

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

# International law-making and the Geneva Declaration on Human Rights at Sea

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## Abstract

The Geneva Declaration on Human Rights at Sea is a recent initiative of the non-governmental organization (NGO), Human Rights at Sea, and provides an opportunity to examine how an NGO-led initiative may contribute to international law-making. This article compares the Geneva Declaration to other NGO-led endeavours that resulted in the adoption of international treaties, including the Ottawa Convention, Cluster Munitions Convention, and Nuclear Weapon Ban Treaty. It also assesses how NGOs may contribute to the development of informal agreements that influence state decision-making. In doing so, the discussion draws on interviews with the drafters of the Geneva Declaration to further assess the possible trajectory of the instrument in international law-making. The experience of Human Rights at Sea in developing the Geneva Declaration provides a striking example of the current potential and limits of civil society actors in international law-making.

**Keywords:** human rights at sea; international law-making; NGOs; soft law; treaty-making

## 1. Introduction

The development of norms and expectations relating to the rights and duties of actors in the international legal system has evolved from an exclusive activity of states to a state-centric model and now to more diffuse forms of international governance.<sup>1</sup> Explanatory theories for international law-making are varied and may emphasize different attributes of the process and output.<sup>2</sup> Positivists will emphasize the requirements of customary international law and the international law of treaties.<sup>3</sup> In contrast to these ‘formal’ sources of international law, informal

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<sup>1</sup>Experimentalist governance, for example, involves ‘a form of adaptive, open-ended, participatory, and information-rich co-operation in world politics, in which the local and the transnational interact through the localized elaboration and adaptation of transnationally agreed general norms, subject to periodic revision in light of knowledge locally generated’. G. de Búrca, R. O. Keohane and C. Sabel, ‘New Modes of Pluralist Global Governance’, (2013) 45 *NYU Journal of International Law and Politics* 723, at 726–7.

<sup>2</sup>I. Venzke, ‘Contemporary Theories and International Law-Making’, in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making* (2016), 66, at 67–8.

<sup>3</sup>See, e.g., O. Sender and M. Wood, ‘The Emergence of Customary International Law: Between Theory and Practice’, in Brölmann and Radi, *ibid.*, at 133.

agreements are generated by a process of international co-operation between public authorities, with or without the participation of private actors or international organizations, in varied institutions and networks.<sup>4</sup>

International law-making thus spans both the formation of formal instruments and rules (treaties and customary international law), as well as the development of norms set out in legally non-binding agreements that are intended to reflect shared expectations and thereby moderate state actions and decision-making. While there are many aspects of the international law-making process that are worthy of study,<sup>5</sup> in this article I aim to explore how a recent initiative of a non-governmental organization (NGO) can potentially contribute to international law-making. From the end of the Cold War, there have been greater opportunities for NGOs to engage in international forums with diverse, like-minded, states. So-called middle-powers have been able to enhance their own international standing (or soft power) in supporting specific issues and could rely on NGO research and expertise in promoting specific issues.<sup>6</sup> Depending on the resources of the NGOs, and the accessibility of different international forums, NGOs have been involved in drafting texts of future agreements and contributed to negotiations.<sup>7</sup> Advancements in technology and communication, including improved rights of participation in international forums, have also increased the reach of NGOs in their own right, both in relation to shining light on certain issues and in galvanizing support in responding to issues of concern.

To assess the potential and the limits of NGO engagement in international law-making, my focus is the Geneva Declaration on Human Rights at Sea (GDHRAS), which was promulgated by a British-based NGO, Human Rights at Sea, in March 2022.<sup>8</sup> The legal and factual underpinnings for this initiative are set out in Section 2. Rather than delving into the legal complexities that are associated with the application and enforcement of human rights at sea,<sup>9</sup> the focus of this article is on the potential for an NGO initiative to contribute to the formation of international law using the issue lens of human rights at sea. I assess both this potential and the limits by foregrounding the engagement of NGOs, and other civil society actors, in the development of international law. There have been instances where NGO initiatives have led to the adoption of international treaties, and my key research questions are to ask (i) if this path could lie ahead for the GDHRAS and, (ii) if so, what conditions may need to exist for this option to eventuate? Alternatively (or perhaps prior to that treaty process), (iii) could the GDHRAS be considered as an informal agreement? This latter question requires an examination of the status of informal agreements and their role in international law-making. While the trajectory for the GDHRAS in international law-making is not without challenges, the core humanitarian mission and existing alignments with international law have the potential to improve the interpretation and application of international law obligations relevant for the protection of human rights at sea.

<sup>4</sup>J. Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking* (2012), 13, at 22.

<sup>5</sup>For general discussions see A. Boyle and C. Chinkin, *The Making of International Law* (2007); see Brölmann and Radi, *supra* note 2; K. Raustiala, 'Form and Substance in International Agreements', (2005) 99(3) *American Journal of International Law* 581.

<sup>6</sup>M. Bolton and T. Nash, 'The Role of Middle Power-NGO Coalitions in Global Policy: The Case of the Cluster Munitions Ban', (2010) 1(2) *Global Policy* 172, at 174.

<sup>7</sup>*Ibid.*

<sup>8</sup>2022 Geneva Declaration on Human Rights at Sea, available at [www.humanrightsatsea.org/GDHRAS](http://www.humanrightsatsea.org/GDHRAS).

<sup>9</sup>A topic that is now to be addressed in the work of a new Committee established under the auspices of the International Law Association, which is initially focused on jurisdiction to protect people at sea. International Law Association, 'Protection of People at Sea', 18 June 2023, available at [www.ila-hq.org/en\\_GB/committees/protection-of-people-at-sea](http://www.ila-hq.org/en_GB/committees/protection-of-people-at-sea). The Committee is chaired by Irini Papanicolopulu and Anna Petrig is a co-rapporteur with the author. See also Human Rights at Sea, 'The International Law Association's New Committee Champions Human Rights at Sea', 21 March 2024. Both Professors Petrig and Papanicolopulu were involved in the drafting of the GDHRAS. See [www.humanrightsatsea.org/news/international-law-associations-new-committee-champions-human-rights-sea#:~:text=The%20International%20Law%20Association%20\(ILA,on%20upholding%20their%20human%20rights](http://www.humanrightsatsea.org/news/international-law-associations-new-committee-champions-human-rights-sea#:~:text=The%20International%20Law%20Association%20(ILA,on%20upholding%20their%20human%20rights).

To answer these research questions, I provide, in Section 3 below, a short background to and overview of the GDHRAS. As a further foundation to answering the research questions, I explain how NGOs may be involved in international law-making in relation to the tasks undertaken and the challenges faced in the law-making process. Section 4 seeks to compare the GDHRAS with experiences of other NGOs in instigating and developing international treaties. In some respects, the GDHRAS is a more complicated 'sell' than may have been the case with the other NGO-led initiatives and may reduce the likelihood of a treaty as a formal output. Section 5, zeroing in on the third research question, argues that there is an important place for the GDHRAS as an informal agreement, explaining how these sorts of instruments may influence decision-making and norm-formation in international law.

In answering the three research questions, the research draws on interviews with the drafters of the GDHRAS,<sup>10</sup> as well as secondary sources that have set out primary accounts and secondary analyses of other instances of NGO engagement in international law-making. The analysis endeavours to show the potential paths that may be pursued for an NGO seeking to promote an improvement in international law and practice as well as some of the difficulties. It is argued that there is potential for Human Rights at Sea as an NGO to use the GDHRAS to catalyse needed developments to respond to human rights violations at sea when considered in light of the contributions that NGOs have made to date in international law-making.

## 2. The problem of human rights at sea

There are an estimated 30 million people at sea at any one time, the majority of whom are fishers.<sup>11</sup> The treatment of fishers, especially in illegal, unreported, and unregulated fishing operations, has been highlighted as parlous in light of the extent and type of abuses endured: ranging from exploitative contract provisions to physical abuse to forced labour, torture, and murder at sea.<sup>12</sup> Other particularly vulnerable groups at sea include refugees and irregular migrants who may be victims of migrant smuggling operations,<sup>13</sup> and find themselves in distress at sea on unseaworthy vessels and face either a lack of response to their need for assistance,<sup>14</sup> or the risk of being sent to a location that will abuse their human rights further.<sup>15</sup> Seafarers may also be at risk of human (and labour) rights violations, notably in the context of their abandonment and highlighted during the COVID-19 pandemic.<sup>16</sup> Other human rights violations may arise in the context of maritime law

<sup>10</sup>These interviews were conducted pursuant to ethics approval from UNSW Sydney's HREAP B: Arts, Humanities & Law approval HC200937 for a project entitled 'Informal Lawmaking in Maritime Security: New Directions and Governance'. The interviewees are identified anonymously with the designation of 'DI' and a number, with page references to transcripts on file with the author further to the requirements of the ethics approval process.

