



ORIGINAL ARTICLES

Prompt Release of Vessel and Crew Under Article 292 of the UNCLOS: Is It An Adequate Safeguard Against the Powers of Coastal States?

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ABSTRACT

The enforcement powers of the coastal State over foreign vessels in their territorial seas normally include arrest of the crew, seizure of the vessels, and their detention that may extend for a considerable length of time. What makes the matter worst is the extension by the UNCLOS 1982 of the coastal State's powers to the new legal regime of the exclusive economic zone that may extend up to 200 nautical miles from the baselines. These extensive enforcement powers of the coastal States may cause hardship to foreign crew and ship owners. To strike a balance between the interests of the coastal State and those of the flag State, Article 292 of the UNCLOS empowers the International Tribunal for the Law of the Sea (ITLOS) to determine whether or not the detaining State has complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security. The main objective of the research, therefore, is to examine whether the overriding purpose of Article 292, that is, to serve as a compromise between the conflicting interests of the coastal and the flag States, is achieved. The methodology is primarily based on analysis of the nine prompt release cases filed before the ITLOS to date, exploring how Article 292 is in fact interpreted and applied by the Tribunal. The study concludes that despite the prompt release obligation, the coastal States naturally are in a position to tip the balance in their favour. The absence of direct access of private persons to the prompt release procedure and the tendency of the coastal State to confiscate the detained vessel are found to be the two main factors that may swing the balance towards the coastal State.

Key words: Prompt release obligation; Enforcement power of coastal State; Jurisdiction of ITLOS; Reasonable bond

Introduction

Of the fifteen cases decided to date by the International Tribunal for the Law of the Sea (ITLOS), nine are prompt release cases. In chronological order they are: the *M/V Saiga* case, the *Camouco* case, the *Monte Confurco* case, the *Grand Prince* case, the *Chaisiri Reefer 2* case, the *Volga* case, the *Juno Trader* case, the *Hoshinmaru* case, and the *Tomimaru* case. The prompt release obligation under Article 292 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 introduced a totally new procedure (Rosenne 1998), previously unknown in international law (Frankx, 2002). Since the 1982 Convention bestows extended jurisdiction on coastal States in areas like fisheries and environmental protection - a jurisdiction reaching far beyond the territorial seas which formed the traditional maximum seaward extension of such competence - this new procedural safeguard of Article 292 is said to have been incorporated as a *quid pro quo* in order to safeguard the interests of the shipping nations (Lagoni, 1996).

The novel character of the prompt release procedure led some scholars to predict that this particular procedure may even become one of the main attractions of ITLOS. This prediction later turns out to be quite correct since the majority of judgments rendered by the Tribunal to date concern Article 292 prompt release procedures. This study nevertheless focuses mainly on the major issues in the prompt release procedure, namely: jurisdiction, objections to admissibility, the impact of confiscation of vessel on prompt release procedure and reasonableness of the bond or security in order to determine whether this procedure is an adequate safeguard against the extensive powers of the coastal State. It concludes that despite the potential of Article 292 to serve as a compromise between coastal and flag States' interests, the coastal States naturally are in a position to tip the balance in their favour.

Statement of problem:

The enforcement powers of the coastal State over foreign vessels in their territorial seas normally include arrest of the crew, seizure of the vessels, and their detention that may extend, in many instances, for a long

period of time. These enforcement powers of the coastal States may cause hardship to foreign masters and crews as well as ship owners. As far as masters and crews are concerned, they are detained in a foreign country, applying foreign laws, which may entirely be different from theirs, and which they do not understand due to language barriers. They may not have any access to lawyers who will protect their legal rights and basic human rights. Since they are away on a foreign soil without any income, we cannot even imagine the pitiful lives of their families left in their home countries. In respect of ship owners, they are deprived of the use of their income-generating ships for a long period of time and their economic loss will multiply with the length of the period of detention.

What makes the matter worst is the extension of the coastal state's enforcement powers under the UNCLOS 1982 to the new legal regime of the exclusive economic zone that may extend up to 200 nautical miles from the baselines. To strike a balance between the interests of the coastal State and those of the flag State, Article 73 of the UNCLOS, among others, creates a new procedural safeguard by imposing "prompt release obligation" on the coastal States. At the same time, Article 292 of the UNCLOS 1982 empowers the International Tribunal for the Law of the Sea (ITLOS) to determine whether or not the detaining State has complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security.

Nevertheless, the situation on the ground is that even after the adoption of the UNCLOS in 1982, many coastal States remain adamant in detaining the vessels and the crews for a long period of time without following the requirements under the prompt release obligation. It is only when the Tribunal was operative in 1997 that the flag states started initiating prompt release proceedings before it. Now that the Tribunal has decided nine prompt release disputes between the coastal States and the flag States, it is a good time to examine the success or otherwise of the safeguard enshrined in Article 292 of the UNCLOS 1982.

