one vessel. It is worth noting that Proelss seems only deterred by the concept of the jurisdiction of the flag-state and the question of whether attacks committed on board a vessel can be considered "outside the jurisdiction of any State." It would therefore be reasonable to determine that, at the bare minimum, transgressions committed on flagless vessels can be defined as piracy without contention. As explained above, the provision naturally refers to a spatial location rather than an inanimate object. If the term "place" is interpreted to refer to a spatial area, then only the territorial sea may be considered under the jurisdiction of the state. Finally, it is important to note that the discussion around the two-ship requirement seems to envision the case of mutiny, rather than the crimes of slavers. The latter are

¹⁵⁹ See, e.g., ROBIN CHURCHILL & VAUGHN LOWE, *THE LAW OF THE SEA* 41-42 (2nd ed. 1988); R.W. Smith, *The Effect of Extended Maritime Jurisdiction*, in *THE 1982 CONVENTION ON THE LAW OF THE SEA* 345 (Albert W. Koers & Bernard H. Oxman eds., 1984).

¹⁶⁰ 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 201 (Myron H. Nordquist ed., 1985).

¹⁶¹ PROELSS, *supra* note 71, at 742.

arguably more suitable to be included under the definition of pirates.

It should also be noted that the purported two-ship requirement was not customary international law before the 1958 Convention on the High Seas or before UNCLOS. In 1955, immediately prior to the adoption of Article 15 of the Convention on the High Seas, Sir Hersch Lauterpacht rejected the two-ship requirement when he described the definition of piracy which would reflect all cases considered as piracy in the international community:

Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorised acts of violence, such as murder of persons on board the attacked vessel, or the destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical. Therefore several writers, correctly, it is believed, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. However, no unanimity exists among them concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.¹⁶²

This comment may also support the proposition that the term “place” ought to be interpreted in reference to a spatial location rather than a means of transportation, i.e., a ship.

¹⁶² OPPENHEIM, *supra* note 115, at 608-09.

As this Part explained, from both the textual-rules-based and the contextual-policy-based modes of decision-making, employing the inclusive powers to combat piracy to ameliorate enslavement would be a *lawful* policy. This is so because an evolutionary interpretation of the provisions governing piracy under UNCLOS must extend these inclusive powers to encompass slavery, and perhaps other severe deprivations of human rights. The text of UNCLOS not only permits such interpretation, but its legislative history supports it. As interpretation must consider the entire context comprising the text, including its preamble, it is justified to note that the UNCLOS Preamble states the following:

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the 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, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.¹⁶³

Though this is a broad statement which does not give specific guidance as to the interpretation of Article 101, it seems important to mention that at the very least, an interpretation concerned with ending the enslavement and slave related activities is in line with the goal of strengthening peace and security and would be in conformity with principles of justice and equal rights. Effectively combatting slavery and other severe deprivations of human rights would promote all of these principles and ideas.

Yet, even if through the application of a strict textual-rules-based mode of decision, such policy could be considered unlawful, as the following Part will explain, it would not constitute an internationally wrongful act by the state.

II. BREACHING EXCLUSIVITY AND INTERNATIONALLY WRONGFUL ACTS

The extension of inclusive powers to combat severe deprivations of human rights is further supported by the fact that a failure to respect exclusivity in this regard would not be deemed an

¹⁶³ UNCLOS, *supra* note 4, pmb1.

internationally wrongful act. In fact, international law prevents exclusivity from shielding those committing severe deprivations of human rights because intervention is unlikely to amount to an internationally wrongful act or produce any ramifications on the inter-state level. In these instances it would be far more important to consider the potential responses of other participants rather than whether a rule was purportedly breached.¹⁶⁴ These facts must be taken into account by policymakers when deciding whether an intervention in severe deprivations of human rights on the oceans would be an *unlawful* or *lawful* decision from a policy-oriented perspective.¹⁶⁵

Under the rules of state responsibility, a warship exercising its right to visit and subsequently releasing the enslaved would not be committing an internationally wrongful act. As mentioned above, warships have the right to visit a ship suspected of slavery. Therefore, the only acts which may then be claimed to breach the warship's state's international obligations would be the freeing of the slaves or punishment of the perpetrators. While punishing the offenders and thus preventing recurrence is desirable, the more pertinent act from a human rights perspective is freeing the victims. Although such acts by a warship would be attributed to the state, it would not entail the state's responsibility under a plausible application of international law. Thus, even if not through a literal interpretation of the applicable rules, in practical terms, exclusivity gives way to the prevention and reversal of severe deprivations of human rights through rules governing state responsibility.

