



Wilton Park



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Report

Human Rights Law at Sea

Monday 5 - Wednesday 7 December 2022 | WP3112

In association with:





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I. Executive Summary

It is widely accepted that human rights apply at sea, yet there are pressing questions about how human rights law and the law of the sea can be reconciled given the unique realities of the sea and the structure of ocean governance as set out in the 1982 UN Convention on the Law of the Sea (LOSC). For example, the law of the sea adopts a functional approach to jurisdiction with its maritime zones, the principle of exclusive flag State jurisdiction, and the freedoms of the high seas. In contrast, the human rights system has been based and developed primarily with reference to protection on land. This leads to complexities concerning jurisdiction and State competence when trying to integrate these rather different regimes which reflect different approaches to jurisdiction. Without further development and clarification of the relationship between the law of the sea and human rights law, practical barriers to the effective protection of human rights in the maritime context will remain.

This meeting brought together academics, experts from governments, the United Nations and the European Union, civil society, lawyers and practitioners, and representatives of a range of industries at Wilton Park. Discussions focused on identifying the practical barriers which exist in relation to the protection of human rights at sea and how these might be overcome.

The following highlights some of the key themes of discussion, problems identified and recommendations for possible ways forward.

II. Key Points

1. What is a human rights violation at sea?

Whilst some situations at sea can clearly be described as 'human rights violations', many other situations do not, in fact, amount to a human rights violation and may be other regulatory, compliance or contractual breaches. Given the ocean context, these latter situations may evolve into human rights violations over time, but there is a need to determine exactly how human rights obligations apply at sea.

2. The application of human rights at sea

The approaches to jurisdiction under human rights law and the law of the sea do not align. There is a need to reconsider the application of human rights law at sea, including whether the thresholds for triggering a State's responsibility at sea might be lower than on land.

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“Political leaders and ‘champion States’ should be identified to take initial action on the protection of human rights at sea”

3. Monitoring and enforcement

The sea provides unique challenges for effective human rights monitoring and enforcement. Besides the physical challenges, concepts such as the ‘genuine link’ between the flag State and the vessel flying its flag pose restrictions to effective enforcement. Where states do take enforcement action, the at-sea context provides significant challenges for complying with human rights law and there is a need for greater clarity about what due process rights include at sea.

4. Industry perspectives and challenges

While industries operating at sea, for example in shipping or fishing, might not be indifferent to the protection of human rights at sea, costs are a significant barrier to be factored in. Economic incentives and responses tailored to the needs and priorities of industry are needed. Industry and market-driven solutions can provide unique approaches to protecting human rights at sea. Business and human rights approaches which emphasise human rights due diligence in supply chains, including with service suppliers such as transportation providers, can contribute to creating incentives for ensuring respect for human rights at sea.

5. Political will

Given the complexities presented by applying human rights at sea, it is important to recognise the role of politics. Adoption of relevant laws and effective implementation are needed to ensure protection of human rights at sea at a time that the rule of law and human rights face significant challenges across the world. Political leaders and ‘champion States’ should be identified to take initial action on the protection of human rights at sea and lead the development of new practice.

III. Issues

6. What is a human rights violation at sea?

Some situations can be clearly identified as amounting to ‘human rights violations’ at sea as they involve direct violations of individuals’ human rights by State actors. Examples might include cases of illegal detention or torture at sea. Where these occur, challenges remain for the enforcement of such human rights at sea.

However, many other incidents and behaviours at sea – albeit concerning or wrongful – do not necessarily amount to human rights violations, yet they are frequently labelled as such. This could be the case, for example, in relation to seafarers’ lack of shore leave which in and of itself is not a human rights violation but over time might evolve into a situation of forced labour. This lack of nuance and clarity often results in a dilution of the meaning of ‘human rights at sea’. As this example highlights, issues may develop into ‘human rights violations’, but the nature of the maritime domain makes it complex to determine precisely when this might occur.

7. The application of human rights at sea

The approaches to jurisdiction under human rights law and the law of the sea do not align. Where human rights law has traditionally favoured a territory-based approach to jurisdiction, LOSC has enshrined functional jurisdiction at sea with its associated maritime zones where the concept of sovereignty does not apply in the same way. Even where human rights law recognises extra-territorial jurisdiction on the basis of effective control over an area or conduct or persons, this does not easily translate to the sea. This is because ‘effective control’ at sea may look very different than on land.

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The European Court of Human Rights (ECtHR) recognises that where a State vessel engages in acts on the high seas this constitutes extra-territorial jurisdiction and that a State’s responsibility may therefore be engaged where effective control is exercised by the State (*Medvedyev and Others v France*; *Hirsi Jamaa and Others v Italy*). The Court has also recognised that State agent authority and control can give rise to extraterritorial jurisdiction where the use of force exercised by a State’s agents outside its territory can bring an individual under their control, including in cases of specific acts involving an element of proximity (*Carter v Russia*).

