

## The Law of the Sea Convention: No Place for Persons?

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### Abstract

The article, adopting an innovative approach to the law of the sea, discusses the place and role reserved to persons in the United Nations Convention on the Law of the Sea (LOSC) and the legal regime of which it is a part. The LOSC and other law of the sea agreements are examined, focussing on provisions that mention persons, their rights and their duties. Shortcomings identified include: the difficulty to configure persons as the beneficiaries of rights and the recipient of duties and the ensuing uncertain subjectivity of persons under the law of the sea; the presence of numerous gaps and inconsistencies in the existing legal regulation; the unavailability of mechanisms to address violations of duties by states. The conclusions draw attention to the potential of the LOSC and other treaties to further develop the international legal regime applicable to persons at sea and to provide an adequate place for persons in the law of the sea.

### Keywords

law of the sea; persons; human rights; jurisdiction; right to life; enforcement; United Nations Convention on the Law of the Sea (LOSC)

### Introduction

The United Nations Convention on the Law of the Sea (LOSC or the Convention) is undoubtedly a monument to international law-making. The ‘constitution for the oceans’, as it has been aptly termed, sets the legal and institutional framework of the legal regime applicable to the seas and contains many detailed substantive rules. However, the LOSC does not say the final word on the law of the sea, as the text and the spirit of the Convention itself,<sup>1</sup> not to mention actual state practice, have shown. The adoption of two

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<sup>1</sup> 21 *International Legal Materials* 1261 (1982). See, generally, Preamble, last paragraph; Arts. 312–316, Art. 311, para. 3, and, on specific issues, Art. 237 and Art. 303, para. 4.

“implementation” agreements so far<sup>2</sup> and the process launched by the UN General Assembly in 2011 concerning areas beyond national jurisdiction, bear witness to the will of states to continue working on law of the sea issues.<sup>3</sup>

Poor regulation, one of the main reasons for revising existing rules, is particularly evident with respect to persons at sea. This contribution addresses this problematic issue by sketching the existing framework, pointing at some major problems and advancing a few suggestions. A focus on shortcomings and inconsistencies may hardly seem suitable for a contribution to a celebratory issue. This choice reposes on the belief that the greatness of a treaty has to be evaluated not only with respect to what it has achieved, but also with respect to what it can still achieve in the future. At 30, it is time to evaluate the LOSC not only as a monument to the past, to international negotiations and the codification and further development of the law in the 1970s and 1980s, but also as a living instrument which, despite its many problems, can provide rules for today’s situations and concerns. In this light, paying homage to what has been achieved seems more like a commemorative speech for something that has passed away, while commenting on shortcomings and addressing possible ways forward seems a better tribute to a treaty that, because it is still living, is capable of evolution. And the LOSC, as will emerge, is indeed a living instrument that can be used as a basis for addressing present concerns.

## **Persons in the LOSC**

On examination of the Convention, it immediately strikes the eye that there seems to be no place for persons. People seem to occupy a space so small that it can be compared to that of a rock or a small island—with the exception that, unlike Part VIII, no Part is dedicated to the former. In order to verify whether this impression is correct, the following discussion identifies LOSC rules mentioning persons and assesses their significance against two criteria: whether they take into account concerns proper to persons and whether they allow persons an active role as subjects of the law of the sea.

The institutional (or framework) provisions of the Convention distribute jurisdiction between states as far as the spaces and objects present at sea are

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<sup>2</sup> Part XI Implementation Agreement (1994), 33 ILM 1309; Fish Stocks Agreement (1995) 34 ILM 1542.

<sup>3</sup> UNGA Res. 66/231, 24 December 2011, para. 167; <http://www.un.org/documents/resga.htm>.

concerned, but apparently do not pronounce on jurisdiction over persons. Unsurprisingly, the International Tribunal for the Law of the Sea (ITLOS) has considered persons to be, to a certain extent, “accessory” to ships.<sup>4</sup> The only three provisions that refer to a state having jurisdiction over a person do not identify the criteria to be used for determining which state has jurisdiction over the persons mentioned.<sup>5</sup> Similarly, there are no general substantive principles concerning the place and relevance of persons within the law of the sea. There is no principle stating, for example, “States have the obligation to protect persons at sea and respect their rights”.<sup>6</sup> Even the protection of human life, certainly one of the concerns of the international community since its inception, is not framed in the words of principle but is contained in two provisions having a limited territorial scope. This is not to say that persons are completely unknown to the reader of the LOSC. Persons are mentioned now and then and some rules are actually directed at them or consider them or are of benefit to them. However, in order to find rules referring to persons,<sup>7</sup> it is necessary to turn to the more detailed provisions.<sup>8</sup>