International rules governing the responsibility of states for internationally wrongful acts were codified by the International Law Commission in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Some of these articles have been recognized to reflect customary international law.¹⁶⁶ The

¹⁶⁴ See W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1, 4, 17 (1984) (contrasting the approach of lawyers with the realities of international incidents as norm generators).

¹⁶⁵ See REISMAN, *supra* note 19, ch. 1.

¹⁶⁶ See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2022 I.C.J. 116, ¶ 70 (Feb. 9). The presumption that the Articles on State Responsibility were intended to be strict rules reflecting customary law is disputed. See W. Michael Reisman & Mahnoush H. Arsanjani, *Has Attribution Lost Its Way* (unpublished manuscript) (on file with authors) (disputing the presumption that the Articles on State Responsibility were intended to be strict rules reflecting customary law).

attribution of the acts of the warship to the flag-state is straightforward based on Articles 4, 5, and 8 of the ARSIWA. Namely, the warship, as part of the navy, is an organ of the state; the warship and its crew exercise elements of governmental authority when exercising the right to visit and releasing the victims; and the conduct of its navy and personnel is under the direct control of the state.

Assume, *arguendo*, that the act of releasing the slaves “constitute[s] a breach of an international obligation of the State” to respect the jurisdiction of the flag-state or the EEZ-state.¹⁶⁷ Three interconnected questions arise for State responsibility: first, whether the flag-state or the EEZ-state may be deemed an injured state; second, whether wrongfulness is precluded under these circumstances; and third, whether any ramifications of a breach may ensue. On close examination, nothing supports the proposition that, from a practical perspective, exclusivity precludes interested participants from releasing those enslaved. The question of arresting and punishing the perpetrators is left open, but the same reasoning may be applied.

a. Neither the EEZ-State nor the Flag-State Is an Injured Party

States possess various instruments at their disposal to respond to the actions of other states when they are deemed to violate an international obligation owed to them. Whether through dispute resolution or countermeasures, for a state to lawfully take action, it must be deemed to be an “injured” state. ARSIWA Article 42, entitled “Invocation of responsibility by an injured State,” found in Part III, which concerns the implementation of the international responsibility of a State, provides that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

¹⁶⁷ ARSIWA with Commentaries, *supra* note 39, art. 2(b).

- (i) specially affects that State; or
- (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.¹⁶⁸

Per the ILC's Commentary, this provision does not apply to mere protest but to an entitlement to take actions under international law such as dispute resolution or countermeasures.¹⁶⁹

While, in a strict sense, a violation of a state's exclusivity under UNCLOS may count as "a breach of an international obligation" owed to that state by all other states,¹⁷⁰ it is highly questionable whether the state is truly injured by the act of remedying severe deprivations of human rights such as releasing the slaves. In considering the application of the rule, several elements must be considered.

Per the Convention, the only potential infringement is the act of freeing the enslaved persons. Yet under UNCLOS Article 99, "[a]ny slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free."¹⁷¹ As the enslaved person is *ipso facto* free, the act of freeing that person may not be deemed a violation against the flag- or EEZ-state. In other words, the flag- or EEZ-state has no right to

¹⁶⁸ *Id.* art. 42.

¹⁶⁹ *Id.* art. 42, ¶ 2 ("This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures.").

¹⁷⁰ The ICJ recognized an obligation to respect the exclusivity of the EEZ-state. See *Alleged Violations*, *supra* note 31, ¶ 101 (finding that Colombia violated its international obligation to respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels).

