

The Protection of Seychelles' Exclusive Economic Zone Through Penal Law: Analysing *Warnakulusuriya Fernando v Republic* [2000] and *Kanapathi v R* [2022] in the Light of Article 73(3) of United Nations Convention on the Law of the Sea

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Abstract

Seychelles ratified the United Nations Convention on the Law of the Sea (UNCLOS) and Article 73(3) of this Treaty provides that '[c]oastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.' Section 24 of the repealed 1986 Fisheries Act provided that a person convicted of fishing in Seychelles' Exclusive Economic Zone (EEZ) without a licence was 'liable to a fine.' Although section 24 did not provide for imprisonment, in *Warnakulusuriya Fernando v Republic* [2000], the Supreme Court convicted the appellant and imposed a fine but also imposed a custodial sentence in default of payment of the fine. On appeal, he argued that the custodial sentence was contrary to Article 73(3) of UNCLOS. However, the Court of Appeal interpreted Article 73(3) as permitting imprisonment in such circumstances. In *Kanapathi v R* [2022] the Supreme Court convicted the appellant under section 11(1) of the 2014 Fisheries Act and imposed the mandatory fine and also ordered that in default of payment, the applicant was to undergo two years' imprisonment. Because he could not afford to pay the fine, he had to serve a custodial sentence. He appealed against the sentence on the grounds that it was harsh. He also argued that the sentence was contrary to Article 73(3) of UNCLOS. All three judges agreed that the sentence was harsh and reduced it. However, one held that Article 73(3) of UNCLOS was applicable; another held that it was not applicable and the third one preferred not to express an opinion on the issue. None of the judges referred to *Warnakulusuriya Fernando v*



South African Yearbook of International Law
Volume 49 | 2024 | #15342 | 24 pages

<https://doi.org/10.25159/2521-2583/15342>

ISSN 2521-2583 (Online)

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Republic. Since this issue is very likely to re-emerge in the future, the author relies on, inter alia, the jurisprudence of the International Tribunal for the Law of the Sea to argue that Article 73(3) of the UNCLOS does not permit imprisonment, including imprisonment in default for paying a fine.

Keywords: Seychelles; Exclusive Economic Zone; *Warnakulusuriya Fernando; Kanapathi*; Article 73 (3) of UNCLOS; International Tribunal for the Law of the Sea; *Dilesh*; illegal fishing

Introduction

Seychelles is an archipelago, which, like any other coastal state, has an Exclusive Economic Zone (EEZ). Illegal fishing in Seychelles' EEZ is one of the challenges the country is grappling with. This is evidenced by, amongst other things, the number of people who have been prosecuted and/or convicted by the magistrate's court¹ and the Supreme Court accordingly.² These offenders have come mostly from Sri Lanka.³ However, a few have come from other countries such as Comoros,⁴ Madagascar⁵ and Iran.⁶ Seychelles has taken different measures both nationally and internationally to prevent and combat this problem. Internationally, in September 1991, Seychelles acceded to the UNCLOS of 10 December 1982. Article 73 of UNCLOS provides that:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, 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.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

1 These include FH/89/18; FH/11/19 (foreign national fishing illegally in Seychelles). See also FH/11/19, FH/38/19, FH/20/19.

2 *Republic v Mohamed* [2016] (CO 106 of 2015) SCSC 51 (2 February 2016); *Republic v Nahanon* [2016] (CO 104 of 2015) SCSC 50 (2 February 2016); *Republic v Abdela* [2016] (CO 103 of 2015) SCSC 49 (2 February 2016); *R v Bacar* [2016] (CO 102 of 2015) SCSC 48 (2 February 2016); *Republic v Eddine* [2016] (CO 107 of 2015) SCSC 52 (2 February 2016). In *Dilesh v R* [2024] (SCA CR 02/2024) (Arising in CR 99/2023) (19 August 2024) paras 1, 2 and 42.

3 *Republic v Dalage* [2020] SCSC 294 (1 June 2020); *Republic v Samantha* [2020] CR 68 of 2020 SCSC 776 (20 October 2020); *Warnakulusuriya Fernando v Republic* [2020] (SCA 12 of 2000) SCCA 31 (2 November 2000); *R v Madushanka* [2020] (CO 25 of 2020) SCSC 725 (5 October 2020); *Republic v Fonseka & Another* [2019] SCSC 715 (2 September 2019); *R v Keerthirathna* [2019] (CO 65/2018) SCSC 1171 (7 March 2019); *R v Nilanga* [2020] (CR 23/2020) SCSC 523 (22 June 2020); *R v Makavita Liyanage Dilesh* [2024] (CR 99 of 2023) SCSC 32 (16 February 2024); *R v Priyankara Fernando* [2024] SCSC 133 (21 June 2024).

4 *R v Attoomani* [2019] SCSC 584 (15 July 2019).

5 *R v Toubou Mochidy* [2019] (CO/ 26/2019) SCSC 1247 (28 July 2019).

6 *R v Mahani* [2010] SCSC 24 (24 August 2010).

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Strictly interpreted, Article 73(3) means that before a state provides for a sentence of imprisonment, there has to be an agreement between that state (the victim of the offence) and another party (the nationality/residence of the offender). This explains why legislation in some African countries which have ratified UNCLOS, such as South Africa⁷ and Namibia⁸ does not provide for imprisonment as a form of penalty in cases where foreign fishing vessels are used for fishing without a licence. It provides for fines only. However, in the case of corporal punishment, such an agreement is not required. Otherwise, Article 73(3) would have been worded as follows ‘coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment or any other form of corporal punishment, in the absence of agreements to the contrary by the States concerned.’ At the time when UNCLOS was adopted, corporal punishment was a competent sentence in many countries. However, since corporal punishment is now considered to be contrary to international human rights law, it is very unlikely that any state will impose it. Therefore, Article 73(3) should be interpreted as strictly abolishing corporal punishment.

Seychelles follows a dualist approach to international law. Hence, for a treaty to form part of Seychelles law, it must be domesticated.⁹ Domestically, and to give effect to

7 South Africa signed UNCLOS in 1984. However, s 52(4) of the Fisheries Act, Act 12 of 1988 provided for imprisonment in such cases. In 1997, South Africa acceded to UNCLOS. This meant that section 52(4) of the Fisheries Act, Act 12 of 1988 was contrary to Article 73(3). In 1998, the Marine Living Resources Act, Act 18 of 1998 was enacted to, amongst other things, repeal the Fisheries Act, Act 12 of 1988. A combined reading of sections 39 and 58 of the Marine Living Resources Act prohibits imprisonment in such cases.

8 Section 52 of the Marine Resources Act, Act 27 of 2000. In Namibia, the repealed legislation also allowed a court to impose a sentence of imprisonment in such cases, see *S v Redondo* [1992] (SA 14 of 1991) NASC 1 (18 June 1992). Although Tanzania domesticated Article 73 of the UNCLOS, section 10 of the Territorial Sea and Exclusive Economic Zone Act (1989), Chapter 238 empowers courts to impose the sentence of imprisonment, amongst other sentences, on foreign nationals convicted of finishing in the EEZ illegally. A similar approach is followed in Kenya under section 11 of the Fisheries Act (1989), Chapter 378. However, unlike Tanzanian legislation, the Kenyan Act does not expressly incorporate Article 73 of UNCLOS in Kenyan law. Since Kenya ratified UNCLOS in 1989, section 11 of the Fisheries Act is contrary to art 2(6) of the Kenyan Constitution (2010), which provides that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.’