<sup>11</sup>See GDHRAS, *supra* note 8, 'Setting the Scene'.

<sup>12</sup>See, e.g., D. Tickler et al., 'Modern Slavery and the Race to Fish', (2018) 9 *Nature Communications* 4643; M. Wilhelm et al., 'Private Governance of Human and Labor Rights in Seafood Supply Chains—The Case of the Modern Slavery Crisis in Thailand', (2020) 115 *Marine Policy* 103833; International Labour Organization, *Rough Seas: The Impact of COVID-19 on Fishing Workers in South-East Asia*, ILO Brief (April 2022).

<sup>13</sup>The situation of mass migration across the Mediterranean is well-documented, but this issue extends to the English Channel, as well as crossings of the Caribbean to the United States, and the plight of the Rohingya seeking to voyage across the Bay of Bengal and Andaman Sea.

<sup>14</sup>As occurred in UN Human Rights Committee, *A.S. et al. v. Italy*, UN Doc. CCPR/C/130/D/3042/2017 (2021).

<sup>15</sup>Amnesty International, 'Libya: New Evidence Shows Refugees and Migrants Trapped in Horrific Cycle of Abuses', Press Release, 24 September 2020, available at [www.amnesty.org/en/latest/press-release/2020/09/libya-new-evidence-shows-refugee-s-and-migrants-trapped-in-horrific-cycle-of-abuses/](http://www.amnesty.org/en/latest/press-release/2020/09/libya-new-evidence-shows-refugee-s-and-migrants-trapped-in-horrific-cycle-of-abuses/); Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya', 12 December 2022, available at [www.hrw.org/news/2022/12/12/eu-frontex-complicit-abuse-libya](http://www.hrw.org/news/2022/12/12/eu-frontex-complicit-abuse-libya).

<sup>16</sup>See, e.g., ILO, *Resolution Concerning Maritime Labour Issues and the COVID-19 Pandemic*, GB.340/Resolution (Rev.2) (2020); S. Galani, 'Port Closures and Persons at Sea in International Law', (2021) 70(3) *International and Comparative Law Quarterly* 605; C. Doumbia-Henry, 'Shipping and COVID-19: Protecting Seafarers as Frontline Workers', (2020) 19 *WMU Journal of Maritime Affairs* 279.

enforcement operations,<sup>17</sup> which may also implicate the rights of the victims of criminal acts at sea (such as hostage-taking during piratical incidents<sup>18</sup> as well as victims of sexual offences on cruise ships<sup>19</sup>).

While the occurrence of human rights abuses at sea has become increasingly documented in recent years,<sup>20</sup> the application and enforcement of international human rights law in a maritime context has been fraught with difficulties.<sup>21</sup> The legal complexities are readily showcased through the situation of irregular migrants at sea.<sup>22</sup> Irregular migration is governed by the law of the sea, laws relating to search and rescue, migrant smuggling laws, as well as international human rights law and international refugee law.<sup>23</sup> Regime interaction is one legal challenge,<sup>24</sup> and there are risks that states will apply one body of law that best suits their policy objectives in responding to migration at sea rather than upholding international human rights law.<sup>25</sup> Lawyers will also respond differently to the question of ‘who has jurisdiction to uphold human rights?’, depending on whether they examine the issue from the perspective of international human rights law or the law of the sea. This problem was manifest before the UN Human Rights Committee in assessing Italy’s responsibility for a violation of the right to life in failing to render assistance to migrants in distress at sea.<sup>26</sup> The majority of the UN Human Rights Committee considered that the special relationship of dependency in the setting before it gave rise to Italy’s responsibility under the International Covenant on Civil and Political Rights.<sup>27</sup> However, a different conclusion could have been reached under the law of the sea, which focuses on the allocation of jurisdiction between coastal states and flag states depending on the maritime zone in which a specific activity is occurring.<sup>28</sup>

<sup>17</sup>See, e.g., A. Petrig, ‘Human Rights in Counter-Piracy Operations: No Legal Vacuum but Legal Uncertainty’, in M. Q. Mejia, C. Kojima and M. Sawyer (eds.), *Piracy at Sea* (2013), 31; A. Petrig, ‘Human Rights and Law Enforcement at Sea’, in R-L. Boşilcă, S. Ferreira and B. J. Ryan (eds.), *Routledge Handbook of Maritime Security* (2022), 153.

<sup>18</sup>S. Galani, ‘Somali Piracy and the Human Rights of Seafarers’, (2016) 34(1) *Netherlands Quarterly of Human Rights* 71.

<sup>19</sup>See, e.g., G. Hiatt, ‘Sexual Assaults on Cruise Ships are Rising’, *Washington Post*, 10 January 2024, available at [www.washingtonpost.com/travel/2024/01/10/sex-assault-cruise-ship-reports/](http://www.washingtonpost.com/travel/2024/01/10/sex-assault-cruise-ship-reports/); D. Rao, ‘Cruise Ships are Floating Hotbeds for Sexual Assault’, *The Week*, 29 January 2024, available at [theweek.com/health/sexual-assault-cruise-ships](http://theweek.com/health/sexual-assault-cruise-ships).

<sup>20</sup>Ian Urbina’s journalistic work being a critical contribution in raising general awareness of these issues, which was subsequently published as a book. I. Urbina, *The Outlaw Ocean* (2019).

<sup>21</sup>See, e.g., S. Haines, ‘Developing Human Rights at Sea’, (2021) 35 *Ocean Yearbook* 18; S. Galani, ‘Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain’, (2020) 35(2) *International Journal of Marine and Coastal Law* 325; I. Papanicolopulu, ‘A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea’, in C. Schofield, S. Lee and M-S. Kwon (eds.), *The Limits of Maritime Jurisdiction* (2014), 387.

<sup>22</sup>The legal difficulties associated with the mistreatment of fishers are well-canvassed in P. Ridings, ‘Labour Standards on Fishing Vessels: A Problem in Search of a Home?’, (2021) 22(2) *Melbourne Journal of International Law* 308. See also C. Wold, ‘Slavery at Sea: Forced Labor, Human Rights Abuses, and the Need for the Western and Central Pacific Fisheries Commission to Establish Labor Standards for Fishing Crew’, (2022) 39 *Wisconsin International Law Journal* 485.

<sup>23</sup>N. Klein, ‘A Case for Harmonizing Laws on Maritime Interceptions of Irregular Migrants’, (2014) 63 *International & Comparative Law Quarterly* 787.

<sup>24</sup>See, e.g., V. Moreno-Lax and N. Vavoula, ‘The (Many) Rules and Roles of Law in the Regulation of “Unwanted Migration”’, (2022) 24(4) *International Community Law Review* 285.

<sup>25</sup>See V. Moreno-Lax, D. Ghezalbash and N. Klein, ‘Between Life, Security and Rights: Framing the Interdiction of ‘Boat Migrants’ in the Central Mediterranean and Australia’, (2019) 32 *Leiden Journal of International Law* 715.

<sup>26</sup>See *A.S. et al. v. Italy*, *supra* note 14.

<sup>27</sup>1966 International Covenant on Civil and Political Rights, 999 UNTS 171; see *A.S. et al. v. Italy*, *supra* note 14, para. 7.8.