Objectives of The Research:

The following are the main objectives of the research:

- (1) To examine jurisdiction *ratione personae* of ITLOS in prompt release proceedings;
- (2) To explore the issue of admissibility in prompt release proceedings;
- (3) To survey the impact of confiscation of vessel in prompt release proceedings;
- (4) To evaluate the adequacy of prompt release obligation as a safeguard against the extensive powers of the coastal State.

Research methodology:

This is a doctrinal research and the research methodology is primarily qualitative in nature. The qualitative approach has been applied by means of analysis and synthesis of the primary sources. The first and the most important primary source is the UNCLOS 1982 itself and its main provisions on prompt release, namely, Articles 73 and 292, are interpreted and synthesized in light of the rules of the ITLOS and its jurisprudence. The nine prompt release proceedings dealt with by the Tribunal are critically analyzed and conclusions are drawn from the analysis of these decided cases.

Research Findings:

The issue of jurisdiction:

Several procedural conditions must be met for a flag State to make an application for the release of a vessel under Article 292. Questions of jurisdiction and admissibility are not addressed in a separate phase. The accelerated procedures anticipated in the Convention and the Tribunal's Rules on the prompt release of vessels necessitates that these challenges be raised and resolved as part of the submissions on detention and conditions of release of the vessel.

The requirements to be satisfied in order to found the jurisdiction of the Tribunal are provided for in Article 292, which, among others, reads as follows:

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time....

In determining the question of 'jurisdiction,' the Tribunal usually examines the following four factors:

- (1) That the parties to the proceedings are States Parties to the Convention;
- (2) That the parties did not agree to submit the question of release from detention to another court or tribunal within ten days from the time the vessel was detained;
- (3) That the applicant State is the flag State of the vessel detained; and
- (4) That the applicant alleges that the detaining State has not complied with the provision of the Convention for the prompt release of the vessel.

Who Can Initiate Prompt Release Proceedings?

Can private individuals or corporations have a direct access to ITLOS in prompt release procedure under Article 292? The answer is in the negative. Only States are parties in prompt release procedures. The application for prompt release, therefore, may be made *only by or on behalf of the flag State* of the vessel (Article 292(2), UNCLOS). When a coastal State detains a flag State's vessel and crew, the flag State or a person or entity authorized by the flag State as its agent may file an application at the ITLOS to order their prompt release under Article 292 of Convention (Noyes, 1998).

A serious problem with the prompt release procedure is that detained crew or owner of the detained vessel has no assured access to the Tribunal. During the UNCLOS III negotiations, some delegations argued for giving individuals access to the ITLOS in prompt release cases. For instance, the United States advocated allowing the owner or operator of any vessel detained by any State to bring the question of the detention of the vessel before the Tribunal in order to secure its prompt release. According to the compromise language of Article 292, however, the application for release may be made *only by or on behalf of the flag State* of the vessel. To initiate an Article 292 prompt release application, either the flag State must bring it or the flag State must designate the vessel captain, the vessel owner, a shipping association, or some other entity to do so.

If States are the only entities that can bring prompt release applications, fewer applications would likely be filed. Many States will choose not to pursue disputes on behalf of private interests. A State's Ministry of Foreign Affairs may prefer that vessel owners or masters pursue their own claims in the domestic courts of the coastal State. States are often reluctant to bring claims against other States, even if they are meritorious, for fear of upsetting friendly relations or disrupting negotiations on other matters. Such concerns may likewise deter States from approving individual access in prompt release cases.

The decisive factor in determining jurisdiction of ITLOS in prompt release cases is whether the applicant is the flag State of the vessel. While the detaining State may question the ownership of particular vessels, as happened in the *M/V Saiga* and the *Volga*, the Tribunal will have jurisdiction under Article 292 if the Applicant State is the flag State of the vessel at the time the application is made (Klein, 2005).

The issue of whether the Applicant State was the flag State of the vessel was central and decisive in the *Grand Prince*. The *Grand Prince* was a fishing vessel flying the flag of Belize when it was arrested in the EEZ of France by a French frigate on 26 December 2000. The vessel and crew were escorted to France where the Master was charged with failure to announce entry into the EEZ as well as fishing without authorization in the EEZ. The Master admitted the violations. At the conclusion of the criminal proceedings, Belize filed an application under Article 292 at ITLOS.

The Tribunal raised *proprio motu* the question of whether Belize was the flag State of the *Grand Prince* for the purposes of filing the application. This question was relevant because the vessel had been issued a provisional patent of navigation which expired on 29 December, 2000. Although Belize was clearly the flag State at the time of the arrest of the vessel, the issue was whether it was the flag State when the application was filed on 21 March 2001. Belize relied, among others, on a letter from the Attorney General authorizing the Agent to institute the proceedings before ITLOS in which the vessel was described as "of Belize flag". France drew the Tribunal's attention to a *note verbale*, dated 4 January 2001, in which the Ministry of Foreign Affairs of Belize notified the Embassy of France that in light of the second reported violation committed by the vessel, the punitive measure being imposed was its de-registration effective the day of the note.