9 See generally, Jamil Ddamulira Mujuzi, ‘Domestic Courts’ Reliance on International Law to Interpret the Charter of Rights and Freedoms and/or Other Domestic Law in the Seychelles’ (2023) IHRL Rev 69–89. See also *Complete Energy Solutions Limited v Vetivert Tech (Pty) Ltd* [2024] (SCA

some of its obligations under UNCLOS, Seychelles enacted, inter alia, the Fisheries Act (2014). Section 2 of the Act empowers Seychelles courts to exercise both territorial and extra-territorial jurisdiction. The Act creates different offences and one of them is under section 11(1) of the Act, which prohibits any foreign vessel from fishing in Seychelles waters without a licence. The penalty for the offence under section 11(1) is provided for under section 58 of the Act. Section 58 provides that a person convicted of an offence under section 11 is ‘liable’ to pay ‘a fine not less than’ the stipulated amount. It is silent on the issue of imprisonment should the offender fail to pay a fine. In *Warnakulusuriya Fernando v Republic*,¹⁰ the appellant, a foreign national, was arrested and prosecuted for fishing in the Seychelles EEZ without a licence. The Supreme Court convicted him and sentenced him to a fine and six months’ imprisonment in default of payment. He challenged the legality of the sentence on the ground that it violated Article 73(3) of UNCLOS. However, the court, unanimously, dismissed his appeal and held that the sentence of imprisonment in those circumstances did not violate Article 73(3) of UNCLOS. This was not the first case in which those convicted of fishing without licences in the EEZ were sentenced to imprisonment in default of paying a fine.¹¹ However, it was the first case in which Article 73(3) was discussed. Twelve years after the decision in *Warnakulusuriya Fernando v Republic*, the issue of Article 73(3) came before the Court of Appeal again. In *Kanapathi v R*,¹² the Supreme Court convicted the appellant under section 11(1) of the Act and imposed the ‘minimum mandatory fine’ under section 58 and also ordered that in default of payment, he was to undergo two years’ imprisonment.¹³ It also ordered that his boat and all fishing equipment should be forfeited to the state.¹⁴ Because he could not afford to pay the fine, he had to serve a custodial sentence. He appealed against the sentence on the grounds that it was harsh. He also argued that the sentence was contrary to Article 73(3) of UNCLOS. All three judges agreed that the sentence was harsh, and they reduced it. However, one held that Article 73(3) of UNCLOS was applicable; another held that it was not applicable and the third one preferred not to express an opinion on the issue. None of the justices referred to *Warnakulusuriya Fernando v Republic*.¹⁵ Since this issue is very likely to re-emerge in the future, the author relies on, inter alia, the jurisprudence of the International Tribunal for the Law of the Sea to argue that Article 73(3) of the UNCLOS

22/2023) (Arising in MA 298/2021 Out of MC 31/2021) (3 May 2024)) [2024] SCCA 13 (3 May 2024) paras 17–33.

10 *Fernando* (n 3).

11 See, for example, *Fernando v R* [1998] (SCA 19 of 1998) SCCA 43 (13 August 1998). Subsequent cases include *R v Keerthirathna* [2019] (CO 65/2018) SCSC 1171 (7 March 2019). The author proceeds under the assumption that Article 73(3) of UNCLOS is applicable whether or not the vessel or ship which was involved in illegal fishing is flying the flag of any state. This is so because, under section 11 of the Fisheries Act (2014), the offence of illegal fishing is committed irrespective of whether or not the vessel is flying any flag. In cases of vessels which are not flying any state flag, the obligation under Article 73(4) is not applicable.

12 *Kanapathi v R* [2022] SCCA 36.

13 *ibid* para 4.

14 *ibid* para 4.

15 *Fernando* (n 3).

was applicable and a sentence of imprisonment violates Article 73(3). However, the author's approach differs from the one adopted by one of the justices in *Kanapathi v R* in concluding that Article 73(3) was applicable.

The Facts, Arguments and Holding(s) in *Warnakulusuriya Fernando v Republic and Kanapathi v R*

In *Warnakulusuriya Fernando v Republic*,¹⁶ the appellant, a Sri Lankan national, was convicted under the 1986 Fisheries Act for fishing in the Seychelles EEZ without a licence. He was the master of the vessel. Section 24 of the 1986 Fisheries Act empowered a court to sentence any person convicted of that offence to a fine. It was silent on imprisonment. However, the Supreme Court imposed a fine or six months' imprisonment in default of payment.¹⁷ On appeal, he argued that the sentence of imprisonment was contrary to Article 73(3) UNCLOS.¹⁸ In rejecting this argument, the Court of Appeal held that:

A reading of section 24(1) of the Act shows that it makes no provision for imprisonment. Hence, the Fisheries Act does not fall foul of the convention. However, the trial court imposed sentences of imprisonment in default of payment of fines. Although no reference was made to statutory provisions for such sentences, it is probable that these were derived from section 294, as read with section 295(1), of the Criminal Procedure Code (Cap 54) which provides for a sentence of imprisonment in default of payment of a fine. This is apparently the context in which the appeal against sentence is made. A question that readily comes to mind is whether such provisions offend against those of the convention. Our response is in the negative for the reason that a default sentence of imprisonment is by its very nature not a direct sentence. Furthermore, an imposition of a sentence of a fine which cannot be enforced would be meaningless and could, therefore, not have been in the contemplation of the legislature, particularly in a case such as the instant one where no warrant of distress can effectively or meaningfully be levied against the convict, pursuant to section 297 of the Criminal Procedure Code, in the light of the order of forfeiture. In any event, the use of the term "may", as opposed to "shall", in Article 73(3) of the convention tends to suggest that the injunction prescribed thereunder is permissive.¹⁹

In *Kanapathi v R*,²⁰ the appellant, also a Sri Lankan national, was the skipper and master of the foreign fishing vessel which was fishing in Seychellois waters without a licence. He was prosecuted before the Supreme Court under section 11(1) of the Act. He pleaded guilty and was convicted.²¹ In mitigation, he argued, inter alia, that he was a first offender, the sole breadwinner for his family and that the Seychellois authorities had

16 *ibid.*

17 *ibid* para 2.

18 *ibid* para 4.

19 *ibid* para 5. This reasoning was endorsed by the Court of Appeal in *Dilesh* (n 2) paras 85–86.

20 *Kanapathi* (n 12).

21 *ibid* para 1.

‘seized the boat he had for his trade and livelihood.’²² The Supreme Court explained that illegal fishing was on the increase in Seychelles and that imposing fines on those convicted under section 11 and seizing their vessels and fishing equipment have not deterred the practice.²³ The Supreme Court imposed a sentence (fine) under section 58(a)²⁴ and made the order under 69²⁵ of the Act. It added that if the appellant had failed to pay a fine, he was to serve a sentence of two years’ imprisonment.²⁶ This was in terms of sections 294²⁷ and 295²⁸ of the Criminal Procedure Code. He was unable to pay the fine and as a result, started serving the custodial sentence.²⁹

The Court of Appeal observed that there were two issues it had to resolve. Firstly, whether it was legal for the Supreme Court to impose a fine ‘with a default term of two years imprisonment within 14 days of non-payment of the fine while also forfeiting his vessel.’³⁰ Secondly, whether the sentence of imprisonment in default of paying the fine was illegal.³¹ In dealing with the above issues, the court also dealt with the question of whether the sentence was ‘harsh and excessive especially given the mitigating circumstances of the convict.’³² The appellant argued further that the sentence was harsh and that the Supreme Court did not consider his mitigating circumstances.³³ On the other hand, the State argued that the sentence was proportionate to the offence committed and it was meant to serve as ‘deterrence.’³⁴ The Court of Appeal referred to sections 58 and

22 *ibid* para 2.