<sup>28</sup>A point appreciated by the minority in a parallel decision. Decision Adopted by the Committee on 30 March 2020 under the Optional Protocol, Concerning Communication No. 3043/2017 submitted by A.S., D.I., O.I. and G.D., CCPR/C/128/D/3043/2017 (2021), Ann. I, Individual Opinion of Committee Member Andreas Zimmermann (Dissenting), para. 6. For further discussion see C. Pitea, ‘The Applicability of Human Rights Treaties to Search and Rescue Operations in the High Seas: A Landmark Decision of the UN Human Rights Committee’, *Criminal Justice Network*, 4 March 2021, available at [www.criminaljusticenetwork.eu/en/post/the-applicability-of-human-rights-treaties-to-search-and-rescue-operations-in-the-high-seas-a-landmark-decision-of-the-un-human-rights-committee](http://www.criminaljusticenetwork.eu/en/post/the-applicability-of-human-rights-treaties-to-search-and-rescue-operations-in-the-high-seas-a-landmark-decision-of-the-un-human-rights-committee); P. Vella de Fremeaux and F. G. Attard, ‘Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I’, *Opinio Juris*, 3 March 2021, available at [opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-](http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-)

The law of the sea does not typically venture beyond affirmations that ‘considerations of humanity apply at sea’.<sup>29</sup>

The problem of human rights at sea is thus multifaceted. It is factual: abuses are occurring but at distances far from shore, which reduces both awareness of what is happening and the redress that victims have available. There is a distinct legal problem, because of the interaction of different legal regimes and a lack of clarity as to *who* is responsible *for what* and *where* are they responsible.<sup>30</sup> That lack of clarity allows for potential duty-bearers to either deflect or deny responsibility. The political problem, as relevant for human rights violations at sea as well as on land, is a lack of willingness of states to act or to prioritize the protection of human rights in the face of other demands or interests. Coupled with the political problem are the economic challenges associated with protecting human rights at sea, due to the combined importance of the fishing and shipping industries (and the financial interests of the key commercial actors in those industries).

It is into this fray that the NGO of Human Rights at Sea has entered, with a strong focus on the rights of *all* persons at sea.<sup>31</sup> The GDHRAS is a signature contribution to the legal complexities associated with the protection of people at sea, as it seeks to harmonize international human rights law and the law of the sea.<sup>32</sup> It does not limit its application to any one group of persons travelling by or working at sea, unlike other international treaties or agreements, nor does it apply to any one maritime zone but covers all ocean areas. The ultimate impact of this contribution will depend on whether the GDHRAS can follow a comparable journey to other NGO initiatives that have led to the adoption of international treaties, or whether the GDHRAS may still provide a basis for norm change<sup>33</sup> as a legally non-binding instrument. The following sections address these issues.

### 3. The possible contribution of the NGO Human Rights at Sea to international law-making

Human Rights at Sea was founded in 2014 by David Hammond, a barrister and retired naval officer.<sup>34</sup> Unlike the trade unions and other organizations that focus on seafarer welfare,<sup>35</sup> Human Rights at Sea seeks to catalyse the protection of human rights for any individual who is in the maritime domain.<sup>36</sup> The core vision is to end human rights abuses at sea.<sup>37</sup> The concern of the NGO thus extends beyond seafarers to include fishers, fishing observers, victims of crime, and children forced to work at sea. The activities of the NGO have included investigating abuses; working with victims, and their families, to seek redress; advocacy efforts in national and international forums; and working with governments and corporations to improve human rights protection.<sup>38</sup> Central to its mission has been the strategic development of the

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[rights-committee-part-i](#); M. Milanovic, ‘Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations’, *EJIL:Talk!*, 16 March 2021, available at [www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/](http://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/).

<sup>29</sup>*Corfu Channel case (UK v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 22; *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, [1999] ITLOS Rep., 10, para. 155; *Enrica Lexie Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, [2015] ITLOS Rep., 182, para. 133.

<sup>30</sup>These issues are considered in the seminal text in the area: I. Papanicolopulu, *International Law and the Protection of People at Sea* (2018).

<sup>31</sup>The motivation for the formation of the NGO by David Hammond is outlined in Haines, *supra* note 21, at 29–30.

<sup>32</sup>N. Klein, ‘Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law’, (2022) 53(2–3) *Ocean Development and International Law* 232.

<sup>33</sup>See discussion in Section 5, *infra*.

<sup>34</sup>Human Rights at Sea, ‘David Hammond’, available at [www.humanrightsatsea.org/david-hammond](http://www.humanrightsatsea.org/david-hammond).

<sup>35</sup>See, e.g., *International Transport Workers’ Federation*, available at [www.itfglobal.org/en](http://www.itfglobal.org/en) and *The Mission to Seafarers*, available at [www.missiontoseafarers.org/](http://www.missiontoseafarers.org/).

<sup>36</sup>Human Rights at Sea, ‘Our Mission’, available at [www.humanrightsatsea.org/who-we-are/our-mission](http://www.humanrightsatsea.org/who-we-are/our-mission).

<sup>37</sup>*Ibid.*

<sup>38</sup>Human Rights at Sea, ‘What We Do’, available at [www.humanrightsatsea.org/what-we-do](http://www.humanrightsatsea.org/what-we-do).

GDHRAS.<sup>39</sup> The GDHRAS is introduced immediately below. To understand how this NGO initiative may interact with international law-making, the discussion in this section further seeks to situate the GDHRAS, as well as the work of the NGO Human Rights at Sea more generally, within the roles of and challenges for NGOs in their engagement in international law-making.

### 3.1 Overview of the Geneva Declaration on Human Rights at Sea

The GDHRAS is the work of the (former) Chief Executive Officer of Human Rights at Sea, David Hammond, along with Professors Steven Haines, Anna Petrig, Irini Papanicolopulu, Dr. Sofia Galani, and Dr. Elizabeth Mavropoulou.<sup>40</sup> An initial declaration was released in 2019, with a second version, which significantly elaborated on the first version, that was launched in 2022.<sup>41</sup> A need for the GDHRAS was based on awareness in Human Rights of Sea ‘of systematic evidence of human rights violations occurring at sea, minimum accountability, lack of enforcement, and . . . the fragmented international legal framework applicable at sea’.<sup>42</sup>

The stated aims of the GDHRAS are:

to recall existing legal obligations, to raise global awareness of human rights abuses at sea, to generate a concerted international response to them and to ensure an effective remedy for those who are abused. Overall, the Declaration aims to promote a culture of compliance with human rights at sea.<sup>43</sup>

In creating the GDHRAS, the drafters were motivated by the ‘need for a re-statement and collation of international law principles across multiple legal disciplines and associated conventions in respect of the existing protection of human rights for persons living, working and transiting global seas and oceans’.<sup>44</sup>

In its adopted form, the GDHRAS consists of a Foreword, the Declaration, which includes four fundamental principles, and three annexes. The four fundamental principles are:

1. Human rights are universal; they apply at sea, as they do on land.
2. All persons at sea, without any distinction, are entitled to their human rights.
3. There are no maritime specific reasons for denying human rights at sea.
4. All human rights established under both treaty and customary international law must be respected at sea.<sup>45</sup>

Annex A of the GDHRAS sets out a summary of evidence of human rights abuses at sea, which is based on information gathered by civil society organizations over the ten years preceding the adoption of the GDHRAS. This factual account was included to demonstrate why there was a need to develop the GDHRAS.<sup>46</sup> Annex B lists the multilateral treaties and articulates specific human rights in need of protection at sea. The relevance of regional human rights treaties is also noted given that flag states may be bound by their regional human rights obligations in relation to vessels

<sup>39</sup>See GDHRAS, *supra* note 8.

<sup>40</sup>See GDHRAS, *supra* note 8, Foreword. The drafters, other than David Hammond, are all academics who are based at European universities.

<sup>41</sup>Interview of DI3, at 4–6; Interview of DI5, at 1.

<sup>42</sup>Interview of DI5, at 2.

<sup>43</sup>See GDHRAS, *supra* note 8.

<sup>44</sup>Interview of DI1, at 1.

<sup>45</sup>See GDHRAS, *supra* note 8.

