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The International Tribunal for the Law of the Sea and Human Rights

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1. Introduction

When considering the topic of human rights before the International Tribunal for the Law of the Sea (ITLOS or Tribunal), it is commonplace to refer to the 'considerations of humanity' dictum pronounced by the Tribunal in its very first judgment on the merits – the *M/V SAIGA (No. 2)* case[1] – and referenced in a series of later cases.[2] Yet what exactly does this expression signify, and what consequences does its invocation entail? Do the Tribunal and individual judges use it to express the idea that human rights norms must have a bearing on disputes concerning the interpretation or application of the United Nations Convention on the Law of the Sea (UNCLOS or Convention)?[3] Or is it rather a reference to a general principle of international law or merely to a moral concept that has not yet been translated into a legal rule? And has the Tribunal – or individual judges – referred to human rights more clearly in its judicial pronouncements?

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[1] *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, 1 July 1999, ITLOS Reports (1999) 10, para. 155.

[2] See latest: *'Enrica Lexie' Incident (Italy* v. *India), Provisional Measures*, Order, 24 August 2015, ITLOS Reports (2015) 182, para. 133.

[3] UNCLOS, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

In-depth analyses of the role of human rights in decisions of ITLOS are few and far between.[4] This book provides an opportunity to consider ITLOS case law from this angle as part of its larger enquiry into the relevance of human rights norms before 'other' international courts – that is, international organs not mandated with deciding on human rights disputes as such.[5] It offers the possibility to assess the various ways – some subtle, some bold – by which ITLOS takes into account the interests and rights of individuals affected by fact pattern submitted to the Tribunal for adjudication. Thereby, our analysis is guided by three contexts discerned by the editor, in which the issue of human rights before 'other' judicial organs may arise.[6]

First, what are the procedural rights of the parties or other participants in the proceedings before the respective judicial body (Context One)? The (generally) inter-State nature of disputes brought before ITLOS limits the number of possible findings on this context. Nevertheless, the prompt release procedure warrants some discussion in this regard because private persons play a key role without, however, being parties with their own procedural rights.

Second, do human rights form part of the substantive law applicable in the adjudication of disputes that fall within the jurisdiction of the respective court or tribunal? The number of findings with regard to 'human rights clauses' (Context Two) depends on how broadly we define the concept – concretely, whether we extend it to encompass 'ordinary' international individual rights, which, according to Peters, exist alongside human rights.[7] The distinction between these two sets of rights, which can be brought together under the umbrella term of international individual rights, rests on a substantive rather than formal criterion.[8] While human rights encompass rights of a fundamental character and derive from the inherent dignity and worth of the human person, 'ordinary' international individual rights pertain to less important subject matters; yet their recognition and protection at the international level is both desirable and legitimate in light of the transnational scenarios in which they apply.[9] To include 'ordinary' international individual rights

[4] But see T. Treves, 'Human Rights and the Law of the Sea', *Berkeley Journal of International Law*, 28 (2010), 3–6; and, most recently, I. Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford: Oxford University Press, 2018).

[5] In this chapter, the case law of ITLOS up until 28 February 2018 is taken into account.

[6] See Chapter 1 by Scheinin.

[7] A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016), p. 436.

[8] Ibid., pp. 436, 439.

[9] Ibid., pp. 441–2.

in the notion of 'human rights clauses' amounts to a slight departure from the understanding of the term adopted in this book,[10] but it enriches the discussion in relation to ITLOS. This holds especially true for the analysis of Article 73 of the UNCLOS – the provision that has arguably been scrutinised the most by ITLOS and which can be said to contain 'ordinary' international individual rights.

Third, this book enquires into whether the court takes into account external human rights law when interpreting or applying the substantive law that determines the jurisdiction of the judicial body in question – that is, systemic integration (Context Three). The bulk of our analysis centres on this context, which seems promising in terms of findings because Article 293 of the UNCLOS contains a specific norm stating that judicial bodies addressing UNCLOS disputes 'shall apply this Convention [the UNCLOS] and other rules of international law not incompatible with this Convention'. We will see that Article 293 of the UNCLOS differs from the systemic integration rule of the Vienna Convention on the Law of Treaties (VCLT), since it is not only an interpretive tool (and thus relevant for Context Three, i.e., systemic integration), but also a gap-filling instrument (and thus of interest for Context Two, i.e., substantive human rights clauses).[11] In this chapter, the Tribunal's case law is explored in three sections, each of which deals with a specific type of procedure: prompt release cases, provisional measures cases and cases on the merits. Most of the decisions relevant to our analysis involve measures taken in the course of law enforcement activities, concretely the arrest and detention of ships and their crews. Despite the similar subject matter, the following analysis separates these decisions according to the procedure in which they were issued because the characteristics of each type of procedure – notably, ITLOS's scope of jurisdiction as well as the speed and standard of appreciation of the respective procedure – impact the (in)ability of the Tribunal to consider human rights when adjudicating UNCLOS disputes and the modes of engagement with human rights.

2. Prompt Release Cases

The vast array of topics regulated by the UNCLOS (the adoption of which was '[p]rompted by the desire to settle . . . *all issues* relating to the law of the sea[12]), taken together with the competence of ITLOS to decide

[10] See Chapter 1 by Scheinin.
[11] VCLT, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, Article 31(3)(c).
[12] UNCLOS, Preamble, para. 1, emphasis added.

disputes relating to the Convention, provides the Tribunal with broad subject matter jurisdiction.[13] Yet, looking at ITLOS's case law, the Tribunal has scrutinised only a limited number of the provisions of the 'Constitution of the Ocean'; and no less than nine of the twenty-three contentious cases[14] that went before the Tribunal found their basis in Article 73(2) of the UNCLOS. The provision stipulates that coastal States shall promptly release ships and their crews – arrested by the coastal State in the Exclusive Economic Zone (EEZ) for an alleged violation of their fisheries laws – upon the posting of a reasonable bond (referred to as 'obligation of prompt release').

Prompt release cases brought under Articles 73(2) juncto 292 of the UNCLOS are of particular interest when considering human rights in 'other' courts because the detention of a vessel greatly affects the rights of individuals involved in the operation of the ship, notably the right to liberty of the crew and the right to property of the ship owner. What is more, these cases allow findings with regard to all three contexts considered in this book where a non-human-rights court may refer to human rights. First, in regard to procedural rights of the parties, the analysis reveals that in many cases, prompt release procedures are de facto of a transnational nature – that is, involving a private party (notably ship owners) and the coastal State. However, de jure they remain inter-State in nature, with the consequence that private persons are not parties to the proceedings and thus do not have their own procedural rights (section 2.1). Second, with regard to substantive human rights clauses, Article 73 of the UNCLOS is of special interest because it arguably contains what are referred to as 'ordinary' international individual rights. Yet, in prompt release proceedings, ITLOS lacks jurisdiction to adjudicate claims of non-compliance with Article 73(3) and (4) of the UNCLOS, prohibiting certain sanctions for fisheries law violations and obliging the

[13] As per Article 288(1) juncto Article 287 of the UNCLOS, ITLOS has jurisdiction over any dispute concerning the interpretation and application of the UNCLOS (referred to as 'UNCLOS disputes' here); in detail, T. Treves, 'Article 288. Jurisdiction', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Munich: C. H. Beck, 2017), pp. 1850–63. Furthermore, according to Article 288(2) of the UNCLOS, ITLOS also has jurisdiction over disputes relating to the interpretation and application of international treaties *other* than the UNCLOS if they provide for its jurisdiction (for a list of treaties providing jurisdiction to the adjudicating bodies mentioned in Article 287 of the UNCLOS, see Treves, 'Article 288', p. 1861). Yet all cases analysed for the purposes of the present chapter were based on ITLOS's competence under Article 288(1) of the UNCLOS.

[14] Overall, as of February 2019, the Tribunal lists twenty-five cases; however, only twenty-three were contentious in nature (in Case No. 17, a request for an advisory opinion was submitted to the Seabed Dispute Chamber of ITLOS and such a request was submitted to the Tribunal in Case No. 21).

coastal State to notify the flag State about the arrest (section 2.2). However, these guarantees become very relevant in the course of interpreting the obligation of prompt release contained in Article 73(2) of the UNCLOS: the Tribunal has achieved a 'humanisation' of this provision through a context- and purpose-based interpretation of the obligation rather than by way of systemic integration (section 2.3). Lastly, we consider whether ITLOS is competent and ready to take a stance on the compliance with human rights of domestic laws, proceedings and decisions in relation to prompt release (section 2.4).

2.1 Nature of Prompt Release Proceedings and Role of Private Parties

One of the main novelties of the UNCLOS was the introduction of the concept of the EEZ, where coastal States are granted certain sovereign rights to explore, exploit, conserve and manage the living resources, notably fishing resources. In the exercise of these rights, the coastal State is, per Article 73(1) of the UNCLOS, authorised to 'take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention'.

The drafters of the UNCLOS counterbalanced this expanded coastal State jurisdiction and far-reaching enforcement powers with the introduction of various strictures.[15] First, Article 73(3) of the UNCLOS bars the coastal State from imposing two types of sanctions for the violation of fisheries laws: imprisonment (unless otherwise agreed by the States concerned) and corporal punishment. Second, in cases of arrest or detention of a foreign vessel, Article 73(4) of the UNCLOS requires the coastal State to promptly notify the flag State of the action taken and any penalties imposed. Third, and most important for our purposes, Article 73(2) of the UNCLOS obliges the coastal State to promptly release arrested vessels and their crews upon the posting of a reasonable bond or other financial security.[16]

[15] *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Dissenting Opinion of Judge Laing, 18 December 2000, ITLOS Reports (2000) 86, para. 6.

[16] The wording of Article 73(2) of the UNCLOS is 'bond or other security' and the wording of Article 292(1) of the UNCLOS is 'bond or other financial security': for the sake of readability, we only refer to the bond in the following. The UNCLOS contains further prompt release obligations: see Articles 220(7) and 226(1)(c) of the UNCLOS; however, all prompt release applications submitted to ITLOS thus far have been based on Article 73(2); the other provisions are therefore not considered any further in this chapter.

The obligation of prompt release has been fortified with a procedural novelty in the realm of international adjudication: prompt release proceedings under Article 292 of the UNCLOS. According to this provision, the flag State or a private party acting on its behalf may submit an application to ITLOS[17] requesting the release of the vessel and/or crew against the posting of a bond or other financial security set by the Tribunal. The procedure may be invoked if inter alia the detaining State's law does not provide for the release of a vessel upon the posting of a bond at all, if the domestic courts reject the release even if a bond has been offered, if local authorities do not take a decision (even if the release of the vessel has been requested), or if the applicant considers the bond to be unreasonable.[18]

According to Article 292(2) of the UNCLOS, an 'application for release may be made only by or on behalf of the flag State of the vessel'. This provision 'establishes, for limited purposes, a form of diplomatic protection' because '[i]n submitting an application for release, the flag State espouses a private claim of persons linked to it by the nationality of the ship'.[19] Unlike 'classic' diplomatic protection – a means for protecting nationals from human rights violations that coexists with the prompt release mechanism[20] – the nationality link is not established via the person but rather via the ship. However, ITLOS perceives ships as a unit including 'every thing on it, and every person involved or interested in its operations'.[21] Therefore, 'crew and cargo on board as well as

[17] As per Article 292(1) of the UNCLOS, 'the question of release from detention may be submitted to *any court or tribunal* agreed upon by the parties' (emphasis added); however, failing such agreement within ten days from the time of detention, ITLOS has compulsory residual jurisdiction. In practice, all prompt release cases have thus far been submitted to ITLOS: T. Treves, 'Article 292. Prompt Release of Vessels and Crews', in Proelss, 'Commentary', p. 1885.

[18] *'Camouco' (Panama* v. *France), Prompt Release*, Dissenting Opinion of Judge Wolfrum, 7 February 2000, ITLOS Reports (2000) 10, para. 10.

[19] *'Grand Prince' (Belize* v. *France), Prompt Release*, Separate Opinion of Judge Treves, 20 April 2001, ITLOS Reports (2001) 17, para. 1; see also *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release,* Joint Separate Opinion of Judges Mensah and Wolfrum, 18 December 2004, ITLOS Reports (2004) 17, para. 10 ('may be compared to diplomatic protection of persons').

[20] See International Law Commission, Draft Articles on Diplomatic Protection and Related Commentary, 2006, UN Doc. A/61/10, Article 18 (Protection of ships' crews), p. 52–3; *M/V 'Virginia G' (Panama/ Guinea-Bissau)*, Dissenting Opinion of Judge ad hoc Sérvulo Correia, 14 April 2014, ITLOS Reports (2014) 4, para. 6.

[21] First in *M/V 'SAIGA' (No. 2)*, Judgment, para. 106; later in *M/V 'Virginia G' (Panama/ Guinea-Bissau)*, Judgment, 14 April 2014, ITLOS Reports (2014) 4, para. 126; and latest in *M/V 'Norstar' (Panama* v. *Italy), Preliminary Objections*, Judgment, 4 November 2016, ITLOS Reports (2016) 44, para. 230.

its owner and every person involved or interested in its operations are to be treated as an entity linked to the flag State, irrespective of their nationalities'.[22] As per the Tribunal, '[a]ny of these ships could have a crew comprising persons of several nationalities' and '[i]f each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue'.[23] Hence, individuals with different nationalities are 'absorbed' by the ship, which has just one nationality – that of the State whose flag it is flying – and which is represented by the flag State.

The idea behind this legal construct – not to impose on each individual the burden of seeking protection – is laudable. Yet, in practice, vessels (and their crews) are often left with little or no protection because the flag State does not apply for prompt release before the Tribunal. It may refuse to do so for political reasons: an application may 'antagonize a friendly State' or 'provoke a powerful unfriendly one'.[24] Moreover, flag States with open registries generally do not show any interest in litigation because a genuine link with the vessel, through national ownership or manning for example, is missing. Yet, in the latter cases, flag States may authorise private persons to submit a prompt release application to ITLOS 'on their behalf'. Indeed, the flag State itself filed the application in only three of the nine prompt release cases;[25] in the rest of the cases, it was a private party (mostly ship owners) submitting the application with the authorisation of the flag State.[26]

However – and this is important for understanding who possesses procedural rights (and duties) – the flag State always remains a party in prompt release proceedings. In other words, the fact that private parties litigate on behalf of the flag State does not change the inter-State character of the proceedings before ITLOS; it is rather a form of procedural agency.[27] This notably accrues from the drafting history of

[22] *M/V 'Norstar'*, Judgment, para. 231.
[23] *M/V 'SAIGA' (No. 2)*, Judgment, para. 107.
[24] Treves, 'Article 292', p. 1890, para. 33.
[25] In the *'Volga'* case (Russian Federation) and the *'Hoshinmaru'* and *'Tomimaru'* cases (Japan).
[26] D. H. Anderson, 'Prompt Release of Vessels and Crews', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, May 2008, para. 5, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e74.
[27] I. V. Karaman, *Dispute Resolution in the Law of the Sea* (Leiden and Boston: Martinus Nijhoff, 2012), pp. 44–5; J. P. Cot, 'Appearing "For" or "On Behalf" of a State: The Role of Private Counsel Before International Tribunals', in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002), vol. 2, p. 843.

the 'on behalf of' clause, which accounts for the failure to provide private persons with independent access to the Tribunal. In 1973, the United States – one of the proponents of a prompt release mechanism that strongly protects the flag State – proposed a provision to grant the 'owner or operator of any vessel detained by any State' the right to bring the question of release of the vessel before the Tribunal.[28] The 1975 Informal Working Group on the Settlement of Disputes widened the circle of private persons having locus standi even further by granting the right to request a release, without interposition of the flag State, to 'the owner or operator of the vessel, or a member of the crew or a passenger of the vessel'.[29] Yet the idea of private parties being able to take a detaining State to court at the international level was met with considerable resistance, notably on part of the coastal States.[30] A compromise was found in the 'on behalf of' formula.

This clause preserves the inter-State nature of the proceedings, even though private persons – through a delegation of sovereignty entailed in the flag State authorisation – litigate before ITLOS in order to protect their own interests and rights (notably their property rights, but also the right to liberty of their crews).[31] This compromise leaves litigating private persons in a somewhat precarious procedural situation: they are not parties to the proceedings (no locus standi), and the flag State may revoke their authorisation and take control of the proceedings at any time;[32] moreover, they do not possess procedural rights as private persons but

[28] Draft Articles for a Chapter on the Settlement of Disputes Submitted by the United States of America, 1973, UN Doc. A/AC.138/97, in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, vol. II, GAOR 28th Sess. Suppl. 21 (A/9021), pp. 22–3, Article 8(2).

[29] Quoted in M. H. Nordquist, S. Rosenne and L. B. Sohn (eds.), *United Nations Convention on the Law of the Sea* (Leiden: Brill Nijhoff, 1982), vol. 5 , Article 292, p. 67.

