

The Contribution of the International Tribunal for the Law of the Sea to the Protection of Human Rights and the Public Interest at Sea

The Contribution of the International Tribunal for the Law of the Sea to the Protection of Human Rights and the Public Interest at Sea

By: Miriam Cohen and Nouwagnon Olivier Afogo

Introduction

Forty years after the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) and over twenty years of subsequent jurisprudence, to what extent has the International Tribunal for the

Law of the Sea (ITLOS) contributed to the protection of human rights and the public interest at sea? The answer to this question is not as obvious as it might seem for at least two important reasons.

First, UNCLOS refers to human rights protection in very few provisions, *i.e.* Articles 18(2), 73(3), 89, 94, 98, 146, and 230, and doesn't expressly confer jurisdiction to ITLOS in this matter. It's well-known that Article 288 confers to ITLOS jurisdiction over "any dispute concerning the interpretation or application" of UNCLOS. Certainly, this includes all UNCLOS provisions that have a human rights incidence. Moreover, Article 290 on provisional measures, and Article 292 regarding the prompt release cases, permit the ITLOS to protect human rights *prima facie* and promptly. However, as the arbitral tribunal under Annex VII to UNCLOS reiterated in the *Arctic Sunrise* case, the human rights protection regime is autonomous and should not be replaced by the courts and tribunals of the law of the sea (para 157). The role of ITLOS in this matter is thus relatively limited.

Second, the law of the sea is facing new challenges which will have the impact of restructuring the role of ITLOS in protecting the "public interest". Generally named "community interest"[1] or "common interest of the international community as a whole" (Yoshifumi Tanaka, 331), public interest refers to a set of principles and values which transcend the personal interests of States to incorporate "all human beings". In the law of the sea, this includes the Area and its resources, which constitute the common heritage of mankind in accordance with Articles 311(6), 136, 137 of UNCLOS; the obligations to preserve and protect the marine environment pursuant to Article 192, and the management and the conservation of marine living resources (Yoshifumi Tanaka, 339, 350, 364). Even if the contribution of ITLOS to the rule of law in these areas is undeniable, the new challenges of the law of the sea require renewed attention to the role of the Tribunal in the protection of public interest.

The flag State regularly addresses the ITLOS, either for the request of provisional measures for the release of the crew of the detained vessel, pending a decision on the merits, or for the prompt release of the crew after a reasonable bond or financial security has been deposited with the coastal State, and where appropriate, to rule upon the compensation of the damage suffered by the crew. Likewise, the ITLOS serves as an avant-gardist in the protection of common interests both by its contentious and advisory function.

1. **The contribution of ITLOS to the protection of human rights at sea**

The prominence of human rights protection under the UNCLOS mechanism was emphasized by ITLOS in the *M/V Saiga* case, the first case where the Tribunal exercised its contentious function. As a reminder, the vessel flying the flag of Saint Vincent and the Grenadines was boarded on 28 October 1997 by two Guinean patrol boats for suspected smuggling in Guinea's exclusive economic zone and the alleged violation of Articles 56(2), 58, 111, 292(4) and 296 of UNCLOS. The crew members were arrested, transferred to Conakry, and the Master of the *M/V Saiga* was sentenced by Guinean courts to 6 months of imprisonment and the payment of US$15 million, with the confiscation of the cargo of the vessel.

Fundamentally, the *M/V Saiga* case revealed that UNCLOS doesn't provide an adequate guarantee for the protection of human rights at sea. Consequently, in its Judgment of 1 July 1999, ITLOS stated that the protection of the crew, the owner, and all persons interested or involved in the ship's activity, is the responsibility of the flag State, independently of their nationality (para 106). Be that as it may, beyond the principle of the unity of the ship, ITLOS ruled that "considerations of humanity must apply in the law of the sea, as they do in other areas of international law" (*Ibid*, para 155). Undoubtedly, this *obiter dictum* constitutes an additional guarantee for the protection of human rights in the law of the sea litigation.