Part XI is probably the one that gives more space to persons. They can exploit the resources of the Area, they can bring claims against the staff of the International Seabed Authority, and they can initiate and be parties to judicial proceedings before the ITLOS Seabed Disputes Chamber.<sup>9</sup> Furthermore, Art. 137, para. 3, is probably the only provision in the entire Convention expressly attributing a right to persons, albeit with a negative formulation. However, the scope of these provisions is limited to Part XI and persons are not fully fledged actors, given that their capacity to act depends on the previous sponsorship of a state, with the latter also retaining ultimate responsibility to ensure compliance and liability for damage for the acts of persons sponsored by it.<sup>10</sup>

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<sup>4</sup> ITLOS: M/V “Saiga” (no. 2) (*Saint Vincent and the Grenadines v. Guinea*), Judgment (1 July 1999), para. 106; (www.itlos.org).

<sup>5</sup> Arts. 113, 114, and 235, para. 2. Jurisdiction over persons according to the LOSC and other international law rules is discussed in I Papanicolopulu, ‘A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea’ in M Kwon, C Schofield and S Lee (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff, forthcoming).

<sup>6</sup> Compare this with Art. 192; other principles are contained in Arts. 87, 136 and 238.

<sup>7</sup> Or the master, the crew, fishermen, passengers, nationals, etc.

<sup>8</sup> In some cases the avoidance of any mention of the word ‘persons’ (or similar terms) is brought to the extreme. Art. 230, para. 3, for example, recognizes the applicability of “rights of the accused” for “violations committed by a foreign vessel”. Violations of anti-pollution laws and regulations are, however, more likely to be committed by persons on board, i.e., the master and crew of the vessel, rather than by the vessel itself.

<sup>9</sup> Art. 153, para. 2 (b); Art. 168, para. 3; Art. 187(c) and (e). Duties are set out in Art. 137.

<sup>10</sup> Art. 153, para. 2 (b), and Art. 4 of Annex III; Art. 139 and ITLOS Seabed Disputes Chamber,

Persons are also mentioned in other LOSC provisions that aim at protecting their interests or rights. In light of the dangers to human safety posed by the sea, the Convention imposes the duty on states to protect human life both on the high seas (Art. 98) and in the context of activities taking place in the Area (Art. 146). Concern for persons is paramount since, in human rights terms, these Articles clearly contain a positive obligation. But can they be interpreted to attribute a right to the person to be saved? If the answer is in the affirmative, then probably persons would acquire a limited subjectivity, although this would not entitle them to have resort to, e.g., the mechanisms provided in Part XV. If the answer is negative, problems would remain, since it is not clear to whom the obligation provided in Arts. 98 and 146 is owed and therefore who may invoke the responsibility of a state for non-compliance.<sup>11</sup> Is it an *erga omnes partes* obligation? Is it an *erga omnes* obligation? Is it an ‘*erga omnes* entities’ obligation, i.e., producing duties also for entities other than states? These are not purely theoretical questions, as illustrated by recent events concerning non-assistance to a boat with migrants fleeing from Libya by both private- and state-owned vessels and the ensuing litigation.<sup>12</sup>

Finally, persons are mentioned in provisions prohibiting illegal activities, such as piracy, unauthorised broadcasting, illegal fishing, and damage to submarine cables or pipelines, and attributing to one, several or all states the power to arrest, prosecute and punish perpetrators.<sup>13</sup> The clear distribution of the power to enforce and the identification of the state or states that can use it are in favour of legal certainty and may constitute the basis for the lawfulness of arrest also under human rights law requirements. In addition, in some cases safeguards are also provided, as for fishers and polluters under Arts. 73 and 230, respectively. Finally, punitive activity by states, although adversely affecting the targeted persons, also has the positive implication of safeguarding the rights of other persons affected by the criminal acts, such as the victims of pirates or those damaged by pollution.<sup>14</sup>

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Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, case no. 17, Advisory Opinion of 1 February 2011; [www.itlos.org](http://www.itlos.org).

<sup>11</sup> Or the International Seabed Authority, in the case of Art. 146.

<sup>12</sup> The application submitted in France is available at <http://www.fidh.org/IMG/pdf/plainte.pdf>.

<sup>13</sup> Respectively, Arts. 105; 109, para. 3; 73, para. 1; 113.

