

Human Rights in the International Tribunal for the Law of the Sea.

Felipe Martins Anawate

^a Faculty of Law, University of São Paulo, São Paulo, Brazil, felipe.anawate@usp.br

Abstract. This paper has the objective to analyse the presence of Human Rights issues in the cases of the International Tribunal for the Law of the Sea. The adopted methodology was the case law analysis, through the search of keywords related to Human Rights in the document search engine of the tribunal. In the 6 cases and 16 separate opinions which had a substantial presence of Human Rights issues were mainly connected with the protection of due process of law in the context of imprisonment of crew and seizure of vessels within the obligation of prompt release enshrined in the United Nations Convention on the law of the sea. Furthermore, several cases of the International Court of Justice were used as a basis for the judgments on the matter of Human Rights. Specifically, even some of the judges recognize that the tribunal established an important long-standing tradition on the considerations of humanity, however, there is a need for further development and deeper approach on the protection of human rights at sea and other important circumstances such as the protection of individual liberties and the jurisdictional issues.

Keywords. Human Rights, International Tribunal for the Law of the Sea (ITLOS), Considerations of Humanity, International Covenant on Civil and Political Rights (ICCPR)

1. Introduction

The International Tribunal for the Law of the Sea (ITLOS) was established by the United Nations Convention on the Law of the Sea (UNCLOS) [1] as one of the options of dispute settlement mechanisms which the parties may choose to submit its pleadings since it is a specialised court to interpret and apply the law of the sea [2]. In article 288 of UNCLOS it is enshrined that ITLOS has the “jurisdiction over any dispute concerning the interpretation or application of this Convention (...)”.

For non-specialists in the area, this convention may preliminarily have only effects on natural resources and environment. However, there are important considerations of rule of law, individual liberties and due process of law [3].

Hence, this paper has the objective to analyse how the ITLOS has applied UNCLOS in Human Rights matters throughout the 29 cases that have been already adjudicated and its proceedings finalised by the Tribunal.

2. Methodology

The research question which this paper tries to

answer is how the ITLOS considers Human Rights issues when applying and interpreting the UNCLOS.

Departing from this objective, was established the hypothesis that, firstly, the Human Rights considerations were not the main point of the cases and, secondly, that the Tribunal has insufficiently dealt with Human Rights issues, even when it is clear the connection between the case and Human Rights.

The method of analysis chosen in this paper is the case-law review. Therefore, to reach the objective, some key words were determined to be searched in the ITLOS' website [4] document search platform for cases and separate opinions of the judges.

The key words searched were “human rights”; “Considerations of Humanity”, since the Digest of Jurisprudence elaborated by the court determines these words in reference to Human Rights; and International Covenant of Civil and Political Rights (ICCPR), as the main Human Rights' Treaty on the United Nations System.

While searching in the document search engine of the Tribunal, it was possible to find 45 documents, between final judgements and separate opinions of the judges. From this number, 23 did not have a real discussion of Human Rights. However, in 22

documents, 6 cases and 16 separate opinions, reflects the opinion of the Tribunal in the presence of Human Rights guarantees in the law of the sea.

3. Human Rights in the decisions of the Tribunal

In the dissenting opinion of judge Anderson [5] in the case M/V "SAIGA" (Saint Vincent and the Grenadines v. Guinea), the first adjudication by the court, was the first time human rights were taken into consideration, specifically the guarantees of fair trial regarding criminal charges on smugglers. Judge Anderson cited the paper written by Oxmann, a Professor in the University of Miami, a reference on the presence of Human Rights in UNCLOS to support its opinion.

The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) [6] is considered even in the digest of jurisprudence of the Tribunal as a Landmark on the theme. The matter of the dispute concerned the way Guinea arrested the crew and the master of M/V Saiga and detained the vessel, supposedly importing gas oil into the customs radius of Guinea. Therefore, the excessive use of force was considered to be unlawful under international law by the court, also affirming in paragraph 155 that "Considerations of Humanity must apply in the law of the sea, as they do in other areas of international law". Furthermore, to support the idea that all efforts should be made not to endanger life, the Tribunal cited the "I'm Alone" case [7] and the Red Crusader case [8], both arbitral awards.

