

**IN THE SEYCHELLES COURT OF APPEAL**

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**Reportable**

[2020] SCCA 36 (19 August 2022)  
SCA CR 14/2021  
(Appeal from CR 62/2021)

In the matter between

**MAHALINGAM KANAPATHI**  
*(rep. by Clifford André)*

**Appellant**

and

**The Republic**  
*(rep. by Lansinglu Rongmei)*

**Respondent**

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**Neutral Citation:** *Kanapathi v R* (SCA CR 14/2021) [2022] SCCA 36 (19 August 2022)  
(Arising in CR 62/2021)

**Before:** Twomey-Woods JA, Robinson JA and André JA

**Summary:** illegal fishing, penalties, minimum mandatory sentence, principles of sentencing, proportionality and individualisation of sentences, prohibition of imprisonment in UNCLOS and application to Seychelles

**Heard:** 1 August 2022

**Delivered:** 19 August 2022

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**ORDER**

The appeal is allowed.

(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 is reasonably practicable unless the fine is paid. Then he will be allowed to leave on the vessel.

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**JUDGMENT**

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**DR. M. TWOMEY-WOODS JA**

## Background

1. Mahalingam Kanapathi, a Sri Lankan national and the skipper and master of a fishing vessel named Sampath 7, was convicted on his own guilty plea in the Supreme Court on 4 August 2021 on the charge of fishing without a fishing vessel licence contrary to section 11(1) as read with section 57 and 69 of the Fisheries Act, 2014 (the Act)
2. In mitigating the sentence for the offence committed, he submitted that he had pleaded guilty at the very first opportunity and that he was a first offender. He added that he was the sole breadwinner of his family with two minor children and that the Seychellois state had seized the boat he had for his trade and livelihood. He submitted that he would no longer be able to provide for his family.
3. The learned Chief Justice, in passing sentence, remarked that:

*“[9] There has been a long list of unauthorised fishing in Seychelles waters cases over the years in which following convictions, the Supreme Court has imposed fines with default of payment of fines being the forfeitures of the fishing vessels, their fishing gears and their catch. In those sentences, the court had also invariably ordered for the repatriation of the convicts. The resulting effect have been the fines being intentionally left unpaid by the convicts allowing the fishing vessels to be forfeited and the accused walking free from the court... (sic)*

*[10] it is clear that this existing sentencing pattern and sentences imposed by this court is not acting as a deterrent to offenders who sees Seychelles as an El Dorado for illegal fishing and keep coming in throve. They have kept plundering our limited fisheries resources over the years, whilst at the same time I feel that we have not been sending the right signal back to their home state. ... (sic)*

4. The learned Chief Justice added that in the preceding cases, the accused persons were made to pay a lesser fine than the minimum mandatory sentence imposed by section 58 of the Act. He stated that after carefully considering the mitigating factors in the case, he felt that a deterrent sentence had to be imposed. He ordered the convict to pay a fine of SR 2,500,000 in default of payment, of which the convict would undergo two years’

imprisonment. He further ordered that the vessel Sampath 7, its fishing equipment and other articles on board be forfeited to the Republic of Seychelles.

5. Unable to pay the fine, Mr. Kanapathi is now serving his gaol sentence.

### **Grounds of Appeal**

6. He has appealed this sentence on the following grounds:

*(1) The learned Chief Justice erred in law and fact in sentencing the Appellant to a fine of SCR2,500,000 and in default of paying this fine within 14 days of the sentence, the accused to undergo 2 years imprisonment. This is harsh and excessive as the accused being a fisherman would have no means of paying such an amount within 14 days let alone pay the said fine. The learned Chief Justice failed to consider the mitigating circumstances of the accused by learned counsel for the accused who stated that the accused is 32 years old, he had pleaded guilty at the very first opportunity, he has 2 minor children, he is the sole breadwinner of the family, and he is a first-time offender.*

*(2) The learned Chief Justice erred in law and fact in sentencing the Appellant to seizure of the fishing vessel and all its gears. (sic) The Chief Justice failed to consider the mitigating factors put forward by the learned counsel for the accused when he said that the accused being the sole breadwinner would require the said vessel to continue to provide for his family and that since the court had imposed a fine, there was no need to seize the vessel along with its equipment.*