[30] Ibid., vol. 5, pp. 70–1. See also the discussion in the context of what became Article 291 ('Access'): ibid., vol. 5, p. 64; J. Akl, 'Article 110', in P. Chandrasekhara Rao and P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden and Boston: Martinus Nijhoff, 2006), p. 309.

[31] S. Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends', *Ocean Development and International Law*, 48 (2017), 3–4. At times, the flag State does not even appoint a State official as its agent for the proceedings but delegates this role to a private counsel who is not necessarily in close contact with the flag State, knowledgeable of the flag State law and/or representing flag State interests: *'Grand Prince' (Belize* v. *France), Prompt Release*, Declaration of Judge ad hoc Cot, 20 April 2001, ITLOS Reports (2001) 17, para. 14.

[32] T. Treves, 'The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea', *International Journal of Marine and Coastal Law*, 11 (1996), 189.

only as alter egos of the flag State.[33] At the same time, however, the private persons generally bear the burden and costs of litigation.[34] De facto, we deal with a form of transnational proceedings:[35] private parties engage a procedure against a State in order to secure their own interests and rights and those of others, notably of the crew members. However, de jure, the procedure remains intergovernmental (i.e., between States), and private parties do not possess any procedural rights.

2.2 *No Jurisdiction to Adjudicate 'Ordinary' International Individual Rights of Article 73 of the UNCLOS*

Reading through the text of the UNCLOS, one gets the impression that the drafters tried to avoid the notions of 'individual' or 'person' at any price. Instead, they opted for indirect references to human beings at sea by using terms such as 'crew' or 'ship' (which, as mentioned, is perceived by ITLOS as a unit including every person on board and every person involved or interested in its operations).[36] Yet, below the surface of such terminology, a number of provisions echo the rights and interests of individual at sea. This holds notably true for Article 73(3) and (4) of the UNCLOS.

In cases of arrest or detention of a vessel, Article 73(4) of the UNCLOS obliges the coastal State to promptly notify the flag State of the action taken and of any penalties subsequently imposed. The similarities with the first sentence of Article 36(1)(b) of the Vienna Convention on Consular Relations (VCCR)[37] are apparent – which, as per the International Court of Justice (ICJ), 'creates individual rights'[38] and amounts (at least) to an 'ordinary' international individual right.[39] Both

[33] This follows from the fact that the State remains the Applicant in the proceeding, see J. Akl, 'Article 110', p. 310.

[34] B. Oxman, 'Observations on Vessel Release under the United Nations Convention on the Law of the Sea', *International Journal of Marine and Coastal Law*, 11 (1996), 214; *'Volga' (Russian Federation* v. *Australia)*, Dissenting Opinion of Judge ad hoc Shearer, 23 December 2002, ITLOS Reports (2002) 10, para. 19.

[35] Trevisanut, 'Twenty Years of Prompt Release of Vessels', 4.

[36] *M/V 'SAIGA' (No. 2)*, Judgment, para. 106; *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Judgment, para. 126; *M/V 'Norstar' (Panama* v. *Italy), Preliminary Objections*, Judgment, para. 230.

[37] VCCR, Vienna, 24 April 1963, in force 19 March 1967, 596 UNTS 261.

[38] *LaGrand Case (Germany* v. *United States of America*), ICJ Reports (2001) 466, para. 77.

[39] On the qualification of Article 36(1) of the VCCR as a human right or 'ordinary' international individual right see Peters, 'Beyond Human Rights', pp. 356–65; she opts for the latter: pp. 385–6.

the VCCR provision and the UNCLOS share the purpose of enabling the exercise of (quasi-)diplomatic protection; in the case of Article 73(4) of the UNCLOS, this consists specifically in applying for prompt release of the vessel and crew at the domestic and/or international level.[40] As regards prompt release proceedings before ITLOS, we have seen that they are de facto of a transnational (rather than inter-State) nature – that is, between the private person (ship owner) and the coastal State. Recognising Article 73(4) of the UNCLOS as an 'ordinary' international individual right would account for the key role played by private persons in securing the release of vessels and crew before ITLOS.

The prohibition on sanctioning a violation of fisheries laws with corporal punishment as enshrined in Article 73(3) of the UNCLOS also echoes well-known human rights guarantees[41] and specifies them for persons suspected or convicted of illegal fishing in the EEZ.[42] The argument that Article 73(3) and (4) of the UNCLOS qualify as 'ordinary' international individual rights is supported by Judge Treves. He argues that these guarantees 'show clear concern for what has been called "the human rights consequences of expanding the bases of jurisdiction"' (i.e., the strictures necessary to counter-balance the enforcement powers granted to coastal States by Article 73(1) of the UNCLOS in the newly established EEZ);[43] and he ascribes these strictures on enforcement powers a 'human rights and due process dimension'.[44]

The obligation of prompt release in Article 73(2) of the UNCLOS features a close link with the guarantees in Article 73(3) and (4) of the UNCLOS. As per Judge Treves, the obligation of prompt release 'stands

[40] Other treaties relevant for law enforcement at sea contain notification obligations similar to Article 36(1)(b) of the VCCR: see Article 7(5) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988, in force 1 March 1992, 1678 UNTS 221 (SUA Convention); and Article 6(2) of the International Convention against the Taking of Hostages, New York, 17 November 1979, in force 3 June 1983, 1316 UNTS 205 (Hostage Convention); they arguably also qualify as 'ordinary' international individual rights: A. Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Leiden: Brill Nijhoff, 2014), pp. 310–11.

[41] E.g., International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, Article 7 (ICCPR) prohibiting 'cruel, inhuman or degrading . . . punishment'.

[42] Peters, 'Beyond Human Rights', p. 437, compares 'ordinary' international individual rights with domestic administrative law guarantees, which spell out, specify and concretise fundamental rights contained in constitutional law.

[43] *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Separate Opinion of Judge Treves, 18 December 2004, ITLOS Reports (2004), para. 3.

[44] Ibid., para. 4.

at the centre of this group of provisions' and 'prompt release is more likely if the flag State is informed promptly under paragraph 4 and the conditions of the crew are more bearable while waiting for release if no imprisonment is involved under paragraph 3'.[45] Yet, despite this close connection between the obligation of prompt release – clearly falling within the jurisdiction of ITLOS – and the two guarantees, the Tribunal has repeatedly held that claims of non-compliance with Article 73(3) and (4) of the UNCLOS are inadmissible.[46]

Hence, the Tribunal respects the unambiguous wording of Article 292(3) of the UNCLOS stating that the Tribunal 'shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew'. Even if, arguendo, the Tribunal deemed itself competent to deal with violations of these 'ordinary' international individual rights in prompt release proceedings, the features of the procedure do not lend itself to such assessment. It is, first of all, an expeditious procedure with a short time frame for submissions by the parties and the Tribunal's judgment.[47] Further, its accelerated nature impacts the standard of appreciation: the Tribunal only assesses 'whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purposes' and does not engage in a full examination.[48] This type of procedure does not lend itself well to making a decision about human rights violations (i.e., a decision on State responsibility requiring an in-depth assessment of the underlying facts). In the *M/V SAIGA* prompt release case, ITLOS admonished that '[b]y applying such a [low] standard the Tribunal does not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion'.[49] This

[45] Ibid., para. 3.

[46] *'Camouco' (Panama v. France), Prompt Release,* Judgment, 7 February 2000, ITLOS Reports (2000) 10, para. 59; *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Judgment, 18 December 2000, ITLOS Reports (2000) 86, paras. 60–3; *'Juno Trader'*, Separate Opinion of Judge Treves, para. 4.

[47] Karaman, 'Dispute Resolution', p. 49 ('a vessel may be released . . . [in] 41 days following the detention . . . or within 31 days after the application for release has been submitted to ITLOS (33 days if submitted on a Friday)').

[48] *M/V 'SAIGA' (Saint Vincent and the Grenadines* v. *Guinea), Prompt Release*, Judgment, 4 December 1997, ITLOS Reports (1997) 16, para. 51.

[49] Ibid. Consequently, ITLOS decided not to examine (paras. 49–50) the allegation that excessive force was used in the course of the arrest of the vessel and crew (para. 30). It only did so in the merits proceedings; see section 4.2.

prophecy proved to be true in the *M/V SAIGA (No. 2)* merits case, where the Tribunal indeed qualified facts differently: while it ordered the release of the tanker in the prompt release proceeding, which is only possible if the vessel is *lawfully* detained, it qualified the tanker's arrest as *unlawful* in the merits case.[50]

To conclude, in prompt release proceedings, ITLOS has rightly refrained from adjudicating potential violations of human rights (e.g., arising from the excessive use of force) or violations of Article 73(3) and (4) of the UNCLOS. However, according to Judge Treves, the 'ordinary' international individual rights contained in Article 73 UNCLOS 'are nevertheless relevant as aspects of non-compliance with paragraph 2 [the obligation of prompt release], in light of the common human rights and due process dimension'.[51] For Judge Treves, both guarantees are crucial when *interpreting* the obligation of prompt release contained in Article 73(2) of the UNCLOS – a finding that the Tribunal as a whole implicitly shares.[52] The next section analyses how exactly ITLOS takes these 'ordinary' international individual rights and, more broadly, human rights into account when interpreting the obligation of prompt release (or particular elements of it), and what concrete consequences flow from it.

2.3 Interpretation of Prompt Release Obligation: What Role Do Human Rights Play?

2.3.1 The Rules of Interpretation Applied by ITLOS

When interpreting the UNCLOS provisions, ITLOS only exceptionally names the methods and rules of interpretation it applies. However, in one of its two advisory opinions, the Tribunal stated that '[a]mong the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role' and considered them to be of a customary nature.[53] It also explained that '[a]lthough the Tribunal has never stated this view explicitly, it has done

[50] *M/V 'SAIGA' (No. 2)*, Judgment, para. 136.
[51] *'Juno Trader'*, Separate Opinion of Judge Treves, para. 4.
[52] *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Judgment, 18 December 2004, ITLOS Reports (2004) 17, para. 77; in detail, see section 2.3.2.
[53] *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports (2011) 10, para. 57.

so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation'.[54]

The Tribunal achieved a 'humanisation' of the obligation of prompt release not by having recourse to external human rights norms (i.e., systemic integration), but rather based on other methods of treaty interpretation. This is a somewhat unexpected finding, because the UNCLOS has its own systemic integration norm, with Article 293 stipulating that the Tribunal 'shall apply this Convention and other rules of international law not incompatible with this Convention'.[55] Unlike Article 31(3)(c) of the VCLT, Article 293 of the UNCLOS does not require that the external rules be 'applicable in the relations between the parties'[56] and thus has a lower threshold of application. Yet the ITLOS has not had recourse to this norm when interpreting the obligation of prompt release. Rather, it was by interpreting the obligation in light of its object and purpose as well as its context that ITLOS carved out the humanitarian purpose or the 'human rights and due process dimension'[57] of the obligation of prompt release in Article 73(2) of the UNCLOS.

2.3.2 Purpose- and Context-Based Interpretation Reveal Human Dimension of Prompt Release Obligation

In a series of judgments, the Tribunal (and certain individual judges) referred to the object and purpose of Articles 73(2) and/or 292 of the UNCLOS in the course of interpretation.[58] Thereby, discerning the object and purpose of the provision has been understood as a synonym for identifying 'which rights and interests are to be protected' under it.[59] As mentioned, the prompt release mechanism aims at striking a 'fair balance' between the interests of the coastal State and those of the flag State.[60]

[54] Ibid.

[55] For an exception, see *'Monte Confurco'*, Dissenting Opinion of Judge Laing, paras. 3, 6.

[56] According to a restrictive reading, this requires that *all* the parties to the treaty under interpretation must be bound by the external rules used for interpretation purposes; for the various readings of the provision, see O. Dörr, 'Article 31. General Rule of Interpretation', in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed. (Berlin: Springer, 2018), pp. 610 et seq.

[57] *'Juno Trader'*, Separate Opinion of Judge Treves, para. 4.

[58] See, e.g., *'Tomimaru' (Japan* v. *Russian Federation), Prompt Release*, Judgment, 6 August 2007, ITLOS Reports (2005–7) 74, paras. 73–4 (here, and elsewhere, ITLOS interpreted Articles 73 and 292 of the UNCLOS together, without neatly separating the two provisions).

[59] *'Camouco'*, Dissenting Opinion of Judge Wolfrum, para. 4.

[60] *'Monte Confurco'*, Judgment, para. 70; similarly: *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Dissenting Opinion of Judge Jesus, 18 December 2000, ITLOS Reports

On the side of flag State interests specifically, various judges have highlighted the humanitarian purpose underlying the prompt release mechanism.[61] Judge Laing even went a step further, translating this humanitarian purpose into human rights language by stating that 'there cannot be any gainsaying that prompt release is also reinforced by its significant humanitarian underpinnings, ranging from the economic rights or concerns of ship owners to the civil rights or concerns of detained crews'.[62] In the 2004 *Juno Trader* judgment, by interpreting the obligation of prompt release in its context, the Tribunal explicitly endorsed the humanitarian purpose highlighted by several of the individual judges in earlier judgments and, on top of that, added a due process of law component:

> The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.[63]

The Tribunal did not elaborate on the meaning and consequences of this seminal finding. However, in his separate opinion, Judge Treves gave a detailed account of his understanding of the finding and, moreover, connected it with human rights law. He first concurs with the judgement in that Article 73(2) of the UNCLOS must be read 'in the context of the article as a whole'.[64]

In a next step, Judge Treves quotes the *Monte Confurco* judgment, stating that Article 73 of the UNCLOS 'strikes a fair balance' between the interests of the coastal State and flag State respectively and goes on to look 'more deeply into the way this balance is obtained': while Article 73(1) of the UNCLOS authorises the coastal State to take various measures to enforce its fisheries laws in the EEZ, the following three paragraphs aim

(2000) 86, para. 5; *M/V 'SAIGA' (Saint Vincent and the Grenadines* v. *Guinea), Prompt Release*, Collective Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, 4 December 1997, ITLOS Reports (1997) 16, para. 9.

[61] *'Camouco' (Panama* v. *France), Prompt Release*, Dissenting Opinion of Judge Anderson, 7 February 2000, ITLOS Reports (2000) 10, 50; *'Grand Prince' (Belize* v. *France), Prompt Release*, Separate Opinion of Judge Laing, 20 April 2001, ITLOS Reports (2001) 17, para. 9.

[62] *'Camouco' (Panama* v. *France), Prompt Release*, Declaration of Judge Laing, 7 February 2000, ITLOS Reports (2000) 10, 42.

[63] *'Juno Trader'*, Judgment, para. 77.

[64] *'Juno Trader'*, Separate Opinion of Judge Treves, para. 2.

at ensuring that the measures in question will not be 'limiting the *freedom* of the persons involved (prompt release of the crew, prohibition of imprisonment as a penalty) and of unduly jeopardizing the *rights* of shipowners and of the flag State (prompt release of the vessel), while ensuring timely protective action by the flag State (obligation to notify in case of arrest and of the imposing of penalties)'.[65] He then encapsulates this finding: 'Seen together in light of paragraph 1, paragraphs 2, 3 and 4 show clear concern for what has been called "the human rights consequences of expanding the bases of jurisdiction"'.[66]

In a last step, Judge Treves establishes a link between the three limitations: 'prompt release is more likely if the flag State is informed promptly under paragraph 4 and the conditions of the crew are more bearable while waiting for release if no imprisonment is involved under paragraph 3'.[67] From this contextual interpretation, he concludes that the obligation of prompt release is not only an obligation of result but also one of means – at least in part.[68] This implies that 'prompt release of the vessel and crew is the result that must be obtained, but the means to obtain it are not without importance. Prompt release must be obtained, and the bond or other financial security must be fixed, through a procedure that respects due process.'[69] As a consequence, '[i]n a prompt-release case unnecessary use of force and violations of due process and of human rights in general may be relevant in various ways', notably for evaluating the elements of promptness and reasonableness.[70]

In sum, Judge Treves – without having recourse to external human rights norms, but rather by remaining within the UNCLOS and even within Article 73 – gave the obligation of prompt release a human rights dimension. The Tribunal proceeded the same way to achieve a 'humanisation' of the obligation of prompt release: by carving out its humanitarian purpose and by interpreting it in the context of Article 73 of the UNCLOS as a whole, it linked the obligation of prompt release with the concepts of elementary considerations of humanity, due process of law and fairness. However, unlike Judge Treves, the Tribunal did not refer to human rights but rather to what can be called general principles of international law. Moreover, it did not elaborate on the concrete

[65] Ibid., emphases added.
[66] Ibid., para. 3.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid., para. 5.

consequences of this finding – notably for the interpretation of the key notions of the obligation of prompt release, such as the reasonableness or detention element. We turn to this issue in the following sections, with a focus on the question whether the 'considerations of humanity' concept is indeed a shorthand expression for human rights as commonly held – or not necessarily.