In a separate opinion of this same case [9], judge president Mensah recognized that the discussion of standing related to the registration day of the ship should be attributed to lapses in the administrative system of Saint Vincent and the Grenadines and, hence, of its nationality. Moreover, he considered the analysis should be less strict, since it involved the possibility of redress to the injury, damage or other loss caused by the actions of Guinea, which affected the fundamental human rights and dignity of the person of the crew and master of Saiga. While referring to the dissenting opinion of judge ad hoc Guggenheim in the International Court of Justice case *Nottobohm* [10], which establishes that in refusing the admissibility on the lack of standing on the absence of nationality, it must not prevent justice from being done, Mensah affirms that it would be the case if the Tribunal had considered inadmissible.

The "Camouco" (Panama v. France) case [11], in which a Panama vessel was unlawfully fishing in the exclusive economic zone of a French island when the authorities seized the vessel and imprisoned the crew. In its dissenting opinion, judge Anderson affirmed that France not only should have respected the prompt release provision of article 292 of UNCLOS, but also the European Convention on Human Rights, in which its articles 6 and 7, guarantees, respectively, fair trial within reasonable

time and not subjected to a cruel and unusual punishment.

Following the case M/V Saiga, the Juno Trader case [12] is another one that needs to be highlighted on human rights matters. Similarly, as in other cases, the ship was apprehended and the crew detained by Guinea-Bissau. However, even with the payment, they were not released and, as a consequence, emerged the discussion of the considerations of humanity and due process of law in cases of prompt release of vessels and crews. In this case, the tribunal found that Guinea-Bissau infringed article 73(2) of UNCLOS when it did not promptly release the Juno Trader and its crew upon the posting of a reasonable bond or other security was well-founded.

Similarly, judges Mensah and Wolfrum, reaffirmed in their separate opinion [13] that is necessary to comply with the limitations imposed by UNCLOS in cases of prompt release, but they have also to respect other relevant rules of international law, such as the international human rights threshold, which includes the right of a fair trial and due process of law.

Furthermore, a relevant statement was made by judge Treves in his separate opinion [14], when he recognized that this case was a great evolution and development on the jurisprudence of the tribunal when reaffirmed the considerations of humanity, specifically on the unnecessary use of force and on the violations of due process of law. Nonetheless, he emphasises that it needs to be further developed in ITLOS, also in a way of expanding the bases of jurisdiction and, hence, the responsibility over human rights, considering that States may have sovereign rights on some fields of the exclusive economic zone.

The case M/V "Louisa" was filed by Saint Vincent and the Grenadines against the Kingdom of Spain [15] to contest the manner in which the right to property of the owner of the Louisa was infringed and the manner four persons were arrested and detained in connection with criminal proceedings instituted in Spain after docking in the port of Cádiz. Supposedly they were carrying weapons of war and archaeological patrimony of Spain.

Judge Bouguetaia, in his separate opinion on this case [16], considers that undoubtedly there was a violation of Human Rights, considering the conditions of the detention, certainly mental torture, but could be also considered physical. However, the court rejected the possibility to consider the jurisdiction over the Human Rights claim simply because it was not evident in the written statements, even if it emphasised the relevance of fulfilling obligations under international human rights law and the respect of due process in all circumstances.

Bouguetaia disagrees, because when Saint Vincent and The Grenadines asked for reparations based on the abuse of rights, article 300 of UNCLOS states that every obligation of the convention shall be conducted

in good faith. They were subtly stating a reparation of Human Rights also, an article that was also cited by Spain several times in the written proceedings.