The Human Rights Committee’s General Comment 36 on the Right to Life has further expanded ‘effective control’ to rely on reasonably foreseeable impacts that must be direct and involve the victim having legitimate expectations. This General Comment was relied on by the majority in the opinion of the Human Rights Committee in *AS v Italy* and illustrates a wider move to functionalism when determining jurisdiction. Nevertheless, it is clear that this functionalism continues to be moderated by limits such as ‘close proximity’, ‘special features’, ‘effective control’ etc. Complexity remains about how these considerations apply in the maritime context. For example, in *AS v Italy* proximity was found to create a special relationship of dependency between the victims and the vessel because the vessel was 40 minutes away.

It is evident that there is a need to re-consider the conceptual basis for human rights at sea and whether the thresholds for triggering jurisdiction at sea might be different than on land. A lack of understanding of the law of the sea amongst judges and panels hearing human rights at sea claims, stymies effective development in this area.

There is also the option of developing a new treaty on human rights at sea. Such a treaty would have to be comprehensive in scope covering all people and activities at sea and avoid a sector-specific focus. Given the complexity of negotiating such a treaty, an alternative or interim soft law option should be explored. This could, for example, take the form of a code of conduct or guidelines for good practices that is equally broad in scope.

8. Monitoring and enforcement

There is a lack of knowledge of the extent to which human rights violations occur at sea and more comprehensive and reliable data is needed. This should serve to both better understand the nature of human rights violations that occur at sea, as well as raising awareness, thereby informing risk-based approaches and generating action and political will. Existing and emerging technological solutions may provide new applications for monitoring and surveillance of human rights violations that occur at sea.

The nature of the genuine link between a flag State and its vessel is a significant concern for the effective protection of human rights. Besides concerns about open registries, this is also the case where vessels re-flag between States which do not effectively enforce human rights at sea. Here the question about who has legislative and enforcement jurisdiction is paramount as vessels are free to change the applicable jurisdiction. So far, ITLOS’ jurisprudence has avoided any direct pronouncement on the genuine link requirement but allows for a continuation of the status quo. Often a lack of visibility of a vessel’s beneficial owner also makes it difficult to truly drive responsible practices that respect human rights with regard to the vessel and there is a need to lift the corporate veil. At the same time, it must be remembered that open registries have been created and persist for economic reasons and, in fact, have often been established and operated by nationals from developed countries. In other cases, open registries may have a will to protect human rights but simply lack the enforcement capacity to do so.

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One widely advocated solution to enhance monitoring and enforcement is to rely more effectively on port State jurisdiction and enhance port State control measures already in place. However, the reliability of this approach in relation to human rights protections is questionable. The question remains as to why port States would voluntarily monitor human rights compliance of foreign-flagged vessels given the costs involved, therefore the need to find incentives for port States was highlighted. In addition, most of the world’s largest and most active ports are located in countries that are not known to actively promote human rights (e.g. China, Saudi Arabia).

Enforcement at sea can be used to protect human rights but can also itself be a source of human rights violations. This requires clear guidance for how enforcement actions should be executed at sea to ensure the protection of persons intercepted at sea. It also requires capacity in terms of appropriate staff, including investigators, prosecutors, defenders and courts, or persons that handle asylum claims. There is a need for smart capacity building on human rights at sea for law enforcement, policy makers, and port States. Instead of focusing on training individual actors, capacity building should take place at the institutional level and ensure that leaders are fully supportive of this. These efforts should be supported by model laws to assert jurisdiction and for standards of evidence as well as standard operating procedures for when human rights violations are found.

The law of the sea permits the boarding and inspection of vessels by a foreign vessel on the basis of a number of grounds such as, for example, under Art. 110 of LOSC or the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). In most cases, the right of visit requires prior flag State consent, yet different requirements and thresholds of consent are required for different issues. The right of visit could be extended directly under Art. 110 or through new multilateral or bilateral agreements to include a reasonable belief of human rights abuses occurring as a basis. This would still require determining which human rights could qualify for such a right, and what the relevant threshold of a reasonable belief should be. Other aspects to be considered are the type of flag State consent that would be required and what the thresholds for obtaining this might be as well as a possible presumption of flag State consent under established circumstances. Nevertheless, it is unclear to what extent States would actually be able or willing to exercise such a right of visit in reality. In practice, many vessels that are boarded are stateless vessels. This raises additional issues for the visiting State for how to comply with the human rights of any potential detainees.

9. Industry perspectives and challenges

Alternative options to protecting human rights at sea should be considered, including economic and market-driven solutions. Similar approaches exist, for example, in relation to product certifications which indicate that a product has been produced in line with social criteria. Notably, these certificates do not yet extend to the transportation of the same goods. A growing acceptance of business and human rights and mandatory human rights due diligence might create alternative solutions for the protection of human rights.