When the *M/T San Padre Pio* was boarded by Nigerian authorities on 23 January 2018, the Master and three other officers were prosecuted for distributing or marketing petroleum products without legal authority or appropriate licenses. Their passports were confiscated, and they couldn't travel outside Nigeria without the authorization of Nigerian courts. In addition, when the *Juno Trader* was boarded by the Guinea-Bissau Navy on 26 September 2004 for infringement of Guinea-Bissau fisheries legislation, the 19 members of the crew were detained on board the vessel, except for the one who was physically injured at the time of boarding. As ITLOS considered in the *Juno Trader* case, "the obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law" (para 77). In such situations, ITLOS has ordered *prima facie* that "Guinea shall refrain from taking or enforcing any judicial or administrative measure against the *M/A Saiga*, its Master and the other members of the crew, its owners or operators" (para 55). Similarly, it ordered promptly in its Judgment of 18 December 2004 that "the crew [of the *Juno Trader*] shall be free to leave Guinea-Bissau without any conditions" (para 104(4)). In the *M/T San Padre Pio* case (Order of 6 July 2019, para 146(1)(c)) as well as in the *Arctic Sunrise* case (Order of 22 November 2013, para 105(a,b), ITLOS ordered that Nigeria and the Russian Federation "shall immediately release [the vessels and all persons detained and ensure that they] are allowed to leave the territory and maritime areas under [their] jurisdiction". In the same vein, in the case concerning the *Detention of three Ukrainian naval vessels*, particularly concerned, from a humanitarian perspective, by the continued deprivation of their liberty and freedom (para 112), ITLOS ordered *prima facie* that "the Russian Federation shall immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine" (para 124(1)(b)). On 25 June 2019, pursuant to paragraph 124(2) of the ITLOS Order, the Russian Federation informed the Tribunal that it intended to adopt a special procedure for the release of the Ukrainian servicemen detained in Russia to permit them to return to Ukraine.

Furthermore, States may request compensation before ITLOS for human rights violations, following the international legal regime of State responsibility. In this regard, in the *M/V Norstar* case, ITLOS stated in its Judgment of 10 April 2019, due to a lack of evidence, that "Panama's claim for compensation […] d[id] not meet the requirement of a causal link between the wrongful act of Italy and damage allegedly suffered by Panama"(para 452).

2. **The contribution of ITLOS to the protection of public interest at sea**

The protection of the common interest has been implicitly addressed in the *MOX Plant* case. In this case, the United Kingdom authorized the installation of the *MOX Plant* for the treatment of nuclear fuel waste containing a mixture of plutonium dioxide and uranium dioxide, with the objective to obtain mixed oxide fuel. Ireland objected to the authorization, arguing that the functioning of the plant may lead to pollution of the marine environment and international transfers of radioactive material. On 25 October 2001, Ireland notified the United Kingdom of the submission of the dispute to the Annex VII arbitral tribunal under UNCLOS.

ITLOS noted in this case that the obligation to cooperate in the preservation and protection of the marine environment is fundamental and gives relevant reasons for the prescription of provisional measures different from those requested by Ireland (Order of 3 December 2001, para 82). In summary, even if there is no urgency to prescribe provisional measures, ITLOS ordered the States to cooperate and to consult without delay, and to survey the risks or effects that might arise or result for the Irish Sea from the operations of the *MOX plant* (paras 81, 89(1)(b)). It should be noted that the protection and preservation of the marine environment involves issues that transcend the protection of the personal rights of States and may therefore give ITLOS the power to prescribe provisional measures *proprio motu*. This obligation is binding on all States, whether they are parties or not to UNCLOS. The Seabed Disputes Chamber reaffirmed the *erga omnes* character of this obligation in its 2011 *Advisory Opinion* on the responsibility and obligations of States regarding activities in the Area (para 180). Essentially, UNCLOS establishes a certain *actio popularis*, thus ensuring collective protection of the marine environment, without prejudice to the subjective rights of States (Nouwagnon Olivier Afogo, 31). In the *Land Reclamation in and around the Straits of Johor* case, the Tribunal, recalling its jurisprudence in the *Mox Plant* case on the fundamental character of the obligation to cooperate to conserve and protect the marine environment, ordered States to establish a group of experts to conduct an environmental impact assessment within a year (paras 92, 106(1)(a)(i)).