It is important to cite *ipsis litteris* the statement of judge Bouguetaia concerning the way ITLOS missed out in this case while rejecting to analyse the Human Rights Claim: "(...) I personally regret that the Tribunal was not able (for fear of favouring the position of one or other of the Parties) to take that step and join the ICJ in its work in furthering the protection of human rights (...) The Tribunal would then have made its own concrete contribution to the momentum in protecting human rights" (paragraphs 31 and 38). Doing so, he highlighted the importance of the ICJ Barcelona traction case [17], that recognized Human Rights as an *erga omnes* obligation and, hence, the tribunal should have done a more substantive analysis than just passing through it.

Not only he thinks it would be possible to sustain this claim on the basis of article 300 of UNCLOS, but also with the help of the last paragraph of the preamble, which establishes that matters not regulated by the convention continue to be governed by rules and principles of general international law, as other legitimate sources of international law, and, moreover, based on article 2(3) of UNCLOS, since happened in Spanish port authority, no right, however sovereign, may be exercised in a manner that results in an abuse of Rights and arbitrariness.

In the same way, judge Lucky, in his dissenting opinion of the same case [18], also thought the court had jurisdiction based on the abuse of rights article and general principles of international law. Specifically, one of the persons which were imprisoned and had the Human rights violated was Alba Avella, an American citizen, and despite this fact, Saint Vincent and The Grenadines was legitimated, according to judge Lucky, to enforce her claim of abuse of Human Rights since it is the flag state of the ship. Additionally, Lucky considers that the other relevant rules of international law encompass the rights related to due process of law and fair trial enshrined in the European Convention on Human Rights, of which Spain is a signatory.

Judge Kateka, in the separate opinion [19], followed Bouguetaia's opinion and further established that the tribunal had gone against its own jurisprudence of M/V Saiga case, which gave importance to the suffering of people when analysing Law of the Sea disputes, the considerations of humanity.

M/V "Virginia G" (Panama/Guinea-Bissau) [20], there was a simple reference to the importance of the considerations of humanity on the arrest and prompt release, following the Tribunal's case law. Judge Lucky, in his separate opinion of this case [21], considered there was a violation of Human Rights of the captain and of the crew.

Besides the conclusive judgement of the case "Arctic Sunrise" (Kingdom of the Netherlands v. Russian

Federation) [22] does not have any reference to Human Rights, judge Wolfrum and judge Kelly, in their separate opinion, differentiates the enforcement based on jurisdiction in the exclusive economic zone, where the enforcement jurisdiction is limited, and on the safety zones of a platform on the sea. To do so, give the example of a case adjudicated in a court in the Netherlands which prohibited Greenpeace International to enter into the safety zone of a platform in the exclusive economic zone of the coast of Greenland. The non-governmental organisation could have alleged the right to freedom of expression enshrined in the ICCPR in the exclusive economic zone, however, this right could be limited by the safety interests of the operator of a platform on the sea if it was the case.

The case "Enrica Lexie" (Italy v. India) [23] was about two Italian marines aboard an Italian-flagged oil tanker that killed two Indian fishermen and damaged their vessel in the exclusive economic zone of India. The dispute that was brought to the Tribunal was which state has jurisdiction to adjudicate the incident. The tribunal considered as one of the reasons to concede the provisional measures was the considerations of humanity, following the tradition of Itlos first established in the case M/V Saiga. Judge Jesus [24] reinforced this idea, emphasising that "detention or restrictions on the movement of persons who wait excessively long to be charged with criminal offences is, per se, a punishment without trial." (paragraph 11).

However, in the dissenting opinion of vice-president Bouguetaia [25], he considered the jurisdiction over a shooting in the exclusive economic zone does fall beyond the scope of the convention, which was silent on those themes, even if there were infringements of humanitarian law and Human Rights law in this case.

In the case M/V "Norstar" (Panama v. Italy) [26], Panama asked the court to consider Human Rights when analysing the procedural obligations, following the court case law on the considerations of humanity, because of the way Italy ordered and requested the arrest of Norstar. Nonetheless, Italy contained that the tribunal has no jurisdiction to determine a breach of obligations of separate treaties and its own separate regimes. The Tribunal concluded that it could not analyse the Human Rights infringements since Panama did not include it on the claim of its final submissions.