Supply chain-based solutions should therefore be encouraged and incentivised, especially as legislation such as the EU Directive on Human Rights Due Diligence is emerging. Nevertheless, concerns were raised about the scale at which solutions might successfully be able to operate and to what extent consumers are really able to create the required incentives for such change.

10. Political will

Human rights at sea presents a range of complexities, including a diverse range of actors involved in the ocean space, a web of formal and informal arrangements, and competing public and private interests. As human rights violations are complex and multi-faceted simple adoption of legislation is usually not enough and there needs to be a will to implement such laws. North/South issues also play a significant role and the related sensitivities will generally require policy rather than legal solutions. The importance of politics must therefore be recognised.

However, the current geopolitical climate is of significant concern. There are active challenges to the liberal international order and human rights are seen as a significant feature of this. At the same time, the concept of 'human rights' is also being challenged in traditionally liberal and developed States. For example, fear of migration makes it increasingly challenging to discuss human rights in the context of migrants at sea. The facts of economic life and competition are also putting pressure on the protection of supply chain workers' rights, including on fishing and transport vessels.

In this complex climate and with competing global emergencies it is difficult to get human rights at sea on the global political agenda. A simple lack of understanding of the issues at play can also act as a barrier. For example, some governments assume that the Maritime Labour Convention (MLC) and Convention for the Safety of Life at Sea (SOLAS) already fully address human rights at sea and are unaware of the wider concerns. One solution might be to identify 'champion States' to take initial action on human rights at sea and thereby slowly create practice and momentum in the international community.

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IV. Recommendations

In light of the issues described as well as possible approaches to move forward, the following key recommendations were made:

There is a need to articulate what a human rights violation at sea entails and to identify all relevant positive obligations that allow for its enjoyment at sea. This could be achieved through model laws or soft law instruments giving detailed guidance on how to apply human rights meaningfully in the maritime context. Instruments could be developed by a joint working group of the Human Rights Committee and law of the sea experts or an International Law Association (ILA) committee. Any such work should not undermine the possibility of a future comprehensive treaty on human rights at sea.

The conceptual basis for how human rights at sea needs to be reconsidered. This includes determining whether the thresholds for triggering jurisdiction at sea might be different than on land. This could be achieved by creating a working group between law of the sea experts and the Human Rights Committee to develop a General Comment on Human Rights at Sea, setting up a committee in the ILA to map out specific problems and propose solutions, and seeking a General Assembly Resolution or requesting the Human Rights Council to appoint a Special Rapporteur on Human Rights at Sea.

There needs to be better monitoring and data gathering of human rights at sea. This could be achieved by expanding current technology in use for monitoring other activities at sea to new areas and gathering better data to understand the nature of human rights violations at sea, including through civil society organisations, and making it widely accessible. Existing inspection schemes such as fishing license inspections in the Exclusive Economic Zone (EEZ) could be expanded to include human rights considerations. Cooperative enforcement approaches should be promoted and initiatives which were originally developed to combat piracy or illegal fishing could be expanded to detect and target human rights abuses.

Specific barriers to effective enforcement of human rights at sea should be removed.

- **The 'genuine link' needs to be clarified** in a manner that enables effective protection of human rights by law of the sea tribunals.
- **The right of visit could be expanded to include a reasonable belief of human rights violations.** This could be established by identifying specific relevant human rights and adding them to Art. 110 LOSC or adopting other bilateral or multilateral agreements modelled on the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) or other conventions to create a right to board and inspect on the basis of a suspected human rights violation. Any such developments also need to consider clear requirements and thresholds for flag State consent.
- **There is a need to ensure that human rights are properly applied in the at-sea context during enforcement operations.** This requires clarification of what due process means at sea. Targeted capacity building, standard operating procedures (SOPs) and model laws should be developed to help enforcement personnel properly assert jurisdiction, apply appropriate standards of evidence and ensure all human rights, including due process rights, are fully respected during enforcement action.

Industry should support human rights at sea by engaging in full human rights due diligence of their own business activities. This should include human rights due diligence of both product and service (e.g. transport) suppliers; independent vessel inspection models can be replicated for human rights at sea. 'ESG' (Economic, Social and Governance) reporting frameworks can provide an opportunity to integrate 'human sustainability' into business goals.

Political leaders and champion States are needed to bring human rights at sea forward. This can be achieved by creating networks of relevant individuals and providing information to them on issues related to human rights at sea, helping them frame the issues in the appropriate language. Champion States can promote ratification of relevant international instruments (e.g., the Work in Fishing Convention, 2007 and the Cape Town Agreement, 2012), introduce bilateral agreements promoting enforcement of human rights at sea and allow for State practice to emerge concerning the protection of human rights at sea.

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