23 *ibid* para 3.

24 Section 58 provides that ‘Where a foreign fishing vessel that is not licensed in accordance with section 11 is used for fishing or any fishing related activity in Seychelles waters or for sedentary species on the continental shelf, the owner and master each commits an offence and is liable on conviction, where the foreign fishing vessel is - (a) of a length overall not exceeding 24 metres, to a fine not less than SCR2,500,000; (b) of a length overall exceeding 24 metres but not exceeding 50 metres, to a fine not less than SCR12,500,000; or (c) of a length overall exceeding 50 meters or more, to a fine not less than SCR18,700,000 and not exceeding SCR 31,250,000.’

25 Section 69 provides that ‘All fish or fish products found on board any vessel which have been used in the commission of an offence against this Act shall be presumed to have been caught in the commission of the offence, unless the contrary is proved.’

26 *Kanapathi v R* [2022] SCCA 36 para 4.

27 Section 294 provides that ‘[i]n every case where an offender is found guilty and according to the nature of the offence is duly sentenced to a fine with or without costs or to a fine with or without costs together with imprisonment; it shall be competent to the court which sentences such offender to direct by the sentence that in default of payment of the fine and costs, the offender shall suffer imprisonment for a certain term. Such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may have been liable under a commutation of a sentence.’

28 Section 295 provides that ‘[n]o sentence of imprisonment in default of a fine and costs shall exceed six months in all, or in default of payment of costs only shall exceed two months.’

29 *Kanapathi* (n 12) para 5.

30 *ibid* para 7.

31 *ibid* para 8.

32 *ibid* para 7.

33 *ibid* para 9.

34 *ibid* para 10.

70 of the Act. Section 58 has been reproduced above and will not be repeated here.³⁵ Section 70 empowers the court, which has convicted a person for an offence under section 11, to order the forfeiture of the fishing vessel, any gear or article used in the commission of the offence; the forfeiture of any fish caught in breach of the Act; and ‘order that the master of the vessel shall be prohibited from operating or boarding any fishing vessel in Seychelles waters for a period of two years from the date of his or her conviction.’ Against that background, the court observed that because of the size of the appellant’s vessel, ‘his conviction attracted a minimum mandatory fine of SCR2,500,000’ and that ‘[h]is boat, fishing gear and catch were also liable to a forfeiture order.’³⁶ The court observed that ‘[i]t cannot be underscored that the penalties in the Fisheries Act in compliance with the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) do not include imprisonment.’³⁷ The court thereafter referred to case law embodying the principles of sentencing in Seychelles.³⁸ The court held that since section 58 provided for the minimum mandatory sentences, its case law shows, *inter alia*, that ‘the minimum mandatory sentence imposed by law might be appropriate in certain situations, but not if indiscriminately applied without considering factors that would mitigate the seriousness of the offence.’³⁹ The court explained the ‘three tests’ which have to be applied before a court can depart from imposing the minimum sentence.⁴⁰ It held that the Supreme Court’s sentence had to be set aside because the court did not consider the appellant’s mitigating factors.⁴¹

The second issue that the court dealt with was the lawfulness of the sentence imposed by the Supreme Court. The appellant argued that the sentences imposed by the Supreme Court were illegal on three grounds. Firstly, in terms of Seychelles law, a custodial sentence which is imposed as a result of failure to pay a fine cannot exceed four months.⁴² The court referred to the relevant legislation and case law and agreed with the appellant on this issue.⁴³ Secondly, the condition that the appellant had to pay a fine within fourteen days contravened the Court of Appeal Rules, which provide that a person who has been aggrieved by the decision of the Supreme Court has thirty days within which to appeal against that decision. The court dismissed this ground of appeal.⁴⁴

The third argument, which is the focus of this article, was whether the sentence complied with Seychelles’ international obligations under UNCLOS. Since this is the most important issue for the purposes article, it is better to highlight the arguments and

35 *ibid* para 9.

36 *ibid* para 12.

37 *ibid* para 12.

38 *ibid* para 13–18.

39 *ibid* para 19.

40 *ibid* para 19.

41 *ibid* para 20–23.

42 *ibid* para 24–26.

43 *ibid* para 27–29.

44 *ibid* para 30.

holding in detail. This is so because all the three judges who were part of the panel (Twomey-Woods JA, Robinson JA and André JA) disagreed on whether Article 73 of the UNCLOS was applicable in this case. Justice Twomey-Woods commenced her judgement by referring to Article 48, which provides that:

This Chapter [Bill of Rights] shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of- [a] the international instruments containing these obligations; [b] the reports and expression of views of bodies administering or enforcing these instruments; [c] the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms; [d] the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

She held that since the case dealt with the lawfulness or otherwise of the appellant's sentence, the accused's right to a fair trial under article 19 of the Constitution was in issue and therefore article 48 of the Constitution was applicable.⁴⁵ This approach opened the door for her to invoke Article 73 of UNCLOS. She held that, since Seychelles ratified UNCLOS, international law provides that 'all the provisions of the Convention should be carried out in good faith.'⁴⁶ She also referred to article 309 of UNCLOS which prohibits states parties from making reservations on the Treaty which are contrary to the Convention.⁴⁷ Against that background, she asked whether imposing the sentence of imprisonment on a person convicted under the Fisheries Act in default of paying the fine contradicts Article 73 of UNCLOS.⁴⁸ She reproduced Article 73 of UNCLOS and held that:

The prohibition against imprisonment in the provision above [Article 73 of UNCLOS] is explicit and may well explain why no such penalty is contained in the Fisheries Act 2104 [sic]. A term of imprisonment remains imprisonment even when it arises in default of the non-payment of a fine. Given that the CPC [Criminal Procedure Code] was enacted in 1952, both the principles of *lex specialis* and *lex posteriori* would apply to render section 294 *et seq* in respect of imprisonment in default of payment of fines inapplicable to the Fisheries Act.⁴⁹

She concluded this issue by holding that '[t]he above principles suffice to render the imprisonment of Mr Kanapathi contrary to law.'⁵⁰ She set aside the Supreme Court order and substituted it with the following order:

45 *ibid* para 32.

46 *ibid* para 33.

47 *ibid* para 33.

48 *ibid* para 34.

49 *ibid* para 35.

50 *ibid* para 36.

(1) Mr. Kanapathi is ordered to pay a fine of SR 400,000 within one month of the date of this judgment. (2) If the SR 400,000 is not paid within the time specified in this order, an order for forfeiture of the vessel and its gear and other equipment found on board to the State shall issue forthwith. (3) Mr. Kanapathi is to be repatriated to his country of residence as soon as reasonably practicable unless the fine is paid. He will then be allowed to leave [sic] on the vessel.