<sup>46</sup>See notes 64–5 and accompanying text, *infra*.

flagged to them irrespective of where that vessel is located.<sup>47</sup> Annex C is of greatest interest to lawyers and maritime practitioners seeking to ensure that human rights are properly protected in the maritime domain. Annex C is entitled ‘Guidelines for Promoting Compliance with Human Rights at Sea’. To this end, Annex C includes core legal obligations and then sets out guidelines for the actions of flag states, coastal states, and port states in relation to internal waters, the territorial sea, exclusive economic zone, and high seas.<sup>48</sup>

Following the launch of the GDHRAS by the Mayor of Geneva in March 2022,<sup>49</sup> there was a six-month period of open consultation via the Human Rights at Sea website. Once this period of consultation was completed,<sup>50</sup> the final text of the GDHRAS was translated, and is now available in 13 languages on the website.<sup>51</sup> Most recently, Human Rights at Sea has worked with the Ukrainian branch of the International Law Association to promote the GDHRAS, including through the publication of a short commentary.<sup>52</sup>

### 3.2 NGO engagement in international law-making

The work of Human Rights at Sea as an NGO in promoting an instrument setting out international law is not a novel development. NGOs have been engaged in international law-making efforts since at least the time of the Hague Peace Conferences at the turn of the twentieth century with the involvement of peace societies.<sup>53</sup> Yet, as noted at the outset, the engagement of civil society actors in international law-making has been limited by the traditionally state-centric nature of international law, which has primarily been derived from state-based agreements reflected in treaties or customary international law. Whether any agreement constituted international law was dependent on state consent, as most commonly manifested in signing treaties or through state practice reflecting those norms accepted as law. NGOs could thus only contribute minimally to a law-making enterprise because a public authority was ultimately required for acceptance of a norm as ‘law’. As such, NGOs may be able to work with ‘middle-power’ or ‘like-minded states’ to advance a humanitarian-based agenda, despite contrary interests of the most powerful states and/or those states most likely to have their practices exposed.<sup>54</sup> Requiring consensus on questions of international law in the current political climate may not always be evident, so any advances made by states towards the end goal should count even if those states are not all in complete unison on the issues.<sup>55</sup>

<sup>47</sup>See GDHRAS, *supra* note 8, Annex B. The drafters opted not to engage with the detailed jurisprudence arising in regional human rights bodies in line with the aim of producing a document of universal applicability and a manageable length. Interview of DI2, at 6, 10.

<sup>48</sup>Annex C has been studied for its alignment of the law of the sea with international human rights law in Klein, *supra* note 32.

<sup>49</sup>Human Rights at Sea, ‘Geneva Declaration on Human Rights at Sea Launched Today’, available at [www.humanrightsatsea.org/news/geneva-declaration-human-rights-sea-launched-today](http://www.humanrightsatsea.org/news/geneva-declaration-human-rights-sea-launched-today).

<sup>50</sup>No negative comments were received during the consultation period. Interview with DI2, at 7.

<sup>51</sup>The GDHRAS is available in the six official languages of the UN: English, French, Arabic, Chinese, Russian, and Spanish, as well as Dutch, Norwegian, Swedish, German, Italian, Portuguese, and Ukrainian. See Human Rights at Sea, ‘The Geneva Declaration on Human Rights at Sea’, available at [www.humanrightsatsea.org/GDHRAS](http://www.humanrightsatsea.org/GDHRAS).

<sup>52</sup>Human Rights at Sea, ‘Ukrainian International Law Association Publishes Geneva Declaration on Human Rights at Sea’, 11 August 2023, available at [www.humanrightsatsea.org/news/ukrainian-international-law-association-publishes-geneva-declaration-human-rights-sea](http://www.humanrightsatsea.org/news/ukrainian-international-law-association-publishes-geneva-declaration-human-rights-sea).

<sup>53</sup>See C. Lynch, ‘Peace Movements, Civil Society, and the Development of International Law’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 198, at 213–14 (though also noting the earlier influences of peace movements throughout the nineteenth century as well).

<sup>54</sup>See Foreword by W. Pace, in H. Durham, ‘The Role of Civil Society in Creating the International Criminal Court Statute: Ten Years On and Looking Back’, (2012) 3 *International Humanitarian Legal Studies* 3, at 4. See also M. Mekata, ‘How Transnational Civil Society Realized the Ban Treaty: An Interview with Beatrice Fihn’, (2018) 1 *Journal for Peace and Nuclear Disarmament* 79, at 82.

<sup>55</sup>See Mekata, *ibid.*, at 82.

It is possible to highlight a range of international agreements in which NGO engagement has been critical. Notably, active NGO involvement occurred in the development of the 1997 Ottawa Convention (banning landmines),<sup>56</sup> the 1998 Rome Statute for the International Criminal Court (ICC),<sup>57</sup> the 2000 Kimberley Process (trade in conflict diamonds),<sup>58</sup> the 2007 UN Convention on the Rights of Persons with Disabilities (UNCRPD),<sup>59</sup> the 2008 Convention on Cluster Munitions<sup>60</sup> and the 2017 Nuclear Weapon Ban Treaty.<sup>61</sup> In the ICC negotiations, the role for NGOs was described as ‘crucial and indispensable’.<sup>62</sup> Yet of these treaties, the Ottawa Convention, Cluster Munitions, and Nuclear Weapon Ban Treaties are especially remarkable because they were initiated within NGOs. Section 4 will explore in more detail the characteristics of the journeys from NGO initiative to international treaties to reflect on whether the GDHRAS may similarly lead to a binding, multilateral, interstate agreement.

Even if a treaty is not the final output of an NGO initiative, there are important contributions that an NGO may make for norm change. Foremost in an international law-making process is the need for information: both developing evidence-based data to inform decision-making, as well as creating analytical information. This information could provide assessments of different proposals being contemplated during negotiations for the development of international law. At the outset of drafting the GDHRAS, Human Rights at Sea had ‘a thousand pages of evidence’ of human rights violations at sea.<sup>63</sup> This evidence was categorized and then summarized for inclusion in Annex A of the GDHRAS.<sup>64</sup> Gathering information and communicating consistently, as well as communicating and co-ordinating with key stakeholders rather than blanket publicity, are all factors to consider for an NGO seeking to develop an international instrument.<sup>65</sup>

The credibility of any movement will depend in part on the reliability and accuracy of the information gathered and reported. Analyses undertaken by NGOs may be less constrained than states and bring to light issues or perspectives that may have otherwise been overlooked.<sup>66</sup> NGOs could also be in a position to provide information or analyses at the request of states that may otherwise lack the time or resources to investigate specific questions. In these instances, as well as others, the credibility and independence of the NGO will be critical.<sup>67</sup> The inclusion of evidence in the GDHRAS sought to improve the credibility of the drafting process, in addition to demonstrating the need for a focus on human rights violations at sea.<sup>68</sup>

Gaining public support for an issue may be a critical factor – not only for generating support for the issue but also for the viability of the NGO. Scholars have observed, ‘the perception of a crisis or shock is a crucial factor in precipitating ideational or normative change’.<sup>69</sup> For Human Rights at Sea, the continuing impunity that exists in relation to human rights violations at sea, lack of effective victim-led remedy, lack of deterrent effect, and the lack of enforcement of human

<sup>56</sup>1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211.

<sup>57</sup>1998 Rome Statute of the International Criminal Court (last amended 2010), 2187 UNTS 3.

<sup>58</sup>Kimberley Process Certification Scheme, available at [www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf](http://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf).

<sup>59</sup>2006 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3.

<sup>60</sup>2008 Convention on Cluster Munitions, 2688 UNTS 39.

<sup>61</sup>2017 Treaty on the Prohibition of Nuclear Weapons, UN Doc. A/CONF.229/2017/8.

<sup>62</sup>See Pace, *supra* note 54, at 4.

<sup>63</sup>Interview of DI2, at 5.

<sup>64</sup>Interview of DI2, at 6, 9–10.

<sup>65</sup>See Bolton and Nash, *supra* note 6, at 180. See also R. Price, ‘Reversing the Gun Sights: Transnational Civil Society Targets Land Mines’, (1998) 52 *International Organization* 613, at 622.

<sup>66</sup>See, e.g., H. Durham, ‘The Role of Civil Society in Creating the International Criminal Court Statute: Ten Years on and Looking Back’, (2012) 3 *International Humanitarian Legal Studies* 3, at 14.

<sup>67</sup>*Ibid.*, at 25.

<sup>68</sup>Interview of DI3, at 7.

