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# Human Rights and the Law of the Sea

Tullio Treves\*

## I.

### INTRODUCTION

Today's international law is characterized by the expansion of specialized groups of rules. Scholarly discussion about these "self-contained" regimes tends to underscore the idea that these specialized groups of rules are separate from general international law; that they have their own sources, their own mechanisms to apply in case(s) of non-compliance, and their own courts and tribunals for settling disputes. The presence of these regimes and the increase in the number of international courts and tribunals raises concerns about possible "fragmentation of international law."<sup>1</sup>

Scholars now broadly agree that totally self-contained regimes do not exist. All allegedly self-contained regimes have some connection with general international law. It remains true, nevertheless, that specialized fields of international law, such as human rights law or environmental law, have emerged with clusters of scholars, organizations and sometimes courts and tribunals focusing their attention on these allegedly self-contained regimes.

Law of the Sea is one of the oldest branches of international law. It maintains a doctrinal framework from Hugo Grotius, who provided us with the first of its kind for international law as a whole. As such, the Law of the Sea is naturally more closely connected to general international law than other specialized branches. Even so, the Law of the Sea has its own specialists, a framework general convention, and an international Tribunal.

The Law of the Sea encounters many of the problems that arise when specialized sets of rules overlap. This is particularly true within the framework of the United Nations (UN) Convention on the Law of the Sea (LOS Convention).

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1. See, e.g., Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 *COMUNICAZIONI E STUDI* 821 (2007).

The UN, through the Convention, entrusts various bodies with the task of settling disputes concerning the interpretation and application of the Convention: the Law of the Sea Tribunal, the International Court of Justice (ICJ), and arbitration tribunals. Under the jurisdictional rules of the LOS Convention, these adjudicating bodies become “treaty bodies” whose primary task is to apply the LOS Convention in light of its purposes. The position of these bodies when invested with a dispute on the basis of the LOS Convention is then comparable to the position of a human rights specialized court, such as the European Court of Human Rights (ECHR).

An adjudicating body entrusted with the task of settling disputes concerning the interpretation and application of a particular convention cannot do so by considering that convention in isolation. The courts and tribunals called to settle disputes under the LOS Convention are bound by Article 293 of the Convention, under which the law applicable to them consists of the Convention “and other rules of international law not incompatible” with it.<sup>2</sup>

Yet it remains true that each court and tribunal, and also each of the international instruments these courts and tribunals are called to apply, has a distinct legal perspective. This makes relevant the choice of forum (if there is a choice) or the fact that a case is brought to one specific forum.

Given these overlapping fields of law, in addition to the different consequences of forum on outcomes of cases, I would like to consider the relevance of human rights in the Law of the Sea and also the relevance of the Law of the Sea from the viewpoint of human rights law. While pioneering studies by Oxman in 1997<sup>3</sup> and by Vukas in 2002<sup>4</sup> have explored the former aspect, the second has yet to be studied.<sup>5</sup> Recent cases in the ECHR and the discussion on specialized branches of international law and the perspectives of different adjudicating bodies make this examination timely and necessary.

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2. United Nations Convention on the Law of the Sea [hereinafter LOS Convention], art. 293, Dec. 10, 1982, 1833 U.N.T.S. 397. Tullio Treves, *The International Tribunal for the Law of the Sea: Applicable Law and Interpretation*, in *THE WTO AT TEN, THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 490 (Giorgio Sacerdoti, Alan Yanovich, Jan Bohanes, eds., 2006).

3. Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, in *POLITICS, VALUES, AND FUNCTIONS: INTERNATIONAL LAW IN THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN* 377 (Jonathan I. Charney, Mary Ellen O’Connell, Donald K. Anton, eds., 1997).

4. Budislav Vukas, *Droit de la mer et droits de l’homme*, in *THE LAW OF THE SEA, SELECTED WRITINGS* 71 (Budislav Vukas ed., 2004).