On her part, Justice Robinson agreed with the conclusions and orders made by Justice Twomey-Woods. However, she ‘reserve[d] ... [her] opinion as to whether or not Article 73 of’ UNCLOS ‘applies to this case in the absence of any reliable submissions from the parties in this case.’⁵¹ On her part, Justice Andre also agreed with the orders above.⁵² However, she held that Justice Twomey-Woods didn’t need to deal with Article 73 of UNCLOS in the appeal.⁵³ This was so because, firstly, during his trial, the applicant did not raise the issue of the applicability of Article 73 of UNCLOS in his case. It was therefore contrary to the Court of Appeal’s established practice to express an opinion on that issue.⁵⁴ Her second reason was anchored on articles 48 and 64(4) of the Constitution. Article 48 has been reproduced above and will not be repeated here. Article 64(4) provides that

A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by- [a] an Act; or [b] a resolution passed by the votes of a majority of the members of the National Assembly.

Against that background, she held that according to article 64(4) of the Constitution, ‘UNCLOS cannot bind this Court given that it has not been legislated.’⁵⁵ She emphasised the fact that article 64(4) ‘means that Seychelles is a dualistic State, and only bound by international conventions once they are domesticated through legalisation or a resolution to that effect by a majority of votes by members of the National Assembly.’⁵⁶ She referred to article 48 and held that:

It is to be noted that this provision is exclusive to human rights. Arguably, art. 48 of the Constitution provides the only exception to art. 64 (4) of the Constitution. Essentially, when interpreting the Seychellois Charter of Fundamental Human Rights and Freedoms, the Courts are to do so in a manner which does not run counter to Seychelles’ obligations related to human rights. In doing so, the Courts are called to take judicial notice of treaties containing human rights.⁵⁷

51 *ibid* para 14 (Justice Robinson’s separate judgment).

52 *ibid* para 1 (Justice Andre’s separate judgment).

53 *ibid* para 2 (Justice Andre’s separate judgment).

54 *ibid* para 3.

55 *ibid* para 4.

56 *ibid* para 5.

57 *ibid* para 6.

She concluded, based on the above arguments, that ‘the UNCLOS cannot be considered by this Court.’⁵⁸

Analysing the Decision(s) in *Kanapathi v R* and *Warnakulusuriya Fernando v Republic*

It is evident from the above decisions in *Kanapathi v R*, that only Justice Twomey-Woods held that UNCLOS was applicable in the case. Justice Andre held that it was not applicable and Justice Robinson declined to express her opinion on whether or not it was applicable. It should also be remembered that in *Kanapathi v R*, the court did not refer to its earlier decision in *Warnakulusuriya Fernando v Republic*.⁵⁹ This implies that *Warnakulusuriya Fernando v Republic* has not been overruled especially since in *Kanapathi v R*, only one justice held that section 73(3) was applicable. In light of the above two conflicting judgements of the same court, the issue of whether Article 73 of UNCLOS is applicable in cases where people are convicted under section 11 of the Act and sentenced to imprisonment in default of paying a fine remains open. Resolving this issue requires one to answer two related questions. The first question deals with the status of international treaty law in Seychelles generally and UNCLOS in particular. The second question deals with the issue of whether UNCLOS is a human rights treaty within article 48 of the Constitution. The discussion will start with the first issue.

As Justice Andre pointed out in her decision in *Kanapathi v R*, article 64 of the Constitution provides for the circumstances in which a Treaty becomes part of Seychelles law. For emphasis, the relevant parts of article 64 will be reproduced below. They are to the effect that:

3. The President may receive or cause to be executed treaties, agreements or conventions in the name of the Republic.

4. A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by- [a] an Act; or [b] a resolution passed by the votes of a majority of the members of the National Assembly.

Clause (4) shall not apply where a written law confers upon the President the authority to execute or authorize the execution of any treaty, agreement or convention.

Under article 64(4), a treaty can only become binding on Seychelles after its ratification by an Act or a resolution by the National Assembly (Parliament). Once this is done, Seychelles will deposit the required instrument of ratification with the relevant treaty

58 *ibid* para 7. In *Dilesh* (n 2) para 87, the Court of Appeal departed from its decision in *Kanapathi* (*ibid*) and held that it ‘erred ... in holding that the order of imprisonment in default of payment of the fine under section 295 of the Criminal Procedure Code to enforce compliance with the law was not valid.’

59 *Fernando* (n 3).

depository.⁶⁰ It followed this approach before ratifying the UNCLOS. It signed it on 10 December 1982 and ratified it on 16 September 1991. The Convention entered into force in respect of Seychelles on 16 November 1994.⁶¹ Once ratified, Seychelles is bound by the treaty and must obey it in good faith. It also means that Seychelles can rely on the treaty dispute mechanism(s) to solve any dispute it has with other states parties, and it has done so. For example, in *Seychelles v France* (the ‘*Monte Confurco*’) case,⁶² Seychelles successfully sued France before the International Tribunal for the Law of the Sea for the immediate release, upon the payment of a reasonable bond, of the crew of a Seychelles-registered fishing vessel which had entered France’s Exclusive Economic Zone illegally. However, there are also cases where Seychelles ‘domesticated’ treaties it has neither signed nor ratified. The validity of this approach remains questionable.⁶³ If a treaty (with the exception of self-executing treaties) can only become part of Seychelles law after domestication, the next question is whether UNCLOS was domesticated.

In domesticating treaties, the Seychelles Parliament has followed two approaches.⁶⁴ The first approach is to domesticate the whole treaty.⁶⁵ In this case, the whole treaty becomes part of Seychelles’ domestic law and can be invoked in court to enforce rights or obligations. The second approach is to incorporate some provisions of the treaty into domestic law. For example, the Fisheries Act incorporates one of the provisions of UNCLOS.⁶⁶ There are also other pieces of legislation which domesticate some treaty

60 Mujuzi (n 9) 74–76.

61 *Seychelles v France*, (The ‘*Monte Confurco*’ Case) Case No. 6 (Judgment of 18 December 2000) para 58 (International Tribunal for the Law of the Sea).

62 *ibid.*

63 For example, as at the time of writing (August 2024), Seychelles was neither a party nor an observer to the Budapest Convention on Cybercrime (2014), see Council of Europe, ‘Parties/Observers to the Budapest Convention and Observer Organisations to the T-CY.’ <<https://www.coe.int/en/web/cybercrime/parties-observers>> accessed 08 August 2024. However, sections 33(1), 34(1) and (2) and 38(b) of the Cybercrimes and Other Related Crimes Act, 2021 requires the Act to be implemented in accordance with Articles 29, 23 and 30 of the Budapest Convention on Cybercrime. In *Complete Energy Solutions Limited* case (n 9) para 41, the court held that ‘[t]here is no prohibition to a State enacting a domestic law in line with a treaty, agreement or convention notwithstanding it not ratifying to such instrument.’

64 See generally, Mujuzi (n 9) 77–78.

65 For example, section 85(1) of the Merchant Shipping Act (Act 13 of 1992) provides that ‘the Collisions Convention, the Load Line Convention and the Safety Convention shall have the force of law in Seychelles.’ See also section 44A of the Children Act which domesticates the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1993, and the Convention on the Civil Aspects of International Child Abduction, 1980.