The last case analysed by the tribunal which mentions Human Rights was the provisional measures on M/T "San Padre Pio" (Switzerland v. Nigeria) [27]. Judge Murphy [28] established that, besides the fact vessels cannot be subjected to arbitrary arrest or detention, guaranteed in article 9 of the ICCPR, it is still valid article 2(1) of ICCPR which establishes there is territorial jurisdiction over the responsibility of Human Rights.

Furthermore, Judge Petrig [29] considers there was a real risk to life, health and liberty of the crew when Nigeria detained the vessel and the decision of the

tribunal in releasing the vessel, the cargo and the crew recognizes the humanity behind the dispute of two states.

When analysing the conclusion of the tribunal that Switzerland makes available the crew to the criminal proceedings in Nigeria if the arrest is not considered a violation under the convention, Petrig disagrees, specifically regarding human rights and humanitarian considerations. The principle of non-refoulement [30] entails that “no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm” and, therefore, Switzerland could not send the Master and the three officers to Nigeria, it would only be possible if sufficient assurances were provided.

4. Analysis of the Results

After describing every reference of Human Rights in case law of ITLOS, it is possible to determine that all the references were made in cases of arrest of the crew and seizure of vessels, including the obligation of prompt release enshrined in articles 73 and 292 of UNCLOS, dealing mainly with Human Rights issues related to due process of law. As a consequence, one of the hypotheses can be confirmed, since the human rights issues analysed by the tribunal were always incidental and not the main point of the litigation, since they mention a possible consequent violation of Human Rights Law when there is an infringement of the provisions of prompt release of vessels, for example.

Moreover, there is an interesting discussion on how further the Tribunal can discuss Human Rights violations, considering the attribution is of applying and interpreting UNCLOS. In the case law, appeared an opinion that Human Rights issues are separate obligations deriving from distinct legal regimes from the one of the law of the sea. On the other hand, some judges consider the determination of “other relevant rules of international law”, which appear several times in UNCLOS, as an instrument to prescribe a possible violation of Human Rights Law that can appear in the disputes.

There is also the determination that Human Rights treaties ratified are still valid under the law of the sea regime, therefore, state parties to both conventions have to continue to respect the ICCPR or the European Convention on Human Rights, for example, as appeared in some of the above-mentioned cases. This idea reflects what was also affirmed in the Geneva Declaration on Human Rights at Sea [31], drafted by the international Non-Governmental organisation Human Rights at Sea, which determines:

“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.”

Also, several cases from the International Court of Justice were used as a basis to interpret human rights issues, such as the Barcelona Traction and Nottebohm. Not only that, but Judge Bouguetaia in the M/V Louisa case established that Itlos should have taken a step further in protecting Human Rights just as ICJ did in its own case law.

In at least two of the separate opinions, there was a clear recognition that the Tribunal circumvented its obligations of analysing a Human Rights claim based on a procedural argument, such as not explicitly bringing the claim in the written proceedings. This fact impeded the court from further developing its case law on the protection of Human Rights at sea. Additionally, this is why there are separate opinions that conclude there was a violation of Human Rights, when, at the same time, there is not a reference on it in the final judgement.

Even if it is possible to establish that the tribunal could have already further developed the protection of Human rights in the law of the sea context, there is an awareness of its importance in individual opinions of judges such as Treves in the case Juno Trader and Bouguetaia in M/V Louisa.

5. Conclusion

Along with the description of case law and its critical analysis it is possible to conclude that Itlos has established a longstanding tradition in taking into account the considerations of humanity in law of the sea disputes. Nonetheless, it is essential that the tribunal further develops in its next judgments a deeper approach in Human Rights issues, similarly as the International Court of Justice already did, so that no state party can disengage from its obligations under International Human Rights Law in the sea.

Furthermore, it is important also to enhance the analysis not restraining the guarantees of human rights on due process of law, also considering individual liberties and the problematic of jurisdiction and its impacts on the protection of Human Rights.