*(3) The learned Chief Justice erred in law and fact in sentencing the Appellant to a fine of SCR2,500,000 and in default of paying this fine within 14 days of the sentence, the accused to undergo 2 years imprisonment and to seizure of the fishing vessel and all its gears. This is not in accordance in law as the time for appeal is 30 days but the time for him to pay the fine is only 14 days, which is not in accordance with the law (sic).*

*(4) The sentence is manifestly harsh and excessive, considering the circumstances of the case.*

7. We have raised our concerns that the grounds of appeal as drafted are infelicitous, confusing and repetitive. Nevertheless, we understand the issues raised around the sentence as follows:

*(1) Fining the convict to a sum of 2.5 million rupees with a default term of two years imprisonment within 14 days of non-payment of the fine while also forfeiting his vessel is harsh and excessive especially given the mitigating circumstances of the convict.*

*(2) The sentence is illegal.*

8. We consider these issues.

**The sentence is harsh and excessive.**

**Submissions**

9. It has been hard to follow learned Counsel Mr. Andre's submissions on behalf of Mr. Kanapathi on the grounds of appeal. Short of the court making a case for the Appellant, we restrict ourselves to the salient issues of Mr. Kanapathi's contentions. We understand Counsel to be saying that the mitigating factors outweighed the minimum mandatory sentence meted out to Mr. Kanapathi in respect of the offence of illegal fishing. He has also contended that the mitigating factors seemed not to have been considered by the court.
10. Mrs. Langsinglu, Counsel for Republic, has submitted that the minimum fine according to section 58 of the Fisheries Act was imposed on the accused. She concedes that the learned Chief Justice departed from the past pattern of sentencing for such offences but contends that the learned Chief Justice did so after lamenting that past sentences of forfeiture of the fishing vessel alone allowed convicts of such crimes to walk free. She submits that the learned Chief Justice wanted to set a deterrence for such offences in the present case.

**Discussion**

11. The penalty for illegal fishing in Seychelles waters is as follows:

*“Section 58- Where a 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*

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*(a) of a length overall not exceeding 24 metres, to a fine not less than SCR2,500,000;*

*(b) of a length exceeding 24 metres but not exceeding 50 metres, to a fine not less than SCR12,500,000;*

*(c) of a length overall exceeding 50 metres or more, to a fine, not less than SCR18, 750,000 and not exceeding SCR31,250,000.*

*Section 70 – Where a person is convicted of an offence under this Act, the court may, in addition to any other penalty –*

*(a) order the forfeiture of the fishing vessel, any gear or article used in the commission of the offence;*

*(b) order the forfeiture of any fish caught in breach of this Act;*

*(c) 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.”*

12. Mr. Kanapathi’s vessel measured less than 25 metres, and his conviction attracted a minimum mandatory fine of SCR2,500,000. His boat, fishing gear and catch were also liable to a forfeiture order. It 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 – but more about this later.

13. Principles of sentencing generally have often been explored in our jurisprudence. In *R v ML & Ors*<sup>1</sup>, the Supreme Court had the opportunity to review factors to be considered by a sentencing court. It cited the case of *Njue v R*<sup>2</sup> and stated that:

*“[14] ... when sentencing, a Court must be guided by several principles including public interest; the nature of the offence and the circumstances it was committed; whether there is a possibility of the offender to be reformed; the*

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<sup>1</sup> (CR 38/2019) [2020] SCSC 256 (16 April 2020),

<sup>2</sup> (2016) SCCA 12

*gravity of the offence; the prevalence of the offence; the damage caused; any mitigating factors; the age and previous records of the accused; the period spent in custody; and the accused's cooperation with law enforcement agencies. These factors can be grouped into three categories, namely - looking at the crime committed, the offender and the interests of society."*

14. The court also referred to the South African case of *S v Zinn*<sup>3</sup> regarding what must be considered when sentencing where the same principles were enunciated, namely:

*"What has to be considered is the triad consisting of the crime, the offender and the interests of society..." (emphasis ours)*

15. We agree that the above triad must be foremost in the mind of the sentencing judge. On the other hand, we also need to reiterate another axiom of sentencing to be borne in mind as summarised in the case of *Suleman v R*<sup>4</sup>, namely that:

*"Much as the court should be guided by a pattern of previous sentences in similar cases, it must be acknowledged that time and circumstances do often combine to make cases dissimilar for purposes of sentencing."*

16. The task of the sentencing judge is to balance all these factors. We also recognise that sentencing remains one of the most delicate processes of our criminal justice system and that sentencing judges ought to be given wide latitude. For this reason, our jurisprudence has reiterated on several occasions, and as far back as the 1960s in *Dingwall v R*,<sup>5</sup> that an appellate court with not lightly interfere with a sentence passed by a lower court. In *Mathiot v R*<sup>6</sup>, this court stated that under rule 41 (2) of the Seychelles Court of Appeal Rules, the Court of Appeal may, if it thinks a different sentence should have been passed, substitute such other sentence warranted in law as it thinks ought to have been given. Still, the court cautioned that the court should only intervene if:

- (a) The sentence was harsh, oppressive and manifestly excessive.*
- (b) The sentence was wrong in principle.*
- (c) The sentence was far outside the discretion limits of the Court.*

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<sup>3</sup> 1969 (2) SA 537 (A)

<sup>4</sup> SCA 3 of 1995) [1995] SCCA 29 (29 April 1995)

<sup>5</sup> 1963-1966 SLR 205)

<sup>6</sup> SCA 9 of 1993) [1994] SCCA 30 (25 March 1994)

*(d) Where a matter had been improperly taken into account by the trial Court or where a matter which should have been taken into account was not taken into account by the trial Court.*

*(e) Where the sentence imposed was not justifiable in law.*

17. Other principles to be borne in mind include the individualisation of the sentence and proportionality. This is why this court, in the seminal case of *Poonoo v R*<sup>7</sup>, found it necessary to expone on these sentencing principles even in the face of statutory mandatory sentences. It held first that:

*“Sentencing involves a judicial duty to individualise the sentence tuned to the circumstances of the offender as a just sentence.”*

18. It also held that Article 19(1) of our Constitution behoves the court to ensure fair hearings and emphasised that a:

*“[F]air hearing includes fair sentencing under the law but includes individualisation and proportionality.”*

19. The court in *Poonoo* also held 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. The court held that there are three tests which a minimum mandatory sentence must pass before the court can depart from the minimum mandatory sentence imposed by the law.:

*“1. The first test is the test of parliamentary power. It is as follows:*

*(a) is the penalty imposed by the legislature wholly or grossly disproportionate with regard to the mischief to be avoided;*

*(b) if it is, then it is unconstitutional as it violates article 16;*

*(c) if it is not, a second test should be applied in relation to article 119(2).*

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<sup>7</sup> [2011] SLR 424

2. *The second test is the test of judicial power under article 119(2). It is as follows:*

*(a) does the mandatory provision remove all discretion from the court to exercise its judicial powers to sentence an offender in the particular circumstances of his case;*

*(b) If it does, the law is unconstitutional and constitutes a breach of section 119(2) of the Constitution inasmuch as the legislature in that case is, thereby, interfering with the independence of the judiciary.*

*(c) If it does not, a third test should be applied.*

3. *And the third test is the test of the right of the citizen under the Constitution. It is as follows:*

*(a) does the mandatory provision breach the principle of proportionality, fair trial or other imperatives of a democratic system;*

*(b) If it does, the law is unconstitutional and constitutes a breach of section 1 in terms of that principle or imperative.*

*(c) If it does not, that is the end of the matter.”*

20. Bearing in mind the principles enunciated in the authorities mentioned above and the tests in *Poonoo*, it cannot be said that the minimum mandatory sentence provided by the statute in the present case is grossly disproportionate to the mischief it seeks to avoid. Nor is there any indication that the learned Chief Justice felt constrained by the mandatory statutory provisions to impose the minimum mandatory sentence. It is the third test that makes the present sentence problematic. The question to be asked is whether it was appropriate and proportionate to impose the sentence as was done given the mitigating circumstances. We do not believe it is.