2.3.3 'Reasonableness' Element: Attempts to Move towards a Human-Rights-Based Interpretation

The prompt release mechanism is based on the idea that vessels and crews are released upon the posting of a 'reasonable' bond – that is, one that reconciles the interest of the flag State in the timely release of the vessel and crew with those of the coastal State in (most notably) securing the payments of fines and appearance of the accused at trial.[71] One of ITLOS's key tasks is thus to assess the reasonableness of a bond set by the coastal State and/or to set a reasonable bond itself. This warrants a look at how the Tribunal has interpreted this notion and whether (and to what extent) human rights have had a bearing.

As seen earlier, in the *Juno Trader* case, ITLOS held that the reasonable bond requirement 'indicates that a concern for *fairness* is one of the purposes of this provision'.[72] With this finding, the Tribunal endorsed similar understandings of the function of the reasonableness element expressed by various individual judges in earlier cases. In *Monte Confurco*, Judge Laing made a rather explicit claim for systemic integration (without, however, naming the concept or referring to Article 293 of the UNCLOS) by stating that he expects the Tribunal – when interpreting concepts found in the UNCLOS – 'increasingly to draw inspiration from a wide variety of international legal sources'; consequently, 'what is reasonable security should be solidly grounded on pertinent international legal principles'.[73] However, rather than spelling out what these 'pertinent international legal principles' are, he remained vague by stating that 'the Tribunal's articulation of the very multi-faceted concept of reasonableness should, as relevant, be patently and fully grounded in such *synonymous notions* as proportionality, balance, fairness, moderateness, consistency, suitability, tolerableness and absence of excessiveness'.[74] Judge Nelson followed suit by writing that '[t]he notion of reasonableness is here used

[71] *'Monte Confurco'*, Judgment, para. 71.
[72] *'Juno Trader'*, Judgment, para. 77, emphasis added.
[73] *'Monte Confurco'*, Dissenting Opinion of Judge Laing, paras. 3, 6.
[74] Ibid., para. 9, emphasis added.

to curb the arbitrary exercise of the discretionary power granted to coastal States'.[75] In the *Volga* case, Judge Cot picked up the thread of Judge Nelson's line of reasoning by arguing that it reasonableness 'implies the existence of a discretionary power that must be curbed' and held that 'the aspects considered in the definition of reasonableness include the concept of proportionality'.[76]

Overall, selected individual judges have interpreted the reasonableness element with reference to what arguably qualify as general principles of international law – without, however, specifically naming this notion. Judge Laing, for example, instead used the term 'pertinent international legal principles'. The spectrum of principles alluded to by individual judges is broader than the Tribunal's reference to fairness and notably includes proportionality and non-arbitrariness.

However, it remains unclear (and Judge Treves criticised the Tribunal for this) whether the remainder of the seminal statement in the *Juno Trader* case – that '[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law'[77] – is also relevant for establishing the reasonableness of the bond or only for establishing whether the claim of a violation of Article 73(2) of the UNCLOS is well-founded.[78] Judge Treves, in his elaboration of ITLOS's elliptical statement, clearly asserts its relevance for the 'reasonableness' element by stating that 'unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a bond or guarantee that can be considered as reasonable'.[79]

Even though Judge Treves' human-rights-based approach seems to go well beyond that of the Tribunal and other individual judges, who refer to general principles of international law and remain vague about the exact consequences of their finding, it is not necessarily incompatible with the bond-setting method developed by ITLOS. In one of its earliest cases, the Tribunal held that 'a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security', including 'the gravity of the alleged offences, the penalties imposed or imposable under

[75] *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Separate Opinion of Vice-President Nelson, 18 December 2000, ITLOS Reports (2000) 86, 124.
[76] *'Volga' (Russian Federation* v. *Australia)*, Separate Opinion of Judge Cot, 23 December 2002, ITLOS Reports (2002) 10, paras. 18, 21.
[77] *'Juno Trader'*, Judgment, para. 77.
[78] *'Juno Trader'*, Separate Opinion of Judge Treves, para. 1.
[79] Ibid., para. 5.

the laws of the detaining State, [and] the value of the ... vessel and ... cargo'.[80] In the *Monte Confurco* case, the Tribunal specified that this list is 'by no means a complete list of factors' and that it does not 'lay down rigid rules as to the exact weight to be attached to each of them'.[81] Hence ITLOS did not close the door to future development of the list of factors relevant for assessing the reasonableness of the bond.

2.3.4 'Detention' Element: Interpretation Disconnected from Human Rights Law

We have seen that ITLOS, through a purpose- and context-based interpretation, has revealed the humanitarian dimension of the obligation of prompt release.[82] The Tribunal's 'considerations of humanity' dictum is commonly understood as requiring a human-rights-based interpretation of UNCLOS provisions and concepts.[83] Indeed, intuitively, one would assume that such interpretation enhances the protection of the individual. In this section, however, we demonstrate that this does not necessarily hold true at the example of the key term of 'detention' (i.e., whether a crew member is considered to be detained and whether ITLOS is in a position to order his or her release). It was only through an autonomous and functional interpretation of the notion of 'detention' (i.e., one that is disconnected from human rights law yet inspired by 'considerations of humanity') that the Tribunal has been able to realise the humanitarian purpose underlying the obligation of prompt release.

As regards the fate of the crew of an arrested vessel, different situations need to be distinguished. In a number of cases, the issue of detention was not disputed by the parties; namely where a custodial measure, such as police custody or preventive detention, was ordered.[84] The controversy begins when domestic authorities do not actually take the suspect into custody, but rather put him under court supervision in combination with the confiscation of passports and orders not to leave the country – as was

[80] *'Camouco'*, Judgment, para. 67.
[81] *'Monte Confurco'*, Judgment, para. 76.
[82] See section 2.3.2.
[83] See, e.g., Treves, 'Human Rights and the Law of the Sea', 5; I. Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law* (The Hague: T. M. C. Asser Press, 2013), p. 539.
[84] *'Camouco' (Panama* v. *France), Prompt Release*, Application Submitted on behalf of Panama, 17 January 2000, para. 131; *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Application Submitted on Behalf of the Seychelles, 24 November 2000, paras. 62–4.

the situation in the *Camouco* and *Monte Confurco* cases.[85] In these cases, the Applicants either acknowledged that the Master was 'not "imprisoned" strictly speaking'[86] or that 'no sentence of imprisonment has been formally pronounced against him'.[87] Yet they contended that the confiscation of passports combined with the fact that each Master had been 'held against his will'[88] in the detaining State amounted to de facto detention.[89] The Applicants qualified the measures in question as 'grave' or 'serious' violations of the Master's 'personal rights', underscoring their assertions by reference to Article 73(3) of the UNCLOS prohibiting imprisonment for violations of fisheries law.[90] Hence they supported their arguments with a legal reference to what can be termed an 'ordinary' international individual right under the UNCLOS,[91] rather than relying on external human rights norms – notably the right to liberty. The Respondents, by contrast, argued that judicial supervision does not amount to detention because the measure in question falls short of a *deprivation* of liberty;[92] they seem to (implicitly) rely on a threshold stemming from the right to liberty.[93]

A further contentious issue is whether crew members who remain on board the detained ship – notably to maintain the vessel and its cargo – can be said to be 'detained' in the sense of Article 73(2) of the UNCLOS.

[85] *'Camouco'*, Judgment, para. 71; *'Monte Confurco'*, Judgment, para. 36.
[86] *'Camouco'*, Application Submitted on Behalf of Panama, para. 130.
[87] *'Monte Confurco'*, Application Submitted on Behalf of the Seychelles, para. 62.
[88] *'Camouco'*, Application Submitted on Behalf of Panama, para. 128, emphasis omitted; *'Monte Confurco'*, Application Submitted on Behalf of the Seychelles, para. 62.
[89] *'Camouco'*, Application Submitted on Behalf of Panama, para. 127; *'Monte Confurco'*, Judgment, para. 62.
[90] *'Camouco'*, Application Submitted on Behalf of Panama, paras. 127–8; *'Monte Confurco'*, Application Submitted on Behalf of the Seychelles, paras. 62–4.
[91] See section 2.3.2.
[92] *'Camouco' (Panama* v. *France), Prompt Release*, Statement in response of the French Government, 25 January 2000, para. 7; *'Monte Confurco'*, Judgment, para. 62; very explicit in *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Statement in response to the French Government, 5 December 2000, para. 6.
[93] Only a deprivation (and not a mere restriction) of liberty triggers the application of the right to liberty in the sense of Article 5 of the ECHR (W. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2017), p. 226–8) and Article 9 of the ICCPR (S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (Oxford: Oxford University Press, 2013), pp. 345–6). The term 'detention' is (depending on the respective doctrinal strand) understood either as a synonym of 'deprivation of liberty' or as the most prevalent means (together with 'arrest'), amounting to deprivation of liberty. See Petrig, 'Human Rights and Law Enforcement at Sea', p. 157 (ECHR), p. 167 (ICCPR).

In the *Juno Trader* case, the Applicant alleged that the Master and the crew were detained on board the arrested ship under the surveillance of armed personnel and their passports had been taken away.[94] At the time of deliberations before ITLOS, the passports – as per the Respondent – had all been returned and the crew members were free to leave the country. Yet the Applicant did not withdraw the request for release of the crew[95] and argued that '[t]he Tribunal cannot reasonably support too strict a concept of . . . the arrest of [the] crew unless it wants at best to leave the door open to abuse of rights (which is categorically prohibited by Article 300 of the Convention), and at worst to situations which are humanly shocking'.[96] Furthermore, the terms 'arrest' and 'detention' would have to be 'understood in a less strictly legal and more down-to-earth way' (i.e., in an 'ordinary' way, as required by Article 31 of the VCLT).[97] Again, the Applicant advocated for a broad understanding of the notion of detention and remained, in terms of references to legal norms supporting their argument, within the framework of the UNCLOS; meanwhile, the Respondent denied that detention occurred since the crew members were free to leave the ship and move around the city.[98]

In none of these cases did ITLOS discuss the meaning of the term 'detention' as used in Article 73(2) of the UNCLOS, nor did it provide a general definition of the term. Rather, after restating the facts – that the crew members were not in a position to leave the country or affirming that they were still in the detaining State and thus subject to its jurisdiction – it readily concluded that it was appropriate to order their release.[99]

The Tribunal seems inclined to set the threshold of what amounts to 'detention' in the sense of Article 73(2) of the UNCLOS very low, which triggers an enquiry into the concept's bottom line. The *Hoshinmaru* case

[94] *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Application on behalf of Saint Vincent and the Grenadines, 18 November 2004, para. 9; *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Verbatim Records, 6 December 2004 a.m., ITLOS/PV.04/02, 24 (lines 9–18); *'Juno Trader'*, Judgment, para. 40.

[95] *'Juno Trader'*, Judgment, para. 78.

[96] *'Juno Trader'*, Application on Behalf of Saint Vincent and the Grenadines, para. 19.

[97] Ibid., para. 20.

[98] *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Verbatim Records, 6 December 2004 p.m., ITLOS/PV.04/03, 34 (lines 3–34), 35 (lines 1–4), 52 (lines 21–7).

[99] *'Camouco'*, Judgment, para. 71; *'Monte Confurco'*, Judgment, para. 90; *'Juno Trader'*, Judgment, para. 79.

is instructive in this regard (and with regard to 'persons' under the UNCLOS more generally): the crew remained on board the detained vessel to ensure its proper maintenance, and the only condition for leaving the territory was to apply for permission under rules applicable to *all* foreign sailors.[100] Still, the Applicant contended that the Master and crew were in detention since 'crew members need to be present on board for the proper maintenance of the vessel and that the release of the crew cannot be separated entirely from the release of the vessel'.[101] The Tribunal was again very brief and succinctly noted 'that the Master and the crew still remain in the Russian Federation'[102] and (unanimously) decided 'that the Master and the crew shall be free to leave without any conditions'[103] – without specifically stating whether the situation amounted to one of detention.

Judge Treves, in his declaration, writes that (the previous reproduced) observation of ITLOS 'seems to imply that, in the opinion of the Tribunal, neither the Master nor the crew is "detained", as does the mild statement that Master and crew "still remain in the Russian Federation"'.[104] He goes on to explain why – absent a finding of detention – it was nevertheless necessary to order 'that the Master and the crew shall be free to leave without any conditions'. In Judge Treves's view, the 'provision should not be read as concerning the release of the *Master and crew* from detention' but rather 'as a complement to the provision for the release of the *vessel*'.[105] 'Its function is to prevent resort to conditions of any kind, bureaucratic or otherwise, concerning the departure of Master and crew, that might delay the departure of the vessel' and thus 'to preserve the efficacy of the judgment of the Tribunal for the release of the vessel'.[106]

The discussion of the detention element reveals how the fate of the crew is intrinsically linked with that of the vessel and vice versa, exemplifying ITLOS's understanding of ships as a unit including persons on board.

[100] *'Hoshinmaru'*, Judgment, para. 76; *'Hoshinmaru' (Japan* v. *Russian Federation), Prompt Release*, Declaration of Judge Treves, 6 August 2007, ITLOS Reports (2005–7) 18.
[101] *'Hoshinmaru'*, Judgment, para. 75.
[102] Ibid., para. 77.
[103] Ibid., para. 102(4).
[104] *'Hoshinmaru'*, Declaration of Judge Treves, 55; it is important to note that in the same breath, Judge Treves supported the broad interpretation of the notion of 'detention' in the *'Camouco'* case (where it was not entirely clear whether the passports of the persons remaining on board the ship were handed back).
[105] Ibid., emphases added.
[106] Ibid., 55–6.

Moreover, it evidences how the interests and rights of the crew – and thus the humanitarian purpose of the obligation of prompt release – may at times require concepts to be interpreted differently from human rights law. This, in turn, suggests that the concept of 'considerations of humanity' is flexible: it may or may not be a shorthand expression for interpreting UNCLOS concepts against the backdrop of human rights law.

2.4 *Requiring Human Rights Compliance of Domestic Procedures: Straying into the Territory of Domestic Courts?*

We now turn to a topic that is related to the interpretation of the obligation of prompt release but is considered separately given the amount of discussion it has sparked within ITLOS: can the Tribunal take a stance on the human rights compliance of *domestic* laws, procedures and decisions in relation to prompt release despite Article 292(3) of the UNCLOS stipulating that it 'shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum'?

The arrest and detention of a ship due to an alleged violation of fisheries laws in the EEZ generally triggers multiple domestic proceedings – notably criminal proceedings against those allegedly involved in illegal fishing, the bond-setting procedure and, at times, a vessel-confiscation procedure. Prompt release proceedings before ITLOS and the mentioned domestic proceedings are, in conceptual terms, unrelated to each other, even though they originate from the same facts. In other words, prompt release proceedings before ITLOS are not a means to appeal domestic decisions;[107] rather, they are separate and independent proceedings strictly limited to the release of the vessel and/ or crew.[108] Yet, in order to actually decide on release and the reasonable bond, the Tribunal cannot completely disregard the proceedings and decisions taken at the domestic level up until the time it decides on the prompt release.[109] Hence, in practice, the question is then rather *how* and to *what extent* the Tribunal can take domestic laws and decisions into account – and what types of pronouncements it can make

[107] *'Camouco'*, Judgment, para. 58.
[108] *M/V 'SAIGA'*, Judgment, para. 50.
[109] Ibid.; *'Monte Confurco'*, Judgment, para. 74; *'Monte Confurco'*, Separate Opinion of Vice-President Nelson; *'Juno Trader' (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Separate Opinion of Judge Lucky, 18 December 2004, ITLOS Reports (2004) 17, paras. 29–31.

without overstepping its doubtlessly limited jurisdiction described by Article 292(3) of the UNCLOS. We scrutinise this question with regard to two types of domestic procedures: bond setting and vessel confiscation.