<sup>69</sup>See Price, *supra* note 65, at 622.



rights obligations in the maritime domain, have been driving factors in developing the GDHRAS, and the work of the organization more generally.<sup>70</sup>

In some instances, influencing consumer behaviour may be an influential factor in highlighting an issue and gaining governmental or other stakeholder support in relation to an issue.<sup>71</sup> For example, Human Rights at Sea undertakes reviews of seafood fisheries and aquaculture certification schemes that seek to monitor responsible fishing practices as a means of informing consumer decisions.<sup>72</sup> Yet in a world where there is a myriad of problems to solve (including climate change, the war in Ukraine, the conflict in Gaza, and economic strife), it may be difficult to gain public interest. Moreover, governments have arguably become more impervious to criticism, and public shaming may not be as powerful a motivator as it once was.<sup>73</sup>

There is a suite of challenges for NGOs in seeking to engage with international law-making. First, the timeframe involved can be lengthy, as it stretches from when local concerns of a particular issue arise to when they have been fully embraced as global matters to be addressed by civil society and to their eventual traction with states. For example, concerns about cluster munitions date back to the Viet Nam war, but civil opposition only crystallized in the 1990s and 2000s; most notably following Israel's devastating use of such weapons in Lebanon in 2006.<sup>74</sup> In the early 2000s, a coalition of NGOs spent time 'building a network of individuals and organizations committed to action on this issue and gathering the information and arguments necessary for action to be successful'.<sup>75</sup>

Second, there can be difficulties in deciding what is the most appropriate forum.<sup>76</sup> With an issue like human rights at sea, which traverses many industries as well as different bodies of law, the 'discourse placement' may create an initial hurdle and lead opponents to argue about the appropriate forum for addressing these issues.<sup>77</sup> For example, a view may be espoused that the GDHRAS is unnecessary when the Maritime Labour Convention has been adopted under the auspices of the International Labour Organization and is available to protect seafarers' rights.<sup>78</sup> The Maritime Labour Convention does not extend to other individuals at sea, however, notably excluding fishers.<sup>79</sup> The International Labour Organization may thus not be a suitable forum. Price has observed in the context of banning land mines that 'the failure of past approaches narrowed the range of acceptable responses'.<sup>80</sup> In the protection of human rights at sea, the failures of flag states to redress this issue indicates that solely relying on these states is not an acceptable response. This challenge has been contemplated in the Food and Agriculture Organization,

<sup>70</sup>Interview of DI1, at 1.

<sup>71</sup>L. Bruffaerts, 'A Diamantine Struggle: Redefining Conflict Diamonds in the Kimberley Process', (2015) 91 *International Affairs* 1085, at 1086; J. A. Grant and I. Taylor, 'Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems', (2004) 93(375) *The Round Table: The Commonwealth Journal of International Affairs* 385, at 391.

<sup>72</sup>See, e.g. Human Rights at Sea, 'The Global Seafood Alliance responds to Human Rights at Sea's Certification, Ratings, and Standards Review', 27 July 2023, available at [www.humanrightsatsea.org/news/global-seafood-alliance-responds-human-rights-seas-certification-ratings-and-standards-review](http://www.humanrightsatsea.org/news/global-seafood-alliance-responds-human-rights-seas-certification-ratings-and-standards-review).

<sup>73</sup>An issue identified in relation to conflict diamonds and the reformation of the Kimberley Process. See Bruffaerts, *supra* note 71, at 1100. A more recent example of the latter is the United Kingdom's decision to break a 50-year relationship with Greenpeace. P. Seddon, 'Greenpeace: Government Cuts Ties with Group after Protest at PM's Home', *BBC News*, 7 August 2023, available at [www.bbc.co.uk/news/uk-politics-66429037](http://www.bbc.co.uk/news/uk-politics-66429037).

<sup>74</sup>See Bolton and Nash, *supra* note 6, at 176–7.

<sup>75</sup>*Ibid.*, at 179.

<sup>76</sup>See Bruffaerts, *supra* note 71, at 1094–7 (discussing 'discourse placement' and 'discourse timing').

<sup>77</sup>*Ibid.*, at 1094.

<sup>78</sup>Interview of DI2, at 18 (speculating on where opposition to the GDHRAS may arise). See also Interview of DI1, at 1 (critical of the idea that the Maritime Labour Convention is sufficient, even when coupled with the UN Convention on the Law of the Sea).

<sup>79</sup>2006 Maritime Labour Convention, 2952 UNTS No. I-51299, Art. II(4).

<sup>80</sup>See Price, *supra* note 65, at 631.

as evident in the adoption of the Port State Measures Agreement,<sup>81</sup> and in the International Maritime Organization, which has adopted the Code for the Implementation of Mandatory IMO Instruments.<sup>82</sup>

Third, timing may be an obstacle,<sup>83</sup> as some elements of the issues may be deferred: for example, states may argue that more time is needed for the Work in Fishing Convention<sup>84</sup> to be ratified among states and that this formal instrument should be implemented before another instrument addressing comparable matters is adopted. Similarly, the Cape Town Agreement,<sup>85</sup> which establishes minimum standards for fishing vessel construction, is yet to enter into force and may also help address the conditions endured on board fishing vessels.<sup>86</sup>

A final concern is the extent that NGO's agenda are widely shared, especially across the globe. Anderson has cautioned against any view that strong engagement from NGOs necessarily produces the democratization of international law-making.<sup>87</sup> His experience in relation to the Ottawa Convention was that the NGOs frequently reflected intellectual elite in wealthy countries and were not necessarily representative of all civil societies.<sup>88</sup> There may be different reasons for a lack of geographic representation among NGO actors on different issues.<sup>89</sup> NGOs may also be involved that have opposing views on particular issues or are in competition with each other, especially to secure scarce funding. While it may be advisable to avoid labels of 'democratic legitimacy' in relation to instruments that are initiated and developed by NGOs, the engagement and contribution of these civil society actors must still be appreciated in extending the potential creation of and engagement in international law to actors other than states. Moreover, the catalytic role remains of relevance.<sup>90</sup> As noted in relation to the Cluster Munitions Convention, NGOs were able 'to reframe the agenda, put cluster munitions on the humanitarian map and pressure states to take the issue seriously'.<sup>91</sup> Each of these achievements by NGOs is critical in its own right, and could be contemplated by Human Rights at Sea in its work on the GDHRAS.

#### 4. NGO initiatives leading to formal international law

To assess the likelihood that an international treaty may emerge from the GDHRAS, a comparison with other NGO initiatives that led to the adoption of multilateral treaties may provide useful benchmarking. Among the Ottawa Convention, the Cluster Munitions Treaty and the Nuclear Ban Treaty, it is possible to identify some common traits in relation to the substance of the law being developed and the process undertaken. The commonalities across these NGO-initiated treaties are drawn out in this part and compared to the GDHRAS, both in relation to the content of the GDHRAS at present and in speculating on what will be necessary for the GDHRAS in the future for it to attain treaty status.

<sup>81</sup>2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, [2016] ATS 21.

<sup>82</sup>IMO, Code for the Implementation of Mandatory IMO Instruments, IMO Res. A.973(24) (19 December 2005).

<sup>83</sup>See Bruffaerts, *supra* note 71, at 1096.

<sup>84</sup>2007 Convention (No. 188) Concerning Work in the Fishing Sector, 3209 UNTS 25.

<sup>85</sup>2012 Cape Town Agreement on the Implementation of the Provisions of the 1993 Torremolinos Protocol Relating to the 1977 International Convention for the Safety of Fishing Vessels, available at [www.mofa.go.jp/files/100318355.pdf](http://www.mofa.go.jp/files/100318355.pdf).

<sup>86</sup>For discussion see Ridings, *supra* note 22, at 314–15.

<sup>87</sup>K. Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society', (2000) 11 EJIL 91.

<sup>88</sup>*Ibid.*, at 118.

<sup>89</sup>See, e.g., Durham, *supra* note 66, at 13.

<sup>90</sup>The catalytic role can pose budgetary concerns for an NGO. Fundraising for preventative action may be difficult because it is less obvious to demonstrate what has been achieved (especially when compared to disaster relief or development programs). See Mekata, *supra* note 54, at 92.

<sup>91</sup>See Bolton and Nash, *supra* note 6, at 179.

Essential in the creation of formal international law is the involvement of a state, or states, to champion the NGO initiative and facilitate the transition to treaty negotiations and adoption. In the context of the Cluster Munitions Treaty, it was observed that the involvement of middle-power states ‘lent legitimacy, resources and diplomatic clout to the campaign’.<sup>92</sup> However, it was not imperative to have every state on board and to endorse the core message. Rather, the initial support enabled momentum to build. As discussed below, this state engagement must be accounted for in the messaging undertaken by an NGO, in addressing the costs of the initiative and in the process to be deployed in engaging in formal law-making.