5. *But see*, Paul Tavernier, *La Cour européenne des droits de l’homme et la mer*, in *LA MER ET SON DROIT, MELANGES OFFERTES A LAURENT LUCCHINI ET JEAN-PIERRE QUENEUDEC* 575 (2003); Sophie Cacciaguidi-Fahy, *The Law of the Sea and Human Rights*, 9 *PANOPTICA* 1 (2007) available at <http://www.panoptica.org>.

## II.

## HUMAN RIGHTS FROM THE PERSPECTIVE OF THE LAW OF THE SEA

The LOS Convention is not a “human rights instrument,” per se. Its main objectives, like those of the Law of the Sea in general, are different. Yet, concerns for human beings, which lie at the core of human rights concerns, are present in the texture of its provisions. Upon cursory analysis, one may recall provisions about assistance to persons or ships in distress, the obligation of rescue, and the exception to the rule against stopping and anchoring during innocent passage “for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”<sup>6</sup>

Provisions setting limitations to powers of the coastal state to enforce its laws and regulations applicable in the exclusive economic zone find their starting point in the need to protect the individual. We should recall especially the prohibition on imprisonment or other forms of corporal punishment for fisheries violations;<sup>7</sup> the prescription that monetary penalties only be imposed for certain pollution violations;<sup>8</sup> and the requirement that parties who take action and impose penalties after arresting and detaining foreign fishing vessels promptly notify the flag State of these ships.<sup>9</sup>

The provisions of the preceding articles oblige the state that arrests a vessel or its crew for alleged infringements of rules concerning fisheries or pollution to promptly release the individuals upon the posting of a reasonable bond or other financial security. These articles also have the objective of safeguarding the freedom of the crewmembers and the rights of the ship and cargo owners to conduct economic activities. These provisions are strengthened in the framework of the LOS Convention by the option given to the flag State, or to any interested person on its behalf such as the ship owner, to request through expeditious international proceedings before the International Tribunal for the Law of the Sea, a judgment prescribing that the ship and its crew be promptly released upon the posting of a reasonable bond or financial guarantee. Tribunal proceedings are relatively frequent, showing that this procedure has been seen as useful in cases where the behaviour of the detaining State is perceived as unreasonable. States of all continents have participated as plaintiffs or defendants.

In its prompt release judgments, the Tribunal has underlined the relevant provisions’ importance for the protection of the individual. In the *Camouco*<sup>10</sup>

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6. LOS Convention, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 18(2).

7. *Id.* at art. 73(3).

8. *Id.* at art. 230.

9. *Id.* at art. 73(4).

10. *Comouco (Panama v. France)*, ITLOS Reports 2000, 10, 125 I.L.R. 164 (Int’l Trib. L. of the Sea 2000).

and *Monte Confurco*<sup>11</sup> judgments of 2000, the Tribunal gave a broad interpretation of the notion of “detention,” as applied to the master and crew of the ship. The French authorities submitted the master, pending judgment, to *contrôle judiciaire* (court supervision), a regime requiring surrender of the master’s passport and obliging the authorities verify its presence on a daily basis. The question was whether this practice amounted to “detention” for the purpose of the prompt release proceedings under Article 292 of the LOS Convention. The Tribunal held it did, observing that the master was “not in a position to leave Réunion” where the domestic proceedings were held.<sup>12</sup>

Special attention to the freedom of the master and crew also emerges in two other judgments: the *Juno Trader* case, Saint Vincent and the Grenadines v. Guinea Bissau, of 2004,<sup>13</sup> and the *Hoshinmaru* case, between Japan and the Russian Federation, of 2007.<sup>14</sup> In the former case, although the passports of crewmembers had been returned to their owners by the detaining State, the Tribunal observed that the crewmembers were “still in Guinea Bissau and subject to its jurisdiction.”<sup>15</sup> On this basis, it ruled in the operative part that “the crew shall be free to leave Guinea-Bissau without any condition.”<sup>16</sup> In the latter case, even though restrictions to the freedom of movement of the master (similar to those of the French *contrôle judiciaire*) had been lifted, the Tribunal, noting that master and crew were still in the Russian Federation, decided, similarly, that “the Master and the crew shall be free to leave without any condition.”<sup>17</sup> The reason why the Tribunal insisted in ruling on the freedom of the master and the crew even in situations in which it refrained from declaring that it was in a state of detention under Article 292 may be to eliminate all possible obstacles, bureaucratic or otherwise, to the departure of the ship. This is like the argument the present author, as a judge of the Tribunal, made in a declaration appended to the *Hoshinmaru* judgment.<sup>18</sup> In other words, it could be read as complementing the release of the ship, instead of concerning the release of the master and crew from detention. Yet, it is undeniable that the relevant paragraphs can also be seen as provisions adopted *ex abundanti cautela* to stress how much the Tribunal is keen to protect the rights of the individuals involved in the cases submitted to it.