This paper only began the analysis of the impact of Human Rights in the law of the sea decisions, and it could be further developed with the considerations of labour law in the sea treaties and also the developing case law which will be adjudicated by Itlos in the near future.

6. Reference

[1] United Nations Convention on the Law of the Sea. UN. Dec 10, 1982.

[2] Menezes W. *O direito do mar*. Brasília: FUNAG; 2015; 238 p.

[3] Oxman BH. Human Rights and the United Nations Convention on the Law of the Sea. *Columbia Journal of Transnational Law*. 1998;

[4] Document search [Internet]. ITLOS. Available

from:

<https://www.itlos.org/en/main/advanced-search/>

- [5] *M/V "SAIGA" (Saint Vincent and the Grenadines v. Guinea)*, Dissenting opinion of Judge Anderson (13 November 1997), (ITLOS Reports 1997).
- [6] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Order (20 January 1998), (ITLOS Reports 1998).
- [7] *"I'm Alone" case (Canada v. United States)*, (1935), (U.N.R.L.A.A., Vol. III).
- [8] *The Red Crusader case (Commission of Enquiry, Denmark v. United Kingdom)*, 1962), (I.L.R., Vol. 35).
- [9] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Separate Opinion of President Mensah, (20 January 1998), (ITLOS Reports 1998).
- [10] *Nottebohm, Second Phase*, dissenting opinion of judge Guggenheim (1955), (I.C.J. Reports 1955).
- [11] *"Camouco" (Panama v. France)*, Dissenting opinion of judge Anderson (17 January 2000), (ITLOS Reports 2000)
- [12] *The "Juno Trader" case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Order (19 November 2004), (ITLOS Reports 2004).
- [13] *The "Juno Trader" case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, separate opinion of judges Mensah and Wolfrum (19 November 2004), (ITLOS Reports 2004).
- [14] *The "Juno Trader" case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, separate opinion of judge Treves (19 November 2004), (ITLOS Reports 2004).
- [15] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, order (30 November 2010), (ITLOS Reports 2008-2010).
- [16] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, separate opinion of judge Bouguetaia (30 November 2010), (ITLOS Reports 2008-2010).
- [17] *Barcelona Traction, Light, and Power Company, Ltd.*, ICJ Judgement (1970).
- [18] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, dissenting opinion of judge Lucky (30 November 2010), (ITLOS Reports 2008-2010).
- [19] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, separate opinion of judge Kateka (30 November 2010), (ITLOS Reports 2008-2010).
- [20] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Order (18 August 2011), (ITLOS Reports 2011).
- [21] *M/V "Virginia G" (Panama/Guinea-Bissau)*, separate opinion of judge Lucky (18 August 2011), (ITLOS Reports 2011).
- [22] *"Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation)*, joint separate opinion of judge Wolfrum and judge Kelly (25 October 2013), (ITLOS Reports 2013).
- [23] *"Enrica Lexie" (Italy v. India)*, Provisional Measures, order (24 July 2015), (ITLOS Reports 2015).
- [24] *"Enrica Lexie" (Italy v. India)*, Provisional Measures, separate opinion of judge Jesus (24 July 2015), (ITLOS Reports 2015).
- [25] *"Enrica Lexie" (Italy v. India)*, Provisional Measures, Dissenting Opinion of Vice-President Bouguetaia (24 July 2015), (ITLOS Reports 2015).
- [26] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Order (15 March 2016), (ITLOS Reports 2016).
- [27] *M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order (29 May 2019), (ITLOS Reports 2018-2019).
- [28] *M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Separate opinion of Judge ad hoc Murphy (29 May 2019), (ITLOS Reports 2018-2019).
- [29] *M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Separate opinion of Judge ad hoc Petrig (29 May 2019), (ITLOS Reports 2018-2019).
- [30] OHCHR, *The principle of non-refoulement under international human rights law* (2018)
- [31] *Human Rights at Sea, Geneva Declaration on Human Rights at Sea*, January 2022.