#### 4.1 Simple messaging

When considering shared characteristics of the Ottawa Convention, the Cluster Munitions Treaty, and the Nuclear Ban Treaty, one commonality across all three treaties that may have facilitated the law-making effort was the simplicity of the core message. In each instance, the core message was straight-forward and unambiguous: ban a weapon.<sup>93</sup> What had to be done (banning) and what was targeted (a specific type of weapon) were clear. Certainly in the context of the Nuclear Weapon Ban Treaty, the central content was readily known throughout societies.<sup>94</sup> The core message of the Geneva Declaration perhaps lacks this simplicity. The first fundamental principle is to establish that human rights apply at sea as they do on land. It prompts an initial question as to whether there is a wide perception that human rights do not apply at sea; or is it more an issue of human rights not being enforced when violated at sea? Then what specific human rights apply?<sup>95</sup> All human rights presumably, but international human rights law is a vast substantive field, and the content of many human rights obligations continues to evolve, including in a maritime setting.<sup>96</sup>

The drafters of the GDHRAS were motivated to develop a simple document that would be accessible to a variety of stakeholders.<sup>97</sup> They consider a strength of the GDHRAS is that it is clear and concise.<sup>98</sup> The audience of the GDHRAS is not just states as potential supporters, but also individuals working in the maritime domain without legal expertise.<sup>99</sup> The length of the GDHRAS is deliberately short to facilitate messaging.<sup>100</sup> The drafters eschewed addressing rights and obligations in every maritime zone,<sup>101</sup> and excluded detail on stateless vessels so as not to complicate the GDHRAS.<sup>102</sup> While there is not one single action point driving the GDHRAS similar to the weapons ban treaties, the GDHRAS aims to present a clearer account of what the law currently is or what good practice otherwise exists.

#### 4.2 Costs of formal agreement

Another commonality of the Ottawa Convention, the Cluster Munitions Treaty and the Nuclear Ban Treaty was that the economic costs associated with each of the weapons bans was seen as relatively low.<sup>103</sup> Arms manufacturers had other munitions that could be produced, and the

<sup>92</sup>*Ibid.*, at 177.

<sup>93</sup>See Anderson, *supra* note 87, at 106; Price, *supra* note 65, at 623.

<sup>94</sup>See Mekata, *supra* note 54, at 80.

<sup>95</sup>Annex B of the GDHRAS goes some way to answering this question in listing the human rights but is not a close examination of the content of the rights listed when placed in a maritime setting. A drafter notes that it was a deliberate decision to leave out these details so as not to render the GDHRAS unwieldy. Interview of DI1, at 3.

<sup>96</sup>The right to life being a prime example. See *A.S. et al. v. Italy*, *supra* note 14.

<sup>97</sup>Interview of DI2, at 4; Interview of DI1, at 2.

<sup>98</sup>Interview of DI3, at 8; Interview of DI1, at 2.

<sup>99</sup>Interview of DI3, at 3; Interview of DI4, at 1-2; Interview of DI5, at 6.

<sup>100</sup>Interview of DI1, at 2; Interview of DI4, at 2; Interview of DI3, at 3.

<sup>101</sup>Interview of DI2, at 4.

<sup>102</sup>Interview of DI4, at 2.

<sup>103</sup>See Anderson, *supra* note 87, at 106-7.

nuclear weapon industry was a state-run expense with less private involvement. As such, there were not private groups operating in opposition to the NGOs pushing for different weapons' bans<sup>104</sup> (as might otherwise occur with, for example, smoking or hand-gun bans).

The economic situation for human rights at sea stands in contrast. Shipping and fishing companies are highly incentivized to ensure their labour costs are cheap; cruise companies do not want profit margins diminished in fully addressing crimes on board. Consumers will be negatively impacted financially if the prices of goods increase because of shipping costs, if seafood is more expensive to source and buy or if cruises become luxury holidays. States also have potential economic costs to bear in disrupting transnational crime operations, rescuing migrants or trafficked persons at sea, and in monitoring and prosecuting human rights abuses that occur on their ships, or in their territorial waters.

A further commonality among these three treaties was that the NGOs concerned initially worked with 'like-minded' states to further learning not only about the central issue but also about the potential economic, political and security costs involved. Security concerns were of course to the fore in addressing bans on landmines, cluster munitions and nuclear weapons, but re-casting the debate as political and humanitarian allowed for greater engagement in addressing the issue beyond the confines of military elite and beyond insular security concerns.<sup>105</sup> The humanitarian dimension should also be a critical point of emphasis for the GDHRAS, as was the case with the Cluster Munitions Convention, the Ottawa Convention, and the Nuclear Weapon Ban Treaty.<sup>106</sup> Focusing on the human impact may allow for the debate to be reframed from questions of military, or security, advantages to one concerned with social justice. Preferably the issue should not be one that is dependent on political persuasions, but the humanitarian dimension crosses political party lines.<sup>107</sup> State support has been recognized as an important next step for the GDHRAS.<sup>108</sup> Similar to the experience with the Cluster Munitions Treaty and the Ottawa Convention, support from a middle-power state has been seen as a viable option to progress support for the GDHRAS.<sup>109</sup>

For the Ottawa and Cluster Munitions Conventions and the Nuclear Weapon Ban Treaty, the political and security costs were not high for many states;<sup>110</sup> the opposite may be true in relation to human rights at sea. The economic concerns were mentioned previously; political and security costs emerge for those states that have developed a securitized approach to maritime issues.<sup>111</sup> In prioritizing a security lens, human rights are most commonly sidelined or ignored. States that may have traditionally supported a human rights framework in international relations may hesitate to engage because of the varied costs involved. What costs matter the most may differ across individual states, which then complicates how to achieve the core objective for protecting human rights at sea.

Yet one argument in favour of the GDHRAS in response to these political concerns is that it does not seek to advance the cause of one particular group. Securitization has been an extremely strong feature of the treatment of migrants at sea.<sup>112</sup> In drafting the GDHRAS, there was a desire not to emphasize refugees and irregular migrants even though the plight of these people had either been at the forefront of a drafter's research or because of commentators engaging in the drafting

<sup>104</sup>*Ibid.*, at 107.

<sup>105</sup>See, e.g., Price, *supra* note 65, at 625.

<sup>106</sup>See, e.g., Mekata, *supra* note 54, at 83; see Price, *ibid.*, at 614.

<sup>107</sup>See Mekata, *supra* note 54, at 81.

<sup>108</sup>Interview of DI5, at 7; Interview of DI2, at 17; Interview of DI1, at 2.

<sup>109</sup>Interview of DI2, at 17.

<sup>110</sup>Except for those states widely using the banned weapons. See Mekata, *supra* note 54, at 90 (discussing the need to create a political cost in relation to nuclear weapons).

<sup>111</sup>Most prevalent in the context of migration, but also relevant in relation to food security and trade security.

<sup>112</sup>See D. Ghezelbash et al., 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia', (2018) 67 ICLQ 315; Klein, *supra* note 23.

process.<sup>113</sup> Instead, the GDHRAS is concerned with *all* persons at sea.<sup>114</sup> Nonetheless, the lack of political will for a new binding treaty on human rights at sea has been acknowledged.<sup>115</sup>

### 4.3 Process considerations

In contemplating the process by which a treaty is made, the format of the initial draft may influence the fate of the agreement. While previous organizations and campaigns have been undertaken in relation to the use or proliferation of nuclear weapons and nuclear disarmament, the International Campaign to Abolish Nuclear Weapons (ICAN) began with a draft model convention banning nuclear weapons as its focus.<sup>116</sup> The format of the GDHRAS could be seen more as an information booklet to serve as guidance for maritime practitioners rather than purporting to set out a suite of rights and obligations comparable to a treaty, beyond the four fundamental principles. The drafters did not intend their text to be a treaty but was to serve as a basis for engaging with state stakeholders. The relatively short Declaration was to be clear on the existing law and contain straightforward messaging, with the Annexes providing further detail and complementing the Declaration.<sup>117</sup> While not resembling one of the UN human rights treaties, a drafter observed that a core instrument with more detailed annexes is also a feature of formal law-making in the International Maritime Organization, and with other treaties.<sup>118</sup> In any event, there is no reason that the GDHRAS could not be re-crafted if taken up by a state or group of states to serve as a zero draft for treaty negotiations where the guidelines in Annex C are given greater prominence. Indeed, the drafters precisely anticipated that any state agreeing to champion the GDHRAS would likely change the text.<sup>119</sup>

Collaboration among NGOs was a further feature of the process producing the Ottawa Convention, the Cluster Munitions Treaty and the Nuclear Ban Treaty. Informal networks among NGOs facilitate engagements with the relevant state actors both during treaty negotiations and in the lead up to any such negotiations. Social contacts and social media may play a role in opening channels of communication and provide opportunities for the sharing of views that will further the work of each stakeholder. Information sharing among networks further permitted greater transparency in exposing the targeted conduct of certain actors (whether multinational corporations or states).<sup>120</sup>

Co-ordination among NGOs may be essential to ensure coverage of the diversity of specific issues that may need addressing in a treaty, and thereby maximize available resources and knowledge.<sup>121</sup> Uniformity in views may not be expected because of the diverse NGOs that may engage and because each NGO will have its own reporting obligations and fundraising considerations to address.<sup>122</sup> A neutral and respected NGO may take on a convenor role for a large number of NGOs, as was the case with the World Federalist Movement in the negotiations of the ICC Statute.<sup>123</sup> For the ICC negotiations, there was a Steering Committee established to assist in co-ordination, with an expectation that any NGO could join the coalition and participate to the extent it was possible for that organization.<sup>124</sup>

<sup>113</sup>Interview with DI2, at 10.