In accordance with its decision in *M/V Saiga* (No. 2), the Tribunal noted that the conduct of the flag State at all times material to the dispute was an important consideration. The majority of the Tribunal accorded more weight to the *note verbale* as an official government communication than to the other documents. The conclusion reached was that Belize did not act at all time material to the dispute as flag State and that accordingly it did not have jurisdiction to determine the application.

Challenges to The Admissibility:

In addition to objections to the jurisdiction of the Tribunal, the detaining State may raise various challenges to the admissibility of an application. The timing of the application, problems of *lis pendens* and the requirement to exhaust local remedies were all argued by France as reasons to find an application inadmissible under Article 292 in the *Camouco* case.

Impact of Domestic Courts Proceedings:

The parallel nature of Article 292 cases and domestic court proceedings have led to questions of the timing of the application, *lis pendens*, and whether domestic proceedings should have been exhausted. The key factor in these decisions is that as Article 292 is in the nature of an interim measure of protection, it does not pre-empt a national court's determination of the merits of the dispute.

The Delay In Prompt Release Application: Not A Valid Objection To Admissibility:

In the *Camouco*, France claimed that Panama had waited more than three months since the seizure to file the application before ITLOS and this delay amounted to an estoppel against Panama. The applicant on the other hand argued that there was no time limit for making an application under Article 292, that in any event, there had not been any delay on its part because it was only on 14 December 1999 when the court of first instance made an order confirming its earlier order, that it came to know in a definitive manner that the sum to be secured by a bond was 20 million FF, and that it was then that it took a decision to approach the Tribunal.

The Tribunal decided that there was no merit in arguments based on the delay in bringing the matter before ITLOS and that Article 292 did not require the flag State to file an application within any specified period of time following the detention of a vessel and its crew.

Lis Pendens: Not A Valid Objection To Admissibility:

An application for prompt release under Article 292 during the pendency of domestic court proceedings also raises the issue of whether the principle of *lis pendens* renders the dispute inadmissible. For *lis pendens* to apply there must be identity of parties, of claims, and of object (Cheng, 1987). There can be no strict application of *lis pendens* between the prompt release proceedings and the domestic court processes because the parties and bases of claims will not be identical (Klein, 2005).

Exhaustion Of Local Remedies: Not A Requirement For Admissibility:

It is an established rule of customary international law that an injured natural or legal person must exhaust remedies in the State, which committed the internationally wrongful act, before its national State can bring an international claim on its behalf (Article 44 (b), ILC's Articles on State Responsibility, 2001). As this principle is a fundamental rule of State responsibility, it is applicable even in law of the sea cases and in that respect Article 295 of the UNCLOS 1982 provides as follows:

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted *where this is required by international law*.

It appears, however, that this requirement to exhaust local remedies does not apply with respect to Article 292 prompt release cases. The Law of the Sea Convention explicitly authorizes the submission of prompt release applications to the ITLOS when a coastal State fails to release the vessel or its crew on the posting of a reasonable bond, and when the parties do not agree on another court or tribunal to hear the question of release within 10 days from the time of detention. Article 292 does not pre-empt national courts from ruling on the underlying merits of the dispute and subsequent arrest. The negotiators at UNCLOS III understood that the exhaustion of local remedies rule "was not likely to apply in cases relating to the prompt release of vessels" (Anderson, 1996).

In the *Camouco*, an objection to admissibility pleaded by the Respondent is that domestic legal proceedings are currently pending before the court of appeal, whose purpose is to achieve precisely the same result as that sought by the present proceedings under article 292 of the Convention. The tribunal rejected the objection and expressed its view that:

It is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide

for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention.

The Tribunal finally concluded that:

Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.

That Decision On Merits Has Already Been Made By Domestic Courts: A Valid Objection To Admissibility:

Another question is whether the final decision of the domestic courts on merits is regarded as a block to an application of prompt release under Article 292. This issue arose in the *Grand Prince* although it was unfortunate that the Tribunal did not have the opportunity to consider the issue. In that case, the court of first instance confirmed the arrest of the *Grand Prince*. Eleven days after this decision, the criminal court found that the *Grand Prince* had entered the EEZ without giving notice of its entry or declaring the tonnage of fish on board, engaged in illegal fishing, and that the master had knowingly engaged in illegal fishing. The court fined the Master and ordered the confiscation of the vessel and that the order should be immediately enforceable notwithstanding the lodging of an appeal.

After the decision, Belize submitted an application to ITLOS under Article 292 of the Convention. Belize alleged that France had evaded the requirement of prompt release by the ‘prompt confiscation’ of the vessel, which amounted to a ‘trick’ or a ‘fraud of law’ as it would render Article 73 redundant. On the contrary, France argued that it was no longer possible for Belize to file an application under Article 292, as the competent domestic forum had delivered judgment on the merits and ordered the confiscation of the vessel. As the Tribunal decided it lacked jurisdiction because Belize was no longer the flag State of the detained vessel at the time of its application. There was no consideration of this question in the Tribunal’s order.