21. We believe the sentence should have reflected that the learned Chief Justice had considered the mitigating factors. To merely cite the mitigating factors and to pass a sentence that does not reflect consideration for the same is as much to say that no regard



ought to be given to them. As McLachlin C.J. and Gascon J stated in the Canadian case of *R v Lacasse*<sup>8</sup>:

*“128...Although a court can, in pursuit of the objective of general deterrence, impose a harsher sentence in order to send a message with a view to deterring others, the offender must still deserve that sentence... If a judge fails to individualise a sentence and to consider the relevant mitigating factors while placing undue emphasis on the circumstances of the offence and the objectives of denunciation and deterrence, all that is done is to punish the crime...” (emphasis added)*

22. We believe that the sentence in the present case punished the crime but not the convict. Mr. Kanapathi received no benefit for his immediate plea of guilty and apparent contrition, the mitigating facts that he was a first offender, that he was the sole breadwinner of a family that included two minor children, and that his livelihood was destroyed by the seizure of his boat and fishing gear. To that extent, the sentence did not meet the standards required for proportionality and individualisation and, in this regard, must be set aside. This ground of appeal therefore succeeds.

**The sentence is illegal.**

23. Mr. Andre has not clearly articulated why the sentence is illegal in his grounds of appeal. However, in his skeleton heads of arguments, he has submitted that the sentence is unlawful as it is not in accordance with the provisions of the Criminal Procedure Code (CPC), Rules for appeals and UNCLoS.

***Breach of the provisions of the CPC***

24. Counsel contends that a sentence of substitutive confinement where a fine is not paid cannot exceed four months. He bases this submission on the provision of section 295 (1) of the CPC, which provides:

*“The term of imprisonment so ordered shall not exceed one day for each rupee of the total amount of the fine and costs to which the offender has been sentenced.*

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<sup>8</sup> 2015 SCC 64 [2015] 3 S.C.R. 1089

*No 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.”*

25. Mr. Andre submits in a novel argument that “the sentence for the fine should not exceed four months as there were no costs added to this case as part of the sentence.”
26. While Mrs. Langsinglu for the Republic has conceded that substitutive confinement for a fine and costs may not exceed six months, she is not of the view that section 295(1) can be interpreted to reduce the detention in default of payment of a fine by two months if no costs are involved.
27. We share this view. The provisions of section 295 of the CPC limit sentences of imprisonment in default of payments of fines and costs to 6 months. Therefore, the learned Chief Justice erred in imposing a sentence of two years in default of the payment of the fine.
28. We find no basis to reduce further the sentence regarding Mr. Andre’s submissions on costs. Section 295(1) of the CPC cannot be read in isolation but must be read together and contextually with the preceding provision on imprisonment in default of payment of fines:

*“294- In 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.”*

29. Sections 294 and 295, therefore, provide for the imposition of imprisonment for the non-payment of costs and fines. The word “and” in section 295(1) must, in this respect, be read disjunctively or alternatively. We are strengthened in this view by section 289 of the CPC, which provides in relevant part that:

*“Whenever under any enactment ...several penalties are provided for any offence, the use of the word “or” shall signify that the penalties are to be inflicted alternatively, the use of the word “and” shall signify that the penalties may be inflicted alternatively or cumulatively, and the use of the words “together with” shall signify that penalties are to be inflicted cumulatively.” (Emphasis added)*

***Breach of appeal rules***

30. In another novel submission, Mr. Andre has contended that the limit of 14 days for paying a fine when the period within which one may appeal a sentence is 30 days<sup>9</sup> makes the sentence illegal. We have difficulty understanding this contention. As pointed out by Mrs. Langsinglu, there is no time limit for paying a fine. Such time limits fall within the discretion of the sentencing judge. We need not more about this ground of appeal apart from stating that it is dismissed.

***Breach of provisions of UNCLOS***

31. Mr. Andre’s final submission is that sentences of imprisonment, albeit in terms of substitutive confinement for non-payment of fines, breach Seychelles' international commitments with regard to UNCLOS.
32. Article 48 of the Constitution provides that with regard to the Charter of Rights (in the present case, the fair trial rights under Article 19 of the Constitution), interpretation must be carried out:

*“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 instrument 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;*  
*...”*

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<sup>9</sup> The Seychelles Court of Appeal Rules 2005 provides that a notice of appeal shall be filed within 30 days after the decision is appealed against.