¹⁷¹ UNCLOS, *supra* note 4, art. 99.

hold the person enslaved. But in any event, from a functional perspective, claiming that the state's *exclusivity* is breached by the act of freeing the person would be an abuse of rights. Per UNCLOS Article 300: "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."¹⁷² It is difficult to imagine a more abusive use of exclusivity than to claim that the mere usurpation of jurisdiction in this regard causes injury. Whether proof of damages is required or not,¹⁷³ a state has no right to keep persons enslaved and has the obligation to punish the perpetrators.¹⁷⁴ The violation here, therefore, even if one exists, would be merely procedural. This is especially true when the act is limited to freeing those enslaved without persecuting the perpetrators.

Neither the flag- nor the EEZ-state should be deemed to have suffered an injury and thus entitled to exercise measures. This discussion, of course, is merely theoretical, since it is difficult to imagine a state claiming that by freeing enslaved persons, another state has caused it injury.¹⁷⁵ While slavery is a clear example, the same logic will reasonably apply to other possible instances of severe deprivations of human rights. From a substance perspective, raising a claim of breach of exclusivity against an act confronting severe deprivations of human rights would constitute an abuse of rights.

b. Wrongfulness Is Excluded

Even if a state were to claim that acts against slavers or other perpetrators of severe deprivations of human rights in its EEZ or on board ships flying its flag were in breach of its exclusivity, the wrongfulness of such acts would be excluded under international

¹⁷² *Id.* art. 300.

¹⁷³ ARSIWA with Commentaries, *supra* note 39, art. 2, ¶ 9 ("It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, 'damage' to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect.").

¹⁷⁴ UNCLOS, *supra* note 4, art. 99.

¹⁷⁵ Not to mention if an obligation to prove damage is deemed to be included in the primary obligation.

law. Chapter V of the ARSIWA considers the circumstances precluding wrongfulness. As explained below, while Article 24, entitled "Distress," may be construed to apply, Article 25, titled "Necessity," clearly applies and precludes any wrongfulness.

Once the slave ship has been lawfully boarded by the naval forces of another state, it is reasonable and consistent with the objectives of UNCLOS to assume that the life of the slave is entrusted to the care of the officers. Such conclusion subjects any claim of wrongfulness to the exclusion found in ARSIWA Article 24, which provides that:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has *no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.*
2. Paragraph 1 does not apply if:
 - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The act in question is likely to create a comparable or greater peril.¹⁷⁶

The objective of this exclusion of responsibility has been explained by the ILC in its *Commentary*:

Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. *The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life.* Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril. Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. *The interest concerned*

¹⁷⁶ ARSIWA with Commentaries, *supra* note 39, art. 24 (emphasis added).

*is the immediate one of saving people's lives, irrespective of their nationality.*¹⁷⁷

The situations to which the defense of distress is applicable must be distinguished from necessity and require a “special relationship” to exist between the state official and the persons in danger. As the ILC further explains:

Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists *a special relationship between the State organ or agent and the persons in danger*. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.¹⁷⁸

Although some may question whether there exists such a “special relationship” between a slave and a naval officer which possesses the ability to free the victim from bondage, this Article suggests that it is the appropriate interpretation. Considering the circumstances and the context, it is reasonable to recognize the applicability of this provision to situations involving slavery and perhaps to other instances of severe deprivation of human rights.

First, there is little doubt that the enslaved person is in distress and that bondage presents a grave, imminent, and likely unavoidable danger to the victim's life. Second, the provision applies to saving the life of any person when such a “special relationship” exists, regardless of nationality. Third, in such circumstances, the only reasonable way to save the slave from an imminent threat to life is to free the victim; any further moment in bondage may be their last. Finally, considering the circumstances of a naval officer discovering an enslaved person aboard a vessel, it is fair to assume that this constitutes a “special relationship,” placing the victim's life in the hands and at the mercy of the foreign officer. The exclusions in Article 24(2) of the ARSIWA are unlikely to apply to such cases.

Nevertheless, even if one were to determine that a “special relationship” in accordance with Article 24 does not exist, the ILC refers the situation to Article 25, which necessarily applies. Article 25 of the ARSIWA provides for the general exclusion of necessity:

¹⁷⁷ *Id.* art. 24, ¶ 1 (emphasis added).