<sup>114</sup>Interview with DI3, at 11; Interview with DI4, at 5.

<sup>115</sup>Interview of DI5, at 3.

<sup>116</sup>See Mekata, *supra* note 54, at 82–3. At its inception, the GDHRAS drafters considered the option of a treaty, modelled on those adopted in the International Maritime Organization. Interview of DI2, at 3.

<sup>117</sup>Interview of DI4, at 4.

<sup>118</sup>Interview of DI3, at 2.

<sup>119</sup>Interview of DI4, at 6; Interview of DI5, at 5; Interview of DI1, at 4.

<sup>120</sup>See Price, *supra* note 65, at 626.

<sup>121</sup>See Durham, *supra* note 66, at 8.

<sup>122</sup>*Ibid.*

<sup>123</sup>*Ibid.*

<sup>124</sup>*Ibid.*, at 8–9.

To advance the GDHRAS to a possible treaty, Human Rights at Sea will likely need to cooperate with like-minded organizations in ways similar to the experiences of other NGOs in drafting multilateral treaties. In the formation of the GDHRAS, representatives of other civil society and intergovernmental organizations were invited to participate in an initial meeting on the GDHRAS and in subsequent drafting sessions.<sup>125</sup> The GDHRAS was also reviewed by several international maritime law firms.<sup>126</sup> The inclusion of different stakeholders in these ways further allowed for awareness raising about human rights violations at sea.<sup>127</sup> Yet the need to extend awareness and acceptance of the GDHRAS among different maritime industries, unions, and further with relevant intergovernmental organizations remains a task ahead.<sup>128</sup>

Finally, in contemplating a treaty process, it may be noted that NGO campaigns do not end once a treaty is adopted; ensuring ratification and implementation, as well as convincing non-parties to become a party, remains serious work to be accomplished.<sup>129</sup> Arguably in the case of human rights at sea, it is not just a question of perspective or understanding, but one of implementation, as with all human rights treaties. States acting in good faith can rely on the GDHRAS to provide information as to how to comply with international human rights requirements at sea; the GDHRAS tells states ‘what these rules are and how to comply with them’.<sup>130</sup> Any future treaty on human rights at sea should do similarly.

## 5. Developing the GDHRAS through informal law-making

While a treaty on the protection of human rights at sea is not currently anticipated, the GDHRAS may still be valuable in articulating expectations of state behaviour even if set out in an instrument that is not considered legally binding. There may be circumstances where any agreement is still better than no agreement at all, and what is agreed provides at least a starting point for redressing a problematic issue. Informal agreements are used for different purposes in international relations and have been prolific as part of ocean governance.<sup>131</sup> They are generally supported as a quicker and more flexible response to an international issue requiring co-operation among states.<sup>132</sup> This advantage was also recognized by one of the drafters of the GDHRAS, who commented:

The development of informal law instruments adds a positive layer of international development through the likes of civil society actors which can often be faster than normative processes at State and international level, it allows timely and current protection needs to be addressed as society and the international rule of law co-develops.<sup>133</sup>

Schaffer and Pollock have similarly highlighted the relative ease and lower financial costs in negotiating an informal instrument.<sup>134</sup>

Informal instruments may also be used to elaborate on or interpret the content of existing international rules.<sup>135</sup> Informal instruments have been used successfully within the IMO to

<sup>125</sup>Interview of DI2, at 3-4; Interview of DI3, at 5.

<sup>126</sup>See GDHRAS, *supra* note 8, Foreword.

<sup>127</sup>Interview of DI5, at 3.

<sup>128</sup>Interview of DI5, at 7; Interview of DI1, at 2.

<sup>129</sup>As with the Nuclear Weapon Ban Treaty. See Mekata, *supra* note 54, at 91.

<sup>130</sup>Interview of DI3, at 4.

<sup>131</sup>As apparent in N. Klein (ed.), *Unconventional Lawmaking in the Law of the Sea* (2022).

<sup>132</sup>See, e.g., G. C. Shaffer and M. A. Pollock, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’, (2010) 94(3) *Minnesota Law Review* 706, at 719.

<sup>133</sup>Interview of DI1, at 4.

<sup>134</sup>See Shaffer and Pollock, *supra* note 132, at 719.

<sup>135</sup>C. Chinkin, ‘Normative Development in the International Legal System’, in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), 21, at 30-1.

elaborate on binding obligations. One such example relevant for the protection of human rights at sea is the IMO's Guidelines on the Treatment of Persons Rescued at Sea (2004 Guidelines).<sup>136</sup> The 2004 Guidelines elaborate on obligations set out in the Safety of Life at Sea Convention<sup>137</sup> and the Search and Rescue Convention.<sup>138</sup> Notably, the 2004 Guidelines provide greater detail to what a 'place of safety' constitutes following the rescue of persons in distress at sea.<sup>139</sup> The 2004 Guidelines further place limitations on a vessel at sea serving as a place of safety. It is clearly envisaged as a temporary solution 'until the survivors are disembarked to their next destination'.<sup>140</sup> The 2004 Guidelines thus play a role in defining any margin of appreciation that states might enjoy in the implementation of their treaty obligations.

However, the drafters of the GDHRAS consider that the legal status of the GDHRAS is drawn from the fact that it primarily brings together existing legal norms that already bind states under human rights treaties and the law of the sea.<sup>141</sup> The difficulty for both duty-bearers and rights holders in relation to human rights at sea has been understanding how these bodies of law can both apply at the same time.<sup>142</sup> The GDHRAS provides an articulation as to how international human rights may be applied and enforced within the law of the sea but whether that articulation is widely accepted remains to be seen.

State acceptance of an informal instrument remains essential for law-making in international law.<sup>143</sup> For an NGO like Human Rights at Sea seeking to gain traction with states to endorse or champion the GDHRAS, the legally non-binding status of the instrument may be more politically acceptable.<sup>144</sup> Whether a new norm also resonates with an existing norm may contribute to the likely acceptance of that new norm.<sup>145</sup> Bans on cluster munitions, landmines and nuclear weapons all aligned with existing norms of international humanitarian law that ban indiscriminate weapons and unnecessary suffering.<sup>146</sup>

If the GDHRAS were to be considered as a restatement of the law given its use of existing law of the sea and human rights principles, it could be viewed as comparable to the manuals that have been developed by private actors that bring together the laws of armed conflict in specific areas.<sup>147</sup> The GDHRAS also includes instances of 'good practice',<sup>148</sup> which are intended to be recommendations to states to improve compliance.<sup>149</sup> If states are able to recognize the GDHRAS as predominantly enshrining existing international law, it may be easier to gain support as a normative instrument.

An advantage of informal agreements is that amendments to their terms may be easier than for treaties. There may further be opportunities to widen the scope of an initial informal agreement. An example of such an effort, which was led by an NGO, occurred in relation to the Kimberly

<sup>136</sup>IMO, Guidelines on the Treatment of Persons Rescued at Sea, IMO Res MSC.167(78) (20 May 2004).

<sup>137</sup>1974 International Convention for the Safety of Life at Sea (as amended), 1184 UNTS 278.

<sup>138</sup>1979 International Convention on Maritime Search and Rescue (as amended), 1405 UNTS 119.

<sup>139</sup>Namely, a place of safety is a location where rescue operations are considered to terminate, where basic human needs are met in relation to food, shelter, and medical needs, and where transportation arrangements can be made to the next or final destination. See IMO, *supra* note 136, para 6.12.