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11. *Monte Confurco* (Seychelles v. France), ITLOS Reports 2000, 86, 125 I.L.R. 220 (Int’l Trib. L. of the Sea 2000).

12. *Camuoco*, 125 I.L.R. 164, at para. 71; *Monte Confurco*, 125 I.L.R. 220, at ¶ 90.

13. *Juno Trader* (Saint Vincent and the Grenadines v. Guinea Bissau), ITLOS, Reports 2004, 17, 128 I.L.R. 267 (Int’l Trib. L. of the Sea 2004), in the Order of 19 November 2004, 2004/1.

14. *Hoshinmaru* (Japan v. Russian Federation), Order of 9 July 2007, ITLOS Reports 2005-2007, 18, ¶12 (Int’l Trib. L of the Sea 2007).

15. *Juno Trader*, 128 I.L.R. at ¶ 25.

16. *Id.* at ¶ 32.

17. *Hoshinmaru*, at ¶ 33.

18. ITLOS Reports 2005-2007, ¶ 55.

In the *Juno Trader* judgment, the Tribunal indicated that the obligation of prompt release, which excludes imprisonment and corporal penalties, and requires notification of detention and subsequent actions, is connected to human rights considerations. It makes this belief clear even though the expression “human rights” is not used as in Article 73, paragraph 2 and the other provisions of the article where these protections are contained. The Tribunal stated “[t]he 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 guarantee must be reasonable indicates that a concern for fairness is one of the purposes of this provision.”<sup>19</sup>

The Tribunal invoked “international standards of due process of law” in the 2007 *Tomimaru* case<sup>20</sup> in order to assess whether confiscation of a vessel had been made in such a way as to permit to the Tribunal to consider that the prompt release proceedings concerning the confiscated vessel were without object (para. 76).

The human rights principles or considerations mentioned so far are directly stated in the LOS Convention or can be inferred from its provisions. The prompt release judgments of the Tribunal for the Law of the Sea illustrate this. Such principles may become applicable in a case concerning the application and interpretation of the LOS Convention even when they do not appear in the latter’s provisions. The Law of the Sea Tribunal stated this in its 1999 *MV Saiga Nr. 2* case.<sup>21</sup> In discussing whether the force used by Guinea in stopping and boarding the *Saiga* was excessive, the Tribunal declared that it had to take into consideration the circumstances of the arrest “in the context of the applicable rules of international law.” It specified that:

Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the 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. *Considerations of humanity must apply to the Law of the Sea as they do in other areas of international law.*<sup>22</sup> (emphasis added)

Reference to considerations of humanity comes from the ICJ *Corfu channel* judgment,<sup>23</sup> and, as seen above, was also used by the Tribunal in the *Juno Trader* judgment as a substitute for human rights.

19. *Juno Trader*, ITLOS Reports 2004, 17, 128 I.L.R. 267, ¶ 77. Further developments on the human rights aspects of Article 73(2) are in the separate opinion of the present writer in his capacity of judge of the International Tribunal for the Law of the Sea, ITLOS Reports 2004, 71-74.

20. *Tomimaru* case (Japan v. Russian Federation), Judgment of 6 August 2007, ITLOS Reports, 2005-2007, 74 (Int’l Trib. L. of the Sea 2007).