Be that as it may, in view of the object and purpose of Article 292, it would be inappropriate for an international court to order prompt release of a vessel when a decision on merits has already been reached before domestic courts. Article 292 provides a procedure for the question of release from detention and is “without prejudice to the merits of any case before the appropriate domestic forum.” It is clearly an interim proceeding and it allows the vessel to continue its business while the legal processes are in progress.

The Impact Of Confiscation:

Confiscation is a valid exercise of a coastal State’s sovereign rights, provided it preserves flag States’ rights. Although the confiscation of vessels is not specifically provided for in Article 73, it is also not prohibited (UNCLOS, 1982, Art. 73(4)). Because it is not prohibited by UNCLOS, the confiscation of fishing vessels as a penalty for illegal fishing within an EEZ is consistent with Article 73 (*Tomimaru*, Separate Opinion of Judge Jesus).

A textual analysis of Article 73 indicates that confiscation is a valid enforcement measure. Article 73(1) allows a coastal state to “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,” in the exercise of its sovereign rights over the living resources in the EEZ. Article 73(1) is a non-exhaustive list of permitted coastal State enforcement measures. Article 73(3) specifically enumerates prohibited coastal State enforcement measures, further indicating that the list in paragraph 1 is non-exhaustive. Coastal state penalties for violations of their fisheries regulations “may not include imprisonment ... or any other form of corporal punishment.” (UNCLOS, Art. 73(3)). One can therefore, fairly conclude that what is not prohibited is allowed (*Lotus* case).

Furthermore, the Language in Article 73 allocates broader enforcement power to coastal States regarding living resources (violations of fisheries laws) than other provisions such as Articles 220 and 230, which address enforcement of marine environmental pollution and protection in the EEZ. Article 73 also specifically allows for “arrest” of vessels, rather than limiting State action to “detention.” This is significant because it marks a deliberate permission of *in rem* actions against the vessel under Article 73 (Blakely, 2008).

Out of the nine “prompt release” cases heard by ITLOS in the course of its existence, four deserve special attention because they deal specifically with vessels forfeited by a coastal State. They are: *the Juno Trader*, *the Grand Prince*, *the Volga*, and *the Tomimaru* cases (Blakely, 2008). Although *the Tomimaru* case was the fourth occasion on which the detaining State challenged a prompt release application on the ground that the fishing vessel had been confiscated, this case was the first in which the Tribunal faced the issue squarely (Oxman, 2008).

The Trawler Tomimaru was a fishing vessel owned by a company registered in Japan. At the time of detention in the EEZ of Russian Federation for violations of Russian fisheries laws on 31 October 2006, it was flying the flag of Japan. On 19 December 2006, the City Court of Russia decided to confiscate the vessel. The District Court confirmed the decision on 6 January 2007. The owner of the vessel then applied on 26 March to the Supreme Court for supervisory review of the ruling of the District Court. On 6 July 2007, an application for prompt release of the vessel was filed by Japan with the ITLOS. After the closure of the hearing at ITLOS, on 26 July 2007, the respondent (Russian Federation) informed the Tribunal that the Supreme Court had dismissed the review concerning the confiscation of the Tomimaru.

The Respondent maintained that the judgment of the District Court confirming the confiscation of the Tomimaru rendered the application under article 292 without object. The Respondent stated that the case had been considered before the appropriate domestic forum on the merits and that the decision rendered by that forum had already been executed because the Federal Agency on Management of Federal Property had included the Tomimaru in the Federal Property Register as property of the Russian Federation.

The applicant on the other hand argued that the position concerning the nationality of the Tomimaru would be the same even if it had been confiscated and that since Tomimaru was still a Japanese flagged vessel, Japan is entitled to bring a prompt release application in respect of it regardless of the nationality of the owner.

The Tribunal emphasized that two questions had to be distinguished: “(1) whether confiscation may have an impact on the nationality of a vessel; and (2) whether confiscation renders an application for the prompt release of a vessel without object.” In relation to the first question, the Tribunal ruled that “the confiscation of a vessel does not result *per se* in an automatic change of the flag or in its loss. The confiscation changes the ownership of a vessel but ownership of a vessel and the nationality of a vessel are different issues.”

As far as the second issue is concerned, Article 73 appears to permit confiscation of the catch, the vessel, and the equipment as punishment for violating coastal state laws and regulations (Oxman, 2008). The only specific restriction imposed on penalties for violations of fisheries laws and regulations in the EEZ is that they may not include imprisonment or any other form of corporal punishment. The Tribunal, therefore, noted that “Article 73 of the Convention makes no reference to confiscation of vessels. The Tribunal also recognized the fact that “many States have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources.” Japan had not contested the right to confiscate as such (Oxman, 2008). This is not surprising because the UN Food and Agriculture Organization (FAO) include both Japan and Russia in the list of many countries that permit confiscation of the vessel for fishing violations.

The Tribunal warned the coastal States against using confiscation of a fishing vessel in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention. The Tribunal further pointed out that “a decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object” and that “in particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.”