2.4.1 Domestic Bond-Setting Procedure

As regards the domestic procedure in which the bond is determined, ITLOS held in the *Monte Confurco* case – its second prompt release case – that it 'will treat the laws of the detaining State and the decisions of its courts as relevant facts'.[110] It further opined that 'the Tribunal is not precluded from *examining* the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond' because '[r]easonableness cannot be determined in isolation from facts'.[111] Such 'examination' went too far in the eyes of some judges. In his dissent, Judge Jesus argued that the Tribunal should limit itself to treating domestic laws and decisions as relevant facts – without, however, qualifying them. By asserting competence 'for examining the facts and circumstances of the case', the Tribunal would essentially pre-empt the domestic court from exercising its full jurisdiction.[112] Judge Mensah was also concerned that some statements by ITLOS 'come perilously close to an attempt by the Tribunal to enter into the merits of the case pending before the domestic forum',[113] noting that any 'examination' of facts 'must be limited to what is strictly necessary for an appreciation of the reasonableness or otherwise of the measures taken by the authorities of the arresting State'.[114] Moreover, ITLOS 'should exercise utmost restraint in making statements that might plausibly imply criticism of the procedures and decisions of the domestic courts' – especially where 'such criticism is not necessary for the decisions of the Tribunal on the issue of the release of a ship or its crew upon the posting of a reasonable bond'.[115] In casu, ITLOS expressed doubts about the determination by the domestic court on the amount of illegally caught fish;[116] yet, as we will see later, the same judges expressed the same concerns when the Tribunal

[110] *'Monte Confurco'*, Judgment, para. 72.
[111] Ibid., para. 74, emphasis added.
[112] *'Monte Confurco'*, Dissenting Opinion of Judge Jesus, paras. 25–30.
[113] *'Monte Confurco' (Seychelles* v. *France), Prompt Release*, Declaration of Judge Mensah, 18 December 2000, ITLOS Reports (2000) 86, 118.
[114] Ibid., 121.
[115] Ibid.
[116] Concretely, the finding in *'Monte Confurco'*, Judgment, para. 88.

required domestic (confiscation) proceedings to be in line with human rights law.

For other judges, ITLOS's approach of examining domestic procedures and decisions as relevant facts has not gone far enough. The most pronounced statement was again issued by Judge Treves in his separate opinion in the *Juno Trader* case, where he construed the obligation of prompt release not only as one of result but also of means: 'prompt release of the vessel and crew [in domestic proceedings] is the result that must be obtained, but the means to obtain it are not without importance. Prompt release must be obtained, and the bond or other financial security must be fixed, through a procedure that respects due process'.[117]

2.4.2 Domestic Vessel Confiscation Proceedings

One type of domestic procedure stands out as regards the Tribunal's insistence of its compliance with international standards of due process of law: domestic vessel-confiscation proceedings. Arguably, the Tribunal was ready to take a comparatively explicit stance because of the considerable impact of the confiscation of a vessel on the prompt release mechanism before ITLOS. Indeed, the confiscation of a vessel by the detaining State provides arguments in relation to all phases of prompt release proceedings. First, a change of ownership of the vessel as a result of confiscation may entail that the applicant is no longer the flag State, which affects the Tribunal's jurisdiction under Article 292 of the UNCLOS.[118] Second, respondents may argue that a confiscated ship is no longer detained as required by Article 292 of the UNCLOS, which renders the application without object and thus inadmissible.[119] Finally, as regards the merits of the prompt release proceedings, respondents have argued that the allegation of detention cannot be well-founded per se if the vessel is possessed rather than detained.[120] These potential effects of confiscation on prompt release proceedings before ITLOS have caused individual judges and ultimately the Tribunal to take an increasingly bold stance on the quality of domestic confiscation proceedings – a development that is re-traced in the following.

[117] *'Juno Trader'*, Separate Opinion of Judge Treves, para. 3.
[118] *'Grand Prince' (Belize* v. *France), Prompt Release*, Judgment, 20 April 2001, ITLOS Reports (2001) 17, para. 93.
[119] Ibid., para. 61; *'Tomimaru'*, Judgment, para. 50.
[120] *'Juno Trader'*, Judgment, para. 74.

In the *Grand Prince* case, the Applicant argued that the domestic decision to confiscate the vessel only a few days after another domestic court fixed the bond 'amounted to "fraud of law"', rendering the prompt release mechanism a 'dead letter'.[121] The Respondent maintained that 'the Tribunal was not competent, under article 292 of the Convention, to go into the allegations made by the Applicant of a denial of procedural fairness and due process in relation to judicial proceedings in France'.[122] The Tribunal, lacking jurisdiction in casu, did not make a finding on the compliance of domestic proceedings with the procedural rights of the parties;[123] yet selected individual judges opined on whether the confiscation by France was speedy and thus not a violation of Article 292 of the UNCLOS (but rather an application of its spirit)[124] or hasty and undertaken with the intent or effect to 'exclude the jurisdiction of that body or extirpate rights or an entire remedial scheme'.[125] As per Judge Laing, the latter type of confiscation, even if valid under domestic law, cannot be accepted by the Tribunal[126] and 'raises significant questions about due process and the essential humanitarian and economic motivations and concerns'.[127]

In the *Juno Trader* case, the Tribunal only briefly attended to the issue of confiscation and did not rule on the quality of the domestic confiscation proceedings. Judges Mensah and Wolfrum, while endorsing the Tribunal's respective findings, deemed it 'appropriate to give a more detailed consideration to it' because of the prominence that the Respondent attached to the argument of confiscation.[128] They recognised the coastal State's right of confiscation but stressed that the right must be exercised within the limits of the UNCLOS 'and other relevant rules of international law, including in particular relevant provisions contained in international instruments on the protection of human rights, such as those providing for the protection of fair trial and due process'.[129] Applying the standard set out in the quoted statement – which is, nota bene, quite unique in ITLOS's case law because of the explicit mention of

[121] *'Grand Prince'*, Judgment, para. 54; *'Grand Prince' (Belize* v. *France), Prompt Release*, Application on behalf of Belize, 21 March 2001, para. 37.
[122] *'Grand Prince'*, Judgment, para. 58.
[123] Ibid., paras. 93–4.
[124] *'Grand Prince'*, Declaration of Judge ad hoc Cot, para. 7.
[125] *'Grand Prince'*, Separate Opinion of Judge Laing, para. 10.
[126] Ibid.
[127] Ibid., para. 13.
[128] See *'Juno Trader'*, Joint Separate Opinion of Judges Mensah and Wolfrum, para. 1.
[129] Ibid., para. 3.

international human rights instruments – in the case at hand, the two judges conclude that the *Juno Trader* 'continues to be a detained ship, within the meaning of article 292 of the Convention, until after the completion of national procedures that meet the standard of due process as developed in international law'.[130] Despite ITLOS's limited jurisdiction – that it must only decide on the release of the vessel and refrain from evaluating the legality or illegality of domestic enforcement measures – the issue of confiscation is directly relevant to the prompt release procedure before ITLOS because it affects the jurisdiction of the Tribunal and/or the admissibility of the case.[131] This finding aligns with that of Judge Treves, who stated that 'confiscation obtained in violation of due process would seem to me abusive so that it cannot preclude an order for release'.[132]

In the *Tomimaru* case, the Tribunal unequivocally endorsed the view expressed by Judges Wolfrum, Mensah and Treves in the *Juno Trader* case by stating:

> A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; *nor should it be taken through proceedings inconsistent with international standards of due process of law*. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.[133]

This rather explicit statement made those judges appear on the scene, who in the early *Monte Confurco* case, argued that it is *not* the task of the Tribunal to qualify (let alone criticise) domestic procedures. Judge Jesus stressed that 'national legislation and decisions should not be the object of a value judgment or qualification in a prompt release case'.[134] Accordingly, if the confiscation process is 'tainted by irregularities or illegalities',[135] domestic remedies must be used to seek redress. In particular, 'the absence of procedures that guarantee the due process of the

[130] Ibid., para. 12.
[131] Ibid., para. 4.
[132] *'Juno Trader'*, Separate Opinion of Judge Treves, para. 6.
[133] *'Tomimaru'*, Judgment, para. 76, emphasis added.
[134] *'Tomimaru' (Japan* v. *Russian Federation), Prompt Release*, Separate Opinion of Judge Jesus, 6 August 2007, ITLOS Reports (2005–7) 74, 107, para. 9(b).
[135] Ibid., para. 9(c).

law ... are issues whose relevance may be pursued in the appropriate domestic forum, but certainly not by the Tribunal in the context of a prompt release procedure'.[136] Judge Nelson joined the criticism voiced by Judge Jesus, stressing that the Tribunal's findings suggest that ITLOS has the power 'to find out whether the proceedings were inconsistent with due process of law' and warning that the approach taken by the Tribunal runs the risk of encroaching on the territory of the domestic courts.[137] Yet, by concluding that '*[p]erhaps* these are not matters to be dealt with within the system contained in article 292', Judge Nelson seems to leave the door ajar for the Tribunal to take a stance on domestic confiscation proceedings.[138] Indeed, this may be necessary at times so as to not deprive the prompt release mechanism of any meaning. The fact that confiscation of the vessel by domestic authorities has the potential to unhinge the prompt release procedure at the international level has arguably led the Tribunal to take a closer look at domestic laws, procedures and decisions as compared to other types of procedures – notably criminal or bond-setting proceedings.

3. Provisional Measures Cases

The Tribunal has residual compulsory jurisdiction to not only decide on the prompt release of vessels, but also – by virtue of Article 290(5) of the UNCLOS – to issue provisional measures pending the constitution of an arbitral tribunal under Annex VII to the UNCLOS. An analysis of provisional measures proceedings in the context of this chapter is necessary in order to determine whether provisional measures seeking to protect human rights could be granted by ITLOS. Provisional measures proceedings are expeditious procedures in which ITLOS applies a standard of appreciation that is lower than that applied in proceedings on the merits: the Tribunal must be satisfied that the rights claimed by the applicant are plausible ('plausibility' test).[139]

In provisional measures proceedings, pending the constitution of an arbitral tribunal, ITLOS is essentially required to award provisional measures in respect to a dispute that is being submitted to another

[136] Ibid.

[137] *'Tomimaru' (Japan* v. *Russian Federation), Prompt Release*, Declaration of Judge Nelson, 6 August 2007, ITLOS Reports (2005–7) 74, 101, emphasis added.

[138] Ibid., emphasis added.

[139] C. A. Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2017), pp. 193–203, and on ITLOS specifically, pp. 201–3.

adjudicatory body for a decision on the merits.[140] This type of provisional measures proceeding is regulated by Article 290(5) of the UNCLOS, which requires a dispute between the parties and an arbitral tribunal to be constituted, which has prima facie jurisdiction over the dispute. The urgency of the situation requires the prescription of provisional measures by ITLOS (i.e., the 'urgency requirement'); and, while Article 290 of the UNCLOS makes no mention of the 'prejudice' requirement', ITLOS case law suggests that irreparable prejudice to the rights sub iudice is a prerequisite to an award of provisional measures.[141] Furthermore, Article 290(1) of the UNCLOS prescribes more generally that provisional measures should be 'appropriate . . . to preserve the respective rights of the parties to the dispute'. This wording dictates the so-called 'link' requirement, which means that the relief sought (and the rights to be protected by the relief) must be closely related to the rights subject to the proceedings on the merits.[142] The 'link' requirement is intimately connected to the function of provisional measures, which is to protect and preserve the respective rights of the parties *pendente lite*.[143]

The following sections analyse whether ITLOS is in a position to award provisional measures for the protection of human rights and to what extent it has done so in the past. So far, the prescription of provisional measures has been requested in eight cases (either under Article 290(1)[144] or 290(5) of the UNCLOS[145]), which, simply put, centred on two subject matters: the marine and coastal environment and resources, and the arrest and seizure of crews and/or vessels. In this section, the latter set of cases are discussed because of their direct bearing on individuals, with

[140] By contrast, Article 290(1) of the UNCLOS provisional measures proceedings concern disputes submitted to ITLOS.

[141] Miles, 'Provisional Measures', p. 241.

[142] Ibid., p. 180.

[143] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures*, Order, 27 August 1999, ITLOS Reports (1999) 280, para. 67. The second general reason for which provisional measures are proscribed is non-aggravation of the dispute, see Miles, 'Provisional Measures', p. 174. See section 3.4.

[144] For provisional measures ordered under Article 290(1) of the UNCLOS, see *M/V 'Louisa' (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures* and *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures*; even though the request was initially based on Article 290(5) of the UNCLOS.

[145] In addition to the '*ARA Libertad*', the *'Arctic Sunrise'* and the *'Enrica Lexie' Incident* cases, which are analysed in this chapter, the other Article 290(5) UNCLOS provisional measures cases are *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures*, Order, 8 October 2003, ITLOS Reports (2003) 10; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures*, Order, 3 December 2001, ITLOS Reports (2001) 95; *Southern Bluefin Tuna*, Order.

a focus on the *ARA Libertad* (section 3.1), the *Arctic Sunrise* (section 3.2) and the *Enrica Lexie* (section 3.3) cases, which evidence a trend of expressing claims and arguments of human rights violations against individuals.

Specifically, the analysis of these cases will centre on the following elements: first, the rules on the jurisdiction of UNCLOS dispute settlement bodies, which, as per Articles 287 and 288 of the UNCLOS, is confined to disputes concerning the interpretation and application of UNCLOS provisions; second, the 'link' requirement and the necessity of co-terminosity between the relief sought (and the rights to be protected) and the rights subject to the proceedings on the merits; and third, the requirement of irreparable prejudice to the rights of the parties in dispute.

3.1 ARA Libertad*: Tacit Reference to Human Rights in the Interpretation of the 'Prejudice' Requirement*

In the *ARA Libertad* case, the Argentinean warship *ARA Libertad* was detained in the Port of Tema (Ghana) pursuant to an order by the Ghanaian High Court. Argentina submitted its request for provisional measures on the basis of irreparable prejudice to inter alia the immunity of warships (Article 32 of the UNCLOS) and its right to leave the jurisdictional waters of Ghana, right of passage and freedom of navigation pursuant to Articles 18(1)(b), 87(1)(a) and 90 of the UNCLOS. Importantly, despite only submitting claims concerning the violation of its *own* rights, Argentina elaborated on the 'urgency' requirement and argued that provisional measures were not only necessary to safeguard Argentina's rights but also to preserve the right to life and well-being of the crew. Argentina contended that the continued detention of the frigate jeopardised 'the security of the warship, and the health and integrity of the crew remaining on board'[146] and that 'the life and well-being of the crew members ... will be placed at peril'.[147] In oral proceedings, Argentina clarified this point by highlighting that 'underlying Argentina's rights ... there are individuals who are personally suffering the consequences of the damage caused to the rights of their State'.[148]

[146] '*ARA Libertad*' *(Argentina* v. *Ghana), Provisional Measures*, Request for Provisional Measures Submitted by Argentina, 14 November 2012, para. 66.

[147] Ibid., para. 65.

[148] '*ARA Libertad*' *(Argentina* v. *Ghana), Provisional Measures*, Verbatim Record, 29 November 2012 a.m., ITLOS/PV.12/C20/1/Rev.1, 26 (lines 14–16).

Argentina formulated its claim using inter-State language: it did not request any measures specifically directed at protecting the rights of the crew; rather, it asked ITLOS to allow the *ARA Libertad* to sail out of Ghana's jurisdictional waters and to be resupplied to that end.[149] Furthermore, it did not justify its request for provisional measures on the basis of prejudice to any specific human right of the crew, yet Argentina's arguments can be understood as an implicit reference to the right to life and physical integrity and the right to liberty of the crew.[150] The Tribunal ultimately prescribed the release of the *ARA Libertad* but did not mention the arguments made by Argentina in relation to the crew. However, ITLOS seems to have tacitly endorsed the implicit reference to human rights norms made by Argentina when it ordered – absent any specific request on its part – to 'ensure that the . . . Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana'.[151]

Although Argentina did not present arguments based on human rights norms, its stance is a first step towards the introduction of arguments highlighting the importance and relevance of provisional measures proceedings for the preservation of human rights (i.e., the rights of the crew). It brought awareness to the consequences that violations of UNCLOS provisions – enshrining State rights and obligations – can have on individuals. As will be demonstrated in a next step, other States have been more unequivocal in provisional measures proceedings regarding the human rights implications stemming from a breach of States' obligations, and they have been more explicit, to varying degrees, in justifying their requests – rather than implicitly as seen in the *ARA Libertad* case – on the basis of human rights instruments such as the ICCPR.

3.2 Arctic Sunrise*: Provisional Measures to Protect Human Rights*

Arguably, the most well-known provisional measures case among the general public is the *Arctic Sunrise* case. A study of the provisional measures proceedings before ITLOS reveals some important developments in terms of the use of human rights norms on the part of the applicant as well as tacit consideration of them on the part of ITLOS.

[149] *'ARA Libertad'*, Request for Provisional Measures Submitted by Argentina, para. 72bis.
[150] See ibid., paras. 65–6.
[151] *'ARA Libertad' (Argentina* v. *Ghana), Provisional Measures*, Order, 15 December 2012, ITLOS Reports (2012) 332, para. 108(1).