21. *M/V Saiga (No.2)* (St. Vincent v. Guinea), ITLOS Reports 1999, 10, 120 I.L.R. 143 (Int’l Trib. L. of the Sea 1999).

22. *Id.* at ¶ 155.

23. *Corfu Channel* (U.K and N. Ir. v. Alb.), 1949 I.C.J. 4, at Merits (April 9).

Courts use multiple tools to incorporate human rights law into cases that fall within the LOS Convention. In the *Saiga* judgment, the Tribunal justified integrating international law beyond the scope of the Convention by making reference to Article 293 of the LOS Convention, which explicitly permits the application of other rules of international law not incompatible with the Convention. It may be added that additional instruments for incorporating rules and principles of human rights law into the Law of the Sea context rest in Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties. Under this provision, in interpreting a treaty, “there shall be taken into account, together with the context... any relevant rules of international law applicable in the relations between the parties.”<sup>24</sup> Leaving aside the complex discussion this provision raises, it can be observed that many conventional human rights rules may become relevant in interpreting the LOS Convention.

The resort to human rights or humanitarian considerations and rules in the context of the Law of the Sea is just at a beginning stage. Other situations may be envisaged that are neither foreseen explicitly or implicitly in the LOS Convention nor have been considered by international courts and tribunals. A possible area of the Law of the Sea where these considerations may be relevant and helpful concerns the provisions, set out in the articles on the exclusive economic zone and on the high seas, that certain activities legal under the LOS Convention shall be conducted with “due regard” to other activities that are equally legal. For instance, the freedom of navigation must be exercised with due regard to the freedom of fishing, and the freedoms of navigation and of fishing must be exercised with due regard to the freedom to lay cables and pipelines.

But how do we solve the problem of “due regard” in instances where it is impossible to conduct both activities simultaneously, thereby making prioritizing necessary? It would seem that a useful criterion would be that of favouring the activity that entails less risk to human life.<sup>25</sup> Existing conventions, such as the COLREG, support this humanitarian view.<sup>26</sup> Reference to human rights, or considerations of humanity, would also be appropriate under Article 31(2)(c) of the Vienna Convention, or Article 293 of the LOS Convention.<sup>27</sup>

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24. Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

25. Tullio Treves, *Le navire et la compatibilité entre les utilisations de la mer*, in SOCIÉTÉ FRANÇAISE DE DROIT INTERNATIONAL, COLLOQUE DE TOULON, LE NAVIRE EN DROIT INTERNATIONAL 151 (1992).

26. Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS), Oct. 10 1972, 28 U.S.T. 3459, 1143 U.N.T.S. 346.

27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 at art. 31(2)(c).

## III.

## THE LAW OF THE SEA FROM THE VIEWPOINT OF HUMAN RIGHTS

As human rights may be relevant in the application and interpretation of the Law of the Sea, the Law of the Sea may be relevant in the application and interpretation of rules concerning human rights. A court such as the ECHR may have to consider Law of the Sea rules as part of the applicable international law necessary to perform its task of interpreting and applying the relevant human rights instruments. The specific point of view of a human rights court, and of its primary task of applying a human rights instrument, emerges nonetheless in the way the ECHR applies the Law of the Sea.

The ECHR judgment of July 10, 2008 on the *Medvedyev et al v. France* case,<sup>28</sup> as well as the earlier *Rigopoulos v. Spain* of 12 January 1999,<sup>29</sup> are interesting to consider from this point of view. In these cases, ships flying the Cambodian and the Panamanian flags, respectively, were apprehended on the high seas by Navy ships of France and Spain. In both cases, the seizure was conducted in the framework of the fight against drug trafficking and with the authorization of the flag State.<sup>30</sup> Such authorization had been requested on the basis of information that the vessels carried narcotic drugs. This was in fact the case, as huge quantities of drugs were found on board or seen being thrown overboard. In both cases, the members of the crew were taken into custody on the Navy ship, brought to a port of the arresting State, and later submitted to criminal proceedings.