66 For example, s 50 of the Act incorporates Article 11 of UNCLOS. See also Cl 173 of the Fisheries and Aquaculture Bill, 2023 (Bill No. 23 of 2023) which provides that ‘where an offence under this Act is committed in the Exclusive Economic Zone of Seychelles by a person who is a national of another State and is associated with a vessel that is not registered in Seychelles, penalties shall not include imprisonment or any form of corporal punishment in the absence of any agreement to the contrary between Seychelles and the State concerned.’ If enacted, it will expressly domesticate Article 73(3) of UNCLOS. However, it is different from UNCLOS because it requires an agreement

provisions.⁶⁷ In this case, the domesticated provisions become part of Seychelles domestic law and the yet-to-be domesticated provisions do not. However, in accordance with the international law rule, which is included in Article 300 of UNCLOS to the effect that states parties to treaties must fulfil their obligations in good faith,⁶⁸ Seychelles should not take any action or omit to do anything that would defeat its obligations under the treaty. Two different methods are followed within the second approach. The first one is to refer to the relevant provision of the treaty that is being domesticated. For example, section 50 of the Fisheries Act specifically refers to Article 111 of UNCLOS. This approach has also been followed in other pieces of legislation.⁶⁹ The second method is to include a provision in the Act which indirectly domesticates a principle(s) that is contained in a treaty. For example, the Fisheries Act of 1986 did not include provisions stipulating the conditions of fishing in EEZ. However, section 4(a) of the Fisheries Act (2014) states that one of the functions of the Seychelles Fishing Authority is to ‘provide for the effective management and sustainable development of fisheries in accordance with internationally recognised norms, standards and best practice, including the United Nations Convention on the Law of the Sea (1982).’ It should be noted that the long title of the Seychelles Fisheries Authority Act (2024) reiterates that the purpose of the Act is to ‘provide for an Authority to oversee the efficient management and sustainable development of the fisheries sector on a par with international norms, standards and best practices...’ The Seychelles Fisheries Authority Act (2024) does not repeal sections 4(a) and 30 of the Fisheries Act (2014). This implies, for example, that when the Seychelles Fishing Authority issues a licence under section 30 of the Fisheries Act for fishing in the EEZ, such a licence should not only comply with the conditions under the Fisheries Act but also with those under Articles 55–75 of the Convention. If the licence does not comply with the relevant conditions under Articles 55–75, its validity could be challenged in Seychelles courts. However, although Article 73 falls within the range of Articles 55–75, it is not a licence condition. This means that the powers of the Seychelles Fishing Authority do not extend to Article 73.

However, since the 1986 Act was enacted four years after Seychelles had signed UNCLOS, it could be argued that its silence on the issue of imprisonment under section 24 was meant to give effect to Seychelles’ obligation under Article 73(3) of UNCLOS

between Seychelles and another state for the sentence of corporal punishment to be imposed. This is not a requirement under Article 73(3) of UNCLOS.

67 See for example, s 3(1) of the Statute Law Revision (Miscellaneous Amendments) (No. 2) Act, 2021 (domesticates Article II of the Convention on the Prevention and Punishment of the Crime of Genocide).

68 Article 300 of UNCLOS provides that ‘States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right.’

69 For example, s 11 of the International Monetary Fund (Membership of Seychelles) Act, Act 3 of 1977 provides that Articles VIII, IX and XII of the Articles of Agreement of the International Monetary Fund shall have the force of law in Seychelles; sections Cybercrimes and Other Related Crimes Act, 2021 (Act 59 of 2021).

as required by Article 18 of the Vienna Convention on the Law of Treaties.⁷⁰ The same argument applies even with more force to section 11 of the Fisheries Act (2014) which was enacted after Seychelles ratified UNCLOS. After ratification and since UNCLOS is expressly referred to in some provisions of the 2014 Act, it is difficult to argue that section 11 was not meant to reflect the spirit of Article 73(3). This argument is also supported by the fact that the long title of the Fisheries Act, which shows the intention of the legislators,⁷¹ provides that the purposes of the Act include ‘to provide for efficient and effective management and sustainable development of fisheries in accordance with international norms, standards and best practice ...; to provide for offences and penalties.’ Those norms and practices are laid down, inter alia, in UNCLOS which is also specifically mentioned in the Act. In different sections of the Act, Parliament also domesticated Seychelles’ obligations under Article 73 on issues such as bond and security⁷² and prompt notification to the flag state in cases where the vessel violated Seychelles law.⁷³ The 1986 Fisheries Act was silent on some of these issues.⁷⁴ In simple terms, Seychelles has indirectly domesticated or incorporated Article 73(3).⁷⁵ As it has been explained, indirect domestication of a treaty ‘occurs where treaty norms influence a legislative enactment or amendment without explicit reference to the treaty.’⁷⁶ This

70 Article 18 of the Vienna Convention on the Law of Treaties provides that ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.’

71 In *Casime & Anor v R* [2020] (SCA 7 of 2019) [2020] SCCA 16 (21 August 2020) 19, the court held that ‘in interpreting an Act of Parliament, Court should be guided by the Mischief Rule. A look at the Long title of [any Act] clearly indicates ... the purpose[s] of the Act ...’

72 Section 53.

73 Section 55.

74 For example, it was silent on the duty to notify the flag state and also its provision on bond and security was very brief.

75 For the discussion of this concept, see for example, Simon Hoffman and Rebecca Thorburn Stern, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’ (2020) *IJCR* 133–156; Rossana Deplano, *Empirical and Theoretical Perspectives on International Law: How States Use the UN General Assembly to Create International Obligations* (CUP 2022). 125. However, in *Dilesh* case (n 2) paras 68–69, the court held that since Art 73(3) had not been expressly incorporated into the Fisheries Act; it was not part of Seychelles law. It is against that background that it concluded that imprisonment in default of paying a fine was not contrary to Art 73(3). As explained in this article, the author does not share this view. He maintains the position that Art 73(3) was indirectly incorporated into the Seychelles law. That is why section 58 of the Fisheries Act does not provide for imprisonment. In the same decision, para 64, the court held that no agreement between Seychelles and Sri Lank ‘in accordance with Article 73(3) of UNCLOS was presented to the trial Court.’ If, as the court held, Seychelles was not bound by Art 73(3), it is not clear on what basis such an agreement would have been signed. Seychelles also cannot invoke its domestic legislation to defeat its treaty obligations.

76 Victor Oluwasina Ayeni (ed), *The Impact of the African Charter and the Maputo Protocol in Selected African Countries* (PULP 2016) 301.

raises the question of whether a sentence of imprisonment in default of paying a fine is contrary to Article 73(3).

The drafting history of Article 73 is silent on the rationale behind including Article 73(2) and (3) provisions in the Convention.⁷⁷ However, there were some submissions on Article 73(1).⁷⁸ The lack of discussion on Article 73 could be attributed to the fact that the delegates did not flag it as one of the ‘hard-core issues.’⁷⁹ Case law from the International Tribunal for the Law of the Sea suggests that a sentence of imprisonment can only be imposed if there is an agreement between states parties to that effect. For example, in *Seychelles v France (The ‘Monte Confurco’ case)*,⁸⁰ one of the issues before the Tribunal was whether France, by imposing travel restrictions on the captain of the Seychelles-registered fishing vessel (by requiring him to submit his passport to the French authorities) acted contrary to Article 73(3) of UNCLOS. Seychelles argued that the French authorities should release the master of the ship ‘without a bond, since he could not be subject to imprisonment.’⁸¹ In other words, Seychelles asked the Tribunal to find that ‘the failure of the French Republic to comply with the provisions of article 73 (3) in applying to the master measures of a penal character constitutes a *de facto* unlawful detention.’⁸² This argument was made notwithstanding the fact French law which deals with the issue of illegal finishing in the EEZ provides that:

Any person who fishes, hunts marine animals or exploits marine products on land or on board a vessel, without having first obtained the authorisation required under article 2, or fails to give notification of entering the economic zone, or to declare the tonnage of fish held on board, shall be punished with a fine of 1,000,000 francs and six months’ imprisonment, or with one only of these two penalties.⁸³

77 Report of the Chairman of the 2nd Committee, A/CONF.62/L.51 (29 Mar. 1980) 83 (Bulgaria made an informal proposal on Art 73. However, the proposal is not reproduced in the report). There were also comments on Art 73(1) and (4), see Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Resumed Eighth Session), A/CONF.62/91 (19 September 1979) 100 and 105.