At the same time the Tribunal suggested the applicant (Japan in this case) that “considering the objective of article 292 of the Convention, it is incumbent upon the flag state to act in a timely manner” implying that, should the applicant filed the application for prompt release quite earlier - that is before the confirmation of confiscation - the outcome of the decision would be different. The Tribunal further emphasized that “a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release of such vessel while proceedings are still before the domestic courts of the detaining State.” In other words, even if the confiscation has legal effect under the law of the detaining state, and even if it is executed, the obligation of prompt release continues while the judgment is still under review by a domestic court (Oxman, 2008).

After noting that the decision of the Russian Supreme Court brought to an end the procedures before the domestic courts, the Tribunal considered that “a decision under article 292 of the Convention to release the vessel would contradict the decision which concluded the proceedings before the appropriate domestic fora and encroach upon national competences, thus contravening article 292, paragraph 3, of the Convention.” The Tribunal ruled unanimously that “the Application of Japan no longer has any object and that the Tribunal is therefore not called upon to give a decision thereon.”

Assessing The Reasonableness of The Bond or Security:

In the difficult exercise of balancing the interests of the coastal and flag States, the notion of ‘reasonableness’ plays a crucial role. The 1982 Convention merely provides for the requirement that the bond or security shall be ‘reasonable’ without giving any further indications as to how ‘reasonableness’ of the bond is to be determined in practice. The Rules of the Tribunal also do not give any further assistance. In fact, the Rules simply refer back to Article 292 of the 1982 Convention in this respect:

1. The Tribunal shall in its judgment determine in each case in accordance with article 292 of the Convention whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded.

2. If the Tribunal decides that the allegation is well-founded, it shall determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew.

3. The bond or other financial security for the release of the vessel or the crew shall be posted with the detaining State unless the parties agree otherwise. The Tribunal shall give effect to any agreement between the parties as to where and how the bond or other financial security for the release of the vessel or crew should be posted.

Thus, the founders of the 1982 Convention left it up to the competent courts and tribunals that would be faced in the future with prompt release cases to give concrete content to the reasonableness criterion (Frankx, 2002).

The M/V Saiga case:

In the *M/V Saiga* case, the Tribunal only marginally touched upon the issue of “reasonableness” of the bond. However, we cannot ignore the fact that the Tribunal in that case laid down the basic guideline that the reasonableness criterion applies to the amount, the nature, and the form of the bond or financial security *in globo*, and not necessarily to each single constitutive element.

The Camouco Case:

In the *Camouco* Case, the elements of the amount, nature, and form of the bond or security were considered in greater details. This issue was argued before the French courts as well as before the ITLOS. After the ship had been seized by the French authorities for violations of the fishery legislation of the EEZ, the national Court of First Instance, set the bond at FFR 20,000,000. The owner and the master of the vessel sought a reduction of the amount of the bond based on the reasonableness criterion in Article 292, but to no avail.

Before the ITLOS, the applicant again argued that the bond set by the French court was not reasonable. This time, the Tribunal dealt with the issue at length and came to the conclusion that the bond was not reasonable. The ITLOS further repeated its understanding, already emphasized in the *M/V Saiga* case, that the reasonableness criterion applies to the amount, the nature, and the form of the bond or financial security *in globo*, and not necessarily to each single constitutive element.

The Tribunal then moved on to enumerate, in a non-exhaustive manner, a number of factors that it considers relevant in the assessment of the reasonableness criterion, namely:

- (1) The gravity of the alleged offences;
- (2) The penalties imposed or imposable under the laws of the detaining State;
- (3) The value of the detained vessel and of the cargo seized; and
- (4) The amount of the bond imposed by the detaining State and its form.

The Tribunal then applied these different elements to the case at hand. These considerations, as well as the overall circumstances of the case, led the Tribunal to hold that the bond of FFR 20,000,000 was not reasonable. The Tribunal considered FFR 8,000,000 as reasonable under the circumstances.

As far as the nature and the form of the bond or financial security are concerned, the Tribunal was of the opinion that unless the parties agreed otherwise, the bond should take the form of a bank guarantee.

The Monte Confurco Case:

Even more than in the *Camouco* Case, the amount, nature, and form of the bond formed the crux of the *Monte Confurco* Case. Special attention is therefore given to this case, especially since it appears that the French Court of First Instance referred back to the jurisprudence of the ITLOS when fixing the bond of the Monte Confurco. The French Court, while referring to Article 73(2) of the 1982 Convention, stated that the bond in question had to be reasonable. What is more, the Court used the arguments of the ITLOS in the *Camouco* Case to check whether the reasonableness criterion had been complied with *in casu*. It listed all the elements that the ITLOS had suggested in this respect. By explicitly referring to them, the French Court apparently attempted to demonstrate it had duly complied with the criteria set by the ITLOS for such cases.

The Court of First Instance in this way fixed the bond at FFR 56,400,000, of which the major part was to secure the payment of fines incurred and the confiscation of the vessel (FFR 55,000,000), followed by a substantially smaller part to secure the appearance of the captain of the arrested vessel (FFR 1,000,000), and finally by a part to secure the payment of the damage caused (FFR 400,000).