As to the factual background, in a nutshell, activists on board the *Arctic Sunrise* – a Dutch-flagged Greenpeace vessel campaigning to 'Save the Arctic' – attempted to scale the *Prirazlomnaya* oil rig located in the Russian Federation's EEZ. The *Arctic Sunrise* was boarded and detained by Russian authorities; the crew and the activists on board (of different nationalities, including Dutch and Russian) and the activists on the *Prirazlomnaya* were arrested and detained by Russian authorities. The dispute submitted by the Netherlands to the arbitral tribunal concerned the interpretation and application of the rules on 'freedom of navigation, other lawful uses of the sea associated with this freedom',[152] and the right to visit a foreign-flagged ship under Article 110 of the UNCLOS. The provisional measures proceedings were instituted with the intent of preventing injury to these rights.[153] In particular, the request for provisional measures was based on the injury caused by acts of the Russian Federation to the rights of the Netherlands in its own right and its rights to protect a vessel flying its flag, to diplomatic protection of its nationals and to seek redress on behalf of crew members of a vessel flying its flag (i.e., the exercise of quasi-diplomatic protection).[154]

In addition to the harm to rights contained in the UNCLOS provisions, the Netherlands claimed that the actions of the Russian Federation caused injury to 'the right to liberty and security of the crew members, and their right to leave the territory and maritime areas under the jurisdiction of a coastal state under the 1966 International Covenant on Civil and Political Rights and customary international law'.[155] In oral proceedings, the Netherlands claimed that the Russian Federation's actions violated Article 9(1) of the ICCPR 'pursuant to which no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law'[156] and Article 12(2) of the

[152] In particular, Articles 56(2), 58(2), 87(1)(a) of the UNCLOS as well as customary law: *'Arctic Sunrise' (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures*, Request for Provisional Measures Submitted by the Netherlands, 21 October 2013, paras. 19–20 and *'Arctic Sunrise' (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures*, Order, 22 November 2013, ITLOS Reports (2013) 230, para. 67.

[153] *'Arctic Sunrise'*, Request for Provisional Measures Submitted by the Netherlands, para. 19.

[154] See Draft Articles on Diplomatic Protection, Article 18.

[155] *'Arctic Sunrise'*, Request for Provisional Measures Submitted by the Netherlands, para. 19. See also *'Arctic Sunrise' (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures*, Verbatim Record, 6 November 2013 a.m., 3 (lines 20–5).

[156] *'Arctic Sunrise'*, Verbatim Record, 6 November 2013 a.m., 24 (line 50), 25 (lines 1–2).

ICCPR 'as the crew is not free to leave the territory and maritime areas under the jurisdiction of the Russian Federation'.[157] In its request, the Netherlands contended that the crew's arrest and detention, which was already argued to be in violation of the UNCLOS, was a 'further breach of the Russian Federation's obligations owed to the Kingdom of the Netherlands'.[158] This affirmation was later clarified in oral proceedings where the Netherlands elaborated on its human rights claims and argued that '[t]he arrest and detention of the persons on board the *Arctic Sunrise* is not only a breach of the law of the sea, but also of international human rights law'.[159]

3.2.1 Linking the Law of the Sea and the Human Rights Dimensions of 'Unlawfulness' of Arrests at Sea

The first remark that must be made is that the invocation of ICCPR provisions in an UNCLOS dispute is revolutionary.[160] Despite being aware of the inter-State nature of the proceedings, the Netherlands did not seem to view the acts of boarding and arresting the vessel (contrary to the law of the sea) separate from the arrest and detention of the individuals (contrary to human rights law). The Netherlands argued that the actions taken by the Russian Federation were contrary to international law – not only the law of the sea, but also human rights law.[161] The underlying reasoning of the ICCPR-based claims was made explicit, to a certain extent, in the oral proceedings[162] and can be elucidated as follows: the unlawfulness of the arrest and detention of a vessel and its crew under the UNCLOS (e.g., in

[157] Ibid., 25 (lines 4–5).
[158] '*Arctic Sunrise*', Request for Provisional Measures Submitted by the Netherlands, para. 25.
[159] '*Arctic Sunrise*', Verbatim Record, 6 November 2013 a.m., 24 (lines 38–9).
[160] It is worth noting that in oral proceedings ('*Arctic Sunrise*', Verbatim Record, 6 November 2013 a.m., 23 (lines 46–8)), the Netherlands argued: 'The actions of Greenpeace would rather fall within the ambit of the freedoms of expression, demonstration and protest. These freedoms are supported by international law'. However, ITLOS refrained from engaging in a balancing exercise between the freedom of expression and the rights of coastal States in their EEZ – arguably on the basis of a narrow understanding of its jurisdiction in provisional measures cases. This approach and ITLOS's restrictive understanding of jurisdiction under Article 290(5) of the UNCLOS were criticised by Judges Wolfrum and Kelly, who indeed confirmed the possibility for Greenpeace to invoke, at least in the EEZ, 'the freedom of expression as set out in the International Covenant on Civil and Political Rights': '*Arctic Sunrise*' *(Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures*, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, 22 November 2013, ITLOS Reports (2013) 230, para. 14.
[161] '*Arctic Sunrise*', Verbatim Record, 6 November 2013 a.m., 24 (lines 48–9).
[162] Ibid., 24–5 (lines 48–50, 1–3).

violation of Article 110 of the UNCLOS on the right of visit)[163] may render the arrest and detention of individuals involved unlawful according to human rights law (e.g., Article 9(1) of the ICCPR), insofar as it may deprive the arrest of its 'substantive' and 'procedural lawfulness'.[164] The connection of these two concepts of 'unlawfulness' – each stemming from a different field of law – is an extraordinary contribution to the comprehensive and full legal scrutiny of arrests and seizures at sea.

3.2.2 Stand-Alone ICCPR-Based Claims in Provisional Measures Proceedings?

From the wording of the request submitted by the Netherlands and the oral proceedings, it is unclear whether the ICCPR-based claims were stand-alone claims or whether violations of human rights were to be considered as a part of, or otherwise linked to, the rights to exercise diplomatic protection of Dutch nationals and to seek redress on behalf of the non-Dutch crew members (quasi-diplomatic protection). While the latter was the interpretation adopted by the Tribunal,[165] it must be noted that the Netherlands seemed to invoke violations of the ICCPR as a separate claim in the arbitral proceedings.[166] Therefore, one could interpret the application by the Netherlands as requesting provisional measures on the basis of violations of the erga omnes obligations that the Russian Federation incurs under the ICCPR vis-à-vis inter alia the Netherlands,[167] as later claimed in the arbitral proceedings.[168]

[163] Article 110 of the UNCLOS sets out the grounds for and the procedure to be followed in exercising the right to visit.

[164] On the 'substantive' and 'procedural' lawfulness components of the right to liberty, see Petrig, 'Human Rights and Law Enforcement at Sea', pp. 212 et seq.

[165] *'Arctic Sunrise'*, Order, 22 November 2013, para. 33.

[166] See Arbitral Award in *'Arctic Sunrise'*, where the Arbitral Tribunal declined to have jurisdiction to determine breaches of the ICCPR, '[a]t times, the Netherlands appears to invite the Tribunal directly to determine that there has been a breach by Russia of Articles 9 and 12(2) of the ICCPR, to which both States are parties': *The Arctic Sunrise Arbitration (Kingdom of the Netherlands* v. *Russian Federation)*, PCA Case No. 2014–02, Award on the Merits, 14 August 2015, para. 193.

[167] On State rights stemming (in parallel to the original human rights) from human rights obligations, see Y. Dinstein, 'The erga omnes Applicability of Human Rights', *Archiv des Völkerrechts*, 30 (1992), 16–21, who affirms on page 18 that '[o]nce State obligations towards the individual assume erga omnes dimensions, . . . [n]ew State obligations come into being, thus engendering new State rights (existing side by side with – and in support of – human rights)'.

[168] In the arbitral proceedings, the Netherlands claimed that Russia violated obligations erga omnes, which are owed to the international community, including to the Netherlands: *The Arctic Sunrise Arbitration*, Award on the Merits, para. 184.

Regardless of whether the human rights provisions in question were invoked in connection with the exercise of diplomatic protection of Dutch nationals and the right to seek redress for the rest of the crew (i.e., as rights formally held by the State) or whether they were invoked as obligations erga omnes engendering State rights (i.e., rights formally held by individuals, but in relation to which all States have an interest and a right), the fact remains that human rights alone cannot be the subject of litigation before ITLOS or any other UNCLOS dispute settlement body. Therefore, questions and doubts regarding fulfilment of the requirements of 'prejudice', 'link' (in particular, the link between human rights provisions and the UNCLOS provisions to be adjudicated) and prima facie jurisdiction[169] arise.

In order to avoid a possible rejection of its human rights claims and given the proximity and partial overlap between the 'link' and 'prejudice' requirements (as they both refer to rights *pendente lite*), the Netherlands argued that the continued detention of the vessel and crew, and arguably the violations of human rights stemming from it, caused prejudice to its own rights. It was therefore via the 'prejudice' requirement that the Netherlands attempted to establish the 'link' between State rights and human rights and tried to usher the latter into the jurisdiction of ITLOS. For this argument, the Netherlands relied on the *M/V SAIGA (No. 2)* case,[170] where ITLOS held that 'the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures'.[171] Implicitly, with the *M/V SAIGA (No. 2)* judgement, the Tribunal endorsed the view that provisional measures could be granted to prevent prejudice to States' interests and 'even to the lives of persons serving on board vessels flying its flag'[172] – an

[169] Miles, 'Provisional Measures', p. 361.

[170] *'Arctic Sunrise'*, Request for Provisional Measures Submitted by the Netherlands, para. 29.

[171] *M/V 'SAIGA' (No. 2), Provisional Measures*, Order, 11 March 1998, ITLOS Reports (1998) 24, para. 41. In *M/V 'SAIGA' (No. 2)*, ITLOS granted the Applicant's request and ordered the Respondent to 'refrain from taking or enforcing any judicial or administrative measures against the M/V Saiga, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel ... and the subsequent prosecution and conviction of the Master': *M/V 'SAIGA' (No. 2)*, Order, 11 March 1998, 52(1).

[172] T. A. Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)', *Heidelberg Journal of International Law*, 62 (2002), 51.

argument used by, among others, the Netherlands to justify its ICCPR-based claims in the *Arctic Sunrise* case.

3.2.3 Human Rights Norms Implicitly Taken into Account

As previously suggested, the *Arctic Sunrise* case is relevant because of the injection of human rights in provisional measures proceedings via claims based on human rights norms (i.e., the ICCPR). In line with its claims, the Netherlands requested the Tribunal to prescribe provisional measures directed at protecting the individuals. Indeed, the Netherlands requested that both the *Arctic Sunrise* and crew members be allowed to leave the territory and maritime areas under the Russian Federation's jurisdiction and for the vessel to be resupplied to that end, to suspend any judicial and administrative proceedings, and to refrain from initiating any such proceedings against the crew members, owners or operators.[173]

For our purposes, it is important to see how the Tribunal responded to and took into account the claims and submissions filed by the Netherlands. The Tribunal did not directly engage with the human rights claims;[174] however, it ordered the release of 'all persons who have been detained', including the crew members and activists arrested on board the *Arctic Sunrise*, as well as the individuals arrested on board the oil rig.[175] It must be noted that the release of the individuals detained on board the oil rig was not covered by the Netherlands' request for provisional measures, which referred to the 'boarding, investigating, inspecting, arresting and detaining' of the *Arctic Sunrise*.[176] Furthermore, the three Russian crew members were not covered by the claim of diplomatic protection (applicable to Dutch nationals only) or the claim of quasi-diplomatic protection, which does not cover nationals of the arresting

[173] '*Arctic Sunrise*', Request for Provisional Measures Submitted by the Netherlands, para. 47.

[174] The Tribunal only quoted without explicitly endorsing the Dutch submission that '[t]he settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned': '*Arctic Sunrise*', Order, 22 November 2013, para. 87.

[175] The Tribunal considered that the requests made by the Netherlands were appropriate to preserve its rights and ordered the Russian Federation to 'release the vessel . . . and *all persons who have been detained*' and to 'ensure . . . [*their right*] to leave the territory and maritime areas under the jurisdiction of the Russian Federation': '*Arctic Sunrise*', Order, 22 November 2013, para. 105(1)(a) and (b), emphases added.

[176] '*Arctic Sunrise*', Request for Provisional Measures Submitted by the Netherlands, para. 20. See Miles, 'Provisional Measures', p. 361.

State (i.e., the Russian Federation).[177] The Tribunal therefore did not award provisional measures for the protection of the State's rights subject to litigation (i.e., the right to exercise diplomatic protection for its nationals or to quasi-diplomatic protection for the crew members) but implicitly for the protection of human rights. With this, ITLOS disregarded the 'link' requirement and arguably overstepped the limits of its jurisdiction.[178]

3.3 Enrica Lexie*: A Special Case*

The latest ITLOS provisional measures case (also in terms of the time of its delivery) that marks a move towards the increased potential relevance of human rights norms in provisional measures proceedings is the *Enrica Lexie* case. This case concerned two Italian marines aboard an Italian-flagged oil tanker that opened fire on an Indian fishing boat (in the EEZ of India), killing two fishermen and seriously damaging the vessel. After the incident, the *Enrica Lexie* was diverted by Indian authorities to the Port of Kochi; once there, the vessel was ordered not to leave, boarded, and the two marines were arrested by Indian authorities with the intention of exercising criminal jurisdiction over them. As accepted by ITLOS,[179] the dispute submitted by Italy to an Annex VII arbitral tribunal concerned the interpretation and application of the UNCLOS:[180] Italy claimed that India's actions prejudiced its rights under the UNCLOS (in particular, its right to exercise exclusive jurisdiction over the *Enrica Lexie* incident pursuant to Article 92(1) of the UNCLOS)[181] and under international law.[182]

In its submissions, Italy requested the Tribunal to order India to refrain from exercising jurisdiction – that is, to refrain from taking or enforcing any judicial or administrative measures over the two marines and to lift the measures depriving them of their liberty, security and

[177] See M. T. Drenan, 'Gone Overboard: Why the Arctic Sunrise Case Signals an Over Expansion of the Ship-as-a-Unit Context in the Diplomatic Protection Context', *California Western International Law Journal*, 45 (2015), 139–40.

[178] See, in a similar vein, Miles, 'Provisional Measures', pp. 362–3.

[179] *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 53.

[180] *'Enrica Lexie' Incident (Italy* v. *India), Provisional Measures*, Request of the Italian Republic for the Prescription of Provisional Measures, 21 July 2015, paras. 37(a), 29.

[181] '*Enrica Lexie*' Incident, Order, 24 August 2015, para. 34(a). Article 92(1) is applicable to the EEZ by virtue of Article 58(2) of the UNCLOS.

[182] On the basis of its own immunity and the immunity of its officials, *'Enrica Lexie' Incident*, Request of the Italian Republic for the Prescription of Provisional Measures, paras. 34(b).

freedom of movement.[183] These latter measures seem to have been requested to protect the human rights of the two marines and to prevent injury to their rights, yet they raise problems with regard to the 'link' requirement because the link between the rights subject to litigation and the provisional measures requested appears to be broken. However, this is not of particular relevance, as ITLOS rejected these requests and only ordered Italy and India to 'suspend all court proceedings' concerning the *Enrica Lexie* and to 'refrain from initiating new ones which might aggravate or extend the dispute'.[184] What is relevant is that Italy followed in the footsteps of the Netherlands in the *Arctic Sunrise* case insofar as it invoked ICCPR norms in provisional measures proceedings and even referred to the views of the Human Rights Committee. However, the ICCPR provisions did not form the basis for its claims (as in the *Arctic Sunrise* case) and only served to substantiate the 'prejudice' requirement, to which we turn now.