33. In this regard, Mr. Andre has invoked the principle of *pacta sunt servanda* (agreements must be kept).<sup>10</sup> As Seychelles ratified UNCLOS on 16 September 1991 and became a party to the Convention, all the provisions of the Convention should be carried out in good faith. This is highlighted in Article 309 of UNCLOS:

*“No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”*

34. In the present case, substitutive confinement arose from the Appellant’s failure and inability to pay the fine imposed by the trial court. The issue now arises as to whether the imposition of imprisonment by section 294 of the Criminal Procedure Code contradicts the prohibition of imprisonment in terms of Article 73 (3) of UNCLOS. Article 73 (3) provides as follows:

*“73 (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.”*

35. The prohibition against imprisonment in the provision above is explicit and may well explain why no such penalty is contained in the Fisheries Act 2104. A term of imprisonment remains imprisonment even when it arises in default of the non-payment of a fine. Given that the CPC 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.

36. The above principles suffice to render the imprisonment of Mr. Kanapathi contrary to law. We have not found the case of *M/V ‘Virginia G’ Case (Panama/Guinea-Bissau)*,<sup>11</sup> submitted to us by Mr. Andre to have any relevance to the present case. That case concerned the issue of whether a coastal State could regulate the bunkering of foreign vessels fishing in its exclusive economic zone. The Tribunal held that Guinee-Bissau

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<sup>10</sup> See Article 26 of the Vienna Convention on the Laws of Treaties 1969

<sup>11</sup>Case no 19.53 ILM 1164 (2014) International Tribunal for the Law of the Sea instituted on 4 July 2011 before the International Tribunal for the Law of the Sea, April 14, 2014

withholding the crew's passports for four months did not violate the provisions relating to imprisonment in Article 73(3).

37. As we have in any case found that the substitutive confinement also breached the provisions of UNCLOS, we find that this ground also has merit.

### **Decision**

38. In all the circumstances of the case, we find that the appeal should be allowed. We are dismayed that Mr. Kanapathi has almost served his sentence of imprisonment and offer our unreserved apology to him.

### **Orders**

39. We substitute the following orders instead of the sentence passed by the court *a quo*:

- (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 on the vessel.*

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Dr. M. Twomey-Woods JA

Signed, dated and delivered at Ile du Port on 19 August 2022

**F. ROBINSON, JA**

I agree with the conclusion and orders made by Justice Twomey-Woods in this case.

However, I reserve my opinion as to whether or not Article 73 of the United Nations Convention on the Law of the Sea applies to this case in the absence of any reliable submissions from the parties in this case.

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Robinson JA

**ANDRE, JA**

- [1] I have read the Judgment of my learned sister Twomey-Woods JA, and I concur with the upholding of the Appeal and the Orders made as a result. In this regards I also endorse the Discussion on the grounds of appeal, Decision and Orders as raised and considered at paragraphs [6] to [30] [38] and [39] thereof.
- [2] However, I do not believe that the ground on United Nations Convention on Law of the Sea (UNCLOS) as considered at length at paragraphs [31 to [37] of her judgement deserves to be addressed in this appeal for the following reasons.
- [3] The Appellant did not refer the trail Court to the applicability of the UNCLOS. It is on record that the Appellant did submit on mitigation, where matters of him being a first offender, saving court's time and having two young children were raised. At that juncture, he ought to have also raised UNCLOS applicability. It is my considered view that where an issue is not raised in the lower Court, it cannot be raised for the first time on Appeal. As such, the applicability of UNCLOS cannot be considered by this Court because it was never raised in the court a quo.

[4] In any regard, the said UNCLOS cannot bind this Court given that it has not been legislated. We are to be guided by article 64 (4) of the Constitution, which states that:

- (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.*

This 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.

[5] Judicial notice of international treaties is envisaged under art. 48 of the Constitution, which reads:

48. *This Chapter 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;*

[6] 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.

[7] It is against the jurisprudence and understanding of the Constitution as laid out in the paragraphs above, that the UNCLOS cannot be considered by this Court.

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Andre, JA

Signed, dated and delivered at Ile du Port on 19 August 2022.