¹⁷⁸ *Id.* art. 24, ¶ 7 (emphasis added).

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) *Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*

(b) *Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.¹⁷⁹

The provision requires that for a claim of necessity to be raised, the act in question—in our case the freeing of slaves—must be “the only way for the State to safeguard an essential interest against a grave and imminent peril; and . . . not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.” The provision, in essence, requires balancing the exclusivity of the state with the interests protected through the exercise of powers to protect persons subjected to severe deprivation of human rights. Recognizing an inclusive power to protect such persons would be consistent with the rationale of necessity, i.e. that the state’s interest in preserving its exclusivity in this regard is outweighed by the interest of the international community in exercising such inclusive powers.

Freeing of victims from the hands of slavers fits neatly into the requirements of necessity and thus indicates the proper balance between exclusivity and inclusive protection powers. As explained above, slavers are *hostis humani generis*, the prohibition of slavery is a *jus cogens* norm, and the eradication of slavery is an essential interest of all nations. It would be reasonable to conclude that, having boarded a slave ship, releasing persons otherwise subject to what has been recognized as a crime against humanity by the Rome

¹⁷⁹ *Id.* art. 25 (emphasis added).

Statute,¹⁸⁰ from the hands of those deemed enemies of humankind, would “safeguard an essential interest against a grave and imminent peril.” The eradication of slavery, as well as piracy, torture, mass murder, and other severe deprivations of human rights, are essential interests of all nations to which exclusivity must give way.

With respect to the second condition, while such actions could arguably intrude upon the jurisdiction of the flag- or EEZ-state, they would hardly “impair an essential interest” of such states or “the international community as a whole.” On the contrary, as mentioned above, all states are obligated to prevent and punish slavery and recognize the *ipso facto* freedom of any slave. To recall, since the right to visit has been lawfully exercised, there is no interest of the flag-state or the EEZ-state to preclude freeing slaves. Were it claimed that the flag-state has an essential interest in regulating criminal activity aboard ships flying its flag, there is nothing to preclude the flag-state from prosecuting the slavers; the release of the victims does not preempt the criminal jurisdiction of the flag- or EEZ-state. From the perspective of the international community as a whole, the achievement of the global order of human dignity entails the eradication of atrocities such as slavery. Targeting these *hostis humani generis* and freeing their victims promotes the interests of the international community and the common interest.

Yet even with respect to the persecution of the perpetrators, it may be argued that the purported usurpation of such jurisdiction produces limited, if any, adverse effects on the other state. Such universal jurisdiction has been recognized when it comes to pirates, war criminals, and the slave trade.¹⁸¹ One may argue that this is true not only for the purpose of increasing the effectiveness of enforcement, but also because the protections afforded by nationality no longer apply to those deemed the enemies of all humankind. In other words, under international law, the state should not have the right to provide those committing such crimes the protections of its sovereignty—that is not what sovereignty is for. But should the state’s sovereignty or exclusivity shield those enslaving others from persecution by interested powers? Surely it should not.

¹⁸⁰ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 38544.

¹⁸¹ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).

Therefore, even if UNCLOS were to be interpreted in such a way that would preclude the freeing of slaves, states have not only the moral obligation, but also the legal justification, to board ships carrying slaves and to subsequently free the slaves. Such acts could not plausibly be interpreted as internationally wrongful.

c. No Lawful Ramifications May Ensur

Finally, it should be noted that even if the act of releasing the slaves were deemed internationally wrongful, it is difficult to see what ramifications might ensue. No international tribunal could plausibly decide that restitution is in order, as enslavement is a violation of a *jus cogens* prohibition and the flag- or EEZ-state is unlikely to lay such a claim or claim that it has suffered damage from freeing the slaves.