In both cases the crew members claimed that the State detaining them had violated Article 5(3) of the European Convention on Human Rights according to which, *inter alia*, arrested or detained persons “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.”<sup>31</sup> The time elapsed between the moment the vessels were boarded and the crew members taken into custody and the point at which they were presented to a judge (16 days in the *Rigopoulos* case and 13 in the *Medvedyev* case) was claimed to be incompatible with the requirement of “promptitude” set out in the European Convention’s provision. The Court stated in both cases that the time elapsed was “in principle incompatible” with such requirement. It also stated that only “exceptional circumstances” could justify such long detention.<sup>32</sup> The Court held that “exceptional circumstances” prevailed in both cases because the arrest was made at a distance of 5,500 kilometres from the Spanish territory in the 1999

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28. *Medvedyev and Others v. France*, no. 3394/03 Eur. Ct. H.R. (2008). Judgment by the Eur. Ct. H. R. Grand Chamber is pending.

29. *Rigopoulos v. Spain* (dec.), no. 37388/97 Eur. Ct. H. R. (1999).

30. *Medvedyev*, no. 3394/03 Eur. Ct. H.R. ; *Rigopoulos*, no. 37388/97 Eur. Ct. H. R.

31. European Convention on Human Rights 1950, Europ. T.S. No. 5.

32. *Medvedyev*, no. 3394/03 Eur. Ct. H.R., ¶ 35.

case and at a distance of the same order from the French territory in the 2008 case. As the Court said in the *Medvedyev* judgment, in both cases “it was materially impossible to bring the applicant ‘physically’ before such an authority any sooner.”<sup>33</sup> Consequently, there was no violation of Article 5(3).<sup>34</sup>

The Court in both the *Rigopoulos* and *Medvedyev* cases recognized that detentions lasting for two weeks are incompatible with human rights law requiring detained persons to be “brought promptly” to a judicial authority.<sup>35</sup> However, it considered the need of an arrest on the high seas, in the framework of cooperation in the fight against drug trafficking, involving a considerable distance between the location of arrest and a land territory, created an exceptional circumstance that justified derogation from the governing human rights law. These circumstances demonstrate the relevance of maritime situations in interpreting a human rights law provision.

In the *Rigopoulos* case there was no discussion as to whether the legality of the Spanish arrest of the Panamanian vessel had any influence on the compatibility of the detention of the crew with the European Convention. The judgment just noted that Spain had obtained the authorization of the Panamanian Embassy in Madrid in conformity with Article 17(3) and (4) of the UN Convention against the illicit traffic of narcotic drugs and psychotropic substances made at Vienna on 20 December 1988, in force between Panama and Spain.<sup>36</sup>

To the contrary, this issue of compatibility was a subject of contention in the *Medvedyev* case. The applicant crew members pleaded a violation of Article 5(1) of the European Convention, according to which, *inter alia*: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.”<sup>37</sup> The applicant claimed the actors making the arrest did not satisfy the requirement of that procedure under both international and domestic law.<sup>38</sup> In their view no legal basis for arrest and detention could be found in the LOS Convention, because Article 108(2) provides that a State suspecting that a ship flying its flag is engaged in drug trafficking “may request the cooperation of other States to suppress such traffic.”<sup>39</sup> This was not the case because Cambodia’s acceptance of France’s authorization request could not be construed as a request of cooperation made by Cambodia to France. The UN Convention of 1988 could not be invoked either, as Cambodia was not a party to it.

The ECHR, while stating that Article 5(1) concerns “domestic legality,”

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33. *Medvedyev*, no. 3394/03 Eur. Ct. H.R., ¶ 67.

34. *Id.*

35. *Rigopoulos*, 12th para. of the “en droit” section”; *Medvedyev*, ¶¶ 64-65.

36. *Rigopoulos*, 2d para. of the “circonstances particulières de l’affaire” section.

37. *Medvedyev*, App. No. 3394/03 at ¶ 62.