The applicant, however, believed the bond to be unreasonable. Instead, the applicant submitted that FFR 2,200,000 constituted a reasonable bond.

In order to determine whether the bond posted by the French Court was reasonable, the Tribunal first explicitly referred to the crucial part of its judgment in the *Camouco* Case where it cited as *relevant factors*, amongst others, “the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and the cargo seized, and the amount of the bond imposed by the detaining State and its form.” The Tribunal then applied each of the relevant factors.

As far as the *value of the ship* is concerned, the parties differed widely. The respondent during the oral procedure relied on an expert opinion, which estimated the value of the ship at approximately \$ 1,500,000. The applicant, however, relied on expert estimates between \$ 400,000 and \$ 450,000. During the oral procedure expert testimony had valued the ship at approximately \$ 345,680. Since the latter figure had not been challenged by the defendant and corresponded moreover to the amount for which the vessel had been sold in 1999, the ITLOS considered this figure to be reasonable. With respect to *the cargo*, the value of FFR 9,000,000, as estimated in the relevant *proces-verbal*, was not contested by the parties.

The above-mentioned considerations led the ITLOS to the conclusion that the bond imposed by the French Court had been unreasonable. Instead, it fixed the bond at FFR 18,000,000, of which half was already in the hands of the French authorities, namely the monetary equivalent of the cargo seized on the arrest of the vessel.

As to the form of the bond, the Tribunal decided that the bond or security should take the form of a bank guarantee to be posted with France.

The “Volga” Case (2002):

The *Volga* was arrested by Australian authorities on 7 February 2002 for illegal fishing in the Australian EEZ. A total of 131 tons of toothfish were found on board at the time of her arrest. The catch aboard was seized and promptly sold for approximately AU\$ 1.9m, with the proceeds held in trust. Australia set a bond of approximately AU\$ 3.33m for the release of the *Volga*. This comprised:

- AU\$ 1.92m (approx) representing the agreed value of the *Volga*;
- AU\$ 0.42m (approx) representing an amount for potential fines against the three crew members;
- AU\$ 1m for the guarantee of non-repetition of IUU (illegal, unreported, and unregulated) fishing by the *Volga* as monitored by VMS.

Pursuant to Article 292, the Russian Federation on 2 December 2002 filed an application against Australia in ITLOS seeking the release of the *Volga* and her three crew members. Hearings were held on 12 and 13 December 2002, and judgment was delivered on 23 December 2002. By nineteen votes to two, ITLOS held that:

- Australia did not comply with the provisions of UNCLOS for the prompt release of the *Volga* or her crew on the posting of a reasonable bond or other financial security;
- Australia must promptly release the *Volga* on the posting of a bank guarantee of AU\$ 1.92m.

As Russia alleged that Australia failed to comply with Article 73(2) by setting a bond that was unreasonable and by imposing impermissible conditions for the release of the *Volga*, there were two questions before ITLOS.

- (i) the reasonableness of the amount of the bond set by Australia;
- (ii) whether Australia could, consistent with Article 73, set non-financial conditions for release of the *Volga*.

When the Tribunal considered the first relevant factor, the alleged offenses against Australian law, the Tribunal held that no direct weight was to be placed on the serious problem of IUU fishing. ITLOS then considered the bond sought by Australia and noted its tripartite nature (representing sums for the vessel, for the potential fines against the crew, and for “good behavior”). In relation to the vessel, the Tribunal held that the amount of AU\$ 1.92m, representing the agreed value of the vessel was reasonable for the purposes of Article 292 of UNCLOS. In relation to the potential fines against the crew, the Tribunal noted that it was unnecessary to consider the issue, given the crew’s release.

The Tribunal noted that whether or not non-financial conditions could be imposed depended on whether or not they could be described as a “bond or other security” as that phrase is used in Article 73(2). It was held that, in light of the object and purpose of Art. 73(2) read together with Art. 292, the phrase must be taken to refer to a bond or security of a “financial nature.”

In relation to the security of AU\$ 1m (the so-called good behavior bond), the Tribunal held that such a security could not come within Article 73(2) because the bond or other security referred to is for the release of

“arrested” vessel alleged to have committed offences. A bond to prevent future illegal activity, it was held, was not encompassed by Article 73(2).

On the basis of the foregoing considerations, the Tribunal considered that the bond as sought by Australia was not reasonable and held that the reasonable bond should be AU\$ 1,920,000. With respect to *the form of the bond* the Tribunal was of the view that it should be, unless the parties otherwise agree, in the form of a *bank guarantee* from a bank present in Australia or having corresponding arrangements with an Australian bank.

Analysis and Discussion:

A closer analysis of the decisions of the ITLOS demonstrates that a consistent case law could develop in this particular area of “prompt release” procedure.

Reasonableness of the bond:

Even if we acknowledge the bright prospects for the development of consistent case law, it must be concluded that the concept of reasonableness has, so far, not yet reached the stage of perfection. It is at the same time to be admitted that the case law of the Tribunal has narrowed down the scope of the concept by setting out a general frame of reference by means of so-called relevant factors and applying them in concrete circumstances. This particular method seems to gather growing support among the judges of the Tribunal.