According to the ILC, whether damage is a condition for finding an internationally wrongful act depends on the primary obligation.¹⁸² It is arguable that the usurpation of the flag-state's jurisdiction is a breach which requires no proof of damage, but where it comes to the EEZ, as the obligation of other states is to give due regard when performing activities in the EEZ, proof of damages seems to be an inherent element.¹⁸³ Were damages deemed essential, any claim by an "injured" state would fail even if brought. But even if proof of damage were not required, it is unlikely that a state would succeed in a claim for cessation and non-repetition. First, a state claiming that another party must refrain from boarding vessels flying its flag and freeing the enslaved risks significant negative public opinion and shaming, which limits the prospects of such claims. Second, and more importantly, it is difficult to imagine that an international tribunal would order a state to cease correcting a violation of *jus cogens* norms. Such a claim would not only be a blatant abuse of rights but likely preempted by the prohibition of slavery.

¹⁸² ARSIWA with Commentaries, *supra* note 39, art. 2, ¶ 9.

¹⁸³ See Chagos Marine Protected Area Arb. (Mauritius v. U.K.), 31 PCA Case Repository 359, 571-72 (Perm. Ct. Arb. 2015) (on the due regard obligation). In other circumstances, the ICJ recently considered whether a breach of exclusivity may be in violation of international law even absent proof of damage. See *Alleged Violations*, *supra* note 31, ¶ 101 (finding that interference by a Nicaraguan-flagged ship with fishing activities and marine scientific research was sufficient).

According to the ARSIWA, the purportedly “injured” state may engage in countermeasures. Yet countermeasures “must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”¹⁸⁴ And, of course, per Article 50 of the ARSIWA:

1. 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.¹⁸⁵

As the ILC explains:

Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.¹⁸⁶

Although this provision concerns the countermeasures themselves, it would be absurd to imagine that a state may notify of countermeasures intended to preserve severe deprivations of human rights. As the Commission noted “[i]n the ‘*Naulilaa*’ arbitration, the tribunal stated that a lawful countermeasure must be ‘limited by the requirements of humanity and the rules of good faith applicable in relations between States.’”¹⁸⁷ It is hardly an act in good faith to implement countermeasures to prevent another state from acting to eradicate slavery and free those enslaved. Thus, even if

¹⁸⁴ ARSIWA with Commentaries, *supra* note 39, art. 51.

¹⁸⁵ *Id.* art. 50.

¹⁸⁶ *Id.* art. 50, ¶ 1.

¹⁸⁷ *Id.* art. 50, ¶ 6.

UNCLOS does not legitimize such actions, they are unlikely to sound in any inter-state countermeasures if taken.

Though the discussion above could lead to the conclusion that there should be no issue with rendering assistance to the victims of slavery on the sea, especially since no state would claim a right to slavery or be able to lawfully enforce its exclusivity to preserve it, the fact of the matter is that slavery and other violations of human rights on the oceans persist. It is, however, clear that the textual-rules-based mode of decision is inappropriate when it comes to interventions to ameliorate severe deprivations of human rights over the oceans. Such intervention would be *lawful* given its context, and it would be absurd to assume that a third party decisionmaker—be it a court or tribunal—would determine otherwise. Therefore, the proper balance between exclusivity and human rights over the oceans must evolve to provide for a clear exception for preventing, arresting, and reversing severe deprivations of human rights.

III. PROMOTING A NEW BALANCE BETWEEN HUMAN RIGHTS AND EXCLUSIVITY

In balancing exclusivity and human rights in the modern context, one must account for the change in circumstances and in perceptions of acceptable behavior; international law must adapt in letter and practice to accommodate new realities and norms. From a forward-looking perspective, it is essential to begin the process of reconsidering the balance between exclusivity and human rights over the oceans. In this process, states, international organizations, and private entities, through the process of claims and counterclaims, will produce a regime balancing exclusive and inclusive rights. Such a process will extend to include international and domestic interactions and be shaped by various entities acting as change agents, norm entrepreneurs, or opinion leaders.¹⁸⁸ The Law of the Sea is a dynamic field of governance, yet changes should

¹⁸⁸ Ellickson, *supra* note 17, at 40-45. On the transnational legal process *see generally* Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996) (arguing that transnational legal process has been the dominant mode of legal scholarship); Harold Hongju Koh, *Is There A "New" New Haven School of International Law?*, 32 *YALE J. INT'L L.* 559 (2007) (explaining how transnational legal process influences laws and policies that govern processes by which international law and policies become domesticated into U.S. law).

be incremental to gain the necessary consensus. Severe deprivations of human rights, including enslavement, as well as anticipated effects of the climate crisis on human rights, demand that the international community expand the tools at its disposal to mitigate and adapt to these realities on the oceans.