38. *Id.*

39. *Id.* at ¶ 27.

underlined that it must consider all rules applicable to the interested persons “including, when necessary, those whose source is in international law.”<sup>40</sup> The ECHR then found that “international law sets out the principle of freedom of navigation on the high seas, save the control and coercion powers of the flag State.”<sup>41</sup> Finally, states may exercise such controls “even without the prior consent of the flag State” in the cases of piracy, slave transport, unauthorized broadcasts, or when the ship has no nationality or has the same nationality of the flag State, “or when specific treaties so provide.”<sup>42</sup>

The 1988 UN Convention would seem to be – in the view of the Court – one such treaty. The Court classified the provisions of that Article concerning the authorization to take appropriate measures as “derogations” to the “law of the flag” principle.<sup>43</sup> However, as Cambodia was not a party to the 1988 Convention, the Court had to assess the legality of the arrest, and France’s request for cooperation from Cambodia, from the perspective of authorization to arrest the vessel based on Article 208(1) of the LOS Convention, which provides for cooperation in the suppression of illicit traffic of narcotic drugs. The ECHR considered, however, that while France’s agreement with Cambodia, based on Article 208(1) of the LOS Convention, was a sufficient legal basis for the interception and the taking of control of the Cambodian vessel, this was not the case in regards to “all consequences” of the arrest of the vessel, for example depriving the crewmembers of their liberty for thirteen days. Consequently, applying the European Convention led to the conclusion that France had infringed Article 5(1). In the operative part, the ECHR held that “the determination of the infringement of Article 5(1) gives in itself a sufficient equitable satisfaction for the moral damage suffered by the plaintiffs.”<sup>44</sup>

The ECHR’s interpretation of the Cambodian note of authorization is also relevant. The Cambodian note authorized the French authorities “to intercept, control and institute legal proceedings against the ship *Winner* flying the Cambodian flag.”<sup>45</sup> In the Court’s view, this did not include the detention of the crewmembers. However, the Court could arrive at a different view if it considered detention part and parcel of a process included in legal proceedings.

The point that is more interesting to make is, however, a different one. The key conclusion of the reasoning, namely that the legality of the arrest of the vessel depended on the authorization of the flag State, seems correct. However, the steps taken in order to reach this point raise doubts from the point of view of an international lawyer specializing in the Law of the Sea. The approach the Court

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40. *Id.* at ¶ 15.

41. *Id.*

42. *Medvedyev*, App. No. 3394/03 at ¶ 54.

43. *Id.* at ¶ 56.

44. *Id.*

45. *Id.* at ¶ 56.

took in regard to the LOS Convention and the 1988 UN Convention on narcotic drugs does not seem to adopt as a starting point the idea that the flag State is free to authorize other States to exercise some or all its powers on its ships, and that all States are free to request such authorization to the flag State. The approach seems to be that a request for and the granting of an authorization needs a legal basis: be it Article 208 of the LOS Convention or Article 17 of the 1988 Convention.

If an international tribunal had decided whether the French had rightfully arrested the Cambodian vessel and rightfully detained its crewmembers, it would have done so by looking directly at the Cambodian authorization and deciding on the basis of whether the authorization covered the action taken by France. The tribunal would have seen Article 208 of the LOS Convention as a provision encouraging cooperation. It would have seen Article 17 of the 1988 Convention as a provision aiming at facilitating and rendering more efficient the cooperation based on the request and grant of an authorization by stressing that the flag state may make the authorization conditional, shall respond expeditiously to requests, and shall designate an authority competent for receiving such requests. Even the obligations ensuing from Article 17 are conditional on the fact that a state can freely request an authorization and a state can freely grant or withhold an authorization.

The ECHR is not, however, an international tribunal authorized to decide on the legality of a ship's arrest on the high seas. Such legality is relevant for it for specific purposes, which are concerned with the rights of individuals. As the Court states, its task includes consideration of the "quality" of the legal rules applicable to the interested parties: "Such quality entails that rules authorizing privation of liberty must be sufficiently accessible and precise in order to avoid any danger of arbitrariness."<sup>46</sup> This explains why a human rights specialized court will prefer written to customary law and interpret provisions building on freedoms of States and aiming at facilitating their cooperation, as rules authorizing certain behaviours.