78 For example, Brazilian and Congolese delegates suggested amendments to Art 73(1). See Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Seventh and Resumed Seventh Session), A/CONF.62/C.2/SR.53 (17 April 1978) paras 5 and 7.

79 Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Seventh and Resumed Seventh Session), A/CONF.62/C.2/SR.53 (17 April 1978) para 1.

80 *Seychelles v France* case (n 61).

81 *ibid* para 65.

82 *ibid* para 4.

83 *ibid* para 44.

However, the Tribunal, while relying on its previous case law, held that it had no jurisdiction to entertain the alleged violation of Article 73(3) when dealing with disputes relating to the failure of one of the states parties to release the arrested ship promptly on the payment of a reasonable bond (under Articles 73(2) and 292 of the Convention).⁸⁴ The above discussion shows that in France, a person arrested for violating fishing laws can be sentenced to imprisonment. However, this does not happen in practice as the French authorities have informed the Tribunal that pursuant to Article 73(3) of UNCLOS, France is prohibited from imposing the sentence of imprisonment and that the Convention is part of its domestic law.⁸⁵ However, French nationals who violate fishing laws can be sentenced to imprisonment.⁸⁶ The Supreme Court of Seychelles followed a similar approach when foreign nationals used a Seychelles-registered vessel for fishing in the EEZ illegally.⁸⁷ Article 73(3) permits imprisonment as a form of

84 *ibid* para 63. In *R v Kumar & Others* [2024] (FH 16/2024) SCSC 78 (27 May 2024), the Supreme Court held that remanding foreign nationals arrested for illegal finishing in the Seychelles EEZ would be contrary to UNCLOS. The court also held that since Seychelles legislation does not provide for imprisonment for foreign nationals convicted of illegal finishing in the EEZ, those suspected of committing such an offence should not be detained in police custody awaiting trial. The court ordered that they should be detained in an ‘appropriate detention centre’ or in any other ‘safe place under police supervision.’ It is beyond the scope of this article to discuss the issue of bail. However, Art 73(2) of UNCLOS provides that ‘[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.’ Case law from the International Tribunal of the Law of the Sea, which has been discussed in this article, shows that Art 73(2) has been invoked in cases where those arrested for illegal finishing were crews of vessels flying the flags of the applicant states. This could be explained by a combined reading of Arts 73(2) and 292 of UNCLOS. The latter provides specifically that the prompt release is applicable to vessels flying the flag of another state and Art 292(2) provides that ‘[t]he application for release may be made only by or on behalf of the Flag State of the vessel.’ As the European Court of Human Rights held in *Mangouras v Spain* (App No 12050/04) [2010] ECHR 1364 (28 September 2010) para 46, while dealing with Art 73, the International Tribunal of the Law of the Sea ‘is tasked with striking a balance between the competing interests of two States rather than the interests of an individual and those of a State.’ It is easy for the vessels flying state flags and their crews to be ‘traced’ in the event of jumping bail. However, in all the Seychelles cases discussed in this article, the facts were silent on whether the vessels involved in illegal fishing were flying flags of any state. However, some of the vessels were registered.

85 International Tribunal for the Law of The Sea, Public sitting held on 28 January 2000 at the International Tribunal for the Law of the Sea, Hamburg, in the ‘*Camouco*’ case, (*Panama v France*) (verbatim record) (submission by France) 6 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_5/Vre28.01.pm.pdf> accessed 30 April 2023.

86 The French authorities informed the Tribunal that ‘if fishing violations are punished under French law by penalties of imprisonment, that penalty is only applicable to French nationals and not applicable to nationals of states which are parties to the Convention of the United Nations Law of the Sea.’ See International Tribunal for the Law of The Sea, Public sitting held on 6 April 2001, at the International Tribunal for the Law of the Sea, Hamburg, in the ‘*Grand Prince*’ case (*Belize v France*) 7 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_8/vre0604.04.pdf> accessed 30 April 2023.

87 *Republic v Edussuriyage and Others* [2023] (CR 22/2023) SCSC 536 (all the six accused were Sri Lankan nationals, and they pleaded guilty to the offence of killing or taking any marine mammal alive or dead in Seychelles Waters contrary to s 32(4) of the Fisheries Act. The Court imposed a fine

punishment if there is an agreement between states parties that imprisonment may be imposed. However, this is very unlikely since the prompt release of fishing vessels and the crew is one of the major objectives of UNCLOS.

In *Panama v Guinea-Bissau (The M/V 'Virginia G' case)*,⁸⁸ the Tribunal held that holding the arrested crew members' passports did not amount to imprisonment and therefore Guinea-Bissau had not violated Article 73(3) of the Convention. This implies that had Guinea-Bissau imprisoned the crew members, it would have been in violation of Article 73(3). Some of the judges of the International Tribunal for the Law of the Sea are of the view that Article 73(3) prohibits imprisonment. For example, in his dissenting opinion in *Panama v France (The 'Camouco' case)*,⁸⁹ Judge Anderson held that

The Convention does not lay down a scale of maximum financial penalties upon conviction for fishery offences, although exclusions are made in regard to imprisonment and corporal punishment by article 73, paragraph 3. (I would observe in passing that these exclusions, by limiting the range of available penalties, may indirectly have led to increases in monetary penalties in order to allow for the repression of serious offences.)⁹⁰

Likewise, in his separate opinion in *Japan v Russian Federation (the 'Tomimaru' case)*,⁹¹ Judge Jesus held that:

Measures of the coastal States that would not be in conformity with the Convention are, for example, those referred to in paragraph 3 of article 73, that is to say, the imposition of the penalty of imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment, for fisheries violations committed in the EEZ. If such measures were to be taken by a detaining State, they would be considered, as referred to in paragraph 1 of article 73 of the Convention, as not being in conformity with the Convention.⁹²

Other judges of the Tribunal have also held that Article 73(3) forbids imprisonment and corporal punishment as penalties for fishing offences.⁹³ The above jurisprudence shows

and one-month imprisonment in default of paying the fine). See also *Barbier v R* [2023] (CM 103 of 2023) SCSC 771 (8 November 2023).

88 *Panama v Guinea-Bissau (The M/V 'Virginia G' Case)* [2014] (Case: No. 19, Judgment of 14 April 2014) paras 305–311.

89 *Panama v France (the 'Camouco' Case)* [2000] (6) (Judgment of 18 December 2000) (International Tribunal for the Law of the Sea) (Dissenting Opinion of Judge Anderson).

90 *ibid* 7.

91 *Japan v Russian Federation (the 'Tomimaru' Case)* (Judgment of 6 August 2007), (Separate Opinion of Judge Jesus) 10 para 7.

92 *ibid* 106 para 7.