Moreover, the Tribunal has refused to specify any of these factors as controlling in the determination of the reasonableness of the amount of the bond. What the Tribunal has, therefore, done so far is to start applying this broad framework to concrete cases with ever increasing attention.

As the value of the ship is often very much disputed between the parties, the Tribunal has already twice relied on expert testimony offered by the applicant during the oral proceedings, and not disputed by the respondent. In *the Monte Confurco* Case it was even clearly stated that the Tribunal considered this assessment to be reasonable, something which had to be assumed in *the Camouco* Case. With respect to the cargo, it is the estimates of the respondent that seem to carry more weight, with the exception of *the M V Saiga 1* Case where the estimates of the applicant were taken into account.

Nevertheless, with respect to the other relevant factors, namely the gravity of the offences and the range of penalties applicable, the Tribunal usually simply states that it “takes note” of the submissions made, without any further indication of the weight given to the evidence or elements.

Article 292 an adequate safeguard?:

The UNCLOS 1982 bestows extended jurisdiction on coastal States in areas like fisheries and environmental protection, even beyond its territorial sea and extending up to 200 nautical miles from its baselines (the EEZ). When a coastal State exercises enforcement and adjudicative jurisdiction over foreign ships for violating its EEZ fisheries or pollution regulations, the Convention requires the coastal state to release the arrested vessel and crew on the posting of a reasonable bond or other financial security. This new procedural safeguard of Article 292 (prompt release procedure) implicates geopolitical questions involving the balance of coastal and flag State rights and obligations in the EEZ.

It has earlier been discussed how ITLOS in the prompt release cases interpreted and applied the relevant provisions of the Convention. The general remark that can be made is that the Tribunal has in its jurisprudence tried its best to strike a balance between the rights and interests of the respective parties. Nevertheless, it appears that there are factors that may tilt the balance towards the coastal State’s interests. They are the following:

No Direct Access of Private Persons To The Prompt Release Procedure

Although a flag State may raise these prompt release guarantees before the ITLOS, detained individuals like Master and crew or the ship-owner have no assured access. During the UNCLOS III negotiations, some delegations favored giving individuals access to the ITLOS in prompt release cases. For example, the United States advocated allowing “the owner or operator of any vessel detained by any state” to “bring the question of the detention of the vessel before the [Law of the Sea] Tribunal in order to secure its prompt release.” According to the compromise language of Article 292, however, “the application for release may be made only by or on behalf of the flag State of the vessel.” To initiate an Article 292 prompt release application, either the flag State must bring it or the flagState must designate the vessel captain, the vessel owner, a shipping association, or some other entity to do so.

The lack of assured individual access can be said as one of the weaknesses of the prompt release procedure. If States are the only entities that can bring prompt release applications, fewer applications would likely be filed. Many States will choose not to pursue disputes on behalf of private interests, either diplomatically or in

litigation before the ITLOS. A State's Ministry of Foreign Affairs may prefer that vessel owners or captains pursue their own claims in the coastal State's courts or that they appeal to the coastal State's government officials. States are often reluctant to bring claims against other States, even if they are meritorious or implicate important "State interests," for fear of upsetting friendly relations or disrupting negotiations on other matters. Such concerns may likewise deter States from approving individual access in prompt release cases.

The Convention, therefore, limits the ability of individuals and corporations to pursue prompt release proceedings against coastal States in the ITLOS. Restricting the access of private entities to the Tribunal deprives them of opportunities to seek judicial clarification of their rights and to pursue remedies when their rights have been infringed.

Confiscation Of Vessel Destroys Prompt Release Safeguard:

In *the Tomimaru* case, the Tribunal explicitly ruled that the confiscation of the detained vessel, if the decision of the domestic court is final, would make the application for prompt release to be without object. At the same time, the Tribunal warned that "a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention." Unlike *the Tomimaru* case, in which the domestic proceedings were final before ITLOS rendered its judgment, *the Volga* proceedings were pending in Australian federal court at the time of judgment. This is apparently why the "prompt release" action was not deemed rendered without object as in *the Tomimaru* case. ITLOS is preserving its own discretion in this regard, relying on the balancing of the coastal and flag States' rights on a case-by-case basis instead of establishing a hard and fast rule.

Still, *the Tomimaru* judgment suggests some limitations on coastal State forfeiture provisions. Even though vessel forfeiture appears to be lawful according to ITLOS, there are limitations imposed on it. Most importantly, the confiscation measure must not upset the balance between coastal and flag States' rights.

Although no legal instrument set out specific rules to conserve this balance within a confiscation proceeding, recent ITLOS decisions, State practice, and the language in Article 73 provide a framework within which to formulate a test for determining the validity of forfeiture (Blakely, 2008). Such forfeiture would certainly be invalid if it had the effect of preventing the flag State from invoking its right to a "prompt release" action before ITLOS. ITLOS's decisions clearly indicate that the forfeiture provision must not simply be a means to prevent the flag State from bringing a "prompt release" action.