3.3.1 Provisions of the ICCPR and Views of the Human Rights Committee in the Substantiation of the 'Prejudice' Requirement

The request for provisional measures was based on the 'serious and irreversible prejudice' to Italy's rights[185] caused by 'India's continued exercise of jurisdiction' over the two marines.[186] Italy put forward three different ways the rights under litigation were prejudiced: first, direct prejudice to its own rights under the UNCLOS;[187] second, indirect prejudice to its rights caused by the measures restricting the liberty and movement of the two Italian marines; third, and most importantly, Italy arguably positioned the 'irreparable consequences for personal health and well-being' of the two marines as an independent, stand-alone human rights claim.[188]

Italy argued that '[t]he duration and circumstances of the custody and bail conditions' of the two marines amounted to a violation of Articles 9 and 14 of the ICCPR.[189] In oral proceedings, with the aim of defining the

[183] Ibid., paras. 5(a)–(b), 57(a)–(b).
[184] *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 141(1).
[185] Italy claimed that India violated Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the UNCLOS and customary international law. See *'Enrica Lexie' Incident*, Request of the Italian Republic for the Prescription of Provisional Measures, para. 29.
[186] Ibid., para. 19.
[187] Ibid., para. 37(a).
[188] Ibid., para. 37(b).
[189] Ibid., para. 49.

content and importance of the obligations to promptly formulate the charges and inform the suspects of them (Articles 9(2) and 14(3)(a) of the ICCPR), Italy cited three 'decisions' by the Human Rights Committee (which are in reality 'views' of the Committee): *Campbell* v. *Jamaica, Grant* v. *Jamaica* and *Kelly* v. *Jamaica*.[190] Finally, Italy argued that India violated the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law' enshrined in Article 14(1) ICCPR[191] and the presumption of innocence principle.[192]

Of particular relevance is Italy's argumentation regarding the 'prejudice' requirement: on the basis of the Tribunal's provisional measures case law (the *Arctic Sunrise* and *M/V SAIGA (No. 2)* cases) and Article 18 of the International Law Commission's Draft Articles on Diplomatic Protection, Italy made an argument connecting prejudice to the 'rights of individuals on board a ship' and prejudice to 'the rights of the State of nationality of the ship'.[193] To reinforce its arguments, Italy added that the link between its rights and the rights of the two marines on board was particularly strong, given that the two marines were State officials exercising State functions.[194] Italy's explicit position was that the prejudice caused to the marines' human rights was ultimately (indirectly or directly) a prejudice to Italy's rights.[195]

The specificities of the *Enrica Lexie* case (i.e., the specific relationship between the Italian State and the individuals concerned as State officials) likely led Italy to emphasise its arguments on the 'prejudice' requirement rather than submitting stand-alone human rights claims and arguing on the basis of violations of the erga omnes nature of obligations arising from the ICCPR (and owed to Italy as such).[196] Despite hinting at such

[190] *'Enrica Lexie' Incident (Italy* v. *India), Provisional Measures,* Verbatim Record, 10 August 2015 a.m., ITLOS/PV.15/C24/1/Rev.1, 31 (lines 35–42), 32 (lines 1–17).

[191] Ibid., 33 (lines 18–27).

[192] Ibid., 33 (lines 43–4).

[193] Italy went deeper into the human rights arguments than the Netherlands in *'Arctic Sunrise'*. On the basis of ITLOS case law (the *'Arctic Sunrise'* and *M/V 'SAIGA' (No. 2)* cases) and Article 18 of the Draft Articles on Diplomatic Protection, Italy made an argument connecting the 'rights of individuals on board a ship and the rights of the State of nationality of the ship': *'Enrica Lexie' Incident*, Request of the Italian Republic for the Prescription of Provisional Measures, para. 43. Italy referred to the ruling of ITLOS in *M/V 'SAIGA' (No. 2*), also invoked by the Netherlands in *'Arctic Sunrise'* and quoted above in section 3.2.2, see *M/V 'SAIGA' (No. 2)*, Judgment, para. 41.

[194] *'Enrica Lexie' Incident*, Request of the Italian Republic for the Prescription of Provisional Measures, para. 45.

[195] Ibid.

[196] As implicit in the Dutch request for provisional measures in the *'Arctic Sunrise'* case.

a possibility when referring to 'the irreparable consequences for personal health and well-being' of the two marines[197] as an independent prejudice on which to base a provisional measures proceeding, Italy invoked the ICCPR norms to substantiate the 'prejudice' requirement alone and not as part of the rights that formed the basis for its request. However, this case is of seminal importance because it illustrates a pattern of increased willingness on the part of States to invoke (universal) human rights instruments (i.e., the ICCPR) – and, in this case, even the views of human rights bodies (i.e., the Human Rights Committee) – in provisional measures proceedings before ITLOS.

3.3.2 The Order for Provisional Measures and the Mere Reiteration of the 'Considerations of Humanity' Dictum

In its order for provisional measures in the *Enrica Lexie* case, ITLOS refrained from mentioning the ICCPR provisions, merely quoting the humanitarian arguments raised by Italy in relation to the 'urgency' requirement,[198] along with the humanitarian considerations raised by India.[199] However, in the Tribunal's view, these issues concerned the merits of the case, and in a split ruling, it decided not to prescribe the release of the two marines.[200] In the subsequent paragraph, possibly to compensate for the lack of direct consideration of the invoked ICCPR

[197] *'Enrica Lexie' Incident*, Request of the Italian Republic for the Prescription of Provisional Measures, para. 37(b).

[198] *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 99. Italy argued: 'Urgency, as you have heard, is both humanitarian and legal. It is humanitarian both because of the individual circumstances of the two marines, and because prolonged pre-charge deprivation of liberty is a grave matter of continuing concern.': *'Enrica Lexie' Incident*, Verbatim Record, 10 August 2015 a.m., 37 (lines 49–50), 38 (line 1).

[199] The Tribunal also referred to India's argument that the 'well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime', *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 94. The relevance of this argument for the present chapter, however, is limited as India did not invoke any specific human right norm, but rather suggested 'a balancing of humanitarian considerations on the two sides' (i.e., the suspects and the victims). A warning against the shortcomings of using general principles instead of human rights provisions, which cannot be subject of a balancing exercise, has been correctly made: see I. Papanicolopulu, 'Considerations of Humanity in the Enrica Lexie Case', *Questions of International Law, Zoom-in*, 22 (2015), 34, 37.

[200] *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 132. In his Separate Opinion, Judge Jesus affirmed that the urgency requirement was met and that ITLOS should have prescribed the requested provisional measures releasing the two marines. Indeed, according to Judge Jesus, pre-trial detention or measures restricting freedom of movement before the trial 'carry with them a built-in need for urgency, as considerations of humanity are important in this regard': *'Enrica Lexie' Incident (Italy* v. *India),*

provisions, ITLOS reiterated its seminal ruling in the *M/V SAIGA (No. 2)* case that 'considerations of humanity must apply in the law of the sea as they do in other areas of international law'.[201]

However, this seems to be a simple statement of principle to which the Tribunal was not inclined to give any practical effect. Foreshadowing that the 'hot potato' concerning the human-rights-based arguments would be considered by the arbitral tribunal, ITLOS mentioned the 'considerations of humanity' statement in the case at hand but did not apply the principle. By contrast, the arbitral tribunal, in its order for provisional measures, explicitly sought to 'give effect to the concept of considerations of humanity' for the purposes of alleviating the bail conditions of one of the two marines and allowing him to return to Italy during the arbitration proceedings.[202] The *Enrica Lexie* case thus illustrates a lack of willingness on the part of ITLOS (as opposed to the arbitral tribunal with jurisdiction over the case) to give effect to and apply the 'considerations of humanity' dictum in provisional measures proceedings.

3.4 Future Developments

What could be the role of human rights in provisional measures proceedings? To what extent can States request provisional measures aimed at protecting human rights? And to what extent can ITLOS use human rights norms as a basis for awarding provisional measures?

To answer these questions, one must first note that Article 89(3) of the Rules of the Tribunal does not require identification of the rights to be protected in a request for provisional measures. This, in principle, might give States some latitude to eschew formalism and ask for (and be awarded) provisional measures not explicitly aimed at protecting human rights, but in fact having this effect. The Tribunal may therefore, as evidenced by the *ARA Libertad* and *Arctic Sunrise* cases, tacitly take into account human rights and grant measures to protect them. However, should States decide to explicitly request provisional measures for the protection of human rights, they would face hurdles

Provisional Measures, Separate Opinion of Judge Jesus, 24 August 2015, ITLOS Reports (2013) 182, paras. 11–12.

[201] *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 133, referring to *M/V 'SAIGA' (No. 2)*, Judgment, para. 155.

[202] *'Enrica Lexie' Incident (Italy* v. *India)*, PCA Case No 2015–28, Order – Request for the Prescription of Provisional Measures, 29 April 2016, paras. 106, 124, 132(a).

regarding fulfilment of the prima facie jurisdiction, 'prejudice' and 'link' requirements.

Indeed, UNCLOS dispute settlement bodies have jurisdiction over disputes concerning the interpretation and application of UNCLOS provisions,[203] yet UNCLOS does not contain any human rights clauses. As a result, the Tribunal's jurisdiction does not extend to the adjudication of human rights norms as such. In provisional measures proceedings, the prima facie jurisdiction requirement requires ITLOS to be satisfied that the provisions invoked by the parties appear prima facie to afford a basis for jurisdiction on the merits. This requirement poses an important limitation to the jurisdiction of the Tribunal and may render requests for provisional measures aimed at protecting human rights inadmissible.

Similarly, the requirement of 'prejudice' to the rights in dispute, and the requirement of a 'link' between the measures requested and the rights to be adjudicated on the merits, significantly restrict any leeway ITLOS might have in awarding measures sought to protect human rights. However, some observations must be made. First, ITLOS could award this type of provisional measure within its power to grant measures preventing the aggravation of the dispute.[204] Despite the fact that the wording of Article 290(5) of the UNCLOS does not seem to include the possibility for ITLOS to prescribe measures to prevent the aggravation or extension of the dispute, it has on occasion awarded non-aggravation measures.[205] These measures do not relate to situations of irreparable harm to the subject matter of the dispute but tackle a more general risk to the rights of the parties. In particular, they relate to situations where one of the parties to the proceedings resorts to actions that might aggravate the dispute simply 'by seeking to undermine or interfere with the rights' and the ability of the other party (i.e., the one seeking provisional measures) to defend its case and protect its rights.[206] Arguably, in some cases, actions that severely undermine the human rights of the crew or the Master (e.g., leading to physical deterioration or death, thus curtailing their ability to stand trial) may fall within the range of acts that aggravate the dispute.

[203] UNCLOS, Article 288.

[204] See *Southern Bluefin Tuna*, Order, para. 67; Miles, 'Provisional Measures', p. 174.

[205] See *M/V 'SAIGA' (No. 2)*, Order, 11 March 1998, para. 52; *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 141.

[206] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, ICJ Reports (2007) 3, Declaration of Judge Buergenthal, para. 11.

It has been contended that, in awarding non-aggravation measures, the conditions for awarding provisional measures – in particular, the 'prejudice' and 'link' requirements – must be construed in a less stringent way, thus allowing the protection of rights other than those already at issue in the case. An extreme view concerns the power to award (in situations involving the use of force) non-aggravation measures regardless of the fulfilment of the prima facie jurisdiction requirement.[207] While these views (also expressed by individual judges of the ICJ) do not find support in international judicial practice,[208] their relevance should not be underestimated in the present discussion since they might justify a widening of the Tribunal's room for manoeuvre in the prescription of provisional measures.

Second, even in the context of provisional measures strictly protecting rights pendente lite, there might be room for provisional measures that protect human rights. As will be analysed in greater depth as follows, there is a norm in the UNCLOS, Article 293, which expands the law applicable to disputes brought before UNCLOS dispute settlement bodies and makes 'other rules of international law not incompatible with [the UNCLOS]'[209] applicable. What is more, the UNCLOS contains specific norms referring to external rules of international law.[210] It will be argued that thanks to these provisions, UNCLOS dispute settlement bodies could take human rights norms into account incidentally when deciding a dispute on the interpretation and application of the UNCLOS. Self-evidently, adopting this position has an expansive effect on the jurisdiction of ITLOS in provisional measures proceedings and on the possible substantiation of the 'prejudice' and 'link' requirements by the party seeking provisional measures.

Fundamental and basic human rights are inevitably affected by the exercise of enforcement jurisdiction under the UNCLOS. The previously mentioned contentions are suggestions on how this inter-State procedure could be constructed so as to expand the protection afforded by provisional measures and effectively safeguard human rights.

[207] For a summary of these views, see P. Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute', *Leiden Journal of International Law*, 21 (2008), 630–3.

[208] Neither ITLOS, nor the ICJ, which is respectfully followed by ITLOS, have expressed any support for this view. See Palchetti, 'The Power of the International Court of Justice', 631–2.

[209] UNCLOS, Article 293(1).

[210] See section 4.1.4.

4. Cases on the Merits

Finally, ITLOS has decided a series of cases on the merits – that is, disputes concerning the interpretation and application of the UNCLOS.[211] The Tribunal's jurisdiction in cases on the merits is much broader as compared with prompt release and provisional measures proceedings.

Since the cases pertaining to maritime delimitation[212] and fisheries[213] do not feature a close link with the interests and rights of individuals, this section concentrates on cases turning – one more time – on the arrest and seizure of vessels and crews.[214] While ITLOS has previously given limited consideration to violations committed by the arresting State against persons and property, and the rights of individuals, the key question is whether this could change in the future. Given that the UNCLOS is silent on human rights, and human rights norms do not feature as 'norms of the actual substantive law that defines ITLOS's jurisdiction (Context Two set forth by the editor),[215] the present analysis will enquire into whether ITLOS – by having recourse to 'anchoring' provisions – could eventually consider human rights violations arising in disputes under its jurisdiction. What follows is an analysis of three potential anchors: Article 293 of the UNCLOS on the determination of the applicable law (section 4.1), which has led to the well-known 'considerations of humanity' dictum (section 4.2) and the prohibition of abuse of rights contained in Article 300 of the UNCLOS (section 4.3).

4.1 The Two Functions of Article 293 of the UNCLOS: Interpretative and Gap-Filling

Article 293 of the UNCLOS provides that the law applicable to disputes falling within the jurisdiction of ITLOS includes 'other rules of international law not incompatible with this Convention' in addition to those set

[211] See UNCLOS, Articles 287–8.

[212] *Dispute of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar),* Judgment, 14 March 2012, ITLOS Reports (2012) 4; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, 23 September 2017, ITLOS Reports (2017).

[213] *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)*, Order, 16 December 2009, ITLOS Reports (2008–10) 13.

[214] *M/V 'SAIGA' (No. 2)*, Judgment; *M/V 'Louisa' (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, 28 May 2013, ITLOS Reports (2013) 4; *M/V 'Virginia G'*, Judgment.

[215] See Chapter 1 by Scheinin.

out in the UNCLOS. The necessity for such a clause arises from the nature of the UNCLOS: its Preamble indeed states that the Convention aims at settling 'all issues relating to the law of the sea', but it is acknowledged that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'. What is more, the UNCLOS is a special regime of international law that only regulates the uses of the seas.[216] This may explain the existence of Article 293 of the UNCLOS, which acknowledges that the UNCLOS must not be interpreted or applied in isolation from general international law.

We shall shed light on the functioning of Article 293 of the UNCLOS, since little scholarly attention has been devoted to unravelling the full potential of this provision.[217] While the issue of interpretation is often conflated with the concept of 'applicable law' in scholarship,[218] it is necessary to distinguish two ways in which Article 293 of the UNCLOS facilitates the entrance of either general international law or its special regimes[219] in the UNCLOS dispute settlement system: first, it functions as an interpretative tool; and second, it acts as a norm expanding the law applicable to UNCLOS disputes.

4.1.1 Systemic Integration

It can be said that Article 293 of the UNCLOS falls within Context Three (systemic integration), as set forth by the editor of this book, insofar as this provision may be a means by which external human rights norms become an instrument to assist ITLOS in the interpretation and application of the UNCLOS.[220] As will be explained in the following, the UNCLOS provisions are to be interpreted in light of the wider body of

[216] UNCLOS, Article 293; P. Ferrara, 'Article 293. Applicable Law', in Proelss, 'Commentary', p. 1894.

[217] See, for a few exceptions, K. Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals', *Ocean Development & International Law*, 48 (2017), 284; Treves, 'Human Rights and the Law of the Sea', 6; Papanicolopulu, 'International Law', pp. 73–4; A. Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change', *International and Comparative Law Quarterly*, 54 (2005), 565–6. Commentaries on UNCLOS (both Nordquist et al., 'United Nations Convention on the Law of the Sea', 'Article 293. Applicable Law', vol. 5, pp. 72–4, and Proelss, 'Commentary', P. Ferrara, 'Article 293. Applicable Law', pp. 1894–5) limit themselves to general remarks.

[218] Treves, 'Human Rights and the Law of the Sea', 6; Karaman, 'Dispute Resolution', pp. 292–6. See, for an exception, Papanicolopulu, 'International Law', pp. 73–6.

[219] Papanicolopulu, 'International Law', p. 75.

[220] See Treves, 'Human Rights and the Law of the Sea', 6.

international law; hence Article 293 seems to be the primary norm within the UNCLOS system allowing for the systemic integration of external international law norms, including human rights, when interpreting and applying the UNCLOS.

The scope of systemic integration within the UNCLOS system seems to be wider than that of Article 31(3)(c) of the VCLT, which – as part of the general rules of interpretation[221] – continues to apply to the Convention. Article 31(3)(c) of the VCLT provides for treaty interpretation that takes into account 'any relevant rules of international law applicable in the relations between the parties'. In order to be taken into account by the interpreter, the external rule of international law must be 'relevant' and 'applicable in the relations between the parties'. Considerable scholarly attention has been devoted to the 'relevance' and 'applicability' criteria.[222] Here, it suffices to say that, if narrowly interpreted, these requirements may considerably limit the ability to rely on external rules of international law as interpretative guidelines.[223] The scope of systemic integration will be constrained if, for example, the 'applicability' criterion is interpreted as requiring all parties to the dispute/treaty to be party to the treaty 'to be taken into account' in the interpretation process, or if the 'relevant' criterion is understood as requiring the rule to be used for interpretative purposes to concern the same subject matter as the treaty to be interpreted.[224] Compared with Article 31(3)(c) of the VCLT, Article 293 of the UNCLOS is considerably more flexible, since it does not require the external rule to meet any formal requirements. At the material level, however, the external rule must not be incompatible with the UNCLOS.