<sup>140</sup>*Ibid.*, para 6.14.

<sup>141</sup>Interview of DI1, at 2 and at 3; Interview of DI4, at 1; Interview of DI3, at 3.

<sup>142</sup>As discussed in Section 2, notes 22–9 and accompanying text, *supra*.

<sup>143</sup>Pauwelyn references a public authority involvement even if private actors are also involved. See Pauwelyn, *supra* note 4, at 22. This view was also acknowledged during the interviews with GDHRAS drafters. Interview with DI3, at 2.

<sup>144</sup>Interview with DI2, at 8.

<sup>145</sup>See Price, *supra* note 65, at 628.

<sup>146</sup>*Ibid.*

<sup>147</sup>Examples include the San Remo Manual on the Law of Naval Warfare and the more recent Newport Manual on the Law of Naval Warfare. DI3, however, considered that there remains too much ignorance of or resistance to human rights law at sea that there is an insufficient corpus of law for this sort of drafting exercise. Interview of DI3, at 9.

<sup>148</sup>See, e.g., GDHRAS, *supra* note 8, Annex C, at 15.

<sup>149</sup>Interview with DI2, at 9; Interview of DI5, at 5.

Process,<sup>150</sup> which established a certification scheme to eliminate the ‘conflict diamond’ (or ‘blood diamond’) industry. Advocates have since proposed that a wider definition is needed for ‘conflict diamonds’ to encompass diamond-related human rights violations.<sup>151</sup> The GDHRAS also anticipates that it will be updated in the future,<sup>152</sup> though the drafters do not consider revisions to be an immediate imperative.<sup>153</sup>

The GDHRAS as an informal instrument can, and should, be used to guide state actions in protecting human rights at seas.<sup>154</sup> Informal instruments may provide a testing ground for the adoption of new principles in response to a shared problem or set standards or create mechanisms to facilitate co-operation between international actors in addressing perceived problems.<sup>155</sup> The socialization or acceptance of norms may occur through a range of methods. Price has identified techniques for stimulating norm change as including: dissemination of information about issues; establishing broad networks to advocate for the issue; grafting<sup>156</sup> the issue on to pre-existing norms; and reversing the burden of proof as to the ongoing viability of norms.<sup>157</sup> The dissemination efforts of Human Rights at Sea have been contributing to the socialization of the GDHRAS, or at least much greater acceptance that there are human rights abuses at sea that need to be better regulated and require compliance efforts in maritime space. One drafter of the GDHRAS aspires to a compliance process associated with the GDHRAS where state actions are measured against the Annex C guidelines, similar to the approach taken with the Safe Schools Guidelines that are intended to ensure protection of schools and universities during armed conflict.<sup>158</sup> Ongoing socialization of the GDHRAS across diverse channels, including diplomatic channels, and engagement with the maritime industry are both important future developments for the GDHRAS.<sup>159</sup>

In the meantime, the GDHRAS serves as a critical advocacy piece to advance awareness and improve protection of human rights at sea. Raising the issues of the NGO through a variety of avenues or forums may also be important for advancing the core mission of the organization.<sup>160</sup> Media engagement will also be important both to advance the NGO’s standing, and more generally in connecting with decision-makers as well as other stakeholders.<sup>161</sup> Media campaigns were deployed successfully in shining a light on the issue of ‘conflict diamonds’, which contributed to the Kimberley Process.<sup>162</sup> Consistent with this stance,

[t]he advocacy around the GDHRAS is constantly developing its international presence and wider stakeholder awareness of the contents of the document, the intent behind the drafting and the understanding of why it is needed as part of the international human rights narrative.<sup>163</sup>

<sup>150</sup>The multi-track diplomacy involved in this initiative is discussed in Grant and Taylor, *supra* note 71, at 385.

<sup>151</sup>For discussion, see Bruffaerts, *supra* note 71, at 1090–2.

<sup>152</sup>See GDHRAS, *supra* note 8, Foreword (referring to annual reviews of the document).

<sup>153</sup>Interview of DII, at 4; Interview of DI4, at 6; Interview of DI3, at 15.

<sup>154</sup>Informal law ‘can provide another source of evidence of the need for change in the areas the instruments target’. Interview of DII, at 4.

<sup>155</sup>N. Klein, ‘Meaning, Scope and Significance of Informal Lawmaking in the Law of the Sea’, in Klein, *supra* note 131, at 7–8.

<sup>156</sup>‘The term grafting refers to the mix of genealogical heritage and conscious manipulation involved in such normative rooting and branching.’ See Price, *supra* note 65, at 628.

<sup>157</sup>*Ibid.*, at 617.

<sup>158</sup>Safe Schools Declaration, available at [www.protectingeducation.org/sites/default/files/documents/safe\\_schools\\_declaration\\_n-final.pdf](http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration_n-final.pdf); Guidelines for Protecting Schools and Universities From Military Use during Armed Conflict, available at [protectingeducation.org/sites/default/files/documents/guidelines\\_en.pdf](http://protectingeducation.org/sites/default/files/documents/guidelines_en.pdf); Interview of DI2, at 9. A conference is held every two years to review compliance with the Safe School Guidelines. Safe Schools Declaration, available at [ssd.protectingeducation.org/](http://ssd.protectingeducation.org/).

<sup>159</sup>Interview of DII, at 4; Interview of DI5, at 7–8.

<sup>160</sup>See, e.g., Durham, *supra* note 66, at 29.

<sup>161</sup>*Ibid.*, at 28.

<sup>162</sup>See Grant and Taylor, *supra* note 71, at 390–1.

<sup>163</sup>Interview of DII, at 3–4.



## 6. Conclusion

Apparent in the sometimes decade(s)-long journeys for the NGOs advocating for international treaties in relation to banning of landmines, cluster munitions and nuclear weapons, there are many factors that will impact on international law-making. As Durham has observed:

Measuring the success of civil society in the creation of international legal norms is not easy. Like all organisations which play an informal part in policy formulation, it is complex to extract the exact value of input from one group due to the range of contributions from various forces and actors.<sup>164</sup>

The influencing factors include political, economic, and strategic concerns, as well as legal matters, such as the normative content of the policy being pursued, accountability, and questions of scope. These issues of substance and process must be added to the possible impact of different stakeholders, beyond states and NGOs, to other actors in the international legal system who hold interests in the issue and engage in international law-making. Even when there is sufficient consensus on substance among the actors as a response to a specific concern, there may not be agreement that a legally binding instrument is needed. Even reaching a state-endorsed informal agreement may be enough for an NGO initiative to change state actions.

The international law-making path that lies ahead for the GDHRAS is potentially long and still obscure. In one respect, it could be argued that a distinct feature of the GDHRAS as a compilation of existing law – a reformulation to demonstrate the applicability of international human rights law at sea and the ways by which it can be enforced – rather than promoting the adoption of a new law (banning a weapon) may mean the GDHRAS is less about law-making but more about law compliance. Yet with either characterization, there is undoubtedly more work to be done in the face of ongoing human rights violations at sea. The inclusion of *lex ferenda* ‘good practice’ in the GDHRAS indicates that there remain areas where international law could be more detailed or clearer so as to promote universal interpretation and application.

In contemplating the future of the GDHRAS, this article has indicated what lessons may be drawn from other NGO experiences that resulted in treaties and what might prompt an informal law-making process. These lessons are pertinent for other civil society actors seeking to influence or reform international law. The reflections of the GDHRAS drafters have indicated an awareness of both the opportunities and the challenges in achieving acceptance of the Geneva Declaration. For Human Rights at Sea, the GDHRAS is a priority for the NGO to meet its vision of ending human rights abuses at sea. It may be that a multi-pronged approach is one more likely to achieve tangible changes for human rights victims rather than focusing all efforts in one campaign behind the GDHRAS, as was seemingly the approach of ICAN in relation to the Nuclear Weapon Ban Treaty. The GDHRAS may become one of many initiatives to address the concerns related to human rights protections at sea and contribute to ‘a norm cascade’ that may ensue ‘after reaching a tipping point’ consisting of a critical mass of states and of critical states.<sup>165</sup> Time will tell.

<sup>164</sup>See Durham, *supra* note 66, at 40.

<sup>165</sup>M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’, (1998) 53 *International Organization* 887, at 902.