In the *Advisory Opinion* on the obligations of the Sub-Regional Fisheries Commission Member States in relation to illegal, unreported, and unregulated fishing, ITLOS recalled its jurisprudence in the *Southern Bluefin Tuna* case in which it stated that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (para 70). Recently, the Commission of Small Island States on Climate Change and International Law requested an *Advisory Opinion* on the consequences of climate change for the preservation and protection of the marine environment, notably ocean warming, sea level rise, and ocean acidification. The questions before ITLOS are of such complexity that they will likely lead the Tribunal to consolidate its contribution in matters of public interests, as well as the link between the law of the sea and other rules of international law in accordance with Article 293 of UNCLOS.

Conclusion

The jurisprudence of ITLOS in the context of human rights protection is not free from criticism (see e.g. in the *M/T San Padre Pio*, *Dissenting Opinion* of Judge Anthony Lucky, (para 21) and *Dissenting Opinion* of Judge Zhiguo Gao, (par. 77); in the *M/V "SAIGA" (No. 2)* case, see *Dissenting Opinion* of M. Joseph Sinde Warioba, (para 2)).

However, promptly or *prima facie*, ITLOS contributes to the protection of human rights and sometimes adopts a strict jurisdictional approach. As such, it has regularly ordered the immediate release of the crew of a boarded vessel or their unconditional liberty to leave the territory under the jurisdiction of the coastal State. Moreover, ITLOS is willing and able to consider the compensation of human rights violations when requested by the flag State, provided that the evidence presented is convincing. It is somewhat unfortunate that ITLOS has not been given the opportunity to examine a number of related issues, such as the duty to render assistance pursuant to Article 98 of UNCLOS. States are not rushing to claim non-compliance with this obligation, despite the numerous human rights violations reported in this regard.

Be that as it may, the submission of the *M/T "Heroic Idun" (No. 2)* case by the Marshall Islands and the Republic of Equatorial Guinea to a Special Chamber of ITLOS on 27 April 2023 provides an opportunity for the Chamber to refine ITLOS jurisprudence on issues relating to the protection of human rights at sea. In short, this vessel belonging to *Idun Maritime Limited* and flying the Marshall Islands flag was intercepted and detained by the Equatorial Guinean Navy on 12 and 13 August 2022 following the order of Nigeria, with 26 crew members on board from India, Sri Lanka, the Philippines and Poland. In the interests *inter alia* of the safety, security and health of the crew, the Marshall Islands had filed an application for the prompt release of the vessel and its crew, but subsequently withdrew it in accordance with Article 106, paragraph 1 of the Rules of the ITLOS.

As regards the protection of the public interest, ITLOS has already made a mark, and it has the potential to further contribute, be it in clarifying the obligations of States or the issues raised by recent developments in the law of the sea. With the adoption of the Agreement under United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (see the draft of the BBNJ agreement here), this responsibility is further increased.

ITLOS is conscious of the importance of protecting the public interest as is reflected in its Judgement on the merits of 28 April 2023 in the *Dispute concerning the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean*. In this case, the Special Chamber adopted a cautious approach by refraining from delimiting the continental shelf beyond 200 miles between Mauritius and the Maldives in order to avoid any "prejudice to the interests of the international community in the Area and to the principle of common heritage" (paras 451, 452, 453).

Citation: Miriam Cohen and Nouwagnon Olivier Afogo, "The Contribution of the International Tribunal for the Law of the

Sea to the Protection of Human Rights and the Public Interest at Sea" (2023) 7 PKI Global Justice Journal 3

[1] See Markus Benzing, "Community Interests in the Procedure of International Courts and Tribunals" (2006) 5:3 Law & Prac Int'l Cts & Tribunals 369.

About the Authors

Miriam CohenDr. Miriam Cohen - Miriam is the Canada Research Chair in Human Rights and International Reparative Justice and Associate Professor of Law at Université de Montréal. She is a member of the Quebec Bar and formerly served as an Associate Legal Officer at the International Court of Justice (United Nations). She acted as counsel for the Republic of Panama in the *M/V Norstar* case (merits phase). The views expressed in this article represent solely those of the authors.

Nouwagnon Olivier AfogoNouwagnon Olivier Afogo - Nouwagnon is a LL.D candidate at the Université de Montréal and Université Jean Moulin Lyon 3, and a Research Associate at the Canada Research Chair in Human Rights and International Reparative Justice. His doctoral research focuses on the case law of ITLOS on the protection of human rights in the context of the use of force at Sea.