[221] See C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', *International and Comparative Law Quarterly*, 54 (2005), 279. This principle has in recent times received a great deal of attention due to the consideration given to its potential scope and application in M. Koskenniemi, Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006, UN Doc. A/CN.4/L.682, paras. 410–80.

[222] See, e.g., R. Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford: Oxford University Press, 2015), pp. 299–320; McLachlan, 'Principle of Systemic Integration', 313–19.

[223] Gardiner, 'Treaty Interpretation', p. 303.

[224] See A. Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', *International Journal of Constitutional Law*, 15 (2017), 694.

4.1.2 Article 293 of the UNCLOS Allows Importing External Norms as Applicable Law

Article 293 of the UNCLOS is not just a tool of interpretation; it also concerns the determination of the applicable law. This provision directs ITLOS to apply international law in order to fill the Convention's gaps.[225]

Article 293 of the UNCLOS should not be considered on equal footing with Article 31(3)(c) of the VCLT, which is a canon of treaty interpretation allowing the interpreter to take into account 'relevant rules ... applicable ... between the parties'. While the boundaries between the 'taking into account' process and the expansion of the applicable law via systemic integration are often unclear in the context of Article 31(3) of the VCLT,[226] it must be noted that Article 293 of the UNCLOS is clear-cut on this point. The latter provision is formulated in a different and more decisive way than the VCLT systemic integration norm insofar as it provides that '[a] court or tribunal having jurisdiction under this section *shall apply* this Convention and other rules of international law not incompatible with this Convention'.[227]

Peters clearly distinguishes the process of determination of the applicable law (in which external norms are applied 'directly') from systemic integration (where external rules are 'indirectly' applied 'as interpretative devices for the proper construction of the regime-specific rules').[228] Article 293 of the UNCLOS not only allows for an interpretation that has recourse to external norms in order to determine the meaning of terms found in UNCLOS provisions,[229] but also allows for external norms to be imported as applicable law.[230]

[225] See *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports (2015) 4, paras. 142–3, where the Tribunal decided that the 'relevant rules of international law on responsibility of States for internationally wrongful acts' would be applied since the UNCLOS does not provide guidance 'on the issue of liability of the flag State for [illegal, unreported and unregulated] fishing activities conducted by vessels under its flag'.

[226] J. d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in O. K. Fauchald and A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart, 2012), pp. 147–50. See also Chapter 7 by Hestermeyer.

[227] UNCLOS, Article 293(1), emphasis added.

[228] Peters, 'Refinement of International Law', 693.

[229] See Treves, 'Human Rights and the Law of the Sea', 6.

[230] On the distinction between systemic integration and applicable law in the system of the World Trade Organization, see Chapter 7 by Hestermeyer.

What is the in concreto effect of the UNCLOS norm on applicable law? Article 293 brings non-UNCLOS norms into the analysis of substantive claims concerning the alleged violation of UNCLOS provisions, thus allowing external norms to be used for the determination of whether UNCLOS provisions have been violated. As a result, human rights law can be employed when examining the obligations and rights arising from the UNCLOS.

4.1.3 Applicable Law and Jurisdiction

Having clarified the difference between the use of non-UNCLOS norms (including human rights norms) as interpretative tools versus their use as applicable law, we now enquire into the expansion of the subject matter jurisdiction of ITLOS and other UNCLOS dispute settlement bodies by means of Article 293 of the UNCLOS:[231] could ITLOS exercise jurisdiction over a claim based solely on 'other rules of international law'? While using Article 31(3)(c) of the VCLT to broaden the range of applicable law and allowing an international judge to adjudicate beyond the jurisdiction ratione materiae can rightly give rise to criticism,[232] the use of Article 293 of the UNCLOS to extend the Tribunal's jurisdiction to claims arising from international law is not a remote prospect.

It must be premised that Article 293 of the UNCLOS does not seem to allow for human rights law to form the basis of separate, stand-alone human rights claims before ITLOS; this provision deals with the applicable law and not with jurisdiction. Therefore, the most cautious position is that, in reliance on Article 293 of the UNCLOS, human rights law can be instrumental to finding a violation of UNCLOS provisions. Article 293 does not grant jurisdiction over human rights claims – but, on this provision's basis, human rights law could inform the assessment of claims based on UNCLOS. Along these lines, UNCLOS dispute settlement bodies have, in some instances, refused to assert jurisdiction over claims based on 'other rules of international law', including international human rights law.[233] However, there is also one line of cases that can be

[231] In the following, references to the jurisdiction of ITLOS shall be considered to include the reference to the jurisdiction of other UNCLOS dispute settlement bodies.

[232] d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts', p. 149.

[233] See, in particular, arbitral tribunals in *The Arctic Sunrise Arbitration*, PCA Case No. 2014–02, Award on the Merits, 14 August 2015, para. 198; and *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, PCA Case No. 2014-07, Award,

read as stating that non-UNCLOS provisions can be the basis of a claim by way of Article 293.[234] Of course, non-UNCLOS claims cannot be completely isolated from claims based on UNCLOS provisions; then, the question is to what extent a non-UNCLOS claim (e.g., based on a violation of human rights norms) must relate to disputes concerning the interpretation and application of the UNCLOS. What nexus must exist between this type of non-UNCLOS claim and the main UNCLOS dispute?

Bearing in mind that this issue cannot be conclusively resolved here and will ultimately be determined on a case-by-case basis, it is still important to recall the different views as regards the threshold to be met for granting jurisdiction over non-UNCLOS claims. In the absence of guidance from Article 293 of the UNCLOS, some have argued that an 'incidental connection' or a 'genuine link' or 'nexus' between the non-UNCLOS claim and the dispute must exist.[235] Others have opined that the non-UNCLOS claims must constitute 'ancillary determinations of law ... necessary to resolve the dispute'.[236] Yet the exact scope and meaning of these thresholds remain poorly defined[237] and require further study.

4.1.4 Reference to External Rules of International Law in UNCLOS Provisions

As compared to Article 293 of the UNCLOS, the UNCLOS provisions that explicitly refer to external norms for a specific subject matter could have more direct bearing on the Tribunal's scope of jurisdiction. The UNCLOS contains a series of provisions that, in regulating different subject matters, refer to rights, obligations or rules of international

5 September 2016, para 207. See also Parlett, 'Beyond the Four Corners of the Convention', 288–90.

[234] See ITLOS in the *M/V 'SAIGA' (No. 2)* and *M/V 'Virginia G'* cases and Annex VII Tribunal in the *Guyana v. Suriname Arbitration*, *(Guyana v. Suriname)*, PCA Case No. 2004–04, Award on the Merits, 17 September 2007. See on this Parlett, 'Beyond the Four Corners of the Convention', 287–8.

[235] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom*), PCA Case No. 2011-03, Dissenting and Concurring Opinion of Judge Kateka and Judge Wolfrum, 18 March 2015, paras. 28, 44–5. See S. Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', *International and Comparative Law Quarterly*, 65 (2016), 935–6. For a good analysis of supplemental jurisdiction under UNCLOS and, in particular, a summary of the different positions, see P. Tzeng, 'Supplemental Jurisdiction under UNCLOS', *Houston Journal of International Law*, 38 (2016), 571–2.

[236] The majority in the *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 220.

[237] Talmon, 'The Chagos Marine Protected Area Arbitration', 935.

law.[238] These so-called *'renvoi'* or 'reference provisions' evidence specific areas where the UNCLOS drafters envisaged a need for complementary external rules of international law.[239]

As an example, Article 87(1) of the UNCLOS establishes that the freedom of the high seas, which includes freedom of navigation, 'is exercised under the conditions laid down by this Convention and by other rules of international law'. Moreover, with respect to the EEZ, Article 58(3) of the UNCLOS reinforces Article 87(1) by providing that in the exercise of inter alia freedom of navigation and other internationally lawful uses of the sea related to the freedoms of the high seas, States must comply with 'other rules of international law in so far as they are not incompatible with this Part [of the Convention]'.[240] These provisions dictate that the exercise of freedom of navigation is governed by other rules of international law. More generally, these clauses place additional limits on the rights and obligations stipulated in the 'reference' provisions. It seems to be the very function of such provisions to incorporate external rules, including international human rights norms, directly into the UNCLOS and to create a pathway for them to enter the UNCLOS legal system.[241]

The Tribunal is therefore required to consider these references when assessing the legality of the exercise of these rights,[242] but what is the precise weight to be given to references to external norms in the UNCLOS? Can such reference provisions grant ITLOS jurisdiction over non-UNCLOS claims, including human rights claims?

A conclusive answer to this question requires analysis of each reference provision – an endeavour that is impossible to conduct here. However, it can be argued that where reference provisions create an obligation of compliance with external norms, ITLOS could extend its jurisdiction over the latter. Indeed, it must first be determined whether the reference provisions are prescriptive – that is, require compliance with other rules of international law (e.g., Articles 2(3)[243] and 87(1) of

[238] See, e.g., UNCLOS, Articles 2(3), 19(1), 58(2)-(3), 21(2), 21(4), 31, 34(2), 87(1), 138.

[239] Churchill argues that the framework nature of UNCLOS makes it necessary to refer to external rules. R. R. Churchill, 'The 1982 United Nations Convention on the Law of the Sea', in D. R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), p. 31.

[240] UNCLOS, Article 58(3).

[241] Parlett, 'Beyond the Four Corners of the Convention', 291.

[242] See also UNCLOS, Articles 2(3), 34(2), 58(2).

[243] Article 2(3) of the UNCLOS stipulates that '[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law'.

the UNCLOS).[244] If in the affirmative, as a second step, ITLOS is required to carry out a reconciling exercise between UNCLOS norms and non-UNCLOS norms. Third, the scope of the reference must be determined. However, since most human rights enshrined in the ICCPR reflect customary law,[245] the question concerning the scope of the reference – that is, whether the clause 'other rules of international law' refers to 'general rules of international law', rather than obligations arising from bilateral agreements or unilateral undertakings – holds no particular relevance here.[246] Fourth, despite the lack of jurisdiction to pronounce itself on a breach of a non-UNCLOS norm, ITLOS – through a reconciling exercise – needs to determine whether there has been a violation of the non-UNCLOS norm.[247] If so, ITLOS will conclude that there has been a violation of the UNCLOS norm. Accordingly, there seems to be room for an indirect expansion of the Tribunal's jurisdiction via reference provisions.[248]

4.2 'Considerations of Humanity': A Norm-Generating Dictum Leading to the Humanisation of the Law of the Sea

Relying on Article 293 of the UNCLOS,[249] ITLOS held in the oft-cited and seminal *M/V SAIGA (No. 2)* ruling (its first case on the merits) that '[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law'.[250] References to 'considerations of humanity' have also appeared in prompt release[251] and provisional

[244] Tzeng, 'Supplemental Jurisdiction under UNCLOS', 539–40, 542. See also Talmon, 'The Chagos Marine Protected Area Arbitration', 939–40.

[245] See H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1996), 317–52; R. B. Lillich, 'The Growing Importance of Customary International Human Rights Law', *Georgia Journal of International and Comparative Law*, 25 (1996), 1–10; General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant', 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8.

[246] See, on this topic, Parlett, 'Beyond the Four Corners of the Convention', 291–6.

[247] Talmon, 'The Chagos Marine Protected Area Arbitration', 940.

[248] Ibid.; Parlett, 'Beyond the Four Corners of the Convention', 295.

[249] It must be noted that this is the only explicit reference by ITLOS to Article 293 of the UNCLOS.

[250] *M/V 'SAIGA' (No. 2)*, Judgment, para. 155. The *'SAIGA'*, an oil tanker registered under the flag of Saint Vincent and the Grenadines, was arrested and detained, together with its Master and crew, by Guinea in the EEZ of Sierra Leone on account of having violated the customs and contraband laws of Guinea.

[251] *'Juno Trader'*, Judgment, para. 77; see sections 2.3.2, 2.3.3 and 2.3.4.

measures[252] cases. However, it must be noted that the phrase 'elementary considerations of humanity' was first coined by the ICJ in the *Corfu Channel* case[253] and later appeared in other cases.[254]

The phrase's place within sources of international law remains ambiguous. Different views have been expressed on the qualification of 'considerations of humanity': are they 'a general principle binding in itself, an equitable principle, a non-binding general principle from which other norms can be derived, a rule of custom, a soft-law norm sitting outside traditional statute sources, [or] a merely rhetorical device of little if any legal import' or an 'equivalent to the concept of obligations *erga omnes*'?[255] On top of the uncertain legal classification of 'considerations of humanity', there are legal and normative difficulties inherent in extrapolating common values from the idea of 'humanity'.[256] Finally, it is necessary to enquire into the impact and effect of this statement in the judicial decision-making process of ITLOS. How does or how will the concept of 'humanity' translate into the judicial method of the Tribunal? Will ITLOS go beyond a mere reiteration that 'considerations of humanity' apply to the law of the sea and give effect and practical application to it in the years to come?

The pioneering use of the phrase in the law of the sea domain was first made in the Tribunal's explanation of the limits of the use of force in law enforcement activities at sea.[257] In *M/V SAIGA (No. 2)*, ITLOS held that 'the

[252] *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 133.

[253] *Corfu Channel Case (United Kingdom* v. *Albania*), ICJ Reports (1949) 4, 22.

[254] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, ICJ Reports (1986) 14, para. 218; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) 226, para. 79.

[255] M. Zagor, 'Elementary Considerations of Humanity', in K. Bannelier, T. Christakis and S. Heathcote (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (London: Routledge, 2012), pp. 266–8. The citation from page 268 is actually a quote in itself, coming from M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford: Oxford University Press, 2002), p. 85–6. On the meaning of this dictum, see also D. Thürer, *International Humanitarian Law: Theory, Practice, Context* (The Hague: Hague Academy of International Law, 2011), p. 329, according to whom the ICJ with this formula referred to general and well-recognised principles of international humanitarian law. See contra Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea', p. 539, according to whom the ICJ meant to refer to human rights obligations.

[256] Zagor, 'Elementary Considerations of Humanity', pp. 269–78.

[257] *M/V 'SAIGA' (No. 2)*, Judgment, para. 155. One of the claims of Saint Vincent and the Grenadines was that Guinea used excessive force in detaining the vessel, *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Memorial Submitted by Saint Vincent and the Grenadines, 19 June 1998, para. 5.

use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'[258] and 'all efforts should be made to ensure that life is not endangered'.[259] According to Treves (in his academic capacity), the Tribunal's reference to 'considerations of humanity' in the *M/V SAIGA (No. 2)* case clarified that the basic principles governing the use of force in law enforcement activities at sea must be read in conjunction with the human rights of the persons involved.[260] More generally, 'respect for the human rights of persons involved' is 'implicit in the mention of "considerations of humanity"'.[261] Therefore, despite reluctance on the part of ITLOS to refer to 'human rights' in disputes under its jurisdiction, this formula can be understood as referring to inter alia human rights norms.[262]

However, the role of 'considerations of humanity' is much broader. The position of the authors is that 'considerations of humanity' is the starting point of a greater process of humanisation of the law of the sea, the outcomes of which remain to be seen.[263] Relying on Peters' argument that humanity is to be considered the new *Grundnorm* replacing sovereignty,[264] 'considerations of humanity' are to be considered a supra norm that, depending on the context in which it is used, can allow for reference to different legal norms. Depending on the factual situation, 'considerations of humanity' can trigger the application of different norms and principles that are expressions of the principle.[265] The analysis of prompt release[266] and provisional measures[267] cases has

[258] *M/V 'SAIGA' (No. 2)*, Judgment, para. 155.
[259] Ibid., para. 156.
[260] T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *European Journal of International Law*, 20 (2009), 414.
[261] Ibid.
[262] Treves, 'Human Rights and the Law of the Sea', 5. See contra *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Dissenting Opinion of Judge Ndiaye, 1 July 1999, ITLOS Reports (1999) 10, para. 90, who affirms that considerations of humanity are not 'rules of law in themselves'.
[263] On the humanisation of the obligation of prompt release, see section 2.3.2.
[264] A. Peters, 'Humanity as A and Ω of Sovereignty', *European Journal of International Law*, 20 (2009), 514.
[265] M. C. Bassiouni, 'A Functional Approach to General Principles of International Law', *Michigan Journal of International Law*, 11 (1990), 775, referring to B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens, 1953), p. 390.
[266] See sections 2.3.2, 2.3.3, and 2.3.4.
[267] See the *'Enrica Lexie' Incident* case, where the arguments of both parties (Italy and India) were based on considerations of humanity. Italy cited the 'considerations of humanity ruling' in *M/V 'SAIGA' (No. 2)* in order to raise arguments concerning the fundamental

indeed evidenced the dictum's flexibility. 'Considerations of humanity' are therefore a norm-generating concept,[268] by virtue of which ITLOS judges are directed in their judicial decision-making process to fill gaps in the UNCLOS in a manner that furthers the protection of the international community's common values.