<sup>14</sup> As of 25 June 2012, 185 hostages are held by Somali pirates; International Maritime Bureau at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>. Economic damage can be huge; the Court of First Instance in Bordeaux recognised that the owners of a campsite had sustained damage amounting to €882268 due to the *Prestige* incident (IOPC, ‘Incidents Involving the IOPC Funds 2011’, [http://www.iopcfund.org/npdf/incidents2011\\_e.pdf](http://www.iopcfund.org/npdf/incidents2011_e.pdf), p. 19).

In conclusion, there is more to the LOSC provisions than catches the eye. Several provisions, even without expressly mentioning persons, aim at promoting their protection and impose duties on States to this effect. However, as far as the subjectivity of persons is concerned, the initial impression is correct. The wording of Arts. 98 and 145 discussed above is indicative of the regulatory paradigm used throughout the Convention. The entire LOSC attributes rights and duties to States, not to individuals.<sup>15</sup> While rights of persons may implicitly follow from the rights and duties of States, they are often uncertain, depending as they do on the implementation of generic obligations by States. The downsides of this approach are particularly visible in the poor implementation of safety and living standards by some flag States and by the appalling living and working conditions faced by fishers in many areas around the world, but also by the evident difficulty of states in dealing with sea migrants. This scheme produces an uncertain attribution of rights, unidentified injured subjects and doubtful applicability of Art. 48 of the International Law Commission's Articles on State Responsibility.<sup>16</sup>

### Persons beyond the LOSC

If the LOSC does not seem to attribute much relevance to persons, the same cannot be said for the law of the sea, understood as a system based on the Convention. Both treaties and institutions that, some way or other, find their *raison d'être* in the LOSC provisions have increasingly addressed persons and have referred to their rights and duties. In this way, the LOSC's jurisdictional and substantive framework has formed the basis for the development of the law in both the negotiating forum and the judicial forum.<sup>17</sup>

Many treaties dealing with marine issues attribute rights to persons and contain provisions for their safeguard. A treaty may be entirely devoted to the protection of a category of persons, giving them rights and providing them with mechanisms to enforce these rights, as achieved by the Maritime Labour

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<sup>15</sup> Or at most to States on behalf of individuals, as in Art. 116.

<sup>16</sup> [http://untreaty.un.org/ilc/texts/instruments/english/.../9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/.../9_6_2001.pdf).

<sup>17</sup> BH Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' in JI Charney and DK Anton (eds), *Politics, Values and Functions: International Law in the 21st Century: Essays in Honor of Professor Louis Henkin* (Martinus Nijhoff, The Hague, 1997); B Vukas, 'Droit de la mer et droits de l'homme' in G Cataldi (ed), *The Mediterranean and the Law of the Sea at the Dawn of the 21st Century* (Bruylant, Bruxelles, 2002); S Cacciaguidi-Fahy, 'The Law of the Sea and Human Rights' (2007) 19 *Sri Lanka Journal of International Law* 85; T Treves, 'Human Rights and the Law of the Sea' (2010) 28 *Berkeley Journal of International Law* 1.

Convention (MLC).<sup>18</sup> Treaties that address problems of a different nature may also contain provisions to ensure that enforcement measures respect human rights standards, as in the case of Arts. 21–22 of the Fish Stocks Agreement.<sup>19</sup> Finally, new treaties have obliged states to criminalise and actively combat acts and activities that pose a risk for other persons; the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)<sup>20</sup> is one example.

These treaties provide evidence of the changing place of persons in the law of the sea. The rights and prohibitions contained in them are often worded in terms directly addressed to persons, as in Art. IV, MLC, Art. 16, Smuggling Protocol, and Art. 3, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).<sup>21</sup> Persons are thus approaching the status of subjects of international law, with the latter addressing them directly, rather than through the State. In addition, treaties often contain one or more provisions reaffirming the duty of states to respect human rights,<sup>22</sup> and contain mechanisms to prevent non-compliance by the State or at least the obligation imposed on the State to provide effective remedies against damage caused by its actions.<sup>23</sup>

This action through negotiations has been supplemented and strengthened by action in the judicial forum. Although it cannot hear claims brought by individuals, the ITLOS has been particularly keen to introduce the so-called “considerations of humanity” into its jurisprudence.<sup>24</sup> At the same time, human rights tribunals, which are directly accessible to individuals, have consistently protected the rights of persons while at the same time taking into due account concepts and rules in the law of the sea.<sup>25</sup> The dialogue between these

<sup>18</sup> <http://www.ilo.org/global/standards/maritime-labour-convention/lang-en>.