93 *Panama v Guinea-Bissau* [2014] (*The M/V 'Virginia G' Case*) (Judgment of 14 April 2014) (Declaration of Judge Kulyk) 146 para 11; *Switzerland v Nigeria* [2019] (Provisional Measures in the M/T 'San Padre Pio' Case) (Order of 6 July 2019) (Dissenting opinion of Judge Kateka) 475 para 5; *Saint Vincent and the Grenadines v Guinea* [2019] (*the M/V 'SAIGA 2' Case*) (Judgment of 1 July 1999) (Separate opinion of Judge Laing) para 38.

that as a general rule, imprisonment for violating fishing laws is prohibited. The only exception is when there is an agreement between states parties to impose imprisonment. Some academics have also expressed this view. For example, Oda referred to Article 73(3) of UNCLOS and argued that it restricts the type of sentences that a coastal state can impose on those arrested for violating its laws in the EEZ and that ‘in its judicial proceedings against the arrested vessel and crew, the coastal state is obliged to impose a financial penalty only.’⁹⁴ Zakaria has argued that Indonesian legislation, which empowers courts to impose a sentence of imprisonment for illegal fishing in the EEZ, is contrary to Article 73(3) of UNCLOS.⁹⁵ Likewise, Barrett referred to Article 73(3) and argued that:

Illegal fishers could face imprisonment in one of two situations. First, the LOSC [UNCLOS] provides that a coastal state and a flag-state may enter into an agreement which allows imprisonment to be included as a possible punishment for the violation of fisheries laws. Secondly, although the LOSC [UNCLOS] prohibit the imposition of a term of imprisonment as a punishment for the violation of fisheries laws, imprisonment as a form of punishment may be imposed against fishers who violate a coastal state’s administration of justice laws. For example, if a fisher wilfully refuses to pay a penalty or breaches a bond condition imposed by a domestic court, a term of imprisonment may be imposed.⁹⁶

Although Article 73(3) prohibits imprisonment in the absence of an agreement between states parties, it has been argued that ‘reviews of state practice have revealed that not all states comply with the prohibition on imprisonment as a form of punishment for foreign fishers found to have violated fishing laws.’⁹⁷ Some states have acted contrary to their obligation under Article 73(3) because they find imprisonment for illegal fishing to have ‘a significant deterrent effect.’⁹⁸ In February 2018, Interpol listed twenty-one countries, including Seychelles which had ‘included imprisonment provisions, or potential for imprisonment penalties in their EEZ laws.’⁹⁹ At that time, 168 states were parties to the

94 Shigeru Oda, ‘Fisheries Under the United Nations Convention on the Law of the Sea’ (1983) *Amer JIL* 739–755, 747. See also Valentin Schatz, ‘Combating Illegal Fishing in the Exclusive Economic Zone-Flag State Obligations in the Context of the Primary Responsibility of the Coastal State’ (2016) 7(2) *Goettingen JIL* 383–414, 394 (where the author paraphrases Art 73(3)).

95 Alfons Zakaria, ‘Imprisonment for IUU Fishing in Indonesia’s Exclusive Economic Zone: Why it Should not be Imposed’ (2012) *AH* 86–97.

95 Malcolm Barrett, ‘Illegal Fishing in Zones Subject to National Jurisdiction’ (1998) 5 *James Cook Univ LR* 1–26, 15.

97 *ibid* 17.

98 *ibid* 17. Although Australia is a state party to UNCLOS, courts have held that Art 73 of UNCLOS was not incorporated into Australian law. Thus, those arrested for illegal finishing in the Australian EEZ can be detained awaiting trial and can also be sentenced to imprisonment in default of paying a fine. See *Ribot-Cabrera & Others v The Queen* [2004] WASCA 101 (18 May 2004); *Djou v Commonwealth Department of Fisheries* [2004] WASCA 282 (26 November 2004).

99 Interpol, ‘International Law Enforcement Cooperation in the Fisheries Sector: A Guide for Law Enforcement Practitioners’ (2018) 42.

UNCLOS.¹⁰⁰ This implies that less than thirteen per cent of the states parties to the UNCLOS have legislation that is contrary or potentially contrary to Article 73(3). In other words, over eighty-five per cent of states parties to UNCLOS, many of which are coastal states, comply with Article 73(3). Indonesia is one of the twenty-one countries mentioned in the Interpol report above. However, Liliansa has demonstrated that the Indonesia Supreme Court is divided on the issue of whether imprisonment in default of paying a fine is not contrary to Article 73(3) of UNCLOS.¹⁰¹ The fact that a few states parties to UNCLOS have enacted legislation which is contrary to their obligation under Article 73(3) does not necessarily mean that Seychelles should also follow suit. Implied in article 64 of the Constitution is that Seychelles has a constitutional obligation to implement the treaties it has ratified. This means that in the absence of a relevant agreement between Seychelles and other states parties, imposing a sentence of imprisonment on a person convicted of an offence under section 11 of the Act would be contrary to Article 73(3).¹⁰² It is also important to mention that the case of *Seychelles v France (The 'Monte Confurco' case)*¹⁰³ was decided before Seychelles enacted the Fisheries Act of 2014. This suggested that since signing the UNCLOS, Seychelles believed that imprisonment should not be imposed on those arrested for fishing in its EEZ without a licence. Therefore, the court's reasoning *Warnakulusuriya Fernando v Republic*¹⁰⁴ that the use of the word 'may' as opposed to 'shall' in Article 73(3) implies that there are circumstances in which Seychelles may impose a sentence of imprisonment on a person who had been convicted of fishing in the EEZ without a licence, is contrary to the proper interpretation of Article 73(3). Under Article 73(3), no state party can introduce a sentence of imprisonment unilaterally. It has to be based on an agreement with other states parties. This could also explain why none of the states parties to the Convention has made a reservation or declarative interpretation on Article 73.¹⁰⁵

This raises the question of whether, as the court held in *Warnakulusuriya Fernando v Republic*, Article 73(3) only prohibits direct imprisonment but not imprisonment in default of paying a fine. The letter and spirit of Article 73(3) are to prohibit imprisonment as a form of sentence. Had the drafters of the Convention wanted to create other exceptions to the prohibition of imprisonment under Article 73(3), they would have done so. Likewise, case law from the International Tribunal for the Law of the Sea is very clear—Article 73(3) prohibits any form of imprisonment in the absence of an

100 Since 2018, only one country, Rwanda, ratified UNCLOS in 2023.

101 Dita Liliansa, 'A Quest for Meaning: Interpretation of Article 73(3) of the Law of the Sea Convention by Indonesian Supreme Court' (2023) 8 Asia-Pacific JOLP 59–72.

102 However, in *R v Thamel* [2019] (CO16/2019) SCSC 1177 (13 March 2019), the Supreme Court of Seychelles ordered the detention of the suspect in custody pending his trial. He was being prosecuted for contravening section 11 of the Act.

103 *Seychelles v France* (n 61).

104 *Fernando* (n 3).

105 See Ratification Status of the UNCLOS <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 21 April 2024.

agreement between states parties. If a treaty has prohibited a certain conduct expressly, indirectly allowing the same conduct defeats the purpose of the treaty. This is the case, for example as it happened in the cases of *Warnakulusuriya Fernando v Republic* and *Kanapathi v R*, where the evidence before the court showed that the offenders were incapable of paying the fine imposed. They were poor fishermen, and their vessels were forfeited to the state. They were willing but unable to pay the fine. Thus, imprisonment in lieu of paying the fine was inevitable.¹⁰⁶ That is why Article 300 of UNCLOS requires states to observe their obligations in good faith. Secondly, it is a well-known rule of international law under Article 27 of the Vienna Convention on the Law of Treaties (1969) that a state party to a treaty ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ Therefore, what Article 73(3) prohibits expressly should not be permissible through indirect means.