While, thus far, the potential of 'considerations of humanity' appears to go largely unused and the effects of the phrase in the determination of judicial outcomes seem limited, its affirmation has important symbolic value in terms of bridging the UNCLOS and human rights law. Furthermore, combined with Article 293 of the UNCLOS on the applicable law, 'considerations of humanity' could have great practical application in the judicial process. Indeed, it has been suggested that human rights become guidelines for ITLOS judges in the interpretation and application of the UNCLOS.[269] As such, human rights are considered to be a means of assistance in the interpretation of UNCLOS provisions.[270] However, since the UNCLOS lacks human rights clauses, the reference to 'considerations of humanity' seems to be a gap-filler,[271] rather than a tool to assist ITLOS judges in the interpretation of obscure norms. Notably, ITLOS has held that 'considerations of humanity' must apply to law of the sea disputes – not that considerations of humanity must be taken into consideration in the law of the sea.[272] This confirms the strong gap-filling role of human rights norms by virtue of the 'considerations of humanity' statement and Article 293 of the UNCLOS.

rights of the two accused (*'Enrica Lexie' Incident*, Request of the Italian Republic for the Prescription of Provisional Measures, paras. 48–9); India argued on the basis of the 'well-being and humanitarian considerations in favour of . . . the victims of the crime' (i.e., the families of the killed fishermen) (*'Enrica Lexie' Incident*, Order, 24 August 2015, para. 94).

[268] For a good discussion on whether 'considerations of humanity' are a 'norm creating, norm exposing, or norm enhancing' device, see Zagor, 'Elementary Considerations of Humanity', pp. 278–85.

[269] Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea', p. 538.

[270] '"General Principles" can be utilized to interpret ambiguous or uncertain language in conventional or customary international law': Bassiouni, 'A Functional Approach to General Principles of International Law', 776.

[271] See, for this purpose, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, paras. 142–3, where ITLOS was very explicit regarding the gap-filling function of external norms.

[272] See ex plurimis *M/V 'SAIGA' (No. 2)*, Judgment, para. 155; *'Enrica Lexie' Incident*, Order, 24 August 2015, para. 133.

4.3 *Abuse of Rights*

Another UNCLOS provision deserving of attention is Article 300 on abuse of rights, which embodies general principles of international law[273] by stipulating that States shall exercise their rights, jurisdiction and obligations under the UNCLOS in good faith and not in a way that constitutes an abuse of them. Article 300 of the UNCLOS does not equate per se to a prohibition of human rights abuses.[274] It is rather a horizontal provision with the purpose of ensuring that States will not abuse rights arising from the UNCLOS. Abuses could amount to exercising rights in a way that impedes another State's enjoyment of their own rights or for a purpose that is different from that for which the right was created, with the result that injury is caused.[275] The exact interpretation of the provision remains unclear, particularly the question whether Article 300 of the UNCLOS could form the legal basis for a human rights claim before ITLOS.[276] The authors argue that, if applied in conjunction with another UNCLOS norm, Article 300 could be an anchor allowing ITLOS to adjudicate human rights violations committed by States parties to the UNCLOS when they exercise their rights and jurisdiction under the UNCLOS.

That Article 300 cannot be invoked alone, but only *together* with another UNCLOS provision, was conclusively decided in the *M/V Louisa* case.[277] In this case, Saint Vincent and the Grenadines argued that Spain had violated several provisions of the UNCLOS, insofar as the detention of the arrested individuals was unlawful and amounted to an abuse of their human rights (in particular, with regard to the conditions under which they were detained, their treatment after their release

[273] *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Separate Opinion of Judge Lucky, 14 April 2014, ITLOS Reports (2014) 4, para. 65; *M/V 'Louisa' (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Dissenting Opinion of Judge Lucky, 28 May 2013, ITLOS Reports (2013) 4, para. 42.

[274] *M/V 'Louisa'*, Dissenting Opinion of Judge Lucky, para. 55.

[275] See A. Kiss, 'Abuse of Rights', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, December 2006, para. 1, available at http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1371?rskey=Qt92lv&result=1&prd=EPIL.

[276] *M/V 'Louisa'*, Dissenting Opinion of Judge Lucky, para. 55.

[277] The dispute concerned the search, arrest and detention by Spain of the vessel *M/V 'Louisa'*, flying the flag of Saint Vincent and the Grenadines, and the detention and arrest of three persons at the port of El Puerto de Santa María in Spain. According to the Spanish authorities, the *M/V 'Louisa'* was the instrument for carrying out the crime of possession and depositing of weapons of war committed in internal waters and the continued crime of damaging Spanish historical patrimony.

and the undue delay in bringing formal charges against some of them).[278] The application of Article 300 of the UNCLOS was disputed, but according to Saint Vincent and the Grenadines, it was one of the possible provisions that could serve as a basis for its claim. The Tribunal rejected the possibility that Article 300 could *alone* serve as a basis for a claim and declined to assert jurisdiction over a claim based on the prohibition of abuse of rights only.[279] Thus, despite dismissing the abuse of rights-based argument,[280] ITLOS shed light on the applicability of the doctrine of abuse of rights enshrined in Article 300 of the UNCLOS. The Tribunal ruled out the possibility that Article 300 could be invoked on its own and found that it must be invoked in conjunction with 'the rights, jurisdiction and freedoms recognised' in the UNCLOS.[281]

[278] Saint Vincent and the Grenadines supplemented the claims presented in the written proceedings by arguing, only in the oral proceedings, that Spain committed 'abuse with respect to both human and property rights' (*M/V 'Louisa' (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Verbatim Record, 4 October 2012 a.m., ITLOS/PV.12/C18/1/Rev.1, 7 (lines 34–5)) and that Article 300 of the UNCLOS was violated 'in at least the following ways: (1) by abusing the human rights of persons only remotely connected to the *Louisa*' (*M/V 'Louisa'*, Verbatim Record, 4 October 2012 a.m., 15 (lines 38–40)). Mr Nordquist, advocate for the Applicant, argued: 'We ask ITLOS specifically to consider that article 300 mandates that justice in a given case such as that of Alba Avella be found by the Tribunal to consist of more than technical rules mechanically interpreted or applied, especially when the inherent rights of human beings are abused. The framers of the Convention deliberately made article 300 an overarching part of the Convention precisely because they wisely concluded that all factual and legal circumstances could not be predicted and covered by explicit rules. Article 300 fills a gap by authorizing this Tribunal to find justice in cases of abuse. The State Parties in article 300 empowered the ITLOS with residual authority to hear about instances of injustice and to provide remedies where merited. Today, the Tribunal has a rare opportunity to discharge that sacred duty in this case that is now squarely before it' (*M/V 'Louisa' (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Verbatim Record, 5 October 2012 p.m., ITLOS/PV.12/C18/4/Rev.1, 13 (lines 30–41)).

[279] The Tribunal declined to exercise jurisdiction ratione materiae over the case: *M/V 'Louisa'*, Judgment, paras. 150–1. The other norms invoked by Saint Vincent and the Grenadines were Articles 73, 87, 226, 227, 245 and 303 of the UNCLOS, but similarly, ITLOS ruled that also these norms could not serve as a legal basis for the claims related to the detention of the *M/V 'Louisa'*.

[280] According to ITLOS, Article 300 of the UNCLOS could not serve as a legal basis for the claim on the abuse of rights doctrine and the alleged violations of human rights by Spain, as it was not presented in the written proceedings, but a new claim only introduced during the oral proceedings, therefore changing the subject matter of the dispute in the course of proceedings: *M/V 'Louisa'*, Judgment, paras. 141–50.

[281] Ibid., para. 137.

This ruling was confirmed in the subsequent *M/V Virginia G* case,[282] in which ITLOS provided further clarification and considered that when invoking Article 300 of the UNCLOS, it falls on the applicant 'to specify the concrete obligations and rights under the Convention [that] were exercised in a manner which constituted an abuse of right'.[283] The Tribunal seemed to imply that the applicant must reference a *specific* provision to be linked with Article 300 of the UNCLOS.[284] Hence, the key question is whether there are provisions in the UNCLOS that could be linked to Article 300 in order to form the legal basis upon which human rights claims could be raised before the Tribunal. In light of the absence of express mention of human rights in the UNCLOS, the authors argue that there are two ways to introduce human rights claims through Article 300.

The first possibility is to make use of the UNCLOS 'reference' provisions. In the *M/V Louisa* case, Judges Lucky and Bouguetaia expressed the view that Article 2(3) of the UNCLOS (which was not invoked by the Applicant) could be invoked in conjunction with Article 300 of the UNCLOS.[285] Indeed, Article 2(3) provides that '[t]he sovereignty over the territorial sea is exercised subject to this Convention and *to other rules of international law*'[286] and 'other rules of international law' could arguably be understood as referring to inter alia human rights law. Therefore, Article 300 in conjunction with Article 2(3) of the UNCLOS could be the entry point for bringing human rights claims before ITLOS. Other 'reference' provisions, such as Articles 87(1) and 58(3) of the UNCLOS, could similarly be invoked in conjunction with Article 300 of the UNCLOS.

[282] *M/V 'Virginia G',* Judgment, paras. 395–6. The dispute concerned the arrest of the *M/V 'Virginia G'*, an oil tanker flying the flag of Panama, by the authorities of Guinea-Bissau for carrying out bunkering activities for foreign vessels fishing in Guinea-Bissau's EEZ.

[283] Ibid., para. 399.

[284] Ibid.

[285] *M/V 'Louisa' (Saint Vincent and the Grenadines* v. *Kingdom of Spain*), Separate Opinion of Judge Bouguetaia, 28 May 2013, ITLOS Reports (2013) 4, para. 33; *M/V 'Louisa'*, Dissenting Opinion of Judge Lucky, para. 63. The relevance of the human rights claims submitted by the Applicant seemed to be indirectly confirmed by an obiter dictum in *M/V 'Louisa'*. Arguably, also because of the failure of the Applicant to link Article 300 to Article 2(3) of the UNCLOS, ITLOS, while declining to address the violation of Article 300 of the UNCLOS, took note of the human rights issues as presented by Saint Vincent and recalled that 'States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances', *M/V 'Louisa'*, Judgment, paras. 154–5.

[286] UNCLOS, Article 2(3), emphasis added.

The second possibility is to establish a permanent link between Article 300 and Article 293 of the UNCLOS, which establishes that the law applicable to disputes falling within the Tribunal's jurisdiction includes 'other rules of international law not incompatible with [the UNCLOS]',[287] including human rights norms. In light of the interpretation provided,[288] Article 293 of the UNCLOS must be viewed as a tool allowing for human rights law to be imported as applicable law before ITLOS. Regardless of the existence of specific norms in the UNCLOS referring to external international rules, Articles 293 juncto 300 of the UNCLOS could be considered horizontal provisions that qualify all rights of the UNCLOS and ensure that the exercise of such rights does not conflict with respect for human rights.[289]

5. Conclusion

In the introduction, the authors have mentioned that it is commonplace to refer to the 'considerations of humanity' dictum pronounced by ITLOS in its very first judgment on the merits, the seminal *M/V SAIGA (No. 2)* case, and referenced in a series of later cases. The focus on this – admittedly important – dictum in the scarce doctrine on human rights and ITLOS may create the (false) impression that the Tribunal's case law does not offer any further findings relevant to the protection of individuals' rights and interests, and that ITLOS never explicitly referred to human rights in its decisions. The analysis at hand reveals that the Tribunal's case law, across all three types of procedures – prompt release, provisional measures and merits cases – is of interest for the three Contexts discerned by the editor of this book: procedural rights of the parties to the proceedings (Context One), substantive human rights clauses in law applicable in the adjudication of the case (Context Two) and systemic integration (Context Three). The varying characteristics and goals of the different types of ITLOS procedures scrutinised in this chapter impact the Tribunal's modes of engagement with human rights. Rather than providing an exhaustive summary of the findings, we limit

[287] Ibid., Article 293(1).
[288] See section 4.1.4.
[289] See *M/V 'Louisa'*, Dissenting Opinion of Judge Lucky, para. 58: 'The principle of respect and protection of a person's right is applicable throughout the Convention and this seems to be the true purport of article 300. . . . It seems to me that in exercising its rights, jurisdiction and freedoms, the State must do so without abusing the right of any person'.

ourselves to highlighting the most interesting (and surprising) findings of this chapter.

As regards prompt release proceedings, they are first of all relevant for Context One. Despite being de jure inter-State in nature (as proceedings before ITLOS generally are), in many cases they are de facto of a transnational nature – that is, involving a coastal State and a private party (notably ship owners). Yet the latter do not have their own procedural rights, as they are not parties to the proceedings. Prompt release proceedings are also of interest from the perspective of Context Two. On the one hand, it is true that the UNCLOS lacks human rights clauses in the strict sense; on the other hand, Article 73(3) and (4) of the UNCLOS – the legal basis for prompt release proceedings – arguably contains what are referred to as 'ordinary' international individual rights by prohibiting certain sanctions for fisheries laws violations and obliging coastal States to notify the flag State about a ship's arrest. The Tribunal, due to the limited jurisdiction it has in prompt release proceedings, is barred from deciding on the violation of these rights. However, they are of paramount importance for the interpretation of the obligation of prompt release contained in Article 73(2) of the UNCLOS because ITLOS has achieved a 'humanisation' of this provision through a context- and purpose-based interpretation (i.e., by having recourse to the rights stipulated in the remainder of the provision), rather than by way of systemic integration (Context Three), despite the existence of Article 293 of the UNCLOS stipulating that external norms can be taken into account in deciding UNCLOS disputes.

Second, when it comes to provisional measures, it is worth pointing out the increasing use of human rights arguments and norms on the part of applicants, which, in some recent cases, ITLOS has responded to by tacitly taking human rights into account. This falls within the 'applying without mentioning' mode of engagement depicted by the editor of this book as one of the methodological tools employed by international non-human-rights courts to rely on human rights norms.[290] Thus far, tacit reliance on human rights norms has allowed ITLOS to award provisional measures protecting individuals' rights, thereby overcoming the limits of its jurisdiction and implicitly circumventing the 'link' and 'prejudice' requirements. In the future, the Tribunal's ability to award provisional measures aimed at protecting human rights may increase with States

[290] See Chapter 1 by Scheinin.

introducing non-UNCLOS claims (notably human rights claims) in the main dispute (via Article 293 of the UNCLOS or 'reference' provisions).

Third and finally, in relation to cases on the merits, the analysis focused on systemic integration (Context Three). A key point of the author's enquiry is that Article 293 of the UNCLOS not only enshrines the principle of systemic integration in the UNCLOS, but it is a norm expanding the law applicable to UNCLOS disputes. Following from this decisive distinction, the analysis first revealed that the use of Article 293, despite being (thus far) rather limited, may allow human rights norms to play a significant role in claims before ITLOS, which could, in turn, permit an indirect expansion of its jurisdiction to cover violations of human rights (linked to violations of UNCLOS provisions). Moreover, it has been demonstrated that the 'reference' provisions of UNCLOS – alone or in combination with Article 300 of the UNCLOS (prohibition of abuse of rights) – may be the gateway norms for importing external norms of international law into claims before ITLOS.

Analysing the role ITLOS plays in terms of human rights protection is certainly interesting from an academic and theoretical point of view, yet it is also of great practical interest both now and in the future. For instance, a current question is whether ITLOS could play a role in addressing human rights violations occurring in the ongoing refugee crisis in the Mediterranean. Could Italy, for example, be brought before ITLOS for having denied the NGO-operated rescue vessel *Aquarius* access to its ports and prohibiting the disembarkation of more than 600 rescued migrants on Italian territory in June 2018?[291] The analysis in the chapter at hand revealed that ITLOS has paved the way for the rights and interests of individuals to be taken into account when deciding law of the sea disputes. Whether States will fully exploit the legal framework of the UNCLOS and the 'humanisation of the law of the sea' path, thereby offering ITLOS the possibility to further develop what it created in nuce, remains to be seen.

[291] See M. Fink and K. Gombeer, 'The Aquarius Incident: Navigating the Turbulent Waters of International Law', EJIL: *Talk!*, 14 June 2018, available at www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/.