The *Women on Waves* case, decided on 3 February 2009,<sup>47</sup> shows another facet of the way the ECHR utilizes the Law of the Sea. In this case one Dutch and two Portuguese Non-Governmental Organizations (NGOs) argued that the Portuguese government had violated the ECHR by prohibiting access to Portuguese waters for its chartered ship the *Borndiep*. The ship was flying the Dutch flag when the Portuguese government sent a warship to deny it access to its waters. The trip was aimed at conducting activities in favour of legalizing abortion, which was then prohibited in Portugal. As such, the NGOs claimed that Portugal had violated their right of expression and freedom of peaceful meeting

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46. *Id.* at ¶ 53.

47. *Women On Waves and Others v. Portugal*, no. 31276/05 Eur. Ct. H. R. (2009). French only.

and of association under Articles 10 and 11 of the ECHR. The Portuguese government argued that its interference with the right of innocent passage of the *Borndiep* was legal under Articles 19 and 25 of the LOS Convention because the passage entailed violations of Portuguese law. Moreover, such measures corresponded to restrictions on passage “prescribed by law as are necessary in a democratic society. . .for the protection of health or morals” in conformity with Articles 10(2) and 11(2) of the ECHR.

The Court stated at the outset that there had been interference with the rights of the requesting parties under the invoked articles. The question to be resolved concerned whether such interference was “prescribed by law” and “necessary in a democratic society.” The Court accepted the view, shared by the parties, that the interference of the Portuguese Government was “prescribed by law” in Articles 19(2)(g) and 25 of the Law of the Sea Convention.<sup>48</sup> It is noteworthy that the ECHR considers the Law of the Sea Convention as “the law” for the purpose of assessing the legality of certain acts of States parties to the European Convention. The approach taken regarding Article 5(1) of the European Convention in the *Medvedyev* case considered above is confirmed.

The Court then concludes, after analyzing a complex array of case law regarding freedom of expression, that the acts of interference with the navigation of the *Borndiep* were not “necessary in a democratic society.”<sup>49</sup> In assessing the lack of proportionality of the means adopted by Portugal, the Court noted: “the State certainly had at its disposal other means to attain the legitimate objectives of defending order and protecting health than to resort to a total interdiction of entry of the *Borndiep* in its territorial waters, especially by sending a warship against a merchant vessel.”<sup>50</sup> It would be interesting to see whether this argument would be valid in a case regarding interference with innocent passage that was submitted to a court or tribunal that had jurisdiction over cases concerning the interpretation and application of the Law of the Sea Convention.

In another recent judgment the ECHR has had to determine whether a guarantee of three million Euros, fixed by the Spanish judicial authorities for release of Captain Mangouras of the vessel *Prestige* from detention constituted a violation of Article 5(3) of the European Convention.<sup>51</sup> Article 5(3), which guarantees release of detainees prior to trial with allowance for reasonable bail, had to be interpreted by the European Court with respect to relevant case law, in particular the *Neumeister* case of 1968.<sup>52</sup> The Court affirmed that although the amount fixed for release of the captain was admittedly high, it did not contra-

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48. *Id.* at ¶ 38.

49. *Id.* at ¶¶ 36-44.

50. *Id.* at ¶ 43, transl. by Tullio Treves.

51. *Mangouras v. Spain*, no. 12050/04 Eur. Ct. H. R. (2009). The case has been submitted to the Grand Chamber of the European Court, whose judgment is pending.

52. *Neumeister v. Austria*, (ser. A) (No. 8) Eur. Ct. H. R. (1968).

vene the Convention. The Court stated two main reasons for this decision. The first is the fact that the guarantee, after 83 days of detention, had been paid by insurer of the ship owner “by virtue of the contractual legal relationship which existed between the ship’s owners and their insurers.”<sup>53</sup>

The second reason, more relevant to the present Article, has to do with the international concern for marine pollution. The court relies on a variety of domestic and international law, including the LOS Convention, and concludes that it cannot overlook the growing and legitimate concern both in Europe and internationally about offences against the environment. It notes in that connection States’ powers and obligations regarding the prevention of marine pollution and the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and impose sanctions on them.<sup>54</sup>

Values emerging in the Law of the Sea generally are assessed by the EHCR to determine whether they should be balanced against values set out in the European Convention.