It is also important to note that domestically, there are compelling reasons why imprisonment is not a competent punishment for the crew or master of foreign vessels that fish in its EEZ without licences. The Fisheries Act (2014) provides for two types of penalties for the offences therein. The first type is a fine and/or imprisonment for people who are convicted of some offences.¹⁰⁷ The Act also provides for offences in terms of which a court can only impose a fine.¹⁰⁸ Section 58 is one of these sections. Had the legislature wanted to stipulate imprisonment as a form of sentence under section 58, it would have done so. It is thus evident that a court which convicts a person under section 11 should not sentence him or her to imprisonment even if he or she fails to pay the fine unless there is an agreement between Seychelles and the offender’s state of nationality. This is so because the purpose of section 11 of the Act is to give effect to Seychelles’ international obligation under Article 73(3) of UNCLOS. However, imprisonment for failure to pay a fine remains a competent sentence in other cases. Section 11 of the Act is the exception.

Another issue that arose in the *Kanapathi v R* case is whether a court can invoke article 48 of the Constitution to take judicial notice of UNCLOS when interpreting the Charter generally and in this case, the right to a fair trial. Since sentencing is an integral part of the trial, the court was justified in holding that the matter dealt with the right to a fair trial. As mentioned above, Article 48 states that the Charter of Rights ‘shall be

106 In *R v Toubou Mochidy* [2019] (CO/ 26/2019) SCSC 1247 (28 July 2019) the Supreme Court convicted the offender of using a foreign fishing vessel without a licence and imposed a fine of R2,5000,000 (the minimum fine). However, the court observed that ‘As the Convict has indicated that he has no personal means to meet the fine imposed, I order that the fishing vessel ... and any gear, article, fish or fish product found on board are seized and sold. The income from the sale shall first be used to pay the fine, and any remainder shall be forfeited to the Republic of Seychelles.’ Para 13. See also *Nilanga* case (n 3). See also *R v Makavita Liyanage Dilesh* [2024] (CR 99 of 2023) SCSC 32 (16 February 2024) para 8 where the court imposed ‘[a] fine of SR550,000.00 which shall be payable within 60 days from today and in default to a term of 18 months imprisonment.’ The appeal against the sentence was dismissed, see *Dilesh* (n 2).

107 See ss 63 and 66 of the Act.

108 See, for example, ss 59–61.

interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms.’ These obligations are contained in human rights treaties ratified by Seychelles such as the International Covenant on Civil and Political Rights (1966), the African Charter on Human and Peoples’ Rights (1981) and the Convention on the Rights of Migrant Workers and Members of their Families (1990). However, although the UNCLOS mentions some rights, they only relate to states.¹⁰⁹ In other words, it provides for the rights of states parties and not for human rights. Although some of the rights indirectly benefit individuals,¹¹⁰ they are only enforceable by states parties. In international law language, states are the subjects and individuals the objects of UNCLOS.¹¹¹ This explains why the International Tribunal for the Law of the Sea does not have jurisdiction in individual matters. It only has jurisdiction in inter-state matters and to a limited extent, between states and some entities.¹¹² In light of the above discussion, it is evident that relying on article 48 of the Constitution to take judicial notice of UNCLOS to interpret a right in the Charter of Rights is not sustainable. Put differently, that approach is contrary to the spirit and letter of article 48.

One of the issues that has emerged in some of the cases where people have been convicted under section 11 is that in mitigation, they often submit that they are first offenders.¹¹³ The prosecutor and the court appear to accept that as ‘gospel truth.’ The facts are silent on whether any effort was made to find out, from the relevant authorities of the offenders’ countries of origin, whether or not they were indeed first offenders. This is an issue that authorities may have to relook and put in place measures to deal with foreign convictions. The Court of Appeal also raised this concern. In *Dilesh v R*,¹¹⁴ the appellant, a foreign national, was convicted of illegal fishing in the Seychelles EEZ. On appeal, he argued, inter alia, that the Supreme Court had failed to consider the fact that he was a first offender as a mitigating factor in determining the sentence. In dismissing this argument, the Court of Appeal held that ‘while the Appellant may be a

109 See for example, Art 17 (right of innocent passage); Art 38 (right of transit passage); Art 52 (right of innocent passage); Art 53 (right of archipelagic sea lanes passage); Art 69 (right of land-locked States) Art 70 (right of geographically disadvantaged States); Article 90 (right of navigation); Art 110 (right of visit); Art 111 (right of hot pursuit); Art 112 (right to lay submarine cables and pipelines); Art 116 (right to fish on the high seas); Art 125 (right of access of land-locked states to and from the sea and freedom of transit); Art 193 (sovereign right of States to exploit their natural resources); Art 238 (right to conduct marine scientific research); Art 299 (right of the parties to agree upon a procedure)

110 For example, Art 116 provides that ‘All States have the right for their nationals to engage in fishing on the high seas subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and (c) the provisions of this section.’ Art 238 (right to conduct marine scientific research).

111 Onuma Yasuaki, *International Law in a Transcivilisational World* (CUP 2017) 186–243; Anthony Aust, *Handbook of International Law* (CUP 2010) 12–13.

112 See Arts 20–22 of the Statute of the International Tribunal for the Law of the Sea (Annex VI to UNCLOS).

113 See, for example, *Republic v Fonsek & Or* [2019] SCSC 715 (2 September 2019); *Nilanga* (n 3).

114 *Dilesh* (n 2).

first-time offender in Seychelles, there are no criminal records of the Appellant in Sri Lanka or elsewhere to substantiate whether he is indeed a first-time offender.’¹¹⁵

Conclusion

In this article, the author has demonstrated why the Court of Appeal’s view in *Warnakulusuriya Fernando v Republic* that Article 73(3) of UNCLOS, in the absence of an agreement, permits imprisonment in certain circumstances is questionable. The author has also demonstrated why the approach adopted by one of the judges in *Kanapathi v R* [2022] to hold that Article 73(3) prohibits imprisonment is debatable. It has been recommended that Seychelles authorities have to put in place measures to verify whether or not foreign nationals who have been convicted of offences under section 11 of the Act are indeed first offenders. Since most of the offenders come from specific countries, Seychelles may have to consider signing agreements with these countries to be able to impose the sentence of imprisonment under section 11 of the Act read with Article 73(3) of UNCLOS in appropriate circumstances.¹¹⁶ This is important since in many cases, the offenders are unable to pay the fines imposed. However, the possibility of imprisonment itself may not deter some people from fishing in the EEZ without licences. This is so because some of them may not even be aware of the sentence for the offence they are committing. More preventive measures such as patrols have to be implemented.

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¹¹⁵ *ibid* para 50.

¹¹⁶ Seychelles has reportedly signed such agreements with Comoros and Madagascar, see B Bonnelame, ‘Seychelles and Comoros Sign Agreement to Help Combat IUU Fishing in EEZ’ (19 April 2024) <<http://www.seychellesnewsagency.com/articles/20438/Seychelles+and+Comoros+sign+agreement+to+help+combat+IUU+fishing+in+EEZ>> accessed 7 May 2024.

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