Sovereignty on the oceans is not identical to terrestrial sovereignty. Unlike terrestrial domains, the oceans are a commons and rights and obligations therein derive from the decision-making process of the international community. While a ship may be treated as an extension of the territorial sovereignty of the state, it is quite distinguishable from it. An intervention on a ship to arrest activities adversely affecting the international community presents limited adverse effects on the flag-state, and even less when it is a flag-of-convenience-state. While sovereignty over land relates to the preservation of minimum order as a core foundation of the international system, flag-state jurisdiction is simply a protection afforded by the fiat of the international community. The rights of intrusion upon such protections under UNCLOS far exceed those of humanitarian intervention. Therefore, the proposition of further confining flag-state jurisdiction is far less radical than one concerning sovereignty.

But even terrestrial sovereignty is limited, not least in cases of severe deprivations of human rights. Sovereignty no longer represents an unfettered power to exclude and control all domestic matters. Sovereigns have international human rights obligations and the international community has invested in the U.N. Security Council an obligation to intervene, even militarily, in the activities of a state or states if it determines these present a threat to world peace.¹⁸⁹ In 2005, the U.N. General Assembly adopted the World Summit Outcome Document, which accepted and committed to the doctrine of Responsibility to Protect (R2P).¹⁹⁰ The document reiterated the responsibility of each state to protect its population from war crimes, genocide, ethnic cleansing and mass atrocities, and the residual responsibility of the international community, through the Security Council, to protect populations of states that are unwilling or unable to fulfill their obligations.¹⁹¹

¹⁸⁹ U.N. Charter ch. VII.

¹⁹⁰ G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138-39 (Sept. 16, 2005).

¹⁹¹ *Id.*

The doctrine of R2P is a culmination of the shift in perception of sovereignty and the acceptance of the interconnectedness of all states and their populations. As Eyal Benvenisti explained:

We live in a shrinking world where interdependence between countries and communities is increasing. These changes also affect - as they should - the concept of sovereignty. Unlike the conception of sovereignty that predominated in past decades of the ownership of a large estate separated from other properties by rivers or deserts, today's reality is more analogous to the ownership of a small apartment in one densely packed high-rise in which about two hundred families live. The sense of interdependency is heightened when we recognize that there is no alternative to this shared home, no exit from this global high-rise. The privilege of bygone days of opting out, of retreating into splendid isolation, of adopting mercantilist policies or erecting iron curtains, is no longer realistically available.¹⁹²

Those who interpret UNCLOS as precluding interventions in cases of slavery on the seas treat ships as if these were floating villas immune from intervention by other states except in limited situations. They require that participants rely on the villa's "overlord" to safeguard the interests of the international community. But the lord of the villa may have limited capabilities, not to mention a lack of interest, to protect others. While the immunity of warships or other governmental vessels is quite understandable, it is highly questionable whether the flag alone should preclude interested participants from addressing severe deprivations of human rights.

The appreciation of our interdependency and the limitations of sovereignty lead to the understanding that sovereigns can no longer use their sovereign rights as a shield from intervention while committing or permitting severe deprivations of human rights. This is true with greater force on the oceans, where the interests of the sovereign are diminished, along with the sovereign's ability to truly control and regulate behaviors. Though it is true that there are benefits to the regime of flag-states or the exclusivity of the EEZ-state, the respect given to the sovereignty of the state or its sovereign rights over the oceans should be more modest.

¹⁹² Benvenisti, *supra* note 15, at 295.

It is therefore suggested that when we endeavor to interpret the provisions of UNCLOS and the ramifications for sovereign states, we must defer more to the side of protecting human rights, and less to the respect of the sovereign's rights. In other words, we must lean toward an interpretation which allows for more inclusivity rather than exclusivity when it comes to the protection of human rights over the oceans. Such policy would be consistent with the objective of securing not only the minimum order, which must extend beyond the mere prevention of conflict,¹⁹³ but also provide for the optimum order which entails the widest production and distribution of human dignity values.¹⁹⁴ It will promote the common interest.