#### IV. CONCLUSIONS

The Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations. The application of rules on human rights may require the consideration of rules of the Law of the Sea.

When cases involving these overlaps are subject to judicial assessment, the nature and task of the adjudicating body may be decisive. Each adjudicating body has its own perspective, which may bring it to read the same rules differently. This is not, in my view, fragmentation of international law. It is recognition of the complexity of the law and a consequence of the fact that a growing number of specialized courts and tribunals exist for settling disputes arising within this complex regime.

However, questions in which the Law of the Sea and the law of human rights overlap are not always brought to a specialized Law of the Sea or human rights court or tribunal. Cases may be brought to the International Court of Justice under general jurisdictional clauses, which exempt the Court from having to adopt the point of view of the specific instrument under which the case is submitted to it. In these cases the ICJ should reconcile the two sets of principles, or state a justifiable preference for one or the other. Legal advisers of the States

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53. *Mangouras*, No. 12050/04 Eur. Ct. H. R. ¶ 39.

54. *Id.* at ¶ 41.

involved, even though duty-bound to plead for the interest of their State, will know that such a balanced result will be one on which both sides may agree.

To obtain such compatibility or to justify such preferences may not be easy. Clear indications of these difficulties are apparent in the recent discussions in the *Tampa*<sup>55</sup> and in the *Cap Anamur*<sup>56</sup> cases, in which Law of the Sea rules on innocent passage and distress had to be reconciled with the human rights principle of *non-refoulement*. Similar difficulties arise in seeking to harmonize naval interdiction programs with *non-refoulement* as well as other human rights of the persons involved.<sup>57</sup>

A recent case highlights similar problems in the field of the fight against piracy. It concerns the Danish Navy ship, *Absalon*, which captured on September 17, 2008, ten suspected pirates in the waters off Somalia. After six days of detention and confiscation of their weapons, ladders and other implements used to board ships, the Danish government decided to free them by putting them ashore on a Somali beach. The Danish authorities had come to the conclusion that the pirates risked torture and the death penalty if surrendered to any Somali authorities. This treatment was unacceptable, as Danish law prohibits extraditing criminals when they may face the death penalty. Additionally, it was not tenable to submit them to trial in Denmark, as it would be difficult to deport them back to Somalia after their sentences were served.<sup>58</sup> It is clear that human rights considerations and expediency prevailed over the fight against piracy.

Subsequent developments have shown that Denmark is not isolated in its view that human rights considerations justify reluctance in prosecuting pirates. The European Union and Kenya concluded an agreement in 2009 regarding the surrender of pirates captured off the coast of Somalia by ships of the European naval "Operation Atalanta." This agreement specified that no person may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law of human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.<sup>59</sup> It is clear that human rights concerns are

55. *Ruddock v. Vadarlis* (2001) FCA 1329 (Austl.).

56. German Aid Crew Tried in Sicily, BBC News, Nov. 27, 2006, available at <http://news.bbc.co.uk/2/hi/europe/6188838.stm>.

57. See Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 205, 222-46 (2008).

58. See Marcus Hand, *Danish Navy Releases 10 Somali Pirates*, LLOYD'S LIST, Sep. 25, 2008, available at <http://www.lloydslist.com/ll/news/danish-navy-releases-10-somali-pirates/20017574257.htm>; Alletta Williams, *Worldwide Threat to Shipping, Mariner Warning Information*, in NATIONAL GEOSPATIAL INTELLIGENCE AGENCY (2008) at para. 10, available at [http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts\\_20081017100000.txt](http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20081017100000.txt).

59. Exchange of letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy

now inextricably intertwined with the concerns of the Law of the Sea.

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and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, EU-Kenya, Mar. 6, 2009, 48 ILM 747. *See* introductory note by Eugene Kontorovich. For further developments and references on piracy *see* Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 Eur. J. Int'l. L. 399 (2009).