Like all enforcement measures, a forfeiture provision must not deny *due process of law*. ITLOS has indicated that a confiscation measure that frustrates the possibility of recourse to domestic remedies would violate international standards of due process. Accordingly, a forfeiture provision must provide concerned parties recourse to available domestic remedies. One aspect of this due process is that Article 73(4) requires coastal States to provide notice to the flag State in case of arrest or detention, and of any further punitive measures it takes. The notification must take place through "appropriate channels." Giving the flag State notice and time to respond to the action, in conformity with *international standards for due process of law*, will help ensure that forfeiture is effective.

ITLOS noted in *the Tomimaru* case that Japan did not claim that the Russian proceedings were inconsistent with international standards of due process of law, implying that had the argument been made, ITLOS would have considered the issue. In contrast, separate opinions in *the Juno Trader* case suggested that the Guinean proceedings did not provide due process of law. Be that as it may, ITLOS seems to interpret 'due process' to include the availability of a domestic forum in which to challenge the forfeiture, and the adequacy of that forum.

Conclusion:

The International Tribunal for the Law of the Sea is a new international court established under the UN Convention on the Law of the Sea 1982. The Tribunal has compulsory jurisdiction in the applications for prompt release of vessels and crews under Article 292. The determination of the prompt release cases can be said as a distinctive feature of the Tribunal due to the fact that of the fifteen cases decided to date, nine are prompt release cases. Despite the potential of Article 292 to serve as a compromise between coastal and flag States' interests, the absence of direct access of private persons to the prompt release procedure and the tendency of the coastal State to confiscate the detained vessel are the two main factors that may swing the balance towards the coastal State.

References

Anderson, D.H., 1996. Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements. *International Journal of Marine and Coastal Law*. 11: 165, at 170, 177.

Blakely, L., 2008. The End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegality Fishing in Its Exclusive Economic Zone. *Pacific Rim Law and Policy Journal*, 17: 677-705.

Brown, E.D. 1998. The M/V 'Saiga' Case on Prompt Release of Vessels: The First Judgment of the International Tribunal for the Law of the Sea. *Marine Policy*, 22: 307-318.

Cheng, B., 1987. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge University Press.

Doehring, K., 1997. Local Remedies: Exhaustion of. *Encyclopaedia of Public International Law*, 3: 38-242.

Franckx, E., 2002. Reasonable Bond in the Practice of the International Tribunal for the Law of the Sea, California Western International Law Journal, 32: 303-342.

Klein, N., 2005. *Dispute Settlement in the UN Convention on the Law of the Sea*. Cambridge University Press.

Lagoni, R., 1996. The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report. 11 *International Journal of Marine and Coastal Law*, 11: 147-198.

Noyes, J.E., 1998. The International Tribunal for the Law of the Sea. *Cornell International Law Journal*, 32: 109-182.

Oxman, B.H., 2008. International Decision: The 'Tomimaru' (Japan v. Russian Federation). *American Journal of International Law*. 102: 316,

Rosenne, S., 1998. International Tribunal for the Law of the Sea: 1996-97 Survey. *International Journal of Marine and Coastal Law*, 13: 487-504.

Rosenne S. and L. B. Sohn (eds.). 1989. United Nations Convention on the Law of the Sea 1982: A Commentary, 5.

Tuerk, H., 2007. The Contribution of the International Tribunal for the Law of the Sea to International Law. *Pennsylvania State International Law Review*, 26: 289-316.

International Conventions and official documents

The United Nations Convention on the Law of the Sea, 1982

The Statute of the International Tribunal for the Law of the Sea (Annex VI of the UNCLOS 1982)

Rules of the International Tribunal for the Law of the Sea (ITLOS/8), as amended on 17 March 2009

Prompt release cases decided by ITLOS

The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea), Judgment of December 4, 1997, Prompt Release, 1997 ITLOS Case No. 1.

The Camouco Case (Panama v. France), Judgment of February 7, 2000, Prompt Release, 2000 ITLOS Case No. 5.

The Monte Confurco Case (Belize v. France), Judgment of April 20, 2001, Prompt Release, 2001 ITLOS Case No. 6.

The Grand Prince Case (Belize v. France), Judgment of April 20, 2001, Prompt Release, 2001 ITLOS Case No. 8.

The Chaisiri Reefer 2 Case (Panama v. Yemen), Judgment of July 3, 2001, Prompt Release, 2001 ITLOS Case No. 9.

The Volga Case (Russian Federation v. Australia), Judgment of 23 December 2002, Prompt Release, 2002 ITLOS Case No. 11.

The Juno Trader Case (Saint Vincent and the Grenadines v. Guinea-Bissau), Judgment of 18 December 2004, Prompt Release, 2004 ITLOS Case No. 13.

The Hoshinmaru Case (Japan v. Russian Federation), Judgment of 6 August 2007, Prompt Release, 2007 ITLOS Case No. 14.

The Tomimaru Case (Japan v. Russian Federation), Judgment of 6 August 2007, Prompt Release, 2007 ITLOS Case No. 15.