Non-flag-states likely lack incentives to intervene or may be dissuaded by the lack of clarity regarding the law. However, changes in the applicable law through interpretation or amendment may serve to generate state action via, *inter alia*, public pressure. We appreciate that one of the limitations on state action in this regard is the lack of interests and incentives for the states that possess the power and capabilities to effectuate change. Yet changing the way in which we think about exclusivity and severe deprivations of human rights provides NGOs and other actors with the tools through which to shape public opinion and pressure states to act. Acting as change agents, norm entrepreneurs, or opinion leaders, participants will influence the evolution of the norm itself and, through that norm, the perception of governmental action and inaction. In other words, through the change in perception, civil society may generate the necessary incentives for governments to cure and prevent severe deprivations of human rights over the oceans.

Importantly, the approach to questions of slavery over the oceans may simply serve as a precedent for a broader realignment of the balance between inclusive and exclusive ocean rights and obligations where it concerns violations of human rights. The process through which international law develops and evolves is complex and includes interactions on both the domestic and international levels. As Harold Hongju Koh described it, this process occurs transnationally through domestic and international interactions, interpretations, and internalizations.¹⁹⁵ When incidents

¹⁹³ See Omri, *supra* note 6, ch. 2.

¹⁹⁴ On the optimum order and minimum orders, see MCDUGAL ET AL., *supra* note 20, at 157, 160; REISMAN, *supra* note 19, at 363–72.

¹⁹⁵ See Koh, *Transnational Legal Process*, *supra* note 188.

in which a purported rule is breached occur, it is far more important to appreciate the way such incidents are perceived by other nations than whether the events violate the applicable norm or its interpretation.¹⁹⁶ To facilitate the development of a new balance between exclusivity and human rights over the oceans, this Article proposes both an interpretational and a practical approach as starting points for the regime's evolution.

From the interpretational perspective, by adopting an interpretation which expands upon the powers of naval forces, either in manuals or through declarations, the process of international lawmaking would continue. From a practical perspective, if States were to implement policies that confront severe deprivations of human rights over the oceans, e.g., and most urgently, slavery and human trafficking, such conduct would likely constitute unopposed state practice for purposes of customary international law. Such conduct is unlikely to generate significant opposition from other states, even the state whose exclusivity was purportedly violated. This prediction is sound given both the political and public opinion ramifications, and the unlikely potential of sustaining any claim of an internationally wrongful act. True, some states may oppose, object, or even claim that exclusivity must be ensured, but the process of international lawmaking is dynamic and dialectic, and disputes in the application of the law, if they arise, are simply an inherent part of the process through which the law is developed and applied.¹⁹⁷ Critically, as explained above, adopting our proposed perspective will embolden civil society to effectuate a change in norms and, through those norms and public opinion, instigate meaningful action by powerful participants.

CONCLUSION

Achieving a public order of human dignity in the twenty-first century requires that the international community reconsider the balance between human rights and exclusivity over the oceans. Rather than employing a textual-rules-based mode of decision when it comes to interventions to ameliorate severe deprivations of human

¹⁹⁶ See INTERNATIONAL INCIDENTS, *supra* note 17, at 5.

¹⁹⁷ See Hakimi, *supra* note 158, at 319 ("Disputes are not necessarily corrosive to the association. To the contrary, conflict can be and often is a unifying force that binds an international community together.").

rights, we suggest that a contextual-policy-based mode of decision is in order. Thus, as this Article suggests, given modern international norms, participants may, and are perhaps even obligated to, employ power to arrest, prevent, and reverse severe deprivations of human rights over the oceans, beginning with slavery.

Extending such powers to eradicate slavery or human trafficking is relatively easy to defend and may be more readily acceptable than other internationally detrimental activities which produce adverse effects for human rights. Yet the proposed treatment of slavery over the oceans may serve as a starting point for the international legal process to reshape exclusivity and human rights over the oceans in the twenty-first century, including, perhaps eventually, the recently recognized right to a healthy environment.