<sup>19</sup> *Supra*, note 2.

<sup>20</sup> “Smuggling Protocol” to UN Convention Against Transnational Organized Crime [2001] 40 ILM 384.

<sup>21</sup> 27 ILM 668 (1988).

<sup>22</sup> Art. 8*bis*, SUA Convention; Art. 11, para. 2, FAO Agreement On Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009): [www.fao.org/fileadmin/user\\_upload/legal/docs/1\\_037s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/1_037s-e.pdf) (not in force); Art. 17, para. 5, UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; 28 ILM 497 (1989).

<sup>23</sup> Art. V, para. 4, MLC and Art. 8*bis*, para. 10 (b), SUA Convention.

<sup>24</sup> *Saiga* decision, para. 155; *Juno Trader (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Judgment (18 December 2004), para. 77; available at [www.itlos.org](http://www.itlos.org).

<sup>25</sup> European Court of Human Rights: *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, Judgment (23 February 2012); *Medvedyev and Others v. France* [GC], 3394/03, Judgment (29 March 2010); see [www.echr.coe.int/echr/homepage\\_en](http://www.echr.coe.int/echr/homepage_en).

different courts constitutes an expression of the genuine wish to ensure the protection of persons and a powerful tool against a fragmented regime.

Developments are still underway; nonetheless, it is already possible to note that a growing body of law of the sea and maritime law treaties is filling, one by one, the gaps in the LOSC and is substantial in the creation of a legal regime that gives an active role to persons. Regrettably, the regulation they provide is far from perfect. Many gaps are still present; for example, persons on board platforms are not addressed at all, and adopted treaties have not entered into force or do not enjoy universal ratification. In some cases, entry into force or wide ratification is only a matter of time, as for the MLC, which will enter into force on 20 August 2013, having been ratified by 30 states representing almost 60% of the world gross tonnage. In other cases, it seems that there is no political will to have a binding regime, as in the case of the safety of fishing vessels.<sup>26</sup>

Many inconsistencies are also present, due to the piecemeal approach to regulation in this field. As a result, rules and standards concerning persons contained in existing instruments often vary, as do the rights, duties and tools envisaged and their scope of application. Fishers and polluters may be subjected to different penalties, seafarers enjoy many more rights than fishers under existing International Maritime Organization and International Labour Organization treaties. These drawbacks can be overcome only by concerted action that addresses both problems. It is hoped that the revision of existing treaties, the adoption of new instruments for unregulated fields and the consistent interpretation by judicial bodies will homogenise the present uneven set of rules.

## **Conclusions**

The role and position of persons under the law of the sea are evolving. In many instances, the LOSC takes care of persons without, however, bringing them to the forefront and without attributing a role to them as active participants in the law of the sea. Persons are considered solely as the object of protection, as in the case of Art. 98, or repression, as in Art. 105, by the State. This traditional approach is, however, superseded in provisions of more recent

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<sup>26</sup> It remains to be seen if the conference convened by the IMO for 9–11 October 2012 (<http://www.imo.org/MediaCentre/HotTopics/torremolinos/Pages/default.aspx>) will succeed where the 1977 Torremolinos Convention and the 1993 Protocol (<http://www.imo.org/About/Conventions/ListOfConventions/Pages/The-Torremolinos-International-Convention-for-the-Safety-of-Fishing-Vessels.aspx>) have failed.

development, in the LOSC and other treaties, within which persons begin to emerge and to acquire subjectivity, with the ensuing rights and duties.

Other contributions in this special issue evaluate whether the LOSC has stood the test of time in other fields. With respect to persons at sea, the LOSC has provided the basis on which states, international organisations and international tribunals have been building a regime that takes into account the needs and concerns of persons and aims at safeguarding their fundamental human rights. By reaffirming some basic duties of States to protect human life, by settling divergent approaches to jurisdiction over marine waters, and by extensively opening up to existing and new instruments, the LOSC has created room for persons in the law of the sea. Far from hindering it, Arts. 293 and 311 certainly allow and in some cases mandate the direct attribution of rights, the uniform regulation of States' duties *vis-à-vis* persons and the consistent interpretation of rights and duties under the Convention, taking into account "considerations of humanity", as the ITLOS calls them, or human rights as they are more generally known.

The development of a consistent and effective regime applicable to persons at sea is still in the initial phase and much work remains to be done. However, the creation of this regime, increasingly pursued in many international fora, would probably not have been possible if order for the oceans had not been provided with the adoption of the LOSC. This is one good reason for celebrating the 30th anniversary of the Convention.